PART XII
PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT

Section 1
General provisions

Article 192
General obligation

States have the obligation to protect and preserve the marine environment.

Bibliography: *Alan Boyle*, Marine Pollution under the Law of the Sea Convention, AJIL 79 (1985), 347–372; *Alan Boyle*, The Environmental Jurisprudence of the International Tribunal for the Law of the Sea, IJMCL 22 (2007), 369–381; *Patricia Birnie*, Impact on the Development of International Law on Cooperation: The United Nations Law of the Sea, Straddling Stocks and Biodiversity Conventions, in: Myron H. Nordquist/John N. Moore/Said Mahmoudi (eds.), The Stockholm Declaration and Law of the Marine Environment (2003), 85–98; *Patricia Birnie*, The Challenges of Applying UNCLOS in a Post UNCED Context, in: Joseph Norton (ed.), The Changing World of International Law in the Twenty First Century (1998), 3–43; *Patricia Birnie/Alan Boyle/Catherine Redgwell*, International Law and the Environment (3rd edn. 2009); *Detlef Czybulka*, Paradise lost? Die Entscheidung eines Internationalen Schiedsgerichts vom 18.3.2015 in Sachen Chagos Marine Protected Area (Republik Mauritius./. Vereinigtes Königreich), EurUP 1/2016, 58–73; *Detlef Czybulka*, The Convention on the Protection of the Marine Environment of the North-East Atlantic, in: Hjalmar Thiel/J. Anthony Koslow (eds.), Managing Risks to Biodiversity and the Environment on the High Sea, Including Tools Such as Marine Protected Areas: Scientific Requirements and Legal Aspects, BfN Skripten 43 (2001), 175–184; *Detlef Czybulka/Peter Kersandt*, Legal Regulations, Legal Instruments and Competent Authorities with Relevance for MPAs in the EEZ and the High Seas of the OSPAR Maritime Area, BfN Skripten 22 (2000), 1–84; *Detlef Czybulka/Peter Kersandt*, Rechtliche Rahmenbedingungen, in: José L. Lozán/Eike Rachor/Karsten Reise/Jürgen Sündermann/Hein von Westernhagen (eds.), Warnsignale aus Nordsee & Wattenmeer: Eine aktuelle Umweltbilanz (2003), 374–383; *Jonathan I. Charney*, The Protection of the Marine Environment by the 1982 United Nations Convention on the Law of the Sea, GIELR 7 (1995), 731–738; *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999); *Peter Ehlers*, Meeresfreiheit und aquitoriale Ordnung – zur Entwicklung des Seerechts, in: Wilfried Erbguth (ed.), Stand und Entwicklung im Seerecht, Umweltrecht, Städtebaurecht, Raumordnungs- und Fachplanungsrecht (2013), 15–36; *Jochen A. Frowein*, Obligations erga omnes, MPEPIL, available at: http://www.mpepil.com; *Kristina Gjerde*, High Seas Marine Protected Areas, IJMCL 16 (2001), 515, 528; *Edgar Gold*, Gard Handbook on Protection of the Marine Environment (3rd ed. 2006); *Gerhard Hafner*, Meeresumwelt, Meeresforschung und Technologietransfer, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 347–459; *Peter Kersandt*, Rechtliche Vorgaben und Defizite bei Schutz und Nutzung der Nordsee (2010); *Lee A. Kimball*, The Law of the Sea Convention and Marine Environmental Protection, GIELR 7 (1995), 745–748; *Lee A. Kimball*, The United Nations Convention on the Law of the Sea: A Framework for Marine Conservation (Part 1), in: IUCN, The Law of the Sea: Priorities and Responsibilities in Implementing the Convention (1995), 1–120; *Rainer Lagoni*, Die Abwehr von Gefahren für die marine Umwelt, in: Rudolf Dolzer (eds.), Umweltschutz im Völkerrecht und Kollisionsrecht, BDGVR 32 (1992), 87–158; Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991); *Alexander Proelß*, Meeresschutz im Völker- und Europarecht: Das Beispiel des Nordatlantiks (2004); *Philippe Sands*, Principles of International Environmental Law, vol. I (1995); *Jon M. Van Dyke*, Giving Teeth to the Environmental Obligations in the Law of the Sea Convention, in Donald R. Rothwell/Alex G. Oude Elferink (eds.), Oceans Management in the 21st Century: Institutional Frameworks and Responses (2004), 167–187; *Jonathan Verschuuren*, Principles of Environmental Law (2003); *Budislav Vukas*, The Law of the Sea: Selected Writings (2004); *Niels West*, Marine Affairs Dictionary: Terms, Concepts, Laws, Court Cases and International Conventions and Agreements (2004); *Michael Winkler*, Ökologische Intervention im internationalen Recht? "Neue Weltordnung" und Umweltschutz in staatsfreien Räumen, Natur und Recht 17 (1995), 57–108; *Jonna Ziemer*, Das gemeinsame Interesse an einer Regelung der Hochseefischerei (2000)

Documents: GA, Law of the Sea – Protection and Preservation of the Marine Environment: Report of the Secretary-General, GA Res. 44/461 of 18 September 1989; GA Res. 2750 (XXV) (C) of 17 December 1970; UN

DOALOS, The Law of the Sea: Protection and Preservation of the Marine Environment (1990); UNCHR, Report of the Intergovernmental Working Group on Marine Pollution on Its Second Session, UN Doc. A/CONF.48/IWGMP.II/5 (1971)

Cases: ICJ, *Case concerning Right of Passage over Indian Territory* (Portugal *v.* India), Merits, Judgment of 12 April 1960, ICJ Reports (1960), 6; ICJ, *Case of Barcelona Traction, Light and Power Company, Limited* (Belgium *v.* Spain), Judgment of 5 February 1970, ICJ Reports (1970), 3; ITLOS, *Southern Bluefin Tuna Cases* (New Zealand *v.* Japan; Australia *v.* Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports (1999), 280; PCA, *Chagos Marine Protected Area* (Mauritius *v.* United Kingdom), Award of 18 March 2015, available at: http://www.pca-cpa.org/showpagea579.html?pag_id=1429; PCA, *South China Sea Arbitration* (Republic of the Philippines *v.* People's Republic of China), Award of 12 July 2016, available at: https://www.pcacases.com/web/view/7

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I. Purpose and Function

1 The environmental part of the Convention (Part XII) starts with the establishment of duties (Art. 192) and rights (Art. 193) regarding the stewardship of the oceans. Art. 192, as the leading principle for a reasonable and careful maintenance of the sea, is underpinned by more stringent and detailed provisions, mainly, but not only, concerning the different types of pollution. The competences for national and international legislation and for the measures which have to be taken to prevent, reduce and control pollution, are outlined in Arts. 207–212, while the legal basis for enforcement measures relating to sources of and activities causing pollution is provided by Arts. 213–222. Provisions relating to standard-setting and enforcement measures can also be found in other parts of the Convention.[1] Regarding the competences, in particular the jurisdiction for environmental protection measures in the exclusive economic zone (EEZ), the jurisdiction assigned to coastal States by Art. 56 (1) b)(iii) has to be taken into account.

2 Art. 192 is the first provision of Part XII 'Protection and Preservation of the Marine Environment'. The initial section comprising Arts. 192 to 196 is entitled 'General Provisions', which reflects the wide ranging scope of the following articles. Part XII provides the highest–level global umbrella beneath which the marine environment is substantially protected.[2] Therefore, the environmental provisions of the Convention are both general in their application, by protecting the entire marine environment, and comprehensive, by including all forms and sources of marine pollution.[3]

3 Being one of the main issues concerning marine environmental protection, the majority of the provisions are related to pollution in the broad sense of Art. 1 (1)(4).[4] Part XII is thus mainly characterised by the 'anti-pollution approach'. While the control of pollution is certainly still an important aspect of environmental protection, 'it is by no means the only

[1] *Cf.* Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991), 18.

[2] *Cf. Detlef Czybulka/Peter Kersandt*, Legal Regulations, Legal Instruments and Competent Authorities with relevance for MPAs in the EEZ and the High Seas of the OSPAR Maritime Area, BfN Skripten 22 (2000), 1, 8; *Edgar Gold*, Gard Handbook on Protection of the Marine Environment (3rd edn. 2006), 64.

[3] *Cf. Alan Boyle*, Marine Pollution under the Law of the Sea Convention, AJIL 79 (1985), 347, 350.

[4] See *Tanaka* on Art. 1 MN 12–15.

one.'[5] Further protection approaches include the conservation of living and non-living natural marine resources by means of their sustainable use and the protection of marine biological diversity through the protection of marine ecosystems, habitats and marine species in their natural habitats.[6] In analysing Art. 297 the Tribunal in the *Chagos Case* considered that the dispute concerning the establishment of the Chagos Marine Protected Area (MPA) related to the preservation of the marine environment in the sense of Art. 297 (1)(c). The Tribunal rejected expressly 'the suggestion that either Article 297 (1)(c) *or Part XII of the Convention* (relating to the protection and preservation of the marine environment) are limited to measures aimed at controlling marine pollution.'[7] In regard to the preservation of the marine environment, Art. 194 (5) is of outstanding importance for the duties and behavior of States vis-à-vis components of the marine ecosystem and for the interpretation of approaches that go beyond anti-pollution.[8] Concerning the conservation of **living resources**, in its *Southern Bluefin Tuna Cases*,[9] the International Tribunal of the Law of the Seas (ITLOS) expressly regarded the conservation of living resources of the sea as an element in the protection and preservation of the marine environment. This jurisprudence has been pursued by the PCA in the so called *South China Sea Arbitration* of 12 July 2016.[10] In addition, the references of ITLOS to the precautionary principle are relevant to the interpretation and application of the complete environmental part of the Convention.[11]

Besides establishing the primary obligation of States to protect the marine environment, 4
Art. 192 sets the general standards and the framework within which a much more complex and wide ranging structure of powers and duties must operate.[12] Special provisions in Part XII include Art. 194, Art. 197 on cooperation, but also Arts. 204–206 concerning monitoring and environmental assessment and other procedural rules such as the obligation to consult with and give regard to the rights of other States,[13] and substantive agreements then specify the minimum (or maximum) standards for carrying out the obligations of States established by the Convention.[14] By ensuring the comprehensive approach of the international community to marine environmental protection, this framework helps to avoid the shortcomings of piece-meal actions.[15]

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[5] PCA, *Chagos Marine Protected Area* (Mauritius *v.* United Kingdom), Award of 18 March 2015, 128–129 (para. 320), available at: http://www.pca-cpa.org/showpagea579.html?pag_id=1429. See also PCA, *South China Sea Arbitration* (Republic of the Philippines *v.* People's Republic of China), Award of 12 July 2016, para. 945, available at: https://www.pcacases.com/web/view/7.

[6] *Detlef Czybulka/Peter Kersandt*, Rechtliche Rahmenbedingungen, in José L. Lozán/Eike Rachor/Karsten Reise/Jürgen Sündermann/Hein von Westernhagen (eds.), Warnsignale aus Nordsee & Wattenmeer: Eine aktuelle Umweltbilanz (2003), 374.

[7] *Chagos Case* (note 5), 128 (paras. 319–320), emphasis added.

[8] For further details, see *Czybulka* on Art. 194 MN 30 *et seq*.

[9] ITLOS, *Southern Bluefin Tuna Cases* (New Zealand *v.* Japan; Australia *v.* Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports (1999), 280, at p. 295, para. 70.

[10] *South China Sea Arbitration* (note 5), 381 (para. 956).

[11] *Alan Boyle*, The Environmental Jurisprudence of the International Tribunal for the Law of the Sea, IJMCL 22 (2007), 369, 373.

[12] *Cf. Boyle* (note 3), 350; *Patricia Birnie,* The Challenges of Applying UNCLOS in a Post UNCED Context, in: Joseph Norton (ed.), The Changing World of International Law in the Twenty First Century (1998), 3, 9; *Gerhard Hafner*, Meeresumwelt, Meeresforschung und Technologietransfer, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 347, 366 *et seq*.

[13] These procedural rules are found also in Part XII itself, see Art. 194 (1); in the *Chagos Case* (note 5), para. 322, the Tribunal noted that such procedural rules 'may, indeed, be of equal or even greater importance than the substantive standards existing in international law'. See also *Czybulka*, Paradise lost? EurUP 1/2016, 58, 65. In the *South China Sea Arbitration* (note 5), the Tribunal underlined the importance of the obligation of EIAs on states, enunciated in Art. 194 (2), being an 'essential part of a comprehensive management system' (para. 948).

[14] UN DOALOS, The Law of the Sea: Protection and Preservation of the Marine Environment (1990), V (introduction).

[15] *Jonathan I. Charney*, The Protection of the Marine Environment by the 1982 United Nations Convention on the Law of the Sea, GIELR 7 (1995), 731, 738.

5 The spatial application of Art. 192 comprises all maritime zones or areas. The obligation covers areas within national jurisdiction as well as areas beyond national jurisdiction.[16] Coastal States, by virtue of their sovereignty, have the duty to protect the marine environment in their territorial sea and their internal waters, in terms of Art. 192.[17] Generally, they also have the competence and the power to enforce the necessary measures.[18] Art. 193 and its reference to Art. 192 would be dispensable if Art. 192 would not apply to the internal waters and the territorial sea. Art. 193 clearly relates to the 'own natural resources of a State' and such a resource tenure in the narrow sense only exists within a State's territory i. e. within the internal waters and the territorial sea. Therefore, States' duty to protect and preserve the marine environment (Art. 192) and its correlation with the sovereign rights of States to exploit their natural resources (Art. 193) are as general provisions applicable to all coastal zones.[19] Art. 192 and its general obligation are hence of great significance where, for example, specific treaties do not include the internal waters in their scope of application.[20]

6 It could be questionable whether the general obligation of Art. 192 is applicable in the EEZs of coastal States. The content of Art. 56 could be an argument against its application in those zones, as it also assigns jurisdiction to coastal States in the EEZ, using the same words with regard to the protection and preservation of the marine environment as Art. 192. This could lead to the misinterpretation that Art. 192 is not applicable in the EEZ due to the existence of a more specific regulation. In fact, however, Art. 56 (1) assigns jurisdiction to coastal States in the EEZ specifically in order to enable them to implement the duties of the environmental part of the Convention. Coastal States not only have the duty to protect the marine environment in their respective EEZ (and the continental shelf), they also need to implement and, moreover, enforce the necessary measures towards other States, since Art. 56 (1)(b)(iii) assigns to them the corresponding jurisdiction. The wording 'as provided for in the relevant provisions of this convention' has to be interpreted in the way that coastal States have to implement the measures in their EEZ, whether normative or administrative, which are necessary to prevent, reduce and control pollution. This encloses the measures mentioned in Arts. 194 (1)-(3), 196, 214 or 220, but also the measures necessary to comply with Art. 194 (5), which include, as a tool, the establishment and management of marine protected areas (MPAs) in the EEZ.[21] Yet, this is without prejudice to specific competency and enforcement regulations laid down numerously in the Convention, as specific provisions are applicable to the different zones of the sea, e. g. Art. 60 (5) concerning the breadth of safety zones, Arts. 73, 211 (4) and (5) concerning laws and regulations regarding marine pollution from foreign vessels or Art. 215.

7 Moreover, the general obligation is also applicable to the high seas and to the Area, where the Authority (ISA) shall adopt appropriate rules, regulations and procedures for the protection of the marine environment (→ Art. 145). On the high seas the obligation concerns the flag States or intergovernmental bodies. To take an example for the high seas, in 2008 the European Council adopted a regulation on the protection of vulnerable marine ecosystems in the high seas from the adverse impact of bottom fishing gears, stating that the absence of a regional fisheries management organisation

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[16] *South China Sea Arbitration* (note 5), para. 940.

[17] Confirmative: *Lee A. Kimball*, The Law of the Sea Convention and Marine Environmental Protection, GIELR 7 (1995), 745, 746: 'Those obligations apply within the territorial water and within estuaries. They effectively reach upstream and inland to cover sources of pollution born to the sea by fresh water courses and through the air.'

[18] For the interpretation of the right of all States of innocent passage and possible laws and regulations concerning the preservation of the environment of the coastal State see Art. 21 (1)(f) and Art. 211.

[19] *Cf. Czybulka/Kersandt* (note 2), 374 *et seq.*; *Rainer Lagoni*, Die Abwehr von Gefahren für die marine Umwelt, in: Rudolf Dolzer (eds.), Umweltschutz im Völkerrecht und Kollisionsrecht, BDGVR 32 (1992), 87, 122; *Birnie* (note 12), 22.

[20] *Lagoni* (note 19), 122.

[21] For further details see *Czybulka* on Art. 194 MN 32 *et seq.*

> 'does not exempt States from their obligation under the law of the Sea to adopt with respect to their nationals such measures as may be necessary for the conservation of the resources of the high seas including the protection of vulnerable ecosystems against the harmful effects of fishing activities.'[22]

Even though no article of the Convention is cited, it seems to be quite clear that the Commission gained its conviction on this obligation of States (or of the EU in this case) by a synopsis of Arts. 192, 194 (5) and Arts. 117 *et seq.* This is evident in the *South China Sea Arbitration*, where the Tribunal found that China breached its obligations 'under Articles 192 and 194 (5) of the Convention' in harvesting endangered species (giant clams) and the environmental degradation of coral reefs due to the 'propeller chopping method'.[23]

8 However, in order to remain adaptable in its application, Part XII is designed as an environmental *framework* and specifically leads the way to further embodiments through regional and sub-regional treaties and agreements. The regional cooperation and elaboration of international rules, standards and recommended practices is explicitly encouraged by the Convention (→ Art. 197). Other conventions and agreements may be concluded in 'furtherance' of the general principles set forth in UNCLOS (→ Art. 237 (1)).

9 The detailed implementation of the primary objective of the environmental part of the Convention, the protection and preservation of the marine environment (Art. 192 *et seq.*), is therefore mainly carried out by advancement (furtherance) of the Convention in regional treaties and regulations, in which individual and regional factors can be taken into account, and in national laws relating to the internal waters, the territorial sea and the respective EEZ transposing the obligations of Part XII.

II. Historical Background

10 UNCLOS represents the first comprehensive codification of international law on the protection and preservation of the marine environment, going well beyond the scope of the 1958 treaties and other sources of environmental law.[24] The emphasis is no longer placed on the responsibility or liability for environmental damage, but rests largely on international regulations and cooperation focused on the protection of the marine environment.[25] At the time of the Geneva Conventions in 1958, the main concerns were still territorial and resource issues and little attention was paid to the protection of the sea. Nonetheless, provisions on duties of States concerning the prevention of pollution by oil and radioactive waste were included in the Convention of the High Seas (High Seas Convention) and in the Convention on the Continental Shelf (CSC). Although these provisions are short and of a general nature, they have had a considerable impact, as they have been widely accepted.[26] Therefore, the four Geneva Conventions signed at UNCLOS I on 29 April 1958 laid the first basis for marine protection on an international scale.[27]

11 As a result of a number of marine environmental disasters, such as accidents of the oil tankers Torrey Canyon in 1967, the blow-out of oil wells at the Ekofisk field in the North Sea in 1977 and at Ixtoc I off Mexico in 1979, resulting in large quantities of oil being spilled into the sea, and the discovery of DDT, a pesticide formerly used in agriculture, in shellfish, fish and even penguins in the Antarctic, the attention towards the protection of the marine environment rose.[28]

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[22] EC Regulation No 734/2008 of 15 July 2008, OJ L 201, 8 (Recital 2).

[23] *South China Sea Arbitration* (note 5), paras. 964–966.

[24] *Lee A. Kimball*, The United Nations Convention on the Law of the Sea: A Framework for Marine Conservation (Part 1), in: IUCN, The Law of the Sea: Priorities and Responsibilities in Implementing the Convention (1995), 1, 25.

[25] *Patricia Birnie/Alan Boyle/Catherine Redgwell*, International Law and the Environment (3rd edn. 2009), 383.

[26] *Cf. Budislav Vukas*, The Law of the Sea: Selected Writings (2004), 208; 56 States are parties to the High Seas Convention and 53 States to the CSC.

[27] *Vukas* (note 26), 208.

[28] *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999), 328.

12 In 1972, the Stockholm Declaration, a 'soft law' product of the United Nations Conference on the Human Environment, set a benchmark in international environmental protection. Recommendations of the Stockholm Conference led directly to the adoption of the 1972 London and Oslo Dumping Convention and the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL).[29] The Stockholm Declaration recognised the inadequacies of the existing law and the need for a more comprehensive approach in order to protect the marine environment from all forms and sources of pollution.[30] The 'Stockholm Principles' formed the base for the environmental provisions of Part XII. Particular reference can be made to Principle 7 of the declaration, which reads:

> 'States shall take all possible steps to prevent pollution of the sea by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.'

Art. 192 also embraces Principle 1, adopted by the Intergovernmental Working Group on Marine Pollution in 1971, which states: 'Every state has a duty to protect and preserve the marine environment and, in particular, to prevent pollution that may affect areas where an internationally shared resource is located.'[31]

13 The challenge of the drafting committee of Part XII was to establish a comprehensive framework for the protection of the marine environment, open for future developments and growing knowledge of the ecology of the oceans. At the same time, the committee had to build on the piece-meal basis of existing international treaties relating to the protection and preservation of the marine environment. The provisions of the Convention in Part XII, Section 1 thus had to be adaptable to known and unknown anthropogenic pollution and intrusion, even of non-substantial nature.[32] As a consequence of this approach, Part XII is not static but open to future developments in many aspects.[33]

14 At the 1973 session of the Sea-Bed Committee, a number of proposals for a comprehensive opening provision of Part XII were submitted to Sub-Committee III, which were then again examined in the Informal Working Group 2. During the drafting process, a working paper was submitted that combined the right of resource exploitation with the duty to protect and preserve the marine environment.[34] Working Group 2, however, decided to separate the rights and duties and came up with the following text (including the asterisk):

> 'States have the obligation to protect and preserve the marine environment, in accordance with the provisions of these articles.*
>
> *The reference to the provisions of these articles is intended to reflect the fact that the Working Group will wish to specify in subsequent articles the scope, qualifications and limitations of this general obligation. For example, the working Group may wish to specify that nothing in these articles shall be deemed to impose a duty on a State to prevent pollution that only affects areas or resources under their jurisdiction.'[35]

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[29] *Cf. Patricia Birnie*, Impact on the Development of International Law on Cooperation: the United Nations Law of the Sea, Straddling Stocks and Biodiversity Conventions, in Myron H. Nordquist/John N. Moore/Said Mahmoudi, The Stockholm Declaration and Law of the Marine Environment (2003), 85, 96; *Birnie/Boyle/Redgwell* (note 26), 382.

[30] *Boyle* (note 3), 349.

[31] UNCHR, Report of the Intergovernmental Working Group on Marine Pollution on Its Second Session, UN Doc. A/CONF.48/IWGMP.II/5 (1971), 3.

[32] *Cf. Alexander Proelss*, Meeresschutz im Völker- und Europarecht: Das Beispiel des Nordatlantiks (2004), 82.

[33] *Cf. Detlef Czybulka*, The Convention on the Protection of the Marine Environment of the North-East Atlantic, in: Hjalmar Thiel/J. Anthony Koslow (eds.), Managing Risks to Biodiversity and the Environment on the High Sea, Including Tools Such as Marine Protected Areas: Scientific Requirements and Legal Aspects, BfN Skripten 43 (2001), 175, 176.

[34] Sea-Bed Committee, Australia: Working Paper on Preservation of the Marine Environment, UN Doc. A/AC.138/SC.III/L.27 (1973, mimeo.), 3 (Principle (a)).

[35] Sea-Bed Committee, Working Group 2 Paper No. 3, UN Doc. A/AC.138/SC.III/L.39 (1973), 1 (Annex).

In 1974, the Third Committee again dealt with the formulation of the opening provision of Part XII. A number of drafts contained a wording similar to the previous proposal of Working Group 2, but without the restrictive footnote, purely stating: **15**

> 'States have the obligation to protect and preserve the marine environment, (in accordance with the provisions of these articles).'[36] In the end, formulations such as '[…] in accordance with the provisions of these articles' were rejected and, after a minor amendment in the Revised Single Negotiating Text, the final version of Art. 192 of the Convention was adopted.[37]

III. Elements

1. 'States'

Art. 192 addresses 'States' and not only 'States Parties' to the Convention as – for example – Art. 311 does. This wording was used in Part XII, but also in Parts XIII and XIV. It is often argued that the use of the term 'States' implies that the obligation of Art. 192 is of a general nature, a principle, and therefore applicable to the State community as a whole.[38] This argument is not convincing since there is no systematic use of the terms 'States' and 'States Parties' in the Convention. Thus, Arts. 34 and 35 of Vienna Convention on the Law of Treaties (VCLT) have to be respected and a potential extension of the general obligation to third States has to be based on other arguments such as State practice and the assumed customary character of the provision that will be treated below[39]. **16**

Although Art. 192 addresses expressively only 'States', it is understood that international organizations have a comparable obligation to protect and preserve the marine environment if they have competences with regard to the use of living or non-living resources or other relevant human activities. Examples include the regional fishery management organizations, the ISA (→ Art. 145) or the International Maritime Organization (IMO) that regulates the pollution from vessels. These organizations are mentioned in several articles of the Convention (Art. 197, Art. 209 in connection with Part XI, Art. 211) where they are asked to fulfil their obligations concerning the protection of the marine environment within their respective fields of competence. **17**

2. 'have the obligation'

a) Legal effect of Art. 192. Art. 192 is entitled 'General Obligation'. Obligation is a generic term for any type of legal duty or liability. In Art. 192, the term 'obligation' is deliberately used instead of the term 'duty' as used in Art. 193. The drafting committee was aware of the different wording throughout Part XII, but the recommended alignment of the English text could not be agreed upon.[40] Although the word obligation is synonymous with duty, 'obligation' and 'duty' do not necessarily bear the same meaning in all contexts. However, the draft text and process plus the fact that the final French and Spanish texts use '*obligacion*' and, respectively, '*obligación*' in Art. 192 and Art. 193 indicate that no substantive distinction should be made between the words for the purpose of Part XII.[41] **18**

The general obligation of Art. 192 produces a legal effect. According to Art. 31 (1) of the VCLT, 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. **19**

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[36] Third Committee UNCLOS III, Canada *et al.*: Draft Articles on a Zonal Approach to the Preservation of the Marine Environment, UN Doc. A/CONF.62/C.3/L.6 (1974), OR III, 249 (Art. 1).

[37] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII.

[38] *Cf.* Nordquist/Rosenne/Yankov (note 1), 39 (MN 192.8).

[39] *Infra*, MN 21 *et seq.*

[40] UNCLOS III, Report of the Chairman of the Drafting Committee, UN Doc. A/CONF.62/L.40 (1979), OR XII, 95, 103 (Section XXIV).

[41] *Ibid.*; *cf.* Nordquist/Rosenne/Yankov (note 1), 39 (MN 192.8).

That a legal effect was intended can be seen from the fact that Part XII is an integrative part of the Convention and starts with the very clear wording of Art. 192. This prominent position of Art. 192, as the opening provision to the environmental part of the Convention, reflects its great significance. If this provision were only meant to be a political statement, the negotiating parties would rather have left it solely at another position e. g. at the Preamble, where the protection and preservation of the environment is also mentioned recognising thus the importance of the subsequent legal regime in Part XII.[42] Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Art. 31. The drafting documents show that the ambition of the conference was to establish general principles and obligations to protect the marine environment as a guiding concept for the law of the sea.[43] Therefore, Art. 192 needs to be understood as a legally binding commitment, a principle, and not only a political obligation.[44] The content of the general obligation in Art. 192 is further detailed in the subsequent provisions of Part XII including Art 194, as well as by reference to specific obligations set out in other international agreements, as envisaged in Art. 237 of the Convention.[45]

20 Yet, there are still opposing views[46] interpreting the drafting documentation as if Art. 192 was simply intended to be a political statement and therefore without any legal effect. In particular, Paper No. 3 submitted by Working Group 2[47] with its restricting asterisk footnote shaped the view that Art. 192 has no legal effect on its own but needs further specification.[48] To counter this view, it should be pointed out that the restricting supplementary notes in the draft proposals[49] did not find their way into the text of the Convention. In the end, the Drafting Committee decided to put specific emphasis on the environmental duty by codifying it in a single article, while the subsequent Art. 193 is aimed at balancing this obligation with the right of States to exploit their natural resources.[50]

21 **b) Art. 192 as Customary Law.** The Stockholm Declaration recommended that:

> 'the rights and powers exercised must be consistent with the State's primary responsibility for marine environmental protection in the areas concerned: they should be subject to international rules and standards and to review before an appropriate international tribunal'.[51]

The negotiating States also stressed that the environmental articles should be supported by a strong measure of *opinio juris*[52] and shall represent an agreed codification of existing principles which have become part of customary law.[53] *Opinio juris* may become binding as a matter of customary law, if there is sufficiently general acceptance by non-parties or by parties acting in a manner evidencing a belief that the treaty rules represent customary law.[54] In 1989, according

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[42] *Cf. South China Sea Arbitration* (note 5), para. 939.

[43] *Cf.* Third Committee UNCLOS III, 3rd Meeting, UN Doc. A/CONF.62/C.3/SR.3 (1974), OR II, 311 (para. 34); Sea-Bed Committee, Decisions of the United Nations Conference on the Human Environment (5–16 June 1972) Relating to the Preservation of the Marine Environment and Marine Pollution, UN Doc. A/AC.138/SC.III/L.17 (1972), 11(Recommendation 92).

[44] *Cf. Proelss* (note 32), 77.

[45] *Cf. South China Sea Arbitration* (note), para. 942.

[46] *Hafner* (note 12), 366 *et seq.*; *Michael Winkler*, Ökologische Intervention im internationalen Recht? 'Neue Weltordnung' und Umweltschutz in staatsfreien Räumen, Natur und Recht 17 (1995), 57, 58.

[47] See *supra*, MN 14.

[48] *Hafner* (note 12), 366 *et seq.*

[49] Working Group 2 Paper No. 3 (note 35).

[50] *Ibid.*

[51] Decisions of the UNCHE (note 43), 11.

[52] *Opinio juris* is the belief that an action was carried out because it was a legal obligation. It is also the second element (along with State practice) necessary to establish a legally binding custom.

[53] *Birnie/Boyle/Redgwell* (note 26), 387; it has also become consensual that the obligation of Art. 192 itself has become part of customary law; GA, Law of the Sea – Protection and Preservation of the Marine Environment: Report of the Secretary-General, GA Res. 44/461 of 18 September 1989, 4 (para. 29).

[54] *Churchill/Lowe* (note 28), 6.

to a report of the UN Secretary General to the General Assembly, Art. 192 was generally regarded as a statement of customary international law with regard to the environmental responsibility of States towards the oceans. The Secretary General further stated that the wording used in the provision reflects its non-discretionary nature and the importance placed upon the issue by the international community, and that a State breaching its obligation to protect and preserve the marine environment would be in breach of international law.[55] Moreover, the provisions on the protection of the marine environment are considered by many States to reflect general applicable principles or rules of customary law.[56] However, reducing the scope on teleological grounds, this simply implies that States (and international organisations in a comparable way) do have a general duty to protect the marine environment,[57] whereas complicated and technical regulations cannot easily convert into customary law. In this sense, and according to a teleological interpretation, Art. 192 forms part of customary law.[58] International customary law is, in principle, binding upon all States.[59]

As a fundamental duty, Art. 192 is kept general to create the necessary flexibility to bring national and regional environmental law in line with international law.[60] Principles have, compared to rules, a higher moral character and therefore create a link between ideals and legal rules.[61] Without doubt, Art. 192 has such a moral character, a fundamental meaning, which is why the majority assigns an *erga omnes* quality to the provision.[62] *Erga omnes* obligations are obligations of a State towards the international community as a whole which, by their very nature, are the concern of all States and in whose fulfilment all States have a legal interest.[63] Therefore, provisions with *erga omnes* character can generally be enforced by the State community as such. Prerequisite for both, obligations *erga omnes* and *opinio juris*, is an ascertainable interest (common concern or common areas) of the community of States in each concrete and individual case.[64] Multilateral treaties and customary law deriving from treaties concerned with the protection of the global environment or of areas of common interest or concern, create obligations whose intended beneficiaries are the international community.[65] The International Law Commission recognised that all States have a collective and individual interest in the enforcement of such treaties.[66] Thus, any State will have standing to sue for breach or non-compliance. This also applies to the duty to protect and preserve the marine environment of areas beyond national jurisdiction.[67] As it may be seen

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[55] GA Res. 44/461 of 18 September 1989.

[56] *Philippe Sands*, Principles of International Environmental Law, vol. I (1995), 294. As evidenced by the reference in the preambular paragraph of the 1992 OSPAR Convention which recalls the relevant provisions of customary law reflected in Part XII of the UNCLOS.

[57] *Peter Ehlers*, Meeresfreiheit und aquitoriale Ordnung – zur Entwicklung des Seerechts, in: Wilfried Erbguth (ed.), Stand und Entwicklung im Seerecht, Umweltrecht, Städtebaurecht, Raumordnungs- und Fachplanungsrecht (2013), 15, 17.

[58] Similar *Birnie* (note 12), 22. *Sands* (note 56), 294; *Jon M. Van Dyke*, Giving Teeth to the Environmental Obligations in the Law of the Sea Convention, in Donald R. Rothwell/Alex G. Oude Elferink (eds.), Oceans Management in the 21st Century: Institutional Frameworks and Responses (2004), 167.

[59] *Kimball* (note 24), 27; *Churchill/Lowe* (note 28), 6; An *opinion iuris* then again rises to the level of a *jus cogens* norm when the principle it embodies has been universally accepted, through consistent practice by most States. *Cf.* ICJ, *Case concerning Right of Passage over Indian Territory* (Portugal *v.* India), Merits, Judgment of 12 April 1960, ICJ Reports 1960, 6, 123 *et seq.*

[60] *Cf.* regarding the nature of principles: *Jonathan Verschuuren*, Principles of Environmental Law (2003), 134 *et seq.*

[61] *Ibid.*, 145: Verschuuren also points out that there is no strict separation between principles on one side and rules on the other.

[62] *Cf. Proelss* (note 32), 79; *Birnie/Boyle/Redgwell* (note 26), 387; *Jonna Ziemer*, Das gemeinsame Interesse an einer Regelung der Hochseefischerei (2000), 217 *et seq.*

[63] *Cf. Jochen A. Frowein*, Obligations Erga Omnes, MPEPIL, para. 1, available at: http://www.mpepil.com; *cf.* ICJ, *Case of Barcelona Traction, Light and Power Company, Limited* (Belgium *v.* Spain), Judgment of 5 February 1970, ICJ Reports (1970), 3, 32 (para. 33).

[64] *Barcelona Traction Case* (note 63), 32 (para. 33).

[65] *Cf. Birnie/Boyle/Redgwell* (note 26), 234.

[66] *Ibid.*

[67] *Ibid.*

in many provisions of the UNCLOS[68], even States that have not joined specialised environmental agreements have to respect with due diligence the substance and directing function of the obligation resulting from Art. 192, even in fields of application where there are still no specialised agreements, such as the use of genetic marine resources.[69]

3. 'Protect and Preserve'

23 The UNCLOS places with Art. 192 the general obligation on all States to protect and preserve the marine environment. The wording of Art. 192 to 'protect and preserve' already indicates its comprehensive meaning which goes far beyond the prevention of substantive pollution, which in many cases is subject to (at least) national criminal law. The wide-ranging obligation rather requires the prevention of suspected negative changes of the marine environment through its use, as well as taking active measures to preserve the ocean as an ecosystem and to minimise pollution.[70]

24 Art. 192 not only concerns the protection of the marine environment from future damage but also the preservation of it. Preservation goes beyond protection. Preservation in the sense of maintaining or improving its present condition[71] is an active long-term process of maintaining and even improving the environmental status of the sea, but, unlike conservation, it does not permit consumptive use by humans.[72] Because of the inclusion of the term 'preservation', it is not enough to only prevent damages, as was previously the case.[73] Art. 192 entails the positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation not to degrade the marine environment.[74] However, the greatest protection (e. g. for fragile ecosystems) would be achieved if States renounced the use of the ocean as such.[75] This can be implemented by the establishment of Marine Protected Areas[76] with an effective management including so-called 'no take', 'no go' and 'no time' areas. If these MPAs are combined in a network, an even higher standard of protection can be reached as by scattered MPAs. It is questionable why the word 'restore' has not been included in this article, since the establishment of an obligation to restore the ocean would be the logical measure to ensure compensation for earlier unsustainable use. Taking a look at the drafting documents, it seems like this aspect was not considered at the time of the negotiations.[77] However, later legislative documents like the European 'Marine Strategy Framework Directive' and other regional agreements do explicitly include 'restore' in their provisions.[78]

4. 'Marine Environment'

25 In contrast to other terms, 'marine environment' is not expressly defined in Art. 1 (1)(4). However, Art. 1 (1)(4), dealing with the 'pollution of the marine environment', allows a

[68] See Art. 208 (3), 211 (2)(5), 217 (1), 218 219, 220 (1), 222.

[69] *Ehlers* (note 57), 18.

[70] *Cf. Günther Jaenicke*, Die Dritte Seerechtskonferenz der Vereinten Nationen, ZaöRV 38 (1978), 438, 441 *et seq*.; *Peter Kersandt*, Rechtliche Vorgaben und Defizite bei Schutz und Nutzung der Nordsee (2010), 219; *Proelss* (note 32), 77 *et seq*.; Nordquist/Rosenne/Yankov (note 1), 40 (MN 192.9); *South China Sea Arbitration* (note 5), para. 941.

[71] *South China Sea Arbitration* (note 5), para. 941.

[72] *Niels West*, Marine Affairs Dictionary: Terms, Concepts, Laws, Court Cases and International Conventions and Agreements (2004), 479.

[73] *Cf.* GA Res. 2750 (XXV) (C) of 17 December 1970; *Jaenicke* (note 70), 441 *et seq*.

[74] *South China Sea Arbitration* (note 5), para. 941.

[75] *Hafner* (note 12), 368.

[76] See *Czybulka* on Art. 194 MN 31–36.

[77] *Cf. Ehlers* (note 52), 17; In the recent *South China Sea Arbitration* (note 5), the Tribunal discussed the possibilities of restoration (and transplantation) of the damaged coral reefs, claimed by Chinese scientist, but rejected the idea because restoration 'is not likely to succeed', if stressors persist, and restorative activities are 'extremely expensive' (para. 982 (d)).

[78] EC Directive 2008/56 of 17 June 2008, OJ 2008 L 164, 19.

conclusion with regard to the spatial scope of the term and its content. The marine environment can be defined in various ways, its scope ranging accordingly from ocean-level processes to those of regional seas or smaller entities and those that occur at species and genetic level. Through the wording of Art 1 (1)(4), it is clarified that estuaries are spatially included.[79] The report of the informal meetings on protection and preservation of the marine environment of the Third Committee in 1978 emphasised that the term 'marine environment', as incorporated in Article 1 (1)(4), includes 'the concept of marine life'.[80] The marine environment was defined by the Malta Working Group as following:

> 'The marine environment comprises the surface of the sea, the air space above, the water column and the sea-bed beyond the high tide mark including the biosystems therein or dependent thereon.'[81]

The Convention thus goes beyond the anthropocentric understanding of the environment;[82] its scope is comprehensive and includes the entire marine ecosystem. The Convention not only refers to pollution but also includes the protection and preservation of the marine environment as such; this becomes obvious by taking a look at Art. 194 (5).[83] Art. 194 (5) expands the scope of Art. 192 to rare or fragile ecosystems and to the habitats of species, as a particular valuable environment in need of protection.[84] As has been highlighted in the recent *South China Sea Arbitration*, Art. 192 imposes in the light of Art. 194 (5) a due diligence obligation to take those measures 'necessary to protect and preserve rare and fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.' 'Therefore, in addition to preventing the direct harvesting of species recognized internationally as being threatened with extinction, Article 192 *extends* to the prevention of harms that would affect depleted, threatened, or endangered species *indirectly* through the destruction of their habitats.'[85] Thus, the obligation of Art. 192 'to protect and preserve' refers to the all-encompassing living and non-living marine nature,[86] its ecosystems and components.

Article 193
Sovereign right of States to exploit their natural resources

States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

Bibliography: *Patricia Birnie*, The Challenges of Applying UNCLOS in a Post UNCED Context, in: Joseph Norton (ed.), The Changing World of International Law in the Twenty First Century (1998); *James C. Card*, Implementing the United Nations Convention on the Law of the Sea: A Coast Guard Perspective, GIELR 7 (1994–1995), 725–730; *Jonathan I. Charney*, The Protection of the Marine Environment by the 1982 United Nations Convention on the Law of the Sea, GIELR 7 (1994–1995), 731–738; *Detlef Czybulka*, Das Rechtsregime der Ausschließlichen Wirtschaftszone (AWZ) im Spannungsfeld von Nutzung und Schutzinteressen – Zur Geltung des nationalen Rechts in der AWZ, NuR 23 (2001), 367–374; *Lee A. Kimball*, The United Nations Convention on the Law of the Sea: A Framework for Marine Conservation (Part 1), in: IUCN, The Law of the Sea: Priorities and Responsibilities in Implementing the Convention (1995), 1–120; *Elli Louka*, International Environmental Law (2006); Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991); *Alexander Proelss*, The Law on the

[79] See further *Tanaka* on Art. 1 MN 12–15.

[80] Third Committee UNCLOS III, 38th Meeting, UN Doc. A/CONF.62/C.3/SR.38 (1978), OR IX, 158; for further details.

[81] Sea-Bed Committee, Malta: Draft Articles on the Preservation of the Marine Environment, UN Doc. A/AC.138/SC.III/L.33 (1972); *cf.* for the development of the definition: *Hafner* (note 12), 361 *et seq.*

[82] *Hafner* (note 12), 363.

[83] For further remarks, see *Czybulka* on Art. 194 MN 30 *et seq.*

[84] *South China Sea Arbitration* (note 5), para. 945; *Kristina Gjerde*, High Seas Marine Protected Areas, IJMCL 16 (2001), 515, 526; for further details, see *Czybulka* on Art. 194 MN 33–34.

[85] *South China Sea Arbitration* (note 5), para. 959, Emphasis added.

[86] *Cf. ITLOS Southern Bluefin Tuna Cases* (note 9).

Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited, Ocean Yearbook 26 (2012), 87–112; *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2010); *Philippe Sands*, Principles of International Environmental Law, vol. I (1995); *Philippe Sands*, Principles of International Environmental Law (2nd edn. 2003); *Nico Schrijver*, Sovereignty over Natural Resources (2008)

Documents: GA, Law of the Sea – Protection and Preservation of the Marine Environment: Report of the Secretary General, UN Doc. A/44/461 (1989); GA Res. 1803 8(XVII) of 14 December 1962; UNCED, The Rio Declaration on the Environment and Development, UN Doc. A/CONF.151/5/REV.1 (1992), ILM 31, 874 (Rio Declaration); UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973), 3 (Stockholm Declaration)

Cases: PCA, *South China Sea Arbitration* (Republic of the Philippines *v.* People's Republic of China), Award of 12 July 2016, available at: https://www.pcacases.com/web/view/7

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I. Purpose and Function

1 This article reflects the integration of the national economic interests of States with their obligation to respect the global interest in the protection and preservation of the marine environment.[1] Two fundamental objectives of international law pulling in opposing directions have to be harmonized: States have a sovereign right over their natural resources but must not cause damage to the environment.[2] The Convention is the glue that binds these maritime interests in the environmental field.[3] Given the general obligation of Art. 192 to protect and preserve the marine environment, and the fact that almost every human exploiting activity in the sea or on the seabed or subsoil (or even on land regarding the effects on river catchments) may lead to pollution or put the marine environment at risk, Art. 193 aims at clarifying that Art. 192 should not be understood as banning States' sovereign right to engage in exploitation of their own natural resources. The prominent position and order of Arts. 192 and 193 reveal the significance of the two topics as fundamental principles.[4] Therefore, Art. 193 balances the States' obligation to protect and preserve the marine environment, as proclaimed in Art. 192, with the States' sovereign right to exploit their natural resources. The sovereignty of States encompasses the exploitation of the resources on land, in the internal waters and in the territorial sea. The sovereignty over the territorial sea is exercised 'subject to this Convention and to other rules of international law' (Art. 2 (3)), that means in accordance with Arts. 192 and 193. However, it should be recognised that the obligation to protect and preserve the marine environment has been prioritized over the sovereign right to exploit own natural resources,[5] since States, while exploiting their resources even in 'their' territorial sea, have to comply with the general

[1] GA, Law of the Sea – Protection and Preservation of the Marine Environment: Report of the Secretary General, UN Doc. A/44/461 (1989), para. 28.

[2] *Cf. Philippe Sands*, Principles of International Environmental Law (2nd edn. 2003), 235.

[3] *James C. Card*, Implementing the United Nations Convention on the Law of the Sea: A Coast Guard Perspective, GIELR 7 (1994–1995), 725, 729.

[4] *Ibid.*, 729.

[5] *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2010), 342.

obligation (and its existing implementations) laid out in Art. 192. It has been clarified in the *South China Sea Arbitration* that China's extensive island building of seven reefs in the Spratly Islands using millions of tons of dredged coral, rocks and sand breached its obligation under Art. 192, independently from the question of sovereignty over these natural resources.[6]

The interaction between Arts. 192 and 193 demonstrates the compromise which had to be made between the proper consideration of the different economic status of States (see *infra* historical background) and the common awareness of the need to protect and preserve the marine environment. While the foremost purpose of Art. 193 has been to guarantee States' demand for natural resources and the right to exploit them, it also underlines the precept: 'No use of the ocean without its protection.'[7] 2

Art. 193 combines in reality *three* concepts: the sovereignty of States to exploit their natural resources, the right and duty to apply national environmental policies to such exploitation[8] and the general obligation in international law to protect and preserve the marine environment.[9] However, the three components of the article do not have the same range of application: a 'sovereign right' to exploit definitely cannot be claimed in the high seas or in the Area; national environmental policies are applied in the territorial sea (or on land or the internal waters) and can be extended by national law in many functional respects to the exclusive economic zone (EEZ) and the continental shelf, but not to the high seas or the Area as a maritime zone. The general obligation of Art. 192, however, is applicable in all zones of the sea[10]. Consequently, the duty to protect and preserve the marine environment but not the sovereign right to exploit natural resources is applicable in all zones of the sea. 3

Even though the wording in Art. 56 and 193 differs ('sovereign rights' instead of 'the sovereign right'), the Convention recognises, as a principle, that the expansion of coastal States' rights to develop, manage and exploit offshore resources, due to the (then) newly possible establishment of a 200 NM EEZ, must be linked to duties to conserve living resources and to protect the marine environment.[11] This balanced approach was the result of a trade-off between the specific interests and concerns of the nations that took part in the UNCLOS III conference.[12] Thus, '[…] the right to exploit their natural resources pursuant to their environmental policies […]' is limited to the territorial seas, *mutatis mutandis* to the EEZ and the continental shelf and is not applicable in the high seas and the Area[13], whereas the compliance with the duty to protect and preserve the marine environment is required in the entire ocean. 4

II. Historical Background

The sovereignty principle pre-dates the Stockholm Declaration and is rooted in the principle of permanent sovereignty over natural resources as it was formulated in various resolutions of the UN General Assembly starting from the 1950s.[14] In the preamble of the 5

[6] PCA, *South China Sea Arbitration* (Republic of the Philippines *v.* People's Republic of China), Award of 12 July 2016, paras. 940, 976, 983, available at: https://www.pcacases.com/web/view/7.

[7] *Cf. Detlef Czybulka*, Das Rechtsregime der Ausschließlichen Wirtschaftszone (AWZ) im Spannungsfeld von Nutzung und Schutzinteressen – Zur Geltung des nationalen Rechts in der AWZ, NuR 23 (2001), 367, 369: 'Wer das Meer nutzt, muss es auch schützen.'

[8] See *infra*, MN 13 *et seq*.

[9] *Cf.* Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991), 46, 47 (MN 193.2); Sea-Bed Committee, Organization of African Unity (OAU) Declaration on the Issues of the Law of the Sea, UN Doc. A/AC.138/89 (1973), 8 (Declaration H, Preservation of the Marine Environment).

[10] See *South China Sea Arbitration* (note 6), Award, para 940; *Czybulka* on Art. 192 MN 5–7.

[11] *Lee A. Kimball*, The United Nations Convention on the Law of the Sea: A Framework for Marine Conservation (Part 1), in: IUCN, The Law of the Sea: Priorities and Responsibilities in Implementing the Convention (1995), 1, 16.

[12] *Ibid*., 18.

[13] The Area and its resources are the common heritage of mankind, see Art. 136.

[14] *Sands* (note 2), 236 (footnote 11 for reference to GA resolutions).

1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, the exercise of this sovereign right is considered to be 'in accordance with the Charter of the United Nations and the principles of international law'; but the genuine origin of Art. 193 must be seen in Principle 21 of the Stockholm Declaration[15] which reads:

> 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.'[16]

6 One of the reasons to subject the right of States to exploit their own natural resources to environmental duties in the Stockholm principle was that States tend to prioritise their economic interests. Arrangements between States and foreign private companies for the exploitation of natural resources, particularly oil and minerals, in developing countries that negatively affected the environment were the results of that policy;[17] later, the policies of many States changed in a more anti-colonial way. The clarification that States are allowed to exploit their natural resources addressed States' fears of too strict environmental obligations which might affect their economic interests. The concern of restraining possible economic development was also present at UNCLOS III. Even though the negotiating parties generally recognised the pressing need for an effective action to prevent marine pollution, at the same time there was the intention to balance this need with States' interest in economic considerations, freedom of navigation and other matters.[18] Foremost, developing States were worried about possible limits of economic development by the envisaged restriction of their sovereign right to exploitation for the benefit of marine environmental protection. Particularly, the Organisation of African Unity (OAU) referred to its responsibility 'to harness the natural and human resources of our continent for the total advancement of our peoples in all spheres of human endeavour, recalling on the resolutions […] on the permanent sovereignty of African countries over their natural resources'.[19] For this reason, the requirement to only exploit natural resources in accordance with 'their duty to protect and preserve the marine environment' was further concretized by the reference to States' 'own environmental policies'.[20]

7 In 1973, an Australian working paper introduced the basic subject matter of Principle 21 Stockholm Declaration into the text of the Convention.[21] Furthermore, it was pointed out that Principle 21 'reflects a basic theme which has arisen in the United Nations deliberations on pollution over recent years, *viz*. that while a State may do whatever damage it wishes to areas under its own sovereignty, it may not cause damage to areas outside its sovereignty.'[22] Several drafts reflect this matter, showing the concerns of the negotiating States regarding their sovereign rights, e. g.: 'Nothing in this Convention shall derogate from the sovereign right of a state to exploit its own natural resources […]'[23] and '[…] taking into account their economic needs and their programmes for economic development.'[24]

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[15] *Patricia Birnie*, The Challenges of Applying UNCLOS in a Post UNCED Context, in: Joseph Norton (ed.), The Changing World of International Law in the Twenty First Century (1998), 7 *et seq*.

[16] UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973), 3 (Stockholm Declaration).

[17] *Sands* (note 2), 236.

[18] *Cf*. Sea-Bed Committee, Australia: Working Paper on Preservation of the Marine Environment, UN Doc. A/AC.138/SC.III/L.27 (1973), 2.

[19] UNCLOS III, Declaration of the Organization of African Unity on the Issues of the Law of the Sea, UN Doc. A/CONF.62/33 (1974), OR III, 1.

[20] See for further remarks, *infra* MN 16 *et seq*.

[21] *Cf*. Australian Working Paper (note 18).

[22] *Ibid.*, 3. See now Art. 195.

[23] Third Committee UNCLOS III, Results of Consideration of Proposals and Amendments Relating to the Preservation of the Marine Environment, UN Doc. A/CONF.62/C.3/L.15 (1974), OR III, 260 (Art. II).

[24] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975), OR IV, 171, 176 (Arts. 3, 35).

The following text of Working Group 2, presented by the delegation of Brazil: 'Nothing in this Convention shall derogate from the sovereign right of a State to exploit its own resources pursuant to its environmental policies and programmes for economic development'[25], and the subsequent draft of the OAU: 'African States recognise that every state has a right to manage its resources pursuant to its environmental policies and has an obligation in the prevention and control of pollution of the marine environment'[26], formed the foundation of Art. 193. During the Fourth Session in 1976, the negotiating parties decided to leave out the reference to economic needs and economic development and thus the final text, which then became Art. 193, was adopted.[27] From today's perspective, the abandonment of the reference to economic needs in the text was far sighted and allows a modern interpretation of the principle. 8

III. Elements

1. 'States'

Art. 193, like Art. 192, addresses all States, not only parties to the Convention.[28] This is the case in a number of provisions in Part XII, XIII and XIV. It is argued that the use of the broad term 'States' means that the corresponding duties and rights constitute principles, which are applicable to the international community as a whole.[29] This argument is not really convincing since there is no systematic use of the terms 'States' and 'States Parties' in the Convention.[30] Whereas the extension of the obligation stemming from Art. 192 to competent international organisations is reasonable and should be made, this is not the case for the application of Art. 193, because international organisations in general have no 'sovereign rights' or even sovereignty. If the sovereign rights of the member States of an international organisation are transferred to the organisation (such as the competence concerning the conservation of marine biological resources under the common fisheries policy in Art. 3 (d) of the Treaty on the Functioning of the European Union (TFEU)) the organisation replaces the 'State' in this respect and is covered by this provision. 9

2. 'have the sovereign right'

a) Sovereignty over natural resources. The United Nations Charter is based on the principle of sovereignty of States.[31] Each State is sovereign and no State is to violate the sovereignty of another State.[32] States enjoy sovereignty and exclusive jurisdiction over their 'territory', comprising the land (including islands and rocks), internal waters, territorial sea, archipelagic waters, and the subsoil below and airspace above this land.[33] The sovereignty of a State over its natural resources is a principle frequently recurring in international legal instruments.[34] The sovereignty of States emerges from its 'territory' and has been expanded to its 'aquitorium', which includes the internal waters and the territorial sea. It is well- 10

[25] Sea-Bed Committee, Note by the Chairman of Working Group 2 Addressed to the Chairman of Sub-Committee III, Addendum, UN Doc. A/AC.138/SC.III/L.52/Add.1, 14 (Annex 2, WG.2/Paper No. 7).

[26] OAU Declaration (note 9), 8.

[27] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/Rev.1/PART III (1976), OR V, 173, 174 (Art. 3).

[28] See *Czybulka* on Art. 192 MN 16–17.

[29] See Nordquist/Rosenne/Yankov (note 9), 39 (MN. 192.8).

[30] See *Czybulka* on Art. 192 MN 16–17.

[31] *Elli Louka*, International Environmental Law (2006), 6.

[32] Art. 2 (1) and (2) Charter of the United Nations.

[33] *Philippe Sands*, Principles of International Environmental Law, vol. I (1995), 15 *et seq*.

[34] *Cf. Louka* (note 31), 49; Principle 21 Stockholm Declaration; UNCED, The Rio Declaration on the Environment and Development, UN Doc. A/CONF.151/5/REV.1 (1992), ILM 31, 874 (Rio Declaration), Principle 2; Art. 3 United Nations Convention on Biological Diversity.

established practice, accepted as law, that, within the limits stipulated by international law, every State is free to manage and utilize its natural resources residing under its sovereignty and to formulate and pursue its own environmental and developmental policies.[35]

11 **b) 'Sovereign rights' in the EEZ and over the continental shelf.** According to Art. 56 (1)(a), the coastal State has 'sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non living, of the waters superjacent to the sea-bed and of the seabed and its subsoil' in the EEZ.[36] According to Art. 77 (1), the coastal State exercises 'over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources'.[37] We do not find expressly a sovereign right for the purpose of 'conserving and managing' the natural resources on the continental shelf, as Art. 56 (1)(a) provides for the EEZ, but Art. 77 has to be interpreted in a similar sense (see *infra* MN 12). In comparison to the functional 'sovereign rights' laid down in Arts. 56 and 77, it must be noted that these rights are conceptually not quite the same as the 'sovereign right' in Art. 193.[38] This is also true for other 'rights' and 'jurisdiction'[39] of the coastal States over other areas adjacent to their territorial seas,[40] the resources of the continental shelf, its seabed and subsoil[41], and in their 'exclusive economic zones'.[42] These 'functional' rights are not identical with the 'sovereign right to exploit' mentioned in Art. 193. The sovereign rights to exploit the (living and non-living) natural resources in the EEZ and on the continental shelf are not given unconditionally, but are restricted by numerous exemptions and special regulations in the Convention itself, especially in Part V and Part VI,[43] and may be further shaped by regional agreements and the environmental law of the coastal State.

12 For the purpose of the interpretation of Art. 193, however, it is not justifiable to exclude the EEZ or the continental shelf completely from the applicability of this principle. According to Art. 56, in the EEZ the coastal State has: (a) sovereign rights for the purpose of exploring, conserving and managing the natural resources, he has also (b)(iii) 'jurisdiction' with regard to 'the protection and preservation of the marine environment'. According to Art. 77 (1) the coastal State exercises over the continental shelf 'sovereign rights for the purpose of exploring and exploiting its natural resources', and its rights are 'exclusive' in the sense that the coastal State may decide not to explore or exploit but to protect and preserve parts of the shelf or even the shelf in totality and that consequently 'no one may undertake these activities without the express consent of the coastal State' (Art. 77 (2)). As a result, Art. 77 (2) empowers the coastal State *inter alia* to protect and preserve the continental shelf. Therefore, it seems difficult to argue for a distinction to be made between 'sovereign right' and 'sovereign rights' on the one hand and 'rights' and 'jurisdiction' on the other in terms of quality by mere recourse to the wording of the pertinent provisions.[44] As mentioned above, there was a consensus of the negotiating States that the expansion of coastal States rights to exploit offshore resources had to be linked with the obligation to protect the marine environment. Hence, coastal States have functional gathered competences and rights to exploit resources (Arts. 56, 60 *et seq.*, Art. 77) as well as competences and jurisdiction or

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[35] *Nico Schrijver*, Sovereignty over Natural Resources (2008), 241.

[36] See further *Proelss* on Art. 56 MN 8–19.

[37] See further *Maggio* on Art. 77 MN 19–20.

[38] *Cf.* Nordquist/Rosenne/Yankov (note 9), 49 (MN 193.6 (b).

[39] Within the EEZ the coastal States have also 'jurisdiction' with regard to 'the protection and preservation of the marine environment'.

[40] Art. 33.

[41] Art. 76 *et seq.*

[42] Art. 55 *et seq.*

[43] See e. g. Arts. 61 *et seq.* for the conservation and utilization of the living resources in the exclusive economic zone.

[44] *Alexander Proelss*, The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited, Ocean Yearbook 26 (2012), 87, 102.

other legal powers to pursue the integration of environmental policies in their national laws regarding human activities in the EEZ or on the continental shelf in order to fulfil their specific duty as coastal state to protect and preserve the marine environment. Thus, Art. 193 is as a principle fully applicable in the EEZ and on the continental shelf.

3. 'to exploit their natural resources'

Exploitation and ('wise' or sustainable) use of natural resources are critical conditions of human existence. The explicit codification of States' demand for natural resources and the respective anchoring of the sovereign right to exploit them in the Convention itself was the leading purpose of Art. 193. 13

Natural resources occur naturally within an environment in a natural not treated form. Every man-made product is composed of natural resources (at its fundamental level). Natural resources are often characterized by a high level of biodiversity or geodiversity existent in various ecosystems. Some natural resources are essential for our survival, while most are used for satisfying our needs. Natural resources may be further classified in different ways. The Convention distinguishes between 'living' and 'non-living' resources, not between 'biotic' and 'abiotic' resources. Natural resources may constitute separate entities, such as fresh water and air, as well as living organisms such as a fish, or they may exist in a form which needs further processing to obtain the resource, as is the case with metal ores, oil, and most forms of energy. 14

There is much debate worldwide over natural resource allocation, which is partly due to increasing scarcity of fossil fuels (depletion of resources) but also because natural resources are the basis for many economies (particularly for developed nations). Some natural resources such as sunlight and air can be found everywhere, and are therefore known as ubiquitous resources. This is also (almost) true for water, currents and winds in the maritime environment, resources that are mentioned in Art. 56 (1)(a) and are used for the production of energy. However, most resources only occur sporadically in small areas, and are referred to as localized resources, such as 'rare earths' or other minerals. There are very few resources that are considered inexhaustible. These are solar radiation, geothermal energy, and air (though access to clean air may not be). The vast majority of resources are exhaustible, which means they exist in a finite quantity and can be depleted if managed improperly, such as many fish stocks are. 15

The right to exploit natural resources mentioned in Art. 193 includes living and non-living resources in the sea in the coastal zone but also on land. The wording of Art. 193 limits the right of States to the exploitation of *their own* natural resources and therefore to activities concerning resources within their territory, including their territorial waters, their EEZ and their continental shelf.[45] Therefore, the exploitation of marine genetic resources is only partly covered by this right since those resources are often found in the high seas and the Area. Marine living resources are the marine fishery resources including cetaceans and other marine mammals that have a special status under the Convention.[46] Concerning natural resources on the continental shelf, quite a broad description is given in Art. 77 (4).[47] Further provisions regarding the use and exploitation of living resources of the sea, in particular fish, are found in the articles for the EEZ[48] and the high seas.[49] The exploitation of non-living natural resources is further regulated by the articles on 'the Area'[50]. 16

[45] See for further details, *supra* MN 11–12.

[46] See Art. 65 and Art. 120 for marine mammals. They should better not be considered as "resources" but as animals with a special protection status.

[47] See *Maggio* on Art 77 MN 24–26.

[48] Art. 62 *et seq*.

[49] Art. 116 *et seq*.

[50] Art. 150 *et seq*.

4. 'pursuant to their environmental policies'

17 The wording 'pursuant to their environmental policies' was inserted to take individual situations, interests and politics of the negotiating States into account. It reflects the concern of negotiating parties about their profitable rights to exploit natural resources. However, at the same time, this right has clearly been made subject to 'their duty to protect and preserve the marine environment'.[51] A traditional interpretation of this clause would accept that State sovereignty allows States, through national law, to authorise such activities of exploitation of natural resources as they choose within their territories, including activities which may have adverse effects on their own environment.[52] More than 50 years ago (in 1962), the UN General Assembly adopted a resolution which states that the 'rights of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and the well-being of the people of the state concerned'. Moreover, some national laws, such as the constitution of Germany, forbid the deterioration of the overall state of the environment by anthropogenic use ("*Verschlechterungsverbot*" Art. 20 a Grundgesetz [Basic Law]). So it must be seen that 'worsening' in environmental standards can no longer be accepted in a world where global effects of human activities are the rule and not the exception. Consequently, the need to cooperate in environmental policies has been recognised worldwide.[53]

18 It is debatable whether the reference to States own environmental policies has further implications. Art. 193 states that States have to act 'pursuant to their environmental policies', which indicates that the 'environmental policies' should be the most important marine regulation of a State. The positioning of 'environmental policies' as a relevant guiding principle in the matter of international ocean governance could lead to the development of certain standards regarding the governance structures of the State parties. This becomes visual by taking a look at the European Union, which for this purpose needs to be understood as 'State' in the sense of Art. 193.[54] Art. 11 TFEU reads: 'Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.' This 'horizontal clause' on the European level determines that environmental protection requirements need to be incorporated in all policies of the European Union. Arts. 192–193 could be understood in a similar way as 'horizontal clauses' and as principles that secure international environmental standards even with regard to the exploitation of natural resources.

5. 'in accordance with their duty to protect and preserve the marine environment'

19 Even though Art. 193 refers to duty and not obligation like Art. 192, no substantial difference in the meaning of the two words should be made for the purpose of Part XII.[55] Art. 193 relates the general obligation 'to protect and preserve' to the right of States 'to exploit natural resources', nonetheless the protection and preservation remains a binding obligation.[56] This may be the basis for regulations and measures of competent States or organisations not only for conservation purposes but also for the sustainable use of natural resources. In the absence of specific or generally accepted international standards of protection and conserva-

[51] *Cf. Jonathan I. Charney*, The Protection of the Marine Environment by the 1982 United Nations Convention on the Law of the Sea, GIELR 7 (1994–1995), 731, 732; OAU Declaration, 1974 (note 19), 1; see for further remarks also, *supra* MN 5–8.

[52] *Sands* (note 2), 236.

[53] GA Res. 1803 8(XVII) of 14 December 1962, cited by *Sands* (note 2), 236 (footnote 13).

[54] See *supra* MN 9.

[55] See for further remarks *Czybulka* on Art. 192 MN 16–17.

[56] *Cf.* Report of the Secretary General on the Law of the Sea (note 1), para. 29; see for further remarks, *Czybulka* on Art. 192 MN 8.

tion, States with a strict national environmental or biodiversity regime may seek to extend its application to areas beyond their territory. It is not persuasive that the extra-territorial application of national laws remains an open question in (environmental) international law.[57] An existing connection with the citizenship or nationality status, State of registration or incorporation (or the flag State principle) is sufficient to impose the higher national standards on individuals or corporations. Certainly, this may lead to jurisdictional disputes if other States use lower standards of environmental protection to grant (alleged) economic advantages and attract foreign investments,[58] but it is no breach of the sovereignty of the host State when the home State insists on its own higher environmental standards in these cases.

Article 194
Measures to prevent, reduce and control pollution of the marine environment

1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

2. States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

3. The measures taken pursuant to this Part shall deal with all sources of pollution of the marine environment. These measures shall include, *inter alia*, those designed to minimize to the fullest possible extent:

(a) **the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping;**
(b) **pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels;**
(c) **pollution from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices;**
(d) **pollution from other installations and devices operating in the marine environment, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices.**

4. In taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.

5. The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.

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[57] This is treated as a problem by *Sands* (note 2), 239.
[58] *Sands* (note 2), 239 *et seq.*

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I. Purpose and Function

As the title suggests, this article pursues three different objectives, the *prevention*, *reduction* and *control* of *marine pollution*. Despite being the third provision in the environment section of UNCLOS, it is in Art. 194 where the rather general principles of Arts. 192 and 193 are concretized and transformed into specific obligations of States. Art. 194 encompasses five paragraphs. Art. 194 (1) concretizing Art. 192 contains two duties: One of protection and one of harmonizing the policies of States. Art. 194 (2) equally contains two obligations: One reflecting the obligation already contained in the *Trail Smelter Arbitration* and the other one extending it to high seas areas. Art. 194 (3) lists – in a non-exhaustive manner – measures States have to adopt relative to e. g. harmful substances, pollution from vessels and from installations and devices. Art. 194 (1)-(3) model the two general principles proclaimed in Arts. 192 and 193 to the specific and 'formal' rules of law laid down in the subsequent articles of Part XII.[1] This article reflects the historical shift in the approach to the protection of the marine environment. While beforehand, States were largely free to determine for **1**

[1] Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991), 53.

themselves whether and to what extent they prevented, controlled and regulated marine pollution, now they are mostly obliged to do so in accordance with the terms of the Convention.[2] In the first three paragraphs, the measures to be taken are described in a detailed way concerning the sources, the means and the manner of preventing or reducing pollution. This is also true for Art. 194 (4); its wording, however, describes a general rule of international law rather than constituting a concrete step towards implementation. Art. 194 (5), first introduced in 1978 in the Informal Composite Negotiating Text (ICNT),[3] can be called the 'Ecosystem clause' of the Convention. Art. 194 (5) indicates that measures with the protection of biodiversity as a primary objective are permissible and are part of the necessary measures of protection. As the Tribunal in the *Chagos Case* stated in 2015 and affirmed in the *South China Sea Arbitration* in 2016, 'Article 194 is accordingly "not limited to measures aimed strictly at controlling pollution" and extends to measures focussed primarily on conservation and preservation of endangered species and rare or fragile ecosystems'.[4] The provision gives, as the Tribunal considered in the *South China Sea Arbitration*, a particular shape to the duties following Art. 192 in the context of fragile ecosystems.[5] These obligations concern the prevention on harm that would affect species and habitats and may extend to the establishing of marine protected areas (MPAs, →*infra* MN 30 *et seq.*). It is a laudable and farsighted provision (a 'bridge') that permits and eventually demands the application of modern approaches and instruments of marine biodiversity conservation in implementing the Convention that go far beyond the 'anti-pollution-approach' historically contained in Art. 194 (1)–(3).

2 The set of measures stipulated in Art. 194 (1)–(3), as a non-exhaustive enumeration, constitute mainly the first component of the three necessary steps for the full implementation of Part XII, which remains a challenging issue. These measures are described in a detailed manner and form a comprehensive legal structure. They are highlighted as examples for efficient protection of the marine environment against pollution in the sense of Art. 1 (1)(4). Special provisions (→ Arts. 207–212) deal with the second level of implementation for these examples of measures and obligate States to take the necessary measures with regards to legislative and administrative acts. The third level[6] is real implementation, including monitoring, control and surveillance of the measures and their enforcement by the competent authority. This implementation- and enforcement-level is partially incomplete (and sometimes ineffective) in UNCLOS in regards to environmental measures. As far as the obligations with regard to fragile ecosystems, habitats and threatened species are concerned, the Tribunal in the *South China Sea Arbitration* held that the obligations include firstly a duty (in this case for China as the flag state) to adopt rules and measures to prevent such (harmful) acts, and secondly a duty to maintain a level of vigilance in *enforcing* those rules and measures (in this case against fishermen engaged in poaching of endangered species such as sharks, sea turtles or giant clams).[7] China breached its obligations under Arts. 192 and 194 (5) although it had enacted a Law of the Protection of Wildlife which prohibits the catching or killing *inter alia* of these marine species but did not take any steps to enforce those rules and measures.[8] The 'third level' is quite elaborated in the Convention itself in relation to enforcement by flag States concerning e. g. pollution from vessels (→ Art. 217) but the

[2] *Alan Boyle*, Marine Pollution under the Law of the Sea Convention, AJIL 79 (1985), 347, 350.

[3] See further, *infra* MN 9.

[4] PCA, *Chagos Marine Protected Area* (Mauritius *v.* United Kingdom), Award of 18 March 2015, 211 (para. 538), available at: http://www.pca-cpa.org/showpagea579.html?pag_id=1429; PCA, *South China Sea Arbitration* (Republic of the Philippines *v.* People's Republic of China), Award of 12 July 2016, para. 945, available at: https://www.pcacases.com/web/view.

[5] *South China Sea Arbitration* (note 4), para. 959.

[6] *Cf.* with regards to the concept of the three fold structure: *Gerhard Hafner*, Meeresumwelt, Meeresforschung und Technologietransfer, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 347, 367.

[7] *South China Sea Arbitration* (note 4), paras. 961, 964.

[8] *Ibid.*, paras. 963, 964.

problem of ensuring comprehensive compliance with existing laws and regulations nevertheless remains partly unsolved due to the system of 'flags of convenience'[9].

A remarkable feature of Art. 194 is its abdication of any damage as an element triggering the established obligations. The primary focus of its legal regime is not on responsibility or liability for damage to the environment, but on the comprehensive regulation to prevent, reduce and control marine pollution.[10] For breach of these provisions, States can furthermore be held responsible and liable according to Art. 235.[11] 3

II. Historical Background

The 1958 Geneva Convention on the High Seas (High Seas Convention) considered the issue of prevention of pollution of the ocean for the first time. At that time, however, the scope of application of the convention was restricted to the discharge of oil[12] and the dumping of radioactive waste[13]. The protection of living resources, which pursuant to Art 194 (5) is a concern of Part XII, was briefly touched on in Art. 5 (7) of the Convention of the Continental Shelf. The 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas had a different objective: Art. 2 laid out that conservation programs should be formulated with a view to securing in the first place a supply of food for human consumption. In 1968, the General Assembly established the Sea-Bed Committee (SBC) and commissioned a study to analyse the matter of the protection of living resources against pollution.[14] Due to a number of maritime accidents in the 1970s that resulted in serious damage to the marine environment, attention towards marine environmental protection increased. Then, in 1972, the Stockholm Declaration initiated for the first time a broad, all-encompassing approach to preserve the marine environment. In accordance with its Principle 7: 4

> 'States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.'[15]

Recommendations set out by the Stockholm Declaration prompted the SBC to establish a broad approach in order to tackle the problems of preservation of the marine environment. Recommendation No. 92 reads:

> 'The marine environment and all the living organisms which it supports are of vital importance to humanity and all people have interest in assuring that this environment is so managed that its quality and resources are not impaired. This applies especially to coastal area resources. The capacity of the sea to assimilate wastes and render them harmless and its ability to regenerate natural resources are not unlimited. Proper management is required and measures to prevent and control marine pollution must be regarded as an essential element in this management of the oceans and seas and their natural resources.'[16]

Art. 194 was drafted based on these broad objectives and even initial proposals contained the intended broad approach. In 1973, the Working Group proposed in Paper No. 8 the following wording: 5

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[9] See generally *Guilfoyle* on Art. 92.
[10] *Cf. Boyle* (note 2), 357.
[11] For further information, see *Stephens* on Art. 235.
[12] Art. 24 High Seas Convention.
[13] Art. 25 High Seas Convention.
[14] *Cf.* GA Res. 2467 A-D (XXIII) of 21 December 1968, para. 2.
[15] UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973), 3 (Stockholm Declaration), Principle 7.
[16] Sea-Bed Committee, Decisions of the United Nations Conference on the Human Environment (5–16 June 1972) Relating to the Preservation of the Marine Environment and Marine Pollution, UN Doc. UN Doc. A/AC.138/SC.III/L.17 (1972), 11 (Recommendation No. 92).

'1. States shall take all necessary measures to prevent pollution of the marine environment from any source[1], using for this purpose the best practicable means in accordance, with their capabilities[2] individually or jointly as appropriate. In particular States shall take measures to ensure that activities under their jurisdiction or control[3] do not cause damage[4].'

The footnotes in Paper No. 8, which indicate some of the issues still under consideration and discussion at that status of negotiations, read as follows:

'[1] It was understood that an elaboration of the meaning of marine pollution could be inserted in the above text after "from any source", if there was to be no special section or article on definitions, containing such an elaboration.

[2] A query was raised as to the meaning of "capabilities" in the above context and the suggestion made that further clarification was needed.

[3] Some delegations considered that "or control" should be retained while others felt it should be deleted. Some delegations thought that the meaning of "control" in this context should be clarified.

It was stressed that the above sentence relates to a State's control over activities and not to areas of control.

[4] This use of the word is not intended to prejudice the question of liability.'

Paragraph 2 of Paper No. 8 reads:

'2. The measures taken pursuant to these articles shall deal with all sources of pollution of the marine environment whether lands, marine, or any other sources, including rivers, estuaries, the atmosphere, pipelines, outfall structures, vessels, aircraft and sea-bed installations or devices. They shall include inter alia […].'[17]

6 Attention was once more given to the concerns of (developing) States about a possible reduction of their opportunities of economic growth due to the stipulation of mandatory measures to protect the marine environment.[18] Kenya incorporated in its draft dealing with the necessary measures to prevent or control pollution of the marine environment the following amendment: 'States shall use the best practicable means in accordance with their capabilities and their environmental policies individually or jointly.'[19] This consideration of individual situations, interests and politics of the negotiating States was only slightly altered and can now be found in Art. 194 (1).

7 In August 1974, the results of proposals and amendments relating to the preservation of the marine environment were revised. For the first time, a draft embraced all three objectives, i. e. reduction, control and prevention of pollution. The proposed text also encouraged States to harmonise their environmental policies.[20] The draft article on particular obligations stated:

'1. States shall take all necessary measures to prevent, reduce and control pollution of the marine environment from any source using for this purpose the best practicable means at their disposal and in accordance with their capabilities, individually or jointly, as appropriate, and they shall endeavour to harmonize their policies in this connexion.

2. States shall fulfil these obligations in accordance with their national environmental policies and their duty to protect and preserve the marine environment.

3. Alternative I

States shall take all necessary measures to ensure that activities under their jurisdiction or control do not cause damage to areas beyond their national jurisdiction including damage to other States and their environment by pollution of the marine environment.

Alternative II

States shall adopt all necessary measures requiring that activities under their jurisdiction or control are so conducted that such activities do not cause damage to areas beyond their national jurisdiction including damage to other States and their environment by pollution of the marine environment.

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[17] Sea-Bed Committee, Note by the Chairman of Working Group 2, Addressed to the Chairman of Sub-Committee III, UN Doc. A/AC.138/SC./III/L.39 (1973), GAOR 28th Session Suppl. 21 (A/9021), vol. I, 85, 86–87 (Annex I, II).

[18] *Cf. Czybulka* on Art. 193 MN 17–18 regarding the insertion 'pursuant to their environmental policies'.

[19] Third Committee UNCLOS III, Kenya: Draft Articles for the Preservation and the Protection of the Marine Environment, UN Doc. A/CONF.62/C.3/L.2 (1974), OR III, 245 (Art. 4).

[20] Third Committee UNCLOS III, Results of Consideration of Proposals and Amendments Relating to the Preservation of the Marine Environment, UN Doc. A/CONF.62/C.3/L.15 (1974), OR III, 260 (Art. 3); *cf.* Nordquist/Rosenne/Yankov (note 1), 59.

Alternative III

In particular, States shall take all necessary measures to ensure that marine pollution arising from activities under their jurisdiction or control does not spread outside their jurisdiction.

4. The measures taken pursuant to these articles shall deal with all sources whatsoever of pollution of the marine environment. These measures shall include, *inter alia*:

(a) those designed to minimize to the fullest possible extent the release of toxic and harmful substances, especially those which are persistent:

(i) From land-based sources;

(ii) From or through the atmosphere;

(iii) By dumping;

(b) those designed to minimize to the fullest possible extent pollution from vessels, in particular for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels;

(c) those designed to minimize to the fullest possible extent pollution from installations and devices used in the exploration or exploitation of the natural resources of the sea-bed and subsoil, in particular for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices;

(d) those designed to minimize to the fullest possible extent pollution from all other installations and devices operating in the marine environment, in particular for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices.

5. In taking measures to prevent pollution of the marine environment States shall have due regard to the legitimate uses of the marine environment, which are not incompatible with the provisions of this Convention and shall refrain from unjustifiable interference with such uses.'[21]

During further discussions for the Informal Single Negotiating Text in 1976, two notable amendments were inserted. The two points embedded in paragraph 2 were emphasised. Now, the primary objective is that States do not cause damage by pollution, but if pollution occurs, the objective is that it does not spread beyond the areas of jurisdiction. Paragraph 4 was amended by adding 'reduce and control' to 'prevent', rendering it consistent with the opening phrase of Art. 194.[22] **8**

In 1978, at the Seventh Session, the United States proposed a new paragraph 5[23]: 'The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile species and other marine life.'[24] It is hard to reconstruct the history of this amendment in detail, but it seems that during the previous informal meetings conducted under the chairmanship of Mr. Vallarta (Mexico) it had been agreed that – with respect to article 1 – the term 'marine environment' included the concept of marine life and that at the same time it had been reached agreement on the addition of the following components to the new paragraph 5 to (former) Art. 195, reading now as follows: **9**

'The measures taken in accordance with the present Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened, or endangered species and other marine life.'[25]

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[21] Results of Consideration of Proposals (note 20), 260; see Sea-Bed Committee, Report of Sub-Committee III, UN Doc. WG.2/Paper No. 8/ADD.2 (1974), GAOR 28th Sess. Suppl. 21, 86–88 (footnotes erased).

[22] UNCLOS III, Revised Single Negotiating Text (Part III) UN Doc. A/CONF.62/WP.8/REV.1/Part III (1976), OR V, 173, 174 (Art. 4).

[23] Third Committee UNCLOS III, United States of America: Informal Document MP/9 (1978, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. X (1986), 224 (Art. 195).

[24] *Ibid.*

[25] Third Committee UNCLOS III, 38th Meeting, UN Doc. A/CONF.62/C.3/SR.38 (1978), OR IX, 158; the same wording appeared later in UNCLOS III, Reports of the Committees and Negotiating Groups on Negotiations at the Seventh Session Contained in a Single Document both for the Purpose of Record and for the Convenience of Delegations, UN Doc. A/CONF.62/RCNG/2 (1978), 126, 178 (Annex I to the Report by the Chairman of the Third Committee Ambassador A. Yankov (Bulgaria)).

So for the first time the terms 'ecosystem' and 'habitat' were introduced to the Convention. It can be added that the sessions of the Third Committee in spring 1978 took place after the *Amoco Cadiz* disaster which had occurred on 16th March 1978 off the French coast. Most delegates agreed expressly with the report and the proposals of Mr. VALLARTA, only the Spanish delegate Y. BARBERÁN uttered in the 38th meeting on Friday 12 May 1978 that his delegation was unable to agree to the proposed text of paragraph 5 of article 195, since 'it was a confused paragraph covering a wide range of subjects and was not really required'.[26] A discussion about this objection did not take place perhaps also due to the very short time left to the Committee to conclude its proceedings. In the report by the chairman of the Third Committee, A. YANKOV, the text of Art. 195 (5) was placed under the category 'Provisions on which consensus was reached'.[27]

10 In 1979, the negotiating States agreed on the content of the provision, and the revision process was initiated.[28] A couple of non-substantial changes were made, the article was renumbered and then, at the very end, the first phrase was again changed by incorporating the words 'individually or jointly'. The opening phrase now reads: 'States shall take, individually or jointly as appropriate, all measures consistent with this Convention […]'.[29] Summarising the *travaux préparatoires* with the words of the Canadian delegate BEESLEY[30] at the 35th meeting of the Third Committee: the text contained in the end 'a series of provisions establishing a global legal regime for the preservation of the marine environment, much of which represented new law in a field where there had previously been a virtual vacuum'.[31]

III. Elements

1. 'States shall take […] all measures […] necessary to prevent, reduce and control pollution'

11 Art. 194 addresses, as Art. 192, '**States**' and not only States Parties to the Convention. This wording has been chosen widely in Part XII but also in Parts XIII and XIV of the Convention. In Part XII the terms 'flag States', 'port States' and 'coastal States' also occur in different constellations. It is often argued that the use of the term 'States' implies that the obligations in Part XII are of a general nature, a principle, and therefore applicable to the State community as a whole.[32] This argument is not particularly convincing since there is no systematic use of the terms 'States' and 'States Parties' in the Convention.[33]

12 Art. 194 (1) concerns appropriate and necessary measures to avoid pollution by reducing and controlling it, but also measures to prevent future pollution. The wording used in this first paragraph shows a clear obligation on States to take these measures ('States shall…'). The enumeration of States' responsibility to prevent, reduce and control pollution in conjunction with the comprehensive definition of pollution in Art. (1)(1)(4) reveals the broad scope of application of this article.[34] Furthermore, the incorporation of living marine

[26] 38th Meeting (note 25), 164.

[27] Reports of the Committees and Negotiating Groups on Negotiations at the Seventh Session (note 25), 173, 178.

[28] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII, 17.

[29] UNCLOS III, Report to the Plenary of the Conference on the Recommendations of the Drafting Committee Presented by the Chairman of the Drafting Committee on Behalf of the President and the Chairman of the First Committee, UN Doc. A/CONF.62/L.142/ADD.1 (1982, mimeo.).

[30] Beesley later was also Chairman of the Drafting Committee in 1982, see UNCLOS III, Report of the Chairman of the Third Committee, UN Doc. A/CONF.62/L.92 (1982), 209, 210.

[31] Third Committee UNCLOS, 35th Meeting, UN Doc. A/CONF. 62/C.3/SR.35 (1978), OR IX, 143, 147.

[32] *Cf.* Nordquist/Rosenne/Yankov (note 1), 39 (MN 192.8).

[33] For further details, see *Czybulka* on Art. 192 MN 16.

[34] See further *Tanaka* on Art. 1 MN 12–15.

resources and biodiversity objectives regarding marine fauna and flora (→ Art. 194 (5)) indicates a strong sense of ecological responsibility in regards to the marine environment.[35] The necessity of measures is normally determined by means of scientific criteria (→ Art. 201) or advice (on the international level for example by the International Council for the Exploration of the Sea or the Food and Agriculture Organization) or by the findings of an environmental assessment (→ Arts. 204–206), but no actual or planned activity or other imminent anthropogenic deterioration of the marine environment is needed for action, because States are already under an obligation to prevent such deterioration before it occurs. The growth of knowledge since the 1980s in relation to the marine ecosystem and the pressures on it caused by human activities has resulted in permission being granted for early and precautionary action without scientific proof in a narrow sense, not only in the field of legislation but also in regards to the taking of executive measures.

The terms '*pollution* of the marine environment' and '*dumping*' (relevant for paragraph 3 (a)) are defined by the first article of the Convention and are used here in the same sense. Art. 1 (1)(4) reads: 13

> ' "[P]ollution of the marine environment" means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities'.

Consequently, the term 'pollution' encompasses *inter alia* the generation of underwater noise because it is 'energy' in the meaning of Art. 1 (1)(4).[36] The use of both dynamite and cyanide by (Chinese) fishing vessels is without any doubt 'pollution' of the marine environment.[37] Art. 194 (1)–(3) need to be understood against the background of two other international treaties dealing with specific forms of pollution. The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Dumping Convention of 1972) contains detailed provisions on sea dumping, and the 1973 International Convention for the Prevention of Pollution from Ship, including its 1978 Protocol (MARPOL 73/78) regulates the prevention of pollution from vessels.

2. 'individually or jointly as appropriate'

In general, States have discretion as to how they discharge their obligations under Art. 194: individually or jointly. If a measure taken by a single State is effective enough in reducing or controlling pollution, it is also appropriate. If cooperation with other States is needed, the provision imposes general responsibility on all States – theoretically-, not merely on the coastal or directly affected States.[38] Some requirements of cooperation in environmental affairs on a global or regional basis are laid down in Art. 197. In practice, cooperation between coastal States or States bordering semi-enclosed seas (→ Art. 123) is often needed and necessary in case of incidents and any resulting marine pollution. Cooperative action is also useful for a wide range of preventing and protecting measures, especially in cases where activities with relevance for neighbouring States are planned, such as the combination of networks of marine protected areas (MPAs) with offshore wind energy plants in the exclusive economic zones (EEZ). 14

3. 'from any source'

The measures taken by States 'shall deal with all sources of pollution', as the wording in Art. 194 (3) reads. That means that neither the place of origin nor the 'source' change the 15

[35] *Detlef Czybulka*, Geltung der FFH Richtlinie in der Ausschließlichen Wirtschaftszone, NuR 21 (2001), 19, 24.
[36] *Henry Hahn*, Die völkerrechtliche Regulierung der für die Meeressäuger belastenden Meeresnutzungen am aktuellen Beispiel des Unterwasserlärms (Teil 1), EurUP (3/2012), 119, 124.
[37] *South China Sea Arbitration* (note 4), para. 970.
[38] Nordquist/Rosenne/Yankov (note 1), 64 (MN 194.10(b)).

obligation of States to prevent, reduce and control marine pollution. The provision encompasses all sources of pollution and shall not leave gaps. This is ensured by both formulations. As shown above,[39] measures should relate to all sources, 'whether lands, marine, or any other sources, including rivers, estuaries, the atmosphere, pipelines, outfall structures, vessels, aircraft and sea-bed installations or devices. They shall include inter alia […].' It is true that the negotiating States focussed on pollution from vessels, which is quite understandable in view of disasters at that time[40], for instance by the super-tanker AMOCO CADIZ flying the Liberian flag and spoiling the French coast. However, during the negotiations many other sources of pollution were discussed, such as pollution arising with seabed activities, dumping or land-based sources.[41] The latter was even the first issue in the 9-power draft article[42] that was the basis for the text of the later Art. 194. Although completeness of sources in Art. 194 was pursued, the special cases of use of technologies and introduction of alien or new species were anchored in an additional article.[43]

4. 'using […] the best practicable means at their disposal and in accordance with their capabilities'

16 The ambitious technical scope of Art. 194 (1) is – mostly on economic grounds for the benefit of developing States – balanced by the insertion of the clauses 'means at their disposal' and 'in accordance with their capabilities'. This takes account of the concerns of developing States that regulations requiring 'best practical means' could overburden them.[44] Even if best means and technique are at the disposal of States, it may occur that *e.g.* the technical personnel is not capable to apply them in a competent way.[45] This problem of 'capabilities' was likely regarded as a transitional problem as Arts. 202–203 were introduced. On a regional level, this provision may become meaningless if principles of best available techniques (BAT) and/or best environmental practices (BEP) are normatively established.[46] In this case such rules would be binding on all contracting parties to the regional convention.

5. 'consistent with this Convention'

17 The measures taken or planned by States have to be 'consistent with this Convention'. This requirement is important for measures that are not included in the list of examples in Art. 194 (3), which can be assumed to be consistent in content with the Convention. The same is true for the measures described in Art. 194 (5), because it must be assumed that they are also, as regards content, overall consistent (or: 'in accordance') not only with 'this Part' but also with the Convention. This is obvious because they 'shall' be included in taking measures. What regards 'form', the provisions of the Convention relating to competences and formal requirements have to be obeyed. This is also true for all examples in the list and for measures according to Art. 194 (5). The demand for consistency with the Convention is a reminder to States that any actions based on Art. 194 are only enforceable if they are compatible with the Convention as a whole. This idea is also contained in Art. 194 (4),

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[39] See *supra*, MN 5 with footnotes.

[40] The *Torrey Canyon* disaster occurred 1967, the *Amoco Cadiz* incident in 1978.

[41] See the contribution of the delegate of Iran, Mr. Sadeghi to land-based sources of pollution, Third Committee UNCLOS, 20th Meeting, UN Doc. A/CONF.62/C.3/SR.20 (1975), 89, 90.

[42] Third Committee UNCLOS, *Belgium et al.*: Draft Articles on the Prevention, Reduction and Control of Marine Pollution UNCLOS III A/CONF. 62/C.3/L.24 (1975), 210 (Art. 1).

[43] For further details see *Czybulka* Art. 196 MN 1, 5–7.

[44] Kenyan Draft Articles (note 19); for further remarks, see *Czybulka* Art. 193 MN 6.

[45] At the spring session of the Sea-Bed Committee in 1973 in a series of informal discussions a query was raised as to the meaning of 'capabilities' but further clarification was not given, *cf.* Nordquist/Rosenne/Yankov (note 1), 55–56 (MN 194.4 with footnote 2).

[46] For the North Sea, see Art. 2 III (b) and Appendix 1 of the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention).

according to which 'unjustifiable interferences' are not allowed.[47] The rights of coastal States to control pollution caused by vessels on transit passage are often mentioned as an example of this issue; if they are exercised by the coastal State, they should be handled in a manner which does not impede the right of innocent passage (→ Art. 21 (1)(f)).[48]

6. 'and they shall endeavour to harmonize their policies'

18 Art. 194 (1) also demands that 'States shall endeavour to **harmonize their policies**'. It can be assumed that, as in Art. 193, 'environmental policies' are meant by the wording used here: 'in this connection'. Art. 194 (1) is a **procedural rule.** Since in Part XII the term 'pollution' has generally to be interpreted in a broad sense, and combating pollution includes measures of conservation and preservation of ecosystems (see the fifth provision of the article), the Tribunal concluded in the *Chagos Case* that in establishing the MPA, the United Kingdom was under an obligation to 'endeavour to harmonize' its policies with Mauritius. Art. 194 (1), however, is prospective and requires only the best efforts of the States. It does not require that such attempts precede any action with respect to the marine environment, nor does it impose any particular deadline. So, a violation of an obligation pursuant to Art. 194 (1) by the UK could not be asserted by the Tribunal in the *Chagos Case*.[49]. The overall intention (endeavour) of the provision is that measures against marine pollution may in a long-term view be standardized on a high and consistent international level, if the respective environmental policies of States become harmonized. This provision needs to be understood also in conjunction with Art. 197 and Art. 237 which declare that States should cooperate on a global and regional basis in environmental matters.[50]

7. 'measures to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and that pollution […] does not spread beyond the areas where they exercise sovereign rights'

19 The responsibility of States not to cause environmental damage in areas outside their jurisdiction pre-dates the Stockholm Conference and UNCLOS III.[51] Art. 194 (2) cl. 1 obliges States to conduct or authorize activities under their jurisdiction or control in a matter not *harming* other States. This duty, generally known as the 'no harm' principle, was initially proclaimed in the *Trail Smelter Arbitration*[52] and later elaborated on in the *Corfu Channel* Case[53]. The 'no harm' principle restricts States' sovereignty with regards to environmental damage caused outside their territory. It does not exclude marine pollution in general and not those activities that only have adverse effects on their own environment.[54] The general principle of this provision with regards to State responsibility for pollution damage outside their territory must be regarded as customary law since the *Nuclear Test Cases*.[55] But Art. 194 (2) goes far beyond the customary core of this provision.

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[47] See further explanations *infra*, MN 25 *et seq*.

[48] *Cf*. also Nordquist/Rosenne/Yankov (note 1), 64 (MN 194.10(c)).

[49] *Chagos Case* (note 4), 211 (paras. 538–539); for details see *Czybulka*, Paradise lost? EurUP 1/2016, 58,68.

[50] For further remarks see generally *Stephens* on Art. 197 and *Czybulka* on Art. 237.

[51] For further details see *Philippe Sands*, Principles of International Environmental Law (2nd edn. 2003) 241 *et seq*.

[52] Trail Smelter Arbitration Tribunal, *Trail Smelter Case* (US *v*. Canada), Award of 16 April 1938 and Award of 11 March 1941, RIAA III, 1905.

[53] ICJ, *Corfu Channel Case* (United Kingdom *v*. Albania), Merits, Judgment of 9 April 1949, ICJ Reports (1949), 4.

[54] *Cf*. regarding States sovereignty: *Philippe Sands*, Principles of International Environmental Law, vol. I (1995), 187.

[55] Most writers accept this formulation as a rule of customary law and Judge de Castro cited it with clear approval in his dissent in ICJ, Nuclear Tests (Australia v. France), Merits, Judgment of 20 December 1974, ICJ Reports (1974), 253, 389. See also *Sands* (note 51), 242.

20 Art. 194 (2) evolved from Principle 21 of the Stockholm Declaration, which stipulates that States have '[…] the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction […].' The obligation to **'ensure'** is an obligation of conduct. This means that Arts. 192 and 194 set forth obligations not only in relation to activities directly taken by States and their organs, but also in relation to ensuring activities within their jurisdiction and control do not harm the marine environment.[56] This interpretation has been prepared by the decision of the ICJ in *Pulp Mills on the River Uruguay* and the ITLOS Seabed Disputes Chamber Advisory Opinion of 1 February 2011.[57] The ITLOS concretised in its *SRFC Advisory Opinion* of 2015 that the above mentioned 'obligation of conduct' requires 'due diligence' in the sense of a flag State not only adopting appropriate rules and measures, but also a 'certain level of vigilance in their enforcement and the exercise of administrative control'.[58] This jurisprudence was adopted by the Arbitral Tribunal in the *South China Sea Arbitration*.[59] The flag State – upon receipt from another State of reports of non-compliance – is then under the obligation to investigate the matter and, if appropriate, take any action necessary to remedy the situation as well as inform the reporting State of that action.[60] While older formulations only dealt with transboundary harm to other States, Stockholm Principle 21 and thereafter the Convention declare that States are also required to protect global common areas, such as those beyond the limits of national jurisdiction, the high seas, the deep seabed, Antarctica and outer space.[61] Here it is debatable if this is part of the 'customary core' as described above in MN 19, or not.

21 It is noteworthy that Art. 194 (2) cl. 2 does not refer to damage (or hazards) by pollution, but plainly to pollution as such, while Principle 21 of the Stockholm Declaration seems to deal only with activities that actually result in damage.[62] This would lead to the legal consequence that the obligation to impede the spread of pollution arising from incidents or activities (under the jurisdiction or control of the State) is triggered by the fact itself and no other reasons such as threat or hazard to neighbouring areas are needed. The term 'jurisdiction or control' indicates that this provision not only refers to the territorial sea but also to the continental shelf (→ Art. 77) and the EEZ (→ Art. 56), which are areas of coastal States' jurisdiction. It also concerns activities over which the States have control e. g. as a flag State, thus not merely areas of control.[63] Such activities 'under control' may be fisheries, seabed-mining, or scientific research regardless where they are exercised.

22 In literature, it is said that Art. 194 (2) lays down principles comprehensive enough to almost settle the entire problem of marine pollution.[64] It implies a States' responsibility for extraterritorial pollution caused by private activities under its jurisdiction or control, regardless whether or not it has exercised 'due diligence' in averting the pollution.[65]

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[56] *South China Sea Arbitration* (note 4), para. 944.

[57] ICJ, *Pulp Mills on the River Uruguay* (Argentina *v.* Uruguay), Judgment, ICJ Reports (2010), 14; ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports (2011).

[58] ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, ITLOS Reports (2015), para. 131, quoting *Pulp Mills on the River Uruguay* (note 57), para. 197.

[59] *South China Sea Arbitration* (note 4), para. 94.

[60] *SRFC Advisory Opinion* (note 58), paras. 131 and 139.

[61] *Patricia Birnie/Alan Boyle/Catherine Redgwell*, International Law and the Environment (3rd edn. 2009), 145.

[62] Detailed on this topic *Hakapää*, Marine Pollution in the Law of the Sea (1981), 84 *et seq.*

[63] Note by the Chairman of Working Group 2 (note 17), 86–87 (Annex I, II); see the draft article *supra*, MN 5, including its footnote 3, illustrating the consideration of the term 'control'.

[64] *Hakapää* (note 62), 85; *cf. Hafner* (note 3), 368.

[65] *Ibid.*

8. 'Measures taken pursuant to this Part shall deal with all sources of pollution' and 'shall include, *inter alia*'

23 The objective of this provision is not to eliminate pollution as such but to reduce it, thus minimizing it to the greatest extent possible. This is a realistic approach, as otherwise most kinds of ocean uses would have to be banned. Art. 194 (3) states that the measures shall deal with *all sources of pollution* of the marine environment. This emphasises again[66] the comprehensive approach of Part XII in regards to preventing, reducing and controlling pollution. The different kinds of pollution are not classified according to their physico-chemical consistency but in a rather traditional way relating to human activities, reflecting the conventional source-based concept of environmental law.

24 The second sentence of paragraph 3 enumerates – without being exhaustive – the most common sources of marine pollution, which shall be included in taking measures. These are:

(a) Pollution from land-based sources (→ Art. 207, Art. 213), through the atmosphere (→ Arts. 212, 222) and by dumping (→ Art. 210, 216);
(b) Pollution from vessels (→ Arts. 211, 217);
(c) Pollution from installations and devices used for sea-bed activities (→ Arts. 208, 214);
(d) Pollution from other installations and devices operating in the marine environment (→ Art. 209).

The 'release of toxic, harmful or[67] noxious substances, especially those which are persistent', is emphasised in Art. 194 (3)(a) as a specific form of pollution. The three terms are not defined in the Convention. A useful definition of 'harmful substance' can be found in Art. 2 MARPOL 1973/78; Annex II of that Convention deals with noxious liquid substances, but Art. 194 is not limited to these. 'Toxic' must be interpreted in the context of the article in a way that besides substances being toxic to humans other substances are included which are toxic to species and other forms of marine life.

25 The provisions in paragraph (3) concerning these sources of pollution are very detailed and specific, and for a good part, they are self-explanatory. They are regulated on a second level in greater detail in Arts. 207 to 212, and enforcement provisions are included in Arts. 213–222. Environmental measures that are not specified here are nevertheless permissible, as the wording *inter alia* and the existence of Art. 194 (5) clearly show. The substantial limits of these measures have to be found through an appropriate interpretation of Art. 194 (4)[68] and from the overall provisions of the Convention concerning the allocation of competences, rights and duties of States and institutions. In Part XII *e.g.* the terms 'competent international organisation' or 'competent international organizations' (in the plural) are frequently used; in Art. 211, 217, 220 and 223 the expression refers to the competence of the International Maritime Organization (IMO). Such mandatory 'formal' provisions of the Convention have to be considered in any case, also with regard to measures which are listed in the catalogue of Art. 194 (3)(a)–(d).

26 Two peculiarities should be noted in the context of Art. 194 (3)(b): It contains several references to the design, construction, equipment, operation and manning of *vessels*. This has to be read in combination with Art. 21, if foreign ships are concerned. Art. 21 in the section about innocent passage allows the coastal State to adopt laws and regulations concerning, *inter alia*, 'the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof'. Such laws and regulations, however, 'shall not apply to the design, construction, manning or equipment of foreign ships unless they are

[66] See also the remarks *supra*, MN 15 ('from any source').

[67] In UNCLOS III, Draft Convention on the Law of the Sea (Informal Text), UN Doc. A/CONF.62/WP.10/REV.3 (1980), OR VIII, 81 the text in Paragraph 3 (a) was changed from 'toxic and harmful' to 'toxic *or* harmful'. This change indicates that three separate qualifications are intended, Nordquist/Rosenne/Yankov (note 1), 67 (MN 194.10(j)).

[68] See *infra*, MN 28–29.

giving effect to generally accepted international rules or standards'.[69] This restriction does not include the operation of vessels so that the prohibition of anchoring for environmental reasons even for foreign vessels is permissible.[70]

27 In Art. 194 (3)(c) and (d), the terms 'installations or devices' are used whereas in Part V the phrase used in Arts. 56 and 60 is 'installations and structures'. Part XIII Section 4 uses the terms 'installations or equipment'. It makes sense that the jurisdiction given to the coastal State in the EEZ for the establishment and use of artificial islands, installations and structures corresponds with its jurisdiction for the protection and preservation of the marine environment 'as provided for in the relevant provisions of this Convention'. One of the relevant provisions is Art. 194 (3), so that it must be assumed that there is no substantial difference between the conceptual pairs 'installations and structures' (Part V) and 'installations or devices' (Part XII) in this context. Moreover, there seems to be no substantial difference between 'devices' and 'equipment'.[71]

9. 'States shall refrain from unjustifiable interference with activities carried out by other States'

28 Art. 194 (4) is not the only provision within UNCLOS asking States to pay **due regard** to the rights of other States, see *e.g.* Art. 300. Art. 56 (2) contains a due regard clause that is very similar or functionally equivalent in content to Art. 194 (4). Art. 194 (4) imposes a different type of obligation than Art. 194 (1). In the *Chagos Case* the Tribunal considered

> 'the requirement that the United Kingdom "refrain from unjustifiable interference" to be functionally equivalent to the obligation to give "due regard", set out in Article 56(2), or the obligation of good faith that follows from Article 2(3). Like these provisions, Article 194 (4) requires a balancing act between competing rights, based upon an evaluation of the extent of the interference, the availability of alternatives, and the importance of the rights and policies at issue. Article 194 (4) differs, however, in that it facially applies only to the "activities carried out by other States" pursuant to their rights, rather than to the rights themselves.'[72]

As a consequence Art. 194 (4) is not applicable to future rights or rights that are prospective in nature, when no activities are carried out at present.[73] Art. 56 (2) reads, for reasons of clarity:

> 'In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.'

Art. 194 (4) relates to a general rule of international law, but it has a particular significance in the context of taking environmental measures with interfering character. The requirement that 'States shall refrain from unjustifiable interference' also specifies the meaning of Art. 300 within the context of Part XII. No indication is given of what is meant by 'unjustifiable interference' but it must be assumed that 'interference' for which the Convention makes provision will not be 'unjustifiable'.[74] An example is the detention of a vessel by the coastal or port State as provided in e. g. Art. 220 (2) and (6). Interference-measures may occur in any part of the ocean, but the competencies and powers of States (and international organizations) differ depending on the maritime zone in question. The *locus agendi* is decisive for answering the question whether environmental measures with an interfering character taken by a State are justified or not. In its internal waters and in its territorial sea, the coastal State

[69] This means that the IMO, as the competent international organisation, has to be involved, if the laws and regulations shall apply on foreign and not only national vessels.

[70] See further *Barnes* on Art. 21 MN 20–22.

[71] *Cf.* Nordquist/Rosenne/Yankov (note 1), 67 (MN 194.10(m)).

[72] *Chagos Case* (note 4), 211 (para. 540). For details see *Detlef Czybulka*, Paradise Lost?, EurUP 1/2016, 58, 68 *et seq*.

[73] *Chagos Case* (note 4), 211 (para. 540).

[74] Nordquist/Rosenne/Yankov (note 1), 67 (MN 194.10(n)).

has sovereignty (→ Art. 2)[75] and may consequently push forward its own advanced environmental and biodiversity policies without taking special regard to other States. Exceptional cases are thinkable such as in the *Chagos Case* where Mauritius possessed acknowledged fishing rights and exercised them within the territorial sea of the UK (Chagos Archipelago waters as part of the British Indian Ocean Territory, BIOT), when the MPA was declared by the UK as 'a no take area'. In these special cases consultations are needed.[76] In the other zones, third States have various rights and freedoms (and they also have the overall duty to protect and preserve the marine environment and refrain from harming it). Therefore, a mechanism must be developed to coordinate these rights and duties of the different States. In the EEZ, the coastal State has certain far reaching sovereign rights as laid down in Art. 56 *et seq*., and to exercise these rights as such cannot be regarded as 'interference'. In case of conflicting claims, a rebuttable [mandatory] presumption of competency in favour of the coastal State should be applied.[77]

29 Art. 194 (4) applies as a *benchmark* for the lawfulness of interfering environmental measures of the coastal State, who, by taking those measures, also 'performs its duties'. The due regard clause must also be respected on the high seas. An unjustifiable interference must be assumed when the measures taken by a State, an alliance of States or international organizations are *disproportionate* and reduce the freedom of other States (→ Art. 87) in an unnecessary way. This criterion remains rather vague, but it is all there is at the moment for lack of an implementing agreement to UNCLOS. Such an agreement has been demanded by legal and governance experts, particularly in relation to the conservation of marine biodiversity in areas beyond national jurisdiction (ABNJ).[78]

10. 'measures […] shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life'

30 Art. 194 (5), by reason of the measures it contains, is a provision that aims to protect **ecosystems** and biodiversity as a whole. It has to be understood in an all-encompassing sense that includes all issues of protection of the marine environment and not only the prevention, reduction and control of pollution.[79] The protection of 'living resources and marine life' is already envisaged in the definition of pollution of the marine environment in Art. 1 (1)(4); Art. 194 (5) would therefore be dispensable if it would only relate to living resources and

[75] Leaving apart the 'innocent passage' of vessels, see Arts. 17 *et seq*.

[76] *Cf. Chagos Case* (note 4), 211 (paras. 528, 534, 535 and 540); *Czybulka* (note 72), 70.

[77] *Cf. Alexander Proelss*, The Law on the Exclusive Economic Zone in Perspective: Legal Status and Resolution of User Conflicts Revisited, Ocean Yearbook 26 (2012), 87, 98.

[78] See *Elisabeth Druel/Raphael Billé/Sébastien Treyer*, A Legal Scenario Analysis for Marine Protected Areas in Areas beyond National Jurisdiction, Report from the Boulogne-sur-Mer Seminar, 19–21 September 2001, IDDRI/IUCN Study No. 6/11 (2011), 5, 13 *et seq*.; *Jeff Ardron et al*., Advancing Governance of the High Seas, IASS Policy Brief 1 (2013), 3.

[79] *Kristina M. Gjerde*, High Seas Marine Protected Areas: Participants' Report of the Expert Workshop on Managing Risks to Biodiversity and the Environment on the High Seas, Including Tools such as Marine Protected Areas: Scientific Requirements and Legal Aspects, IJMCL 16 (2001), 515, 524; *A. Charlotte de Fontaubert*, The Status of Natural Resources on the High-Seas (2001), 79; *Detlef Czybulka/Thomas Bosecke*, Marine Protected Areas in the EEZ in Light of International and European Community Law: Legal Basis and Aspects of Implementation, in: Henning von Nordheim/Dieter Boedeker/Jochen C. Krause (eds.), Progress in Marine Conservation in Europe: NATURA 2000 Sites in German Offshore Waters (2006), 27, 30; *Ronan Long/Anthony Grehan*, Marine Habitat Protection in Sea Areas under Jurisdiction of a Coastal Member State of the European Union: The Case of Deep-Water Coral Conservation in Ireland, IJMCL 17 (2002), 235, 243 *et seq*.; *Detlef Czybulka/Peter Kersandt*, Legal Regulations, Legal Instruments and Competent Authorities with Relevance for MPAs in the EEZ and the High Seas of the OSPAR Maritime Area, BfN-Skripten 22 (2000), 18; *Robin Warner*, Protecting the Diversity of Depths: Environmental Regulation of Bioprospecting and Marine Scientific Research beyond National Jurisdiction, Ocean Yearbook 22 (2008), 411 *et seq*.; Opposing opinion mostly found in Germany: *Rainer Lagoni*, Völkerrechtliche Vorgaben für die Anwendung des Umweltschadensgesetzes in der AWZ (2007), 34; *Hans D. Jarass*, Naturschutz in der AWZ (2002), 30.

marine life. Art. 194 (5) is furthermore indispensable because many maritime human activities or uses, such as fishing or the extraction of sand and gravel, may not be qualified as 'pollution 'in every case, but there is no doubt that they may have negative and harmful impacts on marine biodiversity, where adequate measures of protection have to be found, implemented and, if need be, enforced. The Convention extends the scope of things that have to be protected by necessary measures to (fragile) *ecosystems* and to *habitats* of (depleted, threatened or endangered) species (see *infra*, MN 33). This demonstrates the comprehensive approach of the Convention.[80] Moreover, Art. 194 (5) aims at protecting also non-living components, which becomes evident in the enumeration of ecosystems and habitats as object of protection. Both are entities which are composed of interdependent living and non-living elements. Coral reefs are a good example for the complexity of ecosystems, but quite the same is valid for sand banks and submarine reefs in our temperate zones. The impacts on reef structures caused by the Chinese artificial island-building activities on seven reefs in the Spratly Islands area affected not only the living corals and fish communities and the makrozoobenthos, but also altered e. g. the hydrodynamics and the sedimentation through sediment suspension in lagoons. The Tribunal in the *South China Sea Arbitration* had no doubt that China's building activities including the dredging had not only polluted the marine environment in breach of Art. 194 (1) but also violated its duty under Art. 194 (5).[81]

31 In the *Chagos Case* the Tribunal considered that the dispute concerning the establishment of the Chagos Marine Protected Area (MPA) relates to the preservation of the marine environment in the sense of Art. 297 (1)(c). The Tribunal rejected expressly 'the suggestion that either Article 297 (1)(c) *or Part XII of the Convention* (relating to the protection and preservation of the marine environment) are limited to measures aimed at controlling marine pollution.'[82] The Tribunal did not accept either the hypocritical argumentation of the UK that the MPA was solely a measure relating to fisheries and qualified the establishment of the MPA as a measure to conserve the unique and rich biodiversity of this region,[83] hence rightly as a measure for the protection and preservation over the marine environment in the sense of Art. 194 (5). The International Tribunal of the Law of the Sea (ITLOS) confirmed in the *Southern-Bluefin Tuna* case that the provisions on the protection measures do not only apply to pollution but also to the protection of stocks and species considering 'that the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment.'[84] Art. 194 (5) goes beyond these accustomed protection goals and permits and eventually demands in implementing Part XII of the Convention the introduction of approaches, instruments and eco-measures that excel the 'anti-pollution-approach', generally followed by the UNCLOS. Art. 194 (5) thus gives 'particular shape' to the general obligation of Art. 192 in the context of fragile ecosystems.[85]

32 To guarantee an effective implementation and enforcement of measures following Art. 194 (5), the subsequent articles of the Convention are not sufficient; they concentrate on the known sources of pollution. Only Art. 234 (the 'Arctic' article) addresses expressly problems of ecology and 'ecological balance', but is restricted to ice-covered areas.[86] Therefore, other options have to be considered. Many possibilities of preserving and strengthening marine biodiversity protection are and were discussed and initiatives are being and have been taken. For 2016, the start of a formal UN negotiation process has been announced concerning an

[80] *Patricia Birnie*, The Challenges of Applying UNCLOS in a Post UNCED Period, in: Joseph Norton (ed.), The Changing World of International Law in the Twenty-First Century (1998), 3, 22.

[81] *South China Sea Arbitration* (note 4), para. 983.

[82] *Chagos Case* (note 4), 211 (paras. 319 and 320), emphasis added. Approvingly cited and adopted in the *South China Sea Arbitration* (note 4) para 945 p. 376.

[83] *Ibid.*, 111–113 (paras. 283–291).

[84] ITLOS, *Southern Bluefin Tuna Cases* (New Zealand *v.* Japan; Australia *v.* Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports (1999), 280, 295 (para. 70). Cited approvingly and continued in the *South China Sea Arbitration* (note 4), para. 956 p. 381.

[85] *South China Sea Arbitration* (note 4), para. 939.

[86] See further *Franckx* on Art. 234.

implementation agreement under UNCLOS for improving the protection of marine areas beyond national jurisdiction. Although the Convention does not mention marine protected areas, reserves and sanctuaries, their creation is spreading over the world[87] Art. 194 (5) is at the same time an essential basis for the establishment of *MPAs* (see *infra*, MN 34) beyond the limits of the territorial sea. Such actions are based on modern principles of ocean governance such as the ecosystem (or ecosystem-based) approach, integrated management and the precautionary approach.[88] Art. 194 (5) indicates clearly that measures with the protection of biodiversity even as a *primary* objective are, in general, admissible. As far as the exploration, conservation and management of living resources are concerned, Art. 73 is the appropriate legal basis for the enforcement of measures taken by the coastal State in its EEZ. For the majority of marine biodiversity measures, the rather complex mechanisms and procedures as explained above[89] have to be applied, so that many questions are still open and the process of protecting the marine biodiversity beyond the coastal areas is rather slow. In ABNJ, a further aggravating factor is that the governing bodies of regional seas conventions are sometimes lacking and are often weak, having only restricted powers.[90]

The term **ecosystem** generally refers to a dynamic complex of living (plants, animals and micro-organisms) and non-living components that interacts as a functional unit.[91] The definition codified in Art. 2 Convention on Biological Diversity (CBD) can be used in the context of Art. 194 (5) without modification, as the Tribunal did also in the *South China Sea Arbitration*.[92] There is no conflict between the two global conventions, whose complementarities have to be emphasised.[93] The Convention demands protection measures (always including the obligation to refrain from harmful activities) firstly in relation to '*rare or fragile ecosystems*'. Until now there is no globally consented list of 'rare or fragile ecosystems' so that a case-by-case review is needed. On a global (soft law) scale following the CBD conferences of the parties (COP)-process, the selection of Ecologically and Biologically Significant Areas (EBSAs), Particularly Sensitive Sea Areas (PSSA), and other areas sheltering 'rare or fragile' ecosystems seem to be making significant progress. In regional conventions, such as the Convention on the Protection of the Marine Environment of the Baltic Sea Area, the Conventions for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), or the Marine Environment and the Coastal Region of the Mediterranean (BARCON), networks of MPAs on the basis of ecological evaluation of their marine habitat-types have been more thoroughly elaborated. These lists of MPAs and MPA-networks, which can be regarded as 'furtherance' of general principles in the sense of Art. 237, indicate but do not prove the existence of a 'rare or fragile ecosystem'. In the *South China Sea* 33

[87] *Gary Knight/Hungdah Chiu:* The International Law of the Sea: Cases, Documents and Readings (1991), 745.

[88] *Detlef Czybulka*, The Convention on the Protection of the Marine Environment of the North-East Atlantic, in: Hjalmar Thiel/J. Anthony Koslow (eds.), Managing Risks to Biodiversity and the Environment on the High Sea, Including Tools Such as Marine Protected Areas: Scientific Requirements and Legal Aspects, BfN-Skripten 43 (2001), 175, 180; *Gjerde* (note 79), 524; *Rüdiger Wolfrum*, Die Entwicklung des Seerechts zum marinen Umweltrecht, in: Peter Ehlers/Wilfried Erbguth (eds.), Aktuelle Entwicklungen im Seerecht Dokumentation der Rostocker Gespräche zum Seerecht 1996–1999 (2000), 69, 71; in this tendency *cf.* Nordquist/Rosenne/Yankov (note 1), 68 (MN 194.10 (o)); more extensive: *Scovazzi* even sees all States bound by an obligation of Art. 194 (5): *Tullio Scovazzi*, Marine Protected Areas on the High Seas: Some Legal and Policy Considerations, IJMCL 19 (2004), 1, 5 *et seq.*; *Kimball* sees in the objective and principle of the Convention as such the promotion of an ecosystem approach: *Lee A. Kimball*, The Law of the Seas Convention and Marine Environmental Protection, GIELR 7 (1995), 745, 747.

[89] *Supra*, MN 28–29.

[90] For the possible different scenarios, *cf. Druel/Billé/Treyer* (note 78).

[91] ILC, Report of the International Law Commission on the Work of Its Forty-Second Session (1 May-20 July 1990), UN Doc. A/45/10 (1990), GAOR 45th Sess. Suppl. 10, Para. 312 (Art. 22 of the Draft Articles on the Law of the Non-Navigational Uses of International Water Courses); *cf.* Nordquist/Rosenne/Yankov (note 1), 68 (MN 194.10(o)); Art. 2 CBD.

[92] *South China Sea Arbitration* (note 4), para. 945.

[93] See *Druel/Billé/Treyer* (note 78), 23. Broader explanation for this opinion is given by *Czybulka* on Art. 237 MN 20. For further information on the relationship between UNCLOS and the CBD, see also *Harrison/Morgera* on Art. 61 MN 2.

Arbitration, the Tribunal had no doubt from the scientific evidence before it that the marine environments where the allegedly harmful activities took place (in the Spratly Islands area) constitute such 'rare or fragile ecosystems'.[94] It has to be noted that the Spratly Islands are an area of high biodiversity but the area is not pristine and was affected before by the impacts of human activities such as overfishing, destructive fishing, construction activities and human habitation. These circumstances in the Tribunal's view did not impede the qualification of all seven reefs (and their surroundings) as 'rare or fragile ecosystems'.[95] It may be remarked in this place that a consequent ecosystem approach, however, would had to include as objective the protection of all *representative* (and not only the 'rare and fragile'*)* ecosystems, but this was not standard of science in the 1980s. Art. 194 (5) demands with its second alternative protection measures (always including the obligation to refrain from harmful activities) in relation to the **habitat** of depleted, threatened or endangered species and other forms of marine life. It is not necessary that these habitats are also 'rare' or scarce; they may be common or widespread and they also can be pre-damaged. Their specific ecological value lies in the fact that endangered etc. marine species live there permanently or seasonally. At least the most endangered species such as sea turtles (*Cheloniidae*) or cetaceans listed under Appendix I to the CITES Convention and marine species like giant clams (*Tridacnidae* spp.) listed under Appendix II to CITES are 'endangered' etc. in the sense of Art. 194 (5). As the Tribunal decided in the *South China Sea Arbitration*, CITES, as nearly universal part of the general corpus of international law, informs the content of Arts. 192 und 194 (5).[96] In the *South China Sea Arbitration*, the species mainly affected by the Chinese harmful activities have a strong relationship to the reef habitat, as female sea turtles regularly come ashore to lay their eggs on the sandy reef beaches, and giant clams play a significant role in the overall growth and maintenance of the reef structure itself. These cases of strong relationship between habitat (type) and endangered species are simple to judge but there remain many problems concerning wandering endangered species that e. g. follow fish stocks or zooplankton as nutrition opportunists. In these cases it is hard or impossible to decide whether a place where individuals or populations of the species are more or less regularly met is a 'habitat' in the sense of the provision or not. The definition of 'habitat' in Art. 2 CBD ('"Habitat"' means the place or type of site where an organism or population naturally occurs') does not deliver a final answer. Besides these difficulties of interpretation it is evident that the appendices of CITES are in no way comprehensive what concerns endangered marine life, as e. g. microorganisms or most deep sea species are lacking, and focus mainly on the terrestrial and higher species. It would facilitate the implementation of the ecosystem approach in the marine environment greatly when a network of well explored and managed MPAs would soon be established on international and regional level. The present ecosystem clause as laid down in Art. 194 (5) can be understood as an important supplement to the generally anthropocentric approach of the Convention expanding notably its protective aims and targets. The target course remains the same: only human activities or uses and not the ecosystem itself should be the object of regulation or management by law or treaty.[97] Art. 194 (5) does not hamper coastal States in protecting marine ecosystems in their EEZ[98] that are not 'rare' in adjacent waters of other States. The same interpretation is valid for 'depleted, threatened or endangered species'. The protection measures of the respective State are necessary and legitimate if the species or 'other forms of life' (e. g. macrozoobenthos, microorganisms) are endangered in the area of jurisdiction of the State that takes the measure, even if they occur abundantly in other regions.

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[94] *South China Sea Arbitration* (note 4), para. 945.

[95] *Ibid.*, paras. 977–982.

[96] *Ibid.*, para. 956.

[97] *Detlef Czybulka*, Meeresschutzgebiete in der Ausschließlichen Wirtschaftszone (AWZ), ZUR 14 (2003), 329, 330.

[98] No restrictions whatsoever are given for internal waters or the territorial sea.

The UNCLOS does not explicitly include provision for marine protected areas (**MPA**s),[99] which nowadays are regarded as an important tool to protect marine biodiversity.[100] Here 'multi-sectoral' MPAs mainly are being referred to; areas where a range of human uses or activities are or have to be regulated or managed with the protection of biodiversity as the primary objective, and not only sectoral MPAs (e. g. fishing closures).[101] Multi-sectoral MPAs are often used as tools to implement the ecosystem approach.[102] In its internal waters and *territorial sea*, the coastal State has nearly no restrictions imposed by the Convention for the establishment and management of MPAs, because this is a matter covered by the territorial (or 'aquitorial') sovereignty of the State, which can therefore apply its own environmental and biodiversity policies.[103] 34

Seawards of territorial waters, MPAs cannot be established by 'territorial claims' (see Art. 89). It was therefore controversial in the 1990s and 2000s whether Art. 194 (5), in conjunction with Art. 56 (1) (b)(iii), provides a sufficient legal basis for coastal States to establish MPAs in their **EEZ**s. Nowadays, it has been widely accepted that the 'bundling' of the functional rights conferred by Art. 56 *et seq.* to the coastal State may result in a viable protection regime. Some authors have fundamentally opposed the idea that Art. 194 (5) in conjunction with Art. 56 (1)(b)(iii) provides a legal basis for the designation of MPAs or other measures aimed at protecting and preserving the marine environment.[104] It seems that the dissenting judges in the recent *Chagos Case* did not recognise fully the reach of Art. 194 (5) as it has been developed in the Award itself,[105] and that they overlooked Art. 56 (1)(b)(iii), when they argued that 'Part XII of the Convention does not provide a general competence for coastal States to issue rules on the protection of the marine environment'.[106] This may literally be the case but is not required, as the basic legal competence for the protection of the marine environment (including the establishment of an MPA as a measure in the sense of Art. 194 (5)) in the EEZ is contained in Part V (Art. 56 (1)(b)(iii), and procedural rules in respect thereof are laid down in Arts. 194 (1), 194 (4) and 56 (2). The opponents of the new doctrine consider the establishment of MPAs as problematic because it would imply that coastal States could exclude the access of other States to such areas located in the EEZ. For this reason – the freedom of navigation – the legitimacy of MPAs in the EEZ 35

[99] The UNCLOS does not provide a definition of MPAs, therefore it is referred to the most common definition of the IUCN (IUCN General Assembly Rec. 17.38 of February 1988, reconfirmed in IUCN General Assembly Rec. 19.46 of January 1994), which defines MPAs as an area of intertidal or subtidal terrain, together with its overlying waters and associated flora, fauna, historical and cultural features, which has been reserved by legislation or other effective means to protect part or all of the enclosed environment. Alternatively: *Czybulka* (note 88), 175, 184: 'MPAs are geographically defined marine areas […] of which the ecosystems, natural habitats and species must be protected, because of their biological diversity, rareness and/or fragility, by means of the appropriate and necessary measures, against damages and deterioration due to the adverse effects of human activities and to achieve specific conservation objectives'.

[100] See *Druel/Billé/Treyer* (note 78), 7.

[101] This is also the starting point for the different legal scenarios of *Druel/Billé/Treyer* (note 78), 7.

[102] The ecosystem approach is a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way. Application of the ecosystem approach will help to reach a balance of the three objectives of the Convention. It is based on the application of appropriate scientific methodologies focused on levels of biological organization which encompass the essential processes, functions and interactions among organisms and their environment. It recognizes that humans, with their cultural diversity, are an integral component of ecosystems. Source: http://www.cbd.int/ecosystem/.

[103] For exceptional cases (e. g. existing fishing rights of Mauritius in the territorial sea of UK/BIOT), see *supra*, MN 28.

[104] *Cf. Rainer Lagoni*, Die Errichtung von Schutzgebieten in der Ausschließlichen Wirtschaftszone, in: Peter Ehlers/Wilfried Erbguth (eds.), Aktuelle Entwicklungen im Seerecht II: Dokumentation der Rostocker Gespräche zum Seerecht 2000–2002 (2003), 29, 38; *Alexander Proelss*, Meeresschutz im Völker- und Europarecht: Das Beispiel des Nordatlantiks (2004), 89 *et seq.* He sees the ecosystem approach of Art. 194 (5) rather as an 'opening clause' in favour of the protection of species and stocks.

[105] *Chagos Case* (note 4), paras. 320 *et seq.*, 538 *et seq.*

[106] *Chagos Case* (note 4), Dissenting and Concurring Opinion of Judge James Kateka and Judge Rüdiger Wolfrum, 14 (para. 54), available at: http://www.pca-cpa.org/showpagea579.html?pag_id=1429. See also *Czybulka*, Paradise lost? EurUP 1/2015, 58, 71–72.

has been frequently denied. The specific legal basis for the protection of defined sea areas against pollution by shipping (activities) because of their specific ecological conditions can be found in Art. 211 (5) and (6).[107] In the rare cases that a certain area needs to be protected especially against these effects of shipping, this is possible if strict requirements are met under the custody of the IMO.[108] In many cases, shipping as such has only a minor impact on biodiversity and therefore specific regulations in the protected area are not required. The management of MPAs – depending on their biogeographical situation – calls rather for the regulation of other ocean uses, such as overfishing, destructive ground fishing with deleterious effects on deep-sea habitats, 'bycatch' of sea-birds and marine mammals, hunting, poaching and collecting of living resources, extraction of non-living resources (sand gravel, fossil fuels), establishment of windfarms, and military activities that can have harmful effects such as that caused by underwater noise from sonar systems etc. Nonetheless, the prevailing view is now that it is legitimate for coastal States to establish multi-sectoral MPAs in their EEZs including 'no-take' zones (which until now are extremely rare in the oceans and seas, even in territorial waters) pursuant to Arts. 56 (1) (b)(iii), 192 and 194 (5). They may even be obliged to do so if relevant regional treaties, agreements or supranational laws, such as the Habitat Directive,[109] demand it.[110] Art. (8)(a) CBD provides a supplemental legal basis[111] and requires contracting parties to establish a *system* of protected areas where special measures need to be taken to conserve biological diversity within their national jurisdiction. In this regard, the UN Secretary-General has pointed out:

> 'The Duties of States under the UNCLOS to conserve and manage their natural resources, including, for example […] the obligation of States under Art. 194 (5) […] have been further strengthened by the requirement of parties under the Convention on Biological Diversity to establish marine protected areas within zones of national jurisdiction […].[112]

36 The establishment of **MPAs in ABNJ** is very complicated because of the lack of 'integrated regional oceans management organisations'. Until now, the 'OSPAR-model' (with the help of IUCN) is the only one that includes MPAs (Charlie Gibbs Marine Protected Area and others) in the high seas of the North East Atlantic in the OSPAR Convention area.[113] It is a regional scenario where fishing modalities and closures are regulated by the competent regional fisheries management organization (NEAFC), whereas other necessary regulations are prepared by the regional OSPAR-Commission which has no mandate for fisheries. These regional agreements can be binding for members of the regional organisations, but not for other States or members of international organisations such as IMO, ISBA or the International Commission for the Conservation of Atlantic Tunas (ICCAT). To address this, OSPAR has initiated 'collective arrangements', building on bilateral memoranda of understanding

[107] For further remarks on this topic, see *Bartenstein* on Art. 211.

[108] With regards to shipping Art. 211 (5) and (6) provide special regulations for coastal States to establish particular areas adjacent to pollution through ships. For further information, see *Bartenstein* on Art. 211 MN 40 *et seq*.

[109] EC Directive 92/443/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, OJ 2006, L 206, 7.

[110] *Czybulka/Bosecke* (note 79), 30; *Vladimir Kotiar*, Marine Protected Areas on the High Seas (Some Legal Aspects), 143; *Gerold Janssen*, Die rechtlichen Möglichkeiten der Einrichtung von Meeresschutzgebieten in der Ostsee (2002), 68 *et seq*.; *Warner* (note 79); *Martin H. Belsky*, Management of Large Marine Ecosystems: Developing a New of Customary International Law, San DiegoLRev 22 (1985), 734; *A. Charlotte de Fontaubert/David R. Downes/Tundi S. Agardy*, Biodiversity in the Seas: Implementing the Convention on Biological Diversity in Marine and Coastal Habitats (1998), 774 *et seq*.

[111] *Lagoni* (note 104) considers this as the sole legal basis for MPAs, in contrast *Detlef Czybulka*, Die Anwendung der Umwelthaftungsrichtlinie in der Ausschließlichen Wirtschaftszone und auf dem Festlandsockel: Der Schutz von natürlichen Lebensräumen im marinen Bereich, NuR (2008), 304 *et seq.* rightly considers essential a primary responsibility that is enshrined in UNCLOS because of Art. 21 CBD.

[112] GA, Oceans and the Law of the Sea: Report of the Secretary General, UN Doc. A/54/429 (1999), para. 493.

[113] For further details see *Erik J. Molenaar/Alex G. Oude Elferink*, Marine Protected Areas in Areas beyond National Jurisdiction. The Pioneering Efforts under the OSPAR Convention, Utrecht Law Review 5 (2009), 5 *et seq*.

between regional and global organisations.[114] As the regional coalition has no power to adopt protective measures applicable to non-members, this complicated model whose authorities only have sectoral mandates is the only viable way to establish MPAs in ABNJ at this time.

Article 195
Duty not to transfer damage or hazards or transform one type of pollution into another

In taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another.

Bibliography: *Alan Boyle*, Marine Pollution under the Law of the Sea Convention, AJIL 79 (1985), 347–372; *Astrid Epiney*, Umweltrecht der Europäischen Union (3rd edn. 2013); *Astrid Epiney/Martin Scheyli*, Strukturprinzipien des Umweltvölkerrechts (1998); *Wolfgang Kahl*, Umweltprinzip und Gemeinschaftsrecht: eine Untersuchung zur Rechtsidee des "bestmöglichen Umweltschutzes" im EWG-Vertrag (1993); *Alexander Proelß*, Meeresschutz im Völker- und Europarecht: Das Beispiel des Nordatlantiks (2004); *Philippe Sands*, Principles of International Environmental Law (2nd edn. 2003); *Rüdiger Wolfrum*, Die Entwicklung des Seerechts zum marinen Umweltrecht, in: Dirk Ehlers/Wilfried Erbguth (eds.), Aktuelle Entwicklungen im Seerecht (2000)

Documents: ECOSOC, Rio Declaration on Environment and Development: Application and Implementation, UN Doc. E/CN.17/1997/8 (1997)

Cases: ECJ, C-2/90, Commission of the European Communities *v.* Kingdom of Belgium, 1992, ECR I-4431

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I. Purpose and Function

Art. 195 needs to be read in correlation with the other articles of Part XII, in particular Art. 194 (1) and (2). It concretizes and extends the duty to prevent, reduce and control pollution, laid down particularly in Art. 194 (1) and (2), by prohibiting certain 'measures' regarding the pollution of the marine environment which, in its absence, might be regarded as being in line with this duty. 1

In light of the danger of spreading pollution due to the dynamics of the oceans, Art. 195 firstly codifies the necessity of preventing the transfer of pollution of the marine environment from one area to another. This duty is not limited to cases where the pollution risks spilling over into areas where the inducing State does not exercise sovereign rights (as in Art. 194 (2)). Consequently, it does not matter for the application of this provision if the area concerned by the pollution-related action lies within the scope of state's authority or not. To formulate this duty in a positive way: the acting State shall contain the pollution within the affected area, as far as possible, and combat it as soon as possible where it occurred. 2

The second part of Art. 195 forbids the transformation of one type of pollution into another (directly or indirectly). This means that the pollution is to be combatted at the source (or/and in its original condition). Both aspects are combined as "*Ursprungsprinzip*" in 3

[114] *Cf. Druel/Billé/Treyer* (note 78), 11.

European environmental law. The principle is laid down in Art. 191 (2) cl. 2 Treaty on the Functioning of the European Union (TFEU) and is related to the principle of preventive reaction.[1] But, as EPINEY states, the '*Ursprungsprinzip*' has a specific informative value because it prescribes not *if* but *when* (as soon as possible) and *where* (on the spot, geographically seen) a measure has to be taken.[2] The European Union enshrined these aspects 1996 in its Integrated Pollution Prevention and Control EC Directive 96/61.[3] Unfortunately, the English text of Art. 191 (2) TFEU does not clearly differentiate between these aspects. It reads:

> 'It [sc.: Union policy on the environment] shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should *as a priority be rectified at source*[4] and that the polluter should pay.'

It is not clear if the double content of the '*Ursprungsprinzip*' that is also reflected in Art. 195 is already regarded as customary international law.[5]

4 As with the '*Ursprungsprinzip*', Art. 195 is also indirectly related to the polluter-pays-principle, as according to both principles States cannot detract from their liability.[6] The necessary measures have to be taken quickly and on the spot and have to be realized (and paid) by the polluter. The principle of proportionality is – as in general – the utmost economic limit for the duty to take these measures.

5 Art. 195 has consequently closed existing loopholes that enabled States to get rid of pollution easily. It is for the breach of the obligations contained in this article and other general provisions[7] of Part XII that Art. 235 provides for the first time the possibility of making States responsible (and eventually liable) for causing damage to the marine environment, irrespective of whether the loss or damage affects the interests or environment of other States.[8]

II. Historical Background

6 The wording of the first part of Art. 195 is based on Principle 13 on the assessment and control of marine pollution adopted by the Intergovernmental Working Group on Marine Pollution (IWGMP) in June 1972. It reads:

> '[i]n taking measures to prevent marine pollution States shall guard against the effect merely transferring damage or hazard from one area to another.'[9]

7 The advanced discussions and proposals of the Second Session in 1974 evolved from the IWGMP proposal, merely adjusting the wording. A Norwegian draft expanded the scope of the provision by proposing to include the phrase 'directly or indirectly' and to incorporate a

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[1] *Rüdiger Wolfrum*, Die Entwicklung des Seerechts zum marinen Umweltrecht, in: Dirk Ehlers/Wilfried Erbguth (eds.), Aktuelle Entwicklungen im Seerecht (2000), 71 *et seq.*; Wolfrum also holds the view that Art. 195 is based – at least indirectly – on the precautionary principle, *ibid.*, 71. To the related principle of preventive action see *Philippe Sands*, Principles of International Environmental Law (2nd edn. 2003), 246 *et seq.*

[2] *Astrid Epiney*, Umweltrecht der Europäischen Union (3rd edn. 2013), 151 *et seq.*

[3] EC Directive 96/61 of 24 September 1996, OJ 1996 L 257, 26; ECOSOC, Rio Declaration on Environment and Development: Application and Implementation, UN Doc. E/CN.17/1997/8 (1997), para. 58 mentions the EC Directive as a positive example of an integrative concept for pollution prevention and control, introducing, *inter alia* with a system of integrated permits which includes emission limit values based on best available techniques.

