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11. Residual Jurisdiction under IMO Regulatory Conventions

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1 INTRODUCTION

The extent of port state jurisdiction under general international law has been discussed extensively in literature on the law of the sea. The limited space allotted to the authors in this publication call for optimal use and should therefore focus on specific issues. Consequently, the view taken but not elaborated in this chapter, and supported by a majority of authors, is that a port state has the right to deny foreign vessels entry into its ports, subject to certain exceptions. Implied therein is the right to prescribe conditions for the entry into port.[1]

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1 *See* for example M.S. McDougal and W.T. Burke, *The Public Order of the Oceans* (New Haven/London: Yale University Press, 1962), p. 110; A.V. Lowe, 'The Right of Entry into Maritime Ports in International Law', 14 *San Diego Law Review* (1977), pp. 597-622, at p. 621; K. Hakapää, *Marine Pollution in International Law. Material Obligations and Jurisdiction* (Helsinki: Suomalainen Tiedeakatemia, 1981), pp. 163–168 and 178–180; D.P. O'Connell, *The International Law of the Sea*, ed. by I.A. Shearer, Vol. II (Oxford: Clarendon Press, 1984), p. 848; R.R. Churchill and A.V. Lowe, *The Law of the Sea* (Manchester: Manchester University Press, New rev. ed. 1988), p. 52. *See*, however, G. Schwarzenberger, *International Law* (London: Stevens

This chapter focuses on the relationship between general international law and the United Nations Convention on the Law of the Sea ('UNCLOS')[2] on the one hand, and the conventions adopted under the aegis of IMO (hereinafter: regulatory conventions) on the other hand. Whereas port states are left with a considerable margin of discretion in exercising jurisdiction under UNCLOS and general international law, the question is raised here whether a similar situation exists under regulatory conventions. This is consistently referred to as the existence of 'residual' jurisdiction. Apart from the perspective of the port state acting individually, regional approaches receive attention as well. Finally, trade aspects are briefly examined for possible guidance in an issue which is commonly approached in terms of navigation vs. environment and safety. Although the chapter is predominantly concerned with port states, attention is now and then paid to coastal and flag states.

2 RESIDUAL JURISDICTION UNDER IMO REGULATORY CONVENTIONS

The starting-point in an analysis of regulatory conventions should be that they are predominantly concerned with specific 'technical' obligations rather than jurisdictional matters. At the time when the major regulatory conventions with a bearing on vessel-source pollution were being drafted, such as MARPOL[3] and SOLAS,[4] there was a large measure of uncertainty in international law on the scope and extent of coastal state jurisdiction.[5] Consensus was ultimately reached that jurisdictional matters should be left to the UNCLOS III Conference, which is clearly reflected in MARPOL Article 9(2).[6] With respect to MARPOL, the few jurisdictional provisions embodied deal exclusively with enforcement jurisdiction. Negotiations on coastal state prescriptive jurisdiction did not lead to treaty provisions but provided the basis for the negotiations at UNCLOS III.[7]

and Sons Limited, 1957), p. 198; The American Law Institute, *Restatement of the Law (Third). The Foreign Relations Law of the United States* (St. Paul: American Law Institute Publishers, 1987), § 512, n. 3.

2 21 *ILM* (1982), pp. 1261ff.

3 International Convention for the Prevention of Pollution by Ships, 1973, 12 *ILM* (1973), pp. 1319ff., as amended.

4 International Convention for the Safety of Life at Sea, 14 *ILM* (1975), pp. 959ff., as amended.

5 G.J. Timagenis, *International Control of Marine Pollution* (New York: Oceana Publications/Alphen aan de Rijn: Sijthoff & Noordhoff International Publishers, 1980), p. 486.

6 Article V(4) of the 1978 Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), 1984 *UKTS* 50, is identical.

However, an issue which should be dealt with before entering into a detailed discussion on the few jurisdictional provisions contained in regulatory conventions, is whether the technical standards contained therein should be regarded as minima or maxima, and, consequently, allow no exercise of prescription deviating from those minima or maxima. This question is raised in light of the regulatory regime for vessel-source pollution in UNCLOS, which to a considerable extent aims at a uniform level for the exercise of prescriptive jurisdiction. In most cases this level constitutes at the same time a minimum for flag states and a maximum for coastal states, but does not apply to port states.

