

INTERNATIONAL LAW ASSOCIATION

LONDON CONFERENCE (2000)

COMMITTEE ON COASTAL STATE JURISDICTION RELATING TO MARINE POLLUTION

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Final Report

I INTRODUCTION

The Committee on Coastal State Jurisdiction Relating to Marine Pollution was established by the International Law Association in 1991 and effectively commenced its work in 1993. The Committee was originally chaired by Prof. A. H. A. Soons, Utrecht University. When the latter was elected Director of Studies of the International Law Association in 1997, the Committee Chair was taken over by Prof. K. Hakapää, University of Lapland. Prof. E. Franckx, University of Brussels, was appointed Rapporteur. In 1997 Dr. E. J. Molenaar, Utrecht University, joined the Committee as Assistant Rapporteur. This proved

to be an opportune decision, for later the same year the Rapporteur was temporarily forced to step back for personal reasons. Consequently he was unable to prepare or attend the Taipei Conference, a task taken over at that time by the Assistant Rapporteur.

The title of the Committee is a broad one. In the course of the Committee's work it became apparent that its efforts were to be focussed on specified parts of "coastal state jurisdiction relating to marine pollution". Accordingly, the Committee chose vessel-source pollution as the field of its study and made it a central objective of its work to produce results which could facilitate the interpretation or application of the 1982 United Nations Convention on the Law of the Sea.¹ This approach was recognized by relevant resolutions adopted at the 1996 Helsinki Conference and the 1998 Taipei Conference of the ILA.

The approach chosen was not to undermine other aspects of the overall concept of coastal state jurisdiction relating to marine pollution. Issues such as dumping or sea-bed resource activities may also reflect important questions of coastal jurisdiction. It was the decision of the Committee, however, rather to focus on the complex problems of vessel-source pollution than to attempt an all-encompassing but necessarily superficial survey of the field of coastal jurisdiction as a whole. The Committee neither took up to address general developments in international environmental law. To that effect, events such as the 1972 Stockholm Conference on the Human Environment and the 1992 Rio Conference on Environment and Development are milestones to be appreciated also in the context of the protection and preservation of the marine environment.

By way of introduction, one more clarification must be made. In the international regulation of vessel-source pollution, the International Maritime Organization (IMO) assumes a central role. Under its auspices, numerous conventions have been adopted with relevance to issues under the Committee's consideration. While questions of jurisdiction are touched upon also by IMO Conventions, the basic jurisdictional framework for the various uses of the marine environment is provided by the 1982 Convention. For this reason and recognizing the particular complexity of many of the framework rules of the 1982 Convention, the Committee essentially confined itself to offering clarification to the basic scheme of coastal state jurisdiction over vessel-source pollution in this Convention. At the same time, the Committee wishes to underline the importance also of IMO Conventions in matters relating to the Committee's mandate.

Even though the first official report of the Committee was only presented to the Helsinki Conference in 1996, the Rapporteur prepared a so-called First Internal Interim Report for the 66th ILA Conference, held at Buenos Aires, Argentina. In the margin of this Conference, the Committee held a first unofficial meeting on August 17, 1994. This meeting had two main points on its agen-

¹ United Nations, *The Law of the Sea: United Nations Convention on the Law of the Sea* (U.N. Pub. Sales Nr. E.83.V.5). Hereinafter cited as 1982 Convention. This convention entered into force on November 16, 1994.

da. First of all a discussion of the First Internal Interim Report, referred to above. The central issue of this report was mandatory ship reporting. Secondly, this meeting also had to work out a strategy for its future work. It was agreed that for the 1996 meeting, special attention should be devoted to mandatory ship reporting on the one hand, and the meaning of specific terms to be found in the 1982 Convention, such as “generally accepted international rules and standards”, “applicable international rules and standards”, and “wilful and serious pollution”, on the other. This theoretical work was to be substantiated by state practice which the Committee, from its very inception, tried to obtain from its members by means of questionnaires.

A first preparatory meeting for the 1996 Helsinki Conference took place in the Hague, the Netherlands, on July 11-12, 1995. A second such meeting was arranged in the margin of the Law of the Sea Institute’s Conference, held at Al-Ain, United Arab Emirates, during the month of May 1996. The draft report presented by the Rapporteur focussed primarily on the notions of “generally accepted international rules and standards”, and “wilful and serious pollution”. This report first of all analysed the drafting history of these different provisions. Subsequently, the legal literature on this point was submitted to a detailed analysis. Finally, this report took a closer look at state practice based on the replies received to the questionnaires sent out at the beginning of this Committee’s work. This remained a rather theoretical report, for no policy options were included at that time. After having inserted the remarks made by the Committee members at the occasion of the Al-Ain meeting on May 21, 1996, the report for the Helsinki Conference was prepared, entitled First Report. The latter consisted mainly of merging the First Internal Interim Report with the revised Draft Interim Report of the Al-Ain meeting.² More importantly, it also tried to fill in the void as far as the formulation of concrete proposals was concerned.

No more meetings were held by the Committee in preparation of the 1998 Taipei Conference. The preparation of this conference took place through E-mail contacts between the members or through regular mail. Dr. E. Molenaar prepared this second report in co-operation with the Chairman, entitled Second Report. This report took a closer look at the notions of “applicable international rules and standards” and “wilful and serious pollution”. In doing so, special attention was paid to the actual practice of states. The committee also met during the Taipei Conference.

The 2000 London Conference, finally, was prepared by means of two meetings which took place at Oxford, the United Kingdom. The first one, held between April 23-24, 1999, was able to draw on a number of reports submitted by the Rapporteur and Assistant Rapporteur. The former submitted a paper which had two parts. A first one related to the role of the *pacta tertiis* issue in

² Because of existing restrictions concerning the length of the report, the part on “wilful and serious pollution” did not find its way into the First Report.

the work of the Committee. The second part of that report concerned the issue of coastal state jurisdiction with respect to marine pollution in ice-covered areas. The Assistant Rapporteur prepared a paper on enforcement jurisdiction. It was agreed at that time that the Committee would try to publish the work accomplished by it, backed up as it were by a series of national reports.³ The latter would be based on the different questionnaires requested from the members during the Committee's lifetime. The Rapporteur committed himself to prepare a draft Belgian national report before the next meeting which could serve as point of reference for the other Committee members.

A second meeting of the Committee in preparation of the 2000 London Conference took place on March 25-26, 2000. The Rapporteur and Assistant Rapporteur prepared a Draft Final Report for this meeting, after which the Rapporteur, taking into account the remarks made during this meeting, submitted the present final report to ILA Headquarters for dissemination at the 69th ILA Conference, London, July 2000. During this second meeting the idea to publish the work of the Committee was further developed. It was agreed that a book, containing all the official reports, some preparatory documents, as well as a number of national reports written by Committee members, would be submitted for publication immediately following the London 2000 Conference.⁴

The Committee started its work at a time when it became clear that the 1982 Convention would enter into force on November 16, 1994.⁵ The question arose for the Committee whether the balance struck during the negotiations on Part XII (Protection and Preservation of the Marine Environment), and in practice finalized in 1979,⁶ was still considered to provide a compromise more than ten years later. In other areas the 1982 Convention had already required a certain adaptation. The difficulties with Part XI (The Area) were finally settled even before the 1982 Convention entered into force by means of a separate agreement.⁷ The same happened with respect to high seas fisheries only a few

³ See infra note 4 and accompanying text for further details.

⁴ *Vessel-source Pollution: The Work of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution (1993-2000)* (Franckx, E., ed.), The Hague, Martinus Nijhoff (2000). Forthcoming.

⁵ Namely 12 months after the date of deposit of the sixtieth instrument of ratification by Guyana as provided by its Art. 308 (1). See United Nations, *Report of the Secretary-General on the Law of the Sea: Addendum* (U.N. Doc. A/48/527/Add.1), November 30, 1993, p. 1.

⁶ The grounding of the *Amoco Cadiz* on March 16, 1978 near Porsal off the coast of Brittany, an incident where the entire cargo, some 230.000 tons of oil, was lost causing an ecological disaster without precedent in the history of marine oil transportation, urged France to ask for a re-examination of this part in order to provide greater jurisdiction to the coastal state. See Rémond-Gouilloud, F., "The Preservation of the Marine Environment", in 2 *A Handbook on the New Law of the Sea* (Dupuy, R.-J. & Vignes, D., eds.), Dordrecht, Martinus Nijhoff, pp. 1151, 1187 and 1189 (1991).

⁷ Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of December 10, 1982 (U.N. Doc. A/RES/48/263/Annex), August 17, 1994, multi-lateral, as reprinted in 33 *International Legal Materials* pp. 1309-1327 (1994). This agreement entered into force on July 28, 1996.

years after the entry into force of that same convention.⁸ The Committee consequently started out from the basic query whether Part XII, and more specifically the provisions of the 1982 Convention concerning vessel-source pollution, were similarly in need of adaptation, especially since some critical voices were raised in the specialized literature arguing that the 1982 Convention in fact “does not balance the interests of coastal and maritime states fairly”.⁹

In an area of law which develops to a large extent in response to concrete casualties,¹⁰ the Committee’s lifetime witnessed several of them. The Committee was established the year in which the *Braer* ran aground on the southern Shetland Islands spilling most of its 84.000 tons of oil after breaking up.¹¹ The First Report saw the light of day only weeks after the *Sea Empress* spilled about 70.000 tons of oil on the Pembrokeshire coast in Wales.¹² The Final Report was finished in the wake of the *Erika* disaster, which broke up in heavy weather in the Gulf of Biscay, spilling 10.000 tons of heavy fuel oil, while taking the remaining 20.000 tons down with it to a depth of about 120 meters.¹³ A common element in all three cases is the fact that these tankers flew so-called flags-of-convenience.¹⁴

Whether these occurrences had a direct and immediate impact on the legal developments is, however, not always easy to ascertain. As the Secretary-General of IMO has recently emphasised one has to be careful that “the fix chosen is the correct one for the problem”.¹⁵ In reaction to national and regional initiatives after the breaking-up of the *Erika*, he moreover underlined that IMO was the only appropriate forum where safety and pollution standards affecting international shipping should be considered and adopted and that all

⁸ Agreement for the Implementation of the Provisions of the Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (U.N. Doc. A/CONF.164/37, September 8, 1995), reprinted in 34 *International Legal Materials* pp. 1542-1580 (1995). Hereinafter cited as 1995 Agreement. This agreement has not yet entered into force.

⁹ Bodansky, D., “Protecting the Marine Environment from Vessel-Source Pollution”, 18 *Ecology Law Quarterly* p. 719, 777 (1991).

¹⁰ Especially emphasizing this point when analysing the work of IMO, i.e. the competent international organization in this area, see Rosenne, S., “The International Maritime Organization Interface with the Law of the Sea Convention”, in *Current Maritime Issues and the International Maritime Organization* (Nordquist, M. & Moore, J., eds.), The Hague, Martinus Nijhoff, p. 251, 263 (1999).

¹¹ The vessel broke up during the night of January 11-12, 1993.

¹² The incident occurred on February 15, 1996.

¹³ The vessel broke in two on December 12, 1999.

¹⁴ The *Braer* and the *Sea Empress* flew the flag of Liberia, and the *Erika* the flag of Malta. One can easily add to this list some of the major oil disasters of the past: The *Amoco Cadiz* (1978), the *Argo Merchant* (1976) and the *Torrey Canyon* (1967), all flying the flag of Liberia. Stressing this link, see for instance Anderson, E., “The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives”, 21 *Tulane Maritime Law Journal* p. 139, 162 (1996).

¹⁵ O’Neil, W., “Concluding Remarks”, in *Current Maritime Issues and the International Maritime Organization* (Nordquist, M. & Moore, J., eds.), supra note 10, p. 431, 433.

additional requirements imposed on foreign ships, be it on a national or even regional level, are detrimental to international shipping and therefore to be avoided.¹⁶

The development of the international legal system is therefore apparently not an easy undertaking. Internal pressures must certainly have motivated a country like the United States, after the *Exxon Valdez* disaster,¹⁷ to leave the established international system and opt for very strict unilateral measures instead.¹⁸ Nevertheless, if an orderly development is the ultimate goal to be achieved, it is believed that the international approach has to be preferred over the unilateral or even regional one.

Taking the 1982 Convention as the focal point, the present Committee is of the opinion that no new general international convention is necessary at present amending or replacing this text. It is rather believed that the 1982 Convention is flexible enough to accommodate these new stresses on the system as indicated above. If the international conventional framework governing vessel-source marine pollution at present is quite impressive,¹⁹ what is generally lacking is effective implementation. As a consequence, the basic approach followed by this Final Report is not to try to elaborate a draft convention. Instead, the Committee opted for an approach similar to the one followed by the Restatements of the American Law Institute. The provisions of the 1982 Convention will be commented upon by suggesting basic rules of interpretation, followed by commentaries.

II COASTAL STATE ENFORCEMENT POWERS OVER VESSEL-SOURCE POLLUTION

This part of the Final Report primarily deals with issues that were not yet addressed in the previous two Reports of the Committee. At the 1998 Taipei

¹⁶ International Maritime Organization, Draft Report of the Marine Environment Protection Committee on its Forty-Fourth Session, IMO doc. MEPC 44/WP.6, March 9, 2000. For the content of the statement of the Secretary-General see sub 1.7, for the overwhelming support by the other participants, see sub 1.12 and 1.14. A summary was already included in the unedited, advance copy of the report of the Secretary-General of the United Nations on the law of the sea for the year 2000. See United Nations, *Report of the Secretary-General: Oceans and the Law of the Sea* (U.N. Doc. A/55/...), March 17, 2000, para. 79, as available on Internet: http://www.un.org/Depts/los/GA55_61.htm. Hereinafter cited as 2000 Secretary-General Report on the Law of the Sea.

¹⁷ Contrary to most other incidents mentioned above (see supra notes 11-14), the *Exxon Valdez* was a vessel owned by the oil company itself. This substantially eased the compensation procedure afterwards.

¹⁸ Oil Pollution Act of 1990, Public Law No. 101-380, 140 Stat. 484, August 17, 1990. Hereinafter cited as 1990 US Oil Pollution Act.

¹⁹ A recent study found as many as 83 international conventions and instruments governing this particular area of international law. See Gold, E., *Handbook on Marine Pollution*, Arendal, Assuranceforeningen Gard, pp. 88-95 (1997).

ILA Conference, the Committee decided that a new topic could be dealt with and that a preference existed for coastal state enforcement powers over vessel-source pollution. An exception will nevertheless be made for Mandatory Ship Reporting²⁰ and Vessel Traffic Services,²¹ two concepts which this Committee had already been following since its inception²² and which will be covered first.

Which enforcement powers a coastal state is authorized to use with respect to foreign ships²³ depends on a wide range of factors. One of these is the distinction between, on the one hand, merchant ships and, on the other hand, warships and other government ships operated for non-commercial purposes.²⁴ The legal regime for the latter category of ships is in principle beyond the scope of discussion but as the 1982 Convention deals with all types of ships in times of peace, it will become clear that this has had an impact also on the legal regime of merchant ships. Moreover, as all factors cannot possibly be comprehensively and satisfactorily addressed in this context, it is decided to concentrate on situations where the geographical extent and/or scope of coastal state enforcement powers in the 1982 Convention is in need of clarification. Finally, IMO Conventions are not directly relevant to enforcement at sea and remain therefore unaddressed.²⁵

The following situations are proposed:

- the distinction between enforcement powers over foreign ships in innocent passage and foreign ships in non-innocent passage;

²⁰ Hereinafter cited as MSR.

²¹ Hereinafter cited as VTS.

²² The report prepared by the Rapporteur for the Committee's first meeting at Buenos Aires in 1994, focussed on these aspects. See *supra* sub I.

²³ Anon, "Part XII: Protection and Preservation of the Marine Environment", in 4 *United Nations Convention on the Law of the Sea 1982: A Commentary* (Rosenne, S. & Yankov, A., eds.), Dordrecht, Martinus Nijhoff, p. 3, 17 (1991), where it is observed that the 1982 Convention uses "vessel" and "ship" interchangeably without any apparent difference in meaning. This Final Report will take the same attitude.

²⁴ See, *inter alia*, 1982 Convention, Arts. 29-32 and 236.

²⁵ COLREG 72 contains no provisions on enforcement in general nor specifically on enforcement at sea. The only relevant provisions in SOLAS 74 are Regs. V/8, V/8-1 and V/8-2. Regs. V/8 and V/8-1 on ships' routing systems and ship reporting systems emphasize that enforcement should be "consistent with international law, including the relevant provisions of the" 1982 Convention. Reg. V/8-2 on vessel traffic services contains a non-prejudicial clause to confirm "the rights and duties of Governments under international law". Art. 4 (2) MARPOL 73/78, which imposes on coastal states the obligation to enforce MARPOL 73/78 violations that have occurred within their jurisdiction, should be read together with Art. 9 (2), which clarifies that MARPOL 73/78 cannot prejudice the jurisdictional regime under general international law, including the 1982 Convention. Enforcement action based on MARPOL 73/78 must therefore be in conformity with the 1982 Convention, possibly even for states non-parties to the 1982 Convention. See also Molenaar, E., *Coastal State Jurisdiction over Vessel-Source Pollution*, The Hague, Kluwer Law International, pp. 253-255 (1998).

- coastal state enforcement powers over foreign ships in non-transit passage;
- coastal state enforcement powers in archipelagic waters and archipelagic sea lanes;
- coastal state enforcement powers in the exclusive economic zone (EEZ);
- coastal state enforcement powers in special areas under Art. 211(6) and ice-covered areas under Art. 234 of the 1982 Convention.

As will become clear in the ensuing discussion, complex textual analysis is often needed in the interpretation of ambiguities and inconsistencies to be found in the 1982 Convention. Ultimately, it may therefore be for a court or tribunal with jurisdiction under the 1982 Convention to resolve the issues.

Some mention should also be made of the difficulties that were encountered in gathering and examining state practice. As was just noted, relevant state practice is very scarce and mainly consists of prescriptive activity, whereas actual cases of enforcement would provide more conclusive proof of a state's regulatory intent. Moreover, care was taken to avoid mere reliance on the wording of provisions in enactments without taking proper account of the actual context and objective of these enactments. The state practice referred to in this report should nevertheless be considered with due regard to, *inter alia*, the existence of other national enactments with some relevance to the subject matter of this report, legislation adopted after the completion of the report, and possible translation errors.²⁶

While the substantive discussion of this topic is undertaken in this part, the "black-letter" approach in Part III contains no explanatory commentary but simply refers to Part II.

2.1 MANDATORY SHIP REPORTING AND VESSEL TRAFFIC SERVICES

Ever since the Committee started to focus on these concepts rapid developments have taken place, some of them of a most recent nature, thus warranting the inclusion of the present section in the Final Report. The intention of this section is not to repeat in any detail what has already been developed in the framework of this Committee elsewhere.²⁷ Only a general outline will be provided in order to be able to frame the most recent²⁸ developments in their proper context.

²⁶ Because of the essential role of state practice, the Committee thought it appropriate to include in the outcome of its work national reports on the subject to be prepared by its members. See *supra* note 4 and accompanying text.

²⁷ See Franckx, E., "Coastal State Jurisdiction with Respect to Marine Pollution - Some Recent Developments and Future Challenges", *10 International Journal of Marine and Coastal Law* pp. 253-280 (1995), which represented a slightly modified version of the First Internal Interim Report presented at a Committee meeting during the 66th ILA Conference, held at Buenos Aires, Argentina during the month of August 1994, and by the same author "First Report" (of the Committee on Coastal State Jurisdiction Relating to Marine Pollution, May 1996), in *The International Law Association: Report of the Sixty-Seventh Conference held at Helsinki, Finland, 12 to 17 August 1996*, London, ILA, pp. 148-178 (1996). Hereinafter cited as First Report.

²⁸ Meaning post-May 1996 developments.

