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The Practice of Shared Responsibility in relation to Ship-Source Marine Pollution

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The Practice of Shared Responsibility in relation to Ship-Source Marine Pollution

Henrik Ringbom[*]

1. Introduction

This chapter deals with the responsibility of states for marine pollution from ships. Its main focus is the international responsibility and civil liability that states may face as a consequence of deliberate or accidental acts of pollution by merchant ships. Pollution resulting from dumping of (non-ship-generated) waste is also briefly considered, as are states' obligations to take response measures to combat pollution at sea. Particular attention will be given to the potential sharing of such responsibility between two or more states, or between a state and another responsible entity.

Addressing ship-source pollution from the perspective of state responsibility is unusual, since claims for pollution related damage are usually not directed against states. Questions of responsibility and reparation are normally handled through civil liability, and typically it will be the shipowner, or sometimes other private law subjects, who will be responsible for making good whatever damage the pollution may have caused.[1] Various international conventions have been adopted to regulate this liability in more detail, and to share the financial risks among a broader range of private persons, including the cargo receivers. The regulatory emphasis on the liability of private parties for pollution damage caused by ships has kept the focus away from states and their responsibility in this field.

The absence of examples in practice does not, however, necessarily mean that states are exempt from responsibility. A closer study of both the international civil liability regimes and the general obligations under the law of the sea suggests that states may very well be held responsible for marine pollution incidents involving ships. In certain cases that responsibility

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[1] In this chapter, the term 'responsibility' refers to a state's *ex post* accountability for an international wrongful act; it does not necessarily involve damage or obligations to repair. 'Liability', by contrast, specifically refers to the obligation to compensate for damage caused, irrespective of whether the wrongfulness of the underlying act or omission has been considered.

could be shared between states and private parties and also, at least in theory, between two or more states.

Since both legislative and judicial practice on shared responsibility for marine pollution is scarce, the following analysis will mainly assess the prospects of such sharing in view of the available international rules, notably the 1982 United Nations Convention on the Law of the Sea (LOSC or Convention)[2] and the specialised maritime conventions adopted by the International Maritime Organization (IMO).

States' international law obligations are discussed in section 2. The main focus is on shipping (section 2.2), but the relevant rules on dumping (section 2.3) and pollution response activities (section 2.4) are also briefly considered. Section 2.5 specifically highlights certain issues of relevance to the sharing of obligations in this field of law. The third section discusses secondary rules, that is, rules which specifically address questions of state responsibility and liability. This is done separately for states' international responsibility under public international law (section 3.1) and their exposure under the international civil liability conventions (section 3.2). Some examples of further legislative developments at regional level in Europe are given in section 3.3. In the final section some concluding observations are made on the prospect and desirability of shared state responsibility for ship-source marine pollution.

2. Primary rules

A discussion of the various primary rules is relevant as it demonstrates how different states, acting in different capacities, can have different obligations in relation to what potentially is a single harmful event (marine pollution from a particular ship). This diversity of obligations and capacities of states will be relevant for the determination of a possible shared responsibility, and may allow to identify different responsibilities of the various states.

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[2] United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 1833 UNTS 3 (LOSC or Convention). The LOSC, which is commonly considered to be the 'Constitution of the Oceans', is widely ratified and its provisions on the protection of the marine environment are widely considered to represent customary international law.

2.1 General obligations to protect the marine environment

The very first article of Part XII of the LOSC provides that 'States have an obligation to protect and preserve the marine environment.'[3] To this end states 'shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment'.[4] Further, they shall, individually or jointly, take 'all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source'.[5] Other articles specifically highlight the need for protecting sensitive areas, such as the need to take measures 'necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life'.[6] These obligations are clearly 'due diligence' duties, addressing states' conduct rather than the result of their efforts, and accepting a certain latitude for states in assessing their national needs and priorities.[7]

When taking such measures to protect the marine environment, states shall 'refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention'.[8] In view of this and numerous other references to the provisions of the Convention, the general environmental obligations need to be read together with the more specific provisions for the individual sources of marine pollution which, in the case of ship-source marine pollution, significantly qualify the more general environmental obligations.[9] In sections 2.2-2.4 below, it will be illustrated how the more precise balance between the rights and obligation of states differs

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[3] Article 192 LOSC, ibid.
[4] Article 194(2) LOSC, ibid.
[5] Article 194(1) LOSC, ibid.
[6] Article 194(5) LOSC, ibid. See also the much less committing Articles 123 LOSC on enclosed and semi-enclosed seas and 197 LOSC on regional co-operation. Obligations to protect sensitive sea areas have also been included in subsequent agreements, such as in the 1992 Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 1760 UNTS 79. However, subsequent environmental agreements have generally been careful not to alter the jurisdictional balance set out in the LOSC, even if such development is to some extent foreseen in Article 237 LOSC.
[7] See *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, Seabed Disputes Chamber of the International Tribunal of the Law of the Sea, ITLOS Case No. 17, (2011) 50 ILM 458, paras. 110-120. See also D. French and T. Stephens, 'ILA Study Group on Due Diligence in International Law: First Report', 7 March 2014, available at www.ila-hq.org/en/committees/study_groups.cfm/cid/1045, with further references; and T. Koivurova, 'Due Diligence', in *Max Planck Encyclopedia of Public International Law* (updated February 2010), in particular at paras. 29-30, available at http://opil.ouplaw.com/home/epil.
[8] Article 194(4) LOSC, n. 2.
[9] With respect to ship-source pollution in special areas, for example, there is a specific provision in Article 211(6) LOSC, ibid., which only covers (parts of) the exclusive economic zone (EEZ) and includes very little independent prescriptive and enforcement jurisdiction of the coastal state.

depending on the source of marine pollution, the capacity in which the state acts and the maritime zone involved.

2.2 Pollution from ships

Flag states are subject to detailed legal duties under the Convention. Every state is under an obligation to 'effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag'.[10] These measures include the duty to maintain a shipping register, to subject each ship to regular surveys by qualified surveyors, to ensure that the crew is appropriately qualified and to hold inquiries into maritime casualties. In addition, flag states shall take the measures necessary to ensure that the ships flying their flag are safe with respect to, inter alia, their construction, equipment, seaworthiness and manning, as well as the labour conditions and training of the crew.[11] In doing so, they are required to conform to 'generally accepted international regulations, procedures and practices'.[12] These regulatory obligations apply irrespective of the location of the ship and irrespective of whether or not the flag state has formally accepted the international regulations and standards concerned.

A detailed set of enforcement obligations for rules aiming at the protection of the marine environment is further included in Article 217 LOSC, which requires a variety of enforcement measures by the flag states, including investigations, institution of proceedings in case of alleged violations, penalties for violations, prohibition from sailing in certain cases and cooperation with other states.

The more detailed technical requirements for maritime safety and pollution prevention are laid down in specialised conventions, which are equally focused on flag states' obligations. The main instrument for technical and construction standards for ships, including structural and fire safety, navigational and emergency equipment, is the International Convention for the Safety of Life at Sea (SOLAS),[13] while the main instrument aimed at preventing marine pollution from ships, on relating to ship construction as well as operational discharge

[10] Article 94(1) LOSC, ibid.
[11] Article 94(3) LOSC, ibid.
[12] Article 94(5) LOSC, ibid. With respect to the marine environment, Article 211(2) LOSC adds that the laws of the flag state 'shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference'.
[13] International Convention for the Safety of Life at Sea, London, 1 November 1974, in force 25 May 1980, (1975) 14 ILM 959 (SOLAS), as subsequently amended.

standards, is the International Convention for the Prevention of Pollution from Ships (MARPOL).[14] In these and other conventions adopted by the IMO, it is for the flag state, through an elaborate scheme of surveys and certification, to ensure that the standards are met. In practice, the observance of the flag states' obligations is often entrusted to classification societies which are specialised private organisations responsible for inspecting and monitoring ships.[15] With respect to state-owned ships, it may be noted that warships and other government-owned ships on non-commercial service are usually exempted from the scope of the international marine pollution rules, though there is often an encouragement for flag states to adopt reasonable and practicable measures to ensure that such ships act in a manner consistent with the Convention.[16]

As opposed to the duty-focused regime for flag states in the LOSC and the specialised conventions, the legal framework for coastal states is usually laid down in terms of jurisdictional *rights*, and certain obligations which follow, should those rights be exercised. In case the coastal state does exercise such rights, and obligations are triggered, the possibility for shared responsibility with the flag state may arise.