It seems obvious that the bulk of the obligations contained in the regulatory conventions are aimed at flag states. They thus create a *minimum* level to which flag states must conform. Naturally, nothing stands in principle in their way to adopt more stringent measures than they have already consented to.[8]

Less clear, however, is the situation for port and coastal states. Viewing the technical standards in regulatory conventions as *maxima* would imply that port and coastal states have, by becoming parties to these regulatory conventions, voluntarily excluded residual prescriptive jurisdiction. Guidance in this difficult question is provided by MARPOL Article 9(2):

> 'Nothing in the present Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to Resolution 2750 C (XXV) of the General Assembly of the United Nations nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.'

Article 9(2) thus links jurisdictional matters which may arise under MARPOL to general international law and, more specifically to UNCLOS.

The competence of coastal states to prescribe rules and standards for their maritime zones is, under UNCLOS, mostly limited to the level of 'generally accepted'. The exceptions to this are the faculty to prescribe their own discharge standards for their territorial sea (UNCLOS Article 211(4)), and the largely unrestricted prescriptive jurisdiction in ice-covered areas (Article 234). These standards could certainly exceed those agreed upon under MARPOL. Article 9(2) of MARPOL resolves possible conflicts between UNCLOS and MARPOL by giv-

7 Timagenis, *supra* note 5, at pp. 488–507.

8 *See* for example Article 3(3) of the 1966 International Convention on Load Lines (LL), 640 *UNTS* 133. *See*, however, the first paragraph in section 3 below.

ing priority to the former. Whether the UNCLOS provisions just mentioned also have a basis in customary international law seems likely but cannot be examined here. It therefore seems that, for coastal states parties to both MARPOL and UNCLOS, any residual jurisdiction beyond the standards in MARPOL is permitted when the relevant UNCLOS provisions are taken into account.[9] For coastal states parties to MARPOL only, such conclusion requires an assessment of relevant rules under customary international law but would not *a priori* exclude residual jurisdiction.

UNCLOS deals with the right of port states to prescribe conditions for the entry into their port in Articles 25(3) and 211(3). The wording of these provisions reflect the unqualified and full character of this jurisdiction, similar to the situation under general international law. As a matter of principle, nothing would prevent a port state from voluntarily restricting its prescriptive jurisdiction by becoming a party to regulatory conventions. As it would concern an obligation *not* to make use of a certain competence, it will not conflict with general international law or UNCLOS in which such competence is expressly permitted.

Guidance in the uncertainty surrounding residual port state jurisdiction is perhaps found in Article 31(1) of the Vienna Convention on the Law of Treaties[10] which stipulates that a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. With respect to the 'terms of the treaty', some of the regulatory conventions contain provisions which address the issue of residual prescriptive jurisdiction, albeit in an indirect way. SOLAS Article VI(d) and STCW Article V(3) provide that '[a]ll matters which are not expressly provided for in the present Convention remain subject to the legislation of the Contracting Governments'. Although these provisions seem indeed to imply an exclusion of residual jurisdiction, the fact that similar provisions have not been embodied in other regulatory conventions seems to leave residual jurisdiction, as a general rule, unaffected.[11] The words 'expressly provided for' give in any case

9 A.E. Boyle, 'Marine Pollution under the Law of the Sea Convention', 79 *AJIL* (1985), pp. 347–372, at p. 359, n. 71, maintains that MARPOL Article 4(2) itself does not prevent coastal states from adopting stricter standards. This, of course, would be subject to possible restrictions resulting through MARPOL Article 9(2).

10 8 *ILM* (1969), pp. 679ff.

11 Interesting to note in this respect is that Resolution 23 of the Final Act of the International Conference on Marine Pollution, 1973 contains the following paragraph: 'DECLARES FURTHER that the rights exercised by a State within its jurisdiction in accordance with the Convention do not preclude the existence of other rights of that State under international law.' (Attachment 3 to the Final Act of MARPOL 73). The obligation to avoid undue delay for example under MARPOL Article VII does not impose a restriction on the extent of prescriptive port state jurisdiction but rather functions as a safeguard to incorrect enforcement.

ample room for states intending to prescribe their own standards. Another matter is the obligation embodied in various regulatory conventions that inspection is limited to a certificate check subject to certain exceptions.[12] It is submitted that this cannot be used in support of a prohibition of residual prescriptive jurisdiction since the certificate check only applies to the technical standards contained in regulatory conventions.[13] These considerations, combined with the absence of relevant provisions in other regulatory conventions, warrant the assessment of the 'object and purpose' of regulatory conventions. Two different approaches can be distinguished here.

