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Bernard Oxman
University of Miami School of Law, bhoxman@law.miami.edu

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THE DUTY TO RESPECT GENERALLY ACCEPTED INTERNATIONAL STANDARDS

BERNARD H. OXMAN*

I. INTRODUCTION

Recognition of the international dimension of many environmental problems has generated increased interest in establishing international environmental regulatory regimes, some regional, some universal. This increased environmental awareness has focused renewed attention on the classic obstacles to the creation of effective international regulatory regimes, especially universal regimes, posed by the existing international political and legal order. Those obstacles have yielded to creative political and legal solutions in the past, and will doubtless continue to do so. The purpose of this article is to analyze a modest supplementary tool that can be used in conjunction with other tools to deal with one of the significant legal obstacles, namely the consensual basis of international law.

In some circumstances the achievement of an underlying environmental or safety objective is dependent upon, or would be enhanced by, implementation of substantially the same environmental or safety restraints by all or an indeterminate number of states in a timely manner. Activities in common spaces open to all, like the high seas, present the classic setting in which this need may arise. We now know that activities within national territory may have detrimental effects not only on the oceans but on the global atmosphere.

* Professor of Law, University of Miami School of Law. Thanks are due to my colleagues Thomas Clingan, Stephen Schnably and Richard Williamson for their helpful comments, and to my indefatigable research assistant, Clay Shuett, for his many contributions.

1. The author had the privilege of participating in meetings and conversations under the auspices of Elliot Richardson, designed to analyze goals and approaches for the international conference on the environment to be held in Brazil in 1992 and similar efforts. Ambassador Richardson's paper contains very useful insights about alternative approaches to global environmental regimes. It also suggests that a duty to respect generally accepted international standards be included.
and climate. Such activities also may be prime candidates for universal restraints.

I first examine the various regulatory goals that these situations may suggest, namely universality, regulatory precision, adaptability to change, and a legal obligation to comply. I then explore the difficulties posed by traditional means for imposing new obligations that satisfy such goals: treaties specifying the desired norms, treaties establishing a system of regulation or "tacit amendment" to promulgate legally binding norms, and customary international law. One problem with either treaty option is that, at best, there are almost always gaps or "stragglers": states that are not bound by the relevant treaty. A "soft law" approach to regulation of course does not in itself create any legal obligations. Customary international law, although universal, is not well suited to create rapid new obligations to impose detailed regulatory restraints.

I will then examine the history, use, and utility of a legal tool that may be of supplemental help in dealing with this problem, namely a general legal duty to respect and apply specific types of international standards that come to be "generally accepted." One of the virtues of this approach is that it emphasizes the fact of general acceptance of a standard after promulgation, rather than the legal obligation (if any) created by its initial adoption by an international organization or conference. This approach can take some pressure off the complex issues of voting procedures and enforcement concerns which accompany attempts to create institutions with legally binding regulatory power. It also means that "soft law" recommendations need not remain "soft."

Finally, I will conclude with some observations on the scope of the duty to respect generally accepted international standards and its relationship with customary international law. The reader is cautioned that the tool is a modest one; it should be interpreted and applied prudently if it is to remain useful and available.

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2. "Soft law" is said to emerge from instruments that do not create enforceable rights and duties, but rather reflect underlying principles or values in international law. See Baxter, 29 INT'L & COMP. L. Q. 549 (1980).
II. THE REGULATORY PROBLEM

A. Objectives

Regulatory regimes are tools. No particular type of regime is a priori best suited to further specific goals. Do we need or desire a universal regime as opposed to a regime with more limited regional or functional participation? Do we prefer precise and detailed rules to broad principles? Is the capacity for rapid adaptation to new information and circumstances important? Is the creation of legally binding obligations a significant objective?

A global duty to respect specific types of international standards suggests particular regulatory objectives. To better understand the scope and utility of the duty, it is useful to examine each of these regulatory objectives. The duty could be employed most appropriately in contexts where these objectives are important.

1. Universality

An objective need for universal enforcement of a standard is most likely to arise when: 1) achieving a particular safety or environmental goal is dependent on respect for the standard by all or nearly all persons conducting relevant activities; and 2) enforcement jurisdiction and practical control over those persons are effectively partitioned among a large or indeterminate number of different states.

Geography is often a major factor in making this determination. The object of regulation may be activities in areas outside any state's territorial jurisdiction, where nationals of all states have a right to conduct activities essentially under


4. At some point interesting questions might be asked about the utility of characterizing as a "regime" a body of norms that is not treated at least de facto as binding. The English and French languages are rich enough to supply a different word whose etymology is less closely associated with concepts of rules, governance, and restraint.
the exclusive control of the "flag" state of the craft or expedition in question. Alternatively, the object of regulation may be activities occurring in the territory of an indeterminate number of states that affect a common value such as the marine environment, the atmosphere, or the climate.

Economics may also be an important determinative factor. While immediate self-interest may be concentrated enough to ensure widespread compliance with certain types of safety rules designed primarily to benefit those conducting the regulated activities (for example, "rules of the road" to prevent collisions), the benefits of compliance with many types of environmental restraints are widely dispersed. A situation in which some, or even most, of those conducting a particular activity observe inconvenient or expensive environmental restraints while others do not, poses the classic problem of what economists sometimes call the "free rider."\(^5\) The capacity to establish or to maintain particular regulatory restraints may be enhanced by the ability to demonstrate that the "free rider" problem is not likely to be significant and, should it arise, could be dealt with.

2. **Precision**

Many safety and environmental regulations for which one seeks universal compliance are quite precise and detailed. "Rules of the road" must prescribe precise reactions by at least two different actors to any number of specific circumstances if collisions are to be avoided. In the maritime area alone, there are precise and detailed international regulations regarding training, expertise of personnel, construction, facilities, equipment, discharges, and a host of other matters. The difficulty of "enacting" all such detailed regulations as universally binding positive law suggests a need for additional legal approaches.

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3. **Adaptability**

Few would dispute the need for procedures to change certain rules relatively quickly in response to new knowledge, experience, and technology. Often the more precise and detailed the rules, the more likely that changes will be needed.

Environmental rules in particular must respond to an expanding base of scientific knowledge about the natural environment, effects on that environment, and alternative strategies for furthering environmental goals. They should also respond to advances in the economic, political, and social sciences regarding the effectiveness and costs of alternative strategies for influencing human behavior in order to further environmental (or other) goals.

The ability to make future changes may also influence the content of an initial set of rules. Willingness to experiment may well depend on the capacity to undo mistakes quickly and efficiently.

4. **Legal Obligation**

The purpose of establishing a duty to respect international standards presumably is to further the other objectives already identified in those cases where it is both reasonable and helpful to interpose a legal obligation to observe and enforce the standards.

While there is presumably a safety or environmental argument in favor of observing every international safety or environmental norm, the creation of a legal obligation to do so arms us with additional arguments to persuade those who are not otherwise fully persuaded. In some cultures the existence of a legal obligation may have a significant impact on public perceptions and behavior. Also, the existence, interpretation, and application of a legal obligation are matters that can be arbitrated or adjudicated where there is jurisdiction.

**B. Means**

If these objectives are to be realized, the basic challenge is to find means to oblige all states to impose new restraints on their nationals. The means chosen must overcome the obstacles to achieving fairly widespread assent to new obliga-
The problem remaining is then to close the gap between "widespread" and "universal."

1. **Treaties Setting Forth the New Standards**

   Treaties containing new rules to be observed by the parties are the classic form of "international legislation." The problem is that treaties bind only their parties. Each state's government must affirmatively accept a treaty in order to become a party. With important treaties, this may entail time-consuming internal constitutional procedures. The same generally holds true for changes to treaties. The means of regulation therefore poses obvious problems with respect to goals of universality as well as timely adaptation to changed circumstances.

2. **Treaties Establishing a System to Promulgate Future Legally Binding Rules**

   The most conservative version of a second approach is barely distinguishable from the first option. A treaty establishes an international organization, or calls for regular meetings, for the purpose of drafting rules to be submitted to the governments of the parties. Before a state is bound, its government must specifically ratify or approve the rules. This approach has most of the same problems as the first option, although response time may be shorter at the drafting and the governmental approval stages.

   The legally significant departure from the first option occurs when one attempts to establish a system by treaty pursuant to which a state consents in advance to be bound to apply rules adopted thereafter by an international organization or conference, even if its government has not expressly approved those rules. This typically occurs if the rule is adopted by a qualified majority at the international meeting concerned, or if the rule is thereafter approved by the gov-

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6. Treaties that contain expedited amendment procedures are analyzed in the next group along with other treaties that establish regulatory bodies or processes for promulgating new rules.

7. The nature of the qualified majority may vary substantially. Where plenary organs of all parties are concerned, one would normally expect a requirement of no less than a two-thirds vote for the adoption of substantive texts. Sometimes the concurring votes of specific states or groups of
ernments of a qualified majority of parties, or both. "Tacit amendment" procedures applicable to "technical" annexes of regulatory treaties are one popular manifestation of this approach.

This approach is designed to overcome the obstacles to universality and timely adaptability inherent in the first option. However, this is achieved only after, and to the extent that, the treaty establishing the regulatory procedure is itself widely ratified. Only parties to the "constitutive" treaty are bound by rules adopted under it.

The fact that the treaty establishing a more expedited regulatory procedure must itself be widely ratified to achieve the goal of universality places inherent limitations on precisely how far one may go in presenting a state with the risk that it will be bound by a future rule which is adverse to its interests. There is a tension between the goals of universality and adaptability.

To promote adaptability, one will seek agreement to a procedure that requires less for the entry into force of a rule than the affirmative assent by each state party after formal internal constitutional review. This means that parliaments may be asked to yield a right to review the rules before their states become bound. It also means that domestic agencies and public constituencies may be yielding to a national delegation the effective right to review the rules in their final form.

If less than unanimity or consensus is required for the adoption of a legally binding regulation, great pressure is

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states will be required. "Weighted voting" is often used in commodity arrangements and financial organizations. Another technique is to vest exclusive or concurrent power to adopt proposed rules in a "council" or "commission" of limited composition designed to reflect the underlying interests at stake.


9. This may pose a particular problem in constitutional structures where the government is not responsible to the parliamentary majority.

