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The Northern Sea Route. Conditions for Sailing according to European Community Legislation
- with Special Emphasis on Port State Jurisdiction

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International Northern Sea Route Programme (INSROP)

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FOREWORD - INSROP WORKING PAPER

INSROP is a five-year multidisciplinary and multilateral research programme, the main phase of which commenced in June 1993. The three principal cooperating partners are **Central Marine Research & Design Institute (CNIIMF)**, St. Petersburg, Russia; **Ship and Ocean Foundation (SOF)**, Tokyo, Japan; and **Fridtjof Nansen Institute (FNI)**, Lysaker, Norway. The INSROP Secretariat is shared between CNIIMF and FNI and is located at FNI.

INSROP is split into four main projects: 1) Natural Conditions and Ice Navigation; 2) Environmental Factors; 3) Trade and Commercial Shipping Aspects of the NSR; and 4) Political, Legal and Strategic Factors. The aim of INSROP is to build up a knowledge base adequate to provide a foundation for long-term planning and decision-making by state agencies as well as private companies etc., for purposes of promoting rational decisionmaking concerning the use of the Northern Sea Route for transit and regional development.

INSROP is a direct result of the normalization of the international situation and the Murmansk initiatives of the former Soviet Union in 1987, when the readiness of the USSR to open the NSR for international shipping was officially declared. The Murmansk Initiatives enabled the continuation, expansion and intensification of traditional collaboration between the states in the Arctic, including safety and efficiency of shipping. Russia, being the successor state to the USSR, supports the Murmansk Initiatives. The initiatives stimulated contact and cooperation between CNIIMF and FNI in 1988 and resulted in a pilot study of the NSR in 1991. In 1992 SOF entered INSROP as a third partner on an equal basis with CNIIMF and FNI.

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Report no. 1

THE NORTHERN SEA-ROUTE. CONDITIONS FOR SAILING ACCORDING TO COMMUNITY LEGISLATION - with special emphasis on port State jurisdiction

A project of the International Northern Sea Route (NSR) Programme (INSROP)

(Revised version)

Reviewed by Professor Tullio Scovazzi*

Tromsø, 7 November 1995

* I am also most grateful to Dr. Robin Churchill, who has kindly reviewed an earlier version and to professor Edgar Gold for a good piece of advice regarding the Law of the Sea questions.

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ABSTRACT

The Community (European Union) is rather ambitiously chasing the goal of bringing substandard ships out of business. The "Action Programme" is promoting such efforts (see "Communication from the Commission - A Common Policy on Safe Seas". February 1993). Some steps have already been taken. As reflected in this study, I think the emerging Common Community Policy on Safe Seas does reflect what is at stake, vitalizing the efforts to eliminate substandard ships. This rather strong safety position is obviously promoting equal rights within shipping industries, and transportation along the southern and northern sea routes.

The issue dealt with in this study (report no. 1) under the INSROP (The International Northern Sea Route Programme), is the safety requirements applicable to ships flying the flag of non-member states when docking in an EU or EEA (European Economic Area - the EEA Agreement of 2nd May 1992) Member State harbour. The main issue is to analyse whether Community shipping law addresses member States so as to unify domestic legislation versus third state ships, including substandard ships, those arriving from the Asian Far East along the International Northern Sea Route (NSR) as well - when docking in an EU or EEA harbour. In which way does Community Law, by unifying port State legislation, contribute to the elimination of "ports of convenience"? Is Community Law the "light at the end of the tunnel", the only possible instrument capable of preventing substandard ships from taking charterparties to and from any of the EU or EEA harbours, including ships sailing along the NSR?

The main purpose of Report no 1 is to picture the Community **port State legal situation,** (including legislation as well as enforcement) with special emphasis on the classes of legal persons affected (see Chapter 1 & 2). Of course other legislation; domestic and international law is relevant as well. In this dissertation I do however not deal with these questions.

As the International Law of the Sea (See UNCLOS Article 218) does not prevent port States from making investigations and instituting proceedings in respect of any violation of applicable international rules and standards related to discharge from a vessel which is voluntarily within the port of the enforcing state, irrespective of the area outside that port State, be it internal sea, territorial sea or Exclusive Economic Zone (EEZ), incidents taken place during the NSR transportation is due to Community port State enforcement. The Community is free to direct member States in any aspect within these framework, legislation as well as surveillance and enforcement. For this reason, I also discuss member States enforcement power (Chapter 3).

Report no 2 (forthcoming) addresses the World Trade Organization (WTO) General Agreement on Trade in Services (GATS) and the EU competition law in relation to equal participation rights in NSR transportation. The connection between competition and safety is simple, as unequal technical and safety requirements creates unequal conditions of competition. According to WTO or EU competition law, equal rights are offered to treaty member States complying with basic legal claims.

The Community environmental and safety **legislation** is not directed towards ships **when sailing the NSR**. The importance of Community law is the implementation on all ships **when docking** in an EU or EEA harbour, including ships arriving from the Asian Far East through the NSR. As such Community law **does apply directly to** the standard of ships, manning, the handling of goods and the transportation requirements **when in** the NSR. However, EU or EEA port States may, under UNCLOS Article 218(1), according to Community Law, be made responsible for undertaking investigations and institute proceedings in respect of any discharge occurred within the NSR, from a vessel being voluntarily within the port of the enforcing state, - in violation of applicable international rules and standards. By this reason and because of its very huge geographical area, the Community port State position is a strong one.

The underlying idea of Report no. 1, is that all vessels - vessels of non-convention states as well - competing for charterparties to and from the European Community "inner market" along the NSR, must at least adhere to generally accepted rules and standards and in some instances to advanced, unilateral Community port State standards. These technical improvements being compulsory whilst in ports are obviously still present when sailing the NSR.

The unique Community position is made possible by the huge Community law geographical scope, which include most waters from the Dardanelles Strait to the Norwegian-Russian border, and by the **potential of making compulsory, approximate or harmonized legal solutions** in **all** member States in order to avoid "ports of convenience". All ships - substandard ships as well - destined for any EU or EEA harbour must fulfil the Community law safety requirements.

The study documents that Community law as it now stands, affects all thirdstate ships, substandard ships as well, including ships from the Asian far east, sailing along the NSR - when docking in an EU and EEA state harbour. This includes technical vessel provisions, rules for the manning of ships and handling of goods, waste, equipment, etc. relating to foreign ships.

The Community enjoys substantial legislative power over member States as well as transiting and docking ships with regard to equipment, manning, handling and technical requirements etc. As the limitations under UNCLOS Article 21(2) is related to ships under innocent passage, advanced unilateral Community provisions might - in strict legal terms - be implemented, vis-á-vis foreign ships when docking in an EU or EEA harbour.

Even ships under innocent passage are due to substantial coastal State jurisdiction however limited by UNCLOS Article 21(2), which prohibits the port State to regulate the "design, construction, manning or equipment of foreign ships unless they comply with generally accepted international rules or standards". Similar restrictions are stipulated by the IMO-conventions, i.e. mainly the MARPOL and SOLAS conventions. These provisions do however give rise to interpretational doubt. As Article 21(2) relates to an **extra-legal or non-binding technology-based consensus**, it is my opinion that the IMO resolutions, codes, recommended practice and guidelines, although not legally binding, entitle the coastal State to regulate the hull, technical equipment, engine etc. of foreign vessels, when in transit enjoying the right of innocent passage.

As regards the enforcement competence, Community law does not make any explicit

requirements, which means that Community Member port States have enforcement and surveillance competence within the framework of the Law of the Sea, only. The extent of enforcement is a legal question. Viewing the Community law potential, we have to study the Law of the Sea framework, which however is outside the scoop of this dissertation.

Further studies into the Law of the Sea (esp. IMO and UNCLOS) framework regarding unilateral Community legislation and enforcement, are necessary. Having made this clear, the Community might evaluate different options, i.a. the IMO tradition of implementing generally accepted international rules and standards only, or a more American approach, which establishes unilateral requirements exceeding the average of IMO-standards.

"the role of the Port State in furthering policies to improve conditions on all substandard vessels will remain crucial"

George C. Kasoulides[1]

A PRESENTATION

1. Some introductory remarks

Is Community Law the "light at the end of the tunnel", the only instrument capable of harmonizing member States' legislation and thereby preventing substandard ships from docking in or taking charter-parties to and from any of the EU or EEA[2] harbours? Focusing on the problem of substandard ships, flag-of-convenience ships are not dealt with in particular, unless they happen to be substandard.[3]

This project (Report no. 1) focuses on the European Union (EU) port State safety and environmental provisions (Community Law) relevant to sailing and to ships originating in or destined for an EU or European Economic Area (EEA) harbour **whilst in that harbour.** The main point is to address **member States**' rights and duties regarding ships docking in EU or EEA harbours according to Community law; I call this "the docking-approach". Tullio Scovazzi states that

> "if its [the legislation's] repercussions on the NSR ... are to be considered, [the study] cannot [be] limited to Community law. In the field of protection of the environment, three sets of rules can be distinguished: domestic legislation, Community legislation ... and international law".[4]

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[1] George C. Kasoulides: Port State Control and Jurisdiction. Evolution of the Port State Regime (Martinus Nijhoff Publishers 1993) p. 109.

[2] See the EEA Agreement of 2nd May 1992.

[3] I agree with Edgar Gold that there is no statistical connection between substandard ships and ships from flag-of-convenience states.

[4] In the Review of 1st September 1995 p. 1.

I agree that **if** we are to focus on the rights and duties of shipowners or operators then those three sets of rules must be examined. When focusing only on the member States' rights and duties, as I do, then it is appropriate to exclude the domestic law perspective.

One of the reasons for studying the member States' rights and obligations under Community law, is that most of the actual directives do not confer rights or duties on individuals, cf. the EU-treaty Article 173 fourth paragraph. Accordingly private persons might not rely on such legislation before domestic courts as can be seen by analysing one of the relevant directives applicable to the shipping industry, the Framework Directive on Waste (75/442) - (see p. 14, 22, 26, 28, 48, 51 and 63). In the EU Court of Justice decision of 23 February 1994 in the case of Comitato di Coordinamento per la Difesa della Cava and others v. Regione Lombardia and others (Case C-236/92), the Court ruled that Article 4 is neither unconditional nor sufficiently precise and cannot, therefore, be relied on by individuals in domestic courts. I have reason to believe that the situation is similar under most of the other safe-sea regulations.

The purpose of this report is twofold; firstly to establish whether foreign ships are due to port State legislation and enforcement and secondly to study whether Community law framework unifies port State domestic legislation in relation to foreign ships. In this connection I describe Community legislation with special emphasis on the classes of legal subjects affected (see chapters 1 & 2). The intention of this study is to consider whether Community provisions, mainly by transformation of the international Law of the Sea and Ship Classification rules, are applicable to foreign ships, including substandard ships, when docking in EEA and EU member State harbours. My task is to present valid types of minimum-standard Community vessels and transportation requirements at the time of departure or arrival. The question is whether today's Community legislation is aiming to put substandard ships out of business, whatever their nationality.

In this report the following questions will be addressed: In which way does Community Law contribute to the elimination of "ports of convenience"? In order to identify the relevant safe-sea legislation, the clue to follow is the classes of legal subjects being affected. In the case of foreign ships, the important task is to ensure that these rules are transformed and

implemented in all member States and thereby completely prevent substandard ships from taking charter-parties to and from the European Inner Market.

Competition law issues are not discussed in this report. However, Report no. 2 (forthcoming) addresses the World Trade Organization (WTO) General Agreement on Trade in Services (GATS) and EU competition laws in relation to equal participation rights for NSR transportation. The matter of competition and safety is a simple one, as unequal technical and safety requirements create unequal conditions for competition. According to WTO or EU competition laws, equal rights are granted to shipowners that comply with basic legal requirements, including those shipowners who have their head office in third countries. The approximation and harmonization efforts will hopefully bring substandard ships off the seas.

2. Why port State jurisdiction?

Why should Community **port State** legislation be applicable, when transporting along the International Northern Sea Route (NSR) of Arctic Russia,? Tullio Scovazzi states;

> "waters of the NSR can clearly be included within the scope of this [the EU port States legislation according to UNCLOS Article 218] provision".[5]

Obviously the docking-approach does not prevent port States from undertaking investigations and instituting proceedings under UNCLOS Article 218(1), in respect of any discharge from a vessel that is voluntarily within the port of the enforcing state. (see Chapter 3). The port State has the right to undertake such investigations or institute such proceedings no matter where the incident occurred, be it in internal waters, territorial sea or Exclusive Economic Zone (EEZ).[6] For this reason it is of no consequence whether pollution occurs inside or outside areas under coastal State jurisdiction.

My choice, the docking-approach, is made necessary by the lack of appropriate, unified EU-

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[5] The Review p. 2.

[6] As clearly pointed out by Tullio Scovazzi, the Review p. 2.

remedies relating to third state vessels carrying dangerous or pollutant cargo, **when transiting** the coastal zones of Community member States.[7] As regards docking, the reason for selecting port State and not coastal State jurisdiction, is that the former is, in strict legal terms, advanced in relation to the coastal State competence vis-à-vis ships traversing internal water, territorial sea or the EEZ, enjoying innocent passage (see paragraph 5). These handling and technical improvements are compulsory whilst in port, and are therefore still present when i.a. sailing the NSR. For this reason there is no need to address the more lenient coastal State jurisdiction over innocent passage through the territorial sea, nor jurisdiction over pollution in the EEZ. Tullio Scovazzi states that

> "[i]t seems ... difficult to discuss about pollution from ships without making clear that there are different kinds of coastal waters and different regimes, depending on the status of the waters considered".[8]

If ship enjoying innocent passage, were the issue here, which it is not, then I would of course agree that the zone affected, is an essential matter. As this project focuses at port State competence vis-à-vis docking ships, I do not need to take these zones into consideration.[9]

Few vessels can escape the Community's legal provisions for shipping, simply because such provisions are common to all EU or EEA harbours. Community provisions apply to charter-parties to and from Community ports, to non-convention ships and ships with registers of convenience. For example, under Council Directive 93/75 Article 4 the shipowner is obliged to check that sufficient information regarding technical equipment, manning etc. is issued before offering freight or subsequently closing the charter-party. Only if adequate information is present, may the shipowner launch an offer. It is my belief that complete port State jurisdiction, would ease or even eliminate the problem of substandard ships.