[4] Emphasis by the author; French text: '*correction, par priorité, à la source*'.

[5] *Astrid Epiney/Martin Scheyli*, Strukturprinzipien des Umweltvölkerrechts (1998), 151, see the principle on the way to become (partly) customary international law.

[6] *Alexander Proelss*, Meeresschutz im Völker- und Europarecht: Das Beispiel des Nordatlantiks (2004), 84.

[7] Arts. 192, 194, 196.

[8] *Alan Boyle*, Marine Pollution under the Law of the Sea Convention, AJIL 79 (1985), 347, 367; see also *Stephens* on Art. 235 MN 17.

[9] UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV.1 (1973), 73 (Annex III: Principles for Assessment and Control of Marine Pollution, Principle 13).

second regulation in the provision, 'or from one type of pollution to another'.[10] This had already been suggested by Norway in its proposal to the Sea-Bed-Committee in 1973.[11] At the end of the Second Session, deliberations on these proposals led to the following text:

> 'In taking measures to prevent or control marine pollution States shall guard against the effect of merely transferring, directly or indirectly, damage or hazards from one area to another or from one type of pollution to another.'[12]

During the Fifth and Sixth Sessions, 'shall guard against' was rephrased as follows: States **8**
shall 'act so as not to transfer' damage or hazards. It is not known if the new formulation was meant to increase the responsibility or liability of States. Furthermore, the scope of the required measures and the respective obligations of States was expanded, they now have to 'prevent, *reduce* and *control*' pollution in correspondence with Art. 194.[13] This shows the strong connection between the two articles. After these changes were incorporated, the article was renumbered and subsequently put in its final form.

III. Elements

1. 'Measures to prevent, reduce and control pollution of the marine environment'

Art. 195 is partly self-explanatory and thus leaves little room for interpretation. Moreover, **9**
no comprehensive definitions are found in the documents of the negotiation process. Therefore, most elements of Art. 195 can simply be defined from textual interpretation and in the context of the other articles of Part XII and of the Convention, above all in the context of Art. 194. 'Measures' are human activities, described at length in Art. 194; in the context of Art. 195 they include activities to prevent, reduce and control 'pollution' of the marine environment, in the broad sense of Art. 1 (1) (4), thus *inter alia* measures against oil spills but also measures aimed at the reduction of underwater noise. Most measures require the use of technologies, which may cause further negative side-effects.[14] Within the context of Art. 195, incidents and all measures are also encompassed that are not successful or fail in combating or reducing pollution. Even then, they cannot be 'corrected' by means of transferring or transforming damage or hazards. The object of protection is the marine environment, but it does not matter where the pollution comes from, e. g. measures against land-based sources or pollution from air paths are included in the scope of the provision.

It is debatable whether the transfer of alien species is covered by the provision[15] because **10**
those species may not be regarded as 'substances' or 'energy' in the sense of the definition of 'pollution' in Art. 1 (1) (4).[16] There is no doubt that certain (or a relevant percentage of) alien or new species may cause damage or hazards if they are capable of surviving in a foreign marine ecosystem ('invasive species'); in the light of the specific and elaborated content of Art. 196, it seems dispensable to include alien species here.[17]

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[10] Third Committee UNCLOS III, Consideration of Texts Prepared by Woking Group 2 of Sub-Committee III (Marine Pollution), UN Doc. CRP/MP/4 (1974), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. X (1986), 155.

[11] Sea-bed Committee, Draft Articles on the Protection of the Marine Environment Against Pollution: Working Paper Submitted by Norway, UN Doc. A/AC 138/SC.III/L43 (1973, mimeo.), cited in: GAOR 28th Sess. Suppl. 21 (A/9021-I), 105 (Art. XIII). The text concerning the transformation clause was set in brackets as well as the insertion concerning international organizations.

[12] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/Part III (1976), OR V, 174.

[13] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 35.

[14] See *Czybulka* on Art. 196 MN 10–12.

[15] Affirmative without further explanation Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991), 71 (MN 195.6); see for further comments on this topic *Czybulka* on Art. 196 MN 1, 3, 5–6, 14–20.

[16] See *Tanaka* on Art. 1 MN 12–15.

[17] See *Czybulka* on Art. 196 MN 4.

2. 'States shall act so as not to transfer directly and indirectly damage or hazards'

11 Regarding the scope of the provision, not only activities and measures taken or induced by States are included but also measures taken by international organisations such as the International Maritime Organisation.[18] It is not decisive that the proposition of Norway had not been integrated in the final text.[19]

12 Acting ('so as not') means any active measure at legislative or administrative level concerning pollution-related damages or hazards to the marine environment by a State or international organization. All published acts of a legislative nature must be considered as intentional behaviour. Administrative measures are active measures when a decision in a specific case is made by the State. Qualified acts of negligence in an administrative act disregarding Art. 195 can also constitute an infringement. However, it is questionable if 'inactions' may trigger disputes in the sense of Part XV. In some cases, it may be better to let the natural cleaning power of the sea work than to try to reduce the pollution by potentially problematic, e. g. chemical or hazardous, means. It may thus be justified in certain cases that the responsible authority, after thoroughly examining the situation, decides to do nothing. Where international standards demand a specific handling or action, they should be respected (*e. g.* 'Best available technique').

13 The term 'transfer' means to convey or remove something from one place (or area) to another.[20] This may be done directly e. g. by means of transport or indirectly by using other tools or devices to move the 'original' pollution to another place. An indirect transfer in the sea may also be seen in the omission of an action needed to keep the pollution on place if the circumstances show clearly that it will drift to another area. The connection between the "*Ursprungsprinzip*" and waste management also becomes visible in the transport issue: The ECJ held in the *Wallonie Case*[21] that the ban of introducing dangerous wastes from other Belgian regions or from another state to Wallonia did not violate the free movement of goods principle because of the priority of the "*Ursprungsprinzip*". Regarding the special circumstances at sea, it is admissible to adsorb parts or the complete pollution or the hazardous material and transport it by ship to a disposal facility onshore. It is inadmissible, however, to adsorb the pollution by ship and to dilute and disperse it in another part of the sea, a formerly common practice offshore (dilute acid dumping at sea, '*Dünnsäure-Verklappung*').

14 The meaning of the terms 'damage' and 'hazard' seems to be comparable to the definition of 'damage' in Art. 235 (2) and the respective definitions concerning 'pollution of the marine environment' in Art. 1 (1)(4).[22] In contrast to Art. 1 (1)(4), where this limitation is laid down expressly in the text itself, 'hazards' are not limited to the human health but encompass all possible risks, for example also for rare and fragile ecosystems, for species such as marine mammals and seabirds, for habitats such as coral reefs and for other forms of marine life. The scope of protection of Art. 195 includes the objects of protection mentioned in Art. 194 (5), a provision which stands in a direct and systematic relationship to Art. 195.

3. 'from one area to another'

15 Art. 195 specifies that States, by taking measures to fulfill their obligation of Art. 194, shall not (merely) transfer, directly or indirectly, the damage or hazards from one area to another, no matter if the area is under their authority or not. This differs from Art. 194 (2).[23] Art. 195 is,

[18] See for further details *Czybulka* on Art. 192 MN 17.

[19] See *supra*, note 11.

[20] Webster's, New Encyclopedic Dictionary (1996), 1102.

[21] ECJ, C-2/90, Commission of the European Communities *v.* Kingdom of Belgium, 1992, ECR I-4431; *cf. Epiney/Scheyli* (note 5), 150; *Wolfgang Kahl*, Umweltprinzip und Gemeinschaftsrecht: eine Untersuchung zur Rechtsidee des "bestmöglichen Umweltschutzes" im EWG-Vertrag (1993) 22 *et seq.*

[22] See further *Stephens* on Art. 235 MN 18–21; *Tanaka* on Art. 1 MN 12–15.

[23] See *supra*, MN 2.

as is the general obligation in Art. 192,[24] applicable in all coastal and maritime zones including the internal waters, the exclusive economic zone and the high seas. It is also applicable to measures on the continental shelf and the Area.

4. 'transform one type of pollution into another'

'Transform' refers to the change in composition or structure of the substance(s) that is causing the respective marine pollution.[25] The transformation into 'another type' of pollution does not only mean the transformation of a substance in energy (or vice versa) but also the transformation from a liquid in a solid state and/or any physical or chemical change that does not eliminate or strongly reduce the polluting character of the substance. Gases are included; visual pollution may also be a type of pollution. **16**

In this article, State responsibility is created in a negative way; concrete actions to fulfil the obligation are not defined in the Convention itself. It would be a breach of this provision, however, to 'reduce' an oil spill by dissolving the spill with a chemical substance which is harmful to the marine environment. Measures that include the dispersal of substances must be applied with high precaution. Skimming and establishing artificial barriers do not 'transform' oil pollution. Biological methods (introduction of oil-reducing bacteria) are probably not yet sufficiently developed. If the bacteria are a natural part of the ecosystem, their application might not be considered as constituting a 'transforming' act. In a modern environmental view, the transformation and dislocation of damage or hazards are not means of combating pollution. They contradict today's integrative and ecosystem-oriented approach that has been at least partly anticipated in Art. 195. **17**

Article 196
Use of technologies or introduction of alien or new species

1. States shall take all measures necessary to prevent, reduce and control pollution of the marine environment resulting from the use of technologies under their jurisdiction or control, or the intentional or accidental introduction of species, alien or new, to a particular part of the marine environment, which may cause significant and harmful changes thereto.

2. This article does not affect the application of this Convention regarding the prevention, reduction and control of pollution of the marine environment.

Bibliography: *Nicholas Bax/Angela Williamson/Max Aguero/Exequiel Gonzalez/Warren Geeves*, Marine Invasive Alien Species: A Threat to Global Biodiversity, Marine Policy 27 (2003), 313–323; *Markus Böckenförde*, The Introduction of Alien of New Species into the Marine Environment: A Challenge for Standard Setting and Enforcement, in: Peter Ehlers/Elisabeth Mann-Borgese/Rüdiger Wolfrum (eds.), Marine Issues from a Scientific, Political and Legal Perspective (2002), 241–263; *Thomas Bosecke*, Carbon Capture and Storage: Rechtliche Regelung einer neuen Klimaschutztechnologie, in: Thomas Bosecke/Peter Kersandt/Katrin Täufer (eds.), Meeresnaturschutz, Erhaltung der Biodiversität und andere Herausforderungen im 'Kaskadensystem' des Rechts: Festgabe zur Emeritierung von Detlef Czybulka (2012), 227–260; *Meinhard Doelle/Moira L. McConnell/David L. Van der Zwaag*, Invasive Sea Weeds: Global and Regional Law and Policy Responses, in Craig R. Johnson (ed.), Seaweed Invasions: A Synthesis of Ecological, Economic and Legal Imperatives (2007); *Harm Dotinga/Alex G. Oude Elferink*, Acoustic Pollution in the Oceans: The Search for Legal Standards, ODIL 31 (2000), 151–182; *Jeremy Firestone/Christina Jarvis*, Response and Responsibility: Regulating Noise Pollution in the Marine Environment, Journal of International Wildlife Law & Policy 10 (2007), 109–152; *Henry Hahn*, Die völkerrechtliche Regulierung der für die Meeressäuger belastenden Meeresnutzungen am aktuellen Beispiel des Unterwasserlärms (Teil 1), Zeitschrift für Europäisches Umwelt- und Planungsrecht (2012), 119–128; *Peter Kersandt*, Rechtliche Vorgaben und Defizite bei Schutz und Nutzung der Nordsee: Unter besonderer Berücksichtigung des Naturschutzrechts (2009); *Lee A. Kimball*, The United Nations Convention on the Law of the Sea: A Framework for Marine Conservation (Part 1), in: IUCN, The Law of the Sea: Priorities and Responsibilities in Implementing

[24] See *Czybulka* on Art. 192 MN 5–8.

[25] *Cf.* Webster's, New Encyclopedic Dictionary (1996), 1102.

the Convention (1995), 1–120; *Gerhard Hafner/Isabelle Buffard*, Obligations of Prevention and the Precautionary Principle, in: James Crawford/Allain Pellet/Simon Olleson (eds.), The Law of International Responsibility (2010); *Alexander Proelß*, Meeresschutz im Völker- und Europarecht: Das Beispiel des Nordatlantiks (2004); *Shtarkman YM/Koçer ZA/Edgar R/Veerapaneni RS/D'Elia T et al.*, Subglacial Lake Vostok (Antarctica) Accretion Ice Contains a Diverse Set of Sequences from Aquatic, Marine and Sediment-Inhabiting Bacteria and Eukarya, PLOS ONE 8(7) (2013); *Karen N. Scott*, International Regulation of Undersea Noise, ICLQ 53 (2004), 287–324; *Michael Tsimplis*, Alien Species Stay Home: The International Convention and Management of Ships' Ballast Water and Sediments, IJMCL 19 (2004), 411–482; *Robin Warner*, Marine Protected Areas Beyond National Jurisdiction: Existing Legal Principles and Future Legal Frameworks, in Hjalmar Thiel/Julian A. Koslow (eds.), Managing Risks to Biodiversity and the Environment on the High Sea, Including Tools Such as Marine Protected Areas: Scientific Requirements and Legal Aspects (2001), 149–168; *David M. Whalin*, The Control of Aquatic Nuisance Nonindigenous Species, Environmental Lawyer 5 (1998), 65–127

Documents: Committee of Ships' Ballast Operations/National Research Council, Stemming the Tide: Controlling Introductions of Nonindigenous Species by Ships' Ballast Water (1996), available at: http://www.nap.edu/catalog.php?record_id=5294; GA, Oceans and the Law of the Sea: Report of the Secretary General, UN Doc. A/66/70/ADD.2 (2011); IUCN, Guidelines for the Prevention of Biodiversity Loss Caused by Alien Invasive Species (2000), available at: www.issg.org/pdf/guidelines_iucn.pdf; UNCTAD, International Arrangements for Transfer of Technology: Issues Note by the UNCTAD Secretariat, UN Doc. TD/B/COM.2/EM.9/2 (2001)

Cases: ICJ, *Nuclear Tests* (Australia *v.* France), Merits, Judgment of 20 December 1974, ICJ Reports (1974), 253

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I. Purpose and Function

1 In its first paragraph, Art. 196 combines two different issues. The first part concerning the use of technologies presents a further specification and clarification of Art. 194 (1), which proclaims the obligation of States to prevent, reduce and control pollution of the marine environment resulting from **any source**. This should also address the use of **technologies** because it is known that technological processes produce unwanted by-products such as pollution. But 'technology' is a compound term and combines tools including machinery, but also their modifications, arrangement and procedures, and includes the skills and 'software' to use them. Technologies do not necessarily constitute material things; virtual technology such as computer software falls under the general definition of 'technology'. This obviously differs from Art. 194 (1) – (3), which focus on classical pollution by vessels, 'installations' and 'devices'. It may thus be doubtful if the introduction and the use of a (new) technology is encompassed by Art. 194. Art. 196 clarifies this and obliges States to take all necessary measures to prevent, reduce and control pollution of the marine environment resulting from the use of technologies under their jurisdiction or control, may they produce pollution in a perceptible degree or not. Secondly, Art 196 (1) demands the maintenance of the marine environment in its natural and sound status by including the issue of the introduction of alien or new species which may cause significant and harmful changes to a particular part of the marine environment, within the environmental duties of States and the prescriptions for

combating 'pollution', even if the introduction of new species itself may not be regarded as 'pollution' in the strict sense of the term.

Art. 196 recognizes the need that States take measures to minimize **uncertain risks** possibly arising from two different 'sources', namely the use of technologies and the introduction of alien or new species in the marine environment. The wording is 'open' and does not expressly refer to one specific technology e. g. nuclear technology, which was certainly the main risk (also to the marine environment) at that time.[1] The progressive subject matter of Art. 196 takes the issue of future development into account: on the one hand the uncertain implications of the use of new or emerging technologies and on the other hand the introduction of alien or new species into particular marine areas where the effects on the marine ecosystem were (and are) difficult to assess or anticipate. If interpreted in this way, Art. 196 has a specific value and its significance extends beyond the more general clauses of Art. 192 and 194, at least concerning the prevention and control of new technologies and species. The introduction of Art. 196 in Part XII was thus far-sighted and has relevance for the treatment of emerging technologies such as biotechnology, nanotechnology, laser-technology and robotics. 2

Art. 196 addressed explicitly for the first time at a global scale the issue of the introduction of **alien or new species** which may have great impacts on the environment, biodiversity, human health and economics.[2] The phenomenon was first seen on islands (e. g. Galapagos) and specific marine environments, but it now occurs in many places. Populations that have no natural enemies in their habitat may be threatened with extinction by alien populations that often increase significantly in a short time period ('invasive species'). In the Black Sea, an invasive comb jelly, *Mneniopsis leidyi*, has been blamed for the collapse of coastal fisheries.[3] In Europe today some 12,000 species are alien, of which roughly 10 % to 15 % are estimated to be invasive.[4] 3

Art. 196 (2) regulates the relation of this article to other provisions of the Convention dealing with the pollution of the marine environment and leaves these regulations unaffected. The impacts of technologies, which are also pollution *strictu sensu*, have to be combated by the means regulated in Art. 194 (and in other regulations of the Convention concerning pollution), whereas the duty stemming from Art. 196 cl. 1 has to be respected with regard to the 'soft' aspects of the respective technology. With regard to cl. 2, it becomes obvious that the introduction of new or alien species is in general not encompassed by the regulations that are based on the anti-pollution approach of UNCLOS. It can be argued that Art. 194 (5) could be interpreted in a way that combating alien or new species was a measure 'necessary to protect and preserve rare or fragile ecosystems'; but this would not have the same reach and depth of protection than Art. 196 cl. 2 has. Here, to stipulate the duty of Art. 196, it was necessary to legitimate possible interventions of States in favour of the environment and obligate them to regulate and control respective uses such as marine aquaculture or other ways of introducing new or alien species. 4

II. Historical Background

Even though from a textual point of view it might at a first look appear as if Art. 196 covers merely another aspect of the prevention, reduction and control of marine 'pollution', the legislative history indicates that Art. 196 (1) embraces two **different** duties.[5] This 5

[1] See ICJ, *Nuclear Tests* (Australia *v.* France), Merits, Judgment of 20 December 1974, ICJ Reports (1974), 253.

[2] See in detail on this topic, *Markus Böckenförde*, The Introduction of Alien or New Species into the Marine Environment: A Challenge for Standard Setting and Enforcement, in: Peter Ehlers/Elisabeth Mann-Borgese/Rüdiger Wolfrum (eds.), Marine Issues from a Scientific, Political and Legal Perspective (2002), 241, 263.

[3] *Cf. Nicholas Bax et al.*, Marine Invasive Alien Species: A Threat to Global Biodiversity, Marine Policy 27 (2003), 313 *et seq*.

[4] Recital 1 of Regulation (EU) No 1143/2014 of the European Parliament and of the Coucil of 22 October 2014, OJ 2014 L 317, 35.

[5] *Cf.* Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991), 73 (MN. 196.1).

becomes *inter alia* apparent by looking at the title of 1976 Norway's proposal, which referred to it as an '*additional article* […] on Protection and Preservation of the Marine Environment regarding the introduction of new species into the marine environment.'[6] Furthermore, the objective was to deal with existing or emerging risky human activities causing harm or significant changes to the marine environment that were explicitly not understood as 'pollution'.

6 During the negotiation process of the UNCLOS in the 1970s, at first not much importance was attached to the issue of alien species. However, due to the rapidly increasing ocean traffic and as a result of the accidental introduction of marine species into areas where they did not exist before, the negotiating parties took account of this problem. Norway significantly increased its production of marine aquaculture in the early 1970s and saw many problems arise where non-indigenous fish were introduced in the marine environment and were able to escape from their net cages. The concept of maintenance of the natural state of the marine environment appeared for the first time in 1973, when Malta submitted a proposal to the Sea-bed Committee which included a provision for the maintenance of the natural state of the marine environment. In 1974, Norway introduced a comprehensive draft stating that:

> '1. States shall not undertake or permit activities which may cause significant and extensive harmful changes in the natural state of the marine environment by the deliberate introduction thereinto or the transfer from one area to another thereof of species alien or new thereto. If the effects of any proposed activity could give rise to uncertainty in this respect, the State concerned shall in any event consult with interested States and appropriate international organizations prior to undertaking or permitting any such activity. States shall take appropriate measures to guard against the accidental introduction or transfer of alien or new species, and to restore the previously existing state of the marine environment in case where a disturbance has occurred due to any introduction or transfer of alien or new species.
>
> 2. This article shall be without prejudice to the application of the provisions of this Convention relating to the protection of the pollution of the marine environment.'[7]

The Norwegian representative explained that the intention of the proposed provision was to approach the problem of human activities disturbing the ecological balance of marine environments not caused by pollution but by the introduction of living organisms not previously existing in the seas or by the transfer of a form of marine life to an area where the implications of its existence were unknown.[8] The example Norway put forward was the 1973 discovery of a new type of seaweed on the south coast of England which appeared to have extraordinary properties of growth and unpredictable effects for existing marine life. The origins of that development seemed to have been accidental, but commercial enterprises had planned similar transfers of marine plant life in order to ensure the availability of raw material for the kelp-processing industry. Norway altered this proposed provision at the Fourth Session in 1976 by amplifying its proposal as following:

> '1. States shall to the fullest extent possible assess the possible effect on any planned introduction of species alien or new to a particular part of the marine environment, and shall not undertake or permit any such introduction where they may cause significant and extensive harmful changes to the marine environment.
>
> Whenever the effects of any planned activity could give rise to uncertainty in respect of significant and extensive harmful changes to the marine environment, the State concerned shall duly consult with competent international organizations and other States that may be affected by such changes.
>
> 2. States shall take all appropriate measures to guard against the accidental introduction or transfer of alien or new species to a particular part of the marine environment, and shall endeavour to restore, to the fullest extent possible, the previously existing state of the marine environment in cases where a

[6] Third Committee UNCLOS III, Norway: Additional Article in Chapter One of Part III on Protection and Preservation of the Marine Environment Regarding the Introduction of New or Alien Species into the Marine Environment (1976, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. X (1986), 452 (emphasis added).

[7] Third Committee UNCLOS III, Norway: Working Paper on Preservation of the Marine Environment, UN Doc. A/CONF. 62/C.3/L.18 (1974), OR III, 266.

[8] Third Committee UNCLOS III, 17th meeting, UN Doc. A/CONF.62/C.3/SR.17 (1974), OR II, 381.

significant and extensive harmful change to the marine environment has occurred due to any such introduction or transfer.

3. This Article shall not affect the application of the provision of this Convention regarding the prevention, reduction and control of the pollution of the marine environment.'[9]

At that same session, debates and negotiations came up with the issue of technology use, which was then incorporated in Part III of the Revised Single Negotiating Text: 7

'1. States shall take all measures necessary to prevent, reduce and control the use of technologies under their jurisdiction or control, or the intentional or accidental introduction of species, alien or new, to a particular part of the marine environment, which may cause significant and harmful changes thereto.

2. This article shall not affect the application of the provisions of the present Convention regarding the prevention, reduction and control of pollution of the marine environment.'[10]

After the inclusion of the phrase 'pollution of the marine environment resulting from' subsequent to 'prevent, reduce and control' no more substantial changes were made.[11] The text was renumbered as Art. 196 and finalised during the first revision of the Informal Composite Negotiating Text in 1979.[12]

However, the modification of the draft proposed at the Eleventh Session in 1982 is noteworthy. It was intended to change the wording of the first paragraph from 'under their jurisdiction or control' to 'within the limits of their jurisdiction or under their control'.[13] It appears that it was the intention of the Third Committee to clarify that 'control' does not relate to areas of control but to the State's controlling power over activities (and technologies, e. g. also on ships under their flag, in space or anywhere else).[14] This was explicitly expressed during the drafting processes of Art. 194 (2), referring to the same terminology.[15] However, this draft was not incorporated in the next version of the draft convention and Art. 196 remained unchanged. 8

III. Elements

1. 'States shall take all measures necessary to prevent, reduce and control pollution'

Art. 196 (1) cl. 1 builds on the terminology of Arts. 194 and 195. 'Measures' are understood in the sense of Art. 194 and may be normative or executive implementations of the obligation of States deriving from Art. 192 and Art. 196 to minimize 'pollution'. However, Art. 196 goes beyond Art. 194 as it also demands measures *vis-à-vis* unknown and uncertain risks, which may derive from technologies or the introduction of alien or new species.[16] This article clearly reflects the precautionary principle[17] and extends the 'anti-pollution-approach' 9

[9] Norway: Additional Article (note 6).

[10] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF/62/WP.8/Part III (1975), OR IV, 173 *et seq.* (Art. 6).

[11] Third Committee UNCLOS III, United States: Amendments to Part III (Protection and Preservation of the Marine Environment) (1977, mimeo.), reproduced in: Platzöder (note 6), 492.

[12] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII.

[13] UNCLOS III, Letter Dated 26 March 1982 from the Chairman of the Third Committee to the President of the Conference and the Chairman of the Drafting Committee, UN Doc. A/CONF.62/L.88 (1982), OR XVI, 203.

[14] In this tendency Nordquist/Rosenne/Yankov (note 5), 76 (MN 196.6).

[15] Sea-Bed Committee, Note by the Chairman of Working Group 2 Addressed to the Chairman of Sub-Committee, UN Doc. A/AC.138/SC./III/L.39 (1973), 1 (Annex).

[16] See *supra*, MN 2.

[17] *Cf. inter alia Michael Tsimplis*, Alien Species Stay Home: The International Convention and Management of Ships' Ballast Water and Sediments, IJMCL 19 (2004), 411, 414; *Lee A. Kimball*, The United Nations Convention on the Law of the Sea: A Framework for Marine Conservation (Part 1), in: IUCN, The Law of the Sea: Priorities and Responsibilities in Implementing the Convention (1995), 1, 36.

to an integrative approach beyond pollution in these cases. Specific measures are necessary tools for the implementation of the Convention. 'Soft law' measures, such as recommendations or non-binding decisions can also be measures in this sense. They relate in practice to issues like 'best available technology' (BAT) or 'best environmental practice' (BEP) stemming from the requirement to use the 'best practical means' in Art. 194 (1).[18]

2. 'resulting from the use of technologies'

10 Art. 196 (1) cl. 1 aims at preventing, reducing and controlling pollution of the marine environment from a specific 'source', *i. e.* the use of technologies. However, it does not define the term 'technologies'.[19] Yet the term 'technology' is also used in other UNCLOS provisions, e. g. in the context of knowledge transfer in Art. 144, within Part XIV and defined in Art. 5 (8) Annex III. According to this provision and only for its purposes 'technology' means:

> '[…] the specialized equipment and technical know-how, including manuals, designs, operating instructions, training and technical advice and assistance, necessary to assemble, maintain and operate a viable system and the legal right to use these items for that purpose on a non-exclusive basis.'

This definition is too narrow for Part XII because it deals predominantly with the non-material side of the term 'technology'. It is true that the term 'technology' may embrace very complex practical applications of knowledge like that of running e. g. nuclear technology or, as a recent example, the technology for climate protection known as Carbon Capture and Storage (CCS).[20] But the term 'technology' may (and does in general) also include 'hardware', e. g. small (or comprehensive) installations and structures in the sense of Arts. 194 (3) (c-d), 60 and 80, or devices in the sense of Art. 194. This 'hardware' has to be included in the definition of 'technology' for the purpose of Part XII, because it can produce pollution as an element or by-product of using the respective technology. To give a further example, mariculture technology comprises all these components since it includes devices, software and (in many cases) new species.

11 Thus, in the absence of a comprehensive legal definition of 'technology', the term 'technology' in Part XII of the Convention should be interpreted in accordance with its ordinary meaning, in its context and in the light of the treaty's object and purpose.[21] The declaration to prevent, reduce and control pollution from the use of technologies indicates that the term in this article embraces the 'compound' of 'hardware' and 'software', and a wide range of (emerging) technologies. Due to the progressive nature of this article, it can be assumed that not only known, but also and particularly emerging or future technologies should be subject to this duty, as well as such technologies which cause non-substantial impacts.[22] For example noise, often merely regarded as an incidental consequence of the use of the oceans e. g. by shipping traffic, but also intentionally caused like, for instance, sonar technology for military and research purposes ('airguns'), has to be regarded as a form of 'pollution' resulting from the use of technologies. This was not clear at that time the Convention was negotiated. Sound waves are inevitably 'energy' and therefore covered by the definition of pollution in Art. 1 (1)(4) as well as by other provisions of the Convention

[18] For further explanations see *Czybulka* on Art. 194 MN 16.

[19] For the general use of this term see also *supra* MN 1.

[20] *Cf. Thomas Bosecke*, Carbon Capture and Storage: Rechtliche Regelung einer neuen Klimaschutztechnologie, in: Thomas Bosecke/Peter Kersandt/Katrin Täufer (eds.), Meeresnaturschutz, Erhaltung der Biodiversität und andere Herausforderungen im 'Kaskadensystem' des Rechts: Festgabe zur Emeritierung von Detlef Czybulka (2012), 227–260.

[21] Art. 31 (1) Vienna Convention on the Law of Treaties; UNCTAD, International Arrangements for Transfer of Technology: Issues Note by the UNCTAD Secretariat, UN Doc. TD/B/COM.2/EM.9/2 (2001), para. 19, referring to Art. 31(1) VCLT, available at: www.unctad.org/en/docs/c2em9d2.en.pdf.

[22] *Jeremy Firestone/Christina Jarvis*, Response and Responsibility: Regulating Noise Pollution in the Marine Environment, Journal of International Wildlife Law & Policy 10 (2007), 109, 126; *Harm M. Dotinga/Alex G. Oude Elferink*, Acoustic Pollution in the Oceans: The Search for Legal Standards, ODIL 31 (2000), 158.

dealing with pollution,[23] if they result in deleterious effects. But the obligation resulting from Art. 196 is already triggered when the 'technology' in question does not pollute the marine environment in a perceptible way (e. g. through substances) but risks to cause changes e. g. injure the sense of hearing of marine mammals living there and to disperse them as a result. It is also conceivable that Art 196 aims at preventing 'biopollution', which may be caused by the use of technology (*cf.* drilling project Lake Vostok, the largest of nearly 400 subglacial lakes that have be found in Antarctica).[24] In any case, 'technology' includes biotechnology (Art. 2 Convention on Biological Diversity (CBD)).

Risks may appear in various situations, thus requiring a vast array of different executive and legislative measures to prevent harm to the marine environment resulting from the use of technology. The requirement of the use of best available technology (BAT) and similar standards can at the same time be seen as application of the principle of prevention. 12

3. 'under their jurisdiction and control'

States' obligation to take necessary measures is limited to 'the use of technologies under their jurisdiction or control', since adverse effects of technologies that are out of reach for the governmental powers of the respective State cannot be prevented, reduced or controlled by this State. States have sovereignty over their internal water and the territorial sea. However, in the EEZ, coastal States have jurisdiction as foreseen in Art. 56 (b)(iii). Thus, Art. 196 is applicable to the EEZ. Beyond the limits of this jurisdiction, States have certain enforcement powers as flag States and port States (see Arts. 217–220) that include measures in the sense of Art. 196.[25] The extension of the provision to activities, which take place under their 'control', emphasises the enlargement of the range of application even to other zones or even the space if the use of technology is controlled by the State. Considering the drafting process, the objective was to extend the responsibility of States for these human activities, regardless of their geographical location.[26] 13

4. 'introduction of species, alien or new'

a) Alien/new species. Art. 196 (1) cl. 2 refers to the intentional or accidental introduction of alien or new species which may cause significant or harmful changes to the marine environment. The text of the Convention provides no definition of 'alien' species. The CBD obliges the contracting parties in Art. 8 (h) to prevent the introduction of, control or eradicate 'those alien species which threaten ecosystems, habitats or species.' This relates to 'invasive' alien species. The International Union for Conservation of Nature (IUCN)[27] gives a useful definition (which is not binding for the interpretation of the UNCLOS) that is widely utilized. IUCN refers to an alien species as one that occurs outside its past or present natural range or dispersal potential, being outside the range it occupies naturally or could not occupy without direct or indirect introduction or care by humans and includes any part of such species that might survive and subsequently reproduce.[28] **New** species, in contrast, cover 14

[23] *Karen N. Scott*, International Regulation of Undersea Noise, ICLQ 53 (2004), 287 *et seq.*; *Dotinga/Oude Elferink* (note 22), 176; for further details on the term 'pollution', see *Tanaka* on Art. 1 MN 12–15.

[24] *Shtarkman et al.*, Subglacial Lake Vostok (Antarctica), Accretion Ice Contains a Diverse Set of Sequences from Aquatic, Marine and Sediment-Inhabiting Bacteria and Eukarya, PLOS ONE 8(7) (2013).

[25] *Cf. Robin Warner*, Marine Protected Areas Beyond National Jurisdiction: Existing Legal Principles and Future Legal Frameworks, in Hjalmar Thiel/Julian A. Koslow (eds.), Managing Risks to Biodiversity and the Environment on the High Sea, Including Tools Such as Marine Protected Areas: Scientific Requirements and Legal Aspects (2001), 149, 155.

[26] For further details, see *supra* MN 3–4.

[27] IUCN is constituted in accordance with Art. 60 of the Swiss Civil Code as an international association of governmental and non-governmental members.

[28] IUCN, Guidelines for the Prevention of Biodiversity Loss Caused by Alien Invasive Species (2000), para. 3, available at: www.issg.org/pdf/guidelines_iucn.pdf; *cf. David M. Whalin*, The Control of Aquatic Nuisance Nonindigenous Species, Environmental Lawyer 5 (1998), 65–127.

those that have been bred traditionally or through modern biotechnology.[29] The enumeration of 'alien' and 'new species' indicates that this provision is not limited to the prevention of identified pests or harmful organisms but also includes the broader issue of the introduction of non-indigenous or alien species that may cause significant changes in a marine ecosystem.

15 **b) Intentional or accidental introduction.** The introduction of alien or new species may happen in two different ways, intentional or accidental. The intentional introduction of alien species is planned and managed, generally for economic reasons. In ocean waters, intentional introduction occurs mainly by the operation of mariculture for the production of e. g. salmon, shrimp, oysters, mussels and algae.[30] In contrast to this, the accidental introduction of alien or new species happens unplanned and uncontrolled, e. g. by discard of ballast water[31] and through leakage of species out of maricultures. On 10 October 1973, the International Council for the Exploration of the Sea (ICES) Council adopted the first version of what was to become an internationally recognized 'Code of Practice' on the movement and translocation of non-native species for fisheries. In 2005, the ICES Code of Practice on the Introduction and Transfer of Marine Organisms was established, which was originally developed for marine aquaculture activities.[32] However, in recent years by far the largest numbers of introductions have been caused due to re-stocking or enhancement purposes.[33]

16 While great economic successes have been achieved by these activities leading to the creation of new and important fishery and mariculture resources, three challenges have surfaced over the last few decades relating to the global translocation of species to new regions. The first challenge lies in the ecological and environmental impacts of introduced and transferred species, especially of those that may escape the confines of cultivation and become established in the receiving environment. These new populations can have a negative impact on native species. The second challenge stems from the potential genetic impact of introduced and transferred species, resulting from the mixing of farmed and wild stocks as well as to the release of genetically modified organisms. The third challenge is posed by the inadvertent coincident movement of harmful organisms associated with the target (host) species. The mass transfer of large numbers of animals and plants without inspection, quarantine, or other management procedures has inevitably led to the simultaneous introduction of pathogenic or parasitic agents causing harm to the development and growth of the new fishery resources and to native fisheries.

17 **c) Ballast water.** Presumably, the majority of cases of the introduction of alien species happens due to the discharge of ballast water, as shipping moves 80 % of the world's goods.[34] As shown above, alien or new species are not pollution in a strict sense. Therefore, Art. 211 provides no legal basis for the establishment of international rules and standards to prevent, reduce and control the introduction of alien species by the discharge of ballast water. The basis can be found, however, in Art. 196 in connection with Art. 197 dealing with global and regional cooperation for the protection and preservation of the marine environment.[35] In recent years, the release of exotic organisms via ships' ballast water has become a pressing issue with profound implications for fisheries resources, mariculture and other activities. These issues are

[29] *Böckenförde* (note 2), 242.

[30] *Ibid.*, 249.

[31] Presumably the majority of alien introduction happens by ballast water as shipping moves 80 % of the world's goods, *cf.* Committee of Ships' Ballast Operations/National Research Council, Stemming the Tide: Controlling Introductions of Nonindigenous Species by Ships' Ballast Water (1996), available at: www.nap.edu/catalog.php?record_id=5294. For further details on ballast water, see e. g. the IMO website on Ballast Water Management, available at: www.imo.org/OurWork/Environment/BallastWaterManagement/Pages/Default.aspx.

[32] ICES, Code of Practice on the Introductions and Transfers of Marine Organisms (2005), available at: http://www.ices.dk/reports/general/2004/ICESCOP2004.pdf.

[33] *Ibid.*

[34] *Cf.* Stemming the Tide (note 31); for further details on ballast water, see also the IMO Ballast Water Management website: www.imo.org/OurWork/Environment/BallastWaterManagement/Pages/Default.aspx and *Bax et al.* (note 3) 313, 315 *et seq*.

[35] *Peter Kersandt* Rechtliche Vorgaben und Defizite bei Schutz und Nutzung der Nordsee: Unter besonderer Berücksichtigung des Naturschutzrechts (2009), 205; opposing: *Böckenförde* (note 2), 258.

dealt with separately by the ICES/IOC/IMO Working Group on Ballast and Other Ship Vectors (WGBOSV), and are not considered within the Code of Practice on the Introduction and Transfers of Marine Organisms'. The 2004 International Convention for the Control and Management of Ships' Ballast Water and Sediments (BWM) which makes explicit reference to Art. 196 (1),[36] will definitively enter into force on September 8, 2017, because due to the accession of Finland, the number of contracting States has reached 52 which represents 35,1441 % of the world tonnage.[37] The European Union has set up now a regulation on the prevention and management of the introduction and spread of invasive alien species referring to Art. 8 (h) of the CBD where the Commission was requested to 'take all appropriate steps to encourage Member States to ratify that [sc.: Ballast Water] Convention'.[38]

5. 'which may cause significant and harmful changes thereto'

18 It is questionable whether the restriction of the last phrase of this paragraph 'which may cause significant and harmful changes thereto' is also applicable to the first part (use of technologies). The term 'thereto' obviously relates to the reference to a specific location ('particular part'), but such a reference does not exist in the initial part of this paragraph. Therefore, it is probable that the last phrase only relates to the introduction of species to a particular part of the marine environment. This again leads to the conclusion that the first part of Art. 196 (1) provides a more stringent specification of Art. 194 for the use of technologies, since Art. 196 (1) is also not subject to the reservation of Art. 194 (1), 'as appropriate'.[39]

19 The addition of 'which may cause significant and harmful changes'[40] calls for interpretation. It refers to both the use of technologies and the introduction of alien species. The changes induced by technologies or alien species must be more than irrelevant, and either significant or harmful. The potential effects are decisive, which calls for the early assessment of these activities (see Art. 206). The level of certainty that is needed before necessary measures must be taken is debatable. The word 'may' indicates that changes caused by species introduction that are neither toxic nor pathogenic are also included.[41] Even though this interpretation is fairly far-reaching, the wording implies the precautionary approach, which determines that cost-effective preventive measures should not be held back because of scientific uncertainty where there are threats or risks of significant negative changes.[42] Thus, it is not permissible to await the occurrence of damages or apparent threats before such measures are taken.

6. 'does not affect the application of this Convention regarding the prevention, reduction and control of pollution of the marine environment'

20 Art. 196 (2) clarifies again that the terminology 'pollution of the marine environment' corresponds in its primary meaning to the definition of Art. 1 (1)(4) of the Convention, and that other by-products or side-effects of technologies and alien species are covered by Art. 196 (1).[43] It is questionable whether the introduction of potentially harmful alien

[36] International Convention for the Control and Management of Ships' Ballast Water and Sediments – 2004, Annex, para 1.

[37] It enters in force 12 months after ratification by 30 States, representing 35 per cent of world merchant shipping tonnage. For the details of entering in force of the BWM see GA, Oceans and the Law of the Sea: Report of the Secretary General, UN Doc. A/66/70/ADD.2 (2011), 50 (footnote 294).

[38] Regulation (EU) No 1143/2014 of the European Parliament and of the Coucil of 22 October 2014, OJ 2014 L 317, 35.

[39] *Cf. Henry Hahn*, Die völkerrechtliche Regulierung der für die Meeressäuger belastenden Meeresnutzungen am aktuellen Beispiel des Unterwasserlärms (Teil 1), Zeitschrift für Europäisches Umwelt- und Planungsrecht (2012), 119, 125.

[40] Emphasis added.

[41] *Tsimplis* (note 17), 414.

[42] *Gerhard Hafner/Isabelle Buffard*, Obligations of Prevention and the Precautionary Principle, in: James Crawford/Allain Pellet/Simon Olleson (eds.), The Law of International Responsibility (2010), 529.

[43] See *supra*, MN 4.

('invasive') or new species itself can be understood as pollution. However, there is no need to understand it in this way because Art. 235 concerning liability of States (in this case for transboundary invasion of invasive species), is applicable anyway, because it refers to international obligations 'concerning the protection and preservation of the marine environment', not to pollution.[44] However, as shown above, the historical background and the systematic of the Convention provide a clear distinction between pollution from the use of devices or 'hardware' on the one side and harmful changes to the marine 'environment' caused by alien or new species on the other.[45] Moreover, alien or new species are not pollution in the sense of Art. 1 (1)(4), because they are neither 'substances' nor 'energy'.[46] Consequently, alien or new species as such cannot be understood as pollution in the sense of Art. 1 (1)(4).

Section 2
Global and regional cooperation

Article 197
Cooperation on a global or regional basis

States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

Bibliography: *Alan Boyle*, Marine Pollution under the Law of the Sea Convention AJIL 79 (1985), 347–372; Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991)

Documents: GA, Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, GA Res. A 2749 (XXV) of 12 December 1970; UNCED, The Rio Declaration on the Environment and Development, UN Doc. A/CONF.151/5/REV.1 (1992), ILM 31, 874–880; UNCED, Report of the United Nations Conference on the Environment and Development, UN Doc. A.CONF/151/26/REV.1 (Vol. I) (1992), 9–479 (Agenda 21); UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973), 3–5 (Stockholm Declaration)

Cases: ITLOS, *MOX Plant Case* (Ireland *v.* United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports (2001), 95; ITLOS, *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor* (Malaysia *v.* Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports (2003), 10; PCA, *South China Sea Arbitration* (Republic of the Philippines *v.* People's Republic of China), Award of 12 July 2016, available at: https://www.pcacases.com/web/view/7

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[44] *Meinhard Doelle/Moira L. McConnell/David L. Van der Zwaag*, Invasive Sea Weeds: Global and Regional Law and Policy Responses, in: Craig R. Johnson (ed.), Seaweed Invasions: A Synthesis of Ecological, Economic and Legal Imperatives (2007), 440.

[45] Object of protection is actually the biodiversity as such and the maintenance of the environment (in the sense of a well-functioning ecosystem). This is one of the parts in the Convention where, beyond in Art. 194, the ecosystem approach can be seen.

[46] *Peter Kersandt* (note 35), 223; *Alexander Proelss*, Meereschutz im Völker- und Europarecht: Das Beispiel des Nordostatlantiks (2004), 55 *et seq.*

I. Purpose and Function

Art. 197 is the opening provision of Part XII, Section 2, entitled 'Global and Regional Cooperation'. It sets out the fundamental duty of States to cooperate on a global and regional basis in the protection and preservation of the marine environment. The inclusion of the terms 'on a global basis' and 'on a regional basis' indicate that the duty to cooperate applies to all marine spaces whether within or beyond national jurisdiction. It is one of many provisions in the UNCLOS requiring States to cooperate towards the achievement of common objectives in the governance of ocean space such as e. g. suppression of piracy (→ Art. 100), the conservation of the living resources of the high seas (→ Art 118) and the conduct of marine scientific research in the Area (→ Art. 143 (3)). 1

Art. 197 requires States to cooperate directly or through competent international organizations in order to develop appropriate rules and guidelines for marine environmental protection. Given the highly interconnected nature of the oceanic environment, cooperation among States is critically important for the effective protection of marine ecosystems. Art. 197, and the other generic articles of the UNCLOS relating to cooperation on matters of marine environmental protection, are supplemented by provisions addressing pollution from specific sources including land-based, atmospheric and vessel-source marine pollution (→ Arts. 207–212). 2

Art. 197, and the section of which it forms part, serves an instrumental function in mandating parties to cooperate in formulating rules and standards, while leaving States some margin of appreciation in doing so, as long as the rules agreed are consistent with the UNCLOS. The effect of Art. 197 and other complementary provisions relating to the adoption of internationally agreed rules standards and recommended practices and procedures through cooperative arrangements including competent international organisations, is to incorporate by reference those standards in the obligations under the UNCLOS to prevent pollution of the marine environment. This is an illustration of the framework character of the UNCLOS. 3

II. Historical Background

Art. 197 is far more expansive than Art. 25 (1) of the Convention on the High Seas (High Seas Convention), which provided only that States 'shall take measures to prevent pollution of the seas from the dumping of radioactive waste, taking into account any standards and regulations which may be formulated by the competent international organizations'.[1] 4

The origins of Art. 197 are found in the proposals by various States in the Ad Hoc Sea-Bed Committee and the Sea-Bed Committee to require cooperation to protect the deep seabed marine environment during the conduct of activities in the Area.[2] Of related significance was the United Nations General Assembly Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, which stipulated that States 'shall take appropriate measures for and shall co-operate in the adoption and implementation of international rules, standards and procedures for […] the prevention of pollution […] to the marine environment.'[3] This language found its way into Art. 145, in Part XI UNCLOS, which confers upon the International Seabed Authority (ISA) the authority to adopt 'rules, regulations and procedures' in order to prevent, reduce and control pollution and other hazards to the marine environment. 5

[1] Art. 25 (1) High Seas Convention (emphasis added).

[2] Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991), 79.

[3] Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, GA Res. A 2749 (XXV) of 12 December 1970.

6 Early drafts by Working Group 2 of UNCLOS III of what was to become Art. 197 provided that:

> 'States shall co-operate on a global and as appropriate on a regional basis, directly or through competent international organizations, global or regional, to formulate and elaborate treaties, rules, standards and procedures consistent with this Convention, for the prevention of marine pollution, taking into account characteristic regional features and economic factors.'[4]

7 The main significant change made before Art. 197 was adopted in its final form was the removal of the negatively-phrased 'prevention of marine pollution' and its replacement with positively-expressed objective of 'protection and preservation of the marine environment'.[5] This alteration transformed the emphasis of the provision so that it imposed a proactive obligation on States to protect the marine environment rather than only to prevent marine pollution.

8 The other notable amendment was the removal of the reference to 'economic factors' as matters that could be taken into account when formulating standards for marine environmental protection. Proposals by developing States for an additional economic qualifier to be added which would have allowed the economic capacity of developing States to be considered were rejected.[6] There are a number of provisions in Part XII which still admit the due consideration of economic capabilities, such as Art. 194 (1) which provides that States should take measures 'in accordance with their capabilities' to prevent, reduce and control pollution of the marine environment.[7] Likewise Art. 207 (4) stipulates that States, in establishing agreed rules for the control of land-based pollution of the marine environment, may take into account 'the economic capacity of developing States and their need for economic development.'[8] However it is significant that there are no such caveats incorporated in the articles relating to pollution of the Area (→Art. 209), pollution by dumping (→Art. 210), pollution from vessels (→Art. 211) or pollution from or through the atmosphere (→Art. 212). It is significant that Art. 197 refrains from including any caveats concerning economic capacity as this reaffirms that the overarching Convention obligation to protect and preserve the marine environment is a general and unqualified one.

III. Elements

1. 'States shall cooperate'

9 There are many references to cooperative duties throughout UNCLOS, phrased in a range of different ways ('shall cooperate', 'shall enter into negotiation', 'should cooperate', 'may cooperate', 'shall promote international cooperation' etc). Against a background of many cooperative obligations, Art. 197 has the specific purpose of requiring cooperation to protect and preserve the marine environment. Art. 197 encompasses cooperation of both a procedural (e. g. sharing information) and substantive (e. g. cooperation in defining rules for environmental protection) character.

10 The duty of cooperation in Art. 197 has been recognised as forming part of customary international law and is an expression of the general duty of States to cooperate to conserve, protect and restore the health and integrity of ecosystems.[9] In the *MOX Plant Case*, Ireland

[4] Sea-Bed Committee, Note by the Chairman of Working Group 2 Addressed to the Chairman of Sub-Committee III, UN. Doc. A/AC.138/SC.III/L.52 (1973), Annex 1.

[5] UNCLOS III, Revised Single Negotiating Text (PART III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 175 (Article 7).

[6] See Nordquist/Rosenne/Yankov (note 3), 81.

[7] See *Cybulka* on Art. 194.

[8] See *Wacht* on Art. 207 MN 14–20.

[9] See UNCED, The Rio Declaration on the Environment and Development, UN Doc. A/CONF.151/5/REV.1 (1992), ILM 31, 874 (Rio Declaration), Principle 7; UNCED, Report of the United Nations Conference on the Environment and Development, UN Doc. A.CONF/151/26/REV.1 (Vol. I) (1992), 9 (Agenda 21), Ch. 17.

contended that the United Kingdom had breached its obligations under Art. 197 in relation to the authorisation of a nuclear fuel reprocessing plant and failed to cooperate in the protection of the marine environment of the Irish Sea by declining to share information and failing to carry out an appropriate environmental impact assessment.[10] The United Kingdom responded that it had complied with Art. 197 'inter alia, through its ratification of the OSPAR Convention [The Convention for the Protection of the Marine Environment of the North-East Atlantic] and also in its role as a Member State of the European Community and Euratom.'[11] The Tribunal did not make a finding on this issue one way or the other, but did state that 'the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law.'[12]

Additional support for the view that Art. 197 states a customary law duty may be found in the Preamble to the OSPAR Convention which specifically recalls: 11

> 'the relevant provisions of customary international law reflected in Part XII of the [UNCLOS] and, in particular, Art. 197 on global and regional cooperation for the protection and preservation of the marine environment.'

2. 'on a global or regional basis'

In Art. 197 and throughout Part XII reference is made to the need for States to adopt regional rules where appropriate to prevent marine pollution and to protect and preserve the marine environment.[13] The effect of this is to require cooperation at a scale that is appropriate to meet particular threats to the marine environment. 12

Also of relevance in this context is the inclusion of the qualifier 'taking into account characteristic regional features' at the conclusion of Art. 197. Connected with regional co-operation is Art. 123 which addresses semi-enclosed seas.[14] An example of a situation where it would be 'appropriate' to adopt rules on a regional basis 'taking into account characteristic regional features' is in respect of enclosed and semi-enclosed seas, where a higher level of cooperation and stricter pollution control requirements may be needed than for other ocean areas. Another example would be particular marine environments such as those in the polar regions that are distinguished by certain regional ecological factors and circumstances. 13

The reference in Art. 197 to regional cooperation reflects the fact that the UNCLOS was concluded after a period in which a range of regional regimes were developed to control marine pollution in particular regions and protect regional marine environments. Most notably, in 1974 the United Nations Environment Programme launched the Regional Seas Programme. This programme was established in the wake of the 1972 UN Conference on the Human Environment, which led to the adoption of the Stockholm Declaration which provided in Principle 7 that: 14

> 'States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.'[15]

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[10] ITLOS, *MOX Plant Case* (Ireland *v.* United Kingdom), Request for Provisional Measures and Statement of Case of Ireland, 9 November 2001, para. 56, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/request_ireland_e.pdf.

[11] ITLOS, *MOX Plant Case* (Ireland *v.* United Kingdom), Provisional Measures, Written Response of the United Kingdom, 15 November 2001, para. 13, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/response_uk_e.pdf.

[12] ITLOS, *MOX Plant Case* (Ireland *v.* United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports (2001), 95, para. 82; see also ITLOS, *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor* (Malaysia *v.* Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports (2003), 10, para. 92.

[13] Arts. 207 (4), 210 (4), 212 (3).

[14] PCA, South China Sea Arbitration (Republic of the Philippines v. People's Republic of China), Award of 12 July 2016, 946, available at: https://www.pcacases.com/web/view/7. See *Winkelmann* on Art. 123.

[15] UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973), 3 (Stockholm Declaration).

15 The Regional Seas Programme has involved the adoption of action plans and treaties in 13 regions covering the Black Sea, Wider Caribbean, East Asian Seas, Eastern Africa, South Asian Seas, Persian Gulf, Mediterranean, North-East Pacific, North-West Pacific, Red Sea and Gulf of Aden, South-East Pacific, Pacific, and Western Africa. There are also five areas regarded as 'partners' to the Regional Seas Programme: the Antarctic, Arctic, Baltic Sea, Caspian Sea and the North East-Atlantic. Notably there is no regional seas convention for East Asian Seas.

3. 'through competent international organizations'

16 The UNCLOS makes frequent use of the term 'competent international organizations' in four main contexts: navigation (e. g. →Art. 22), conservation of living resources (e. g. →Art. 61), the protection and preservation of the marine environment including through the prevention, reduction and control of pollution (→Art. 211 (5)), marine scientific research (e. g. →Art. 238) and the transfer of marine technology (e. g. →Art. 266 (1)).

17 The meaning of the term therefore varies according to the context in which it is used. In connection with Art. 197, and with the other articles of Part XII which use the term, 'competent international organization' refers primarily to the International Maritime Organization (IMO) which is the sole international organization with the mandate to regulate international shipping, including operational and accidental pollution.

4. 'international rules, standards and recommended practices and procedures'

18 The UNCLOS refers throughout Part XII to 'international rules, standards and recommended practices and procedures' or similar formulations (such as 'global rules' →Art. 210 (6)) without providing a definition as to what such terms encompass. For instance Art. 210 (4) provides that:

> 'States, acting especially through competent international organizations, or diplomatic conference, shall endeavour to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control such pollution [caused by dumping].'

Art. 210 (6) states further that '[n]ational laws, regulations and measures shall be no less effective in preventing, reducing and controlling such pollution than the global rules and standards'.

19 There are several possible meanings of 'rules' and 'standards' (terms that are used interchangeably). On the one extreme they would include only universal rules accepted as part of customary international law, or at the very least those rules found in widely ratified conventions addressing marine environmental protection. However qualifying 'international rules' in this way would significantly limit the capacity of the UNCLOS to give effect to pollution control standards of general applicability. This in turn would prevent such standards from being used as the basis for determining the duties of States to protect the marine environment, and the limitations applicable to coastal States in asserting jurisdiction over foreign vessels. The UNCLOS approach to adopt by reference international rules serves not only in setting a floor below which pollution standards may not fall, but also a ceiling that coastal States may not exceed, and thereby prevents coastal States from imposing excessive burdens upon foreign vessels.[16]

20 It is more consistent with the object and purpose of the UNCLOS to incorporate by reference rules laid down in conventions adopted under the auspices of the IMO that have entered into force. This would be the case even in respect of IMO conventions that have attracted only limited support, so long as there is no evidence of opposition by a significant bloc of maritime States. As Boyle has noted:

[16] *Alan Boyle*, Marine Pollution Under the Law of the Sea Convention, AJIL 79 (1985), 347, 353.

> 'to insist on widespread ratification or acceptance in customary law before the duty to regulate is perfected, would not encourage broader adoption of international rules and standards for all sources of pollution.'[17]

21 The additional terms 'standards and recommended practices and procedures', are broader than 'rules' and 'standards', which can be considered to refer only to legally-binding norms. This raises the question whether non-binding or soft-law instruments such as guidelines and codes adopted by the IMO give rise to obligations under the UNCLOS. Given that applying international 'rules' may involve binding States which are parties to the UNCLOS but have not consented to the relevant rule in the treaty regime concerned, it is likely to be too far a further step to apply also soft-law standards.[18] This therefore serves to emphasise the importance of reaching agreement within the IMO, or the other relevant competent international organization, on the conclusion of a binding instrument. A recent example of this process is the 2004 International Convention for the Control and Management of Ships' Ballast Water and Sediments[19] which emerged from IMO guidelines,[20] and which is now close to acquiring the required number of ratifications representing the required percentage proportion of world merchant shipping tonnage.

5. 'marine environment'

22 There is no definition in the UNCLOS of the term 'marine environment', but its meaning may be discerned from the definition in Art. 1 (1)(4) of 'pollution of the marine environment' and by the provisions of Part XII. Art. 1 (1)(4) refers to pollution as including the introduction of substances or energy 'into the marine environment, including estuaries'. It also makes reference to 'living resources and marine life' and the 'quality' of sea water. The 'marine environment' also includes the coastline, as made clear by Art. 211, which addresses marine pollution from vessels. Other provisions of the UNCLOS refer also to the 'ecological balance' of the marine environment (e. g. → Art. 234).[21] In summary, therefore, the 'marine environment' to which Art. 197 refers is the water column and the seabed from the coastline seawards, in areas both within and beyond the limits of national jurisdiction. It encompasses both the physical estuarine and oceanic environment and also its ecology including individual biological components.

Article 198
Notification of imminent or actual damage

When a State becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution, it shall immediately notify other States it deems likely to be affected by such damage, as well as the competent international organizations.

Bibliography: Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991)

Documents: ILC, Responsibility of States for Internationally Wrongful Acts, GA Res. 56/83 of 12 December 2001, Annex; ILC, Report of the International Law Commission: Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), GAOR 56th Sess. Suppl. 10, 370–377; ILC, Report of the International Law Commission: Prevention of Transboundary Harm from Hazardous Activities with Commen-

[17] *Ibid.*, 356.
[18] *Ibid.*, 356–357.
[19] International Convention for the Control and Management of Ships' Ballast Water and Sediments (not yet in force).
[20] Including IMO Res. A.868(20) of 27 November 1997.
[21] See e. g. Art. 234.

taries, UN Doc. A/56/10 (2001), GAOR 56th Sess. Suppl. 10, 377–435; UNCED, The Rio Declaration on the Environment and Development, UN Doc. A/CONF.151/5/REV.1 (1992), ILM 31, 874–880

Cases: ICJ, *Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland *v.* Albania), Merits, Judgment of 9 April 1949, ICJ Reports (1949), 4; ICJ, *Gabčíkovo-Nagymaros Project* (Hungary *v.* Slovakia), Judgment of 25 September 1997, ICJ Reports (1997), 7; ICJ, *Case Concerning Pulp Mills on the River Uruguay* (Argentina *v.* Uruguay), Judgment of 20 April 2010, ICJ Reports (2010), 14; ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica *v.* Nicaragua) and *Construction of a Road in Costa Rica Along the San Juan River* (Nicaragua *v.* Costa Rica) (2015), available at: http://www.icj-cij.org/docket/files/150/18848.pdf; ITLOS, *Southern Bluefin Tuna Cases* (New Zealand *v.* Japan; Australia *v.* Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports (1999), 280; ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports (2011), 10

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I. Purpose and Function

1 Art. 198 sets out the duty of States to notify other States where the latter are likely to be affected by imminent or actual damage to the marine environment of which the notifying State is aware. In such situations a State that has knowledge of a potential or real pollution emergency must also notify the competent international organizations, whether or not the State is a member of those organizations. The obligation applies to all situations of actual and imminent damage to the marine environment whether or not the State that becomes aware of it itself has responsibility for the situation giving rise to the pollution incident or threat of pollution. The purpose of Art. 198 is to minimise environmental harm and the risk of environmental harm by notifying affected states and competent authorities so that appropriate responses can be taken.

2 The Art. 198 duty to notify of pollution incidents affecting the marine environment is one of customary international law and is an expression in the law of the sea of the general obligation to warn States of the risk of significant harm arising from activities within their territory, jurisdiction or control. In the *Corfu Channel Case*, which concerned the risk posed to maritime traffic by sea-mines in the straits of Corfu, the International Court of Justice (ICJ) observed that the duty to notify other States of risks of significant harm is grounded in 'elementary considerations of humanity.'[1]

3 The International Law Commission's (ILC) 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities[2] sets out general duties upon States in relation to transboundary harm. The duty of notification of actual or potential transboundary harm in the Draft Articles on Prevention is of two types. First, if a State plans to undertake an activity which an environmental assessment indicates may cause transboundary harm, then the State of origin is to provide the State likely to be affected with timely notification of the risk and the relevant technical and other information.[3] As the ICJ held in

[1] ICJ, *Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland *v.* Albania), Merits, Judgment of 9 April 1949, ICJ Reports (1949), 4, 22.

[2] ILC, Report of the International Law Commission: Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), GAOR 56th Sess. Suppl. 10, 370 (Draft Articles on Prevention).

[3] Art. 8 Draft Articles on Prevention.

Certain Activities Carried Out by Nicaragua in the Border Area and *Construction of a Road in Costa Rica Along the San Juan River*:

> 'If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk.'[4]

Second, there is the more specific obligation requiring a State of origin to notify without delay any State likely to be affected by a pollution emergency.[5] It is this second obligation that Art. 198 gives effect to in the particular context of the law of the sea. The ILC in its commentaries to the Draft Articles on Prevention cites Art. 198 of the UNCLOS as an example of the obligation of states of origin to notify of a pollution emergency.[6] The wording of Art. 198 suggests that it applies not only to states of origin of pollution, but to all states which detect an imminent danger of marine pollution.

Duties of notification of pollution emergencies are elaborated in a range of bilateral and multilateral treaties and in soft-law instruments. These include the Rio Declaration[7] and also a host of watercourse agreements. In the *Pulp Mills Case* the ICJ observed that obligations of notification under a bilateral river treaty constitute 'procedural obligations' that 'constitute an appropriate means' for achieving the objective of sustainable water resource management.[8] The Court further noted that the obligation of notification is 'all the more vital when a shared resource is at issue'.[9] This observation applies with equal force in the context of the marine environment. **4**

In the law of the sea the obligation to notify of pollution emergencies found in Art. 198 is given more specific effect through implementing agreements applicable to particular pollutants and to certain regions. An example of the former is the 1990 International Convention on Oil Pollution Preparedness, Response and Cooperation (OPPRC Convention) which establishes a sophisticated system of procedures for reporting oil pollution incidents, including an obligation on States to inform the IMO and other States of oil pollution incidents where the severity of the incident justifies this.[10] An example of a regional treaty that includes an obligation similar to Art. 198 is the 1995 Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean which in Art. 9 (2) provides that '[a]ny Contracting Party which becomes aware of any pollution emergency in the Mediterranean Sea Area shall without delay notify the Organization and, either through the Organization or directly, any Contracting Party likely to be affected by such emergency.' **5**

II. Historical Background

The origin of Art. 198 can be traced to the 1973 session of the Sea-Bed Committee where Canada proposed a duty of notification. The proposed wording of that provision was similar to that ultimately found in Art. 198, although it was limited to notification of other states and **6**

[4] ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica *v.* Nicaragua) and *Construction of a Road in Costa Rica Along the San Juan River* (Nicaragua *v.* Costa Rica) (2015), available at: http://www.icj-cij.org/docket/files/150/18848.pdf, [104].

[5] Art. 17 Draft Articles on Prevention.

[6] ILC, Report of the International Law Commission: Prevention of Transboundary Harm from Hazardous Activities with Commentaries, UN Doc. A/56/10 (2001), GAOR 56th Sess. Suppl. 10, 377, 431 (Art. 17, para. 1).

[7] UNCED, The Rio Declaration on the Environment and Development, UN Doc. A/CONF.151/5/REV.1 (1992), ILM 31, 874 (Rio Declaration), Principle 18: 'States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted.'

[8] ICJ, *Case Concerning Pulp Mills on the River Uruguay* (Argentina *v.* Uruguay), Merits, Judgment of 20 April 2010, ICJ Reports (2010), 14, para. 81.

[9] *Ibid.*

[10] Art. 5 (3) OPPRC Convention.

not competent international organizations.[11] The extension to include competent international organizations was made in the draft article prepared by Working Group 2 which provided as follows:

> 'A State which becomes aware of cases in which the marine environment is in imminent danger of being damaged or has been damaged by pollution shall immediately notify other States likely to be affected by such damage, as well as the competent organizations.'[12]

7 Only two changes of major significance were discussed during the Third Conference. These were the Brazilian proposal that the provision should apply only to 'significant' damage from pollution, and that the words 'they deem' be included before 'likely to be affected' to inject a subjective element to the duty of notification.[13] The first amendment was rejected, ensuring that Art. 198 as finally agreed has a very wide application. However, the second was accepted, suggesting that states must make their own, subjective, judgment as to whether another state is likely to be affected by pollution damage of which the former becomes aware.[14]

8 The final form of Art. 198 was settled in the Informal Composite Negotiating Text, Revision 3 (1980).[15]

III. Elements

1. 'becomes aware'

9 The duty of notification is triggered when a state becomes aware of imminent danger to the marine environment or where the marine environment has actually been damaged by pollution. Knowledge of risk of damage or damage may be obtained in various ways, including as a result of routine observation and monitoring of the marine carried out in conformity with Art. 204(2) of the Convention, which requires surveillance of the effects of any activities that states permit or which they engage in that have some likelihood of polluting the marine environment.

2. 'imminent danger'

10 The obligation of notification applies not only to actual pollution damage, but also in situations where there is 'imminent danger' of such damage. As such Art. 198 requires States that have knowledge of potential marine pollution emergencies to notify other States that may be affected if the impending damage is anticipated in the near future.

11 The term 'imminent danger' bears some similarity with that of 'imminent peril' which appears in Art. 25 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ASR)[16] which sets out the circumstances in which a State may invoke necessity as a ground for precluding the wrongfulness of an act not in conformity with international law. In the *Gabčíkovo-Nagymaros Case*[17] the ICJ observed that for the purposes of the necessity

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[11] Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991), 83 (MN 198.1).

[12] Third Committee UNCLOS III, Results of Consideration of Proposals and Amendments Relating to the Preservation of the Marine Environment, UN Doc. A/CONF.62/C.3/L.15 (1974), OR III, 260, 261.

[13] Third Committee UNCLOS III, Conference Room Papers Containing Proposals or Amendments Informally Introduced but Not Considered by the Drafting and Negotiating Group of the Informal Meetings on Item 12 (Preservation of the Marine Environment), UN Doc. A/CONF.62/C.3/L.14/Add.1 (1974), OR III, 255, 256.

[14] Results of Consideration of Proposals (note 12).

[15] UNCLOS III, Draft Convention on the Law of the Sea (Informal Text), UN Doc. A/CONF.62/WP.10/REV.3 (1980), OR VIII, 82.

[16] ILC, Responsibility of States for Internationally Wrongful Acts, GA Res. 56/83 of 12 December 2001, Annex.

[17] ICJ, *Gabčíkovo-Nagymaros Project* (Hungary *v.* Slovakia), Judgment of 25 September 1997, ICJ Reports (1997), 7.

defence the word 'peril' 'evokes the idea of "risk"; that is precisely what distinguishes "peril" from material damage.'[18] In relation to the word 'imminent' the ICJ noted that it was 'synonymous with "immediacy" or "proximity" and goes far beyond the concept of "possibility".'[19] The Court also held that this 'does not exclude […] that a "peril" appearing in the long term might be held to be "imminent" as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.'[20]

3. 'it deems likely to be affected'

States are not required to notify all States of all potential or actual pollution emergencies, only those States that 'it deems likely' to be affected by such pollution. As such, a State confronting a situation of pollution damage whatever the source of that pollution and wherever it is found, need only notify other States if, in its judgment, those other States are likely to be affected. The term 'affected' is a general one, and is not to be limited to situations in which the State that may be impacted is an 'injured' State entitled to invoke State responsibility under Chapter I of the ASR. 12

This element imports into the Art. 198 duty of notification a subjective element, however consistent with the precautionary approach States aware of pollution incidents should err on the side of caution and notify of any situation likely to result in pollution damage. The UNCLOS does not refer to the 'precautionary principle' or 'precautionary approach' as the concept post-dated the conclusion of the Convention. However there are clear precautionary elements in the Convention. As Judge Treves noted in his separate opinion in the *Southern Bluefin Tuna Cases*,[21] 'a precautionary approach seems […] inherent in the very notions of provisional measures' that may be ordered by the International Tribunal for the Law of the Sea (ITLOS). Moreover, as the Seabed Disputes Chamber of the ITLOS observed in its Advisory Opinion in *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*,[22] there is a 'trend towards making [the precautionary] approach part of customary international law',[23] a trend which also gained some recognition by the ICJ in the *Pulp Mills Case*.[24] As such, the Chamber noted, the precautionary approach is relevant to the interpretation of treaties including the UNCLOS by operation of Art. 31 (3)(c) of the Vienna Convention on the Law of Treaties according to which treaty interpretation should take into account 'any relevant rules of international law applicable in relations between the parties.' 13

4. 'damage'

Art. 198 refers generally to all situations where there is imminent or actual 'damage' to the marine environment from 'pollution'. It is therefore cast in general terms, and does not include a threshold for the seriousness or significance of the pollution other than that it must threaten or actually involve 'damage'. There is state practice to indicate that notification by origin states has been made as soon as pollution is visible within the EEZ of another state, regardless of the actual level of damage, if any, occasioned by that pollution. For example, in relation to the oil spill from the Montara Wellhead in the Timor Sea, the Australian 14

[18] *Ibid.*, para. 54.
[19] *Ibid.*
[20] *Ibid.*
[21] ITLOS, *Southern Bluefin Tuna Cases* (New Zealand v Japan; Australia v Japan), Provisional Measures, Order of 27 August 1999, Separate Opinion of Judge Treves, para. 9, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/Separate.Treves.27.08.99.E.pdf.
[22] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports (2011), 10.
[23] *Ibid.*, para. 135.
[24] *Pulp Mills Case* (note 8), para. 164.

government notified the Indonesian government 'as soon as possible after satellite imagery showed […] that small patches of weathered oil had crossed into Indonesia's [EEZ]'[25].

15 'Pollution of the marine environment' is defined in Art. 1 (1)(4) of the UNCLOS to mean 'the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.'

5. 'competent international organizations'

16 The primary 'competent international organization' will be the IMO, at least as regards sources of pollution within the IMO's general competence such as oil and other hazardous materials released from ships during their normal operation or in situations of collision or grounding.

17 Other competent international organizations would include relevant regional organisations in the event of a regional pollution emergency, or relevant global organisations with competence to address a particular type of pollutant, such as the International Atomic Energy Agency in respect of marine pollution from nuclear materials. An example is the Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea which is administered by the IMO in cooperation with the UNEP, and which assists Mediterranean States meet their obligations under the Convention for the Protection of the Marine Environment and Coastal Region of the Mediterranean and its Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea. To that end it oversees centralized emergency communications procedures allowing national competent authorities to notify of pollution emergencies.

Article 199
Contingency plans against pollution

In the cases referred to in article 198, States in the area affected, in accordance with their capabilities, and the competent international organizations shall cooperate, to the extent possible, in eliminating the effects of pollution and preventing or minimizing the damage. To this end, States shall jointly develop and promote contingency plans for responding to pollution incidents in the marine environment.

Bibliography: Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991)

Documents: UNCED, The Rio Declaration on the Environment and Development, UN Doc. A/CONF.151/5/REV.1 (1992), ILM 31, 874–880

Cases: ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports (2011), 10

[25] Australian Embassy, Jakarta, Indonesia, Media Release, 2 November 2009. http://www.amsa.gov.au/marine_environment_protection/Montara_Well_Head_Platform/media/4-Nov-09-Montara-oil-leak.pdf.

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I. Purpose and Function

Art. 199 is a counterpart provision to Art. 198, and is aimed at ensuring that States in an area affected by imminent or actual damage from marine pollution take active and collaborative measures to eliminate, minimize and prevent such damage. Cooperative measures are preferable to unilateral responses given the fluid and dynamic nature of pollution emergencies at sea. The second clause of Art. 199 has a more preventative emphasis, requiring States to develop contingency plans so that they are able to respond promptly and effectively to pollution emergencies, if they arise. **1**

In terms of spatial application, Art. 199, like Art. 198, applies in any oceanic area where there has been or may be a pollution incident, regardless of the maritime zone in which the 'area affected' by the pollution is found. However in practice, the obligations to prepare for and respond to pollution emergencies will have greatest application in marine areas that neighbour two or more States. **2**

II. Historical Background

A precursor to Art. 199 can be found in Art. 25 (2) of the 1958 Convention on the High Seas (High Seas Convention) which provides that: **3**

> 'All States shall co-operate with the competent international organizations in taking measures for the prevention of pollution of the seas or air space above, resulting from any activities with radioactive materials or other harmful agents'.

By contrast with Art. 25 (2) High Seas Convention, however, Art. 199 applies to all types of marine pollution. Moreover, it is more specific than Art. 25 (2) High Seas Convention in setting out the steps that takes are to take in preventing marine pollution, including the requirement that States undertake contingency planning.

The origin of Art. 199 was Article III of Canada's Draft Convention on Marine Pollution placed before the Sea-Bed Committee in 1973 which referred to the need for States to develop 'action plans' for preventing marine pollution.[1] At the Conference, agreement was quickly reached on what was to become Art. 199. By the third session in 1975, the Informal Single Negotiating Text included a provision that was in substance identical to Art. 199 of the present Convention. **4**

III. Elements

1. 'In the cases referred to in Article 198'

The obligations in Art. 199 to cooperate to prevent or minimise pollution and to eliminate its effects are enlivened '[i]n the cases referred to in article 198', that is to say in pollution **5**

[1] Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991), 87 (MN 199.1).

emergencies, where the marine environment is in imminent danger of being damaged or has in fact been damaged by pollution.[2] The second element of Art. 199, the obligation to prepare and promote pollution contingency plans, is one that operates in advance or anticipation of such emergencies.

2. 'in the area affected'

6 Art. 199 provides that it is only States 'in the area affected' that are required to cooperate in eliminating the effects of pollution and in preventing or minimising pollution damage. Art. 199 does not indicate that 'area affected' must be one within a coastal State's maritime zone. It could therefore be any oceanic area, including the high seas, affected by pollution. However, as noted above, coastal States adjoining an ocean area affected by pollution assume the main obligations under Art. 199, as it will be these States that are in the best position to prevent and respond to pollution emergencies.

3. 'in accordance with their capabilities […] to the extent possible'

7 The term 'to the extent possible' appears in Art. 199 and no other provision in the UNCLOS, while the term 'in accordance with their capabilities' appears in two other articles in the UNCLOS – in Art. 194 (1) which sets out the general obligation to prevent marine pollution[3] and Art 266 (1) which requires States to cooperate in the transfer of marine science and technology.[4] However there are other similar qualifiers used in the Convention (e. g. 'economic capacity' as used in Art. 207 (4))[5].

8 These two closely related qualifications were included in Art. 199 in order to allay concerns held by developing States at the Conference that the article committed them to a standard of pollution preparedness and response that would be beyond their financial and technical capacities.[6] In this respect Art. 199 is similar to other norms of international law relating to the protection of the environment. For instance, Principle 15 of the United Nations Declaration on Environment and Development (Rio Declaration) stipulates that States should take a precautionary approach 'according to their capabilities'.[7] In *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) observed that the due diligence obligation to take a precautionary approach to prevent pollution from activities in the Area[8] 'may be stricter for the developed than for the developing sponsoring States.'[9] The same conclusion can be reached in respect of the obligations of developed and developing States in relation to preparations for, and immediate responses to, marine pollution emergencies.

4. 'competent international organizations'

9 In Art. 199, and the other articles of Part XII which use the term, 'competent international organizations' refers first and foremost to the International Maritime Organization (IMO) and then to other global and regional organizations that have capacity to assist in developing pollution contingency plans and in responding to pollution emergencies.

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[2] For further information see, *Stephens* on Art. 198.

[3] See *Czybulka* on Art. 194.

[4] See *Bartenstein* on Art. 266.

[5] *Cf. Wacht* on Art. 207 MN 14–20.

[6] See, e. g., Third Committee UNCLOS III, Kenya: Draft Articles for the Preservation and Protection of the Marine Environment, UN Doc. A/CONF.62/C.3/L.2 (1974), OR III, 245–247.

[7] UNCED, The Rio Declaration on the Environment and Development, UN Doc. A/CONF.151/5/REV.1 (1992), ILM 31, 874 (Rio Declaration), Principle 15.

[8] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, para. 131, ITLOS Reports (2011), 10.

[9] *Ibid.*, para. 161.

5. 'eliminating the effects of pollution and preventing or minimizing the damage'

The obligation to eliminate the effects of pollution and prevent or minimize pollution damage is activated in the event of a pollution emergency of the kind referred to in Art. 198. States should endeavour in the first instance to eliminate the effects of pollution by taking those steps necessary to contain a pollution emergency, and where possible neutralize the effects of pollutants in the marine environment. Where it is not possible to prevent pollutants escaping into the environment, then efforts are to be made to prevent or minimize the damage those pollutants cause. However, States must be mindful of the obligation under Art. 195 not to transfer damage or pollution from one area to another when taking measures to prevent, reduce and control pollution of the marine environment.[10] **10**

6. 'contingency plans'

Art. 199 requires States to develop and promote contingency plans for responding to pollution incidents in the marine environment. The content of such contingency plans is not specified in the UNCLOS. However the level of contingency planning required will turn on the nature of the pollution threat. **11**

The general obligation in Art. 199 has been elaborated and extended by a number of multilateral agreements, including e. g. the 1990 Convention on Oil Pollution Preparedness, Response and Cooperation (OPPRC Convention), and the 2000 Protocol on Preparedness, Response and Co-operation to Pollution Incidents by Hazardous and Noxious Substances (OPRC-HNS Protocol). The OPPRC Convention was agreed under the auspices of the IMO in the aftermath of the Exxon Valdez disaster in Alaska in 1989. It seeks to bolster flag and coastal state readiness and planning for potential pollution incidents, and requires parties to provide assistance to States affected by pollution. The OPPRC Convention requires its parties to formulate oil pollution plans for their vessels and for their ports and offshore terminals. **12**

Article 200
Studies, research programmes and exchange of information and data

States shall cooperate, directly or through competent international organizations, for the purpose of promoting studies, undertaking programmes of scientific research and encouraging the exchange of information and data acquired about pollution of the marine environment. They shall endeavour to participate actively in regional and global programmes to acquire knowledge for the assessment of the nature and extent of pollution, exposure to it, and its pathways, risks and remedies.

Bibliography: Patricia Birnie, Law of the Sea and Ocean Resources: Implications for Marine Scientific Research, IJMCL 10 (1995), 229–251; Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991)

Documents: UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc A/CONF.48/14/Rev. 1 (1972), 73–74 (Annex III, General Principles for Assessment and Control of Marine Pollution); UNEP/IOC, An Assessment of Assessments: Findings of the Group of Experts Pursuant to GA Res. 60/30 (2009)

[10] See *Czybulka* on Art. 195.

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I. Purpose and Function

1 Art. 200 requires States to cooperate in undertaking scientific studies of marine pollution and to exchange information that is acquired about marine pollution. Art. 200 applies to the pollution of the marine environment generally, regardless of the maritime zone in which pollution is introduced, or where the effects of pollution are felt. Art. 200 operates in tandem with Art. 201, which stipulates that the information gained in this process is to be the basis of the rules, standards and recommended practices and procedures adopted to prevent, reduce and control marine environmental pollution.[1] There are also linkages between Arts. 200 and 201 and Part XIII of the UNCLOS concerning marine scientific research.

2 The purpose and function of Art. 200 is to ensure that the impact of pollution on the marine environment is recognised, so that appropriate measures may be taken to protect and preserve the oceanic environment. Art. 200 imposes an obligation upon States to cooperate in gathering information on the causes and effects of pollution, in recognition of the fact that the nature of the marine environment means that pollution may have widespread impacts and affect a number of States.[2] The objective served by Art. 200 is rendered all the more important given the emergence of a range of global threats to the marine environment, most notably the process of 'ocean acidification' brought about by the absorption of carbon dioxide from the atmosphere that is damaging corals and other calcifying organisms.

3 The importance of research regarding pollution of the marine environment is emphasised in the Preamble, which states that one of the purposes of the Convention is to promote the 'study, protection and preservation of the marine environment',[3] a formulation that emphasises the important linkages between marine scientific research, especially research directed towards understanding the sources and impacts of pollution, and sustainable development.[4]

II. Historical Background

4 As with many other provisions of Part XII, the origins of Art. 200 can be traced to debates and discussions within the Sea-Bed Committee on pollution and other marine environmental issues connected with mining in the Area.[5] Art. 200 is inspired by the General Principles for Assessment and Control of Marine Pollution[6] which were formulated by the Intergovernmental Working Group on Marine Pollution held in Ottawa in 1971 (and were endorsed at the 1972 United Nations Conference on the Human Environment held in Stockholm). Of

[1] Both of these provisions also overlap to some extent with Art. 204 (1) which requires States to 'measure, evaluate and analyze, by recognized scientific methods, the risks or effects of pollution of the marine environment', see *Blitza* on Art. 204 MN 11–19.

[2] Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991), 91 (MN 200.1).

[3] See *Lagoni* on the Preamble.

[4] *Patricia Birnie*, Law of the Sea and Ocean Resources: Implications for Marine Scientific Research, IJMCL 10 (1995), 229.

[5] Nordquist/Rosenne/Yankov (note 2), 91–92 (MN 200.1–200.2).

[6] UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/Rev. 1 (1972), 73 (Annex III, General Principles for Assessment and Control of Marine Pollution).

most importance was Principle 15 which provided that States should 'co-operate […] with a view to the development of marine environmental research and survey programmes and systems and means for monitoring changes.'[7]

The first sentence of Art. 200 is expressed in mandatory language (States 'shall co-operate' in undertaking scientific research about marine pollution), while the second is formulated in aspirational terms (States 'shall endeavour' to participate in regional or global programmes to acquire knowledge about marine pollution). The distinction between the two is explained by the drafting history, in which Kenya proposed a qualification to what was to become Art. 200 to add the words 'according to their capabilities' to the requirement that States support international research programs.[8] This was to address the concern that while all States may cooperate in scientific research, not all States will have the expertise or financial capacity to participate actively in scientific research programmes. 5

III. Elements

1. 'competent international organizations'

In Art. 200 the term 'competent international organizations' refers primarily to those inter-governmental organisations directly engaged with or which support research on issues of marine pollution. 6

Scientific research in the marine environment that specifically examines marine pollution or has implications for its regulation is carried out by an array of governmental, inter-governmental and private organisations. The key inter-governmental organisation engaged in research on marine pollution is the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection (GESAMP). GESAMP was established in 1960 as an advisory body, providing the United Nations system with advice on scientific aspects of marine environmental protection. It consists of 16 experts from a range of discipline areas, and is supported by nine United Nations organisations whose responsibilities extend to the marine environment. GESAMP has published over 80 reports or studies that include in-depth scientific studies and reviews of marine pollution and other issues relating to marine environmental degradation.[9] Another important intergovernmental organisation engaged in related work is the Intergovernmental Oceanographic Commission (IOC) of the United Nations Educational, Scientific and Cultural Organisation, that was established to promote international cooperation and coordinate programs in marine scientific research. 7

The IOC and other organisations participated in the First Global Integrated Marine Assessment (First World Ocean Assessment), which among other things undertook a comprehensive assessment of the impact of pollution on the global marine environment, and was noted and welcomed with appreciation by the United Nations General Assembly in 2015.[10] 8

2. 'pollution of the marine environment'

The wide reach of the obligation in Art. 200 to expand the body of scientific knowledge of marine pollution is confirmed by the definition of 'pollution of the marine environment' in Art. 1 (1)(4): 9

[7] Principle 15 General Principles for Assessment and Control of Marine Pollution.

[8] Third Committee UNCLOS III, Kenya: Draft Articles for the Preservation and the Protection of the Marine Environment, UN Doc. A/CONF.62/C.3/L.2 (1974), OR III, 245, 246 (Article 14).

[9] See http://www.gesamp.org/publications.

[10] GA Res. 70/235 of 23 December 2015.

'the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.'[11]

Article 201
Scientific criteria for regulations

In the light of the information and data acquired pursuant to article 200, States shall cooperate, directly or through competent international organizations, in establishing appropriate scientific criteria for the formulation and elaboration of rules, standards and recommended practices and procedures for the prevention, reduction and control of pollution of the marine environment.

Documents: UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc A/CONF.48/14/Rev. 1 (1972), 73–74 (Annex III, General Principles for Assessment and Control of Marine Pollution)

Cases: ITLOS Seabed Disputes Chamber, *Responsibilities and Obligation of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Reports (2011), 10

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I. Purpose and Function

1 In several provisions in Part XII reference is made to the need for States, individually or jointly or through competent international organisations, to adopt measures and standards for the prevention, reduction and control of the marine environment (see particular → Art. 194; Art. 196; Art. 197). The purpose of Art. 201 is to bring together these obligations with the obligation in Art. 200 to conduct scientific studies of marine pollution, so that there is a sound scientific basis for all rules, standards and recommended practices for the prevention, reduction and control of pollution of the marine environment. Art. 201 recognises that there is much more likely to be agreement on rules for the protection of the marine environment when these rules are based upon widely accepted scientific criteria.

II. Historical Background

2 The historical origins of Art. 201 are the same as those for Art. 200, namely the discussion within the Sea-Bed Committee of pollution issues associated with mining in the Area.[1] The most direct historical antecedent to the Art. 201 text is Principle 10 of the General Principles for Assessment and Control of Marine Pollution that were formulated by the Intergovern-

[11] For details see *Tanaka* on Art. 1 MN 12–15.
[1] See *Stephens* on Art. 200.

mental Working Group on Marine Pollution[2] and were endorsed at the 1972 United Nations Conference on the Human Environment held in Stockholm.[3] Principle 10 provided, among other things, that:

> '[a] comprehensive plan for the protection of the marine environment should be based upon the identification of critical pollutants […] and assessment of the risks they pose, timely detection of undesirable trends, and development and detection and monitoring systems.'

III. Elements

1. 'competent international organizations'

States may cooperate directly or through competent international organizations. The term 'competent international organization' in Art. 201 bears much the same meaning as it does in Art. 200,[4] and refers primarily to those inter-governmental organisations directly engaged or which support scientific research on issues of marine pollution such as the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection (GESAMP). However, whereas Art. 200 refers to international organizations engaged in research, Art. 201 refers specifically to those organizations engaged in 'establishing appropriate scientific criteria' in relation to marine pollution. Prominent among these are the International Maritime Organization (IMO), which is at the forefront of coordinating the formulation of rules and standards for the protection of the marine environment from vessel source pollution, and to this end adopts new treaties, or amendments to existing regimes, by reference to 'appropriate scientific criteria' identified by the IMO's Marine Environment Protection Committee (MEPC). The MEPC is the IMO's primary technical body tasked with considering marine pollution issues. 3

2. 'establishing appropriate scientific criteria for the formulation and elaboration of rules'

Art. 201 is designed to ensure that the measures adopted to address marine pollution keep pace with scientific understanding of the sources, types and impacts of pollution on coastal and marine environments and ecosystems. As the Seabed Disputes Chamber of the International Tribunal for the Law of the Seas (ITLOS) observed in *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, measures adopted to prevent pollution of the marine environment may need to change over time to become stricter 'in light…of new scientific or technological knowledge.'[5] 4

In tailoring protective measures to match scientific knowledge concerning marine pollution, it is often the case that there is some level of scientific uncertainty about the nature of pollution threats. In this respect the precautionary principle or approach will have a role to play in the operation of Art. 201 as the establishment of appropriate scientific criteria will need to acknowledge potential risks even if they are not fully known. In the *Responsibilities and Obligations of Sponsoring States* advisory opinion, the Seabed Disputes Chamber of the ITLOS observed that the precautionary approach, as formulated in Principle 15 of the Rio 5

[2] UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/Rev. 1 (1972), 73 (Annex III, General Principles for Assessment and Control of Marine Pollution).

[3] The Intergovernmental Working Group on Marine Pollution was established by the Preparatory Committee for the UN Conference on the Human Environment to devise a set of general principles for assessment and control of marine pollution.

[4] See *Stephens* on Art. 200 MN 6–8.

[5] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligation of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, para. 117, ITLOS Reports (2011), 10, para. 161.

Declaration,[6] 'has been incorporated into a growing number of international treaties and other instruments' and that 'this has initiated a trend towards making this approach part of customary international law.'[7] The significance of this is that the precautionary approach may be taken into account, where relevant, in interpreting the UNCLOS:

> 'in light of article 31, paragraph 3(c) of the Vienna Convention, according to which the interpretation of a treaty should take into account not only the context but "any relevant rules of international law applicable in the relations between the parties.'[8]

6 There is extensive state practice in the practical application of Art. 201, and the majority of this is found in the work of the IMO, discussed above.

Section 3
Technical assistance

Article 202
Scientific and technical assistance to developing States

States shall, directly or through competent international organizations:

(a) **promote programmes of scientific, educational, technical and other assistance to developing States for the protection and preservation of the marine environment and the prevention, reduction and control of marine pollution. Such assistance shall include, *inter alia*:**
  (i) **training of their scientific and technical personnel;**
  (ii) **facilitating their participation in relevant international programmes;**
  (iii) **supplying them with necessary equipment and facilities;**
  (iv) **enhancing their capacity to manufacture such equipment;**
  (v) **advice on and developing facilities for research, monitoring, educational and other programmes;**

(b) **provide appropriate assistance, especially to developing States, for the minimization of the effects of major incidents which may cause serious pollution of the marine environment;**

(c) **provide appropriate assistance, especially to developing States, concerning the preparation of environmental assessments.**

Bibliography: *Laurence Boisson de Chazournes*, The Global Environment Facility (GEF): A Unique and Crucial Institution, RECIEL 14 (2005), 193–201; *Laurence Boisson de Chazournes*, Technical and Financial Assistance, in: Daniel Bodansky/Jutta Brunnée/Ellen Hey (eds.), Oxford Handbook of International Environmental Law (2007) 947–973; *Claudio Dordi/Michel Kostecki*, Technical Assistance, MPEPIL, available at: http://www.mpepil.com; *Ellen Hey*, Common but Differentiated Responsibilities, MPEPIL, available at: http://www.mpepil.com; Myron Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1990)

Documents: GA Res. 67/78 of 11 December 2012; GA Res. 69/292 of 19 June 2015; Global Environment Facility, Catalysing Ocean Finance, vol. I (2012); Global Environment Facility, Catalysing Ocean Finance, vol. II (2012); UN, Report of the Work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at Its Eleventh Meeting, UN Doc A/65/164 (2010); UNCED, The Rio Declaration on the Environment and Development, UN Doc. A/CONF.151/5/REV.1 (1992), ILM 31, 874; UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973)

[6] In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

[7] *Responsibilities and Obligation of Sponsoring States* (note 5), para. 135.

[8] *Ibid.*

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I. Purpose and Function

Art. 202 is one of two provisions which form part of Section 3 of Part XII of the Convention, under the title 'Technical Assistance'. It recognises that some States may require support from other countries in complying with their obligations under Part XII to protect and preserve the marine environment. Such assistance potentially covers a range of different types of support, including financial assistance, capacity-building, and technology transfer.[1] **1**

The need to provide technical assistance is found across many areas of international law, although it is particularly pertinent in the field of environmental protection because 'effective environmental management by governments requires scientific and technical expertise, adequate infrastructure for environmental monitoring, and complex decision-making processes, which in many countries are not available.'[2] Indeed, technical assistance is implicit in the concept of common but differentiated responsibilities in international environmental law, according to which: **2**

> '[t]he developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.'[3]

Financial and/or technical support is one way of addressing the difficulties that developing countries may face in meeting environmental obligations, without compromising the level of protection for the environment.

Art. 202 is one of the means of implementing the principle of common but differentiated responsibilities in the context of the law of the sea by encouraging the strengthening of the capabilities of developing countries. The provision does not go as far as some international treaties on this topic which provide that **3**

> '[t]he extent to which developing country Parties will effectively implement their commitments […] will depend on the effective implementation by developed country Parties of their commitments […] related to financial resources and transfer of technology.'[4]

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[1] See generally *Claudio Dordi/Michel Kostecki*, Technical Assistance, MPEPIL, available at: http://www.mpepil.com.

[2] *Laurence Boisson de Chazournes*, Technical and Financial Assistance, in: Daniel Bodansky/Jutta Brunnée/Ellen Hey (eds.), Oxford Handbook of International Environmental Law (2007), 949.

[3] UNCED, The Rio Declaration on the Environment and Development, UN Doc. A/CONF.151/5/REV.1 (1992), ILM 31, 874, Principle 7.

[4] Art. 20 (4) Convention on Biological Diversity. See also Art. 13 (4) Convention on Persistent Organic Pollutants.

4 The provision of technical assistance may affect the standards that must be met by developing countries in the field of marine environmental protection. Ordinarily, the capacities of developing countries may be a factor to be taken into account when determining the standard of due diligence expected of them in implementing their environmental commitments under the Convention. Art. 194 (1) explicitly recognizes that

> 'States shall take […] all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, *using for this purpose the best practicable means at their disposal and in accordance with their capabilities*.'[5]

Thus, in some circumstances, developing countries may be expected to bear a lower burden under Art. 194 (1) than developed countries. However, developing countries that have received financial or technical assistance may be expected to meet the same obligations as more developed countries.[6]

II. Historical Background

5 The need for support for developing countries to implement their international environmental obligations was recognised at a very early stage in the development of international environmental law. According to Principle 12 of the Stockholm Declaration on the Human Environment:

> 'Resources should be made available to preserve and improve the environment, taking into account the circumstances and particular requirements of developing countries and any costs which may emanate from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their request, additional international technical and financial assistance for this purpose.'[7]

A similar principle was advocated by the Working Group on Marine Pollution, which met prior to the 1972 Stockholm Conference on the Human Environment. The Working Group proposed the principle that:

> 'the states at higher levels of technological and scientific development should assist those nations which request it, for example, by undertaking programmes, either directly or through competent agencies, intended to provide adequate training of the technical and scientific personnel of those countries, as well as by providing the equipment and facilities needed in areas such as research, administration, monitoring or surveillance, information, waste disposal, and others, which would improve their ability to discharge their duties consisting of protecting the marine environment.'[8]

The principles prepared by the Working Group were subsequently endorsed by the Stockholm Conference, which recommended that they should be taken into account in the upcoming Third United Nations Conference on the Law of the Sea.[9]

6 It was already recognized in parallel debates taking place in the Sea-Bed Committee that the needs and interests of developing countries would need to be taken into account in the proposed new Convention and several States proposed provisions aimed at promoting technical assistance for the purposes of marine environmental protection.[10] These proposals were taken up by the Third Committee at UNCLOS III. Agreement was soon reached on the basic content of a provision that would ultimately become Art. 202. Only minor changes

[5] Emphasis added.

[6] *Ellen Hey*, Common but Differentiated Responsibilities, MPEPIL, para. 15, available at: http://www.mpepil.com.

[7] UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973), 3, 4.

[8] *Ibid.*, 73 (Principle 6 General Principles for the Assessment and Control of Marine Pollution).

[9] *Ibid.*, 6, 23 (Recommendation 92 (a) Action Plan for the Human Environment).

[10] Important proposals were put forward by Canada, USSR and Kenya; see Myron Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1990), 100.

were made to the draft text following its initial inclusion in the Informal Single Negotiating Text at the Third Session of the Conference in 1975.[11]

III. Elements

1. 'States shall, directly or through competent international organizations promote'

Art. 202 (a) imposes an obligation on States to 'promote programmes of scientific, educational, technical and other assistance to developing countries' for the purpose of marine environmental protection. The obligation may be carried out by States individually or, as is increasingly common, through international organizations. The provision refers to 'competent international organizations' and there are a large number of international organizations which may fall within this category in the modern law of the sea. 7

In practice, the United Nations is a key provider of technical assistance, through bodies such as the United Nations Environment Programme or the United Nations Development Programme, through its specialised agencies working on maritime issues such as the International Maritime Organization (IMO) or the Food and Agriculture Organization, or through related international financial institutions. Assistance may also be granted through regional institutions. 8

Whilst the language of Art. 202 (a) is mandatory, the Convention only creates an obligation to 'promote' assistance to developing countries, which 'does not affect the individual freedom of action of the States concerned.'[12] Indeed, this is an example of the broader 'reluctance, especially of the developed States, to be bound by strict rules in this field.'[13] Nevertheless, the importance of providing technical assistance in order to support developing States to comply with their obligations to protect and preserve the marine environment has been stressed on a regular basis at the international level. Notably, the UN General Assembly has emphasized in its annual resolution on oceans and the law of the sea that: 9

> 'capacity-building is essential to ensure that States, especially developing countries, in particular the least developed countries and the small island developing States, as well as coastal African States, are able to fully implement the Convention, benefit from the sustainable development of the oceans and seas and participate fully in global and regional forums on ocean affairs and the law of the sea.'[14]

2. ' programmes of scientific, educational, technical and other assistance'

Art. 202 (a) refers to 'programmes of scientific, educational, technical and other assistance.' Some of these forms of assistance are elaborated in the sub-paragraphs of this provision, although the list is not exhaustive, as indicated by the inclusion of the wording '*inter alia*'. Art. 202 (a) is notably lacking in an explicit reference to 'financial assistance', but this type of assistance may fall within the category of 'other assistance' and it was certainly considered by some delegates at the Conference to fall within the scope of this provision.[15] Indeed, the inclusion of financial assistance within the scope of this section would appear to be confirmed by Art. 203, which explicitly refers to 'the allocation of appropriate funds' and, in practice, significant financial assistance is provided to developing countries through a number of bodies. Of particular note is the Global Environment Facility (GEF), which was established for the purpose of facilitating the provision of financial assistance to developing 10

[11] See *ibid.*, 102–103.
[12] *Ibid.*, 103.
[13] *Dordi/Kostecki* (note 1), para. 7.
[14] GA Res. 67/78 of 11 December 2012, para. 9.
[15] Nordquist/Rosenne/Yankov (note 10), 101.

countries for environmental purposes.[16] The GEF operates the International Waters Programme, which is designed to provide financial assistance to projects relating to *inter alia* the rebuilding of marine fisheries and the reduction of pollution of coasts and large marine ecosystems.[17]

3. 'to developing States'

11 The beneficiaries of the obligation under Art. 202 are identified as 'developing States'. There is no definition of this term in the Convention, although it should be interpreted in light of United Nations practice.[18] In practice, a specific emphasis is often placed on providing assistance to particular categories of developing countries, such as least-developed countries, small island developing States, or coastal African States.[19]

12 It should be noted that the obligation in Art. 202 applies to all States and thus the provision not only encourages assistance by developed countries to developing countries, but also so-called 'South-South technical assistance'[20] from one developing country to another developing country.[21]

4. 'for the protection and preservation of the marine environment and the prevention, reduction and control of marine pollution.'

13 Art. 202 is concerned with technical assistance for environmental purposes. The text of Art. 202 is broadly drafted to include not only technical assistance in relation to the prevention, reduction and control of marine pollution, but also protection and preservation of the marine environment more generally. Thus, it could also include technical assistance for the purpose of the conservation of marine biological diversity. The provision also covers marine environmental protection both within national jurisdiction and in areas beyond national jurisdiction.[22]

5. 'training of their scientific and technical personnel'

14 Training of scientific and technical personnel is one of the more common forms of technical assistance, often referred to as capacity-building. Scientific and technical expertise is vital in building effective regimes for environmental protection. The aim of this form of technical assistance is to help developing countries to develop the skills of their own nationals so that they do not need to rely on external assistance in the future. Training may be tailored to a single country or it may be general training offered to a range of countries. This provision overlaps to an extent with Art. 244 (2) which also requires States to 'actively promote […] the strengthening of the autonomous marine scientific research capabilities of developing States through, *inter alia*, programmes to provide adequate education and training of their technical and scientific personnel.' One issue that arises in practice is the need to ensure that 'training

[16] See generally *Laurence Boisson de Chazournes*, The Global Environment Facility (GEF): A Unique and Crucial Institution, RECIEL 14 (2005), 193–201.

[17] See Global Environment Facility, Catalysing Ocean Finance, vol. I (2012). For examples of case studies, see Global Environment Facility, Catalysing Ocean Finance, vol. II (2012).

[18] Nordquist/Rosenne/Yankov (note 10), 104.

[19] See e. g. GA Res. 67/78 of 11 December 2012, para. 9. See also UN, Report of the Work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at Its Eleventh Meeting, UN Doc. A/65/164 (2010), para. 16.

[20] *Dordi/Kostecki* (note 1), para. 3.

[21] See also Report of the Work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (note 19), para. 69.

[22] Capacity building and technology transfer are the subject of negotiations towards a new legally binding instrument relating to the conservation and sustainable use of marine biological diversity beyond national jurisdiction; see GA Res. 69/292, 19 June 2015, para. 2.

programmes conducted in developed countries could be effectively applied once the trainees returned to their home countries' and it has been suggested that '*in situ* training in developing countries would be more effective.'[23]

6. 'facilitating their participation in relevant international programmes'

15 The participation of developing countries in relevant international programmes is another form of technical assistance. This provision is linked to the obligation under Art. 200 which requires States to, *inter alia*, cooperate for the purpose of 'undertaking programmes of scientific research.' Developing countries may not have the financial resources to support participation in such programmes themselves and so assistance should be granted in order to facilitate their participation. The provision may also cover other training and educational programmes offered at the international level in order to assist developing countries to develop their capacity in relation to the protection and preservation of the marine environment. Examples include the courses offered by the World Maritime University[24] in Sweden and the International Maritime Law Institute[25] in Malta, both operated under the auspices of the IMO. The United Nations Nippon Fellowship scheme is another example of an international programme which offers human resources development opportunities to maritime professionals in developing countries.[26] All of these programmes offer training and education that is relevant to the protection of the marine environment.

7. 'supplying them with necessary equipment and facilities'

16 Some aspects of marine environmental protection require access to particular technologies that may not be readily available to developing countries. Thus, assistance may be granted in the form of supplying such equipment and facilities to developing countries. Depending on the nature of the equipment and facilities concerned, this aspect of technical assistance may raise issues of technology transfer. Indeed, Art. 266 explicitly foresees the transfer of marine technology for the purpose of the protection and preservation of the marine environment and it should be treated as *lex specialis* when technology transfer occurs.

8. 'enhancing their capacity to manufacture such equipment'

17 Where equipment for the protection of the marine environment is needed on an on-going basis, developing countries may need to develop their own capacity to manufacture such equipment in order to reduce their reliance on external assistance in the long-term. This aspect of technical assistance may also raise issues of technology transfer, in which case the relevant provisions of the Convention will apply.

9. 'advice on and developing facilities for research, monitoring, educational and other programmes'

18 Instead of facilitating the participation of developing countries in scientific or educational programmes organized by other actors, it may be more effective in the long-term to assist developing countries to set up their own programmes. To this end, technical assistance can include the provision of advice on developing facilities for research, monitoring, educational and other programmes.

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[23] Report of the Work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (note 19), para. 67.

[24] See the website of the World Maritime University, available at: http://www.wmu.se/.

[25] For information on the International Maritime Law Institute, see http://www.imli.org/.

[26] See http://www.un.org/depts/los/nippon/.

10. 'provide appropriate assistance, especially to developing States, for the minimization of the effects of major incidents which may cause serious pollution of the marine environment'

19 The text of Art. 202 (b) refers to a particular type of assistance, namely assistance in relation to clean-up operations in the wake of major pollution incidents. States are already under an obligation by virtue of Art. 199 to 'cooperate, to the extent possible, in eliminating the effects of pollution and preventing or minimizing the damage.' Art. 202 (b) complements that provision by emphasizing that assistance should be particularly targeted at developing countries, but it only requires States to provide 'appropriate assistance', which offers a degree of leeway for States to comply with this provision. A similar obligation is found in the International Convention on Oil Pollution Preparedness, Response and Cooperation, which provides in Art. 9 (1) that

> 'parties undertake directly or through the [IMO] and other international bodies, as appropriate, in respect of oil pollution preparedness and response, to provide support for those Parties which request technical assistance: (a) to train personnel; (b) to ensure the availability of relevant technology, equipment and facilities; (c) to facilitate other measures and arrangements to prepare for and respond to oil pollution incidents; (d) to initiate joint research and development programmes.'

Moreover, the IMO is granted a role under the Convention to both 'facilitate the provision of technical assistance'[27] and to 'assist in identifying sources of provisional financing' of the costs of clean-up operations.[28] Thus, the IMO can be expected to take a leading role in promoting technical assistance in this field.

11. 'provide appropriate assistance, especially to developing States, concerning the preparation of environmental assessments'

20 The text of what is now Art. 202 (c) was first included in the original proposal for a provision on environmental impact assessment that went on to become Art. 206.[29] As the text referred to assistance to developing countries, it was decided to move it to the general provision on technical assistance. Art. 202 (c) requires States to provide 'appropriate assistance' concerning the preparation of environmental impact assessments. To some extent, the type of assistance that is required for the preparation of environmental assessments may overlap with the type of assistance covered by Art. 202 (a)(i) and (iii). As with the other paragraphs in Art. 202, the language of this provision offers some latitude for States to comply, as it only requires 'appropriate' assistance.

Article 203
Preferential treatment for developing States

Developing States shall, for the purposes of prevention, reduction and control of pollution of the marine environment or minimization of its effects, be granted preference by international organizations in:
(a) **the allocation of appropriate funds and technical assistance; and**
(b) **the utilization of their specialized services.**

Bibliography: Myron Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1990)

[27] Art. 12 (1)(d) International Convention on Oil Pollution Preparedness, Response and Cooperation.
[28] Art. 7 (2) International Convention on Oil Pollution Preparedness, Response and Cooperation.
[29] Nordquist/Rosenne/Yankov (note 10), 103.

Documents: GA Res. 68/70 of 9 December 2013; GA Res. 2997 (XXVII) of 15 December 1972; IMO, IMO's Contribution to Sustainable Maritime Development: Capacity-building for Safe, Secure and Efficient Shipping on Clean Oceans Through the Integrated Technical Co-operation Programme (2012); UN, Report of the Work of the United Nations Open-ended Informal Consultative Process Established by the General Assembly in its Resolution 54/33 in Order to Facilitate the Annual Review by the Assembly of Developments in Ocean Affairs at its Third Meeting, UN Doc. A/57/80 (2002); UN DOALOS, Available Assistance to and Measures that May Be Taken by Developing States to Realize the Benefits of Sustainable and Effective Development of Marine Resources and Uses of the Oceans Within the Limits of National Jurisdiction: Study Prepared by the Secretariat, UN Doc. A/63/342 (2008); UN, Report of the Work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at Its Eleventh Meeting, UN Doc. A/65/164 (2010); UNEP, Bali Strategic Plan for Technology Support and Capacity-Building, UN Doc. UNEP/GC.23/6/ADD.1 (2005), Annex

Cases: ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion/C21_AdvOp_02.04.pdf; ITLOS, *Southern Bluefin Tuna Cases* (New Zealand *v.* Japan; Australia *v.* Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports (1999), 280; PCA, *The Chagos Marine Protected Area Arbitration* (Mauritius/United Kingdom of Great Britain and Northern Ireland), Award of 18 March 2015, available at: http://www.pca-cpa.org/showpage.asp?pag_id=1429

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I. Purpose and Function

Art. 203 supplements Art. 202 by making it clear that the target of any financial or technical assistance provided through international organizations should be developing countries. The purpose of this measure is to ensure that developing countries are given assistance in meeting their obligations to protect and preserve the marine environment. **1**

II. Historical Background

Proposals for what was to become Art. 203 were first advanced by Kenya in the 1973 Session of the Sea-Bed Committee, which at that time was acting as the preparatory committee for UNCLOS III.[1] Sub-Committee III of the Working Group discussed the proposal and it adopted text which was later incorporated into the Informal Single Negotiating Text at the Third Session of UNCLOS III in 1975. No major changes were made to the content of the provision, although the formulation of the text was amended during negotiations on the Informal Composite Negotiating Text in 1980. It was at this stage that the text was adopted in its present form. **2**

[1] Sea-Bed Committee, Draft Articles on Prevention and Control of Pollution in the Marine Environment, Submitted by Kenya, UN Doc. A/AC.138/SC.III/L.41 (1973. mimeo.), cited in: GAOR 26th Sess. Suppl. 21 (A/9021-I), 107.

III. Elements

1. 'Developing States shall […] be granted preference […]'

3 This provision identifies developing countries as the target of international assistance for the purposes of the prevention, reduction and control of the marine environment. There is no definition of this term in the Convention, although it should be interpreted in light of United Nations practice.[2] In addition, international organizations have distinguished in practice between categories of developing States, depending on their particular characteristics and needs. In particular, it is common to find preference being given to least developed countries, small island developing States and African States when developing technical assistance programmes.[3]

2. 'by international organizations'

4 The text of Art. 203 is unusual in that it does not directly impose an obligation on States, but rather simply refers to preferences to be granted by international organizations. In discussing the provision at the Fourth Session of the Conference, a different formulation had been proposed, according to which

> 'States shall take measures to ensure that developing countries shall, for the purposes of the prevention of marine pollution or the minimization of its effects, be given preference in: (a) the allocation of appropriate funds and technical assistance facilities of international organizations, and (b) the utilization of their specialized services.'[4]

However, this proposal was not accepted. Thus, in its final form, international organizations would appear to be the direct addressee of the provision. However, as the majority of international organizations are not directly bound by the Convention,[5] this provision cannot formally establish an obligation for such actors, but rather must be considered as a statement of policy.

5 Many international organizations have a formal mandate in their constituent instrument to pursue technical assistance,[6] but this policy applies to all institutions, regardless of whether they have such a mandate. The provision must also be read in light of Art. 202 which refers to 'competent international organizations.' Thus, Art. 203 is relevant to any international organization which has a competence in respect of the prevention, reduction and control of pollution. The United Nations Division on Ocean Affairs and Law of the Sea, in response to requests from the General Assembly, has prepared information about some of the capacity building activities carried out by international organizations in this field, which is relevant to the implementation of Art. 203.[7] By its very nature, however, the precise scope and content of technical assistance provided by international organizations is constantly changing.

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[2] Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1990), 104. See also *Harrison* on Art. 202 MN 11–12.

[3] See e. g. IMO, IMO's Contribution to Sustainable Maritime Development: Capacity-building for Safe, Secure and Efficient Shipping on Clean Oceans Through the Integrated Technical Co-operation Programme (2012), 4, available at: http://www.imo.org/OurWork/TechnicalCooperation/Documents/Brochure/English.pdf.

[4] UNCLOS III, Preservation of the Marine Environment (1976, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. XI (1987), 504, 507 (Art. 12).

[5] Annex IX only permits participation by international organizations to which states have 'transferred competence over matters governed by the Convention.' In practice, this annex only applies to the European Union. For further information see below *Franckx/Benatar/Cambou/Janssens/Mampaey/Scotcher/Tran* on Annex IX.

[6] See e. g. Art. 1 (3)(a) Constitution of the Food and Agriculture Organization, in: Basic Texts of the Food and Agriculture Organization of the United Nations, vol. I (2013), 3–16; Art. 2(e) Convention on the International Maritime Organization, in: Basic Documents of the International Maritime Organization, vol. I (2004), 7–25.

[7] See UN DOALOS, Available Assistance to and Measures that May Be Taken by Developing States to Realize the Benefits of Sustainable and Effective Development of Marine Resources and Uses of the Oceans Within the Limits of National Jurisdiction: Study Prepared by the Secretariat, UN Doc. A/63/342 (2008).

3. 'for the purposes of prevention, reduction and control of pollution of the marine environment or minimization of its effects'

This part of the provision defines the purpose of the technical and financial assistance to be granted to developing countries. It refers to 'the prevention, reduction and control of pollution of the marine environment and the minimization of its effects' and it should be interpreted in accordance with both the general definition of 'pollution of the marine environment' found in Art. 1 of the Convention, as well as Art. 194 which specifies that States are under an obligation to prevent, reduce and control pollution of the marine environment 'from any source.' Oddly, Art. 203 is more narrowly drafted than Art. 202, as it does not contain a general reference to the protection and preservation of the marine environment. However, international tribunals have stressed that the obligations of States in relation to pollution prevention should not be read in isolation from the broader provisions on the protection of the marine environment[8] and therefore this principle should not be interpreted narrowly. **6**

4. 'in the allocation of appropriate funds and technical assistance and in the utilization of their specialized services'

Art. 203 specifies the scope of the preferences which are expected to be granted to developing countries. Thus, international organizations are expected to grant preferences to developing countries in relation to both financial assistance and technical assistance, as well as in relation to any specialized services that may be provided by an international organization, such as advisory services. The scope of this provision is broad and it covers most capacity-building activities that are likely to be carried out by international organizations. **7**

It has been noted that it is important for international organizations to work in cooperation with developing countries in order to identify their needs and priorities for technical assistance.[9] It has also been stressed that capacity-building initiatives must be designed in such as way as to ensure the sustainability of the results, if they are to meet the long-term needs of developing countries.[10] Furthermore, calls have also been made for international organizations to coordinate their capacity-building programmes 'in order to ensure a targeted approach and to prevent fragmentation or duplication of effort.'[11] This is an objective that could be pursued by way of inter-agency cooperation through bodies such as UN Oceans[12] and it is also promoted by the United Nations Environment Programme (UNEP) as the UN body responsible for the 'coordination of environmental programmes within the United Nations system.'[13] To this end, UNEP has adopted the Bali Strategic Plan **8**

[8] See e. g. PCA, *The Chagos Marine Protected Area Arbitration* (Mauritius/United Kingdom of Great Britain and Northern Ireland), Award of 18 March 2015, para. 538, available at: http://www.pca-cpa.org/showpage.asp?pag_id=1429: 'Article 194 is […] not limited to measures aimed strictly at controlling pollution and extends to measures focussed primarily on conservation and the preservation of ecosystems.' In this manner, the obligation under Art. 194 (1) to harmonize policies in connection with the prevention, reduction and control of pollution was interpreted by the tribunal to include harmonization of policies related to marine protected areas.' See also ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, para. 120, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion/C21_AdvOp_02.04.pdf; ITLOS, *Southern Bluefin Tuna Cases* (New Zealand *v.* Japan; Australia *v.* Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports (1999), 280, para. 70.

[9] UN, Report of the Work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its Eleventh Meeting, UN Doc. A/65/164 (2010), para. 53. See also UNEP, Bali Strategic Plan for Technology Support and Capacity-Building, UN Doc. UNEP/GC.23/6/ADD.1 (2005), Annex, para. 31(g).

[10] See Report of the Work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (note 9), paras 59–60.

[11] *Ibid.*, para. 52. See also UN, Report of the Work of the United Nations Open-ended Informal Consultative Process Established by the General Assembly in Its Resolution 54/33 in Order to Facilitate the Annual Review by the Assembly of Developments in Ocean Affairs at Its Third Meeting, UN Doc. A/57/80 (2002), para. 57.

[12] For the mandate of UN Oceans, see GA Res. 68/70 of of 9 December 2013.

[13] See GA Res. 2997(XXVII) of 15 December 1972, para. 2(b).

for Technology Support and Capacity-Building, which includes capacity building for oceans and seas and coastal areas within its remit.[14]

Section 4
Monitoring and environmental assessment

Article 204
Monitoring of the risks or effects of pollution

1. States shall, consistent with the rights of other States, endeavour, as far as practicable, directly or through the competent international organizations, to observe, measure, evaluate and analyse, by recognized scientific methods, the risks or effects of pollution of the marine environment.

2. In particular, States shall keep under surveillance the effects of any activities which they permit or in which they engage in order to determine whether these activities are likely to pollute the marine environment.

Bibliography: *Ulrich Beyerlin/Thilo Marauhn*, International Environmental Law (2011); *Patricia Birnie/Alan Boyle/Catherine Redgwell*, International Law and the Environment (3rd ed., 2009); Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991); *Alexander Proelß*, Meeresschutz im Völker- und Europarecht: Das Beispiel des Nordostatlantik (2004); *Helen M. Rozwadowski*, The Sea Knows No Boundaries: A Century of Marine Science under ICES (2002); *Kamen Sachariew*, Promoting Compliance with International Environmental Legal Standards: Reflections on Monitoring and Reporting Mechanisms, YIEL 2 (1991), 31–52; *Philippe Sands/Jacqueline Peel* (with Adriana Fabra/Ruth MacKenzie), Principles of International Environmental Law (3rd ed., 2012); *A. E. J. Went*, Seventy Years Agrowing: A History of the International Council for the Exploration of the Sea 1902–1972 (1972)

Documents: ILC, Report of the International Law Commission: Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), GAOR 56th Sess., Suppl. 10, 370; UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973)

Cases: Arbitral Tribunal Constituted under Annex VII of the United Nations Convention on the Law of the Sea, *Chagos Marine Protected Area Arbitration* (Mauritius *v.* United Kingdom), Award of 18 March 2015, available via: http://www.pca-cpa.org/showpage.asp?pag_id=1429; ICJ, *Case Concerning Pulp Mills on the River Uruguay* (Argentina *v.* Uruguay), Judgment of 20 April 2010, ICJ Reports (2010), 14; ICJ, *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, ICJ Reports (1997), 7; ICJ, *Case Concerning Pulp Mills on the River Uruguay* (Argentina *v.* Uruguay), Judgment of 20 April 2010, ICJ Reports (2010), 14; ICJ, *Whaling in the Antarctic* (Australia *v.* Japan: New Zealand Intervening), Judgment of 31 March 2014, available at: http://www.icj-cij.org/docket/files/148/18136.pdf; ITLOS, *Southern Bluefin Tuna Cases* (New Zealand *v.* Japan; Australia *v.* Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports (1999), 280; Trail Smelter Arbitration Tribunal, *Trail Smelter Case* (US *v.* Canada), Award of 16 April 1938 and Award of 11 March 1941, RIAA III, 1905

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[14] UNEP Bali Strategic Plan (note 9).

I. Purpose and Function

Art. 204, the opening provision of Section 4 Part XII, obliges States to monitor risks or effects of marine pollution. Despite not defining 'monitoring' explicitly, it follows from the provision's wording that 'monitoring' refers to acts of observance, measurement, evaluation and analysis.[1] As scientific knowledge about risks and effects of marine pollution is key to an effective protection and preservation of the marine environment, Art. 204 operates as a precondition for States' fulfillment of the more eminent obligations laid down in Arts. 192 and 194. 1

Monitoring is a tool frequently used in international environmental agreements.[2] As a means to collect information relevant to the formulation and implementation of treaty provisions, it has been applied in various ways, e. g. in order to detect cause-effects relationships, for the improvement of environmental standards or as a means of compliance control.[3] Art. 204 contains two differing monitoring obligations. They do not differ in the purpose pursued though – both are concerned with enhancing the understanding of the effects of marine pollution – but rather in respect of the monitoring object. Whereas Art. 204 (1) aims at generating knowledge on the effects and risks of pollution to the marine environment as a whole, Art. 204 (2) narrows down the focus by requiring States to particularly keep activities under their control under surveillance. 2

In line with Arts. 192 and 194, the monitoring obligations established through Art. 204 apply in all maritime zones.[4] Potential conflicts arising from this, e. g. in the case of environmental monitoring in a foreign exclusive economic zone, are mitigated since monitoring needs to be conducted in a manner 'consistent with the rights of other States'. In this respect, great importance is accorded to Part XIII and its conditions for research in the respective maritime zones as monitoring of marine pollution is essentially marine scientific research (MSR).[5] 3

Art. 204 is closely related to Art. 206 which requires States to assess potential effects of planned activities on the marine environment.[6] The duty to monitor effects and risks of pollution may in fact be described as a continuing environmental impact assessment, which as such would end with the authorization of the activity.[7] A further link exists with regard to Arts. 62 and 119. Both provisions are concerned with the conservation of living resources. States are required to determine the allowable catch and to conduct other conservation measures.[8] This necessarily presupposes monitoring activity.[9] However, following from the focus on pollution in Art. 204 (excluding preservation), the relationship between this article and Arts. 62 and 119 is – unlike the one with regard to Art. 165[10] – not one of *lex specialis-lex generalis*, but rather complementary in kind. 4

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[1] The term 'monitoring' is frequently employed throughout the UNCLOS. While it appears to have the same meaning in Arts. 165, 202 and 204, in Art. 39 it must be understood from a more practical point of view, i. e. paying attention to the assigned radio frequency.

[2] *Philippe Sands/Jacqueline Peel* (with *Adriana Fabra/Ruth MacKenzie*), Principles of International Environmental Law (3rd edn., 2012), 644.

[3] *Kamen Sachariew*, Promoting Compliance with International Environmental Legal Standards: Reflections on Monitoring and Reporting Mechanisms, YIEL 2 (1991), 31, 35–36.

[4] In may be noted however, that Art. 165 (2)(h) mirrors Art. 204 and functions as *lex specialis* for activities in the Area. For further information, see *van Doorn* on Art. 165 MN 23.

[5] For further definition on the term MSR, see *Matz-Lück* on Art. 238 MN 12–18.

[6] See generally *Blitza* on Art. 206.

[7] Similarly *Patricia Birnie/Alan Boyle/Catherine Redgwell*, International Law and the Environment (3rd ed. 2009), 170 in their assessment of the *Gabčíkovo-Nagymaros Case* (ICJ, *Gabčíkovo-Nagymaros Project* (Hungary *v.* Slovakia), Judgment of 25 September 1997, ICJ Reports (1997), 7, 77–78 (para. 140)): 'The court's approach treats prior EIA and subsequent monitoring of the ongoing environmental risks and impacts (or 'post project analysis') as a continuum which will operate throughout the life of a project'.

[8] See further *Harrison/Morgera* on Art. 61 MN 11–16 and *Rayfuse* on Art. 119 MN 14–21.

[9] Art. 61 (5) and Art. 119 (2) are supportive in this regard as they demand States to exchange available scientific information, catch and fishing statistics and other data relevant to the conservation of fish stocks.

[10] See *supra*, note 4.

II. Historical Background

5 The obligation to gather information on the condition/quality of the marine environment in Art. 204 is inextricably linked to the duty to protect the marine environment (→ Arts. 192 and 194). As the general obligation to protect and preserve the marine environment under the UNCLOS was new,[11] so was the content of Art. 204. However, looking at Art. 204 from a broader perspective and understanding it generally as a duty to furnish information related to the marine environment, one may come to a different conclusion. The reason for that being that as early as the late 19th century it became clear that exploitation of the marine living resources was in need of regulation.[12] As the conservation measures[13] required in this respect relied on scientific knowledge on the condition of fish stocks, it may be argued that the monitoring obligation of Art. 204 in fact finds its roots in that period. This finding is supported by the establishment of the International Council for the Exploration of the Sea in 1902 which served the purpose of providing Northern European States with a scientific basis for their fishing regulations.[14]

6 Accepting monitoring as implicit to every duty to protect the marine environment raises the question of the additional benefit of including a separate obligation in Art. 204. The answer to that lies in its comprehensiveness. Whereas environmental protection used to be single-objective oriented in nature (e. g. the prohibition of specific sources of pollution)[15] and guided by an anthropocentric way of thinking, the 1970s heralded a paradigm shift.[16] Triggered by the environmental catastrophes of the preceding decade,[17] and encouraged by the Stockholm Conference on the Human Environment, States started to pay greater attention to the intrinsic value of the environment and tended to support holistic approaches to its protection. With regard to the marine environment said rethinking is evidenced in the Draft Resolution on Preliminary Measures to Prevent and Control Marine Pollution submitted by Canada and Norway in the 1971 session of the Sea-Bed Committee. It appealed on States 'to co-operate in establishing on a regional or universal basis effective monitoring systems in order to control marine pollution and the ecosystems of the marine environment'.[18] By proposing monitoring systems in order to control ecosystems of the marine environment as a whole, the draft diverted from traditional monitoring programs, and was thus in this perspective already in line with Art. 204. The increased significance of extensive monitoring also became apparent in the work of the Intergovernmental Working Group on Marine Pollution which, parallel to the discussions in the Sea-Bed Committee, stated with regard to its necessity that:

> 'Every State should co-operate with other States and with competent international organizations with a view to the development of marine environmental research and survey programmes and systems and means for monitoring changes, in the marine environment, including studies of the present state of the

[11] For further information, *Czybulka* on Art. 192 MN 10.

[12] This is e. g. evidenced by the conclusion of the 1882 Convention for Regulating the Police of the North Sea Fisheries.

[13] According to the International Tribunal for the Law of the Sea conservation measures are 'an element in the protection and preservation of the marine environment', ITLOS, *Southern Bluefin Tuna Cases* (New Zealand *v.* Japan; Australia *v.* Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports (1999), 280, para. 70.

[14] See generally: *Helen M. Rozwadowski*, The Sea Knows No Boundaries: A Century of Marine Science under ICES (2002); *A. E. J. Went*, Seventy Years Agrowing: A History of the International Council for the Exploration of the Sea 1902–1972 (1972).

[15] One might even say that apart from the sources of pollution forbidden, there exited a 'right to pollute'. See e. g. *Bartenstein* on Art. 216 MN 3.

[16] *Ulrich Beyerlin/Thilo Marauhn*, International Environmental Law (2011), 6 and 9.

[17] With regard to the marine environment, particularly the Torrey Canyon accident deserves mentioning. *Cf.* also *Czybulka* on Art. 192 MN 11.

[18] Sea-Bed Committee, Draft Resolution on Preliminary Measures to Prevent and Control Marine Pollution Submitted to Sub-Committee III by Canada and Norway, UN Doc. A/AC.138/SC.III/L.5 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 247, 248.

> oceans, the trends of pollution effects and the exchange of data and scientific information on the marine environment. There should be similar co-operation in the exchange of technological information on means of preventing marine pollution, including pollution that may arise from offshore resource exploration and exploitation.'[19]

In 1973 various proposals submitted to the Sea-Bed Committee included an obligation to monitor the marine environment.[20] As monitoring was frequently linked to environmental assessment, Working Group 2, after consolidating the different drafts, proposed the following paragraph: 7

> 'States shall employ suitable systems of observation, measurement, evaluation and analysis to determine the risk or effect of pollution on the marine environment, especially pollution likely to arise from activities which they permit or in which they engage.'[21]

Indicated by the use of the word 'shall' States were, according to this proposal, obliged to make use of surveillance programmes to determine the risks or effects of marine pollution. Despite the similarities of this duty with today's Art. 204, it was not congruent with it, as it merely demanded that States employ systems of analysis when determining risks. Therefore, it was rather concerned with 'how' States should proceed when assessing risks and effects of pollution, and remained rather silent as to the 'if' they should do so.[22] 8

The drafts submitted on Art. 204 at the beginning of UNCLOS III in essence repeated the Working Group 2 text. Informal negotiations in the Third Committee in 1975, however, let to a draft article on monitoring[23] which reflected the shift from a general duty to employ systems of analysis when assessing risks to a more specific obligation to monitor risks and effects of marine pollution: 9

> '1. States shall, consistent with the rights of other States, endeavour, as much as is practicable individually or collectively through the competent international organizations to observe, measure, evaluate and analyse, by recognized methods the risks or effects of pollution of the marine environment.
>
> In particular, States shall keep under surveillance the effect of any activities which they permit or in which they engage to determine whether these activities are likely to pollute the marine environment.'

The draft, which additionally contained the qualifiers 'as much as is practicable', proposed by Kenya in order to avoid excessive burdens for developing States,[24] and 'consistent with the rights of other States', as suggested by the Chairman in 1974,[25] found its way unchanged into the Informal Single Negotiating Text. It remained the same in the Revised Single Negotiating Text and was subsequently merely modified through the proposal of Israel to concretise 'competent international organization' by adding 'global 10

[19] UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV.1 (1973), 73 (Annex III: Principles for Assessment and Control of Marine Pollution, Principle 15).

[20] Sea-Bed Committee, Draft Resolution on Preliminary Measures to Prevent and Control Marine Pollution Submitted to Sub-Committee III by Canada and Norway, UN Doc. A/AC.138/SC.III/L.5 and ADD.1 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 247; Sea-Bed Committee, Draft Resolution on Preliminary Measures to Prevent and Control Marine Pollution, Submitted by Australia, Bulgaria, Canada, Greece, Iceland, the Netherlands, Norway, Sweden; the Ukraine Soviet Socialist Republics, and the Union of Soviet Socialist Republics, UN Doc. A/AC.138/SC.III/L.25 (1972), GAOR 27th Sess., Suppl. 21 (A/8721), 210–211; Sea-Bed Committee, Draft Articles for a Comprehensive Marine Pollution Convention, submitted by Canada, UN Doc. A/AC.138/SC.III/L.28 (1973, mimeo.), cited in: GAOR 28th Sess., Suppl. 21 (A/9021-I), 106.

[21] Sea-Bed Committee, Note by the Chairman of Working Group 2 addressed to the Chairman of Sub-Committee III, UN Doc. A/AC.138/SC.III/L.52 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-I), 89, 92 (Annex: WG.2 Working Paper No. 13).

[22] Similarly Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991), 114.

[23] Third Committee UNCLOS III, Results of Consideration of Proposals and Amendments relating to the Preservation of the Marine Environment, UN Doc. A/CONF.62/C.3/L.15/ADD.1 (1975), OR III, 200.

[24] Third Committee UNCLOS III, Kenya: Draft Articles for the Preservation and the Protection of the Marine Environment, UN Doc. A/CONF.62/C.3/L.2 (1974), OR III, 245, 246 (Art. 19).

[25] Third Committee UNCLOS III, Conference Room Papers Containing Proposals or Amendments Informally Introduced but Not Considered by the Drafting and Negotiating Group of the Informal Meetings on Item 12 (Preservation of the Marine Environment), UN Doc. A/CONF.62/C.3/L.14/ADD.1 (1974), OR III, 255, 256.

and regional'.[26] This amendment however, did not make it in the final text as the whole phrase was substituted to 'directly or through the competent international organization' due to an unsubstantial drafting change.[27]

III. Elements

1. 'States shall […] endeavour […] to observe, measure, evaluate and analyse the risks or effects of pollution'

11 Art. 204 obligates 'States' to observe, measure, evaluate and analyse risks or effects of marine pollution. The duty to monitor the marine environment is thus not limited to either coastal or flag States, but applicable to all States Parties[28] to the Convention. In view of Arts. 1 (2)(2) and 305 (1)(f), which provide for the application of the Convention *mutatis mutandis*[29] to non-State entities, it may be argued that international organisations are also potential addressees of Art. 204. This however presupposes, as clarified by Art. 4 Annex IX, that the international organisation in question has the respective competence to act in this matter.[30] The European Union (EU) is currently the only international organisation that has become party to the UNCLOS. In its declaration pursuant to Art. 5 Annex IX it specified its competences as follow:

> 'the Community points out that its Member States have transferred competence to it with regard to the conservation and management of sea fishing resources. […] Furthermore, with regard to rules and regulations for the protection and preservation of the marine environment, the Member States have transferred to the Community competences as formulated in provisions adopted by the Community and as reflected by its participation in certain international agreements […]'.[31]

Both its exclusive competence in fisheries[32] and its partial competence in the protection and preservation of the marine environment are strong arguments for also subjecting the EU to the monitoring obligation established by Art. 204.

12 As indicated by the use of 'shall', parties to the Convention are not only encouraged, but obliged to monitor the risks or effects of pollution. This duty is however mitigated by the fact that States only have to endeavour monitoring. The word 'endeavour' qualifies the obligation to monitor the marine environment and thereby turns it into one of best effort.[33] Art. 204 consequently does not require States to accomplish a specific result, but rather demands a certain conduct.

13 Monitoring pursuant to Art. 204 may be described as twofold duty: In a first step it requires States to gather primary data by means of observance and measurement from the

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[26] Third Committee UNCLOS III, Oral Proposal on Article 14 by Israel (1976, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. X (1986), 459.

[27] UNCLOS III, Report of the Chairman of the Drafting Committee, UN Doc. A/CONF.62/L.40 (1979), OR XII, 95, 102.

[28] As some provisions of the UNCLOS are explicitly directed to 'all States' instead of merely 'States' a difference in meaning may be presumed. *Matz-Lück* (on Art. 238 MN 19) holds the view that term 'all States' renders a provision applicable also to non-member States. *Czybulka* (on Art. 192 MN 16) on the other hand doubts this point of view as he sees no systematical use of the respective terms in the Convention.

[29] On this term, see e. g. *Maggio* on Art. 80 MN 10–11.

[30] See further *Franckx* on Annex IX Art. 4.

[31] Declaration of the European Community: UN, UNCLOS Declarations Made upon Signature, Ratification, Accession or Succession, or Any Time Thereafter, available at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en#EndDec.

[32] Note in this regard also the following passage from the *Southern Bluefin Tuna Cases* (ITLOS, *Southern Bluefin Tuna Cases* (New Zealand *v.* Japan; Australia *v.* Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports (1999), 280, para. 70): '[T]he conservation of the living resources of the sea is an element in the protection and preservation of the marine environment'.

[33] Arbitral Tribunal Constituted under Annex VII of the United Nations Convention on the Law of the Sea, *Chagos Marine Protected Area Arbitration* (Mauritius *v.* United Kingdom), Award of 18 March 2015, para. 539, available via: http://www.pca-cpa.org/showpage.asp?pag_id=1429.

marine environment. The information, reflecting the actual state of the marine environment, is then, e. g. through comparison with previous or parallel data, to be evaluated and analysed. This combined approach enables States to assess the risks and effects of pollution.

The fact that Art. 204 subjects both risks and effects of pollution to monitoring reveals its preventative approach. In line with Art. 1 (1)(4), which by defining pollution equates a causal link with one of mere likelihood ('which results or is likely to result'), it requires States to include potential harmful effects in their assessments.[34] It thus fulfills an important precondition for effective marine environmental protection. Art. 204 however does not clarify what amounts to a risk of pollution. It gives no indication on how likely the polluting effects need to be to trigger the monitoring obligation. Nevertheless, this should not be perceived as an unfortunate lack in the provision, but rather as an opportunity: The ambiguity, or to express it positively, the openness of the provision[35] renders it possible to account for developments in the evolving field of international environmental law.[36] **14**

2. 'consistent with the rights of other States' and 'as far as practicable'

In discharging their obligation under Art. 204, States may only take measures 'consistent with the rights of other States.' As the duty to monitor risks and effects of pollution is applicable to all States in all maritime zones, the rights referred to differ depending on the position of the State involved. Whereas it seems that coastal States' monitoring measures would primarily be restricted by the freedom of navigation and the right of innocent passage through the territorial sea, flag States on the other hand are more likely to be limited by the jurisdictional and sovereign rights of coastal States. Due to the fact that a coastal State can also be flag State and *vice versa*, the preceding assumption is, of course, merely a simplification.[37] **15**

The emphasis of due regard to the rights and interests of other parties is a key feature of the UNCLOS and has not only been expressed in the good faith provision of Art. 300, but can be found in many provisions throughout the Convention.[38] In regard to the specific due regard clause contained in Art. 194 (4), the Annex VII Tribunal in the *Chagos Marine Protected Area Arbitration* held that this provision 'requires a balancing act between competing rights, based upon an evaluation of the extent of the interference, the availability of alternatives, and the importance of the rights and policies at issue.'[39] However, whether Art. 204 also requires an act of interests-balancing may be questionable as its wording differs from Art. 194 (4).[40] Whereas Art. 194 (4) appears to allow for other States rights to be interfered with as long as this is not disproportionate to the aim pursued, a strict textual interpretation of Art. 204 might suggest that it only allows monitoring measures which do not interfere **at all** with other States' rights. However, such a reading neglects two aspects. First, as already pointed out, the rights of other States under the UNCLOS are not unconditional – they are similarly qualified through due regard clauses. As a consequence, it needs to be highlighted that not every interference with another State's rights may be **16**

[34] *Tanaka* on Art. 1 MN 13; *Czybulka* on Art. 194 MN 12.