Reacting to state practice during the 1970s and early 1980s, IMO initially adopted a set of guidelines for VTS in 1985.²⁹ Only later did this organization change its conventional system to explicitly allow states first to introduce MSR systems in 1994³⁰ and secondly also to introduce mandatory VTS in 1997.³¹ Before the latter changes became operational,³² IMO also adopted a new set of guidelines for VTS on November 27, 1997.³³

MSR became operational under the 1994 changes to SOLAS with respect to all potential candidates mentioned in the First Report.³⁴ The French system at the western entrance of the English Channel became operational on November 30, 1996.³⁵ The Torres Strait and inner route of the Great Barrier Reef in Australia followed suit on January 1, 1997,³⁶ as did the Straits of Malacca and Singapore on December 1, 1998. In the Strait of Dover and off the northeastern and southeastern coasts of the United States such a system became operative on July 1, 1999.³⁷ The next in line appears to be China, with an MSR system off Chengsan Jian Promontory,³⁸ and at a later stage also Spain.³⁹ As of now, no mandatory VTS has yet been proposed under the 1997 SOLAS amendment.

What is the exact legal basis for such developments and how do coastal or port states enforce such MSR and mandatory VTS systems are however questions which are not easily answered. The discussions in the Legal Committee of IMO at the time of the debate surrounding the 1994 SOLAS amendment already clearly showed the fundamental difficulties involved.⁴⁰ The exact relationship with the 1982 Convention, which does not specifically allow, nor prohibit, such

²⁹ International Maritime Organization, Guidelines for Vessel Traffic Services, IMO doc. Res. A.578 (14), November 20, 1985.

³⁰ International Maritime Organization, Consideration and Adoption of Amendments to Mandatory Instruments, IMO doc. MSC 63/WP.8, May 20, 1994. The text of regulation V/8-1 is reproduced in annex 1 to this IMO document.

³¹ International Maritime Organization, Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, as Amended, Resolution MSC 65(68), June 4, 1997, IMO doc. MSC 68/23/Add.1, June 23, 1997. The text of regulation V/8-2 is reproduced in annex 2 to this IMO document.

³² July 1, 1999.

³³ International Maritime Organization, Guidelines for Traffic Vessel Services, IMO doc. Resolution A.857 (20), December 3, 1997. Hereinafter cited as 1997 VTS Guidelines.

³⁴ First Report, *supra* note 27, pp. 155-156.

³⁵ International Maritime Organization, Mandatory Ship Reporting Systems, IMO doc. Resolution MSC.66 (24), June 18, 1996, sub. 7.13.

³⁶ *Ibid.*, sub 7.12. See also International Maritime Organization, Mandatory Ship Reporting Systems, IMO doc. Resolution MSC.52(66), May 30, 1996.

³⁷ International Maritime Organization, Mandatory Ship Reporting Systems, IMO doc. Resolution MSC.85(70), December 7, 1998.

³⁸ The Sub-committee on the Safety of Navigation requested the Maritime Safety Committee during its 45th session to adopt this MSR system. See International Maritime Organization, Report to the Maritime Safety Committee, IMO doc. NAV 45/14, October 25, 1999, sub 14.1.3 and Annex 4.

³⁹ *Ibid.*, sub 3.31-3.36 and 14.2.1.

⁴⁰ Franckx, E., "Coastal State Jurisdiction with Respect to Marine Pollution - Some Recent Developments and Future Challenges", *supra* note 27, pp. 267-268.

developments is not always clear.⁴¹ If no specific difficulties appear to exist with respect to internal waters, including ports, given the full sovereignty of the coastal state there, everything beyond becomes more problematic.⁴² It should therefore be no wonder that MSR and VTS are at present both tied in principle to the territorial sea concept, even though nothing seems to prevent the former from sometimes extending beyond.⁴³ Both systems, however, have a series of safeguards attached to them. The 1994 amendment, besides a general non-prejudicial character clause with respect to international law and a specific one relating to the legal regime of international straits, also contained a provision stating that the ship reporting systems and enforcement actions must be compatible with international law in general, and the 1982 Convention in particular.⁴⁴ The 1997 amendment contains a similar provision stating:

“Nothing in this regulation or the guidelines adopted by the Organization shall prejudice the rights and duties of Governments under international law or the legal regimes of straits used for international navigation and archipelagic sea lanes”.⁴⁵

In this light, it is instructive to note the concerns recently expressed by the United States, as supported by the Russian Federation, about Spain’s intention to establish a MSR system in its territorial sea without first submitting a proposal to IMO for adoption.⁴⁶

The question of the performance and jurisdiction in the event of a breach, and more specifically whether the flag state or the coastal state should be competent under such circumstances, therefore seems to be governed by the normal rules of the 1982 Convention. Even though this might appear to be a straightforward principle, in practice it might not always be that easy to apply. It may suffice in this respect to recall that VTS is a broad concept,⁴⁷ which can include ship’s routing

⁴¹ Plant, G., “The Relationship Between International Navigation Rights and Environmental Protection: A Legal Analysis of Mandatory Ship Traffic Systems”, in *Competing Norms in the Law of Marine Environmental Protection* (Ringbom, H., ed.), London, Kluwer Law International, pp. 11, 25-27 (1997).

⁴² For a brief theoretical analysis of this issue, see Boisson, Ph., *Safety at Sea: Policies, Regulations & International Law*, Paris, Bureau Veritas, pp. 474-477 (1999).

⁴³ Franckx, E., “Vessel-source Pollution and Coastal State Jurisdiction”, 24 *South African Yearbook of International Law* p. 1, 15 (2000). VTS systems, on the other hand, are indeed strictly tied to the territorial sea. Regulation 8.2.3 (supra note 31) clearly states: “The use of VTS may only be made mandatory in sea areas within the territorial seas of a coastal State”.

⁴⁴ Franckx, E., “Coastal State Jurisdiction with Respect to Marine Pollution - Some Recent Developments and Future Challenges”, supra note 27, pp. 269-270.

⁴⁵ Regulation 8.2.5 (supra note 31).

⁴⁶ See International Maritime Organization, Report to the Maritime Safety Committee, IMO doc. NAV 45/14, October 25, 1999, sub 3.32.

⁴⁷ First Report, supra note 27, p. 153 note 25. According to the new guidelines VTS is “a service implemented by a Competent Authority, designed to improve the safety and efficiency of vessel traffic and to protect the environment. The service should have the capability to interact with the traffic and to respond to traffic situations developing in the VTS area”. 1997 VTS Guidelines, supra note 33, sub 1.1.1.

measures as well. Giving IMO the competence to approve such systems, sometimes as a consequence goes beyond the role which is attributed to that organization under Art. 22 (3) of the 1982 Convention.⁴⁸ In the same line of thought, VTS might as well include MSR, whereas Art. 21 (2) of the 1982 Convention would seem to prohibit states to require ships to be equipped with special instruments necessary in order to make contact with the onshore centre.⁴⁹

The conclusions to be reached based on these recent developments to a great extent confirm those already included in the First Report,⁵⁰ namely that behind the screen of technical measures, the substance of the balance struck by the 1982 Convention between navigational and environmental interests may well be touched by these developments. At the same time, the very reluctant attitude of states to openly defy this balance still remains a basic factor in the discussion.⁵¹

But this evolution by no means reached its terminal point. The issue seems to have gained momentum once again after the disaster with the *Erika* on December 12, 1999.⁵² After France had stated that it would propose to the European Union member states a MSR requirement for all ships transporting dangerous cargo through the territorial sea of a member state, a system which would also be operated on a voluntary basis in the EEZ,⁵³ this system formed part of a series of proposals introduced by the Commission during the month of

⁴⁸ Plant, G., supra note 41, p. 22.

⁴⁹ Boisson, Ph., supra note 42, p. 473. The novel provisions of the 1990 US Oil Pollution Act providing for the possibility to make VTS mandatory (see Franckx, E., "Coastal State Jurisdiction with Respect to Marine Pollution - Some Recent Developments and Future Challenges", supra note 27, p. 264), for instance, explicitly state that vessels operating in an area of a VTS and subjected to that system must meet certain communication equipment requirements. As mentioned by Silverman, W., "Cleaning Up Polluted Waters: Rhode Island's New Oil Pollution Control Act and Tank Vessel Safety Act", 31 *Suffolk University Law Review* p. 625, 636 and note 59 (1998). Separate states in the United States have apparently already further developed this particular provision of the Act of 1990, given the non-preemption of the latter in respect of state laws. See Dubner, B., "On the Interplay of International Law of the Sea and the Prevention of Maritime Pollution — How Far Can a State Proceed in Protecting Itself from Conflicting Norms in International Law", 11 *Georgetown International Environmental Law Review* p. 137, 150 (1998), providing the example of the State of Washington. Even though a careful analysis of this non-preemption clause of the Oil Pollution Act leads to the conclusion that equipment standards were not meant to be covered by it (see Allen, C., "Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part II)", 29 *Journal of Maritime Law and Commerce* pp. 565, 607-613 (1998)), this is not always clearly reflected in court decisions. See by the same author "Federalism in the Era of International Standards: Federal and State Government Regulation of Merchant Vessels in the United States (Part III)", 30 *Journal of Maritime Law and Commerce* pp. 85-142 (1999).

⁵⁰ First Report, supra note 27, pp. 156-158.

⁵¹ Boisson, Ph., supra note 42, p. 491.

⁵² See supra note 13 and accompanying text.

⁵³ *Le Monde*, February 17, 2000, p. 11. The next day the French Minister of Supply, Transport and Housing and the Minister of Foreign Affairs jointly addressed a letter to the Secretary-General of IMO informing him about these French initiatives. As reprinted in International Maritime Organization, Communication from the Government of France, IMO doc. Circular letter No. 2208, February 29, 2000.

March 2000.⁵⁴ As a matter of policy France had already announced, moreover, through its Minister of Transport, that it would seize the French presidency of the European Union during the second half of the year 2000 to make security at sea a priority issue.⁵⁵ Also for IMO the further development of VTS has been considered to be a major policy objective during the coming years,⁵⁶ but then with the implied caveat attached to it that national and regional rules on the subject should never be allowed to supersede the international framework established by that organization.⁵⁷ The lifetime of the present Committee, in other words, definitely proved to be too short to bring this analysis to its term.

2.2 THE DISTINCTION BETWEEN ENFORCEMENT POWERS OVER SHIPS IN INNOCENT PASSAGE AND SHIPS IN PASSAGE WHICH IS NON-INNOCENT

The regime of innocent passage in the territorial sea is largely laid down in Section 3 of Part II of the 1982 Convention, although relevant provisions are also incorporated elsewhere in the 1982 Convention, including in Part XII, i.e. the Part which is the main focus of the Committee's work. The regime of innocent passage seeks to balance a variety of coastal state interests which stem from its sovereignty over the territorial sea with the legitimate interests of other members of the international community. Accordingly, the right of innocent passage recognized in Art. 17 of the 1982 Convention must be balanced with the need for foreign ships to comply with the coastal state's laws and regulations enacted in conformity with international law.⁵⁸ In practice, notwithstanding the theoretical right of coastal states, the latter's jurisdiction over foreign vessels will tend to be effectuated in port, especially as far as commercial vessels are concerned.

The issue of non-compliance with these enactments and the appropriate response by the coastal state is heavily influenced by the distinction between innocent passage and passage which is non-innocent. The 1982 Convention recognizes that passage becomes non-innocent, for instance, if a foreign ship engages in "any act of wilful and serious pollution contrary to" the 1982 Convention.⁵⁹ Apart from that, Art. 19 (2) identifies several other situa-

⁵⁴ *Le Monde*, March 4, 2000, p. 15.

⁵⁵ *Le Monde*, December 31, 1999, p. 8.

⁵⁶ Keynote speech by Mr. William A. O'Neil, Secretary-General of the International Maritime Organization, at the occasion of a seminar on "Co-ordination of VTS Standards in the United Kingdom" organized by Trinity House, London, on May 12, 1999, as available on Internet: <http://www.imo.org/speech-1/vts.htm>, and Keynote speech by Mr. William A. O'Neil, Secretary-General, International Maritime Organization, at the occasion of a symposium on "VTS 2000" organized at Singapore on January 18, 2000, as available on Internet: <http://www.imo.org/speech-1/vts2000.htm>. In this latter speech, the Secretary-General plainly states: "Vessel traffic services represent the future".

⁵⁷ See *supra* note 16 and accompanying text.

⁵⁸ 1982 Convention, Art. 21 (4).

⁵⁹ 1982 Convention, Art. 19 (2)(h).

tions in which passage is to be deemed non-innocent.⁶⁰ The 1982 Convention treats the consequences of non-innocent passage quite straightforwardly in Art. 25 (1) by providing that “[t]he coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent”. It is generally agreed that in order to prevent non-innocent passage under Art. 19 or for passage *per se* under Art. 18,⁶¹ a coastal state may expel a vessel from its territorial sea.

What occurs more often, however, is that foreign ships violate coastal state enactments which are not serious enough to render passage non-innocent. Even though Art. 24 (1) of the 1982 Convention stipulates that innocent passage shall not be hampered, the *chapeau* recognizes that coastal states are allowed to take reasonable enforcement measures provided these are “in accordance with” the 1982 Convention. Art. 27 of the 1982 Convention deals more generally with enforcement powers over criminal matters, but Art. 220 (2) will commonly be applicable as a *lex specialis*, and therefore more relevant to the mandate of the Committee.⁶² Art. 220 (2) allows the coastal state to take the “normal” range of enforcement measures, such as boarding, physical inspection, detention and the institution of proceedings, but not to expel the ship from the territorial sea.

It is obvious and also widely accepted that with respect to vessels in non-innocent passage, coastal states have the broad range of enforcement powers associated with its full sovereignty.⁶³ Ships in non-innocent passage face therefore all the regular types of enforcement action laid down in Arts. 27 and 220 (2) of the 1982 Convention, in addition to running the risk of being expelled from the territorial sea.

While ships in non-innocent passage lose their *right* of innocent passage,

⁶⁰ Moreover, the Second Report of the Committee identified several additional situations in which passage is to be deemed non-innocent. See “Second Report” (of the Committee on Coastal State Jurisdiction Relating to Marine Pollution, 1998), in *The International Law Association: Report of the Sixty-Eighth Conference held at Taipei, Taiwan, 24 to 30 May 1998*, London, I.L.A., pp. 372, 388-399 (1998). Hereinafter cited as Second Report. See also Conclusion No. 7 and Explanatory Note, *infra* sub Part III.

⁶¹ Churchill, R. & Lowe, V., *The Law of the Sea*, Manchester, Manchester University Press, p. 87 (1999).

⁶² Para. (2) of Art. 220 deals with foreign ships that have violated coastal state laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution from vessels while navigating in the territorial sea, and the coastal state powers which can be used while the ship is still within the territorial sea. Other paras. of Art. 220 (e.g. (3), (5) & (6)) deal with violations committed in the EEZ. See also the discussion *infra* sub 2.5.

⁶³ See Hakapää, K., *Marine Pollution in International Law. Material Obligations and Jurisdiction*, Helsinki, Suomalainen Tiedeakatemia, p. 195 (1981); Smith, B., “Innocent Passage as a Rule of Decision: Navigation V. Environmental Protection”, 21 *Columbia Journal of Transnational Law* p. 49, 84 (1983). Some argument to the contrary could be raised due to the verb “to prevent” in Art. 25 (1). The cause for this confusion could, at least partially, be that Art. 25 is applicable to all ships, including warships. Obviously, not least with reference to rules of sovereign immunity, coastal states would be very hesitant to proceed to other enforcement action besides ordering a warship to leave the territorial sea.

violations of coastal state laws and regulations only allow *interference with passage*, but not annulment of the right itself. Ships in innocent passage can still be detained and brought into port, although from a legal perspective the right of innocent passage does not cease to exist. This does not necessarily mean that, from the coastal state point of view, interference with passage is always to be preferred above annulment of the right through expulsion. Finally, it is worth emphasizing that in any situation, whether innocent or non-innocent passage, the type of enforcement action resorted to must stand a test of reasonableness, which *inter alia* requires taking account of such general principles as necessity and proportionality.

On the other hand, the question should be raised if a right to deny a ship entry into the territorial sea or to expel it therefrom exists only in cases of non-innocent passage. If, for example, ships are incontestably in violation of “generally accepted” international CEDM standards⁶⁴ as meant in Arts. 21 (2) and 220 (2) of the 1982 Convention or do not observe the special precautionary measures pursuant to Art. 23 of the 1982 Convention, would the coastal state be authorized to order such a ship to leave the territorial sea?⁶⁵ Surely, a coastal state cannot be compelled to detain ships it considers dangerous to its marine environment because of non-compliance with “generally accepted” international CEDM standards or special precautionary measures. The coastal state did not want such ships in its territorial sea in the first place, let alone in one of its ports. Under these circumstances, detention does not meet the specific needs of the coastal state.

Some support for this exists in state practice, where enactments of several coastal states provide for the possibility of expelling a ship from the territorial sea or even denying it the right to enter, in cases where such ships are *not* explicitly alleged to be in *non-innocent passage*.⁶⁶ Because of the need for caution in the analysis of state practice, as already emphasized above,⁶⁷ it should certainly not be ruled out that in practice some of these states use this power predominantly for vessels in non-innocent passage.⁶⁸ Despite this reservation and the fact that this state practice is not widespread, it seems to suggest that at least some states take the view that expulsion/denial of entry is not exclusively reserved for cases in which passage has become non-innocent. Although

⁶⁴ I.e. construction, equipment, design and manning standards.

⁶⁵ Although in some parts of the world this will perhaps not occur too frequently, such ships could still slip through the net of the harmonized efforts on port state control at the regional level.

⁶⁶ The following examples can be given: *Canada* (S. 662 (1)(f, g) 1972 CSA); Chile (Arts. 6 & 19, 1992 Regulations); *Denmark* (S. 43 (1) 1993 Act); Italy (Art. 6, Presidential Decree No. 504/78); Norway (S. 188 1903 Act; S. 26 1994 Regulations); Russian Federation (Art. 30 (19), 1993 Law on the State Boundary (as amended)); Spain (Art. 88 (3)(a), 1992 Act); Ukraine (Art. 28 (3), 1991 Statute); and the *United States* (S. 1016 (b)(2), 1990 OPA (33 U.S.C. § 2716 (b)(2)); 33 U.S.C. §§ 1223 (b), 1232 (e)). The countries marked in italics were not yet parties to the 1982 Convention as of January 1, 2000.

⁶⁷ See *supra* note 26 and accompanying text.

⁶⁸ See Second Report, *supra* note 60.

protests against these enactments do not seem to have been made, this could also indicate that these powers have never been resorted to. On the other hand, legislation which explicitly stipulates that expulsion/denial of entry shall be used exclusively for non-innocent vessels could not be located either.⁶⁹ Moreover, several other states claim specific enforcement powers over non-innocent vessels without referring to the power of expulsion/denial of passage at all.⁷⁰ In light of the relative scarcity of state practice, all that can be concluded here is that some states do not seem to rigidly pursue the distinction between innocent and non-innocent vessels, as would be expected on the basis of the 1982 Convention. In case such state practice would become more widespread, this may well lead to an erosion of this distinction.

2.3 COASTAL STATE ENFORCEMENT POWERS OVER FOREIGN SHIPS IN NON-TRANSIT PASSAGE

At an early stage an awareness already existed that the extension of the maximum breadth of the territorial sea to 12 nautical miles would bring a large number of important international straits under the sovereignty of states. The regime of transit passage in straits used for international navigation was ultimately incorporated in Section 2 of Part III of the 1982 Convention, to alleviate concerns that a regime of innocent passage would impose too many restraints on navigation through such straits. The transit passage regime provides for a balance of rights and obligations of strait (coastal) states and those of flag states, which is more favourable to navigational interests in comparison with the regime of innocent passage. The flag state right of transit passage, as laid down in Art. 38 (1) of the 1982 Convention, must be balanced with the need for foreign ships to comply with the more limited competence of the strait state to prescribe laws and regulations.⁷¹

In light of the discussion in Section 2.2, the question which springs to mind is whether or not the same considerations would be relevant to the regime of transit passage under Part III of the 1982 Convention.⁷² In other words, would there be a distinction between strait state enforcement over, on the one hand, ships that exercise a right of transit passage and, on the other hand, ships that due to certain reasons have lost their right of transit passage?

It seems that ships engaging in activities which are not an exercise of the right of transit passage will lose this right. Such ships are to be considered in

⁶⁹ Nevertheless, mention must be made here of states like Finland (see its Act No. 524/96, Decree No. 525/96) that have not enacted specific legislation on innocent passage but, on the other hand, have incorporated the 1982 Convention as a whole in their legislation.

