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# Balancing coastal state jurisdiction and international navigational rights : a vessel-source marine pollution perspective

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# BALANCING COASTAL STATE JURISDICTION AND INTERNATIONAL NAVIGATION RIGHTS: A VESSEL-SOURCE MARINE POLLUTION PERSPECTIVE

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# DECLARATION

I hereby certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

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ABSTRACT

Coastal states, like flag states, have always had an interest in, and the right to use, the ocean space. However, the exercise of coastal state jurisdiction and international navigation rights has at times been subject to conflict.

UNCLOS 82 is a framework convention that, among other things, provides safeguards to protect the interests of coastal states as well as those of flag states in terms of navigation rights. However, there have been instances where coastal states did not always respect international navigation rights.

This dissertation is an assessment of, and a reflection on, the extent to which contemporary state practice maintains the balance between coastal state jurisdiction and international navigation rights. This is done against the backdrop of historical developments in the domain. The focus is on vessel-source marine pollution.

The development and establishment of the notions of *mare liberum* and *mare clausum*, as well as the conflict between the two are considered. The emergence of early relevant concepts and notions in the domain, as well as the momentum towards giving an international dimension to the law of the sea are addressed. The UNCLOS 82 regime is then discussed in terms of the delicate balance that it establishes between coastal state jurisdiction and international navigation rights. Some instances of deviant and non-deviant post-UNCLOS 82 state practice are discussed to assess the extent to which coastal state jurisdiction has in general been enhanced at the expense of navigation rights.

The conclusion is that the trend is indeed towards increased coastal state jurisdiction at the expense of international navigation rights. It is recommended that the way forward is for coastal and flag states to continue to negotiate within the IMO prospective and actual coastal state actions that may impede navigation rights rather than resort to unilateralism or regionalism. There is also a call for the international community to muster every effort to discourage instances of deviant state practice that is inconsistent with international law.

**KEYWORDS:**

Coastal state jurisdiction, Deviant state practice, Flag states, IMO, International navigation rights, Non-deviant state practice, UNCLOS 82.

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## ABBREVIATIONS

| | |
|---|---|
| APM | Associated Protective Measures |
| EEC | European Economic Community |
| EEZ | Exclusive Economic Zone |
| EU | European Union |
| GESAMP | Joint Group of Experts on the Scientific Aspects of Marine Evironmental Protection |
| ILA | International Law Association |
| ILC | International Law Commission |
| IMO | International Maritime Organization |
| MARPOL | International Convention for the Prevention of Oil Pollution from Ships |
| MAS | Maritime Assistance Services |
| MEPC | Marine Environmental Protection Committee |
| NGO | Non Governmental Organization |
| OPA | Oil Pollution Act |
| PSSA | Particularly Sensitive Sea Area |
| UN | United Nations |
| UNCLOS | United Nations Convention on the Law of the Sea |
| UNEP | United Nations Environment Programme |
| US | United States |
| VTS | Vessel Traffic Services |

CHAPTER ONE

# INTRODUCTION

The story about the vast oceans of the world often involves three basic, and perhaps obvious facts regarding the relationship between the coastal state and the flag state, viz. First, the flag state and the coastal state have traditionally claimed a legitimate right to use the sea. Secondly, the two have opposing interests in that regard, which is only logical. Thirdly, it has always been necessary to reconcile these interests, in terms of ensuring that the power and authority of the coastal state over portions of the sea will not impede the right of navigation. These three facts are today reflected in the United Nations Convention on the Law of the Sea, 1982 (UNCLOS 82)[1], which is an international instrument that seeks, among other things, to strike a balance between the interests of the coastal state and those of the flag state.

The objective of this work is to assess, and to reflect on the extent to which contemporary state practice maintains the balance referred to in the preceding paragraph. The focus is on the way coastal states interfere with international navigation with regard to vessel-source marine pollution. This objective is pursued against the backdrop of earlier developments in the domain.

Historically, the law of the sea has been characterized by a continual conflict between two opposing, yet complementary, fundamental concepts, 'territorial sovereignty' and the 'freedom of the high seas'.[2] On the one hand, coastal states at different times had territorial sovereignty in a specific geographical area of the sea, but the extent of that sovereignty and the enforcement of the law over vessels using

[1] UNCLOS 82, online: http://www.univie.ac.at/RI/KONTERM/Intlaw (accessed on 14/08/2004).
[2] E. D. Brown, *The International Law of the Sea – Vol. 1 Introductory Manual* (Aldershot: Dartmouth, 1994) 6.

the area would often be disputed. On the other hand, the freedom of the sea with regard to navigation and fishing[3] were important for states under whose flags vessels sailed. These opposing principles came to be enshrined in the seventeenth century in two respective concepts, *mare clausum* (closed sea) and *mare liberum* (free sea).[4] Thus, 'coastal state jurisdiction' as used in this dissertation goes with *mare clausum* while 'international navigation rights' is associated with *mare liberum*.

It is easy to infer from the preceding paragraph that the relationship between *mare clausum* and *mare liberum* has in several respects been a dynamic one, underpinned at different times by various intellectual views and practical considerations. In this regard, R. R. Churchill and A. V. Lowe have stated that:

> Although modern international law has almost wholly abandoned the intellectual foundations upon which many of the early writers built with regard to *mare clausum* and *mare liberum*, their work remains of continuing importance both because it portrays the prevailing views of their day upon the law of the sea and because the modern law has developed, by a continuing process of modification and refinement, from those foundations.[5]

For reasons related to matters such as security, sea resource use, and vessel-source marine pollution, coastal states tend to defend sovereignty as the dominant principle. *A contrario*, flag states tend to defend the freedom of the sea for reasons of international navigation and sea resource use. These opposing positions were governed by customary international law. After some early attempts, such as with the Hague Conference, 1930, the Geneva Conventions on the Law of the Sea, 1958[6] marked the first significant effort to codify the law of the sea. However, the key international instrument to refer to today is UNCLOS 82 (mentioned at the

[3] Until the mid 20th century, navigation and fishing were the only important economic uses of the sea. Of course, scientific developments in recent decades have contributed to the existence today of multiple economic uses of the sea.
[4] The two concepts are better dealt with in chapter 2 *infra*.
[5] R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed. (Manchester: Juris Publishing, 1999) 4 – 5.
[6] Geneva Conventions on the Law of the Sea, 1958; Online: http://www.cpps-int.org/english/conventionofthelawofthesea.html (accessed on 25/07/2004).

beginning), which itself has absorbed, for the most part, the 1958 Geneva Conventions and non-codified customary law.[7]

UNCLOS 82 reflects an unreserved effort by the international community to strike a delicate balance between coastal state jurisdiction and international navigation rights, based on the notion of 'due regard'. At the same time, the Convention recognizes exceptional enforcement circumstances for the coastal state, such as 'right of visit' and 'hot pursuit'. It is also fair to say that UNCLOS 82 provides little more than a framework. The Convention has to be supplemented by more detailed rules in other already existing or still-to-be-developed conventions, and in national legislation, provided such detailed rules are consistent with international law.

There is no overemphasizing the fact that coastal states are nowadays very concerned about the risk posed by vessels using their waters, especially in terms of pollution resulting from a maritime accident. Generally, only vessels that respect international standards and requirements are welcome. The problem, though, is that the practice of some coastal states in terms of how they interfere with the navigation rights of vessels they consider to be non-compliant does not always seem to make for coherence and consistency in international law.

This dissertation thus sets out to consider some instances of deviant coastal state practice. 'Inconsistent with international law' may mean one of two things: a) that the practice constitutes a clear violation and is thus unlikely to contribute to the 'progressive development of international law', or b) that the practice, though a violation, could nevertheless be of a norm-creating character. Since it is now theoretically possible to amend UNCLOS 82[8], this dissertation is incidentally a

[7] Arnd Bernaerts, *Bernaerts' Guide to the 1982 United Nations Convention on the Law of the Sea*, (Surrey: Fairplay Publications, 1988) 14.
[8] Mary George, "Transit Passage and Pollution Control in Straits under the 1982 Law of the Sea Convention" in *Ocean Development and International Law*, Vol. 33 No.2 (2002) 189.

reflection on how to reconcile contemporary state practice with the present UNCLOS regime.

It is useful at this point to comment on the vitality of state practice in international law. D. P. O'Connell has referred to the Vattelian tradition of acquiescence and consent, whereby rules of international law have been promulgated by reference to the practice of states.[9] He states that when the rules of that law are so indeterminate that they give rise to disputes, the only resolution it offers for settlement is to endorse whatever comes to prevail in practice. O'Connell, however, underscores the importance of securing widespread agreement upon rules that are at least the fruit of compromise or are definite, clear and comprehensive.[10] Hence, the significance of this work lies in the fact that while there may be widespread agreement on UNCLOS 82, generally, the rules contained therein are not always definite, clear and comprehensive.

In concrete terms, using UNCLOS 82 and related instruments such as the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78)[11], this writer critically considers state practice in terms of the apparently increasing legislative and enforcement powers of coastal states by comparison with international navigation rights. To attain this composite objective, the following situations are examined: a) historical background to, and relationship between 'coastal state jurisdiction' and 'international navigation rights', b) the balance between 'coastal state jurisdiction' and 'international navigation rights' in perspective of UNCLOS 82, and c) post- UNCLOS 82 practices and trends relating to that balance.

[9] D. P. O'Connell, *The International Law of the Sea*, Vol. 1 (Oxford: Clarendon Press, 1982) IX.
[10] Ibid. at X.
[11] International Convention for the Prevention of Pollution from Ships, 1973/78, as amended; Online: http://www.imo.org/Conventions/contents.asp? (accessed on 25/07/2004).

In view of the wide scope of the subject and the fact that the issues involved are inextricably linked, it is now proposed to circumscribe the work by: a) explaining the key terms in the dissertation title (that is, 'coastal state jurisdiction' and 'international navigation rights'), and b) outlining the respective chapters.

With regard to point (a) above, it is important to note that jurisdiction by a coastal state is primarily exercised over its maritime zones.[12] Thus, violations committed by vessels navigating within a coastal state's maritime zones fall under the jurisdiction of the coastal state. A coastal state has two enforcement options - one within any of its ports and the other at sea – and the former is based on the voluntary presence of the alleged offender in port pursuant to article 220 (1) of UNCLOS 82.[13]

Generally, the notion of coastal state jurisdiction embodies legislative and enforcement powers in the sense that it may invoke the sovereignty or sovereign rights of the coastal state, depending on the maritime zone as well as the activity involved. This dissertation considers jurisdiction in terms of the extent to which the coastal state is permitted under international law to interfere with navigation rights within its respective maritime zones, from the point of view of vessel-source marine pollution concerns.