10. Modern electronic communications notwithstanding, this could pose a particular problem for governments that do not have a tradition of (and travel budgets for) strong representation and influence by domestic agencies and public constituencies on their delegations.
placed on the question of the composition and voting rules of the bodies authorized to adopt a regulation. This question will be negotiated in the abstract, not in the context of a specific rule or an existing organization with a known regulatory track record. Some participants will argue for “democratic” or “efficient” decision-making procedures by a majority or two-thirds majority. From others one will hear objections to yielding a right to consent to a rule before it becomes binding on any given state unless that state, or states with which it shares relevant interests, have effective blocking power.

These obstacles can be overcome where the regulatory procedure is designed to deal with “technical” matters that are not deemed likely to result in rules significantly prejudicial to the interests of concerned states. But this fact creates a tension between a substantive goal of significant regulation, on the one hand, and potential resistance to the idea of consenting in advance to a significant (that is a potentially significantly adverse) regulation, on the other. In general, the greater the potential that a rule will have significant adverse impact on the economic or other interests of a state, the more cautious a government will be about yielding to others the authority to adopt that rule.

Thus, in general, one will find greatest adaptability where the rules adopted will not be legally binding without subsequent affirmative assent, or where there is a right to “opt out” of particular rules, or where the rules adopted are unlikely to have significant adverse impact on the economic or other interests of states.

3. Customary International Law

“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.” It is evident even from this general description that there are difficulties in relying on customary

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11. Restatement (Third) of the Foreign Relations Law of the United States § 102 (1986) [hereinafter Restatement]. This is a somewhat more accessible formulation of the idea referred to as “international custom, as evidence of a general practice accepted as law” in article 38, paragraph 1, of the Statute of the International Court of Justice (June 26, 1945, art. 38, para. 1, T.S. No. 993, at 30).
respecting international standards

international law to achieve the relevant underlying regulatory objectives.

If one relies on evidence of actual behavior of governments to generate the relevant rules, it will be very difficult, and often impossible, to achieve the desired measure of precision sought in many regulatory regimes. The need for authoritative written articulations of the restraints is great. The question then becomes one of achieving widespread acceptance of essentially the same written articulation. While this can, and doubtless does at times, occur by a process in which states copy each other's legislation and regulations, it is a slow, uncertain, and haphazard process that is likely to be impaired by the absence of broader participation in the drafting of the rules.\(^1\)

Many legal systems rely on the development of a richly textured written case law to provide a reasonable degree of articulate precision. It seems unlikely that judicial or arbitral resolution of inter-state disputes would produce the volume or variety of cases necessary to achieve the desired degree of precision with respect to the matters under consideration.\(^2\)

Perhaps more to the point, most states have themselves felt the need to resort to detailed statutory and regulatory rules enacted as positive law to deal with the kinds of environmental and other problems with which we are concerned in this article.

To the extent we conclude that the international system must likewise resort to positive written "legislation," we of course revert to the treaty and regulatory options already discussed. The question here, therefore, concerns some hy-

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12. The same would hold true of attempts to adapt the rules to changing circumstances and information. This difficulty is also likely to inhibit attempts to rely on "general principles of law recognized by civilized nations" as an alternative source of legal obligation. See Statute of the International Court of Justice, supra note 11, art. 38, para. 1(c).

13. As in the case of admiralty, it is possible for private law to develop, through municipal judicial decisions, roughly parallel to national rules regarding the liability of private actors who are the ultimate object of international regulatory restraints. Today, much of the law has been articulated by national legislatures as codes, comprehensive regulatory schemes, or free-standing statutes. Moreover, many objects of regulation are much less obviously international than are ships. Thus, the likelihood of such a development flowering into a new and generally uniform international system of restraint must be regarded as slight.
brid in which we rely on international conferences or organizations to provide the written articulation of the rules but rely on customary law, in whole or in part, to supply the universal legal obligation to comply. One model uses the treaty or regulatory option outlined above to achieve as much express acceptance of binding rules as possible, and then relies on customary law to fill in the gaps. The other uses an international organization to articulate the rules in a resolution that does not in itself have binding effect, and then relies entirely on customary law to supply the universal legal obligation.


One example of this process arises when it can be demonstrated that the drafters of the provision, themselves expert in international law, believed the provision to be declaratory of existing or emerging international law, particularly if this belief was shared by a wide range of government delegations. In that case, it might be asserted that the provision was declaratory of customary international law when adopted. This kind of argument will not normally be available in the case of most detailed environmental and other regulatory measures. The purpose of such measures is not only, or even mainly, to articulate existing or emerging customary restraints on governments, but to provide new (and updated) detailed regulatory guidance for restraining specific activity, much of it private.

The more pertinent example arises when it can be demonstrated that the relevant provisions of the instrument, although not declaratory of international law when adopted
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by the international organization or conference, have since been absorbed into customary international law. The International Court of Justice articulated several requirements with respect to treaty provisions in the North Sea Continental Shelf cases:  

1) "the provision concerned should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law . . . ."  
2) there should be "very widespread and representative participation" in the treaty containing the relevant provision, including "that of States whose interests were specially affected . . . ."  
3) within the time period since adoption and entry into force of the treaty containing the relevant provision, "short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved . . . ."  

The substantive heart of many regulatory treaties is to be found in extremely technical annexes, some of which may be incomprehensible to a generalist. It is open to doubt whether all, or even many, of these "could be regarded as forming the basis of a general rule of law" for purposes of the first requirement.  

The second and third requirements might be regarded as complementary. The second requirement deals with very
widespread and representative ratification of a treaty, including that of states whose interests are specially affected, while the third deals with extensive and virtually uniform state practice, again including that of states whose interests are specially affected.

One can identify four important quantitative and qualitative elements of the requisite "state practice": the provision must be accepted by states, whether by treaty ratification, national legislation, or authoritative governmental pronouncement; acceptance by states must be very widespread or extensive; the states accepting the provision must be representative; and the states accepting the provision must include the states whose interests are specially affected.

Assuming there is sufficient state practice (for example, extensive uniformity in national legislation on the subject), it must occur in a way that shows a general recognition that an international legal obligation is involved. It is unlikely to prove easy to satisfy this *opinio juris* requirement. Relative uniformity may emerge for a variety of substantive and policy reasons having nothing to do with a sense of legal obligation. Even a belief that uniformity with respect to the provision in question is sound international policy is not the same as a belief that uniformity is legally required.

So-called law-making treaties and declarations of legal principles adopted by international organizations, even if they are not regarded in whole or in part as *lex lata* or authoritative statements of what international law is, are usually regarded as *lex ferenda* or statements by the "authors" of what international law should be. Technical regulatory provisions in environmental and other treaties and resolutions rarely share these qualities. Their purpose is neither the codification nor the progressive development of international law as such. This makes it more difficult to say that implementation by a state of the requirements imposed by such provisions arises out of a sense of legal obligation (except of course where the state is bound by treaty to do so).

20. International regulations may be applied by private companies prior to or in the absence of formal entry into force or implementation by the state concerned. Such practice by private entities would presumably be an insufficient basis for establishing a customary law obligation of states.
Even if all of these requirements are satisfied, there remains the problem of the so-called "persistent objector." A state may be able to avoid being bound by a new rule of customary law if it consistently opposed the rule while state practice was still emerging.\(^2\)

In sum, while a hybrid "legislative/customary law" approach has had some success in areas such as human rights, the law of the sea, and the law of treaties, that approach poses formidable obstacles to the creation of universal legal obligations even in traditional fields of international law. Those obstacles would be more difficult to surmount in the context of detailed technical regulation of private activities for environmental or other purposes.

For example, experienced mariners may know that green means starboard, but does that make it a rule of customary international law that states are obliged to enforce? One is more likely to reach that result through the intermediation of a more general rule of conventional or customary international law that incorporates the maritime custom. It is this intermediate rule that is the subject of this article.

### III. The Emergence of a Duty to Respect Generally Accepted Standards at Sea

A duty to respect generally accepted international standards was developed in the course of efforts sponsored by the United Nations to provide for the codification and progressive development of the law of the sea. The duty was first articulated by the International Law Commission and the 1958 Conference on the Law of the Sea, largely in view of the need to ensure universal adherence to certain "rules of the road" and safety requirements on the high seas. The Third U.N. Conference on the Law of the Sea substantially expanded the range of situations in which the duty is applied, notably with respect to environmental matters.

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\(^2\) See Asylum (Colom. v. Peru), 1950 I.C.J. 266, 277-78 (refusal by Peru to ratify convention concerning diplomatic asylum); Anglo-Norwegian Fisheries, 1951 I.C.J. 116, 131 (refusal by Norway to adhere to fisheries zone).
A. The 1958 Convention on the High Seas

In 1950, the International Law Commission began work on the international law of the sea. By 1956 it had completed a set of draft articles which became the basis for the work of the Conference on the Law of the Sea convened by the United Nations in Geneva in 1958. The Conference made some changes in the articles submitted, and divided them into four separate conventions on the law of the sea.

1. Article 10

The Convention on the High Seas is the only one of the four conventions adopted at the 1958 Conference to state in its preamble that its purpose is "to codify the rules of international law" and that the Conference adopted its provisions "as generally declaratory of established principles of international law." It is therefore particularly interesting that article 10, paragraph 2, contains an idea that does not appear to have been articulated as a principle of international law prior to work on the Convention, at least not in that form.

Article 10 provides:

1. Every State shall take such measures for ships under its flag as are necessary to ensure safety at sea with regard inter alia to:
   (a) The use of signals, the maintenance of communications and the prevention of collisions;
   (b) The manning of ships and labour conditions for crews taking into account the applicable international labour instruments;
   (c) The construction, equipment and seaworthiness of ships.

2. In taking such measures each State is required to conform to generally accepted international standards and to take any steps which may be necessary to ensure their observance.

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24. Id., art. 10.
2. *Negotiating the Background of Article 10*

Article 10 of the Convention on the High Seas finds its origin in the need for universal observance of what Manley Hudson styled “the maritime rules of the road.” During the 1950 session of the International Law Commission, Hudson stated that “[h]e hoped that the Rapporteur would be able . . . to elicit from existing rules a principle which the Commission could discuss . . . with a view to its insertion in a draft code.” Hudson later observed that “he knew of no other case of a subject of such great international significance being left to a concordance of municipal laws instead of being regulated by international convention.” He was alluding to the fact that international “maritime rules of the road,” while in existence since 1863, and revised in 1889, 1929, and 1948, “were not in the nature of international conventions, and their international application was not compulsory.”

