

Port-state Jurisdiction, Extraterritoriality and the Protection of Global Commons

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Abstract

Port state jurisdiction has been used as a means of circumventing the inadequacies of enforcement on the high seas, flag states' ineffectiveness, but also the absence of international rules due to lack of consensus at the international level. Pressing and complex problems related to the global environment and global commons, such as depletion of fisheries, marine and atmosphere pollution and climate change, and foot-dragging in the international community to effectively cooperate to tackle these problems have brought the concept of unilateral regulation of extraterritorial activities to the forefront. In this respect, the role of the port state, as a first point of contact for industries engaged in activities harmful to the global commons (ie fishing and shipping), is increasingly important. This article examines the scope and limits of port state jurisdiction with respect to measures which may have an extraterritorial impact in the light of the law of the sea and international rules on jurisdiction. The aim of the article is to assess whether the practice of port states in exercising jurisdiction has contributed to developments regarding the exercise of (extraterritorial) jurisdiction as a regulatory tool for the protection of global commons. By identifying elements of current state practice regarding exercise of port state jurisdiction, the article advances a framework for the most effective exercise of port state jurisdiction for the protection of global commons with reference to the principle of common concern.

Keywords: Port state, extraterritorial jurisdiction, environmental protection, global commons.

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I. Introduction

Port state jurisdiction has been used as a means of circumventing the inadequacies of enforcement on the high seas, flag states' ineffectiveness, but also the absence of international rules due to lack of consensus at the international level. Molenaar refers to "the notion of a 'responsible port state' namely a state committed to making the fullest possible use of its jurisdiction under international law in furtherance of not just its own rights and interests but also those of the international community."¹ Tanaka's observation regarding the role of the port state as an example of Scelle's theory of *dedoublement fonctionnel*² according to which the port state assumes the "role of an organ of the international community in marine environmental protection"³ is also pertinent. Use of port state jurisdiction, especially in cases where national laws go beyond internationally-prescribed rules and standards, may inevitably have an extraterritorial impact. In some instances, ports aim at regulating and take enforcement action over vessels for activities outside their national jurisdiction. What a port state can do with respect to visiting vessels is of increasing importance in light of attempts by states to expand their

¹ E.J. Molenaar, "Port state jurisdiction: towards mandatory and comprehensive use," in D. Freestone *et al.*, (eds.), *The Law of the Sea: Progress and Prospects* (Oxford University Press, 2006), p. 209; T.L. McDorman, "Port state enforcement: a comment on article 218 of the 1982 Law of the Sea Convention," 28 *Journal of Maritime Law and Commerce* (1997), p. 322 comments: "international treaties and practice are simply shifting the burden and opportunity for enforcement from the flag state to the local (or port) state". See also B. Marten, *Port State Jurisdiction and the Regulation of International Merchant Shipping* (Springer, 2013), p. 4.

² G. Scelle, "Le phénomène juridique du dédoublement fonctionnel" in W. Schätzel and H.J. Schlochauer (eds.) *Rechtsfragen der Internationalen Organisation, Festschrift für Hans Wehberg* (Frankfurt: Kostermann, 1956), p. 331, definition of *dedoublement fonctionnel*:

les agents dotés d'une compétence institutionnelle ou investis par un ordre juridique utilisent leur capacité 'fonctionnelle' telle qu'elle est organisé dans l'ordre juridique qui les a institués, mais pour assurer l'efficacité des normes d'un autre ordre juridique privé des organes nécessaire à cette réalisation, ou n'en possèdent que d'insuffisants.

³ Y. Tanaka, "Protection of community interests in international law: the case of the law of the sea," 15 *Max Planck Yearbook of UN Law* (2011), p. 351 and Y. Tanaka, *The International Law of the Sea* (2nd ed.) (Cambridge University Press, 2015), p. 295-6.

legislation and standards to activities outside their territory with the view to protecting global interests and shared resources such as migratory species, the atmosphere and climate change.⁴

This is within the framework of a general trend of expansion of extraterritorial jurisdiction prompted by a number of contemporary circumstances including the globalisation of the world economy, an increase in transnational criminal activities, and a rise in the movement of persons beyond national borders.⁵ Jurisdiction as a regulatory tool in a globalised community has been discussed in the academic literature in the framework of global legal pluralism⁶ and globalised jurisdiction.⁷ Extraterritorial jurisdiction has also been suggested as a mechanism to promote the production of global public goods⁸ and as a tool for the normativisation of the principle of common concern.⁹ Suggestions that jurisdiction should be determined based on international interests with the main objective the “increase [of] global welfare and justice,”¹⁰ also reflect the perception of jurisdiction as a regulatory tool in a globalised community. Appreciating the potential of using jurisdiction as a regulatory tool, Scott discusses recent measures adopted by the European Union which extend its territorial jurisdiction and argues that this “technique” of

⁴ P. Sands and J. Peel, *Principles of International Environmental Law* (3rd ed.) (Cambridge University Press, 2012), p. 193.

⁵ International Law Commission (ILC) Report on the work of its 58th Session, [on Extraterritorial Jurisdiction], (2006) GA 61st Session Supp. No10 (A/61/10), Annex E, p. 516. See also M.T. Kamminga, “Extraterritoriality,” *Max Planck Encyclopaedia of Public International Law* (Oxford University Press, 2012), para. 4.

⁶ P. Schiff Berman, “Global Legal Pluralism,” 80 *Southern California Review* (2006-7), p. 1155-1237.

⁷ H.L. Buxbaum, “Territory, territoriality and the resolution of jurisdictional conflict,” 57 *American Journal of Comparative Law* (2009), p. 631 and P. Schiff Berman, “Globalisation of jurisdiction,” 151 *University of Pennsylvania Law Review* (2002), p. 490 ff.

⁸ G. Shaffer, “International law and global public goods in a legal pluralist world,” 23 *European Journal of International Law* (2012), p. 669-693; N. Krisch, “The decay of consent: international law in an age of global public goods,” 108 *American Journal of International Law* (2014), 7-25; and E. Benvenisti, “Legislating for humanity – May states compel foreigners to promote global welfare?”, (February 1, 2013) GlobalTrust Working Paper No. 2/2013, at <ssrn.com/abstract=2646880>.

⁹ T. Cottier, et al., “The Principle of Common Concern and Climate Change,” 52 *Archiv des Volkerrechts* (2014), p. 293-324 and D. Shelton, “Common concern of humanity,” *Iustum Aequum Salutare* V.2009, p. 33-40.

¹⁰ C. Ryngaert, *Jurisdiction in International Law* (2nd ed.) (Oxford University Press, 2015), p. 186-7.

territorial extension “enables the EU to govern activities that are not centred upon the territory of the EU and to shape the focus and content of third country and international law.”¹¹

Pressing and complex problems related to the global environment and global commons, such as depletion of fisheries, pollution of the atmosphere and climate change, and foot-dragging within the international community to effectively cooperate to tackle these problems have brought the concept of unilateral regulation of extraterritorial activities to the forefront. In this respect, the role of the port state, as a first point of contact for industries engaged in activities harmful to the global commons (i.e., fishing and shipping), is increasingly important.¹²

This article examines the scope and limits of port state jurisdiction with respect to measures which may have an extraterritorial impact in the light of the law of the sea and international rules on jurisdiction. The article initially discusses the scope and limits of state jurisdiction with reference to jurisdictional principles recognised in international law. The concept of port state jurisdiction and its relationship with the right of a state to regulate access to its ports is examined. State practice plays an important role in the development and validation of jurisdictional assertions and establishment of jurisdictional principles in customary international law. Therefore, specific instances of application and enforcement of port state measures aiming at protection of global commons and entailing an extraterritorial element, such as unilaterally-prescribed vessel construction, design, equipment and manning (CDEM) standards, operational standards such as requirements for the provision of information, measures related to fishing activities, and pollution and emission regulation, are scrutinised, and their compatibility with jurisdictional principles assessed. In this framework, a further suggestion is explored: to what

¹¹ J. Scott, “Extraterritoriality and Territorial Extension in EU law,” 62 *American Journal of Comparative Law* (2013), p. 89.

¹² Marten, *supra* note 1, p. 225, argues that “the environmental field in particular will undoubtedly see the fiercest regulatory battles in the decades to come as issues involving fuel, energy and emission come under greater port state scrutiny.”

extent the specific enforcement measures may be relevant or may have an impact on the jurisdictional basis.

The aim of the article is to assess whether the practice of port states in exercising jurisdiction has contributed to developments regarding the exercise of (extraterritorial) jurisdiction as a regulatory tool for the protection of global commons. A combination of practical and theoretical perspectives is attempted. By identifying elements of current state practice regarding the exercise of port state jurisdiction, the articles advances a framework for the most effective exercise of port state jurisdiction for the protection of global commons with reference to the principle of common concern.

II. Jurisdiction in International Law: Scope and Limits of Jurisdictional Principles

Jurisdiction has been defined by Oppenheim as “the extent of each state’s right to regulate conduct or the consequence of events” and “the legal competence of a state ... to make, apply, and enforce rules of conduct upon persons.”¹³ Jurisdiction refers to the authority of a state to prescribe laws (prescriptive jurisdiction), and the power to enforce them via either executive or judiciary authorities (enforcement jurisdiction; the power of the courts to adjudicate a case has been referred to as adjudicatory jurisdiction).¹⁴ How international law determines the scope and limits of state jurisdiction is not clear. The *Lotus Case*¹⁵ created some confusion in this respect. The Permanent Court of International Justice (PCIJ) found that a state can exercise jurisdiction in any case not explicitly prohibited by international law:

Far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property

¹³ *Oppenheim’s International Law* (9th ed.) edited by R. Jennings and A. Watts (Longman, 1996), Vol. 1, p. 456.

¹⁴ D.W. Bowett, “Jurisdiction: changing patterns of authority over activities and resources,” 53 *British Yearbook of International Law* (1982), p. 1. See also: Restatement (Third) of Foreign Relations Law of the United States, para 401 (a-c); Ryngaert, *supra* note 10, p. 9-10; ILC Report on Extraterritorial Jurisdiction, *supra* note 5, p. 518; B. Oxman, “Jurisdiction”, *Max Planck Encyclopaedia*, *supra* note 5, para. 3-4; and M. Akehurst, “Jurisdiction in international law,” 46 *British Yearbook of International Law* (1972-3), p. 151.

¹⁵ *SS Lotus, P.C.I.J. Reports*, Series A, No. 10 (1927).

or acts, outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every state remains free to adopt the principles which it regards as best and most suitable.¹⁶

The positivistic view of the PCIJ has been criticised,¹⁷ but confusion continues with respect to the scope of state jurisdiction and the role and status of jurisdictional principles in international law.

On one hand, it has been generally accepted that jurisdiction is to be exercised according to a number of jurisdictional bases/principles accepted by states to be in line with international law.¹⁸ The development and recognition in state and judicial practice of specific jurisdictional bases demonstrate that states have accepted that jurisdiction needs to rely on one or more jurisdictional principles¹⁹ the scope and limits of which are determined by state practice, namely assertions of jurisdiction and acceptance by other states. On the other hand, it has been suggested that general principles of international law, such as equality of states, non-intervention and the principle of territorial integrity, determine the scope of jurisdiction in international law.²⁰ These

¹⁶ *Ibid.*, p. 18-19.

¹⁷ See F.A. Mann, "The doctrine of jurisdiction in international law," 111 *Recueil des Cours* (1964-I), p. 35; V. Lowe and C. Staker, "Jurisdiction" in M.D. Evans (ed) *International Law* (3rd ed.), (Oxford University Press, 2010), p. 319-20; M. Shaw, *International Law* (6th ed.) (Cambridge University Press, 2008), p. 656; and Ryngaert, *supra* note 10, p. 30-34.

¹⁸ Ryngaert, *supra* note 10, p. 39; Shaw, *supra* note 17, p. 652; and Lowe and Staker, *supra* note 17, p. 320. See also *Arrest Warrant Case of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, [2002] *I.C.J. Reports* 3, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, p. 78.

¹⁹ Lowe and Staker *supra* note 17, p. 315; Shaw, *supra* note 17, p. 652; R.Y. Jennings, "The limits of state jurisdiction," 32 *Nordisk Idsskrift International Ret* (1962), p. 210; and U.S. Third Restatement, *supra* note 14, para 402. See the approach of the United Kingdom noted in ILC Report on Extraterritorial Jurisdiction, *supra* note 5, p. 521. See, however, *Oppenheim*, *supra* note 13, p. 457, where it is argued that "although it is usual to consider the exercise of jurisdiction under one or other of more or less widely accepted categories, this is more a matter of convenience than of substance."

²⁰ Bowett, *supra* note 14, p. 14-18. See also: *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)* [1962], *I.C.J. Reports*, Dissenting Opinion by Judge Fitzmaurice para. 70, p. 105:

it is true that under present conditions international law does not impose hard and fast rules on states delimiting spheres of national jurisdiction in such matters ... but leaves to states a wide discretion in the matter. It does, however (a) postulate the existence of limits – though in any given case it may be for the tribunal to indicate what these are for the purposes of that case; and (b) involve for every state an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by the courts in

principles may inform the scope of recognised jurisdictional principles but also contribute to further developments in the exercise of jurisdiction.

Jurisdictional principles are, as Crawford points out, “in substance generalisations of a mass of national provisions,”²¹ which have been accepted in state practice as reflecting a consensus on acceptable jurisdictional bases in international law. The jurisdictional principles, which are broadly determined so as to allow flexibility, are reflective of a certain jurisdictional link between the state exercising jurisdiction and the regulated activity. Reasonableness and the general principles suggested above, however, have a place in ascertaining jurisdictional limits with respect to existing jurisdictional principles and new assertions leading to further developments.

The most common and fundamental jurisdictional basis deriving its authority from the principle of sovereignty is the territorial principle.²² Territorial jurisdiction is presumed to apply with respect to events taking place wholly or partly within the territory of a state. The objective and subjective territorial principles have been accepted in instances where part of the activity or one of the constituent elements of an offence occur outside the territory of a state.²³ The territorial principle does not cover the exercise of prescriptive or enforcement jurisdiction with respect to activities which take place wholly outside its territory.²⁴ Principles of extraterritorial

cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another state.

²¹ J. Crawford, *Brownlie's International Law* (8th ed) (Oxford University Press, 2012), p. 477. See also *Oppenheim*, supra note 13, p. 457: “much of the law relating to jurisdiction has developed through the decisions of national courts applying the laws of their own states”.

²² See Bowett, supra note 14, p. 4: the territorial principle is “the most fundamental of all principles governing jurisdiction. Indeed the proposition that a state has the right to regulate conduct within its territory would be regarded as axiomatic.”

²³ See Akehurst, supra note 14, p. 152-3; Lowe and Staker, supra note 17, p. 321-2; and C. Ryngaert, “Territorial Jurisdiction Over Cross-frontier Offences: Revisiting a Classic Problem of International Criminal Law,” 9 *International Criminal Law Review* (2009) p. 197-209 where he reviews the relevant legislation of a number of countries.

²⁴ Shaw, supra note 17, p. 653.

jurisdiction have been developed to justify the exercise of jurisdiction in such cases.²⁵ In these cases, a jurisdictional link exists which justifies the exercise of jurisdiction: the person involved in an activity – either actor or victim – is a national of that state (nationality principle – active or passive); a security interest of the state is involved (protective principle); all states have an interest due to the nature of the crimes (universal jurisdiction); the state suffers (direct and substantial) effects from the specific activity (effects doctrine). The effects doctrine, mainly supported by U.S. jurisprudence with respect to anti-trust legislation, remains controversial.²⁶ International treaties may also provide the legal basis for the exercise of extraterritorial jurisdiction.²⁷

The relationship between territorial and extraterritorial jurisdiction is not always clear and different states perceive the distinction differently.²⁸ Higgins argues that “a broad interpretation of territoriality overlaps in part with what has been defined by others as extraterritorial.”²⁹ Extraterritorial jurisdiction is based on the presumption that despite the jurisdictional link, the regulated activity has taken place outside a state’s territory.³⁰ It means that no (or no sufficient) territorial link can be established. As mentioned above, states have expanded the scope of territorial jurisdiction in instances where the act has only partly taken place within the territory of the state or due to the nature of the crime as being continuous. The broad construction of the

²⁵ R. Higgins, “Problems and Process: International Law and How We Use It,” (Oxford University Press, 1995), p. 73, notes “logically, all exercises of jurisdiction that are not based on the territoriality principle are exercises of extraterritorial jurisdiction.” See also ILC Report on Extraterritorial Jurisdiction, supra note 5, p. 520.

²⁶ The effects doctrine is discussed further below.

²⁷ See, for example, U.N. Convention on the Law of the Sea, 1833 *U.N.T.S.* 397, article 218. For treaty-based “universal” jurisdiction see, for example, articles 49, 50, 129 and 149 of the four Geneva Conventions respectively 75 *U.N.T.S.* 31. For treaties providing for universal jurisdiction in relation to the principle of *aut dedere aut judicare* see the Convention For the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971), *U.N.T.S.* 974, article 5 and the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970), *U.N.T.S.* 860, article 4. See further L. Rydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press, 2003), p. 43-68.

²⁸ Jennings, supra note 19, p. 214. Ryngaert, supra note 10, p. 8-9, argues that “the exact meaning of ‘territoriality’ depends not only on the state or entity interpreting it, but also on the field of law where it is applied.”

²⁹ Higgins, supra note 25, p. 76. See also Ryngaert, supra note 10, p. 162-7.