Meanwhile, from the flag state perspective, it is important to note that antipollution measures on board a vessel, in terms of respecting international standards and requirements, will always have to be taken, irrespective of whether the vessel is within the internal waters, territorial sea or any other maritime zone of the coastal state. As well, such measures will sometimes be stricter on account of the different pollution risks existing in a maritime zone or indeed the extent of coastal state authority exercised therein.

[12] Erik Jaap Molenaar, *Coastal State Jurisdiction over Vessel-source Pollution*, (The Hague: Kluwer Law International, 1998) 92.
[13] Ibid.

On another sphere, the jurisdiction of a coastal state with respect to navigation rights also depends on the type of vessel, in terms of ownership or activity. UNCLOS 82 makes a distinction between commercial vessels, government non-commercial vessels and naval vessels or warships. However, this dissertation is concerned only with commercial vessels. Hence, issues such as state immunity are beyond the scope of the work.

Regarding 'international navigation rights' as used in the title, the key point to note is that 'navigation' refers to the period when a vessel is in motion as it navigates from point A to point B. This dissertation does not concern itself with maritime casualties or incidents that have already occurred. It is limited to *any* situation that precedes a casualty or incident, that is, before a vessel is rendered motionless. Thus, while matters relating to issues such as casualty investigation are not addressed, instruments such as the International Convention Relating to Intervention on the High Seas in cases of Oil Pollution Casualties, 1969 (the Intervention Convention 1969)[14], as amended, are considered.

Finally, the adjective 'international' used to qualify 'navigation rights' is important, and should not be taken for granted. What it means is that this work is concerned with how coastal states interfere with the navigation rights of 'foreign vessels', as opposed to 'national vessels'. Thus, in determining the international character of navigation, only the flag state cap will be worn.

This thesis comprises five chapters. Having stated the objective and explained the relevant concepts and notions, and after defining the scope of the dissertation, it is now proposed to outline the remaining chapters.

[14] International Convention Relating to Intervention on the High Seas in cases of Oil Pollution Casualties, 1969, as amended; Online: http://www.imo.org/Conventions/mainframe.asp? (accessed on 25/07/2004).

Chapter two gives a brief historical overview of the period before UNCLOS 82. It begins with a background to the establishment in the 17th century of the concepts of *mare clausum* and *mare liberum*. It then continues with developments up to UNCLOS 82, passing through highlights such as The Hague Codification Conference, 1930 and UNCLOS I and II. Emphasis is placed on the relationship between *mare clausum* (associated with coastal state jurisdiction) and *mare liberum* (associated with international navigation rights). The early emergence of related concepts and notions such as 'hot pursuit' and 'innocent passage' as well as their relevance to the development of the law are also explained. It concludes by spelling out some of the relevant issues that were to be codified in UNCLOS 82, in terms of the balance between coastal state jurisdiction and international navigation rights.

Chapter three concerns UNCLOS 82 proper as well as related instruments. It discusses coastal state jurisdiction and international navigation rights in the context of all the maritime zones (including a discussion on straits and archipelagic waters). It is noteworthy that ports are a part of a coastal state's internal waters, hence navigation rights are also discussed in the context of 'ships in distress' both in this chapter and as regards state practice in the next. Finally, chapter three considers 'hot pursuit' under UNCLOS 82, as well as the Intervention Convention, 1969 to show how special coastal state enforcement measures fit into the delicate balance that UNCLOS 82 seeks to establish between coastal state jurisdiction and international navigation rights

Chapter four deals illustratively with the balance between coastal state jurisdiction and international navigation rights post-UNCLOS 82, with a focus on state practice. The chapter is discussed in direct relation to UNCLOS 82, providing the opportunity to assess the extent to which the Convention still serves as the central instrument given the well-known instances of deviant state practice.

The last chapter provides a conclusion based on the entire work. More specifically, it is a reflection on the real impact of state practice on international law as concerns navigation rights. It concludes with suggestions on the way forward based on the reflection.

CHAPTER TWO

# HISTORICAL OVERVIEW

## 2.1 Introduction

This chapter covers the period stretching from the Rhodian sea law (Lex Rhodia)[1] to UNCLOS 82 and goes to show that the notions of 'coastal state jurisdiction' and 'international navigation rights', as well as the problem of balancing the two were historically well established prior to UNCLOS III. It begins with an encapsulation of the origins, establishment and development of the concepts of *mare liberum* and *mare clausum* . Hallmarks of the discussion include, *inter alia,* the recognition of the notions of 'territorial waters' and 'high seas', and early 20th century efforts towards codifying and 'stabilizing' the international law of the sea as regards the focus of this thesis.

## 2.2 Background

A historical analysis of the law of the sea shows that trade was a vitally important activity in Greek antiquity. The Aegean island of Rhodes became a major centre of commerce during that period, with almost all trade between Europe and Asia being channelled through it. To regulate such huge trade, a code on marine and commercial law, called Rhodian law, was developed.[2]

[1] According to Wolfgang Graf Vitzthum, the Lex Rhodia is the codification of the customs of maritime trade in the Mediterranean Sea during Greek antiquity. It laid the foundation of modern maritime jurisprudence. See Wolfgang Graf Vitzthum, "From the Rhodian Sea Law to UNCLOS III" in Peter Ehlers, et al., *Marine Issues from a Scientific, Political and Legal Perspective* (The Hague: Kluwer Law International, 2002) 1.
[2] Ibid. at 2.

Up to the early middle ages, this Rhodian law was restricted to the necessary regulation of maritime trade, and state practice at the time suggests that much of the sea was left to the merchants to carry out trade in a rather unperturbed fashion. During the same period, it is said that a state of peace tended to be the exception rather than the rule, and to be founded on "…precarious bilateral treaties of peace or truce."[3] Little wonder that at sea too the rule was *bellum omnium contra omnes* (the war of all against all) in the absence of conventional provision to the contrary.[4] What all this means is that where there were no exceptional, restrictive rules to the contrary, the freedom of the high seas was the order of the day.

The Middle Ages was also characterized by discoveries and the rise of seafaring powers such as Spain, Portugal, the Dutch and the English. These new sea powers began to claim vast areas of the sea, and it is understandable that other nations (especially those with some maritime interest) could not stand idly by in the wake of such apparently gross pretensions - hence the tension between coastal states and those interested in using the sea or flag states. Of course, each side had to defend its own cause.

Justification for the claims to areas of the sea were sought through two notions that emerged in the 17th century, *mare liberum* (or free sea) strongly defended by the Dutch, and *mare clausum* (or closed sea) defended by the English. It is important to note that these notions emerged from a context of claims and counter-claims, as *mare clausum* was used to counter *mare liberum*. It is now proposed to consider the two arguments.

### 2.2.1 Mare liberum

Grotius' treatise *Mare Liberum* was published in 1609. The work was initially part of a legal defence he gave in favour of the Dutch East India Company early in the 17th

[3] Rudolf Bernhardt, "Law of the Sea, History" in Rudolf Bernhardt, ed., *Encyclopedia of Public International Law*, vol. 3 (Amsterdam: North Holland & Elsevier Science, 1999) 169.
[4] Ibid.

century.[5] In effect, Spain and Portugal had opposed Dutch intervention in the Indies, and Grotius' treatise was "… intended to be used as moral ammunition and designed to justify in the eyes of the world the whole cause and methods of the Dutch as against Spain (and Portugal)."[6]

Grotius argued that the sea was not capable of being subjected to the sovereignty of any state. He was of the view that the seas were international commercial routes, which should naturally not be appropriated.[7] The argument put forward by Grotius was in tune with the Roman characterization of the sea as *res nullius*, implying that things not assigned to individuals or the public could pass to the first to seize them. Simply put, he advocated that the sea was free to all and belonged to no one.

It is important to note, for historical purposes, that the idea of 'free sea' was not terribly new. Grotius apparently benefited from the efforts of others before him. As a matter of fact, it has been stated that:

> The task of Grotius was […] materially facilitated by the exploits of Drake, Hawkins, and Cavendish on the part of the English, and of Jakob van Heemskerk on the part of the Dutch; and […] the credit of having first asserted the freedom of the seas in the sense now universally recognised, belongs rather to Queen Elizabeth than to the Dutch publicist.[8]

Grotius' legal doctrine has also been characterized, with rather similar effect, in the following terms:

> The *mare liberum* has become the classic of the international law of the sea. It may, indeed, have been the most influential formulation of the principle of the freedom of the seas – but it certainly was not the first one. Grotius relied on many sources from Antiquity to his days. Most prominent among these featured the writings of late Spanish scholasticism, especially by Fernando Vásquez and Francisco de Vitoria, and of the Italian jurist Alberico Gentili.[9]

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[5] D. P. O'Connell, *The International Law of the Sea*, Vol. 1 (Oxford: Clarendon Press, 1982) 9.
[6] R. P. Anand, *Origin and Development of the Law of the Sea* (The Hague: Martinus Nijhoff Publishers, 1982) 79.
[7] O'Connell, *supra* note 5.
[8] Thomas Wemyss Fulton, *The Sovereignty of the Sea* (Millwood: Kraus Reprint Co., 1976) 5.
[9] Wolfgang, *supra* note 1 at 9.

Having considered *mare liberum*, it is now proposed to consider *mare clausum*, which, in several respects, was antithetical to *mare liberum*.

### 2.2.2 Mare clausum

As stated previously, *mare clausum* as a doctrine or argument was used to counter *mare liberum*. Although the publication of Grotius' work was met with very strong criticism and opposition from some of his well-known contemporaries, history tells us that the most formidable reply to Grotius came from John Selden, an English scholar.