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[7] As pointed out by Tullio Scovazzi in the Review. See the rejected draft provisions in EC Commission doc. COM (93) 647 final of 17 December 1993.

[8] The Review p. 3.

[9] Additionally it must be said that the scope of my study is substandard ships and the question of implementing domestic standards with respect to non-convention ships, and not the problems of pollution as such.

Port State jurisdiction over third-state vessels is therefore of fundamental importance in preventing substandard ships from sailing, and therefore in reducing the possibility of unequal competition. As the port State regime seems to evolve rapidly and dynamically, unilateral Community action - made possible by the lack of international Law of the Sea constraints on technical equipment, hull, manning, handling etc. of goods - may have a bolstering effect on port State jurisdiction.

3. Why Community law and not domestic legislation?

Since I examine Community Law only, domestic and international law play no part within the scope of this dissertation. Such issues are not part of my task within the framework of this dissertation.[10]

The Community law preference is due to the unique legislative position of this legal system which, however, is not primarily, a result of the Community's exclusive authority, given under UNCLOS to set shipping standards for vessels docking in Community member State harbours. Rather, the Community position is shaped by the **possibility of laying down compulsory, approximate or harmonized legal solutions** for **all** member States, and thereby avoiding "ports of convenience".

The superiority of the Community system is also provided by the huge geographical range of Community Law, which encompasses most waters from the Dardanelles Strait to the Norwegian-Russian border. Being common to all northern, western and almost all southern European harbours, Community Law is the only instrument capable of harmonizing legal solutions in this vast area. As such, Community Law will undoubtedly prevent substandard

[10] See, however, Tullio Scovazzi: "La liberté de navigation dans la zone économique exclusive confrontée à l'attitude des Etats membres de la C.E.E. en matière de prévention de la pollution" in Lebullenger & Le Morvan: La Communauté européenne et la mer (Paris 1990) p. 307; L. Pineschi: "The Transit of Ships Carrying Hazardous Wastes through Foreign Coastal Zones" in Francioni & Scovazzi: International Responsibility for Environmental Harm (London 1991) p. 299; L. Pineschi: "The EEC, Safety of Navigation, and Vessel Source Pollution" in Miles & Treves (eds.): The Law of the Sea: New worlds, New Discoveries (Honolulu 1993) p. 526.

ships from taking charter-parties to and from the "European Inner Market" (the EEA).

National environmental jurisdiction is substantial, thanks to coastal State EEZ jurisdiction under i.a. UNCLOS Articles 56(1)(b)(iii), 218(1), 234 etc. Due to the fact that coastal States, which are also large shipping nations such as Norway, seem to have no intention of using the environmental jurisdiction given under the EEZ, I do not believe that domestic legislation presently makes any meaningful contribution to the fight against substandard ships. Nonetheless, I do not undervalue the legal importance of coastal State based jurisdiction. Unilateral action to combat substandard ships is obviously valuable. However, due to the lack of harmonized instruments in the arena of Nation States, unilateral action by coastal States does not prevent the development of "ports of convenience", which is currently an issue of the utmost importance.

Since the NSR runs through Russian internal waters, territorial sea and EEZ, we might also ask why Russian environmental legislation, which is directly applicable to vessels sailing the NSR, is excluded.[11] For vessels destined for an EU harbour, Community Law requirements are supplementary to the Russian "Regulations for Navigation on the Seaways of the Northern Sea Route".[12] Russia has no intention of transforming or incorporating Community Law into her domestic legislation. However, insofar as vessels transporting along the NSR must comply with EU port State provisions, safety and environmental conditions along the coast of Arctic Russia, ships, which at the end are docking in a Community harbour, are affected *de facto* by Community Law provisions.

Due to regulations governing innocent passage, cf. UNCLOS Article 42 - even in the event of the NSR being covered by ice (Article 234) - coastal State jurisdiction over ships in transit is incomplete in comparison to port State jurisdiction over vessels docking in an EU harbour. For example coastal State powers do not include enforcement in respect of discharge effectuated at the high seas, and technical vessel provisions are limited to generally accepted

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[11] Coastal State jurisdiction under the international Law of the Sea is discussed by Douglas Brubaker: "Legal Status of Straits in Russian Arctic Waters" (INSROP 1995).

[12] See "Note to Mariners" no. 23 of 13 July 1991, and additional legislation.

rules or standards. Of course Russian law and Community Law, in their respective territories, might contribute greatly to the tightening of legal shipping standards. However, as Russian legislation is not yet adopted, though it might soon be passed,[13] this survey is restricted to Community Law. It does not seek to judge which legal system makes the strongest contribution - both national and Community Law systems are undoubtedly important. Whatever the case, Community Law is clearly one of the comprehensive legal instruments capable of preventing substandard ships from sailing the NSR, and I therefore wish to concentrate on Community Law. Tullio Scovazzi states:

> "Community law can provide a limited help in dealing with NSR environmental problems"[14] and "may have some positive effect".[15]

I think this conclusion is a little too pessimistic because the Community even under the innocent passage perspective of UNCLOS Article 21(2), might implement the unanimously accepted IMO extra-legal technology-based standards vis-à-vis non-convention state ships as well.

Regarding ships deliberately docking in an EU or EEA member State harbour, ships of all nationalities are in strict legal terms, subject to domestic legislation within the IMO provisions. Obviously most of the NSR traffic is affected by unilateral Community provisions.

Additionally, EU or EEA port States might according to Community Law, under UNCLOS Article 218(1), be made responsible for undertaking investigations and institute proceedings in respect of any discharge - in violation of applicable international rules and standards - from a vessel being voluntarily within the port of the enforcing state, as regards all kinds of incidents occurred outside internal waters, territorial sea or EEZ. This places the Community

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[13] Personal communication from Prof. Anatoly Kolodkin of the International Maritime Association in Moscow.

[14] The Review p. 3.

[15] The Review p. 2.

port States in a strong position because of the vast geographical area.

This means that my report draws an incomplete picture of the overall legal situation confronting vessels on the NSR. However, my intention is not to give a full description, but to address the member State obligations, which I regard as a fundamental part of the entire scheme.

4. Why Community law and not International Classification Rules or International Law?

Why make Community Law the subject of this study rather than the rules of the International Ship Classification Societies or the International Law of the Sea? Of course, the latter of these is relevant because domestic law and Community Law must comply with international law. In order to study the legal situation facing transportation along the NSR, all applicable national and international legislation must be examined as a matter of course. However, my main reason for concentrating solely on Community Law topics is the lack of international law and Ship Classification instruments for compulsory, harmonized rules (see para. 8). Another reason is the fact that Community law of course does not have to take advantage of all the competence available under the Law of the Sea. The Community law situation is obviously not in all respects, identical to the situation under the Law of the Sea. Consequently it is not sufficient to look solely into the latter field.

Law of the Sea instruments are undeniably valuable. The International Convention for the Prevention of Pollution from Ships (MARPOL) 1973/78 involved 95 contracting parties as of 17 October 1995[16] MARPOL 73/78 Annex I & II, has been ratified by 95 states (representing approx.95% of world shipping tonnage). Also, the 1974 International Convention for the Safety of Life at Sea (SOLAS) involved 128 contracting states as of 17 October 1995. However, the introduction of new safety requirements is proving to be a slow process because unanimity among the world's shipping nations is not easily achieved, as can be observed in current State practice. Many environmental and safety conventions are far from unanimously

[16] Information by fax of 17 October 1995 from IMO.

accepted, e.g. MARPOL Annex III involved 74 states (into force 1st July 1992) and Annex V involved 77 states (into force 31th December 1988 - representing less than 70% of world shipping tonnage), while Annex IV - having 61 member States, is not yet in force.[17] The 1923 Convention on the International Regime of Maritime Ports has even fewer contracting parties, totalling 37 in 1991. Since these provisions, contrary to UNCLOS,[18] hardly express customary international law,[19] many important Flag States are permanently beyond these Law of the Sea obligations. States with high-standard ships are therefore frustrated about the incapacity to create equal conditions all round. This situation begs the question whether Community port State legislation can offer the right solution.

By choosing the Community Law perspective, I am not presuming that Community Law is the only answer. However, if Community Law, by transforming generally accepted international IMO standards, demands that **all** vessels (including substandard ships flying whatever flag) entering or leaving Community Ports conform with these provisions, then I believe that Community Law requirements might be a sufficient instrument for solving the problem of substandard ships. My intention is to examine the possible solutions offered by Community Law. Nothing else falls within the scope of this dissertation.

5. The Law of the Sea framework

Even though I examine the situation from the viewpoint of Community Law, the Law of the Sea issues play a supporting role. As documented under Council Directive 93/75 (concerning minimum requirements for ships carrying dangerous or polluting goods at entry to or departure from Community Ports) Annex III, EU submits jurisdiction to Law of the Sea provisions. This being a casuistic example, port State jurisdiction under the Law of the Sea

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[17] All data regarding these Annexes is updated per 17 October 1995.

[18] Effective from 16 November 1994, signed by more than 60 states.

[19] In the Review Tullio Scovazzi states that "the provisions of MARPOL, and of other IMO-sponsored treaties as well, fully correspond to customary international law or, at least, to generally accepted international rules and standards" (p. 4).

Today, coastal States in some respects exercise full and unlimited jurisdiction in their ports. A ship intentionally docking in a foreign harbour must comply with port State legislation. For environmental and safety reasons outside the ports, new steps codified under the 1982 UNCLOS give member States the authority to regulate ships destined for one of their ports, wherever those ships might be and whatever nationality they are. The provisions are codified in UNCLOS Articles 21(1), 21(1)(f), 22, 24, 56, 192, 211(4) & (5), 218, 219 and 221.

Obviously, all port States exercise jurisdiction over foreign merchant vessels. In brief, the port State jurisdiction over requirements for the handling of goods, either while in a harbour or prior to entering a harbour, is the most complete. Such authority embraces notification requirements, denial of access, restriction of sailing route, enforcement and so forth. During a voyage, environmental provisions for ship handling and manoeuvering are absent on the high seas and limited within the EEZ. However deliberately docking in a harbour, environmental damage caused even at the high sea, does make a legal basis for port state enforcement according to Article 218.

When crossing territorial water adjacent to a port, all ships are duty-bound to notify the competent port State Authority of vital ship characteristics, such as certificates, deficiencies, and incidents which might reduce the normal safe manoeuvrability of the vessel. The main points are presented in chapter 1. This admittance-remedy is made possible by UNCLOS Article 25. If breaking the conditions to which admission of such a "call" is subject, the passage is probably no longer "innocent" and according to Article 25(2) the port State has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject. By reason of redundancy caused by the port State initiated improvements made necessary while docking, UNCLOS Article 25(2) - even though as stated by Tullio Scovazzi which -

> "could be a useful remedy against the risks caused by such [substandard] ships",[21]

[21] The Review p. 4.

is not dealt with in this dissertation. **Concluding** on the matter I would say that once mature, the Community might initiate and implement (and still be within the framework of International Law of the Sea) technical as well as handling provisions with regard to all ships, including substandard ships as well.

8. The Community Law environmental and safety provisions

Having discussed the limitations on port State jurisdiction, we must analyse the Community Law environmental and safety provisions that regulate the hull, engine, ship's equipment, handling of goods and sailing procedure. Member States are of course obliged to incorporate Community directives into domestic law, i.e. Community regulations are directly applicable to member States. Community legislation approximates or harmonizes member State national legislation, and this will hopefully eliminate "ports of convenience".

Turning to Community Law issues, the main task is to study the groups of persons who are subject to Community legislation. Since the end of the seventies, the Community has adopted quite a few shipping provisions, directives and regulations. Ships must comply with these provisions when they enter Community ports. If compulsory, Community Law is of vital importance to all navigation between western Europe and the Asian Far East, including transportation along the NSR. The question is whether Community Law is applicable to foreign vessels docking in EU member State harbours.

The details are omitted because the important task is to show the **kind** of legislation that applies to **foreign** vessels **when entering and docking** into an EU or EEA harbour. The underlying notion is that all vessels competing for charter-parties to and from the European Community "inner market" along the NSR must abide by Community port State standards. Consequently the handling and technical improvements whilst in port are also present when sailing the NSR.

Of fundamental importance are provisions relating to technical standards: Regulation No 613/91; Directive 79/116 (replaced on 13 September 1995 by Directive 93/75) - minimum

standard provisions for ships; and Regulation No 259/93 - surveillance and control. Also of importance are rules governing treatment and transportation of dangerous and poisonous freight or waste: Directive 75/439 - oil spills; Directive 75/442 - waste disposal; Directive 91/689 - dangerous waste; Directive 718/319 - poisonous and dangerous waste; and Regulation No 259/93 - transport surveillance and control.

