

## THE LEGAL REGIME OF STRAITS

The right of transit passage in straits and the analogous right of archipelagic sea lanes passage in archipelagic States, negotiated in the 1970s and embodied in the 1982 UNCLOS, sought to approximate the freedom of navigation and overflight while expressly recognizing the sovereignty or jurisdiction of the coastal State over the waters concerned. However, the allocation of rights and duties of the coastal State and third States is open to interpretation. Developments in State practice, such as Australia's requirement of compulsory pilotage in the Torres Strait, the bridge across the Great Belt and the proposals for a bridge across the Strait of Messina, the enhanced environmental standards applicable in the Strait of Bonifacio and Canada's claims over the Arctic Route, make it necessary to reassess the whole common law of straits. *The Legal Regime of Straits* examines the complex relationship between the coastal State and the international community.

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# THE LEGAL REGIME OF STRAITS

Contemporary Challenges and Solutions

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## Sovereignty of States bordering straits and archipelagic States

The UNCLOS seeks to establish a balance between the right of the States bordering straits and archipelagic States to claim sovereignty over expanses of waters used for international navigation, on the one hand, and, on the other hand, the right of third States to benefit from a right of passage there that approximates as much as possible the freedoms of navigation and overflight that they enjoyed under customary law prior to the extension of the territorial sea to 12 nautical miles in the case of straits and, in the case of archipelagic States, prior to the drawing of archipelagic baselines enclosing archipelagic waters wherein routes normally used for international navigation lie. Sovereignty of the coastal State is recognized in Article 49(1) and (2) in Part IV, as well as Article 2(1) and (2) in the case of the territorial sea.

Sovereignty has been characterized as the ‘totality of the powers and rights which every independent State claims in virtue of its statehood and in its relations with other States’.<sup>1</sup> It enables States to affect individuals or situations under certain circumstances. This quality is generally referred to as ‘jurisdiction’, which has been defined as the ‘legal power to exercise a legal activity’;<sup>2</sup> more specifically, it is defined as the conferral on and control by a subject, whether as a matter of right or obligation, of certain rights and duties in relation to a specific object.<sup>3</sup> Jurisdiction viewed as a sovereign right of States or a consequence of sovereignty is common among writers,<sup>4</sup> and the Permanent Court of International

<sup>1</sup> H. Waldock, ‘General Course on International Law’, 1962(106) *Recueil des cours*, 157; J. Crawford, *The Creation of States in International Law* (Cambridge University Press, Cambridge, 1979), 27.

<sup>2</sup> L. Cavaré, *Le droit international public positif*, 2 vols. (Pedone, Paris, 1951), vol. 1, 164.

<sup>3</sup> B. H. Oxman, ‘Jurisdiction of States’, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 3 (North-Holland, Amsterdam, 1997), 55.

<sup>4</sup> See, e.g., D. P. O’Connell, *International Law*, 2 vols. (Stevens & Sons, London, 1965), vol. 2, 655; D. W. Bowett, ‘Jurisdiction: Changing Patterns of Authority over Activities and Resources’, 1983(53) *British Year Book of International Law*, 1; M. N. Shaw, *International Law*, 4th ed. (Cambridge University Press, Cambridge, 2000), 452.

Justice also said that the title of a State to exercise jurisdiction ‘rests in its sovereignty’.<sup>5</sup> Sovereignty is not the only mode through which jurisdiction is acquired, but it is generally the case. Sovereignty in relation to territory has been described rather tautologically as the exercise by a State, in its territory, of the functions of a State to the exclusion of any other State.<sup>6</sup> More precisely, territorial sovereignty has been defined as ‘the plenitude of exclusive competences appertaining to a State under public international law within the boundaries of a definite portion of the globe’.<sup>7</sup> Whereas territorial sovereignty refers to the totality of rights and duties of a State over a territory and, ultimately, the right to dispose of that territory, the nature and extent of these rights are determined by general international law,<sup>8</sup> as well as particular engagements of the territorial sovereign.<sup>9</sup>

Under Part III and Part IV, sovereignty of a coastal State is ‘exercised’ subject to the provisions in Parts III and IV, respectively.<sup>10</sup> This mirrors the provision in Part II, Article 2(3). What ‘exercised’ means is that the bundle of rights and duties that the coastal State has over the waters concerned is different from what would generally obtain in its territory. Because the interests of third States in these waters are expressed in terms of rights of passage and certain other rights (see, for example, Article 51), this also means a restriction on the jurisdiction of the coastal State in its territorial sea and archipelagic waters. Such restriction is framed in terms of prescriptive and enforcement jurisdiction of the coastal State, which is conspicuously limited in matters regarding passage. The phrase ‘in other respects’ in Articles 34(1) and 49(4) preserves the jurisdiction

<sup>5</sup> *The S.S. ‘Lotus’ case (France v Turkey)*, PCIJ (1927), Ser. A, No. 10, 19.

<sup>6</sup> *Island of Palmas (Netherlands v United States)*, 2 RIAA 828, 838 (Arbitral Award of 4 April 1928).

<sup>7</sup> J. H. W. Verzijl, *International Law in Historical Perspective*, part II (Sijthoff, Leiden, 1968), 12–13. Vattel wrote that ‘sovereignty following upon ownership gives a Nation *jurisdiction* over the territory which belongs to it’. E. de Vattel, *The Law of Nations or the Principles of Natural Law* (Charles G. Fenwick trans.) (Carnegie Institution, Washington, DC, 1916), 139 (emphasis in original).

<sup>8</sup> E.g. *Nationality Decrees Issued in Tunis and Morocco (Advisory Opinion)*, PCIJ (1923), Ser. B, No. 4, 7, 24.

<sup>9</sup> E.g. *The S.S. ‘Wimbledon’ case (France, Italy, Japan and the United Kingdom v Germany)*, PCIJ (1923), Ser. A, No. 1, 15, 25; *Perry v United States*, 294 US 330, 353 (1935); A. D. McNair, ‘Treaties and Sovereignty’, in F. M. van Asbeck et al., *Symbolae Verzijl* (Nijhoff, The Hague, 1958), 222, 226–227. In the case of territorial jurisdiction not obtained through sovereignty, the nature and extent of these rights are determined by the particular regime in place.

<sup>10</sup> Articles 34(2) and 49(3).

of the coastal State in matters other than passage. However, because sovereignty is exercised subject to the duty of the coastal State not to impede, hamper, obstruct or suspend the rights of passage in the waters concerned, it is also limited in matters other than the regulation of passage. For instance, the right to fish in a strait belongs exclusively to the coastal State, but the exercise of that right is inherently constrained by its duties towards third States under Part III. How to develop a 'rule of reason' in that regard will be examined in Chapter 9. Article 34(2) refers to the sovereignty or jurisdiction of the States bordering the straits being exercised subject to Part III and to other rules of international law; Article 49(3) only refers to the sovereignty of the archipelagic State. The reference to jurisdiction in Article 34 is clearly meant to refer to straits wider than twice the breadth of the territorial sea, and the State(s) bordering the strait may exercise sovereign rights or jurisdiction, as the case may be, over the continental shelf or EEZ and contiguous zone if declared. The reference to 'other rules of international law' is equally absent from Article 49(3). The reference is found in the UK Draft Articles on archipelagic States,<sup>11</sup> but it was not reproduced in the ISNT. For Nandan and Rosenne, this was done 'apparently to make clear that the new regime established in this section was complete and self-contained'.<sup>12</sup> The reference to other rules of international law in Part III could refer, for example, to the rules on the non-use of force or delimitation.<sup>13</sup> They may also refer to general rules on State jurisdiction or State responsibility. As such, there is no reason why the sovereignty of the archipelagic State should not also be exercised subject to rules of international law other than Part IV; in any event, a dispute regarding the allocation of competences may also be solved using other applicable rules of international law under Article 293 of the UNCLOS.

The status of archipelagic waters under international law (Article 49(4)) and of the waters forming part of a strait under Part III (Article 34(1)) reflects the jurisdictional balance established at UNCLOS III. It has been claimed that 'the requirements of free access to the strait and its airspace were given priority and precedence over the acknowledged rights and

<sup>11</sup> UN Doc. A/AC.138/SC.II/L.44 (1973), para. 5.

<sup>12</sup> S. N. Nandan and S. Rosenne (eds.), *United Nations Convention of the Law of the Sea 1982: A Commentary*, vol. II (Nijhoff, Dordrecht, 1993), 440.

<sup>13</sup> S. N. Nandan and D. Anderson, 'Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982', 1989(60) *British Year Book of International Law*, 172.

interests of bordering States'.<sup>14</sup> It has also been suggested that Article 44 'reinforces the supremacy of the right of transit passage over the rights of the coastal State'.<sup>15</sup> But these claims could be true of any duty imposed on States to exercise their sovereignty in a way that preserves and does not impinge on a given right or collection of rights of third States on their own territory. Parts III and IV are based on a quid pro quo in which the recognition of the sovereignty of the coastal State over the waters concerned and, in the case of an archipelagic State, the prospect of a whole 200-mile EEZ around the archipelago was conditioned by the acceptance of restrictions to that sovereignty. One should add that coastal States do not have to concede such restrictions if they accept to limit their sovereignty claims. This may be achieved by limiting the territorial sea to 3 or 4 nautical miles and also by drawing archipelagic straight baselines accordingly in the case of an archipelagic State.

<sup>14</sup> A. El Mor, 'The Regime of Passage in Straits Used for International Navigation in the Light of the Third UN Conference on the Law of the Sea', 1981(37) *Revue égyptienne de droit international*, 57.

<sup>15</sup> B. B. Jia, *The Regime of Straits in International Law* (Clarendon Press, Oxford, 1998), 166.

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## Limitations to the sovereignty of States bordering straits and archipelagic States: rights and duties of coastal States

### 7.1 General

Article 38(1) indicates that transit passage shall not be impeded. Article 44 says that States bordering straits shall not hamper transit passage and that there shall be no suspension of transit passage. Article 44 applies by incorporation to archipelagic sea lanes passage (Article 54). Under Article 53(3), archipelagic sea lanes passage notably means unobstructed transit. Article 42(2) specifically concerns the effect of laws and regulations that the coastal State may adopt relating to transit passage (and archipelagic sea lanes passage by incorporation under Article 54) and says that their application shall not have the practical effect of denying, hampering or impairing the right of transit passage.

It is perhaps convenient to first identify the duty of the coastal State not to suspend transit passage, in contrast to the right of the coastal State to suspend without discrimination, in form or in fact among foreign ships, temporarily in specified areas of its territorial sea, the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises.<sup>1</sup> An archipelagic State may also suspend innocent passage in its archipelagic waters under similar conditions.<sup>2</sup> Article 16(4) of the 1958 Convention on the Territorial Sea and the Contiguous Zone provides for the duty not to suspend the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State. In the UNCLOS, the right of non-suspendable innocent passage is exercised in a limited category of straits under Article 45, and the limitations applicable to the regime of innocent passage continue to apply.<sup>3</sup> Early on at

<sup>1</sup> Article 25(3).    <sup>2</sup> Article 52(2).

<sup>3</sup> E.g. the duty of submarines to navigate on the surface and show their flags, the absence of a right of overflight and the right to prevent non-innocent passage. Exceptions to the right

UNCLOS III, the United Kingdom suggested the duty not to suspend transit passage.<sup>4</sup> The non-suspendable characteristic of transit passage applies to ships, submarines and aircraft alike and, as far as the latter are concerned, notably means that the coastal State may not, in the airspace over straits or archipelagic sea lanes, rely on its right under Article 9 of the 1944 Chicago Convention to restrict or prohibit uniformly the aircraft of other States from flying over certain areas of its territory for reasons of military necessity or public safety or to temporarily restrict or prohibit flying over the whole or any part of its territory in exceptional circumstances or during a period of emergency. The Chicago Convention otherwise reserves the case of war (Article 89). The issues raised by the law of war and the question of whether a strait must never be closed or whether temporary closure is justified by military necessity were addressed in Part I. The closure in September 1988 by Indonesia of the Sunda and Lombok straits to all shipping for the purpose of conducting air and sea tactical exercises was contrary to Article 44.<sup>5</sup>

The differences in terminology, if there are any, between 'impede', 'impair', 'obstruct' or 'hamper' are irrelevant. The Concise Oxford Dictionary defines 'to hamper' as 'to obstruct movement with material obstacles' or 'to impede, hinder'. It defines 'to impede' as 'to retard by obstructing, hinder'. It defines 'to impair' as 'to damage, weaken'. 'To hinder' means 'to impede, delay, prevent'. In all of these is the notion of the imposition of a restriction either in time ('retard') or space or both or at least a requirement that will cause such restriction. The French version speaks of 'entrave' in Article 38(2) and 'entraver' in Article 44, 'empêcher, restreindre ou entraver' in Article 42(2) and 'entrave' in Article 53(3).<sup>6</sup> The Spanish text refers to 'obstaculizado' in Article 38(2) and 'obstaculizarán' in Article 44 and 'negar, obstaculizar o menoscabar' in Article 42(2). The expression 'sin trabas' is used in Article 53(3).<sup>7</sup> The duty not to deny transit passage in Article 42(2) is narrower than the duty not to impede or hamper. A denial of passage is a negation of the right to pass, as when passage is suspended or refused. It is contained in the duty not to impede,

of non-suspendable innocent passage in straits were envisaged by Fiji in its Draft: UN Doc. A/CONF.62/C.2/L.19, UNCLOS III, III Official Records (1974), 197, Article 4(2).

<sup>4</sup> UN Doc. A/CONF.62/C.2/L.3, UNCLOS III, III Official Records (1974), 186, Chapter III, Article 6.

<sup>5</sup> See Part III, Section 4.3.2.2.2.; 1989(83) *American Journal of International Law*, 559.

<sup>6</sup> 'Entrave' means 'interference or obstacle'. 'Entraver' means 'to prevent, to obstruct, to interfere with'. 'Restreindre' means 'to restrict, to diminish'.

<sup>7</sup> 'Obstaculizar' means 'to block'. 'Menoscabar' translates as 'to undermine, to reduce, to lessen'. 'Trabas' refers to 'obstacles, obstructions'.

delay, prevent or hamper passage. The duty involved is a duty of abstention, for the coastal State is required to refrain from engaging in activities that will result in the impairment or impediment of the right of transit. Such activities are not limited to the placing of physical obstacles in a strait or archipelagic sea lane, although material obstacles were singled out during the negotiations.<sup>8</sup> Article 44 refers to (material) *dangers* to navigation or overflight and the duty of the coastal State to give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. The notion should arguably receive a broad interpretation and not be restricted to natural dangers. A bridge could certainly constitute a danger to navigation or overflight. This is a modern articulation of the duty in the *Corfu Channel* case,<sup>9</sup> adopted in Article 15(2) of the Geneva Convention on the Territorial Sea on the basis of the work of the ILC, and carried over into Articles 24(2) and 44.<sup>10</sup>

However, the duty not to impair or hamper refers more broadly to acts, measures or activities of the coastal State.<sup>11</sup> Thus Article 44 serves

<sup>8</sup> See Chapter 9, n. 7 and accompanying text.

<sup>9</sup> *Corfu Channel* case (*United Kingdom v Albania*) (*Merits*), ICJ Rep. (1949), 22.

<sup>10</sup> Nandan and Rosenne in Chapter 6, n. 12, 388. Article 43 asks all the users of the strait to contribute to the safety of navigation in the strait. See Part V. The IMO noted:

[T]he objective of publicity required will be effectively achieved only if the information in question reaches the States, authorities, entities and persons who are expected to be guided by the information. IMO maintains the most direct and continuing contact with the authorities of States concerned with safety of navigation and the prevention of vessel-source pollution. Accordingly the purpose of the 'publicity' is likely to be served by some IMO involvement. To the extent that this involvement is considered necessary and appropriate, it may be useful to consider suitable arrangements by which the Organization may assist or co-operate with the States, or international organizations concerned in ensuring that the publicity given by them will in fact reach the destinations for which it is intended.

IMO Doc. LEG/MISC/1, Implications of the United Nations Convention on the Law of the Sea, 1982, for the International Maritime Organization, Study Prepared by the Secretariat of IMO (1987), para. 130.

<sup>11</sup> E.g. UN Doc. A/CONF.62/C.2/L.11, UNCLOS III, III Official Records, 189, Article 1(2)(e): 'No State shall be entitled to interrupt or suspend the transit of ships through the straits, or engage therein in any acts which interfere with the transit of ships, or require ships in transit to stop or communicate information of any kind'; UN Doc. A/CONF.62/C.2/L.20, Draft Articles submitted by Algeria on straits used for international navigation and semi-enclosed seas, UNCLOS III, III Official Records (1974), 199: 'No State shall be entitled to interrupt or suspend free transit through straits or to take any measures likely to hamper such transit' (Article 1(2)(d)). In subsequent discussions in the Second Committee, the Draft prepared in 1975 by the Private Group on Straits, which is materially identical to

to reinforce the point that transit passage may not be hampered by States bordering straits by the adoption of laws or regulations or in any other manner.<sup>12</sup> The difficulty with the identified duty is its undetermined scope, for unless passage is denied or suspended, all the other words used refer to scalar concepts. Passage may be delayed by three hours, but it may also be delayed by 30 minutes. It does not necessarily mean that in both cases the coastal State has breached its duty. Furthermore, the UNCLOS necessarily rests on the assumption that an internationally approved measure such as a traffic separation scheme or a mandatory reporting requirement, transposed into domestic law under Article 42, will not qualify as measures that hamper or impede navigation, even though they impose restrictions on ships. Clearly, the scope of the right of transit is interpreted within the objectives that these measures serve. International measures themselves must remain within the framework established by the UNCLOS. Similarly, the appropriate enforcement measures taken under Article 233 must be regarded either as lawful exceptions to the duty not to hamper or impede transit passage, in light of the objective listed in that provision, or as permitted enforcement measures that do not come within the purview of Article 44 in the first place.<sup>13</sup>

## 7.2 Adoption of archipelagic sea lanes, sea lanes, traffic separation schemes and other routing measures: joint process

The designation of archipelagic sea lanes was presented in Part III, Section 4.3.2.2.2. Under Article 53(6) of the UNCLOS, an archipelagic State which designates sea lanes may also prescribe traffic separation schemes for the safe passage of ships through narrow channels in such sea lanes. Pursuant to Article 53(7), that State may also substitute other sea

Article 44 (see IV Platzöder, 196, Article 6), was not subject to much questioning; suggestions to qualify the word 'hamper' with the adverb 'unduly' were not accepted, no doubt because it would have weakened the duty. Nandan and Anderson in Chapter 6, n. 13, 95.

<sup>12</sup> Nandan and Rosenne in Chapter 6, n. 12, 388. 'A State bordering a strait may not seek to impose legislative requirements which would in effect retard or prevent passage, nor seek to arrest ships in transit, nor allow the construction of works or installations which would impede ships or aircraft in transit'. Nandan and Anderson in Chapter 6, n. 13, 195. The duty in Article 44 is expressly labelled a duty of States bordering straits. The duty in Articles 38(2) and 53(3) could possibly also be conceived of as a duty of flag States not to impede or obstruct the right of transit (or archipelagic sea lanes) passage of other States. See J. A. de Yturriaga, *Straits Used for International Navigation: A Spanish Perspective* (Nijhoff, Dordrecht, 1991), 192.

<sup>13</sup> The enforcement of the under-keel clearance requirement applicable in the Strait of Malacca was deemed to come within the second alternative. See Section 7.6.1.2.2.

lanes or traffic separation schemes for any sea lanes or traffic separation schemes it had previously designated or prescribed. In all of these cases, the General Provisions for the adoption, designation and substitution of archipelagic sea lanes must be followed. The General Provisions and Part A of the IMO publication on Ships' Routeing concerning the prescription of traffic separation schemes apply equally to the substitution of traffic separation schemes.<sup>14</sup> Within archipelagic sea lanes, traffic is not separated, except in traffic separation schemes.<sup>15</sup> No traffic separation schemes have been designated in Indonesian archipelagic sea lanes.

Unlike Article 22 on innocent passage, the State bordering a strait under Article 41 does not have the unilateral right to designate sea lanes and traffic separation schemes in a strait.<sup>16</sup> These schemes are adopted by the IMO and designated by the State. In both cases, sea lanes and traffic separation schemes promote the safe passage of ships.<sup>17</sup> Contrary to some suggestions at the Sea-Bed Committee and UNCLOS III, there is no right under Article 41 to adopt air routes.<sup>18</sup> Unlike Article 22(2), Article 41 also does not provide for the coastal State's unilateral power to confine to sea lanes the passage of tankers, nuclear-powered ships and ships carrying nuclear or other inherently dangerous or noxious substances or materials.<sup>19</sup> Article 41 in fact codifies pre-existing practice. For reasons of safety, ships began following predetermined routes around 1898.<sup>20</sup> The Dover Straits traffic separation scheme was the first mandatory traffic scheme, adopted in 1971 by the IMO's Assembly.<sup>21</sup> This meant that no

<sup>14</sup> General Provisions, section 5.3.      <sup>15</sup> *Ibid.*, section 6.4.

<sup>16</sup> On Article 22, see Part III, Section 4.2. The coastal State must *take account of* the recommendations of the competent international organization (para. 3). Under Article 41, sea lanes and traffic separation schemes shall *conform to* generally accepted international regulations.

<sup>17</sup> Articles 22(1) and 41(1). See also Article 211(1).      <sup>18</sup> See Part III, Section 5.2.

<sup>19</sup> Oman, which favoured a regime of non-suspendable innocent passage in straits used for international navigation, would have granted the coastal State the right to require the passage through its strait along designated traffic lanes for foreign marine research and hydrographic survey ships, foreign oil tankers and chemical tankers carrying nuclear substances or materials. (undated, 1975), IV Platzöder, 188, Article 4(4). This was not adopted. But see n. 30.

<sup>20</sup> This concerned shipping companies operating passenger ships across the North Atlantic. IMO, *Ships' Routeing*, 10th ed. (International Maritime Organization, London, 2010), introduction.

<sup>21</sup> The institutes of Navigation of the Federal Republic of Germany, France and the United Kingdom had begun a study on improving safety measures in congested areas, such as the English Channel. The group came up with a series of proposals, including the idea that ships using congested areas should follow a system of one-way traffic schemes, like those being used on land. Traffic lanes of this type were already in use on the Great Lakes of North

State could unilaterally alter the regulations with which all mariners were required to comply.<sup>22</sup> As early as the American proposal at the Sea-Bed Committee, it was claimed that coastal States may designate corridors suitable for transit by all ships.<sup>23</sup> The UK proposal at the Conference for the first time referred to a straits State (that is, a State bordering a strait) being under the obligation to refer proposals for sea lanes or traffic separation schemes in the strait to the competent international organization for approval. The British delegate identified the IMCO (IMO) as the competent international organization.<sup>24</sup> This idea was reproduced in the Draft prepared by the Private Group on Straits,<sup>25</sup> and it was repeated later in the ISNT.<sup>26</sup> This became Article 41, with minor changes.<sup>27</sup> Article 41 reads:

1. In conformity with this Part, States bordering straits may designate sea lanes and prescribe traffic separation schemes for navigation in straits where necessary to promote the safe passage of ships.
2. Such States may, when circumstances require, and after giving due publicity thereto, substitute other sea lanes or traffic separation schemes

America. The proposals were favourably received by the Maritime Safety Committee of the IMO (then the IMCO) in 1964, and governments were urged to advise their ships to follow the routes suggested by the group. In June 1967, a traffic separation scheme was established in the Dover Straits and a significant fall was seen in the number of collisions between ships on opposing courses. Observance of the schemes was voluntary, but in 1971, a series of accidents in the English Channel led to calls for immediate action. The IMO's Maritime Safety Committee meeting in March 1971 recommended that observance of all traffic separation schemes be made mandatory, and this recommendation was adopted by the IMO Assembly later the same year. See [www.imo.org/OurWork/Safety/Navigation/Pages/ShipsRouteing.aspx](http://www.imo.org/OurWork/Safety/Navigation/Pages/ShipsRouteing.aspx).

<sup>22</sup> Statement by the British Representative, UNCLOS III, II Official Records (Second Committee, 11th meeting, 22 July 1974), 125.

<sup>23</sup> UN Doc. A/AC.138/SC.II/L.4 (1971). See also the Preliminary Draft submitted by Malta, UN Doc. A/AC.138/SC.II/L.28 (1973), Article 37(2)(a).

<sup>24</sup> Statement by the British Representative in n. 22. This is also contained in Article 3 of Chapter III of the UK Draft Articles in n. 4. See also the Statement by Tonga, UNCLOS III, I Official Records (28th plenary meeting, 3 July 1974), 108, para. 68.

<sup>25</sup> (18 April 1975), IV Platzöder, 195, Article 3. This provision added the clauses on sea lanes and traffic separation schemes conforming with generally accepted international regulations and on neighbouring straits States co-operating in formulating proposals.

<sup>26</sup> UN Doc. A/CONF.62/WP.8/Part II, IV Official Records, 158, Article 40.

<sup>27</sup> Notably, the reference to the substitution of sea lanes or traffic separation schemes in Article 41(4). This was added at the request of the International Chamber of Shipping in its Commentary on the ISNT (1976), IV Platzöder, 244 (noting that the ISNT gave 'a strait state the right to substitute alternative schemes without reference to the competent international organization').

for any sea lanes or traffic separation schemes previously designated or prescribed by them.

3. Such sea lanes and traffic separation schemes shall conform to generally accepted international regulations.
4. Before designating or substituting sea lanes or prescribing or substituting traffic separation schemes, States bordering straits shall refer proposals to the competent international organization with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the States bordering the straits, after which the States may designate, prescribe or substitute them.
5. In respect of a strait where sea lanes or traffic separation schemes through the waters of two or more States bordering the strait are being proposed, the States concerned shall cooperate in formulating proposals in consultation with the competent international organization.
6. States bordering straits shall clearly indicate all sea lanes and traffic separation schemes designated or prescribed by them on charts to which due publicity shall be given.
7. Ships in transit passage shall respect applicable sea lanes and traffic separation schemes established in accordance with this article.

The relevant generally accepted international regulations referred to in paragraph 3 include Regulation V/10 of the International Convention for the Safety of Life at Sea (SOLAS),<sup>28</sup> as well as Rules 1(d) and 10 of the Convention on the International Regulations for Preventing Collisions at Sea (COLREG).<sup>29</sup> Under SOLAS Regulation V/10(2), the IMO is recognized as the only international body for developing guidelines, criteria and regulations on an international level for ships' routeing systems. Similarly, under Rule 1(d) of COLREG, traffic separation schemes may be adopted by the IMO for the purpose of COLREG. With this mandate and under Article 15(j) of its Constitution, the IMO adopted resolution A.572(14) in 1985 entitled 'General Provisions on Ships' Routeing' (as amended). Traffic separation schemes (TSS) are part of a broader set of measures that the IMO refers to as 'routeing'. Ships' routeing systems contribute to safety of life at sea, safety and efficiency of navigation and/or protection of the marine environment. Ships' routeing systems are

<sup>28</sup> 1184 UNTS 2, opened for signature on 1 November 1974 and entered into force on 25 May 1980 (text as amended). 162 contracting States as of 31 July 2013.

<sup>29</sup> 1050 UNTS 16, opened for signature on 20 October 1972 and entered into force on 15 July 1977 (text as amended). 156 contracting States as of 31 July 2013.

recommended for use by, and may be made mandatory for, all ships or certain categories of ships or ships carrying certain cargoes, when adopted and implemented in accordance with the guidelines and criteria developed by the Organization.<sup>30</sup>

With resolution A.376(X), the IMO decided that the function of adopting TSS, assigned to the Organization by COLREG, shall be performed by the MSC on behalf of the IMO. The IMO adopted general provisions on ships' routeing in resolution A.378(X), which was later replaced by subsequent resolutions and finally by resolution A.572. Under resolution A.858(20) of 1997, the IMO Assembly resolved that the function of adopting TSS, routeing measures other than TSS, including the designation and substitution of archipelagic sea lanes, and ship reporting systems, as well as amendments thereto, shall be performed by the MSC on behalf of the Organization. A routeing system is defined in resolution A.572(14) as 'any system of one or more routes or routeing measures aimed at reducing the risk of casualties; it includes traffic separation schemes, two-way routes, recommended tracks, areas to be avoided, inshore traffic zones, roundabouts, precautionary areas and deep-water routes'.<sup>31</sup> The preamble to that resolution indicates that all routeing systems including TSS should conform to the same general criteria and principles. A strict interpretation of Article 41 as limited to TSS is therefore not

<sup>30</sup> SOLAS Regulation V/10(1). Apart from archipelagic sea lanes, the IMO as such does not designate sea lanes but only TSS and other routeing measures. 'Some doubts were expressed in IMO and by some delegations and observers at the Third United Nations Conference on the Law of the Sea about the appropriateness of the expression "sea lanes", as used in the provisions of the Convention on the Law of the Sea dealing with the regulation of maritime traffic': Implication of the United Nations Convention on the Law of the Sea 1982 for the International Maritime Organization, Study by the Secretariat of IMO, IMO Doc. LEG/MISC/1 (27 July 1987), 1987(3) *International Organizations and the Law of the Sea. Documentary Yearbook*, 379.

<sup>31</sup> Para. 2.2.1.1. A TSS is defined as a routeing measure aimed at the separation of opposing streams of traffic by appropriate means and by the establishment of traffic lanes. A traffic lane is an area within defined limits in which one-way traffic is established. A two-way route is a route within defined limits inside which two-way traffic is established, aimed at providing safe passage of ships through waters where navigation is difficult or dangerous. A deep-water route is a route within defined limits which has been accurately surveyed for clearance of the sea bottom and submerged obstacles as indicated on the chart. An area to be avoided is a routeing measure comprising an area within defined limits in which either navigation is particularly hazardous or it is exceptionally important to avoid casualties and which should be avoided by either all ships or certain classes of ship. *Ibid.*, para. 2.1. Rule 10 of COLREG, which supplies the 'rules of the road' in a TSS, is applicable to the TSS adopted by the IMO.

warranted in light of the fact that the UNCLOS under Article 42(1)(a) gives the coastal State the power to adopt laws and regulations in respect of 'the safety of navigation and the regulation of maritime traffic, as provided in Article 41'. Measures other than TSS are typically taken by the IMO following the procedure for adoption of routeing measures. Thus Oxman rightly concludes that Article 41 should be read liberally, so as to permit complete implementation under Article 41 of the full substantive scope of the regulatory powers under Article 42(1)(a) that are to be implemented 'as provided in Article 41', namely, the adoption of any measures consistent with the UNCLOS deemed necessary by the riparian State and the IMO for the safety of navigation and the regulation of maritime traffic. This liberal reading of Article 41 advances coastal, maritime and environmental interests, any or all of which could be prejudiced in both practice and principle if a serious regulatory vacuum were to emerge.<sup>32</sup>

The initiation of action to establish a routeing system is the responsibility of the Member Government or Governments concerned. The

<sup>32</sup> B. H. Oxman, 'Environmental Protection in Archipelagic Waters and International Straits – The Role of the International Maritime Organisation', 1995(10) *International Journal of Marine and Coastal Law*, 476–477. By the same writer, see also 'The Territorial Temptation: A Siren Song at Sea', 2006(100) *American Journal of International Law*, 844: 'All concerned, straits states and maritime states alike, have an interest in the effective functioning and responsiveness of such a "mixed" regulatory system. Given the difficulty of achieving express agreement with all possible flag states, the effect of a narrow construction of that regulatory option is to invite unilateral coastal state action to fill the regulatory vacuum'. If the power of the IMO under Article 41 and that of the coastal State under Article 42(1)(a) were limited to the designation of TSS, then Article 42(1)(a) would be redundant. The reference to Article 41 in that provision is procedural. This may also be the view of Treves: T. Treves, 'Navigation', in R. J. Dupuy and D. Vignes (eds.), *A Handbook on the New Law of the Sea*, 2 vols. (Nijhoff, Dordrecht and Boston, 1991), vol. 2, 966. Moore is of the view that Article 42(1)(a) does not provide a basis for regulation except to effectuate sea lanes or TSS internationally adopted. J. N. Moore, 'The Regime of Straits and the Third United Nations Conference on the Law of the Sea', 1980(74) *American Journal of International Law*, 105. This restrictive view does not conform to international practice. Notably, the IMO adopted, at the request of Indonesia, Malaysia and Singapore, resolution A.375(X), which requires for the Straits of Malacca and Singapore a TSS, deep-water routes and a minimum of 3.5 metres under-keel clearance for deep draught vessels and very large crude carriers during the entire passage through the Straits. The resolution also recommends for these vessels the use of the pilotage services of the respective countries when they become available. The resolution was adopted considering resolution A.378(X) and noting Article 16(i) of the Constitution of the IMCO. Under Article 16(i), the Assembly has the power to 'recommend to Members for adoption regulations concerning maritime safety, or amendments to such regulations, which have been referred to it by the Maritime Safety Committee through the Council'.

proposal should first set forth the objectives for submitting the routing system, the demonstrated need for its establishment and the reasons why the proposed system is preferred. This should include any history of groundings, collisions or damage to the marine environment. It should also state whether the system applies to all ships, certain categories of ships or ships carrying certain cargoes. Additionally, the summary should set forth the proposed impact on navigation, including the expected impact on shipping.<sup>33</sup> Routes should follow as closely as possible existing patterns of traffic flow. For proposals intended to protect the marine environment, the summary should state whether the proposed routing system can reasonably be expected to significantly prevent or reduce the risk of pollution or other damage to the marine environment of the area concerned.<sup>34</sup> A new or amended routing system adopted by the IMO shall not come into force as an IMO adopted system before an effective date promulgated by the government that proposed the system, which shall be communicated to the IMO by the responsible government. That date shall not be earlier than six months after the date of adoption of a routing system by the IMO.<sup>35</sup> A routing system, when adopted by the IMO, shall not be amended or suspended before consultation with and agreement by the

<sup>33</sup> MSC/Circ.1060 (2003), Guidance note on the preparation of proposals on ships' routing systems and ship reporting systems, paras. 2.1, 3. See also General Provisions, para. 5.2; SOLAS Regulation V/10(3).

<sup>34</sup> MSC/Circ.1060 in n. 33, paras. 3.4.1., 3.5.2. See also General Provisions, paras. 3.6 and 6.2. In deciding whether to adopt or amend a TSS, the IMO will consider whether the aids to navigation proposed will enable mariners to determine their position with sufficient accuracy to navigate in the scheme in accordance with Rule 10 of the COLREG and also whether the state of hydrographic surveys in the area is adequate. General Provisions, para. 3.2.

<sup>35</sup> General Provisions, para. 3.8. The legends, symbols and notes adopted by the International Hydrographic Organization are recommended as guidance for the representation on nautical charts. *Ibid.*, para. 9.1. The obligation in Article 41(6) to clearly indicate TSS on charts to which due publicity shall be given is one that rests with the coastal State, not the IMO; the IMO adopts the relevant measures, but it is the coastal State which designates them. The IMO will invariably indicate the geographical positions of the routing measures that it adopts. Unlike Articles 16(2), 47(9), 75(2), 76(9) and 84(2), there is no obligation to deposit charts with the UN Secretary-General (see also Article 22(4)). 'Due publicity' has been defined by the United Nations as 'notification of a given action for general information through appropriate authorities within a reasonable amount of time in a suitable manner'. Notification is made through diplomatic channels and more directly to national hydrographic offices. See United Nations Office for Oceans Affairs and the Law of the Sea, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (United Nations, New York, 1989), 54.

IMO, unless local conditions or the urgency of the case require that earlier action be taken.<sup>36</sup>

The applicable regulations contain general safeguards in the interest of navigation. The IMO will not adopt a mandatory routeing system before it has considered whether proper and sufficient justification has been advanced by the sponsoring government(s) and whether ports or harbours of littoral States would be adversely affected.<sup>37</sup> A routeing system may be made mandatory either for all ships or for certain categories of ships or for ships carrying certain cargoes.<sup>38</sup> However, the extent of a mandatory routeing system should be limited to what is *essential* in the interest of safety navigation and the protection of the marine environment.<sup>39</sup> IMO will not adopt a proposed routeing system until it is satisfied that the proposed system will not impose *unnecessary* constraints on shipping and that the system is completely in accordance with the requirements of SOLAS.<sup>40</sup> The General Provisions specify that in the case of mandatory routeing systems, governments should ensure that drilling rigs (MODUs), exploration platforms and other structures obstructing navigation and not being an aid to navigation will not be established within the traffic lanes of a TSS that is part of a mandatory routeing system.<sup>41</sup>

SOLAS Regulation V/10(9) indicates that all adopted ships' routeing systems and actions taken to enforce compliance with those systems shall be consistent with international law, including the relevant provisions of the UNCLOS. It contains a special safeguard on straits: 'Nothing in this regulation nor its associated guidelines and criteria shall prejudice the

<sup>36</sup> General Provisions, para. 3.1.7. In an emergency such as that which might result from the unexpected blocking or obstruction of a traffic lane or any other part of a routeing system by a wreck or other hazard, immediate temporary changes in the use of the affected traffic separation scheme or other routeing system may be made by the responsible and sponsoring government or governments, with the objective of directing traffic flow clear of the new hazard. *Ibid.*, para. 3.19.

<sup>37</sup> General Provisions, para. 3.5. In particular, when establishing areas to be avoided by all ships or by certain classes of ship, the necessity for creating such areas should be well-demonstrated and the reasons should be stated. In general, these areas should be established only in places where inadequate survey or insufficient provision of aids to navigation may lead to danger of stranding, where local knowledge is considered essential for safe passage, where there is the possibility that unacceptable damage to the environment could result from a casualty or where there might be hazard to a vital aid to navigation. These areas shall not be regarded as prohibited areas unless specifically so stated; the classes of ship which should avoid the areas should be considered in each particular case. *Ibid.*, para. 5.5.

<sup>38</sup> *Ibid.*, para. 8.1. <sup>39</sup> *Ibid.*, para. 6.17 (emphasis added).

<sup>40</sup> *Ibid.*, para. 3.7 (emphasis added). <sup>41</sup> *Ibid.*, para. 3.12.

rights and duties of Governments under international law or the legal regimes of straits used for international navigation and archipelagic sea lanes'.<sup>42</sup> The General Provisions do not elaborate and only provide a safeguard for straits in the case of the proposed designation of an area to be avoided: 'An area to be avoided will not be adopted if it would impede the passage of ships through an international strait'. As the concepts of 'unnecessary constraints', 'prejudice of the regimes of straits and archipelagic sea lanes' and 'impediment of passage' are not defined further, the balance between the interests of navigation and the interests of coastal State needs to be addressed.<sup>43</sup>

Under Article 41(7) of the UNCLOS, ships in transit passage shall respect applicable sea lanes and traffic separation schemes established in accordance with this Article. SOLAS Regulation V/10(7) indicates that a ship shall use a mandatory ships' routing system adopted by the IMO as required for its category or cargo carried and in accordance with the relevant provisions in force, unless there are compelling reasons not to use a particular ships' routing system. The duty to respect sea lanes and TSS is arguably not similar to a duty to comply with those schemes, although, in practice, ships in transit can be expected to follow them.<sup>44</sup> Should compulsory routing measures not be respected, for instance, when a ship navigates outside a designated traffic lane, the ship concerned would be in breach of Article 41, but that does not entitle the State bordering the strait to consider the right of transit to have been lost.<sup>45</sup>

It is not necessary to reproduce here the routing measures adopted by the IMO for various straits used for international navigation. They are described in the latest edition (2010) of its publication on *Ships' Routing*. In addition to routing measures as defined earlier in this Section, other traffic measures were developed. Notably, SOLAS V/10 contains Regulation 11 on ship reporting systems and Regulation 11 on vessel traffic services, and the IMO has adopted associated guidelines. These measures, which concern safety of navigation, also form part of the regulatory competence of the coastal State under Article 42(1)(a), and some have been adopted for straits used for international navigation.<sup>46</sup>

<sup>42</sup> SOLAS Regulation V/10(10). <sup>43</sup> See Chapter 9.

<sup>44</sup> Nandan and Anderson in Chapter 6, n. 13, 189. See the parallel duty in Article 53(11).

<sup>45</sup> Contra M. J. Valencia and A. B. Jaafar, 'Environmental Management of the Malacca/Singapore Straits: Legal and Institutional Issues', 1985(25) *Natural Resources Journal*, 217.

<sup>46</sup> See Section 7.3.2.

### 7.3 Limitations to the prescriptive jurisdiction of States bordering straits and archipelagic States regarding passage: scope of content

#### 7.3.1 *General*

The prescriptive jurisdiction of the coastal State under Parts III and IV is conspicuously more restricted than it is in Part II. Under Article 42(1), States bordering straits may adopt laws and regulations relating to transit passage through straits, in respect of all or any of the following:

- (a) the safety of navigation and the regulation of maritime traffic, as provided in Article 41;
- (b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait;
- (c) with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear;
- (d) the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits.

Under Article 42, these four matters are the only ones for which the coastal State is allowed to legislate. These are broader than the initial proposals made by the United States and the United Kingdom. Early on at the Sea-Bed Committee, the United States recognized that the State bordering a strait could designate corridors suitable for transit and pollution regulations, on the condition that these safety and environmental considerations not be left to the unilateral determination of the coastal State: The standards should be established by international agreement.<sup>47</sup> The United Kingdom, for its part, suggested at the Conference that a straits State may make laws and regulations in conformity with the provisions on sea lanes and traffic separation schemes and giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait.<sup>48</sup> This was expanded by the Private Group on Straits in Article 4(1) of its Draft, which is substantially similar to Article 42(1) of the UNCLOS and which was repeated in the successive Drafts of the Convention.<sup>49</sup> Several attempts were made to widen

<sup>47</sup> UN Doc. A/AC.138/SC.II/L.4 and Corr.1 (1971); UN Doc. A/AC.138/SC.II/SR.33–47 (37th meeting, 1972), 25.

<sup>48</sup> UK Draft Articles in n. 4, Chapter III, Article 4.

<sup>49</sup> Private Group on Straits in n. 11.

the scope of the legislative jurisdiction of the coastal State. Spain would have added the protection of navigational aids and facilities, as well as other facilities or installations; the protection of cables or pipelines; the conservation of the living resources of the sea; the preservation of the environment; marine scientific research and hydrographic surveys; and the prevention of infringement on the customs, fiscal, immigration or sanitary regulations of the States bordering the strait.<sup>50</sup> A proposal by Malaysia contained similar extensions and would also have added the right of the coastal State, where the navigational and hydrographical peculiarities of, and the density of traffic in, the strait so require, to establish and enforce non-discriminatory laws limiting the right of transit passage of vessels which, because of their insufficient under-keel clearance, constitute a grave danger to the safety of navigation or to the marine environment of that State. Such laws were to be made in consultation with the IMO.<sup>51</sup> Greece would have amended paragraph 1(a) to include the safety of air traffic, as well as the rules, regulations and procedures of the ICAO.<sup>52</sup>

It is important to stress that coastal States are not allowed to adopt laws and regulations on the duties of ships and aircraft identified elsewhere in Part III; these are for flag States and States of registry to legislate. Thus the duties in Article 39 flow from the UNCLOS itself and are distinct from the additional duties that may be created by coastal States in the implementation of sea lanes (Article 41) or those resulting from Article 42.<sup>53</sup> Coastal States, for instance, may not adopt laws and regulations giving effect to generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships under Article 39(2)(b). Hence, a coastal State that has not legislated under Article 42(1)(b) on discharge standards may not take enforcement measures under Article 233, even though the breach committed may well fall under Article 39(2)(b), too. The principle of delinkage identified in Section 5.4 between the duties of ships and aircraft under Article 39 and the enforcement jurisdiction of the coastal State also applies to the duties of ships under Articles 41 and 42 and the enforcement jurisdiction of the coastal State.<sup>54</sup> The coastal State remains free to adopt laws and

<sup>50</sup> Proposed amendments to the RSNT (undated), IV Platzöder, 395.

<sup>51</sup> Ibid. (7 September 1976), 398. See also the Moroccan proposal, IV Platzöder, 401.

<sup>52</sup> (undated, 1978), V Platzöder, 24.

<sup>53</sup> H. Caminos, 'The Legal Regime of Straits in the 1982 United Nations Convention on the Law of the Sea', 1987(205) *Recueil des cours*, 148.

<sup>54</sup> Caminos in n. 53, 168. Article 42, unlike Article 234, does not give the coastal State the power to adopt *and enforce* its laws and regulations, and Article 42 is subject to 'the

regulations relating to the status of the waters forming a strait or the exercise of its sovereignty over such waters in matters other than passage (Article 34), but this, too, is analysed along the same principles. Issues raised by this and by Article 38(3) were addressed in Sections 5.3 and 6. Legislative confusion, unfortunately, is not uncommon. Indonesia, in Regulation No. 37 on the rights and obligations of foreign ships and aircraft exercising the right of archipelagic sea lanes passage through designated archipelagic sea lanes,<sup>55</sup> notably prohibits foreign ships and aircraft from carrying out unauthorized broadcasting (Article 4(7)) and requires foreign ships in the area where facilities for exploitation or exploration of natural resources are located not to sail within 500 metres of the prohibited zone around the installation (Article 7(4)). It also requires foreign ships not to damage or disrupt navigation facilities or submarine cables or pipelines (Article 7(3)), and it is reminiscent of the Spanish and Malaysian proposal to amend the RSNT.<sup>56</sup> Under Article 9(1), foreign ships are prohibited from discharging oil, oily waste or other dangerous materials into the marine environment and/or from conducting other activities in contravention of international standards and regulations to prevent, reduce and control marine pollution originating from the ship. The accompanying Elucidation of Government Regulation No. 37 indicates that this provision 'serves as the application of Article 54 in conjunction with Article 42, paragraph 1, letter (b), and Article 211, paragraph 2, of the Convention'. The claimed Indonesian competence is in excess of what the UNCLOS allows if it is broadly extended to the control of marine pollution from ships. Article 211(2) concerns flag State, not coastal State, jurisdiction. Therefore, it is unclear whether Article 9(1) is meant to reproduce the duties of ships under Article 39 and the coastal State's legislative competence under Article 42.<sup>57</sup> Other inconsistencies are raised by domestic legislation which has not updated laws on innocent passage in the territorial sea to take account of the right of transit or archipelagic sea lanes passage.<sup>58</sup>

provisions of this section', which includes Articles 38 and 44 (the duty not to impede or hamper transit passage).

<sup>55</sup> 28 June 2002, available in 2003(52) *Law of the Sea Bulletin*, 20.

<sup>56</sup> See n. 51 and accompanying text.

<sup>57</sup> The legislation of Saint Vincent and the Grenadines is drafted in a clearer fashion. The Maritime Areas Act, 1983(1) (Act No. 15 of 19 May 1983), reproduces the duties of ships and aircraft in section 13, and then in section 14, it specifies that the Minister may make laws and regulations relating to the matters in Article 42, which the Act reproduces.

<sup>58</sup> E.g. Yemen Act No. 45 of 1977 concerning the Territorial Sea, Exclusive Economic Zone, Continental Shelf and other Marine Areas, which applies to the Strait of Bab

### 7.3.2 Article 42(1)(a)

Pursuant to this provision, States bordering straits and archipelagic States (Article 54) may adopt laws and regulations relating to transit passage through straits (or archipelagic sea lanes passage), in respect of the safety of navigation and the regulation of maritime traffic, as provided in Article 41. The adoption of TSS was studied in Section 7.2. As argued in that Section, Article 42(1)(a) should be taken as a procedural provision and read broadly to include other measures adopted by the IMO in the interest of the safety of navigation.<sup>59</sup> The question may be asked whether these other measures may be taken only when a TSS is adopted. This appears to the view of Beckman.<sup>60</sup> Oxman offers a more liberal approach, in which it is unnecessary for the riparian State and the IMO to attach other safety and traffic regulations to a TSS in order to act under Article 42(1)(a), but he is 'prepared to concede that fig leaf to those who demand interpretative modesty'.<sup>61</sup> The IMO itself in the General Provisions on Ships' Routing indicated that a government planning, implementing or maintaining mandatory routing systems should consider whether, because of the particular circumstances in the area or parts of the area concerned, an associated monitoring service, a reporting service or a vessel traffic service (VTS) should be established in accordance with the guidelines adopted by the IMO.<sup>62</sup>

Chapter V of SOLAS was amended by the IMO's MSC by resolution MSC.31(63) on 23 May 1994 and came into force on 1 January 1996. A new Regulation made ship reporting systems (SRS), once adopted by the IMO,

Al-Mandeb and which only makes provisions for innocent passage (with a requirement of authorization for foreign warships). Cape Verde, which claims archipelagic State status, has also claimed archipelagic waters enclosed by straight baselines. Within these waters, it only recognizes the innocent passage of ships. See Law No. 60/IV/92 (21 December 1992), Articles 2 and 6.

<sup>59</sup> See n. 32 and accompanying text.

<sup>60</sup> R. C. Beckman, 'The Regulation of Ship-Source Pollution in Straits Used for International Navigation', in M. H. Nordquist, T. T. B. Koh and J. N. Moore (eds.), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Nijhoff, Leiden and Boston, 2009), 327.

<sup>61</sup> Oxman, 'Environmental Protection' in n. 32, 477. Oxman adds: 'This is exactly what was done in the Straits of Malacca and Singapore, where underkeel clearance requirements – strangers at the time to conventional notions of traffic regulation – were attached to a [TSS] in IMO as part of arrangements leading to support for the straits and archipelago provisions of the draft LOS Convention by Indonesia, Malaysia and Singapore.'

<sup>62</sup> Resolution A.572(14) (as amended), para. 5.3.

compulsory for all ships or for some of them.<sup>63</sup> The initiation of action for establishing a ship reporting system is the responsibility of the government or governments concerned. Before proceeding with a proposal for adoption of a ship reporting system, the IMO must disseminate details of the proposal to those governments which have a common interest in the area covered by the proposed system.<sup>64</sup> In developing such systems, provisions of the guidelines and criteria developed by the Organization must be taken into account.<sup>65</sup> The Assembly of the IMO, on 27 November 1997, adopted a new set of General Principles for ship reporting systems and ship reporting requirements.<sup>66</sup> An SRS is used to provide, gather or exchange information through radio reports for many purposes, including search and rescue, VTS, weather forecasting and prevention of marine pollution.<sup>67</sup> The Principles notably indicate that reports should be simple, kept to a minimum, use the standard international ship reporting format and preferably use a single radio frequency. SOLAS requires that participation of ships be free of charge to the ships concerned.<sup>68</sup> Therefore, an SRS is considered a general service to navigation for which no charge should be levied.<sup>69</sup> SOLAS V/11(7) requires the master of a ship to comply with the requirements of an adopted SRS and report to the appropriate authority all information required in accordance with the provisions of each such system. No direct enforcement action by the coastal State is permitted

<sup>63</sup> Regulation V/11(1): 'Ships reporting systems contribute to safety of life at sea, safety and efficiency of navigation and/or protection of the marine environment. A ship reporting system, when adopted and implemented in accordance with the guidelines and criteria developed by the Organization pursuant to this regulation, shall be used by all ships, or certain categories of ships or ships carrying certain cargoes in accordance with the provisions of each system so adopted'.

<sup>64</sup> *Ibid.*, para. 5.

<sup>65</sup> Ship reporting systems not submitted to the Organization for adoption do not necessarily need to comply with this regulation. However, governments implementing such systems are encouraged to follow, wherever possible, the guidelines and criteria developed by the Organization. *Ibid.*, paras. 2 and 4.

<sup>66</sup> Resolution A.851(20). This revokes an earlier version of 19 October 1989 (resolution A.648(16)), which made SRS recommendatory only.

<sup>67</sup> *Ibid.*, Annex 1.1.

<sup>68</sup> Regulation V/11(10). This is repeated in an attenuated form in the General Principles: 'No charge *should* be made for communication of reports' (para. 1.1.4, emphasis added). The Guidelines therefore suggest that the establishment and operation of a SRS should take into account the cost to ship operators and responsible authorities. In particular, governments should ensure that shore establishments responsible for operation of the system are manned by properly trained persons (paras. 1.1.10.2 and 1.1.11).

