Chapter 5

The EU Acting as a Port State

5.1. Legal Overview of Port State Jurisdiction

5.1.1. Introduction

Port-based regulation and enforcement of maritime safety and environmental protection requirements has a number of advantages compared to coastal State regulation. First of all, it is more practical to take enforcement measures against ships in port than at sea. It requires less time and resources for the port State authorities and involves fewer navigational impediments for the ship. Secondly, port State regulation at a regional level offers several advantages compared to national regulation. Through the harmonisation of requirements for ships entering ports in all the EU Member States, a very significant proportion of the transiting ships may be covered, without having to resort to sea-based enforcement.1 Harmonisation of control and enforcement policies among a larger group of States also reduces the problem of ‘ports of convenience’, where more lenient standards apply. Thirdly, and most importantly for present purposes, regulation in the capacity of port State involves legal advantages, in the form of broader jurisdictional rights as regards prescription and enforcement, compared to the rights of coastal States.

It should therefore come as no surprise that the overwhelming majority of EU maritime safety legislation adopts a port State perspective.2 The purpose of this chapter is to analyse that legislation in more detail. Following an introduction to

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1 There seem to be no precise figures available on the share of the traffic along the EU’s coast which is bound for ports in the EU. It seems clear, however, that the overwhelming majority of ships transiting the Western and Northern coastal waters of the EU Member States are bound for some Community port, as only traffic to or from Russian ports will be excluded. In the Mediterranean, transit traffic remains a more significant portion of the total traffic. See also note 1 in chapter 6.

2 The basis for distinguishing between measures adopted from the coastal and port State perspectives below is whether the rule applies only to ships entering the ports or internal waters of a Member State (port State rules), or whether it applies to ships that are merely transiting the coastal waters of a Member State (coastal State measures). Rules relating to conduct in the port
the legal context in which port State legislation operates (5.1), a survey of the EU’s port State rules and their gradual development is undertaken, first as regards the prescription of rules (5.2), then on their enforcement (5.3). The chapter ends with a more detailed legal assessment of certain measures which are deemed to be of particular interest from the point of view of international law (5.4).

5.1.2. General International Law

5.1.2.1. Access to Internal Waters and Ports

The legal status of internal waters is often assimilated to that of a State’s land territory. States enjoy full territorial sovereignty over their internal waters and ports and foreign ships have no rights of passage therein.3 Leaving aside certain exceptions which are not relevant in the present context,4 a State’s jurisdiction is consequently not limited with respect to ships present in its ports or internal waters. In the light of this starting point, which is not in dispute, it may seem surprising that one of the most fundamental aspects of the port State’s jurisdiction, i.e., its right to deny ships access, or make that access dependent on the fulfilment of certain conditions has been a source of controversy in international law, in particular during the first half of the last century. More recently, the focus and scope of the discussion has changed. The controversy is no longer so much about the existence of the right of the State to regulate access to its ports, but about the limits to that right. The relevance of this question for present purposes is that, if there is no such right of access to ports in international law, it suggests, a fortiori, that there is no immediate obstacle to making that access conditional on the fulfilment of additional requirements.

3 The sovereignty of a State over its internal waters is confirmed in UNCLOS Article 2(1), and it follows from Articles 8, 11 and 12 that ports form part of those waters. See e.g. Jennings & Watts (1992), p. 572; Brownlie (2003), p. 116; Churchill & Lowe (1999), pp. 60–61; and Molenaar (1998), pp. 101–102.

4 The only geographical exception in UNCLOS (Article 8(2)) is where the drawing of straight baselines has the effect of enclosing as internal waters areas that had not previously been considered as such. In these cases, ships still enjoy a right of innocent passage. Other exceptions to the complete jurisdiction of the port State include the position of government-owned vessels and, at least to some extent, ships that have entered by reason of force majeure or distress. See, e.g.: Brownlie (2003), pp. 315–317; Hydeman & Berman (1960), pp. 130–131; Hakapää (1981), p. 167–168; Devine (1996), pp. 229–230; Smith (1988), pp. 169, 171; Churchill & Lowe (1999), pp. 65–69; Molenaar (1998), p. 101; and Johnson (2004), pp. 37–39. See also at notes 33-38 below.