These provisions are applicable to EEA member States according to the EEA Agreement arts. 38 and 47(2) and Annex XIII no. V cf. protocol 19. Thus, EEC legislation is valid for ships docking at EEA countries (Iceland and Norway). Since ships originating in or destined for EU or EEA States must comply with Community Law requirements, such ships must be equipped so as to comply with Community safety and pollution provisions when sailing along the NSR. Since I do not deal with vessel source pollution here, it is unnecessary to go into the problems of different coastal State regimes at sea.[22]

Leaving the legislative situation aside, Community Law as it now stands does not require member States to enforce Community provisions vis-à-vis foreign ships that are an actual or potential threat to the State's waters or coastline. Consequently each member State may take advantage of the Law of the Sea option that allows port States to enforce national and Community safety and environmental provisions if they feel it necessary.

9. Some concluding remarks

The Community plays an important role in the international society of organizations and states. Unilateral Community action might expand port State jurisdiction so as to put restrictions on the handling of goods and traffic, even though the principles enforced are not generally accepted SOLAS or MARPOL provisions. Such a development is made possible caused by the fact that State practice is far from filling the gap between what is appropriate in strict legal terms, and the remedies actually implemented in respect of ships voluntarily

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[22] However I agree with Tullio Scovazzi, the Review p. 3, where he states that it is "difficult to discuss pollution from ships without making clear that there are different kinds of coastal waters considered".

entering a port. Consequently; if politically valid, the Community - might in accordance with the latest US port State practice - impose advanced standards in relation to technical equipment, manning etc. on board a ship voluntarily docking in an EU or EEA harbour.

Making such a step, EU might contribute to this US-initiated development and thereby complete port State jurisdiction. As reflected in this study, I believe the emerging Common Policy on Safe Seas[23] does reflect the underlying intention, namely the initiation of efforts to eliminate substandard ships.

[23] Communication from the Commission - A Common Policy on Safe Seas (February 1993).

COMMUNITY SAFETY AND ENVIRONMENTAL PROVISIONS

As no Community coastal State jurisdiction is exercised over third-state vessels when in the NSR traffic scheme, I will focus on third-state vessels accessing Community ports. For ships docking at a harbour, it is sufficient to ascertain whether the port State legislation applies to vessels located in that port, regardless of nationality. Community safety regulations affect vessels **when they arrive at** EU or EEA member State harbours, at the latest.

Community Law provisions are aimed at the standard of vessels as well as the shipping activity. The Community's special status among international legal subjects is contingent on Community legislative jurisdiction under EU Treaty Article 189, which regulates i.a. shipowners and directs member State legislation when a member State exercises the Law of the Sea port State jurisdiction.

How far does Community Law affect third-state vessels docking in EU member State harbours? This is primarily a question of Community port State legislation. In the case of shipping industries, the following are of fundamental importance: EU Treaty Article 7 (anti-discrimination clause), Articles 9-37 (free movement of goods), 48-51 (free movement of workers), 52-58 (freedom of establishment) 59-66 cf. Article 84,2 (freedom to provide services), 130r (environment) cf. 235 ("creeping jurisdiction").

My intention is to interpret the relevant EU legislation in some but not all respects. The main task is to identify the **class of legal subjects** that are affected, with special emphasis on foreign vessels. The actual legal requirements are only briefly outlined. There is no point in discussing details because the important task is to illustrate the kind of legislation applicable to foreign ships when entering and docking in an EU or EEA harbour.

Port State jurisdiction vis-à-vis innocent passage has traditionally come under strict limitations due to strong Flag State advocates.[24] However, the emerging environmental consciousness and

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[24] See e.g. Kasoulides' conclusion, op.cit. p. 4: "Even the authors that support the existence of a right of access agree on the permissibility of imposing qualifications of such entry and that access is reasonably restricted"

"alarming increase in reported instances of maritime fraud"[25] seem to be inducing harmonized Community port State solutions.[26] The port State **enforcement** jurisdiction (discussed in part B para. 11) is codified under the United Nations Convention on the Law of the Sea (UNCLOS) Article 218.

First, I shall give a brief description of some general items in the international Law of the Sea that particularly affect the port State legal situation, with special regard to third-state vessels entering EU harbours (part A). After surveying the Law of the Sea legal framework, I shall study the situation in Community Law (part B).

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[25] See Thomas S.R. Topping: "International Action against Maritime Fraud" in Elizabeth Mann Borgese and Norton Ginsburg (ed.): Ocean Yearbook 5 (Chicago 1985) p. 102.

[26] See H.-G. Nagelmackers: "Aftermath of the Amoco Cadiz. Why must the European Community act?" in Marine Policy Vol. 4 (1980) pp. 123-127.

Chapter 1

Port State jurisdiction

The international Law of the Sea standpoint

Council Directive 93/75 concerning minimum requirements for ships entering or leaving Community Ports carrying dangerous or polluting goods, Annex III, explicitly submits member State jurisdiction to the international Law of the Sea, and defines the outer limits of port State jurisdiction. Since this dissertation does not contribute to studies on the international Law of the Sea, I restrict myself here to only a brief overview, mainly of environmental shipping legislation applicable to third-state legal subjects. More detailed interpretations are dealt with as problems are raised. In this section I present some general items.

Where port State authority is concerned, legal theory is diverse. On the one hand, the French doctrine[27] stresses exclusive Flag State autonomy over internal effects on the crew and community on board, however limited by events which affect the peace and tranquillity of the port. On the other hand, the Anglo-American doctrine expresses a complete legal authority. The only kind of limitation, which is a matter of comity,[28] is that the port State may refrain from intervening unless there are effects upon the coastal community.[29] This, however, is a non-legal obligation. Since there is general acceptance of exclusive port State competence to define the precise limits of its jurisdiction and to decide whether external effects have occurred or not, port State legislative power seems quite complete. But is this the end the road? I think not. We must look deeper into the problems of jurisdiction.

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[27] Also supported by Norway, Greece, Portugal, Belgium and a group of Latin-American states; see F. Francioni: "Criminal Jurisdiction Over Foreign Merchant Vessels in Territorial Waters: A new analysis" in 1 Italian Yearbook of International Law (1975) p. 29.

[28] See A.V. Lowe: "The Right of Entry into Maritime Ports in International Law" in 14 San Diego Law Review (1976-77) p. 621. This article stresses the political obligation not to "forbid merchant vessels to enter maritime ports [because this] would be a breach of international comity".

[29] Such effects have been ascertained from time to time; see K. Hakapää: Marine Pollution in International Law (Material Obligations and Jurisdiction), Helsinki 1981 p. 168.

The starting point is **the principle of innocent passage** in territorial sea (UNCLOS Article 17 ff.). It is unanimously accepted that UNCLOS, with the exception of part XI (The Area), is customary international law.[30] Obviously, then, the rules of innocent passage are part of customary international law. Innocent passage is limited because the coastal State exercises legislative competence relating to foreign vessels within its territorial sea (Article 21) as well as beyond (Article 221).

In the EEZ, on the previous high sea, Article 56(1)(b)(iii) limits coastal State authority to the protection and preservation of the marine environment. In order to analyse present coastal jurisdiction in the EEZ, one must bear in mind the traditional principle of exclusive Flag State jurisdiction on the high seas. As stated by the International Court of Justice in the **Lotus** case (1927) - "no state may exercise any kind of jurisdiction over foreign vessels".[31] Originally, ships therefore solely derived their rights and obligations from the State whose flag they fly.[32] Consequently, under customary and conventional international law, a Flag State would execute exclusive jurisdiction over vessels flying its flag.

As times have changed since the Geneva Convention on the Law of the Sea (1958), a mixed regime has come into existence due to the extension of coastal State sovereignty to areas outside the territorial sea. The Flag State as well as the coastal State enjoys legal authority within the EEZ. Due to exclusive Flag State presumption, the coastal State is only entitled to implement measures that are explicitly approved in bilateral or multilateral conventions.

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[30] The Russian position as documented in a personal statement from Prof. Anatoly Kolodkin to the author. Prof. Tullio Treves - in "The U.N. Convention on the Law of the Sea as a Non-universally accepted Instrument: Notes on the Convention and Customary Law" in A.W. Koers and B.H. Oxman (ed.): The 1982 Convention on the Law of the Sea (1984) - states that the Russian position seems to be universal, at least where the high sea and territorial sea are concerned: "The first category includes rules which confirm traditional international law. These rules correspond to customary law and are binding on all states. The main set of rules in this category are those on the high seas and on the territorial sea."

[31] International Court of Justice Reports (ICJR) series A no. 10 (1927) p. 23.

[32] See R.R. Churchill: "European Community Law and the Nationality of Ships and Crews" in European Transport Law vol. XXVI no. 5 (1991) p. 592.

For the sake of coastal State jurisdiction within the EEZ, legislative, surveillance and enforcement competence do have to be titled in the Law of the Sea conventions.

Within the territorial sea, coastal State jurisdiction is restricted by UNCLOS Article 24(1), since no state is allowed to hamper the innocent passage of foreign ships "except in accordance with this Convention". Does this provision terminate the general presumption of coastal State exclusive autonomy within its ports, internal waters and territorial sea unless international conventions rule otherwise? The answer can be inferred from the sentence that follows, which contains the phrase "in conformity with this Convention". The notion indicates - in contrast to the legal situation on the high seas - that the required coastal State legal competence does not have to be explicitly titled in the UNCLOS. It is sufficient that national legislation does not **conflict** with the Law of the Sea. The task, then, is to describe the Community Law environmental and safety framework under the Law of the Sea. This is dealt with in Part B. Consequently, we are still in the position described by the International Court of Justice in the **Lotus case** (1927):

> "[A]ll that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty".[33]

In other words, exclusive coastal State jurisdiction is justified under the principle of sovereignty. Codified under the 1958 Territorial Sea Convention Article 1(1) and UNCLOS Article 2(1), it reads as follows:

> "The sovereignty of a coastal State extends beyond its land territory and internal waters ... to an adjacent belt of sea, described as the territorial sea".

2) As sovereignty is the general presumption, restrictions upon coastal jurisdiction must be explicitly stated, cf. the International Court of Justice in the **Lotus case** (1927): "Restrictions

[33] International Court of Justice Reports (ICJR) series A no. 10 (1927) p. 23.

upon the independence of States cannot be presumed",[34] i.e. the existence of coastal sovereignty is a decisive interpretive element when analysing the proposed new customary law in opposition to the well-established guiding principles of coastal sovereignty. It is strongly advocated that the counteractive presumption of limitations is not evident, as long as the new principle is not recognized by "civilized nations".[35] Strictly speaking, such recognition is more than a presumption.

In the case of treaty interpretation and "at first sight" contradiction between coastal sovereignty rights and the extended - though not strictly textual - interpretation of treaties, the latter is inferior. If limitations on sovereignty are not explicitly made, then these are not legally binding upon the port State. Consequently, coastal State jurisdiction in its territorial sea rests in its sovereignty, and is incontestably part of the international Law of the Sea. The only problem is to deduce which codified limitations port State competence is encumbered with (see Chapter 2).

Obviously the coastal State can execute legal authority in ports, internal waters, territorial sea and on the high seas. As no State opposes the port State competence to secure safety of navigation and anchorage and to prevent pollution,[36] the basic question is whether port State jurisdiction is complete, i.e. does its applicability extend as far as citizens and ships of all nationalities? The details of this question will be dealt with in the continuation.

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[34] International Court of Justice Reports (ICJR) series A no. 10 (1927) p. 18.

[35] Georg Schwartzenberger: International Law vol. 1 (London 1957) p. 192.

[36] K. Hakapää: Marine Pollution in International Law (Material Obligations and Jurisdiction), Helsinki 1981 p. 169.

Chapter 2
Community port State Legislation

We must now turn to Community Law minimum requirements for ships and for the handling of waste, cargo etc. entering Community ports, i.e. standards for tankers (EU Directive 79/116, succeeded by Council Directive 93/75 as from 13 September 1995), disposal of waste oils (EU Directive 75/439), waste (EU Directive 75/442), toxic and dangerous waste (EU Directive 78/319), and supervision and control of transfrontier shipment of hazardous waste (EU Directive 84/631 and Council Regulation No 259/93).

These rules are also applicable to non-EU States according to EEA Agreement Article 38 and 47 (2) and Annex XIII no. V cf. protocol 19. Accordingly, EEC legislation is also valid for ships registered in EFTA countries (Iceland and Norway), but are third-state vessels subject to this Community legislation?

In the continuation, I will discuss port State jurisdiction vis-à-vis third-state vessels, including vessels from states other than International Transport Convention states, at entry into Community port State harbours, as it is according to Community Law. The approximation of laws and convergent implementation in all port State jurisdiction, irrespective of nationality, clearly constitutes Community policy:

> "The approach proposed in the present Communication seeks the enhancement of safety and prevention of pollution at sea through the elimination of substandard operators, vessels and crews from Community waters, irrespective of flag of the ships".[37]

Since this Community legislation is adopted in the form of directives, it is addressed to member States; see Council Directive 79/116 Article 4 and Council Directive 93/75 Article 16. In other words, legislation should be implemented in municipal law under EU Treaty

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[37] Communication from the Commission - A Common Policy on Safe Seas (February 1993) p. 2.

Article 189. The legal liability of the shipping industries is therefore dependent upon the action of the member State. If implementation is not fulfilled, vessels docking at negligent port States are not affected by Community legislation. However, proper national implementation is assumed in this dissertation.