⁷⁰ See Molenaar 1998, *supra* note 25, pp. 268-270. A summarized version has been incorporated in: Hakapää, K. & Molenaar, E., "Innocent Passage - Past and Present", *Jussens Venner*, pp. 333, 352-353 (1998) and 23 *Marine Policy* pp. 131, 140-141 (1999).

⁷¹ 1982 Convention, Art. 42 (4).

⁷² 1982 Convention, Art. 38 (1) & (2) grant and define the right of transit passage to all ships and aircraft.

non-transit passage and, through Art. 38 (3), will automatically fall under the general regime of innocent passage. This will usually imply loss of innocence as well, and bring the powers under Art. 25 (1) into operation.⁷³ It is submitted that the obligation under Art. 44 for strait states not to suspend transit passage does not prevent a strait state from suspending a particular case of transit passage for want of innocence, but rather prohibits the general suspension for security or any other reason similar to Art. 25 (3).

On the issue under consideration some state practice exists. The following states regard the exercise of an activity which renders passage non-innocent also as an activity which is not an exercise of the right of transit passage, and claim in such cases enforcement powers similar to those in Art. 25 (1):

State	Instrument	State	Instrument
Antigua & Barbuda	Ss. 15A 92), 16, 20C 1982 Act	Turkey ^a	Art. 2 1994 Regulations
France	Ellis Case	United Kingdom	SS. 95 (2A), 100C, 258 (1A), paras. 3 (4A), 17 (2A) Sched. 3 1995 MSA
Grenada	Ss. 18 (2), 23 1989 Act		

^a As at 1 January 2000, Turkey was not yet Party to the 1982 Convention. Also, the 1994 Regulations apply to the Turkish Straits which, due to Art. 35 (c) of the 1982 Convention, do not fall under the regime of transit passage.

⁷³ Reisman, W., "The Regime of Straits and National Security: An Appraisal of International Lawmaking", 74 *American Journal of International Law* pp. 48, 70 (1980); Churchill, R. & Lowe, V., supra note 61, p. 107; de Yturriaga, J., *Straits Used for International Navigation. A Spanish Perspective*, Dordrecht, Martinus Nijhoff Publishers, pp. 183 and 201 (1991); Treves T., "Navigation", in 2 *A Handbook on the New Law of the Sea* (Dupuy, R.-J. & Vignes, D., eds.), supra note 6, p. 835, 964, who, however, promotes prudence. Contra Moore, J., "The Regime of Straits and the Third United Nations Conference on the Law of the Sea", 74 *American Journal of International Law* pp. 77, 102-105 (1980); Koh, L., *Straits in International Navigation. Contemporary Issues*, London, Oceana Publications Inc., pp. 156-157 (1982); Caminos, H., "The Legal Regime of Straits", 205 *Recueil des Cours de l'Académie de Droit International* pp. 13, 149-150 and 172 (1989); Anon, "Article 42: Laws and Regulations of States Bordering Straits Relating to Transit Passage", in 2 *United Nations Convention on the Law of the Sea 1982: A Commentary* (Nandan, S. & Rosenne, S., eds.), Dordrecht, Martinus Nijhoff, pp. 367, 377 (1993); Anon, "Article 44: Duties of States Bordering Straits", in 2 *United Nations Convention on the Law of the Sea 1982: A Commentary* (Nandan, S. & Rosenne, S., eds.), supra, p. 384, 389. J. Moore and H. Caminos both speak of a "delinkage" between the right of transit passage and duties of transiting ships. In case of violations, flag states shall bear international responsibility for such violations, with enforcement solely through the normal diplomatic channels. Hakapää, K., supra note 63, p. 204, submits that certain violations can bring the ship in non-transit passage while still remaining in innocent passage.

Although this group contains some important strait states, their number is too modest to convincingly argue that state practice confirms the view that (certain) activities undertaken by ships in transit passage that would in the territorial sea render passage non-innocent, also render passage non-transit and allow enforcement powers similar to Art. 25 (1). On the other hand, there seems to be no state practice which indicates that a different approach must be taken. Finally, account should also be taken of paragraph (5) of the 1982 Malacca Statement⁷⁴ which emphasizes: “Articles 42 and 233 [1982 Convention] do not affect the rights and obligations of states bordering the Straits regarding appropriate enforcement measures with respect to vessels in the Straits not in transit passage”.

For the purpose of the work of the present Committee, however, there is no need to formulate an exhaustive list of situations in which the right of transit passage is lost. With the focus on marine pollution, it is sufficient to argue that “any act of wilful and serious pollution contrary to” the 1982 Convention, committed within areas in which the transit passage regime applies, leads also to a loss of transit passage. This is clearly supported by the fact that Art. 233 of the 1982 Convention accords enforcement powers to strait states in situations which are less serious. A similar situation arises with respect to maritime casualties, which would give strait states a right of intervention under general international law, and ships whose condition is so utterly deplorable that they are extremely likely to cause serious incidents with major harmful consequences, including to the marine environment.

2.4 COASTAL STATE ENFORCEMENT POWERS IN ARCHIPELAGIC WATERS AND ARCHIPELAGIC SEA LANES

Recognition of a coastal (archipelagic) state’s sovereignty over archipelagic waters enclosed by the archipelagic baselines drawn in conformity with Art. 47 of the 1982 Convention, is accompanied once again with upholding navigational interests. Implicit in the title to this section is the fact that a distinction should be made between archipelagic state enforcement powers which can normally be exercised in archipelagic waters and those enforcement powers which are permitted in archipelagic sea lanes. Part IV of the 1982 Convention on “Archipelagic States” does not explicitly address enforcement issues but the scope and extent of such powers can nevertheless be deduced from the applicable rights of navigation. Arts. 52 and 53 of the 1982 Convention grant foreign ships a right of innocent passage in archipelagic waters and a right of archipelagic sea lanes passage in archipelagic sea lanes or, when these have not (yet) been designated, “routes normally used for international navigation”.

⁷⁴ Statement relating to Art. 233 of the Draft Convention on the Law of the Sea in its Application to the Straits of Malacca and Singapore, of April 28, 1982. Made on behalf of Indonesia, Malaysia and Singapore, Official Records, Vol. XVI, pp. 250-251, UN Doc. A/CONF.62/L.145, and Annex. Soon thereafter, the Malacca Statement was acknowledged by the main user states, *viz.* Australia, France, Germany, Japan, the United Kingdom and the United States (Official Records, Vol. XVI, pp. 251-253, UN Doc. A/CONF.62/L.145/Add. 1 to 8).

Part IV of the 1982 Convention devotes relatively little attention to defining the extent of jurisdiction which archipelagic states can exercise within their archipelagic waters “in general”, *viz.* in non-special situations. One could of course argue that this would be unnecessary in light of Arts. 2 (1) and 49 (1) of the 1982 Convention which recognize the archipelagic state’s sovereignty over its archipelagic waters. This sovereignty is to be exercised without prejudice to existing agreements, traditional fishing rights and existing submarine cables (Arts. 47 (6) and 51), the right of archipelagic sea lanes passage (Arts. 53 and 54) and the right of innocent passage (Art. 52 (1)). Art. 52 (1) provides:

“Subject to Art. 53 and without prejudice to Art. 50, ships of all states enjoy the right of innocent passage through archipelagic waters, in accordance with Part II, Section 3”.

This provision declares that the right of innocent passage applies to all waters within archipelagic waters except where these have become internal waters or where a broader right of archipelagic sea lanes passage exists. Paragraph (2) of Art. 52 permits, subject to stringent conditions, the suspension of innocent passage, but not archipelagic sea lanes passage.⁷⁵ At first sight, the reference to the right of innocent passage in paragraph (1) of Art. 52 gives the impression that it is only directed at flag states as it explicitly confirms a right which applies to them. However, as the phrase “in accordance with Part II, Section 3” already indicates, the existence of this right cannot be separated from an obligation to respect it. Therefore, by recognizing the existence of a right of innocent passage in archipelagic waters, this entire balance of jurisdiction is in fact imposed on archipelagic waters (outside archipelagic sea lanes).⁷⁶

One problem which is caused by the reference “Part II, Section 3”, is that the 1982 Convention has both a zonal and a sectoral approach. Apart from Section 3 in Part II, there are other provisions in the 1982 Convention, including in Part XII, which are relevant to the jurisdictional balance in the territorial sea.⁷⁷ As the relevant provisions on vessel-source pollution in Part XII are more detailed than the general provisions in Section 3 of Part II, these should thus be treated as a *lex specialis*. It is therefore submitted that references to the territorial sea in Part XII should for the purpose of coastal state jurisdiction over vessel-source pollution be read to include archipelagic waters.⁷⁸

⁷⁵ 1982 Convention, Arts. 44 and 54.

⁷⁶ However, it is not excluded that certain differences may exist. For example, the applicability of Art. 22 within archipelagic waters.

⁷⁷ E.g. Arts. 211 (3 & 4), 218 (1), 220 (1, 2, 3, 5 & 6) and 230 (2). Note that the reference to the territorial sea in Art. 245 of Part XIII on Marine Scientific Research would also be relevant.

⁷⁸ See Oxman, B., “Observations on Vessel Release under the United Nations Convention on the Law of the Sea”, 11 *International Journal of Marine and Coastal Law* p. 201, 204 note 14 (1996). Churchill, R. & Lowe, V., *supra* note 61, p. 128, submit that the fact that Part XII does not refer to archipelagic waters is “anomalous and undesirable, and may possibly be an oversight in drafting”.

These same arguments could also be made for other areas in which the 1982 Convention recognizes a regime of innocent passage: internal waters established by the method set forth in Art. 7 (as referred to in Arts. 8 (2) and 35 (a)), and straits used for international navigation where a regime of non-suspendable innocent passage applies under Art. 45.

With respect to archipelagic sea lanes, it is noticeable that Part IV lacks provisions on enforcement, not even by way of mentioning these by the cross-reference in Art. 54. The question therefore arises if Arts. 38 (3) and 233 of the 1982 Convention (which concern strait state enforcement powers in areas subject to transit passage) apply to the regime of archipelagic sea lanes passage. The absence of a provision similar to Art. 38 (3) could indicate that a loss of the right to archipelagic sea lanes passage does not imply a loss of the right of innocent passage and the consequential coastal state powers. Two arguments could be used to counter that view. Firstly, the applicability of Art. 39 via the cross-reference in Art. 54 would avoid such a notable difference with the regime of transit passage. The obligation to “comply with other relevant provisions of this Part” incorporated in Art. 39 (1)(d) would arguably extend to Art. 38 (3).

Secondly, the negotiations at UNCLOS III reflected the understanding that the underlying concepts of transit passage and archipelagic sea lanes passage were broadly identical. When this is taken as the point of departure, it would not appear to be objectionable to treat the two regimes as identical also in relation to various specific issues. It is submitted that one of these issues should be the exercise of coastal state enforcement jurisdiction over the prevention, reduction and control of pollution by foreign vessels in passage.

This second argument can also be made with respect to Art. 233, which is not explicitly referred to by the cross-reference in Art. 54 either. In fact Part IV does not explicitly include provisions on enforcement at all. It may be argued, however, that Art. 233 can implicitly be applied to archipelagic sea lanes passage since it is linked to Art. 42, which itself is made applicable *mutatis mutandis* by Art. 54.⁷⁹

Various arguments can thus be mentioned which support the interpretation that the 1982 Convention provisions on coastal state enforcement jurisdiction over vessel-source pollution within areas subject to the regime of transit passage are identical to those of areas subject to the regime of archipelagic sea lanes passage. Nevertheless, the limited state practice which was identified does not necessarily reflect this view.⁸⁰

⁷⁹ See Anon, “Article 54: Duties of Ships and Aircraft During their Passage, Research and Survey Activities, Duties of the Archipelagic State and Laws and Regulations of the Archipelagic State Relating to Archipelagic Sea Lanes Passage”, in 2 *United Nations Convention on the Law of the Sea 1982: A Commentary* (Nandan, S. & Rosenne, S., eds.), supra note 73, p. 481, 487; and Oxman, B., “Environmental Protection in Archipelagic Seas and International Straits. The Role of the International Maritime Organization”, 29 *Law of the Sea Institute Proceedings* p. 266, 279 note 45 (1997).

⁸⁰ S. 15A (2) 1982 Act of Antigua and Barbuda explicitly stipulates that engaging in activities based on Art. 19 (2) of the 1982 Convention while in transit passage, implies a loss of innocent passage. However, S. 15B does not take the same approach with respect to archipelagic sea lanes passage. The same can be said in relation to Ss. 18 (2) and 19 1989 Act of Grenada. The reason for

2.5 COASTAL STATE ENFORCEMENT POWERS IN THE EEZ

The legal regime of the EEZ in the 1982 Convention, predominantly laid down in Part V, seeks to balance the sovereign rights, jurisdiction and duties of coastal states under Art. 56 with rights and duties of other states under Art. 58. With respect to vessel-source pollution, this balance is concerned with the jurisdiction accorded to coastal states under Art. 56 (1)(b)(iii) and the freedom of navigation accorded to flag states under Art. 58 (1).

Part V of the 1982 Convention deals with enforcement in a single provision, namely Art. 73. However, the enforcement measures which the coastal state is allowed to take pursuant to this provision have to constitute an “exercise of its sovereign rights to explore, exploit, conserve and manage the living resources” in the EEZ. Efforts to prevent, reduce and control pollution by vessels could of course be regarded as directly linked to these sovereign rights. However, the inclusion of Art. 220 on “Enforcement by coastal States”, in Part XII of the 1982 Convention, clearly indicates that it should be applied as a *lex specialis* to Art. 73.⁸¹

Art. 220 consists of 8 paragraphs, each of which raises a number of intricate questions that cannot all be discussed here.⁸² Paragraph (1) deals with in-port enforcement of violations that have occurred within the coastal state’s territorial sea or EEZ, while paragraph (2) permits enforcement at sea in situations where both violation and enforcement action take place in the territorial sea. Paragraphs (3), (5) and (6) all concern the situation where “a vessel navigating in the exclusive economic zone or the territorial sea of a state has, in the exclusive economic zone, committed a violation”. The enforcement powers in these paragraphs can thus be exercised for violations in the EEZ, regardless of whether the ship is navigating in the territorial sea or the EEZ at the moment of enforcement. The phraseology suggests, however, that enforcement jurisdiction in the EEZ is only admissible when a violation takes place in the EEZ. Not covered would be violations committed in the internal waters or the territorial sea in cases where the coastal state cannot, for whatever reason, commence enforcement before the vessel is already in the EEZ. The right of hot pursuit could, due to the specific requirements laid down in Art. 111 of the 1982 Convention, not be used under such circumstances.

There seem to be no fundamental reasons why violations committed in the territorial sea should not be subject to enforcement when the offender is navigating in the EEZ. One commentator argues that the negotiations at UNCLOS III reflected that this situation needed no explicit attention in the text for the reason that “coastal jurisdiction over violations in the territorial waters cannot be

such a differentiation does not become apparent, although it could be explained by the absence of a provision in Part IV that is similar to Art. 38 (3) of the 1982 Convention.

⁸¹ See Shearer, I., “Problems of Jurisdiction and Law Enforcement against Delinquent Vessels”, 35 *International and Comparative Law Quarterly* p. 320, 334 (1986).

⁸² For a discussion on para. (7) see Molenaar, E., *supra* note 25, pp. 493-494. Para. (6) is discussed in Section 2.6.

more restricted than coastal jurisdiction over violations in the zone".⁸³ Nevertheless, it seems prudent to require that the conditions incorporated in Art. 220 (3, 5 & 6) have to be met *mutatis mutandis* before any of the types of enforcement can be resorted to.⁸⁴

As far as the situation for violations committed in internal waters is concerned, Art. 27 (2) of the 1982 Convention confirms that coastal state enforcement jurisdiction remains unrestricted in cases of violations in internal waters committed by ships navigating in the territorial sea at the time of enforcement. Consequently, it could be argued that also the extent of coastal state enforcement powers which can be resorted to in the EEZ should be more extensive for violations committed in internal waters than for violations in the territorial sea. However, for practical purposes it would seem preferable to require that the conditions incorporated in Art. 220 (3, 5 & 6) are met *mutatis mutandis* in this situation also.

As far as could be ascertained, only the 1986 Decree of Romania provides for the possibilities discussed above, although it also contains many inconsistencies with Art. 220 (3, 5 & 6) of the 1982 Convention.⁸⁵

Art. 220 (3, 5 & 6) allows the coastal state to resort to various types of enforcement action with increasing impact on the freedom of navigation. This "graded" enforcement scheme could, depending on the circumstances, justify asking for information, physical inspection and the institution of proceedings, including a vessel's detention. As the enforcement measures become more onerous, not only more evidence is required that a violation has taken place, but the consequences of the violation, or threat thereof, also have to be more serious. While these safeguards are incorporated to ensure that coastal states only have limited enforcement capacity in the EEZ, the fact that they are linked to a range of undefined criteria gives reason for concern as coastal states will have to interpret these in concrete situations. Objectivity and, consequently, uniformity, can therefore not be guaranteed.⁸⁶

State practice on enforcement jurisdiction within the EEZ shows that only a small number of coastal states has enacted detailed provisions on enforcement at sea. Many states have done no more than claim jurisdiction, whether by repeating the substance of Art. 56 (1)(b)(iii) *verbatim* or by alternative phraseology whose consistency with the 1982 Convention is sometimes questionable.⁸⁷ States that have made only general claims to enforcement jurisdiction

⁸³ Hakapää, K., *supra* note 63, p. 243.

⁸⁴ *Ibid.*

⁸⁵ See Molenaar, E., *supra* note 25, pp. 395-396.

⁸⁶ See Boyle, A., "Marine Pollution under the Law of the Sea Convention", 79 *American Journal of International Law* p. 347, 364 (1985).

⁸⁷ See the list of states that have established an EEZ in Molenaar, E., *supra* note 25, pp. 368-369. The 25 states in Group No. 3 claim "exclusive jurisdiction" to preserve and protect the marine environment or to prevent, reduce and control marine pollution, but this excessive claim has in general not been substantiated by more specific legislation or enforcement practice (*ibid.*, pp. 397-399).

within the EEZ obviously do not take account of the graded enforcement regime in Art. 220 (3, 5 & 6), but even specific legislation often omits reference to the carefully formulated safeguards therein. While it is assumed that ships navigating in the EEZ are frequently requested to give information, cases of enforcement at sea in the form of boarding, inspection and detention, or the institution of proceedings related thereto, have not been reported.⁸⁸

Finally, mention should be made of Art. 221 of the 1982 Convention which gives coastal states a right of intervention to avoid pollution arising from maritime casualties. Such powers can be applied “beyond the territorial sea” which would thus also include the high seas.

2.6 COASTAL STATE ENFORCEMENT POWERS IN SPECIAL AREAS UNDER ART. 221 (6) OF THE 1982 CONVENTION AND ICE-COVERED AREAS UNDER ART. 234 OF THE 1982 CONVENTION

Two special regimes relating to coastal state powers in the EEZ, as discussed in the previous section, will be analysed. The first one concerns so-called special areas provided by Art. 211 (6) of the 1982 Convention, the second one ice-covered areas as regulated by Art. 234 of that same document. Both articles germinated from a single drive to grant coastal states, under clearly defined conditions, competence in certain areas of their EEZ exceeding the generally accepted international rules and standards. However, in 1976 the regime concerning areas within the EEZ where that extra competence would be granted on the basis of the presence of particularly severe climatic conditions creating obstructions or exceptional hazards to navigation and possibly entailing major harm to or irreversible disturbance of the ecological balance, was taken apart to become Art. 234 at a later stage.⁸⁹

Even though both special regimes thus have a common history and are treated under the same heading in the present report, it should be emphasized from the beginning that the 1982 Convention treats them in an entirely different manner. Art. 211 (6), through its specific enforcement provision of Art. 220 (8), forms part and parcel of the EEZ enforcement regime (of which the basis is to be found in Art. 73) as a *lex specialis*.⁹⁰ Art. 234, on the other hand, forms part of a section of its own, bearing the same name as the article itself, namely “Ice-covered areas”. The latter, as a consequence, will deserve more attention

⁸⁸ An interesting case is that of an oil spill that was detected approximately 10 miles off San Francisco Bay, on September 27, 1998. Oil samples were matched to a previous spill by the Liberian flagged tanker *Command*, on the 24th of September. The *Command* was finally boarded by the United States Coast Guard 200 miles south of Guatemala, on the high seas, with the consent of Liberian authorities (for a report see: www.uscg.mil/d11/msosf/mystery/command.htm). Under these circumstances, however, this a case of enforcement at sea that cannot be discussed in the context of Art. 220 of the 1982 Convention.