³⁰ Kamminga, supra note 5, para 1.

territorial principle, especially related to transnational crimes and economic globalisation,³¹ creates difficulties with respect to drawing a clear line between territorial and extraterritorial jurisdiction and the determination of the scope of the former. This uncertainty can be demonstrated by the “effects doctrine”. This doctrine has been suggested as being part of objective territorial jurisdiction, due to the fact that the effects of the regulated activities are realised in the territory of the state exercising jurisdiction.³² However, there is no physical act taking place within the territory to justify prescriptive jurisdiction.³³ In many instances of the effects doctrine, the regulated activity is legal according to the laws of the state. In this sense, the effects doctrine significantly expands the jurisdictional competence of a state where the activity takes place.³⁴ The European Union, despite its initial reluctance, appears to have accepted the doctrine both in cases where there is an intraterritorial element, such as the existence of an agent of a subsidiary company within the framework of the concept of “economic unity,”³⁵ but also in

³¹ Ryngaert, *supra* note 10, p. 99, points out that common law countries, especially the United States, have constructed the territorial principle broadly for these purposes. See also A.L. Parrish, “Evading legislative jurisdiction”, articles by Maurer Faculty, Paper 887 (2012), p. 1691-1699, at <www.repository.law.indiana.edu/facpub/887>.

³² Crawford, *supra* note 21, p. 459, refers to violation of antitrust as objective territorial jurisdiction. Ryngaert, *supra* note 10, p. 76, states that “international law seems ... to have satisfied itself with requiring that either the criminal act or its effects have taken place within a state’s territory for the state to legitimately exercise territorial jurisdiction irrespective of the municipal characterisation of the act or the effects (in practice usually the effects) as a constituent element of the offence.” G.F. Hess, “The Trail Smelter, the Columbia River, and the extraterritorial application of CERCLA” 18 *Georgetown International Environmental Law Review* (2005), p. 25 refers to extraterritorial application when “the potentially responsible party ... is not a US citizen, the conduct does not take place in the US, or the effects do not occur in the US’ signifying that when the effects are felt in the territory this is not extraterritorial application of the laws.

³³ Bowett, *supra* note 14, p. 7. Lowe and Staker, *supra* note 17, p. 322-3, argue: “it is the reliance upon economic repercussions within the territory rather than upon some element of intraterritorial conduct, that distinguishes the effects doctrine in its pure form from objective territorial jurisdiction, which does require some intraterritorial conduct.” Akehurst, *supra* note 14, p. 152-5 comments: “Once we abandon the ‘constituent elements’ approach in favour of the ‘effects’ approach, we embark on a slippery slope which leads away from the territorial principles towards universal jurisdiction.”

³⁴ K. Hixson, “Extraterritorial Jurisdiction under the Third Restatement of Foreign Relations Law of the United States”, 12 *Fordham International Law Journal* (1988), p. 144-150.

³⁵ J.J. Friedber, “The convergence of law in an era of political integration: the Wood Pulp case and the Alcoa effects doctrine,” 52 *University of Pittsburg Law Review* (1990-1) 308-323 and Lowe and Staker, *supra* note 17, p. 329.

cases with no apparent intraterritorial activity without however clearly recognising the effects doctrine as its jurisdictional basis.³⁶

Jurisdiction may finally develop on an *ad hoc*, case-specific way related to particular types of activities.³⁷ The jurisdictional link in these cases may be determined by the specific nature of the regulated activities as accepted in state practice. To what extent this jurisdictional link can be generalised in other similar cases will depend upon the similarities in the regulation, the rationale of the exercise of jurisdiction and the acceptance by other states.

III. The Jurisdictional Competence of the Port State

A. Port State Jurisdiction and Extraterritoriality

Ports are part of the territory of the state where the latter exercises sovereignty, and therefore, the port state can exercise such jurisdiction as it would be able to exercise in any part of its territory.³⁸ Port state jurisdiction is a corollary to the principle of state sovereignty and primarily – but not exclusively - a case of territorial jurisdiction. Legislative and enforcement jurisdiction need to comply with the international rules on jurisdiction and the law of the sea. The temporary presence of the vessels in the ports of a state along with the global nature of shipping activities

³⁶ In the *Wood Pulp* case the CJEU found that ‘the Community’s jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognised in public international law’ relying on the place where the agreement was implemented (para. 15-8); Åhlström Osakeyhtiö and others v Commission (joined cases ‘Wood pulp’) Judgment of 27 September 1988, European Court Reports 1988. *Re Wood Pulp Cartel* [1988] 4 *Common Market Law Review*, p. 941.

R. Higgins, *supra* note 25, p. 75, argues that the European Court in this case asserted jurisdiction over a cartel without agents in the European Union and that “the effects doctrine has now been accepted in all but name.” See also Friedber, *supra* note 35, p. 318-322. M. Jeffrey “The implications of the Wood Pulp case for the European Communities,” 4 *Leiden Journal of International Law* (1991), p. 103-4, argues that the *Wood Pulp Case* did not support the effects doctrine.

On the growing acceptance of the EU’s interests in exercising jurisdiction over foreign activities which generate effects in the EU market, see: “Developments in the law of Extraterritoriality,” 124 *Harvard Law Review* (2011), p. 1254-6 and Scott, *supra* note 11, p. 88.

³⁷ Lowe and Staker, *supra* note 17, p. 316, argue that “US doctrine appears to treat jurisdiction as an aspect of the substantive topic that is regulated” and they continue “if this trend persists the principles of jurisdiction may fragment, so that states may assert a more extensive jurisdiction over, say, tax matters and ‘terrorist’ offences than they do over unlawful arms sales and other crimes.”

³⁸ T.L. McDorman, “Regional port state control agreements: some issues of international law,” 5 *Ocean and Coastal Law Journal* (2000), p. 210: “within the ports a state has the same (territorial) jurisdiction which it would have over a foreign citizen visiting (temporarily on holiday or on business) the territory”.

have been taken into account with respect to the application (or more appropriately non-application) of general civil and criminal laws in cases which relate to the internal affairs or economy of the vessel and when the peace of the port is not affected or disturbed.³⁹ Port state measures for the protection of the environment do not concern solely the internal affairs of visiting vessels and, therefore, the internal economy doctrine is not a restrictive factor for their application.⁴⁰

What is more, the mere physical presence of the vessel in the port does not give the port state unlimited (prescriptive) territorial jurisdiction.⁴¹ It facilitates enforcement, but does not justify it. Enforcement jurisdiction within the territory of a state must be justified on a valid prescriptive jurisdictional basis.⁴² The territoriality principle will normally concern the exercise of jurisdiction by a state for activities which take place wholly or partly in its territory.⁴³ Violations of national laws occurring in the internal waters and ports are *ipso facto* covered by territorial jurisdiction. Article 220(1) of the U.N. Convention on the Law of the Sea (LOSC) provides for an extended territorial jurisdiction, since it expands the legislative jurisdiction of the state to violations taking place in the maritime zones where it exercises sovereignty (territorial sea) and certain sovereign rights in the 200-n. mile exclusive economic zone (EEZ).⁴⁴ Molenaar

³⁹ Different approaches have been applied by civil and common law countries with respect to their abstention from intervening. Common law countries argue that the port state has jurisdiction in such cases but chooses not to exercise it as a matter of comity. On the other hand, civil law countries argue that in cases pertaining exclusively to the internal peace of the vessel, the port state does not have jurisdiction as a matter of customary international law. See Marten, *supra* note 1, p. 28-31 and R.R. Churchill and A.V. Lowe, *The Law of the Sea* (Manchester University Press, 1999), p. 65-68. See also *Oppenheim*, *supra* note 13, p. 622-4.

⁴⁰ Churchill and Lowe, *supra* note 39, p. 67.

⁴¹ McDorman, *supra* note 1, p. 314 comments: “the fact that a foreign vessel has voluntarily entered a port does not make internationally-questionable legislation enforceable against the foreign vessel. If the local state has no recognised jurisdictional basis for a law, the enforcement of the law, if not the law itself, is inconsistent with international law”.

⁴² See Bowett, *supra* note 14, p. 1 who states: “there can be no enforcement jurisdiction unless there is prescriptive jurisdiction”.

⁴³ McDorman, *supra* note 38, p. 216 comments: “Customary international law directs that a port state can only enforce laws that relate to activities of a foreign vessel that take place while the vessel is in port.”

⁴⁴ LOSC, *supra* note 27, article 220(1):

refers to this as quasi-territorial jurisdiction.⁴⁵ Such legislative jurisdiction needs to be in line with the competence enjoyed by the state in the specific maritime zone. For example, a state can exercise enforcement jurisdiction in its ports for violation of its laws in the EEZ only when those laws have been adopted according to the jurisdictional competence given to the coastal state in this maritime zone. Laws requiring foreign vessels to comply with nationally (and not internationally)-stipulated standards contrary to article 211(5) LOSC⁴⁶ cannot form the basis for “quasi-territorial” jurisdiction in the port and cannot, therefore, be enforced therein, unless the violation of national laws continues in the port.

The port state can exercise extraterritorial jurisdiction either based on a treaty provision or in any way a state is allowed to exercise extraterritorial jurisdiction as discussed above. With respect to regulating and exercising jurisdiction over activities which take place on the high seas, the jurisdiction of a state may contravene rules related to the high seas, specifically flag-state exclusive jurisdiction and the non-subjection of any part of the high seas to its sovereignty (articles 87 and 89 LOSC). The LOSC in article 218 has innovatively allowed the port state to exercise extraterritorial jurisdiction for activities “in violation of applicable international rules and standards established through the competent international organisation or general diplomatic conference” outside its maritime zones regarding discharges from a vessel.⁴⁷ *A contrario*, this

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”.

⁴⁵ E.J. Molenaar, “Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage,” 38 *Ocean Development and International Law* (2007), p. 196.

⁴⁶ LOSC, supra note 27, article 211(5) provides that the coastal state “may in respect of their EEZ 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 organisation or general diplomatic conference.”

⁴⁷ See McDorman, supra note 1, p. 305-322. L.S. Johnson, *Coastal State Regulation of International Shipping* (Oceana, 2004), p. 41, notes that this applies “regardless of whether the state in which the ship is registered is a party to the instrument imposing such a rule and standard or even whether the enforcing port state is itself a party to it.”

provision does not grant ports enforcement jurisdiction for discharges on the high seas which are in violation of national (and not international) standards.⁴⁸

Distinguishing between territorial and extraterritorial jurisdiction may depend on the design of national legislation and the definition of the specific offence. How national law determines the location of the violation and the nature of the crime (i.e., continuous offence) would be important for the establishment of jurisdiction. The “territorialisation of the offence”⁴⁹ may be straightforward with respect to static requirements (requirements which follow the vessel throughout its voyage and cannot, due to their nature, change), but may be more problematic with respect to other standards and rules, as will be explained below.

This territorialisation of an offence is also linked to the customarily-established right of a port state to regulate and deny access to its ports. Despite some early disagreement on the existence of a right of access of foreign vessels into ports as part of customary international law, there is now general agreement that the port state has the right to deny and regulate access to its ports.⁵⁰ According to article 211(3) LOSC, coastal states can “establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition

⁴⁸ McDorman, supra note 1, p. 319-20 notes that the discharges obligations established by the International Convention for the Prevention of Pollution from Ships (1973) and the Protocol of 1978, (MARPOL), 130 *U.N.T.S.* 61, are considered as forming “applicable international rules and standards”. See also Tanaka (2015), supra note 3, p. 296.

McDorman, p. 321-2, opines that this provision restricts the scope of extraterritorial jurisdiction as recognised in international law based on the effects doctrine. He argues that “under existing law, where the discharge violation affects the port state, enforcement action arguably could be taken.” According to this author, article 218 goes beyond the existing regime by not requiring the existence of effect and argues that “ratification and implementation of article 218 of the LOS Convention will require states to accept the limitation on their jurisdiction while embracing a new opportunity to control vessel-source pollution discharges.”

⁴⁹ H. Ringbom, “Global problem – Regional solution? International law reflections on an EU CO2 Emissions Trading Scheme for ships,” 26 *Journal of Maritime Law and Commerce* (2011), p. 628 indicates that all will depend on “defining the violation in such terms that it takes place in the port.” See also H. Ringbom, *EU Maritime Safety Policy and International Law* (Martinus Nijhoff, 2008), p. 359.

⁵⁰ L.de La Fayette, “Access to ports in international law,” 11 *International Journal of Marine and Coastal Law* (1996), p. 1-22; A.V. Lowe, “The right of entry into maritime ports in international law,” 14 *San Diego Law Review* (1976-7), 597-622; G.C. Kasoulides, *Port State Control and Jurisdiction: Evolution of the Port State Regime* (Martinus Nijhoff, 1993), p. 2-22; V. Tasikas, “The regime of maritime port access: a relook at contemporary international land US law,” 5 *Lloyds Maritime Law Journal* (2007), p. 44; Churchill and Lowe, supra note 39, p. 62; and Ringbom (2008), supra note 49, p. 207-8.

for the entry of foreign vessels into their ports or internal waters.” There is no reference to “generally accepted international rules and standards established through the competent international organisation” as is found in other paragraphs of this article (i.e., para. 5 regarding the EEZ), and, therefore, these measures can go beyond internationally prescribed standards.⁵¹ The LOSC necessitates states to give “due publicity to such requirements” and to communicate them to the International Maritime Organization (IMO). Therefore, states have the right to establish (nationally-determined) entry criteria⁵² and to deny access to their ports for vessels not complying with these requirements – subject to general principles such as non-discrimination,⁵³ good faith and abuse of right (article 300 LOSC),⁵⁴ and treaty-based obligations especially those trade-related.⁵⁵

The right of a state to regulate access to its ports has inherent and consequential extraterritorial effects. By establishing entry requirements, especially beyond international standards, the port state can regulate the conduct of vessels in areas beyond its national jurisdiction.⁵⁶ However, a number of contentious issues arise especially with respect to the relationship between prescribing entry requirements and exercising jurisdiction over vessels in

⁵¹ G.L. Rose and B. Tsamenyi, “Universalising jurisdiction over marine living resources crime: A report for WWF International” (2013), at <ro.uow.edu.au/cgi/viewcontent.cgi?article=2261&context=lhapapers>, p. 68: “as the port state can set these conditions as a manifestation of its sovereignty, there is no requirement that the conditions themselves be limited to reflect a specific international legal norm already set in place by international agreement”.

⁵² LOSC, supra note 27, article 211(3) permits the port state to prescribe requirements regarding vessel construction, design, equipment and manning (CDEM) but since the right to regulate access to its ports is based on state sovereignty, entry requirements are not limited to CDEM. E.J. Molenaar, “Port State Jurisdiction,” *Max Planck Encyclopaedia*, supra note 5, para. 9-10, 29-30.

⁵³ See Churchill and Lowe, supra note 39, p. 63 who comment that: “port closures or conditions of access which are patently unreasonable or discriminatory might be held to amount to an *abus de droit* for which the coastal state might be internationally responsible”. See also LOSC, supra note 27, articles 24(1)(b), 25(3), 119(3) and 227.

⁵⁴ See Ringbom (2008), supra note 49, p. 225-228 and Tasikas, supra note 50, p. 44.

⁵⁵ H. Ringbom (2008), supra note 49, p. 231-234.

⁵⁶ T. Keselj, “Port state jurisdiction in respect of pollution from ships: the 1982 UN Convention on the Law of the Sea and the Memoranda of Understanding” 30 *Ocean Development and International Law* (1999), p. 149, discusses the need to balance port state jurisdiction with freedom of navigation and finds that since the enforcement powers arise when the vessel enters the port, “the exercise of navigation, in the abstract, is not impeded. However, the exercise of port state powers may result in a restraint on the freedom of navigation, meaning the freedom to navigate for trade purposes, when such powers are used to deny port access to foreign vessels that are not compliant with the port entry requirements”.

the port. Is the right to prescribe entry requirements restricted by the existence of a jurisdictional basis? Would this be related to the specific enforcement measure adopted by the state?

On one hand, the right of the state to regulate access is a reflection of its sovereignty; on the other hand, territorial jurisdiction, which is based on the concept of sovereignty, requires a territorial link for its exercise. As Molenaar rightly argues: “the absence of this right [of access to ports under customary international law] does not mean that extra-territorial port state jurisdiction is exempt from the need for a sufficient jurisdictional link”.⁵⁷ Entry requirements and prescriptive jurisdiction do not necessarily coincide and, therefore, jurisdictional principles have to be taken into account when exercising jurisdiction in the port on the basis of entry requirements.⁵⁸ On the other hand, it has been suggested that states may establish such unilateral extraterritorial conditions on the basis of the vessel’s voluntary entry into the port and the public announcement of the entry requirement which reflect the consent of the visiting vessel to the exercise of jurisdiction.⁵⁹ Non-compliance with the entry requirement can or may be said to give the port state the right to exercise jurisdiction for the breach occurring within the port.⁶⁰ The scope of jurisdiction may also be linked to the enforcement measures a state can adopt against non-compliant vessels in its ports.⁶¹ Should enforcement measures be restricted to refusal of

⁵⁷ Molenaar, supra note 45, p. 229.

⁵⁸ B.D. Smith, *State Responsibility and the Marine Environment* (Clarendon Press, 1988), p. 171-2, seems to argue that any port entry condition with an extraterritorial effect should be justified on a jurisdictional ground and that: “if the principles of jurisdiction are to retain integrity and function, such tactical avoidances [entry requirements regulating extraterritorial activities] should not be permitted”.

⁵⁹ Johnson, supra note 47, p. 41-3.

⁶⁰ Rose and Tsamenyi, supra note 51, comment: “The mere fact of entering port in breach of the condition set by the port state unilaterally triggers its enforcement power, nor does any offence under international law itself need to have been committed prior to the vessel entering port in order for the port state to exercise its national enforcement powers”.

Marten, supra note 1, p. 101, argues that “the port state can frame the argument as one about what it can do in relation to its sovereign territory, as opposed to what foreign vessels can do on the high seas.” Also Ringbom (2011), supra note 49, p. 626-7.