The opposing views would both acknowledge that regulatory conventions have been adopted in order to achieve two main objectives, viz. protection of the marine environment and uniformity in the regulation of international shipping.[14] However, the first view emphasizes that although protection of the marine environment reflects the direct interests of port and coastal states on the one hand, and uniformity in international shipping those of flag states on the other, the two objectives do not represent a *quid pro quo* relationship. In other words, regulatory conventions are not package-deals in which interests are balanced. While flag states have committed themselves to a minimum level of mandatory jurisdiction, port states have not, in return, voluntarily restricted their jurisdiction in these matters. Whereas the multilateral approach is in general the preferable one, it does not exclude an occasional unilateral course.[15] Taken together with the, in principle, unrestricted sovereignty in UNCLOS and general international law, the conclusion seems justified that port states have not, by becoming parties to the regulatory conventions, committed themselves to a maximum level of prescriptive jurisdiction.[16] The important difference with coastal states is that these are, through MARPOL Article 9(2), bound to UNCLOS and/or general international law. UNCLOS, in any case, imposes a maximum level of prescriptive jurisdiction on a coastal state. That is, where it decides to make use of it.[17]

12 *See* for example MARPOL Article 5(2).

13 The same reasoning can be applied to UNCLOS Article 226.

14 M. Göransson refers, in this publication, in this context to the 'principle of globally applicable standards'.

15 The pre-eminence of standard-setting on the international level comes clearly to the fore in UNCLOS Article 211(1). However, this cannot be so broadly interpreted as to exclude residual jurisdiction.

16 Hakapää, *supra* note 1, at p. 113 adheres to this view when observing that a port state has the option to 'resort to yet more stringent measures which, of course, could be applied to the ships of the other Contracting Parties, as well'. With respect to the issue of the burden of proof, a fundamental rule of international law requires that limitations upon sovereignty must be established by those claiming their existence (*Lotus* case, *PCIJ* 1927, Series A, No. 10 at p. 18).

17 Coastal state jurisdiction remains, after all, facultative.

Conversely, when the view would be supported that regulatory conventions constitute package-deals between opposing interests, it seems logical to submit that port and coastal states have, by becoming parties to the regulatory conventions, at the same time consented to enforce only those standards to which the flag state must conform under the same regime. The *quid pro quo* character of these conventions would then override the absence of provisions expressly restricting residual port and coastal state jurisdiction. Furthermore, the presumption of unrestricted sovereignty could, under these specific circumstances, not be upheld.[18]

The latter view is not supported here for the reasons mentioned in the discussion of the first view. Some additional support for the first view can perhaps be derived from the circumstance that most regulatory conventions contain opting-out provisions in relation to amendments.[19] A state becoming a party to a convention consents to the package of obligations as it is at that time but retains the faculty to opt out for future obligations.[20] The faculty of opting-out could therefore be regarded as confirming the existence of residual jurisdiction.[21] Admittedly, the instrument of opting-out is not frequently resorted to and its practical effect hard to determine.[22]

18 *See* M. Valenzuela, 'International Maritime Transportation: Selected Issues of the Law of the Sea', in A.H.A. Soons (ed.), *Implementation of The Law of the Sea Convention Through International Institutions*, Proceedings of the 23rd Annual Conference of The Law of the Sea Institute, Noordwijk aan Zee, 1989 (Honolulu: Law of the Sea Institute, University of Hawaii, 1990), pp. 187–215, at pp. 213–215. Some support for this view can be found in the wording of Resolution No. 14 of the 1995 SOLAS Conference and Article 5 of the 1996 Stockholm Agreement discussed below.

19 Under MARPOL Article 16(2)(g) states can either (i) not issue a declaration of acceptance or (ii) or issue a declaration of non-acceptance. Article 16(4)(a) provides that '[a]ny Party which has declined to accept an amendment to an Annex shall be treated as a non-Party only for the purpose of application of that amendment'. Opting out is also possible under SOLAS Article VIII(b)(vi) and (vii). SOLAS Article VIII(d)(i) provides that states accepting an amendment 'shall not be obliged to extend the benefit' of this amendment to states that have not accepted it. This seems essentially the same as treating them as non-parties.

20 It could even be submitted that the faculty of establishing regional agreements under Resolution No. 14 of the 1995 SOLAS Conference is a special form of opting-out. One reason that the contracting parties to SOLAS 74 adopted this course could be the acknowledgement that residual jurisdiction exists and that this construction would at least provide a role for the IMO.

21 *See* in this context J.A. Roach, 'Dispute Settlement in Specific Situations', 7 *Georgetown International Environmental Law Review* (1995), pp. 775–789, at p. 789.

