UiT The Arctic University of Norway | Faculty of Law

Sanitary Jurisdiction of coastal and port States

A discussion on conflicting interests and reconciliation mechanisms

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“*Μέσον ἄρα τι τὸ δίκαιον, εἴπερ καὶ ὁ δικαστής. ὁ δὲ δικαστὴς ἐπανισοῖ, καὶ ὥσπερ γραμμῆς εἰς ἄνισα τετμημένης, ᾧ τὸ μεῖζον τμῆμα τῆς ἡμισείας ὑπερέχει, τοῦτ’ ἀφεῖλε καὶ τῷ ἐλάττονι τμήματι προσέθηκεν. ὅταν δὲ δίχα διαιρεθῇ τὸ ὅλον, τότε φασὶν ἔχειν τὸ αὑτοῦ ὅταν λάβωσι τὸ ἴσον.*”

Αριστοτέλους, *Ηθικά Νικομάχεια*, E 1132a, 24

“*That which is just, then, must be a sort of mean, if the judge be a “mediator”. But the judge restores equality; it is as if he found a line divided into two unequal parts, and were to cut off from the greater that by which it exceeds the half, and to add this to the less. But when the whole is equally divided, the parties are said to have their own, each now receiving an equal or fair amount.*”

Aristotle, *The Nicomachean Ethics*, E 1132a, 24
Translated by *F. H. Peters*, London (1906), Book V [4], 8, p. 150[*]

[*] Available at: https://www.stmarys-ca.edu/sites/default/files/attachments/files/Nicomachean_Ethics_0.pdf.

List of abbreviations

Art.	Article
BYIL	British Yearbook of International Law (journal)
CDEM	Construction, Design, Equipment and Manning (requirements)
Cf.	confer
CILJ	Cambridge International Law Journal (journal)
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law (journal)
COVID-19	Coronavirus disease 2019
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ed(s).	editor(s)
EJIL	European Journal of International Law (journal)
EJIL: Talk!	Blog of the European Journal of International Law
EMSA	European Maritime Safety Agency
ER	English Reports (journal)
et seq.	et sequentia
ff.	folio
ibid.	ibidem
ICJ	International Court of Justice
ICLQ	International & Comparative Law Quarterly (journal)
IHR	International Health Regulations
IJMCL	International Journal of Marine and Coastal Law (journal)
ILC	International Law Commission
ILDC	Oxford Reports on International Law in Domestic Courts (journal)
ILO	International Labour Organization
IMO	International Maritime Organization
in f.	in fine
ITLOS	International Tribunal for the Law of the Sea
LNTS	League of Nations Treaty Series
LOSC	Law of the Sea Convention

MPEPIL	Max Planck Encyclopedias of International Law
M/S	Motor ship
M/V	Motor (or merchant) vessel
n.	note(s)
n.m.	nautical mile(s)
No.	number
ODIL	Ocean Development & International Law (journal)
op. cit.	opus citatum
p.	page
para(s).	paragraph(s)
PHEIC	Public health emergency of international concern
subpara.	subparagraph
UN	United Nations
UN DOALOS	United Nations – Division for Ocean Affairs and the Law of the Sea
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
YB	Yearbook

Formatting notes

- The study has been drafted and formatted in accordance with the relevant requirements set forth in the LL.M. Regulations. More specifically: *(a)* its length is **55 pages**, including footnotes and conclusions; *(b)* the font used is the 'Times New Roman' [size **12 pt**, line spacing **1,5** and margin **2,5**].
- The study, in its aforementioned length, **does not include** the first pages and the bibliography catalogue.
- Any provisions that are **not** followed by the full name or the abbreviation of a specific legal instrument shall be deemed as referring to the Law of the Sea Convention (LOSC).
- In order to facilitate internal references, the paragraphs of the main chapters are consecutively numbered.
- The pictures used on the front and the back page of the study are digital copies of two paintings made by Panagiotis Gkikas who generously granted his permission to use them in this essay.

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Introduction

Contextual background

In May 1720, after a voyage of ten months, the merchant ship '*Grant-Saint-Antoine*' arrived at the harbour of Marseilles with fine cottons and silks from the Levant. Part of the cargo had been accidentally contaminated with the bacterium '*Yersinia pestis*', responsible for the bubonic plague. Despite the introduction of strict sanitary protocols, including the quarantine of the ship, the bacterium spread rapidly around the city, causing the Great Plague outbreak which is estimated to have killed 100.000 people. Today, 300 years later, the world is called upon to deal with a similar situation of public health emergency. The ongoing Coronavirus disease (Covid-19) outbreak[1] has proven to be a particularly challenging test case for the majority of States, especially as regards their preparedness to respond to a pandemic of this scale and complexity. In light of the urgent necessity to ensure unimpeded performance and responsiveness of the national health systems, several States have adopted and implemented a wide range of restrictive measures in order to mitigate the risk of contagion, and in so doing, slow down the spreading pace of the new virus. Among the innumerable health, social and economic consequences both of the pandemic itself and of the relevant measures, various legal concerns have been raised as to whether such restrictions are compatible with the constitutional order of the States. The general legal concerns arising from the pandemic-related measures can be further elaborated with an emphasis on specific nuances that are relevant in the framework of the law of the sea. In light of the exceptional sanitary policy currently in place, several coastal States have imposed restrictive measures on foreign vessels navigating through their territorial sea or entering their ports. This practice triggers a legal debate on how to reconcile the public health interests of a coastal State, on the one hand, and the rights and freedoms that foreign merchant vessels enjoy in areas under national jurisdiction, on the other.

Research problem

As will be thoroughly discussed, within the realm of the law of the sea, the ultimate purpose of the sanitary jurisdiction is to protect the public health of a coastal State against a foreign vessel which may carry a sanitary hazard. Just as in various other occasions of protected interests, coastal States are empowered to adopt and implement sanitary measures in areas under their jurisdiction on account of such protection. Notably, the sanitary jurisdiction is a protective regime mostly oriented towards the *prevention* rather than the *ex post* suppression of the relevant infringements. Thus, the

[1] Available at: https://www.who.int/emergencies/diseases/novel-coronavirus-2019; last access on 14.9.2020.

main burden falls on the jurisdictional options that a coastal State has in order to *forestall* a hygienic risk *before* this is actually materialized. Most importantly though, this practically means that the coastal authorities are expected to interfere with certain rights and freedoms that foreign merchant ships enjoy in those areas under international law. That said, the core research problem to be solved concerns the legitimacy limits of this very interference in light of the public health objectives pursued.

Research objectives

Within the context outlined above, the purpose of this study is to ascertain the legal aspects arising from the coastal States' sanitary jurisdiction against foreign vessels which navigate in areas under national jurisdiction. More specifically, through the interpretation of the relevant applicable law, accompanied by targeted subsidiary means, the study seeks to investigate to what extent a coastal State may interfere with the rights and freedoms that foreign merchant vessels enjoy in areas under national jurisdiction for the purpose of protecting its public health interests. As implied in the title, and is best illustrated in the following chapters, the principal burden falls on the examination of how the applicable law should be interpreted and applied in order to best accommodate the relevant conflicting interests, thus striking a fair and equitable balance therebetween.

Research questions

On the basis of the above remarks, the core research question is *to what extent a coastal State may interfere with the rights and freedoms of foreign merchant vessels navigating in areas under national jurisdiction by virtue of sanitary measures*. An answer thereto shall be provided through the discussion of the following five (5) sub-questions:

1. What are the scope and the limits of the jurisdictional powers of a coastal State against vessels in the contiguous zone under Art. 33?
2. To what extent a coastal State may regulate the right of innocent passage by virtue of sanitary laws under Art. 21(1)(h)? To what extent a coastal State may apply such preventive measures under Art. 25?
3. What sanitary-related infringements may entail disqualification from the right of innocent passage under Art. 19? What are the punitive measures that may be enforced in this case?
4. To what extent a coastal State may regulate and apply sanitary laws against foreign merchant vessels in transit passage under Art. 42(1)(d)?
5. How is entry into internal waters and ports regulated in the context of the sanitary jurisdiction, in the case of: *(a)* normally operating vessels; and *(b)* vessels in distress?

Research outline

Towards achieving the aforementioned objectives, the research body focuses on the examination of how the sanitary policy of coastal States interacts with the fundamental regimes which govern the various maritime zones under national jurisdiction. Commencing from the contiguous zone and the discussion of the relevant powers under Art. 33, the study shall proceed with the investigation of how the sanitary jurisdiction interacts with the passage rights of foreign ships. In the first part of this chapter, the spotlight shall be put on the scope and the limits of coastal States' jurisdiction to adopt and enforce sanitary measures against foreign merchant vessels in innocent passage, while the second part shall discuss the relevant powers against vessels in transit passage. Furthermore, the study continues with the legal analysis on how a port State may regulate access into its internal waters and ports by virtue of sanitary measures, both in case of normally operating vessels and vessels in distress. Finally, the research burden falls on the discussion of certain elements stemming from the proportionality principle, the latter being estimated to form a catalytic methodological tool for achieving the reconciliation sought in the present context.

Sources & Methodology

The study discusses the relevant legal issues on the basis of various sources of international law, as listed in Art. 38 ICJ Statute.[2] The cardinal **legal sources** for the research purposes are to be found in certain provisions of the Law of the Sea Convention[3] (hereinafter LOSC or Convention), as well as the International Health Regulations[4] (hereinafter IHR or Regulations). With the two instruments forming the central axis, the study shall progressively employ other legal sources and subsidiary means, according to the nuances of the discussion in question.[5] Finally, other sources which are not authoritative *stricto sensu*, such as official reports, guidelines, soft law instruments and websites may also be used.

[2] Statute of the International Court of Justice; signed on 26.6.1945; entered into force on 24.10.1945, 1 UNTS XIV.

[3] UN Convention on the Law of the Sea; signed on 10.12.1982; entered into force on 16.11.1994, 1833 UNTS 3.

[4] International Health Regulations (2005) 3rd ed., World Health Organization 2016; entered into force on 15.6.2007.

[5] Inter alia: International Convention on maritime search and rescue (signed on 27.4.1979; entered into force 22.6.1985; 1405 UNTS 119); IMO Guidelines on places of refuge for ships in need of assistance (IMO Res. A.949(23) of 5 December 2003); European Convention for the Protection of Human Rights and Fundamental Freedoms (signed in Rome on 4.11.1950); WHO, Operational considerations for managing Covid-19 cases or outbreaks on board ships, Interim guidance (25.3.2020); IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization; Study by the Secretariat of IMO; (2014); WHO/IMO, A Joint Statement on the Response to the Covid-19 Outbreak, 13.2.2020; see list of sources at the end.

With regard to the **methodology** employed, the study is exclusively conducted by means of the *doctrinal legal research* and focuses on the normative and teleological investigation of the relevant applicable law. More precisely, it uses the analytical legal method, with the principal burden falling on the interpretation and analysis of the primary and secondary legal sources, placing particular emphasis on the provisions enshrined in the aforementioned two instruments; both individually and in light of the normative interaction therebetween. For this task, the study makes recourse to the rules of Art. 31 et seq. of the Vienna Convention on the Law of Treaties (hereinafter VCLT).[6]

Delimitation of scope

This essay is a legal research in the field of public international law and, specifically, within the law of the sea domain. As such, any aspects related to private international law and international maritime law shall fall beyond its scope. From within the context of the law of the sea, the study shall *exclusively* discuss the legal aspects arising from the sanitary jurisdiction of coastal States against foreign merchant ships in areas under national jurisdiction. Therefore, it shall abstain from any examination of matters related to: ***(a)*** the flag States jurisdiction; ***(b)*** the coastal States jurisdiction on health laws over artificial islands and installations in the EEZ, under Art. 60(2); ***(c)*** the archipelagic States jurisdiction; ***(d)*** the transit passage of aircrafts; ***(e)*** warships and other government ships operated for non-commercial purposes; ***(f)*** the international responsibility of a flag State in case that a ship in transit passage does not comply with the relevant sanitary measures under Art. 42(1)(d). Finally, the study shall abstain from the discussion of the actual health measures that may apply to travellers, conveyances and cargo, once the hazardous ship is docked at a point of entry, given that the topic is mostly of a technical and *lege artis* character.

[6] Vienna Convention on the Law of Treaties; signed on 23.5.1969; entered into force on 27.1.1980, 1155 UNTS 331.

Chapter I

Normative interaction between the LOSC and the IHR

1. The hybrid nature of the sanitary jurisdiction

1 As is the case with various legal (sub)domains which arise from the intersection of major fields of law following a respective overlap in human activities, the sanitary jurisdiction of coastal States is similarly built upon the foundations of two fields of study: the law of the sea on the one side, and the international health law, on the other. As will be best illustrated in the following chapters, the hybrid nature of this domain is already reflected in the fact that the relevant activities are subject to diverse regulatory factors at both normative and institutional level. Thus, as it logically follows, the prudent and holistic examination of this topic requires an *'interpretative oscillation'* between the two major instruments which govern the two legal fields respectively. That said, with the LOSC forming the central research axis, the study shall progressively examine the applicable provisions in light of the IHR. As will be shown, the latter will prove a catalytic companion for the facilitation of the legal analysis, as well as the normative specification of the measures in question. For this reason, before proceeding to the main research body, it is considered necessary to discuss the normative interaction between the LOSC and the IHR.

2 According to Art. 2 IHR, '[t]he purpose and scope of these Regulations are to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.' Reading this in light of the reconciliatory mission of the LOSC to strike a fair balance between the public health interests of a coastal State and the rights and freedoms of foreign merchant vessels, one may suggest that both instruments are moving towards the same teleological direction. With this in mind, a practical consolidation of the subject calls for the joint reading thereof, as well as the interpretative complementarity of one another. Thus, the LOSC provisions are being specified through the IHR while, at the same time, the provisions of the latter are interpretatively adjusted to the nuances of the law of the sea.

3 This regime interaction seems to be in line with the regulatory limits of both instruments. More specifically, Art. 311(2) LOSC reads '[t]his Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.' Similarly, Art. 57(1) IHR provides that 'States Parties recognize that [the IHR] and other relevant international agreements *should be interpreted so as*

to be compatible. The provisions of the IHR shall not affect the rights and obligations of any State Party deriving from other international agreements.' (emphasis added). Ultimately, the suggested interplay between the two instruments seems to be 'under the auspices' of the VCLT, Art. 31(3)(c) of which reads '[t]here shall be taken into account, together with the context [...] any relevant rules of international law applicable in the relations between the parties.'.

2. The regulatory meaning of the term 'sanitary'

4 One may suggest that the first interpretative product from this interaction is already the regulatory meaning of the term *sanitary*. More specifically, the LOSC employs the term in *four* provisions to merely describe the *kind* of the laws and regulations that may apply in certain cases.[7] Apart from that, it remains silent as to what exactly the sanitary legislation may concern. According to its ordinary meaning, the term *sanitary* is defined as something 'relating to health or pertaining to the conditions affecting health, especially with reference to cleanliness and precautions against infection and other deleterious influences [...]'.[8] From this definition, one may see that the term is conceptually related to the notion of *health*. Importantly though, the two words should not be understood as synonyms. In fact, a closer look seems to indicate that there is a teleological *nexus* between the two: that is to say, the notion of *health* forms a broader concept which encompasses the ultimate purpose pursued, while the term *sanitary* refers to specific means and conditions set out for serving this purpose. This being said, not every health-related issue raises a sanitary interest. While the recourse to its ordinary meaning somewhat paved the way for its interpretation, the definite determination of the term's regulatory scope seems to be eventually achieved in view of the IHR. Indeed, a quick reading of the latter suffices to observe that the relevant provisions make predominant use of the compound term *public health* in order to describe both the objectives and the function of the measures.[9] It thus seems to follow that from every health related issue, only those concerning the *public health* may raise a sanitary interest. Besides, the close conceptual relationship between the terms *sanitary* and *public health* may be further amplified considering that the predecessor of the IHR was titled 'International Sanitary Regulations'.[10] In light of the

[7] Art. 19(2)(g), 21(1)(h), 33, 42(1)(d) LOSC.

[8] Oxford University Press, OED Online, available at: www.oed.com/view/Entry/170705; last access 6.9.2020.

[9] For example, Art. 1 IHR defines *health measures* as 'the procedures applied to prevent the spread of disease or contamination [...]'. Similarly, *public health risk* means 'a likelihood of an event that may affect adversely the health of human populations, with an emphasis on one which may spread internationally or may present a serious and direct danger'; see, inter alia, Art. 2, 23, 28, 43 which are some of the key provisions on the topic discussed herein.

[10] See International Sanitary Regulations, World Health Organization Regulations No. 2 (1951); available at: https://apps.who.int/iris/bitstream/handle/10665/86489/WHA4.75_eng.pdf?sequence=1&isAllowed=y.

above remarks, a coastal State may not embody every health law in its sanitary policy, but only those tending to protect its *public health* against a hygienic risk.[11]

5 In the same vein, the term sanitary should be understood as excluding from its scope matters relating to the protection of the marine environment. Indeed, despite the fact that an oil polluting incident might indirectly affect the health conditions of the people living ashore, the Convention comprises numerous provisions regulating these cases *ad hoc*.[12] Therefore, a broad interpretation of the term would possibly entail a severe risk of excessive jurisdictional claims on behalf of the coastal States in the name and by virtue of allegedly sanitary measures.[13]

3. The IHR as a means of interpretation of the LOSC

6 Within the context of international navigation, most of the provisions of the IHR concern health measures to be implemented once the hazardous vessel is docked at a point of entry. In this case, the relevant provisions may directly apply to specify the respective powers of a coastal State. At the same time, for reasons of major protection of their legitimate interests, various provisions in the LOSC authorize coastal States to apply preventive measures against a potentially hazardous vessel at an earlier stage; namely, prior its entry into a port or a roadstead facility. While access into ports is warranted *ad hoc* regulation within the IHR, anything concerning the jurisdiction of a coastal State before that point (i.e. while the ship is in the contiguous zone or the territorial sea) is left for regulation to the general provisions of the LOSC. Notably, even in this case, the IHR will prove to be a benchmark for the normative specification of those measures *mutatis mutandis*.

7 Overall, as will be further explained below, the regulatory content of the IHR seems to materialize, in an exemplary manner, the objectives of the LOSC as regards an equitable reconciliation model between the relevant conflicting interests.[14] Under this point of view, one would not be out of place to suggest that some of the measures enshrined in the former may be used as the '*model legislation*' that a coastal State is expected to adopt under the LOSC.[15] More so, given that the vast majority

[11] Cf. *Women on the Waves case*, ECtHR, Women on the Waves and Others v. Portugal, Judgement of 2 March 2009. The Portuguese authorities banned *Borndiep* from entering the territorial sea. The vessel was in a mission to support a campaign for decriminalization of abortion. The relevant decision was, inter alia, justified on the grounds of protecting the national health laws; more about the case, infra n. 94.

