Coastal State Jurisdiction in Preventing Vessel Source Pollution

*To Preserve Marine Environment or Freedom of Navigation?*

- LLM in Natural Resources and International Environmental Law -

Dominik Andreska

Faculty of Law
School of Social Sciences
Pétur Dam Leifsson
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HÁSKÓLI ÍSLANDS
Abstract

The presented thesis seeks for answers about precise territorial extent and legal content of the coastal State jurisdiction over vessel source pollution in its adjacent marine jurisdictional areas. After introducing the topic and discussing the important terms and concepts, it discusses the historical development in the law of the sea regarding State jurisdiction and sovereignty over its adjacent marine areas both in theory and in State practice. Further, it discusses the development of the jurisdictional framework for prevention of vessel source pollution of marine environment in the 20th century, and subsequently the framework itself, paying special attention to the 1982 United Nations Convention on the Law of the Sea and the 1973/78 International Convention for the Prevention of Pollution from Ships. It then provides a detailed overview of coastal State jurisdiction in its marine jurisdictional areas, in respect of both prescription and enforcement, as stipulated by the 1982 Convention, other regulatory treaties and general international law. In the concluding chapter, the content of the thesis is summarised and possible future developments in the field are contemplated.
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Foreword

I was born in a land locked country. Nevertheless, ever since I was a child, I have been fascinated by the sea. Its vastness and perpetual motion struck fear into my heart, the distant horizons encouraged to voyages to unknown places, and the abundance and diversity of sea life left me speechless in amazement.

Much later, I learned about the fragility and delicacy of marine ecosystems and threats the present day and notably globalization of world economy, with its ever-growing maritime transport of goods and increasingly effective fisheries, pose to world oceans. About that time, the Erika and Prestige oil spills attracted attention of most Europe, including that of me. As most laymen, I could not understand why tankers in bad shape are allowed to sail close along the coast, when the possibility of serious environmental harm is so high, and why the coastal States are not allowed to exclude them from navigation within areas with fragile ecosystems that are under their national jurisdiction.

Later, when I started to study the law of the sea as a field of law, one of the areas that primarily attracted my attention was protection and preservation of the marine environment, notably combating the pollution of the seas. Even though most of the pollution that is eventually accumulated in the marine environment originates on the land\(^1\), vessel source pollution still contributes significantly to the amount of marine pollution every year. At first, I was displeasingly surprised about the extent of means the coastal State may employ to prevent the vessel source pollution. It seemed that according to the law of the sea, the coastal State may not forbid ships from entering its territorial sea because of the established right of innocent passage. Much less the coastal State may forbid ships from entering its exclusive economic zone. At the same time, the coastal State may not prescribe more stringent standards for the ships entering its jurisdictional zones than the standards set on international level. I found these limitations placed upon the coastal State rather unfair, as, in the end, in case of a serious pollution accident, it is the coastal State, its population and its environment that will face the consequences of it.

From a security point of view, every ship entering the jurisdictional zone of the coastal State may be perceived as a threat to its marine and/or coastal environment. It may be an aging oil tanker with damage to its hull that may end up breaking apart, or it may be a tanker in a perfect condition that hits a shoal and breaks apart subsequently. Even more danger is posed by ships transporting hazardous or noxious cargoes, such as nuclear waste. Any of previously mentioned accident scenarios may have grave implications for the coastal State’s environment.

In the presented thesis, I would like to explore the limits of coastal State jurisdiction in prevention of vessel source pollution in its adjacent marine zones, notably territorial sea, contiguous zone and exclusive economic zone. I would like to examine both geographic extent and its material content of the coastal State jurisdiction, and focus predominantly on how far the costal State go in prescribing rules for foreign ships in its jurisdictional zones and enforcing them. I would also like to provide theoretical and historical perspective for the contemporary framework of preventing and responding to marine vessel source pollution. Last, I would like to contemplate on the possibilities of improving the jurisdictional framework.
Chapter 1: Aim and content

1.1 Introduction: the sinking of the Prestige

On November 13, 2002, the Prestige, an Aframax-size\(^2\) tanker loaded with 77.000 tons of heavy fuel oil, suffered internal damage of one of its tanks in a violent winter storm in the Bay of Biscay. At the time, it was approximately 30 miles from Galicia, off the Spanish northbound Atlantic coast; from jurisdictional point of view within the Spanish exclusive economic zone and in the Finisterre traffic separation scheme.\(^3\) Subsequently, the ship started to leak oil. Its captain, aware of the possibility of the damaged tank breaking and fearing the possible sinking of the vessel, asked Spanish maritime authorities for help of rescue workers, expecting that the Prestige would be towed to any of the nearby ports for necessary repairs. A rescue operation was immediately conducted, the crew except for the captain and two other crewmen was evacuated. A salvage vessel also approached the Prestige, at the time with a turned-off engine and pushed by the strong western wind towards Spanish coast. Even though the tanker came as close as 5 miles from the Spanish coast on November 14, the local authorities denied it a place of refuge where repairs could have been made and cargo could have been unloaded. Instead, they ordered the ship to reignite its engine and salvage ship to tow the damaged tanker away from the Spanish coast, so that in case of a pollution incident, there would be more time to deal with it.\(^4\) The ship was towed in the north-western direction as it was discussed that the damaged ship could be towed to one of the French ports.\(^5\) This option was nevertheless dismissed by the French authorities on November 15. Afterwards, the

\(^2\) An Aframax tanker is a tanker smaller than 120 thousand metric tonnes with breadth not greater than 32 meters, therefore able to pass through the Panama Canal before its enlargement. The name itself is derived from Average Freight Rate Assessment (AFRA), a rating system for tankers devised by Shell Oil Company in 1954 to standardise shipping contract terms. Due to their size, the Aframax tankers do not require customized port facilities that are required by larger tankers (such as Suezmax or larger) and may serve most ports in the world. They are therefore favoured, especially for transport of oil from non-OPEC countries.

\(^3\) A separation scheme is a navigational measure requiring ships to follow set directions on designated routes in a certain area to avoid collisions and accidents (such as grounding) in areas with dense maritime traffic.


\(^5\) The possibility of towing the vessel all the way to France seems irrational when looking at a map, as Portuguese ports were closer (with the Spanish ones being in immediate vicinity, one should add). One should nevertheless keep that, if towed to France, the Prestige would have drifted along the Gulf Current, whereas if towed towards Portugal, it would have moved against it. Further, one should keep in mind the circumstances at the time, notably the strong southwestern wind and waves associated with the storm. Taking the combined effect of all this in mind, towing of the damaged ship to France was (after granting a place of refuge in Spain, of course) arguably the second-best option. Confer http://ioscproceedings.org/doi/pdf/10.7901/2169-3358-2005-1-1055?code=ampi-site.
ship was towed southward. On November 18, the salvage ship towing the Prestige was prohibited to enter the EEZ of Portugal, and instead ordered to tow the Prestige westward, further into the high seas. Eventually, after 6 days from the initial damage, the Prestige broke in two approximately 130 miles westward from the Galician coast. The halves of the ship descended to depth of 3,500 meters, which made any attempt of salvaging of the extremely difficult. Approximately 60,000 tons of oil was spilled, affecting 2,900 kilometres of Spanish and French coastlines along the Bay of Biscay. 2,000 kilometres of the coast was covered with oil sludge; with further grave implications for the coastal and marine environment in the area. It has been estimated that some 250,000 marine birds died as direct results of the oil spill, the damage to underwater ecosystems and fish being inestimable.

In the immediate aftermath of the sinking of the Prestige, Spain, promptly followed by France, Portugal and Italy, unilaterally banned single hull tankers from entering its ports and internal waters. Further, they reinforced this policy by using naval force to escort single hull tankers out of their territorial seas and EEZs. This approach has been strongly condemned by the international community as violating the international law of the sea, notably freedom of navigation. The practice has since been abandoned.

The sinking of the Prestige has thereby attracted attention to several issues in the today’s international legal framework for prevention of vessel source pollution.

First, there was the question of the continued usage of single hull tankers for oil transportation. As the name suggests, the single hull tanker has a single hull only, where the sides of the tanks also form the side of the ship itself. The inconvenience of such design lies in the fragility of the hull as the hull and tanks may be easily accidentally damaged, resulting in oil spills. The vulnerability of single hull tankers has been proven countless times, notably by the sinking of Exxon Valdez off the Alaskan Coast in 1989. Therefore, following the sinking of the Prestige, the question was raised why the single hull tankers were still in service. Even though this particular question is not the main issue I will discuss in the presented thesis, I will tackle the issue further several times.

Second, the passing the ticking bomb by approach that was taken by the respective governments during the crisis, from the moment of the initial damage until the moment of the

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6 Totally 81 single hulls were expelled from French and Spanish EEZs during the 6 months following the Prestige accident. FRANK, Veronica. Consequences of the Prestige Sinking for European and International Law. The International Journal of Marine and Coastal Law, Vol. 20, No. 1 (2005). P. 9.
7 Ibidem.
sinking, has shown clearly that there is still a fundamental inconsistency in State practise about whether damaged oil tankers should be granted access to places of refuge. I will discuss this issue in detail in Chapter 6.

Third, and possibly most importantly, the sinking of the Prestige has shown the loopholes in the complicated framework of overlapping jurisdictions in preventing the vessel source marine pollution. The jurisdictions of flag States, coastal States and port States constitute a conundrum where States have often opposite interests. Exploring this framework, especially exploring the extent and content of the jurisdiction of coastal State as well as its deficiencies, will be the core of the presented thesis.

1.2 The goal and aim of the thesis

Particularly, the objective and goal of the presented thesis shall be to answer the following questions:

1) What is the content of the jurisdiction of the Coastal State (= what aspects of shipping it may regulate and how) and the extent (= how far from its coastline does its jurisdiction extend) of the jurisdiction of the coastal State over foreign vessels in its respective jurisdictional zones (internal waters, territorial sea, contiguous zone and exclusive economic zone) whilst preventing (possible) vessel source pollution of the marine and coastal environment?

2) How has the system evolved into its today’s state?

3) What future developments may be expected in the field?

1.3 The content

In the introductory Chapter 2, I will discuss the concepts of sovereignty and jurisdiction, and categories of jurisdiction in the law of the sea. I will further discuss categories of States as actors in the law of the sea, the concept of freedom of navigation and the legal definition of vessel source pollution.

In Chapter 3, I will provide theoretical background for the opposing interests regarding State jurisdiction over marine areas, and pursue the historical and doctrinal developments towards appropriation of marine areas and executing jurisdiction over them.
In Chapter 4, I will deal with developments in the law of the sea in the 20th century and development of the international legal framework for preserving marine environment from vessel source pollution up until adoption of the LOSC.

In Chapter 5, I will discuss the today’s legal framework for preserving marine environment from vessel source pollution, including its inherent principles. I will primarily focus on jurisdictional framework set by the LOSC, and further examine the other important international regulatory conventions in the field.

In Chapter 6, I will examine the content of coastal State jurisdiction in its jurisdictional zones. I will examine the measures it may prescribe and enforce in them so that those are consistent with the international law.

In concluding Chapter 7, I will contemplate on the possible developments of the jurisdictional system in the future.
Chapter 2: Defining the basic terms

2.1 Introduction

In this chapter, I would like to provide insight in the basic legal concepts, terms and institutes I will be operating throughout the whole thesis. I will notably discuss the concept of jurisdiction, as I think the exhaustive definition of the term that is so often used in the law of the sea is a key for further elaboration upon its various kinds as well as its limits.

First, I will discuss the concept of jurisdiction in general international law, while comparing it to the concept of sovereignty and further explain the two basic kinds of jurisdiction in the law of the sea: the prescriptive and the enforcement jurisdiction. Further, I will discuss States as actors in the law of the sea and its creation, regarding their interests and motivations in the field. I will also briefly introduce the concept of freedom of navigation. Lastly, I will provide definition of the vessel source pollution itself.

2.2 Jurisdiction

In the general theory of law, the term jurisdiction refers to authority granted to a legal body to regulate conduct of subjects of law within a defined area of responsibility. As such it stems from Latin words ius (law) and dicere (to say, to prescribe), and refers therefore to the competence to say what is law and further to decide what conduct is in accordance with the law. From this, the two aspects of jurisdiction may be distinguished, namely the prescriptive (also referred to as legislative) jurisdiction and the enforcement jurisdiction (a part of which is the adjudicative jurisdiction). I will in detail discuss these in greater detail later in this chapter.

2.2.1 Concept of jurisdiction in general international law

In the international law, the concept of jurisdiction is closely associated with the concept of State’s sovereignty. One of the cornerstones of the international law, the principle of sovereign equality of States, grants the State an exclusive legal authority to regulate conduct of persons in its territory, whereas other States are not allowed to interfere in those “internal matters”. In this context, State’s jurisdiction refers to legal competence of the State to regulate activities of persons in a specific area of conduct (such as environmental

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8 Embodied today in the Article 2(1) of the Charter of the United Nations and Declaration on Friendly Relations and Cooperation among States.
protection), as opposed to sovereignty, which is absolute in nature. The jurisdiction is a narrower competence than sovereignty, from which it is derived and from which it stems. One of the aspects of the principle of sovereign equality is that all States are juridically equal; sovereignty in this respect can basically be understood as a complete sum of jurisdictions in all imaginable matters.

The exclusivity of State’s jurisdiction is simple to uphold when the State regulates matters of its nationals on its own territory. It is however much more complicated when a foreign element is involved, such as citizens of other State. In the case of the jurisdiction over vessels (such as in the case of vessel source pollution), this may happen in the case of non-nationals (such as foreign vessels) in the area of State’s sovereignty, or in the areas where State only holds a particular jurisdiction (where State’s sovereignty is limited to only some explicit area of conduct).

State’s jurisdiction must be set on a basis recognized by the international law. In theory, there are four principles that provide basis for jurisdiction. There is (1) the territorial principle, acknowledging the spatial aspect of the State’s jurisdiction, namely its capacity to enact laws on its territory and enforce them towards all persons and activities therein. From the law of the sea perspective, it shall be pointed out that the internal waters and the territorial sea of a State are to be considered part of the territory of that coastal State, according to the Article 2 of the LOSC. Further, it may be (2) the nationality principle, which entitles the State to exercise its jurisdiction over its nationals (natural as well as legal persons incorporated therein) for actions perpetuated outside of its territory; such enforcement may however not interfere with jurisdiction of the State where such actions were committed. The nationality principle is reflected in the international law by the concept of genuine link, within the law of the sea further by concepts of flag, flag State and flag State jurisdiction, which will be discussed in greater detail in Chapter 5.3.

Whereas the first two principles are generally accepted in the theory of international law, the further two that generally stem out of the international criminal law are more controversial. The first of the two is (3) the protective principle that allows State to assume

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10 The state sovereignty has limits, though – the States are limited by the peremptory norms of ius cogens such as prohibition of waging an aggressive war, conduct crimes against humanity or use or tolerate torture. In the law of the sea, the primary limitation of the sovereignty of the State in its territorial sea is the customary right of innocent passage, which I will discuss further in the chapter 3 and in detail in chapter 6.5.
jurisdiction over non-nationals for actions committed outside of its territory but violating or threatening that State’s security. The controversy of the principle lies in the shaky foundation of the security interests that may lead to arbitrary interpretation and possible abuse of jurisdiction assumed by States on its basis. The last of the principles is the (4) universality principle. According to it, some international crimes (in context of the law of the sea notably piracy)\(^\text{11}\) are so grave that they are to be considered as committed against whole of humanity, rendering their perpetrators *hostes communis omnium*, enemies of all mankind, and granting universal jurisdiction, upon which any State is entitled to assert criminal jurisdiction over perpetrators of such crimes.

2.2.2 Concept of jurisdiction in the international law of the sea

In the law of the sea, and notably in relation to the vessel source pollution, the question of jurisdiction (whether particular State has the jurisdiction to take certain actions or whether State abused its jurisdiction by taking them) is often the core question in the discussion. Tan refers to the question of jurisdiction over a particular event, its effects and its perpetrators as *one of the central tenets of the international law*.\(^\text{12}\) The word jurisdiction however, despite being frequently used in various international instruments dealing with powers of States regarding marine zones and ships, is far from uniform in its meaning. Yang points out that this confusion may stem partially from the text of the LOSC itself, as the term jurisdiction is not defined in the LOSC and is used in different meanings in various Articles.\(^\text{13}\)

2.2.2.1 Prescriptive jurisdiction

In the international law and specifically in the law of the sea, it is commonly distinguished between two basic aspects of jurisdiction. The first is the prescriptive jurisdiction, the jurisdiction to prescribe binding rules of conduct. States may do so by enacting laws, concluding international treaties, as well as prescribing administrative regulation by State’s administrative bodies. From the point of view of the international law,

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\(^{11}\) The list of the international crimes that are subject to universal jurisdiction is not presented in any international convention and varies among authors. It seems safe to include genocide, war crimes, crimes against humanity and crime of aggression, with piracy and slave trade being generally agreed upon as well. Other notable crimes, namely apartheid, terrorism and hijacking are more controversial. More on the topic confer for example BASSIOUNI, Cherif. Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice. *Virginia Journal of International Law*. Iss. 42 Vol. 81 (2001-2002). Pp. 81-162.

\(^{12}\) TAN. P. 176.

\(^{13}\) Yang specifically refers to differences in the meaning of the word jurisdiction in Articles 27, 92(1) and 94(1) of LOSC. I will discuss these differences in Chapter 6. YANG. P. 30.
there is no difference between rules set by legislative or executive bodies; either way these are binding rules of conduct sanctioned by the State.\textsuperscript{14}

There are several modalities of the prescriptive jurisdiction. The coastal State may (1) \textit{entirely prohibit} ships with certain characteristics from entering some (or all) of its jurisdictional zones (such as ships with nuclear materials on board), or (2) only allow the presence of such ships if their presence was previously \textit{notified and authorized} (often the case for transports of dangerous cargoes). Further, the coastal State may put (3) \textit{conditions} on the incoming ships, regarding their entry, transit and operations within its jurisdictional zones. There are several ways for the coastal State to set such conditions. It may do so by setting of standards for (3a) \textit{discharges} (e.g. of oil, exhaust gases or sewage). It may set the (3b) \textit{crew, design, equipment and manning standards} (CDEM standards), bearing in mind that ship’s design, technical state and the expertise of the crew that operates the ship are all variables contributing to whether the ship poses threat to the coastal State environment.

Last, the coastal State may prescribe (3b) \textit{navigational measures} for the ships in its jurisdictional zones, especially in waters where navigation is difficult (straits, waters with underwater obstacles such as shoals or reefs). Navigational measures may be again divided into two subcategories: (a) setting of shipping lanes, speed limits, ship routing measures (such as traffic separation schemes or compulsory routes) and (b) \textit{ship reporting systems} (further abbreviated as SRSs) and \textit{vessel traffic services} (further VTSs). Whereas the navigational standards of the first category can essentially be followed by a ship provided it has a precise enough sea chart and a compass, for the SRSs and VTSs a certain level of cooperation between the coastal State and the ship is required. The ships entering areas where SRSs and VTSs are in place are usually required to provide some information in advance, such as cargo, draft, length and diameter of the turning circle, estimated times of arrival and departure, and in some VTSs ships are required to ask for clearance to enter certain areas or to entertain compulsory pilotage.\textsuperscript{15}

All the aforementioned measures may be, from the perspective of the ship and its operator, perceived as obstacles to freedom of navigation and there is indeed potential for

\textsuperscript{14} Some authors also use the term \textit{legislative jurisdiction}. I chose to use the term \textit{prescriptive} in this thesis as it in my opinion better reflects the fact the rules of conduct may be prescribed by legislative and administrative acts alike, and also by acts of international law, which in some States do not require to be implemented into laws to be legally binding.

abuse by the coastal State. Therefore, the coastal State is limited in its prescriptive ambitions by international law and may not prescribe more stringent standards for ships entering its territorial sea than those that are the internationally set and accepted (as set by Article 21(2) of the LOSC). The exact extent of the coastal State jurisdiction will be in detail examined in Chapter 5 and 6.

### 2.2.2.2 Enforcement jurisdiction

The other aspect of jurisdiction is the enforcement jurisdiction. Enforcement is the practical realization of the prescriptive jurisdiction, conducted by State agencies (such as for example the navy, police or coast guard). The enforcement does immanently include possibility use of force. The enforcement jurisdiction must be based on either domestic legislation or administrative regulation or a rule of international law; it is accepted that this rule may be also customary in nature.

At this point, several observations should be made regarding the enforcement jurisdiction. First, the mere fact that a State enacts and enforces certain rules of conduct within its territory (or adjacent marine areas) does not necessarily mean that the legislation and enforcement are consistent with international law. Once again, this is often the case when State adopts excessively stringent standards on ships entering their jurisdictional zones. Second, in order to be consistent with the international law, the measures of the enforcement action itself must be appropriate to its purpose. In this respect, the choice of the enforcement measure at sea is much more intricate than at land, as at sea the enforcing State must have due regard to legitimate interests of other States, especially their general interest in upholding the navigational rights and freedom of navigation. There is a wide variety of enforcement measures, ranging from those with almost none impact upon navigation (such as monitoring of ship’s movements) towards more impeding but temporary (e.g. inspection, forcible stopping, pursuit, interception, boarding, on board investigation) with the ultimate enforcement procedures (e.g. arrest, detention, confiscation, judicial proceedings and forced sale in auction). Yang adds that in international practise the use of force against a [foreign] ship is always a source of controversy.

The actual extent of State’s enforcement jurisdiction depends on the marine zone where State intends to take the enforcement action, namely whether there is another State with

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16 YANG. P. 37.
17 YANG. P. 39.
which the jurisdiction is concurrent. To provide an example: whereas in principle the flag State enjoys exclusive jurisdiction on board of vessels flying its flag and is entitled to enforce it wherever the ship is at the particular moment, in practice the enforcement action cannot be carried out without the consent of the State that has jurisdiction in the marine area in which the ship finds itself, such as the coastal State if the ship is traversing through its territorial sea.  

Further, the customary law of the sea requires certain code of conduct from the enforcing party. The chosen enforcement action must be appropriate to the gravity of violations of law by the ship or persons on board. Instruction and warning through internationally recognized auditory and/or visual signals must be made prior to direct use of force. Afterwards, blank shots may be fired, and solid shots only if all preceding signals were ignored. The first solid shots shall be fired across the bow of the ship, and if these warning shots are ignored, shots may be fired against the ship itself. Nevertheless, only the smallest calibre shall be used and only with the purpose of disabling the ship’s propulsion.

The LOSC stipulates limitations upon enforcement actions taken for purpose of protection of environment in its Part XII, Section 7 Safeguards. First, according to Article 224, powers of enforcement against foreign vessels under this Part may only be exercised by officials or by warships, military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect. Second, there is duty set by Article 225 for the enforcing State to avoid adverse consequences in the exercise of its powers: In the exercise […] of their powers of enforcement against foreign vessels, States shall not endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk. Arguably, this duty applies to enforcement actions against the State’s own flagged vessels as well. Rules for performing investigation onboard foreign vessels are set by Article 226: States shall not delay a foreign vessel longer than is essential for purposes of the investigations. Any physical inspection of a foreign vessel shall be limited to an examination of such certificates, records or other documents as the vessel is required to carry. A more detailed physical inspection may be undertaken only after such an examination and only

18 YANG. P. 37.
19 YANG. P. 40.
20 This is reference to the certificates of seaworthiness and similar documentation issued by authorities of the flag State. More on this in subchapter 5.3.3.1.
when: (i) there are clear grounds for believing that the condition of the vessel or its equipment does not correspond substantially with the particulars of those documents; (ii) the contents of such documents are not sufficient to confirm or verify a suspected violation; or (iii) the vessel is not carrying valid certificates and records. However, even if the investigation indicates a violation of applicable laws and regulations or international rules and standards for the protection and preservation of the marine environment, release shall be made promptly subject to reasonable procedures such as bonding or other appropriate financial security, unless the released vessel would present an unreasonable threat of damage to the marine environment, then the release may be refused or made conditional upon proceeding to the nearest appropriate repair yard. The Article 226(2) goes as far as to say that States shall cooperate to develop procedures for the avoidance of unnecessary physical inspection of vessels at sea. Additional rules on court proceedings are further stipulated in Article 228-230 that are of limited relevance for the presented thesis. Article 231 that stipulates that States shall promptly notify the flag State and any other State concerned of any measures [...] against foreign vessels, and shall submit to the flag State all official reports concerning such measures. Special rule applies for enforcement action taken in the territorial sea, where the notification duty of the coastal State only applies to measures taken in proceedings.

The limitations set by the LOSC generally correspond with the overall interest in unobstructed navigation and fear of the maritime States and shipping industry of abuse of powers by the coastal States in the form of creeping jurisdiction (see following subchapters).

2.2.2.3 Creeping jurisdiction

The term creeping jurisdiction does not describe another legal category of jurisdiction. Even though it is used in scholarly debate, it is a term with a rather negative connotation, used by some authors in relation to extending the jurisdiction of the coastal State. Originally, it was used derogatorily to describe then developments in the law of the sea and extension of coastal State jurisdiction in both content (jurisdiction over additional areas of conduct, such as marine scientific research) and geographic extent (such as extending the breadth of territorial sea or formation of the EEZ regime in the law of the sea). The existence of the right of the coastal State to enact a 12-mile territorial sea or the concept of the EEZ has meanwhile been accepted internationally and codified in the LOSC. Today, creeping jurisdiction is used to describe actions of coastal States that extend their jurisdiction beyond the limits set by the LOSC. It is
still perceived by its critics as an undesirable development in the law of the sea, conducted at expense of the flag States, their jurisdiction over their flagged vessels and freedom of navigation (and other high seas freedoms) altogether. The exact meaning of the term depends on the particular user of it and on particular book or article. Most recently, the Chinese actions in the South China Sea, notably the ban of presence of warships of other States within the area as well as denying the freedom of overflight for other States’ military aircraft, has been called an example of creeping jurisdiction.

2.3 States as actors in the law of the sea

There are several ways to categorise States as actors in the law of the Sea, depending on the perspective. The careful differentiation among positions of the States is important when attempting to understand the motivations of States’ policies as well as actions taken by them on the international level. On the following pages, I will discuss the several ways of approaching States as actors in the law of the sea.

2.3.1 Maritime States versus coastal States

The first possible differentiation in this field is the differentiation between maritime and coastal States. It is not based on the geographical location, since the maritime States must ipso facto also have coastlines and therefore be coastal States themselves. Rather one can distinguish the maritime States by the relative strength of the States’ military navies, merchant fleets and the importance of the shipping industry for that particular State’s economy. It does not matter at that point whether the commercial ships are flagged in that State, as those may be flagged in the open registries of other States; it is rather the ownership of the vessel that matters. The maritime States promote freedom of navigation and setting limitations to extension of jurisdiction of coastal States. The coastal States, on the other hand, are defined geographically: basically, they are the States with a sea coastline, as opposed to land-locked States. Other State’s vessels move in their marine jurisdictional zones or in their proximity.

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22 On open registries, see the following subchapter 2.3.2.
Coastal States favour extension of their jurisdiction on various basis, also in order to better preserve marine environment.\textsuperscript{23}

2.3.2 Flag States versus coastal States (and port States)

The differentiation between flag and coastal States stems from jurisdictional difference. As for the flag State, the manifestation of adherence of a ship to a particular sovereign State, community or company by flying its flag is one of the oldest maritime traditions. With creation of modern concepts of state and its sovereignty following the Peace of Westphalia in 1648, the legal principle of the freedoms of the high seas emerged along with the principle of flag State jurisdiction on board ships flying that State’s flag.\textsuperscript{24} The concept of flag State jurisdiction as primary jurisdiction over vessels, even though challenged periodically, remains a paramount in the law of the sea.

The distinction between the maritime States and the flag States is of even more importance if set in the greater picture of a trend that surfaced in the latter half of the 20th century, namely the growing preference for flags of convenience within the shipping industry. As it is with the so-called tax havens, there are some flag States that allow ship owners to lower costs of their business. This may happen by various means. The ship owners may choose to have their ships registered in a state with open registry in order to pay lower taxes than in their State of origin or business. They may also choose the open registry State because these States are somewhat more “relaxed” in enforcing requirements on the crew. As the crew costs are one of the few variable costs in the shipping industry, the ship owners are prompted by the highly competitive environment of this business to register their ships in the open registry states.