Selden's comprehensive treatise *Mare Clausum, seu de Dominio Maris Libri Duo* (The closed Sea or Two Books Concerning the Rule over the Sea) was published in 1635[10] by the "express command" of King Charles "…for the manifesting of the right and dominion of us and our Royal Progenitors in the seas which encompasses these our realms and Dominions of Great Britain and Ireland."[11] Relying on historical data and state practice at the time in Europe, Selden tried to prove that the sea was not everywhere common and had in fact been appropriated in many cases. Selden's main thesis was that the sea was not common to all men but, indeed, could be dominated and owned, and that the King of England was the 'proprietor' of the surrounding sea "…as an inescapable and perpetual appendix of the British empire."[12]

It seems therefore that Selden was, in effect, propagating the view that it was possible (for coastal states) to occupy portions of the oceans, as long as they could ensure control by means of naval power.[13] This view was consistent with the

[10] R. R. Churchill and A. V. Lowe, *The Law of the Sea* (Manchester: Juris Publishing, 1999) 4.
[11] Anand, *supra* note 7 at 105.
[12] George P. Smith II, *Restricting the Concept of Free Seas: Modern Maritime Law Re-Evaluated* (New York: Robert E. Krieger Publishing Co. INC, 1980) 17.
[13] Wolfgang, *supra* note 1 at 9.

persistent idea at the time of fixed limits to the rights of the coastal state in its neighbouring sea, a principle appropriately embodied in the cannon-shot rule.[14]

There seems to be enough evidence that Selden, like Grotius before him, did build on the accumulated knowledge of history. Indeed, D. P. O'Connell has said with regard to *mare clausum* that:

> There is certainly evidence that throughout the later Middle Ages and the sixteenth century the Crown exercised authority over fishing, and on several occasions had his authority acknowledged by other nations. There was also judicial authority in the Irish Reports of Sir John Davies in the case of the *Royal Piscary of the Banne* that 'the sea is the King's proper inheritance'.[15]

### 2.3 The notions of effective control and creeping jurisdiction

After *mare liberum* and *mare clausum* had become firmly established by the end of the 17th century[16], it was clearly recognised that a state must have exclusive jurisdiction and control in a part of the sea adjacent to its coastline for the protection of its security and other interests. The issue initially centred on determining the extent of the territorial sea as seen in the cannon-shot rule mentioned earlier. Then developed arguments for extending this jurisdiction in some form, as discussed below.

#### 2.3.1 Territorial waters[17]

Ever since the concept of an independent state was born following the Holy Roman Empire, it seems that the right of the coastal state to regulate activities in its coastal

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[14] O'Connell, *supra* note 5 at 14.
[15] Ibid. at pp. 5-6.
[16] The principle of *mare clausum* started losing its hold in the later eighteenth and early nineteenth centuries, under pressure of the Commercial and later Industrial Revolution, while *mare liberum* began to be accepted as a more useful principle. See Anand, *supra* note 6 at 137.
[17] This discussion focuses on the sovereignty over the superjacent waters themselves. States that had for many years claimed sovereignty over the waters did not at first claim sovereignty over the superjacent air space and seabed in the zone. The question of the status of the air space above the territory of states and territorial sea arose following the use of balloons during the Franco-Prussian war in 1870-71. See Churchill and Lowe, *supra* note 11 at 75.

waters in its own interest has been generally recognized.[18] It is even said that Grotius himself, the leading advocate of the freedom of the sea, acknowledged the need and practice of maritime states exercising jurisdiction over some part of the neighbouring sea.[19] Indeed, other writers such as Bynkershoek based their works on the distinction between the freedom of the high seas and the sovereignty of the coastal state over its adjacent waters.[20]

Divergent scholarly views aside, the distinction between the high seas and territorial waters crystallized, with the need to balance the two becoming more obvious.

### 2.3.2 Contiguous zone

One reason for the lack of agreement on the extent of territorial waters (discussed above) seems to have been the diverse needs of the coastal state to have some authority in an area of the sea beyond a comparatively narrow maritime belt for the protection of their special interests, and for the prevention of infringement of their customs, fiscal and sanitary regulations within their territorial seas.[21] This narrow belt is what was referred to as 'contiguous zone'.

According to R. R. Churchill and A. V. Lowe, the contiguous zone "…has its origins in functional legislation such as the eighteenth century 'Hovering Acts' enacted by Great Britain against foreign smuggling ships hovering within distances of up to 24 miles from the shore."[22] The Acts had effect from 1736 until their repeal in 1876.

In any event, issues relating to the extent as well as the legal status of the contiguous zone took different directions until codification of the law of the sea in the 20th

[18] See ibid. at 71.
[19] Anand, *supra* note 7 at 137.
[20] See Churchill and Lowe, *supra* note 11 at 72.
[21] Anand, *supra* note 7 at 141.
[22] Churchill and Lowe, *supra* note 11 at 132.

century.[23] This, like the other maritime zones that later developed, was indicative of the creeping nature of coastal state jurisdiction.

### 2.3.3 Zone of security and fisheries jurisdiction

For several reasons the desire by coastal states to extend jurisdiction to areas of what was then considered to be the high seas remained strong. One such reason, an old one for that matter, had to do with security concerns. Internationally, however, security was first put forward by Portugal at The Hague Codification Conference, 1930.[24] Although there was difference of opinion at the Conference as to whether a state was entitled to extend its powers to areas of the high seas for its security interests, the fact is that many coastal states continued to patrol the extended waters of the high seas.

As concerns fisheries jurisdiction, it is noteworthy that one very important reason for long-standing lack of agreement for several centuries on territorial waters was the need and desire of coastal states to protect the fisheries adjacent to their coasts from fishermen from other states. For example, in 1613 William Welwood sought to justify the British claim of sovereignty over the British sea for the protection of fisheries off the coast of England and Scotland by relying on the argument that inhabitants of a country had exclusive right to the fisheries along their coasts. He stated that this was one of the principal reasons for which "…this part of the sea must belong to the littoral state given the risk that these fisheries may be exhausted as a result of the free use of them by everybody."[25]

[23] As regards legal status, there is one key point to remember, namely, that early unilateral claims to the contiguous zone had asserted both the right to prescribe regulations to operate in the extended zones and the right to enforce them; in other words, both legislative and enforcement jurisdiction. See ibid. at 137. See also the discussion on the contiguous zone in the next chapter.
[24] Anand, *supra* note 7 at 144.
[25] Ibid. at 145-146.

Given such strong convictions about the need for fisheries jurisdiction, and dissatisfied with subsequent selective *ad hoc* measures adopted for solving the problem of fishery conservation, states moved ahead to extend their jurisdictions.[26]

### 2.3.4 High seas and 'Rules of the Road on the High Seas'

Beyond the territorial waters (where, as discussed earlier, coastal states could exercise sovereign jurisdiction), and a limited though controversial contiguous zone (where most of the states claimed to exercise limited jurisdiction), the vast oceans came to be accepted as free in the 19th century Europe, and declared as open or high seas, where all states were entitled to the unrestricted right of use and enjoyment.[27] Not only was navigation unobstructed in the high seas, no state had a preferential right of fisheries near other states' shores.[28]

As regards jurisdiction, the general law was that vessels on the high seas were subject to no authority except that of the state whose flag they were flying. Furthermore, the international community adopted certain 'rules of the road' so that collisions might be avoided at sea. These, and lots of other issues[29] were all considered in discussions during the first maritime conference in the 1880's. These issues became even more important with the development of steam ships, hence the need for a 'formal' conference, the first of which took place in 1930, as discussed below.

## 2.4 Codification attempts

As already seen, by the 19th century the law of the sea already knew such concepts as ships in distress, hot pursuit and innocent passage. In the same vein, this chapter has

[26] See discussion on continental shelf and the exclusive economic zone (EEZ) in the next chapter.
[27] Anand, *supra* note 7 at 151.
[28] Ibid.
[29] For purposes of this dissertation, one most useful issue was 'hot pursuit'. It was recognized that a vessel could be pursued and arrested on the high seas if it committed a violation of the law of the coastal state within its territorial waters and was detected there. See ibid. See also the discussion on 'hot pursuit' in the next chapter.

addressed the notions of territorial waters, contiguous zone and high seas, whilst emphasizing the desire by coastal states to continue to extend their jurisdiction seawards to defend various interests. Furthermore, the international community by the 19th century was already showing the desire to agree on rules that would govern the use of the sea. It is thus fair to say that, by the end of the 19th century, the law of the sea had assumed such stability that the codification of the rules was warranted.

The following subsections briefly examine the three respective major codification attempts leading up to UNCLOS 82, namely, The Hague Codification Conference, 1930, and UNCLOS I and II.

### 2.4.1 The Hague Codification Conference, 1930

With the establishment of the League of Nations after World War I, an ideal international forum in which to finally codify the law of the sea seemed to have been created. Various bodies in the 1920s, such as the Institut de Droit International and the American Institute of International Law were particularly active in this regard. Organizations such as the Harvard Law School attempted some private codification. All these activities turned out to be a form of rehearsal for The Hague Codification Conference, which was called by the League of Nations.

Speaking of The 1930 Hague Codification Conference, D. P. O'Connell has stated that:

> The whole procedure was directed to establishing what the rules of international law then were, not what they might become. To that extent, the emphasis at the Conference was more legal than political, and delegations included prominent legal experts.[30]

In the period leading up to the conference the League of Nations had appointed a committee of experts to draw up a list of subjects for codification, and a preparatory commission was set up to prepare three subjects, namely: nationality, state responsibility, and territorial waters. However, it was not possible to reach agreement

[30] O'Connell, *supra* note 5 at 21.

at the conference on the crucial question of the breadth of the territorial waters. Nevertheless, when the Hague Conference reported to the League of Nations that it was unable to reach agreement on the extent of the territorial sea, the intention was to explore the question further after a time and reconvene the conference rather than to abandon or discard it.[31]

### 2.4.2 UNCLOS I and II

The Hague draft articles constituted a basis for future efforts to codify the law of the sea. The United Nations replaced the League of Nations in 1945 after World War II. Under the auspices of the new organization, the International Law Commission (ILC) was charged with the 'progressive codification' of international law. However, unlike the Preparatory Committee of the Hague Codification Conference, the ILC's mandate was not only the codification of international law but also its development as well.[32]

In the meantime, two important law of the sea developments having direct bearing on the work of the ILC and, ultimately, on UNCLOS I had just occurred. As discussed below, the first was the Truman Proclamation on the continental shelf in 1945, while the second was the *Anglo-Norwegian Fisheries case* in 1951.[33]

As concerns the first development, President Truman on September 28, 1945, made a twin proclamation relating to fisheries and the continental shelf. He referred to advances in technology as necessitating "… the extension of coastal jurisdictions for the establishment of conservation zones in the areas of the high seas contiguous to the coasts of the United States for the protection of fisheries and exclusive exploitation of mineral resources of the continental shelf."[34]

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[31] Ibid.
[32] Ibid.
[33] *Anglo-Norwegian Fisheries Case* (1951) ICJ Report 116 at 8 (Cited in R. R. Churchill and A. V. Lowe, *supra* note 11 at 35).
[34] Anand, *supra* note 7 at 234.