The rights of coastal states vary in scope and are set out differently for each maritime zone, with a particularly detailed regime being elaborated for ship-source marine pollution.[17] In general, both prescriptive and enforcement jurisdiction increase in proportion to the geographical proximity of the maritime zone in question to the coastal state. On the high seas, the flag state's jurisdiction over ships flying its flag is exclusive 'save in exceptional cases expressly provided for in [the LOSC]',[18] while the jurisdiction of coastal states to prescribe rules for foreign shipping in its coastal waters is subject to various limitations, often placing a maximum limit of the coastal state's regulation by reference to the 'generally accepted international rules and standards',[19] thereby seeking to ensure a wide degree of uniformity in the regulation of shipping worldwide.

[14] International Convention for the Prevention of Pollution from Ships, London, 2 November 1973, in force 2 October 1983, (1973) 12 ILM 1319 (MARPOL), as amended.
[15] This relevance of classification societies rules for the standard-setting and maintenance of ship safety is also formally recognised in SOLAS Regulation II-1/3-1. The relevant addition, made in 1995 and in force since June 1998, provides that ships are to be 'designed, constructed and maintained in compliance with the structural, mechanical and electrical requirements of a recognised classification society'.
[16] See e.g. Article 236 LOSC, n. 2, and Article 3(3) MARPOL, n. 14.
[17] Articles 211 and 220 LOSC, ibid., are the main articles on the prescriptive and enforcement jurisdiction of coastal states over foreign ships.
[18] Article 92(1) LOSC, ibid.
[19] See e.g. Articles 21(2) and 211(5) LOSC, ibid.

States' powers to enforce these rules in their coastal waters similarly depend on the nature and location of the ship and the violation, usually limiting the coastal state's enforcement activities to serious cases of pollution.[20] In cases of maritime casualties 'which may reasonably be expected to result in major harmful consequences', specific rights of the coastal state are provided to take and enforce protective measures that are 'proportionate to the actual or threatened damage', including beyond its own territorial sea.[21]

Port state jurisdiction over ships that are voluntarily present in their port is based on the general principle of states' sovereignty over their territory, and the absence of a general right of ships to enter ports.[22] The extent of port states' regulatory authority over foreign ships is subject to little regulatory detail in the LOSC. The only explicit jurisdictional provisions are Article 220(1) LOSC, which provides enforcement jurisdiction over violations having taking place in the port state's own territorial sea or exclusive economic zone (EEZ), and Article 218 LOSC, which does the same for violations of applicable international rules and standards beyond the port state's own maritime zones. Apart from that, the extent of port state jurisdiction is left to be governed by more general principles in international law, such as the prohibition to abuse rights and the principles of non-discrimination and proportionality. Limitations on port states' rights to prescribe or enforce their environmental standards on foreign ships may also follow from applicable bilateral or regional trade agreements. With respect to ships in distress, it seems accepted that there is no general obligation to accept such ships into a place of refuge, or general right to refuse them, but that any decision by the port/coastal state on whether or not to grant a ship access is to be taken in the light of the particular circumstances of the case.[23]

In view of the permissive nature of port and coastal state jurisdiction, those states are

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[20] See in particular the detailed rules laid down in Article 220 LOSC, ibid.
[21] Article 221(1) LOSC, ibid.
[22] See e.g. E.J. Molenaar, 'Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage' (2007) 38 ODIL 225; D. Anderson, 'Port States and Environmental Protection', in A. Boyle and D. Freestone (eds.), *International Law and Sustainable Development – Past Achievements and Future Challenges* (Oxford University Press, 1999), 325; H. Ringbom, *The EU Maritime Safety Policy and International Law* (Leiden: Martinus Nijhoff, 2008), 203-237.
[23] See Guidelines on places of refuge for ships in need of assistance, IMO Resolution A.949(23), adopted 5 December 2003, para. 3.12 and footnote 3. See also E. van Hooydonk, *Places of Refuge: International Law and the CMI Draft Convention* (London: Lloyd's List, 2010); A. Blanco-Bazán, 'The Law of the Sea: Places of Refuge', in *Globalism: People, Profits and Progress*, *Proceedings of the 30th Annual Conference of the Canadian Council on International Law, 2001* (Alphen aan den Rijn: Kluwer Law International, 2002), 65; A. Chircop and O. Lindén (eds.), *Places of Refuge for Ships, Emerging International Concerns of a Maritime Custom* (Leiden: Martinus Nijhoff, 2006); H. Ringbom, 'Places of refuge and environmental liability and compensation, with particular reference to the EU', in *Comite Maritime International Yearbook 2004*, Part II - The work of the CMI, 208.

normally unlikely to be held responsible for their inaction or failure to prevent a certain marine pollution incident, while they may very well be responsible for having taken improper positive enforcement action against foreign ships. This starting point is altered, however, where port or coastal states have agreed between them to transform rights under the LOSC into obligations to act. The European Union (EU), in particular, has been active in turning certain jurisdictional rights of coastal and port states into obligations for its member states.[24] Such obligations not only expose member states to responsibility under EU law (for failing to act as envisaged under the EU rule), but also increases their exposure to responsibility under international law. By obliging member states to play an active enforcement role as coastal and port states, the risk is that member states, in taking enforcement measures, may not comply with all the international law conditions and safeguards linked to such actions.

In conclusion, states' obligations relating to ship-source pollution are not in principle shared. The primary obligations are centred on the flag state, of which there is only one per ship.[25] Coastal and port states may share obligations in relation to a pollution incident, but only when they take positive (enforcement) measures against a ship. In view of the facultative nature of their jurisdiction, inaction by port and coastal states is unlikely to result in a breach of an obligation. In cases where one or more port and/or coastal states are subject to such obligations, they can, and probably will, be shared with the ship's flag state.

2.3 Dumping

While the rules on pollution from shipping represent a careful balancing act between two competing interests of global concern, i.e. freedom of navigation versus environmental interests, ocean dumping represents a different setting. Here the wide community interest to protect the marine environment from pollution caused by dumping is contrasted with an activity that mainly benefits the polluter itself, which is becoming increasingly unacceptable from a social point of view and has few defenders. This has permitted the rules of the LOSC

[24] As to port states, the best example is probably Directive 2009/16/EC on port state control, (2009) OJ L 131/57, which sets up a mandatory and highly sophisticated common inspection and enforcement regime in EU ports, which, among other things, sets out common procedures and tools for selecting ships for inspection, mandatory inspection targets, administration procedures and collective EU-wide sanctions against serious offenders. The best examples regarding coastal states can be found in Directive 2002/59/EC, (2002) OJ L 208/10, as amended, in which several coastal state rights are turned into obligations, including on ship reporting and routeing systems and vessel traffic services (Articles 5, 7 and 8) and the right to intervene in casualties on the high seas (Article 19).

[25] Article 92 LOSC, n. 2.

and subsequent treaties on dumping to include firmer obligations than the counterparts for shipping.