As of 2015, the most important open registry States are Panama (20\% of total world tonnage; over 8.000 vessels), Liberia (11\%; over 3.000 vessels), Marshall Islands (10\%; over 2.500 vessels). Combined, the 10 States with the largest shares on world total tonnage have a cumulated share of 78\% of the world total tonnage.\textsuperscript{25}

The most unfortunate consequence of the majority of the world’s fleet being registered under flags of convenience is the lack of the enforcement by these States as the flag States.

\textsuperscript{23} MOLENAAR. P. 30-32.
The enforcement lacks in several fields, notably in the fields of the standards for the crews and importantly also in the field of the standards on the ships themselves. There are several reasons, the lack of the incentive being probably the most important one. As the ships flagged in such flag States rarely ever visit the ports (or other jurisdictional zones) of their flag State and citizens of other States are employed on board, there is no concern for them to enforce international standards.\textsuperscript{26} Further, some of the flag of convenience States simply lack the capacity to control the ships registered in their registries, as those ships do not ever visit their ports and these States simply cannot afford any other procedures of control. The lack of control and enforcement has direct consequences for the declining technical state of the world fleet, resulting in what is usually called \textit{substandard shipping}. A substandard ship is a vessel that, through its physical condition, its operation or activities of its crew, fails to meet basic standards of seaworthiness and thereby poses a threat to life and/or to the environment. This would be evidenced by the failure of the vessel to meet regulations contained in international maritime conventions to the extent that it would considered unfit to sail by a reasonable flag state or port state inspection.\textsuperscript{27}

The coastal State jurisdiction over ships in its adjacent marine jurisdictional zones stems out of the coastal State’s sovereignty over its land based territory. This is principally enshrines in the customary maxim of the law of the sea, that \textit{the land dominates the sea}. Tanaka in this context talks about the principle of sovereignty, which according to him is one of the three general principles of the law of the sea (along with principle of freedom and principle of common heritage of mankind). According to him, \textit{this principle essentially promotes the extension of national jurisdiction into offshore spaces and supports the territorialisation of the oceans}.\textsuperscript{28}

The content of coastal State jurisdiction depends on the relative position of the ship within or near that State’s marine jurisdictional zone. The coastal States usually do have incentive to preserve marine environment under their national jurisdiction, be it for economic reasons (preservation of living resources of the sea, preservation of the coast for tourism, etc.), if not for the sake of the environment itself. I will deal with the exact content and extent of the coastal State jurisdiction in later chapters, predominantly in Chapter 6.

\textsuperscript{26} FRANK. P.10-11.
\textsuperscript{27} MTC/OECD Policy Statement on Substandard Shipping (2002), through FRANK. P. 11.
\textsuperscript{28} TANAKA. P. 18-19.
2.3.3 Developed States versus developing States

The last possible division line between States is based upon the relative level of industrial and technical development. The difference in approach towards environmental protection is well acknowledged in the literature, and the same applies to the protection of marine environment as well. It seems safe to say that developed States put more emphasis on the environmental protection. However, at the same time, the primary concern of the developed States is the state of the environment so to say, in their backyard, and they are often much less interested in preserving the environment under jurisdiction of other States, especially if it would hurt their economic interests. This is, of course, not the case of all developed States and all developing States. The developed States are also the ones that can afford unilateral steps in protection of marine environment, which can have serious economic consequences for the State taking them.

2.4 Freedom of navigation

The concept of freedom of navigation is partially interwoven with the previously discussed notion of creeping jurisdiction. According to many authors, it is the core value endangered by creeping jurisdiction. Navigational rights and freedom of navigation in general are often said to be of particular importance in international relations for economic and strategic reasons, which are mutually intertwined. The term freedom of navigation is nevertheless complex in its meaning and deserves at least a brief explanation.

Traditionally, freedom of navigation is the core freedom of the high seas freedoms, without which the other freedoms (such as the freedom of fisheries) would be unthinkable. The area of global oceans that retains the legal status of high seas has lessened in the 20th century considerably, with extension of breadth of territorial sea and contiguous zone as well as emerging of the regimes of continental shelf and exclusive economic zone. With extension of coastal State jurisdiction seaward, the unlimited freedom of navigation has been “pushed” into the high seas; with some pieces of international law further limiting its exercise even within the high seas itself.

29 MOLENAAR. P. 29.
30 MOLENAAR. P. 28.
Further, coastal States tend to take measures that put restrictions on navigational rights (such as the right of innocent passage) in their territorial sea. Today, the discussion on freedom of navigation generally revolves around several core issues.

First, there is complex discussion on the right of warships to entertain the right of innocent passage in the coastal State’s territorial sea. The interest of coastal State to prevent foreign warships from coming close to its coastline is understandable, as military control was historically perceived as a prerequisite for the very existence of dominion over marine area adjacent to the State’s coast. A so-called cannon-ball rule has emerged in the 17th and 18th century, setting the breadth of the territorial waters by the effective range of coastal gun forts. Nowadays, the freedom of navigation for warships is perceived as a prerequisite for global security by influential maritime nations, such as the USA, in order to keep their powerful military navies quickly deployable anywhere in the world. A fragile balance was struck between interests of coastal States and maritime nations upon establishing the extension of breadth of the territorial sea to 12 nautical miles in the LOSC, namely confirming the right of innocent passage for warships, albeit under certain conditions (e.g. submarines are required to navigate on surface flying a flag and taking-off and landing of aircraft must be suspended, as prescribed by Article 14 of the LOSC). The State practise in this regard is nevertheless not uniform. Despite the guarantees set by the LOSC, some States seek to limit movements of foreign warships in their territorial sea. Some 40 States worldwide set requirement of prior authorisation or notification of upcoming entry of foreign warships into their territorial waters. This practise is firmly opposed by Western maritime nations, notably the US, the UK, Germany or the Netherlands. The 1989 Uniform Interpretation of Laws Governing Innocent Passage between the USA and USSR is very explicit in this regard, as its head 2 states that all ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required (emphasis added). Tanaka draws a distinction between the requirements of authorisation and notification: according to him the authorisation is an excessive requirement, whereas the notification remains a matter for discussion.

33 More on this topic in Chapter 3.5.
Second, there is the issue of nuclear and hazardous materials. Some States have banned entry in territorial sea to ships with nuclear propulsion or nuclear cargo on board. That is most notoriously the case of New Zealand and its nuclear free zone established in 1984. The land, airspace and the territorial sea of New Zealand are nuclear free zones and ships with nuclear propulsion, armaments and cargo are prohibited from entering them. Again, this practise has been opposed by other States, most notably the US. In pursuing their anti-nuclear policy, New Zealand authorities went as far as not granting access to ports to conventionally powered US Navy vessel USS *Buchanan* in 1984. This was done despite the offer of New Zealand that it is ready to accept guarantees by the US government that nuclear arms are not present on board of the vessel, as the US Navy would on principle neither confirm nor deny whether its ships are armed with nuclear weapons. Following this incident, the US, previously the most important military ally of New Zealand, went as far as to withdraw from the *Australia, New Zealand, United States Security Treaty*, which provided legal base for military cooperation between the three States in the Pacific region in manner similar to *North Atlantic Treaty Organisation* (NATO) in the Northern Atlantic region. Very recently, however, there has been a development in this regard, as the USS *Sampson*, a US Navy destroyer with conventional propulsion visited New Zealand in November 2016, a first US Navy ship after more than 30 years. A clearance was given to the vessel by New Zealand; it nevertheless remains unclear whether a physical inspection of the ship by NZ officials was conducted before or the clearance was issued on a basis of a guarantee by the US Navy.\(^{36}\) This recent event seems to suggest that the US might have accepted the New Zealand anti-nuclear policy.\(^{37}\) Only time will tell whether this change of approach does only apply to New Zealand or whether it is of a more general nature towards other States. I will re-examine the issue of transports of nuclear and other hazardous cargoes in Chapter 6.

Third, freedom of navigation is pointed out to be a prerequisite for proper functioning of international trade and commerce as well as that of global economy, which relies heavily on unobstructed movement of ships carrying goods and raw materials (notably oil). In last decades, the importance of arrivals of ships carrying goods into ports being timely and perfectly scheduled has also grown, further strengthening the vital issue of unobstructed free

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movement of commerce ships. From that perspective, almost any obstacle to free movement of vessels, even if it is set on the basis of the international law and well within its limits, is seen as a dangerous development or “creeping jurisdiction”. Once more, the issue of right of innocent passage through coastal State’s territorial sea comes immediately to mind, followed by questions about the extent of the coastal State jurisdiction in other marine jurisdictional areas, notably the exclusive economic zone. As answering these questions is the topic of this thesis, I will in detail answer them in the subsequent chapters.

2.5 Vessel source pollution

There is no definition of vessel source pollution that was agreed upon and included in a globally applicable international treaty. I would therefore like to start with brief contemplation about the legal definition before proceeding to categories of vessel source pollution.

As set in the Article 1(4) LOSC, "pollution of the marine environment" means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities. It is a broad, open definition which aims to include any source of pollution, including the not yet existing (or not yet discovered) ones, as well as activities which are “only” likely to have deleterious results for the environment. It is both “action oriented” (the action of introduction) and “effect oriented” (result in such deleterious effects). Also, it not only covers actions that are guaranteed to have such effects, but those that are likely to as well. This is referred to as “probability formula”.38

Apart from material substances, it also covers pollution in form of energy, not only as radiation, but also as electricity, heat and sound. The latter is of great importance in relation to the shipping industry with increasing recognition of harmful effects of high-frequency sonars used by vessels for navigation upon marine life. Harmful effects of sonars have already been proven in the case of cetaceans; despite that only limited steps towards protection of them, as usage of high frequency sonars is today necessary for safety of shipping.

38 MOLENAAR. P. 17.
As for vessel source pollution, there are generally three kinds of it: operational, accidental and pollution by emissions.

First, there is operational pollution, pollution that is caused by intentional operational discharges. The “discharge” is defined by the Article 2(3) of the MARPOL 73/78 Convention as any release howsoever caused from a ship and includes any escape, disposal, spilling, leaking, pumping, emitting or emptying [of harmful substances or effluents containing such substances].\textsuperscript{39} The discharges are result of day-to-day operation of the ships, and include cleaning of its tanks with seawater in order to wash out the residues; the water polluted with oil and dispersants is afterwards discharged into the sea. Another common practise was discharge of low-quality sludge residues of fuel oil before tanking of new fuel, as well as discharge of the residues in tanks of oil tankers before those enter ports for repairs.\textsuperscript{40}

The accidental pollution is pollution that is unintentional. Generally, authors distinguish between pollution accidental to loading and unloading of oil, which is called terminal spills and is deemed minor, and pollution caused by incidents at sea with much more deleterious effects. The incidents may be caused by structural failures, groundings, and collisions and to lesser extent explosions, breakdowns and on board fires.\textsuperscript{41} There is a long and sad history of well-known incidents involving oil tankers, including the \textit{Torrey Canyon} in 1967, the \textit{Amoco Cadiz} in 1978, the \textit{Exxon Valdez} in 1989, the \textit{Erika} in 1989 and lastly also the \textit{Prestige} in 2002. It is especially the large oil tankers that pose a great threat to the environment due to the large amounts of oil they carry. Nevertheless, other large carriers such as bulk carriers or ships transporting hazardous materials or goods also pose a significant threat. Needless to say, almost every maritime incident results in an oil spill, when fuel tanks of the ship are damaged.

As for pollution by emissions, this is predominantly the pollution caused by the exhausts of ships’ engines and on board incinerators, and further emissions of certain harmful substances, such as gases harmfully affecting the ozone layer. The international standards for emissions are set by Annex VI to MARPOL 73/78 Convention.

\textsuperscript{39} The Article excludes \textit{dumping, releases of harmful substances directly arising from the exploration, exploitation and associated offshore processing of sea-bed mineral resources and release of harmful substances for purposes of legitimate scientific research} into pollution abatement or control, which are not dealt with by this thesis.
\textsuperscript{40} MOLENAAR. P.20.
\textsuperscript{41} MOLENAAR. P. 19.
Chapter 3: The theoretical background and historical development of the concepts of freedom of navigation and coastal State jurisdiction over marine areas

3.1 Introduction

Ever since the beginning of the development of the international law of the sea, two approaches of the State towards marine areas and the assertion of control over them, as well as towards the existence of the freedom of navigation, competed. Those approaches were the *mare clausum* approach and the *mare liberum* approach, which may be considered political reflection of what Tanaka calls *principle of sovereignty* and *principle of freedom*, and which (according to him) are (together with the much later added *principle of common heritage of all mankind*) the three underlying principles of the international law of the sea.\(^2\)

The *mare clausum* (Latin for *enclosed sea*) approach advocates the possibility of appropriation of the marine areas and executing dominion and sovereignty over them in the similar manner as in the case of State’s land-based territory. This approach has been reflected by the practice of States throughout history, and was eventually firmly anchored in scholarly literature by English legal scholar John Selden in his 1635 book *Mare Clausum*. There is a well-established maxim in the law of the sea, namely that the *land dominates the sea*, or, in other words, the claim of sovereignty (or jurisdiction) over marine areas stems out of sovereignty over land. The sovereignty (or jurisdiction) of the coastal State relates to the fact that the marine zones are adjacent to its territory and is based on the principle of territoriality.

Contrary to the former, the *mare liberum* (Latin for *free or open sea*) approach advocates impossibility of appropriation of over marine areas and executing ownership (dominion, sovereignty, jurisdiction) over them. It cheers for as much unlimited freedom of navigation as possible for all States. The *opus magnum* of this approach is the 1609 work of Dutch legal scholar Hugo Grotius, the notorious *Mare Liberum*.

These two opposing doctrines, the approach to assert sovereignty over and control of marine areas on one hand and the approach to uphold unobstructed freedom of navigation for all States on the other, seem to be two most important tendencies in the historical as well as

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contemporary developments in the law of the sea. To quote O’Connell: [t]he question was whether the power to rule (jurisdiction) flowed from proprietorship of the marine terrain, or was independent of it. It was a critical question then [in both classical antiquity and the 17th century], and it remains a critical one today.\textsuperscript{43}

Therefore, it is in my opinion appropriate to include a chapter in this thesis that would discuss the development of this integral question of the law of the sea, both in the perspective of theory represented by scholarly literature and in the State practise reflecting the evolving customary low. I would nevertheless like to go deeper in history and discuss the development of the concepts from the very beginning of the recorded history in the antiquity.

In chronological order, I will go through the ancient, medieval and modern developments in the law of the sea, regarding the prevalent theoretical discourse as well as States’ practise towards freedom of navigation and possibility of appropriation and control over States’ adjacent marine areas.

\textbf{3.2 Antiquity}

\textbf{3.2.1 Ancient Greece}

The issue of appropriation of marine areas appeared as soon as the first maritime nations were established in Eastern Mediterranean. According to the Greek tradition, the first State with powerful navy that pronounced dominion over adjacent sea was the ancient Minoan Crete. Its legendary king Minos, according to Greek historian Herodotus and Thucydides \textit{had the mastery of the Aegean Sea and made himself a Master of a great part of what is now termed the Hellenic Sea} respectively, as soon as in some 1500 BC.\textsuperscript{44} Roman historian Quintus Curtius (1\textsuperscript{st} century AD) in his books on life of Alexandre the Great mentioned the claim of the city State of Tyre in Phoenicia whose citizens \textit{brought the sea under their dominion, not only their neighbouring sea, but wherever their fleet went}, before the city was conquered by Alexandre in 332 BC. Allegedly, passage of other nations’ ships through the Tyrian Sea was only allowed with permission of the Tyrians.\textsuperscript{45} Potter nevertheless comments on the concept of dominion over sea in ancient Greece as a reflection of purely factual state, rather than legal

\textsuperscript{45} POTTER. P. 12.
one, or, in other words, the dominion over the sea was ensured by physical presence of military vessels in the marine areas in question. As soon as military control dissipated, so did the dominion. There was no legal basis for the dominion on the international level, as there was no law of nations at the time.\footnote{POTTER. P. 13-14.}

In classic Greece, claims of dominion over sea were made notably by Athenians, especially Themistocles and Pericles in 5\textsuperscript{th} century BC. In 423 BC Athens imposed a regulation upon Sparta and her allies that none of their warships and neither ships over 500 talents of burden were allowed to sail along the coast of Greece.\footnote{Thucydidès, Book IV Chapter 118 through POTTER. P. 18.} It is nevertheless questionable whether or how long the Spartans obeyed the rule, as this happened in the middle of the Peloponnesian War between the two powers, a war Sparta eventually won. Despite the classical sources may be considered much more reliable than the ancient ones, Potter still dismisses the existence of the rule over sea as legal concept, claiming that Greeks still did not distinguish between the legal and physical control over marine areas, notably that the former may exist without the latter. In this respect, he points out the case of piracy – one of the aspects of the claimed dominion over sea was the claimant’s ability to keep the sea free from pirates suggesting the aspect of physical control over sea was more important than the legal one.\footnote{POTTER. P. 22-23.}

It must be nevertheless noted here that Athenian politician Pericles is recorded to have introduced a law to the effect that all Greeks from Europe and Asia should be invited to send deputies to a conference in Athens to deliberate \textit{[on the issues concerning] the sea, so that all might sail it fearlessly and keep the peace.}\footnote{Plutarch, Life of Pericles, Chapter XVII. Available at http://penelope.uchicago.edu/Thayer/e/roman/texts/plutarch/lives/pericles*.html.} By that, Pericles is the first person known to introduce the concept of freedom of navigation. Potter is nevertheless dismissive of acknowledging that the Athenian concept of freedom of navigation had the same meaning as it has today. He points out that Athenians had undisputed naval supremacy in the Aegean Sea and acted as police force especially when combatting piracy and foreign (e.g. Persian) military incursions, and that the offered freedom of navigation that was to be agreed upon on the conference was merely supposed to be a freedom of navigation within the sea under Athenian rule. Further, this offer was a political act, as Athens was at the time already losing...
the war against Sparta. How this notion of freedom of navigation would have worked in practice therefore remains unclear. Potter concludes his thoughts on the contribution of ancient and classic Greece with notion that *it did not lay down any formal rules of legal right respecting sea dominion, but regarded the latter as […] a matter of military and commercial power.*\(^{50}\)

### 3.2.2 Ancient Rome

As with other areas of law, notable Roman influence can be traced in the law of the sea. However, the exact extent of the Roman influence on the law of the sea is more difficult to follow than it is for example in the case of the Roman influence on the civil law, which stems to large extent out of *Codex Justinianus.*\(^{51}\)

In the discussion on the Roman contribution to the law of the sea, it is usual to mention and discuss two primary documents.\(^{52}\) The first is the aforementioned *Codex Justinianus*, the other is the *Nomos Rhodion Nautikos*, the Rhodian Sea Code.

At this point I shall briefly discuss the dichotomy between the law of the sea and the maritime law (sometimes also referred to as *admiralty* law). Some authors argue that the division of law relating to the sea between the public and private branch is *likely to be highly artificial*,\(^{53}\) there is still, however, a clear line of distinction between the two today. Whereas the law of the sea may be considered a public branch of the legal order of the seas dealing with issues of general nature and shared interest of all States (such as delimitation of marine spaces, jurisdiction, use of marine resources or protection of marine environment), the maritime law is its private branch dealing mostly with the issues of maritime transport, commerce, salvaging and offences.

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\(^{50}\) POTTHER, P. 24-25.

\(^{51}\) *Codex Justinianus*, also referred to as *Corpus Iuris Civilis*, is a body of Roman law issued between 529 and 534 AD by the Eastern Roman Emperor Justinian. It has three parts, *Codex* (compilation of edicts of Roman emperors), the *Digests* (the encyclopaedia of Roman legal terms and institutes) and *Institutiones* (study book to the Codex).


\(^{53}\) Confer for example BEDERMAN. P. 361.
Regarding the possibly of appropriation and ownership of the sea itself, the Justinian’s Institutes are notoriously quoted: by the law of nature the following things are common to all men: air, running water, the sea, and consequently, the shores of the sea. This notion on impossibility of appropriation of the sea is further supported by another quote from Justinian’s Digests (attributed to the Emperor Antoninus): I am indeed the lord of the world, but the law is the lord of the sea. These two quotes were often used to advocate the mare liberum approach and the freedom of navigation, pointing out their Roman origins and using the authority of Justinian to underline authors’ own position. This is most notably done by Hugo Grotius, who did so in the Defence of Chapter V of the Mare Liberum.\(^{54}\) Potter nevertheless shares to some extent this view when he states that Roman philosophers and jurists this raised what was at the time the first, and still remains in some way the most powerful, challenge to the concept of maritime dominion put forward in human thought.\(^{55}\)

This argumentation has been proven to be, at least partially, erroneous. One must keep several important things in mind. First, the Justinian’s Code was primarily dealing with the private branch of the law. Therefore, the explicit ban on attribution of the marine spaces is primarily aimed at private persons, not State actors. Second important point is the state of international relations in the time of Justinian, around 550 AD. By that time the Roman Empire has had extended around the whole Mediterranean Sea, reached its highpoint and then slipped from it, being eventually divided into two parts. The Western part collapsed under attacks of Germanic tribes, and Justinian, originally based in the Eastern part, set upon a mission to reclaim and reunite the Roman Empire as one in its former extent and glory. The other States/nations present in the Mediterranean area were seen as intruders and enemies by Justinian, and his Empire was in state of perpetual war with them, with periods of truce (rather than peace) being only temporary. As the other powers in the region were not seen as equal by the Romans, there was no urge and no basis to establish long-term international relations or conclude any treaties establishing rules of international law (such as the law of the sea).

\(^{54}\) The full title of this work by Grotius, that is usually attached to the Mare Liberum as an appendix, is “Defence of Chapter V of the Mare Liberum Which had been attacked by William Welwod, Professor of Civil Law, in Chapter XXVII of that book written in English to which he gave the title “An Abridgement of All Sea-Lawes””.

\(^{55}\) POTTER. P. 27.
Even if we accept that the quotes from Justinian’s Code have implications for the public branch of the law of the sea, they only reflect an approach held at one particular period of time. As the Roman Empire spanned for a period of more than thousand years, there certainly must have been some development in the law in general, as well as the international law. It is in my opinion therefore necessary to start much earlier than in the age of Justinian while looking for Roman legal approaches towards attribution of the sea, particularly to the time when the Romans have not yet become the single dominant power of the Mediterranean region. I therefore examined State practise and international law as preserved in recordings of international treaties between Rome and then-relevant Mediterranean powers from earlier times, particularly looking for provisions on marine delimitation.

As early as in 509 BC, coincidentally the very same year the Roman Republic was allegedly founded, an important treaty was signed between Rome and Carthage (at the time not yet an enemy of Rome) that stipulated friendly relations between the two States and outlined conditions upon both in order to prevent possible conflicts in the future. By concluding the treaty, both parties outlined their spheres of interest and influence, and divided the Western Mediterranean for future expansion of the two. The condition most important for this thesis is the obligation of Romans and their allies not to sail “past Fair Promontory” (= into the Gulf of Carthage) unless driven there by storm or enemies; in such case the non-Carthaginian ship was supposed to leave within five days. By this provision, the Carthaginians openly claimed sovereignty over the marine area adjacent to their city, banning other vessels (military as well as civilian) from entering it, and Romans agreed to it, accepting the possibility of imposing sovereignty over marine body through an act of international law. The exception granted in the cases of distress by weather or enemies is also of notable interest, as it for the first time mentions a concept that is an integral part of the law of the sea until today, namely the concept of ship in distress and its right to seek refuge in ports. A question arises, as to why would Romans accept such unfavourable conditions. Pitassi speculates that the one of the reasons for Romans to accept this disadvantageous position was that Carthage as the leading naval power in the region undertook to keep the seas free from pirates, which was beneficial for Romans as well without the need for them to keep a strong a

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56 It should be pointed out that I only worked with secondary documents such as The Histories written by Greek-Roman historian Polybius (cca 200-cca 118 BC) that recorded (and commented upon) the primary documents that are lost today.

57 Polybios himself suggests the location of the Fair Promontory to be northward from Carthage.
naval police force. The second treaty between Rome and Carthage was concluded in 348 BC. In the same year, Romans founded the colony of Ostia, the port for Rome on the coastline, as until then Rome was only accessible on the Tiber River; I nevertheless did not find any evidence of correlation between these two events. In the treaty, the friendly relations between the two powers were once again confirmed and the conditions of the original treaty were revisited. The original provision on marine delimitation was also elaborated upon: by the terms of the new treaty the Romans were not allowed to find cities nor maraud nor navigate eastward from the Fair Promontory as well as Mastia (today’s Cartagena in Spain) and Tarseium (location unknown) and not to find cities nor navigate along the Sardinian or Libyan coastline. Again, an exception was granted in case of a storm – in such case, the shipmaster was allowed to take provisions and repair the ship and leave within five days. The area upon which the Carthaginians claimed sovereignty expanded fundamentally by concluding the treaty, covering not only the Bay of Carthage, but the whole coast of Libya, the coastline of the island of Sardinia as well as notable part of the coastline of Spain.

The treaties between Rome and Carthage were preserved in The Histories by Polybius, as they are relevant in the prelude towards the Punic Wars between the two powers. Romans however concluded treaties with other States as well. In 338 BC, they concluded a treaty on navigation with Taranto, a wealthy Greek city State in southern Italy. The treaty limited Roman military navigation in the area beyond Promontory Lacinium, today’s Cape Colonna. Besides that, little is known about its provisions. When 10 Roman ships entered those waters in 282, they were either destroyed or forcibly removed. After Roman delegation seeking compensation was belittled in Taranto, a war broke out between the two powers, resulting in the invitation of Pyrrhus of Epirus into Italy.

Pyrrhus also played an important part in further relations between Rome and Carthage. Following his infamous Pyrrhic victory in 279 BC, Pyrrhus intervened in a civil war on Sicily, at the time a sphere of interest for both Rome and Carthage. Because of his actions in Sicily, both States concluded their last amicable treaty in 279 BC, affirming previous treaties on marine delimitation and additionally forging an alliance against Epirus. After his ultimate defeat, Rome and Carthage militarily engaged in the three Punic Wars, beginning in 264 BC.

59 POLYBIOS. Chapter 3.24
60 PITASSI. P. 21-22.
After the decisive victory of Roman navy in the Battle off Aegados Islands in 241 BC, Rome for the first time became leading maritime power in western Mediterranean. The victory in the first war enabled Romans to forbid Carthaginians from presence of any kind in Sicily, it however did not put restrictions upon recreation of Carthaginian navy. After some time, Rome lost its dominant maritime position and regained it first after the surrender of Carthaginian fleet in the Second Punic War 202. The peace treaty concluded after the end of the second war limited Carthaginian navy to only 10 warships to fend off pirates (besides other conditions).

A similar obligation (to limit the amount of warships to 12) was bestowed upon the Seleucid Empire by the Treaty of Apamea, the peace treaty concluded by the Romans and their allies with Antiochus III. in 188 BC.

About that time, there was no other relevant sea power in the Mediterranean, as Roman Empire extended around the whole Mediterranean Sea (which the Romans proudly called Mare Nostrum, Our Sea). Therefore, it was not necessary for the late Roman Empire to engage into international treaties that would set rules for foreign vessels in “their” sea.

That does not mean that the Roman dominion in the Mediterranean was not uncontested. Romans notably struggled with piracy in “their sea”. They repeatedly had to “clear” the Adriatic Sea from pirates. The earliest recording of such campaign comes from 220 BC. In the most notorious case of war on pirates, the Senate in 67 BC enacted the Lex Gabinia, which granted Pompey the Great an imperio (highest command authority) in any province within 50 miles from the sea along with command of several hundred warships and 120 thousand men to take any measures necessary to eliminate piracy and restore the sovereignty of the sea to the Roman people. Apparently, the concept of pirates as hostes communis omnium (Latin for enemies of all mankind) has its roots in the Roman period as well.