<sup>69</sup> On Articles 26 and 43, see Part V.

under Part III for failure to comply with an SRS. SOLAS V/11(8)–(9) says that all adopted SRS and actions taken to enforce compliance with those systems shall be consistent with international law, including the relevant provisions of the UNCLOS, and it suggests that nothing in the Regulation or its associated guidelines and criteria shall prejudice the rights and duties of governments under international law or the legal regimes of straits used for international navigation and archipelagic sea lanes. This was also emphasized by the UN Secretary-General in his report on the law of the sea in 1995.<sup>70</sup> However, he also noted that the Regulation reflects important progress in the task undertaken at the IMO to provide port and coastal States with the regulatory framework necessary to prevent accidents in their jurisdictional waters.<sup>71</sup> The General Principles indicate: that reports should only contain information essential to achieve the objectives of the system; that the purpose of the system should be clearly defined; and that SRS should provide for special reports from ships concerning defects or deficiencies with respect to their hull, machinery, equipment or manning which could adversely affect navigation.<sup>72</sup> Hence, the argument was made in 1994, while the MSC was debating the amendment to SOLAS, that the ship's name, call sign, position, speed, course and route information were expected to be provided as part of a mandatory SRS, but it was still uncertain if a requirement to report cargo and destination could be justified under the UNCLOS.<sup>73</sup> Scovazzi adopts the view that 'a mere notification only makes the bordering State aware of what will happen, without ipso facto providing that State with the right to hamper transit passage. Information would enable bordering States to exercise adequate control for the protection of the environment, and facilitate intervention in the case of accidents or casualties'.<sup>74</sup> The matter is even more obvious in the case of SRS and routing measures that apply to certain ships or ships carrying certain cargoes. If a ship carrying a certain cargo must comply with a given area to be avoided, the coastal State will not be able to monitor non-compliance unless information regarding cargo is supplied. The Appendix to the General Principles indicates that, apart from sailing plan, position report, deviation report, final report and dangerous goods or harmful substances reports in the case of an incident,

<sup>70</sup> UN Doc. A/50/713, para. 91.      <sup>71</sup> *Ibid.*, para. 92.

<sup>72</sup> General Principles, paras. 1.1.1, 1.1.8., 1.1.15.

<sup>73</sup> S. B. Kempton, 'Ship Routing Measures in International Straits', 2000(14) *Ocean Yearbook*, 244.

<sup>74</sup> T. Scovazzi, 'Management Regimes and Responsibility for International Straits: With Special Reference to the Mediterranean Straits', 1995(19) *Marine Policy*, 141–142.

‘any other report’ should be made in accordance with the procedures that the government that established the SRS put in place. Mandatory SRS for certain ships are notably in place in the Dover Straits-Pas de Calais (CALDOVREP), the Great Belt (BELTREP), the Strait of Gibraltar TSS area (GIBREP), the Strait of Bonifacio (BONIFREP), the Straits of Malacca and Singapore (STRAITREP) and the Torres Strait (REEFREP). CALDOVREP and BONIFREP require a report on hazardous cargo, class and quantity, if applicable. GIBREP, STRAITREP and REEFREP apply, inter alia, to all ships, regardless of length, carrying hazardous and/or potentially polluting cargo (carried in bulk for REEFREP), as defined in the relevant MSC resolution.

Another, broader marine traffic control (MTC) measure is the use of vessel traffic services (VTS); these may go beyond reporting requirements and are classified by Corbet as ‘active’ measures (as opposed to passive ones), that is, as ‘any pragmatic involvement in the navigation of a ship . . . by a person not on board the ship . . . and such person is defined here as a “marine traffic controller”’.<sup>75</sup> By amendment of SOLAS chapter V, a new Regulation 12 came into force on 1 July 2002, according to which contracting governments undertake to arrange for the establishment of VTS where, in their opinion, the volume of traffic or the degree of risk justifies such services.<sup>76</sup> That Regulation allows for mandatory VTS but only in sea areas within the territorial seas of a coastal State.<sup>77</sup> The value of VTS in navigation safety was first recognized by the IMO in resolution A.158 (ES.IV) in 1968, but as technology advanced and the equipment to track and monitor shipping traffic became more sophisticated, it was clear that guidelines were needed to standardise procedures in setting up VTS. In particular, it became apparent that there was a need to clarify when a VTS might be established and to allay fears in some quarters that a VTS might impinge on the shipmaster’s responsibility for navigating the vessel. As a result, in 1985, the IMO adopted resolution A.578 (14), ‘Guidelines for Vessel Traffic Services’. The Guidelines made clear that decisions concerning effective navigation and manoeuvring of the vessel remained with the shipmaster. The Guidelines highlighted the importance of pilotage in a VTS and described reporting procedures for ships passing through an area where a VTS operates.<sup>78</sup> VTS was not mandatory.

<sup>75</sup> A. G. Corbet, ‘Development of Vessel Traffic Services: Legal Considerations’, 1989(16) *Maritime Policy and Management*, 277.

<sup>76</sup> SOLAS V/12(2). <sup>77</sup> *Ibid.* (3).

<sup>78</sup> [www.imo.org/OurWork/Safety/Navigation/Pages/VesselTrafficServices.aspx](http://www.imo.org/OurWork/Safety/Navigation/Pages/VesselTrafficServices.aspx).

These Guidelines were revised by resolution A.857(20) of 27 November 1997. A VTS is defined as a 'service implemented by a Competent Authority, designed to improve the safety and efficiency of vessel traffic and to protect the environment' (1.1.1). A VTS is particularly appropriate in an area that may include, *inter alia*, high traffic density, traffic carrying hazardous cargoes, environmental considerations, a record of maritime casualties and narrow channels (3.2.2). The Guidelines specify that VTS services improve the safety of navigation and the protection of the marine environment (2.1.1) but say that the precise objectives of any VTS will depend on the particular circumstances in the VTS area (2.1.4). Beyond that, the Guidelines merely mention that VTS should comprise at least an information service and may also include other services, such as a navigational assistance service or a traffic organization service or both (1.1.9). In particular, a navigational assistance service is defined as a service to assist on-board navigational decision making and to monitor its effects (1.1.9.2). This service is normally rendered 'at the request of a vessel or by the VTS when deemed necessary' (2.3.2).<sup>79</sup> The Guidelines specify that in planning or establishing a VTS, the government or competent authority 'should ensure' that the VTS is operated in accordance with international law (2.2.2.1). SOLAS V/12(5) expresses this in categorical terms: 'Nothing in the regulation or the guidelines adopted by the IMO shall prejudice the rights and duties of Governments under international law or the legal regimes of straits used for international navigation and archipelagic sea lanes'.<sup>80</sup>

Concerns were expressed at the 61st session of the MSC in 1992, whereupon plans for the introduction of mandatory observance of VTS were deferred. In the course of its discussions, the legal committee found that 'there was no consensus on whether an existing treaty instrument could provide the legal basis necessary for establishing a mandatory VTS'.<sup>81</sup> A

<sup>79</sup> A VTS may be made mandatory in the territorial sea: see n. 77. The Guidelines specify that decisions concerning the actual navigation and the manoeuvring of the vessel remain with the master; neither a VTS sailing plan nor requested or agreed upon changes to the sailing plan can supersede the decisions of the master concerning the actual navigation and manoeuvring of the vessel (para. 2.6.2). The Guidelines are less imperative in para. 2.3.4: 'When the VTS is authorized to issue instructions to vessels, these instructions should be result-oriented only, leaving the details of execution, such as course to be steered or engine manoeuvres to be executed, to the master or pilot on board the vessel. Care should be taken that VTS operations do not encroach upon the master's responsibility for safe navigation, or disturb the traditional relationship between master and pilot.'

<sup>80</sup> As in the case of SRS, compliance is a matter for the flag State to ensure.

<sup>81</sup> Kempton in n. 73, 243.

case in point is the delegation of the United States, supported by the Russian delegation, expressing concern over Spain's proposal to establish mandatory SRS in its territorial sea without first submitting its proposals to the IMO for adoption.<sup>82</sup> SOLAS has since been amended to allow for mandatory VTS in the territorial sea but with a safeguard regarding straits and archipelagic waters. Nevertheless, the exact relationship with the UNCLOS, which does not specifically allow or prohibit such developments, is not always clear, and the very reluctant attitude of States to openly defy the balance achieved in the UNCLOS still remains a basic factor in the discussion.<sup>83</sup> Under SOLAS V/11(4), States do not always have to submit plans for SRS for adoption by the IMO (but they are encouraged to do so); however, SOLAS V/11(1) makes it clear that SRS, 'when adopted and implemented in accordance with the guidelines and criteria developed by the Organization pursuant to this regulation', shall be used by ships. The appropriateness of other measures sought by coastal States, such as compulsory pilotage, has also attracted vivid debates within the IMO and academia. As this is part of the broader balance between the rights and duties of coastal States and third States, it is analysed in Chapter 10.

### 7.3.3 Article 42(1)(b)

#### 7.3.3.1 Scope

The scope of this provision is more restricted than the power of the coastal State relating to innocent passage is. Here, the coastal State may only give effect to applicable international regulations, and these concern the discharge of oil, oily wastes and other noxious substances in the strait. The provision can be traced back directly to the 1974 Draft presented by the United Kingdom.<sup>84</sup> Rules on discharge are clearly much narrower than are rules on the preservation of the environment of the coastal State and the prevention, reduction and pollution control thereof (Article 21(1)(f)). Furthermore, the coastal State is only allowed to give effect to international regulations in its internal legal order. It is not allowed to modify them.<sup>85</sup>

<sup>82</sup> IMO Doc. NAV 45/14 (1991), 3.32.

<sup>83</sup> International Law Association's Committee on Coastal State Jurisdiction Relating to Marine Pollution, 2000(69) *International Law Association Conference Report*, 452–453.

<sup>84</sup> See n. 48 and accompanying text.

<sup>85</sup> If the laws of the coastal State set standards that are more stringent, they will need to be modified as far as transit passage is concerned.

By proposed amendment of 13 April 1982, Spain would have deleted the adjective 'oily' before the word 'waste'.<sup>86</sup> Spain later withdrew this proposal. The limitation to discharge arguably excludes giving effect to regulations pertaining to construction, equipment, design or manning (CEDM).<sup>87</sup> But the argument has been made that a literal reading of the words 'regarding the discharge' does not necessarily limit the extent of jurisdiction to the prescription of discharge standards; CEDM standards directly related to the discharge of these substances would then be permitted, as well, although there seems to be no indication that such a complex interpretation was really envisaged.<sup>88</sup> It is not evident, however, that Article 42(1)(b) excludes pollution from other sources, such as the dumping of waste or maritime casualty.<sup>89</sup> The international regulations concerned are admittedly primarily those contained in the MARPOL Convention, which concerns the prevention of pollution from ships. 'Discharge' is not limited to intentional discharge. Discharge in relation to harmful substances or effluents means any release howsoever caused and includes any escape, disposal, spilling, leaking, pumping, emitting or emptying.<sup>90</sup> The MARPOL Convention has six Annexes: Annex I on pollution by oil; Annex II on pollution by noxious liquid substances in bulk; Annex III on pollution by harmful substances carried by sea in packaged form; Annex IV on pollution by sewage from ships; Annex V on pollution by garbage from ships; and Annex VI on air pollution from ships. Article 42(1)(b) clearly applies to Annexes I and II (which are compulsory), given that they refer to oil and noxious substances.<sup>91</sup> Writing in 1998, Beckman considered that there 'may be doubt as to whether the coastal State can adopt laws and regulations requiring ships exercising transit passage to comply with the optional annexes to MARPOL 73/78

<sup>86</sup> UN Doc. A/CONF.62/L.109, UNCLOS III, XVI Official Records, 223.

<sup>87</sup> Contrast with UNCLOS Article 21(2). E.g. Moore in n. 32, 105.

<sup>88</sup> E. J. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (Kluwer, The Hague, 1998), 291.

<sup>89</sup> Contra Yturriaga in n. 12, 175.

<sup>90</sup> MARPOL, Article 2(3)(a); Article 2(6). Pace A. G. López Martín, *International Straits: Concept, Classification and Rules of Passage* (Springer, Berlin, 2010), 166; Yturriaga in n. 12, 175. The UNCLOS defines dumping as 'deliberate disposal': Article 1(1)(5)(a).

<sup>91</sup> Annex I notably sets strict conditions (in particular relating to quality) on the discharge of oil and oily mixture and special standards for Special Areas. These standards do not apply to discharge into the sea resulting from damage to a ship or its equipment, provided that all reasonable precautions have been taken after the occurrence of the damage or discovery of the discharge for the purpose of preventing or minimizing the discharge, except if the owner or the master acted either with intent to cause damage or recklessly and with knowledge that damage would probably result.

because [they] deal with matters other than the discharge of oil, oily wastes and noxious substances'.<sup>92</sup> He changed his mind 10 years later and included this time Annex III, as well.<sup>93</sup> Roach ambiguously concluded that 'the scope of the competence of the State bordering straits to legislate under Article 42(1)(b) extends only to MARPOL Annexes I and II, and not to its optional annexes, except to the extent they deal with discharge of noxious substances into the marine environment'.<sup>94</sup> In its commentary to the UNCLOS, the US government stated that Article 42 covers 'the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, with annexes . . . (MARPOL) and any applicable regional agreement'.<sup>95</sup> Annex IV on 'sewage' applies to drainage, notably from toilets, medical premises and spaces containing animals and controls the discharge of sewage. In Annex V, 'garbage' means all kinds of waste generated during the normal operation of the ship, and the Annex controls the disposal of garbage, notably that which contains toxic residue. Even though sewage and garbage do not qualify as 'noxious' or 'harmful' substances under MARPOL Annexes II and III, there is no reason why they would not fall under the 'other noxious substance' clause in Article 42. There is no reason to exclude Annex VI, either, seeing as it applies to the emission of certain harmful substances from ships. An indication that Article 42 should not be limited to MARPOL is given by the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter.<sup>96</sup> 'Dumping' is defined as the deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea, excluding the disposal at sea of wastes or other matter incidental to, or derived from, the normal operations of vessels, aircraft, platforms or other man-made structures at sea and their equipment (Article 1). Dumping of operational waste is regulated by Annex V of MARPOL. Under MARPOL's Article 2(3)(b)(i),

<sup>92</sup> R. C. Beckman, 'The International Legal Regime Governing the Safety of Navigation and the Prevention of Pollution in International Straits', 1998(2) *Singapore Journal of International and Comparative Law*, 375.

<sup>93</sup> Beckman in n. 60, 325.

<sup>94</sup> J. A. Roach, 'Responsibilities and Rights of Other States', in M. Kusuma-Atmadja, T. A. Mensah and B. H. Oxman (eds.), *Sustainable Development and Preservation of the Oceans: The Challenges of UNCLOS and Agenda 21* (Law of the Sea Institute, William S. Richardson School of Law, University of Hawaii, Honolulu, 1997), 228–229.

<sup>95</sup> Treaty Document 103–39, Letter of Transmittal, Commentary, 20, [www.foreign.senate.gov/imo/media/doc/treaty\\_103-39.pdf](http://www.foreign.senate.gov/imo/media/doc/treaty_103-39.pdf).

<sup>96</sup> 1046 UNTS 120, opened for signature on 29 December 1972 and entered into force on 30 August 1975.

'discharge' excludes dumping within the meaning of the 1972 Convention. The 1972 Convention also applies to matter other than waste, and this is defined as 'material and substance of any kind, form or description' (Article III(4)). It includes 'crude oil and its wastes, refined petroleum products, petroleum, distillate residues, and any mixtures containing any of these' (Annex I(5)).

### 7.3.3.2 Applicable international regulations: definition

It should be noted first that Article 42(1)(b) is limited to 'regulations', unlike other provisions in the UNCLOS which refer to rules, standards, practices and procedures. On its face, it is limited to instances of international legislation.<sup>97</sup> There is controversy over the meaning of 'applicable', particularly when it is contrasted to 'generally accepted' in Article 39(2), which is examined in Section 8.2.4.2. The UNCLOS refers on numerous occasions to applicable international norms relating to the environment, labour conditions or safety or navigation.<sup>98</sup> Sometimes such reference is made in combination with a generally accepted rule or standard.<sup>99</sup> For Treves, 'applicable' means in force for the bordering State.<sup>100</sup> However, he makes reference to his observations on Article 218 on port State enforcement of applicable rules and standards in matters of pollution. There, he argues that both the flag State and the port State must be bound by the rules which are relevant for the port State to be able to exercise the powers conferred on it.<sup>101</sup> Why dispense with the flag State in the case of Article 42? If only a coastal State's consent is required, then Article 42 could be read as allowing two States bordering a strait to adopt a regulation by treaty (making it 'international'), therefore rendering it 'applicable' to the strait, unless Article 42 only applies to international regulations that are generally accepted *and* to which the coastal State has given its consent. If both coastal State and flag State consent is required,

<sup>97</sup> '[I]nternational conventions adopted for example under the auspices of the [IMO] . . . as well as subsidiary or related instruments and decisions'. Nandan and Anderson in Chapter 6, n. 13, 185. It is doubtful that it encompasses customary law, which is ill-suited to the development of technical regulations.

<sup>98</sup> E.g. Articles 42(1)(b), 60(5), 94(3)(b), 94(4)(c), 213, 214, 216(1), 217, 218, 219, 220(1), 220(2), 220(3), 222, 226(1)(c), 228, 230(1), 230(2) and 297(1)(c).

<sup>99</sup> See Article 94(3): 'Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to . . . (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments'. And Article 94(5): 'In taking the measures called for in paragraph 3 . . . each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance'. See also Article 60(5).

<sup>100</sup> Treves in n. 32, 966. <sup>101</sup> *Ibid.*, 854.

then the coastal State may not give effect to an international regulation which has not been accepted by the flag State, and therefore the pollution regime in force for a given strait would depend on each flag State's international commitments. This is apparently how Spain understood the effect of 'accepted' when it suggested replacing the word 'applicable' by 'generally accepted'.<sup>102</sup> For Spain, 'the present text might be interpreted as preventing coastal States from adopting a set of objective regulations that could be uniformly applied to all ships in transit'.<sup>103</sup> Before the vote on the proposed amendment, the French delegate indicated that:

[H]is delegation was opposed in principle to any amendment to the text adopted within the Second and Third Committees. It was not, however, opposed to the amendment under consideration inasmuch as it brought the wording of Article 42 into line with that of other provisions, including those on the protection of the marine environment, and did not change the general meaning of the text. His delegation was therefore in favour of the amendment.

Similar support was expressed by Canada.<sup>104</sup> The vote yielded 60 in favour and 29 against, with 51 abstentions, but the amendment was rejected, because it had not received the majority required (two-thirds of the vote) in accordance with Rule 39(1) of the Rules of Procedure.<sup>105</sup> For Yturriaga, the Spanish terminology was accepted in the Drafting Committee and the Second Committee, and only the tactical opposition of the Argentinean delegation and the indecisiveness of Chairman Aguilar prevented the harmonization of paragraph 1(b) with other parallel provisions of the Convention. He claims that the negative votes cast were only because of the objection on principle to the introduction of changes to the Draft text.<sup>106</sup> A similar stance is taken by Oxman, who writes that the negative implication created by the failure to adopt the Spanish amendment is

<sup>102</sup> UN Doc. A/CONF.62/L.109, UNCLOS III, XVI Official Records (13 April 1982), 223.

<sup>103</sup> UN Doc. A/CONF.62/L.136, UNCLOS III, XVI Official Records (26 April 1982), 244.

<sup>104</sup> UNCLOS III, XVI Official Records (176th plenary meeting, 26 April 1982), 132.

<sup>105</sup> *Ibid.*, 133.

<sup>106</sup> Yturriaga in n. 12, 177. In August 1980, the English language group proposed the substitution of the words 'generally accepted' for the word 'applicable' in the reference to international regulations or international rules and standards in Articles 42(1)(b), 94(4)(c), 218(1) and 219. The co-ordinators of the language groups invited all language groups to give their views on the proposal. The proposal was still under consideration by the Drafting Committee at the beginning of 1981, but the final result was negative, and nothing has in this respect been changed in the Convention's text. B. Vukas, 'International Rules and Standards', in A. H. A. Soons (ed.), *Implementation of the Law of the Sea Convention through International Institutions. Proceedings of the 23rd Conference of the Law of the Sea Institute* (University of Hawaii, Honolulu, 1990), 410.

insufficient to overcome a literal, coherent and logical interpretation of the UNCLOS. The Conference was reluctant to risk unravelling complicated package deals by adopting formal amendments by vote at its conclusion, and the same caution was evident within the Drafting Committee itself.<sup>107</sup>

Upon signing the UNCLOS, Spain declared that, with regard to Article 42, it believes that the provisions of paragraph 1 (b) do not prevent it from issuing, in accordance with international law, laws and regulations giving effect to generally accepted international regulations.<sup>108</sup> Having adopted a restrictive construction of 'applicable', Treves opines that the interpretation given by Spain is open to strong doubts.<sup>109</sup> A restrictive interpretation of 'applicable international regulation' refers to rules that are binding only for the State which has expressed its consent to be bound by them in an international treaty, and only if that treaty is in force.<sup>110</sup> The inconsistencies in applicable norms for a given ship are apparent if one adopts the view that 'applicable' means 'expressly consented to' by the coastal State and the flag State; in that case, the ship may be required to comply with a given standard under Article 39 which binds the flag State even if it has not consented to it and not under Article 42 if the flag State has not consented to it. A coastal State may not apply its legislation under Article 42 to ships flying the flag of a State that has not consented to a given regulation, but the coastal State's own ships might have to comply with the same regulation by virtue of Article 39 if it is generally accepted. For Oxman, the applicable standards in Article 42 are those identified in the straits chapter itself, namely, in Article 39(2)(b); apart from its textual clarity and administrative coherence, this result also has the merit of being consistent with the regulatory power of the coastal State in the EEZ.<sup>111</sup> Oxman also refers to Article 297(1), which applies only to 'disputes concerning the interpretation or application of *this* Convention' (emphasis added). It would be normal to interpret language in such a compromissory clause with

<sup>107</sup> Oxman, 'Environmental Protection' in n. 32, 477.

<sup>108</sup> [www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm#SpainUponSignature](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#SpainUponSignature).

<sup>109</sup> Treves in n. 32, 967. <sup>110</sup> Yturriaga in n. 12, 176.

<sup>111</sup> Oxman, 'Environmental Protection' in n. 32, 477 (quoting Article 211(5), which refers to generally accepted rules and standards). This argument seems to suggest that an increase in coastal State jurisdiction in the EEZ is not logical when compared to a restrictive approach to 'applicable'. That said, even if 'applicable' is read as 'generally accepted', Articles 211(5) and 211(6) give the coastal State a wider measure of legislative competence than Article 42(1)(b) does. See also Molenaar in n. 89, 293.

reference to substantive provisions of the same instrument. Unless ‘applicable’ in sub-paragraph (c) of that Article is read as a cross-reference to the substantive provisions of the UNCLOS rather than to some other agreement, how does a dispute alleging failure to comply with an ‘applicable’ standard ‘established . . . through a competent international organization or diplomatic conference’ qualify as a dispute ‘concerning the interpretation or application of [the] Convention’? For the purposes of Article 297, it seems reasonable to conclude that the international standards ‘applicable’ to a coastal State are those that the Convention requires such standards to respect.<sup>112</sup>

Clearly, if a regulation is generally accepted, ipso facto it is applicable in the mutual relations between the flag State and the coastal State. The whole debate concerns the question of whether the consent of a given State is necessary to make the regulation ‘applicable’ beyond the notion that a State has consented through the UNCLOS itself to be bound by generally accepted rules. The matter, at least with respect to MARPOL, seems moot in light of the great number of Parties. Nevertheless, it is submitted that questions of legal logic, internal economy in the UNCLOS and environmental concerns of States bordering straits at UNCLOS III lead to an interpretation that makes ‘applicable’ and ‘generally accepted’ at least functionally equivalent. This means that regulatory power should not be refused to coastal States simply because a flag State has not expressly consented to a given rule, as long as that rule is generally accepted. Beyond that, nothing prevents the coastal State and the flag State from being parties to instruments that are not generally accepted; these are also applicable in their mutual relations.<sup>113</sup>

#### 7.3.4 Article 42(1)(c)

The coastal State may legislate on the prevention of fishing, including the stowage of fishing gear. This expressly only applies to fishing vessels, as only they would arguably be capable of causing sufficient prejudice to the interests of the coastal State. The restriction to fishing vessels is not

<sup>112</sup> B. H. Oxman, ‘The Duty to Respect Generally Accepted International Standards’, 1991–1992(24) *New York University Journal of International Law and Politics*, 138.

<sup>113</sup> See also the conclusions reached by the International Law Association’s Committee on Coastal State Jurisdiction Relating to Marine Pollution, 2000(69) *International Law Association Conference Report*, 483–484 (noting that ‘the term “applicable” will potentially cover a broader set of rules and standards than those coming under the concept of “generally accepted”’).

found in Article 19(2)(i);<sup>114</sup> nor is it found in Article 21(1)(e);<sup>115</sup> but Article 14(5) of the Convention on the Territorial Sea says that ‘passage of foreign fishing vessels shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent these vessels from fishing in the territorial sea’. The United Kingdom in its Draft provisions on innocent passage granted the coastal State prescriptive jurisdiction in relation to the ‘prevention of unauthorized fishing by foreign fishing vessels including *inter alia* the stowage of gear’.<sup>116</sup> The Private Group on Straits granted a strait State the right to adopt laws in respect of ‘the prevention on fishing, including the stowage of fishing gear’.<sup>117</sup> This was reproduced in the ISNT with the restriction to fishing vessels.<sup>118</sup> The ISNT in its section on innocent passage also makes ‘any fishing activities’ circumstances that render passage non-innocent.<sup>119</sup>

Nandan and Rosenne argue that the authority of the coastal State is limited to fishing vessels and that fishing by other ships in transit passage would fall under the prohibition in Article 39(1)(c).<sup>120</sup> There are two difficulties with this restrictive view. One is that the coastal State’s only remedy in the case of fishing by other ships would be to turn to the flag State for enforcement of the ‘other than those incident to their normal modes’ condition, and doing so may attract a different punishment from that under Article 42, which the coastal State is free to impose as long as passage is not hampered.<sup>121</sup> The other difficulty is that it is unclear whether it is the law of the coastal State or that of the flag State or some international standard that determines what constitutes a fishing vessel.<sup>122</sup> The more plausible interpretation is that Article 42(1)(c) applies to all ships, but fishing vessels were targeted especially in order to make it clear

<sup>114</sup> ‘Any fishing activities’.

<sup>115</sup> ‘The prevention of infringement of the fisheries laws and regulations of the coastal State’.

<sup>116</sup> UK Draft Articles in n. 4, III Official Records, 184, Article 18(1)(g).

<sup>117</sup> Private Group on Straits in n. 11 (18 April 1975), Article 4(1)(c).

<sup>118</sup> See n. 26, IV Official Records (7 May 1975), 160, Article 40(1)(c).

<sup>119</sup> See n. 26, IV Official Records, 155, Article 18(1)(e).

<sup>120</sup> Nandan and Rosenne in Chapter 6, n. 12, 377. <sup>121</sup> See Section 7.6.1.

<sup>122</sup> E.g. Under SOLAS Regulation I/2, ‘a fishing vessel is a *vessel used for* catching fish, whales, seals, walrus or other living resources of the sea’ (emphasis added). Under Article 2 of the 1977 International Convention on the Safety of Fishing Vessels, ‘fishing vessel means any vessel *used commercially for* catching fish, whales, seals, walrus or other living resources of the sea’ (emphasis added). For the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, “‘fishing vessel’ means any vessel *used or intended for use for the purposes of the commercial* exploitation of living marine resources, including mother ships and any other vessels directly engaged in such fishing operations’ (Article 1(a), emphasis added).

that they may not allege that fishing is an activity incident to their normal mode of passage under Article 39.<sup>123</sup>

### 7.3.5 Article 42(1)(d)

Under this Article, States bordering straits and archipelagic States may adopt laws and regulations relating to transit passage through straits, with respect to the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of States bordering straits or archipelagic States. This provision is identical to Article 19(2)(g), and if the activity is performed during passage in the territorial sea, the coastal State is allowed to consider passage non-innocent and to prevent it. Unlike Article 21(1)(h), Part III does not give competence to legislate for the prevention of infringement on the customs, fiscal, immigration or sanitary laws and regulations of the coastal State. Arguably, the loading or unloading of any commodity, currency or person is a particularly serious type of infringement of such laws.<sup>124</sup> The substantial modification of Article 14 of the Convention on the Territorial Sea was first suggested by Fiji in the Sea-Bed Committee to the effect, notably, that ‘the embarking or disembarking of any person’ was an activity during passage that made it non-innocent.<sup>125</sup> This was expanded by the United Kingdom in 1974, in its provisions on innocent passage, to include the ‘embarking or disembarking of any person or cargo contrary to the customs, fiscal, immigration or sanitary laws or regulations of the coastal State’.<sup>126</sup> The provision was included the following year in the work on the Private Group on Straits and modified into ‘commodity,

<sup>123</sup> In that sense, Yturriaga in n. 12, 177–178; López Martín in n. 90, 167. The latter writer also raises the issue of natural resources other than fish. If ‘fishing activities’ only apply to the removal from the sea of halieutic resources, then the breach may not be addressed under Article 42. One may note that Article 21 distinguishes between living resources of the sea and fisheries laws. On the other hand Article 62, entitled ‘utilization of living resources’, is directed at ‘fish and other species’ (para. 4(d)) and Article 65 singles out marine mammals. The definitions reported in n. 122 are not limited to ‘fish’. So far as non-living natural resources are concerned, they admittedly do not fall under the legislative competence of the coastal State under Article 42; they are addressed in Articles 34 and 39(1)(c).

<sup>124</sup> For the contiguous zone, see Article 33 and Article 34(1) in the case of a sufficiently broad strait.

<sup>125</sup> Draft Articles relating to passage through the territorial sea, UN Doc. A/AC138/SC.II/L.42 and Corr.1 (1973), Article 3(2)(e).

<sup>126</sup> UK Draft Articles in n. 4, III Official Records, 184, Article 16(2)(d). At that time, the United Kingdom gave the States bordering straits legislative competence in two matters only. See n. 48.

currency or person'.<sup>127</sup> It was repeated in the ISNT provisions on innocent passage,<sup>128</sup> where the switch from 'cargo' to 'commodity, currency' was also made.<sup>129</sup> The argument could be made that the provision is meant to be broad in effect: Traffic in currency, for instance, may not be subject to the same domestic legal regime as the movement of commodities is, and Article 42 makes sure that both are prohibited.<sup>130</sup> On the other hand, the argument could also be made that the provision has in-built restrictions. 'Commodities' normally refer to marketable products valuable in money. Propaganda leaflets could scarcely be considered a commodity, even though their unloading may be prohibited by the customs legislation of the coastal State. In this instance, the only breach committed would be of Article 39(1)(c).

### 7.3.6 *Publicity*

The duty of the coastal State to give due publicity to its laws and regulations adopted pursuant to Article 42(1) (Article 42(3)) was established in the early days of the proposals on straits.<sup>131</sup> The provision mirrors Article 21(3) on innocent passage. The duty to give due publicity to charts on which all sea lanes and TSS are indicated was referred to in Section 7.2, with a definition of what the United Nations considers 'due publicity'.<sup>132</sup> To date, the United Nations identified 14 States that have specifically reported under their duty to give due publicity to laws and regulations pursuant to Articles 21 or 42.<sup>133</sup> The Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs (DOALOS), as the responsible substantive unit of the Secretariat, has informed the States Parties concerned that it is willing to assist them in complying with their 'due publicity' obligations under the Convention. Accordingly, DOALOS has transmitted to the States Parties concerned several Notes Verbales recalling their 'due publicity' obligations

<sup>127</sup> Private Group on Straits in n. 11 (18 April 1975), Article 4(1)(d) (referring to 'taking on board or putting overboard').

<sup>128</sup> See n. 26, IV Official Records (7 May 1975), 158, Article 41(1)(d).

<sup>129</sup> See n. 26, IV Official Records, 155, Article 16(2)(h). The change from 'embarking or disembarking' in the section on innocent passage and 'taking on board or putting overboard' in the section on transit to 'loading or unloading' was made later by the Drafting Committee.

<sup>130</sup> No consequences should be drawn from the use of 'commodity' instead of 'good'. The UNCLOS uses both terms, notably in Part XI.

<sup>131</sup> E.g. UK Draft Articles in n. 4, 186, Article 4(3). <sup>132</sup> See n. 35.

<sup>133</sup> [www.un.org/Depts/los/LEGISLATIONANDTREATIES/duepublicity.htm](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/duepublicity.htm) (updated 3 April 2012).

and offering its assistance in meeting those obligations. A Note Verbale regarding the obligation under Article 42(3) typically says:

States bordering straits Parties to the Convention, in keeping with article 42(3) thereof, are invited to submit to the Legal Counsel one (1) copy of the above-mentioned laws and regulations that they may have adopted relating to transit passage through straits used for international navigation. For administrative purposes, it would be greatly appreciated if these laws and regulations, were submitted in English and/or French and, if possible, in electronic format.<sup>134</sup>

Argentina, in a Note Verbale of 15 April 1996 sent to DOALOS and concerning Article 42(3) of the UNCLOS, transmitted to the UN Secretary-General copies of both the 1881 Boundary Treaty and the 1984 Treaty of Peace and Friendship. Paragraph 2 of the Argentine Note adds:

Article 5 of the 1881 Treaty and Article 10 of the 1984 Treaty establish neutrality and the freedom of ships of all flags to navigate through the Strait of Magellan. Annex II of the 1984 Treaty establishes the navigation regime between the Strait of Magellan and Argentine ports in the Beagle Channel and vice versa, as well as the navigation regime along the Strait of Maire.

In a Note Verbale of 6 September 1996 sent to the United Nations, Chile stated that, firstly, Part III does not apply to the Strait of Magellan under Article 35(c) of the UNCLOS.<sup>135</sup> Therefore, the argument could be made that the duty to give due publicity, which is found in Part III, does not apply either and that, in order to justify a right not to submit information under Article 42(3), the State concerned would not need to supply evidence of the existence of a long-standing convention under Article 35(c), which is supposed to be well-known. The Argentinean Note was sent in reply to a Note from the UN Secretary-General of 21 February 1996 concerning Article 42(3) and the due publicity obligation. In that respect, it should be recalled that Part III is not necessarily wholly excluded when Article 35(c) applies, for the relevant Convention may only partly cover passage. In addition, it is possible that the UN Secretariat is of the view

<sup>134</sup> United Nations, *Law of the Sea Information Circular No. 2* (October 1995), 49, 51 (Note Verbale SIN/TP/SP/1). In line with its normal practice in this regard, it must be assumed that the UN Secretariat will make information deposited with it available to all States concerned. IMO Doc. LEG/MISC/1, Implications of the United Nations Convention on the Law of the Sea, 1982, for the International Maritime Organization, Study Prepared by the Secretariat of IMO (1987), para. 131.

<sup>135</sup> United Nations, *Law of the Sea Information Circular No. 5* (March 1997), 33.

that publicity of coastal States' laws and regulations on straits has a virtue in itself. In May 1997, Argentina replied to the Chilean Note, saying that the treaties of 1881 and 1984 'contain regulations which affect third States. The Argentine presentation was for information purposes and did not put forward any interpretation of the United Nations Convention on the Law of the Sea, the 1881 Boundary Treaty, the 1984 Treaty of Peace and Friendship or any other aspects of the issue'. It added that Argentina, as a State Party together with Chile to the 1881 Boundary Treaty, has the power to give due publicity, in ratifying the UNCLOS, to the legal regime for the area of the Strait of Magellan.<sup>136</sup> Hence, it is possible that Argentina did not believe that it was bound to give due publicity under Article 42(3) but that it had a right to do so. One may also conclude that giving due publicity to laws and regulations does not 'affect' the legal regime in the special Convention. In that sense, Argentina

does not share the interpretation concerning the inapplicability of Part III of the [UNCLOS], since such interpretation does not follow from Article 35 (c) of the Convention. That norm, in fact, establishes that the provisions of Part III do not affect the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force.<sup>137</sup>

Practice seems to confirm this: In response to a Note from the Secretary-General of 24 July 1996 concerning transit passage in straits, Finland, instead of replying that it did not have to supply any information in light of the existence of the Convention of 1921, responded on 22 August 1997 that the passage regime in the Ahvenanrauma Strait was regulated by that long-standing convention and that the regime of passage there was the regime of innocent passage, which had remained unchanged after the entry into force of the UNCLOS. It also informed the Secretariat that the UNCLOS provision on innocent passage had been incorporated into Finnish internal law.<sup>138</sup>

<sup>136</sup> In its Note Verbale, Chile also argued that 'Argentina does not border the Strait of Magellan. Under the 1881 Boundary Treaty, the whole of the Strait of Magellan – including, the land bordering it on both sides – is under Chilean sovereignty. Therefore, it is not incumbent on Argentina to give publicity to laws and regulations on straits which are not under its sovereignty'. Ibid.

<sup>137</sup> United Nations, *Law of the Sea Information Circular No. 6* (September 1997), 23–24.

<sup>138</sup> United Nations, *Law of the Sea Information Circular No. 5* (March 1997), 33.

Apart from Argentina and Finland, only Italy reported under Article 42(3).<sup>139</sup>

### 7.3.7 *Scope ratione personae of laws and regulations*

Article 42(4) says that foreign ships exercising the right of transit passage shall comply with such laws and regulations as are adopted by the coastal State. However, paragraph 5 indicates that the flag State of a ship or the State of registry of an aircraft entitled to sovereign immunity which acts in a manner contrary to such laws and regulations or other provisions of this Part shall bear international responsibility for any loss or damage which results to States bordering straits. From the text of that provision, one possible interpretation is that public vessels and aircraft are bound by laws and regulations adopted by the coastal State under Article 42(1), whereas only private vessels are in fact bound by such laws. Although this would be a curious result in the first place, it also poses the question of whether the coastal State may legislate under Article 41 for aircraft or only for ships. Indeed, Article 42(4) only refers to the duty of foreign ships to comply

<sup>139</sup> United Nations, *Law of the Sea Information Circular No. 2* (October 1995), 53 (informing the UN of the Decree of the Minister of Merchant Marine of 8 May 1985 relating to the Strait of Messina, *Gazzetta Ufficiale*, 11 May 1985, no. 110, and the Decree of the Minister of Merchant Marine of 26 February 1993 relating to the Straits of Bonifacio, *Gazzetta Ufficiale*, 2 March 1993, no. 50). The Decree of 1993 is reproduced in United Nations, *Law of the Sea: Current Developments in State Practice No. IV* (1995), 69 (prohibiting navigation in the Straits of Bonifacio to ships flying the Italian flag which are tankers, gas transporters or chemical transporters and which have on board a cargo of oil, chemical products or other polluting substances dangerous and harmful to the marine environment, as they are defined by the international conventions in force in Italy). Implementing some resolutions adopted by the IMO's MSC, Italy enacted a series of navigational requirements which apply to all ships that transit in the part of the Strait of Bonifacio, which is subject to Italian jurisdiction by means of a Decree of the Minister of Transport and Navigation, dated 27 November 1998 (*Gazzetta Ufficiale*, 27 November 1998, no. 287). The Decree establishes a TSS, creates a system of mandatory SRS upon entrance into the Strait and provides for some further requirements, such as the duty to keep open radio contact with coastal authorities, to which the position of the ship must be constantly reported during transit. A. Merialdi, 'Case Study of Italy', in E. Franckx, *Vessel-Source Pollution and Coastal State Jurisdiction* (Kluwer, The Hague, 2001), 299. See also Part VI, Chapter 14, n. 122–128 and accompanying text. The Decree of 1985 (*Gazzetta Ufficiale*, 11 May 1985, no. 110) is reported under Article 21, because it concerns innocent passage pursuant to Article 45 of the UNCLOS. That Decree indefinitely suspends, in the Strait of Messina, the passage of ships of 50,000 tonnes or more carrying oil or other polluting substances; all merchant ships have to comply with a TSS; compulsory pilotage is established for certain ships, depending on their size and the nature of the cargo; and all ships are subject to a mandatory reporting system. Merialdi, *ibid.*, 298. This was protested by the United States: see Part II, Chapter 2, n. 49–50 and accompanying text.

with the laws and regulations of the coastal State. That does not as such rule out the legislative competence of the coastal State vis-à-vis aircraft, although the argument is rather far-fetched. Article 42(1)(a) only applies to ships. The Council of the ICAO has exclusive legislative authority with respect to the flight and manoeuvring of civil aircraft above straits, and the Rules of the Air so adopted are implemented into the domestic law of the State of registry. This is addressed by Article 39(3). Article 42(1)(c) on its face also applies to ships. Article 42(1)(b) is not *prima facie* restricted to ships. An aircraft may discharge noxious substances in a strait, whether in the air or the water. The question is whether there are applicable international regulations on these matters. For one, such instruments as the London Dumping Convention apply to aircraft (Article III).<sup>140</sup> Secondly, Annex 16, volume II, to the 1944 Chicago Convention on Civil Aviation contains standards adopted by the ICAO Council on aircraft engine emissions, notably setting maximum emissions levels. Article 42(1)(d) on its face is not restricted to ships either. The added difficulty is that certain means of transportation may qualify as both ships and aircraft. Would a seaplane be required to comply with laws and regulations when it navigates on water but not when it flies?

To read 'ships and aircraft' into Article 42(4) goes against the text if one assumes that the expressed duty of ships to comply with laws and regulations excludes a duty of aircraft to comply, too. Although it is true that, in treaty interpretation, *a contrario* interpretation (*unius est exclusio alterius*) has to be approached carefully by taking context into account,<sup>141</sup> negotiating context seems to confirm that aircraft were meant to be excluded from the scope of regulation. The UK Draft only mentioned the duty of foreign ships exercising the right of transit passage to comply with laws and regulations of the straits State and only contemplated damage caused by a ship entitled to sovereign immunity.<sup>142</sup> The addition of aircraft entitled to sovereign immunity was made by the Private Group on Straits.<sup>143</sup> Article 233, too, is restricted to ships and concerns the serious consequences of a violation of Article 42(1)(a) and (b). Nevertheless, some writers are prepared to offer a liberal interpretation of Article 42.<sup>144</sup>

<sup>140</sup> See n. 96.

<sup>141</sup> A. D. McNair, *The Law of Treaties* (Clarendon Press, Oxford, 1961), 400; U. Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer, Dordrecht, 2008), 299–303.

<sup>142</sup> UK Draft Articles in n. 4, Article 4(4) and (5).

<sup>143</sup> Private Group on Straits in n. 11, Article 4(5).

<sup>144</sup> Nandan and Rosenne write that paragraphs 1 to 4 '*prima facie* only apply to ships'. Nandan and Rosenne in Chapter 6, n. 12, 378. Jia argues that there may be violations by

However, it may be more plausibly argued that the restriction to ships was the intention of the negotiators at UNCLOS III and that regulatory authority is denied for aircraft in transit, because, unlike the activities of ships in transit, those of aircraft have not been considered potentially prejudicial to the basic interests of States bordering straits.<sup>145</sup> Furthermore, it would be at odds with the internal logic of Part III to allow, for example, the coastal State to legislate to give effect to discharge standards for aircraft under Article 42(1)(b) when pollution by aircraft is not within the scope of Article 39(3). Article 42(5) may very well support that conclusion from a purely textual perspective. It says that ‘the flag State of a ship *or* the State of registry of an aircraft entitled to sovereign immunity which acts in a manner contrary to such laws and regulations *or* other provisions of this Part shall bear international responsibility for any loss or damage which results to States bordering straits’ (emphasis added). International responsibility of the State is not restricted to breach of Article 42 regulations but to other provisions in Part III, notably Article 39, as well.<sup>146</sup> Article 42(5) permits a reading that restricts the international responsibility of the State of registry of an immune aircraft for the breach of provisions of Part III other than Article 42 regulations, which do not apply to aircraft.

Finally, Article 42(4) applies to both merchant ships and public vessels, but the remedies are different. Under Article 42(5), public vessels are bound by Article 42 regulations and other provisions of Part III. Therefore, the flag State will also be internationally responsible for damage caused to the coastal State for breach of, for example, Articles 39(1) or (2), 40 or 41. An exception to the duty in Article 42(4) is the fact that regulations of the coastal State taken under Article 42(1)(b) do not apply under Article 236 to a vessel owned or operated by a State and used only on government non-commercial service.<sup>147</sup> This exception also applies to the duty in Article 39(2)(b). Nevertheless, Article 236 requires each State to ensure

aircraft of the laws and regulations of the coastal State enacted under Article 41(1)(b) and that the smuggling of any commodity, currency or person under sub-paragraph (d) may be carried out by aircraft. Jia in Chapter 6, n. 15, 160.

<sup>145</sup> K. Hailbronner, ‘Freedom of the Air and the Convention on the Law of the Sea’, 1983(77) *American Journal of International Law*, 497; H. B. Robertson, Jr., ‘Passage through International Straits: A Right Preserved in the Third United Nations Conference on the Law of the Sea’, 1979–1980(20) *Virginia Journal of International Law*, 840, 842.

<sup>146</sup> Articles 40 and 41 are restricted to ships, too.

<sup>147</sup> The scope of Article 236 includes provisions of the UNCLOS regarding the protection and preservation of the marine environment; it therefore includes the duties imposed by the UNCLOS to observe national and international regulations regarding the protection and preservation of the marine environment. See B. H. Oxman, ‘The Regime of Warships

that such vessels act in a manner consistent, so far as is reasonable and practicable, with the UNCLOS. Damage caused by a 'failure to ensure' may not attract international responsibility under Article 42(5), given that Article 236 is not within 'this Part' (that is, Part III), but breach of Article 236 may be raised under Part XV more generally, provided that, when section 2 of Part XV is applicable, the flag State has not lodged an optional exception pursuant to Article 298(1)(b) if damage was caused during military activities.

#### 7.4 Limitations to the prescriptive jurisdiction of States bordering straits and archipelagic States relating to passage: scope of effect

Article 42(2) says that the laws and regulations adopted by the coastal State under Article 42(1) 'shall not discriminate in form or in fact among foreign ships or in their application have the practical effect of denying, hampering or impairing the right of transit passage as defined in this section'.

##### 7.4.1 *Non-discrimination*

This provision is similar to Article 24, with certain differences.<sup>148</sup> The first is that Article 24(1)(b) also imposes a duty not to discriminate against cargo to, from or on behalf of any State. Article 42(1) finds its source in the UK Draft,<sup>149</sup> and it takes its present form from the Draft prepared by the Private Group on Straits.<sup>150</sup> Cargo discrimination is absent in both, although it was included in proposals on passage in straits that equated it with the regime of innocent passage.<sup>151</sup> Interestingly, it was also absent in the UK Draft in its provisions on innocent passage. The distinction between innocent passage and transit passage, as far as the prohibition of cargo discrimination is concerned, is found in the ISNT. As the provision now stands, it should be wondered whether it is possible for a State bordering a strait and an archipelagic State to legislate under Article 42 in order to, for example, single out ships carrying cargo to a given State and

under the United Nations Convention on the Law of the Sea', 1984(24) *Virginia Journal of International Law*, 820.

<sup>148</sup> The non-discrimination clause is also found in Articles 25(3), 52(2), 119(3) and 227.

<sup>149</sup> UK Draft Articles in n. 4, 186, Article 4(2). <sup>150</sup> IV Platzöder, 196, Article 4(2).

<sup>151</sup> E.g. UN Doc. A/AC.138/SC.II/L.18 (1973), Article 4 (Draft Submitted by Cyprus, Greece, Indonesia, Malaysia, Morocco, the Philippines, Spain and Yemen); UN Doc. A/CONF.62/C.2/L.16, UNCLOS III, III Official Records (1974), 192, Article 4(1) (Draft Submitted by Malaysia, Morocco, Oman and Yemen).

subject them to stricter requirements. The argument may be made that such a scenario will in fact lead to discrimination among foreign ships, because different foreign ships will be subjected to different conditions, even though the flag of the ship itself is not discriminated against.

Secondly, Article 42 prohibits discrimination *among* foreign ships. Article 24 prohibits discrimination *against* the ships of any State. Therefore, Article 42 could be read as allowing discrimination against *all* foreign ships, as long as there is no discrimination among them. However, this seems to be of little practical relevance and is arguably an unintended drafting inconsistency.<sup>152</sup> Therefore, if the anti-discrimination clauses in Articles 42 and 24 are taken to be functionally equivalent, Article 42 prohibits discrimination against foreign ships generally,<sup>153</sup> as well as discrimination against a particular foreign ship. This would mean, in particular, that foreign ships may not be treated less favourably than ships of the coastal State are. Such discriminatory treatment, however, is inherent in the duty in Article 42(4) that only foreign ships are required to comply with the laws and regulations of the coastal State. One wonders whether this, too, is not an unfortunate drafting mishap: For instance, one could hardly conceive of a coastal State being relaxed about a vessel flying its flag unloading illegal immigrants in the strait while transiting through the strait (assuming the law of the flag does not already prohibit such activity).<sup>154</sup> On the other hand, nothing arguably prevents the coastal State from discriminating against its own ships.

Article 42(2) prohibits discrimination in form or in fact. It is therefore the discriminatory effects of the laws and regulations that matter, whether or not they have a discriminatory intent.<sup>155</sup>

#### 7.4.2 *Negative effects on transit*

Article 24(1)(a) prohibits a coastal State, in the application of its laws and regulations, to impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage. Such requirements are those that the coastal State may adopt under Articles 21

<sup>152</sup> Nandan and Rosenne in Chapter 6, n. 12, 376; Yturriaga in n. 12, 193.

<sup>153</sup> Nandan and Rosenne in Chapter 6, n. 12, 226.

<sup>154</sup> A drafting inconsistency may also be revealed in Article 41(7), which requires ships in transit to respect TSS, whereas laws and regulations under Article 42(1)(a) formally only need to be complied with by foreign ships.

<sup>155</sup> Analogies with human rights regimes or regimes of the free movement of goods may be drawn in case of controversy.

and 22. The coastal State must not hamper innocent passage, except in accordance with the UNCLOS (for example, by boarding the ship).<sup>156</sup> The imposition of requirements that deny or impair the right of innocent passage or the discrimination against the ships of any State are, in the text of Article 24(1), particular examples of the general duty not to hamper innocent passage.

Article 42(2) does not mention the imposition of requirements but only the application of the laws and regulations adopted under Article 42. This at least confirms the general lack of executive jurisdiction of the coastal State over vessels in transit, if 'application' is read as 'enforcement'.<sup>157</sup> It is also a prohibition reflecting the general obligation not to hamper transit passage (Article 44). That said, there is no reason not to give a broader meaning to Article 42(2). The UNCLOS prohibits national standards set under Article 42(1) that have the practical effect of denying, impairing or hampering the right of transit passage. For two of these standards, the objectives are set according to international standards, which also means that the latter may not have the practical effect of denying, hampering or impairing the right of transit either. This, in turn, is an application of the general, impersonal duty in Article 38 not to impede transit passage.

## 7.5 The special case of Articles 51 and 47(6)

Sovereignty over the resources in, under and above archipelagic waters is arguably the greatest achievement of insular States; this concept is embodied in Article 49(2). Nevertheless, a limited number of rights are granted to third States by Article 51, thereby placing restrictions to the coastal State's sovereignty. In addition, Part IV of the UNCLOS preserves certain existing rights and legitimate activities hereinbefore exercised by certain States.

### 7.5.1 *General rights granted to all States*

#### 7.5.1.1 Existing agreements

Article 51(1) provides that the archipelagic State shall respect existing agreements with other States. This provision first appeared in the ISNT as

<sup>156</sup> Article 24(1).

<sup>157</sup> E.g. Nandan and Rosenne in Chapter 6, n. 12, 377: 'Ships exercising the right of transit may not be inspected, arrested, detained, seized, refused passage or subjected to other forms of control that would impair the right of transit'; Treves in n. 32, 968.

a result of informal negotiations in the Second Committee,<sup>158</sup> and it was repeated *verbatim* in the successive Drafts of the UNCLOS. Despite the affirmation that these existing agreements refer to ‘agreement with other States regarding traditional fishing rights and other legitimate activities of those States in archipelagic waters’,<sup>159</sup> this is not what the UNCLOS says: Drafting history does not reveal that these agreements should relate to these categories only. Indeed, the provision on ‘traditional fishing rights and other legitimate activities’ precisely safeguards rights that were not secured by formal agreements but that were acquired through practice or freely enjoyed where portions of archipelagic waters were high seas. In addition, the latter are limited to immediately adjacent neighbouring States.

It has been suggested that the provision on existing agreements was superfluous in view of the principle *pacta sunt servanda*.<sup>160</sup> But the provision makes it clear that the newly articulated regime of archipelagic waters does not deprive third States of the rights they had obtained through agreements when these waters enjoyed a previous status under international law. Because sovereignty of the archipelagic State over archipelagic waters is proclaimed under Article 49 and, in particular, because archipelagic States alleged that previous rights were to lapse with the new status of the waters concerned, Article 51(1) expressly serves the purpose of preserving existing agreements with other States. It prevents the archipelagic State from invoking the principle *rebus sic stantibus* (if it is at all applicable) with respect to treaty rights.<sup>161</sup> Obviously, Article 51 does not aim at preserving freedoms that were previously enjoyed by third States in areas then considered high seas, seeing as there would have been no need for an agreement to secure them anyway. Some of these freedoms, such as navigation and overflight, are preserved and qualified in Part IV; others, such as fishing (with the exception of traditional fishing rights enjoyed by neighbouring States), were terminated with the establishment of the sovereignty of the archipelagic States over those areas under Article 49. Hence, the agreements in Article 51(1) arguably

<sup>158</sup> See n. 26, 152, Article 122.      <sup>159</sup> Nandan and Rosenne in Chapter 6, n. 12, 453.