⁶¹ Molenaar, supra note 45, suggests that “the legality or justifiability of extra-territorial port state jurisdiction depends, in addition to the abovementioned jurisdictional bases, on the type of enforcement action taken.” Ringbom (2011), supra note 49, p. 627 acknowledges the “paradoxical situation ... in which it is easier for a State to defend

entry or services in the port, or can the state adopt more intrusive measures such as refusal of departure, arrest, detention, confiscation of cargo/assets, imposition of fines? Would the more intrusive measures require a jurisdictional basis for their exercise?

There may be no straightforward answer to these questions, and as will be discussed below, much will depend on practice, but it needs to be noted that entry requirements and jurisdiction share a common element – the non-abuse of rights. Entry requirements have to be stipulated in good faith and in line with the concept of non-abuse of right, which relates to a “disproportionate encroachment upon the rights of other states”.⁶² Jurisdiction also relies on a balancing of rights and the avoidance of encroaching upon the rights of other states.⁶³ The two concepts equally rely on balancing of rights and reasonableness.

Answers to questions related to the validity of entry requirements and exercise of jurisdiction depend on state practice and state reaction,⁶⁴ and its consolidation into customary law. As noted by Akehurst, “protests generally hold jurisdictional claims within reasonable bounds. If other states choose to acquiesce in the claim, it will become established in customary law”.⁶⁵ Marten argues that:

its right to refuse entry to its ports for non-complying ships than to find a legal basis for enforcing those conditions by means of other sanctions once the ship has actually entered”. See also Ringbom (2008), *supra* note 49, p. 369-377.

⁶² Ryngaert, *supra* note 10, p. 160 argues that “states may not assert their jurisdictional freedom if it would actually serve their legitimate interests, but instead disturb the peace of another state.” On abuse of right, see M. Byers, “Abuse of rights: an old principle, a new age,” (2002) 47 *McGill Law Journal* 389 and G.D.S. Taylor, “The Content of the Rule Against Abuse of Rights in International Law,” 46 *British Yearbook of International Law* (1972-3), p. 331.

⁶³ Ryngaert, *supra* note 10, p. 160, argues that “pursuant to the harm test then, it could be examined whether the exercise of jurisdiction in actual cases is reasonable, viz whether it does not amount to an abuse of rights or to arbitrariness’ stressing ‘a case-by-case reasonableness analysis.” Byers, *supra* note 62, p. 424, also stresses the usefulness of the doctrine of abuse of right in cases of “activities that occur outside the territory of any state, in common spaces, such as the high seas, or in multiple states without any particular territorial nexus, as is the case with the internet and some source of pollution.”

⁶⁴ Lowe and Staker, *supra* note 17, p. 332, discuss the question of whether it is possible to redraft every offence so as to make it a crime for a vessel to enter the state having done x, y, z before entry and argue that “there is no clear theoretical answer to this problem”, and that a “falling back on common sense” relying on the reaction of other states may provide the answer.

⁶⁵ Akehurst, *supra* note 14, p. 176. See also Ryngaert, *supra* note 10, p. 44-45.

provided laws governing extraterritorial operations are carefully tailored, meaning enforcement on a day to day basis is unobtrusive enough to compel compliance without giving rise to any international protest, then ... these arguments are likely to gain ground over time by way of a growing body of state practice.⁶⁶

Jurisdictional competence will depend on the design of the offence (prohibited act) in national laws, its reasonableness and state practice including states' reactions.

The following subsection attempts to elucidate, on the basis of state practice, the approach of states to the general right of a state to regulate entry to its ports and exercise jurisdiction over vessels therein with respect to environmental protection and the potential ascertainment of a jurisdictional link. In this framework, the limits between territorial and extraterritorial jurisdiction will be clarified with reference to the grey areas in state practice. Moreover, a suggestion is explored: to what extent are the specific enforcement measures relevant or have an impact on the jurisdictional basis?

B. Exercise of Port State Jurisdiction in Practice and Jurisdictional Principles

1. Condition-related requirements: Standards related to construction, design, equipment and manning (CDEM)

States have enacted laws requiring vessels to comply with CDEM standards both as entry requirements and rules to be complied with while in port. Normally, these measures are in the international treaties adopted under the auspices of the IMO. The exercise of prescriptive jurisdiction related to CDEM standards beyond those required by international treaty law raises concerns regarding their extraterritorial application, since the vessel needs to conform to such requirements throughout its voyage even when outside a port state's maritime zones. Authors either point out that these standards form part of a continuous activity which also takes place in the port,⁶⁷ or stress that the incidental extraterritorial effect of these measures is not the primary

⁶⁶ Marten, *supra* note 1, p. 104.

⁶⁷ Ringbom (2008), *supra* note 49, p. 329 and McDorman, *supra* note 1, p. 315.

purpose of national legislation and enforcement action.⁶⁸ Although the aim of these measures is to regulate extraterritorial activities,⁶⁹ jurisdiction may be justified on the territorial principle due to the static nature of the standards.⁷⁰ With respect to enforcement measures for non-compliance with CDEM national laws, the state may provide (and has provided) for sanctions, such as fines and penalties, but more intrusive measures such detention, arrest or seizure of visiting vessels in cases of nationally-prescribed requirements are more controversial.⁷¹ Proportionality between the sanctions and the offence is required. Ringbom calls for caution in cases of purely regional requirements, noting that “the appropriateness of using detentions for enforcing compliance with regional requirements is not self-evident”.⁷²

Uncertainty with respect to more stringent enforcement measures in cases of nationally-prescribed requirements is demonstrated by the *Sellers v Maritime Safety Inspector Case*, from New Zealand, which concerned the denial of exit due to non-compliance with a nationally-prescribed requirement.⁷³ A broad approach links the right to deny exit to the right to regulate

⁶⁸ Molenaar, supra note 45, p. 198 and V. Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea* (Martinus Nijhoff, 2008), p. 213.

⁶⁹ See, for example, the measures adopted by the EU following the *Erika* and *Prestige* accidents with respect to double-hulled tankers. Regulation (ED) No 1726/2003 of the European Parliament and of the Council of 22 July 2003 amending Regulation (ED) No 417/2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers *Official Journal* L 249/1 (1.10.2003). These measures were endorsed in the IMO soon after. Resolution MEPC.111(50) – Amendments to the Annex of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, MEPC 50/3, 50th session, December 2003, Annex I, available on the IMO website, at <www.imo.org>.

⁷⁰ Molenaar, supra note 45, p. 198.

⁷¹ McDorman, supra note 38, p. 223, argues that “there does not appear to be any restriction in international law regarding the type of penalty that can be levied against a foreign vessel which, while in port, breaches such laws or standards. Thus detention, arrest or seizure of a visiting vessel would be possible”. See also Ringbom (2008), supra note 49, p. 284-5. To the contrary, R. Lagoni, “The prompt release of vessels and crews before the International Tribunal for the Law of the Sea: a preparatory report,” 11 *International Journal of Marine and Coastal Law* (1996), p. 155, argues that “a detention for not complying with the port entry requirements of the port state that are more stringent than the applicable international rules and standards” is an example of a detention inconsistent with international law.

⁷² Ringbom (2008), supra note 49, p. 228-9 and also p. 285, 344.

⁷³ *Sellers v Maritime Safety Inspector*, Judgment of 5 November 1998, 2 *New Zealand Law Reports* (1999), p. 44.

access to the ports in international law.⁷⁴ A more restrictive approach, as elaborated by the Court of Appeal of New Zealand in the *Sellers Case*, with some support in literature,⁷⁵ requires a treaty-based right to deny exit (such as article 219 or 226 LOSC) or a customary international rule. In *Sellers*, the defendant challenged his prosecution and conviction for permitting his vessel *Nimbus* to leave a New Zealand port without obtaining clearance from the New Zealand Maritime Safety Authority as required by national law. The statutory clearance was denied since the vessel, contrary to relevant national guidelines and legislation, but not international standards, was not equipped with a radio and emergency location beacon. The Court found that international treaty rules providing for the right to deny exit did not apply in the specific case as the vessel was not in a dangerous state according to international standards.⁷⁶ The Court did not say that the port state did not have jurisdiction over the vessel, but rather that the scope of the jurisdiction depended on the extraterritorial effect of the requirement, which was to regulate behaviour beyond its territory.⁷⁷ The Court did not deny that the breach may arise in the port,⁷⁸ but took the view that “the reality is ... quite different” and that “the effect, if not the purpose, of the provision is to place requirements on the exercise of the freedom to navigate on the high seas by reference to the adequacy of the ship, her crew and her equipment for the voyage”.⁷⁹ Whether

⁷⁴ Churchill and Lowe, *supra* note 39, p. 64, argue that detentions of vessels and requiring clearing papers before the vessel leaves port “flow from the sovereignty of the state in its ports, and submission to them is arguably an implied condition of admission to the ports”. See also Johnson, *supra* note 47, p. 35-6 (fn. 116).

⁷⁵ Z. Oya Özçayir, *Port State Control* (2nd ed.) (Lloyds Law Publications, 2004), p. 90; J.S. Davidson, “New Zealand Freedom of Navigation on the high seas: *Sellers v Maritime Safety Inspector*” (1999) 14 *International Journal of Marine and Coastal Law* 438; and D. Devine, “Port state jurisdiction: a judicial contribution from New Zealand,” 24 *Marine Policy* (2000), p. 218.

⁷⁶ *Sellers v Maritime Safety Inspector*, *supra* note 73, p. 57.

⁷⁷ *Ibid*, p. 48, 57. The Court of Appeal stated that “a port state has no general power to unilaterally impose its own requirements on foreign ships relating to their construction, their safety and other equipment and their crewing if the requirements are to have effect on the high seas.”

⁷⁸ *Ibid.*, p. 48.

⁷⁹ *Ibid*. Interestingly, while Ringbom (2008), *supra* note 49, p. 339, dismisses the decision of the New Zealand Court of Appeal as not adequately reflecting international law, at p. 345 he reaches a similar conclusion with respect to detention and an obligation to rectify the deficiency – without, however, relying on extraterritoriality but on the absence of an international requirement (which was also part of the argument of the Court of Appeal) stating that:

the extraterritorial effect or objective of the legislation is incidental (as suggested by Molenaar⁸⁰) can be a matter of perception. This demonstrates the uncertainty created by dealing with extraterritorial elements as incidental and the use of territoriality as the basis for exercise of jurisdiction for the imposition of requirements in the port.⁸¹ However, state practice has demonstrated that detention with an obligation for rectification (which has the same impact as denial of exit until rectification) has been used by states in specific contexts⁸² as part of port enforcement measures. Of course, it would be different if the port state denied exit (or detained a vessel) with respect to a requirement for use of the equipment on the high seas. Denial of exit should not be linked to denial of access, but to the jurisdictional basis for exercise of jurisdiction, which is in this case, due to the static nature of the requirement territorial, but might also depend

in the absence of any international requirement to that effect, it is uncertain whether the absence of a VCR on a pre-2002 cargo ship may be described as a deficiency, and even if it could, it is uncertain whether a ship could be forced to install such equipment in that port or in the nearest appropriate repair yard.

⁸⁰ Molenaar, *supra* note 1, p. 199, also argues that “the Court of Appeal may have ruled differently if the extra-territorial effect of the prescribed unilateral standard would have been incidental rather than its sole purpose.” See also B. Marten, “Port State Jurisdiction in New Zealand: The Problem with Sellers,” 44 *Victoria University College Law Review* (2013), p. 566-8, who argues that the breach arises in port, and therefore, the port state has jurisdiction.

⁸¹ Ringbom (2011), *supra* note 49, p. 340, notes that “in many cases the purpose of such static rules is precisely to have more widespread effect than the strictly territorial ones.”

⁸² See, for example, Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port state control *Official Journal* L131/57 (28.5.2009) (related to compliance of ships with international standards for safety, pollution prevention and on-board living and working conditions and taking a broad view regarding unseaworthiness), Article 19(2) Rectification and detention. This provision relates to international standards but similar measures are provided for ships flying the flag of states not party to a relevant convention: “substantial compliance with the provisions is required before the ship sails” (Annex X, 3.1).

Also EU Regulation No 2244/2003 of 18 December 2003 laying down detailed provisions regarding satellite-based vessel monitoring systems, *Official Journal* L333/17 (20.12.2003) Article 23(3):

A third-country vessel operating in Community waters shall not leave a port of a Member State, following a technical failure or non-functioning, before the satellite tracking device fitted on board is functioning to the satisfaction of the competent authorities or before it is otherwise authorised to leave by the competent authorities.

See also prohibition of exit until rectification of deficiencies with respect to non-static requirements in Directive 2000/59/EC of the European Parliament and of the Council of 27 November 2000 on port reception facilities for ship-generated waste and cargo residues *Official Journal* L332/81 (28.12.2000) (article 11(2)(c)) and Directive 1999/95/EC of the European Parliament and of the Council of 13 December 1999 concerning the enforcement of provisions in respect of seafarers' hours of work on board ships calling at Community ports *Official Journal* L14/29 (20.1.2000) (article 5(1-2)).

on considerations related to the purpose and effect of the requirement – which courts, as demonstrated by the *Sellers Case*, might not be prepared to ignore.

2. Requirements related to the operation of the vessel and other activities

(i) Monitoring and provision of information related to activities taking place outside a state's jurisdiction

National laws providing for the monitoring of activities outside the state's maritime zones or requiring the provision of relevant information have been used as part of port state control and jurisdiction to tackle marine pollution and illegal, unregulated and unreported (IUU) fishing. These measures take two forms: first, a requirement of the use of Vessel Monitoring Systems (VMS) or similar monitoring and surveillance systems by vessels, and second, an obligation to collect information extraterritorially and to report when in port.

Requirements for VMS systems are increasingly common especially within the framework of tackling IUU fishing.⁸³ A number of regional fisheries management organizations (RFMOs) require fishing vessels of contracting and cooperating non-contracting parties to be equipped with such systems and comply with related reporting obligations.⁸⁴ Similar systems have been required for safety purposes.⁸⁵ While requirements for such equipment is a static feature and covered by territorial jurisdiction, as examined in the previous subsection, requiring transiting fishing vessels (or support vessels e.g., engaged in bunkering) in the EEZ or fishing vessels on

⁸³ See U.N. Food and Agriculture Organization (FAO), Code of Conduct for Responsible Fisheries, article 7(7) (3) available on the FAO website, at <www.fao.org>; FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, para. 24, on the FAO website, and the Agreement for the Implementation of the U.N. Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement), 2167 *U.N.T.S.* 3, article 18. See generally M-A. Palma, M. Tsamenyi and W. Edeson, *Promoting Sustainable Fisheries The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Brill, 2010), p. 220-222.

⁸⁴ See Palma, *et al.*, supra note 83, p. 220-222.

⁸⁵ See for example, See Directive 2002/59 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC *Official Journal* L 208/10 (27.06.2002) which at the time of its enactment went beyond international rules and specifically SOLAS Regulation V/20 on Voyage Data Recorders. See H.Ringbom (2008), supra note 49, p. 263-4.

the high seas to have the VMS on or to report in live time (by radio, telex, etc.) entails a non-static extraterritorial element which cannot as such be justified under the territorial principle of jurisdiction.⁸⁶

Port states have expanded the use of VMS within their maritime zones but have demonstrated caution with respect to monitoring vessels on the high seas.⁸⁷ In some RFMOs, VMS systems on the high seas areas within their competence are operated in a centralised way by established bodies (i.e., Commissions),⁸⁸ but this only concerns party members and cooperating states. The EU Regulation No 2244/2003 is indicative in this respect.⁸⁹ The Regulation provides that Fisheries Monitoring Centres will monitor “third country fishing vessels during the time they are in the waters under the sovereignty or the jurisdiction of that member state” (article 3 (2) (c)) and that “a third-country fishing vessel subject to VMS shall have an operational satellite-tracking device installed on board when it is in community waters” (article 17).⁹⁰ However, there is no obligation upon these vessels to ensure the VMS system is in operation when outside the maritime zones of member states.

⁸⁶ E.J. Molenaar and M. Tsamenyi, “Satellite-based Vessel Monitoring Systems (VMSs) for fisheries management: International Legal Aspects and Developments in State Practice,” FAO Legal Papers online (2000) p. 44, at <www.fao.org/fileadmin/user_upload/legal/docs/lpo7.pdf>, note that port states would not have a basis of jurisdiction to require such ships (foreign vessels without fishing licenses) to have these systems switched on prior to entry into port, but point out that “various indications exist that states and RFMOs are probing the limits of international law, in particular with regard to port state jurisdiction.”

⁸⁷ U.N. Fish Stocks Agreement, supra note 83, article 18(3)(g) (iii) refers to VMS as the responsibility of the flag state.

⁸⁸ Western Central Pacific Fisheries Commission, Conservation and Management Measure 2014-02, Commission Vessel Monitoring Scheme, on the WCPFC website, at <www.wcpfc.int>. The VMS system applies to “all fishing vessels that fish for highly migratory fish stocks on the high seas within the Convention Area” (article 6 (a)).

⁸⁹ Commission Regulation (EC) No 2244/2003 of 18 December 2003 laying down detailed provisions regarding satellite-based Vessel Monitoring Systems, supra note 82.

⁹⁰ *Ibid.* To what extent these measures are in line with the coastal state’s jurisdiction in the EEZ or a potential violation of freedom of navigation may be questioned. However, restrictions on the navigation rights of fishing vessels seem to have been accepted in state practice as being within the framework of the coastal state’s sovereign rights and jurisdiction for the management of resources in the EEZ; see discussion in J.M. Van Dyke, ‘The disappearing right to navigational freedom in the Exclusive Economic Zone’ 29 *Marine Policy* (2005), p. 108-109.