The LOSC provides, firstly, that all states shall ensure that dumping is not carried out without the permission of the competent authorities. Secondly, coastal states are given explicit jurisdiction to permit and regulate any dumping taking place in their territorial sea or EEZ or onto their continental shelf. Thirdly, with respect to the standards, a minimum requirement is laid down, as national rules on dumping 'shall be no less effective … than the global rules and standards'.[26]

More detailed technical rules on dumping are to be found in the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,[27] which was significantly strengthened through a Protocol adopted in 1996.[28] Under the 1996 Protocol states are required to prohibit the dumping of all wastes or other matter, unless the substance in question is specifically listed in the Annex 1 of the Convention and specifically authorised. Incineration at sea of waste and other matter is completely prohibited.[29]

With respect to the enforcement of these rules, Article 216 LOSC lays down an unqualified (and shared) obligation to enforce the rules for the coastal state, the flag state, and for any state in which the substance is loaded. As opposed to the regime for vessel-source pollution, the positive obligation to make use of the prescriptive and enforcement jurisdiction with respect to dumping extends to states acting in any of these capacities, not only to the flag state.

Even if these obligations mainly target states' duties to enact and implement the relevant legislation, rather than imposing an obligation of result, some of the formulations in Articles 210 and 216 LOSC are phrased in a manner which suggests that failure by states – whether flag, coastal or loading state – to prevent a particular instance of illegal and unauthorised dumping in itself (even in the absence of a breach of the due diligence obligation) could represent a breach of these obligations and hence give rise to responsibility for the states

[26] Article 210(3), (5) and (6) LOSC, ibid.
[27] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, London, 13 November 1972, in force 30 August 1975, (1972) 11 ILM 1294.
[28] 1996 Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, London, 7 November 1996, in force 24 Mach 2006, (1997) 36 ILM 1 (1996 Protocol or London Dumping Protocol), see in particular Article 10(1) of the 1996 Protocol.
[29] Article 5 of the 1996 Protocol, ibid.

concerned.[30]

2.4 Pollution response

In addition to the rules aiming at preventing ship-source pollution, ports and coastal states have also agreed to certain obligations to maintain an adequate capacity and procedures to notify and respond to pollution incidents when they occur. The foundation for such commitments is laid in the LOSC, which includes certain general obligations for states to respond to pollution incidents under their jurisdiction. First of all, Article 194(2) LOSC calls upon states to 'take all measures necessary to ensure that … pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights'. Article 195 LOSC, similarly, provides that '[i]n taking measures to prevent, reduce or control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another'. In addition, Articles 198 and 199 LOSC contain obligations to notify other states that are likely to be affected by the pollution and to cooperate, inter alia, by developing contingency plans for marine pollution incidents.

At an operational level, these duties have been developed and concretised for ship-source pollution incidents in the 1990 International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC)[31] and its Protocol for other hazardous and noxious substances.[32] These instruments, along with several regional instruments on the same subject matter,[33] lay down some basic rules for the organisation, procedures and inter-state cooperation of responses to pollution incidents, but also include an obligation to establish a national system for responding promptly and effectively to pollution incidents.[34]

Through such obligations, states may accordingly be held responsible for their failure to

[30] See e.g. Article 210(3) and 216(1) LOSC, n. 2.
[31] International Convention on Oil Pollution Preparedness, Response and Co-operation, London, 30 November 1990, in force 13 May 1995, (1990) 30 ILM 733 (OPRC).
[32] Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances, London, 15 March 2000, in force 14 June (OPRC-HNS), available at www.imo.org.
[33] See e.g. the Agreement for Cooperation in Dealing with Pollution of the North Sea by Oil and other Harmful Substances, Bonn, 13 September 1983, in force 1 September 1989 (Bonn Agreement), available at www.bonnagreement.org; or the 2002 Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea, Malta, 25 January 2002, in force 17 March 2004 (Malta Protocol), available at www.unep.org.
[34] Article 6(1) OPRC, n. 31; Article 3(1) OPRC-HNS, n. 32.

respond to incidents under their jurisdiction. If it can be shown that one or more states have failed to exercise due diligence in meeting their response and cooperation obligations, it is quite possible that they may be held responsible under international law, even if the event giving rise to the pollution is not in itself in any way attributable to their action or inaction.[35] In view of the nature of the obligations involved, however, such instances are more likely to relate to administrative failures, e.g. failing to have a national system in place to ensure that oil pollution notifications and reports are promptly sent and received, than failure to respond effectively to the spill as such. The latter type of obligation is typically qualified by references to the coastal state's capabilities and other qualifying circumstances.[36]

2.5 Sharing responsibility for ship-source pollution

All rules discussed above, whether 'jurisdictional' or 'technical' in nature, acknowledge that states act in different capacities and therefore have different roles, tasks and obligations towards states depending on their role as flag states, port states, loading states or coastal states. Such differentiation between capacities may have consequences for the question of shared responsibility, in that even if several states (in different capacities) were to be held jointly responsible for a marine pollution incident, the states would typically be responsible for violating *different* obligations (those that apply to their particular capacity). However, for present purposes they will still be considered to share responsibility for the pollution, which in this case represents the 'single harmful outcome' of the states' acts or omissions.[37]

A more important consideration seems to be that the apportioning of rights and obligations between flag, coastal and port states differs so much in the LOSC that it affects the prospect of states sharing responsibility for a single pollution incident to start with. First, with respect to flag states, whose obligations generally are of compulsory nature, the main difficulty, as was noted above, lies in the attribution of the failure to the state. Even if it could be attributed to the flag state, however, the resulting responsibility would not normally be shared with another flag state,[38] as there is only one flag state per ship. In practice, a flag state is much

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[35] See e.g. P. Birnie, A. Boyle and C. Redgwell, *International Law & The Environment*, 3rd edn (Oxford University Press, 2009), 425.
[36] See e.g. Articles 6(2) and 7(1) OPRC, n. 31.
[37] See P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MIJIL 359, 366-369.
[38] It is conceivable, however, that such responsibility could be shared in a temporal sense, between the ship's

more likely to share its responsibility with non-state actors, notably classification societies, which are commonly mandated to perform the controls and surveys of ships on behalf of the flag state.[39]

Second, in view of the facultative nature of port and coastal states' regulatory authority over ships, inaction by these states with respect to a specific ship, no matter how polluting or unseaworthy, would normally not constitute a breach of an international obligation, or otherwise represent a wrongful act which would give rise to international responsibility for the state. Similarly, failure by coastal states to prevent a pollution incident by failing to adopt or enforce legislation on, for example, sensitive sea areas in the EEZ or in semi-enclosed seas will normally not constitute a breach of any obligation, in view of the permissive wording employed in the LOSC in this respect.[40]

It is thus mainly in the context of actions (as opposed to failure to act) that port and coastal states run the risk of breaching their international law obligations and thereby invoking their potential responsibility under international law.[41] A typical example for a coastal state would be to exercise excessive force when enforcing its national rules on marine pollution, whereas a port state could be responsible for the unlawful detention of a foreign ship or for otherwise preventing it from proceeding on its voyage. Some of those actions may be undertaken jointly by several states, through specific implementation agreements, such as a 'banning' of a particular ship from a whole region based on a port state control agreement[42] or other protection measures established through regional marine environment protection agreements.[43] Those concerted efforts may involve a sharing of responsibility. Another

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current and previous flag states. It has also been suggested that when governments charter ships, for example for military use, both the chartering state and the flag state should be subject to the due diligence obligations. See e.g. N. Ronzitti, 'The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law' (2011) 74 *Yearbook of Institute of International Law – Rhodes Session*, Preliminary Report, 131, at 164.

[39] See below in section 3.3 on EU rules to this effect.

[40] E.g. Articles 123 and 211(6) LOSC, n. 2. The optional character of port and coastal state jurisdiction is altered, however, if the inaction by these states amounts to a failure by them to respect the general duties to protect the marine environment as laid down in Articles 192, 194 or 195 LOSC. As was noted above in section 2.1, however, these general obligations are in most cases likely to be superseded by the more detailed rules on the jurisdiction over vessel-source pollution in the subsequent articles of LOSC Part XII.