[35] *Alexander Proelß*, Meeresschutz im Völker- und Europarecht: Das Beispiel des Nordostatlantik (2004), 83.

[36] For an example from case law, see *Tanaka* on Art. 1 MN 13 (footnote 40).

[37] In may be note that Nordquist et al. are of the view that the rights referred to are not exclusively those granted to other States by the Convention. Nordquist/Rosenne/Yankov (note 21), 115 (MN 204.8(b)).

[38] See e. g. Art. 87 (2) (Freedom of the High Seas): 'These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area'; Art. 58 (3) (Rights and Duties of other States in the Exclusive Economic Zone): 'In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State […]'.

[39] *Chagos Marine Protected Area Arbitration* (note 27), para. 540.

[40] Art. 194 (4) reads: 'In taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.'

regarded as a violation of Art. 204. And secondly, assuming the strict textual interpretation was correct, one would be faced with the rather absurd situation that monitoring under Art. 204 (as the generally less interfering precondition for an effective protection and preservation of the marine environment) could in fact be more easily forbidden than the dependent obligations contained in Arts. 192 and 194. Following on from this, there are strong arguments supporting a more liberal interpretation of Art. 204. Like Art. 194 (4), it requires a balancing of interests.

17 The second qualifier to the obligation in Art. 204 derives from the fact that States only have to conduct monitoring 'as far as practicable'. It differs from the previously outlined condition as it is – similarly to the word 'endeavour' – linked to the capability of a State to discharge its duty. Proposed by Kenya in order to avoid excessive burdens for developing States,[41] it provides for some flexibility and adds to the fact that the duty in Art. 204 may be regarded as rather weak. Having said that, it does not render the provision meaningless, as any unjustified non-performance would still amount to a violation of Art. 204.

3. 'directly or through the competent international organizations'

18 States may engage in monitoring directly or through competent international organisations. The possibility for States to fulfill their obligations under Art. 204 through competent international organisations, needs to be understood in a complementary manner – it provides for cooperative monitoring. Following from that 'international organization' presumably relates to intergovernmental organisations. 'Competent organizations' are those international organisations with respective expertise and the capability to actually engage in research in the field of marine pollution. The Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection (GESAMP) fulfils these criteria and may therefore – particularly as it was already in place prior to the UNCLOS negotiations[42] and in fact participated in them[43] – be described as a 'model' of the competent international organisations referred to in Art. 204.[44] However, as clarified by the use of the plural ('organizations'), it is not the only one possible.

4. 'by recognized scientific methods'

19 Monitoring is to be conducted 'by recognized scientific methods'. Considering its relevance in the protection and preserving of the marine environment, this seems self-evident, as it ensures reliability of the gained information. Demanding monitoring to be based on scientific methods reveals the provision's close relationship to Part XIII. Notably, Art. 240 (b) of Part XIII establishes a similar duty, as it states: 'marine scientific research shall be conducted with appropriate scientific methods and means.' Instead of referring to 'recognized' methods, Art. 240 (b) however demands 'appropriate' methods, which appears to involve some sort of balancing.[45] This may not be said for 'recognized' as it – from a textual point of view – may rather be understood as generally or commonly accepted.[46]

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[41] See *supra*, MN 10.

[42] GESAMP was founded in 1969 and operates as an advisory body of the United Nations in view of the scientific aspects of marine environmental protection.

[43] The definition of marine pollution, e. g. can be traced back a proposal of the GESAMP. For further information, see *Tanaka* on Art. 1 MN 12.

[44] See also *Stephens* on Art. 200 MN 7.

[45] See similarly the position of Australia in: ICJ, *Whaling in the Antarctic* (Australia *v*. Japan: New Zealand Intervening), Judgment of 31 March 2014, para. 73, available at: http://www.icj-cij.org/docket/files/148/18136.pdf.

[46] In this context, it seems noteworthy to also make reference Art. 201 which requires States to establish scientific criteria. See generally *Stephens* on Art. 201.

5. 'States shall keep under surveillance the effects of any activities which they permit or in which they engage'

20 In comparison to the general monitoring obligation in Art. 204 (1), which was new in the UNCLOS, the obligation laid down in Art. 204 (2) is more specific and arguably much older.[47] It shifts the object of monitoring from the marine environment as a whole to activities conducted under the control of a State party. Because it depends on the control of a State over the potential harmful source, it is inherently linked to Arts. 139, 194 (2), 196 (1), and 263. Art. 204 (2) aims at the timely detection of potential harmful effects. It is thus key to the 'principle of prevention' which the International Court of Justice confirmed to be customary international law.[48] Art. 204 (2) differs from the related obligation to conduct an environmental impact assessment in Art. 206, which demands a specific conduct prior to the authorization of the activity under scrutiny, as it is continuous in nature.[49]

21 The introductory phrase 'in particular' links Art. 204 (2) to the monitoring obligation established in paragraph 1, and clarifies that a special monitoring obligation applies in the case of activities under State control. The *lex specialis* character of Art. 204 (2) not only follows from its confined monitoring object but also from the fact that Art. 204 (2) lays out a firmer obligation ('shall keep under surveillance' as opposed to 'shall […] endeavour, as far as practicable […] to' in Art. 204 (1)). 'In particular' combined with the stricter duty of Art. 204 (2) also establishes some sort of hierarchy. If financial means are limited, a State should first of all discharge its obligations under Art. 204 (2) before turning to the more extensive monitoring of the marine environment as a whole under Art. 204 (1).

6. 'in order to determine whether these activities are likely to pollute the marine environment'

22 The surveillance required by Art. 204 (2) aims to enable States to better assess if activities under their control are likely to pollute the marine environment. The UNCLOS is silent on what amounts to the 'likeliness' of pollution. As mentioned above,[50] this lack of definition is not necessarily a drawback as it renders the wording a gateway for future developments in the evolving field of international environmental law. Additionally, it should be noted that even if the State's assessment leads to the conclusion that the polluting effect of an activity is unlikely, this determination may change over time[51] and furthermore does not exclude preventive measures to be taken.[52]

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[47] See already the Trail Smelter arbitration (Trail Smelter Arbitration Tribunal, *Trail Smelter Case* (US *v.* Canada), Award of 16 April 1938 and Award of 11 March 1941, RIAA III, 1905) and UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973), 3 (Stockholm Declaration), Principle 21.

[48] ICJ, *Case Concerning Pulp Mills on the River Uruguay* (Argentina *v.* Uruguay), Judgment of 20 April 2010, ICJ Reports (2010), 14, 55–56 (para. 101).

[49] Nordquist/Rosenne/Yankov (note 21), 111–112.

[50] *Supra*, MN 12.

[51] ICJ, *Gabčíkovo-Nagymaros Project* (Hungary *v.* Slovakia), Judgment of 25 September 1997, ICJ Reports (1997), 7, 77–78 (para. 140).

[52] Instructive in this respective is Art. 2(a) of the ILC Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), GAOR 56th Sess., Suppl. 10, 370, 371. It defines the 'risk of causing significant transboundary harm' as including 'risks taking the form of a high probability of causing significant transboundary harm and a low probability of causing disastrous transboundary harm'.

Article 205
Publication of reports

States shall publish reports of the results obtained pursuant to article 204 or provide such reports at appropriate intervals to the competent international organizations, which should make them available to all States.

Bibliography: *Robin Churchill*, Compliance Mechanisms in the International Law of the Sea: From Individual to the Collective, in: Holster P. Hestermeyer/Doris König/Nele Matz Lück/Volker Röben/Anja Seibert-Fohr/Peter-Tobias Stoll/Silja Vöneky (eds.), Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum (2012), 777–806; *Neil Craik*, The International Law of Environmental Impact Assessment: Process, Substance and Integration (2008); *Alexandre Kiss*, Reporting Obligations and Assessment of Reports, in: Ulrich Beyerlin/Peter-Tobias Stoll/Rüdiger Wolfrum (eds.), Ensuring Compliance with Multilateral Environmental Agreements: Academic Analysis and Views from Practice (2006), 229–245; *Elli Louka*, International Environmental Law: Fairness, Effectiveness, and World Order (2006); Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991); *Jan Schneider*, Something Old, Something New: Some Thoughts on Grotius and the Marine Environment, VJIL 18 (1977–1978), 147–164

Documents: Bund-Länder Messprogramm Meeresumwelt, Meeresumwelt 1999–2002 (2005); GA Res. 57/141 of 12 December 2002; UN, Report of the World Summit on Sustainable Development, UN Doc. A/CONF.199/20 (2002); UN, The First Global Integrated Marine Assessment: World Ocean Assessment I (2016); UNEP, Compliance Mechanisms under Selected Multilateral Environmental Agreements (2007); UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973), 73 (General Principles for Assessment and Control of Marine Pollution); Marine Environment Monitoring Group, UK National Marine Monitoring Programme: Second Report, 1999–2001 (2004)

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I. Purpose and Function

1 Art. 205, which is premised on the notion that the universal concern for the marine environment is best be served when information on its condition is generally available,[1] obliges States to disseminate the monitoring results gathered pursuant to Art. 204. In order to fulfill this duty States may either publish pertinent reports themselves or, provide them to competent international organisations, which make them available to all States.

2 Art. 205, like Art. 204,[2] is not, or at least not primarily, concerned with compliance control.[3] States are not required to issue reports in order to prove their implementation of

[1] Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991), 119.

[2] *Blitza* Art. 204 MN 2.

[3] Whereas nowadays collective compliance mechanisms are – particularly in international environmental and human rights treaties – commonly used to monitor compliance with treaty obligations, they are still of a relatively recent origin. Kiss e. g. identifies the 1971 Ramsar Convention on Wetlands of International Importance as one of the earliest treaties establishing reporting as a means of compliance control (*Alexandre Kiss*, Reporting Obligations and Assessment of Reports, in: Ulrich Beyerlin/Peter-Tobias Stoll/Rüdiger Wolfrum (eds.), Ensuring Compliance with Multilateral Environmental Agreements: Academic Analysis and Views from Practice (2006), 229, 232). In view of this, Churchill is to be agreed with when he considers it unsurprising that the UNCLOS – excluding the International Seabed Authority, the Commission on the limits of the Continental

Art. 204, but rather to exchange information on the marine environment.[4] Although the provision could also be used to detect non-compliance with regard to Art. 204, its focus lies elsewhere. Art. 205 is, accordingly, closely linked to Art. 200 ('States shall cooperate for the purpose of encouraging the exchange of information), and the more specific obligations to exchange information in relation to the conservation of living resources in the EEZ (Art. 61 (5))[5] and marine scientific research (Art. 244 (1)).[6]

II. Historical Background

The origin of Art. 205 can be traced back to the Principles on the Assessment and Control of Marine Pollution drafted by the Intergovernmental Working Group on Marine Pollution in 1971. In Principle 15 the Working Group laid out that: 3

> '[e]very State should co-operate with other States and with competent international organizations with a view to the development of marine environmental research and survey programmes and systems and means for monitoring changes, in the marine environment, including studies of the present state of the oceans, the trends of pollution effects **and the exchange of data and scientific information** on the marine environment. […]'[7]

The idea to exchange data and scientific information on the marine environment found support in several draft proposals submitted to Sub-Committee III of the Sea-Bed Committee[8] and eventually resulted in the following draft:

> 'States shall disseminate, as soon as possible, the data and information obtained on the risks and effects of pollution of the marine environment to States likely to be affected and to the international organizations, with a request to disseminate such data and information.'[9]

It is noteworthy that this early draft already envisaged monitoring as a strict duty. States should not only co-operate with a view of exchanging scientific information but were required to disseminate data. Commenting on this, SCHNEIDER noted in 1977 that this was the first time that States were prepared to assume legal responsibility to cooperate in international monitoring programmes.[10] However, in contrast to today's Art. 205, the early

Shelf and the compulsory dispute settlement which differs in its functioning from ordinary compliance systems – does not contain a *general* collective compliance mechanism. *Robin Churchill*, Compliance Mechanisms in the International Law of the Sea: From Individual to the Collective, in: Holster P. Hestermeyer *et al.* (eds.), Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum (2012), 777, 786. See also UNEP, Compliance Mechanisms under Selected Multilateral Environmental Agreements (2007), 91.

[4] *Kiss* (note 2), 230 holds the view that reporting needs to be distinguished from the exchange of information not being linked to implementation and would thus presumably argue against Art. 205's qualification as a 'classical' reporting obligation.

[5] Art. 61 (5): 'Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchange on a regular basis'.

[6] Art. 244 (1): 'States […] shall, in accordance with this Convention, make available by publication and dissemination through appropriate channels information on proposed major programmes and their objectives as well as knowledge resulting from marine scientific research.'

[7] UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV.1 (1973), 73 (Annex III: Principles for Assessment and Control of Marine Pollution, Principle 15) (emphasis added).

[8] See only: Sea-Bed Committee, Draft Resolution on Preliminary Measures to Prevent and Control Marine Pollution Submitted to Sub-Committee III by Canada and Norway, UN Doc. A/AC.138/SC.III/L.5 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 247, 248.

[9] Sea-Bed Committee, Note by the Chairman of Working Group 2 addressed to the Chairman of Sub-Committee III, UN Doc. A/AC.138/SC.III/L.52/ADD.1 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-I), 89, 92 (WG.2/Paper No. 14).

[10] Prior cooperation in monitoring was, according to this author, conducted exclusively on a voluntary basis: *Jan Schneider*, Something Old, Something New: Some Thoughts of Grotius and the Marine Environment, VJIL 18 (1977–1978), 147, 156.

draft did not provide for dissemination to all States, but limited the exchange obligation to likely affected States and interested international organisations.[11]

4 During UNCLOS III, the negotiations on the future Art. 205 mainly revolved around the question as to which international organisation(s) should be deemed competent to receive and disseminate monitoring results. A proposal submitted by Kenya at the Second Session of the Conference favoured the International Seabed Authority (→ Art. 156) and the United Nations Environment Programme (UNEP).[12] However, in light of further discussion, the draft of the Chairman differed slightly:

> '2. States shall communicate, as soon as possible, the results obtained to UNEP, to the appropriate international organization where one has been established, or where none exists, to the States likely to be affected.'

According to this proposal, UNEP or appropriate international organisations should primarily be competent to receive monitoring data.[13] Information would only have been directly communicated to them in cases where no appropriate international organisation existed. Despite concerns on the elevated significance of UNEP or other international organisations in the publication process, the continuing informal negotiations throughout the Third Session led to an even further shift of competence to those organisations.[14] The 1975 draft, which found its way into the Informal Single Negotiating Text, did not provide for the possibility that States publish their monitoring results themselves; all communication had to be channeled through international or regional organisation:

> 'States shall provide at appropriate intervals reports of the results obtained relating to risks or effects of pollution of the marine environment to the United Nations Environment Programme or any other competent international or regional organizations, which should make them available to all States.'[15]

5 During the Fourth Session in 1976, however, the article was significantly amended. Specific reference to the UNEP as a competent organisation was deleted and, following a US proposal,[16] States regained the possibility to disseminate monitoring results without depending on cooperation with international organisations.[17] The Revised Single Negotiating Text[18] reflected those changes, and the provision was incorporated then verbatim as Art. 206 in the Informal Composite Negotiating Text.[19] Apart from its renumbering and some unsubstantial drafting amendments, the text remained unchanged until adopted as Art. 205 of the Convention.

III. Elements

1. 'States shall publish reports of the results obtained pursuant to article 204'

6 As indicated by the use of the word 'shall,' the obligation to disseminate monitoring results is a strict one. Whereas Art. 200, for example, only requires States to cooperate in order to

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[11] A duty which is owed only to those States affected, can be found in Art. 198 on notification of imminent or actual damage. See generally Stephens on Art. 198.

[12] Third Committee UNCLOS III, Proposal Kenya, UN Doc. A/CONF.62./C.3/L.2 (1974), OR III, 245, 247.

[13] Nordquist/Rosenne/Yankov (note 1), 118 explain the reference to 'appropriate international organization' with parallel discussions – outside the UNCLOS context – on the establishment of international or marine environmental organisations.

[14] Third Committee UNCLOS III, Results of Consideration of Proposals and Amendments relating to the Preservation of the Marine Environment, UN Doc. A/CONF.62/C.3/L.15/ADD.1 (1975), OR III, 200 (Art. VIII (2)).

[15] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975), OR IV, 171, XX.

[16] UNCLOS III, United States: Proposal (1974, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. X (1986), 419, 423.

[17] As a consequence the provision no longer contained an implicit obligation to become a member of an international organisation.

[18] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173.

[19] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 36.

encourage the exchange of information about pollution of the marine environment, according to Art. 205 States have to make their monitoring results available – it is thus an obligation of specific result.[20] The fact that Art. 205 is silent on the content of the reports to be published,[21] may however mitigate its stringency. Having said that, it must be noted that States need to fulfill their treaty obligations in good faith (→ Art. 300). The deliberate withholding of monitoring results may thus – despite no specific requirements on the reporting content – amount to a material breach of the Convention.

7 The results to be published are those obtained pursuant to Art. 204. The general reference to Art. 204 suggests that both paragraphs of the provision are equally important sources for the compilation of monitoring reports. This, however, neglects the differences in the monitoring measures laid down in Art. 204. While measurements conducted in order to fulfill paragraph 1 undoubtedly aim at generating 'results', this seems at least questionable in view of the surveillance activities required by Art. 204 (2). Even if it is possible to gather results from surveillance activities, the purpose pursued with this kind of monitoring is primarily preventive and not knowledge-generating in nature. Following from that, it may be argued that the reporting obligation laid down in Art. 205 mainly relates to monitoring results acquired in view of Art. 204 (1). Support for this assessment may be found in the *travaux préparatoires*: The reference to Art. 204 in Art. 205 was inserted as an unsubstantial drafting change, an extension of the required reporting duty was not intended. As previous drafts only demanded reporting in relation to risks and effects of pollution, there are good reasons to assume that Art. 205 does the same. Moreover, from a systematic point of view, reference may be made to the Convention on the Protection of the Black Sea Against Pollution (Black Sea Convention) and the Convention on the Protection of the Environment of the Baltic Sea Area (Helsinki Convention). Both Conventions are concerned with marine pollution and concretise the rather general, framework-like environmental provisions contained in the UNCLOS. However, neither of them contains a general reporting obligation in view of all activities conducted under a State's control.[22]

2. 'or provide such reports […] to the competent international organizations'

8 States may discharge their obligation under Art. 205 either by publishing monitoring reports themselves or by providing them to competent international organisations. The possibility to fulfill the reporting requirement by submitting monitoring results to international organisations can be traced back to States' concerns about excessive burdens.[23] In order to avoid being subjected to multiple reporting duties, States favoured a reporting model in which international organisations could be used as focal points to gather and subsequently disseminate information.[24] As mentioned above, the role of international organisations in the reporting process changed significantly during the drafting of Art. 205. While the ISNT envisaged international organisations to be solely competent to disseminate reporting results to other States, the RSNT reintroduced the option for States to directly publish their results obtained pursuant to Art. 204. The fact that the text of the provision mentions the latter alternative first does not establish some sort of hierarchy. States are free to choose how they disseminate their monitoring results.

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[20] Despite Art. 205 only mentions 'States' as addressees of the reporting duty, it may also be binding on international organisations which are parties to the UNCLOS. See further *Blitza* on Art. 204 MN 11.

[21] In this regard UNCLOS differs from environmental treaties with a rather narrow focus as those frequently prescribe the concrete content of the reports to be disseminated. See *Elli Louka*, International Environmental Law: Fairness, Effectiveness, and World Order (2006), 124.

[22] Art. 16 (2) Helsinki Convention however obliges contracting parties to provide information on discharge permits, emission data or data on environmental quality, as far as available, if requested by another party or the Commission.

[23] Nordquist/Rosenne/Yankov (note 1), 118.

[24] UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973), 73, 74 (General Principles for Assessment and Control of Marine Pollution), Principle 22.

9 In view of the above, it is notable that the reasons for utilizing international organisations for the distribution of information has not been explained with potential synergy effects. Despite the obvious that an international organisation with access to a variety of monitoring reports would be well situated to recommend goal-orientated measures, for a long time no effort was made to enhance the value of monitoring through the collection of all assessments. In 2002, however, at the World Summit on Sustainable Development States agreed to

> '[improve] the scientific understanding and assessment of marine and coastal ecosystems as a fundamental basis for sound decision-making, through actions at all levels to
> (a) Increase scientific and technical collaboration, including integrated assessment at the global and regional levels […]
> (b) Establish by 2004 a regular process under the United Nations for Global Reporting and assessment of the state of the marine environment, including socio-economic aspects, both current and foreseeable, building on existing regional assessments.'[25]

10 The General Assembly endorsed this recommendation and asked the Secretary-General to compile a report on modalities for a global marine assessment.[26] Following two preparatory workshops, the Assessment of Assessment, during which more than 1,200 ocean assessments were analysed, formed the basis for the First Global Integrated Marine Assessment.[27]

11 The UNCLOS does not define what is meant by 'competent international organizations'. Whereas early negotiations on Art. 205 regarded the UNEP as primarily competent, later drafts favoured a broader understanding of this term. When assessing national monitoring reports, it becomes apparent that they are often explicitly prepared for regional seas commissions and not in order to fulfill Art. 205.[28] This is an acceptable result, for those commissions are in fact competent to handle States' monitoring results.[29] For example, Art. 20 Helsinki Convention establishes the Helsinki Commission, which, according to Art. 20 (1)(e), shall 'promote close co-operation with appropriate governmental bodies […] measures to protect the marine environment of the Baltic Sea Area and for this purpose [shall] receive, process, summarize and disseminate relevant scientific, technological and statistical information from available sources'. Besides the regional seas commissions, other international organisations with expertise in marine environmental protection should be considered competent for the purpose of this provision.

3. 'at appropriate intervals'

12 If a State chooses to discharge its publication duty by summiting pertinent reports to competent international organisations, it has to do so 'at appropriate intervals'. Art. 205 therewith clarifies that the reporting duty is continuous in nature. Surprisingly, the structure of the provision seems to suggest that only States that have opted for the second publication modality need to ensure to update their reports at appropriate intervals. However, given the object and purpose of the provision it is beyond doubt that States which directly publish their reports also have to do so in a continuous manner. When monitoring generates new insights on the state of the marine environment, these have to be shared. In the absence of explicit instructions, States are granted some discretion in this respect.

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[25] UN, Report of the World Summit on Sustainable Development, UN Doc. A/CONF.199/20 (2002), 7 (Annex: Plan of Implementation of the World Summit on Sustainable Development, para. 36).

[26] GA Res. 57/141 of 12 December 2002.

[27] UN, The First Global Integrated Marine Assessment: World Ocean Assessment I (2016); a summary of that report can be found in: UN, Letter of Transmittal, UN Doc. A/70/112 (2015).

[28] See e. g.: Marine Environment Monitoring Group, UK National Marine Monitoring Programme: Second Report, 1999–2001 (2004), 5; Bund-Länder Messprogramm Meeresumwelt, Meeresumwelt 1999–2002 (2005), 7.

[29] See also *Neil Craik*, The International Law of Environmental Impact Assessment: Process, Substance and Integration (2008), 145.

4. 'which should make them available to all States'

Art. 205 is based on the idea that information on the marine environment should, as a precondition for effective marine environmental protection, be shared among all States. If a State publishes its monitoring results itself, it ensures that other States are able to access this information. If it decides to provide the results to an international organisation, however, general access depends on the rules of this organisation. By qualifying the second dissemination alternative with the condition that the competent international organisation should make the results available to all States, Art. 205 makes sure that both publication alternatives in fact correspond to the pursued aim. However, following from the use of the word 'should' instead of 'shall' to indicate the obligation, it may be argued that even if the international organisation does not make the results available to all States, States would not be in breach of Art. 205. NORDQUIST *et al.* explain this inconsistency with the fact that the Convention may not impose direct obligations on international organisations.[30] This view however seems rather misleading, as the condition is embellished as a qualifier to an obligation addressed to UNCLOS State parties and not as a direct obligation having effect on non-member entities. 13

Article 206
Assessment of potential effects of activities

When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.

Bibliography: *Alan Boyle*, Developments in the International Law of Environmental Impact Assessments and Their Relation to the Espoo Convention, RECIEL 20 (2011), 227–231; *Kees Bastmeijer/Timo Koivurova*, Introduction, in: Kees Bastmeijer/Timo Koivurova (eds.), Theory and Practice of Transboundary Environmental Impact Assessment (2008), 1–25; *Neil Craik*, The International Law of Environmental Impact Assessment: Process, Substance and Integration (2008); *Neil Craik*, Principle 17: Environmental Impact Assessment, in: Jorge E. Viñuales (ed.), The Rio Declaration on Environment and Development: A Commentary (2015), 451–470; *Astrid Epiney*, Environmental Impact Assessment, MPEPIL, available at: http://www.mpepil.com; *Douglas Guilfoyle*, The High Seas, in: Donald R. Rothwell/Alex G. Oude Elferink/Karen N. Scott/Tim Stephens (eds.), The Oxford Handbook of the Law of the Sea (2015), 203–225; *Warwick Gullet*, Environmental Impact Assessment and the Precautionary Principle: Legislating Caution in Environmental Protection, AJEM 5 (1998), 146–158; *Lingjie Kong*, Environmental Impact Assessment under the United Nations Convention on the Law of the Sea, Chinese JIL (2011), 651–669; *Michael Lodge*, Protecting the Marine Environment of the Deep Seabed, in: Rosemary Rayfuse (ed.), Research Handbook on International Marine Environmental Law (2015), 151–169; *Laura Pineschi*, The Duty of Environmental Impact Assessment in the First ITLOS Chamber's Advisory Opinion: Towards the Supremacy of the General Rule to Protect and Preserve the Marine Environment as a Common Value?, in: Nerina Boschiero/Tullio Scovazzi/Cesare Pitea/Chiara Ragni (eds.), International Courts and the Development of International Law (2013), 425–439; *Alexander Proelß*, Raum und Umwelt im Völkerrecht, in: Wolfgang Graf Vitzthum/Alexander Proelß (eds.), Völkerrecht (6th edn., 2013), 351–438; *Alexander Proelß/Eike Blitza/Jan Oliva*, Die Genehmigung wissenschaftlicher Forschung in der Antarktis im Lichte von Umweltschutz und Forschungsfreiheit (2013); *Alex G. Oude Elferink*, Environmental Impact Assessment in Areas beyond National Jurisdiction, IJMCL 27 (2012), 449–480; *Rosemary Rayfuse*, Differentiating the Common? The Responsibilities and Obligations of States Sponsoring Deep Seabed Mining Activities in the Area, GYIL 54 (2011), 459–488; *Robin Warner*, Protecting the Oceans Beyond National Jurisdiction: Strengthening the International Law Framework (2009)

Documents: GA Res. 2995 (XXVII) of 15 December 1972; GA, Letter Dated 13 February 2015 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, UN Doc. A/69/780 (2015); ILC, Report of the International Law Commission: Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), GAOR 56th Sess., Suppl. 10, 370;

[30] Nordquist/Rosenne/Yankov (note 1), 120.

ILC, Report of the International Law Commission: Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities with Commentaries, UN Doc. A/56/10 (2001), GAOR 56th Sess., Suppl. 10, 377; ISA Legal and Technical Commission, Recommendations for the Guidance of the Contractors for the Assessment of the Possible Environmental Impacts Arising From Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/7/LTC/1/Rev.1 (2002); UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973); UNCED, The Rio Declaration on the Environment and Development, UN Doc. A/CONF.151/5/REV.1 (1992), ILM 31, 874

Cases: ICJ, *Case Concerning Pulp Mills on the River Uruguay* (Argentina *v.* Uruguay), Judgment of 20 April 2010, ICJ Reports (2010), 14; ICJ, *Gabčíkovo-Nagymaros Project* (Hungary *v.* Slovakia), Judgment of 25 September 1997, ICJ Reports (1997), 7; ITLOS, *MOX Plant Case* (Ireland *v.* United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports (2001), 95; ITLOS, *Southern Bluefin Tuna Cases* (Australia *v.* Japan; New Zealand *v.* Japan), Order of 16 August 1999, ITLOS Reports (1999), 274; ITLOS, *Case Concerning Land Reclamation in and around the Straits of Johor* (Malaysia *v.* Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports (2003), 10; ITLOS Seabed Dispute Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect To Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Report (2011), 10; Trail Smelter Arbitration Tribunal, *Trail Smelter Case* (US *v.* Canada), Award of 16 April 1938 and Award of 11 March 1941, RIAA III, 1905; WTO Appellate Body, *Japan – Measures Affecting the Import of Applies*, 10 December 2003, WT/DS245/AB/R

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I. Purpose and Function

1 Art. 206 sets out the duty of States to conduct environmental impact assessments (EIAs). It obliges them to assess the potentially harmful effects of planned activities prior to their execution and to subsequently disseminate the corresponding results. Art. 206 therewith seeks to ensure that decision makers are well informed of a project's consequences on the marine environment by the time they opt for its implementation. The duty to conduct EIAs is an essential element of the superordinated principle of prevention. Indeed, as recently confirmed by the ICJ in its *Pulp Mills* judgment, it would be difficult for a State to argue that it had complied with said principle, if it had not even examined the potentially adverse effects of a planned project on the environment.'[1]

2 Since its first occurrence in US domestic law,[2] the duty to undertake EIAs has become widely accepted. Today there are numerous binding and non-binding international instruments requiring EIAs; a recent study suggests that almost every single State provides for some sort of EIA in its national legal order.[3] However, the existing EIA obligations differ in content and scope. For example, whereas the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)[4] contains detailed requirements on

[1] ICJ, *Case Concerning Pulp Mills on the River Uruguay* (Argentina *v.* Uruguay), Judgment of 20 April 2010, ICJ Reports (2010), 14, para. 204; see also: *Kees Bastmeijer/Timo Koivurova*, Introduction, in: Kees Bastmeijer/Timo Koivurova (eds.), Theory and Practice of Transboundary Environmental Impact Assessment (2008), 1, 7.

[2] US National Environmental Policy Act, 42 USC §§ 4321–4370 (f) (NEPA).

[3] *Neil Craik*, Principle 17: Environmental Impact Assessment, in: Jorge E. Viñuales (ed.), The Rio Declaration on Environment and Development: A Commentary (2015), 451, 452.

[4] Convention on Environmental Impact Assessment in a Transboundary Context, 25 February 1991, UNTS 1989, 306.

how and when to undertake an EIA,[5] UNCLOS does not. Art. 206 merely demands the execution of an EIA, but leaves it for the domestic authorities to decide on its content.[6]

Art. 206 aims at identifying all potential threats to the marine environment. Given the interdependence of the components of the marine environment, the duty to conduct an EIA as laid down in Art. 206 does not – unlike many other instruments – require a transboundary context to be triggered. It merely requires the existence of 'reasonable grounds for believing that planned activities under [its] jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment'. As a consequence, it covers activities which are likely to only pollute e. g. the coastal State's territorial sea, as well as those affecting the high seas (→ Art. 86), or maritime zones under the exclusive jurisdiction (→ Arts. 56, 77) or sovereignty (→ Art. 2) of other States. The already broad scope of application is further complemented by the fact that the provision contains virtually no spatial limitation. It is not confined to planned activities within a State's territory or zones of jurisdiction, but applies everywhere[7] – even in the territory of another State, supposing the requirement 'under [a State's] jurisdiction or control' is satisfied. 3

Art. 206 is closely related to Art. 204, which contains the Convention's general obligation to monitor risks and effects of marine pollution.[8] Both provisions aim at providing States with the information necessary to effectively protect the marine environment in line with Arts. 192 and 194. However, while Art. 206 is concerned with the assessment of risk prior to the implementation of a project, Art. 204 covers the continuing post project analysis.[9] A further link exists with Section 2 of Part XII, as the obligation to disseminate EIAs results serves to inform other States and can thus be regarded as an element of States' general duty to cooperate in the protection of the marine environment. 4

II. Historical Background

Initially developed in domestic law from the late 1960s, the duty to undertake EIAs quickly found its way to the international sphere. Initial opposition, particularly by developing States, which feared excessive burdens for their economies, prevented the inclusion of the duty in the Stockholm Principles,[10] but did not stop its increasing acceptance as a 'tool for environmental decision-making'.[11] Indeed, not only was the rejected draft of an EIA provision for the Stockholm Principles soon revived as part of GA Res. 2995,[12] but the Stockholm Conference itself also adopted recommendations to undertake EIAs, with the Action Plan for the Human Environment.[13] 5

[5] Appendix 1 and 2 Espoo Convention.

[6] *Neil Craik*, The International Law of Environmental Impact Assessment: Process, Substance and Integration (2008), 99; *Lingjie Kong*, Environmental Impact Assessment under the United Nations Convention on the Law of the Sea, Chinese JIL (2011), 651, 660. See further *infra*, MN 14.

[7] The fact that there exist special EIA rules for activities in the Area (see in this regard e. g. ITLOS Seabed Dispute Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect To Activities in the Area*, Advisory Opinion of 1 February 2011, ITLOS Report (2011), 10, paras. 141–151) does not conflict with this finding. For further information, see *infra*, MN 15.

[8] See generally *Blitza* on Art. 204.

[9] ICJ, *Gabčíkovo-Nagymaros Project* (Hungary *v.* Slovakia), Judgment of 25 September 1997, ICJ Reports (1997), 7, 77–78 (para. 140).

[10] UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973), 3 (Stockholm Declaration).

[11] *Craik* (note 6), 90–91.

[12] GA Res. 2995 (XXVII) of 15 December 1972.

[13] UNCHE Report (note 10), 27, 17 (Recommendation 51) and 19 (Recommendation 61).

6 The more precise origin of Art. 206 can be traced back to a working paper submitted by Norway during the 1973 session of the Sea-Bed Committee.[14] It contained the following provision:

> 'Before any State or a person within its jurisdiction undertakes an activity which may lead to significant alteration of the marine environment the State shall file an environmental impact statement with the international organization (United Nations agency) concerned. The statement shall provide all necessary information to assess the possibility of damage, and shall be communicated to competent international organizations and to other States whose interests may be affected. If such States or organizations so wish, the first-mentioned State shall consult with them before any alteration of the environment is undertaken, with a view to avoid damage to other interests and to preserve the environment against pollution.'[15]

While the terminology ('environmental impact statement') used in the Norwegian draft reveals its connection with early EIAs in national legislation,[16] the requirement to inform potentially affected States was genuinely international; it followed from the emerging international duty to cooperate in environmental matters. Moreover, the proposal to explicitly require States to conduct EIAs prior to the execution of activities was also progressive. In the subsequent sessions of the Sea-Bed Committee the proposed duty was discussed in a broader context. Paper 13 of the Working Group 2 envisaged that:

> '1. States shall employ suitable systems of observation, measurement, evaluation and analysis to determine the risk or effect of pollution on the marine environment, especially pollution likely to arise from activities which they permit or in which they engage.
>
> 2. States shall disseminate, as soon as possible, the data and information obtained on the risks and effects of pollution on the marine environment to States likely to be affected and to the international organizations concerned, with a request to disseminate such data and information.'[17]

7 During the Second Session of UNCLOS III, this provision was revisited by the Third Committee. Following amendment proposals submitted by various States, the Chairman drafted a new article which ascribed greater significance to the idea of environmental impact assessment.[18] However, in contrast to a proposal made by a delegation to create an explicit duty for States to 'prepare environmental assessments [for] activities which may reasonably expected to create a risk of significant marine pollution',[19] the Chairman's draft remained rather conservative. This changed with the Third Session of the Conference. In response to an informal US proposal which provided for an EIA obligation in addition to the general duty to monitor marine pollution,[20] the Chairman prepared a separate provision on 'environmental assessment' and referred it to the Conference. The provision, which built on the US draft, read as follows:

> '1. When States have reasonable grounds for expecting that planned activities under their jurisdiction or control may cause substantial pollution of the marine environment, they shall, as far

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[14] In contrast to the general monitoring obligation (see *Blitza* on Art. 204 MN 7), the General Principles for Assessment and Control of Marine Pollution (UNCHE Report (note 10), 73), did not provide for a 'classical' EIA obligation. However, Principle 10 cl. 2 arguably contains some elements of later EIAs. It read: 'A comprehensive plan for the protection of the marine environment should provide for the identification of critical pollutants and their pathways and sources, determination of exposures to these pollutants and assessment of the risks they pose, timely detection of undesirable trends, and development of detection and monitoring systems.'

[15] Sea-Bed Committee, Norway: Draft Articles on the Protection of the Marine Environment Against Pollution, UN Doc. A/AC.138/SC.III/L.43 (1973), cited in: GAOR 28th Sess. Suppl. 21 (A/9201-I), 106, 110.

[16] *Cf.* Section 102 NEPA. *Kong* (note 6), 658 (footnote 35).

[17] Sea-Bed Committee, Note by the Chairman of Working Group 2 Addressed to the Chairman of Sub-Committee III, UN Doc. A/AC.138/SC.III/L.52 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-I), 89, 92 (Annex: WG.2 Working Paper No. 13).

[18] Third Committee UNCLOS III, Conference Room Papers Containing Proposals or Amendments Informally Introduced but Not Considered by the Drafting and Negotiating Group of the Informal Meetings on Item 12 (Preservation of the Marine Environment), UN Doc. A/CONF.62/C.3/L.14/ADD.1 (1974), OR III, 255, 256.

[19] *Ibid.*, note 6.

[20] Third Committee UNCLOS III, USA: Monitoring, UN Doc. CRP/MP/7/ADD.2 (1975, mimeo), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. X (1986), 164.

> as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in paragraph 2 of article VIII (monitoring)
>
> 2. States shall directly or through competent international or regional organizations, on request, provide appropriate assistance, in particular to developing countries, concerning the preparation of such environmental assessments.'[21]

Similar to the early Norwegian proposal, the draft required States' to assess risks that might arise from planned activities **prior** to their implementation. It supplemented the general monitoring obligation through a preponed and thus separate duty, which had the potential to actually prevent environmental harm from the outset.

8 The draft was incorporated in the Informal Single Negotiating Text (ISNT).[22] Paragraph 1 became, as Art. 15, the sole provision of a Chapter V on Environmental Assessment, while the draft's second paragraph was moved to Art. 11 (c) in a Chapter III on Technical Assistance. At the Fourth Session of the Conference, continuing informal negotiations led to a further revision of Art. 15 ISNT in the Revised Single Negotiating Text (RSNT):

> 'When States have reasonable grounds for expecting that planned activities under their jurisdiction or control may cause substantial pollution of, or significant and harmful changes to, the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in Article 15 of this Part of the Convention'[23]

The RSNT expanded the provisions scope of application, as it clarified that not only the likelihood of substantial pollution of the marine environment, but similarly harmful changes to it, may require States to act. Given the comprehensive definition of 'pollution' in Art. 1 RSNT, the additional value of this amendment may raise some doubts. However, an answer can arguably be found in Art. 6 RSNT (Art. 196 of the Convention), as that provision contains a similar phrase. It intends to cover interferences with the marine environment caused by technologies and the introduction of alien species.[24] Apart from its renumbering and some unsubstantial drafting amendments, the text remained unchanged until eventually adopted as Art. 206 of the Convention.

III. Elements

1. 'reasonable grounds for believing that planned activities […] may cause substantial pollution of or significant and harmful changes to the marine environment'

9 In line with most EIA obligations, Art. 206 does not apply without exception. For the provision to apply, a State must have reasonable grounds for believing that the planned activity may cause substantial pollution of or significant and harmful changes to the marine environment. While threshold requirements in general are a common feature of EIA obligations,[25] the one contained in Art. 206 appears to be special. In comparison to e.g, Principle 17 Rio Declaration,[26] Art. 2 (3) Espoo Convention, Art. 14 Convention on Biodi-

[21] Third Committee UNCLOS III, Results of Consideration of Proposals and Amendments Relating to the Preservation of the Marine Environment, UN Doc. A/CONF.62/C.3/L.15/ADD.1 (1975), OR III, 200 (Art. IX).

[22] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975), OR IV, 171.

[23] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 175 (Art. 16).

[24] See *Czybulka* on Art. 196 MN 19.

[25] *Craik* (note 6), 133; *Alan Boyle*, Developments in the International Law of Environmental Impact Assessments and Their Relation to the Espoo Convention, RECIEL 20 (2011), 227, 228.

[26] UNCED, The Rio Declaration on the Environment and Development, UN Doc. A/CONF.151/5/REV.1 (1992), ILM 31, 874.

versity and Art. 1 of the ILC Draft Articles on Transboundary Harm,[27] which all refer to a 'likelihood of a significant environmental harm' as the EIA triggering momentum, the wording of Art. 206 seems to differ as it suggests a rather subjective threshold. While the latter is undoubtedly true, the presumed differentiation is not. The phrase 'reasonable grounds for believing […]' does not differ in substance from the more common requirement of likely harm,[28] because it similarly provides for an objective determination;[29] in any case States may not remain ignorant in situations of foreseeable harm.[30] This is further supported by the fact that the obligation – irrespective of it's freestanding nature[31] – needs to be read in line with Arts. 192 and. 194. As these provisions require States to take all measures necessary to avoid pollution, their discretion under Art. 206 is *a priori* limited.[32] Moreover, the increasing significance of the precautionary principle in international environmental law[33] may further confine States' discretion in this regard, since it might require them to assess potential harm despite uncertainty of an activity's environmental impacts.[34] Indeed, in *Land Reclamation*[35] and *Southern Bluefin Tuna*[36] the ITLOS – in essence – held that an EIA needs to be conducted if there is some evidence of a risk of significant harm.[37] This corresponds to the ICJ's finding in *Pulp Mills* where risk was equally referred to as the triggering circumstance for EIAs.

10 The requirement of 'substantial pollution of or significant and harmful changes to the marine environment' in Art. 206 can be traced back to the *Trail Smelter Arbitration*.[38] In the award, the tribunal held that:

> 'no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of **serious consequences** and the injury is established by clear and convincing evidence.'[39]

Given that only serious consequences are considered to provoke international responsibility, the international EIA obligation[40] is confined to instances of potentially **significant harm**. Only for particularly sensitive areas, States agreed to lower the relevant threshold. The Madrid Protocol e. g. requires a pre-assessment for every planned activity in order to determine if it is likely to have less than minor or transitory impact on the environment.[41]

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[27] ILC, Report of the International Law Commission: Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), GAOR 56th Sess., Suppl. 10, 370.

[28] *Pulp Mills* (note 1), para. 204.

[29] *Craik* (note 6), 98–99.

[30] *Craik* (note 3), 467; in this regard the Convention's good faith provision also seems noteworthy. See generally *O'Brien* on Art. 300.

[31] *Boyle* (note 25), 227 with regard to the judgment of the ICJ in the *Pulp Mills Case*.

[32] The fact that Art. 206 substantiates the general provisions of Arts. 192 and 194 does not preclude the above finding, but indeed supports it. Another provision with potentially discretion limiting effect is Art. 300 which generally requires States to fulfill their obligations under the Convention in good faith.

[33] On UNCLOS and the precautionary principle, see: *Tanaka* on Art. 1 MN 13; *Czybulka* on Art. 194 MN 32.

[34] *Warwick Gullet*, Environmental Impact Assessment and the Precautionary Principle: Legislating Caution in Environmental Protection, AJEM 5 (1998), 146, 148.

[35] ITLOS, *Case Concerning Land Reclamation in and around the Straits of Johor* (Malaysia *v.* Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports (2003), 10.

[36] ITLOS, *Southern Bluefin Tuna Cases* (Australia *v.* Japan; New Zealand *v.* Japan), Order of 16 August 1999, ITLOS Reports (1999), 274.

[37] *Boyle* (note 25), 228.

[38] ILC, Report of the International Law Commission: Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities with Commentaries, UN Doc. A/56/10 (2001), GAOR 56th Sess., Suppl. 10, 377, 378 and 388.

[39] Trail Smelter Arbitration Tribunal, *Trail Smelter Case* (US *v.* Canada), Award of 16 April 1938 and Award of 11 March 1941, RIAA III, 1905.

[40] The same holds true for the duty of notification in case of (serious) harm, see *Alexander Proelß*, Raum und Umwelt im Völkerrecht, in: Wolfgang Graf Vitzthum/Alexander Proelß (eds.), Völkerrecht (6th edn., 2013), 351, 413 (FN 393). In the UNCLOS however a proposal to limit the notification duty to significant harm was rejected, *cf. Stephens* on Art. 198 MN 7.

[41] Art. 1 (2) Annex I Madrid Protocol.

Only if that is the case, the activity may be proceeded with. If, however, the assessment suggests that greater impacts are likely, an initial EIA in line with Art. 2 Annex I Madrid Protocol needs to be conducted. Moreover, in cases where the outcome of the initial EIA indicates that the activity is likely to have more than minor and transitory effect, the comprehensive EIA pursuant to Art. 3 Annex I Madrid Protocol becomes compulsory.[42] Outside this special ecological context, however, the significant harm requirement remains the rule; neither the Espoo Convention nor the tailor-made Regional Sea Conventions[43] employ a lower threshold.

UNCLOS does not define the criteria 'substantial pollution of or significant and harmful changes'. In line with the International Law Commission, CRAIK argued that the term 'substantial' could set a higher threshold than 'significant'.[44] Building on this, however, he pointed out that, given the disjunctive structure of the provision, the lower standard (significant harmful changes) would apply in any event.[45] This seems doubtful. As explained above, the two criteria address different threats to the marine environment.[46] Following from that and accepting the suggested differentiation, one may not qualify less than substantial pollution as a 'significant and harmful change' to the marine environment. The *travaux préparatoires* unfortunately do not shed further light on the reasons for relying on different terms. If one assumes a distinction, it might be explained by the fact that harmful[47] changes to marine ecosystems were considered to be worse in comparison to usually transitory pollution that 'merely' needed to be significant. **11**

2. 'under their jurisdiction or control'

The scope of application of Art. 206 parallels that of Art. 194 (2). It seeks to avoid loopholes by shifting the obligation's triggering point from the potentially harmed object to the source of harm. Its effect-based nature distinguishes it from EIA obligations which require a transboundary context[48] and brings it in line with the comprehensive environmental management system of the UNCLOS. Whereas Principle 21 Stockholm Declaration similarly contained a reference to 'activities under [States] jurisdiction', the meaning has since changed. In addition to a State's land and marine territory and its continental shelf, it most notably encompasses its exclusive economic zone. Apart from that, the term arguably encompasses flag State jurisdiction (→ Art. 94) and thus provides the provision with the potential for world wide application. When a vessel is within areas of jurisdiction of another State, instances of concurrent jurisdiction may occur.[49] **12**

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[42] On attempts to concretise the criteria 'minor and transitory', see: *Alexander Proelß/Eike Blitza/Jan Oliva*, Die Genehmigung wissenschaftlicher Forschung in der Antarktis im Lichte von Umweltschutz und Forschungsfreiheit (2013), 27 *et seq.*

[43] Art. XV (5) Convention on the Protection of the Black Sea against Pollution; Art. 14 (2) Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region; Art. 4 (3)(c) Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean; slightly different: Art. 10 (3) Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific; see also *Kong* (note 6), 660–661.

[44] *Craik* (note 6), 133; see also ILC Transboundary Harm Articles with Commentaries (note 38), 388.

[45] *Craik* (note 6), 133.

[46] *Supra*, MN 8.

[47] It should be emphasized that the element 'significant' and 'harmful' are cumulative. A significant change to the marine environment does not trigger the obligation as long it is not harmful.

[48] In this regard reference should however be given to the *Responsibilities and Obligations of Sponsoring States* advisory opinion (note 7), para. 148, in which the Chamber argued that the term 'transboundary' could also apply to the commons as its resources are shared by the international community as a whole and thus adverse effects may affect other States. See also *Alex G. Oude Elferink*, Environmental Impact Assessment in Areas beyond National Jurisdiction, IJMCL 27 (2012), 449, 453; *Rosemary Rayfuse*, Differentiating the Common? The Responsibilities and Obligations of States Sponsoring Deep Seabed Mining Activities in the Area, GYIL 54 (2011), 459, 479.

[49] See further: ILC Transboundary Harm Articles with Commentaries (note 38), 383–384 (paras. 8 and 11); *Douglas Guilfoyle*, The High Seas, in: Donald R. Rothwell *et al.* (eds.), The Oxford Handbook of the Law of the Sea (2015), 203, 209–210.

13 The term 'or control' complements the provision in that it extends the duty to cover activities which, while not under the jurisdiction of a State, are nevertheless conducted under its control. In the early discussions of the Sea-Bed Committee it was stressed that control was related to activities and not areas of control.[50] Consequently, everywhere – no matter if it is on the High Sea, in the Area, in the territory or in zones of functional jurisdiction of other States – where an activity is conducted under the control of a State party, Art. 206 may apply.[51] UNCLOS does not define the term control. However, the drafting history suggests that it aims to cover instances in which there is a factual rather than a legal link between the activities conducted and the State concerned.

3. 'they shall […] assess the potential effects of such activities on the marine environment'

14 As indicated by the use of the word 'shall' and confirmed e. g. in the *MOX Plant* and the *Land Reclamation* cases,[52] Art. 206 establishes an enforceable obligation. However, given its rather brief nature, the provision does not seem to demand much in order to be complied with. This is, however, misleading. While it is true that Art. 206 neither prescribes the specific content of an EIA nor stipulates how the EIA's outcome should influence the final decision on the planned project,[53] but leaves it to the States to decide on these matters, international case law suggests that States are nevertheless bound by certain (minimum) EIA requirements. Indeed, in its *Pulp Mills* judgment, the ICJ held:

> '[I]t is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment.'[54]

Despite initially emphasizing States' role in determining the specific content of an EIA, it thus clarified that States' discretion in this regard is not unlimited. In line with the ILC,[55] it stressed that an EIA needs to be commensurate; it must account for the nature and the magnitude of the project as well as its likelihood of causing adverse impacts on the environment.[56] Apart from this finding, the judgment in essence confirmed the decision of the ITLOS in *MOX Plant.* In both cases, the claimants, relying respectively on Art. 206 and general international law, failed with their argument as to the inadequacy of the defendant's EIA. As a consequence, it seems reasonable to presume that international tribunals are – in the absence of precise treaty requirements – unlikely to find breaches of the duty except in cases where no EIA has been conducted[57] or the EIA carried out was evidently[58] inadequate.[59]

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[50] Sea-Bed Committee, Note by the Chairman of Working Group 2 Addressed to the Chairman of Sub-Committee III, UN Doc. A/AC.138/SC.III/L.39 (1973), GAOR 28th Sess., Suppl. 21 (A/9021-I), 85, 87 (Annex: WG.2 Working Paper No. 8/ADD.2, note 6).

[51] Similarly *Czybulka* on Art. 194 MN 21.

[52] ITLOS, *MOX Plant Case* (Ireland *v.* United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports (2001), 95; *Land Reclamation* (note 35).

[53] See on this issue: *Astrid Epiney*, Environmental Impact Assessment, in MPEPIL, para. 2, available at: http://www.mpepil.com.

[54] *Pulp Mills* (note 1), para. 205.

[55] ILC Transboundary Harm Articles with Commentaries (note 38), 404–405.

[56] *Boyle* (note 25), 229.

[57] *Land Reclamation* (note 35).

[58] See WTO Appellate Body, Japan – Measures Affecting the Import of Applies, 10 December 2003, WT/DS245/AB/R, para, 202: 'Under the SPS Agreement, the obligation to conduct an assessment of "risk" is not satisfied merely by a general discussion of the disease sought to be avoided by the imposition of a phytosanitary measure. The Appellate Body found the risk assessment at issue in EC – Hormones not to be "sufficiently specific" even though the scientific articles cited by the importing Member had evaluated the "carcinogenic potential of entire categories of hormones, or of the hormones at issue in general."'

[59] *Boyle* (note 25), 230.

With regard to the Area, however, this conclusion requires modification, since special rules indeed exist. In its advisory opinion on *Responsibilities and Obligations of Sponsoring States*, the ITLOS Seabed Dispute Chamber linked the contractor's obligation to conduct an EIA pursuant to Sec. 1 (7), Annex, 1994 Implementation Agreement to States' duty under Arts. 153 (4) and 139 UNCLOS and held that sponsoring States were under a due diligence obligation to ensure compliance with sponsored contractor's duties.[60] Moreover, the Chamber, relying on Reg. 31 (5) Nodules Regulation and Reg. 33 (6) Sulphides Regulation, found States to be under a direct obligation to conduct EIAs. As it qualified the latter obligation as a concretisation of Art. 153 (4) and Art. 139,[61] it arguably carved out a freestanding duty which supplements Art. 206.[62] This argument may be supported by the fact that the Chamber most notably held that the content of said EIA obligation should be based on the International Seabed Authority (ISA) Regulations and particularly on the Recommendations for the Guidance of the Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Polymetallic Nodules in the Area,[63] which, *inter alia*, specify the extent of the EIAs to be conducted.[64] 15

In contrast to the Area, the high seas are less well protected. Even though there exists no doubt as to Art. 206's applicability to this zone, States willingness to conduct EIAs in order to detect harmful effects for the high seas marine environment remains rather low.[65] In the absence of a guardian similar to the ISA, States readiness to conduct EIAs seems in some ways to depend on the particular value of the high seas area under concern. Accordingly, the Ad Hoc Open-ended Informal Working Group to Study Issues relating to the Conservation of Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction recently recommended to the General Assembly that negotiations on the proposed Implementation Agreement on the Conservation and Sustainable Use of Marine Biodiversity beyond Areas of National Jurisdiction should encompass the obligation to conduct EIAs.[66] 16

4. 'as far as practicable'

States' duty to conduct EIAs is mitigated through the use of the term 'as far as practicable'. In line with its use in other provisions of the UNCLOS, it provides States with a certain amount of discretion. It should be noted though that this discretion only relates to the extent of the actual assessment and not to the prior decision as to its necessity.[67] The phrase particularly accounts for the special needs and restricted capabilities of developing States. It is noteworthy that in its *Responsibilities and Obligations of Sponsoring States* advisory opinion, the ITLOS Dispute Chamber – despite eventually ruling against a 'two-tiered model of 17

[60] *Responsibilities and Obligations of Sponsoring States* (note 7), para. 141.

[61] *Ibid*., 142.

[62] Art. 165 (2)(d) which requires the ISA Technical Commission to provide EIAs is technically a separate obligation. However, a link to States' obligation insofar exists as the Commissions gathers its information from the constructor's EIAs (*Michael Lodge*, Protecting the Marine Environment of the Deep Seabed, in: Rosemary Rayfuse (ed.), Research Handbook on International Marine Environmental Law (2015), 151 *et seq*.). See further *van Doorn* on Art. 165 MN 22.

[63] ISA Legal and Technical Commission, Recommendations for the Guidance of the Contractors for the Assessment of the Possible Environmental Impacts Arising From Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/7/LTC/1/Rev.1 (2002).

[64] *Responsibilities and Obligations of Sponsoring States* (note 7), paras. 149, and 144. For further information see e. g. *Laura Pineschi*, The Duty of Environmental Impact Assessment in the First ITLOS Chamber's Advisory Opinion: Towards the Supremacy of the General Rule to Protect and Preserve the Marine Environment as a Common Value?, in: Nerina Boschiero *et al* (eds.), International Courts and the Development of International Law (2013), 425–439.

[65] *Robin Warner*, Protecting the Oceans Beyond National Jurisdiction: Strengthening the International Law Framework (2009), 51–52; *Oude Elferink* (note 48), 449–450.

[66] GA, Letter dated 13 February 2015 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, UN Doc. A/69/780 (2015), Annex (Recommendation (f)).

[67] *Craik* (note 6), 99.

responsibility and liability',[68] – did acknowledge that the 'rules setting out direct obligations of the sponsoring State could provide for different treatment for developed and developing sponsoring States.'[69]

5. 'and shall communicate reports […] in the manner provided in article 205'

18 Subsequent to carrying out an EIA, States are required to disseminate their results in accordance with Art. 205. In contrast to the UNEP EIA Goals and Principles[70] or the Espoo Convention, the obligation to notify pursuant to Art. 206 is rather brief in nature. There is neither a need to inform other States prior to the actual assessment, nor a duty to consult with them on the basis of the results. Moreover, given that Art. 205 only demands States to either publish their examination results themselves or to provide them to competent international organisations, Art. 206 does not guarantee that affected States are in fact properly notified.[71]

Section 5
International rules and national legislation to prevent, reduce and control pollution of the marine environment

Article 207
Pollution from land-based sources

1. States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, taking into account internationally agreed rules, standards and recommended practices and procedures.

2. States shall take other measures as may be necessary to prevent, reduce and control such pollution.

3. States shall endeavor to harmonize their policies in this connection at the appropriate regional level.

4. States, acting especially through competent international organizations or diplomatic conference, shall endeavor to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from land-based sources, taking into account characteristic regional features, the economic capacity of developing states and their need for economic development. Such rules, standards and recommended practices and procedures shall be re-examined from time to time as necessary.

5. Laws, regulations, measures, rules, standards and recommended practices and procedures referred to in paragraphs 1, 2 and 4 shall include those designed to minimize, to the fullest extent possible, the release of toxic, harmful or noxious substances, especially those which are persistent, into the marine environment.

Bibliography: *Patricia Birnie/Alan Boyle/Catherine Redgwell*, International Law and the Environment (3rd edn. 2009); *Alan Boyle*, Land-based Sources of Marine Pollution: Current Legal Regime, Marine Policy 16 (1992), 20–35; *Alan Boyle*, Marine Pollution under the Law of the Sea Convention, AJIL 79 (1985), 347–372; *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999); *Gerhard Hafner*, Meeresumwelt, Meeresforschung und Technologietransfer, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 347–459; *Daud*

[68] *Rayfuse* (note 48), 474.
[69] *Responsibilities and Obligations of Sponsoring States* (note 7), para. 160.
[70] UNEP, Goals and Principles of Environmental Impact Assessment, UNEP Res. GC14/25, 14th Session.
[71] See on this aspect *Blitza* on Art. 205 MN 3 (footnote 11).

Hassan, Protecting the Marine Environment from Land-Based Sources of Pollution (2006); *Elizabeth A. Kirk*, Science and the International Regulation of Marine Pollution, in: Donald R. Rothwell/Alex G. Oude Elferink/Karen N. Scott/Tim Stephens (eds.), The Oxford Handbook of the Law of the Sea (2015), 516–535; *Doris König*, Marine Environment, International Protection, MPEPIL, available at: http://www.mpepil.com; Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea, 1982: A Commentary, vol. IV (1991); *Alexander Proelss*, Meeresschutz im Völker- und Europarecht (2004); *Meng Qing-Nan*, Land-based Marine Pollution (1987); *William van Reenen*, 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, NYIL 12 (1981), 3–44; *Martine Rémond-Gouilloud*, Land-Based Pollution, in: Douglas M. Johnston (ed.), The Environmental Law of the Sea (1981), 230–245; *Yoshifumi Tanaka*, Regulation of Land-Based Marine Pollution in International Law: A Comparative Analysis Between Global and Regional Legal Frameworks, ZaöRV 66 (2006), 535–574; *Yoshifumi Tanaka*, The International Law of the Sea (2nd edn. 2015); *Gregory J. Timagenis*, International Control of Marine Pollution, vol. II (1980); *David L. VanderZwaag/Ann Powers*, The Protection of the Marine Environment from Land-Based Pollution and Activities: Gauging the Tides of Global and Regional Governance, IJMCL 23 (2008), 423–452; *Wolfgang Wiese*, Grenzüberschreitende Landrohrleitungen und seeverlegte Rohrleitungen im Völkerrecht (1997); *Sarah Wolf*, Unterseeische Rohrleitungen und Meeresumweltschutz (2011)

Documents: Beijing Declaration on Furthering the Implementation of the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities (2006); GA, A Regular Process for the Global Reporting and Assessment of the State of the Marine Environment: Proposals on Modalities: Special Report of the Secretary-General, UN Doc. A/58/423 (2003); GA, Oceans and the Law of the Sea: Report of the Secretary General, UN Doc. A/59/62/ADD.1 (1989); GA, Oceans and the Law of the Sea: Report of the Secretary General, UN Doc. A/67/79/ADD.1 (2012); GA, Oceans and the Law of the Sea: Report of the Secretary General, UN Doc. A/69/71/ADD.1 (2014); GA, Protection and Preservation of the Marine Environment: Report of the Secretary General, UN Doc. A/44/461 (1989); GA Res. 55/7 of 27 February 2001; GA Res. 70/235 of 23 December 2015; IAEA, IAEA Involvement in the Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities, IAEA Doc. GOV/INF/820-GC(41)/INF/10 (1997); IMO, Interpretation of the London Convention and Protocol, IMO Doc. LC 37/9/2 (2015); Montreal Declaration on the Protection on the Marine Environment from Land-based Activities (2001); UNCED, Report of the United Nations Conference on the Environment and Development, UN Doc. A.CONF/151/26/REV.1 (Vol. I) (1992), 9 (Agenda 21); UN DOALOS, 'Competent or Relevant International Organizations' under the United Nations Convention on the Law of the Sea, LOSB 31 (1996), 79–95; UNEP, Governing Council, Montreal Guidelines for the Protection of the Marine Environment against Pollution from Land-Based Sources, Decision 13/18/II (1985); UNEP, Report of the Third Session of the Intergovernmental Review Meeting on the Implementation of the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities, UN Doc. UNEP/GPR/IGR.3/6 (2012), Annex (Manila Declaration on Furthering the Implementation of the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities); UNEP, Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities, UN Doc. UNEP(OCA)/LBA/IG.2/7 (1995); UNEP, Washington Declaration on Protection of the Marine Environment from Land-based Activities (1995)

Cases: PCA, *Chagos Marine Protection Area Arbitration* (Mauritius *v.* United Kingdom), Award of 18 March 2015, available at: www.pca-cpa.org/showpage.asp?pag_id=1429

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I. Purpose and Function

1 Art. 207 is the first provision of Section 5 (International Rules and National Legislation to prevent, reduce and control Pollution of the Marine Environment) of Part XII (Protection and Preservation of the Marine Environment). It deals with the most important and significant source of marine pollution: pollution from land-based sources. The article encompasses five paragraphs and provides prescriptive obligations, requiring States to adopt national, regional and global instruments with regard to their obligations stipulated in Arts. 192, 194 (1), (2) and specifically (3)(a),[1] to take measures 'to minimize to the fullest possible extent […] the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources'. Thus, Art. 207 constitutes the second component of the three necessary steps for the implementation of Part XII.[2] The relevant enforcement power is laid down in Art. 213 (Enforcement with respect to pollution from land-based sources).

2 Of the six pollution sources covered in UNCLOS, land-based pollution is the largest source of marine degradation. Over 70 per cent of marine pollution is caused by land-based activities[3] and has been described as 'the result of the imbalance between human populations and industrial activities and the limited capacity of the marine environment to absorb the wastes they produce'.[4] Land-based pollution is a generic term that materially describes marine pollution caused by various land-based sources[5] originating from a wide variety of human activities, such as domestic, municipal, industrial and agricultural sources.[6] Through discharge, run-off, effluent and accidental introduction, (persistent) toxic, harmful and noxious substances find their way into the marine environment either through direct introduction into marine waters or indirectly through waterways, rivers, estuaries, pipelines and outfall structures and thus cause pollution.[7] Due to the various pollutants discharged and the many sources from which the pollution originates, the problem of land-based sources constitutes a considerable challenge.

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[1] Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea, 1982: A Commentary, vol. IV (1991), 127 (MN 207.1), state that 'Art. 207 in particular completes the obligation under article 194, paragraph 3(a)'. *Alan Boyle*, Marine Pollution under the Law of the Sea Convention, AJIL 79 (1985), 347, 353, takes the view that the obligations contained in Arts. 207–212 'form part of the primary obligation established by Articles 192 and 194'.

[2] UNCLOS lays down a three-level-structure for the implementation of Part XII. Firstly, Art. 194 (1)–(3) describes in detail a set of measures for the protection of the marine environment from pollution. Secondly, with regard to these measures, Arts. 207 *et seq.* provide prescriptive powers. Thirdly, different measures need to be implemented and enforced. *Cf. Gerhard Hafner*, Meeresumwelt, Meeresforschung und Technologietransfer, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 347, 367; *cf. Czybulka* on Art. 194 MN 2.

[3] UNCED, Report of the United Nations Conference on the Environment and Development, UN Doc. A.CONF/151/26/REV.1 (Vol. I) (1992), 9 (Agenda 21), 243, Ch. 17.18 mentions 70 %. The UN Secretary-General points out that land-based sources contribute about 80 % to marine pollution, although he also includes atmospheric pollutants, see GA, Oceans and the Law of the Sea: Report of the Secretary-General UN Doc. A/59/62/Add.1 (1989), para. 97. Atmospheric pollution of the marine environment that is caused by certain land-based activities is dealt with in Art. 212 (Pollution from or through the atmosphere). One of the reasons why land-based pollution contributes so much to the degradation of the marine environment is because approximately half of the world's population lives within 100 km of the coast.

[4] *Yoshifumi Tanaka*, Regulation of Land-Based Marine Pollution in International Law: A Comparative Analysis Between Global and Regional Legal Frameworks, ZaöRV 66 (2006), 535, 536.

[5] *Meng Qing-Nan*, Land-based Marine Pollution (1987), 18 *et seq.*, describes that on the one hand the term 'sources' may concern 'the place from which harmful substances which cause pollution are generated' and on the other hand it may refer to 'human activities from which harmful substances are introduced to the environment'.

[6] *Martine Rémond-Gouilloud*, Land-Based Pollution, in: Douglas M. Johnston (ed.), The Environmental Law of the Sea (1981), 230, 231 *et seq.*, emphasizes three special characteristics of the issue of land-based pollution. One of these characteristics is the 'diversity of causes'. Besides that, she adds the 'Importance of National Regulation' and the 'Inadequacy of Liability Provisions'.

[7] *Patricia Birnie/Alan Boyle/Catherine Redgwell*, International Law and the Environment (3rd edn. 2009), 453. Land-based pollution of the marine environment may also cause human health problems due to *e.g.* contaminated seafood.

Art. 207 concerns circumstances not occurring primarily within marine areas but rather further inland. This provision geographically applies to every part of the State's territory.[8] The broad wording of Art. 207 further indicates that States tried to preserve a certain degree of their freedom of action in order to balance environmental protection measures against their economic needs (*cf.* the primary notion of development in Art. 193).[9] Generally, land-based marine pollution is closely linked to the industrial and agricultural situation of a State, because discharge, effluent and run-off contribute greatly to marine degradation. However, industrial and agricultural development, in turn, contribute to the State's economy. Thus, States did not wish to commit themselves to strict international rules and regulations as compared to their commitment with respect to other sources of marine pollution. Therefore, it follows from the wording that States primarily intended to regulate this source of marine pollution on a national or regional basis rather than globally.[10] 3

II. Historical Background

A first reference to rules concerning marine pollution from land can be found in draft resolutions from the Sea-Bed Committee in 1971 and 1972.[11] These documents did not explicitly mention land-based marine pollution. Nevertheless, they dealt with preliminary measures regarding the pollution of the marine environment caused by sources within States' jurisdiction. In the 1973 session of the Sea-Bed Committee, Working Group 2 of Sub-Committee III explicitly addressed the subject of marine pollution from land-based sources in a paper. This paper contained several draft articles, similar in some part to the wording of Art. 207.[12] Subsequently, Norway submitted a series of draft provisions that referred to pollution from certain activities within the States' territory.[13] Moreover, Working Group 2 elaborated additional provisions comprising, in particular, standards for land-based sources of marine pollution.[14] 4

[8] *Cf. Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999), 379, who assume that marine pollution from land-based sources is the most 'national' source of marine degradation. Art. 207 only relates to discharges that cause pollution within the meaning of Art. 1 (1)(4), *cf. Birnie/Boyle/Redgwell* (note 7), 453. In contrast dumping within the meaning of Art. 1 (1)(5) is beyond the scope of Art. 207 because it only concerns certain discharges at sea and is, thus, not a land-based source. Land-based dumping, however, may very well fall within the scope of Art. 207.

[9] *Birnie/Boyle/Redgwell* (note 7), 454.

[10] This becomes apparent in Art. 207 (1), (3) and (4). See also *Doris König*, Marine Environment, International Protection, MPEPIL, para. 26, available at: www.mpepil.com, who clarifies that international regulation concerning land-based source pollution of the marine environment would cause 'severe restrictions of industrial and other activities within the sovereign territories of States'. Therefore, States are unwilling to become legally bound by strict international rules. With respect to Art. 207 (1), Nordquist/Rosenne/Yankov (note 1), 132 (MN 207.7(a)), point out that the balance of this paragraph is 'one that favors national measures'. *Qing-Nan* (note 5), 104, mentions that 'Article 207 shows once again that the prevention of land-based marine pollution is more national than international'. For the consequential ability of States with respect to adopting measures more or less stringent than international rules and standards see *infra*, MN 9 (note 35). *Boyle* (note 1), 347, 355, alleges that universal regulation of land-based pollution is only possible if there is a flexibility concerning the standard-setting.

[11] Sea-Bed Committee, Canada and Norway: Draft Resolution on Preliminary Measures to Prevent and Control Marine Pollution submitted to Sub-Committee III, UN Doc. A/AC.138/SC.III/L.5 and Add.1 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 247 *et seq.*, paras. 2, 3, 4 and 7. Sea-Bed Committee, Australia *et al.*: Draft Resolution on Preliminary Measures to Prevent and Control Marine Pollution, UN Doc. A/AC.138/SC.III/L.25 (1972), GAOR 27th Sess. Suppl. 21 (A/8721), 210 *et seq.* (paras. 1 and 3).

[12] Sea-Bed Committee, Note by the Chairman of Working Group 2, Addressed to the Chairman of Sub-Committee III, UN Doc. A/AC.138/SC.III/L.39 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-I), 85, 86 *et seq.* (paras. 1, 2(a) and 3(a)).

[13] An extract from Norway's draft articles is reproduced in: Nordquist/Rosenne/Yankov (note 1), 128 *et seq.* (MN 207.2).

[14] Sea-Bed Committee, Note by the Chairman of Working Group 2, Addressed to the Chairman of Sub-Committee III, UN Doc. A/AC.138/SC.III/L.52 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-I), 89, 91, 93 (WG 2/Paper No. 15, Sec. I).

5 During the Second Session of UNCLOS III (1974), Kenya remarked that the measures States would be obliged to adopt with respect to marine pollution from land-based sources should include, *inter alia*, 'those designed to minimize the release of toxic, harmful and persistent substances into the marine environment'.[15] Subsequently, ten States submitted another proposal regarding the subject of potential measures against land-based marine pollution. As in Kenya's draft articles, it can be noted that the proposed wording of the obligation to prevent pollution of the marine environment in general (Art. 3 (1)) and specifically in regard to land-based source pollution (Art. 3 (3)(a)) is similar to the wording of Arts. 194 and 207. Furthermore, these draft articles had a more specific content than earlier proposals.[16] At the 1975 session, discussions and submissions of proposals resulted in a draft article on standards for land-based sources of marine pollution, which closely resembled the present Art. 207. However, it contained different wording with regard to its paragraph 3:

> 'States […] shall endeavor to establish global rules and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from land-based sources'.[17]

In addition to this, an alternative text added 'taking into account characteristic regional features, the economic capacity of developing States and their need for economic development'. This draft article with the extended text was adopted in Art. 16 of the Informal Single Negotiating Text Part III.[18] During the Fourth Session (1976), the wording was, except for smaller changes especially in paragraph 4, reproduced in the Revised Single Negotiating Text Part III.[19] Subsequently, in 1977, this text was adopted in the Informal Composite Negotiating Text (ICNT).[20] In the ICNT Revision 1, the article number changed from 208 to 207.[21] The text of the article remained largely the same as in the ICNT, with only small changes made on the recommendation of the Drafting Committee. With respect to Art. 207 (5), the wording was changed from 'harmful *and* noxious substances' to 'harmful *or* noxious substances' (emphasis added).[22] Furthermore, in Art. 207 (3) the wording was slightly modified to 'to harmonize their policies in this connection at the appropriate regional level'.[23]

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[15] Third Committee UNCLOS III: Kenya: Draft Articles for the Preservation and the Protection of the Marine Environment, UN Doc. A/CONF.62/C.3/L.2 (1974), OR III, 245, 247 (Arts. 5(a) and 25).

[16] Third Committee UNCLOS III: Canada *et al.*: Draft Articles on a Zonal Approach to the Preservation of the Marine Environment A/CONF.62/C.3/L.6 (1974), OR III, 249 *et seq.* (Arts. 3 (1), (3)(a), 7 (3)(a)).

[17] Third Committee UNCLOS III: Results of the Consideration of Proposals and Amendments Relating to the Preservation of the Marine Environment, UN Doc. A/CONF.62/C.3/L.15/ADD.1 (1975), OR III, 200–201 (Art. X).

[18] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF. 62/WP.8/PART III (1975), OR IV, 171, 173 (Art. 16).

[19] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 176 (Art. 17).

[20] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 36 (Art. 208).

[21] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII, 105 (Art. 207).

[22] Corresponding to Art. 194 (3)(a), the Chairman of the Third Committee proposed the substitution in Art. 207 (5). See UNCLOS III, Report by the Chairman of the Third Committee, UN Doc. A/CONF.62/L.34 and ADD.1-2 (1980), OR XIV, 185, 186.

[23] UNCLOS III, UN Doc. A/CONF.62//L.67/Add.7 (1981, mimeo.) (Drafting Committee), 61, 66, cited in: Nordquist/Rosenne/Yankov (note 1), 132 (MN 207.6). *Martine Rémond-Gouilloud* (note 6), 230, 242 *et seq.*, expresses doubts with regard to the effective implementation of Art. 207 as this provision has an 'extremely vague formulation'. Even though she had a pessimistic view concerning the future fate of this provision, she concluded that Art. 207 would be of 'fundamental importance in the evolving international law', *ibid.*, 230, 243 *et seq.*

III. Elements

1. 'States shall adopt laws and regulations to prevent, reduce and control pollution'

Art. 207 (1) contains a duty to adopt laws and regulations at the national level to prevent, reduce and control pollution from land-based sources.[24] Thus, it provides prescriptive powers with regard to the obligations contained in Art. 194 (1), (2) and (3)(a). The norm addressees in Art. 207 (1) are 'States'. Hence, every member State, whether coastal or landlocked, is bound by this provision. A specification on how to fulfill this obligation can be found in Art. 207 (5). The corresponding enforcement authority is stipulated in Art. 213, which, in particular, obliges States to enforce their national rules and regulations which have been adopted on the basis of Art. 207.[25] **6**

2. 'land-based sources, including rivers, estuaries, pipelines and outfall structures'

The term 'land-based sources' is not defined in UNCLOS. However, the term is specified by the enumeration[26] of different kinds of land-based sources, such as rivers, estuaries, pipelines and outfall structures. Various regional conventions addressing the pollution of the marine environment from land-based sources contain definitions of the terms 'land-based marine pollution' or 'land-based sources'. According to Art. 1(e) Convention for the Protection of the Marine Environment of the North-East Atlantic (1992) (OSPAR Convention), the term 'land-based sources' means: **7**

> 'point and diffuse sources on land from which substances or energy reach the maritime area by water, through the air, or directly from the coast. It includes sources associated with any deliberate disposal under the sea-bed made accessible from land by tunnel, pipeline or other means and sources associated with man-made structures placed, in the maritime area under the jurisdiction of a Contracting Party, other than for the purpose of offshore activities'.

This term has a broader scope than the term in Art. 207, because pollution from or through the atmosphere is addressed in Art. 212. Nevertheless, this definition can be useful for the interpretation of Art. 207.

Land-based pollutants reach the marine environment via different pathways. Art. 207 (1) mentions rivers, estuaries, pipelines and outfall structure; but UNCLOS does not define any of these terms. By means of the word 'including' it becomes clear that the enumeration has a non-exhaustive character. Thus, additional land-based sources (apart from atmospheric land-based source pollution which is covered in Art. 212) that potentially cause harm to the marine environment may fall within the scope of this provision, such as: streams, canals, any water course, including underground water courses. With regard to the issue of 'pipelines', it is questionable whether this provision (in addition to pollution caused by pipelines laid on land to deliberately discharge sewage) also includes accidental pollution from damaged pipelines transporting various resources such as oil and gas.[27] While for instance the definition of land-based sources in Art. 2 (2) (Helsinki) Convention on the Protection of the Marine Environment of the Baltic Sea Area (1992) explicitly refers to the deliberate **8**

[24] The text includes the word 'shall', which generally entails a legal obligation.

[25] For further information see *König* on Art. 213.

[26] *Qing-Nan* (note 5), 103.

[27] *Sarah Wolf*, Unterseeische Rohrleitungen und Meeresumweltschutz (2011), 132 *et seq*., concludes that only the deliberate discharge of sewage through pipelines is subject to this provision. Thus, she excludes pipelines with the sole purpose of transporting resources and substances such as oil and gas. However, she adds that pipelines which have been covered by anti-corrosive substances are also subject to this provision. *Cf.* also *Wolfgang Wiese*, Grenzüberschreitende Landrohrleitungen und seeverlegte Rohrleitungen im Völkerrecht (1997), 354 *et seq*.

disposal from land by pipelines,[28] UNCLOS does not differentiate in this respect, and it may be argued that land-based pipelines that transport resources and other substances should be included in Art. 207. Based on the discussion whether the discharge via land-based pipelines may be qualified as dumping, the IMO Legal Affairs and External Relations Division concluded that there is, due to a lack of guidance in UNCLOS, no clear borderline between the scope of Art. 207 and the scope of the definition of dumping as laid down in Art. 1 (5)(a) and in the London Dumping Convention/1996 London Protocol with regard to this issue. Therefore, a mutual exclusiveness of the respective scope could be denied. Thus, pipelines could be qualified as 'other man-made structures at sea' within the meaning of the 'dumping' definition.[29] However, the term 'other man-made structures *at sea*' (emphasis added), in contrast, rather seems to be understood as referring to objects that are wholly located at sea. This indicates that there is a strict borderline between the scope of Art. 207 on the one hand and that of the definition of 'dumping' in UNCLOS and the London Dumping Convention/1996 London Protocol on the other hand, so that discharges via land-based pipelines rather fall exclusively within the scope of Art. 207.[30] Otherwise, the scope of the definition of 'dumping' would be vastly extended so that man-made structures that have direct access to the sea such as channels would also be included.

3. 'taking into account internationally agreed rules, standards and recommended practices and procedures'

9 In contrast to most of the provisions of Section 5 of Part XII, Art. 207 does not require national laws, regulations and measures to be *no less effective* than international rules, standards and recommended practices and procedures.[31] According to Art. 207 (1), States are only obliged '[to take] into account internationally agreed rules, standards and recommended practices and procedures' when carrying out their obligation under this paragraph.[32] This shows that UNCLOS does not lay down a 'single uniform approach' for the regulation of all pollution sources.[33] Nevertheless, the incorporation of such a reference to international instruments demonstrates one of the aims of Section 5: harmonization between international regulations and national instruments. Consequently, States also have to consider international instruments they may have not consented to. However, this does not conflict with the *pacta tertiis* rule because it follows from the term of reference that States are not bound by a minimum international standard.[34] Hence, States may adopt national laws and regulations

[28] Art. 1(e) OSPAR Convention has a similar wording.

[29] IMO, Interpretation of the London Convention and Protocol, IMO Doc. LC 37/9/2 (2015), Annex, paras. 3 *et seq*.

[30] *Cf. Wiese* (note 27), 354 *et seq*. Another indication for this interpretation is that the term 'pipelines' is explicitly mentioned in Art. 207 but it is not used in the definition of 'dumping'. Additionally, other conventions such as the OSPAR Convention also separately address land-based sources, including pollution via pipelines, and dumping.

[31] Arts. 208 (3), 209 (2), 210 (6) and 211 (2) contain broadly similar obligations. During UNCLOS III many developing States desired a preferential status with regard to standards concerning the prevention of different pollution sources ('double standard'). A number of developed States showed reluctance and such a double standard was eventually not adopted. In the end, the only concession was made in respect of land-based sources. The less stringent standard is reflected in Art. 207 (1) and Art. 212 (1) where the term 'taking into account' was implemented. *Cf. William van Reenen*, 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, NYIL 12 (1981), 3, 17 *et seq*.

[32] For the corresponding annotation with regard to this qualifying reference in Art. 212 (1) see *Wacht* on Art. 212 MN 8.

[33] *Boyle* (note 1), 347, 354. Especially developing States objected to a uniform approach.

[34] With regard to the character of this qualifying reference in Art. 207 (1), see: *Birnie/Boyle/Redgwell* (note 7), 452 *et seq*.; *Daud Hassan*, Protecting the Marine Environment from Land-Based Sources of Pollution (2006), 82; *Elizabeth A. Kirk*, Science and the International Regulation of Marine Pollution, in: Donald R. Rothwell/Alex G. Oude Elferink/Karen N. Scott/Tim Stephens (eds.), The Oxford Handbook of the Law of the Sea (2015), 516, 526. See also *Yoshifumi Tanaka*, The International Law of the Sea (2nd edn. 2015), 279, who says that 'taking into account' means that 'States may adopt measures which are either more of less stringent than those embodied in

concerning land-based marine pollution that derogate from an international standard with the effect that national measures may be less effective. Within this context, NORDQUIST ET AL. point out that the phrase 'taking into account' is the 'weakest of the qualifications used' concerning the States' obligation with regard to internationally agreed measures.[35] Thus, Art. 207 (1) provides wide discretion to States in this respect – and in comparison to most other provisions in Section 5 of Part XII even wider discretion – to adopt their own laws with regard to land-based pollution. Hence, in the case of Art. 207, States have the power to adopt national regulations 'uncontrolled by any internationally agreed criteria'[36]. This underlines the sovereignty of States with respect to the adoption of measures combating land-based marine pollution.[37] However, it should be noted States must act in good faith when carrying out their obligations under the Convention (Art. 300).

4. 'States shall take other measures as may be necessary'

Art. 207 (2) imposes an obligation on States to take other measures as may be necessary to **10**
protect the marine environment from land-based pollution. Thus, this duty shows a strong link to the general obligation in Art. 194 (1) to take 'all measures […] that are necessary' to protect the marine environment from pollution from any source. It can be noted that the wording of Art. 207 (2) is too general as to provide useful guidance to States on how to fulfill this obligation.[38] UNCLOS does not define the terms used in this paragraph. Thus, it leaves wide discretion for States when adopting measures based on this paragraph.[39] The term 'other measures' should be understood as concerning national instruments other than laws and regulations. Since the terms 'laws' and 'regulations' reflect binding national instruments, Art. 207 (2) primarily refers to non-binding national measures such as recommendations, guidelines, scientific and technical advice, capacity-building programs, cooperation programs, certification schemes, codes of conduct etc.[40]

With regard to the term 'necessary', it can be pointed out that it needs to be determined on **11**
a case-by-case basis. It is noticeable that the phrase 'as may be necessary' differs from similar terms as laid down in Art. 194 (1) and (2).[41] In Art. 194 (1) it says 'States shall take […] all

international law'. *Qing-Nan* (note 5), 103, assumes that States are not required to follow internationally agreed rules and standards. Instead they are merely asked to take them into account. *Cf. Boyle* (note 1), 347, 353 *et seq.*, who also alleges that the reference in Art. 207 (1), 'taking into account', in comparison to the other references, which indicate a minimum standard, is 'much weaker'. Alternative viewpoint: *Gerhard Hafner*, Meeresumwelt, Meeresforschung und Technologietransfer, in: Wolfgang Graf Vitzthum (note 2), 347, 384, who assumes that these 'internationally agreed rules, standards and recommended practices and procedures' constitute a 'minimum standard'.

[35] Nordquist/Rosenne/Yankov (note 1), 132 (MN 207.7(a)).

[36] *Boyle* (note 1), 347, 354. *Cf.* GA, Protection and Preservation of the Marine Environment: Report of the Secretary-General, UN Doc. A/44/461 (1989), para. 39, who stated that Art. 207 gives States 'a certain degree of discretion with respect to the implementation of international rules and standards'.

[37] Nordquist/Rosenne/Yankov (note 1), 132 (MN 207.7(a)).

[38] Some guidance on this can be found in Art. 207 (5).

[39] *Cf. Alexander Proelss*, Meeresschutz im Völker- und Europarecht (2004), 85.

[40] *Cf. Gregory J. Timagenis*, International Control of Marine Pollution, vol. II (1980), 603, who states that the term 'other measures' usually refers to national administrative measures 'not necessarily of a normative nature'. In contrast to paragraph 1, Art. 207 (2) does not mention that States have to take into account internationally agreed instruments when taking other measures. Thus, it seems as if this paragraph contains a much weaker obligation where States are completely free to adopt measure without even considering any international instruments. However, since Section 5 of Part XII pursues the harmonization of national and international measures and due to the fact that States could, at least in some cases, circumvent the obligation in Art. 207 (1) to take into account internationally agreed instruments by choosing to take other measures instead of adopting laws and regulations, States also have to consider internationally agreed rules, standards and recommended practices and procedures when taking other measures pursuant to Art. 207 (2).

[41] The French text reads: 'toutes autres mesures qui *peuvent être nécessaires*' (emphasis added). The German text states: 'andere Maßnahmen, die […] notwendig *sein können*' (emphasis added). In the context of Art. 194, Nordquist/Rosenne/Yankov (note 1), 64 (MN 194.10(b)), point out that no indication is laid down to describe the meaning of 'necessary' in relation to the measures which shall be taken pursuant to Art. 194 (1).

measures […], that *are* necessary to prevent, reduce and control pollution of the marine environment from any source' (emphasis added) and Art. 194 (2) reads 'States shall take *all* necessary measures' (emphasis added). These different versions show that Art. 207 (2) stipulates a weaker qualification of the obligation to take other measures. Thus, it suggests that, with respect to land-based marine pollution, this phrase was chosen to encourage States to undertake measures to combat such pollution even though they may not be able to ensure that these measures will eventually serve this purpose in each individual case. Hence, this provides a broad scope for States to act.

5. 'States shall endeavor to harmonize their policies […] at the appropriate regional level'

12 Art. 207 (3) comprises a States' obligation to endeavor to harmonize their policies at the appropriate regional level. As can be noticed, this duty is weakened by the word 'endeavor'. This indicates that the effort the respective State may put in, is dependent on their individual capacity. Within this context, in the *Chagos Marine Protected Area Arbitration*, the arbitral tribunal commented on the obligation to 'endeavor to harmonize' policies imposed on States in Art. 194 (1). First, the tribunal concluded that Art. 194 (1) has a prospective character. Thus, it does not require that attempts to harmonize policies necessarily need to precede any action regarding the marine environment. Art. 194 (1) does not impose a particular deadline. Consequently, attempts of policy harmonization may also occur after the establishment of marine environmental protection measures. The tribunal added that in order to meet the obligation, a State would be required to use its best effort.[42] Concerning the scope of Art. 207 (3), the harmonization of policies relates to the substantive rules of law as well as to the enforcement of national laws. The intention behind such harmonization is the prevention of a mosaic-like legal structure.[43]

13 Although, a general harmonization duty is already stipulated in Art. 194 (1) in respect of the protection of the marine environment from any pollution source, it does not mean that Art. 207 (3) is only of a declaratory nature.[44] Through the element 'at the appropriate regional level', it geographically concretizes this obligation with regard to pollution from land-based sources.[45] This shows that Art. 207 rather envisages an approach of regional cooperation concerning land-based marine pollution. Although, UNCLOS does not define the term 'appropriate regional level', it seems that this qualification primarily concerns enclosed or semi-enclosed seas within the meaning of Art. 122.[46] Thereby, States bordering such a marine area generally share the same interests in this area and need to coordinate their actions. In addition, these areas are exposed to greater danger from land-based sources than others. In these cases, Art. 123 (Cooperation of States bordering enclosed or semi-enclosed seas) concretizes the requirement laid down in Art. 207 (3). Within the context of regional harmonization, the various Regional Seas Programmes (RSPs), *e. g.* those in the Mediterranean, the Black Sea and the Baltic Sea, need to be highlighted as good examples of fulfilling the obligation laid down Art. 207 (3).

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[42] PCA, *Chagos Marine Protection Area Arbitration* (Mauritius v. United Kingdom), Award of 18 March 2015, para. 539, available at: www.pca-cpa.org/showpage.asp?pag_id=1429. Especially in the case of such a duty to endeavor to harmonize, where occasionally a lack of reliable proof leads to difficulties as to whether a State has fulfilled its obligation, the *good faith*-requirement in Art. 300 (that must always be considered when applying UNCLOS) is of particular relevance.

[43] Nordquist/Rosenne/Yankov (note 1), 64 *et seq.* (MN 194.10(d)).

[44] At the same time, Art. 207 (3) can also be considered as being a specification of Art. 197 (Cooperation on a global or regional basis).

[45] Different economic, technological and geographical characteristics of every State as well as the character of the pollution source as being land-based consequently cause difficulties in establishing uniform rules and standards with regard to land-based marine pollution on the global level. Thus, it seemed more adequate to stipulate this obligation with a focus on regional harmonization.

[46] For further information on enclosed and semi-enclosed seas see *Winkelmann* on Art. 123.

6. 'States, acting especially through competent international organizations or diplomatic conference'

In Art. 207 (4)(1), UNCLOS stipulates an obligation to endeavor to establish global and regional rules, standards and recommended practices and procedures. This shall be done through competent international organizations or diplomatic conference. Various kinds of land-based pollution make it necessary that they are dealt with in different forums.[47] Consequently, no specific international organization has an exclusive mandate with regard to land-based marine pollution.[48] Through which organization a State endeavors to establish a particular instrument depends on multiple factors, for instance: time, knowledge and the source of pollution. However, it is assumed that the respective organization has the responsible mandate and expertise.[49] An example of a competent intergovernmental organization is the International Atomic Energy Agency (IAEA). This organization would be the appropriate (competent) body to address radioactive substances.[50] In this context, it is notable that the text in paragraph 4 speaks of 'acting *especially* through competent international organizations or diplomatic conference' (emphasis added).[51] The word 'especially' shows that the enumeration is non-exhaustive. Thus, international organizations and diplomatic conferences are not the only alternatives to cooperate in order to regulate land-based pollution internationally. Nevertheless, the term indicates a preference to these fora. The option to choose between them provides flexibility.[52] **14**

A further example where States act through an international organization and drawing attention to the issue of land-based marine pollution is the UN. In its resolutions on 'Oceans and the Law of the Sea', the UN General Assembly has expressed 'deep concern at the degradation of the marine environment, particularly from land-based activities'. At the same time, the General Assembly has also pointed out the importance of implementing the GPA.[53] The Secretary-General also addressed the issue of land-based marine pollution in **15**

[47] Nordquist/Rosenne/Yankov (note 1), 133 (MN 207.7(d)), state that the various types of land-based pollution need to be addressed with different legal as well as different functional approaches.

[48] In contrast, Art. 211 only speaks of *the* competent international organization (this reference concerns the IMO).

[49] *Cf.* Nordquist/Rosenne/Yankov (note 1), 14 (MN XII.17).

[50] A list of various international organizations and activities relating to land-based marine pollution control is available in: *Qing-Nan* (note 5), 229 *et seq.* For information particularly with regard to the relation of IAEA to the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities (GPA) see IAEA Involvement in the Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities, Doc. GOV/INF/820-GC(41)/INF/10 (1997), available at: http://www.iaea.org/About/Policy/GC/GC41/GC41InfDocuments/English/gc41inf-10_en.pdf. UN DOALOS, 'Competent or Relevant International Organizations' under the United Nations Convention on the Law of the Sea, LOSB 31 (1996), 79 *et seq.*, provides a table of various international organizations that are relevant when applying UNCLOS. In the introductory note, it is pointed out that the table is merely indicative and that it could change or evolve in the future. The relevant international organizations with regard to Art. 207 (4) are listed *ibid.*, 79, 86. In addition to the IAEA, the table also includes the following examples: The International Civil Aviation Organization, the International Hydrographic Organization, the IMO, the International Labour Organization, the Intergovernmental Oceanographic Commission of UNESCO, UNEP, the United Nations Industrial Development Organization and the World Health Organization.

[51] The German text reads: '*insbesondere* im Rahmen der zuständigen internationalen Organisationen oder einer diplomatischen Konferenz' (emphasis added). The French wording states: '*en particulier* par l'intermédiaire des organisations internationales compétentes ou d'une conférence diplomatique' (emphasis added).

[52] *Cf.* Nordquist/Rosenne/Yankov (note 1), 133 (MN 207.7(d)).

[53] *E. g.* GA Res. 55/7 of 27 February 2001, introductory para. 16. In para. 27, the GA first called upon States 'to prioritize action on marine pollution from land-based sources as part of their national sustainable development strategies' and highlighted again the importance of implementing the GPA. In the latest GA resolution on Oceans and the Law of the Sea (GA Res. 70/235 of 23 December 2015), introductory para. 17, deep concern is particularly expressed at the 'adverse economic, social and environmental impacts of the physical alteration and destruction of marine habitats that may result from land-based sources and coastal development activities'. The GPA is also addressed *infra* MN 17.

his annual reports on 'Oceans and the Law of the Sea'.[54] In his report from 2014, he pointed out that nitrogen and phosphorous pollution would pose a significant peril to biodiversity and ecosystem services worldwide. He further emphasized that pollution from oil spills from vessels appear to have declined, whereas pollution from pipelines, mainly land-based, has increased.[55]

7. 'shall endeavor to establish global and regional rules, standards and recommended practices and procedures'

16 Art. 207 (4)(1) obliges States to endeavor to establish global and regional rules, standards and recommended practices and procedures. The wording indicates that this obligation encompasses the establishment of binding as well as non-binding instruments. As in paragraph 3, the wording shows that States wished to exercise restraint with regard to regulating land-based marine pollution globally. In contrast to Arts. 208 (5) (seabed pollution) and 211 (1) (vessel source pollution), Art. 207 (4) does not oblige States to establish international rules and regulations. Rather, they are required to endeavor to do so.[56] Since the question as to whether States have complied with their obligation to endeavor to establish international measures, depends on various individual aspects such as economic circumstances, special needs or the respective level of development, the obligation in Art. 207 (4) has to be exercised in good faith.[57]

17 Even though land-based pollution is the major source of marine pollution, the issue has not been well addressed internationally. Overall the regulation of land-based source pollution is rather fragmented and there is no comprehensive regulation of this issue in a treaty. In this respect, UNCLOS is the only global treaty that comprises at least general obligations concerning this issue. Nevertheless, it does not set detailed environmental standards but merely provides general framework provisions.[58] The work of the United Nations Environment Programme (UNEP) over the last three decades has engaged with the issue of land-based marine pollution resulting in a number of work programmes and soft law instruments. Under its auspices, particularly the non-binding 'Montreal Guidelines'[59], elaborated in 1985, as well as the GPA and the 'Washington Declaration', both adopted in 1995, are of particular

[54] GA, Protection and Preservation of the Marine Environment: Report of the Secretary-General, UN Doc. A/44/461 (1989), paras. 30, 39, 80, 81, 93, 102 *et seq*., 116, 118 *et seq*. See also: GA, A Regular Process for the Global Reporting and Assessment of the State of the Marine Environment: Proposals on Modalities: Special Report of the Secretary-General, UN Doc. A/58/423 (2003), paras. 17, 19(b), Annex I section 1(d), Annex II section C (2); GA, Oceans and the Law of the Sea: Report of the Secretary-General, UN Doc. A/67/79/ADD.1 (2012), paras. 89 *et seq*.

[55] GA, Oceans and the Law of the Sea: Report of the Secretary-General, UN Doc. A/69/71/ADD.1 (2014), para. 82.

[56] *Cf. Boyle* (note 1), 347, 354. The same wording can be found Art. 212 (3) (atmospheric pollution). Due to their wording, Boyle describes both articles as being 'hortatory' (*ibid.*).

[57] *Cf.* Nordquist/Rosenne/Yankov (note 1), 133 (MN 207.7(d)). It is questionable why Nordquist/Rosenne/Yankov mentioned the *good faith*-requirement especially in this case. For a possible reason, see note 42.

[58] *David L. VanderZwaag/Ann Powers*, The Protection of the Marine Environment from Land-Based Pollution and Activities: Gauging the Tides of Global and Regional Governance, IJMCL 23 (2008), 423, 425.

[59] UNEP, Governing Council, Montreal Guidelines for the Protection of the Marine Environment against Pollution from Land-Based Sources, Decision 13/18/II (1985). This set of Guidelines is of a 'recommendatory nature' and has the general purpose of assisting governments 'in the process of developing appropriate bilateral, regional and multilateral agreements and national legislation for the protection of the marine environment against pollution from land-based sources', (*ibid*., introduction).

importance in this respect.[60] At the regional level, the RSPs play an important role with regard to the protection of the marine environment from land-based pollution.[61]

8. 'taking into account characteristic regional features, the economic capacity of developing States and their need for economic development'

The obligation to 'endeavor to establish global and regional rules, standards and recommended practices and procedures' laid down in Art. 207 (4)(1) is subject to a qualification. According to the last part of the paragraph's first sentence, it is prescribed that States must – when acting in accordance with this obligation – take into account different criteria, such as characteristic regional features, the economic capacity of developing States and their need for economic development. This qualification particularly reflects the interest of States in development priorities already laid down in Art. 194 (1).[62] Developing States especially have been afraid of being restricted in their scope of action in the case such a qualifying element would have been omitted.[63] Thus, it gives evidence of the reluctance of States which did not wish to be committed to the same high level of international control as with regard to other pollution sources.[64] 18

[60] For the text of the GPA see UNEP, Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities, UN Doc. UNEP(OCA)/LBA/IG.2/7 (1995); see also *VanderZwaag/Powers* (note 59), 423, 427 *et seq*. UNEP, Washington Declaration on Protection of the Marine Environment from Land-based Activities (1995), available at: http://unep.org/gpa/documents/meetings/Washington/WashingtonDeclaration.pdf. Subsequently, Intergovernmental Review Meetings have been organized in order to review the status of the implementation of the GPA, in which future actions to strengthen the implementation have been decided: Montreal Declaration on the Protection on the Marine Environment from Land-based Activities (2001), reproduced in: LOSB 48 (2002), 58–61; Beijing Declaration on Furthering the Implementation of the GPA (2006), available at: http://unep.org/gpa/documents/meetings/IGRII/IGRIIBeijingDeclaration.pdf; UNEP, Report of the Third Session of the Intergovernmental Review Meeting on the Implementation of the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities, UN Doc. UNEP/GPR/IGR.3/6 (2012), Annex (Manila Declaration on Furthering the Implementation of the Global Programme of Action for the Protection of the Marine Environment from Land-based Activities).

[61] For legal instruments of the RSPs addressing land-based pollution of the marine environment, see *e. g.* Art. 3 and Annex I OSPAR Convention; Art. 6 and Annex III Helsinki Convention, 1992; Art. VII Convention on the Protection of the Black Sea against Pollution, 21 April 1992, UNTS 1764, 3; Protocol on Protection of the Black Sea Marine Environment Against Pollution from Land-based Sources, 21 April 1992, available at: http://www.blacksea-commission.org/_convention-protocols.asp; Protocol on the Protection of the Marine Environment of the Black Sea from Land-based Sources and Activities, 7 April 2009 (entry into force pending) will replace, as between its Contracting Parties, the 1992 Protocol (Art. 23), text of the 2009 Protocol is available at: *ibid.*; Art. 7 Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, 24 March 1983, UNTS 1506, 157; Protocol Concerning Pollution from Land-based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, 6 October 1999; Protocol for the Protection of the South-East Pacific against Pollution from Land-based Sources, 22 July 1983, UNTS 1648, 73; Art. 7 Convention for the Protection, Management and Development of the Marine Environment of the Eastern African Region, 21 June 1985, amended and renamed Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean, 31 March 2010, available at: www.unep.org/NairobiConvention/docs/Final_Act_Nairobi_Amended_Convention&Text_Amended_Nairobi_Convention.pdf; Art. VI Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution, 24 April 1978, UNTS 1140, 133; Protocol to the Kuwait Regional Convention for the Protection of the Marine Environment Against Pollution from Land-based Sources, 21 February 1990, UNTS 2399, 3; Art. 8 Convention for the Protection of the Mediterranean Sea against Pollution, 16 February 1976, amended and renamed Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, 10 June 1995, reproduced in: Tullio Scovazzi (ed.), Marine Specially Protected Areas (1999), 129.

[62] According to Art. 194 (1), States must take all necessary measures to combat marine pollution from any source 'using for this purpose the best practicable means at their disposal and in accordance with their capabilities'. Within this context, *cf. Hassan* (note 34), 84 (footnote 86), who alleges that such elements introduce 'an uncertain standard for marine environment protection, which indicates that a less developed States, with limited capabilities, may not be required to take the same costly or sophisticated steps as a highly developed State'.

[63] *Cf.* Nordquist/Rosenne/Yankov (note 1), 64 (MN 194.10(b)).

[64] *Cf. Alan Boyle*, Land-based Sources of Marine Pollution: Current Legal Regime, Marine Policy 16 (1992), 20, 25 *et seq.* With regard to this kind of qualification in Art. 194 (1), *Hassan* (note 34), 84, assumes that it 'gives a 'license of reluctance' to states in relation to their responsibility for taking adequate measures'.

Consequently, the introduction of this due diligence qualification particularly concedes wide discretion to developing States with regard to their obligation to combat this pollution source at the international level.[65]

9. 'shall be re-examined from time to time as necessary'

19 Art. 207 (4)(2) imposes an obligation on States to periodically review the measures taken under sentence 1 of this paragraph.[66] The 'global and regional rules, standards and recommended practices and procedures' established by States acting through competent international organizations or diplomatic conferences, set an international standard States, in the case of Art. 207 (and Art. 212), have to take into account when adopting national instruments.[67] Due to the fact that various factors constantly change, such as new synthetic substances are established or new industries are installed which potentially create new perils for the marine environment, it is important to ensure an adequate response to these new risks. Within this context, the obligation of re-examination provides flexibility and strengthens efficiency of international regulation, which, in turn, may create a new reference for national legislation.[68] Thus, this obligation permits a progressive development of the law. The phrase 'from time to time as necessary' does not set a fixed schedule when re-examinations have to be conducted. Rather, it provides wide discretion to States.

10. 'minimize, to the fullest extent possible, the release of toxic, harmful or noxious substances, especially those which are persistent'

20 Art. 207 (5) differs from the previous paragraphs. While they lay down general obligations without any guidance on how to fulfill them, this paragraph specifies the content of the obligations imposed in Art. 207 (1), (2) and (4). According to paragraph 5, the different instruments adopted under these paragraphs need to include 'those designed to minimize to the fullest extent possible, the release of toxic, harmful or noxious substances, especially those which are persistent'.[69] Such substances are not defined in UNCLOS. Thus, it is for each State to stipulate which substance will be regulated and controlled as well as which measures will be introduced.[70] Hence, this paragraph only provides vague guidance on how to fulfill the obligations in Art. 207 (1), (2) and (4).[71] Due to the modification of the wording – from 'toxic, harmful *and* noxious' (emphasis added) to 'toxic, harmful *or* noxious' (emphasis added) – the scope of this paragraph was broadened. Instead of requiring the cumulative presence of the characteristics, it is already sufficient for the respective substance to have one of the above-mentioned characteristics in order to trigger the application of this paragraph. The affix '*especially* those which are persistent' (emphasis added) reveals that there could be toxic, harmful or noxious substances with other chemical properties than persistence that may also fall under this paragraph.

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[65] *Cf. Proelss* (note 39), 85; with regard to the similar qualification in Art. 194, *cf. Hassan* (note 35), 83 *et seq.*

[66] An obligation to re-examine can also be found in Arts. 208 (5), 209 (1), 210 (4) and 211 (1).

[67] In Arts. 208 (3), (5), 209, 210 (4), (6) and 211 (1), (2), the international instruments established through competent international organizations and diplomatic conferences create a minimum standard States must respect when taking national measures.

[68] *Cf. Qing-Nan* (note 5), 227; *cf.* also Nordquist/Rosenne/Yankov (note 1), 14 (MN XII.16).

[69] *Qing-Nan* (note 5), 104, assumes that this paragraph indicates a priority in the adoption of measures referred to in paras. 1, 2 and 4. It was further alleged that Art. 207 (1) read with paragraph 5 lays down a 'minimum international requirement' namely that 'States shall adopt laws and regulations to minimize the release of toxic, harmful, or noxious substances.

[70] *Hassan* (note 34), 83, assumes that States have wide discretion in this respect.

[71] *Birnie/Boyle/Redgwell* (note 7), 453.

Article 208
Pollution from seabed activities subject to national jurisdiction

1. Coastal States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction, pursuant to articles 60 and 80.

2. States shall take other measures as may be necessary to prevent, reduce and control such pollution.

3. Such laws, regulations and measures shall be no less effective than international rules, standards and recommended practices and procedures.

4. States shall endeavor to harmonize their policies in this connection at the appropriate regional level.

5. States, acting especially through competent international organizations or diplomatic conference, shall establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment referred to in paragraph 1. Such rules, standards and recommended practices and procedures shall be re-examined from time to time as necessary.

Bibliography: Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea, 1982: A Commentary, vol. IV (1991); *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999); *Gerhard Hafner*, Meeresumwelt, Meeresforschung und Technologietransfer, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 347–460; *Alexander Proelss*, Meeresschutz im Völker- und Europarecht (2004); *Alexander Proelss*, Ausschließliche Wirtschaftszone, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 222–264; *Phillippe Sands/Jacqueline Peel/Adriana Fabra/Ruth MacKenzie*, Principles of International Environmental Law (3rd edn. 2012); *Tullio Scovazzi*, Harlequin and the Mediterranean, in: Rüdiger Wolfrum/Maja Seršić/Trpimir M. Šošić (eds.), Contemporary Developments in International Law: Essays in Honour of Budislav Vukas (2016), 291-304; *Tullio Scovazzi*, The Legal Condition of Mediterranean Waters, in: Tullio Scovazzi (ed.), Marine Specially Protected Areas (1999), 47–54; *Gregory J. Timagenis*, International Control of Marine Pollution, vol. II (1980)

Documents: ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 256–264; ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 265–301; IMO, Code for the Construction and Equipment of Mobile Offshore Drilling Units, IMO Res. A.1023(26) of 2 December 2009; IMO, Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone, IMO Res. A.672(16) of 19 October 1989; IMO, OPRC-HNS Protocol: Protocol on Preparedness, Response and Cooperation to Pollution Incidents by Hazardous and Noxious Substances, 2000 (2002); IMO, Safety Zones and Safety of Navigation Around Offshore Installations and Structures, IMO Res. A.671(16) of 18 October 1989; UN DOALOS, 'Competent or Relevant International Organizations' under the United Nations Convention on the Law of the Sea, LOSB 31 (1996), 79–95; UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973), Annex III (General Principles for Assessment and Control of Marine Pollution), 73; OSPAR, 2003 Strategies of the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic, Summary Record of the Ministerial Meeting of the OSPAR Commission (2003), OSPAR 03/17/1-E, Annex 31

Cases: PCA, *Chagos Marine Protection Area Arbitration* (Mauritius *v.* United Kingdom), Award of 18 March 2015, available at: www.pca-cpa.org/showpage.asp?pag_id=1429

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I. Purpose and Function

1 Art. 208, entitled 'Pollution from seabed activities subject to national jurisdiction', is the second provision of Section 5 (International Rules and National Legislation to prevent, reduce and control Pollution of the Marine Environment) of Part XII (Protection and Preservation of the Marine Environment). It encompasses five paragraphs and stipulates prescriptive obligations to establish national as well as international instruments with regard to the protection of the marine environment against pollution from seabed activities that are subject to national jurisdiction. Art. 208 details the States' obligations laid down in Arts. 192 and 194 (1) and (2) and particularly as specified in Art. 194 (3)(c), according to which States are obligated to take necessary measures in order to 'minimize to the fullest possible extent […] pollution from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil'. Thus, Art. 208, together with the other provisions of Section 5, form the second part of the three necessary steps for the implementation of Part XII.[1] The related enforcement power is laid down in Art. 214.

2 UNCLOS differentiates between the pollution from seabed activities[2] subject to national jurisdiction (Art. 208) and the pollution from activities in the Area (Art. 209). Concerning Art. 208, the title '[…] *seabed activities subject to national jurisdiction*' specifies the scope of the provision. Firstly, it geographically confines the scope to the seabed areas that are under the sovereignty or within national jurisdiction of coastal or archipelagic States. Consequently, these seabed areas are: the seabed of internal waters, the territorial sea, archipelagic waters, the exclusive economic zone (EEZ) and the continental shelf. Secondly, the phrase '[…] *seabed activities subject to national jurisdiction*' refers to the jurisdiction of any State over vessels flying its flag (Art. 94) and involved in seabed activities. In addition to that, it also includes activities of coastal States, which they are either engaged in themselves or they have consented to, provided that these seabed activities are related to seabed areas that are subject to their national jurisdiction (*e. g.* as in the case of Arts. 60 and 80).[3]

II. Historical Background

3 A first reference to the interference with the marine environment in connection with seabed activities was made in the International Law Commission's (ILC) draft articles on the

[1] While Art. 194 (1)–(3), as the first component, lays down a set of measures, the provisions of Section 5 of Part XII provide, as a second step, prescriptive powers in respect of these measures. The third necessary part is implementation and enforcement of the different measures. *Cf. Gerhard Hafner*, Meeresumwelt, Meeresforschung und Technologietransfer, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 347, 367; *cf. Czybulka* on Art. 194 MN 2.

[2] *Phillippe Sands/Jacqueline Peel/Adriana Fabra/Ruth MacKenzie*, Principles of International Environmental Law (3rd edn. 2012), 387, state that the contribution of this pollution source to the entire marine pollution is only 1 %. For further information about deliberate (operational) and accidental pollution from different seabed activities within national jurisdiction see *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999), 370 *et seq*.

[3] *Cf.* Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea, 1982: A Commentary, vol. IV (1991), 144 (MN 208.10(a)). In these cases the coastal State is also bound by Art. 204 (2).

law of the sea (1956).[4] Art. 71 (1) of these draft articles reads: 'The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with […] the conservation of the living resources of the sea'. In its commentary to Art. 71, the ILC clarified that with respect to the conservation of living resources 'everything possible should be done to prevent damage by exploitation of the subsoil, seismic exploration in connection with oil prospecting, and leaks from pipelines'.[5] The wording of Art. 71 was adopted in Art. 5 (1) of the 1958 Convention of the Continental Shelf.[6]

In the Sea-Bed Committee, negotiations on this issue continued when Malta submitted a draft for an ocean space treaty.[7] Art. 2(c) of the draft laid out an obligation on States: 4

> 'To take and enforce all reasonable regulatory and control measures for the avoidance of pollution in national ocean space [defined as 'that part of the ocean which is under the jurisdiction of a costal state' in Art. 1 (3) of that draft] which might cause substantial injury to the interests of other states or of the international community'.[8]

In 1971, Norway and Canada submitted a further draft resolution calling on States 'to take adequate steps to prevent and control, to the extent possible, the dangers of marine pollution stemming from the exploration and exploitation of the mineral resources on or in their national continental shelves'.[9]

The issue was taken up again at the United Nations Conference on the Human Environment held in Stockholm in 1972. In its Conference Report, a reference to this was made in the General Principles for Assessment and Control of Marine Pollution, which were elaborated by the Intergovernmental Working Group on Marine Pollution. Principle 18 of these Principles stated that: 'Coastal States should ensure that adequate and appropriate resources are available to deal with pollution incidents resulting from the exploration and exploitation of seabed resources in areas within the limits of their national jurisdiction.[10] The Seabed Committee examined these Principles. With respect to the issue of pollution from seabed activities, Working Group 2 of the Sub-Committee III prepared two working papers. The first paper comprised draft articles concerning the prevention of pollution of the marine environment.[11] The second paper laid down a number of alternative texts relating to standards for various marine pollution sources. Concerning seabed activities subject to national jurisdiction only two proposals were made.[12] 5

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[4] ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 256–264.

[5] ILC, Report of the International Law Commission: Commentaries to the Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 265, 299.

[6] Likewise, Art. 24 of the 1958 Convention on the High Seas, provides a general obligation requiring States to 'draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil, taking into account existing treaty provisions of the subject'.

[7] Sea-Bed Committee, Malta: Draft Ocean Space Treaty, UN Doc. A/AC.138/53 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 105, 114.

[8] *Ibid.*, 105, 116 (Art. 2(c)).

[9] Sea-Bed Committee, Canada and Norway: Draft Resolution on Preliminary Measures to Prevent and Control Marine Pollution submitted to Sub-Committee III, UN Doc. A/AC.138/SC.III/L.5 and Add.1 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 247, 248. This wording was also laid down in another draft resolution on preliminary measures to prevent and control marine pollution: Sea-Bed Committee, Australia *et al.*: Draft Resolution on Preliminary Measures to Prevent and Control Marine Pollution, UN Doc. A/AC.138/SC.III/L.25 (1972), GAOR 27th Sess. Suppl. 21 (A/8721), 210.

[10] UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973), Annex III (General Principles for Assessment and Control of Marine Pollution), 73, Principle 18.

[11] Sea-Bed Committee, Note by the Chairman of Working Group 2, addressed to the Chairman of Sub-Committee III, UN Doc. A/AC.138/SC.III/L.39 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-I), 85, 86 *et seq.* (WG 2/Paper No. 8/Add.2, paras. 1, 2(c)).

[12] Sea-Bed Committee, Note by the Chairman of Working Group 2, Addressed to the Chairman of Sub-Committee III, UN Doc. A/AC.138/SC.III/L.52 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-I), 89, 93, 94 *et seq.* (WG 2/Paper No. 15, Sec. II, Alternative B, para. 2: Alternative F).

6 At the Second Session of UNCLOS III, held in 1974, Kenya submitted a proposal dealing with activities subject to national jurisdiction. Art. 21 of Kenya's draft articles referred to a State's obligation to establish international standards regarding the prevention of pollution of the marine environment from all sources within national jurisdiction.[13] However, Kenya did not explicitly mention seabed activities. During the informal meetings at this session, it was eventually agreed upon to limit the scope of the provision to only address the seabed area under national jurisdiction.[14]

7 During the following session in 1975, further draft articles on the prevention of pollution of the marine environment were submitted to the Third Committee, including a provision addressing the seabed area.[15] After further discussions in the Third Committee as well as in the informal negotiations, a draft text with three paragraphs already resembling Art. 208 was introduced by the Chairman of the Informal Meetings.[16] Subsequently, three States submitted a further draft text with regard to the Chairman's proposal, suggesting modifications of that text.[17] In addition to the obligation concerning the establishment of national laws and regulations to prevent, reduce and control pollution of the marine environment stemming from the exploration and exploitation of the sea-bed under national jurisdiction, these States also added the enforcement jurisdiction in the same article (paragraph 4). Furthermore, paragraph 1 extended the coastal States' obligation by referring not only to the exploration and exploitation of the seabed under national jurisdiction but also to any activity in that area. After additional informal negotiations, a modified text with three paragraphs and without enforcement powers was included as Art. 17 in the Informal Single Negotiating Text Part III. This provision already contained multiple elements which were later incorporated in the final text of Art. 208:

> '(1) Coastal States shall establish national laws and regulations to prevent, reduce and control pollution of the marine environment arising from activities concerning exploration and exploitation of the sea-bed and from installations under their jurisdiction, pursuant to chapter … of this Convention. States shall also take any other measures as may be necessary to prevent, reduce and control such pollution. Such laws, regulations and measures shall be no less effective than generally accepted international rules, standards and recommended practices and procedures.
>
> (2) States shall endeavor to harmonize their national policies at the appropriate regional level.
>
> (3) States, acting in particular through the appropriate intergovernmental organizations or by diplomatic conference, shall establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment arising in connexion with sea-bed activities and installations mentioned in paragraph 1 above'.[18]

8 At the Fourth Session of the Conference, held in 1976, the Revised Single Negotiating Text was introduced which adopted a structure of five paragraphs, with only minor changes in the wording. In paragraph 1 and 5 the elements 'artificial islands' and 'structures' were added as potential pollution sources in the seabed area for which States shall establish national rules and regulations. In addition to this, paragraph 5 contained the States' obligation to periodically re-examine the rules, standards and recommended practices and procedures'.[19]

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[13] Third Committee UNCLOS III: Kenya: Draft Articles for the Preservation and the Protection of the Marine Environment, UN Doc. A/CONF.62/C.3/L.2 (1974), OR III, 245, 247 (Art. 21).

[14] Nordquist/Rosenne/Yankov (note 3), 140 (MN 208.4).

[15] Third Committee UNCLOS III, Belgium *et al.*: Draft Articles on the Prevention, Reduction and Control of Marine Pollution, UN Doc A/CONF.62/C.3/L.24 (1975), OR IV, 210 (Art. 2).

[16] UNCLOS III, Chairman, Informal Meeting on Item 12, UN Doc. CRP/MP/19 (1975, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. X (1986), 214.

[17] Third Committee UNCLOS III: Proposals or Amendments Informally Introduced as Conference Room Papers but not agreed upon by the Informal Sessions on Item 12 during the Third Session of the Conference, UN Doc. A/CONF.62/C.3/L.30 and ADD.1 (1975), OR IV, 219 (Brazil, India and Peru: Proposed Alternative to the Draft Text Prepared by the Chairman).

[18] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF. 62/WP.8/PART III (1975), OR IV, 171, 173 (Art. 17).

[19] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 176 (Art. 18).

In the subsequent Informal Composite Negotiating Text (ICNT) the text was repeated in Art. 209 (Pollution from sea-bed activities). Only paragraph 1 was rephrased, extending its applicability. Thus, this provision not only addressed pollution of the marine environment arising from seabed activities but also pollution arising in connection with these activities. With regard to artificial islands, installations and structures under the coastal States' jurisdiction, a reference to Art. 60 and 80 was added.[20] Following, an informal proposal by Brazil to modify paragraph 1 and 5 to ensure that all activities, artificial islands, installations and structures are covered by the relevant provision was not implemented in the text.[21] In the ICNT Revision 1 (1979), the relevant article concerning pollution from seabed activities was renumbered 208 and adopted unchanged.[22] The final caption of the article was adopted in the Eleventh Session of UNCLOS III, held in 1982. At the same time paragraph 5 was put in its final version.[23]

III. Elements

1. 'Coastal States shall adopt laws and regulations to prevent, reduce and control pollution […] arising from or in connection with seabed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction, pursuant to articles 60 and 80'

Art. 208 (1) lays out the obligation ('shall') for coastal States to adopt national legislation 9
to combat marine pollution from seabed activities subject to national jurisdiction. This paragraph only addresses coastal States.[24] This limitation stems from the fact that UNCLOS provides coastal and archipelagic States with sovereign rights and jurisdictional powers concerning the seabed of their internal waters, their archipelagic waters, their territorial seas, their EEZs and their continental shelves. According to this, coastal and archipelagic States have jurisdiction over seabed activities in these geographical areas. The wording of Art. 208 (1) shows that the Convention distinguishes between pollution of the marine environment arising *from* seabed activities and such pollution *in connection with* seabed activities. Thus, this provision not only addresses direct activities on the seabed subject to national jurisdiction but also indirect influences from activities which are conducted in connection with such seabed activities.[25]

The last part of Art. 208 (1), reading 'pollution […] arising […] from artificial islands, 10
installations and structures under their jurisdiction, pursuant to articles 60 and 80', further extends the obligation. According to Arts. 60 and 80, the coastal State has exclusive jurisdic-

[20] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 36 (Art. 209).

[21] UNCLOS III, Reports of the Committees and Negotiating Groups on Negotiations at the Resumed Seventh Session Contained in a Single Document both for the Purposes of Record and for the Convenience of Delegations, UN Doc. A/CONF.62/RCNG/1 (1978), OR X, 13, 96, 107 *et seq.* (Brazil: proposal on Art. 209 (1) and (5)); UNCLOS III, Reports of the Committees and Negotiating Groups on Negotiations at the Seventh Session Contained in a Single Document both for the Purposes of Record and for the Convenience of Delegations, UN Doc. A/CONF.62/RCNG/2 (1978), OR X, 126, 173, 182 *et seq.* (Report by the Chairman of the Third Committee (C.3/Rep. 1), Proposal on Art. 209 (1) and (5) (MP/4) (Brazil)). The Brazilian proposal was discussed again at UNCLOS III in 1979. Nevertheless, it did not get enough support to be included in the text.

[22] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII, 105 (Art. 208).

[23] UNCLOS III, UN Doc. A/CONF.62/L.152/Add.25 (1982, mimeo.), 8–9, cited in: Nordquist/Rosenne/Yankov (note 3), 144 (MN 208.9); UNCLOS III, Report of the Chairman of the Drafting Committee on behalf of the President and the Chairmen of the First, Second and Third Committees, UN Doc. A/CONF.62/L.160 (1982), OR XVII, 225.

[24] For further information about the term coastal States see Nordquist/Rosenne/Yankov (note 3), 145 (MN 208.10(c)).

[25] Activities that may be done in connection with seabed activities and potentially cause harm to the marine environment are, for instance, actions related to the construction of man-made objects for the purpose of exploring and exploiting the seabed.

tion 'to construct and to authorize and regulate the construction, operation and use of' artificial islands, installations and structures in the EEZ and on the continental shelf (Arts. 60 (1), 80).[26] Artificial islands, installations and structures in the internal waters, territorial sea and the archipelagic waters (maritime areas under the territorial sovereignty of the coastal and archipelagic State) are, *a fortiori*, included in this provision. In the EEZ and on the continental shelf, the provision of exclusive jurisdiction with regard to installations and structures is qualified in Arts. 60 (1)(b), (c) and 80.[27] Hence, generally any artificial island is, regardless of its purpose, under the exclusive jurisdiction of a coastal or archipelagic State, whereas installations and structures must meet certain conditions laid down in Art. 60. In addition to the exclusive jurisdiction under Art. 60 (1), coastal and archipelagic States have exclusive jurisdiction over these constructions in the above-mentioned zones (Arts. 60 (2) and 80) (as well as necessarily in the territorial sea and the archipelagic waters). Therefore, such States are also obligated to establish national legislation in respect of these man-made objects for the purpose of preventing pollution of the marine environment, such as safety, construction and operation regulations, provided that these objects are somehow involved in seabed activities.

2. 'States shall take other measures as may be necessary'

11 Unlike Art. 208 (1), Art. 208 (2) addresses all States, including landlocked States. Thus, every State is obligated to establish national measures beyond those referred to in paragraph 1 in order to combat marine pollution from seabed activities that are subject to national jurisdiction.[28] While Art. 208 (1) enumerates binding national instruments like laws and regulations, Art. 208 (2) primarily refers to nonbinding national measures, such as recommendations, capacity-building programs, cooperation programs, certification schemes, scientific and technical advice, guidelines, codes of conduct etc.[29] The imposition of this obligation on all States follows from the fact that every State enjoys the freedoms referred to in Art. 87, especially to lay submarine cables and pipelines in seabed areas under national jurisdiction (*cf.* Arts. 58 and 79 (2)).[30] Consequently, any State may be directly or indirectly engaged in some kind of seabed activity. Hence, the rights of all States and the coastal States' rights concerning the seabed area within the limits of national jurisdiction coexist. The meaning of the term 'necessary' should be determined on a case-by-case basis. In contrast to the obligations in Art. 194 (1) ('all measures […] that are necessary') and (2) ('all measures necessary'), the qualification 'as may be necessary' seems less strict. It provides more flexibility by encouraging States to take measures with regard to this pollution source that appear necessary. Thus, States have wide discretion to act in respect of this obligation.

3. 'shall be no less effective than international rules, standards and recommended practices and procedures'

12 Art. 208 does not specify the content of national instruments States are required to adopt under paragraph 1 and 2.[31] It rather contains a rule of reference concerning the quality of such instruments. According to Art. 208 (3), States are obligated to ensure that laws, regulations and measures they establish are 'no less effective than international rules, standards and recom-

[26] With further references, see *Alexander Proelss*, Ausschließliche Wirtschaftszone, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 222, 251 *et seq*.

[27] See: *Proelss* on Art. 60 MN 13; *Maggio* on Art. 80 MN 14.

[28] The obligation 'to take other measures as may be necessary' with regard to the respective pollution source is also laid down in Arts. 207 (2), 210 (2) and 212 (2).

[29] *Cf. Gregory J. Timagenis*, International Control of Marine Pollution, vol. II (1980), 603, who states that the term 'other measures' generally encompasses national administrative measures 'not necessarily of a normative nature'.

[30] For further information about the EEZ and the freedoms every States enjoys therein see *Proelss* on Art. 58 MN 11 *et seq*.; for the laying of submarine cables on the continental shelf see *Englender* on Art. 79.

[31] Within this context, an exception to the lack of guidance can be seen in Art. 207 (5). This paragraph provides some guidance concerning the content of national and international instruments States are obliged to adopt under Art. 207 (1), (2) and (4), see *Wacht* on Art. 207 MN 21.

mended practices and procedures'.[32] Thus, States are bound by a minimum standard (unlike, for example, under Art. 207[33]). States still have a margin of discretion, but this is limited to the establishment of 'equally effective' or 'more effective' instruments.[34] It would be inconsistent with Art. 208 (3) if States established less effective measures than international rules, standards and recommended practices and procedures. Due to the requirement to respect an international minimum standard, States may be bound by international instruments they have not consented to. Nevertheless, this does not lead to a violation of the *pacta tertiis* rule because States, by becoming a party to UNCLOS, voluntarily subject themselves to the terms of other treaties, so that they cannot be seen as third States to such instruments anymore.[35]

4. 'States shall endeavor to harmonize their policies […] at the appropriate regional level'

Art. 208 (4) contains an obligation requiring States to harmonize their policies at the 13
appropriate regional level.[36] This duty is weakened by the word 'endeavor'. While UNCLOS does not further explain this requirement, an arbitral tribunal addressed the issue about the content of the obligation to 'endeavor to harmonize' policies imposed on States in Art. 194 (1) in the *Chagos Marine Protected Area Arbitration*. According to the tribunal, this obligation only encompasses the duty to use the best effort. Moreover, it was concluded that it was not required to meet this duty before a marine environmental protection measure is taken. Since Art. 194 (1) does not set a deadline, attempts to harmonize may also be undertaken after a particular action with regard to the marine environmental protection has been performed.[37] Despite this conclusion, there is still no set of requirements that must be met to fulfill this obligation. One of the reasons for the inclusion of this obligation is to avoid a mosaic-like legal structure.[38] Despite the harmonization obligation laid down in Art. 194 (1), Art. 208 (4) is not of a declaratory nature. Rather, it specifies this requirement to harmonize policies at the appropriate regional level.[39] This indicates that UNCLOS prefers regional cooperation with regard to seabed pollution subject to national jurisdiction. Although the Convention does not define the term 'at the appropriate regional level', it can be assumed that it especially refers to enclosed or semi-enclosed seas (Arts. 122 *et seq.*), such as the Mediterranean, where, for instance, due to delimitation issues concerning the respective continental shelves, cooperation of the bordering States is of particular importance.[40] In any such case where enclosed or semi-enclosed seas are concerned, Art. 123 provides

[32] Examples of international instruments addressing this pollution source and contributing to set a minimum standard are mentioned *infra*, MN 16 and 17. This reference implies that Section 5 of Part XII particularly aims at the harmonization of international and national instruments. It further shows that this Section generally strives for a coherent and effective level of protection.

[33] For the analysis of the obligation in Art. 207 (1) and Art. 212 (1) according to which States are only required to '[take] into account internationally agreed rules, standards and recommended practices and procedures' when adopting national instruments, see *Wacht* on Art. 207 MN 9 and on Art. 212 MN 8.

[34] Similar wording requiring States to respect a minimum international standard is also laid down in Arts. 209 (2) and 211 (2).

[35] With regard to the similar term of reference in Art. 210 (6*), cf. Alexander Proelss*, Meeresschutz im Völker- und Europarecht (2004), 141 *et seq.* In respect of the similar reference in Art. 211 (2), *cf. Bartenstein* on Art. 211 MN 36.

[36] Even though this paragraph addresses all States, including landlocked States, it primarily refers to coastal States. The same harmonization obligation can also be found in Art. 207 (3) with respect to land-based marine pollution. This obligation particularly concerns the harmonization of the substantive rules of law as well as of the enforcement of national instruments, *cf.* Nordquist/Rosenne/Yankov (note 3), 64 *et seq.* (MN 194.10(d)).

[37] PCA, *Chagos Marine Protection Area Arbitration* (Mauritius *v.* United Kingdom), Award of 18 March 2015, para. 539, available at: www.pca-cpa.org/showpage.asp?pag_id=1429.

[38] Nordquist/Rosenne/Yankov (note 3), 64 *et seq.* (MN 194.10(d)).

[39] At the same time, this obligation is also a concretization of the general obligation laid down in Art. 197 (Cooperation on a global or regional basis).

[40] See with further references in respect of the issues concerning the continental shelves and the proclamation of exclusive economic zones in the Mediterranean *Tullio Scovazzi*, The Legal Condition of Mediterranean Waters, in: Tullio Scovazzi (ed.), Marine Specially Protected Areas (1999), 47, 51 *et seq.* For further information on the current situation concerning marine zones in the Mediterranean cf. *Tullio Scovazzi*, Harlequin and the

specified cooperation duties concretizing the requirement in Art. 208 (4). For the purpose of regional harmonization, multiple regional regimes have been established, such as the various Regional Seas Programmes (RSPs), for example those in the Mediterranean and North-East Atlantic.[41]

5. 'States, acting especially through competent international organizations or diplomatic conference'

14 Art. 208 (5)(1) imposes a prescriptive obligation on States to act through competent international organizations or diplomatic conference when regulating pollution from seabed activities subject to national jurisdiction internationally.[42] This element also refers to the plural form 'competent international organizations', which means that, in contrast to Art. 211 (1), multiple organizations may have a mandate as well as the expertise to address this kind of marine source pollution.[43] The international organizations which have been primarily responsible for activities within the scope of Art. 208 are: the International Atomic Energy Agency, the International Hydrographic Organization, the International Labour Organization, the IMO, the Intergovernmental Oceanographic Commission of UNESCO, UNEP and the United Nations Industrial Development Organization.[44] Although, the word 'especially' implies that the enumeration is non-exhaustive, it indicates that UNCLOS prefers States to act primarily through these fora.

6. 'shall establish global and regional rules, standards and recommended practices and procedures'

15 With respect to international instruments States are obligated to establish through competent international organizations or diplomatic conferences, Art. 208 (5)(1) mentions global and regional rules, standards, and recommended practices and procedures. This enumeration indicates that States are obligated to establish binding as well as non-binding instruments with regard to the protection of the marine environment against pollution from seabed activities that are subject to national jurisdiction. In contrast to Arts. 207 (4), 210 (4) and 212 (3), the wording in Art. 208 (5)(1) does not contain the qualifying term 'endeavor'. Thus, it is not enough for States to use only their best effort to establish such international measures. The phrase 'shall establish' indicates a strict obligation to develop and introduce international instruments with regard to the prevention, reduction and control of marine pollution referred to in paragraph 1.[45]

16 Even though there is no specific global instrument dealing primarily with this pollution source, several international provisions addressing this issue are laid down in the International Convention on Oil Pollution Preparedness, Response and Cooperation (1990) and its Protocol on Preparedness, Response and Cooperation to Pollution Incidents by Hazardous and Noxious Substances (2000).[46] In addition to that, Annex I (Regulations for the Prevention of Pollution by Oil), Chapter 7, Regulation 39 (Special Requirements for Fixed of Floating Platforms) of the

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Mediterranean, in: Rüdiger Wolfrum/Maja Seršić/Trpimir M. Šošić (eds.), Contemporary Developments in International Law: Essays in Honour of Budislav Vukas (2016), 291 et seq.

[41] With further information on the RSPs addressing this pollution source, see *infra* MN 17.

[42] Similar wording concerning the respective pollution sources are found in Arts. 207 (4), 210 (4), 211 (1), 212 (3).

[43] With regard to vessel source marine pollution (Art. 211), the IMO is the only competent international organization.

[44] UN DOALOS, 'Competent or Relevant International Organizations' under the United Nations Convention on the Law of the Sea, LOSB 31 (1996), 79 *et seq.* The relevant international organizations with regard to Art. 208 (5)(1) are listed *ibid.*, 79, 86.

[45] Such a strict obligation concerning the establishment of international measures can also be found in Arts. 209 (2) and 211 (1).

[46] Text of the convention: UNTS 1891, 78. Text of the protocol is reproduced in: IMO, OPRC-HNS Protocol: Protocol on Preparedness, Response and Cooperation to Pollution Incidents by Hazardous and Noxious Substances, 2000 (2002), 5.

International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), stipulates certain requirements for fixed and floating platforms engaged in the exploration, exploitation and associated offshore processing of sea-bed mineral resources.[47] Furthermore, the IMO has contributed to the establishment of non-binding standards regarding this pollution source. To this end, it established several codes and guidelines.[48] Concerning liability for pollution from seabed activities under national jurisdiction (see Art. 235), one global instrument which has not entered into force yet needs to be highlighted, namely the Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, 1977.[49] This convention lays out that 'the operator of the installation at the time of an incident shall be liable for any pollution damage resulting from the incident' (Art. 3 (1)).

Moreover, on the regional level, various RSPs contain general rules on the issue of marine pollution from seabed activities subject to national jurisdiction in their governing instruments. While some provisions speak of combatting pollution resulting directly or indirectly from the exploration and exploitation of the seabed and subsoil, others refer to the continental shelf within the context of these activities. In this respect, the RSPs for the following regions represent good examples of subsequent State practice with regard to the obligation laid down in Art. 208 (5): Mediterranean, Black Sea, Baltic Sea, Eastern Africa, North-East Atlantic, North-East Pacific, South Pacific, Red Sea and Gulf of Aden, ROPME Sea Area and Wider Caribbean.[50] **17**

7. 'shall be re-examined from time to time as necessary'

Art. 208 (5)(2) requires States that have established global and regional rules and recommended practices and procedures through international organizations or diplomatic conferences to periodically review these instruments.[51] Thus, this provides flexibility to react to new developments and changes. This duty contributes to the efficiency of the protection of the marine environment and leads to an advancement of international environmental law. After a **18**

[47] Annex I of MARPOL 73/78 is available at: https://www.amsa.gov.au/environment/regulations/marpol/documents/117-52.pdf. Nevertheless, it follows from Art. 2 (3)(ii) MARPOL 73/78 that the convention does not apply to 'the release of harmful substances directly arising from the exploration, exploitation and associated offshore processing of sea-bed mineral resources'.

[48] IMO, Code for the Construction and Equipment of Mobile Offshore Drilling Units, IMO Res. A.1023(26) of 2 December 2009 (2009 MODU CODE); IMO, Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone, IMO Res. A.672(16) of 19 October 1989, IMO, Safety Zones and Safety of Navigation Around Offshore Installations and Structures, IMO Res. A.671(16) of 18 October 1989.

[49] 16 ILM 1451.