<sup>160</sup> H. W. Jayewardene, *The Regime of Islands in International Law* (Nijhoff, Dordrecht and Boston, 1990), 157.

<sup>161</sup> The invocation of the principle *rebus sic stantibus* seems rather disingenuous. Fundamental changes of circumstances, whether under customary law or under the Vienna Convention on the Law of Treaties, are characterized by their unforeseeability. See, notably, P. Reuter, *Introduction au droit des traités* (PUF, Paris, 1995), 166, and *Fisheries Jurisdiction (United Kingdom v Iceland) (Jurisdiction)*, ICJ Rep. (1973), 21, para. 43.

refer to activities over which the archipelagic State enjoyed some degree of jurisdiction prior to the establishment of the archipelagic regime. For instance, one may think of an agreement relating to exploitation of the subsoil or living resources in areas previously located in the archipelagic State's territorial sea (around each island) and transformed into archipelagic waters by the UNCLOS.

#### 7.5.1.2 Rights relating to submarine cables

Article 51(2) states: 'An archipelagic State shall respect existing submarine cables laid down by other States and passing through its waters without making a landfall. An archipelagic State shall permit the maintenance and replacement of such cables upon receiving due notice of their location and the intention to repair or replace them'. Obviously, this is particularly important for cables previously located in the high seas and laid without prior consent of the archipelagic State. This provision originated in an anonymous Variant F on archipelagos compiled by Sub-Committee II and annexed to the 1973 Report of the Sea-Bed Committee.<sup>162</sup> The Draft Articles Relating to Archipelagic States submitted by Fiji, Indonesia, Mauritius and the Philippines to the Conference in 1974 mentioned the right of an immediately adjacent neighbouring State to lay submarine cables and pipelines where this right had traditionally been exercised; this, however, was limited to cases where the drawing of archipelagic baselines separated one part of the territory of that State from another part of its territory.<sup>163</sup> Although Article 122 of the ISNT did not include a general provision on cables and pipelines,<sup>164</sup> Japan made an informal proposal

<sup>162</sup> Nandan and Rosenne in Chapter 6, n. 12, 448. It provided:

Where a declaration . . . has the effect of enclosing as archipelagic waters areas which previously had been considered as part of the high seas, the archipelagic State shall enter into consultation, at the request of any other State, with a view to safeguarding the rights and interests of such other State regarding any existing uses of the sea in such areas, except the navigational uses provided for in article . . . but including, *inter alia*, fisheries, submarine cables and pipelines.

Variant F was included as Provision 213, formula A of the Main Trends Working Paper, UNCLOS III, III Official Records, 137.

<sup>163</sup> UN Doc. A/CONF.62/C.2/L.49, UNCLOS III, III Official Records (1974), 226, Article 2(5). An amendment suggested by Malaysia in 1974 aimed at safeguarding 'all forms of communications'. UN Doc. A/CONF.62/C.2/L/64, UNCLOS III, III Official Records, 233, Article 2(5).

<sup>164</sup> Article 118(7) of the ISNT, however, took account of the Draft Articles submitted by four archipelagic States and the amendment thereto suggested by Malaysia and restated

suggesting the following: 'Archipelagic States shall respect existing submarine cables laid by other States and passing through the archipelago. In particular, the maintenance and replacement of such cables shall not be hampered'.<sup>165</sup> This suggestion was included and modified in the RSNT, which constitutes the final basis for Article 51(2), including the landfall provision and the conditions for repair and replacement.<sup>166</sup>

Article 51(2) applies to cables laid by any other State, not just neighbouring States.<sup>167</sup> But it only applies to existing cables, the maintenance and replacement of which are permitted upon notification. There is no right to lay new submarine cables; this requires the consent of the archipelagic State. Similarly, the management of submarine cables making a landfall would be subject to some specific arrangements with the archipelagic State. Article 51(2), contrary to early proposals, does not cover pipelines: There is no right to repair or replace them, and any operation relating to their maintenance would require separate negotiations with the archipelagic State. Because there is no duty to respect existing pipelines, the question may be asked whether the archipelagic State is entitled to require their removal. Unless there is an existing agreement under Article 51(1), the answer seems to be in the affirmative, and the answer is probably the same with respect to cables making a landfall.

Finally, Article 51(2) mentions cables passing through 'waters' of the archipelagic State, not just archipelagic waters. For practical purposes, this should be deemed to encompass the territorial sea of the archipelagic State, given that it would also cover areas that were previously considered high seas. It would serve no purpose to allow a State to replace its submarine cables in the archipelagic waters and exclusive economic zone of an archipelagic State (Article 58(1)) and to refuse that right in the middle zone of territorial sea.

in Provision 212, formula B of the Main Trends Working Paper, UNCLOS III, IV Official Records, 168:

If the drawing of such baselines encloses a part of the sea which has traditionally been used by an immediately adjacent neighboring State for direct access and all forms of communication, including the laying of submarine cables and pipelines, between two or more parts of the territory of such State, the archipelagic State shall continue to recognize and guarantee such rights of direct access and communication.

<sup>165</sup> Second Committee Informal Proposals, Japan Draft Articles (undated, 1976), IV Platzöder, 339.

<sup>166</sup> UNCLOS III, V Official Records, 171, Article 123.

<sup>167</sup> 'Other States' refers both to cables laid by other States and to cables laid by the nationals of other States rather than by the State itself: Nandan and Rosenne in Chapter 6, n. 12, 454.

### 7.5.2 *Special rights granted to immediately adjacent neighbouring States*

Traditional fishing rights and other legitimate activities of immediately adjacent neighbouring States in areas falling within archipelagic waters are protected by Article 51(1). The provision has its basis in discussions at the Sea-Bed Committee and Variant F already mentioned.<sup>168</sup> During the Conference itself, certain neighbouring States of archipelagic States expressed the view that these rights and interests would have to be accommodated. Thailand notably emphasized:

The application of the new concept, as originally introduced in the proposal submitted by Fiji, Indonesia, Mauritius and the Philippines, would create a situation affecting neighbouring countries, such as Thailand, which were enclosed by waters of archipelagic States . . . [A]ccount had to be taken of the interests of those enclosed countries in the living resources of the areas regarded in international law as part of the high seas . . . In view of the complicated nature of the fisheries question and of other problems peculiar to each region, the modalities of access to the living resources in those areas should be agreed upon between the countries concerned within the framework of regional or, if necessary, bilateral arrangements.<sup>169</sup>

Thailand submitted a Draft with Article 1 that read:

In any situation where the archipelagic waters, or territorial waters measured therefrom, of an archipelagic State include areas which previously had been considered as high seas, that archipelagic State, in the exercise of its sovereignty over such areas, shall give special consideration to the interests and needs of its neighbouring States with regard to the exploitation of living resources in these areas, and, to this effect, shall enter into an agreement with any neighbouring State, at the request of the latter,

<sup>168</sup> See n. 162.

<sup>169</sup> UNCLOS III, II Official Records (Second Committee, 36th meeting, 12 August 1974), 265, para. 72. Singapore stated that it was prepared to recognize Indonesia and the Philippines as archipelagic States, provided that the legitimate interests and rights of the international community, on the one hand, and those of the countries' regional neighbours, on the other hand, were taken into account. It mentioned that it obtained approximately half its total catch from waters that were previously high seas which would be enclosed by Indonesian baselines. *Ibid.*, 268, para. 29. Japan expressed similar concerns. *Ibid.*, 261, paras. 13–18. Malaysia spoke in these terms: 'Two groups of Indonesian islands dotted the South China Sea between West and East Malaysia, and the Indonesian archipelagic boundary as claimed would end the free access and communication, so vital for the maintenance of Malaysia's geographical, economic and political unity. . . . Malaysia therefore wished to see reflected . . . a clear recognition and guarantee of all its existing rights of access and communication'. *Ibid.*, 198, para. 49.

either by regional or bilateral arrangements, with a view to prescribing modalities entitling the nationals of such neighbouring State to engage and take part on an equal footing with its nationals and, where geographical circumstances so permit, on the basis of reciprocity, in the exploitation of living resources therein.<sup>170</sup>

Indonesia, for which these proposals were specifically intended, made it clear at the Conference that it was aware of the needs of its immediate neighbours and assured them that, in the spirit of co-operation which was being fostered in the region, it would continue to seek a mutual and acceptable accommodation of their interests. It also mentioned the possible problem of traditional fishing of immediately adjacent neighbouring countries in Indonesian waters.<sup>171</sup> The current version of Article 51 appeared in Article 122 of the ISNT with an important omission: Article 122 left out 'other legitimate activities', as well as the provision on the nature of the fishing rights and other activities.<sup>172</sup> These additions were suggested in a joint proposal by Indonesia and Singapore,<sup>173</sup> and they appeared in Article 123 of the RSNT, which was left unchanged in subsequent versions.

Article 51(1) manifestly secures established activities that foreigners had carried out in waters that are now subject to the archipelagic regime. Rights and interests previously enjoyed in areas seaward of archipelagic

<sup>170</sup> UN Doc. A/CONF.62/C.2/L.63, UNCLOS III, III Official Records (1974), 233. This proposal was adopted verbatim as formula B of Provision 213 of the Main Trends Working Paper.

<sup>171</sup> UNCLOS III, II Official Records (1974), 260, para. 5. On the other hand, the Thai proposal appeared to Indonesia to raise a series of problems:

First, because the provision was applicable to all areas which constituted archipelagic waters and the territorial sea, over which the archipelagic State had sovereignty; secondly, it placed the archipelagic State under the obligation to give special consideration to the interests and needs of its neighbours, without regard to whether those interests and needs were traditional, legitimate or reasonable; thirdly, it imposed an obligation on the archipelagic State to enter into an agreement with any neighbouring State at the request of the latter; fourthly, the draft article did not qualify which neighbouring country was entitled to accommodation by the archipelagic State . . . finally, the elements of reciprocity and equality included in the draft article in order to accommodate the interests of neighbouring countries with respect to the living resources of the archipelagic waters and the territorial sea might create problems for the archipelagic State.

Ibid., 298, para. 3.

<sup>172</sup> See n. 164.

<sup>173</sup> Second Committee Informal Proposals, Indonesia and Singapore Draft Articles (28 April 1976), IV Platzöder, 339.

baselines, however, are not safeguarded: They would vanish with the establishment of the sovereignty of the archipelagic State over its territorial sea and its jurisdiction over its EEZ, unless protected by an existing agreement. Article 51 applies to ‘immediately adjacent neighbouring States’, which is translated into French as ‘les Etats limitrophes’ and into Spanish as ‘los Estados vecinos inmediatamente adyacentes’. There is no ambiguity with respect to the fact that the States concerned must share a border with the archipelagic State. Hence, this result is more restrictive than the notion of a ‘neighbouring’ State which was suggested in earlier proposals. The issue was particularly important to Japan, which claimed traditional rights in Indonesian waters. At the Conference, Japan noted that ‘application of the archipelagic regime would entail problems relating to the existing uses of the sea, particularly for countries in the same region’.<sup>174</sup>

The rights covered by Article 51 are not exempt from ambiguity. Firstly, there is no definition of ‘traditional fishing rights’. It is not clear in the English version whether the adjective ‘traditional’ refers to the rights or to the fishing method, whereas the French text speaks of ‘droits de pêche traditionnels’, thus clearly referring to rights acquired by long-standing usage. Similarly, the Spanish text mentions ‘derechos de pesca tradicionales’. However, the Indonesian representative at UNCLOS III, Hasjim Djalal, offered another interpretation. For him, the term ‘traditional’ refers to the fishermen themselves, their equipment, their catch and the area of their fishing activities.<sup>175</sup> Furthermore, traditional fishing rights should be distinguished from the traditional right to fish which every State enjoyed on the high seas; a traditional fishing right would only be recognized if it had been actually traditionally exercised for a sufficient length of time.<sup>176</sup> The phrase ‘other legitimate activities’ is not defined

<sup>174</sup> UNCLOS III, II Official Records (Second Committee, 36th meeting, 12 August 1974), 261, para. 17. Indonesia made it clear that it would accommodate the needs of its ‘immediate’ neighbours, not of its neighbours in general.

<sup>175</sup> Hasjim Djalal, ‘Indonesia and the New Extensions of Coastal State Sovereignty and Jurisdiction at Sea’, in D. M. Johnston (ed.), *Regionalization of the Law of the Sea. Proceedings of the 11th Conference of the Law of the Sea Institute* (Ballinger, Cambridge, MA, 1978), 284.

<sup>176</sup> *Ibid.*, 285. Djalal lists four conditions for traditional fishing:

1. The fishermen must have been fishing for a sufficient length of time in the area; thus, newcomers could not be regarded as having ‘traditional fishing rights’.
2. Their equipment must be sufficiently ‘traditional’; thus, fishermen using modern technology could not be regarded as falling under the definition of ‘traditional fishing rights’; otherwise, poor local fishermen using traditional equipment would be placed at a tremendous disadvantage.
3. Since the catch based on ‘traditional fishing’ is normally

either. It has been claimed that these activities ‘include military uses, such as training, as they had been legitimately exercised before the archipelagic regime provided in the Convention was established’.<sup>177</sup> Whether an activity that was legitimate on the high seas is still so ‘in certain areas falling within archipelagic waters’ is a matter of controversy. In any event, the resolution of this question is not left to the unilateral appreciation of the archipelagic State: Article 51(1) indicates that the nature of these activities (including traditional fishing rights), together with the terms and conditions for their exercise and the extent and the areas to which they apply, must be regulated by bilateral agreements. Article 51(1) not only creates an obligation to negotiate but also an obligation to reach an acceptable solution for both States concerned.<sup>178</sup> Contrary to what was suggested by Thailand, Article 51 does not cover the ‘needs’ of neighbouring countries, in particular those that might appear in the future. Only traditional fishing rights and other activities that had been performed prior to the establishment of straight archipelagic baselines are secured, unless it is decided otherwise by agreement.

### 7.5.3 *The special case of Malaysia*

Malaysia was particularly alarmed by the effect Indonesian archipelagic claims would have on its traditional interests in Indonesian waters. These concerns were expressly recognized by Indonesia and by the Conference itself. Indeed, Article 47(6) deals specifically with the maritime area between the Malay Peninsula and North Borneo, which is enclosed by Indonesian baselines.<sup>179</sup> In fact, it is Malaysia itself which suggested that:

not very substantial, the notion of ‘traditional fishing rights’ excludes the possibility of a sharp increase in the catch by using modern equipment and methods or by establishing large scale joint-ventures with ‘non-traditional’ fishermen. 4. The area of traditional fishing rights must have been frequented for a sufficient length of time; the area, therefore, should be relatively easy to determine by observing actual practice; it should be limited to the border region of the archipelagic waters.

*Ibid.*, 284. This commentary was made within a private body; there has been no official statement. For a concrete application, however, see Section 7.5.3.

<sup>177</sup> Nandan and Rosenne in Chapter 6, n. 12, 453.

<sup>178</sup> The rights cannot be shared with third States or their nationals. They cannot be transferred, either. Compare with Article 72(1).

<sup>179</sup> Article 47(6): ‘If a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighbouring State, existing rights and all other legitimate interests which the latter State has traditionally exercised in such waters and all rights stipulated by agreement between those States shall continue and be respected.’

[I]f the drawing of such baselines results in enclosing an area or areas of the sea separating two or more parts of an immediately adjacent neighbouring State, all rights which that State has traditionally exercised regarding the enclosed area, such as rights, *inter alia*, relating to navigation, overflight, fishing, the laying of submarine cables and pipelines, and other legitimate interests shall enure and remain unaffected.<sup>180</sup>

Article 47(6) as it now stands is based on a subsequent proposal made by Indonesia for amendment to the RSNT.<sup>181</sup>

Article 47(6) takes into account 'existing rights', not merely 'traditional fishing rights', as well as 'all other legitimate interests', not just 'other legitimate activities'. An interest does not necessarily imply an activity. But an interest that has been traditionally exercised seems similar to a legitimate activity under Article 51. Article 47 does not include an obligation to regulate the nature and extent of these rights and interests by bilateral agreement. This may have been superfluous when, early during the Conference, Indonesia stated that 'there was the problem of the traditional interests claimed by neighbouring countries in archipelagic waters, a question which Indonesia was prepared to discuss bilaterally with its neighbours, based on the recognition of Indonesian sovereignty over such waters'.<sup>182</sup> Nevertheless, an immediately adjacent neighbouring State, the territory of which has been separated by archipelagic baselines, is also an immediately adjacent neighbouring State for the purpose of Article 51 generally, and it therefore benefits from the requirement to conclude a bilateral agreement at the initiative of either State.<sup>183</sup>

Malaysia entered into an agreement with Indonesia on these questions. The Treaty of Jakarta of 25 February 1982 goes further than what is prescribed in Part IV, because it is not limited to Indonesian archipelagic waters.<sup>184</sup> It recognizes in Article 2(2) the 'existing rights and other

<sup>180</sup> UN Doc. A/CONF.62/C.2/L.64/Rev.1, UNCLOS III, IV Official Records (1975), 192, Article 2. See also the Malaysian proposed amendment to Article 118 of the ISNT (undated, 1976), IV Platzöder, 334.

<sup>181</sup> Indonesian amendment to Article 119 (6 July 1977), IV Platzöder, 479.

<sup>182</sup> UNCLOS III, I Official Records (42nd plenary meeting, 15 July 1974), 188, para. 66.

<sup>183</sup> Following the same reasoning, one can conclude that rights under Article 47(6) cannot be transferred or shared. Article 47(6) also repeats the obligation to respect existing agreements.

<sup>184</sup> Treaty between the Republic of Indonesia and Malaysia Relating to the Legal Regime of Archipelagic State and the Rights of Malaysia in the Territorial Sea and Archipelagic Waters as well as in the Airspace above the Territorial Sea, Archipelagic Waters and the Territory of the Territory of the Republic of Indonesia Lying between East and

legitimate interests which Malaysia has traditionally exercised in the territorial sea and archipelagic waters as well as in the airspace above the territorial sea, archipelagic waters and the territory of the Republic of Indonesia lying between East and West Malaysia'. Malaysia is required to refrain from any threat or use of force against Indonesia and to take the necessary measures to prevent, reduce and control pollution of the marine environment from any source (Article 3(1)). Under Article 2(2), traditionally exercised existing rights and other legitimate interests consist of the following: (a) the right of access and communication of government ships, State aircraft, merchant ships, fishing vessels, including foreign fishing vessels, and civil aircraft; (b) the traditional fishing right of Malaysian traditional fishermen; (c) the existence, protection, inspection, maintenance, repair and replacement of submarine cables and pipelines and the laying of other submarine cables and pipelines; (d) the promotion and maintenance of law and order through co-operation with Indonesia; (e) the undertaking of search and rescue operations through co-operation with Indonesia; and (f) the conducting of marine scientific research with the co-operation of Indonesia.

Traditional fishing is defined as fishing by Malaysian traditional fishermen using traditional methods in the traditional area (the 'Fishing Area') lying between East and West Malaysia.<sup>185</sup> Traditional fishermen are Malaysian fishermen who are engaged directly in traditional fishing in the Fishing Area as their basic means of livelihood.<sup>186</sup> Malaysia must ensure that the fishing activities undertaken by its fishermen are not detrimental to the fishing activities of Indonesian fishermen and that they do not infringe on the exploration and exploitation of the mineral resources of the seabed.

The provisions on cables and pipelines, as well as those on access and communication, respond to the concerns Malaysia itself had expressed at the Conference. The Treaty of Jakarta recognizes in Article 16(1) the right of Malaysia to maintain, protect, inspect, repair and replace existing cables and pipelines, as well as its right to lay them. This goes further than

West Malaysia, made at Jakarta on 25 February 1982 and entered into force on 25 May 1984. For the text, see B. Kwiatkowska and E. R. Agoes, *Archipelagic State Regime in the Light of the 1982 UNCLOS and State Practice* (ICLOS, UNPAD, Bandung, 1991), Annex 3.

<sup>185</sup> Article 1(7). The Fishing Area where traditional fishing is agreed to apply is delineated in a map annexed to the Treaty.

<sup>186</sup> Article 1(8).

Article 51(2) of the UNCLOS. The right applies both in the archipelagic waters and the territorial sea of Indonesia between East and West Malaysia. Malaysia is permitted to conduct cables or pipelines route survey for purposes of laying submarine cables or pipelines, as are Malaysia's nationals and the Malaysian State working jointly with the nationals, corporations and governments of third States. Indonesia recognizes a right of expeditious and unobstructed access to submarine cables or pipelines for the purposes of inspection, protection, maintenance, repair and replacement.<sup>187</sup> Indonesia undertakes to adopt necessary measures for the protection of Malaysian submarine cables and pipelines and to establish safety zones for their protection. Malaysia, on the other hand, is under the obligation to make sure that activities relating to cables and pipelines do not infringe on the exploration of the seabed in the area and endeavours to take the necessary measures to prevent, reduce and control pollution from submarine cables and pipelines.<sup>188</sup>

The provisions on navigation and overflight implement a *sui generis* right of passage in the area between East and West Malaysia, labelled 'right of access and communication'. For ships, the right is limited to two designated 'Corridors' defined by a series of continuous axis lines in a map annexed to the Treaty.<sup>189</sup> The right described is the right of 'continuous, expeditious and unobstructed navigation'. Naval ships of Malaysia are permitted to conduct naval manoeuvres, including tactical exercises, provided that no firing of weapons occurs.<sup>190</sup> Merchant ships registered or licensed in Malaysia enjoy the right of continuous, expeditious and unobstructed navigation through the Corridors for the purpose of proceeding to the destined ports in Malaysia or to the high seas. The right also applies to foreign merchant ships navigating through the Corridors solely for the purpose of direct passage between East and West Malaysia if they are engaged in trading with East and West Malaysia.<sup>191</sup> Malaysian fishing vessels (that is, those owned and used by Malaysian fishermen) and foreign fishing vessels on joint venture with Malaysian nationals or under any other arrangements with Malaysia may exercise the right of access and communication through the Corridors solely for the purpose of direct passage between East and West

<sup>187</sup> Article 15(1). A notification procedure is established in Article 15(2), (3) and (4).

<sup>188</sup> Articles 16 and 17. <sup>189</sup> Article 2(2)(a) and (b).

<sup>190</sup> Article 4. <sup>191</sup> Article 5(1) and (2).

Malaysia.<sup>192</sup> All ships are prohibited from conducting activities not having a direct bearing on access and communication.<sup>193</sup> Stopping and anchoring is allowed only if it is incidental to ordinary navigation or rendered necessary by *force majeure* or distress or for the purpose of rendering assistance.<sup>194</sup>

The right of access and communication has a spatial requirement. All ships must not deviate more than 10 nautical miles to either side of the axis lines of the Corridors during passage, and they must not navigate closer to the coasts than 3 nautical miles.<sup>195</sup> All ships are also required to comply with generally accepted regulations, procedures and practices for safety at sea, including the COLREG Convention, and to comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships.<sup>196</sup>

State aircraft (owned or used by Malaysia and used for official, non-commercial purposes) and civil aircraft (registered under Malaysian law) enjoy the right of continuous, expeditious and unobstructed overflight through the airspace above the territorial sea, archipelagic waters and the territory of Indonesia between East and West Malaysia. Aerial manoeuvres, including tactical exercises, performed by military aircraft are allowed, provided no weapons are fired.<sup>197</sup> Civil aircraft must exercise the right of overflight in accordance with existing international rules and regulations, and they must comply with the laws and regulations of Indonesia in conformity with generally accepted international rules and regulations and the relevant international rules and regulations as they apply to civil aircraft with respect to safety of overflight. They must at all times maintain radio communication with the appropriate air traffic control authority.<sup>198</sup> Civil aircraft have the right to use existing established air

<sup>192</sup> Articles 1(10), 1(11) and 5(3). The right of innocent passage in the area between East and West Malaysia continues to apply in accordance with international law. Innocent passage 'shall not be hampered for Malaysian traditional fishing boats in the territorial sea and archipelagic waters of the Republic of Indonesia lying between East and West Malaysia, including such right of innocent passage from base stations to the Fishing Area and vice versa' (Article 13(1)(b)). A traditional fishing boat is any boat owned and used by Malaysian traditional fishermen specifically for traditional fishing in the Fishing Area (Article 1(9)).

<sup>193</sup> Articles 4(4) and 5(4). <sup>194</sup> Article 6. <sup>195</sup> Article 7.

<sup>196</sup> Article 12(1). This is taken verbatim from Article 39(2) of the UNCLOS.

<sup>197</sup> Article 8(1). Under Article 8(2), Malaysia and Indonesia were to conduct arrangements regarding overflight and manoeuvres.

<sup>198</sup> Articles 9(1), 12(2)(a) and 12(3).

routes,<sup>199</sup> but they are prohibited from conducting any activity not having a direct bearing on access and communication.<sup>200</sup> State aircraft 'will' at all times operate with due regard for safety of navigation.<sup>201</sup> In accordance with ICAO instruments, Indonesia provides for air traffic services and communication services of any aircraft of any State in the airspace above East and West Malaysia.<sup>202</sup>

Generally, the right of access and communication exercisable by Malaysia cannot be suspended or hampered.<sup>203</sup> There is no similar provision to the benefit of foreign merchant vessels. Finally, under Article 22, Malaysia is required not to take any action which has the effect of transferring any of the rights and other legitimate interests provided in the Treaty to a third party.<sup>204</sup>

## 7.6 Limitations to the enforcement jurisdiction of States bordering straits and archipelagic States

### 7.6.1 *Enforcement and right of transit or archipelagic sea lanes passage*

#### 7.6.1.1 Principle

It was previously identified that Part III of the UNCLOS, unlike Part II, contains references to neither the prevention or suspension of passage

<sup>199</sup> Article 9(2).

<sup>200</sup> Article 9(3). This limitation does not apply to Malaysian State aircraft, whereas it does apply to Malaysian government vessels under Article 4(4).

<sup>201</sup> Article 12(2)(b). Contrast with Article 39(3)(a) of the UNCLOS. There is no provision similar to Article 39(3)(b). Malaysia is bound to bear international responsibility for any loss or damage suffered by Indonesia which is caused by a Malaysian ship or aircraft entitled to sovereign immunity acting contrary to international law or contrary to the laws and regulations of Indonesia which are in conformity with international law (Article 21).

<sup>202</sup> Article 11. <sup>203</sup> Article 3(2).

<sup>204</sup> The Treaty of Jakarta also contains three sets of provisions on bilateral co-operation between Indonesia and Malaysia. Article 18 provides for co-operation (through bilateral arrangements to be agreed upon) in the promotion and maintenance of law and order in the area between East and West Malaysia, including the territorial sea of Malaysia. Article 19 provides for the setting up of consultations for the purpose of enabling Malaysia to undertake in Indonesia between East and West Malaysia search and rescue operations for any Malaysian government ship, merchant ship, fishing vessel, traditional fishing boat, foreign fishing vessels (as defined in Article 1(11)), Malaysian State aircraft or civil aircraft, as well as for the crew, passengers and cargo of such ships, vessels, boats or aircraft. Article 20 enables any Contracting Party, upon the request of the other, and through bilateral arrangements to be agreed upon, to co-operate in respect of marine scientific research in the territorial sea and archipelagic waters of Indonesia and in the territorial sea of Malaysia between East and West Malaysia.

nor the exercise of the criminal and civil jurisdiction on board a ship passing through the territorial sea. Parts III and IV indicate expressly that passage must not be impaired, impeded, obstructed or hampered. In particular, the application of the laws of the coastal State must not hamper, deny or impair the right of passage. The principle of delinkage is a cornerstone of the rights of transit and archipelagic sea lanes passage and means that a breach of ships' and aircraft duties does not call for a coastal State's unilateral right to suspend transit passage and for its enforcement competence.<sup>205</sup> This does not mean that the coastal State is denied the right to enforce its rights, but it may not enforce them in a way that hampers, denies or impairs passage. This means that the coastal State has no right to board or arrest a ship, no right to require an aircraft to land and no right to demand that a submarine surfaces.

### 7.6.1.2 Exceptions

**7.6.1.2.1 United Nations Charter** The UNCLOS specifies that ships and aircraft, while exercising the right of transit passage, shall refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait and shall refrain from any other manner in violation of the principles of international law embodied in the Charter of the United Nations.<sup>206</sup> As such, it adds nothing to the provisions in the UN Charter, notably Article 2(4).<sup>207</sup> Should a ship or aircraft belonging to, or directed by, a State to conduct an armed attack against the coastal State, the latter would be allowed to resort to individual or collective self-defence, which is an inherent right preserved by Article 51 of the UN Charter.<sup>208</sup> Customary law requires that the response be necessary and proportionate, but it is evident that

<sup>205</sup> Moore in n. 32, 106–107; Caminos in n. 53, 149–150; Nandan and Anderson in Chapter 6, n. 13, 192; K. L. Koh, *Straits in International Navigation* (Oceana Publications, Dobbs Ferry, 1982), 157–158; Yturriaga in n. 12, 179; see Part III, Section 5.3. This was made expressly clear in the Draft Articles on straits submitted by the Soviet bloc: UN Doc. A/CONF.62/C.2/L.11, UNCLOS III, III Official Records, 189, Article 1(2)(e), and 190, Article 3(2)(d).

<sup>206</sup> Article 39(1)(b). The word 'sovereignty' was originally omitted from the British proposal and the ISNT. It was added after Romania's suggestion during the article-by-article review of the RSNT in 1976. Caminos in n. 53, 148, n. 338.

<sup>207</sup> Treves in n. 32, 961. Article 2(4) reads: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations'.

<sup>208</sup> On the definition of aggression, see UN General Assembly resolution 3314(XXIX) of 14 December 1974.

the right of transit passage may, in those circumstances, be impaired or denied. Questions concerning the law of war were addressed in Part I.

Use of force that does not constitute an armed attack, such as the supply of arms to rebels, does not call for the corresponding right of self-defence.<sup>209</sup> Arguably, it does not call for a direct enforcement right of the coastal State either.<sup>210</sup>

Because the obligation in Article 39(1)(b) is addressed to ships and aircraft, not just to warships and military aircraft, one must ask whether civil aircraft and merchant ships are capable of committing an ‘armed attack’ in the sense of Article 51. Despite some contemporary claims to the contrary, it is not believed that customary international law has yet broadened the scope of Article 2(4) to non-State actors. Use of force by private individuals is regarded as a common crime calling for a corresponding response by the target State.<sup>211</sup> Therefore, a right to ‘self-defence’ under Article 51 may not be claimed in that respect. However, this does not mean that a coastal State victim of activities carried out by private means of transportation that have effects similar to those of an armed attack is prevented from taking the necessary reactive measures. It seems that, in such circumstances, the coastal State would be entitled to assume that the flag State or the State of registry has given implied consent to the coastal State to take measures that hamper, deny or impair the right of transit. It does not appear reasonable to expect the coastal State to contact the flag State and receive an express authorization from the flag State to take enforcement measures or, in light of the prolonged silence of the flag State, to assume that the flag State has endorsed the attack in a way that the attack may be considered to be carried out on its behalf. Additionally, measures that the UN Security Council authorizes the coastal State to take will take precedence over Part III–derived rights and duties, pursuant to Article 103 of the UN Charter.

**7.6.1.2.2 Article 233** Article 233 is entitled ‘Safeguards with respect to straits used for international navigation’ and reads:

<sup>209</sup> ‘As regards certain particular aspects of the principle in question, it will be necessary to distinguish the most grave forms of the use of force (those constituting an armed attack) from other less grave forms’. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Merits)*, ICJ Rep. (1986), 101, para. 191. See also paras. 195, 228–229.

<sup>210</sup> As was argued in Section 5.4, n. 71, the principle of delinkage also means that the denial of the right of transit passage as a countermeasure is not sound reasoning.

<sup>211</sup> See, notably, O. Corten, *The Law against War* (C. Sutcliffe trans.) (Hart, Oxford, 2010), 127 et seq.

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.

Article 233 is found in Part XII of the UNCLOS on protection and preservation of the marine environment. Section 5 deals with the adoption of international rules and national legislation to prevent, reduce and control pollution of the marine environment, from various sources and in various maritime zones. Section 6 is concerned with enforcement. Article 233 is found in section 7, which provides safeguards relating to the enforcement of environmental legislation. This provision has its origin in the ISNT of 1975, which says that ‘nothing in chapters VI and VIII shall affect the legal regime of straits used for international navigation.’<sup>212</sup> Chapter VI deals with standards; chapter VIII, however, deals with responsibility and liability and comes after the chapter in which Article 39 is contained. Article 39 is found in chapter VII on enforcement. It therefore seems that the printed version of the ISNT contains a misprint.<sup>213</sup> This is confirmed by Article 39 of the Draft on preservation of the marine environment prepared by the Group of Juridical Experts,<sup>214</sup> along with the RSNT.<sup>215</sup> At this stage, the question of enforcement was reserved, because ‘the positions concerning the general law regarding straits . . . fell into two groups. One group supported maintenance of the regime of non-suspendable innocent passage . . . The other group supported the regime of transit passage, as it was being negotiated in the Second Committee.’<sup>216</sup> The USSR, which advocated the acceptance of a new right of transit, submitted Draft Articles, according to which ‘without prejudice to the provisions of article 3, the coastal State shall, within the limits of its territorial sea, ensure compliance by all ships with regulations for the prevention of pollution of the

<sup>212</sup> UN Doc. A/CONF.62/WP.8/Part III, UNCLOS III, IV Official Records, 176, Article 39.

<sup>213</sup> Rosenne and Yankov were seemingly aware of the problem, seeing as they reproduce Article 39 as follows: ‘Nothing in chapters VI and [VII] [Standards and Enforcement] shall affect the legal regime of straits used for international navigation’. S. Rosenne and A. Yankov (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. IV (Nijhoff, Dordrecht, 1991), 385.

<sup>214</sup> (19 March 1976), XI Platzöder, 543.

<sup>215</sup> UN Doc. A/CONF.62/WP.8/Rev.1/Part III, UNCLOS III, V Official Records (1976), 180, Article 42.

<sup>216</sup> Rosenne and Yankov in n. 213, 385.

marine environment'.<sup>217</sup> Under Article 3, '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'.<sup>218</sup> Ambiguities regarding coastal State enforcement powers were not alleviated by Malaysia, which submitted a proposal that 'this Chapter [of the RSNT] shall apply to straits used for international navigation provided that States bordering the straits in establishing and enforcing national laws and regulations relating to the protection and preservation of the marine environment shall not have the practical effect of denying, hampering or impairing the right of transit passage'.<sup>219</sup> Article 233 as it now stands finds its source in a joint Malaysian, British and American proposal.<sup>220</sup> These States, together with Indonesia and Singapore, were in direct negotiation at the same time regarding under-keel clearance requirements for the Straits of Malacca and Singapore.<sup>221</sup> The provision was subsequently incorporated into the ICNT.<sup>222</sup>

<sup>217</sup> UN Doc. A/CONF.62/C.3/L.25, UNCLOS III, IV Official Records (1975), 212, Article 2(2).

<sup>218</sup> The USSR delegate acknowledged that 'the problem of combating pollution in international straits situated within the territorial sea was a complicated one. The only way to deal with it was to include in the future convention provisions, such as those in article 3 of his delegation's draft articles, prohibiting in straits any discharge from ships of harmful or toxic substances either on board or being transported, as well as mixtures containing such substances. Such a rule would complicate the position of ships passing through straits but was essential in order to reach agreement concerning the regime of straits'. UNCLOS III, IV Official Records (Third Committee, 19th meeting, 26 March 1975), 88.

<sup>219</sup> (undated, 1976), X Platzöder, 482.

<sup>220</sup> (7 July 1977), X Platzöder, 507. <sup>221</sup> See Section 7.6.1.2.3.

<sup>222</sup> UN Doc. A/CONF.62/WP.10, UNCLOS III, VIII Official Records (1977), 40, Article 234. Spain attempted on several occasions to have the provision deleted or to have it amended in order to replace 'legal regime of straits' by 'transit regime of straits'. The Spanish delegation on 26 August 1980 stated that 'Article 233 has to be considered discriminatory against States bordering straits, inasmuch as it is precisely their geographical narrowness that creates greater risks of accidents which could cause irreparable damage to the marine environment. Apart from being unjust, this provision is poorly drafted since what is affected is not the "legal regime" but the "transit regime" of straits'. UN Doc. A/CONF.62/WS/12, UNCLOS III, XIV Official Records, 150. An amendment to that effect was proposed as late as 13 April 1982: UN Doc. A.CONF.62/L.109, UNCLOS III, XVI Official Records, 223. The Spanish delegate explained that 'the purpose of the proposed amendment to article 233 was to bring it into line with the similar provisions of article 34, which stipulated that the regime of passage through straits did not affect the legal status of the waters forming such straits. That proviso was not in article 233'. UNCLOS III, XVI Official Records (169th plenary meeting, 15 April 1982), 93. At the request of the President, the Chairman of the Third Committee, Mr. Yankov, also

Article 233 confirms the rule that States bordering straits are generally not granted enforcement jurisdiction within straits, notably in relation to any matter over which they may have regulatory authority, except where a violation of Article 42(1)(a) or (b) occurs.<sup>223</sup> Although Article 42 is found in Part III, it is also cross-referred in Part IV by Article 54. Therefore, even though Article 233 only mentions the legal regime of straits, it is submitted that it is also applicable to the legal regime of archipelagic sea lanes and the right of archipelagic sea lanes passage.<sup>224</sup>

As Article 233 excepts all aircraft from its scope of application, as well as warships, naval auxiliaries and other vessels owned or operated by a State and used, for the time being, only on government, non-commercial service, no enforcement measure may be taken against them. Remedies available to the coastal State for damage to the marine environment of the strait are dealt with in Section 7.6.2.

The applicability of Article 233 is restricted to a violation of laws and regulations under Article 42(1)(a) and (b). These are laws and regulations that the coastal State may adopt, but it is not obliged to do so. When the

undertook consultations on the amendments submitted to Articles 221, 230 and 233 of the Draft Convention. Mr. Yankov informed the President that, in spite of his best efforts, it was not possible to find generally acceptable solutions to these amendments. See UN Doc. A/CONF.62/L.132 and Add.I, UNCLOS III, XVI Official Records (1982), 236. In a letter of 26 April 1982 to the President of the Conference, Spain decided that it would not put its amendment to the vote: UN Doc. A/CONF.62/L.136, UNCLOS III, XVI Official Records, 244. However, when Spain signed the UNCLOS on 4 December 1984, it notably declared that 'Article 233 must be interpreted, in any case, in conjunction with the provisions of Article 34'.

<sup>223</sup> Caminos in n. 53, 172. Article 233 refers to a violation of Article 42(1)(a) *and* (b). But this should not be interpreted as meaning that a cumulative violation must occur before enforcement powers may be triggered. E.g. Caminos, *Ibid.*; Nandan and Anderson in Chapter 6, n. 13, 192.

<sup>224</sup> Nowhere in Part XII are archipelagic waters expressly mentioned. However, it is not a reasonable interpretation of the UNCLOS to assume that archipelagic waters are left out of the system of protection established by Part XII. For instance, Article 212 applies to the airspace under the sovereignty of a State; this includes archipelagic waters. Pollution of, or threat of pollution to, the often fragile environment of insular waters was a major concern to archipelagic States. The drafters of the UNCLOS could not possibly have intentionally refused to archipelagic States the unique enforcement power relating to archipelagic sea lanes that was granted to States bordering a strait. Whether one reads archipelagic sea lanes (or, if not designated, the routes normally used for international navigation) as implicit in the reference to straits in Article 233, or as implied from it, or whether one relies on the object and purpose of Part XII and the overall effectiveness of the UNCLOS, Article 233 should be read as covering the case of archipelagic sea lanes passage.

coastal State has not legislated to give effect either to measures adopted by the IMO concerning the safety of navigation and the regulation of maritime traffic or to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait, no breach of its laws and regulation may occur. Therefore, a breach of Article 39(2) by ships causing major damage to the marine environment of the strait does not attract the enforcement competence contemplated by Article 233. Furthermore, Article 42 refers to laws and regulations relating to transit passage in section 2 of Part III or to archipelagic sea lanes passage in Part IV. Straits used for international navigation in which Part III does not apply (for example, under Article 36) and straits regulated by Part III, in which the right of transit passage does not apply (Article 45), are subject to the regime applicable in the relevant maritime zone.

As Caminos observed, in order for a State bordering a strait to take any enforcement measures under Article 233, there must first be a direct nexus between the transiting vessels' violation of Article 42(1)(a) or (b) and the resulting major damage to the marine environment of the strait. A breach of the relevant Article 42 regulations does not ipso facto entitle the coastal State to act under Article 233.<sup>225</sup> If, however, the 'major damage' has not yet materialized but is a perceived 'threat', then the application of Article 233 is more problematic. Arguably, the State bordering the strait may subjectively determine the probability that the 'threat' will actually materialize, as well as the amount of damage foreseeable to the marine environment.<sup>226</sup> This is subject to dispute settlement under the UNCLOS. Koh suggests that the test for what constitutes 'threat of major damage' should 'simply be an odds-on probability' that an accident will occur. For him, there need not be a high probability of its occurring.<sup>227</sup> In light of the exceptional nature of Article 233, one may question whether this standard is correct and whether there should be a requirement that damage is highly likely to occur.

Once Article 233 has been found applicable, 'the States bordering the straits may take appropriate enforcement measures and if so shall respect

<sup>225</sup> Caminos in n. 53, 172. 'Major damage' is admittedly not the same as 'damage'. The same interpretative issues are raised in Articles 220(6) and 228(1). In case of controversy, compulsory dispute settlement applies.

<sup>226</sup> Caminos in n. 53, 172–173.

<sup>227</sup> Koh in n. 205, 160. Koh adds: '[I]t is relevant to consider the size of the vessel and the cargo it is carrying. If it is an oil-laden vessel of over 100,000 Dwt, an oil spillage could cause major damage'.

*mutatis mutandis* the provisions of this section'. Article 233 does not say 'appropriate enforcement measures without prejudice to the right of transit passage'. It is evident that, in the circumstances of Article 233, the passage of the vessel may be impaired or hampered. As a guideline, appropriate enforcement measures contemplated in Article 233 include those that the coastal State may take under section 6 of Part XII, such as a request for information, a physical inspection, the institution of proceedings or detention. Treves offers a different interpretation, arguing that:

[D]etention, or rather the enforcement of the detention of the ship, by completely preventing passage, seems to go so far against the very concept of this passage that it cannot be justified. The latter considerations are even more valid for violations of the laws and regulations concerning safety of navigation contained in Article 42(1)(a) since, unlike what is provided for in point (b), for the rules on pollution by ships, Article 220 does not apply in this connection.<sup>228</sup>

This interpretation does not seem entirely correct. Firstly, the differentiation made between the two kinds of violations contemplated (those of Article 42(1)(a) and those of 42(1)(b)) and the enforcement measures permitted is not justified by the ordinary meaning of Article 233. Secondly, a textual examination of Article 233 demonstrates that any enforcement acts taken under its authority are an exception to the general rule embodied in Article 42(2) that transit passage may not be impeded. Although the opening sentence of Article 233 states that 'nothing in sections 5, 6 and 7 affects the legal regime of straits used for international navigation', the word 'however', which qualifies the second sentence, confirms that the safeguards contained therein are an exception to the first sentence.<sup>229</sup> That said, the balance between the duty not to impede transit passage and the exceptional character of Article 233 arguably calls for caution on the part of States bordering straits. Hence:

States bordering straits should, as far as possible, respect the general rule that transit passage cannot be impeded or impaired. When a violation of the safety of navigation standards or pollution control regulations has occurred or is suspected, strait States must act cautiously, weighing the seriousness of the damage or threatened damage, against the

<sup>228</sup> Treves in n. 32, 969.      <sup>229</sup> Caminos in n. 53, 174–175.

reasonableness of the enforcement measures undertaken. In every case the actions of States bordering straits must be proportionate and non-arbitrary.<sup>230</sup>

In particular, the safeguards in section 7 of Part XII apply to enforcement undertaken under Article 233.

**7.6.1.2.3 Article 233 and the Malacca and Singapore straits under-keel clearance requirement** Article 233 is the brainchild of Malaysia.<sup>231</sup> That State was most concerned about the preservation of the marine environment in the Straits of Malacca. In 1976, Malaysia, Indonesia and Singapore drew up an agreement on the safety of navigation in the Straits of Malacca and Singapore. Among the guidelines was a requirement that vessels maintain an under-keel clearance (UKC) of at least 3.5 metres at all times during the entire passage through the Straits.<sup>232</sup> It is on that basis that Malaysia suggested an amendment to the RSNT adding the legislative (in consultation with the IMO) and enforcement competence of a State bordering a strait regarding limitation of the right of transit in light of insufficient UKC.<sup>233</sup> Subsequent negotiations with the United Kingdom, the United States and the USSR led to the proposal regarding Article 233.<sup>234</sup> As Article 233 now stands, the coastal State may enforce a breach of a UKC requirement adopted under Article 42(1)(a) if it causes or threatens to cause major damage to the environment of a strait. The IMO adopted a UKC requirement for the Straits of Malacca and Singapore by resolution 375(X) of 14 November 1977, adopted on the basis of Article 16(j) of the Convention on the IMCO and resolution A.378(X) on general provisions on ships' routing. That resolution establishes: in Annex I, a new TSS at One Fathom Bank; in Annex II, a new TSS in the Singapore Strait; in Annex III, a new TSS at Horsburgh Light Area; in Annex IV, a deep-water route forming part of the TSS in the Singapore Strait; and in Annex VI, navigational aids that will be installed. Annex V says that deep draught vessels and very large crude carriers must allow for an UKC of at least 3.5 metres at all times during the entire passage through the Straits,<sup>235</sup> and they must also take all the necessary safety precautions especially when navigating through the TSS. The resolution also recommends the use of a pilot within

<sup>230</sup> *Ibid.*, 177.      <sup>231</sup> See n. 220 and accompanying text.      <sup>232</sup> Koh in n. 205, 158.

<sup>233</sup> See n. 51.      <sup>234</sup> See n. 220.

<sup>235</sup> A vessel having a draught of 15 metres or more is deemed to be a deep draught vessel, and a tanker of 150,000 Dwt or more is deemed to be a VLCC. *Ibid.*

the TSS. The resolution, however, is silent on the question of enforcement. Article 233 had already been proposed on 7 July 1977,<sup>236</sup> but on 28 April 1982, Malaysia sent a letter to the President of the Conference, also on behalf of Indonesia and Singapore, containing a common understanding regarding the purpose and meaning of Article 233 in its application to the Straits. That common understanding was reached after negotiations with the delegations of States which constitute major users of those Straits. This understanding, which takes cognizance of the peculiar geographic and traffic conditions in the Straits and which recognizes the need to promote the safety of navigation and to protect and preserve the marine environment in the Straits, reads as follows:<sup>237</sup>

1. Laws and regulations enacted by States bordering the Straits under Article 42(1)(a) of the UNCLOS, refer to laws and regulations relating to TSS, including the determination of under keel clearance for the Straits provided in Article 41.
2. Accordingly, a violation of the provision of resolution A.375(X), whereby the vessels referred to therein shall allow for an under keel clearance of at least 3.5 metres during passage through the Straits, shall be deemed, in view of the peculiar geographic and traffic conditions of the Straits, to be a violation within the meaning of Article 233. The States bordering the Straits may take appropriate enforcement measures, as provided for in Article 233. Such measures may include preventing a vessel violating the required under keel clearance from proceeding. Such action shall not constitute denying, hampering, impairing or suspending the right of transit passage in breach of Articles 42(2) or 44 of the UNCLOS.
3. States bordering the Straits may take appropriate enforcement measures in accordance with Article 233, against vessels violating the laws and regulations referred to in Article 42(1)(a) and (b) causing or threatening major damage to the marine environment of the Straits.
4. States bordering the Straits shall, in taking the enforcement measures, observe the provisions on safeguards in section 7, Part XII of the UNCLOS.

<sup>236</sup> See n. 220.

<sup>237</sup> UN Doc. A/CONF.62/L.145, UNCLOS III, XVI Official Records, 250–251 (text edited).

5. Articles 42 and 233 do not affect the rights and obligations of States bordering the Straits regarding appropriate enforcement measures with respect to vessels in the Straits not in transit passage.
6. Nothing in the above understanding is intended to impair:
  - (a) the sovereign immunity of ships and the provisions of Article 236 as well as the international responsibility of the flag State in accordance with paragraph 5 of Article 42;
  - (b) the duty of the flag State to take appropriate measures to ensure that its ships comply with Article 39, without prejudice to the rights of States bordering the Straits under Parts III and XII of the UNCLOS and the provisions of paragraphs 1, 2, 3 and 4 of this statement.

The statement naturally preserves the general meaning of Article 233 in paragraph 3. The effect of the common understanding in paragraph 2 is that a breach of the UKC requirement 'is deemed' to be a violation within the meaning of Article 233 and therefore calls for appropriate enforcement measures under Article 233, including prevention to proceed. The content of the declaration was confirmed by Indonesia,<sup>238</sup> Singapore,<sup>239</sup> the United Kingdom,<sup>240</sup> the United States,<sup>241</sup> Japan,<sup>242</sup> Australia,<sup>243</sup> and also by the Federal Republic of Germany.<sup>244</sup> France declared that it had taken note of the declarations.<sup>245</sup> From the understanding, it may therefore be assumed that a breach of the UKC requirement ipso facto threatens major damage to the marine environment of the Straits.

Interestingly, the common understanding also presumes that enforcement of the violation of the UKC requirement shall not constitute denying, hampering, impairing or suspending the right of transit passage in breach of Articles 42(2) or 44 of the UNCLOS. This would mean that lawful enforcement against transiting vessels does not come within the scope of the prohibition to hamper, deny or impair passage. Such a statement would not have been necessary, however, if it is concluded, as is generally the case, that enforcement under Article 233 is an exception

<sup>238</sup> UN Doc. A/CONF.62/L.145/Add.1, *ibid.*, 251.

<sup>239</sup> UN Doc. A/CONF.62/L.145/Add.2, *ibid.*, 251.

<sup>240</sup> UN Doc. A/CONF.62/L.145/Add.4, *ibid.*, 252.

<sup>241</sup> UN Doc. A/CONF.62/L.145/Add.5, *ibid.*, 252.

<sup>242</sup> UN Doc. A/CONF.62/L.145/Add.6, *ibid.*, 253.

<sup>243</sup> UN Doc. A/CONF.62/L.145/Add.7, *ibid.*, 253.

<sup>244</sup> UN Doc. A/CONF.62/L.145/Add.8, *ibid.*, 253.

<sup>245</sup> UN Doc. A/CONF.62/L.145/Add.3, *ibid.*, 252.

to the general prohibition, that is, that transit passage may be hampered or impeded if the relevant conditions are met. Both interpretations are acceptable; the first gives an absolute or objective meaning to hampering of passage, whereas the second gives a relative one.<sup>246</sup>

In light of the fact that the statement was made in relation to the Straits of Malacca and Singapore, it is doubtful that its scope may be extended to other straits. If it is, it should at least be restricted to straits with similar ‘peculiar geographic and traffic conditions’.<sup>247</sup> Hence, it is not necessarily the case that the breach of a UKC requirement, if adopted by the IMO, will, as such, be deemed to constitute a threat of major damage to the marine environment of the strait.<sup>248</sup>

**7.6.1.2.4 Article 234** Article 234 is the only provision in section 8 of Part XII. It gives coastal States

<sup>246</sup> Caminos favours the second interpretation: ‘Thus, the “common interpretation” of IMO resolution A.375(X) . . . and Article 233 does not exceed the scope of Article 42(2); rather it is an example of the way the exception to the general rule was intended to function.’ Caminos in n. 53, 175. Treves favours the first view: ‘This statement [i.e. the common understanding], because of the very fact that it was considered necessary to make it, confirms the idea that Article 42(2) should prevail (in any case as far as the measures preventing passage are concerned). It may be seen as an agreement between the most directly concerned States, falling within the framework of Article 311(2), and thus not a violation of the Convention.’ Treves in n. 32, 970.

<sup>247</sup> On these conditions, see, e.g., J. H. Ho, ‘South East Asian SLOC Security’, in W. Shicun and K. Zou (eds.), *Maritime Security in the South China Sea. Regional Implications and International Cooperation* (Ashgate, Farnham, 2009), 158.