Altogether, apart from the later misused notion of impossibility of appropriation of marine areas that I discussed previously, the significant Roman impact in the discourse in law of the sea is the input in legal philosophy and terminology. The concept of legal ownership

61 PITASSI
62 Even though the original text of the treaty is lost, its content was recorded by Roman historic Appianus, who comments on the treaty in his Roman History, particularly the book Syriaca (On Syrian War), Chapters 37-39. Conferr the English translation on http://www.livius.org/sources/content/appian/appian-the-syrian-wars/appian-the-syrian-wars-8/?d5B%A739%5D.
63 BEDERMAN. P. 363. Footnote 12.
(dominion) that exists on its own, without the need to exercise physical control at any given time, is Roman in origin, even though – in respect of the State territory and adjacent marine areas – it has yet to be altered slightly in what we nowadays call sovereignty. Also, the concept of sea as res publica extra commercium (Latin for public thing that cannot be owned or traded with) is Roman in origin. And so is the concept of jurisdiction (Latin for to say what is law), the exact meaning and extent of will later be subject of the scholarly discourse up until today and will be of essential importance throughout the presented thesis.

3.3 Middle Ages and Renaissance

After the fall of the Roman Empire and consolidation of the new States in Western Europe, the discourse on the possibility of appropriation of the sea was once again opened. The mare clausum approach, even though not yet called like this, can be traced back to that day and the aggressive approach of that-day Mediterranean maritime superpowers, Italian commercial city States of Venice and Genoa, towards foreigners in what they again considered “their” sea (the Adriatic Sea and the Ligurian Sea, respectively). To demonstrate the will to assert sovereignty over the marine areas, a ceremony of “marriage” of the city to the sea where perpetuique dominii (perpetual dominion) was pronounced was held annually in Venice. The Venetian supremacy over the Adriatic and eastern Mediterranean Sea was further assured by a network of colonies and trading post along the eastern coast of the Adriatic Sea, imposing of tolls and the ability of enforcement through the powerful fleet of military vessels, and was generally (and customarily) accepted by other Mediterranean State actors.

The Genoese, on the other hand, concluded treaties with neighbouring States that acknowledged their supremacy over the Ligurian Sea, as well as jurisdiction to interdict vessel traffic and collect tolls. Their jurisdiction was described as unassailible custom by Italian legal scholar Baldus de Ubaldis (1327-1400). The Genoese were also the first to use the flag to indicate adherence of a vessel to a certain State, establishing the concept of a flag into the international law.64 To quote one of the traditional stories on the origin of the flag of England (also called the St. George flag): “The St. George's flag, a red cross on a white field, was adopted by England and the City of London in 1190 for their ships entering the Mediterranean to benefit from the protection of the Genoese fleet. The English Monarch paid

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an annual tribute to the Doge of Genoa for this privilege.” The flying of Genoese flag might have had two reasons – not to be attacked by Genoese fleet itself and to act as deterrence towards pirates and other possible assailants aware of possible repercussions by the Genoese navy.

Soon, other maritime nations claimed their dominion towards what they considered their sea. That was the case of the Danish in the Baltic Sea (an assertion firmly opposed by other important actors of the time, notably the Hanseatic League). The English sovereignty over the adjacent part of the North Sea and the English Channel was traditionally claimed ever since the Saxon times. This assertion was later maintained and extended after the Norman Conquest. The declarations made by the English Crown repeatedly imposed tolls and requirements of licenses to sail through particular marine areas, as well as claimed jurisdiction over the fisheries in them. One has to keep in mind, though, that at the time, the Kingdom of England had integral parts in what today is part of France – notably Bretagne and Normandy, lied on the other side of the English Channel, making this particular body of sea a link of grave importance for the English Crown, thereby giving some legitimacy to their claims.

3.4 Age of Discoveries

Eventually, it were most notably Spaniards and Portuguese in respect to the shipping routes towards America and India during the Age of Discovery who sought to exclude other nations from participating in the exploration and colonization of newly discovered territories and assert dominion over entire oceans. Following the discovery of America by Christopher Columbus in 1492 (his expedition was funded by the Kingdom of Castile), the Portuguese King attempted to assert sovereignty over the newly discovered territories. The 1479 Alcaçovas Treaty confirmed by the 1481 papal bull Aeterni regis, which stipulated that all countries southward of the Canary Islands shall belong to Portugal, served as legal basis for his claim, which was to be reinforced by dispatching of an armada to America. His claim went unopposed by other Catholic monarchs who lacked naval power to confront the Portuguese. The only opposition came from the Pope Alexander VI., a Spaniard by birth, who

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67 The kingdoms of Castile and Aragon were in 1516 united as Kingdom of Spain.
in 1493 issued the bull *Inter Caetera* stipulating a meridian line set 100 leagues westward from the Azores Islands, west- and southward of which all the discovered oversea territories were to belong to Castile. Following the Papal intervention, Castile and Portugal agreed to amicably divide the known world between themselves in the 1494 Treaty of Tordesillas, which moved the line set by the Pope to the meridian 370 leagues westward of the Cape Verde Islands. According to the treaty, everything westward of the meridian was to belong to Castile, whereas everything eastward would belong to Portugal. The Treaty of Tordesillas, despite effectively violating the *Inter Caetera* bull, was accepted and sanctioned by the following Pope Julius II. in 1506. Following the circumnavigation of Earth by the expedition led by Ferdinand Magellan, it was proven that Earth is round. Legal disputes between Portugal and Spain soon followed, concerning the division of the world along an anti-meridian line drawn at the opposite side of the planet. The core issue when drawing the division line was the ownership of the Moluccas Islands, where the highly-priced spices were produced. Eventually, Portugal agreed to pay compensation to Spain for the Moluccas and an anti-meridian line was set by the 1529 Treaty of Zaragoza, effectively dividing the known world and excluding any other nation from participating in the oversea discoveries and trade.

Around that time, the literature of legal scholars began to address State practise of appropriation of marine areas. Alphonse de Castro (1495-1558), a Franciscan scholar from the university in Salamanca in Spain, wrote a treatise dismissive of Genoese and Venetian practise of appropriation of adjacent marine areas in the Mediterranean. Another Spanish scholar, Fernando Vázquez y Menchaca (1512–1569) in his 1564 books *Controversiarum illustrium aliarumque usus frequentium libri tres* (vaguely *Three books on various disputes*) went further and in his analysis of excessive marine claims criticized the Venetian and Genoese practise along with the Spanish and the Portuguese ones.70

The most important input in the scholarly debate of the 16th century was done by Alberico Gentili (1552–1608), an Italian Protestant who settled in England and became Professor of Law at Oxford; he was also a practitioner in admiralty courts in England. In his 1598 *De iure belli libri tres* (*Three Books on Law of War*), Gentili revived the distinction between dominion and jurisdiction. While he dismissed the possibility of dominion of the

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68 One Portuguese maritime league was 5.555 metres, 100 leagues therefore approximately 555 km.
69 370 leagues approximately 2055 kilometres.
70 BEDERMAN. P. 365.
seas, he held at the same time that certain forms of regulation could extended into ocean areas by coastal States.\textsuperscript{71}

\section*{3.5 17th Century: The Battle of the Books}

By the beginning of the 17th century, Portuguese and Spanish dominance over the foreign trade and navigation became close to monopoly in their respective parts of the world. In 1602, however, Dutch East India Company was founded and took an aggressive approach towards dismantling the monopoly asserted by the Portuguese on trade with spices and other products from the East Indies. In 1603, a Portuguese galleon Santa Catarina was captured a squadron of Dutch vessels in the straits of Molucca and taken as prize to the Netherlands. Aware of the controversial nature of this action, the Company hired a young Dutch jurist Hugo Grotius (1683-1645) to provide legal assessment on legality of the capture of the Santa Catarina. Subsequently, Grotius wrote \textit{De iure praedae commentarius} (The Commentary on the Law of Prize) for the Company as an expert opinion for private use; a part of it was published in 1609 as an anonymous pamphlet by the name of \textit{Mare Liberum} (usually translated as \textit{The Freedom of the Seas}).\textsuperscript{72} The subtitle of the book was \textit{A Disputation Concerning the Right Which the Dutch Ought to Have to the Indian Merchandise for Trading}\.\textsuperscript{73} The book is divided into three parts, discussing legitimacy of the Portuguese assertions of sovereignty in the East Indies, monopoly on navigation in the Indian ocean and monopoly to trade with the East Indies. As the name suggests, freedom of navigation was the primary concern of Grotius. According to him, the appropriation of the seas is impossible as it is impossible to occupy the sea. As such, the appropriation of the seas would not be sanctioned by economic considerations, as resources of the oceans are limitless and inexhaustible. Further, he considered freedom of navigation to be a natural right – in his own words \textit{every nation is free to travel to every other nation and to trade with it}. For his cause, he used mostly Latin sources and arguments of classic Roman lawyers (such as Ulpian) and provisions from \textit{Codex Justinianus}, the validity (or invalidity) for the discussion I discussed previously. Grotius nevertheless accepted distinction between ownership (\textit{dominion}) and right over sea not beyond protection and jurisdiction. He used the jurisdiction to take measures

\textsuperscript{71} BEDERMAN. P. 366.
\textsuperscript{72} BEDERMAN. P. 366.
\textsuperscript{73} TANAKA. \textit{Navigational Rights and Freedoms}. P. 536.
against pirates as an example of such right, which is however common right which also other free nations have in the sea.\textsuperscript{74}

In reaction to \textit{Mare Liberum}, Scotsman William Welwood, Professor at the University of St. Andrews, published \textit{Of the Community and Propriety of the Seas} in 1613. He criticised the method of Grotius (Grotius claimed he rediscovered the original law of the nations by studying the Roman sources) and stressed that the international law is based on common consent of States which is in turn shown by State practice. Further, Welwood only accepted the principle of freedom of navigation as applicable to open areas of the ocean (the future high seas), but not to coastal areas. He also accepted the possibility of jurisdiction in particular areas of conduct, notably over fisheries.\textsuperscript{75}

In 1625, a Portuguese response to \textit{Mare Liberum} was written by Serafim de Freitas (1570-1633), a legal scholar at the university in Valladolid. Entitled \textit{De Iusto Imperio Lusitanorum Asiatico} (\textit{Of the just Portuguese Asian Empire}). De Freitas dismissed the concept of natural law altogether, arguing that it is the sovereign who has the right to set rules in the territories she appropriated, including exclusion of foreigners. Further he (correctly, one might add) pointed out that argumentation in favour of impossibility of appropriation of the seas borrowed from Roman sources is of little importance, as they had been meant to regulate conduct of private persons, not States. It was the Roman Empire that gave its citizens the right of free navigation from its position of a sovereign. Lastly, de Freitas argued that it is possible for a territorial sovereign to acquire a prescriptive right (today’s prescriptive jurisdiction) over particular areas of conduct in a specified marine area, if those rights have been exercised over some period of time.\textsuperscript{76}

It should be pointed out that Grotius himself in his 1625 book \textit{De jure belli ac pacis} (\textit{On the Law of War and Peace}) accepted the possibility of appropriation of a certain marine area by the power possessed of the shore on both sides of it; although beyond those limits it may spread to a wide extent, which is the case with a bay, and with a straight beyond each of its outlets into the main sea or ocean.\textsuperscript{77}

\textsuperscript{75} BEDERMAN. P. 368
\textsuperscript{76} BEDERMAN. P. 368.
In 1635, John Selden, an English lawyer, published his treatise *Mare Clausum*, which eventually gave the name to the approach advocated by him. Interestingly, Selden wrote his book soon after the publication of *Mare Liberum*, but was forbidden to publish the book by his royal patron, King James I., who supported the Dutch in their war with the Spaniards and the Portuguese. In manner similar to Grotius, Selden accumulated a vast repository of records ranging from biblical and antique times up to then-recent practice of States in support of his argument of possibility of appropriation of marine areas by a coastal State. According to him, the coastal State may assert ownership over areas that are adjacent to its coast by continued possession or usage. While dismissing the Spanish and Portuguese claims as excessive, Selden also dismissed the limitless freedom of navigation, setting course towards balance between the interests of maritime States and coastal States.

Following the end of Thirty Years War in Europe through Peace of Westphalia in 1648, the State as a sovereign actor in the international community emerged in the international law. Along with it, the legal principle of the freedoms of the high seas emerged together with the principle of flag State jurisdiction on board ships flying that State’s flag.78

Throughout the latter half of the 17th century, more scholars took sides in the dispute on freedom of navigation, giving this part of development of the international law of the sea its moniker “the Battle of the Books”. The developments in the doctrine of the 17th century were summarised in the work of Cornelius van Bynkershoek (1673-1743), a Dutch jurist who essentially provided synthesis of both approaches, settling the theoretical dispute in a compromise that would last for two centuries. In his primary work, *De dominio maris dissertatio* (*On ownership of the sea*) published in 1702, Bynkershoek provided different regimes for open ocean (the high seas) and marine areas adjacent to coastlines. Whereas the high seas cannot be possessed, marine areas adjacent to the shore may be claimed by the assertion of force from land based fortifications, by the so-called cannon-shot-rule. As the maximum range of cannons at the time was up to 3 nautical miles, the breadth of this belt, which would in time be called the territorial sea, was established to be 3 miles. The 3-miles breadth of the territorial sea as a primary rule of international law was first challenged in the 20th century and finally changed not sooner than by the LOSC in 1982. This was nevertheless

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not the only important input by Bynkershoek. He dismissed the notion held by Grotius that
the resources of the oceans are inexhaustible, stating that *res communis can be made almost
useless by promiscuous use, as often happens in a sea which has been fished out.* This
position is extremely important from the environmental perspective, yet first found its
audience in the second half of the 20\textsuperscript{th} century.

## 3.6 18\textsuperscript{th} and 19\textsuperscript{th} Century

In the beginning of the 18\textsuperscript{th} century, the law of the sea has entered a *period of great
stability and coherence that would persist for nearly 250 years.* The Battle of the Books was
over, with the *mare liberum* approach seemingly having prevailed. As Bederman comments,
the victory of the *mare liberum* approach had little to do with how sound the arguments of
either side were. Rather it echoed the shift in the international relations and the dawn of
powerful European maritime States such as England, France or the Netherlands, joining Spain
and Portugal in the elite club of colonial powers. The maritime powers promoted freedom of
navigation to ensure unobstructed movement of raw materials and goods between parts of
their vast colonial empires. Further, upholding of the colonies scattered all around the world
required powerful navies capable of swift response to local unrest.

As for the issue of appropriation of marine areas, the State practise in the 18\textsuperscript{th} has
firmly adhered to the concept of territorial sea of the breadth of 3 miles. The territorial sea
was considered a part of the territory of coastal State, in which that coastal State enjoyed
unlimited sovereignty. Any vessel that was within the territorial sea of other State violated its
sovereignty and could be captured. As a practical matter, though, the right of innocent passage
emerged by mid-18\textsuperscript{th} century. The earliest comment on innocent passage can be traced to a
1758 book by Emmerich de Vattel called *The Law of Nations, Or, Principles of the Law of
Nature, Applied to the Conduct and Affairs of Nations and Sovereigns.* There, in section 288,
de Vattel argues that there is right of free passage, as *to vessels that are not liable to
suspicion, she [= the State] cannot, without a breach of duty, refuse permission to approach
for harmless purposes [...]*. He nevertheless acknowledges that *the state itself is sole judge of
what is proper to be done in every particular case that occurs: and if it judges amiss, it is to
blame; but the others are bound to submit,* subtly hinting that at the time the right of innocent

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79 BEDERMAN. P. 370.
80 BEDERMAN. P. 369.
81 BEDERMAN. P. 372.
passage still required consent of the coastal State. In section 292 on straits de Vattel acknowledges the same right of passage in straits that serve for a communication between two seas, the navigation of which is common to all or several nations, the nation which possesses the strait, cannot refuse the others a passage through it, provided that passage be innocent. [...] the right to such a passage is a remnant of the primitive liberty enjoyed by all mankind. The „owner of the strait“ may nevertheless require certain formalities, commonly established by the custom of nations, such as right to levy a moderate tax on the vessels that pass, in part as a return for the safety he procures them by protecting them from their enemies, by keeping pirates at a distance, and by defraying the expense attendant on the support of light-houses, sea-marks, and other things necessary to the safety of mariners. Vattel therefore accepts the right of the coastal State to put conditions on right of the innocent passage, which he perceives as reflection of the coastal State’s services towards ships in passage.

In addition to the territorial sea, the States started to extend their jurisdiction over sea belt adjacent to the territorial sea, with the aim of keeping the territorial sea safe from the seaward side by establishing what was eventually called the contiguous zone. The literature usually points out the 1736 Hovering Act that extended the UK’s jurisdiction over foreign vessels “beyond the range of cannons” to be the first of such regulations. Lord Stowell wrote in the High Court of Admiralty ruling of the 1817 Le Louis case in support of the Hovering Act that it was the common courtesy of nations for their convenience to consider those parts of the ocean adjoining their shores as part of their dominions for various domestic purposes and particularly for fiscal or defensive regulations more immediately affecting their safety and welfare. Similar approach was taken by the United States and its 1799 law that allowed US authorities to interdict and inspect the vessels headed towards ports in the US outside of its territorial waters in the distance of as much as 12 nautical miles. As was previously pointed out, the primary reason for creation of contiguous zones was extension of enforcement and criminal jurisdiction for suppression of illegal activities such as smuggling – very much the same reasons why the contiguous zones are established today.

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83 The *Le Louis* case, through BEDERMAN. P. 376, note 80.

By the end of 18th century, the existence of the right of innocent passage has been confirmed by State practise, including in the UK courts that set the course for the rest of the world. Tanaka in this respect quotes the ruling by Lord Stowell in the 1801 *Twee Gebroeders* case: *the act of inoffensively passing over such portions of water, without any violence committed there, is not considered a violation of territory belonging to a neutral state. Permission is not usually required.* Obviously, the word *usually* suggests that sometimes the prior permission could be required; the ruling itself did not specify when, though.

In the second half of the 19th century, the UK has established itself as the leading world maritime power, in term of both naval power and influence over the law of the sea. The Trinity House in London rose to prominence as the body that set rules on maintaining and improving safety at sea. This private corporation established by Royal Charter as early as in 1514 initially dealt with pilotage on the Thames River. Later, they focused at pilotage at sea and safety of mariners, for example by building lighthouses. In 1840, the Trinity House established rules for avoidance of collisions at sea that were later incorporated in the 1849 Merchant Shipping Act. Its revised version of 1894 foresaw that its provisions were applicable not only to the ships flagged in the UK, but, based on the consent of another State, also to vessels flagged in that State. In similar manner, the 1857 UK Code of maritime signals quickly gained universal adherence by most States.

Another important case decided by the UK’s Central Criminal Court was the 1876 *Queen v. Keyn*, usually referred to as the *Franconia*. The *Franconia* was a German-flagged vessel that sank on route to England within the 3 miles limit of the territorial sea. A British woman was killed in the sinking, and a criminal case was held against the ship’s captain, Mr. Keyn, a foreigner over whom the UK did not have personal jurisdiction. A question arose, as to whether the UK had jurisdiction over the captain, since the sinking took place in the UK’s territorial sea. The Court held that the established custom of nations does not *per se* set basis for the jurisdiction of the UK, without a corresponding act of the Parliament, prompting

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85 *BEDERMAN*. P. 375. Note 71.
adoption of the 1878 Territorial Waters Jurisdiction Act.\textsuperscript{88} The use of word \textit{jurisdiction} should be noticed, hinting that only jurisdiction, not absolute sovereignty was claimed over the territorial sea. Bederman comments that the adoption of the act was still an immensely controversial move - especially by Great Britain, which had, historically, resisted any efforts to extend coastal State authority offshore.\textsuperscript{89}

\textbf{3.7 Conclusion}

Long and complicated was the debate on appropriation of marine areas and executing jurisdiction within them in the law of the sea.

The issue was present already in the antiquity; the powers at the time, including powerful maritime nations, nevertheless did not distinguish properly between claims of (momentarily) control and long-term ownership over the sea. From that time, the eldest notion of concept of freedom of navigation comes, attributed to classic Athenian politician Pericles. The Romans, contrary to later claims of influential scholars including Grotius, accepted the possibility of appropriation of marine areas and engaged in international treaties on marine delimitation with other Mediterranean powers, notably Carthage. The (often misunderstood) excerpts from \textit{Codex Justinianus} concerning appropriation of marine areas apply to private persons and altogether reflect the fact that the whole Mediterranean was perceived as owned by Roman Empire at the time.

The newfound medieval States sought to assert control and ownership over marine areas closely adjacent to their territory on the land. Italian city states of Genoa and Venice went further and asserted ownership over large areas of the Mediterranean.

Following the discoveries of new oversea territories by Europeans in the second half of the 15\textsuperscript{th} century, attempts were made by Portuguese and Spaniards to divide the known world amongst them and exclude other nations from overseas trade, pronouncing exclusive ownership over the entirety of world oceans. This attempts triggered response by Dutch jurist Hugo Grotius, formulating the concepts of oceans free and open for navigation and impossibility of appropriation of marine bodies. In response to Grotius (and based on practice by most States then and today), English jurist John Selden formulated the theory of closed sea, acknowledging the possibility of appropriating belts of sea adjacent to State’s territory on

\textsuperscript{89} BEDERMAN. P. 375.
the land. More lawyers engaged in what was later called the Battle of the Books, with another Dutchman Cornelius Bynkershoek providing synthesis of both approaches and formulating the theory that a belt of sea adjacent to land may be appropriated by State to maximum breadth of 3 miles.

The 18th and 19th century saw only limited developments in the field of the law of the sea. Following the end of the Napoleonic Wars, the United Kingdom emerged as uncontested leading maritime nation of the world and shaped the development of the law of the sea. It was the UK that introduced the new marine jurisdictional zone, the contiguous zone, as well as acknowledged the existence of the right of innocent passage and jurisdiction rather than unlimited sovereignty in the territorial sea. It also provided for first internationally accepted standards for shipping, such as collision regulations.

To provide a more general concluding remark to this chapter, the issue of freedom of navigation and striking the balance between the States’ interest in free navigation and asserting control and sovereignty over marine areas adjacent to their land territory has seen a long development in the two and half thousand years of recorded history. At the beginning of the 20th century, the area under States’ sovereignty was only 3 miles broad, with clear majority of world oceans being high seas, where high seas freedoms and use of the sea were open to anyone. This was about to change rapidly in the course of the 20th century, where the law of the sea along with the rest of the international law would see more rapid development than ever before.

This will be the topic of the next chapter.
Chapter 4: Developments in the law of the sea in the 20th century: Towards formation of the regime of prevention of vessel source pollution

4.1 Introduction

In this chapter, as its title suggests, I will follow two primary threads. The first would continue in the course set in the previous chapter and discuss the developments in the international law regarding the struggle between the *mare liberum* and *mare clausum* approaches. The second would focus on the genesis of regulatory framework designed to combat vessel source pollution until the 1970s. The contemporary framework for combatting vessel source pollution will then be discussed in the following chapter.

4.2 Freedom of navigation as a basis for international peace

The beginning of the 20th century saw little developments in the area of international law of the sea. A notable exception was adoption of the first international convention dealing with CDEM standards, the original SOLAS 1914, concluded following the disaster of RMS *Titanic*. Albeit not yet with direct implications for prevention of vessel source pollution, it was an important step forward in setting the CDEM standards on international rather than national basis, setting course for step-by-step improvements of the ship safety that continues until today.

The First World War contributed with many new concepts to the art of war; for the law of the sea, the unrestricted warfare against merchant shipping conducted by the German *Kriegsmarine* presumably being the most important one. Well aware of the fact that the Western Allies would not be able to engage in the war without men, arms and supplies being shipped from overseas, the Germans engaged in a campaign to sink any ship carrying supplies to the UK and France, including the ones flagged in neutral States, in 1917. Whereas this affected all neutral States, it had the most severe repercussions for the US, which in reaction entered the War on the side of the Allies. The importance of freedom of navigation was so grave for the US that it became the Point 2 of *14 Points* of the US President Woodrow Wilson: *Absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war, except as the seas may be closed in whole or in part by international action*
for the enforcement of international covenants.\textsuperscript{90} At the time, the Point 2 was highly controversial, also among the other Allies, and was even rejected by the UK as the only one of the 14 Points. With American dominance on the Versailles Peace Conference, the course for \textit{absolute freedom of navigation upon the seas, outside territorial waters} was firmly set for the development of the law of the sea in the 20\textsuperscript{th} century.

\subsection*{4.3 Early attempts to regulate vessel source oil pollution}

The earliest attempt to set an international instrument to combat vessel source pollution took place in 1926. At the time, the public in the US and the UK pressured for regulation of oily waste discharges in the areas beyond the then 3-miles limit, and there was a fear in both States that a unilateral action taken by the other State could result in competitive disadvantages for the merchant fleet of the other. An instrument of international law was therefore sought as a solution. The Preliminary Conference on Oil Pollution of Navigable Waters was convened in Washington DC in 1926. The US and the UK succeeded in persuading other States to accept the adoption of pollution control zones of breadth up to 50 miles from the shore, which could be extended up to 150 miles under exceptional circumstances. Ship discharges beyond 500 parts per million of oil to water would be prohibited in these zones. This was the first time a zonal approach was chosen in the field of pollution prevention and control. The choice of instruments coined the \textit{point per million discharge} and \textit{prohibition zone} approach, setting a framework where in certain areas pollution is for some reason more acceptable than in other.\textsuperscript{91} Tan suggests that other States only agreed to the establishing of the prohibition zones on condition that the exclusive flag State jurisdiction was in the zones, as they feared consequences for their shipping interests. The coastal States therefore lacked any enforcement jurisdiction in the prohibition zones. Tan concludes his thoughts on the 1926 Conference with a remark that \textit{from an environmental perspective, the concession to the flag state jurisdiction was the major flaw in the zonal system [as] the flag states – now and then – lack the incentive to control the polluting activities of their flag vessels in other state’s waters}.\textsuperscript{92} Even with all the discussed shortcomings, the draft convention produced in 1926 was eventually never adopted. After

collapse of the world trade and economy caused by the Great Depression, States soon lost interest in regulation of vessel source pollution due to more pressing domestic matters.

Law of the sea was a topic at the 1930 Codification Conference, convened by the League of Nations. According to Bederman, *by the time of the 1930 Hague Codification Conference, the main doctrinal features of the law of the sea were formed in a way that would be fully recognizable today. Those included the conceptual division between ‘ownership’ of ocean areas and ‘jurisdiction’ over maritime activities; the notional supremacy of freedom of the seas; the dynamic competition between coastal State and maritime Power interests.* The topic of vessel source pollution was nevertheless notably omitted during the Codification Conference. The Conference’s primary concern in the field of the law of the sea was setting the breadth as well as the regime of the territorial waters, together with the rules of drawing the baseline from which the breadth would be set. No agreement was reached at the Conference regarding extending the breadth of the territorial waters beyond 3 miles. Maritime powers (especially the UK and the US) were firmly opposed to such an extension. The Final Act of the Conference included a draft resolution that hints the areas where common ground was found. A consensus was found that the legal regime prevailing in the territorial sea was tantamount to coastal State sovereignty, including jurisdiction over the natural resources (such as fisheries). The extent and content of the right of innocent passage was also clarified. From then on, it also implicitly applied to ships bound for internal waters of the coastal State.

The next opportunity to stipulate pollution prevention and control mechanisms came in the 1930s. The UK, motivated by the pressure of environmentalist groups together with fear of possible harm to her shipping interests caused by unilateral action of other States, raised the issue in the League of Nations. Upon realizing the total ban on discharges would not be acceptable to other maritime States, the 50/150-miles zonal approach based on the 1926 Washington Draft was discussed. A proposal by France on giving the coastal State exclusive (including enforcement) jurisdiction in the zone was rejected, as was the UK one on concurrent jurisdiction of the flag and coastal States. The raise of the power of the Axis States and the Second World War itself have eventually shifted the interest of the world away from the issue of vessel source pollution. In any case, had the proposed instrument been adopted,

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93 BEDERMAN. P. 373.
its core feature, the reliance on flag State jurisdiction, would have posed serious limitations to its effectivity.95

4.3 Developments after the Second World War

Following the WW2, the world economy stroked a conjuncture combined with demand for energy resources. With respect to maritime transportation, it soon became obvious that it is primarily the transportation of oil and the world tanker fleet that pose a serious threat to the marine and coastal environment. In 1948, an international maritime conference was convened in Geneva under the paramount of the UN. There, among other things, the Intergovernmental Maritime Consultative Organisation (IMCO) that would later become the IMO in 1982 was found. The IMCO was faced with serious troubles from its very beginning, notably with reserved approach by the maritime States that were suspicious of the involvement of the UN in their maritime affairs. Because of this, the IMCO did not begin to function before 1958.96

Another important development in the law of the sea after the WW2 was a pressure by States to assert control over natural resources in the marine areas adjacent to their coast beyond the 3-mile belt of territorial sea. The first attempt of such an extension of jurisdiction was made by the US in 1945. In the so-called Truman proclamations, the US asserted jurisdiction and control over natural resources of the sub soil and the seabed of the continental shelf beneath the high seas contiguous to the US coast.97 By that, the entirely new concept of the continental shelf was established in the law of the sea. The US nevertheless did not assert any jurisdiction over vessels in the high seas above their continental shelf. One might say that the approach taken by the US (at the time already the leading maritime nation in the world) was ingenious – the US took control of the natural resources in their proximity but upheld the freedom of navigation (and fisheries) for their military and fishing fleets. Even if other States followed in the US footsteps (and they did), the crucial interest of the US (preservation of navigational rights in the areas close to coasts of other States) was preserved.