The national implementation of Community directives does not necessarily prohibit member States from taking more stringent measures than granted in the directive, provided that such measures are within the framework of UNCLOS esp. the Article 21(2). In the case of a member State making more rigorous provisions, the authority must be stated explicitly; see Council Directive 78/319 on toxic and dangerous waste, Article 8, and Council Directive 84/631 on supervision and control within the European Community of the transfrontier shipment of hazardous waste, Article 4(3). Otherwise the directive is the maximum provision, and the member State may not violate this provision. This is also the case if urgent need forces a member State to derogate from any directive; see Council Directive 78/319 Article 13.

In case of failure to notify the coastal State authorities of potential danger, or if a situation or incident threatens the coast or coastal interests, Directive 93/75 Article 6(3) cf. Annex III gives the port State the authority to restrict transportation or order a ship to use a specific traffic scheme. The question is: what situations or accidents can provoke port State jurisdiction? See Chapter 3, which deals with jurisdiction over control and enforcement.

Legislative competence is subject to coastal State free discretion, cf. the phrase "If the ... Member State affected ... consider it necessary" to prevent, remedy or eliminate an impending or overwhelming threat to the coastal society, marine environment, other ships etc. If the coastal State so considers, the Community cannot overrule the coastal State decision. However, the International Court of Justice is competent to judge whether the coastal State legislation is in defiance of the Law of the Sea, if the disputing states so believe.

In the continuation, I will look into the elements of national surveillance and enforcement competence. The first is a question of administrative and legislative competence, while the latter is a question of expulsion and civil or criminal arrest of ships at sea, discussed in para.

12. The outline is as follows: after discussing some problems of limitation, i.e. the geographical area (para. 2), the types of ship (para. 3) and nationality (para. 4), I will analyse the legislation concerning notification (para. 5), the state technical criteria for vessels, i.e. hull, machinery and other equipment (para. 6), the closure of charter-parties (para. 7), the transportation and manoeuvering of ships (para. 8), sailing routes (para. 9), the handling of goods, waste etc. (para. 10) and sailors' qualifications (para.11).

The Community is rather ambitiously chasing the goal of putting substandard ships out of business. The "Action Programme" in "Communication from the Commission - A Common Policy on Safe Seas" (February 1993) promotes such efforts. Before going into the *de lege lata* situation, let me first make a brief contribution to the de lege ferenda picture.

1. Community Political Goals[38]

As exemplified by the former legislation on the technical standard of tankers entering or leaving Community Ports (EU Directive 79/116 and 79/1034), succeeded on 13 September 1995 by more rigorous requirements under Directive 93/75, new proposals were introduced to improve i.a. equipment on board merchant and passenger vessels, convergent application of the International Maritime Organization (IMO) Resolutions, safety requirements for vessels not subject to international conventions, control of ships by port State etc.

A new and hopefully more successful legislation is provoked by heavy maritime transportation of poisonous and polluting goods, the increasing risk of serious accidents and the connection between substandard ships and casualties. The Commission's understanding is that the existing international safety standards provide an adequate framework for preventing casualties, but that problems still remain which are caused by "laxity in their application and enforcement".[39] One of the remaining problems is the diversity in legislation and surveillance

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[38] For more detail on Community policy, see "Proposal for a Council Directive concerning the Enforcement, in Respect of Shipping using Community Ports, of International Standards for Shipping Safety and Pollution Prevention", COM (80) 360.

[39] Communication from the Commission - A Common Policy on Safe Seas (February 1993) p. 10.

in closely located harbours under different national legislation, giving rise to "ports of convenience". There is a need for convergent solutions to prevent substandard ships - especially non-convention vessels - from dodging the most strictly legislated harbours. One way of achieving this goal is to enact a Common Community Policy on Safe Seas.

As mentioned in the foregoing, the Community political goal is to make legislation applicable to all ships, including third-state vessels entering Community ports. Are these efforts being effectuated in recently established Community legislation?

2. Geographical area

The question in focus is the geographical domain of **Community Law**. In this section I do not deal with the Law of the Sea issues - they will be discussed separately wherever appropriate. Do Community Law provisions lead member States to implement national legislation on foreign vessels beyond the territorial sea? If not, Community member States, within the Law of the Sea framework, may decide whether or not to establish national legislation.

a) Directive 79/116, concerning minimum requirements for certain tankers entering or leaving Community Ports, was valid in the "territorial sea adjacent to the port of destination or departure" (the preamble). In other words, member States were, until 13 September 1995, obliged to apply the harmonized Community solutions in this area only.

Occasionally the geographical area is not precise. For instance, **Council Directive 75/439** concerning the disposal of waste oil is limited to "internal surface waters ... coastal waters" (Article 3.1). Does this cover territorial sea only? Since the EEZ was not unanimously accepted customary law in 1975 (the year of the Anglo-Icelandic cod war), the notion of geographical area clearly does not cover waters beyond the territorial sea. This interpretation is made clear by the amendment to Directive 75/439 (Council Directive 87/101 Article 4) affecting "territorial sea waters" only.

Council Directive 75/442 on waste and **Council Directive 78/319** on toxic and dangerous waste are even more vague in the way they relate to the disposal of waste "without risk to water, air, soil" etc. (Articles 4 and 5). These directives indicate what is to be protected but make no contribution to the interpretation of geographical area.

Since the Community has not made a resolution on this matter, we are compelled to adopt the solution provided by the Law of the Sea. The Law of the Sea limitations on coastal States will be discussed later wherever relevant. Before 13 September 1995, no applicable Community legislation was valid for ships crossing the high sea adjacent to the port of entry. **Accordingly, member States exercise exclusive autonomy within the scope of UNCLOS Article 221.** In other words, they were free to decide whether or not to implement national legislation.

b) Directive 93/75, concerning minimum requirements for vessels entering or leaving Community Ports, expands the geographical area of Community Law. Under this directive the limitation to territorial seas is no longer maintained. The sole condition is that a vessel is intentionally leaving the territorial sea and is destined for a member State harbour. If an incident occurs on the high seas adjacent to the coast of a member State, then according to Community Law the member State is entitled to respond in several ways.

Since I focus on foreign ships entering a port, it is of no consequence for this dissertation whether coastal State jurisdiction is in any way valid outside the territorial sea. It is therefore unnecessary to go any further into the question of geographical area.

3. What kinds of ships?

a) The minimum technical requirements. Under Directive 79/116 only **tankers** are affected. Article 1(1) of the directive covers all types of oil, gas and chemical tankers, but not tankers under 1,600 gross reg. ton. Whether the ship is a Segregated Ballast Tanker[40] or not, is

[40] A ship with tanks for carrying ballast only.

insignificant. The provisions are applicable whether the tanker is fully or partly laden, and include empty tankers not yet degassed or cleansed of hazardous residues.

An empty, well cleaned tanker is excluded, as are cargo, passenger and fishing vessels. Consequently, each member State enjoys exclusive autonomy regarding the enactment of surveillance and enforcement competence.

As mentioned earlier, Council Directive 93/75 has replaced Council Directive 79/116 on 13 September 1995. The new legislation is aimed at "ships entering or leaving Community Ports" and is applicable to all types of vessels, with the exception of warships and state-owned ships. However, the legal obligations are limited to ships transporting dangerous or polluting goods. Empty tankers that have been degassed or cleansed of hazardous residues are - as before - not affected.

b) Transfrontier shipment of hazardous waste and disposal of dangerous, oil or toxic waste. Council Directive 84/631 on supervision and control within the European Community of transfrontier shipment of hazardous waste, and Council Regulation No 259/93 on the same matter, are applicable to "shipment of waste" (Article 1) as such and are not limited to any specific kinds of ships. Likewise, Council Directive 78/319 on toxic and dangerous waste relates to "carriage", which obviously includes maritime transportation. The rules on disposal of waste oils under Council Directive 75/439 cf. Council Directive 87/101 (amendment) affect "the treatment, discharge and collection of waste oils" (the preamble). These provisions, which prohibit "any discharge of waste oils into ... territorial sea waters" (Article 4), clearly affect ships of all kinds when in Community member State waters.

4. Vessels of all nationalities?

a) The minimum technical requirements. No explicit provision under Council Directive 79/116 relates to the nationality of ships. However, through the omnipresent phrase "tankers entering or leaving Community ports" and by the scheme of notification of nationality of ships under Article 1(1A) litra b, the text was applicable to all nationalities. Since the Amendment of 6

December 1979 (No 79/1034) does not affect the domain of legal subjects, all vessels have been subject to these provisions regardless of nationality. The situation is not changed by the Council Directive 93/75 in action since 13 September 1995.

b) Regarding the dumping of dangerous, oil, or toxic waste etc. There is no provision in Council Directive 75/442 whose scope is limited to Community member State vessels. As we have already seen (para. 3), the expression "... transport and treatment ... and tipping" obviously applies to all vessels. The situation is parallel in the case of dangerous, oil or toxic waste (Directive 78/319, Council Directive 75/439), cf. Council Regulation No 259/93 regarding transfrontier shipment of hazardous waste. There seems to be no reason why foreign vessels should not be included.

In **conclusion**, the relevant Community legislation is applicable to all legal subjects, and that includes third-state vessels. The question then is which elements of Community legislation can be fully incorporated into national legislation?

5. The basic obligation of notification

The Community system of notification under Article 6(2) - in force from 13 September 1995 - is identical to the IMO "General Principles for Ship Reporting Requirements, including Guidelines for Reporting Incidents involving Dangerous Goods, Harmful Substances and/or Marine Pollutants" (IMO Resolution A 648 (16). At the very least, the obligation of notification is binding in all circumstances mentioned in this resolution; see Article 6(2).

a) The ship's characteristics. Since the new legislation (Council Directive 93/75) is identical to the newly terminated Council Directive 79/116, I shall present the main points in the latter legislation, first. In advance of entering a port, vessels of all nationalities are obliged under Council Directive 79/116 to notify the competent port State Authority of vital characteristics. The information includes the ship's name, call sign, nationality, length and draught, port of destination, estimated time of arrival, whether or not there are any deficiencies or incidents that might reduce the normal safe manoeuvrability of the vessel, and a complete tanker

checklist giving information on vessel identification, safety installations aboard, safety certificates and other documents, and officers and ratings (Council Directive 79/116 Article 1 (1A) litra A-H).

While crossing the territorial waters adjacent to the port, notification responsibilities under Council Directive 79/116 Article 1 (1B) are valid. However, the obligations are not as numerous as those for vessels entering a port, when the shipmaster is obliged to inform the competent national authorities of any deficiencies or incidents which may reduce the normal safe manoeuvrability of the vessel, and to establish radio communication with the coastal radio stations and nearest radar station; see Directive 79/116 Article 1 (1B). Even though it is not explicitly stated, the shipmaster is responsible for reporting any significant difficulties that arise during transportation. This rule is codified under the new Council Directive 93/75 Article 6(1). The obligation relates to incidents or situations representing a threat to the coastal environment or associated interests.

If a pilot is prescribed under national legislation, the required information may be presented to the pilot. Otherwise the information must be communicated to the competent authority on shore.

Under Directive 79/116 Article 1B (2), **the pilot** was responsible for reporting to the competent authority "any deficiencies which may prejudice the safe navigation of the vessel". The pilot's duties are similar under the new Council Directive 93/75 Article 8(2). Since no limitation is made, the duty to report includes all technical equipment, the hull, engine, auxiliary engine, navigation instruments etc.

Under Directive 79/116 Article 2, **the port State** being informed of deficiencies that involve or increase the risk of a hazard to certain maritime and coastal zones of other member States, is obliged to inform the other states thereof as soon as possible. This coastal State obligation is prolonged under Directive 93/75 Article 10.

b) Transfrontier shipment and handling of hazardous waste. No shipment of hazardous waste shall be made from one member State to another, nor between a member State and a third

state, without notifying the states concerned in advance; see Council Regulation No 259/93.[41] These provisions must be interpretated in the light of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 22 March 1989,[42] and the positions taken by Community member States.[43]

For shipment from outside the Community, Article 20 states that those concerned are the Community member State of destination and the state(s) of transit. When sailing along the NSR, the appropriate Community member State and Russia are to be notified. No presumed consent may be anticipated, as Article 6(4) of the Convention provide for written consent of every transit State party to the Convention. For transit States which are however, not parties to the agreement, only a duty of prior notification is required.[44]

Under Article 20(6), no transfrontier shipment may be made before the member State has authorized the shipment. Authorization must be given no later than 70 days after dispatching the acknowledgement of receipt of notification of the planned shipment. The states receiving notification - within the Community, see Article 20(3) - may object to the planned shipment. The purpose of notification is to enable the states in question to object to the shipment or shipping procedure. According to Article 20(4), one possibility is to refuse the shipment. Otherwise, if reasonable objections are raised, the operator must straighten out the situation. When the receiving state is satisfied, it must immediately send acknowledgement to the holder of the waste. The receiving state is entitled to lay down conditions in respect of the shipment in its territory; see Article 20(5).

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[41] Replacing Council Directive 84/631.

[42] For a detailled analysis of the regime under the Convention, see L. Pineschi: "The Transit of Ships Carrying Hazardous Wastes through Foreign Coastal Zones" in Francioni & Scovazzi: International Responsibility for Environmental Harm (London 1991) p. 300-305.

[43] T. Scovazzi, the Revew p. 4.

[44] See L. Pineschi op.cit. p. 301.

The previous legislation (Council Directive 84/631) limited member State jurisdiction to internal laws and regulations relating to environmental protection, safety and public policy or health protection, provided that these were in conformity with the directive, with other Community instruments or with certain international conventions. However, present regulations do not refer to any Community, nor to any national or international legislation. The sole limitation is the provision that restricts unequal treatment of similar shipments, see Article 20(5).