Spiropoulos replied that he “thought it his duty to point

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Manley Hudson was a member of the International Law Commission that drafted the above text.


27. *Id.*

28. *Id.* For example, as Special Rapporteur François subsequently reported, the 1948 London Maritime Conference “decided not to annex the revised [Collision] Regulations to the International Convention for the Safety of Life at Sea, 1948.” Instead, it invited the United Kingdom to forward the 1948 Regulations to governments that had accepted the 1929 Regulations. It also invited the United Kingdom, “when substantial unanimity has been reached as to the acceptance of the International Regulations for Preventing Collisions at Sea, 1948, to fix the date on and after which the International Regulations for Preventing Collisions at Sea, 1948, shall be applied by the Governments which have agreed to accept them.” *Report of the 66th Meeting, [1950]* 1 Y.B. Int’l L. Comm’n 208, U.N. Doc. A/CN.4/SER.A/1950.
out that the Commission did not seem to him to be prepared for dealing with questions as technical as those raised by cer-
tain problems of navigation on the high seas and particularly by that of the safety of human life.”

No member of the Commission suggested that the technical rules, even those widely adopted by national governments, were part of cus-
tomary law.

Hudson subsequently identified the nub of the problem as follows:

It could not be stated that any particular set of rules . . . should be recommended; but in order to prevent chaos in maritime traffic it could be stated that maritime States must bring the law applicable to their own vessels into conformity with that applicable to the vessels of other States. Without going so far as to codify the principles of 1948 or of 1929, the Commission should take steps to avoid the confusion that would prevail and the dangers that would arise if every maritime State established whatever regulations it thought fit for its own ves-
sels.

He suggested that recommendations should be given to states asking them not to issue “regulations which conflicted with regulations jointly agreed [upon] by other maritime States.” In reflecting on Hudson’s idea, Scelle noted a “danger . . . which might, however, be avoided by careful drafting, namely, that the main maritime powers might set themselves up as shipping controllers.”

Based on this discussion, the Special Rapporteur (Fran-

30. This was subsequently made explicit by Yepes with reference to the rules adopted by the 1948 London Conference: “Those rules concerned navigation signals and other technical points, but did not constitute principles of international law.” Summary Records of the 123rd Meeting, [1951] 1 Y.B. Int’l L. Comm’n 346. While Scelle did retort, “Regulations were just as much a part of international law as any principle,” he did not argue that the regulations in question were a part of customary international law. Id. at 347. Such a position would seem to be inconsistent with his other remarks. See infra text accompanying notes 36-39.
32. Id. at 349.
33. Id. at 348.
François proposed the following text: "A State may not issue any regulations inconsistent with those jointly agreed upon by the majority of maritime States, if such inconsistency would jeopardize the safety of life at sea."\(^{34}\)

François noted that this text did not permit the principal maritime powers to establish themselves as regulators.\(^ {35}\) This conclusion was based in part, presumably, on the words "majority of maritime states." This text was later criticized by Scelle because it did not reflect a "principle of a qualified as distinct from a simple majority."\(^ {36}\) A reference to "the majority of vessels engaged in international seafaring" was regarded as superior in this regard.\(^ {37}\) At the same time, Scelle vigorously supported retaining some reference to an appropriate majority. He claimed that it "had the great advantage of substituting for the stultifying rule of unanimity the effective rule of a genuine majority."\(^ {38}\) Scelle also had "serious objections" to the words "jointly agreed," which were to him totally unacceptable.\(^ {39}\) "Jointly agreed" suggested that the states needed a special agreement to establish regulations, whereas they actually developed out of a series of individual decisions in the same way as customary law.

In light of the discussion, François combined the texts on safety and signals, and proposed the following:

States shall issue, for their ships, regulations concerning the use of signals and the prevention of collisions on the high seas. Such regulations must not be inconsistent with those fixed by international agreement and applying to the majority of sea-going vessels, if such inconsistency would jeopardize the safety of life at sea.\(^ {40}\)

Two issues regarding the second sentence of the proposed text were raised. First, whether the requisite majority

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35. Id.
37. Id.
38. Id.
39. Id.
should be measured in terms of tonnage rather than vessels. It was also suggested that the expression should be qualified even further by the word “substantial.” Second, it was argued that limiting the applicable international standards to regulations “fixed by international agreement” would be overly restrictive.\(^{41}\) Noting that “it was only in certain spheres of maritime law that definite agreements existed,” and that “in other fields certain rules had come to be generally accepted and applied,” Sir Gerald Fitzmaurice proposed substituting the words “generally accepted internationally” for the words “fixed by international agreement.”\(^{42}\) He noted that “the purpose of the article was to oblige States to conform to generally accepted rules which \textit{ex hypothesi} were not necessarily accepted by all States. It was essential to ensure that States did not issue regulations inconsistent with those observed by the great majority.”\(^{43}\)

The question of the requisite “majority” needed to trigger a universal duty to conform remained controversial. The Commission stuck to a functional view, although it switched from counting vessels to counting tonnage. Yugoslavia proposed that the Commission change this to a “majority of Members of the United Nations.”\(^{44}\) Sir Gerald Fitzmaurice opposed the Yugoslav proposal vigorously:

Countries with large fleets had already been forced to give serious consideration to the best means for ensuring maximum safety at sea. The methods adopted therefore applied to a majority of vessels. It would be regrettable if an existing and satisfactory state of affairs were to be upset by a decision—that could not be unanimous—inspired by considerations quite remote from the essential technical requirements.\(^{45}\)

The Commission decided to delete the express refer-

\(^{41}\) Id. at 67.

\(^{42}\) Id.

\(^{43}\) Id. at 68.


ence to a requisite majority.\textsuperscript{46} It also went beyond the matter of signals and collisions, adding references to other types of regulations,\textsuperscript{47} and making the specific references indicative rather than exclusive. The result was the following text of article 34 in the 1956 Report of the Commission:

1. Every State is required to issue, for ships under its jurisdiction, regulations to ensure safety at sea with regard, inter alia, to:
   (a) The use of signals, the maintenance of communications and the prevention of collisions;
   (b) The crew, which must be adequate to the needs of the ship and enjoy reasonable labour conditions;
   (c) The construction, equipment and seaworthiness of the ship.

2. In issuing such regulations, each State is required to observe internationally accepted standards. It shall take the necessary measures to secure observance of the regulations.\textsuperscript{48}

At the 1958 Conference, the United Kingdom originally proposed deleting the Commission's article 34 and other regulatory provisions proposed by the Commission on the grounds that those provisions might be inconsistent with specific international regulatory instruments or that their substance might be addressed by specific international maril-

\textsuperscript{46} \textit{Id.} at 45. The Commission's report explains that "the majority of the Commission preferred the more general expression 'internationally accepted standards.' This expression also covers regulations which are a product of international co-operation, without necessarily having been confirmed by formal treaties." \textit{Report to the General Assembly, [1956] 2 Y.B. Int'l L. Comm'n} 281, U.N. Doc. A/CN.4/SER.A/1956/Add.1 (1956).

\textsuperscript{47} \textit{Summary of the Records of the 342nd Meeting, supra note} 45, at 43-44. The additions were specifically linked to the question of "flags of convenience" in the Commission's report:

"Regulations concerning the construction, equipment and seaworthiness of ships, and the labour conditions of crews, can contribute much to the safety of navigation. Objections to the transfer of ships to another flag have often been accentuated by the fact that such regulations, and an effective control over their application, were lacking in the State of the new flag."

\textit{Report to the General Assembly, supra note} 46, at 280.

\textsuperscript{48} \textit{Report to the General Assembly, supra note} 46, at 280.
time regulatory organizations or conferences. François was constrained to observe that the text submitted by the Commission in fact contained no such incompatibilities. The very purpose of article 34 was to ensure substantive regulatory consistency.

Article 34 nevertheless raised the possibility that a state might be bound by a standard set forth in an instrument adopted by an international organization or conference notwithstanding the absence of power or intent to adopt a legally binding rule and without regard to the provisions of the instrument regarding its entry into force. Jenks noted this possibility of procedural inconsistency in communicating the concerns of the International Labour Organisation (ILO):

[T]he internationally accepted standards for labour conditions at sea were laid down in conventions and recommendations adopted by the International Labour Conference, which were not binding upon members of the Organisation by virtue of such adoption. Members were obliged to apply such instruments only if they had accepted them by ratification. . . . Furthermore, ILO conventions did not enter into force for ratifying members until certain conditions were fulfilled, such as ratification by a certain number of countries, including members having a prescribed minimum tonnage. The International Law Commission's text might therefore be open to objection.

The United Kingdom then made it quite clear that the nub of its problem with paragraph 2 of article 34 was the possible duty to apply ILO conventions that had not been ratified by the state concerned or were not widely accepted. It also felt paragraph 1 required legislative regulation when the underlying objectives were achievable by other means.

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51. Id. at 27.
52. Id. at 51-52.
Faced with opposition to its proposal to delete article 34 from a number of participants, including France, the Netherlands, the United States, and the Soviet Union, the British delegation redrafted the text. The revised proposal incorporated the Israeli idea of substituting the more flexible obligation to take measures rather than adopt regulations in the first paragraph, and proposed substituting the words "generally accepted standards" for "internationally accepted standards" in the second paragraph. A week later Britain joined with the Netherlands to propose a new text that ultimately became article 10 of the Convention on the High Seas. That text uses the term "generally accepted international standards" in paragraph 2.


The Third U.N. Conference on the Law of the Sea adopted texts that significantly broaden the duty of the flag state to apply generally accepted international standards. It also applied the concept in new contexts. Six provisions refer to generally accepted international regulations, practices, and procedures, five to generally accepted international rules or standards, and three to generally accepted standards.