In 1947, Chile and Peru took a step further towards assuming control of marine areas adjacent to their coasts. As there was no continental shelf around their coastlines in

95 TAN. P. 109-110.
96 TAN. P. 110.
geographic sense, they announced extension of their territorial waters to the breadth of 200 miles, in which they claimed exercise of full sovereignty. Such extension would enable them to utilise the rich living resources of the Humboldt Stream along their coastlines. The figure of 200 miles was based upon scientific data, such as spatial distribution of anchovy larvae, upon which the birds producing guano (at the time one of the most priced export resource of these States) fed. The extension of territorial waters to 200 miles by other States followed soon; Costa Rica (1948), El Salvador (1950) and Honduras (1951). In 1952, Chile, Peru and Ecuador adopted Declaration on Maritime Zone, later called Declaration of Santiago, in which they again claimed full jurisdiction and sovereignty over the 200-miles zone adjacent to their coastline. This extension of territorial sea was nevertheless firmly opposed by maritime States as it was viewed as a threat to their interests, especially shipping and long distance fisheries.98

In the 1950s, the concept of exclusive fisheries zone was introduced by some South American States after the extension of their territorial waters to 200 miles met with opposition. Those were supposed to be only 12 miles wide at maximum, some countries nevertheless again extended their claims to 200 miles.99 In Europe, Iceland was the first State to extend its fisheries jurisdiction, proclaiming a fisheries zone of 12 miles in 1958, prompting a conflict with the UK and Germany, otherwise its allies in the NATO. The dispute, later referred to as the First Cod War, lasted until 1961, but subsequent extensions of fisheries jurisdiction to 50 miles by Iceland caused the Second Cod War that took place between 1971 and 1976. By that time, the concept of exclusive economic zone (as we know it today) had already been introduced (by Kenya in 1971). In this (at the time yet discussed) zone, the coastal State would no longer have full sovereignty, but would keep jurisdiction over natural resources and certain right in regard of marine environmental protection. This concept was eventually incorporated into the LOSC; its customary status was afterwards confirmed by the ICJ in the 1985 Libya/Malta case. By that, the last of today’s marine jurisdictional zones was introduced into the law of the sea.

99 This was the case of Ecuador and Argentina (1966), Panama (1967), Uruguay (1969) and Brazil (1970). TANAKA. International Law of the Sea (2nd Ed.). P. 127.
4.4 OILPOL 54, UNCLOS I and II

Following the WW2, the issue of oil pollution was again raised as a domestic issue of concern by environmentalist groups in the UK. The UK, wary of possible consequences for its shipping industry if unilateral action was taken by the UK alone, convened a conference in 1954 for setting a regulatory framework on international level. The London Conference eventually succeeded where the previous ones failed and the International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL 54) was adopted. The 50-mile prohibition zone regime previously discussed in 1920s a 30s was adopted as mandatory, and discharges beyond 100 ppm were made illegal. Many other ideas discussed at the conference were eventually not incorporated into the OILPOL 54, such as obligation for State Parties to provide port reception facilities for tankers or to ensure that non-tankers would be equipped with on board separators of oil and water. Tan criticises the regime set by OILPOL 54 as ineffective: 

\[\text{[t]he effective result of OILPOL 54 was that no prohibition whatsoever was to be prescribed for most part of the oceans. [...] vessels were essentially free to discharge whatever amounts of oily wastes so long as they did it outside the prohibited coastal zones.}^{100}\]

The key problem of OILPOL 54 jurisdictional regime was the regime of enforcement it set up in Article X. In case of illegal discharge by a foreign vessel in the Coastal State’s pollution prevention zone, the coastal State had the right to inform the flag State of that ship of this violation, which then was supposed to conduct investigation and institute proceedings against the ship. The exclusive jurisdiction of flag State regarding conduct of its vessels was reaffirmed. The only other enforcement was offered to port States, namely inspection of Oil Record Book of the ship upon its visit in port (as set by Article IX). As for coastal State, it could according to Article XI take measures under its jurisdiction in respect of any matter to which the Convention related. As Tan points out, the exact extent and content of this “jurisdiction” remained vague. This effectivity of this provision was further weakened by the fact that most coastal States lacked both experience, capacity and technical measures to enforce pollution control standards, especially beyond their established territorial sea, as control of discharges over vast marine areas required aerial surveillance and capacity of fast response to take samples of discharged oil wastes to measure whether its ppm exceeded the 100 ppm threshold.\(^{101}\)

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\(^{100}\) TAN. P. 111.  
\(^{101}\) TAN. P. 112-113.
In 1958, the first United Nations Conference on the Law of the Sea (UNCLOS I) was convened, followed by UNCLOS II in 1960. The issue of marine environmental protection was not a priority at the conferences. A single provision of the High Seas Convention addressed the issue, the Article 24: *Every State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil, taking account of existing treaty provisions on the subject.* As the *existing treaty provisions* the Article referred to were mostly ineffective, little has changed. A minor jurisdictional change was posed by the Article 24 of the Convention on Territorial Sea and Contiguous Zone, which set the maximum breadth of the contiguous zone to 12 nautical miles from the baseline (with the 3 miles of territorial sea, the maximum breadth of the zone would be 9 miles). The Article allowed that coastal State may *exercise the control* necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea; (b) punish infringement of the above regulations committed within its territory or territorial sea (emphasis added). The possibility to exercise control (in other words, enforcement jurisdiction) for sanitary purposes, including sanitation for protection of marine environment, was thereby for the first time firmly established in the law of the sea.

In response to initiatives by States to amend OILPOL 54, an international conference was convened by the IMCO to London in 1962. As such, the conference met with limited success. Participating State parties agreed to total prohibition of oil discharges by new ships over 20,000 gross tons, but rejected extension of the prevention zones from 50 miles to 100 – such extension was only allowed for special areas with higher risk of pollution, such as the Mediterranean and the Red Sea and the Persian Gulf. The enforcement shortcomings of OILPOL 54 remained without much change, as for example the UK’s proposals to give the port State the right of inspection or to shift the burden of proof to the ship’s master that the alleged violation was not committed by his ship were rejected. Similarly a proposal that the alleged violations would be reported to the IMCO on an informative basis (along with passing the information to the flag State) was rejected. Altogether, the interests of the maritime States and shipping industry almost entirely prevailed at the 1962 conference.

102 TAN. P. 115.
103 TAN. P. 116-118.
4.5 Torrey Canyon and the High Seas Intervention Convention

The regulatory framework for oil shipping industry was soon to be proven insufficient the hard way. Following the 1956 Suez crisis that saw closure of the Suez Channel (a chokepoint on the oil transportation route from the Persian Gulf to Europe and America), a route around Africa was proven to be a viable alternative. This resulted in development and construction of new generation of tankers, no longer limited by the breadth and depth of the Suez Channel, the so-called large crude carriers and very large crude carriers, the latter over 200,000 tons of tonnage. In similar manner, many older tankers were enlarged to that their operation would be more economical for their owners. The threat to marine environment posed by the ever-larger ships was unprecedented, and a serious risk was posed by smaller but aging oil tankers as well.

On March 18, 1967, a Liberia-flagged supertanker Torrey Canyon hit Pollard’s Rock, one of the Seven Stones reef group located between the Islands of Scilly and the Cornish coast, and became stuck. At the time, it was loaded with 120,000 tons of crude oil. The ship’s attempts to liberate itself were unsuccessful, and so were the attempts conducted by a salvo ship, whose captain died in an accident during one of those attempts. As the grounded vessel began to break apart, the UK authorities undertook operations to mitigate the resulting oil spill. Large amounts of detergents were poured into the water. Eventually, a decision was made by the UK Prime Minister to set the wreck and its cargo on fire by bombardment, and multiple bomb raids were conducted by military airplanes on March 28, before the wreck was set on fire.\textsuperscript{104} It sank on March 29; the resulting oil spill covering some 80 kilometers of French and 190 kilometers of Cornish coast contaminated by oil, and grave impact upon marine and coastal ecosystems; the deleterious effects by the detergents being possibly even graver than those of the oil itself. Being the biggest accident of an oil tanker to that date and receiving extensive coverage in the media, the sinking of the Torrey Canyon triggered response in the industry as well as international community.

In the industry, the loading-on-top method was introduced, that no longer required washing of tanks on the tankers before loading new cargoes of oil, effectively putting an end to the practice of intentional operational discharges. Tan suggests that the sudden understanding for the need to limit operational discharges by oil industry shall be perceived in relation of the fear the major oil companies had regarding the costs of the (much more

\textsuperscript{104} TANAKA. The International law of the Sea, 2\textsuperscript{nd} Ed. P. 299.
effective) reception facilities that were the other option and that would have been paid for by
the industry itself. Further, the rising costs of the oil following the 1973 Oil Crisis made the
operational discharges very costly for the oil industry. Further, the Torrey Canyon had serious implications for the international law on regulation of oil pollution. First, the OILPOL Convention was amended, to reflect the changes in the industry and adoption of the loading-on-top procedure. The parts-per-million standard that has been cornerstone in the discharge regulation was abolished, as during the ballast discharging in loading-on-top, discharges of much higher concentrations were released. Those discharges were however smaller in total volume per loading. Further, additional enforcement mechanisms by port States were included in the amended OILPOL. Tan nevertheless dismisses the amendments as ineffective: no substantive improvements were made [and] whatever improvements made to the enforcement system in 1969 were entirely incidental. It is worth mentioning though that the French delegation to the amendment conference proposed that the port States would had obligation to inspect all ships in their ports, and coastal States would be allowed to conduct inspections in their waters. Both proposals were rejected, the reasons being causing unnecessary delays for ships, technical and financial difficulties and, most importantly, interference with the balance of flag and coastal State jurisdiction.

Further, the International Convention on Civil Liability for Oil Pollution Damage was adopted in 1969, as a compensation and liability mechanism to those who suffered pollution damage caused by ships carrying oil. Even though civil liability and compensation for damage is an important part of the legal framework regulating international oil industry, it has only little to do with jurisdiction of the coastal State, and I will therefore not discuss it in detail.

Another convention adopted in 1969 is however very important for the topic of the presented thesis, namely the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (further referred to as High Seas Intervention Convention). The convention affirms the right of a coastal State to take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, as stipulated by its

105 TAN. P. 120-121.
106 TAN. P. 124-125.
107 Ibidem.
Article 1. Taking such measures nevertheless does not affect the principle of freedom of high seas, as the Preamble assures. The High Seas Intervention Convention until today forms the framework for actions taken by coastal State on the high seas and in its EEZ, and will be therefore discussed in the corresponding parts of the Chapter 6.

Altogether, the end of the 1960s has witnessed an emergence of a new concept in the law on protection of marine environment, namely emergence of the possibility of enforcement jurisdiction by coastal and port States against vessels flagged in other States. The previously unimaginable was soon to become one of the cornerstones of the regulatory framework.108

4.6 Developments towards formation of today’s regulatory framework

The 1970s witnessed a major turn in human understanding and approach towards the environment. Developed States became under intense domestic pressure to address the issues of environmental protection, and national environmental agencies as well as environmental regulations were adopted. For the protection of marine environment, adoption of Canadian Arctic Waters Pollution Prevention Act (further the 1970 AWPPA) in 1970 marked an important step towards unilateral State action in the area. The main incentive behind adoption of the AWPPA was a journey conducted by the US oil tanker Manhattan through the Northwest Passage to demonstrate the possibility of its utilisation for shipping.109 By adopting of AWPPA, Canada established 100-mile pollution prevention zone with proscriptive and enforcement competences much beyond the international law allowed for at the time. The Act was widely criticised and contested by maritime powers, most notably by the US. On the other hand, it provided a warning towards the maritime States that unilateral action by coastal States dissatisfied with the then international regulatory network could lead to unilateral actions.110

In 1972, the UN sponsored the Conference on the Human Environment, held in Stockholm, Sweden, where the Stockholm Declaration on Human Environment as well as the Action Plan for Human Environment were adopted. The pollution of the marine environment was one of the topics of the Stockholm conference as well, resulting among other things in convening a separate International Conference on Marine Pollution by IMCO in 1973.

108 TAN. P. 181-182.
109 MOLENAAR. P. 421.
110 TAN. P. 183.
The 1973 Conference marked several important developments in the field. For the first time, the developing States had majority on a conference on marine pollution, and blocks begun to form that would later shape the negotiations in third UN Conference on the law of the sea: the divided developed States with different (maritime v. environmentalist) agendas, depending on whether their maritime interests were greater than domestic pressure for environmental protection, then the Eastern bloc and finally the developing States, that were at the Conference called *Territorialist States* and that wanted to reshape the framework to give more jurisdiction to the coastal States. The outcome of the 1973 conference was the International Convention for Prevention of Oil Pollution from Ships (usually and further referred to as MARPOL 73), which left the precise differentiation between flag and coastal State jurisdiction (in both content and extent) in vague terms, leaving the question to be answered by the UNCLOS III. It however brought up several concepts that would be later employed by the UNCLOS and incorporated into the LOSC, such as the port State enforcement (especially prosecutorial) jurisdiction. Probably most importantly, however, the tacit acceptance procedure for amendments of MARPOL was incorporated into the convention, providing for faster adoption of any changes in the regulatory framework. The year 1973 is further important as the year when the third UN Conference on the Law of the Sea started. The Conference took place until 1983 and resulted in adoption of the 1982 UN Convention on the Law of the Sea (the LOSC).

In 1974, another important regulatory convention was adopted, the International Convention for the Safety of Life at Sea (SOLAS 74) was adopted at the IMCO. The new and revised version reflected the progress and development in the shipping industry as well as greater concern for safety.

In 1978, the IMO convened Tanker Safety and Pollution Prevention Conference. Mostly technical (discharge and design) issues were discussed at the Conference, the passionate debate about extent and content of jurisdiction was left for the UNCLOS III. The Conference adopted the 1978 Protocol to MARPOL 73, creating today’s MARPOL 73/78.

Since the LOSC, MARPOL 73/78 and SOLAS 74 form the main body of today’s regulatory framework for prevention of vessel source pollution I will examine its provisions and mechanisms in greater detail in the subsequent Chapters 5 and 6.
4.7 Conclusion

After two centuries of stability, the 20th century had and its technological developments had grave implications for the developments in the law of the sea as well. An unprecedented rise in shipping of goods as well as raw materials (especially oil) has called for establishing of rules for shipping to better regulate vessel source marine pollution. However, the freedom of navigation that was set as a cornerstone of international legal order following the WW1, together with firm opposition of maritime States and their shipping industry against has made all such attempts to have only limited success and impact. Similar opposition stood against any extension of the breadth of territorial sea or coastal State jurisdiction that would impair in any way the freedom of navigation.

Following the WW2, the States’ interest in assertion of sovereignty over adjacent marine areas has resulted in introduction of two new concepts into the law of the sea, the special jurisdictional regime for continental shelf and the exclusive fishing zone, which later evolved into the exclusive economic zone.

The 1967 sinking of *Torrey Canyon* as the first major catastrophe of an oil tanker together with major shift that occurred in human approach towards the environment in the 1970s have set the course for creation of acts of international law for prevention of vessel source pollution. On the basis of the LOSC, the MARPOL and other conventions create a regulatory framework that I will in detail explore in the following Chapters 5 and 6.
Chapter 5: Today’s international legal framework for preventing vessel source marine pollution

5.1 Introduction

In this chapter, I will provide the overview of the today’s international legal framework designed for combatting vessel source marine pollution. I will start with the general principles of marine environmental law relevant for prevention of vessel source pollution. Afterwards, I will discuss the LOSC and its jurisdictional framework in the field of vessel source pollution. Finally, I will discuss relevant international regulatory conventions that set particular rules and standards for prevention of vessel source pollution.

5.2 General principles

The existence of principles of international law and specifically the principles of international environmental law has been extensively discussed. Sands et al. identify altogether seven of those principles: (1) sovereignty of States over their natural resources and the responsibility not to cause transboundary environmental damage, (2) principle of preventive action, (3) principle of cooperation, (4) principle of sustainable development, (5) precautionary principle, (6) polluter pays principle and (7) principle of common but differentiated responsibilities.\footnote{SANDS, Phillipe et all. Principles of International Environmental Law (3rd Edition). Cambridge: Cambridge University Press, 2003.}

International Union for Conservation of Nature, an international NGO, presented 10 Principles of High Seas Governance that include (1) conditional freedom of activity on the high seas, (2) protection and preservation of the marine environment, (3) international cooperation, (4) science-based approach to management, (5) public availability of information, (6) transparent and open decision making processes, (7) precautionary Approach, (8) ecosystem approach, (9) sustainable and equitable use and (10) responsibility of States as stewards of the global marine environment.

Tanaka comments that whilst all of these principles \textit{may be relevant to marine environmental protection, their legal status varies. Whilst some principles can be considered as a rule of customary international law or as an emerging rule of the law, other seems to}
perform as policy guidelines.\textsuperscript{112} In addition to that, only some of these principles are relevant to the vessel source marine pollution. I will therefore discuss in detail only those principles relevant to vessel source pollution.

### 5.2.1 Cooperation

The principle of cooperation of States in protection of global environment is a specification of a general principle of international law reflected by the UN Charter. Its application in the field of combatting deterioration of global environmental is a general interest of all States, and is as such reflected in the first part of the Principle 7 of the Rio Declaration: States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem.

In the field of preventing vessel source pollution, this principle may find a twofold application. First, in the area of setting of international standards in the international and regional fora, where cooperation is a prerequisite, and second in preparing and coordinating response plans in case of accidents. The 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC) is a prime example of such an instrument, negotiated in the IMO and aimed at establishing measures for dealing with pollution incidents.

### 5.2.2 No harm principle

The responsibility of State not to cause transboundary environmental damage (also called no harm principle or the principle of sic utere tuo ut alienum non laedas – Latin for thou shall not use thy possessions to cause harm to others) is generally accepted to be a norm of customary law, and confirmed as such by the ruling in the Trail Smelter Arbitration in 1941 or the ICJ’s Advisory opinion concerning the Legality of the Threat or Use of Nuclear Weapons.\textsuperscript{113} Further, it was incorporated to several soft-law international legal instruments and eventually also into Article 194(2) LOSC.

Even though there is clarity as to the customary nature of this principle, the exact extent of the obligation incorporated within it remains unclear while applying it to the protection of marine environment. The obligation in the principle is commonly understood as


\textsuperscript{113} ICJ’s Advisory Opinion Concerning the Legality of the Threat or Use of Nuclear Weapons. Para. 29.
obligation of exercising the due diligence, with the responsibility of the State for consequences if there is a failure to exercise such due diligence. As Tanaka points out, due diligence is an elusive concept, and the degree of it may vary depending on the nature of the specific activities as well as technical and economical capabilities of States. Tanaka further quotes Seabed Dispute Chamber of the ITLOS in its 2011 Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, according to which the “due diligence” is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity. Some international instruments specify the due diligence further: according to OSPAR Convention, due diligence may be understood as application of the most appropriate combination of environmental control measures and strategies. Tanaka argues that the obligation of due diligence relates to the obligation of application of best environmental practices, as both are evolutionary in nature. He further argues that State whose activities caused serious environmental damage had failed to fulfil its obligation [to apply best environmental practices], it would be difficult to claim that due diligence had been exercised. This, in my opinion, is a position one can relate to as it is very pro-environmental, but are on the other hand difficult to actually put in practice. This is especially the case in the field of vessel source pollution, where balance must be found between interests of shipping and international trade. An obligation placed upon States and eventually individual ships to be equipped with best available techniques would result in serious difficulties of (or even collapse) international trade and economy, and is therefore in my opinion (unfortunately) unrealistic.

5.2.3 Precautionary principle

There is much less certainty and unity in the literature regarding customary nature of the precautionary principle. The precautionary principle was integrated in several soft-law instruments, where the actual wording of the principle varies. Usually the formulation used in

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114 ITLOS Seabed chamber Advisory Opinion Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area. Para. 117.
115 Convention for the Protection of the Marine Environment of the North-East Atlantic, concluded in 1992, regulates international cooperation on protection of marine environment in the North-East Atlantic.
the Principle 15 of the Rio Declaration is used: *Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.* In other words, even if scientific data do not confirm detrimental effects of the activity (product, medicine etc.), precautionary measures should be taken beforehand to ensure prevention of damage to the environment (human health etc.). The precautionary principle has not yet integrated in legally binding part of any hard-law international instrument dealing with protection of marine environment.\(^{117}\)

The already mentioned 2011 ITLOS Advisory Opinion states that incorporation of the precautionary principle *into a growing number of international treaties and other instruments […] has initiated a trend towards making this approach part of customary international law.*\(^{118}\) The statement of the Chamber indicates that the trend towards making the precautionary principle part of customary international law has not yet ended, and the precautionary principle is not yet part of the customary law.

Molenaar points out that for the precautionary principle to have concrete impact on international practice it needs to be institutionalised. This requires adapting administrative and legal procedures which, in the context of vessel source pollution, should above all take place within the IMO where most of the standard setting is carried out.\(^{119}\)

Furthermore, the same question I already discussed regarding the no harm principle applies to putting the precautionary principle in practise: namely striking the balance between interests of international trade and economy on one hand and environmental protection on the other. Methodical and comprehensive application of the precautionary principle would guarantee absolute safety to the environment, but also restrict the economic and industrial activities of States, especially the developing ones, with subsequent impact on the well-being of their inhabitants, and is therefore probably ruled out as an option.

### 5.2.4 Common but differentiated responsibilities

The principle of common but differentiated responsibilities (the CBDR principle) in some ways responds exactly to the concerns associated with unequal consequences of

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\(^{117}\) The precautionary principle is for example referred to in the Preamble to the 1997 Protocol amending MARPOL 73/78, but not in the text Protocol itself. 

\(^{118}\) ITLOS Seabed camber Advisory Opinion *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area.* Para. 135.

\(^{119}\) MOLENAAR. P. 45-46.
applying the obligations to protect the environment (as was discussed in the case of the principle of no harm and the precautionary principle) to the developed and the developing States. It is embodied in the Principle 7 of the Rio Declaration, according to which *in view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.* The CBDR principle reflects the difference between the developed and the developing States in two ways. First, it acknowledges that the developed States contribute more to the deterioration of the world environment than the developing. Second, it echoes the difference in wealth between the developed and the developing States and the different means they have at their disposal to properly protect their environment.

With respect to the law of the sea, it should be kept in mind that whereas all the maritime States are among the developed States, majority of the coastal States, on the other hand, are among the developing States. As for the open-registries flag States, all of them are among the developing States.

As the prevalent interest in setting rules for prevention of vessel source pollution is upholding the uniformity of the global framework and prevention of unilateral actions, the CBDR principle is of limited application in the field. On the other hand, however, the possibility of setting higher environmental standards by States interested in environmental protection rather than economic development is severely limited by this uniform approach. It will therefore be of particular interest for me in Chapter 6 to examine the possibilities available to coastal States to set particular rules and standards in their jurisdictional zones.

**5.2.5 Other principles**

There are of course other principles applicable to the vessel source pollution, such as polluter pays principle. The reflection of this principle may be best seen in the formulation and existence of compensation mechanisms, notably in the case of pollution by oil: the International Fund for Compensation for Oil Pollution Damage established in 1992 and the Supplementary Fund established in 2003. As I do not deal with the issue of compensation in this thesis, I will not discuss this principle further.
5.3 Treaty law

Generally speaking, there are four basic categories of treaty instruments in the international law on protection of marine environment law.

First, there is the LOSC as the paramount general treaty with worldwide application that only deal with marine environmental protection in broad terms. It is nevertheless of vital importance as it specifies the general legal terms (such as marine jurisdictional zones etc.) and thereby establishes the basic legal framework for marine environmental protection.

Second, there are treaties with worldwide application that only deal with certain aspect of protection of marine environment, most notably the treaties on the specific sources of pollution of marine environment, as listed in the LOSC. For the topic of the presented thesis, the 1973 International Convention for the Prevention of Pollution from Ships, as modified by the Protocol of 1978 (MARPOL 73/78) is a prime example.

Third, there are treaties with general nature, but with only regional application. Any of the regional seas conventions that includes provisions on protection of marine environment, may serve as an example. As of 2016, there are 18 conventions on regional seas, 13 convened within the framework of the UN Environmental Program Regional Seas Programme, and the remaining five that are independent of it. Most of the regional seas conventions essentially operate as framework conventions, to which environmental Action Plans of various depth are attached, together with either Annexes or Protocols on specific sources of marine pollution.

Fourth and last, as a leftover category of sorts, there are instruments that combine regional and source specific approach. Tanaka points out the 1974 Paris Convention for Prevention of Marine Pollution from Land-Based Sources as an example; it is nevertheless necessary to mention that this particular convention has since been replaced by the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (the OSPAR Convention), a regional sea convention independent of UNEP. It should be mentioned that Tanaka further lists the “standalone” protocols to the regional seas conventions into this category.\(^\text{120}\)

\(^{120}\) TANAKA. *International Law of the Sea*. P. 274-275.
5.3.1 LOSC as a framework convention for the protection of marine environment

The LOSC is commonly referred to as constitution for the oceans, and as such, it altered the law of the sea more than any instrument before. It succeeded in setting the breadth of the territorial sea to 12 miles (where the UNCLOS I and II notably failed) and set jurisdictional framework for all imaginable uses of the seas. It incorporated the (previously contested) concept of the exclusive economic into the law of the sea, as well as entirely new concept of the Area and principle of common heritage of all mankind. The LOSC also included a compulsory dispute settlement and the International Tribunal for the Law of the Sea was sponsored by it. In addition to all these achievements, it must be added that the LOSC is a package deal and it is not possible for the parties to make reservations to its provisions. That does not mean that there are no disputes about meanings of some of its Articles, but altogether this provides for the unprecedented uniformity in the law of the sea. This uniformity is further strengthened by the fact that the LOSC, except for the Part XI on the Area, is considered a customary law, binding also upon the States that are not parties to the LOSC.

Especially important, from the point of view of the presented thesis, is that the LOSC as the first such international convention included an obligation not to pollute the seas and set rules for protection of the marine environment. Such comprehensive legal framework for the protection of marine environment with worldwide application was established for the first time. Tanaka sees three main elements in the framework for protection of marine environment established by the LOSC: (1) generality and comprehensiveness, (2) uniformity of rules and (3) obligation for States to cooperate in protection of marine environment.

The LOSC was the first international convention to include a general obligation to protect and preserve the marine environment in its Article 192. Further, it is comprehensive in the sense it covers all the sources of pollution to the marine environment, and obliges all States to take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source in Article 194(1). From the theoretical point of view, the LOSC causes a paradigmatic shift in the marine environmental law, as it changes the approach towards marine pollution from freedom to pollute (albeit some conditions were prescribed for certain sources of pollution before the LOSC) to an obligation not to intentionally pollute and to prevent negligent pollution as much as possible.
As for uniformity of rules, the LOSC aims to provide a universal and worldwide standard of protection of marine environment. It does so usually by referring to some certain minimum standards, ensuring minimum worldwide harmonisation. The LOSC uses different terms for these minimum standards, such as international rules, standards, practices and procedures. These minimum standards or procedures are not set in the LOSC itself, but rather at specialised international fora such as the International Maritime Organisation (IMO), or agreed upon in specialised regulatory treaties (often convened under the paramount of IMO). By that, in a rather inconspicuous way, the LOSC indirectly obliges States to either participate in such international fora and become parties to such international treaties, or follow the rules prescribed by them anyway, as they are already obliged to do so by the LOSC itself. In respect of vessel source pollution, the international standards are referred to as generally accepted international rules and standards established through the competent international organization or general diplomatic conference by the Article 211(2), a subtle hit towards the IMO.