[41] For a range of such actions and the exposure to responsibility for the state, see P. Wendel, *State Responsibility for Interferences with the Freedom of Navigation in Public International Law* (London: Springer, 2007).

[42] E.g. 1982 Paris Memorandum of Understanding on Port State Control, Paris, 26 January 1982, in force 1 July 1982, (1982) 21 ILM 1, as amended. In the past decade such 'bans' have become increasingly common (for a current list of ships banned from all EU ports, see https://portal.emsa.europa.eu/web/thetis/refusal-of-access) and now includes, in case of repeated bans, the possibility of a permanent refusal of access to any port in the region.

[43] See e.g. Regulation 4(c) of Annex IV to the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area, Helsinki, 9 April 1992, in force 17 January 2000, (1974) 13 ILM 546 (Helsinki

example could be the refusal of ships into a place of refuge, or unsuccessful salvage activities with respect to ships in distress, which may shift the burden of accommodating it to its neighbouring states, which in turn may raise claims for responsibility and liability.[44] Multiple refusals could give rise to a shared responsibility.[45]

In theory, it is also possible that a flag state on the one hand, and one or more coastal or port states on the other hand, are considered to be co-responsible for a certain pollution incident: the former for failing to maintain the required standards and appropriate control over the ship; the latter for contributing to the damage through their enforcement actions. In such cases, some mitigation of the coastal state's compensation would probably be provided under the principle of contributory negligence, which has some support in the law of state responsibility,[46] but the availability of such mitigation is less clear if the negligent acts were attributable to individuals of the states concerned, rather than to the state itself.[47]

The regime for ocean dumping is more likely to generate instances of shared responsibility, as the obligations placed on coastal and loading states are more substantial than with respect to ship-source pollution. It is therefore possible that an instance of dumping – at least in part – has been caused by the failure by those states to meet their international obligations to prevent dumping, while the flag state might have failed in its own obligation to prevent dumping by its ships. On the other hand, the technical rules on dumping, and even more so the rules relating to pollution response, are more flexible than those for shipping, in that they include a certain differentiation of states' obligations depending on their capacity to take effective measures. In contrast to the regulation of shipping, which is traditionally based on the premise that the rules are globally uniform and states' obligations are the same worldwide,[48] it is

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Convention), where the Baltic states collectively undertake not to give access to their ports for certain oil tankers which may still be allowed to trade under the global rules.

[44] See e.g. Van Hooydonk, *Places of Refuge*, n. 23.

[45] A notorious example of multiple refusals is the case of the *Castor*, a ship carrying a cargo of gasoline, which developed a crack on its main deck during a storm in the western Mediterranean off the coast of Morocco in December 2000. Requests for permission to enter coastal waters to lighten the ship were refused by seven states, and the ship had to be towed around the Mediterranean for several weeks before a transfer operation could be carried out in Libyan waters. See A.P. Morrison, *Places of Refuge for Ships in Distress: Problems and Methods of Resolution* (Leiden: Martinus Nijhoff, 2012), 32-34.

[46] See Article 39 of the ARSIWA, n. 52, providing that '[i]n the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.'

[47] See Wendel, *State Responsibility for Interferences with the Freedom of Navigation*, n. 41, 162-165.

[48] Apart from the frequent references to the 'generally accepted' international rules in the LOSC, this is notable e.g. in the 'no more favourable treatment' principle which is commonly employed in the IMO conventions. It provides that ships flying the flag of states that are not parties to the convention should be given no more

accepted in the technical conventions for dumping and pollution response that states' capacities to act differ, and that this may also influence their material obligations.[49] Hence the stringent obligations of all states – irrespective of capacity – to prevent dumping, which follows from Articles 210 and 216 LOSC, may have a different significance for states, depending on their capacity to enact and enforce such measures.

3. Secondary rules

3.1 The responsibility of states under the LOSC

Despite the stringency of flag state obligations as provided by the LOSC, the Convention does not contain much specification of the legal consequences of a failure to meet those duties. The only immediate remedy which is provided for any state 'which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised' is a formal factual report, which the flag state has to investigate and act upon as appropriate.[50] A flag state also loses its privilege to take over proceedings from a port state in case of an illegal discharge, if the flag state 'has repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards'.[51]

Despite the absence of explicit provisions to that effect, it seems clear in view of the stringency of flag states' obligations, both under the LOSC and the more technical IMO conventions, combined with the general international principles on state responsibility as contained in the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA),[52] that a failure to meet those obligations may give rise to international responsibility for flag states. The level of conduct required by the state would normally be the

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favourable treatment when visiting ports of states parties (e.g. Article I(3) SOLAS, n. 13; Article 5(4) MARPOL, n. 14).

[49] While the specific obligations laid down in the 1996 London Dumping Protocol, n. 28, are not differentiated, Article 2, spelling out the objective of the Protocol, provides that its parties 'shall take effective measures, according to their scientific, technical and economic capabilities, to prevent, reduce and where practicable eliminate pollution caused by dumping'. Article 6(2) of the OPRC Convention, n. 31, refers to some additional response capacities that a state party shall ensure 'within its capabilities either individually or through bilateral or multilateral co-operation'. See also the Convention's Annex on the sharing of the costs of assistance, which in its third paragraph specifically highlights the needs of developing countries. See also Article 194(1) LOSC, n. 2, which differentiates the duty to protect the marine environment by obliging states to use, for this purpose, 'the best practicable means at their disposal and in accordance with their capabilities'.

[50] Article 94(6) LOSC, ibid.

[51] Article 228(1) LOSC, ibid.

[52] Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA).

'due diligence' standard,[53] though there have been discussions about a strict liability in cases of 'ultra-hazardous activities', to which the transport of hazardous substances by sea arguably belongs.[54] Failure to ensure and maintain international minimum standards on ships flying its flag could hence give rise to international responsibility for a pollution incident, provided that a link can be established between the flag state's failure to respect its duties and the pollution. This is likely to be problematic where the pollution results from operational decisions made by the crew on board, but may be easier to establish in cases involving manifestly substandard ships.[55] It may be noted that the claimant state is not necessarily limited to the state where the damage has occurred.[56]

The LOSC includes certain specific provisions on the responsibility and liability of states, some of which deal specifically with the protection of the marine environment. The main rule is laid down in Article 235 LOSC, which provides that states 'shall be liable in accordance with international law'. This provision indicates that the liability and responsibility of states is to be governed by the rules of general international law, and in particular the ARSIWA, which were not finalised at the time of the adoption of the LOSC.[57] To underline that the LOSC was not intended to alter states' responsibility under general international law, Article 304 clarifies that the provisions of the LOSC 'are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law'.

In a few instances, however, the responsibility or liability of states is further detailed in the

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[53] States' obligations to prevent and control marine pollution are not normally of the kind that a pollution incident by itself would necessarily give rise to responsibility for the state. As states are not responsible for activities of individuals as such, the incident would have to be coupled with a failure by the state to exercise appropriate control over the required activities. The obligation of states would therefore typically be to exercise a certain conduct (due diligence), rather than an obligation of result. See *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, n. 7. B. Smith, *State Responsibility for the Marine Environment* (Oxford University Press, 1988), at 154-160, notes, however, that conduct of state operated ships may directly attributable to the flag state.

[54] See e.g. G. Handl, 'State Liability for Accidental Transnational Environmental Damage by Private Persons' (1980) 74 AJIL 525, 529-530 and 546-547; Smith, ibid., 154-163; Birnie, Boyle and Redgwell, *International Law & The Environment*, n. 35, 430-431.

[55] See also Smith, ibid., 163.