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53. Id. at 51, 57-58.
54. Id. at 59-60.
56. Id. at 77, 148. While the addition of an express reference to "international labour instruments" in paragraph 1(b) would seem to be in conflict with objections stated by the British delegation and the ILO itself, one should note that the reference is qualified by the potentially ambiguous word "applicable," and more importantly, that the reference is qualified by the words "taking into account." This could be read as suggesting that while applicable international labour instruments should be taken into account by a state in adopting measures for its own ships under paragraph 1, this is to be distinguished from generally accepted international standards with regard to labor conditions to which a state is required to conform under paragraph 2. In other words, the express reference may weaken the argument that the labor conventions are in and of themselves the source of the generally accepted international standards. See Myres S. McDougal & William T. Burke, The Public Order of the Oceans 837-39 (1985).
57. Law of the Sea Convention, supra note 3.
58. Id., arts. 21(4), 39(2), 41(3), 53(8), 94(2), 94(5).
59. Id. arts. 21(2), 211(2), 211(5), 211(6), 226(1).
Two significant environmental provisions employ similar concepts with different language.

During the interval between the negotiation of the 1958 Conventions and the 1982 U.N. Convention, public interest in prevention of pollution and protection of the environment increased dramatically. This interest was reflected both in the strong and elaborate environmental provisions of the 1982 Convention, and in the fact that such traditional concerns as safety at sea and prevention of collisions took on added environmental significance.

1. Safety on the High Seas

Article 10 of the Convention on the High Seas was retained and expanded in article 94 of the U.N. Convention on the Law of the Sea to provide for inspection of ships as well as qualifications and training of the master, officers, and crew. This change resulted from an early European proposal to retain article 10 as drafted and add a new article specifying additional matters with respect to which a state "shall conform to generally accepted international regulations, procedures and practices." The two were subsequently combined, with the final version of the text reading "generally accepted international regulations, procedures and practices," instead of the previously worded phrase "generally accepted international standards."

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60. Id. art. 60, paras. 3, 5, 6.
61. Id. arts. 208(3), 210(6).
62. Law of the Sea Convention, supra note 3, art. 194, para. 3(b).
63. Id. art. 94, para. 4(c). Indeed, article 94, paragraph 4(c) specifically requires "that the master, the officer, and to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio." Id.
65. The history of article 94 is traced in U.N. Office for Ocean Af-
2. *Pollution from Ships and Related Safety Concerns*

At the same time, the idea of a duty to respect international standards was being extended to the question of pollution from ships. Pursuant to recommendations of an Intergovernmental Working Group on Marine Pollution, the U.N. Conference on the Human Environment held at Stockholm in 1972 endorsed a principle obliging states to "ensure that vessels under their registration comply with internationally agreed rules and standards relating to ship design and construction, operating procedures and other relevant factors." This idea was ultimately incorporated in article 211, paragraph 2, of the U.N. Convention on the Law of the Sea, in the following form:

States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference.

With this provision we have moved well beyond "rules of the road" situations in which the need for uniformity seemed objectively inescapable. As the foregoing provision makes clear, the international environmental standards represent a minimum obligation for the flag state; it may impose stricter constraints on its ships if it so chooses. This constitutes part of a more general effort in the Convention to establish that international standards represent the minimum level of environmental restraint that states must impose with respect to activities at sea under their control.

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68. The provisions of the Convention regarding the protection and preservation of the marine environment do not apply to any warship or
The Convention also imposes other obligations on the flag state or its ships. These obligations are to respect "generally accepted" international rules or standards regarding safety or pollution in the territorial sea,\(^{69}\) in straits and archipelagos,\(^{70}\) and in the vicinity of fixed installations.\(^{71}\)

3. Pollution from Seabed Activities and Ocean Dumping

Coastal state restraints on seabed activities and offshore installations subject to the state's jurisdiction must be "no less effective than international rules, standards and recommended practices and procedures."\(^{72}\) Its dumping regulations must be "no less effective . . . than the global rules and standards."\(^{73}\)

The absence of the qualifying words "generally accepted" in these two provisions suggests, in strictly textual terms, that the underlying idea may not be precisely the same.\(^{74}\) However, careful interpretation of the provisions

other government non-commercial ship or aircraft, but states are required to ensure that such vessels or aircraft act in a manner consistent with the Convention so far as is reasonable and practicable. Law of the Sea Convention, \textit{supra} note 3, art. 236.

\(^{69}\) \textit{Id.} art. 21, para. 4.

\(^{70}\) \textit{Id.} art. 39, para. 2; \textit{id.} at 22, art. 54.

\(^{71}\) \textit{Id.} art. 60, para. 6.

\(^{72}\) \textit{Id.} art. 208, para. 3. It was contemplated that international environmental regulations for seabed mining beyond the limits of coastal state jurisdiction would be established directly under the Convention by the International Seabed Authority. \textit{See id.} arts. 145, 209.

\(^{73}\) Law of the Sea Convention, \textit{supra} note 3, art. 210, para. 6.

\(^{74}\) It cannot be assumed that the use of different words, in such a huge Convention drafted and negotiated by so many different people in disparate groups over many years, necessarily represents an intentional decision to convey a different meaning. There was no convenient forum for dealing with such technical problems at the Law of the Sea Conference. Since the main committees had the authority to renegotiate substance, delegates there usually remained silent about imperfect texts that emerged from informal negotiations and consultations for fear of upsetting those or other parts of the package on which a consensus was beginning to emerge. The Conference Drafting Committee, having been precluded from dealing with matters of substance and having been destined by its organization into open-ended language groups to be preoccupied with problems of concordance among different languages, was able to deal effectively with only some of the overwhelming number of technical problems of this sort. This was, in part, because of a procedure pursuant to which an objection by any delegation terminated discussion of a proposal.
RESPECTING INTERNATIONAL STANDARDS will lead to much the same result.\textsuperscript{75}

It is implausible to assume that states were (or are) significantly more willing to be bound to respect international environmental restraints with respect to seabed activities in their territorial seas and on their continental shelves than with respect to their ships at sea. Most states at the Conference gave priority to their coastal resource interests.\textsuperscript{76} The obligation of the coastal state to restrain the development of seabed resources off its coast to the extent required by environmental “rules, standards and recommended practices and procedures” it has not otherwise accepted is properly interpreted to apply only to those which are truly “international” by virtue of their very widespread (that is general) acceptance.\textsuperscript{77}

\textsuperscript{75} The Third Restatement, while citing article 208 of the U.N. Convention of the Law of the Sea as authority, subjects seabed activities to a general duty to respect “generally accepted” international standards regarding pollution of the marine environment. \textit{Restatement}, supra note 11, § 603 and Comment c.

Kwiatkowska notes that the U.N. Environment Program’s regional conventions oblige state parties to ensure implementation of the “applicable” or “generally accepted” international rules and standards. BARBARA KWIAKTOWSKA, THE 200 MILE EXCLUSIVE ECONOMIC ZONE IN THE NEW LAW OF THE SEA 193, n.60 (1989).

\textsuperscript{76} Parts II, III and IV of the Convention articulate no express duties of the coastal state with respect to seabed resources in internal waters or the territorial sea other than those arising out of the applicable regimes for passage of ships and aircraft, and only very limited additional duties in archipelagic waters. \textit{Law of the Sea Convention}, supra note 3, art. 51. Part VI of the Convention reveals the reluctance of coastal states to accept limitations on their exclusive right to manage the hydrocarbons and other resources of the continental shelf. Pursuant to article 68, sedentary species of the continental shelf, as a textual matter, are excluded from the obligation even to conserve living resources imposed by the regime of the exclusive economic zone. Compared with the text of the Convention on the Continental Shelf, express coastal state rights over the continental shelf are increased with respect to geographic limits, \textit{id.} art. 76; drilling for non-resource purposes, \textit{id.} art. 81; pipelines, \textit{id.} art. 79; and artificial islands, installations, and structures, the safety zones around them, and the duty to remove them, \textit{id.} arts. 60, 80. Insofar as the seabed of the continental shelf is concerned, no other detailed regime set forth in the 1982 Convention (perhaps excluding that of the territorial sea) exhibits less textual preoccupation with interests other than those of the coastal state.

\textsuperscript{77} While article 63 of the Convention itself imposes on the coastal state an obligation to conserve living resources of the exclusive economic zone designed to serve both environmental and economic purposes, the
A more liberal interpretation of this or any other language dealing with such a duty is not only unlikely to be of practical utility but could well compel some governments to try to restrain the emergence or content of new international standards. Such interpretation could also provoke a serious attempt to render the provision superfluous.

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coastal state is bound merely to take into account any generally recommended international minimum standards; it is not required to give effect to them. The fact that the exclusive economic zone represents the culmination of a struggle to substitute coastal state regulation for international regulation of fisheries may explain the weakness of this reference to international standards. Law of the Sea Convention, supra note 3, art. 63. Still, this approach parallels the similar weakness of the duty only to take into account international standards in connection with land-based and atmospheric sources of marine pollution. Id. art. 207, para. 1; id. art. 212, para. 1. It is not easy to reconcile the absence of an obligation to observe even “generally accepted” international standards in the foregoing provisions with an interpretation of article 208 pursuant to which the coastal state is bound to comply with international standards for seabed activities off its coast even if those standards are not generally accepted. Id. art. 208.

78. To the extent that it is not due to mere oversight at the outset and lack of temerity thereafter, the difference in wording may well be due to the fact that at the time the text was drafted in the Third Committee of the Conference, there were no specific international standards in existence regarding environmental limitations on the development of continental shelf resources as such, not to mention “generally accepted” ones. The Second Committee faced the same problem, but did refer to generally accepted international standards in connection with the removal of installations, the breadth of safety zones around installations, and navigation in the vicinity of installations and safety zones. Law of the Sea Convention, supra note 3, art. 60. With respect to each of these matters, however, restraints on the coastal state are not at issue. The Convention itself states a norm, and leaves to “generally accepted international standards” (or, in the second case, the recommendation of the competent international organization) the question of exceptions or additions more favorable to the coastal state.

79. The argument would be that the absence of qualifying words like “generally accepted” means one must refer to general principles of international law to determine which international environmental rules and standards a state is legally bound to respect, and that these principles generally require either the agreement of the coastal state concerned or, in the absence of such agreement, satisfaction of stringent conditions for demonstrating that each technical rule has been absorbed into customary international law. With respect to the difficulties of satisfying such conditions, see the discussion in Part II(B)(3) supra. Notably, apart from the International Seabed Authority established by the Convention itself, in only one case did the drafters of the Convention seek to impose regulations adopted by an international organization directly on all parties to the Convention. The text of article 39(3)(a) refers to rules adopted by an or-
In the case of ocean dumping, there was no incentive to qualify the reference to "global standards." Only one relatively limited activity was involved, a generally satisfactory environmental regime for the activity was already established by the Ocean Dumping Convention, and no alternative or additional global regulatory regime regarding ocean dumping was contemplated. Both parties and nonparties to the Ocean Dumping Convention seemed unconcerned about the procedure for imposing stricter requirements in the future within the framework of the Convention. Should the need arise, it would not be difficult to interpret "global" in much the same way one would interpret "generally accepted."