<sup>248</sup> In the Dover Strait, the IMO in resolution A.475(XII) of 19 November 1981, Annex I, indicated that ‘Masters of ships, when planning their passage through the Dover Strait and its approaches, should ensure that there is an adequate under-keel clearance at the time of passage. In order to achieve this clearance, the static under-keel allowance should be not less than 4 metres, which includes allowance for squat for a speed not exceeding 12 knots. The static under-keel allowance is the difference between the calculated depth of water and the ship’s draught when stopped’ (4.5). Later, the IMO revised its recommendation and dropped the four-metre figure. The *Ships’ Routeing* publication indicates that:

[A]llowance must be made for the effects of squat at the passage speed, for uncertainties in charted depths and tide levels, and for the effects of waves and swell resulting from local and distant storms. In assessing a safe under-keel allowance, masters of vessels constrained by their draught are strongly advised to consult the Sailing Directions, Mariners’ Routeing Guides and Deep-Draught Planning Guides published for the area by hydrographic offices, and to be guided by the recommendations for under-keel allowance contained therein.

See also resolution A.893(21), Guidelines for Voyage Planning, adopted on 25 November 1999.

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 environment could cause major harm to or irreversible disturbance of the ecological balance (emphasis added).

Because the right of transit passage under the UNCLOS applies in the territorial sea, which is 'within the limits' of the EEZ, and because Article 234 is not covered by the safeguards in Article 233, it must be concluded that the coastal State enjoys the necessary enforcement powers in a strait to which Article 234 applies, bearing in mind the sovereign immunity clause in Article 236. This is studied more extensively in Part VI.

### 7.6.2 *General remedies available to the coastal State*

It was never assumed that the lack of direct enforcement jurisdiction of the coastal State over transiting ships and aircraft left it without a possibility to vindicate breaches of the duties of ships and aircraft during transit (or, as applicable, archipelagic sea lanes) passage. The British representative indicated early on:

Foreign ships exercising the right of transit passage would have to conform with the regulations [adopted by the coastal State]; should they fail to comply, the possibility of legal proceedings would arise in the case of merchant vessels. In the case of warships and other vessels entitled to sovereign immunity . . . the flag-State was directly responsible for damage caused by non-compliance with such laws and regulations on the part of one of its ships. Namely, there would be liability on the international level or, in other words, State responsibility.<sup>249</sup>

Liability for damage caused to the coastal State by ships or aircraft, with secondary liability of the flag State, was envisaged by a socialist Six-Power Draft.<sup>250</sup> This is a modified version of the initial USSR Draft,

<sup>249</sup> UNCLOS III, II Official Records (Second Committee, 11th meeting, 22 July 1974), 125.

<sup>250</sup> 'Liability for any damage which may be caused to the coastal States of the straits, their citizens or juridical persons by the ship in transit, shall rest with the owner of the ship or other person liable for the damage, and in the event that such compensation is not paid by them for such damage, with the flag-State of the ship'. UN Doc. A/CONF.62/C.2/L.11, UNCLOS III, III Official Records, 189, Article 1(2)(d) (and 3(2)(c) for aircraft).

which indicated that ‘liability for any damage which may be caused to the coastal States of the straits as a result of the transit of ships shall rest with the flag State of the ship which has caused the damage or with juridical persons under its jurisdiction or acting on its behalf.’<sup>251</sup> Liability was also envisaged by those equating the right of transit passage with the right of non-suspendable innocent passage,<sup>252</sup> including liability for damage caused by a public vessel, which is claimable under the rules of State responsibility.<sup>253</sup> For Malta, liability for damages negligently caused by a vessel exercising the right of passage rested with the State whose flag the vessel flies. The courts of the coastal State were competent to adjudicate cases involving accidents of navigation and damages to the marine environment or to installations resulting from negligence in the exercise of the right of passage.<sup>254</sup> These tendencies were included in the Main Trends Working Paper.<sup>255</sup> The ISNT, in its provisions on innocent passage, contains provisions on liability for damage caused by immune ships and also by merchant ships.<sup>256</sup> In its provisions on transit, it only contains a provision on the liability of immune ships and aircraft.<sup>257</sup>

<sup>251</sup> UN Doc. A/AC.138/SC.II/L.7 (1972), Article [...] (2)(d) (and the mirror provision for aircraft).

<sup>252</sup> E.g. UN Doc. A/CONF.62/C.2/L.16 in n. 151, 193, Article 9(1).

<sup>253</sup> *Ibid.*, 194, Article 19. <sup>254</sup> UN Doc. A/AC.138/SC.II/L.28 (1973), Article 41.

<sup>255</sup> Provision 63, formula B: ‘Liability for any damage which may be caused to the coastal States of the straits, their citizens or juridical persons by the ship in transit, shall rest with the owner of the ship or other person liable for the damage, and in the event that such compensation is not paid by them for such damage, with the flag State of the ship’. Provision 65 replicates this for aircraft. Provision 62(5) and Provision 63, formula A, concern liability for damage caused by an immune ship or aircraft. For innocent passage, the only provision on liability is Provision 46 on liability for damage caused by immune vessels. UN Doc. A/CONF.62/L.8/Rev.1, UNCLOS III, III Official Records (1974), 114, 117.

<sup>256</sup> In the rules applicable to all ships, Article 23(1) says: ‘If a ship exercising the right of innocent passage through the territorial sea does not comply with the laws and regulations concerning navigation, it shall be liable for any damage caused to the coastal State, including its environment and any of its facilities, installations or other property or to any ships flying its flag’. Article 32 concerns the liability of public vessels: ‘If, as a result of any non-compliance by any warship or other government ship operated for non-commercial purposes with any of the laws or regulations of the coastal State relating to passage through the territorial sea or with any of the provisions of these articles or other rules of international law, any damage is caused to the coastal State, including its environment and any of its facilities, installations or other property, or to any ships flying its flag, international responsibility shall be borne by the flag State of the ship causing the damage’. UN Doc. A/CONF.62/WP.8/Part II, UNCLOS III, IV Official Records (1975), 156, 157.

<sup>257</sup> *Ibid.*, 159, Article 41(5): ‘If a ship or aircraft entitled to sovereign immunity acts in a manner contrary to the provisions of this part or laws and regulations adopted in

The RSNT, in its provisions on innocent passage, dropped the liability clause applicable to merchant ships. Later on, Spain added a provision that:

[A] State shall ensure that (a) ships flying their flag are provided with adequate insurance to cover any loss or damage which they may cause in the exercise of the right of transit passage; (b) recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of any loss or damage caused by ships flying their flag in the exercise of the right of transit passage.<sup>258</sup>

Thus, neither Part II nor Part III specifically addresses the liability of private vessels or aircraft for breach of a duty relating to passage. Several scenarios need to be distinguished.

Firstly, as was seen earlier, the coastal State, in Part III, is given legislative competence over a few matters concerning transit passage. As the coastal State generally lacks direct enforcement jurisdiction, a breach of its laws or regulations will have to be addressed at a later stage, such as: when the ship finds itself in a port of the coastal State;<sup>259</sup> through *in rem* or *in personam*

accordance with paragraph 1 and loss or damage results to a strait State or other State in the vicinity of the strait, the flag State shall be responsible for that loss or damage<sup>258</sup>.

<sup>258</sup> Doc. C.2/Informal Meeting/4 (26 April 1978), V Platzöder, 9, Article 42bis.

<sup>259</sup> This is how Australia intends to enforce the requirement of compulsory pilotage in the Torres Strait. See Part VI, Chapter 14, n. 101 and accompanying text. Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005, amended by Directive 2009/123/EC of 21 October 2009 is entitled 'Directive of the European Parliament and of the Council on ship-source pollution and on the introduction of penalties, including criminal penalties, for pollution offences'. Its purpose is to incorporate international standards for ship-source pollution into Community law and to ensure that persons responsible for discharges of polluting substances are subject to adequate penalties, including criminal penalties, in order to improve maritime safety and to enhance protection of the marine environment from pollution by ships, public vessels excepted (Article 1(1)). The directive applies to the discharge of polluting substances as defined in Annexes I and II of MARPOL. Infringements are regarded as a criminal offence (Article 5a). Under Article 3(1)(c), the Directive applies to straits used for international navigation subject to the regime of transit passage. Enforcement may be effected by the port State when the ship is voluntarily within a port (Article 6), and the Directive also requires co-operation with the next port of call if the ship is not calling at a port of a Member State holding information relating to the suspected discharge (Article 7(1)). The Directive provides for detention of the ship when there is clear, objective evidence that a ship navigating in the territorial sea or EEZ has, in the EEZ, committed an infringement resulting in a discharge causing major damage or a threat of major damage to the coastline or related interests of the Member State concerned or to any resources of the territorial sea or EEZ (Article 7(2)). This does not apply to ships navigating in a strait. The Directive must be applied in accordance with section 7 of Part XII of the UNCLOS

proceedings against a sister ship or other asset of the defendant; through mechanisms of international co-operation in judicial matters; and so on. Whether and to what extent the case is brought against the shipmaster, the shipowner and other related interests are beyond the scope of this study and are, to some extent, also determined by applicable conventions.<sup>260</sup> In addition, the coastal State will be entitled, through diplomatic channels, to request the flag State's assistance, if needed. Article 42(4) creates a direct duty for ships to comply with laws and regulations, but the flag State has a general duty of jurisdiction and control which will be addressed in Section 8.1.4.

Secondly, duties of ships or aircraft for which the coastal State is not given regulatory competence, namely, those contained in Articles 39, 40 and 41, do not warrant judicial proceedings being launched in the coastal State. If the coastal State was allowed to enforce them domestically, it would not have been necessary to specifically confer on that State legislative competence in Article 42. It is not correct to argue that the coastal State may legislate in relation to all duties of ships and aircraft in Part III and may enforce these duties in its domestic legal order. Rather, Articles 39, 40 and 41 essentially spell out a code of self-discipline, the violation of which does not afford States bordering straits any enforcement jurisdiction. As far as strait States are concerned, a breach of a duty under Articles 39, 40 or 41 may attract the international responsibility of the flag State, on the basis of the duty of due diligence, without granting strait States the unilateral right to determine violations. The only remedy is to pursue the matter as a breach of international law through diplomatic channels and through other dispute settlement procedures.<sup>261</sup> Hence, the coastal State will expect the flag State to enforce the duties of ships and aircraft and will have a right to allege that the flag State is not exercising due diligence if the flag State does not enforce those duties. As far as persons affected by the relevant breach are concerned, they will admittedly use the domestic procedures in the flag State against the shipowner and other interests in

(Article 9). Article 233 is therefore applicable, too. Contrary to the opinion of López Martín (in n. 91, 166–167), it does not seem that the Spanish Royal Decree 394/2007 of 31 March 2007, which implements the Directive, allows for the Maritime Administration to arrest a vessel suspected of infringement in the Strait of Gibraltar. Under Article 3(2) of the Royal Decree, enforcement measures are said to be taken in 'conformidad con la parte XII, sección 7, de la Convención de las Naciones Unidas sobre el Derecho del Mar de 1982'.

<sup>260</sup> E.g. MARPOL, Article 4(2).

<sup>261</sup> Caminos in n. 53, 150.

the ship (or aircraft). So far as the protection of the marine environment is concerned, provisions such as Articles 229 and 235 of the UNCLOS are also relevant.

With respect to the activities of public vessels and aircraft, because these are directly attributable to the flag State and the State of registry, liability will be raised at the international level. This, too, is examined further in Section 8.4.

### 7.7 International responsibility of the coastal State

The question of the liability of the coastal State for damage caused to private or public vessels and aircraft in transit, which raises the reverse situation, is not expressly addressed in Part III. The UK Draft had suggested that if 'a straits State acts in a manner contrary to the provisions of this chapter and loss or damage to a foreign ship or aircraft results, the straits State shall compensate the owners of the vessel or aircraft for that loss or damage'.<sup>262</sup> This proposal was taken up by the Private Group on Straits,<sup>263</sup> as well as by several other Drafts at UNCLOS III.<sup>264</sup> Malta, in its Draft submitted to the Sea-Bed Committee, would have had claims for compensation for injury to persons or for loss or damage to vessel or cargo caused by the coastal State for failure to maintain and facilitate navigation through straits less than 24 nautical miles wide adjudicated by the International Maritime Court.<sup>265</sup> None of these suggestions was incorporated into the ISNT.

A breach of a duty of the coastal State (for example, the prevention of passage, hampering of passage or unlawful enforcement measures) could be raised on the international level by the State of nationality of the ship or aircraft. State responsibility generally is not a matter for the UNCLOS to regulate, and it refers to the general international law on that aspect in Article 304. In the specific context of the enforcement of pollution regulations, Article 232 says that 'States shall be liable for damage or loss attributable to them arising from measures taken pursuant to section 6 [of Part XII] 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'. This

<sup>262</sup> UK Draft Articles in n. 4, 186, Article 7(2).      <sup>263</sup> IV Platzöder, 196, Article 4(6).

<sup>264</sup> E.g. UN Doc. A/CONF.62/C.2/L.16, UNCLOS III, III Official Records (1974), 194, Article 9(2).

<sup>265</sup> See n. 254, Article 39.

solution may be extrapolated to other forms of damages: Even though the right of transit passage is a right conferred on States, not individuals, individuals benefit from that right through the nationality of vessels and aircraft. Nothing seems to prevent individuals from seeking to rely on the rights of transit in the domestic courts of the coastal State.<sup>266</sup>

<sup>266</sup> But individuals do not *have to* use the domestic courts of the coastal State: The rule of exhaustion of local remedies is not applicable there, as it is similarly inapplicable for other flag States' rights. See *Saiga (No. 2) (Saint Vincent and the Grenadines v Guinea) (Merits)*, ITLOS Rep. (1999), paras. 97–98; *the M/V "Virginia G" case (Panama v Guinea-Bissau)*, ITLOS Judgment (14 April 2014), paras. 156–158, [www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.19/judgment/C19-Judgment\\_14\\_04\\_14\\_orig.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/judgment/C19-Judgment_14_04_14_orig.pdf).

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## Duties of ships and aircraft in transit

As was seen in Part III, the right of transit passage was originally envisaged by the United States and the USSR as an import into straits of the freedoms of the high seas. However, it was never envisaged that the measure of freedom would be the same as that enjoyed on the high seas.

### 8.1 General compliance duties of ships and aircraft in transit

Article 39(1) of the UNCLOS says:

Ships and aircraft, while exercising the right of transit passage, shall:

- (a) proceed without delay through or over the strait;
- (b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress;
- (d) comply with other relevant provisions of this Part.

This provision also applies to archipelagic sea lanes passage under Article 54. It has its origin in the early Soviet proposal at the UN Sea-Bed Committee, which incorporated elements now found in Article 39(2) and which prohibited ships from causing any threat to the security of the coastal State. In particular, warships in transit were not to engage in exercises or gunfire, use weapons of any kind, launch their aircraft, undertake hydrographical work or engage in any other act unrelated to the transit. Ships were also to avoid causing pollution or any other damage to the coastal State and to comply with international rules concerning the prevention of collisions. Aircraft were to avoid causing any threat to the security of the coastal State, and military aircraft were prohibited from engaging in any exercises or gunfire, using weapons of any kind, taking aerial photographs, circling or diving down towards ships, taking on

fuel or re-engaging in other acts of a nature unrelated to the right of overflight.<sup>1</sup> Proposals in a similar vein were drafted by Malta.<sup>2</sup> This was reworked in the British proposal, which contains the direct antecedent to Article 39(1);<sup>3</sup> it was developed by the Private Group on Straits into a provision that is, in essence, similar to Article 39(1),<sup>4</sup> and it then made its way into the ISNT.<sup>5</sup>

The content of the duty to proceed without delay was examined previously in Section 5.1, when the condition of continuity and expeditiousness was analysed. That condition also means that stopping or anchoring is not allowed, unless it is rendered necessary by *force majeure* or unless it is incident to the normal mode of navigation, including rendering assistance to persons in distress. Section 5.3 also identified the fact that the ‘normal mode of navigation’ of submarines implies that they may pass submerged. Similarly, the flight of aircraft from and to its carrier may be considered the normal mode of navigation, bearing in mind the geographical characteristics of a given strait.<sup>6</sup> More generally, the term ‘normal mode’ is not defined and was intended to refer to that mode

<sup>1</sup> See Chapter 7, n. 251.      <sup>2</sup> See Chapter 7, n. 254.

<sup>3</sup> See UK Draft Articles in Chapter 7, n. 4, 186, Article 2(1): ‘Ships and aircraft, while exercising the right of transit passage shall: (a) proceed without delay through the strait and shall not engage in any activities other than those incident to their normal modes of transit; (b) refrain from any threat or use of force in violation of the Charter of the United Nations against the territorial integrity or political independence of an adjacent straits State.’

<sup>4</sup> IV Platzöder, 194–195, Article 2(1).

<sup>5</sup> See Chapter 7, n. 212, 158, Article 39(1). The phrase ‘against the sovereignty’ in Article 39(1)(b) was added after Romania’s suggestion during the article-by-article review of the RSNT in 1976. Caminos in Chapter 7, n. 53, 148, n. 338.

<sup>6</sup> See Part III, Section 5.4, n. 50 and accompanying text. Contra Yturriaga in Chapter 7, n. 12, 224. Oxman notes:

What constitutes ‘delay’ and what constitutes the normal mode of continuous and expeditious transit for military aircraft depends upon the circumstances. Military aircraft may transit alone or in squadron formation. Helicopters or fixed wing aircraft also may accompany warships in transit in a defensive mode. This is one reason why military overflight is not restricted to prescribed altitudes and why the air routes across archipelagic waters must be above the archipelagic sea lanes . . . In principle, it is to be expected that naval and air forces in transit will take normal defensive precautions against attack. For security as well as navigation purposes, they may, for example, communicate by radio, use radar or sonar, and, where circumstances permit, travel in defensive formation and use defensive maneuvers. If ships and aircraft are traveling in a group for normal defensive purposes, total transit time will be limited by the slowest unit.

B. H. Oxman, ‘Transit of Straits and Archipelagic Waters by Military Aircraft’ 2000(4) *Singapore Journal of International and Comparative Law*, 402–403.

which is normal or usual for navigation by the particular type of ship or aircraft concerned. For aircraft in particular, this means whatever altitude and speed are appropriate in the given circumstances.<sup>7</sup> The undertaking of military exercises or the use of weapons was an express prohibition in the Soviet Draft.<sup>8</sup> This is also prohibited by, for example, Indonesian law.<sup>9</sup> Although this would render passage non-innocent under Article 19(2)(b), Yturriaga argues that the exercise or practice of weapons or the launching, landing or taking on board of an aircraft or a military device imply a threat or use of force prohibited under Article 39(1)(b).<sup>10</sup> It does not seem, however, that this is necessarily the case, and an activity incident to the normal mode of passage must be distinguished from a breach of the prohibition of use or threat of force. It should first be established what constitutes ‘normal mode of passage’ and then whether an activity is incident to the normal mode for the type of ship or aircraft concerned.<sup>11</sup> Thus Nandan and Rosenne conclude that the lack of specification of what constitutes incidental activities

is appropriate for a general treaty of indefinite duration which is intended to apply to a wide variety of straits, in a number of geographic settings, and to ships and aircraft of significantly different operating characteristics. An appropriate test would be one of reasonableness under the circumstances. The employment of radar, sonar, and depth-finding devices would be included if they are normally used in navigation through constricted waters or if safety or other conditions dictate their use. Speed and

<sup>7</sup> Nandan and Rosenne in Chapter 6, n. 12, 342.

<sup>8</sup> See Chapter 7, n. 251. See also the Six-Power Draft, UN Doc. A/CONF.62/C.2/L.11, UNCLOS III, III Official Records, 189–190, Articles 1(2)(a) and 3(2)(b).

<sup>9</sup> Government Regulation No. 37 on the rights and obligations of foreign ships and aircraft exercising the right of archipelagic sea lanes passage through designated archipelagic sea lanes (28 June 2002), Article 4(4).

<sup>10</sup> Yturriaga in Chapter 7, n. 12, 198. Oxman and Stevenson lucidly write: ‘[S]ophisticated warships, submarines, and high-speed aircraft need not, and would in fact not be foolish enough to, enter narrow straits passages if their intent were hostile’. B. H. Oxman and J. R. Stevenson, ‘The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session’, 1975(69) *American Journal of International Law*, 15.

<sup>11</sup> Interestingly, the USSR Draft prohibited the taking on of fuel by aircraft. In the *Virginia G* case, the ITLOS emphasized ‘that the bunkering of foreign vessels engaged in fishing in the [EEZ] is an activity which may be regulated by the coastal State concerned’. *The “M/V Virginia G” case (Panama v Guinea-Bissau)*, ITLOS Judgment (14 April 2014), para. 223, [www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.19/judgment/C19-Judgment\\_14\\_04\\_14\\_orig.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no.19/judgment/C19-Judgment_14_04_14_orig.pdf), emphasis added. Hence, admittedly, bunkering per se remains within the freedom of navigation and may be considered an activity incident to the normal mode of transit under Article 39.

course variations of ships and aircraft, to take account of tide, currents, weather and navigational hazards, also would be included. Beyond these obvious activities, other 'normal' activities would depend on the characteristics of the transiting ship or aircraft, as well as the navigational and hydrographical characteristics of the strait.<sup>12</sup>

The prohibition contained in Article 39(1)(b) obviously finds its source in Article 2(4) of the UN Charter, but the two formulas are not identical. Firstly, the UNCLOS provision adds 'sovereignty', which arguably does not add anything to 'territorial integrity', although it is possible that the prohibition encompasses threat or use of force committed by a ship or aircraft in transit against a non-'territorial' coastal State's interests (for example, the launching of a missile to hit an aircraft registered in the coastal State, if one abandons the classical assumption that a means of transportation is a detached piece of territory), but such prohibition is encompassed by the last phrase of Article 39(1)(b). Secondly, the source of the obligation in Article 39(1)(b) is not the UN Charter itself but the principles of international law embodied therein.<sup>13</sup> This rather broad formula encapsulates not only rules relating to the use of force but also those on relations among States as stated, for example, in UN General Assembly resolution 2625 (XXV) and 'embodied' in the Charter. A general clause to that effect is found in Article 301 of the UNCLOS. The prohibition applies to all ships and aircraft, whether public or private, as does Article 39(1) in general.<sup>14</sup>

Lastly, the final paragraph of Article 39(1) redundantly reminds ships and aircraft to comply with obligations specified elsewhere in Part III.<sup>15</sup>

## 8.2 Specific duties of ships

### 8.2.1 Article 40

Article 40 says: 'During transit passage, foreign ships, including marine scientific research and hydrographic survey ships, may not carry out any research or survey activities without the prior authorization of the States bordering straits.' This applies by incorporation, pursuant to Article 54,

<sup>12</sup> Nandan and Rosenne in Chapter 6, n. 12, 342–343.

<sup>13</sup> Caminos in Chapter 7, n. 53, 148, n. 339. <sup>14</sup> See Section 7.6.1.2.1.

<sup>15</sup> E.g. Article 39(1)(d) requires that ships comply with the duty not to carry out research activities in Article 40 or with their duty to comply with the laws and regulations of the coastal State under Article 42(4).

to archipelagic sea lanes passage. This rule of conduct, like those in Article 39, flows from the UNCLOS itself and is different from additional regulations enacted by States bordering straits under the authority of Article 42.<sup>16</sup>

This same rule was first addressed by the USSR in its Draft submitted to the Sea-Bed Committee, although the duty was addressed to warships only.<sup>17</sup> The prohibition is also expressed in Article 19(2)(j) of the UNCLOS on the regime of innocent passage; not surprisingly, it was incorporated in proposals emanating from such States as would only grant a right of non-suspendable innocent passage in straits.<sup>18</sup> In particular, the Fijian Draft Articles relating to passage in the territorial sea of 1974 contain language identical to Article 40, although they only refer to 'coastal State' and 'passage'.<sup>19</sup> The prohibition made its way neither to the Articles prepared by the Private Group on Straits nor to the ISNT or the RSNT. The prohibition for all ships to carry out any research or survey activities during transit passage was suggested by Malaysia as additional provisions in the RSNT on the duties of ships in transit.<sup>20</sup> Malaysia was supported by Morocco,<sup>21</sup> as well as Spain.<sup>22</sup> The prohibition was included in the Informal Composite Negotiating Text in a provision (Article 40) separate from the duties of ships found in Article 39 of the UNCLOS.<sup>23</sup> There is no explanation for not having included Article 40 as an additional subparagraph in Article 39. It might be related to the fact that the provision had appeared as a stand-alone duty of ships in the ISNT's provisions on archipelagic States, applicable both to innocent passage and archipelagic

<sup>16</sup> Caminos in Chapter 7, n. 53, 163–164. <sup>17</sup> See Chapter 7, n. 251, Article [...] (2)(b).

<sup>18</sup> E.g. Draft Articles on navigation through the territorial sea, including straits used for international navigation submitted by Cyprus, Greece, Indonesia, Malaysia, Morocco, the Philippines, Spain and Yemen, UN Doc. A/AC.138/SC.II/L.18 (1973). Article 22(2)(e) prohibits warships from carrying out research operations of any kind; Article 14(c) gives the coastal State the right to regulate passage of ships engaged in research of the marine environment; and Article 6(g) allows the coastal State to enact regulations on research of the marine environment.

<sup>19</sup> UN Doc. A/CONF.62/C.2/L.19, UNCLOS III, III Official Records (1974), 197, Article 5(5).

<sup>20</sup> (7 September 1976), IV Platzöder, 396.

<sup>21</sup> (undated, 1976), *ibid.*, 399. Morocco also gave the State bordering a strait legislative competence relating to transit passage, in relation to scientific research and hydrographic surveys: *ibid.*, 401.

<sup>22</sup> (undated, 1977), *ibid.*, 394 (and legislative competence as Morocco had proposed it: *ibid.*, 395).

<sup>23</sup> UN Doc. A/CONF.62/WP.10, UNCLOS III, VIII Official Records (1977), 11, Article 40.

sea lanes passage in archipelagic waters.<sup>24</sup> The prohibition was reproduced in the RSNT (Article 127). In 1977, Malaysia submitted an amendment to Article 127 of the RSNT to the effect that ‘during their passage through straits, foreign ships, including marine research and hydrographic survey ships, may not carry out any research or survey activities without the prior authorization of the States bordering straits.’<sup>25</sup> Its incorporation into the ICNT resulted from a series of bilateral consultations conducted by Malaysia with the delegations of Indonesia and Singapore, on one side, and the delegations of the United States, the USSR, the United Kingdom and Japan, on the other. Malaysia noted that a provision relating to scientific research had been inadvertently omitted from the chapter on straits in the RSNT.<sup>26</sup>

The necessity of Article 40 may be subject to doubt. Nandan and Anderson correctly argue that Article 40 supplements the general rule in Article 39; it adds little to what is implicit in Article 39 but appears to have been included largely for the avoidance of doubt.<sup>27</sup> Even though Article 38(2) specifies that transit passage means the exercise of the freedom of navigation and overflight *solely* for the purpose of continuous and expeditious transit, a claim may be made that research activities are a normal mode of navigation for, say, hydrographic vessels.<sup>28</sup> The prohibition applies in particular to marine scientific research and hydrographic survey ships, but it does not distinguish between private and public vessels and indeed covers all ships. It does not apply to aircraft which are bound by Article 39(1)(c) anyway. The duty, however, is restricted to foreign ships, as the coastal State is free to regulate ships flying its own flag as it sees fit. The coastal State is equally free to grant foreign ships the right to conduct research activities; its jurisdiction in the field stems

<sup>24</sup> Article 127 reads: ‘During their passage through archipelagic waters, foreign ships, including marine research and hydrographic survey ships, may not carry out any research or survey activities without the prior authorization of the archipelagic State’. The Main Trends Working Paper, in Provision 216(1)(g), had given the archipelagic State legislative competence in relation to research in the marine environment and hydrographic surveys. This can be traced to the early Draft on archipelagos submitted by Fiji, Indonesia, Mauritius and the Philippines in Article V(5)(f): see UN Doc. A/AC.138/SC.II/L.48 (1973).

<sup>25</sup> (30 June 1977), IV Platzöder, 483.

<sup>26</sup> Caminos in Chapter 7, n. 53, 118. The Vice-Chairman of the delegation of Malaysia sent a letter to the Chairman of the Second Committee on 5 July 1977 (*ibid.*, n. 268).

<sup>27</sup> Nandan and Anderson in Chapter 6, n. 13, 187.

<sup>28</sup> The same argument admittedly justified giving coastal States regulatory competence with respect to fishing vessels in Article 42(1)(c).

directly from its sovereignty over the territorial sea (Article 34). Should research activities straddle international boundaries within a strait that has several bordering States, the authorization of each State in the territorial sea of which the activity is conducted is required. Although the regime of marine scientific research is specifically addressed in Part XIII of the UNCLOS,<sup>29</sup> Article 40 prohibits research activities *tout court*. This includes, for example, research on the airspace over the strait conducted by a transiting vessel. Article 40 equally prohibits survey activities. In specific cases, it will therefore be necessary to distinguish survey activities from, say, 'sonic depth sounding by fathometer for purposes of navigation, and position plotting by visual and radar-means',<sup>30</sup> which may be activities that are incidental to the normal mode of navigation of a given ship. Thus, admittedly, survey activities undertaken by foreign ships with the intent of drawing up hydrographic maps in the general interest of navigation require the consent of the coastal State. A dispute on whether a given activity is incidental to the navigation of a ship or constitutes a survey activity is subject to dispute settlement under Part XV, bearing in mind possible issues regarding the classification of such activity as 'military' activity under Article 298(1)(b).<sup>31</sup>

#### 8.2.2 Article 41(7)

This was addressed in Section 7.2.

#### 8.2.3 Article 42(4)

This was dealt with in Section 7.3.

#### 8.2.4 Article 39(2)

This provision also applies to archipelagic sea lanes passage by virtue of Article 54.

<sup>29</sup> See Article 245 for the territorial sea. This includes archipelagic waters by logical implication.

<sup>30</sup> Nandan and Rosenne in Chapter 6, n. 12, 352.

<sup>31</sup> This would work in favour of the flag State. Law enforcement activities of the coastal State may not be excepted from compulsory jurisdiction under Article 298(1)(b) if they do not fall within Article 297(2) or (3), which are not relevant here.

## 8.2.4.1 Scope

Article 39(2) reads:

Ships in transit passage shall:

- (a) comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea;
- (b) comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships.

The early United States proposal at the Sea-Bed Committee envisaged that transiting ships had to comply with relevant international regulations.<sup>32</sup> This was developed by several other proposals. For instance, according to the USSR, ships in transit were to comply with the international rules concerning the prevention of collisions and had to take precautionary measures to avoid causing pollution of the marine environment of the strait.<sup>33</sup> The provision was then echoed in the Six-Power Draft of 1974,<sup>34</sup> and it was repeated in an Algerian Draft of the same year.<sup>35</sup> The UK proposal of 1974 is the direct antecedent to Article 39(2) in a text that is virtually identical to that in the UNCLOS, with two minor differences concerning aircraft.<sup>36</sup>

The only reference to an explicit international convention in Article 39(2) is to the COLREG (1972). This Convention (as amended) covers such matters as lookouts, safe speeds, avoidance of collision, navigation in narrow channels, encounters between vessels, operation in conditions of restricted visibility, ships' lights and distress signals. COLREG also authorizes the IMO to adopt TSS for the purposes of the Rules (Rule 1(d)) and regulates the conduct of vessels in sea lanes (Rule 10), such as passing and crossing. Another IMO Convention dealing with safety at sea, SOLAS (as amended) deals with such matters as ships surveys and certificates, ship design and construction, subdivision and stability, machinery and electrical insulation, fire safety, life saving gear, radio equipment and radio watches and various other safety measures. It also contains provisions dealing with the carriage of grain, carriage of dangerous goods and

<sup>32</sup> UN Doc. A/AC.138/SC.II/SR.33–47 (37th meeting, 1972), 25.

<sup>33</sup> See Chapter 7, n. 251, Article [...] (2)(b) and (c).

<sup>34</sup> CONF.62/C.2/L.11, UNCLOS III, III Official Records, 189, Articles 1 and 3.

<sup>35</sup> UN Doc. A/CONF.62/C.2/L.20, UNCLOS III, III Official Records (1974), 198, Article 1.

<sup>36</sup> See Section 8.3.

nuclear ships other than warships. SOLAS chapter V deals with routeing measures.<sup>37</sup> These two instruments are not the only applicable ones. The generally accepted regulations refer to certain rules adopted within the framework of the IMO, the principal co-ordinating body for the development of international standards in the field.<sup>38</sup> But the International Labour Organization (ILO) also plays an important role in dealing with training and labour conditions. Thus one may also refer to: the 1966 International Convention on Load Lines;<sup>39</sup> the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW);<sup>40</sup> the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation;<sup>41</sup> and the International Convention on Maritime Search and Rescue.<sup>42</sup> The effectiveness of Article 39(2)(a) is reinforced by Article 94(5) of the UNCLOS, which requires a flag State to take measures for ships flying its flag that conform to generally accepted international regulations, procedures and practices in relation to the safety at sea with regard, inter alia, to the construction, equipment and seaworthiness of ships, the manning of ships, the training of crews, labour conditions, the use of signals and the prevention of collisions.<sup>43</sup>

Regarding the prevention, reduction and control of pollution from ships, the most evident instrument is the MARPOL 73/78 Convention (as amended), which had 152 contracting States as of 31 July 2013. Although this list is not meant to be exhaustive, one may add, perhaps, the International Convention on Oil Pollution Preparedness, Response and Co-operation,<sup>44</sup> as well as the London Dumping Convention,<sup>45</sup> depending on whether they are considered 'generally accepted'. As was seen in

<sup>37</sup> Caminos in Chapter 7, n. 53, 152. See Section 7.2 for routeing measures and Chapter 7, n. 28 and 29 for the status of the conventions.

<sup>38</sup> Ibid., 151.

<sup>39</sup> Opened for signature on 5 April 1966 and entered into force on 21 July 1968. 161 contracting States as of 31 July 2013, representing 99.19 per cent of world tonnage. The 1988 amendment has 98 contracting States, representing 95.96 per cent of world tonnage.

<sup>40</sup> Opened for signature on 7 July 1978 and entered into force on 28 April 1984. 157 contracting States as of 31 July 2013, representing 99.23 per cent of world tonnage.

<sup>41</sup> Opened for signature on 10 March 1988 and entered into force on 1 March 1992. 161 contracting States as of 31 July 2013, representing 94.51 per cent of world tonnage.

<sup>42</sup> Opened for signature on 27 April 1979 and entered into force on 22 June 1985. 105 contracting States as of 31 July 2013, representing 82.58 per cent of world tonnage.

<sup>43</sup> See, e.g., S. N. Nandan and S. Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. III (Nijhoff, The Hague, 1995), 147–148.

<sup>44</sup> Opened for signature on 30 November 1990 and entered into force on 13 May 1995. 106 contracting States as of 31 July 2013, representing 71.04 per cent of world tonnage.

<sup>45</sup> See Chapter 7, n. 96. 87 contracting States as of 31 July 2013, representing 67.17 per cent of world tonnage.

Section 7.3.7, the duty in Article 39(2)(b) does not apply to vessels owned or operated by a State and used on government non-commercial service, by virtue of Article 236.

#### 8.2.4.2 Generally accepted international regulations, procedures and practices

During its work on coastal State jurisdiction relating to marine pollution, the International Law Association examined the concept of generally accepted international rules and standards (GAIRAS). These appear in one form or another in many provisions of the UNCLOS, referring to rules, regulations, standards, practices, procedures, guidelines or criteria.<sup>46</sup> The Rapporteur to the ILA noted in his second report that no material seems to be available which testifies to a formal attitude of States towards the concept of 'generally accepted', as States have not made declarations in which they expound their view of this concept. On the other hand, States have occasionally claimed that certain rules or instruments should be regarded as 'generally accepted'. Silence on the question of when certain rules and standards become 'generally accepted' does not prevent States from claiming that certain GAIRAS exist. Two aspects should be clearly distinguished: views on which rules and standards are currently 'generally accepted'; and views on the criteria which have to be met before rules and standards become 'generally accepted'.<sup>47</sup> In addition, variety in terminology raises an added difficulty, because a 'practice' is clearly different from a 'regulation'. But the distinction between a 'regulation' and a 'rule' or 'standard' is less apparent. Vukas reports that the Drafting Committee's English Group at UNCLOS III used two approaches: There would be no need to refer both to 'rules' and 'regulations' in the same provision; and in addition to either 'rule' or 'regulation', it would be desirable to choose one word from among 'standards', 'practices' and 'procedures', making clear that the words deleted are deemed to be included in those retained. But in the end, the drafters of the UNCLOS were convinced that the multitude of words corresponds to the existing variety of international measures to which the Convention refers, so not a single word from the ICNT was omitted in the final text of the UNCLOS.<sup>48</sup> Confusion also arises when different expressions are used with respect to the same

<sup>46</sup> Articles 21(2), 21(4), 39(2), 41(3), 53(8), 60(3), 60(5), 60(6), 94(2)(a), 94(5), 211(2), 211(5), 211(6)(c), 226(1)(a) and 271.

<sup>47</sup> 1998(68) *International Law Association Conference Report*, 373 (referring notably to American and Dutch statements on MARPOL).

<sup>48</sup> Vukas in Chapter 7, n. 106, 407–408.

source of pollution. Thus Article 39(2)(b) refers to regulations, practices and procedures, but Article 211(1) requires States to establish international rules and standards to prevent, reduce and control pollution of the marine environment.<sup>49</sup> In that respect, a standard or regulation may be seen as norms of a technical nature, whereas a procedure is a certain way of achieving or implementing something. A norm may stem from a practice if it is generally accepted, and such a practice is not necessarily restricted to that of States but also encompasses the practice of mariners or seafarers. It is not obvious that 'standards' should be equated with 'rules' in the sense that "standards", like "rules", should be restricted to those laid down in instruments intended to be binding.<sup>50</sup> It seems, on the contrary, that what matters is not the source of the instrument in which the rule or standard is contained but the fact of their being generally accepted. Rules and standards are categories of norms, and a norm may not be enshrined in a binding instrument. It may nevertheless be widely followed if it has a sufficient degree of specificity to make it capable of regulating conduct and if it is clearly intended to establish a standard the intent of which is to harmonize national laws and regulations.<sup>51</sup> Oxman aptly writes that, where appropriate, standards (or guidelines) can be developed in a somewhat more relaxed procedural environment which is not specifically designed to generate legally binding obligations as such; yet those same standards can become legally binding if they become generally accepted. A standard, particularly one that is ahead of its time, may be adopted by a divided vote reflecting controversy and hesitation. This controversy and hesitation may thereafter gradually subside. If the standard becomes sufficiently widely accepted in practice, the fact that it was controversial when adopted should not necessarily prevent it from being regarded as 'generally accepted'. The same may be true of a decision to articulate the standard as a non-binding recommendation rather than as part of an instrument intended to create a legally binding obligation. In some cases, the decision to articulate the standard as a recommendation may reflect an intent to promote widespread, uniform practice by encouraging all States to implement the standard directly without the intermediation of a binding international legal instrument. That could be a more expeditious approach where governments already have regulatory authority to

<sup>49</sup> Ibid., 409.

<sup>50</sup> A. E. Boyle, 'Marine Pollution under the Law of the Sea Convention' 1985(79) *American Journal of International Law*, 357.

<sup>51</sup> E.g. 1996(67) *International Law Association Conference Report*, 167 (First Report on coastal State jurisdiction relating to marine pollution).

implement the standard without needing to seek additional legislation from their parliaments and where the domestic agencies to which such authority is delegated are prominently represented in the international discussions. If such a standard thereafter comes to be sufficiently widely accepted in practice, the fact that it was promulgated in non-binding form should not necessarily prevent it from being regarded as 'generally accepted'.<sup>52</sup>

The task of identification in Article 39(2) first requires that a norm (whether contained in a standard, practice or procedure) be identified to deal with 'safety at sea' and 'prevention, reduction and control of pollution from ships'. The UNCLOS defines in Article 1(1)(4) 'pollution of the marine environment' as 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.

But Article 39 is not restricted to pollution of the marine environment. Furthermore, such concepts as 'safety at sea' and 'prevention of pollution' are broad enough to range from brightness of lights to design standards to emission targets. Secondly, these norms are binding upon the flag State in Article 39 by virtue of its participation in the UNCLOS, regardless of whether the flag State would otherwise be bound by the norm in question. The duty to be bound by GAIRAS stems from the UNCLOS itself, but that duty is triggered only when the international regulations, procedures or practices under consideration are 'generally accepted'. One restrictive but clear-cut view is that the test for general acceptance is the same as that applicable to customary law, that is, GAIRAS are rules of customary law. For van Reemen, the legal nature of a 'generally accepted international rule' is identical to what the International Court of Justice in the *North Sea Continental Shelf* cases called a 'general rule of international law'. 'In the context of the judgment, the Court is referring to a rule of world-wide international customary law which originates from a treaty rule. However, a rule of customary law can also be completely independent

<sup>52</sup> Oxman in Chapter 7, n. 112, 144, 149. See also P. Contini and P. H. Sand, 'Methods to Expedite Environment Protection: International Ecostandards', 1972(66) *American Journal of International Law*, 40; G. Kasoulides, *Port State Control and Jurisdiction: Evolution of the Port State Regime* (Nijhoff, Dordrecht, 1993), 35.

of a treaty rule'. Furthermore, he writes that '[w]ith regard to the use of the words, "generally accepted international rules and standards" as "established *through* the competent international organization", . . . non-binding IMCO decisions should also be included amongst the generally accepted rules and standards if they acquire a binding character as the result of becoming customary law'.<sup>53</sup> Others hold the view that 'generally accepted' is not restricted to customary law but also applies to rules to which the international community has given 'a consent at the same time diffuse and general' or rules which, if treaty-based, are ratified not only by the minimum number of States required for its entry into force but by a greater number of States, thus obtaining a wider acceptance, without necessarily becoming customary law.<sup>54</sup> The latter view leaves out non-binding instruments as rules or standards and, in addition, it assumes that a treaty which is not ratified by a great number of States may not contain a rule that is otherwise generally accepted. The former opinion defines general acceptance by general and diffuse consent.

In his final report to the ILA, Franckx noted that GAIRES can be equated neither with customary law nor with legal instruments in force for the States concerned. Instead, it appears not only less important whether the legal instrument containing the specific rules and standards is by

<sup>53</sup> W. van Reemen, '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', 1981(12) *Netherlands Yearbook of International Law*, 11–12, emphasis in original. Contra Oxman in Chapter 7, n. 112, 146–147 (noting that a simple reference to international law would have sufficed had GAIRES been considered the same as customary law).

<sup>54</sup> Respectively, D. Vignes, 'La valeur juridique de certaines règles, normes ou pratiques mentionnées au TNCO comme "généralement acceptées"', 1979(25) *Annuaire français de droit international*, 718, and G. J. Timagenis, *International Control of Marine Pollution*, vol. 2 (Oceana Publications, Dobbs Ferry, 1980), 605 (cited in Vukas in Chapter 7, n. 106, 417). Article 10 of the Convention on the High Seas says that:

[E]very State shall take such measures for ships under its flag as are necessary to ensure safety at sea with regard, inter alia, to: (a) The use of signals, the maintenance of communications and the prevention of collisions; (b) The manning of ships and labour conditions for crews taking into account the applicable international labour instruments; (c) The construction, equipment and seaworthiness of ships. In taking such measures each State is required to conform to generally accepted international standards.

This stems from Article 34 of the ILC Draft. In its commentary, the ILC explained: 'At its eighth session . . . the majority of the Commission preferred the more general expression "internationally accepted standards". This expression also covers regulations which are a product of international co-operation, without necessarily having been confirmed by formal treaties. This applies particularly in the case of signals'. UN Doc. A/3159, Yearbook of the ILC, vol. II (1956), 281.

itself legally binding, but the conclusion must be reached that, in this respect, the latter instrument is only of secondary importance. The central element, on the contrary, for determining 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. This may well be by means of a non-binding document, an agreement which at the time of adoption was rejected by a certain number of States but later on nevertheless became acceptable to all as reflected in State practice, in a resolution of an international organization or in some other way.<sup>55</sup> The determining factor is the subsequent general acceptance of a rule or standard, not the general acceptance of the legal instrument in which the rule or standard is incorporated, although, of course, it is easily understood that a widely accepted international instrument containing the specific rule or standard will enhance the chances of later general acceptance, especially if such treaties require the member States to take specific action on the national level.<sup>56</sup> Thus, once a particular standard becomes generally accepted, the standard binds everyone. This is true even if the organization that adopted the standard does not have universal membership, the standard was adopted by a divided vote, the resolution that articulates the standard is not legally binding or the treaty in which the standard is incorporated is not generally accepted or even in force.<sup>57</sup> Even though Section 8.2.4.1 mentioned conventional instruments only, the IMO, in the field of maritime safety and pollution prevention, also refers to numerous guidelines and recommended practices.<sup>58</sup> The adoption and enforcement of a standard by national governments is the central factor in assessing general acceptance. In that respect, as was argued earlier in this Section, there is no reason to reject a priori practice by individuals and companies generating obligations among States. For instance, in some cases, it seems reasonable to conclude that, for the purposes of establishing the duty of another State to respect an international standard, States may be relieved of the need to demonstrate general acceptance by government behaviour alone if the nationals of some States that have not affirmatively adopted the standard have voluntarily and uniformly implemented the standard with the express or tacit approval of their governments.<sup>59</sup>

<sup>55</sup> 2000(69) *International Law Association Conference Report*, 480.

<sup>56</sup> *Ibid.*, 480–481. <sup>57</sup> Oxman in Chapter 7, n. 112, 141.

<sup>58</sup> See [www.imo.org/OurWork/Pages/Home.aspx](http://www.imo.org/OurWork/Pages/Home.aspx).

<sup>59</sup> Oxman in Chapter 7, n. 112, 152, 154–155.

What makes acceptance general is not revealed in the negotiating history of the UNCLOS and, arguably, is left deliberately vague. Kachel suggests that GAIRAS covers treaties that have gained widespread ratification, IMO Conventions that have come into force and relevant resolutions adopted by IMO with a great majority.<sup>60</sup> For Rojahan, the requirement is something more than a simple majority, including the major maritime States.<sup>61</sup> Hakapää considers the sizeable support given to a rule by the States most affected by it.<sup>62</sup> Treves is of the opinion that the degree of acceptance must be 'very high'. However, most of the IMO conventions require, for their entry into force, strict conditions not only as to the number of ratifications but also as to the tonnage represented by such ratifications.<sup>63</sup> As far as IMO conventions are concerned, the 1998 second report to the ILA took account of the ratification number and tonnage percentage and included among GAIRAS the 1966 Load Line Convention, SOLAS 1974, MARPOL Annexes I and II, the 1978 STCW and COLREG, with a number of ratifications and percentage of tonnage, respectively, of 140/98, 136/98, 102/93, 130/97, 130/96. For MARPOL Annexes III and V, respectively 83/78 and 85/82, the answer was not so obvious; nor was it so obvious for instruments not yet in force.<sup>64</sup> This view would probably be different today, seeing as participation in Annex III now represents 97 per cent of the world's gross tonnage, 90 per cent for Annex IV and 98 per cent for Annex V.

For Oxman, the suggested criterion includes both quantitative and functional majorities. He argues that this conclusion is supported by *analogy* to requirements for a new rule of customary international law, following the dictum of the ICJ in the *North Sea Continental Shelf* cases,

<sup>60</sup> M. J. Kachel, *Particularly Sensitive Sea Areas. The IMO's Role in Protecting Vulnerable Marine Areas* (Springer, Berlin, 2008), 89–90.

<sup>61</sup> O. Rojahan, 'National Jurisdiction and Marine Pollution from Ships', in C. Park (ed.), *The Law of the Sea in the 1980s. Proceedings of the 14th Conference of the Law of the Sea Institute* (University of Hawaii, Honolulu, 1983), 476.

<sup>62</sup> K. Hakapää, *Marine Pollution in International Law: Material Obligations and Jurisdiction, with Special Reference to the Third United Nations Conference on the Law of the Sea* (Suomalainen Tiedekatemia, Helsinki, 1981), 121.

<sup>63</sup> Treves in Chapter 7, n. 32, 875. For Boyle, though, 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. Boyle in n. 50, 355–356.

<sup>64</sup> See n. 47, 378, 380. Osieke notes that it is possible for a State to apply provisions of an international instrument it has not ratified; it is also possible for it to apply an international regulation that is not yet in force. E. Osieke, 'Flags of Convenience Vessels: Recent Developments', 1979(73) *American Journal of International Law*, 620–621.

that is, 'State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked'. Where a conventional rule is involved, 'very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected'. This is also supported by the practice of international organizations and the requirements for the entry into force of new or amended technical rules in regulatory treaties. Many of these specifically require the affirmative participation of at least a representative number of specially affected States.<sup>65</sup> Extensive and uniform practice was invoked in the context of the emergence of a customary rule on the basis of what was originally a purely conventional rule within a short period of time. If all of these elements are taken into account, the assessment of whether an international norm has become generally accepted will include the number and identity of those in support of the norm. In that respect, the majority support expected could be higher if the norm is controversial or aims at modifying an existing norm and the identity of those in support (representativeness) is expected to include those specially affected by it. Furthermore, the degree of support would need to be especially strong when it is alleged that the norm has become generally accepted within a short period of time. This test equally applies to non-binding instruments or instruments that are not yet in force. The question of whether a standard is generally accepted is subject to compulsory dispute settlement.

### 8.3 Specific duties of aircraft

Article 39(3) of the UNCLOS reads:

Aircraft in transit passage shall:

- (a) observe the Rules of the Air established by the International Civil Aviation Organization as they apply to civil aircraft; State aircraft will normally comply with such safety measures and will at all times operate with due regard for the safety of navigation;
- (b) at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency.

It was shown in Section 5.2 that certain delegations sought to control extensively the movement of aircraft in transit or even to delete references to the right of overflight. These attempts remained unsuccessful.

<sup>65</sup> Oxman in Chapter 7, n. 112, 157.

Article 39(3) stems from early proposals, such as that of Malta, for which aircraft in transit were to comply with regulations concerning aerial navigation that were adopted by the competent international institutions, contained in widely ratified multilateral conventions or enacted by the coastal State.<sup>66</sup> UNCLOS III did not favour unilateral competence of the coastal State in this matter. The British Draft submitted to UNCLOS III in 1974 is essentially identical to Article 39(3), with two differences.<sup>67</sup> Firstly, it contained a reference to the 1944 Chicago Convention; such a reference is redundant in light of the express mention of the ICAO. Secondly, it mentioned the ‘appropriate’ internationally designated air traffic control (ATC) authority, whereas the UNCLOS contains the adjective ‘competent’. The change regarding the first element was made in the ISNT, and it arguably ensures that, if a new civil aviation convention came into force, the applicability of the ICAO rules to the law of the sea would not be questioned. The modification of the adjective was done by the Drafting Committee.

### 8.3.1 *Duty relating to radio frequency*

Article 39(3)(b) requires all aircraft, whether civil or military, to monitor at all times the radio frequency assigned by the competent internationally designated ATC authority or the appropriate international distress radio frequency. The internationally designated ATC is the authority listed in the appropriate Regional Air Navigation Plan approved by the Council of the ICAO. Regional Air Navigation Plans (ANPs) set forth in detail the facilities, services and procedures required for international air navigation within a specified geographical area. The development of these regional plans is undertaken by the ICAO’s six planning and implementation regional groups (PIRGs) in co-ordination with States and is supported by the ICAO’s Regional Offices and the Air Navigation Bureau.<sup>68</sup> The ‘appropriate international distress radio frequency’ is the VHF emergency frequency 121.5 MHz referred to in Annex 10 (Aeronautical Telecommunications) to the Chicago Convention, as well as in other Annexes. The ICAO Secretariat prepared a study entitled ‘United Nations Convention on the Law of the Sea – implications, if any, for the application of the

<sup>66</sup> See Chapter 7, n. 254, Article 47.

<sup>67</sup> UK Draft Articles in Chapter 7, n. 4, 186, Article 2(3).

<sup>68</sup> [www.icao.int/safety/ANP/Pages/Air-Navigation-Plans.aspx](http://www.icao.int/safety/ANP/Pages/Air-Navigation-Plans.aspx).