[56] It can well be argued that flag states' obligations in this area are of an *erga omnes* character, owed towards all states, as is suggested, inter alia, by Article 218 LOSC, n. 2, providing enforcement jurisdiction for port states with respect to pollution violations on the high seas and, on certain conditions, in other states' coastal waters. See also D. König, 'Flag of Ships', in *Max Planck Encyclopedia of Public International Law* (updated April 2009), para. 50, available at http://opil.ouplaw.com/home/epil.

[57] S. Rosenne, A. Yankov, and N. Grandy (eds.), *Third Committee: Articles 192 to 278, and Final Act, Annex VI, United Nations Convention on the Law of the Sea – A Commentary*, M.H. Nordquist (ed. in chief), vol. IV, (Leiden: Martinus Nijhoff, 1991), 401-415.

Convention.[58] For present purposes, Article 232 is of particular interest, as it deals with the liability for enforcement measures taken to protect the marine environment, providing that: 'States shall be liable for damage or loss attributable to them arising from [enforcement] measures taken … when such measures are unlawful or exceed those reasonably required in the light of the available information.'[59] Article 232 LOSC also introduces a proportionality requirement for the enforcement measures and offers guidance as to how that proportionality assessment is to be made, i.e. in light of the information available at the time, rather than *ex post*.

The Article does not specify against who the state is liable, i.e. the recipient of reparation (the flag state or the individual ship operators concerned by the interference), but unlike some other provisions of the LOSC,[60] Article 232 does not provide for an explicit right of private entities to be compensated. This, in combination with the fact that it is states, rather than individuals, who enjoy the navigational freedoms which are being infringed by this kind of excessive enforcement, suggests that the Article mainly refers to compensation to the flag state in question. The last sentence on remedies in national law, however, leaves open the interpretation that private parties should also benefit directly from this type of reparation.

Neither Article 232 nor any of the other Articles of the LOSC dealing with the responsibility/liability of states referred to above include any provision on how to deal with

[58] See notably Article 31 LOSC, n. 2, establishing that the flag state 'shall bear international responsibility for any loss or damage to the coastal state resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes … with the provisions of this Convention or other rules of international law'. This, however, has to be read in conjunction with the general exemption for such ships from the environmental provisions of the under Article 236 LOSC. Responsibility for excessive enforcement actions against ships are also laid down in certain other articles, beyond the topic of marine environmental protection: Article 106 LOSC (seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds); Article 110(3) LOSC (unfounded boarding on the high seas on suspicion of piracy, slave trade, unauthorised broadcasting or uncertainty about nationality); 111(8) LOSC (stopping or arresting a ship under the hot pursuit regime without the conditions for hot pursuit being fulfilled). Compensation for excessive enforcement action at sea is also provided for in Article 21(18) of the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 August 1995, in force 11 December 2001, 2167 UNTS 3; Article 9(2) of the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the 2000 UN Convention against Transnational Organized Crime, New York, 15 November 2000, in force 28 January 2004, (2001) 40 ILM 384; and Article 8bis(10)(b) of the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, London, 14 October 2005, in force 28 July 2010, IMO Doc. LEG/CONF.15/21 (2005 SUA Protocol). See Wendel, *State Responsibility for Interferences with the Freedom of Navigation*, n. 41, 112-123.

[59] The text is based on a similar wording of Article VI of the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Brussels, 29 November 1969, in force 6 May 1975, 970 UNTS 211 (Intervention Convention).

[60] See Articles 110(3) and 111(8) LOSC, n. 2, and Article 8bis(10)(b) of the 2005 SUA Protocol, n. 58.

cases where multiple states are involved.[61] This suggests that the general principles of attribution and participation under the general law of state responsibility apply.[62]

Generally speaking, there is very limited judicial practice to clarify the extent of these provisions and other elements of state responsibility in this area. In practice, states have been very reluctant to invoke this type of claims against other states.[63] Instead softer measures to promote compliance with international rules have been developed, both directly targeting the flag state administration[64] and more indirectly through disincentives and sanctions that target ship operators based on the flag they fly, such as the black-listing and ranking of flags in port state control schemes and through 'naming and shaming' actions etc.[65]

Inter-state disputes in this area are subject to the compulsory dispute settlement procedures entailing binding decisions, in accordance with section 2 of the LOSC Part XV,[66] yet there is a notable reluctance by states to make use of these procedures for claims related to ship-source pollution. While there are numerous cases in national courts on the extent of the civil liability of states in respect to damage caused by their warships or other government-owned ships, the international responsibility of flag states or coastal states (vis-à-vis other states) for marine pollution has not been addressed by international courts or tribunals. Similarly, there are no known cases where states have been held internationally responsible for dumping

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[61] But note that the 2005 SUA Protocol, ibid., seeks to ensure that a flag state should not share liability for an illegitimate boarding just because it has authorised another state to board one of its ships. Article 8bis(10)(b) of the 2005 SUA Protocol begins by the proviso '[p]rovided that authorization to board by a flag State shall not *per se* give rise to its liability'. Similarly, the European Court of Human Rights, in *Xhavara and fifteen others* v. *Italy and Albania* rejected the admissibility of a claim by a number of Albanian refugees whose boat had been forcefully intercepted on the high seas by Italian authorities, resulting in several casualties. The reason given by the Court to dismiss the claim against Albania was the mere fact that Albania was party to a bilateral convention authorising Italian authorities to intercept boats and therefore could not invoke its responsibility for potential failures by Italian authorities when implementing the agreement. *Xhavara and fifteen others* v. *Italy and Albania*, App. No. 39473/98 (ECtHR, 11 January 2001).

[62] See in particular Articles 4, 16 and 17 of the ARSIWA, n. 52. This view is also supported by the general references to the law of state responsibility in Articles 235(1) and 304 LOSC, n. 2, and by the reference to damage or loss 'attributable to' states in Article 232 LOSC. See also Wendel, *State Responsibility for Interferences with the Freedom of Navigation*, n. 41, 128-138.

[63] But see *The M/V 'Virginia G' Case (Panama/Guinea-Bissau)*, ITLOS Case No. 19, Order 2012/3 of 2 November 2012, available at www.itlos.org, where the Tribunal accepted the admissibility of Guinea Bissau's claim that Panama had violated its flag state obligations by granting its nationality to a ship without a genuine link to the flag state, and thereby had facilitated the allegedly illegal bunkering actions on its EEZ.

[64] See e.g. L.D. Barchue, Sr., 'A Cooperative Compliance Strategy: The Voluntary IMO Member State Audit Scheme', in H.-J. Koch et al. (eds.), *Climate Change and Environmental Hazards Related to Shipping, An International Legal Framework* (Leiden: Martinus Nijhoff, 2013), 121-127.

[65] For an overview, see König, 'Flag of Ships', n. 56, paras. 51-57.

[66] Apart from the general rule in Article 286 LOSC, n. 2, Article 297(1)(c) LOSC specifically targets coastal states by providing that a case may be brought before a court or one of the other dispute settlement mechanisms if it is alleged that a coastal state has 'acted in contravention of specific international rules and standards for the protection and preservation of the marine environment'. The LOSC dispute settlement provisions are also referred to in Article 16 of the 1996 London Dumping Protocol, n. 28.

incidents at sea.[67]

3.2 The role of states in the IMO civil liability conventions

The LOSC envisages an important role for civil liability for dealing with pollution of the marine environment. The role of states in this regard is to develop civil liability compensation schemes, also at the international level,[68] and to make compensation available to victims of marine pollution. Thus, Article 235(2) LOSC requires states to 'ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction'.[69]

In post-LOSC practice, civil liability instruments have been preferred by states. While there is not a single IMO convention that elaborates on the responsibility of states for failing to comply with their flag state obligations or other obligations in relation to marine pollution,[70] a whole series of instruments has been developed to regulate and harmonise the rules on liability of private persons involved in ship-source marine pollution incidents.