The US example was followed by other states such as the United Kingdom, which also claimed similar rights. These rights were later set out in articles 1 and 3 of the Continental Shelf Convention, 1958 and were recognized as having passed into customary international law.[35]

With regard to the *Anglo-Norwegian Fisheries case*, suffice it to note that besides the fact that the International Court of Justice recognized an extended fisheries zone for Norway, the case laid the groundwork for nations to institute straight baselines. Indeed, the rules enunciated by the Court in that case were taken up by the ILC and eventually incorporated in the Territorial Sea Convention, 1958 (article 4), which closely followed the language of the Court's judgment.[36]

In light of the foregoing, the ILC draft articles had been quite 'enriched'. The articles submitted to the General Assembly in 1956 by the ILC were placed before the specially convened first Geneva Conference on the Law of the Sea, 1958 (UNCLOS I). There were four separate conventions, namely: the High Seas Convention, Convention on the Territorial Sea and Contiguous Zone, Convention on the Conservation of Fisheries, and Convention on the Continental Shelf. There was also a dispute settlement protocol.

It is not the intention of this writer to dwell on the details of the 1958 Geneva Conventions. However, it is useful at this point to briefly consider two of the conventions, in terms of some of their key principles that are related to UNCLOS 82 discussed in the next chapter. The first concerns the Territorial Sea Convention. Perhaps the most important issue is the right of innocent passage. Both conventions provide similarly on the right of innocent passage, except that UNCLOS 82 carries a few more refinements.[37]

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[35] Churchill and Lowe, *supra* note 11 at 7.
[36] Ibid. at 35.
[37] Ibid. See also the discussion on innocent passage in the next chapter.

The second Geneva Convention of importance here is the High Seas Convention. It should be evident from earlier discussion in this chapter that the regime of the high seas has traditionally been characterized by the dominance of the principle of free use and the exclusivity of flag state jurisdiction, in sharp contrast to the powers of states over their coastal waters. The High Seas Convention which, alone among the 1958 Conventions, purported to codify customary international law, gave four examples of the freedom of the high seas: the freedoms of navigation, fishing, laying of submarine cables and pipelines, and overflight.[38] It is noteworthy that this list was extended in article 87 of UNCLOS 82 to include the freedom to construct artificial islands and other installations, and the freedom of scientific research.[39]

All said and done, the Geneva Conference, 1958, like that of 1930, failed to reach agreement on the extent of the territorial sea and a second post-World War II Conference on the subject (UNCLOS II) was convened in 1960. This was unsuccessful due to disagreement over a compromise proposal for a six-mile fishery zone plus a six-mile territorial sea.

UNCLOS III was initiated by a question raised by Malta in the United Nations in 1967, the catalyst having been provided by Dr. Arvid Pardo, that country's then Ambassador to the UN. Basically, the diplomat made a celebrated speech at the UN that year in which he called for the recognition of the sea area beyond the 'present' limits of national jurisdiction and its resources as "the common heritage of mankind".[40]

The UN General Assembly responded by establishing in December 1967 an *ad hoc* Seabed Committee initially composed of 35 members, which was made permanent in 1968 and enlarged.[41] This Committee on the Peaceful Uses of the Seabed and Ocean

[38] Churchill and A. V. Lowe, *supra* note 11 at 203.
[39] Ibid.
[40] O'Connell, *supra* note 5 at 25.
[41] Anand, *supra* note 7 at 234.

Floor Beyond the Limits of National Jurisdiction became (from 1968 – 1973) the most important forum for preliminary negotiations on a new law of the sea.[42]

The Pardo initiative thus eventually led to the convocation of (UNCLOS III) that produced the mother instrument in the field, namely, UNCLOS 82. This Convention, along with related instruments, will be examined in the next chapter in terms of determining the balance between coastal state jurisdiction and international navigation rights.

## 2.5 Conclusion

Chapter two shows certain elements that could be subsumed within at least four points. First, the flag state and the coastal state have always had a legitimate right to use the sea, but there was always conflict between the two. The need to find some way of balancing these rights was real. Prior to UNCLOS 82, the interest of the coastal state was expressed more in terms of security and the use of sea resources, especially fisheries, while the interest of the flag state was expressed in terms of the freedom of navigation for commercial and fishing purposes.

Secondly, the balance between coastal state jurisdiction and flag state jurisdiction was expressed more in terms of control in the physical sense, rather than anything else. Thus, we had territorial waters on the one hand (where the coastal state could exercise control or extend its power) and the high seas on the other (where the freedom of navigation was considered more feasible) – hence the ‘freedom of the high seas’ doctrine. The balance between coastal state jurisdiction and international navigation rights was sought in terms of ‘boundaries’, the element of exclusivity being paramount.

[42] Ibid.

Thirdly, the notion of ‘creeping jurisdiction’ meant that the balance between coastal state jurisdiction and international navigation rights was likely to be uncertain and somewhat volatile. Flagrantly conflicting situations were bound to arise given the ‘exclusivity’ aspect that formed the fundamental basis of the balance at the time between territorial waters and high seas.

Finally, the chapter shows a momentum towards giving an international dimension to the problem. It further shows us how the existence of customary international law elements such as ‘innocent passage’ and ‘hot pursuit’ emerged out of a natural need to attain some equilibrium or to create a new regime that would govern the relationship between coastal state jurisdiction and international navigation rights. These new complexities, it seems, could only be addressed in an international forum.

All in all, the advent of UNCLOS 82 was preceded by significant developments in the shipping industry as well as on the international scene, including (as will be seen in the next chapter) new dimensions to the interests of the coastal state. In this regard, perhaps the most important development concerning this work is that the need was also felt to enable the coastal state better protect its environment against vessel-source marine pollution. The question at this point then is, did UNCLOS 82 establish a new equilibrium between coastal state jurisdiction and international navigation rights in view of all these developments? The next chapter seeks to answer this.

CHAPTER THREE

# COASTAL STATE JURISDICTION AND INTERNATIONAL NAVIGATION RIGHTS UNDER UNCLOS 82: A SEARCH FOR A NEW EQUILIBRUM

## 3.1 Introduction

It was clear by the time UNCLOS 82 was signed that the interests of both the coastal state and the flag state had assumed new dimensions. Not only had the shipping industry grown much bigger in terms of the types, size, and speed of vessels, which obviously meant increased traffic, it was equally understood that the implications of these developments had to be dealt with. One conspicuous problem had to do with protecting the marine environment from pollution resulting from maritime casualties. Equally clear was the fact that the law of the sea was characterized by very rapid developments, as seen in the emergence of the exclusive economic zone (EEZ), for example.

UNCLOS 82 was thus designed to grapple with these realities as well as to set the stage for the further development of the law. How the Convention does this in terms of attaining some form of equilibrium in the relationship between coastal state jurisdiction and international navigation rights is what this chapter sets out to examine. While the discussion may be unavoidably pervading, the focus remains on how this is done in the context of vessel-source marine pollution.

The chapter discusses how UNCLOS 82 addresses rights of navigation within the various maritime zones of the coastal state. Under UNCLOS, a coastal state's exercise of sovereignty and its enjoyment of sovereign rights within its maritime

zones are weighed in some measure against its duties, in terms of freedom of navigation. Coastal state jurisdiction is wider and stronger within internal waters, and the situation is less so as one moves seawards across other maritime zones. Conversely, the rights of navigation are much stronger in the high seas and tend to reduce as one moves landwards across the maritime zones.

Maritime zones are considered in the following order: internal waters, territorial sea (including the special regime of straits and archipelagos), contiguous zone, continental shelf, exclusive economic zone (EEZ) and the high seas.

Furthermore, the chapter discusses special coastal state enforcement powers in two different contexts: a) the doctrine of 'hot pursuit', and b) the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969[1] (The Intervention Convention, 1969), as amended. The discussion on 'hot pursuit' follows that on the EEZ while the Intervention Convention, 1969 comes after the discussion on the high seas.

Finally, it is important to note that the discussion on internal waters draws not only from UNCLOS 82, but also from customary law and the implications of bilateral or regional treaties to which a coastal state may be a party.

## 3.2 Internal waters

### 3.2.1 Internal waters: definition

According to Article 8 of UNCLOS, the internal waters of a state are "waters on the landward side of the baseline of the territorial sea". In other words, internal waters

[1] International Convention Relating to Intervention on the High Seas in cases of Oil Pollution Casualties, 1969, as amended; Online: http://www.imo.org/Conventions/mainframe.asp? (accessed on 25/07/2004).

are separated from the territorial sea by the baseline.[2] This definition covers waters such as estuaries, lying wholly within the territory of one state from source to mouth, and lakes within the same territory.[3]

### 3.2.2 Rights of the coastal state within internal waters

In principle, the coastal state enjoys full sovereignty over its internal waters. Article 2 of UNCLOS 82 provides, *inter alia*, that:

> The sovereignty of a coastal state extends, beyond its land territory and internal waters and, in the case of an archipelagic state, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.[4]

The fact that the coastal state exercises "full" sovereignty and enjoys sovereign jurisdiction in its internal waters is further enhanced by the fact that, unlike in the case of territorial sea, there is no right of innocent passage through internal waters.[5] However, Article 8 (2) of UNCLOS 82 provides for an exception in this connection. It states:

> Where the establishment of a straight baseline in accordance with […] Article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in (UNCLOS) shall exist in those waters."[6]

The exercise of sovereignty within internal waters implies that coastal State jurisdiction in this case is, in principle, somewhat unlimited.[7] Not surprisingly, therefore, UNCLOS 82 provisions on coastal state in-port enforcement essentially refer to coastal state prescriptive jurisdiction, which refers essentially to regulatory

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[2] According to F. Ngantcha, it is important to distinguish between internal and archipelagic waters. See F. Ngantcha, *The Right of Innocent Passage and the Evolution of the International Law of the Sea* (London: Pinter Publishers, 1990) 71.
[3] Ibid.
[4] UNCLOS 82, online: http://www.univie.ac.at/RI/KONTERM/Intlaw (accessed on 14/08/2004).
[5] R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed. (Manchester: Juris Publishing, 1999) 61.
[6] UNCLOS 82, online, *supra* note 4.
[7] Erik Jaap Molenaar, *Coastal State Jurisdiction Over Vessel-Source Pollution* (The Hague: Kluwer Law International, 1998) 186.

conventions issues.[8] Basically, coastal state in-port enforcement is provided for in Article 220(1), as follows:

> When a vessel is voluntarily within a port or at an off-shore terminal of a state, that state may subject to section 7, institute proceedings in respect of any violation of its laws and regulations adopted in accordance with this convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels when the violation has occurred within the territorial seas or the exclusive economic zone of that state.[9]

Clearly, therefore, except in special cases, the sovereignty of the coastal State in internal waters is not limited by an obligation to grant a right of innocent passage to foreign shipping. It does not follow, however, that there are no limitations upon the exercise of the sovereignty of the coastal state in its internal waters. Such limitations may arise under international customary law or pursuant to treaties entered into by the coastal state.[10]

#### 3.2.2.1 Passage through internal waters and access to ports and other internal waters

As explained earlier, the basic premise is that the coastal state enjoys full sovereignty within its internal waters. It follows that in general there is no right of navigation for foreign vessels through internal waters.[11] Indeed, it has been argued that there is no such right under customary international law, despite an often-quoted dictum that "…the ports of every state must be open to foreign vessels and can only be closed when the vital interest of the state so requires."[12]

It is noteworthy that even more important than the unilateral measures a coastal state may adopt as implied in the previous paragraph are the provisions in international

[8] Ibid.
[9] UNCLOS 82, online, *supra* note 4.
[10] According to E.D. Brown, the most important of such limitations concern the rights of vessels to pass through internal waters and to enter a port and other internal waters. See E. D. Brown, *The International Law of the Sea*, vol.1 (Aldershot: Dartmouth, 1994) 38.
[11] Ibid.
[12] Churchill and Lowe, *supra* note 5 at 16.

treaties that envisage the refusal of entry to ports to ships that do not comply with measures adopted under the treaties, such as MARPOL 73/78, as amended (cited at page 4 *supra*).[13] It is important to refer, in this regard, to the obvious implication by UNCLOS 82 itself in articles 25(2), 211(3) and 225 that states may set conditions for entry to their ports.[14]

However, the coastal state would not be expected to unnecessarily and wantonly forbid navigation in its internal waters. Indeed, it is possible that closures of, or conditions of access to ports which are grossly unreasonable or discriminatory might be held to amount to an *abus de droit*, for which the coastal state might be internationally responsible even if there was no right of entry to the port.[15]

Finally, it has so far been shown that there is no general right of entry into ports for foreign merchant vessels under customary law. However, the following subsections show two things: first, that some treaties do confer a right of entry, and secondly, that there is a customary law right of entry to ports as concerns ships in distress. It is important to note that although not under UNCLOS 82, 3.2.2.2 and 3.2.2.3 below are relevant to the discussion.

#### 3.2.2.2 Commercial treaties

This discussion on commercial treaties is relevant to this work in that a country that is a party to UNCLOS may find itself in a situation where it needs to reconcile its maritime jurisdictional obligations under UNCLOS with those under another treaty, bilateral or multilateral. A treaty is a binding bilateral or multilateral international agreement between the state parties that sign (and ratify) it. Thus, foreign vessels are

[13] Ibid.
[14] See UNCLOS 82, online, *supra* note 4.
[15] Churchill and Lowe, *supra* note 5 at 16.

entitled to enjoy a right of access to ports by virtue of a treaty of commerce and navigation or friendship.[16]

However, it is understandable that the freedom of access granted to foreign vessels under a treaty will not be absolute, given that the scope of the freedom will be contemplated under the treaty. Nevertheless, as long as such a treaty remains in force, the coastal state is not expected to carry out acts that are inconsistent with it; similarly, foreign vessels will not be expected to abuse their right under the treaty.[17]

#### 3.2.2.3 Ships in distress[18]

Although not under UNCLOS, this customary law concept is directly relevant to issues of coastal state jurisdiction. Where a vessel needs to enter a port or internal waters to shelter in order to preserve human life, it seems that there is a clear customary law right of entry.[19] E. D. Brown refers to this customary right as a classical formulation of the " …enlightened principle of comity which exempts a merchant vessel, at least to a certain extent, from the operation of local laws."[20]

Generally, therefore, ships in distress have customarily enjoyed the right to seek refuge in ports or safe waters. However, it is important to note that consideration has always been given to the question as to the degree of necessity prompting vessels to seek refuge. For example, today it would be unsafe to say that a vessel has the right

[16] Brown, *supra* note 10.
[17] Ibid.
[18] See also chapter 4 *infra* for a discussion on contemporary state practice in the domain.
[19] Churchill and Lowe, *supra* note 5 at 63.
[20] Brown, *supra* note 10 at 39.

to enter ports or internal waters in order to save its cargo, where human life or important environmental concern is not at risk.[21] Ships in distress will be further discussed in chapter four.

## 3.3 Territorial Sea

### 3.3.1 Breadth of territorial sea and rights of coastal state

According to Article 3 of UNCLOS, every state has the right to establish a territorial sea up to a maximum of 12 nautical miles, measured from baselines determined in accordance with UNCLOS.[22]

The sovereignty of the coastal state over the territorial sea has been recognized at least since the 1930 Hague Conference.[23] According to the Encyclopedia of Public International Law, the territorial sea is that area of the water adjacent to the coast over which the littoral state is permitted by international law to exercise sovereign competence for purposes of jurisdiction, control and exploitation, subject only to a general right of innocent passage by foreign ships.[24]

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[21] Churchill and Lowe, *supra* note 5 at 63.
[22] See UNCLOS 82, online, *supra* note 4.
[23] Molenaar, *supra* note 7 at 195. The author further states that this recognition seems to have largely brought an end to the discussion on the juridical mature of the territorial sea. See ibid.
[24] Rudolf Bernhardt, ed., *Encyclopedia of Public International Law* (Amsterdam: North Holland & Elsevier Science, 1999) 818.

### 3.3.2 Innocent passage

The right of innocent passage renders coastal states' rights over the territorial sea less extensive than those over their land territory or internal waters. Indeed, international law concurrently accommodates coastal and flag state interest in the territorial sea.[25]

Article 17 of UNCLOS provides that "Ships of all states, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea".[26] According to Erik Jaap Molenaar, this right is made subject to the relevant provisions of the Convention, in particular articles 18 and 19, which stipulate the constituent elements of 'innocent passage'.[27] It follows that ships can only claim a right of innocent passage if the constituent elements of "passage" under article 18 and "innocence" under article 19 are satisfied.

As regards the meaning of "passage", article 18 provides:

> 1. Passage means navigation through the territorial sea for the purpose of:
>    a. traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters, or
>    b. proceeding to or from internal waters or a call at such roadstead or port facility.
>
> 2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or distress or for the purpose of rendering assistance to persons, ships or aircraft in distress.[28]

Passage thus involves more than merely passing through the territorial sea; it also involves stopping and anchoring insofar as this is incidental to ordinary navigation or

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[25] Molenaar, *supra* note 7 at 195.
[26] See UNCLOS 82, online *supra* note 4.
[27] Molenaar, *supra* note 7 at 195.
[28] UNCLOS 82, online *supra* note 4.

rendered necessary by *force majeure* or distress (Article 18(2)).[29] It also covers navigation by ships that come from or head to a port or internal waters.[30] One may thus assert, as Molenaar puts it, that: "… ships 'cruising', 'hovering' or merely 'lying in' the territorial sea cannot claim their passage to be continuous and expeditious."[31]

On the meaning of "innocence", Article 19 of UNCLOS provides:

> 1. Passage is innocent as long as it is not prejudicial to peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.
>
> 2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities…
>
> (h) any act of wilful and serious pollution contrary to this Convention; (…)
>
> (i) any other activity not having direct bearing on passage.[32]

Article 19(2) gives a long list of "activities" that could deprive passage of its innocent character. It has been observed that the list is not intended to be exhaustive; commission of any of the listed acts, which include any activity not having a direct bearing on passage, will automatically render the passage non-innocent.[33]

Finally, the term "activity" (as used in Article 19(2)(i)) is important in the understanding of innocent passage. It would appear that only activities are relevant; apparently, poor condition, lack of equipment and dangerous cargo, in terms of a ship within the territorial sea, are not factors to be taken into account in the context.[34] Thus in pollution cases, for example, actual 'discharges', if 'serious' and 'wilful', can render a passage 'non-innocent'.[35]

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[29] Churchill and Lowe, *supra* note 5 at 81.
[30] Ibid.
[31] Molenaar, *supra* note 7 at 196.
[32] UNCLOS 82, online *supra* note 4.
[33] Churchill and Lowe, *supra* note 5 at 85.
[34] Molenaar, *supra* note 7 at 196.
[35] Ibid.

Under UNCLOS 82 standards, therefore, the right of innocent passage may be defined simply as the right of the ships of all states to "pass innocently" (as explained) through the territorial sea. However, because there are other types of coastal waters, it is now proposed to discuss how this definition of innocent passage may be distinguished from other rights of passage in straits and archipelagic waters.

### 3.3.3 Right of transit passage through straits

#### 3.3.3.1 Meaning of strait

A strait falls within what has been described as the regime of narrow international ocean waterways.[36] A strait is commonly understood as a narrow natural waterway connecting two larger bodies of water. While most straits are not wide, some such as the Mozambique Channel or the Denmark Strait may be as much as 100 miles across their narrowest point.[37]

Straits connect both water bodies and separate territories. An important characteristic of straits is that they provide the opportunity for passage between two water bodies. It is important to note, however, that it is the legal status of the waters constituting straits and their use by international shipping, rather than the definition of "strait" as such, that determines the rights of coastal and flag states.[38]

#### 3.3.3.2 Types of straits and corresponding types of transit passage

Writers differ in their assessment of the types of straits provided for under UNCLOS 82. E. D. Brown, for example, states that there are five types of straits, to which correspond five separate types of rights of passage.[39] However, Mary George has stated that, by using a combination of geographical criteria such as high seas,

[36] Lewis M. Alexander, *Navigational Restrictions within the New Law of the Sea Context: Geographical Implications for the US* (Peace Dale: Offshore Consultants, 1986) 95.
[37] Ibid.
[38] Churchill and Lowe, *supra* note 5 at 10.
[39] Brown, *supra* note 10 at 86.

exclusive economic zones, territorial seas, islands and other legal criteria such as the use of the straight baseline method, UNCLOS 82 has established six different categories of straits, as shown in the table below.