With respect to the obligation to monitor and provide information, which may take various forms, such as recording the required information and retaining on board log books or documents evidencing the information, or reporting of information before entry. is the former is common with respect to fisheries, where catch-related data is required in order to confirm that the fish found on a vessel was not caught in the EEZ of RFMOs' member states or on the high seas in contravention to conservation measures.⁹¹ Such laws are normally applied indiscriminately, regardless of whether the flag state is bound by RFMO rules.⁹² Reporting of information regarding the cargo before entry has been used as part of safety-related measures aiming at protecting the marine environment.⁹³ An interesting recent example of regulation regarding reporting going beyond international standards is EU Regulation 2015/757⁹⁴ which requires ship-owners, or other persons responsible for the operation of a ship, to monitor and report the carbon dioxide emissions for each ship above 5000 gross tonnage both on a per-voyage and on an annual basis and carry on board the relevant certification for inspection by the port state and submit an emissions report concerning the emissions and other climate-relevant information

⁹¹ See, for example, Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), Conservation measure 10-05 (2014) Catch Documentation Scheme for *Dissostichus* spp, available on the CCAMLR website, at <www.ccamlr.org>, which provides that each landing at a port needs to be accompanied by catch document with specific information with the view to identifying the origin of toothfish but also to determining whether the toothfish was harvested in a manner consistent with CCAMLR conservation measures (article 2). See also EU Regulation No 1005/2008, establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated Fishing, Article 12. For an overview of the relevant measures, see Palma *et al.*, supra note 83, p. 226-7.

⁹² M. Hayashi, "Regional Fisheries Management Organisations and non-members," in T.M. Diaye and R. Wolfrum (eds.) *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Th.A. Mensah* (Martinus Nijhoff, 2007), p. 756-7.

⁹³ See, for example, Directive 2002/59/EC of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC, article 13(2) which requires that vessels notify EU ports of any dangerous or polluting goods on board before arrival at the latest upon departure from the loading port. This requirement is outside the scope of SOLAS Regulation V/11 on Ship Reporting Systems

⁹⁴ Regulation (EU) 2015/757 of the European Parliament and of the Council of 29 April 2015 on the monitoring, reporting and verification of carbon dioxide emissions from maritime transport, and amending Directive 2009/16/EC, *Official Journal* L 123/55 (19.5.2015).

during the entire reporting period. This Regulation applies ‘in a non-discriminatory manner to all ships regardless of their flag’ (paragraph 14 of Preamble).

Two types of extraterritorial elements can be observed: vessels are required to collect such information when outside a state’s maritime zones and/or they need to notify the port state when outside a state’s territorial sea.⁹⁵ In both instances, a certain (extraterritorial) behaviour of the vessel is required (and thus regulated) by the port state.⁹⁶ These measures do not appear to have been subjected to challenges or public protests.

The U.S. Supreme Court has made pronouncements regarding the extraterritoriality of such operational measures. These cases did not concern extraterritoriality in international law, rather they involved the constitutional allocation of jurisdictional competences between the federal government and the states in their adjacent maritime area. Nevertheless, they have some relevance in terms of the scope of territorial jurisdiction. In these cases, the state-imposed measures were challenged for, *inter alia*, exceeding the territorial jurisdiction (3-n. miles) of the state. In *Intertanko v Lowry*, Intertanko objected “to the requirements that owners report hazardous events even if the events occur outside of Washington” and other operational requirements.⁹⁷ The U.S. Supreme Court accepted that “while some of these activities are likely to occur outside of Washington, such occurrences are not mandated” and stressed that “some incidental impact on extraterritorial activities is permitted to protect state resources”.⁹⁸ It

⁹⁵ See Marten, *supra* note 1, p. 106 and H. Ringbom (2008), *supra* note 49, p. 253-6.

⁹⁶ The Legal Committee of the IMO noted that mandatory ship reporting was in line with the LOSC when the vessel was in the territorial sea and in the EEZ but not when on the high seas. IMO Doc LEG 67/8/1, 12 August 1992, “Legal issues regarding mandatory ship reporting systems and vessel traffic services,” Note by the Secretariat, Annex paras 44-46.

⁹⁷ *Intertanko v Lowry* 947 *F.Supp.* 1484, Section D.

⁹⁸ *Ibid.*

concluded that “rather, the oil spill prevention laws legitimately protect Washington’s delicate and valuable marine resources through the exercise of the state’s police powers”.⁹⁹

However, in contrast to CDEM requirements, which are static in nature, the extraterritorial element of information requirements is not incidental, as the legislation would pose an obligation upon the vessel to collect or report such information when outside the state’s maritime zones. The breach, however, arises in the port when the vessel is found to have provided either false or no information. Despite the extraterritorial element, state practice indicates that there is a jurisdictional link with the port state. This is often connected with the right of entry. With respect to fisheries, for example, entry of fishing vessels into the ports is authorised when the vessel has provided such information, should the information be found to be false, the state can take enforcement measures. States have been more cautious with direct extraterritorial regulation for example, requiring the use of VMS in areas outside a state’s maritime zone.

(ii) *Measures related to fishing and fishing-related activities*

The possibility of port measures related to fishing activities, including as regards IUU fishing, has been recognised in international agreements, such as the 1995 U.N. Fish Stocks Agreement¹⁰⁰ and the 2009 Port State Measures Agreement¹⁰¹ (not yet in force) and soft-law documents adopted by the U.N. Food and Agriculture Organization (FAO).¹⁰² The substantive regulatory objective of port measures relate to activities and protection of living resources on the high seas and may have an extraterritorial effect. Article 23(3) of the Fish Stocks Agreement provides for the adoption of measures “where it has been established that the catch has been

⁹⁹ *Ibid.* Similarly, *Intertanko v Locke*, 148 F.3d 1053 para. 84.

¹⁰⁰ U.N. Fish Stocks Agreement, supra note 83, article 23.

¹⁰¹ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 22 November 2009, on the FAO website, supra note 83.

¹⁰² FAO Code of Conduct for Responsible Fisheries, supra note 83, and International Plan of Action to Prevent, Deter and Eliminate IUU Fishing, supra note 83.

taken in a manner which undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas”. However, there is no direct enforcement (punitive) measures related to the activities on the high seas. Molenaar regrets this: “as regards extraterritorial port state jurisdiction, it is unfortunate that an opportunity was missed to progressively develop international law by explicitly empowering port states to impose punitive measures modelled on article 218 of LOSC”.¹⁰³ The prescriptive and enforcement measures in the Fish Stocks Agreement and the Port State Measures Agreement provide for notification before entry, denial of entry, inspections and prohibition of landings and transshipments and other port services.¹⁰⁴ However, the Fish Stocks Agreement acknowledges the sovereignty of the port state,¹⁰⁵ and can be interpreted to denote that states can adopt more stringent measures as long as they are consistent with international law.¹⁰⁶ The Port State Measures Agreement is more explicit in recognising:

the exercise by parties of their sovereignty over ports in their territory in accordance with international law, including their right to deny entry thereto as well as to adopt more stringent port state measures than those provided for in this agreement, including such measures adopted pursuant to a decision of a regional fisheries management organisation.¹⁰⁷

There is uncertainty regarding the enforcement measures states can adopt especially with respect to more intrusive measures and this may be related to the potential extraterritorial reach.

¹⁰³ E.J. Molenaar, “Port state jurisdiction to combat IUU fishing: the Port State Measures Agreement” in D.A. Russell and D.L. VanderZwaag, (eds.) *Recasting Transboundary Fisheries Management Arrangements in Light of Sustainability Principles* (Martinus Nijhoff, 2010), p. 386.

¹⁰⁴ U.N. Fish Stocks Agreement, supra note 83, article 23 and Port State Measures Agreement, supra note 101, articles 8-11 and 18.

¹⁰⁵ *Ibid.*, article 23(4).

¹⁰⁶ Molenaar, supra note 103, p. 381. Rose and Tsamenyi, supra note 51, p. 72, argue that “these measures could conceivably include vessel detention and the seizure of catch and/or gear” and that “beyond the provisions of the PSM-IUU Agreement civil penalties and criminal prosecutions of vessels breaching the conditions of entry are within the power of the port state.”

¹⁰⁷ Port State Measures Agreement, supra note 101, article 4(1)(b) and see also article 18(3). See also “A Guide to the background and implementation of the 2009 FAO Agreement on port state measures to prevent, deter and eliminate IUU fishing,” *FAO Fisheries and Aquaculture Circ.*, No 1074, p. 60, on the FAO website, supra note 83, where it is stated that: “a party is at liberty to take additional measures, as long as they are in conformity with international law. ... Such actions may include initiating legal proceedings against the vessel”.

However, it should be noted that these measures apply to all states indiscriminately.¹⁰⁸ States and RFMOs require states to notify them in advance of their intention to enter the port and engage in activities such as landing and transshipment.¹⁰⁹ They also require authorisation for entry and authorisation for landing/transshipment based on the information received.¹¹⁰ Others also require a declaration that vessels have not engaged in IUU fishing or related activities as a condition of entry or use of port facilities.¹¹¹ With respect to enforcement measures, most states and RFMOs deny access to their ports and port facilities especially with respect to landing and transshipment.¹¹² Vessels have also been excluded from other services such as refuelling or re-supplying.¹¹³ Besides denial of entry and facilities, some RFMOs have indicated that states can criminalise activities taking place in the port (such as landing, transshipment or even possession of fish) due to the violation of conservation measures on the high seas.¹¹⁴ What is more, some RFMOs and some states have taken steps to adopt more stringent measures with respect to IUU fishing on the high seas. For example, the Commission for Conservation of Antarctic Marine Living Resources (CCAMLR) provides for the confiscation of catch of foreign vessels in the ports of member states.¹¹⁵ Some RFMOs have also left open the possibility of further measures

¹⁰⁸ See Hayashi, *supra* note 92, p. 757-8 and Palma, *et al.*, *supra* note 83, p. 232-4.

¹⁰⁹ See, for example, Northwest Atlantic Fisheries Organization (NAFO), the 2015 NAFO Conservation and enforcement measures (2014), Chapter VII, article 43(2) and 45, available on the NAFO website, at <www.nafo.int>. For states, see the FAO port state measures database, on the FAO website, *supra* note 83.

¹¹⁰ See, for example, NAFO, *ibid.*, Conservation and enforcement measures, article 43(7). See also Port State Measures Agreement, *supra* note 101, article 9.

¹¹¹ CCAMLR, Convention measure 10-03 (2014), para. 4, on the CCAMLR website, *supra* note 91.

¹¹² *Ibid.*, article 6 and NAFO Conservation and enforcement measures (2014), *supra* note 109, article 55. For the states which have adopted restrictions on entry and landing and transshipment, see the list provided (and access to the relevant provisions) on the FAO port state measures database, *supra* note 109.

¹¹³ See *ibid.*, article 22 (iv) (b) (ii) and NAFO Conservation and enforcement measures (2014), *supra* note 109, article 55.

¹¹⁴ See NAFO Chapter V, 2009 NAFO Conservation and enforcement measures (2009), Chapter V, *supra* note 109, on the NAFO website, *supra* note 109.

¹¹⁵ CCAMLR Conservation Measure 10-07 (2009), Scheme to promote compliance by non-contracting party vessel with CCAMLR conservation measures, Paragraph 22 (iv) and see CCAMLR Conservation Measure 10-06 (2008) para. 18 (v) (a) (b), both available on CCAMLR website, *supra* note 91. See also: NAFO Conservation and enforcement measures, (2015), *supra* note 109, article 43(7).

and enforcement action.¹¹⁶ In this context, the measures adopted by the United States and the EU deserve particular mention.

The United States appears more open in embracing the extraterritorial scope of IUU-tackling measures. The Lacey Act, the cornerstone of protection of wildlife in the U.S. legal system, prohibits and makes it an offence to “import, export, transport, sell, receive, acquire or purchase any fish or wildlife or plant taken, possessed, transported or sold in violation of any law, treaty or regulation of the US or in violation of any Indian tribal law”.¹¹⁷ The Act further criminalises the possession of “any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any state or in violation of any foreign law or Indian tribal law”.¹¹⁸ These offences may relate to activities on the high seas which breach international or US law. The Magnuson-Stevens Fishery Conservation and Management Act¹¹⁹ “extends the application of US national legislation to areas beyond national jurisdiction and to fisheries which are currently unregulated”.¹²⁰ The Act makes it an unlawful act to “ship, transport, offer for sale, sell, purchase, import, export, or have custody, control or possession of, any fish taken or retained in violation of this Act” or relevant regulation and “provision of, or regulation under, an applicable governing international fishery agreement”.¹²¹ This practice goes beyond the criminalisation of activities in the port and punishes possession of illegally caught fish.

¹¹⁶ CCAMLR Conservation measure 10-03 (2014), Port inspections of fishing vessels carrying Antarctic Marine living resources, article 7, on the CCAMLR website, supra note 91 and NAFO Conservation and enforcement measures (2014), supra note 109, article 42 recognising “the right of the port State Contracting Party to impose requirements of its own for access to its ports.”

¹¹⁷ The Lacey Act, para. 3372(a), 18 USC 42-43, 16 USC 3371-3378.

¹¹⁸ *Ibid.*, para. 3372(a) (3) (A).

¹¹⁹ Magnuson-Stevens Fishery Conservation and Management Act (Public Law 64-265) as amended by Magnuson-Stevens Fishery Conservation and Management Reauthorisation Act (Public Law 109-479).

¹²⁰ Palma, *et al.*, supra note 83, p. 240. These authors specifically refer to the definition of IUU fishing in 16 USC 1826j.

¹²¹ Magnuson-Stevens Act, 16 USC 1857 (1) (G).

Enforcement measures include: civil penalties, liability *in rem* for any civil penalties, criminal penalties, forfeiture of fish and fishing vessels (including fishing gear).¹²²

The U.S. Supreme Court has upheld the validity of regulating the possession of fish even if this may impose restrictions on catch harvested outside the territorial scope of legislative competence of a U.S. state.¹²³ These cases, while involving the division of powers between the U.S. federal government and the U.S. states, are interesting since the U.S. Supreme Court has taken the view that these extraterritorial elements are incidental and thus accepted the territorial jurisdiction of the state.¹²⁴ Justifying the extraterritorial aspect of the regulation, the Court stressed the following two aspects: “if boats fishing outside the three-mile limit were not included in the permit requirement when they enter Washington waters, it would defeat the purpose of the act”,¹²⁵ and “if this latter power [to regulate fishermen outside California territorial waters] were denied to the state, it would clearly result in the practical deprivation to the state of its undoubted right to regulate the taking of fish from within its territorial waters”.¹²⁶ The Court has upheld extraterritorial jurisdiction of a U.S. state in cases of fisheries jurisdiction by invoking the effects doctrine.¹²⁷ Interestingly, in the *Weeren Case*, the California Supreme Court noted that “California had powerful interest in preserving its fisheries and that such an interest extended beyond its borders because fish swim and do not otherwise respect the borders drawn by governmental entities”.¹²⁸

¹²² *Ibid.*, 16 USC, 1858-61. See also Lacey Act, supra note 117, 16 USC 3373 which provides for civil and criminal penalties, permit sanctions and the forfeiture of fish and of vessels and other equipment used to aid in the violation of the Act.

¹²³ *Frach v Schoettler*, 46 Wn.2d 281 (1955), 280 P.2d 1038 and *Bayside Fish Flour Co v Gentry* 297 U.S. 422, 80 L.Ed 772 (1936).

¹²⁴ The U.S. Supreme Court referred to these fisheries cases and drew this conclusion in *Intertanko v Lowry*, supra note 97, p. 288.

¹²⁵ *Ibid.*, referring to *Frach v Schoettler*, supra note 123.

¹²⁶ *Mirkovich v Milnor*, 34 F.Supp. 409 (1940), 412.

¹²⁷ For an overview of these cases, see *PMSA v Goldstene*, 639 F.3d 1154, p. 1172-3, (9th Cir. 2011).

¹²⁸ *People v Weeren*, 26 Cal.3d at 658-670 (Crim. No. 21078. Supreme Court of California. March 24, 1980).

EU legislation on IUU fishing has a similar scope of extraterritorial application. Regulation 1005/2008 provides that the “system to prevent, deter and eliminate illegal, unreported and unregulated fishing ... shall apply to all IUU fishing and associated activities carried out within the territory of member states to which the Treaty applies, within Community waters, within maritime waters under the jurisdiction or sovereignty of third countries and on the high seas”.¹²⁹

Among other aspects, a fishing vessel is presumed to be engaged in IUU fishing if it has:

carried out fishing activities in the area of a regional fisheries management organisation in a manner inconsistent with or in contravention of the conservation and management measures of that organisation and is flagged to a state not party to that organisation, or not cooperating with that organisation as established by that organisation.¹³⁰

The Regulation requires notification and authorisation of entry and landing/transshipment, catch certificates and provides for denial of entry or use of port services.¹³¹ Avoiding direct extraterritorial application, the Regulation relies on flag state cooperation and consent and does not include an LOSC article-218-like provision. Article 11 (4) provides:

where the suspected breach has taken place in the high seas, the port member state shall cooperate with the flag state in carrying out an investigation into it and, where appropriate, shall apply the sanctions provided for by the legislation of that port member state, under the condition that, in accordance with international law, that flag state has expressly agreed to transfer its jurisdiction.¹³²

Only when the violation of the preservation measures on the high seas is linked to activities in port, does the Regulation provide for a variety of enforcement measures including “effective,

¹²⁹ Council Regulation (EC) No. 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing *Official Journal* L 286/1 (29.10.2008), article 1(3). Also article 3, para 7 of preamble of this Regulation states: “In line with the definition of IUU fishing, the scope of this Regulation should extend to fishing activities carried out on the high seas ...”. The EU adopted the scope and nature of IUU fishing as set out in the FAO IPOA-IUU, *supra* note 83.