Chicago Convention, its Annexes and other international air law instruments' at the request of the Secretary-General of the ICAO.<sup>69</sup> It considered the duty to monitor the ATC authority radio frequency and the distress frequency. It was of the view that:

[T]he UN Convention formulates this duty as an alternative . . . It is submitted that the UN Convention in this respect contains an error, possibly a typing error, which has been perpetuated since the early drafting stages in 1977 and which has not been corrected in spite of ICAO notification to the UN Secretariat and to the Drafting Committee of the Conference. In fact, the duty of the aircraft to monitor the two different frequencies is not an alternative, but, according to firmly established practice and international standards adopted by the ICAO Council, the duty is of a cumulative nature; both these frequencies have to be monitored at all times. Standard 3.6.5.1 in Annex 2 – Rules of the Air – stipulates that the aircraft shall maintain 'continuous listening watch' of the ATC frequency; again, Annex 10 – Aeronautical Telecommunications, Vol. II – stipulates that 'aircraft . . . shall continuously guard the VHF emergency frequency 121.5 MHz' (Standard 5.2.2.1.1.1). Consequently, both these frequencies should be monitored simultaneously on a continuing basis and not selectively; the word 'or' in the Convention should have read 'and'; in view of the delicate overall compromise on the issues of straits, the Conference was apparently reluctant to make any, however minor, textual changes in this respect. In practice this matter will be of minor importance and does not represent a real conflict; the ICAO Standards are *lex specialis* which in practical application will be complied with in spite of the general broad terms of the Convention which, in any case, are not excluding or prohibiting the compliance with more stringent standards.<sup>70</sup>

Despite the fact that, as a matter of safety, aircraft may wish to monitor both radio frequencies, this analysis is not correct. The alternative 'or' had been envisaged since the British Draft in 1974 and was not modified since.<sup>71</sup> Standard 3.6.5.1 in Annex 2 (Rules of the Air) says that 'an aircraft operated as a controlled flight shall maintain continuous air-ground voice communication watch on the appropriate communication channel of, and establish two-way communication as necessary with, the appropriate

<sup>69</sup> ICAO Doc. LC/26-WP/5-1 (4 February 1987), reproduced in 1987(3) *International Organizations and the Law of the Sea. Documentary Yearbook*, 243.

<sup>70</sup> *Ibid.*, 252–253, para. 9.12.

<sup>71</sup> In his own study, the Rapporteur to the ICAO indicated that the Netherlands does not agree with the Secretariat's belief that the UNCLOS is in error or that 'it is a firmly established practice that the aircraft must monitor the international emergency frequency'. ICAO Doc. LC/26-WP/5-41 (4 February 1987), reproduced in 1987(3) *International Organizations and the Law of the Sea. Documentary Yearbook*, 267, para. 19.

air traffic control unit, except as may be prescribed by the appropriate ATS authority in respect of aircraft forming part of aerodrome traffic at a controlled aerodrome.<sup>72</sup> A controlled flight, under Annex 2, is any flight which is subject to an air traffic control clearance. The ICAO Secretariat concluded that, because the duty to maintain continuous listening watch of the ATC frequency applies under Annex 2 only to controlled flights, it must be concluded that, in view of Article 39(3) of the UNCLOS, no uncontrolled flights are contemplated for transit passage over straits used for international navigation.<sup>73</sup> This, too, is not correct. The duties in Article 39(3)(b) do not depend on the applicability of Annex 2 or, indeed, the applicability of the Chicago Convention in the first place but stem from the UNCLOS itself. Unlike Article 39(3)(a), paragraph (b) does not make reference to the Rules of the Air. This, naturally, is particularly relevant to military aircraft. Unlike Standard 3.6.5.1, Article 39 requires aircraft to ‘monitor’ a radio frequency. Oxman reports that some States proposed a requirement of two-way communication with air traffic controllers, but these proposals were not accepted because of concerns regarding the security of military aircraft or their mission in certain situations. What emerged was an accommodation that requires State aircraft to listen at all times but not necessarily to speak. This does not conflict with the Chicago Convention, which does not apply to overflight by State aircraft. Notwithstanding its history, as drafted, the radio monitoring provision applies to all aircraft, not just to State aircraft. For this reason, a question may arise, as it did for the ICAO Secretariat, regarding the compatibility of this provision with regulations under the Chicago Convention applicable to civil aircraft, which by virtue of Article 39(3)(a) are subject to Annex 2. But both the text and the history of the UNCLOS make clear that an obligation to operate only as a controlled flight and to maintain two-way communication ‘as necessary’ with an air traffic control unit was not imposed on State aircraft.<sup>74</sup>

### 8.3.2 *Duties relating to the Rules of the Air and safety of navigation*

Article 39(3)(a) says that aircraft in transit shall observe the Rules of the Air established by the ICAO as they apply to civil aircraft; State aircraft will

<sup>72</sup> ATS, or air traffic service, is a generic term meaning, variously, flight information service, alerting service, air traffic advisory service or air traffic control service (including area control service, approach control service or aerodrome control service).

<sup>73</sup> See n. 69, 252, para. 9.10. <sup>74</sup> Oxman in n. 6, 413–414.

normally comply with such safety measures and will at all times operate with due regard for the safety of navigation.

The Rules of the Air are contained in Annex 2 to the Chicago Convention. These Rules are adopted and amended by the Council of the ICAO under Article 37 of the Chicago Convention.<sup>75</sup> Over the high seas, the Rules of the Air are the rules in force.<sup>76</sup> The ICAO does not adopt rules of the air applicable in the airspace over the land or sea territory of a member State, but Article 12 calls on the States Parties to undertake to keep their own regulations in these respects uniform, as far as possible, with the rules established from time to time under the Convention. The Convention recognizes that contracting States have exclusive sovereignty over the airspace above their territories. 'Territory' is deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of contacting States.<sup>77</sup> Pursuant to Article 38, a State which finds it impracticable to comply in all respects with an international standard or procedure or which finds it impracticable to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard shall give immediate notification to the ICAO of the differences between its own practice and that established by the international standard. Hence, as a matter of scope of Article 39(3)(a), which is meant to apply over the territorial sea (and archipelagic waters), the question is whether aircraft overflying straits used for international navigation should observe the Rules of the Air in Annex 2 or the rules of the air promulgated by member States. If the former is correct, then only the Council of the ICAO may legislate over such straits. If the latter stands true, States bordering straits may promulgate their own rules of the air in straits and can file a notice of

<sup>75</sup> '[T]he International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with... (c) Rules of the air and air traffic control practices'. See also Articles 54(1) and 90 for procedure. One should add that the UNCLOS requires compliance with Annex 2, not with all the Annexes of the Chicago Convention (e.g. Annex 1 on licensing of personnel, Annex 8 on air worthiness and notably Annex 16 on environmental protection). These concerns were arguably not at the forefront of the delegates' preoccupations at UNCLOS III. The matter is moot for civil aircraft, in light of the fact that the Chicago Convention has 191 Parties. See [www.icao.int/secretariat/legal/List%20of%20Parties/Chicago\\_EN.pdf](http://www.icao.int/secretariat/legal/List%20of%20Parties/Chicago_EN.pdf).

<sup>76</sup> Article 12. <sup>77</sup> Articles 1 and 2.

non-complying practices with the ICAO.<sup>78</sup> The ambiguity was apparent enough for the United States to suggest an interpretative statement at UNCLOS III that the Rules of the Air were indeed the ICAO rules as they apply to the high seas.<sup>79</sup> Article 39(3)(a) refers to the Rules of the Air, not the Rules of the Air with which a State finds itself incapable of complying. And a *renvoi* to Rule 2.1.1 in Annex 2, which says that ‘the Rules of the air shall apply to aircraft bearing the nationality and registration marks of a Contracting State, wherever they may be, to the extent that they do not conflict with the rules published by the State having jurisdiction over the territory overflown’, would have defeated the purpose of Article 39(3)(a).<sup>80</sup> The sovereignty of the coastal State under Article 34 of the UNCLOS is exercised subject to Part III, which articulates a right of transit that approximates the freedom of the high seas of navigation and overflight, and subject to other rules of international law. Therefore, the Secretariat of the ICAO rightly concluded that the UNCLOS *de facto*, without any need for an amendment of the Chicago Convention, led to an extension of the legislative jurisdiction of the ICAO Council with respect to the Rules of the Air over the airspace above straits used for international navigation.<sup>81</sup> As the Rules of the Air apply without exception (Forward to Annex 2), States bordering the strait cannot file a difference to Annex 2 (Rules of the Air) under Article 38 of the Chicago Convention with respect to the airspace over the straits.<sup>82</sup> Consequently, the Spanish declaration made upon signature of the UNCLOS on 4 December 1984 does not seem compatible with Article 39: ‘It is the Spanish Government’s interpretation that the regime established in Part III of the Convention is compatible with the right of the coastal State to issue and apply its own air regulations in the air space of the straits used for international navigation so long as this does not impede the transit passage of aircraft’.

<sup>78</sup> Caminos in Chapter 7, n. 53, 161.

<sup>79</sup> United States Interpretative Statement to Article 38 of the RSNT, Part II (17 June 1976), IV Platzöder, 360. This received no objections. The United States and Hungary supported a United Kingdom proposal that the word ‘the’ be placed before ‘Rules of the Air’. The intent, apparently, was to clarify that the rules of the air referred to were those of Annex 2 of the 1944 Chicago Convention. Caminos in Chapter 7, n. 53, 161, n. 373.

<sup>80</sup> Above n. 71, 266, para. 16.

<sup>81</sup> This is challenged by Yturriaga, who recalls that, under the Vienna Convention on the Law of Treaties, an amending agreement does not bind any State which does not become Party to it. Yturriaga in Chapter 7, n. 12, 229. But the matter is not one of the amendment of the Chicago Convention; it is a question of the UNCLOS itself extending the scope of the compulsory Rules of the Air over straits.

<sup>82</sup> See n. 69, 252, para. 9.7.

The Rapporteur to the ICAO noted that there is, however, another problem which may arise: Aircraft in transit through straits will be required to comply with the Rules of the Air in Annex 2, without taking account of any differences which may have been filed by the coastal States; aircraft in flight from one side of a strait to the other will, on the contrary, be obliged to take account of such differences. In consequence, diversity of rules, and with it a risk of collision, may arise. The Rapporteur understood in 1987 that some 300 differences had been filed by 29 member States against the standards in Annex 2, but he wrote that he was not competent to assess how far, if at all, the differences filed by coastal States were likely to give rise to the risk of collisions or other hazards affecting aircraft in transit through straits and aircraft in flight across them. He deemed it possible that any problems could be solved by regional or bilateral agreements.<sup>83</sup>

The Rules of the Air are concerned, *inter alia*, with flight plans, signals, visual flight rules, instrument flight rules and avoidance of collision. As all aircraft enjoy the right of transit overflight, this also means, as was seen in Section 3.3.1,<sup>84</sup> that in the case of non-scheduled flights, such aircraft will enjoy the right of transit passage independently of Article 5 of the Chicago Convention, and consequently, the coastal State will be unable to require landing, to prescribe routes or to insist on special permission. Similarly, in the case of scheduled air services, such aircraft will be able to exercise the right of transit without the special permission or authorization required by Article 6 of the Chicago Convention. It will be irrelevant whether the coastal State has given permission under an air services agreement or under the International Air Services Transit Agreement (IASTA) or otherwise. Furthermore, because Article 44 of the UNCLOS provides that the right of transit passage cannot be suspended and because it exists independently of other conventions or agreements, it cannot be affected by their provisions for suspension. The right of the coastal State under Article 9 of the Chicago Convention to create restricted or prohibited areas over its territory (including its territorial sea) for reasons of military necessity or public safety will not be exercisable so as to restrict or prohibit transit passage allowed by the UNCLOS, nor will the right to temporarily restrict or prohibit flying over the whole or part of its territory in exceptional circumstances, during an emergency or in the interest of public safety.<sup>85</sup>

<sup>83</sup> See n. 71, 266, para. 17.

<sup>84</sup> See Part II, Section 3.3.1, n. 44–49 and accompanying text.

<sup>85</sup> See n. 71, 265, para. 13. The question of war was studied in Part I.

The Rules of the Air apply to civil aircraft. The Chicago Convention does not apply to State aircraft.<sup>86</sup> Article 39(3)(a) says that ‘State aircraft will normally comply with such safety measures’. Whether ‘will normally’ should be taken as ‘shall normally’ may be a matter of debate. The French version says ‘respectent’ for civil aircraft and ‘se conforment normalement’ for State aircraft. The Spanish version says ‘observarán’ and ‘se cumplirán normalmente’. The ICAO Secretariat interpreted Article 39(3)(a) to mean that the Rules of the Air ‘do not automatically apply’ to State aircraft over a strait, but these ‘should have due regard for safety of navigation and the ultimate regard could best be secured by compliance with the Rules of the Air.’<sup>87</sup> This is certainly reinforced by the rule in Article 39(3)(a) that State aircraft will at all times operate with due regard for the safety of navigation.<sup>88</sup> It is on the adverb ‘normally’ that emphasis should be placed. The normal practice is for military aircraft to observe and comply with ICAO rules.<sup>89</sup> State aircraft are not invariably subject to the Rules of the Air, but all ships are required by the UNCLOS to comply with generally accepted international regulations, procedures and practices for safety at sea, and this relates in important respects to the distinct competencies and traditions of the IMO and ICAO:

IMO does not have regulatory powers comparable to the broad powers of the ICAO Council. Binding regulation generally emerges from treaties negotiated under IMO auspices. Where relevant, the particular needs of warships have traditionally been taken into account in this work... The Chicago Convention is very widely ratified. Under that Convention, ICAO has broad regulatory powers, especially with respect to overflight of the high seas, but those powers do not extend to military aircraft. For that reason, ICAO regulations need not be drafted to take into account the particular needs of military aircraft. Thus, there are problems, such as those associated with flight plans, flight control, and two-way communication,

<sup>86</sup> Article 3(1). ‘Aircraft used in military, customs and police services shall be deemed to be state aircraft’. Article 3(2).

<sup>87</sup> See n. 69, 252, para. 9.8.

<sup>88</sup> This is not restricted to air navigation. For Nandan and Rosenne, ‘State aircraft should normally comply with such safety measures and should at all times operate with due regard for the safety of navigation – not merely aerial navigation’. Nandan and Rosenne in Chapter 6, n.12, 348.

<sup>89</sup> Nandan and Anderson in Chapter 6, n. 13, 185. The ICAO Assembly has called for the co-ordination of civil and military air traffic in several resolutions. See, notably, M. Milde, ‘United Nations Convention on the Law of the Sea – Possible Implications for International Air Law’, 1983(8) *Annals of Air and Space Law*, 186.

that make compliance with ICAO regulations in all circumstances difficult in the case of military aircraft.<sup>90</sup>

Spain submitted an amendment towards the end of UNCLOS III to delete the word ‘normally’.<sup>91</sup> It maintained its amendment and insisted that a vote be taken.<sup>92</sup> Before the vote in Plenary, the representative of the Holy See expressed regret that the Conference had to resort to a vote to settle disputed points. The American delegate said that it was unfortunate that the amendment of Spain should upset the balance achieved, following lengthy negotiations, in the formulation of Article 39. His delegation was opposed to that amendment, which, if it were adopted, might jeopardize the entire Draft Convention. The amendment was rejected by 55 votes to 21, with 60 abstentions.<sup>93</sup> In its declaration made upon signature of the UNCLOS, Spain ‘takes the word “normally” to mean “except in cases of *force majeure* or distress”’. But, as this is not what the text of the UNCLOS says, the declaration seems to attempt to circumvent the defeated amendment submitted by Spain.<sup>94</sup> Yturriaga suggests that the Spanish declaration only tries to give a *pro domo* interpretation of what can be considered as abnormal.<sup>95</sup> What the provision arguably means is that State aircraft are exempt from complying with the Rules of the Air when operational reasons or reasons of national security so require, but it should be recalled that these aircraft must operate with due regard for the safety of navigation ‘at all times’. To insist on a restrictive meaning of ‘normally’ seems less relevant in the context of compulsory dispute settlement, for disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, may be excluded under Article 298(1)(b). On the other hand, not

<sup>90</sup> Oxman in n. 6, 399–400.

<sup>91</sup> UN Doc. A.CONF.62/L.109, UNCLOS III, XVI Official Records (13 April 1982), 223.

<sup>92</sup> UN Doc. A/CONF.62/L.136, UNCLOS III, XVI Official Records (26 April 1982), 244.

<sup>93</sup> Ibid. (176th plenary meeting, 26 April 1982), 132. In favour were notably Indonesia, Greece, Morocco, the Philippines and, of course, Spain.

<sup>94</sup> Caminos in Chapter 7, n. 53, 230. The Spanish representative at UNCLOS III indicated:

What is causing most concern to my delegation, however, is the fact that, under article 39, paragraph 3 (a), State aircraft are subject to practically no regulation since they will only ‘normally’ have to comply with the rules and safety measures established by the International Civil Aviation Organization. The inevitable consequence is that such aircraft in circumstances deemed to be ‘abnormal’ would represent a definite hazard to air navigation, the populations bordering the straits and the safety of the States themselves over which they fly.

UN Doc. A.CONF.62/WS/12, XIV Official Records (3 October 1980), 150.

<sup>95</sup> Yturriaga in Chapter 7, n. 12, 232.

every State aircraft will be engaged in military activities, and, in addition, compulsory dispute settlement may still obtain under section 1 of Part XV anyway.<sup>96</sup>

## 8.4 Enforcement of the duties of ships and aircraft

### 8.4.1 Immune ships and aircraft

Under Article 42(5), the flag State of a ship or the State of registry of an aircraft entitled to sovereign immunity which acts in a manner contrary to the relevant provisions of Part III must bear international responsibility for any loss or damage which results to States bordering straits.<sup>97</sup> This was made explicit in several suggestions during the Conference, notably in the UK Draft.<sup>98</sup> Article 31 of the UNCLOS contains a parallel provision applicable to the right of innocent passage.

Article 42(5) does not add anything to the general rules of State responsibility. Liability for loss or damage to the coastal State arises from the breach by the immune ship or aircraft of one or several duties applicable to it. In Part III, these are found in Articles 39 to 42, bearing in mind the effect of Article 236. Under the terms of Article 42(5), it is only the 'States bordering straits' which may raise the international responsibility of the State concerned. The Private Group on Straits added damage to '[an]other State in the vicinity of the strait'.<sup>99</sup> If such damage occurs, it will be raised under the general rules of State responsibility to which the UNCLOS refers in Article 304.

The liability of immune ships and aircraft will be raised through diplomatic channels and applicable means of international peaceful dispute settlement. The flag State or State of registry of a public vessel or aircraft is directly responsible for breaches of the duties applicable to it. It seems that Article 42(5) assumes that the flag State or State of registry is also the State which controls the relevant vessel or aircraft. However, the case may also be that the international responsibility of the State which controls the vessel or aircraft is engaged, and it is not necessarily always the State of nationality.<sup>100</sup> These matters are outside the scope of this study and

<sup>96</sup> See also Article 302. <sup>97</sup> The scope of Article 42(5) was analysed in Section 7.3.7.

<sup>98</sup> UK Draft Articles in Chapter 7, n. 4, 186, Article 7(1).

<sup>99</sup> (18 April 1975), IV Platzöder, 196, Article 4(5).

<sup>100</sup> See Articles 1 and 6 of the ILC Draft Articles on State responsibility. The same assumption seems to be made in Article 96.

will need to be settled under the applicable rules of international law.<sup>101</sup> Article 42(5) envisages liability as a consequence of a breach of duty under the UNCLOS, that is, as an internationally wrongful act. Whether liability may also arise as a consequence of a lawful activity when the coastal State has suffered a loss or damage will also need to be examined under the applicable rules, if there are any, of international law. Strict liability for damage caused had been suggested by Morocco.<sup>102</sup> Article 304 says that the UNCLOS is without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.

#### *8.4.2 Private vessels and civil aircraft*

It was submitted in Section 7.6.2 that a breach of duties applicable to ships or aircraft other than a breach of Article 42 regulations is not actionable before the courts of the coastal State. The physical or legal persons who suffer damage in the coastal State as a result of the breach of a duty of ships or aircraft applicable during transit passage are entitled to seek compensation against the shipowner or operator, or possibly against other interests in the ship, before the courts of the flag State. When the coastal State itself suffers damage, it will normally raise the matter diplomatically with the flag State. Despite proposals at UNCLOS III to make the flag State liable, at least indirectly, for illegal activities of the ship or aircraft, this is not how the relation between a flag State and a private means of transportation endowed with its nationality works.<sup>103</sup> The flag State has an obligation to ensure compliance by ships and aircraft of its nationality with the requirements imposed by Part III.<sup>104</sup> This is part of its customary duty of jurisdiction and control, which is notably expressed in Article 94 of the UNCLOS, but it is not limited to Article 94. The 'jurisdiction and

<sup>101</sup> UNCLOS, Article 304.

<sup>102</sup> Amendments to the RSNT (undated, 1976), Article 42bis(1), IV Platzöder, 401. See also the informal suggestion by Morocco, Doc. C.2/Informal Meeting/22 (18 April 1978), V Platzöder, 33. Spain, too, would have preferred a regime of objective responsibility: see n. 94, 150.

<sup>103</sup> For such proposals see Section 7.6.2 and also, e.g., the Moroccan proposals of 1976 and 1978 in n. 102 (referring to a relation of subrogation between the flag State and the ship or aircraft).

<sup>104</sup> E.g. Implications of the United Nations Convention on the Law of the Sea, 1982, for the International Maritime Organization, Study Prepared by the Secretariat of IMO, IMO Doc. LEG/ISC/1 (27 July 1987), 362.

control' of the State of nationality over means of transportation lie at the root of the good order of international spaces. The foundation of this jurisdiction and control goes back to the emergence of the nationality of ships and the need to connect an organized community with a given State for certain purposes. In light of the entrenched necessity to control means of transportation with the help of a permanent link, that is, the link of nationality, it seems rather incongruous to claim that, under international customary law, there is hardly any rule which imposes a positive duty to exercise jurisdiction and that the international responsibility of States for ships or aircraft of their nationality is nominal.<sup>105</sup> On the contrary, it is 'indispensable for the maintenance of public order upon the oceans . . . that some State have control of the movements and activities of a ship [and that] each State be given control of the ships to which it has attributed its national character'.<sup>106</sup> At the most fundamental level, the flag State has the obligation to ensure that the vessel or aircraft and its personnel do not infringe on the legitimate rights of other States and that they abide by the rules applicable to the space traversed. Jurisdiction broadly encompasses the power to govern, and control refers to the right to act in order to supervise the object.<sup>107</sup> Hence, even though the flag State may not be held directly responsible for the damage caused, it will be held responsible under international law for failure to exercise due diligence to ensure that the ship or aircraft complied with their duties.<sup>108</sup> It will be held liable for damage caused by its own failure to exercise jurisdiction and control over the ship or aircraft.<sup>109</sup> Failure by the flag State to comply

<sup>105</sup> B. Cheng, 'Analogies and Fictions in Air and Space Law', 1968(21) *Current Legal Problems*, 148.

<sup>106</sup> M. S. McDougal and W. T. Burke, *The Public Order of the Oceans* (Yale University Press, 1962), 1066. 'The juridical link between a State and a ship that is entitled to fly its flag produces a network of mutual rights and obligations'. 'Tomimaru' (*Japan v Russian Federation*), ITLOS Prompt Release Judgment of 6 August 2007, [www.itlos.org/case\\_documents/2007/document\\_en\\_296.pdf](http://www.itlos.org/case_documents/2007/document_en_296.pdf), para. 70.

<sup>107</sup> E.g. L. Panella, 'La registrazione della stazione spaziale internazionale', 1991(46) *La Comunità Internazionale*, 205–206.

<sup>108</sup> This can be done by making sure that those responsible for the ship or aircraft are aware of the duties applicable to the ship or aircraft and that they are properly trained. Within IMO, one may note the ongoing work performed by the Sub-Committee on Flag State Implementation.

<sup>109</sup> In another context, the Seabed Disputes Chamber of the ITLOS examined the duty of due diligence of sponsoring States under Article 153(4) of the UNCLOS and Article 4(4) of Annex 3, which may be of relevance to the duties of flag States. The Chamber held that the sponsoring State's liability arises not from a failure of a private entity but rather from its own failure to carry out its own responsibilities. In order for the sponsoring

with the due diligence obligation is raised at the international level by the coastal State. Such failure is raised expressly in Article 94(6), but it is generally applicable and may be raised under Article 304. The flag State has a related duty to ensure that its domestic legal system allows for the good faith performance of the duties of ships and aircraft of its nationality and the effective remedy for any breach of such duties.<sup>110</sup>

State's liability to arise, it is necessary to establish that there is damage and that the damage was a result of the sponsoring State's failure to carry out its responsibilities. Such a causal link cannot be presumed and must be proven (para. 182). The Chamber, however, pointed out that liability for damage of the sponsoring State arises only from its failure to meet its obligation of due diligence. This rules out the application of strict liability (para. 189). As the liability of the sponsoring State arises from its own failure to carry out its responsibilities, and the contractor's liability arises from its own non-compliance, both forms of liability exist in parallel (para. 201). If the contractor has paid the actual amount of damage, as required under Annex III, Article 22, in the view of the Chamber, there is no room for reparation by the sponsoring State (para. 202). The liability of the sponsoring State depends on the occurrence of damage resulting from the failure of the sponsored contractor. However, this does not make the sponsoring State responsible for the damage caused by the sponsored contractor (para. 204). Advisory Opinion of 1 February 2011, [www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_17/Adv\\_Op\\_010211\\_eng.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/Adv_Op_010211_eng.pdf).

<sup>110</sup> E.g., in general, *Exchange of Greek and Turkish Populations (Advisory Opinion)*, PCIJ Rep. Series B, No. 10, 20. The duty is addressed in the specific context of pollution in Article 235(2) of the UNCLOS.

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## Striking a balance between the sovereignty of States bordering straits and the right of transit

The paramount duty of the coastal State is a duty of abstention in order to achieve a specific result: The right of transit passage (and archipelagic sea lanes passage) must not be obstructed, impaired, impeded, suspended or hampered. It was seen in Section 7.1 that this duty, overall, means the prevention of acts, measures or activities that have such an effect. It was also concluded that, unless passage is denied or suspended, hampering or impeding passage is a scalar notion that has no pre-determined scope. Thus, its scope may lie somewhere between a very broad interpretation, that is, any imposition or restriction on ships and aircraft is deemed to impede passage, and a very limited interpretation, that is, only acts or obstacles that amount to a denial of passage or that gravely impair the movement of ships or aircraft are deemed to fall within the prohibition. The strict interpretation is not suggested by the history of the negotiations. The broad interpretation is not acceptable, even within the logic of Part III: Articles 39 to 42 obligate ships and aircraft to comply with certain measures, including for ships the duty to navigate within designated sea lanes and traffic separation schemes. The UNCLOS rests on the assumption that internationally approved measures that fall within the balance of interests in the UNCLOS, such as a TSS or a mandatory reporting requirement, will not qualify as measures that hamper or impede navigation, even though they impose restrictions on ships. Clearly, the scope of the right of transit is interpreted within the objective that these measures serve and within the balance between that objective (for example, safety of navigation or protection of the environment) and the right of transit. Similarly, the appropriate enforcement measures taken under Article 233 must be regarded either as lawful exceptions to the duty not to hamper or impede transit passage, in light of the objective listed in that provision, or as permitted enforcement measures that do not come within the purview of Article 44 in the first place.<sup>1</sup>

<sup>1</sup> The enforcement of the under-keel clearance requirement applicable in the Strait of Malacca was deemed to come within the second alternative.

Two things need to be distinguished. Firstly, the duty not to hamper or impair the right of transit qualifies, and puts a limit to, the exercise by the coastal State of its sovereignty over the strait in matters other than passage, pursuant to Article 34(2) of the UNCLOS. Even though this may not necessarily lead to the complete prohibition of a given activity, it will determine the way a given activity is undertaken. This includes activities of the coastal State alone and activities performed by one or several third States (for instance, under Articles 47(6) and 51 of the UNCLOS). Secondly, the duty not to hamper or impair the right of transit also applies to the exercise of jurisdiction in relation to passage itself. This duty is not limited to the coastal State. Whereas Article 44 applies to the coastal State, Articles 38(1) and 53(3) are drafted in more impersonal terms. Article 42(2) concerns the laws and regulations of the coastal State, but these (at least under Article 42(1)(a) and (b)) depend on international standards. International standards set within the framework of the IMO, the ILO or the ICAO, as the case may be, also apply to ships and aircraft under Article 39, but they, too, have to be understood within the scope of unimpeded passage under Article 38(1). What this means is that any measure, including a measure stemming from a treaty or adopted by an international organization may not deny, impede or hamper transit passage. Therefore, the Parties to the UNCLOS have a duty not to enter into a treaty that would have that effect and a duty to ensure that negotiation within an international organization does not lead to the adoption of a measure that conflicts with the duty not to hamper or impede the right of transit.

Both types of measures, namely those related to passage and those in matters other than passage, may have a similar effect on the right of transit. It is therefore best to distinguish measures on the basis of their impact rather than their formal legal source. The examples in this Chapter are not meant to be exhaustive.

## 9.1 Measures that create a physical impediment to passage

### 9.1.1 *Termination of the right of transit*

The right of transit passage will disappear when natural conditions, such as earthquakes, volcanic eruptions and so on, lead to the strait being entirely closed.

Any activity by the coastal State that would be likely to cause such a natural disaster (for example, dams, drilling or building) will need

to be planned accordingly. At the very least, the coastal State should consult with interested States and the international scientific community in the assessment of precautionary measures to be taken. It seems that when the risk is very high and cannot be reasonably counterbalanced by prophylactic measures, the coastal State's plans should be abandoned or downsized.

### *9.1.2 Restriction of the right of transit*

#### 9.1.2.1 Land reclamation

The coastal State may extend its land territory by reclamation works. It is a well-established principle of international law that artificial extension of the coastline does not affect maritime spaces. Such activities may, however, impact on the rights of third States. The matter was raised in relation to the Straits of Johor when, on 4 July 2003, Malaysia instituted arbitral proceeding as provided for in Annex VII of the UNCLOS in a dispute concerning land reclamation by Singapore in and around the Straits. The Johor Straits is the natural water course between the southern coast of Malaysia and northern coast of Singapore. On 5 September 2003, pending the constitution of an arbitral tribunal, Malaysia submitted to the ITLOS a request for provisional measures under Article 290(5). In its Notification and Statement of Claim of 4 July 2003, Malaysia requested the arbitral tribunal to be constituted under Annex VII, *inter alia*, to decide that Singapore shall, in light of the assessment and of the required processes of consultation and negotiation with Malaysia, revise its reclamation plans so as to: minimise or avoid the risks or effects of pollution or of other significant effects of those works on the marine environment; provide adequate and timely information to Malaysia of projected bridges or other works tending to restrict maritime access to coastal areas and port facilities in the Straits of Johor; and take into account any representations of Malaysia so as to ensure that rights of maritime transit and access under international law are not impeded. In its request for provisional measures, Malaysia stated that the rights which it sought to protect by the granting of provisional measures were those relating to the preservation of the marine and coastal environment and the preservation of its rights to maritime access to its coastline, in particular via the eastern entrance of the Straits of Johor, and it claimed that these rights are guaranteed by Articles 2, 15, 123, 192, 194, 198, 200, 204, 205, 206 and 210 of the UNCLOS and in relation thereto Article 300 and the precautionary principle. Malaysia also

expressed the view that the reclamation activities would have an actual and potential impact on navigation and the stability of coastal structures, including the possible formation of large-scale eddies which could pose a serious risk to ships sailing at low speed or at anchor. Singapore stated that it had given an explicit offer to share the information that Malaysia requested in reliance of its rights under the Convention and that it would give Malaysia full opportunity to comment on the reclamation works and their potential impacts.<sup>2</sup>

On 8 October 2003, ITLOS unanimously prescribed, pending the decision by the arbitral tribunal, provisional measures which contributed to the subsequent settlement of the dispute. The Tribunal stipulated that:

Malaysia and Singapore shall cooperate and shall, for this purpose, enter into consultations forthwith in order to: (a) establish promptly a group of independent experts with the mandate (i) to conduct a study, on terms of reference to be agreed by Malaysia and Singapore, to determine, within a period not exceeding one year from the date of this Order, the effects of Singapore's land reclamation and to propose, as appropriate, measures to deal with any adverse effects of such land reclamation; (ii) to prepare, as soon as possible, an interim report on the subject of infilling works in Area D at Pulau Tekong; (b) exchange, on a regular basis, information on, and assess risks or effects of, Singapore's land reclamation works; (c) implement the commitments noted in this Order and avoid any action incompatible with their effective implementation, and, without prejudice to their positions on any issue before . . . the arbitral tribunal, consult with a view to reaching a prompt agreement on such temporary measures with respect to Area D at Pulau Tekong.

The Order directed Singapore not to conduct its land reclamation in ways that might cause irreparable damage prejudice to the rights of Malaysia or serious harm to the marine environment, taking especially into account the reports of the group of independent experts. Finally, the Tribunal decided that Malaysia and Singapore should submit their initial report on the steps they had taken or proposed to take to ensure prompt compliance with the measures prescribed no later than 9 January 2004.<sup>3</sup> On the basis of the Report of the groups of independent experts, Malaysia and Singapore signed a Settlement Agreement of the dispute submitted to the Arbitral

<sup>2</sup> Malaysia's Request for provisional measures is available at [www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_12/request\\_malaysia\\_eng.1.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_12/request_malaysia_eng.1.pdf)

<sup>3</sup> The ITLOS Order is available at [www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_12/Order.08.10.03.E.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_12/Order.08.10.03.E.pdf)

Procedure. The Arbitral Tribunal, on 1 September 2005, decided, in light of the joint request by the Parties, to deliver a final Award binding on the Parties in the terms set out in the Settlement Agreement, and it was attached as the Annex to the Award. Thus, the proceedings were terminated. The Agreement contains issues such as the final design of the shoreline, but it is also stated that 'Singapore reassures Malaysia that even after the Pulau Tekong reclamation, the safe and smooth passage of ships through Kuala Johor and Calder Harbour will not be adversely affected by the said reclamation'.<sup>4</sup>

The case focused on the protection of the marine environment and Malaysia's right of access to its own coastline. The case was not argued on the basis of an alleged impediment to the right of transit passage. Indeed, the Strait of Johor is cut in half by the Johor-Singapore Causeway, completed in 1923, which constitutes a road, rail and water pipe connection between Malaysia and Singapore. The Strait is therefore not used for international navigation between two parts of the high seas/EEZ and does not fall within Article 37 of the UNCLOS. From Malaysia's perspective, access to the Johor Port in Pasir Gudang is possible from the eastern side of the Strait of Johor. If a State were to reclaim part of a strait used for international navigation to the point where navigational issues were raised for ships in transit, one assumes that the issue would be raised in the IMO and the UN at an early stage. The Causeway is an existing feature of the Strait of Johor but it raises issues that are addressed in the following Section.<sup>5</sup>

<sup>4</sup> The Arbitral Award is available at [www.pca-cpa.org/showpage.asp?pag\\_id=1154](http://www.pca-cpa.org/showpage.asp?pag_id=1154).

<sup>5</sup> 'There had been calls from Malaysian politicians for the demolishment of the Causeway before 1996, when Malaysia's Prime Minister Mahathir Mohamad proposed that the Causeway be replaced by a bridge in order to *open* the straits for shipping and for environmental reasons. The Gerbang Perdana consortium undertook construction of a bridge in December 1998, as part of a RM \$2 billion project named the Southern Integrated Gateway. After a series of inter-governmental negotiations, there was no agreement on the Causeway and in October 2002, Malaysia called off inter-governmental talks on the proposed bridge and later announced that it would unilaterally build the bridge. However, Singapore sent a diplomatic note in October 2003 stating that the Causeway could not be legally demolished without the agreement of both countries. Negotiations were restarted in 2004 and ended without agreement in April 2006. Malaysia also stopped construction of the bridge from the Johor end', [http://infopedia.nl.sg/articles/SIP\\_99\\_2004-12-30.html](http://infopedia.nl.sg/articles/SIP_99_2004-12-30.html) (emphasis added).

A bridge also exists across the Strait in the western section: the Malaysia-Singapore Second Link, built to reduce traffic congestion at the Causeway. The bridge opened on 2 January 1998, and its main navigational channel is 25 metres high.

### 9.1.2.2 Bridges and other structures

The ILC, in its commentary to Article 16 of its 1956 Draft Articles on the Law of the Sea, indicated that, ‘if they hamper innocent passage, installations intended for the exploitation of the sea-bed and subsoil of the territorial sea must not be sited in narrow channels or in sea lanes forming part of the territorial sea and essential for international navigation’.<sup>6</sup> At the UN Sea-Bed Committee and at UNCLOS III, the issue of material obstacles to the right of transit was raised by some delegations. For Poland, ‘the coastal State shall not place, in the straits used for international navigation, structures of any kind which could hamper or obstruct the passage of ships through such straits’.<sup>7</sup> For Bulgaria and others, ‘the coastal State shall not place in the straits any installations which could interfere with or hinder the transit of ships’.<sup>8</sup> Malaysia, Morocco, Oman and Yemen, in their Draft Articles on navigation through the territorial sea, including straits used for international navigation, stated that ‘the coastal State shall not place in navigational channels in a strait facilities, structures or devices of any kind which could hamper or obstruct the passage of ships through such strait’.<sup>9</sup> As was seen in Section 7.2, the General Provisions on Ships’ Routing specify that, in the case of mandatory routing systems, governments should ensure that drilling rigs (MODUs), exploration platforms and other structures obstructing navigation and not aiding navigation will not be established within the traffic lanes of a TSS being part of a mandatory routing system.<sup>10</sup>

For Wolfrum, the construction of a bridge that takes no account of the navigational rights of third States would amount to an abuse of rights. An abuse of rights is explicitly prohibited by Article 300 of the UNCLOS. The German scholar would be familiar with that notion: Article 226 of the German Civil Code says that ‘the exercise of a right is not permitted

<sup>6</sup> UN Doc. A/3159, Yearbook of the ILC, vol. II, 273. Article 16 reads in part: ‘The coastal State must not hamper innocent passage through the territorial sea’.

<sup>7</sup> UN Doc. A/AC.138/SC.II/L.49 (1973), Proposal by Poland concerning aspects of navigation through straits.

<sup>8</sup> UN Doc. A/CONF.62/C.2/L.11, UNCLOS III, III Official Records (1974), 189, Draft Articles on straits used for international navigation submitted by Bulgaria, Czechoslovakia, the German Democratic Republic, Poland, the Ukrainian Soviet Socialist Republic and the USSR (Article 1(2)(f)).

<sup>9</sup> UN Doc. A/CONF.62/C.2/L.16, UNCLOS III, III Official Records (1974), 195 (Article 22(4)).

<sup>10</sup> See Chapter 7, n. 41 and accompanying text.

if its only possible purpose consists in causing damage to another'.<sup>11</sup> Article 300 of the UNCLOS 'mirrors the fact that all rights concerning the utilization of the marine environment are interrelated and are to be exercised only with due regard for the interests of other States in exercising their rights'.<sup>12</sup> Any rule against the abuse of rights is based on, and cannot exist apart from, the existence of a discretion in some person. Thus it is not every 'right' which is reviewable for abuse but only those which are susceptible to limitation by reference to the reason for exercising them.<sup>13</sup> For Wolfrum, it is appropriate to establish which right requires priority. For him, Articles 60(7) and 78(2) of the UNCLOS may be taken as an indication that the law of the sea attributes a certain priority to navigation vis-à-vis other maritime uses.<sup>14</sup> However, the relation between the right to construct artificial islands, the rights over the continental shelf and the freedom of navigation in these two provisions is not so straightforward, and it may be questioned whether the UNCLOS establishes a hierarchy. Article 78(2) prohibits 'unjustifiable interference' with navigation, leading one to believe that interference in some cases is acceptable. Article 60(7) prohibits 'interference . . . to the use of recognized sea lanes essential to international navigation', but interference is subject to interpretation. Article 58(3) says that in exercising their rights under the UNCLOS in the EEZ, States shall have due regard to the rights and duties of the coastal State.

The question of bridges was raised in the *Passage through the Great Belt* case (*Finland v Denmark*) before the ICJ. The Danish project to span the Great Belt with a suspension bridge was the object of a dispute submitted by Finland to the Court on 17 May 1991. Both parties agreed that the planned bridge was situated within Denmark's territorial sea and internal waters and that the 'Danish Straits' were subject to passage regulated by the 1857 Treaty for the Redemption of the Sound Dues.<sup>15</sup> But they differed on whether ships and other modes of transport more than 65 metres

<sup>11</sup> See, notably, V. Bolgar, 'Abuse of Rights in France, Germany, and Switzerland: A Survey of a Recent Chapter in Legal Doctrine', 1975(35) *Louisiana Law Review*, 1015.

<sup>12</sup> R. Wolfrum, 'Bridges over Straits', in E. L. Miles and T. Treves (eds.), *The Law of the Sea: New Worlds, New Discoveries. Proceedings of the 26th Conference of the Law of the Sea Institute* (University of Hawaii, Honolulu, 1993), 55. On due regard, see Part III, Chapter 4, n. 22–28 and accompanying text.

<sup>13</sup> G. D. S. Taylor, 'The Content of the Rule against Abuse of Rights in International Law', 1972–1973(46) *British Year Book of International Law*, 350, 352. See also G. Schwarzenberger, 'Uses and Abuses of the "Abuse of Rights" in International Law', 1956(42) *Transactions of the Grotius Society*, 147.

<sup>14</sup> Wolfrum in n. 12, 55. <sup>15</sup> See Part III, Section 2.4.

in height enjoyed a right of passage specifically through the Great Belt. The right of passage of mobile offshore drilling units (MODUs) more than 65 metres in height was one of the decisive legal questions at issue. However, on 3 September 1992 and before the opening of the hearings, Denmark and Finland reached a settlement, wherein Denmark agreed to pay Finland DKK 90 million. One week later, the Court removed the case from the list.<sup>16</sup>

In its Memorial of 20 December 1991,<sup>17</sup> Finland relied first on Article 1(1) of the 1857 Treaty for the Redemption of the Sound Dues according to which ‘aucun navire quelconque ne devra désormais, sous quelque prétexte que ce soit, être assujetti au passage du Sund ou des Belts, à une détention ou entrave quelconque’. This provision makes clear that the engagement of Denmark not to subject ships passing through the Sound and Belts to any detention or hindrance concerns all vessels, whether they belong to the contracting Parties or not.<sup>18</sup> The regime applicable in the Straits is preserved by Article 35(c) of the UNCLOS. For Finland, all the various rules of international law to which attention was drawn obligate Denmark to ensure passage of all ships through the Great Belt.<sup>19</sup> The prohibition of hindrance in the 1857 Treaty presumably excludes not only an absolute hindrance but every measure that can render passage difficult. Similarly, under the UNCLOS, the coastal State must not hamper or deny

<sup>16</sup> See M. Koskenniemi, ‘Passage through the Great Belt case (Finland v. Denmark)’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, <http://opil.ouplaw.com/home/EPIL>. At the provisional measure phase, the Court ordered on 29 July 1991 that the ‘the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures’. ICJ Rep. (1991), 20.

<sup>17</sup> The pages are omitted in the following analyses. The memorial is available at [www.icj-cij.org/docket/files/86/6885.pdf](http://www.icj-cij.org/docket/files/86/6885.pdf). A good summary is also found in M. Koskenniemi, ‘Case Concerning Passage through the Great Belt’, 1996(27) *Ocean Development and International Law*, 255.

<sup>18</sup> Denmark and Finland are both Parties to the 1958 Convention on the Territorial Sea, which in Article 25 specifies that ‘the provisions of this Convention shall not affect conventions or other international agreements already in force, as between States Parties to them’.

<sup>19</sup> For Finland, the rule providing for the right of passage without any hindrance has become customary law. In addition, numerous examples from State practice indicate that there is evidence of an emerging principle on ‘transit passage’ through straits. Present-day customary law on passage through straits does not correspond any longer with the Convention on the Territorial Sea. No distinction has ever been made between passage based on the Geneva Convention, passage based on the Copenhagen Treaty and passage based on general international law as far as passage through the Danish Straits is concerned. Hence, the above-mentioned sources merge, in their application to passage through the Danish Straits, into a general rule of freedom of passage.

passage. Although Denmark may adopt regulations concerning passage, these cannot have the practical effect of making passage impossible.<sup>20</sup> For Finland, the right of the State bordering the strait to adopt laws and regulations concerning the question of the safety of navigation consequential to the existence of a bridge cannot justify the construction of a bridge any more than works making the strait narrower or shallower are justified. There can be no doubt that territorial sovereignty over the strait includes the right to build a fixed link between the coasts separated by the strait, but such a right cannot be exercised to deprive the strait – in whole or in part – of its character as a navigable waterway. This is particularly true in light of the positive obligation to permit passage which exists for Denmark as regards the Great Belt.<sup>21</sup> The height of a bridge to be built depends on the height of the tallest ships known to exist, without excluding known future developments. The existence of MODUs exceeding the maximum height clearance of the planned bridge was well known in the 1970s, when Denmark passed its first, and unsuccessful, law on the construction of the bridge. Passage of such ships through the Great Belt was normal in the 1980s, when the second law was adopted and the decision to build a bridge, and not a tunnel, for road traffic across the East Channel was taken.

It may be argued that other bridges have been constructed over straits that have a clearance equal or similar to that of the planned Great Belt Bridge, but for Finland, any such supposed international standard would not be constant in time. For instance, in his discussion of the Little Belt

<sup>20</sup> Both the provisions on innocent passage and transit passage have rules to that effect. Denmark claimed that, because the Parties to the 1857 Treaty accepted the clearance of 65 metres by their lack of reaction to the Danish Circular Note announcing the intention of building a bridge of such clearance, Finland could not claim a right of passage extending to ships taller than 65 metres. As a third-party beneficiary, it would not be entitled to invoke additional rights or a more favourable treatment than the one agreed to by the actual Parties to the 1857 Treaty. For Finland, however, the right of passage includes all ships, including tall Finnish ships. This is the right of which Finland is a third-party beneficiary. This right can be revoked or modified by the parties, according to Article 37(2) of the Vienna Convention on the Law of the Treaties. But a series of consents by treaty parties not to object to a modification planned by another treaty party to the factual situation in which the right is exercised is not equivalent to the parties revoking or modifying a right that has arisen for a third party.

<sup>21</sup> Brüel, in discussing the Treaty of 1857, expressed this idea as follows: ‘Even if the treaty does not place upon Denmark any duty to maintain the Straits as navigable waterways the fact that it does pre-suppose them to be such raises the presumption that Denmark cannot *actively deprive them* of their character as such e.g. by building embankments or bridges without openings wide enough for navigation, over all three waterways’.

bridge,<sup>22</sup> Brüel expressed strong doubts on its compatibility with international law, because, by giving it a clearance of 33 metres, Denmark ‘a non seulement rendu plus difficile le passage par ce détroit, mais aussi – sans d’autres motifs que des simples raisons d’économie – complètement privé une partie des navires de la possibilité même de l’utiliser’ [‘not only rendered passage through this strait more difficult, but it also – with no reasons other than simple economy – completely deprived some of the ships from the possibility of using it’]. Brüel believed that a clearance of 42 metres would have been preferable because it would have permitted passage of almost all ships. All the existing bridges cited by Denmark in support of an international standard are situated in internal waters, and almost all of them cross passages that lead only into the territory of the coastal State itself. No fixed bridge can be found across an international strait, with the exception of the Bosphorus bridges, and all – with the exception of the Bosphorus – have alternative passages. The routes through the Little Belt and through the Sound are not real alternatives because of the presence of a bridge over the first and because of the shallowness of the second. Furthermore, there is no evidence of any existing international navigation that would have been hampered by the two Bosphorus bridges at the time of their construction.<sup>23</sup> In assessing the clearance for a bridge over an international strait, the specific traffic using that particular strait should be considered, not only in so far as the present is concerned but also as regards the foreseeable future.

In its Counter-Memorial of 18 May 1992,<sup>24</sup> Denmark stated that any legal evaluation concerning a State’s activities in its territorial sea must take as a starting point the sovereign right enjoyed by States over their territory. Special rights for certain foreign States or the international community at large may restrict the territorial sovereignty otherwise enjoyed, but such restrictions are not to be presumed and need a clear legal foundation. As early as 1936, when the possibilities for constructing bridges across the Great Belt and the Sound were discussed, the Danish Ministry of Foreign Affairs stated that nothing precludes the construction of a bridge across the Great Belt and the Sound, provided the design of the bridge does not impede passage to and from the Baltic Sea by even the largest ships existing at the time. Denmark relied on several opinions

<sup>22</sup> The bridge was completed in 1935.

<sup>23</sup> The first bridge was opened in 1973, with a vertical clearance of 64 metres. The second bridge was opened in 1988, also with a vertical clearance of 64 metres. The construction of a third bridge began in 2013.

<sup>24</sup> [www.icj-cij.org/docket/files/86/6893.pdf](http://www.icj-cij.org/docket/files/86/6893.pdf).

by Danish professor and diplomat Max Sørensen. In an opinion of 1962, he stated:

[I]t must still be possible to maintain that the requirements for the freedom of navigation do not necessarily have to be complied with as far secondary sea lanes are concerned . . . As far as the territorial sea is concerned, the construction of a bridge across a passage-way of water cannot be deemed to be contrary to the coastal State's obligations under international law on the ground of the Convention on the Continental Shelf or other grounds, provided that the breadth and height of the spans are such that the passage of any foreign ship is not hampered.

In an opinion of 1971, in which consideration was given to a fixed link between Denmark and Sweden, he stated:

[A]s far as various possible bridge constructions were concerned, it was stipulated that the clearance and the positioning of the bridge piers were not allowed to preclude or impede the passage of even the biggest vessels of our time which are capable of passing through the Sound – irrespective of whether the vessel in question sailed in ballast or with cargo. On the other hand, only ships could be taken into account, not other floating constructions, such as drilling platforms, which might pass through the Sound by way of towing.

He later opined that there is general agreement that it is not possible, and therefore not necessary, to take into account unknown developments of the future:

Once the bridge is there, future ship constructions will have to be adapted to it. A certain principle of priorities can be adopted for this purpose. Modern technology has posed a delicate problem in the past few years. Drilling platforms for the extraction of oil and gas from the continental shelf are towed with their extremely high constructions, but floating, from one field to the other. In the event of plans to tow such a gigantic structure through the straits, is it possible then to assert a right of passage, unobstructed by bridges? The considerations and preparatory work seem to indicate a reply in the negative. It is true that an explicit interpretation is non-existent, but all legal analyses take into account ordinary navigation only. Customary international law could hardly be deemed to deal with this new problem. At any rate, there is no rule of international law which imposes an obligation to draw parallels between such constructions and ships. It might be a different situation if a conventional ship, capable of moving under her own power, is provided with a derrick. Even under these circumstances, however, it remains doubtful whether it is a case of such navigational interest as are embraced by the right of innocent passage under customary international law.

For the government of Denmark, the right of passage through the Great Belt does not extend to floating offshore units, such as jack-ups and semi-submersibles, which do not come within an internationally recognized concept of ships. MODUs never navigated the Danish Straits, like ships do, but instead have been towed through or transported on heavy-lift ships. Even if these MODUs were to be considered ships, Denmark is entitled to establish a TSS according to which drilling platforms shall exercise their right of passage through the Sound and not through the Great Belt. The right of the coastal State to direct ships with special characteristics to use such sea lanes and TSS as it may designate is an established customary rule codified in Article 22 of the UNCLOS. Denmark added that it provided notification that it was building a high-level bridge across the Great Belt and that no objection had been presented to the successive Danish governments in charge of the project, until the much-belated Finnish diplomatic reaction on 19 June 1990.

As Koskenniemi notes, negotiations that started after the Court Order on provisional measures were not particularly fruitful. Denmark expressed its readiness to increase the vertical clearance in the East Channel by an additional 3.8 metres and to study the possibility of dredging the Drogden Channel in the Sound, but both suggestions were regarded as insufficient by Finland. Finland proposed that the East Bridge should be opened to a width of 180 to 200 metres by a swing bridge. Denmark opposed this on the basis of economic, security and navigational reasons. Only brief mention was made from the Finnish side of two alternatives: the opening of the West Bridge together with a deepening of the Western Channel or a return to the tunnel alternative. Lack of time prevented an in-depth study of these matters, and Denmark came close to rejecting the latter alternative a priori. At the end of June 1992, Denmark contacted Finland once more and suggested that it was prepared to compensate the concrete harm caused to individual drill rigs by the East Bridge. At the time, Finland could not accept this and insisted on the preservation of the navigation conditions as they were. During the spring and summer of 1992, Finland contacted a well-known engineering consultant firm in the Netherlands and had a study prepared on how to allow the opening and closing of the East Bridge in a reasonable time. However, the costs of this modification would have risen to approximately US \$250 million, which Denmark was not prepared to pay, especially because there was no evidence that the opening would be used more than once a year. During the summer of 1992, it became evident that a negotiated solution could be based only on a Danish payment to Finland that would correspond

to the reasonably foreseeable harm that the bridge might cause to the latter.<sup>25</sup>

The Great Belt Bridge is not the only example. Anderson notes that two Franco-British Reports, in 1963 and 1982, reviewed the legal aspects of proposals for bridges and tunnels across the Straits of Dover. The Report of 1963 said, in part:

Besides the serious disadvantages to shipping which it would involve, the bridge project could not be carried out, having regard to the principles of international law, until Great Britain and France had sought the concurrence of the States principally concerned with navigation in the Channel. An agreement of this kind, which could in particular be concerned with the drawing up of a system for the regulation of navigation, would certainly involve lengthy negotiations which would only with difficulty be brought to a conclusion.