4. Protecting Navigational Rights

The above examples all involve the imposition of duties on a state that otherwise has exclusive or primary authority to authorize and regulate an activity. These are the examples that are particularly relevant to the underlying theme of this Article.

The U.N. Convention on the Law of the Sea also employs similar techniques to deal with the tension that arises when one state has safety or environmental competencies over an activity that another state has the right to conduct or organizes whose authority derives from what has long been one of the most widely ratified regulatory treaties in the world: "Aircraft in transit passage shall . . . observe the Rules of the Air established by the International Civil Aviation Organization as they apply to civil aircraft." Law of the Sea Convention, supra note 3, art. 39, para. 3(a).

80. Because the text under consideration gave coastal states the right to control dumping in broad areas off their coast, an attempt to qualify the duty to respect global standards could have been misinterpreted domestically as signalling an intent to pollute one's own waters in a manner that exceeded international minimum requirements.


82. It might be noted that while paragraph 4 of article 210 provides for the elaboration of both global and regional rules and standards, paragraph 6 requires that national laws and regulations are to be "no less effective" than global rules. Law of the Sea Convention, supra note 3, art. 210.
authorize. This is the problem posed by coastal state prescriptive or enforcement competence with respect to foreign ships navigating off its coast.

Two difficulties arise. First, coastal state regulations that differ from those of the flag state or other coastal states may impose conflicting obligations on ships that are impossible to reconcile. Second, even where this is not the case, unlimited coastal state regulatory discretion could effectively extinguish the underlying right to navigate without specific coastal state consent, or impose undue burdens on the exercise of that right.

Denying the coastal state any competence would provide one solution. Another is to give the coastal state enforcement but not unilateral prescriptive competence by limiting its regulatory discretion to measures based upon generally accepted international standards.83

Thus, innocent passage in the territorial sea outside straits is the only navigation regime subject to general coastal state prescriptive competence regarding safety, pollution, and certain other matters.84 However, even here competence "giv[es] effect to generally accepted international rules or standards" where the matter concerns "the design, construction, manning or equipment of foreign ships."85 Coastal state prescriptive competence over pollution from foreign ships in the exclusive economic zone is limited to laws and regulations "conforming to and giving effect to generally accepted international rules and standards."86

Sea lanes and traffic separation schemes proposed by

83. An interesting aspect of the balance thus achieved is that the coastal state, in the first instance, may identify the international standards that in its opinion are generally accepted.

84. Law of the Sea Convention, supra note 3, art. 21, para. 1; id. art. 211, para. 4; id. art. 220, para. 2.

85. Id. art. 21, para. 2. The same limitation applies to coastal state laws and regulations in special areas within the exclusive economic zone. Id. art. 211, para. 6. Those laws and regulations are also subject to agreement with the competent international organization. Id.

86. Law of the Sea Convention, supra note 3, art. 211, para. 5. As an exception to this overall approach, the Convention accords general prescriptive and enforcement competence to the coastal state to control pollution from foreign ships in certain ice-covered areas. Id. art. 234.
the coastal state in straits and archipelagos must "conform to generally accepted international regulations" even though each proposal also is subject to approval by the competent international organization.\(^{87}\) A coastal state may not establish safety zones around its continental shelf installations exceeding 500 meters from the installation "except as authorized by generally accepted international standards or as recommended by the competent international organization."\(^{88}\) The duty to remove abandoned or disused installations\(^ {89}\) in order to avoid the accumulation of obstructions to navigation and other uses is newly qualified by what is in effect an exception expanding coastal state options, namely the clause "taking into account any generally accepted international standards established in this regard by the competent international organization."\(^ {90}\)

5. Dispute Settlement

One of the most significant aspects of the U.N. Convention on the Law of the Sea is that it provides for compulsory arbitration or adjudication of a wide variety of disputes that are not settled by other means.\(^ {91}\) Although this obligation generally does not apply to disputes "with regard to the exercise by a coastal State of its sovereign rights or jurisdiction," such conflicts are subject to compulsory arbitration or adjudication in three situations relevant to the texts reviewed above:\(^ {92}\)

1) "when it is alleged that the coastal State has acted in contravention of the provisions of [the U.N. Convention of the Law of the Sea] in regard to the freedoms and rights of navigation . . . .",\(^ {93}\)

2) "when it is alleged that a State in exercising the aforementioned freedoms [or] rights . . . has acted in contravention of [the] Convention or of

\(^{87}\) Id. art. 41, paras. 3, 4; id. art. 53, paras. 8, 9.

\(^{88}\) Id., art. 60, para. 5; id. at 35, art. 80.

\(^{89}\) Convention on the Continental Shelf, Apr. 29, 1958, art. 5, 499 U.N.T.S. 311.

\(^{90}\) Law of the Sea Convention, supra note 3, art. 60, para. 3.

\(^{91}\) Id. art. 286.

\(^{92}\) Id. art. 297, para. 1.

\(^{93}\) Id. art. 297(a), para 1.
laws or regulations adopted by the coastal State in conformity with this Convention . . .”;

3) “when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by [the] Convention or through a competent international organization or diplomatic conference in accordance with this Convention.”

While the scope of the third provision may be ambiguous, it is clear that violations, both by the flag state of its

94. Id. art. 297(b), para. 1.
95. Id. art. 297(c), para. 1.
96. This provision is one of 21 in which the word “applicable” qualifies a cross-reference to environmental standards which a state or person is obliged to respect or entitled to enforce under the Convention. It was to have been expected, and can now be documented, that certain commentators would hasten to interpret “applicable” in a manner that renders the relevant provision useless and superfluous (notwithstanding general principles of interpretation that counsel us to try to avoid such results). Those commentators can do this neatly and even coyly by interpreting “applicable” to mean “otherwise legally in force” for the state concerned, thus negating the very idea that a state is legally bound or entitled by virtue of the Convention alone to respect or enforce an “applicable” standard unless another clause of the Convention (that does not use the word “applicable”) so provides.

The text of article 297(1) of the Convention seems to suggest a resolution of the problem even under the interpretive approach indicated above. The paragraph as a whole applies only to “[d]isputes concerning the interpretation or application of this Convention.” It would be normal to interpret language in such a compromissory clause with reference to substantive provisions of the same instrument. Unless “applicable” is read here as a cross-reference to the substantive provisions of the Convention rather than some other agreement, how does a dispute alleging failure to comply with an “applicable” standard “established . . . through a competent international organization or diplomatic conference” qualify as a dispute “concerning the interpretation or application of [the] Convention?”

For purposes of article 297, it seems reasonable to conclude that the international standards “applicable” to a coastal state are those that the Convention requires such standards to respect. Since all three of the basic coastal state obligations to apply international environmental standards under Part XII of the Convention (arts. 208(3), 210(6) and 211(2)) are phrased in the form of a duty to adopt laws and regulations that have the
duties to apply generally accepted international environmental standards regarding navigation safety and pollution from ships and by the coastal state of its duties not to prescribe or enforce standards that are not generally accepted with respect to foreign ships, are subject to compulsory arbitration or adjudication under the first two paragraphs. The clause thus enhances the coastal state's confidence in a flag state's duty to respect generally accepted international standards in place of broader coastal state prescriptive or enforcement competencies. It further heightens the flag state's ability to share with coastal states the enforcement of generally accepted international standards. It also opens the door to the development of a jurisprudence of detailed environmental obligations rooted in the concept of the generally accepted standard.

IV. WHERE IS IT USEFUL TO INCORPORATE THE DUTY?

If a treaty itself establishes the standards necessary to achieve the underlying objectives, there is no need to include a duty to respect generally accepted standards.97 Similarly, if the treaty establishes a regulatory organ or other mechanism for future elaboration of the binding standards necessary to same effect as, or are no less effective than, the international standards, one must regard these as creating legal obligations for purposes of dispute settlement if the compromissory clause is to have any content. On the other hand, a coastal state could not be sued for "contravention" of a standard that the Convention merely obliges it to take into account.

Coastal state contravention of an international environmental standard that the Convention authorizes (but does not require) it to enforce against foreign ships would normally be challenged on the ground that it is a contravention of the provisions of the Convention with respect to freedoms and rights of navigation. Nevertheless, it is possible that the coastal state is also subject to suit in such a case on the ground that it acted in contravention of an applicable international environmental standard. See Law of the Sea Convention, supra note 3.

97. In theory, the duty could be used in this situation to fill substantive gaps, much as general cross-references to international law may be used to fill such gaps in so-called law-making treaties and similar instruments.

The duty to respect generally accepted standards bears a certain resemblance to the more general legal technique of incorporation by reference. The difference is that incorporation by reference is normally associated with a reasonably precise identification of the texts incorporated. A treaty that, by reference, incorporates precisely identified, existing standards, is in fact a variant of the type of treaty described in the above text.
achieve the underlying objectives, there is no need to include a duty to respect generally accepted standards.98

It may be useful to incorporate a duty to respect generally accepted standards in treaties establishing general regimes, especially in what are sometimes called “framework” treaties. Two historical examples are the 1958 Convention on the High Seas and, with one exception,99 the 1982 U.N. Convention on the Law of the Sea. They suggest that the duty is used where there is a perceived need to require or authorize states to apply detailed technical international standards, accompanied by a reluctance to articulate or specify the precise standards.

That reluctance may be due to a variety of factors. Participants may lack specific technical expertise or may wish to minimize the time or potential for disagreement involved in dealing with the matter. Members of the secretariat may counsel against duplication of effort with other international organizations or fora. “Freezing” detailed technical standards in a treaty that is difficult to amend may be ill-conceived. There is a risk of omission in too precise an articulation. Inconsistent obligations could emerge from renegotiation or amendment of relevant texts in the treaty being drafted or the instrument from which those texts are drawn. It may be desirable to provide for the incorporation by reference of changes and new standards that are developed in the future in response to experience and new information.