Concerning the Regulation, see M. Tsamenyi, *et al.*, “The European Council Regulation on IUU Fishing: an international fisheries law perspective,” 25 *International Journal of Marine and Coastal Law* (2010), 5-31. See also Commission Regulation No 1010/2009 of 22 October 2009 laying down detailed rules for the implementation of Council Regulation No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, *Official Journal* L 280/5 (27.10.2009).

¹³⁰ *Ibid.*, article 3(1)(k).

¹³¹ *Ibid.*, articles 4-22.

¹³² *Ibid.* See also article 41(3) and 42(2) regarding enforcement measures.

proportionate and dissuasive” administrative and criminal sanctions, and confiscation of “fishing gear, catches or fishery products”.¹³³

The application of such measures vis-à-vis third states has been confirmed by the Court of Justice of the EU (CJEU) in the *Poulsen Case*,¹³⁴ which concerned the challenge of the prosecution of Poulsen, the master of *Onkel Sam*, and Diva Navigation, its owner, for breaches arising from Council Regulation No 3094/86.¹³⁵ This regulation provided for certain technical measures for the conservation of fishery resources and specifically article 6 provided that salmon and sea trout caught outside the “waters under the sovereignty or jurisdiction of the member states” “may not be retained on board, transhipped, landed, transported, stored, sold, displayed or offered for sale”. This was in line with the Convention for the Conservation of Salmon in the North Atlantic,¹³⁶ though the question before the Court concerned non-party states. The CJEU recognised that the Salmon Convention cannot be invoked directly against third state vessels,¹³⁷ but pointed out that “community legislation may be applied to [a vessel] when it sails in the inland waters or, more especially, is in a port of a member state, where it is generally subject to the unlimited jurisdiction of that state”.¹³⁸ The CJEU justified this on the basis of territorial jurisdiction, similarly to the *ATA Case* to be discussed below, without, however, discussing that the regulated actions (including retention on board) related to the way fish were caught on the high seas.

¹³³ See *ibid.*, Chapter IX and more specifically articles 43 (immediate enforcement measures) and 44 (sanctions for serious infringements).

¹³⁴ Case C-286/90, *Anklagemyndigheden [Public Prosecutor] v Peter Michael Poulsen and Diva Navigation Corp.*, Judgment of the Court, 25 November 1992, European Court Reports 1992-I-06019. [SOURCE]

¹³⁵ Council Regulation No. 3094/86 of 27 June 1994 laying down certain technical measures for the conservation of fishery resources in the Mediterranean, *Official Journal* L171/1 (6.7.1994) [SOURCE]

¹³⁶ Convention for the Conservation of Salmon in the North Atlantic, 2 March 1982, 1338 *U.N.T.S.* 33.

¹³⁷ *Poulsen Case*, supra note 134, para. 23.

¹³⁸ *Ibid.*, para. 28. Also at para. 33: “since the prohibition on transporting and storing salmon caught in the areas mentioned in Article 6(1)(b) of the Regulation can in principle be applied to a vessel registered in a non-member country only when the vessel is in the inland waters or in the port of a MS [member state], confiscation of the cargo temporarily transported into waters under Community jurisdiction may be ordered only in that situation.”

A rather different approach was advanced by the EU in its dispute with Chile over the prohibition by the latter of landing and transshipment of swordfish in Chilean ports by fishing vessels engaged in fishing activities in contravention of regionally-prescribed rules on the high seas.¹³⁹ In the dispute submitted to a Special Chamber of International Tribunal for the Law of the Sea (ITLOS) by an agreement concluded between Chile and the EU, the EU challenged the Chilean Decree on the basis of its (alleged) breach of articles 87, 89 and 116 to 119 LOSC as it purported to apply unilateral conservation measures relating to swordfish on the high seas.¹⁴⁰ These measures were also challenged on the basis of a breach of article 300 (good faith and abuse of right). Chile argued in favour of its sovereign right and duty “as a coastal state, to prescribe measures within its national jurisdiction for the conservation of swordfish and to ensure their implementation in its ports, in a non-discriminatory manner”.¹⁴¹ Chile and the EU concluded a provisional arrangement and expressed their commitment to negotiate an agreement, which led to a discontinuance of the ITLOS case.¹⁴² This dispute demonstrates the potential extraterritorial elements of port state measures regulating fishing on the high seas.

Despite the fact that national legislation regulates fishing-related actions which take place in port, such as transshipment, the legality of these actions depends on the activity on the high seas, and in this sense it can be said that a port state extends its legislative jurisdiction

¹³⁹ Article 165 of the Chilean Fishery Law (Ley General de Pesca y Acuicultura), as consolidated by the Supreme Decree 430 of 28 September 1991, and extended by Decree 598 of 15 October 1999. [SOURCE available at http://faolex.fao.org/cgi-bin/faolex.exe?rec_id=000190&database=faolex&search_type=link&table=result&lang=spa&format_name=@SRA_LL (in Spanish).

¹⁴⁰ *Case concerning the conservation and sustainable exploitation of swordfish stocks in the South-Eastern Pacific Ocean* (Chile/EU) List of cases 7, Order of 20th December 2000, para. 2, on the website of the International Tribunal for the Law of the Sea (ITLOS), at <www.itlos.org>.

¹⁴¹ *Ibid.*

¹⁴² *Case concerning the conservation and sustainable exploitation of swordfish stocks in the South-Eastern Pacific Ocean* (Chile/EU), ITLOS, Order of 15 December 2009, on the ITLOS website, supra note 140.

extraterritorially.¹⁴³ Criminalisation of possession without any activity by the vessel also manifests the long-arm of the jurisdiction. The exercise of jurisdiction is based on carefully-drafted provisions in national legislation ensuring that the breach arises in port (i.e., entry without authorisation or notification, false information in declaration related to entry, introduction of illegally-caught fish). Uncertainty exists as to the spectrum of enforcement measures, but it seems that increasingly (and without public protests) more intrusive measures such as fines, confiscation and detention are being used.

(iii) *Compulsory pilotage and Vessel Traffic Schemes*

Measures regulating maritime traffic in areas where the coastal state does not have the relevant jurisdiction have been enacted as port entry requirements. Australian attempts to incorporate compulsory pilotage as a protective measure in the Particularly Sensitive Sea Area established in the Torres Strait¹⁴⁴ (an international strait) have been opposed by some states as a violation of the LOSC and customary international law related to transit passage.¹⁴⁵ The compromise reached mainly between Australia and the USA concerned the enforcement of the requirement for compulsory pilotage in the Torres Strait only for vessels entering Australian ports.¹⁴⁶ According to Section 59C of the Great Barrier Reef Marine Park Act 1975 it is an “offence to enter an Australian port after navigating without a pilot if a regulated ship navigates without a pilot in the

¹⁴³ G. deBaere and C. Ryngaert, “The ECJ’s judgment in ATA and the international legal context of the EU’s climate change policy”, 18 *European Foreign Affairs Review* (2013), p. 406.

¹⁴⁴ IMO, Resolution MEPC.133(53), 22 July 2005, “Designation of the Torres Strait as an Extension of the Great Barrier Reef Particularly Sensitive Sea,” MEPC 53/24/Add 2, Annex 21, available on the Australian Maritime Safety Authority, at <www.amsa.gov.au>.

¹⁴⁵ See D.R. Rothwell, “Compulsory pilotage and the law of the sea: lessons learned from the Torres Strait,” ANU College of Law Research Paper No. 12-06, p. 15-6, at <ssrn.com/abstract=2020781> or <dx.doi.org/10.2139/ssrn.2020781>.

¹⁴⁶ For the revised Australian position see Australian Maritime Safety Authority, Bridge Resource Management (BRM) and Torres Strait Pilotage, Marine Notice 7/2009. For the compromise see D.R.Rothwell, supra note 145, p. 16-7, and H.Caminos and V.P.Cogliati-Batz, *The Legal Regime of Straits: Contemporary Challenges and Solutions* (CUP, 2014), p. 433-436.

compulsory pilotage area”.¹⁴⁷ The United States, which had protested the imposition of compulsory pilotage in the Torres Strait as an infringement upon the right of transit passage, has noted that ‘the international legal basis for enforcing the system of pilotage in the Torres Strait is as a condition for entry into an Australian port and that compliance with this system is as recommended by the IMO’.¹⁴⁸ It is also interesting to note that the entry into the port does not have to be immediately following the passage, it can relate to a different voyage. Similarly, the EU in Directive 2002/59 requires all vessels heading for a port of a member state to comply with Vessel Traffic System (VTS) rules in areas outside its territorial sea.¹⁴⁹ The Directive does not specify the sanctions for breach of these requirements but leaves it to the states to adopt “effective, proportionate and dissuasive” measures.¹⁵⁰ The extraterritorial element – regulation of activity outside a state’s territory – is obvious in both cases: the offence is committed in the port when the vessel enters, but the regulated activity is behaviour beyond state jurisdiction though it is tied directly to a vessel entering national waters.

(iv) *Air pollution and emissions standards*

Emissions from ships have also been the target of port states. California introduced an ambitious system requiring vessels within 24-n. miles off its coast to use cleaner marine fuels (fuel could

¹⁴⁷ Great Barrier Reef Marine Park Act 1975, Act No. 85 of 1973, Section 59 C.

¹⁴⁸ MEPC 61/24 Annex 15 (2010). See also J.T. Oliver, “Legal and policy factors governing the imposition of conditions on access to and jurisdiction over foreign-flag vessels in US ports,” 5 *South Carolina Journal of International Law and Business*, 209 (2008-2009), p. 290. This author examines whether this extraterritorial exercise of jurisdiction met a number of criteria mainly based on reasonableness and balance of interests. Singapore which protested against compulsory pilotage in the strait noted the extraterritorial regulation of the port measure: ‘By threatening criminal action against parties who fail to take on pilotage whilst transiting the Torres Strait when the ship next calls at an Australian port, the effectively continues to treat pilotage for transit vessels as compulsory. If a right of transit passage exists, action by a state party to criminalise the proper exercise of that right by a vessel is wholly inconsistent with giving effect to that right, even if it cannot immediately enforce such legislation. It has the effect of denying or impairing that right because any vessel which chooses to act inconsistently with the marine Notice faces the threat of domestic prosecution’ IMO Doc MEPC 55/23 (2006) Annex 22, Statement by Singapore.

¹⁴⁹ Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC, *Official Journal L* 208/10 (5.8.2002), article 8(b).

¹⁵⁰ *Ibid.*, article 25.

not exceed 0.1 per cent sulphur).¹⁵¹ This was challenged by the Pacific Merchant Shipping Association (PMSA) on the grounds of its unconstitutionality related to the division of powers between the U.S. states and the federal government with reference to the Submerged Land Act,¹⁵² which also raised interesting jurisdictional issues with respect to the regulation of fuel beyond the territorial sea.¹⁵³ Both the U.S. District Court and the Court of Appeal (9th Circuit) rejected the challenge regarding the pre-emption of the state's regulation by the federal Submerged Lands Act and relied on the "effects test" to justify California's exercise of jurisdiction.¹⁵⁴ The Court of Appeal admitted that "the regulatory scheme at issue here pushes a state's legal authority to its very limits, although the state had clear justifications for doing so".¹⁵⁵ By referring to relevant case law in relation to the effects test, it found that "California may enact reasonable regulations to monitor and control extraterritorial conduct substantially affecting its territory".¹⁵⁶ The reasonableness and justifiability of the measures was based on the "severe environmental problems confronting California",¹⁵⁷ the "specific environmental impacts" arising from the activities and that the adopted regulation would "significantly reduce these harmful effects".¹⁵⁸ The close connection with the state was also stressed: "we are also

¹⁵¹ For an overview of the scheme and background information see S.P. Broder and J.M. Van Dyke, "The urgency of reducing air pollution from global shipping," in A. Chircop, *et al.* (eds.) *The Regulation of International Shipping: International and Comparative Perspectives* (Martinus Nijhoff, 2012), p. 278-284.

¹⁵² U.S. Submerged Land Act, 43 U.S.C. 1301 et seq.

¹⁵³ *PMSA v Goldstene*, supra note 127. See also Broder and Van Dyke, supra note 150, p. 279-280. One of the main questions was to what extent the specific authority of the state was pre-empted by the Submerged Land Act.

¹⁵⁴ *Ibid.*, p. 1170.

¹⁵⁵ *Ibid.*, p.1162.

¹⁵⁶ *Ibid.*, p. 1170. At p. 1174-5 the Court found that "a state law regulating extraterritorial conduct in the high seas immediately adjacent to the state's territorial waters satisfying the well-established effects test should generally be sustained."

J. Hammitt, "Who's afraid of the supremacy clause? State regulation of air pollution from offshore ships is upheld in *Pacific Merchant Shipping Ass'n v. Goldstene*," 66 *University of Miami Law Review* (2001), p. 70, criticizes the application of the effects doctrine due to the lack of intention to cause harm and the broad spectrum of allowed regulation "allowing a state to regulate based on remote repercussions of lawful activity wholly performed outside the state's territory could potentially provide nearly limitless regulatory power."

¹⁵⁷ *Ibid.*, p. 1181-2.

¹⁵⁸ *Ibid.*, p. 1175-6.

confronted with a state regulatory scheme applicable to the high sea waters immediately adjacent to the state itself”.¹⁵⁹ The Court admitted that the costs to the shipping industry appears to be quite significant but noted that “MPSA still fails to show the absence of any genuine issue of material fact with respect to the regulations’ impact on commerce and navigation”.¹⁶⁰ The Court also stressed the existence of steps and attempts at the international level to tackle this problem and noted that the Californian regulations would soon be in line with IMO regulations.¹⁶¹

Similarly, the EU enacted Directive 2012/33/EU on sulphur content of marine fuels which applies to the territorial sea, EEZ or pollution control zones of member states including SOx Emission Control Areas.¹⁶² Some of its requirements and standards go beyond international standards.¹⁶³ Since a coastal state does not have relevant jurisdiction in areas beyond its territorial sea, port state enforcement cannot be based on the jurisdiction over vessels provided for in LOSC article 220(1).¹⁶⁴ Enforcement in port may rely on entry requirements, however, the Directive does not prescribe the specific measures as an entry requirement but seems to assume that legislative jurisdiction in the EEZ is enforced in the ports. Sanctions for breach of the requirements are not set out in the Directive and are left to member states to determine, but the

¹⁵⁹ *Ibid.*, p. 1175. The Court noted the difference with “an attempt to regulate ships in Shanghai Harbor because of their effects on global climate change.”

¹⁶⁰ *Ibid.*, p. 1176.

¹⁶¹ *Ibid.*, p. 1160-1, 1180. The U.S. and Canada’s proposal for an emission control area (ECA) to be established 200 nm off their coasts, with the same standard to the Californian rules, was adopted in 2010. Annex 11, Resolution MEPC.190 (60), 26 March 2010, North America Emission Control Area, IMO, MEPC 60122, Annex II, on the IMO website, *supra* note 69.

¹⁶² Directive 2012/33/EU of the European Parliament and of the Council of 21 November 2012 amending Council Directive 1999/32/EC as regards the sulphur content of marine fuels, *Official Journal L 327/1* (27.11.2012).

¹⁶³ See, for example, *ibid.*, article 4 on passenger vessels operating in territorial sea and EEZ. See Ringbom (2008), *supra* note 49, p. 264.

¹⁶⁴ Ringbom (2008), *supra* note 50, p. 374, invokes various reasons for the legality of the port state measures and argues that, from a port state perspective the scope of the EU Directive 2012/33, *supra* note 162, is in compliance with the law of the sea referring to LOSC, *supra* note 27, article 220(1). This provision, however, necessitates that the prescriptive jurisdiction in the territorial sea and EEZ be in line with the LOSC for the port state to assume enforcement jurisdiction, which, as admitted by Ringbom, is not the case with 2012 Directive. The same author also invokes the international legitimacy of the rule with respect to international standards, the “host state” argument and finally the indeterminacy of the enforcement measures, He argues, however, that extension of the requirement to cover the high seas would be a major challenge with respect to the justification of a jurisdictional link.

Directive requires member states to enforce these requirements “at least in respect of vessels flying their flag and vessels of all flags while in their ports”.¹⁶⁵

Port states are increasingly claiming a role in the reduction of greenhouse gas (GHG) emissions as evidenced by the EU climate policy.¹⁶⁶ Jurisdiction implications are bound to arise.¹⁶⁷ Legislation incorporating aviation in the Emission Trading Scheme (ETS) has been protested by states¹⁶⁸ and challenged before the Court of Justice of the European Union (CJEU).¹⁶⁹ According to EU Directive 2008/101,¹⁷⁰ airlines operating flights landing or taking off from EU airports were required to submit emission allowances for their flights. A number of airlines and airline associations challenged the measures taken by the United Kingdom in implementing the Directive and argued that the EU was in breach of international law.¹⁷¹ Both the CJEU and the Advocate General examined issues related to jurisdiction which are relevant for the present discussion.

The CJEU found that the Directive did not “infringe the principle of territoriality ... since those aircrafts are physically in the territory of one of the Member States of the EU and are thus

¹⁶⁵ Article 4a(4) of Directive 2012/33/EC supra note 162.

¹⁶⁶ EU Regulation on carbon dioxide emissions and maritime transport, (2015), supra note 94.

¹⁶⁷ A.Miola *et al.*, “Regulating Air Emissions from Ships The State of the Art on Methodologies, Technologies and Policy Options” (2010), p. 41, at <ec.europa.eu/jrc/sites/default/files/jrc_reference_report_2010_11_ships_emissions.pdf>.