The Report of 1982 considered the possibility of constructing a bridge-tunnel-bridge with artificial islands and included the following passage:

From the point of view of the hazard to shipping, the spacing of these obstacles and the flexibility of their siting varies according to the option chosen, but no project completely avoids them being located in a main shipping lane. Therefore, for all these options, measures must be taken to maintain the freedom and safety of shipping during surveying, construction work and (with regard to the final structures) the operating phase. It would, of course, be the responsibility of France and the United Kingdom to draw up these provisions, but other countries should be consulted through the appropriate international authorities to demonstrate that the rights of transit passage will be respected and shipping safety maintained.

In an Invitation to Promoters for the development, financing, construction and operation of a Channel Fixed Link between France and the United Kingdom, issued by the Department of Transport in April 1985, the following passage appeared:

Any project which involves construction work or the building of permanent structures in the Straits of Dover must not hamper the freedom and safety of navigation . . . A routing system operates in the Dover Straits which has been adopted by the International Maritime Organisation (IMO) . . . Promoters should be aware that any structure (such as

<sup>25</sup> Koskenniemi in n. 16, 275–278. The degree of Finland's concrete interest in the matter had become uncertain. Aside from two Caribbean sail cruisers, there existed no conventional ships with a mast height in excess of 65 meters. No such ships seemed to be under construction or even under serious design. Even those two cruisers would have had easy access to the Baltic through the Sound (as their draughts are only 5 metres). *Ibid.*, 277.

ventilation shafts, bridge piers, artificial islands and embankments) that in any respect involved a permanent modification of the traffic separation scheme would require acceptance by the IMO and any modification of the traffic system would have to be adopted by the IMO.<sup>26</sup>

A bridge and causeway project between Egypt and Saudi Arabia, across the Strait of Tiran and through Tiran Island has been talked about for the past 20 years. The length of the link would vary from 25 to 50 kilometres. Media reports claim that Israel and Jordan are against the project and that Israel is taking the issue so seriously that it has hinted it may be ‘a direct cause of war’ if it proceeds. The project was instigated by ousted president Hosni Mubarak years ago, only to be shelved. It has been revived post-revolution. Israel insists that a bridge over the islands of Tiran and Sanafir located at the entrance to the Gulf of Aqaba would pose a ‘strategic threat to Israel’, given that it puts the freedom of navigation to and from the Israeli port of Eilat ‘at risk’.<sup>27</sup> Other projects include a fixed link between Morocco and Spain across the Strait of Gibraltar, which was the object of an agreement of 1980 and an additional agreement of 1989, although, in the end, a tunnel was deemed more advantageous economically, and it was concluded that a tunnel would not interfere with navigation and would be more environmentally friendly; and the Öresund Bridge between Denmark and Sweden, completed in 2000, a fixed link comprising a bridge with a vertical clearance of 57 metres, an artificial island and a tunnel.<sup>28</sup> Hence, ships may pass through that strait above the Drogden Tunnel.

Schachte and Bernhardt write that, if the construction of a bridge across an international strait is not subject from its inception to internationally accepted safeguards and readily applicable standards, it could destroy the carefully crafted balance between strait States’ and user States’ rights and

<sup>26</sup> D. H. Anderson, ‘The Strait of Dover and the Southern North Sea: Some Recent Legal Developments’, 1992(7) *International Journal of Estuarine and Coastal Law*, 87–89. In 1986, the two governments reviewed four schemes for the Channel fixed link and chose the bored tunnel for railway traffic. *Ibid.*, 89.

<sup>27</sup> [www.middleeastmonitor.com/news/middle-east/4977-israel-hints-at-war-with-egypt-over-bridge-to-saudi-arabia](http://www.middleeastmonitor.com/news/middle-east/4977-israel-hints-at-war-with-egypt-over-bridge-to-saudi-arabia) (11 January 2013). The German magazine *Spiegel* reported on 18 July 2011 that ‘Egypt has given the nod to plans for a gigantic bridge across the Red Sea. It would provide the first direct road link between Arab North Africa and the Middle East – but the project could upset Israel and Jordan’. [www.spiegel.de/international/world/crossing-the-red-sea-egypt-approves-massive-bridge-to-saudi-arabia-a-775020.html](http://www.spiegel.de/international/world/crossing-the-red-sea-egypt-approves-massive-bridge-to-saudi-arabia-a-775020.html). For the effect of the 1979 and 1994 Peace Treaties, see Part II, Section 2.4.6.

<sup>28</sup> See S. Piaskowski-Rafowicz, ‘Les ponts sur les détroits’, 2004(9) *Annuaire du droit de la mer*, 337–339, 343–344. The Gibraltar project has not taken off yet.

obligations under the UNCLOS.<sup>29</sup> This is certainly true with respect to not only the planned height of the bridge but also the navigational channels through the bridge and, in any event, disruption to navigation during the construction of the bridge. They argue that, because bridges have similar effects on navigation that sea lanes and TSS do, it is both reasonable and practical that comparable steps be followed in the construction of bridges. Therefore, they suggest that the strait State should be required to provide actual notice of the proposal well in advance to States through the IMO. All States would then be given adequate opportunity to communicate their views to the proposing strait State, which would then be obliged to try to accommodate these views. As part of this process, the IMO would establish internationally recognized guidelines and standards to ensure that the construction of bridges will not hamper or impede navigation through international straits. These guidelines and standards would vary in part with regard to the type of international strait involved and other important considerations, such as the nature and density of the traffic through such a strait, the availability of equally practicable alternate routes and the associated additional costs, if any, of the proposed bridge construction. The strait State could only proceed with actual construction upon the determination by the IMO that the proposal conforms to the established guidelines.<sup>30</sup>

The IMO was involved in the discussions concerning the construction of a bridge across the Strait of Messina between Sicily and continental Italy. That strait is subject to the right of non-suspendable innocent passage under Article 45 of the UNCLOS. Innocent passage under Article 24 may only be hampered in accordance with the UNCLOS. The construction of a bridge across the territorial sea does not fall under the legislative competence of the coastal State under Article 21, which, in any event, is limited by Article 24(1)(a). It falls under the general jurisdiction of the coastal State under Article 2, but its effects need to be assessed under Part II. Spadi reported in 2001 that the planned bridge would have a height above sea level of around 64–70 metres.<sup>31</sup> For Spadi, if it were to be proved that no ship higher than 64–70 metres had ever passed through the Strait or that one is extremely unlikely to do so in the future, Italy's case would

<sup>29</sup> W. L. Schachte and J. P. A. Bernhardt, 'International Straits and Navigational Freedoms', 1992–1993(33) *Virginia Journal of International Law*, 548.

<sup>30</sup> *Ibid.*, 549.

<sup>31</sup> F. Spadi, 'The Bridge on the Strait of Messina: "Lowering" the Right of Innocent Passage?', 2001(50) *International and Comparative Law Quarterly*, 413. The project has been revived several times since, but it was shelved again in 2013 for lack of funds.

be difficult to contest. He notes that, in 1988, the Italian government notified the IMO of the Messina Bridge project, seeking ‘advice on the navigational aspects of the bridge with special reference to its minimum clearance above sea level.’<sup>32</sup> The Sub-Committee on Safety of Navigation reported to the Maritime Safety Committee that the minimum clearance foreseen for the single span bridge would exceed 55 metres, would be no less than 64 metres in the central span and that, consequently, ‘these minimum clearances should be more than adequate for ships likely to use the Strait of Messina, so far as can be foreseen’. The MSC endorsed the Sub-Committee’s report.<sup>33</sup>

From these various discussions and arguments, it is clear that the construction of a bridge across a strait used for international navigation was never thought to be prohibited *ipso facto*. Debates focused on the clearance of the bridge to accommodate international navigation. In that respect, certain essential aspects are taken into account: an assessment of all interests at stake, that is, those of the coastal State and its infrastructural and economic needs and those of the international community; the existing and reasonably foreseeable nature of passage in the strait, that is, the types of ships and their cargo; the existence of a genuine (that is, cost-effective and equivalent, as far as navigational characteristics are concerned) alternative route; the primary or secondary nature of the channel across which the bridge is planned; notification of the project well in advance to all users and opportunity to respond; involvement of the IMO and opportunity to debate; and possible compensation to a State which sacrifices one of its legitimate interests when that interest cannot be reasonably taken into account.

### 9.1.2.3 Areas to be avoided

An area to be avoided is a routeing measure envisaged by IMO resolution A.572(14), Guidelines for Ships’ Routeing. It is defined as an ‘area within defined limits in which either navigation is particularly hazardous or it is exceptionally important to avoid casualties and which should be avoided

<sup>32</sup> IMO Doc. NAV/35/Inf.4 (1988). Article 22(3) of the UNCLOS on the recommendatory role of the IMO regarding sea lanes in the territorial sea was discussed; the bridge project only partially fitted into this category (especially the double-span version, which would have needed some kind of traffic separation scheme because of the pylon in the middle of the Strait), but Italy’s notification served the purpose of communicating to the world maritime community the potential transformation of the Strait. Spadi in n. 31, 416.

<sup>33</sup> *Ibid.*, 417 (referring to IMO Doc. NAV 35/14 (1989) and IMO Doc. MSC 57/27 (1989), paras. 10.2.16–10.2.17).

by all ships, or certain classes of ship'.<sup>34</sup> An area to be avoided may be made mandatory for all ships, certain categories of ships or ships carrying certain cargoes pursuant to SOLAS V/10. The necessity of creating such areas should be well-demonstrated and the reasons should be stated. In general, these areas should be established only in places where inadequate survey or insufficient provision of aids to navigation may lead to a danger of stranding, where local knowledge is considered essential for safe passage, where there is the possibility that unacceptable damage to the environment could result from a casualty or where there might be hazard to a vital aid to navigation. These areas shall not be regarded as prohibited areas unless specifically so stated; the classes of ship which should avoid the areas should be considered in each particular case.<sup>35</sup> In deciding whether to adopt or amend a routeing system which is intended to protect the marine environment, the IMO will notably consider whether, given the overall size of the area to be protected and the aggregate number of environmentally sensitive areas established or identified in the geographical region concerned, the use of areas to be avoided could have the effect of *unreasonably limiting the sea area available for navigation*.<sup>36</sup> The Guidelines add that an area to be avoided will not be adopted if it would impede the passage of ships through an international strait. It is clear that an area to be avoided may be adopted in a strait, provided it does not impede the passage of ships. It is not clear whether passage is impeded when it is unreasonably limited, which is a general test applicable to all areas to be avoided with the purpose of protecting the marine environment, or whether the standard applicable to transit passage is more stringent. Nor is it specified what level of interference with navigation is tolerable when the area to be avoided is compulsory. Areas to be avoided have notably been adopted in the Dover Strait and the English Channel, north of the Strait of Tiran and in the Bass Strait. In the Strait of Bonifacio, the IMO recommended governments to prohibit or at least strongly discourage the transit of the Strait of Bonifacio by laden oil tankers and ships carrying dangerous chemicals or substances in bulk liable, in the event of a casualty, to pollute the sea or the coasts.<sup>37</sup> These are not compulsory measures. It can at least be concluded that the IMO did not believe that the adoption of such measures impeded the passage of ships in the strait concerned.

<sup>34</sup> See Chapter 7, n. 31 and accompanying text. <sup>35</sup> Resolution A.572(14), para. 5.5.

<sup>36</sup> *Ibid.*, para. 3.6.2 (emphasis added). <sup>37</sup> IMO resolution A.766(18) (1993).

## 9.2 Measures that create requirements to be met by transiting ships

International practice referred to throughout this study shows the diversity of measures taken in the interest of safety of navigation or environmental protection, with which ships are recommended or required to comply. Some of these measures are taken in straits where the right of transit, or the right of non-suspendable passage, applies or in straits where a special conventional regime is in force. Measures such as ships' routeing or ships' reporting systems are said explicitly in the SOLAS Convention not to prejudice the legal regime of straits, but the adoption of such measures in straits used for international navigation admittedly only means that they are not, in context, thought to hamper or impede navigation. The question is particularly acute when the measure concerned is compulsory. Furthermore, no question of the possible impact of a measure can be discussed if the authority to adopt the measure in the first place is not well-established. It was already seen in Section 7.3.2 that doubts were expressed at the IMO regarding the adoption of compulsory SRS, but doubts have not vanished with the amendment of SOLAS chapter V. Plant argues that the willingness of States to adjust the navigation/environmental protection balance appears to extend merely to traffic measures, as opposed to CDEM standards.<sup>38</sup> But having the necessary equipment is inherent in the compliance with any routeing system. For Plant, approval by the IMO of mandatory ships' routeing under the amended chapter V of SOLAS 'appears to conflict with the provisions of UNCLOS Article 22(3), which gives IMO merely a recommendatory role'.<sup>39</sup> However, sea lanes and TSS in the territorial sea may be made compulsory by the coastal State by virtue of Article 22(1) and Article 41 in straits. The source of the legal power for the IMO is to be found in the UNCLOS, COLREG, the SOLAS and the IMO Constitution. Furthermore, as was seen in Section 7.2, it is doubted that Part III only allows such passive measures as TSS, which a ship undertakes to respect, as opposed to active measures which incorporate any pragmatic involvement in the navigation of a ship. This is not how Article 41 was interpreted.<sup>40</sup> Plant opines that:

<sup>38</sup> G. Plant, 'The Relationship between International Navigation Rights and Environmental Protection: A Legal Analysis of Mandatory Ship Traffic Systems', in H. Ringbom (ed.), *Competing Norms in the Law of the Marine Environmental Protection – Focus on Ship Safety and Pollution Prevention* (Kluwer, The Hague, 1997), 12.

<sup>39</sup> *Ibid.*, 22.

<sup>40</sup> See Section 7.2. *Contra* Kempton in Chapter 7, n. 73, 237, 244 (although acknowledging that recent developments might allow one to answer differently).

[There] is, at the very least, a potential clash of treaties as between states parties to both UNCLOS and the amended SOLAS . . . One might argue that mandatory requirements on ships to comply with a routing measure, or to report to coastal state authorities merely their name, call-sign . . . and position, do not diminish their international rights to *navigate* . . . Indeed, it is possible to regard them as positive *services, facilitating* rather than hindering navigation. Unfortunately, the reality that distances added to voyages by diversions to use routing systems can cost commercial shipowners significant sums lies uncomfortably with this argument . . . What is perhaps of crucial importance, therefore, is the fact that even maritime states with strong shipping interests and attachments to the present navigation/environmental protection balance were prepared to go along with the amendments and with the procedure for their adoption. It follows that they are likely to become 'generally accepted' standards quickly, so as to alter slightly the navigation/environment relationship . . . It also, however, underlines the limited nature of the concessions that such maritime states are prepared to make towards environmental protection; placing this matter in SOLAS involves some 'pretence' that it is a technical matter, involving no danger of constituting the thin end of a wedge that could be used to alter the navigation/environment relationship more fundamentally.<sup>41</sup>

Care should certainly be taken in not presuming that the UNCLOS favours navigational rights and that IMO instruments favour environmental protection. All contain a balance between the rights at stake. If the argument is made that IMO recent activities establish, or seek to establish, a new balance in favour of environmental protection, then, implicitly, one assumes that the UNCLOS favours the rights of user States over those of coastal States regarding international straits.<sup>42</sup> Such views were presented in Chapter 6, and it was noted that this could be true of any duty imposed on States to exercise their sovereignty in a way that preserves and does not impinge on a given right or collection of rights of third States on their own

<sup>41</sup> Plant in n. 38, 26–27 (emphasis in original). The effect of vessel traffic regulation is notably analysed by Gold, who argues that, if vessel traffic regulation expedites shipping, which it often does, shipowners will go along with it. On the other hand, there may well be additional costs arising out of these new systems: Many of the new systems will be costly, and some States will look to a 'user-pay' system or will pass costs along to users more indirectly as port dues. Also, there may be other indirect costs relating to changes in liability. Masters will find very little fault with vessel traffic management. In general, pilots and their organizations are strongly opposed to the approaches taken by coastal States in establishing vessel traffic regulation systems. At best, pilots suggest that such systems should have no more than an informational and advisory role. However, Gold believes that pilotage and vessel traffic regulation are perfectly compatible. E. Gold, 'Vessel Traffic Regulation: The Interface of Maritime Safety and Operational Freedom', 1983(14) *Journal of Maritime Law and Commerce*, 12–13.

<sup>42</sup> Kempton in Chapter 7, n. 73, 243.

territory.<sup>43</sup> The assumption that the UNCLOS 'favours' third States and, therefore, establishes the priority of navigational rights, invites action outside of the UNCLOS's jurisdictional frame when the safeguarding of other rights is at stake. This does not seem to be a reasonable approach. In addition, the UNCLOS does not give priority to the right of transit or archipelagic sea lanes passage. It gives priority to unimpaired, unimpeded, unobstructed, unhampered passage. The UN Secretary-General analysed, in 1995, IMO activity (the question of mandatory ships' routeing and regulations in the Turkish Straits) as 'restrictions on navigational rights in the form of mandatory ship routeing and reporting, with commensurate benefits, however, for the protection of the marine environment and maritime safety'.<sup>44</sup> The fact that these IMO instruments contain a safeguarding clause for straits should not be underestimated; at the very least, it means that a restriction in a given context is not seen as impairment or hampering.

The question of compulsory pilotage has caused enormous controversy, admittedly because it is an active navigational measure whereby the coastal State becomes involved in the navigation of the ship. In 1968, the Assembly of the IMCO (IMO) 'recommend[ed] to Governments that they should organize pilotage services in those areas where such services would contribute to the safety of navigation in a more effective way than other possible measures and should, where applicable, define the ships or classes of ships for which employment of a pilot would be mandatory'.<sup>45</sup> The Assembly only relied on Article 16(i) of the IMCO Constitution as legal basis.<sup>46</sup> The IMO has, since then, adopted several resolutions recommending the use of pilots in certain areas, including straits used for international navigation, and resolutions on the training of pilots.<sup>47</sup> In

<sup>43</sup> See Chapter 6, n. 14 and 15 accompanying text.

<sup>44</sup> Report of the Secretary-General, UN Doc. A/50/713 (1995), para. 88.

<sup>45</sup> Resolution A.159 (ES.IV).

<sup>46</sup> 'The functions of the Assembly shall be... to recommend to Members for adoption regulations concerning maritime safety, or amendments to such regulations, which have been referred to it by the Maritime Safety Committee through the Council'.

<sup>47</sup> See resolution A.960(23) (2003), Recommendations on Training and Certification and Operational Procedures for Maritime Pilots other than Deep-Sea Pilots, including Recommendation on Training and Certification of Maritime Pilots other than Deep-Sea Pilots and Recommendation on Operational Procedures for Maritime Pilots other than Deep-Sea Pilots; resolution A.480(IX) (1975) recommends the use of qualified deep-sea pilots in the Baltic, and resolution A.620(15) (1987) recommends that ships with a draught of 13 metres or more should use the pilotage services established by coastal States in the entrances to the Baltic Sea; resolution A.486(XII) (1981) recommends the use of deep-sea pilots in the North Sea, English Channel and Skagerrak; resolution A.579(14) (1985)

its Draft on ocean space submitted to the UN Sea-Bed Committee, Malta proposed that, in a strait less than 24 nautical miles wide which is or can be used for international navigation, the coastal State may require, when passage is hazardous, the use by transiting vessels of pilots designated by the coastal State.<sup>48</sup> The legality of compulsory pilotage in a strait used for international navigation was raised starkly when Australia in 2006 implemented a system of compulsory pilotage in the Torres Strait for certain categories of ships. This is linked to the designation of the Torres Strait as a Particularly Sensitive Sea Area (PSSA) by the IMO in 2003 and is examined in detail in Part VI. The Great Barrier Reef was designated as a PSSA in 1990 by the IMO, and at the same time, the MEPC in resolution 45(30) recommended that governments inform ships flying their flag that they should act in accordance with Australia's system of pilotage for merchant ships 70 or more metres in length, oil tankers, chemical tankers and gas carriers. The Australian system was only recommendatory at the time, but Australia made it compulsory on 1 October 1991 under Australian legislation. Also in 1991, the IMO in resolution A.710(17) recommended that ships 70 or more metres in length and all loaded oil tankers, chemical tankers and liquefied gas carriers use an Australian pilot when transiting the Torres Strait.<sup>49</sup>

In their joint proposal for the designation of the Torres Strait as a PSSA, Australia and Papua New Guinea notably suggested the extension of the existing Great Barrier Reef region compulsory pilotage area to the Torres Strait as an associated protective measure. They cited IMO resolution A.159 as relevant in that context.<sup>50</sup> The two States relied on

recommends that certain oil tankers, all chemical carriers and gas carriers and ships carrying radioactive material using the Sound (which separates Sweden and Denmark) should use pilotage services; resolution A.668(16) (1989) recommends the use of pilotage services in the Euro-Channel and IJ-Channel (in the Netherlands); resolution A.710(17) (1991) recommends ships of more than 70 metres in length and all loaded oil tankers, chemical tankers and liquefied gas carriers, irrespective of size, in the area of the Torres Strait and Great North East Channel, off Australia, to use pilotage services; resolution A.827(19) (1995) on *Ships' Routeing* includes in Annex 2, Rules and Recommendations on Navigation through the Strait of Istanbul, the Strait of Çanakkale and the Marmara Sea, the recommendation that 'Masters of vessels passing through the Straits are strongly recommended to avail themselves of the services of a qualified pilot in order to comply with the requirements of safe navigation'. [www.imo.org/OurWork/Safety/Navigation/Pages/Pilotage.aspx](http://www.imo.org/OurWork/Safety/Navigation/Pages/Pilotage.aspx). On Chilean legislation applicable to the Strait of Magellan, see Part II, Section 2.4. On recommended pilotage in the Straits of Malacca and Singapore, see IMO resolution 375(X) of 1977 and Section 7.6.1.2.3.

<sup>48</sup> UN Doc. A/AC.138/SC.II/L.28 (1973), Article 37(2)(c). <sup>49</sup> See Part VI.

<sup>50</sup> IMO Doc MEPC 49/8 (2003), paras. 5.7–5.8.

UNCLOS provisions in support of their claim: Interestingly, Articles 41 and 42(1)(a) were only used to justify the adoption of sea lanes and TSS, not compulsory pilotage.<sup>51</sup> For the two States, compulsory pilotage would be consistent with Article 211(6)(a), 39(2) and 194(1).<sup>52</sup> But Article 211 applies to the EEZ, not the territorial sea.<sup>53</sup> Article 194 is a provision of general application, and measures adopted under that provision must be 'consistent with the' UNCLOS. Article 39(2) does not give legislative competence to the coastal State. Australia and Papua New Guinea asserted that 'Article 39.2 of UNCLOS requires compliance with generally accepted international regulations, procedures and practices for safety at sea and for the prevention, reduction and control of pollution from ships. A mandatory pilotage scheme approved by IMO member states would reinforce the necessity of such practice for the prevention, reduction and control of pollution from ships'. Clearly, evidence would need to be advanced first that compulsory pilotage in straits is a generally accepted rule. However, the document also contains a provision on enforcement of the associated protective measures and says that:

[C]onsistent with Article 233 of UNCLOS, Australia may enforce measures against the violation of any laws regulating the recommended shipping route through the Torres Strait where the violation causes or threatens major damage to the marine environment. As a necessary adjunct to this traffic separation scheme, the mandatory pilotage scheme may also be enforced as a law regulating the recommended shipping route through the Torres Strait.<sup>54</sup>

It seems for these two States that compulsory pilotage is now considered to be a measure incidental to traffic measures taken under Article 41, hence, within the purview of Article 42(1)(a).

The MEPC approved, in principle, the extension of the existing Great Barrier Reef PSSA to include the Torres Strait Region and to request NAV 50 to consider the extension of the compulsory pilotage measures.<sup>55</sup> Australia and Papua New Guinea submitted a document to NAV 50 in which, this time, Article 42(1)(a) is relied on as a possible legal basis for compulsory pilotage:

Article 42.1(a) permits Australia to adopt laws and regulations regarding the safety of navigation and the regulation of maritime traffic in straits, in a manner consistent with Article 41. In the specific circumstances of the Torres Strait, which shares geographical and ecological characteristics

<sup>51</sup> Ibid., para. 5.13.      <sup>52</sup> Ibid., paras. 5.14–5.16.      <sup>53</sup> See Part VI.

<sup>54</sup> See n. 50, para. 6.2.1.      <sup>55</sup> IMO Doc. MEPC 49/22 (2003).

with the Great Barrier Reef, a mandatory pilotage scheme is a necessary means by which to ensure the safe passage of ships through such sea lanes and prescribed traffic separation schemes.<sup>56</sup>

The jurisdiction of the IMO to adopt compulsory pilotage, however, is not examined in that document. The delegation of Panama queried the jurisdiction of the IMO to consider proposals for compulsory pilotage in international waters in the absence of any appropriate instrument which could be used to regulate such requirements. The delegation of the Russian Federation was of the opinion that an amendment to an IMO Convention, for example, SOLAS, was necessary prior to the consideration of compulsory pilotage issues.<sup>57</sup> Several delegations concluded that compulsory pilotage in a strait used for international navigation could not be allowed, seeing as it went against the provisions of Article 38 of the UNCLOS. It was pointed out that the freedom of navigation through a strait used for international navigation superseded the rights of the coastal State to regulate traffic in its territorial sea. In their view, there was no precedent for the IMO to approve compulsory pilotage in international waters; neither was there any jurisdiction in any IMO convention.<sup>58</sup> Several other delegations and one observer delegation supported the proposal by Australia and Papua New Guinea, although some had serious reservations regarding legal issues.

These legal issues were debated more fully at the LEG 89.<sup>59</sup> There, the two sponsors were of the view that ‘the 1982 Convention does allow for the implementation of a system of compulsory pilotage in the Torres Strait. It is not prescriptive of the exact means by which this may be done other than that such a scheme must have the imprimatur of the relevant international organization, being IMO.’<sup>60</sup> Article 41 is identified as an appropriate legal basis: ‘Article 41 has not been given a strict interpretation. For example, there is little doubt that it covers “under keel clearance” . . . In that respect, there is no reason why it could not also cover pilotage, particularly when such pilotage is a necessary adjunct to compliance with designated sea lanes.’<sup>61</sup> More confusingly, Article 39(2) is said to ‘pick up

<sup>56</sup> IMO Doc. NAV 50/3 (2004), para. 5.10.

<sup>57</sup> IMO Doc. NAV 50/10 (2004), para. 3.16. <sup>58</sup> *Ibid.*, para. 3.22.

<sup>59</sup> Australia and Papua New Guinea, in the meantime, submitted another document to the MEPC, where it is stated that ‘the right of transit passage as provided in Part III of UNCLOS will not be impeded as a result of this proposal. Indeed the use of a pilot can only enhance transit by ensuring that it takes place expeditiously and without incident.’ IMO Doc. MEPC 52/10/3 (2004), para. 12.

<sup>60</sup> IMO Doc. LEG 89/15 (2004), para. 23. <sup>61</sup> *Ibid.*, para. 24 and n. 16.

action taken by IMO, including action to give effect to Article 211.6 of the 1982 Convention'.<sup>62</sup> For the two sponsors:

[T]he purpose and effect of pilotage is to promote transit through the Torres Strait, not to inhibit it. Pilotage does not retard or prevent passage, nor would Australia or Papua New Guinea be seeking to arrest ships while in transit. Pilotage is a measure entirely designed to facilitate the safe passage of vessels. It benefits the vessel, and protects the environment of the Torres Strait and the livelihood and traditional way of life of the indigenous people of the Torres Strait. A vessel that transits the Torres Strait without a pilot creates an unacceptable risk of running aground and impeding the passage of other vessels.<sup>63</sup>

Although Australia and Papua New Guinea sought to identify a legal basis in the UNCLOS for compulsory pilotage, they did not clearly distinguish this legal basis from the competence of the IMO to adopt the measure. This was taken up by some delegations at the LEG 89. Some delegates indicated that a compulsory pilotage scheme through IMO procedures was in full compliance with the overall principles of freedom of navigation.<sup>64</sup> Other delegations expressed the view that, because the UNCLOS does not contain specific Articles to prevent compulsory pilotage, compulsory pilotage can be introduced legally under the auspices of IMO. However, this should not be seen as a precedent, and the IMO should consider each proposal on a case by case basis.<sup>65</sup> On the other hand, some delegations were of the view that compulsory pilotage was of itself an impediment to transit passage. Therefore, the introduction of a compulsory pilotage scheme would have the practical effect of denying or hampering the transit passage regime. The Articles cited by Australia and Papua New Guinea as authority for compulsory pilotage did not provide the proper legal basis. Some delegations suggested that, in order for the IMO to be able to consider any other proposal concerning compulsory pilotage, further instruments were needed and should be developed. Some suggested that a new regulation in SOLAS chapter V could be adopted. Others thought that compulsory pilotage as a condition of port entry or compulsory pilotage

<sup>62</sup> Ibid., para. 26. Article 211(6) was said to provide another means by which Australia and Papua New Guinea can seek compulsory pilotage in the Torres Strait. Ibid., para. 27: 'While Article 211.6 refers to taking measures in respect of exclusive economic zones in which a coastal State does not have sovereignty, there is little doubt that similar measures could be applied in particularly sensitive sea areas over which a State does have sovereignty'. But the right of transit passage strongly qualifies the exercise of the sovereignty of the coastal State in its territorial sea.

<sup>63</sup> Ibid., para. 29. <sup>64</sup> IMO Doc. LEG 89/16 (2006), para. 228.

<sup>65</sup> Ibid., paras. 230–231.

under Article 43 of UNCLOS could be an alternative solution.<sup>66</sup> Some were of the view that it was not possible for governments to know, on the basis of the current proposal, whether transit passage would be impaired, impeded or hampered.<sup>67</sup> Hence, the Legal Committee remained divided.

In December 2004, the MSC agreed that MEPC resolution 45(30) should be revoked and replaced by a resolution that

recommends that Governments recognize the need for effective protection of the Great Barrier Reef and Torres Strait region and inform ships flying their flag that they should act in accordance with Australia's system of pilotage for merchant ships 70 m in length and over or oil tankers, chemical tankers and gas carriers, irrespective of size when navigating' in the Torres Strait.<sup>68</sup>

The committee saw no need to develop guidelines and criteria for a pilotage system in straits used for international navigation. It is evident for Australia that the system referred to was the one in force in the GBR, which is compulsory.<sup>69</sup> This was also clear for the MEPC.<sup>70</sup> The MEPC adopted the resolution in 2005.<sup>71</sup> However, the language of the resolution uses the word 'recommends', which was emphasized by the United States and other delegations.<sup>72</sup> Australia adopted a compulsory pilotage system in the Torres Strait in 2006, which raised serious controversy over the effect of the IMO resolution.<sup>73</sup>

There have been sharp divisions in literature over this issue. Beckman argues that Australia's prescriptive jurisdiction is limited under Article 42(1) and that pilotage is not included there. He offers a limited interpretation to Article 41, writing that nothing in the language of Article 41 or its *travaux préparatoires* suggests that it was intended to include measures such as pilotage schemes as adjuncts to sea lanes and TSS. He also supports views that see compulsory pilotage as an impairment of transit passage under Article 42(2).<sup>74</sup> According to him, there

<sup>66</sup> Ibid., paras. 232–237. With respect to the latter argument, Australia noted that the majority of vessels transiting the Torres Strait do not make port of calls in Australia or Papua New Guinea. On the possibility of bilateral agreements, Australia stated that they would not provide a comprehensive solution and that IMO is the appropriate forum to consider compulsory pilotage.

<sup>67</sup> Ibid., para. 238. <sup>68</sup> IMO Doc. MSC 79/23 (2004), para. 10.13.

<sup>69</sup> IMO Doc. MEPC 53/8/2 (2005), Annex 2, 2.

<sup>70</sup> IMO Doc. MEPC 53/24 (2005), para. 8.3. <sup>71</sup> IMO Doc. MEPC 133(53) (2005).

<sup>72</sup> Ibid., paras. 8.5–8.7. <sup>73</sup> See Part VI.

<sup>74</sup> R. C. Beckman, 'PSSAs and Transit Passage – Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS', 2007(38) *Ocean Development and International Law*, 344–345.

is no clear legal basis in any IMO conventions or other instruments for the imposition of compulsory pilotage by the IMO in a strait used for international navigation or in any maritime zone.<sup>75</sup> In a similar vein, Kaye argues that jurisdiction of the coastal State under Articles 41 and 42 only exists to implement navigation and safety matters in relation to sea lanes and TSS: '[L]egislation to compel transiting vessels to accept the services of a pilot, even if for reasons of maritime safety, would seem to go beyond what a State can legitimately impose'.<sup>76</sup> At the other end of the spectrum, Bateman and White argue that Article 42(1)(a) supports general wide-ranging provisions for the safety of navigation, and thus, in the Torres Strait, there is no reason that safety of navigation should not include compulsory pilotage, provided that it is proportionate to the risk. Furthermore, impairing or hampering is a question of fact, and it would need to be the subject of evidence from knowledgeable and informed sources as to whether, in fact, the practical effect of the regime hampers or impairs the ships so affected:

Of course, it is quite possible that a compulsory pilotage system could be operated in such a manner as to hamper or impair transit passage. If pilots were not available as required, if the fees were extortionate, or if the pilots were inefficient or incompetent, then it could be said that such a regime would hamper or impair straits passage. In Australia's case, however, the evidence does not justify any such description. The pilots are readily available, they are efficient and competent, and the fee is reasonable (about A \$4,000 per ship per passage).<sup>77</sup>

They do not discuss the jurisdiction of the IMO to adopt a compulsory pilotage scheme. Even when a treaty provision supplies the legal basis for the IMO to adopt compulsory routing and other safety measures, all controversies may not disappear: As was seen in Section 7.2, SOLAS V/10 allows for the adoption of mandatory routing measures, but these may not 'prejudice' the legal regime of straits, leaving the notion of 'prejudice' open-ended.

<sup>75</sup> Ibid., 347.

<sup>76</sup> S. B. Kaye, 'Regulation of Navigation in the Torres Strait: Law of the Sea Issues', in D. Rothwell and S. Bateman (eds.), *Navigational Rights and Freedoms and the New Law of the Sea* (Nijhoff, The Hague and Boston, 2000), 126, 128. See also J. Neher, 'Compulsory Pilotage in the Torres Strait', in M. H. Nordquist, T. T. B. Koh and J. N. Moore (eds.), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Nijhoff, Leiden and Boston, 2009), 349–350.

<sup>77</sup> S. Bateman and M. White, 'Compulsory Pilotage in the Torres Strait: Overcoming Unacceptable Risks to a Sensitive Marine Environment', 2009(40) *Ocean Development and International Law*, 194–196.

### 9.3 Elements for a balanced approach

The UNCLOS is based on a carefully crafted, delicate balance of interests. In its prompt release cases, the ITLOS had the opportunity to state that Article 73, which deals with alleged breaches of the fisheries laws of the coastal State in its EEZ and that State's duty of prompt release of arrested vessels and crews, establishes a balance between the interests of the flag State and those of the coastal State. Such balance of interests notably determines the reasonableness of the bond to be fixed by the coastal State or the legitimacy of a final judgment of confiscation which terminates the duty to promptly release vessels. Article 73(2) requires that the bond fixed by the detaining State be reasonable. From the case law of the Tribunal, one can see that reasonableness is an open-ended concept which aggregates certain factors, but no pre-determined formula exists; it is the end result which must be reasonable.<sup>78</sup>

Part III and Part IV also rest on a balance of interests, and it was argued in Section 9.2 that it is not a reasonable interpretation of the object and purpose of the regime of transit passage to assume that navigational interests trump coastal States' interests. A game can be played by coastal States to the effect that a measure may easily be presented as one that serves the safety of navigation and environmental protection, and environmental protection serves the interests of navigation itself, an ecological disaster having potentially disastrous consequences on the movement of vessels. A similar game can be played by flag States in holding that environmental measures are an indirect way of territorializing straits in a way that is incompatible with their international nature.

The only exceptions in the UNCLOS to the general lack of direct *enforcement* jurisdiction of the coastal State in relation to transit passage are Articles 233 and 234; this, leading to the arrest of the ship, may be viewed as an exception to the duty not to hamper transit passage or as not amounting to hampering of passage in the first place.<sup>79</sup> There is a general duty not to impede or hamper transit passage as a consequence of the *adoption* of measures on the navigation of ships or on the requirements to be met by them.<sup>80</sup>

<sup>78</sup> See V. Cogliati-Bantz, *Hoshinmaru (Japan v Russian Federation)* and *Tomimaru (Japan v Russian Federation)*, Prompt Release Judgments of 6 August 2007, 2009(58) *International and Comparative Law Quarterly*, 241.

<sup>79</sup> This is the case for the enforcement of the under-keel clearance requirements in the Straits of Malacca, and it is submitted that this is also how Article 234 works.

<sup>80</sup> On Article 234 and the duty to have due regard to navigation, see Part VI, Section 14.1.2.

Among all IMO-adopted measures, it seems that reporting requirements are the least restrictive. Even though the IMO has adopted mandatory TSS in straits and recommended areas to be avoided, both may retard the movement of vessels or intrude on their navigational plans. Pilotage admittedly imposes a higher degree of compulsion on vessels and, at an even higher end of the scale, there are measures prohibiting transit by certain ships. The IMO has recommended these two measures in the Strait of Bonifacio and recommended pilotage in the Torres Strait for certain categories of ships and also in Sound and the Great Belt for certain categories of ships, as well as in the Turkish Straits.<sup>81</sup> The IMO has a broad recommendatory power under Article 15(j) of its Constitution. The argument that it may only adopt mandatory measures if there is a conventional legal basis to do so is sound. The debates on the jurisdiction of the IMO to adopt a system of compulsory pilotage have, surprisingly, neglected the fact that, even though SOLAS chapter V allows for the adoption of mandatory routeing measures, the definition of what these measures are is to be found in the General Provisions on Ships' Routeing. Resolution A.572(14) was adopted on the basis of Article 15(j), and it defines a routeing system as a system of 'measures aimed at reducing the risk of casualties; it includes traffic separation schemes, two-way routes, recommended tracks, areas to be avoided, inshore traffic zones, roundabouts, precautionary areas and deep-water routes'.<sup>82</sup> If the definition includes listed measures, it does not appear to exclude others.

The regime of transit passage cannot operate without the assumption that an IMO-adopted measure is deemed not to hamper or impair transit passage. The IMO is not a Party to the UNCLOS, but it necessarily has to interpret the UNCLOS, seeing as the latter refers to the competent international organization in the field; the relevant IMO instruments safeguard the right of transit and archipelagic sea lanes passage. Also, the Parties to the UNCLOS, even when acting within the IMO, have a duty not to breach the UNCLOS; they are entitled in that respect to give an authentic interpretation of the UNCLOS. The committees structure at the IMO and the liberal amendment procedures of key conventions should not detract from the conclusion that, when the IMO takes action which warrants the assertion that it was appropriate for the fulfilment of one of its purposes, the presumption is that such action is not

<sup>81</sup> For the Danish Straits and the Turkish Straits, see Part II, Section 2.4. On recent measures in the Danish Straits, see also Part VI, Chapter 14, n. 125 and accompanying text.

<sup>82</sup> See Chapter 7, n. 31.

*ultra vires*.<sup>83</sup> The emphasis here is on the collective response to a proposal by the coastal State for a given measure relating to a strait. Such a collective response, which needs to be prepared in a representative, international forum, is the only acceptable way that ensures the international vocation of a strait used for international navigation.

The interests of the coastal State in a strait or archipelagic waters are open-ended, and this is a consequence of its sovereignty. The interests of third States are generally limited to navigational interests, but this does not necessarily mean that these interests are all well defined; the question of tall ships raised by Finland in the Great Belt proves it. Third States may also have special interests in relation to a strait or archipelagic waters, under an agreement with the coastal State or by virtue of the UNCLOS itself (Articles 47(6) and 51). These interests may affect the rights of passage that all States enjoy. The legitimacy of an interest claimed by the coastal State, or by a third State, and its impact on the regime of transit or archipelagic sea lanes passage, or on the coastal State's sovereignty, is best left to international, not unilateral, determination. Because impeding or hampering is a scalar notion, the degree of tolerance of the international community for a proposed measure, that is, an accepted restriction on navigation, depends firstly on the interest it seeks to protect and, secondly, on the way that interest is going to be served. For instance, fishing activities in archipelagic waters and the right of unobstructed transit in archipelagic sea lanes (or routes normally used for international navigation) under Article 53 need to be reconciled. When Indonesia prepared proposals for the designation of archipelagic sea lanes, a variety of considerations were taken into account.<sup>84</sup> When the international community has accepted restrictions to navigation, it will be concluded that the right of transit is not hampered or impaired.

In order to assess the effect of a proposed measure on the right of transit, it is suggested that the following be taken into account:

- the magnitude of those affected by the measure and the perception of a discriminatory effect;
- the nature of the restriction imposed on navigation and the perception of unreasonable restriction;
- the kind of requirements to be met by ships and the perception of unreasonable requirements;

<sup>83</sup> See *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* (Advisory Opinion), ICJ Rep. (1962), 168.

<sup>84</sup> See Part III, Section 4.3.2.2.3.

- the distinction between requirements themselves and associated fees; both have to be assessed on their own merits, and the unilateral imposition by the coastal State of a fee associated with a compulsory measure is likely to be perceived as an unlawful toll;<sup>85</sup>
- the nature of the interest claimed by the coastal State and the proportionality between the nature of the interest and the nature of the proposed measure;
- the proportionality between the nature of the proposed measure and the restrictions or the requirements imposed on ships;
- the ability for those particularly affected by the measure to receive compensation negotiated within an international framework;
- when all these elements are taken into account, the measure will be deemed not to constitute an impairment on the right of transit.

<sup>85</sup> On the question of fees, see Part V.



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## Preliminary remarks and genesis of Article 43 of the UNCLOS

Article 43 of the UNCLOS reads: ‘User States and States bordering a strait should by agreement cooperate: (a) in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation; and (b) for the prevention, reduction and control of pollution from ships’. To understand the rationale of that provision, it is necessary to first clarify the state of the law in relation to the territorial sea generally, for the right of the coastal State to charge fees or levy tolls or dues on ships navigating in the territorial sea has been the subject of some controversy.

Grotius, while arguing the duty of the coastal State not to hinder navigation which is of innocent intent in the part of the sea that it has occupied,<sup>1</sup> also argued that it was not contrary to the law of nature or of nations ‘if he who has taken upon himself the burden of protecting navigation and of making it safe by night-flares and marks indicating shoals, shall impose a fair tax on those who sail’.<sup>2</sup> It seems that there was no right to levy a tax merely for passage, for this would run against the very right of innocent passage. The fair tax to be collected was to defray the costs of navigational aids from which all seafarers benefited.<sup>3</sup> This is also the position of Vattel, who concluded that the nation could

<sup>1</sup> H. Grotius, *De jure belli ac pacis, libri tres* [1625] (F. W. Kelsey trans.) (Carnegie, Washington, DC, 1925), 212. Grotius had made it clear that the freedom of the seas he was defending concerned the outer sea or ocean, not a gulf or a strait or the expanse of sea which is visible from the shore. H. Grotius, *Mare liberum* [*The Freedom of the Seas*] [1609] (R. van Deman Magoffin trans.) (Oxford University Press, Oxford, 1916), 37. The law of nature did not prevent, in particular, the acquisition of sovereignty over a part of the sea gained by means of territory, in so far as those who sail over the part of the sea along the coast may be constrained from the land. Grotius, *De jure belli*, 214.

<sup>2</sup> Grotius, *De jure belli* in n. 1, 214.

<sup>3</sup> He notably gives the example of a toll collected by the Romans for the navigation of the Red Sea in order to defray the costs of the maritime force maintained against the expeditions of pirates. It is, however, unclear whether the ‘transit tax’ collected by Byzantium for the navigation of the Black Sea or the tax collected by the Athenians for the passage of the Hellespont Demosthenes were also used to defray costs. *Ibid.*, 215.

extend its sovereignty over the seas along its coasts (especially the bays and straits which are of greater importance to the safety of the State) but that access could not be lawfully refused to vessels when their purpose was innocent.<sup>4</sup> In a section on straits in particular, he wrote that the nation had a right to levy a moderate toll on vessels which passed through, partly because of the inconvenience they caused in obliging the nation to be on its guard and partly as the cost of the security provided for them against their enemies and pirates, of the expenditures entailed in the maintenance of lighthouses and buoys, and of other things necessary to the safety of navigators.<sup>5</sup> The power to levy a tax for passage alone is justified for those actually denying a right of innocent passage and thus, logically, there is to be no limit to the amount collected. Bynkershoek wrote that a man who holds a sea after a lawful occupation can also prohibit others from navigating it, whether absolutely or conditionally.<sup>6</sup> Such ambiguities were not lifted in the nineteenth century, if only because the customary nature of the right of innocent passage was not universally endorsed.<sup>7</sup> For those supporting a right of passage, it was evident that a tribute for passage could only be recognized in special agreements. The example is given of

<sup>4</sup> E. de Vattel, *The Law of Nations or the Principles of Natural Law* [1758] (Ch. G. Fenwick trans.) (Carnegie Institution, Washington, DC, 1916), 107–109.

<sup>5</sup> Such tolls should be based on the same reasons and be subject to the same rules as those of tolls on land and rivers. *Ibid.*, 109.

[O]ne of the principal duties of the government, in the interest of public welfare and of commerce in particular, will relate to its highways, canals, etc. . . . The construction and maintenance of all these works demand large expenditures, and therefore a Nation may with perfect right force all those who make use of them to contribute to them. This is the lawful source of the right of toll . . . But this right . . . has been made a pretense for great abuses . . . But the arbitrary Law of Nations, or the *custom* of Nations, at present tolerates the abuse so long as it is not carried to such an excess as to destroy commerce.

*Ibid.*, 44. See also G. F. de Martens, *Précis du droit des gens moderne de l'Europe*, vol. 1 (Dieterich, Göttingen, 1789), 196.

<sup>6</sup> C. van Bynkershoek, *De dominio maris dissertatio* [1703] (Oxford University Press, Oxford, 1923), 57. For him, it would not be surprising if the Spaniards subjected the Strait of Gibraltar to a tribute 'slight, to be sure, at first (otherwise the business would be very hard to begin), under the *pretext*, if not of maintaining light, at any rate of guarding the Mediterranean Sea from the pirates who dash out from the neighboring coast of Africa; and then heavy and ever heavier'. *Ibid.*, 58 (emphasis added). See also J. Selden, *Of the Dominion, or, Ownership of the Sea* (W. Du Gard, London, 1652), 123–124.

<sup>7</sup> E.g. F. Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (Pinter Publishers, London and New York, 1990), 39–40; E. Brüel, *International Straits: A Treatise on International Law*, 2 vols. (Sweet & Maxwell, London, 1947), vol. 1, 106, 108 (assessing the situation until 1914). See, notably, the UK Territorial Waters Jurisdiction Act 1878 in reaction to the ruling in *R. v Keyn*, 2 Ex.D. 63 [1876].

the dues paid to Denmark in relation to the Sound and the Belts.<sup>8</sup> But whether general international law permitted the coastal State to charge for the maintenance of navigational aids is unclear. Ortolan considered it fair that, when navigation in a strait was difficult and when ships could only navigate with the help of pilots, buoys, marks and lighthouses, passage could be subjected to the payment of certain fixed dues; these, however, were to be agreed upon by treaty.<sup>9</sup> He wrote that, in the territorial sea in general, a fee could be levied as indemnity for the maintenance of works or aids that were needed in the general interest of navigation.<sup>10</sup> Heffter opposed the levying of a toll for mere passage but not of charges for the use of navigational facilities.<sup>11</sup> At about the same time, Hautefeuille denied the right of innocent passage in the territorial sea and therefore allowed the levying of any sort of dues,<sup>12</sup> but he also expressed the opinion that these dues cannot apply to a strait, where navigation must not be impeded; therefore, no condition or dues of any sort could be imposed.<sup>13</sup> The possibility of abuse would be too great to impose a toll under the pretext of maintaining night-flares and buoys. The only exception was a charge for service rendered or a charge agreed upon in a convention.<sup>14</sup> For Lawrence, the right to collect a reasonable toll for passage in a strait became increasingly irksome with the growth of modern commerce; for him, navigation in straits had to be as free as it is on the high seas.<sup>15</sup> The tolls levied by Denmark were expressly denounced by Bluntschli

<sup>8</sup> Denmark was authorized by treaties to levy tolls for the passage of foreign merchant ships in the Sound and the Belts. These levies were first fixed in a treaty of 1645 between Denmark and the United Provinces and, for France, in a treaty of 1663. T. Ortolan, *Règles internationales et diplomatie de la mer*, 4th ed., 2 vols. (Henri Plon, Paris, 1864), vol. 1, 148. See Part II, Section 2.4.3.

<sup>9</sup> Ortolan in n. 8, 147. <sup>10</sup> *Ibid.*, 157.

<sup>11</sup> A. Heffter, *Le droit international public de l'Europe* (J. Bergson trans.) (Schröder, Berlin; Cotillon, Paris, 1857), 159.

<sup>12</sup> L. B. Hautefeuille, *Des droits et des devoirs des nations neutres en temps de guerre maritime*, 3rd ed., vol. 1 (Guillaumin, Paris, 1868), 55.

<sup>13</sup> *Ibid.*, 61, 64.

<sup>14</sup> *Ibid.*, 65–66. Otherwise, the charges must be borne solely by the coastal State. *Ibid.*, 67 (rejecting the claim by Azuni that a small due can be levied as compensation for the inconvenience caused by passage: *ibid.*, citing Azuni, *Droit maritime de l'Europe*, vol. 1, Chapter III, Article 2, para. 2).

<sup>15</sup> T. J. Lawrence, *The Principles of International Law* (Macmillan, London and New York, 1895), 177. Ortolan noted that the Sound dues, which were originally not very high and which were justified arguably to defray the costs of surveillance and protection, had increased so much with the development of maritime commerce that the annual revenue generated had become disproportionate in relation to the expenses that they could legitimately cover. The surplus thus constituted a kind of tribute for the mere use of the Danish Straits. Ortolan in n. 8, 149–150.

and Martens, among others, as an obstacle to navigation.<sup>16</sup> These writers did not deal with the right to collect fees for navigational aids in the territorial sea in general, or in a strait in particular, and this is also the case for instance for Rivier,<sup>17</sup> Wheaton,<sup>18</sup> von Liszt,<sup>19</sup> and also, in the early twentieth century when the right of innocent passage was established with certainty for merchant ships, for such writers as Hall and Hyde.<sup>20</sup> The Institut de droit international in 1894 determined that ships will comply with the special regulations adopted by the coastal State in the interest of and for the security of navigation.<sup>21</sup> The International Law Association made similar analyses and reached similar conclusions.<sup>22</sup> Westlake wrote that Article 7 of the Institut's resolution does not include a right to exact payment of dues by ships not entering the coastal State's harbour, 'under pretext of providing the navigation with the necessary lights and buoys'.<sup>23</sup> This opinion was shared by Oppenheim.<sup>24</sup> On the eve of the 1930 Hague Conference, the Harvard Research adopted a Draft Convention on the law of territorial waters in which Article 14 stated that 'a State must permit innocent passage through its marginal seas by the vessels of other States, but it may prescribe reasonable regulations for such passage'. The

<sup>16</sup> See J. C. Bluntschli, *Le droit international codifié* (C. Lardy trans.) (Guillaumin, Paris, 1870), 27 (considering that the right of Denmark to levy the Sound dues, recognized in treaties, had rightly been opposed by the United States as being contrary to the natural law on freedom of the seas); F. F. Martens, *Traité de droit international*, vol. 1 (A. Léo trans.) (Chevalier-Marescq, Paris, 1883), 507.

<sup>17</sup> A. Rivier, *Principes du droit des gens*, vol. 1 (Arthur Rousseau, Paris, 1896), 148.

<sup>18</sup> H. Wheaton, *Elements of International Law*, the literal reproduction of the edition of 1866 by Richard Henry Dana, Jr. (G. G. Wilson ed.) (Clarendon Press, Oxford, 1936), 228.

<sup>19</sup> F. von Liszt, *Das Völkerrecht systematisch dargestellt* (O. Haering, Berlin, 1898), 52.

<sup>20</sup> W. E. Hall, *A Treatise on International Law*, 8th ed. (A. P. Higgins ed.) (Clarendon Press, Oxford, 1924), 197–198; C. C. Hyde, *International Law, Chiefly as Applied and Interpreted by the United States* (Little, Brown and Co., Boston, 1922), 277–279, 404.