⁸⁹ Anon, “Article 211: Pollution from Vessels”, in 4 *United Nations Convention on the Law of the Sea 1982: A Commentary* (Rosenne, S. & Yankov, A., eds.), supra note 23, p. 176, 190.

⁹⁰ See supra note 81 and accompanying text.

in the present report. Taking into account this totally different content, moreover, both articles are best kept separated in the interest of clarity of exposition.⁹¹

2.6.1 *Special areas under Art. 211 (6) of the 1982 Convention*

Art. 211 (6)(a) allows coastal states to create so-called special areas in clearly defined areas of its EEZ, which require mandatory pollution prevention measures for recognized technical reasons in relation to their oceanographical and ecological conditions, as well as the utilization or protection of their resources and the particular character of their traffic. If these requirements are fulfilled, the coastal state has the right to adopt the measures which have been developed by IMO especially for such areas. Moreover, Art. 211 (6)(c) allows for additional measures to be taken by that same coastal state⁹² relating to discharges or navigational practices, but excluding CEDM standards, provided that they are agreed to by IMO.

Ratione loci this article applies to “a particular, clearly defined area” of the EEZ. If the outer limit seems to be clearly determined, the inner limit, namely whether such special areas may include part of the territorial sea or not, may give rise to some discussion.⁹³ But since IMO approval forms an essential element in the creation of such special areas, application of this enlarged competence to the territorial sea seems to be less problematic⁹⁴ than for instance with respect to Art. 234, where this is not the case.⁹⁵ The specific wording used does, first of all, not seem to lend support to the view that states can claim their whole EEZ as a special area under this article. On the other hand, nothing prevents two or more coastal states with an adjacent EEZ from designating such “particular, clearly defined area” in a joint manner.⁹⁶ The exact field of application of Art.

⁹¹ But see deGeneres Berret, A., “UNCLOS III: Pollution Control in the Exclusive Economic Zone”, 55 *Louisiana Law Review* pp. 1165, 1171-1172 (1995), mixing up both concepts which results in a misleading overall picture.

⁹² In order for this second possibility to apply, in other words, an Art. 211 (6)(a) special area must necessarily exist.

⁹³ See Molenaar, E., *supra* note 25, p. 402 note 4 for an overview of the relevant literature.

⁹⁴ When a coastal state submits a concrete proposal to IMO, it has necessarily to start by identifying the area in question. See for instance text submitted by the Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations to the Marine Environment Committee of IMO, entitled “Relationship between the 1982 Convention on the Law of the Sea and IMO: Guidelines for the Designation of Special Areas and the Identification of Particularly Sensitive Sea Areas”. International Maritime Organization, Identification and Protection of Special Areas and Particularly Sensitive Areas, IMO doc. MEPC 43/6/2, March 31, 1999, sub 18. Hereinafter cited as DOALOS 1999 Document on Relationship between 1982 Convention and IMO. If such a proposal would include parts of the territorial sea of that state, it would then be up to IMO to see how best to accommodate the different interests involved.

⁹⁵ See *infra* note 128.

⁹⁶ DOALOS 1999 Document on Relationship between 1982 Convention and IMO, *supra* note 94, sub 16.

211 (6)(a), tied as it is to the EEZ, already sufficiently indicates that the notion of “special area” to be found in this article must not be confused with the same term as it appears in MARPOL 73/78,⁹⁷ which can cover an entire sea such as the Black Sea or even the Mediterranean where EEZs are almost completely absent.⁹⁸

Ratione materiae, two hypotheses have to be distinguished for the coastal state to adopt more stringent laws and regulations than the generally accepted international rules and standards normally applicable in the EEZ. Art. 211 (6)(a) first of all allows the coastal state under certain conditions to adopt laws and regulations “as are made applicable, through the organization, for special areas”. Under this paragraph, even though it is not specified what kind of measures may be implemented, it is clear that the coastal state has no prescriptive powers whatsoever, but that the latter competence fully appertains to IMO instead. In other words, under this scheme the power of the coastal state is limited to introducing a concrete proposal, based on scientific and technical evidence, to IMO, which subsequently decides. But even then, the question remains whether IMO simply proposes a list of possible measures from which the coastal state may then select, or whether this organization itself determines the concrete measures to be applied to that particular special area.⁹⁹

Art. 211 (6)(c) allows the coastal state even to adopt additional laws and regulations for a paragraph (a) special area, thus superseding those normally made applicable by IMO for such areas. As was the case with respect to the designation of special areas, the coastal state makes a proposal to IMO and can enact it only if the latter organization agrees. The difference here, when compared with paragraph (a), is that a specific reference is made to the kind of measures which the coastal state can propose under this paragraph, namely discharge regulations and navigational practices, but explicitly excluding CEDM standards. The latter element, which is similar to the situation as it exists in the territorial sea, is an essential element of the balance of power.¹⁰⁰

⁹⁷ Anon, supra note 23, p. 181. Furthermore, the “utilization or protection of the resources” is not to be found in the MARPOL framework. On the other hand, the latter document allows for additional conditions to be required, such as a concrete management regime. Finally, it can be added that adequate reception facilities, which are a *conditio sine qua non* under the MARPOL framework, are treated somewhat less stringent in Art. 211 (6)(a). See DOALOS 1999 Document on Relationship between 1982 Convention and IMO, supra note 94, sub 26.

⁹⁸ As stated in International Maritime Organization, Implications of the Entry into Force of the United Nations Convention on the Law of the Sea for the International Maritime Organization, IMO Doc. Leg/MISC/2, as attached to IMO Doc. C/ES.19/19(b)/1, October 6, 1997, sub II (A)(4): “[W]hile [Art. 211 (6) special areas] are restricted in jurisdictional scope to the EEZ, MARPOL Special Area provisions cover enclosed or semi-enclosed areas which may include parts of the territorial sea, the EEZ and the high seas”. Hereinafter cited as Implications of the 1982 Convention for IMO.

⁹⁹ DOALOS 1999 Document on Relationship between 1982 Convention and IMO, supra note 94, sub 22.

¹⁰⁰ A concrete proposal trying to do away with this restriction was defeated during the negotiations at UNCLOS III. See Anon, supra note 23, p. 205.

It seems therefore preferable to understand the role of IMO in these two instances as follows. Under Art. 211 (6)(a) this organization makes a general list of possible measures to be applied, out of which it subsequently adopts those specific measures which will apply to a concrete proposal submitted to it by a particular coastal state. Under Art. 211 (6)(c), the coastal state can propose other measures not included in the above-mentioned general list, but with the exclusion of CEDM standards.

As far as enforcement is concerned, not much needs to be added at present. First of all, because through Art. 220 (8), the normal enforcement powers of a coastal state in its EEZ apply.¹⁰¹ The fact that the same thresholds consequently apply in these special areas as with respect to other parts of the EEZ, be it with some margin of flexibility,¹⁰² seems to entail that also the flag state will have to play a central role in the enforcement of this provision, based on its obligation to see to it that its vessels comply with this more restrictive regime. The latter results indeed from the general responsibility of flag states for ensuring compliance of vessels flying their flag with “applicable international rules and standards, established through the competent international organization for the prevention, reduction and control of pollution of the marine environment from vessels”.¹⁰³ Another reason for not attaching too much attention to this article at present is that it has found no application in state practice so far.¹⁰⁴ As of now, moreover, IMO has not yet developed the international rules and standards or navigational practices required for the application of Art. 211 (6).

What can be said with certainty, however, is that certain pieces of national legislation giving effect to this specific provision do not always contain all the elements of the carefully crafted compromise on which Art. 211 (6) was based.¹⁰⁵

¹⁰¹ As already emphasized supra note 90 and accompanying text.

¹⁰² Because of the special ecological conditions normally present, the pollution thresholds provided in Art. 220 (5 & 6) may be met more easily under such circumstances.

¹⁰³ 1982 Convention, Art. 217 (1).

¹⁰⁴ Given the strong resemblances with MARPOL special areas on the one hand (see Birnie, P. & Boyle, A., *International Law and the Environment*, Oxford, Clarendon Press, p. 279 (1992), who qualify Art. 211 (6) as “little more than a re-enactment of the special areas provisions of MARPOL”. But see supra note 97 and accompanying text) and Particularly Sensitive Sea Areas on the other, states for the moment rather tend to rely on these latter alternatives. Given a certain confusion which exists between these three concepts, the Marine Environment Protection Committee of IMO has recently taken the initiative to revise its Guidelines on the Identification of Particularly Sensitive Sea Areas and, while doing so, to re-assess the relationship of this concept with the 1982 Convention (IMO doc. MEPC 42/10).

¹⁰⁵ It might suffice in this respect to refer to the national legislation of the Russian Federation which contains virtually an exact copy of the wording of Art. 211 (6)(a), with the exclusion however of any reference to a system of international control. See Franckx, E., “The New USSR Legislation on Pollution Prevention in the Exclusive Economic Zone”, 1 *International Journal of Estuarine and Coastal Law* p. 155, 162 (1986).

2.6.2 Ice-covered areas under Art. 234 of the 1982 Convention

Art. 234 of the 1982 Convention was a hard-fought issue at UNCLOS III.¹⁰⁶ This article, however, does not excel in clarity, to say the least. Some have described it as “probably the most ambiguous, if not controversial, clause in the entire treaty”,¹⁰⁷ others have labelled it “a witch’s brew, a caldron of legal uncertainty which could be stirred in favour of either the coastal or shipping state”.¹⁰⁸

This, by itself, should be sufficient reason to justify falling back on the *travaux préparatoires* of this provision when trying to suggest concrete guidelines for coastal states concerning their jurisdiction relating to foreign vessels in these water areas situated along their coasts.¹⁰⁹ Even with the help of these supplementary means of interpretation, however, the exercise envisaged by the present part still remains a rather hazardous undertaking. It has indeed been stated that Art. 234 was negotiated between the directly concerned states, and included in the 1982 Convention without opposition from the other participants.¹¹⁰ As a consequence, it should always be kept in mind that this article represents a compromise between Canada and the former Soviet Union on the one hand, and the United States on the other. Considering the protagonists, the conclusion can also be drawn that its intended field of application, despite the rather broad title of this article and relevant section of the 1982 Convention, was strictly limited to the Arctic.¹¹¹

But even if one takes this history one step further back, it can hardly be denied that Canada has to be considered the conceptual father of this article. Indeed, this country tried to find international acceptance of its Arctic Waters Pollution Prevention Act (1970)¹¹² in different international fora, but especially during the UNCLOS III negotiations. It has been submitted by Canadian authors that Art. 234 conferred international recognition on this national legislation¹¹³ which, it should be remembered, received a “drawer full of protests” at the time of its promulgation.¹¹⁴ The negotiating process as well as the subse-

¹⁰⁶ Miles, E., *Global Ocean Politics: The Decision Process at the Third United Nations Conference on the Law of the Sea 1973-1982*, The Hague, Martinus Nijhoff, p. 92 (1998).

¹⁰⁷ Lamson, C., “Arctic Shipping, Marine Safety and Environmental Protection”, 11 *Marine Policy* p. 3, 4 (1987).

¹⁰⁸ Lamson, C., & VanderZwaag, D., “Arctic Waters: Needs and Options for Canadian-American Cooperation”, 18 *Ocean Development and International Law* p. 49, 81 (1987).

¹⁰⁹ Vienna Convention on the Law of Treaties, May 23, 1969, multilateral, Art. 32, 1155 *United Nations Treaty Series* 331. Hereinafter cited as 1969 Vienna Convention on the Law of Treaties.

¹¹⁰ Anon, “Article 234: Ice-Covered Areas”, in 4 *United Nations Convention on the Law of the Sea 1982: A Commentary* (Rosenne, S. & Yankov, A., eds.), supra note 23, p. 392, 393.

¹¹¹ Or as stated by Rothwell, D., *The Polar Regions and the Development of International Law*, Cambridge, Cambridge University Press, p. 294 (1996), this article “is considered by most commentators, and apparently was assumed by its negotiators, only to apply to the Arctic”.

¹¹² As reprinted in 9 *International Legal Materials* pp. 543-552 (1970).

¹¹³ Franckx, E., *Maritime Claims in the Arctic*, Dordrecht, Martinus Nijhoff, pp. 95-96 (1993). See especially note 315 on pp. 127-128 for an overview of the relevant literature.

¹¹⁴ Expression used by the Director of Legal Operations of the Canadian Department of External

quent drafts, introduced before IMO and UNCLOS III,¹¹⁵ clearly indicate that even though Canada took the initiative, the shipping nations very much influenced the further evolution of this idea. Taken together with the manner in which Art. 234 was finally adopted during UNCLOS III, it seems fair to assume that this article must always be understood as a compromise between the aspirations of the two most important Arctic coastal states and one or more third states. Reliance on the state practice of Canada and Russia in order to clarify the content of this article, therefore, should be done with the utmost care, since these countries will normally display a natural tendency to try to maximize their competence.¹¹⁶

The latter point becomes highly relevant when trying to clearly describe the competence *ratione loci* of Art. 234. First of all there is the issue of the inner limit. The Soviet five volume commentary of the 1982 Convention has no difficulty stating that the words “within the limits of the exclusive economic zone”¹¹⁷ do not mean from 12 to 200 n.m.,¹¹⁸ in the supposition that the coastal state has a 12 n.m. territorial sea, but rather from 0 to 200 n.m.¹¹⁹ This submission is explained by the fact that it would seem quite illogical that the convention would have attributed broader powers to the coastal state in its EEZ than in its territorial sea.¹²⁰ A similar reasoning is developed by other commentators.¹²¹ But also as far as the external limit is concerned, some uncertainty remains, especially with respect to the Soviet and Russian point of view. Even though the

Affairs, E. Wang, as mentioned by McDorman, T., “The New Definition of ‘Canadian Lands’ and the Determination of the Outer Limit of the Continental Shelf”, 14 *Journal of Maritime Law and Commerce* p. 195, 215 and note 64 (1983).

¹¹⁵ For a good overview, see McRae, D. & Goundrey, D., “Environmental Jurisdiction in Arctic Waters: The Extent of Article 234”, 16 *University of British Columbia Law Review* pp. 197, 210-215 (1982).

¹¹⁶ By way of example, it might suffice to refer to pollution prevention legislation enacted by the former Soviet Union, see Franckx, E., *supra* note 105, pp. 163-164.

¹¹⁷ 1982 Convention, Art. 234.

¹¹⁸ Such a limitation, excluding the territorial sea, seems to be implied in the reasoning of Brubaker, D. & Østreng, W., “The Northern Sea Route Regime: Exquisite Superpower Subterfuge?”, 30 *Ocean Development and International Law* pp. 299, 320-321 (1999). A shortened version of this article is also to be found in an article by these authors entitled: “The Military Impact on Regime Formation for the Northern Sea Route”, in *Order for the Oceans at the Turn of the Century* (Vidas, D. & Østreng, W., eds.), The Hague, Kluwer Law International, pp. 261-290 (1999).

¹¹⁹ Kiselev, V., “Zashchita i sokhranenie morskoi sredy ot zagriazneniia s sudov” [The Protection and Preservation of the Marine Environment from Pollution from Vessels], in 4 *Mirovoi okean i mezhdunarodnoe pravo: Zashchita i sokhranenie morskoi sredy* [The World Ocean and International Law: The Protection and Preservation of the Marine Environment] (Movchan, A. & Yankov, A., eds.), Moskva, Nauka, p. 116, 139 (1990).

¹²⁰ *Ibid.* In order to sustain this particular submission, reference is made to the Russian edition of Hakapää, K., *Marine Pollution in International Law*, Moscow, Progress, p. 334 (1986).

¹²¹ See for instance Churchill, R. & Lowe, V., *supra* note 61, p. 348. See also Molenaar, E., *supra* note 25, p. 419.

application of Art. 234 is explicitly tied to the EEZ notion,¹²² its concrete application to the Northern Sea Route does not seem to comply with this strict outer limit.¹²³

But this is only the tip of the iceberg as far as interpretational problems surrounding this article are concerned.¹²⁴ There is also the interpretation of the word “where”,¹²⁵ which opens different avenues with quite diverging results.¹²⁶ The *travaux préparatoires* do not solve this question.¹²⁷ Furthermore, there is the fundamental question of special importance for the present report whether the notion “due regard” of Art. 234¹²⁸ obliges coastal states to observe at least generally accepted international rules and standards concerning the design, construction, manning or equipment of vessels,¹²⁹ or not.¹³⁰ Finally, the exact rela-

¹²² See supra note 117 and accompanying text. As a consequence, the importance of Art. 234 should not be overstated since it does not confer upon coastal states the ability to implement extensive marine pollution provisions for the entire Arctic Ocean, not even to mention all polar waters. As for instance duly stressed by Rothwell, D., supra note 111, pp. 210 and 294-295 respectively.

¹²³ Franckx, E., “Nature Protection in the Arctic: Recent Soviet Legislation”, 41 *International and Comparative Law Quarterly* pp. 366, 380-382 (1992). Highly relevant in this respect is an article by Kolodkin, A. & Volosov, M., “The Legal Regime of the Soviet Arctic”, 14 *Marine Policy* p. 158, 164 (1990), where these authors explicitly confirm that the Northern Sea Route, field of application of the national regulation, may at times pass through portions of the high seas.

¹²⁴ For a good overview, see McRae, D., “The Negotiation of Article 234”, in *Politics of the Northwest Passage* (Griffiths, F., ed.), Kingston, McGill-Queen’s University Press, pp. 98-114 (1987). See also McRae, D. & Goundrey, D., supra note 115, pp. 209-222.

¹²⁵ McRae, D. & Goundrey, D., supra note 115, pp. 216-218.

¹²⁶ *Ibid.*, pp. 218-222.

¹²⁷ *Ibid.*, p. 218.

¹²⁸ As remarked by Kwiatkowska, B., *The 200 Mile Exclusive Economic Zone in the New Law of the Sea*, Dordrecht, Martinus Nijhoff, p. 176 (1989), this is “the only exception to the requirement of conformity of national rules concerning vessel-source pollution to generally accepted international rules and standards”. Even those elaborated by IMO under Art. 211 (6) are said to become inapplicable. As stressed by DOALOS 1999 Document on Relationship between 1982 Convention and IMO, supra note 94, sub 14, note 2.

¹²⁹ See for instance van der Essen, A., “The Arctic and Antarctic Regions”, in 1 *A Handbook on the New Law of the Sea* (Dupuy, R.-J. & Vignes, D., eds.), supra note 6, p. 525, 527, who gives this article a very restrictive interpretation. See also Brubaker, D. & Østreng, W., “The Northern Sea Route Regime: Exquisite Superpower Subterfuge?”, supra note 118, p. 320, who, when discussing the high seas channels in straits (assuming that Russian Arctic straits become international, that historic title fails and that the straits-regime of the 1982 Convention does not form part of customary international law, but Part XII does), which in the Russian context means portions of their EEZ, criticize the Russian laws and regulations for having been adopted unilaterally and dealing with design, construction, manning and equipment standards, whereas Part XII requires prescriptive and enforcement measures to be consistent with generally accepted and applicable international rules and standards. The context in which these authors make this argument, however, is clearly framed in an ice-infested, i.e. Art. 234, setting.