| CATEGORY | DESCRIPTION | RELEVANT PROVISION UNDER UNCLOS 82 | EXAMPLE |
|---|---|---|---|
| One | High seas or EEZ corridor runs through the middle | Art. 36 recognizes straits used for international navigation where there exists through the strait a high seas or EEZ route of similar convenience with respect to navigational or hydrographical characteristics. | Bass Strait, in Australia |
| Two | Formed by high seas/EEZs | Art.37 recognizes straits covered by territorial seas situated between a high seas or an EEZ and another part of the high seas or an EEZ. | Straits of Malacca and Singapore |
| Three | Strait Situated between part of the high seas or an EEZ and the territorial sea of a foreign state. | Art. 45(1) (b) refers to straits used for international navigation located between a part of the high seas or an EEZ and the territorial sea of a foreign state. | Strait of Juan de Fuca found between the United States and Canada |
| Four | Formed by an island of a strait state and its mainland | Art. 38(1) refers to a strait covered by a territorial sea which is formed by an island of a strait bordering the strait and its mainland, and seaward of the island there exists high seas or an EEZ. | Strait of Messina between Italy and Sicily |
| Five | Long-standing convention | Art. 35(c) recognizes straits regulated in whole or in part by long-standing international conventions in force specifically relating to such straits. Such conventions may confer greater freedom of navigation. | The arrangement under the 1937 Montreux Convention regulating the Turkish Straits |
| Six | Straits that were previously territorial sea | Art.35(a), read together with Art.8(2), highlights straits used for international navigation where the waters of the strait were previously territorial seas but, since the establishment of straight baselines in accordance with the method set forth in Art.7, are now considered as internal waters. | |

*Source:* Adapted from Mary George, "Transit Passage and Pollution Control in Straits under the 1982 Law of the Sea Convention", in *Ocean Development and International Law*, vol. 33 (New York: Taylor and Francis, 2002) 189-205.

The above table suggests that UNCLOS 82 provides a general regime of transit passage for many international straits. Article 38 (2) of the Convention provides:

> Transit passage means the exercise in accordance with this Part of the freedom of navigation and of over flight solely for the purpose of continuous and expeditious transit of the strait between one part of the

> high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.[40]

Key phrases in the above provision are: "freedom of navigation" and "solely for the purpose of continuous and expeditious transit of the strait". Clearly, transit passage is a right akin to freedom of the high seas, on condition however that the transit is continuous and expeditious.[41] Thus, the implication of the transit passage regime for all strait states is that user states have "…unlimited and maximized freedom of passage."[42]

However, it is important to note that transit through an area is subject to the sovereignty of the coastal state, which implies that the freedom of navigation has to be subjected to a number of limiting rules designed to protect the interests of the coastal state and promote safety of navigation.[43] Indeed, when exercising the right of transit passage, article 39 of UNCLOS states that ships are required to proceed "…without delay, refrain from threat of use of force, comply with the convention and other principles of international law, and refrain from activities other than those incidental to their normal modes of continuous and expeditious transit."[44]

### 3.3.4 Navigation through archipelagic waters

Archipelagic waters comprise all the maritime waters within archipelagic baselines.[45] An archipelagic state is defined under Article 46 of UNCLOS as "a state constituted wholly by one or more archipelagos and may include other islands". An archipelago is defined in the same article as:

> A group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical,

[40] UNCLOS 82, online *supra* note 4.
[41] Brown, *supra* note 10 at 89.
[42] Ibid.
[43] Ibid. at 60.
[44] Ibid.
[45] Churchill and Lowe, *supra* note 5 at 125.

> economic and political entity, or which historically have been regarded as such.[46]

As provided in Article 49 of UNCLOS[47], an archipelagic state has sovereignty over its archipelagic waters, including their superjacent air space, subjacent seabed and subsoil, and the resources contained in it. However, this sovereignty is obviously subject to a number of rights enjoyed by third states.

#### 3.3.4.1 Innocent passage through archipelagic waters

A close look at articles 50, 52 and 54 indicates that in archipelagic waters other than the designated sea lanes, ships of all states enjoy the right of innocent passage, except in inland waters delimited by straight lines drawn across mouths of rivers, bays and entrance to ports.[48]

Innocent passage should be understood here in the same sense as discussed earlier in this chapter. In other words, and as per Article 52(1), the ships of all states enjoy in archipelagic waters the same right of innocent passage as they enjoy in the territorial sea. Hence, the earlier discussion on the balance between coastal State jurisdiction and rights of navigation for the territorial sea would also apply in the case of archipelagic waters.

#### 3.3.4.2 Archipelagic sea lanes passage

Under UNCLOS, the archipelagic state is also permitted to designate sea and air lanes or routes for ships or aircraft of all states to follow.[49] According to Article 53 (1), (2) and (9), sea-lanes must be designated in consultation with the "competent international organisation" (by which is meant the IMO).[50]

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[46] UNCLOS 82, online *supra* note 4.
[47] Ibid.
[48] Alexander, *supra* note 36.
[49] Churchill and Lowe, *supra* note 5 at 127.
[50] Ibid.

Where an archipelagic state does not designate sea lanes ships of all states navigate through routes normally used for international navigation. Indeed, Article 53 (12) of UNCLOS provides:

> If an archipelagic state does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation.[51]

In the case of both Article 53(1), (2) and (9) and Article 53(12), the ships of all states enjoy the right of archipelagic sea-lane passage. This right is more extensive than the right of innocent passage. The right of archipelagic sea-lane passage means navigation in the normal mode (that is "free" navigation); but solely for the purpose of continuous and expeditious transit between two areas of the high seas or between two areas of exclusive economic zone.[52]

Indeed, it has been noted, on the basis of articles 53 and 54 of UNCLOS, that archipelagic sea-lane passage is essentially the same as transit passage through straits, and the rights and duties of foreign states and the archipelagic state in respect of archipelagic sea-lane passage are the same, *mutatis mutandis*, as the rights and duties of foreign states and strait states in respect of transit passage.[53]

Whatever the difference or relationship between innocent passage, transit passage and archipelagic sea-lane passage, in terms of general jurisdiction (both legislative and enforcement), it is crucial to realize how UNCLOS 82 is involved in a delicate "balancing act" between the sovereignty and sovereign rights of the coastal state on the one hand, and the rights of navigation and hence of the flag state on the other, taking into account the specificities of each type of waters.

[51] UNCLOS 82, online *supra* note 4.
[52] Churchill and Lowe, *supra* note 5 at 127.
[53] Molenaar, *supra* note 7 at 341.

## 3.4 The contiguous zone

### 3.4.1 Definition

The contiguous zone is simply the 12 nautical miles zone contiguous to the territorial sea of the coastal state. Since the territorial sea itself covers 12 nautical miles, this 12 nautical mile distance may be implied from article 33(2) of UNCLOS 82, which provides that the contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.[54]

Coastal states are not obliged to maintain contiguous zones, as they are to maintain territorial seas; the contiguous zone is not automatically ascribed to the coastal state.[55]

### 3.4.2 Jurisdiction within the contiguous zone

As per article 33(2) of UNCLOS 82, the contiguous zone falls within the exclusive economic zone, the consequence being in theory that the presumption against coastal state jurisdiction is removed.[56] Article 33(1) of UNCLOS provides:

> In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal state may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration, sanitary laws and regulations committed within its territory or territorial sea.[57]

It has been noted that a coastal state's rights in the contiguous zone is a functional and protective measure.[58] Indeed, the preventive control authorized under article 33(1) is exercisable only in relation to incoming vessels, and it is clear that the article

[54] UNCLOS 82, online *supra* note 4.
[55] Churchill and Lowe, *supra* note 5 at 127.
[56] Ibid.
[57] UNCLOS 82, online *supra* note 4.
[58] Z. Oya Özçayir, *Port State Control* (Hong Kong: LLP, 2001) 72.

does not recognize the prescriptive or enforcement authority of the coastal state to protect the environment of the contiguous zone itself.[59]

Obviously, therefore, the right of the coastal state in the contiguous zone does not amount to an exercise of sovereignty (or exclusive jurisdiction).[60] One may thus simply say that, within the contiguous zone, all vessels in principle enjoy freedom of navigation, subject only to the limitations under Article 33 (1) of UNCLOS.[61]

## 3.5 Continental shelf

### 3.5.1 Continental shelf: definition

According to article 76(1) of UNCLOS 82, the continental shelf of a coastal state comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.[62] The article also adds in paragraph 2 that the continental shelf of a coastal state shall not extend beyond the limits provided for in (article 76) paragraphs 4 to 6.[63]

### 3.5.2 Continental shelf jurisdiction

Based on article 78(1) of UNCLOS 82, the rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters or that of the airspace above those waters. According to Christos L. Rozakis, the above article means two things: a) that the "… superjacent waters are exclusive economic zones, entailing rights and obligations with regard to the coastal state and third countries, or

[59] Ibid.
[60] Ibid.
[61] Churchill and Lowe, *supra* note 5 at 264.
[62] UNCLOS 82, online *supra* note 4.
[63] See Ibid.

high seas when the coastal state has not established an exclusive economic zone, or high seas in all cases for that part of the sea which extends beyond 200 nautical miles, and b) that the airspace over the same area is absolutely free."[64]

In the area governed by the high seas regime, the freedoms guaranteed under international law will apply to third states.[65] However, differences have arisen from the need for coastal states to exercise their rights. In this regard, article 78(2) of UNCLOS 82 provides that the exercise of the rights of the coastal state over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other states as provided for in the Convention.[66]

By virtue of article 78, the coastal state may intervene in the exercise of the freedoms of the high seas if its interference is justifiable. Logically, interference is justifiable when it is essential to the coastal state's ability to exercise its rights. However, the coastal state must be extremely cautious in interfering with freedoms and it must avoid all action "…not absolutely essential for the exercise of its freedoms."[67]

## 3.6 The exclusive economic zone (EEZ)

### 3.6.1 The EEZ: definition

According to The Encyclopedia of Public International Law, the EEZ is an area beyond and adjacent to the territorial sea, not extending beyond 200 nautical miles from the baseline of the territorial sea, in which the coastal state enjoys special

[64] Christos L. Rozakis, "Continental Shelf" in Rudolf Bernhardt, ed., *Encyclopedia of Public International Law* vol. 1 (Amsterdam: North Holland and Elsevier Science, 1992) 790.
[65] Ibid.
[66] UNCLOS 82, online *supra* note 4.
[67] Rozakis, *supra* note 64.

authority principally for certain economic purposes.[68] According to article 57 of UNCLOS 82, the outer limit of the EEZ shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.[69] The right to claim EEZ is discretionary rather than mandatory.