22 From a legal view, the actual effect of opting-out varies with the capacity in which states act: as flag, port or coastal states. When flag states decide to opt out with respect to an amendment, this implies that they do not agree with a specific higher level of stringency. Obviously, nothing would prevent them from imposing a higher level on their own ships; the opting-out procedure would in that event not even be necessary. Therefore, by opting-out, flag states have become non-party states in regard to this amendment. Accordingly, the no-more-favourable-treatment (NMFT-) clause (*see* below) should be applied, which could considerably reduce the ultimate impact of opting-out for flag states.
There seem to be no problems with port states opting-out of amendments which are too stringent for their likes. Similarly, where an amendment introduces a regime which is not stringent enough according to port states, they would then be free to opt out and unilaterally introduce more rigorous standards. Reasoning from the view that supports voluntary restriction could lead to patently unreasonable results in situations where the adoption of amendments takes very long or does not take place at all. This would then leave a port state no other choice than to await decisions on the international level. The observations for port states are, *mutatis mutandis*, the same for coastal states, viz. subject to MARPOL Article 9(2).
The NMFT-clause essentially stipulates that states parties shall enforce the standards contained in regulatory conventions also with respect to ships of non-parties. Many IMO regulatory conventions contain the NMFT-clause (for example in MARPOL Article 5(4); Article II(3) of SOLAS Protocol 1978; Article I(3) LL Protocol 88; and Article X(5) STCW 78) and in some others it can be implied (for example in Article 22 LL). It is submitted that the NMFT-clause does not seek to extend the scope of jurisdiction to third states but rather ensures the application of a right already existing under general international law. To a large extent the NMFT-clause aims at preventing ships from re-flagging. Consequently, it should be regarded as a provision which has been embodied as a safeguard to the benefit of flag states ratifying or acceding to regulatory conventions who feared adverse effects on their competitiveness. *See* Hakapää, *supra* note 1, at p. 113; and the position taken by the United States in IMO Doc. MEPC 38/9/9, para. 11. Valenzuela, *supra* note 18, at p. 206 submits that the NMFT-clause has developed, with respect to port state jurisdiction over vessel-source pollution, into a rule of customary international law.

3 LIMITATIONS ON RESIDUAL JURISDICTION

The foregoing analysis should not immediately lead to the conclusion that port or coastal states parties to regulatory conventions are entirely free in pursuing a unilateral course. Socio-economic and political interests or international comity require in such situations the balancing of interests of all actors involved. Additionally, unilateralism is certainly not a guarantee for effectiveness or 'better results'. These considerations, however, do not belong to the domain of law. Moreover, a unilateral approach would in any case have to take such general

principles as non-discrimination and national treatment into account.[23] Apart from having legal implications, the principle of national treatment will restrain an overzealous exercise of residual jurisdiction. In this context it should be kept in mind that the distinction between port, coastal and flag states is a legal one which largely ignores everyday reality. Most states exercise jurisdiction in all three roles. The exercise of residual jurisdiction in the role of port state has, through the principle of national treatment, the result that vessels flying the flag of the port state have to comply with the same regulations. A progressive exercise of flag state jurisdiction resulting in standards with a higher level of stringency without applying them through port and coastal state jurisdiction to foreign vessels, often leads to a loss in competitiveness.

Some authors argue that although port and coastal states parties to regulatory conventions have in no way voluntarily restricted their jurisdiction, these states would nevertheless be bound by the notion of abuse of rights.[24] Lauterpacht considers as the essence of the doctrine of abuse of rights that:

> '[a]s legal rights are conferred by the community, the latter cannot countenance their anti-social use by individuals; that the exercise of a hitherto legal right becomes unlawful when it degenerates into an abuse of rights; and that there is such an abuse of rights each time the general interest of the community is injuriously affected as the result of the sacrifice of an important social or individual interest to a less important, though hitherto legally recognized, individual right'.[25]

23 The principle of non-discrimination as between flags in general does not appear consistently in regulatory conventions but is firmly rooted in general international law and in UNCLOS Article 227. *See* also Section 1.2 Paris MOU. The principle of national treatment has been laid down in, for example, IMO Res. A.787(19) Section 3.1.2, which explicitly observes that the more detailed inspection is not intended 'to impose control procedures on foreign ships in excess of those imposed on ships of the port State'. *See* also Section 3.6.2.5. The NMFT-clause shows similarity with the principle of non-discrimination *per se*, or the principle of national treatment, but has a meaning and application of its own.