The obligation to cooperate in the protection of the marine environment is set by Article 197, according to which the States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features. From today’s point of view, the obligation to cooperate does hardly seem as innovatory as it did in 1982. Obviously, protection of marine environment regardless of invisible boundaries of marine jurisdictional zones is a common goal for all States as well as non-State actors and cooperation is the only way this goal may be achieved. One must nevertheless keep in mind the fundamental change in the state of international community as well as fast developments in the international environmental law since 1982. Especially important is that Article 197 urges States to cooperate on both global as well as regional level, implicitly referring to the framework of regional sea conventions, and further to cooperate in competent international organizations, referring again tacitly to relevant actors in the field, such as IMO or UNEP. The content of the obligation to cooperate is further elaborated upon in the following Articles of the LOSC and include duty to notify in case of danger, elaboration of contingency plans or scientific cooperation.
Last but definitely not least, the Article 195 is very important from the perspective of the presented thesis. It stipulates that *in taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another* (emphasis added). The States are gently reminded by this Article not to forcibly push the environmentally hazardous situations and activities to each other jurisdictional areas or their own jurisdictional areas further from their coastlines, but rather cooperate in dealing with them. The *passing the hot potato* approach taken by Spain, France and Portugal taken during the *Prestige* crisis immediately comes to mind as blatant example of what course of action should not pursued.

### 5.3.2 LOSC and vessel source pollution

As for the jurisdiction over vessels regarding prevention of pollution of marine environment, the relevant provisions are somewhat scattered within the LOSC. Some provisions in the Parts dealing with jurisdictional zones set basic rules, whereas the specialised Part XII *Protection and preservation of marine environment* in its Section 5 *International rules and national legislation to prevent, reduce and control pollution of the marine environment* contains specialised regulation. In Article differentiates between six sources of pollution of the marine environment, namely (1) pollution from land-based sources, (2) from seabed activities subject to national jurisdiction, (3) from activities in the Area, (4) by dumping, (5) from vessels and (6) from or through atmosphere (emphasis added).

When negotiating the Part XII of the LOSC, it was very important to harmonize contradictory needs and interests of the participating States, the need to protect the marine environment on one hand and the need to preserve the freedom of navigation on the other.\(^{121}\) A balance had to be found between the two doctrinal approaches: the call for upholding the exclusivity of flag State jurisdiction and the call for extension of coastal State jurisdiction in its respective jurisdictional zones, especially the territorial sea and the EEZ. Eventually, the balance was found by establishing a complicated conundrum of overlapping jurisdictions of three different categories of States, as well as introducing the concept of the *generally accepted international rules and standards*. Both of these will be discussed on the following pages.

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5.3.3 States and States’ jurisdiction according to the LOSC

As Gavouneli points out, the LOSC does allocate state power across maritime zones with a distinct geographic emphasis. Nowhere, however, in the text of the UNCLOS may one find any reference to the traditional bases of jurisdiction; instead, the State operates in the UNCLOS context in the guise of the ‘flag State’, the ‘coastal State’, or the ‘port State’, with no definition cited anywhere. These three kinds of jurisdictions are sometimes (in principle) exclusive, yet much more often overlap and create a bit of a confusing jurisdictional network.

5.3.3.1 Flag State jurisdiction

As was discussed previously in the Chapters 3 and 4, flag State jurisdiction is a traditional concept in the law of the sea. Today, the flag State jurisdiction still provides one of the principal ways of maintaining legal order over activities at sea. The bond between the State and its flagged ship is exclusive, as according to Article 92 of the LOSC a ship is only allowed to sail under flag of one state only. The importance of the exclusivity of the link between the ship and the flag State relates to the broad jurisdiction the flag State enjoys over its flagged ships, as the flag State jurisdiction is to be considered primary prescriptive and enforcement jurisdiction over the ships flying its flag.

The juridical link between the flag State and its flagged ship is based upon the ship’s nationality, represented by the flag the ship sails under (one should keep in mind though that the flag itself is merely a manifestation of such link). The nationality itself is nowadays represented by including the ship into flag State’s ship registry. According to Article 91 of the LOSC every State shall 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. There must exist a genuine link between the State and the ship (emphasis added).

The precise extent of what constitutes the genuine link nevertheless remains unclear and is a subject to extensive academic debate. Neither the LOSC nor the case-law of either

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122 Gavouneli refers to the principles of territoriality, nationality, protection and universality which I discussed previously in subchapter 2.2.1.
124 BARNES. P. 304.
125 BARNES. P. 304.
ICJ or ITLOS specifies the concept of the genuine link. Its nature is notoriously difficult to pin down with authors taking different stands on the issue. The instant allusion to the well-known ICJ’s 1955 Nottebohm Case, which also focuses on defining the term genuine link, is nevertheless misleading in the light of the ITLOS’s rulings in the M/V Saiga and M/V Virginia G. According to the M/V Saiga ruling, the flag State enjoys exclusive jurisdiction while determining the criteria and establishing the procedures for granting and withdrawing nationality to ships, and this capacity shall not be challenged by other States. The ITLOS ruling in M/V Virginia G supports this approach, as according to it, even if there is evidence of the absence of jurisdiction and control, States cannot refuse to recognize the right of a ship to fly the flag of the flag State, or, in other words, must recognize the exclusive jurisdiction of the flag State on board of the ship sailing under its flag.

Altogether, it remains unclear what the exact qualities of the genuine link are. It is nevertheless clear that there is a need for the genuine link, as the ITLOS pointed out in the M/V Saiga ruling that the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State. This leads some authors to claim that such an approach collapses the genuine link into the requirement that States exercise effective jurisdiction and control over flag ships. The question therefore arises, as to what the extent of the flag State’s obligation to enforce its jurisdiction and compliance of the particular vessels with the international regulations is.

The flag State is according to Article 94 of the LOSC obliged to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. Particularities of this obligation are elaborated upon in Article 94(3), and include for instance taking measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to: (a) the construction, equipment and seaworthiness of ships [...]. The Article 94(5) further states that each [flag] State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be

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126 The ICJ had the opportunity to address the issue in its 1960 Advisory Opinion on Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization. However, ICJ ruled that any further examination of the contention based on a genuine link is irrelevant for the purpose of answering the question which has been submitted to the Court for an advisory opinion (Advisory Opinion, p. 25). Barnes comments that the ICJ side-stepped the issue. (BARNES. P. 308).
127 BARNES. P. 308.
128 ITLOS Judgment in the M/V Saiga Case. Para. 83.
129 ITLOS Judgment in the M/V Virginia. Para. 111.
130 ITLOS Judgment in the M/V Saiga case. Para. 83.
131 BARNES. P. 309.
necessary to secure their observance, by which the corresponding conventions and protocols of the responsible international organization, notably the IMO and the ILO. In case another State has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State, according to Article 94(6). Other States are therefore not allowed to interfere with the flag State jurisdiction, and may only report suspected shortcomings. This procedure is referred to by Yang as low-key intervention right.\textsuperscript{132} The flag State shall then (in theory) investigate the matter.

There has been an extensive discussion on effectivity of the notification procedure, as there is no way to force the flag State to deal with the reports by other States. Gavouneli goes as far as to call the notification procedure an exercise in frustration.\textsuperscript{133} It seems safe to say that the control mechanisms by the flag States are easy to circumvent by the ship owners, unenforceable by other concerned States, and altogether unsatisfactory at best.

Specifically for vessel source pollution, the content of flag State prescriptive jurisdiction is laid by Article 211(2), according to which [flag] States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference (emphasis added). By that, the LOSC obliges the flag State to set minimum standards upon its flagged vessels, but allows setting of more stringent standards, without setting limitations to flag States’ discretion (and sovereignty, for that matter). As for enforcement jurisdiction, it is set by Article 217, and [flag] States shall provide for effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation occurs; […] in particular, take appropriate measures in order to ensure that [their flagged] vessels are prohibited from sailing, until they can proceed to sea in compliance with the requirements of the international rules and standards. Flag States shall further ensure periodical inspections of their flagged vessels and provide for immediate investigation and institute proceedings, if there is a violation of the standards.

\textsuperscript{133} GAVOUNELI. P. 11.
To some extent, the content of the flag State’s enforcement jurisdiction depends on the relative position of its flagged ship in different marine zones. In principle, the flag State enjoys prescriptive and enforcement jurisdiction over ships flying their flag wherever the ship is located, in practice however, the prescriptive enforcement jurisdiction is exclusive only on the high seas, and is shared with other States if the ship is located in marine zones where these States have prescriptive or enforcement jurisdiction of their own. If the ship moves coastward from the high seas, into the exclusive economic zone, the flag State jurisdiction is limited by the jurisdiction of the coastal State, also by jurisdiction in the field of protection and preservation of the marine environment.

If the ship is located within the territorial waters of another State, the flag State jurisdiction is limited even more. The flag State cannot exercise its enforcement jurisdiction in other State’s territorial waters without consent of that coastal State, since such enforcement action would take place within marine area where the coastal State enjoys sovereignty. In practice, though, coastal States tend to refrain from exercising criminal jurisdiction over foreign ships as regards matters that are purely internal to the ship (whether as a matter of comity or legal duty), leaving such matters to the flag State. As for overlapping jurisdiction of the flag and coastal State, I will further discuss this issue in the Chapter 6.

Importantly, it is the flag State that keeps the principal jurisdiction over its flagged ships in the special areas designated under the MARPOL 73/78 Convention.

5.3.3.1 Coastal State Jurisdiction

The content of coastal State jurisdiction lessens with how the marine zones are located more and more seaward from its seashore. Whereas in the internal waters of the coastal State its sovereignty is without limitations (according to Article 2 of the LOSC), its sovereignty in its territorial sea is limited in its content by the customary right of innocent passage. The coastal State jurisdiction is further more limited in its contiguous zone (depending on the grounds for which the zone was established, which could be enforcement of coastal State’s immigration, import, fiscal, security, sanitary and/or environmental regulations) and EEZ (jurisdiction relating to preservation of coastal State’s sovereign rights in the EEZ). As

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134 MOLENAAR. P.95.
135 YANG. P. 90 and following.
136 The special Areas are marine areas where more stringent environmental rules apply, e.g. in respect of discharges of oil or noxious liquid substances. They may be established both in the marine areas within and beyond national jurisdiction. More on special areas in Chapter 6.3.
exploring the extent and content of the coastal State jurisdiction is one of the paramount topics of this thesis, I will discuss those in great detail in the subsequent Chapter 6. It can be maintained at this point that the LOSC, by imposing limits on prescriptive jurisdiction and thereby discretion of the coastal State, sets maximum standards that may be (in accordance with international law) required by the coastal State from the ships traversing through its marine jurisdictional areas.

5.3.3.3 Port State Jurisdiction

Because the ports are a bottleneck where goods are loaded and unloaded from ships and passengers embark and disembark to travel from one State to another, they are also the places where it is most cost-effective for States to engage in control of compliance of those ships and passengers with the port State’s rules. Historically as well as today, the most carefully observed is the compliance with the State’s immigration, import, fiscal and sanitary regulations. In this respect, concurrency with coastal State jurisdiction in its territorial sea is apparent. Gavouneli goes as far as to say that jurisdiction of the port State coincides largely with that of the coastal State for a port State is always a coastal State. It would have been entirely appropriate not to distinguish between the two but the inescapable fact that although a vessel may come under the jurisdiction of the coastal State as a result of navigating the high seas, submission to the jurisdiction of the port State assumes at all times that it has entered voluntarily into the port and thus has acquiesced to its jurisdiction. That is an opinion that can only partially be agreed with, as this is the case for prescriptive jurisdiction which will be discussed in the subchapter 6.6.1 on coastal State jurisdiction in its internal waters, but not for the enforcement jurisdiction, and it is the enforcement jurisdiction I will examine in detail here.

The main feature of the port State enforcement jurisdiction is indeed the fact that the ship subjects itself to it voluntarily. Spatially, port State jurisdiction covers the ports themselves (the ports within the meaning of Article 11 of the LOSC located within internal waters of the State) as well as marine zone of the coastal State in which the port is located (which may or may not be the same State as the port State) and marine zones of other coastal States. The reason why the port State jurisdiction “spills over” into areas of jurisdiction of coastal State lies in the wording of the Article 11 of the LOSC, according to which if for the purpose of delimiting the territorial sea, the outermost permanent harbour works which form

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137 GAVOUNELI. P.24.
an integral part of the harbour system are regarded as forming part of the coast. Off-shore installations and artificial islands shall not be considered as permanent harbour works. The off-shore installations as well as roadsteads that extend beyond the baseline (and therefore into the territorial sea of the coastal State) are nevertheless used for port activities, and therefore fall within the functional scope of port State jurisdiction.

As set by Article 218, when a vessel is voluntarily within a port […] of a State, it may investigate and, where the evidence so warrants, institute proceedings in respect of any **discharge** from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards (emphasis added). If the violation took place in jurisdictional area of another State, the port State may institute proceedings only if requested by that State, the flag State, or a State damaged or threatened by the discharge violation, or unless the violation has caused or is likely to cause pollution in the internal waters, territorial sea or exclusive economic zone of the port State. The port State shall, as far as practicable, comply with requests from any State for investigation of a discharge violation. From the wording of Article 218 it is obvious that the port State enforcement powers deal mainly with investigation of suspected violations. If the violations take place outside of its jurisdictional zones, the port State may only take steps if so requested or the violation had negative impacts in its territory. As for subsequent proceedings (such as civil proceedings etc.), there seems to be a preference for them to be conducted by either the flag State or the affected State, as set by Article 218(4) and Article 228. Article 228 includes a safeguard, stating that affected State has priority in a *case of major damage to the coastal State or the flag State in question has repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels and possible following proceedings*.

Additional enforcement measures are provided for in Article 219: **States which, upon request or on their own initiative, have ascertained that a vessel within one of their ports or at one of their off-shore terminals is in violation of applicable international rules and standards relating to seaworthiness of vessels and thereby threatens damage to the marine environment shall, as far as practicable, take administrative measures to prevent the vessel from sailing. Such States may permit the vessel to proceed only to the nearest appropriate repair yard and, upon removal of the causes of the violation, shall permit the vessel to continue immediately. This provision, basically, serves as a safeguard to prevent ships that were established as**
unseaworthy by the port State from leaving the ports. Upon this provision, the various memorandums of understandings were established that form networks of cooperating ports that seek to eliminate substandard shipping.

The term port State *jurisdiction* is broader than the term port State *control*. The concept of port State control was introduced by the 1982 Paris Memorandum of Understanding (Paris MoU), and refers to control of technical state of ships entering the ports, particularly whether the ship adheres to generally accepted international rules and standards. It was meant as a response to deteriorating state of the ships in shipping business, caused by ineffective exercise of flag State (as well as port State) control and enforcement (flags of convenience and ports of convenience). The Paris MoU and other MoUs shaped on it basis create regional networks of ports that cooperate in harmonizing the standards of ships entering the ports located in the State Parties to such MoUs and commit port authorities to carry out thorough inspections and keep track of ships violating the international standards, usually by placing them on so-called black lists. The *ultima ratio* procedure is putting the vessel into forced detention until the shortcomings are repaired, which itself resonates with Article 226(1)(c) of the LOSC.

### 5.3.4 Generally accepted international rules and standards

As was previously stated, the LOSC serves as a paramount treaty that sets the basic framework for prevention of vessel source pollution. The particular rules and standards of the framework are nevertheless not to be found in the LOSC. After all, it would not be practical, as the actual content of obligations for their final recipients (States, ship operators) is subject to development, unlike the LOSC that should be – due to its quasi-constitutional status – as stable as possible. Instead, the LOSC in Article 211(1) stipulates that *States, acting through the competent international organization or general diplomatic conference, shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels and promote the adoption, in the same manner, wherever appropriate, of routeing systems designed to minimize the threat of accidents which might cause pollution of the marine environment, including the coastline, and pollution damage to the related interests of coastal States. Such rules and standards shall, in the same manner, be re-examined from time to time as necessary*. It is commonly held that the *competent international organization* referred to is the IMO as it has the mandate by the UN, despite that no direct reference to IMO is made by the LOSC in this regard. The IMO serves as the
international forum where standards for discharges and emissions, safety of navigation, and construction, design, equipment and manning are set. It must be pointed out that regarding manning the mandate is shared with the International Labour Organisation, and in the field of nuclear-related issues, with the International Agency for Atomic Energy.

To refer to such *established rules*, the LOSC usually uses the concept of rules of reference, using various terms in various Articles. Together, they form the *generally accepted international rules and standards*. These rules form a very fluid category that deserves a closer examination.

### 5.3.4.1 Legal nature

First, as for the difference between *rules* and *standards*, the literature understands the rules as rules of international law, setting obligations and rights upon States, whereas *standards* are more technical in nature. Both rules and standard are primarily found in specialised treaties set within the IMO framework, notably in MARPOL 73/78, SOLAS 74 and COLREG 72 (further on those in subchapter 5.4). The rules are prescribed in the body of the treaties, whereas technical norms and standards are found in annexes and protocols of the specialised treaties. Usually, those are referred to as Regulations (as for example in the Annexes to MARPOL 73/78).

Second, regarding the sources of the rules and standards, as was previously stipulated, many of those are to be found in the specialised regulatory treaties. Some of them were initially industry practices that became part of international custom (for example signals or oil loading procedures), others were initially adopted as non-binding instruments but gained binding nature by incorporation into legal instruments (resolutions, recommendations and guidelines of international organisations, notably the IMO).

Altogether, it can be said that the body of regulations that can be considered as *generally accepted international rules and standards* is vast and not very orderly organised. Therefore, it is important to clearly identify the rules and standards that may be considered as binding and adhere to them as sources of law, and take rather cautious and restrictive approach in the process. Molenaar takes the *conservative approach*, as he calls it, and limits standards to *provisions contained in instruments intended to be binding*.138 The alternative approach which might (as opposed to the conservative) be called *progressive*, focuses on the

138 MOLENAAR. P. 142.
element of general acceptance of the rule, regardless its source and its binding/non-binding nature. That approach was taken for example by the International Law Association, according to which the central element [...] to determine the generally accepted character of a specific rule or standard appears to be the practice of States, no matter in what form the rule or standard might have been expressed.  

Either way, one must ask, what makes a rule generally accepted. The LOSC does not provide any clues in this regard and there have so far been no disputes on the issue before international judiciary bodies. What seems to be clear is that generally accepted does not equal customary, otherwise would the drafters of LOSC simply referred to customary rules.140 State practice is therefore the only source when deciding what rules have achieved the status of being generally accepted. However, State practice in this respect is very difficult to follow. First, States do not provide declarations to point out a list of rules and standards they consider generally acceptable, and their attitude must therefore be searched for in national legislation and practice of enforcement agencies. Second, the mere fact a State does prescribe or enforce only some of the standards or rules available in the international law does not per se mean that it dismisses other standards and rules. It is hinted in the literature, though, that generally accepted CDEM standards may be at least partially provided by the already discussed memoranda of understanding. As the basic function of a MoU is to set a framework where compliance with international standards is inspected, particular MoUs include in their annexes the lists of standards that will be controlled during inspections. As for navigational standards, the question as to which of them are generally accepted and which not must be deduced primarily from State national legislation and further from positions States take in the IMO.

5.3.4.2 Tacit acceptance procedure

Closely related to the question of generally accepted is the issue of tacit acceptance procedure, included in many of the specialised regulatory conventions that will be discussed in the subsequent sub-chapter. In the general international law, when a need arises for amending an international convention, a conference is convened where the original text of the convention is amended; either by accepting an amending instrument or an entirely new international convention is accepted replacing the old one. For the new instrument to enter

140 MOLENAAR. P. 152.
into force, certain percentage of ratifications is required, which delays the process, and there is also the possibility of objections.

The tacit amendment procedure functions differently. It grants the IMO as *competent international organization* a mandate to amend the rules contained in those regulatory conventions without convening an international conference, simply by adopting a resolution amending or altering the text of the regulatory conventions. The amendment will then enter into force for all of the Parties of the convention after set period of time unless before that date, specified minimum number of Parties objects to the amendment. This approach may at first glance seem opposing the core rule of international rule that a State is only bound by those rules of international law it expressly consented to. The legitimacy of tacit acceptance procedure dwells in the nature of the regulated area, as both the shipping industry and the scientific understanding and social acceptance of deleterious effects of human activities upon the environment develop too fast for a usual approach of amending to keep up.\(^{141}\) Further, the early amendments only came into force after a relevant percentage of State parties had accepted them, causing further delays in the process of setting regulations in practice. It is, however, precisely the rapid response on the international level (by the IMO) that first provides for sufficient protection of marine environment and second prevents States with keen interest in environmental protection from taking unilateral steps that would shatter the uniformity of the international framework.

The tacit acceptance procedure for amendments is included in all of the relevant standard-setting specialised conventions, the COLREG 72, the MARPOL 73/78 or the SOLAS 1974.

Can it therefore be said that a regulation is generally accepted if it is adopted by the tacit acceptance procedure, is not objected to and therefore enters into force? Molenaar suggest that it is indeed so, the criteria being reflected in the formula introduced by the ICJ in the *North Sea Continental Shelf Cases: widespread and representative participation in the convention, provided it included that of States whose interest were specially affected*. He nevertheless firmly dismisses the notion of generally accepted international rules and

\(^{141}\) For example, the 1960 International Convention for the Safety of Life at Sea (SOLAS 60), was amended six times after it entered into force in 1965 - in 1966, 1967, 1968, 1969, 1971 and 1973; then in 1974, a completely new convention (SOLAS 74) was adopted incorporating all these developments. Confer [http://www.imo.org/en/About/Conventions/Pages/Home.aspx](http://www.imo.org/en/About/Conventions/Pages/Home.aspx).
standards forming international custom, stating that the level of acceptance for them is lower than in the case of custom.\footnote{MOLENAAR. P. 157.}

5.3.4.3 Binding nature

Importantly, the binding nature of the generally accepted international rules and standards shall be examined, particularly the mechanism of making the rules envisioned and referred to by the LOSC binding upon States that are parties to the LOSC but must not necessarily be parties to the specialised conventions containing the rules the standards.

Available literature suggests that the LOSC creates an effect of making the rules in the specialised conventions indirectly binding upon its parties. By mere becoming party to the LOSC, States are also bound by the generally accepted rules and standards. The idea is that the generally accepted international rules and standards are not prescribed by the specialised regulatory conventions, but rather immanently exist and are merely reflected in the specialised conventions. The legitimacy of this approach is the prevalent need for uniform and global rules that reconcile the interests of environmental protection on one hand and unobstructed navigation on the other.

A question arises as to whether the States, following their accession to the LOSC, would further feel the need to ratify specialised regulatory convention, as they are already indirectly bound by their rules. If they did not accede to for example SOLAS 72, they would retain more discretion in what navigational measures they would like to prescribe in their marine jurisdictional zones. Such concern is legitimate, there is however reason for States to ratify the specialised conventions. By adhering to the specialised conventions the State gets the right to participate in the IMO’s decision making process and amendment procedures and execute greater influence on the shaping of the law of the sea, thereby better securing its interests.

Finally, the question arises about binding effect of previously described mechanism upon States that are not parties to the LOSC.\footnote{There are several States that are not parties to the LOSC, such as the USA, Israel, Turkey or Venezuela.} Whereas it is commonly held argue that the LOSC has achieved status of customary law,\footnote{This notion is usually based on the proclamation by the US President Reagan that accepted that the LOSC, with exception of Part XI (on legal status of the Area) is a reflection of customary international law.} it must be pointed out – as I discussed previously – that generally accepted rules and standards have not, or at least not in the entirety
of them. Is it therefore acceptable to derive binding nature of rules of reference from an instrument of customary law? This question is rather theoretical in nature and, to be honest, not of much importance since it has neither attracted attention of most of the literature I worked with and neither from the States non-parties to the LOSC. To conclude the thought, it seems safe to say that even States non-parties to LOSC accept the binding nature of generally accepted international rules and standards.

5.4 Specialised regulatory conventions

The actual generally accepted international rules and standards are found in specialised treaties. In this section, I will discuss the ones relevant for this thesis.

5.4.1 MARPOL 73/78

The MARPOL 73/78 is the only of the international treaties in the field that contain not only CDEM standards but also discharge and emission standards. In its body, it contains Articles, but the most important regulatory rules are included in its six Annexes, divided in Regulations. The 1973 original only had two Annexes; later, four additional Annexes were added. Each of the Annexes deals with a different source of vessel source pollution (oil, noxious substances carried in bulk, dangerous goods carried in packages, sewage, garbage and air pollution). The Annexes operate with discharge standards modelled on particular substances; some also provide for establishing of special areas with more stringent standards. States are further obliged to provide reception facilities for substances that must not be discharged, for example in ports.

Rather than restrictive in its wording, the MARPOL 73/78 seeks to find a balanced solution between interests of shipping and environmental protection. The interest in upholding the as much as possible unobstructed movement of ships is seen the best in emphasis the MARPOL 73/78 puts on limitations of exercise of States’ enforcement power. Most notably, the formulation of the effect of the regulations not causing undue delay to the ships is a recurring one throughout the convention, appearing in Article 7 and Regulation I/10, I/12, II/7, V/5, V/6 and VI/17.

The MARPOL 73/78 framework also foresees three situations that are exceptional to the general rules on discharges: (1) situations of force majeure where discharges are made to secure the safety of the ship or save life at sea; (2) where discharge is result of damage to the
ship and (3) for the purpose of combatting already existing pollution, as by otherwise forbidden discharges of other substances.\textsuperscript{145}

The Annex I \textit{Regulations for the Prevention of Pollution by Oil} deals with pollution by oil. It builds on the experience with the OILPOL 54 and deals comprehensively with discharges by tankers and from machinery of all ships. It includes design standards such as segregated ballast tanks and standards on crude oil washing systems (Regulation I/13, I/13B), protective location of ballast tanks (Regulation I/13E), oil discharge monitoring and control system and oil filtering equipment (Regulation I/16) or limitation of size and arrangement of cargo tanks (Regulation I/24). The precise content of the regulations has developed significantly over time. One of the most important (and controversial) additions was introducing of the double hull standards for oil tankers in 1992 (Regulations I/13F and I/13G).

The Annex II \textit{Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk} deals with pollution by noxious substances by setting of discharge and design and equipment standards. Noxious substances are divided into categories A-D based on the degree of hazard they pose to marine environment and human health (Regulation II/3). Discharges of all substances are prohibited within 12 miles of the nearest land and in water not deeper than 25 meters, in other areas they are subject to varying regulation. Substances from categories A-C are required to be transported only by special tankers conforming to the design standards set by the Code for the Construction Equipment of Ships Carrying Dangerous Chemicals in Bulk (BCH Code; for ships built before 1986) or the International Code for the Construction and Equipment of Ships carrying Dangerous Chemicals in Bulk (IBC Code, for ships built after 1986), as set by Regulation II/13.

The Annex III \textit{Regulations for the Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Form} sets norms on packaging and labelling of dangerous goods transported in packaged form, as well as requirements for accompanying documentation and limitations on quantity.

The Annex IV \textit{Regulations for the Prevention of Pollution by Sewage from Ships} sets discharge and other standards for sewage. Any discharges are prohibited within 4 miles nearest land, and within 4 to 12 miles of the nearest land only properly comminuted and

\textsuperscript{145} MARPOL Regulations I/11, II/6, IV/9 and VI/3.
disinfected sewage may be discharged (Regulation IV/8). The Annex IV does not provide for enactment of special areas.

The Annex V *Regulations for the Prevention of Pollution by Garbage from Ships* sets rules on disposal of garbage. Whereas it is entirely prohibited to dispose of plastics anywhere at sea, other substances may be disposed of, depending on the distance from the nearest land (e.g. 3 miles for comminuted food wastes or paper, 12 miles for non-comminuted food wastes or paper, 25 miles for dunnage and other floatable materials, as set by Regulation V/3).