[12] Art. 21(1)(f), 56(1)(b)(iii), Part XII, esp. 210(2), 211(5), 220; see Crawford J., *Brownlie's Principles of Public International Law*, (2019), 267-268.

[13] See Khan, 'Article 33', in Proelss A. (ed.) *The United Nations Convention on the Law of the Sea: A Commentary*, (2017), para. 28. The author brings as an example the debate raised in the context of the 1999 US Contiguous Zone proclamation, where there have been expressed suggestions of equating 'sanitary' with 'pollution'; cf. Crawford J., supra n. 12, 267; Molenaar E., *Coastal State Jurisdiction over Vessel Source Pollution*, (1998), 280-281.

[14] See, for example, the measures included in the temporary recommendations under Art. 15 IHR, recently issued by the WHO for providing appropriate public health response to the ongoing Covid-19 pandemic; infra, Chapter IV/3.

[15] Infra paras. 35-36.

of the States are Parties to the IHR,[16] it seems that the relevant provisions are actually taking the place of the various national 'laws and regulations' provided for under the LOSC. If anything, the policy-making technique through international agreements should be without hesitation acclaimed, as it ensures not only a proper degree of regulatory uniformity, but also appropriate awareness of the measures in place, thus promoting the legal certainty.[17]

8 However, it is important to note that the IHR do not substitute the sovereign right of the States to unilaterally adopt different and –in some cases– stricter health measures. In this regard, Art. 3(4) IHR expressly reads: 'States have, in accordance with the Charter of the United Nations and the principles of international law, the *sovereign right to legislate* and to implement legislation in pursuance of their health policies.' (emphasis added). In the same vein, Art. 43(1) IHR stipulates that the IHR 'shall not preclude States Parties from implementing health measures, in accordance with their relevant national law and obligations under international law, in response to specific public health risks or public health emergencies of international concern [...]'.[18] Importantly though, both provisions continue highlighting how important it is for those measures to not exceed the legitimacy of the IHR. Specifically, Art. 3(4) IHR states that: '[i]n doing so [States Parties] should uphold the purpose of these Regulations', while the second passage of Art. 43(1) IHR reads that such measures 'shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection'. It thus seems to follow that the coastal States do retain the sovereign right to legislate insofar as the national measures take account of the utmost protective limits set by the IHR in respect for a fair and equitable reconciliation between the conflicting interests. In the same vein, the LOSC comprises various similar elements that delimit the jurisdictional powers of a coastal State in an attempt to avoid the unilateral introduction of excessive or abusive domestic requirements. Those very elements are specifically addressed in the following chapters in light of the respective legal regimes governing each maritime zone.

[16] According to the World Health Organization, there are 196 States Parties to the IHR, including all WHO member States; available at: https://www.who.int/ihr/legal_issues/states_parties/en/; last access on 22.8.2020; cf. Broberg M., 'A critical appraisal of the World Health Organization's International Health Regulations (2005) in times of pandemic: It is time for revision', *European Journal for Risk Regulation*, 11 (2020), 202 et seq. (204). The author points out that the IHR figures amongst the international agreements that most States have signed up to.

[17] Cf. the duty of information, infra para. 39.

[18] For the relevant discussion, see Chapter IV/3.

Chapter II

Sanitary jurisdiction in the contiguous zone

1. Scope of the jurisdictional powers in the contiguous zone

9 The contiguous zone, where proclaimed, is the furthest maritime area where a coastal State may exercise a certain degree of control against foreign vessels by virtue of sanitary laws.[19] This section discusses the scope of relevant powers as provided for in Art. 33 LOSC. According to para. 1 '[i]n a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the *control necessary* to: (a) *prevent* infringement of its [...] sanitary laws and regulations within its territory or territorial sea; (b) *punish* infringement of the above laws and regulations committed *within its territory or territorial sea*.' (emphasis added).

10 Already from its wording, one may determine *grosso modo* the application scope of the provision. A coastal State is empowered to exercise the *control necessary* against foreign vessels in the contiguous zone in order to protect certain interests, including those concerning its public health. This protection may be achieved via two jurisdictional modes: *(a)* by *preventing* an infringement beforehand; or/and *(b)* by *punishing* the perpetrators after such infringement occurs. Notably, both modes seem to be parts of the enforcement mechanism of the coastal State. This, coupled with the fact that Art. 33 makes no substantive reference to the underlying laws that are to be enforced, allows for the safe conclusion that *no prescriptive jurisdiction* may be exercised within the contiguous zone.[20] In other words, the laws referred to in Art. 33 do not *per se* apply to the zone, but the State may only exercise some *limited enforcement powers* to protect the integrity thereof, as they apply within the territory and the territorial sea.[21] Thus, the jurisdiction in the contiguous zone does not derive from the zone itself, but constitutes an *attenuated extension* of the relevant powers that the State enjoys in areas under its sovereignty. This should be mostly attributed to the fact that the contiguous zone forms a part of the high seas (Art. 86) or the EEZ (Art. 55) which both are maritime areas where foreign vessels enjoy the freedom of navigation.[22] This functional

[19] According to Art. 33(2), the maximum breadth of the contiguous zone is 24 n.m. from the baselines.

[20] See *M/V Saiga (No. 2) case*, (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10, para. 127; see also, Crawford J., supra n. 12, 265; Khan, Art. 33, supra n. 13, para. 23; Tanaka Y., *The International Law of the Sea* (2015), 122-123, where further citations on the debate regarding the legal nature of the relevant powers; cf. Eschenhagen P., Jürgens M., 'Protective jurisdiction in the contiguous zone and the right of hot pursuit: Rethinking coastal States' jurisdictional rights', *Melbourne Journal of International Law* 19 (2018), 1 et seq., (6).

[21] For the legal debate about the nature of the relevant enforcement powers, see Crawford J., supra n. 12, 266-269; Khan, Art. 33, supra n. 13, para. 23; Eschenhagen/Jürgens, supra n. 20, 2; cf. Gavouneli M., *Functional Jurisdiction in the Law of the Sea* (2007), where she aptly observes that 'the contiguous zone is the embodiment of the protective principle'.

[22] Crawford J., supra n. 12, 265.

peculiarity can be well illustrated by the following analogy: The relevant powers are like *trees standing by the borders of two adjacent land plots*; while their roots are located in areas under the full sovereignty of the State, their spiky branches extend beyond them.

11 Moving on, Art. 33 uses the term *control necessary* to delimit the scope of the relevant powers.[23] As will be thoroughly discussed below, the term should be understood as meaning that, among other options available, the coastal State must apply those achieving the regulatory objectives with the least possible cost for the foreign vessel.[24] Finally, as noted, the provision establishes both the *preventive* and the *punitive* options of a coastal State. However, it does not specify what measures may be implemented in each case, reserving this task for those studying its components. For purposes of better understanding, the two options need to be examined individually.

2. Preventive jurisdiction

12 According to Art. 33(1)(a), a coastal State may exercise the control necessary to prevent any infringement of the sanitary laws and regulations within its territory or territorial sea.[25] Since the sanitary laws do not *per se* apply in the contiguous zone, any infringement thereof may only occur once the vessel is within the territorial sea or the territory of the State. It thus logically follows that any action to prevent such infringement *ex ante* may only be taken against inbound vessels. On the other hand, foreign vessels merely traversing the contiguous zone without any intention to enter the territorial sea must be excluded from the application of Art. 33(1)(a).[26]

13 Moving on, as will be further discussed below, due to the biological nature of a hygienic risk, any sanitary infringement is most likely to occur when the ship is docked at an entry point.[27] Similarly, the actual implementation of health measures shall normally take place therein. This being said, the preventive mechanism of a coastal State against an inbound ship –both in the contiguous zone and the territorial sea– seems to focus on the *verification* and *assessment* of a sanitary hazard in order to decide whether the ship should be granted admission to proceed landwards.[28] In light of

[23] Eschenhagen/Jürgens, supra n. 20, 2, 4, 10. The authors accurately observe that the term *control necessary* seems to reject the notion of full jurisdiction in the contiguous zone.

[24] See Chapter V.

[25] Art. 33 indistinguishably refers to four different groups of laws. However, as will be best understood in the following chapters, the grouping of those laws under one overarching provision should be attributed to mere legislative brevity. Apart from that, each of them constitutes an individual regulatory module, requiring to be interpreted as such. With this in mind, the study shall discuss only those elements that are relevant in the context of the sanitary jurisdiction.

[26] Khan, Art. 33, supra n. 13, para. 23, who pointedly observes that maritime traffic in mere transit beyond the twelve-mile limit is very unlikely to have a negative impact on the onshore public order; cf. Tanaka, supra n. 20, 122.

[27] Infra para. 42.

[28] Cf. Eschenhagen/Jürgens, supra n. 20, 10 who argue in favour of the *administrative character* of the control rights in the contiguous zone. This view seems to well correspond with the above description about the preventive measures that the coastal authorities may take against a hygienically hazardous vessel in the contiguous zone. For

this, one may suggest that the relevant interference takes place in two stages: the *exploratory* and the *executory* stage, the nuances of which may be further elaborated by recourse to the IHR.

14 More specifically, during the first stage, the competent authorities may request information from the vessel in order to verify and assess the sanitary hazard in question, as provided for in Art. 28(3) and (4) IHR. Such information may, inter alia, regard: the vessel's itinerary so as to ascertain if there was any previous travel in or near an affected area; the origin of the cargo; the ship sanitation control certificate (if any); the maritime declaration of health; report of the health conditions of the crew and the passengers; report of the sanitary conditions of the vessel, etc.[29] Where applicable, such information shall be sent via radio or other telecommunication means. If this is not possible, or if the information provided does not suffice for the appropriate assessment of the public health risk, the authorities may board and inspect the vessel. Importantly, as demanded by the term control necessary, the interference of the coastal State should be of *gradual escalation*, in the sense that the boarding and inspection of the ship may only be conducted if other telecommunication means are not practicable or sufficient to provide the information required.[30]

15 Based on the findings from the first stage, the coastal authorities may either grant or deny admission to the territorial sea. As will be extensively discussed, the final decision is dependent upon the consideration of two major factors: *(a)* the public health risk, as previously assessed; and *(b)* the capacity of the entry point to implement the necessary health measures. If the entry point is adequately equipped, the competent authorities shall normally grant conditional admission to the territorial sea in order for the ship to proceed to the designated point, as provided for in Art. 28(1)(a) IHR. In this case, the ship must comply with any admission requirements (e.g. to proceed to a specific point and undergo certain sanitary procedures), otherwise it may be disqualified from

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further elaboration on the administrative jurisdiction of the coastal States, see Yang H., *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (2006), 205 et seq.

[29] See Art. 23(1) IHR. The provision lists certain health measures which may directly apply when the vessel is docked at a point of entry. However, its regulatory content seems to be susceptible for application *mutatis mutandis* hereto.

[30] This argument is further supported in view of Art. 110 and 111 LOSC establishing the rights of visit and of hot pursuit respectively. The legitimate exercise of both rights presupposes that the coastal authorities have a reasonable ground (or good reason to believe) that the vessel has committed an infringement. Discussing the right of hot pursuit in *M/V Saiga (No 2) case* (supra n. 20), ITLOS held that such reasonable ground must be 'more than a suspicion'. *Mutatis mutandis*, one may suggest that the boarding of a vessel in the contiguous zone accordingly requires that the authorities have previously obtained such reasonable ground; namely, a fact that would justify the necessity for exercising a physical intervention, while there are less invasive measures that would achieve the same objectives. Obviously, the impracticability or inadequacy of the latter measures, as well as the non-compliance of the ship therewith, may constitute one such reasonable ground for the legitimate boarding of the ship; cf. Guilfoyle, 'Article 111', in Proelss A. (ed.) *The United Nations Convention on the Law of the Sea: A Commentary*, (2017), para. 6. For a thorough discussion about the notion of necessity and its role in the sanitary jurisdiction, see Chapter V.

the right of innocent passage.[31] On the other hand, if the point of entry lacks the capacity required, the authorities may order the ship to proceed at its own risk to the nearest suitable and available point, by virtue of Art. 28(1)(b) IHR, save for the cases of distress.[32] Notably, such alternative point may still be in the territory of the same State. In this case, given that the ship is in the contiguous zone, the coastal authorities may not deny access to those parts of the territorial sea necessary to pass through in order for it to reach the newly designated point. Overall, as can be seen, the final decision does not fall under the absolute discretion of the coastal State, but instead, the latter needs to take into consideration all the specific circumstances on a case-by-case basis, and make a reasonable decision that best accommodates the conflicting interests in question.

3. Punitive jurisdiction

16 Moving on, according to Art. 33(1)(b), a coastal State may exercise the control necessary to *punish* infringement of sanitary laws committed within its territory or territorial sea. Unlike the preventive measures, punitive jurisdiction comes at a later stage, focusing on the suppression of a delinquent behaviour and the punishment of the infringers. As it logically follows, the prior infringement of the relevant laws constitutes a *conditio sine qua non* before the exercise of punitive jurisdiction. Given that the sanitary laws do not apply within the contiguous zone, the scope of the provision seems to be limited to outbound vessels.[33]

17 Art. 33(1)(b) authorizes a coastal State to punish infringements *committed within the territory or territorial sea*. Hence, it must be read in conjunction with Art. 19(1) and (2)(g) which regulate what infringements may entail disqualification of a vessel from the right of innocent passage, thus triggering the overall punitive mechanism of the coastal State. As will be extensively discussed in the relevant chapter, a vessel engages in prejudicial sanitary infringements: *(a)* when it loads or unloads persons and cargo contrary to the domestic sanitary laws; or *(b)* when it fails to comply with the preventive sanitary measures under Art. 25.[34] While the first scenario is most likely to occur once the vessel is docked at a port (hence in the territory of the State), the second one may also happen during its passage through the territorial sea.[35] In either case, the delinquent vessel

[31] Infra paras. 52 et seq.

[32] In cases of distress, the operation conditions of the ship involved constitute another major factor to be taken into consideration by the coastal authorities. This topic is extensively discussed below in paras. 80 et seq.

[33] This conclusion is manifestly supported by the wording of the Art. 33(1)(b) itself which speaks of infringements 'committed within [the] territory or territorial sea'; for the relevant debate see Khan, Art. 33, supra n. 13, para. 25.

[34] Infra paras. 49 et seq.

[35] For example, the coastal authorities grant admission to the territorial sea under the condition that the ship will dock at a specific point where the necessary sanitary procedures can be applied. If the master of the ship, after entering the territorial sea, disregards this condition and redirects the ship towards an entry point other than that specifically

shall be subject to the plenary jurisdiction of the coastal State and, even if it manages to depart from the territorial sea, as long as it remains within the contiguous zone, the coastal authorities may still exercise enforcement jurisdiction against it, by virtue of Art. 33(1)(b). With regard to what measures may be taken in this case, apart from denying new access to the territorial sea, the authorities may arrest the ship and the crew, and institute proceedings against them according to the relevant violations.[36]

18 On the other hand, as can be clearly deducted from the wording of Art. 33(1)(b), if the vessel fails to comply with the preventive measures under Art. 33(1)(a), *before entering the territorial sea*, the coastal State may not exercise any enforcement jurisdiction against it.[37] This conclusion builds a smooth bridge between the general punitive jurisdiction under Art. 33(1)(b) and specific nuances arising from the right of hot pursuit in the contiguous zone, as discussed right below.

4. The right of hot pursuit

19 According to Art. 111(1), when the coastal authorities have a good reason to believe that a ship has violated the laws and regulations of the State, they may undertake hot pursuit against it, under the conditions laid down therein.[38] The provision expressly states that the hot pursuit may be commenced, inter alia, when the foreign ship is in the contiguous zone (subpara. 2), provided that there has been a violation of the rights for the protection of which the zone was established (subpara. 4). Despite its *prima facie* unambiguous wording, the provision has triggered particular controversies with regard to its application scope in the contiguous zone. The relevant debate focuses on whether the hot pursuit presupposes that the pursued vessel has previously been in the territory or territorial sea of the State, or it may also be undertaken against an inbound vessel. In other words, the key question concerns whether the right of hot pursuit applies only within the punitive competence of the coastal State, under Art. 33(1)(b), or it may also cover the cases where an inbound vessel fails to comply with the preventive measures taken under Art. 33(1)(a). The core element of the debate is to be found in the interpretation of the last passage of Art. 111(1) which reads: '[i]f the foreign ship is within a contiguous zone, as defined in Art. 33, the pursuit may *only* be undertaken if there has been a violation of the rights *for the protection of which* the zone was established.' (emphasis added).

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designated by the coastal authorities, the ship will be in violation of Art. 21(4) and 25. Moreover, this violation may also entail its disqualification from the right of innocent passage, if considered prejudicial under Art. 19(1).

[36] For the discussion about the (punitive) enforcement jurisdiction of the coastal States, see infra paras. 48 et seq.

[37] Khan, supra n. 13, Art. 33, para. 25. For the more liberal interpretation advocating the equal treatment of inbound and outbound traffic, cf. Oda S., 'The Concept of the Contiguous Zone', *ICLQ* 11 (1962), 131 et seq.

[38] Among others, Guilfoyle, Art. 111, supra n. 30, para. 4; cf. *M/V Saiga (No. 2)* case, supra n. 20, paras. 146 et seq.

20 Those advocating the exercise of the right in both jurisdictional modes of Art. 33, take the view that the last sentence of Art. 111(1) should be construed *lato sensu*.[39] According to this, the phrase is not limited to the *substantive rights* enshrined in Art. 33 (i.e. the customs, fiscal, immigration and sanitary laws), but it also encompasses the *procedural (control) rights* that the State actually holds for safeguarding the former (here: the preventive measures that may apply for the verification and assessment of a hygienic risk).[40] If this is the case, a failure to comply with these measures constitutes a violation of Art. 111(1) which alone gives rise to the right of hot pursuit regardless of the fact that the vessel is yet to be in the territorial sea.