24 Churchill and Lowe, *supra* note 1, at pp. 52–53. *See* also P.W. Birnie and A.E. Boyle, *International Law and the Environment* (Oxford: Clarendon Press, 1992), p. 274. Valenzuela, *supra* note 18, at p. 214 seems to submit that the notion of abuse of rights applies also where the view is taken that port and coastal states have voluntarily restricted their jurisdiction. However, this seems to imply that this right has ceased to exist and, consequently, would preclude the applicability of the notion of abuse of rights. E. Gold, 'The Control of Marine Pollution from Ships: Responsibilities and Rights', in T.A. Clingan (ed.), *The Law of the Sea: What Lies Ahead?*, Proceedings of the Law of the Sea Institute 20th Annual Conference, Miami, 1986 (Honolulu: Law of the Sea Institute, University of Hawaii, 1988), pp. 276–291, at p. 289 observes that some fear that 'marine pollution controls can be used by coastal states as a pretext for "creeping jurisdiction" purposes other than environmental protection'.

The concept of abuse of rights received some support in the rulings of international tribunals,[26] but is not widely recognized as a general principle of law.[27] The fact that the principle of abuse of rights is laid down together with the principle of good faith in UNCLOS Article 300, could contribute to acquiring this status of general principle of law. The delimitation of the function of the notion of abuse of rights in general, but also in relation to other principles such as the principle of *sic utere tuo ut alienum non leadas*, *ultra vires*, *détournement de pouvoir*, equity, reasonableness and good faith remains a difficult matter in which restraint is called for.[28] In acknowledging that every right has its limitations, the notion involves in many instances the balancing of conflicting rights in which resort to dispute settlement procedures could play a central role.[29] It would, moreover, seem that, *prima facie*, intention to inflict harm is not relevant.[30]

At first glance the concept of abuse of rights seems particularly relevant for port state jurisdiction. Usually, conditions for the entry into port concern construction, design, equipment and manning ('CDEM') standards. Although the

25 H. Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933), p. 286. For B.O. Iluyomade, 'The Scope and Content of Abuse of Right in International Law', 16 *Harvard International Law Journal* (1975), pp. 47–93, at p. 48, the concept of abuse of rights consists of 'the prohibition of the exercise of a right for an end different from that for which the right was created, to the injury of another person or the community'. It seems therefore that Iluyomade identifies the notion of abuse of rights to a large extent with the principle of *détournement de pouvoir*.

26 *Inter alia* in the *Certain German Interests in Polish Upper Silesia* case ((1926), *PCIJ*, Ser. A, no. 7, p. 30); and the *Free Zones* case ((1932), *PCIJ*, Ser. A/B, no. 46, p. 167).

27 I. Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 4th ed. 1990), p. 446. But *see* Lauterpacht, *supra* note 25, at pp. 292–295; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London: Stevens and Sons, 1953), p. 121; Hakapää, *supra* note 1, at p. 140; D.W. Abecassis and R.J. Jarashow 2nd ed. with R. Jarvis (*et al.*), *Oil Pollution from Ships: International, United Kingdom and the United States Law and Practice* (London: Stevens and Sons, 1985), p. 15.

28 Brownlie, *supra* note 27, at p. 445. *See* also Lauterpacht, *supra* note 25, at p. 304.

29 Lauterpacht, *supra* note 25, at p. 305; Abecassis *et al.*, *supra* note 27, at p. 16.

30 Brownlie, *supra* note 27, at p. 445; Lauterpacht, *supra* note 25, at p. 286. Iluyomade, *supra* note 25, at pp. 77–79, considers intention in inflicting harm on others a necessary requirement for the presence of an abuse of rights. *See* also Lauterpacht, *supra* note 25, at pp. 292–295; Hakapää, *supra* note 1, at p. 139.

port state demands in essence nothing more than that these standards are complied with when the vessel is in one of its ports, due to their nature these standards are also complied with beyond the maritime zones of the port's coastal state. Standards which are more stringent than 'normal' could therefore have far-reaching effects. However, these extraterritorial effects are incidental rather than the very object of these conditions. More questionable are conditions for the entry into port that concern behaviour that occurred before entry, for example discharges or notification requirements. Since such conditions cannot rely on the territorial jurisdiction of the port state, they need another basis in international law. An example is UNCLOS Article 218, which provides for 'universal' port state jurisdiction over illegal discharges. Although such exercise of extraterritorial jurisdiction is thus not necessarily inconsistent with international law, it should be employed with caution.[31]

It seems that, in the context of residual jurisdiction, the notion of abuse of rights is best evaluated in light of the balancing of conflicting rights. This approach was for example pursued in the *North Atlantic Coast Fisheries* arbitration where the Permanent Court of Arbitration observed with regard to the right of Great Britain to legislate for the protection and preservation of fisheries that:

> 'Regulations which are (1) appropriate or necessary for the protection and preservation of such fisheries, or (2) desirable or necessary on grounds of public order and morals without unnecessarily interfering with the fishery itself, and in both cases equitable and fair as between local and American fishermen, and not so framed as to give unfairly an advantage to the former over the latter class, are not inconsistent with the obligation to execute the treaty in good faith and are therefore reasonable and not in violation of the treaty.'[32]