The Annex VI *Regulations for the Prevention of Air Pollution from Ships* sets complex regulatory framework for vessel source air pollution and emissions. It contains design and equipment standards for engines, exhaust gas cleaning systems and onboard incinerators and emission standards for exhaust gases from engines or incinerators as well as standards for ozone depleting substances. As such it the first global regulatory instrument relevant to vessel source air pollution.

### 5.4.2 SOLAS 74

The 1974 Convention for the Safety of Life at Sea (SOLAS 74) is the today’s incarnation of the international convention dealing with maritime safety by setting of CDEM and navigational standards. It incorporates the previous 1960 version and all its amendments and introduces the tacit amendment procedure. As in the case of MARPOL 73/78, a protocol was adopted for the SOLAS 74 at the 1978 IMO TSPP Conference, it is however a separate instrument and as such the SOLAS is further referred to as SOLAS 74.

The convention is divided into Articles dealing with general issues of application, relation to other treaties and entry into force. The core of the regulations can be found in the Annex I, divided into Chapters, further divided into Regulations. Whereas Chapter I contains general provisions on State jurisdiction and obligations, particular CDEM standards directly relevant to vessel source pollution may be found in Chapter II *Construction*, Chapter IV *Radiocommunications*, Chapter V *Safety of Navigation*, Chapter VI *Carriage of Cargoes*, Chapter VII *Carriage of dangerous goods*, Chapter VIII *Nuclear ships*, Chapter IX *Management for the Safe Operation of Ships*, Chapter X *Safety measures for high-speed craft*, Chapter XI *Special measures to enhance maritime safety and security*, Chapter XII *Additional safety measures for bulk carriers* and Chapter XIV *Safety measures for ships operating in polar waters.*
Out of those, it is primarily the Chapter V \textit{Safety of Navigation} that contains rules on ship routeing systems (Regulation V/10) and further on ship reporting systems and vessel traffic services (V/11 and V/12) that is of importance for the topic of the thesis. A common feature for the two former categories of measures is that only IMO’s Maritime Safety Committee is authorised to adopt such measures for areas beyond territorial sea of a coastal State. There are altogether eight routeing measures: traffic separation schemes, two-way routes, recommended tracks, areas to be avoided, inshore traffic zones, roundabouts, precautionary areas and deep water routes, and one or all may be employed together. Further, archipelagic sea lanes are also considered a ships routeing measure by this Regulation. As for SRSs, Regulation V/11 must be read together with the Guidelines and Criteria for Ship Reporting Systems (the SRSs Guidelines). The SRSs may only be adopted if a need is demonstrated; the content of the required report should be limited to ship’s name, call sign, IMO identification number and position. Additional information, as for example about the nature of the cargo, may only be requested in the initial report if the cargo can be considered hazardous due to its nature and thereby falls under other international instruments such as MARPOL 73/78 as well. Similarly, the Regulation V/12 on VTSs should be read together with Guidelines for Vessel Traffic Systems. The information shared between the ship and the competent authority of the coastal State involve a more regular, periodic and comprehensive exchange of information than in the case of SRSs that may only involve the initial report by the ship.\textsuperscript{146} Similarly, though, the information on cargo may only be requested from the ships carrying hazardous cargoes. From the jurisdictional point of view, the main difference between SRSs and VTSs lies in the fact that mandatory VTSs can be only adopted in the territorial sea; as the IMO’s Maritime Safety Committee has no mandate according to Regulation V/12, VTSs cannot be extended into the EEZ.

\textbf{5.4.3 Other regulatory conventions}

There are also other international conventions that, despite not primarily aimed at environmental protection from vessel source pollution, stipulate rules that have indirect effect on safety of navigation and therefore environmental protection. Compliance by the ship with such regulations may be used as condition for entry into a jurisdictional zone by the coastal State.

\textsuperscript{146} MOLENAAR. P. 72.
The 1966 International Convention on Load Lines sets limitations on draft to which a ship may be loaded. Interestingly (however obviously from the scientific point of view), these limitations vary depending on chemical qualities of the seawater the ship sails on.

The 1972 Convention on International regulations for Preventing Collisions at Sea (COLREG 72) replaced the 1960 Collision Regulations that were listed as Annex to the SOLAS Convention as a self-standing instrument. According to its Rule 10, the IMO’s Maritime Safety Committee has mandate to establish mandatory traffic separation schemes partly or entirely outside the territorial sea.

The 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (the Basel Convention) is an international treaty adopted to set framework for movements of hazardous waste between States. As such, it has implications for such movements at sea as well, that will be discussed in detail in the chapters 6.3.4 and 6.5.3.

5.5 Regional Seas Conventions

In 1974, the Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention, since replaced by a 1992 convention of the same name) became the first regional convention on protection of marine environment. Also in 1974, the UNEP Regional Seas programme was initiated. As of 2016, there are 13 conventions on regional seas convened within the UNEP framework and 5 independent ones. The impact of the regional instruments on vessel source pollution is dismissed by Molenaar as very modest. The only exception is the Helsinki Convention that, due to geographic specifics of the Baltic Sea that pioneered many concepts that were later incorporated into MARPOL 73/78 regime. The area covered by the Helsinki Convention is today also covered by special areas established under MARPOL, thereby diminishing the importance of the regional rules. The only preserved standard that is more stringent than those prescribed by MARPOL concerns

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148 MOLENAAR. P. 453.
discharges of sewage; it is, however, only applicable onboards of ships flagged in the State parties, thereby not falling under the coastal State jurisdiction.\textsuperscript{149}

Therefore, the regional conventions will not be further examined in this thesis.

5.6 Conclusion

The international law dealing with protection of marine environment stands, so to say, between two major bodies of international law. On the one side, there is the traditional and established branch of international law, the law of the sea that has evolved for millennia and contains certain very persistent concepts (such as strong flag State jurisdiction), on the other side there is the international environmental law that has been rapidly developing over last approximately 45 years and is still often found only in non/binding instruments as set of abstract principles that are only slowly put in practice. The international regulation of vessel source pollution therefore seeks to reconcile the conflicting interests of the navigation and environmental protection.

The framework consists of several layers of international law. First, there is the LOSC as the paramount treaty with quasi-constitutional nature that sets the jurisdictional framework for States and general obligations towards protection of marine environment, but does not stipulate particular content of such obligations its final recipients. Instead, it uses rules of reference to calls upon States to set the rules and standards through an international organisation, thereby indirectly giving mandate in the field to the IMO. Second, there are specialised regulatory conventions with worldwide application that set the particular generally applicable international rules and standards as well as obligations upon States, shipbuilders and ship operators such as MARPOL 73/78 and SOLAS 74. The IMO has an important role as a forum where such regulatory conventions are adopted and further amended. A rather unique element in the field is the use of the tacit acceptance procedure that allows for fast amending of regulatory treaties without the need to convene an international conference or wait for States to expressly ratify the amendments; instead, the new rules are accepted unless enough States object.

The LOSC therefore establishes a \textit{gear mechanism} of sorts. The minimum standard of regulations, procedures and practices that is required from vessels engaging in navigation of world’s oceans is set on the international level, in the international fora. Flag States have the

\textsuperscript{149} MOLENAAR. P. 454.
primary obligation to ensure that the ships sailing under their flag adhere to these regulations. Port States retain jurisdiction for investigation of incidents, usually when requested by flag States or affected States, and are further obliged to detain ships that are not seaworthy, eliminating them. The precise content of coastal State jurisdiction depends primarily on the geographic location of vessel at time of discharge and the place where the effects of the violation present themselves. The precise content and extent of coastal State jurisdiction will be presented in the following chapter 6.
Chapter 6: Coastal State jurisdiction over vessel source pollution

6.1 Introduction

Whereas in the previous chapter I described the regulatory framework for preventing the vessel source pollution in more general perspective, in this chapter I will explore the prevention of vessel source pollution from the perspective of the coastal State.

As was noted before, the coastal State is in a peculiar position while protecting the marine environment under its jurisdiction (exclusive economic zone) and sovereignty (internal waters and territorial sea) from vessel source pollution. On one hand, there is an obligation imposed upon the coastal State by general international environmental law and particularly Article 192 of the LOSC to protect the marine environment, on the other hand there is general interest of the international community to keep the freedom of navigation and unobstructed movement of ships. The question this chapter seeks to answer, is what the legal content and geographical extent of coastal State’s jurisdiction over foreign ships in its respective jurisdictional zones?

Contrary to the course usually pursued by authors as well as the wording of the LOSC itself I would like to begin with the areas where the jurisdiction of the coastal State is the most limited in content, in the high seas and the EEZ, and later move to the territorial sea and internal waters. There are several reasons for this approach. First, since the coastal State jurisdiction grows stronger in content when coming closer to its coastline, most of the rules applicable in the EEZ also apply in the territorial sea and internal waters. There are several reasons for this approach. First, since the coastal State jurisdiction grows stronger in content when coming closer to its coastline, most of the rules applicable in the EEZ also apply in the territorial sea, so instead of subtracting the competences and limiting the content of coastal State jurisdiction in every further zone, I will instead focus on adding those, which in my opinion altogether add to better clarity. Second, this course of writing also follows the course of the ship entering the areas under coastal State jurisdiction from the high seas, as it usually happen.

6.2 High Seas

Obviously, high seas is not a jurisdictional zone of a coastal State. Traditionally, the ships in the high seas were within the jurisdiction of their flag State; this certainty has nevertheless been partially taken away by the 1969 High Seas Intervention Convention and subsequently, Article 221 of the LOSC, which indirectly refers to it.
The Article 221 affirms right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences. Thereby all the States (including the coastal ones) retain the right of intervention and also enforcement jurisdiction in case of marine incidents taking place beyond their territorial sea, in high seas and in their EEZs.

In the Intervention Convention, the rights of the coastal State are set by Article III. Before taking any measures, the coastal State has an obligation to proceed to consultations with other States affected by the maritime casualty, particularly with the flag State or States, notify without delay the proposed measures to any persons physical or corporate known to the coastal State […] to have interests which can reasonably be expected to be affected by those measures [and] take into account any views they may submit. However, in cases of extreme urgency requiring measures to be taken immediately, the coastal State may take measures rendered necessary by the urgency of the situation, without prior notification or consultation. Any measures taken must be notified without delay to the States and to the known physical or corporate persons concerned, as well as to [IMO]. As for the measures actually taken, those must according to Article V be proportionate to the damage actual or threatened to it; not go beyond what is reasonably necessary to achieve [the goal] and shall cease as soon as that end has been achieved. Further, the measures taken by the coastal State must not unnecessarily interfere with the rights and interests of the flag State, third States and of any persons, physical or corporate, concerned.

The Intervention Convention is in my opinion one of the most interesting international conventions in the law of the sea, as it basically allows the coastal State a carte blanche to take any measures in the wake of oil-pollution accident that threatens its interests, such as the interest in environmental protection of its coastline. It is especially worth mentioning that the Convention does not provide any suggestion whatsoever as to what specific measures the coastal State is allowed to take. Provided the notification and consultation obligations were fulfilled (or the situation at sea requires an extremely urgent response), it is entirely up to the coastal State to choose whether it will forcibly let the ship in danger be towed in one of its ports to prevent it from breaking apart, or away from its waters further into the high seas so
that it would break apart there, far away. The Torrey Canyon approach with aerial bombardment is certainly an option as well. The only criterion is that the measures taken would be *proportionate*. That is, however, extremely vague at best. It can be said nevertheless that never again there was an attempt to set a grounded tanker on fire by bombardment.

### 6.3 Exclusive economic zone

In the exclusive economic zone, the jurisdiction of the coastal State is limited, but still of importance, especially in the area of marine environmental protection. The EEZ is according to Article 55 *an area beyond and adjacent to the territorial sea*, which, according to Article 57, *shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured*. Therefore, if there are territorial waters of maximum breadth of 12 miles and an EEZ of maximum breadth of 200 miles, the EEZ regime applies to the belt of sea adjacent to coastal State territorial sea, with maximum breadth of 188 miles.

### 6.3.1 Prescriptive jurisdiction

According to Article 56(1) of LOSC, the coastal State enjoys *sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds* in the EEZ. The term *sovereign right* deserves at least a brief explanation, as it is neither sovereignty in its traditional meaning nor jurisdiction, but a special legal concept. As such, the term sovereign rights is not new, it is derived from the 1958 Convention on the Continental Shelf, which also provides explanation of the term. According to Article 2(2) of it, sovereign rights are *exclusive in the sense that if a coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make claim to the continental shelf, without the express consent of the coastal State*. The key concept is therefore the express consent of the coastal State to activities pursued in the EEZ by other States. This is nevertheless, obviously not the case for shipping, but rather activities such as fishing.

As set primarily by Article 56(1) head c): *the coastal State has jurisdiction as provided for in the relevant provisions of this Convention with regard to: [...] (iii) the protection and preservation of the marine environment*. It is apparent from the formulation of
this Article that there must be additional legal basis for coastal State jurisdiction within the LOSC. For vessel source pollution, this additional basis is provided by Article 211(5): *Coastal States, for the purpose of enforcement as provided for in section 6, may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference* (emphasis added).

As Molenaar points out, the word *may*, as opposed to *shall*, indicates that adoption of such regulation is discretionary for the coastal State. If it decides to, it is still limited in its prescriptive jurisdiction, as the adopted regulations may only go as far as to *conforming to and giving effect to generally accepted international rules and standards*. There is also no residual jurisdiction if no generally accepted rules were adopted. Actually, the coastal State is given both minimum and maximum level of jurisdiction – it must implement measures no less and no more stringent than those established through IMO.150

Particular content of coastal State jurisdiction in its EEZ must therefore be indirectly assumed from Article 221 concerned with general enforcement jurisdiction of the coastal State towards vessel source pollution. According to Article 221(5), it is possible to take certain steps against *a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that State conforming and giving effect to such rules and standards*. From the wording of Article 221(5) it does not seem entirely clear what particular rules and standards may be prescribed. Molenaar argues that any rules or standards may be prescribed, if they fulfil the condition of being *generally accepted*; this primarily aims at discharge or CDEM standards. The Article 4(2) of MARPOL 73/78 must be considered here, that stipulates that *[a]ny violation of the requirements of the present Convention within the jurisdiction of any Party to the Convention shall be prohibited and sanctions shall be established therefor under the law of that Party* (emphasis added). This includes also the EEZ. Setting the line for *generally accepted* is more difficult in the case of navigational measures, as those are always set for particular navigational situation and can therefore hardly fall into *generally accepted* category. Today, following the amendments to the SOLAS 74,
mandatory ship routeing schemes and ship routeing systems (SRSs) may be prescribed by the coastal State but are subject to approval by the IMO. Vessel traffic services (VTSs), on the other hand, may not be prescribed.\(^\text{151}\) Since establishing of traffic separation schemes partly or entirely located in the high seas is foreseen by Regulation 10 of COLREG 72, it is logical (and corresponds to the State practice) that mandatory TSSs may be prescribed by the coastal State in its EEZ. Again, however, such TSS would be subject to approval of IMO.

As for State practice, Molenaar through careful examination of national legislation came to distinguish four groups of States: (1) States that claim prescriptive jurisdiction in their EEZs in manner consistent with the LOSC; (2) States that claim competence to issue specific regulations for protection and preservation of marine environment in the EEZ, but in practice do not differ from the regime of the LOSC; (3) States that claim exclusive jurisdiction in respect of protection and preservation of marine environment in their EEZs and (4) States that claim no such jurisdiction at all.\(^\text{152}\) It seems obvious that it is claims of the third category of States that might be inconsistent with the LOSC. Molenaar includes Brazil, Iran, Pakistan, India, Sri Lanka, Bangladesh and Philippines into this category, but since specific national legislation based upon the claims was not enacted, little can be said on its inconsistency with the LOSC.

Out of those States that enacted national legislation, several are worth discussing in detail. Canada in the past prohibited discharges of any garbage (including, e.g. food waste or paper) in its EEZ, a more stringent discharge standard than the one set by Regulation V/3 of MARPOL 73/78, as well as discharges of certain substances that are allowed under Annex II of MARPOL 73/78, but since has, through adoption of the 2001 Canada Shipping Act, set its obligations in line with international law. Chile reserves a right to prohibit passage or presence to ships in any of the areas under its jurisdiction, including the EEZ, for prevention of pollution in Article 14 of its 1992 Act. As such, this is excessive not only in the EEZ but also in the territorial sea. According to Article 2 of the 1991 Act of Spain, tankers that intend to anchor in Spanish EEZ before proceeding to destinations outside of Spanish jurisdiction must first obtain authorisation. When applying for such authorisation, the operator must submit information including name as well as nature and quantity of cargo. The ship will be subject to physical safety inspection. Further, the anchored tanker must contract a sufficiently

\(^{151}\) MOLENAAR, P. 364.
\(^{152}\) MOLENAAR, P. 365.
strong tugboat to be at stand-by, and is prohibited from cleaning its tanks. Despite such broad obligations that do not have any basis in treaty law, no objections seem to have been made to this practice.\textsuperscript{153}

6.3.2 Enforcement jurisdiction

The basic provision on coastal State enforcement powers in the EEZ is in Article 73(1), according to which \textit{the coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.} Protection of marine environment is however notably omitted as basis for taking the listed enforcement measures.

Instead, Article 220 provides in detail basis for coastal State enforcement jurisdiction in respect of vessel source pollution. According to Article 220(3) \textit{where there are clear grounds for believing} that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation of \textit{applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that State conforming and giving effect to such rules and standards}, that State may require the vessel to give \textit{information} regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred. Article 220(5) stipulates that \textit{where there are clear grounds for believing} that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 \textit{resulting in a substantial discharge causing or threatening significant pollution} of the marine environment, that State may undertake physical inspection of the vessel for matters relating to the violation if the vessel has refused to give information or if the information supplied by the vessel is manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection. Finally, Article 220(6) says \textit{where there is clear objective evidence} that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 \textit{resulting in a discharge causing major damage or...}

\textsuperscript{153} MOLENAAR. P. 376.
threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone, that State may, subject to section 7, provided that the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws.

All three subparagraphs apply to situations where the vessel is navigating the territorial sea or EEZ of the coastal State. As for the place where the violation was committed, the subparagraphs only provide for the EEZ, not the territorial sea. Question therefore arises whether there is enforcement jurisdiction in the EEZ over violations committed in the territorial sea. Available literature indicates that enforcement jurisdiction applies to violations committed in the coastal State’s internal waters or territorial sea, simply because coastal [State] jurisdiction over violations in the territorial waters cannot be more restricted than coastal [State] jurisdiction over violations in the [EE] zone. Such interpretation somewhat diminishes the importance of the contiguous zone for vessel source pollution, though.

As for violation, it covers violations of both discharge and CDEM standards. Violations of ship routeing systems such as traffic separation schemes and ship reporting systems probably would not qualify as violation and could only by sanctioned by coastal State on the base of Article 221 that was already discussed in the subchapter 6.2.

Articles 220(3), 220(5) and 220(6) give the coastal State a wide choice of enforcement measures, depending primarily on how well established the suspicion of violation is. If there is clear ground for believing that the vessel violated the generally accepted rules and standards, the State may require further information relevant for further investigation; these clear grounds for believing may be based upon information provided by the ships itself (e.g. upon entry into an SRS) or by aerial surveillance. However, a physical inspection of the vessel may take place only if significant pollution was caused or threatened. Only clear objective evidence of violation resulting in major damage or threat of major damage allows the coastal State to take the most severe measures including detention; such evidence is likely to be established only by conducting physical inspection.

Molenaar point out that in practice there would be difficult to set lines between requirement of information in a ship reporting system (established with consent of IMO) and

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155 MOLENAAR. P. 246.
a request of information. Further, already the right of physical inspection provides for coastal State jurisdiction to order and enforce ships into one of ports for investigations.\textsuperscript{156}

Regarding State practice in enforcement, there are again several national regimes worth discussing in greater detail. The already discussed Canadian 1972 Shipping Act seemed excessive, as it enabled for inspections to be conducted by pollution prevention authorities if there are \textit{reasonable grounds} for believing a violation was committed, thereby lowering the standard of proof required for physical inspection by Article 220(5). Even though this particular piece of legislation was replaced by the 2001 Canadian Shipping Act, formulations of the provisions were not changed much, despite the fact that in the meantime Canada ratified the LOSC, suggesting that Canadian authorities are quite satisfied with formulation of those provisions and presumably do not see them as inconsistent with the LOSC. Section 175.1 authorizes issuing \textit{ad hoc} routing instructions and even denial of passage through the Canadian EEZ in cases of non-compliance with a broad range of international standards as well as simply prevention of pollution. Section 176(1) allows for broad range of enforcement powers, including inspections simply for verifying compliance with the standards prescribed by the Act and section 177(1) for detention on \textit{reasonable grounds that an offence [...] has been committed}. There has been a case where the \textit{Atlantic Cartier}, a container ship flagged in Bahamas, was observed discharging within the Canadian EEZ; the ship was subsequently ordered to a Canadian port and inspected upon entry, detained and charged with violations. According to Article 6 of the discussed 1991 Act of Spain, tankers not complying with regulations on anchoring may be ordered to leave the Spanish EEZ into the high seas.

\textbf{6.3.3 Hot pursuit in the EEZ}

At this moment, the coastal State’s right of hot pursuit should be discussed.

The right of hot pursuit, as established in customary law of the sea and incorporated into Article 111 of the LOSC, allows the authorities of the coastal State to pursue ships if there is \textit{a good reason to believe that the ship has violated the laws and regulations of that State}. The pursuit is started when the enforcing ship issues an order to stop towards the ship suspected of violation; this order must be issued by \textit{visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship}. The ship issuing that order must not necessarily be in the same jurisdictional area as the suspected ship.

\textsuperscript{156} MOLENAAR. P. 384.
Even though the hot pursuit was originally associated with the contiguous zone, per Article 111(3) it applies *mutatis mutandis to violations in the exclusive economic zone*. It ceases first when the pursued ship enters territorial sea of other State.

The other condition for legality of hot pursuit is that the pursuit must be uninterrupted. As for this condition, the cases of the pursuit of F.V. *South Tomi* and *Viarsa 1* seem to be the leading cases when discussing this condition. The *South Tomi* was a fishing vessel flagged in Togo. On March 29, 2001, it was spotted on radar off the coast of Herd Island, 110 miles within the Australian exclusive economic zone, by the Australian Customs and Fisheries patrol boat *Southern Supporter* and suspected of illegal fishing for Patagonian Tooth Fish within the Australian EEZ, thereby violating the Australian sovereign rights. After making visual contact, the *Southern Supporter* ordered the vessel to port of Fremantle for further investigation. Instead of that, the *South Tomi* headed out of the Australian EEZ; the Australian vessel did follow. On April 12, the *South Tomi* was surrounded by two South African military vessels, one of which carried Australian military personnel on-board. They forced *South Tomi* to stop and subsequently boarded the vessel, took control of it and confined the crew. Afterwards, they sailed the vessel to Fremantle. The course of action by the Australian authorities underwent scrutiny in the subsequent trial, including as to whether the hot pursuit was uninterrupted, and was upheld as lawful.

The *Viarsa 1* was an Uruguay-flagged fishing vessel, suspected of conducting illegal fishing of tooth fish in the Australian territorial waters near Heard Island. On August 3, 2003, after ordered to stop by the *Southern Supporter*, the *Viarsa 1* ignored the order and attempted to flee, closely followed by the *Southern Supporter*. The hot pursuit lasted for three weeks and 3,900 nautical miles, before the *Viarsa 1* was eventually surrounded by the Australian vessel and three other government vessels (two of South Africa, one British from the Falkland Islands). Almost two months after the pursuit started both ships arrived to Fremantle, Australia, where bail was imposed upon the ship and its crew. In the trial, however, the Australian Authorities were unable to prove that the tooth fish found in freezers on board *Viarsa 1* were actually caught in Australian waters, and the crew was acquitted.\(^{157}\)

The experience from both cases suggests several things. First, cooperation (which Molenaar refers to as multilateral hot pursuit) is a viable option while conducting a hot pursuit. Second, the condition of uninterrupted is very elastic and can cover pursuits of thousands of miles in length.

To conclude, even though I was not able to find any case of hot pursuit of a vessel suspected of violations of pollution or similar standards, it would be in my opinion acceptable for a coastal State to pursue a vessel, especially in cases envisioned by Article 220(5) and (6), where clear grounds for believing or respectively clear objective evidence of such violation exists.

6.3.4 Ships carrying hazardous cargoes

As for ships carrying hazardous cargoes, there is no provision in the LOSC that would give the coastal State any additional jurisdiction over them. The only other international regulatory convention is the 1989 Basel Convention. According to its Article 6(4) the State of export shall not allow the transboundary movement to commence until it has received the written consent of the State of transit, when, at the same time, Article 4(12) stipulates that nothing in this Convention shall affect in any way the sovereign rights and the jurisdiction which States have in their exclusive economic zones, and the exercise by ships and aircraft of all States of navigational rights and freedoms as provided for in international law and as reflected in relevant international instruments. The text is rather ambiguous, as Molenaar points out, and does not aim at resolving the issue.

We must therefore resort to State practice to stipulate some emerging rules in the field. A worldwide turmoil took place regarding safety of such shipments and lack of jurisdiction of coastal States following the shipments of nuclear waste and secondary products between Japan and France in the 1990s. Prior to voyage of the Akatsuki Maru in 1992, South Africa and Portugal requested it not to enter their EEZs. Similar requests were made before the voyage of the Pacific Pintail in 1995 by Argentina, Brazil, Chile, South Africa, Nauru and Kiribati. Japan decided not to challenge the requests and the route taken by the Pacific Pintail avoided all EEZs along the way, except those of Chile and Argentina, which the ship entered due to force majeure in the form of extreme weather circumstances in southern Pacific. Chile

159 MOLENAAR. P. 207.
objected to this strongly and took enforcement measures by sending military vessels to escort the Pacific Pintail out of its EEZ.  

Based on today’s national legislation, the State practice is far from uniform. Whereas some States require notification (e.g. Portugal), other prohibit transit of ships carrying hazardous cargoes altogether (e.g. Philippines). Whereas denial of passage seems to be inconsistent with the general spirit of the LOSC regime, it is difficult to say whether the requirements of authorisation or notification are excessive, mainly because of lack of explicit provision in a regulatory instrument or sufficient experience to create a rule of custom. In my opinion, though, at least notification should be a sign of comity between States, providing the coastal State with opportunity to prepare emergency scenarios and responses.

6.3.5 Special areas under Article 211(6)

Under Article 211(6) of the LOSC, where the generally accepted international rules and standards are inadequate to meet special circumstances and coastal States have reasonable grounds for believing that a particular, clearly defined area of their respective exclusive economic zones is an area where the adoption of special mandatory measures for the prevention of pollution from vessels is required for recognized technical reasons in relation to its oceanographical and ecological conditions, as well as its utilization or the protection of its resources and the particular character of its traffic, the coastal State may, following consultations at the IMO, submit evidence for designation of such area. Following IMO approval, the coastal State may adopt laws and regulations for the prevention, reduction and control of pollution from vessels implementing such international rules and standards or navigational practices as are made applicable, through the organization, for special areas.

Despite the fact those are generally foreseen in the EEZs, they may also be established in the territorial sea, as the coastal State jurisdictional powers in the EEZ may hardly be greater than those in the EEZ.  

In areas established under Article 211(6), the coastal State has a very limited prescriptive power. After initiating the process in the IMO through submission with proposed measures, the IMO determines whether the conditions in that area correspond to the requirements and authorises the coastal State to adopt additional laws and regulations may

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160 MOLENAAR. P. 378-381.  
161 MOLENAAR. P. 402.
relate to discharges or navigational practices but shall not require foreign vessels to observe design, construction, manning or equipment standards other than generally accepted international rules and standards. The precise content of enforcement jurisdiction in the areas under Article 211(6) varies depending on under what other additional instrument they were established, and further depending on national jurisdiction as well as particular zone.

6.3.5.1 Special areas under MARPOL 73/78

By setting rules for areas where special discharge standards apply, MARPOL 73/78 basically follows the direction of OILPOL 54. Nevertheless, graduate development and adopting of ever more stringent standards in general, but not for special areas, has gradually diminished the importance of special areas.  