¹⁶⁸ International Civil Aviation Organization (ICAO) Council, 194th Session, Summary minutes of the Second Meeting, C-MIN 194/2 and Declaration in Annex, on the ICAO website at <www.icao.int>. See also Joint letter of United States, Australia, Canada, China, Japan, and South Korea transmitted to the European Union on April 6, 2007, *Digest of United States Practice in International Law 2007*, (Oxford University Press), p. 692-94 and Letter from K. Silverberg, U.S. Ambassador to the EU to J. Delbeke, EU Acting Director General for Environment (October 30, 2008), *Digest of United States Practice in International Law 2008*, (Oxford University Press), p. 686-8.

¹⁶⁹ *C-366/10 Air Transport Association of America (ATA) and Others v Secretary of State for Energy and Climate Change*, Judgment of the Court (Grand Chamber) of 21 December 2011. European Court Reports 2011-I.

¹⁷⁰ Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, *Official Journal* L 8/3 (13.01.2009).

¹⁷¹ See “Written observations of the IATA and the National Airlines Council of Canada at ATA Case,” at <www.airlinecouncil.ca/pdf/EU%20ETS%20Legal%20Challenge%20IATA-NACC%20Brief_FINAL%20(21%20Oct%202010).pdf>. They stressed that the extraterritorial application of the Directive contravened territorial jurisdiction and expanded legislative jurisdiction on the high seas (para. 147-152) and breached, among other issues, customary international law with respect to the non-subjection of the high seas to the exclusive sovereignty of a state (paras. 147-157).

subject on that basis to the unlimited jurisdiction of the EU”.¹⁷² The CJEU stressed the fact that the Directive covered the airlines voluntarily landing in the EU and implied that operators could choose not to “operate a commercial air route” using EU airports.¹⁷³ It further stressed the capacity of a state to impose conditions for the performance of a certain commercial activity, i.e., air transport in its territory, but also emphasised that these conditions relate to criteria “designed to fulfil the environmental protection objectives which it has set for itself, in particular where those objectives follow on from an international agreement to which the EU is a signatory, such as the Framework Convention on Climate Change and the Kyoto Protocol”.¹⁷⁴ The CJEU did not regard the existence of an extraterritorial element in the regulated activity as having an impact on the exercise of territorial jurisdiction, commenting that just because “certain matters contributing to the pollution of the air, sea or land territory of the member states originate in an event which occurs partly outside that territory is not such as to call into question ... the full applicability of EU law in that territory”.¹⁷⁵ This is as far as the CJEU commented on extraterritoriality in the assessment of the Directive in the light of customary international law.¹⁷⁶ Advocate General Kokott’s opinion – reaching the same conclusion – was more nuanced. On one hand, she pointed out that the Directive did not seek to regulate activities of airlines in areas beyond the airspace of the EU and thus the Directive did not have any extraterritorial effect.¹⁷⁷ She admitted that “to

¹⁷² *ATA Case*, supra note 168, para. 125.

¹⁷³ *Ibid.*, para 127.

¹⁷⁴ *Ibid.*, para. 128. B. Mayer, “Case C-266/10, *ATA and others v Secretary of state for Energy and Climate Change*, Judgment of the Court of Justice (Grand Chamber) of 21 December 2011” 49 *Common Market Law Review* (2012), p. 1130, stresses the importance of the objective of the Directive with respect to its reasonableness and argues that this was implied in paras. 128-9 of the Judgment.

¹⁷⁵ *Ibid.*, para. 129.

¹⁷⁶ A. Gattini, “Between splendid isolation and tentative imperialism: the EU’s extension of its Emission Trading Scheme to international aviation and the ECJ’s judgment in the *ATA case*” 61 *International and Comparative Law Quarterly* (2012), p. 982, noted that “it is striking that the Court did not use any other of the arguments ..., which the Advocate General had advanced in order to buttress the credibility of the territoriality approach.”

¹⁷⁷ Opinion of Advocate General Kokott delivered on 6 October 2011, European Court Reports 2011-I. She argued at para. 145 that “Directive 2008/101 does not give rise to any kind obligation on airlines to fly their aircraft on certain routes, to observe specific speed limits or to comply with certain limits on fuel consumption and exhaust

some extent, account is thus taken of events that take place over the high seas or on the territory of third states” but even if airlines may conduct themselves in a particular way when over the high seas or on the territory of third states, “the Directive does not contain any concrete rule regarding their conduct within airspace outside the EU”.¹⁷⁸

There is no doubt that there is an extraterritorial element in the 2008 Directive. The calculation of the allowance is based on the distance between the airport of departure and the airport of arrival on the basis of the formula: tonne-kilometres = distance x payload. The exercise of jurisdiction in the form of a requirement of submission of allowance is based on activities (flying) outside its territory.¹⁷⁹ The question is whether this extraterritorial element negates the territorial link necessary to substantiate territorial jurisdiction. Both the CJEU and AG Kokott found that the physical presence of the aircraft in the territory of the EU provided “an adequate territorial link”.¹⁸⁰ The CJEU relied on the unlimited jurisdiction of the (port) state. AG Kokott explained that the territorial principle can apply in instances where activities have taken place outside the state exercising jurisdiction, and provided examples the regulation of income tax (for income earned in a third country), jurisdiction over antitrust activities, and fisheries.¹⁸¹

gases” and continued in para. 147: “the fact that the calculation of emission allowances to be surrendered is based on the whole flight in each case does not bestow upon Directive 2008/101 any extraterritorial effect.”

¹⁷⁸ *Ibid.*, para. 147.

¹⁷⁹ J. Scott and L. Rajamani, “EU climate change unilateralism” 23 *European Journal of International Law* (2012), p. 470-1, state that the ETS “includes emission that are generated outside EU airspace and consequently airlines will be obliged to surrender emission allowances also for those parts of a flight that take place abroad.” S.M. Dejong, “Hot air and hot heads: an examination of the legal arguments surrounding the extension of the European Union’s Emissions Trading Scheme to Aviation” 2 *Asian Journal of International Law* (2013), p. 172, comments that “airlines face significant sanctions for failure to comply with the ETS including fines and blacklisting and therefore it is a tenuous argument that the ETS does not contain any ‘rules or limits’ on aircraft emissions”.

¹⁸⁰ Opinion of AG Kokott, *supra* note 177, explicitly concluded that “the EU can rely on the territoriality principle in the present case” (para. 15) and pointed out that “the territoriality principle does not prevent account also being taken in the application of the EU emissions trading scheme of parts of flights that take place outside the territory of the EU” (para. 154)

¹⁸¹ *Ibid.*, para. 148.

Providing support for the existence of the territorial link, AG Kokott also referred to the “spirit and purpose of environmental protection and climate change measures” and the effects doctrine noting that:

It is well known that air pollution knows no boundaries and that greenhouse gases contribute towards climate change worldwide irrespective of where they are emitted; they can have effects on the environment and climate in every state and association of states, including the EU.¹⁸²

It may be suggested that the CJEU also implicitly referred to the effects doctrine within the framework of its analysis of the extraterritorial elements of the legislation by citing two cases where extraterritorial activities had an effect on the territory of a member state.¹⁸³ The Court did not clarify how these cases were relevant in the context of the *ATA Case* or how the effects from aviation emissions were felt in the territory of the member states.¹⁸⁴

The reasoning of the CJEU, especially its playing-down of extraterritoriality and its reluctance to engage more clearly with the extraterritorial elements, has been criticised in academic literature. Authors have rejected the Court’s application of the territorial principle on account of the extraterritoriality of the Directive.¹⁸⁵ These arguments are interlinked with the alleged violation of sovereignty over airspace. Opposition to inclusion of aviation in the ETS by

¹⁸² *Ibid.*, para. 154.

¹⁸³ *ATA Case*, supra note 169, para. 129, where the Court referred to the *Commune de Mesquer* and *Ahlström Osakeyhtiö and Others v Commission* cases, both of which involved some extraterritorial activities which had an effect in the territory of the state.

¹⁸⁴ B.F. Havel and J.Q. Mulligan, “The triumph of politics: reflections on the judgment of the Court of Justice of the EU validating the inclusion of non-EU airlines in the Emissions Trading Scheme” *Air and Space Law* (2012), p. 21-22, argue: “while there may be a defensible argument that the long term impact of those emissions will have tangible effects within EU territory, the distinctions are large enough to warrant a more substantive discussion by the Court of which parts of the reasoning in earlier rulings that it finds persuasive.”

¹⁸⁵ Gattini, supra note 175, p. 980 comments: “here the Court’s reasoning assumes ubiquitous features in order to deny any extraterritorial effect of the Directive”. Havel and Mulligan, supra note 183, p. 18-9, 21 state: “mirroring the semantic manipulations of the AG, the Court takes a narrow temporal view of the regulation, suggesting that the ETS is only in technical effect while an aircraft is within the EU territory”. G. Plant, “Air Transport Association of America v Secretary of State for Energy and Climate Change,” 107 (1) *American Journal of International Law* (2013), p. 189 states that: “the Court took a particular narrow spatial view of the ETS’s extension to international aviation, and failed to mention that the cap (in addition to the obligation to surrender allowances) appears to have extraterritorial scope”. See also Dejong, supra note 178, p. 171.

states, despite the CJEU judgment upholding its compatibility with jurisdictional principles, demonstrates that some states perceive the EU measures to contravene international law, though it is not clear whether the states oppose the exercise of jurisdiction or whether the reasons are political.¹⁸⁶

Similar reservations with respect to the application of the territorial principle have been expressed about the potential inclusion of shipping in the ETS. Some authors have suggested that it would be difficult to justify the extraterritorial elements of a regulation on the basis of territorial jurisdiction;¹⁸⁷ while others have examined the potential application of extraterritorial principles with an emphasis on the effects doctrine.¹⁸⁸

IV. Port State Jurisdiction and Protection of Global Commons

A. Assessment of State Practice and Jurisdictional Principles

The state practice examined above demonstrates two main elements: expansion of port state jurisdiction with respect to measures with extraterritorial application and effect, increasingly supported by the use of more intrusive enforcement measures; but also some reticence to endorse extraterritoriality more explicitly and directly. There is no attempt to adopt an article-218-LOSC-like provision which may relate to states' concerns regarding infringements upon other states' sovereignty. The territorialisation of activities outside a state's territory has been based upon adopting entry requirements referring to these activities or by criminalising related-activities

¹⁸⁶ deBaere and Ryngaert, *supra* note 143, p. 403.

¹⁸⁷ See T. Bauerle, *et al.*, *Integration of Marine Transport into the European Emissions Trading System* (Umwelt Bundesamt, 2010), p. 85 and C. Hermeling, *et al.*, "Sailing into a dilemma: an economic and legal analysis of an EU trading scheme for maritime emissions," *ZEW Discussion Paper* No. 14-021, p. 13-4. To the contrary, see C.E. Delft, "Technical Support for European Action to Reducing Greenhouse Gas Emissions from International Maritime Transport" (report 2009), at <www.cedelft.eu>, at 16, argues that the territorial principle can justify such measures due to the presence of the vessel in port. Similarly, see A. O'Leary, *et al.*, *Legal implications of EU action on GHG emission from the international maritime sector* (ClientEarth, 2011), p. 20.

¹⁸⁸ See Bauerle, *et al.*, *supra* note 186, p. 85-87, 96. This study relies on the effects doctrine (as an extension of the territorial principle) but distinguishes between the enforcement measures that the state can take in this respect. It argues that denial of entry or denial of use of port services will be justified, while the more severe measures such as detention or pecuniary penalties cannot be justified due to the weak jurisdictional basis.

which take place in the port. However, all the cases entail extraterritorial elements and reflect attempts to regulate activities and behaviour outside a state's territory. Can the extraterritorial elements be circumvented in this respect especially when they directly form the objective and purpose of the measures?

Scott distinguishes between “territorial extension of domestic law” and extraterritorial jurisdiction *per se*.¹⁸⁹ She uses the term territorial extension to denote that “the application of a measure is triggered by a territorial connection but in applying the measure the regulator is required as a matter of law, to take into account conduct or circumstances abroad”; while she defines extraterritoriality as “the application of a measure triggered by something other than a territorial connection with the regulating state”.¹⁹⁰ What does this territorial connection entail? Would the presence of the vessel in the port justify it?¹⁹¹ Meng argues that the differentiating element between extraterritorial regulation and “mere foreign links” is the intention “to have coercive effects abroad”.¹⁹² According to this author, “coercion is intentionally directed at influencing the addressee with respect to the desired behaviour or prohibition”.¹⁹³ On the other hand, territorial jurisdiction entails “those domestic regulations which only have domestic connections and legal consequences, but factual effects abroad”.¹⁹⁴ Bartels interestingly reverses the effects doctrine and identifies two elements which demonstrate extraterritorial jurisdiction: “legal connection between the legislation and the extraterritorial subject-matter” and “denial of

¹⁸⁹ Scott, *supra* note 11, p. 90.

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*, p. 91, she links presence with the fact that states

may make access to their territory or the enjoyment of a given status within their territory conditional upon compliance with the entirety of their laws. The consequences of this are important but are often ignored. If the presence of a person within a state is capable of constituting an autonomous basis for the exercise of territorial jurisdiction, this means that territorial jurisdiction may be exercised over natural or legal persons who are present even where the conduct in question takes place abroad.

¹⁹² W. Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* (Springer, 1994), p. 86 as translated and quoted in L. Bartels, “Article XX of GATT and the problem of extraterritorial jurisdiction: The case of trade measures for the protection of human rights” 36 *Journal of World Trade* (2002), p. 379-380.

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

opportunities normally open to the person against whom enforcement is directed”.¹⁹⁵ Thus, it is important to examine whether the aim and purpose of the relevant legislation is to coerce and induce certain extraterritorial behaviour and create legal consequences extraterritorially.¹⁹⁶ Another element which should be borne in mind is that a breach in port only arises due to a breach of rules and standards in areas outside a state’s jurisdiction. Without the extraterritorial behaviour, there is no territorial offence. This is obvious in all the cases of state practice discussed above. Whether the extraterritorial elements can be justified on the basis of the territorial principle may need to be examined on a case-by-case basis, but the mere presence of a vessel in the port does not *prima facie* provide a sufficient territorial jurisdictional link.

Reliance on entry requirements may provide an opportunity for port states to enhance the scope of their jurisdiction especially in instances of protection of the global commons. In particular, Marten argues that state practice favours an expansive approach to port state jurisdiction based on the right of a state to regulate entry into its ports.¹⁹⁷ However, as mentioned above, entry requirements and the exercise of jurisdiction in the port following a breach of such entry requirements cannot be disassociated from jurisdictional rules. What is more, entry requirements have to comply with the principle of good faith and non-abuse of rights which also relate to issues of jurisdictional reasonableness, proportionality, and non-encroachment upon the rights of other states. In this sense, there is a common denominator underpinning the establishment of entry criteria and the exercise of jurisdiction in the form of balancing of

¹⁹⁵ Bartels, *supra* note 191, p. 381-2.

¹⁹⁶ A.V. Lowe, “The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution” 34 *International and Comparative Law Quarterly* (1985), p. 735, argues that the extraterritorial impact of the legislation can be determined by “asking what the measure was in fact intended to achieve.”

¹⁹⁷ B. Marten, *supra* note 1, p. 233-5. He argues at p. 114 that this may be the preferred way forward: “even though finding a well-established basis of extraterritorial jurisdiction for any regulation of vessel operations may be more desirable, the lack of any strong authority on this point means that port states are able to slowly extend their jurisdiction to cover more and more aspects of such operations with arguments based on territorial jurisdiction.”

interests and non-encroachment upon the rights of other states within the framework of justifying extraterritoriality. This will be further examined in the section below.

Emphasis on territoriality is understandable due to the uncertainty related to extraterritorial jurisdictional principles and the practicality offered by the location of a vessel in the port with respect to enforcement.¹⁹⁸ This is in line with a contemporary trend of invocation of the territorial principle to justify jurisdiction with respect to activities abroad,¹⁹⁹ especially those of a transnational nature for which territory plays a minimal role (i.e., cybercrime).²⁰⁰ However, such an expansive approach to territoriality is not free from implications and problems.²⁰¹ First, there is uncertainty with respect to what the port state can do within the framework of territorial jurisdiction. Emphasis on the intra-territorial activities may limit the scope of the intended regulation which is behaviour outside national jurisdiction. This may also relate to the enforcement measures that a state can adopt, as demonstrated by fisheries measures. Uncertainty may also arise from the legalistic formulation of offences which aim at territorialising activities outside a state's jurisdiction. Furthermore, the exercise of territorial jurisdiction especially based on entry requirements may be perceived as excessive as it does not take into consideration the jurisdictional competence of the flag state, but also as being arrogant as it is based on the precept 'you can come in my ports but only under my rules'. It denies, therefore, an important element of exercise of jurisdiction, namely the balancing of interests.

¹⁹⁸ Cottier, *et al.*, supra note 9, p. 319, state: "Territoriality often will be a matter of practical expediency as states are largely dependent upon attachment to their territory one way or another in implementing laws and measures."

¹⁹⁹ Parrish, supra note 31, p. 1674, points out, and criticizes, a trend of decisions in the United States which have held that the regulation of foreign activities abroad is not necessarily extraterritorial "by redefining extraterritoriality itself".

²⁰⁰ Ryngaert, supra note 10, p. 99, points out that the United States "has construed the territorial principle rather broadly in order to get to grips with the challenges posed by transnational crime and economic globalization."

²⁰¹ Parrish, supra note 31, p. 1675, criticises this "redefinition of extraterritoriality" and "explains why redefining extraterritoriality obscures an already difficult analysis" and then "suggests that a return to well-established law would correct some of the excesses of transnational litigation."