While the duty is normally articulated where some standards are already in existence, this need not be the case.100

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98. In theory, there is a role for such a duty to the extent that the regulatory organ is accorded only recommendatory powers. In practice, the simultaneous negotiation of the constituent instrument and the duty to respect recommendations of the proposed organization that are “generally accepted” might prove awkward.

99. Part XI and its annexes would establish a highly detailed regulatory system for deep seabed mining.

100. Article 208, paragraph 3, of the U.N. Convention on the Law of the Sea set forth a duty to respect international environmental standards regarding activities on the continental shelf at a time when all or virtually all such standards remained to be established by the competent international organization.
V. Utility of the Duty

The utility of a duty to respect generally accepted international standards should be measured against underlying regulatory goals. Objectives identified for purposes of this study are universality, regulatory precision, adaptability to change, and a legal obligation to comply.

The duty achieves nothing in the absence of particular standards, and the goal of adaptability is dependent on the existence of a source to generate new or revised standards. Thus, the utility of the duty should not be measured as an alternative to treaties establishing particular standards or international regulatory organizations authorized to do so, but as a complement to such measures.

A. Universality

The duty does not automatically produce universal respect for a particular standard. The standard's pedigree should be international, preferably a multilateral organization or conference. The standard must be generally accepted. That general acceptance is most likely to emerge from a combination of ratification or formal acceptance by some states of the treaty or instrument containing the standard, implementation of the standard by other states, and respect for the standard by individuals and companies whose activities are its ultimate object.

Once a particular standard becomes "generally accepted," the gap is closed by the duty and the standard binds everyone. This is true even if the organization that adopted the standard does not have universal membership, the standard was adopted by a divided vote, the resolution that articulates the standard is not legally binding, or the treaty in which the standard is incorporated is not generally accepted or even in force.101

In order for this to occur, states must be bound by a duty to respect generally accepted international standards of

101. To the extent that support for adoption of a standard by an international organization or conference is itself widespread and representative, including states that are specially affected, the chances for its general acceptance are enhanced. However, it is the subsequent general acceptance of the standard, not the standard's pedigree, that controls.
a particular type. This duty will normally arise from the text of a treaty designed to establish a widely ratified global regime in a particular field.\textsuperscript{102}

In situations where states are prepared to be bound to respect at least some international standards that they have not affirmatively accepted, inclusion of the duty may facilitate rather than impair negotiation and ratification. Delegates are spared the task of negotiating specific standards, which carry with them the risk that some detail or other could obstruct ratification in one or another state. Negotiators can avoid the complex problem and risks to ratification posed by a decision regarding what type of majority will bind all parties to a standard.\textsuperscript{103} The mere fact of adoption of a standard by an international organization or conference does not make it binding on a party to the "framework treaty." Only subsequent general acceptance triggers a legal duty.\textsuperscript{104}

It is easier to argue either that a duty to respect generally accepted international standards has become customary international law from a "law-making" or "framework" treaty\textsuperscript{105} than it is to argue that specific technical standards

\footnotesize{\begin{itemize}
\item \textsuperscript{102} With respect to incorporation of the duty into customary international law, see infra note 105 and accompanying text.
\item \textsuperscript{103} This problem is discussed in greater detail in Part II(B)(2) supra.
\item \textsuperscript{104} The scope of the duty is examined in Part VI infra.
\item \textsuperscript{105} The provenance of the concept adds plausibility to such an argument. The Convention on the High Seas states in its preamble that it was intended to be a codification of international law. See supra Part III(A)(1). Deep seabed mining apart, the U.N. Convention on the Law of the Sea is now widely regarded as generally declaratory of international law.
\end{itemize}}

Section 603 of the Third Restatement deduces from the U.N. Convention on the Law of the Sea that a "state is obligated . . . to adopt laws and regulations to prevent, reduce, and control any significant pollution of the marine environment that are no less effective than generally accepted international rules and standards." \textit{Restatement}, supra note 11, § 603 and Source Note. A duty to conform to generally accepted international rules and standards "is adopted from the law of the sea" and extended by section 601 to apply, beyond pollution of the marine environment, more broadly to "injury to the environment of another state or of areas beyond the limits of national jurisdiction," but only "to the extent practicable under the circumstances." \textit{Id.} § 601 and Comment b. No specific authority apart from the law of the sea is cited for the extension in section 601. The "practicability" qualification introduced in section 601 not only implies some hesitation but is arguably inconsistent with the objective of uniformity historically associated with the duty. The textual difference between sections 601 and 603 suggests that the incorporation into custom-
have become part of customary law as such\textsuperscript{106} or that a non-party is bound to accept the regulatory authority of an international organization. The duty resembles a norm. The requirement that standards are generally accepted resonates with the familiar harmonies of state practice. States seeking to avoid an obligation are more likely to squeal about particular standards than to thunder their defiance of the norm.

B. Precision

The duty assumes the independent existence of international standards or means for generating such standards. The standards incorporated by the duty may be drafted with any level of precision. Because "general acceptance" rather than the procedure by which the standard is drafted and adopted is the test for creating a legal obligation, the standard can be drafted by technical experts, and does not need to be included in an instrument subject to ratification.

C. Adaptability

It is perhaps in the area of adaptability that the duty has its greatest utility. It incorporates new standards as they become generally accepted. In the fields of safety and environmental protection, changes in municipal laws and regulations and the practice of individuals and companies may well outpace the formal processes of treaty ratification or approval of binding international regulations. New standards and refinements may become generally accepted before they otherwise become legally binding on a large number of states.

D. Legal Obligation

The duty entails a legally binding obligation to observe generally accepted standards. This obligation, however, is created by general acceptance of a standard in fact, rather than by the procedure by which the standard was articulated.

\textsuperscript{106} A law of an unqualified duty to respect generally accepted international standards is most likely to occur when it arises directly out of a "law-making" or "framework" treaty that expressly applies the duty to the specific fields and activities in question.

\textsuperscript{106} See supra II(B)(3).
Thus, it creates a useful bridge between so-called "soft law" and "hard law." This, indeed, was part of its original function. Where appropriate, standards (or guidelines) can be developed in a somewhat more relaxed procedural environment which is not specifically designed to generate legally binding obligations as such; yet those same standards can become legally binding if they become generally accepted.

VI. SCOPE OF THE DUTY

The effect of the duty under discussion is to impose a legal obligation on a state to respect a standard which it would not otherwise be legally bound to respect. The consensual requirements of international law for the imposition of legal obligations are not offended by this proposition; those requirements have previously been satisfied through acceptance of the general duty either by treaty or by customary international law. It is unnecessary to restrict the scope of the duty itself to conform to such requirements.

At the same time, the fact that the duty, once in effect operates in derogation of the normal consensual requirements of international law must be borne in mind when considering its scope. Neither its text nor its history suggests the substitution of legislative mandates for consensual norms. The failure to address questions of legislative competence and procedure belies such a broad interpretation.

The interpretation of the scope of the duty unquestionably affects the utility of the concept. That interpretation should be informed by and should further the purposes for employing such a duty. If the concept is to prove useful in the future, lawyers must approach it with the same care and deference with which they approach other legal tools. The meaning of those tools may be adapted to particular instruments or contexts in which they are used, but the central

107. See supra Part III(A)(1).

108. The precise language used in phrasing the duty is of course the point of departure. For example, the word "international" is normally included to describe the standards to which reference is made. When that word is used in conjunction with the express requirement that the standards be "generally accepted," it may be reasonable to interpret the word "international" broadly to mean some respectable international pedigree. If the word "international" is used without the additional term "generally
idea should be described with deference to both present and future utility.\textsuperscript{109}

accepted," it may be necessary to interpret the word far more restrictively in order to render the underlying duty plausible. See supra Part III(B)(3).

In some cases, the duty is also limited to standards emanating from a forum such as "the competent international organization." In such cases, even if the word "international" were interpreted broadly, the reference to a specific pedigree such as "the competent international organization" would limit the scope of the duty so qualified.

In other cases, differences in language are less crucial. For example, while this article uses the word "standards" as a convenient catch-all reference, the relevant treaty texts may instead or in addition refer to rules, regulations, practices, procedures, etc. The U.N. Convention on the Law of the Sea reveals a wide variety of permutations in this regard. It is not clear that these terms were or should be regarded as alternatives and, if so, whether it makes much difference. Today, most relevant standards are likely to be manifested in the "regulatory" work of an international organization.

\textsuperscript{109} The scope of the duty to respect generally accepted international standards, and in particular the meaning of the key term "generally accepted," have been the subject of interesting scholarly comment. While relevant to the future utility of the duty in other instruments, the comments generally were not made in that context, and the commentators had little if any occasion to consider some of the teleological factors that influence this article. Comments may be found, inter alia, in the following works:

To achieve the objective of universality, at least three things must be promoted: universal acceptance of the duty to respect particular types of standards (generally enhanced by a strict construction of the duty); universal respect for particular standards (generally enhanced by a liberal construction of the duty); and negotiation and promulgation of the precise standards (which could be restrained by concerns about a liberally construed duty). A useful interpretation of the scope of the duty must balance these three sometimes conflicting goals. Whether strict or liberal, too precise an interpretation not only threatens that balance but deprives the concept of its central virtue: that quality prized by diplomats and politicians as flexibility and scorned by lawyers and academicians as ambiguity.\(^{110}\)

The lawyer is tempted to draw analogies between the process by which an international standard becomes generally accepted and the more familiar (if no less elusive) process by which a new rule contained in a treaty or other instrument adopted by an international organization or conference becomes customary international law. Since the juridical result is conceptually the same—a state is bound by a rule notwithstanding its failure affirmatively to accept that rule—one is tempted to conclude that the requirements for achieving that result are the same.

There are important differences between the two concepts that suggest caution in making too facile an analogy. The most obvious is that a generally accepted international standard is not the same as a rule of customary international law. If it were, there would be no need for the duty to respect generally accepted standards: the jurists who devel-

\(^{110}\) To appropriate and extend a finely wrought insight taught by Elliot Richardson: ideas, like people, have the defects of their virtues.
opposed the concept and those who have used it could have re¬sorted to the more familiar drafting technique of a cross-ref¬erence to international law.