21 Despite its well-thought-out argumentation, this view should ultimately not be accepted, mostly because it significantly departs from both the wording and teleology of Art. 111. Indeed, a careful reading of the passage in question leaves little space for interpretative conclusions other than those dictated by its clear ordinary meaning: '... the pursuit *may only* be undertaken if there has been a *violation of the rights for the protection of which* the zone was established.' (emphasis added). The syntax of the sentence is crystal clear: the term 'of which' (i.e. of rights) indicates the *object* of the action denoted by the term 'protection'; not the subject. This means that the term *violation* refers to the protected rights and *not* the protective ones. Moreover, the use of the term *only* is an unambiguous indication that subpara. 4 serves as an *explanatory restriction* to, rather than as a regulatory expansion of subpara. 2.[41] Considering, apparently, the risk of abuse that subpara. 2 alone could possibly entail, the drafters went one step further by reiterating the self-evident: the hot pursuit in the contiguous zone may *only* be undertaken if there has been a violation of the rights for the protection of which the zone was established; namely the substantive rights referred to in Art. 33 and Art. 303(2), as those are the only rights that such establishment intends to protect.[42]

22 The above syntactical considerations are all the more supported by the teleology of both Art. 33 and 111. As has been pertinently described, the right of hot pursuit 'consists of a coastal State's right to *enforce* the laws applicable in waters under its sovereignty or jurisdiction against vessels suspect of *having broken those laws*, even once those vessels have fled onto the high seas'.[43] In light of this, one could say that the right constitutes an *extraordinary extension* of the enforcement

[39] For a comprehensive presentation of the relevant arguments, see Eschenhagen/Jürgens, supra n. 20, 13 et seq.

[40] According to this position, subpara. 4 of Art. 111(1) was established exactly for the purpose of safeguarding these control rights, since the substantive rights are arguably already covered by virtue of subpara. 2 which refers to the contiguous zone. In this direction, Eschenhagen/Jürgens, supra n. 20, 13.

[41] Indeed, if the intention of the drafters was to expand the application of Art. 111 to the so-called control rights, it seems reasonable to suggest that they would have done so by using the term *may also* in lieu of the term *may only*.

[42] Cf. Khan, Art. 33, supra n. 13, para. 31ff.

[43] Guilfoyle, Art. 111, supra n. 30, para. 1; (emphasis added).

powers that a coastal State enjoys in areas under national jurisdiction. As such, it logically follows that it cannot go beyond the *maximum* limits of the main enforcement mechanism. As mentioned above though, no enforcement powers may be exercised under Art. 33(1)(b) against an inbound vessel which fails to comply with the preventive measures of Art. 33(1)(a) *before* it enters the territorial sea. Therefore, any recognition of the right of hot pursuit in the same case would be in blatant disregard of both the wording and the teleology of Art. 33 and 111. In the words of Khan, 'a prior violation of local law [...] constitutes an indispensable premise for taking enforcement measures via hot pursuit beyond the seawards limits of the territorial sea. Ships in transit within the contiguous zone or inbound ships merely suspected of a possible future violation of local laws [...] may under no circumstances be made subject to measures under Art. 111.'[44]

23 Notwithstanding the clear wording of the Convention, as well as the meticulous argumentation by various legal scholars, State practice has shown a significant degree of divergence from the respective theoretical considerations. In fact, both Art. 33 and 111 have proven particularly susceptible to circumvention resulting in various forms of 'creeping jurisdiction'.[45] Coastal States, either via plausible and imaginative interpretation of the Convention, or sometimes even in direct defiance of its wording, manipulate the relevant provisions and expand their jurisdiction beyond the *maximum* acceptable limits.[46]

24 Coming back to the sanitary jurisdiction, it must be noted that, among the four groups of laws enshrined in Art. 33, the vast majority of the cases concern immigration, customs and tax infringements, while the sanitary laws, especially coupled with the right of hot pursuit, have not hitherto received much attention. This should be mostly attributed to the behavioural nature of a sanitary infringement. Indeed, having a closer look at the protected interests behind the four groups

[44] Khan, Art. 33, supra n. 13, para. 31ff.; in the same direction, Tanaka, supra n. 20, 122; Poulantzas N., *The Right of Hot Pursuit in International Law* (2002), 243 et seq; Lowe, 'The Development of the Concept of the Contiguous Zone' (1982) *British Yearbook of International Law* [52],166; Guilfoyle, Art. 111, supra n. 30, 775, para. 5. See also *Kircaoglu e Sanaga case*, Corte di Cassazione [Italian Supreme Court of Cassation], No 32960, 8.9.2010 ('Kircaoglu e Sanaga'), cited in Andrea Caligiuri, 'Kircaoglu and Sanaga Final Appeal Judgment, No 32960/2010' (2010) *ILDC* 1635 (IT 2010) = Rivista di Diritto Internazionale 93 (2010), 1272.

[45] Extensively, Khan, Art. 33, supra n. 13, para. 24.

[46] See *M/V Saiga (No. 2) case*, supra n. 20, para. 127, supra; *Kircaoglu and Sanaga case*, supra n. 44, [H4], [H10]. A Turkish vessel and a boat, suspected of smuggling migrants, were captured by an Italian military vessel beyond the Italian territorial sea. The capture took place following a hot pursuit which commenced, according to the Italian authorities, when the vessel was within the Italian contiguous zone. At first instance, the Tribunal of Locri, asserted jurisdiction to prosecute the crew of the vessel and sentenced Mr. Kircaoglu and Mr. Sanaga to eight years in prison. The Court of Appeals upheld the decision. Finally, the Court of Cassation overruled the previous judgements holding, inter alia, that the conduct of the applicants was *entirely committed in areas excluded from Italian criminal jurisdiction*, since such conduct took place beyond the Italian territorial sea; cf. Wu Y.J., 'The Enrika Lexie incident: Jurisdiction in the Contiguous zone?' available at: http://cilj.co.uk/2014/04/19/enrica-lexie-incident-jurisdiction-contiguous-zone/.

of laws, one can see that the first three deal with matters that have been traditionally attracting an intense criminal interest. In most of those cases, the perpetrators act maliciously and purposefully towards the relevant infringement which is anything but incidental. On the other hand, sanitary infringements do not seem to come with the same level (or the same frequency) of malpractice. This very difference in the *mens rea* is undoubtedly reflected on how the relevant cases are handled by the States.[47] In practice, if a ship is suspected of carrying a sanitary risk, it is very probable that the officer in command will readily comply with the relevant measures and the subsequent orders of the authorities, rendering any recourse to the hot pursuit *legally unnecessary*. Besides, even in the case that a ship intentionally disregards the preventive measures, any violation (or any attempt for violation) of the sanitary laws is most likely to be of peripheral character in relation to the ship's main operation, merely in an attempt to ensure uninterrupted performance of its commercial activities. For example, the master of a cargo ship disregards the admission requirements and unloads containers without undergoing the necessary sanitary procedures. Similarly, the master of a cruise ship conceals or counterfeits health documents in order to deceive the port authorities about the health conditions of the travellers so as the ship is granted admission to the port. Importantly, as can be seen from both examples, such activities are mostly carried out by vessels of particularly large size and high tonnage, conditions which alone render any recourse to the hot pursuit *technically unnecessary*.

[47] Cf. the ILC's commentary notes which point out that '[...] the number of States which claim rights over the contiguous zone for the purpose of applying sanitary regulations is fairly small [...]; Yearbook of the ILC (1956), vol. II, 294-295; available at: https://legal.un.org/ilc/publications/yearbooks/english/ilc_1956_v2.pdf; cf. Crawford J., supra n. 12 , 267.

Chapter III

Sanitary jurisdiction and passage rights

1. The right of innocent passage

25 Unlike the contiguous zone, the territorial sea is subject to the sovereignty of a coastal State.[48] Due to its sovereign status, the latter enjoys a remarkably broad range of jurisdictional powers therein. Importantly though, these powers are subject to certain qualifications introduced by both the LOSC and other rules of international law, as provided for in Art. 2(3). The paramount qualification in this regard is the right of innocent passage enshrined in Art. 17 et seq.[49] The innocent passage is the normative product from the reconciliation between the coastal States' interests and the navigational interests of foreign vessels. As such, it is natural to form a blend of rights and obligations for both sides of this tug-of-war. The purpose of this section is to discuss on what legal basis and to what extent a coastal State may interfere with the right of innocent passage by virtue of sanitary measures. More specifically, the section seeks to answer: *(a)* to what extent a coastal State may regulate the right of innocent passage for sanitary purposes, under Art. 21(1)(h); *(b)* to what extent it may implement preventive measures against vessels in innocent passage, under Art. 25(1) and (2); and *(c)* what sanitary infringements may entail disqualification from the right of innocent passage under Art. 19 and what punitive measures may be enforced in this case.

1.1. Regulation of innocent passage by virtue of national sanitary laws

26 Pursuant to Art. 21(1), a coastal State is empowered to exercise prescriptive jurisdiction in relation to innocent passage subject to certain qualifications. More specifically, the legislative competence is *(a)* limited *ratione materiae* to the subjects exhaustively enumerated in Art. 21(1);[50] and *(b)* is further circumscribed by certain duties that delimit *ex lege* the discretion of coastal States in order to safeguard the right against excessive requirements.[51] Sanitary laws are explicitly listed among those permitting national regulation. In this regard, Art. 21(1)(h) reads:

> 'The coastal State may adopt laws and regulations, *in conformity with the provisions of this Convention and other rules of international law*, relating to innocent passage through the territorial sea, in respect of [...] the *prevention of infringement of the* [...] *sanitary laws and regulations* of the coastal State.' (emphasis added).

[48] As provided for in Art. 2(1) LOSC.

[49] Among others, Crawford J., supra n. 12, 264, 317; Tanaka, supra n. 20, 85 et seq.; Barnes, 'Article 17', in: Proelss A. (ed.) *The United Nations Convention on the Law of the Sea: A Commentary*, para. 1; Yang, supra n. 28, 185.

[50] Yang, supra n. 28, 188.

[51] See Art. 21 paras. 2 and 3, and Art. 24; cf. Yang, supra n. 28, 189. The author pointedly observes that the scheme under Art. 21 strikes a 'delicate balance between the interests of international navigation and the right of coastal States to regulate the passage of foreign ships in the territorial sea'.

27 The provision makes a twofold reference to *laws and regulations* to describe both the *preventive measures* that may be adopted under Art. 21(1)(h) and the *primary legislation* which is to be protected by the former.[52] The functional mission of these measures is to *prevent infringement of the sanitary laws of the coastal State*. Accordingly, the purpose of the primary sanitary legislation is to protect the public health of a State against a hygienic risk.[53] It thus follows that the provision empowers a coastal State to adopt preventive measures in order to safeguard its public health against an imminent hygienic risk. Practically speaking, these measures are to be implemented on foreign ships in innocent passage with the purpose of forestalling any activity that may be prejudicial to the public health of the coastal State. In light of this, Art. 21(1)(h) seems to form the legitimation basis of the actual preventive mechanism that a State may deploy under Art. 25.[54]

1.2. Limitations upon the coastal States' jurisdiction

28 According to Art. 21(1), the national laws must be in conformity with the provisions of the LOSC and other rules of international law. It follows that the legislative discretion of a coastal State is not absolute, but it is qualified by certain duties stemming from international law. From within the LOSC, the cardinal provisions in this regard are found in Art. 24, as well as in Art. 21(2) and (3). As regards other rules of international law, the most relevant instrument is the IHR.

1.2.1. The rule of not hampering the innocent passage

29 Art. 24(1) stipulates that coastal States 'shall not hamper the innocent passage of foreign ships [...] except in accordance with this Convention'. The provision establishes the principal limitation of the relevant powers, applying to both the prescriptive and enforcement jurisdiction.[55] Due to its rather laconic and indefinite wording,[56] one may suggest that Art. 24(1) embodies an *equity clause* the specification of which is to be achieved through the consideration of the material circumstances on a case-by-case basis. The reconciliatory nature of Art. 24(1) has been elaborated by various scholars who suggest that the key term *hamper* should be construed *proportionately* or *reasonably*, in a way that best accommodates the relevant competing interests.[57] Notably, as will be further

[52] Between the two groups there is an inextricable teleological *nexus* in the sense that the laws adopted under Art. 21(1)(h) constitute means for materializing the purposes served by the substantive legislation of the coastal State.

[53] *Expressis verbis* Art. 2 IHR; cf. Khan, Art. 33, supra n. 13, para. 28.

[54] As Yang (supra n. 28, 191) points out, many of the measures to be taken under Art. 25 are to be previously established under Art. 21(1). For the specification of those measures, see infra paras. 47, 73 et. seq.

[55] Among others, Barnes, Art. 24, supra n. 49, para. 1; Yang, supra n. 28, 191.

[56] Linguistically speaking, the word *hamper* is not a fixed-meaning term, but rather it has a dynamic content which is to be specified *in concreto*.

[57] Smith B., 'Innocent Passage as a Rule of Decision: Navigation v. Environmental Protection', *Colum. J. Transnat'l L.* 21 (1982), 49 et seq., 91-97; see also Barnes, Art. 24, supra n. 49, para. 6; Molenaar, supra n. 13, 202, who elaborates the *concept of reasonableness* as a tool for the desired reconciliation; cf. Yang, supra n. 28, 217, where

explained below, these theoretical considerations seem to become an explicit regulatory demand within the framework of the IHR.[58]

1.2.2. Normative specifications

30 Further specifying the main rule of Art. 24(1), the LOSC introduces more targeted obligations for a coastal State. The most relevant for the purposes of this study are the following: Art. 24(1)(a) provides that coastal States shall not impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage, while Art. 24(1)(b) reiterates the fundamental rule of non-discrimination. Finally, Art. 21(2) stipulates that the national measures shall not apply to the so-called CDEM requirements, while Art. 21(3) provides that a coastal State shall give due publicity to the relevant laws and regulations. For purposes of better understanding, the said requirements should be examined individually.

a. The meaning of *practical effect*

31 Art. 24(1)(a) is articulated in a very careful and delicate manner that reinforces the right of innocent passage against *any* jurisdictional behaviour of the coastal State. The key element towards this end is the term *practical effect*. By virtue of it, the scope of the provision becomes significantly broad, given that it focuses on the actual impact of those measures regardless of whether the jurisdictional process is legitimate. In other words, the term seems to *substantively* delimit the discretion of a coastal State in cases where an externally or apparently legitimate right is exercised in a way that exceeds the *maximum* allowable limits set by the LOSC. That said, the characterization of Art. 24 altogether as a 'concrete application of the doctrine of abuse of rights' seems to be a very accurate and helpful assimilation for those trying to identify the legal nature of the provision.[59]

b. The meaning of *denying*

32 The regulatory meaning of the term *denying* is rather straightforward; the coastal States shall not impose requirements that render the innocent passage practically impossible. Indeed, the notion of denial has such an absolute dimension that entails complete frustration of the relevant right. That said, one may suggest that it is, by definition, incompatible with a reconciliation process, the latter demanding that at least some of the normative functions of either conflicting element remain

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the author highlights that principles such as the necessity, proportionality and non-discrimination constitute basic rules of international law which every jurisdictional step taken shall conform to. See also Chapter V.

[58] Infra para. 36.

[59] Barnes, Art. 24, supra n. 49, para. 6.

active. Therefore, any action which is equated with full denial of the right of innocent passage shall automatically be in contravention of Art. 24(1)(a).[60]

c. The meaning of *impairing*

33 On the other hand, the term *impairing* does not have such an absolute meaning, but rather it embodies a more *relative* notion which is to be specified *in concreto*. From a linguistic point of view, the verb *impair* means 'to spoil something or make it weaker so that it is less effective'.[61] Based on this definition, one may observe that the term has an underlying comparative function; that is to say, the classification of a behaviour as *impairment* logically presupposes that it has been compared with a *model behaviour* from which the former is found to deviate *in peius*. In simpler terms, an impairment occurs when something is *worse than it should be*.

34 Following the above remarks, one would not be completely out of place to argue that the regulation itself of the innocent passage under Art. 21(1) could be considered as impairing the right, given that the latter, in the absence of any such possibility, would have been exercised free from any domestic requirements. As it is obvious though, such interpretation entails a direct intra-systemic antinomy given that, by recourse to Art. 24(1)(a), one could neutralize the overall application of Art. 21. Most importantly, as already mentioned, the regime of innocent passage, in its entirety, is the normative product from a reconciliation process. As such, the legislative powers conferred upon the coastal States under Art. 21 constitute an inextricable part of this package deal. Therefore, the duty of non-impairing the right should be construed as mitigating the jurisdictional discretion of a coastal State rather than as fully obliterating it.

1.2.3. Specification of the principal limitations in light of the IHR

35 In light of the above considerations, a coastal State hampers the right of innocent passage when its jurisdictional behaviour against a foreign vessel is *more restrictive than it should be*. But what are the factors that outline the model behaviour of a coastal State in order to assess whether its actual one is in line with the Convention? Again, a prudent answer to this question must be given on a case-by-case basis. However, the LOSC seems to have found a very handy companion for this task in the IHR. As previously discussed, both instruments seem to be moving in the same teleological direction as regards the sanitary jurisdiction of a coastal State. With this in mind, the recourse to the relevant provisions of the IHR serves as a catalyst for both the normative specification of the preventive measures under the LOSC and the outlining of the said model behaviour.

[60] Without prejudice to cases where a coastal State lawfully suspends the right of innocent passage under Art. 25(3).
[61] *Cambridge dictionary*; available at: https://dictionary.cambridge.org/dictionary/english/impair.

36 More specifically, as noted, the IHR do not substitute the sovereign right of a State to legislate. However, '[i]n doing so, [the States] should uphold the purpose of [the IHR]'[62], while any such measures 'shall not be more restrictive of international traffic and not more invasive or intrusive to persons than *reasonably available alternatives that would achieve the appropriate level of health protection*.'[63] Reading this in light of Art. 21 and 24, one may suggest that the material terms *hamper*, *deny* and *impair* are given clear regulatory meaning through the provisions of Art. 2, 3 and 43 IHR. Besides, a comparative study of both instruments illustrates that the theoretical considerations with regard to the key term 'hamper' seem to be manifestly confirmed by the letter of the IHR itself. Indeed, core methodological elements, such as the concept of necessity and reasonableness, which were interpretatively deducted from Art. 24, are now directly embodied in the provisions of the IHR forming an explicit regulatory demand.[64] Therefore, within the context of the sanitary jurisdiction, the equity clause of Art. 24(1), along with its normative specifications, should be read as follows: the national sanitary laws adopted under Art. 21(1)(h) are in conformity with the LOSC and the IHR insofar as they provide appropriate response to a public health risk, while causing the least necessary disturbance on foreign vessels engaging in innocent passage.

1.2.4. The rule of non-discrimination

37 Art. 24(1)(b) reiterates one of the fundamental rules of international law providing that the coastal State shall not 'discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State'. As has been aptly observed, by using the terms 'in form' or 'in fact', the duty of non-discrimination 'covers both overt (legal) and covert (factual) discriminatory acts'.[65] In the context of the sanitary jurisdiction, the rule may be supplemented by that of Art. 42 IHR which stipulates that health measures taken pursuant to the IHR shall be applied in a transparent and non-discriminatory manner.