Furthermore, unclear and extended uses of the territorial principle in cases of regulation of extraterritorial activities deprives international law from a clear elaboration and development of jurisdictional principles. A similar point was made by Ellis referring to a case concerning the (extraterritorial) application of U.S. laws over a Canadian company located in Canada.²⁰² She did not find fault with the outcome, which she argued was in line with justice (otherwise there would have been no compensation or reparation of the environmental damage), but questioned the reasoning and the legal basis for the exercise of jurisdiction. She argued that “what is required in particular is an acknowledgment of the relevance of concerns of foreign parties and governments in extraterritorial cases”.²⁰³ Clear representation of jurisdictional competence will, as Buxbaum argues, “generate a conversation about what lies behind claims of territoriality and extraterritoriality thereby creating more specific awareness of what is being contested – not only the power of particular actors to regulate certain conduct, but the shape of the global regulatory community”.²⁰⁴ As noted by Scott, “notions of territoriality and extraterritoriality are legal constructs” and “while labels and categories can help to map the legal landscape, it is crucial to look beneath the surface of labels and categories”.²⁰⁵ It might well be that the limits between territoriality and extraterritoriality cannot be established with certainty, but it is submitted that what matters is the justification of the scope of the measures beyond and despite the location of the activities and the existence of a jurisdictional link. Justification of extraterritoriality including

²⁰² *Pakootas v Teck Cominco Metals, Ltd* 452 F.3d 1066 (9th Cir.2006).

²⁰³ J. Ellis, “Extraterritorial Exercise of Jurisdiction for Environmental Protection: Addressing Fairness Concerns” 25 *Leiden Journal of International Law* (2012), p. 411. Similar concerns regarding the reasoning of the court were expressed by Parrish, *supra* note 31, p.1694-1695.

²⁰⁴ Buxbaum, *supra* note 7, p. 675.

Gattini, *supra* note 175, p. 984, makes some interesting comments regarding the *ATA Case*, arguing that the CJEU could have justified jurisdiction on a different jurisdictional basis instead of “hopelessly clinging to traditional but misplaced legal concepts” and that this “would have rendered the EU and its environmental policy a better service.” He adds “if it is only understandable that the Court shies away from such a radical statement, it is true that the time should by now be ripe for the Court to embrace more openly the extraterritorial ambition of EU law.”

²⁰⁵ Scott, *supra* note 11, p. 89.

consideration of the impact of such exercise upon the interests of other states could provide legitimacy and circumvent problems related to the limits of territoriality.

Existing extraterritorial jurisdictional principles have been suggested as providing a framework for the exercise of jurisdiction for the protection of global commons and the environment by the port state.

The protective principle has been suggested as offering such a potential jurisdictional basis for the port state with respect to the protection of its national interests.²⁰⁶ The protective principle has mainly been developed to reflect vital interests of the state such as its sovereignty and political independence.²⁰⁷ While further interests of the state could be protected and invoked, this principle does not reflect the main rationale of the practice examined above which is the protection of the global commons and the common interests of the international community.

The notion of exercise of jurisdiction for the protection of interests of the international community and on its behalf may be more appropriately reflected by the principle of universal jurisdiction. Universal jurisdiction allows states to exercise jurisdiction over certain offences regardless of the location of their commission (or the existence of any other jurisdictional link) due to the nature of the crimes.²⁰⁸ Disagreements over the crimes and discrepancy in the approaches in national legislation, but also disagreement over the conditions and requirements for the exercise of universal jurisdiction, have hindered its application,²⁰⁹ though its acceptance

²⁰⁶ Rose and Tsamenyi, *supra* note 51, p. 68, 77.

²⁰⁷ U.S. Third Restatement, *supra* note 14, para. 402, “a state has jurisdiction to prescribe law with respect to ... 3. Certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.” Ryngaert, *supra* note 10, p. 114, comments “some states may construe sovereignty and political independence rather broadly: they may not only include in the protective principle espionage, terrorism, or counterfeiting, but also drug-trafficking, the latter at first sight being difficult to square with the protection of state interests.”

²⁰⁸ *Ibid.*, Section 404: “offences recognised by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes and perhaps certain acts of terrorism.”

²⁰⁹ See, for example, the discussions at the Sixth Committee of the U.N. General Assembly on the scope and application of the principle of universal jurisdiction, 65th - 69th session, at

in international law is not disputed.²¹⁰ Damage to the global commons would need to be recognised by the international community as a crime similar to piracy or as an international crime in order to give rise to the exercise of universal jurisdiction.²¹¹ There is, however, a practical and conceptual difference – in the case of universal jurisdiction (at least in its pure form) there is no necessary nexus between the state exercising jurisdiction and the activity; whereas in the case of possible extraterritorial jurisdiction for the protection of global commons, the state exercising jurisdiction has an interest and a link with the regulated activities as any damage to the global commons has direct impacts not only upon the interests of the international community, but also upon the state itself. In this sense, the jurisdictional link may relate to the effect of the regulated activities upon the global commons whose stakeholders are all states/nations.

The effects doctrine may form the basis for the extraterritorial jurisdiction by a (port) state in cases of protection of global commons.²¹² The effects doctrine, however, is controversial with

<www.un.org/en/ga/sixth/69/universal_jurisdiction.shtml> and the relevant reports of the U.N. Secretary General presented in these sessions. See also M. Langer, “The diplomacy of universal jurisdiction: the political branches and the transnational prosecution of international crimes,” 105 *American Journal of International Law* (2011), p. 1.

²¹⁰ The U.N. General Assembly Sixth Committee discussion above, supra note 209, clearly acknowledged that “universal jurisdiction was an important principle in the fight against impunity and that its validity was beyond doubt”, at <www.un.org/ga/search/view_doc.asp?symbol=A/68/113> (GA). See also A. Zimmermann, “Violations of fundamental norms of international law and the exercise of universal jurisdiction in criminal matters” in C. Tomushat and J-M. Thouvenin (eds.) *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff, 2006), p. 351. On the controversial nature and application of universal jurisdiction, see C. Ryngaert, supra note 10, p. 126-135.

²¹¹ Ozcayir, supra note 75, p. 82, argues that the issue of the application of the universality principle to justify port state enforcement jurisdiction on the high seas remains controversial. Tsamenyi and Rose, supra note 51, p. 4, advise against the use of universal jurisdiction, commenting that:

Promoting a new form of universal crime in the form of a defined series of acts that harm Marine Living Resources (MLR) and are criminalised directly under international law would be a most difficult challenge. The four universal crimes established by the mid-twentieth century (genocide, war crimes, crimes against humanity and torture) are even still, in the twenty-first century, subject to major and bitter controversies as to their legal definitions and proper enforcement. Elevating or recasting illegal harms to MLR as universal crimes would be a quite long term and probably quixotic undertaking.

²¹² McDorman, supra note 1, p. 321, argues that “under existing law, where the discharge violation affects the port state, enforcement action arguably could be taken”. Sands and Peel, supra note 4, p. 195 comment: “where activities carried out in one state have, or are likely to have, effects in another state, recourse might be had to the objective

some states accepting it – though on the basis of diverse requirements. The doctrine has been mainly invoked in cases of competition and antitrust law, but there is some support with respect to environmental protection and maritime affairs.²¹³ The Permanent Court in the *Lotus Case* appears to have accepted the effects doctrine with respect to activities on the high seas which have an impact on the territory on a state – though in that *Case*, the territory was perceived to be the Turkish vessel.²¹⁴ In the *Pacific Merchant Shipping Association v Goldstene* case, the U.S. District and Ninth Circuit Courts also applied the effects doctrine with respect to specific environmental impacts and substantial effects within California caused by the regulated activities.²¹⁵ The relevance of the effects doctrine was implicitly referred to by the Court of Justice of the European Union in the *ATA Case* and more explicitly by the Advocate General.²¹⁶ A.G. Kokott seemed to accept the relevance of the effects doctrine for environmental problems especially based on their transboundary and global nature, and the need for states to protect an interest of the international community.²¹⁷

Interestingly, it has been suggested that the effects doctrine relies on international solidarity. Higgins argues:

applying a more flexible approach to decision-making, [...] the key to the issue lies in the protection of common values rather than the invocation of state sovereignty for its own sake. [...] The exercise of extraterritorial jurisdiction to that end [international solidarity] seems to me as acceptable as its exercise in the other non-territorial bases of jurisdiction.²¹⁸

application of the territorial principle otherwise known as the ‘effects’ doctrine,’” however they point out that the doctrine is of doubtful consistency and there is controversy regarding its application.

²¹³ See Ringbom (2011), supra note 49, p. 630 and McDorman, supra note 1, p. 321.

²¹⁴ *Lotus Case*, supra note 16, p. 23. The Court regarded the “effects doctrine” as part of the territorial principle.

²¹⁵ *PMSA v Goldstene*, supra note 127, p. 1170-1, 1175.

²¹⁶ *ATA Case*, supra note 168 and “Opinion of AG Kokott,” supra note 176 and above notes 181-183.

²¹⁷ “Opinion of AG Kokott”, supra note 176.

²¹⁸ Higgins, supra note 25, p. 77. Similarly, see Council of Europe: European Committee on Crime Problems, “Extraterritorial Criminal Jurisdiction”, 3 *Criminal Law Forum* (1992), p. 465, which commented that: “Public international law does not impose any limitations on the freedom of states to establish forms of extraterritorial criminal jurisdiction where they are based on international solidarity between states in the fight against crime.”

The potential relevance of a broader effects doctrine will be discussed below, but it should be stressed here that the effects doctrine has been applied mainly in anti-trust activities on the basis of specific (and rather restrictive) criteria placing an emphasis on the ascertainment of intended or established substantial effects felt in the territory of the state exercising jurisdiction.²¹⁹ In environmental cases in the United States, courts referred to the substantial impact of the activities on the territory of the regulating state as a requirement for the application of the effects test.²²⁰ In the case of global commons, the effect on the territory of a state may not be able to be quantified or ascertained with certainty.²²¹ It is the effect upon the global commons in whose protection all states are stakeholders which is relevant.

The current framework of jurisdictional principles appears to be inadequate to accommodate the exercise of (extraterritorial) jurisdiction in cases of negative effects of activities to the global commons. What is most often identified as the global commons (and public goods) due to their omnipresence (i.e., climate) and transboundary and shared nature (i.e., fisheries and marine environment/ecosystems) do not easily fit traditional jurisdictional principles.

Jurisdictional principles are developed on the basis of the ascertainment of jurisdictional links and conflicting interests. In this sense, balancing of rights, reasonableness and legitimacy determine the scope of jurisdiction and ensure that safeguards exist and are taken into account to prevent undue encroachments upon states' sovereignty. Ryngaert has suggested a new theory of

²¹⁹ See *United States v Aluminium Co. of America* 148 F.2d 416 (2d Cir. 1945) at 443 and U.S. Third Restatement, supra note 4, para. 403(1)(c) referring to jurisdiction over "conduct outside its territory that has or it intended to have substantial effect within its territory".

²²⁰ See the comment by the U.S. Ninth Circuit, in *Pacific Merchant Shipping*, supra note 127, p. 1175, responding to an argument by the applicants, related to the very specific impact due to the location of regulated activities in a maritime area directly adjacent to the territorial waters of the state.

²²¹ Ringbom (2011), supra note 49, p. 632, does not preclude that the effects doctrine might be relevant but stresses the difficulties in assessing the impact with respect to scientific evidence. Similarly Mayer, supra note 174, p. 1130-1 stresses that "using effects to justify jurisdiction for climate change will be problematic due to lack of direct (palpable, evident) impacts."

jurisdiction based on international interests with the main objective being the “increase [of] global welfare and justice”.²²² Port state jurisdiction as exercised by some states and, as explored above, demonstrates such elements. It is the argument here that port state jurisdiction can be taken further to support regulating activities taking place extraterritorially which harm the global commons. The jurisdictional link in this context is explored in the following section.

B. Jurisdiction for the Protection of Global Commons

Reasonableness and the balancing of rights are important elements of jurisdictional competence. These concepts play a role in ascertaining the limits and scope of jurisdictional principles and the determining of the existence of a jurisdictional link.²²³ The U.S. Third Restatement of Foreign Relations provides a number of factors related to the reasonableness of the exercise by a state of jurisdiction over activities beyond its territory including the “importance of regulation to the regulating state, the extent to which other states regulate such activities and the degree to which the desirability of such regulation is generally accepted”.²²⁴ Reasonableness may justify and provide legitimacy to the establishment and ascertainment of extraterritorial jurisdictional and contribute to its acceptance by other states.²²⁵ The reasonableness of a jurisdictional link needs to be assessed on the basis of the importance of the regulatory and substantive interests involved and the potential infringement of the interests and sovereignty of other states.

²²² Ryngaert, *supra* note 10, p. 186-7.

²²³ U.S. Third Restatement, *supra* note 14, provides “(1) Even when one of the bases for jurisdiction under para. 302 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable”. Ryngaert, *supra* note 10, p. 146, argues that “assertions of jurisdiction ... based on the classical grounds of jurisdiction ... are merely *prima facie* valid. Only to the extent that they survive a subsequent reasonableness analysis, could they be considered as appropriate, and even lawful, under international law.”

²²⁴ *Ibid.*, para. 403(2).

²²⁵ R.Y. Jennings, “Extraterritorial jurisdiction and the US Antitrust laws,” 33 *British Yearbook of International Law* (1957), p. 152, argues that “it is reasonable to say that international law will permit a state to exercise extraterritorial jurisdiction provided that state’s legitimate interests (legitimate that is to say the interests accepted in the common practice of states) are involved.” Oliver, *supra* note 147, p. 244-245, comments: “the more vital the interest and the more the exercise of jurisdiction is directly related to protecting or promoting it, the more likely the international community will respect it as appropriate”.

The balance is between the sovereignty of the state exercising jurisdiction and the sovereignty of third states whose sovereign rights and interests may be encroached upon by this exercise.²²⁶ The main aim of jurisdictional rules is to ensure that a situation is regulated by a state with a close jurisdictional link. It can be argued that reasonableness and balancing of interests is related to effectiveness since the state with the closest link will be in a better position to effectively regulate a situation. It is the argument here that common interests of the international community in the protection of the global environment are also an important factor in jurisdictional balancing.

The global commons and the global environment have been recognised as a “common concern” of humankind necessitating international cooperation for their protection but also reflecting an interest of the international community in their regulation.²²⁷ A number of key international environmental agreements and instruments recognise environmental problems related to the global commons as being of common concern and incorporate obligations on all states to protect aspects of global commons.²²⁸

The consideration of global commons as an issue of common concern relates to their exploitation being linked to “the tragedy of the commons”²²⁹ and the creation of externalities for all states by their use. All states, it is argued, benefit from measures for their protection and all

²²⁶ Mann, *supra* note 17, p. 30, points out that “jurisdiction is an aspect of sovereignty, it is coextensive with and, indeed, incidental to, but also limited by, the state’s sovereignty.” See also Ryngaert, *supra* note 10, p. 39-41 and U.S. Third Restatement, *supra* note 14, para. 403 (2).

²²⁷ Shelton, *supra* note 9, p. 34-5, argues that: “the climate, the stratospheric ozone layer, the oceans, and indeed the entire physical world form an interdependent ecological system, much of which can only be protected at the global level, making it a common concern for all humanity”. See also J. Bruneel, “Common areas, common heritage, and common concern” in D. Bodansky, *et al.*, (eds.), *Oxford Handbook of International Environmental Law* (Oxford University Press, 2007), p. 553-4 and Cottier, *et al.*, *supra* note 9, p. 298-299.

²²⁸ See, for example, LOSC, *supra* note 27, articles 192, 194 and 117-8. See also: U.N. Framework Convention on Climate Change, 1771 *U.N.T.S.* 107, preamble, “Acknowledging that change in the Earth’s climate and its adverse effects are a common concern of humankind” and “Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.”

²²⁹ F. Hardin, “The Tragedy of the Commons”, 162 *Science* (1968), p. 1243.

states – due to the community of interests – are affected by activities impacting them. Due to their physical and legal attributes, global commons are “beyond the reach of individual states”.²³⁰ They transcend states, and belong and relate to humankind including present and future generations. Their open access to all, non-exclusivity, non-appropriation or no sovereignty over them, and the need for collective action underpin their consideration as a common concern of humankind.

The concept of global public goods, a term from economics, has been invoked in the legal literature as relevant – to an extent – to issues related to environmental governance. The global commons can be regarded as global public goods especially considering that “states cannot be excluded from receiving the benefits of a global public good, whether they contributed to its creation or not, they are able to free ride on the efforts of others”.²³¹ Both the global commons and their protection can be perceived as global public goods. States, therefore, contribute to the provision of a global public good which is protection of global commons, but also benefit from the provision of public goods as free riders. In the latter case and due to the production of negative externalities for free riders, (over)exploitation of global commons can be perceived as a global public bad.²³²

The concept of common concern and the collective nature and objective of the protection of global commons may legitimise the exercise of extraterritorial jurisdiction. Lowe argues that “extraterritorial claims are more likely to be acceptable when used in service of legislation upholding generally-held values”.²³³ This reflects what has been suggested in the literature as the

²³⁰ Bruneo, *supra* note 227, p. 554.

²³¹ D. Bodansky, “What’s in a Concept? Global Public Goods, International Law, and Legitimacy,” 23 *European Journal of International Law* (2012), p. 658. See also N. Krisch, “The decay of consent: international law in an age of global public goods,” 108 *American Journal of International Law* (2014), p. 15: “Environmental protection is the quintessential public good in that it is non-exclusive and non-rivalrous in consumption”.

²³² Bodansky, *supra* note 231, p. 658, 664-5, 653-5.