Applying these considerations to, for example, the double hull requirements in the 1990 Oil Pollution Act ('OPA') of the United States,[33] necessitates making difficult assessments of elements such as appropriateness, necessity, or desirability. It seems, however, that the primary intention of OPA 1990 was indeed the protection of the marine environment and that there are no apparent other motives looming behind. Moreover, OPA 1990 does not seem to discriminate between national and foreign vessels. It is admitted, on the other hand, that by enacting OPA 1990, the United States took a unilateral stand without taking much notice of other states' interests in a multilateral approach. To conclude, however, that this legislation amounts to an abuse of rights is not altogether obvious.[34]

4 REGIONAL APPROACHES

A related question is whether residual port state jurisdiction can also be exercised by regional organizations or whether there are circumstances which warrant a different approach. Several regulatory conventions contain of course a regional concept, meaning a differentiated regional approach. The issue raised here sees, however, to residual port state jurisdiction exercised on a regional basis and independent from the approval of a global organization. UNCLOS Article 211(3) expressly confirms such a right for port states acting in concert.

These issues surfaced during the 1995 SOLAS Conference, although in the end amendments were adopted which did not cater for independent regional differentiation. Nevertheless, the Conference adopted Resolution 14 which envisages the conclusion of regional agreements on specific stability requirements[35] for 'every ro-ro passenger ship ... on regular scheduled voyages between designated ports in their territory'. Although this formulation seems to point at the intention to subject third flags to these agreements as well, the Conference records state that 'the Conference accepted the explanation' that there was no such intention.[36] This is qualified somewhat by the last operative paragraph of Resolution 14 which reads:

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31 W.T. Burke, 'Changes Made in the Rules of Navigation and Maritime Trade by the 1982 Convention on the Law of the Sea', in R.B. Krueger and S.A. Riesenfeld (eds.), *The Developing Order of the Oceans*, Proceedings of the Law of the Sea Institute 18th Annual Conference, San Francisco, 1984 (Honolulu: Law of the Sea Institute, 1985), pp. 662–677, at p. 669, observes that the initial idea of using the tool of conditions for the entry into port as a means of securing prohibition of anchoring in the United States Flower Garden Banks National Marine Sanctuary was never pursued.

32 J.B. Scott, *The Hague Court Reports*, Vol. 1, p. 171, cited in Cheng, *supra* note 27, at p. 125.

33 Oil Pollution Act of 1990, Pub. L. No. 101–380, 104 Stat. 484 (1990), in 33 *U.S.C.* §§ 2701–2761, 46 *U.S.C.* §§ 3701–3718. Note that the United States has opted out from the 1992 MARPOL (double hull) amendments by notifying on 23 December 1992 that, in accordance with MARPOL Article 16(2)(f)(ii), entry into force would only be possible after express approval by the US Government (*Status of IMO Conventions 1994*, p. 49).

34 Note A.A. Ayorinde, 'Inconsistencies Between OPA '90 and MARPOL 73/78: What is the Effect on Legal Rights and Obligations of the United States and Other Parties to MARPOL 73/78?', 25 *JMLC* (1994), pp. 55–94, at p. 94, who submits, unconvincingly, that OPA 1990 is 'unreasonable because it violates United States treaty obligations'.

35 *See IMO News* No. 3:1996, p. 18, where, *inter alia*, the effectiveness of the damage stability criteria is doubted in view of uncertainty on the cause of the *Estonia* disaster.

36 IMO Doc. SOLAS/CONF.3/RD/6, paras. 5 and 7.

> 'URGES all Contracting Governments [to SOLAS] to apply the provisions of such agreements on ro-ro passenger ships entitled to fly their flags when engaged on regular scheduled voyages between designated ports covered by such agreements.'[37]

Since a textual interpretation of Resolution 14 does not provide an unambiguous result on the apparent intention behind it, particular weight may be attributed to state practice regarding Resolution 14. So far, the only regional agreement concluded pursuant to this resolution is the 1996 Stockholm Agreement.[38] Article 5(1) of the Agreement reads:

> 'The Contracting Governments agree that the specific stability requirements should apply to all ro-ro passenger ships operating on regular scheduled international voyages carrying passengers between or to or from designated ports, irrespective of flag and bearing in mind the necessity to ensure that no more favourable treatment should be given to ships entitled to fly the flag of states non-parties to the present Agreement.'