6. Technical requirements for vessels and hull.

The technical issues are of utmost importance to the problem of substandard ships. Jurisdiction is limited by the scope of the Law of the Sea. Paras. 6.2-6.8 explain the Law of the Sea rules concerning innocent passage, with special emphasis on coastal State legislative competence. Para. 6.9 declares the Community technical requirements for hull, engine, machinery, equipment etc.

6.1 Coastal State legislative authority (1). Introduction

Directive 79/116, no longer valid, affects "certain tankers entering or leaving Community ports". The purpose of the legislation is to ascertain whether ships comply with the EU minimum requirements in advance of entering EU harbours. As documented later, these requirements are prolonged under Council Directive 93/75 Annex I, and are consequently still valid today, after the termination of Council Directive 79/116. However, the duties of notification and port State surveillance competence are in many ways extended.

The Directive is addressed to member States and obliges member States to notify the Commission of the laws, regulations and administrative provisions necessary to implement this Directive. Since EU legislation evokes minimum standards, these provisions do not prevent member States from setting stricter standards (Directive 93/75, the preamble). In that case the international Law of the Sea, under Council Directive 93/75 Annex III, continues to limit such national efforts.

Improper technical equipment, or any lack in the quality of vessels, could represent a threat to the coastal and marine environment. In view of this, the port State is entitled to implement and enforce legislation.

Neither the 1979 nor the 1993 Directive lays down specific technical criteria for the engine, hull, equipment etc. However, the port State is able to demand certificates of fitness and seaworthiness under the terms of the SOLAS and MARPOL Conventions in order to detect deficiencies and incidents or non-fulfillment of standard requirements, and to take action against substandard ships if necessary. This is obviously applicable to ships docking in an EU or EEA harbour, but it also applies to innocent passage through the territorial sea, since the MARPOL and SOLAS provisions "correspond ... at least, to generally accepted international rules and standards".[45]

Port States enjoy legal jurisdiction over foreign merchant vessels. As documented (para. 6.2), ships crossing territorial water adjacent to the port are obliged to notify the competent port State Authority of vital ship characteristics, deficiencies or incidents affecting safety or reducing the normal safe manoeuvrability of the vessel. But does the port State have the right to deny access, restrict the sailing route, or dictate the manoeuvering of ships and handling of goods, waste, equipment etc. during the voyage?

The vital question is whether the port State is competent to regulate foreign vessels, including ships of non-convention states or ships with registers of convenience. Since the focus is on ships entering or docking in Community harbours, I shall restrict my analysis to the legal problems inside the territorial sea.

6.2 Coastal State legislative authority (2). The Law of the Sea framework. A presentation.

How far-reaching is port State legislative competence? As mentioned earlier, Directive 93/75 Annex III submits port State jurisdiction to the Law of the Sea framework. Exactly which

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[45] Tullio Scovazzi, the Review p. 4.

legislation does this entail? In the case of safety and environmental law, it is mainly a question of UNCLOS, SOLAS and MARPOL provisions. As stated by Pat Birnie,[46] the limits of the coastal State are not defined in the two latter conventions, which are awaiting the outcome of UNCLOS III. Consequently, the legal framework in question is to be found under UNCLOS. As regards innocent passage, Article 21(2) makes the framwork:

> "Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards."

Since this provision provides the Community Law legal framework, it will be discussed in more detail in the continuation. As will be seen however, Article 21(2) is not related to ships when docking. Since EU according to Council Directive 93/75 Annex III, submits jurisdiction to IMO provisions, it seems most likely that the present **Community practice** as regards docking, is similar to the situation under UNCLOS Article 21(1), regarding technical provisions for ships enjoying innocent passage. Describing the *de lege lata* situation, it is necessary to interpret the Article 21(2) provision.

6.3 Coastal State legislative authority (3). The scope of UNCLOS Article 21(1). Protection of innocent passage

The port State jurisdiction is limited under the UNCLOS due to the principles of innocent passage. Embarking or discharging at a port facility is however not part of the concept of "call" under the UNCLOS Article 18(1)(b) and are therefore not within the principle of innocent passage. Even though state practice seems to be somewhat reserved toward a strict exercise of jurisdiction in matters which do not concern solely the "internal economy" of foreign ships, the port State, as a matter of strict law, obviously is entitled to exercise its jurisdiction in respect of the internal affairs as well because of the voluntary entry of those

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[46] "The Legal Regime of Prevention of Collision and Stranding of Vessels Carrying Noxious or Hazardous Cargoes", Memorandum from Birnie, P.W. in Parliamentary Papers 1978-79 Vol. 15 paras. 15-74. See para. 38 note 68.

ships. Consequently; if politically important, the port State, hereunder the Community might - according to the latest US port State practice making unilateral advanced requirements - impose advanced standards in relation to technical equipment and manning on board a ship voluntarily docking in an EU or EEA harbour.

Under the present Community safe sea policy regime, the Community law as it now stands, does restrict itself to the enforcement of **generally accepted rules or standards** under International Law, see i.a. Council Directive 93/75 (concerning minimum requirements for ships carrying dangerous or polluting goods at entry to or departure from Community Ports) Annex III, according to which EU submits jurisdiction to IMO provisions. Consequently it seems most likely that the present Community practice as regards docking, is similar to the situation under UNCLOS Article 21(1), regarding technical provisions for ships enjoying innocent passage. Having the exclusive port State autonomy in the case of docking ships under the sovereignty of state in mind, I intend to go into the details of port State competence under the Article 21. I underline however, that this analysis does not intend to give the outer limit in strict legal terms, for Community legislation according to the Law of the Sea, but to draw the picture of the *de lege lata* situation of today.

Coastal State is according to Council Directive 93/75 Annex III, entitled to adopt all kinds of laws with the exception of provisions for design, construction etc. that are not generally accepted according to Article 21(2). **In principle, coastal State technical standards for vessels are part of legislative competence.** Otherwise it would be needless to exclude the rules concerning design, construction that are not generally accepted under Article 21(2).

Two questions arise here. Firstly, what kind of international sea transportation enjoys Article 21 protection? Secondly, what are the Article 21 coastal State legal limitations on the activity involved? The latter question will be discussed in para. 6.3. The problems of "generally accepted international rules" are dealt with in paras. 6.4 & 6.5.

Under UNCLOS Article 21(1), coastal State exclusive autonomy is limited only by reason of "innocent passage through the territorial sea". This means that foreign vessels with any other purpose put no restrictions on coastal State jurisdiction. Under Article 18, innocent passage

includes crossing the territorial sea, proceeding to internal waters and stopping and anchoring in the event of force majeure and distress. Docking in a harbour - where and when allowed - is however no part of the "innocent passage" rule. **Since free access to ports is no part of the notion 'innocent passage", the coastal State provisions for the purpose of innocent passage are not affected by Article 21. This means that EU legislation might establish stricter standards for vessels when docking.**

However, one cannot reason that the coastal State is free to establish a regime that would eliminate freedom of access. Yet it is not the easiest task to detect the presence of a generally accepted customary rule that restricts coastal State jurisdiction. My solution to this question (para. 6.7) is more "*de sententia ferenda*" than "*de lege lata*".

Third-state vessels entering and docking in EU harbours are undoubtedly entitled to innocent passage. As regards such vessels, Article 21 states that coastal State jurisdiction is limited. Where technical provisions are concerned, coastal State jurisdiction is dependent upon whether regulations applying to "design, construction, manning or equipment" are "generally accepted" (see para. 6.4).

6.4 Coastal State legislative authority (4). The scope of UNCLOS Article 21(1). Limitations on port State jurisdiction

I have no intention of discussing all measures listed in Article 21(1) litra (a)-(h). For my purpose it is sufficient to determine whether this provision prevents coastal States from establishing technical rules for foreign vessels docking in EU or EEA member State harbours.

a) Technical measures may be adopted for a wide range of purposes, such as safety of navigation, the regulation of maritime traffic (litra a), the protection of navigational aids and other facilities, installations, cables and pipelines (litra b-c), conservation of the living resources of the sea (litra d), preservation of the environment, the prevention, reduction and control of pollution (litra f), the prevention of infringement of the sanitary laws and regulations of the coastal State (litra h), and so forth. Such regulations must be part of port State legal competence because the technical standard of the hull, machinery, equipment etc.

has some bearing on safety of navigation, prevention of infringement of sanitary laws, pollution and so on.

b) **It may be asked whether port State jurisdiction - according to the international Law of the Sea - includes control of potential hazards.** As documented in para. 6.4 (1) the **prevention** of pollution, collision and infringement of sanitary laws is part of coastal State jurisdiction. In order to prevent pollution or collision at sea by initiating and implementing legislation that counteracts the undesirable effects, situations which potentially threaten the environment and safety of navigation must be foreseen. By trespassing, one is breaking the law even if pollution or collision does not occur. The coastal State is obviously entitled to prevent potentially dangerous situations from arising:

> "There is no evidence that international law restricts in any way the competence of the coastal State to regulate vessels presenting such hazards or to take precautionary measures to avoid the threat of damage".[47]

Ships that are statistically proven to be substandard are a danger to the environment and to the safety of navigation. Accordingly, a reporting system is established under MARPOL 73/78 Article 8, cf. Protocol I concerning "Reports on Incidents involving Harmful Substances" and several resolutions.[48] Legislation prohibiting substandard ships from sailing is entitled under UNCLOS Article 21(1). To fulfil the purpose of legislation, i.e. to avert a single disastrous incident, the port State regulations must treat the situation hypothetically. To prevent hazards or even maritime fraud, precautionary action is permissible. A lack of necessary equipment on board a substandard ship could render transportation unsafe and thereby expose the harbour to external effects contrary to port State legislation. Consequently, dangerous situations might arise. The entrance of a ship into a port might represent a breach of law if the ship is substandard according to port State requirements. This could lead to civil and criminal seizure, and subsequent liability or punishment (see para. 12). Port State power is obviously

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[47] George C. Kasoulides: Port State Control and Jurisdiction. Evolution of the Port State Regime (Martinus Nijhoff Publishers 1993) p. 24.

[48] See IMO Provisions concerning the Reporting of Incidents involving Harmful Substances, under MARPOL 73/78 (London 1990).

not limited to incidents that have already occurred.

This seems to be the Community *opinio juris*, since "any deficiency potentially deleterious to the safety of shipping" (Council Directive 79/116, the preamble) is the reason for the obligation of notification, according to Community legislation on technical requirements for foreign vessels.

The conclusion is that the coastal State may exercise legislative power within its territorial sea, regulating all kinds of maritime activity. In saying this, I have not come to any conclusion where technical measures are concerned. In order for unilateral coastal State technical demands on design, construction, manning etc. to be valid, they have - as far as innocent passage is concerned - to match "generally accepted international rules or standards", cf. UNCLOS Article 21(2); see para. 6.5 ff. Docking in an harbour however, the port State competence is limited by IMO-Conventions, only. This means that IMO maximum provisions are restricting the Community, from establishing advanced, unilateral standards. IMO minimum requirements are otherwise, as those do not restrict member States from establishing more advanced standards.

6.5 Coastal State legislative power (5). The scope of UNCLOS Article 21(2). "Generally accepted" - a question of international customary law?

If port State legislation applies to the mechanical or technical outfit or manning etc. of foreign vessels, such regulations are not valid unless they are in conformity with "generally accepted" international rules or standards. **If coastal State legislation is not in accordance with international rules or standards, or if such rules are not generally accepted, then the legislation may not be enforced against foreign ships.**

First of all it is important to note that the law of the sea-limitations is related to mechanical and technical outfit. That means that handling provisions does not need to be in accordance with these generally accepted rules and principles. Consequently, in this case Community might operate unilateral provisions. Hereonin I presuppose that port State technical regulations

are in accordance with "international rules or standards". The question then is whether these standards are generally accepted, i.e. whether the notion "generally accepted" refers to customary law or to extra-legal solutions? Indeed we might ask whether the SOLAS or MARPOL provisions constitute customary international law[49] I will first look into the problems of customary law.

The status of customary international law involves the problem of unanimity. As stated by Georg Schwartzenberger, customary international law "has two constitutive elements: (a) a general practice of States and (b) the acceptance by States of this general practice as law".[50] However, as d'Amato points out, this and similar definitions raise more problems than they solve:[51] How many states and what kinds of states are required? For how long does the practice have to be continued? Without going in details, but taking into consideration the number of states having ratified the MARPOL provisions,[52] I think this legislation has neither the required universality nor the character of unanimity to constitute customary international law. Some important IMO standards relating to shipping pollution are not in force, and some which are in force, are not ratified by the majority of shipping nations. Those states who have not ratified are presumably in opposition to the draft conventions. Therefore I would not hesitate to **conclude** that **some** of the MARPOL provisions hardly express customary international law. In the Review Tullio Scovazzi states that

> "the provisions of MARPOL, and of other IMO-sponsored treaties as well, fully correspond to customary international law or, at least, to generally accepted international rules and standards" (p. 4).

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[49] See P.W. Birnie: "International Standards: Their Present Shortcomings and Possible Development" in J. Nowak (ed.): Environmental Law. International and Comparative Aspects. A symposium (1976) p. 101.

[50] Georg Schwartzenberger: A Manual of International Law Vol.1 (1960) p. 27.

[51] d'Amato: The Concept of Custom in International Law (1971) p. 7 et seq.

[52] See p. 9.

I fully agree with Scovazzi with regard to the latter category, the technical standards, which to some extent are "generally accepted" (see p. 39 ff.). I find it however, more uneasy to say that those standards express customary international **law**, as many important Flag States still are non-contracting parties to several IMO-obligations.