[50] See *e.g.* Art. 7 Convention for the Protection of the Mediterranean Sea against Pollution, 16 February 1976, amended and renamed Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, 10 June 1995, reproduced in: Scovazzi (note 40), 129, 131; Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil, 14 October 1994, text is reproduced in: *ibid.*, 179; Art. XI Convention on the Protection of the Black Sea against Pollution, 21 April 1992, UNTS 1764, 3; Art. 12 and Annex VI Convention on the Protection of the Marine Environment of the Baltic Sea Area, 17 January 2001, UNTS 2099, 195; Art. 8 Convention for the Protection, Management and Development of the Marine Environment of the Eastern African Region, 21 June 1985, amended and renamed Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean, 31 March 2010, available at: www.unep.org/NairobiConvention/docs/Final_Act_Nairobi_Amended_Convention&Text_Amended_Nairobi_Convention.pdf; Art. 5, Annex III Convention for the Protection of the Marine Environment of the North-East Atlantic, 22 September 1992, UNTS 1974, 45. The OSPAR Commission has further elaborated an 'Offshore Oil and Gas Industry Strategy' in 2003, see 2003 Strategies of the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic, Reference number: 2003-21, Summary Record of the Ministerial Meeting of the OSPAR Commission (2003), OSPAR 03/17/1-E, Annex 31. According to para. 3.1 of Section IV 'The Commission will carry forward the development of programmes in respect of all phases of offshore activities in accordance with the provisions of the OSPAR Convention'.

[51] A similar obligation is also laid down in Arts. 207 (4), 209 (1), 210 (4) and 211 (1).

re-examination has been conducted, changes or modifications of the reviewed instruments may result from it. This, in turn, would eventually change the international protection standards which States are obligated to respect when establishing national instruments. With regard to the temporal aspect concerning the re-examination, UNCLOS does not determine a time frame. The element 'from time to time as necessary' implies that States have wide discretion in respect of this issue.

Article 209
Pollution from activities in the Area

1. International rules, regulations and procedures shall be established in accordance with Part XI to prevent, reduce and control pollution of the marine environment from activities in the Area. Such rules, regulations and procedures shall be re-examined from time to time as necessary.

2. Subject to the relevant provisions of this section, States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from activities in the Area undertaken by vessels, installations, structures and other devices flying their flag or of their registry or operating under their authority, as the case may be. The requirements of such laws and regulations shall be no less effective than the international rules, regulations and procedures referred to in paragraph 1.

Bibliography: *Alan Boyle*, Marine Pollution under the Law of the Sea Convention, AJIL 79 (1985), 347–372; *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999); *Alex G. Oude Elferink*, Artificial Islands, Installations and Structures, MPEPIL, available at http://www.mpepil.com; *Gerhard Hafner*, Meeresumwelt, Meeresforschung und Technologietransfer, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 347–460; Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea: A Commentary, vol. IV (1991); *Tullio Scovazzi*, Mining, Protection of the Environment, Scientific Research and Bioprospecting: Some Considerations on the Role of the International Sea-Bed Authority, IJMCL 19 (2004), 383–410; *Yoshifumi Tanaka*, The International Law of the Sea (2rd edn. 2015); *Gregory J. Timagenis*, International Control of Marine Pollution, vol. II (1980)

Documents: GA Res. 2467 (XXIII) of 21 December 1968; GA Res. 2749 (XXV) of 17 December 1970; ISA, Decision of the Assembly of the International Seabed Authority regarding the amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/19/A/9 (2013); ISA, Decision of the Council of the International Seabed Authority Relating to Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and Related Matters, ISA Doc. ISBA/19/C/17 (2013), Annex (Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, as amended); ISA, Recommendations for the Guidance of Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration of Marine Minerals in the Area, ISA Doc. ISBA/19/LTC/8 (2013); ISA, Recommendation on an Environmental Management Plan for the Clarion-Clipperton Zone, ISA Doc. ISBA/17/LTC/7 (2011); ISA, Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts, ISA Doc. ISBA/18/A/11 (2012), Annex; ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/REV.1 (2010), Annex; UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973), Annex III (General Principles for Assessment and Control of Marine Pollution), 73

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I. Purpose and Function

Art. 209, entitled 'Pollution from activities in the Area', is the third provision of Section 5 (International Rules and National Legislation to prevent, reduce and control Pollution of the Marine Environment) of Part XII (Protection and Preservation of the Marine Environment). It encompasses only two paragraphs and partly differs from other provisions in Section 5. Instead of laying down a prescriptive power, Art. 209 (1)(1) provides that international rules, regulations and procedures must be established in accordance with Part XI to protect the marine environment against pollution from activities in the Area. Thus, this provision only contains a general obligation with a clarifying character. It especially refers to Art. 145 (Protection of the marine environment), which imposes an obligation on the International Seabed Authority (ISA) to adopt appropriate instruments in respect of the protection of the marine environment against pollution from activities in the Area. Art. 209 (2) lays down a complementing duty requiring States to adopt national laws and regulations with regard to pollution from activities in the Area. It details the obligation of States stipulated in Arts. 192, 194 (1), (2) and specifically (3)(c). As a whole, Art. 209 particularly together with Art. 145 constitute a part of the second level of the three-layer-structure for the implementation of Part XII.[1] The enforcement of international instruments is, according to Art. 215 (Enforcement with respect to pollution from activities in the Area), governed by Part XI. On the high seas Art. 217 (Enforcement by flag States) is applicable. **1**

UNCLOS identifies certain marine areas where no State is allowed to claim or exercise sovereignty or sovereign rights. Such ocean parts, including the Area, are areas beyond the limits of national jurisdiction. With regard to marine pollution from seabed activities, a comparison between Art. 208 (Pollution from seabed activities subject to national jurisdiction) and Art. 209 shows that UNCLOS distinguishes between seabed activities that are subject to national jurisdiction and others that are conducted beyond the limits of national jurisdiction. As laid down in the analysis of Art. 208, the seabed within the limits of national jurisdiction comprises of the seabed areas of the internal waters, the territorial sea, the archipelagic waters, the exclusive economic zone and the continental shelf of the coastal or archipelagic State.[2] The seabed area located beyond the continental shelf constitutes the seabed outside the limits of national jurisdiction and thus, together with its subsoil, forms the Area.[3] Art. 209 together with the relevant provisions of Part XI (especially Art. 145) concern this remaining part of the seabed by providing obligations with regard to the protection of the marine environment against pollution from activities in this marine zone.[4] **2**

[1] Part XII contains a structure that requires three steps for its implementation. The first part is the set of measures laid down in Art. 194 (1)–(3). On the second level, Section 5 of Part XII lays down prescriptive powers with regard to these measures. The last component of the structure is the actual implementation of the measures as well as their enforcement (contained in Section 6), *cf. Gerhard Hafner*, Meeresumwelt, Meeresforschung und Technologietransfer, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 347, 367; *cf. Czybulka* on Art. 194 MN 2.

[2] *Cf. Wacht* on Art. 208 MN 2.

[3] UNCLOS contains a definition of the term 'Area' in Art. 1 (1) Nr. 1. For further information about this term see *Tanaka* on Art. 1 MN 6 *et seq.*

[4] For further information about the Area and the relevant provision relating to the protection of the marine environment, see *Vöneky/Beck* on Art. 145.

II. Historical Background

3 In 1968, the UN General Assembly adopted a resolution addressing the subject of potential pollution of the marine environment from activities in the Area. The Secretary-General was requested to undertake a study in respect of 'all aspects of protection of the living and other resources of the seabed and the ocean floor […] against the consequences of pollution and other hazardous and harmful effects arising from various modalities of such exploration and exploitation'.[5] Subsequently, the General Assembly made the 'Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction'.[6]

4 In 1970, the issue of pollution from seabed activities came up for the first time in the Sea-Bed Committee. The USA introduced a draft convention particularly obligating the 'International Seabed Resource Authority' to prescibe rules and recommended practices to ensure 'The protection of the marine environment against pollution arising from exploration and exploitation activities'.[7] In the following session (1971), Malta made a reference to the prevention of pollution of the international ocean space caused by exploration and exploitation in its 'Draft Ocean Space Treaty'.[8] Subsequently, the Intergovernmental Working Group on Marine Pollution elaborated general principles with regard to the prevention of marine pollution.[9]

5 During the 1973 session, Sub-Committee I of the Sea-Bed Committee established a draft convention dealing with the international seabed and ocean floor.[10] Regarding the protection of the marine environment, it laid down a provision, entitled 'Safeguarding the marine environment', in which it referred to the adoption of rules and measures to prevent pollution of the marine environment from seabed activities.[11] Following, in Sub-Committee III, the USA submitted a proposal with regard to the role of the Authority being the competent body to adopt international standards concerning seabed activities.[12] Norway also submitted a proposal, addressing coastal States and calling for the adoption of the necessary regulations with regard to pollution resulting from the exploration and exploitation of seabed resources within national jurisdiction.[13] After that, Working Group 2 of Sub-Committee III proposed a

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[5] GA Res. 2467 (XXIII) of 21 December 1968, B, paras. 2, 4.

[6] GA Res. 2749 (XXV) of 17 December 1970. With regard to activities in the Area, Principle 11 of the Declaration specified the development of national and international measures concerning marine pollution in the way that: 'States shall take appropriate measures for and shall co-operate in the adoption and implementation of international rules, standards and procedures for, *inter alia*, (a) The prevention of pollution and contamination, and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment; (b) The Protection and conservation of the natural resources of the area and the prevention of damage to the flora and fauna of the marine environment'.

[7] Sea-Bed Committee, USA: Draft United Nations Convention on the International Seabed Area, UN Doc. A/AC.138/25 (1970), GAOR 25th Sess. Suppl. 21 (A/8021), 130, 137 (Art. 23 (1)(a)).

[8] Sea-Bed Committee, Malta: Draft Ocean Space Treaty, UN Doc. A/AC.138/53 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 105, 116 (Art. 2(e)), 146 (Art. 72).

[9] In 1972, the principles also found their way into the Report of the United Nations Conference on the Human Environment: UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973), Annex III (General Principles for Assessment and Control of Marine Pollution), 73. Principle 19 concerns activities related to the seabed and the ocean floor beyond the limits of national jurisdiction and the prevention of pollution of the marine environment.

[10] Sea-Bed Committee, United Nations Convention on the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, UN Doc. A/AC.138/94/ADD.1 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-II), 51.

[11] *Ibid.*, 51, 91 (Art. 21).

[12] Sea-Bed Committee, USA: Draft Articles on the Protection of the Marine Environment and the Prevention of Marine Pollution, UN Doc. A/AC.138/SC.III/L.40 (1973, mimeo.), Art. III cited in: Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea, 1982: A Commentary, vol. IV (1991), 150 (MN 209.4).

[13] Sea-Bed Committee, Norway: UN Doc. A/AC.138/SC.III/L.43 (1973, mimeo.), Art. X, paragraph 2, cited in: Nordquist/Rosenne/Yankov (note 12), 150 (MN 209.4).

series of alternatives, drawing a distinction between pollution of the marine environment from seabed activities subject to national jurisdiction and pollution from activities in the international seabed area.[14]

At the Second Session of UNCLOS III, held in 1974, proposals maintained this distinction between the seabed within and beyond the limits of national jurisdiction. For example Art. 22 of Kenya's 'Draft Articles for the Preservation and the Protection of the Marine Environment' stated: 6

> 'The Authority individually or in collaboration with other competent international or regional bodies shall formulate and adopt rules and regulations for the preservation of the marine environment and the prevention of pollution arising from the air space, the exploration and exploitation of the marine resources of the seabed, subsoil and the water column beyond the limits of national jurisdiction'.[15]

At the 1975 session, the Chairman of the Third Committee presented the Informal Single Negotiating Text Part III. With regard to the seabed, the distinction between the seabed activities within and beyond the limits of national jurisdiction was retained. This text laid down, *inter alia*, that: 'Coastal States shall establish national laws and regulations to prevent, reduce and control pollution of the marine environment arising from activities concerning exploration and exploitation of the seabed and from installations under their jurisdiction […]' (Art. 17). The subsequent article stated: 'The provisions referring to measures to prevent, reduce and control pollution of the marine environment from activities concerning exploration and exploitation of the international seabed area are contained in chapter […] of this Convention' (Art. 18).[16] 7

At the following session in 1976, the Chairman of the Third Committee introduced the Revised Single Negotiating Text Part III. This text contained major changes with regard to the article addressing the protection of the marine environment from activities in the Area. Art. 19 read: 8

> 'States, acting in accordance with the provision of Part I of this Convention, shall establish rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from activities concerning exploration and exploitation of the international seabed area. Such rules, standards and recommended practices and procedures shall be re-examined from time to time as necessary'.[17]

The wording shows that this provision solely referred to the 'international seabed area'. Thus, the application of the article was localized to an area beyond the limits of national jurisdiction. Due to this spatial concentration on an international area, the norm addressee was changed from 'coastal States' to 'States'. As a further consequence of the confinement to activities in the international seabed, the provision laid out the States' obligation to establish rules, standards and recommended practices and procedures. The addition of the requirement of a periodical review is comparable to the other provisions in Section 5 of Part XII.

In the Sixth Session (1977), a proposal from the USA,[18] dividing the provision concerning the Area into two paragraphs, was incorporated as Art. 210 in the Informal Composite Negotiating Text (ICNT). It read: 9

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[14] For the proposals see Sea-Bed Committee, Note by the Chairman of Working Group 2, Addressed to the Chairman of Sub-Committee III, UN Doc. A/AC.138/SC.III/L.52 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-I), 89, 93, 94 *et seq.* (WG 2/Paper No. 15, Sec. II).

[15] UNCLOS III, Kenya: Draft Articles for the Preservation and the Protection of the Marine Environment, UN Doc. A/CONF.62/C.3/L.2 (1974), OR III, 245, 247 (Art. 22).

[16] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF. 62/WP.8/PART III (1975), OR IV, 171, 173 (Arts. 17 and 18).

[17] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 176 (Art. 19). The relevant enforcement provision was proposed in Art. 25.

[18] Third Committee UNCLOS III, Proposals Received During the Informal Meeting on Marine Pollution (1976, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. X (1986), 473 *et seq.* (Art. 19 USA); Third Committee UNCLOS III, USA: Amendments to Part III (Protection and Preservation of the Marine Environment (1977, mimeo.), reproduced in: *ibid.*, 492 (Art. 19).

> '(1) International rules, standards and recommended practices and procedures shall be established in accordance with the provisions of Part XI of the present Convention to prevent, reduce and control pollution of the marine environment from activities relating to the exploration and exploitation of the Area. Such rules, standards and procedures shall be re-examined from time to time as necessary.
>
> (2) Subject to other relevant provisions of this section, States shall establish national laws and regulations to prevent, reduce and control pollution of the marine environment from activities relating to the exploration and exploitation of the Area undertaken by vessels, installations, structures and other devices flying their flag or of their registry. The requirements of such laws and regulations shall be no less effective than the international rules, standards and procedures referred to in paragraph 1 of this article'.[19]

In the 1979 Revision 1 of the ICNT, the article was renumbered as Art. 209. Except for a few words that were taken out, the wording of the provision remained the same.[20] In the second revision of the ICNT (1980), the Drafting Committee made further changes on the wording. The phrase 'activities relating to the exploration and exploitation of the Area' was substituted by 'activities in the Area'.[21] This change was made to establish coherence, particularly with regard to Art. 1 (1)(3). The final text of Art. 209 was laid down in the Eleventh Session in 1982.[22]

III. Elements

1. 'International rules, regulations and procedures shall be established in accordance with Part XI to prevent, reduce and control pollution of the marine environment from activities in the Area'

10 Art. 209 (1)(1) lays down a general obligation ('shall') clarifying that international rules, regulations and procedures must be established in accordance with Part XI to prevent, reduce and control pollution of the marine environment from activities in the Area. This provision primarily refers to Art. 145 which imposes, under lit. a), a prescriptive obligation on the ISA to adopt appropriate measures to protect the marine environment, including the ecological balance, against pollution arising from activities in the Area, particularly in respect of 'such activities as drilling, dredging, excavation, disposal of waste, construction and operations or maintenance of installations, pipelines and other devices related to such areas'.[23] In addition, the regulatory powers of the ISA are enlarged by Art. 145 (b). It stipulates the duty that the ISA must adopt international instruments concerning the 'protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna […]'.[24] Nevertheless, the latter requirement does not mean that all exploitation of natural resources should be prohibited.[25] This shows that the ISA is

[19] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 36 (Art. 210). Its relevant enforcement provision was laid out in Art. 215 (Enforcement with respect to pollution from seabed activities), *ibid.*, 37.

[20] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII, 106 (Art. 209); enforcement, *ibid.*, 109 (Art. 215).

[21] UNCLOS III, Informal Composite Negotiating Text (Revision 2), UN Doc. A/CONF.62/WP.10/REV.2 (1980), OR VIII, 110 (Art. 209).

[22] Until then only minor changes were made on the recommendation of the Drafting Committee. *Cf.* with further reference Nordquist/Rosenne/Yankov (note 12), 153 (MN 209.9).

[23] This list of examples of activities in the Area laid down in Art. 145 (a) is non-exhaustive. For further prescriptive jurisdiction of the ISA with regard to the protection of the marine environment see *e. g.* UNCLOS Annex III, Art. 17 (1)(b)(xii) and (2)(f) and Sec. 1, para. 5(g) of the Annex to the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea.

[24] *Tullio Scovazzi*, Mining, Protection of the Environment, Scientific Research and Bioprospecting: Some Considerations on the Role of the International Sea-Bed Authority, IJMCL 19 (2004), 383, 393, explains that the prescriptive powers provided to the ISA in Art. 145 show that they not only concern the negative effects from mining activities. Instead, they go beyond this 'typical field of competence'.

[25] *Cf. Hafner* (note 1), 347, 411.

the only international organization which has the competence to establish environmental protection instruments regarding activities in the Area.

Pursuant to the obligation under Art. 209 (1)(1) in conjunction with Part XI, the ISA, through its organs (see Arts. 160 (2)(f)(ii), 162 (2)(o)(ii) and 165 (2)(e)), has adopted the 'Mining Code'. This code consists of a comprehensive set of rules, regulations and procedures with the purpose of regulating prospecting, exploration and exploitation of marine minerals in the Area.[26] Examples of instruments that form part of the 'Mining Code' are: the 2000 Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area,[27] 2010 Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area[28] and the 2012 Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts.[29] Each of these instruments contains, in their Part V, multiple regulations on the protection and preservation of the marine environment. Thus, the rules, regulation and procedures laid down in the Mining Code set the minimum standard States have to respect when adopting national legislation under Art. 209 (2). In addition to the above-mentioned regulations, the ISA's Legal and Technical Commission has issued recommendations on various marine environmental protection matters relating to activities in the Area to the Council (Art. 165 (2)(d), (e) and (h)), such as on Environmental Management Plans[30] or environmental impact assessments.[31] The enforcement of such international rules, regulations and procedure is, according to Art. 215, governed by Part XI.[32] **11**

2. 'shall be re-examined from time to time as necessary'

The second sentence of Art. 209 (1) imposes an obligation on the ISA to periodically re-examine the rules, regulations and procedures it established pursuant to the first sentence of this paragraph. In general, the requirement ensures that the international instruments do not become outdated. These instruments constitute the minimum international standard, States have to respect when adopting national laws and regulations under Art. 209 (2). If, as a result of a re-examination, international rules, regulations and procedures are changed or revised, the modified instruments will set a new minimum international standard which will be the new point of reference for States when acting pursuant to Art. 209 (2). Consequently, this obligation promotes effective protection of the marine environment and contributes to the advancement of international environmental law. Due to a lack of scientific knowledge in respect of the complex conditions in the Area, this duty is of particular importance. Even though UNCLOS prescribes that such a re-examination has to be conducted on a periodic basis, it does not give a particular time frame. Rather, through the phrase 'from time to time as necessary' the Convention leaves it to the ISA to decide when to meet this obligation. New ecological findings in the Area or in the context of activities therein would possibly trigger **12**

[26] Further information on the 'Mining Code' is available at: www.isa.org.jm/mining-code.

[27] These regulations were amended in 2013. For the text of the amended regulations see ISA, Decision of the Council of the International Seabed Authority Relating to Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and Related Matters, ISA Doc. ISBA/19/C/17 (2013), Annex (Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, as amended). For the approval of the text see ISA, Decision of the Assembly of the International Seabed Authority Regarding the Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/19/A/9 (2013).

[28] ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/REV.1 (2010), Annex.

[29] ISA, Regulations on Prospecting and Exploration for Cobalt-Rich Ferromanganese Crusts, ISA Doc. ISBA/18/A/11 (2012), Annex.

[30] *E. g.* ISA, Environmental Management Plan for the Clarion-Clipperton Zone, ISA Doc. ISBA/17/LTC/7 (2011).

[31] *E. g.* ISA, Recommendations for the Guidance of Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration of Marine Minerals in the Area, ISA Doc. ISBA/19/LTC/8 (2013).

[32] See: *Bartenstein* on Art. 215; *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999), 378; *Yoshifumi Tanaka*, The International Law of the Sea (2nd edn. 2015), 318 *et seq*.

the necessity of a re-examination. Another time frame for the periodic review of international instruments may be within the context of the obligation in Art. 154, according to which the Assembly is required to periodically undertake a general and systematic review (every 5 years) of the manner in which the international regime of the Area has operated in practice. The primary examples of international rules, regulations and procedures that are subject to the re-examination obligation are those contained in the 'Mining Code'.[33]

3. 'Subject to the relevant provisions of this section'

13 The clause 'Subject to the relevant provisions of this section' at the beginning of Art. 209 (2)(1) qualifies the subsequent obligation imposed on States to adopt complementary national legislation with regard to the protection of the marine environment against marine pollution from activities in the Area. Due to this condition, a State must first examine whether potential national legislation can be based on Art. 209 (2) or whether such an action would overlap and, thus, would be in conflict with corresponding articles in this section.[34] Therefore, the States' regulatory power within the scope of Art. 209 (2) is limited. States have to decide on a case-by-case basis whether there are relevant provisions that take precedence over Art. 209 (2). Especially in case of Art. 211 (Pollution from vessels), it seems likely for conflicts to emerge.[35]

4. 'States shall adopt laws and regulations to prevent, reduce and control pollution […] from activities in the Area undertaken by vessels, installations, structures and other devices flying their flag or of their registry or operating under their authority'

14 Art. 209, in conjunction with Part XI, indicates that the ISA has the primary role with regard to environmental protection in the Area.[36] However, in addition to the regulatory powers of the ISA, Art. 209 (2)(1) obliges States to adopt complementary national rules and regulations to prevent, reduce and control marine pollution from activities in the Area from vessels, installations, structures and other devices.[37] The wording shows that this duty only applies in cases where there is some authoritative link between a State and a vessel, a man-made object or another device involved in activities in the Area. Thus, even though this paragraph speaks of all States, it indicates that the obligation is primarily addressed to flag States, States of registry or States that have authorized the engagement of a device in activities in the Area.[38] Due to such a link, the State in question bears responsibility to protect the marine environment against pollution from activities in the Area in which *its* vessels, man-made units or devices are involved.

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[33] The ISA incorporated an obligation of a periodic review of environmental rules, regulations and procedures in its established international instruments: Reg. 31 Polymetallic Nodules Regulations; Reg. 33 Polymetallic Sulphides Regulations; Reg. 33 Ferromanganese Crusts Regulations.

[34] *Gregory J. Timagenis,* International Control of Marine Pollution, vol. II (1980), 608 *et seq.*, explains that during UNCLOS III, concern was expressed because Art. 209 (2) was considered to address similar matters as other provisions in Section 5, which might lead to a conflict of norms.

[35] *Cf. ibid.*

[36] *Cf. Scovazzi* (note 24), 383, 394.

[37] Installations and structures are man-made objects that are especially used to prospect, explore and exploit non-living marine resources. For further information about the terms 'installations' and 'structures' see: *Proelss* on Art. 60 MN 9 *et seq.*; *Alex G. Oude Elferink*, Artificial Islands, Installations and Structures, MPEPIL, paras. 3 *et seq.*, available at: http://www.mpepil.com. Within the context of activities in the Area, there are and will be various appliances and different equipment engaged in this field, especially in the light of the technical and scientific development. Thus, the broad term 'other devices' at the end of the enumeration constitutes a catch-all element.

[38] *Cf.* Nordquist/Rosenne/Yankov (note 12), 153 (MN 209.10(a)), who explain that the norm addressee in this paragraph are flag States.

5. 'shall be no less effective than international rules, regulations and procedures'

The second sentence of Art. 209 (2) qualifies the States' obligation to establish national instruments. In contrast to Arts. 207 (1) and 212 (1), this provision requires national instruments to be 'no less effective' than the international rules, regulations and procedures established by the ISA pursuant to Art. 209 (1)(1) in conjunction with Part XI.[39] Thus, States are bound to respect minimum international standards set by the ISA when establishing national instruments under Art. 209 (2)(1).[40] Such standards with regard to activities in the Area are stipulated in the instruments that constitute the 'Mining Code'. However, since the ISA is, according to Art. 209 (1)(2), obligated to periodically re-examine the international instruments it established, adopted standards may change over time. In this case, States are, in turn, obligated to respect the modified standards when adopting national legislation. It follows from the wording of Art. 209 (2)(2) that States are also free to choose a higher (more effective) protection standard. Overall, the requirement for States to ensure that their national instruments reflect, at the minimum, the international standard established by the ISA contributes, at least to some extent, to global harmonization.[41] 15

Article 210
Pollution by dumping

1. States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment by dumping.

2. States shall take other measures as may be necessary to prevent, reduce and control such pollution.

3. Such laws, regulations and measures shall ensure that dumping is not carried out without the permission of the competent authorities of States.

4. States, acting especially through competent international organizations or diplomatic conference, shall endeavor to establish global and regional rules, standards and recommended practiced and procedures to prevent, reduce and control such pollution. Such rules, standards and recommended practices and procedures shall be re-examined from time to time as necessary.

5. Dumping within the territorial sea and the exclusive economic zone or onto the continental shelf shall not be carried out without the express prior approval of the coastal State, which has the right to permit, regulate and control such dumping after due consideration of the matter with other States which by reason of their geographical situation may be adversely affected thereby.

6. National laws, regulations and measures shall be no less effective in preventing, reducing and controlling such pollution than the global rules and standards.

Bibliography: *Patricia Birnie/Alan Boyle/Catherine Redgwell*, International Law and the Environment (3rd edn. 2009); *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999); *Louise de La Fayette*, The London Convention 1972: Preparing for the Future, IJMCL 13 (1998), 515–536; *Gerhard Hafner*, Meeresumwelt,

[39] This also reflects the preferential role of the ISA regarding the protection of the marine environment in the Area. For the analysis concerning the weaker States' obligation to '[take] into account internationally agreed rules, standards and recommended practices and procedures', which is laid down in Art. 207 (1) as well as in Art. 212 (1), see *Wacht* on Art. 207 MN 9 and on Art. 212 MN 8.

[40] A similar wording is contained in Arts. 208 (3), 210 (6) and 211 (2).

[41] *Alan Boyle*, Marine Pollution under the Law of the Sea Convention, AJIL 79 (1985), 347, 356, assumes that the intention behind rules of reference laid down in the provisions of Section 5 of Part XII, is in most cases 'to give effective content to the regulatory duties of states'. He adds that such rules of reference will 'to a greater or lesser degree […] limit the traditional freedom of states to refuse to ratify or apply relevant multilateral conventions'.

Meeresforschung und Technologietransfer, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 347–315; Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea, 1982: A Commentary, vol. IV (1991); *Alexander Proelss*, Meeresschutz im Völker- und Europarecht (2004); *Catherine Redgwell*, From Permission to Prohibition: The 1982 Convention on the Law of the Sea and Protection of the Marine Environment, in: David Freestone/Richard Barnes/David M. Ong (eds.), The Law of the Sea: Progress and Prospects (2006), 180–191; *Philippe Sands/Jacqueline Peel/Adriana Fabra/Ruth MacKenzie*, Principles of International Environmental Law (3rd edn. 2012); *Yoshifumi Tanaka*, The International Law of the Sea (2nd edn. 2015); *Gregory J. Timagenis,* International Control of Marine Pollution, vol. II (1980); *Wolfgang Wiese*, Grenzüberschreitende Landrohrleitungen und seeverlegte Rohrleitungen im Völkerrecht (1997)

Documents: ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 256–264; IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, IMO Doc. LEG/MISC.7 (2012); IMO, Report of the Seventeenth Consultative Meeting, IMO Doc. LC 17/14 (1994); IMO, Interpretation of the London Convention and Protocol, IMO Doc. LC 37/9/2 (2015); UNCLOS I, Pollution of the High Seas by Radioactive Materials, Conference Resolution (1958), AJIL 52 (1958), 864–865; UNCED, Report of the United Nations Conference on the Environment and Development, UN Doc. A.CONF/151/26/REV.1 (Vol. I) (1992), 9 (Agenda 21); UN DOALOS, 'Competent or Relevant International Organizations' under the United Nations Convention on the Law of the Sea, LOSB 31 (1996), 79–95

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I. Purpose and Function

1 Art. 210, entitled 'Pollution by dumping', is the fourth provision of Section 5 (International Rules and National Legislation to prevent, reduce and control Pollution of the Marine Environment) of Part XII (Protection and Preservation of the Marine Environment). It encompasses six paragraphs and lays down prescriptive obligations for national and international law-making with regard to the States' obligations under Arts. 192, 194 (1), (2) and specifically (3)(a), to take necessary measures 'to minimize to the fullest possible extent […] the release of toxic, harmful or noxious substances, especially those which are persistent […] by dumping'. Thus, Art. 210 (and the other provisions of Section 5 of Part XII) represent the second layer of the three-tier-structure for the implementation of Part XII.[1] The relevant enforcement powers are laid down in Art. 216 (Enforcement with respect to pollution by dumping).

[1] Part XII contains a structure of three necessary steps with regard to its implementation. The first component is laid down in Art. 194 (1)–(3), stipulating a set of measures. The second tier is Section 5 of Part XII, providing prescriptive obligations with respect to these measures. The final part concerns the enforcement (see Section 6 of

Dumping is one of the six pollution sources covered in UNCLOS.[2] Although, it is closely related to pollution from vessels (waste is often dumped from ships) as well as to land-based pollution (usually waste that is dumped at sea has been produced on land), UNCLOS addresses it as a separate pollution source due to its specific characteristics. One of the main elements of dumping is that it is done deliberately. Waste of all kinds is dumped at sea, such as industrial waste, dredged material, sewage sludge, toxic, harmful or noxious substances, obsolete items such as vessels, aircraft, platforms and other man-made structures, and military equipment.[3] 2

II. Historical Background

The International Law Commission (ILC) addressed the matter of dumping in its draft articles on the law of the sea (1956). According to Art. 48 (2) (Pollution of the high seas) of these articles, every State shall 'draw up regulations to prevent pollution of the seas from the dumping of radioactive waste'.[4] Dumping was also addressed in the 1958 Convention on the High Seas. Some parts of the wording from the ILC article were adopted and the limitation to radioactive materials remained.[5] In addition to that, UNCLOS I adopted a resolution on 'Pollution of the High Seas by Radio-active Material'.[6] According to this resolution it was recommended that the International Atomic Energy Agency should take necessary measures to: 3

> 'to assist states in controlling the discharge or release of radio-active materials to the sea, in promulgating standards, and in drawing up internationally acceptable regulations to prevent pollution of the sea by radio-active materials in amounts which would adversely affect man and his marine resources'.[7]

At the beginning of the 1970s, public awareness about dumping and the prevention of the pollution of the marine environment increased, and notably proposals regarding the regulation of dumping were no longer limited to radioactive wastes. This broader view was recognizable in a statement, adopted by the Sea-Bed Committee in 1970, containing its concern regarding 'the practice of using the sea-bed and the ocean floor for the purpose of dumping toxic, radio-active and other noxious materials'.[8] In the same year, the USA submitted a 'Draft United Nations Convention on the International Sea-Bed Area' to the Sea-Bed Committee. According to its Art. 23 (1)(a), the 'International Seabed Resource Authority' shall prescribe rules and recommended practices for the 'International Seabed Area' ensuring the 'protection of the marine environment against pollution arising from […] disposal of waste […]'.[9] In the following years, various proposals were submitted to the Sea-Bed Committee addressing the issue of dumping.[10] In 1973, Norway proposed draft 4

Part XII). *Gerhard Hafner*, Meeresumwelt, Meeresforschung und Technologietransfer, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 347, 367; *cf. Czybulka* on Art. 194 MN 2.

[2] *Philippe Sands*/*Jacqueline Peel*/*Adriana Fabra*/*Ruth MacKenzie*, Principles of International Environmental Law (3rd edn. 2012), 365, explain that approximately 10 % of pollution of the marine environment is caused by dumping.

[3] *Cf.* with further explanation *Robin R. Churchill*/*Alan V. Lowe*, The Law of the Sea (3rd edn. 1999), 329 *et seq.*

[4] ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 256, 262.

[5] Art. 25 (1) reads: 'Every State shall take measures to prevent pollution of the seas from the dumping of radioactive waste, taking into account any standards and regulations which may be formulated by the competent international organizations'.

[6] UNCLOS I, Pollution of the High Seas by Radio-active Materials, Conference Resolution (1958), AJIL 52 (1958), 864 *et seq.*

[7] *Ibid.*, para. 4.

[8] Sea-Bed Committee, Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond National Jurisdiction (1970), GAOR 25th Sess. Suppl. 21 (A/8021), 8 (para. 25).

[9] Sea-Bed Committee, USA: Draft United Nations Convention on the International Seabed Area, UN Doc. A/AC.138/25 (1970), GAOR 25th Sess. Suppl. 21 (A/8021), 130, 137 (Art. 23 (1)(a)).

[10] *E. g.* Sea-Bed Committee: Draft Resolution on Preliminary Measures to Prevent and Control Marine Pollution submitted to Sub-Committee III by Canada and Norway, UN Doc. A/AC.135/SC.III/L.5 and Add.1

provisions on this issue. Its Art. XI stated 'States shall prevent the pollution of the marine environment by dumping of harmful waste into the sea […]'.[11]

5 At the Second Session of UNCLOS III (1974), ten States submitted a proposal containing draft articles which particularly specified the measures to be taken with respect to marine degradation from dumping by vessels, aircraft and fixed or floating platforms. It was laid out that measures prohibiting or regulating such pollution shall be included.[12] During the Third Session, several States proposed draft articles on the prevention, reduction and control of marine pollution. It was suggested that the regulation of dumping should be harmonized with other provisions regarding the prevention, reduction and control of marine source pollution.[13] Greece then submitted a draft article on the prevention of pollution from dumping at sea. This article included a definition of dumping as well as prescriptive obligations and enforcement powers.[14] In the context of the Informal Sessions on Item 12 of the Third Committee, the Chairman of these meetings, after having considered various proposals, prepared a draft text on pollution from dumping of wastes at sea:

> '(1) States shall establish national laws and regulations to prevent, reduce and control pollution of the marine environment from dumping of wastes and other matters. States shall also take such other measures as may be necessary to prevent, reduce and control such pollution. Such laws, regulations and measures shall ensure that dumping is not carried out without the appropriate authorization by States.
>
> (2) States acting in particular through the appropriate intergovernmental organizations or by diplomatic conference, shall endeavor to establish as soon as possible and to the extent that they are not already in existence, global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment by dumping of wastes and other matter.
>
> (3) Dumping of wastes and other matter, within ___ shall require the express authorization of the coastal State.
>
> (4) National laws, regulations and measures shall be no less effective in preventing, reducing and controlling pollution from dumping than global rules and standards'.[15]

Following this, further informal proposals[16] induced the Chairman to slightly change the wording of his draft text.[17] This modified text was adopted in the Informal Single Negotiating Text Part III.[18]

(1971), GAOR 26th Sess. Suppl. 21 (A/8421), 247 (para. 4); Sea-Bed Committee, Australia *et al.*: Draft Resolution on Preliminary Measures to Prevent and Control Marine Pollution, UN Doc. A/AC.138/SC.III/L.25 (1972), GAOR 27th Sess. Suppl. 21 (A/8721), 210 (para. 1).

[11] Sea-Bed Committee, Norway: UN Doc. A/AC.138/SC.III/L.43 (1973, mimeo.) Art. XI, cited in: Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea, 1982: A Commentary, vol. IV (1991), 159 (MN 210.3).

[12] Third Committee UNCLOS III, Canada *et al.*: Draft Articles on a Zonal Approach to the Preservation of the Marine Environment, UN Doc. A/CONF.62/C.3/L.6 (1974), OR III, 249 (Art. 3 (3)(d)).

[13] Third Committee UNCLOS III, Belgium *et. al.*: Draft Articles on the Preservation and Control of Marine Pollution, UN Doc. A/CONF.62/C.3/L.24 (1975), OR IV, 210, 211–212 (Art. 4).

[14] Third Committee UNCLOS III, Greece: Draft Article on the Prevention of Pollution from Dumping at Sea, UN Doc. A/CONF.62/C.3/L.27 (1975), OR IV, 215.

[15] Third Committee UNCLOS III, Pollution from Dumping of Wastes at Sea: Draft Text Prepared by the Chairman, UN Doc. CRP/MP/20 (1975, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. X (1986), 215 (footnotes omitted).

[16] Third Committee UNCLOS III, Belgium: Pollution from Dumping of Wastes at Sea, UN Doc. CRP/MP/20/Add.1 (1975, mimeo.), reproduced in: Platzöder (note 15), 216; Third Committee UNCLOS III, India: Pollution from Dumping of Wastes at Sea, UN Doc. CRP/MP/20/Add.2 (1975, mimeo.), reproduced in: *ibid.*, 217; Third Committee UNCLOS III: Proposals or Amendments Informally Introduced as Conference Room Papers but Not Agreed Upon by the Informal Sessions on Item 12 During the Third Session of the Conference, UN Doc. A/CONF.62/C.3/L.30 and ADD.1 (1975), OR IV, 219 *et seq.* (Pollution from dumping of wastes at sea).

[17] Third Committee UNCLOS III: Draft Article on Pollution from Dumping of Wastes at Sea (refer to CRP/MP/20), UN Doc. CRP/MP16/Add.1 (1975, mimeo.), reproduced in: Platzöder (note 15), 210. See also Third Committee UNCLOS III, Results of Consideration of Proposals and Amendments Relating to the Preservation of the Marine Environment, A/CONF.62/C.3/L.15/Add.1 (1975), OR III, 200, 201 (Art. XI).

[18] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975), OR IV, 171, 173–174 (Art. 19). In footnote (*) of this article it was suggested that a definition of dumping should be incorporated in a special introductory chapter of the Convention.

In the subsequent Revised Single Negotiating Text Part III, the entire article was restructured and major changes of the wording were undertaken. The text read: 6

> '(1) States shall establish national laws and regulations to prevent, reduce and control pollution of the marine environment from dumping and other matter.
> (2) States shall also take other measures as may be necessary to prevent, reduce and control such pollution.
> (3) Such laws, regulations and measures shall ensure that dumping is not carried out with the permission of the competent authorities of States.
> (4) States, acting in particular through competent international organizations or diplomatic conference shall endeavor to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment by dumping of wastes and other matter. Such rules, standards and recommended practices shall be re-examined from time to time as necessary.
> (5) Dumping of wastes and other matter, within the territorial sea and the economic zone or on to the continental shelf shall not be carried out without the right to permit, regulate and control such dumping after due consultations with other States which by reason of their geographical situation may be adversely affected thereby.
> (6) National laws, regulations and measures shall be no less effective in preventing, reducing and controlling pollution from dumping than global rules and standards'.[19]

In order to establish coherence, this draft article included, comparable with the provisions that later became Arts. 207, 208, 209 and 211, a reference to a periodical review of rules, regulations and recommended practices and procedures established by the States through competent international organizations or diplomatic conference.

As part of the Sixth Session, held in 1977, France submitted a considerable proposal regarding the scope of the dumping provision, adding the term 'incineration at sea'.[20] However, as with other informal proposals at that time, France's draft text was not adopted by the Third Committee. Thus, the wording did not largely change in the subsequent Informal Composite Negotiating Text (ICNT). Due to the incorporation of a definition of 'dumping' into the Convention text, the wording 'dumping of wastes and other matters' became obsolete. This was reflected in the modified text.[21] Subsequently, only minor changes were made, particularly with regard to the term 'due consideration' in paragraph 5, which was incorporated in the ICNT/Revision 1. The article was renumbered to Art. 210 (Dumping).[22] Eventually, only stylistic changes were made,[23] and in 1981 the text of the ICNT/Revision 3 found its way unchanged into the Draft Convention on the Law of the Sea[24] and later into UNCLOS. 7

[19] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 176 (Art. 20). In the footnote (*) of this draft provision, it was clarified that the term 'dumping' should be construed in the context of London Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matters (1972) (London Dumping Convention).

[20] France explained this term in a note as 'any deliberate burning of wastes, substances, products or materials taken on board with a view to being destroyed at sea from a vessel or fixed artificial installations', Third Committee UNCLOS III, France: Article 20 (1977, mimeo.), reproduced in: Platzöder (note 15), 495.

[21] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 36–37 (Art. 211).

[22] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII, 106 (Art. 210). For further information about the element 'due consideration' see *infra*, MN 19.

[23] For these changes see UNCLOS III, Informal Composite Negotiating Text (Revision 2), UN Doc. A/CONF.62/WP.10/REV.2 (1980), OR VIII, 110 (Art. 210); UNCLOS III, Draft Convention on the Law of the Sea (Informal Text), UN Doc. A/CONF.62/WP.10/REV.3 (1980), OR VIII, 86 (Art. 210).

[24] UNCLOS III, Draft Convention on the Law of the Sea, UN Doc. A/CONF.62/L.78 (1981), OR XV, 172, 208 *et seq.* (Art. 210).

III. Elements

1. 'States shall adopt laws and regulations to prevent, reduce and control pollution'

8 Art. 210 (1) contains an obligation ('shall') to adopt national legislation to combat pollution of the marine environment from dumping. It is imposed on all member States, both coastal and landlocked.[25] In particular, it concretizes the obligation specifically laid down Art. 194 (3)(a) to take all necessary measures, including 'those designed to minimized to the fullest possible extent […] the release of toxic, harmful or noxious substances, especially those which are persistent, […] by dumping'. This paragraph refers to laws and regulations. This implies that States are obligated to adopt binding instruments on the national level. A specification of this duty can be found in Art. 210 (3), (5) and (6). The relevant enforcement jurisdiction is codified in Art. 216.

2. 'dumping'

9 The scope of Art. 210 is determined by the definition of the term 'dumping', which is laid down in Art. 1 (1)(5). According to this provision 'dumping' means: '(a)(i) any deliberate disposal of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea; (ii) any deliberate disposal of vessels, aircraft, platforms or other man-made structures at sea'. Subparagraph (b) clarifies the meaning by listing situations which cannot be qualified as dumping. Under these terms 'dumping' does not include the disposal of wastes and other matter incidental to, or derived from regular operations of vessels, aircraft, platforms or other man-made structures and their equipment.[26] In addition to that, dumping does not encompass the placement of matter as long as the placement serves another purpose as the mere disposal thereof and it is in accordance with the aims of UNCLOS.[27] The definition encompasses dumping in all marine zones, including internal waters. Materially, the definition demonstrates that one of the main elements of dumping is the deliberate nature of the disposal of any kind of waste, including vessels, aircraft, platforms and other man-made structures. Thus, it has a broader scope than the obligation in Art. 194 (3)(a), which only contains a reference to 'toxic, harmful or noxious substances, especially those which are persistent'. The obligations stipulated in Art. 210 are not limited to these substances. Rather, States are required to take measures regarding all elements within the meaning of the definition. According to the IMO Legal Affairs and External Relations Division, which has addressed the issue whether the disposal via land-based pipelines could be qualified as dumping, there is no clear borderline between the scope of Art. 207 and the scope of the definition of 'dumping'. Therefore, it concluded that nothing would indicate the mutual exclusiveness of Arts. 207 and 210. Consequently, it could be

[25] This also applies to all other paragraphs in which Art. 210 addresses 'States', namely 2, 3 and 4.

[26] An exception is made for the two cases: (1) Wastes and other matter transported by or to objects mentioned above, that operate for the purpose of the disposal of such matter and (2) wastes and other matter derived from the treatment of such wastes or other matter on such objects.

[27] For further information about the definition of the term 'dumping' see *Tanaka* on Art. 1 MN 16. An almost identical definition was laid down in Art. III (1) (a and b) London Dumping Convention. This Convention has been replaced by the 1996 Protocol, which entered into force in 2006 for those parties of the convention which ratified the Protocol: www.imo.org/OurWork/Environment/LCLP/Documents/PROTOCOLAmended2006.pdf. The 1996 Protocol modified the definition of 'dumping' by including 'any storage of wastes and other matter in the seabed and the subsoil thereof from vessels, aircraft, platforms or other man-made structure at sea' (Art. 1 (4.1.3)) as well as 'any abandonment or toppling at site of platforms or other man-made structures at sea, for the sole purpose of deliberate disposal' (Art. 1 (4.1.4)). Furthermore, the 1996 Protocol added a prohibition of incineration at sea of wastes or other matter (Art. 5).

decided that pipelines are qualified as 'other man-made structures at sea' within the meaning of the definition of 'dumping'.[28] However, the wording 'other man-made structures *at sea*' (emphasis added) rather seem to refer to structures that are wholly located in marine areas. Furthermore, the inclusion of pipelines would extend the scope of the definition of 'dumping' whereby other man-made structures with direct access to the sea such as channels would also be addressed. This indicates that there is a clear borderline between the scope of Art. 207 and the scope of the definition of 'dumping'. Hence, disposal via land-based pipelines is exclusively covered by Art. 207.[29]

3. 'States shall take other measures as may be necessary'

Art. 210 (2) imposes an obligation on States to take other measures as may be necessary.[30] **10**
Thus, States are required to take measures other than those instruments mentioned in Art. 210 (1) (laws and regulations). Art. 210 (2) concerns non-binding national measures to be taken, such as recommendations, scientific and technical advice, capacity-building programs, cooperation programs, certification schemes, guidelines and codes of conduct etc.[31] UNCLOS does not provide any guidance on how to meet this requirement. A comparison between different terms speaking of 'necessary measures', such as in Art. 194 (1) and (2),[32] shows that Art. 210 (2) contains a weaker qualification. The term '*as may be* necessary' (emphasis added) implies an encouragement to take other measures even though States may not ensure that these measures serve, in the end, the intended purpose. Furthermore, the term 'necessary' needs to be determined on a case-by-case basis, which provides wide discretion to States to fulfill this obligation.

4. 'Such laws, regulations and measures shall ensure that dumping is not carried out without the permission of the competent authorities of States'

Art. 210 (3) qualifies the States' obligation to establish national instruments laid down in **11**
Art. 210 (1) and (2). According to this paragraph, States are obligated to establish national instruments which ensure that dumping is not conducted without the permission of the competent authorities of States. This provision uses the plural form *competent authorities*. This indicates that there may be multiple mandated institutions within a State which deal with this issue. In contrast to the requirement of 'express prior approval', the nature of the required permission in this paragraph is not directly specified. However, it can be derived from the wording that dumping can only be lawfully carried out when the competent national authority has issued a permit. Thus, Art. 210 (3) requires the prior consent of the relevant State entity. This interpretation is coherent with Art. 210 (5). The London Dumping Convention and its 1996 Protocol explicitly specify the character of permits. The convention contains definitions of the terms 'special permit' and 'general permit'. According to these definitions, the terms refer to permissions granted in advance.[33] Beyond the definitions, the convention occasionally

[28] IMO, Interpretation of the London Convention and Protocol, IMO Doc. LC 37/9/2 (2015), Annex, paras. 3 *et seq*.

[29] *Cf. Wolfgang Wiese*, Grenzüberschreitende Landrohrleitungen und seeverlegte Rohrleitungen im Völkerrecht (1997), 353 *et seq*. An additional aspect that suggests this interpretation is that UNCLOS explicitly uses the term 'pipelines' in Art. 207 but it is not used in definition of 'dumping'. Furthermore, it can particularly be referred to the OSPAR Convention which also separately regulates land-based sources, including pipeline, and dumping. The same issue is explained in Art. 207, see *Wacht* on Art. 207 MN 8.

[30] This obligation can also be found in Arts. 207 (2), 208 (2) and 212 (2).

[31] In this respect, *Gregory J. Timagenis*, International Control of Marine Pollution, vol. II (1980), 603, assumes that this paragraph concerns national administrative measures 'not necessarily of a normative nature'.

[32] Art. 194 (1) states 'all measures […] that *are* necessary' (emphasis added); Art. 194 (2) reads '*all* measures necessary' (emphasis added).

[33] Art. III Nr. 5 (special permit) and Nr. 6 (general permit) London Dumping Convention.

uses the adjective 'prior' to describe when a permit must be issued.[34] The 1996 Protocol also defines the general term 'permit' as being a 'permission granted in advance'.[35]

5. 'States, acting especially through competent international organizations or diplomatic conference'

12 Art. 210 (4)(1) refers to competent international organizations or diplomatic conference through which States are especially required to act with regard to international law-making addressing pollution of the marine environment from dumping.[36] By incorporating the word 'especially', UNCLOS stipulates a preference concerning these fora. At the same, this term indicates that the enumeration does not have an exhaustive character. Due to the plural form 'organizations', it is implied that multiple international organizations may have a mandate and the expertise to deal with this pollution source. Examples of such international organizations that come into question in this respect are: the International Atomic Energy Agency, the International Civil Aviation Organization, the IMO, the International Oceanographic Commission of UNSECO, UNEP and the World Health Organization.[37]

6. 'shall endeavor to establish global and regional rules, standards and recommended practices and procedures'

13 Art. 210 (4)(1) also specifies what kinds of international instruments States are required to establish. According to this provision, States (acting through the fora mentioned above) are obligated to develop global and regional rules, standards and recommended practices and procedures. This indicates that binding and non-binding instruments are included. As in Arts. 207 (4) and 212 (3), the obligation to establish international instruments is weakened by the word 'endeavor'.[38] Thus, every member State is required only to use a certain amount of effort, depending on its individual capacity. The instruments established pursuant to this paragraph contribute to the setting of a minimum standard. Thus, this paragraph is closely related to paragraph 6, which lays down the requirement for States to ensure that their national laws and regulations respect a minimum global standard. In addition, the obligation in Art. 197 to cooperate on the global and on the regional level with regard to the establishment of international instruments is also of importance within the context of this provision.

14 Regarding State practice, the main instruments States established on the global level have been the London Dumping Convention and its 1996 Protocol.[39] While the London Dumping Convention codified a *black-/grey-list* approach, its Protocol replaced this by a so-called 'reverse listing' approach. According to the *black-/grey-list* approach, any dumping was permitted unless a prohibition was stipulated in Annex I (black list) and II (grey list) of the convention. In contrast, the codification of a 'reverse listing' approach in the 1996 Protocol

[34] Arts. IV (1)(b and c), VI (1)(a and b) London Dumping Convention.

[35] Art. 1 (9) 1996 Protocol to the London Dumping Convention.

[36] Similar references are contained in Arts. 207 (4), 208 (5), 211 (1) and 212 (3).

[37] UN DOALOS, 'Competent or Relevant International Organizations' under the United Nations Convention on the Law of the Sea, LOSB 31 (1996), 79, 87. This list has no authoritative character.

[38] The Chairman of the Third Committee proposed the deletion of the word 'endeavor', UNCLOS III, Letter Dated 26 March 1982 from the Chairman of the Third Committee to the President of the Conference and the Chairman of the Drafting Committee, UN Doc. A/CONF.62/L.88 (1982), OR XVI, 203. However, the Collegium did not refer this proposal to the Drafting Committee, UNCLOS III: Memorandum Issued by the Collegium on Changes Incorporated in the Draft Convention, UN Doc. A/CONF.62/L.93 (1982), OR XVI, 210, 211. In the case of an obligation to endeavor to do something, occasionally it can be difficult to furnish proof of the fulfillment of the obligation. Thus, the *good faith*-requirement (Art. 300) is of particular relevance.

[39] As the London Dumping Convention was established in 1972, it clearly cannot be seen as *subsequent* State practice to Art. 210 (4).

underscores the regulatory paradigm change 'from permission to prohibition'[40]. Thus, under the Protocol any dumping is prohibited unless a permit has been issued.

On the regional level, various regimes have been established which address dumping at sea. In this respect, subsequent State practice based on Art. 210 (4)(1) can be seen in the context of the following Regional Seas Programmes (RSPs): Mediterranean, Black Sea, South Pacific, North-East Atlantic, Eastern Africa, North-East Pacific, Wider Caribbean and Baltic Sea.[41] Similar to the regulatory development on the global level, the above-mentioned paradigm change is also notable in some regional regimes. While, for instance, conventions such as the 1972 Oslo Convention and the 1976 Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft adopted a *black-/grey-list* approach, the 1992 OSPAR Convention and the 1995 Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea contain a 'reverse listing approach'.[42] **15**

7. 'shall be re-examined from time to time as necessary'

Art. 210 (4)(2) imposes an additional obligation on States, whereby a re-examination of the international instruments established under Art. 210 (4)(1) has to be conducted from time to time as necessary.[43] This duty takes into account that circumstances regarding dumping and the marine environment may change over time. Consequently, the obligation to periodically review international instruments provides flexibility and ensures that they will not become outdated. This supports the development of international environmental law and promotes the efficiency of the protection of the marine environment. Some of the instruments that are subject to such a re-examination contribute to the establishment of an international minimum standard,[44] which – according to Art. 210 (6) – must be respected by States when adopting national laws, regulations and measures. If the content of reviewed instruments changes, the international standard may also change. In this case, States are required to ensure that the national instruments they adopt are no less effective than the **16**

[40] *Yoshifumi Tanaka*, The International Law of the Sea (2nd edn. 2015), 313.

[41] Art. 5 Convention for the Protection of the Mediterranean Sea against Pollution, 16 February 1976, amended and renamed Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, 10 June 1995, reproduced in: Tullio Scovazzi (ed.), Marine Specially Protected Areas (1999), 129, 131; Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft, 16 February 1976, amended and renamed Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea, 10 June 1995. Text of the amendment, which is not yet in force, reproduced in: *ibid.*, 141. Art. X Convention on the Protection of the Black Sea against Pollution, 21 April 1992, UNTS 1764, 3; Protocol on the Protection of the Black Sea Marine Environment against Pollution by Dumping, 21 April 1992, UNTS, 1764, 27; Art. 10 Convention for the Protection of the Natural Resources and the Environment of the South Pacific Region, 24 November 1986, text available at: https://www.sprep.org/attachments/Legal/Files_updated_at_2014/NoumeaConvProtocols.pdf; Protocol for the Prevention of Pollution on the South Pacific Region by Dumping, 25 November 1986, text available at: https://www.sprep.org/attachments/Legal/Files_updated_at_2014/Dumping_Protocol.pdf; Art. 4 and Annex II of the Convention for the Protection of the Marine Environment of the North-East Atlantic, 22 September 1992 (1992 OSPAR Convention). Art. 6 Convention for the Protection, Management and Development of the Marine Environment of the Eastern African Region, 21 June 1985, amended and renamed Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean, 31 March 2010, text available at: www.unep.org/NairobiConvention/docs/Final_Act_Nairobi_Amended_Convention&Text_Amended_Nairobi_-Convention.pdf; Art. 6 (1)(iii) Convention for the Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the North-East Pacific, 14 November 2002, text available at: www.unep.org/regionalseas/programmes/nonunep/nepacific/instruments/nep_convention.pdf; Art. 6 Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, 24 March 1983, UNTS 1506, 157; Art. 11 Convention on the Protection of the Marine Environment of the Baltic Sea Area, 9 April 1992, UNTS 2099, 195.

[42] See also *Tanaka* (note 40), 315.

[43] Such an obligation is also laid down in Arts. 207 (4), 208 (5), 209 (1) and 211 (1).

[44] Within the context of Art. 210, only global rules and standards build the minimum standard, see *infra*, MN 20.

modified standard. Art. 210 (4)(2) stipulates that a re-examination has to be conducted 'from time to time as necessary'. However, it does not determine an exact time frame for this duty. Rather, it is left to the discretion of States. One example that resulted from this obligation is the 1996 Protocol to the London Dumping Convention.[45]

8. 'Dumping within the territorial sea and the exclusive economic zone or onto the continental shelf shall not be carried out without the express prior approval of the coastal State, which has the right to permit, regulate and control such dumping'

17 The first part of Art. 210 (5) describes the marine areas within which coastal States have jurisdiction to permit or prohibit dumping. According to this provision, dumping within the territorial sea and the exclusive economic zone (EEZ) or on the continental shelf is unlawful, unless the coastal State has given its express prior approval.[46] It is clear that dumping cannot be conducted in the internal waters and the territorial sea without the coastal State's consent.[47] Thus, the incorporation of the 'territorial sea' is of a declaratory nature. However, this paragraph specifies that the coastal State also has jurisdiction within the EEZ and on the continental shelf to issue licenses with regard to dumping. In contrast to UNCLOS, the London Dumping Convention only uses vague wording requiring each Contracting Party 'to implement the present Convention to all […] vessels and aircraft and fixed or floating platforms *under its jurisdiction* believed to be engaged in dumping' (emphasis added).[48] In comparison, the 1996 Protocol has extended its geographical scope by including the seabed and the subsoil (Art. 1 (7)) as well as, on a voluntary basis, the internal waters (Art. 7). One reason why UNCLOS adopted a wider scope than earlier conventions was that, at the time the Convention was concluded, 'the nature and the extent of coastal State jurisdiction beyond the limits of the territorial sea was clearer […] it was therefore possible to draft paragraph 5 in more specific terms'.[49] UNCLOS, thus, provides coastal States with a regulatory jurisdiction which, for instance, was not explicitly mentioned in the London Dumping Convention and which, as BIRNIE ET AL. state, 'as in the case of flag-state regulation, may be invoked notwithstanding the grant of a permit elsewhere'.[50] At the same time, this

[45] In this context, in its Ch. 17, para. 17.30 lit. b)(i), Agenda 21 has called on States to 'assess the need for additional measures to address degradation of the marine environment from dumping, by […] supporting wider ratification, implementation and participation in relevant Conventions on dumping at sea, including early conclusion of a future strategy for the London Dumping Convention': UNCED, Report of the United Nations Conference on the Environment and Development, UN Doc. A.CONF/151/26/REV.1 (vol. I) (1992), 9 (Agenda 21), 247 *et seq*. *Louise de La Fayette*, The London Convention 1972: Preparing for the Future, 13 IJMCL (1998), 515, 516.

[46] On the high seas, it is on the flag State to ensure that dumping is not conducted without its consent. A reason behind the concession of regulatory jurisdiction to coastal States concerning the issuance of permits with regard to dumping in the EEZ and on the continental shelf may be the fact that dumping usually harms the marine environment and thus may particularly affect marine living and non-living resources. The coastal State, however, has certain sovereign rights in these marine zones such as a right to exploit such resources. Therefore, it is consistent that the coastal State particularly has the power to decide whether to issue a permit in respect of dumping that may have a negative effect on *its* resources.

[47] The coastal State enjoys full jurisdiction over ships conducting such activities in these marine zones because the flag States cannot invoke their right of innocent passage, *cf. Patricia Birnie/Alan Boyle/Catherine Redgwell*, International Law and the Environment (3rd edn. 2009), 470.

[48] *Timagenis* (note 31), 609, explains that the London Dumping Convention did not specify the geographical scope within which the coastal State has jurisdiction to permit or prohibit dumping. Nordquist/Rosenne/Yankov (note 11), 166 (MN 210.11(e), explain that while the geographical scope of the 1972 Oslo Convention had been limited to the territorial sea, the London Dumping Convention purposely left open the question about 'the extent of the coastal State's jurisdiction beyond the territorial sea'. The latter had been done 'without prejudice to the outcome of UNCLOS III on this central issue'. See Art. XIII London Dumping Convention. For the relationship between UNCLOS and the London Dumping Convention see IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, IMO Doc. LEG/MISC.7 (2012), 67 *et seq*.

[49] Nordquist/Rosenne/Yankov (note 11), 167 (MN 210.11(e)).

[50] *Birnie/Boyle/Redgwell* (note 47), 470.

provision seems to implicitly impose an obligation on flag States to ensure that they have received an express approval of the coastal State before they conduct dumping within the coastal State's territorial sea, its EEZ or on its continental shelf.

Furthermore, the wording of Art. 210 (5) specifies the character of the approval. The **18** term 'express prior approval' confirms that this paragraph does not cover tacit or retrospective approval.[51] Due to the fact that approval concerns a particular action, namely dumping, it follows that it has to be obtained before dumping is conducted.[52] After consent is given, the permitting State is subject to the obligation under Art. 204 (2). According to this provision, States are particularly required to monitor the effects of any activities which they permit in order to determine whether these activities negatively affect the marine environment.[53]

9. 'after due consideration of the matter with other States which by reason of their geographical situation may be adversely affected thereby'

The second part of Art. 210 (5) requires the coastal State, prior to permitting dumping, to **19** consider the matter with other States which by reason of their geographical situation may be adversely affected by dumping within the coastal State's territorial sea, EEZ or on its continental shelf.[54] The term 'due consideration' indicates that the obligation has to be carried out in good faith.[55] UNCLOS does not provide a general procedure how 'due consideration' has be conducted. Rather, it will be determined on a case-by-case basis. Nevertheless, Churchill & Lowe state that 'the requirement of 'due consideration' goes beyond the provisions of the London and most regional conventions relating to prior consultation'[56]. Thus, coastal States are obligated to do more than consult States which may be negatively affected. This may include discussions, sharing of information, balancing the various interests of the respective States, conducting further research on the effects the dumping might have or performing an environmental impact assessment.[57] Since UNCLOS does not give any guidance, coastal States have wide discretion concerning this matter.

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[51] The adjective 'express' was incorporated into the RSNT. In contrast, this qualification was not mentioned in the London Dumping Convention.

[52] *Cf.* Nordquist/Rosenne/Yankov (note 11), 166 (MN 210.11(c)).

[53] For further information see *Blitza* on Art. 204 MN 2, 20 *et seq*.

[54] Before the term 'due consideration' was incorporated into the Convention, the wording of this paragraph was modified various times. See Results of Consideration of Proposals and Amendments (note 17), 200, 201 (Art. XI, Draft Article on Pollution from Dumping of Wastes at Sea (CRP/MP/20)); Third Committee UNCLOS III, Brazil: Art. 211 UN Doc. MP/4 (1978, mimeo.), reproduced in: Platzöder (note 15), 220; A/CONF.62/RCNG/1 (1978), Third Committee UNCLOS III: Report to the Plenary by the Chairman of the Third Committee, Informal Proposal by Brazil on Art. 211 para. 5 (MP/4), OR X, 13, 96, 108). Even though this proposal was not adopted, a modified text of paragraph 5 was suggested, in which the part Brazil intended to omit was changed. Instead of reading 'after due consultation', the new proposal stated 'after due consideration of the matter with other States', Third Committee, UNCLOS III: Working Paper Results of Negotiations, UN Doc. MP/27 (1978, mimeo.), reproduced in: Platzöder (note 15), 251 (Art. 211 para. 5); UNCLOS III, Reports of the Committees and Negotiating Groups on Negotiations at the Seventh Session Contained in a Single Document both for the Purposes of Record and for the Convenience of Delegations, UN Doc. A/CONF.62/RCNG/2 (1978), OR X, 126, 173, 179 (proposal on Art. 211 paragraph 5). Eventually this wording was incorporated in the ICNT/Revision 1 (note 22) and consequently found its way into the Convention, see *supra*, MN 7.

[55] Nordquist/Rosenne/Yankov (note 11), 167 (MN 210.11(f)). The duty to duly consider the matter has a similar character as the obligations to endeavor to do something (*e. g.* Arts. 207 (3), (4)(1), 210 (4)(1), 212 (3). In both cases it may be difficult to reliably prove whether a State has fulfilled its obligation. Thus, when acting pursuant to this kind of obligations the *good faith*-requirement (Art. 300) is of particular relevance. *Cf.* note 38.

[56] *Churchill/Lowe* (note 3), 369, additionally state that the obligation of 'due consideration' 'may do no more than reflect the requirements of customary law'. *Birnie/Boyle/Redgwell* (note 47), 470 *et seq.*, assume that Art. 210 (5) as a whole reflects customary law.

[57] *Hafner* (note 1), 347, 390, speaks of a duty to consult the potentially affected States. *Cf. Catherine Redgwell*, From Permission to Prohibition: The 1982 Convention on the Law of the Sea and Protection of the Marine Environment, in: David Freestone/Richard Barnes/David M. Ong (eds.), The Law of the Sea: Progress and Prospects (2006), 180, 189, who also speaks of a requirement of consultation in this respect.

10. 'National laws, regulations and measures shall be no less effective […] than global rules and standards'

20 The last paragraph of Art. 210 further specifies the obligation imposed on States to adopt national laws, regulations and measures pursuant to Art. 210 (1) and (2). According to Art. 210 (6), States must ensure that national instruments they adopt are 'no less effective' than global rules and standards addressing the marine pollution from dumping.[58] Thus, States are obliged to respect international minimum standards, so that they cannot adopt less effective national legislation, but are free to enact stricter instruments. However, it seems problematic that this duty may lead to the situation where States are bound by global instruments they did not originally agree to. Nevertheless, this does not constitute a violation of the *pacta tertiis rule* because States, by becoming a party to UNCLOS, voluntarily agreed to be indirectly bound by these global instruments.[59] A similar wording, obliging States to respect an international minimum standard, is contained in Arts. 208 (3), 209 (2) and 211 (2). In contrast to these provisions, Art. 210 (6) only refers to global rules and standards. Global practices and procedures as well as regional instruments, which may also be established pursuant to paragraph 4, do not need to be considered when adopting national laws, regulations and measures. However, regional rules and standards might become part of customary international law, which would change their regional character to a global one. In this case, these instruments would become a part of the minimum standard.[60] The global rules and standards referred to in Art. 210 (6) are primarily laid down in the London Dumping Convention[61] and its 1996 Protocol.[62] Thus, these instruments set the international standard States have to respect when adopting national laws, regulations and measures pursuant to their obligation contained in Art. 210 (1) and (2).

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[58] During UNCLOS III, Brazil, Ecuador and India, proposed a weaker obligation. They wanted to adopt a 'to take into account' approach, which is stipulated in Arts. 207 (1) and 212 (1), see Third Committee UNCLOS III: Proposals or Amendments Informally Introduced as Conference Room Papers but Not Agreed Upon by the Informal Sessions on Item 12 During the Third Session of the Conference, UN Doc. A/CONF.62/C.3/L.30 and Add.1 (1975), OR IV, 219 *et seq.* (Pollution from Dumping of Wastes at Sea (CRP/MP/20/Add.2, Proposed Alternative to Text of Paragraph 4 and Additional Paragraph 5 to the Chairman's Draft Text Contained in CRP/MP/20 by Brazil, Ecuador and India)).

[59] *Cf. Alexander Proelss*, Meeresschutz im Völker- und Europarecht (2004), 141 *et seq.*; with regard to the similar term of reference in Art. 211 (2), see *Bartenstein* on Art. 211 MN 36.

[60] *Hafner* (note 1), 347, 390, explains that national instruments must at least conform with universal measures, including nonbinding measures as long as they are globally applied.

[61] Concerning the relationship between the London Dumping Convention and UNCLOS, Art. 237 states that Part XII is 'without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment' (paragraph 1), provided that such obligations are 'consistent with the general principles and objectives' of UNCLOS (paragraph 2). This opens up the possibility for Art. 210 (6) to incorporate the obligations of the London Dumping Convention. *Cf. Proelss* (note 59), 142 *et seq.*

[62] *Cf. de La Fayette* (note 45), 515, 516; IMO, Report of the Seventeenth Consultative Meeting, IMO Doc. LC 17/14 (1994), para. 2.5. This approach is not unproblematic because it leads to the situation that States, when acceding to UNCLOS, indirectly incorporate all and, thus, also future and unpredicted, obligations of the London instruments, such as the 1996 Protocol. Due to such a wide scope of Art. 210 (6) – especially with regard to States that deliberately have not become a party to the 1996 Protocol – it could be assumed that it would be more adequate to determine the international minimum standard set by global rules, individually at the time a State accedes to UNCLOS. However, Art. 210 (4)(2), which can be seen as the obligation from which the 1996 Protocol resulted (see *supra* MN 16), indicates that UNCLOS intends parties to be confronted with revised and, thus, future and unpredicted global rules. Furthermore, the above-mentioned interpretation seems to be contrary to the objective of UNCLOS, harmonizing the international protection standard, because States, dependent on their accession date, would have to respect different standards.

Article 211
Pollution from vessels

1. States, acting through the competent international organization or general diplomatic conference, shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels and promote the adoption, in the same manner, wherever appropriate, of routeing systems designed to minimize the threat of accidents which might cause pollution of the marine environment, including the coastline, and pollution damage to the related interests of coastal States. Such rules and standards shall, in the same manner, be re-examined from time to time as necessary.
2. States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference.
3. States which establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their off-shore terminals shall give due publicity to such requirements and shall communicate them to the competent international organization. Whenever such requirements are established in identical form by two or more coastal States in an endeavour to harmonize policy, the communication shall indicate which States are participating in such cooperative arrangements. Every State shall require the master of a vessel flying its flag or of its registry, when navigating within the territorial sea of a State participating in such cooperative arrangements, to furnish, upon the request of that State, information as to whether it is proceeding to a State of the same region participating in such cooperative arrangements and, if so, to indicate whether it complies with the port entry requirements of that State. This article is without prejudice to the continued exercise by a vessel of its right of innocent passage or to the application of article 25, paragraph 2.
4. Coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage. Such laws and regulations shall, in accordance with Part II, section 3, not hamper innocent passage of foreign vessels.
5. Coastal States, for the purpose of enforcement as provided for in section 6, may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference.
6. (a) Where the international rules and standards referred to in paragraph 1 are inadequate to meet special circumstances and coastal States have reasonable grounds for believing that a particular, clearly defined area of their respective exclusive economic zones is an area where the adoption of special mandatory measures for the prevention of pollution from vessels is required for recognized technical reasons in relation to its oceanographical and ecological conditions, as well as its utilization or the protection of its resources and the particular character of its traffic, the coastal States, after appropriate consultations through the competent international organization with any other States concerned, may, for that area, direct a communication to that organization, submitting scientific and technical evidence in support and information on necessary reception facilities. Within 12 months after receiving such a communication, the organization shall determine

whether the conditions in that area correspond to the requirements set out above. If the organization so determines, the coastal States may, for that area, adopt laws and regulations for the prevention, reduction and control of pollution from vessels implementing such international rules and standards or navigational practices as are made applicable, through the organization, for special areas. These laws and regulations shall not become applicable to foreign vessels until 15 months after the submission of the communication to the organization.

(b) **The coastal States shall publish the limits of any such particular, clearly defined area.**

(c) **If the coastal States intend to adopt additional laws and regulations for the same area for the prevention, reduction and control of pollution from vessels, they shall, when submitting the aforesaid communication, at the same time notify the organization thereof. Such additional laws and regulations may relate to discharges or navigational practices but shall not require foreign vessels to observe design, construction, manning or equipment standards other than generally accepted international rules and standards; they shall become applicable to foreign vessels 15 months after the submission of the communication to the organization, provided that the organization agrees within 12 months after the submission of the communication.**

7. **The international rules and standards referred to in this article should include *inter alia* those relating to prompt notification to coastal States, whose coastline or related interests may be affected by incidents, including maritime casualties, which involve discharges or probability of discharges.**

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I. Purpose and Function

1 Art. 211, entitled 'Pollution from vessels', details the obligation of the States to take measures in order to fulfil their duty set forth generally in Art. 194 (3)(b) to 'minimize to the fullest possible extent pollution from vessels'. Art. 211 is a provision of Part XII on the protection and preservation of the marine environment, and more precisely of Section 5, which provides prescriptive powers. It addresses national and international law-making with regard to the prevention, reduction and control of vessel-source pollution of the marine environment. The related enforcement powers are addressed in Section 6, in Arts. 217 to 220.

2 Vessel-source pollution is the generic term for pollution of the marine environment caused by vessels. The term includes accidental pollution as well as intentional and operational pollution. Accidental pollution, in particular oil spills, is often the more striking type of pollution and therefore the one that precipitates the development of new rules. However, intentional pollution, such as discharge of ballast water, bilge water, blackwater and greywater, and operational pollution, including air pollution by exhaust gases, water pollution by anti-fouling paint on the vessel hull or the disposal of solid waste and perturbation by noise, is by far the more significant problem.[1] The single most significant cause of marine pollution is land-based sources, which accounts for approximately 80 % of marine pollution;[2] it is addressed by Art. 207 to the extent possible given the inherent limits of the law of the sea. Airborne pollution, which poses an increasingly significant threat to the oceans is addressed by Art. 212 insofar as it falls into the realm of the law of the sea. This is particularly the case for air-borne pollution caused by vessels, such as ship exhaust, an issue for which case Art. 212 is the *lex specialis* provision over 211. Like pollution caused by seabed activities (→ Art. 208), by activities in the Area (→ Art. 209) and by dumping (→ Art. 210), vessel-source pollution is a concern that can be fully addressed by the Convention. Yet, none of these other kinds of pollution trigger such powerful clashes of interests as vessel-source pollution. Indeed, the competing interests of maritime and coastal States crystallize in the provision on vessel-source pollution. Hence, it falls to Art. 211 to establish the right balance between navigational rights on the one hand, and environmental protection on the other, by allocating jurisdiction to the different categories of States. Coastal States' interest in extensive authority over vessel-source pollution, in order to protect the marine environment contiguous to their coasts, stands in opposition to the needs of merchant fleets. These fleets fear nothing more than passage hampered by costly and sometimes 'patchwork'[3] or even contradictory legal requirements.

3 Due to its role, Art. 211 is closely related to the rules governing internal waters and ports, innocent passage in the territorial sea (→ Part II) and freedom of navigation in the exclusive economic zone (EEZ) (→ Art. 58). The differentiated compromise that was reached under Art. 211 confirms the principle of flag State jurisdiction (para. 2), although some room is offered for coastal State (paras. 4–6) and port State jurisdiction (para. 3), without, however, disrupting the equilibrium established under other relevant parts of the Convention. The

[1] A study on oil pollution shows that only 37 % of ship-borne oil pollution is accidental, while operational pollution amounts to 63 %. *Cf.* GESAMP, Estimates of Oil Entering the Marine Environment from Sea-based Activities, Reports and Studies 75 (2007), 60.

[2] See UNESCO, Facts and Figures on Marine Pollution, available at: http://www.unesco.org/new/en/natural-sciences/ioc-oceans/priority-areas/rio-20-ocean/blueprint-for-the-future-we-want/marine-pollution/facts-and-figures-on-marine-pollution/. This figure seems to confirm a rough estimation made by GESAMP in 1990, according to which 12 % of marine pollution stemmed from shipping, whereas, 44 % originated from land based activities, 33 % from the atmosphere (itself greatly land based), 10 % from dumping and 1 % from sea-bed activities, *cf.* GESAMP, The State of the Marine Environment, Reports and Studies 39 (1990), 88.

[3] *Ted L. McDorman et al.*, The Marine Environment and the Caracas Convention on the Law of the Sea (1981), 31.

sophisticated balance between these three different types of States distinguishes notably between construction, design, equipment and manning (CDEM) standards[4] to be regulated internationally and discharge standards open to unilateral regulation by coastal States. Not surprisingly, Art. 211 is one of the longest provisions of the Convention. Most authors agree in welcoming the allocation of jurisdiction enshrined in Part XII as well as the increased port and coastal State jurisdiction; they also observe on a more or less critical note that the final compromise does not fundamentally call into question neither the flag State's primary responsibility nor the navigational rights granted in the different maritime zones.[5]

Like all other provisions of Part XII, and generally most provisions of the Convention, Art. 211 does not establish a complete regime of standards, but provides the framework for detailed, technical standards by allocating the States' powers and obligations.[6] At the same time, it refers to specialized technical regimes by means of different terms or rules of reference, such as 'generally accepted international rules and standards'. The uncertainty surrounding their respective meaning is discussed below. The technique of incorporating by reference the rules and standards elaborated in other fora, namely the International Maritime Organization (IMO) in the case of Art. 211, allows for constant development of detailed rules and standards in keeping with evolving ecological and navigational needs and new technical possibilities. Combining reliable structure and high adaptability, such framework regimes are a common feature in international environmental law.[7] Incidentally, the framework character of Part XII is in line with the idea put forward by Tommy Koh of the Convention as a 'Constitution for the oceans'.[8] Art. 211 is divided into seven paragraphs. The first paragraph addresses international standard setting and the second is concerned with the obligations of flag States. The next four paragraphs detail the regimes applicable to ports and internal waters (Art. 211 (3)), the territorial sea (Art. 211 (4)) and the EEZ (Art. 211 (5) and (6)). Art. 211 (7) deals with notification. **4**

II. Historical Background

Early international efforts concerning the prevention of environmental pollution caused by vessels can be traced back to the 1926 Preliminary Conference on Oil Pollution on Navigable Water, held in Washington,[9] while the first tangible result was reached in 1954, with the adoption of the International Convention for the Prevention of Pollution of the Sea by Oil. This agreement and those that followed[10] were in line with the prevailing customary balancing of powers between different categories of States. Jurisdiction regarding the prevention of vessel-source pollution rested primarily with the flag State. However, the port State **5**

[4] On CDEM standards generally, see *Barnes* on Art. 21 MN 20–22.

[5] *Erik J. Molenaar*, Coastal State Jurisdiction over Vessel-Source Pollution (1998), 530; *Alan K. J. Tan*, Vessel-Source Marine Pollution (2006), 200, 201; *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2010), 356; *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999), 347; *Gerhard Hafner*, Meeresumwelt, Meeresforschung und Technologietransfer, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 347, 404 *et seq.*; *Mario Valenzuela*, Enforcing Rules Against Vessel-Source Degradation of the Marine Environment: Coastal, Flag and Port State Jurisdiction, in: Davor Vidas/Willy Østreng (eds.), Order for the Oceans at the Turn of the Century (1999), 485, 492.

[6] *Daniel Bodansky*, Protection of the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond, Ecology Law Quarterly 18 (1991), 719, 764.

[7] See for example the most important environmental framework conventions: 1985 Vienna Convention for the Protection of the Ozone Layer; 1992 Convention on Biological Diversity; 1992 United Nations Framework Convention on Climate Change.

[8] Statement by the President, UNCLOS III, 185th Plenary Meeting, UN Doc. A/CONF.62/SR.185 (1982), OR XVII, 11, 13 (para. 47).

[9] *Cf.* Preliminary Conference on Oil Pollution on Navigable Water, Report of the Conference (1926).

[10] In particular, 1969 International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Intervention Convention), the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (Anti-dumping Convention); and the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto (MARPOL 73/78).

had almost unlimited prescriptive power with regard to conditions of access to its ports, while the coastal State's possibilities were constrained by its obligation not to hamper navigational rights. The 1958 Geneva Conventions,[11] the first framework agreements, maintain this balance in those few provisions explicitly addressing the problem. Art. 24 of the High Seas Convention mentions the obligation of flag States to elaborate 'regulations to prevent pollution of the seas by the discharge of oil from ships', 'taking account of existing treaty provisions on the subject', among others. In the CTSCZ, the jurisdiction of the coastal State related to environmental protection can be derived from the provisions on sovereignty (Art. 1) and on the right of innocent passage (Arts. 14 to 17), including the interdiction to hamper innocent passage (Art. 15 (1)).

6 The protection of coastal States' interests continued to be considered insufficient in the early 1970s, when the negotiations on the new law of the sea began. Hence, several States advocated the elaboration of new international rules on the control by coastal States of international navigation in waters contiguous to the territorial sea, to enable more efficient protection against vessel-source pollution, without hampering freedom of navigation.[12] The development of coastal State authority over vessel-source pollution was itself part of the wider issue of the expansion of coastal State jurisdiction *ratione materiae* and *ratione loci*. The problem of the so-called 'creeping jurisdiction' opposed and linked coastal and maritime States to one another by complex interwoven interests and negotiation strategies. Coastal States interested in the protection of their maritime zones and coasts are often also States with major fleets, which partly explains the relative weakness of the efforts to enhance coastal State jurisdiction.[13] As a compromise between the antagonistic interests of unhampered navigation and protection of the marine environment reached under the Convention, the geographical scope of coastal States' prescriptive power was increased by the extension of the territorial sea and the creation of the EEZ, while the material scope of coastal State action has been strictly determined.[14]

7 The first official proposal within UNCLOS III on the prevention of pollution from vessels was submitted by Kenya during the Second Session, held in 1974. It called for standard-setting through international organizations.[15] The so-called ten States zonal approach, while building on the principle of international standard-setting, included the proposition to allow coastal States to unilaterally adopt laws and regulations for areas which are particularly vulnerable or perilous for navigation and where such national legislation is essential because international rules for the prevention of vessel-source pollution are non-existent or insufficient.[16] Australia and the Group of 77 (G77) were among the most fervent advocates of strengthened coastal and port State jurisdiction, as evidenced by their informal drafts submitted in 1975. In the Australian draft, coastal State jurisdiction was, however, limited to the territorial sea.[17] By contrast, the G77 draft, after confirming the jurisdiction of the flag State, provided for coastal State jurisdiction in all maritime zones under the jurisdiction of the coastal State and reiterated the concept of 'special areas'.[18] The so-called nine-power proposal, submitted by nine European States, was

[11] Convention on the High Seas (High Seas Convention), Convention on the Territorial Sea and Contiguous Zone (CTSCZ), Convention on the Continental Shelf (CSC), Convention on Fishing and Conservation of the Living Resources of the High Seas (High Seas Fishing Convention).

[12] Sea-Bed Committee, Work of Sub-Committee III in 1971 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 40, 43 (para. 134).

[13] *Tan* (note 5), 200 *et seq*.

[14] See also: *Rothwell/Stephens* (note 5), 356; *Churchill/Lowe* (note 5), 347.

[15] Third Committee UNCLOS III, Kenya: Draft Articles for the Preservation and the Protection of the Marine Environment, UN Doc. A/CONF.62/C.3/L.2 (1974), OR III, 245, 247 (Art. 23).

[16] Third Committee UNCLOS III, Canada *et al.*: Draft Articles on a Zonal Approach to the Preservation of the Marine Environment, UN Doc. A/CONF.62/C.3/L.6 (1974), OR III, 249, 250 (Art. 7 (3)(b)(ii)).

[17] Third Committee UNCLOS III, Australia: Pollution from Vessels (1975, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. X (1986), 435.

[18] Third Committee UNCLOS III, Group of 77: Draft Articles on Marine Pollution (1975, mimeo.), reproduced in: Platzöder (note 17), 436, 440–441 (Art. XII).

primarily based upon flag State jurisdiction and relied entirely upon international standard-setting, allowing coastal States to adopt regulations only in recognized 'special areas' and only so as to give effect to international regulations.[19] In reaction to this proposal, several delegations pointed to the absence of any prescriptive power of the coastal State in its territorial sea and in special areas off its coast.[20] The USSR proposal, submitted shortly after the nine-power proposal, allowed for greater coastal State jurisdiction in the territorial sea, while limiting it with regard to design, construction, equipment, operation and manning aspects.[21] It still did not go far enough in the view of several delegations.[22]

After further negotiations, the Informal Single Negotiating Text (ISNT) was prepared, which 8
included Art. 20 on vessel-source pollution.[23] It partly prefigured Art. 211, with paragraph 1 requiring States to proceed to international standard-setting, paragraph 2 confirming the flag State principle, paragraph 3 providing for the jurisdiction of the coastal State in its territorial waters and paragraphs 4 to 6 outlining the jurisdiction of the coastal State in its EEZ. A modified version of the ISNT draft provision was presented in the Revised Single Negotiating Text (RSNT).[24] The most important changes to the draft provision were: the removal of the obligation of the coastal State to conform to international rules and standards with respect to national laws and regulations applying to the territorial sea; the addition of paragraph 4 which addresses the prescriptive power of the coastal State in its EEZ; and the regrouping of several elements of the former paragraphs 4 to 6, related to special areas in the EEZ, in a new paragraph 5. In addition, the former paragraph 5 on areas in the EEZ that are subject to particularly severe climatic conditions was drafted in a separate provision on ice-covered areas, which ultimately evolved into Art. 234.[25] During the following negotiations, discussions were devoted to the question of the relationship between the provision on vessel-source pollution and the provision on the prescriptive competence of the coastal State concerning innocent passage (→ Art. 21). Some delegations considered it necessary to safeguard the right of innocent passage,[26] others expressed the concern about unacceptable erosion of the existing coastal State powers under the new provision on vessel-source pollution.[27] Another bone of contention was paragraph 5 on special areas, with some delegations expressing their disagreement with the intended role of the Inter-Governmental Maritime Consultative Organization (IMCO, renamed IMO in 1982).[28] These discussions prompted the redrafting of paragraph 5 of the provision in the 1977 Informal Composite Negotiating Text (ICNT),[29] which came very close to the final text. According to it, the consultation with States concerned with the establishment of a special area had to be channelled through the competent international

[19] Third Committee UNCLOS III, Belgium *et al.*: Draft Articles on the Prevention, Reduction and Control of Marine Pollution, UN Doc. A/CONF.62/C.3/L. 24 (1975), OR IV, 210 (Art. 3).

[20] Third Committee UNCLOS, 19th Meeting, UN Doc. A/CONF.62/C.3/SR.19 (1975), OR IV, 82, 84 *et seq.* (see particularly Finland, Tanzania, India, Senegal, USSR, and Canada mentioning also the absence of jurisdiction in the EEZ); Third Committee UNCLOS III, 20th Meeting, UN Doc. A/CONF.62/C.3/SR.20 (1975), OR IV, 89 *et seq.* (see particularly Spain, Iran, Egypt, Nigeria, and New Zealand mentioning also the absence of jurisdiction in the EEZ).

[21] Third Committee UNCLOS III, Union of Soviet Socialist Republics: Additional Draft Articles on Prevention of Pollution of the Marine Environment, UN Doc. A/CONF.62/C.3/L.25 (1975), OR IV, 212.

[22] See 19th Meeting (note 20), 86 (Norway); 20th Meeting (note 20), 90 (New Zealand).

[23] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF. 62/WP.8/PART III (1975), OR IV, 171, 174 (Art. 20).

[24] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 176–177 (Art. 21).

[25] *Ibid.*, 180 (Art. 43).

[26] Third Committee UNCLOS III, 32nd Meeting, UN Doc. A/CONF.62/C.3/SR.32 (1975), OR VI, 106, 109 (Korea); Third Committee UNCLOS III, 33rd Meeting, UN Doc. A/CONF.62/C.3/SR.33 (1975), OR VI, 111 *et seq.* (United Kingdom, Cuba and Greece).

[27] 32nd Meeting (note 26), 108 (Tanzania) and 108–109 (Canada).

[28] See *ibid.*, 108 (Tanzania), 109 (Kenya) and 110 (Somalia); 33rd Meeting (note 26), 114 (Pakistan).

[29] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 37 (Art. 212.).

organization, which also had the power to determine whether the requirements for a special area were fulfilled. The possibility for additional laws and regulations related to discharge and navigational practices was also added.

9 In March 1978, the super tanker *Amoco Cadiz* ran aground off the coasts of Brittany, causing the most significant oil spill that had ever been recorded and heavily affecting the French coasts. The disaster illustrates the impetus of such pollution incidences on the international rule-making process. In its aftermath, France proposed, among others, the addition of a new paragraph on the admission of vessels within the internal waters and ports and the control of foreign vessels under agreements of concerned coastal States.[30] The proposition eventually evolved into Art. 211 (3). The United States suggested adding a reference to routeing systems in the first paragraph.[31] A new paragraph on the notification of incidents to interested States, today's paragraph 7, was also agreed upon. These propositions were included in the first revised ICNT, where the provision became Art. 211. The Tanzanian proposal, which eliminated the decisive role of the IMCO with regard to special areas, was not followed.[32] No substantive changes were made in the second and third revised ICNT.[33] The draft convention on the law of the sea[34] left the formulation almost unchanged, but divided paragraph 6 into three subparagraphs to improve its readability, bringing the provision into its final form.

III. Elements

1. 'States […] shall establish international rules and standards to prevent, reduce and control pollution'

10 Art. 211 (1) first of all requires States to establish international rules and standards to prevent, reduce and control vessel-source pollution. Cooperation and multilateral action are, for reasons of efficiency, generally considered advisable strategies regarding the protection and preservation of the marine environment, as it also follows from Art. 197.[35] With respect to vessel-source pollution, which occurs in the highly international context of shipping, cooperation is of particular importance because it is an efficient means to strike the balance between the need, particularly felt by coastal States, to reduce the environmental impact of navigation and the necessity of ensuring international consent and legal uniformity in order not to unduly impede international navigation. Art. 211 (1) bestows a prominent position on international cooperation by providing that States shall establish international rules and standards concerning vessel-source pollution. The provision reflects the priority given to international rule-making over national rule-making under the Convention.

11 Contrary to the other paragraphs of Art. 211, under which the State operates as a flag State, a port State or a coastal State, Art. 211 (1) applies to States *tout court*, as Gavouneli rightly states.[36] Hence, it calls upon all States, irrespective of their status, to participate in the

[30] Third Committee UNCLOS III, France, MP/1 (1978, mimeo.), in: Platzöder (note 17), 218 (Art. 212 (2)*bis*). See also discussions at Third Committee UNCLOS III, 35th Meeting, UN Doc. A/CONF.62/C.3/SR.35 (1978), OR IX, 143 *et seq*.

[31] Third Committee UNCLOS III, United States, MP/5 (1978, mimeo.), in: Platzöder (note 17), 221.

[32] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP/10/REV.1 (1979), OR VIII, 108 (Art. 212).

[33] UNCLOS III, Informal Composite Negotiating Text (Revision 2), UN Doc. A/CONF.62/WP.10/REV.2 (1980), OR VIII;UNCLOS III, Draft Convention on the Law of the Sea (Informal Text), UN Doc. A/CONF.62/WP.10/REV.3 (1980), OR VIII, 86 (Art. 211).

[34] UNCLOS III, Draft Convention on the Law of the Sea, UN Doc. A/CONF.62/L.78 (1981), OR XV, 172, 209 (Art. 211).

[35] See generally *Stephens* on Art. 197 MN 2–3.

[36] *Maria Gavouneli*, Functional Jurisdiction in the Law of the Sea (2007), 31.

law-making process. Art. 211 (1) uses the word 'shall',[37] entailing a legal obligation. It is, however, merely a best-efforts obligation, as an obligation to negotiate does not in itself guarantee success. This inherent weakness of Art. 211 (1) notwithstanding, States have carried out extensive international standard-setting.[38]

12 The expression 'international rules and standards' is not defined by the Convention. In practice it has been interpreted as including rules and standards on discharge and rules related to the operation of vessels as well as CDEM rules and standards. To ensure that these international rules and standards take into account the changing uses of the oceans and new needs, scientific knowledge and technological possibilities, States have the related obligation to reexamine them from time to time. Art. 211 (7) specifies that rules and standards related to notification of pollution incidents are included in the definition.[39] The difference between 'rules' and 'standards' is not entirely clear. A plausible distinction may be that 'rules' are classic norms of positive public international law, whereas 'standards' refer to provisions which are not legally binding.[40] The latter kind of provision is a common feature in the international regulation of marine activities, raising the question whether they are 'generally accepted' in the sense of paragraphs 2, 5 and 6.[41] Another distinction would be to interpret 'rules' as being those norms contained in the more general provisions of international conventions and 'standards' as being the more technical norms of international conventions, often laid down as 'regulations' in annexes or protocols to the main body of the conventions.[42]

13 International rules and standards are to be developed, according to Art. 211 (1), in order to prevent, reduce and control 'pollution of the marine environment'. These words are defined in Art. 1 (1)(4) for the purpose of the whole Convention, including Art. 211. The definition, which delineates the contours of pollution by its effects on the diverse components of the marine environment, ensures a broad meaning.[43] The term 'marine environment' explicitly includes estuaries, according to Art. 1 (1)(4). In addition to the marine environment, Art. 211 (1) mentions the coastline, a concept referred to several times in the Convention without being defined.[44] The ordinary meaning of the word suggests that it refers to the interface between water and land. It recognizes the close relationship between the marine ecosystem, strictly understood, and the terrestrial ecosystem, and remedies to some extent the ecologically untenable distinction between them for the purposes of protecting coastal zones. The effect-based approach of Art. 1 as to the definition of 'pollution of the marine environment' is also adopted in Art. 211 with regard to the 'pollution damage to the related interests of coastal States'. The inclusion of related interests takes account of the fact that ecological damage is often essentially perceived as damage caused to interests that are not strictly speaking environmental in nature, although they rely on the environment. A relevant enumeration of interests affected by marine pollution may be found in Art. 1 (1)(4). Accordingly, 'related interests' may result from all legitimate uses of the marine and terrestrial coast areas, including healthy living conditions, navigation and other economic activities, fishing and exploitation of other resources of the coast area, tourism and amenities.

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[37] UNCLOS III, UN Doc. ELGDC/5 (1980, mimeo.), cited by: Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea, 1982: A Commentary, vol. IV (1991), xlii (footnote 3).

[38] International standard setting, which ranks among the activities referred to by Art. 211 (1) whether it occurred before or after UNCLOS' entry into force, ranges from safety related measures, such as search and rescue or training, certification and watchkeeping, to true pollution prevention measures, such as pollution preparedness and response, anti-fouling systems and ballast water management. For more detailed information, see IMO, List of IMO Conventions, available at: http://www.imo.org/About/Conventions/ListOfConventions/Pages/Default.aspx.

[39] See *infra*, MN 49 *et seq.*

[40] *Molenaar* (note 5), 141 *et seq.*

[41] See *infra*, MN 17 *et seq.*, 33 *et seq.* and 47.

[42] *Molenaar* (note 5), 141.

[43] See also *Tanaka* on Art. 1 MN 12–15.

[44] Arts. 7, 142, 145, 211 (7), 220, 221.

2. 'through the competent international organization or general diplomatic conference'

14 Negotiations of international rules and standards must be channelled through the 'competent international organization or general diplomatic conference'. Even though no express mention is made of the IMO, it is understood that the expression 'competent international organization' – in the singular form – refers to the IMO. By contrast, in all other provisions of Section 5, reference is made to the plural 'competent international organizations', which includes, among others, the IMO. During the early negotiations, the plural form was sometimes explicitly advocated and it was used in several drafts of what became Art. 211.[45] The reference to a single competent organization ultimately prevailed, arguably avoiding uncertainties related to competence and ensuring a higher degree of uniformity of the rules and standards developed. Other international bodies, such as the International Labour Organization (ILO) and the International Atomic Energy Agency (IAEA) may also play a certain role,[46] but in a more indirect manner.[47] Cooperation may also take place through a 'general diplomatic conference'. This expression, which emphasizes the general character of the conferences referred to and which is also used in Arts. 217 and 218, contrasts with the reference to 'diplomatic conference' used in all other provisions of Part XII.[48] It may be inferred from the purpose of the three provisions, concerned with truly international standards, that reference is made to conferences open to 'universal participation',[49] as opposed to geographically or otherwise limited participation. The word 'diplomatic' makes it clear that such a conference must be composed of plenipotentiaries, i. e. delegates invested with full authority to represent their State, as opposed to representatives of international intergovernmental organizations or independent experts.[50]

3. '[States] shall […] promote the adoption […] of routeing systems'

15 Besides the obligation to establish rules and standards intended to prevent, reduce and control vessel-source pollution, Art. 211 (1) also includes the obligation to adopt routeing systems. It was included as a consequence of the *Amoco Cadiz* incident with the objective of enhancing preventive action. Routeing systems, which include traffic separation schemes, traffic lanes, deep water routes and recommended routes, as well as precautionary areas and areas to be avoided, are known to enhance safety of navigation, in particular in congested or otherwise dangerous shipping areas. The elaboration and adoption of such routeing systems is assigned to the IMO by Reg. 10, Ch. V, Annex, International Convention for the Safety of Life at Sea 1974 (SOLAS 1974). The IMO's competence as the only international body for developing guidelines, criteria and regulations on an international level for ships' routeing systems is well established.[51] Ships' routeing has more than a century of history and is of widespread use, since it corresponds to the needs of shipping companies and coastal States, both of whom are interested in enhanced safety of navigation. It is recognized that such ships' routeing systems, as a side effect of enhanced safety, contribute to the protection of the marine environment.[52]

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[45] 19th Meeting (note 20), 84 (Tanzania).

[46] *Molenaar* (note 5), 137.

[47] They are not mentioned in the matrix prepared by the UN: UN DOALOS, 'Competent or Relevant International Organizations' under the United Nations Convention on the Law of the Sea, LOSB 31 (1996) 79, 87.

[48] Arts. 207, 208, 210, 212, 213, 214, 216, 222.

[49] See also Nordquist/Rosenne/Yankov (note 37), 191, 202 (MN 211.15(e)).

[50] *Ibid.*, 125, 133 (MN 207.7(d)).

[51] Reg. 10 (2), Ch. V, Annex, SOLAS 1974.

[52] Reg. 10 (1), Ch. V, Annex, SOLAS 1974.

4. 'States shall adopt laws and regulations […] at least hav[ing] the same effect as that of generally accepted international rules and standards'

Art. 211 (2) is related to the prescriptive obligations of the flag State. It constitutes the complement to Art. 94 insofar as it further details those obligations that concern the prevention, reduction and control of pollution of the marine environment. The enforcement facet of flag State jurisdiction regarding vessel-source pollution is enshrined in Art. 217. The use of the term 'registry', alongside the term 'flag' simply conforms to a practice consistently followed in the IMO conventions.[53] In contrast to Art. 211 (4) to (6), Art. 211 (2), like the first paragraph of the provision, articulates a prescriptive obligation and not a prescriptive power.[54] **16**

Art. 211 (2) stipulates that the flag State shall adopt laws and regulations that have 'at least the same effect as that of generally accepted international rules and standards' established through the mechanism mentioned in Art. 211 (1). By referring to the effect of national legislation, the formulation leaves it up to States to decide on the means by which this effect is to be obtained. The main feature of Art. 211 (2) is to specify, by reference to international rules and standards, the minimum threshold that national legislation must respect. Nothing prevents flag States, if they consider it appropriate, from prescribing more stringent standards for their fleets. In practice, however, States will usually refrain from doing so given the negative impact on the competitiveness of their fleet.[55] Therefore, the problem associated with flag State primacy is usually related to the lack of incentives for flag States to prescribe – and, even more so, to enforce – comprehensive rules of pollution prevention for their fleets, a problem most strikingly crystallized by the phenomenon of what is known as flags of convenience.[56] **17**

The meaning of the expression 'generally accepted international rules and standards' has been much discussed. The Convention does not define the term nor does it give any interpretative guidance, apart from a vaguely related reference to notification requirements in Art. 211 (7).[57] The ancestor of the expression is to be found in Art. 10 of the High Seas Convention on the obligation of the flag State to impose CDEM standards on vessels sailing under its flag.[58] From a practical point of view, the precise meaning of the expression may have further implications in Art. 211 (5), in which, rather than determining the minimum with which the flag States have to comply, it indicates the limits of coastal States' powers. It will thus be discussed below.[59] **18**

Another issue is whether the provision in Art. 211 (2) is also recognized as customary law.[60] The answer is determinative as to whether a coastal State party to the Convention may apply Art. 211 (2) to a non-party flag State, and if a non-party coastal State may apply Art. 211 (2) to a flag State, be it party or non-party. This is particularly relevant, since the 'generally accepted' clause potentially includes treaty law that is not consented to by all States and that is too technical to acquire customary status. There are good reasons to believe that Part XII of the Convention, if not the whole Convention except for Part XI, constitutes **19**

[53] Nordquist/Rosenne/Yankov (note 35), 147, 154 (MN 209.10(c)).

[54] See reference *supra*, note 37.

[55] State practice of standards, which are more stringent than global norms, is therefore scarce. An exception in this respect is the proposal of the European Commission on ship recycling, which is, though not concerned with shipping itself, but rather with the disposal of ships at the end of their useful life, related to Art. 211 (2) insofar as EU-flagged vessels would be only allowed to be recycled in facilities meeting more stringent environmental requirements. *Cf.* EU Commission, Proposal for a Regulation of the European Parliament and of the Council on Ship Recycling, 23 March 2012, COM(2012) 118 final.

[56] For further information on 'flags of convenience', see *Bartenstein* on Art. 217 MN 2 and *Guilfoyle* on Art. 91 MN 4–6.

[57] With regard to the distinction between 'rules' and 'standards', see *supra*, MN 12.

[58] For more detailed information, see *Molenaar* (note 5), 148 *et seq*.

[59] See *infra*, MN 33 *et seq*.

[60] See *Molenaar* (note 5), 161 *et seq*.

customary law. This is the view of the United States, the most prominent non-party State.[61] As regards State practice, according to a survey of several national legislations, States do not always draw a distinction between flags of States that are parties to the Convention and States that are not,[62] suggesting an underlying presumption that Art. 211 (2) forms customary law. With regard to persistent objections, it must be asked if such objections may be overridden by the 'generally accepted' clause. Molenaar rightly distinguishes three situations.[63] First, a persistent objector to a customary rule or standard resulting from a regulatory agreement renounces, by consenting to the Convention, its objection. Second, a State which has, in the course of amending the technical agreement, opted out from a specific regulatory rule or standard preserves its position, in line with Art. 311, since opting-out is explicitly provided for by the regulatory agreement. Third, a State which is not a party to the Convention and at the same time a persistent objector to a specific rule or standard should be recognized as such even if the Convention is considered customary law.

5. 'States which establish particular requirements […] for the entry of foreign vessels into their ports'

20 Art. 211 (3) addresses the particular situation of access of foreign vessels to internal waters, ports and off-shore terminals. It outlines more precisely the powers of the State in ports or internal waters, addresses harmonized requirements for access to ports or internal waters and the corresponding obligations of the flag State and confirms the right of innocent passage.

21 Although the provision refers to States in general, given the neutral formulation, it follows from the context that Art. 211 (3) addresses some aspects related to the establishment by States of conditions for the entry of foreign vessels into their ports or internal waters or for a call at their off-shore terminals and complements in some respects the provision on obligations of the flag State. With respect to the first category of States, the term 'port State' is often used, meaning the State in whose ports or internal waters are foreign vessels.[64] Some authors assert, however, that port States have no prescriptive, but only enforcement authority, as set forth in Art. 218, and that any prescription with regard to internal waters and ports is based on coastal State jurisdiction.[65] Nevertheless, Art. 211 (3) is commonly associated with port State jurisdiction,[66] suggesting that port State jurisdiction *lato sensu* includes the State's prescriptive authority concerning its ports and internal waters.[67]

22 The legal basis of port States' prescriptive authority is not to be found in Art. 211 (3), but indirectly in other provisions of the Convention, such as Arts. 2, 8 and 25, and in customary law. Territorial sovereignty allows States to establish requirements for the prevention, reduction and control of pollution of the marine environment as a condition applicable to foreign vessels seeking access to their territory, i. e. the internal waters, ports and off-shore terminals. Except in certain situations of distress,[68] a State may deny access to its ports altogether, despite the fact that State practice and a (rebuttable) presumption support the principle of open ports.[69] *A fortiori*, access may be subject to conditions of

[61] United States, Presidential Proclamation No. 5030, Federal Register, Vol. 48, 1983, 605 (codified in Code of Federal Rules, Vol. 3, sec. 5030).

[62] Erik Franckx (ed.), Vessel-Source Pollution and Coastal State Jurisdiction: The Work of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution (1991–2000) (2001), 50 *et seq.*

[63] *Molenaar* (note 5), 163 *et seq.* (with further references); see also a systematic presentation in *Erik J. Molenaar*, Port and Coastal States, in Donald Rothwell et al. (ed.), The Oxford Handbook of The Law of the Sea (2015), 287 *et seq.*

[64] *Tan* (note 5), 23. See also generally *Bartenstein* on Art. 218 MN 3, 7.

[65] *Bodansky* (note 6), 759.

[66] Among others see Nordquist/Rosenne/Yankov (note 37), 203 (MN 211.15(g)) and *Molenaar* (note 5), 104.

[67] See also *Erik J. Molenaar*, Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage, ODIL 38 (2007), 225, 230, 233, 236.

[68] For further information, see *Barnes* on Art. 18.

[69] On the presumption, see *Louise de la Fayette*, Access to Ports in International Law, IJMCL 11 (1996), 1, 22.

entry,[70] as the International Court of Justice confirmed in the *Nicaragua* decision: 'It is […] by virtue of its sovereignty that the coastal State may regulate access to its ports.'[71] This customary prescriptive authority must be distinguished from the expansion of port State enforcement powers, which has been rightly welcomed as one of the most significant innovations of the Convention.[72] While, in practice, prescription and, even more so, enforcement of conditions of entry are always balanced against the economic and competitive imperatives of the ports,[73] this has not prevented States from making extensive use of their power to take measures for the prevention, reduction and control of marine pollution.[74]

Art. 211 (3) cl. 1 imposes procedural constraints on the prescriptive power of the port State. Given the word 'shall',[75] the port State, whenever it exercises its prescriptive power, has the obligation to give due publicity to the access requirements and to communicate them to the competent international organization, i. e. the IMO, which, in turn, ensures information dissemination. The choice of the adjective 'particular' to describe entry requirements in the first sentence of Art. 211 (3) is unclear. A compelling interpretation of the word would be that it grants broad discretionary powers to the port State so that it may decide, after weighing environmental needs and economic constraints, which conditions are deemed reasonable,[76] even if these conditions are more stringent than those usually imposed according to port State practice.[77] It has been argued that the publicity obligation only applies if conditions of access are more stringent than usual,[78] but, in order to ensure the smooth course of port activities, publicity should be given to any requirement. The form and modality of the publicity and the communication requirements are not specified. It seems, therefore, that as long as the information may easily reach the actors concerned, the obligation is fulfilled. In practice, well-known information channels established by the IMO are probably preferable. **23**

6. '[identical] requirements […] established […] in by two or more coastal States'

Art. 211 (3) cl. 2 addresses the situation where two or more coastal States establish identical requirements of port access for the sake of harmonization. It requires the concerned States to indicate, in their communication addressed to the IMO, the participating States. This second sentence is tied to the objective of harmonizing policies contemplated in Art. 194 (1). Given that the provision applies to the establishment of requirements, agreements stipulating new obligations are clearly within the scope of the provision.[79] In contrast, cooperation in enforcement of existing requirements under regional arrangements is not **24**

[70] See among others *Churchill/Lowe* (note 5), 61 *et seq.*

[71] ICJ, *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua *v.* United States), Merits, Judgment of 27 June 1986, ICJ Reports 1986, 14, para. 213.

[72] Amongst many others: *Churchill/Lowe* (note 5), 350; *Bodansky* (note 6), 759; *Rothwell/Stephens* (note 5), 355.

[73] See also *Tan* (note 5), 320.

[74] An anecdotic example is Germany which, according to *Wolfgang Graf Vitzthum*, Maritimes Aquitorium und Anschlusszone, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 63, 91, was the first State to do so on 23 August 1994 by the adoption of a regulation on port access conditions (see BGBl 1994 I, 2246).

[75] See Nordquist/Rosenne/Yankov (note 35).

[76] *Ted L. McDorman*, Regional Port State Control Agreements Some Issues of International Law, OCLJ 5 (2000), 207, 218.

[77] *Molenaar* (note 5), 104; for a broad interpretation of the port State's jurisdiction, see also *Bevan Marten*, Port State Jurisdiction, International Conventions, and Extraterritoriality: An Expansive Interpretation (2015), 129 et seq.

[78] *Ibid.*

[79] An example of an accord establishing new requirement would be the Agreement Concerning Specific Stability Requirement for Ro-Ro Passenger Ships Undertaking Regular Scheduled International Voyages Between or to or from Designated Ports in North West Europe and the Baltic Sea.

covered. Some discussion concerns the question of whether regional cooperation agreed upon in instruments on port State control, such as the 1982 Paris Memorandum of Understanding on Port State Control,[80] are based on Art. 211 (3). It has been argued that these agreements are under the scope of the provision.[81] It may be counter-argued, as Molenaar does (with good cause), that this type of agreement merely harmonizes enforcement of already existing regulations and does not enact 'new' standards and, for this reason, does not fall under the scope of Art. 211 (3).[82] A memorandum of understanding on port State control is not an international treaty, but rather a regional non-binding administrative agreement between maritime authorities of the participating States.[83] Instead of partaking in international standard-setting, it aims to coordinate compliance control related to existing conventions, notably in the field of safety and environmental protection.[84]

7. 'Every [flag] State shall require the master of [its] vessel[s] […] to indicate whether it complies with the port entry requirements'

25 Unlike the preceding sentences, Art. 211 (3) cl. 3 is not concerned with port State measures. It rather complements the obligations of the flag State, in particular that of Art. 94 (4)(c), with respect to vessels navigating in areas which are under the scope of cooperative arrangements of two or more port States with harmonized conditions of port access. The flag State, to facilitate the application of port access requirements, has to make sure that the shipmaster, when sailing through the territorial sea of a State party to such an agreement and upon the request of that State, provides information as to whether the vessel is proceeding to a State party to the regional agreement and, if so, whether it complies with the port entry requirements.

8. 'without prejudice to article 25, paragraph 2'

26 Art. 211 (3) cl. 4 preserves the jurisdictional balance established for the territorial sea with respect to the application of the preceding clauses. On the one hand, it maintains the right of innocent passage (→ Arts. 17 *et seq.*). On the other hand, by referring to Art. 25 (2), it preserves the right of the coastal State, with respect to 'ships proceeding to internal waters or a call at a port facility outside internal waters, […] to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal water or such a call is subject'.[85] Art. 211 (3) cl. 4 corroborates the interpretation of cl. 1, according to which the port State has a broad discretionary power to determine its port entry conditions. While Art. 211 (3) cl. 3 aims to provide the port State with the information necessary to prevent problems of compliance in accordance with Art. 25 (2), the objective of cl. 4 is to ensure that preventive port State measures do not impede innocent passage. Accordingly, the port State may prescribe conditions of entry that go beyond what is possible to enforce in the territorial sea, due to the right of innocent passage. These conditions may, however, be enforced only once the vessel seeks access to or is in the port.[86]

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[80] Paris Memorandum of Understanding on Port State Control, 26 January 1982, ILM 21, 1.

[81] *Valenzuela* (note 5), 498.

[82] For more detail, see *Molenaar* (note 5), 104 and 117 *et seq.*

[83] *Doris König*, Port State Control: An Assessment of European Practice, in: Peter Ehlers/Elisabeth Mann-Borgese/Rüdiger Wolfrum (eds.), Marine Issues: From a Scientific, Political and Legal Perspective (2002), 37, 40. The non-binding character is also supported by the language used in the MOUs.

[84] *Z. Oya Özçayir*, The Use of Port State Control in Maritime Industry and Application of the Paris MOU, OCLJ 14 (2009), 201, 201–212; *König* (note 83), 39.

[85] See generally *Barnes* on Art. 25.

[86] See also: *Molenaar* (note 67), 230; *Tan* (note 5), 205.

9. 'coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for […] foreign vessels'

Art. 211 (4) is related to the prescriptive powers of the coastal State in its territorial sea. It must, therefore, be read in light of Part II, which lays down the rules applicable to this maritime zone, in particular those relating to the right of innocent passage by foreign vessels. 27

Contrary to the preceding paragraphs, Art. 211 (4) does not set forth an obligation, but grants a right. Tied to Art. 21, Art. 211 (4) cl. 1 confirms that, given its sovereignty over the territorial sea (→ Art. 2), the coastal State may prescribe measures for the prevention, reduction and control of marine pollution from foreign vessels, including from those that exercise their right of innocent passage. It should be noted that although Art. 211 (4) articulates a right, coastal States are under the general obligation, set forth in Arts. 192 and 194, to take measures that aim to prevent pollution of the marine environment. Specific obligations may also arise out of special conventions and agreements, which, in line with Art. 237 of the Convention, must be complied with in a manner consistent with the principles set forth in the Convention. 28

10. 'such laws and regulations shall […] not hamper innocent passage of foreign vessels'

Art. 211 (4) cl. 2 upholds the general balance established in the Convention between the interests of the coastal States and of the flag States by the explicit reference to Section 3 of Part II on innocent passage in the territorial sea. The right of the coastal State to adopt laws and regulations is limited by the obligation, which results from the word 'shall',[87] not to hamper innocent passage of foreign vessels. Prescriptions with hampering effect must therefore be distinguished from those without hampering effect. Only in the latter case, the coastal State may, in its territorial sea, impose national rules and standards, while it is limited to prescribing international rules and standards in case they have a hampering effect.[88] The 'Solomonic compromise'[89], reached under the third Section of Part II of the Convention, distinguishes between discharge and navigation standards, on the one hand, and CDEM standards, on the other. The latter being more burdensome for international navigation, the coastal State may only adopt, according to Art. 21 (2), laws and regulations that give effect to generally accepted international rules and standards, when it comes to CDEM standards. This limitation does not apply to non-CDEM measures for the safety of navigation and the regulation of maritime traffic (→ Art. 21 (1)(a)), the conservation of the living resources of the sea (→ Art. 21 (1)(b)), the preservation of the environment of the coastal State and the prevention, reduction and control of pollution (→ Art. 21 (1)(f)). Sea lanes and traffic separation schemes, necessary for the safety of navigation, arguably including environmental purposes,[90] may also be prescribed unilaterally, although the recommendations of the IMO must be taken into account (→ Art. 22). All such standards must be duly publicized, according to Arts. 21 (3) and 22 (4). 29

Surprisingly, Art. 211 (4) does not address the issue of international straits, and neither does any other paragraph of Art. 211. It is therefore appropriate to resort, by analogy, to the relevant provisions of Part III, bearing in mind Art. 233. This seems justified not only because international straits lay in waters that, had they not the particular features of international straits, would be under the regime of innocent passage, but also because coastal and navigational interests are balanced following the same technique used for the territorial sea; in international straits, however, the equilibrium achieved is more to the advantage of navigation.[91] Conse- 30

[87] See *supra*, note 37.
[88] *Bodansky* (note 6), 749.
[89] *Ibid.*
[90] *Ibid.*, 751.
[91] *Churchill/Lowe* (note 5), 347, without discussing the matter, refer to Arts. 41 and 42.

quently, pursuant to Art. 41, sea lanes and traffic separation schemes must conform to generally accepted international regulations. Furthermore, prescriptive powers with regard to the environment are limited to discharge standards and must be exercised in a manner that does not have the 'practical effect of denying, hampering or impairing the right of transit passage', according to Art. 42. States adopting such discharge standards are limited to doing so 'by giving effect to applicable international regulations', according to Art. 42 (1)(b). Although the word 'applicable' is usually interpreted as meaning that a rule or standard must directly be binding for both States involved,[92] it has been mentioned that as an arguably absurd consequence of this interpretation, the coastal State's jurisdiction would be broader in its EEZ than in its international straits.[93] Hence, a suggested alternative interpretation would be to equate 'applicable' with 'generally accepted' international regulations.[94]

11. 'Coastal States […] may in respect of their exclusive economic zones adopt laws and regulations […] giving effect to generally accepted international rules and standards'

31 Art. 211 (5) is concerned with the coastal State's prescriptive powers in the EEZ. It is therefore closely related to Part V and, in particular, to Art. 56 (1)(b)(iii), according to which the coastal State has, in its EEZ, 'jurisdiction as provided for in the relevant provision of this Convention with regard to […] the protection and preservation of the marine environment'. Furthermore, the prescriptive powers mentioned in Art. 211 (5) are, as explicitly indicated, the necessary prerequisite for the exercise of the enforcement powers provided for in Section 6, namely in Art. 220.

32 Like Art. 211 (4) on the coastal State's prescriptive authority in the territorial sea, Art. 211 (5), using the word 'may', articulates a right, contrary notably to paragraphs 1 and 2. As under Art. 211 (4), the coastal State has the general obligation, set forth in Arts. 192 and 194, to take measures to prevent pollution of the marine environment. It may further be bound, in conformity with Art. 237, by international commitments to take action in its EEZ in order to limit vessel-source pollution. The very notion of a coastal State's authority over waters beyond the territorial sea is a novelty established in law for the first time by the Convention. However, although the most significant change with respect to prescriptive – and enforcement – powers concerns the EEZ, the coastal State's powers over pollution in this maritime zone remain, in the final analysis, limited and do not substantially encroach upon international navigation.

12. 'generally accepted international rules and standards'

33 Art. 211 (5), like Art. 211 (2) on flag States' obligations, refers to 'generally accepted international rules and standards established through the competent international organization or general diplomatic conference'. The general formulation notwithstanding, the organization referred to is, again, the IMO. The rules and standards referred to by the expression 'generally accepted international rules and standards' are determined in the

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[92] *Molenaar* (note 5), 168 *et seq.* Contra: Mensah, who argues that the principle of 'no more favorable treatment', which he considers an integral part of general international law, allows States to apply international rules and standards even to vessels flying the flag of a State that is not bound by these rules and standards: *Thomas A Mensah*, Marine Pollution from Ships, Prevention of and Responses to, MPEPIL, para. 33, available at: http://www.mpepil.com.

[93] *Molenaar* (note 5), 293. See Art. 211 (5), on coastal States' prescriptive powers in the EEZ, referring to 'generally accepted international rules and standards'.

[94] *Bernard H. Oxman*, Environmental Protection in Archipelagic Waters and International Straits: The Role of the International Maritime Organization, IJMCL 10 (1995), 467, 477; *Molenaar* (note 5), 292. For a similar problem of coherence of the coastal State's powers in its maritime zones in Art. 234, see *Kristin Bartenstein*, The 'Arctic Exception' in the Law of the Sea Convention: A Contribution to Safer Navigation in the Northwest Passage?, ODIL 42 (2011), 22, 41 *et seq.*, with further references. See also *Franckx/Boone* on Art. 234.

same way as under Art. 211 (2). However, unlike in Art. 211 (2), in which they correspond to the minimum level of the flag State's action, they constitute the limit of the coastal State's authority with respect to the EEZ. They are therefore directly tied to the issue of the coastal State's action infringing upon navigational rights, which is the core problem when it comes to protecting the marine environment against vessel-source pollution. Opinions diverge as to which international rules and standards must be considered as 'generally accepted'. Interpretation of the clause, in accordance with the rules of Art. 31 of the Vienna Convention on the Law of Treaties, is therefore necessary. Different kinds of systematization efforts have been made in order to determine the most appropriate interpretation of this clause.

34 One possibility is to resort to the classic categories of legal sources, as identified by Art. 38 (1) of the Statute of the International Court of Justice. This strategy led several authors to hold the view that only international rules and standards which have customary status may be viewed as 'generally accepted'.[95] An advantage of this interpretation is that soft law originating from the IMO and grown into customary law could be adequately taken into consideration.[96] It is not clear, however, if this criterion would be helpful, as it may be very difficult to identify the rules or standards that have evolved into customary law. This difficulty might be avoided with respect to rules and standards laid down in IMO and other conventions in force that have universal character.[97] However, while the quantitative and functional requirements of the entry into force of such treaties ensure a certain level of acceptance, this level is established based on considerations relevant for the treaty in question and not necessarily for the balancing of flag and coastal States' interests in general.[98] It may therefore not be appropriate to limit the relevant rules and standards to those enshrined in widely accepted treaties.

35 Some authors doubt that the classic categories of legal sources constitute a sound criterion for the 'generally accepted' clause,[99] arguing that the expression would have no added value.[100] If it had been the States' intention to refer to rules and standards resulting from customary law or conventions in force, they could have done so explicitly. Some interpretations therefore advocate a *sui generis* category of rules and standards. Accordingly, a significantly widespread acceptance of the rules or standards – by whatever form of international consent – has been suggested as a valuable alternative criterion.[101] Many authors agree upon considering MARPOL, or at least its first two annexes, as 'generally accepted', as it is the most important IMO instrument addressing pollution prevention.[102] With regard to other legal regimes, the appropriate threshold is much discussed. Some interpretations require widespread ratification and sometimes incorporation in national law.[103] It is however difficult, if not impossible, to

[95] *W. van Reenen*, 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, NYIL 12 (1981), 3, 12; with reference to the similarity of the formulation of the generally accepted clause to that of Art. 38 (1)(b) Statute of the International Court of Justice: *Alexander Proelß*, Meeresschutz im Völker- und Europarecht (2004), 87 *et seq.*; *Graf Vitzthum* (note 74), 108.

[96] *George C. Kasoulides*, Port State Control and Jurisdiction: Evolution of the Port State Regime (1993), 39 *et seq.*; *Proelß* (note 95); *Graf Vitzthum* (note 74).

[97] *Alan Boyle*, Marine Pollution under the Law of the Sea Convention, AJIL 79 (1985), 347, 356; *Valenzuela* (note 5), 492.

[98] *Molenaar* (note 5), 155.

[99] *Bernard H. Oxman*, The Duty to Respect Generally Accepted International Standards, NYJILP 24 (1991), 109, 146 *et seq.*

[100] *Molenaar* (note 5), 152.

[101] *Gregorios J. Timagenis*, International Control of Marine Pollution, vol. II (1980), 606; *Tan* (note 5), 197.

[102] *Patricia Birnie/Alan Boyle/Catherine Redgwell*, International Law and the Environment (2009), 404; *Tan* (note 5), 196; *Valenzuela* (note 4), 488–489.

[103] *Daniel Vignes*, La valeur juridique de certaines règles, normes ou pratiques mentionnées au TNCO comme 'généralement acceptées', AFDI 25 (1979), 712, 718; *Kasoulides* (note 96), 37; *Oxman* (note 99), 146 *et seq.*; *Louis B. Sohn*, 'Generally Accepted' International Rules, Washington LR 61 (1986), 1073, 1074–1075; *Tullio Treves*, Navigation, in: René-Jean Dupuy/Daniel Vignes (eds.), A Handbook on the New Law of the Sea, vol. II (1991), 874–875.

identify, in theory and for each and every situation, the number of ratifications and incorporations that would be sufficient. Moreover, it has been cautiously suggested that rules and standards included in conventions that are not yet in force, but have been signed by a significant number of States, might be considered 'generally accepted'.[104] This view seems sound only if acceptance can be established otherwise; therefore the signing of a given treaty alone is not a valid criterion.[105] Besides the number of parties, their characteristics, such as being a major maritime or an important port State or a State with particularly vulnerable coastal regions, may also be relevant considerations. It seems indeed that the States that have accepted the given rules and standards should be representative of the various interests regarding the issues addressed.[106] It goes without saying that customary rules are included in this interpretation.[107]

36 As a consequence of any such *sui generis* interpretation of the 'generally accepted' clause, some international rules and obligations could be applied to States that have not explicitly accepted them. This result is corroborated by the fact that, unlike several other provisions,[108] Art. 211 (5) does not use the word 'applicable', which normally implies the applicability of a given rule between two given States. The binding effect of the 'generally accepted' rules and standards, even upon States that did not consent to them, underlined by some authors,[109] is widely supported in literature.[110] The role of the terms of reference seems to be precisely to make rules and standards established outside the framework of the Convention applicable by means of incorporation. The *pacta tertiis* rule is not encroached upon, as States, by becoming party to the Convention, agree to being bound by these international rules and standards. Furthermore, the number of States that will be bound by a rule or standard to which they have not consented directly or to which they are even opposed will be small, as these rules and standards are widely accepted. It is suggested that a drawback of this interpretation might be the reluctance of States to ratify technical agreements to which they would be bound automatically through the Convention.[111] However, through ratification a State becomes a party to the technical agreement, a status which grants direct influence on the regulatory framework and its evolution.[112] In addition, States interested in the binding effect of these regulatory instruments must consider that their ratification contributes to providing the 'generally accepted' character.

37 Prescriptions that regulate shipping traffic, such as ships' routeing systems, ship reporting systems and vessel traffic systems, are recognized as contributing to the 'prevention, reduction and control of pollution from vessels' and therefore, in principle, qualify under Art. 211 (5). Yet, ships' routeing systems and ship reporting systems, which may be made mandatory beyond the territorial sea, i. e. in the EEZ, generally need approval by the IMO.[113] Since Art. 211 (5) focuses on the coastal State's jurisdiction to prescribe rules and standards established at the international level, it does not deal with the approval role of the IMO.[114] Furthermore, these systems are usually tailor-made for the area to which they apply. This raises the question of whether these systems are based on 'generally accepted' rules. Denying

[104] *Kari Hakapää*, Marine Pollution in International Law: Material Obligations and Jurisdiction (1981), 120.
[105] *Oxman* (note 99), 152 (footnote 120).
[106] *Oxman* (note 99), 157; *Molenaar* (note 5), 156 *et seq.*; *Frederic L. Kirgis*, Shipping, in: Oscar Schachter/Christopher C. Joyner (eds.), United Nations Legal Order, vol. II (1995), 715, 737–738.
[107] *Molenaar* (note 5), 157.
[108] Arts. 42 (1)(b), 60 (5), 94 (3)(b) and (4)(c), 123, 214, 216, 217 (1), 218 (1), 219, 217 (1), (2) and (3), 222, 226 (1)(b) and (c), 228 (1), 230 (1) and (2).
[109] *Churchill/Lowe* (note 5), 347; *Sohn* (note 103), 1075.
[110] *Van Reenen* (note 95), 15; *Hakapää* (note 104), 119; *Bodansky* (note 6), 761; *Molenaar* (note 5), 157; *Timagenis* (note 101), 606.
[111] *Churchill/Lowe* (note 5), 347.
[112] *Molenaar* (note 5), 158.
[113] Reg. 10-2, Ch. V Annex SOLAS 1974 and 11-2, Ch. V Annex SOLAS 1974 (for ships' routeing and ship reporting systems) and Reg. 12-3, Ch. V Annex SOLAS 1974 (for vessel traffic systems).
[114] *Molenaar* (note 5), 365.

it poses, however, the problem that States that are parties to the Convention, but not to SOLAS 1974, would not be bound by them.

While the expression 'generally accepted rules and standards' raises difficult problems of interpretation, State practice suggests that they are mostly theoretical. Difficulties arise in ascertaining the level of acceptance deemed necessary by the majority of the States for a norm to be a 'generally accepted international rule or standard' as well as in identifying the kinds of rules and standards covered by the expression. Although any assessment of State practice faces methodological challenges,[115] several partial investigations hint at a rather liberal practice. Coastal States swiftly assume that international rules and standards are 'generally accepted', sometimes due to the sole fact that they are themselves bound by them.[116] Some States even consider that all measures deemed necessary to prevent pollution of their EEZ are within the scope of Art. 211 (5).[117] Ships' routeing and ship reporting systems are assumed to be 'generally accepted', as they are usually applied irrespectively of the vessel's flag.[118] **38**

13. 'conforming to and giving effect to'

The emphasis placed on the pre-eminence of generally accepted international rules and standards reflects the balance that has been established between the interests of the coastal and the maritime States. The coastal State has the right – and sometimes the obligation, pursuant to specific commitments – to take action, but it cannot go beyond generally accepted international rules and standards, safeguarding the interests of international navigation. The extent of the coastal States' discretion as to how to conform to their obligation and to exercise their right through generally accepted international rules and standards under the paragraphs 2 and 5 of Art. 211 seems not the same. While under Art. 211 (2) the domestic law 'shall at least have the same effect', Art. 211 (5) requires that domestic laws and regulations must be adopted 'conforming to and giving effect to' such international rules and standards. The latitude implied by the reference to the words 'giving effect to' appears to be negated by the obligation of conformity, which unlike Art. 211 (2) seems to require accordance with respect not only to the effect, but also to the design of the domestic laws and regulations. The obligation to conform to international rules and standards implies that in the EEZ, the coastal State cannot choose the level of protection, since going beyond international rules and standards would be as unlawful as staying behind. Furthermore, if no such international rules and standards exist, the coastal States have no prescriptive rights.[119] **39**

14. Coastal States may adopt laws and regulations for special areas

Art. 211 (6) addresses the problem of particularly vulnerable areas of the EEZ with special protection needs that cannot be met by general rules and standards, but require the establishment of special areas of protection. While Art. 211 (6) is the general provision on special areas, Art. 234 is the *lex specialis* provision for ice-covered areas.[120] Both provisions share their negotiation and drafting history until the RSNT, which introduced a separate provision for ice-covered areas.[121] **40**

Art. 211 (6) grants the coastal State the right to establish 'special areas' in which special mandatory measures apply. The corresponding enforcement powers are set forth in Art. 220. **41**

[115] *Ibid.*, 164 *et seq* and 172 *et seq.*

[116] This is the conclusion to be drawn from an assessment of State practice undertaken by *Molenaar* (note 5), 177 *et seq.*, and Franckx (note 62), 53.

[117] See *Robin R. Churchill*, The Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention, in: Alex G. Oude Elferink (ed.), Stability and Change in the Law of the Sea: The Role of the LOS Convention 2005), 91, 129 *et seq.*

[118] *Molenaar* (note 5), 365.

[119] *Ibid.*, 363.

[120] See *Franckx/Boone* on Art. 234 MN 3.

[121] RSNT (note 24): Art. 21 became Art. 211 whereas Art. 43 evolved into Art. 234.

Art. 211 (6) complements, by providing the necessary prescriptive power, the general obligation contemplated in Art. 194 (5), to take measures 'necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life'. Nothing prevents the coastal State from establishing protective measures in its EEZ through laws and regulations the geographical scope of which is limited, provided that it abides by the limits imposed by Art. 211 (5). However, if the coastal State decides to establish a special area, it is bound by the conditions laid down in the subparagraph (a), (b) and, if applicable, (c) of Art. 211 (6).

42 It seems that thus far no special areas have been created under Art. 211 (6) and a plausible reason for this might be the provision's cumbersome regime.[122] An increasing number of marine protected areas are nevertheless being established with the aim of protection or conservation, but they differ from the special areas framed by Art. 211 (6).[123] First, the special area system available under MARPOL 73/78 is widely used. Such MARPOL special areas can be located outside the EEZ and concern international areas as well as areas of more than one State. They are designed for areas, which need, for technical reasons relating to their oceanographical and ecological condition and to their sea traffic, protection against specific pollution. The protection regimes for various sources of pollution are set forth in the annexes of MARPOL. Second, the concept of particularly sensitive sea areas (PSSA) has become more and more consolidated. It has evolved from a mere pragmatic initiative under the auspices of the IMO to a concept with a legal basis and clear guidance provided by the Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas.[124] The creation of a PSSA entails the establishment of a tailor-made legal regime, the associated protective measures,[125] which is neither limited to a particular maritime zone nor to pollution issues, but may straddle various maritime zones and include routeing measures or vessel traffic services. Providing greater flexibility than Art. 211 (6), PSSAs and MARPOL special areas seem to suit States' needs better and although they are not directly envisioned by the Convention, they contribute to implementing it.

15. Constitutive Conditions

43 Art. 211 (6)(a) lays down three conditions for the establishment of a special pollution protection area. First, the area concerned must be 'a particular, clearly defined area of [the coastal State's] exclusive economic zone'. This wording has raised the question of whether special areas are confined to the EEZ or may overlap with the territorial sea. While Art. 211 (6)(a) clearly states that the area must be one 'of' the EEZ, the wording of Art. 234 – 'within the limits of the exclusive economic zone' – seems more ambiguous and has sparked a heated debate.[126] Under both provisions, the main argument in favour of a special area that may extend to the territorial sea is to the effect that the coastal State must be granted at least as much competence within its territorial sea as within its EEZ.[127] Coherence would be threatened if the coastal State has more power under Art. 211 (6), than under the provisions applicable to the territorial sea, an issue discussed below.[128] According to the second condition, the normally applicable international rules and standards referred to in Art. 211 (1) must be 'inadequate to meet special circumstances'. This may be difficult to establish, as the assessment of the adequateness implies a fair amount of discretion. Furthermore, there is

[122] *Robin R. Churchill,* Under-Utilized Coastal State Jurisdiction: Causes and Consequences (2015), 295 *et seq*.
[123] See also: *Gavouneli* (note 36), 72–82; *Barbara Kwiatkowska*, The 200 Mile Exclusive Economic Zone in the New Law of the Sea (1989), 174.
[124] IMO, Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, IMO Doc. A/RES/24/982 (2005).
[125] *Ibid*., para. 1.2.
[126] See *Bartenstein* (note 94), 28 *et seq*. and 45, with further references.
[127] *Ibid*.; *Molenaar* (note 5), 402.
[128] See MN 45.

no direct definition of the expression 'special circumstances', although the third condition provides some interpretative guidance. According to it, the coastal State must have reasonable grounds for believing that, in a given area, special mandatory measures for the prevention of vessel-source pollution are required. The situations in which particular measures for the prevention of vessel-source pollution may be deemed necessary are circumscribed by reference to 'technical reasons in relation to [the area's] oceanographical and ecological conditions, as well as its utilization or the protection of its resources and the particular character of its traffic'. It is not entirely clear from this formulation if and to what extent it sets forth cumulative or alternative conditions. According to a compelling interpretation supported by the French version of the Convention and favoured by the United Nations Division for Ocean Affairs and the Law of the Sea (UN DOALOS),[129] the coastal State is required to establish three cumulative conditions,[130] that is:

(1) technical reasons related to the 'oceanographical and ecological conditions' of the area,
(2) technical reasons related to the 'utilization of the area or the protection of [the area's] resources', and
(3) technical reasons related to 'the particular character of traffic' in the area.

Another reading is corroborated by a comparison with the MARPOL 73/78 special areas concept which is intended to contain the effects of vessel traffic. Unlike Art. 211 (6)(a), this concept does not refer to the utilization of the concerned area nor to the protection of its resources, but only to the cumulative 'recognized technical reasons in relation to its oceanographical and ecological condition **and** to the particular character of its traffic'.[131] It is argued that the additional criteria mentioned in Art. 211 (6)(a) give it a wider scope than MARPOL 73/78 providing alternative rather than cumulative criteria.[132] Art. 211 (6)(a) accordingly applies to any clearly defined part of the EEZ, that is sensitive because of one of the reasons mentioned in Art. 211 (6)(a).[133]

16. Procedure

According to Art. 211 (6)(a), the coastal State must comply with a four-tiered procedure. 44
First, the coastal State must hold consultations with the States concerned by the intended measures. This arguably includes States that simply express an interest in the matter.[134] Consultations must be channelled through the IMO, the 'competent international organization'. Second, the coastal State has to provide the IMO with scientific and technical evidence in support of its claim as well as information on necessary reception facilities. In a third step, the IMO determines whether the conditions in the given area correspond to the requirements established by subparagraph (a). Fourth, upon a positive decision of the IMO, the coastal State may adopt the necessary laws and regulations, provided that they do not become applicable to foreign vessels until 15 months after the submission of the communication. The approval requirement, giving the IMO a veto against the coastal State's projects, contrasts with the genuine unilateral prescriptive powers of the coastal State with respect to ice-covered areas under Art. 234.[135]

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[129] UN DOALOS, Identification and Protection of Special Areas and Particularly Sensitive Sea Areas, IMO Doc. MEPC 43/6/2 (1999), para. 19.

[130] *Aldo Chircop*, The Designation of Particularly Sensitive Sea Areas: A New Layer in the Regime for Marine Environmental Protection from International Shipping, Aldo Chircop/Ted L. McDorman/Susan J. Rolston (eds.), The Future of Ocean Regime-Building: Essays in Tribute to Douglas M. Johnston (2009), 573, 588; *Proelß* (note 97), 94.

[131] Reg. 1-11 Annex I, Reg. 1-7 Annex II Annex V, Regs. 1-3 Annex V MARPOL 73/78 (emphasis added).

[132] *Molenaar* (note 5), 403.

[133] *Hakapää* (note 104), 253; *Malcolm Forster*, Special Areas in the Sea: Treaty and Legislative Practice, EnvtPolyL 16 (1986), 179, 180; *Kwiatkowska* (note 123), 174.

[134] *Chircop* (note 130), 588.

[135] See also: *Bartenstein* (note 94), 36–37; *Tan* (note 5), 215.