The IMO civil liability conventions set up three different pollution liability schemes: one for oil pollution by tankers;[71] one for (bunker) oil pollution by other ships than tankers;[72] and one

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[67] Personal communication with Head of the Secretariat of the London Dumping Convention, Mr Edward Kleverlaan, 21 March 2013.

[68] Article 235(3) LOSC, n. 2, calls upon states to 'cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage', '[w]ith the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment'.

[69] See also Article 229 LOSC, ibid., affirming that '[n]othing in this Convention affects the institution of civil proceedings in respect of any claim for loss or damage resulting from pollution of the marine environment.' More recent instruments encouraging states to adopt civil liability instruments for damage caused by hazardous activities include the 2006 ILC Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, ILC *Yearbook* 2006/II(2).

[70] It is to be noted, however, that the 1996 London Dumping Protocol, n. 28, in its Article 15, provides that '[i]n accordance with the principles of international law regarding State responsibility for damage to the environment of other States or to any other area of the environment, the Contracting Parties undertake to develop procedures regarding liability arising from the dumping or incineration at sea of wastes or other matter.' Such procedures have not been developed as of yet.

[71] This consists of the following three instruments: 1992 Protocol to amend the 1969 International Convention on Civil Liability for Oil Pollution Damage, London, 27 November 1992, in force 30 May 1996, 1956 UNTS 255 (CLC); International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Brussels, 18 December 1971, in force 16 October 1978, 1110 UNTS 57 (IOPC Fund Convention); and the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, London, 16 May 2003, in force 3 March 2005 (Supplementary Fund), available at www.iopcfunds.org.

for pollution by other hazardous or noxious substances carried by sea,[73] of which only the two first-mentioned are in force.[74] The three liability regimes have a number of key features in common. They are all based on a strict, but limited, liability of the owner; a compulsory insurance regime admitting rights of direct action for claimants against the insurer; and a certificate to be verified in the port of each state party. They all cover pollution damage caused in the territory, including the EEZ or an equivalent zone up to 200 nautical miles from the coastline, and measures (wherever taken) to prevent or minimise such damage. The conventions also lay down a regime of exclusive jurisdiction for the courts of the state where the pollution has occurred and a system of mutual recognition and enforcement of judgments of those courts between states parties. In the following, emphasis will be given to the International Convention on Civil Liability for Oil Pollution Damage (CLC)/Fund regime on oil pollution by tankers, which is the oldest, the most broadly ratified, and the one for which there is most practical experience.[75]

The liability under the CLC is channelled to the registered owner of the ship involved. The owner has strict liability for pollution damage, save for a few particular cases, but is in most cases entitled to limit the liability to an amount which depends on the size of the tanker.[76] For present purposes it is interesting to note that the convention not only channels the liability to the registered owner, but also explicitly excludes claims against certain other parties, including persons 'performing salvage operations … on the instructions of a competent public authority' and persons taking preventive measures to prevent or minimise pollution damage.[77] Such a strong channelling of the liability to one party only reduces the scope for a shared

[72] International Convention on Civil Liability for Bunker Oil Pollution Damage, London, 23 March 2001, in force 21 November 2008, (2001) 40 ILM 1493 (Bunkers Convention).

[73] International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, London, 3 May 1996, not yet in force (HNS Convention).

[74] Mention may also be made of the Nairobi International Convention on the Removal of Wrecks, Nairobi, 18 May 2007, in force 14 April 2015, available at www.imo.org, which provides international rules on the rights and obligations of states and shipowners in dealing with wrecks and drifting or sunken cargo which may pose a hazard to navigation and/or pose a threat to the marine environment, including the identification, reporting, locating and removal of hazardous wrecks.

[75] Since the establishment of the first fund in 1978, the funds have been involved in the compensation of 145 oil pollution incidents worldwide. See www.iopcfunds.org/incidents.

[76] The shipowner loses the right to limit if it is proven that the pollution damage 'resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result'. (Article V(2) CLC, n. 71).

[77] Article III.4 CLC, ibid. The solution opted for in the Bunkers Convention is different in this respect. It represents a single tier liability system (without a fund) which includes not only the registered owner, but also the ship's bareboat charterer, manager and operator among the (strictly) liable persons, and contains no channelling provisions protecting salvors and others who take preventive measures against compensation claims.

liability among several parties.[78]

If victims do not get full compensation from the shipowner or his insurer, e.g. if the amount of damage exceeds what is available under the owner's limited liability, compensation is paid by the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (IOPC Fund), funded by oil receivers in the states parties.[79] Such a 'top-up' of the shipowner's liability by cargo receivers, could be seen as a sharing of responsibility by the two main industry groups involved in the transport of oil by sea. Yet, since the Fund's contribution is financed collectively by oil importers in states parties worldwide, irrespectively of the cause or location of the individual incident, the role of the Fund is probably better described as providing a mechanism for sharing the costs of pollution incidents caused by oil tankers.[80]

By channeling the liability and compensation obligations to the private persons who are most directly involved in – and benefit from – marine transport, states have successfully avoided to place themselves in the spotlight following marine pollution incidents. Features such as the strict liability of the owner, compulsory insurance with rights of direct action against the insurer, and a compensation fund have reduced pressure for finding additional liable parties following oil pollution incidents. Yet, the civil liability schemes do not completely exclude that states may also be held liable for such incidents.

The *flag state* of the ship causing the pollution is completely left out of the convention schemes and is hence, in theory, exposed to compensation claims made outside the liability conventions, according to applicable national or international law. In practice, however, it has not been common to bring the flag state into the proceedings, and such actions may in any event be hampered by the flag state's possibility to claim sovereign immunity in foreign courts.[81] Another possibility, which has been of only theoretical interest until now, is that

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[78] See also the little-used Article IV of the CLC, ibid., providing that '[w]hen an incident involving two or more ships occurs and pollution damage results therefrom, the owners of all the ships concerned, unless exonerated under Article III, shall be jointly and severally liable for all such damage which is not reasonably separable.'

[79] The maximum amount of compensation payable under the Fund Convention, n. 71, is 203 million Special Drawing Rights (SDR), while the Supplementary Fund, n. 71, provides additional compensation on the same basis up to 750 million SDR, including the amount payable under the 1992 Conventions.

[80] For details of the international regime, reference is made to the IOPC Funds Annual Reports and to the Funds' website in general at www.iopcfunds.org.

[81] In the judgment by the French Court de Cassation of 25 September 2012 in the *Erika* case, the Court considered that even the classification society acting on behalf of the flag state had had the possibility to claim immunity of jurisdiction, but in that case was considered to have renounced such immunity by participating in the criminal proceedings. For a summary, see IOPC Funds: 'Incidents Involving the IOPC Funds 2012', at 9-10, available at www.iopcfunds.org. But see Article XI of the CLC, n. 71, providing that flag states operating ships

several states parties appear to accept that some residual liability for the flag state may follow in their national system, if they have issued insurance certificates under the conventions with respect to insurers that are not able to provide the required security.[82]

Conversely, the potential (co-)liability of *coastal states* has been addressed in some oil pollution compensation cases. The only explicit reference to this type of exposure in the text of the convention is the exoneration of the shipowner's liability in case he can prove that the pollution damage 'was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function'.[83]

More importantly, the conduct of the coastal state(s) during the response operation and the 'reasonableness' of their measures to prevent and minimise damage has sometimes been closely scrutinised by the Fund. This question is not only important for deciding whether a coastal state is entitled to full compensation for its own losses and expenses during the operations,[84] but is also crucial for determining the state's exposure to liability claims by others. Measures which fail the test of reasonableness, on which there is some practice,[85] will

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on commercial service 'shall be subject to suit in the jurisdictions set forth in Article IX and shall waive all defences based on its status as a sovereign State'.

[82] See D. Schwampe, 'Report on the work of the international working group on marine insurance', CMI documents for the Conference Beijing I, in *Yearbook 2011-2012*, 350 and other material related to the work on marine insurance, available at www.comitemaritime.org.