1.2.5. The rule of non-application to the CDEM requirements

38 Moving on, Art. 21(2) provides that '[s]uch laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules and standards' (hereinafter GAIRAS). The provision introduces a significant limitation to the legislative discretion of a coastal State, precluding the so-called *static*

[62] Art. 3(4) IHR. Moreover, according to Art. 2 IHR, the purpose of the IHR is to prevent, protect against, control and provide a public health response [...] in ways that avoid unnecessary interference with international traffic and trade.

[63] Art. 43(1) in f. IHR (emphasis added); cf. supra para. 8, infra paras. 89 et seq., 95 et seq.

[64] Supra para. 29.

[65] Yang, supra n. 28, 182; namely, discrimination against the nationality of the ship, or discrimination against the State of departure, of destination, or than owing the cargoes; cf. Barnes, Art. 24, supra n. 49, para. 9.

requirements[66] from the relevant regulations unless the latter correspond to GAIRAS. As has been aptly stated, the purpose of the provision is to balance coastal and flag State interests by removing the risk of such requirements which foreign vessels would be technically unable to comply with during their voyage.[67] Notably, as will be better explained below, this discussion seems to be of little practical importance in the context of the sanitary jurisdiction, given that the relevant measures regard –in most cases– behavioural aspects of the ship, the crew and the passengers, which, anyway, fall outside the scope of Art. 21(2).

1.2.6. The duty of information

39 Pursuant to Art. 21(3) '[t]he coastal State shall give due publicity to all such laws and regulations.' According to the IMO, the goal of this duty is to make States, seafarers and other interested persons aware of the measures in place and thus enable them to take appropriate and necessary steps either to prevent infringements of the respective laws and regulations, or to avoid any dangers which may be presented in particular situations.[68] Therefore, it is essential that the publicity be given in a manner which ensures that the information provided will in fact reach those who are likely to be affected. Towards this end, the same study suggests that 'the required publicity objective will be effectively achieved only if the information in question reaches the States, authorities, entities and persons that are intended to be guided by the information'. Especially with regard to the sanitary jurisdiction, one may argue that this duty is best facilitated by the IHR, the provisions of which ensure both regulatory uniformity and appropriate awareness among the States Parties.[69] Finally, another practical tool for the dissemination of crucial information is the institutional cooperation between the IMO, the WHO and other international organizations.[70]

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[66] Molenaar E., 'Port and Coastal States' in Rothwell et al. (eds.) *The Oxford Handbook of the Law of the Sea*, 288. The author, discussing the port State jurisdiction, makes a distinction between *static* and *behavioural* requirements which serves as a very illustrative observation for understanding the teleological and application scope of Art. 21(2).

[67] Churchill R. Lowe A., *The Law of the Sea* (1999), 94; cf. Molenaar, supra n. 66, 288; Barnes, Art. 21, supra n. 49, para. 20; Yang, supra n. 28, 190.

[68] IMO, *Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization*; Study by the Secretariat of IMO; (2014), p. 100-102; available at: http://www.imo.org/en/OurWork/Legal/Documents/LEG%20MISC%208.pdf; cf. Yang, supra n. 28, 183, 220; Barnes, Art. 22, supra n. 49, para. 23.

[69] See, for example, 43(3) IHR which subjects the possibility of a State Party to take additional health measures to certain restrictions. The provision stipulates, inter alia, that the State shall, at a minimum, provide WHO with the relevant information, while the latter shall share this information with other State Parties concerned. Moreover, in the context of the ongoing Covid-19 pandemic, this purpose is very well facilitated via an online platform, established by the European Maritime Safety Agency (EMSA), which works as a single point of reference listing the relevant information per country; available at: http://emsa.europa.eu/news-a-press-centre/covid19.html.

[70] See Art. 14 IHR which provides for the obligation of WHO to cooperate and coordinate its activities with other competent intergovernmental organizations or international bodies in the implementation of the IHR. From the recent practice, the results from such cooperation may be found in various documents providing instructions and guidelines on an appropriate response to the Covid-19 pandemic. In this regard, see *Operational considerations for managing Covid-19 cases/outbreak on board ships*, IMO, Circular Letter No. 4204/Add.3, (2.3.2020). The purpose

1.3. Preventive enforcement jurisdiction

40 As is widely accepted, foreign vessels not in innocent passage fall under the plenary jurisdiction of the coastal State.[71] The disqualification from the right results mostly from the vessel's prior engagement in activities which are considered to be prejudicial to the peace, good order or security of the State, as provided for in Art. 19. Practically speaking, such disqualifying incidents may occur a fair amount of time after the vessel has entered the territorial sea of the State. In this very meantime, the suspected vessel retains the right of innocent passage since no prejudicial activity has yet occurred. As it is obvious though, the coastal authorities should be given the possibility to take preventive action before the vessel actually commits any prejudicial activity. Towards this end, Art. 25 establishes the preventive enforcement jurisdiction which empowers a coastal State to take preventive measures against a suspected vessel beforehand. The provision introduces three *modus operandi*: *(a)* the coastal State's *general preventive jurisdiction* (para. 1); *(b)* the port State's *enhanced preventive jurisdiction* (para. 2); and *(c)* the right to *suspend* the innocent passage (para. 3). The most relevant for the purposes of this study are the first two.

1.3.1. General preventive jurisdiction of coastal States

41 According to Art. 25(1), '[t]he coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent'. As can be seen, the provision establishes a *teleological nexus* between the preventive measures and the right of innocent passage. Hence, it must be read in conjunction with Art. 19 which regulates the cases where a foreign vessel may be disqualified from the right. The latter provision, in para 2(g), makes *ad hoc* reference to the sanitary laws, stating that passage shall be prejudicial if the ship in the territorial sea engages in the 'loading or unloading of any commodity, currency or person contrary to the [...] sanitary laws and regulations of the coastal State'. Importantly, as noted under the contiguous zone and the right of hot pursuit, the scenario of a hygienically hazardous ship engaging in the above activities, *while being in the territorial sea*, is very unlikely to occur, due to the rather low level of malpractice that sanitary infringements are associated with. That said, Art. 19(2)(g) seems to be of little practical importance in the context of the sanitary jurisdiction, its application being limited to marginal cases of criminal

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of this circular letter was to disseminate the relevant guidance issued by WHO to all Member States and 'all parties concerned as widely as possible.'; see also *A Joint Statement on the Response to the Covid-19 Outbreak*, issued by WHO and IMO on the 13.2.2020; enclosed in the IMO Circular Letter 4204/Add.2 (21.2.2020); *A Joint Statement on medical certificates of seafarers, ship sanitation certificates and medical care of seafarers in the context of the Covid-19 pandemic*; issued by WHO, IMO and ILO on the 22 April 2020; available at: http://www.who.int/docs/default-source/coronaviruse/2020-04-22-ilo-who-imo-joint-statement-on-medical-certificates-of-seafarers-ship-sanitation-certificates-22-april-sg(003).pdf?sfvrsn=6afdd464_2.

[71] Churchill/Lowe, supra n. 67, 87; Molenaar, supra n. 13, 249; Yang, supra n. 28, 216; Barnes, Art. 25, supra n. 49, para. 5.

hue. Notably, given that the functional mission of Art. 25(1) is exactly to forestall this kind of activities, its application seems to be accordingly limited to such marginal cases.[72]

42 On the other hand, as similarly mentioned under the contiguous zone, a hazardous vessel –which does not engage in any of the activities listed in Art. 19(2)(g)– is most likely to affect the public health of a coastal State when docked at a point of entry. This should be attributed to the biological characteristics of a sanitary risk. Indeed, biologically speaking, the most common modes of disease transmission require a physical contact –directly or indirectly– with an affected person or an infected element.[73] In the context discussed herein, such contact may normally be established when the ship is docked at an entry point and disembarks passengers or unloads cargo.

43 In light of the above remarks, one could suggest that the preventive sanitary jurisdiction in the territorial sea concerns two different scenarios: the *ordinary*, where a coastal State may only implement preventive measures against inbound ships [namely those proceeding to internal waters or to a port, under Art. 18(1)(b)]; and the *extraordinary* scenario, where the State may take preventive measures against any ship in the territorial sea, if it has reasonable grounds to believe that the latter has committed (or attempts to commit) any of the prejudicial activities listed in Art. 19(2)(g).[74] Apart from them, no preventive jurisdiction may be exercised against a ship merely traversing the territorial sea without any intention of stopping, or any suspicion that it is going to engage in prejudicial activities, since in such cases, the ship entails no risk for the public health of the State.[75] The said considerations are all the more confirmed by recourse to Art. 25(b) IHR which provides that no health measures shall –in principle– apply against a ship which passes through waters within the jurisdiction of a State Party *without calling at a port or on the coast*.

44 While the extraordinary scenario, dealing with delinquent ships, seems to be regulated by recourse to Art. 25(1) in conjunction with 19(2)(g), the ordinary preventive mechanism of a coastal State,

[72] For example, the transhipment of affected passengers or infected cargo from vessel to vessel. Obviously, in this case, the coastal State may take all the *necessary steps* against the suspected vessel(s) to prevent such infringement.

[73] For an interesting medical analysis on this topic, see Van Seventer J.M., Hochberg N. S., 'Principles of Infectious Diseases: Transmission, Diagnosis, Prevention, and Control', 6 (2017) *International Encyclopedia of Public Health*, 22 et seq. (32); available at: http://dx.doi.org/10.1016/B978-0-12-803678-5.00516-6.

[74] Cf. Barnes, Art. 19, supra n. 49, paras. 7-8.

[75] Cf. Rothwell, 'Coastal State Sovereignty and Innocent Passage: The Voyage of the Lusitania Expresso', 16 (1992) *Marine Policy*, 427 et seq. (434). In the *Lusitania Expresso Incident*, the Indonesian government denied passage through its territorial sea to the Lusitania Expresso, a ship on a voyage from Portugal to the port of Dili, with the purpose to raise awareness about human rights abuses in East Timor. Indonesia grounded its position allegedly on the vessel's infringement of immigrant laws. The author pointedly argues that ships without any intention of stopping at a port would not pose a threat to coastal State immigration laws and should therefore be permitted to proceed unhampered. Despite the fact that the case deals with a whole different subject, the relevant remarks on ships traversing the territorial sea, and their potential (or not) to put the interests of a coastal State at stake seem to apply *mutatis mutandis* to the sanitary jurisdiction; see also Barnes, Art. 24, supra n. 49, para. 6; Art. 19, para. 12.

which concerns potentially hazardous inbound ships, is exercised on the grounds of Art. 25(2), which is examined right below.

1.3.2. Enhanced preventive jurisdiction of port States

45 According to Art. 25(2) '[i]n the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State has the right to take the *necessary steps* to *prevent any breach of the conditions* to which admission of those ships to internal waters or such a call is subject.' (emphasis added). The provision confers more enhanced powers upon a coastal State in the case that a foreign ship does not merely traverse its territorial sea, but intends to proceed to the internal waters or use any of its port facilities. As has been aptly described, the enhanced character of those powers 'reflects the greater degree of interest [that] States have in controlling entry into ports and internal waters.'[76] As noted, given that the preventive sanitary jurisdiction mostly applies to inbound vessels (ordinary scenario), Art. 25(2) is the core provision of this mechanism. In fact, one may suggest that port State jurisdiction is the most common capacity under which a coastal State acts in order to protect its public health interests against a hazardous foreign vessel.

46 The specification of the relevant measures takes place under the section 'access into the internal waters and ports'.[77] However, already from this point, special attention needs to be drawn to the following issue: in the same logic as in the prescriptive jurisdiction, both paras. 1 and 2 of Art. 25 use the term *necessary steps* to delimit the jurisdictional behaviour of a coastal State during the *application* of the relevant measures. By virtue of it, the cardinal notion of necessity seems to expand to the enforcement field, thus covering the overall jurisdictional spectrum of the State. In fact, one may argue that the task of delimiting the enforcement powers to the degree necessary appears even more imperative compared to the similar qualifications placed upon the legislative competence.[78] That is because, the actual interference with a foreign ship is most likely to occur during the implementation rather than the prescription of the relevant measures. Besides, at a legislative level, it is very probable that there are various measures enacted in order to cover the whole spectrum of possible cases. And most importantly, by the time of any preventive interference, the vessel is still considered to be in innocent passage, hence, any measure must be applied with particular caution.[79]

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[76] Barnes, Art. 25, supra n. 49, para. 9.

[77] Chapter IV.

[78] The significance of taking into consideration the necessity and reasonableness *during the enforcement jurisdiction* is, among others, highlighted by Yang in various instances; supra n. 28, p. 205, 217, 220.

[79] See Barnes, Art. 19, supra n. 49, para. 8. The author takes the view that coastal States should exercise, at the very least, *some degree of caution* when deciding to interfere with passage; in the same direction Yang, supra n. 28, 196,

47 Elaborating the above general remarks in the framework of the sanitary jurisdiction, it seems that the coastal State is not free to select any of the preventive measures available in text. Instead, according to the nuances of each case, it must apply those achieving the appropriate level of health protection with the least possible disturbance of the foreign ship. Practically speaking, the intervention of the port State under Art. 25(2) is similar to that in the contiguous zone. This means that the competent authorities may initially request the information necessary to verify and assess the hygienic risk and, accordingly, decide whether or not the ship should be granted admission to the point of entry requested. Again, in order to ensure compliance with the necessity requirement, the interference must be of *gradual escalation*. That is to say, the boarding and inspection of the ship should be an option only when necessary; namely, if the information requested cannot be provided via telecommunication means, or it does not suffice to assess the hygienic risk.[80] Finally, in the same vein as the assessment stage itself, the subsequent decision of the port authorities is similarly subject to the *necessity* requirement, as will be thoroughly discussed below.[81]

1.4. Punitive enforcement jurisdiction against delinquent vessels

48 As the study hitherto has shown, the enforcement jurisdiction against foreign vessels *in innocent passage* is limited to the application of preventive measures which aim at protecting the public health interests of a coastal State by forestalling a prejudicial incident before this actually occurs. On the other hand, it is generally accepted that a merchant vessel engaged in *non-innocent passage* falls under the plenary jurisdiction of the coastal State, including any punitive measures.[82] Thus, the right of innocent passage seems to serve as a catalyst for determining the scope of the powers that a coastal State may exercise in each case. That said, before examining the punitive measures

who points out that 'in the interest of innocent passage, any enforcement against foreign ships during passage in the territorial sea may be more limited than the laws and regulations may apply'; Tanaka, supra n. 20, 94; Rothwell/Stephens, *The International Law of the Sea*, 218; cf. *Women on the Waves case*, infra n. 94, where the ECtHR held that any interference must be *proportionate* to the aims pursued.

[80] A rather illustrative example in this regard may be found in para. 4 of the 'USA/USSR Joint Statement on the Uniform Interpretation of the Rules of International Law Governing Innocent Passage'; Done at Jackson Hole, Wyoming 23.9.1989; 14 LOSB 13; reproduced in Lowe/Talmon, *The Legal Order of the Oceans. Basic Documents on the Law of the Sea*; Hart Publishing 2009, [42]. The provision reads: '[a] coastal State which questions whether the particular passage of a ship through its territorial sea is innocent *shall inform the ship* of the reason why it questions the innocence of the passage, and *provide the ship an opportunity to clarify its intentions* or *correct its conduct* in a reasonably short period of time.' (emphasis added); cf. Art. 28(3) IHR which states that '[w]henever practicable [...], a State Party shall authorize the granting of free pratique *by radio or other communication means* to a ship or an aircraft when, on the basis of information received from it prior to its arrival, the State Party is of the opinion that the arrival of the ship or aircraft will not result in the introduction or spread of disease.' (emphasis added); see also Yang (supra n. 28, p. 216) who suggests that foreign ships should be allowed to explain their operations on being suspected prior to the confirmation of non-innocence.

[81] Chapters IV, V.

[82] Supra n. 71.

that may be taken, it is necessary to discuss under what circumstances a foreign merchant ship may be disqualified from the right of innocent passage by reasons related to sanitary infringements.

1.4.1. The relationship between sanitary infringements and the right of innocent passage

49 The key provision on the meaning of the innocent passage is to be found in Art. 19(1), according to which '[p]assage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with [the] Convention and with other rules of international law.' Taking one step further, Art. 19(2) introduces a non-exhaustive list with certain activities that are considered *ipso facto* prejudicial to the aforementioned values making, inter alia, *ad hoc* reference to the sanitary laws.[83] Already at this point, it must be noted that para. 2 should not be understood as a mere illustration of para. 1, but instead, each paragraph enjoys *regulatory autonomy*. That is to say, Art. 19(1) may also constitute a disqualification ground regardless of whether the ship has engaged in any of the activities listed in para. 2.[84] This clarification is of paramount importance for determining the jurisdictional options of a coastal State in cases where the ship fails to comply with the preventive measures under Art. 25.[85]

a. Loading or unloading of commodities and persons contrary to sanitary laws

50 According to Art. 19(2)(g), if a ship in the territorial sea engages in 'the loading or unloading of any commodity, currency or person contrary to [...] the sanitary laws', it is *ipso facto* disqualified from the right of innocent passage.[86] Unlike the measures under Art. 25, Art. 19(2)(g), as such, is not a part of the preventive mechanism of the coastal State, but instead applies to the cases where a ship has already committed a prejudicial activity. In other words, the provision targets the suppression *ex post* (not the prevention *ex ante*) of illegal activities entailing the disqualification from the right of innocent passage. Moreover, it must be borne in mind that the provision deals with activities carried out exclusively *in the territorial sea*. Most importantly though, as noted above, due to the behavioural nature of the sanitary infringements, the scenario that a foreign ship engages in such activities (e.g. loading or unloading of affected persons or contaminated cargo) within the territorial sea is very unlikely to occur.[87] Under this point of view, Art. 19(2)(g), despite its incontrovertible functionality in the cases of custom, tax and immigration infringements, seems

[83] For the non-exhaustive character of Art. 19(2) see, among others, Churchill/Lowe, supra n. 67, 85; Tanaka, supra n. 20, 86; Barnes, Art. 19, supra n. 49, paras. 12, 13 with further citations to scholars who support this view. The latter author, however, points out that it is difficult to identify a clear body of practice favouring either view.

[84] For the relevant debate see, among others, Tanaka supra n. 20, 87; Barnes, Art. 19, supra n. 49, paras. 10, 11.

[85] Infra paras. 52 et seq.