Regarding SOLAS 1974, the situation is more similar to customary law because of the high number of parties that have signed the convention, altogether 128 as of 17 October 1995. This confirms that the major shipping nations support the established safety standards. In "*de sententia ferenda*" terms, **customary law conditions are perhaps to be found here.** However, as will be discussed in the continuation, I do not believe that such a conclusion is necessary to enable a port State to set requirements for design, construction etc. vis-à-vis foreign ships.

6.6 Coastal State legislative power (6). The scope of UNCLOS Article 21(2). Do "rules or standards" represent extra-legal norms?

The answer to this question depends on the normative status of the expression "international rules or standards", and depends indirectly on which legal subject is authorized to constitute the general acceptance: the states or the technical experts? (see para. 6.71). I will first analyse the notion "rules or standards", then (para. 6.72) I will turn to the interpretation of the enigmatic phrase "generally accepted".

Firstly I will deal with the textual and contextual analysis. Under Article 19(1), UNCLOS Section 3 concerning innocent passage in the territorial sea limits the right of innocent passage to the "rules of international law". Under Article 21(1), coastal State duties must be in conformity with "rules of international law". Coastal State regulations applying to design, construction etc. are not valid under Article 21(2) "unless they are giving effect to generally accepted international rules or standards". Article 21(3) relates to coastal State duty to communicate "all such laws and regulations". Under Article 21(4), foreign ships are obliged to "comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea".

There is clearly a distinction between "rules of law" and "rules or standards". Furthermore "rules or standards" must be distinguished from the "rules and standards". The conjunction "and" implies that rules and standards are two specific classes of norms. However, the exact definition is uncertain: "It is not clear whether a definite distinction can be drawn between "rules" and "standards".[53] Kasoulides refers to the general opinion:

> "[i]t seems more appropriate to support the view that 'standards' are intended to refer to resolutions, codes, recommended practices and guidelines and other **such non-binding instruments** of the IMO" [54](the italics are mine).

The problems of limitations, however, have no bearing on the fact that these notions express two different kinds of norms.

In the case of **or**, not **and**, we are addressing the "standard" class of rules. Technical provisions are usually classified as standards. In this instance - concerning design, construction etc. - we are addressing technical norms. Under Article 21(2) and Article 21(4), coastal State legislative competence relating to vessels' obligations refers to a different kind of normative system than those under Articles 19(1), 21(1) and 21(3). Otherwise the expression "rules of law" should have been used. Consequently, in the light of international Law of the Sea, the standards in question are not rules of law, but rather rules of an extra-legal nature.

I therefore conclude that the coastal State is competent to regulate foreign vessels entering the territorial sea, **if** the standards in question are implemented on the basis of a consensus of technical experts, i.e. under the IMO.

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[53] George C. Kasoulides: Port State Control and Jurisdiction. Evolution of the Port State Regime (Martinus Nijhoff Publishers 1993) p. 35.

[54] Op.cit. p. 35 note 2.

6.7 Coastal State legislative power (7). The scope of UNCLOS Article 21(2). The notion of "general acceptance"

The next question is **how to interpret the notion of "general acceptance"?** It is obviously correct when Tullio Scovazzi states that "if different and perhaps contradictory regimes were possible, no ship could sail from one country to another".[55] This being the reason to stress the importance of applying generally accepted standards only. Unilateral advanced standards is of course improper. However, what makes a standard generally accepted? Obviously not all members of the society of states have to accept it.

The textual and contextual analysis tell us that the notion of "general acceptance" in Article 21(2) - also found in Articles 211(2), 211(5), 211(6)(c) and 226(1)(a) - must be distinguished from expressions like "principles of general international law" (UNCLOS, the preamble i.f.), "general international recognition", Article 7(4) etc. It is clear that the two latter notions constitute "carrying" legal norms relating to **state** practice and acceptance. How about the first expression? This must be interpreted in the light of the norm category which is the object of "general acceptance", i.e. the notion of "standards" and the legal subjects in question.

1) Which legal subjects are entitled to fix appropriate standards under Article 21(2)? As concluded in para. 6.6, the types of norms in question are standards applying to design, construction etc. These are extra-legal (cf. the distinction between "rules of law" and "rules or standards") and, as such, do not apply to traditional international law subjects, i.e. the states. Consequently, the notion of "general acceptance" does not apply to the practice of states.

UNCLOS does not specify any legal subject. However, as nobody is excluded, the arena is open for all organizations to establish norms. The power to create generally accepted standards is the only limit. Since the IMO sets the standards for the design, construction, manning etc., it is undoubtedly the basic standard-setting organization in the area of vessel source pollution. Consequently, we must look into the IMO system in particular.

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[55] The Review p. 2.

2) What does "generally accepted" mean? The remaining question is the meaning of the phrase "generally accepted", and which standards under the IMO system in particular fulfil this requirement and are therefore applicable to foreign vessels? As documented (paras. 6.6 and 6.7, 1), the international organizations might have the job of setting standards. The question then is the criteria for declaring general acceptance. A legal author observes the following:

> "such a standard ... [is] generally accepted once it is widely recognized as practical and feasible. In other words, to become generally accepted, a technical standard must be carried by a consensus relating to its technological justification and economic feasibility. The test of general acceptance requires a technology-related judgement. This judgement must not be confused with the acceptance of a technical standard as legally binding. A technical standard may be carried by a general consensus on "good practice" without having acquired legal force. Once a standard is generally accepted as safe and practical, it would possess the same extra-legal status as so-called trade customs. In my view, it is precisely the technology-based consensus that is required by the draft [UNCLOS] provisions".[56]

It is clear that the author of this quote does not consider it necessary that a standard with extra-legal status, in order to be generally accepted, must be legally in force. It is sufficient that technical experts around the world believe a standard is necessary for achieving good and viable results.

When discussing this matter, it is necessary to distinguish between IMO conventions (protocols too) and pure recommendations. An IMO convention in force undeniably fulfills the criteria for general acceptance:

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[56] Ondolf Rojahn: "National Jurisdiction and Marine Pollution from Ships: The future Role of IMCO Standards" in Choon-ho Park: The Law of the Sea in the 1980s (The Law of the Sea Institute, Hawaii 1983) p. 474.

"[B]oth the 1958 and 1982 preparatory works clearly indicated that 'generally accepted' relates to those IMO and ILO conventions which have been ratified by a number of states required for their entry into force, who between them will therefore own the majority of the world fleet. IMO conventions require for their entry into force ratification by a certain specified number of states who between them own the majority of the world fleet ... Thus, all IMO conventions in force can be considered 'generally accepted'."[57]

The main point, however, is the recommendations and technical standards that are not in force. Do some of these qualify as generally accepted? Kasoulides' conclusion seems rather restrictive as regards the possibility of recommendations being "generally accepted". In his discussion of the recommendations, his starting point is that the notion of general acceptance "implies that such a recommendation **would have to be** implemented by a certain **number of states** who between them own the majority of the world fleet" (the italics are mine).[58] By this, Kasoulides seems to indicate that the extra-legal viewpoint is irrelevant, though he can be confusing because he states at least once that the term "standard" does represent the non-binding instruments of the IMO (p. 35). Yet this is a single statement. Since I see no sign of Kasoulides' commitment to non-binding rules later in his dissertation (p. 44), I take it for granted that he does not reserve a place for the extra-legal norms within his system of generally accepted standards.

However, I think Kasoulides is drawn to his conclusion because the preparatory work consulted relates to UNCLOS part XII, which concerns coastal State jurisdiction on the high seas regarding protection and preservation of the marine environment. Having a purely legal textual explanation as well as by reason of legal policy, the phrase "generally accepted" as used in Articles 211(2), 211(5) and 211(6)(c) is not identical to the notion in Article 21(2).

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[57] George C. Kasoulides: Port State Control and Jurisdiction. Evolution of the Port State Regime (Martinus Nijhoff Publishers 1993) p. 44.

[58] Op.cit.

The overbearing fact is that Articles 21(2) and 211(2) seem to relate to different groups of norms. The phrase "rules **or** standards" possibly expresses norms of the category called standards while "rules **and** standards" might relate to two separate, juxtaposed groups of norms. More important, however, is that the latter group of norms is qualified as the basis for coastal State legislation vis-à-vis foreign vessels when "**established** through the competent international organization or general diplomatic conference" (the italics are mine). This strongly indicates legal norms of a mandatory character at the state level. As regards Article 21(2), the problems that I address relate to the rules of a type of standard that is generally accepted but not necessarily "established". This is a strong indication of the non-binding and extra-legal character of the "standards" in Article 21(2).

The legal policy reason for making a distinction between the standards of Articles 21(2) and 211(2) is that coastal jurisdiction on the high seas was highly disputed while UNCLOS was in force, yet this was obviously not the case within the territorial sea. The "generally accepted" rules and/or standards fulfil different functions in these two geographical areas.

Beyond the territorial sea, coastal State jurisdiction is **entitled** by the rules and standards under Article 211(2). By establishing - under the Law of the Sea - expanded coastal State jurisdiction on the high seas, traditional customary law is limited. Such limitations are impossible if they are not laid down at the level of multilateral conventions. Otherwise new international Law of the Sea provisions would not prevail over customary legal rights. This is why the notion "generally accepted" in Article 211 must relate to established solutions at the state level.

In addition to this reason of technical legislation, there is a purely political explanation: in order to avoid "creeping jurisdiction" it was crucial for shipping-state advocates to make the environmental obligations explicit so as to prevent open commitment to rules and standards that were not expressly agreed upon. On these grounds, the phrase "generally accepted rules and standards" must relate to solutions that are legally binding in the international legal society of states.

Within the territorial sea the situation is different. In this area the coastal State has traditionally exercised jurisdiction regardless of limitation by rules of innocent passage. Under the Law of the Sea, the coastal State is competent to establish provisions affecting foreign vessels. The purpose of the UNCLOS Article 21(2) provision is to define the outer limits of coastal State jurisdiction. It is not a question of adding new jurisdiction to the port State regime, but making the legislative competence more concise. Further, the standards under Article 21(2) do not establish new coastal regime jurisdiction at the expense of the Flag State, as is the case under Article 211(2).

To **conclude** on this matter, the notion "generally accepted" in Article 21(2) relates to an extra-legal or non-binding technology-based consensus. The IMO resolutions, codes, recommended practice and guidelines, although not legally binding, entitle the coastal State to regulate the hull, technical equipment, engine etc. of foreign vessels. This means that Community might establish technical standards provisions which are generally accepted among the world of technical experts, even though it is not customary law.

6.8 Coastal State legislative authority (8). Technical standards. A brief outline

To complete the round-up of the Law of the Sea, I now turn to the Community provisions being implemented for foreign ships entering an EU member State harbour. Firstly, does the Community make its own provisions by transforming IMO resolutions into Community Law, or is the method of reference utilized? Secondly, I present a brief outline of the types of standards in question.

a) Unilateral Community technical provisions? As documented, the Community is competent to apply **technically spoken,** generally accepted standards to the design, construction etc. of foreign ships intentionally entering and docking in an EU harbour. Has the Community transformed such standards into Community legislation?

Being the basic provision, Council Directive 93/75 (and 79/116) Article 1 does require member States to ensure that vessels entering Community harbours adhere to the minimum requirements of the directive. The directive itself, however, does not establish any provisions

regarding design, construction etc. No specific technical standards relating to foreign vessels are incorporated into Community legislation.

b) The IMO standards are valid. Instead of making unilateral decisions regarding technical issues, Community implementation and surveillance are based on the control of checklists and vessel certificates. According to Annex II, information on technical items is required: the vessel checklist and certificates for equipment, construction, classification etc. This list is for the sake of information only, so foreign vessels might enter an EU harbour without having made technical improvements of any kind. Through such information, however, possible deficiencies might be discovered, judged in relation to IMO codes for the construction and equipment, i.e. the IGC code regarding liquefied gas in bulk and the IBC code for dangerous chemicals. According to the nature of any proven deficiencies, the Community may respond in various ways. Problems associated with possible deficiencies will be analysed in the continuation.

The conclusion is that even though the coastal State exercises legislative power regarding technical equipment, machinery, hull, etc. in accordance with generally accepted international rules or standards, the Community **has not yet** taken advantage of this competence.

7. Breaching the IMO provisions (1). Restriction of access to ports

A question fervently discussed is the competence of the port State to deny access to substandard merchant vessels. Today, authors seem to unanimously accept the basic principle of port State jurisdiction to restrict access under certain circumstances, within the framework of bilateral and multilateral treaties, of course.[59] The theory is open to modification.[60] For my purposes it is sufficient to state the position without discussing the details. Nonetheless, it is my intention to look into such details when discussing the outer limits of EU safety and environmental provisions.

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[59] George C. Kasoulides: Port State Control and Jurisdiction. Evolution of the Port State Regime (Martinus Nijhoff Publishers 1993) p. 23.

[60] See R.R. Churchill & A.V. Lowe: The Law of the Sea (Manchester 1983) p. 46.

Council Directive 93/75 is the starting point for Community Law. According to Article 6(3), possible member State provisions under the Law of the Sea are defined in Annex III. One of the possible responses is to restrict the freedom of navigation or order the vessel to adhere to specific traffic schemes. Denying access to ports is clearly one of the possible responses. The port closure response is available as a precautionary measure; see para. 6.4(2). Not every default enables the coastal State to deny access. Obviously the default must have some significant statistically documented influence on the coast or environment. This is strongly emphasised in Annex III, which links the competence of the coastal State to limit free access to serious and impending incidents which may decrease the normal safe manoeuvrability of the vessel or deficiencies prejudicing safe navigation.