The adoption regime for special areas is the strictest of all the adoption regimes for the discussed special pollution prevention areas. As defined for example by Regulation I/11, special area means a sea area where for recognized technical reasons in relation to its oceanographical and ecological condition and to the particular character of its traffic the adoption of special mandatory methods for the prevention of sea pollution by oil is required (emphasis added). An imperative requirement for designation is that special measures are required, not just desirable. Also, the particular conditions vary for special areas established under different MARPOL Annexes – the highest threshold is to be passed when establishing SOX Emission Control Area under the Annex VI as it requires an assessment on other sources of pollution in the intended SOX area, including land-based ones. Designating an area as a special area under MARPOL also requires providing of reception facilities, a condition that has caused delays in entry of such areas in effect.  

As for prescriptive and enforcement jurisdiction, the same applies to MARPOL special areas as to areas under Article 211(6).

6.3.5.2 Particularly sensitive marine areas

In addition to the previously discussed categories of special areas, the concept of particularly sensitive marine areas (PSSAs) has emerged in 1990s in the IMO, following the growth of environmental concerns after the 1989 sinking of the Exxon Valdez. Unlike the

\[ \text{162 MOLENAAR. P. 431.} \]
\[ \text{163 Confer differences in entry into force and effect for particular special areas on} \]
\[ \text{http://www.imo.org/en/OurWork/Environment/SpecialAreasUnderMARPOL/Pages/Default.aspx.} \]
special areas under MARPOL 73/78 that are provided for by an international convention, the PSSAs are adopted on the basis of the IMO PSSA Guidelines that in head 1.2 define a PSSA as an area that needs special protection through action by IMO because of its significance for recognized ecological, socio-economic, or scientific attributes where such attributes may be vulnerable to damage by international shipping activities. To be designated as such, the considered PSSAs need (in addition to risk to the area in question from international shipping) to satisfy only one of the following criterions: heightened ecological, cultural, historical/archaeological, socio-economic or scientific significance. The PSSAs are adopted by resolutions of the IMO’s Marine Environmental Protection Committee, together with the Associated Protective Measures (APMs) a list of particular protective measures that include various navigational measures such as traffic separation schemes, sea lanes, areas to be avoided (ATBAs), no-anchor zones or mandatory ship reporting systems (SRSs).

Additionally, as Kraska and Pedrozo point out: [a]lthough PSSA designation does not necessarily prohibit entry into the area by all shipping carriers, once a particular area is designated as a PSSA, expectations in government, private industry, and the NGO community are that shipping will remain outside of the area. Thus, whether a PSSA actually contains APMs that impede shipping as a matter of regulation, the practical effect is predictable; ships, both commercial vessels and warships, avoid the area. While the impact on navigation may tend to promote the environmental goals being pursued in the PSSA, it also diverts shipping and impairs freedom of navigation both for commercial vessels (by regulation) and warships (through policy, if not as a matter of law).164

Altogether, 14 PSSAs have been established so far by the IMO. Of the established PSSAs, several attracted much attention and criticism, in the time of negotiations in the IMO as well as upon establishment.

The Western European PSSA was established in response to several maritime accidents in the area, including most recently the sinking of the Prestige. During the negotiations in the IMO, many concerns were risen by various States as to the unprecedented size of the PSSA, impairment to navigational freedoms as well as proposed APMs (notably prohibition of single hull tankers in the PSSA). Following the heated discussion and adoption of the PSSA, a call for new IMO Guidelines has led to adoption of the 2005 Guidelines with

more detailed provisions that made the adoption process more rigorous, by ensuring that all APMs, which serve as the regulatory “teeth” of the PSSA, have a clear basis in the international law.\textsuperscript{165}

The Baltic Sea Area PSSA attracted similar controversy. The Baltic Sea is a sensitive area from both political and environmental point of view. Due to the narrow connection to the northern Atlantic Ocean through Straits of Denmark and powerful tributary rivers, it has unique properties of seawater that contribute to large amounts of ice in winter. Further, the Baltic Sea has unusual density of tanker traffic, as up to 200 are present in the area at all times. As a prominent maritime power with keen interest in export of oil from its Baltic ports, Russia firmly opposed the Baltic PSSA, which was on the other hand supported no less firmly by all other Baltic States. First after the Russian territorial sea and EEZ were removed from the proposed PSSA and Russia received assurances from the other Baltic on preservation of navigational freedoms in the Baltic Sea, Russia took its objections back. The APMs for the Baltic Sea include a new traffic separation scheme south of Sweden and several ATBAs.

The most recent (and presumably also the greatest) controversy was caused the Torres Strait Expansion to the Great Barrier Reef PSSA. Australia pioneered the PSSA regime when the Great Barrier Reef was established as the first PSSA in 1990. The APMs for the Great Barrier Reef included compulsory pilotage in several particularly dangerous areas. In 2003, Australia together with Papua New Guinea proposed extension of the original PSSA to also cover the adjacent area of the Torres Strait, with APMs including a TSS and several ATBAs. It was primarily one particular proposed APM that attracted attention of other States: compulsory pilotage in the Torres Strait for tankers, chemical tankers and gas carriers and also for ships of 70 meters in length and longer. Together with actual legality of introduction of compulsory pilotage in an international strait, the IMO’s jurisdiction to do so was questioned, especially by influential maritime States such as Russia and Panama.\textsuperscript{166} After prolonged negotiations in the IMO, the extension was accepted in the IMO in 2005, with ambiguous formulation stating that the IMO recommends that Governments recognize the need for effective protection of the Great Barrier Reef and Torres Strait region and inform ships flying their flags that they should act in accordance with Australia’s system of pilotage

\textsuperscript{165} KRASKA & PEDROZO. P. 123.
[...]. Upon its adoption, several States including the US made statements that pointed out the recommendatory nature of the resolution and provided no legal basis for adoption of mandatory pilotage in the Torres Strait or any other international strait. Australia did not object to such statements, however, in 2006, she replaced the regime of voluntary pilotage in the Torres Strait with a compulsory pilotage as an APM of the PSSA, a step which was immediately firmly protested by many maritime States. One of the reasons for such step was that the percentage of ships participating in the system of voluntary pilotage dropped significantly between 1995 and 2001, with some 500 unpiloted transits each year.\textsuperscript{167} The compulsory pilotage in Torres Strait remains a sensitive and controversial issue. Especially to pro-navigational authors and States, it stays as a reminder of deceptive the pro-environmental States may be in limiting the navigational rights.\textsuperscript{168}

\section*{6.3.6 Ice-covered areas}

The ice-covered areas are considered to be exceptionally vulnerable to vessel source pollution. The interest in protection of ice-covered areas is so great that an exception to general regime is created for them. As stipulated by Article 234, the \textit{coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence} (emphasis added).\textsuperscript{169}

Even though Article 234 only enables adoption and enforcement of special regulation within the EEZ, a generally agreed wider interpretation allows for inclusion of territorial sea, again on the premise that coastal State jurisdiction in EEZ cannot be wider than in its territorial sea. The only other condition is the \textit{most of the year} criterion – meaning that areas that are covered for at least six month a year are eligible.


The proscriptive jurisdiction of the coastal State is not subject to many limitations. No generally accepted international standards are invoked, meaning that the coastal State may prescribe any measures as long as they are non-discriminatory and have due regard to navigation and environmental protection. The prescribed measures may include higher CDEM standards (e.g. reinforced hulls). If the ice-covered areas include territorial sea, an exception is foreseen in the regime of innocent passage, as coastal State may prescribe and enforce higher CDEM standards than those generally accepted. The enforcement measures may include expulsion of vessel that does not comply with the higher CDEM standards out of the territorial sea.

As for State practice, notably Canada has adopted legislation relating to CDEM standards and discharges in the ice-covered area of the Arctic Ocean. The 1970 Arctic Waters Pollution Prevention Act provides for broad prescriptive and enforcement powers that were already discussed in the subchapter 4.6. It is worth noting though, that whereas such extensive jurisdiction may be considered excessive in the normal EEZ and territorial sea regime, it is in line with the special regime set by Article 234. In 2010, Canada adopted clearance mechanism and mandatory vessel traffic services (VTS) in its Arctic waters, known as NORDREG, as set by section 126(1)(a) of the 2001 Canada Shipping Act. This caused controversy with the US that claimed that mandatory VTSs were not envisioned by Article 234. Since the altogether background of the US-Canada dispute regarding the Northwest Passage is too complex to be discussed in detail in this thesis, I shall only say that the dispute on legality of NORDREG has not yet been settled by the respective parties.\footnote{Further on the issue confer MCDORMAN, Ted L. Canada, the United States and the international law of the sea in the Arctic Ocean. In STEPHENS, Tim and VANDERZWAAG, David L. (eds.). Polar Oceans Governance in an Era of Environmental Change. Cheltenham/Northampton: Edward Elgar, 2014. PP. 253-268}

6.3.7 Conclusion

The LOSC regime in the EEZ essentially restrict the coastal State prescriptive jurisdiction to implementation of generally accepted international rules and standards, and adoption of each individual mandatory navigational measures such as ship routeing systems and ship reporting systems is subject to approval by IMO. Unilateral prescription of rules in the EEZ is therefore ruled out by the LOSC. This, however, does not mean that all States would respect this in their national legislation.
The enforcement jurisdiction in the EEZ is, in comparison to the prescriptive one, set in much vaguer terms. Even though Article 220 stipulates almost step-by-step a procedure of enforcement, actual meaning of many words in the Article is open for interpretation and therefore difference in State practice. Further, many States do not at all differentiate between enforcement powers in their EEZ and territorial sea in their national legislation, or which presumably was not the intention at UNCLOS III.

As for shipments of hazardous and nuclear cargoes in the EEZ, the LOSC omits it altogether and the Basel Convention is ambiguous at best, with State practice being inconsistent. Whereas it is definitely not consistent with the LOSC regime for coastal State to exclude such vessels from its EEZ, the requirements of notification may be considered to be sign of comity.

Creation of special areas with more stringent environmental standards is envisioned in Article 211(6) of the LOSC, providing basis for several categories of special areas. Of those, the IMO sponsored special areas under MARPOL 73/78 and PSSAs seem to be of the most relevance, with the PSSAs being favoured in the past decade. Despite the fact that such areas and the measures regulating navigation in them are agreed in the IMO, the proliferation of areas with special rules is increasingly perceived as unsettling development by maritime States. Further, special areas for ice-covered areas with unrestricted coastal State prescription jurisdiction towards CDEM and discharge standards set a major exception to otherwise limited coastal State prescriptive powers set by the LOSC regime for the EEZ and territorial sea.

6.4 Contiguous zone

The contiguous zone is the zone adjacent to the territorial sea, of maximum breadth of 24 miles from the baseline. Within the contiguous zone, the coastal State may in accordance with Article 33(1) of the UNCLOS exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea. The wording of the Article suggests that the coastal State only has enforcement jurisdiction in the contiguous zone, and lacks any prescriptive jurisdiction. According to the restrictive view, which seems to be best reflecting the formulation of Article 33, the contiguous zone must not be used by the coastal State as an jurisdictional extension of
its territorial sea. It is only a zone adjacent to it, within which the coastal State may enforce its jurisdiction regarding violations of its laws committed in the territorial sea, but not within the contiguous zone itself. As for the violations committed in the contiguous zone (which can from the jurisdictional perspective be a part of either exclusive economic zone or high seas, if the EEZ is not established by the coastal State), the enforcement action conducted by the coastal State must be based on its jurisdiction in these respective areas.

Whereas some authors\(^\text{170}\) attempt to derive the coastal State enforcement jurisdiction in the area of vessel source pollution from the notion of *sanitary laws* and enforcement of regulations on discharges, as the deleterious effects of the discharges beyond the territorial sea may have effects in the territorial sea or the coast of the coastal State, others dismiss such interpretation as inconsistent with the altogether LOSC intention.\(^\text{171}\)

Then again, international law grants enforcement and even prescription jurisdiction to coastal State in its EEZ. The discussion on such prevention and intervention powers of a coastal State is of some relevance for States that have not, for whatever reason, not established an EEZ, but then again, there are broad interdiction powers granted to the coastal State on the high seas (see subchapter 6.2). It must be kept in mind, though, that Article 111 provides for the contiguous zone as the outermost zone from which a hot pursuit (for violations with effects in the territorial sea or landward) may be initiated. It would be in my opinion unjust to limit the State power of initiating the hot pursuit only because there is no EEZ, however, State practice and case law in the area are missing.

Based on the fact that none of the regulatory conventions foresees special powers of the coastal State in the contiguous zone and that no States claim specific prescriptive or enforcement jurisdiction with respect to vessel source pollution in the contiguous zone, Molenaar comes to conclusion that *regime of the contiguous zone in the LOSC seems irrelevant for coastal State jurisdiction over vessel source pollution*.\(^\text{172}\) It is in my opinion possible to agree, with him with the previously discussed exception on hot pursuit.

### 6.5 Territorial sea

As was mentioned in the previous chapters, the LOSC in Article 3 establishes the territorial sea of a State as a belt of water adjacent the baseline on or along the coastline of

\(^{170}\) Confer discussion on the topic by MOLENAAR. P. 277, in note 11.

\(^{171}\) HAKAPÄÄ. P. 212-213.

\(^{172}\) MOLENAAR. P. 277 and 281.
that State with the maximum breadth of 12 miles. According to Article 2, territorial sea falls under that State’s sovereignty as much as that State’s terrestrial territory and internal waters. There is however a major difference in the regime of the internal waters and territorial sea, namely the existence of the right of innocent passage for foreign vessels that gravely limits the coastal State’s sovereignty over ships in its territorial sea. The existence of the right of innocent passage is a prime example of striking the balance between interest of environmental protection and freedom of navigation, but at the same time puts limitations on coastal State discretion in prescribing rules on protection and preservation of its marine and coastal environment. In this subchapter, I will examine the content of coastal State jurisdiction over ships in transit through its territorial sea.

To be entitled to the right of innocent passage, ships must first comply with conditions set by Article 18: the passage is done for the purpose of (a) traversing [territorial] sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress (emphasis added). Passage must be continuous and expeditious; cruising or hovering in the territorial sea disqualifies the passage as continuous and such ships forfeit the right, unless exceptions such as force majeure are fulfilled. Further, the passage must be innocent in the meaning of Article 19, meaning not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law. Among activities expressly stipulated by Article 19 as rendering the passage non-innocent, any act of wilful and serious pollution contrary to this Convention is also listed. Therefore, intentional discharge resulting in serious pollution renders the passage non-innocent. It is unclear though, what kind of intent is required, and whether negligence would be enough; vagueness of terms provides for wide discretion in interpretation for the coastal State.\footnote{MOLENAAR. P. 197.} Neither the seriousness of pollution is further elaborated upon, it is worth pointing out that the condition of inflicting of actual
damage upon environment is not included in the definition. However, Yang dismisses the provision as extremely rigid that can hardly make passage non-innocent.\textsuperscript{174}

As for non-compliance with other generally accepted international standards and regulations and consequences of such behavior for the ships committing such violations, a deeper analysis is required, which is provided on the following pages. Nevertheless, for both prescriptive and enforcement jurisdiction, an overriding imperative that limits discretion of the coastal State is set by Article 24, by which the coastal State is explicitly forbidden to hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention. In particular, in the application of this Convention or of any laws or regulations adopted in conformity with this Convention, the coastal State shall not: (a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage [...]. Additionally, Article 211(4) which can be considered lex specialis to Article 24, stipulates that coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage. Such laws and regulations shall, in accordance with Part II, section 3, not hamper innocent passage of foreign vessels.

It is therefore forbidden to abuse the protection of environment as basis for excessive requirements from ships, where in reality the coastal State seeks to impair the right of passage. Yang calls this the duty of abstention.\textsuperscript{175} Even though only such hampering that is inconsistent with the LOSC is forbidden, from an extremely pro-navigation point of view, any limitation to the free passage is constitutes hampering. Answering the questions on extent of the coastal State discretion is therefore of maximum importance.

\textbf{6.5.1 Prescriptive jurisdiction}

Despite the previously mentioned imperative of Article 24, the LOSC foresees that the coastal State may put certain limitations to passage through its territorial sea.

According to Article 21, it may adopt laws and regulations, in conformity with the provisions of this Convention and other rules of international law, relating to innocent passage through the territorial sea, in respect of all or any of the following: (a) the safety of

\textsuperscript{174} YANG. P. 165-166.
\textsuperscript{175} YANG. P. 180.
navigation and the regulation of maritime traffic; [...] (f) the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof; [...]. Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.

Regarding the CDEMs, the coastal State prescriptive jurisdiction is limited to mere implementation, and again, as in the EEZ, both minimum and maximum level of jurisdiction is set, as there is no residual discretion left for the coastal State – if there are no generally accepted international CDEM standards, the coastal State may not prescribe any. The purpose of this is twofold. First, regional standards set by individual coastal States would render the international shipping much more difficult, as the operators of the vessels would have to keep track of every individual standard set by each individual coastal State. That would greatly increase the costs and effectiveness of the shipping industry. Second, more stringent local or regional standards could lead to the so-called “leakage” effect – shall the coastal State prescribe more stringent standards for the ships traversing through its territorial sea, the vessels not meeting the more stringent standards would be moved by their operators into waters of States with less stringent rules. It is reasonable to expect that the direction of such “leakage” would go from developed countries towards developing countries.\textsuperscript{176} Second, it is also in the interest of the IMO itself to prevent emergence of regions with more stringent standards, as that would – besides aforementioned reasons – also diminish the influence and importance of this international organisation.

There are, though, still States that prescribe national CDEM standards (e.g. the UK or Sweden). Notable inconsistency with the international law was found by Molenaar in the US national legislation. According to 46 USC 9101, manning, training, qualification, and watchkeeping standards of a foreign country shall be evaluated on periodic basis and when the vessel (tanker) is involved in a marine casualty. If the evaluation determines that the country has failed to maintain or enforce standards at least equivalent to United States law or international standards accepted by the United States, its flagged vessels will be prohibited from entering the United States.\textsuperscript{177}

\textsuperscript{176} Similarly, the situation of decrease of carbon emissions in one (usually developed) country that occurs at the expense of increase of carbon emission in another (usually developing) country is described as so-called carbon leakage.

\textsuperscript{177} MOLENAAR. P. 221-226.
As for national discharge standards, Article 211(4) stipulates that coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage. Such laws and regulations shall, in accordance with Part II, section 3, not hamper innocent passage of foreign vessels. State practice goes as far as to totally prohibit any discharges in their territorial sea. There are several States that apply such measures, including Belgium, Canada, China, Denmark, Greece, Italy, Malta, New Zealand and United States. Again, the US legislation seem to go above the MARPOL 73/78 standards when requiring vessels to comply with higher standards prescribed by 33 CFR §159, based on Section 312(b)(1) of the 1972 Clean Water Act.\[178\] Molenaar adds that reasoning behind adoption of more stringent national standards is an assumption by States that discharge standards under MARPOL 73/18 are not apparently sufficiently stringent, for whatever reason (emphasis added).\[179\]

As for navigational measures, according to Article 22 the coastal State may, where necessary, having regard to the safety of navigation, require foreign ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may designate or prescribe for the regulation of the passage of ships. (2). In particular, tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials may be required to confine their passage to such sea lanes. (3). In the designation of sea lanes and the prescription of traffic separation schemes under this article, the coastal State shall take into account: (a) the recommendations of the competent international organization; (b) any channels customarily used for international navigation; (c) the special characteristics of particular ships and channels; and (d) the density of traffic. An important question is, whether non-compliance with navigational measures established by the coastal State renders the passage non-innocent. Yang suggests that minor breach should not lead passage of a foreign ship to non-innocence, while flagrant one would. He further suggests that a more stringent approach is to be expected from coastal States towards tankers, nuclear-powered ships and ships carrying hazardous cargoes.\[180\]

Even though Article 22 mentions only sea lanes and traffic separation schemes, the coastal State may also describe other mandatory navigational measures, such as speed lanes. It

\[178\] MOLENAAR. P. 220-223.  
\[179\] MOLENAAR. P. 221.  
\[180\] YANG. P. 176.
may also require ships in territorial sea to follow ship reporting systems established on the basis of Regulation V/11 of SOLAS 74 and thereby require information from vessels prior to entering the SRS. The most notable feature of coastal State jurisdiction in the territorial sea, though, is that it is allowed to establish mandatory vessel traffic systems (VTSs) on the basis of Regulation V-12 of SOLAS 74. Molenaar argues that the fact that the SRSs and VTSs are not explicitly mentioned in the LOSC means that no additional requirements (such as consent of the IMO, as in case of SRSs in the EEZ) is required; and the formulation of Regulations V-11 and V-12 supports this opinion. It is safe to conclude that coastal State jurisdiction to prescribe mandatory SRSs and VTSs in its territorial sea is not subject to approval by the IMO and therefore fully within coastal State discretion.

The broad discretion in unilateral prescribing of navigational measures is reflected by State practice.\textsuperscript{181} Whereas some States claim competence to prescribe sea lanes and traffic separation schemes that would fall within the scope of Article 22,\textsuperscript{182} there are States that set more extensive navigational measures, including prohibition zones (Canada, China) or traffic control zones.\textsuperscript{183} Additionally, there are several States that adopted SRSs and VTSs, including the US and Canada.

6.5.2 Enforcement jurisdiction

The regime for enforcement in the territorial sea is complex, mainly due to the overlap of two actual regimes, the general one over ships in innocent passage and the special for ships that have committed violation towards environment, irrespective of location. The main distinction in content of enforcement jurisdiction therefore relates to simple criterion: whether the ship against which the enforcement action is taken is or is not in innocent passage.\textsuperscript{184} As stated by the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution: \textit{While ships in non-innocent passage lose their right of innocent passage, violations of coastal [State] laws and regulations only allow interference with passage, but not annulment of the right itself. Ships in innocent passage can still be detained and brought into port, although from legal perspective the right of innocent passage does not cease to exist.}\textsuperscript{185}

\textsuperscript{181} MOLENAAR. P. 226-228.
\textsuperscript{182} Altogether 22 States as of 2004. MOLENAAR. P. 227.
\textsuperscript{183} YANG. P. 199-200.
\textsuperscript{184} MOLENAAR. P.242.
6.5.2.1 Enforcement against ships in innocent passage

As set by Article 27 of the LOSC: 1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases: (a) if the consequences of the crime extend to the coastal State; (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; [...]. 2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters. 3. In the cases provided for in paragraphs 1 and 2, the coastal State shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken. 4. In considering whether or in what manner an arrest should be made, the local authorities shall have due regard to the interests of navigation. 5. Except as provided in Part XII or with respect to violations of laws and regulations adopted in accordance with Part V, the coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.

Further basis for enforcement action is provided by Article 220(2) that stipulates: where there are clear grounds for believing that a vessel navigating in the territorial sea of a State has, during its passage therein, violated laws and regulations of that State adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels, that State, [...] may undertake physical inspection of the vessel relating to the violation and may, where the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws, subject to the provisions of section 7 (emphasis added). When compared with other enforcement scenarios foreseen by other parts of Article 220, it is clear that the bar for detention of vessel is lower than in Article 220(6) that requires major damage to have been caused or threatened.
On the combined basis of Articles 27 and 220(2), the following may be said.

An enforcement action could be taken following a violation of discharge standards, as consequences of the crime extend to the coastal State. It could also be taken as response to violation of ship routeing system, SRS or VTS notwithstanding whether actual damage was caused, as such violations would disturb the good order of the territorial sea. However, the course of enforcement steps must follow the procedure and conditions set by Article 220 and discussed in subchapter 6.3.2, and further also by the imperative not to unreasonably hamper innocent passage. Molenaar therefore suggests restrictive approach, as most such violations would be serious enough to justify interference with freedom of navigation.\(^\text{186}\)

Interestingly, the protection and preservation of the marine environment constitute an exception limitations otherwise stipulated by Article 27(5), and the coastal State is thereby allowed to take any actions on board of a ship in innocent passage in respect of violations committed before it entered its territorial sea – in its EEZ, in a jurisdictional zone of other State and even at the high seas. Again, the course of enforcement steps must follow the procedure and conditions set by Article 220.

Lastly, Article 25(2) grants the coastal State right of protection in the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject. Such protective action would take place in the territorial sea.

State practice generally reflects the broad range of enforcement powers over vessels in innocent passage granted by the LOSC. As enforcement powers in the territorial sea are by far the most often invoked powers by the coastal States, I will limit myself to several general remarks and some examples. Some States do not distinguish between enforcement powers in the EZZ and the territorial sea (Canada, Germany or Spain), there are also some States that enacted national legislation that is inconsistent with the LOSC regime (notably, in both cases, Canada which excessive enforcement claims I already discussed in subchapter 6.3.2.). Section 27(1) of the 1983 Act of Australia authorises boarding and inspection when non-compliance with any provisions of the MARPOL 73/78 is suspected, without the need for clear grounds as required by Article 220(2) and (3), thereby lowering the standard of proof required by the

\(^\text{186}\) MOLENAAR. P. 247.
LOSC; with clear ground required only for detention of such vessel. Chile, by Articles 6 and 19 of its 1992 Regulations assumes power to deny of entry to vessels which have deficiencies in their pollution prevention systems or present danger to the environment.\(^{187}\)

### 6.5.2.2 Enforcement against ships in non-innocent passage

As set simply by Article 25(1), *the coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent* (emphasis added). This includes an expulsion of the ship from the territorial waters, which would be of particular interest for the State in case of continuing threat to environment. In case of suspension of innocent passage due to caused or threatening environmental harm, the procedure set by Article 220 does not apply and coastal State has full discretion in choosing the enforcement measures; the expulsion may very well be the first one. As such, leaving the territorial sea may be a preferable choice for the operator of the ship as well, as that way he/she will not have to face penalties and costs in case of marine accident with grave consequences, such as sinking of a fully loaded tanker.

As for State practice, only few State expressly claim the right of expulsion, with some reserving the right to take all necessary steps, which include the expulsion.

As a concluding remark, seemingly and surprisingly, there has never been a case of enforcement action taken against a ship for violations that would constitute a non-innocent passage and led to expulsion of such ship from coastal State’s territorial sea.\(^{188}\)

### 6.5.3 Ships carrying hazardous cargoes

First, the ships carrying hazardous cargoes are entitled by the LOSC to innocent passage through the territorial sea. Article 22(2) stipulates that indirectly as it allows the coastal State to enact sea lanes and TSSs specifically for tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials. Article 23 further requires nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances to carry documents and observe special precautionary measures established for such ships by international agreements when exercising the right of innocent passage [...].

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\(^{187}\) Through MOLENAAR. P. 258.

\(^{188}\) MOLENAAR. P. 271.
An important question arises, though, as to whether there is right for the coastal State to require notification or authorisation prior to the entry of the ship into the passage. There are relevant arguments for both sides: apart from environmental and navigational concerns that were discussed at length previously, there are also relevant security concerns regarding terrorist attacks on ships that are confined to sea lane at set time and space and therefore easy to find. Nevertheless, proposals to establish mandatory authorisation or notification procedure for such ships were eventually not included into the LOSC, despite being raised at the UNCLOS III. The issue was again discussed during negotiations of what eventually became the 1989 Basel Convention. According to its Article 6(4) the State of export shall not allow the transboundary movement to commence until it has received the written consent of the State of transit. However, at the same time, Article 4(12) stipulates, that [n]othing in this Convention shall affect in any way the sovereignty of States over their territorial sea [...], and the exercise by ships and aircraft of all States of navigational rights and freedoms as provided for in international law and as reflected in relevant international instruments. The text is rather ambiguous, as Molenaar points out, and does not aim at resolving the issue.

State practise essentially opts for one of four approaches: (1) view that ships carrying hazardous cargoes are entitled to passage unconditionally, (2) requirement of prior notification, (3) requirement of prior authorisation and (4) total denial of passage. The first group comprises mostly of maritime States, most of them being nuclear powers with keen interest in unobstructed movement of nuclear-powered ships and/or nuclear products or wastes. It includes Germany, Italy, Japan, Netherlands, Russia, the UK and the US. The second group (requiring notification) include Canada, Malta, Pakistan and Portugal. The third group (requiring authorisation) include Egypt, Iran, Malaysia, Oman, Saudi Arabia, Turkey and Yemen. The last group that supports the possibility of denial of passage includes Venezuela and (based on actions towards the Pacific Pintail) also Chile.

Again, there is yet no evidence of any of such measures being applied in practice.

6.5.4 Special regime for waters forming international straits

The straits used for international navigation play a very important role in international navigation, making chokepoints the shipping routes necessarily must go through.