[86] The (un)loading of currency should be excluded from the relevant discussion as obviously related to the violation of custom or tax laws; see supra n. 25.

[87] Supra para 24.

to be of little practical importance in the context of the sanitary jurisdiction, its application being limited to marginal cases. For example, transhipment of affected passengers or infected cargo from ship to ship, or unloading of commodities[88] at a roadstead facility outside the internal waters,[89] contrary to the sanitary laws in place.[90] Obviously, if this is the case, the ship(s) involved lose *ipso facto* the right of innocent passage and become subject to the full jurisdiction of the coastal State.

51 Even though Art. 19(2)(g) *per se* does not seem to correspond with the ordinary *modus operandi* of a hygienically hazardous ship, its regulatory elements provide for a rather solid ground that allows for the discussion of the *ordinary scenario* as well; namely, when the ship is docked at a designated point of entry. Besides, given that Art. 19 applies to the territorial sea, which is a maritime zone where the coastal State exercises attenuated powers compared to the full jurisdictional capacity that it enjoys in its internal waters and ports, one may suggest that the normative content of the provision applies *a fortiori* to the latter areas. That said, a ship which is docked at an entry point must obviously abstain from the loading or unloading of any commodities or persons contrary to the domestic sanitary legislation.[91] Practically speaking, this scheme refers to the duties of a foreign ship to comply with the sanitary measures imposed by the port authorities as conditions for its admission. Thus, if the ship fails to comply with those measures, the port State may, without a doubt, exercise full enforcement jurisdiction against it. For example, a cruise ship is granted admission under the condition that no passenger shall disembark unless otherwise instructed by the port authorities. If the officer in command disregards the quarantine order and allows the passengers to disembark, the ship shall obviously be in violation of the domestic sanitary laws and the port State may exercise full enforcement jurisdiction against it. Legally speaking, in

[88] The term *commodity* is linguistically defined as 'a substance or product that can be traded, bought, or sold'; *Cambridge Dictionary*; available at: https://dictionary.cambridge.org/dictionary/english/commodity. Reading this in light of the IHR, it seems that the term refers to the *cargo* of a merchant ship, as well as the *containers* themselves. On the other hand, the commercial hue of the term suggests that any personal belongings of the crew and the passengers (e.g. baggage) fall outside its scope. However, such personal items are so closely related to those carrying them, that one could suggest their inclusion under the term person; cf. Art. 1 IHR for the relevant definitions.

[89] According to Art. 12, '[r]oadsteads which are normally used for the loading, unloading and anchoring of ships, and which would otherwise be situated wholly or partly outside the outer limit of the territorial sea, are included in the territorial sea'. The UN-Baselines Study has defined roadstead as 'an area near the shore where vessels are intended to anchor in a position of safety; often situation in a shallow indentation of the coast'; UN DOALOS, Baselines: An Examination of the Relevant Provisions of the Law of the Sea (1989), 47; cf. Symmons, Art. 12, in Proelss A. (ed.) *The United Nations Convention on the Law of the Sea: A Commentary*, (2017), paras. 3, 6; Tanaka, supra n. 20, 84.

[90] Art. 19(2)(g) establishes a direct legal *nexus* between the relevant activities and the domestic sanitary legislation. As such, the provision is contingent upon –and supplemented by– Art. 21(1)(h); see Barnes, supra n. 49, Art. 19, para. 21; Art. 21, para. 19.

[91] The described activities themselves not only are far from prejudicial, but instead are of paramount importance for global trade and communications. The key element that turns their role upside down is when they are conducted in contravention of the domestic sanitary laws and regulations.

such a case, the relevant powers do not derive from Art. 19, but shall be a direct corollary from the fact that the port is placed under the territorial sovereignty of the State by virtue of Art. 2(1).

b. Non-compliance with the preventive measures

52 Assuming that Art. 19(2) exclusively regulates the disqualifying grounds from the right of innocent passage, a hygienically hazardous ship could under no other circumstances lose the right, unless it engages in the (un)loading of persons and commodities contrary to the sanitary legislation. As a result, the coastal State would be unable to exercise enforcement jurisdiction against that ship before such activity occurs. As can be seen though, this interpretative approach compromises –to a significant degree– the effectiveness of the preventive mechanism of a coastal State, given that it subjects the successful application of the relevant measures to the *bona fide* of the ship. Indeed, if this is the case, the coastal authorities will be unable to deploy their enforcement mechanism against a hazardous vessel which, without committing any prejudicial activity, fails to comply with the preventive measures or the admission requirements under Art. 25. Obviously though, a coastal State should be able to protect its legitimate interests regardless of the intentions of the vessel.

53 The aforementioned scheme serves as an illustrative example as to why Art. 19(1) should be understood as enjoying normative autonomy against that of para. 2. To be more precise, the second sentence of Art. 19(1) reads: '[s]uch passage shall take place in conformity with [the] Convention and with other rules of international law.' The phrase seems to denote that the innocent character of the passage is not exclusively determined by virtue of Art. 19, but the rest of the Convention, as well as other relevant rules of international law may also have a decisive saying on this matter. In the words of *Barnes*, the provision 'leaves the door open for further regulation of the right'.[92]

54 From within the LOSC, the most relevant provision is to be found in Art. 21. Thus, the innocent character of the passage may also be determined by virtue of the respective national laws and regulations in place. The general obligation of foreign ships to comply with those laws is expressly provided in Art. 21(4). However, it must be borne in mind that not any violation of the national laws entails automatic disqualification from the right, but only those that are found to be prejudicial to the peace, good order or security of the coastal State, under Art. 19(1).[93] To put this in more descriptive terms, Art. 19(1) might seem to authorize other rules to further determine the innocent passage, however, it keeps holding the *core requirements* that must always be met in order for a

[92] Barnes, Art. 19, supra n. 49, para. 10.

[93] This view is further supported by reference to the classic judgement in the *Corfu Channel case* which emphasizes on the *manner* of the passage. *Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, Judgement of 9 April 1949, ICJ Reports (1949), 30; cf. Barnes, Art. 19, supra n. 49, para. 11; Yang, supra n. 28, 217 in f.; Tanaka, supra n. 20, 88 with further citations to scholars supporting this view.

certain behaviour to be considered as prejudicial. It thus seems that the requirement of *prejudice* serves as a cardinal counterweight to the remarkably broad discretion that a coastal State is given by the fact that it may determine the innocent character of the passage by virtue of both paragraphs of Art. 19. In fact, due to the constant tendency of various coastal States towards creeping jurisdiction, one must be very cautious when examining similar cases; that is because State practice has shown that the above normative balance is –in several instances– far from properly struck, with various coastal States arbitrarily hampering the right of innocent passage.[94]

55 Coming back to the sanitary jurisdiction, the smooth implementation of the measures under Art. 25 necessitates the cooperation of the ship with the coastal State. Practically speaking, during the exploratory stage, both the master and the crew must facilitate the job of the port authorities by providing them with the information requested, or by allowing them to board and inspect the ship, if necessary. Subsequently, after the decision is made, the ship must comply with the relevant orders. If, in any of those stages, the master of the ship denies to cooperate or fails to comply with any of the subsequent orders (such as the conditions to which the granting of admission might be subject), the ship shall be in violation of Art. 21(4). Most importantly, given that the measures in question are set to safeguard the public health, which is obviously one of the most vital interests of a coastal State, as well as a normative expression of the *good order* stated in Art. 19(1), a failure to comply therewith should be deemed as prejudicial. Therefore, a ship that fails to comply with the preventive measures under Art. 25 –which is the executive arm of Art. 21– may lose the right of innocent passage and become subject to the plenary jurisdiction of the coastal State.[95]

56 Similarly, Art. 19(1) leaves the door open to other rules of international law. In the context discussed herein, the most relevant instrument is the IHR. Therefore, constitutionally speaking, the provisions of the latter may directly determine the meaning of the innocent passage regardless of their transposition into national law, provided of course that the State is a Party to the IHR, or

[94] See *Women on Waves case*, supra n. 11. On 27 August 2007, *Borndiep*, a vessel operated by the Women on the Waves Foundation in a mission to support a campaign for decriminalization of abortion, was banned from entering Portuguese territorial sea by virtue of a ministerial order, on the basis of maritime law and Portuguese health laws, and its entry was blocked by a Portuguese warship. After a series of unsuccessful legal remedies before the Portuguese courts, the case was brought before the European Court of Human Rights. The Court found that Portugal violated Art. 10 ECHR (freedom of expression) holding that the interference by the authorities has been disproportionate to the aims pursued. More specifically, it states that '[t]he Portuguese authorities could have resorted to other means of preventing disorder and protecting health than preventing the Borndiep, a civilian ship, from entering its territorial waters, especially by dispatching a warship to meet it. [...] The interference in question had therefore not answered a *pressing social need* and could not be regarded as *necessary in a democratic society*.' cf. The analysis of the *Lusitania Expresso* case by Rothwell, supra n. 75; Barnes, Art. 19, supra n. 49, para. 12.

[95] See Yang, supra n. 28, 291. The author takes the view that any breach of the admission conditions to ports would bring about the same legal consequences as that of non-innocence.

the provision in question reflects customary international law. In such case, the non-compliance of a ship with certain measures of the IHR may also result in its disqualification from the right, so long as it is prejudicial to the peace, good order or security of the coastal State.

57 On the other hand, when the violation of the domestic laws is tantamount to minor procedural offences which fall short from compromising the peace, good order or security of the State, the vessel does not necessarily lose the right of innocent passage.[96] For example, if a suspected vessel denies to transmit the documents required for the assessment of the hygienic risk, the denial *per se* should not be considered as prejudicial. Obviously though, in such a case, the coastal authorities may apply subsequent measures under Art. 25 (e.g. boarding and inspection, denial of access), the non-compliance with which may eventually result in its disqualification. Finally, if the offence entails violation of any procedural rules set by the port, the competent authorities may also impose the respective administrative penalties according to the national legislation in place.

1.4.2. Imposition of punitive measures

58 As noted, a ship not in innocent passage is subject to the full jurisdiction of the coastal State. This means that the competent authorities may deny further passage and divert or expel the ship from the territorial sea. In addition to that, they may arrest the ship and institute proceedings against the crew members, according to the national legislation in place. Ultimately, if the offence is classified as a crime under national law, the State may also exercise criminal jurisdiction against the persons involved, under the requirements of Art. 27.

1.4.3. Criminal jurisdiction

59 Due to the sovereign status of the territorial sea, a coastal State may theoretically exercise criminal jurisdiction on board any foreign ship within this zone. However, Art. 27 –which is the cardinal provision in this regard– somewhat qualifies the relevant powers in respect for the navigational interests of foreign ships.[97] As suggested by Barnes, for identifying the application scope of Art. 27, one should distinguish between three types of passage: lateral, inward, and outward passage.[98] Roughly speaking, Art. 27(1) concerns the lateral passage, para. 2 deals with the outward passage, while, from the elements comprised in para. 5, one may identify the relevant powers against ships

[96] Cf. Tanaka, supra n. 20, 88.

[97] Yang, supra n. 28, 90; Tanaka, supra n. 20, 94; cf. Barnes, Art. 27, supra n. 49, para. 13.

[98] Barnes, Art. 27, supra n. 49, para. 2.

in inward passage. Given that the sanitary jurisdiction mostly concerns foreign ships engaging in inward/outward passage, the role of Art. 27(1) is somewhat limited in this study.[99]

60 With regard to **inward vessels**, from the reverse reading of Art. 27(5) it follows that a vessel which passes through the territorial sea with the purpose of entering the internal waters is unconditionally subject to the criminal jurisdiction of the coastal State.[100] However, as Yang aptly observes, in such cases the recourse to Art. 27 is of little practical significance, since '[c]oastal States always prefer to take enforcement action after the ship enters a port, unless there exist imminent threats [...].'[101] For example, the master of an inbound cargo ship falsifies material information in an attempt to deceive the port authorities about the existence or the gravity of a sanitary hazard.

61 The discretion of coastal States in exercising criminal jurisdiction is even broader with respect to **outward vessels**. In this regard, Art. 27(2) stipulates that the restrictions of Art. 27(1) (i.e. those applying to vessels in lateral passage) 'do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea *after leaving internal waters*.' (emphasis added). The broader range of the powers in this case can be justified considering that the offence has been committed in areas placed under the full and absolute sovereignty of the State.[102] For example, an affected passenger on board a cruise ship docked at a port disregards the quarantine orders and clandestinely manages to disembark. If such behaviour is classified as a criminal act under national law, the authorities may board the ship and arrest the offender, even if the former has already left the internal waters.

62 As implied by both the aforementioned examples, it seems that a coastal State assumes criminal jurisdiction only where the offence committed on board may adversely affect its interests. This observation puts the spotlight on one of the oldest legal debates within the law of the sea regarding the scope of the coastal States' criminal jurisdiction against foreign vessels in **internal waters and ports**.[103] Due to the territorial jurisdiction that a coastal State enjoys within those areas, one could reasonably suggest that the answer thereto is fairly simple: a coastal State is fully entitled to apply

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[99] See Art. 27(1), according to which '[t]he criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea [...]'; Barnes, Art. 27, supra n. 49, para. 12; Tanaka, supra n. 20, 95, where the author takes the view that the restriction of criminal jurisdiction under Art. 27(1) does not apply to the case of inward/outward navigation by virtue of Art. 27(2).

[100] Yang, supra n. 28, 251-252.

[101] *Ibidem*, 252.

[102] As pointedly noted by Barnes, '[t]he broad range of enforcement jurisdiction of the coastal State over outward-bound ships finds its justification in an analogy with the doctrine of hot pursuit'; Art. 27, supra n. 49, para. 18.

[103] Among others, Hayashi M., 'Jurisdiction over Foreign Commercial Ships in Ports: A Gap in the Law of the Sea Codification', *18 (2004) Ocean YB*, 488 (492 et seq.); Yang, supra n. 28, 90 et seq; Tanaka, supra n. 20, 78; Barnes, Art. 27, supra n. 49, para. 8; cf. Crawford J., supra n. 12, 318.

its criminal laws on board a foreign merchant ship in its internal waters and ports. However, despite the seemingly simple answer, the fact that the criminal measures entail a major interference with the foreign ship, coupled with the legal issue of how to coordinate the territorial and the flag State jurisdiction, have triggered the relevant debate. The prevailing positions are the Anglo-American on the one hand,[104] and the French jurisprudence, on the other.[105] Following a joint study thereof, one may summarize that the core difference between the two schools of thought can be detected in their opposing views on the rule/exception relationship. That is to say, the Anglo-American position assumes that a coastal State enjoys full criminal jurisdiction which, however, decides by reasons of comity not to exercise if the offence regards the 'internal economy' of the ship, while the French position suggests that no such jurisdiction exists in law unless the offence endangers essential interests of the coastal State, such as the peace and good order of the port.[106] Despite the distinct legal nuances, one may argue that both approaches practically converge on the following point: when the criminal offence committed on board entails an external effect that may adversely affect the interests of the coastal State, the latter may exercise criminal jurisdiction against the persons involved.[107]

63 In an attempt to bridge the above general remarks with the topic discussed herein, the following must be pointed out: the overall domain of the sanitary jurisdiction, including the preventive measures under Art. 25, aims at protecting the public health of a coastal State, which is obviously among its most vital legitimate interests. That said, any criminal act towards the violation of the domestic sanitary legislation in place should be understood as an offence with an *external effect* and, therefore, it may trigger the criminal mechanism of the coastal State.

2. The right of transit passage

64 According to Art. 42(1)(d), '[s]ubject to the provisions of [section 2], States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of [...] the loading or unloading of any commodity, currency or person in contravention of the [...] sanitary laws and regulations of States bordering straits'. From the wording of the provision itself, one may observe that it is *prima facie* similar to Art. 19(2)(g) and 21(1)(h) which both concern the right of innocent

[104] *Wildenhus* case, US Supreme Court, 120 US 1 (1887); cf. Tanaka, supra n. 20, 78, 95; Yang, supra n. 28, 90.

[105] *Sally and Newton* cases Conseil d' Etat (1806). The cases were reproduced in Simmonds, Cases, vol. I, 77-78; cf. Yang, supra n. 28, 91; Tanaka, supra n. 20, 78.

[106] *Ibidem*.

[107] Yang, supra n. 28, 91, according to whom State practice has been fairly consistent on this matter by asserting criminal jurisdiction depending on whether the consequences of an act on board are confined within the ship or go beyond.

passage. Notably though, despite the formulation similarities between the said provisions, it must be underlined that the two regimes (of innocent and transit passage) appear stark regulatory and functional differences deriving already from their distinct legal nature. More specifically, unlike the innocent passage, where the main burden falls on the sovereignty of a coastal State, the regime of transit passage seems to rather follow the essence of freedom of navigation.[108] In fact, the right of transit passage was developed exactly to permit free and unimpeded transit of a ship through an international strait.[109] As the famous *dictum* of the *Corfu Channel* case reads, this kind of straits are considered as 'international highways through which passage cannot be prohibited by a coastal State in time of peace'.[110] In other words, the paramount role that certain straits play in global navigation necessitated the establishment of the more liberal regime of transit passage according to which, ships passing through one such strait enjoy a greater degree of freedom compared to those traversing the territorial sea. Accordingly, the powers of a strait State against ships in transit passage are remarkably narrower vis-à-vis those engaging in innocent passage.

2.1. Sanitary jurisdiction against vessels in transit passage

65 Within the context outlined above, one may observe that the formulation similarities of the said provisions do not really correspond with the major structural differences between the two regimes. Indeed, Art. 42(1)(d) seems to empower a strait State to regulate the right of transit passage by virtue of sanitary laws, just as Art. 21(1)(h) provides so in the case of innocent passage, despite the fact that the former regime reserves remarkably less powers for the strait State. However, a scrutiny of the provisions in question, in light of the above remarks about the two regimes, reveals that, behind their seemingly akin expression, there are major regulatory and functional differences.

2.1.1. Non-application of preventive measures

66 As has been repeatedly stated, the sanitary jurisdiction mostly concerns the preventive measures that a coastal State may apply against inbound vessels. As such, one may argue that any sanitary-related measure is *prima facie* incompatible with the right of transit passage which is defined in Art. 38(2) as 'the exercise in accordance with [Part III] of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the

[108] See Jia, 'Article 38' in Proelss A. (ed.) *The United Nations Convention on the Law of the Sea: A Commentary*, (2017), para. 1, 7, 16 et seq.; Molenaar, supra n. 13, 287. The author describes transit passage as a 'neologism lying somewhere between free navigation and innocent passage; Rothwell D., 'International Straits' in Rothwell et al. (eds.), *The Oxford Handbook of the Law of the Sea* (2015), 121; cf. Tanaka, supra n. 20, 102.