17. Types of measures that can be adopted

45 The coastal State may adopt laws and regulations designed for the prevention, reduction and control of vessel-source pollution. Yet, not only is the initiative of the coastal State subject to approval by the IMO, but its prescriptive authority is also limited. The laws and regulations adopted may not go beyond 'implementing such international rules and standards or navigational practices as are made applicable, through the [IMO], for special areas'. There is little doubt that discharge standards may be prescribed; otherwise, it would be unnecessary to submit information on necessary reception facilities during the authorization procedure. Navigational measures seem to notably include ship reporting and vessel traffic systems, traffic separation schemes and areas to be avoided (ATBA's).[136] No express mention is made of CDEM standards, but although they may affect international navigation considerably, nothing in the wording indicates that they are not encompassed by this provision. The coastal State is limited to a 'right of initiative',[137] i. e. the right to decide that more stringent rules and standards or practices are needed and to take the necessary procedural steps leading to the authorization to prescribe pre-designed measures; the role of the IMO is less clear. Evidently, it has an approval role with regard to the designation of special areas and a law-making function with regard to the establishment of the international rules, standards and practices. However, the wording is open to interpretation as to whether, as this is the case under subparagraph (c), the IMO is also called upon to approve the measures the coastal State intends to adopt. This is sometimes assumed,[138] with the argument that without approval by the IMO, measures adopted by the coastal State could bypass other substantive and procedural requirements and would, without the consent of the other States, lack mandatory character.[139] Yet, the coastal State only implements already existing measures, although it might not be guaranteed that each of these measures is 'generally agreed'. The real question is, therefore, whether approval of the coastal State's choice among these measures might safeguard any significant navigational interests and, if so, whether the lack of approval would be an unacceptable risk to those interests. The risk is that the coastal State might choose more, or more stringent, measures than the IMO would have allowed. According to a systematic interpretation, this seems acceptable, since, unlike under subparagraph (c), an approval requirement cannot be built on any explicit wording and the imposed measures, as measures elaborated under the IMO, were consented to by the international community in a general way.[140] Only if a coastal State imposes CDEM standards that do not meet the 'generally accepted' consent level and that are, as a matter of fact, unacceptable to a significant number of States, the risk for navigational interests may be considered unacceptable. In this particular case, the coastal State would have greater prescriptive powers in its EEZ than in its territorial sea under Arts. 211 (4) and 21, the latter requiring the 'generally accepted' consent level. Furthermore, even the coastal State's power under subparagraph (c) to adopt 'additional measures' does not override this consent level. Hence, overall coherence would call for an approval function of the IMO under subparagraph (a), although this seems unnecessary from a mere practical point of view and is not supported by the wording.

[136] *Kristina Gjerde/David Freestone*, Particularly Sensitive Sea Areas. An Important Environmental Concept at a Turning-Point, IJMCL 9 (1994), 455, 456.

[137] *Gavouneli* (note 36), 72.

[138] Interestingly, the study submitted to the IMO by the DOALOS, does not clearly state an approval function for the IMO with respect to subparagraph (a), whereas it does state such a function with respect to subparagraph (c); see UN DOALOS Identification and Protection of Special Areas (note 129), para. 18–19.

[139] *Molenaar* (note 5), 406.

[140] *Hakapää* (note 104), 254.

18. 'coastal States shall publish the limits of any such particular, clearly defined area'

Art. 211 (6)(b) sets forth the coastal State's obligation to publish the limits of the particular area. This requirement may be viewed as the fifth procedural step related to the establishment of special areas set forth in subparagraph (a). As the IMO is involved in their establishment, there is, unlike under Art. 211 (3), no obligation of communicating the measures to the IMO under Art. 211 (6)(a). 46

19. 'coastal States intend[ing] to adopt additional laws and regulation […] shall […] notify the organization thereof'

Art. 211 (6)(c) grants the coastal State the right to adopt additional laws and regulations for a special area established under subparagraph (a). The coastal State may prescribe discharge standards and navigational practices, provided that no CDEM standards other than 'generally accepted international rules and standards' are imposed upon foreign vessels. Although the wording of the reference to generally accepted international rules and standards slightly differs from that in Art. 211 (5), there seems to be no significant difference in meaning. As a consequence, the coastal State's prescriptive power, at least concerning CDEM standards, does not exceed, under Art. 211 (6)(c), the general powers granted by Art. 211 (5). The same balance between the coastal State's and flag State's interests prevails in the territorial sea according to Art. 21 (2), applicable by way of the reference in Art. 211 (4). An equivalent balance, safeguarding the interests of international navigation, is also set forth in Art. 211 (6)(a), provided that it is interpreted as requiring the IMO's approval for the coastal State's measures. The wording of the power granted to the coastal State suggests that the State is not limited to internationally designed measures, but may design and prescribe its own standards tailored for the needs of the area.[141] 47

Nevertheless, these additional powers are not completely unilateral. Several procedural steps ensure the consent of the international community, as represented within the IMO. The coastal State must notify the IMO of its intention to adopt additional laws and regulations at the moment of submitting the communication related to the establishment of the special area mentioned under Art. 211 (6)(a). From that moment on, the IMO has twelve months to decide whether it agrees with the coastal State's project. In other words, the IMO may exercise its veto with regard to the necessity of such additional measures as well as to the design of the measures.[142] If they are approved by the IMO, they may become applicable no earlier than fifteen months after the submission of the coastal State's communication. Some interpretative uncertainty concerns the moment at which the coastal State must notify the IMO of its intention to impose additional measures. By the words 'at the same time', the provision seems to require the State to request the establishment of a special area and the adoption of additional measures simultaneously. This is also the reading of the IMO.[143] As a consequence of such rigid interpretation, it would be impossible for the coastal State to adapt to an evolving situation of sensitivity once a special area has been established. Hakapää, although addressing the problem, seems to consider it merely hypothetical.[144] A pragmatic interpretation would be to consider that the coastal State may notify the IMO of its general intention to adopt, at a later moment, additional measures that are not yet determined.[145] This interpretation is not only sound from a teleological viewpoint, but might even be supported by the wording. Indeed, 48

[141] *Tan* (note 5), 216.
[142] UN DOALOS Identification and Protection of Special Areas (note 129), para. 19.
[143] Secretariat of the IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization (Study), IMO Doc. LEG/MISC.6 (2008), 62.
[144] *Hakapää* (note 104), 255.
[145] *Molenaar* (note 5), 407.

according to Art. 211 (6)(c), '[i]f the coastal States intend to adopt additional laws and regulations […], they shall […] at the same time notify the organization thereof'. The word 'thereof' can be read as referring to the intention rather than to the actually proposed laws and regulations, thus allowing the State to postpone the adoption of such measures.

20. 'incidents, including maritime casualties'

49 Art. 211 (7) relates to the prompt notification in case of incidents affecting the marine environment and is related, regarding vessel-source pollution, to the general obligation of notification in case of imminent or actual damage, set forth in Art. 198.[146] Art. 211 (7) does not itself create a notification obligation, but, instead, invites States to consider elaboration of international rules and standards on prompt notification. Such international rules and standards may range from a material obligation of prompt notification to the establishment of special procedures. Art. 211 (7) acts only as a reminder for States, since using the word 'should' does not cast it in mandatory language.[147] This contrasts with the clear obligation set forth in Art. 198, but may be explained by the fact that Art. 211 (7) is only concerned with formulating a preference for an international, uniform means of implementing Art. 198. Furthermore, the '*inter alia*' clause of Art. 211 (7) is somewhat incongruous and seems, given the context, in fact to be used as a synonym for the word 'also', since the prompt notification rules simply add to the rules and standards implied by the previous paragraphs.

50 The concept of prompt notification is broadly shaped. Notification is considered necessary in case of 'incidents, including maritime casualties, which involve discharges or probability of discharge'. The term 'maritime casualty' may be interpreted in light of its meaning under Art. 221 (2), even though the definition is explicitly limited to the purpose of Art. 221. As Arts. 221 and 211 (7) are both dealing with the consequences of casualties, the definition given in the former may provide good interpretative guidance for the latter.[148] A 'maritime casualty' is defined as 'a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.' In addition to maritime casualties, Art. 211 (7) also mentions 'incidents'. This raises the question whether non-accidental incidents are also included, particularly as the impetus for Art. 211 (7) was the *Amoco Cadiz* disaster. Contrary to the Spanish version, which is identical to the English version and gives no further clues, the French text slightly differs. It simply refers to '*les accidents de mer, notamment ceux qui entraînent ou risquent d'entraîner des rejets*', apparently excluding non-accidental incidents. By contrast, in Art. 94 (7), another provision on maritime casualties, incidents and casualties are distinguished in all three versions. The conclusion may therefore be drawn that the word 'incidents' is not limited to accidental incidents. This seems justified notably in light of the fact that non-accidental incidents, such as operational or intentional discharge, may affect coastal States just as much as accidental spills. The interpretative uncertainty raised by the difference between the English and Spanish text of Art. 211 (7) on the one hand and the French on the other may thus be resolved with a broad teleological interpretation, although it would entail considerable strain on the French wording.

21. 'States, whose coastline or related interests may be affected'

51 The prompt notification concept embodied in Art. 211 (7) is also fairly broad regarding beneficiaries. It is stipulated that notification should be given to those coastal States, 'whose coastline or related interests may be affected'. Art. 220 (6) and Art. 221 (1) both include a similar reference to the coastline or related interests. As in Art. 211 (1), the word 'coastline' indicates that the terrestrial ecosystem at the water-land-interface is included in the protective

[146] For further information *cf. Stephens* on Art. 198.
[147] Only the word 'shall' clearly conveys a legal obligation see *supra*, note 37.
[148] See also Nordquist/Rosenne/Yankov (note 37), 191, 205 (MN 211.15(m)).

purpose. The reference to 'related interests' further opens the range of States to be notified, in accordance with the perceived effects of environmental damage. The enumeration of interests in Art. 1 (1)(4) is also relevant for Art. 211 (7). In the event that a State's related interests are affected, be they sanitary, food-related, economic, cultural or recreational, it should be notified.

Article 212
Pollution from or through the atmosphere

1. States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere, applicable to their air space under their sovereignty and to vessels flying their flag or vessels or aircraft of their registry, taking into account internationally agreed rules, standards and recommended practices and procedures and the safety of air navigation.

2. States shall take other measures as may be necessary to prevent, reduce and control such pollution.

3. States, acting especially through competent international organizations or diplomatic conference, shall endeavor to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control such pollution.

Bibliography: *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999); *Gerhard Hafner*, Meeresumwelt, Meeresforschung und Technologietransfer, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 347–460; *Alexandre Ch. Kiss*, La pollution du milieu marin, ZaöRV 38 (1978), 902–932; *Charlotte Kreuter-Kirchhof,* Atmosphere, International Protection, MPEPIL, available at: http://www.mpepil.com; Myron H. Nordquist/Shabtai Rosenne/Alexander Jankov (eds.), United Nations Convention on the Law of the Sea: A Commentary, vol. IV (1991); *Alexander Proelss*, Raum und Umwelt im Völkerrecht, in: Wolfgang Graf Vitzthum/Alexander Proelss (eds.), Völkerrecht (6th edn. 2013), 351–438; *Henrik Ringbom*, The EU Maritime Safety Policy and International Law (2008); *Gregory Rose*, Persistent Organic Pollutants (POPs), MPEPIL, available at: http://www.mpepil.com; *Gregory J. Timagenis*, International Control of Marine Pollution, vol. II (1980); *Rüdiger Wolfrum*, Preservation of the Marine Environment, in: Jürgen Basedow/Ulrich Magnus/Rüdiger Wolfrum (eds.), The Hamburg Lectures on Maritime Affairs 2011–2013 (2015), 3–20

Documents: IMO, Third IMO Greenhouse Gas Study 2014 (2015); IPCC, Climate Change 2007: The Physical Science Basis, Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (2007); IPCC, Climate Change 2013: The Physical Science Basis, Summary for Policymakers, Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (2013); GA, Protection of Global Climate for Present and Future Generations of Mankind, GA Res. 43/53 of 6 December 1988; GESAMP (IMO/FAO/UNESCO-IOC/UNIDO/WMO/IAEA/UN/UNEP/UNDP Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection), The Atmospheric Input of Chemicals to the Ocean, GESAMP Reports and Studies No. 84 (GAW Report No. 203) (2012); ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 256–264; IMO Res. MEPC.176(58) of 10 October 2008; UN DOALOS, 'Competent or Relevant International Organizations' under the United Nations Convention on the Law of the Sea, LOSB 31 (1996), 79–95; UNEP, Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities, UN Doc UNEP(OCA)/LBA/IG.2/7 (1995); World Meteorological Organization, Greenhouse Gas Bulletin No. 10 (2014); World Meteorological Organization, Greenhouse Gas Bulletin No. 11 (2015)

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I. Purpose and Function

1 Art. 212, the last provision of Section 5 (International Rules and National Legislation to prevent, reduce and control Pollution of the Marine Environment) of Part XII (Protection and Conservation of the Marine Environment), lays down prescriptive powers to adopt national and international instruments with regard to the prevention, the reduction and the control of pollution from or through the atmosphere. The article encompasses three paragraphs and concretizes the States' obligations stipulated in Arts. 192, 194 (1), (2) and specifically in (3)(a). It constitutes the second component of the three-layer-structure for the implementation of Part XII.[1] The related enforcement powers are contained in Art. 222 (Enforcement with respect to pollution from or through the atmosphere).

2 Art. 212 concerns the last source of marine pollution that is dealt with in UNCLOS, namely atmospheric pollution of the marine environment.[2] The causes for this pollution source are manifold. It is mainly caused by emissions from vessels and aircraft, incineration at sea, discharges from the air as well as atmospheric pollution from land-based activities, leading to the introduction of toxic, harmful or noxious substances into the marine environment.[3] Within this context, persistent organic pollutants (POPs)[4] and human-caused greenhouse gases[5] are the major contributors to the degradation of the marine environment. Comparable with water, the medium air has the characteristic of wide-ranging spread beyond State borders and marine zones. Thus, this pollution source is of a global nature.[6]

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[1] Art. 194 (1)–(3) lays down the first part of this structure by stipulating a set of measures. The provisions of Section 5 of Part XII and, thus, Art. 212 form the second necessary level of implementation by stipulating obligations to establish national and international instruments. The third and last step is the real implementation of such measures and their enforcement, *cf. Gerhard Hafner*, Meeresumwelt, Meeresforschung und Technologietransfer, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 347, 367; *cf. Czybulka* on Art. 194 MN 2.

[2] IPCC, Climate Change 2007: The Physical Science Basis, Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (2007), 941 available at: www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4_wg1_full_report.pdf, defines 'atmosphere' as: 'The gaseous envelope surrounding the Earth'.

[3] *Hafner* (note 1), 347, 392. With respect to air pollution from ships, it was estimated in 2002 that the contribution of international shipping was approximately 2.2 % of the worldwide emission of carbon dioxide and it is projected that it will significantly increase in the future. For further references, particularly to vessel emissions during the period 2007–2012, see IMO, Third IMO Greenhouse Gas Study 2014 (2015), available at: http://www.imo.org/OurWork/Environment/PollutionPrevention/AirPollution/Documents/GHG3%20FULL%20REPORT.pdf. According to IPCC, Climate Change 2013: The Physical Science Basis, Summary for Policymakers, Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (2013), 9, available at: http://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WGIAR5_SPM_brochure_en.pdf, 'carbon dioxide concentrations have increased by 40 % since pre-industrial times'. Furthermore, it is stated that concentrations of carbon dioxide, methane and nitrous oxide in the atmosphere have reached levels beyond example in at least the last 800,000 years.

[4] Such pollutants are: 'chemical compounds that are resistant to degradation and that bioaccumulate in human and animal fatty tissue; they are man-made, and include pesticides, industrial chemical, and unintentional chemical by-products'. Due to their character as being semi-volatile POPs may spread to every part of the world, including areas where they have not been produced or used. *Gregory Rose*, Persistent Organic Pollutants (POPs), MPEPIL, paras. 1 *et seq.*, available at: http://www.mpepil.com. Examples of POPs are: Aldrin, Chlordane, DDT, Lindane and Heptachlor.

[5] For information about greenhouse gases see for instance http://www.epa.gov/climatechange/ghgemissions/. Examples of greenhouse gases are: carbon dioxide, methane, nitrogen oxides and CFCs. A definition of the term greenhouse gas is available in: IPCC Climate Change 2007 (note 2), 947.

[6] *Charlotte Kreuter-Kirchhof,* Atmosphere, International Protection, MPEPIL, paras. 8 *et seq.*, available at: http://www.mpepil.com, explains that 'changes in the atmosphere potentially affect all nations, every people, and all ecosystems'. Hence, the protection of the atmosphere is often described as a 'Common Concern of Mankind'.

II. Historical Background

In contrast to other sources of marine pollution, atmospheric pollution is a relatively young source. Thus, it is not surprising that instruments regulating this pollution source has yet been relatively sparse and that UNCLOS has been one of the first treaties recognizing it as a source of marine pollution.[7] Prior to UNCLOS III, a reference to pollution and air space was made in the International Law Commission's (ILC) draft articles concerning the law of the sea in 1956.[8] Subsequent to these ILC draft provisions, the States' obligation to 'cooperate with the competent international organizations in taking measures for the prevention of pollution of the seas or air space above' was codified in Art. 25 (2) of the Convention of the High Seas, 1958. 3

At the beginning of 1970s, Canada and Norway submitted a draft resolution on preliminary measures to prevent and control marine pollution to the Sea-Bed Committee. Shortly afterwards, a similar resolution was submitted by ten States. Both documents called upon States to take steps to prevent and control marine pollution emanating from any source within their national jurisdiction.[9] However, the first time the issue of atmospheric marine pollution was explicitly mentioned was during the 1973 session of the Sea-Bed Committee. Working Group 2 of the Sub-Committee III elaborated an informal document containing draft articles. One of these articles stated that 'The measures taken […] shall deal with all sources of pollution of the marine environment, whether land, marine, or any other sources, including […] the atmosphere […and] aircraft'.[10] 4

At the Second Session of UNCLOS III, held in 1974, Kenya proposed draft articles with regard to the preservation and the protection of the marine environment.[11] Art. 5 of these articles provided that: 5

> 'States shall ensure that measures taken under these articles shall deal with all sources of pollution of the marine environment, whether land, marine or any other sources including […] the atmosphere […and] aircraft. Such measures shall include *inter alia*: […] (d) With respect to pollution from the atmosphere, measures relating to the prevention of accidents involving flying crafts, and release of toxic and harmful substances and particularly atmospheric nuclear fall-out'.[12]

Art. 6 (b) of this proposal added that measures taken shall 'in respect of marine and atmospheric based sources of pollution of the marine environment, conform to generally accepted regional or international standards […]'.[13] In comparison to this draft, which already included specific wording with respect to the atmosphere and aircraft as potential sources of marine pollution, the following draft, submitted by ten States, was worded in

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This concept illustrates that the protection of the common good, the atmosphere, is in the interest of all States. In this context, the UN General Assembly assumes in that climate change is a 'common concern of mankind', GA, Protection of Global Climate for Present and Future Generations of Mankind, GA Res. 43/53 of 6 December 1988.

[7] *Cf. Hafner* (note 1), 347, 391 *et seq*. During the time of UNCLOS III, *Alexandre Ch. Kiss*, La pollution du milieu marin, ZaöRV 38 (1978), 902, 910, explained: 'c'est bien la première fois que cette forme de pollution est visée dans un texte concernant la pollution de la mer'.

[8] *Cf.* ILC, Report of the International Law Commission: Articles Concerning the Law of the Sea, UN Doc. A/3159 (1956), GAOR 11th Sess. Suppl. 9, 256, 262 (Art. 48 (3)).

[9] Sea-Bed Committee, Canada and Norway: Draft Resolution on Preliminary Measures to Prevent and Control Marine Pollution submitted to Sub-Committee III, UN Doc. A/AC.138/SC.III/L.5 and ADD.1 (1971), GAOR 26th Sess. Suppl. 21 (A/8421), 247 (para. 2). Sea-Bed Committee, Australia *et al.*: Draft Resolution on Preliminary Measures to Prevent and Control Marine Pollution, UN Doc. A/AC.138/SC.III/L.25 (1972), GAOR 27th Sess. Suppl. 21 (A/8721), 210 (para. 1).

[10] Sea-Bed Committee, Note by the Chairman of Working Group 2, Addressed to the Chairman of Sub-Committee III, UN Doc. A/AC.138/SC.III/L.39 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-I), 85, 86, 87 (WG 2/Paper No. 8/Add.2, para. 2).

[11] UNCLOS III, Kenya: Draft Articles for the Preservation and the Protection of the Marine Environment, UN Doc. A/CONF.62/C.3/L.2 (1974), OR III, 245.

[12] *Ibid.*, 245 *et seq.*

[13] *Ibid.*, 245, 246.

more general terms.[14] Art. 3 of this draft only stated that measures taken 'shall deal with all sources of pollution of the marine environment, whether air […] or any other sources'.[15] At a subsequent informal meeting, Colombia, Spain and Venezuela informally introduced a conference room paper containing a proposal with regard to pollution of the marine environment from the atmosphere.[16] However, the drafting and negotiating group of the informal meetings did not consider this proposal.[17] During the Third Session in 1975, a text similar to the proposal from Colombia, Spain and Venezuela was included in the Informal Single Negotiating Text (ISNT)/Part III.[18] At the Fourth Session (1976), the ISNT was revised by the Revised Single Negotiating Text (RSNT). The phrase 'within air space under their sovereignty or with regard to vessels or aircraft flying their flag or of their registry' was added to paragraph 1 of the corresponding article. Moreover, a new paragraph 2 was introduced and, on the whole, small changes were incorporated to establish coherence with other articles dealing with marine source pollution. The revised article (Art. 22) read:

> '(1) States shall, within air space under their sovereignty or with regard to vessels or aircraft flying their flag or of their registry, establish national laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere, taking into account internationally agreed rules, standards and recommended practices and procedures.
>
> (2) States shall also take other measures as may be necessary to prevent, reduce and control such pollution.
>
> (3) States, acting in particular through competent international organizations or diplomatic conference shall endeavor to establish global and regional rules, standards and recommended practices and procedures to prevent, reduce and control pollution of the marine environment from or though the atmosphere'.[19]

In the Informal Composite Negotiating Text (ICNT) the article was renumbered to Art. 213, its title was introduced and the wording was adopted as it was stated in the RSNT.[20] In an informal proposal by the USA in 1978, it was suggested that the text of paragraph 1 should include a reference to the safety of air navigation.[21] After approval in the informal negotiations,[22] this proposal was adopted in the ICNT Revision 1 (1979) in which the article was renumbered to Art. 212.[23] At the Tenth Session, held in 1981, the Drafting

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[14] Third Committee UNCLOS III: Canada *et al.*: Draft Articles on a Zonal Approach to the Preservation of the Marine Environment, UN Doc. A/CONF.62/C.3/L.6 (1974), OR III, 249.

[15] *Ibid.*

[16] Their draft article stated that: '(1) States shall endeavor to establish international rules and standards for preventing and combating pollution of the marine environment from the atmosphere; (2) States shall establish national rules and standards for preventing and combating pollution of the marine environment from the atmosphere, taking into account internationally agreed rules and standards', Third Committee UNCLOS III, Consideration of Questions Relating to Standards, UN Doc. CRP/MP/11 (1974, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. X (1986), 180.

[17] Third Committee UNCLOS III: Conference Room Papers Containing Proposals or Amendments Informally Introduced but not Considered by the Drafting and Negotiating Group of the Informal Meetings on Item 12 (Preservation of the Marine Environment), UN Doc. A/CONF.62/C.3/L.14/Add.1 (1974), OR III, 255, 259.

[18] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF. 62/WP.8/PART III (1975), OR IV, 171, 174 (Art. 21).

[19] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 177 (Art. 22).

[20] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 37 (Art. 213).

[21] Third Committee UNCLOS III, USA: Informal Proposals, UN Doc. MP/9 (1978, mimeo.), reproduced in: Platzöder (note 16), 224 (Art. 213).

[22] UNCLOS III: Reports of the Committees and Negotiating Groups on Negotiations at the Resumed Seventh Session Contained in a Single Document both for the Purposes of Record and for the Convenience of Delegations, UN Doc. A/CONF.62/RCNG/1 (1978), OR X, 13, 96, 98 (Art. 213 (1)); UNCLOS III: Reports of the Committees and Negotiating Groups on Negotiations at the Seventh Session Contained in a Single Document both for the Purposes of Record and for the Convenience of Delegations, UN Doc. A/CONF.62/RCNG/2 (1978), OR X, 126, 173, 179 (Art. 213 (1)).

[23] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII, 108 (Art. 212).

Committee suggested an almost complete change of paragraph 1.[24] The new version, which had almost the form of the final wording, was laid down in the draft convention on the law of the sea, reading:

> 'States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere, applicable to the air space under their sovereignty and to vessels or aircraft flying their flag or of their registry, taking into account internationally agreed rules, standards and recommended practices and procedures and the safety of air navigation'.[25]

Only minor changes were made in the subsequent informal negotiations before the final text was eventually adopted in 1982.

III. Elements

1. 'States shall adopt laws and regulations to prevent, reduce and control pollution'

Art. 212 (1) imposes a prescriptive obligation ('shall') on States to adopt national laws and regulations to prevent, reduce and control pollution from or through the atmosphere. This obligation concretizes the requirement in Arts. 192, 194 (1), (2) and specifically (3)(a) to take all necessary measures to protect the marine environment, particularly those 'designed to minimize to the fullest possible extent […] the release of toxic, harmful or noxious substances, especially those which are persistent […] from or through the atmosphere'. Art. 212 addresses 'States'. This reference encompasses every UNCLOS States Party. The corresponding enforcement provision, particularly for the national legislation adopted under Art. 212 (1), is laid down in Art. 222 (Enforcement with respect to pollution from or though the atmosphere). **6**

2. 'from or through the atmosphere, applicable to the air space under their sovereignty and to vessels flying their flag or vessels or aircraft of their registry'

Art. 212 (1) describes the jurisdictional scope of the provision and, thus, specifies the States' obligation with regard to the establishment of laws and regulations. At first, Art. 212 (1) differentiates, in a material sense, between pollution of the marine environment *from* and *through* the atmosphere.[26] 'From' describes the instance that the atmosphere itself is 'the polluter' because it conveys pollutants which directly affect the marine environment, such as persistent organic pollutants or greenhouse gases, whereas 'through' refers to pollution of the marine environment that stems indirectly from the atmosphere, such as acid rain. The provision applies to the air space under the sovereignty of a State and to vessels flying its flag or vessels or aircraft of its registry. The first element, air space under a State's sovereignty, specifies the geographical scope. It refers to the air space of the State's territory (which includes the air space above land). In the case of coastal or archipelagic States, it further refers to the air space above the so-called maritime part of the State's territory, namely the internal waters, archipelagic waters and the territorial sea (Arts. 2 (1), (2), 49 (1), (2)).[27] In **7**

[24] UNCLOS III, UN Doc. A/CONF.62//L.67/Add.8 (1981, mimeo.) (Drafting Committee), 61, 66, cited in: Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea: A Commentary, vol. IV (1991), 207, 211 (MN 212.8).

[25] UNCLOS III, Draft Convention on the Law of the Sea, UN Doc. A/CONF.62/L.78 (1981), OR XV, 172, 209 (Art. 212).

[26] This indicates that Art. 212 does not directly address the issue of pollution of the atmosphere itself. It only concerns pollution of the marine environment from or through the atmosphere within the scope of Art. 1 (1)(4), Nordquist/Rosenne/Yankov (note 24), 212 (MN 212.9(d)).

[27] *Alexander Proelss*, Raum und Umwelt im Völkerrecht, Wolfgang Graf Vitzthum/Alexander Proelss (eds.), Völkerrecht (6th edn. 2013), 351, 374. The inclusion of the air space above the internal waters can be logically derived from the fact that these waters are located landwards from the territorial sea. This maritime area belongs

this respect, it follows that national instruments States adopt with regard to the airspace above their territory also have a binding effect on foreign aircraft.[28] Art. 212 (1) further extends its applicability to vessels flying the flag of a State and to vessels and aircraft on a State's registry.[29] Within this context, it needs to be highlighted that this part of the wording does not provide States with the power to establish rules and regulations that are binding on foreign-flagged/-registered vessels/aircraft. Concerning this, RINGBOM states: 'the scope of Art. 212 is limited to ships or aircraft registered or flying the flags of the regulating States "and the airspace under their sovereignty"'.[30] These points of reference regarding the jurisdictional scope reveal that this provision is applicable to land-based atmospheric pollution (which is not covered by Art. 207)[31] as well as marine- and air-based atmospheric pollution of the marine environment.

3. 'taking into account internationally agreed rules, standards and recommended practices and procedures and the safety of air navigation'

8 Due to the close connection between Arts. 207 and 212, the rule of reference in Art. 212 (1) comprises almost the same wording as the one in Art. 207 (1), qualifying the obligation of States to adopt laws and regulations. Instead of being obliged to respect a minimum international standard[32] when adopting national legislation, Art. 212 only stipulates a requirement '[to take] into account "internationally agreed rules, standards and recommended practices and procedures and the safety of air navigation"'. Consequently, States are free to adopt less or more stringent national instruments under this reference. It follows from the foregoing that States also have to take into account binding international instruments to which they originally have not consented. However, this qualifying reference does not lead to a violation of the *pacta tertiis* rule.[33] In contrast to Art. 207 and due to the specific character of this pollution source, the rule of reference contains an additional feature. Besides internationally agreed rules, standards and recommended practices and procedures, it is also imposed on States to take into account the safety of air navigation. This primarily consists of international standards and recommended practices and procedures established by the International Civil Aviation Organization pursuant to Art. 37 Chicago Convention on International Civil Aviation (1994). One reason for the weak obligation concerning international instruments can be seen in the fact that parts of this pollution are caused by land-based activities and therefore, falls under the territorial sovereignty of States.

4. 'States shall take other measures as may be necessary'

9 In addition to the obligation in Art. 212 (1), Art. 212 (2) requires States to take other measures as may be necessary. UNCLOS does not define any of the terms used in this paragraph. While the instruments mentioned in Art. 212 (1) have a binding character,

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to the coastal State's territory over which it has sovereignty. Based on the principle of the vertical legal unity of space, the air space above this area is also under the sovereignty of the coastal State. The airspace above the exclusive economic zone is not embraced by this provision, see Arts. 55, 56 and 78. *Cf. ibid.*, 351, 382 *et seq.*

[28] *Hafner* (note 1), 347, 392.

[29] According to Art. 17 Chicago Convention on International Civil Aviation (1944), 'aircraft have the nationality of the State in which they are registered'. For further information about the terms 'flag State' and 'State of registry' see *Guilfoyle* on Art. 91 MN 1, 12–16.

[30] *Henrik Ringbom*, The EU Maritime Safety Policy and International Law (2008), 431 *et seq.*; *cf.* also Nordquist/Rosenne/Yankov (note 24), 211 *et seq.* (particularly MN 212.9(a)).

[31] *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999), 390, state that 'atmospheric pollution is essentially a form of land-based pollution'. See also *Rüdiger Wolfrum*, Preservation of the Marine Environment, in: Jürgen Basedow/Ulrich Magnus/Rüdiger Wolfrum (eds.), The Hamburg Lectures on Maritime Affairs 2011–2013 (2015), 3, 11.

[32] Such a minimum standard is laid down in Arts. 208 (3), 209 (2), 210 (6), 211 (2).

[33] With further references to the character of the element 'taking into account', see *Wacht* on Art. 207 MN 9 (especially notes 34 and 35).

Art. 212 (2) primarily aims at the establishment of non-binding measures, such as scientific and technical advice, recommendations, guidelines, codes of conduct, capacity-building programs, cooperation programmes, certifications schemes etc.[34] The meaning of the term 'necessary' needs to be assessed on a case-by-case basis. Furthermore, the phrase 'as may be necessary' – which is a weaker qualification than the one in *e. g.* Art. 194 (1) and (2)[35] – seems like an encouragement for States to take measures that appear to be necessary to protect the marine environment from this pollution source even though they cannot ensure that these measures will eventually serve the intended purpose in every case. It follows that States have wide discretion concerning the performance of this obligation.

5. 'States, acting especially through competent international organizations or diplomatic conference'

In all provisions of Section 5 of Part XII, reference is made to international law-making concerning different sources of marine pollution. In this respect, Art. 212 (3) lays down that States are required to especially act through 'competent international organizations or diplomatic conference'. This shows that, with regard to pollution from or through the atmosphere, there is not only one mandated international organization. Rather, various fora are eligible and competent to address atmospheric marine pollution, such as: The International Atomic Energy Agency, the International Civil Aviation Organization, the IMO, Intergovernmental Oceanographic Commission of UNESCO, UNEP and the World Meteorological Organization.[36] Although, the word 'especially' implies that the fora mentioned in this paragraph are non-exhaustive, it indicates that they are the preferred alternatives States have to primarily act through. **10**

6. 'shall endeavor to establish global and regional rules, standards and recommended practices and procedures'

The wording of Art. 212 (3) describes what kind of international instruments States (through competent international organizations or diplomatic conferences) are required to establish, namely 'global and regional rules, standards and recommended practices and procedures'. This indicates that binding as well as non-binding international measures are included in this obligation. In contrast to Arts. 208 (5) and 211 (1), but in common with Arts. 207 (4) and 210 (4), this paragraph only imposes a weak duty on States to *endeavor* to establish these international instruments. Therefore, the performance of this obligation depends on multiple aspects such as the individual state of development and, thus, the capacity of the State in question. This leads to difficulties with regard to the review of whether a State has complied with this obligation. However, States have to exercise this duty in good faith.[37] It is notable that Art. 212 (3) is the only provision in Part XII Section 5 that **11**

[34] *Cf.* with regard to the meaning of the term 'other measures' *Gregory J. Timagenis*, International Control of Marine Pollution, vol. II (1980), 603, who explains that the expression usually refers to 'national administrative measures not necessarily of a normative nature'. Similar to Art. 207 (2), Art. 212 (2) does not require States to take into account internationally agreed instruments when taking other measures. Thus, it seems as if paragraph 2 lays down a weaker obligation without such a qualification. This would lead to the situation that States are free to take national measures without having to take into account internationally agreed instruments. However, Section 5 of Part XII pursues the harmonization of international and national instruments. Therefore, it stands to reason that States also have to take into account internationally agreed instruments when adopting other measures pursuant to Art. 212 (2). *Cf. Wacht* on Art. 207 note 40.

[35] Art. 194 states 'all measures […] that *are* necessary' (emphasis added) (paragraph 1) and '*all* measures necessary' (emphasis added) (paragraph 2).

[36] UN DOALOS, 'Competent or Relevant International Organizations' under the United Nations Convention on the Law of the Sea, LOSB 31 (1996), 79, 88.

[37] Especially in the case where a State is only required to endeavor to do something, it may be difficult to reliably prove whether the State has fulfilled its obligation. Thus, the *good faith*-requirement (Art. 300) is of particular importance. *Cf.* also *Wacht* on Art. 207 note 42.

does not contain the requirement to periodically re-examine the established international instruments as necessary. Although this omission does not contribute to coherence, the reason for this may be the relatively 'young age' of this pollution source. Nevertheless, in order to ensure consistency between the States' obligations concerning the establishment of international instruments (especially with regard to the closely related duty in Art. 207 (4)), it can be suggested that States also have to periodically re-examine the international instruments established pursuant to Art. 212 (3).

12 Concerning subsequent practice, it is notable that there are two forms of rules: One that specifically deals with control and reduction of atmospheric marine pollution and another one that generally addresses atmospheric pollution that eventually may also have a positive effect on the marine environment.[38] In contrast to the issue of land-based pollution of the marine environment covered in Art. 207, it can be noted that the aspect of atmospheric marine pollution has been incorporated in more detail at the global level.[39] At the regional level, especially the Regional Seas Programmes (RSP) are of particular importance with regard to atmospheric pollution of the marine environment. Even though, some of the RSP did not originally cover this issue, provisions dealing with it have been incorporated over time. Currently, the following RSPs contain provisions which (explicitly or implicitly) address this pollution source: Mediterranean, Black Sea, Wider Caribbean, Eastern Africa, ROPME Sea Area, North-East Pacific, Red Sea and Gulf of Aden, South-East Pacific, South Pacific, North-East Atlantic, Baltic Sea.[40]

13 With regard to soft law addressing atmospheric (marine) pollution, it can be referred to the work of various institutions. In 1995, UNEP adopted the Global Programme of Action

[38] *Churchill/Lowe* (note 31), 390. Examples of general instruments dealing with atmospheric pollution are: Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, UNTS 1513, 293 and its Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, UNTS 1552, 3. Text as adjusted and amended at: http://ozone.unep.org/new_site/en/Treaties/treaties_decisions-hb.php?sec_id=5. United Nations Framework Convention on Climate Change, 9 May 1992, UNTS 1771, 107 and the Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, UNTS 2303, 162, which was only in effect in its first commitment period between 2008–2012. Only a few States accepted a second commitment period until 2020 in Doha (2012). See also Protocols to the (Geneva) Convention on Long-Range Transboundary Air Pollution, 1979, an overview of the eight protocols is available at: http://www.unece.org/env/lrtap/status/lrtap_s.html. Stockholm Convention on Persistent Organic Pollutants, 22 May 2001, UNTS 2256, 119.

[39] See for instance the 1997 Annex VI (Regulations for the Prevention of Air Pollution from Ships) to International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto (MARPOL 73/78), entered into force in 2005 and was amended in 2008. Text as amended: MEPC 58/23/Add.1 (2008), Annex 13, Resolution MEPC.176(58) of 10 October 2008, Annex, 3, available at: http://www.imo.org/blast/blastDataHelper.asp?data_id=23760&filename=176(58).pdf. This Annex lays down various emission control measures concerning the atmospheric pollution of the marine environment from vessels. Besides a prohibition of deliberate emissions of ozone depleting substances (Reg. 12), certain emission limits for NO_x (Reg. 13), SO_x, and particulate matter (Reg. 14) in marine diesel engines, prohibitions of shipboard incineration of certain substances (Reg. 16) and provisions on the composition of fuel oil (Reg. 18). Annex VI further includes the legal basis for the establishment of *Emission Control Areas* (Reg. 13 (6), 14 (3) *et seq.*, Appendix III) in which even higher standards for NO_x, SO_x and particulate matter apply (*e.g.* North Sea and Baltic Sea). Another global agreement which deals with an aspect of atmospheric pollution is the 1996 Protocol to the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, 1972, text as amended in 2006, available at: http://www.imo.org/OurWork/Environment/LCLP/Documents/PROTOCOLAmended2006.pdf. The 1996 Protocol replaces the 1972 London Convention as between the Parties to the Protocol. While under the 1972 Convention incineration at sea is permitted, the 1996 Protocol prohibits it (Art. 5).

[40] *E. g.* Art. 8(b) Convention for the Protection of the Mediterranean Sea against Pollution, 16 February 1976, amended and renamed Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, 10 June 1995, reproduced in: Tullio Scovazzi (ed.), Marine Specially Protected Areas (1999), 129, 132; Art. 1 Protocol on Protection of the Black Sea Marine Environment Against Pollution from Land-based Sources, 21 April 1992, available at: http://www.blacksea-commission.org/_convention-protocols.asp; Art. 2 paras. 9, 10, 11, 14, 16, Art. 3(i), (ii), Annex III Protocol on the Protection of the Marine Environment of the Black Sea from Land-based Sources and Activities, 7 April 2009 (entry into force pending), will replace, as between its Contracting Parties, the 1992 Protocol, text of the 2009 Protocol is available at: *ibid.*; Art. 9 Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, 24 March 1983, UNTS 1506, 157.

for the Protection of the Marine Environment from Land-Based Activities.[41] This programme not only addresses land-based pollution within the scope of Art. 207, but also encompasses land-based atmospheric pollution of the marine environment and lays down various recommendations on measures to be taken to reduce for instance atmospheric deposition. The World Meteorological Organization (WMO) releases the Greenhouse Gas Bulletin annually, in which the actual state of greenhouse gases in the atmosphere is reported. In its latest report (November 2015) it was pointed out that the globally averaged mole fractions of various substances, *e. g.* carbon dioxide, methane and nitrous oxide, have reached new highs in 2014.[42] Based on an agreement between the WMO and UNEP in 1988, the Intergovernmental Panel on Climate Change (IPCC) promotes climate protection, closely related to the field of atmospheric pollution, through scientific research and the development of protection strategies.[43] Another important forum in which atmospheric marine pollution is dealt with is the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection. It released a study on 'The Atmospheric Input of Chemicals to the Ocean' in 2012 in which, for instance, the impact of chemicals from anthropogenic activities on the marine environment was explained. Moreover, many recommendations and proposals were included in the study on how to improve the issue of atmospheric pollution in the future.[44]

Section 6
Enforcement

Article 213
Enforcement with respect to pollution from land-based sources

States shall enforce their laws and regulations adopted in accordance with article 207 and shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conference to prevent, reduce and control pollution of the marine environment from land-based sources.

Bibliography: *David M. Dzidzornu*, Marine Environment Protection under Regional Conventions: Limits to the Contribution of Procedural Norms, ODIL 33 (2002), 263–316; *Erik Franckx*, Regional Marine Environment Protection Regimes in the Context of UNCLOS, IJMCL 13 (1998), 307–324; *Gerhard Hafner*, Meeresumwelt, Meeresforschung und Technologietransfer, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 347–460; *Daud Hassan*, International Conventions Relating to Land-Based Sources of Marine Pollution Control: Applications and Shortcomings, GIELR 16 (2003–2004), 657–677; *Daud Hassan*, Protecting the Marine Environment from Land-Based Sources of Pollution (2006); *Elizabeth A. Kirk*, Noncompliance and the Development of Regimes Addressing Marine Pollution from Land-Based Sources, ODIL 39 (2008), 235–256; *Thomas A.*

[41] UNEP, Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities, UN Doc. UNEP(OCA)/LBA/IG.2/7 (1995), available at: http://unep.org/gpa/documents/meetings/Washington/GPAFullTextEn.pdf. In the subsequent years, Intergovernmental Review Meetings have been organized in order to review the status of the implementation of the GPA. At these meetings, future actions to strengthen the implementation have been adopted. For further information, see http://www.gpa.unep.org.

[42] World Meteorological Organization, Greenhouse Gas Bulletin No. 11 (2015), 1 *et seq.*, available at: http://library.wmo.int/pmb_ged/ghg-bulletin_11_en.pdf. In contrast to this report, World Meteorological Organization, Greenhouse Gas Bulletin No. 10 (2014), 4 *et seq.*, for the first time, contained a section on ocean acidification, which was prepared in collaboration with other international institutions, available at: http://www.wmo.int/pages/prog/arep/gaw/ghg/documents/GHG_Bulletin_10_Nov2014_EN.pdf.

[43] For further information on the IPCC see http://www.ipcc.ch.

[44] GESAMP (IMO/FAO/UNESCO-IOC/UNIDO/WMO/IAEA/UN/UNEP/UNDP Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection), The Atmospheric Input of Chemicals to the Ocean, GESAMP Reports and Studies No. 84 (GAW Report No. 203) (2012), available at: http://www.gesamp.org/data/gesamp/files/media/Publications/Reports_and_studies_84/gallery_2010/object_2200_large.pdf. A report of the GESAMP/SDS-WAS Workshop, held in Malta in 2011, is also included in this study.

Mensah, The International Legal Regime for the Protection and Preservation of the Marine Environment from Land-based Sources of Pollution, in: Alan Boyle/David Freestone (eds.), International Law and Sustainable Development: Past Achievements and Future Challenges (1999), 297–324; Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991); *Bernard H. Oxman*, Jurisdiction of States, MPEPIL, available at: http://www.mpepil.com; *Yoshifumi Tanaka*, Regulation of Land-Based Marine Pollution in International Law: A Comparative Analysis between Global and Regional Legal Frameworks, ZaöRV 66 (2006), 535–574; *David L. VanderZwaag/Ann Powers*, The Protection of the Marine Environment from Land-Based Pollution and Activities: Gauging the Tides of Global and regional Governance, IJMCL 23 (2008), 423–452; *Caroline Williams/Bruce Davis*, Land-based Activities: What Remains to Be Done, Ocean & Coastal Management 29 (1995), 207–222

Documents: UNEP, Annual Report (2006); UNEP, Global Programme of Action for the Protection of the Marine Environment from Land-based Activities, UN Doc. UNEP(OCA)/LBA/IG.2/7 (1995); UNEP, Regional Seas: Action Plan for the Protection and Sustainable Development of the Marine and Coastal Areas of the East Asian Region, UN Doc. UNEP(OCA)/EAS IG5/6 (1994), Annex IV

Cases: ICJ, *Case Concerning Pulp Mills on the River Uruguay* (Argentina *v.* Uruguay), Judgment of 20 April 2010, ICJ Reports (2010), 14; ITLOS, *MOX Plant Case* (Ireland *v.* United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports (2001), 95

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I. Purpose and Function

1 Art. 213, headed 'Enforcement', is the opening provision of Part XII Section 6 (Arts. 213–222) and needs to be understood as the corollary to the Section 5 provisions on the prescriptive jurisdiction of States Parties in the field of marine environmental protection. Accordingly, it mirrors the sectoral approach taken in Section 5, regulating marine pollution with a view to its different sources. As a part of Section 6, Art. 213 is subject to the safeguard provisions in Section 7 which aim at limiting enforcement action and guarantee accountability. Taken as a whole, Section 6 gives practical effect to the general obligations contained in Arts. 192 and 194.[1]

2 Art. 213 needs to be read together with Arts. 207 and 194 (3)(a). Whereas the latter obliges States to take measures 'designed to minimise to the fullest possible extent […] the release of toxic, harmful or noxious substances' from, *inter alia*, land-based sources and from and through the atmosphere, the former concretizes this general obligation by requiring States to adopt national laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources (Art. 207 (1)) and to establish global and regional rules in this respect (Art. 207 (4)). Since sources of land-based pollution are usually located within either the coastal State's territory or territorial sea, Art. 213 obliges States Parties to use their territorial jurisdiction for the implementation and enforcement of national legal provisions and international rules and standards to prevent, reduce and control marine pollution from land-based sources.

3 However, for several reasons, States are reluctant to adopt and enforce national laws against marine pollution by land-based sources.[2] First, measures with regard to land-based sources

[1] Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991), 215 (MN 213.1).

[2] For more details, see *Daud Hassan*, Protecting the Marine Environment from Land-Based Sources of Pollution (2006), 37 *et seq.*; *Yoshifumi Tanaka*, Regulation of Land-Based Marine Pollution in International

have substantial influence on the economic and social policy of States. The internalisation of environmental costs makes industrial and agricultural production, including animal husbandry, more expensive and less profitable.[3] Second, sometimes the identification of sources is difficult, especially in the case of non-point (diffuse) sources, such as urban, agricultural and other land-use run-off. Third, due to scientific uncertainties and lack of data, it is also difficult to determine the causation of environmental damages by a particular source or a combination of different sources.[4] Fourth, States have to define the threshold between socially acceptable nuisances and unacceptable pollution, thereby taking into account numerous factors, such as the type of contaminants, their impact on the environment and human health, and economic and social priorities.[5] In this respect, it should be pointed out that, due to a lack of the necessary financial and technical means in developing countries, marine pollution from land-based sources is closely linked to poverty.[6] Finally, regulation and control of land-based pollution sources are considered to be a national concern which fall entirely under State sovereignty. States are usually not willing to accept substantial restrictions of their sovereign decisions and want to retain as much discretion as possible.[7] Thus, Art. 213 aims at ensuring that States Parties enforce their own national laws and regulations adopted in accordance with Art. 207 (1), (2) and (5), as well as implement international rules and standards established in accordance with Art. 207 (4), even though these obligations might affect their short-term economic interests. Since pollution from land-based sources usually has negative transboundary effects, the international community has an interest in ensuring that certain international and regional standards are complied with and enforced.

II. Historical Background

Although land-based sources are the major contributors to marine pollution,[8] they were not explicitly mentioned in the 1958 Geneva Convention on the High Seas (High Seas Convention). In the 1950s, the focus was on combating accidental and operational oil pollution from vessels. Accordingly, the High Seas Convention contained only two provisions concerning the prevention of marine pollution. Art. 24 High Seas Convention dealt with the discharge of oil from ships or pipelines or resulting from offshore exploration or exploitation activities. Art. 25 (2) High Seas Convention imposed a general duty to cooperate with competent international organizations 'in taking measures for the prevention of pollution of the seas or air space above, resulting from any activities with radio-active materials or other harmful agents'. The latter provision could be interpreted in a way as to encompass land-based sources of pollution implicitly. However, until the 1970s the interest in regulating land-based sources was limited.[9] 4

At UNCLOS III, the focus of the international community shifted to other sources of marine pollution. The first draft text on the enforcement of regulations concerning marine pollution from land-based sources was part of a separate chapter on enforcement included in the Informal Single Negotiating Text (ISNT), prepared at the Third Session.[10] It was based on 5

Law: A Comparative Analysis Between Global and Regional Legal Frameworks, ZaöRV 66 (2006), 535, 547 *et seq.*, both with further references.

[3] *Hassan* (note 2), 40 *et seq.*

[4] *Ibid.*, 38 *et seq.*

[5] *Ibid.*, 41 *et seq.*

[6] *Tanaka* (note 2), 549.

[7] *Hassan* (note 2), 44 *et seq.*, with further references.

[8] In 2006 UNEP estimated that more than 80 % of marine pollution originated from inland sources: UNEP Annual Report (2006), 56, available at: http://www.unep.org/pdf/annualreport/UNEP_AR_2006_English.pdf.

[9] See *Daud Hassan*, International Conventions Relating to Land-Based Sources of Marine Pollution Control: Applications and Shortcomings, GIELR 16 (2003–2004), 657, 661 *et seq.*

[10] Included as Art. 22 in the ISNT: UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF. 62/WP.8/PART III (1975), OR IV, 171, 174 (Art. 22).

a proposal made by nine European States requiring States to 'ensure compliance with their laws and regulations' established pursuant to the standards referred to in the relevant article in the section on prescriptive jurisdiction in relation to marine protection.[11] Art. 22 of the ISNT read,

> 'States *shall have the right to enforce* laws and regulations adopted in accordance with the provisions of this Convention for the protection and preservation of the marine environment from land-based sources of marine pollution'.[12]

This draft was substantially changed, following discussions in the Informal Group of Juridical Experts, in the Revised Single Negotiating Text (RSNT) reading now,

> 'States *shall enforce* their laws and regulations […] and shall adopt the necessary legislative, administrative and other measures to implement *applicable international rules and standards* established through competent international organizations or diplomatic conference […].'[13]

By this slight change of the wording in the opening phrase, a State's right of enforcement was transformed into an obligation to enforce measures against marine pollution from land-based sources.[14] Accordingly, Art. 213 was brought in line with the general obligation to protect and preserve the marine environment spelled out in Arts. 192 and 194 (3)(a). The qualification 'applicable' before 'international rules and standards' was also a change from the ISNT. Neither its origin nor the intention behind it are quite clear, though it was generally understood as referring to international provisions which are binding for the State concerned.[15] The RSNT version of 1976 was only slightly changed at subsequent sessions following recommendations of the Drafting Committee. However, these editorial changes did not affect the substance of the article.[16]

III. Elements

1. 'States shall enforce their laws and regulations adopted in accordance with article 207'

6 Art. 213 cl. 1 obliges States to enforce their domestic laws and regulations adopted in accordance with Art. 207 and therewith complements the latter's aim, i. e. universal standard setting,[17] by addressing States' reluctance to enforce laws against marine pollution from land-based sources. The addressees of the enforcement obligation are not all States but all States Parties contributing to marine pollution from land-based sources, especially coastal States.

7 The enforcement obligation aims at ensuring that States do not only adopt national laws and regulations in accordance with Art. 207 (1), but that these provisions are actually implemented and complied with. The wording 'shall enforce' makes it clear that States do not only have a right to enforce their domestic laws and regulations with regard to marine pollution from land-based sources, as phrased in the ISNT,[18] but are under a strict enforcement duty. The term 'enforcement' usually refers to State action against private natural or juridical persons in order to ensure compliance with legal obligations, including

[11] Nordquist/Rosenne/Yankov (note 1), 218 (MN 213.4), referring to: Third Committee UNCLOS III, Belgium *et al.*: Draft Articles on the Prevention, Reduction and Control of Marine Pollution, UN Doc. A/CONF.62/C.3/L.24 (1975), OR IV, 210 (Art. 1).

[12] *Ibid.* Emphasis added.

[13] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 177(Art. 24, emphasis added).

[14] Nordquist/Rosenne/Yankov (note 1), 219 (MN 213.5.).

[15] *Ibid.*, 220 (MN 213.7(c)). For a detailed analysis of the term 'international rules and standards', see *Bartenstein* on Art. 211 MN 33–38.

[16] Nordquist/Rosenne/Yankov (note 1), 219 (MN 213.6), with further references.

[17] See *Wacht* on Art. 207 MN 1.

[18] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF. 62/WP.8/PART III (1975), OR IV, 171, 174 (Art. 22).

judicial proceedings and sanctions in cases of violations.[19] A State Party has to provide the necessary technical know-how, appropriate management strategies and adequate administrative procedures to prohibit or permit, regulate and control sources of pollution based in its territory, including internal and territorial waters, rivers and estuaries, as well as pipelines and outfall structures.

A precondition to national enforcement is the applicability of the rule to be enforced for domestic authorities, thus obliging States to adopt the necessary legal framework covering their obligations. Therefore, enforcement requires, as a first step, domestic norms enacted in accordance with Art. 207 (1).[20] The strict duty to enforce the relevant laws and regulations is, however, diminished by the fact that States are not bound by international rules and standards when adopting domestic legislation. Art. 207 (1) only requires the 'taking into account internationally agreed rules, standards and recommended practices and procedures'.[21] This is the 'weakest of qualifications used in the Convention to indicate the obligations of States in respect of internationally agreed measures'.[22] The reason for this weak reference is the protection of a State's sovereignty with regard to land-based sources. **8**

2. 'and shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards'

Art. 213 cl. 2 obliges States to adopt legally binding norms and take other measures to ensure the implementation and enforcement of 'applicable international rules and standards established through competent international organizations or diplomatic conference' against marine pollution from land-based sources. Unlike Art. 207 (1), which defines the purpose all rules adopted should serve, yet demands only the 'taking into account' of international rules and standards,[23] Art. 213 cl. 2 obliges the coastal State to implement those standards adopted by the international conferences or organizations and render them effective. This obligation complements Art. 207 (4), obliging States to endeavour towards such standards in the first place. **9**

The meaning of the phrase 'applicable international rules and standards' is not entirely clear. As mentioned above,[24] in the Third Committee of UNCLOS III it was generally understood to refer to international rules and standards which are binding on the State concerned, either as treaty or as customary law.[25] In the case of land-based sources, the only State concerned is the State in whose territory a source originates or an activity is undertaken. Interpreted in this way, Art. 213 cl. 2 does not seem to have an 'added value', because it only repeats obligations States are bound to fulfil anyway. Nevertheless, by emphasising such obligations, States' large discretion regarding the adoption and enforcement of their national laws is restricted.[26] As a minimum, States have to comply with the legally binding rules and standards they have agreed upon in global or regional treaties. **10**

Internationally agreed rules and standards with regard to land-based pollution sources are few at the global level. States have not been able to agree upon the necessity and appropriateness of a global legally binding treaty.[27] Instead, in 1995, 108 States and the European **11**

[19] See generally *Bernard H. Oxman*, Jurisdiction of States, MPEPIL, paras. 3–5, available at: http://www.mpepil.com.

[20] *Tanaka* (note 2), 568 *et seq.* and 568–569 (footnote 163 with further references).

[21] For further information, see *Wacht* on Art. 207 MN 1–3.

[22] Nordquist/Rosenne/Yankov (note 1), 220.

[23] See *supra*, MN 6–7.

[24] *Supra*, MN 5.

[25] Nordquist/Rosenne/Yankov (note 1), 220 (MN. 213.7(c)); see also *Van Reenen*, 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 Tankers, NYIL 12 (1981), 3, 12 *et seq.*

[26] *Ibid.*, 219–220 (MN 213.7(a)); see also *Gerhard Hafner*, Meeresumwelt, Meeresforschung und Technologietransfer, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 347, 402–403 (MN 167).

[27] For the efforts to reach a binding agreement, see *Thomas A. Mensah*, The International Legal Regime for the Protection and Preservation of the Marine Environment from Land-based Sources of Pollution, in: Alan Boyle/

Commission adopted the UNEP Global Programme of Action for the Protection of the Marine Environment from Land-Based Activities (GPA),[28] which is of a recommendatory nature, suggesting, *inter alia*, the development of action programmes at the national level. It recommends the identification and assessment of environmental problems, the selection of management objectives for priority problems and management strategies, and the establishment of legal and enforcement mechanisms.[29] Furthermore, it calls for close regional and international cooperation, promoting capacity building, technology transfer and financial support for developing countries in particular.[30] At the regional level, Regional Seas Conventions and/or Action Plans cover 18 regions of the world's oceans.[31] Seven of these conventions are accompanied by protocols on land-based sources;[32] the 1992 Helsinki Convention and the OSPAR Convention have Annexes in this respect. These protocols and annexes establish a number of legally binding rules and standards, though there are significant differences in strictness.

12 A further global treaty relevant with regard to land-based sources of marine pollution is the Stockholm Convention on Persistent Organic Pollutants[33] (Stockholm Convention)

David Freestone (eds.), International Law and Sustainable Development: Past Achievements and Future Challenges (1999), 297, 300 *et seq*.

[28] UNEP, Global Programme of Action for the Protection of the Marine Environment from Land-based Activities, UN Doc. UNEP(OCA)/LBA/IG.2/7 (1995); for more details, see *Caroline Williams/Bruce Davis*, Land-based Activities: What Remains to be Done, Ocean & Coastal Management 29 (1995), 207; *David L. VanderZwaag/Ann Powers*, The Protection of the Marine Environment from Land-Based Pollution and Activities: Gauging the Tides of Global and Regional Governance, IJMCL 23 (2008), 423; *Mensah* (note 27), 310 *et seq*.; *Hassan* (note 2), 95 *et seq*.

[29] UNEP GPA (note 28), 10–17 (paras. 16–28).

[30] *Ibid.*, 17–20 (paras. 29–35 (regional cooperation)); *ibid.*, 20–34 (paras. 36–90 (international cooperation)).

[31] Currently there are 14 regional conventions: Mediterranean: Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, 10 June 1995, UNTS 1102, 27; Wider Caribbean: Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, 24 March 1983, ILM 22, 221 (1983); East Africa: Convention for the Protection, Management and Development of the Marine and Coastal Environment of the East African Region, 21 June 1985, IELMT 985, 46; Western and Southern Africa: Convention for the Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, 23 March 1981, ILM 20, 746 (1981); Black Sea: Convention on the Protection of the Black Sea against Pollution, 21 April 1992, ILM 32, 1110 (1992); ROPME Sea Area: Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution, 23 April 1978, UNTS 1140, 133; North-East Pacific: Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention between the United States of America and the Republic of Costa Rica, 13 December 2004, available at: https://www.iattc.org/PDFFiles2/Antigua_Convention_Jun_2003.pdf; Red Sea and Gulf of Aden: Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment, 14 February 1982, Environmental Policy and Law 9 (1982), 56; South Pacific: Convention for the Protection of Natural Resources and Environment of the South Pacific Region Pacific, 24 November 1986, ILM 26, 38 (1987); South-East Pacific: Convention for the Protection of the Marine Environment and Coastal Area of the South East Pacific, 12 November 1981, IELMT 981, 85, Antarctic: Convention for the Conservation of Antarctic Marine Living Resources, 1 August 1980, ILM 19, 841 (1980); Baltic Sea: Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area, 17 January 2000, UNTS 2099, 195; Caspian Sea: Framework Convention for the Protection of the Marine Environment of the Caspian Sea, 4 November 2003, available at: http://www.tehranconvention.org/IMG/pdf/Tehran_Convention_text_final_pdf.pdf; North-East Atlantic: Convention for the Protection of the Marine Environment of the North East Atlantic, 22 September 1992, UNTS 2354, 67; and 4 Action Plans: UNEP, Regional Seas: Action Plan for the Protection and Sustainable Development, UN Doc. of the Marine and Coastal Areas of the East Asian Region Coordination Body for the Seas of East Asia UN Doc. UNEP(OCA)/EAS IG5/6 (1994), Annex IV; UNEP, Regional Seas: Northwest Pacific Action Plan, available at: http://www.unep.org/regionalseas/programmes/unpro/nwpacific/instruments/action_plan_nowpap.pdf; UNEP, Regional Seas: Action Plan for the Protection and Management of the Marine and Coastal Environment of the South Asian Seas Region, available at: http://www.sacep.org/pdf/SAS%20Action%20Plan.pdf and for the Arctic: Arctic Council Working Group on the Protection of the Arctic Marine Environment. For further information, see: https://oaarchive.arctic-council.org/handle/11374/52.

[32] For the following regions: Black Sea (1992), South-East Pacific (1983), Mediterranean (1980/1996), ROPME Sea Area (1990), Wider Caribbean (1999), Red Sea and Gulf of Aden (2005), Eastern Africa/Western Indian Ocean (2010).

[33] Persistent organic pollutants (POPs) are toxic substances found, e. g., in pesticides, industrial chemicals or as by-products of industrial processes. They are transported far from their sources, e. g., into the Arctic, through the

which, *inter alia*, prohibits or substantially restricts the production and use of Persistent Organic Pollutants (POPs), limits the import and export of intentionally produced POPs, and obliges States Parties to reduce emissions of unintentionally produced POPs. Within the European Union, the Stockholm Convention has been implemented by several regulations. Member States are required to report periodically to the European Commission on their implementation measures. A similar treaty on mercury was adopted in 2013, but has not yet entered into force.[34] Most international rules and standards are, however, contained in regional treaties and accompanying protocols.[35] Although these agreements show a number of differences, as far as the density and strictness of obligations are concerned, many of them also have some common features: the replacement of the black and grey lists approach by a uniform approach which in principle prohibits the discharge of hazardous substances; the adoption of the precautionary approach; the use of best available technology (BAT) and best environmental practices (BEP); the establishment of environmental impact assessment (EIA) and monitoring systems; and, finally, international control by a treaty body to ensure compliance with the relevant rules.[36]

In the *MOX Plant Case*, so far the only case before International Tribunal for the Law of the Sea (ITLOS) dealing with marine pollution from a land-based source, Ireland alleged that the United Kingdom breached its obligations, *inter alia*, under Arts. 207 and 213 by authorising the MOX plant at Sellafield without a proper risk assessment regarding the discharge of radioactive substances into the Irish Sea.[37] Furthermore, Ireland argued that the precautionary principle placed the burden of proof on the United Kingdom to demonstrate that no harm would arise from the operation of the MOX plant, and that this principle should also be taken into account with a view of the assessment of the urgency of provisional measures by the Tribunal.[38] ITLOS denied the urgency of the situation, but emphasised that both States were under the duty to cooperate (→ Art. 197), i. e. exchange further information with regard to the possible consequences for the Irish Sea, monitor risks or effects of the operation of the MOX plant, and devise measures to prevent pollution to the marine environment.[39] Whereas the Tribunal as a whole did not mention the precautionary principle, in their Separate Opinions two judges referred to it in an extremely cautious manner, leaving open whether the precautionary principle can already be regarded as part of customary international law.[40] Following this, the precautionary principle could be consid- 13

atmosphere, rivers and ocean currents. Since they bioaccumulate through the food web, they are hazardous to the environment and human health. For a short overview, see the information given by the European Commission, available at: http://ec.europa.eu/environment/pops/index_en.htm.

[34] Minamata Convention on Mercury, signed in Kumamoto, Japan, on 10 October 2013; it will enter into force after the 50th ratification has been deposited (Art. 31); available at: http://www.mercuryconvention.org/Portals/11/documents/Booklets/Minamata%20Convention%20on%20Mercury_booklet_English.pdf.

[35] See *supra*, note 22; for the interrelationship between UNCLOS and regional regimes, see: *Erik Franckx*, Regional Marine Environment Protection Regimes in the Context of UNCLOS, IJMCL 13 (1998), 307, 316 *et seq.*

[36] *Tanaka* (note 2), 573, who thoroughly analysed the pertinent regional agreements on land-based pollution (550 *et seq.*). For another comparative analysis, see *Hassan* (note 2), 140 *et seq.* On BATs and BEPs, monitoring and reporting, see: *David M. Dzidzornu*, Marine Environment Protection under Regional Conventions: Limits to the Contribution of Procedural Norms, ODIL 33 (2002), 263, 271 *et seq.*, 287 *et seq.* On compliance control, see: *Elizabeth A. Kirk*, Noncompliance and the Development of Regimes Addressing Marine Pollution from Land-Based Sources, ODIL 39 (2008), 235.

[37] ITLOS, *MOX Plant Case* (Ireland *v.* United Kingdom), Provisional Measures, Order of 3 December 2001, ITLOS Reports (2001), 95, 99–101 (para. 26).

[38] *MOX Plant Case* (note 37), Request for Provisional Measures and Statement of Case Submitted on Behalf of Ireland, 9 November 2001, 48–50 (paras. 97–101), available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/request_ireland_e.pdf; the UK rejected this argument and declared that the precautionary principle was not applicable on the facts of the case, since Ireland had failed to prove that there would be either irreparable damage to her rights or serious harm to the environment: *MOX Plant Case* (note 37), Written Response of the United Kingdom, 15 November 2001, 428–429 (para. 184), available at: https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/response_uk_e.pdf; and *MOX Plant Case* (note 37), 109 (para. 75).

[39] *MOX Plant Case* (note 37), paras. 81–89.

[40] *MOX Plant Case* (note 37), Separate Opinion of Judge Treves, 139, para. 8; *MOX Plant Case* (note 37), Separate Opinion of Judge Wolfrum, 134–135. However, in: ICJ, *Case Concerning Pulp Mills on the River*

ered a standard within the meaning of Art. 213 cl. 2. In this vein, States under UNCLOS would be obliged to regard the precautionary principle in their pollution-preventing activities. Furthermore, it arguably frames the interpretation of other international standards that come within Art. 213 cl. 2 themselves.

14 In sum, Art. 213 leaves States parties with a wide margin of discretion with regard to the means and precise activities chosen to enforce their national laws and regulations and international rules and standards. In comparison to other sources of marine pollution, State sovereignty is only marginally restricted by international rules and standards relating to land-based pollution. To date, no overall global treaty on land-based sources of marine pollution has been concluded because international restrictions on such sources have a substantial impact on the economic and social development of States. Nevertheless, at the regional level a number of principles and legal and administrative techniques have been agreed upon which are designed to limit a State's discretion and improve effective enforcement of regional rules and standards against marine pollution from land-based sources.

Article 214
Enforcement with respect to pollution from seabed activities

States shall enforce their laws and regulations adopted in accordance with article 208 and shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conference to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction, pursuant to articles 60 and 80.

Bibliography: *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999); *Gerhard Hafner*, Meeresumwelt, Meeresforschung und Technologietransfer, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 347–460; *John W. Kindt*, The Law of the Sea: Offshore Installations and Marine Pollution, Pepperdine Law Review 12 (1984/85), 381–426; Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991)

Documents: European Maritime Safety Agency, Action Plan for Response to Marine Pollution from Oil and Gas Installations, as adopted by EMSA's Administrative Board at its 37th Meeting held in Lisbon, Portugal, on 13–14 November 2013, available at: http://www.emsa.europa.eu/news-a-press-centre/external-news/item/1961-action-plan-for-response-to-marine-pollution-from-oil-and-gas-installations.html; EU Commission, Decision of 19 January 2012, OJ 2012 C 18, 8; IMO, Code for the Construction and Equipment of Mobile Offshore Drilling Units, adopted by IMO Res. A.1023(26) of 2 December 2009; IMO, Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and Exclusive Economic Zone, adopted by IMO Res. A.672(16) of 19 October 1989; IMO, Guidelines for the Design and Construction of Offshore Supply Vessels, adopted by IMO Res. MSC.235(82) of 1 December 2006; US Presidential Proclamation 2667, Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf of 28 September 1945

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Uruguay (Argentina *v.* Uruguay), Judgment of 20 April 2010, ICJ Reports (2010), 14, 71 (para. 164) it was held by the court that 'while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as a reversal of the burden of proof'.

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I. Purpose and Function

Art. 214 establishes obligations for coastal States to use the jurisdiction over their maritime zones to enforce action against pollution stemming from seabed activities. It has to be read together with Art. 208 providing prescriptive jurisdiction with regard to marine pollution from seabed activities subject to national jurisdiction.[1] Both provisions are closely linked to Art. 194 (3)(c) obliging the States Parties to take measures against pollution 'from installations and devices used in the exploration and exploitation of the natural resources of the seabed and subsoil', particularly focusing on the prevention of accidents, how to deal with emergency situations and the regulation of construction, design, equipment and manning standards to ensure the safety of operations. These provisions have to be read in the light of Art. 193, confirming a State's sovereign right to exploit its natural resources pursuant to its own national environmental policies, but also in accordance with its general obligation to protect and preserve the marine environment. **1**

The purpose of Art. 214 is to give effect to the national laws and regulations a State party has adopted in accordance with Art. 208 (1) and to ensure that additional measures are taken to implement applicable international and regional rules and standards, pursuant to Art. 208 (5). **2**

The function of this article is to oblige States engaged in seabed activities, mainly on the continental shelf, or other economic uses in the exclusive economic zone (EEZ) connected with the construction and operation of artificial islands and offshore installations and structures to use their jurisdiction for applying and enforcing the pertinent legal provisions. **3**

II. Historical Background

After the 1945 Truman Proclamation on the continental shelf,[2] offshore oil and gas production increased, thus becoming a new source of marine pollution. Consequently, in Art. 24 of the 1958 Geneva Convention on the High Seas, States were obliged to draw up regulations against marine pollution from oil resulting, *inter alia*, 'from the exploitation and exploration of the seabed and its subsoil'. Furthermore, according to Art. 5 (7) of the 1958 Geneva Convention on the Continental Shelf, States Parties were under the duty 'to undertake, in the safety zones [established around offshore installation and devices], all appropriate measures for the protection of the living resources of the sea from harmful agents'. These provisions allowed for some protection of the marine environment from pollution caused by seabed activities, but were limited in scope and lacked specific requirements States had to comply with. **4**

During UNCLOS III, a distinction was made between prescriptive and enforcement jurisdiction.[3] At the Second Session in 1974, Greece submitted a proposal providing for enforcement jurisdiction of the flag State as well as the coastal State.[4] Whereas the Informal **5**

[1] See generally *Wacht* on Art. 208.

[2] US Presidential Proclamation 2667, Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf of 28 September 1945, available at: http://www.gc.noaa.gov/documents/gcil_proc_2667.pdf.

[3] *Cf. König* on Art. 213 MN 5.

[4] Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991), 223 (MN 214.3). For the Greek Proposal, see: Third Committee

Single Negotiating Text (ISNT) stated that 'States shall have the right to enforce laws and regulations […]'[5], the Revised Single Negotiating Text (RSNT), after consultations in the Informal Group of Juridical Experts, read 'States shall enforce their laws and regulations […]'[6], thus transforming a right of enforcement into a duty to enforce national laws and regulations adopted in accordance with the relevant provisions of the Convention.[7] In addition, the Informal Group of Juridical Experts proposed an extension of the scope of application by inserting into the text the formulation '[…] arising from activities concerning exploration and exploitation of *their continental shelves and from installations under their jurisdiction*'.[8] This proposal entered the RSNT in a slightly modified wording which read '[…] arising from seabed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction, […]'[9]. This extension of the scope of application brought Art. 213 into line with Art. 208 the scope of application of which had already been extended to 'installations and structures under their jurisdiction' in the ISNT and re-formulated in the RSNT (1976).[10] At the Tenth Session in 1981, the scope of application was broadened once again by inserting the words 'or in connection with' between 'from' and 'seabed activities', thus bringing it into concordance with Art. 208.[11]

III. Elements

1. 'States shall enforce their laws and regulations adopted in accordance with article 208'

6 Art. 214 obliges States to enforce their laws and regulations adopted in accordance with Art. 208. Despite its reference to 'States' without further specification, Art. 214 is primarily aimed at coastal States exploiting or licensing the exploitation of the natural resources in their maritime zones. In addition, it is applicable to flag States with regard to ships engaged in sea-bed activities.[12] The drafting history of Art. 214 shows that the States obliged to enforce their national laws and regulations adopted in accordance with Art. 208 are, first of all, coastal States and, to a lesser extent, flag States (when vessels or floating structures similar to ships are used in connection with seabed activities).

7 The obligation to enforce relates to national laws and regulations which have been adopted pursuant to Art. 208. Art. 214 complements the duty to adopt with an obligation to enforce and thus counters the reluctance of States to implement the adopted laws and regulations according to Art. 208.

8 The national laws and regulations referred to in Art. 214 shall, according to Art. 208 (3), be 'no less effective than international rules, standards and recommended practices and procedures'.[13] Consequently, the discretion of the States concerned is far more limited than in the case of pollution from land-based sources.[14] International rules, standards, practices and procedures, no matter whether they are legally binding or 'soft law', have the function of minimum standards. Since the phrase 'no less effective than international rules' focuses on

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UNCLOS III, Greece Draft Article on the Enforcement of the Provisions on the Protection of the Marine Environment, UN Doc. A/CONF.62/C.3/L.4 (1974), OR III, 247.

[5] See UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF. 62/WP.8/PART III (1975), OR IV, 171, 174 (Art. 23).

[6] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 177 (Art. 24).

[7] Nordquist/Rosenne/Yankov (note 4), 224–225 (MN 214.4–214.5).

[8] *Ibid*., 224 (para. 214.4, emphasis added).

[9] RSNT (note 6), 177 (Art. 24).

[10] Nordquist/Rosenne/Yankov (note 4), 140–141 (MN 208.5–208.6); *cf*. also RSNT (note 6), 176 (Art. 18).

[11] Nordquist/Rosenne/Yankov (note 4), 225 (MN 214.6), and 143 (MN 208.7).

[12] *Ibid*., 144 (MN 208.10(a)).

[13] For further information, see *Wacht* on Art. 208.

[14] *Cf. König* on Art. 213 MN 8.

the result of national legislation, States retain some discretion with regard to the ways and means by which they transpose these rules and standards into national law. This discretion also exists with regard to the implementation and enforcement of the national legal provisions, as long as the results are in compliance with the rules and standards agreed upon at the international or regional level.

2. 'shall adopt laws, regulations and other measures necessary to implement applicable international rules and standards'

Art. 214 cl. 1 obliges States to actually enforce already existing laws and obligations on the domestic level with regard to pollution from seabed activities. Art. 214 cl. 2 extends this obligation to such rules adopted internationally, and consequently also entails an obligation to enact domestic laws in order to make such rules applicable in domestic proceedings. This second prong is necessary in particular with regard to Art. 208 (5), which favours global or regional cooperation, which will not necessarily result in domestically applicable rules without an act of domestic implementation. The phrase 'applicable international rules and standards established through competent international organizations or diplomatic conference' has the same meaning as in Art. 213.[15] **9**

To date, there is no global legally binding agreement concerning pollution from seabed activities, in particular offshore oil and gas exploration and exploitation.[16] Some forms of pollution from offshore platforms are however regulated by the International Convention for the Prevention of Pollution from Ships (MARPOL), such as discharges of oil from platform drainage (Annex I), sewage (Annex IV) and garbage (Annex V), with the exception of the 'release of harmful substances directly arising from exploration, exploitation and associated offshore processing of seabed mineral resources'[17]. At the regional level, only four out of fourteen regional seas conventions[18] are supplemented by a protocol or an annex specifically dealing with pollution from offshore activities.[19] These protocols and annexes are far from uniform, but have, at least to a certain extent, some common features with regard to implementation and enforcement measures required by coastal and flag States. For example, the erection of installations or structures has to be subject to an environmental impact assessment and prior written authorisation from the competent national authorities which have to ensure operators' compliance with the relevant rules and standards by monitoring and inspection schemes. In the case of breaches of obligations or non-observance of national laws and regulations, sanctions have to be imposed. In addition, operators are under the duty to use best available technology, follow best environmental practices and remove disused or abandoned installations. In cases of accidental pollution, e. g. from a blow-out, international and regional conventions or protocols on preparedness and cooperation in emergency situations are applicable. These oblige States Parties, *inter alia*, to require from operators to have oil pollution emergency plans and report on discharges, to exchange information with **10**

[15] *Cf. König* on Art. 213 MN 10.

[16] IMO, Code for the Construction and Equipment of Mobile Offshore Drilling Units, adopted by IMO Res. A.1023(26) of 2 December 2009; and IMO, Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and Exclusive Economic Zone, adopted by IMO Res. A.672(16) of 19 October 1989, are only of a recommendatory nature. See also IMO, Guidelines for the Design and Construction of Offshore Supply Vessels, adopted by IMO Res. MSC.235(82) of 1 December 2006.

[17] Art. 2 (3)(b)(ii) MARPOL. For an overview see *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd ed. 1999), 370 *et seq.*

[18] See *König* on Art. 213 MN 11 (footnote 31).

[19] Protocol Concerning Marine Pollution Resulting from Exploration and Exploitation of the Continental Shelf, 23 March 1989, UNTS 2605, 91; Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil, 14 October 1994, available via: http://www.unepmap.org/; Annex VI Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area17 January 2000, UNTS 2099, 195; Annex III Convention for the Protection of the Marine Environment of the North East Atlantic, 22 September 1992, UNTS 2354, 67.

neighbouring States and to cooperate in preventing or combating pollution incidents.[20] Nevertheless, the effectiveness of implementation and enforcement measures differs substantially from region to region. In order to strengthen and harmonize such measures in the European Union, the European Commission, in the aftermath of the *Deepwater Horizon* incident in April 2010, adopted a new directive on safety of offshore oil and gas operations. According to this directive, Member States have to assess the potential safety and environmental performance including the financial capacity of applicants, establish competent authorities for supervision, inspection and investigation to ensure compliance by operators, and impose appropriate penalties for violations.[21] To support close cooperation and the exchange of experiences among the competent national authorities, the Commission established the European Union Offshore Oil and Gas Authorities Group.[22] In addition, the European Maritime Safety Agency (EMSA) was accorded with a new mandate to respond to marine pollution caused by oil and gas installations.[23]

3. 'pollution of the marine environment'

11 **a) 'arising from or in connection with seabed activities subject to their jurisdiction'.** The phrase 'arising from or in connection with seabed activities subject to their jurisdiction' means any kind of activities connected with the exploration and exploitation of the natural resources in maritime zones under national jurisdiction, i. e. internal waters, territorial sea, archipelagic waters, exclusive economic zone and continental shelf, as defined in Art. 76, of the coastal or archipelagic State.[24] This enforcement jurisdiction derives either from territorial sovereignty or from the sovereign rights accorded to the coastal or archipelagic State in the Convention, though this right may also exist in customary international law. It encompasses not only their own citizens or companies, but also foreign natural or juridical persons involved in seabed activities in these maritime zones.[25] Furthermore, the above-cited phrase refers to the enforcement jurisdiction of flag States as far as ships are used for or in connection with seabed activities, such as ships used for towing, offshore storage and transportation.[26]

12 **b) 'and from artificial islands, installations and structures under their jurisdiction, pursuant to Articles 60 and 80'.** In addition, coastal States are obliged to implement and enforce their national provisions adopted in accordance with Art. 208 and applicable international rules and standards concerning marine pollution from artificial islands, installations and structures under their jurisdiction, pursuant to Arts. 60 and 80. Whereas Art. 80, which applies to these constructions on the continental shelf, deals with seabed activities, the scope of application of Art. 60 concerning such artifices in the EEZ is broader.[27]

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[20] International Convention on Oil Pollution Preparedness, Response and Cooperation, 30 November 1990, UNTS 1891, 51; 8 out of 14 Regional Seas Conventions are supplemented by protocols on cooperation to combat pollution by oil and other harmful substances in cases of emergency. See, e. g., Protocol on Cooperation in Combating Pollution of the Black Sea Marine Environment by Oil and Other Harmful Substances in Emergency Situations, 21 April 1992, UNTS 1764, 24.

[21] Directive 2013/30/EU of the European Parliament and the Council of 12 June 2013 on Safety of Offshore Oil and Gas Operations and Amending Directive 2004/35/EC, OJ 2013 L 178, 66; this Directive has to be transposed into national law by 19 July 2015.

[22] EU Commission, Decision of 19 January 2012, OJ 2012 C 18, 8.

[23] Regulation (EU) No 100/2013 of the European Parliament and the Council of 15 January 2013 amending Regulation (EC) No 1406/2002 establishing a European Maritime Safety Agency, OJ 2013 L 39, 30; for more details see EMSA, Action Plan for Response to Marine Pollution from Oil and Gas Installations, as adopted by EMSA's Administrative Board at its 37th Meeting held in Lisbon, Portugal, on 13–14 November 2013, available at: http://www.emsa.europa.eu/news-a-press-centre/external-news/item/1961-action-plan-for-response-to-marine-pollution-from-oil-and-gas-installations.html.

[24] Nordquist/Rosenne/Yankov (note 4), 144 (MN 208.10(a)).

[25] *Gerhard Hafner*, Meeresumwelt, Meeresforschung und Technologietransfer, in: Wolfgang Graf Vitzthum (ed.), Handbuch des Seerechts (2006), 347, 403 (MN 169).

[26] Nordquist/Rosenne/Yankov (note 4), 144 (MN 208.10(a)).

[27] See *Maggio* on Art. 80 MN 15.

According to Art. 60 (1), the coastal State has exclusive jurisdiction over artificial islands, irrespective of their purpose, installations and structures that are used for economic purposes as referred to in Art. 56 (1), and installations and structures, irrespective of their purpose, which may interfere with the coastal State's rights in the EEZ.[28]

Article 215
Enforcement with respect to pollution from activities in the Area

Enforcement of international rules, regulations and procedures established in accordance with Part XI to prevent, reduce and control pollution of the marine environment from activities in the Area shall be governed by that Part.

Bibliography: *Edward D. Brown*, Pollution from Seabed Mining: Legal Safeguards, Environmental Policy and Law 10 (1983), 122–134; *James L. Kateka*, Protection and Preservation of the Marine Environment in the Area under UNCLOS, in: Holger P. Hestermeyer/Doris König/Nele Matz-Lück/Volker Röben/Anja Seibert-Fohr/Peter-Tobias Stoll/Silja Vöneky (eds.), Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum, vol. I (2012), 919–931; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. VI (2002); Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea, 1982: A Commentary, vol. IV (1991); *Rosemary Rayfuse*, Precaution and the Protection of Marine Biodiversity in Areas beyond National Jurisdiction, IJMCL 27 (2012), 773–781

Documents: ISA, Draft Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, ISA Doc. ISBA/18/C/WP.1 (2011); ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/A/18 (2000), Annex; ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/REV.1 (2010), Annex

Cases: ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf

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I. Purpose and Function

Art. 215 is found in Section 6 of Part XII, which addresses enforcement with respect to protection and preservation of the marine environment. It states that the enforcement of all provisions regarding the prevention, reduction and the control of pollution of the marine environment resulting from activities in the Area adopted under Part XI is governed by Part XI. It is the counterpart of Art. 209, which relates to prescriptive measures regarding prevention of pollution of the marine environment which might be caused by activities in the Area. The meaning of 'pollution of the marine environment' is defined in Art. 1 (1)(4). **1**

Art. 215, as a cross-reference, does not provide any normative content of its own. Instead, it makes clear that the relevant provisions are found in Part XI, the most significant of which is Art. 145. In spite of its lack of substantive content, Art. 215 formally satisfies the conception **2**

[28] *Ibid.*, 226 (MN 214.7(c)); *Hafner* (note 25), 403 (MN 169); *John W. Kindt*, The Law of the Sea: Offshore Installations and Marine Pollution, Pepperdine Law Review 12 (1984/85), 381, 411 *et seq.*; see also *Proelss* on Art. 60 MN 8–17.

that Part XII addresses the protection and preservation of the marine environment in all maritime zones.[1] Art. 215 has, therefore, been characterized as a statement of principle.[2]

II. Historical Background

3 The concern of pollution caused by activities on the ocean floor as such was not entirely new at the beginning of UNCLOS III. With respect to pollution resulting from exploration and exploitation activities on the seabed and its subsoil, the 1958 Geneva Convention on the High Seas (High Seas Convention) provided that States were under the obligation to introduce preventive regulations, but included no mention of how such regulations were to be enforced.[3] According to the 1958 Convention on the Continental Shelf (CSC), 'exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with […] the conservation of the living resources of the sea.'[4] Yet, the novelty of the concept of the Area alongside the growing awareness of the risks posed by human activity to the marine environment called for an explicit, more detailed framework.

4 The provisions of Part XII, including Art. 215, were negotiated by the Third Committee, which dealt with the preservation of the marine environment and scientific research. In contrast, Part XI was elaborated by the First Committee, which was in charge of the development of a regime for the deep seabed. The First Committee completed its work after the Third Committee, which might explain the absence of any provision detailing the enforcement powers to which Art. 215 implicitly refers.[5] Despite the institutional disconnectedness of the drafting processes concerning Art. 215 and Part XI, there is some obvious parallelism between the negotiations related to Art. 215 and the discussion on the new regime on the international seabed.

5 The earliest drafts do not detail a regime applicable to prevention and enforcement measures regarding pollution from seabed activities, but they mention the issue in very general language.[6] Substantive negotiations began at the Caracas Session in 1974, with Kenya submitting the first formal proposal. It suggested that the International Seabed Authority (ISA or the Authority) be vested with the responsibility to ensure the enforcement of measures taken to prevent 'all sources of pollution of the marine environment beyond the limits of national jurisdiction.'[7] This strong role intended for the ISA was in sharp contrast to the decentralized conception of ocean governance reflected by the Greek proposal, according to which 'pollution arising from the exploration and exploitation of the sea-bed [should be] enforced by the coastal State within the areas under its national jurisdiction and by the flag State.'[8] In other words, the flag State would have been entrusted with enforcement responsibility in international areas. Middle ground between the institutionalized and the decentralized approach was found at the Geneva Session in 1975, as the Informal Single Negotiating Text provided for enforcement by the ISA in cooperation with flag States.[9]

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[1] For further information on the scope of application of Part XII, see *Czybulka* on Art. 192 MN 1–9.

[2] Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea, 1982: A Commentary, vol. IV (1991), 228.

[3] Art. 24 High Seas Convention.

[4] Art. 5 (1) CSC.

[5] See *James L. Kateka*, Protection and Preservation of the Marine Environment in the Area under UNCLOS, in: Holger P. Hestermeyer *et al.* (eds.), Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum, vol. I (2012), 919.

[6] See, e. g., Sea-Bed Committee, Draft Ocean Space Treaty: Working Paper Submitted by Malta, UN Doc. A/AC.138/53 (1971).

[7] Third Committee UNCLOS III, Kenya: Draft Articles for the Preservation and the Protection of the Marine Environment, UN Doc. A/CONF.62/C.3/L.2 (1974), OR III, 245, 247 (Art. 28); see also *ibid.*, 245(Art. 2).

[8] Third Committee UNCLOS III, Greece: Draft Articles on the Enforcement of the Provisions on the Protection of the Marine Environment, UN Doc. A/CONF.62/C.3/L.4 (1974), OR III, 247 *et seq.* (Art. 2).

[9] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975), OR IV, 171, 174 (Art. 24).

The final wording is, however, essentially based on the Informal Group of Juridical Experts' reformulation, which reads: 6

> 'Enforcement of measures established to prevent, reduce and control pollution of the marine environment from activities concerning exploration and exploitation of the international sea bed area pursuant to Chapter […] of the Convention shall be governed by the provision of that Chapter.'[10]

In the Revised Single Negotiating Text, the word 'measures' was changed to 'international rules, standards and recommended practices and procedures,'[11] harmonizing the wording with that of the provision that later evolved into Art. 209. Subsequent changes were also only cosmetic in nature. The expression 'international sea-bed area' was changed into 'Area' in draft Art. 216 of the Informal Composite Negotiation Text, which also identified Part XI as the relevant part governing all questions related to the Area.[12] Another harmonizing change was made by adopting the expression 'rules, regulations and procedures,' which was the phrasing used in the provision that later became Art. 145.[13] Art. 145 is the central, though not the only, provision in Part XI relating to the issue of environmental protection in the context of activities carried out in the Area.

III. Elements

1. 'Enforcement […] shall be governed by [Part XI]'

Being strictly a cross-reference provision, Art. 215 does not detail the enforcement measures to be taken nor does it identify those who are in charge of taking such measures. Instead, it indicates that enforcement in this particular maritime zone is governed by Part XI. It therefore corresponds to the prescriptive provision of Art. 209 as the enforcement counterpart, forming another cross-reference to Part XI devoid of any independent normative content. 7

2. 'Enforcement [measures] in accordance with Part XI'

Although Part XI does not provide a detailed framework on the enforcement of measures for the prevention, reduction and control of pollution of the marine environment arising out of activities in the Area, several of its provisions are concerned with environmental protection. The main provision of Part XI on the protection of the marine environment is Art. 145. It specifies that necessary measures are to be taken in order to ensure effective protection and that the Authority shall adopt appropriate rules, regulations and procedures to this end.[14] It therefore appears that Art. 145 is mainly concerned with prescriptive measures and does not even mention enforcement. In so far as emergencies are concerned, Art. 162 (2)(w) determines that the Council, which is the executive organ of the ISA, may issue emergency orders in order prevent serious harm to the marine environment arising out of activities in the Area. According to Art. 165, the Council is assisted by a Legal and Technical Commission, whose tasks are linked to the Council's executive functions and which, according to Art. 165 (2)(d) to (h) and (k), deals with the protection of the marine environment. Of particular interest with respect to enforcement is the Commission's task to make recommendations to the 8

[10] UNCLOS III, Group of Juridical Experts: Preservation of the Marine Environment (1976, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. XI (1987), 525, 533 (Art. 24).

[11] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 177 (Art. 25).

[12] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 37 (Art. 216).

[13] According to Nordquist/Rosenne/Yankov (note 2), 231 who cite UNCLOS III, UN Doc. A/CONF.62/L.67/ADD.8 (1981, mimeo.), 34–35. See also *Vöneky/Beck* on Art. 145.

[14] For an assessment of the rules and standards elaborated by the Authority, see *Rosemary Rayfuse*, Precaution and the Protection of Marine Biodiversity in Areas beyond National Jurisdiction, IJMCL 27 (2012), 773, 778 *et seq.*

Council. More specifically, these recommendations may address, according to Art. 165 (2)(h), the establishment of a monitoring programme, which ensures, *inter alia*, compliance with existing regulations and, according to Art. 165 (2)(k), the issuance of emergency orders. Art. 142 (3) states that the coastal State keeps its rights to take measures consistent with Part XII that are 'necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline, or related interests from pollution or threat thereof or from other hazardous occurrences resulting from or caused by any activities in the Area.'

9 Some complementary rules are set out in Annex III, which provides for basic conditions of prospecting, exploration and exploitation and to which Art. 153 of Part XI refers. Several provisions address enforcement measures with regard to environmental protection without, however, establishing a comprehensive framework on the matter. According to Annex III Art. 2 (1)(b), the prospector (→ Art. 153 (2)) has to give a written undertaking to comply with the rules concerning the protection of the marine environment and to accept verification of the Authority in this regard. Annex III Art. 17 (1)(b)(xii) requires that the Authority adopt and uniformly apply rules, regulations and procedures on, *inter alia*, mining standards and practices, including those relating to operational safety, resource conservation and environmental protection. Annex III Art. 17 (2)(f), while detailing how prescriptive measures are to be conceived by the Authority, does not mention the aspect of enforcement. However, Annex III Art. 21 (3) provides that 'the application by a State Party to contractors sponsored by it, or to ships flying its flag, of environmental […] regulations more stringent than those […] adopted by the Authority pursuant to article 17, paragraph 2(f),' is not deemed inconsistent with Part XI. According to the interpretation by the International Tribunal of the Law of the Sea (ITLOS), 'the rules, regulations and procedures concerning environmental protection adopted by the Authority are used as a minimum standard of stringency for the environmental […] laws and regulations that the sponsoring State may apply to the sponsored contractor,' while the sponsoring State may also apply to the contractors they sponsor 'more stringent standards as far as the protection of the marine environment is concerned.'[15]

10 The absence of a specific, detailed legal framework on the enforcement of measures to prevent, reduce and control pollution of the marine environment from activities in the Area in Part XII contrasts with the well-developed legal framework on enforcement regarding all other marine activities established by Arts. 216 through 221. At first glance, this discrepancy may be explained by the principle enunciated in Art. 134 (2), according to which all aspects related to activities in the Area are governed by the provisions of Part XI. However, even Part XI and, by extension, Annex III do not provide comprehensive rules on enforcement of measures to prevent, reduce and control pollution of the marine environment from activities in the Area. The reference in Art. 145 to measures to be taken to 'ensure effective protection for the marine environment from harmful effects which may arise from activities' in the Area is, however, sufficiently broad to include the elaboration of enforcement measures.[16] Consequently, the detailed framework on enforcement emerges from treaty practice. Several regulations adopted by the Authority are indeed related to enforcement, addressing compliance and compliance control.[17]

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[15] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, para. 240, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf.

[16] See also Nordquist/Rosenne/Yankov (note 2), 231.

[17] See Reg. 3 (4)(d)(i) and Reg. (4)(d)(b.)(ii) ISA, Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, ISA Doc. ISBA/6/A/18 (2000), Annex, as well as Part V on the protection and preservation of the marine environment, especially Regs. 31 through 33 dealing with the establishment of a monitoring system, emergency orders and the coastal States' rights, respectively. See also both Reg. 3 (4)(d)(i) and Reg. (4)(d)(b.)(ii) ISA, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, ISA Doc. ISBA/16/A/12/REV.1 (2010), Annex and Reg. 3 (4)(d)(i) and Reg. (4)(d)(b.)(ii) ISA, Draft Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, UN Doc. ISBA/18/C/WP.1 (2011) as well as Part V on the protection and preservation of the marine environment, especially Regs. 33, 35, 36

Several other provisions of Part XI address enforcement in a more general manner than Art. 215, which is limited to environmental protection. It appears that under Part XI, enforcement is a responsibility that is not attributed to one single actor. Art. 139 (1), underlines the responsibility of the State Parties and international organizations to ensure that activities in the Area are carried out in conformity with Part XI. It appears from Art. 139 (2), in conjunction with Art. 153 (4), that this includes the responsibility to take appropriate enforcement measures. This was confirmed by the ITLOS advisory opinion, which states that in addition to domestic laws and regulations, domestic administrative measures and even a proper mechanism of active supervision of the activities may be necessary to ensure enforcement of the international framework regarding activities in the Area, including rules and regulations adopted by the Authority.[18] Art. 153 (4) entrusts the Authority with the control over activities in the Area that is necessary for securing compliance with Part XI, the law adopted by the Authority and the planes of work. By referring to Art. 139, it also mentions that the sponsoring States have to assist the Authority by taking all measures necessary to ensure such compliance. Annex III Art. 4 (4), also referring to Art. 139, repeats the responsibility of the sponsoring State to ensure, within its legal system, that contractors carry out activities in the Area in conformity with the terms of its contract and its obligations under the Convention. According to ITLOS, the references to Art. 139 made by Art. 153 and Art. 4 Annex III allow for the conclusion that the States referred to, but not explicitly identified in Art. 139 are sponsoring States.[19] These States share their responsibility with the Authority, but, as the Tribunal further states, have in their relationship to it only a subordinate role, which merely consists in assisting the Authority when it comes to ensuring compliance.[20] **11**

Article 216
Enforcement with respect to pollution by dumping

1. Laws and regulations adopted in accordance with this Convention and applicable international rules and standards established through competent international organizations or diplomatic conference for the prevention, reduction and control of pollution of the marine environment by dumping shall be enforced:

(a) **by the coastal State with regard to dumping within its territorial sea or its exclusive economic zone or onto its continental shelf;**
(b) **by the flag State with regard to vessels flying its flag or vessels or aircraft of its registry;**
(c) **by any State with regard to acts of loading of wastes or other matter occurring within its territory or at its off-shore terminals.**

2. No State shall be obliged by virtue of this article to institute proceedings when another State has already instituted proceedings in accordance with this article.

Bibliography: Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea, 1982: A Commentary, vol. IV (1991); *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2010); *Alan Sielen*, The New International Rules on Ocean Dumping: Promise and Performance, GIELR 21 (2008–2009), 295–336

dealing respectively with the establishment of a monitoring system, emergency orders and the coastal States' rights, reproduced in: Myron H. Nordquist/Satya N. Nandan/James Kraska (eds.), UNCLOS 1982 Commentary: Supplementary Documents (2012), 227 *et seq*.

[18] *Responsibilities and Obligations of Sponsoring States* (note 15), para. 212–222, in particular 218 *et seq*.

[19] *Ibid*., para. 101.

[20] *Ibid*., para. 102.

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I. Purpose and Function

1 Art. 216, which belongs to Section 6 of Part XII, on enforcement with regard to the protection and preservation of the marine environment, deals with enforcement related to pollution of the marine environment by dumping. It corresponds, at least in part, to the prescriptive provision of Art. 210. The meaning of the expression 'pollution of the marine environment' is defined in Art. 1 (1)(4). The definition of the word 'dumping' in Art. 1 (1)(5) makes it possible to distinguish the scope of application of Art. 216 from that of Art. 222, which addresses enforcement with respect to pollution from or through the atmosphere. Incidental or operational disposal of wastes from aircraft and their equipment, unless it is related to genuine dumping activities, is not comprised in the meaning of the word 'dumping', so that this kind of pollution, instead of being covered by Arts. 210 and 216, falls into the scope of Arts. 212 and 222. As Art. 216 (1) imposes enforcement obligations upon different types of States – including flag States, according to subparagraph (b), and coastal States, according to subparagraph (a) – it must be applied in light of the corresponding Arts. 217 and 220.[1] Furthermore, subparagraph (c) establishes another rather unusual category of States obliged to take enforcement measures, that is, States, in whose territory or off-shore terminals the loading of wastes and other matter occurs. In the latter case, enforcement measures will generally be preventive, while enforcement by coastal States will mostly be curative. Flag States' enforcement measures may play either a preventive or a curative role, depending on the situation. The obligations set forth in Art. 216 are completed by Art. 226, which provides for the obligations of States engaged in investigating foreign vessels.

2 Art. 216 (2), limiting the scope of the obligations set forth in paragraph 1, makes clear that no State is under the obligation to institute proceedings when proceedings are already instituted by another State. This is to avoid multiple proceedings, which may be unhelpful in particular with regard to judicial efficiency and legal coherence.

II. Historical Background

3 The prohibition of dumping at sea must be seen against the backdrop of the centuries-old practice of using the oceans as a bottomless waste disposal site. This *de facto* 'right to pollute' was only challenged when the environmental consequences became apparent later on. Dumping at sea was an early environmental concern, as the disposal at sea of industrial and military wastes, including wastewater and sludge, nuclear waste and hardware, was one of the first industrial problems to reach serious proportions. At first, States' attention was drawn by the dumping of radioactive waste, which led to the inclusion, in the 1958 Convention on the High Seas (High Seas Convention), of a provision that called upon States to prevent this particular kind of dumping.[2] In an effort to address the entire problem of dumping, the 1972

[1] See *infra*, MN 10.
[2] Art. 25 (1) High Seas Convention.

United Nations Conference on the Human Environment, held in Stockholm in June 1972, called for the elaboration of a comprehensive and global instrument for the control of ocean dumping.[3] Earlier the same year, the regional Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (Oslo Dumping Convention) had been adopted for parts of the Atlantic and the Arctic Ocean.[4] Not only does the Oslo Dumping Convention explicitly lay out an obligation of enforcement, but it also paved the way for the distinction, in Art. 216, of different categories of States. The registering or flag State must ensure compliance by vessels flying its flag or registered by it, pursuant to Art. 15 (1)(a) Oslo Dumping Convention, while the coastal State must ensure compliance with regard to dumping which takes place in its territorial sea, according to Art. 15 (1)(c), and with respect to the loading of material to be dumped, according to Art. 15 (1)(b).[5]

Following the Stockholm Conference, the Inter-Governmental Conference on the Convention on the Dumping of Wastes at Sea, held the same year in London, adopted the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention).[6] Its Art. VII (1) is modelled on Art. 15 (1) Oslo Dumping Convention, except for a reformulation of subparagraph (c), which refers to vessels, aircraft or platforms believed to be engaged in dumping as long as they are under the State's 'jurisdiction'. This vague term, which caused uncertainties on the eve of the UNCLOS negotiations, nevertheless forebodes the substantial expansion of the coastal States' jurisdiction. The London Convention further includes Art. XIII, which addresses the coordination of this sectorial instrument and the new global convention on the law of the sea with its subsequent developments. In particular, it left the development of the rights and obligations of the coastal State in areas beyond its territorial sea to the UNCLOS III negotiations. Under UNCLOS, coordination with specific agreements is governed by Art. 311, and, with respect to specific environmental agreements, by Art. 237. Both provisions were drafted to the effect that specific agreements may be concluded or upheld in so far as they are consistent with the Convention.[7] 4

While several proposals had been submitted to and discussed by the Sub-Committee III of the Sea-Bed Committee, the Committee was unable to prepare any draft provisions concerning enforcement.[8] During UNCLOS III, substantial negotiations on the issue began at the Caracas Session in 1974. Greece was the first to propose an enforcement provision, which closely followed the models of the Oslo and the London dumping conventions.[9] Israel's proposal only provided a very general obligation of making discharge of pollutants into the sea a punishable offence.[10] The other proposals made at this stage of negotiations focused on standard-setting rather than enforcement. This is the case of a draft sponsored by a group of ten States, which required States to take 'measures for prohibiting or regulating' 'dumping by vessels, aircraft and fixed or floating platforms.'[11] Likewise, a 5

[3] UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973), 6 (Action Plan for the Human Environment), Recommendation 86 (c).

[4] The Oslo Dumping Convention (Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, 15 February 1972, 932 UNTS 5) was later replaced by the OSPAR Convention (Convention for the Protection of the Marine Environment of the North-East Atlantic, 22 September 1992, 2354 UNTS 70)).

[5] The latter provision has also been interpreted as imposing an obligation on port States, see Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea, 1982: A Commentary, vol. IV (1991), 234.

[6] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 29 December 1972, 1046 UNTS 138.

[7] *Cf. Matz-Lück* on Art. 311 and *Czybulka* on Art. 237.

[8] See Sea-Bed Committee, Chairman of Working Group 2, Note Addressed to the Chairman of Sub-Committee III, UN Doc. A/AC.138/SC.III/L.52 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-I), 89, 90.

[9] Third Committee UNCLOS III, Greece: Draft Articles on the Enforcement of the Provisions on the Protection of the Marine Environment, UN Doc. A/CONF.62/C.3/L.4 (1974), OR III, 247, 248 (Art. 3).

[10] Third Committee UNCLOS III, Israel: Draft Articles on the Enforcement of Provisions on the Protection of the Marine Environment, UN Doc. A/CONF.62/C.3/L.5 (1974), OR III, 249 (Art. 1).

[11] Third Committee UNCLOS III, Canada *et al.*: Draft Articles on a Zonal Approach to the Preservation of the Marine Environment, UN Doc. A/CONF.62/C.3/L.6 (1974), OR III, 249 (Art. 3 (3)(d)).

provision put forward by the United Kingdom went no further than suggesting an obligation to establish and adopt international and national regulations to prevent and control pollution by dumping.[12] A proposal submitted by the German Democratic Republic and the USSR provided for a right to authorize and regulate dumping of wastes and other matter.[13]

6 At the Geneva Session, a proposal submitted by a group of nine States included a provision according to which States were required to ensure that dumping is not carried out without authorization in accordance with international minimal standards.[14] A detailed provision on the prevention of pollution by dumping at sea was proposed by Greece.[15] Its paragraph 5 read as follows:

> 'Rules and regulations adopted in accordance with the provisions of this Convention for the protection and preservation of the marine environment from dumping at sea shall be enforced:
> (a) By any State within its territory;
> (b) By the coastal State on vessels, aircraft, platforms, or other man-made structures at sea, engaged in dumping within an area of […] miles measured from the baselines of its territorial sea;
> (c) By the port State on vessels and aircraft loading in its ports or offshore terminals matter which is to be dumped;
> (d) By the flag State on vessels and aircraft registered in its territory or flying its flag.'

Like the Oslo and London dumping conventions, this draft distinguishes different categories of States, but goes further in that it mentions them explicitly. The category of subparagraph (a) reflects the uncompleted development of the concept of coastal State.

7 The Greek proposal paved the way for the inclusion of a slightly different draft provision in the Informal Single Negotiation Text (ISNT), which was prepared at the end of the Third Session.[16] While the introductory clause remained unchanged, both the order of the four types of States and the wording concerning coastal States were changed. It appeared from the latter that the concept of the coastal State would have been exclusively tied to the continental shelf and the exclusive economic zone (EEZ). On the basis of the ISNT formulation, the Informal Group of Juridical Experts proposed a revised version of the paragraphs. The order of the paragraphs was inverted and the formulation concerning the coastal State linked the concept to the territorial sea and the EEZ. The paragraph on the port State's obligation with regard to loading activities was changed to merely refer to the obligation of enforcement of 'any State with regard to acts occurring within its territory or at its off-shore terminal.'[17]

8 After further informal negotiations at the Fourth Session, a proposal was prepared by the Chairman of the Informal Meetings. Changes were made to paragraph (a), on the coastal State's enforcement obligation, so as to make it applicable to dumping in general, without reference to vessels or aircraft, whether it occurs in the territorial sea, the EEZ or on the continental shelf. Paragraph (c) restored the State's obligation to enforce measures regarding 'acts of loading of wastes or other matter occurring within its territory or at its off-shore terminals.' A footnote added that no State was under any obligation to take proceedings

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[12] Third Committee UNCLOS III, Conference Room Papers Containing Proposals or Amendments Informally Introduced But Not Considered by the Drafting and Negotiating Group of the Informal Meetings on Item 12 (Preservation of the Marine Environment), UN Doc. A/CONF.62/C.3/L.14/ADD.1 (1974), OR III, 255, 259 (suggestion by the United Kingdom).

[13] *Ibid.*, 259–260 (German Democratic Republic and Union of Soviet Socialist Republics).

[14] Third Committee UNCLOS III, Belgium *et al.*: Draft Articles on the Prevention, Reduction and Control of Marine Pollution, UN Doc. A/CONF.62/C.3/L.24 (1975), OR IV, 210, 211 (Art. 4 (2)). The third paragraph of this provision formulated a right of authorizing dumping activities.

[15] Third Committee UNCLOS III, Greece: Draft Article on the Prevention of Pollution from Dumping at Sea, UN Doc. A/CONF.62/C.3/L.27 (1975), OR IV, 215.

[16] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975), OR IV, 171, 174 (Art. 25).

[17] UNCLOS III, Group of Juridical Experts: Preservation of the Marine Environment (1976, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. XI (1987), 525, 533 (Art. 25).

where proceedings had already been taken by another State.[18] Further informal negotiations led to two changes in the Revised Single Negotiating Text: first, the footnote in the preceding proposal was transformed into a proper second paragraph; and second, the mention of 'applicable international rules and standards established through competent international organizations or diplomatic conference' was added to the introductory clause.[19]

Neither Pakistan's proposition to add a subparagraph on the enforcement responsibility of **9**
the Authority in the Area[20] nor the French proposition to address incineration within the provision on dumping[21] were incorporated in the Informal Composite Negotiation Text.[22] Alongside some minor drafting changes, the provision became Art. 217 on 'Enforcement with respect to dumping'. Further changes in formulation, leading eventually to the definitive wording of today's Art. 216, were made with respect to both the text of the provision and its title. They were, however, mere drafting changes and did not imply any substantial modification, although the second paragraph was completely rephrased.

III. Elements

1. 'Laws and regulations […] and applicable international rules and standards […] for the prevention, reduction and control of pollution of the marine environment by dumping shall be enforced'

The word 'shall' in the introductory phrase of Art. 216 (1) casts the provision as a legal **10**
obligation.[23] States have to enforce measures not only as an implicit consequence of the adoption of these measures, but also on the basis of a proper enforcement commitment. Investigation of a vessel may be required if a State has grounds for believing that applicable rules and regulations have been violated, but lacks evidence. The State's investigation power is implied by Art. 226, which sets out the conditions under which the State may investigate a given vessel.[24] As Art. 226 (1) explicitly refers to Art. 216, these conditions apply to investigations carried out with regard to potential dumping activities. Furthermore, the introductory clause refers to the prescriptive powers concerning the prevention of pollution by dumping. However, contrary to several other provisions of Section 6, i. e. Arts. 213, 214 and 222, Art. 216 does not do so by mentioning the corresponding provision of the Convention, on the prescription of measures to counter pollution by dumping, i. e. Art. 210. The words '[l]aws and regulations adopted in accordance with this Convention' certainly include an indirect reference to Art. 210 (1), but they also extend to laws and regulations adopted under other relevant provisions of the Convention, such as Art. 21 (1)(f), Art. 56 (1)(b)(iii), Art. 94 (4)(c), Art. 77 (1) and Art. 194 (3). Art. 77 (1) may be relevant insofar as one may argue that the coastal States' 'sovereign right for the purpose of exploring […] and exploiting [the continental shelf's] natural resources' includes the right to prohibit the dumping of any wastes that might be produced as a result of exploration or exploitation activities on the continental

[18] Third Committee UNCLOS III, Chairman's Proposal: Protection and Preservation of the Marine Environment (1976, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. X (1986), 448 (Art. 25).

[19] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 177 (Art. 26).

[20] Third Committee UNCLOS III, 33rd Meeting, UN Doc. A/CONF.62/C.3/SR.33 (1976), OR VI, 111, 114 (para. 27). For the proposal submitted by Pakistan, see Third Committee UNCLOS III, Proposals Received During the Informal Meeting on Marine Pollution (1976, mimeo.), reproduced in: Platzöder (note 17), 464, 465 (Art. 26).

[21] Third Committee UNCLOS III, France: Informal Proposal (1977, mimeo.), reproduced in: Platzöder (note 17), 496 (Art. 26).

[22] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 38 (Art. 217).

[23] UNCLOS III, UN Doc. ELGDC/5 (1980, mimeo), cited by: Nordquist/Rosenne/Yankov (note 5), xlii (footnote 3).

[24] For further information, see *Becker-Weinberg* on Art. 226.

shelf. In a yet more indirect way, Art. 56 (1)(b)(iii) is relevant as it is a reminder of the State's right, according to Art. 210, to regulate dumping in its EEZ. Through the expression 'applicable international rules and standards established through competent international organizations or diplomatic conference', it is also recognized that standard-setting may take place through a variety of international fora, including permanent international organizations and ad hoc conferences. With respect to the former, it is worth noting that the plural form indicates that the International Maritime Organization is not the only relevant international body. Regional or other specialized international organizations may also play a role in standard-setting.

11 In practice, the above-mentioned London Convention[25] and, since its entry into force in 2006, the 1996 Protocol,[26] have addressed the problem of pollution by dumping at sea. As a first step, dumping of certain especially hazardous types of material, in particular radioactive and industrial wastes, has been banned. A 'reverse strategy' adopted under the 1996 Protocol prohibits dumping, except for the dumping of material recorded on a so-called 'reverse list', provided that the activity is carried out with a permit. The requirement of permits, as a most effective administrative measure of control, is certainly covered by Art. 216 (1). Although dumping at sea remains a source of concern, especially with regard to States not willing to join the effort to combat this deleterious waste disposal, it has been successfully decreased in recent years. The effective control of dumping at sea has been attributed to the global legal framework established by the London Convention and its 1996 Protocol,[27] although the contribution of regional agreements with their own enforcement schemes should not be underestimated. Their number reflects both the concerns dumping activities cause and the political will to tackle the problem.[28]

2. 'by the coastal State', 'by the flag State', 'by any State with regard to acts of loading of wastes or other matter occurring within its territory or at its off-shore terminals'

12 Art. 216 (1)(a)–(c) sets explicit enforcement obligations addressing three situations in which a State may be called upon to intervene against dumping activities. In the first situation, the State takes action as a coastal State with regard to dumping which takes place in its territorial waters (→ Art. 2), in its EEZ (→ Art. 55) or on its continental shelf (→ Art. 76) (subparagraph (a)). In the second situation, the State intervenes in its capacity as flag State (→ Art. 94) taking action regarding vessels flying its flag or regarding vessels and aircraft it has registered (subparagraph (b)). Finally, a State may be called upon to intervene in a capacity that is not defined, but that is derived from the State's territorial jurisdiction (subparagraph (c)). As the first two subparagraphs do not detail the States' enforcement powers, it is necessary to refer to the detailed enforcement obligations of the flag State set forth in Art. 217 and to those of the coastal State set forth in Art. 222. Therefore, the added

[25] See *supra*, MN 6.

[26] Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 7 November 1996, ILM 36, 7.

[27] With respect to the London Convention, see *Alan Sielen*, The New International Rules on Ocean Dumping: Promise and Performance, GIELR 21 (2008–2009), 295, 297. Regarding both instruments, see *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2010), 377.

[28] Following regional agreements are noteworthy: for the North-East Atlantic see OSPAR Convention, for the Mediterranean see Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft, 16 February 1976, UNTS 1102, 92. This instrument could eventually be replaced by a modernized text adopted by the United Nations Environment Programme (UNEP), but not yet entered into force; see UNEP, Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping of Ships and Aircraft or Incineration at Sea, UN Doc. UNEP(OCA)/MED IG.6/4 (1995). For the South Pacific see Protocol for the Prevention of Pollution of the South Pacific Region by Dumping, 24 November 1986, LOSB 10 (1987), 78 and for the Black Sea see Protocol of the Protection on the Black Sea Marine Environment against Pollution by Dumping, 21 April 1992, UNTS 1764, 27.

value of these parts of Art. 216 consists in solemnly reaffirming a specific enforcement obligation with regard to pollution by dumping. According to Art. 216 (1)(c), the enforcement obligation applies to a further, unspecified category of States that early drafts associated with the concept of port State, a conceptual rapprochement that is also made, although indirectly, by NORDQUIST.[29] However, the concept of port State, as reflected in Art. 218, does not seem entirely fitting, as its main feature is to grant a given State the curative power to take action against a vessel that is voluntarily in its port with regard to activities which took place outside its territory.[30] Art. 216, by contrast, has a strong preventive thrust, as the loading of waste is not as such a problematic activity, but becomes problematic under the prospect of later dumping. Furthermore, Art. 216 (1)(c) is related to activities occuring generally within the State's territory, or to which the State has a quasi-territorial link (offshore terminals). It may therefore seem convincing to either argue that Art. 216 (1)(c) refers to a *sui generis* category of States, or to refer to Art. 216 (1)(c) as a port State obligation only in the broadest sense of the concept of port State. In either case, the enforcement obligation also arguably extends to landlocked States (→ Part X), provided that waste is loaded onto seagoing vessels in their river ports. It seems equally reasonable to argue that the obligation applies to landlocked States that lease offshore terminals, at least as an obligation shared with the territorial State. While the coastal State referred to in Art. 216 (1)(a) is likely to be negatively impacted as the dumping activities occur its waters, landlocked States concerned under Art. 216 (1)(c) might lack the natural motivation to take action.

3. 'No [obligation] when another State has already instituted proceedings'

Art. 216 (2) relieves States from their obligations under the Art. 216 (1) as far as proceedings are concerned, provided that another State has taken action in compliance with its own obligations resulting from the Art. 216 (1). Different States may have to take enforcement measures under different subparagraphs of the Art. 216 (1), and competing proceedings would not only consume more resources than necessary, but might also punish the same offence twice, while carrying the risk of contradicting outcomes. This notwithstanding, Art. 216 (2) does not require a State to refrain from instituting proceedings; it only gives it the possibility to do so. An explanation might be the fact that effective enforcement is not guaranteed by the mere institution of proceedings by another State. There is no explicit standard that already instituted proceedings must meet in order for another State to be exempted from its enforcement obligation. However, States should arguably make sure that effective enforcement is not jeopardized by their decision to take no legal action. **13**

In order for Art. 216 (2) to be of practical use, any potentially interested State should be notified of the institution of proceedings. In this respect, Art. 231 provides that States must 'promptly notify the flag State and any other potentially concerned State of any [enforcement] measures taken […] against foreign vessels'. This includes the notification of proceedings.[31] The rationale of Art. 231 is, *inter alia*, to ensure that flag States are kept informed of measures taken by foreign States against vessels flying their flag, as they have, in some circumstances, according to Art. 228, priority in instituting proceedings.[32] The expression 'any other State concerned', in the context of the notification obligation of Art. 231, is sufficiently broad to encompass the situations that might arise under Art. 216 (1), that is, situations in which the coastal State suffering the consequences of dumping or the State in which the loading activities occurred have legal interest in instituting proceedings. **14**

[29] See *supra*, note 5.
[30] See also *König* on Art. 218.
[31] Compare *Becker-Weinberg* on Art. 231.
[32] See generally *Becker-Weinberg* on Art. 228.

Article 217
Enforcement by flag States

1. States shall ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards, established through the competent international organization or general diplomatic conference, and with their laws and regulations adopted in accordance with this Convention for the prevention, reduction and control of pollution of the marine environment from vessels and shall accordingly adopt laws and regulations and take other measures necessary for their implementation. Flag States shall provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation occurs.

2. States shall, in particular, take appropriate measures in order to ensure that vessels flying their flag or of their registry are prohibited from sailing, until they can proceed to sea in compliance with the requirements of the international rules and standards referred to in paragraph 1, including requirements in respect of design, construction, equipment and manning of vessels.

3. States shall ensure that vessels flying their flag or of their registry carry on board certificates required by and issued pursuant to international rules and standards referred to in paragraph 1. States shall ensure that vessels flying their flag are periodically inspected in order to verify that such certificates are in conformity with the actual condition of the vessels. These certificates shall be accepted by other States as evidence of the condition of the vessels and shall be regarded as having the same force as certificates issued by them, unless there are clear grounds for believing that the condition of the vessel does not correspond substantially with the particulars of the certificates.

4. If a vessel commits a violation of rules and standards established through the competent international organization or general diplomatic conference, the flag State, without prejudice to articles 218, 220 and 228, shall provide for immediate investigation and where appropriate institute proceedings in respect of the alleged violation irrespective of where the violation occurred or where the pollution caused by such violation has occurred or has been spotted.

5. Flag States conducting an investigation of the violation may request the assistance of any other State whose cooperation could be useful in clarifying the circumstances of the case. States shall endeavour to meet appropriate requests of flag States.

6. States shall, at the written request of any State, investigate any violation alleged to have been committed by vessels flying their flag. If satisfied that sufficient evidence is available to enable proceedings to be brought in respect of the alleged violation, flag States shall without delay institute such proceedings in accordance with their laws.

7. Flag States shall promptly inform the requesting State and the competent international organization of the action taken and its outcome. Such information shall be available to all States.

8. Penalties provided for by the laws and regulations of States for vessels flying their flag shall be adequate in severity to discourage violations wherever they occur.

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Cases: ITLOS, *M/V 'SAIGA' (No. 2) Case* (Saint Vincent and the Grenadines *v.* Guinea), Judgment of 1 July 1999, ITLOS Reports (1997), 10; ITLOS, *The 'Grand Prince' Case* (Belize v. France), Judgment of 20 April 2001, ITLOS Reports (2001), 17

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I. Purpose and Function

As part of Section 6 of Part XII, on enforcement relating to the protection and preservation of the marine environment, Art. 217 details the flag State's enforcement obligations with respect to the prevention, reduction and control of pollution of the marine environment. It corresponds to Art. 211 (2), which sets forth the flag State's prescriptive obligations. Art. 217 must, furthermore, be considered in the broader context of general flag State jurisdiction, which is the classic concept of jurisdiction over vessels in the international law of the sea. Despite its broad discretion under Art. 91 to grant its nationality to vessels, the flag State has to assume a number of corresponding obligations,[1] in particular as defined in Art. 94. **1**

[1] In this respect it is interesting to mention the United Nations Convention on Conditions for Registration of Ships, which has not entered into force, and probably never will, but which nevertheless hints at the obligations

Art. 217 details the enforcement aspects of these obligations as they relate to the protection of the marine environment. As the discussion below shows, several paragraphs of Art. 217 reiterate obligations set forth in the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto (MARPOL 73/78), making them applicable to States that are not party States to the MARPOL 73/78.

2 Historically, flag State jurisdiction has been considered an exclusive jurisdiction. According to Art. 92 (1), the principle of exclusive jurisdiction still persists on the high seas, while exceptions may be established through international agreements or the Convention.[2] Recent, cautious developments in State practice suggest, however, that with respect to illegal, unreported and unregulated fishing, the principle has come under some pressure.[3] This is the consequence of the fact that the principle of flag State jurisdiction is at the heart of the failure of the law of the sea to ensure a satisfactory level of compliance of vessels.[4] The proliferation of what is known as 'flags of convenience,' that is, flags that are attributed to vessels by States not willing or not able to ensure the vessels' strict respect of international law, is of particular concern.[5] As the result of an evolving legal framework related to jurisdiction over vessels, the actual scope of flag State jurisdiction must be assessed against the backdrop of strengthened coastal and port State jurisdiction.[6] In modern law of the sea, as established in the Convention, responsibility for the protection of the marine environment against vessel-source pollution is not that of the flag State alone; it is rather a responsibility shared with the port State and the coastal State.[7] Art. 217 is thus part of the 'core trilogy' of enforcement provisions related to vessel-source pollution, together with Art. 218, on enforcement by port States, and Art. 220, on enforcement by coastal States.

3 These complementary jurisdictions notwithstanding, the primacy of flag State jurisdiction is clearly recognized, as a perusal of several relevant provisions confirms.[8] This primacy follows directly from the duties set forth for the flag State, as in the provisions on prescriptive obligations (→ Art. 209 (2); Art. 211 (2), (3) (third sentence); Art. 212 (1); Art. 220 (4)) and on enforcement obligations (→ Art. 216 (1)(b)); Art. 222). Furthermore, it follows indirectly from the prerogatives of the flag State in its relationship to port and coastal States (→ Art. 218 (3); Art. 223; Art. 226 (1)(c) and in particular Art. 228 (1) and Art. 231), including the power to require the prompt release of vessels flying its flag and their crew (→ Art. 292). In contrast to the two latter categories of States, whose jurisdiction depends on the location of the vessel, the flag State has jurisdiction over vessels flying its flag or registered by it irrespective of their position. Given the limitations of the coastal and port State jurisdiction, both as to geographical scope and to content, flag State primacy still gives cause for concern, in particular with respect to enforcement loopholes. Although the Convention

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that accompany States' right to allow vessels to sail under their flag. Some of this Convention's objectives and rules are identical with those of the UNCLOS.

[2] As to the exception provided for by the UNCLOS, see in particular *Guilfoyle* on Art. 110 MN 13–17. See also *Guilfoyle* on Art. 111.

[3] According to some authors, new customary law seems to be emerging: *Rosemary Rayfuse*, Regulating and Enforcement in the Law of the Sea: Emerging Assertions of a Right to Non-Flag State Enforcement in the High Seas Fisheries and Disarmament Contexts, AustYBIL 24 (2005), 181. See also *Tullio Treves*, Jurisdiction Over Vessels in the Areas of Pollution and Fisheries: General Report, in: Erik Franckx/Philippe Gautier (eds.), The Exercise of Jurisdiction Over Vessels: New Developments in the Fields of Pollution, Fisheries, Crimes at Sea and Trafficking of Weapons of Mass Destruction (2010), 1, 10 *et seq.*

[4] Among many others, see the recent assessments by: *Robin R. Churchill*, The Persisting Problem of Non-compliance with the Law of the Sea Convention: Disorder in the Oceans, IJMCL 27 (2012), 813, 818 *et seq.*; and *Tim Stephens/Donald R. Rothwell*, The LOSC Framework for Maritime Jurisdiction and Enforcement 30 Years On, IJMCL 27 (2012), 701, 706.

[5] On flags of convenience, see also *Guilfoyle* on Art. 91 MN 4–6.

[6] With respect to port State jurisdiction, see in particular *Stephens/Rothwell* (note 4), 708.

[7] Port State jurisdiction in particular is considered to be an effective means to enhance compliance by flag States, see *Churchill* (note 4), 818 *et seq.*

[8] See also the summary of flag State duties in the Code for the Implementation of Mandatory IMO Instruments, IMO Doc. A.973(24) (2005).

imposes obligations on flag States, in particular with regard to enforcement, the incentives for flag States to comply with these obligations are weak and the Convention fails to provide for the review of flag State enforcement and for concrete sanctions against non-compliant flag States.[9]

Art. 217 is composed of eight paragraphs. The flag State's obligation of enforcement is set forth in general terms in the Art. 217 (1), while the following paragraphs address several aspects of this obligation in greater detail. The flag State's duty to prohibit substandard vessels from proceeding to sea is set out in Art. 217 (2). Art. 217 (3) addresses the carriage and inspection of certificates. Art. 217 (4) provides for the flag State's obligation to investigate violations committed by vessels flying its flag and, when appropriate, to take legal action. Art. 217 (5) specifies the right of the investigating flag State to request the assistance of any other State whose cooperation could further the investigations as well as the corresponding obligation of requested State to respond adequately. Art. 217 (6) affirms flag States' obligation to investigate, at the request of other States, any violation allegedly committed by vessels flying its flag and, when appropriate, to institute proceedings. The flag State's duty to follow up with the requesting State and the competent international organization on the action taken is detailed in Art. 217 (7). Finally, according to Art. 217 (8), flag States are obliged to provide for penalties that are adequate in severity. 4

II. Historical Background

Flag State jurisdiction over vessels is a long-standing and strong customary principle. It is of such dominance in the international law of the sea that States continue to refrain from exercising criminal or civil jurisdiction over foreign vessels, even if they are in their ports. Exclusive jurisdiction of the flag State still applies, with limited exceptions, on the high seas, pursuant to Art. 92 (1), which only underwent a minor drafting change since its formulation under Art. 6 (1) of the 1958 Convention on the High Seas. Nevertheless, a good deal of the negotiating efforts at UNCLOS III centred on the flip side of flag State jurisdiction, such as lax enforcement practice, the development of 'flags of convenience' and the lack of sanctions in case of inadequate flag State enforcement. In particular, the negotiation of the Convention's Part XII must therefore be seen against the backdrop of increasing international efforts that aimed to strengthen the complementary jurisdiction of the coastal and the port States, but also to ensure that flag States exercise their powers properly. However, these efforts were not confined to the UNCLOS III forum. In particular, the issue was also discussed during the 1972 United Nations Conference on the Human Environment in Stockholm, which left its mark in the form of two of the non-binding General Principles for Assessment and Control of Marine Pollution adopted at the Stockholm Conference.[10] Principle 20 read: 5

> 'All States should ensure that vessels under their registration comply with internationally agreed rules and standards relating to ship design and construction, operating procedures and other relevant factors.'

The word 'should' suggests a fairly mild attempt to convince flag States to respect international rules and standards, but it nevertheless paved the way for the formulation of the clearly articulated obligations of flag States found in Art. 217 (1) and (2). Principle 4 of the same 1972 document read:

> 'States should ensure that their national legislation provides adequate sanctions against those who infringe existing regulations on marine pollution.'

[9] *Alan K. J. Tan*, Vessel-Source Marine Pollution: The Law and Politics of International Regulation (2006), 203. This assessment is widely shared among legal scholars. See, among others, *Thomas A. Mensah*, Prevention of and Responses to Marine Pollution from Ships, MPEPIL, para. 45, available at: http://www.mpepil.com.

[10] UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV.1 (1973), 3 (Stockholm Declaration), Principle 20.

The idea of encouraging States to go after non-compliant vessels has translated into the far more detailed paragraphs 4 through 8 of Art. 217.

6 During the negotiations that took place within the Sea-Bed Committee in 1973, it became apparent that the inclusion in the Convention of enforcement obligations of the flag State was generally accepted. Several drafts submitted expressed this approval in various forms. A Canadian working paper suggested a clear legal obligation of the flag State to ensure that vessels and aircraft flying its flag comply with international measures concerning the protection and preservation of the marine environment, including in environmental protection zones, even if they are in zones under the jurisdiction of another State.[11] Another Canadian working paper added a draft provision on adequate domestic sanctions for non-compliance in order to discourage violations.[12] The United States expressed the view that international standards applying to all States would have the advantage of levelling the playing field in the very competitive world of shipping.[13] It later proposed two draft provisions, which set forth a general enforcement obligation of the flag State as well as an obligation to provide for penalties in domestic law applicable in case of violations of international standards.[14] A set of draft articles, submitted by Norway, included the obligation to 'exercise effective control over areas, persons and ships under their jurisdiction,'[15] to provide for adequate domestic sanctions for infringements, to take all appropriate steps to prevent and punish infringements and, for flag States, to investigate alleged infringements and prosecute violations.[16] Among the draft articles submitted by the Netherlands, the first is of particular interest, as it seeks to require States to prohibit violations of the Convention 'under the law of the administration of the ship concerned,' to specifically prohibit violations related to discharge standards and to provide for adequate domestic penalties in case of violation.[17] Following consultations, the Chairman of Working Group 2 prepared a note that included several draft provisions with various alternatives. Among the drafts prepared on issue III, concerning 'Standards for vessel-source pollution,' appear two formulations referring to the flag State's obligations. Alternative B provided for the States' obligation to 'ensure that vessels under their registration comply with such internationally agreed standards relating to ship design, construction, equipment, operation, maintenance and other relevant factors.'[18] Alternative E laconically stated: 'States shall ensure that vessels under their flag comply with such standards and rules.'[19] Although the Working Group 2 had discussed the issue of enforcement, no draft provisions were produced as it had been impossible to reconcile the diverging views on several fundamental questions within the time frame.[20]

7 The substantial UNCLOS III negotiations with regard to enforcement by flag States began at the Second Session in 1974, but concentrated, during the first stage, on standard-setting. The first proposal to address specifically the issue of vessel-source pollution was submitted by

[11] See: Sea-Bed Committee, Canada, Working Paper: Draft Articles for a Comprehensive Marine Pollution Convention, UN Doc. A/AC.138/SC.III/L.28 (1973), 5 (Art. X (1) and (2)).

[12] Sea-Bed Committee, Canada: Prevention of Pollution from Ships, UN Doc. A/AC.138/SC.III/L.37 (1973), 4 (Alternative II of Art. 4 (4)).

[13] See: Sea-Bed Committee, United States of America: Competence to Establish Standards for the Control of Vessel Source Pollution, UN Doc. A/AC.138/SC.III/L.36 (1973), 6, 7 (in particular the fifth point).

[14] See: Sea-Bed Committee, United States of America: Draft Articles on the Protection of the Marine Environment and the Prevention of Marine Pollution, UN Doc. A/AC.138/SC.III/L.40 (1973), 5, 8 (Arts. VII and XVIII).

[15] See: Sea-Bed Committee, Norway: Draft Articles on the Protection of the Marine Environment against Pollution, UN Doc. A/AC.138/SC.III/L.43 (1973), 7 (Art. XVI).

[16] *Ibid.*, Art. XVII.

[17] See: Sea-Bed Committee, Netherlands: Draft Articles on the Enforcement of International Provisions for the Prevention of Marine Pollution form Vessels, UN Doc. A/AC.138/SC.III/L.48 (1973), 1 (Art. 1).

[18] See: Sea-Bed Committee, Chairman of Working Group 2, Note Addressed to the Chairman of Sub-Committee III, UN Doc. A/AC.138/SC.III/L.52 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-I), 89, 96 (Section III: Alternative B).

[19] *Ibid.*, 97 (Section III: Alternative E).

[20] *Ibid.*, 90.

Greece. It provided for the flag State's primary enforcement obligation, which included the obligation to prosecute violations and to issue certifications, as well as for its obligation to inspect vessels flying its flag or registered in its territory, and detailed the flag State's role if proceedings are taken against a non-compliant vessel.[21] While the Greek draft provisions envisioned a responsibility partially shared between the flag State, the coastal State and the port State, a proposal submitted by Germany essentially retained the principle of primary flag State jurisdiction.[22] Furthermore, the German proposal particularly insisted on the certification of vessels by the flag State in order to rationalize its surveillance. A working paper of the European Communities sought to clarify the notion of flag State jurisdiction and underlined the relevance of flag State obligations with respect to ensuring that vessels flying its flag comply with applicable rules and regulations.[23] Another set of draft articles submitted by Germany, again based on the primacy of flag State jurisdiction, detailed the surveillance of compliance of vessels by means of certification.[24] Finally, a proposal presented by the United States of America put forward a clear flag State obligation to ensure compliance with international law and stressed the possibility for the flag State to apply more stringent standards.[25] However, these informal meetings on 'standards, jurisdiction and enforcement' did not result in a draft text.[26]

At the Third Session, held in 1975, a group of nine European States, in a set of draft articles, submitted a provision on 'Flag State enforcement', according to which flag States have to first 'provide for the effective enforcement of regulations […], irrespective of where any violation may have occurred', then investigate alleged violations and take the necessary proceedings, where required, and finally, provide penalties in domestic law that are 'adequate in severity to discourage violations.'[27] The ensuing debate focused on the complementarity of flag States, coastal States and port States and the organization of their respective jurisdiction.[28] The Group of Juridical Experts modelled its proposal essentially on the first two obligations set forth by the European group, while slightly redrafting the obligation to ensure compliance.[29] This redraft and the two other provisions submitted by the European group were then included in the Informal Single Negotiating Text (ISNT), unchanged except for the choice of the term 'vessel' instead of 'ship'.[30] On the basis of the ISNT, the Group of Juridical Experts prepared a more comprehensive and detailed provi- 8

[21] Third Committee UNCLOS III, Greece: Draft Articles on the Enforcement of the Provisions on the Protection of the Marine Environment, UN Doc. A/CONF.62/C.3/L.4 (1974), OR III, 247, 248 (Arts. 4, 5 and 6).

[22] Third Committee UNCLOS III, Federal Republic of Germany: Draft Articles on Enforcement of Regulations Concerning the Protection or the Marine Environment Against Vessel-Source Pollution, UN Doc. A/CONF.62/C.3/L.7 (1974), OR III, 250 (Arts. 1 and 2).

[23] Third Committee UNCLOS III, Council of the European Communities Working Paper: Respective Jurisdiction in Respect of Vessels Likely to Pollute the Sea or to Carry out Dumping Operations Causing Marine Pollution (1974, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. X (1986), 407 *et seq.* (Sections I and II, para. A).

[24] UNCLOS III, Federal Republic of Germany: Draft Articles on the Protection of the Marine Environment Against Pollution by Ships (1974, mimeo.), reproduced in: Platzöder (note 23), 414 *et seq.* (Arts. I, II, III, IV and V).

[25] UNCLOS III, United States of America: Draft Articles (1974, mimeo.), reproduced in: Platzöder (note 23), 419, 424 (Art. IX).

[26] Third Committee UNCLOS III, Note by the Chairman of the Informal Meetings of the Third Committee on Item 12 (Preservation of the Marine Environment) Addressed to the Chairman of the Third Committee, UN Doc. A/CONF.62/L.14 (1974), OR III, 254.

[27] Third Committee UNCLOS III, Belgium *et al.*: Draft Articles on the Prevention, Reduction and Control of Marine Pollution, UN Doc. A/CONF.62/C.3/L.24 (1975), OR IV, 210 (Art. 3, paras. 6, 7, 8).