Assuming, *arguendo*, that the amount of international ac¬ceptance necessary to conclude that a standard is “generally accepted” is analogous to the amount of acceptance required to establish state practice with respect to a new rule of cus¬tomy international law, other important differences re¬main. The difficulties involved in establishing that technical standards satisfy the norm-creating, *opinio juris* and other re¬quirements for a rule of customary law have already been ex¬plored.¹¹¹ Neither text nor policy suggests the imposition of these kinds of restrictions on the duty to respect generally accepted international standards.¹¹²

The problem of the “persistent objector” is a more complicated one. The goal of uniformity and the idea of al¬lowing an exception for the persistent objector are in ten¬sion. There is no a priori requirement that such a limitation on the application of a new rule of customary international law be incorporated into the duty to respect generally ac¬cepted international standards.

The fundamental question is whether the underlying purpose of the duty to respect generally accepted interna¬tional standards is to deal only with the passive straggler or also with the active dissenter. In some cases, the nature of the system that produced the standard may also influence the answer.¹¹³ Generally, one must weigh the benefits, if

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¹¹¹ See *supra* Part II(B)(3).
¹¹² For example, it is often necessary to give states a right to “opt out” of regulations or technical amendments in order to persuade them to ac¬cept a treaty delegating authority to a qualified majority of states to adopt regulations or amendments binding all parties. If a right to “opt out” were regarded as having the same effect on the duty to respect generally accepted standards as the express right to reserve to a particular treaty provision has in determining whether the provision partakes of a funda¬mental norm-creating character necessary for its absorption into custom¬ary law, many useful and very widely implemented standards could be ex¬cluded from the duty to respect generally accepted international stan¬dards. See *North Sea Continental Shelf cases*, supra note 15, para. 72.
¹¹³ For example, treaties that establish expedited systems for adopting regulations or technical amendments binding all parties may give the par¬ties a right to “opt out,” at least if they act in a timely fashion. Should the same right be accorded non-parties if they act in a timely fashion, that is
any, from invoking the duty with respect to an active disserter against the possible cost of making states more reluctant to accept such a duty in the future. It should be borne in mind that at some point active dissent contradicts the underlying assertion that a standard is generally accepted. Prudence would counsel gaining more experience in dealing with passive stragglers before considering the extent to which the duty provides a useful solution to the more challenging problem of active dissenters.

A. What is a Standard?

Little attention is ordinarily devoted to the meaning of the word "standard," or for that matter "rule," "regulation," "procedure," or "practice," in analyzing the scope of the duty to respect generally accepted international standards. Yet, upon reflection, it would appear that many provisions of instruments adopted by international organizations or diplomatic conferences would not be relevant to the duty, even if the instruments were very widely accepted.

The duty to respect international standards is typically expressed in connection with a duty (or right) to adopt national laws and regulations governing a particular matter. While a provision need not have a fundamental norm-creating character\(^\text{114}\) to be regarded as a standard, it should inform the precise content of those national laws and regulations.

The purpose of the duty is to establish uniform practice. Myriad clauses such as "States shall cooperate to . . ." or "States shall take into account . . ." or "States shall endeavor to . . ." normally do not introduce precise rules of conduct to be observed and enforced uniformly even by states legally bound by the specific instrument in which they appear. If the goal of uniform practice cannot be deduced from the nature, language, or history of a provision, it may not be regarded as

\(^{114}\) See supra notes 16, 19 and accompanying text.
establishing a global "standard" of conduct.115

B. Where Does One Find "Acceptance"?

The requirement that standards be "generally accepted" lies at the heart of the inquiry. Two questions may be posed: 1) where does one look to find "acceptance"?; and 2) how much acceptance is required?

One can look to three possible sources to determine whether a standard has been accepted: events at the organization or conference that adopted the standard; the practice of governments, reflected in ratification of treaties, national laws and regulations, and authoritative statements of policy; and the practice of individuals and companies whose activities are the object of a particular standard. The question is whether, and to what extent, each should be considered in deciding if the requirement that a standard be generally accepted has been satisfied.

1. Circumstances of Promulgation

Events at the organization or conference that adopted the standard, while not entirely irrelevant, should not be accorded significant weight in determining whether a standard is generally accepted. There are important reasons for reaching this conclusion with respect to both negative and positive inferences.

a. Negative Inferences

A standard, particularly one that was ahead of its time, may have been adopted by a divided vote reflecting controversy and hesitation. This controversy and hesitation may thereafter gradually subside. If the standard becomes sufficiently widely accepted in practice, the fact that it was controversial when adopted should not necessarily prevent it from being regarded as "generally accepted."

The same may be true of a decision to articulate the standard as a non-binding recommendation rather than as part of an instrument intended to create a legally binding obligation. In some cases, the decision to articulate the standard as a recommendation may reflect an intent to promote

115. See infra note 116.
widespread uniform practice by encouraging all states to implement the standard directly without the intermediation of a binding international legal instrument. That could be a more expeditious approach where governments already have regulatory authority to implement the standard without the need to seek additional legislation from their parliaments, and the domestic agencies to which such authority is delegated are prominently represented in the international discussions. If such a standard thereafter comes to be sufficiently widely accepted in practice, the fact that it was promulgated in non-binding form should not necessarily prevent it from being regarded as "generally accepted."\(^{116}\)

b. Positive Inferences

Absent specific agreement to the contrary, states are not deemed to have "accepted" new rules by the votes they cast in international organizations or at diplomatic conferences or even by their signature of agreements subject to ratification or acceptance.\(^{117}\) There is no reason to construe the reference to "generally accepted" standards any differently insofar as it relates to events at such organizations and conferences. It cannot be maintained that the purpose of establishing a duty to respect generally accepted international standards is to confer legislative power on an international organization or conference. To the contrary, the duty is an attempt to provide a solution to the problem posed by the absence of an organization with the power to prescribe standards that are universally binding.

The affirmative votes of a large number, or even all dele-

\(^{116}\) In other cases the decision to promulgate a "standard" as a recommendation may reflect a view that the "standard" is not expected to be widely implemented, or that it is essentially optional in nature and uniform practice is not being sought. If the "standard" proved widely influential, the circumstances of its adoption might be of some relevance in determining whether, or more probably when, it is an appropriate object of the duty to respect generally accepted standards. The language of the resolution may help in this regard. A chapeau such as, "Governments are encouraged to consider the desirability of" adopting the recommended approach "in whole or in part" seems quite weak. The question then is whether we are dealing with something that is properly regarded as a "standard" or a "rule" or a "regulation" at all, even if it comes to be generally accepted. The response may well be, "No."

\(^{117}\) See Vienna Convention, supra note 14, arts. 1(b), 9, 11, 12, 14(2).
gations in an organization, should be accorded legislative effect only if the constituent instrument of the organization so provides, and only with respect to the parties to that instrument in accordance with the procedures specified therein. A general duty set forth in a one-sentence text that does not necessarily identify the organization promulgating the relevant standards, and that says nothing about decision-making and entry into force procedures, cannot plausibly be converted into a grant of quasi-legislative power by a deft interpretation of "generally accepted" that relies on votes in the organization that "adopts" the standard.

A significant virtue of the duty to respect generally accepted international standards is that it can be adopted in a framework treaty without elaborate negotiations on the voting procedures of the organizations that promulgate standards. That virtue would be lost if the duty were interpreted by reference to votes in international organizations. Moreover, the duty can perform the function of promoting the universality of standards only if the duty itself is universally accepted. That is much less likely if the duty is interpreted to confer legislative power on international organizations that otherwise lack such power over the states concerned.

One must also consider the impact on international organizations and diplomatic conferences, and their capacity to generate new and revised standards. The flexibility of delegations would likely be substantially curtailed if governments

118. The "competent international organization" that has the most frequent role in enunciating standards applicable to vessels is the International Maritime Organization. It has no legislative power over its members. The closest it comes are some procedures for expedited "tacit amendments" of technical annexes to treaties. See International Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, art. 6, 28 U.S.T. 3459, 38 U.N.T.S. 295 (entered into force July 15, 1977); International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, art. 16, 12 I.L.M. 1319 (entered into force Oct. 2, 1983).

119. The question of the impact on customary law of the adoption of so-called law-making conventions and declarations of legal principles is distinct from the issue posed here. Most of the standards involved here are not likely to emerge from considered judgments about what international law requires or should require. They are more likely to reflect technical judgments about specific restraints on private activities that should be incorporated into national laws and regulations.
were concerned that a vote in the organization, in and of itself, might be a substantial factor in determining whether all states were subject to new, legally binding obligations, notwithstanding the fact that the vote, as a formal matter, concerned only a nonbinding resolution or the text of a treaty subject to ratification.

In brief, according significant effect to events at the organization or conference that adopted the standard would be inconsistent with the purposes of the duty to respect generally accepted international standards and would frustrate their realization. Such an approach misinterprets what governments thought they were doing in adopting the duty in the past, and would discourage governments from adopting the duty in the future.

2. Practice of Governments

The adoption and enforcement of a standard by national governments are the central factors in assessing general acceptance. A state may adopt a standard by national legislation, national regulations, authoritative policy statements or by becoming party to a treaty articulating the standard. The question is not whether a treaty articulating the standard is widely ratified, or even in force. The question is whether the standard has been adopted by one of several possible means.

The goal of the duty is uniformity of practice. To establish acceptance of the standard in fact, one may need to verify enforcement and compliance. Mere formal or rhetorical adoption of the standard by some states should not be sufficient to establish a duty to respect and apply the standard by others. In the case of mere formal or rhetorical adoption, there would be no uniformity of practice essential to the achievement of the safety or environmental objective involved, even without regard to the states that have not adopted the standard. In economic terms, those states can-

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120. The fact that a treaty articulating the standard is not in force would be significant if assent to the treaty were the only manifestation of acceptance of the standard by certain states. If, on the other hand, those states had also implemented the standard prior to the entry into force of the treaty, then the fact the treaty is not in force may well be irrelevant for purposes of determining whether they have “accepted” the standard.
not fairly be characterized as "free riders" if many others are in fact not observing the standard.