### 3.6.2 Some aspects of EEZ jurisdiction

The general principle, as per article 60 of UNCLOS 82, for example, is that the authority to be exercised by the coastal state in the EEZ is limited and no activities considered under UNCLOS as falling outside the rights or competence of the coastal state may be placed under its authority.[70] All other states, whether coastal or land-locked, continue to enjoy in the EEZ the freedoms of navigation and overflight, together with the freedom to lay submarine cables and pipelines and engage in other internationally lawful uses of the sea exercisable under the regime of the high seas.[71]

In general, coastal state authority within the EEZ could be classified as follows:

a) sovereign rights for the purpose of exploring, exploiting, conserving and managing the natural resources, whether living or non-living, of the superjacent waters and of the seabed and its subsoil and with regard to other activities for the economic exploitation and exploration of the zone;
b) jurisdiction with regard to the establishment and use of artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment;
c) other rights and duties provided for in the Convention. [72]

As concerns protection and preservation of the environment, it is important to note two key points. First, the coastal state has some responsibilities for the preservation

[68] Shigeru Oda, "Exclusive Economic Zone" in Rudolf Bernhardt, ed., *Encyclopedia of Public International Law* vol. 2 (Amsterdam: North Holland and Elsevier Science, 1992) 306.
[69] See UNCLOS 82, online *supra* note 4.
[70] Oda, *supra* note 68.
[71] Ibid.
[72] See classification at ibid. See also article 56 of UNCLOS at UNCLOS 82, online *supra* note 4.

of the marine environment in the EEZ. For example, dumping within the zone is not to be carried out without the express prior approval of the coastal state, and the coastal state is entitled to enforce the rules and regulations with regard to dumping within the zone.[73]

The second point is to the effect that coastal states, in respect of their EEZ and for the purpose of enforcement as provided under UNCLOS 82, may adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference.[74]

In light of the foregoing, it is safe to say that the authority of the coastal state in respect of the EEZ is limited by UNCLOS 82, and any additional dimension to that authority can only come about through action taken within the "competent international organization or general diplomatic conference". Furthermore, the nature of coastal state control over the EEZ has been described as "functional"[75] in that jurisdiction is accorded for specific purposes. Finally, the requirement that the coastal state should have due regard for the rights and interests of other states is a crucial one.

### 3.7 Right of Hot Pursuit[76]

The doctrine of Hot Pursuit is regarded as an important enforcement right of coastal states.[77] Hot pursuit is provided for under article 111 of UNCLOS 82. Based on that

[73] Oda, *supra* note 68 at 310.
[74] See article 211(5) at UNCLOS 82, online *supra* note 4.
[75] A. D. Couper and Edgar Gold, eds., *The Marine Environment and Sustainable Development: Law, Policy, and Science* (Honolulu: University of Hawaii Law of the Sea Institute, 1993) 20.
[76] See also chapter 2 *supra.*
[77] Nicholas M. Poulantzas, *The Right of Hot Pursuit in International Law*, 2nd ed. (The Hague: Martinus Nijhoff Publishers, 2002) 42.

article as well as on a definition provided by Nicholas M. Poulantzas[78], it is submitted that maritime hot pursuit may be generally defined as the right of the coastal state to continue, outside the territorial sea, the contiguous zone, or - under special circumstances - the EEZ, the continental shelf (including safety zones around the continental shelf installation) the pursuit of a foreign vessel which, while in the internal waters or the territorial sea, the contiguous zone, the EEZ, the continental shelf (including safety zones around the continental shelf installations) has violated the laws and regulations of this state, provided, however, that the pursuit has commenced immediately after the offence and has not been interrupted.

The doctrine is closely related to the principle of the freedom of the high seas since it constitutes one of the traditional limitations to that freedom.[79] It follows that hot pursuit is an exception to the rule of exclusive jurisdiction of the flag state on the high seas over vessels flying its flag.[80] It seems therefore that the right of hot pursuit is at the same time a right of the coastal state established for the effective protection of areas under its sovereignty or jurisdiction.

Drawing mainly from article 111 of UNCLOS 82, Erik Jaap Molenaar has made three pertinent conclusions regarding hot pursuit, viz.[81] First, the right of hot pursuit enables the coastal state to pursue a foreign vessel across maritime zones and into the high seas, provided it has good reason to believe that its laws or regulations have been violated. Secondly, although the right of hot pursuit will clearly be very relevant for issues like drug trafficking and violations of fisheries legislation, one may add that the right would also be useful in violations related to vessel-source marine pollution, as in the case of unlawful discharge. Thirdly, the right of hot pursuit must be justified (paragraph 8 of Art. 111), which implies that a right of hot

[78] Ibid.
[79] Ibid.
[80] Ibid.
[81] Molenaar, *supra* note 7 at 250 – 253.

pursuit does not exist in circumstances which would in the territorial sea amount to unreasonably hampering innocent passage.

From the foregoing, it is fair to simply say that the doctrine of hot pursuit, if carefully applied, enhances the authority of coastal state and constitutes an important safeguard for the flag state.

### 3.8 High seas

The area beyond the 200 nautical mile exclusive economic zone is considered high seas, which remain subject to the traditional "freedom of the seas" regime.[82]

Under article 86 of UNCLOS 82, the high seas provisions "apply to all parts of the sea that are not included in the EEZ, in the territorial sea or in the archipelagic waters of an archipelagic state".[83] The spatial limits of the high seas are variable in time and, according to Treves, "… they depend on state action concerning the limits of the territorial seas and the institution of archipelagic waters and of exclusive economic zones."[84]

The freedom of the high seas may be exercised by both coastal and non-coastal states. In this connection, article 87 (1) of UNCLOS 82 provides as follows:

> The high seas are open to all states, whether coastal or land-locked.
> Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked states:
> (a) freedom of navigation;
> (b) freedom of overflight;
> (c) freedom to lay submarine cables and pipelines….[85]

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[82] Couper and Gold, eds., *supra* note 75 at 21.
[83] UNCLOS 82, online *supra* note 4.
[84] Tullio Treves, "High Seas" in Rudolf Bernhardt, ed., *Encyclopedia of Public International Law* vol. 2 (Amsterdam: North Holland and Elsevier Science, 1992) 706.
[85] UNCLOS 82, online *supra* note 4.

However, article 87 (2) provides that all these freedoms shall be exercised by all states with due regard for the interests of other states in their exercise of the freedom of the high seas, and also with due regard for the rights under the Convention with respect to activities in the Area (special regime established for the deep-sea bed).[86]

Furthermore, according to article 89 of UNCLOS, the high seas are not subject to the sovereignty of any state. However, the dominant principle on the high seas is the presumption of the exclusiveness of flag state jurisdiction, subject only to the exceptions provided under international law.[87] Examples of such exceptions include 'hot pursuit' (discussed earlier in this chapter) and the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969 (The Intervention Convention 1969), as amended (cited at page 6 *supra*).

### 3.9 The Intervention Convention 1969

According to Erik Jaap Molenaar, The Intervention Convention, as amended, (cited at p. 6 *supra*) "… affirms the right of the coastal state to take measures on the high seas as may be necessary to prevent, mitigate or eliminate danger to the coastline or related interest from pollution by oil or the threat thereof, following upon a maritime casualty." [88]

Although the right of the coastal state to take action against foreign vessels in the territorial sea has been long established, its right to do so beyond that limit seems to have remained challengeable in international law. For example, in the *Torrey Canyon*, the British Government had to base its action of bombing the vessel out in

[86] Ibid.
[87] Özçayir, *supra* note 58 at 73.
[88] Molenaar, *supra* note 7 at 198.

the high sea on justification ranging from the principle of necessity to the right of self-defence in customary international law.[89]

Since the conclusion of the Intervention Convention, the right to intervene in case of polluting casualties involving foreign vessels beyond the territorial sea is now generally accepted as a part of customary international law.[90] Indeed, that right is included in article 221 of UNCLOS 82. Article 221 of UNCLOS provides:

> 1. Nothing in this Part shall prejudice the right of States, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial seas proportionate to the actual or threatened damage to protest that coastlines or related interests, including fishing, from pollution or threat or pollution following upon a maritime casualty or act relating to such a casualty, which may reasonably be expected to result in major harmful consequences.
>
> 2. For the purposes of this article, "maritime casualty" means a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vesselor cargo.[91]

Patricia Birnie has pointed out four limitations to the application to the Intervention Convention as regards the coastal state, viz.[92] First, the coastal state is allowed to take only such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to its coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty which may reasonably be expected to result in harmful consequences.

Secondly, 'intervention' applies only to maritime casualties, and is limited to collisions, strandings, and other navigational accidents, or occurrences on board or

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[89] Patricia Birnie, "Ocean Governance: Past, Present and Future" in T. A. Mensah, ed., *Ocean Governance: Strategies and Approaches for the 21st Century* (Honolulu: University of Hawaii Law of the Sea Institute) 623.
[90] Ibid.
[91] UNCLOS 82, online *supra* note 4.
[92] Birnie, *supra* note 89 at 623-624.

external to a ship, thus excluding operational discharges or dumping. It is further required that material damage or imminent threat thereof result from the accident.

Thirdly, there is a requirement that there be a danger or threat that is grave and imminent and has 'major harmful consequences'. This also is a limiting factor. However, see article 221 of UNCLOS above, which is less restrictive. It talks of 'actual or threatened damage', which may reasonably be expected to result in 'major harmful consequences' to the coastal state's interests.

Finally, it is left to the discretion of the coastal state to evaluate not only the risk but also the nature of the damage and to then decide what measures are 'proportionate' with regard to the risk.

### 3.10 Conclusion

This chapter shows how UNCLOS 82 marks a giant step away from customary international law. The chapter brings out a number of points. First, it shows that UNCLOS 82 carefully embraces all the main interests of the coastal state (including the environment) in balancing coastal state jurisdiction and international navigation rights. In addition to the traditional interests of the coastal state as discussed in the previous chapter, the environmental dimension now features prominently. As well, detailed maritime geographical diversity is considered in determining coastal state jurisdiction in relation to international navigation.

This writer is of the view that the balance between coastal state jurisdiction and international navigation rights under UNCLOS 82 is qualitative rather than quantitative, in the sense that it is not spelt out only in terms of boundary divides. In other words, the interests of both the coastal state and the flag state are taken care of in each of the maritime zones on the basis of 'due regard'. As a result, the territorial waters – freedom of the high seas divide as understood in the traditional sense seems to have been discontinued under UNCLOS.