Evaluating which element of risk would provoke this jurisdiction is the exclusive responsibility of the competent port State Authority. As part of coastal State free discretion, the coastal State's factual evaluation cannot easily be discounted, either by the EU or by the International Court of Justice.

To **conclude** this matter, one could say that the coastal State exercising legislative power within its territorial sea, is according to Community law competent to regulate technical equipment, machinery, hull and potential hazards from ships, and to take precautionary measures to avoid the threat of damage. In graver circumstances, the coastal State is competent to restrict access.

8. Breaching the IMO provisions (2). Investigating an incident

Instead of immediately denying access to the port in the event of an incident, the coastal State - under Council Directive 93/75 Annex II - might ask the shipmaster for all relevant information on incidents or deficiencies from the checklist, and - under Annex I no. 9 - a copy of the loading register. Is the coastal State obliged to demand relevant information? Annex III uses the word "may", so we may safely assume that the coastal State does have the jurisdiction to demand information. So, according to Community Law, the state is not obliged to ask the shipmaster for the relevant information before barring access to the port.

However, according to the administrative law principle of contradiction, the coastal State is not competent to restrict access without allowing the shipmaster to provide the coastal State with the relevant information. If the coastal State, having examined the information, finds that no hazardous or pollutant goods are affected by the incident in question, then we must ask whether the port authority still has the competence to restrict access.

The basic Human Rights principle, hence also Community Law principle, of proportionality[61] requires an evaluation of the private interest of entering a port and an evaluation of the threat to the environment and coastline. Such an evaluation necessitates the submission of all information relevant to the incident in question. If the notification disproves the presumed threat, then the conditions for denying access - cf. circumstances of serious and impending incidents - would no longer be present. Therefore it would be illegal to still deny such a vessel access to the harbour.

9. Closure of charter-parties

Since Council Directive 93/75 Article 4 is applicable to ships of all nationalities transporting hazardous or poisonous freight, no freight may be offered before the shipmaster or operator has received an IMO class-of-risk consignment note complying with the IMDG, IBC and IGC Codes. Issue of the note is the duty of the dispatcher. He may also verify that the goods in question are identical to the ones declared. The shipowner is obliged to check that sufficient information is issued before offering freight or subsequently closing the charter-party. If adequate information is present, the shipowner may launch an offer.

Similar contractual restrictions are not laid down for the transportation of other kinds of goods. However, under Council Regulation No 259/93 Articles 3(6) and 6(6), a person having waste shipped between member States of the European Community (as defined under Article 1 (a) of Directive 75/442) - even aboard third-state vessels - is liable to contractualise the

[61] The European Court of Human Rights Judgement of 23 September 1982: Sporrong and Lønnroth vs. Sweden.

following obligations. **For the consignee** (the person or company under Article 2 litra (h) to whom or to which the waste is shipped for recovery or disposal) "to provide as soon as possible and no later than 180 days following the receipt of the waste a certificate to the notifier that the waste has been disposed of in an environmentally sound manner". **For the notifier** (the person under Article 2 litra (g) having the waste shipped) the contractual obligation is to "take the waste back if the shipment has not been completed as planned or if it has been effected in violation of this regulation".

The notification procedure (see para. 2) may be terminated if the competent authorities of dispatch and transit have any objections based on the conditions laid down in Article 3. This includes i.a. the contractual obligations.

10. The handling of goods, waste and spill oils during transportation

Within the territorial sea the coastal State is entitled under UNCLOS Article 21 litra (a) to regulate the safety of navigation and maritime traffic, i.a. sea-traffic rules on manoeuvring for the purpose of avoidance of collision. Correctly interpreted, the coastal State does not have the jurisdiction to regulate "life on board". However, if there are external effects on living resources or the coastal environment, the coastal State may adopt laws and regulations affecting the "inner life" of the ship. Apparently hazardous, poisonous or pollutant goods may have such external effects. The Community legislation reflects the Law of the Sea framework because in these situations it applies only to foreign vessels transporting such hazardous cargo; see paras. 9.2-9.4.

As already mentioned, coastal State legal competence does not include regulations affecting "design, construction, manning or equipment" (Article 21(2)), if such regulations are not generally accepted. Correctly interpreted, the items listed include technical equipment as a physical entity, but not the manipulation of such equipment. If external effects occur, the coastal State is undoubtedly competent to regulate the handling of objects during transportation across the territorial sea. In this section I analyse Community legislation requirements for transportation during the voyage, i.e. how to handle the goods and how to

properly use the equipment. By the word "objects" I mean the goods or merchandise being transported ("the cargo") as well as spill oils and other pollutant items.

10.1 Non-hazardous and non-pollutant cargo

Apparently, Community legislation does not regulate the carriage of non-hazardous or non-pollutant goods or the performance of transportation during the voyage. But what are harmless goods and what are hazardous goods ("hazardous" being a common name for dangerous and pollutant goods)?

a) **Dangerous goods?** Under Council Directive 93/75 Article 2(c), the notion of **"dangerous goods"** is linked to the IMO definition, i.e. the species mentioned in the IMDG Code (the International Maritime Dangerous Goods Code, adopted by the IMO on 6 November 1991 as Resolution A 716(17)), the IBC Code Chapter 17 (the International Liquid Bulk Carrier Code) and the IGC Code Article 19 (the International Gas Carrier Code).

Without going into details, these Codes include poisonous and hazardous goods, and these in turn mean goods that are dangerous, as well as harmless goods transported in a dangerous manner (e.g. gas under pressure). However, steel, rice, cars, fish etc. transported along the NSR to and from Community harbours are not classed as dangerous goods.

b) **Pollutant goods?** If not dangerous, goods could be **pollutant** and for that reason they would come under Directive 93/75. Pollutant goods are defined in Article 2 litra d) and include oil and oil products as described in MARPOL (The International Convention for the Prevention of Pollution from Ships 1993, as amended by the 1978 Protocol) Annex I, noxious liquids as defined in Annex II, and harmful substances in packaged form as defined in Annex III. In short, Annex II & III cover chemicals other than oil, such as sulfuric acid, lye, radioactive materials etc.

c) **Conclusion.** The handling of non-dangerous or non-pollutant goods during transportation is affected neither by Directive 93/75, nor by other Community legislation. Therefore, as regards the carriage of **harmless cargo** on foreign vessels, no minimal Community provisions

are applicable. Consequently, such ships are entitled to unimpeded access to EU harbours as well as unrestricted use of port harbour facilities; see para. 9.2.

By this conclusion I have however not said that the Community lacks the power of making unilateral technical requirements vis-à-vis foreign ships when docking in an EU or EEA harbour. As stated under the chapter of presentation, UNCLOS, neither under the Article 21 nor elsewhere, prevents Community or member States from establishing unilateral technical standards related to foreign, non-convention-states' ships.

10.2 Transfrontier shipments of hazardous waste

Vessels transporting dangerous or pollutant goods, representing potentially harmful effects on resources and coastline ecology, are subject to coastal State legal competence. UNCLOS Articles 21 and 221 apply to the territorial sea and the high sea respectively. Article 218 is relevant for discharge in all kinds of zones. Community legislation affects the transportation of useful but dangerous products (see Council Directive 79/116 before 13 September 1995 and Directive 93/75 thereafter), as well as the disposal of waste oils (Council Directive 75/439), waste (Council Directive 75/442) and toxic and dangerous waste (Council Directive 78/319). Since waste is merchandise, its transportation is strictly governed under Council Regulation No 259/93. In this section I present the latter Regulation.

Transfrontier shipment of hazardous waste for disposal is prohibited, with the exception of export to (Article 14) or import from (Article 19) those EFTA countries which are parties to the Basle Convention of 22 March 1989 on the control of transboundary movements of hazardous wastes and their disposal.[62] In this respect, the Regulation has no bearing on transportation along the NSR.

However, exceptions are made for imports into the Community from other parties to the Basle Convention and states that are not parties to this convention but with whom the Community,

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[62] See L. Pineschi op.cit. p. 299.

the Community and the member States or the member States (prior to the date of the application of Regulation No 259/93) have concluded bilateral or multilateral agreements or arrangements. In principle this encompasses all states, and might also affect transportation along the NSR.

a) The notification system

I have already described the **notification** obligations (see para. 5). Attention must now be drawn to **other provisions** that restrict transportation or free entry into harbours. As mentioned earlier (para. 4), ships of all states are subject to Regulation No 259/93. The obligations discussed in the continuation are therefore applicable to vessels of all nations.

b) The closure of access

If waste is imported into the Community from countries that are parties to the Basle Convention[63] or have concluded Agreements with the Community, then entry is unrestricted. However, notification shall be given to the competent authority at the port of destination. If the information available does give the competent port State Authority "reason to believe that the waste will not be managed in an environmentally sound manner" (Regulation No 259/93 Article 19(4), the shipment of waste into the Community shall be prohibited.

i. Free discretion

The coastal State executing exclusive autonomy has free discretion in assessing whether the waste will be destroyed in a proper manner, cf. the phrase "The competent authority of destination shall prohibit the bringing of waste into its area ... if **it** has reason to believe" (the italics are mine). The port State assessment is vital as it is impossible for Courts, Commission or Council to judge whether the member State might have had sufficient cause to believe, when the decision was taken, that the treatment would be insufficient.

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[63] The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 22 March 1989.

ii. The legal subjects affected

In relation to the legal subjects, coastal State jurisdiction is complete. Since I am studying "shipments of waste" I do not deal with waste disposal onshore; that is debated in para. 9.4. Council Regulation No 259/93 makes no limitation on the legal subjects concerned as jurisdiction relates to the management of waste regardless of which persons or ships are involved. Clearly all transportation is affected, no matter which flags the vessels are flying or which legal subject is the owner.

iii. Legal competence

To resolve the question of access, the scope of reference is whether the waste will "be managed in an environmentally sound manner in its area". The phrase "sound manner" is extremely vague and clearly does not impede coastal State jurisdiction. However, some restrictions are incorporated in the provisions of notification; see Council Regulation Article 20.

10.3 Waste oils

In this section I focus on legislation regarding the discharge of waste oils, i.e. the bans on discharge into the territorial sea and the obligation to deliver such oil to a licensed undertaking. The meaning of waste oils is "any mineral-based lubrication or industrial oils which have become unfit for the use for which they were originally intended" (see Council Directive 75/439 on the disposal of waste oils amended recently by Council Directive 87/101 Article 1). The suitability for use on board is decisive. It is of no significance whether the oil is or could be useful for others.

Member States are obliged "to ensure that waste oils are collected and disposed of without causing any avoidable damage to man and the environment" (Article 2). According to Article 3(1), waste oils should be re-used if possible.

10.31 Discharge

Among the member State duties, under Article 4, member States shall take necessary measures to ensure the prohibition of i.a. "any discharge of waste oils into inland surface water, ground water, territorial sea water". The prohibition of discharge obviously applies to foreign vessels crossing the territorial sea as well as entering coastal State harbours. Outside the territorial sea, however, no Community legislation regarding waste oils is in effect. This means that Community legislation which, according to UNCLOS Article 221, could be initiated in areas beyond the territorial sea, does not affect foreign vessels outside the 12 mile limit (at the most). Accordingly, if the Flag State does not prohibit waste oil discharge on the high sea, then discharge is permissible.

Thus, foreign ships crossing the territorial sea cannot discharge waste oils into the territorial sea. On the basis of this obligation, however, one cannot conclude that a ship in transit is obliged to deliver waste oils at the nearest harbour. Even when intentionally docking in an EU harbour, foreign vessels are not compelled to deliver waste oil to undertakings at that harbour. If the waste oil is properly stored on board, the ship is allowed to carry it to another harbour for delivery. However, waste oils in storage must not be mixed with PCBs and PCTs (see Council Directive 76/403) or with toxic and dangerous waste (the term is defined under Directive 78/319, the Annex). In case of such mixing, waste oil must be delivered promptly.

10.32 Receival of waste

Under Article 5(2), member States shall secure the collection of waste oils by ensuring that "one or more undertakings carry out the collection and/or disposal of waste oils offered to them by holders". The undertakings which dispose of waste oils must obtain a permit. Others are not authorized to receive waste oils. Foreign vessels entering an EU harbour are not allowed to unload waste oils for the benefit of an unlicensed receiver.

An oil-consuming ship is a holder of waste oils and is not to be classified as an undertaking. As a holder of waste oils, the ship does not have to apply for a permit.

10.4 Toxic and dangerous waste

Besides the environmental and safety issues, Council Directive 78/319 does not aim to "create unequal conditions of competition and thus directly affect the functioning of the common market" (the preamble). The kind of waste defined as "toxic and dangerous" is listed in the Annex to the directive and includes 27 different items, from arsenic to acids or alkaline substances, "in such quantities or in such concentrations as to constitute a risk to health or the environment" (Article 1 litra B). As regards other substances, Article 3 excludes radioactive waste, explosives etc. from the scope of this directive.

The notion of waste is defined under Article 1 litra (A) and means "any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of national law in force". The holder's disposition is conclusive. If he considers something to be useless and therefore disposes of it, then it must be classified as waste. In addition, if national law does oblige someone to dispose of something, then it is waste. If the substance is toxic and dangerous and also classified as waste, then it is to be treated according to Council Directive 78/319.

a) Are foreign vessels carrying toxic and dangerous waste reckoned among the legal subjects of Council Directive 78/319? No provision unambiguously resolves the question. Obviously transportation is included because the directive applies to "carriage ... of toxic and dangerous waste" (Articles 1, 2, 5(2) etc.), "being transported", etc. (Articles 7, 14(2) etc.). Due to the use of the phrase "any carriage" in the preamble and "risk to water" in Article 5(1), maritime traffic is a type of transportation which falls under the directive. But does this also affect foreign vessels transporting toxic and dangerous waste?