[28] See the statements of numerous delegations made at the 19th and 20th Meetings: Third Committee UNCLOS III, 19th Meeting, UN Doc. A/CONF.62/C.3/SR.19 (1975), OR IV, 82 *et seq.* and Third Committee UNCLOS III, 20th Meeting (1975), UN Doc. A/CONF.62/C.3/SR.20 (1975), OR IV, 89 *et seq.*

[29] Third Committee UNCLOS III, Group of Juridical Experts: Preservation of the Marine Environment (1975, mimeo.), reproduced in: Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. XI (1987), 475, 477 (Art. XIII).

[30] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975), OR IV, 171, 174 (Art. 26).

sion.[31] The obligation to adopt the necessary measures in domestic law was thereby integrated in the first paragraph on compliance. The second paragraph added the previously discussed certification and inspection obligation of the flag State. Paragraph 3, related to investigation and proceedings, was extended by the obligation to inform not only the requesting State of the action taken and its outcome, but also 'the competent international organization' and to make such information available to all States. Paragraph 4 was identical to the ISNT provision on penalties.

9 Informal negotiations followed at the Fourth Session and led to the reformulation of the provision, which was included as Art. 27 in the Revised Single Negotiating Text (RSNT).[32] The newly extended paragraph 1 specified that the applicable international rules and standards whose observance had to be ensured by the flag State were 'established through the competent international organization or general diplomatic conference.' The scope of flag State enforcement obligations was widened by the addition of two paragraphs on two entirely new aspects. The new paragraph 2 required the flag State to ensure that vessels flying its flag were not allowed to leave its ports if they do not comply with international law relating to the prevention, reduction and control of pollution from vessels. According to the new paragraph 5, flag States were under the obligation to seek assistance of any other State whose cooperation could be useful to an ongoing investigation. Paragraph 6 established the flag State's obligation to investigate alleged violations at the request of any State. It was thus separated from paragraph 7, which imposed the obligation to inform the requesting State and the competent international organization of the action that had been taken.

10 On the basis of the RSNT's Art. 27, further informal negotiations followed. The suggested changes were mere drafting changes,[33] with the exception of one substantial proposal that put forward a new paragraph providing for States' obligation to endeavour to standardize penalties for violations.[34] After further negotiations, the Chairman was able to present a reformulated version of Art. 27 that integrated drafting changes agreed upon by the negotiators.[35] When the Informal Composite Negotiating Text (ICNT) was produced at the following Sixth Session, this version was incorporated unchanged as Art. 218, on 'Enforcement by flag States.'[36] The provision was then reiterated unmodified as Art. 217 in the first revision of the ICNT.[37] Subsequently, several drafting changes were made, including a complete redraft of paragraph 8, which did not, however, entail any change in meaning.[38]

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[31] Third Committee UNCLOS III, Group of Juridical Experts: Preservation of the Marine Environment (1976, mimeo.), reproduced in: Platzöder (note 29), 525, 533–535 (Art. 26).

[32] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 177–178 (Art. 27).

[33] Proposal of the Federal Republic of Germany, Third Committee UNCLOS III, Proposals Received During the Informal Meeting on Marine Pollution (August 1976, mimeo.), reproduced in: Platzöder (note 23), 464, 465 (Art. 27, para. 1); proposal of France, Third Committee UNCLOS III, Proposals Received During the Informal Meeting on Marine Pollution (September 1976, mimeo.), reproduced in: Platzöder (note 23), 473, 475 (Art. 27, para. 1); proposals of Canada, Denmark and Greece on Art. 27, para. 2, *ibid.*, 475; proposals of Spain, United Kingdom, Guatemala, Greece and France on Art. 27, para. 3, *ibid.*, 475–476; proposal of Greece on Art. 27, para. 6, *ibid.*, 476; proposals of Trinidad and Tobago and the Union of Soviet Socialist Republics on Art. 27, para. 9, *ibid.*, 476.

[34] Proposals Received During the Informal Meeting on Marine Pollution, September 1976 (note 33), 465–466 (proposal of Trinidad and Tobago on Art. 27, para. 9).

[35] Third Committee UNCLOS III, 31st Meeting, UN Doc. A/CONF.62/C.3/SR.31 (1976), OR VI, 100, 105.

[36] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 38 (Art. 218).

[37] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII, 110.

[38] See Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea, 1982: A Commentary, vol. IV (1991), 255 (MN 217.7).

III. Elements

1. 'States shall ensure compliance'

Art. 217 (1) lays out the general obligation of the flag State. It requires the flag State to ensure that vessels flying its flag or of its registry comply with applicable international rules and standards as well as with domestic law adopted in accordance with the Convention. The word 'shall' indicates that flag State jurisdiction, as conceived under Art. 217, entails obligations on the part of the flag State.[39] Generally expressed in the Art. 217 (1) the obligation's various components are further detailed in Art. 217 (2)–(8). The flag State is identified by the reference to States' duties regarding 'vessels flying their flag or of their registry.' This two-pronged reference is common in the Convention[40] and is in keeping with the fact that according to Art. 91, States enjoy broad discretion as to how they grant their nationality to vessels.[41] Thus, even if the registering State's domestic law does not consider the State as a flag State in the technical sense of the term, it is, by way of this all-encompassing expression, considered as such for the purposes of Art. 217. 11

2. 'with applicable international rules and standards, established through the competent international organization or general diplomatic conference'

The flag State shall ensure compliance with 'applicable international rules and standards, established through the competent international organization or general diplomatic conference.' The singular form of the expression 'competent international organization', despite its generic appearance, suggests a reference to the United Nations agency dedicated to all questions surrounding navigation, i. e. the International Maritime Organization (IMO). The vast majority of rules and standards concerning navigation are elaborated under the auspices of the IMO, from major agreements and their amendments to specific, tailor-made standards. Rules and standards with which vessels must comply may also originate from a 'general diplomatic conference'. This expression, which is also used in Arts. 211 and 218, emphasizes the general character of the conferences referred to and contrasts with the reference to 'diplomatic conference' used in all other provisions of Part XII.[42] As the purpose of Arts. 211, 217 and 218 relates to truly international standards, it may be inferred that reference is made to conferences open to 'universal participation'.[43] The word 'diplomatic' makes it clear that such a conference must be composed of plenipotentiaries, i. e. persons invested with full authority to represent their State, as opposed to representatives of international intergovernmental organizations or independent experts.[44] Major conventions have been established by such conferences, either because they took place before the IMO came into existence, as was the case for International Convention for the Prevention of Pollution of the Sea by Oil, or simply because a special negotiation or adoption forum seemed convenient, as was the case for International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties. 12

The most important international rules and standards, though not the only ones, are found in MARPOL 73/78, the 1974 International Convention for the Safety of Life at Sea (SOLAS 13

[39] The word 'shall' conveys an obligation, see UNCLOS III, UN Doc. ELGDC/5 (1980, mimeo.), cited by: Nordquist/Rosenne/Yankov (note 38), xlii (footnote 3).

[40] In Part XII, besides in Art. 217, the double reference to either the flag or the registry, in singular or plural form, is also made in Art. 209 (2), Art. 211(2) and (3), Art. 212 (1), Art. 216 (1)(b) and Art. 222.

[41] Regarding the extent of the flag State's discretion, see in particular ITLOS, *M/V 'SAIGA' (No. 2) Case* (Saint Vincent and the Grenadines *v.* Guinea), Judgment of 1 July 1999, ITLOS Reports (1997), 10; and ITLOS, *The 'Grand Prince' Case* (Belize *v.* France), Judgment of 20 April 2001, ITLOS Reports (2001), 17.

[42] Arts. 207, 208, 210, 212, 213, 214, 216 and 222.

[43] See also Nordquist/Rosenne/Yankov (note 38), 191, 202 (MN 211.15(e)).

[44] *Ibid.*, 125, 133 (MN 207.7(d)).

1974) and the International Convention on Standards of Training, Certification and Watch-keeping for Seafarer (STWC) and the numerous specific standards adopted on their basis. The word 'applicable', frequently used in the Convention, in particular with respect to enforcement of measures aimed at protecting the marine environment, is subject to some uncertainty regarding its precise meaning. If used in a context where two States are involved, the flag State, on the one hand, and the port or the coastal State on the other, it raises the question whether a rule is applicable only if it is accepted by both States. This is the interpretation favoured by MOLENAAR, who considers the word to be a 'relative term.'[45] Although its use in Art. 217 does not imply any relationship between States, it seems compelling to interpret it as meaning that the concerned flag State must ensure compliance only with international rules and standards by which it is bound, through conventional or customary law.

3. 'and with their laws and regulations adopted in accordance with this Convention'

14 The flag State has to, furthermore, ensure compliance with its 'laws and regulations adopted in accordance with [the] Convention'. As compliance with international norms can only be ensured if these norms are received in domestic law, the flag State 'shall accordingly adopt laws and regulations'. This explicit obligation to legislate and regulate highlights the importance attributed to the enforcement obligation. It must be seen in the context of lax enforcement and of the multiplication of 'flags of convenience,' problems to which negotiators sought to respond. The obligation to prescribe domestic law is at the heart of Art. 211 (2), the provision on the flag State's prescriptive jurisdiction. Interestingly, this provision's second sentence specifies that such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards. Accordingly, the flag State is free to subject vessels under its flag to more stringent norms.[46] Although no such mention is made in Art. 217 (1), it seems that the flag State's prescriptive jurisdiction must be interpreted consistently, i. e. in accordance with Art. 211 (2). The expression, according to which domestic laws and regulations are to be 'adopted in accordance with [the] Convention', not only relates to the 'applicable international rules and standards, established through the competent international organization or general diplomatic conference' mentioned in Art. 217 (1),[47] but also to Art. 211 (1), the provision related to international cooperation with respect to combatting vessel-source pollution.

15 In order to ensure compliance with its own laws and regulations, the flag State is called upon not only to regulate and legislate, but also to take 'other measures necessary for their implementation.' While the obligation to adopt laws and regulations does not raise any particular difficulty of interpretation, the meaning of the expression 'other measures necessary for their implementation' is less obvious. The expression appears, however, to be sufficiently broad to include administrative and judicial measures that might be necessary to ensure compliance with domestic laws and regulations. Subsequent paragraphs of Art. 217 provide examples of such measures, including the issuance and control of certificates, the investigation of vessels and the institution of proceedings. The boarding and arrest of vessels seem to be prerequisites of several enforcement activities.[48]

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[45] *Erik J. Molenaar*, Coastal State Jurisdiction over Vessel-Source Pollution (1998), 168 *et seq.* See also *Kari Hakapää*, Marine Pollution in International Law: Material Obligations and Jurisdiction (1981), 176. Mensah's interpretation differs, at least as far as port State control is concerned. He holds, on account of a principle of 'no less favorable treatment for foreign ships', that the port State may apply the rules and standards it is bound to observe to foreign vessels, regardless of whether their flag States are States party to the concerned conventions. See *Mensah* (note 9), para. 33.

[46] Also see *Bartenstein* on Art. 211 MN 16–19.

[47] *Supra*, MN 12.

[48] See also *Treves* (note 3), 5.

4. 'effective enforcement […] irrespective of where the violation occurs'

16 Art. 217 (1) cl. 2 makes it clear that 'effective enforcement of such rules, standards, laws and regulations' must be provided for by the flag State, 'irrespective of where a violation occurs.' While the first part of this sentence only reinforces the central message of the preceding sentence, the second part underlines that this enforcement obligation applies regardless of where the violation was committed. Accordingly, the flag State must ensure compliance not only in its own maritime zones, but also on the high seas and in foreign maritime zones. It seems, furthermore, that enforcement can take place in an area other than the one in which the infringement occurred.[49] The flag State's obligation is of primary interest on the high seas, as it is only the flag State that is vested with jurisdiction over its vessels in this area. In foreign maritime zones, it shares jurisdiction with the coastal State or the port State. However, the latter two merely have the right to take enforcement measures, as indicated by the word 'may' in Arts. 218 and 220.[50] The flag State, on the contrary, bears an obligation to carry out enforcement, according to the word 'shall' used in the last sentence of Art. 217 (1).

5. 'ensure that vessels flying their flag […] are prohibited from sailing, until […] in compliance with the requirements of the international rules and standards'

17 Art. 217 (2) requires the flag State to ensure that only vessels complying with the requirements of international rules and standards are permitted to sail. This duty of the flag State is the first detailed enforcement obligation that is established; others follow in Art. 217 (3)–(8). The position of the duty in Art. 217 conveys its importance, as do the words 'in particular'. However, these words also indicate that, though important, it is not the only component of the flag State's enforcement obligation. Art. 217 (2) details both the flag State's enforcement obligation, set forth in a very general manner in the first paragraph, and the general obligation of the flag State to ensure safety at sea, according to Art. 94 (3). By requiring the flag State to take the necessary measures to ensure safety at sea, the latter arguably includes the obligation to ensure that substandard vessels do not proceed to sea. As a provision of Part XII, Art. 217 (2) is concerned with the protection of the marine environment. It is therefore also related to the flag State's general obligation to minimize vessel-source pollution, provided by Art. 194 (3)(b). In case of the flag State's failure to fulfil its obligation, the unseaworthy vessel that is voluntarily in a foreign port, must be prevented from sailing by that State, pursuant to Art. 219.

18 Flag States must ensure compliance with international rules and standards referred to in Art. 217 (1).[51] As a consequence of the cross-reference, only international rules and standards that are relevant under Art. 217 (1) are also relevant under Art. 217 (2). This means that the international rules and standards whose compliance must be ensured are only those 'applicable' to – or consented by[52] – the flag State. The wording of Art. 217 (2) clearly indicates that these international rules and standards include 'requirements in respect of design, construction, equipment and manning' (CDEM standards).[53] The most relevant international agreements concerning the prevention of vessel-source pollution are the MARPOL 73/78, the SOLAS 1974 and the STWC conventions.

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[49] *J. Peter A. Bernhardt*, A Schematic Analysis of Vessel-Source Pollution: Prescriptive and Enforcement Regimes in the Law of the Sea Conference, VJIL 20 (1980), 265, 296.

[50] Compare also: *König* on Art. 218 and *Hamamoto* on Art. 220.

[51] See *supra*, MN 11, 12.

[52] See *supra*, MN 12.

[53] On CDEM standards, see also *Barnes* on Art. 22 MN 20–22.

6. 'States shall ensure that vessels flying their flag […] carry on board certificates'

19 Art. 217 (3) deals with certification, which greatly facilitates the control of the vessels' conformity by the different States involved. Pursuant to the first sentence, the flag State has to ensure that vessels flying its flag or of its registry carry appropriate certificates on board. These certificates must be in accordance with the international rules and standards, such as those provided by the MARPOL 73/78 convention, or those of the STCW and SOLAS 1974 conventions that are more indirectly tied to environmental protection. According to the second sentence of Art. 217 (3), States must ascertain that vessels flying their flag are submitted to periodical inspection aiming to ensure that the actual conditions of the vessels correspond to those recorded by the certificate. Flag States have made extensive use of the possibility to delegate activities entailed by their obligations to private classification societies, such as Lloyd's Register, Bureau Veritas, Registro Italiano Navale (RINA), American Bureau of Shipping and DNV GL, to name just a few. These societies have been mandated to carry out the inspection of vessels and other seagoing structures and to issue certificates on behalf of the flag States.

20 The certification mechanism follows from the last sentence of Art. 217 (3). Contrary to the first two sentences, the last sentence is not addressed to the flag State, but instead requires other States to accept the certificates 'as evidence of the condition of the vessels.' While there is no definition of the words 'other States', it follows from the scheme of Art. 217 that reference is made to the port and coastal States, i. e. the States that have the right to inspect foreign vessels according to Arts. 218 and 220. A further feature of the certification mechanism consists in requiring these other States to regard certificates issued by the flag State 'as having the same force as certificates issued by them.' This duty, modelled on Art. 5 (1) MARPOL 73/78,[54] implies a rebuttable presumption. Other States may only deny foreign certificates force equal to their own if 'there are clear grounds for believing that the condition of the vessel does not correspond substantially with the particulars of the certificates.' The denying State would have to prove that the denial is justified. Art. 226, which deals with the safeguards that apply to the investigation of foreign vessels, also relies on the certification mechanism, including its rebuttable presumption.

21 Certification is of utmost practical importance in the daily shipping business. In particular, the exercise of port State control relies, in its most basic form, on the certificates carried by vessels. The system of certification has therefore been further developed and refined under the auspices of the IMO. A Harmonized System of Survey and Certification (HSSC) was established in 1988 and was incorporated in the SOLAS and the Load Lines conventions[55] by the adoption of two protocols respectively and in the MARPOL 73/78 by the adoption of amendments.[56] Most recently, detailed guidelines were adopted for the HSSC,[57] replacing several preceding instruments on the matter.

[54] More precisely, Art. 5 (1)1 MARPOL 73/78.

[55] International Convention on Load Lines.

[56] Protocol of 1988 relating to the International Convention for the Safety of Life at Sea, 1974 and of the Protocol of 1988 relating to the International Convention on Load Lines, 1966; Amendments to introduce the harmonized system of survey and certification into MARPOL 73/78, as well as amendments to MARPOL Annex VI and IMO, Amendments to the Annex of the Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, 1973, as Modified by the Protocol of 1978 Thereto, IMO Res. MEPC.132(53) of 22 July 2005.

[57] IMO, Survey Guidelines under the Harmonized System of Survey and Certification, IMO Res A.1053(27) of 30 November 2011, Annex (HSSC).

7. 'If a vessel commits a violation […] the flag State […] shall provide for immediate investigation and where appropriate institute proceedings'

If a vessel commits a violation of international rules and standards, Art. 217 (4) imposes on the flag State the obligation to investigate immediately and, if warranted, to institute proceedings. This provision is very similar to Art. 4 (1) MARPOL 73/78. The relevant rules and standards, whose violation must be investigated and prosecuted, are those established through the competent international organization or general diplomatic conference referred to in Art. 217 (1). Investigation by the flag State must be 'immediate.' Given the geographical separation between the vessels and their flag States, a convincing interpretation of the word 'immediate' seems to be that action must be taken immediately upon the flag State's knowledge of the violation, whereby the flag State has the duty, according to the principle of due diligence, to keep track of the deeds of the vessels flying its flag. If necessary, especially if the investigation has confirmed the allegations of a violation, the flag State has, furthermore, the obligation 'to institute proceedings in respect of the alleged violation.' The objective of this obligation is to impel the flag State to effectively prosecutes any violation committed by vessels flying its flag. 22

Flag States' obligations apply 'irrespective of where the violation occurred or where the pollution caused by such violation has occurred or has been spotted.' This wording is owed to the fact that these three different places do not necessarily coincide, particularly as pollution travels easily in the marine environment. Furthermore, contrary to coastal and port State jurisdiction, which both apply in particular maritime zones, flag State jurisdiction is tied to the vessel flying the State's flag, independent of the vessel's location. This characteristic of flag State jurisdiction is conveyed by the word 'irrespective.' Wherever the alleged violation or pollution occurred, the flag State has the obligation to investigate and, if appropriate, to institute proceedings. 23

Given that the flag State's obligation applies regardless of which maritime zone is concerned, including foreign maritime zones, a conflict of jurisdiction may occur. Art. 217 (4) makes it clear that the flag State's obligation applies 'without prejudice to articles 218, 220 and 228.' In other words, the port State and the coastal State may investigate foreign vessels and institute proceedings according to Arts. 218 and 220 respectively. However, proceedings related to a violation committed beyond the territorial sea must be suspended if the flag State takes proceedings within six months of the date on which proceedings were first instituted, pursuant to Art. 228. An exception only applies if major damage has been caused to the coastal State or if the flag State has proven unreliable in the past as far as effective enforcement is concerned. Tan argues that the flag State's 'right to pre-empt coastal and port State action' contributes to the lack of effectiveness that characterizes flag State jurisdiction.[58] 24

8. 'Flag States conducting an investigation […] may request the assistance of any other State' and 'States shall endeavour to meet appropriate requests of flag States'

Art. 217 (5) addresses the issue of cooperation, the generally preferred *modus operandi* when it comes to protecting the environment.[59] This preference also permeates the provisions on the prevention, reduction and control of pollution of the marine environment. Art. 194 (1), the general provision on States' obligation in this respect, mentions measures taken 'jointly' by States, and the entire second Section of Part XII is devoted to the issue of global and regional cooperation. With respect to vessel-source pollution, the obligation of cooperation extends to enforcement. Assistance may be requested of 'any other State whose cooperation could be 25

[58] *Tan* (note 9). Though slightly more optimistic, see also *Bernhardt* (note 49), 298.

[59] See generally: UNCED, The Rio Declaration on Environment and Development, UN Doc. A/CONF.151/5/REV.1 (1992), ILM 31, 874 (Principle 7, first sentence).

useful in clarifying the circumstances' of a given case. Such assistance may consist of allowing access to data recorded and stored by a port State in the context of port State control or in providing access to testimony given by relevant personnel of the coastal State responsible for maritime affairs, notably surveyors, coastguard officers, vessel traffic operators, pilots, etc. Assistance also encompasses technical assistance by any State that has developed particular expertise, such as, for example, expertise related to the collection and evaluation of evidence, including the tracking of the source of pollution. As rightly highlighted, Art. 218 (3), although similar to Art. 217 (5), appears more limited in that it seems to allow for a State to be asked for assistance only if the concerned vessel is voluntarily in its port.[60]

26 The formulation of the first sentence of Art. 217 (5), according to which the flag State 'may request the assistance' of other States, entails a right and not an obligation for the flag State. States asked for assistance, however, 'shall endeavour to meet appropriate requests.' While the use of the word 'shall' conveys an obligation for the requested States,[61] the word 'endeavour' reduces it to a mere 'best efforts obligation.' Moreover, the requested State only has to make an effort to meet the requests that are 'appropriate,' which implies a certain discretion as to whether it must respond to the request.

9. 'States shall, at the written request […] investigate any violation alleged to have been committed'

27 According to Art. 217 (6), the flag State must, at the written request of any State, investigate any alleged violation and, if warranted, impose sanctions. Pursuant to the wording of the first sentence of Art. 217 (6), the flag State is left without discretion as to whether an investigation has to be launched. It has to take action upon the reception of the written request. This is of particular interest for States that are directly affected by violations committed by foreign vessels, as a consequence of a threat posed to their marine environment or through the dumping effect of substandard vessels. These States may thus decide if an investigation is appropriate. However, the flag State determines the type and extent of investigation. It might be more questionable whether a State without any immediate interest in an investigation is also entitled to make a request. The wording of Art. 217 (6) is clear, however, as it allows 'any State' to submit a request. Although no specific interest of the requesting State is required, the discussion seems to be of little practical relevance.

28 If the evidence gathered during the investigation is sufficient to enable proceedings in respect of the alleged violation, such proceedings must be instituted by the flag State, according to Art. 217 (6) cl. 2. Although the wording entails a firm obligation, the flag State has to appraise the evidence and therefore retains some discretionary power in deciding whether it institutes proceedings in a given case. The proceedings must be brought without delay and in accordance with the flag State's laws. While any lag of time required by appropriate and fair proceedings would be justified, a dilatory conduct would be in contradiction to the duty to act without delay. The fact that proceedings must be instituted in accordance with the flag State's laws presupposes that such laws exist. The corresponding obligation of the flag State to adopt domestic laws and regulations for efficient enforcement is set out in Art. 217 (1).

10. 'Flag States shall promptly inform […] of the action taken and its outcome'

29 Art. 217 (7) imposes upon the flag State an obligation to follow up on measures taken under Art. 217 (6). The provision is modelled on Art. 4 (1) MARPOL 73/78. Pursuant to Art. 217 (7) cl. 1, the flag State has to promptly inform the requesting State as well as 'the competent international organization' of the action it has taken regarding the requested investigation and of its outcome. As in all other provisions, the generic expression 'compe-

[60] Nordquist/Rosenne/Yankov (note 37), 257 (MN 218.8(f)).
[61] See *supra*, note 39.

tent international organization' refers to the IMO. The question has been raised within the IMO whether there is a need for special disclosure arrangements with regard to this obligation to disseminate information, but no measure has been taken so far.[62] The expectation of the requesting State and the IMO is, of course, to the effect that the flag State's action either confirms or restores the conformity of the vessel and that a deterrent punishment is meted out to the non-compliant vessel.

Through the duty to follow up on its measures in a given case, the flag State is accountable to the requesting State and to the international community. The requesting State and other interested States may exercise some compliance control, which arguably has a self-disciplining effect on the flag State. The accountability is further compounded by the obligation of the flag State, set forth in Art. 217 (7) cl. 2, to make the information available to all States. The flag State's accountability thus extends to the international community as a whole, both indirectly by obliging the flag State to inform the competent international organization, and directly by ensuring that every State has access to the information. **30**

11. 'Penalties provided for […] shall be adequate in severity to discourage violations wherever they occur'

Art. 217 (8) addresses the severity of domestic penalties applied to non-compliant vessels. The flag State is explicitly required to make sure that the sanctions imposed upon vessels found to be in violation of its laws and regulations are sufficiently severe to discourage further violations. A very similar obligation is imposed upon party States of MARPOL 73/78 in Art. 4 (4). This obligation is another sign of the concern that too many flag States apply, if at all, too lenient punishments, which encourage rather than prevent the vessels' non-compliant conduct. Although the provision seems concerned, at first sight, with prescription rather than enforcement, Treves rightly argues that it is related to enforcement insofar as the imposition of penalties entails components both of prescription and, in case of violation, of enforcement.[63] Furthermore, the provision of Art. 217 (8) makes it clear that the adequate severity to discourage violations must be provided for with regard to all violations, wherever they occur. This specification underlines the fact that flag State jurisdiction is not tied to certain maritime zones, but 'follows the flag.'[64] **31**

Art. 217 (8) does not specify the type of penalty that can be imposed on the vessels by their flag States. However, as Art. 230 specifically limits the penalties that may be imposed upon foreign vessels to monetary penalties, save in exceptional cases, it may be concluded that there is nothing to prevent the flag State from providing for administrative penalties or even imprisonment as far as vessels flying its flag or of its registry are concerned. **32**

Article 218
Enforcement by port States

1. When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference.

[62] IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, IMO Doc. LEG/MISC.7 (2012), 56. The question has been raised before, as highlighted by a 1987 study of the Secretariat of the IMO (IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, IMO Doc. LEG/MISC.1 (1987), para. 130).

[63] *Treves* (note 3), 6.

[64] *Bernhardt* (note 49), 295.

2. No proceedings pursuant to paragraph 1 shall be instituted in respect of a discharge violation in the internal waters, territorial sea or exclusive economic zone of another State unless requested by that State, the flag State, or a State damaged or threatened by the discharge violation, or unless the violation has caused or is likely to cause pollution in the internal waters, territorial sea or exclusive economic zone of the State instituting the proceedings.

3. When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State shall, as far as practicable, comply with requests from any State for investigation of a discharge violation referred to in paragraph 1, believed to have occurred in, caused, or threatened damage to the internal waters, territorial sea or exclusive economic zone of the requesting State. It shall likewise, as far as practicable, comply with requests from the flag State for investigation of such a violation, irrespective of where the violation occurred.

4. The records of the investigation carried out by a port State pursuant to this article shall be transmitted upon request to the flag State or to the coastal State. Any proceedings instituted by the port State on the basis of such an investigation may, subject to section 7, be suspended at the request of the coastal State when the violation has occurred within its internal waters, territorial sea or exclusive economic zone. The evidence and records of the case, together with any bond or other financial security posted with the authorities of the port State, shall in that event be transmitted to the coastal State. Such transmittal shall preclude the continuation of proceedings in the port State.

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I. Purpose and Function

Art. 218 enables port States to exercise jurisdiction in terms of enforcement action against vessels in their port or off-shore facilities. Art. 218 (1) establishes the general principle of port State enforcement of international rules, whereas Art. 218 (2) declares investigation of occurrences within maritime zones or internal waters of other States subject to the consent of States more closely connected with this ship and occurrence, e. g. the flag or coastal State. Art. 218 (3) establishes a certain corollary obligation of the port State to investigate occurrences on the request of other States. Art. 218 (4) includes a duty to transmit results of any investigations carried out under paras. 1–3. Thus, unlike other provisions in Section 6, Art. 218 establishes no obligation to enforce rules enacted under a connected provision on jurisdiction in Section 5 (unlike, e. g. Arts. 213 and 214), but extends the States competent to investigate occurrences with vessels beyond the coastal and flag State, to reflect the reality of ships travelling long routes and rarely, if ever, returning to either their flag States' ports or formerly visited coastal States. **1**

Port State jurisdiction was, at the time of the UNCLOS negotiations in 1970s, an innovative concept.[1] Some elements of enforcement competences of port States, e. g., inspection rights and the right to prevent a ship from sailing in the case of unseaworthiness, could be found in International Maritime Organization (IMO) conventions on maritime safety and the prevention of marine pollution, such as the International Convention for the Safety of Life at Sea 1974 (SOLAS) and the International Convention for the Prevention of Pollution from Ships (MARPOL).[2] These conventions did not, however, accord the port State a right to institute proceedings against foreign vessels on its own.[3] In contrast, Art. 218 allows port States, under certain conditions, to undertake investigations and institute proceedings against foreign vessels in the case of an alleged discharge violation in sea areas outside that port State's own maritime zones. The purpose of this substantial extension of the scope of port State jurisdiction aims at compensating the deficiencies of flag State jurisdiction.[4] By **2**

[1] Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991), 260 (MN 218.1); *David Anderson*, Modern Law of the Sea: Selected Essays (2008), 267, 275 ('most significant addition').

[2] Art. 5 MARPOL (certificates and special rules on inspection of ships) and Art. 6 MARPOL (detection of violations and enforcement of the Convention). For a brief overview, *cf. Yoshifumi Tanaka*, The International Law of the Sea (2012), 253, 276–278.

[3] See, e. g., Art. 6 (2)–(4) MARPOL: If the inspection of a vessel indicates a discharge violation the port State is obliged to forward its report to the flag State for further action. Only if the latter is satisfied that sufficient evidence is available, it has the duty to institute proceedings in accordance with its national law as soon as possible. For details, see: *Doris König*, Durchsetzung internationaler Bestands- und Umweltschutzvorschriften auf Hoher See im Interesse der Staatengemeinschaft (1990), 174 *et seq.*, with further references.

[4] Nordquist/Rosenne/Yankov (note 1), 260 (MN 218.1); *König* (note 3), 172 *et seq.*; *Erik J. Molenaar*, Port State Jurisdiction, MPEPIL, para. 3, available at: http://www.mpepil.com; *Dolliver Nelson*, Maritime Jurisdiction, MPEPIL, para. 61, available at: http://www.mpepil.com; *Anderson* (note 1), 251, 257 *et seq.*

extending the enforcement jurisdiction of port States, the widespread lack of flag State enforcement can be remedied to a certain extent because the risk of ship-owners and masters getting punished for discharge violations increases.[5] This could lead to a better compliance by vessels and their crews with discharge regulations *viz.* prohibitions. The concept of port State jurisdiction is closely related to, but distinct from port State control (PSC).[6] While port State control measures are primarily proactive *viz.* preventive aiming at ensuring better compliance with internationally agreed maritime safety and pollution prevention rules and standards,[7] port State jurisdiction in the sense of Art. 218 is reactive, focusing on the detection and punishment of discharge violations.

3 In comparison with the coastal State's enforcement jurisdiction, a port State exercises its jurisdiction in respect of discharge violations which occur in marine spaces outside its own jurisdiction, i. e. either in the maritime zones of other States or on the high seas. In either case – with the exception of the last alternative mentioned in Art. 208 (2) – the port State does not act to protect its own interests, but in the interest of another State or, on the high seas, in the interest of all States. The distinction between the concept of coastal State jurisdiction, regulated in Art. 220, and the concept of port State jurisdiction, is based on the different functions coastal and port States fulfil. Whereas the coastal State protects its territorial sovereignty and its sovereign rights in the EEZ, the port State acts either as an agent for the coastal State(s) concerned or, if the discharge violation occurs on the high seas, as a trustee for the international community.[8] By instituting proceedings and punishing the perpetrators in these cases, the port State protects the interest of all States in the protection and preservation of the marine environment beyond the areas of national (coastal State) jurisdiction. In this respect, it is regrettable that attempts to make investigations and proceedings by port States mandatory were rejected during the negotiating process. Accordingly, the exercise of port State jurisdiction is an entitlement, not a legal obligation.[9]

II. Historical Background

4 As already mentioned, in the 1970s several IMO conventions on maritime safety and the prevention of marine pollution contained some limited enforcement competences for port States.[10] They were, however, not entitled to undertake thorough investigations in cases of alleged violations or institute proceedings. During the negotiations of MARPOL in 1973/78, proposals to establish a 'universal port state jurisdiction' in respect of discharge violations

[5] *René-Jean Dupuy/Daniel Vignes*, A Handbook on the New Law of the Sea, vol. II (1991), 1151, 1209.

[6] *Ho-Sam Bang*, Is Port State Control an Effective Means to Combat Vessel-Source Pollution? An Empirical Survey of the Practical Exercise by Port States of Their Powers of Control, IJMCL 23 (2008), 715, 717.

[7] PSC refers to a number of international rules and standards listed in the various regional Memoranda of Understanding (MOUs) on Port State Control. Currently, there exist 9 PSC MOUs. For details, see: IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, IMO Doc. LEG/MISC.7 (2012), 57 *et seq.* And for further treatment, see: *Bang* (note 6), 715 *et seq.*; *Anderson* (note 1), 258; *Z. Oya Özçayir*, The Use of Port State Control in Maritime Industry and Application of the Paris MOU, OCLJ 14 (2008–2009), 201 *et seq.*; *Erik J. Molenaar*, The EC Directive on Port State Control in Context, IJMCL 11 (1996), 241 *et seq.*

[8] *König* (note 3), 237 *et seq.*; *Doris König*, The Enforcement of the International Law of the Sea by Coastal and Port States, ZaöRV 62 (2002), 1, 6; see also *Patricia Birnie/Alan Boyle/Catherine Redgwell*, International Law and the Environment (3rd ed. 2009), 422; *Molenaar* (note 4), para. 2; *Christian J. Tams*, Individual States as Guardians of Community Interests, in: Ulrich Fastenrath *et al.* (eds.), From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma (2011), 379, 397 *et seq.*; *Yoshifumi Tanaka*, Protection of Community Interests in International Law: The Case of the Law of the Sea, MPYUNL 15 (2011), 329, 351 *et seq.*, who considers the concept of port jurisdiction 'an interesting example of Scelle's theory of "la loi du dédoublement fonctionnel" '.

[9] *Tanaka* (note 2), 284.

[10] See *supra*, MN 2.

were rejected.[11] It was left to the negotiating process at UNCLOS III to decide on whether and to what extent flag State jurisdiction should be supplemented by port State jurisdiction.

In the early days of the negotiations, flag States, coastal States and some environmentally- 5
friendly industrial States pursued opposing interests with regard to port State jurisdiction. Whereas traditional flag States wanted to retain exclusive jurisdiction with limited inspection rights for port States and coastal States focused on extensive enforcement rights in the EEZ, some industrial States, such as Canada, the Netherlands and the United States, submitted proposals at the 1973 session of the Seabed Committee on far-reaching enforcement competences for port States.[12] It was a difficult task to find a compromise accommodating these divergent interests. The first pertinent provision in the Informal Single Negotiating Text did not differentiate between discharge violations and other infringements of international rules and standards.[13] It did also not distinguish between the concepts of coastal State and port State jurisdiction.[14] The latter was restricted, but the port State was obliged to undertake investigations 'regardless of where the violation occurred', and submit the results of the investigation to the flag State and other States affected by the alleged violation.[15] This provision was based on a compromise proposal submitted by nine European States[16] and reflected the position of the traditional flag States.

A substantial change came with the proposal made in Art. 28 of the Revised Single 6
Negotiating Text (RSNT), which reproduced almost verbatim a text suggested by the Informal Group of Juridical Experts.[17] For the first time, the role of port States was distinguished from that of coastal States. From the wording of the new paragraphs 2 to 4 it became clear that the port State is the State that acts with regard to violations occurring outside the maritime zones under its own jurisdiction.[18] The port State was not allowed to act unless requested by the coastal State, the flag State or 'the State damaged or threatened by a discharge violation' (paragraph 2). The mandatory nature of undertaking investigations by port States was, however, changed to

> 'that State **may** undertake investigations and, where warranted by the evidence of the case, cause proceedings to be taken in respect of any discharge from that vessel in violation of international rules and standards […], irrespective of where the violation occurred.'[19]

Accordingly, the scope of port State jurisdiction was limited to discharge violations. The competence to undertake investigations was made optional on the one hand, but the port State's powers were extended to instituting administrative and criminal law proceedings, subject to the safeguards in what is now Section 7, on the other.[20] Moreover, the optional nature of port State jurisdiction was complemented by the obligation to 'endeavour to

[11] *Gregorius J. Timagenis*, International Control of Marine Pollution, vol. 2 (1980), 510 *et seq.*; *R. Michael MacGonigle/Mark W. Zacher*, Pollution, Politics and International Law: Tankers at Sea (1979), 231 *et seq.*; for a comprehensive overview, see: *König* (note 3), 174 *et seq.*

[12] *König* (note 3), 184 *et seq.*, 188 *et seq.*, with further references. The US and the Netherlands' proposals are published in: Shigeru Oda (ed.), The International Law of the Ocean Development, Basic Documents, vol. 2 (1975), 390 *et seq.* and 412 *et seq.* For the Canadian proposal, see: Sea-Bed Committee, Working Paper on Prevention of Pollution from Ships, Submitted by Canada, UN Doc. A/AC.138/SC.III/L.37/ADD.1 (1973, mimeo.), cited in: GAOR 26th Sess. Suppl. 21 (A/9021-I), 106. See also *Anderson* (note 1), 270 *et seq.*

[13] See UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF. 62/WP.8/PART III (1975), OR IV, 171, 175 (Art. 27).

[14] *Ibid.*

[15] *Ibid.*

[16] *König* (note 3), 186 *et seq.*; Nordquist/Rosenne/Yankov (note 1), 263 *et seq.* (MN 218.4); see Third Committee UNCLOS III, Belgium et al.: Draft Articles on the Prevention, Reduction and Control of Marine Pollution, UN Doc. A/CONF.62/C.3/L.24 (1975), OR IV, 210.

[17] Nordquist/Rosenne/Yankov (note 1), 266 (MN 218.4), referring to UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 178 (Art. 28).

[18] *Ibid.*

[19] RSNT (note 17); see also Nordquist/Rosenne/Yankov (note 1), 267 (MN 218.5), emphasis added.

[20] In Art. 27 (3) ISNT, the power to institute proceedings against foreign vessels in its ports was restricted to the coastal State: ISNT (note 13), 175.

comply with requests […] for investigation of violations' made by the coastal State(s) affected by the violation, as well as with requests from the flag State (paragraph 3).[21] In addition, the port State could, at its discretion, transfer proceedings upon request to the coastal State when the violation had occurred in waters under the sovereignty or jurisdiction of that State.[22] Although Art. 28 of the RSNT was already very similar to the final version of Art. 218, some additional substantive changes were made in Art. 219 of the Informal Composite Negotiating Text (ICNT).[23] The obligation of port States to act upon request from other (coastal) States or the flag State was further weakened by changing the wording 'shall […] endeavour to comply with requests […]' into 'shall, as far as practical, comply with requests […]', thus leaving the decision to comply to the port State's discretion.[24] In addition to coastal and flag States, requests could also be made by States damaged or threatened by damage to their maritime zones, thus increasing the number of States which could ask the port State to use its enforcement jurisdiction. The most important change was made to paragraph 4, obliging the port State to transfer its **investigation records** to the flag or coastal State at their request.[25] **Proceedings** 'may be suspended at the request of a coastal State, when the violation has occurred within the internal waters, territorial sea or exclusive economic zone of that State […]'.[26] In addition, the traditional flag States succeeded in inserting in the safeguards section an obligation on port States to suspend proceedings 'upon the taking of proceedings to impose penalties in respect of corresponding charges by the flag State within six months of the date on which proceedings were first instituted, […]'.[27] Even though this and other provisions in the safeguards section restrict the enforcement jurisdiction of port States, the concept of port State jurisdiction as shaped in the RSNT and ICNT should be understood as a 'carefully structured compromise' and 'generally acceptable package in which proper balance was maintained'[28]. After 1977, only minor editorial changes were made to Art. 218 which did not affect its substance.[29]

III. Elements

1. 'When a vessel is voluntarily within a port or at an off-shore terminal of a State'

7 Port States may exercise their enforcement jurisdiction only against vessels which are voluntarily within one of their ports or off-shore terminals. A port is 'a facility on the sea coast, river shore or lake shore where ships can load and unload goods or livestock or embark or disembark passengers'[30], forming part of the land territory and the internal waters of a State. Off-shore terminals are 'artificial islands or installations outside the internal waters, which serve as port facilities for loading or offloading mainly oil and gas […]'[31]. The 'port

[21] RSNT (note 17).

[22] *Ibid.*; the first sentence of Art. 28 (4) read, 'Any proceedings initiated by a port State under this Article **may** be transferred to a coastal State at the request of that State, when the violation has occurred within the internal waters, territorial sea or economic zone of that State' (emphasis added).

[23] Nordquist/Rosenne/Yankov (note 1), 269 *et seq.* (MN 218.7), referring to, UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 38 (Art. 219).

[24] *König* (note 3), 199. The first proposal made by the Informal Group of Juridical Experts in March 1976 contained the much stronger formulation ' […] shall make every effort to comply with requests from any other State […]'.

[25] *Cf. MacGonigle/Zacher* (note 11), 249–251 for the development up to the ICNT version.

[26] ICNT (note 23), 38 (Art. 219).

[27] This safeguard is now regulated in Art. 228 (1). For further information, see *Becker-Weinberg* on Art. 228.

[28] See UNCLOS III, Memorandum by the President of the Conference on Document A/CONF.62/WP.10, UN Doc. A/CONF.62/WP.10/ADD.1(1977), OR VIII, 65, 69; *Dupuy/Vignes* (note 5), 1223, consider it rightly 'a very careful apportionment of competences'.

[29] *König* (note 3), 196 *et seq.*; Nordquist/Rosenne/Yankov (note 1), 270 (MN 218.8).

[30] *Rainer Lagoni*, Ports, MPEPIL, para. 1, available at: http://www.mpepil.com.

[31] *Ibid.*, para. 2.

State' is the State in the territory or territorial sea of which the port or off-shore terminal is located.[32] Because of its territorial sovereignty over these facilities, the port State is physically and practically capable of enforcing its national laws and regulations against merchant ships under foreign flags using them. In order to be subject to port State jurisdiction, a foreign merchant vessel must be in port 'voluntarily'. From this wording it can be deferred that vessels in a situation of *force majeure* or distress are exempted from port State enforcement measures, because they did not enter the port on their own free will, but to seek shelter and possibly save the lives of passengers and crew.[33] Furthermore, a ship forced into port by sovereign action would not fall under Art. 218 (1), either.[34]

2. 'any discharge from a vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards'

8 The enforcement jurisdiction of port States in respect of vessel-source pollution is restricted to 'discharge' violations. The term 'discharge' is not defined in the Convention. Read together with the 'international rules and standards', it can be concluded that the word 'discharge' should be interpreted with a view to MARPOL and its Annexes I to V.[35] According to Art. 2 (3)(a) MARPOL, 'discharge, in relation to harmful substances or effluents containing such substances, means any release howsoever caused from a ship and includes any escape, disposal, spilling leaking, pumping, emitting or emptying'.[36] This definition encompasses operational as well as accidental discharges.[37] Discharge violations must have occurred outside the waters under the port State's sovereignty or jurisdiction. This condition is crucial to the distinction between the concepts of port State jurisdiction and coastal State jurisdiction. If a discharge violation has occurred in one of the maritime zones of the State at the port of which a foreign-flagged vessel has called, that State acts as a coastal State. The pertinent provision in this respect is Art. 220 (1). Only when the violation took place outside its own maritime zones, i. e., in the maritime zones of other coastal States or on the high seas, the State of the port of call acts as port State in the sense of Art. 218. As such, the jurisdiction to enforce certain measures under Art. 218 is a case of exceptionally granted extraterritorial jurisdiction for the port State.[38]

9 The term 'applicable international rules and standards established through the competent international organization or general diplomatic conference' referred to in Art. 218 (1) has the function to restrict port State enforcement to internationally agreed provisions, thus ensuring the primacy of international rules and standards over possibly more stringent national laws. This restriction is crucial for the compromise reached between traditional

[32] In most cases, the port State is also a coastal State. However, exceptions to this are possible. See, for example, Basel in Switzerland.

[33] Nordquist/Rosenne/Yankov (note 1), 272 (MN 218.9(f)).

[34] *George C. Kasoulides*, Port State Control and Jurisdiction (1993), 125; probably also *Lorenzo Schiano di Pepe*, Port State Control as an Instrument to Ensure Compliance with International Marine Environmental Obligations, in: Andree Kirchner (ed.), International Marine Environmental Law (2003), 142 ('has been compelled howsoever').

[35] Nordquist/Rosenne/Yankov (note 1), 271 (MN 218.9(a)).

[36] According to Art. 2 (3)(b) MARPOL, the term 'discharge' does not include dumping, the release of harmful substances directly arising from the exploration, exploitation or processing of seabed mineral resources, and the release of harmful substances for scientific research purposes.; in contrast, other authors consider accidental discharges to be outside of the scope of Art. 218, *cf. Bianca Dormuth*, Befugnisse des Hafenstaates, in: Christian Tomuschat (ed.), Schutz der Weltmeere gegen Tankerunfälle (2005), 93, 101.

[37] For the distinction between operational and accidental discharges see *Thomas A. Mensah*, Marine Pollution from Ships, Prevention of and Responses to, MPEPIL, para. 4–5, available at: http://www.mpepil.com; *Tanaka* (note 2), 257 *et seq*.

[38] *Anderson* (note 1), 260; *Ted L. McDorman*, Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention, JMLC 28 (1997), 305, 313–314 and 318; *Tatjana Keselj*, Port State Jurisdiction in Respect of Pollution from Ships: The 1982 United Nations Convention on the Law of the Sea and the Memoranda of Understanding, ODIL 30 (1999), 127, 135–136.

shipping nations on the one hand, and coastal and port States on the other.[39] With regard to vessel-source pollution, the meaning of the word 'applicable' is more complex than in the context of Art. 213.[40] It refers to those States that are involved in a concrete enforcement situation, i. e., the flag State, the port State and, in most cases, a coastal State.[41] Consequently, if the flag State, the port State and the coastal State concerned are parties to the Convention they are, by means of the rules of reference, indirectly bound by the 'generally accepted international rules and standards' (GAIRS), as referred to in Art. 211 (2) and (5).[42] The 'competent international organization' in respect of vessel-source pollution is the IMO;[43] the GAIRS are, as already mentioned, to a large extent stipulated in MARPOL and its Annexes I to V, arguably also Annex VI.[44] As such, they are included in the term 'applicable international rules and standards'.[45] Since the word 'applicable' refers to all 'international rules and standards' which are binding for the States concerned in an individual enforcement situation, it could also refer to more stringent rules and standards not yet 'generally accepted', e. g. discharge regulations in a regional treaty these States are party to. In this respect, the term 'applicable international rules and standards' is broader than the term 'generally accepted international rules and standards', used in the context of prescriptive jurisdiction.[46]

3. 'undertake investigations and, […] institute proceedings'

10 The port State '**may** undertake investigations, and where the evidence so warrants, institute proceedings'[47] in respect of discharge violations. The word 'may' makes clear that the exercise of enforcement jurisdiction is a right *viz.* an option for the port State, not an obligation.[48] Given the novelty of this concept, its permissive nature is not surprising but remains one of its weak points. The terms 'investigations' and 'proceedings' are not further qualified from which can be inferred that investigations may be undertaken by either administrative agencies or prosecutors, and judicial proceedings may be instituted before administrative, civil and/or criminal courts, depending on the seriousness of the violation and the port State's national legal system. Enforcement measures include boarding and inspection, detention of the vessel and monetary or other penalties.[49] These measures are, as already mentioned, subject to the safeguards spelt out in Section 7, especially in Arts. 226, 228, 230, 231 and 232, and the prompt release procedure in Art. 292.[50] As a general rule, the port State's national legal system requires the transposition of the applicable international

[39] See *supra*, MN 5–6.

[40] *Cf. König* on Art. 213 MN 10.

[41] ILA, Report of the Sixty Ninth Conference, London Conference (2000),(Committee on Coastal State Jurisdiction Relating to Marine Pollution) 443, 483, with further references; see also Nordquist/Rosenne/Yankov (note 1), 271 (MN 218.9(a)); *W. van Reenen*, 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, NYIL 12 (1981), 3, 12 *et seq.*

[42] ILA Report 2000 (note 41), 443, 484 and footnote 218. Contra *Daniel Bodansky*, Protecting the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond, Ecology Law Quarterly 18 (1991) 719, 762–763; Moreover, *McDorman* (note 38), 319–20, suggested that Art. 218 permits enforcement even vis-à-vis non-members of UNCLOS.

[43] ILA, Report of the Sixty Seventh Conference, Helsinki Conference (1996), Committee on Coastal State Jurisdiction Relating to Marine Pollution, 148, 166 *et seq.*, with further references.

[44] *Doris König*, Marine Environment, International Protection, MPEPIL, para. 28, available at: http://www.mpepil.com; *Tanaka* (note 2), 284.

[45] ILA Report 2000 (note 41), 443, 482 *et seq.*

[46] *Ibid.*, 484.

[47] Emphasis added.

[48] *Tanaka* (note 2), 284; *Anderson* (note 1), 278 *et seq.* A more categorical formulation contained in earlier proposals could not be agreed upon, see Nordquist/Rosenne/Yankov (note 1), 271 (MN 218.9(a)). In contrast, in Art. 23 (1) UN Fish Stocks Agreement, port State jurisdiction was made mandatory.

[49] *Molenaar* (note 4), para. 20.

[50] For an example as to the implementation, *cf. Henrik Ringbom*, The EU Maritime Safety Policy and International Law (2008), 274 *et seq.*

rules and standards into that State's national law as the legal basis for the administrative agencies or judicial institutions to act upon. In this respect, it can be concluded that Art. 218 not only refers to the port State's enforcement jurisdiction but implicitly also to its prescriptive jurisdiction which is implicitly mentioned in Art. 211 (3).[51] In practice, port State investigations are furthermore constrained by the limited availability of evidence that discharges occurred.[52]

4. No proceedings by the port State unless requested by another State

When a discharge violation has occurred in the maritime zones of another State, i. e., not on the high seas, the port State is, according to Art. 218 (2), permitted to institute proceedings only upon the request of that other State or a State damaged or threatened by that violation. The reason for this requirement is that the port State in such instances does not act in its own interest, but in the interest and in lieu of the coastal State(s) actually or potentially affected by the offence. Therefore, their consent in the form of a request is needed. In addition, the port State may take enforcement measures when requested by the flag State of the vessel concerned. In this case, the port State acts as an agent of the flag State which itself is, according to Art. 217 (4) and (6), under the duty to investigate any violation alleged to have been committed by a vessel flying its flag and where appropriate institute proceedings against that vessel and crew. The only exception from the requirement to act solely upon request of another State is made when the discharge violation has caused or is likely to cause pollution in the maritime zones of the port State instituting the proceedings. This exception is due to the fact that the port State takes enforcement measures to protect its own interests and, therefore, does not need the consent of any other State. In this case, jurisdiction may be said to correspond to the principle of effects.[53] If the alleged violation occurred on the high seas, i. e., outside the maritime zones of another State, it can be concluded *e contrario* that the port State is free to institute proceedings at its discretion. However, this discretion might be limited by the port State's own obligation to protect the marine environment under Arts. 192 and 194, depending on how those obligations are interpreted in the case at hand.[54] **11**

5. 'shall, as far as practicable, comply with requests from any State for investigation of a discharge violation'

According to Art. 218 (3), the port State 'shall, as far as practicable, comply with requests from any other State for investigation of a discharge violation […], believed to have occurred in, caused, or threatened damage' to the maritime zones of the requesting State. This duty, which is considerably softened by the insertion 'as far as practicable',[55] relates only to undertaking an investigation, i. e. not to instituting proceedings. Since the port State is usually the only State that is, from a practical perspective, able to conduct an investigation of an alleged discharge violation, it makes sense to use this capacity in the interest of the States affected by that violation. The port State is, therefore, obliged – at least to a certain extent – to assist these coastal States in establishing the facts and securing the evidence needed for subsequent administrative or judicial proceedings they might want to institute against the vessel and crew concerned. This obligation reduces the need for coastal States to interfere **12**

[51] *McDorman* (note 38), 315; *Ho-Sam Bang*, Port State Jurisdiction and Article 218 of the UN Convention on the Law of the Sea, JMLC 40 (2009), 291, 301, with an analysis of national implementation laws, at 303 *et seq*.; for implementation in Greece, *cf. Gregorius J. Timagenis*, The Protection of the Maritime Environment from Pollution, in: Theodore C. Kariotis (ed.), Greece and the Law of the Sea (1997), 221 *et seq*. On the contrary, *Bodansky* (note 42), 759, considers prescriptive jurisdiction superfluous, as foreign laws may be made applicable.

[52] *Tanaka* (note 2), 284; *Keselj* (note 38), 138.

[53] *Bang* (note 51), 297.

[54] See *Cybulka* on Arts. 192 and 194.

[55] See *supra*, MN 5.

with vessels in transit in order to investigate alleged discharge violations which correlates with the limited coastal State's rights of interference in the EEZ under Art. 220 (3).[56] The same (imperfect) obligation exists *vis à vis* the flag State making a request with regard to a violation, 'irrespective of where the violation occurred'. This provision correlates with the one spelt out in Art. 217 (5) and aims at enabling the flag State to fulfil its duty to institute proceedings if sufficient evidence is available and punish violations committed by ships under its flag wherever the violation has occurred.

6. 'records of the investigation […] shall be transmitted upon request' and 'proceedings […] be suspended'

13 Art. 218 (4) regulates the relationship between the concurring jurisdictions of port, coastal and flag States. If the port State has carried out **investigations**, either at its own discretion (Art. 218 (1)) or upon request of a coastal or the flag State (Art. 218 (2) and (3)), it is under the duty to transmit the investigation records to the coastal or flag State concerned, at their request. If the port State has instituted **proceedings** with regard to an alleged discharge violation having occurred in the maritime zones of another State, that other coastal State has the option to take over the proceedings. In this case, the port State 'may' decide to suspend its proceedings in favour of the requesting coastal State. Such a decision has two consequences: First, the port State is obliged to transmit any evidence secured so far and all relevant documents, together with any bond or other financial security to the competent authorities of the coastal State. And secondly, such a transmittal of the proceedings precludes the port State from continuing its own proceedings, irrespective of what the outcome of the coastal State's proceedings may be. In relation to the flag State, the port State is not even free to decide on a transmittal of the proceedings. According to Art. 228 (1), it has to suspend them if requested by the flag State within six months of the date on which the proceedings started, unless the flag State in question has a bad enforcement record.[57] By means of this obligation, the traditional predominance of flag State jurisdiction is widely preserved.

Article 219
Measures relating to seaworthiness of vessels to avoid pollution

Subject to section 7, States which, upon request or on their own initiative, have ascertained that a vessel within one of their ports or at one of their off-shore terminals is in violation of applicable international rules and standards relating to seaworthiness of vessels and thereby threatens damage to the marine environment shall, as far as practicable, take administrative measures to prevent the vessel from sailing. Such States may permit the vessel to proceed only to the nearest appropriate repair yard and, upon removal of the causes of the violation, shall permit the vessel to continue immediately.

Bibliography: *David H. Anderson*, Investigation, Detention and Release of Foreign Vessels under the UN Convention on the Law of the Sea of 1982 and Other International Agreement, IJMCL 11 (1996), 165–177; *Robin R. Churchill*, Compliance Mechanisms in the International Law of the Sea: From the Individual to the Collective, in: Holger Hestermeyer/Doris König/Nele Matz-Lück/Volker Röben/Anja Seibert-Fohr/Peter-Tobias Stoll/Silja Vöneky (eds.), Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum, vol. I (2012), 777–806; *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999); *Damar Duygu*, Enforcement of the Law of the Sea Rules in the Context of Port State Control: The European Approach, in: Peter Ehlers/Rainer Lagoni (eds.), Enforcement of International and EU Law in Maritime Affairs (2008), 11–45; *Kari Hakapää*, Marine Pollution in International Law: Material Obligations and Jurisdiction (1981); *John Hare*, Port State Control: Strong Medicine to Cure a Sick Industry, Georgia JICL 26 (1996–1997), 571–594; *Doris König*, The Enforcement of the International Law of the Sea by Coastal and Port States, ZaöRV 62 (2002), 1–15; *George Kasoulides*, Paris Memorandum of

[56] *Anderson* (note 1), 259; *Birnie/Boyle/Redgwell* (note 8), 420 *et seq*.

[57] See *supra*, MN 4 *et seq*. For further information, *cf*. *Becker-Weinberg* on Art. 228 MN 19–20.

Understanding: A Regional Regime of Enforcement, IJECL 5 (1990), 180–192; *Rainer Lagoni*, The Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea: A Preparatory Report, IJMCL 11 (1996), 147–164; *Jan H. Lindemann*, Untersuchung, Festhalten und sofortige Freigabe ausländischer Seehandelsschiffe (1997); *Ted L. McDorman*, Regional Port State Control Agreements: Some Issues of International Law, OCLJ 5 (2000), 207–225; *Thomas A. Mensah*, Marine Pollution from Ships, Prevention of and Responses to, MPEPIL, available at: http://www.mpepil.com; *Erik J. Molenaar*, Coastal State Jurisdiction over Vessel-Source Pollution (1998); *Rosemary Rayfuse*, The Role of Port States, in: Robin Warner/Stuart Kaye (eds.), Routledge Handbook of Maritime Regulation and Enforcement (2016), 71–85; *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2010); *Tullio Treves*, The Proceedings Concerning Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea, IJMCL 11 (1996), 179–200; *W. Van Reenen*, 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, NYIL 12 (1981), 3–44; *Haijiang Yang*, Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea (2006)

Cases: ITLOS, *M/V 'Saiga' Case* (Saint Vincent and the Grenadines *v.* Guinea), Judgment of 4 December 1997, ITLOS Reports (1997), 16

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I. Purpose and Function

Art. 219 is found in Section 6 of Part XII, on protection and preservation of the marine environment. Together with three other provisions, i. e. Arts. 217, 218 and 220, it addresses enforcement measures with regard to vessel-source pollution. According to Art. 219, if a State determines that a vessel within one of its ports or offshore facilities violates international seaworthiness standards and therefore poses a threat to the marine environment, it has the obligation to take administrative measures in order to prevent the vessel from sailing, unless it proceeds to the next appropriate repair yard. The provision's position between Art. 218, on enforcement by port States, and Art. 220, on enforcement by coastal States, is not coincidental, but highlights its link with both provisions. The common feature of Art. 218 and 219 is that both apply providing the vessel concerned by enforcement measures is in the port of the State that takes these measures. As such they are both port State provisions.[1] Unlike Art. 218, which sets forth the right of the port State to undertake investigations and institute proceedings with respect to alleged violations committed by a vessel outside the zones that are under that port State's jurisdiction, Art. 219 addresses situations in which violations against seaworthiness standards occur (also) within the port State's port. Consequently, Art. 219 appears as a complementary obligation in relation to the coastal State's general enforcement powers under Art. 220 (1).[2] There may, however, be situations in which the port State within the meaning of Art. 219 is not a coastal State, as, for example, in the case where the port concerned is an inland seaport located within the territory of a landlocked State or an off-shore port facility leased by a landlocked State. **1**

[1] Rosemary Rayfuse, The Role of Port States, in: Robin Warner/Stuart Kaye, Routledge Handbook of Maritime Regulation and Enforcement (2016), 72.
[2] See also *infra*, MN 13.

2 As a provision articulated around the concept of seaworthiness, Art. 219 is, furthermore, related to Art. 94 (3)(a), which sets forth the obligation of the flag State to take measures in order to ensure, *inter alia*, the seaworthiness of the ships flying its flag. In practice, port State jurisdiction under Art. 219 steps in where a flag State has been unable or unwilling to comply with its obligation. The primary responsibility of the flag State over its vessels explains the obligation of the enforcing port State to promptly notify the flag State, as required under Art. 231. Notification enables the flag State, in case of detention of the vessel, to take the necessary means for prompt release, in particular under Art. 292. In this respect, the concept of seaworthiness also links Art. 219 to Art. 226 (1)(c).[3]

II. Historical Background

3 Even before the Convention entered into force, provisions very similar to Art. 219 were operative within different frameworks of regional port State control.[4] These provisions were developed at about the same time as Art. 219, i. e. in the aftermath of the black tide caused by the sinking of the Torrey Canyon off the coasts of Cornwall, England, in 1967 and of the Amoco Cadiz off the coast of Brittany, France, in 1978. These incidents' only positive side effect was an increased awareness of the threat posed by 'substandard vessels' to the marine environment. With regard to safety and environmental protection, port States had thus far made only limited use of their well-established jurisdiction over vessels calling voluntarily at their ports.[5] The conclusion of the 1978 Memorandum of Understanding between certain Maritime Authorities on the Maintenance of Standards on Merchant Ships (Hague MoU),[6] which created the first regional port State control system, marked a change in this attitude. According to Section 5, port authorities had to 'ensure the rectification of any deficiencies which are found to be clearly hazardous to safety or health and, if need be, detain the ship for that purpose' and if such rectification could not be achieved in the port of inspection or if the ship's detention in the port was otherwise deemed unreasonable, the vessel could be allowed to sail to another port, provided that it could 'proceed to sea without danger to the passengers or the crew'. The Amoco Cadiz disaster in March 1978, weeks before the entry into force of the Hague MoU, prompted the elaboration of the 1982 Paris MoU,[7] which, superseding the Hague MoU, aimed to tighten surveillance and enforcement and was adhered to by a greater number of port authorities. The protection of the marine environment had come into focus, as demonstrated by Section 3.7 of the Paris MoU, which, dealing with the port authorities' obligation to ensure that deficiencies are rectified before the vessel is allowed to leave port, explicitly mentions deficiencies that are hazardous to safety, health or the environment. According to Section 3.8, the vessel may only be allowed to proceed to another port if the deficiencies cannot be removed in the port of inspection, provided that it can be made sure that the 'ship can so proceed without unreasonable danger to safety, health or the environment'. The obvious kinship of these provisions with Art. 219 may be explained by their simultaneous elaboration.

4 A proposal submitted in 1973 by the United States of America to the Sea-Bed Committee articulated for the first time the idea that a port State should be allowed to prevent a vessel

[3] See also, *infra* MN 14, 18.

[4] See: *Doris König*, The Enforcement of the International Law of the Sea by Coastal and Port States, ZaöRV 62 (2002), 1, 7 *et seq*; and *George Kasoulides*, Paris Memorandum of Understanding: A Regional Regime of Enforcement, IJECL 5 (1990), 180.

[5] See *John Hare*, Port State Control: Strong Medicine to Cure a Sick Industry, Georgia JICL 26 (1996–1997), 571, 572 *et seq*.

[6] Memorandum of Understanding between Certain Maritime Authorities on the Maintenance of Standards on Merchant Ships, 2 March 1978 (entered into force on 1 July 1978), also called North Sea Agreement. For a downloadable authentic version, see http://www.minbuza.nl/en/key-topics/treaties/search-the-treaty-database/1978/3/001767.html.

[7] Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and Protection of the Marine Environment, 26 January 1982, ILM 21, 1 (entered into force on 1 July 1982).

from sailing if that vessel poses a threat to the marine environment due to the lack of seaworthiness. Draft Art. XVII set forth the obligation of prompt release of vessels, while continued detention was conceived as an exception which applied providing the 'release would present an unreasonable threat of harm to the marine environment or where other action [would be] required or authorized by the applicable international standards.'[8] Yet, despite discussion on the issue of enforcement within the Sub-Committee III of the Sea-Bed Committee, the Committee was unable to prepare any draft provisions.[9]

At the Third Session of UNCLOS III, several draft articles were submitted by nine European States and included a provision that read: **5**

> 'Where a port State arrests a ship in pursuance of this article it shall promptly release the ship on a bond or other reasonable security, in an amount not exceeding the maximum penalty for the violation, being given by or on behalf of its owner, but such release shall be refused if the ship cannot proceed to sea without presenting an unreasonable threat of harm to the marine environment. The port State may, however, grant the ship permission to leave the port or offshore terminal for the purpose of proceeding to the nearest appropriate repair yard available.'[10]

This draft only departed in one significant manner from the US draft submitted to the Sea-Bed Committee. Although the refusal to release the vessel was still conceived as an exception to the general obligation of prompt release, it was explicitly cast as an obligation given the particular case where the vessel poses unreasonable threat to the marine environment. The subsequent stage of development of the provision is marked by the inclusion in Art. 27 (2) of the Informal Single Negotiating Text (ISNT):

> 'The coastal State may prevent this vessel from sailing if it presents an excessive danger to the marine environment: it may, however, authorize it to leave the port or terminal to go to the nearest appropriate shipyard for repairs.'[11]

As part of a draft article on enforcement that draws on the concept of both port State and coastal State enforcement, the provision sets forth a power, not an obligation. However, Art. 29 ISNT, which formulated the principle of prompt release, completed Art. 27 ISNT by adding, in keeping with the aforementioned European proposal, that a 'vessel shall not be released if it cannot proceed to sea without presenting an excessive danger to the marine environment,' unless it proceeds 'to the nearest repair yard available.'[12]

With the Outline of Issues, prepared by the Chairman of Informal Meetings at the Fourth Session, appeared, for the first time, the reference to 'administrative measures' as a means for the State to prevent a vessel in its port from leaving if the vessel violates international seaworthiness standards.[13] The issue of seaworthiness thus became a concern in its own right. In the second sentence, the Outline set forth the State's possibility to permit the vessel to proceed to the nearest repair yard and to release it immediately upon rectification of the violation. The text included in the Revised Single Negotiating Text closely followed the Outline: **6**

> 'Subject to the provisions of Section 8 of this Chapter of the Convention, States may within their ports or off-shore terminals take administrative measures, upon request or upon their own initiative, to prevent a vessel from sailing when it is in violation of applicable international rules and standards

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[8] Sea-Bed Committee, United States of America: Draft Articles on the Protection of the Marine Environment and the Prevention of Marine Pollution, UN Doc. A/AC.138/SC.III/L.40 (1973).

[9] See: Sea-Bed Committee, Chairman of Working Group 2, Note Addressed to the Chairman of Sub-Committee III, UN Doc. A/AC.138/SC.III/L.52 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-I), 89, 90.

[10] Third Committee UNCLOS III, Belgium *et al.*: Draft Articles on the Prevention, Reduction and Control of Marine Pollution, UN Doc. A/CONF.62/C.3/L.24 (1975), OR IV, 210, 211 (Art. 3 (18)).

[11] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975), OR IV, 171, 175 (Art. 27 (2)).

[12] *Ibid.*, 175 (Art. 29, cl. 2, 3).

[13] Third Committee UNCLOS III, Chairman of Informal Meetings of Committee III on Marine Pollution, Outline of Issues Concerning Vessel Source Pollution and Suggestions (1976, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. X (1986), 449, 450 (Section II, Item 3(b)).

> relating to seaworthiness of ships or threatens damage to the marine environment. States shall permit the vessel to proceed only to the nearest appropriate repair yard or continue immediately upon rectification of the violation.'[14]

The main feature of an informal proposal submitted orally by the Federal Republic of Germany and France at the Sixth Session was to recast the provision into an obligation:

> 'Subject to the provisions of Section VIII of this Chapter of the Convention, States which have ascertained that a vessel within their ports or at their off-shore terminals is in violation of applicable international rules and standards relating to seaworthiness or threatens damage to the marine environment shall take administrative measures to prevent the vessel from sailing. Such States may permit the vessel to proceed only to the nearest appropriate repair yard, upon rectification of the violation they shall permit the vessel to continue immediately.'[15]

This proposal set the tone for the draft included in the Informal Composite Negotiating Text (ICNT):

> 'Subject to the provisions of section 7 of this Part of the present Convention, States which have ascertained, upon request or on their own initiative, that a vessel within their ports or at their off-shore terminals is in violation of applicable international rules and standards relating to seaworthiness and thereby threatens damage to the marine environment shall, as far as practicable, take administrative measures to prevent the vessel from sailing. Such States may permit the vessel to proceed only to the nearest appropriate repair yard and, upon rectification of the causes of the violation, shall permit the vessel to continue immediately.'[16]

Besides several minor changes in wording, the phrase 'as far as practicable' was added after the word 'shall'. The main effect of this addition was to soften the strong mandatory character of the provision conveyed by the word 'shall' alone. The ICNT draft brought the text very close to its final form, as only minor drafting changes were made before the provision was included as Art. 219 in the final text of the Convention.[17]

III. Elements

1. 'Subject to section 7'

7 The obligation set forth by Art. 219 applies subject to the safeguards that must be observed, pursuant to Section 7, when enforcement measures and proceedings are taken. Although the respect of these safeguard clauses would be mandatory without the explicit reference to Section 7, the explicit reference has the advantage of establishing a clear hierarchy of potentially contradictory norms. In case of conflicting norms, the obligations of Section 7 override that of Art. 219. The provisions of Section 7 that are most relevant to Art. 219 are: Art. 227, which prohibits discrimination; Art. 231, which imposes the obligation of notifying the flag State; and Art. 232, on liability in case of unlawful enforcement measures.

2. 'States […] shall, as far as practicable, take administrative measures to prevent the vessel from sailing'

8 The drafting history of Art. 219 is marked by proposals oscillating between the States' right and the States' obligation to hinder unseaworthy vessels from leaving port. While the right to detain an unseaworthy vessel that is voluntarily in its port is the direct and undisputed

[14] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 178 (Art. 29).

[15] Proposal of France, Third Committee UNCLOS III, Proposals Received During the Informal Meeting on Marine Pollution During the 6th Session (1977, mimeo.), reproduced in: Platzöder (note 13), 497, 503 (Art. 29).

[16] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 38 (Art. 220).

[17] A revised text included words 'of vessels' after the word 'seaworthiness', see UNCLOS III, Draft Convention on the Law of the Sea (Informal Text), UN Doc. A/CONF.62/WP.10/REV.3 (1980), OR VIII, 91 (Art. 219).

consequence of the State's territorial sovereignty, the obligation to detain unseaworthy vessels, including those that did not call voluntarily at the port, proved to be more controversial.[18] Eventually, a compromise solution was agreed upon. While the word 'shall' suggests that Art. 219 comprises an obligation,[19] the phrase 'as far as practicable,' which immediately follows, limits the scope of that obligation considerably. As has rightly been pointed out, the obligation only applies inasmuch as taking administrative measures is practicable 'as a matter of fact.'[20] The assessment of the practicability of administrative measure is left to the port States, which may be tempted to refrain from taking measures that entail a burden not only for the vessel concerned, but also for the port States themselves. However, the inherent risk of lax application of Art. 219 is effectively counterbalanced by the port States' genuine interest to ensure safe navigation in their waters.

The port State's obligation more precisely consists of taking 'administrative measures to prevent the vessel from sailing'. The objective to ensure that a substandard vessel that potentially poses a risk to the marine environment does not leave the port is achieved through measures taken by the administrative authorities. This excludes proceedings and other judicial actions. Administrative measures include the refusal of granting exit clearance, the order of detention and the order of reparation or removal of deficiencies. If it is impossible to repair the vessel or to remedy its deficiencies in the port, it may be ordered to proceed to the nearest appropriate repair yard.[21] **9**

3. 'a vessel within one of their ports or at one of their off-shore terminals'

States' enforcement powers under Art. 219 are subject to several prerequisites. One such prerequisite concerns the location of the vessel, as States may take action only regarding a 'vessel within one of their ports or at one of their off-shore terminals.' A similar reference to ports and off-shore terminals may be found in Art. 218 (1), on port State jurisdiction, and in Art. 220, on coastal State jurisdiction, with the difference that according to these provisions the stay in the port or off-shore terminal must be voluntary. The absence of the word 'voluntarily' in Art. 219 indicates that a vessel that is in the port or off-shore terminal due to involuntary circumstances, including but not limited to situations of unseaworthiness, such as maneuvering difficulties, collision damage, technical problems, but also weather conditions or other situations of distress, is nevertheless subject to the obligation imposed upon States by the provision.[22] **10**

A related issue concerns the fact that besides the ports and off-shore terminals, no mention is made of internal waters. The question has therefore been raised as to whether the port States may also take measures against vessels passing through their internal waters (→ Art. 8) without calling at a port or off-shore terminal. During the negotiations, the addition of the phrase 'other internal waters' after the word 'ports' had been discussed,[23] but it never materialized in the final text. Yet, the omission has no impact on the power of the coastal State over unseaworthy vessels in its internal waters. The coastal State's power in its internal waters is undoubted, as it has full sovereignty in this part of its territory, according to **11**

[18] For further information on the voluntariness requirement, see: *infra*, MN 10; *König* on Art. 218 and *Hamamoto* on Art. 220.

[19] UNCLOS III, UN Doc. ELGDC/5 (1980, mimeo.), cited by: Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea, 1982: A Commentary, vol. IV (1991), xlii (footnote 3).

[20] Nordquist/Rosenne/Yankov (note 19), 277, 278 (MN 219.8 (c)).

[21] *Haijiang Yang*, Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea (2006), 114; see also, *infra* MN 15.

[22] *Damar Duygu* Enforcement of the Law of the Sea Rules in the Context of Port State Control: The European Approach, in: Peter Ehlers/Rainer Lagoni (eds.), Enforcement of International and EU Law in Maritime Affairs (2008), 11, 26.

[23] Third Committee UNCLOS III, 31st Meeting, UN DOC. A/CONF.62/C.3/SR.31 (1976), OR VI, 100, 105 (para. 72).

customary international law recognized by Art. 2 (1). The question must be framed differently, as the real issue is whether the State has the **obligation**, under Art. 219, to take measures against unseaworthy vessels transiting its internal waters. Due to the absence of a reference to these waters in Art. 219, the conclusion is negative, which does not mean that it does not have the **right** to do so.[24]

4. 'ascertained […] violation of applicable international rules and standards relating to seaworthiness'

12 The port State's obligation is, furthermore, conditional on the detection by the State of a violation, committed by the concerned vessel, of applicable international rules and standards relating to seaworthiness. Although the whole provision centres on the concept of seaworthiness, also mentioned in Art. 94 (3)(a) and Art. 226 (1)(c), no definition is given by the Convention. According to its general meaning, the term concerns the issue of whether a vessel is fit or safe or else in a good enough condition for a voyage at sea with all its risks and dangers.[25] Under Art. 219, the relevant conditions of seaworthiness are circumscribed by the reference made to 'applicable international rules and standards relating to seaworthiness.' Through these words the detailed framework set forth in specialized agreements, which do not necessarily use the term 'seaworthiness,' is incorporated into the Convention. With only international rules and standards being relevant under Art. 219, as opposed to domestic rules and standards, the relevant provisions are those elaborated in international fora, notably the International Maritime Organization. The 1974 International Convention for the Safety of Life at Sea, the Convention on the International Regulations for Preventing Collisions at Sea, the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto (MARPOL 73/78), the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers and the International Convention on Load Lines are but the most significant agreements in this respect.

13 The word 'applicable' is of particular interpretative difficulty, as it raises the contentious issue as to whom the rules and standards must be applicable, the flag State, the port State, or both simultaneously.[26] Lindemann contends that only the port State must be bound.[27] By contrast, Molenaar and Van Reenen argue that the term is used with relative meaning in the Convention and that, consequently, both the port State and the flag State must be bound by a specific rule or standard in order for that rule or standard to be applicable.[28] The latter interpretation seems to be more in keeping with the term 'applicable,' as the personal scope of application of a norm is determined with reference to the States that accepted it. However, while the argument seems strong with regard to provisions creating a particular State's right of prescription or enforcement that potentially conflicts with rights of other States, it is much weaker with respect to provisions that do not imply such balancing. The right of the port State to apply and enforce the rules and standards upon foreign vessels that it deems necessary is undisputed, as the vessels are in its ports. The argument seems furthermore unconvincing with respect to the particular case of Art. 219, where the word 'applicable' delineates the extent of the port State's obligation. As a consequence, it seems plausible to interpret the word 'applicable' as meaning that the port State cannot be required to enforce norms and standards it has not agreed to. The reference made to 'applicable international rules and standards'

[24] See also *Jan H. Lindemann*, Untersuchung, Festhalten und sofortige Freigabe ausländischer Seehandelsschiffe (1997), 81.

[25] Synopsis of the definitions given for the word 'seaworthy' by Merriam Webster online and Oxford Dictionaries online, available at: http://www.merriam-webster.com/ and http://oxforddictionaries.com/.

[26] For a similar discussion of the word 'applicable' in Art. 217, see *Bartenstein* on Art. 217 MN 13.

[27] See also *Lindemann* (note 24), 175 with further references.

[28] *Erik J. Molenaar*, Coastal State Jurisdiction over Vessel-Source Pollution (1998), 168, with further references; *W. Van Reenen*, 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, NYIL 12 (1981), 3, 13.

should therefore be read as meaning that these provisions must at least be binding upon the port State. It seems unnecessary for the port State to ensure that a given flag State is also bound by the provision in question, as it has jurisdiction over the foreign vessel in its port. This would also be in keeping with the principle of 'no more favourable treatment', included in MARPOL 73/78,[29] and might even be an integral part of general international law.[30]

14 The violation of these international rules and standards creates the obligation of the State to take administrative action against the vessel concerned. Art. 219 is often mentioned in the same breath as port State jurisdiction, set forth in Art. 218.[31] A closer look at Art. 218 reveals, however, differences between the two provisions that mean, according to some, that Art. 219 is not a provision on port State enforcement powers *stricto sensu*.[32] The State referred to in Art. 219 does not react to an alleged violation that occurred outside its jurisdiction, as it does under Art. 218. It rather acts as a coastal State, within the meaning of Art. 220, against a vessel infringing rules or standards while it is in the particular coastal zone that are ports and off-shore terminals. While Art. 219 might therefore be qualified as a *lex specialis* to Art. 220 (1), the qualitative difference of both provisions – the first containing an obligation and the second, a power – must be kept in mind.

15 The port State must have ascertained that the vessel concerned is indeed in violation of applicable international rules and standards related to seaworthiness and that it thereby threatens damage to the marine environment. The determination of a violation and the assessment of its potential consequences for the marine environment require investigation on the part of the port State. Although it is not mentioned, the right of the port State to investigate foreign vessels in its ports is implicit in Art. 219, as investigation constitutes the ordinary means to assess the vessel's compliance with relevant rules and standards.[33] Moreover, the right is recognized by customary international law. Investigation is problematic only if it causes delays or even leads to the detention of the vessel, issues addressed by Art. 226.[34] In respect of this safeguard clause, it is useful to indicate that Art. 226 (1)(a) seems inapplicable in case of delays caused to foreign vessels that are investigated under Art. 219, as Art. 226 (1)(a) explicitly mentions Arts. 216, 218 and 220, but not Art. 219.[35] By contrast, Art. 226 (1)(b) and (c), respectively concerning the obligation of prompt release and the exception to it, do not include any specific cross-reference, which makes them applicable to any situation of detention. Art. 226 (1)(c) in particular reiterates the underlying idea of Art. 219 that an unseaworthy vessel should not be allowed to sail, by establishing a right of the investigating State to refuse prompt release of the vessel or to make it conditional upon proceeding to a repair yard. It thus neutralizes the obligation of prompt release, according to Art. 226 (1)(b), in cases where an unreasonable threat of damage to the marine environment is at stake. It is important to note that the threat is qualified under this provision by the word 'unreasonable', whereas a simple threat is sufficient under Art. 219. Furthermore, according to Art. 219, the port State has to ascertain that the violation of seaworthiness standards gives rise to the threat of damage to the marine environment by the unseaworthy vessel. The word 'thereby' conveys the necessity of a causal link between the unseaworthiness and the threat of damage. Any threat posed to the vessel itself or its crew is irrelevant. Unlike the expression 'pollution of the marine environment,' defined in Art. 1 (1)(4), the expression 'damage to the marine environment' is not specified. It seems, however, to be of broader meaning and include not only pollution but also

[29] Art. 5 (4) MARPOL 73/78.

[30] See *Thomas A Mensah*, Prevention of and Responses to Marine Pollution from Ships, MPEPIL, para. 33, available at: http://www.mpepil.com.

[31] *König* (note 4), 5–6; *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2010), 355; *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999), 350.

[32] See *Daniel Bodansky*, Protection of the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond, Ecology Law Quarterly 18 (1991), 719, 759.

[33] See also *Yang* (note 21), 113.

[34] See generally *Becker-Weinberg* on Art. 226.

[35] See *Lindemann* (note 24), 309.

impairment or destruction of the marine environment, notably by mechanical impacts. The word 'threaten' suggests that the obligation set forth in Art. 219 has a preventive dimension. Consequently, the port State only has to conclude that damage may potentially occur.

16 The port State may take the initiative of investigating a foreign vessel, but it may also be asked to ascertain a violation. When assessing the seaworthiness of vessels in its ports, the State acts naturally in its own interest in an undamaged marine environment off its coasts. As the seaworthiness of the vessels is to be assessed through international rules and standards and not domestic ones, it has been argued that the State simultaneously takes on the role of a 'trustee' or 'agent' of the international community,[36] which makes sure, through the port State's obligation, that the collective interest in containing the threat to the marine environment is safeguarded. The words 'upon request' indicate that the initiative of investigating a foreign vessel does not exclusively rest with the port State but do not specify on whose request the port State may be required to act. Most obviously, the request may be made by the flag State, especially if the vessel does not regularly call to its ports. Furthermore, regular inspection of vessels in view of ascertaining their compliance with international rules and standards as well as their detention, if warranted, is at the heart of the memoranda of understanding on port State control.[37] Although these administrative agreements between maritime authorities serve a broader objective, they help ensure seaworthiness in an effective way by submitting visiting vessels to a coordinated inspection schedule, which depends, among other things, on their overall compliance. Information on inspected vessels is shared between participating authorities, which enables them to inspect vessels with a poor compliance record at short intervals. The expression 'upon request' seems sufficiently broad to include initiatives taken on the basis of such administrative inspection schedules, even if such 'requests' are not made by States, but rather by port authorities.

5. 'States may permit the vessel to proceed only to the nearest appropriate repair yard and, upon removal of the causes of the violation, shall permit the vessel to continue immediately'

17 Art. 219 cl. 2 constitutes an exception to the obligation to prevent an unseaworthy vessel from sailing. The port State has the right to allow the vessel to sail, provided that it leaves to proceed to the nearest appropriate repair yard. As reparation in the port is not always possible, this authorization might be the only chance to restore the vessel's seaworthiness. Art. 219 recognizes that it may be acceptable, after balancing the risk for the marine environment, on the one hand, and the interests of the vessel's owner, operator or charterer on the other, that the vessel resumes service in order to proceed to a repair yard. The decision, which rests with the port State, is discretionary in nature. This right of the port State to allow an unseaworthy vessel to proceed to the nearest repair yard is reiterated by Art. 226 (1)(c).

18 In addition to the aforementioned right of the port State to authorize the vessel to proceed to a repair yard, Art. 219 cl. 2 imposes on the port State the obligation to allow the vessel to leave the port as soon as the causes of unseaworthiness are eliminated. Consequently, the obligation imposed by the first sentence to prevent unseaworthy vessels from sailing is to be strictly interpreted. A vessel may be hindered from leaving the port only as long as its unseaworthiness persists. However, detention of the unseaworthy vessel cannot be based on Art. 219 if proceedings for past violation of international rules and standards on seaworthiness or for damages effectively caused are instituted against that vessel. The legal basis for such punitive or curative judicial measures would be instead found in Art. 218 or Art. 220.

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[36] For the concept of 'trustee' or 'agent' in this respect, see *König* (note 4), 3 *et seq.*

[37] See also *Robin R. Churchill*, Compliance Mechanisms in the International Law of the Sea: From the Individual to the Collective, in: Holger Hestermeyer *et al.* (eds.), Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum, vol. I (2012), 777, 791 *et seq.*

Detention of a vessel and the permission to proceed to the nearest repair yard are subject to Art. 226 (1)(c), which addresses the question of prompt release of unseaworthy vessels. The first sentence mirrors Art. 219 in so far as it confirms the possibility for the port State to refuse the release of an unseaworthy vessel or to make it conditional upon proceeding to the nearest appropriate repair yard. According to the second sentence, the flag State may seek release of the vessel in accordance with Part XV.[38] As Art. 226 (1)(c), unlike Art. 226 (1) (b), does not mention 'bonding or other appropriate financial security', release envisioned under Art. 226 (1)(c) cannot be sought upon the posting of a bond or other financial security.[39] Instead, release can be sought successfully if the condition of the detention, i. e. unseaworthiness, proves unexistent or has been eliminated. Arguably, the flag State may make the request that the vessel be allowed to proceed to a repair yard, as this request is less far-reaching than that of unconditional release and as such covered by Art. 226 (1)(c).[40] **19**

Article 220
Enforcement by coastal States

1. When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may, subject to section 7, institute proceedings in respect of any violation of its laws and regulations adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels when the violation has occurred within the territorial sea or the exclusive economic zone of that State.

2. Where there are clear grounds for believing that a vessel navigating in the territorial sea of a State has, during its passage therein, violated laws and regulations of that State adopted in accordance with this Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels, that State, without prejudice to the application of the relevant provisions of Part II, section 3, may undertake physical inspection of the vessel relating to the violation and may, where the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws, subject to the provisions of section 7.

3. Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws and regulations of that State conforming and giving effect to such rules and standards, that State may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred.

4. States shall adopt laws and regulations and take other measures so that vessels flying their flag comply with requests for information pursuant to paragraph 3.

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[38] See also, *Ted L. McDorman*, Regional Port State Control Agreements: Some Issues of International Law, OCLJ 5 (2000), 207, 223.

[39] To that effect, see also: *Lindemann* (note 24), 312, 318 and 339; *David H. Anderson*, Investigation, Detention and Release of Foreign Vessels under the UN Convention on the Law of the Sea of 1982 and Other International Agreement, IJMCL 11 (1996), 165, 176; *Rainer Lagoni*, The Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea: A Preparatory Report, IJMCL 11 (1996), 147, 155; *Tullio Treves*, The Proceedings Concerning Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea, IJMCL 11 (1996), 179, 184 *et seq*. However, according to the decision of the International Tribunal for the Law of the Sea decision in the ITLOS, *M/V 'Saiga' Case* (Saint Vincent and the Grenadines *v*. Guinea), Judgment of 4 December 1997, ITLOS Reports (1997), 16, para. 52, Art. 226 (1)(c) is one of three provisions on prompt release of vessels upon the posting of a reasonable bond or other financial security, the two other ones being Art. 73 (2), and Art. 220 (6) and (7). As the Tribunal did not analyze Art. 226 (1)(c) in detail, it is questionable whether this statement would have withstood closer scrutiny or even led the Tribunal to reject the distinction made in the legal literature.

[40] See also *Lagoni* (note 39), 155.

5. Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a substantial discharge causing or threatening significant pollution of the marine environment, that State may undertake physical inspection of the vessel for matters relating to the violation if the vessel has refused to give information or if the information supplied by the vessel is manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection.

6. Where there is clear objective evidence that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone, that State may, subject to section 7, provided that the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws.

7. Notwithstanding the provisions of paragraph 6, whenever appropriate procedures have been established, either through the competent international organization or as otherwise agreed, whereby compliance with requirements for bonding or other appropriate financial security has been assured, the coastal State if bound by such procedures shall allow the vessel to proceed.

8. The provisions of paragraphs 3, 4, 5, 6and 7 also apply in respect of national laws and regulations adopted pursuant to article 211, paragraph 6.

Bibliography: *Patricia Birnie/Alan Boyle/Catherine* Redgwell, International Law & the Environment (3rd edn. 2009); *Valentín Bou Franch*, Freedom of Navigation versus Pollution by Oil from Vessels: The Point of View of Coastal States, in: Rafael Casado Raigón (ed.) L'Europe et la mer (2005), 251–288; *Chelsea Purvis*, Coastal State Jurisdiction under UNCLOS: The Shen Neng 1 Grounding on the Great Barrier Reef, YJIL 36 (2011), 207–217; *Catherine Fabregoule*, Chronique: Environnement marin, Annuaire du droit de la mer 8 (2003), 49–571; *Magali Lehardy*, Espagne/France: Naufrage du "Prestige" et accord sur le contrôle de la navigation dans la zone économique exclusive, Revue générale de droit international public 107 (2003), 132–136.; *Christophe Marques*, À la recherche d'un fondement juridique pour l'accord franco-espagnlo de Malaga relatif à la sécurité maritime, *Annuaire du droit de la mer* 9 (2004), 241–258.; *Kimio Yakushiji*, Kaiyo Osen [Marine Pollution], in: Soji Yamamoto (ed.) Kaijo Hoan Hosei [Laws and Regulations on Maritime Security] (2009), 329–345

Documents: ILA, Committee on Coastal State Jurisdiction Relating to Marine Pollution, Final Report: London Conference (2000)

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I. Purpose and Function

1 As for pollution caused by vessels, the Convention sets forth rights and obligations of the coastal State (Arts. 216(1)(a) and 220), the flag State (Arts. 216(1)(b) and 217) and the port

State (Arts. 216(1)(c), 218 and 219). Art. 220 specifically entitles the coastal State to exercise its enforcement jurisdiction with regard to marine pollution occurring in the exclusive economic zone (EEZ) as well as in the territorial sea, balancing the coastal State's interests within these maritime zones against the freedom of navigation. Under this article, the coastal State is empowered to ('may') take enforcement measures. This contrasts with the obligation incumbent upon the flag State under Art. 217.

Art. 220 entitles the coastal State to 'institute proceedings' (*intenter une action*), 'undertake physical inspection' or 'require the vessel to give information' depending on specific circumstances. The extent of the exercise of enforcement jurisdiction is determined by a combination of the location of the vessel, the location of the acts causing pollution and the seriousness of the pollution caused. 2

II. Historical Background

The Convention on the High Seas (1958), reflecting the customary international law rules concerning the high seas, provided that ships shall be subject to the exclusive jurisdiction of the flag State (Art. 6). A coastal State was thus prohibited from exercising its jurisdiction over foreign ships that caused pollution out of its territorial sea or internal waters. The first treaty dealing with marine pollution, the International Convention for the Prevention of Pollution of the Sea by Oil (1954),[1] also provides for the exclusive jurisdiction of the flag State regarding enforcement measures to be taken against vessels carrying out discharge prohibited by the Convention (Art. 3 (3). See also Art. 6 (1) of the 1962 amended Convention[2] and of the 1969 amended Convention[3]). Although the *Torrey Canyon* incident (1967) resulted in the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution,[4] the latter went no further than entitling the States Parties to 'take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline' (Art. 1). MARPOL 73/78 provides that '[a]ny violation of the requirements of the present Convention within the jurisdiction of any Party to the Convention shall be prohibited and sanctions shall be established therefor under the law or that Party.'[5] Although the term 'within the jurisdiction' suggests that coastal States could apply its laws beyond their territorial sea, Art. 9 (3) MARPOL ambiguously provides that '[t]he term "jurisdiction" in the present Convention shall be construed in the light of international law in force at the time of application or interpretation of the present Convention'. 3

In the Sea-Bed Committee, various proposals were advanced to deal with the jurisdiction of the coastal State with respect to marine pollution from vessels beyond the territorial sea[6] but no draft texts were prepared by the working group dealing with the issue.[7] At the Second Session 4

[1] International Convention for the Prevention of Pollution of the Sea by Oil, 1954, UNTS 327,.

[2] International Convention for the Prevention of Pollution of the Sea by Oil, 1962, UNTS 600, 332.

[3] International Convention relating to Intervention on the High Seas in Cases of Oil Pollution, UNTS 1140, 340.

[4] See *Bartenstein* on Art. 221 MN 4 *et seq*.

[5] International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto (MARPOL 73/78).

[6] Sea-Bed Committee, Kenya: Draft Articles on Prevention and Control of Pollution in the Marine Environment, U.N. Doc. A/AC.138/SC.III/L.41 (1973), cited in: GAOR 28th Sess. Suppl. 21 (A/9021-I), 106; Sea-Bed Committee, Ecuador *et al.*, Working Paper on the Preservation of the Marine Environment, U.N. Doc. A/AC.138/SC.III/L.47 (1973), cited in: GAOR 28th Sess. Suppl. 21 (A/9021-I), 107; Sea-Bed Committee, Canada: Draft Articles for a Comprehensive Marine Pollution Convention, U.N. Doc. A/AC.138/SC.III/L.28 (1973), cited in: GAOR 28th Sess. Suppl. 21 (A/9021-I), 107; Sea-Bed Committee, France: Draft Articles Concerning the Rights Exercisable by Coastal States for the Purpose of Preventing Marine Pollution, U.N. Doc. A/AC.138/SC.III/L.46 (1973), cited in: GAOR 28th Sess. Suppl. 21 (A/9021-I), 107; Sea-Bed Committee, Japan: Proposal on Enforcement Measures by Coastal States for the Purpose of Preventing Marine Pollution, U.N. Doc. A/AC.138/SC.III/L.49 (1973), cited in: GAOR 28th Sess. Suppl. 21 (A/9021-I), 107.

[7] Sea-Bed Committee, Consideration of the report of Working Group 2, U.N. Doc. A/AC.138/SC.III/L.52 (1973), cited in: GAOR 28th Sess. Suppl. 21 (A/9021-I), 110.

of UNCLOS III (1974), further proposals were advanced by Kenya, Greece, Canada, and the Federal Republic of Germany.[8] At the Third Session (1975), nine European States submitted a draft, which gave no more power to the coastal State than requiring information from the vessel suspected to cause pollution damaging the coastline, while recognizing the exclusive jurisdiction of the flag State to ensure compliance by the vessels with the rules on the prevention of marine pollution.[9] The negotiations then took place essentially in the Informal Group of Juridical Experts. At the end of the session, the Informal Single Negotiating Text (ISNT) was prepared (Arts. III Part I 30 and 31).[10] According to Art. III Part I 31, the coastal State might stop and board the vessel in question for inspection, provided that the violation had been of flagrant character causing severe damage or threat of severe damage to the marine environment, or the vessel is proceeding to or from the internal waters of the coastal State.

5 At the Fourth Session (1975–76), discussions were carried out on the basis of the Outline of Issues prepared by the Chair of the Informal Meetings[11] and the Revised Single Negotiating Text (RSNT) was prepared at the end of the session (Art. 30).[12] Art. 30 of the RSNT had the same structure as, and contained essentially identical rules to, the current Art. 220. The only major difference from the current Art. 220 was paragraph 7, which provided that the coastal State should allow the vessel to proceed notwithstanding the provisions of paragraph 6 when the flag State had made a specific undertaking to ensure compliance by the vessel in question and assumed liability in respect of damage caused. At the Sixth Session (1977), following informal negotiations, the Informal Composite Negotiating Text (ICNT) was prepared (Art. 221), which replaced paragraph 7 of Art. 30 of the RSNT with a text essentially identical to paragraph 7 of the current Art. 220.[13] At the Seventh Session (1978), paragraph 6 was slightly modified. While the ICNT envisaged the situation where there were 'clear grounds for believing' that the vessel in question had committed 'a flagrant or gross violation' of international rules and standards, the revised paragraph 6 was made applicable where there was 'clear objective evidence' that the vessel in question had committed 'a violation' or such rules and standards. The revised text also made it explicit that the coastal State could arrest the vessel, whereas the ICNT was silent on this point.[14] Following further modifications agreed to at the seventh resumed session (1978),[15] the ICNT Revision 1 was prepared (Art. 220).[16] With further drafting changes, the Draft Convention was adopted (Art. 220).[17]

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[8] Third Committee UNCLOS III, Kenya: Draft Articles for the Preservation and the Protection of the Marine Environment, U.N. Doc. A/CONF.62/C.3/L.2 (1974), ORIII, 245, 247 (Art. 26); Third Committee UNCLOS III, Greece: Draft Articles on the Enforcement of the Provisions on the Protection Of the Marine Environment, U.N. Doc. A/CONF.62/C.3/L.4 (1974), OR III, 247, 248 (Arts. 5 and 6); Third Committee UNCLOS III, Canada *et al.*: Draft Articles on a Zonal Approach to the Preservation of the Marine Environment, U.N. Doc. A/CONF.62/C.3/L.6 (1974), 249, 250 (Arts. 6 and 7); Third Committee UNCLOS III, Federal Republic of Germany: Draft Articles on Enforcement of Regulations Concerning the Protection of the Marine Environment against Vessel-Source Pollution, U.N. Doc. A/CONF.62/C.3/L.7 (1974), 250, 250–251 (Arts. 2, 3 and 4).

[9] Third Committee UNCLOS III, Belgium *et al.* Draft Articles on the Prevention, Reduction and Control of Marine Pollution, U.N. Doc. A/CONF.62/C.3/L.24 (1975), OR IV, 210.

[10] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF. 62/WP.8/PART III (1975), OR IV, 171.

[11] For an outline of issues concerning vessel source pollution and suggestions of the Chairman of the informal meetings of Committee III on marine pollution, see: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. X (1986), 449.

[12] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173.

[13] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII.

[14] UNCLOS III, Reports of the Committees and Negotiating Groups on Negotiations at the Seventh Session Contained in a Single Document both for the Purposes of Record and for the Convenience of Delegations, U.N. Doc. A/CONF.62/RCNG/1 (1978), OR X, 1, 99–100 (Art. 221 (6)).

[15] UNCLOS III, Reports of the Committees and Negotiating Groups on Negotiations at the Resumed Seventh Session Contained in a Single Document both for the Purposes of Record and for the Convenience of Delegations, U.N. Doc. A/CONF.62/RCNG/2, OR X, 1, 180–181 (Art. 221 (2), (5) and (6)).

[16] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII.

[17] UNCLOS III, Draft Convention on the Law of the Sea, UN Doc. A/CONF.62/L.78 (1981), OR XV, 172.

III. Elements

1. Different exercises of jurisdiction envisaged

a) Where the violation occurred in the territorial sea. The sovereignty of a coastal State extends to the territorial sea (Art. 2) and the coastal State may adopt laws and regulations in respect of the preservation of the environment and the prevention, reduction and control of pollution in the territorial sea (Arts. 21 (1)(f) and 211 (4)). **6**

'Proceedings' may be instituted under the following two scenarios in respect of violations of the laws and regulations of the coastal State adopted in accordance with the Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels. First, when the vessel that has committed any such violation and is voluntarily within a port or at an off-shore terminal, the coastal State may institute proceedings against the vessel (Art. 220 (1)). In this case, the coastal State is also a port State but exercises its jurisdiction as a coastal State and not as a port State.[18] Secondly, when the vessel in question is navigating in the territorial sea, the coastal State may institute proceedings where there are clear grounds for believing that the vessel has committed such violation, on the condition that the evidence warrants the institution of the proceedings (Art. 220 (2)). **7**

If, on the other hand, the institution of proceedings is not warranted by the evidence (Art. 220 (2)), only physical inspection may be undertaken in respect of violations of laws and regulations, even when the vessel in question is navigating in the territorial sea. Rules on physical inspection are provided in Art. 226. **8**

Curiously enough, Art. 220 is silent about the situation where a vessel which committed a violation of relevant laws and regulations in the territorial sea or in the internal water is situated in the EEZ. It is clear that the coastal State is granted enforcement powers in such situations in cases of hot pursuit (Art. 111) or to the same extent as authorised in cases of violations committed in the EEZ (see Art. 220 (4), (5) and (6)). In other cases, the coastal State can only request that the vessel should call at its nearest port. If the vessel voluntarily enters the port, the coastal State may exercise its jurisdiction in accordance with Art. 220 (1). **9**

The Convention does not require that the coastal State's laws and regulations on the preservation of the environment and the prevention, reduction and control of pollution in the territorial sea should conform to international standards, except for those on the design, construction, manning and equipment of foreign vessels (Art. 21 (1)(f) and (2)). However, when it comes to enforcement, the coastal State may take measures only in respect of violations of its laws and regulations adopted in accordance with international standards, even when such violations occur in the territorial sea (Art. 220 (1) and (2)). **10**

b) Where the violation occurred in the exclusive economic zone. In the EEZ, the coastal State has jurisdiction as provided for in the relevant provisions of the Convention with regard to the protection and preservation of the marine environment (Art. 56 (1)(b)(iii)). Art. 211 (5) entitles the coastal State to adopt laws and regulations and Art. 220 gives it the power to enforce such laws and regulations. **11**

When the vessel in question is voluntarily within a port or at an off-shore terminal, the same rule applies as in the case of the violation occurring in the territorial sea and the coastal State may thus institute proceedings. In other cases, the measures that the coastal State may take vary with the seriousness of the pollution caused by the vessel. As the default rule, the coastal State may only require the vessel to give certain information such as its identity and port of registry (Art. 220 (3)). In other words, physical inspection of the vessel is not allowed in cases of simple violation of laws and regulations of the coastal State. Physical inspection of the vessel may be conducted by the coastal State where the violation of its laws and **12**

[18] See *König* on Art. 218.

regulations results in a substantial discharge (*rejets importants*) causing or threatening significant pollution (*pollution notable*) of the marine environment; but even in such a case, physical inspection may take place only when the vessel has refused to give information or if the information supplied by the vessel is manifestly at variance with the evident factual situation, and if the circumstances of the case justify such inspection (Art. 220 (5)) (on physical inspection, see Art. 226). Proceedings (including detention of the vessel) may be instituted only when such a violation has resulted in a discharge causing major damage (*dommages importants*) or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or EEZ (Art. 220 (6)). In other words, even in cases of (threat of) significant pollution, the coastal State is authorised to do no more than obtaining relevant information, leaving the flag State to take enforcement measures (Art. 217), unless such pollution causes or threatens major damage to interests specific to the coastal State (see also Art. 228 (1)). Furthermore, no preventive measures are allowed under Art. 220. The coastal State is not allowed to take any enforcement action against a vessel in violation of applicable rules unless the violation results in a discharge ((Art. 220 (5) and (6)).

13 The fact that the extent of the coastal State's jurisdiction is thus limited suggests that Art. 220 does not grant the coastal State any specific interests in that the environment in the EEZ as such be protected. This rationale is underscored by Art. 56 (1), according to which the coastal State does not have 'sovereign rights' but 'jurisdiction' with regard to the protection and preservation of the marine environment in the EEZ.

2. Relationship with the right of innocent passage and the right of transit passage

14 As indicated above, Art. 220 (2), (5) and (6) allow the coastal State to exercise its jurisdiction over vessels navigating its territorial sea. The relationship between this power of the coastal State and the right of innocent passage (Art. 17) is somewhat ambiguous. Art. 220 (2) explicitly provides that the exercise of jurisdiction in accordance with that paragraph ought to be carried out without prejudice to the application of the relevant provisions of Part II, Section 3 on innocent passage (see also Art. 211 (4)). The coastal State's exercise of jurisdiction in accordance with Art. 220 constitutes an exception of the right of innocent passage in light of Art. 24 (1), which provides that '[t]he coastal State shall not hamper the innocent passage of foreign ships through the territorial sea *except in accordance with this Convention*' (emphasis added). It is also to be noted that vessels committing 'any act of wilful and serious pollution contrary to this Convention' (Art. 19 (2)(h)) do not enjoy the right of innocent passage and penalties other than monetary ones can be imposed upon such vessels (Art. 230 (2)).

15 Art. 220 does not apply to vessels that enjoy the right of transit passage according to Art. 233, which provides for rules relating to damage to the marine environment of straights used for international navigation.

3. 'violation of [the] laws and regulations [of the coastal State]'

16 In the territorial sea, the coastal State may adopt laws and regulations concerning design, construction, manning or equipment of foreign ships on the condition that such laws and regulations are giving effect to generally accepted international rules or standards (Art. 21 (2)). As regards the EEZ, the text of Art. 220 makes it clear that the coastal State may adopt laws and regulations concerning discharge but is silent about other elements such as design, construction, manning or equipment of vessels. However, taking into account the *travaux préparatoires*, where the proposal advanced by the Federal Republic of Germany to add the word 'discharge' before the word 'violation' was not adopted,[19] the 'violation of [the] laws and regulations [of the coastal State]' under this article is not limited to violation relating to discharge.

[19] Third Committee, Proposals Received During the Informal Meeting on Marine Pollution (1976, mimeo.), reproduced in: Platzöder (note 11), 464, 468 (Federal Republic of Germany, Art. 29).

EU Regulation No. 530/2012 provides in Art. 4 (1) that **17**

> 'No oil tanker shall be allowed to operate under the flag of a Member State, nor shall any oil tanker, irrespective of its flag, be allowed to enter into ports or offshore terminals under the jurisdiction of a Member State unless such tanker is a double-hull oil tanker.'[20]

This provision does not deal with discharge but regulates design and construction of vessels. EU Member States may certainly prohibit any single-hull tankers from operating under *their* flags. They may also refuse to admit single-hull tankers of any State into *their* ports. This regulation thus goes no further than what is provided in Art. 220.

4. 'applicable international rules and standards for the prevention, reduction and control of pollution from vessels'

It is far from clear what constitutes 'applicable international rules and standards' in this context. The final report of the committee of the International Law Association dealing with the issue states that '[g]enerally accepted international rules and standards cannot be equated with customary law nor with legal instruments in force for the states concerned' and that '[t]he central element […] 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 expressed.'[21] **18**

5. 'subject to (the provisions of) section 7'

Any institution of proceedings (Art. 220 (1), (2) and (6)) is subject to Section 7, which includes, *inter alia*, prompt release of vessels (Art. 226 (1)(b); see also Arts. 220 (7) and 292) and limitation of available sanctions to monetary penalties (Art. 230 (1)). Much consideration is thus paid to the freedom of navigation even when the coastal State is authorised to institute proceedings under Art. 220 (1), (2) or (6). **19**

6. Sovereign immunity

No enforcement action based on Art. 220 is allowed with respect to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service (Art. 236). **20**

7. Prompt release

Art. 220 (7) envisages prompt release of vessels (Art. 292) caught under this article. In practice, however, no submission on prompt release has ever been made to the International Tribunal for the Law of the Sea (ITLOS) or other competent courts or tribunals in relation to Art. 220, as of March 2016, probably because vessels are rarely caught in conformity with Art. 220, as explained in the following section. **21**

8. Application of Art. 220 in practice

It is said that few States have resorted to the exercise of the powers granted in Art. 220 in full[22] and that cases of enforcement at sea in the form of boarding, inspection and detention, or the institution of proceedings related thereto, have not been reported.[23] It is only under- **22**

[20] EU Regulation No. 530/2012 of 13 June 2012, OJ 2012 L 172, 3.

[21] ILA, Committee on Coastal State Jurisdiction Relating to Marine Pollution, Final Report: London Conference (2000), 33 (Conclusion No. 2), 37–38, available at: http://www.ila-hq.org/en/committees/index.cfm/cid/12.

[22] *Patricia Birnie/Alan Boyle/Catherine* Redgwell, International Law & the Environment (3rd edn. 2009), 421.

[23] ILA Report (note 21), 22.

standable that coastal States do not necessarily want to detain or prolong the presence of vessels causing pollution within their territorial sea or EEZ.

23 In Japan, the Act on the Exclusive Economic Zone and the Continental Shelf (Act No. 74 of 1996) provides that Japanese laws and regulations on marine environment will apply in Japan's EEZ (Art. 3 (1)). The Act also makes it clear that if relevant treaties provide otherwise, such treaties shall supersede the Act (Art. 4). In practice, when the Coast Guard or the Maritime Self-Defense Force finds a foreign vessel causing pollution within Japan's EEZ, the Coast Guard initiates investigation after the vessel in question has entered a port in Japan voluntarily.[24] Although the Coast Guard often requests the vessel in question to enter a Japanese port, the vessel that follows the request is considered to enter the port 'voluntarily' since the 'request' has no legally binding force.

24 In 2010, a Chinese coal carrier, SHEN NENG 1, grounded and caused considerable pollution in Australia's EEZ, the Australian authorities took various measures to minimize the pollution and to help the vessel to leave Australian waters but did not institute proceedings with respect to this tragic incident.[25]

25 It is probably France and Spain that have taken the most daring measures relevant to Art. 220. Following the *Prestige* oil spill incident in 2002, the French President and the Spanish Prime Minister announced on 26 November 2002 that they considered that:

> 'les navires construits depuis plus de quinze ans, qui ont une coque unique, qui transportent du fuel ou du goudron ou du bitume et qui ne seraient pas équipés de dispositifs qui permettent de contrôler le niveau et la pression des hydrocarbures, constituent une menace pour nos côtes'.

And if the competent authorities of the two States find that a ship continues to represent dangers,'*il sera expulsé de la zone économique exclusive*'.[26]

26 Following this announcement, the authorities of both States proceeded to expel such ships from their respective EEZs. In a report submitted to the French National Assembly, 28 ships were thus expelled from the French EEZ by March 2003.[27] Spain also proceeded to expel a number of such ships.[28] France and Spain invoked Art. 56 UNCLOS to justify such measures, which are however generally considered to be incompatible with any of the provisions of UNCLOS.[29] It is nevertheless reported that only Greece issued a diplomatic protest against such expulsion.[30] In any case, the fact that they did not refer to Art. 220 suggests that the two States considered that their enforcement measures could not be based on Art. 220.

Article 221
Measures to avoid pollution arising from maritime casualties

1. Nothing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime

[24] *Kimio Yakushiji*, Kaiyo Osen [Marine Pollution], in: Soji Yamamoto (ed.) Kaijo Hoan Hosei [Laws and Regulations on Maritime Security] (2009), 329–345.

[25] *Chelsea Purvis*, Coastal State Jurisdiction under UNCLOS: The Shen Neng 1 Grounding on the Great Barrier Reef, YJIL 36 (2011), 207, 208; See further: https://www.amsa.gov.au/environment/major-historical-incidents/Shen_Neng1/index.asp.

[26] *Magali Lehardy*, Espagne/France: Naufrage du "Prestige" et accord sur le contrôle de la navigation dans la zone économique exclusive, Revue générale de droit international public 107 (2003), 132, 133.

[27] Délégation pour l'Union européenne, compte rendu N° 31, Réunion du mardi 4 mars 2003 à 17 heures 45, p. 4.

[28] *Valentín Bou Franch*, Freedom of Navigation Versus Pollution by Oil from Vessels: The Point of View of Coastal States, in: Rafael Casado Raigón (ed.) L'Europe et la mer (2005), 269–270.

[29] *Lehardy* (note 26), 133; *Catherine Fabregoule*, Chronique: Environnement marin, Annuaire du droit de la mer 8 (2003), 557–558; *Christophe Marques*, À la recherche d'un fondement juridique pour l'accord franco-espagnlo de Malaga relatif à la sécurité maritime, Annuaire du droit de la mer 9 (2004), 24.

[30] *Bou Franch* (note 28), 270.

casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.

2. For the purposes of this article, 'maritime casualty' means a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.

Bibliography: *Claude C. Emanuelli*, The Right of Intervention of the Coastal States on the High Seas in Cases of Pollution Casualties, University of New Brunswick Law Journal 25 (1976), 79–96; *Rob McLaughlin*, Costal State Use of Force in the EEZ under the LOSC, University of Tasmania Law Review 18 (1999), 11–21; *Erik J. Molenaar*, Coastal State Jurisdiction over Vessel-Source Pollution (1998); *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2010); *Attila Tanzi*, State of Necessity, MPEPIL, available at: http://www.mpepil.com

Documents: Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res. 2749 (XXV) of 17 December 1970; ILC, Responsibility of States for Internationally Wrongful Acts, GA Res. 56/83 of 12 December 2001, Annex

Cases: ICJ, *Gabčíkovo-Nagymaros Project* (Hungary *v.* Slovakia), Judgment of 25 September 1997, ICJ Reports (1997), 7; ITLOS, *M/V 'Saiga' (No. 2) Case* (Saint Vincent and the Grenadines *v.* Guinea), Judgment of 1 July 1999, ITLOS Reports (1999), 10

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I. Purpose and Function

Art. 221 is a provision of Section 6 in Part XII, on enforcement relating to the protection and preservation of the marine environment. It addresses the measures coastal States may take in areas beyond their territorial sea in response to maritime casualties that damage or threaten to damage their coastline or related interests by pollution. The enforcement power it grants to coastal States has been linked to the right of self-protection or self-help[1] and is also referred to as the coastal States' right of intervention.[2] States have the right and even the obligation, according to Arts. 192 and 194, to take measures that are necessary to respond to pollution caused within their territory or by activities under their jurisdiction. Art. 221, by contrast, deals with situations where the coastal State does not otherwise have the personal or territorial jurisdiction necessary to intervene. **1**

Art. 221 is related to the broader problem of vessel-source pollution and provides for a special form of coastal State enforcement power. It is linked to Art. 220, on enforcement by the coastal State, as the enforcement power is tied to the protection of the State's coastline and thus of its territory. However, the special features of Art. 221 set it apart from Art. 220. First of all, Art. 221 focuses exclusively on accidental pollution caused by maritime casualties. Secondly, and even more importantly, while Art. 220 sets forth the coastal State's object-based power to enforce measures against the vessel concerned, Art. 221, area-based, allows the coastal State to intervene in marine areas beyond the territorial sea, where the casualty **2**

[1] Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea, 1982: A Commentary, vol. IV (1991), 304, 305 (MN 221.2).

[2] *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2010), 364.

occurred. Although Art. 221 is related to the coastal State's territorial interests, it provides for extraterritorial powers, as the concerned areas, i. e. the exclusive economic zone (EEZ) (→ Part V) or the high seas (→ Part VII), are not part of the State's territory.

3 An extra-conventional justification of this enforcement power can be found in customary international law related to internationally wrongful acts, and, more precisely, to the defence of necessity. This defence allows the State to invoke necessity in order to preclude the wrongfulness of an otherwise wrongful act. The act must be 'the only way for the State to safeguard an essential interest against a grave and imminent peril,'[3] including peril threatening the natural environment.[4] Therefore, as long as this condition is met, an intervention measure that, at first sight, does not seem within the explicit scope of Art. 221 would nevertheless be in conformity with general international law, and, by way of reference, also with Art. 221.[5] This supposes, however, that the additional conditions of necessity are met, in particular the condition of not 'seriously impair[ing] an essential interest of the State or States towards which the obligation exists, or of the international community as a whole' and of not having 'contributed to the situation of necessity'.[6]

II. Historical Background

4 Accidents at sea, especially those involving oil tankers, had been a major concern, including for a broader public, for some time, even before the beginning of UNCLOS III. Dozens of accidents at sea causing oil spills occurred in the 1960s and 1970s. Two incidents causing major black tides had a direct bearing on the negotiations. In March 1967, due to a navigational error, the supertanker Torrey Canyon ran aground a reef off the western coast of Cornwall in the United Kingdom and spilled its entire crude oil cargo – over 100,000 tons – provoking the worst shipwreck-caused environmental disaster of its time. In March 1978, while UNCLOS III negotiations were in full swing, another even greater disaster struck, when the supertanker Amoco Cadiz, incapacitated by damage caused by stormy weather, hit the Portsall Rocks off the coast of Brittany and eventually sank, spilling its crude oil cargo of over 200 000 tons into the sea and heavily polluting the French coast. While the incident reminded the delegations to UNCLOS III of the threats posed by supertankers and strengthened their resolve to grant effective enforcement powers to the States. Legal innovation leading to Art. 221 was provoked by the earlier Torrey Canyon incident. Although the shipwreck occurred on the high seas, the English coast was threatened. This persuaded the British government to resort to the extreme measure of bombing the tanker and its spilled cargo in order to prevent the pollution from affecting the coast. This intervention raised the question of the conformity of such extraterritorial measures with international law.[7]

5 The legal answer came in the form of a new treaty, the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Intervention Convention).[8] It was concluded in 1969 at the International Legal Conference on Marine Pollution Damage, convened the same year by the Inter-Governmental Maritime Consultative Organization,

[3] See ILC, Responsibility of States for Internationally Wrongful Acts, GA Res. 56/83 of 12 December 2001, Annex (ASR), Art. 25 (1)(a). See also *Attila Tanzi*, State of Necessity, MPEPIL, available at: http://www.mpepil.com.

[4] Confirmed by the ICJ, *Gabčíkovo-Nagymaros Project* (Hungary *v.* Slovakia), Judgment of 25 September 1997, ICJ Reports (1997), 7, para. 53. For the recognition of the concept by the International Tribunal of the Law of the Sea, see ITLOS, *M/V 'Saiga' (No. 2) Case* (Saint Vincent and the Grenadines *v.* Guinea), Judgment of 1 July 1999, ITLOS Reports (1999), 10.

[5] *Erik J. Molenaar*, Coastal State Jurisdiction over Vessel-Source Pollution (1998), 388. See also *infra*, MN 16.

[6] Art. 25 (1)(b), (2)(b) ASR.

[7] *Claude C. Emanuelli*, The Right of Intervention of the Coastal States on the High Seas in Cases of Pollution Casualties, University of New Brunswick Law Journal 25 (1976), 79. See also *Tanzi* (note 3), para. 4.

[8] International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 29 November 1969, 970 UNTS 212.

today's IMO. The United Kingdom's intervention on the high seas in the effort to protect its coast was endorsed by this convention, which establishes, in Art. I, that States are allowed to:

> 'take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences.'[9]

In 1970, a year after the adoption of the Intervention Convention, the United Nations General Assembly explicitly maintained, in the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, the right of States to intervene in international areas in order to protect their coasts against pollution caused, in the situation envisioned by the Declaration, that is, by activities in the Area.[10] The right of intervention was, furthermore, reaffirmed in the General Principles for Assessment and Control of Marine Pollution, adopted in 1972 by the United Nations Conference on the Human Environment.[11] In 1973, the Intervention Convention's scope was broadened by the Protocol Relating to Intervention on the High Seas in Cases of Oil Pollution by Substances Other than Oil (Intervention Protocol).[12]

The legal framework on intervention on the high seas in response to an environmental threat caused by marine casualties had thus been essentially elaborated even before the Sea-Bed Committee launched the preparatory work for UNCLOS III. In a working paper submitted to Sub-Committee III of the Sea-Bed Committee, Canada, reminding the Sub-Committee of these documents, underlined the existence and wide political recognition of the right of intervention.[13] Several draft proposals received by Sub-Committee III also relied upon these documents, and according to NORDQUIST *et al.*, three conditions emerge therefrom: intervention is only allowed if 1) a maritime accident occurred; 2) the maritime accident poses a threat of major or grave or imminent damage to the intervening State; and 3) the measures taken by the intervening State are necessary and proportionate to the actual or threatened damage.[14] Although Sub-Committee III was unable, in the end, to draft a text on the issue,[15] its work had an impact on the negotiations surrounding Art. 221 at UNCLOS III.[16] **6**

The first formal proposal was submitted at the Third Session of UNCLOS III by the USSR. While it had some of the main features of the Intervention Convention's Art. I and Art. III, on consultation, and Intervention Convention's Art. VI, on proportionality, it broadened the scope of the right of intervention by including incidents arising from exploration or exploitation of the sea-bed's resources.[17] The Group of 77 submitted a more succinct draft that provided for a right of the coastal State to 'take appropriate measures of self-protection' in response to 'actual grave or imminent danger of pollution arising from activities or incidents' outside the State's territory, a wording which confirmed the broader scope **7**

[9] Art. 1 Intervention Convention.

[10] Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res. 2749 (XXV) of 17 December 1970, Principle 13 (b).

[11] UNCHE, Report of the United Nations on the Human Environment, UN Doc. A/CONF.48/14/REV.1 (1972), 73, 74 (Annex III: General Principles for Assessment and Control of Marine Pollution, Principle 21).

[12] Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances Other than Oil, 02 November 1973, 1313 UNTS 4.

[13] Sea-Bed Committee, Canada: Working Paper on Preservation of the Marine Environment, UN Doc. A/AC.138/SC.III/L.26 (1972).

[14] Nordquist/Rosenne/Yankov (note 1), 306, 307 (MN 221.3).

[15] See: Sea-Bed Committee, Chairman of Working Group 2, Note Addressed to the Chairman of Sub-Committee III, UN Doc. A/AC.138/SC.III/L.52 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-I), 89, 90.

[16] See *supra*, note 11.

[17] Third Committee UNCLOS III, Union of Soviet Socialist Republics: Additional Draft Articles on Prevention of Pollution of the Marine Environment, UN Doc. A/CONF.62/C.3/L.25 (1975), OR IV, 212, 213 (Art. 4).

proposed by the USSR proposal.[18] In the Informal Single Negotiating Text, prepared at the end of the Third Session, the issue remained unheeded, as no article was drafted.[19]

8 Work on the topic continued within the Informal Group of Juridical Experts, which put forward, at the beginning of the Fourth Session, a draft article that read:

> 'Nothing in this Chapter shall affect the lawful taking of measures beyond the limits of the territorial sea for the protection of coastlines or related interests, including fishing, from grave and imminent danger from pollution or threat of pollution following upon a maritime casualty or acts related to such a casualty.
>
> Measures taken in accordance with this article shall be proportionate to the actual or threatened damage.'[20]

At the Fourth Session, informal negotiations led the Chairman of the Third Committee to slightly redraft the text, which then appeared as Art. 31 in the Revised Single Negotiating Text.[21] At the end of the Sixth Session, the text remained unchanged and the draft was incorporated into the Informal Composite Negotiating Text (ICNT) as Art. 222 titled 'Measures relating to maritime casualties to avoid pollution.'[22]

9 At the Seventh Session, France submitted an informal proposal, whose first paragraph only slightly differed from the ICNT draft and which introduced a second paragraph defining the expression 'maritime casualty'.[23] This definition was clearly influenced by the Amoco Cadiz incident that had occurred off the French coast only weeks earlier. It made clear that only accidents involving vessels were within the scope of the provision. The expression 'maritime casualty', according to this definition, designated:

> '[…] a collision of ships, stranding or other incident of navigation or occurrence on board a ship or external to it resulting in material damage or threat of material damage which, by affecting the vessel or its cargo, would or might cause damage to the marine environment.'[24]

After further informal negotiations, the Chairman of the Informal Meetings suggested a reformulation that consisted of two rather laconic paragraphs affirming the right and the necessity of measures that are in conformity with international law and proportionate to the damage;[25] it was dismissed. As negotiations continued, it became apparent that while the majority of delegations were satisfied with the draft text, some delegations found the 'grave and imminent danger' condition too restrictive.[26] Further informal negotiations led to the development of the following text, proposed by the Chairman of the Informal Meetings:

> '1. Nothing in this Part of the present Convention shall prejudice the right of States, pursuant to international law, both customary and conventional, to adopt and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline and related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or

[18] UNCLOS III, Group of 77: Draft Articles on Marine Pollution (1975, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. X (1986), 436, 438 (Art. VI).

[19] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975), OR IV, 171 *et seq*.

[20] UNCLOS III, Group of Juridical Experts: Preservation of the Marine Environment (1976, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. XI (1987), 525, 538 (Art. 28 *bis*).

[21] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 179 (Art. 31).

[22] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 39 (Art. 222).

[23] Third Committee UNCLOS, France: Informal Proposal, MP/1 (1978, mimeo.), reproduced in: Platzöder (note 18), 218 (Art. 222).

[24] *Ibid*., Art. 222 (2).

[25] Third Committee UNCLOS III, Chairman of the Informal Meetings: Informal Proposal, MP/2 (1978, mimeo.), reproduced in: Platzöder (note 18), 219 (Art. 222).

[26] See Third Committee UNCLOS III, 37th Meeting, UN Doc. A/CONF.62/C.3/SR.37 (1978), OR IX, 152 (para. 3).

> acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences.
>
> 2. For purposes of this article, 'maritime casualty' means a 'collision of ships, stranding or other incident of navigation, or other occurrences on board a ship or external to it resulting in material damage or imminent threat of material damage to a ship or cargo.'[27]
>
> This proposal was eventually included in the first revision of the ICNT.[28] It replaced the draft previously included in the ICNT, which neither mentioned customary and conventional law nor defined the expression 'maritime casualty.'[29]

Subsequent changes to the draft were not substantive. The word 'ship' was changed to 'vessel'[30] and several other adjustments were made, in particular with regard to the title.[31] A last attempt to alter the scope of power granted to the affected State failed. During the discussion, Spain, concerned about the bordering States' powers in straits off their coasts, proposed either deleting the phrase 'beyond the territorial sea' or adding the word 'within or' in order to affirm States' rights in these waters.[32] However, the formal proposal of an amendment deleting the phrase 'beyond the territorial sea'[33] lacked support and was eventually withdrawn.[34] **10**

III. Elements

1. 'Nothing in this Part shall prejudice the right of States […] to take and enforce measures beyond the territorial sea […] to protect their coastline or related interests'

The wording of Art. 221 (1) acknowledges that States have the right to take and enforce measures beyond the territorial sea and ensures that this right is not diminished by other provisions of Part XII. Another example of such a 'conservatory' provision[35] is found in Art. 142, which reaffirms the coastal State's rights with regard to threats caused by activities in the Area.[36] The right preserved by Art. 221 allows States to 'take and enforce measures,' i. e. to design and effect protective measures. **11**

Protective measures may be taken and enforced 'beyond the territorial sea,' that is to say, outside of the State's marine territory, in the EEZ or the high seas. Consequently, in contrast to the usual specification of the quality of the States concerned by a given provision, Art. 221 simply refers to 'States'. They take action as coastal States in their EEZ and as a *sui generis* category of States in the high seas. With regard to this latter situation, the reaffirmed right is exceptional, as it is related neither to the flag State's nor to the coastal State's powers, while it is justified by the purpose of protecting the coasts of the intervening State. Art. 221 is silent with respect to States' powers within their territorial sea. As the coastal States are sovereign in this zone, they have the right to take action provided that the flag States' rights are respected. The right of innocent passage (→ Art. 17) – the same applies to the right of transit passage, as far as international straits are concerned **12**

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[27] Third Committee UNCLOS III, Chairman of the Informal Meetings: Suggestions Based on the Consultations Held During the 7th Session, MP/23 (1978, mimeo.), reproduced in: Platzöder (note 18), 235, 236 (Art. 222).

[28] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII, 113 (Art. 221).

[29] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 39 (Art. 222).

[30] UNCLOS III, Draft Convention on the Law of the Sea (Informal Text), UN Doc. A/CONF.62/WP.10/REV.3 (1980), OR VIII, 93 (Art. 221).

[31] See Nordquist/Rosenne/Yankov (note 1), 310, 311 (MN 221.7).

[32] UNCLOS III, Statement by the Delegation of Spain, UN Doc. A/CONF.62/WS/12 (1980), OR XIV, 149, 150 (para. 9).

[33] UNCLOS III, Spain: Amendments, UN Doc. A/CONF.62/L.109 (1982), OR XVI, 223 (Art. 221).

[34] UNCLOS III, 176th Plenary Meeting, UN Doc. A/CONF.62/SR.176 (1982), OR XVI, 132 (para. 5).

[35] Nordquist/Rosenne/Yankov (note 1), 312 (MN 221.9 (b)).

[36] *Cf.* also *Vöneky/Höfelmeier* on Art. 142.

(→ Art. 38) – therefore must be observed according to the Convention.[37] If the coastal State intervenes in its territorial sea or in an international strait to protect its coastline and thereby violates these rights, it may invoke the customary defence of necessity.[38]

13 A difficult question is whether the States' right, as set forth in Art. 221 (1), also extends to interventions in maritime zones that are under other States' sovereignty or jurisdiction. Protective measures taken in a foreign EEZ may admittedly infringe upon that coastal State's jurisdiction related to the protection and preservation of the marine environment, set forth in Art. 56 (1)(b)(iii), and affect other sovereign rights. Intervention in a foreign territorial sea amounts to a violation of that coastal State's territorial sovereignty. It must be recalled that, given the development of the EEZ, the phrasing used in the Intervention Convention was ill-suited and needed to be adapted to ensure that the right of intervention also applied to the States' own EEZ. It must further be recalled that Art. 221 also explicitly maintains any right existing under customary law.[39] The question whether a State is allowed to intervene in zones that are under another State's sovereignty or jurisdiction must therefore be answered with reference to the customary defence of necessity.[40] If the situation corresponds to a state of necessity and the measures taken meet the conditions of application, then an intervention in foreign territorial waters or a foreign EEZ would be justified under the customary law of state responsibility.

2. 'pursuant to international law, both customary and conventional'

14 The expression 'pursuant to international law, both customary and conventional' confirms the conservatory function of Art. 221. The right expressed in Art. 221 is by no means a right created by the Convention, but an existing right recognized by it. The phrasing 'both customary and conventional' is unique to Art. 221 and, when first proposed by the Chairman of the Informal Meetings,[41] faced some opposition.[42] The concerns seem to have been eased by an interpretation of the controversial words submitted by the Soviet delegation, according to which Art. 221

> 'should not be held to give the coastal State more extensive rights of intervention in cases of maritime casualty than the rights of intervention it already enjoyed under the terms of the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, signed in Brussels in 1969,'

and according to which the controversial formulation only 'gave States which were not parties to the 1969 Convention the right to intervene within the limits defined by that Convention.'[43] Several months later, the Chairman of the Third Committee reported that the provision, as included in his report with the reference to customary and conventional law, was among those that had 'significantly broadened the basis of a compromise and offer[ed] a substantially improved prospect for consensus.'[44]

15 International law referred to by Art. 221 includes, first of all, other relevant provisions of the Convention, as they contribute to the tracing of the outline of the right of intervention. In

[37] This implicit choice not to affect the regime of straits used for international navigation is also in keeping with Art. 233, which indicates that in principle sections 5, 6 and 7 of the Part XII do not affect the regime of straits.

[38] See Art. 25 ASR.

[39] See *infra*, MN 14 *et seq*.

[40] See *supra*, MN 3.

[41] See *supra*, note 25.

[42] Third Committee UNCLOS III, 38th Meeting, UN Doc. A/CONF.62/C.3/SR.38 (1978), OR IX, 158, 159 (para. 15). See also UNCLOS III, Reports of the Committees and Negotiating Groups on Negotiations at the Resumed Seventh Session Contained in a Single Document Both for the Purposes of Record and for the Convenience of Delegations, UN Doc. A/CONF.62/RCNG/1 (1978), OR X, 13, 100.

[43] 38th Meeting (note 40), 162 (para. 52).

[44] UNCLOS III, Reports of the Committees and Negotiating Groups on Negotiations at the Seventh Session Contained in a Single Document Both for the Purposes of Record and for the Convenience of Delegations, UN Doc. A/CONF.62/RCNG/2 (1978), 126, 173, 175 (para. 8) (for the wording of Art. 222, see *ibid*., 181).

the context of enforcement measures, the provisions on safeguards that form Section 7 of Part XII are of particular importance. With respect to intervention, which often consists of measures applied to foreign vessels, the duty set forth in Art. 225 is especially noteworthy. It imposes upon States exercising their enforcement powers the obligation to avoid adverse consequences on foreign vessels. The obligation, according to Art. 231, to notify the flag State of a foreign vessel against which enforcement measures are taken is another relevant provision of Section 7. Of further relevance is Art. 236, as it entails a particular restriction of the State's power under Art. 221. Indeed, it excludes intervention, under the Convention, directed at a vessel that is a foreign warship, naval auxiliary or other State vessel or aircraft.

16 The reference to conventional law certainly also includes the Intervention Convention and its protocol. Though concluded prior to the Convention, they are maintained, according to Art. 311 (2), provided that they are in conformity with it and detail its framework.[45] The reference to customary law includes in particular the defence of necessity.[46] It is worth noting that this specific customary defence may be invoked even if a given intervention does not comply with the conditions established in Art. 221 or the Intervention Convention and its protocol. This means, for example, that if the intervention is directed against a foreign warship and the weighing of the concerned States' interests leads to the conclusion that the interests of the intervening State override the interest of the warship's flag State, the intervention, although in violation of Art. 236, might be justified under customary law.

17 As to the kind of enforcement measures a State may take under Art. 221, neither Art. 221 itself nor the regime of the Intervention Convention give any detailed indications. Instead, they stake out the general conditions under which States may take action. Conformity with international law is one of these general conditions, and the proportionality of the measures is another.[47] A variety of measures have been taken by States confronted with a maritime casualty off their coasts. They include: the extreme action of setting the vessel and its cargo on fire by bombing the site; but also the decision to tow a disabled vessel further off the coast; to salvage the remaining oil of a sunken tanker or the wreck as a whole; to destroy the wreck; and to use oil booms to contain the spilled oil and skim it from the sea, or chemically dissolve it.[48] As every maritime casualty is an unique situation, the conformity of the measures with international law must be determined on a case-by-case basis, with a particular view to the detailed conditions set out in the Intervention Convention. More specifically, these conditions require States to consult, to notify and to seek expert advice.[49]

3. 'proportionate to the actual or threatened damage' and 'from pollution or threat of pollution'

18 States must comply with the obligation to take and enforce measures that are proportionate to the actual or threatened damage. This obligation also seems to apply under the customary defence of necessity, as the wrongful act may only be justified if it constitutes the 'only way to safeguard' the State's essential interest.[50] Pursuant to the general meaning of proportionality, a proportionate act does not exceed what is necessary to respond in an effective manner to the damage. As the degree of damage is often not readily identifiable, States may determine the proportionate measure with respect to the threatened, i. e. anticipated, damage.

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[45] One author even considered that in absence of the Intervention Convention, Art. 221 would be incomprehensible, *Rob McLaughlin*, Costal State Use of Force in the EEZ under the LOSC, University of Tasmania Law Review 18 (1999), 11, 15.

[46] See Art. 25 ASR; see also *supra*, MN 3.

[47] See *infra*, MN 18 and 19.

[48] Some of these methods have been used in reaction to the *Amoco Cadiz*, *Torrey Canyon* and *Prestige* disasters, to name only a few. They are, however, neither limited to maritime casualties involving vessels, as may be seen with regard to the *Deepwater Horizon* oil spill, nor to maritime casualties outside the territorial sea.

[49] See Art. III Intervention Convention.

[50] Art. III (a) Intervention Convention.

19 The word 'damage' is not directly qualified by Art. 221. It replaces the more contentious ICNT formulation, which referred to 'grave and imminent danger' and which some delegations considered to be too restrictive.[51] The term 'damage' seems indeed to call for a more objective evaluation on the part of the State than the word 'danger,' although the assessment of the 'threatened damage' introduces a certain subjectivity in the evaluation. Furthermore, the formulation 'actual or threatened damage' is, at least indirectly, linked to the phrasing 'from pollution or threat of pollution […] which may reasonably be expected to result in major harmful consequences' at the end of the first paragraph. It seems useful to read the word 'damage' in light of this phrase. Accordingly, it appears that the damage referred to in Art. 221 is caused by pollution and the threatened damage is due to the threat of pollution. Furthermore, the expected consequences of the (potential) pollution must be 'major' and 'harmful.' These are characterizations that are not further specified, but they appear to reintroduce surreptitiously the supposedly restrictive effect of the eventually eliminated expression 'grave and imminent danger.'