¹³⁰ For a Canadian and Russian point of view, see for instance VanderZwaag, D., *Canada and Marine Environment Protection: Charting a Legal Course Towards Sustainable Development*, London, Kluwer Law International, pp. 341-342 (1995) and Koroleva, N., Markov, V. & Ushakov, A., *Legal Regime of Navigation in the Russian Arctic*, Moscow, Soyuzmorniioproekt, p. 97 (1995),

relationship between this Section 8 of Part XII and Part III concerning straits, is far from clear and remains obscure even after consulting the drafting history. The fact is that by placing the article in a section of its own, and thus withdrawing it from the safeguard provision with respect to straits used for international navigation where it was initially incorporated,¹³¹ it could be inferred that the international straits regime became irrelevant for the application of this article. But the above-mentioned options of interpretation of Art. 234 may well question such conclusion depending on the interpretation relied upon.¹³² In the event that an actual dispute of this nature would occur in practice, it has been argued that the straits regime would prevail.¹³³ The United States indeed takes a strong position in this respect.¹³⁴ The rationale for this claim is to be found mainly in concerns to preserve the regime of submerged passage, with respect to both the Northeast¹³⁵ and the Northwest Passage.¹³⁶

where it is stated: "Such a regime, seemingly tough at first glance, should not be considered as [a] limitation of the freedom of navigation for it is aimed at the preservation and development of the Arctic unique ecological systems, protection of its environment from pollution and artificial destruction which is the duty of an Arctic-rim state and for which it is liable before the world community and the generations to come". For an account of the first foreign ship, the French ice-class vessel *Astrolabe*, making use of the possibility created by the former Soviet Union to allow for navigation, under certain conditions, along the shores of the Eurasian continent, see Franckx, E., "The Soviet Maritime Arctic, Summer 1991: A Western Account", 1 *Journal of Transnational Law and Policy* pp. 131-149 (1992). And even though compliance with the Russian regulation is said to be high, occasional exceptions do exist. See Brubaker, D. & Østreng, W., "The Northern Sea Route Regime: Exquisite Superpower Subterfuge?", supra note 118, p. 313. For a detailed account of such exception, see for instance Franckx, E., "De reis van het Greenpeace schip, de *MV Solo*, naar Novaia Zemlia en het internationaal recht: Enkele bemerkningen" [The Voyage of the Greenpeace Ship *MV Solo* to Novaia Zemlia and International Law: A Commentary], in *Liber Amicorum Paul De Voede*, Diegem, Kluwer Rechtswetenschappen België, pp. 803-836 (1994) and by the same author "L'écologie et le droit de la mer dans l'Arctique Russe: La Nouvelle Zemble", 7 *Espaces et Ressources Maritimes* pp. 185-216 (1994).

¹³¹ Presently 1982 Convention, Art. 233.

¹³² McRae, D. & Goundrey, D., supra note 115, p. 222.

¹³³ See for instance Dunlap, W., "Transit Passage in the Russian Arctic Straits", 1 *Maritime Briefing* (No. 7) p. 19 (1996).

¹³⁴ *Message from the President of the United States Transmitting United Nations Convention on the Law of the Sea, with Annexes, Done at Montego Bay, December 10, 1982 (the "Convention"), and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, with Annex, Adopted at New York, July 28, 1994 (the "Agreement"), and Signed by the United States, Subject to Ratification, on July 29, 1994*, Senate, 103d Congress, 2d Session, Treaty Doc. 103-39, Washington, US Government Printing Office, p. 40 (1994). This document concludes the comment on Art. 234 by stressing the fundamental U.S. security interests in the exercise of navigational rights and freedom throughout the Arctic. See also Brubaker, D. & Østreng, W., "The Northern Sea Route Regime: Exquisite Superpower Subterfuge?", supra note 118, pp. 313-314 and 319. These authors also conclude that "it is doubtful that Art. 234 of the Convention is completely dominant due to the global practice of Russia and the United States with regard to international straits" (*ibid.*, p. 319).

¹³⁵ About nine collisions of Russian and United States submarines are said to have taken place near Russian shores between 1968 and 1992 (*ibid.*, p. 314 note 70 and p. 321), a practice which despite

The work within IMO on a Polar Code,¹³⁷ of which the object is exactly “to provide that all ship operations in Polar Waters meet internationally acceptable standards”¹³⁸ seems highly relevant in this respect. The Sub-Committee on Stability and Load Lines and on Fishing Vessels Safety decided early 1999 not to proceed with making that document mandatory, at least not at the present stage.¹³⁹ Recently the Maritime Safety Committee agreed to a new title of this item, namely “Development of guidelines for ships operating in ice-covered waters”,¹⁴⁰ while the Marine Environment Protection Committee concurred with the decision of the Maritime Safety Committee to exclude Antarctic waters from the application of the guidelines in view of the fact that the Consultative Parties under the Environmental Protocol of 1991 to the Antarctica Treaty of 1959 decided, in 1998, to give priority to the development of their own guidelines for Antarctic shipping instead.¹⁴¹

If taken together with the issue of the inner limit of the field of application of Art. 234, as mentioned above,¹⁴² the uncertainty relating to the term “due regard”,¹⁴³ and in the light of the just mentioned recent initiatives within the framework of IMO to develop guidelines for ships operating in ice-covered waters,¹⁴⁴ the submission seems reasonable that the coastal state was not given *carte blanche* in this respect. Unlike subject areas of the 1982 Convention where discretionary powers of the coastal state have been excluded from the system of compulsory dispute settlement, Art. 234 is subjected to it by means of Art. 297 (1)(a). This has been considered to constitute the security clause in order to be able to obtain the general objective of Art. 234, which is to balance the interests of the coastal state in such areas with the general interests of inter-

the end of the Cold War, is apparently still continuing above the Eurasian continent. For a detailed account of one of them, see for instance Franckx, E., “La collision entre deux sous-marins, un américain et un russe, dans la baie de Kola (Mer de Barents)”, 6 *Espaces et Ressources Maritimes* pp. 33-50 (1992).

¹³⁶ Griffiths, F., “The Northwest Passage in Transit”, in *Order for the Oceans at the Turn of the Century* (Vidas, D. & Østreng, W., eds.), supra note 118, pp. 249, 251-253, citing a May 1998 government statement indicating that Canada does not have at present, nor in near future, an Arctic undersea surveillance capability.

¹³⁷ For an overview of the early work accomplished by IMO in this respect, see VanderZwaag, D., “Regionalism and Arctic Marine Environmental Protection: Drifting between Blurry Boundaries and Hazy Horizons”, in *Order for the Oceans at the Turn of the Century* (Vidas, D. & Østreng, W., eds.), supra note 118, pp. 231, 240-241.

¹³⁸ International Code of Safety for Ships in Polar Waters (Polar Code), IMO doc. DE 41/10, Annex 1, p. 3.

¹³⁹ Report to the Maritime Safety Committee, IMO doc. SLF 42/18, p. 33.

¹⁴⁰ Report of the Maritime Safety Committee on its Seventy-First Session, June 2, 1999, IMO doc. MSC 71/23, sub 20.43.

¹⁴¹ Report of the Marine Environment Protection Committee on its Forty-Third Session, July 6, 1999, IMO doc. MEPC 43/21, sub 8.59-8.64.

¹⁴² See supra notes 117-121 and accompanying text.

¹⁴³ See supra notes 129-130 and accompanying text.

¹⁴⁴ See supra notes 138-140 and accompanying text.

national navigation.¹⁴⁵ Important to note in this respect is therefore the paper submitted by the United States in early 1999 to the Maritime Safety Committee of IMO in which this country urged, besides making the document only applicable to the Arctic, also to delete all provisions inconsistent with international law,¹⁴⁶ to make the document non-mandatory¹⁴⁷ and finally to restrict itself strictly to technical concerns with regard to ships designed, built, and operated within ice-covered environments.¹⁴⁸ All of these concerns are at present accepted within the framework of IMO as a basis for further work on this issue.¹⁴⁹ Such technical considerations could well emerge in a not too distant future as the international standard¹⁵⁰ beyond which coastal states could not go in their implementation of Art. 234. This would secure the above-mentioned general objective of this article¹⁵¹ while at the same time giving concrete content to the “due regard” notion to be found therein.¹⁵²

III CONCLUSIONS

3.1 THE PURPOSE AND MEANING OF THE CONCEPT OF “GENERALLY ACCEPTED INTERNATIONAL RULES AND STANDARDS”¹⁵³

Conclusion No. 1: The Purpose of the Concept of Generally Accepted International Rules and Standards

The rule of reference “generally accepted international rules and standards” is to be found in four specific instances of the 1982 Convention relating to pollution from ships, i.e. Arts. 211 (2), 211 (5), 211 (6), 226 (1)(a). Art. 21 (2) could be added to this list.

This rule of reference primarily concerns prescriptive jurisdiction either of flag states, in which case it constitutes a mandatory minimum, or of coastal states, where it rather represents a facultative maximum.

The purpose of this concept within the framework of the 1982 Convention is to give expression to the “umbrella” function of

¹⁴⁵ Anon, *supra* note 110, p. 393.

¹⁴⁶ The United States labelled the prior notification requirement when entering the coastal state’s EEZ as contrary to contemporary international law. *Ibid.* sub 8.

¹⁴⁷ The United States felt it premature to develop a code at this time. Rather, a necessary first step would be to develop guidelines, the exact status of which would then be reconsidered at a later date. *Ibid.*, sub 11.

¹⁴⁸ *Ibid.*

¹⁴⁹ See for instance the document emanating from the Sub-committee on Safety of Navigation at its 45th session, International Maritime Organization, Report to the Maritime Safety Committee, IMO doc. NAV 45/14, October 25, 1999. See more specifically sub 13.7.

¹⁵⁰ See VanderZwaag, D., *supra* note 137, p. 246, stating that this code could eventually become binding.

¹⁵¹ See *supra* note 145 and accompanying text.

¹⁵² See *supra* note 128 and accompanying text.

¹⁵³ In this part of the Final Report cited as GAIRS.

Part XII, which aims at securing the primacy of international rules and standards over national laws and regulations. Instead of providing technical rules and regulations directly applicable to the parties, Part XII provides only general rules primarily apportioning competence while leaving technical rules and regulations to the relevant conventions, already existing or still to be created. This is mainly achieved through the above-mentioned rule of reference, i.e. an instrument to refer to these technical rules while at the same time securing the primacy of these international rules and standards over national laws and regulations.

Explanatory Note

The notion of GAIRS in the 1982 Convention has to be understood against the general background of Part XII of the Convention. A major feature of this part of the Convention on the protection and preservation of the marine environment was the attempt to harmonize often opposing interests such as the need to protect the marine environment on the one hand and the preservation of the rights and freedoms of navigation, or of any other national activities affecting the seas, on the other.¹⁵⁴ A balance would have to be struck somewhere between two extremes, which themselves did not appear to represent acceptable solutions, namely the exclusive jurisdiction of the flag state on the one hand, and a blanket authority in the hands of the coastal state on the other.¹⁵⁵ This goal was attained by the adoption at UNCLOS III of a so-called comprehensive approach, which started from the premise that the global ecological and navigational systems constituted elements of one single whole and resulted in a primacy of international rules and standards over national laws and regulations.¹⁵⁶ Instead of providing technical rules and regulations directly applicable to the parties, an option which was discarded right from the start,¹⁵⁷ Part XII of the 1982 Convention rather operates as an “umbrella”¹⁵⁸ providing general rules primarily apportioning competence and leaving technicalities to the relevant conventions, already existing or still to be created.¹⁵⁹ This “umbrella” structure

¹⁵⁴ Yankov, A., “The Law of the Sea Conference at Crossroads”, 18 *Virginia Journal of International Law* p. 31, 36 (1977). A. Yankov was the Chairman of the Third Committee at UNCLOS III, i.e. the Committee which was competent *inter alia* for issues relating to the protection and preservation of the marine environment.

¹⁵⁵ Hargrove, J., “Environment and the Third Conference on the Law of the Sea”, in *Who Protects the Oceans?* (Hargrove, J., ed.), St. Paul, West Publishing Co., pp. 191, 206-207 (1975).

¹⁵⁶ See Anon, *supra* note 23, p. 3, 13, where various examples are provided.

¹⁵⁷ See for instance Douay, C., “Le droit de la mer et la préservation du milieu marin”, in *Le nouveau droit de la mer*, Paris, Pedone, p. 231, 248 (1983).

¹⁵⁸ See United Nations, *Report of the Secretary-General: Protection and Preservation of the Marine Environment* (U.N. Doc. A/44/461), September 18, 1989, p. 5.

¹⁵⁹ Looked upon from the perspective of IMO, i.e. the competent international organization to establish these technical rules and standards, see Implications of the 1982 Convention for IMO, *supra* note 98, sub Part I.

was adopted precisely to give coherence to this particular field of law by fixing in this manner the general rules to be applied.¹⁶⁰ It is in this perspective that the notion of GAIRS has to receive its full *raison d'être*, namely as an instrument to refer to these technical rules while at the same time securing the pre-eminence of these international rules and standards over national laws and regulations.

Conclusion No. 2: The Meaning of the Concept of Generally Accepted International Rules and Standards

Based on the drafting history of the notion of generally accepted international rules and standards, as it first appeared in the 1958 Geneva Convention on the High Seas, the application of this concept to the environmental sphere in the 1982 Convention is believed to retain the same ultimate objective, namely to make compulsory for all states certain rules which had not taken the form of an international convention in force for the states concerned, but which were nevertheless respected by most states.

Generally accepted international rules and standards cannot be equated with customary law nor with legal instruments in force for the states concerned.

Generally accepted international rules and standards, instead, are primarily based on state practice, attaching only secondary importance to the nature and status of the instrument containing the respective rule or standard.

Explanatory Note

The Explanatory Note to Conclusion No. 1 indicates that the purpose of these so-called rules of reference may well be clear when analysed in their proper context. The same, however, cannot be said *primo* about the manner in which this reference has been made to these GAIRS and *secundo* about the actual effect of such reference, namely the question which rules and standards are being referred to.¹⁶¹ These two aspects, clarifying the exact meaning of GAIRS will be addressed next.

As far as the lack of consistency is concerned in the terminology used, it might suffice to quote B. Vukas, who wrote in this respect:

“A multitude of terms was used in order to denote international rules relative to the prevention, reduction, and control of the marine environment to which they refer. The terms ‘rules’, ‘standards’, ‘regulations’, ‘procedures’, and ‘practices’ were used in different combinations and they

¹⁶⁰ Dupuy, J.-M., “The Preservation of the Marine Environment”, in 2 *A Handbook on the New Law of the Sea* (Dupuy, R.-J. & Vignes, D., eds.), supra note 6, p. 1151, 1193.

¹⁶¹ As stated by Boyle, A., supra note 86, p. 350.

were characterized as ‘generally accepted’, ‘international’, ‘applicable’, ‘internationally agreed’, ‘global’, ‘regional’, ‘relevant’, and ‘specified’. These adjectives were also combined in different ways; most often were used the combinations ‘generally accepted international’ and ‘applicable international’.¹⁶²

A closer analysis of Arts. 211 (2), 211 (5), 211 (6), 226 (1)(a) and 21 (2)¹⁶³ led to the conclusion that, from a purely formal point of view, it must be admitted that not much uniformity can be found in the 1982 Convention with respect to the terminology used to refer to other international rules. Not that the Drafting Committee at UNCLOS III was unaware of the problem, for it expressly addressed the issue in 1978,¹⁶⁴ i.e. very soon after it commenced its work.¹⁶⁵ This Committee, however, was precluded from dealing with substantive matters and since delegates of the main committees, who did have the authority to negotiate substance, rather remained silent about such anomalies in order not to further burden the difficult road towards consensus, the question seems to be justified whether differences in semantics always intend to convey differences in meaning.¹⁶⁶ Based on the drafting history of these expressions, B. Vukas comes to the conclusion that:

“it would be a vain attempt to try to comment on all these expressions we find in the UNCLOS provisions on the protection and preservation of the marine environment.”¹⁶⁷

As far as the actual legal implications of GAIRS are concerned, once again the conclusion has to be reached that different options present themselves. The latter is very well reflected in the writings of scholars on this subject. In an attempt to bring some order to these diverging opinions,¹⁶⁸ the following broad categorization might be suggested.¹⁶⁹ A restrictive point of view can be found

¹⁶² Vukas, B., “Generally Accepted International Rules and Standards”, 23 *Law of the Sea Institute Proceedings* p. 405, 407 (1990).

¹⁶³ First Report, *supra* note 27, pp. 13-18.

¹⁶⁴ Drafting Committee, Informal Paper 2 (August 8, 1978), A Preliminary List of Recurring Words and Expressions in the Informal Composite Negotiating Text Which May Be Harmonized.

¹⁶⁵ On this latter point, see Nelson, L., “The Drafting Committee of the Third United Nations Conference on the Law of the Sea: The Implication of Multilingual Texts”, 57 *British Yearbook of International Law* p. 169, 171 (1986).

¹⁶⁶ As stressed by Oxman, B., “The Duty to Respect Generally Accepted International Standards”, 24 *New York University Journal of International Law and Politics* pp. 109, 132 note 74 (1991), who writes: “It cannot be assumed that the use of different words, in such a huge Convention drafted and negotiated by so many different people in disparate groups over many years, necessarily represents an intentional decision to convey a different meaning.”

¹⁶⁷ See Vukas, B., *supra* note 162, p. 410.

¹⁶⁸ This is not intended to be an exhaustive overview. For possible further references see for instance Oxman, B., *supra* note 166, pp. 145-146 note 109 and Treves, T., *supra* note 73, p. 874 note 131.

¹⁶⁹ This is a most difficult undertaking for the simple reason that the issue has many different aspects which authors address differently.

by authors like G. Kasoulides,¹⁷⁰ T. Treves¹⁷¹ and W. van Reenen.¹⁷² A common feature to be found in the writings of these authors appears to be their reliance on the classical notion of customary international law in order to give content to the concept under discussion.¹⁷³ A similar restrictive interpretation is achieved by linking this concept to international instruments to which a state is a contracting party. As mentioned by G. Kasoulides, this was exactly the result of the discussions which took place at the occasion of the United Nations Conference on Conditions for Registration of Ships held during the middle of the 1980s.¹⁷⁴ A middle of the road position is taken by a series of authors who link the exact content to be given to this notion to IMO conventions in force, whether or not the state to which the rule or standard is applied is itself a party to that particular IMO convention.¹⁷⁵ Mention can be made in this respect to R. Churchill and V. Lowe,¹⁷⁶ O. Rojahn,¹⁷⁷ G. Timagenis¹⁷⁸ and M. Valenzuela.¹⁷⁹ A third category of authors finally takes a much more progressive point of view. They foremost stress the fact that, by accepting the 1982 Convention, states have agreed beforehand to apply a less strict standard of acceptance than the ones suggested so far. Writers belonging to this group are B. Oxman,¹⁸⁰ L. Sohn,¹⁸¹ D. Vignes,¹⁸² and R. Wolfrum.¹⁸³

¹⁷⁰ Kasoulides, G., *Port State Control and Jurisdiction: Evolution of the Port State Regime*, Dordrecht, Martinus Nijhoff, pp. 38-41 (1993).

¹⁷¹ Treves, T., *supra* note 73, pp. 874-875.

¹⁷² van Reenen, W., "Rules of Reference in the New Convention on the Law of the Sea, in Particular in Connection with the Pollution of the Sea by Oil from Tankers", 12 *Netherlands Yearbook of International Law* pp. 3, 11-12 (1981).

¹⁷³ Despite this common feature, fundamental differences may remain. Some of them, for instance, deny resolutions of the IMO any importance in this framework, while others include such features.

¹⁷⁴ Kasoulides, G., *supra* note 170, pp. 43-46.

¹⁷⁵ Again different gradations can be found ranging from wider ratification than merely necessary for the entry into force, to merely being in force.

¹⁷⁶ Churchill, R. & Lowe, V., *supra* note 61, p. 346.

¹⁷⁷ Rojahn, O., "National Jurisdiction and Marine Pollution from Ships: The Future Role of IMCO Standards", *Law of the Sea Institute Proceedings* pp. 464, 474-478 (1980).

¹⁷⁸ Timagenis, G., 1 *International Control of Marine Pollution*, New York, Oceana, p. 605 (1980).

¹⁷⁹ Valenzuela, M., "IMO: Public International Law and Regulation", *Law of the Sea Institute Proceedings* pp. 141-151 (1981).

¹⁸⁰ Oxman, B., *supra* note 166, pp. 109-159.

¹⁸¹ Sohn, L., "'Generally Accepted' International Rules", 61 *Washington Law Review* pp. 1073, 1074-1075 and note 16 (1986). Or as stated by the same author in a more recent publication, "Managing the Law of the Sea: Ambassador Pardo's Forgotten Second Idea", 36 *Columbia Journal of Transnational Law* p. 285, 295 (1997): "Thus, whenever a ship commits a violation of these 'generally accepted' rules and standards, it can be punished for it anywhere, even if the flag State has not expressly accepted these rules and standards. It is sufficient for a competent court to ascertain that a sufficient number of States had accepted them by reaching consensus at a general international conference or at a meeting of a competent international organization or by ratifying a relevant document".