<sup>21</sup> Article 7 of the Institut de droit international's 1894 resolution on the definition and status of the territorial sea, 1894(XIII) *Annuaire*, 328. The provision was adopted without a debate. *Ibid.*, 316.

<sup>22</sup> *Report of the 17th Conference* (1895), 102 et seq.

<sup>23</sup> J. Westlake, *International Law*, 2nd ed., 2 vols. (Cambridge University Press, Cambridge, 1910), vol. 1, 194. For him, there is no exception to the rule that dues cannot be levied on passing ships without express sanction from treaty: *ibid.*, 195.

<sup>24</sup> L. Oppenheim, *International Law: A Treatise*, 2 vols. (Longmans, Green and Co., New York and London, 1905–1906), vol. 1, 243. Calvo was ready to accept that, in the case of a strait where navigation is very dangerous, the State which maintains lights and pilotage services could be reimbursed for the costs involved. C. Calvo, *Manuel de droit international public et privé conforme au programme des facultés de droit* (Arthur Rousseau, Paris, 1881), 124.

comment indicates that the innocent passage of vessels is free of tolls, light dues or other exactions.<sup>25</sup>

The 1930 Hague Codification Conference lifted any ambiguity, if any was left, in the state of the law. Article 7 of the Draft on the legal status of the territorial sea annexed to the Final Act read: ‘No charge may be levied upon foreign ships by reason only of their passage through the territorial sea. Charges may be levied upon a foreign vessel passing through the territorial sea as payment for specific services rendered to the vessel. These charges shall be levied without discrimination.’<sup>26</sup> The Second Committee (Territorial Sea), in its Observations to Article 7, indicated:

The object of this article is to exclude any charges in respect of general services to navigation (light or conservancy dues, etc.), and to allow payment to be demanded only for special services rendered to the vessel (pilotage, towage, etc.). These latter charges must be made on the basis of strict equality and with no discrimination between one vessel and another. The provision of the first paragraph will include the case of compulsory anchorage in the territorial sea, in the circumstances indicated in Article 3, last paragraph.<sup>27</sup>

This is in contrast with the Draft prepared in 1927 by Schücking as Rapporteur to the Sub-Committee (Territorial Waters) of the League of Nations’ Committee of Experts, which envisaged that ‘dues intended solely to defray expenses of supervision and administration’ may be levied within the territorial waters.<sup>28</sup> Hence, the likely rule that had crystallized by 1930 was that both tolls for mere passage in territorial waters (including in straits) and levies to defray the costs of aids to navigation were prohibited. This was endorsed by the ILC in Article 19 of its Draft Articles.<sup>29</sup> In its commentary, the Commission indicated that the Article barred

<sup>25</sup> 1929(23)(Spec. Supp.) *American Journal of International Law*, 295. The comment adds: ‘It seems to be the practice of states to refrain from levying dues on vessels in innocent passage and that practice is *so well established* that the power of the littoral state to prescribe regulations should not be interpreted to include the power to levy dues.’ *Ibid.*, 296 (emphasis added).

<sup>26</sup> Reproduced in 1930(24)(Supp.) *American Journal of International Law*, 185–186.

<sup>27</sup> *Ibid.*, 243. Article 3(3) reads: ‘Passage includes stopping and anchoring, but in so far only as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.’

<sup>28</sup> L.o.N. Doc. C.196.M.70.1927, V, 193, Article 10.

<sup>29</sup> Yearbook of the ILC, vol. II (1956), Report to the General Assembly, 274: ‘1. No charge may be levied upon a foreign ship by reason only of their passage through the territorial sea. 2. Charges may only be levied upon a foreign ship passing through the territorial sea as payment for specific services rendered to the ship.’

any charge in respect of general services to shipping (light dues, buoyage dues, etc.) and allowed payment to be demanded only for special services rendered to the ship (pilotage, towage, etc.).<sup>30</sup> The ILC reserved special rights recognized in conventions.<sup>31</sup> The provision became Article 18 of the Convention on the Territorial Sea and the Contiguous Zone, with the addition that the charges must be levied without discrimination.<sup>32</sup>

The limitation of the right of the coastal State to levy charges only for specific services rendered may have been the result of the bitter memories left by the Danish dues, but it also admittedly indicates that there is no general duty for the coastal State to guarantee or facilitate navigation in the territorial sea. The right of innocent passage implies the reflex duty of the coastal State to give appropriate publicity to any danger to navigation, of which it has knowledge (Article 24(2) of the UNCLOS) but not to ensure that navigation is always possible; proposals to that effect met with sharp criticism at the Geneva Conference.<sup>33</sup> They

<sup>30</sup> The Commission did not include the non-discrimination clause that appeared in the 1930 Draft Article, because it concluded that, although the rule may be a general one, cases may occur in which special rights granted by one State to another may be fully justified by their special relationship; in the absence of treaty provisions to the contrary, other States could not invoke similar treatment. *Ibid.*

<sup>31</sup> *Ibid.* See, e.g., the rights of Turkey under the Montreux Convention in Chapter 11, n. 62.

<sup>32</sup> 516 UNTS 205, opened for signature on 29 April 1958 and entered into force on 10 September 1964. The inclusion of the non-discrimination clause (see n. 30) was the result of an amendment suggested by Norway. UNCLOS I, III Official Records, 115.

<sup>33</sup> Article 4 of the Hague Conference's Final Act in relation to the territorial sea indicated that a coastal State may put no obstacles in the way of the innocent passage of foreign vessels. See n. 26, 241. Article 16(1) of the ILC's Articles on the Law of the Sea indicated: '1. The coastal State must not hamper innocent passage through the territorial sea. It is required to use the means at its disposal to ensure respect for innocent passage through the territorial sea and must not allow the said sea to be used for acts contrary to the rights of other States'. Yearbook of the ILC, vol. II (1956), Report to the General Assembly, 273. The commentary simply states that this confirmed the principles upheld by the ICJ in the *Corfu Channel* case. *Ibid.* See n. 35. This was rejected in Geneva. The United States notably indicated that the rule in the second sentence of Article 16 imposed duties which went far beyond existing principles of international law, and full compliance might constitute an onerous economic burden, given that it might be construed as constituting a rule of absolute liability on the part of the coastal State for failure to take effective steps to assist passage. The ICJ's dictum was unsuited to codification and was only supported by a bare majority at the ILC. UN Doc. A/CONF.13/C.1/L.38, UNCLOS I, III Official Records, 220. See Yearbook of the ILC, vol. I (1954), 113. At that meeting of the ILC, MM. Cordova, Zourek, Pal and Hsu argued that the duty envisaged was excessive. The Netherlands also warned against an interpretation implying a specific responsibility of coastal States for obstacles, not of their own making, in the territorial sea: UN Doc. A/CN.4/90, Yearbook of the ILC, vol. II (1955), 51. In Geneva, the US proposal was adopted by the First Committee by 26 votes to 18, with 25 abstentions: UNCLOS I, III Official Records, 115.

had met with similar opposition to earlier analogous proposals.<sup>34</sup> Had the law evolved in this way, a charge to defray the costs of keeping the territorial sea navigable might, arguably, have been understandable. This does not mean that there is only a duty of abstention on the part of the coastal State. The ICJ in the *Corfu Channel* case articulated a general duty to warn of dangers in the territorial sea. It appears from the circumstances of the judgment that this was a duty to inform of dangers of a certain magnitude, that is, dangers susceptible of causing harm in violation of elementary considerations of humanity and the principle of the freedom of maritime communications.<sup>35</sup> However, this duty was endorsed by the ILC,<sup>36</sup> and it was later embodied in Article 15(2) of the Convention on the Territorial Sea and applies to ‘any’ dangers to navigation.<sup>37</sup> The degree of knowledge required of the State ought to be read with the circumstances of that judgment in mind, because it does not establish as a consequence of territorial sovereignty the presumption that the State knows of all dangers on its territory or in its territorial sea at all times.<sup>38</sup> The duty to publicize dangers to navigation was modified at the Geneva Conference at the request of the United Kingdom, endorsed by the

On the other hand, a Yugoslav proposal that Article 16 be amended to include that ‘the coastal State is required to take steps which are necessary for the safety of navigation’ (UN Doc. A/CONF.13/C.1/L.16, Yearbook of the ILC, vol. II (1955), 213) was rejected by 17 votes to 11, with 43 abstentions: UNCLOS I, III Official Records, 115.

<sup>34</sup> When the Institut de droit international was considering the status of the territorial sea, the report by Barclay contained the provision that the coastal State must attend to the security of navigation in its territorial sea. This was opposed by Strisower, who thought that it could lead to the international responsibility of the State for any possible negligence. That provision was later deleted. 1894(XIII) *Annuaire*, 154.

<sup>35</sup> *Corfu Channel case (United Kingdom v Albania) (Merits)*, ICJ Rep. (1949), 4, 22.

<sup>36</sup> Yearbook of the ILC, vol. II (1956), Report to the General Assembly, 273, Article 16(2).

<sup>37</sup> Rapporteur François, in his Second Report of 1953, mentioned in Article 15 that the coastal State ‘est tenu d’user des moyens dont il dispose pour sauvegarder dans la mer territoriale le principe de la liberté des communications et de ne pas laisser utiliser ces eaux aux fins d’actes contraires aux droits d’autres Etats’ [‘is bound to use the means at its disposal to safeguard in the territorial sea the principle of freedom of communications and must not allow these waters to be used for activities committed against the rights of other States’]. UN Doc. A/CN.4/61, Yearbook of the ILC, vol. II (1953), 71. When the ILC discussed it in 1954, Lauterpacht suggested the addition of the duty to give notice of any *serious* danger to shipping. Yearbook of the ILC, vol. I (1954), 111. (He added that it was not desirable to go so far as to say that the coastal State was under a duty to remove obstacles to shipping, for example, by raising submerged wrecks, but it should notify ships of the existence of such obstacles. *Ibid.*) This was adopted one day later by 11 votes to none without any explanation as to deletion of the adjective ‘serious’. Yearbook of the ILC, vol. I (1954), 117.

<sup>38</sup> *Corfu Channel* case in n. 35, 18–21.

Drafting Committee, from a duty to give 'due' publicity to a duty to give 'appropriate' publicity,<sup>39</sup> emphasizing perhaps that relevant circumstances will be prevalent.<sup>40</sup> This duty to inform will, in all likelihood, be implemented by the provision of certain minimum aids to navigation, without which the substance of the right of safe innocent passage itself might be prejudiced. The provision of basic navigational aids being free for foreign ships is a consequence of sovereignty over the territorial sea.<sup>41</sup> There is, however, a further element which indicates that, from a practical point of view, the navigational aids supplied by coastal States will, admittedly, be of a standard higher than the minimum requirements associated with a duty to warn: Firstly, the coastal State will, arguably, strive to ensure safety of navigation off its coasts for its own nationals. Secondly, the right of innocent passage is a reciprocal right that foreign States enjoy but that, in turn, the coastal State expects to enjoy in the territorial seas of other States. The important aspect which emerges from the majority view of writers in the nineteenth century is that, although navigational aids such as lighting and buoys are doubtless of great use to navigation, the development of maritime commerce and the relative equality of nations at the time meant that it was thought easier to distribute the burdens and the benefits of navigational aids among all the seafaring nations in a fairly equitable manner; the nation which performed its administrative duty by erecting and maintaining help for maritime traffic secured to its own subjects, through treaties of commerce and navigation, the advantages of the parallel administrative action of all other nations.<sup>42</sup>

<sup>39</sup> UN Doc. A/CONF.13/C.1/L.37, UNCLOS I, III Official Records, 218, and *Corfu Channel* case in n. 35, 115.

<sup>40</sup> See S. N. Nandan and S. Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (Nijhoff, Dordrecht, 1993), 227.

<sup>41</sup> E.g. H. Yang, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (Springer, Berlin, 2006), 183; Yearbook of the ILC, vol. I (1954), 112 (comments by Amado and Lauterpacht). The French text of Article 15 says that the coastal State 'est tenu de faire connaître de façon appropriée tous les dangers dont il a connaissance'; the versions in Articles 24 and 44 indicate that the State must 'signaler par une publicité adéquate'. It is a well-known rule that territorial sovereignty has corollary duties, in particular the obligation to protect within the territory the rights of other States. *Island of Palmas (Netherlands v United States)*, 2 RIAA 828, 839 (arbitral award of 4 April 1928).

<sup>42</sup> See F. von Holtendorff, *Handbuch des Völkerrechts*, vol. 2 (Richter, Hamburg, 1887), 494 (English translation in Westlake in n. 23, vol. 1, 194). See also Lawrence in n. 15; E. Gold, 'Transit Services in International Straits: Towards Shared Responsibilities', in A. Hamzah (ed.), *The Straits of Malacca* (Pelanduk, Kuala Lumpur, 1997), 226. It is certainly no

Articles 15(2) and 18 of the Convention on the Territorial Sea became Articles 24(2) and 26 of the UNCLOS, although not without occasional challenge. For instance, an Eight-Power Draft presented in 1973 at the Sea-Bed Committee contained the provision that ‘the coastal State shall have the right to be compensated for works undertaken to facilitate [innocent] passage’.<sup>43</sup> At UNCLOS III, the rule in Article 15(2) of the Convention on the Territorial Sea was incorporated verbatim into the Main Trends Working Paper of the Second Committee.<sup>44</sup> The rule in Article 18 is also already contained in the Main Trends Working Paper.<sup>45</sup> The provision in Article 44 of the UNCLOS, which mirrors Article 24(2) and which applies specifically to Part III, as well as to Part IV in accordance with Article 54, appeared early on during the negotiations.<sup>46</sup>

accident that the Sound Dues were abolished (1857) at a time when maritime commerce struggled; the potential abuse, already denounced by Vattel (in n. 4–5), and the difficulty of exacting tolls, meant that the international community came to prefer a system of free aids enjoyed on a reciprocal basis financed by internal tax revenues or other levies on commerce.

<sup>43</sup> UN Doc. A/AC.138/SC.II/L.18, Article 11(3) (Draft Submitted by Cyprus, Greece, Indonesia, Malaysia, Morocco, the Philippines, Spain and Yemen). The United States believed that this would create a ‘vague new right’. UN Doc. A/AC.138/SC.II/SR.51, 12.

<sup>44</sup> UN Doc. A/CONF.62/L.8/Rev.1, Appendix I, UNCLOS III, III Official Records (1974), 113, Provision 32. The provision was subsequently modified to substitute ‘shall’ for ‘is required’: UN Doc. A/CONF.62/WP.8/Rev.1, UNCLOS III, V Official Records (1974), 157, Article 23(2). The switch from the plural to the singular in ‘danger’ was made subsequently by the Drafting Committee.

<sup>45</sup> UN Doc. A/CONF.62/L.8/Rev.1, Appendix I, UNCLOS III, III Official Records (1974), 113, Provision 38. A UK Draft would have added that the charges must be reasonable: UN Doc. A/CONF.62/C.2/L.3, UNCLOS III, III Official Records (1974), 185, Article 21(2) (UK Draft Articles). In any event, the charge must be reasonably commensurate with the cost of providing the service; otherwise, it would serve as a disguised toll on passage: see Nandan and Rosenne in n. 40, 236 (also noting that, in the UNCLOS, Article 26 is applicable to all ships, whereas in the Convention on the Territorial Sea, Article 18 was contained in a section applicable to merchant ships only).

<sup>46</sup> See UK Draft Articles in n. 45, 186, Article 6 (referring to ‘a straits State’). Already at the Sea-Bed Committee, the representative of Poland said that the coastal States had, in relation to straits, the obligation to publicize information on obstacles or dangers to navigation known to them. UN Doc. A/AC.138/SC.II/SR.73, 2. The Main Trends Working Paper contained a Provision 54 wherein ‘the coastal State is required to give appropriate publicity to any obstacle or danger to navigation, of which it has knowledge, within the strait’. It also indicated that the coastal State ‘shall make every effort to ensure speedy and expeditious passage’: UN Doc. A/CONF.62/L.8/Rev.1, Appendix I, UNCLOS III, III Official Records (1974), 116. The equivalent of Article 44 is present in the early Drafts on archipelagic waters presented to UNCLOS III (e.g. UN Doc. A/CONF.62/C.2/L.52, UNCLOS III, III Official Records (1974), 228, Article 5(10) (proposal by Bulgaria, the GDR and

The question is quite different for the ability of the coastal State to levy charges in relation to transit passage and archipelagic sea lanes passage, if only because neither Part III nor Part IV of the UNCLOS contains provisions analogous to Article 26. The consequence of the absence of such a provision is a matter of interpretation.<sup>47</sup> One can note from the outset a Maltese proposal at the Sea-bed Committee with the following characteristics: The charges are to be levied only with respect to straits less than 24 nautical miles in breadth; they were to be levied only when the conditions of navigation and the risk of accident so require (that is, when the strait ‘requires dredging, the installation and maintenance of aids to navigation or the adoption of other measures to maintain or facilitate safe passage, or when passage of certain types or classes of vessels, in the event of accident, could cause considerable loss of human life or substantial injury to economic activities or to the marine environment in the area’); they were to be equitable and payable without discrimination by the relevant vessels (not necessarily all vessels); they were to be paid into a fund administered by an international organization and used to maintain navigational aids or to compensate the coastal State in the event of damage; and the amount of the charge was to be determined by international agreement between the organization and the coastal State(s).<sup>48</sup> The Maltese Draft otherwise emphasized that the coastal State(s) may not levy charges or tolls on vessels, their cargo, their crew or their passengers exercising the right of passage through straits used for international navigation but was silent on charges for specific services rendered.<sup>49</sup> The proposal which had been made in the

Poland)) and in the Main Trends Working Paper (UNCLOS III, III Official Records, 138, Provision 219, formula B) but without the ‘duty to warn of dangers’ component. The latter appeared in the Informal Single Negotiating Text: UN Doc. A/CONF.62/WP.8/Part II, UNCLOS III, IV Official Records (1975), 170, Article 126. Djalal argues that there is no stipulation that archipelagic sea lanes must be ‘safe’ under Article 53(1): ‘There was an objection to this word during the Conference, since the word “safe” implied obligation to provide navigation on the archipelagic states. Recognising this difficulty, the word “safe” was later abandoned and the word “suitable” was considered more appropriate’. H. Djalal, ‘The 1982 UN Convention on the Law of the Sea and Navigational Regimes’, in D. M. Johnston and A. Sirivivatnanon (eds.), *Maritime Transit and Port State Control: Trends in System Compliance* (Innomedia, Bangkok, 2000), 78.

<sup>47</sup> See Section 12. <sup>48</sup> UN Doc. A/AC.138/SC.II/L.28 (1973), Article 40.

<sup>49</sup> *Ibid.*, Article 40(1). A Fijian Draft reproduced Article 18 of the Convention on the Territorial Sea (UN Doc. A/AC.138/SC.II/L.42), on which Canada commented that this was ‘novel and constructive’ and could allay any fears that toll-gates might be set up at the limit of economic zones. UN Doc. A/AC.138/SC.II/SR.69, 10.

Eight-Power Draft and which concerned the territorial sea in general, for the Draft did not articulate a special right of passage in straits,<sup>50</sup> had been justified by Indonesia to facilitate navigation without over-burdening the coastal States.<sup>51</sup> Similarly, a Four-Power Draft proposed that the 'coastal State may require the co-operation of interested States and appropriate international organizations for the establishment and maintenance of navigational facilities and aids in a strait'.<sup>52</sup> However, at the Third Conference, an early British proposal very similar to Article 43 of the UNCLOS departed considerably from these suggestions.<sup>53</sup> That Article reads: 'User States and States bordering a strait should by agreement cooperate: (a) in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation; and (b) for the prevention, reduction and control of pollution from ships'. The only differences were that the UK Draft contained the word 'navigation' instead of 'navigational',<sup>54</sup> it did not mention 'reduction' of pollution,<sup>55</sup> and the British clause envisaged alternative, not cumulative, co-operation.<sup>56</sup> Article 43, however, is not among the provisions applicable to archipelagic States by incorporation in Article 54. The early

<sup>50</sup> See n. 43.

<sup>51</sup> UN Doc. A/AC.138/SC.II/SR.73, 17:

[T]he compensation . . . was not intended to be a toll, but merely compensation for the work which the coastal State might have done to facilitate the passage of others . . . Indonesia . . . might not be in a position to allocate funds to make its waters safe for mammoth tankers. However, if Indonesia failed to improve its navigational aids, it would be accused of neglecting those straits, and the dangers to the country itself would be multiplied.

<sup>52</sup> UN Doc. A/CONF.62/C.2/L.16, UNCLOS III, III Official Records (1974), 195, Article 23 (Draft proposal by Malaysia, Morocco, Oman and Yemen, which only envisaged non-suspendable innocent passage in straits). For the rest of the territorial sea, the Draft repeated Article 18 of the Convention on the Territorial Sea: *ibid.*, 193, Article 10.

<sup>53</sup> UN Doc. A/CONF.62/C.2/L.3, UNCLOS III, III Official Records (1974), 186, Article 5.

<sup>54</sup> The switch was made in 1981 by the Drafting Committee. See UN Doc. A/CONF.62/L.67/Add.1/Rev.1.

<sup>55</sup> The term was added in the Informal Composite Negotiating Text, UN Doc. A/CONF.62/WP.10, UNCLOS III, VIII Official Records (1977), 11, Article 43.

<sup>56</sup> The change was made in the Revised Single Negotiating Text, UN Doc. A/CONF.62/WP.8/Rev.1/Part II, UNCLOS III, V Official Records (1975), 160, Article 41. A Moroccan proposal would have added co-operation 'for the establishment and maintenance of any other device calculated to safeguard the exercise of the right of transit passage in accordance with the provisions of this Part [Part III of the UNCLOS] and other rules of international law'. Doc. C.2/Informal Meeting/22 (1978), Article 43, V Platzöder, 32.

proposals on archipelagos at the Sea-Bed Committee do not incorporate parallel suggestions that had been made in regard to the territorial sea or straits more specifically, and the same goes for the documents of the Third Conference.<sup>57</sup>

<sup>57</sup> See references in n. 46 *in fine*.

## Scope of Article 43: interpretation and suggested implementation

### 11.1 Fees for service in the territorial sea, straits and archipelagic waters

Article 43 was adopted in order to establish a balance between the interests of the States bordering straits and of the States using the straits.<sup>1</sup> That provision does not expressly address the issue of the recovery of costs associated with establishing aids to navigation and other pollution-prevention measures, and this is not the only matter that can be addressed in agreements under Article 43. It is nevertheless true that the question of costs is central in the literature on the topic and that Article 43 primarily covers the adoption of mechanisms leading to the equitable sharing of the burdens associated with the prevention of risks in straits.<sup>2</sup>

One cannot fail to note that Article 26 is not repeated in Parts III and IV. A Malaysian informal proposal, which contained what was to become Article 43, would have expressly incorporated the provisions of Article 26 into the regime of straits.<sup>3</sup> This was not adopted. Hence, from the structure of the UNCLOS, Oxman concludes that Article 26(2) regarding payment for specific services rendered to a ship is not applicable to ships

<sup>1</sup> See the General Statement by the British Delegate, UNCLOS III, II Official Records, 101.

<sup>2</sup> The question of costs and, hence, fees and burden sharing, is implicit in the opinion that 'the question under Article 43 is one of practical measures, such as surveys, navigational aids, and the like'. B. H. Oxman, 'Observations on the Interpretation and Application of Article 43 of UNCLOS with Particular Reference to the Straits of Malacca and Singapore', 1998(2) *Singapore Journal of International and Comparative Law*, 419. See also S. N. Nandan and D. H. Anderson, 'Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982', 1989(60) *British Year Book of International Law*, 194:

Sub-paragraph (a) would form a basis for international co-operation to defray the cost of such things as new lighting or buoying schemes, as well as the dredging of new channels for deep draught vessels. . . Sub-paragraph (b) would form a basis for co-operation in the provision of navigational aids in order to prevent the grounding or collision of vessels. That course would reduce the risks of pollution.

<sup>3</sup> Proposal of 1976 on Article 41(1) of the RSNT II, IV Platzöder, 398.

exercising the right of transit passage.<sup>4</sup> He had supported this analysis earlier by noting that the same members of most delegations generally worked on both the innocent passage and straits texts at UNCLOS III and that the delegations of Fiji and the United Kingdom played central roles.<sup>5</sup> However, both the Fijian and the British delegates believe that Part III *does not* prevent the levying by the States bordering straits of charges for specific services rendered as envisaged in Article 26(2).<sup>6</sup> It is thus essential to determine what constitutes a specific service. The negotiating history of Article 26, dating back to 1930, makes it clear that what is prohibited is not simply tolls and fees for passage but also charges to recover the costs of general services to navigation, such as lights, conservancy dues or buoyage; the coastal State is also not prohibited from levying charges for specific services, such as pilotage or towage.<sup>7</sup> Gidel reported that, in reply to a questionnaire sent by the Preparatory Committee for the 1930 Hague Conference, Sweden emphasized that ‘services rendered’ are not services rendered to navigation in general but services rendered to a specific vessel. This, Gidel wrote, reflected the state of the law at the time.<sup>8</sup>

<sup>4</sup> B. H. Oxman, ‘Sub-Regional, Regional and International Co-operation in Responding to and Deterring Transboundary Marine Pollution’, 1999(3) *Singapore Journal of International and Comparative Law*, 426. Oxman moderated his approach in an earlier article, writing that ‘[t]his omission is arguably without prejudice to the rare case in which liability arises under general principles of law regarding *negotiorum gestio* or unjust enrichment’. B. H. Oxman, ‘The Regime of Warships under the United Nations Convention on the Law of the Sea’, 1984(24) *Virginia Journal of International Law*, 858.

<sup>5</sup> Oxman in n. 2, 414.

<sup>6</sup> E.g. S. N. Nandan, ‘Management of Straits Used for International Navigation: International Cooperation in Malacca and Singapore Straits’, 1999(3) *Singapore Journal of International and Comparative Law*, 432–433: ‘A coastal State may, however, without discrimination, levy a charge upon a foreign ship exercising its right of innocent passage in the territorial sea, but only for “specific services rendered to the ship” . . . There is nothing in the Convention prohibiting charges for similar services in straits which are part of the territorial sea’; Nandan and Rosenne in Chapter 10, n. 40, 383: ‘Article 43 does not preclude the levying of charges for specific services rendered to a ship in transit’; D. H. Anderson, ‘Funding and Managing International Partnership for the Malacca and Singapore Straits’, 1999(3) *Singapore Journal of International and Comparative Law*, 446: ‘These rules [Article 26] apply also to those parts of the territorial sea which are included in straits used for international navigation. Charges may be imposed, on a non-discriminatory basis, only for specific services rendered to a ship, such as pilotage or towage’.

<sup>7</sup> See Chapter 10, n. 26 et seq. and accompanying text.

<sup>8</sup> G. Gidel, *Le droit international public de la mer*, 3 vols. (Mellottée, Chateauroux, 1932–1934; reprinted, Topos, Vaduz, 1981), vol. III, 230 (also noting that the Institut de droit international rejected in 1892 a suggestion that a charge could be levied on passing ships in certain cases; *ibid.*, 231, and, for the 1894 work of the Institut, Chapter 10, n. 21).

It is submitted that this is also the interpretation to be given to Article 26 of the UNCLOS. It is improbable to refuse to the State bordering a strait, or to an archipelagic State, the ability to levy a charge for a service rendered to a vessel at the vessel's request. This is even more compelling in the case of archipelagic waters which lie landward of the inner limit of territorial seas where the State has the express right under Article 26(2) to levy charges. One should not draw normative consequences from the absence of Article 26 in Parts III and IV. There is no reason not to believe that the specific service under consideration is a service requested by the vessel itself, that is, a service that includes an element of choice and that is provided, not required, by the coastal State. The service must benefit a particular vessel and must not be compulsory, and the charge must be commensurate to the service.<sup>9</sup> Ünlü correctly distinguishes between such general services as lighting or patrolling straits against piracy and terrorism and specific services, such as pilotage, towing and escort services, which are provided to individual vessels and for which the State can charge. A service that is imposed cannot be considered a specific service.<sup>10</sup>

It is submitted that Article 43 per se does not emasculate the ability of the coastal State to charge for specific services. What Article 43 purports to achieve is to find means, notably financial arrangements, to 'temper, through cooperation, the financial impact of the general obligation of

<sup>9</sup> 'Service' is not a defined term. A useful reference could be made to such legal regimes as contain rules on the provision of services. Thus the European Court of Justice, when interpreting the prohibition to levy customs duties and charges having an equivalent effect (now contained in Article 30 of the Treaty on the Functioning of the European Union), allowed one to conclude that the obligation under Belgian law, upon the importation of diamonds, to pay a contribution to the social funds of diamond workers, was equivalent to a customs duty and declared: 'Although it is not impossible that in certain circumstances a specific service actually rendered may form the consideration for a possible proportional payment for the service in question, this may only apply in specific cases which cannot lead to the circumvention of the provisions of the Treaty'. *Sociaal Fonds voor de Diamantarbeiders v S.A. Ch. Brachfeld & Sons and Chougol Diamond Co.*, Cases 2 and 3/69, ECR (1969), 222–223. It further declared that a charge would not be equivalent to a customs duty if it is 'the consideration for a service actually rendered to the importer or the exporter and is of an amount commensurate with that service'. This was not the case of fees charged by the Dutch postal administration in respect of customs clearance charges and commission on books imported from another member State. *Andreas Matthias Donner v Netherlands State*, Case 39/82, ECR (1983), 34. See also *Commission v. Belgium*, Case 132/83, ECR (1983), 1694.

<sup>10</sup> N. Ünlü, 'Protecting the Straits of Malacca and Singapore against Piracy and Terrorism', 2006 (21) *International Journal of Marine and Coastal Law*, 543.

states bordering straits . . . to give warnings to passing ships of dangers to navigation’;<sup>11</sup> it also attempts to get all interested States together in the adoption and funding of mechanisms that ensure the highest possible level of safety in the interest of all. Furthermore, it is necessary to determine whether any normative consequence can be drawn from the absence of Article 43 in Part IV of the UNCLOS. Surely, nothing prevents the States concerned from entering into co-operative agreements in relation to aids to navigation and prevention or control of pollution in archipelagic sea lanes, even without an exhortation to do so. The object and purpose of Part IV clearly imply that the type of co-operation envisaged in Article 43 would be equally welcome in relation to archipelagic sea lanes for the same reasons that co-operation is encouraged vis-à-vis straits.<sup>12</sup> In light of the similarity between transit and archipelagic sea lanes passages, it would be quite fantastic to suggest that Article 43 has no application in Part IV, when Part III applies if the archipelagic State has not drawn archipelagic baselines.<sup>13</sup> Depending on the number and location of routes normally used for international navigation or, if designated, sea lanes and air routes, the conclusion of Article 43 agreements will be beneficial to all.

<sup>11</sup> Anderson in n. 6, 447. The correct assumption here is that the discharge of that duty is more burdensome in straits used for international navigation and even more burdensome in busy straits than it is in the territorial sea in general. This duty may be increased when the State participates in such instruments as SOLAS, which provides in Regulation 13 of chapter V that each Contracting Government ‘undertakes to provide, as it deems practical and necessary either individually or in cooperation with other Contracting Governments, such aids to navigation as the volume of traffic justifies and the degree of risk requires’. Gidel agreed that the maintenance of certain navigational aids is a duty of States under international law for which no charge can be levied. However, he also suggested that, if in the interest of navigation the coastal State undertook costly works, it would be fair to enter into international agreements with a view to defraying costs. Gidel in n. 8, 230, 232. He endorsed by analogy, as the minimum obligation of coastal States, Article 10(1) of the Statute on the Regime of Navigable Waterways of International Concern, 7 LNTS 35, opened for signature on 20 April 1921 and entered into force on 31 October 1922: ‘Each riparian State is bound, on the one hand, to refrain from all measures likely to prejudice the navigability of the waterway, or to reduce the facilities for navigation, and, on the other hand, to take as rapidly as possible all necessary steps for removing any obstacles and dangers which may occur to navigation’. See also Chapter 10, n. 33 et seq. and accompanying text; on the removal of dangers, see contra Lauterpacht in Chapter 10, n. 37.

<sup>12</sup> See, notably, H. Djalal, ‘Funding and Managing International Partnerships for the Malacca and Singapore Straits Consonant with Article 43 of the UNCLOS’, 1999(3) *Singapore Journal of International and Comparative Law*, 468; Djalal in Chapter 10, n. 46, 84.

<sup>13</sup> In that case, there are no archipelagic waters, and the right of transit will apply in inter-islands straits used for international navigation. See, generally, Part III, Section 4.3.

In the absence of co-operative agreements under Article 43, and apart from the case of services rendered at the request of the ship for which States bordering a strait or an archipelagic State can request a reasonable fee, the coastal State is not allowed to request payment for the use of general aids, devices, assistance and traffic control. The lawfulness of these measures is assessed under the UNCLOS, which, apart from special regimes that fall under Article 35(c), addresses them in Articles 39, 41 and 42. Measures of marine traffic control have been classified as passive measures, such as traffic separation schemes or deep-water routes, and active measures, such as vessel traffic services and reporting systems.<sup>14</sup> These measures may lawfully be implemented in straits or archipelagic waters, notably through the provisions of SOLAS and COLREG. As was seen in Part IV, the lawfulness of these measures includes a test of their compatibility with the regimes of transit and archipelagic sea lanes passages. It is quite revealing that sub-paragraph 10 of Regulation 11 of SOLAS's chapter V on mandatory ship reporting systems says that the 'participation of ships in accordance with the provisions of adopted ship reporting systems shall be free of charge to the ships concerned'. Anderson notes that this rule is fully consistent with Article 26 of the UNCLOS on the basis that reporting is a general service, similar to lights and buoys, and not a specific service.<sup>15</sup>

What Article 26 does not prohibit, however, are *agreements* among States regarding burden-sharing schemes. Article 43 precisely provides for such co-operative arrangements in straits. This is reflected in a British proposal to the IMO in 1998:

[M]odern developments such as Vessel Traffic Services (VTS), in straits or off the coast, and counter-pollution provisions, which were clearly not contemplated by the original authors of Article 26 . . . do not fall clearly into the category of specific services. At the same time, the arrangements reached within the IMO with regard to such developments have not been accompanied by rules about the funding of those services, either by their users or by the coastal States. By default, the charges are falling upon the latter. Article 43 of UNCLOS provides for co-operation between user States and coastal States bordering a strait in establishing and maintaining necessary navigational and safety aids or other improvements in aid of

<sup>14</sup> See A. G. Corbet, 'Development of Vessel Traffic Services: Legal Considerations', 1989(16) *Maritime Policy and Management*, 278. Plant notes: 'A VTS is any service implemented by a competent authority, designed to improve safety and efficiency of traffic and the protection of the environment. It may range from the provision of certain information messages to extensive management within a port or a waterway'. G. Plant, 'International Legal Aspects of Vessel Traffic Services', 1990(14) *Marine Policy*, 71.

<sup>15</sup> Anderson in n. 6, 453–454.

international navigation and to control pollution from ships. Before ships on transit passage could be made the subject of charges for such services, the United Kingdom believes that there would have to be an international agreement following the terms of Article 43.<sup>16</sup>

It has been suggested that, if a mechanism were established pursuant to an amendment to the SOLAS Convention, it might be possible to make the contributions mandatory.<sup>17</sup> This is not the only possible solution and, in fact, not the one implemented in the Straits of Malacca.<sup>18</sup>

## 11.2 Co-operation by agreement

Article 43 does not establish a duty to co-operate by agreement or a duty to enter into an agreement. The Article uses the verb 'should', not 'shall'. The distinction is not fortuitous. The suggested amendment by Morocco mentioned in Chapter 10 would have replaced 'should co-operate' by 'shall co-operate'.<sup>19</sup> That proposal was not adopted. In informal discussions in the Fiji/UK Group and later in the Second Committee Working Group, when it was discussing the Informal Single Negotiating Text, it was noted that the Article was cast in conditional, non-mandatory terms.<sup>20</sup> The Convention and its Annexes make the distinction between 'shall' and 'should' in other provisions, although the latter is used much more sparingly and, in fact, comparatively rarely.<sup>21</sup> In particular, the Convention differentiates in other Articles between a duty to co-operate or a duty to enter into an agreement and an exhortation to do so.<sup>22</sup> Sometimes the scope of the duty is more complex or composite.<sup>23</sup> The point in Article 43

<sup>16</sup> IMO Doc. LEG/77 10 (1998), paras. 10–11. Oxman correctly notes that Article 43 is not designed to be the source of a regulatory regime for safety or prevention of pollution from ships in transit passage. This regime is to be found in other provisions. Oxman in n. 2, 415. One objective of Article 43 is the funding of such a regulatory regime.

<sup>17</sup> R. C. Beckman, 'Towards Implementation of UNCLOS Article 43 for the Straits of Malacca and Singapore – Rapporteur's Report', 1999(3) *Singapore Journal of International and Comparative Law*, 283.

<sup>18</sup> See Sections 11.4 and 12. <sup>19</sup> See Chapter 10, n. 56.

<sup>20</sup> Nandan and Anderson in n. 2, 193.

<sup>21</sup> The modal auxiliary verb 'shall' is used 1,430 times; 'should' is used 33 times.

<sup>22</sup> E.g. Article 123 ('should cooperate'); Articles 41(5), 100, 197 and 276(2) ('shall cooperate'); Article 243 ('shall cooperate through the conclusion of... agreements'); Article 118 ('shall enter into negotiations'); and Article 51(1) ('shall be regulated by bilateral agreements').

<sup>23</sup> E.g. Article 165(1) ('shall endeavour to ensure'); Article 266(3) ('shall endeavour to foster favourable economic and legal conditions'); and Article 200 ('shall endeavour to participate actively').

is that there is no duty to co-operate by agreement or to enter into an agreement in order to co-operate to achieve a certain result.<sup>24</sup> When no such duty exists, one can conclude that there also exists a reflex right of user States not to enter into agreement embodying co-operation with States bordering a strait. One can also endorse the view that Article 43 is deliberately hortatory in nature in order to ensure that straits States do not unilaterally impose charges on passing vessels.<sup>25</sup>

That said, Article 43 is of a strong normative significance, for it addresses an issue which lies at the core of the right of transit, that is, a balance between the rights and duties of user States and straits States. Whether one believes that co-operation by agreement in Article 43 is encouraged or, adopting an interpretation that lies at the threshold of an obligation, that Article 43 embodies a 'measure of an obligation to cooperate',<sup>26</sup> the point is that neither user States nor straits States have anything to gain, and much to lose at the most pragmatic level, by refusing to co-operate.<sup>27</sup> Indeed, assuming that straits States are faced with user States which refuse to co-operate along the lines indicated in Article 43, the argument has been made that, because the right of transit cannot be impeded, hampered or suspended in any event, and apart from resorting to Part XV of the UNCLOS, States bordering straits may refuse to provide navigational aids if user States do not co-operate.<sup>28</sup> This should not be read as allowing the State bordering a strait to abandon its duty to maintain the minimum aids that accompany the duty to warn of dangers under Article 44; the UNCLOS is characterized by the principle that States' rights and duties are generally independent of each other.<sup>29</sup>

<sup>24</sup> Capon's argument that, by the strength of Article 43, 'UNCLOS contains an affirmative grant of authority to coastal States to implement navigational and safety aids in international straits', does not seem to be correct. See C. J. Capon, 'The Threat of Oil Pollution in the Malacca Strait: Arguing for a Broad Interpretation of the United Nations Convention on the Law of the Sea', 1998(7) *Pacific Rim Law and Policy Journal*, 133.

<sup>25</sup> S. N. Nandan, 'The Provisions on Straits Used for International Navigation in the 1982 United Nations Convention on the Law of the Sea', 1998(2) *Singapore Journal of International and Comparative Law*, 397.

<sup>26</sup> Nandan in n. 6, 433. Oral, who believes that the use of 'should' instead of 'shall' is of interpretative significance, also accepts that Article 43 may provide legal support for user States to contribute financially. N. Oral, 'Straits Used in International Navigation, User Fees and Article 43 of the 1982 Law of the Sea Convention', 2006(20) *Ocean Yearbook*, 584.

<sup>27</sup> E.g. M. L. Pal and G. Götsche-Wanli, 'Proposed Usage and Management of the Fund', 1999(3) *Singapore Journal of International and Comparative Law*, 480.

<sup>28</sup> Nandan and Rosenne in Chapter 10, n. 40, 383.

<sup>29</sup> B. H. Oxman and V. P. Bantz, 'The M/V "Saiga" (No. 2)', 2000(94) *American Journal of International Law*, 149.

However, if only as a matter of prudence, the maintenance of only minimum aids to navigation is not a reasonable proposition in major straits used for international navigation. Furthermore, legalistic emphasis of the use of 'should' neglects the fact that States have a variety of duties to be found in other parts of the Convention. Oxman rightly emphasizes that, under Article 192, where the objective circumstances require co-operation in order to protect and preserve the marine environment, a duty to seek co-operative means to achieve those ends is implicit in the basic obligation set forth in that provision.<sup>30</sup> In addition, even though all States Parties to the UNCLOS have a duty to exercise their rights, jurisdiction and freedoms in a manner which would not constitute an abuse of right, the argument could be made that user States would abuse the right of transit by refusing to co-operate with straits States in the establishment of mechanisms which facilitate the right of transit (Article 43(a)) or alleviate the consequences of the right of transit (Article 43(b)), thereby leaving straits States alone to bear the burdens associated with the exercise of the right of transit. A parallel argument can be made with straits States that would refuse to co-operate with user States.

Article 43 only specifies the objectives of co-operation but not the means or the concrete implementation. The only guidance as to the form of co-operation is that it should take place by 'agreement' ('par voie d'accord' in the French text). It has been noted that the word 'agreement' is sufficiently vague to include either formal written agreements or less formal arrangements.<sup>31</sup> Co-operation can take place on a bilateral basis, on a multilateral basis or within an international conference or an international organization, such as the IMO.<sup>32</sup> In addition, Article 43 does not just contemplate co-operation between user States and States bordering straits; both a literal reading of the first sentence and a sensible, pragmatic approach, dictate that co-operation is possible, and indeed encouraged, among user States themselves and also among the States bordering straits themselves: Article 43 points to the multidimensional aspect of co-operation.<sup>33</sup> The extent and the modalities of co-operation

<sup>30</sup> Oxman in n. 2, 410.

<sup>31</sup> R. Beckman, 'The Establishment of a Cooperative Mechanism for the Straits of Malacca and Singapore under Article 43 of the United Nations Convention on the Law of the Sea', in A. Chircop, T. L. McDorman and S. J. Rolston (eds.), *The Future of Ocean Regime-Building: Essays in Tribute to Douglas M. Johnston* (Nijhoff, Leiden, 2009), 239.

<sup>32</sup> E.g. Djalal in n. 12, 466. The early Maltese proposal only envisaged adopting an agreement between the States bordering straits and the international oceans institutions. See Chapter 10, n. 48.

<sup>33</sup> Pal and Göttsche-Wanli in n. 27, 479.

will therefore depend on each strait, and Article 43 itself refers to 'a' strait, not to straits generally. This indicates that Article 43 is meant to apply on a strait-by-strait basis and that any notion that 'all straits' used for international navigation would be subjected to one, single model of co-operation should be avoided.<sup>34</sup> Nothing prevents a combination of formal and informal agreements, and Article 43 does not envisage the adoption of only one single instrument covering every aspect of co-operation as long as, overall, co-operation covers both aspects in sub-paragraphs (a) and (b).<sup>35</sup> In light of the fact that navigational safety and pollution prevention are often intermingled, it is likely that both aspects will be addressed simultaneously.

### 11.3 Who are the users?

Both the original British proposal and Article 43 envisage co-operation between States bordering the strait and user States. It has thus been claimed that any existing obligation did not fall directly on user ships but on the States whose ships use the strait.<sup>36</sup> This formulation surely alleviated the fears of those fretting about States bordering straits exacting co-operation directly with user ships. It has also been argued that, had a reference been made to 'users of a strait' only, it could have been taken to mean that only the shipping industry was required to co-operate, with the added connotation that a 'user charge' was being contemplated.<sup>37</sup> This said, Article 43 does not prevent the input of private users, such as P&I clubs or oil companies; nor is Article 43 meant to prevent the agreements concluded from providing that charges will be levied on vessels themselves. Hence, as there is no definition of 'user States', it seems that only a pragmatic approach will deliver satisfactory results. It has been emphasized many times that 'user States' cannot realistically be restricted to flag States. Which other States are included as 'user States' is, however, not fully determined. It has been suggested that a 'user' at large could encompass 'other direct and indirect beneficiaries of the convenience and

<sup>34</sup> Ibid.

<sup>35</sup> 'Article 43 does not require a single system of co-operation including the same states for all purposes. Even if an "umbrella" arrangement embracing many users were deemed desirable, there is nothing wrong with a representative group of straits states and principal users preparing the "umbrella" arrangements, possibly soliciting the views of others in the process, and then leaving the arrangements open to participation by other users'. Oxman in n. 2, 419.

<sup>36</sup> See Nandan and Rosenne in Chapter 10, n. 40, 381.

<sup>37</sup> Pal and Göttsche-Wanli in n. 27, 479.

savings afforded by the strait. This could include a wide array of beneficiaries from cargo interests to the ultimate consumers'.<sup>38</sup> It has also been noted that if all ship types were made to participate in an Article 43 agreement, the next question would be whether the participating State would be the State of the owner, operator, charterer or cargo interest and that, in practical terms, the more likely candidate will be the flag State.<sup>39</sup> These concerns are not shared by Nandan, for whom 'user States' must also include nationals of States and, therefore, the flag State, the exporting States, the receiving States, the shipowners and others who benefit from the provision of facilities for safe navigation, such as insurance corporations whose risks and liabilities are minimized and major oil companies whose global trade is facilitated.<sup>40</sup> In a similar vein, Gold argues in terms of 'beneficiaries' of the transit passage and, taking the Straits of Malacca as a case study, he writes that beneficiaries comprise individual shipping companies as well as States, such as Japan and the Republic of Korea, which rely on the 'oil lifeline' for their economic well-being.<sup>41</sup> There are also indirect beneficiaries, such as the IMO and its membership, and the shipping and oil industries, represented by, for example, the International Chamber of Shipping, the International Union of Marine Insurers, the International Group of P&I Clubs, the Oil Companies International Marine Forum, the International Oil Pollution Claims Fund and the

<sup>38</sup> Oral in n. 26, 590. See also, e.g., B. A. Hamzah, 'Funding Services in the Straits of Malacca: Voluntary Contribution or Cost Recovery?', 1999(3) *Singapore Journal of International and Comparative Law*, 508.

<sup>39</sup> *Ibid.*, 590–591.

<sup>40</sup> Nandan in n. 6, 435 (including, at 436–443, tables showing in the Straits of Malacca and Singapore transits by flag nationality, by shipowner nationality, by vessel types, by shipper nationality and by import shares by commodity). See also S. Tiwari, 'Legal Mechanisms for Establishing a Fund', 1999(3) *Singapore Journal of International Law*, 471:

It does not seem unreasonable to take the position that user States should include States whose nationals own the ships, States whose nationals own the cargo, States whose nationals are the recipients of the cargo, and States from which the cargo originates. In addition, the other parties who should participate in the co-operative arrangements are the shipping industry, the marine insurance industry and the oil industry.

See also the study undertaken by Japan, Malaysia, Singapore and Indonesia in O. Matsumoto, 'Who Are the Contributors? Littoral States, User States and Stakeholders? Or Who Are the Users?', 1999(3) *Singapore Journal of International and Comparative Law*, 499–500.

<sup>41</sup> Gold in Chapter 10, n. 42, 233. He adds that the littoral States also derive some benefit from their straits proximity; their economic development depends on participating in international shipping and trade.

International Tank Owners Pollution Federation.<sup>42</sup> This broad approach is confirmed by practice; it is not surprising that, when invitations were sent out to participate in the 1996 Singapore Conference relating to the safety of navigation in the Straits of Malacca and Singapore, the various stakeholders identified included the shipping industry (including tanker owners), major users, such as the oil industry, the insurance industry, the salvage industry and various governmental and non-governmental organizations dealing with maritime affairs, such as port authorities and representatives of predominantly ship-owning States.<sup>43</sup>

It is perhaps inapposite to devote complex analyses to whether ‘user States’ encompass only States themselves and, if so, which ones or if it includes non-State entities as well.<sup>44</sup> An interpretation that puts too much emphasis on ‘State’ would imply that the State of nationality, or residence, of nationals benefiting from the use of a strait should always be involved in negotiating Article 43 agreements, but nothing suggests that this is necessarily the case in practice, and the industry has, *sua sponte*, declared itself ready to make financial contributions under certain

<sup>42</sup> Ibid. See also N. Oral, ‘User Fees for Straits’, in B. Öztürk and R. Özkan (eds.), *The Proceedings of the Symposium on the Straits Used for International Navigation, 16–17 November 2002, Istanbul* (Turkish Marine Research Foundation, Istanbul, 2002), 116.

<sup>43</sup> L. L. Theng, ‘Safety of Navigation in the Straits of Malacca and Singapore – Modalities of Co-operation – Rapporteur’s Report’, 1998(2) *Singapore Journal of International and Comparative Law*, 258. In 1960, the ICJ had to decide what the phrase ‘the largest ship-owning nations’ meant in relation to election to the Maritime Safety Committee of the IMO (formerly the IMCO) under Article 28(a) of the IMCO Constitution. The Court concluded that Article 28(a) ‘can only have in mind a comparative size vis-à-vis other nations owners of tonnage’. *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization (Advisory Opinion)*, ICJ Rep. (1960), 166. The Court came to the conclusion that this could only mean ‘registered tonnage’. Ibid., 170.

<sup>44</sup> It is evident that, at the very least, user States include not just the flag State which is the recipient of the right of transit but also other States which indirectly benefit from this right. Khee-Jin reported on the 1996 Singapore Conference:

Defining criteria for ‘user states’ was discussed. The various criteria suggested included major flag states, exporting states, importing (recipient) states, port states, and trading states. Private sector ‘users’ were considered to include the oil, shipping and marine insurance industries, and vessel and freight owners. Several delegates felt that the types of cargo to be included within the definition criteria of ‘users’ should be widened to cover hazardous materials. It was further thought that all cargo ships with a potential to pollute the oceans should also be included, including passenger vessels . . . It became apparent that the list is potentially endless.

A. T. Khee-Jin, ‘Control of Pollution in the Straits of Malacca and Singapore: Modalities of Co-operation – Rapporteur’s Report’, 1998(2) *Singapore Journal of International and Comparative Law*, 271.

conditions.<sup>45</sup> Article 43 is not prescriptive in nature and encourages co-operation among all those concerned, in particular because co-operation with the industry cannot be dispensed with if it is decided that ships themselves will be charged. In addition, it is also perhaps appropriate to associate not only the direct beneficiaries of a safe passage but also other interests affected by the safety of navigation.<sup>46</sup> Oxman rightly concludes:

[T]he formal reference to user 'States' does not preclude imaginative arrangements, whether formal or informal, to secure the constructive co-operation of the private sector . . . [S]ubject to considerations of efficiency and practicality, straits states have much to gain and nothing to lose by taking a broadly inclusive approach to the question of who the users, or at least the principal users, are. So do users.<sup>47</sup>

A broad approach to the concept of 'user' is fully consistent with the notion that a strait constitutes a social good, the consumption of which can no longer be considered non-rival, for users impose on one another externalities which grow with the increase in the use of the strait itself.<sup>48</sup>

#### 11.4 Burden sharing and implementation of Article 43

Although most academic comments and official attention have been given in the context of the Straits of Malacca and Singapore, methods of the implementation of Article 43 have also been suggested that could be

<sup>45</sup> E.g. INTERTANKO, the Tankers Owners' Association, has indicated a willingness to pay for improved safety, provided that the WORLDSCALE rates can be revised to reflect increased costs and that their members not be discriminated against. See P. B. Marlow, 'Financing Straits Management: Inherent Problems', in A. Hamzah (ed.), *The Straits of Malacca* (Pelanduk, Kuala Lumpur, 1997), 171–172. For WORLDSCALE rates, see [www.worldscale.co.uk](http://www.worldscale.co.uk)

<sup>46</sup> E.g. H. Djalal, 'Pointers on the Safety of Navigation in the Straits of Malacca and Singapore', 1998(2) *Singapore Journal of International and Comparative Law*, 440 (mentioning the exploitation of living resources in the Straits, local peace and tranquillity and the preservation of the marine environment); G. Peet, 'Financing Straits Management: Policy Options', in A. Hamzah (ed.), *The Straits of Malacca* (Pelanduk, Kuala Lumpur, 1997), 153–155 (mentioning oil and gas activities off the Indonesian coast, mangrove and coral reef areas).

<sup>47</sup> Oxman in n. 2, 418–419. See also Khee-Jin in n. 44, 271–271: '[I]t was suggested that some measure of prioritisation was necessary. Some participants thought that the littoral states must initiate some form of prioritisation to identify the most significant users and enter into consultations with them.' The open-ended nature of the group of users also reflects the nature of the agreements concluded. See n. 35.