[109] Rothwell, supra n. 108, 121-122; cf. Molenaar, supra n. 13, 284.

[110] *Corfu Channel case*, supra n. 93, p. 4 (29); for the classification criteria with regard to a strait used for international navigation, see Art. 36, 37, 38(1) LOSC; cf. Rothwell, supra n. 108, 120.

high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone [...]'. Indeed, a ship merely traversing a strait without calling at a port of a strait State does not seem to entail a public health risk that would justify the application of preventive measures.[111] Indeed, a closer look at the elements of the relevant provisions of the LOSC seems to manifestly confirm these considerations. More specifically, unlike Art. 21(1)(h) which refers to laws for the *prevention of infringement* of the domestic sanitary laws, Art. 42(1)(d) empowers a strait State to enact laws in respect of the *loading or unloading* of any commodity, currency or person. The absence from the latter provision of any reference to 'prevention' denotes that the relevant powers do not comprise any preventive measures, but are limited only to cases where the ship has already engaged in the loading or unloading of commodities or persons. Therefore, a strait State may under no grounds exercise preventive jurisdiction against ships in transit passage which have not called at a port. In further amplifying those remarks, Art. 25(b) IHR expressly reads that '[s]ubject to Articles 27 and 43 or unless authorized by applicable international agreements, no health measure shall be applied by a State Party to [...] a ship which passes through waters within its jurisdiction *without calling at a port or on the coast*' (emphasis added).

67 On the other hand, the right of transit passage does not affect the sovereign discretion of strait/port State to regulate access into its ports. Indeed, when a ship passes through an international strait for the purpose of entering (or leaving from) the internal waters of a strait State, the latter may also act under the jurisdictional capacity of the port State. As such, it may introduce conditions of entry into its ports and further apply the necessary measures to prevent any breach thereof by virtue of Art. 25(2). This can be clearly deducted from the last sentence of Art. 38(2) which follows the definition of transit passage and reads: '[h]owever, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, *subject to the conditions of entry to that State*.' (emphasis added). Therefore, when a ship has called at a port, which is situated inside an international strait, it shall be fully subject to the preventive measures set by the respective strait/port State under Art. 25(2).

2.1.2. International responsibility of the flag State in case of violation

68 As shown, the jurisdictional mechanism of a State against a ship in transit passage is triggered only *after* the latter engages in the loading or unloading of commodities or persons in contravention of the sanitary laws.[112] Most importantly, even in this case, the actual powers of a strait State against

[111] Cf. Rothwell, *Lusitania Expresso case*, supra n. 75, 434; Molenaar, supra n. 13, 287.

[112] Cf. Molenaar, supra n. 13, 287; Jia, Art. 42, supra n. 108, para. 10 who accurately observes that the activities regulated by virtue of Art. 42(1)(d) are not incidental to the exercise of the right of transit passage.

the delinquent ship are remarkably narrower compared to those exercised under the regime of innocent passage. In fact, due to the more liberal character of the transit passage, it is debatable whether a strait State may unilaterally terminate the right and exercise full enforcement jurisdiction against ships not complying with the provisions of the LOSC under Art. 39(1)(d);[113] let alone with the municipal laws adopted by virtue of Art. 42.[114] Again, a comparative study of the two regimes seems to suggest that no such option is reserved against vessels in transit passage.

69 More specifically, unlike Art. 19(2)(g) which identifies the exact same activities as *ipso jure* prejudicial to the interests of a coastal State, thus forming a ground for the disqualification of the delinquent vessel from the right of innocent passage, no such provision is included in the regime of transit passage (Art. 37 et seq.). Furthermore, as noted, a ship in the territorial sea may also lose the right of innocent passage when it fails to comply with certain laws, by virtue of Art. 21(4) in conjunction with Art. 19(1). Notably, neither such option seems to exist in the regime of transit passage, given that: *(a)* no provision similar to Art. 19 is included in Part III; and *(b)* Art. 42(4), providing for the obligation of foreign ships in transit passage to comply with the municipal laws, is complemented by para. 5 which stipulates that, in case of non-compliance, the flag State 'shall bear international responsibility for any loss or damage which results to States bordering straits.' It thus seems to follow that the non-compliance of a ship with the domestic sanitary laws under Art. 42(1)(d) may only give rise to international responsibility of the respective flag State, while no direct enforcement measures may be taken by the strait State against it.

[113] Among others, Molenaar, supra n. 13, 289, 295.

[114] Tanaka, supra n. 20, 105. Unlike the laws referred to in Art. 42(1)(a) and (b), the violation of which may trigger the enforcement mechanism of a coastal State by virtue of Art. 233, no similar reference is made in the Convention for the rest of the cases of Art. 42. Based on this, one could argue that the violation of any other municipal laws does not entail disqualification from the right of transit passage; see also Molenaar, supra n. 13, 295 et seq.; Jia, Art. 42, supra n. 108, para. 11.

Chapter IV

Sanitary jurisdiction and access into the internal waters and ports

1. Internal waters and access into ports

70 According to Art. 8(1), '[e]xcept as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State'. Within the internal waters, a State exercises full sovereignty just as over its land territory.[115] This is clearly deducted from Art. 2 which reads '[t]he sovereignty of the coastal State extends, beyond its land territory and *internal waters*... to an adjacent belt of sea, described as the territorial sea'.[116] As a corollary, the State enjoys full jurisdiction in its internal waters, without the qualifications deriving from the right of innocent passage which does not apply thereto. The only exception to this rule concerns the cases where the internal waters are newly enclosed by a straight baseline, where the right of innocent passage keeps applying by virtue of Art. 8(2).[117] Among the maritime areas embraced under the term 'internal waters',[118] the most relevant for the purposes of this study are the ports.

71 Ports are under the territorial sovereignty of a coastal State. As such, it is widely recognized that the latter enjoys a broad discretion in regulating access thereto.[119] This may even be concluded from Art. 25(2) which grants port States enhanced jurisdictional powers to take the 'necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject'. Indeed, even though the provision deals with the preventive measures,

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[115] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Merits, Judgement of 27 June 1986, ICJ Reports 1986, 111 (para. 212). The Court holds that '[t]he basic legal concept of State sovereignty in customary international law, expressed in, inter alia, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory'; cf. Churchill/Lowe, supra n. 67, 60; Trümpler, 'Article 8', in Proelss A. (ed.) *The United Nations Convention on the Law of the Sea: A Commentary*, (2017), para. 14; Tanaka, supra n. 20, 78; Molenaar, supra n. 66, 283 in f.

[116] See Barnes, Art. 2, supra n. 49, para. 16; Trümpler, Art. 8, supra n. 115, para. 14. The latter author aptly observes that the language of the Convention indicates that there is no difference in the sovereignty over land and internal waters and that the sovereignty over internal waters is original; emphasis added.

[117] Tanaka, supra n. 20, 78; Trümpler, Art. 8, supra n. 115, para. 14, 15, 31.

[118] For an overview of the areas denoted by the term, see Tanaka, supra n. 20, 77.

[119] *Nicaragua v. United States case*, supra n. 115, para. 213. The relevant *dictum* reads '[i]t is also by virtue of sovereignty that the coastal State may regulate access to its ports'. The majority or scholars stand in favour of this position; see inter alia, Lowe, 'The Right of Entry into Maritime Ports in International Law', *San Diego Law Review* 14 (1977), 597 et seq. (605); Churchill/Lowe, supra n. 67, 60; Molenaar, supra n. 66, 185; de la Fayette L., Access to Ports in International Law, *IJMCL* 11 (1996), 2; Tanaka, supra n. 20, 80; Yang, supra n. 28, 48 et seq. (51); Trümpler, Art. 8, supra n. 115, para. 17, where further citations to international scholarship may be found. On the other side of this debate, there is the position arguing in favour of a general right of entry into ports under customary international law. See Saudi Arabia v. Arabian American Oil Company (ARAMCO), Award of 23 August 1958, ILR 27 (1963) 117, 212, which stated that '[a]ccording to a great principle of public international law, the ports of every State must be open to foreign merchant vessels and can only be closed when the vital interests of the State so require'. Towards this direction, Colombos C.J., *The international Law of the Sea* (1967), 167; Brown E.D., *The international Law of the Sea,* (1994), vol. I, 38.

both its wording and teleology clearly denote that a port State is empowered to regulate admission to its internal waters and ports. Thus, a normally operating vessel[120] does not automatically enjoy the right of entry into a port unless it complies with those regulations.[121]

72 On the other hand, it is without a doubt that ports are of paramount importance for global trade and communications. Due to this very role, there is a generally recognised presumption in maritime practice that ports are left open to merchant ships *unless otherwise provided and duly publicized* by the port authorities.[122] This presumption seems to strike a fair and workable balance between the conflicting interests, given that, without questioning the sovereign discretion of the port State, it ensures smooth performance of the shipping operations by imposing certain obligations for when the latter decides to amend the admission conditions usually in force.[123] In practice, entry into ports is facilitated by virtue of various bilateral,[124] as well as one multilateral instrument.[125]

2. Sanitary jurisdiction and access into ports

73 Given that the sanitary jurisdiction concerns mostly inbound vessels, the drafters of the IHR could not but warrant particular attention to the relevant topic. In this regard, Art. 28(1) IHR reads:

> 'Subject to Article 43 or as provided in applicable international agreements, a ship or an aircraft *shall not be prevented for public health reasons from calling at any point of entry*. However, if the point of entry is *not equipped* for applying health measures under these Regulations, the ship or aircraft may be ordered to proceed at its own risk to the nearest suitable point of entry available to it, *unless* the ship or aircraft has an *operational problem* which would make this diversion unsafe.'[126]

Already from its wording, one can see that the provision reflects *grosso modo* the above general considerations with regard to the right of entry into ports. More specifically, it comprises *three* possible scenarios which, together, seem to cover the overall jurisdictional spectrum of a port State. Those are: *(a)* the *main rule* (conditional admission); *(b)* the *exception to that rule* (denial of access due to lack of the necessary capacity); and *(c)* the *exception to the exception* (vessels in distress).

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[120] Save in cases of distress. For the relevant discussion, see infra paras 80 et seq.

[121] Trümpler, Art. 8, supra n. 115, para. 20; Tanaka, supra n. 20, 80; Molenaar, supra n. 66, 284; see also Yang, supra n. 28, 48, 61 et seq., where an extensive presentation of the relevant State practice.

[122] Churchill/Lowe, supra n. 67, 47; Yang, supra n. 28, 51; Tanaka, supra n. 20, 80-81; Molenaar, supra n. 66, 284.

[123] For the relevant discussion see, inter alia, Yang, supra n. 28, 51 who argues that '[a]n arbitrary closure of port without prior notification or delayed publication of newly introduced entry conditions would render the coastal State accountable internationally'; cf. Tanaka, supra n. 20, 80.

[124] E.g. Article XIX (2) of the 1956 Treaty of Friendship, Commerce and Navigation between the Netherlands and the United States of America; see Tanaka, supra n. 20, 80; Trümpler, Art. 8, supra n. 115, para. 19, where further citations.

[125] E.g. Art. 2 of the 1923 Geneva Convention and Statute on the International Regime of Maritime Ports, *58 LNTS* p. 285; entered into force on 26 July 1926.

[126] Emphasis added.

2.1. The main rule: Conditional admission

74 From the joint reading of the first two passages of Art. 28(1) IHR, it follows that if the point of entry is *adequately equipped* to apply the health measures necessary, the port authorities shall *grant admission* to the vessel requesting so. The rationale behind this main rule clearly reflects the general purpose of the IHR which is 'to prevent, protect against, control and provide a public health response in ways that [...] *avoid unnecessary interference* with international traffic and trade'.[127] Therefore, if the port at call is *technically capable* to provide effective response against a ship which carries a public health risk, the latter should not be the reason for denying its entry.

75 Furthermore, given that an inbound ship intends, in most cases, to use the port facilities for loading or unloading purposes, para. 1 should be read in conjunction with para. 2 which stipulates:

> 'Subject to Article 43 or as provided in applicable international agreements, ships [...] *shall not be refused free pratique by States Parties for public health reasons*; in particular they shall not be prevented from embarking or disembarking, discharging or loading cargo or stores, or taking on fuel, water, food and supplies. States Parties *may subject the granting of free pratique* to inspection and, if a source of infection or contamination is found on board, the carrying out of necessary disinfection, decontamination, disinsection or deratting, or *other measures necessary to prevent the spread of the infection or contamination*.' (emphasis added).

As can be seen, in case that a ship requests admission for purposes related to *free pratique*,[128] Art 28(1) and (2) IHR must be read in cahoots. That said, when a ship is granted admission under Art. 28(1)(a) IHR, it may also be provided with *free pratique*. Importantly though, it must be underlined that the general admission granted in the first place was based on the fact that the port is adequately equipped to apply the necessary health measures. This very consideration is now being clarified and complemented by Art. 28(2)(b) IHR which provides that the port State has the right to subject the granting of *free pratique* to certain conditions. As can be seen from the measures listed therein, these conditions regard certain sanitary procedures that the ship must undergo in order to 'prevent the spread of the infection or contamination'.

76 Attempting now to build a bridge between the IHR and the LOSC, the right enshrined in Art. 28(2)(b) IHR seems to be a normative expression of Art. 25(2) LOSC. That is to say, the conditions to which a State may subject the granting of *free pratique* seem to be tantamount to the admission

[127] Art. 2 IHR; emphasis added.

[128] According to Art. 1 IHR, *free pratique* means 'permission for a ship to enter a port, embark or disembark, discharge or load cargo or stores [...]'.

requirements that may be imposed under Art. 25(2). That said, after such conditional admission is granted, the ship must take all the necessary steps to comply with the relevant requirements.[129]

2.2. Exception to the rule: Denial of access

77 The performance of the necessary sanitary procedures obviously requires that the entry point be adequately equipped both in terms of infrastructure and qualified personnel.[130] If the port lacks the necessary capacity, it is *technically impossible* to apply any preventive measures. That said, any obligation to grant admission and *free pratique* (which will be *de facto* unconditional) would entail a serious threat for the public health of the State, the latter being exposed to a sanitary risk, while unable to take any measures for the prevention and control thereof. As it is obvious though, this scenario would severely undermine the interests of the port State, thus disturbing the reconciliatory balance pursued. Under this point of view, the only reasonable option for the port State is to *deny access* in the first place and indicate another point of entry that has the necessary capacity. Towards this end, Art. 28(1)(b) introduces an exception to the main rule, stipulating exactly that if the point of entry is not equipped for applying health measures, the ship may be ordered to proceed at its own risk to the nearest suitable point of entry available. Both the provision itself and the preceding remarks call for the following comments:

78 Art. 28(1)(b) speaks of 'the nearest suitable point of entry available'. In practice, such a point might be a bigger and better-equipped port facility in the territory of the same State. If this is the case, the port authorities of the newly designated point shall grant the vessel admission and *free pratique* under the conditions of Art. 28(2)(b). Therefore, the requirement for the necessary capacity should not be assessed on a State basis, but it concerns each point of entry individually.

79 Moreover, as can be seen from both its definition and the elements of Art. 28(1)(a), *free pratique* is a rather inclusive term which encompasses various activities that may be carried out by a vessel inside the port. Under this point of view, one may reasonably suggest that the required capacity of

[129] It must be borne in mind that the entry conditions set by a port State are a functional tantamount to the behavioural requirements related to innocent passage. That said, a vessel which fails to comply with those conditions shall be treated by the port authorities as if it engages in non-innocent passage. Practically speaking, if the vessel is still in the territorial sea, the coastal State may exercise full enforcement jurisdiction under Art. 19; if it has already entered the internal waters, the State may exercise at least the same powers by virtue of its territorial sovereignty. For the relevant discussion, supra paras. 52 et seq.

[130] See Annex 1/B IHR which comprises a list with the core capacity requirements for designated points of entry. Besides, Art. 13 IHR provides that each State Party shall 'develop, strengthen and maintain [...] the capacity to respond promptly and effectively to public health risks and public health emergencies on international concern as set out in Annex 1'. Reading the list embodied in Annex 1 in view of the individual characteristics of a case, one should be able to identify whether a port is to be considered as 'equipped'; cf. para. 37 of the Communication from the Commission: Guidelines on protection of health, repatriation and travel arrangements for seafarers, passengers and other persons on board ships, 2020/C 119/01.

the entry point should be examined *ad hoc*, on the basis of: *(a)* the specific activities for which the vessel requests admission; *(b)* the characteristics of the sanitary hazard. For example, a cruise ship is carrying 1000 passengers some of whom have been tested positive in the Covid-19. If the ship requests admission for refuelling purposes, without any intention to disembark the passengers, the entry point should not necessarily have designated areas for decontamination of containers in order for it to be identified as *equipped*.

2.3. Exception to the exception: Vessels in distress

80 According to what has been hitherto discussed, the decision on whether or not a hazardous vessel should be granted admission is inextricably dependent on the *capacity* of the entry point to apply the necessary sanitary measures. However, it must be noted that the said reconciliation scheme is designed to apply in cases where the vessel involved operates under normal circumstances. Indeed, in these cases, the protection of the public health seems to be given greater weight vis-à-vis the vessel's economic and commercial interests, the latter being served only after such protection has been properly secured.[131] Most reasonably though, the balance between the relevant interests is without a doubt tilted when the public health plays against the integrity and seaworthiness of the vessel, or a life threat for someone on board; shortly, when it plays against a situation of distress.

81 As is broadly recognised, vessels in distress have the right to enter any port under customary international law.[132] The IMO Search and Rescue Convention (SAR) defines a *distress phase* as 'a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance'.[133] As can be seen, the rationale behind the well-established customary rule is the *great need for immediate assistance*. It is exactly in the name of this necessity that the legitimate interests of a port State must decline against serious safety and humanitarian concerns.[134] For the same reasons, once a ship in distress enters the port, it enjoys immunity from the local laws and regulations. Importantly though, the immunity applies

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[131] Cf. *M/V Toledo case*, ACT Shipping (PTE) Ltd. V. Minister for the Marine, Ireland and the Attorney-General, [1995] *2 ILRM*, 30. For the relevant *dictum* about the humanitarian considerations, see infra n. 134.

[132] The *Eleanor case* (1809) *English Reports 165*,1067. According to the well-known *dictum* by Lord Stowell '[r]eal and irresistible distress must be at all times a sufficient passport for human beings under any such application of human laws.'; see also Churchill/Lowe, supra n. 67, 63; Tanaka, supra n. 20, 81; Noyes J., 'Ships in Distress', in *Max Planck Encyclopedia of Public International Law (MPEPIL)*, 2007, para. 11; Barnes, Art. 8, supra n. 49, para. 28; *ibid.*, 'Refugee Law at Sea', *ICLQ 53* (2004), 58; Yang, supra n. 28, 64 et seq.