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189 YANG. P. 234-236. MOLENAAR. P. 205.
190 MOLENAAR. P. 207.
191 MOLENAAR. P. 228-232.
increased density of shipping provides for increased concerns for safety and environment in the straits, which are, on the other hand, complemented with increased interest in unimpeded shipping in such chokepoints. Altogether, finding a balance of these interests while setting the regime of international straits is one of the most demanding tasks for the international law of the sea.

The Part III of the LOSC provides for two possible regimes for international straits; (1) those where the regime of transit passage applies and (2) those where regular innocent passage applies. The main difference between the regime of innocent passage and transit passage is that for transit passage, the LOSC provides for additional limitations to the coastal (or also referred to as strait State) jurisdiction in favour of unimpeded navigation. Apart from that, the general imperatives seem to be the same, such as the obligation not to hamper the transit passage and duty of publicity (Article 44).

According to Article 38(2), the [t]ransit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. Further, according to Article 39 ships in transit passage shall: (a) proceed without delay through or over the strait; [...] (c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress; [...] and further comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea; (b) comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships (emphasis added). Essentially, ships in transit should use the right of transit passage to navigate through the strait in safely but expeditiously, without stops. During the passage, they should follow the generally accepted CDEM and discharge standards; those do not necessarily have to be adopted by the national legislation of the strait State to be binding upon the ships.

The prescriptive jurisdiction of the strait State is set by Article 42(1). The strait State may adopt laws and regulations relating to transit passage through straits, in respect of all or any of the following: (a) the safety of navigation and the regulation of maritime traffic, as provided in Article 41; (b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and
other noxious substances in the strait; [...] The formulation of Article 42(1) is rather peculiar and difficult to interpret. Regarding discharges, the strait State may only implement the international rules and standards ones and of those only those that are related to oil, oily wastes and other noxious substances, but not other substances. The prescription jurisdiction in this area is extremely limited. The strait State may designate sea lanes and traffic separation schemes, however, those require, according to Article 41(4), an approval by the IMO.

An important thing to point out is that the strait State does not retain any residual jurisdiction – shall there be no generally accepted international rules and standards, the strait State may not adopt any regulations.

As for enforcement, Article 233 is the core provision: if a foreign ship other than those referred to in section 10 has committed a violation of the laws and regulations referred to in article 42, paragraph 1(a) and (b), causing or threatening major damage to the marine environment of the straits, the States bordering the straits may take appropriate enforcement measures. As such, is it also more restrictive than its counterparts applicable in the territorial sea or the EEZ, requiring occurrence or threat of major damage to take measures; if condition of major damage is not met, no other enforcement measures corresponding to asking for information or inspection is available to the strait State. Furthermore, the enforcement action is limited to violations that happened in the strait, and therefore violations that happened outside of the strait but had negative impacts in the strait would not be covered for.

The State practise in international straits differs greatly from one strait to another and precise analysis is not possible here. Molenaar, who entertained detailed examination of the State practice at hand, identifies several tendencies in the State practice. First, there seems to be an interpretation difficulty regarding vague terms used in the Part III; second, many States do not differentiate in their national legislation between regimes of territorial sea and international straits (“implicit regulation”).

Altogether, in respect of vessel source the coastal State does not have any unilateral prescriptive jurisdiction in the international strait. States, however, often adopt national laws that have effect for their territorial sea as a whole, without clearly setting boundaries to such regulation in either extent or content. Such „implicit regulation“ is however inconsistent with the LOSC regime for international straits.

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192 For confer MOLENAAR. PP. 299-328.
6.5.5 Conclusion

The regime for the territorial sea as set by the law of the sea and notably the LOSC seeks to reconcile the interest of the environmental protection and navigation. The right of innocent passage sets limitations on sovereignty it otherwise enjoys in the territorial sea, and the imperative exists for the coastal State not to take measures that would hamper the innocent passage. The prescriptive jurisdiction regarding CDEM and discharge standards is essentially limited to implementation of the generally accepted international rules and standards; in this respect, there is little variance with the regime established for the EEZ. Notable difference between the EEZ and the territorial sea exists in respect of navigational measures, as the coastal State in its territorial sea has full discretion to prescribe navigational measures, including SRSs and VTSs.

The coastal State also enjoys broader enforcement powers than in the EEZ that include the possibility of physical inspection and detention of a ship, even if no major damage was caused which is required for detention in the EEZ.

Ships carrying hazardous cargoes cannot be excluded from the innocent passage, but may be required to follow sea lanes or other navigational measures enacted for safety of navigation. Again, as in the EEZ, requirement of prior authorisation or notification do not seem to be based on any basis in the international law.

Special rules apply to international straits, as in some straits, right of transit passage instead of right of innocent passage exists, where the prescriptive and enforcement jurisdiction of the strait State are even more limited.

6.6 Internal waters

According to the Article 8 of the LOSC waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State. It is not the purpose of this thesis to go further into rather delicate issue of drawing the baselines, but with only minimal simplification it is safe to say that internal waters cover the sea along the coast down to the low-tide mark, including waters enclosed by the straight baselines, and for the purpose of this paper importantly ports.

In its internal waters, the coastal State enjoys full sovereignty, as established in customary law as well as Article 2 of the LOSC: The sovereignty of a coastal State extends, beyond its land territory and internal waters [...] to an adjacent belt of sea, described as the
It is obvious from the formulation of Article 2 that the internal waters are besides the actual terrestrial territory of the state the area from which the sovereignty emanates and eventually extends further. The only limitations on this full sovereignty and the prescriptive and enforcement jurisdiction associated with it are those imposed by international law. One of those limitations, imposed by the LOSC, is reflecting the key difference between the territorial sea and the internal waters. The right of the innocent passage in the territorial sea, but does not exist in the internal waters with exception for situations anticipated by Article 8(2) of the LOSC: Where the establishment of a straight baseline [...] has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters.

The key issues to be dealt with on following pages therefore are the following: whether there is a right of access for foreign vessels and whether it can be denied on grounds of protection of environment, and what is the content of jurisdiction of the coastal State over vessels in internal waters/ports in respect to protection of environment.

### 6.6.1 Prescriptive jurisdiction

As the coastal State sovereignty in its internal waters is unrestricted and there is no right of innocent passage in the internal waters, the prescriptive jurisdiction of the coastal State is not restricted either. In other words, the coastal State has full discretion in prescribing any measures, standards or rules in its internal waters and set compliance with them as a condition for ships to be allowed in. The coastal State may go as far as to prohibit ships from entering its internal waters altogether in case they do not fulfil the prescribed conditions. This was, after all, the case after sinking of the *Prestige* when Spain and France allowed entry into their internal waters and ports only to double hull tankers, requiring a higher CDEM standard than the international one applicable in their territorial sea and EEZ (the supplementary practice of escorting of single hull tankers from their respective EEZs by force was however not in line with international law).

### 6.6.2 Enforcement jurisdiction

The LOSC regulates the coastal State enforcement jurisdiction in its ports in Article 220(1): *When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may, subject to section 7, institute proceedings in respect of any violation of its laws and regulations adopted in accordance with this Convention or applicable international rules and*
standards for the prevention, reduction and control of pollution from vessels when the violation has occurred within the territorial sea or the exclusive economic zone of that State. The important operative word in the Article is the word voluntarily. Majority of authors maintain that the enforcement powers of State only apply to vessels that are in the port voluntarily, as opposed to cases of force majeure, distress or in need of assistance.¹⁹³

6.6.2.1 Right of access to ports

There is no provision in the LOSC that would deal with the right to access to ports. However, since the ports are always located in the internal waters of a State and the State enjoys unlimited sovereignty in its internal waters, it seems that the port State may deny access to ports to ships. This is also supported by the ICJ ruling in the Nicaragua Case, which held that it is also by virtue of its sovereignty that the Coastal State may regulate access to its ports.¹⁹⁴

Furthermore, formulation of Article 25 of the LOSC supports this conclusion: [i]n the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject. Creation of rules is anticipated by Article 211(3) stating: States which establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their off-shore terminals shall give due publicity to such requirements and shall communicate them to the competent international organization. Based on formulation of these Articles, the coastal State is clearly allowed to condition entry to its internal waters or ports and take steps (such as denying the entry) if its requirements are not met.

Special rules also apply to nuclear-powered vessels and vessels that carry nuclear or otherwise noxious cargo. Many States only allow such vessels to enter their ports upon prior permission.¹⁹⁵ The previously discussed New Zealand’s 1984 Nuclear Free Zone, Disarmament, and Arms Control Act in Articles 9 and 11 prohibits foreign nuclear-powered vessels from entering New Zealand’s internal waters as well as forbids the Prime Minister

¹⁹³ MOLENAAR. P. 187, note 12.
from granting right to entry to foreign warships in cases where the Prime Minister is not satisfied that those ships are not carrying nuclear explosive devices. The series of special treaties the United States negotiated with various nations, regarding entry into their ports for nuclear-powered merchant vessel Savannah, also suggest that in case of nuclear powered vessels the automatic entry is not granted on the basis of usual treaties.

6.6.2.2 Ships in distress, ships in need of assistance and places of refuge

Special rules on access to ports apply to ships in distress. According to customary law, a ship in distress is entitled to enter any foreign port, in which it is exempted from jurisdiction of the port State; it must however prove that it is in such distress. As for preservation of marine environment from pollution, it is obvious that it is especially vessels in distress that pose a threat of environmental harm. With regard to the case of the tanker Prestige that – despite being clearly in distress – was not allowed to enter port to conduct necessary repairs and instead ordered away, an interesting question arises, as to what constitutes distress and when is the ship in such distress that the port State is obliged to open its ports to it.

A rule of customary law, established as early as in 1809 in the Eleanor Case, specifies four conditions for distress: (1) urgent distress and grave necessity, (2) moral necessity, (3) the distress must not be caused by oneself and (4) distress must be proved in a clear and satisfactory manner. Provisions of Chapter 1 of the Annex to the 1979 International Convention on Maritime Search and Rescue stipulate that distress phase is a situation wherein there is a grave and imminent danger and requires immediate assistance. Altogether, the provisions are too vague to draw a clear line. Tanaka provides for an analogy from the Draft Articles on Responsibility of States for International Wrongful Acts, adopted by the International Law Commission (ILC). According to ILC Commentary to Article 24 dealing with distress, such situation is only limited to cases where human lives are at stake. Therefore, the distress situation only arises when there is human life in danger. Tanaka dismisses that the economic interests (such as saving the cargo) would provide enough basis for a ship to be considered a ship in distress. On the other hand, he acknowledges that there has been a recent development in distinguishing between the economic and environmental

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196 Ruling in Eleanor Case, through TANAKA. P. 81
197 The 1979 International Convention on Maritime Search and Rescue is another international treaty concluded within the IMO framework. The SAR Convention sets a framework for State cooperation in search and rescue operations at sea, dividing the world’s oceans among States into parts where particular States are responsible for SAR operations and setting a framework for international cooperation in the area.
motivations to provide assistance to a damaged ship, whether or not there were human lives in danger on board.\textsuperscript{198}

Indeed, several instruments of the international law have recently called for establishing the so-called \textit{places of refuge}. The most important of them are the IMO Guidelines on Places of refuge for Ships in Need of Assistance adopted by the IMO in 2003. According to head 1.1 of the IMO Guidelines, they should be followed \textit{where a ship is in need of assistance but safety of life is not involved}, as opposed to situations \textit{where the safety of life is involved}, \textit{where} the provisions of the SAR Convention should be followed. The place of refuge is defined by head 1.19 as \textit{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 the environment}, whereas ship in need of assistance (according to head 1.18) means \textit{a ship in a situation, apart from one requiring rescue of persons on board, that could give rise to loss of the vessel or an environmental or navigational hazard}. Head 1.3 explains the reasoning behind creating places of refuge: \textit{when a ship has suffered an incident, the best way of preventing damage or pollution from its progressive deterioration would be to lighten its cargo and bunkers; and to repair the damage. Such an operation is best carried out in a place of refuge}. Head 1.4 nevertheless addresses the inherent difficulties of such an approach: \textit{however, to bring such a ship into a place of refuge near a coast may endanger the coastal State, both economically and from the environmental point of view, and local authorities and populations may strongly object to the operation}. However, swift reaction while granting access to a place of refuge is a necessary prerequisite for the proper functioning of the concept, as (according to head 1.6) \textit{the longer a damaged ship is forced to remain at the mercy of the elements in the open sea, the greater the risk of the vessel is condition deteriorating or the sea [...] thereby becoming a greater potential hazard}. The Guidelines repeatedly and explicitly point out that granting a ship an access to a place of refuge is by no means an obligation for a State, but mere a recommendation, most notably in head 3.12 that clearly states: \textit{when permission to access a place of refuge is requested, there is no obligation for the coastal State to grant it}, as (as set in head 1.7) \textit{granting access to a place of refuge could involve a political decision which can only be taken on a case-by-case basis} with due consideration given to the balance between the advantage for the affected ship
and the environment resulting from bringing the ship into a place of refuge and the risk to the environment resulting from that ship being near the coast (emphasis added).

In further provisions of the Guidelines, the procedure for granting an access to the place of refuge is provided for in greater detail. The party that has the initiative in the procedure is either the master of the ship or the salvor, and it is they who must contact the authorities of the coastal State. The obligation are set by head 3.7 for the coastal State to merely ensure that maritime authorities, port authorities, authorities responsible for shoreside safety and generally all governmental authorities concerned should ensure that an appropriate system for information-sharing exists and should establish communications and alert procedures (identification of contact persons, telephone numbers, etc.), as appropriate. This provision is basically a reformulation of Article 6 of the OPRC Convention. Further, States shall conduct an analysis of each of the considered places of refuge before an actual situation when such places would be required arises (head 3.5) and to establish procedures consistent with Guidelines by which to receive and act on requests for assistance with a view to authorizing, where appropriate, the use of a suitable place of refuge (head 3.4).

The Guidelines also provide the list of factors that should be taken into consideration by the coastal State authorities before an access to a place of refuge is granted (or denied), which among other things include assessment of nature and condition of cargo, especially hazardous goods, and distance and estimated transit time to place of refuge (head 3.9). Head 3.10 allows for coastal State to board the ship to perform an expert analysis: [a]n inspection team designated by the coastal State should board the ship, when appropriate and if time allows, for the purpose of gathering evaluation data. The analysis should according to head 3.11 include a comparison between the risks involved if the ship remains at sea and the risks that it would pose to the place of refuge and its environment; including evaluation of the consequences if a request for place of refuge is refused, including the possible effect on neighbouring States.

Altogether, however, the main feature of the Guidelines is their non-binding nature that does not oblige States to provide ships in critical situation with necessary assistance. Even though such obligation and subsequent creation of network of places of refuge (especially along frequented shipping routes) could in theory contribute to much safer international shipping, coastal States, including the developed ones, would never agree to imposing of such obligation. In this regards, the regional initiatives taken by the EU through
adoption of the 2009 EU Directive 2009/17/EC are worth mentioning. The EU that usually is able to enforce the EU Member States to adopting environmental measures against their will, took a very cautious approach and merely obliged the Member States to take steps towards identification of possible places of refuge and designating the competent authority that would decide on acceptance of the ship into place of refuge, instead of making establishing of places of refuge mandatory and supervised by the European Maritime Safety Agency (EMSA). The current state of progress in the area is uncertain.199

6.6.3 Conclusion

In its internal waters, the coastal State enjoys unlimited sovereignty that provides basis for unlimited prescriptive and enforcement jurisdiction. The coastal State may go as far as to unilaterally deny access to ships that do not comply with the prescribed CDEM standards, which is otherwise prohibited by the international law in other jurisdictional areas. The main feature of jurisdiction over vessels in internal waters and ports is the aspect of voluntary entry into those areas under coastal State sovereignty. An important question therefore arises as towards ships in distress and especially ships in need of assistance that pose threat to the environment.

As for enforcement jurisdiction, the coastal State may in its ports institute proceedings against a ship that voluntarily entered the port in respect of any violations in the territorial waters or the EEZ of that State.

6.7 Conclusion

It seems rather difficult to me to provide conclusion to this long chapter, because so many different regimes, concepts and different zones were discussed.

Altogether, it may be said that the international framework and allocation of prescriptive jurisdiction to States in their jurisdictional zones aims at upholding the uniformity of the rules and sets limitations upon coastal State prescriptive measures.

The primary jurisdictional zones for dealing with vessel source pollution for the coastal State are the EEZ and the territorial sea, with contiguous zone essentially not being important at all. Both in the EEZ and in the territorial sea, the coastal State prescriptive jurisdiction in adoption of rules on CDEM standards is essentially limited to implementation


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of generally accepted international rules and standards. Notable difference arises in respect of navigational measures: their adoption in the EEZ is subject to IMO approval, with VTSs not being available for adoption at all; in the territorial sea the coastal State has full discretion in adopting navigational measures, including VTSs. The right of innocent passage exists in the territorial sea, which at the same time puts limitations to coastal State’s sovereignty (it must not take steps to hamper the passage) and obliges ships to follow certain rules in order not to lose the right of passage, which could result in expulsion from the territorial sea. Apart from that, general enforcement jurisdiction is not that much different, in its core for the regime of the EEZ and the territorial sea, and allows for request of information, inspection and in case of the most severe violations, detention; the difference is that in the EEZ, clear objective evidence that the ship caused major damage or threatening it is the sole basis for detention.

Exceptions to general regimes exist in the form of several categories of special areas. Special regime applies to ice-covered areas where State enjoys broad prescription and enforcement jurisdiction. Under the IMO, special areas established under MARPOL 73/78 and recently also Particularly Sensitive Sea Areas may be established for additional protection of the marine environment in the EEZ as well as in the territorial sea, with recent State practice seemingly favoring the PSSAs.

A rather complicated regime is set by the LOSC for the international straits. In some, the right of innocent passage is replaced by the right of transit passage, which limits the coastal (strait) State in its jurisdiction even further.

In the internal waters including ports, the prescriptive and enforcement jurisdiction is essentially unlimited. An interesting question of the right to access ports for vessels in distress (including those that pose threat to marine environment) has provided for development of the place of refuge.
Chapter 7: Conclusions

7.1 Summarising my findings

Ever since its beginnings, two paramount principles compete in the practice of States, shaping the development of the law of the sea. First, there is the principle of freedom, striving to keep the world oceans free and accessible for all States for free use for navigation, gathering of resources and also polluting. Second, there is the principle of sovereignty allowing for appropriation of marine areas by a single State and execution of that State’s sovereignty, going as far as to exclude other States from mere navigation in those areas. After rich scholarly debate in the 17th century, a balance between the interests of maritime and coastal States was struck for two hundred years with establishing the 3-mile territorial waters in the beginning of the 18th century and the right of innocent passage soon afterwards.

Following the industrial revolution in the 19th century, the world oceans began to be used much more intensively for shipping purposes. New types of propulsion that replaced rows and sails together with dangerous cargoes that were not shipped previously changed the paradigm of the use of world oceans forever. Rise in the quantity as well as size of ships taking part in global shipping has resulted in more frequent and more serious pollution of the world oceans. This was notably the case of the oil shipping industry where operational discharges took place as a part of the transportation process. Also, accidents of oil transporting vessels became more frequent in the second half of the 20th century and had greater impact upon marine and coastal environments than ever before.

A regime for combating and preventing vessel source pollution, especially pollution by oil tankers, was slowly and carefully established by the international community, in an attempt to strike balance between opposing interests. The coastal States sought to extend their jurisdiction further seaward and acquire sufficient legal means to effectively combat and prevent vessel source pollution, whereas maritime States were afraid that this extended jurisdiction for environmental protection could eventually obstruct the free navigation of vessels carrying resources and goods that were necessary for their national economies. Major accidents of oil tankers in the 1960s provided incentive for establishing the regime of MARPOL 73/78, today’s main tool of preventing vessel source pollution. The deteriorating state of environment worldwide has attracted the attention of States to the issue of environmental protection and the need for establishing new branch of international law, the
international environmental law. The 1972 Rio Declaration, a founding document in this new field, had direct impact in the third UN Conference on the Law of the Sea and its final act, the UN Convention of the Law of the Sea, the so-called constitution for the oceans.

The LOSC sets a complex framework for prevention of vessel-source pollution that is built upon overlapping jurisdictions of flag, coastal and port States; and opts for upholding the traditional primacy of the flag State jurisdiction, with control and enforcement jurisdiction provided to port State rather than to the coastal State. The LOSC uses the system of rules of reference when setting the content of the State jurisdictions, using the formula of generally accepted international rules and standards. The actual rules and standards for prevention of vessel source pollution, which include crew, design, equipment and manning standards, standards for discharges of various substances and navigational measures are set on the international level by the International Maritime Organisation. They are included in several treaty instruments (including Annexes to MARPOL 73/78 and SOLAS 74) and are subject to constant development, as opposed to jurisdictional framework, which provides the stable element in the regulatory framework.

The content of coastal State jurisdiction depends dynamically on the jurisdictional area. In the EEZ its discretion in prescription of rules is limited to implementation of generally accepted CDEM and discharges standards, with additional prescriptive jurisdiction in special areas such as Particularly Sensitive Sea Areas, the establishment of which is however subject to IMO approval, as is establishing of any navigational measures. In the territorial sea, the coastal State should in theory enjoy sovereignty, which is however limited by the right of innocent passage. The coastal State may adopt laws to prevent vessel source pollution, those laws however must not hamper the right of passage, and regarding the CDEM standards may only implement the generally accepted international ones. Its discretion in prescription of navigational measures is only limited with the obligation not to hamper the passage, though; ships that pose threat to safety of navigation and to the environment such as tankers are obliged to follow prescribed navigational measures.

The enforcement regime in the EEZ provides for taking several possible enforcement measures, going as far as to detention in cases where clear evidence on violation of the ship resulting in major damage or threat of it exists. In territorial sea, the enforcement powers of the State are greater, and additionally provide also for expulsion of the vessel from the territorial sea.
As for transports of nuclear and hazardous cargoes, the international framework has significant blind spots. It may be said, though, that whereas denial of entry for such ships into EEZ or territorial sea is clearly inconsistent with the LOSC, the State practice of requiring prior notification is more than anything else based on comity.

Altogether, the content of coastal State jurisdiction seems very limited by the fact that most standards are set internationally and its prescriptive jurisdiction is for the most part limited to implementation. The coastal States with environmental concerns have therefore in recent years sought alternative ways to sufficiently protect marine environment under their jurisdiction, and many PSSAs have been established.

7.2 Possible future developments in the jurisdictional framework for vessel source pollution

It seems suitable to conclude this thesis with at least a brief thought on possible future developments in the international law dealing with vessel source pollution. Even though I am no seer and can hardly predict the future, there are several themes and tendencies in the international legal framework for vessel source pollution I would like to discuss before the end of this thesis, as I think they will be of ever increasing relevance.

7.2.1 Possibility of amending the jurisdictional framework

Following the *Prestige* accident, there has been a call in the EU for amending the LOSC framework for prevention of vessel source pollution. Already then the idea met with opposition from almost all stakeholders. Maritime States such as the US (despite not being a Party to LOSC) and Russia (including EU Member States such as Greece and Denmark) firmly opposed any changes in the compromise between maritime and environmental interests. Further, there has been a concern (shared by environmental NGOs as well) that opening the LOSC, the *constitution of the oceans*, could have unforeseen results, as reopening the overall LOSC package deal could lead to opening of other chapters, not only those dealing with jurisdiction over vessel source pollution. Additionally, per Article 316, amendments to the LOSC could only enter into force between States that ratified them, throwing the uniformity of the law of the sea in absolute disarray. For those reasons, amending the LOSC framework directly seems unlikely. An advantage could be taken of negotiations regarding amending the LOSC in some other area, such as due to effects the global climate change could have upon global oceans – this is however a mere hypothesis.
An option would be an indirect amendment that would elaborate upon some of the LOSC provisions, as it happened regarding straddling fish stocks seems equally unlikely. As the jurisdictional framework for regulation of shipping is scattered throughout the whole LOSC and does not make a separated and clearly definable unit within the LOSC such a possibility is ruled out for the same reasons as a proper amendment.

The last though regarding the LOSC that comes to mind regarding the possibility of indirect amendments to the LOSC jurisdictional framework by concluding treaties (presumably only between some of the State parties) that would grant such States broader enforcement powers, such as boarding and inspections, towards the other States’ flagged vessels. Basically, such an approach would not take away the primacy of the flag State jurisdiction, but rather enabled for more effective enforcement of generally accepted international rules and standards. Such mechanism would complement the port States control and enforcement jurisdiction mechanisms of the LOSC, and provided for safer navigation in general. It is also not an entirely new concept in the law of the sea, as similar treaties were established by States for example for suppression of illicit trafficking of drugs in the Caribbean region. Is, however, marine environmental protection against substandard shipping a grave enough concern for the international community to accept such measures? I am rather pessimistic about this.

7.2.2 Expansion of PSSAs

In my opinion, there is to be expected a gradual expansion of the particularly sensitive marine areas, both in number and in geographical scope. It has been clearly demonstrated in recent years that State favor establishing of the PSSAs to establishing of other special zones, notably special areas under MARPOL 73/78. Probably, the reason is the easier procedure of adoption in the IMO, together with swifter entry into effect and also possibility to prescribe mandatory navigational measures in the PSSAs, albeit with the consent of the IMO.

The proliferation and growing appreciation of the PSSAs among the environmentally-concerned States has already attracted attention of maritime States and pro-navigational interest groups, especially the shipping industry. Despite the growing opposition of those States and actors, the benefits of the PSSAs together with the mechanism of adoption, when States apparently tend to support the PSSA
7.2.3 Regional frameworks combining coastal and port State jurisdictions

Despite the overriding imperative for uniformity in the international regulation of shipping, prominently represented by the concept of generally accepted international rules and standards that put severe limitations on coastal State prescriptive jurisdiction, there is, in my opinion, a great opportunity for influential environmentally-concerned actors for pressure for adoption of more stringent international rules, by combining coastal and port State jurisdiction. As was proven by the unilateral actions taken by the US following sinking of the Exxon Valdez and by the EU following the sinking of the Erika and the Prestige, it is possible (ab)use the possibility of unilateral prescription jurisdiction of CDEM standards by port States to force and accelerate changes of the generally accepted international rules and standards (in that particular case, the requirement for double hull tankers and the accelerated phase out of the single hull ones). The imperative for upholding uniformity of the international framework and fear of establishing regional standards forced the IMO into faster adoption of the double hull standards worldwide.

Obviously, such an action is only an option for specific actors. They must be able to bear the temporary financial costs of such measures, or constitute simply too big of a market to be disregarded and boycotted by the international shipping industry. Also, geographical factors (area, amount of ports and their size, possibility of alternative routes for goods to such State’s territory) are important when taking such unilateral actions. Either spacious and rich single States, or groups of tightly cooperating States are capable of such actions, leaving these extortionist practices essentially to the US and the EU. Still, especially in the case of the EU with its genuine concerns for environmental agenda, and possibility of coordinating port and coastal State enforcement, such course of action could prove be very effective.

7.2.4 Northwest Passage

The climate change has already affected many areas of human conduct. Its effects on the marine environment emerged as well, especially in the sensitive areas of the Arctic and the Antarctic. As for the former, the melting of ice that has so severe impacts for local ecosystems and fauna has also opened the area for previously impossible uses, including oil drilling and navigation in the Northwest Passage. Whereas it is beyond the scope of this brief thought to provide a detailed discussion on the struggle regarding the legal nature of Northwest Passage, it seems obvious that with melting of Arctic ice and movement of the line of ice northward, Canada will soon no longer be able to rely on the exceptions for ice-covered areas to the general LOSC regime and will be faced with shrinking of its vast prescription and enforcement jurisdiction. As one of the notorious pioneering powers in
protection of marine environment, Canada will surely provide an interesting impetus in the global discourse, come the day.

7.3 Conclusion

Over the course of working on the presented thesis, I have learned a lot about the intricate legal framework for vessel source pollution and its limitations. The framework is subject to constant development, with the

It seems impossible to conclude this thesis with any other thought than the following: striking the balance between legitimate environmental concerns of the coastal States as well as good state of marine environment worldwide on one hand and preserving navigational rights and freedoms on the other has been a difficult task for the law of the sea in the 20th century and will remain one of the greatest challenges for the law of the sea in the 21st one.
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