<sup>48</sup> See R. Mesznik, 'Transit Fees for Ocean Straits and Their Impact on Global Economic Welfare', 1980(8) *Ocean Development and International Law*, 344–345; Marlow in n. 45, 167–168.

of general relevance. Ambassador Koh reminded the participants of a 1999 Conference on the Straits of Malacca co-organized by the IMO: '[T]hrough these discussions we are testing Article 43 and... there is a lot at stake in our collective endeavor. There is no other international strait which is seeking to find an implementing mechanism under Article 43. If we succeed in arriving at a consensus on how to implement Article 43, we can be a paradigm case'.<sup>49</sup> There is no doubt that the issue of burden sharing and financing of aid to ensure the safety of navigation and the prevention or control of pollution have been at the centre of discussions.<sup>50</sup> The argument was made that a global community of unequal nation-States demands very different approaches for rich States and poor States.<sup>51</sup> The costs of risk management have been well-documented in the Straits of Malacca and Singapore,<sup>52</sup> but it has also been claimed that the transit passage regime has failed to incorporate certain compensatory mechanisms to defray the cost to coastal States for the provision of services in straits and that the free-of-charge situation needs to be reviewed in light of the changed circumstances.<sup>53</sup> It is no secret that the Malaysian Prime Minister openly addressed the need to levy a toll on passing ships.<sup>54</sup> The soundness of levying tolls has also been justified in economic terms.<sup>55</sup> Furthermore, in light of the open-ended nature of the

<sup>49</sup> Beckman in n. 17, 285.

<sup>50</sup> E.g. Oxman in n. 2, 420 (citing a 1993 report of an IMO Working Group on the Malacca Strait, MSC 63/INF.3).

<sup>51</sup> E. Gold, 'Preventing and Managing Marine Pollution in the Malacca and Singapore Straits: Framework for Cooperation', 1999(3) *Singapore Journal of International and Comparative Law*, 359.

<sup>52</sup> E.g. M. R. bin Ahmad, 'The Financial Cost of Risk Management in the Straits of Malacca', in A. Hamzah (ed.), *The Straits of Malacca* (Pelanduk, Kuala Lumpur, 1997), 187.

<sup>53</sup> B. A. Hamzah, 'Global Funding for Navigational Safety and Environmental Protection', in A. Hamzah (ed.), *The Straits of Malacca* (Pelanduk, Kuala Lumpur, 1997), 130, 133. The changed circumstances for him include the end of the Cold War, because during the Cold War, '[m]any countries which controlled access to strategic waterways were prepared to tolerate the United States or the Soviet Union for security reasons. Burden sharing was not a problem as the contribution from coastal states seen in a larger strategic context was minimal'. *Ibid.*, 132 (also noting that it has cost the Malaysian government RM 1 billion since 1984 to keep the straits safe for international navigation: *ibid.*, 136).

<sup>54</sup> *Ibid.*, 137.

<sup>55</sup> Mesznik in n. 48, 345 (emphasis in original):

The presence of externalities implies that, even if the management costs equal zero, *a price of zero is no longer compatible with an optimal utilization of the strait*. Without an explicit transit fee, the strait will be over-used and the costs will be borne by all users in a non-optimal way, through implicit costs in the form of waiting time and complex regulations. This situation, with the resulting non-price rationing, is a perennial problem of many social goods.

co-operation recommended in Article 43, the aggregation of costs may greatly exceed what is immediately associated with practical measures; it has been noted that co-operation under Article 43 may encompass measures such as institution building, capacity building of relevant institutions, capacity building of human resources, assistance in ratifying or implementing pertinent international conventions, rules and standards, and assistance in developing national laws or preparation of strategies and action plans.<sup>56</sup> In particular, the cost of pollution abatement could arise from pollution response and contingency expenses, costs of cleaning up oil spills and payment of compensation.<sup>57</sup> Therefore, in October 1995, the Marine Environmental Protection Committee (MEPC) of the IMO indicated that the IMO should consider potential mechanisms by which user States and States bordering straits used for international navigation could facilitate the development of appropriate financial mechanisms to be consistent with Article 43. Such financial mechanisms should be designed to achieve an *equitable* sharing of burdens.<sup>58</sup> Greece, the United States and Russia reiterated their position that they were against the imposition of a tax on shipping as a means of obtaining funds.<sup>59</sup>

Several regimes contain mechanisms for the collection of charges on shipping.<sup>60</sup> Article 3 of the Statute on Freedom of Transit says:

Traffic in transit shall not be subject to any special dues in respect of transit (including entry and exit). Nevertheless, on such traffic in transit there may be levied dues intended solely to defray expenses of supervision and administration entailed by such transit. The rate of any such dues must correspond as nearly as possible with the expenses which they are intended to cover.<sup>61</sup>

<sup>56</sup> Pal and Göttsche-Wanli in n. 27, 489 (and the comprehensive list at 490–491). It has also been noted that co-operation could be used to have a strait (in the case at hand, the Straits of Malacca) designated as a MARPOL Special Area. R. M. Sunardi, 'Prospects for Sub-Regional, Regional and International Cooperation in Implementing Article 43 of UNCLOS', 1998(2) *Singapore Journal of International and Comparative Law*, 446.

<sup>57</sup> Khee-Jin in n. 44, 271.

<sup>58</sup> IMO Doc. MEPC 37/22, para. 10.17 and Annex 11, quoted in Oxman in n. 2, 421 (emphasis added).

<sup>59</sup> IMO Doc. NAV 41/23, paras. 4.2–4.4, quoted in Oxman, *ibid.*

<sup>60</sup> The UNCLOS knows other systems of payments or contributions in kind; see Article 82 and Part XI.

<sup>61</sup> 7 LNTS 11, opened for signature on 20 April 1921 and entered into force on 31 October 1922. But see Article 127 of the UNCLOS. Article 7 of the Statute on the Regime of Navigable Waterways of International Concern in n. 11, says:

No dues of any kind may be levied anywhere on the course or at the mouth of a navigable waterway of international concern, other than dues in the nature of

The Montreux Convention, which comes within the ambit of Article 35(c) of the UNCLOS, enables Turkey to levy taxes and charges on merchant vessels when passing in transit without calling at a port in the Turkish Straits.<sup>62</sup> Tolls apply for the passage through the Suez Canal,<sup>63</sup> as well as the Panama Canal.<sup>64</sup> Anderson also mentions an Agreement of 1962 among 15 States for the maintenance of certain lights on islands and rocks in the southern part of the Red Sea, north of Aden and the Straits of Bab-el-Mandeb; annual contributions were collected by the Foreign and Commonwealth Office on the basis of registered tonnage of shipping passing through the Red Sea.<sup>65</sup> Also, the North Atlantic ice patrol service has been in existence since 1914 and is described in the SOLAS Convention. The scheme is managed by the United States with the assistance of Canada, and the US Department of State collects the payments from the participating governments.<sup>66</sup> Mechanisms are also known, notably in the United Kingdom and Ireland, where the coastal States charge ships visiting their

payment for services rendered and intended solely to cover in an equitable manner the expenses of maintaining and improving the navigability of the waterway and its approaches, or to meet expenditure incurred in the interest of navigation. These dues shall be fixed in accordance with such expenses, and the tariff of dues shall be posted in the ports. These dues shall be levied in such a manner as to render unnecessary a detailed examination of the cargo, except in cases of suspected fraud or infringement of regulations, and so as to facilitate international traffic as much as possible, both as regards their rates and the method of their application.

See also *ibid.*, Article 10(2).

<sup>62</sup> Convention Regarding the Regime of the Straits, 1937(31)(Supp.) *American Journal of International Law*, 1, opened for signature on 20 July 1936 and entered into force on 9 November 1936, Article 2. Annex I to the Convention specifies the general amounts of charge, payable in gold Francs or in Turkish currency, that are levied on each tonne of net registered tonnage in respect of a return voyage through the Straits. The charges may only apply in respect of sanitary control, lighthouses, lights, channel buoys and lifesaving services. The charges can only be increased by amendment of the Convention in Article 29. Charges and taxes can be levied for optional services, such as pilotage and towage.

<sup>63</sup> See [www.suezcanal.gov.eg/TollCirculars.aspx](http://www.suezcanal.gov.eg/TollCirculars.aspx) for the toll amounts and [www.suezcanal.gov.eg/Treaties.aspx](http://www.suezcanal.gov.eg/Treaties.aspx) for the legal regime.

<sup>64</sup> See [www.acp.gob.pa/eng/maritime/tolls.html](http://www.acp.gob.pa/eng/maritime/tolls.html).

<sup>65</sup> Anderson in n. 6, 451. The scheme ended in 1990. *Ibid.*

<sup>66</sup> *Ibid.*, 448–449. Revised rules came into effect in 2002. Under Regulation 6(1) of chapter V of SOLAS, ‘ships transiting the region of icebergs guarded by the Ice Patrol during the ice season are required to make use of the services provided by the Ice Patrol’. Para. 2 of the Appendix to chapter V says: ‘Each Contracting Government specially interested in these services whose ships pass through the region of icebergs during the ice season undertakes to contribute to the [United States] its proportionate share of the costs for the management and operation of the ice patrol service’. The method of determining contributions is explained in paras. 2 and 3.

ports light dues designed to defray the costs of the lighthouse authorities in respect of lights, buoys, the operation of the Decca Navigator System and radio beacons. They are a form of port State jurisdiction.<sup>67</sup>

Following up on the suggestions made by the MEPC,<sup>68</sup> the United Kingdom indicated at the 66th session of the MSC in 1997 that:

[I]ncreasing need for navigational aids and other services on important shipping routes could overstretch the ability of particular coastal States to provide such services . . . It would be helpful to all parties if a recognised framework for cost recovery were developed. The levying of such charges outside a framework of arrangements agreed internationally could be detrimental to traditional navigational rights and freedoms and to the orderly development of world maritime trade.<sup>69</sup>

The criteria suggested by the United Kingdom for a set of fair and equitable principles which would encourage the establishment of future charging systems were as follows:

- the system must be consistent with the UNCLOS;
- the system must not discriminate among vessels of different Member States participating in the scheme, nor between them and vessels of third countries which might transit the area;
- the charges raised by the system should be related clearly to the costs of providing the service, including the costs of investment in its initial provision or subsequent improvement. The charges should be transparent, so as to avoid suspicion of overcharging or the imposition of indirect taxation on transiting trade;
- the services charged for should be provided at a level that is consistent with the IMO or other similar international agreements.<sup>70</sup>

<sup>67</sup> D. H. Anderson, 'The Imposition of Tolls on Ships: A Review of International Practice' (1998) 2 *Singapore Journal of International and Comparative Law*, 403. In the United Kingdom, the light dues are levied on commercial vessels calling at ports in the British Isles, on the basis of the net registered tonnage of the vessel. The rate is set by the Department of Transport, and it is annually reviewed. Light dues are charged at 43 pence per net registered tonne, subject to a maximum charge of £17,200 per voyage in 2010. See [www.trinityhouse.co.uk/about\\_us/financial/index.html](http://www.trinityhouse.co.uk/about_us/financial/index.html). In the aftermath of the *Braer* incident, Lord Donaldson delivered in 1994 several recommendations, including 'paying for pollution prevention': see, e.g., Anderson, *ibid.*, 403–406. In 1997, the Merchant Shipping and Maritime Security Act was adopted, which allows charges to be levied in relation to prevention of pollution from ships but only on ships which have entered a UK port or are anchored off a UK port or an installation in UK waters: see Schedule 2. For the dues levied for aids of navigation within the Gulf, see Marlow in n. 45, 183.

<sup>68</sup> See n. 58. <sup>69</sup> IMO Doc. LEG 76/INF. 2 (1997). <sup>70</sup> *Ibid.*

Commenting on that scheme, Anderson wrote that the system could be installed by means of an international agreement for the particular strait or pursuant to an arrangement reached within the IMO; the system could also extend to the question of charges on users, whether they are user States or individual ships using the system. A charge on each participating government, assessed according to the extent of the use of the service by ships flying the flag of the State concerned, may be appropriate where ships are in transit. The direct imposition of a charge on each ship would be appropriate when ships are making a port of call in the vicinity of the service area. The scheme would, overall, serve to transfer part of the costs from the taxpayers of coastal States to the users, and the latter would, in turn, pass on their added costs to the passengers and owners of the goods being transported and, ultimately, to the consumers.<sup>71</sup> The MSC reacted cautiously to the United Kingdom's proposal, with some delegates suggesting that the IMO was not the competent body to consider the issue.<sup>72</sup> In response, the United Kingdom indicated that the IMO was an appropriate body to consider issues with commercial implications under Article 1 of its Constitution. The United Kingdom believed that, before ships on transit passage could be made the subject of charges for such services, there would have to be an international agreement following the terms of Article 43 of the UNCLOS. In principle, charges should apply to all ships benefiting from a particular service, although the application of charges would need to be considered on a case-by-case basis depending on the type of service being charged for and in relation to the principles established.<sup>73</sup> The United Kingdom referred to the arrangements for air traffic control services adopted by the ICAO under Article 15 of the Chicago Convention.<sup>74</sup> However, it has been noted that aviation control is

<sup>71</sup> Anderson in n. 6, 454–456.

<sup>72</sup> IMO Doc. LEG 76/INF. 2 (1997), para. 4. Some MSC delegates concluded that the issue went beyond the scope and mandate of the IMO, which focuses on technical, not commercial, matters and that the issue should be left to national Administrations and that the proposal might give rise to complex legal issues which would need to be clarified (for example, the types of vessels which should be charged fees). IMO Doc. LEG 77/10 (1998), para. 3.

<sup>73</sup> IMO Doc. LEG 77/10 (1998), paras. 11–12.

<sup>74</sup> *Ibid.*, para. 11. Article 15 refers to the charges that may be imposed or may be permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State. It also specifies that no fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over, entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon. Convention on International Civil Aviation, as amended, 15 UNTS 295, opened for signature on 7 December 1944 and entered into force on 4 April 1947. This

traditionally absolute and total, but marine control has limited potential, and the two industries are not directly comparable in the context of navigational aids and safety.<sup>75</sup> No further action was taken.

Charging users has also been envisaged in literature, on the basis of a user-pays-principle.<sup>76</sup> Its concrete implementation, however, may involve complex economic determinations. Oral notes that the principle that inspired the user-pays-principle, the polluter-pays-principle, remains unclear and its actual implementation has focused on post-pollution liability rather than it being used as a method to prevent pollution.<sup>77</sup> A user-pays-principle implemented through agreements has been considered to achieve co-operative collection of uniform dues, in a way that is similar to light dues, or to design user- or benefit-based cost-sharing schemes. But there, too, the principal issues include defining the users, estimating users' benefits, deciding on the level of adequate (incremental) funding and designing mechanisms to distribute the funding.<sup>78</sup> The problems associated with mandatory payments by users to finance the recovery of costs have also been raised by Hamzah, who wondered who should contribute and to whom, what the mode and scale of contribution should be and what the formula for the contribution would be.<sup>79</sup> For the Straits of Malacca in particular, he singled out oil tankers as major contributors and proposed that 'Hong Kong, China, South Korea, Taiwan, Thailand, the Philippines and Liberia be persuaded to make appropriate contributions'; it would be more practical if such contributions were made to an existing fund, the Revolving Fund.<sup>80</sup> Compulsory

has been implemented in Europe in a uniform way by the creation in 1962 of Eurocontrol, which bills the airline on a cost-recovery basis. Administrative costs and the capital cost of new radars and computer equipment can be included in the assessment of the total costs to be recovered from the beneficiaries or consumers of the service. No element of profit or return on capital is included. Anderson in n. 6, 448. See [www.eurocontrol.int](http://www.eurocontrol.int).

<sup>75</sup> Marlow in n. 45, 172–173.

<sup>76</sup> On the user pays principle in general, see C. S. Pearson, 'Testing the System: GATT + PPP=?', 1994(27) *Cornell International Law Journal*, 553.

<sup>77</sup> Oral in n. 26, 593, 598.

<sup>78</sup> T. A. Grigalunas, Y.-T. Chang and J. Opaluch, 'Sustainable Financing for Controlling Transboundary Pollution by Shipping in the Malacca Straits – Options and Implications', 2000(2) *Maritime Economics and Logistics*, 340, 341.

<sup>79</sup> Hamzah in n. 38, 502. Suggestions were made in 2007 to collect contribution of US \$0.01 for each ton of oil and gas transiting the Straits of Malacca; but this was not positively and favourably considered by shipping and oil companies. See H. Djalal, 'The Development of Cooperation on the Straits of Malacca and Singapore', Kuala Lumpur, 24 November 2008, [www.nippon-foundation.or.jp/eng/current/malacca\\_sympto/6.doc](http://www.nippon-foundation.or.jp/eng/current/malacca_sympto/6.doc), para. 47.

<sup>80</sup> *Ibid.*, 508–509. See also Grigalunas et al. in n. 78, 333–335. On the Revolving Fund, see Chapter 12, n. 13 and accompanying text.

contributions have also been suggested through the IMO either by amendment to SOLAS or in a new convention in relation to specific straits.<sup>81</sup> But the collection of mandatory contributions is not the only solution envisaged and may not be the primary solution. A voluntary approach, by definition, does not ensure the solving of the free-rider problem, but it has been noted that the prospects for agreement on a mandatory system are probably too remote to justify the effort.<sup>82</sup> When the matter was discussed at a Conference in Singapore in 1996, it was generally presumed that the computation and allocation of specific proportions of financial responsibility would be based on criteria such as the number of vessels or the amount of tonnage going through the strait. Alternatives to transit fees, which could only be established by agreement, were suggested and included a special fund to which users would be requested to make contributions, whether monetary or in the form of technical assistance and the provision of pollution-abatement equipment.<sup>83</sup> It was suggested that all major beneficiaries should contribute to a fund that was managed by a committee of members from littoral States or that a fund be established from aid from international funding agencies. It was also considered that regional organizations or the IMO itself could maintain and implement agreements entered into under Article 43.<sup>84</sup> At a similar Conference in 1999, Nandan argued that it might be useful, in the first instance, for States bordering straits to invite user States to make voluntary contributions to a trust fund established to compensate for the burden they have to bear.<sup>85</sup> The Singapore Minister for Communication and Information Technology expressed the view that a fund should be established and managed by an international entity, which would include representatives from the coastal States, user States, other users and the IMO, and that contributions should be based on a cost-recovery basis.<sup>86</sup> However, the proposal that the fund should be managed by an international entity met with a cool response from the representatives of Indonesia and Malaysia, who emphasized the sovereignty of the coastal States.<sup>87</sup> The most

<sup>81</sup> Tiwari in n. 40, 474.

<sup>82</sup> Oxman in n. 2, 424. See also Khee-Jin in n. 44, 273: '[A]ny mandatory system of collecting contributions would require the mechanism of a treaty which could take a long time to negotiate... An alternative that was suggested was a voluntary system pursuant to an MOU or a declaration by the relevant littoral or stakeholder states'.

<sup>83</sup> Khee-Jin in n. 44, 274. <sup>84</sup> Theng in n. 43, 265–266. <sup>85</sup> Nandan in n. 6, 435.

<sup>86</sup> Y. C. Tong, 'Opening Address', 1999(3) *Singapore Journal of International and Comparative Law*, 298.

<sup>87</sup> Beckman in n. 17, 285. Their position was that the Straits of Malacca are not 'international straits' but 'straits used for international navigation'. This view dates back to a tripartite

extensive proposal suggested that the fund could be an 'umbrella' fund or a financial mechanism to fund specific projects and would be operated under a market-oriented approach.<sup>88</sup> The fund would be managed by one committee or board instead of an assembly plus an executive committee. Representation in the board would be by all interested parties, including stakeholders, and decision making would be by consensus as a general rule. The IMO would also have a role in the fund.<sup>89</sup>

All of these proposals surely testify to the increased interest in the issue of burden sharing, although the schemes to be agreed upon have yet to be fleshed out. Although the marked preference is for a strait-by-strait approach, the proposals developed in the context of the Straits of Malacca and Singapore, which could inspire arrangements in other straits, reveal, at the very least, a broad approach to the concept of 'users', a voluntary approach to the issue of contributions and institutional mechanisms which would both involve the IMO and assign a central role to the littoral States, perhaps by resorting to several funds. There seemed to be no discernable consensus on the calculation of contributions, and one could therefore assume that concrete arrangements would favour donations in an amount determined by the donor or in proportion of estimated costs of actual projects, instead of contributions based on actual interests in shipping or tonnage that navigate through a given strait. These conclusions are confirmed by the solutions found for the Straits of Malacca.

official statement (including Singapore) of 1971, although that statement occurred at a time when they only envisaged innocent passage in the straits. See Chapter 12, n. 2 and accompanying text.

<sup>88</sup> Pal and Götsche-Wanli in n. 27, 484. 'The issue of levying a toll or fee or charge also loses its meaning because goods and services collectively in demand would be purchased collectively at market price'. *Ibid.*, 485.

<sup>89</sup> *Ibid.*, 492–493.

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## Co-operative schemes: the special case of the Straits of Malacca and Singapore

Like some other provisions in the UNCLOS drafted with specific situations in mind, Article 43 was negotiated with the Straits of Malacca and Singapore (the Straits) as a model.<sup>1</sup> To date, the Straits are the only examples where a co-operative mechanism under Article 43 has been implemented.

Such co-operation is preceded by a well-documented history of collaboration among the riparian States of Indonesia, Malaysia and Singapore, which adopted, at a ministerial meeting, a common policy for the Straits in a Joint Statement of 16 November 1971, wherein the governments concerned agreed that there was a need for tripartite co-operation on the safety of navigation in the Straits and also agreed that a body for co-operation to co-ordinate efforts among the three States for the safety of navigation in the Straits should be established as soon as possible.<sup>2</sup> Although a Joint Statement of 19 February 1975 called for the establishment of a Council of Ministers of the three States on the safety of navigation and marine pollution to meet annually, such a Council was never created, and after 1977, no ministerial meetings specifically dealing with co-operation in the Straits were held until August 2005.<sup>3</sup> The 1975 Statement also called for the appointment of an expert group to study the problem of very large crude carriers (VLCCs) and other measures to enhance the safety of navigation. This group of experts, the Trilateral

<sup>1</sup> Nandan and Anderson in Chapter 11, n. 2, 193. One can refer to Article 47(7), which addressed the concerns of the Bahamas; Article 47(6), which addressed the concerns of Malaysia; Article 38(1), which was drafted with Sicily in mind; Article 38(2), which was drafted with Singapore in mind; Article 45(1)(b), which accommodates the position of Israel; or Article 7(2), which accommodates the position of Bangladesh.

<sup>2</sup> Text in K. L. Koh, *Straits in International Navigation* (Oceana Publications, Dobbs Ferry, 1982), 59.

<sup>3</sup> Beckman in Chapter 11, n. 31, 236. The Ministerial Council had held an initial meeting but ceased to follow up on the initiative: Khee-Jin in Chapter 11, n. 44, 276. The Council had to be assisted by a Committee of Senior Officials.

Technical Experts Group (TTEG), meets regularly to co-ordinate policies relating to the safety of navigation and environmental protection in the Straits.<sup>4</sup> A meeting of Foreign Affairs Ministers of 24 February 1977 endorsed the report of a Senior Officials meeting held in December 1976, which suggested an under-keel clearance requirement of at least 3.5 metres, the delineation of a traffic separation scheme in three critical areas, a deep-water route for deep draught vessels, the improvement of navigational aids and facilities, the maintenance of the existing voluntary reporting procedure for large vessels, voluntary pilotage through critical areas, a maximum speed for VLCCs, adequate insurance for all tankers and large vessels and a joint policy to deal with marine pollution.<sup>5</sup> As was seen in Section 7.6.1.2.3, most of these suggestions were endorsed by the IMO shortly thereafter.<sup>6</sup> Further measures were adopted by the IMO on the recommendation of the three littoral States, namely, the revision by the IMO's Maritime Safety Committee of the existing traffic separation scheme,<sup>7</sup> as well as the adoption, also by the MSC, of a mandatory ship reporting system in the Straits (STRAITREP).<sup>8</sup> Other mechanisms

<sup>4</sup> Beckman in Chapter 11, n. 31, 235–236. For the text of the 1975 Statement, see M. Danusaputro, 'Elements of an Environmental Policy and Navigational Scheme for Southeast Asia, with Special Reference to the Straits of Malacca', in D. M. Johnston (ed.), *Regionalization of the Law of the Sea. Proceedings of the 11th Conference of the Law of the Sea Institute* (Ballinger, Cambridge, MA, 1978), 185.

<sup>5</sup> Text in Koh in n. 2, 179–181.

<sup>6</sup> IMCO resolution A.375(X) of 14 November 1977 (adopting traffic separation schemes, deep-water routes, the UKC requirement of 3.5 metres for deep draught vessels and VLCCs at all times during the entire passage through the Straits and the installation of navigational aids (beacons) at designated points; also endorsing the necessity for all oil tankers in the Straits to be adequately covered by relevant insurance schemes). One may recall that, at UNCLOS III, Norway suggested adopting 'a clause requiring shipping nations to establish a mandatory insurance pool that should guarantee that riparian States would be compensated for damage caused by foreign ships in cases where the traditional rules of liability proved inadequate'. UNCLOS III, I Official Records (25th plenary meeting, 1974), 86. This was supported by Turkey, UNCLOS III, I Official Records (39th plenary meeting), 169.

<sup>7</sup> The new TSS adjusts the existing TSS (already amended in 1981 by resolution A.476(XII)) to changing circumstances relating to the increase of the through traffic and the size, speed and types of vessels in the Straits. See E. E. Mitropoulos, 'Enhancing Navigational Safety in the Malacca and Singapore Straits', 1999(3) *Singapore Journal of International and Comparative Law*, 309.

<sup>8</sup> Resolution MSC.73(69) of 19 May 1998 (Annex 1), adopted in compliance with SOLAS Regulation V/8–1 (now Regulation 11 of chapter V) and in accordance with IMO's Guidelines for Ship Reporting Systems. Designated categories of vessels are required to participate in the mandatory ship reporting system. For a summary of the technical details, see M. H. E. Siang, 'Implementation of Mandatory Ship Reporting in the Malacca and Singapore Straits', 1999(3) *Singapore Journal of International and Comparative Law*, 345.

include a Vessel Tracking and Information Service provided by Singapore, a Vessel Tracking System supplied by Malaysia and the Marine Electronic Highway (MEH) Project.<sup>9</sup>

Co-operation with at least one user State also dates back to before the adoption of the UNCLOS. In 1969, the Japanese Malacca Strait Council was established for the purpose of route maintenance on the Straits and, since then, has been continuing its activities towards the improvement of safe navigation and preservation of the marine environment.<sup>10</sup> The Council works hand in hand with the TTEG, and over the years, such co-operation led to, for example, the production of navigational charts, the maintenance of aids to navigation, the clearance of navigable channels, the donation of an oil-skimming vessel, the observation of tides and technology transfer.<sup>11</sup> The 1977 Ministerial Statement also indicated that the implementation of a traffic separation scheme should not pose a financial

<sup>9</sup> A project envisaged as being built on a network of electronic navigational charts for use with Electronic Chart Display and Information System. See Mitropoulos in n. 7, 313–314; N. Guy and T. Kruuse, ‘Application of New Generation Navigational Aids and Aids to Navigation in the Malacca and Singapore Straits’, 1999(3) *Singapore Journal of International and Comparative Law*, 338–339; C. Thia-Eng and A. Ross, ‘The Marine Electronic Highway: Concepts and Challenges’, 1999(3) *Singapore Journal of International and Comparative Law*, 388. This voluntary system would notably be financed by a fair and equitable subscription fee system among a variety of users: *ibid.*, 395. Discussions for the project began in 1996 between the IMO-UNDP and the GEF. In 2001, the IMO and the three littoral States embarked on the MEH project, with a project implementation period running from 2004 to 2008 and with an initial US \$15 million allocated to the project, US \$8 million provided by the GEF and the rest provided by foreign banks and the participating governments. The project relies on Article 26(2) of the UNCLOS as providing the legal grounds to charge voluntary users of the MEH as specific services rendered to ships. Oral in Chapter 11, n. 26, 576–578 (citing a GEF Project Brief of 2003). The period between 2006 and 2011 was the MEH Demonstration Project, which assists the littoral States and representatives of some of the large commercial ship owners with collectively deciding whether to establish a marine electronic highway for the entire length of the Straits. See <http://web.worldbank.org/external/projects/main?Projectid=P068133&theSitePK=40941&pagePK=64283627&menuPK=228424&piPK=73230>; [www.imo.org/OurWork/Safety/Navigation/Pages/MarineElectronicHighway.aspx](http://www.imo.org/OurWork/Safety/Navigation/Pages/MarineElectronicHighway.aspx).

<sup>10</sup> [www.nmc.com.sg/MSA.pdf](http://www.nmc.com.sg/MSA.pdf), 2. The Council is financed by the Nippon Foundation, the Japanese government, the Japan Maritime Foundation and several Japanese associations. *Ibid.*, 6.

<sup>11</sup> *Ibid.*, 3, 5. See also K. Saishoji, ‘Japan’s Contribution to Safe Navigation in the Straits of Malacca and Singapore’, 1998(2) *Singapore Journal of International and Comparative Law*, 511 et seq. (mentioning NAVAREA Warning, NATEX Warning, the Oil Spill Response Action Plan project and the Japanese contribution to the Tokyo MOU adopted in 1983 to establish a system of port State control in the Asia-Pacific Region); A. Ono, ‘Japan’s Contribution to Safety and Pollution Mitigation in the Straits of Malacca’, in A. Hamzah (ed.), *The Straits of Malacca* (Pelanduk, Kuala Lumpur, 1997), 241.

burden on the coastal States, and the necessary funds should be obtained from the users. Furthermore, the Foreign Ministers adopted guidelines for the TTEG, notably to the effect that financial sources should be tapped to fund the implementation of the traffic separation scheme, to study the need for creating a revolving fund for anti-pollution activities and to initiate consultation with the users of the Straits.<sup>12</sup> In 1981, a Revolving Fund was set up by MOU signed by Indonesia, Malaysia, Singapore and the Malacca Strait Council. Japan donated ¥400 million to the Fund, which allows the littoral States to take an advance for use in combating an oil spill from a ship. When compensation is received, the amount is repaid into the Fund.<sup>13</sup> Overall, in 2009, it was estimated that the total amount of Japanese financial contribution up to that year had exceeded US \$150 million.<sup>14</sup>

There is no reason to conceal that the three States bordering the Straits lamented over the lack of participation by other user States.<sup>15</sup> They saw the entry into force of the UNCLOS in 1994 as an opportunity to attempt to implement Article 43, and this resulted in a series of conferences and workshops held from 1994 to 1999.<sup>16</sup> In 1999, it was notably suggested that the three littoral States take the initiative of implementing Article 43, in co-operation with the IMO,<sup>17</sup> and, even more concretely, that ‘the Tripartite Committee of Senior Officials . . . be convened immediately to revive discussion on the implementation of Article 43, either through informal voluntary cooperation with the users of the straits or through a much more formal mechanism through IMO or through other international conferences’.<sup>18</sup> As indicated by Beckman, the three littoral States did not immediately take up these suggestions. However, several meetings held in conjunction with the IMO in 2005 and 2006 culminated in

<sup>12</sup> Koh in n. 2, 182–183.

<sup>13</sup> T. K. Leong, ‘The Revolving Fund: A Unique Facility’, in A. Hamzah (ed.), *The Straits of Malacca* (Pelanduk, Kuala Lumpur, 1997), 247–248. For the text of the MOU, see *ibid.*, 251–252. The Fund is controlled by the Revolving Fund Committee, comprising one representative of each littoral State. In 1984, the Committee adopted the Standard Operating Procedure for Joint Oil Spill Combat in the Straits of Malacca and Singapore (SOP). *Ibid.*, 248 and 253–260 for the text of the SOP.

<sup>14</sup> H. Terashima, ‘Transit Passage and Users’ Contribution to the Safety of the Straits of Malacca and Singapore’, in M. H. Nordquist, T. T. B. Koh and J. N. Moore (eds.), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Nijhoff, Leiden and Boston, 2009), 360.

<sup>15</sup> E.g. Djalal in Chapter 11, n. 12, 467.      <sup>16</sup> Beckman in Chapter 11, n. 31, 241–242.

<sup>17</sup> Statement by Singapore Ambassador T. Koh, in Beckman in Chapter 11, n. 17, 286.

<sup>18</sup> Suggestion by Djalal in Chapter 11, n. 12, 469. See n. 3 for the Committee of Senior Officials.

the release of the 'Singapore Statement' on 6 September 2007,<sup>19</sup> at the close of a meeting convened by Singapore and the IMO, with the co-operation of Indonesia and Malaysia. The Statement affirms that primary responsibility over the safety of navigation, environmental protection and maritime security in the Straits lies with the littoral States and acknowledges the role of the IMO, the user States, the shipping industry and other stakeholders in co-operating with the littoral States.<sup>20</sup> The Statement welcomes the establishment by the littoral States of the Co-operative Mechanism between the littoral States and the user States on safety of navigation and environmental protection in the Straits, consisting of the three components announced in 2006: the Co-operation Forum, the Project Co-ordination Committee and the Aids to Navigation Fund.<sup>21</sup> The Singapore meeting agreed that the work of the TTEG should continue to be supported. This is a clear signal that the co-operative mechanism builds on and enhances existing co-operative arrangements.<sup>22</sup> Indeed, an earlier Statement released by the three littoral States indicates that the

<sup>19</sup> In August 2005 in Batam, the three littoral States reaffirmed that they have sovereignty over the Straits and welcomed the assistance of user States, relevant international agencies and the shipping community in the areas of capacity building, training and technology transfer, as well as other forms of assistance; they emphasized the importance of tripartite ministerial meetings. Beckman in Chapter 11, n. 31, 247. In September 2005 in Jakarta, at an IMO-sponsored meeting attended by more than 30 States, it was agreed that the work of the TTEG should continue and that the littoral States should establish a mechanism for meetings on a regular basis with user States, the shipping industry and other stakeholders, as well as for information exchange. *Ibid.*, 248. At a follow-up meeting in September 2006 in Kuala Lumpur, the three States announced that the proposed mechanism would consist of projects, a forum and a fund: They proposed six specific projects, under the co-ordination of the TTEG, to enhance safety and environmental protection, and they requested user States to co-operate directly in these projects; they also suggested the establishment of a Co-operation Forum to promote open dialogue between the littoral States, user States and other interested parties; lastly, they agreed to establish an Aids to Navigation Fund that would accept voluntary contributions. *Ibid.*, 249. Beckman explains these developments by a combination of factors: the increased concern about the vulnerability of the Straits to terrorist attacks and other risks, the informal announcement by Japan that it would no longer bear all the costs and personal impetus from IMO Secretary-General E. Mitropoulos. *Ibid.*, 244–246.

<sup>20</sup> [www.mpa.gov.sg/sites/pdf/spore\\_statement.pdf](http://www.mpa.gov.sg/sites/pdf/spore_statement.pdf).

<sup>21</sup> See n. 19. The Statement also emphasizes that the establishment of the Co-operative Mechanism represents, notwithstanding the role of the TTEG on Safety of Navigation, a historic breakthrough and landmark achievement in co-operation between States bordering a strait used for international navigation and user States, as well as other interested stakeholders, and, for the first time, it brings to realization the spirit and intent of Article 43 of the UNCLOS.

<sup>22</sup> Beckman in Chapter 11, n. 31, 251.

Co-operative Mechanism is 'established within the framework of the [TTEG]'.<sup>23</sup>

The Co-operative Mechanism is intended to be flexible. For instance, user States and other stakeholders can contribute either in kind, for example, by sponsoring identified projects, or in direct financial form, for example, by making monetary contributions to the Aids to Navigation Fund. Also, the Mechanism does not preclude any other form of specific forum that a user State may want to establish with the littoral States directly, and the implementation of projects does not preclude any bilateral arrangement on a specific project. Furthermore, the Aids to Navigation Fund does not discount contributions that may be made directly or indirectly, for example, directly from the contributor or indirectly through an industry.<sup>24</sup>

The Co-operation Forum serves to promote general dialogue and exchange of views on issues of common interests in the Straits. It limits its deliberation on matters relating to the safety of navigation and environmental protection in the Straits. Participation in the Forum is made up of representatives from the three littoral States, user States, the shipping industry and other parties in the Straits.<sup>25</sup> The Project Co-ordination Committee (PCC), comprising the littoral States and sponsors of projects, oversees the co-ordination of the implementation of these projects. The PCC enables the sponsors of projects to have a role in the overall project co-ordination. In addition to the PCC, the littoral States directly involved and the sponsor of a specific project can establish a joint project implementation team.<sup>26</sup> The Aids to Navigation Fund (ANF) provides the

<sup>23</sup> Doc. IMO/SGP 2.1/1 (2007), para. 7.      <sup>24</sup> *Ibid.*, paras. 9, 22–23.

<sup>25</sup> *Ibid.*, Annex 2, Rules of Procedure. The Forum is hosted by the three littoral States on the basis of rotation or, in lieu of this, by a mutually agreed upon arrangement. The host country assumes the Chair; the quorum of the Forum is to be constituted when representatives of the three littoral States and one user State or interested stakeholder are present. *Ibid.* The participation of stakeholders in the Forum is voluntary and inclusive: Stakeholders with an interest to contribute in the maintenance of navigation safety and environmental protection in the Straits can participate in sessions of the Forum. *Ibid.*, Annex 2, Appendix.

<sup>26</sup> *Ibid.*, para. 15. The PCC comprises one Representative from each littoral State and the user States, industry or other parties contributing to the various projects co-ordinated by the PCC. Representatives should, as far as possible, be senior officials who are administratively or operationally involved in safety of navigation or environmental protection matters. The PCC meets at least annually or at any interval as agreed. The PCC meeting may be held in conjunction with the TTEG meeting or as may be decided by the TTEG. The PCC meeting will be hosted by the littoral States on the basis of rotation or, in lieu of this, by a mutually agreed upon arrangement. All decisions of the PCC are by consensus with full

means for all users of the Straits to also contribute financially towards the maintenance of the aids to navigation in the Straits that are identified and agreed upon by the TTEG, such as light beacons and light buoys. Contributions to the ANF are on a voluntary basis. Contributions may be received from States, industry, private benefactors, non-governmental organizations and inter-governmental organizations, including the IMO. The administration of the ANF will be by the littoral States on a rotational basis.<sup>27</sup>

The six projects presented at the 2006 Kuala Lumpur meeting are led by the littoral States and have received the support of various user States,<sup>28</sup> but the industry has yet to actively participate, despite the appeals to participation by all stakeholders and despite the announcement by INTERTANKO, ICS and BIMCO that they considered involvement in the Co-operative Mechanism.<sup>29</sup> The projects, so far, have notably received support from India, Germany, Australia, China, the USA, the EU Commission, the Roundtable of International Shipping Associations, the IMO, Japan, the Republic of Korea and the Nippon Foundation. Contributions and pledges to contribute to the ANF were also received from the Middle East Navigation Aids Service and the Japanese Shipowners Association.<sup>30</sup> The Singapore Statement also invited the IMO to participate in the Co-operative Mechanism, to continue to co-operate with the littoral States and to provide every assistance possible in attracting sponsors for the projects and contributors for the establishment, maintenance, repair and

participation of all Representatives. *Ibid.*, Annex 3, Rules of Procedure. Each littoral State shall be responsible for the implementation of the project in its area of jurisdiction. *Ibid.*, Annex 3, Appendix.

<sup>27</sup> *Ibid.*, paras. 19–20. The Fund is used only to cover the costs of services rendered or activities carried out for the provision and maintenance of the identified aids to navigation. Such costs could include training of key personnel involved in the day-to-day operations and maintenance of the aids to navigation and other matters incidental thereto as may be duly approved. An ‘Aids to Navigation Fund Committee’ was established, comprising the littoral States and the contributing user State(s), to manage and operate the Fund, in accordance with the principles and guidelines to be agreed to by the Committee and approved by TTEG. All decisions of the Committee are by consensus with full participation of all Representatives. *Ibid.*, Annex 4, Rules of Procedure and Appendix.

<sup>28</sup> The ANF Committee members include the three littoral States, China, India, Japan, the Republic of Korea, Saudi Arabia, the United Arab Emirates, the International Foundation of Aids to Navigation, the IMO, the Malacca Strait Council and the Nippon Foundation. To date, the ANF has received about US\$15.2 million in both pledged and actual contributions. See [www.mpa.gov.sg/sites/pdf/annex\\_a\\_factsheet\\_on\\_co-operative\\_mechanism.pdf](http://www.mpa.gov.sg/sites/pdf/annex_a_factsheet_on_co-operative_mechanism.pdf) for the list of projects (now seven projects) and the supporters of each project.

<sup>29</sup> See Terashima in n. 14, 367.

<sup>30</sup> See n. 28. See [www.menas.org](http://www.menas.org) and [www.nippon-foundation.or.jp/eng/](http://www.nippon-foundation.or.jp/eng/)

replacement of the aids to navigation in the Straits. This is not only a tribute to the achievements of the IMO; it is also the immediate consequence of the direct involvement of the IMO in helping find collaborative mechanisms to ensure the safety of navigation and environmental protection in the Straits.<sup>31</sup> One may recall that this had also been suggested earlier by the United Kingdom.<sup>32</sup>

The First Co-operation Forum, one of the three limbs of the Co-operation Mechanism, was held in Kuala Lumpur on 27–28 May 2008. It agreed on its rules of procedures, discussed the report of the first meeting of the ANF held on 16–17 May 2008, and performed other activities of the Project Co-ordination Committee, which held its first meeting on 29 May 2008 to discuss the progress of the six projects.<sup>33</sup> In particular, during the first meeting of the ANF, its terms of reference were adopted, under which Malaysia was chosen as the Chairman of the ANF Committee for the next three years and, thereafter, chairmanship will be held by rotation among the three coastal countries.<sup>34</sup> At the third meeting of the ANF in April 2009, the rules of procedure were amended to authorize its Chairman to enter into an agreement with any contributor in order to verify the contribution.<sup>35</sup>

<sup>31</sup> In his keynote address at the Asian Regional Forum Conference on regional co-operation in maritime security, IMO Secretary-General Mitropoulos said:

As part of my own efforts to push forward collaboration on maritime security in the region, I initiated a round of consultations with representatives of Indonesia, Malaysia and Singapore, the three littoral States, and other States using the Straits, offering my services in the pursuit of any collaborative scheme aimed at ensuring safety, security and environmental protection through the Straits . . . [T]his is an issue that clearly involves wider interests and a greater stakeholder community and it would be disingenuous to suggest otherwise. I think it is both appropriate and entirely within the provisions of international law that the views of this wider stakeholder community should be sought and taken into consideration, and I see this meeting as being part of the necessary process that must be undertaken to determine the mechanisms for doing so.

[www.imo.org/Newsroom/mainframe.asp?topic\\_id=1028&doc\\_id=4777](http://www.imo.org/Newsroom/mainframe.asp?topic_id=1028&doc_id=4777) (2 March 2005).

<sup>32</sup> IMO Doc. LEG/77 10 (1998), para. 11: ‘The United Kingdom believes that the IMO would be the competent body to consider such an agreement; indeed, it cannot identify another suitable international body’.

<sup>33</sup> Djalal in Chapter 11, n. 79, para. 19.

<sup>34</sup> *Ibid.*, paras. 21, 24. The first meeting was attended by three coastal countries, plus the Republic of Korea, the United Arab Emirates, the Nippon Foundation and the MENAS. The observers from China, Greece, Japan, and the IMO also attended. The meeting acknowledged contributions received so far. The second meeting was held in October 2008.

<sup>35</sup> IMO Doc. C 102/14/2 (2009), para. 6.

At the opening of the Second Co-operation Forum, on 14 October 2009, it was announced that the three littoral States had concluded a Joint Technical Arrangement (JTA) with the IMO to institutionalize an IMO Trust Fund that supports co-operation among stakeholders towards enhancing safety and marine environment protection in the Straits. The Fund benefits from an initial contribution of US \$1 million from Greece. This 'IMO Straits of Malacca and Singapore Trust Fund' complements the ANF.<sup>36</sup>

During the Third Co-operation Forum, held from 6 to 7 October 2010, Malaysia announced that the level of contributions was still short of the average annual cost required.<sup>37</sup> The IMO announced that it had introduced e-Navigation, which will harmonize the collection, integration, exchange, presentation and analysis of marine information on board and ashore by electronic means.<sup>38</sup> Various initiatives to enhance the safety of navigation in the Straits were announced.<sup>39</sup> Australia shared with the Forum its objectives in using the Under Keel Clearance Management system, which was on trial in the Torres Strait and which was considered as part of the current generation of Aids to Navigation.<sup>40</sup> Indonesia informed the Forum that it was in the progress of establishing a VTS that

<sup>36</sup> See [www.mpa.gov.sg/sites/global\\_navigation/news\\_center/mpa\\_news/mpa\\_news\\_detail.page?filename=nr091014.xml](http://www.mpa.gov.sg/sites/global_navigation/news_center/mpa_news/mpa_news_detail.page?filename=nr091014.xml). It was announced that:

[N]ew mechanisms for collaboration will also be established to broaden the scope of participation. In particular, there will be two new panel discussions on 'Safety of Navigation' and 'Environment Protection'. Co-chaired by the littoral States and the Roundtable of international shipping associations, the panel discussions will promote the active participation of the Industry and its engagement with the littoral and user States.

*Ibid.* At the 33rd meeting of the TTEG in October 2008, the representative of the IMO informed the meeting of the receipt of US \$1 million from Greece, which would be kept at IMO Trust Fund, and stated that a mechanism would be worked out on how the IMO Trust Fund would co-operate with the ANF in utilizing the fund in order to promote the safety of navigation in the Straits. Djalal in Chapter 11, n. 79, para. 34. The total amount of contributions to the Trust Fund so far is US\$1,238,193 and EUR315,000 (from the EU). See [http://www.cooperativemechanism.org.my/index.php?option=com\\_content&view=article&id=10&Itemid=11](http://www.cooperativemechanism.org.my/index.php?option=com_content&view=article&id=10&Itemid=11).

<sup>37</sup> See [www.tteg-indonesia.com/download/cf/CF%203-Reportofthe3rdCo-operationForum.pdf](http://www.tteg-indonesia.com/download/cf/CF%203-Reportofthe3rdCo-operationForum.pdf), para. 2.3.

<sup>38</sup> *Ibid.*, para. 2.9.

<sup>39</sup> Included among them are the problem of ships crossing the TSS and Precautionary Areas in the Singapore Strait and the performance of the Class B Automatic Identification System in high traffic density areas. *Ibid.*, paras. 3.2.2., 3.4.

<sup>40</sup> *Ibid.*, para. 3.7.

would commence in 2012.<sup>41</sup> With respect to the overall direction of the Co-operation Mechanism, Singapore explained that:

[W]hen it was first launched, the overriding concern was on establishing a sustainable framework for co-operation. In this regard, Singapore noted there has been concrete progress in the ANF and Straits Projects. Going forward, the review and enhancement of measures to improve navigational safety and environmental protection in the Straits would be critical for further co-operation under the Co-operative Mechanism.<sup>42</sup>

The latest Co-operation Forum (the Sixth) was held in early October 2013 in Bali. The Forum noted several issues in the MEH that need to be addressed and agreed to further discuss the issues in the 38th TTEG. The Forum also noted that the littoral States have already ratified IMO Conventions to enhance environmental protection in the Straits. The Forum noted the need to further consider an urgent and comprehensive study of living environment quality and its implication in the Straits.<sup>43</sup> The 38th TTEG was held shortly afterwards. Malaysia, as the Chair of the Working Group on Voluntary Pilotage Services in the Straits of Malacca and Singapore, reported the result of the Working Group. The Meeting agreed that each littoral States will consolidate the revised draft guidelines within three months. The Meeting noted an IMO suggestion to consider and develop reasonable time frame and modalities before submitting the final revised guidelines to the IMO Sub-Committee on Navigation, Communications and Search and Rescue (NCSR).<sup>44</sup> The establishment of an IMO trust fund is, surely, reminiscent of the early Maltese proposal that directly associated the coastal States with an international organization.<sup>45</sup> But the difference is that no charge on vessels is envisaged, that the trust fund exists in addition to the ANF and that the whole system is purely voluntary. The predominance of the littoral States in the Co-operative Mechanism, chiefly through the TTEG, the open attitude towards the notion of a 'user', the voluntary nature of contributions to specific projects, to

<sup>41</sup> Ibid., para. 5.4.4.      <sup>42</sup> Ibid., para. 5.12.

<sup>43</sup> See [http://www.cooperativemechanism.org.my/index.php?option=com\\_phocadownload&view=category&id=33:6th-cooperation-forum&Itemid=20](http://www.cooperativemechanism.org.my/index.php?option=com_phocadownload&view=category&id=33:6th-cooperation-forum&Itemid=20)

<sup>44</sup> See [http://www.cooperativemechanism.org.my/index.php?option=com\\_phocadownload&view=category&id=34:2013-38th-tteg-meeting&Itemid=44](http://www.cooperativemechanism.org.my/index.php?option=com_phocadownload&view=category&id=34:2013-38th-tteg-meeting&Itemid=44). The Working Group has been examining an Indonesian proposal introducing a new concept of joint management of voluntary pilotage and the implication of the establishment of the joint management concept on IMO Resolution A.375(X) and the laws under which the concept should operate. On Resolution A.375(X), see Section 7.2, note 32.

<sup>45</sup> See Chapter 10, n. 48.

the ANF or to the IMO Trust Fund and the primacy of consensus as a decision-making procedure are characteristics of the kind of implementation of Article 43 that was designed for the Straits. The flexibility of that system surely reflects the original intention of the drafters. It can only be hoped that the private industry will follow with good deeds, as well.<sup>46</sup> It should also be noted that the original intention of the drafters is reflected in the absence in the Co-operation Mechanism of concerted measures towards maritime security. It is well known that both the IMO and the United Nations had addressed the particular problem of security (terrorist attacks and piracy) in the Straits.<sup>47</sup> Maritime safety, the protection of the environment and maritime security had been linked at the Batam, Jakarta and Kuala Lumpur meetings.<sup>48</sup> However, maritime security per se is absent from the implementation of the Co-operative Mechanism as announced in the Singapore Statement, which addressed the matter separately. The meeting commended ‘the joint efforts of the armed forces of the littoral States in contributing to the security of the Straits, through the Malacca Straits Sea Patrols and the “Eyes in the Sky” maritime air patrols, as formalized by the signing of the Malacca Straits Patrol Standard Operating Procedures on 21 April 2006.’<sup>49</sup> This is certainly more consonant

<sup>46</sup> At the Third Co-operation Forum, INTERTANKO announced that their proposal on environmental protection had been discussed at the 35th TTEG meeting. The objective of the proposal is to work towards a mutual objective of enhancing environmental protection in the Straits by co-operation and capacity building through the development of a common environmental action plan. The 35th TTEG meeting supported further consideration of the project proposal on port reception facilities, the establishment of a Technical Working Group and the proposed project activity and time schedule for the project implementation. See, n. 37, para. 5.7.1.

<sup>47</sup> See, e.g., IMO Doc. C 93/15 (7 October 2004), Note by the Secretary-General on the Protection of Vital Shipping Lanes; UN Doc. A/RES/59/24 (17 November 2004), paras. 34, 45, 47; J. A. Roach, ‘Enhancing Maritime Security in the Straits of Malacca and Singapore’, 2005(59) *Journal of International Affairs*, 97.

<sup>48</sup> See, notably, J. H. Ho, ‘Enhancing Safety, Security, and Environmental Protection in the Straits of Malacca and Singapore: The Cooperative Mechanism’, 2009(40) *Ocean Development and International Law*, 235–237. In the Batam Joint Statement of August 2005, the Ministers notably agreed to establish a TTEG on Maritime Security to complement the works of the existing TTEG on Safety of Navigation and the Revolving Fund Committee. At the Jakarta meeting in September 2005, safety of navigation, maritime security and environmental protection were also linked, in particular in the design of burden-sharing solutions. See UN Doc. A/60/529 (1 November 2005), 9–10.

<sup>49</sup> Ho (in n. 46, 239) indicates:

Besides the lack of support for the funding of safety-related projects, security measures were not discussed at the Kuala Lumpur meeting. This was probably because of the steady decline in the incidents of piracy and armed robbery following the 2005 Jakarta

with the text and negotiating history of Article 43. One may also add that States are, perhaps, less enthusiastic about discussing security plans than they are about discussing pollution and navigational safety with private associations.

meeting and the removal of the Malacca Strait from the Lloyd's JWC's list of war risk areas in August 2006 . . . There was also tacit understanding between the three littoral states that security matters would be addressed in the [Malacca Strait Patrols] forum.