On the one hand, the text makes it clear that it is 'irrespective of flag', supported by a determination to apply the NMFT-clause. On the other hand, this is mitigated somewhat by the fact that the requirements 'should apply' 'irrespective of flag'. More evidence for an approach which tempers the *erga omnes* character of the Agreement is found in subparagraph (2) which provides for phases in which non-parties should conform to the requirements. On the whole, however, the text of the Agreement makes it clear that its regional stability requirements can also be applied to vessels flying the flag of non-parties to the Agreement. The Agreement should therefore be considered as an exercise of collective residual port state jurisdiction. The circumstance that these regional rules do not really go beyond the stringency of the stability requirements envisaged in Resolution 14 and set in the Annex thereto, is unable to affect this conclusion.[39] Of decisive importance is the application to non-parties to the Agreement.

The question is then whether the Agreement is in line or in conflict with the proper interpretation of Resolution 14? Since the Agreement adopts an approach which tends more towards an *erga omnes* effect than the Resolution, it seems that the two instruments conflict with each other. However, the consequences of this

37 IMO Doc. SOLAS/CONF.3/RD/6, para. 5, acknowledges the difficulties that might 'be created if two standards were applied on the same route'.

38 Agreement Concerning Specific Stability Requirements for Ro-Ro Passenger Ships Undertaking Regular Scheduled International Voyages between or to or from Designated Ports in North West Europe and the Baltic Sea, 1996, IMO Circular No. 1891.

39 M. Göransson in this publication.

conflict are, particularly in light of the non-binding character of the Resolution, unclear.

The question remains as to the explanation for the difference between the apparent intention behind Resolution 14 and that of the Agreement. The approach of Resolution 14 is perhaps motivated by political rather than legal considerations. Although no distinction exists between collective and individual residual port state jurisdiction in principle, the former has in general a greater impact on a globally uniform system than the latter. Of course, this all depends on the power of the individual state. More important seems to be the fact that an explicit acknowledgement of collective residual jurisdiction within the framework of a regulatory convention has the serious risk of undermining its global orientation. Clearly, such an acknowledgement in the applicable fora would by many states not be deemed appropriate. This, however, would not as a consequence impair the recognition that collective residual jurisdiction is allowed for states parties to regulatory conventions or, for that matter, under general international law.

5 TRADE ASPECTS

Another perspective on the discussion of residual port state jurisdiction is obtained by taking into account the possible trade effects of conditions for the entry into port. Measures adopted for environmental purposes which affect trade are referred to by one author as 'trade-related environmental measures'.[40] States that have bound themselves to legal regimes that strive for the liberalization of trade, such as the EC, NAFTA or WTO, could find themselves with additional restrictions on their right to prescribe environmental or safety regulations. Although an in-depth analysis of these matters would broaden the discussion too much, it seems interesting to make some general comments on WTO law.[41]

The global instrument relevant to maritime transport is the General Agreement on Trade in Services ('GATS').[42] A preliminary remark is that the GATS reveals that the liberalization of trade in services is still in an infantile stage,

40 P. Demaret, 'Environmental Policy and Commercial Policy: The Emergence of Trade-Related Environmental Measures (TREMs) in the External Relations of the European Community', in M. Maresceau (ed.), *The European Community's Commercial Policy after 1992: The Legal Dimension* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993). Similar language is already used with regard to intellectual property rights and investment: TRIPs and TRIMs.

41 For the sake of brevity no attention is given to similar issues within the context of the EC, NAFTA, or other regional trade agreements.

42 33 *ILM* (1994), pp. 44ff.

allowing for a large measure of unilateralism. Moreover, the GATS and accompanying annexes should perhaps be regarded as rules that focus on issues not specific enough to cover jurisdiction over environmental and safety standards. Such issues *are* addressed in the context of trade in goods, viz. in the Agreement on Technical Barriers to Trade ('TBT Agreement'),[43] brought under the Multilateral Agreements on Trade in Goods. The relevance of the TBT Agreement to trade in services will be discussed below. The GATS is nevertheless briefly addressed here to illustrate the extent of state discretion it allows.

States parties to the WTO Agreement are bound by GATS Article II(1) which embodies the 'Most-Favoured-Nation' treatment. However, paragraph (2) of the same provision makes it possible for a state to exempt itself from the obligation in the first paragraph. Moreover, the Annex on Negotiations on Maritime Transport Services[44] provides that GATS Article II only enters into force after the conclusion of negotiations on maritime transport services. Nevertheless, participating states in the Negotiating Group on Maritime Transport Services 'shall not apply any measure affecting trade in maritime transport except in response to measures applied by other countries'.[45] The first round of negotiations proved to be unsuccessful and led to the decision to start a new round of negotiations not later than the year 2000. In the meantime, GATS Article II(1) continues to be non-applicable to maritime transport services. However, states that have made specific commitments under Part III of the Agreement are supposed to apply these non-discriminatorily.[46]

The escape clause in GATS Article XIV seeks in fact to retain a certain amount of residual prescriptive and enforcement jurisdiction with respect to measures 'necessary to protect human, animal or plant life or health'. This is subject to the requirements that 'such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services'.