The purpose of the harmonization and approximation of laws was to prevent a situation of unequal conditions of competition. If foreign vessels are subject to lax safety and environmental conditions, such vessels will have advantages which are not in accordance with the basic principle of harmonization and approximation. In addition, the purpose of preventing accidents with regard to "human health and the safeguard of the environment" (the preamble) does not exclude foreign vessels.

In **conclusion**, vessels of all nationalities are subject to the provisions of Council Directive 78/319. This means that all member States, including the EEA-states Iceland and Norway, are obliged to incorporate and practice provisions relevant to non-convention-ships as well, docking in an EEA or EU harbour.

b) So, what are the consequences of the application of this directive to foreign vessels entering an EU or EEA harbour? It is mainly a question of identifying the nature, composition, volume or mass of the waste, the name and address of the producer or the previous holder of the waste, the name and address of the next holder or the final disposer and the location of the site of final disposal where known; see Article 14(2). There are no requirements for a licence because the permit system under Article 9(1) relates only to the storage, treatment or disposal. According to this Article, transportation is carried out under the supervision of the coastal State, which may control the undertakings engaged in the carriage of toxic waste.

11. Sailors' qualifications

Under UNCLOS Article 21(2), the Community is competent to adopt generally accepted international rules or standards regarding "manning ... of foreign ships" with respect to "the safety of navigation and the regulation of maritime traffic" (Article 21(1) litra (a). The term "manning" obviously refers to the number of crew on board a ship. But does it embrace all aspects of sailors' qualifications? If not, the coastal State is entitled to adopt provisions even if they clash with generally accepted standards. My intention is to look at the Community legislation without making any contribution to the particular issue of manning under the Law of the Sea.

11.1 Educational diplomas and minimum educational requirements

The Community legislation on professional education and recognition of higher education diplomas under Council Directive 89/48 is improved by Council Directive 92/51, and is to be implemented in member State legislation before 18 June 1994 (cf. Article 17). This

directive obliges member States to establish the minimum level of qualification through national education requirements. The aim of the harmonized system is to eliminate obstacles to the pursuit of professions being regulated (the preamble, para. 18). Due to Council Directive 94/58 on the minimum educational level for seafarers, sailors' qualifications are among these regulated professions. According to Article 14 the minimum requirements listed in the Annex should be incorporated into national legislation by 31 December 1995 at the very latest.

The question is whether these provisions apply to foreign ships entering Community port State harbours. The political goal is to prevent accidents caused by underqualified sailors; see Council Directive 94/58, the preamble. Lack of qualifications obviously does not distinguish between flag-of-convenience vessels and Community vessels. Undoubtedly there is a need for applying professional requirements to all vessels in transit or entering Community harbours.

Despite the urgent need for improved human qualifications aboard all ships entering an EU harbour, the present Community legislation (under Council Directive 94/58, the preamble) only regulates ships flying the flag of a member State or Euros (the EU shipping register). Community educational requirements do not affect third-state vessels.

11.2 Certificate of Competency

Even though Community minimum educational requirements do not apply to sailors of foreign vessels, the Community still adopts some standards relating to the crew and manning of the ship. According to Council Directive 79/116 and the replacement Directive 93/75, the coastal State may demand that Certificates of Competency be forwarded to the competent authority.

According to Directive 93/75 Annex II litra D, the requested information includes the number of crew, formal positions on board, the presence of key members of staff, such as shipmaster, chief, second and third mate, first, second and third engineers and the radio officer. Further, the unavailability of a certificate should be noted, and when a certificate is available, a detailed description and serial number of the certificate should be recorded. Missing

certificates do constitute a deficiency which might provoke the coastal State to restrict access according to the provisions under Annex III (see paras. 7 and 8).

12. Some concluding remarks

During innocent passage, ships are not compelled to comply with coastal State legislation that does not conform with "generally accepted international rules or standards" (UNCLOS Article 21(2)). However, if a ship docks in a harbour, the coastal State might establish unilateral provisions for all visitors, even vessels flying the flags of non-convention states. Such autonomous EU provisions, however, are not in force at present.

Chapter 3
Community port State Enforcement

Having examined the influence of Community Law on coastal State legislative competence, I now turn to the question of surveillance and enforcement. The main topic is civil jurisdiction within the territorial sea according to Community Law. Is the latter compulsory or does the coastal member State enjoy exclusive autonomy regarding surveillance and enforcement?

Within the scope of this project, which focuses on foreign vessels accessing EU or EEA harbours, it is unnecessary to examine the legal situation in the EEZ or on the high seas. However, as enforcement competence under UNCLOS Part XII (Protection and Preservation of the Marine Environment), Section 6 is valid in the EEZ, coastal and port State jurisdiction within and beyond the territorial sea is in some respects identical.

1. The Law of the Sea standpoint

Several conventions regulate coastal State enforcement competence regarding foreign ships in general or, in particular, the discharge of waste from ships. Of importance here are the Convention and Statute on the International Regime of Maritime Ports of 9 December 1923, International Convention on certain Rules concerning Civil Jurisdiction in matters of Collision of 10 May 1952, and the International Convention relating to the Arrest of Seagoing Ships, also of 10 May 1952. As several shipping nations are not parties to these conventions, which do not constitute customary law, I make no further analysis of these provisions.

UNCLOS does, however, express customary law solutions and is consequently an important part of the coastal State legal title and framework. Civil jurisdiction over foreign ships is limited under UNCLOS Article 28 to incidents or damage to the ship itself "in the course or for the purpose of its voyage through the waters of the coastal State". No jurisdiction must be exercised in relation to a person on board the ship. Neither is the coastal State competent to levy or detain the ship for any other reason than such incidents or damage.

Port State enforcement authority for the purpose of environmental protection and preservation is codified in UNCLOS Articles 218 & 219. Article 218 is limited to "discharge violation", i.e. to dispose waste or poisonous or other environmentally dangerous items, cf. the phrase "to cause pollution"; see Article 218(2). Obviously, ships violating safety and environmental provisions are subject to coastal State enforcement competence. The international Law of the Sea limitation under Article 218(1) does not prevent port States from undertaking investigations and initiating proceedings into any violation of applicable international rules and standards related to discharge from a vessel which is voluntarily within the port of the enforcing state. This is applicable no matter where the incident occurred outside the port, e.g. in internal waters, territorial sea or EEZ. As mentioned under the chapter of presentation, I agree with Tullio Scovazzi pointing at Article 218 as important title for port State influence on discharge caused by ships sailing along the NSR when later on, docking in an EEA or EU harbour.[64]

Other kinds of violation are subject to other UNCLOS provisions, which play no part in this dissertation.

Member State port authorities are competent to implement and enforce Community Law against trespassers, i.e. civil and criminal seizure. However, enforcement is limited, and the details will be discussed in para. 2.

2. The Community Law enforcement situation

As indicated, several conventions regulate coastal State enforcement competence relating to foreign ships in general or, in particular, the discharge of waste from ships. The question is whether Community Law makes additional requirements that member States are obliged to fulfil.

There is no such thing as a Community coastal task force for the enforcement of jurisdiction. Consequently, Member port States may exercise enforcement competence within its territorial

[64] See the Review p. 2.

sea. For the purpose of environmental protection and preservation, **the Nation State** is entitled to control and enforce jurisdiction on vessels entering Community harbours. Does Community Law make surveillance or control compulsory? My intention is to examine the Community surveillance and control provisions, with special emphasis on the member State's virtually free discretion.

2.1 Technical requirements

As mentioned in Chapter 2, vessels of all nationalities are obliged to comply with certain minimum technical requirements when entering an EU or EEA harbour. According to Council Directive 93/75 Annex III, coastal State enforcement competence is linked to the Law of the Sea framework, under which the coastal State is entitled to act. Under Community Law, the coastal State is not obliged to respond to non-fulfillment of technical requirements in any specific way. Clearly then, the surveillance and enforcement competence of the coastal State, limited under International Law, is not compulsory. The port State is not forced by Community Law to control or enforce the technical requirements laid down in Council Directive 93/75 Article 6(3). The port State enjoys free discretion in that matter. Therefore, Community Law as it now stands does not require any member State to exercise jurisdiction over foreign ships that represent a potential threat to that state's waters or coastline. Consequently, Community Law does not make demands that are supplementary to the Law of the Sea and which reduce the Nation State's exclusive jurisdiction under the international law system.

Nonetheless, in the preamble to Directive 93/75, the Council strongly recommends that member States take all appropriate measures to avoid incidents. Should incidents occur, member States are advised to limit the effects. In addition, IMO-resolution A 648 (16) recommends that member States ascertain that all reporting systems or routines are in accordance with the requirements mentioned in Council Directive 93/75 Annex I and II. These provisions, however, are only recommendations and therefore not legal obligations.

2.2 Shipment of waste

Council Regulation No 259/93 applies to the transportation of waste within, into or out of the European Community. Under Article 1 (3c) cf. the preamble, jurisdiction concerning control is set at the member State level. When control is necessary for environmental or public health reasons, it embraces shipments of substances with certain hazardous characteristics, as well as other waste. Since these details are of minor interest here, I make no further comment on them.

In paras. 9.2 and 9.4, I have already discussed the sphere of legal subjects affected by this and other environmental legislation (i.a. the carriage of toxic and dangerous waste, Council Directive 78/319). Jurisdiction is obviously complete, i.e. it affects the same legal subjects in all respects, including executive, judicial as well as legislative power. I therefore conclude that member State supervision and control competence includes all transportation, no matter which flags the vessels are flying or which legal subject is the owner.

Still open to discussion is the question of coastal State obligation under Community Law. Does Community Law require member States to enforce this kind of Community legislation, or is member State enforcement competence optional?

As a Community Regulation, the "waste shipment" rules are directly applicable to all legal subjects involved, i.e. Member States and individuals. The Council is competent to establish new obligations and alter others that are aimed at the member States. The legal situation at present will not necessarily persist into the future. Optional jurisdiction today might become compulsory action tomorrow.

What is the *de lege lata* situation? Is the port State forced by Community Law to control or enforce jurisdiction over shipments of waste? Does the port State enjoy free discretion in this matter?

2.21. Free discretion?

Do member States enjoy the right to decide which legal criteria should comprise the basis for member State supervision and control of the transportation of waste? This is a question of which organ enjoys legislative competence: the member State or the Community? As documented in paras. 9.2 and 9.4, jurisdiction belongs to the Community. Under Council Regulation No 259/93 (the preamble), this is stated explicitly:

> "supervision and control ... within a member State is a national responsibility whereas, however, a national system for the supervision and control of shipment of waste within a member State should comply with minimum criteria in order to ensure a high level of protection of the environment and human health".

As stated above, member States should verify that the minimum criteria are fulfilled. Obviously, member State supervision and control does relate to the Community minimum criteria as documented in i.a. Regulation No 259/93.

2.22 An optional choice?

Are member States obliged to take action? Does Community Law compel member States to supervise and control the transportation of waste? According to Council Regulation No 259/93 Articles 1 (3c) & (3d), certain waste substances "may be controlled". There is no textual basis for the assertion that member States are obliged to enforce Community Law provisions. Clearly then, member State jurisdiction is optional.

Under Council Directive 75/442 (see Chapter 2 para. 4), jurisdiction concerning waste embraces "planning, organization, authorization and supervision of waste disposal operations". According to Article 10, "undertakings transporting ... their own waste and those which ... transport waste on behalf of third parties shall be subject to supervision by the competent authority". This legal obligation rests on the transport undertaking, not the state. The transport undertaking must submit to state supervision. There is nothing to support the argument that

member States are obliged to enforce Community Law provisions.

3. Conclusion

As it now stands, Community Law neither requires any member State to enforce Community provisions vis-à-vis foreign ships that represent an actual or potential threat to the waters or coastline of that member State, nor to enforce port State competence according to UNCLOS 218 vis-à-vis third states vessels in respect of any discharge from that vessel when sailing the NSR. Consequently, each member State may take advantage of the Law of the Sea option that allows port States to enforce national and Community provisions for safety and environmental protection.

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The three main cooperating institutions of INSROP

Ship & Ocean Foundation (SOF), Tokyo, Japan.
SOF was established in 1975 as a non-profit organization to advance modernization and rationalization of Japan's shipbuilding and related industries, and to give assistance to non-profit organizations associated with these industries. SOF is provided with operation funds by the Sasakawa Foundation, the world's largest foundation operated with revenue from motorboat racing. An integral part of SOF, the Tsukuba Institute, carries out experimental research into ocean environment protection and ocean development.

Central Marine Research & Design Institute (CNIIMF), St. Petersburg, Russia.
CNIIMF was founded in 1929. The institute's research focus is applied and technological with four main goals: the improvment of merchant fleet efficiency; shipping safety; technical development of the merchant fleet; and design support for future fleet development. CNIIMF was a Russian state institution up to 1993, when it was converted into a stock-holding company.

The Fridtjof Nansen Institute (FNI), Lysaker, Norway.
FNI was founded in 1958 and is based at Polhøgda, the home of Fridtjof Nansen, famous Norwegian polar explorer, scientist, humanist and statesman. The institute spesializes in applied social science research, with special focus on international resource and environmental management. In addition to INSROP, the research is organized in six integrated programmes. Typical of FNI research is a multidisciplinary approach, entailing extensive cooperation with other research institutions both at home and abroad. The INSROP Secretariat is located at FNI.