[133] Annex Chapter 1.3.11. of the 1979 International Convention on Maritime Search and Rescue (SAR); adopted in 27.4.1979; entered into force in 22.6.1985; *UNTS* 1405, 97; cf. Tanaka, supra n. 20, 81.

[134] See *M/V Saiga (No. 2) case*, supra n. 20, para. 155: 'Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.'. Similar concerns were raised by Judge Barr A. in the *M/V Toledo case* (supra n. 131) who stated that '[...] the right of a foreign vessel in serious distress to the benefit of a safe haven in the waters of an adjacent state is *primarily humanitarian rather than economic* [...]' (emphasis added).

only to those laws the violation of which was unavoidable due to the distress.[135] Apart from them, the ship shall comply with the rest of the municipal laws, as well as the instructions of the port authorities concerning, inter alia, measures for the protection of the port facility against a public health risk.[136] Notably, despite the fact that the topic has been very thoroughly discussed by both international jurisprudence and scholarship, it seems that no concrete identification criteria have been consolidated, thus leaving a broad space of discretion to the port States.[137] In fact, recent State practice has shown, in various instances, significant divergence from the above doctrinal views, with several States denying access to ships in distress, on account of major environmental concerns,[138] or by reasons of protecting their public order.[139]

82 Coming back to the sanitary jurisdiction, even though Art. 28(1)(c) IHR does not explicitly refer to a distress phase, it, however, describes a scenario which is very close to that. More specifically, it stipulates that the port State may order a ship to proceed to the nearest suitable point of entry (thus deny access) 'unless the ship [...] has an *operational problem* which would make this diversion *unsafe*.' (emphasis added). In light of this, a hygienically hazardous ship, when in distress, may enter any port regardless of whether the latter is adequately equipped to apply the necessary health measures. It thus follows that the discretion of a port State (to assess the hygienic risk and decide about the ship's admission accordingly) applies only to normally operating vessels. A supporting argument of this view can be drawn from the systematic structure of Art. 28 IHR. Specifically, Art. 28(1) which regulates the general admission to an entry point makes no reference to the possibility of subjecting the admission itself to any conditions; instead the IHR reserve this

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[135] Among others, see Noyes, supra n. 132, para 21; Tanaka, supra n. 20, 81; Yang, supra n. 28, 66, 85.

[136] In this direction, Trümpler, Art. 8, supra n. 115, para. 29, where further citations; cf. infra paras 84-85.

[137] Yang, supra n. 28, 66.

[138] From the recent State practice: **M/V Erika case**: a Maltese tanker, carrying some 31,000 tonnes of heavy fuel oil as cargo, faced a distress phase due to a severe storm in the Bay of Biscay on 12th December 1999, 60 miles from the coast of Brittany. After the French authorities refused to provide a place of refuge, the vessel broke in two resulting in the spilling of 20,000 tonnes of oil; an overview of the case may be found at: https://www.itopf.org/in-action/case-studies/case-study/erika-west-of-france-1999/; cf. Tanaka, supra n. 20, 82; **M/V Prestige case**, for an overview of the facts see ECtHR *Mangouras v. Spain case* (Application No. 12050/04), Judgement of the 8 January 2009; **M/V Toledo case**, supra n. 131; cf. Tanaka, *ibid.*, 83; Trümpler, Art. 8, supra n. 115, para. 28.

[139] See **Tampa case**: On 27 August 2001, a Norwegian merchant ship after rescuing 433 asylum seekers from a sinking Indonesian ship on the high seas sought refuge in Australian territory of the tiny Christmas Island to disembark these people. The Australian authorities refused access to the island, while Australian troops boarded the ship until an agreement was eventually reached; see Yang, supra n. 28, 67; Feld F., 'The Tampa case: Seeking Refuge in Domestic Law', *Australian Journal of Human Rights* 8(1) (2002), 157; available at: http://classic.austlii.edu.au/ au/journals/AUJlHRights/2002/11.html#fn1; see also the **Aquarius incident**: Papastavridis E., 'The Aquarius Incident and the Law of the Sea: Is Italy in Violation of the Relevant Rules?', published in *EJIL:Talk!* on 27 June 2018, available at: https://www.ejiltalk.org/the-aquarius-incident-and-the-law-of-the-sea-is-italy-in-violation-of-the-relevant-rules/; Fink M., 'The Aquarius incident: navigating the turbulent waters of international law', published in *EJIL:Talk!* on 14 June 2018; available at: https://www. ejiltalk.org/the-aquarius-incident-navigating-the-turbulent-waters-of-international-law/.

option for Art. 28(2) which concerns the right of *free pratique*. Notably, the latter is by definition a right that is exercised by normally operating ships, while a ship in distress obviously does not call at a port for any such purposes. In light of this, one may argue that Art. 28(1) is deliberately silent on this matter so as to indicate that the admission *per se* should not be subject to any conditions (*argumentum ex silentio*), thus covering exactly the cases where a ship requests to enter a port for purposes not related to *free pratique*; as is the case with a ship in distress.

83 Moving on, another point that calls for further discussion is the relationship between Art. 28(3) and the above general customary rule. The provision refers to cases where a ship has an *operational problem* which would make its diversion *unsafe*. From its rather clear wording, it follows that any other situation of distress, such as a grave and imminent danger of life for someone on board, is seemingly outside the scope of the provision unless it is related to an existing operational problem that affects the integrity and seaworthiness of the ship. On the other hand, as discussed above, the relevant customary rule indistinguishably applies to any case where a 'person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance'.[140] The use of the conjunction *'or'* clearly denotes that the three subjects of the sentence (person, vessel, other craft) are listed in an alternative order; namely, each of them may constitute a standalone condition capable to generate a distress phase. This is all the more amplified by the widely accepted position that 'if safety of life is a factor, the coastal State should not deny access to a vessel in distress.'[141] Based on this, one may reasonably suggest that humanitarian considerations should not arise only when the danger of life is an aggravating factor to an existing operational problem, but also when someone on board is in need of immediate health care which cannot be provided by the medical means available, regardless of the seaworthiness of the vessel. Therefore, Art. 28(3) should be broadly interpreted so as to apply to any case of *force majeure* that demands the immediate entry of a vessel into a port; either this results from an operational problem *or* from an imminent danger

[140] See the definition provided by the SAR Convention, supra para. 81.

[141] The above sentence is formulated following the reverse reading of the well-known *dictum* by Judge Barr A. in the *M/V Toledo case* (supra n. 131); see also *M/V Saiga (No. 2) case*, supra n. 20, para. 155; cf. Tanaka, supra n. 20, 83; Again, it must be noted that State practice has shown a significant degree of divergence from the above doctrinal approaches. See, for example, **Aquarius incident**: On 10 June 2018, a rescue vessel operated by a German NGO requested access to an Italian port to disembark more than 600 rescued migrants. The Italian authorities denied access to the ship, despite the fact that many people on board were reported as traumatized and in need of immediate medical care. For an interesting analysis on the law of the sea aspects of this case, Papastavridis, supra n. 139, *EJIL:Talk!*, posted on 27.6.2018.

of life for someone on board.[142] That said, the study will now discuss the nuances of each scenario as they may arise in the context of the sanitary jurisdiction.

2.3.1. Operational problem

84 As stipulated in Art. 28(1)(c), in case that a vessel is facing an operational problem which renders the continuation of its journey unsafe, it may enter any point regardless of whether it is adequately equipped to perform the necessary sanitary procedures. In this scenario, the point of entry does not work as a voluntarily scheduled destination, but rather as a place of refuge where the ship requests admission by reasons of *force majeure*. Thus, in view of a grave and imminent danger for the ship, the public health interests of the coastal State seem to temporarily retreat. However, the public health risk, due to which a normally operating ship would have been denied access to the specific point, is always present. With this in mind, it seems reasonable to suggest that, once the distress phase has passed, the public health interests of the State regain full normative effect.

85 This reconciliatory necessity is clearly reflected in Art. 28(5) which lists certain duties to be performed by a ship exactly in cases where this, 'for reasons beyond the control of the officer in command', has berthed elsewhere than at the port at which it was due to berth. These duties regard inter alia: the obligation of the master to communicate with the nearest competent authority; as well as the right of the port authorities to apply the necessary health measures. Obviously, the applicability of those measures is contingent upon the relevant capacity of the port facility. If the latter happens to be adequately equipped, the ordinary sanitary procedures may normally apply. If, however, the port lacks the necessary capacity, it seems reasonable to suggest that the competent authorities may take any equivalent measures –suitable and available– provided that they are in conformity with the LOSC, the IHR and other rules of international law. For further facilitating the task of the authorities, Art. 28(5)(c) imposes an *ex lege* quarantine requirement, stating that no traveller on board the ship shall leave its vicinity and no cargo shall be removed from that vicinity unless required for emergency or communication purposes, or authorized by the port authorities.

2.3.2. Danger of life

86 In case that the distress phase results from a life-threatening situation for someone on board, the urgent need for medical care may also constitute a *force majeure* event that demands the immediate entry of the ship into the nearest point, regardless of whether the latter is adequately equipped for

[142] This conclusion is further amplified in view of Art. 28(6) IHR which reads: '[n]otwithstanding the provisions contained in this Article, the officer in command of a ship [...] may take such emergency measures as may be necessary for the health and safety of travellers on board'.

applying the sanitary measures normally required.[143] Practically speaking, once the ship enters the port, the authorities, in cooperation with the officer in command, shall take the necessary steps to ensure the safe medical evacuation of the patient.[144] Apart from that, the measures under Art. 28(5) IHR shall equally apply hereto, as long as the hazardous ship remains docked. However, it must be noted that, unlike the operational problem, in this case the distress phase for the ship ends with the disembarkation of the patient in danger. Therefore, in the absence of any other reasons justifying its berth, the port authorities may order the ship to depart.

87 The particular case of a life-threatening event on board a hygienically hazardous vessel calls for one additional comment: Apart from the assessment of the hygienic risk which is the benchmark for the application of any preventive measures, the port authorities should also examine whether the life emergency is actually related to this risk. If it is not related (e.g. a crew member is suffering a heart attack on board a dry cargo ship which is suspected of carrying contaminated containers), the patient may be provided with the necessary healthcare without necessarily being subject to any sanitary protocols in place. On the other hand, if the health emergency is directly related to the sanitary hazard (e.g. elderly passenger on board a cruise ship, tested positive to the Covid-19, is suffering serious respiratory problems), the patient in danger is at the same time a dangerous patient, or as the IHR define so, an *'affected person'*.[145] In this case, the competent authorities shall apply all the necessary sanitary protocols in order to prevent the spread of the disease.[146]

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[143] One may argue that the lack of the necessary equipment is the reason why Art. 28(1)(c) refers only to operational problems excluding any life-threating situation, given that the point of entry might not have the capacity to deal with such medical situations. However, the requirement for an 'equipped' entry point under Art. 28(1) refers only to the necessary capacity for the application of sanitary measures and does not cover other facilities that a port shall have, such as medical care unit. Most importantly, even in the marginal case that the port lacks such unit, the process of medical evacuation anyway demands the transport of the patient ashore. If this cannot be done by aerial or other naval means, the vessel must be granted admission to the nearest point of entry.

[144] Art. 28(5)(c) provides that no traveller on board the ship shall leave its vicinity '*unless required for emergency purposes*' (emphasis added). It seems that such cases of medical emergency are the *rationale* behind this provision; the term *medical evacuation* is defined as the '[t]ransport of persons, especially by helicopter, to a place where they can receive medical care'; available at: https://medical-dictionary.thefreedictionary.com/medical+evacuation. For the purposes of this study, the term is used to describe the medical transport of a patient by any means.

[145] According to Art. 1 IHR, the term *affected persons* means 'persons [...] that are infected or contaminated, or carry sources of infection or contamination, so as to constitute a public health risk'.

[146] Cf. *Operational considerations by WHO*, supra n. 5, p. 2. The document stipulates that 'during the disembarkation of suspected cases, every effort should be made to minimize the exposure of other persons and environmental contamination'. Relevant practices include: the wearing of medical mask; routine performance of hand hygiene; change of the personal protective equipment (PPE); high volume of air exchange inside transport vehicles; frequent cleansing and disinfection of ambulances and other transport vehicles, etc.; see also *Management of ill travellers at Points of Entry (international airports, seaports, and ground crossings) in the context of Covid-19*, Interim guidance by WHO (19.3.2020), 4ff; Chapters: 'Preparation of transport of ill travellers suspected to have Covid-19' and 'Infection Prevention and Control considerations for ambulances and transport staff'; available at: https://www.who.int/publications/i/item/10665-331512.

88 Overall, one can see that the equity scale between the conflicting interests always tilts in favour of those being in greater need for protection. To put this in more descriptive terms, when the seesaw is played between the public health of a coastal State and the ordinary (economic and trade) interests of a foreign merchant ship, the former must be given a heavier burden of protection. On the other hand, if the public health (or better a potential risk for the public health) is playing against an ongoing distress phase that is likely to put the integrity and seaworthiness of a ship in jeopardy, or against a life-threatening situation for someone on board, that burden must obviously be given to the latter. After all, as the famous maxim of the Latin philosopher *Cicero* reads: '*salus populi suprema lex esto*' which, in this case, seems to apply in its very literal meaning.[147]

3. Public health emergency of international concern

89 From the legal analysis so far, the ordinary mission of the sanitary jurisdiction within the law of the sea seems to target a specific sanitary risk that an inbound ship may carry. In other words, the preventive measures under the LOSC and the IHR are mainly developed to correspond to *individual cases* between a coastal State and a hazardous foreign ship. However, as is manifestly attested by the ongoing Covid-19 pandemic, a public health risk has *ex natura rei* the potential to become a public health emergency of international concern.[148] Having this in mind, the drafters of the IHR provided coastal States with the possibility to implement measures more stringent than the ordinary, in cases where the Director-General of the WHO has classified a certain event as a public health emergency of international concern under Art. 12 IHR. Following such classification, the WHO shall issue temporary recommendations under Art. 15 IHR with specific health measures to be implemented by the States Parties concerned. These measures may possibly exceed the legitimacy standards usually in place. Notably though, they must always uphold the reconciliatory objectives of both the LOSC and the IHR.[149]

3.1. Access into ports in cases of public health emergency of international concern

90 There is no doubt that the smooth and effective implementation of the temporary recommendations requires a certain level of compliance and coordinated response on behalf of the States Parties concerned.[150] However, State practice does not always warmly correspond to this necessity. The

[147] Cicero Marcus Tullius, *De Legibus* III, Part III, Sub. VIII.

[148] Public health emergency of international concern is defined in Art. 1 IHR as 'an extraordinary event which is determined, as provided in these Regulations: *(i)* to constitute a public health risk to other States through the international spread of disease and *(ii)* to potentially require a coordinated international response.'; cf. Annex 2 IHR for the events that may constitute a PHEIC.

[149] See Art. 15(2) and 18 IHR. The relevant mechanism seems to reflect the 'doctrine of necessity' which one rely on 'to justify measures that would otherwise be wrongful'; sic *M/V Saiga (No. 2) case*, supra n. 20, para. 129.

[150] See Broberg, supra n. 16, 206.

reasons behind the –sometimes significant– divergence of the national measures from the respective recommendations should be mostly attributed either to the lack of the necessary capacity for implementing the measures indicated, or to the fact that several States decide to unilaterally apply horizontal measures exceeding the limits set by the recommendations, in an exorbitant attempt to protect their public health (e.g. ban of specific types of ships, closure of ports).[151]

3.2. The Covid-19 case study

91 The recent State practice on the Covid-19 pandemic may serve as a very helpful case study for exemplifying the above remarks through the examination of the responsiveness of certain States to the temporary recommendations. More specifically, on 30 January 2020, based on the Emergency Committee recommendations, the Director-General of the WHO declared that the outbreak of the Covid-19 is classified as a Public Health Emergency of International Concern (PHEIC).[152] Following this, the WHO issued temporary recommendations, as well as various operational documents dealing *inter alia* with international traffic.[153] Already from the first reading of the recommendations, one may observe that the principal burden, as regards the various national measures to be adopted pursuant to them, falls on ensuring, to the best degree possible, unimpeded performance of international traffic. As a very illustrative excerpt thereof reads: '[t]ravel measures that significantly interfere with international traffic may only be justified at the beginning of an outbreak, as they may allow countries to gain time, even if only a few days, to rapidly implement effective preparedness measures. Such restrictions must be based on a *careful risk assessment*, be *proportionate* to the public health risk, be *short in duration*, and be *reconsidered regularly* as the situation evolves.'[154] Thus, in line with the general regulatory objectives of the IHR, the WHO strongly recommends that any national measures should take into account the major importance of international traffic for the global trade and communication system, as well as for the numerous human and economic activities which are dependent thereupon.

92 Within the context of the law of the sea, despite the clear guidelines set by the WHO, as generally stated in the IHR and specifically reiterated in the temporary recommendations currently in place, several coastal States have implemented more stringent measures which entail major interference

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[151] *Ibidem*.

[152] WHO Director-General's statement on IHR Emergency Committee on Novel Coronavirus (2019-nCoV) on the 30 January 2020; information available at: https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihr-emergency-committee-on-novel-coronavirus-(2019-ncov).

[153] WHO recommendations for international traffic in relation to Covid-19 outbreak; available at: https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak.

[154] Supra n. 153 (emphasis added); cf. *Operational considerations for managing Covid-19*, supra n. 5.

to foreign merchant ships, thus disturbing the aforementioned reconciliatory scheme. For example, Australia has imposed a general ban on the entry of any foreign-flagged cruise ship into 'Australian waters', which is in force from the 27.3.2020 until (at least) 17.9.2020.[155] In a similar vein, the Maltese authorities enforced a 'temporary ban on the entry of cruise liners and passenger ships into Maltese ports and territorial waters', while the relevant decision continues that, depending on the prevailing circumstances, the authorities 'may grant conditional permits for a vessel to be rendered essential services related to the wellbeing of the persons on board and the vessel's safety and security at a designated anchorage'.[156] Similarly, the measures initially adopted by the Hellenic Government provided that all calls at Greek ports of incoming private recreational vessels and professional tourist vessels are temporarily suspended for public health reasons.[157] On the other hand, there are countries whose national measures adopted in response to the Covid-19 are less restrictive for international traffic. For example, in March 2020, the Norwegian Ministry of Health and Care Services introduced a group of health measures regarding, inter alia, cruise ships which operate on the coast of Norway. Among other rules, it was provided that no passenger or crew member on board a cruise ship is allowed to disembark in the Norwegian territory.[158] At the same time though, the Norwegian Government emphasized the major significance of international traffic as forming a part of the supply lines of essential goods in and out of Norway, and explicitly declared that '[a]ll transport of goods, both import and export, which does not involve the carriage of passengers is to carry on as normal by road, trains, ships and aircraft. Airports, ports and border crossings are being kept open for such traffic.'[159]

93 As can be seen from the above indicative examples, there are cases where the States' initiatives have exceeded the purpose and the letter of both the IHR and the temporary recommendations. It is nonetheless important to note that the vast majority of those measures are of temporary force, being regularly subject to reconsideration depending on how the epidemiological situation

[155] Information from the official website of the Australian Department of Health; last access 31.8.2020; available at: https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-restrictions/coronavirus-covid-19-advice-for-international-travellers#travel-into-australia.