4. 'to protect their coastline or related interests, including fishing'

20 The character of Art. 221 as a provision of self-protection is clearly shown by the terms 'to protect their coastline or related interests, including fishing.' It is the intended purpose of the measures that justifies the State's intervention beyond its territorial sea. Neither Art. 221 nor any other provision of the Convention defines the term 'coastline', although it is used several times in the Convention.[52] Particularly interesting are the links with Art. 211 (7), which addresses 'prompt notification to coastal States, whose coastline or related interests may be affected by incidents, including maritime casualties' and with Art. 220 (6), which sets forth the coastal State's enforcement power in case of 'discharge causing major damage or threat of major damage to [its] coastline or related interests.' The ordinary meaning of the term 'coastline' arguably refers to the interface between water and land. Recognizing the close relationship between the marine ecosystem, strictly understood, and the terrestrial ecosystem, it captures both and transcends the ecologically untenable distinction between them for the purposes of protecting coastal zones.[53] The phrase 'or related interests, including fishing' opens the State's potential scope of intervention even further, as it adds to the broad concept of 'coastline'. While the word 'interests' is not formally defined, it is understood that it is not limited to interests that are framed as legal rights under the Convention. The reference to fishing suggests that food-related and economic interests are included, but sanitary, cultural or recreational interests seem to be encompassed as well.[54]

5. 'following upon a maritime casualty or acts relating to such a casualty'

21 Under Art. 221, States are granted the right of intervention, if there is actual or threatened damage of pollution caused by a 'maritime casualty or acts relating to such a casualty.' A definition of the term 'maritime casualty' is given in Art. 221 (2). Its opening phrase '[f]or the purposes of this article' limits the scope of the definition to Art. 221, although the term is referred to in other provisions of the Convention.[55] According to the definition, the term 'maritime casualty' refers to two kinds of situations. The first encompasses what may be called, according to the provision's wording, 'incidents of navigation,' such as the explicitly mentioned collisions of vessels and stranding or, in other words, problems arising during the vessel's voyage. The second kind is related to problems that are not directly related to the voyage, but arise on board or are external to the vessel and affect the vessel by causing

[51] See *supra*, MN 9.
[52] Arts. 7, 142, 145, 211 (1), 211 (7) and 220.
[53] See also *Bartenstein* on Art. 211 MN 13.
[54] See also *Bartenstein* on Art. 211 MN 51.
[55] Arts. 94 (7) and 211 (7).

'material damage' or 'imminent threat of material damage.' Art. 221 is the only provision of the Convention that uses the expression 'material damage'. As it is not defined, it is necessary to resort to its ordinary meaning, which seems to refer to damage caused to the vessel or its cargo. The AMOCO CADIZ disaster clearly left its mark on the definition, as it was initially caused by a wave that damaged the rudder.

Finally, it is interesting to note that Art. 221, which only covers casualties involving vessels, is a special norm on vessel-source pollution. Some early proposals explicitly sought to include casualties of drilling platforms or did not distinguish between casualties of vessels and other types of casualties.[56] They were abandoned following the French proposal, which was submitted in the aftermath of the AMOCO CADIZ disaster and whose definition of the expression 'maritime casualty' clearly cast the provision in the narrow perspective of vessel-related casualties.[57] Art. 221 thus follows the example of the Intervention Convention, which, by defining the word 'ship', excludes 'installation[s] or device[s] engaged in the exploration and exploitation of the resources of the sea-bed and the ocean floor and the subsoil thereof.'[58] Interventions in such kinds of casualties are governed by customary law, including the defence of necessity.[59] 22

Article 222
Enforcement with respect to pollution from or through the atmosphere

States shall enforce, within the air space under their sovereignty or with regard to vessels flying their flag or vessels or aircraft of their registry, their laws and regulations adopted in accordance with article 212, paragraph 1, and with other provisions of this Convention and shall adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organizations or diplomatic conference to prevent, reduce and control pollution of the marine environment from or through the atmosphere, in conformity with all relevant international rules and standards concerning the safety of air navigation.

Bibliography: *Alan Boyle*, Law of the Sea Perspectives on Climate Change, IJMCL 27 (2012), 831–838.; *Richard Hildreth/Alison Torbitt*, International Treaties and U.S. Laws as Tools to Regulate the Greenhouse Gas Emissions from Ships and Ports, IJMCL 25 (2010), 347–376; Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea, 1982: A Commentary, vol. IV (1991); *John Vidal*, Health Risks of Shipping Pollution Have Been 'Underestimated', The Guardian, 9 April 2009, available at: http://www.theguardian.com/environment/2009/apr/09/shipping-pollution

Documents: IMO, Amendments to the Annex of the Protocol of 1997 to amend the International Convention for the Prevention of Pollution from Ships, 1973, as Modified by the Protocol of 1978 Relating thereto, IMO Res. MEPC.203(62) of 15 July 2011

Cases: ICJ, *Nuclear Tests* (Australia *v.* France), Provisional Measures, Order of 22 June 1973, ICJ Reports (1973), 99; ICJ, *Nuclear Tests* (New Zealand *v.* France), Provisional Measures, Order of 22 June 1973, ICJ Reports (1973), 135; ICJ, *Nuclear Tests* (Australia *v.* France), Provisional Measures, Order of 20 December 1974, ICJ Reports (1974), 253; ICJ, *Nuclear Tests* (New Zealand *v.* France), Provisional Measures, Order of 20 December 1974, ICJ Reports (1974), 457

[56] Among the proposals that did not distinguish between the different kinds of casualties, see the G77 Proposal (note 16), the Draft of the Group of Juridical Experts (note 18), the RSNT (note 19) and the Suggestion of the Chairman of the Informal Meetings (note 23). For the proposal explicitly including casualties arising from exploration and exploitation of the seabed resources, see the USSR Proposal (note 15).

[57] French Proposal (note 21).

[58] Art. II (2)(b) Intervention Convention.

[59] See *supra*, MN 3.

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4. 'in conformity with all relevant international rules and standards concerning the safety of air navigation' 13

I. Purpose and Function

1 Art. 222 is part of Section 6, which deals with enforcement within Part XII on protection and preservation of the marine environment. Corresponding to the prescriptive provision of Art. 212, it sets forth the obligation of enforcement regarding pollution of the marine environment from or through the atmosphere. The expression 'pollution of the marine environment' is defined in Art. 1 (1)(4).

2 The scope of Art. 222 must be distinguished from that of Art. 216, on enforcement with respect to pollution by dumping. According to the definition of Art. 1 (1)(5)(a), the word 'dumping' includes, *inter alia*, the deliberate disposal of wastes from aircraft. However, as dumping does not comprise 'the disposal of wastes […] incidental to, or derived from the normal operations of […] aircraft […] and their equipment,' unless it is related to genuine dumping activities, this kind of waste disposal may fall within the scope of Arts. 212 and 222. Furthermore, as most atmospheric pollutants originate from land-based sources, the scope of Art. 222 must be distinguished from that of Art. 213, which addresses enforcement in regard to pollution from land-based sources. Rather than overlapping, the provisions are complementary. While Art. 222 relates to enforcement within the air space under a given State's sovereignty and regarding vessels flying its flag or vessels and aircraft of its registry, Art. 213 deals exclusively with sources of pollution based on the State's land territory. Pollution from or through the atmosphere encompasses in particular air pollution caused by emissions of aircraft and vessels. The exhaust fumes of vessels, for example, contain toxic substances such as sulphur, nitrogen oxides, volatile organic compounds, particulate matter and chlorofluorocarbon (CFC) emissions.[1] These substances contribute to acid rain, to the greenhouse effect and to ozone depletion, all of which have a more or less direct negative impact on the marine environment, causing, among others, acidification, eutrophication, reduction of plankton populations and various other ecological disruptions due to global warming. Air pollution by vessels being a particular kind of vessel-source pollution, enforcement activities pursuant to Art. 222 should arguably be carried out in harmony with Art. 217, on enforcement by flag States, and with Art. 220, on enforcement by coastal States.

3 The enforcement obligation established in Art. 222 has two components. First, Art. 222 affirms States' obligation to enforce their laws and regulations adopted in accordance with Art. 212 or other relevant provisions of the Convention.[2] Second, it sets forth the obligation to adopt domestic laws and regulations and to take other measures necessary to implement applicable international rules and standards agreed upon by competent international organizations or diplomatic conferences.[3]

[1] International shipping accounted for approximately 2.2 % and 2.1 % of global CO2 and GHG emissions in 2012 according to the Third IMO Greenhouse Gas Study 2014 (IMO 2015), 1.

[2] See *infra*, MN 8–10.

[3] See *infra*, MN 11–12.

II. Historical Background

Pollution of the marine environment from or through the atmosphere was a new concern 4
at the UNCLOS III. Although Art. 25 of the 1958 Convention on the High Seas was in the broadest sense related to the issue, dealing with 'pollution of the seas or the air space above resulting from any activities with radioactive materials or other harmful agents', it did not address the problem of pollution of or carried through the atmosphere before reaching the marine environment. During discussions of the Sea-Bed Committee, in the preparatory phase of UNCLOS III negotiations, enforcement regarding pollution of the marine environment from or through the atmosphere was dealt with in very general, sometimes only indirect, terms. Canada even suggested that, besides national action, international cooperation on marine pollution 'brought about by substances entering the sea via the atmosphere' was appropriate, but should be carried out in other fora.[4] According to the text of a draft article prepared after further discussions by Working Group 2 of Sub-Committee III, 'States shall take all necessary measures to prevent pollution of the marine environment from any source', including the atmosphere, and 'take measures to ensure that activities under their jurisdiction or control do not cause damage to other States, including their environment, by pollution of the marine environment.'[5] No specific provision was drafted by the Sea-Bed Committee.[6]

An early proposal during UNCLOS III negotiations, made by Kenya, provided a specific 5
provision on enforcement of measures related to pollution through atmospheric sources which read: 'States shall take appropriate measures to give effect to these articles in respect of land-based and atmospheric sources of marine pollution.'[7] A proposal co-sponsored by Canada simply mentions that States' measures shall also deal with pollution through the atmosphere.[8] 'Marine pollution from the atmosphere' was listed among the items for consideration regarding standards, jurisdiction and enforcement.[9] The necessity of dealing with all kinds of pollution sources, including pollution from or through the atmosphere, was reaffirmed.[10] Although contemporary to the negotiations, the *Nuclear Tests* cases before the International Court of Justice, in which New Zealand and Australia petitioned against France's atmospheric nuclear tests in the South Pacific, did not contribute substantially to the discussion. These tests were related to the issue of pollution of the marine environment from or through the atmosphere. However, while the Court could not examine, at the stage of the indication of interim measures, the merits of the arguments submitted by New Zealand and Australia,[11] it decided, during the main proceedings, that it did not have to do so, as France had given sufficient assurance that no further atmospheric tests would be carried out.[12]

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[4] See: Sea-Bed Committee, Canada: Working Paper on Preservation of the Marine Environment, UN Doc. A/AC.138/SC.III/L.26 (1972).

[5] See: Sea-Bed Committee, Note by the Chairman of Working Group 2 Addressed to the Chairman of Sub-Committee III, UN Doc. A/AC.138/SC.III/L.39 (1973), Annex II (paras. 1 and 2).

[6] See: Sea-Bed Committee, Chairman of Working Group 2, Note Addressed to the Chairman of Sub-Committee III, UN Doc. A/AC.138/SC.III/L.52 (1973), GAOR 28th Sess. Suppl. 21 (A/9021-I), 89, 90.

[7] Third Committee UNCLOS III, Kenya: Draft Articles for the Preservation and the Protection of the Marine Environment, UN Doc. A/CONF.62/C.3/L.2 (1974), OR III, 245 (Art. 25).

[8] Third Committee UNCLOS III, Canada *et al.*: Draft Articles on a Zonal Approach to the Preservation of the Marine Environment, UN Doc. A/CONF.62/C.3/L.6 (1974), OR III, 249 *et seq.* (Art. 3 (3)).

[9] Third Committee UNCLOS III, Note by the Chairman of the Informal Meetings of the Third Committee on Item 12 (Preservation of the Marine Environment) Addressed to the Chairman of the Third Committee, UN Doc. A/CONF.62/C.3/L.14 (1974), OR III, 254, 255.

[10] Third Committee UNCLOS III, Results of Consideration of Proposals and Amendments Relating to the Preservation of the Marine Environment, UN Doc. A/CONF.62/C.3/L.15 (1974), OR III, 260 (Art. 4 (a)(ii)).

[11] ICJ, *Nuclear Tests* (Australia *v.* France), Provisional Measures, Order of 22 June 1973, ICJ Reports (1973), 99; ICJ, *Nuclear Tests* (New Zealand *v.* France), Provisional Measures, Order of 22 June 1973, ICJ Reports (1973), 135.

[12] ICJ, *Nuclear Tests* (Australia *v.* France), Provisional Measures, Order of 20 December 1974, ICJ Reports (1974), 253, 271 (para. 56); ICJ, *Nuclear Tests* (New Zealand *v.* France), Provisional Measures, Order of 20 December 1974, ICJ Reports (1974), 457, 476 (para. 59).

6 The Third Session of UNCLOS III marked the next stage of negotiations, with the inclusion of a provision that recognized States' 'right to enforce laws and regulations adopted in accordance with the provisions of [the] Convention for the protection and preservation of the marine environment from atmospheric sources of marine pollution'[13] in the Informal Single Negotiating Text (ISNT). At the following Session, the Informal Group of Juridical Experts submitted a reformulated text that conveyed an obligation rather than a right:

> 'States shall within air space under their sovereignty enforce laws and regulations adopted in accordance with the provision of this Convention for the protection and preservation of the marine environment from atmospheric sources of marine pollution in conformity with all relevant international rules and standards concerning air safety.'[14]

This major conceptual change was confirmed at the same session in the Revised Single Negotiating Text (RSNT). The revised draft of the provision added to the obligation of enforcing laws and regulations adopted in accordance with the Convention the additional obligation of implementing rules and standards established by other international fora.[15] The same addition was made to the corresponding prescriptive provision.[16] The main drafting phase was thereby completed.

7 In the Informal Composite Negotiating Text (ICNT), the provision was given its present title, but was otherwise reiterated unchanged as Art. 223.[17] It was then renumbered Art. 222 in the revised ICNT.[18] At the end of the negotiations, successive drafting changes were made in order to establish, *inter alia*, an explicit link to the corresponding prescriptive provision of Art. 212.[19] Due to time constraints, the reformulation submitted by the United States of America remained unstudied. Likewise, a redraft presented by the Chairman of the Third Committee[20] was not presented to the Drafting Committee and had no impact on the final result.[21]

III. Elements

1. States shall enforce […] their laws and regulations'

8 In the first part of Art. 222, a common enforcement provision is established. Art. 222, like most of the provisions in Section 6 of Part XII, is cast as a legal obligation.[22] This conveys the importance attributed to the effectiveness of the law meant to protect the marine environment. Unlike the provisions on enforcement with respect to vessels, in particular Arts. 217–220, Art. 222 does not establish a detailed enforcement regime. It is rather limited to

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[13] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975), OR IV, 171, 176 (Art. 40).

[14] UNCLOS III, Informal Group of Juridical Experts, Preservation of the Marine Environment (1976, mimeo.), reproduced in: Renate Platzöder (ed.), Third United Nations Conference on the Law of the Sea: Documents, vol. XI (1987), 525, 543 (Art. 40). For an earlier draft, see UNCLOS III, Informal Group of Juridical Experts, Preservation of the Marine Environment (1976, mimeo.), reproduced in: *ibid.*, 504, 515 (Art. 40).

[15] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 179 (Art. 32).

[16] *Ibid.*, 177 (Art. 23).

[17] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 39 (Art. 223).

[18] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/Rev.1 (1979), OR VIII, 113 (Art. 222).

[19] See Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea, 1982: A Commentary, vol. IV (1991), 318 (MN 222.6), in particular sources 10 and 12.

[20] UNCLOS III, Letter Dated 26 March 1982 from the Chairman of the Third Committee to the President of the Conference and the Chairman of the Drafting Committee, UN Doc. A/CONF.62/L.88 (1982), OR XVI, 203.

[21] UNCLOS III, Memorandum Issued by the Collegium on Changes Incorporated in the Draft Convention, UN Doc. A/CONF.62/L.93 (1982), OR XVI, 210, 211 (para. 7 (e)).

[22] UNCLOS III, UN Doc. ELGDC/5 (1980, mimeo.), cited by: Nordquist/Rosenne/Yankov (note 19), xlii (footnote 3).

specifying that States have to enforce their domestic laws and regulations adopted in accordance with Art. 212 (1), the prescriptive counterpart of Art. 222, and with other provisions of the Convention. Such 'other provisions' include: Art. 21 (1)(f), on the coastal States' power to adopt laws and regulations regarding 'the preservation of the environment of the coastal State and the prevention, reduction and control of pollution thereof'; Art. 42 (1)(b), on the power of the States bordering straits to give effect to international regulations regarding the discharge of noxious substances; and Art. 94, on flag State obligations. As the rationale of Art. 222 is the protection of the marine environment, other relevant provisions would be Art. 194 (1) and (3)(a), the general provisions on States' obligations to protect the marine environment against, among others, noxious substances threatening the marine environment from or through the atmosphere, as well as Art. 211, on States' prescriptive powers concerning vessel-source pollution, and the corresponding provisions on enforcement, i. e. Arts. 217–220.

2. 'within the air space under their sovereignty or with regard to vessels flying their flag or vessels or aircraft of their registry'

Art. 222 draws on the (partly adjusted) concepts of coastal State and flag State in operationalizing the obligation of enforcement. States must enforce measures 'within the air space under their sovereignty.' This space extends to the air space over the State's land territory, over its internal waters and, where relevant, over its archipelagic waters, pursuant to Art. 2 (1). It, furthermore, extends to the air space over the State's territorial sea, pursuant to Art. 2 (2), and, where applicable, over international straits, pursuant to Arts. 37 and 34 (1). The unequivocal wording of Art. 222 imposes a strict interpretation of the word 'sovereignty', according to which the enforcement obligation does not extend to activities in the State's exclusive economic zone (EEZ) or on its extended continental shelf. The precise scope of the obligation is to be determined in light of the Convention's other provisions, pursuant to Art. 222, including in particular the obligations related to the rights of innocent passage and of transit passage. This means that, while the adopted domestic legislation and regulations must conform to Art. 211, considerations of coherence require that the corresponding enforcement measures be in accordance with Art. 220. Consequently, the least complicated enforcement situation is the one where the State whose laws or regulations have been violated by a foreign vessel takes measures against the vessel while it is voluntarily in the State's port, pursuant to Art. 220 (1). Enforcement measures taken against a vessel exercising its right of innocent passage in the coastal State's territorial sea, however, are subject to the nuanced provision of Art. 220 (2), including the safeguards set forth in Section 7. **9**

Furthermore, States have to enforce their laws and regulations 'with regard to vessels flying their flag or vessels or aircraft of their registry.' Accordingly, Art. 222 also relies on the concept of flag State (→ Art. 92). The enforcement obligation of the flag State remains pivotal despite its practical flaws, as coastal States only have limited powers over vessels flying another State's flag within their territorial waters and international straits.[23] According to Art. 222, domestic laws and regulations are to be adopted in accordance with Art. 212 (1) and other provisions of the Convention. Consequently, domestic rules must respect Art. 94 and the particularly relevant provision of Art. 211. For reasons of coherence, the corresponding enforcement measures must be taken in conformity with Art. 217. It should be noted that according to Art. 228 of Section 7 on safeguards, proceedings taken by a coastal State against a vessel flying another State's flag must be suspended if the flag State institutes proceedings concerning the same incident within six months of the date on which proceedings were first instituted, except for certain situations where the coastal State has a special interest in the proceedings. **10**

[23] See *supra*, MN 9.

3. '[States] shall adopt laws and regulations and take other measures necessary'

11 The second part of Art. 222 sets forth the States' obligation to adopt laws and regulations and to take other measures necessary to implement applicable international rules and standards concerning the protection of the marine environment against pollution from or through the atmosphere. The enforcement provision of Art. 222 thus includes an obligation of a prescriptive character. This may be explained by the fact that Art. 222 is concerned with the effectiveness of the protection of the marine environment, which depends not only on concrete enforcement measures, but also on the existence of a domestic legal regime. This aspect of the provision, furthermore, corresponds to Art. 212 (3), on the establishment of internationally agreed upon rules, standards and practices related to the protection of the marine environment against pollution from or through the atmosphere.

12 The provision's reference to competent international organizations in plural form and to indeterminate diplomatic conferences reflects the recognition that a variety of international fora may contribute to normative developments in the field of air pollution and pollution carried by the atmosphere. Within the realm of the law of the sea, the International Maritime Organization is the most important forum as far as the development of rules and standards applicable to navigation is concerned. Airborne emissions from ships are notably addressed by the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto (MARPOL 73/78) in Annex VI, on Regulations for the Prevention of Air Pollution from Ships.[24] Recent amendments seek to reduce the emission of greenhouse gases from ships by enhancing fuel efficiency.[25] Examples of instruments prepared by other fora are the Convention on Long-range Transboundary Air Pollution, elaborated under the auspices of the Economic Commission for Europe, as well as two of its Protocols, i. e. the Protocol on Control of Emissions of Nitrogen Oxides or their Transboundary Fluxes, and the Protocol on Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes. The Vienna Convention for the Protection of the Ozone Layer and the related Protocol on Substances that Deplete the Ozone Layer, as well as the United Nations Framework Convention on Climate Change and the related Kyoto Protocol to the United Nations Framework Convention on Climate Change are further examples.[26] To some extent, the Stockholm Convention on Persistent Organic Pollutants is yet another relevant instrument. A great number of States are bound by these treaties; they are under the obligation to implement them, as a consequence of both their quality as State party to these treaties and their obligation according to Art. 222.

4. 'in conformity with all relevant international rules and standards concerning the safety of air navigation'

13 States' obligations under Art. 222 must be carried out 'in conformity with all relevant international rules and standards concerning the safety of air navigation.' This means that if it is impossible to simultaneously conform to the enforcement obligation concerning pollution from or through the atmosphere and the obligation to observe the relevant international rules and standards concerning the safety of air navigation, the latter obligation prevails. The safety of air navigation thus has priority over considerations of environmental protection.

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[24] See also *Richard Hildreth/Alison Torbitt*, International Treaties and U.S. Laws as Tools to Regulate the Greenhouse Gas Emissions from Ships and Ports, IJMCL 25 (2010), 347.

[25] See IMO, Air Pollution and Energy Efficiency: Assessment of fuel oil availability – final report, IMO Doc. MEPC 70/INF.6, 25 July 2016, paving the way for a new mandatory maximum sulphur content of 0.50% m/m in fuel oil from 1 January 2020 onwards.

[26] With respect to the agreements on climate change, see *Alan Boyle*, Law of the Sea Perspectives on Climate Change, IJMCL 27 (2012), 831.

Section 7
Safeguards

Article 223
Measures to facilitate proceedings

In proceedings instituted pursuant to this Part, States shall take measures to facilitate the hearing of witnesses and the admission of evidence submitted by authorities of another State, or by the competent international organization, and shall facilitate the attendance at such proceedings of official representatives of the competent international organization, the flag State and any State affected by pollution arising out of any violation. The official representatives attending such proceedings shall have such rights and duties as may be provided under national laws and regulations or international law.

Bibliography: *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999)

Documents: IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization: Study by the Secretariat of the International Maritime Organization, IMO Doc. LEG/MISC. 6 (2008)

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I. Purpose and Function

Art. 223 safeguards the possibility of States, other than the State instituting proceedings and international organizations, participating and submitting evidence during proceedings. This provision seeks to strengthen the cooperation between flag, port and coastal States against the violation of international rules and standards, as well as of national laws and regulations, adopted in accordance with UNCLOS. It also recognizes the important role that the International Maritime Organization (IMO) has in that respect, as the enforcement powers of these States, as provided in Section 6 of Part XII UNCLOS, include the applicability of the international rules and standards established under IMO instruments.[1] Other provisions of UNCLOS also refer to cooperation in carrying out investigations of violations, as well as the institution of proceedings as a result of such investigations.[2] **1**

As well as establishing that States and the IMO may give evidence and attend proceedings through their officials, Art. 223 also allows States and the IMO to assist the enforcing State in gathering evidence and following proceedings, while at the same time, giving that State a larger understanding of the situation in which the violation has occurred. **2**

Considering the wording of Art. 223, and subject to States' discretion, the enforcing State may call upon the relevant States and the IMO to submit evidence and attend proceedings, **3**

[1] *Cf. infra*, MN 16.
[2] Arts. 217 (5) and (6), 218 (2).

just as they may request the enforcing State to accept their submission of evidence and the attendance at proceedings of their official representatives.

II. Historical Background

4 The negotiations of Part XII of UNCLOS were particularly concentrated in vessel-source pollution as a result of the environmental awareness brought by the 1967 *Torrey Canyon* and 1978 *Amoco Cadiz* disasters.[3] These circumstances underlined the need for the improvement and enforcement of preventive measures, namely those existing under the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone (CTSCZ), in a rapidly expanding shipping sector and with new developments in the field of marine pollution control. This resulted in the need for the adoption of more stringent requirements for ships entering or coming close to States' waters in order to eliminate substandard ships. This is emphasised in particular when considering the ample evidence of flag States' failure over the years to enforce international rules and standards on ships flying their flag.[4]

5 Until the entering into force of UNCLOS, flag State pre-emption was a prevailing aspect regarding the exercise of powers of enforcement with respect to ships. The CTSCZ did not include the possibility of coastal States interfering with the exercise of innocent passage with respect to the protection of the marine environment from vessel source pollution. The only relevant passage in the Geneva Conventions can be found in Arts. 24 and 25 of the 1958 Geneva Convention on the High Seas, whereby States were subject to an obligation to prevent pollution by the discharge of oil and dumping of radioactive waste.

6 At UNCLOS III, Israel presented two draft articles on the enforcement of provisions on the protection of the marine environment, which determined that every State undertook to make the discharge of pollutant 'an offence punishable by adequate penalties'.[5] It also provided that States would make the admission of documentary evidence by the respective courts of law possible, when submitted by the 'competent authorities of another State, concerning the commission by ships operating under its flag.'[6] The negotiations resulted in a compromise between flag State pre-emption and the enlargement of port and coastal States enforcement powers.[7]

7 Although unsuccessfully, the USSR made a proposal for a separate part dealing exclusively with general safeguards, in order to ensure that this regime would be applicable irrespective of the part of UNCLOS that might be invoked as grounds for adopting of enforcement measures against foreign vessels.[8] During the drafting of the Convention, the safeguards were treated alongside States' enforcement powers, having eventually been included at a later stage as a separate section.[9] The safeguards against abuses of these powers of enforcement were established under Section 7 of Part XII, as well as in other relevant multilateral and regional international legal instruments which complement UNCLOS' provisions.[10]

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[3] *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999), 328.

[4] *Ibid.*, 346.

[5] Third Committee UNCLOS III, Israel: Draft Articles on the Enforcement of Provisions of the Marine Environment, UN Doc. A/CONF.62/C.3/L.5 (1974), OR III, 249.

[6] *Ibid.*

[7] UNCLOS III, Memorandum by the President of the Conference on Document A/CONF.62/WP.10, UN Doc. A/CONF.62/WP.10/ADD.1 (1977), OR VIII, 65. Also see: Third Committee UNCLOS III, 31st Meeting, UN Doc. A/CONF.62/C.3/SR.31 (1976), OR VI, 100; Third Committee UNCLOS III, 32nd Meeting, UN Doc. A/CONF.62/C.3/SR.32 (1976), OR VI, 106.

[8] UNCLOS III, Reports of the Committees and Negotiating Groups on Negotiations at the Seventh Session Contained in a Single Document Both for the Purpose of Record and for the Convenience of Delegations, UN Doc. A/CONF.62/RCNG/1 (1978), OR X, 13, 102.

[9] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975), OR IV, 171; UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173.

[10] Arts. 237 and 311 (2).

III. Elements

1. 'In proceedings instituted pursuant to this Part'

Despite the opening sentence of this article referring to measures to facilitate proceedings that concern Part XII of UNCLOS, it does not exclude the possibility of such measures being adopted to facilitate proceedings instituted pursuant to other legal regimes. In Art. 192, UNCLOS recognizes the general obligation that all States have the obligation to protect and preserve the marine environment, including States that are not parties to the Convention, whether they are flag, port, coastal or landlocked States. 8

The Convention seeks to reinforce State jurisdiction through the exercise of the enforcement powers pursuant to Section 6 and, ultimately, ensure compliance of international rules and standards; while guaranteeing the unity of international law applicable to the protection and preservation of the marine environment by stating, in Art. 237 (2), that specific obligations assumed by States regarding the protection and preservation of the marine environment shall be carried out in a manner consistent with the general principles and objectives of the Convention.[11] 9

Measures to facilitate the hearing of witnesses and the admission of evidence may also be relevant outside of UNCLOS, as long as the States adopting such measures are parties to this Convention and other international legal instruments that may not include or exclude the possibility of States taking such measures regarding proceedings instituted pursuant to those international legal instruments. 10

2. 'States shall take measures to facilitate'

As reflected by the wording "shall", the obligation to facilitate the hearing of witnesses and the admission of evidence submitted by authorities of another State is explicit. However, it is weakened by the fact that no specific facilitation measures are requested and thus leaves the State with a considerable amount of discretion in view of its implementation. Consistent with other provisions of UNCLOS[12] 'to facilitate' should be understood as States lending support or providing the means for, or even making certain actions uncomplicated, as opposed to creating obstacles or not taking any action which would have the practical effect of preventing the production of evidence or the attendance of official representatives at proceedings. 11

States must make meaningful efforts to take measures that facilitate the hearing of witness and the admission of evidence and that facilitate the attendance of official representatives during these proceedings. Such measures may include, for example, making the production of evidence by authorities of another State and the attendance of their official representatives admissible under domestic law. The assessment of compliance must, however, take into consideration the specificities of each case and the limits of State discretion on adopting measures deemed appropriate. 12

3. 'hearing of witnesses and the admission of evidence submitted by authorities of another State'

As a safeguard provision, Art. 223 counterbalances the wide enforcement rights of Section 6 by introducing certain procedural rights. The enforcing State is obliged to facilitate the hearing of witnesses and the admission of evidence submitted by authorities of other States. Following from the provision's purpose the other State submitting evidence or providing witnesses is usually the flag State acting in support of its vessels. It appears from the wording of the 13

[11] See *Czybulka* on Art. 237.

[12] Preamble, Arts. 27 (3), 72 (3), 239, 255, 268 (a) and (c), 270, 273, 274 (c) and 275 (2).

provision that it is the flag State that is usually envisioned, but it is also possible to include States with sufficient nexus to the ship or personnel in this category.

14 The provision may, however, allow for another reading. Due to the interconnectivity of the marine environment and that damage caused by pollution activity is not subject to political boundaries or the limits of national jurisdiction, pollution of the marine environment does not only affect the territory of the State where the polluting act or activity took place: It may result in damage to the environment of neighbouring States, as well as that of more than one State beyond the immediate adjacent maritime areas. The damage caused by a polluting act or activity and their full consequences may only become evident after the perpetrating ship is no longer under any of the situations referred in Arts. 218 and 220, thus preventing the respective port and coastal States from instituting proceedings pursuant to these provisions.[13] In these cases, under Art. 223 those States may share evidence and participate in proceedings when the polluting ship is subject to enforcement by flag States or other port and coastal States. Sharing of evidence is therefore essential to enable a system of effective control of foreign ships and to ultimately deter non-compliance by owners, operators and crews of substandard ships. It may also persuade flag States to exercise effective control over the ships flying their flag, as provided for in Art. 217.[14]

15 The submission of evidence can be made by those States that have evidence to share within proceedings instituted by the enforcing State. It does not necessarily imply that it must be a State affected by pollution. In this respect, Art. 223 makes a distinction between, on the one hand, the submission of evidence by any State and the IMO, and on the other hand, the attendance of official representatives, which can only be those of the IMO, the flag State and of the port and coastal States affected by pollution. This distinction takes into account the exercise of powers of enforcement pursuant to Section 6 of Part XII.

16 A witness submitted by any State may be an official representative of that State. Also, the enforcing State may always request, subject to its national laws and regulations, the attendance of the official representatives of States not affected by pollution, if it is deemed relevant to the proceedings. In addition, the use of the term 'affected' may also result in excluding States that, although not harmed by pollution at the time of the proceedings, might suffer the consequences later on. The use of an alternative wording such as States concerned, as in Art. 231, could have perhaps avoided the outcome of enforcing States not allowing the attendance of States not affected by pollution that might have an interest in attending proceedings, such as neighbouring coastal States.[15] The participation in proceedings by private entities must be assessed under the national laws and regulations of the State instituting proceedings.

4. 'the competent international organization'

17 UNCLOS does not mention the IMO as the competent international organization for the purpose of Part XII. However, bearing in mind that the rules and standards of the IMO relating to pollution from vessels and pollution by dumping constitute the point of reference for the definition of applicable national laws and regulations,[16] the reference to 'the competent international organization' should be understood as referring to the IMO.[17]

5. 'official representatives'

18 The reference to 'official representatives' only appears in this provision of UNCLOS. However, as with similar references in this Convention and in other international legal

[13] See further: *König* on Art. 218 and *Hamamoto* on Art. 220.
[14] See *Bartenstein* on Art. 217 MN 16.
[15] See *Becker-Weinberg* on Art. 231 MN 12–13.
[16] Art. 211 (2).
[17] IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization: Study by the Secretariat of the International Maritime Organization, IMO Doc. LEG/MISC. 6 (2008), 7–9.

instruments,[18] 'official representatives' should be considered as entities or persons appointed by the flag State or any State affected by pollution or the IMO, which may, under the applicable national laws and regulations, lawfully act on its behalf and in accordance with a valid mandate granted to that effect.

According to the last sentence of this provision, the official representatives shall have rights and duties as provided by national laws and regulations. The current wording is the result of the final editing of this provision. Early drafts of Art. 223 stated that such representatives enjoyed rights instead of having rights, as well as mentioned legislation in place of laws and regulations.[19] 19

Article 224
Exercise of powers of enforcement

The powers of enforcement against foreign vessels under this Part may only be exercised by officials or by warships, military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

Bibliography: *Douglas Guilfoyle*, Shipping Interdiction and the Law of the Sea (2009); *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2010); *Philipp Wendel*, State Responsibility for Interferences with the Freedom of Navigation on Public International Law (2007)

Documents: ABUJA MoU: Memorandum of Understanding on Port State Control for West and Central African Region (1999); EC Directive 2009/16/EC of 28 May 2009, OJ 2009 L 131, 57; Memorandum of Understanding on Port State Control in the Asia-Pacific Region (2013); Memorandum of Understanding on Port State Control in the Black Sea Region (2010); Memorandum of Understanding on Port State Control for the Indian Ocean Region (2013); Memorandum of Understanding on Port State Control in the Mediterranean Region (2006); Paris Memorandum of Understanding on Port State Control (2013); Riyadh Memorandum of Understanding on Port State Control (2004)

Cases: PCIJ, *The Case of the S.S. Lotus* (France *v.* Turkey), Judgment of 7 September 1927, Series A, No. 10, 3

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3. 'warships, military aircraft, or other ships or aircraft' 9

I. Purpose and Function

The purpose of Art. 224 is to define the general conditions whereby port and coastal States may lawfully interfere with the right of innocent passage or the freedom of navigation of foreign vessels under the exercise of their respective powers of enforcement, and which may be readily recognizable by foreign vessels. 1

[18] Art. 5 (3) International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto; Art. 8 Convention and Statute of the International Regime of Maritime Ports, 8 December 1923, LNTS 58, 285; Art. 10 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers.

[19] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII, UNCLOS III, Informal Composite Negotiating Text (Revision 2), UN Doc. A/CONF.62/WP.10/REV.2 (1980), OR VIII and UNCLOS III, Draft Convention on the Law of the Sea (Informal Text), UN Doc. A/CONF.62/WP.10/REV. 3 (1980), OR VIII. The wording of this provision was also subject of reorganization, see UNCLOS III, Revised Single Negotiating Text (Text III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173 (Art. 33).

2 The right of innocent passage and the freedom of navigation are a fundamental pillar of the law of the sea that only allow for limited interference.[1] States are required by UNCLOS to adopt, implement and enforce rules and regulations for the protection and preservation of the marine environment, without unjustifiably interfering with the exercise of the rights and freedoms established under the Convention.[2] The Convention determines the circumstances under which such interference is permissible (→ Art. 87 (2)), taking into account the rights of flag States and the general interests and obligations of all States regarding the protection and preservation of the marine environment (→ Art. 194 (4)).

II. Historical Background

3 The wording of Art. 224 was included in the draft articles presented by several countries on the prevention, reduction and control of marine pollution as part of general provisions concerning the exercise of powers of enforcement against foreign ships.[3] Art. 6 (1) of the draft read: 'The powers of a State under this chapter may only be exercised in respect of a foreign ship or aircraft by officials or by warships or military aircraft, or other ships or aircraft on government service, authorized to that effect.'[4]

4 The reference in this early draft to 'the powers of a State' would be amended to mention 'the powers of enforcement against foreign vessels under this Convention'. Other amendments included the replacement of the initial reference to 'naval vessels' by 'warships', as well as the limitation of the scope of this provision to the powers of enforcement as provided in Part XII.[5]

III. Elements

1. 'powers of enforcement against foreign vessels'

5 The powers of enforcement referred in this provision are those of port and coastal States.[6] Independently from Art. 224, flag States may determine the conditions in which they intercept vessels flying their flag.[7] This principle was recognized in a draft proposal concern-

[1] Arts. 17, 24 (1), 27 (5), 45 (1), 52 (1), 58 (1) and (3), 73, 78 (2), 87 (1)(a), 105 and 211 (4). Also see Arts. 14 (1) and 15 (1), 19 (2)(4) and 20 (3) Convention on the Territorial Sea and the Contiguous Zone; and PCIJ, *The Case of the S.S. Lotus* (France *v.* Turkey), Judgment of 7 September 1927, Dissenting Opinion of Judge Moore, Series A, No. 10, 3, para. 245. On the interference with the freedom of navigation, see *Douglas Guilfoyle*, Shipping Interdiction and the Law of the Sea (2009); *Philipp Wendel*, State Responsibility for Interferences with the Freedom of Navigation in Public International Law (2007). Also see *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2010), 205–229.

[2] This is apparent from Art. 194 (4), but can also be derived from Art. 300, which contains a good faith obligation in the exercise of rights, jurisdiction and freedoms in the Convention.

[3] Third Committee UNCLOS III, Belgium *et al.*: Draft Articles on Prevention, Reduction and Control of Marine Pollution UN Doc. A/CONF.62/C.3/L.24 (1975), OR IV, 210.

[4] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII; UNCLOS III, Informal Composite Negotiating Text (Revision 2), UN Doc. A/CONF.62/WP.10/REV.2 (1980), OR VIII; UNCLOS III, Draft Convention on the Law of the Sea (Informal Text), UN Doc. A/CONF.62/WP.10/REV. 3 (1980), OR VIII.

[5] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 179 (Art. 34). Also see UNCLOS III, Informal Composite Negotiating Text, UN Doc A/CONF.62/WP.10 (1977), OR VIII; UNCLOS III, Reports of the Committees and Negotiating Groups on Negotiations at the Seventh Session Contained in a Single Document Both for the Purpose of Record and for the Convenience of Delegations, UN Doc. A/CONF.62/RCNG/1 (1978), OR X, 13; and UNCLOS III, Reports of the Committees and Negotiating Groups on Negotiations at the Resumed Seventh Session Contained in a Single Document Both for the Purpose of Record and for the Convenience of Delegations, UN Doc. A/CONF.62/RCNG/2 (1978), OR X, 126.

[6] Arts. 216 (1)(a) and (b), 218 and 220.

[7] Art. 94.

ing coastal enforcement, which stated that proceedings would not prevent the flag State from exercising its own competence.[8]

2. 'exercised by officials'

In the case of port States, the undertaking of investigations of vessels that are voluntarily in a port or at an offshore terminal must be carried out by officials. These officials ought to be recognizable through their appearance and procedures. There should be a clear relation between such officials and the respective State and the mission or service conferred to them. 6

Although Art. 224 mentions 'officials or warships', those onboard a ship or aircraft that are exercising powers of enforcement or those conducting investigations must also be identifiable with the ship or aircraft and the mission or service conferred to them. The exercise of powers of enforcement against foreign ships shall be carried out by officials acting under the authority granted by the enforcing State.[9] An early draft of this provision determined that the enforcement rights of the coastal State should be exercise only by officials or agents having the authority to establish that a violation has been committed.[10] 7

The reference in UNCLOS to 'officials' appears in several provisions but this concept is not defined, nor the role of such 'officials' clarified. There are, however, international rules and regulations that do refer to the scope of actions by officials and as a result complement the provisions of UNCLOS. This is the case, for example, of the European Union Directive on Port State Control[11] or the Paris Memorandum of Understanding,[12] both of which adopt strict criteria regarding the exercise powers of inspection by officials. 8

3. 'warships, military aircraft, or other ships or aircraft'

The requirement for the use of warships and military aircraft that are visibly recognizable as belonging to the armed forces and being in the service of the enforcing State avoids any misrepresentation or misunderstanding as to the meaning of their presence and actions. It also aims at inducing compliance, thus avoiding potential damages, without prejudicing States' responsibility and liability for the exercise of powers of enforcement, as provided in Art. 232.[13] 9

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[8] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975), OR IV, 171, 175 (Art. 28 (7)).

[9] See also Reg. 6.3.1 Annex I International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto (MARPOL 73/78), Reg. 9.2 Annex II MARPOL 73/78, Reg. 16.9.1 Annex II MARPOL 73/78, Reg. 8.1 Annex III MARPOL 73/78, Reg. 4.3 Annex IV MARPOL 73/78, Reg. 8.1 Annex V MARPOL 73/78, Reg. 10.1.2 Annex VI MARPOL 73/78; Reg. 6 (a) and Reg. 19 (a), Ch. I International Convention for the Safety of Life at Sea 1974 (SOLAS 1974), Reg. 4.1, Ch. II-1 SOLAS 1974, Reg. 9.1.1, Ch. II-2 SOLAS 1974; Art. 10 (1) International Convention on Standards of Training, Certification and Watchkeeping for Seafarers; Sect. 3.8 Acuerdo de Viña der Mar: Latin American Agreement on Port State Control of Vessels (1992), available at: http://www.acuerdolatino.int.ar/ciala/index.php; Sect. 3.5.1 ABUJA MoU: Memorandum of Understanding on Port State Control for West and Central African Region (1999), available at: http://www.abujamou.org/post/90.pdf; Sect. 3.5.1 Memorandum of Understanding on Port State Control for the Indian Ocean Region (2013) available at: http://www.iomou.org/moumain.htm; Sect. 3.5.1 Memorandum of Understanding on Port State Control in the Black Sea Region (2010), available at: http://www.bsmou.org/2009/11/memorandum-text/; Sect. 3.5.1 Memorandum of Understanding on Port State Control in the Mediterranean Region (2006), available at: http://www.medmou.org/; Sect. 3.5 Memorandum of Understanding on Port State Control in the Asia-Pacific Region (2013), as amended, available at: http://www.tokyo-mou.org/doc/memorand.pdf; Sect. 3.8 Riyadh Memorandum of Understanding on Port State Control (2004), available at: http://www.riyadhmou.org/aboutmoutext.html.

[10] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975), OR IV, 171, 176(Art. 33).

[11] Arts. 4 (2), 22 and Annex 11 of EC Directive 2009/16/EC of 28 May 2009, OJ 2009 L 131, 57–100.

[12] Sect. 3.3 and Annex 6 of Paris Memorandum of Understanding on Port State Control (2013), as amended, available at: https://www.parismou.org/system/files/Paris%20MoU%2C%20incl%2036th%20amendment%20%28-final%29.pdf.

[13] See further, *Becker-Weinberg* on Art. 232 MN 2.

10 The Convention does not define what ought to be considered as constituting military aircraft, despite the fact that it does provide a definition of warships in Art. 29.[14] The distinction made under UNCLOS between civil and public or State aircraft is also found in other international legal instruments,[15] with military aircraft traditionally included in the latter.

11 Considering that the use of other ships and aircraft for the purpose of exercising powers of enforcement requires that such ships and aircraft are identifiable and distinguishable as being in the service of the enforcing State, there should be a clear relation between the mission or service, the ship or aircraft, and its personnel, in order to achieve the same effect that results from the use of warships and military aircraft.[16] The same *ratio* is reflected in the legal regime applicable to the repression of piracy (→ Art. 107), and concerning the exercise of the rights of visit (→ Art. 110 (5)) and hot pursuit (→ Art. 111 (5)).[17]

Article 225
Duty to avoid adverse consequences in the exercise of the powers of enforcement

In the exercise under this Convention of their powers of enforcement against foreign vessels, States shall not endanger the safety of navigation or otherwise create any hazard to a vessel, or bring it to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk.

Bibliography: *James Crawford*, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (2005); James Crawford (ed.), Brownlie's Principles of Public International Law (8th edn. 2012)

Cases: ICJ, *Pulp Mills on the River Uruguay* (Argentina *v.* Uruguay), Judgment of 20 April 2010, ICJ Reports (2010), 14; ICJ, *Dispute Regarding Navigational and Related Rights* (Costa Rica *v*. Nicaragua), Judgment of 13 July 2009, ICJ Reports (2009), 213; ICJ, *Gabčíkovo-Nagymaros Project* (Hungary *v*. Slovakia), Judgment of 25 September 1997, ICJ Reports (1997), 7; ICJ, *The Corfu Channel Case* (United Kingdom *v.* Albania), Judgment of 9 April 1949, ICJ Reports (1949), 4; ITLOS, *The M/V 'Saiga' (No.2) Case* (Saint Vincent and the Grenadines *v*. Guinea), Judgment 1 July 1999, ITLOS Reports (1999), 10; ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf; PCIJ, *Case Concerning the Factory at Chorzów* (Germany *v*. Poland), Claim for Indemnity, Merits, Judgment of 13 September 1928, PCIJ Series A No. 17

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[14] See Second Committee UNCLOS III, United Kingdom: Draft Articles on the Territorial Sea and Straits, UN Doc. A/CONF.62/C.2/L.3 (1977), 183, 185 (Art. 26). Also see Art. 8 (2) Convention on the High Seas (High Seas Convention).

[15] See Art. 39 (3)(a) UNCLOS making reference to the Rules of the Air established by the International Civil Aviation Organization.

[16] Also see Art. 9 High Seas Convention.

[17] Also see Art. 23 (4) High Seas Convention.

I. Purpose and Function

The main purpose of the Art. 225 is to ensure that, in the exercise of their powers of enforcement against foreign ships, port and coastal States shall act with due regard, by adopting the necessary measures to avoid endangering the safety of navigation or creating any hazard to a vessel, as well as refraining from any action that may have that result. 1

This provision further includes a specific obligation for States not to bring a vessel to an unsafe port or anchorage, as well as an unclear reference to an obligation not to expose the marine environment to an unreasonable risk. 2

II. Historical Background

An early draft of this provision read that: 'The coastal State may exercise the powers provided for in article 35 only to the extent that there is no excessive danger to the vessel in question and that no unreasonable risks are created for navigation or the marine environment.'[1] 3

Despite certain alterations, the wording adopted remained very similar.[2] Some of the changes included replacing the use of 'cause any hazard' and 'cause an unreasonable risk to the marine environment', with, respectively, 'create any hazard' and 'expose the marine environment to an unreasonable risk.'[3] These appear to be only minor drafting alterations and do not alter the substantive scope of the article. 4

III. Elements

1. 'powers of enforcement against foreign vessels'

The wording of Art. 225 differs from that of other provisions included in Section 7 of Part XII, in particular regarding the reference in other articles to the exercise of the powers of enforcement pursuant to Part XII. This is the case, for example, of Arts. 224 and 227, where the initial reference to the Convention was replaced by the current draft, which refers only to Part XII, thus restricting the scope of application of these articles.[4] 5

Despite Art. 225 referring to States without distinction, the powers of enforcement against foreign vessels are necessarily those of port and coastal State.[5] Flag States are also subject to the obligation to ensure the safety at sea of ships flying its flag (→ Art. 94 (4)(c) and (5)), as well as to protect and preserve the marine environment (→ Art. 192; Art. 211 (2); Art. 216 (1)(b); Art. 217). 6

Considering the broad reference in this article to the powers of enforcement under UNCLOS, these also include those exercised by coastal States in the territorial sea (→ Art. 2 (3); Art. 21 (1); Art. 22 (1); Art. 25; Art. 27 (2); Art. 28 (3); Art. 30), the contiguous zone (→ Art. 33), the exclusive economic zone (→ Art. 73), the continental shelf (→ Art. 78 (2)) and 7

[1] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975), OR IV, 171, 179 (Art. 36).

[2] UNCLOS III, Informal Composite Negotiating Text, UN Doc A/CONF.62/WP.10 (1977), OR VIII; UNCLOS III, Reports of the Committees and Negotiating Groups on Negotiations at the Seventh Session Contained in a Single Document Both for the Purpose of Record and for the Convenience of Delegations, UN Doc. A/CONF.62/RCNG/1 (1978), OR X, 13; UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII and UNCLOS III, Informal Composite Negotiating Text (Revision 2), UN Doc. A/CONF.62/WP.10/REV.2 (1980), OR VIII and UNCLOS III, Draft Convention on the Law of the Sea (Informal Text), UN Doc. A/CONF.62/WP.10/REV. 3 (1980), OR VIII.

[3] *Ibid.*

[4] See *Becker-Weinberg* on Art. 224 MN 4; *Becker-Weinberg* on Art. 227 MN 4.

[5] Arts. 218, 220 and 211 (5).

straits used for international navigation (→ Art. 42 (1),(4); Art. 44; Art. 233), as well as those exercised by States with respect to the rights of visit (→ Art. 110 (1)) and of hot pursuit (→ Art. 111 (1)–(2)), and the obligations to repress piracy (→ Art. 100; Art. 105) and suppress unauthorized broadcasting (→ Art. 109 (4).

2. 'States shall not endanger'

8 The exercise of due regard may be achieved by States adopting or refraining from adopting any measures that could result in endangering the safety of navigation or creating any hazard to a vessel.

9 The protection of the safety of navigation is also referred to in the context of the right of innocent passage and transit passage, whereby coastal States may adopt laws and regulations to ensure that ships safely exercise such rights (→ Art. 22 (1)(a); Art. 22; Art. 42 (1)(a); Art. 54). In this case, the safety of navigation may be attained by coastal States adopting and giving due publicity to rules and regulations and providing for sea lanes or traffic separation schemes in order to avoid collisions,[6] without foregoing the compliance with flag States' laws and regulations relating to the seaworthiness of vessels (→ Art. 94 (3)(a), (4)(a)) and other applicable international rules.[7]

10 Failure by a State to proceed in conformity with its obligations under Art. 225 may endanger navigation or create a hazard to ships, as well as give rise to State responsibility under international law,[8] in particular in the event of collision or damage to the marine environment. This would also be the case, for example, if a ship in distress is refused to stop in a port or anchorage (→ Art. 18 (2)). In this situation, a State may be responsible for impairing the right of passage (→ Art. 24 (1)(a); Art. 211(3),(4); Art. 131; Art. 233), except, for example, in the event that a foreign vessel undertakes any act of wilful and serious pollution (→ Art. 19 (2)(h)).

3. 'expose the marine environment to an unreasonable risk'

11 The reference to 'unreasonable risk', as opposed to reasonable risk, implies that, in the exercise of their powers of enforcement, States must not undertake actions that constitute a considerable threat of damage to the marine environment. States are legally required to make assessments of the environmental impact that their actions might carry, including with respect to the exercise of their powers of enforcement.

12 The International Tribunal for the Law of the Sea has recognized the existence of such a requirement under general international law when there is a risk that activities may have a significant adverse impact in a transboundary context. However, the assessment of the reasonableness of States' actions with respect to the exercise of their powers of enforcement will depend on the circumstances of each case and must be measured taking into account the specificities of the situation.[9]

13 A State may also be considered responsible should it release a ship which represents an unreasonable threat of damage to the marine environment (→ Art. 226 (1)(c))[10] or, for that

[6] Arts. 21 (3), 22 (4), 24 (2), 25 (3), 41 (2) (6), 42 (3), 44, 52 (2), 53 (7) (10), 60 (3) (5), 80, 211 (3) (6) and 217 (7) and Art. 15 (2) Convention on the Territorial Sea and the Contiguous Zone. Also see Rule 10 Convention on the International Regulations for Preventing Collisions at Sea (COLREGs) and Reg. 8, Ch. 5 Annex International Convention for the Safety of Life at Sea 1974.

[7] Rule 1 (1) COLREGs.

[8] ICJ, *Dispute Regarding Navigational and Related Rights* (Costa Rica *v.* Nicaragua), Judgment of 13 July 2009, ICJ Reports (2009), 213, para. 148.

[9] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, paras. 147–150, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf. Also see ICJ, *Pulp Mills on the River Uruguay* (Argentina *v.* Uruguay), Judgment of 20 April 2010, ICJ Reports (2010), 14, para. 204.

[10] Also see Art. 5 (2) and Reg. 11 (2) Annex 1 International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto.

matter, if the State unlawfully prevents a vessel from sailing or detains a vessel based on the same grounds (→ Art. 219; Art. 292). In these instances, a balance should be achieved between States' powers of enforcement and the rule of non-impediment of the right of passage and the freedom of navigation established in international law.

14 The use of force in operations at sea must be avoided when possible and not go beyond what is reasonable and necessary considering the relevant circumstances.[11] The use of excessive force constitutes a breach of the right of the flag State and may consequentially lead to the responsibility of the enforcing State.[12] It is a well-established rule of international law that a State which suffers damage as a result of an internationally wrongful act by another State is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act.[13]

15 In addition, the duty to avoid adverse consequences encompasses both an obligation to adopt measures to that effect, as well as to abstain from undertaking any conduct that may result in endangering the safety of navigation or which may create any hazard to a vessel or expose the marine environment to an unreasonable risk, without prejudice to the state of necessity which may preclude the wrongfulness of an act not in conformity with an international obligation.[14]

Article 226
Investigation of foreign vessels

1. (a) **States shall not delay a foreign vessel longer than is essential for purposes of the investigations provided for in articles 216, 218 and 220. Any physical inspection of a foreign vessel shall be limited to an examination of such certificates, records or other documents as the vessel is required to carry by generally accepted international rules and standards or of any similar documents which it is carrying; further physical inspection of the vessel may be undertaken only after such an examination and only when:**

(i) **there are clear grounds for believing that the condition of the vessel or its equipment does not correspond substantially with the particulars of those documents;**

(ii) **the contents of such documents are not sufficient to confirm or verify a suspected violation; or**

(iii) **the vessel is not carrying valid certificates and records.**

(b) **If the investigation indicates a violation of applicable laws and regulations or international rules and standards for the protection and preservation of the marine environment, release shall be made promptly subject to reasonable procedures such as bonding or other appropriate financial security.**

(c) **Without prejudice to applicable international rules and standards relating to the seaworthiness of vessels, the release of a vessel may, whenever it would present an unreasonable threat of damage to the marine environment, be refused or made conditional upon proceeding to the nearest appropriate repair yard. Where release**

[11] ITLOS, *The M/V 'SAIGA' (No. 2) Case* (Saint Vincent and the Grenadines *v.* Guinea), Judgment of 1 July 1999, ITLOS Reports (1999), 10, para. 155. See further *O'Brien* on Art. 301 MN 7.

[12] Art. 232. Also, see Arts. 21 (18), 22 (1)(f) and 35 UN Fish Stocks Agreement.

[13] ITLOS, *The M/V 'Saiga' (No. 2) Case* (note 11), para. 170; PCIJ, Case Concerning the *Factory at Chorzów* (Germany *v.* Poland), Claim for Indemnity, Merits, Judgment of 13 September 1928, PCIJ Series A No. 17, 47. Also see *James Crawford*, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (2005), 77–80; James Crawford (ed.), Brownlie's Principles of Public International Law (2012), 567–580.

[14] ICJ, *Gabčíkovo-Nagymaros Project* (Hungary *v.* Slovakia), Judgment of 25 September 1997, ICJ Reports (1997), 7, paras. 51, 52; ITLOS, *The M/V 'SAIGA' (No. 2) Case* (note 11), para. 133; ICJ, *The Corfu Channel Case* (United Kingdom *v.* Albania), Judgment of 9 April 1949, ICJ Reports (1949), 23.

has been refused or made conditional, the flag State of the vessel must be promptly notified, and may seek release of the vessel in accordance with Part XV.

2. States shall cooperate to develop procedures for the avoidance of unnecessary physical inspection of vessels at sea.

Bibliography: *Tullio Treves*, The Proceedings Concerning Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea, IJMCL 11 (1996), 179–200; *Erik J. Molenaar*, Coastal State Jurisdiction over Vessel-Source Pollution (1998); *Michael White*, Prompt Release Cases in ITLOS, in: Tafsir Malick Ndiaye/Rüdiger Wolfrum (ed.), Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah (2007), 1025–1052

Documents: ABUJA MoU: Memorandum of Understanding on Port State Control for West and Central African Region (1999); Acuerdo de Viña der Mar: Latin American Agreement on Port State Control of Vessels (1992); EC Directive 2009/16/EC of 28 May 2009, OJ 2009 L 131, 57; Memorandum of Understanding on Port State Control in the Asia-Pacific Region (2013); Memorandum of Understanding on Port State Control in the Black Sea Region (2010); Memorandum of Understanding on Port State Control for the Indian Ocean Region (2013); Memorandum of Understanding on Port State Control in the Mediterranean Region (2006); Paris Memorandum of Understanding on Port State Control (2013); Riyadh Memorandum of Understanding on Port State Control (2004)

Cases: ICJ, *Gabčíkovo-Nagymaros Project* (Hungary *v.* Slovakia), Judgment of 25 September 1997, ICJ Reports (1997), 7; ITLOS, *The 'Camouco' Case* (Panama *v.* France), Judgment of 7 February 2000, ITLOS Reports (2000), 10; ITLOS, *The 'Hoshinmaru' Case* (Japan *v.* Russian Federation), Judgment of 6 August 2007, ITLOS Reports (2005–2007), 18; ITLOS, *The 'Juno Trader' Case* (Saint Vincent and the Grenadines v. Guinea-Bissau), Judgment of 18 December 2004, ITLOS Reports (2004), 17; ITLOS, *The 'Monte Confurco' Case* (Seychelles *v.* France), Judgment of 18 December 2000, ITLOS Reports (2000), 86; ITLOS, *The M/V 'Saiga' Case* (Saint Vincent and the Grenadines v. Guinea), Judgment of 4 December 1997, ITLOS Reports (1997), 16; ITLOS, *The M/V 'Saiga' (No. 2) Case* (Saint Vincent and the Grenadines *v.* Guinea), Judgment of 1 July 1999, ITLOS Reports (1999), 10; ITLOS, *The 'Tomimaru' Case* (Japan *v.* Russian Federation), Judgment of 6 August 2007, ITLOS Reports (2005–2007), 74; ITLOS, *The 'Volga' Case* (Russian Federation *v.* Australia), Judgment of 23 December 2002, ITLOS Reports (2002), 10; PCIJ, *Case Concerning Factory at Chorzów* (Germany *v.* Poland), Claim for Indemnity, Merits, Judgment of 13 September 1928, PCIJ Series A No. 17

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I. Purpose and Function

1 Art. 226 sets limits on the exercise of the powers of enforcement by port (→ Art. 216; Art. 218) and coastal States (→ Art. 216; Art. 220), as provided in Section 6 of Part XII, by minimizing the interference with navigation of foreign vessels caused by delays resulting from lengthy investigations. For the same reason, but recognizing that more investigations may be required, this provision also identifies and limits the situations where further inspections or the detention of vessels may take place when investigations based on the examination of certificates and other documents are not sufficient.

2 Art. 226 (1) lays out the rules applicable to the inspection of foreign vessels and the requirements for their release and includes a reference to dispute settlement in accordance with Part XV of UNCLOS. Art. 226 (2) refers to cooperation between States to develop procedures for the avoidance of unnecessary physical inspection of vessels at sea.

Through the safeguards included in Art. 226, the Convention seeks to establish a balance between the right of coastal States to enforce its laws and regulations and that of flag States to obtain prompt release of its vessels.[1] 3

II. Historical Background

Part of the wording of this provision may be traced to a proposal of draft articles on the prevention, reduction and control of marine pollution presented by several countries in relation to port State enforcement.[2] This preliminary proposal provided that the port State could only undertake an immediate and thorough investigation of the violation in instances where discharges of a ship in violation of international regulations that had taken place in the preceding six months while the ship was voluntarily in a port or offshore terminal. 4

The proposal also laid out that after a ship had been arrested, the port State could decide if it would be necessary to detain the ship and take it to a safe port or anchorage.[3] It also mentioned that the amount of a bond or other reasonable security given by or on behalf of the owner of the ship presented for the prompt release could not exceed the maximum penalty for the violation committed.[4] The current wording was eventually included in the draft proposal, but arranged in a different structure.[5] 5

III. Elements

1. 'delay longer than is essential for purposes of investigations'

In accordance with UNCLOS and other relevant international legal instruments, ships are to be inspected periodically and may be subject to further inspection when there is evidence of violation of laws, regulations, rules or standards applicable to the protection and preservation of the marine environment.[6] Art. 226 makes explicit reference to investigations carried out under Arts. 216, 218 and 220, thus excluding those under flag States' enforcement powers, which are subject to their own jurisdiction (→ Art. 92). 6

It is ultimately in the interest of all States, including flag States, that such inspections are carried out in order to establish an efficient control system that allows for the regular inspection of more ships and consequently a reduction in the number of substandard ships. Inspections provide an added incentive for compliance for ship-owners and operators, as well as an incentive for flag States to exercise effective jurisdiction, thus contributing towards the prevention, reduction and control of vessel-source pollution (→ Art. 194; Art. 197; Art. 211). 7

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[1] ITLOS, *The 'Tomimaru' Case* (Japan *v.* Russian Federation), Judgment of 6 August 2007, ITLOS Reports (2007), 74, para. 74; ITLOS, *The 'Monte Confurco' Case* (Seychelles *v.* France), Judgment of 18 December 2000, ITLOS Reports (2000), 86, para. 70.

[2] Third Committee UNCLOS III, Belgium *et al.*: Draft Articles on the Prevention, Reduction and Control of Marine Pollution, UN Doc. A/CONF.62/C.3/L.24 (1975), OR IV, 210. The relevant proposals of this draft were taken into account in the articles included in the UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975), OR IV, 171, and subsequently altered to one single article in the UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 179 (Art. 36).

[3] Belgium *et al.*: Draft Articles (note 2).

[4] *Ibid.*

[5] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII; UNCLOS III, Informal Composite Negotiating Text (Revision 2), UN Doc. A/CONF.62/WP.10/REV.2 (1980), OR VIII; UNCLOS III, Draft Convention on the Law of the Sea (Informal Text), UN Doc. A/CONF.62/WP.10/REV. 3 (1980), OR VIII.

[6] Arts. 94 (4)(a), 217 (3) and (4), 218 (1), 220 (1) and (2); Art. 6 International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto (MARPOL 73/78); Regs. 6-19, Ch. I Annex International Convention for the Safety of Life at Sea 1974 (SOLAS 1974).

8 Furthermore, it is also of the interests of States, ship-owners and operators that investigations are not time-consuming procedures, so as to avoid delays that might have costly repercussions.[7] In the event of undue delay, ships[8] and flag States[9] have the right to compensation.

2. physical inspection limited to examination of certificates

9 The initial proposals of Art. 226 did not include the second sentence of Art. 226 (1), but merely referred to the obligation of States not to delay a foreign vessel.[10] The limitation of inspection to the examination of certificates, records and documents takes into account flag State pre-emption (→ Art. 94; Art. 211 (3)) and the right of States to adopt laws and regulations for the prevention, reduction and control of marine pollution by foreign ships (→ Art. 73 (1); Art. 211 (4), (5); Art. 220), without prejudice of the right of innocent passage as provided by UNCLOS.[11]

10 The preliminary limitation of investigations to the inspection of certificates, records or other documents presumes their truthfulness. UNCLOS does not regulate the content and issuance of such documentation. Documentation is issued by the authorities of the flag State in the exercise of their jurisdiction and in conformity with the applicable international rules and regulations.[12] Flag States must, however, make sure their ships carry the necessary certificates and that these are periodically inspected to verify their conformity (→ Art. 94 (4)(a); Art. 211 (3); Art. 217).[13] Most certificates are valid for a definite period of time, requiring ships to undergo inspections before they can be renewed.[14]

11 On-board documentation should provide information on the nationality of the ship,[15] its conformity with technical and safety requirements,[16] such as those regarding garbage[17] or air

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[7] Art. 7 (1) MARPOL 73/78.

[8] Art. 232; Art. 19 (8) EC Directive 2009/16/EC of 28 May 2009, OJ 2009 L 131, 57–100 (EC Directive on PSC); Art. 7 (2) MARPOL 73/78; Reg. 19 (f), Ch. I Annex SOLAS 1974; Art. X (4) International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW Convention); Sect. 3.13 Paris Memorandum of Understanding on Port State Control (2013), available at: https://www.parismou.org/system/files/Paris%20MoU%2C%20incl%2036th%20amendment%20%28final%29.pdf; Sect. 3.13 Acuerdo de Viña der Mar: Latin American Agreement on Port State Control of Vessels (1992), available via: http://www.acuerdolatino.int.ar/ciala/index.php; Sect. 3.10 ABUJA MOU: Memorandum of Understanding on Port State Control for West and Central African Region (1999), available at: http://www.abujamou.org/post/90.pdf; Sect. 3.10 Memorandum of Understanding on Port State Control for the Indian Ocean Region (2013), available at: http://www.iomou.org/moumain.htm; Sect. 3.10 Memorandum of Understanding on Port State Control in the Mediterranean Region (2006), available at: http://www.medmou.org/; Sects. 3.21, 3.2 Riyadh Memorandum of Understanding on Port State Control (2004), available at: http://www.riyadhmou.org/aboutmoutext.html; Sect. 3.13 Memorandum of Understanding on Port State Control in the Asia-Pacific Region (2013), available at: http://www.tokyo-mou.org/doc/memorand.pdf.

[9] ITLOS, *The M/V 'Saiga' (No. 2) Case* (Saint Vincent and the Grenadines *v.* Guinea), Judgment of 1 July 1999, ITLOS Reports (1999), 10, para. 170; ICJ, *Gabčíkovo-Nagymaros Project* (Hungary *v.* Slovakia), Judgment of 25 September 1997, ICJ Reports (1997), 7, para. 152; PCIJ, *Case Concerning Factory at Chorzów*, Claim for Indemnity, Merits, Judgment of 13 September 1928, PCIJ Series A No. 17, 47.

[10] Revised Single Negotiating Text (note 2), 179 (Art. 36).

[11] Arts. 17, 19 (1), 24 (1), 27 (5), 211 (3)(4) and 220 (4).

[12] Arts. 23, 91 (2), 110 (2), 217 (3); Art. 5 (2) MARPOL 73/78; Reg. 19, Ch. I Annex SOLAS 1974; Sect. 3.3 Viña del Mar Port State Agreement (note 8); Sect. 3.1.1 Abuja MoU (note 8); Sect. 3.1 Indian Ocean MoU (note 8); Sect. 3.1.1 Memorandum of Understanding on Port State Control in the Black Sea Region (2010), available at: http://www.bsmou.org/2009/11/memorandum-text/; Sect. 3.11 Mediterranean MoU (note 8); Sect. 3.1 Asia-Pacific MoU (note 8); Sect. 3.1 Riyadh MoU (note 8). The EC Directive on PSC (note 8) and the Paris MoU (note 8) provide a comprehensive list of certificates and documents to be presented during an inspection. *See* Art. 12 (1) and Annex 4 EC Directive on PSC (note 8) and Annex 10 Paris MoU.

[13] Art. 5 (1) MARPOL 73/78; Art. 12 (7) International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention).

[14] Regs. 7, 10 Annex I MARPOL 73/74, Regs. 9, 10 Annex II MARPOL 73/74, Reg. 5, 8 Annex IV MARPOL 73/78; Reg. 14, Ch. I Annex SOLAS 1974.

[15] Art. 91 (2); Art. 5 (2) Convention on the High Seas.

[16] Regs. 7–10, 12, Ch. I Annex SOLAS 1974, Reg. 18.8, Ch. V Annex SOLAS 1974, Reg. 4, Ch. IX SOLAS 1974.

[17] Reg. 8 Annex V MARPOL 73/78.

pollution,[18] and, in some cases, also evidence of compliance with specific obligations depending on the purpose and characteristics of the ship and its cargo, including undergoing periodic inspections.[19] This is the case, for example, for ships carrying oil,[20] chemicals,[21] gas[22] irradiated nuclear fuel,[23] harmful substances,[24] dangerous goods[25] or grain.[26] Flag States may also adopt and implement laws and regulations regarding the design, construction, manning or equipment of their ships.[27] Documentation should also evidence seafarers' compliance with rules and standards on training, certification and watchkeeping.[28]

These inspections are in accordance with flag States' obligation to verify that the master, officers and crew of a ship conform with applicable international regulations on safety of life at sea and avoidance of collisions, as well as on prevention, reduction and control of marine pollution.[29] 12

3. 'further physical inspection'

Further physical inspection of foreign ships can only take place in the situations described in Art. 226 (1)(a), i. e., discrepancy between the documents exhibited and the condition of the ship or its equipment, or in the event of insufficient or lack of valid documentation. 13

UNCLOS does not clarify what constitutes 'further physical inspection' or for that matter what are considered 'clear grounds'. In fact, an early proposal on port State enforcement referred to 'reasonable grounds'.[30] The development of these concepts will depend on regulatory international instruments.[31] 14

4. prompt release

Art. 226 (1)(b) does not require the presentation of a bond or financial security for a flag State to be able to request the prompt release of a vessel or for the coastal State to release it.[32] This provision merely indicates bonding or other appropriate financial security as reasonable procedures, alongside others that the relevant States may consider suitable.[33] It would be difficult to argue that a ship that constitutes an unreasonable threat to the marine environment could be released merely upon the posting of a bond or appropriate financial security.[34] The detaining State may, however, release the ship based on the guarantee by the flag State that the ship will be demolished, decommissioned or repaired.[35] 15

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[18] Regs. 5, 6, 9, 10, Annex VI MARPOL 73/78.

[19] Regs. 7, 10 Annex I MARPOL 73/78; Regs. 9, 10 Annex II MARPOL 73/78; Regs. 5, 8 Annex IV MARPOL 73/78; Reg. 14, Ch. I Annex SOLAS 1974; Art. 14 EC Directive on PSC (note 8).

[20] Reg. 6 Annex I MARPOL 73/78; Art. 7 Protocol to amend the International Convention on Civil Liability for Oil Pollution Damage.

[21] Reg. 7 Annex II MARPOL 73/78; Reg. 10, Ch. VII Annex SOLAS 1974.

[22] Reg. 13, Ch. VII SOLAS 1974.

[23] Reg. 16, Ch. VII SOLAS 1974.

[24] Reg. 4 Annex III MARPOL 73/78; Art. 12 (2) HNS Convention.

[25] Reg. 19 (4), Ch. II-2 Annex SOLAS 1974, Reg. 7-2/Pt.A/Ch.7 SOLAS 1974; Art. 12 (2) HNS Convention.

[26] Reg. 9, Ch. VI Annex SOLAS 1974.

[27] Art. 21 (2), 94 (3)(a)–(b),(5), 217 (2). SOLAS 1974 and the SOLAS 1978 Protocol provide minimum standards for the construction, equipment and operation of ships.

[28] Art. 10 (1) and Reg. 1/4 Annex STCW Convention.

[29] Art. 94 (4)(b),(c) and Art. 10 Convention on the High Seas.

[30] Belgium *et al.*: Draft Articles (note 2).

[31] *Erik Jaap Molenaar*, Coastal State Jurisdiction over Vessel-Source Pollution (1998), 461.

[32] *Tullio Treves*, The Proceedings Concerning Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea, IJMCL 11 (1996), 184.

[33] On the requirement of posting bond for the applicability of the procedure pursuant to Art. 292 UNCLOS, see ITLOS, *The M/V 'Saiga' Case*, Judgment of 4 December 1997, ITLOS Reports (1997), 16, paras. 76, 77.

[34] *Treves* (note 32), 184.

[35] *Ibid.*, 184.

16 Pursuant to Art. 226 (1)(c), the detaining State shall promptly notify the respective flag State and submit all official reports.[36] Release may be refused or made conditional upon the ship proceeding to the nearest appropriate repair yard,[37] in which case the respective flag State shall be promptly notified.[38] Other international legal instruments also establish an obligation to inform the next port State[39] or coastal State in case of incident evolving dangerous goods.[40]

17 Should the detaining State refuse to release the ship after receiving the financial security, pursuant to Art. 226 (1)(c) the flag State may request the prompt release, in accordance with Art. 292. This is without prejudice to the rights established under other legal instruments concerning port State control.[41] In cases where the intervention of an international court or tribunal has been requested in accordance with Art. 292, the release is subject to compliance with the order to post bond or other financial security (→ Art. 292 (4)).

18 The reference to 'bonding or other appropriate financial security' provided by Art. 226 (1)(b) and also in Arts. 73 (2),[42] 218 (4), 220 (7) and 292 (4) of the Convention, does not give a clear indication regarding its assessment. States when determining the appropriate financial security should consider its adequacy in view of its purpose in order to avoid a situation of abuse of right (→ Art. 300), without prejudice to any attempt to peacefully settle a dispute on the matter (→ Art. 283 (1)).

19 Pursuant to Arts. 292 (1) and 73 (2) UNCLOS, Art. 113 (2) of the Rules of International Tribunal for the Law of the Sea determines that in a procedure for the prompt release of vessel and crew, the Tribunal shall determine the amount, nature and form of the bond or financial security considering its reasonability and the complexity and circumstances of the case, taking into account UNCLOS and applicable international law.[43]

20 In the the *M/V 'Saiga' Case*, the International Tribunal for the Law of the Sea (ITLOS) took into consideration the value of the gasoil discharged and the difficulties that could have been incurred in restoring the gasoil to the holds of the M/V SAIGA. The Tribunal found that the security should consist of the amount of gasoil discharged and a financial security of USD 400,000 to be posted in the form of a letter of credit or bank guarantee.[44] In the *'Hoshinmaru'* case, the ITLOS did not consider it to be reasonable that a bond should be set on the basis of the maximum penalties that could be applicable, or that it should be calculated on the basis of the confiscation of the vessel in light of the circumstances of the

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[36] Arts. 73 (4) and 231.

[37] Art. 5 (2) MARPOL 73/78, Reg. 6.3.3 Annex I MARPOL 73/78, Reg. 8.2.5 Annex II MARPOL 73/78, Reg. 4.5 Annex IV MARPOL 73/78; Regs. 6 (c) and 19 (c), Ch. I SOLAS 1974; Art. 21 (1) EC Directive on PSC (note 8); Sect. 3.8 Paris MoU (note 8); Sect. 3.8.1 Abuja MoU (note 8); Sect. 3.8.1 Indian Ocean MoU (note 8); Sect. 3.8.1 Black Sea MoU (note 8); Sect. 3.8.1 Mediterranean MoU (note 8); Sect. 3.8 Asia Pacific MoU (note 8); Sect. 3.17 Riyadh MoU (note 8).

[38] Art. 94 (6); Art. 5 (3) MARPOL; Reg. 19 (d), Ch. I Annex SOLAS 1974.

[39] Reg. 19 (e), Ch. I Annex SOLAS 1974.

[40] Regs. 7-4, Ch. VII SOLAS 1974.

[41] Art. 237, 311 UNCLOS; Art. 20; Sect. 3.12 Paris MoU (note 8); Sect. 3.5 Viña del Mar Port State Agreement (note 8); Sect. 3.13 Indian Ocean MoU (note 8); Sect. 3.13 Abuja MoU (note 8); Sect. 3.1.2 Black Sea MoU (note 8); Sect. 3.13 Mediterranean MoU (note 8); Sect. 3.15 Asia Pacific MoU (note 8); Sect. 3.24 Riyadh MoU (note 8); Art. 10 (1)(b) HNS Convention.

[42] This article refers to 'reasonable bond or other security', see further *Harrison* on Art. 73 MN 9–12.

[43] ITLOS, *The 'Hoshinmaru' Case* (Japan *v.* Russian Federation), Judgment of 6 August 2007, ITLOS Reports (2005–2007), 18 paras. 79, 82, 88; ITLOS, *The 'Juno Trader' Case* (Saint Vincent and the Grenadines *v.* Guinea-Bissau), Judgment of 18 December 2004, ITLOS Reports (2004), 17, para. 85; ITLOS, *The 'Volga' Case* (Russian Federation *v.* Australia), Judgment of 23 December 2002, ITLOS Reports (2002), 10, para. 65; ITLOS, *The 'Camouco' Case* (Panama *v.* France), Judgment of 7 February 2000, ITLOS Reports (2000), 10, para. 66; ITLOS, *The 'Monte Confurco' Case* (Seychelles *v.* France), Judgment of 18 December 2000, ITLOS Reports (2000), 86, para. 76; ITLOS, *The M/V 'Saiga' Case* (Saint Vincent and the Grenadines *v.* Guinea), Judgment of 4 December 1997, ITLOS Reports (1997), 16, paras. 81, 82. On the Tribunal's jurisprudence see *Michael White*, Prompt Release Cases in ITLOS, in: Tafsir Malick Ndiaye/Rüdiger Wolfrum (eds.), Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah (2007), 1025–1052.

[44] *The M/V 'Saiga' Case* (note 43), 16, paras. 83–85; ITLOS, *The M/V 'Saiga' (No. 2) Case* (note 9), 10, paras. 178–180.

case.[45] The Tribunal determined that the gravity of the offence justified a bond of RUB 10,000,000 instead of the RUB 22,000,000 bond set by the Russian Federation, given the 'broadly satisfactory cooperative framework' with Japan.[46] In this case, the ITLOS considered that the payment could be made either directly to the bank account or by presenting a bank guarantee.[47] In the '*Monte Confurco*' case, the Tribunal considered that the value of the fish and of the fishing gear seized should be taken into account as a relevant factor for the assessment of the reasonableness of the bond, having the Tribunal found that the bond of FF 56,400,000 imposed by the French court was not reasonable and consequently ordering that the total amount should be of FF 18,000,000 in the form of bank guarantee, dismissing the claim that cash or certified cheque were the only possible forms for the bond.[48] Likewise, the Tribunal also considered in the '*Camouco*' case that the FF 20,000,000 bond imposed by the French court was not reasonable in light of the gravity of the alleged offences, and that the amount should be of FF 8,000,000 paid in the form of a bank guarantee, if no other form had been agreed by the parties.[49] Also in the '*Juno Trader*' case, the ITLOS considered that the bond or financial security should be of EUR 300,000 paid in the form of a bank guarantee, if no other form had been agreed by the parties.[50] The Tribunal noted that:

> '[i]t is by reference to the penalties imposed or imposable under the law of the detaining State that the Tribunal may evaluate the gravity of the alleged offences, taking into account the circumstances of the case and the need to avoid disproportion between the gravity of the alleged offences and the amount of the bond.'[51]

5. 'unreasonable threat of damage to the marine environment'

Art. 226 (1)(c) provides that the release of a vessel may be refused or made conditional if it presents an 'unreasonable threat of damage.'[52] In these circumstances, a ship may not be allowed to leave port until it can proceed to sea without presenting an 'unreasonable threat of damage to the marine environment.'[53] In a situation where such threat of damage is considered reasonable there can be no interference with the right of innocent passage and for that matter with flag State pre-emption. The assessment of the reasonableness of the threat of damage of a vessel is subject to a case-by-case analysis. A more detailed inspection of the ship, equipment or crew may be undertaken in order to determine if they meet the relevant standards relating to the seaworthiness of the ship.[54] **21**

In the event that a ship not constituting an unreasonable threat has been detained, the flag State may also seek its release pursuant to Art. 292.[55] This seems also to be the rationale of the last sentence of Art. 226 (1)(c). **22**

Furthermore, in comparison with other provisions that also mention the arrest or detention of vessels and their crews, there is no similar reference to an 'unreasonable threat of damage'. Art. 219 refers to the 'violation of applicable international rules and standards relating to seaworthiness of vessels and thereby threatens damage to the marine environment'; while Art. 73 (2) mentions the possibility of arrest for the purpose of ensuring compliance with laws and regulations of the coastal State. On the other hand, Art. 220 (6) **23**

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[45] *The 'Hoshinmaru' Case* (note 43), para. 93.
[46] *Ibid*., paras. 98–99.
[47] *Ibid*., para. 100.
[48] *The 'Monte Confurco' Case* (note 43), 86, paras. 86–93.
[49] *The 'Camouco' Case* (note 43), paras. 70, 74.
[50] *The 'Juno Trader' Case* (note 43), 17, para. 98.
[51] *Ibid.*, para. 89.
[52] Also see Art. 5 (2) MARPOL 73/78.
[53] Art. 5 (2) MARPOL 73/78.
[54] Also, *see* Reg. 8 Annex 3 MARPOL 73/78; Art. 13 (3) EC Directive on PSC (note 8); Sect. 3.3 Viña del Mar Port State Agreement (note 8); Sect. 3.2.1 Indian Ocean MoU (note 8); Sect. 3.1.2 Abuja MoU (note 8); Sect. 3.2.1 Black Sea MoU (note 12); Sect. 3.1 Asia Pacific MoU (note 8); Sect. 3.2 Riyadh MoU (note 8).
[55] *Treves* (note 32), 185.

requires 'objective evidence […] that a violation has been committed resulting in a discharge causing major or threat of major damage.'

24 In requesting the prompt release of an unseaworthy ship and not allowing it to proceed to the nearest repair yard, the flag State is responsible and subject to the obligation to adopt all measures necessary to ensure its seaworthiness and safety at sea (→ Art. 94 (3); Art. 219).

6. 'unnecessary physical inspection'

25 Interference with the freedom of navigation and flag State pre-emption should be limited to a minimum. Art. 226 (2) of this provision underlines that States shall cooperate to avoid unnecessary physical inspection of vessels at sea.

26 An early draft, eventually leading to the present Art. 218, also provided that if the port State received information from another State that there were reasonable grounds for believing that a ship has discharged in violation of international regulations to prevent, reduce and control pollution from ships, that State should undertake an investigation and inform the other States, including the flag State, or competent organization of the results of the investigation, thus considerably limiting the discretionary powers of the State to act.[56]

Article 227
Non-discrimination with respect to foreign vessels

In exercising their rights and performing their duties under this Part, States shall not discriminate in form or in fact against vessels of any other State.

Documents: ABUJA MoU: Memorandum of Understanding on Port State Control for West and Central African Region (1999); EC Directive 2009/16/EC of 28 May 2009, OJ 2009 L 131, 57; GA Res. 2625(XXV) of 24 October 1970; Memorandum of Understanding on Port State Control in the Asia-Pacific Region (2013); Memorandum of Understanding on Port State Control in the Black Sea Region (2010); Memorandum of Understanding on Port State Control for the Indian Ocean Region (2013); Memorandum of Understanding on Port State Control in the Mediterranean Region (2006); Paris Memorandum of Understanding on Port State Control (2013); Riyadh Memorandum of Understanding on Port State Control (2004)

Cases: PCIJ, *The Case of the S.S. Lotus* (France *v.* Turkey), Judgment of 7 September 1927, Series A, No. 10, 3

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I. Purpose and Function

1 The enlargement of port and coastal States' powers of enforcement and their respective exercise may result in hindering the access to internal waters or the right of passage of foreign ships as a result of the implementation of measures to protect, reduce and control the pollution of the marine environment from vessel-source pollution.

2 In the exercise of the rights and duties provided in Part XII of UNCLOS, States must ensure that they do not discriminate against foreign vessels. In order to prevent the exercise of such powers of enforcement resulting in a disadvantage for foreign ships or creating more favourable conditions for ships flying their own flags, Art. 227 establishes that States shall

[56] Belgium *et al.*: Draft Articles (note 2).

not adjust the exercise of their powers of enforcement included in Part XII of the Convention in a discriminatory manner.

II. Historical Background

The wording of this provision may be traced to a set of draft articles dealing with port and coastal State enforcement, which read that: 'In the exercise of its rights and duties under this chapter, a State shall not discriminate in form or in fact against foreign ships or aircrafts.'[1] Other proposals laid out that: 'When internationally agreed rules and standards are not in existence or are inadequate to meet special circumstances, coastal States may adopt reasonable and non-discriminatory laws and regulations additional to or more stringent than the relevant internationally agreed rules and standards.'[2] 3

In subsequent drafts, the wording was amended to exclude the reference to aircrafts,[3] and a subsequent revision also replaced the limitation to the rights and duties pursuant to 'this chapter' by those 'under this Convention',[4] though the reference to Part XII was later reinstated.[5] This limitation resulted in excluding, for example, those rights and duties that coastal States may exercise in the exclusive economic zone and on the continental shelf. 4

The principle of non-discrimination is widely used in the law of the sea and it can be found, for example, in the 1958 Convention on the Territorial Sea and Contiguous Zone (CTSCZ) with reference to the suspension of innocent passage or the applicability of charges upon foreign ships.[6] This principle is also reflected in the 1923 Convention and Statute of the International Regime of Maritime Ports, although on the basis of reciprocity.[7] Accordingly, States should abide by the principle of equality of treatment and reciprocity on granting foreign ships the freedom of access to port, including its use and the full enjoyment of the benefits regarding navigation and commercial operations granted to vessels, their cargoes and passengers.[8] In addition, a port State could temporarily adopt measures necessary to protect the vital interests or safety of that State which may be contrary to the principle of equality established in this international legal instrument.[9] The principle of non-discrimination is further present in the Convention and Statute on the International Regime of Ports regarding the selection of ships for the purpose of conducting random inspections, in granting access to the port and its use, and the full enjoyment of the benefits as regards navigation and commercial operations which a State affords to vessels, their cargoes and passengers.[10] 5

[1] Third Committee UNCLOS III, Belgium *et al.*: Draft Articles on the Prevention, Reduction and Control of Marine Pollution, UN Doc. A/CONF.62/C.3/L.24 (1975), OR IV, 210. Also see UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 179 (Art. 37). This draft proposal reads: 'In exercising their rights and carrying out their duties under this Convention, States shall not discriminate in form or in fact against vessels of any other State'.

[2] Third Committee UNCLOS III, Canada *et al.*: Draft Articles on a Zonal Approach to the Preservation of the Marine Environment, UN Doc A/CONF.62/C.3/L.6 (1974), OR III, 249.

[3] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975), OR IV, 171, 176 (Art. 37).

[4] *Ibid.*; UNCLOS III, Reports of the Committees and Negotiating Groups on Negotiations at the Seventh Session Contained in a Single Document both for the Purpose of Record and for the Convenience of Delegations, UN Doc. A/CONF.62/RCNG/1 (1978), OR X, 13, 113.

[5] UNCLOS III, Informal Composite Negotiating Text, UN Doc A/CONF.62/WP.10 (1977), OR VIII, 40 (Art. 228); UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII, 114 (Art. 227).

[6] Arts. 16 (3) and 18 (2) CTSCZ.

[7] Convention and Statute of the International Regime of Maritime Ports, 9 December 1923, LNTS 58, 287.

[8] Art. 2 Convention and Statute of the International Regime of Maritime Ports.

[9] Art. 16 Convention and Statute of the International Regime of Maritime Ports.

[10] Arts. 2, 3 and 8 (1) Convention and Statute of the International Regime of Maritime Ports.

III. Elements

1. 'exercising their rights and performing their duties'

6 The rights and duties referred in Art. 227 are those as established under Part XII of the Convention, thus excluding the rights and duties that States may exercise pursuant to other provisions of the Convention. Particularly relevant are the powers of enforcement that port and coastal States may exercise (→ Art. 216; Art. 218; Art. 220).

2. 'shall not discriminate'

7 The nationality of a ship is determined by its flag, and all States are bound to respect the nationality of a ship, as well as the jurisdiction of the flag State over all the ships flying its flag (→ Art. 91 (1)).[11]

8 The principle of non-discrimination of foreign vessels referred to in Art. 227 is also a reflection of the principle of sovereign equality of States established in international law, to the extent that any discrimination based on the nationality of a ship would represent a differential recognition of the rights of the respective flag State, namely the right to grant its flag to a ship and the related duty for all States to respect its jurisdiction over that ship.[12] The principle of non-discrimination of foreign vessels is well established in the law of the sea and is reflected in many provisions of UNCLOS. This is the case, for example, of the prohibition of coastal States to discriminate among foreign vessels with respect to situations of innocent passage[13] or regarding ships flying the flag of land-locked States (→ Art. 131). This principle is also consistent with the regime applicable to the Area (→ Art. 141; Art. 152 (1)) and ice-covered areas (→ Art. 234), as well as when States apply charges to foreign vessels for services rendered.[14] It is also a principle that is applicable to ships flying the flag of a State that is not a party to UNCLOS, such as the USA. Indeed, in Art. 227 the Convention uses the wording 'of any State' as opposed to 'of States Parties'.[15]

9 Furthermore, notwithstanding Art. 227 referring to non-discrimination of foreign ships for the purpose of the exercise of States' powers of enforcement regarding the protection and preservation of the marine environment, when implementing rules or standards regarding the control of seafarers' working conditions in compliance with international legal instruments, States may choose not to grant favourable treatment to ships flying the flag of a State that does not implement such standards.[16]

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[11] See PCIJ, *The Case of the S.S. Lotus* (France *v.* Turkey), Judgment of 7 September 1927, Series A, No. 10, 3, paras. 64, 65, 68.

[12] GA Res. 2625(XXV) of 24 October 1970.

[13] Arts. 24 (1) (b), 25 (3), 42 (2) and 52 (2) and 211 (3) UNCLOS and Art. 16 (3) CTSCZ.

[14] Art. 26 (2) and Art. 18 (2) Convention on the Territorial Sea and the Contiguous Zone. Also see Art. 5 Convention and Statute of the International Regime of Maritime Ports.

[15] See, for example, Art. 139.

[16] Art. 10 (5) International Convention on Standards of Training, Certification and Watchkeeping for Seafarers; Art. 5 (7) Maritime Labour Convention; Art. 1 (3) 1988 to the Protocol International Convention for the Safety of Life at Sea; Art. 5 (4) International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto (MARPOL 73/78); Sect. 2.4 Paris Memorandum of Understanding on Port State Control (2013), available at https://www.parismou.org/system/files/Paris%20MoU%2C%20incl%2036th%20amendment%20%28final%29.pdf; Sect. 2.4 Memorandum of Understanding on Port State Control in the Mediterranean Region (2006), available at: http://www.medmou.org/; Sect. 2.4 Memorandum of Understanding on Port State Control in the Black Sea Region (2010), available at: http://www.bsmou.org/2009/11/memorandum-text/; Sect. 2.4 Riyadh Memorandum of Understanding on Port State Control (2004), available at: http://www.riyadhmou.org/aboutmoutext.html; Sect. 2.4 ABUJA MoU: Memorandum of Understanding on Port State Control for West and Central African Region (1999), available at: http://www.abujamou.org/post/90.pdf; Sect. 2.4 Memorandum of Understanding on Port State Control for the Indian Ocean Region (2013), available at: http://www.iomou.org/moumain.htm; Sect. 2.5 Memorandum of Understanding on Port State Control in the Asia-Pacific Region (2013), available at: http://www.tokyo-mou.org/doc/memorand.pdf; Art. 3 (3) EC Directive 2009/16/EC of 28 May 2009, OJ 2009 L 131, 57–100 (EU Directive on PSC).

The possibility established under the EC Directive on Port State Control[17] for a State to refuse access to its ports and anchorages of ships that fly the flag of a State that appear in the grey or black list adopted in accordance with the Paris Memorandum of Understanding[18] does not constitute a breach of the aforementioned principle of non-discrimination. This is also the case regarding ships flying the flag of a State that is not a party to a relevant international instrument or that is manned with crew members who do not hold a valid Standards of Training, Certification and Watchkeeping for Seafarers certificate.[19] In both cases, the relevant port State is implementing measures necessary to prevent substandard ships from calling at ports in order to maintain an effective port State control system.[20] **10**

Article 228
Suspension and restrictions on institution of proceedings

1. Proceedings to impose penalties in respect of any violation of applicable laws and regulations or international rules and standards relating to the prevention, reduction and control of pollution from vessels committed by a foreign vessel beyond the territorial sea of the State instituting proceedings shall be suspended upon the taking of proceedings to impose penalties in respect of corresponding charges by the flag State within six months of the date on which proceedings were first instituted, unless those proceedings relate to a case of major damage to the coastal State or the flag State in question has repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels. The flag State shall in due course make available to the State previously instituting proceedings a full dossier of the case and the records of the proceedings, whenever the flag State has requested the suspension of proceedings in accordance with this article. When proceedings instituted by the flag State have been brought to a conclusion, the suspended proceedings shall be terminated. Upon payment of costs incurred in respect of such proceedings, any bond posted or other financial security provided in connection with the suspended proceedings shall be released by the coastal State.

2. Proceedings to impose penalties on foreign vessels shall not be instituted after the expiry of three years from the date on which the violation was committed, and shall not be taken by any State in the event of proceedings having been instituted by another State subject to the provisions set out in paragraph 1.

3. The provisions of this article are without prejudice to the right of the flag State to take any measures, including proceedings to impose penalties, according to its laws irrespective of prior proceedings by another State.

Bibliography: *J. Peter A. Bernhardt*, A Schematic Analysis of Vessel-Source Pollution: Prescriptive and Enforcement Regimes in the Law of the Sea Conference, VJIL 20 (1980), 265–311; *Erik J. Molenaar*, Coastal State Jurisdiction over Vessel-Source Pollution (1998)

Cases: ICJ, *Gabčíkovo-Nagymaros Project* (Hungary *v.* Slovakia), Judgment of 25 September 1997, ICJ Reports (1997), 7; PCIJ, *Case Concerning the Factory at Chorzów* (Germany *v.* Poland), Claim for Indemnity, Merits, Judgment of 13 September 1928, PCIJ Series A No. 17

[17] Art. 16 EC Directive on PSC (note 16).
[18] Sects. 1.2 and 4.1.1 Paris MoU (note 16).
[19] Sect. 2 Paris MoU (note 16).
[20] Also see Regs. 9 (2.4) and 9 (2.5.4), Ch. II-2 International Convention for the Safety of Life at Sea 1974; Art. 5 (3) MARPOL 73/78.

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I. Purpose and Function

1 Art. 228 safeguards flag State pre-emption[1] by providing for the suspension of proceedings by port and coastal States regarding violations committed by foreign vessels. The possibility of flag States to demand the suspending proceedings is limited to the circumstances and conditions provided in this provision.

2 The possibility of port and coastal States instituting proceedings against foreign vessels is limited to three years.[2] Art. 228 (2) also impedes any State from instituting proceedings if these have already been initiated by another State. These limitations inhibit port and coastal States from extending investigations longer than is necessary,[3] which could potentially delay the decision to institute procedures. It also prevents parallel proceedings from being instituted.

3 Consistent with these limitations, Art. 228 (3) underlines the principle of flag State pre-emption regarding the applicability and enforcement of its laws and regulations to ships flying its flag, regardless of whether proceedings have already been instituted by a port or coastal State.[4]

II. Historical Background

4 Prior to UNCLOS, flag State pre-emption prevailed with respect to the exercise of powers of enforcement against vessel-source pollution. With UNCLOS, Art. 228 underlines the continued prevailing nature of flag-State enforcement regarding vessel-source pollution, despite the safeguards and respective limitations introduced in this provision.[5] To a certain extent, the recognition of this principle in Section 7 has the effect of moderating the enforcement powers of port and coastal States introduced by UNCLOS.[6] This is reflected in earlier drafts of the Convention that refer to port State enforcement,[7] which provide, for example, that proceedings in respect of any violation would not be taken by any State other than the flag State if proceedings in respect of the same incident had already been taken by the port State.[8]

[1] Arts. 94, 211 (2) and 217 (4), (6).

[2] Also see Art. 8 Protocol to amend the International Convention on Civil Liability for Oil Pollution Damage; Art. 17 (1) Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment and Art. 37 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea.

[3] Art. 226.

[4] Art. 217 (4).

[5] *J. Peter A. Bernhardt*, A Schematic Analysis of Vessel-Source Pollution: Prescriptive and Enforcement Regimes in the Law of the Sea Conference, VJIL 20 (1979–1980), 265, 298.

[6] *Ibid.*

[7] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975), OR IV, 171, 175 (Art. 28 (7)).

[8] Third Committee UNCLOS III, Belgium *et al.*: Draft Articles on the Prevention, Reduction and Control of Marine Pollution, UN Doc. A/CONF.62/C.3/L.24 (1975), OR IV, 210.

A further aspect to consider is that an early proposal of Art. 228 referred to criminal proceedings, providing in paragraph 3 that such proceedings would be without prejudice to the institution of civil proceedings.[9] In light of this distinction, which was also made in a draft proposal of Art. 230,[10] proceedings referred in Art. 228 of the Convention are those regarding criminal proceedings, as opposed to civil proceedings which are referred to in Art. 229. 5

III. Elements

1. 'Proceedings to impose penalties'

An essential condition for the applicability of the safeguards established in Art. 228 is that proceedings are instituted by a port (→ Art. 218) or coastal State (→ Art. 220) against a foreign vessel in order to impose penalties. Only when such proceedings have been initiated, can flag States exercise their right to suspend proceedings in the terms set out in this provision. UNCLOS also refers to the situations in which coastal States may ask port States to suspend proceedings for violations committed in the internal waters, territorial sea or EEZ.[11] 6

The suspension of proceedings pursuant to Art. 228 does not forego the possibility of port and coastal States cooperating with flag States in clarifying the circumstances of the case without being legally bound to do so (→ 217 (5)). 7

The proceedings to impose penalties are identified in an early draft of Art. 228 as being 'criminal proceedings'.[12] They should be distinguished from penalties seeking compensation for loss or damage resulting from pollution of the marine environment, which are referred in Art. 229. 8

UNCLOS does not provide a definition of penalties, nor is there any reference to their applicability included in the provisions on port and coastal State enforcement. It is a matter to be determined in accordance with the laws of port and coastal State as applicable and subject to the safeguards provided in Section 7 of Part XII of UNCLOS.[13] 9

2. 'violation of applicable laws and regulations or international rules and standards […] committed by a foreign vessel beyond the territorial sea'

Flag States may only interfere and limit the exercise of the powers of enforcement by port and coastal States and consequently suspend proceedings with respect to those proceedings instituted by port States to impose penalties for infractions of international rules and standards committed by foreign vessels on the high seas,[14] or in the EEZ of another State at the request of that State.[15] Proceedings may also be suspended when instituted by coastal States to impose penalties for violations of their laws and regulations committed in the EEZ.[16] 10

Flag States can also interfere with proceedings initiated by port States and suspended at the request of coastal States when the violation of the applicable internal rules and standards has occurred in the internal waters, territorial sea, or EEZ of the coastal State.[17] In this case, any bond or financial security posted with the authorities of the port State and later transmitted to the coastal State shall be subject to the same procedure as provided in Art. 228. Although 11

[9] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 179 (Art. 38).
[10] *Ibid.*, Art. 39.
[11] Art. 218 (4).
[12] RSNT (note 9), 179 (Art. 38).
[13] Arts. 218 and 220.
[14] Art. 218 (1).
[15] Art. 218 (2).
[16] Art. 220 (1).
[17] Art. 218 (4).

this possibility is not mentioned in this provision, Art. 218 (4) underlines that the proceedings established therein are subject to Section 7 of Part XII of the Convention.[18]

12 In the territorial sea, the exercise of flag State pre-emption is conditional. It is limited in order to take into account the right of the coastal State to adopt laws and regulations relating to innocent passage, including with respect to the preservation of the environment of the coastal State and the prevention, reduction and control of pollution,[19] without prejudice to its duties of not hampering the right of innocent passage of foreign vessels (→ Art. 24).

3. 'corresponding charges'

13 Flag States may only interfere and limit the exercise of powers with respect to proceedings that seek to impose penalties based on 'corresponding charges'. Although this reference is not clear, these charges should be thought to relate to the same facts that constitute the violation committed by a foreign vessel. The legal qualification of the actual charges will be determined under the applicable law of the relevant State.

14 The flag State has six months to take proceedings as of the date that proceedings were first initiated by the port or coastal State, including those instituted by port States and suspended by coastal States.[20] The time frame of six months, as well as that of three years, can be traced to an early proposal on port State enforcement.[21]

15 If flag States do not institute proceedings to impose penalties, or fail to do so within six months, or should they institute proceedings based on the same facts, port and coastal States are entitled to continue proceedings against the foreign vessel.

4. 'major damage to the coastal State'

16 Another limitation to the exercise of flag State pre-emption occurs when proceedings regard a case of major damage to the coastal State. In this case, the exercise of flag State pre-emption may not interfere with the exercise of coastal State enforcement.

17 UNCLOS uses the expression 'major damage' in only two provisions and does not provide a definition or clarification of what constitutes 'major damage'.[22] Most provisions in UNCLOS only refer to 'damage', and on one occasion to 'serious damage'.[23] Ultimately, the perception of the significance of the damage suffered is that of the coastal State. The possibility of coastal States continuing proceedings against a foreign vessel will depend on the assessment made of the relevant circumstances. The ambiguity of such undefined concepts may result in a restriction of the right of flag State pre-emption.[24]

18 Should a dispute arise between the coastal and flag States in this respect they may attempt to settle the matter in accordance with Part XV of UNCLOS.

5. 'repeatedly disregarded its obligation to enforce'

19 Flag State pre-emption is also limited in cases where the flag State has repeatedly disregard its obligation to effectively enforce applicable international rules and standards in respect of violations committed by vessels flying its flag. Thus, in the case of repeated non-compliance by flag States, port and coastal States have the possibility to pursue proceedings. It

[18] In this respect *Erik Jaap Molenaar* mentions that in situations where the institution of proceedings under the exercise of coastal States' right of preemption as provided by Art. 218 (4) may suffer delay as a result of the exercise of flag State pre-emption, this possibility should be rejected. See *Erik Jaap Molenaar*, Coastal State Jurisdiction over Vessel-Source Pollution (1998), 463.

[19] Arts. 21 (1)(f) and 211 (4).

[20] Art. 218 (4).

[21] Third Committee UNCLOS III, Belgium *et al.*: Draft Articles on the Prevention, Reduction and Control of Marine Pollution, UN Doc. A/CONF.62/C.3/L.24 (1975), OR IV, 210. Also see ISNT (note 7), 175 (Art. 28 (5), (6)).

[22] Arts. 220 (6) and 233.

[23] Art. 94 (7).

[24] *Molenaar* (note 18), 464.

contributes towards the effective protection and preservation of the marine environment from vessel source pollution and discourages flag States from non-compliance.

In case of disagreement by flag States that proceedings be instituted on the basis of their repeated non-compliance, they may make use of the dispute settlement mechanisms provided in Part XV of UNCLOS. **20**

6. 'The flag State shall in due course make available […] a full dossier of the case'

The obligation on flag States to share information allows port and coastal States some measure of control of proceedings. The fact that the sharing of information is to take place 'in due course' leaves some degree of discretion, particularly when confronted with early drafts of the Convention which laid out that a coastal State that had arrested a ship should 'immediately notify' the flag State, proving the latter with a report and all other relevant information.[25] **21**

The purpose of this obligation is that flag States inform the relevant port or coastal States of the on-going proceedings and in so doing deliver a 'full dossier' to that State. On the one hand, Art. 228 allows flag States to exercise their right of pre-emption, while, on the other hand, creates the possibility for port and coastal States to follow the advancement of proceedings. This is consistent with flag States' duty to inform the State that requests the exercise of its powers of enforcement of any action taken and its outcome (→ Art. 217 (7)). It is ultimately of the interest of the flag State to share information and to bring proceedings to a conclusion in order that suspended proceedings instituted by port or coastal States may be terminated. **22**

Non-compliance with the obligation to share information allows the relevant port or coastal State to make use of the dispute settlement mechanisms provided in Part XV of UNCLOS. **23**

7. 'Proceedings […] shall not be instituted'

The conclusion of proceedings instituted by flag States and the respective communication to the relevant port or coastal States will lead to the termination of any proceedings suspended due to the exercise of flag State pre-emption. Once the relevant port or coastal State is informed that proceedings by the flag State have been concluded, those that were initially instituted and suspended must be terminated. Art. 228 does not acknowledge the right of port and coastal States to make any assessment with respect to the proceedings instituted by the flag State or their outcome. **24**

Only after costs incurred in connection with proceedings instituted by coastal States have been paid will the bond or other financial security posted with the coastal State, or posted with a port States but transmitted to the coastal State,[26] be released. If a bond or other financial security was not posted with the coastal State and the costs incurred were not paid, the coastal State may use the dispute settlement mechanisms provided in Part XV of UNCLOS. **25**

8. Liability

Considering the obligations on flag States in Art. 228, possible responsibility and liability may arise on the basis of non-fulfilment, in addition to the breach of the general obligation to protect and preserve the marine environment.[27] These include, for example, failure to comply **26**

[25] ISNT (note 7), 175 (Art. 28 (3)).

[26] Art. 218 (4).

[27] Art. 235; ICJ, *Gabčíkovo-Nagymaros Project* (Hungary *v.* Slovakia), Judgment of 25 September 1997, ICJ Reports (1997), 7, paras. 152, 170; PCIJ, *Case Concerning the Factory at Chorzów* (Germany *v.* Poland), Claim for Indemnity, Merits, Judgment of 13 September 1928, PCIJ Series A No. 17, 47.

with the duty to promptly inform the coastal State and provide records of the proceedings following the suspension of proceedings.[28]

27 Similarly, there may also be liability for a coastal State that makes no serious effort to cooperate with the flag State in the investigation of any violation committed by a foreign vessel.[29]

Article 229
Institution of civil proceedings

Nothing in this Convention affects the institution of civil proceedings in respect of any claim for loss or damage resulting from pollution of the marine environment.

Cases: ICJ, *Gabčíkovo-Nagymaros Project* (Hungary *v.* Slovakia), Judgment of 25 September 1997, ICJ Reports (1997), 7; PCIJ, *Case Concerning the Factory at Chorzów* (Germany *v.* Poland), Claim for Indemnity, Merits, Judgment of 13 September 1928, PCIJ Series A No. 17

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I. Purpose and Function

1 Art. 229 is complementary to other provisions in UNCLOS that relate to criminal proceedings (e. g. → Art. 228), confirming that the Convention does not affect the right to institute civil proceedings for loss or damage caused by pollution of the marine environment.

2 The possible instigation of civil proceedings provides another incentive for compliance with international rules and standards for the protection and preservation of the marine environment and compliance with measures to prevent, reduce and control pollution.

II. Historical Background

3 This provision was written together with Art. 228, which in its early draft expressly mentioned 'criminal proceedings', clearly making the distinction with civil proceedings.[1] It included a sentence at the end of paragraph 3 which provided that criminal proceedings instituted by another State would not

> 'affect the institution of civil proceedings in respect of any claim for loss and damage connected with any incident involving any violation of applicable laws and regulations or international rules and standards relating to the prevention, reduction and control of pollution from vessels.'[2]

4 Prior to UNCLOS, the matter of civil proceedings was dealt with under Art. 20 of the 1958 Convention on the Territorial Sea and Contiguous Zone. This article adopted the general rule that the coastal States should not stop or divert, levy execution against or arrest a foreign ship

[28] Also see Arts. 217 (7) and 218 (4) UNCLOS and Art. 4 (2)(b), (3) International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto.

[29] Arts. 217 (5) and 223.

[1] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 179 (Art. 38).

[2] *Ibid.*

for the purpose of exercising civil jurisdiction when that ship is passing through the territorial sea.[3] This article also recognized the right of the coastal State, pursuant to civil proceedings, to levy execution against or to arrest a foreign ship that is 'lying' or passing though the territorial sea after leaving the internal waters. This is currently reflected in Art. 28 of the Convention.[4]

III. Elements

1. 'Nothing in this Convention affects the institution of civil proceedings'

The aforementioned draft of Art. 228 only stated that the provisions regarding criminal jurisdiction did not affect the institution of civil proceedings. Only later was this rule arranged in a single article in order to 'introduce technical modifications' while preserving the 'substance of the "package" '[5] referring its current version to UNCLOS and not to the proceedings mentioned in Art. 228 or in Part XII of UNCLOS.[6] 5

Art. 229 must be read together with other relevant provisions of UNCLOS regarding the exercise of civil jurisdiction or the execution of civil proceedings.[7] Art. 229 expressly safeguards that the provisions of UNCLOS do not affect the institution of civil proceedings, though such proceedings under Art. 229 must regard claims for loss or damage resulting from pollution of the marine environment as defined in the Convention.[8] 6

The clarification in Art. 229 concerns proceedings with respect to the exercise of the powers of enforcement as provided in Part XII of the Convention, and not those established under the legal regimes which determine the rights of sovereignty and jurisdiction of coastal States in adjacent maritime areas. As such, any such civil proceedings must not result in the enlargement of the rights of coastal States with respect to the exercise of their civil jurisdiction in the respective adjacent maritime areas. 7

This article recognizes that in dealing with claims for loss or damage resulting from pollution of the marine environment, States may institute civil proceedings in addition to proceedings to impose criminal penalties as provided in Art. 228. 8

2. 'claim for loss or damage resulting from pollution of the marine environment'

States as well as natural persons or other entities are potential defendants under Art. 229 with respect to civil liability for pollution. This would be the case, for example, in civil proceedings against an owner of a ship for damages resulting from the introduction of substances through discharges into the marine environment.[9] 9

However, there are certain constraints to the success of claims, namely the lack of recourse available for civil proceedings under national jurisdiction, despite the obligation contained in Art. 235(2). Difficulties may also arise if the polluter is not a national of the State where the damage occurred or if the polluter has no assets in that jurisdiction. Another issue is in the 10

[3] In paragraph 2 of Art. 20, the coastal State could levy execution against or arrest the ships in respect of obligations or liabilities assumed or incurred by the ship itself in the course of for the purpose of its voyage through the waters of the coastal State.

[4] For further information, see *Barnes* on Art. 28.

[5] UNCLOS III, Memorandum by the President of the Conference on Document A/CONF.62/WP.10, UN Doc. A/CONF.62/WP.10/ADD.1 (1977), OR VIII, 65, 69 (Part III).

[6] UNCLOS III, Informal Composite Negotiating Text, UN Doc A/CONF.62/WP.10 (1977), OR VIII, 40 (Art. 230). Also see UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII, 115 (Art. 229).

[7] Arts. 28 (1), 45, 52 and 73 (1).

[8] Art. 1 (1)(4).

[9] Art. 218 (1) UNCLOS; Arts. 2 (3)(a), 4 (1) and 6 (4) International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto.

possibility of the concurrent liability of more than one person. This is the case, for example, with the responsibility of those on board a ship. In this respect, the 1992 Protocol to amend the International Convention on Civil Liability for Oil Pollution Damage includes the possibility of claims based on liability for oil pollution damage being made only against the owner of a ship, excluding, in accordance with Art. 3, the servants or agents of the owner or the members of the crew, amongst others, without prejudice of the owner's right of recourse against third parties.[10]

11 States themselves are liable for the non-fulfilment of their obligations regarding the protection and preservation of the marine environment under international law in accordance with Art. 235.[11] States are further liable for damage resulting from the exercise of the powers of enforcement included in Section 6 of Part XII, as laid out in Art. 232.

12 The aforementioned responsibility regimes are programmatic and require further development. Accordingly, and in conformity with Art. 304, the provisions included in the Convention on responsibility and liability for damage do not preclude the application and further improvement of existing rules.[12]

Article 230
Monetary penalties and the observance of recognized rights of the accused

1. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels beyond the territorial sea.

2. Monetary penalties only may be imposed with respect to violations of national laws and regulations or applicable international rules and standards for the prevention, reduction and control of pollution of the marine environment, committed by foreign vessels in the territorial sea, except in the case of a wilful and serious act of pollution in the territorial sea.

3. In the conduct of proceedings in respect of such violations committed by a foreign vessel which may result in the imposition of penalties, recognized rights of the accused shall be observed.

Bibliography: *J. Peter A. Bernhardt*, A Schematic Analysis of Vessel-Source Pollution: Perspective and Enforcement Regimes in the Law of the Sea Conference, VJIL 20 (1980), 265–311; *Erik J. Molenaar*, Coastal State Jurisdiction over Vessel-Source Pollution (1998)

Documents: IMO, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization: Study by the Secretariat of the International Maritime Organization, IMO Doc. LEG/MISC. 6 (2008)

Cases: Trail Smelter Arbitration Tribunal, *Trail Smelter Case* (US *v.* Canada), Award of 16 April 1938 and Award of 11 March 1941, RIAA III, 1905

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[10] Other regimes provide rules regarding the transport of substances. See International Convention on Civil Liability for Oil Pollution Damage, and the Protocol to amend the International Convention on Civil Liability for Oil Pollution Damage; Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material; International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea; International Convention on Civil Liability for Bunker Oil Pollution Damage.

[11] ICJ, *Gabčíkovo-Nagymaros Project* (Hungary *v.* Slovakia), Judgment of 25 September 1997, ICJ Reports (1997), 7, paras. 152, 170; PCIJ, *Case Concerning the Factory at Chorzów* (Germany *v.* Poland), Claim for Indemnity, Merits, Judgment of 13 September 1928, PCIJ Series A No. 17, 47.

[12] See generally *Tams/Devaney* on Art. 304 MN 3 and 8 *et seq.*

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I. Purpose and Function

The main purpose of Art. 230 in restricting the applicability of penalties to monetary ones is to limit interference with navigation beyond the territorial sea. However, in the territorial sea, this safeguard allows for one exception with respect to the cases of non-innocent passage (→ Art. 19). **1**

Art. 230 is the only provision of Section 7 of Part XII that makes a distinction between innocent (→ Art. 17) and non-innocent passage.[1] Indeed, it has been argued that this article indicates that the safeguards section applies only partially in cases of non-innocent passage, taking foremost into account the sovereignty of coastal States in their territorial sea (→ Art. 2).[2] As a result, punishment in the territorial sea would be limited to monetary penalties for passage that is not innocent. Similar to the pursuance of proceedings, the applicability of such penalties is, nonetheless, subject to States' discretion and domestic legislation. This is evident from the use of the expression 'may' instead of 'shall' in the first two paragraphs. **2**

II. Historical Background

The reference to monetary penalties is present in an early draft on port State enforcement, whereby only monetary penalties may be imposed by port States for violations committed by foreign vessels beyond their internal waters. This draft also stated that in the conduct of criminal proceedings in respect of violations committed by a foreign vessel, recognized rights of the accused shall be observed.[3] **3**

This provision was redrafted and the reference to the territorial sea replaced that to internal waters.[4] As a result, the enforcement of monetary penalties to natural persons onboard a foreign ship was restricted to violations committed beyond the territorial sea, while those carried out in the territorial sea could be subject to non-monetary penalties, though these are not defined in the Convention.[5] This draft also provided an exception in the **4**

[1] *Erik J. Molenaar* considers Art. 230 (2) as merely having a confirmatory nature, consistent with the presumption of unrestricted coastal State sovereignty in the territorial sea, which, consequently, makes the safeguards in Section 7 partially applicable in cases of non-innocent passage. See *Erik J. Molenaar*, Coastal State Jurisdiction over Vessel-Source Pollution (1998), 467.

[2] *Ibid.*; also see on monetary penalties, *J. Peter A. Bernhardt*, A Schematic Analysis of Vessel-Source Pollution: Perspective and Enforcement Regimes in the Law of the Sea Conference, VJIL 20 (1980), 265, 301.

[3] Third Committee UNCLOS III, Belgium *et al.*: Draft Articles on the Prevention, Reduction and Control of Marine Pollution, UN Doc. A/CONF.62/C.3/L.24 (1975), OR IV, 210. Also see UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975), OR IV, 171, 175 (Art. 28 (9)).

[4] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 179–180 (Art. 39 (1)): 'Only monetary penalties may be imposed with respect to violations committed by foreign vessels beyond the internal waters.'

[5] UNCLOS III, Reports of the Committees and Negotiating Groups on Negotiations at the Seventh Session Contained in a Single Document Both for the Purpose of Record and for the Convenience of Delegations, UN Doc. A/CONF.62/RCNG/1 (1978), OR X, 13. Also see UNCLOS III, Memorandum by the President of the Conference on Document A/CONF.62/WP.10, UN Doc. A/CONF.62/WP.10/ADD.1 (1977), OR VIII, 65, Part III. See *Molenaar* (note 1), 467.

case of wilful and serious acts of pollution in the territorial sea, as well as the safeguarding of the rights of the accused.[6]

5 Another version of Art. 230 (3) also expressly referred to criminal proceedings.[7] Eventually, these different references were incorporated into one single article[8] and the respective wording was edited.[9] The amendments made to Art. 228 may lead to the assumption that penalties do not reflect a compensation for damages incurred, which would instead fall under Art. 229 of the Convention.

III. Elements

1. 'Monetary penalties'

6 Beyond the territorial sea, only monetary penalties are applicable and do not constitute compensation for damage or loss suffered and are not, as such, related to the actual damage to the environment or to the State or an individual or group of individuals. These constitute a sanction for an illicit act in accordance with the relevant domestic legislation and proceedings and are applicable to those responsible.

2. 'violations of national laws and regulations or applicable international rules and standards'

7 Monetary penalties may be imposed for violations of national laws and regulations or applicable international rules and standards for the protection of the marine environment. As a result, despite coastal States' being allowed to pass national laws stricter than the international standards (→ Arts. 208 (3), 209 (2); 210 (6) *e contrario*), they are restricted to imposing monetary penalties.

3. 'committed by foreign vessels beyond the territorial sea'

8 As mentioned above,[10] the reference to the territorial sea replaced that to internal waters, and the exception of wilful and serious act of pollution was added in paragraph 2, resulting in an exception with respect to the cases of non-innocent passage.

9 However, the question may arise in those cases of States with opposite or adjacent coasts (→ Art. 15) where 'beyond the territorial sea' of one State, lays the territorial sea of a neighbouring State. It would seem that in these cases, the ship would always fall within the non-innocent passage-exception, being subject, respectively, to the applicable penalties by the relevant coastal State.

4. 'except in the case of a wilful and serious act of pollution in the territorial sea'

10 Art. 230 (2) allows the imposition of penalties, other than monetary penalties, in the case of a 'wilful and serious act of pollution' in the territorial sea.[11] This provision repeats a similar wording to that of Art. 19 (2)(h), which states that the passage of a foreign ship shall

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[6] *Ibid.*

[7] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 179 (Art. 39).

[8] UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII, 115 (Art. 230).

[9] UNCLOS III, Informal Composite Negotiating Text (Revision 2), UN Doc. A/CONF.62/WP.10/REV.2 (1980), OR VIII, and UNCLOS III, Draft Convention on the Law of the Sea (Informal Text), UN Doc. A/CONF.62/WP.10/REV.3 (1980), OR VIII.

[10] See *supra*, MN 4.

[11] *Molenaar* (note 1), 467.

be considered non-innocent if it engages in any act of wilful and serious pollution contrary to UNCLOS.[12] The Convention also uses the expressions 'wilfully or through culpable negligence'[13] and 'serious, persistent and wilful violations'[14] without clarifying their respective meanings.

The reference to serious harm, as opposed to one which is not serious, depends on assessment on a case-by-case basis. In this respect it has been established in international jurisprudence since the *Trail Smelter* case that: **11**

> 'under the principles of international law […] no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.'[15]

5. 'recognized rights of the accused shall be observed'

The reference 'recognized rights of the accused shall be observed' should be construed under the applicable international legal instruments, such as the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights.[16] **12**

Article 231
Notification to the flag State and other States concerned

States shall promptly notify the flag State and any other State concerned of any measures taken pursuant to section 6 against foreign vessels, and shall submit to the flag State all official reports concerning such measures. However, with respect to violations committed in the territorial sea, the foregoing obligations of the coastal State apply only to such measures as are taken in proceedings. The diplomatic agents or consular officers and where possible the maritime authority of the flag State, shall be immediately informed of any such measures taken pursuant to section 6 against foreign vessels.

Bibliography: *Philipp Wendel*, State Responsibility for Interferences with the Freedom of Navigation in Public International Law (2007)

Documents: Memorandum of Understanding on Port State Control in the Asia-Pacific Region (2013); Memorandum of Understanding on Port State Control in the Black Sea Region (2010); Memorandum of Understanding on Port State Control for the Indian Ocean Region (2013); Memorandum of Understanding on Port State Control in the Mediterranean Region (2006); Paris Memorandum of Understanding on Port State Control (2013); Riyadh Memorandum of Understanding on Port State Control (2004)

Cases: ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports (1996), 226

[12] For further information, see *Barnes* on Art. 19 MN 19–22.
[13] Art. 113.
[14] Annex III, Art. 18 (1)(a) Annex III UNCLOS.
[15] Trail Smelter Arbitration Tribunal, *Trail Smelter Case* (US *v.* Canada), Award of 16 April 1938 and Award of 11 March 1941, RIAA III, 1905, 1965.
[16] Preamble of the Charta of the United Nations; Arts. 6–11 Universal Declaration of Human Rights; Art. 14 International Covenant on Civil and Political Rights. Also see Art. 10 (1)(b) Protocol to amend the International Convention on Civil Liability for Oil Pollution Damage; Art. 7 (6) and 40 (1) International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea. See *Molenaar* (note 1), 465.

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I. Purpose and Function

1 Art. 231 includes two obligations of notification, which allow for one exception, and a further obligation with respect to the duty to provide information provided in the last sentence. The two main obligations are the prompt notification of flag States in relation to measures taken under Section 6 and other States concerned and the submission to the flag State of all official reports. This obligation enables flag States to become aware of measures being enforced against their ships, thus giving them the opportunity to demand the suspension of proceedings for violations committed beyond the territorial sea in conformity with Art. 228.

2 The exception inserted in the second sentence of Art. 231 safeguards that the obligations of coastal State concerning the prompt notification of flag States and other States concerned and the submission to the flag State of all official reports do not include those measures taken outside proceedings but within the exercise of the powers of enforcement of coastal States.

3 The duty to inform other States concerned is also a reflection of States' obligation to cooperate with respect to the protection and preservation of the marine environment and to establish an effective monitoring and compliance system of international rules and standards.[1] It also takes into account States' obligation to act with due regard, which is consistent with the general obligation of ensuring that activities within the jurisdiction and control of one State respect the environment of other States or of areas beyond their control.[2]

II. Historical Background

4 A proposal on Art. 231 that was drafted together with provisions on coastal States' right to require information laid out that such information included the name and port of registry of the ship, its last and next ports of call, and any other information in accordance with international regulations that would be relevant to establish whether the suspected violation had been committed.[3] The provisional wording of Art. 231 provided that coastal States should promptly notify the flag State of the alleged violation and of the information which that State had obtained. It further stated that the coastal State could give the information to

[1] Arts. 192, 197, 198, 211 (7), 217 (5), (7) and 218 (3). Also see Sect. 1.4 Paris Memorandum of Understanding on Port State Control (2013), as amended, available at: https://www.parismou.org/system/files/Paris%20MoU%2-C%20incl%2036th%20amendment%20%28final%29.pdf.

[2] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports (1996), 226, 242 (para. 29).

[3] Third Committee UNCLOS III, Belgium *et al.*: Draft Articles on the Prevention, Reduction and Control of Marine Pollution, UN Doc. A/CONF.62/C.3/L.24 (1975), OR IV, 210, 211 (Art. 3 (20)).

the next port of call of the ships concerned.[4] An early version of this provision also only included the current first and third sentences.[5] The second sentence was added later.[6]

III. Elements

1. 'violations committed in the territorial sea'

The obligation on coastal States to inform flag States is restricted to the measures included in Section 6 of Part XII. While prompt notification refers to any measures taken by port and coastal States, which should include the submission of 'all official reports', the prompt notification by coastal States only applies to measures taken in proceedings with respect to violations committed in the territorial sea. The purpose of this exception inserted in Art. 231 is to safeguard enforcement measures carried out in the territorial sea from the obligation to notify. Such measures include, for example, the physical inspection of vessels in accordance with Art. 220. In this manner, the Convention seeks to maintain the balance between flag State pre-emption and the exercise of the powers of enforcement by port and coastal States (→ Art. 217 (1); Art. 228 (1),(3)), while also ensuring compatibility with the legal regime applicable to innocent passage (→ Arts. 17–19).[7] It remains, however, that the institution of such proceedings is subject to the relevant States' discretion. 5

2. Prompt Notification

The obligations to inform the flag State included in Art. 231 with respect to the measures applicable pursuant to its Section 6 of Part XII, namely the exercise of the powers of enforcement of port and coastal States (→ Arts. 218, 220), are consistent with similar obligations included in other provisions of the Convention,[8] as well as relevant international legal instruments.[9] 6

The duty of prompt notification included in Art. 231 is considered with respect to port States' exercise of enforcement powers regarding proceedings for violations committed in the internal waters, territorial sea or EEZ of a coastal State by a foreign vessel that is voluntarily within its port. In this case, Art. 218 (4) requires that evidence and records, including any bond or financial security, shall be transmitted by the port State to the coastal State, precluding the continuation of proceedings by the port State. Furthermore, this provision clearly differentiates that the said transmission is not dependent on the request of the relevant coastal State. 7

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[4] *Ibid.*, Art. 3 (13)(b) and (22).

[5] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 180 (Article 40). The third sentence reads: 'The consular or diplomatic representatives, and where possible the maritime authority of the flag State, shall be immediately informed of any such measures.' This amendment followed Art. 34 of the Informal Single Negotiating Text, see UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975), OR IV, 171, 176.

[6] UNCLOS III, Informal Composite Negotiating Text, UN Doc A/CONF.62/WP.10 (1977), OR VIII, 40 (Art. 232).

[7] Third Committee UNCLOS, 31st Meeting, UN Doc. A/CONF.62/C.3/SR.31 (1976), OR VI, 100, 104 (para. 57).

[8] Arts. 27 (3), 28, 73 (4) and 94 (1).

[9] *Cf.* Arts. 4 (2)(b), 5 (3) and 6 (1) International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto (MARPOL 73/78); Sect. 3.7 Paris MoU (note 1); Sect. 3.7 Memorandum of Understanding on Port State Control for the Indian Ocean Region (2013), available at: http://www.iomou.org/moumain.htm; Sect. 3.7 Memorandum of Understanding on Port State Control in the Black Sea Region (2010), available at: http://www.bsmou.org/2009/11/memorandum-text; Sect. 3.7 Memorandum of Understanding on Port State Control in the Mediterranean Region (2006), available at: http://www.med-mou.org/; Sect. 3.6 Memorandum of Understanding on Port State Control in the Asia-Pacific Region (2013), available at: http://www.tokyo-mou.org/doc/memorand.pdf.; Sect. 3.16 Riyadh Memorandum of Understanding on Port State Control (2004), available at: http://www.riyadhmou.org/aboutmoutext.html; Art. 19 (6) EC Directive 2009/16/EC of 28 May 2009, OJ 2009 L 131, 57–100.

3. 'State concerned'

8 An early draft of Art. 231 merely referred that only flag States should be informed when a coastal State has exercised its enforcement powers, and that the coastal State could give this information to the next port of call.[10] The reference to 'States concerned' aims to include those States which have a certain link to individuals on board a given ship threatened with prosecution.

4. 'Official reports'

9 As outlined above, in early draft articles on port State enforcement reference was made to the submission of 'all relevant information with respect to the matter'[11] to the flag State. There is no definition of 'official reports' as referred to in Art. 231. The purpose of such reports is to allow the flag State to be informed, in reasonable detail, of the measures taken against a ship flying its flag. The reference to 'official' can be understood as being the account of the circumstances issued by the relevant authority of the enforcing State.

5. 'diplomatic agents or consular officers'

10 Similar to other international legal provisions, Art. 231 requires the notification of the relevant diplomatic agents or consular officers of any measures taken against foreign vessels pursuant to Section 6 of Part XII.[12] This sentence was included in a draft presented by the Federal Republic of Germany on enforcement regulations concerning the protection of the marine environment against vessel-source pollution.[13]

11 UNCLOS does not clarify either phrase, though definitions are included in Art. 1 (e) of the 1961 Vienna Convention on Diplomatic Relations and in Art. 1 (d) of the 1963 Vienna Convention on Consular Relations. Moreover, the assumption that States have established diplomatic or consular relations forgoes the possibility that States might have failed to do so, though possibility is envisaged in respect of the regime applicable to marine scientific research (→ Art. 246 (4)).[14]

12 In the absence of diplomatic or consular ties, States are not exempt from carrying out the obligation laid out in Art. 231 as a result of their general obligation of fulfilling international agreements, as provided in Art. 26 Vienna Convention on the Law of Treaties. The same is applicable in the event that it is not possible to notify the relevant maritime authorities.

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[10] Belgium *et al.*: Draft Articles (note 3), 211 (Art. 3 (22)).

[11] *Ibid.*, Art. 3 (13)(b).

[12] Art. 27 (1)(c), (3). Also see Art. 8 Statute annexed to the Convention of the International Régime of Maritime Ports, 9 December 1923, LNTS 58, 287; Art. 10 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers.

[13] Third Committee UNCLOS III, Federal Republic of Germany: Draft Articles on Enforcement of Regulations Concerning the Protection of the Marine Environment Against Vessel-Source Pollution, UN Doc. A/CONF.62/C.3/L.7 (1974), OR III, 250, 251 (Article 5 (3)): 'If a State, pursuant to Art. 3, denies a foreign ship entry to its ports or offshore terminals or passage through its territorial sea, or takes any action against such ship on account of a violation of discharge regulations, the State shall immediately inform the consul or diplomatic representative of the flag State'.

[14] For further information, see *Huh/Nishimoto* on Art. 246.

Article 232
Liability of States arising from enforcement measures

States shall be liable for damage or loss attributable to them arising from measures taken pursuant to section 6 when such measures are unlawful or exceed those reasonably required in the light of available information. States shall provide for recourse in their courts for actions in respect of such damage or loss.

Bibliography: *James Crawford*, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (2005); Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991); *Tullio Treves*, The Proceedings Concerning Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea, IJMCL 11 (1996), 179–200; *Philipp Wendel*, State Responsibility for the Interferences with the Freedom of Navigation in Public International Law (2007)

Documents: ABUJA MoU: Memorandum of Understanding on Port State Control for West and Central African Region (1999); Memorandum of Understanding on Port State Control in the Asia-Pacific Region (2013); Paris Memorandum of Understanding on Port State Control (2013)

Cases: ICJ, *Gabčíkovo-Nagymaros Project* (Hungary *v.* Slovakia), Judgment of 25 September 1997, ICJ Reports (1997), 7; ITLOS, *The M/V 'SAIGA' (No. 2) Case* (Saint Vincent and the Grenadines *v.* Guinea), Judgment of 1 July 1999, ITLOS Reports (1999), 10

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I. Purpose and Function

Art. 232 establishes that States or international organizations[1] may incur in liability for damages caused as a result of the exercise of the powers of enforcement established in Section 6 of Part XII of the Convention. **1**

The distinction with respect to the regime provided in Arts. 229 and 235 is that, while these provisions safeguard, respectively, the right to institute proceedings for loss or damage resulting from pollution of the marine environment, and from the fulfilment of international obligations concerning the protection and preservation of the marine environment; Art. 232 establishes the liability of States arising specifically from the exercise of the respective powers of enforcement. With respect to the liability regime laid out in Arts. 235 and 304, it has been noted that the inclusion of Art. 232 as a separate provision might in fact result in duplication.[2] **2**

II. Historical Background

The wording of this provision can be traced back to the draft articles dealing with port and coastal State enforcement.[3] It provided that every State should take legislative measures to **3**

[1] See *infra*, MN 6.

[2] Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991), 381.

[3] Third Committee UNCLOS III, Belgium *et al.*: Draft Articles on Prevention, Reduction and Control of Marine Pollution UN Doc. A/CONF.62/C.3/L.24 (1975), OR IV, 210.

ensure that there would be recourse under their legal systems against persons subject to their jurisdiction for pollution of the marine environment. It further laid out that States undertook to develop international law on liability and compensation or other relief in respect of such damage.[4]

4 These draft articles also mentioned that a State would be required to pay compensation for damage or loss resulting from inspection or enforcement measures that exceeded those 'reasonably necessary in the light of available information and shall provide for recourse in its courts for actions in respect of such damage or loss.'[5]

5 The drafting of Art. 232 was particularly influenced by Art. VI International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties[6] with respect to the issue of proportionality,[7] whereby only an act in breach of this provision would entail responsibility.[8] This influence is noticeable in the last part of the first sentence of Art. 232: 'or exceed those reasonably required in the light of available information.'

III. Elements

1. 'liable for damage or loss'

6 Liable, damage or loss are terms used in UNCLOS that must be understood in the context of State responsibility under general international.[9] It is argued that since Art. 232 was drafted before Art. 305, claims under Art. 232 may be brought against States and also organizations.[10]

7 Such claims could be based, *inter alia*, on the undue delay of a vessel and consequential loss of profits, repercussions on value of the ship and cargo, detention and mistreatment of crew, the use of excessive force, or on the violation of the rights of the flag State in respect of ships flying its flag.[11]

2. 'measures are unlawful or exceed those reasonably required'

8 The reference to unlawful or exceeding measures, which is also adopted in the UN Fish Stocks Agreement (UNFSA),[12] should be viewed as referring to States' conduct that is not in conformity with international law.

9 Exceeding measures would be those, which, while not being unlawful, do not fulfil a criterion of reasonability and which may very well constitute an abuse of right (→ Art. 300).

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[4] *Ibid.*, Article 5 (1).

[5] *Ibid.*, Article 6 (3).

[6] Art. VI International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties reads: 'Any Party which has taken measures in contravention of the provisions of the present Convention causing damage to others, shall be obliged to pay compensation to the extent of the damage caused by measures which exceed those reasonably necessary to achieve the end mentioned in Article I.'

[7] See *Philipp Wendel*, State Responsibility for the Interferences with the Freedom of Navigation in Public International Law (2007), 118–120, 220–203.

[8] A proposal of the U.S.S.R. on measures to be taken in cases of serious danger of pollution, read: '2. Measures taken by the coastal State […] shall be proportionate to the actual or threaten damage. The coastal State shall be obliged to pay compensation for the damage caused by measures exceeding those reasonably necessary to achieve the purpose mentioned in paragraph 1', see Third Committee UNCLOS III, Union of Soviet Socialist Republics: Additional Draft Articles on Prevention of Pollution of the Marine Environment, UN Doc. A/CONF.62/C.3/L.25 (1982), OR IV, 212.

[9] *Wendel* (note 7), 170–203; *James Crawford*, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (2005), 204–206.

[10] Art. 305 (1)(f) refers to Annex IX UNCLOS, which provide in Art. 6 (1) that: 'Parties which have competence under article 5 of this Annex shall have responsibility for failure to comply with obligations or for any other violation of this Convention', see UNCLOS III, Report of the President on the Question of Participation in the Convention, UN Doc. A/CONF.62/L.86 (1982), OR XVI, 197.

[11] ITLOS, *The M/V 'SAIGA' (No. 2) Case* (Saint Vincent and the Grenadines *v.* Guinea), Judgment of 1 July 1999, ITLOS Reports (1999), 10, paras. 155–156, 159–172, 176.

[12] Art. 21 (18) UNFSA; See *Wendel* (note 7), 120.