[83] Article III(2)(c) CLC, n. 71. In the *Tsesis* case (1977), the Swedish Supreme Court held that the shipowner was not liable for the pollution damage, since the incident had been wholly caused by negligence on the part of the Swedish government in its failure to mark a shoal on the maritime chart and to adjust the white sector from a lighthouse. See C. de la Rue and C. Anderson, *Shipping and the Environment*, 2nd edn (London: LLP, 2009), 101. It should be noted, however, that this type of exoneration is not available for the Fund, which suggests that *if* the 1971 Fund Convention had been applicable at that time, the Fund may nevertheless have had to compensate the Swedish government for the costs of the clean-up operations.

[84] Under Article I(6) and (7) CLC, ibid. See e.g. the discussions on the measures taken to prevent damage from the wreck of the *Nakhodka*, referred to in J. Nichols, 'Admissibility of claims: development of the IOPC Funds' policy', in *The IOPC Funds' 25 years of compensating victims of oil pollution incidents* (London: International Oil Pollution Compensation Funds, 2003), at 106 or, on the *Prestige*, IOPC Doc. 92FUND/A.11/24 (2006) 'Admissibility Criteria Relating to Claims for Costs of Preventive Measures', Note by the Director, paras. 3.3-3.5.

[85] In its practice, the IOPC Funds have taken the view that whether or not a measure is reasonable should be determined on the basis of objective criteria, in the light of the facts available at the time of the decision to take the measures, and that those in charge of the operations should continually reappraise their decisions in the light of development and technical advice. The fact that a government or a public authority decides to take certain measures does not, in the view of these bodies, in itself mean that the measures are reasonable for the purpose of compensation under the Conventions. On the other hand, the fact that the measures proved to be ineffective is not in itself a reason for rejection of a claim. The governing bodies have further decided that the costs incurred, and the relationship between these costs and the benefit derived or expected, should in their opinion also be reasonable. For a detailed analysis of the concept of reasonableness see M. Jacobsson, 'How clean is clean? The concept of "reasonableness" in the response to tanker oil spills', in *Scritti in Onore di Francesco Berlingieri*, (special issue of *Il Diritto Marittimo*, (2010) 112(1) *Il Diritto Marittimo* 565). See also the 2013 edition of the IOPC Funds Claims Manual, at 27-29, available at www.iopcfunds.org.

not qualify as 'preventive measures', which means that the 'responder immunity' from liability claims which is offered by the channelling of liability could also be lost.[86] This, in turn, opens up the door for salvors, charterers, classification societies and others to place claims on the coastal state for compensating their losses. Another potential exposure of coastal states is that owners and insurers (who normally pay the compensation initially, based on the owner's strict liability) have the right under Article III(5) CLC to take recourse action against any third parties, including state authorities. The extent of the IOPC Fund's rights of recourse against states is less clear.[87]

The liability of public authorities in the context of such actions is not governed by the conventions, but depends on the forum state's national law. A finding to the effect that one or more coastal states are (partially) liable for the pollution caused is hence not excluded, even if there are no clear-cut examples of such findings as of yet.[88] In view of the increasing involvement of coastal state authorities in activities related to salvage, and in decisions relating to places of refuge, it is likely that pressure for including coastal states among the defendants may increase over time.[89] The processes for establishing the liability of the

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[86] See at n. 77 above. Preventive measures is defined in Article I(7) CLC, n. 71, as 'any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage'.

[87] See Article 9(2) Fund Convention, n. 71, which in principle provides the Fund with broad rights of recourse and subrogation against third parties. Yet, the Fund's entitlement to a general right of recourse against third parties is less explicit than that of the owner and may entail limitations, as the Fund's rights in this respect could exceed those of the persons which it subrogates. The Fund's policy is to take recourse actions 'whenever appropriate'. Consideration is to be given in each case about the prospect of recovery in light of the facts and the applicable national law. However, 'if matters of principle are involved, the question of costs should not be the decisive factor'. See e.g. IOPC Doc. 92FUND/A.6/4 (2001), para. 10.2.

[88] Three pollution cases which have touched upon coastal state responsibility are worth highlighting. Firstly, in the *Sea Empress* incident in 1996, the IOPC Fund (in that case governed by the older treaties of 1969 and 1971) took recourse action against the Milford Haven Port Authority, claiming, inter alia, that the port had failed to put in place a proper system to satisfy itself of the safe entry of ships into the port. The action eventually led to a settlement in which the Port Authority agreed to pay 20 million pounds to the Fund (see IOPC Fund Annual Report 2003, available at www.iopcfunds.org, at 60-62). Secondly, concerning the *Erika* incident, the Fund took measures to protect its right to take recourse action against the French state, pending the outcome of criminal charges against government officials (who were eventually acquitted). See e.g. the IOPC Fund Report 2003, ibid, at 92). Thirdly, in the *Prestige* incident (Spain, 2002), following the Spanish state's legal action against the classification society the ship's classification society, American Bureau of Shipping (ABS) in the United States, the ABS made a counter-claim against the Spanish state, arguing that if the state had suffered damage, this was caused in whole or in part by its own negligence, inter alia by unreasonably refusing the ship entry into the port of La Coruña. ABS requested that that the state should be ordered to indemnify it for any amount it may have to pay in compensation pursuant to a judgement relating to that incident. The case came after appeal before the Court of Appeals in New York which held that the state had not produced sufficient evidence to establish that ABS had acted in a reckless manner and rejected the state's claim. Since that claim was rejected, the counter-claim of ABS was not considered by the Court of Appeals. See also IOPC Doc. IOPC/OCT12/3/6/1 (2012), section 2.

[89] It may be noted that the international maritime law association, the CMI, has also carried out work in this field. Despite the decision by the IMO Legal Committee in 2005 (IMO Doc. LEG 90/15 at 49) that there is no need presently for a specific convention on places of refuge, the CMI decided to draft an 'instrument' on this topic, focusing in particular on states' obligations and liability. The instrument was finalised in 2009 and

shipowner and that of the state would be two separate ones, however, and in practice the sharing of the responsibility would be undertaken in a subsequent recourse action by the shipowner/Fund in the national court in charge of the case. As the *Prestige* incident illustrates, a single pollution accident may very well involve coastal state decisions and enforcement actions by several states and, hence, shared responsibility for pollution resulting from such actions.[90] In that scenario, where multiple coastal states are affected and claimed to be responsible, the sharing of responsibility between the states concerned would presumably be complicated by a corresponding multitude of legal fora involved.

So far, however, the conclusion remains that, while both the LOSC and the specific liability conventions accept that states may face liability for their actions or omissions relating to marine pollution, which can be shared with private entities as well as with other states, judicial practice on this matter is limited. No example has been identified where a flag state has been found (co-)liable for a pollution incident,[91] but some recent cases involving oil pollution from tankers have touched upon the (potential) liability of coastal states, though not in a conclusive manner.[92] In all these cases, liability is not regulated in the international conventions, but will eventually be decided on the basis of the national liability laws that apply to the case.

3.3 Some examples of regional co-operation

There are some examples worth highlighting, where regional bodies have further considered issues related to the extent of states' liability for damage caused by ships. One example, which is quite dormant in practice, but interesting as a matter of principle, is the 'working relationship' that EU member states are to formalise with recognised organisations

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includes an article, providing that '[i]f a competent authority refuses to grant access to a place of refuge to a ship in need of assistance and another State, the ship owner, the salvor, the cargo owner or any other party prove that it or they suffered loss or damage (including, in so far as the salvor is concerned, but not limited to, the salvors inability to complete the salvage operations) by reason of such refusal such competent authority shall be liable to compensate the other State, ship owner, salvor, cargo owner, or any other party, for the loss or damage occasioned to it or them, unless such competent authority is able to establish that it acted reasonably in refusing access', see www.comitemaritime.org. See also J.L. Pulido, 'Compensation by the Coastal State', in J. Basedow and U. Magnus (eds.), *Pollution of the Sea – Prevention and Compensation* (Hamburg: Springer, 2007), 165.