[156] See Malta Transport Centre, Ports and Yachting Directorate, COVID-19 Precautionary measures applicable to cruise liners and passenger ships; Port Notice No. 05/2020.

[157] See Art. 2(1) of the Joint Ministerial Decision No. 30341/15.5.2020, (Government Gazette B' 1860/15-05-2020); cf. Art 2 of the Circular issued by the Hellenic Coast Guard on the 7.7.2020, 'Covid-19 - Update of the measures taken by the Hellenic Maritime Administration with a view to facilitate and progressively restore maritime transport services and connectivity', Ref No. 2020.0/42907/2020.

[158] See §10b of the Covid-19-Regulations, issued by the Norwegian Ministry of Health and Care Services, which, inter alia, provides for a general prohibition of disembarkation of passengers and crew members in the territory of Norway; available at: https://lovdata.no/dokument/SF/forskrift/2020-03-27-470 (Norwegian version).

[159] Information from the official website of the Norwegian Government; Press release of 15.03.2020 (No. 29-2020); available at: https://www.regjeringen.no/en/aktuelt/goods_traffic/id2693654/.

evolves.[160] Therefore, in order to holistically assess the legality of a certain measure, one should also be aware of its application timeframe. With this in mind, the Australian ban of foreign cruise ships, for example, which has a consecutive application timeframe of almost six months, may not easily be considered as aligned with the relevant recommendations. Finally, it should not be left unmentioned that various States have adopted additional measures in an attempt to counterbalance the disruptions that the extraordinary health measures have caused to the shipping industry.[161]

94 Overall, behind the temporary recommendations by the WHO, one can see the *dual necessity* to safeguard the public health, while paying due regard to other legitimate interests at stake, such as international traffic and the numerous economic activities contingent thereupon. The importance for the national measures to be aligned with the recommendations in place is expressly denoted in Art. 43 IHR which empowers States to apply additional health measures that 'achieve the same or greater level of health protection than WHO recommendations.' Notably, in these cases, especially when the measures *significantly interfere with international traffic*,[162] the State must inform the WHO within 48 hours of their application, providing the public health rationale and the relevant scientific information for it, 'unless these [measures] are covered by a temporary or standing recommendation', as provided for in Art. 43(3) and (5) IHR. Following these remarks, one can see that the prudent and balanced response to a public health risk is a multifactorial challenge which requires that all the competing interests be subtly taken into consideration. That said, even though the application of horizontal measures undoubtedly ensures a greater level of health protection for the port States, the reasonableness and, ultimately, the legality thereof should nonetheless be examined on the basis of whether they pay due regard for international traffic and the navigational interests of foreign merchant ships.

[160] See the temporary recommendations currently in place which state that '[t]ravel measures that significantly interfere with international traffic may only be justified at the beginning of an outbreak, as they may allow countries to gain time, even if only a few days, to rapidly implement effective preparedness measures'; supra n. 153.

[161] See, for example, the additional measures taken by the Maltese authorities with regard to the extension of sea service beyond the seafarer employment agreement, and the extension of the validity of seafarer certificates beyond their expiry date; available at: https://www.transport.gov.mt/include/filestreaming.asp?fileid=4718.

[162] The last passage of Art. 43(3) IHR somewhat determines the term *significant interference* by stating that this 'generally means refusal of entry or departure of international travellers, baggage, cargo, containers, conveyances, goods, and the like, or the delay, for more than 24 hours'.

Chapter V

The proportionality principle at the core of the reconciliation mechanism

1. From the criterion of necessity to the proportionality principle

95 As has been stated in various instances throughout this study, the jurisdictional powers of a coastal State must be exercised to the degree necessary for achieving the public health objectives. The notion of *necessity*, employed in several provisions of both the LOSC and the IHR, seems to govern the behaviour of a State across its whole jurisdictional *spectrum*, thus indicating not only *what* measures it may adopt and apply in each case, but also *how* it must do so. Methodologically speaking, the criterion of necessity is one of the core elements of the proportionality principle, the other three being the proper *purpose*, the *suitability* requirement, and the proportionality *stricto sensu* element.[163] The four elements together form the so-called 'proportionality test' which is undertaken in order to ensure that a response or an action is commensurate with the anticipated goal to be achieved.[164] Roughly speaking: *(a)* there must be a legitimate purpose to be served; *(b)* the requirement of *suitability* demands that the measures selected be appropriate for this purpose; *(c)* the criterion of *necessity* provides that between other measures suitable to achieve this purpose, the least onerous must be chosen; and *(d)* the proportionality *stricto sensu* requires a balancing between the benefits gained and the harm caused by the application of the selected measure.[165]

96 Even though the proportionality principle has been mostly elaborated within the context of the constitutional rights, its application being extended to other legal domains as well, such as the human rights,[166] the use of force,[167] or the peaceful countermeasures of a State,[168] it is not utterly foreign to the law of the sea, where it plays a lead role in the context of the maritime delimitation disputes.[169] All the more, due to its fundamental character in the legal doctrine at large, it is broadly

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[163] Among others, Barak A., *Proportionality: Constitutional Rights and their Limitations* (2012), 131 et seq., 372; Crawford E., 'Proportionality' in *Max Planck Encyclopedia of Public International Law (MPEPIL)*, 2011; para. 2.

[164] Newton M., May L., *Proportionality in International Law* (2014), 15.

[165] Barak, supra n. 163, 340, 372.

[166] See Crawford E., supra n. 163, para. 13, where an extensive list with the ECtHR case law on this matter; cf. ECtHR *Women on the waves case*, supra n. 11.

[167] See *Nicaragua v. USA case*, supra n. 115, para. 176; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Reports 1996, p. 226, para. 41. In both cases the Court held that the submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law.

[168] See *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgement, ICJ Reports 1997, p. 7, para. 85.

[169] See *North Sea Continental Shelf*, Judgement, ICJ Reports 1969, p. 3, para. 98; cf. Tanaka, supra n. 20, 200 et seq., where extensive reference to relevant case law.

recognised as forming a general principle of law.[170] As such, 'proportionality means that a State's acts must be a rational and reasonable exercise of means towards achieving a permissible goal, without unduly encroaching on protected rights of either an individual or another State'.[171] In the accurate words of Allan, '[t]he proportionality doctrine will be employed to secure a defensible accommodation of competing rights and interests, according to the circumstances of the particular case'.[172] In light of this, one may suggest that the principle, as a methodological tool, could also be of potential use in other cases of conflicting interests, including that of the sanitary jurisdiction.

2. Application of the principle to the sanitary jurisdiction

97 If one attempts to reconstruct the legal analysis conducted in the previous chapters in light of the proportionality principle, it will not be difficult to observe that the regulatory elements of the latter are reflected in every aspect behind the jurisdictional powers of a coastal State. More specifically, through the criterion of *necessity* which is *expressis verbis* reiterated in various provisions,[173] the LOSC seems to substantively delimit the discretion of a coastal State to the degree necessary for achieving the public health purposes. Furthermore, in the exact same vein, and sometimes even more expressly, the IHR comprise numerous provisions which demand the selection of the least disturbing measures that would achieve the public health objectives.[174] Notably, according to the proportionality test, the *criterion of necessity* applies to the second stage of the relevant process, after the measures in question have successfully passed the first stage of suitability.[175] This being said, despite the fact that the LOSC does not explicitly refer to the suitability requirement, the latter should be understood as tacitly included in the necessity criterion, the recourse to which logically presupposes that the measures in question have already been found as suitable. Finally, an implicit yet clear recourse to the proportionality principle, and especially to the third stage of the relevant test, is to be found behind the considerations why a vessel in distress must be provided a place of refuge regardless of whether the latter is adequately equipped to apply the necessary

[170] *ECJ Schräder v. Hauptzollamt Gronau case* (C-265/87), Judgement of 11.7.1989, p. 2263 et seq. (2269), where the Court held that the principle of proportionality is one of the general principles of Community Law; cf. Allan T.R.S., 'Democracy, Legality, and Proportionality', in Huscroft et al. (eds.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (2014), 205, where the author states that justice itself invokes the notion of proportionality; Crawford E., supra n. 163, para. 1; Engle E., 'The history of the general principle of proportionality: An overview', *Dartmouth Law Journal* 10/1 (2012),1-11; Eschenhagen/Jürgens, supra n. 20, 11; Yang, supra n. 28, 51, 75, 184, 196 (n. 902), 217, 245, 268.

[171] Crawford E., supra n. 163, para. 1.

[172] Allan, supra n. 170, 208.

[173] Art. 25(1) and (2), 33 LOSC; cf. Art. 24 and the theoretical considerations with regard to the meaning of the term *hamper*; supra para. 29.

[174] Art. 2, 15(2), 16, 43(1), (3) IHR.

[175] For an interesting legal analysis on the *necessity test*, see Barak, supra n. 163, 317 et seq.

sanitary measures. Indeed, in these cases, even if the denial of entry appears the only suitable and necessary option for the port State, such a decision would entail a cost for the ship that would most likely exceed the public health benefit sought.[176]

98 Following the above remarks, the study takes the view that the proportionality principle forms the core *rationale* behind the reconciliatory mechanism of the sanitary jurisdiction.[177] Indeed, not only does it not alter the normative function of the applicable provisions, but instead it facilitates their interpretation, as well as their actual application, thus ensuring a fair and equitable outcome. In other words, a recourse to the proportionality principle seems to provide the commentator with specific methodological tools which, albeit developed on account of other fields of law, seem to form a valuable and applicable mechanism in the context of the sanitary jurisdiction as well.

99 Therefore, the overall legal analysis could be summarized in the following reconciliation model:

> The measures taken by a coastal State in the context of the sanitary jurisdiction must: *(a)* serve the **legitimate purpose** of protecting the public health by preventing, controlling or mitigating a sanitary risk; *(b)* be **appropriate** for achieving this purpose; *(c)* be **necessary**, so they can achieve it with the least possible disturbance of the foreign vessel; and *(d)* be **proportionate *stricto sensu***, in the sense that the public health benefit pursued by the measure in question must not fall short of the cost that its application may cause to the legitimate interests of the foreign vessel involved.

[176] Supra para. 81; n. 138, 139, where further references to relevant State practice.

[177] In fact, due to the fundamental character of the principle, one could suggest that, even in the absence of the relevant positive law, a Court should have been able to reach an equally fair and equitable outcome by virtue of the proportionality principle alone which, in this case, would have applied *extra legem, intra jus*.

Conclusions

The purpose of this study was to investigate the scope and the limits of the coastal States' sanitary jurisdiction in order to formulate a fair and equitable reconciliation model between the relevant conflicting interests. More precisely, at the edges of this tug-of-war are placed the public health interests of coastal States, on the one side, and the rights and freedoms that foreign merchant vessels enjoy in areas under national jurisdiction, on the other. The common denominator between them, as well as the generating event of the sanitary mechanism, is the existence of a public health risk, on board a foreign vessel, which is likely to spread to the shore and adversely affect the public health of the coastal State. Within this context, the study attempted to examine the jurisdictional options of a coastal State through the interpretation and the legal analysis of the applicable law, as enshrined mostly in the LOSC and the IHR. Following the discussion of the normative relationship between the two instruments, the research body focused on the examination of how the sanitary jurisdiction interacts with the fundamental regimes that govern the maritime areas under national jurisdiction. Commencing from the contiguous zone and the examination of the relevant powers under Art. 33, the study proceeded with the investigation of how the sanitary laws interact with the right of innocent passage in the territorial sea, as well as with the regime of transit passage within an international strait where the latter applies. After that, the spotlight was put on the cardinal issue with regard to the scope of the jurisdictional powers of a port State to regulate access into its internal waters and ports by virtue of sanitary measures, both in case of normally operating ships and ships in distress. Furthermore, the study discussed the reasonableness and legality of the extraordinary measures that a coastal State may implement in case of a public health emergency of international concern, taking as a case study the ongoing global pandemic of the Covid-19. Ultimately, the research burden has fallen on the discussion of certain elements deriving from the proportionality principle which, according to the view of this study, may serve as a catalytic methodological tool for interpreting the relevant applicable law in a way that best accommodates the conflicting interests in question. For purposes of better understanding, the final part of these concluding remarks is devoted to some uniform considerations which summarize the essence of this legal analysis.

The sanitary jurisdiction is a regime of mostly proactive rather than suppressive character. This means that the main burden falls on the *prevention* of a public health risk *before* this is actually materialized. Moreover, the overall regime is characterized by two central features which both seem to somewhat relate to the biological nature of a hygienic risk; the first one concerns the fact

that sanitary infringements do not attract intense criminal interest compared to the other three groups of laws usually accompanying the sanitary legislation within the LOSC;[178] and the second one relates to the fact that a public health risk on board a ship is most likely to be materialized once the latter is docked at a point of entry. In view of these particular characteristics, the sanitary jurisdiction had to be examined on the basis of two different scenarios: *(a)* the ordinary –and most common– scenario dealing with non-delinquent hazardous ships that have called at a port; and *(b)* the extraordinary scenario regarding the jurisdictional options of a coastal State against delinquent ships which attempt to commit, or have deliberately committed, a sanitary infringement.

Under the **ordinary scenario**, the sanitary jurisdiction exclusively concerns *inbound ships*, and it is exercised in the following *two stages*: At the first stage, the coastal authorities are expected to request from the ship any information necessary in order to *verify* and *assess* the hygienic risk in question. If the information cannot be provided through telecommunication means, or it does not suffice, authorized personnel of the port may board and inspect the ship ***(exploratory stage)***.[179] Based on the findings from the preceding stage, the authorities shall decide whether the ship is to be granted admission to the entry point. For this decision, two major factors must be taken into consideration: *(i)* the capacity of the entry point to apply the health measures required; and *(ii)* the operation conditions of the ship. If the entry point is **adequately equipped**, the authorities should not deny access to any ship. A deviation from that rule may possibly occur when a public health risk is classified by the WHO as being of *international concern*. In such a case, the coastal States involved may adopt stricter sanitary measures which, however, should not exceed the legitimacy limits set by the IHR and the temporary recommendations in place. That said, the legality behind the recent State practice on the Covid-19 response, where several States implemented horizontal measures in significant disregard for international traffic, seems to be questionable. Moving on, if the entry point **lacks the necessary capacity**, one must further consider the operation conditions of the ship involved. If the latter *operates normally*, the authorities may deny access and redirect it to the nearest suitable and available point.[180] If, however, the ship is facing a situation of *distress*, the authorities shall grant admission into a place of refuge. Notably, given that in this case the entry point is unequipped, hence susceptible to the sanitary hazard, the authorities are entitled to

[178] Namely the customs, tax, and immigration laws.

[179] The relevant preventive measures stem from: **Art. 33(1)(a)** for the contiguous zone; **Art. 21(1)(h)** and **25(2)** for the territorial sea; **Art. 38(2)** for when a ship in transit passage has called at a port of the strait/port State.

[180] If the ship is in the contiguous zone and the new point of entry is placed in the territory of the same State, it seems reasonable to suggest that the authorities should not deny access to the parts of the territorial sea which the ship is necessary to pass through in order to reach the newly designated point.

implement any measures suitable and available, provided that they are in conformity with the LOSC and the IHR (***executory stage)***. If, in any of the above stages, the inbound ship **fails to comply** with the preventive measures or the subsequent orders of the competent authorities, or it engages in any **prejudicial activity**, the coastal State may exercise full enforcement jurisdiction, save when the ship is in the contiguous zone without having previously been in the territorial sea.[181]

The above scenario does not preclude the possibility that a delinquent ship may (attempt to) commit a sanitary infringement while traversing the *territorial sea* without entering the internal waters (**extraordinary scenario**). Albeit very rare in practice, the LOSC empowers a coastal State to take the necessary steps to prevent or to punish any such prejudicial infringement by virtue of Art. 25(1) and 19(2)(g). On the other hand, the exact same behaviour is subject to a different legal treatment, if the delinquent ship is within other maritime zones. Specifically, if the ship traverses the *contiguous zone* without any intention to enter the territorial sea, the coastal State may not exercise any jurisdiction, either preventive or punitive, given that the laws under Art. 33 do not apply within the zone itself. If, however, the infringement has previously occurred while the ship was in the territory or the territorial sea, the State may take enforcement measures under Art. 33(1)(b). Finally, if the ship traverses a *strait* in transit passage without calling at a port, the strait State enjoys even narrower powers, since it may take no direct enforcement measures against it, while the only legitimate option is to raise claims against the respective flag State on the grounds of international responsibility.

Ultimately, as has been repeatedly signified throughout this study, the overall regime of the sanitary jurisdiction is governed by the paramount notion of *necessity* which substantively delimits the powers of a coastal State to the extent necessary for achieving the public health objectives. With this as a springboard, the methodological model sought for a fair and equitable reconciliation between the relevant conflicting interests may be achieved by recourse to the *proportionality principle*, of which the criterion of necessity forms one of the core components. Therefore, the study takes the view that a prudent, as well as a doctrinally consistent and practicable solution to the research problem raised herein may be best provided by virtue of a '*normative consortium*' between the substantive provisions applicable and the methodological tools that this fundamental principle has to offer.

[181] The relevant enforcement powers stem from: **Art. 33(1)(b)** for when the ship in the contiguous zone has previously engaged in a sanitary infringement within the territory or the territorial sea; **Art. 19(2)(g)** and **25(1)** for when the ship in territorial sea engages in the loading or unloading of persons or commodities contrary to the domestic sanitary laws; **Art. 21(4)**, **25(2)** and **19(1)** for when the ship in territorial sea fails to comply with the preventive measures or the subsequent orders of the authorities; **Art. 2** for when the ship is in the internal waters and ports.

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[**] This section includes judgements by international and national fora, as well as relevant incidents that were discussed.