As already mentioned above, the TBT Agreement applies in principle only to trade in goods and not in services. It should, however, be acknowledged that stringent conditions for the entry into port could have significant impact on trade in goods. The double hull requirements offer a good example of a situation where technical barriers to trade in services have a simultaneous impact on trade in

43 18 *ILM* (1979), pp. 1079ff.

44 33 *ILM* (1994), p. 151.

45 Para. 7 of the Ministerial Decision on Negotiations on Maritime Transport Services. This obligation apparently does not apply to states not participating in the negotiations.

46 *See* WTO Doc. Nos. S/L/24 and S/NGMTS/16, 3 July 1996. Information kindly obtained from Mr. A. Mattoo from the WTO.

goods. The foremost characteristics of the TBT Agreement could therefore throw light on the extent of residual port state jurisdiction over vessel-source pollution. Central to our discussion is Article 2 of the Agreement which regulates the right of states to prepare, adopt and apply technical regulations. The principles of non-discrimination and national treatment are incorporated in the first paragraph. Paragraph (2) acknowledges the legitimacy of regulations for the protection of the environment. This is subject to numerous requirements throughout Article 2, such as: respect and preference for multilateralism; necessity; proportionality; availability of scientific and technical information; and publication.

A further question is the possible applicability to our subject of general observations made in GATT or WTO panel reports. The environmental component of regulations affecting trade comes most clearly to the fore in the *Tuna-Dolphin* case.[47] This case concerns, *inter alia*, United States regulations that ban imports of tuna and tuna products caught by vessels using fishing methods that cause higher losses of dolphins than methods used in the United States. Admittedly, since the contested regulations are in fact production requirements for specific products,[48] this has only limited similarity in the context of environmental and safety requirements which are not necessarily related to a particular type of product. Nevertheless, two general conclusions in the Panel Report transcend its specific context. The first is that measures can only be justified under GATT[49] Article XX(b) if they are used to 'safeguard life or health of humans or plants within the jurisdiction of the importing country'.[50] The second is the obligation to exhaust other options before resorting to unilateralism, 'in particular ... the negotiation of international cooperative arrangements'.[51]

47 General Agreement on Tariffs and Trade: Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna (further: Panel Report), 30 *ILM* (1991), pp. 1594ff. It should be noted that the then existing consensus rule under the GATT prevented the panel report from being accepted. *See* Demaret, *supra* note 40, at pp. 388–398 for a discussion on panel reports with environmental aspects. Specifically on the *Tuna-Dolphin* case, *see* T.L. McDorman, 'The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles', 24 *George Washington Journal of International Law and Economics* (1991), pp. 477–525. Worth noting as well is that the Panel Report on US Standards for Reformulated and Conventional Gasoline was appealed by the US to the WTO Appellate Body on 21 February 1996.

48 *See* Panel Report, *supra* note 47, at paras. 5.8–5.16.

49 General Agreement on Tariffs and Trade, 1947, 55 *UNTS* 194.

50 Panel Report, *supra* note 47, at para. 5.26. *Cf.* McDorman, *supra* note 47, at pp. 520 and 522.

51 Panel Report, *supra* note 47, at para. 5.28. *See* also the submissions made by Thailand in para. 4.25.

As a whole WTO rules and rulings indicate, if not directly then at least by analogy, that the right of a state to prescribe standards for the protection of the environment against vessel-source pollution remains in principle unaffected. Several safeguards ensure that other states' interests are taken into account. Although the importance of a multilateral approach surfaces repeatedly, no intention is made to prohibit a deviation therefrom entirely.

6 CONCLUSIONS

The foregoing leads to the conclusion that regulatory conventions cannot be interpreted as supporting the exclusion of residual port state jurisdiction, exercised on a unilateral or regional basis. WTO rules and rulings also indicate the considerable extent of sovereignty in the sphere of international shipping. An excessive resort to unilateralism is nevertheless avoided by the principles of national treatment, non-discrimination and abuse or rights. The importance of non-legal considerations should, moreover, not be underestimated. Unilateral approaches do not necessarily have adverse consequences for the protection of the marine environment against shipping, although much depends on the specific circumstances of each case. Assessing for a specific issue which course, unilateral or multilateral, is the most beneficial for the environmental cause is a task better left to others.