[90] The sinking of the Bahamas-flagged oil tanker *Prestige* in 2001 heavily polluted the coastlines of Spain, France and Portugal, and led to a massive response action involving at sea and on shore operations by all three states, as well as oil pollution response teams from other EU member states, private salvors and other actors.

[91] But see a few early examples in Handl, 'State Liability', n. 54, at 546-547, where the flag state informally appears to have accepted to provide compensation to coastal states for pollution caused by its ships.

[92] See n. 88 above.

(classification societies) performing statutory work on their behalf. Directive 2009/15 provides that liability questions shall be addressed in such agreements.[93] More specifically Article 5(2) of the directive provides that where a (flag state) administration has been found liable and it is confirmed that the liability is due to intentional or grossly negligent conduct by the organisation, the latter shall not be able to limit its liability in relation to the administration. In case of negligent or reckless conduct by the organisation, its liability may be limited (and hence shared with the flag state), but certain minimum levels of liability that the organisation needs to face are provided, although this may be different depending on the nature of the loss.[94]

Coastal states, too, have sometimes specified how they are to allocate their costs in case of joint actions against marine pollution. An example is Article 13 of the 2002 Malta Protocol,[95] which lays down an elaborate scheme for how the costs are to be shared in cases where one state offers assistance to another in combatting marine pollution. Under this regime, the sharing of costs depends on the nature of assistance provided, on which state took the initiative, and includes a provision on waiving the reimbursement claims in case full compensation will not be provided.[96]

Within the Baltic Sea area, an initiative was introduced specifically for sharing costs related to places of refuge which may not be covered by the international liability schemes. Helcom Recommendation 31E/5 from 2010 deals with cases where one coastal state has asked another state to assist, avoiding an emergency, by offering a place of refuge to the ship at the request of the former state. States are recommended to 'bilaterally discuss ways of fair sharing of the operation costs by state authorities in a place of refuge situation not met by the international compensation regime and without prejudice to the Polluter Pays Principle'.[97] The cost sharing was to be considered in 2012, but it was eventually decided that 'the issue of fair sharing of costs referred to in Recommendation 31E/5 is likely best solved on a case-to-case basis' and

[93] Directive 2009/15/EC on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations, (2009) OJ L 131/47.
[94] In case of death or personal injury, the member states may limit the maximum amount payable by the recognised organisation, but it must be at least EUR 4 million; in case of property damage that limit is EUR 2 million.
[95] See n. 33 above.
[96] Malta Protocol, ibid. Cf. the Annex to the OPRC Convention, n. 31.
[97] Helcom Recommendation 31E/5, adopted on 20 May 2010, revised 6 March 2014, available at helcom.fi/Recommendations/Rec%2031E-5.pdf.

no further guidance on how these costs are to be shared has since been elaborated.[98]

4. Concluding observations

States are not prime targets of the international rules establishing responsibility for ship-source pollution, whether under civil liability or inter-state responsibility under international law. In practice, too, there has been a notable reluctance to invoke such responsibility against states. Neither consideration, however, should be taken as suggesting that states are excluded from responsibility or liability. The review above has indicated that states may very well be exposed to claims relating to ship-source marine pollution, by other states as well as by private individuals, and that in some cases their responsibility may be shared. The tools for invoking such responsibility are already in place; the shortage of practice in this field rather depends on, on the one hand, a political resistance by states to invoke the international responsibility of fellow states, and, on the other hand, the availability of more convenient channels for obtaining financial compensation for pollution damage from ships.[99] In the absence of case law and other authoritative guidance on the more precise mechanisms of sharing responsibility for ship-source pollution, only a few observations on the *prospects* for shared state responsibility in this field can be made here.

First, it seems that a true sharing of obligations between states acting in different capacities only exists in the law regarding dumping. Both the LOSC and subsequent specialised instruments, notably the 1996 Protocol to the London Convention, provide for tangible, though separate, obligations to prevent unlawful dumping for flag states, coastal states and loading states. It is therefore in this area where a clear-cut shared responsibility between states for a single pollution incident is most likely to appear. This type of sharing is interesting as it involves not only an assessment of the measures taken (or not taken) by the states involved to prevent the incident in question, but also implies weighing the different (flag, port and loading) states' obligations against each other. A more detailed clarification of the responsibility of states, as envisaged in the 1996 London Protocol, would be a welcome development in this respect.

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[98] Minutes of HELCOM RESPONSE 16/2012, available at https://portal.helcom.fi/default.aspx, para. 6.16.
[99] See also T.A. Mensah, 'Civil Liability and Compensation for Environmental Damage in the 1982 Convention on the Law of the Sea', in J. Basedow et al. (eds.), *The Hamburg Lectures on Maritime Affairs 2007&2008*, Hamburg Studies on Maritime Affairs (Berlin, Heidelberg: Springer-Verlag, 2010), 4-7.

Second, as regards shipping, the setting is interesting in that the primary obligations rest with flag states, while the secondary rules and the subsequent attention to the matter in practice emphasise the responsibility of coastal states. Even if flag states have stringent duties to ensure safety and protect the marine environment, and coastal states mainly have rights to do so, it is the latter's responsibility which is highlighted and subject to further specification. Almost any right of interference with shipping which is granted to coastal states in the LOSC is coupled with a corresponding protection against abuse, and with accountability for excessive or unjustified interferences. A sharing of responsibility between flag and port/coastal states for a given pollution incident is not excluded, but a more probable scenario for shared responsibility would seem to be where port or coastal states are taking enforcement measures in concert, for example in the form of coordinated port state control enforcement measures, joint intervention against a maritime casualty or collective refusal of access to places of refuge. This, in turn, suggests that a likely candidate for such shared responsibility would be regional bodies that have transformed the *rights* of port and coastal states into (regional) obligations for them to act in certain situations. One particular regional body, i.e. the EU, has been particularly inclined to make use of such regulations.[100]

Third, it seems more likely that a state will be held financially liable under civil liability claims for compensation, than found responsible for the pollution under the law of state responsibility. There is already a significant amount of practice on the application of the civil liability scheme for oil pollution by tankers. So far no state has been held (co-)responsible for pollution caused by ships flying their flag under this system. By contrast, there are numerous indications that coastal states' actions in relation to pollution incidents outside their coast might well be subject to either direct compensation claims, or subsequent recourse action by parties who have provided initial compensation under the existing international instruments. In either case, the nature and scope of state liabilities under these systems will eventually be regulated by applicable national law, rather than rules of the international liability

[100] See n. 24 above. This can be both in terms of liability for damage caused by several member states jointly and in terms of a shared liability between a member state and the Union as such. The sharing of responsibility between the EU and its member states has been addressed in the LOSC Annex IX, Article 6(2) LOSC, n. 2, providing for joint and several liability between the organisation and its member states if there is uncertainty as to the responsible party. Article 57(2) of the ITLOS Rules provides a procedural mechanism for the Tribunal to inquire about the division of competence (and obligations) between an international organisations and its member states. See also the ILC's 2011 Articles on the Responsibility of International Organizations, ILC Report on the work of its sixty-third session, UNGAOR 66th Sess., Supp. No. 10, UN Doc. A/66/10 (2011) (ARIO), in particular Articles 6-9 and 15 ARIO. Ringbom, *The EU Maritime Safety Policy*, n. 22, 152-158 and 163, concludes that the extent of the EU's international responsibility for unlawful acts taken by the member state when implementing EU legislation in the end depends on the degree of control it exercises over the act in question and the proximity of the unlawful conduct with the EU legislation that is being implemented.

instruments.