²³³ Lowe, *supra* note 195, p. 734.

normative content of the principle of common concern.²³⁴ Apart from the obligation to cooperate in order to collectively address the concern, and invoking responsibility for harm to global commons, Cottier argues that “a principle of common concern forms the normative foundation and the limits for states to take lawful unilateral action with extraterritorial effects within the bounds of international law where international cooperation and joint action remains absent”.²³⁵ Similarly, Shaffer argues that despite the problems related to unilateral action, it “may also be an important part of a broader transnational process leading to the production of a global public good over time” stressing the interaction of legal orders and lack of centralisation and hierarchy.²³⁶ The nature of global commons as public goods also legitimises the exercise of extraterritorial jurisdiction. Krisch argues that driven by the provision of global public goods “this effects-based rationale for jurisdiction enables each state affected by an issue – that is, for matters of global public goods, all states – to exercise regulatory powers”.²³⁷

In this respect, the jurisdictional link relates to whether activities over which jurisdiction is exercised have a measurable impact/effect upon the global commons and the “attainment of the common concern”.²³⁸ The jurisdictional balancing of interests does not relate only to interests of

²³⁴ Cottier, *et al.*, supra note 9, p. 314 et seq. Brunée argues, supra note 227, p. 566 that the concept of common concern does not imply a specific rule for the conduct of states. Nonetheless, it signals that states’ freedom of action may be subject to limits even where other states’ sovereign rights are not affected in the direct transboundary sense envisaged by the no harm principle. ... all states would have concomitant legal interests and could demand others to adjust their conduct accordingly.

N. Matz, “Comment: the common interest in international law: some reflections on its normative content,” 62 *Heidelberg Journal of International Law* (2002), p. 19, takes a middle-ground view on the normativity of the concept: “while still lacking legal content itself, the concept already has legal implications concerning the enforcement of law. As such it is also one of the most important aspects of the progressive development of international environmental law and the restriction of national sovereignty for the benefit of the community of states.”

²³⁵ Cottier, *et al.*, supra note 9, p. 296.

²³⁶ Shaffer, supra note 8, p. 691 stresses that: “In practice, unilateralism may help to produce a global public good where common action fails, especially in light of opt-in rules under international treaties.”

²³⁷ Krisch, supra note 231, p. 20. Further, at p. 13, he stresses that this approach could circumvent key problems such as “substantive disagreement, free riding and distribution of costs, which are typically seen as key obstacles to reaching cooperative schemes,” but he also acknowledges its weaknesses.

²³⁸ T. Cottier, “The emerging principle of common concern: a brief outline,” Working paper No 2012/20 (May 2012), p. 8, at <www.nccr-trade.org/publication/the-emerging-principle-of-common-concern/>.

individual states but also to “the greater interests of humanity and planetary welfare,” to use the wording of Judge Weeramantry in his separate opinion in the *Gabcikovo-Nagymaros Case*.²³⁹ This legitimises the exercise of extraterritorial jurisdiction since it can be argued that the encroachment upon the interests of the flag state are outweighed by the protection and regulation of common interests which includes the interests of the flag state itself. Sovereignty in this sense is not side-lined but exercised for the protection of global interests.²⁴⁰ This is in line with academic views of modern concepts of jurisdiction which perceive states as “de facto ... global regulators of internationally relevant situations” and sovereignty as responsibility for regulation with the common interest in mind,²⁴¹ and which endorse jurisdiction by states in cases of “global governance gaps” beyond solely the protection of national interests.²⁴²

Legitimacy and reasonableness are also interlinked with effectiveness and necessity.²⁴³ The role of the port state in environmental regulation has been justified on the basis of practicality and effectiveness since it is easy for port states to inspect and take enforcement measures against

²³⁹ *Case concerning the Gabcikovo-Nagymaros Project* (Hungary v Slovakia), [1997] *I.C.J. Reports* 7, separate opinion of Vice-president Weeramantry, p. 118.

²⁴⁰ See Matz, supra note 234, p. 19. Sands and Peel, supra note 4, p. 193, refer to “a more modern conception of an ecologically interdependent world in which limits are placed in the exercise of sovereignty or sovereign rights.” It is noted that

for ‘shared natural resources’ such as the high seas and atmosphere, it will often be difficult, if not impossible, to draw a clear link between natural resources over which a state does and does not have sovereignty or exercise sovereign rights. In such circumstances, it is unlikely that the principle of territorial sovereignty, or permanent sovereignty over natural resources, can provide much assistance in allocating rights and responsibilities of states over environmental policy.

²⁴¹ Ryngaert, supra note 10, p. 190.

²⁴² See Berman, supra note 7, p. 491 who advances a “cosmopolitan conception of jurisdiction aim[ing] to capture a jurisdictional middle ground between strict territorialism on the one hand and expansive universalism on the other.”

²⁴³ D. Bodansky, “What’s so bad about unilateral action to protect the environment?” 11 *European Journal of International Law* (2000), 346, discusses necessity as one of the factors to be taken into account in weighing “the benefits to the environment of a unilateral action against the costs of that action to the stability of the international system.” The same author at p. 667, argues that when an international agreement or multilateral response is not possible, the legitimacy of the unilateral effort “will tend to be evaluated after the fact, in terms of whether it was successful in providing the public good.”

Matz, supra note 234, p. 18, argues that “the recognition of the necessity to generally restrict national sovereignty as far as common interests are concerned is an important aspect of the development of international environmental law.”

vessels in ports, and due to the failure of flag states to enforce such measures on the high seas.²⁴⁴ Contemporary approaches in the conflict of laws discipline and practice also demonstrate the importance of effectiveness with respect to jurisdictional conflicts. Specifically, the “substantivist approach” calls for the selection of the law in certain cases to be made on the basis of the substantive content of the law (choice of law theory) without regard to territorial linkages.²⁴⁵ Due to the interconnectedness of the global environment, denying states the right to regulate (even indirectly) behaviour outside their territory can be seen as depriving them of the right to protect their environmental interests.²⁴⁶

The existence of legitimate interests and the protection of global commons with respect to measures with extraterritorial effect were addressed by the WTO Appellate Body in the *Shrimp/Turtle Case*. The Appellate Body gave some, admittedly cautious, approval of the possibility of adoption of measures related to protection of species located outside a state’s jurisdiction.²⁴⁷ It was careful to note that it did not “pass upon the question of whether there is an implied jurisdiction limitation in article XX(g)” and referred to the fact that in the specific case “the sea turtle species here at stake [...] are all known to occur in waters over which the United

²⁴⁴ See S.A. Hagan, “Too big to tackle? The persistent problem of pirate fishing and the new focus on port state measures,” 37 *Suffolk Transnational Law Review* (2014), p. 129, who argues: “Concentrating regulatory efforts at ports is cost-effective, safer, and more logistically efficient, as entry through the port is a necessary step in the supply chain from ocean to table.”

²⁴⁵ H.L. Buxbaum, “Conflict of economic laws: from sovereignty to substance,” 42 *Virginia Journal of International Law* (2002), p. 956 notes that:

The term substantivism ... is used to describe a choice-of-law methodology whose goal is to select the better law in any given case. Under this approach, the analysis of substantive content is central and not merely an aspect of an otherwise territory- or sovereignty-based approach. Under this approach, in other words, a court faced with a choice-of-law problem will resolve it by choosing a law rather than a jurisdiction.

See also R.A. Leflar, “Choice-Influencing considerations in conflicts law,” 41 *NYU Law Review* (1966), p. 295-304 and Ryngaert, supra note 10, p. 199 *et seq.*

²⁴⁶ See comments by the U.S. Supreme Court in the *Mirkovich v Milnor*, supra note 126, p. 412.

²⁴⁷ United States – Import prohibition of certain shrimp and shrimp products, DS58/AB/R, Report of Appellate Body, available on the WTO website, at <www.wto.org>.

States exercises jurisdiction”.²⁴⁸ Despite this territorial link, which was stressed for purposes of factual evidence without however apparent normative or interpretative intention, the Appellate Body stressed the existence of a “sufficient nexus between the migratory and endangered marine populations involved and the US”.²⁴⁹ Importance was also placed upon the fact that neither litigant claimed “exclusive ownership over the sea turtles”.²⁵⁰ It was thus implied that the United States had a legitimate interest in the conservation of turtles outside its national jurisdiction,²⁵¹ which may be dependent on the effects caused by the relevant activities upon these interests and the specific global common.

C. Protection of Global Commons and Jurisdictional Safeguards

Jurisdiction grounded on the harmful effects of activities upon the global commons raise a number of concerns which need to be considered carefully. The exercise of legislative and enforcement jurisdiction in the case of protection of global commons can be criticised as a form of unilateralism ignoring the principle *pacta tertiis nec nocent nec prosunt*, and therefore the consensual nature of international law, or the absence of international consensus with respect to the regulation of a specific problem.²⁵² The imposition of unilaterally-prescribed measures upon

²⁴⁸ *Ibid.*, para. 133.

²⁴⁹ *Ibid.* See Ryngaert, *supra* note 10, p. 98 and Bartels, *supra* note 191, p. 388-9.

²⁵⁰ *Ibid.*, para. 133. Would the contrary, namely, that the species cannot be found within the jurisdiction of a state, deprive the state of their right to legislate or diminish its legitimate interest? The Appellate Body did not seem to imply this, rather it focused on the facts of the specific situation and stressed that it was not making general comments regarding jurisdictional issues.

²⁵¹ Sands and Peel, *supra* note 4, p. 193. See also P. Sands, “‘Unilateralism,’ values and international law,” 11 *European Journal of International Law* (2000), p. 299, who argues that “the decision may be seen as a radical expression by a leading international judicial authority of the potential capacity of state to act unilaterally in seeking to apply their environmental standards to activities taking place outside their jurisdiction.”

²⁵² Generally on unilateralism, see Bodansky, *supra* note 243, p. 341. Sands, *supra* note 251, p. 293, comments: “Unilateral acts become especially contentious where they are associated with the imposition by one community of its values on another community, and where that other community has not consented to or acquiesced in the imposition of such values.” See also L. Boisson de Chazournes, “Unilateralism and environmental protection: issues of perception and reality of issues,” 11 *European Journal of International Law* (2000), p. 315-338 and Ryngaert, *supra* note 10, p. 185, 188.

states which have not accepted them may also be considered as green imperialism and as an infringement upon sovereignty and state equality.

However, international standards enforced vis-à-vis third states may not truly be unilateral where they are in line with objectives and obligations derived from international instruments.²⁵³ The jurisdiction assumed by a state can be said to reflect (general though not unanimous) international consensus and is undertaken to facilitate the effectiveness of international rules²⁵⁴ with respect to the non-compliance of free-riders. The lack of international consensus regarding specific measures enforced upon vessels by a port state can be controversial due to the imposition of nationally-prescribed rules upon other members of the international community and the impact the enforcement may have upon the shipping industry which relies on uniformity and the universality of standards. The principle of common concern mitigates the unilateral aspect of such measures by focusing on their objective and benefits. This can legitimise jurisdictional competence, but also restrict it. Port states need to ensure that any such “unilateral” measures reflect an international consensus with respect to the protection of specific aspects of the global commons in line with multilateral instruments and cooperative processes. Cottier refers to “common concern as a principle instigating both cooperation and unilateral action in a dialectical process”.²⁵⁵ The aim of such measures should be to enhance the efficiency of

²⁵³ The obligations can be specific, i.e., rules related to conservation of fishing resources enshrined in RFMOs or more general related to the protection of the marine environment, LOSC provisions or commitments to tackle climate change.

Molenaar, supra note 45, p. 243, notes that such measures are not unilateral “because [they] support the interests of specific other states or the international community in general”. Bodansky, supra note 243, p. 345 comments:

... unilateral action, although questionable from a process standpoint, may nevertheless be justified by its substantive objectives and results. When unilateral action is aimed at developing multilateral standards that are impartial and advances shared objectives, rather than parochial national interests, then it can play a beneficial role in the international standard-setting process.

²⁵⁴ The EU in its submission as a third party to the *Shrimp/Turtle Case* stated that: “In this field [international environmental law], the application of agreed rules beyond the normal jurisdictional limits of Members might indeed be necessary to ensure effective application of such rules.” *Shrimp/Turtle Case*, supra note 247, para. 356.

²⁵⁵ Cottier, *et al.*, supra note 9, p. 296.

multilateral/collective measures vis-à-vis free riders or to create “incentives to international cooperation under the same principle of common concern”.²⁵⁶ In this respect, jurisdictional safeguards such as necessity²⁵⁷ and proportionality of the legislation vis-à-vis the specific objective, including the consideration of alternatives related to less intrusive means without the extraterritorial scope,²⁵⁸ would need to be taken into account. Multilateral efforts should be attempted before there is an exercise of jurisdiction,²⁵⁹ and in cases of inconclusive discussions at the international level, the adopted national measures should not preclude but should strengthen the possibility of adopting multilateral measures by streamlining its content with relevant suggestions and options for future international standards.²⁶⁰

A further jurisdictional safeguard concerns the interests of the flag state, as the state having concurrent jurisdiction. The concept of subsidiarity suggested by Ryngaert is interesting and relevant in this respect. He argues that if the state with the strongest link to a situation does not assume its jurisdictional responsibility, it may forfeit its right to protest against other states’ jurisdictional assertions over that situation.²⁶¹ He links this failure to assume jurisdiction with its consequences being “on aggregate, harmful to, the regulatory interests of the international community”.²⁶² This subsidiarity has already been observed in port measures in international instruments and state practice and legislation discussed above since the enforcement of port measures requires the flag state to be notified so as to enhance cooperation and implementation

²⁵⁶ *Ibid.*, p. 302.

²⁵⁷ Bodansky, supra note 243, p. 346, discusses the following criteria with respect to necessity: “is unilateral action truly necessary to promote an international standard, or is there a prospect of developing an effective multilateral regime? And if the latter, is there sufficient time to pursue the international option, given the nature of the environmental threat?”

²⁵⁸ Ringbom (2008), supra note 49, p. 375, refers to achieving the objective of the legislation only by extending the rule to the high seas.

²⁵⁹ WTO *Shrimp/Turtle Case*, supra note 247.

²⁶⁰ See for example Regulation (EU) 2015/757, supra note 94, article 22, para. 3, where the EU noted that the legislative initiative was due to the lack of a relevant agreement in the IMO, but also clearly expressed its preference for an international agreement and cooperation.

²⁶¹ Ryngaert, supra note 10, p. 190.

²⁶² *Ibid.*

of the relevant measures.²⁶³ But at the same time the failure of flag states (especially continuous failure as has been manifest in fisheries regulation) to exercise regulatory jurisdiction over its vessels or their reluctance to subscribe to international rules or act for the protection of global interests justifies their circumvention in favour of a state willing and capable of asserting this jurisdiction.

Further cooperation and collaboration may be attempted with various stakeholders in order to enhance the understanding of the need and scope of the substantive aspect of jurisdictional protection referring to common interests. Better understanding of the regulatory intention and implications, especially in cases of exercise of jurisdiction related to unilaterally-prescribed measures, could legitimise the process and facilitate and strengthen acceptance by other states and stakeholders. Considerations related to the measures themselves can also function as safeguards of reasonableness, such as costs implications, flexibility and potential inclusion of alternative means to minimise costs and enhance compliance by vessels, and interference with navigation and trade.

V. Concluding Remarks

This article has examined the practice of port states exercising authority over vessels in port where the actions of the vessels raised questions or concerns about the global commons with the view to ascertaining the scope and limits of the exercise of such jurisdiction. An expansion of port state jurisdiction in instances of measures with extraterritorial application and effects in cases of protection of global commons was observed. There was also a reticence to endorse extraterritoriality explicitly and directly. Reliance on entry requirements was important in cases

²⁶³ Subsidiarity is also implied LOSC, supra note 27, in articles 218(4) (regarding notification of the flag state) and 228(1) (suspension of proceedings by the port state if the flag state initiates proceedings unless the flag state has “repeatedly disregarded its obligation”). In a similar way Directive 2008/101 (supra note 169) requires that the EU take into account the measures that other states had taken to tackle climate change from aviation (see article 25a).

with a more direct regulation of extraterritorial activities such in the cases of fisheries and traffic schemes. It was argued that entry requirements cannot be disassociated from the exercise of jurisdiction, while the imposition of such requirements needs to be in line with concepts such as good faith and non-abuse of right which are also relevant for the exercise of jurisdiction.

It was further suggested that an expanded territorial principle may not clearly and sufficiently justify the extraterritorial elements which need to be validated by the existence of a reasonable jurisdictional link. Territoriality can provide only a limited solution to the protection of global commons, and, as indicated by state practice and the attempts of states to territorialise the offences (especially related to fisheries), it may be restrictive with respect to the measures and their enforcement. This may mean that the port state can not take advantage of all the possible jurisdictional options in international law, since extraterritorial jurisdiction has been successfully used by states for various reasons. It will be a missed opportunity if port states do not develop or utilize such potential.

A number of generally-accepted jurisdictional principles and their relevance as jurisdictional bases for the exercise of extraterritorial port state jurisdiction for the protection of global commons were explored. Despite the fact that aspects of these jurisdictional principles were found to be relevant, a jurisdictional framework – based on elements of state practice as analysed in the article - was developed with respect to the existence of a legitimate and reasonable jurisdictional link based on the concept of global commons as an issue of common concern and the effect the regulated activities have upon them. It was argued that these concepts legitimise the exercise of extraterritorial jurisdiction by the port state and provide a legitimate jurisdictional link. This is seen as being in line with contemporary aspects of jurisdiction based on legitimacy, reasonableness, effectiveness and necessity.

Engagement with extraterritorial elements can strengthen the jurisdictional assertions via a process of legitimisation where the interests of other states and the international community are taken into account and potential encroachments upon sovereign rights and interests can be averted. The cooperative and multilateral aspect of the exercise of jurisdiction with respect to the protection of the global commons by virtue of international instruments and the resultant obligations of states to protect them can provide a reasonable and legitimate basis for the exercise of jurisdiction. Further safeguards have been suggested to ensure that the exercise of jurisdiction is reasonable and clearly reflects a legitimate balancing of state interests, which is an integral part of jurisdictional assertions.