3. Practice of Individuals and Companies Whose Activities are the Object of a Particular Standard

The duty to respect generally accepted international standards is usually articulated as a qualification of the broader duty of states to adopt laws and regulations governing certain activities of persons subject to their jurisdiction. Restraining the conduct of individuals and companies is the object of the provisions; imposing duties of enforcement on states is the means.

If uniform observance of a standard is the goal, then it is the behavior of the individuals and companies concerned that will truly determine the degree to which that goal has been achieved. For this reason alone, it is not unreasonable to consider whether behavior of such individuals and companies may shed some light on the question of whether a standard has been generally accepted. Both negative and positive inferences are possible.

a. Negative Inferences

The mere existence of non-compliance by individuals in itself does not suggest that a standard is not generally accepted. Indeed, the identification of violators may be an important step in vigorous government enforcement. At some point, however, widespread non-compliance by significant numbers of individuals who are the ultimate object of the standard suggests that the standard is not generally accepted in fact.

b. Positive Inferences

The idea of practice by individuals and companies generating international obligations among states is unlikely to have much appeal in government circles. The question of drawing positive inferences from such practice therefore must be approached with circumspection.

One should recognize that the question is not whether the practice of individuals and companies can create obligations for the state of which they are a national against its will. The question is whether their voluntary compliance with an
international standard, with the express or tacit approval of their own government, can be taken into account in determining whether there is general acceptance of the standard for purposes of securing compliance by nationals of some other state. To put it differently, must states require their willing nationals to comply before they, or more importantly, other states that require compliance may enjoy protections against non-compliance by third states?

In some situations, one can imagine the rapid implementation of a newly promulgated international standard by the individuals and companies whose conduct is the ultimate object of regulation. This may occur well in advance of (and sometimes obviating a practical need for) governmental regulation in some states. Reasons might include a concern for safety, political pressure, public relations, a fear of civil liability, or responsible citizenship. The result might be a level of governmental practice that taken alone would be insufficient to establish general acceptance, but that would cross that threshold if the behavior of a world-wide industry as a whole, including nationals of most other states, were taken into account.

The objective desirability of concluding that the combination of state and private practice is sufficient to satisfy the requirement of general acceptance is most evident with respect to a standard that might be characterized as a generally accepted “rule of the road,” but it need not be so limited. The burden of the economic “free rider,” which the duty is in part designed to suppress, may well be felt more keenly by responsible private actors complying with a standard than by governments themselves.

In some cases, it seems reasonable to conclude that, for purposes of establishing the duty of another state to respect an international standard, states may be relieved of the need to demonstrate general acceptance by government behavior alone if the nationals of some states that have not affirma-

121. One might imagine a situation in which some governments, and virtually all ships, implement an international rule calling for the installation of a green light on the starboard side of a ship and a red light on the port side in order to help prevent collisions. That is precisely the kind of situation Gidel and Hudson had in mind when they initiated consideration of the problem that led to the adoption of article 10 of the Convention on the High Seas. See supra note 25.
tively adopted the standard have voluntarily and uniformly implemented the standard with the express or tacit approval of their governments.

Some may prefer to regard this as a situation in which private behavior is not relevant as such to the question of general acceptance, but is a means for establishing that particular states have accepted a standard in fact, albeit not in form. Having concluded that the absence of acceptance in fact should prevail over mere formal or rhetorical acceptance in determining whether a standard is "generally accepted," we might reasonably conclude that acceptance in fact should prevail over the absence of mere formal or rhetorical acceptance.

C. How Much Acceptance is Required?

In developing the first articulation of the duty to respect generally accepted international standards, the International Law Commission was in the end unable to choose between a quantitative and a functional description of the degree of acceptance necessary in order for the duty to arise.122 The specific functional choices before it were a majority of maritime states, a majority of sea-going vessels, or vessels forming the greater part of the tonnage of sea-going ships. A proposal to refer to a majority of members of the United Nations encountered fierce opposition. The Commission wound up proposing "internationally accepted standards."

Those favoring a numerical formula feared investing the principal maritime powers with legislative authority. Those favoring a functional formula feared investing a numerical majority with authority in a field where experience and interest were unevenly distributed. According to the record, the International Law Commission did not consider a combination of numerical and functional requirements. The "generally accepted" criterion, originally proposed by Sir Gerald Fitzmaurice to the Commission as a more flexible substitute for a reference to standards "fixed by international agreement," became the solution adopted at the 1958 Conference to the question of the requisite majority.

It is fair to say that the solution worked. The govern-

122. See supra notes 21-56 and accompanying text.
ment representatives at the 1958 Conference, and during a
decade of negotiations on the U.N. Convention on the Law
of the Sea, expressed no objection to the "generally ac-
cepted" criterion, even as use of the language was greatly
expanded.

One reason for the lack of objection may be fairly wide-
spread understanding of the nature and origin of the stan-
dards. In 1958, the safety standards being incorporated
were rather well known. By the 1970s, maritime countries
had become quite comfortable with the organization and
work of the Intergovernmental Maritime Consultative Or-
ganization. That organization was one of the first to
adopt an active and productive environmental agenda. It
was expected to be the source for most, if not all, of the in-
ternational safety and environmental standards referred to in
the 1982 Convention.

Another reason is that, at the Third U.N. Conference,
the duty to conform to generally accepted standards became
a positive alternative to unilateral coastal state competence
to prescribe and enforce pollution or safety regulations for
foreign ships navigating off the coast. That alternative could
have been undermined if maritime states had sought to re-
strict or even discuss the scope of the duty.

A further factor relates to the difficulty of predicting in
the abstract whether national interests will be served by a
strict or liberal interpretation of the duty. The duty
originated in an effort to protect the safety of the principal
maritime fleets. Its expansion to environmental matters re-
fects a preoccupation with environmental protection that is
particularly widespread in industrialized countries. Its use as
a restriction on coastal state competence may suggest that it
is better to allow coastal states some flexibility in determin-
ing which international standards are generally accepted
than to risk collapse of the rule that coastal state competence
is generally limited to enforcing international standards.

Even for states normally fearful of "majority rule," the
scope of the risk here is unclear. Virtually all governments
are in fact more cautious about what standards they will im-

123. This is symbolized by their willingness to remove the word "con-
sultative" from its title, so that it is now called the International Maritime
Organization.
plement than about how they vote in a global multilateral forum. To the extent that the duty to respect generally accepted standards arises out of the actual laws, regulations, and enforcement activities of governments, rather than their rhetorical positions, the risk of being bound by seriously inconvenient standards may not be substantial.

Where does this leave the lawyer charged with interpretation? If the question is, what precisely is the numerical requirement, no a priori answer is possible, at least at this time. If the question is what factors are relevant to the determination that a standard is generally accepted, one may suggest that both quantitative and functional majorities are important.

This conclusion is supported by analogy to requirements for a new rule of customary international law: “State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked.”124 Where a conventional rule is involved, “very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.”125

It is also supported by the practice of international organizations and the requirements for the entry into force of new or amended technical rules in regulatory treaties. Many of these specifically require the affirmative participation of at least a representative number of specially affected states. Where these formal requirements do not exist, one will frequently find informal arrangements designed to achieve the same result.126

It is further supported by the purpose of the duty. Unless most activities that are the ultimate object of a standard are already subject to the standard, the goal of uniformity will not be achieved by requiring the remaining states to impose the standard on its nationals. The duty exists to close gaps, not to impose a legislative system. If the intent were to

124. See North Sea Continental Shelf cases, supra note 15, para. 74.
125. Id. para. 73.
126. These arrangements might include a preference for making decisions by consensus or the establishment of subsidiary bodies with limited and more interest-oriented membership.
impose a legislative system, "specially affected states" almost certainly would have demanded and received a special voice.¹²⁷

Finally, it is not plausible to assume that specially affected states would respect a system that ignored their experience and interests. It is as unrealistic to assume that the principal maritime and trading states can be ignored with respect to standards for ships as it would be to assume that the principal producers and consumers of offshore petroleum can be ignored with respect to standards for oil drilling on the continental shelf. The real question is whether the state with respect to which one would invoke the duty to enforce a standard could plausibly be regarded in context as a mere "straggler." If the answer is "no," an attempt to invoke the duty to observe generally accepted standards is likely to do little good in that case and much harm to the continued utility of the duty itself.

VII. CONCLUSION

The duty to respect generally accepted international standards appears in two consecutive conventions setting forth the basic rules of the international law of the sea. It is used to require uniform adherence to "rules of the road" and safety practices, to establish a minimum level of regulation for purposes of environmental protection, and to restrain the regulatory competence of the coastal state with respect to ships exercising recognized navigation rights and freedoms.

As these examples indicate, it is a tool that is particularly well-suited to general "law-making" or "framework" treaties that do not themselves contain or establish a system for de-

¹²⁷. It should be recalled that all of the texts proposed by the International Law Commission that identified a specific majority were phrased in functional terms, the most liberal being a majority of "maritime" states. Moreover, the strong initial support for expanding the duty to respect generally accepted standards in the U.N. Convention on the Law of the Sea came from European Community states with respect to safety matters, and from the United States with respect to environmental protection. None of these states is likely to have regarded its proposal as entailing a duty to accept what a numerical majority of states had accepted without regard to the position of states with proportionately greater interests at stake.
tailed international regulation, but whose objectives are fur-
thered by regulatory uniformity. It would therefore seem to
be particularly well-suited to certain types of environmental
"framework" treaties, both global and regional.

The practical utility of the duty has not been tested.
Like many legal duties, it will function best where its exist-
ence encourages voluntary compliance, perhaps with a gen-
tle reminder from outsiders. It needs to grow slowly.

It also needs to be nurtured. That requires avoiding re-
strictive interpretations that prejudice its utility in both ex-
isting and future treaties. That also requires avoiding liberal
interpretations that prejudice its acceptability as a useful
tool. The tool is a modest one. Unless it is so described,
treated, and interpreted, it is likely to prove useless. Some
governments easily could be provoked by liberal interpreta-
tions to resort to both restrictive interpretations and opposi-
tion to the use of the tool in future instruments. Coastal
states easily could be provoked by restrictive interpretations
into denouncing the very idea that their prescriptive compe-
tence over navigation off their coasts is often limited to en-
forcing generally accepted international standards.

There is then a certain irony in this study. Like the par-
et whose ultimate rejoinder is, "Do as I say, not as I do,"
perhaps the author's most significant conclusion is, "The
less said, the better."