This would be the case, for example, where a ship was unduly delayed[13] or imposing of unattainable compliance standards were imposed.[14]

In the event that a State should be compelled to adopt measures that surpass the powers of enforcement in order to avoid a grave or imminent peril to its essential interests, in order to claim the necessity of such intervention, the relevant State would have to demonstrate, that such measures constituted the only means of safeguarding the aforementioned essential interest against the grave or imminent peril.[15] That State would also have to demonstrate that it did not seriously impair an essential interest of the State towards which the obligation existed.[16] 10

However, while other provisions of UNCLOS may require a straightforward substantiation of the damage incurred in order for a ship to claim compensation (→ Arts. 110 (3), 111 (8), 106), Art. 232 demands the demonstration of the unlawfulness of these measures or their excessiveness, thus underlying the relevance of the specificities of each case. 11

3. 'States shall provide for recourse'

Similar to Art. 235 (2), Art. 232 provides that States shall adopt the necessary measures in their national legal orders to allow that any entity, without distinction, may claim for compensation before the jurisdiction of the relevant State. On the international plain, however, despite certain international jurisdictional bodies not excluding recourse by private entities,[17] UNCLOS does not envisage this possibility. 12

National courts remain the competent forum for entities other than States to claim compensation. This is the case, for example, where a ship is unlawfully detained by a State, whereby the ship-owner intending to seek compensation against the detaining State must do so through the relevant national courts.[18] 13

Article 233
Safeguards with respect to straits used for international navigation

Nothing in sections 5, 6 and 7 affects the legal regime of straits used for international navigation. However, if a foreign ship other than those referred to in section 10 has committed a violation of the laws and regulations referred to in article 42, paragraph 1(a) and (b), causing or threatening major damage to the marine environment of the straits, the States bordering the straits may take appropriate enforcement measures and if so shall respect *mutatis mutandis* the provisions of this section.

Bibliography: *Bing Bing Jia*, The Regime of Straits in International Law (1998); *Ana G. López Martín*, International Straits: Concept, Classification and Rules of Passage (2010); *Satya N. Nandan/David H. Anderson*, Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the

[13] Art. 226 (1); Art. 7 (b) International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto; Sect. 3.13 Paris Memorandum of Understanding on Port State Control (2013), as amended, available at: https://www.parismou.org/system/files/Paris%20MoU%2C%20incl%2036th%20amendment%20%28final%29.pdf; Sect. 3.10 ABUJA MoU: Memorandum of Understanding on Port State Control for West and Central African Region (1999), available at: http://www.abujamou.org/post/90.pdf; Art. 10 (4) International Convention on Standards of Training, Certification and Watchkeeping for Seafarers.

[14] For example, see Sect. 3.6 Memorandum of Understanding on Port State Control in the Asia-Pacific Region (2013), available at: http://www.tokyo-mou.org/doc/memorand.pdf.

[15] *Crawford* (note 9), 178–186.

[16] ICJ, *Gabčíkovo-Nagymaros Project* (Hungary *v.* Slovakia), Judgment of 25 September 1997, ICJ Reports (1997), 7, paras. 51, 52; ITLOS, *The M/V 'SAIGA' (No. 2)* (note 11), 10, para. 133.

[17] E. g. Art. 20 (2).

[18] *The M/V 'SAIGA' (No. 2) Case* (note 11), Separate Opinion of Vice-President Wolfrum, paras. 50 to 53; *Tullio Treves*, The Proceedings Concerning Prompt Release of Vessels and Crews before the International Tribunal for the Law of the Sea, IJMCL 11 (1996), 179–200.

Law of the Sea 1982, BYIL 60 (1989), 159–204; *Jon M. Van Dyke*, Transit Passage Through International Straits, in: Aldo Chircop/Ted L. McDorman/Susan J. Rolston (eds), The Future of Ocean Regime-Building: Essays in Tribute to Douglas M. Johnston (2009), 177–232

Cases: ICJ, *Corfu Channel Case* (United Kingdom *v.* Albania), Merits, Judgment of 9 April 1949, ICJ Reports (1949), 4

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I. Purpose and Function

1 Art. 233 safeguards the right of transit passage in straits used for international navigation, while recognizing that, given certain limitations, bordering coastal States may exercise their enforcement powers with respect to the laws and regulations relating to transit passage, namely on the safety of navigation and the regulation of maritime traffic, as well as the prevention, reduction and control of pollution (→ Art. 42 (1)(a),(b)).

2 This provision reconciles the right of transit passage in straits used for international navigation, pursuant to Part III of the Convention, and the interests of coastal States regarding the protection and preservation of the marine environment under Part XII.[1]

3 The protection and preservation of the marine environment in these straits should also be of concern for all States considering the inevitable consequences that marine pollution may have regarding navigation in straits used for international navigation and the importance of safeguarding passage therein.

II. Historical Background

4 The legal regime of straits used for international navigation is the result of the compromise reached with bordering coastal States during the drafting of UNCLOS. The extension of the territorial sea up to 12 NM resulted in including areas that were previously part of the high seas where all States enjoyed the freedom of navigation (→ Art. 87). The result was the protection of the right of transit passage in straits between part of the high seas or an exclusive economic zone (EEZ) and another part of the high seas or an EEZ, while allowing coastal States to adopt laws and regulations relating to said passage.[2]

5 The Convention, similar to Art. 16 (4) Convention on the Territorial Sea and Contiguous Zone, recognizes the right of innocent passage (which cannot be suspended) in straits not included in the previously mentioned straits, or those between a part of the high seas or an EEZ and the territorial sea of a third State (→ Art. 45).[3]

[1] On straits used for international navigation, see *Bing Bing Jia*, The Regime of Straits in International Law (1998), 129–167. Also see *Ana G. López Martín*, International Straits: Concept, Classification and Rules of Passage (2010); *Jon M. Van Dyke*, Transit Passage Through International Straits, in: Aldo Chircop/Ted L. McDorman/Susan J. Rolston (eds), The Future of Ocean Regime-Building: Essays in Tribute to Douglas M. Johnston (2009), 177–232; *Satya N. Nandan/David H. Anderson*, Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982, BYIL 60 (1989), 159–204.

[2] Arts. 38 and 42; See Second Committee UNCLOS III, United Kingdom: Draft Articles on the Territorial Sea and Straits, UN Doc. A/CONF.62/C.2/L.3 (1977); also, see UNCLOS III, Informal Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152, 157–159 (Articles 34–44).

[3] In this respect, the judgment of the ICJ in the 1949 *Corfu Channel Case* recognized that in 'time of peace' coastal States may not prohibit passage through straits used for international navigation between two parts of the

The initial wording of Art. 233 only mentioned that the legal regime of straits used for international navigation could not be affected by the exercise of the powers of enforcement.[4] This meant that coastal States could not interfere with the right of transit of foreign vessels. **6**

The second sentence of this provision was added following a proposal made by Malaysia which recognized the need to promote the safety of navigation and to protect and preserve the marine environment in the straits of Malacca and Singapore.[5] Thus allowing coastal States to exercise powers of enforcement when a violation is committed by a foreign vessel of its laws and regulations as mentioned in Art. 42 (1)(a) and (b), with the exception of ships referred in Art. 236,[6] and only if such violation causes or threatens to cause a major damage to the marine environment. **7**

The limitation to the safeguard introduced by the second sentence of Art. 233 of UNCLOS did not address issues of navigation, underlining that there can be no suspension of passage through straits.[7] **8**

III. Elements

1. 'Nothing […] affects the legal regime of straits'

The limitations introduced with the second sentence of Art. 233 resulted in coastal States being able to exercise their enforcement powers in accordance with Part XII and within the terms set out in this provision. The provision ensures that Sections 5, 6 and 7 of Part XII are applicable as long as they do not hinder, impair or suspend the right of transit passage.[8] **9**

2. 'foreign ship other than those referred to in section 10'

Art. 233 excludes the applicability of the limitations to the safeguards of the right of transit passage to vessels with sovereign immunity (→ Art. 236).[9] The wording of this provision may **10**

high seas, provided the passage is innocent, see ICJ, *Corfu Channel Case* (United Kingdom *v.* Albania), Merits, Judgment of 9 April 1949, ICJ Reports (1949), 4, 28.

[4] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975), OR IV, 171, 176 (Art. 39); and UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 180 (Article 42): 'Nothing in Sections 6, 7 and 8 of this Chapter of the Convention shall affect the legal régime of straits used for international navigation.' Also, see UNCLOS III, Reports of the Committees and Negotiating Groups on Negotiations at the Seventh Session Contained in a Single Document both for the Purposes of Record and for the Convenience of Delegations, UN Doc. A/CONF.62/RCNG.2 (1973–1982), OR X, 126, 185. The current wording of Art. 233 was included in UNCLOS III, Informal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), VIII. A proposal of the USSR on prohibition to discharge harmful substances from ships in straits, reads: 'The flag State shall ensure that no ship registered in its territory or flying its flag discharges in straits referred to in articles […] of this Convention, any harmful or toxic substances or mixtures containing such substances which such a ship has on board or is transporting, save when it is necessary to do so for the purpose of saving human life at sea', see Third Committee UNCLOS III, Union of Soviet Socialist Republics: Additional Draft Articles on Prevention of Pollution of the Marine Environment, UN Doc. A/CONF.62/C.3/L.25 (1982), OR IV, 212.

[5] UNCLOS III, Letter Dated 28 April from the Representative of Malaysia to the President of the Conference, UN Doc. A/CONF.62/L.145 (1982), OR XVI, 203. The letter was sent with reference to the straits of Malacca and Singapore and following consultations between Indonesia, Malaysia and Singapore and States that constituted the major users of these straits. Also see UNCLOS III, Memorandum by the President of the Conference on Document A/CONF.62/WP.10, UN Doc. A/CONF.62/WP.10/Add.1 (1977), OR VIII.

[6] Art. 42 (5).

[7] The proposal made by Malaysia expressly refers that 'Articles 42 and 233 do not affect the rights and obligations of States bordering the Straits [of Malacca and Singapore] regarding appropriate enforcement measures with respect to vessels in the Straits not in transit passage.', see Letter from the Representative of Malaysia (note 5); also, see United Kingdom Draft Articles (note 2) and Second Committee UNCLOS III, Bulgaria *et al.*,: Draft Articles on Straits Used for International Navigation, UN Doc. A/CONF62/C.2/L.11 (1974), OR III, 189.

[8] Art. 42 (2); See *López Martín* (note 1), 172.

[9] The immunity regime applicable to warships and other ships used only on government non-commercial service is included in several provisions of the Convention (*cf.* Arts. 32, 95 and 96) as well as other relevant

be traced to a proposal on draft articles dealing with port and coastal State enforcement which excluded the applicability in relation to 'warships, naval auxiliary or other ship or aircraft owned or operated by any State and used, for the time being, only on governmental non-commercial service.' This proposal did, however, state that such provisions would be applicable 'so far as is reasonable and practicable.'[10]

3. 'causing or threatening major damage'

11 The reference to 'major damage', which is also referred to in Arts. 220 (6) and 228 (1), could be perceived as underlining the exception pursuant to this safeguard, in the sense that, a State bordering a strait used for international navigation should have due regard to the balance between the right of passage and the damage or potential damage to the marine environment caused by a vessel as a result of non-compliance with the laws and regulations of that State.

12 The use of the phrase 'causing or threatening major damage' does not provide much assistance regarding the assessment of what ought to be included in its ambit. Early proposals with respect to global and regional cooperation, for example, referred instead to 'cases in which the marine environment is in imminent danger of being damaged or has been damaged'.[11] The reference in Art. 233 of UNCLOS to 'causing or threatening major damage' is quite ambiguous. It leaves a significant degree of discretion regarding the adoption of enforcement measures based merely on the threat of damage, rather than on the occurrence of pollution.[12]

13 The exercise of powers of enforcement is also subject to coastal States discretion, leaving it in each case to question if the enforcement measures adopted were in fact appropriate and if the safeguards provided in Section 7 of Part XII were respected *mutatis mutandis*.

Section 8
Ice-covered areas

Article 234
Ice-covered areas

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine

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international legal instruments, such as in Art. 8 (1) 1958 Convention on the High Seas; Art. 22 (2) 1958 Convention on the Territorial Sea and the Contiguous Zone; Art. 3 (3) International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto; Reg. 3 (a)(i), Ch. 1 Annex International Convention for the Safety of Life at Sea 1974; Art. 3 (a) International Convention on Standards of Training, Certification and Watchkeeping for Seafarers; Art. 13 Statute annexed to the Convention of the International Régime of Maritime Ports, 9 December 1923, LNTS 58, 287; Art. 11 (1) Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources; Art. 3 (4) EC Directive 2009/16/EC of 28 May 2009, OJ 2009 L 131, 57–100; Art. 4 (3) Convention on the Protection of the Marine Environment of the Baltic Sea; Art. 4 (4) International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea.

[10] Third Committee UNCLOS III, Belgium *et al.*: Draft Articles on Prevention, Reduction and Control of Marine Pollution UN Doc. A/CONF.62/C.3/L.24 (1975), OR IV, 210.

[11] Third Committee UNCLOS III, Results of Consideration of Proposals and Amendments relating to the Reservation of Marine Environment, UN Doc. A/CONF.62/C.3/L.15 (1974), OR III, 200. Also, see Informal Single Negotiating Text (Part III) (note 2), 172 (Article 7).

[12] *Jia* (note 1), 162–163; *López Martín* (note 1), 173.

environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.

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I. Purpose and Function

Art. 234 allows coastal States to unilaterally adopt and enforce laws and regulations within the limits of the exclusive economic zone (EEZ) in ice-covered waters, in order to prevent, reduce and control marine pollution. Such laws and regulations may not be discriminatory in nature and must have due regard to navigation and the protection of the marine environment. Moreover, Art. 234 prescribes that such laws and regulations shall be based on the best available scientific evidence. The article thus applies exclusively to ice-covered areas where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. The general objective of the provision is to 'balance the interests of the coastal State in ice-covered areas within the limits of its exclusive economic zone with the general interests of international navigation.'[1] More generally, this balance of interests between coastal States exercising sovereign rights and jurisdiction, and the freedom of navigation is secured by means of Art. 297 (1) on compulsory dispute settlement.[2] Pursuant to Art. 236, State-owned vessels used for non-commercial government services only, such as warships and naval auxiliary, are exempted from the scope of Art. 234. **1**

Art. 234 differs from any other provision in UNCLOS, both in relation to its wording and negotiating history. The article was introduced by Canada at UNCLOS III, in an effort to seek legal justification for its Arctic Waters Pollution Prevention Act (AWPPA).[3] This municipal piece of legislation was enacted as part of a package in reaction to the Manhattan crisis (1969–1970), when four American oil companies tested the feasibility of oil transport by ship through the Northwest Passage.[4] The purpose of Art. 234 is to grant the coastal State the power to adopt and enforce stricter rules and standards to create a greater level of protection for the exceptionally vulnerable marine environment in ice-covered waters. The article is the only provision in Section 8 'Ice-covered waters', under Part XII 'Protection and preservation of the marine environment' and coincides with the aim of Art. 194 (5) to 'protect and preserve rare or fragile ecosystems.' **2**

The rights and jurisdiction of a coastal State to establish and enforce international rules and standards to prevent, reduce and control vessel-source pollution within its own maritime zones are to be found in Section 5 (Art. 211) and Section 6 (Art. 220) of Part XII. As Art. 234 was placed in a section of its own, it does not fall directly under the scope of these provisions.[5] At first sight, Art. 234 appears similar to Art. 211 (6). Both provisions allow the coastal State to enact more stringent rules and standards to protect and preserve its marine environment. This can be explained by their closely interwoven negotiating history, as both articles ultimately emerged from the same proposal set out by Canada and other coastal States. However, Art. 234 must be understood as a compromise between the diverging views of Canada, the Soviet Union and the United States and as a result, two different concepts **3**

[1] Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea, 1982: A Commentary, vol. 4 (1991), 392, 393.

[2] *Ibid*.

[3] Canada, Act to Prevent Pollution of Areas of the Arctic Waters Adjacent to the Mainland and Islands of the Canadian Arctic, 26 June 1970, ILM 9 (1970), 543–552.

[4] About this episode and its legal consequences, see: *Erik Franckx*, Maritime Claims in the Arctic: Canadian and Russian Perspectives (1993), 78–88.

[5] Art. 220 (8) explicitly extends the scope of the article to 'national laws and regulations adopted pursuant to article 211, paragraph 6' on special areas. However, no analogous reference is made to Art. 234.

were developed: one dealing with 'vulnerable areas,' now embodied in Art. 211 (6) and the other dealing with 'ice-covered areas' established under Art. 234. Whereas the latter grants the coastal State a unilateral right, the former imposes a far more restrictive right, subject to prior approval by the International Maritime Organization (IMO). For that reason, Art. 234 should be understood as a *lex specialis* to Art. 211 (6).[6]

4 As it constitutes the only article under Section 8, questions also arise as to the relationship between Arts. 234 and 233 on safeguards with respect to straits used for international navigation. It should be remembered that both articles were, because of political circumstances, somewhat interlinked during the UNCLOS III negotiations. Art. 233 notes that '[n]othing in sections 5, 6 and 7 affects the legal regime of straits used for international navigation.' The omission of Section 8 from the scope of Art. 233 has given rise to opposite interpretations. Canadian scholars have concluded that the safeguards with respect to straits used for international navigation will not be applicable to the ice-covered areas of the Arctic,[7] whereas American scholars, basing themselves on a careful analysis of the content, the negotiating history, as well as the particular placement of Art. 234 in the framework of Part XII, reach the conclusion that this article does apply to international straits.[8] This lends credence to the argument that the omission of Section 8 in Art. 233 is the result of the political relations between Canada and the United States during the UNCLOS III negotiations, as both countries successfully avoided addressing the issue at that time.[9]

5 Notwithstanding that the Southern Ocean also reasonably meets the criteria of an 'ice-covered area,' the drafting history indicates that Art. 234 was clearly developed with the Northern Hemisphere in mind and is therefore often referred to as the 'Arctic Article' of UNCLOS.[10] When Canada amended its AWPPA in 2009 to extend its scope from 100 to 200 NM, it officially expressed the view that Art. 234 constitutes a validation of the AWPPA in its original as well as amended version.[11] Today it is argued that Canada and the Russian Federation have both established rules for navigation exceeding the generally accepted international rules and standards in their respective Arctic EEZs on the basis of this provision.[12]

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[6] Nordquist/Rosenne/Yankov (note 1), 393. Even though there is nothing in UNCLOS prohibiting the coastal States from making use of Art. 211 (6) in an Arctic setting, it is highly unlikely that States will do so, as the necessity of the adopted rules and standards will be easier to justify by Arctic coastal States under Art. 234 than under the more general provision of Art. 211 (6). *Kristin Bartenstein*, The 'Arctic Exception' in the Law of the Sea Convention: A Contribution to Safer Navigation in the Northwest Passage?, ODIL, 42 (2011), 22, 33.

[7] According to Pharand, for instance, '[i]f it had been the intention to apply the legal regime of straits used for international navigation to those within ice-covered areas, a Section 8 entitled 'ice-covered areas' would have been added to the excluded sections specifically mentioned in article 233': *Donat Pharand*, The Arctic Waters and the Northwest Passage: A Final Revisit, ODIL, 38 (2007), 3, 47. In the same sense, see: *Armand de Mestral*, Article 234 of the United Nations Convention on the Law of the Sea: Its Origins and Its Future, in: Suzanne Lalonde/Ted L. McDorman (eds.), International Law and Politics of the Arctic Ocean: Essays in Honor of Donat Pharand (2015), 111, 121.

[8] *J. Ashley Roach/Robert W. Smith*, Excessive Maritime Claims (3rd edn. 2012), 319 footnote 119; *Bernard H. Oxman*, Observations on Vessel Release under the United Nations Convention on the Law of the Sea, IJMCL 11 (1996), 201, 204 (footnote 15). See also *infra*, note 64 and accompanying text.

[9] *Donald M. McRae*, The Negotiations of Article 234, in: Franklyn Griffiths (ed.), Politics of the Northwest Passage (1987), 98, 110. See also *Erik J. Molenaar*, Coastal State Jurisdiction over Vessel-Source Pollution (1998), 468, who considers this omission to be a 'drafting error'. This author bases himself on Oxman, who more subtly argues that 'political sensitivity of the issue was such that little if any attention was paid to technical drafting questions, including the question of ensuring precise textual harmonization with various other provisions': *Oxman* (note 8), 204 (footnote 15).

[10] Nordquist/Rosenne/Yankov (note 1), 393.

[11] Canada, Legislative Summary (LQ-629E), Bill C-3: An Act to Amend the Arctic Waters Pollution Prevention Act, *sub* C, 1, *in fine*, available at; http://www.parl.gc.ca/Content/LOP/LegislativeSummaries/40/2/c3-e.pdf.

[12] *Vladimir Golitsyn*, The Legal Regime of the Arctic, in: David Joseph Attard/Malgosia Fitzmaurice/Norman A. Martinez Gutiérrez (eds.), The IMLI Manual on International Maritime Law, vol. I – The Law of the Sea (2014), 462, 467. This submission can be substantiated by making reference to authoritative sources in this particular domain in Canada and the Soviet Union/Russian Federation, writing between the date of signature and entry into force of UNCLOS, i. e. a time period when both countries adapted their respective municipal legal

II. Historical Background

The provision on ice-covered areas originated from Canada. This country, in an effort to extend its coastal State jurisdiction, introduced a proposal on 'special measures' to the United Nations Seabed Committee and the Inter-Governmental Maritime Consultative Organization (IMCO, now IMO) and again during the negotiations at UNCLOS III. From the initial negotiations in the early 1970s to the adoption of Art. 234 at UNCLOS III, the proposal was continuously narrowed down in order to find a compromise between the interests of the coastal and shipping States. This Canadian initiative finally developed into two separate concepts, namely 'specially vulnerable areas' to address more general concerns and 'ice-covered areas' to take into account Arctic specificities. The latter was ultimately the result of a side deal directly negotiated between Canada, the Soviet Union and the United States. **6**

In an effort to protect the vulnerable marine environment, Canada decided to pursue a provision on extended coastal State jurisdiction as a way to seek international acceptance of, and legal justification for, its 1970 AWPPA.[13] Early attempts by Canada resulted in submissions to the Intergovernmental Working Group on Marine Pollution in preparation for the 1972 Stockholm Conference, the United Nations General Assembly's Seabed Committee and the 1973 IMCO Conference on Marine Pollution.[14] Although none of these early proposals were accepted, the Canadian effort nevertheless proved to be valuable. The proposed provision submitted to both the Seabed Committee and the preparatory IMCO Conference called for a right for the coastal State to take special measures to protect the environment, 'within the limits of its national jurisdiction, including environmental protection zones,' unrelated to 'internationally agreed measures,' in so far as these 'are necessary in the light of local geographical and ecological characteristics.'[15] It should not be surprising that this proposal was soon opposed by the shipping States. Nevertheless, negotiations followed and counter-arguments were provided by both the shipping and coastal States,[16] which showed that awareness for the need for special measures was established. A first consensus was reached, be it under more restrictive conditions and limited to discharge standards.[17] The power of the coastal State was to be limited to 'exceptionally vulnerable areas' and this conclusion would become the basis for the Canadian approach during the UNCLOS III negotiations.[18] **7**

The main challenge during the UNCLOS III negotiations was to find a balance between the rights of the coastal States to control their offshore areas on the one hand, and the right of the shipping States to freedom of navigation on the other. Key to this discussion was the **8**

provisions applicable to Arctic waters to the new law of the sea. Claiming that this new municipal legislation was based on Art. 234 in Canada, see: *Donat Pharand*, Canada's Arctic Waters in International Law (1988), 236–237; in Russia, see: *Anatoli L. Kolodkin/Marlen E. Volosov*, The Legal Regime of the Soviet Arctic: Major Issues, Marine Policy, 14 (1990), 158, 160–163.

[13] The AWPPA established both prescriptive and enforcement rights for Canada to regulate and prohibit all shipping and to prescribe construction, design, equipment and manning standards within a 100 NM zone. The AWPPA came into direct conflict with the right to freedom of navigation: *McRae* (note 9), 101.

[14] *John A. Beesley*, Arctic Pollution Prevention Act: Canada's Perspective, Syracuse Journal of International Law and Commerce 1 (1973), 226, 233.

[15] Sea-Bed Committee, Canada: Draft Articles for a Comprehensive Marine Pollution Convention, UN Doc. A/AC.138/SC.III/L.28 (1973), cited in: GAOR 26th Sess. Suppl. 21 (A/9021-I), 106.

[16] IMCO, Consideration of the Articles of the Draft International Convention for the Prevention of Pollution from Ships, 1973 – Possible Alternative Text of Article 8 MP/CONF/C.1/WP.36 (1973) (Greece, The Netherlands, Norway, Sweden and the United States); IMCO, Consideration of the Articles of the Draft International Convention for the Prevention of Pollution from Ships, 1973 – Proposed Alternative Text of Article 8, MP/CONF/C.1/WP.37 (1973), (Australia, Brazil, Canada, Ghana, Iceland, Indonesia, Iran, Ireland, New Zealand, Philippines, Spain, Uruguay and Trinidad and Tobago).

[17] *Donald M. McRae/D. J. Goundrey*, Environmental Jurisdiction in Arctic Waters: The Extent of Article 234, University of British Columbia Law Review 16 (1982), 197, 211–212.

[18] *McRae* (note 9), 104.

right of transit passage in straits used for international navigation.[19] Canada decided to re-launch its proposal for 'special measures' on the premise of 'exceptionally vulnerable areas.'[20] The draft article proposed by Canada and other coastal States allowed for the coastal State to adopt laws and regulations 'additional to or more stringent than the relevant internationally agreed rules and standards.' This right would include the setting of stricter construction and design standards provided these standards 'are rendered essential by exceptional hazards to navigation or the special vulnerability of the marine environment.'[21] As this draft went well beyond the consensus reached following the 1973 IMCO Conference, it was met by stiff resistance from the shipping States who considered such an elaborate unilateral right to be unacceptable. In response, the shipping States proposed an application to the competent international organization when:

> 'States which have reasonable grounds for believing that a particular area of the sea is an area where, for recognized technical reasons in relation to its oceanographical and ecological conditions, its utilization, and the particular character of its traffic, the adoption of special mandatory methods […] is required.'[22]

Canada however realized that this general drive for special areas within the EEZ, which had become linked after its inclusion in the Informal Single Negotiating Text (ISNT) to IMO approval,[23] a body not particularly inclined towards such measures as those included in the AWPPA,[24] would never be able to alleviate its Arctic concerns. The inclusion of a special paragraph on areas characterized by severe climatic conditions by the Chairman of the Third Committee in the ISNT, namely

> 'Nothing in this article shall be deemed to affect the establishment by the coastal state of appropriate non-discriminatory laws and regulations for the protection of the marine environment in areas within the economic zone, where particularly severe climatic conditions create obstruction or exceptional hazards to navigation, and where pollution of the marine environment, according to accepted scientific criteria, could cause major harm to or irreversible disturbance of the ecological balance'.[25]

was certainly a step in the right direction, but the further discussions of this clause at UNCLOS III once again triggered a reaction tying it to the rules and standards adopted by IMO.[26]

9 Canada therefore developed an alternative strategy aimed at trying to reach a deal with the immediately concerned Arctic States, namely the Soviet Union and the United States.[27] This proved ultimately to be successful. Indeed, even though these two superpowers had hitherto strictly avoided any discussion on the Arctic at UNCLOS III, 'a bizarre minuet of talks between two of the three states at a time began.'[28] These discussions were respectively led by

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[19] *Rob Huebert*, Article 234 and Marine Pollution Jurisdiction in the Arctic, in: Alex G. Oude Elferink/Donald R. Rothwell (eds.), The Law of the Sea and Polar Maritime Delimitation and Jurisdiction (2001), 249, 255.

[20] Even though the main concern for Canada was clearly to secure acceptance of its AWPPA, opting for this broader approach brought the needed support from other (non-Arctic) coastal States. *de Mestral* (note 7), 115–116; *McRae* (note 9), 105.

[21] Third Committee UNCLOS III, Canada *et al.*: Draft Articles on a Zonal Approach to the Preservation of the Marine Environment, UN Doc. A/CONF.62/C.3/L.6 (1974), OR III, 249, 250 (Art. 7 (3)(b)(ii)).

[22] Third Committee UNCLOS III, Belgium *et al.*: Draft Articles on the Prevention, Reduction and Control of Marine Pollution, UN Doc. A/CONF.62/C.3/L.24 (1975), OR IV, 210 (Art. 3 (2)).

[23] UNCLOS III, Informal Single Negotiating Text, Part III, UN Doc. A/CONF.62/WP.8/PART III (1975), OR IV, 171, 174 (Art. 20 (5)).

[24] Or as stated by *de Mestral* (note 7), 117, 'the culture of the institution was based strictly on the promotion of maritime shipowners interests and had been resolutely hostile to the kind of measures in the AWPPA.'

[25] ISNT Part III (note 23), Art. 20 (5).

[26] Nordquist/Rosenne/Yankov (note 1), 395.

[27] *de Mestral* (note 7), 116–120; *McRae* (note 9), 110.

[28] *Bernard H. Oxman*, From Cooperation to Conflict: The Soviet Union and the United States at the Third U.N. Conference on the Law of the Sea (Donald L. McKernan Lectures in Marine Affairs, 15 May 1984) (1985), 15. For a detailed account of this peculiar series of bilateral negotiations between Canada, the Soviet Union and the United States, based on declassified US materials, see: *James Kraska*, Governance of Ice-Covered Areas: Rule

John A. Beesley (Canada), Valentin A. Romanov (Soviet Union) and John N. Moore (United States). Especially the central role played by John N. Moore of the US delegation in these direct negotiations deserves to be highlighted.[29] After having obtained, not without difficulty, a negotiating mandate from his own government around three pillars, namely first allowing coastal States to unilaterally set construction and operation standards in ice-covered areas, second granting warships and ships solely used for government non-commercial activities sovereign immunity, and third subjecting the coastal State regulations so enacted to binding third-party dispute resolution, Moore recalls that, even though the original language he proposed on navigational rights was later weakened by his successor to 'due regard,' the essence of his proposal proved acceptable.[30] This finally resulted in a compromise text acceptable to all three delegations, after thorough consultations with their respective governments. This text was subsequently put before the Conference and inserted in the Revised Single Negotiating Text (RSNT) of 6 May 1976 in a section of its own, entitled 'Ice-covered areas.'[31]

Art. 43 RSNT was subsequently included as Art. 235 in the Informal Composite Negotiating Text (ICNT),[32] renumbered as Art. 234 in the second version,[33] but, apart from minor drafting modifications, the provision ultimately remained unchanged.[34] The 'Arctic Exception,' which had emerged as a side-deal during UNCLOS III, negotiated directly by Canada, the Soviet Union and the United States, was thus included without much further opposition and adopted, as Art. 234, in 1982.[35] **10**

III. Elements

1. Interpretational difficulties

Art. 234 has often been critiqued for its unclear and highly ambiguous wording and has been described as 'probably the most ambiguous, if not controversial' article of the entire UNCLOS.[36] Questions of interpretation involve the terms 'non-discrimination,' 'within the limits of the exclusive economic zone,' 'where,' 'due regard to navigation' and 'based on the best available scientific evidence.' Because the literal meaning of Art. 234 and the meanings attributed to it in light of its context or object and purpose all seem to lead to differing results, ordinary treaty interpretation, i. e. 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose,'[37] **11**

Construction in the Arctic Ocean, ODIL, 45 (2014), 260, 263–265. Between January 1975 and mid-April 1976 the deal was concluded as the result of a process in which the United States is described as having 'barely […] boarded the train as it left the station', *ibid.*, 264.

[29] As stressed by a member of the Canadian delegation: *de Mestral* (note 7), 119. This is also confirmed by recently declassified US materials, as mentioned by *Kraska* (note 28), 264–256.

[30] *John N. Moore*, The UNCLOS Negotiations on Ice-covered Areas, in: Myron H. Nordquist/Tomas H. Heidar (eds.), Changes in the Arctic Environment and the Law of the Sea (2010), 17, 21–22.

[31] UNCLOS III, Revised Single Negotiating Text, Part III, UN Doc. A/CONF.62/WP.8/REV.1/Part III (1976), OR V, 173, 180 (Art. 43).

[32] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 40–41 (Art. 235).

[33] UNCLOS III, Inofrmal Composite Negotiating Text (Revision 1), UN Doc. A/CONF.62/WP.10/REV.1 (1979), OR VIII, 1, 116 (Art. 234).

[34] UNCLOS III, Draft Convention on the Law of the Sea, UN Doc. A/CONF.62/L.78 (1981), OR XV, 172, 213 (Art. 234).

[35] Nordquist/Rosenne/Yankov (note 1), 396.

[36] *Cynthia Lamson*, Arctic Shipping, Marine Safety and Environmental Protection, Marine Policy 11 (1987), 3, 4. Or as described in a witty manner by the same author in a joint article with VanderZwaag: '[A] witch's brew, a caldron of legal uncertainty which could be stirred in favor of either the coastal or shipping state'. *Cynthia Lamson/David VanderZwaag*, Arctic Waters: Needs and Options for Canadian-American Cooperation, ODIL 18 (1987), 49, 81.

[37] Art. 31 Vienna Convention on the Law of Treaties (VCLT).

provides little clarification. Moreover, supplementary means of interpretation, i. e. relying on the *travaux préparatoires*,[38] seem to be equally challenging.[39] One should, however, always keep in mind that Art. 234 very much represents a compromise between the three States having directly negotiated this particular clause of UNCLOS.[40]

12 **a) '[T]o adopt and enforce laws and regulations'.** Art. 234 does not seem to make a distinction between the prescriptive and enforcement rights of the coastal States and simply states that '[c]oastal States have the right to adopt and enforce […].' As a general rule, embedded in Art. 211, prescriptive jurisdiction of the coastal State is optional and needs to conform and give effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference.[41] Following Art. 211 (6), the coastal State may adopt special measures within recognized vulnerable areas. However, this must be communicated to, and requires the prior approval of, IMO.[42] No similar provision is to be found in Art. 234, leading to the conclusion that the coastal State is free to adopt any measures it deems necessary to protect the environment, within the limitations prescribed in the article itself.[43]

13 It is not clear however whether these broader prescriptive rights also entail broader enforcement powers in such cases.[44] One could argue that the notion 'due regard' would imply 'a test of reasonableness' for the coastal State pursuant to Art. 220 (2), while it would not be subject to the limitations listed under Art. 220 (3), (5) and (6).[45] The only certainty of Art. 234, often referred to as its most distinctive feature, is the lack of any approval requirement via IMO.[46] Art. 234 thus establishes a truly unilateral right for the coastal State and gives considerable leeway to adopt rules and regulations for the protection of ice-covered areas, within the limits provided by the article itself.

14 **b) '[F]or the prevention, reduction and control of marine pollution from vessels in ice-covered areas'.** The phrasing 'where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstruction or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance,' seems to indicate that the nature of the measures at the disposal of the coastal State is twofold, expanding beyond mere environmental measures to also allow for safety measures.[47] The latter could allow for the coastal

[38] Art. 32 VCLT.

[39] As noted by Brubaker: 'It is difficult to know exactly what took place in the negotiations between the Soviet Union, the United States, and Canada over ice-covered areas' and '[t]he key phrases of the article were characterized by textual ambiguity in order to accommodate the transformation of the diverse positions.' *R. Douglas Brubaker*, The Russian Arctic Straits (2005), 44 and 45. Today, because of the declassification of certain diplomatic correspondence, new information at times becomes part of the public domain (see notes 28-29), but other than that only recollections of those directly involved (see for instance notes 30 and 64 and accompanying text) provide guidance in this respect. It should be acknowledged, however, that even such guidance is not always totally fault proof, as illustrated by the fact that the US delegation reported back after the first meeting with the Canadians that special measures for ice-covered areas would be submitted to IMCO for a non-binding review, something which apparently was not correct (*Kraska* (note 28), 264–256, calling it a case of pareidolia).

[40] Final Report of the International Law Association's Committee on Coastal State Jurisdiction Relating to Marine Pollution, as presented at the London Conference in 2000, reprinted in Erik Franckx (ed.), Vessel-source Pollution and Coastal State Jurisdiction: The Work of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution (1991–2000) (2001), 75, 100 (2000 ILA London Report).

[41] The concept of 'generally accepted international rules and standards' should be understood as international rules and standards 'primarily based on state practice, attaching only secondary importance to the nature and status of the instrument containing the respective rule or standard': *ibid.*, 107.

[42] This restriction recognizes the primacy of IMO in developing appropriate international standards for vessel safety and protection of the marine environment: *ibid.*, 106.

[43] *Molenaar* (note 9), 420.

[44] *Bartenstein* (note 6), 39.

[45] *Molenaar* (note 9), 421.

[46] *Bartenstein* (note 6), 37.

[47] Blanco-Bazán notes that 'the reference to 'obstructions or exceptional hazards to navigation' expands the purely environmental hazard to include safety issues.' *Agustiín Blanco-Bazán*, Specific Regulations for Shipping

State to adopt traffic regulation schemes, and might arguably go so far as to allow for the adoption of stricter construction, design, equipment or manning standards. This is remarkable as elsewhere in UNCLOS the coastal State's jurisdiction to prescribe such standards will either be limited to give effect to 'generally accepted international rules and standards' or simply not be allowed because it effectively hinders and impairs the freedom of navigation.[48]

15 Measures aimed at protecting the environment could range from setting acceptable discharge standards to potentially prohibiting navigation in certain exceptionally vulnerable areas. A total ban on navigation through ice-covered waters would not be possible as the notion of 'due regard to navigation' should be understood as allowing at least a certain degree of navigation in these waters. The enactment of such rules and regulations is however not unlimited as it is required that pollution would result in 'major harm' or 'irreversible disturbance of the ecological balance.' The burden of proof rests with the coastal State enacting such rules and regulations, but it has been argued that the mere potential of such major harm or irreversible disturbance would be justified on the basis of the particular sensitivity of and unpredictable circumstances within ice-covered areas.[49]

16 **c) '[N]on-discriminatory'.** The requirement of non-discrimination is a common feature in UNCLOS and concerns the rights of user States.[50] Art. 234 only prescribes that '[c]oastal States have the right to adopt and enforce non-discriminatory laws and regulations,' yet, the provision gives no clarification as to how this requirement needs to be understood, i. e. whether it prohibits discrimination among or against foreign vessels or both.[51] Brubaker distinguishes between those UNCLOS provisions that use 'among' in relation to non-discrimination, and those who use 'against.'[52] Arts. 24 (1)(b) and 227 prohibit discrimination in form or in fact against vessels of any (other) State, meaning all. In his view, Art. 234 should be understood as part of this cluster and be interpreted in a 'non discriminatory manner 'against' all vessels, the coastal State's flag vessels and vessels of any other State.'[53] This interpretation seems to be supported by the notion of 'due regard to navigation,' which intends to allow at least a certain degree of passage, and the environmental protection purpose of Art. 234.[54] Read in relation to Art. 227,[55] the coastal State must refrain from both direct and indirect discrimination. Considering the purpose and function of Art. 234, the latter may arguably be justified, provided the discrimination is rendered necessary for solely environmental reasons and irrelevant to the nationality of the vessels affected.[56]

17 **d) '[W]ithin the limits of the exclusive economic zone'.** The geographical application of Art. 234, more particularly what should be understood under 'within the limits of the exclusive economic zone,' has been subject to much debate. Does the provision, under the narrow interpretation, only apply to the ice-covered waters of the EEZ, or is the broader interpretation to be preferred and must it be understood to also include the territorial sea? The narrow or literal interpretation is the most convincing one.[57] UNCLOS clearly defines the inner and outer limit of the EEZ as an 'area beyond and adjacent to the territorial sea,'

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and Environmental Protection in the Arctic: The Work of the International Maritime Organization, IJMCL 24 (2009), 381, 383.

[48] *Bartenstein* (note 6), 38.

[49] *Ibid*., 39.

[50] Nordquist/Rosenne/Yankov (note 1), 396.

[51] *Bartenstein* (note 6), 40.

[52] Arts. 25 (3), 42 (2) and 52 (2) belong to the 'among' cluster, whereas Arts. 24 (1)(b) and 227 belong to the 'against' cluster. *Brubaker* (note 39), 55.

[53] *Ibid*., 56. See also Nordquist/Rosenne/Yankov (note 1), 396.

[54] Moreover, Art. 227 is believed to apply to Art. 234, rendering the non-discrimination reference in Art. 234 basically redundant: *Bartenstein* (note 6), 42.

[55] Art. 227 reads: 'In exercising their rights and performing their duties under this Part, States shall not discriminate in form or in fact against vessels of any other State'.

[56] *Bartenstein* (note 6), 41.

[57] *McRae/Goundrey* (note 17), 221.

not extending beyond 200 NM from the baseline.[58] As such, the geographical extent of Art. 234 must be understood as within 12 and 200 NM, measured from the baseline. Following this line of thought, the coastal State in ice-covered areas would not be able to exercise greater powers than what is acceptable in the territorial sea.[59] This interpretation is clearly favourable to the shipping States.

18 Those supporting the broader interpretation base themselves on the same premise that it would be unreasonable for the coastal State to have greater powers within the EEZ than it has within the territorial sea, yet argue that Art. 234 extends from the coastline of the coastal State to the outer limit of the EEZ. This approach is goal-oriented and favourable to the coastal States.[60] The limitation to areas 'within the limits of the exclusive economic zone' was, it is argued, deliberate. It indicates that the drafters considered the remaining provisions of UNCLOS, as a whole, to be adequate to protect the coastal State and refers to that part of the sea extending from the outer limit of the EEZ, to the coastal State's coastline.[61] Accordingly, the reasoning adopted by Pharand is that, because UNCLOS already grants greater powers to the coastal State within its territorial sea, it was the intention of the drafters to include this area.[62] As the drafters had the same logic in mind, there was no need to mention the territorial sea as it was considered to be implied.[63] Oxman notes in this respect that UNCLOS only contains two articles that apply not only to the EEZ, but to all waters landward of the outer limit of that zone, namely Arts. 66 (Anadromous stocks) and 234. He recalls in this respect that both were negotiated in essence between Canada, the Soviet Union and the United States and even though the provision on anadromous stocks was drafted more artfully, he affirms that both 'intended to embrace all waters landward of 200 miles, including the territorial sea, internal waters, and straits.'[64]

19 The broader interpretation is favourable from an environmental perspective, as this would not restrict the coastal State to the limitations in place for the territorial sea. This would allow the coastal State to adopt and enforce construction, design and equipment standards, irrelevant to the existence of a right of innocent passage. This would arguably be in line with the purpose of Art. 234 to establish greater powers for the coastal State to adequately protect the vulnerable Arctic environment and would effectively separate the provision from the remainder of Part XII and UNCLOS as a whole. However, taking into account that the circumstances of its conclusion can only constitute a supplementary means of interpretation, a special meaning may only be granted to the article if the intention of the negotiators is clearly established. In view of the uncertainty surrounding Art. 234, the latter can hardly be considered true.[65] In addition, the broader interpretation conflicts with Art. 55, which recognizes an inner limit of the EEZ and therefore expands the ordinary meaning of 'within the limits of the exclusive economic zone.'[66]

20 Finally, the issue can be raised whether the coastal State can at times also exercise Art. 234 powers beyond the external limit of the EEZ. This kind of argument has foremost been

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[58] Arts. 55 and 57.

[59] This interpretation obviously restricts the rights of the coastal States pursuant to Art. 234, as this would entail the existence of a right of innocent passage and would deny the coastal State the right to adopt stricter construction, design and equipment standards: *McRae/Goundrey* (note 17), 221.

[60] *Bartenstein* (note 6), 29.

[61] This interpretation would find support in Arts. 64, 66 and 67. Nordquist/Rosenne/Yankov (note 1), 397.

[62] *Pharand* (note 7), 47.

[63] *Lamson* (note 36), 80 (footnote 81).

[64] Intervention by Oxman at the panel on 'Legal Regimes of the Arctic' held on 22 April 1988 at the occasion of the 82nd annual meeting of the American Society of International Law, as reprinted in: ASIL Proceedings 40 (1988), 315, 333–334. This author had already argued two years earlier that the extended coastal State powers of Art. 234 applied not only to the EEZ, but to the territorial sea and straits as well: *Oxman* (note 28), 15.

[65] *Bartenstein* (note 4), 29.

[66] Or as stated by Boyle: 'This view has to overcome the objection of patent inconsistency with article 55, which defines the EEZ as the area "beyond and adjacent to" the territorial sea.' Contribution as speaker to a panel on 'Legal Regimes of the Arctic' held on 22 April 1988 at the occasion of the 82nd annual meeting of the American Society of International Law, as reprinted in ASIL Proceedings 40 (1988), 323, 328.

developed in Soviet[67] and Russian[68] circles. Based on the specific nature of the Northern Sea Route, as this country calls part of the Northeast Passage,[69] namely 'a national transport route' of which the exact sailing routes are not fixed but constantly change consonant with the prevailing ice conditions, these authors argued that at times the specific coastal State competence found in Art. 234 could be extended beyond the EEZ. This possibility seemed also to have been incorporated in municipal legislation of the early 1990s.[70] Under this principle, some Russian authors even included high latitude routes, reaching up to the North Pole, under this definition.[71] In 2012, however, the definition of the Northern Sea Route has found a more prominent place in the Merchant Shipping Code[72] and no longer seems to imply that at times it may extend beyond the EEZ.[73]

e) '[W]here'. According to McRae and Goundrey, the key to interpreting Art. 234 is the meaning of the word 'where.'[74] Under the broad interpretation, the use of the word 'where' should be understood as simply describing the area in which the coastal State can adopt and enforce stricter rules and standards. This conforms to the ordinary meaning of the word 'where' and is the more literal interpretation. At the same time, this would render the listed conditions redundant, as it would have sufficed for the drafters to simply refer to the area as being ice-covered for most of the year.[75] **21**

Under the narrow interpretation, the word 'where' would have a dual scope, both spatial and temporal. The language of Art. 234 would grant greater powers to the coastal State of ice-covered areas 'when' these conditions actually prevail. Although this is not the literal interpretation of 'where,' as Brubaker notes, 'when' represents a sound secondary interpretation.[76] Moreover, it can be argued that ascribing both a spatial and temporal meaning to the word 'where' would be true to the purpose and spirit of the provision.[77] **22**

The proposal introduced by Canada to the UNCLOS III negotiations allowed for the coastal State to adopt laws where 'rendered essential by exceptional hazards to navigation or the special vulnerability of the marine environment.'[78] However, the draft article included in **23**

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[67] *Kolodkin/Volosov* (note 12), 164–165.

[68] *Anatoli L. Kolodkin/Vasili N. Gutsuliak/Iulia V. Bobrova*, Mirovoi okean. Mezhdunarodno-pravovoi rezhim. Osnovnye problemy (The World Ocean. International Legal Regime. Basic Problems) (2007), 264.

[69] *Erik Franckx/Laura Boone*, The Northeast Passage and the Northern Sea Route: Unity in Division?, in: Sungjae Choo (ed.), The 18th International Seminar on Sea Names: Asian and European Perspectives (7–9 March 2012, Brussels, Belgium) (2012), 63–69. In the west, the Northern Sea Route does not include the Barents Sea as its western limit is formed by Novaia Zemlia and the meridian 68°35'E starting from the northern tip of that island at Capa Zhelanie, while the eastern boundary is formed by the meridian passing through Cape Dezhnev in the Bering Strait, namely 168°58'37", even though a tendency can be discerned in the Russia to also include the waters of the eastern Barents Sea and northern Bering Sea: *ibid.*, 65–66.

[70] Regulations for Navigation on the Seaways of the Northern Sea Route, 14 September 1990, Izveshcheniia Moreplavateliam (Notices to Mariners), No. 29 of 18 June 1991 (1990 Regulations), of which Art. 1 (2) defines the Northern Sea Route as 'the essential national transportational line of the USSR that is situated within its inland seas, territorial sea (territorial waters), or exclusive economic zone adjacent to the USSR Northern Coast *and includes seaways suitable for leading ships in ice*' (translation by one of the authors in *Franckx* (note 4), 315; our emphasis).

[71] *Nelia D. Koroleva/Vladimir Iu. Markov/Aleksandr P. Ushakov*, Pravovoi rezhim sudochodstva v Rossiiskoi Arktike (Legal Regime of Navigation in the Russian Arctic) (1995), 49 and 99 and maps on 50 and 100.

[72] Russian Federation, Federal Law 'On the Introduction of Changes to Certain Legislative Acts of the Russian Federation Related to the Governmental Regulations of Marchant Shipping in the Water Areas of the Northern Sea Route' (2012 Federal Law), 28 July 2012, Art. 5 (1)(1), available at: http://www.nsra.ru/en/zakon_o_smp/.

[73] As argued by one of the authors elsewhere, the problematical addition 'and includes seaways suitable for leading ships in ice', to be found in the 1990 Regulations (note 70), no longer appears in the present definition. *Erik Franckx*, The 'New' Arctic Passages and the 'Old' Law of the Sea, in: Henrik Ringbom (ed.), Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea (2015), 194, 211–212.

[74] *McRae/Goundrey* (note 17), 216.

[75] *Ibid.*, 217.

[76] *Brubaker* (note 39), 54.

[77] *Bartenstein* (note 6), 31.

[78] Canada *et al.*: Draft Articles (note 21), Art. 7.

the ISNT lacks the same explicit restriction.[79] The same wording was maintained for the ICNT and forms part of Art. 234.[80]

24 In comparison, the limitation embedded in Art. 211 (6), whose negotiating history is closely interwoven with Art. 234, is much more explicit because the coastal State may adopt special measures for areas 'where the adoption of special mandatory measures for the prevention of pollution from vessels is required for recognized technical reasons in relation to its oceanographical and ecological conditions.' As such, these conditions are not meant to define the area, but rather to establish the purpose for which rules and standards may be adopted.[81] The narrow interpretation of Art. 234 could then be confirmed by analogy.[82] It should, however, be remembered that it is not clear what took place during the negotiations and the intention of the drafters is therefore not well established. Moreover, the obvious limitation in Art. 211 (6) contrasts with the difference in wording of Art. 234, providing implicit support for the ordinary meaning of the provision under the broad interpretation.[83] Contrary to other vulnerable areas where these conditions need to be specified, it can be assumed that for ice-covered areas these conditions generally prevail.[84] It would be the general characteristics of the waters and their relation to both navigational hazards and the vulnerable ecological balance that should be kept in mind.[85]

25 The importance of the difference between the broad and narrow interpretation must be understood in light of their consequences. Adopting the broad interpretation would allow for the coastal State to adopt and enforce stricter measures within ice-covered areas, regardless of whether severe climatic conditions create obstructions or exceptional hazards to navigation or whether pollution that could cause major harm to or irreversible disturbance of the ecological balance are present at the time of enforcement. Although this interpretation provides considerable leeway to the coastal State, the requirement that the area must be ice-covered for most of the year avoids an all too liberal application of Art. 234. Under the narrow interpretation, the coastal State would be restricted to adopt and enforce stricter rules and standards for those instances where the listed conditions actually prevail. This would effectively create a 'twin-set regime' with two sets of regulations to be applied depending on the present conditions. As Art. 234 lacks a definition of 'ice covering such areas for most of the year' and local ice conditions vary from year to year, this would create an uncertain and unworkable situation.[86] These possible consequences again steer the favourable interpretation in the direction of the broader approach. As Brubaker notes, the latter seems to find acceptance within State practice.[87] It should finally be noted in this respect that both Canadian and Russian municipal legislation at present do distinguish between different zones according to ice conditions in order to differentiate between the kind of regulations applicable to ships.[88]

26 **f) '[D]ue regard to navigation'.** The notion of 'due regard to navigation' is one of the few explicit limits on the power granted to the coastal State by Art. 234, but it is unclear how exactly this limit is to be understood. Due regard is frequently used throughout UNCLOS,[89] though it is up to the States to determine what exactly constitutes due regard in concrete cases.[90] Once

[79] See *supra*, note 25 and accompanying text.
[80] *McRae/Goundrey* (note 17), 217; See also *supra*, note 34 and accompanying text.
[81] *McRae/Goundrey* (note 17), 218.
[82] *Bartenstein* (note 6), 30.
[83] *McRae/Goundrey* (note 17), 218.
[84] *Bartenstein* (note 6), 30.
[85] Nordquist/Rosenne/Yankov (note 1), 397.
[86] *Bartenstein* (note 6), 32.
[87] *Brubaker* (note 39), 55.
[88] As mentioned below with respect to Canada (*infra*, notes 114-115 and accompanying text) and the Russian Federation (*infra*, notes 139-140 and accompanying text).
[89] Arts. 27 (4), 56 (2), 58 (3), 60 (3), 66 (3)(a), 79 (5), 87 (2), 142 (1) and 267 all make use of 'due regard.'
[90] *Bartenstein* (note 6), 41.

more, this lack of clarity complicates the interpretation of Art. 234. At a minimum, the notion 'due regard' requires a certain degree of reasonableness and implies that the coastal State must allow some navigation.[91] The question that remains is: What are the established navigational rights, if any, that need to be acknowledged?[92]

27 Much will depend on the interpretation given to 'within the limits of the EEZ.' The most literal interpretation of the due regard clause, with Art. 234 clearly being applicable to the EEZ, would require the coastal State to have due regard to the normal rules of navigation, i. e. the freedom of navigation as limited by the provisions related to the EEZ. It may be apparent that this is not the preferred interpretation, as this would nullify the purpose of Art. 234, which is precisely to give the coastal State broader powers to protect the environment.[93] Nevertheless, due regard does impose some restrictions on the coastal State. In the assumption that the narrow interpretation of 'within the limits of the EEZ' is the correct one and following the premise that it is unlikely that the coastal State would be able to exercise greater power in its EEZ than what is accepted for the territorial sea, the limit of what can be considered reasonable would be defined in reference to the territorial sea. At a minimum, the regime of innocent passage will be applicable and the coastal State will not be able to impose requirements having the practical effect of denying or impairing the right of innocent passage, nor to discriminate against cargo-carrying ships.[94] Accordingly, the coastal State will not be able to impose stricter rules and standards concerning construction, design, manning or equipment.[95] This submission is contested by PHARAND, who argues that one of the elements of Art. 234 is that it allows for the coastal State to adopt and enforce measures of a preventive nature, therefore applicable to the design, construction, managing, and equipment of vessels.[96] To apply any of the existing UNCLOS navigation regimes would be contrary to the purpose of the provision.[97] Under this scenario, the broader interpretation of 'within the limits of the EEZ,' that is including the area of the territorial sea, would be preferred. Consequently, the applicable regime of navigation for ice-covered areas would, at least in some respects, be unrestricted by the right of innocent passage.

28 As noted by BRUBAKER, Art. 234 was clearly adopted to change coastal State rights due to the extreme climate conditions. The due regard clause in Art. 234 would therefore differ from the meaning of due regard to navigation normally to be taken into account. If the test of reasonableness may be based on the circumstances, Art. 234 would allow for a special regime.[98] A similar reasoning is adopted by BARTENSTEIN who considers the due regard clause as establishing a *sui generis* regime for navigation in ice-covered areas.[99] The adopted reasoning, supported by the wording of Art. 234, is that for ice-covered areas, due regard has to be paid to navigation as well as to the protection of the marine environment. Linking both navigational and environmental considerations would mean that the balance to be struck gives more weight to environmental considerations and accordingly differs from the balance established under existing navigation regimes.[100]

29 A third interpretation that has been suggested in legal writings links the notion not to 'within the limits of the EEZ,' but rather to the meaning of the word 'where.' The adopted argumentation is that whether or not the area of application is broadly or narrowly defined, the test of reasonableness under the due regard clause would vary according to the status and

[91] *McRae/Goundrey* (note 17), 221; 2000 ILA London Report (note 40), 104.
[92] *Bartenstein* (note 6), 41.
[93] This suggestion would go too far, as it would reintroduce the standards from which the provision intends to derogate. *McRae/Goundrey* (note 17), 221; *Bartenstein* (note 6), 42.
[94] Art. 24.
[95] Art. 21 (2).
[96] *Pharand* (note 7), 47.
[97] *Bartenstein* (note 6), 44.
[98] *Brubaker* (note 39), 57.
[99] *Bartenstein* (note 6), 45.
[100] *Ibid*., 45.

circumstances of the waters in question.[101] As a result, the requirement of due regard to navigation would only allow the coastal State to enact stricter rules and standards where and when necessary.[102]

30 If one focusses on outcomes, this last line of argumentation has much in common with the temporal interpretation of the word 'where' as 'when' because it will lead to the same uncertainty and practical difficulties in applying the provision. One author has suggested, when looking at the practice of Canada, the Russian Federation and the United States, that a special interpretation of the due regard clause, establishing a *sui generis* regime of navigation exceeding the restrictions within the territorial sea, is acceptable.[103]

31 **g) '[B]ased on the best available scientific evidence'.** In addition to the restriction imposed by the due regard clause, Art. 234 states that such laws and regulations shall be 'based on the best available scientific evidence' to protect and preserve the marine environment. This requirement is the final element of Art. 234 and obliges the coastal State to justify its actions, based on scientific studies suitable. Both the notions of 'due regard' and 'best available scientific evidence' can be submitted to compulsory dispute settlement[104] in order to safeguard the freedom of navigation against random or uninformed control exercised by the coastal State.[105] To appreciate what should be understood under 'based on the best available scientific evidence,' it is useful to compare Art. 234 with the wording of Art. 61 (2). Art. 234 refers to scientific evidence in general, whereas the latter only requires the coastal State to take 'into account the best available scientific evidence available to it.' Accordingly, the provision on ice-covered areas will require a higher degree of certainty and will necessitate a good understanding of the marine environment and the changing circumstances therein for the coastal State.[106] It has been suggested that these differences in wording are due to negligence on the part of the drafting committee,[107] yet, in light of the considerable greater power bestowed on the coastal State by dint of Art. 234, imposing this higher standard as implied by the ordinary meaning would seem to be justified.

2. Difficult application in practice

32 Even though Art. 234 is not yet binding as a matter of treaty law for the United States,[108] its customary law nature under general international law has nevertheless been suggested in the literature.[109] Despite such a general submission, the difficulties of interpretation mentioned above suggest that the practical application of this article remains problematic. If in the past this only gave rise to occasional disputes between states, good reasons exist to believe that such conflicts will increase in number as to the future.

33 Indeed, if harsh climatic conditions had prevented the international use of the Arctic Ocean for navigational purposes for a long time, this has started to change recently as a direct

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[101] *Boyle* (note 66), 328.

[102] *Molenaar* (note 9), 420.

[103] *Brubaker* (note 39), 57.

[104] As noted before (*supra*, note 30 and accompanying text), it was one of the elements that lay at the foundation of the elaboration of Art. 234. It is at present guaranteed by Art. 297 (see *supra*, note 2 and accompanying text).

[105] As Bartenstein notes: 'The best available scientific evidence assumes to some extent the role played in special areas by the IMO review. This scientific safeguard appears to be another price paid for not having an international review procedure': *Bartenstein* (note 6), 40.

[106] *Ibid.*

[107] Nordquist/Rosenne/Yankov (note 1), 398.

[108] At the time of writing the United States has not yet signed or ratified UNCLOS. This country nevertheless, from the beginning, seems to have been of the opinion that Art. 234 forms part of customary international law. *Brian Hoyle*, The United States Government Perspective, in: Lawrence Juda (ed.), The United States Without the Law of the Sea Treaty: Opportunities and Costs (Proceedings from the Seventh Annual Conference Held June 12–15, 1983, Center for Ocean Management Studies, University of Rhode Island) (1983), 133, 135.

[109] *R. Douglas Brubaker*, The Arctic: Navigational Issues under International Law of the Sea, Yearbook of Polar Law 2 (2010), 7, 25 and 107–108.

consequence of climate change. As a result of global warming, the ice in the area has not only substantially diminished in extent, but also in average thickness, upgrading the Northeast and Northwest Passages suddenly as possible alternative routes for shipping goods between the Atlantic and Pacific Oceans. Uneven distribution of ice as well as islands along both routes has made the Northeast Passage, making use of the Northern Sea Route, the more viable option at present.[110]

a) State practice of Canada. If the Canadian delegation at UNCLOS III was already 34
'entirely satisfied' with the adoption of Art. 234,[111] this country today considers the adoption of Art. 234 a validation of its AWPPA enacted in 1970.[112] In 2009, this enactment was amended in order to extend its geographic application from 100 to 200 NM.[113] Under the powers granted to him under the AWPPA,[114] the Governor in Council established 16 different shipping safety control zones in which different regulations apply.[115] In 2010 the Governor in Council, acting this time pursuant to the Canadian Shipping Act,[116] made the Northern Canada Vessel Traffic Services Zone Regulations (NORDREG).[117] Even though a similar system had already been in operation on a voluntary basis before, the 2010 NORDREG envisaged instead a mandatory reporting system.[118]

The United States, as a directly concerned State, has very much contested the Canadian 35
assertion that NORDREG, as changed in 2010, is in compliance with Art. 234[119] and later brought the issue before IMO arguing that conventions adopted under its auspices did not allow for unilateral mandatory ship reporting systems.[120] As the Chairman of the Maritime Safety Committee simply took note of the divergence of opinion,[121] authors on both sides of the spectrum continue to argue their case,[122] involving intricate arguments of treaty interpretation.[123]

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[110] Arctic Council, Arctic Marine Shipping Assessment 2009 Report (2009), 114, explaining why the Northwest Passage is less prone to become a viable trans-Arctic route when compared to the Northeast Passage in the short term.

[111] *Armand Léonard C. de Mestral/L. H. J. Legault*, Multilateral Negotiation: Canada and the Law of the Sea Conference, International Journal 35 (1979), 47, 67.

[112] See *supra*, note 11 and accompanying text.

[113] Canada, An Act to amend the Arctic Waters Pollution Prevention Act, Statutes of Canada 2009, Chapter 11, Art. 1, changing the definition of the AWPPA.

[114] AWPPA (note 3), Arts. 11–12.

[115] Canada, Shipping Safety Control Zones Order, Consolidated Regulations of Canada, Chapter 356, Schedules 1 and 2.

[116] Canada, Canadian Shipping Act, 2001, Statutes of Canada 2001, Chapter 26, Art. 136 (1)(a, b and i).

[117] Canada, NORDREG, Statutory Orders and Regulations 2010-27.

[118] *Ibid.*, Arts. 4–10.

[119] For a detailed argumentation to be found in the US diplomatic correspondence in this respect, see: Elizabeth R. Wilcox (ed.), Digest of United States Practice in International Law, 2010 (2010), 514–518. For a recent evaluation of the question, see *Peter Luttmann*, Ice-Covered Areas under the Law of the Sea Convention: How Extensive are Canada's Coastal State Powers in the Arctic?, Ocean Yearbook 29 (2015), 85–124, concluding that even though for the most part in agreement with Art. 234, NORDREG does deviate from it in a number of ways (*ibid.*, 120–121).

[120] *Wilcox* (note 119), 518–520.

[121] IMO MSC, Report of the Maritime Safety Committee on Its Eighty-eighth Session, IMO MSC Doc. MSC 88/26, 15 December 2010, 55–56 (item 11.39). These debates at IMO were thus inconclusive. *Erik J. Molenaar*, Options for Regional Regulation of Merchant Shipping Outside IMO, with Particular Reference to the Arctic Region, ODIL 45 (2014), 272, 278.

[122] Defending the Canadian and US points of view respectively, see for instance *Ted L. McDorman*, National Measures of Navigation in Arctic Waters: NORDREG, Article 234 and Canada, in: Myron H. Nordquist (ed.), The Law of the Sea Convention: US Accession and Globalization (2012), 409–424, as further expanded by the same author in: *Ted L. McDorman*, Canada, the United States and International Law of the Sea in the Arctic Ocean, in: Tim Stephens/David L. VanderZwaag (eds.), Polar Oceans Governance in an Era of Environmental Change (2014), 253, 261–266; and *James Kraska*, The Northern Canada Vessel Traffic Services Zone Regulations (NORDREG) and the Law of the Sea, IJMCL 30 (2015), 225–254.

[123] Such as the relationship between earlier and later treaties. For a short overview of the issues involved, see *Roach/Smith* (note 8), 494–495.

36 When in August 1985 the United States intended to send its Coast Guard icebreaker USCGC Polar Sea through the Canadian Northwest Passage from east to west for operational reasons, the two countries initially struck a deal before the actual crossing through an exchange of diplomatic correspondence[124] by which they 'agreed to disagree on this divergence'[125] which had become apparent after the Manhattan incident in 1969–1970.[126] But after the press found out about this intended crossing, the passage once again spiralled out of control. Whether Art. 234 was applicable to the incident was hotly debated in view of the fact that neither Canada nor the United States were parties to UNCLOS at that time.[127] Both countries finally solved the issue by concluding an agreement,[128] which once again, however, did not solve the underlying legal dispute.[129]

37 **b) State practice of the Russian Federation.** The Russian Federation did a partial overhaul of its national legislation on the Northern Sea Route, which was mainly developed during the 1990s,[130] in 2012.[131] One of these amendments is believed to have limited the Russian field of application of its municipal legislation more clearly to areas within its EEZ.[132] Even though it has been argued that this legislation is based on Art. 234,[133] a strand of Russian authors today diminish the importance of this particular article in this respect.[134] This fits into a broader desire of certain Russian scholars to try to lessen the role of UNCLOS in the Arctic.[135] This

[124] For a detailed reconstruction of that correspondence, see *ibid.*, 320–324.

[125] *Ted L. McDorman*, In the Wake of the Polar Sea: Canadian Jurisdiction and the Northwest Passage, Marine Policy 10 (1986), 243, 234.

[126] As already mentioned above (*supra*, note 4).

[127] *McDorman* (note 125), 246–247. Canada only became a party to UNCLOS on 7 November 2003, the United States is still not a party at the time of writing (see *supra*, note 108).

[128] Agreement on Arctic Cooperation, Canada-United States, 11 January 1988, ILM 28 (1989), 142–143. For relevant statements made by Secretary Clark and Secretary Shultz during a press conference following the signing of this agreement, see: *Roach/Smith* (note 8), 325.

[129] *Franckx* (note 4), 261–264. Moreover, the limited scope of application, namely to US Coast Guard icebreakers, should be noted as this agreement clearly does not apply to commercial navigation. As stressed by Oxman moreover, it does not cover US warships or other US government non-commercial vessels operating in the Arctic either. *Bernard H. Oxman*, Canada's Arctic Waters, in: Lalonde/McDorman (note 7), 197, 199–200.

[130] *Erik Franckx*, The Legal Regime of Navigation in the Russian Arctic, Journal of Transnational Law and Policy, 18 (2010), 327–342, giving an overview. The 1990 Regulations for Navigation on the Seaways of the Northern Sea Route are today still considered to have been adopted on the basis of UNCLOS, more particularly Art. 234. *Irina N. Mikhina*, Interpretatsiia statei 234 i 236 Konventsii OON po morskomu pravu (The Interpretation of Articles 234 and 236 of the United Nations Convention on the Law of the Sea), in: Rossiiskii Sovet po Mezhdunarodnym Delam (ed.), Severnyi morskoi put': Pravo, transit, ekologiia, ledokoly, bezopasnost' (rider RSMD) (2015), available at: www.russiancouncil.ru/sevmorput.

[131] 2012 Federal Law (note 72). This indeed was not the expected new law on the Northern Sea Route, but a piecemeal amendment of three pieces of existing legislation, namely the Federal Law on Natural Monopolies of 17 August 1995 (as amended), the Federal Law on the Internal Waters, the Territorial Sea and the Contiguous Zone of the Russian Federation of 31 July 1998 (as amended), and the Merchant Shipping Code of 30 April 1999 (as amended).

[132] As already mentioned above (*supra*, notes 72-73 and accompanying text). But see *Viatcheslav V. Gavrilov*, Legal Status of the Northern Sea Route and Legislation of the Russian Federation: A Note, ODIL 46 (2015), 256, 260, stressing that the Northern Sea Route constitutes 'an indivisible transport system whose legal regime does not differ depending on the areas of its passing.' As far as the western boundary of the Northern Sea Route is concerned, and more particularly whether the eastern waters of the Barents Sea could possibly be included (see *supra*, note 69), it is interesting to note that the Tribunal in the *Arctic Sunrise Arbitration* stated that '[t]here is evendence before the Tribunal that indicates that the regulations adopted by Russia in accordance with Arcticle 234 of the Convention apply to an area that does not include the Barents Sea, where the *Prirazlomnaya* is located.' PCA, *The Arctic Sunrise Arbitration* (Netherlands v. Russia), Award on the Merits, 14 August 2015, para. 296, available at: http://www.pcacases.com/web/view/21.

[133] As already mentioned above (*supra*, note 12 and accompanying text). This is apparently also the opinion taken by the Arbitral Trinunal in the *Arctic Sunrise Arbitration* (note 132).

[134] See for instance *Aleksandr N. Vylegzhanin*, Pravovoi rezhim Arktiki (The Legal Regime of the Arctic), in: Aleksandr N. Vylegzhanin (ed.), Mezhdunarodnoe pravo, vol. 1 (3rd edn. 2015), 109, 115–117 (rather looking back in history to justify the regulation of navigation by the coastal State).

[135] *Erik Franckx*, UNCLOS and the Arctic?, Belgian Review of International Law, 47 (2014), 157, 166–169, where the arguments advanced by Russian authors diminishing the importance of UNCLOS in the Arctic are analysed.

recent move, however, does not seem to represent a majority opinion in present-day Russian legal writings, nor does it reflect the position of the Russian government at present.[136]

In preparation for the shipping season of 2013,[137] new rules concerning navigation in the Northern Sea Route were adopted.[138] Seven different zones are distinguished within the Northern Sea Route,[139] in which different regulations apply.[140] These rules now offer more transparency, including that reasons have to be given by the Administration for the Northern Sea Route whenever a request to use the route is refused.[141] This body, whose status was upgraded to that of a federal public agency in 2012,[142] has explicitly stated in one of its refusals that the Russian Arctic Rules of Navigation were 'adopted and enforced by the Russian Federation in accordance with article 234'.[143] **38**

Like the Canadian NORDREG, the Russian Arctic Rules of Navigation have also been open to criticism as far as their conformity with Art. 234 is concerned.[144] After the Arctic Sunrise, an 1A1 icebreaker certified by Det Norske Veritas and flying the flag of the Netherlands, was denied access to the Northern Sea Route at three subsequent occasions during the summer of 2013 by the Administration of the Northern Sea Route, it outright defied Russian national legislation by entering the Kara Sea on 24 Augus of that same yeart.[145] Following threats by the Russian Coast Guard that force would be used if the ship refused to leave the Kara Sea, including the opening of fire, the ship left again on 27 August after having been boarded.[146] The Minister of Foreign Affairs of the Netherlands responded the following to a parliamentary question on this incident: **39**

> 'On the basis of article 234 UNCLOS concerning ice-covered areas Russia has adopted "Rules of navigation on the water area of the Northern Sea Route". They *inter alia* subject navigation through the Northern Sea Route to a system of mandatory prior notification and authorization and oblige the ship and the crew to comply with certain (technical) requirements. These rules have been drafted to secure that ships operating in this area comply with safety and environmental requirements. I would stress the fact that article 58, paragraph 3 read together with article 234 UNCLOS is no licence to

[136] *Ibid.*, 170–181, where a detailed argumentation in support of these submissions can be found.

[137] 2012 Federal Law (note 72), Art. 4, making clear that the new amendments would only enter into force for the next shipping season.

[138] Russian Federation, Rules of Navigation in the Water Area of the Northern Sea Route (Russian Actic Rules of Navigation), 17 January 2013, available at: http://www.nsra.ru/files/fileslist/20150513153104en-Rules_Perevod_CNIIMF-13%2005%202015.pdf. Other subsequent subordinate regulations can be found on the official webpage of the Administration of the Northern Sea Route, available at: http://www.nsra.ru/en/celi_funktsii/.

[139] *Ibid.*, Art. 10 (6).

[140] In these seven zones, different admission criteria apply depending on the ice strengthening of the vessel, the prevailing ice conditions, whether icebreaker assistance is provided, and the time of sailing (*ibid.*, Annex 2). See also, for instance, Russian Federation, Federal Service for Tariffs, Order No. 45-t/1, About the Approval of Tariffs for the Icebreaker Escorting of Ships Rendered by FSUE 'Atomflot' in the Water Area of the Northern Sea Route, 4 March 2014, available at: http://www.nsra.ru/en/tarrifs_for_icebreaker_escort_atomflot/, establishing different tariffs depending on the period, the number of zones traversed and the ice-class of the vessel.

[141] Russian Arctic Rules of Navigation (note 138), Art. 11.

[142] 2012 Federal Law (note 72), Art. 3 (3).

[143] Russian Federation, Ministry of Transport, Federal Agency for Sea and Inland Water Transport, Northern Sea Route Administration, Notification No. 77, 20 September 2013 (based on an application of 5 September 2013), available at: http://www.nsra.ru/files/zayavka/20130920143952ref%20A%20S.pdf. The theoretical possibility to rely on Art. 234 had first been included in Art. 14 of the Decree of the Presidium of the Supreme Soviet of the USSR on the Economic Zone of the USSR, available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1984_Decree.pdf (for a comparison of this provision with Art. 234, see *Erik Franckx*, The New U.S.S.R. Legislation on Pollution Prevention in the Exclusive Economic Zone, IJECL, 1 (1986), 155, 163–164), and later in Art. 32 of the Federal Act on the Exclusive Economic Zone of the Russian Federation, 2 December 1998, available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/RUS_1998_Act_EZ.pdf, following Art. 234 more closely.

[144] For an analysis focussing on the compatibility of Russian regulations with Art. 234, see *R. Douglas Brubaker*, Regulation of Navigation and Vessel-source Pollution in the Northern Sea Route: Article 234 and State Practice, in: Davor Vidas (ed.), Protecting the Polar Marine Environment: Law and Policy for Pollution Prevention (2000), 221, 225–239.

[145] For more details on this particular incident, see *Franckx* (note 73), 207–210.

[146] As this was the summer season, the Kara Sea was ice-free at that time.

> inhibit the freedom of navigation without restrictions. Russia did not grant permission to the Greenpeace Ship Artic [sic] Sunrise to sail the Northern Sea Route because Greenpeace apparently provided incomplete information concerning the technical requirements of the ship. The Artic [sic] Sunrise has the second highest ice class, which is more than sufficient for the intended journey and there are no reasons to doubt the physical condition of ship.'[147]

The Minister also indicated that he had summoned the Russian Ambassador on 27 August at which time he emphasized that 'the special measures concerning the Northern Sea Route cannot result in an unbridled restriction of the freedom of navigation.'[148]

The United States delivered a diplomatic note on 29 May 2015 raising a number of objections to the Russian legislation as adapted in the period 2012–2013. They concern for example the requirement to obtain prior permission to sail the territorial sea and EEZ in the Northern Sea Route, the designation of certain straits there as internal waters, and the absence of any provision exempting foreign vessels, enjoying sovereign immunity, from having to subject themselves to the system so established.[149]

40 Finally, it should be noted that in contrast to Canada, Norway and the Russian Federation submitted their proposal to establish a mandatory ship reporting system outside the territorial sea in the Barents Sea to IMO for approval.[150]

41 **c) Polar Code.** After looking into the issue during the 1990s[151] and the subsequent elaboration of a non-legally binding set of guidelines applicable solely to the Arctic in 2002,[152] later extended to the Antarctic in 2009,[153] the decision was taken that same year in IMO to strive for a legally binding code for navigation in both polar areas.[154] This resulted in the adoption of the Polar Code, partly through the adoption of a 2014 resolution of the Maritime Safety Committee[155] and partly through a 2015 resolution of the Marine Environment Protection Committee,[156] both expected to become operational on 1 January 2017.[157]

42 The exact relationship between this Polar Code and Art. 234 is far from clear. Indeed, different opinions have already been aired with respect to the possible impact the Polar Code will have, once fully operational, on national legislation enacted by Arctic coastal States on

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[147] Translation by one of the authors of Handelingen, Tweede Kamer der Staten-Generaal, Vergadering 2013–2014, Aanhangsel 136, 2 October 2013, Vragen van de leden Van Tongeren en Van Ojik (beiden GroenLinks) aan de Ministers van Buitenlandse Zaken en van Infrastructuur en Milieu over de dreigementen van de Russische kustwacht aan het adres van het Greenpeace-schip Arctic Sunrise (ingezonden 28 augustus 2013). Antwoord van Minister Timmermans (Buitenlandse Zaken) mede namens de Minister van Infrastructuur en Milieu (ontvangen 2 oktober 2013) [Questions of members Van Tongeren and Van Ojik (both members of "GroenLinks") to the Ministers of Foreign Affairs and the Minister of Infrastructure and the Environment, concerning threats by the Russian Coast Guard to the Greenpeace ship Arctic Sunrise (submitted on 28 August 2013). Answer of Minister Timmermans (Foreign Affairs), also in name of the Minister of Infrastructure and the Environment (received on 2 October 2013)], available at: https://zoek.officielebekendmakingen.nl/ah-tk-20132014-136.html?zoekcriteria=%3Fzkt%3DEenvoudig%26pst%3D%26.

[148] *Ibid.*

[149] CarrieLyn D. Guymon (ed.), Digest of United States Practice in International Law (2015), 526–528, available at: http://www.state.gov/documents/organization/258206.pdf.

[150] IMO MSC, Adoption of a New Mandatory Ship Reporting System 'in the Barents Area (Barents SRS),' IMO MSC Res. MSC.348(91) of 28 November 2012, Annex 27 to IMO Doc. MSC 91/22/Add.2.

[151] *Lawson W. Brigham*, The Emerging International Polar Navigation Code: Bi-polar Relevance?, in: Vidas (note 144), 244, 248–249.

[152] IMO MSC, Guidelines for Ships Operating in Arctic Ice-covered Waters, IMO MSC Doc. MSC/Circ.1056 and MEPC/Circ.399 (2002).

[153] IMO Assembly, Guidelines for Ships Operating in Polar Waters, IMO Assembly Res. A.1024(26) of 2 December 2009.

[154] Of the different options available, the Polar Code was made mandatory by means of the tacit acceptance procedure under already existing relevant IMO conventions: *J. Ashley Roach*, A Note on Making the Polar Code Mandatory, in: Lalonde/McDorman (note 7), 125–140.

[155] IMO MSC Res. MSC.385(94) of 21 November 2014, Annexes 6 and 7.

[156] IMO MEPC Res. MEPC.264(68) of 15 May 2015, Annex 10.

[157] Third operational paragraph of both resolutions (notes 154 and 155).

the basis of Art. 234:[158] Either the application of a legally binding Polar Code will limit the regulatory powers of the coastal States[159] or it will have no such limiting effect.[160] This simply adds a layer of difficulty as far as issues of treaty interpretation are concerned[161] to the already complex relationship between Art. 234, IMO treaties and national legislation enacted by Canada and the Russian Federation with respect to the Arctic.[162] Whatever the outcome of this discussion, it is submitted that the Polar Code can nevertheless be considered an international standard giving content to the due regard clause contained in Art. 234.[163]

Section 9
Responsibility and liability

Article 235
Responsibility and liability

1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.

2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

Bibliography: Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991); *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2nd edn. 2016)

Documents: ILC, Report of the International Law Commission: Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, UN Doc. A/61/10 (2006), GAOR 61st Sess. Suppl. 10, 106–110; ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, GA Res. 56/83

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[158] *Rosemary Rayfuse*, Coastal State Jurisdiction and the Polar Code: A Test Case for Arctic Oceans Governance?, in: Stephens/VanderZwaag (note 122), 235, 245–246.

[159] *Ole Kristian Fauchald*, Regulatory Framework for Maritime Transport in the Arctic: Will a Polar Code Contribute to Resolve Conflicting Interests?, in: John Grue/Roy H. Gabrielsen (eds.), Marine Transport in the High North (2010), 73, 82–83.

[160] *Willy Østreng/Karl Magnus Eger/Brit Fløistad/Arnfinn Jørgensen-Dahl/Lars Lothe/Morten Mejlænder-Larsen/Tor Wergeland*, Shipping in Arctic Waters: A Comparison of the Northeast, Northwest and Trans Polar Passages (2013), 245–246; *Andrea Scassola*, An International Polar Code of Navigation: Consequences and Opportunities for the Arctic, Yearbook of Polar Law 5 (2013), 271, 283–285. See also *Kristin Bartenstein*, Navigating the Arctic: The Canadian NORDREG, the International Polar Code and Regional Cooperation, GYIL 54 (2011), 77, 117–188, pointing at Canadian and Russian initiatives within IMO to that extent, but countered by the United States.

[161] *Ted L. McDorman*, A Note on the Potential Conflicting Treaty Rights and Obligations between the IMO's Polar Code and Article 234 of the Law of the Sea Convention, in: Lalonde/McDorman (note 7), 141, 155–158.

[162] See *supra*, note 123 and accompanying text.

[163] This is in line with the Final Report of the International Law Association's Committee on Coastal State Jurisdiction Relating to Marine Pollution, Conclusion No. 14 'Coastal State Enforcement Powers in Ice-covered Areas,' where it was already submitted with respect to the non-legally binding guidelines being worked out at the time: '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.' 2000 ILA London Report (note 40), 132.

of 12 December 2001; ILC, Report of the International Law Commission: Responsibility of States for Internationally Wrongful Acts with Commentaries, UN Doc. A/56/10 (2001), GAOR 56th Sess. Suppl. 10, 59–365; ILC, Report of the International Law Commission: Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), GAOR 56th Sess. Suppl. 10, 370–377; UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973), 3–5 (Stockholm Declaration)

Cases: ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, ITLOS Reports (2011), 10

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I. Purpose and Function

1 As marine environmental damage may be long lasting or permanent it is desirable that States take every effort to prevent pollution of the marine environment in before it occurs. To that end Art. 194 (1) requires States to take all measures 'consistent with [the] Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities.'[1] However when damage to the marine environment does occur there is a need for a system of liability so that States and non-State entities may be held accountable and victims appropriately compensated. Such a system serves both a corrective function and also a deterrent one in providing an incentive to States and non-State actors, such as the shipping industry, to take measures to prevent the pollution of the marine environment.

2 Art. 235 is the keystone provision of the UNCLOS addressing responsibility and liability for marine environmental damage, and operates alongside a number of complementary provisions addressing particular liability issues such as Art. 139 which concerns liability in respect of damage caused by activities in the Area.

3 There are three key elements to Art. 235. First, Art. 235 (1) provides that States are required to fulfil their legal obligations concerning the protection of the marine environment, and are themselves liable in accordance with international law if they do not. Second, Art. 235 (2) stipulates that States are to ensure that there is recourse available under their domestic legal systems, so that prompt and adequate compensation may be sought in respect of damage caused by natural or legal persons under their jurisdiction. Hence Art. 235 (2) requires States to establish domestic legal mechanisms by which individuals or legal persons may be held directly liable for pollution damage. Third, Art. 235 (3) requires that States cooperate in implementing existing and developing further international law addressing responsibility and liability for marine environmental damage.

II. Historical Background

4 The origins of Art. 235 lie in Principle 22 of the Stockholm Declaration[2] adopted at the United Nations Conference on the Human Environment in 1972 and which applies to

[1] For further information, see *Czybulka* on Art. 194 MN 11–18.

[2] UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973), 3 (Stockholm Declaration).

pollution damage generally.[3] Principle 22 provides that States shall cooperate in developing further the body of international law regarding liability and compensation for the victims of pollution.

A range of proposals were put to the Sea-Bed Committee and to UNCLOS III regarding the questions of liability, responsibility and compensation for marine environmental damage, and how the particular problems of transboundary damage, and damage to areas beyond the limits of national jurisdiction, could be addressed. These various proposals reflected different approaches to the central question as to how to provide compensation to victims of marine environmental damage, whether they be States or non-State actors. One initial point of contention was whether damage to areas within and beyond the limits of national jurisdiction should be treated differently. Hence proposals by Australia and Canada to the Sea-Bed Committee recognised that there should be clear rules for the responsibility of States for damage caused to areas within national jurisdiction, but for areas beyond national jurisdiction it was not possible to establish such rules because of 'technical difficulties' as to how claims could be made, how compensation could be measured and to whom any reparation should be made.[4] 5

Several alternative provisions for addressing matters of responsibility and liability were distilled by the Informal Group of Juridical Experts during UNCLOS III, and the provision that was to become Art. 235 appeared in its essential elements in the Revised Single Negotiating Text (RSNT) as Art. 44.[5] This article blended the various proposals for addressing responsibility and liability, incorporating the responsibility of States for breaches of their obligations resulting in damage, the requirement for States to allow victims to seek compensation in domestic courts, and the duty upon States to develop further the law on responsibility and liability. Significantly, Art. 44 RSNT drew no distinction between damage caused within a State's jurisdiction and damage caused beyond the limits of jurisdiction, ensuring that Art. 235, which it was to become, has very broad application. 6

III. Elements

1. 'States are responsible'

Art. 235 (1) refers to the 'responsibility' of States for fulfilling their international obligations to protect the marine environment and provides further that they 'shall be liable in accordance with international law.' In *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area,*[6] the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) considered the meaning of 'responsibility' and 'liability' and made the following observations about the differences between the two terms: 7

> 'In Art. 139, Art. 235, paragraph 1, and Annex III, Art. 4, paragraph 4, of the Convention, the term 'responsibility' means 'obligation'. This emerges not only from the context of the aforementioned articles, but also from a comparison with other linguistic versions […].'[7]

> 'In the view of the Chamber, in the provisions cited in the previous paragraph, the term 'responsibility' refers to the primary obligation whereas the term 'liability' refers to the secondary obligation, namely, the consequences of a breach of the primary obligation.'[8]

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[3] Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991), 401 (MN 235.1).

[4] Sea-Bed Committee, Australia: Working Paper on Preservation of the Marine Environment, UN Doc. A/AC.138/SC.III/L.27 (1973); Sea-Bed Committee, Canada: Working Paper on the Preservation of the Marine Environment, UN Doc. A/AC.138/SC.III/L.26 (1972).

[5] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 180.

[6] ITLOS Seabed Disputes Chamber, *Responsibilities and Obligation of States Sponsoring Persons and Entities with Respect to Activities in the Area,* Advisory Opinion of 1 February 2011, ITLOS Reports (2011), 10.

[7] *Ibid.*, para. 65.

[8] *Ibid.*, para. 66.

8 In referring to the liability of States 'in accordance with international law', Art. 235 (1) refers to general international law concerning State responsibility, the core elements of which are set out in the International Law Commission (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ASR).[9] Art. 235 (1) does not limit liability only to circumstances where there has been damage (in contradistinction with Art. 139 (2), which provides for liability in the event of damage to the marine environment from activities in the Area).[10] Hence, the general rule with respect to responsibility for failing to meet a State's environmental protection obligations is the same as the ordinary rule of State responsibility, meaning a State will incur responsibility even where there is no material damage.[11]

9 It should be noted that in the ASR, 'responsibility' refers to the consequences that flow from the breach of a State's legal obligations. Should there be damage to the marine environment, the ASR will be relevant to issues such as attribution for violating an obligation to protect and preserve the marine environment, the invocation of the responsibility of a State, potential defences such as necessity, and reparation for the wrongful act.

10 A condition precedent for liability under Art. 235 (1) will be the breach of an applicable norm. And the standard of liability will be set by the applicable norm, and will ordinarily be one of due diligence rather than strict liability. An example of an obligation to protect the marine environment that imposes a due diligence standard is Art. 194 (2) which provides that States shall take 'all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment'. In the *Responsibilities and Obligations of Sponsoring States* advisory opinion, the Seabed Disputes Chamber of the ITLOS referred to Art. 194 (2) and observed that

> 'The expression 'to ensure' is often used in international legal instruments to refer to obligations in respect of which, while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law (see ILC Articles on State Responsibility, Commentary to Art. 8, paragraph 1).'[12]

11 The ILC has taken a similar approach in the 2001 Draft Articles on Prevention of Transboundary Harm from Hazardous Activities.[13]

12 In relation to invocation of responsibility, if there is a breach of an obligation of the UNCLOS relating to the protection of the marine environment, then under Art. 42 ASR 'injured' States will be able to invoke the responsibility of the State that has breached the obligation. For breaches of a multilateral treaty such as the UNCLOS a State will be injured if it is 'specially affected'. An example given by the ILC in its commentaries on the ASR in this regard is pollution on the high seas, in violation of Art. 194 UNCLOS, which specially affects one or more coastal States by damaging their coastal environments.[14]

13 If no State has been 'specially affected' the invocation of State responsibility is still possible by operation of Art. 48 ASR under which a State that is not injured may invoke the responsibility of another State if the obligation breached is owed to a group of States, including that State, and is established for the protection of a collective interest, or the obligation is owed to the international community as a whole. In the *Responsibilities and Obligations of Sponsoring States* advisory opinion, the Seabed Disputes Chamber of the ITLOS referred to Art. 48 ASR as providing support for the view that any State party to the

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[9] ILC, Articles on the Responsibility of States for Internationally Wrongful Acts, GA Res. 56/83 of 12 December 2001, Annex.

[10] For further information, see *Vöneky/Höfelmeier* on Art. 139.

[11] See *Responsibilities and Obligations of Sponsoring States* (note 6), para. 178.

[12] *Ibid.*, para. 112.

[13] ILC, Report of the International Law Commission: Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), GAOR 56th Sess. Suppl. 10, 370, 372 (Art. 3).

[14] ILC, Report of the International Law Commission: Responsibility of States for Internationally Wrongful Acts with Commentaries, UN Doc. A/56/10 (2001), GAOR 56th Sess. Suppl. 10, 119 (Art. 42, para. 12).

UNCLOS would be entitled to claim compensation in respect of damage to the marine environment of the high seas or the Area.[15]

If State responsibility for a breach of an obligation to protect and preserve the marine environment is established then a State will be able to utilise the dispute settlement system in Part XV of the UNCLOS, since 'Part XII comes fully within the scope of Part XV on the settlement of disputes, without any reservations or exceptions.'[16] **14**

The ILC has also been active in establishing liability rules that would apply in situations where a State has met its legal obligations but damage to the marine environment nonetheless occurs. A central issue in this context is whether the victim (the injured coastal State or the marine environment per se) should bear the loss. The ILC has adopted Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities (Draft Principles on Liability).[17] In contrast to the ASR and the Articles on the Prevention of Transboundary Harm, the Draft Principles on Liability are mostly in the nature of progressive development rather than the codification of customary international law. In the *Responsibilities and Obligations of Sponsoring States* advisory opinion, the Seabed Disputes Chamber of the ITLOS noted that it was: **15**

> 'aware of the efforts made by the International Law Commission to address the issue of damages resulting from acts not prohibited under international law. However, such efforts have not yet resulted in provisions entailing State liability for lawful acts.'[18]

2. 'international obligations'

Art. 235 (1) provides that States are responsible for the fulfilment of their 'international obligations concerning the protection and preservation of the marine environment'. The central source of such obligations is the UNCLOS itself, and Part XII in particular. However, there are other relevant obligations supplied by bilateral and multilateral agreements and by customary international law the breach of which will give rise to responsibility. In this respect Art. 235 (1) does little more than state the position at general international law. **16**

3. 'shall be liable in accordance with international law'

Art. 235 (1) goes on to add that States will be 'liable in accordance with international law' for failing to fulfil their international legal obligations. As with the first sentence of Art. 235 (2), the effect of this is to refer to general international law, but in this case not to the primary obligations binding States so much as the secondary obligations of responsibility for internationally wrongful acts, which have been distilled by the ILC in its ASR. By providing that States will be 'liable in accordance with international law', Art. 235 (1) ensures that the UNCLOS rules for liability follow those of general international law, and this allows standards of responsibility and liability to be changed so as to introduce for instance a system of liability without fault.[19] **17**

4. 'recourse is available […] prompt and adequate compensation'

Art. 235 (2) requires States to take steps to provide domestic legal remedies to ensure that there is prompt and adequate compensation for pollution of the marine environment by natural or juridical persons under their jurisdiction. Art. 235 (2) complements and goes further than an earlier provision of Part XII, Art. 229, which provides that nothing in the **18**

[15] *Responsibilities and Obligations of Sponsoring States* (note 6), para. 180.
[16] Nordquist/Rosenne/Yankov (note 3), 412 (MN 235.10(a)).
[17] ILC, Report of the International Law Commission: Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, UN Doc. A/61/10 (2006), GAOR 61st Sess. Suppl. 10, 106.
[18] *Responsibilities and Obligations of Sponsoring States* (note 6), para. 209.
[19] Nordquist/Rosenne/Yankov (note 3), 412 (MN 235.10(c)).

UNCLOS affects the institution of civil proceedings in respect of any claim for loss or damage resulting from pollution of the marine environment.[20]

19 The purpose of this paragraph is to allow victims of pollution to take civil proceedings in the courts of the State which has jurisdiction over natural or juridical persons responsible for the pollution damage. Once those proceedings are exhausted or if there is no available remedy then the State of the victim may exercise the right of diplomatic protection on the victim's behalf.

20 There now exist a suite of regimes establishing civil liability for marine pollution in the courts of the State in whose territory, territorial sea, or exclusive economic zone such pollution damage has been suffered.[21] The 1969 International Convention on Civil Liability for Oil Pollution Damage,[22] as amended,[23] is the leading example, and applies to sea-going vessels or craft constructed or adapted for the purpose of carrying oil in bulk. It establishes territorial jurisdiction; allowing victims to pursue claims in the courts of the coastal State impacted by the pollution, regardless of the flag of the vessel involved in the incident. Anyone sustaining pollution injury may make a claim for compensation, including individuals, businesses and governments. The liability of shipowners is strict, and they are required to hold insurance to defined liability limits.

21 What constitutes 'recourse' and 'prompt and adequate compensation' is not defined. There is clearly some similarity between Art. 235 (2) of the UNCLOS and provisions of other treaties beyond the law of the sea context such as Art. 2 (3) of the 1966 International Covenant on Civil and Political Rights.[24]

5. 'further development of international law relating to responsibility and liability'

22 Art. 235 (3) requires States to co-operate in the implementation of existing international law on liability and in the further development of international law relating to responsibility and liability for damage to the marine environment. Art. 235 (3) operates alongside Art. 304 which is found in Part XVI ('General Provisions') and provides that the provisions of the UNCLOS relating to responsibility and liability for damage 'are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.'[25]

23 Art. 235 (3) and Art. 304 are significant because the UNCLOS does not establish a comprehensive regime for responsibility and liability for damage to the marine environment. In the *Responsibilities and Obligations of Sponsoring States* advisory opinion, the Seabed Disputes Chamber of the ITLOS noted that there were several 'gaps' in the system for responsibility and liability as regards damage to the marine environment from activities in the Area. Methods for filling such lacunae include expanded rules of responsibility and liability, and Art. 235 (3) also makes specific reference to the establishment of 'compulsory insurance or compensation funds.' The Chamber noted that this aspect of Art. 235 was a basis for the establishment of a trust fund to compensate for damage to the marine environment caused by activities in the Area where there is no prospect of recourse against states or mining contractors.[26]

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[20] For further information, see *Becker-Weinberg* on Art. 229.

[21] See *Donald R. Rothwell/Tim Stephens*, The International Law of the Sea (2nd edn. 2016), 394–399.

[22] International Convention on Civil Liability for Oil Pollution Damage.

[23] Most recently by the 1992 Protocol to amend the International Convention on Civil Liability for Oil Pollution Damage.

[24] International Covenant on Civil and Political Rights (ICCPR). Art. 2 (3) ICCPR provides, in part, that 'Each State Party to the prevent Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy […]'.

[25] See further *Tams/Devaney* on Art. 304.

[26] *Responsibilities and Obligations of Sponsoring States* (note 6), para. 205.

Section 10
Sovereign immunity

Article 236
Sovereign immunity

The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service. However, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.

Bibliography: *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999); Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991); *Bernard H. Oxman*, The Regime of Warships Under the United Nations Convention on the Law of the Sea, VJIL 24 (1983–84), 809–863

Documents: ILC, Report of the International Law Commission: Draft Articles on Jurisdictional Immunities of States and Their Property with Commentaries, UN Doc. A/46/10 (1991), GAOR 46th Sess. Suppl. 10, 11–150

Cases: ICJ, *Jurisdictional Immunities of the State* (Germany *v.* Italy: Greece intervening), Judgment of 3 February 2012, ICJ Reports (2012), 99; ITLOS, *The 'ARA Libertad' Case* (Argentina *v.* Ghana), Provisional Measures, Order of 15 December 2012, ITLOS Reports (2012), 332; *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812)

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I. Purpose and Function

Art. 236 provides that the provisions of the UNCLOS concerning the protection and preservation of the marine environment (including, but not limited to, those found in Part XII) will not apply to warships or other naval vessels, or any vessel or aircraft owned or operated by a State or government non-commercial service. Although Art. 236 is titled 'Sovereign Immunity', it in fact goes beyond according such ships immunity from enforcement, and instead grants a general exemption from those provisions of the UNCLOS concerning the protection and preservation of the marine environment.[1] The *quid pro quo* for this exemption is that the flag State of a naval or other vessel or aircraft in government service must ensure that such vessels or aircraft comply with the requirements of Part XII, so long as this does not interfere with operations or operational capabilities, and is not unreasonable or impractical.[2] 1

[1] *Bernard H. Oxman*, The Regime of Warships Under the United Nations Convention on the Law of the Sea, VJIL 24 (1983–84), 809, 820.

[2] Two States, Bangladesh and Malta, on ratifying the UNCLOS included declarations that the sovereign immunity contemplated in Art. 236 does not exonerate a State from such obligation, moral or otherwise, in accepting

2 Art. 236 reflects customary international law regarding the sovereign immunity of warships and government owned and operated aircraft and vessels, and makes clear that the immunity operates with respect to the rights and duties of States under the UNCLOS to protect the marine environment.[3] The general customary position as regards State jurisdiction over ships (but not aircraft) owned or operated by a State is codified in Art. 16 of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property.[4] The rule of immunity for naval vessels or other vessels on government non-commercial service finds expression in a range of cases,[5] and treaties pre- and post-dating UNCLOS such as the 1926 International Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Ships (Brussels Convention).[6]

3 In the specific context of marine pollution, the suite of International Maritime Organization (IMO) conventions applicable to vessel source and other forms of pollution and marine environmental damage include express exceptions for government vessels that reflect the language of Art. 236.

II. Historical Background

4 The negotiating history of Art. 236 was largely uncontroversial (unlike other aspects of warship immunity, such as the possible immunity attaching to sunken warships),[7] and the main elements of the article were agreed upon from the early stages of UNCLOS III. This was largely because there were antecedents upon which Art. 236 could draw. Art. VII (4) of the 1972 International Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter provided:

> '[t]his Convention shall not apply to those vessels and aircraft entitled to sovereign immunity under international law. However each Party shall ensure by the adoption of appropriate measures that such vessels and aircraft owned or operated by it act in a manner consistent with the object and purpose of this Convention, and shall inform the Organisation accordingly.'

More directly apposite is Art. 3 of the 1973 International Convention for the Prevention of Pollution from Ships,[8] which provides that

> 'The present Convention shall not apply to any warship, naval auxiliary or other ship owned and operated by a State and used, for the time being, only on government non-commercial service. However, each Party shall ensure by the adoption of appropriate measures not impairing the operations or operational capabilities of such ships owned or operated by it, that such ships act in a manner consistent, so far as is reasonable and practicable, within the present Convention.'

5 In 1973 Australia submitted a proposal on sovereign immunity to Sub-Committee III of the Sea-Bed Committee which stipulated that the principles regarding marine environmental protection 'shall not apply to naval vessels, military aircraft or their auxiliaries' but that States 'shall…ensure that to the greatest extent feasible' their vessels and aircraft act consistently

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responsibility and liability for compensation and relief in respect of damage caused by pollution of the marine environment by any warship, naval auxiliary, other vessels or aircraft owned or operated by the State and used on government non-commercial service, see Declarations and Reservations to UNCLOS, available at: http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en.

[3] *Robin R. Churchill/Alan V. Lowe*, The Law of the Sea (3rd edn. 1999), 351.

[4] United Nations Convention on Jurisdictional Immunities of States and Their Property.

[5] See e.g, ITLOS, *The 'ARA Libertad' Case* (Argentina *v.* Ghana), Provisional Measures, Order of 15 December 2012, para. 95, stating 'in accordance with general international law, a warship enjoys immunity, including in internal waters', but *cf. ibid.*, Separate Opinion of Judges Wolfrum and Cot, para. 45: 'prima facie [Art. 32] is meant to be applicable in the territorial sea only'; US Supreme Court, *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812) in which the United States Supreme Court held that a French warship in port in the United States was immune from proceedings in local courts.

[6] Art. 3 (1) Brussels Convention.

[7] See *Barnes* on Art. 32 MN 9–10, 13.

[8] 1973 International Convention for the Prevention of Pollution from Ships.

with the object and purpose of the principles.[9] The first fully-drafted precursor to Art. 236 was presented in an informal proposed draft submitted in 1975 by the United States at the Second Session of UNCLOS III.[10]

The initial proposals, including those by Australia and the United States, applied the sovereign immunity principle not only to government vessels but also to aircraft. In Art. 42 of the 1975 Informal Single Negotiating Text, aircraft were omitted, and the immunity principle was confined to parts of the text relating to marine environmental protection.[11] These limitations were removed in the 1976 Revised Single Negotiating Text (RSNT), where Art. 45 was framed in mostly identical terms to the present Art. 236,[12] and this was carried into Art. 237 of the Informal Composite Negotiating Text with minor amendments.[13] 6

III. Elements

1. 'provisions of this Convention regarding the protection and preservation'

Art. 236 stipulates that all provisions of the UNCLOS relating to the protection and the preservation of the marine environment do not apply to warships, naval auxiliaries, or other vessels or aircraft owned or operated by a State and used only on government non-commercial service. The main environmental protection obligations that would otherwise be applicable to warships and other government vessels are found in Part XII. However there are linkages between several of these obligations in Part XII and provisions found elsewhere in the UNCLOS. For example, Art. 211, which provides that coastal States may adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage and the innocent passage regime set out in Arts. 19 and 21. Given the close linkages between Art. 211 and the innocent passage provisions, it would be impractical to apply the Art. 236 exemption only to the provisions of Part XII.[14] 7

2. 'warship, naval auxiliary'

Art. 29 provides a definition of 'warship', for the purposes of the Convention generally, as 'a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned'. Under Art. 102, a warship whose crew has mutinied will no longer be entitled to the status of 'warship' and therefore will have no immunity.[15] Less clear is the situation of sunken warships. Proposals at the Conference to include provisions addressing sunken warships were not accepted, and as a consequence the matter is governed by customary international law. This is indicated by Art. 303, which provides that the duty to protect objects of an archaeological or historical nature found at sea are without prejudice to other agreements and rules of international law.[16] Some guidance is now provided by the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage.[17] 8

[9] Sea-Bed Committee, Australia: Working Paper on Preservation of the Marine Environment, UN Doc. A/AC.138/SC.III/L.27 (1973).

[10] Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991), 419 (MN 236.4).

[11] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975), OR IV, 171, 176.

[12] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/REV.1/PART III (1976), OR V, 173, 180.

[13] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 1, 41; see also Nordquist/Rosenne/Yankov (note 10), 420 (MN 236.6(a)).

[14] *Oxman* (note 1), 821 and 854.

[15] For detail, see *Guilfoyle* on Art. 102 MN 2.

[16] See *Scovazzi* on Art. 303.

[17] *Ibid.*

9 'Naval auxiliary' is not defined in the Convention (and the term is used only in Art. 236 and in no other provision). Such vessels are usually understood to be those vessels that have a naval support function, providing assistance to combatant vessels such as by refuelling, provisioning or repairing.

10 The exception contained in Art. 236 applies both to warships and to other vessels owned or which are operated by a State and used for the time being only on government non-commercial service. Hence for the purposes of Art. 236 nothing turns on 'the precise line of demarcation and other government non-commercial ships'.[18]

11 Under Art. 32 of the Convention,[19] and at customary international law, warships and their auxiliaries enjoy immunity from the jurisdiction of coastal States purely as a consequence of their status as naval vessels, and regardless of the civilian tasks they may be engaged in at any relevant time (such as in response to humanitarian disasters or other emergencies). The only exceptions to this immunity, which is akin to the wide immunity *ratione personae* attaching to diplomatic agents and heads of state and governments, are set out in Part II, Section 3. These include the right of coastal States under Art. 19 to request warships (and presumably also naval auxiliaries) to leave the territorial sea immediately if they do not comply with the laws and regulations of the coastal State concerning innocent passage (with the exception of those concerning the marine environment, which are exempted from application to warships by Art. 236 (see below)).

3. 'other vessels or aircraft'

12 Art. 236 extends immunity from the provisions of Part XII to 'other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service.'

13 Some guidance as to the types of vessel that would be regarded as 'other vessels or aircraft' under Art. 236 can be found in Art. 16 of the 2004 United Nations Convention on the Jurisdiction of States and Their Property, which mirrors the formulation in Art. 236 as regards ships. The Commentaries to the ILC's Draft Articles, on which the 2004 Convention is based, note that immunity applies not only to naval vessels, but:

> 'is also maintained for other government ships such as police patrol boats, customs inspection boats, hospital ships, oceanographic survey ships, training vessels and dredgers, owned or operated by a State and used or intended for use in government non-commercial service.'[20]

14 The meaning of aircraft owned or operated by a State only on government non-commercial service may be informed by the 1944 Convention on International Civil Aviation which provides in Art. 3 (a) that the Convention does not apply to 'state aircraft' and explains in Art. 3 (b) that '[a]ircraft used in military, customs and police services shall be deemed to be state aircraft'.

15 The language of the first sentence of Art. 236 of UNCLOS raises some confusion because of the missing conjunction 'or' in the English text before 'other vessels'. Read on its face the statement that '[t]he provisions of this Convention […] do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State […]' suggests that *all* vessels other than warships and naval auxiliaries, and not only those owned or operated by a State on government non-commercial service, will be entitled to sovereign immunity. However, the word 'or' was omitted by error when the reference to aircraft was added in the RSNT in 1976.[21] Interpreting Art. 236 without the conjunction would lead to an absurd result, especially in light of the fact that other provisions (e.g →. Art. 224) do include the conjunction.[22]

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[18] *Oxman* (note 1), 814.

[19] See *Barnes* on Art. 32; see also *The 'ARA Libertad' Case* (note 5).

[20] ILC, Report of the International Law Commission: Draft Articles on Jurisdictional Immunities of States and their Property with Commentaries, UN Doc. A/46/10 (1991), GAOR 46th Sess. Suppl. 10, 52 (Art. 16).

[21] RSNT Part III (note 12), 180; see further *Oxman* (note 1), 820.

[22] Nordquist/Rosenne/Yankov (note 10), 420–421 (MN 236.6(a)).

4. 'only on government non-commercial service'

Beyond warships and naval auxiliaries, the second class of vessel referred to in Art. 236 are 'other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service.' This has the effect of providing a functional rather than absolute immunity in respect of such vessels, with the vessels enjoying immunity only where they are on 'government non-commercial service.' For vessels other than naval vessels Art. 236 therefore makes a distinction between *acta jure imperii* (sovereign acts) and *acta jure gestionis* (private and commercial activities), with only the former attracting immunity. As the International Court of Justice observed in the *Jurisdictional Immunities of the State* case,[23] many States draw this distinction when limiting the immunity applicable to foreign States, and this accords with a 'restrictive' as opposed to an 'absolute' approach to State immunity. A similar distinction can be found in Arts. 95 and 96 addressing the issue of immunity on the high seas, and which provide respectively that warships and other ships used only on government non-commercial service have complete immunity.[24] **16**

5. 'each State shall ensure by the adoption of appropriate measures'

Art. 236 confers immunity on certain vessels and aircraft by virtue of their status or function. This is coupled with an obligation on all States to: **17**

> 'ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.'

This second main element of Art. 236 is accompanied by such significant qualifications that it provides flag States with considerable discretion in deciding whether or not to adhere to the standards of marine environmental protection set out in Part XII and elsewhere in the Convention. **18**

It is significant that Art. 236 is not accompanied by a provision equivalent to Art. 31 which applies to warships and other government ships in the territorial sea. Art. 31 provides that: **19**

> 'The flag State shall bear international responsibility for any loss or damage to the coastal State resulting from the non-compliance by a warship or other government ship operated for non-commercial purposes with the laws and regulations of the coastal State concerning passage through the territorial sea or with the provisions of this Convention or other rules of international law.'

The absence of a similar provision in Part XII, and the casting of Art. 236 in broad terms to disapply the marine environmental protection provisions of UNCLOS ('The provisions of this Convention regarding the protection and preservation of the marine environment do not apply […]'), rather than only limiting jurisdiction over government ships, suggests that States will not be responsible in cases of marine environmental damage caused by the operation of such vessels in circumstances that would otherwise be a breach of UNCLOS. **20**

[23] ICJ, *Jurisdictional Immunities of the State* (Germany *v.* Italy: Greece intervening), Judgment of 3 February 2012, ICJ Reports (2012), 99, para. 59, available: http://www.icj-cij.org/docket/files/143/16883.pdf.

[24] For further information, see *Guilfoyle* on Art. 95 and on Art. 96.

Section 11
Obligations under other conventions on the protection and preservation of the marine environment

Article 237
Obligations under other conventions on the protection and preservation of the marine environment

1. The provisions of this Part are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in this Convention.

2. Specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives of this Convention.

Bibliography: *Lewis M. Alexander*, National Jurisdiction and the Use of the Sea, Natural Resources 8 (1968), 373–400; *Detlef Czybulka*, Die Anwendung der Umwelthaftungsrichtlinie in der Ausschließlichen Wirtschaftszone und auf dem Festlandsockel: Der Schutz von natürlichen Lebensräumen und Arten im marinen Bereich, NuR 30 (2008), 304–311; *Peter Kersandt*, Rechtliche Vorgaben und Defizite bei Schutz und Nutzung der Nordsee – unter besonderer Berücksichtigung des Naturschutzrechts (2009); *Rainer Lagoni*, Völkerrechtliche Vorgaben für die Anwendung des USchadG in der AWZ (2007); Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991); *Alexander Proelss*, Legal Opinion on the Legality of the LOHAFEX Marine Research Experiment under International Law (2009); *Katrin Täufer*, Die Entwicklung des Ökosystemansatzes im Völkerrecht und im Recht der Europäischen Union und seine Verwirklichung im Meeresbereich des Nordostatlantiks, 2012,; *Rüdiger Wolfrum/Nele Matz*, The Interplay of the United Nations Convention on the Law of the Sea and the Convention on Biological Diversity, MPYUNL 4 (2000), 445–480

Documents: CBD SBSTTA, Marine and Coastal Biodiversity: Review, Further Elaboration and Refinement of the Programme of Work, UN Doc. UNEP/CBD/SBSTTA/8/INF/3/REV.1 (2003); COP CBD, Decision IX/20: Marine and Coastal Biodiversity, UN Doc. UNEP/CBD/COP/DEC/IX/20 (2008); GA, Oceans and the Law of the Sea: Report of the Secretary-General Addendum, UN Doc. A/60/63/ADD.1 (2005); IMO, Study by the Secretariat of the International Maritime Organization, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, IMO Doc. LEG/MISC.7 (2012)

Cases: ITLOS, *MOX Plant Case* (Ireland *v.* United Kingdom). Provisional Measures, Order of 3 December 2001, ITLOS Reports (2001); PCA, *South China Sea Arbitration* (Republic of the Philippines *v.* People's Republic of China), Award of 12 July 2016, available at: https://www.pcacases.com/web/view/7

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I. Purpose and Function

Art. 237 is contained in Section 11 of Part XII UNCLOS and represents the final provision of this Part dedicated to the Protection and Preservation of the Marine Environment. It is the purpose of Art. 237 to clarify the relationship of Part XII of the Convention to other treaties dealing with the protection and preservation of the marine environment. Art. 237 addresses the parties of the Convention and determines the integration of further specific environmental treaties and agreements into the overarching provisions of Part XII of the UNCLOS. Due to the existing and continuously increasing number of relevant conventions, agreements and commitments on various levels, a regulating provision like this is indispensable. Art. 237 acts as a conflict rule which provides guidance in case of a normative conflict between obligations of the States assumed under other special conventions and the foremost rather general obligations assumed under Part XII of the Convention concerning the protection and preservation of the marine environment. The provision comprises two paragraphs, whereby paragraph 1 is the conflict clause itself and paragraph 2 treats specific (environmental) obligations assumed by the States under special (e. g. environmentally or biodiversity oriented) conventions. The first paragraph again can be divided in two parts which differ in their applicability regarding the time of conclusion of the possibly conflicting obligations. **1**

Art. 237 (1) has to be regarded as *lex specialis* to the general conflict rule of the Convention, Art. 311 (2).[1] Art. 311 (2) concerns the relation of the Convention within the broad regulative scope of UNCLOS to other treaties and international agreements as such. Art. 237 (1) is only applicable to the environmental part of the Convention (Part XII) in correlation with other conventions and agreements and their specific provisions dealing with the protection and preservation of the marine environment and their respective obligations resulting therefrom. Whereas Art. 311 does not seem to be particularly open to changes to the Convention, Art. 237 helps to develop the principles and concretizes the standards laid down in Part XII. This way of 'furtherance' is formally secured by Art. 311 (5). Art. 311 (2) prescribes that the Convention shall not alter the rights and obligations of States Parties arising from other agreements, provided that they are compatible with the Convention and do not affect the application of its basic principles. International agreements expressly permitted or preserved by other articles of the Convention (e. g. also by Art. 237) are not to be affected (Art. 311 (5)).[2] Environmental treaties and agreements which are based upon Art. 237 are not and will not be measured against Art. 311 (2) and (3).[3] Without Art. 237, all conventions needed to be checked against Art. 311, which might convey the wrong message that environmental treaties or agreements must not be elaborated further. Art. 237 (1) determines that Part XII is without prejudice to specific environmental commitments ('specific obligations') previously undertaken and to agreements concluded previously or in the future 'in furtherance' of the general principles. In contrast to Art. 311 (2), this does not explicitly enclose the restriction that other agreements have to be 'compatible with this Convention'. It rather underlines the framework- and 'minimum-standard' character of the Convention in its Part XII and consequently the need of advancement or furtherance of the general provisions, especially of Art. 192. This may include – following the development of marine science and ecology – comprehensive changes and the assumption of precise and far and/or in depth going obligations by the States. As a result, Art. 237 does not inhibit the existence or adoption of these specific international rules and regulations concerning the protection and preservation of the marine environment including its ecosystems on a global or international level e. g. by the International Maritime **2**

[1] *Cf. Rainer Lagoni*, Völkerrechtliche Vorgaben für die Anwendung des USchadG in der AWZ (2007), 37; Myron H. Nordquist/Shabtai Rosenne/Alexander Yankov (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. IV (1991), 425 (MN 237.7(a)).

[2] For further details see *Matz-Lück* on Art. 311 MN 10–12.

[3] *Ibid.*, MN 18.

Organization (IMO)[4] or on a regional basis by the parties of the Convention (see also Art. 197). Specific provisions are in fact necessary to ensure an effective implementation of the general environmental principles of UNCLOS. Moreover, the mandate of the IMO assigned to it by the Convention is to develop such international rules and regulations or to review and revise existing ones.[5] Hence, Art. 237 (1) is not only a conflict rule resolving arising or potential conflicts between the rules of Part XII and other treaties concerning the protection of the marine environment; the article also supports and enhances the development of specific obligations of the States regarding the protection and preservation of the marine environment including its ecosystems and habitats.

3 A qualification concerning specific obligations with regards to the protection and preservation of the marine environment is contained in the second paragraph of Art. 237. It proclaims that if such obligations have been assumed under special 'conventions', they should be carried out in a manner consistent with the general principles and objectives of the Convention.

4 Art. 237 should be seen in close and mutual relationship also to Art. 197. Art. 197 deals with co-operation for the protection and preservation of the marine environment. This article addresses 'States' in general and obliges them to co-operate in the elaboration and implementation of international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, on a global or regional basis.[6] In its provisional measures order in the *MOX Plant Case*, the ITLOS emphasised that the duty to cooperate is a fundamental principle in the prevention of pollution under Part XII of the Convention and general international law.[7] This jurisprudence has been cited approvingly by the Tribunal in the *South China Sea Arbitration* when it alluded also to Art. 123 UNCLOS being specifically important for regional cooperation in enclosed and semi-enclosed seas such as the South China Sea,[8] but also in the Baltic Sea or the Mediterranean and Black Sea, as can be added.

II. Historical Background

5 One of the first drafts with regards to the relation of the environmental obligations under the UNLOS to other commitments dealing with the preservation of marine environment was submitted in 1973 by the representatives of the USSR, reading:

> 'Other conventions on the preservation of the marine environment
> The provisions of this Convention shall be without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the prevention of pollution of the marine environment nor to agreements which may be concluded in furtherance of the general principles set forth in this Convention.'[9]

6 At the sixth meeting in 1974, the Chairman reported that a number of delegations emphasized the need to make greater use of existing international institutions concerned

[4] E. g. the amendment of MARPOL in 1992 to make it mandatory for tankers of 5,000 dwt and more ordered after 6 July 1993 to be fitted with double hulls, or an alternative design approved by IMO: International Convention for the Prevention of Pollution from Ships, 1973, as modified by the 1978 Protocol relating thereto (MARPOL 73/78), Annex I (Reg. 19)).

[5] IMO, Study by the Secretariat of the International Maritime Organization, Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, IMO Doc. LEG/MISC.7 (2012), 10 and 50.

[6] For further details, see *Stephens* on Art. 197 MN 9–11.

[7] ITLOS, *MOX Plant Case* (Ireland *v.* United Kingdom). Provisional Measures, Order of 3 December 2001, ITLOS Reports (2001), para. 82.

[8] PCA, *South China Sea Arbitration* (Republic of the Philippines *v.* People's Republic of China), Award of 12 July 2016, para. 946, available at: https://www.pcacases.com/web/view/7.

[9] Sea Bed-Committee, USSR: Draft Articles for a Convention on General Principles for the Preservation of the Marine Environment, UN Doc. A/AC.138/SC.III/L.32 (1973), 2 (Art. 8).

with the conservation of the marine environment, and to the need for more coordination between them.[10] In 1975 at the Third Session negotiations led to the introduction of the second paragraph. The text included in the Informal Single Negotiating Text then read:

> '1. The provisions of this Convention shall be without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the prevention of pollution of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in this Convention.
>
> 2. Specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be applied in a manner consistent with the general principles and objectives of this Convention.'[11]

The reference to 'this Convention' in this draft which indicates the intended broad scope of this article is noteworthy. It leads to the assumption that in the beginning of the negotiations the objective was to create a final clause, which in the end then became Art. 311.

During the Fifth and Sixth Sessions in 1976/1977, the reference to 'this Convention' was changed to 'this Part of the Convention' and then finalized to 'this Part'.[12] This limits the range of application to the environmental Part XII. Thus, Art. 237 became the special conflict rule within the environmental provisions. The article was then further changed from 'prevention of pollution of the marine environment' to the phrase 'protection and preservation of the marine environment', now reflecting the wording of the general obligation of Art. 192.[13] In the second paragraph, the term 'applied' was altered to 'carried out' before the finalization of the provision.[14] 7

III. Elements

1. 'without prejudice to the specific obligations assumed […] previously'

The first part of Art. 237 (1) refers to the **obligations** that have been assumed by States before the UNCLOS came into force. 'Without prejudice' means that the obligations assumed previously are not altered by the UNCLOS.[15] The obligations and duties remain unchanged. This element focuses on environmental obligations, not on privileges that might have been formerly conceded to some states. The provision does not have the scope to integrate or allow conventions or agreements that have a roll-back-effect on the status of the marine environment ('pollution treaties'). As the wording indicates, the obligations assumed previously, may be (more) specific and probably more aggravating than the general obligation in Art. 192. It is understood that this benchmark is also set for agreements concluded in the future. 8

Art. 237 refers to 'States' and not to all possible signatories of the Convention. However, it should be noted that this article was finalized before Art. 305 (1)(f) with its Annex IX was determined. Therefore, the term 'States' used in this article embraces all entities, including international organisations that are parties to the Convention.[16] 9

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[10] Third Committee UNCLOS III, 6th Meeting, UN Doc. A/CONF.62/C.3/SR.6 (1974), OR II, 328, 335 (para. 113).

[11] UNCLOS III, Informal Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/PART III (1975), OR IV, 171, 176 (Art. 43).

[12] UNCLOS III, Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10 (1977), OR VIII, 41 (Art. 238).

[13] UNCLOS III, Revised Single Negotiating Text (Part III), UN Doc. A/CONF.62/WP.8/Rev.1/PART III (1976), OR V, 173, 180 (Art. 46).

[14] UNCLOS III, Informal Composite Negotiating Text (Revision 2), UN Doc. A/CONF.62/WP.10/REV.2 (1980), OR VIII, 121 (Art. 237).

[15] For other 'without prejudice clauses' within UNCLOS, *cf.* Arts. 28 (3), 51 (1), 52 (1), 62 (1), 63 (1), 69 (5), 70 (6), 74 (3), 76 (10), 83 (3), 139 (2), 141, 151 (1)(a), 189, 211 (3), 217 (4), 220 (2), 226 (1)(c), 228 (3), 242 (2), 246 (7), 249 (2), 292 (3), 298 (1), 302, 303 (4), 304.

[16] Nordquist/Rosenne/Yankov (note 1), 425 (MN. 273.7(b)).

10 Furthermore it should be pointed out that the text explicitly refers to obligations assumed under 'conventions and agreements' whereas the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations define 'treaties' as subject of their conventions. According to the Vienna Conventions 'treaties' should be regarded as international agreements governed by international law and concluded in written form, whatever its particular designation may be. This leads to the conclusion that the applicability of this article shall go beyond the range of the Vienna Convention.[17]

2. 'agreements which may be concluded in furtherance'

11 The second part of Art. 237 (1) refers to 'agreements', which might be concluded (also in the future) in furtherance of the general principles set forth in this Convention. It is notable that this part refers merely to agreements and not to 'special conventions and agreements' like the first part of this paragraph. It is questionable whether the different terminology leads to another scope of application. 'Agreements' are usually regarded as less prim as conventions; there is a general tendency to apply the term to bilateral or restricted multilateral treaties.[18] The term is also employed for instruments of a technical or administrative character which are signed by the representatives of government departments, but are not subject to ratification.[19] The use of the term 'agreement' increases the scope of applicability and leads to the assumption that in particular the furtherance of the general principles of this Convention, not even necessarily related to the protection and preservation of the marine environment, shall be permitted, regardless of their form. Since in the second paragraph the term 'convention' is again introduced, it is also possible that the phrasing is random.

12 Furtherance in general linguistic usage means the process of helping something (or someone) to develop successfully. Agreements which may be concluded in furtherance of the achievement of the objectives of Part XII including all possible measures mentioned in Art. 194 (or elsewhere in Part XII) are encompassed by this phrase. Thus, it is in accordance with the Convention when agreements concerning the enforcement of measures to prevent, reduce and control pollution (in the broad sense of Art. 1 (1)(4)) are concluded in multilateral or even bilateral treaties. The areas of application of these agreements comprise the high seas, but not the Area in all respects, as the International Seabed Authority (ISA) has an exclusive competence laid down in Art. 145 for 'necessary measures' with respect to exploiting resource activities in the Area and by reference in Art. 215 in the application issue of enforcement with respect to pollution from these activities.[20] However, there is no hindrance for concluding 'agreements' concerning e. g. the protection of vulnerable marine ecosystems from the adverse impacts of bottom fishing gears by States, regional fisheries management organisations or other international organizations[21] in the sense of Art. 1 Annex IX. The competence of the ISA does not exclude the protection and preservation of the sea-bed from activities not deriving from the research and exploitation of 'resources' in the sense of Art. 133.

3. 'Specific obligations assumed by States under special conventions […] should be carried out in a manner consistent with the general principles and objectives of this Convention'

13 Art. 237 (2) serves as a qualification to the first paragraph. This clause concerns the manner of (executive) implementation of those other 'conventions', not their conclusion. Whilst

[17] In this tendency: *Ibid*., 425 (MN 273.7(c)).

[18] Definition of Key Terms used in the UN Treaty Collection, available at: http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page 1_en.xml#agreements.

[19] *Ibid.*

[20] For further details see *Vöneky/Beck* on Art. 145 and *Bartenstein* on Art. 215 MN 8–10.

[21] See Council Regulation (EC) No 734/2008 of 15 July 2008 on the Protection of Vulnerable Ecosystems in the High Seas from the Adverse Impacts of Bottom Fishing Gears, OJ 2008 L 201, 8.

Art. 237 (1) provides room for further developments of the provisions of Part XII, the second paragraph proclaims that specific obligations assumed under 'special conventions' with respect to the protection and preservation of the marine environment 'should be carried out in a manner consistent with the general principles and objectives of this Convention.' The wording 'should' gives a little margin to measures and actions of the States Parties within the scope of the specific obligation. Lastly, it is clear that a scope given for discretion should be used in the direction of the principles and objectives of the Convention. An exceptional case would be – theoretically – a possible conflict between the specific obligation and an obligation under the UN Charter. Here one has to recall Art. 103 of the Unites Nations Charter, which determines that in the event of a conflict between the obligations of members of the United Nations and their obligations under any other international instrument, their obligations under the Charter shall prevail. This limitation is also applicable to Art. 237 of this Convention.[22]

14 The reference to 'the general principles of this Convention' could furthermore indicate that the applicability of Art. 237 should not be limited to Part XII of this Convention. Considering that Art. 237 is *lex specialis* to Art. 311, it becomes obvious that there is no room for such an application. Only provisions of 'this part' (XII) are without prejudice to specific obligations that refer to protection and preservation of the marine environment. Moreover, taking a look at the drafting process, it becomes apparent that such distinction in the wording has already been made in the proposal submitted by the USSR in 1973. It seems possible that the wording is simply a remainder from those times, affected by the intention to create a general final clause, which in the end became Art. 311.

15 The term 'convention' is used for formal multilateral treaties with a broad number of parties. Conventions are in general open for participation by the international community as a whole, or by a large number of States.[23] In comparison to the term 'agreement' as used in Art. 237 (1), the more specific term 'convention' could limit the scope of application for the second paragraph. Hence 'only' specific obligations under special conventions, e. g. under the Convention on Biological Diversity (CBD) of 1992 with 193 parties should be carried out in the sense of the qualification namely in consistency with the general principles and objectives of the UNCLOS.[24] It is questionable if 'soft law obligations' deriving from this Convention are also meant by the wording 'specific obligations assumed *under* special conventions',[25] such as the obligations resulting from the decisions of the Conference of the Parties (COP) of the CBD. The COP 9 Decision IX/20 urges the Parties to apply scientific criteria to identify ecologically or biologically significant and/or vulnerable marine areas and has the clear target to implement 'conservation and management measures including the establishment of representative networks of marine protected areas'.[26] If this scenario is regarded as 'specific obligation' that has to be carried out it is an application of Art. 237 (2). As the Decision IX/20 itself shows, the implementation of these obligations into national jurisdiction has to be in 'accordance with international law, including the United Nations Convention on the Law of the Sea'. But it has to be seen that the effects of these 'soft law obligations' are not unilateral, since they spread as a repercussion into the interpretation of the Convention and its principles.

16 Moreover, due to the fact that UNCLOS contains a variety of principles, the furtherance of one principle might not necessary leave other principles unaffected. Thus, the role of Art. 237 (2) should not be underestimated. Nevertheless, Art. 237 (2) rather seems to be of clarifying character, applicable to all specific obligations dealing with the protection and preservation of the marine environment. Moreover, agreements concluded 'in furtherance' necessarily have to be done consistently with the general principles and objectives of the Convention, otherwise such agreements would not be concluded 'in furtherance' but rather in contradiction to the principles.

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[22] *Cf.* Nordquist/Rosenne/Yankov (note 1), 425 (MN 237.7(d)).

[23] Definition of Key Terms used in the UN Treaty Collection, available at: http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page 1_en.xml#conventions.

[24] For details on the relation between the CBD and UNCLOS *cf. infra*, MN 20.

[25] Emphasis added.

[26] COP CBD, Decision IX/20: Marine and Coastal Biodiversity, UN Doc. UNEP/CBD/COP/DEC/IX/20 (2008).

17 Furthermore, it is debatable whether the scope of application was supposed to be limited by the use of terms such as 'States'. Regarding the fact that this article was finished before Art. 305 finally defined the possible signatories to the Convention,[27] the term 'States' in the context of this paragraph should be understood in the sense of Art. 305 (1) as also embracing international organizations like the IMO.[28]

4. List of Multilateral Treaties on the protection and preservation of the marine environment

18 The following list displays a number of multilateral treaties dealing with the protection and preservation of the marine environment.[29] A special clause relating to the management and conservation of the living resources of the sea is contained in Art. 123 (a). This article treats the co-operation of States bordering enclosed or semi-enclosed seas such as the Baltic Sea, the Black Sea or the Mediterranean. Some of the respective treaties are listed below.

1954, 12 May	International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL), done at London, UNTS 327, 3
1958, 29 April	Convention on Fishing and Conservation of Living Resources of the High Seas, done at Geneva, UNTS 559, 285
1958, 29 April	Convention on the High Seas, done at Geneva, UNTS 450, 82
1963, 5 August	Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, done at Moscow, 480 UNTS 480
1969, 29 November	International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, done at Brussels, 970 UNTS 970, 211
1969, 29 November	International Convention on Civil Liability for Oil Pollution Damage, done at Brussels, UNTS 973, 3
1971, 18 December	International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, done at Brussels, UNTS 1110, 57
1972, 29 December	Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, done at London, Mexico City, Moscow, and Washington DC, UNTS 1046, 120
1973, 3 March	Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), signed at Washington D.C., Amended at Bonn, on 22 June 1979, Amended at Gabarone, on 30 April 1983
1973, 2 November	Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances Other than Oil, done at London, UNTS 1340, 184
1978, 17 February	Protocol to the International Convention for the Prevention of Pollution from Ships, done at London, UNTS 1341, 3

[27] Nordquist/Rosenne/Yankov (note 1), 425 (MN. 273.7(b)).
[28] To this consideration see also remarks *supra*, MN 8–10.
[29] This is a non-exhaustive enumeration.

1982, 20 May	Convention on the Conservation of Antarctic Marine Living Resources, done at Canberra, UNTS 1329, 48
1992, 9 April	Convention on the Protection of the Marine Environment of the Baltic Sea, done at Helsinki, UNTS 1507, 167
1992, 21 April	Convention on the Protection of the Black Sea Against Pollution, done at Bucharest, UNTS 1764, 3
1992, 5 June	Convention on Biological Diversity, done at Convention on Biological Diversity, done at Rio de Janeiro, UNTS 1760, 79
1992, 3–14 June	Agenda 21, done at Rio de Janeiro, UNCED, Report of the United Nations Conference on the Environment and Development, UN Doc. A.CONF/151/26/REV.1 (Vol. I) (1992), 9
1992, 22 September	Convention for the Protection of the Marine Environment of the North-East Atlantic, done at Paris, UNTS 2354, 67
1995, 10 June	Amendments to the Convention for the Protection of the Mediterranean Sea against Pollution; done at Barcelona, UNTS A/6908
1995, 4 December	Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, relating to the Conservation, done at New York, UNTS 2167, 3
1995, 31 October	FAO Code of Conduct for Responsible Fisheries (Code of Conduct)
2000, 29 January	Cartagena Protocol on Biosafety to the Convention on Biological Diversity, done at Cartagena, UNTS 2226, 208
2000, 20 April	Convention on the Conservation and Management of Fishery Resources in the South East Atlantic (SEAFO), done at Windhoek, UNTS 2221, 189

As promoted by Art. 237, the environmental part of the UNCLOS has been substantiated by a number of specialized treaties and conventions, concluded either prior to or after its adoption or in order to directly implement its general principles. The above list shows treaties that directly or indirectly address issues relevant to the protection and preservation of the marine environment. **19**

The relation to the CBD, which is complementary to the UNCLOS in relation to its specific objectives, is particularly noteworthy. The CBD establishes in its conflict rule of Art. 22 that its provisions do not affect the rights and obligations of the Contracting Parties deriving from any existing international agreements (such as the United Nations Convention on the Law of the Sea), except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity. With particular reference to the marine environment, Parties are required to implement the CBD consistently with the rights and obligations of States under the law of the sea.[30] It results from those provisions that actions implemented under the CBD framework for the conservation and sustainable uses of biodiversity must be compatible with the provisions of the UNCLOS.[31] The CBD is an elaboration of some of the general principles **20**

[30] Art. 22 CBD.

[31] *Cf. Detlef Czybulka*, Die Anwendung der Umwelthaftungsrichtlinie in der Ausschließlichen Wirtschaftszone und auf dem Festlandsockel: Der Schutz von natürlichen Lebensräumen und Arten im marinen Bereich, NuR 30 (2008), 304, 307 *et seq.*

of the UNCLOS, as provided for in Art. 237 (1).[32] As far as rights and obligations of States are concerned, in practice this implies a hierarchy of the law of the sea over the CBD.[33] Many provisions of the CBD have no conflicting potential and most of the terms used in the CBD such as 'ecosystem' or 'habitat' in Art. 2 of the CBD may be (and are frequently) used in the interpretation of respective articles of the UNCLOS.[34] As the Tribunal decided in the *South China Sea Arbitration*, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), as a nearly universal part of the general corpus of international law, informs the content of Arts. 192 und 194 (5).[35]

21 The UN Fish Stock Agreement (UNFSA) was explicitly adopted as an implementation of the UNCLOS.[36] Therefore, it has to be interpreted and applied in a manner consistent with UNCLOS, as outlined in Art. 4 UNFSA, and does not alter the rights and obligations of States parties to both treaties.[37] Conservation and management measures adopted and applied by the parties to the agreement must be in compliance with UNCLOS. As a furtherance of the general principles of the environmental part of the Convention, the UNFSA implies with its Art. 21 a far reaching cooperation and enforcement provision, breaking new ground in giving non-flag States certain enforcement rights.

22 Relevant non-binding instruments and State practice elaborating on the general principles of the environmental part of the Convention are the Food and Agriculture Organization's (FAO) Code of Conduct for Responsible Fisheries and four FAO international plans of action. The Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem and the second supplement to the FAO Technical Guidelines for Responsible Fisheries on the ecosystem approach to fisheries, provide voluntary guidelines on the implementation of the ecosystem approach.[38]

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[32] *Cf.* CBD SBSTTA, Marine and Coastal Biodiversity: Review, Further Elaboration and Refinement of the Programme of Work, UN Doc. UNEP/CBD/SBSTTA/8/INF/3/REV.1 (2003), 7 (para. 18).

[33] *Alexander Proelss*, Legal Opinion on the Legality of the LOHAFEX Marine Research Experiment under International Law (2009), 12, available at: http://www.internat-recht.uni-kiel.de/de/forschung/opinions/LOHAFEX_en.pdf.

[34] *Peter Kersandt*, Rechtliche Vorgaben und Defizite bei Schutz und Nutzung der Nordsee – unter besonderer Berücksichtigung des Naturschutzrechts (2009), 226; approving *Katrin Täufer*, Die Entwicklung des Ökosystemansatzes im Völkerrecht und im Recht der Europäischen Union und seine Verwirklichung im Meeresbereich des Nordostatlantiks (2012), 101. See now – concerning the interpretation of Art. 194 (5) UNCLOS – *South China Sea Arbitration* (note 8), para. 945.

[35] *South China Sea Arbitration* (note 8), para. 956.

[36] Art. 2 UNFSA.

[37] Art. 44 UNFSA.

[38] GA, Oceans and the Law of the Sea: Report of the Secretary-General Addendum, UN Doc. A/60/63/ADD.1 (2005). *Cf. Täufer* (note 34). 244 *et seq.* and 251.