¹⁸² Vignes, D., "La valeur juridique de certaines règles, normes ou pratiques mentionnées au TNCO comme 'généralement acceptées'", 25 *Annuaire Français de Droit International* p. 712, 716

The Committee, in order to arrive at Conclusion No. 2, started by ruling out those interpretations which lead to results which the particular formulation of the rule of reference, i.e. GAIRS, in the 1982 Convention most certainly did not intend to have. First of all, GAIRS can hardly be equated with customary law. If they did, there would be no use for having this rule of reference in the 1982 Convention since states would be bound by customary international law anyway. It would have sufficed in that case to use the well-known drafting technique of a cross-reference to international law.¹⁸⁴ Moreover, the question can be raised whether it is even possible to develop the highly detailed and technical rules envisaged by this rule of reference by means of customary law. The major result of this observation distinguishing GAIRS from customary law is that the high threshold required for an international custom to become established is not required.¹⁸⁵ It also appears to include that the role of the persistent objector does not need *a priori* to be applicable.¹⁸⁶

Secondly, GAIRS cannot be construed to mean only legal instruments in force for the states concerned. A similar reasoning as with respect to customary law applies, for it would indeed be redundant to prescribe states to apply certain legal instruments to which they are already bound outside the framework of the 1982 Convention.¹⁸⁷

After having discarded some elements, the more difficult tasks of formulating a positive definition remains. A central element in this endeavour appears to be Art. 31 (1) of the 1969 Vienna Convention on the Law of Treaties.¹⁸⁸ Since

(1979). After having made a comparison with norms of *ius cogens*, D. Vignes puts the essence of the matter in the form of a rhetorical question: “Ne peut-on dès lors considérer qu’en proclamant ainsi la force juridique non pas de normes impératives et supérieures — comme dans le cas du jus cogens — mais de règles infiniment plus techniques et spécifiques, de navigation ou de pollution, on a reconnu également force à une règle de droit en dehors de tout consentement exprès de l’Etat intéressé, en raison d’un consentement à la fois diffus et général de la Société internationale et de ce que par le T.N.C.O., cet Etat avait accepté de se déclarer ainsi lié?”. *Ibid.*, p. 718.

¹⁸³ Wolftrum, R., “IMO Interface with the Law of the Sea Convention”, in *Current Maritime Issues and the International Maritime Organization* (Nordquist, M. & Moore, J., eds.), supra note 10, pp. 223, 231-232.

¹⁸⁴ Oxman, B., supra note 166, pp. 146-147.

¹⁸⁵ See Treves, T., supra note 73, p. 875, who indicates that GAIRS may be less generally accepted than customary rules. Even though this author thus relied on the notion of customary international law to give content to GAIRS (see supra note 171 and accompanying text), it should be stressed that he did not totally assimilate GAIRS to customary international law either. For a similar point of view, see Hakapää, K., supra note 63, p. 121, and by the same author “Vessel-source Pollution in the UN Law of the Sea Convention: Some Assessment as of Today”, in *Liber Amicorum Bengt Broms* (Tupamäki, M., ed.) (Publications of the Finnish Branch of the International Law Association No. 9), Helsinki, PMS Print Oy, p. 97, 104 (1999).

¹⁸⁶ Oxman, B., supra note 166, pp. 147-148.

¹⁸⁷ Treves, T., supra note 73, p. 875.

¹⁸⁸ Supra note 109. This article reads: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

the ordinary meaning of the terms is not that clear, their context and their object and purpose should receive special attention. Here it should be recalled that the basic purpose of this rule of reference was the concern of the international community to secure the primacy of these international rules and standards over national laws and regulations.¹⁸⁹ Intrinsic in the notion is also the element that in order to obtain this primacy, certain rules and standards which would not otherwise be legally binding would become so by means of this rule of reference. The drafting history of this provision¹⁹⁰ indeed goes back to the 1958 Geneva Convention on the High Seas¹⁹¹ and the preparatory work of the International Law Commission. A careful study of this drafting history,¹⁹² indicates that its purpose at that time was to make compulsory for all states the so-called maritime rules of the road, which had not taken the form of international conventions, but which were respected by most seafaring states. The very idea was to oblige states to conform to these generally accepted rules which were not necessarily accepted by all states. The 1982 Convention subsequently expanded its field of application to the environmental sphere.

The starting point therefore seems to be that the rule of reference discussed imposes a legal obligation on a state to apply a particular rule or standard, which the latter would otherwise not be legally bound to observe. The rule of reference, therefore, must be clearly intended to establish such a global standard. Even though the exact expressions used in connection with the rules of reference discussed in this report vary largely,¹⁹³ all of them appear to be sufficiently precise in order to imply this goal of uniform practice.¹⁹⁴

The crucial question then is, what does one have to understand by “generally accepted”? Taken into account the particular history of this concept, namely that the maritime rules of the road, which as already stressed were not legally binding instruments at that time, became so by means of incorporation of the rule of reference in the 1958 Convention, it is submitted that the primary aim of this rule of reference must today still reflect this *raison d'être* of the concept. As such, it appears not only less important whether the legal instrument referred to containing the specific rules and standards is by itself legally binding, but the conclusion must be reached that in this respect the latter instrument is only of secondary importance. The central element, on the contrary, to determine the generally accepted character of a specific rule or standard appears to be the practice of states, no matter in what form the rule or standard might have been

¹⁸⁹ See supra note 156 and accompanying text.

¹⁹⁰ And here the 1969 Vienna Convention on the Law of Treaties (supra note 109) is taken one step further, namely the consultation of the *travaux préparatoires* in order to better understand the rule of reference. See Art. 32.

¹⁹¹ 450 *United Nations Treaty Series* 82, Art. 10.

¹⁹² Oxman, B., supra note 166, pp. 123-129.

¹⁹³ First Report, supra note 27, p. 166.

¹⁹⁴ As such they differ clearly from the myriad clauses suggested by Oxman that cannot be regarded as such. See Oxman, B., supra note 166, pp. 148-149.

expressed. This may well be by means of a non-binding document, an agreement which at the time of adoption was rejected by a certain number of states but later on nevertheless became acceptable to all as reflected in state practice, a resolution of an international organization, e.a.

The suggested interpretation is thus characterized by the fact that it helps to solve the dilemma for which it was initially invented, namely to require a legally binding pattern of behaviour which the participants would not otherwise have to follow. It would also restrict the “different drummer” approach,¹⁹⁵ which was again one of the key elements which surrounded its expansion to the environmental sphere in the 1982 Convention. This interpretation as a consequence also firmly endorses the point that, once established, such a norm becomes automatically applicable to vessels flying the flag of a state which itself is not bound by the instrument in which the concrete rule or standard was incorporated.¹⁹⁶ It has moreover the advantage of being extremely flexible. If sufficient state practice supports a rule, the time-consuming nature of traditional international lawmaking can be side-stepped.¹⁹⁷

The final problem to be addressed relates to the degree of acceptance necessary in order to attain the threshold of generally accepted. No clear-cut criteria appear to be present. The drafting history of this provision indicates that it was intentionally kept vague in order not to upset the delicate balance which the notion incorporates.¹⁹⁸ Nevertheless, quantitative as well as functional majorities appear to be important.¹⁹⁹ The level of flexibility which this interpretation entails²⁰⁰ should not be considered an impediment, for also those interpretations favouring the acceptance of the legal instrument incorporating the rule or standard end up with a similar margin of flexibility in the end.²⁰¹

As indicated above, the determining factor is the subsequent general accep-

¹⁹⁵ Stein, T., “The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law”, 26 *Harvard International Law Journal* pp. 457 ff. (1985).

¹⁹⁶ This appears to be a submission also accepted by those supporting the view that general acceptance refers to the legal instrument containing the rule or standard. See for example, Treves, T., “Action commune pour la protection de l’environnement marin: Rapport général”, 3 *Revue de l’Indemer* p. 71, 79 (1995). It can also *a contrario* be argued that the discussion of this issue at the occasion of the United Nations Conference on the Conditions for Registration of Ships, and the ensuing textual changes (see *supra* note 174 and accompanying text), further sustain this point.

¹⁹⁷ This would alleviate the fears expressed by A. Boyle that only obsolescent conventions would resort under this rule of reference. See Boyle, A., *supra* note 86, pp. 356 and 360-361. Nothing would prevent more recent conventions, even though only having a limited membership, to fall under the scope of the rule of reference, under the condition that state practice is sufficiently general.

¹⁹⁸ Oxman, B., *supra* note 166, pp. 155-156. See also *supra* note 155 and accompanying text. Especially the drafting history of Art. 211 illustrates this basic duality and the difficulty to arrive at a compromise acceptable to both sides. See First Report, *supra* note 27, pp. 160-163.

¹⁹⁹ Oxman, B., *supra* note 166, p. 157.

²⁰⁰ A different view, urging for more precision through the establishment of minimum requirements, existed within the Committee.

²⁰¹ See for instance Treves, T., *supra* note 73, p. 875.

tance of a rule or standard, not the general acceptance of the legal instrument in which this rule or standard is incorporated. Of course, it is easily understood that a widely accepted international instrument containing the specific rule or standard will enhance the chances of later general acceptance, especially if such treaties require the member states to take specific action on the national level. In respect to the provisions analysed by this report, the MARPOL 73/78 Convention is usually believed to fit this category.²⁰² Or as stated by the last report of the Secretary-General of the United Nations on the law of the sea:

“The extent to which parties to UNCLOS are required to implement and enforce these provisions, even if they are not parties to MARPOL, depends upon the degree of international acceptance of those provisions”.²⁰³

As far as Art. 21 (2) is concerned, this finding may be further strengthened, according to one author,²⁰⁴ by the fact that the first proposal incorporating the substance of this provision explicitly made reference to this convention.²⁰⁵ Also the SOLAS Convention and a few others can be mentioned in this respect.²⁰⁶

3.2 THE PURPOSE AND MEANING OF THE CONCEPT OF “APPLICABLE INTERNATIONAL RULES AND STANDARDS”²⁰⁷

Conclusion No. 3: The Purpose of the Concept of Applicable International Rules and Standards

If the primacy of international rules and standards over national laws and regulations in the area of protection and preservation of the marine environment, as far as prescriptive jurisdiction is concerned, is secured in the 1982 Convention by means of the rule of reference “generally accepted international rules and standards” (Conclusion

²⁰² Treves, T., supra note 196, p. 79. Or as stated by Valenzuela, M., “Enforcing Rules against Vessel-Source Degradation of the Marine Environment: Coastal, Flag and Port State Jurisdiction”, in *Order for the Oceans at the Turn of the Century* (Vidas, D. & Østreng, W., eds.), supra note 118, pp. 485, 488-489: “MARPOL, which has now been accepted by 102 states parties (accounting for 93 percent of the gross registered tonnage of the world’s merchant fleet), undoubtedly constitutes the ‘generally accepted rules and standards’ established by Article 211 of the LOS Convention ...”. This includes Annexes I and II. See also Second Report, supra note 60, pp. 378-380.

²⁰³ United Nations, *Report of the Secretary-General: Oceans and the Law of the Sea* (U.N. Doc. A/54/429), September 30, 1999, p. 65. Hereinafter cited as 1999 Secretary-General Report on the Law of the Sea. Reaching a similar conclusion with respect to IMO in general, see Oxman, B., “Environmental Protection in Archipelagic Waters and International Straits – The Role of the International Maritime Organisation”, *10 International Journal of Marine and Coastal Law* pp. 467, 474 and 481 (1995).

²⁰⁴ Treves, T., supra note 73, p. 922.

²⁰⁵ As confirmed by the analysis of the drafting history of this article. See First Report, supra note 27, p. 164 note 109.

²⁰⁶ Second Report, supra note 60, pp. 378-380.

²⁰⁷ Hereinafter cited as AIRS.

No. 1), exactly the same goal is attained with respect to enforcement jurisdiction through the rule of reference “applicable international rules and standards”.

Explanatory Note

As was the case with GAIRS, the ultimate purpose of this rule of reference is also to secure the primacy of international rules and standards over national laws and regulations.²⁰⁸

Conclusion No. 4: The Meaning of the Concept of Applicable International Rules and Standards

With respect to the enforcement in cases of vessel-source pollution by flag states, port states as well as coastal states, the violations giving rise to such enforcement must be contrary to applicable international rules and standards, i.e. international rules and standards which, at the time of the violation, are operational in the direct relationship between the flag state on the one hand, and the coastal or port state on the other.

For parties to the 1982 Convention, as a consequence, generally accepted international rules and standards are included in applicable international rules and standards.

Explanatory Note

In the rules of reference for vessel-source pollution, the term “applicable” is used to qualify the phrase “international rules and standards”, most commonly in enforcement provisions.²⁰⁹ Contrary to the concept of “generally accepted”, “applicable” appears in relation to all actors: Flag, port, and coastal states.²¹⁰ Additional qualifications commonly used in combination with “generally accepted”, such as the phrase “shall at least have the same effect as”, are not used together with the term “applicable”.

Neither the origin nor the intention of the term “applicable” in the 1982 Convention can be determined from the documents that originated during UNCLOS III.²¹¹ The uncertainty around its meaning and purpose is aptly illustrated by the fact that in August 1980 the English language group of the Drafting Committee proposed to substitute the words “generally accepted” for the word “applicable” in several provisions.²¹² The controversy surrounding the use of

²⁰⁸ See supra notes 156 and 189 and accompanying text.

²⁰⁹ An exception to this is Art. 42(1)(b), also discussed below.

²¹⁰ Arts. 94 (3)(b) and 217 for flag states; Arts. 218, 219, 226 (b & c), and 228 for port states; and Arts. 219, 220, 226 (b & c), and 228 for coastal states.

²¹¹ Anon, “Article 213: Enforcement with respect to Pollution from Land-Based Sources”, in 4 *United Nations Convention on the Law of the Sea 1982: A Commentary* (Rosenne, S. & Yankov, A., eds.), supra note 23, p. 214, 220.

²¹² Namely in Arts. 42 (1)(b), 94 (4)(c), 218 (1) and 219. See Drafting Committee, Informal Paper 4/Rev. 2, p. 17.

the term “applicable” in Article 42(1)(b),²¹³ which concerns strait state prescriptive jurisdiction, suggests that flag states should not have to submit to the enforcement of rules and standards that they have not somehow accepted. However, as that discussion relates to prescriptive rather than enforcement provisions, it would not be correct to transpose conclusions arrived at there to a more general enforcement perspective.²¹⁴

In light of these observations it is submitted that “applicable” as used in the 1982 Convention is a relative term: It concerns the relation between states involved in specific enforcement cases. International rules and standards have to be “applicable” in the mutual relationship between these states as a condition for enforcement.²¹⁵ Which rules and standards are “applicable” depends on the various rights and obligations accepted by the states involved in enforcement cases. The purpose of “applicable” seems simply to limit the exercise of enforcement jurisdiction to a certain body of rules and standards. In the absence of additional qualifications linked to the term “applicable”, as with “generally accepted”, it is submitted that it is not intended to denote a certain level, but rather a specific set of rules.

In order to assess for each case the “applicable” rules and standards, it is necessary to determine whether the states involved in the enforcement situation have accepted certain rights or obligations with respect to certain rules and standards. This is assessed for states individually before the consequences for the relationship between states are analysed.

Acceptance of rights and obligations with respect to rules and standards can occur through various processes. Uncontroversial is acceptance through formal

²¹³ Spain proposed to insert “generally accepted” instead of “applicable” in Art. 42 (1)(b), but without avail (UN Doc. A/CONF.62/L.136, April 28, 1982, 16 *Official Records*, p. 243). In its declaration upon signature of the 1982 Convention, Spain continued to insist that “applicable” should have been replaced by “generally accepted”. In its declaration upon ratification of the 1982 Convention, Spain submitted that strait states can “enact and enforce in straits used for international navigation its own regulations, provided that such regulations do not interfere with the right of transit passage”.

²¹⁴ The term “applicable” in Arts. 5 (2)(3)(a & b) and 9 (6)(a & b) of the United Nations Convention on Conditions for Registration of Ships should be interpreted as applying only to conventions to which a contracting state is a party (see *supra* note 174 and accompanying text). But in light of the use of the concept of “generally accepted” in the 1982 Convention, this interpretation cannot be directly transposed to the 1982 Convention.

²¹⁵ van Reenen, W., *supra* note 172, p. 12. Anon, “Article 218: Enforcement by Port States”, in 4 *United Nations Convention on the Law of the Sea 1982: A Commentary* (Rosenne, S. & Yankov, A., eds.), *supra* note 23, p. 258, 271, where this view seems to be supported when it is submitted that “[e]arly proposals to limit Article 218 to port States parties to the Convention were not adopted, on the general opinion that this could be clarified in applicable international rules and standards”. Whether or not rules and standards are “applicable” thus has to be determined on a case-by-case basis. See also Anon, “Article 220: Enforcement by Coastal States”, in 4 *United Nations Convention on the Law of the Sea 1982: A Commentary* (Rosenne, S. & Yankov, A., eds.), *supra* note 23, pp. 279, 301-302. Hakapää, K., *supra* note 63, p. 205, submits in relation to Art. 42 (1)(b), that violations might occur which are “applicable” “in the mutual relationship between the coastal state and the flag state”.

adherence to a legally binding instrument containing these rules and standards, through a binding decision of an international organization, or through customary international law. In addition, specifically for the context of vessel-source pollution it is possible that states accept rights and obligations with regard to GAIRS when they ratify or accede to the 1982 Convention. This will hereinafter be referred to as the indirectly binding effect of the 1982 Convention.²¹⁶ Another, somewhat controversial, possibility is acceptance through the prescription of national laws and regulations that conform to the rules and standards that have been laid down in legally binding instruments, *viz.* acceptance without formal adherence.²¹⁷ However, a precondition for an exercise of rights granted under such instruments is the existence of a concurrent basis in customary international law. In the absence of such basis, such rights can only be exercised *vis-a-vis* states parties to the treaty in which the right is incorporated.

Which international rules and standards are “applicable” depends on the individual enforcement situations. It is submitted that where two states involved in enforcement have matching rights and obligations regarding certain rules and standards, these rules and standards can be said to be “applicable” for the enforcement provisions on vessel-source pollution. The process in which states have obtained these rights and obligations does not have to be identical, provided they “match”. Rejected should thus be the interpretation which would imply that even though rights and obligations exist, they could not lead to enforcement. Where for example flag states parties to the 1982 Convention are required, and port and coastal states permitted, to exercise prescriptive jurisdiction with respect to GAIRS, it would be logical to presume that GAIRS are included within the term “applicable”.²¹⁸ In light of this view the term “applicable” will potentially cover a broader set of rules and standards than those coming under the concept of “generally accepted”.

²¹⁶ First Report, *supra* note 27, pp. 175-177.

²¹⁷ See Anon, *supra* note 211, p. 220, where it is stated that there was general understanding that “applicable” “referred to international rules binding on the state concerned, whether as conventional or as customary rules”. Whether this excludes acceptance through national legislation and the indirectly binding effect of the 1982 Convention is uncertain to say.

²¹⁸ van Reenen, W., *supra* note 172, p. 24; Oxman, B., *supra* note 166, p. 139 note 96. McDorman, T., “Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention”, 28 *Journal of Maritime Law and Commerce* p. 305, 319 (1997), would also seem to agree with this contention. Hakapää, K., *supra* note 63, pp. 118 and 176 note 124, seems to submit that the term “applicable” does not cover GAIRS. However, on p. 205 he supports the indirectly binding effect of the 1982 Convention, and interprets “generally accepted” in Art. 39 (2) in a similar manner as the present report with respect to “applicable”. Kasoulides, G., *supra* note 170, p. 38, seems to exclude GAIRS from the scope of “applicable”, which can be explained by his hesitation to accept the indirectly binding effect of the 1982 Convention on p. 41, and his treatment of the meaning of “applicable” in the 1986 United Nations Convention on Conditions for Registration of Ships discussed on pp. 43-46. Valenzuela, M., *supra* note 179, p. 145, takes a middle course by submitting that the flag state must “at least in some cases” be a party to regulatory conventions. Bodansky, D., *supra* note 9, pp. 761-762, argues that the phrase “applicable international rules and standards” in Art. 218 of the 1982 Convention does not encompass GAIRS as between parties to the 1982 Convention. The main element in Bodansky’s reasoning seems to be that the

3.3 THE *PACTA TERTIIS* PRINCIPLE AND THE 1982 CONVENTION REGULATORY APPROACH CONCERNING VESSEL-SOURCE POLLUTION (STATUS OF THE RULE OF REFERENCE)

Conclusion No. 5: Importance of the Rule of Reference Relating to Vessel-source Pollution in the Framework of the 1982 Convention.

The rules of reference relating to vessel-source pollution, namely “generally accepted international rules and standards” and “applicable international rules and standards”, form the cornerstone of a delicate balance arrived at in the framework of the 1982 Convention between navigational interests on the one hand and environmental concerns on the other. This balance does not necessarily coincide with that arrived at with respect to other sources of marine pollution. Its correct understanding, therefore, seems essential for the proper application of this part of the 1982 Convention.

Explanatory Note

It is noteworthy that with respect to other forms of marine pollution emanating from an area over which no other but the territorial state exercises in principle any rights, and where, as a consequence, the balance between flag states on the one hand, and coastal and port states on the other, is much more tilted towards national in lieu of international measures,²¹⁹ these rules of reference do not play the same role. Sources like land-based pollution and pollution from or through the atmosphere can be taken as examples here.

With respect to prescriptive jurisdiction relating to the latter two sources of pollution, states only have “to take into account” the international level when adopting national laws and regulations,²²⁰ which is the weakest qualification to be found in that section of the 1982 Convention dealing with international rules

1982 Convention contains no specific prescriptive basis to enable an exercise of port state enforcement jurisdiction pursuant to Art. 218. Arguably, however, Art. 218 functions as both a prescriptive and an enforcement basis, since a basis for enforcement without a related (implicit) prescriptive basis would lead to a result that can never have been the intention of the negotiators at UNCLOS III (see McDorman, T., *supra*, pp. 307 and 315). Another argument suggested by Bodansky in support of the view that GAIRS cannot be applied as between parties to the 1982 Convention, is the absence of a reference to the enforcement of national laws and regulations. This seems not convincing since such references only appear, in the context of vessel-source pollution, in relation to the possibility of establishing norms more stringent than “generally accepted”. The absence of such references does not, however, preclude national legislation in conformity with the level of “generally accepted” (see also Anon, *supra* note 215, p. 272). Bodansky’s view can perhaps be explained by the use of the word “permitting” in relation to flag state prescription on p. 761. This should have been substituted by a term reflecting the mandatory character of this competence.

²¹⁹ See for instance Franckx, E., “Regional Marine Environment Protection Regimes in the Context of UNCLOS”, 13 *International Journal of Marine and Coastal Law* pp. 307, 312-313 (1998), addressing the issue of land-based pollution.

²²⁰ 1982 Convention, Arts. 207 (1) and 212 (1) respectively.

and national legislation to prevent, reduce and control pollution of the marine environment.²²¹ For pollution from sea-bed activities, from activities in the Area, and by dumping, the term used is “shall be no less effective”.²²² With respect to pollution from vessels, it should be remembered, the wording is slightly different, namely “shall at least have the same effect”.²²³ Especially the use of the word “shall” in both formula, missing with respect to pollution from land-based sources and pollution from or through the atmosphere, has to be stressed.²²⁴

The rule of reference to be found in the provisions on land-based pollution and pollution from or through the atmosphere is a most curious one because of its formulation, namely “internationally agreed rules, standards and recommended practices and procedures”.²²⁵ This very much reminds one of the early proposals which lay at the origin of the wording “GAIRS”, namely “internationally agreed rules and standards”.²²⁶ As stressed by M. McDougal and W. Burke, this change from one expression to the other “narrows the coverage considerably by precluding reference to such standards as are adopted by some states but not generally accepted”.²²⁷ At first sight, this seems difficult to reconcile with the reduced role of the international level mentioned above in these particular areas, unless of course the argument is made that, because of the weakness of the notion “take into account”, a more careful qualification of the reference to this international level became redundant.²²⁸

With respect to enforcement jurisdiction, it must be admitted, this distinction is somewhat weakened,²²⁹ but the express cross-reference to be found in the

²²¹ Anon, “Article 207: Pollution from Land-based Sources”, in 4 *United Nations Convention on the Law of the Sea 1982: A Commentary* (Rosenne, S. & Yankov, A., eds.), supra note 23, p. 125, 132 and Anon, “Article 212: Pollution from or Through the Atmosphere”, in *ibid.*, p. 207, 211.

²²² 1982 Convention, Arts. 208 (3), 209 (2), and 210 (6) respectively.

²²³ 1982 Convention, Art. 211 (2).

²²⁴ See for instance Kirgis, F., “Specialized Law-Making Processes”, in 1 *United Nations Legal Order* (Schachter, O & Joyner, C., eds.), Cambridge, Cambridge University Press, p. 109, 130 (1995), stressing the requirement of mandatory language for these rules of reference to have the effect of binding states, which are parties to the 1982 Convention, to these IMO regulations. The author then continues: “In some instances the 1982 Convention simply requires its parties to take account of these norms, but that too is a duty, and it would not be limited to IMO members”. The clear policy of the 1982 Convention concerning terminology in this respect (see infra note 233 and accompanying text), does not appear to sustain such a proposition.

²²⁵ 1982 Convention, Arts. 207 (1) and 212 (1) respectively.

²²⁶ As incorporated in U.N. Doc. A/AC.138/SC.III/L.52/Add.1, Annex 1. About the genesis of this concept of GAIRS, see First Report, supra note 27, pp. 160-166.

²²⁷ McDougal, M. & Burke, W., *The Public Order of the Oceans: A Contemporary International Law of the Sea*, Dordrecht, Nijhoff, p. 839 (1987).

²²⁸ But see Ring, D., “Sustainability Dynamics: Land-based Marine Pollution and Development Priorities in the Island States of the Commonwealth Caribbean”, 22 *Columbia Journal of Environmental Law* pp. 65, 94-95 (1997), who argues that, when confronted with a vague Art. 207 and a stronger obligation under Art. 213, “one might argue that the more specific duty should prevail as a general principle of statutory interpretation”.

²²⁹ Nevertheless, these articles still do place some limits on the discretion of the coastal states, within the circumstances envisaged by that article. See Anon, supra note 211, p. 220.

articles dealing with land-based pollution²³⁰ and pollution from and through the atmosphere,²³¹ referring back to the respective articles concerning prescriptive jurisdiction for these sources of pollution, appears nevertheless to sustain this submission. The rule of reference to be found in these provisions is similar to those to be found in the articles of Section 6 of Part XII²³² relating to the other sources of pollution, namely AIRS.

The exact formulation of the rule of reference was therefore, apparently, a much more delicate exercise if it related to areas of pollution where the balance of power aimed at was guided by a desire to subordinate the national to the international level, than in areas where the opposite was true. Once linked to the verb “shall”, conveying the idea of imperative duties and obligations, positive or negative, in the 1982 Convention,²³³ the exact formulation of the rule of reference deserved more careful analysis since it reflected the crux of a delicately weighed balance of power arrived at between coastal states and shipping nations.

Conclusion No. 6: The *Pacta Tertiis* Principle and the Rules of Reference in the 1982 Convention with Respect to Vessel-source Pollution

By becoming a party to the 1982 Convention, states *ipso facto* accept the legal technique of law-making by reference inherent in the very notion of generally accepted international rules and standards.

This implies, on the one hand, that coastal states which are parties to the 1982 Convention may enact national laws and regulations up to a level not exceeding international rules and standards which are generally accepted. Flag states bound by the 1982 Convention, on the other hand, incur the obligation to prescribe in their national legislation norms which at least reach that same level.

The way in which these international rules and standards find expression, as stated in Conclusion No. 2, is only of secondary importance. Even in the hypothesis that the concrete international rules and standards referred to are of a conventional nature, the question whether that state is a party to the convention containing a particular international rule or standard becomes irrelevant for the state in question to exercise prescriptive jurisdiction, as long as that rule or standard is generally accepted.

Since, in accordance with Conclusion No. 4, generally accepted international rules and standards are included in applicable international rules and standards for states party to the 1982 Convention, the

²³⁰ 1982 Convention, Art. 213.

²³¹ 1982 Convention, Art. 222.

²³² Entitled “Enforcement”.

²³³ Anon, “Note on the Use of the Word Shall”, in 4 *United Nations Convention on the Law of the Sea 1982: A Commentary* (Rosenne, S. & Yankov, A., eds.), supra note 23, pp. xli-xlii.

above submissions also apply with respect to enforcement jurisdiction, be it in an indirect manner. Consequently, flag states, coastal states and port states can enforce concrete international rules and standards which are generally accepted irrespective of the form they have taken. In the hypothesis that a concrete international rule or standard is contained in a convention, it is therefore not only irrelevant whether the coastal state is party to that particular convention in order to prescribe such rule or standard, but it is equally irrelevant for the coastal or port state implementing such a rule or standard whether the flag state of that vessel committing the violation is party to it.

This Conclusion does not infringe the *pacta tertiis* principle, since the consensual nature of international law is satisfied by the fact that states, party to the 1982 Convention, did agree to accept the rule of reference.

Explanatory Note

The fundamental question to be answered here is whether one can develop the binding nature of international law to non-consenting states by means of treaty law. This is not a new phenomenon and treaties imposing obligations on third states appeared to have existed in the 19th century.²³⁴ But the 1969 Vienna Convention called a halt to such practice,²³⁵ if it had ever existed. A meticulous analysis of the matter in 1974 came to the conclusion that, if one excludes these older cases, the possible effect of treaties on third states was in fact a non-issue.²³⁶

Nevertheless, today such a rigid conclusion appears no longer to be fully in touch with reality. Recent developments have made it possible for authors to sustain the argument that, in certain cases, treaties are a suitable instrument to promote and enforce community interest.²³⁷ Certainly not by annihilating the

²³⁴ When the European powers imposed their conditions on the conquered by treaty provisions, without these smaller entities concerned participating in these treaties, they indeed appeared to act as if they had the power to impose treaty obligations on third states. See for instance McNair, *The Law of Treaties*, Oxford, Clarendon Press, pp. 260-263 (1961) and Rousseau, C., *Droit International Public*, Vol. 1, Paris, Sirey, p. 192 (1970).

²³⁵ By stating that treaties do not "create either obligations or rights for a third State without its consent". See 1969 Vienna Convention on the Law of Treaties, *supra* note 109, Art. 34. The issue of treaties creating objective regimes, even though raised during the preparatory phase, was discarded later on.

²³⁶ Cahier, Ph., "Le problème des effets des traités à l'égard des Etats Tiers", *Recueil des Cours*, Vol. 143, pp. 588, 730-732 (1974), sustaining moreover the proposition that even these older treaties were not really exceptions to the rule of *pacta tertiis*.

²³⁷ See for instance Tomuschat, C., "Obligations Arising for States Without or Against Their Will", *Recueil des Cours*, Vol. 241, pp. 195, 241-274 (1994), who remains rather skeptical, and Simma, B., "From Bilateralism to Community Interest in International Law", *Recueil des Cours*, Vol. 250, pp. 217, 322-376 (1997), who wholeheartedly supports this proposition (see *infra* notes 241-242 and accompanying text).

pacta tertiis rule, but rather by stretching the element of consent to the maximum.²³⁸ The 1969 Vienna Convention on the Law of Treaties, despite its strict approach,²³⁹ is said not to prevent such kind of development.²⁴⁰ According to B. Simma, treaties are even the instrument *par excellence* to promote the community interest.²⁴¹ According to this author:

“[A]s international customary law is a natural companion of bilateralism, the multilateral treaty is an indispensable tool for fostering community interests”.²⁴²

Especially with respect to environmental law, these new developments have been demonstrated to be relevant.²⁴³

It is in this context that one has to understand the present day position in international law of the rules of reference to be found in the 1982 Convention. Having been labelled as “a still somewhat obscure form of international legislation”,²⁴⁴ this legislation by reference has been severely under fire from some quarters. G. Danilenko, for instance, goes back to the *travaux préparatoires* of UNCLOS and reaches the conclusion, based mainly on the statements of some participants, that only treaties to which they subscribed would be binding on them.²⁴⁵ Others start apparently from the teleological point of view that IMO Conventions, if they want to retain the central role so far played in this area, have to be strictly adhered to by states in order to become binding on them.²⁴⁶ Only IMO treaties in force for the states parties to the 1982 Convention, in other words, can be meant by the rule of reference to be found there. Based on the premise that IMO conventions need to be properly ratified before they can have binding effect on the parties, this point of view in other words starts from the other end of the line, but reaches the same result. The rule of reference to be found in the 1982 Convention cannot imply that states are bound by concrete rules to which they themselves did not properly adhere.

²³⁸ Tomuschat, C., *supra* note 237, pp. 273-274. Simma, B., *supra* note 237, p. 367 speaks in this regard of the “tamed” notion of consent.

²³⁹ See *supra* note 235 and accompanying text.

²⁴⁰ Chinkin, C., *Third Parties in International Law*, Oxford, Clarendon Press, p. 138 (1993), arguing that even though the 1969 Vienna Convention relies heavily on consensualism, “it was drafted in a sufficiently flexible way to allow future development of international law”.

²⁴¹ Simma, B., *supra* note 237, p. 322.

²⁴² *Ibid.*

²⁴³ For a detailed overview of this issue, see Fitzmaurice, M., “Modifications to the Principles of Consent in Relation to Certain Treaty Obligations”, 2 *Austrian Review of International & European Law* pp. 275-317 (1997).

²⁴⁴ Tomuschat, C., *supra* note 237, p. 348.

²⁴⁵ Danilenko, G., *Law-Making in the International Community*, Dordrecht, Martinus Nijhoff, pp. 72-73 (1993).

²⁴⁶ See for instance Blanco-Bazan, A., “IMO Interface with the Law of the Sea Convention”, in *Current Maritime Issues and the International Maritime Organization* (Nordquist, M. & Moore, J., eds.), *supra* note 10, pp. 269, 278-284.

Both lines of argumentation can however be challenged. Regarding G. Danilenko's reasoning, instead of looking at the text in the framework of the object and the purpose of the provision first, as required by the 1969 Vienna Convention on the Law of Treaties,²⁴⁷ and only then, under the condition that doubts still remain, falling back on the drafting history, he would seem to reverse the process.²⁴⁸ With respect to the second line of argumentation, this can be rebutted by pointing to the fact, as already done in the First Report,²⁴⁹ that this rule of reference cannot be construed as meaning only legal instruments in force for the state concerned, for that would make the rule of reference redundant.²⁵⁰ Even the Legal Committee of IMO seems to support this point of view.²⁵¹

The point of departure adopted by the Committee, namely that the rule of reference cannot be reduced merely to customary²⁵² or treaty law in force for the parties,²⁵³ still stands. As concluded by C. Tomuschat:

“Thus, if Article 21 (2) and Art. 211 (2) and other relevant provisions of the Law of the Sea Convention are to have a reasonable meaning ... the only possible explanation is that they place under the umbrella of UNCLOS rules which otherwise would be lacking legally binding force”.²⁵⁴

This implies that sometimes states can become bound by rules and standards which they have not otherwise expressly accepted.²⁵⁵ But besides the textual arguments on which this interpretation can be founded, the latter can be further sustained by reference to the object and purpose of such rule of reference, which is exactly to permit progressive adjustment binding the international community as such.²⁵⁶

²⁴⁷ 1969 Vienna Convention on the Law of Treaties, *supra* note 109, Art. 31 (1).

²⁴⁸ Tomuschat, C., *supra* note 237, p. 349.

²⁴⁹ First Report, *supra* note 27, p. 175 and further reference to be found there.

²⁵⁰ As already argued *supra* note 187 and accompanying text. In the same sense, see Tomuschat, C., *supra* note 237, p. 349, for whom the text does not leave any room for possible doubt: “It is clear from the text of the relevant provisions that no reference is made to treaties in force. Simply to draw attention to the rules established by multilateral treaties would have made no sense either. It is clear beyond any doubt that existing conventional rules must be respected”.

²⁵¹ Implications of the 1982 Convention for IMO, *supra* note 98, sub Part I, under the heading: “Legal status of IMO treaties in accordance with international law and the Law of the Sea. Consequences for Parties to UNCLOS”. Instead of obliging parties to the 1982 Convention to adhere to IMO conventions or pointing at the discouraging effect this could have on states from becoming parties to the main IMO conventions (see Blanco-Bazan, A., *supra* note 246, p. 279), this document rather endorses an opposite point of view: “The fact that Parties to UNCLOS should apply IMO rules and standards should be seen as a paramount incentive for them to become Parties to the IMO treaties containing those rules and standards.”

²⁵² See *supra* notes 184-186 and accompanying text.

²⁵³ See *supra* notes 187 and 250 and accompanying text.

²⁵⁴ Tomuschat, C., *supra* note 237, p. 350.

²⁵⁵ Noyes, J., “The International Tribunal for the Law of the Sea”, 32 *Cornell International Law Journal* p. 109, 124 (1998).

²⁵⁶ Tomuschat, C., *supra* note 237.

Is this interpretation defying the *pacta tertiis* rule? Today, it seems safe to conclude that it is not so.

“At present it is possible for states to allow themselves to be bound by certain rules to which they have not given their express consent, but which are brought into existence by a rule making process to which they *have* given their consent — in particular through adoption of rules by international organizations”.²⁵⁷

These procedures soften the edges of the consent requirement by limiting its conditions, its consequences and the freedom of the parties involved.²⁵⁸ It has moreover been affirmed that nothing in the law of treaties prevents such a construction.²⁵⁹ Or to conclude with the words of C. Tomuschat:

“The legal technique of law-making by reference does not amount to a legal revolution, but it takes the international community one step further on the way to establishing a true legislative function, at least in the field of maritime law. Its roots are firmly grounded in the traditional system as reflected in Article 38 of the Statute of the ICJ, in that an international treaty constitutes the legal foundation”.²⁶⁰

For all the reasons just stated, the argument that such interpretation would oblige states, by their acceptance of the 1982 Convention, to become bound by legal rules which they never accepted, is not really convincing. As concluded by L. Sohn, no rule of international law prevents states to agree, like in the 1982 Convention, to use certain methods of law-creation and to be bound by the rules established through that particular method. This procedure has already been relied upon in the past and, as predicted by this author, “it is quite likely that the use of such new methods will increase in the future”.²⁶¹

²⁵⁷ Fitzmaurice, M., *supra* note 243, p. 276. This process has been described by Palmer, G., “New Ways to Make International Environmental Law”, 86 *American Journal of International Law* p. 259, 273 (1992), in the following way: “Procedures for the creation of norms are agreed upon. Those procedures include a provision that in respect of certain rules or in certain circumstances unanimous consent is not required. The norms created by using the procedures did not necessarily receive unanimous consent but are binding on any nation that did not consent because they were created by agreed procedures. Nations thus consent in advance to be bound by norms whose content is unknown at the time of the consent”.

²⁵⁸ Simma, B., *supra* note 237, p. 325.

²⁵⁹ Fitzmaurice, M., *supra* note 243, p. 293.

²⁶⁰ Tomuschat, C., *supra* note 237, p. 352.

²⁶¹ Sohn, L., *supra* note 181, p. 1080. One could also in this respect refer to the tacit acceptance procedure within IMO, the legality of which was also contested at one time exactly on the same grounds. See Shi, L., “Successful Use of the Tacit Acceptance Procedure to Effectuate Progress in International Maritime Law”, 11 *University of San Francisco Maritime Law Journal* pp. 299, 307-309 (1998-99). Nevertheless, it was on the basis of this novel procedure that the important

The availability of rules of reference in a convention which approaches the threshold of becoming an international treaty of a universal character, generally agreed upon because of its qualitatively and quantitatively important list of ratifications, representing an even geographical spread of participants, seems to provide an ideal instrument to foster the development of technical rules and standards as the ones here at hand.²⁶² It does not appear necessary, nor even opportune, to transgress this strict conventional framework.

Another example following a similar approach is the 1995 straddling fish stocks agreement.²⁶³ Despite claims by some pretending that the regime created by this agreement gives rise to obligations *erga omnes*,²⁶⁴ a closer analysis of that agreement demonstrates that none of its provisions negate the *pacta tertiis* rule.²⁶⁵ A somewhat similar technique has been used in this 1995 Agreement as the one relied upon by rules of reference to be found in the 1982 Convention, namely that by becoming a party to the 1995 Agreement, one accepts beforehand to be subjected to the regulations enacted by regional fisheries organizations, to which one may not adhere or whose regulations one may not have consented to.²⁶⁶

developments with respect to MSR (supra note 30) and VTS (supra note 31) found their way into the SOLAS Convention. About the former, see Shi, L., *ibid.*, pp. 324-328.

²⁶² This contrasts sharply with the utmost care taken by IMO, when preparing the publication "MARPOL - How to do it", not to include too much text from the 1982 Convention in order not to impose the latter on states which are a party to MARPOL, but not to the 1982 Convention. See 1999 Secretary-General Report on the Law of the Sea, supra note 203, p. 66, where the issue was raised, and the 2000 Secretary-General Report on the Law of the Sea, supra note 16, para. 184, where the final outcome of this discussion is provided. This seems to be a rather recent trend in IMO. If the Guidelines to Assist States in the Implementation of IMO Instruments, adopted by Resolution A.847(20) on November 27, 1997, for instance still gave credit to the 1982 Convention by finding it the basis for IMO obligations (see sub 1.2, 2.1, 5.1 en 5.2, 5.4 and 7.1)), the Flag-State Performance Self-Assessment, approved by the Maritime Safety Committee and the Marine Environment Protection Committee about one year later, is much more restrictive by strictly linking the flag state obligations to the IMO conventions to which the latter is a party. See International Maritime Organization, Self-Assessment of Flag State Performance, IMO doc. MSC/Circ.889 and MEPC/Circ.535, December 17, 1998, sub 1-3, 5.3.3 and 8.

²⁶³ 1995 Agreement, supra note 8.

²⁶⁴ Delbrück, J., "'Laws in the Public Interest' - Some Observations on the Foundations and Identification of *erga omnes* Norms in International Law", in Liber amicorum Günther Jaenicke - Zum 85. Geburtstag (Götz, V., Selmer, P. & Wolfrum, R., eds.), Berlin, Springer, pp. 17, 26-27 (1998). See also de Yturriaga, J., *The International Regime of Fisheries: From UNCLOS 1982 to the Presential Sea*, The Hague, Martinus Nijhoff, p. 223 (1997).

²⁶⁵ For a detailed analysis of this specific aspect, see Frackx, E., "*Pacta Tertiis* and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention on the Law of the Sea", 8 *Tulane Journal of International and Comparative Law* pp. 49-81 (2000). See also by the same author "*Pacta Tertiis* and the 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 & Management of Straddling Fish Stocks & Highly Migratory Fish Stocks", *FAO Legal Papers Online* # 8, 28pp. (June 2000), as available on Internet: <http://www.fao.org/Legal/default.htm>.

²⁶⁶ Fitzmaurice, M., supra note 243, pp. 280 and 296.

3.4 THE CONCEPT OF “WILFUL AND SERIOUS POLLUTION” IN THE 1982 CONVENTION

Conclusion No. 7: Vessel-source Pollution and Loss of the Right of Innocent Passage

The regime of innocent passage in the territorial sea as laid down in the 1982 Convention, defines *inter alia* the jurisdictional balance with regard to vessel-source pollution. A foreign ship which:

- a) does not comply with the requirements of “passage” pursuant to Art. 18 of the 1982 Convention; or
- b) engages in “any act of wilful and serious pollution contrary to [the 1982 Convention]” pursuant to Art. 19 (2)(h) of the 1982 Convention; or
- c) is involved in a maritime casualty which would give the coastal state a right of intervention under general international law; or
- d) can be categorized as a ship whose condition is so utterly deplorable that it is extremely likely to cause a serious incident with major harmful consequences, including to the marine environment;

while navigating in the territorial sea, is considered to be in passage which is prejudicial to the peace, good order or security of the coastal state pursuant to Art. 19 (2) of the 1982 Convention, and consequently loses its right of innocent passage.

Non-compliance with “passive” requirements, such as CEDM standards, the type of cargo carried or a mere threat to pollution (other than in situations (c) and (d) above), does not render passage non-innocent.

The criteria of “wilful” and “serious” in Arts. 19 (2)(h) and 230 (2) of the 1982 Convention are not defined in the 1982 Convention. It is nevertheless clear that these criteria are cumulative and that “wilful” reflects a requirement of some level of intent. The criterion of seriousness may in certain situations also be met by relatively limited operational discharges if taking place, for instance, in already heavily polluted enclosed seas or areas which are highly sensitive to pollution and are recognized as such at the international level.

Explanatory Note

The right of innocent passage laid down in Art. 17 of the 1982 Convention is made subject to various conditions, in particular Arts. 18 and 19 of the 1982 Convention, which contain the two different elements of the concept. Ships must first of all be in “passage” within the meaning of Art. 18, which covers navigation by ships in transit through the territorial sea, and navigation by ships that come from or head to a port or internal waters. Ships “cruising”, “hovering” or

merely “lying in” the territorial sea, cannot claim their passage to be “continuous and expeditious”, and consequently cannot claim a right of innocent passage, except under the circumstances of paragraph (2), for example *force majeure*.²⁶⁷

The second element is that of “innocence”. While the definition of innocent passage included in Art. 14 (4) of the 1958 Convention on the Territorial Sea and the Contiguous Zone²⁶⁸ simply stipulates that passage is innocent as long as “it is not prejudicial to the peace, good order or security of the coastal State”, Art. 19 (2) of the 1982 Convention adds thereto a list of activities which, if engaged in by a foreign ship, render passage non-innocent. Subparagraph (h) mentions as one of these activities engaging in “any act of wilful and serious pollution contrary to [the 1982 Convention]”.

As Art. 19 (2) only refers to activities, this would seem to suggest that nothing but activities could deprive passage of its innocent character. Ultimately this line of reasoning leads to the conclusion that something which cannot be regarded as an activity, could in principle never be brought under the heading “prejudicial to the peace, good order or security of the coastal State”. Such a conclusion is admittedly too categorical and ignores the powers coastal states have in certain situations, for example the right of intervention. However, violations of “passive” requirements such as CEDM standards or the mere presence or passage of a ship cannot make passage non-innocent.²⁶⁹

Discharges, if both “serious” and “wilful”, can remove the innocent character of passage.²⁷⁰ These cumulative criteria represent a significant threshold, in particular the element of intent. “Wilful” implies that the act of pollution has to be intentional, but does not reveal which type of intent is required, for example malicious intent. While the seriousness of the act of pollution is certainly consistent with the notion that innocence should only disappear in cases which are “prejudicial etc.” to the coastal state, no definition of “serious” is provided.²⁷¹ Since the requirements are cumulative, it is important to realize that intentional operational discharges will in general not also be “serious”.²⁷² Admittedly, however, the vagueness of this term gives the coastal state much room for interpretation. Apart from the possibility of “stretching” this term, it is not unlikely that under certain conditions illegal operational discharges should be considered “serious”.

²⁶⁷ Lee, L., “Jurisdiction over Foreign Merchant Ships in the Territorial Sea: An Analysis of the Geneva Convention on the Law of the Sea”, 55 *American Journal of International Law* p. 77, 80 (1961); Churchill, R. & Lowe, V., *supra* note 61, p. 82.

²⁶⁸ 526 *United Nations Treaty Series* 205.

²⁶⁹ Hakapää, K., *supra* note 63, p. 184; Smith, B., *supra* note 63, pp. 66 and 75; Churchill, R. & Lowe, V., *supra* note 61, p. 85.

²⁷⁰ The drafting history of Art. 19 (2)(h) has been analysed in the Committee’s Draft Interim Report (1995), pp. 17-19.

²⁷¹ Note that under Art. 21 (11) of the 1995 Agreement, *supra* note 8, a list of examples of “serious violations” has been included.

²⁷² Noteworthy here is *U.S. v. Royal Caribbean Cruises (Ltd., 24 F. Supp. 2d 155 (D.P.R. 1997))*, in which the District Court of Puerto Rico treated a 30-gallon spill which posed “no immediate threat to the environment” as non-serious, thereby permitting only monetary penalties.

Examples could include already heavily polluted enclosed seas or areas which are highly sensitive to pollution and are recognized as such internationally.²⁷³ The fact that the coastal state does not have to invoke a specific category of interests which it seeks to protect, for example its coastline, and the fact that the term “pollution” has only been defined in a general sense in the 1982 Convention,²⁷⁴ contributes to a larger measure of discretion. Finally, while accidental discharges are often “serious”, they cannot meet the criterion of intent.²⁷⁵

Non-innocence only arises in cases of actual infliction of damage, but not where a threat thereto exists.²⁷⁶ Therefore, passage by ships carrying hazardous cargoes cannot, based on the type of cargo, be labelled as non-innocent.²⁷⁷ An exception should be made for threats to pollution of the territorial sea resulting from maritime casualties that take place in the territorial sea or beyond. Although not explicitly referred to in the 1982 Convention, a coastal state retains in principle a right vested in general international law and based on its sovereignty over the territorial sea, to take and enforce measures to protect its interests. Such measures must at all times be reasonable, which requires taking account of such general principles as necessity and proportionality.²⁷⁸ It seems acceptable not to regard maritime casualties any longer as “passage” under Art. 18 or, alternatively, as something having a “direct bearing on passage” under Art. 19 (2)(l). In either case, a ship involved in a maritime casualty and polluting or threatening to pollute the territorial waters of a coastal state would lose its right of innocent passage.

A ship which is not involved in a maritime casualty but whose condition is so utterly deplorable that it is extremely likely to cause a serious incident with major harmful consequences, including to the marine environment, would not be able to exercise the right of innocent passage either. This does not mean that a coastal state can deny passage to such ships under *all* circumstances, for example in cases of distress. Even then, however, the interests of the ship have to be balanced with the interests of the port/coastal state involved.²⁷⁹

²⁷³ E.g. by designation as special area under Art. 211 (6) of the 1982 Convention, the Annexes to MARPOL 73/78 or the PSSA Guidelines (IMO. Res. A.720(17), “Guidelines for the Designation of Special Areas and the Identification of Particularly Sensitive Sea Areas. Adopted on 6 November 1991”; presently under revision).

²⁷⁴ 1982 Convention, Art. 1 (1)(4).

²⁷⁵ See, however, 1982 Convention, Art. 229.

²⁷⁶ The various proposals made at UNCLOS III that incorporated an element of threat did not secure the necessary support (Hakapää, K., *supra* note 63, p. 185).

²⁷⁷ See Smith, B., *supra* note 63, p. 88; and Pineschi, L., “The Transit of Ships Carrying Hazardous Wastes through Foreign Coastal Zones”, in *International Responsibility for Environmental Harm* (Francioni, F. & Scovazzi, T., eds.), London, Graham & Trotman, p. 299, 308 (1991), who, however, at the same time seems to suggest that non-observance of Art. 23 would render passage non-innocent. Contra Van Dyke, J., “Sea Shipment of Japanese Plutonium under International Law”, 24 *Ocean Development and International Law* p. 399, 408 (1993).

²⁷⁸ Implicit in Art. 221 of the 1982 Convention is a similar or more extensive right for maritime casualties in its territorial sea.

²⁷⁹ State practice shows many examples of ships whose condition is so utterly deplorable that they

The phrase “wilful and serious pollution” also appears in Art. 230 (2) of the 1982 Convention to ensure that non-monetary penalties can be applied in cases of passage which is non-innocent. Art. 230 (2) does not enumerate which non-monetary penalties can be imposed, although imprisonment comes first to mind.²⁸⁰ Moreover, the provision does not limit coastal states with respect to the type of jurisdiction. Reference is only made to the type of penalties, and the choice of procedure, criminal or administrative, is left to the discretion of the coastal state.

State practice with respect to Art. 19 (2)(h) of the 1982 Convention indicates that only a small number of states incorporates an activity similar to “wilful and serious pollution” in its legislation. In addition, none of these states define or give guidelines for the interpretation or application of the elements “wilful” and “serious”. Also, even though several states take the elements “wilful” and “serious” into account in deciding on the type of penalty, and others are likely to do this as well, a direct link between the concept of innocent passage and penalties could only be identified in the case of Finland and Sweden. That such a link nevertheless exists for other states as well could be proven by analysing penalties actually imposed for violations.

3.5 MANDATORY SHIP REPORTING AND VESSEL TRAFFIC SERVICES

Conclusion No. 8: Mandatory Ship Reporting and Vessel Traffic Services

The 1982 Convention neither expressly allows nor prohibits mandatory ship reporting or vessel traffic services. Recent developments indicate that both concepts, from an international point of view, are closely tied to the territorial sea notion. The former may, however, also exceptionally operate beyond the territorial sea while the latter notion is at present strictly tied to that zone.

Safeguard provisions attached to both concepts, however, make it clear that they remain subject to the general rights and duties of states under international law, i.e. the 1982 Convention in particular, as well as the legal regimes of straits and archipelagic sea lanes.

are extremely likely to cause serious incidents with major harmful consequences, including to the marine environment that are denied entry into the territorial sea for fear of harm to the interests of the coastal state (see Kasoulides, G., “Vessels in Distress. ‘Safe Havens’ for Crippled Tankers”, 11 *Marine Policy* pp. 184, 185-186 (1987)). Recent cases include the *Toledo* (1990) which led to a judgment by the Irish High Court (*Act Shipping (PTE) Limited v. The Minister for the Marine, Ireland*, February 7, 1995, Doc. No. 2749J (ANK)), and the *Long Lin* (1992) leading to a judgment by the Netherlands’ Judicial Division of the Council of State (10 April 1995, R01.92.1060, commentary in *Nederlands Juristen Blad*, No. 23, 299 (1995)).

²⁸⁰ Anon, “Article 230: Monetary Penalties and the Observance of Recognized Rights of the Accused”, in 4 *United Nations Convention on the Law of the Sea 1982: A Commentary* (Rosenne, S. & Yankov, A., eds.), supra note 23, p. 362, 370, observes, however, that “[a]lthough it is not stated expressly (as in article 73), it is taken for granted that the penalties imposed by the coastal state may not include ‘any other form of corporal punishment.’”

Because of this circumstance, namely that mandatory ship reporting as well as vessel traffic services are both concepts not foreseen by the 1982 Convention but have nevertheless to be fitted within this particular framework, enforcement by coastal states may often remain problematic. More substantive conclusions necessarily rest on the outcome of further developments concerning the subject matter.

Explanatory Note

See Part II of the present report, sub 2.1.

3.6 COASTAL STATE ENFORCEMENT POWERS OVER VESSEL-SOURCE POLLUTION

Conclusion No. 9: The Distinction Between Enforcement Powers over Ships in Innocent Passage and Ships in Non-Innocent Passage

In the territorial sea, the extent of coastal state enforcement powers over vessel-source pollution depends first of all on the distinction between innocent and non-innocent passage. However, in any situation, whether innocent or non-innocent passage, the type of enforcement action resorted to must stand a test of reasonableness, which *inter alia* requires taking account of such general principles as necessity and proportionality.

In case ships violate coastal state laws and regulations, but this does not amount to non-innocent passage, the coastal state is authorized to exercise enforcement powers in conformity with, *inter alia*, Arts. 24 (1), 27 and 220 (2) of the 1982 Convention. These powers do not include expulsion from the territorial sea.

In case ships are in non-innocent passage (all categories mentioned in Conclusion No. 7), coastal states are in principle allowed to use the full range of enforcement powers, including expulsion from the territorial sea.

Explanatory Note

See Part II of the present report, sub 2.2.

Conclusion No. 10: Coastal State Enforcement Powers over Foreign Ships in Non-Transit Passage

A ship which meets any of the conditions enumerated in categories (b), (c) or (d) of Conclusion No. 7, while navigating through areas in which the regime of transit passage applies pursuant to Part III, Section 2, of the 1982 Convention, is in non-transit passage. In such cases of non-transit passage, coastal state enforcement powers are identical to those in non-innocent passage.

Explanatory Note

See Part II of the present report, sub 2.3.

Conclusion No. 11: Coastal State Enforcement Powers in Archipelagic Waters and Archipelagic Sea Lanes

The right of innocent passage which can be exercised in archipelagic waters pursuant to Art. 52 (1) of the 1982 Convention is not exclusively governed by Section 3 of Part II but, *inter alia*, also by Part XII of the 1982 Convention. References to the territorial sea in Part XII should for the purpose of coastal state jurisdiction over vessel-source pollution be read to include archipelagic waters. This is not to be construed as affecting the archipelagic state's sovereignty over its archipelagic waters.

The same considerations are applicable, *mutatis mutandis*, to areas in which, pursuant to Arts. 8 (2), 35 (a) and 45 of the 1982 Convention, a regime of innocent passage applies.

The regimes of transit passage and archipelagic sea lanes passage set out in Part III, Section 2 and Part IV of the 1982 Convention respectively, are by way of prescription two separate regimes. Nevertheless, the two regimes can be treated as essentially identical, for instance, in relation to coastal state enforcement jurisdiction over the prevention, control and reduction of pollution by foreign vessels in passage. Accordingly:

- a) as Art. 38 (3) of the 1982 Convention applies to the regime of archipelagic sea lanes passage, the observations made in Conclusion No. 10 with respect to non-transit passage apply also, *mutatis mutandis*, to archipelagic sea lanes passage;
- b) the enforcement powers under Art. 233 can also be applied to foreign ships exercising the right of archipelagic sea lanes passage.

Explanatory Note

See Part II of the present report, sub 2.4.

Conclusion No. 12: Coastal State Enforcement Powers in the Exclusive Economic Zone (EEZ)

Coastal state enforcement jurisdiction over vessel-source pollution in the EEZ is governed by Arts. 220 (3, 5 & 6) and 221 of the 1982 Convention, which constitute a *lex specialis* to Art. 73 of the 1982 Convention. A literal interpretation of the graded enforcement scheme in Art. 220 (3, 5 & 6) suggests that it only applies to violations committed in the EEZ while enforcement action can be undertaken either in the territorial sea or the EEZ. Nevertheless, the powers

under Art. 220 (3, 5 & 6) should also be applicable to violations committed in the coastal state's internal waters or territorial sea in cases where enforcement is only undertaken when the vessel is in its EEZ.

Explanatory Note

See Part II of the present report, sub 2.5.

Conclusion No. 13: Coastal State Enforcement Powers in Special Areas Under Art. 211 (6) of the 1982 Convention

A special area according to Art. 211 (6) of the 1982 Convention, limited as this notion is to a “particular, clearly defined area” of the EEZ, implies a certain area of the EEZ, possibly including parts of the territorial sea or even the EEZ of an adjacent or opposite state or states if the concerned states act jointly, but definitively excluding reaching beyond. It therefore has to be clearly distinguished from MARPOL 73/78 special areas covering enclosed or semi-enclosed areas and often including high seas areas.

In Art. 211 (6) special areas, laws and regulations can be adopted by the coastal state as are made applicable through IMO. Under Art. 211 (6)(a) IMO could be suggested to make a general list of such measures, out of which it subsequently could adopt the specific measures to be applied by a coastal state at its request.

When a coastal state requests additional measures under Art. 211 (6)(c), however, the latter can only relate to discharges or navigational practices, but not to CEDM standards. Also these additional measures require IMO approval.

Since Art. 211 (6), through its specific enforcement provision of Art. 220 (8), forms part and parcel of the EEZ enforcement regime, the same thresholds apply as those provided in the graded enforcement scheme of Art. 220 (3, 5 & 6). Even if some flexibility may be present given the special ecological conditions present, it will also remain a flag state obligation to enforce these enhanced powers to reduce and control pollution of the marine environment from vessels.

Explanatory Note

See Part II of the present report, sub 2.6.1.

Conclusion No. 14: Coastal State Enforcement Powers in Ice-covered Areas

The precise field of application of Art. 234, isolated as it is from the other articles of Part XII, remains fraught with difficulty. It is certain that it cannot operate beyond the EEZ and that at present its field of application is confined to the Arctic.

It is the only exception to the requirement of the conformity of national law and regulations relating to vessel-source pollution to generally accepted international rules and standards. Even the procedure provided in Art. 211 (6) does not apply.

Nevertheless, the “due regard” notion, combined with the particular history of this article and the fact that Art. 234 remains subject to the system of compulsory dispute settlement, result in the fact that navigational considerations remain a non-negligible factor in the equation. The guidelines for ships operating in ice-covered waters, as presently developed by IMO, might well prove an important element in the future application of this article. These guidelines, moreover, have been recently focussed exclusively on the Arctic.

In broad terms, navigational rights and freedoms are not totally excluded from ice-covered areas but may be effectively restricted by coastal state measures taken under Art. 234.

Explanatory Note

See Part II of the present report, sub 2.6.2.