Secondly, in balancing the two, UNCLOS does highlight as necessary those particular coastal state interests that need specific attention. In the case of vessel-source pollution, article 221 of UNCLOS, which is itself reflective of the Intervention Convention 1969, would be a good example. Nevertheless, even in cases of enhanced coastal state enforcement jurisdiction, UNCLOS carefully injects safeguards to minimize the risk of excesses in order to protect the interests of both the flag state and the coastal state.

Thirdly, the manner in which UNCLOS balances coastal state jurisdiction and international navigation rights may be described as detailed and delicate. Given the fragile nature of the equilibrium, among other reasons, UNCLOS 82 does recognize that the law of the sea will continue to develop and that there is need to ensure that the issues will be taken care of in the future. As concerns vessel-source marine pollution in particular, one could safely refer to the provision regarding the importance of regional groupings as well as those relating to “the competent international organization”. It is expected in particular that IMO will be useful in addressing issues that have to do, among other things, with interfering with navigation rights. This brings to mind the question as to the extent to which coastal states have in practice maintained the delicate balance between their jurisdiction and international navigation. That is the focus of the next chapter.

CHAPTER FOUR

# COASTAL STATE JURISDICTION AND INTERNATIONAL NAVIGATION RIGHTS POST-UNCLOS 82: DISRUPTING THE EQUILIBRIUM?

## 4.1 Introduction

UNCLOS 82 entered into force on 16 November 1994 following the deposit of the 60th instrument of ratification by Guyana a year earlier.[1] Besides the fact that the Convention did not necessarily cover the length and breadth of every aspect of the law of the sea, developments have continued to take place since it was signed and eventually entered into force.

However, UNCLOS 82 does provide for the "progressive development of the law of the sea" as explained in the conclusion to the previous chapter. As far as vessel-source marine pollution is concerned, work undertaken by scientists (such as the Joint Group of Experts on the Scientific Aspects of Marine Evironmental Protection – GESAMP), non-governmental organizations (NGOs), among others, have continued to contribute immensely towards environmental awareness. Needless to mention the alarming and highly publicized maritime accidents registered here and there on the globe that resulted in pollution. Consequently, coastal states have had to grapple with related issues such as political pressure from environmental groups. All these developments do influence the way coastal states would like to interfere with international navigation. Hence, coastal state jurisdiction is based not only on what UNCLOS provides; it is also determined by events on the ground, hence the relevance of state practice.

[1] Mary George, "Transit Passage and Pollution Control in Straits under UNCLOS 82" *Ocean Development and International Law* - Vol.33 No.2 (2002) 189.

This chapter explores aspects of post-UNCLOS 82 coastal state practice to ascertain the extent to which that practice has tilted the delicate balance provided by UNCLOS 82, if at all, in favour of the coastal state and at the expense of the flag state. Only aspects of apparently deviant state practice are considered, which is not to rebut the presumption that coastal states, for the most part, act more or less correctly.

It is important to consider the meaning of state practice first before proceeding with the discussion. According to D. P. O'Connell, state practice refers to general and consistent practice adopted by directly concerned states; the practice need not be universally adopted, and it may or may not be in tune with international law.[2] Molenaar adds that state practice may be said to originate in both the collective and the individual spheres.[3] Collective state practice exists in the form of bilateral or multilateral conventions or other international instruments such as the International Maritime Organization (IMO) resolutions.[4] This could relate, for example, to situations of regional action with regard to specific issues such as special areas and particularly sensitive sea areas (PSSAs). Individual state practice, for its part, may consist of unilateral declarations, legislation, and actual exercises of enforcement.[5]

The discussion on state practice in this chapter goes in the following order: unilateral action (including a special consideration of the case of ships in distress) and regional action (with a focus on special areas and PSSAs).

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[2] State practice should be distinguished from 'usages' and 'customary international law'. 'Usages' simply refers to practice that may or may not be widespread or that may or may not be accepted or recognized by other states. Customary international law requires state practice coupled with *opinio juris sive necessitates*. For further details on the distinction between the three concepts, see, for example, D. P. O'Connell, *The International Law of the Sea*-vol.1 (Oxford: Clarendon press, 1982) 31-35. See also R. R. Churchill and A. V. lowe, *The Law of the Sea* (Manchester: Juris Publishing, 1999) 7-9.

[3] Erik Jaap Molenaar, *Coastal State Jurisdiction Over Vessel-source Pollution* (The Hague: Kluwer Law International, 1998) 4.

[4] Ibid.

[5] Ibid.

## 4.2 Unilateralism

Historically, unilateral state action has been frequently decisive in changing the law of the sea. The evolution of the law relating to adjacent fishing zones, and eventually the exclusive economic zone (EEZ), seems to be the most striking illustration of the cumulative effect of unilateral acts.[6] As concerns post-UNCLOS 82 and with regard to international navigation rights, it is proposed to discuss unilateralism in the following cases: the United States (US) and the Oil Pollution Act (OPA) 1990, the *Prestige* and Spain's decision to ban single hull tankers from its exclusive economic zone (EEZ), the European Union's (EU's) accelerated phase-out of single hull tankers, and the use of national legislation by some coastal states to claim greater rights within maritime zones than permitted under UNCLOS 82. The attitude of coastal states with regard to ships in distress will also be considered.

### 4.2.1 The United States and the Oil Pollution Act (OPA) 90[7]

In the wake of the Exxon Valdez disaster in 1989 off the coast of Alaska, the US enacted the Oil Pollution Act into law in August 1990.[8] OPA 90 constituted a much stricter liability regime than anything international under the IMO auspices at the time. The Act, *inter alia*, requires foreign tankers calling at US ports to have double hulls. It improved America's capability to prevent and respond to oil spills by establishing provisions that expanded the federal government's ability, and provided the money and resources necessary to respond to spills.[9] The act also created the

[6] O'Connell, *supra* note 2 at 33.
[7] It is important to note that the US is not yet a party to UNCLOS 82. However, many authors and several states have maintained that much of UNCLOS 82 has passed into customary international law (although this may not be the case with all the provisions of the Convention). Indeed, in the drafting stage of IMO Resolution A.847 (20), for example, the US itself proposed to incorporate an obligation for all states to comply with IMO Conventions, on the ground that UNCLOS 82 and the obligation coupled to rules of reference represent customary law. For details, see Erik Jaap Molenaar, *supra* note 3 at 161.
[8] Oil Pollution Act, 90; Online: http://www.epa.gov/oilspill/opaover (accessed on 10/08/ 2004).
[9] Ibid.

nation's Oil Spill Liability Trust Fund, which is available to provide up to one billion dollars per spill incident.[10]

As concerns this dissertation, the most important aspect of OPA 90 is the banning of single hull tankers within US ports. Although the double hull requirement was considered at the time to be far-fetched, it could be argued that the US was merely exercising its full sovereignty within its internal waters. However, R.R. Churchill and A.V. Lowe have commented on the passing of OPA 90 in relation to UNCLOS 82 by stating, *inter alia*, that:

> While the US measure is in accordance with the jurisdiction of port states under both customary law and the law of the sea Convention, it may be questioned how far it is in accordance with the spirit of the convention, which is to **discourage unilateral design and construction standards for ships** (emphasis added).[11]

As stated earlier[12], UNCLOS 82 itself clearly implies in articles 25(2), 211(3) and 225 that coastal states may set conditions for entry to their ports. However, as far as design and construction standards for ships are concerned, article 94(3) of UNCLOS 82 provides that:

> Every state shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to: (a) the construction, equipment and seaworthiness of ships…[13]

Furthermore, article 94(5) of UNCLOS provides:

> In taking the measures called for in paragraphs 3 and 4 each state is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to ensure their observance.[14]

Clearly, therefore, UNCLOS 82 encourages multilateral design and construction standards for ships. This will ensure that the delicate balance between coastal state

[10] Ibid.
[11] Churchill and Lowe, *supra* note 2 at 353.
[12] See chapter 3 *supra*.
[13] UNCLOS 82, online: http://www.univie.ac.at/RI/KONTERM/Intlaw (accessed on 14/08/2004).
[14] Ibid.

jurisdiction and flag state responsibilities as relates to rights of navigation is maintained.

One may wonder why OPA 90 was established outside the framework of the IMO. Was it a problem of political pressure? Was it simply a matter of sheer urgency? It would be safe to say, rather laconically, that the US seemed to have made the change simply on the hypothesis that change was necessary. It is said that the Truman Proclamation on the Continental Shelf, another US unilateral act, was not enunciated 'out of the blue,' but was preceded by extensive diplomatic overtures to ensure that it would gain substantial support.[15] If the Truman Proclamation is anything to go by, it is possible that the US was aware that the strict nature of OPA 90 with regard, *inter alia*, to navigation rights was unlikely to draw support from other states, especially flag states, either within the IMO or any other diplomatic milieu.

Thus, OPA 90 was in some respects the epitome of coastal state unilateralism. Yet it is important to add that the EU and the IMO have recently introduced the double hull requirement, even if the US regime remains stricter in some respects than the others.[16]

### 4.2.2 The *Prestige* and Spain's ban on single hull tankers from its EEZ

On 19 November 2002, the oil tanker Prestige carrying 77, 000 metric tonnes of fuel oil broke in two and sank off the coast of Spain. Oil leaking from the tanker had earlier begun polluting the shores of Galicia, and sinking now meant that the potential for major pollution was real.

Eager to minimize the risk of vessel-source marine pollution in the future, and anxious perhaps to placate the pollution victims such as fishermen in a bid to mitigate any political fallout, the Spanish government decided to ban all single hull

[15] O'Connell, *supra* note 2 at 31-32.
[16] Churchill and Lowe, *supra* note 2 at 353.

tankers from its EEZ. The ban came to the limelight when Spain instructed Norwegian-flagged single hull tankers en route from Europe to Asia to get out of the Spanish EEZ, in blatant violation of UNCLOS 82.[17] Needless to add that the Norwegian government responded by delivering a formal protest with the Spanish chargé d'affaires in Oslo for what it considered to be a violation of international law. It is interesting to note that the instrument of the Spanish decision, Royal decree-law of 13 December 2002, actually bans "…all single hull tankers, regardless of the flag, carrying heavy fuel, tar, asphaltic bitumen and heavy crude, entering **Spanish ports, terminals or anchorages** (emphasis added)".[18]

The obvious question one may ask at this point is, how exactly did the Spanish ban violate UNCLOS 82? Article 211(5) of UNCLOS 82 provides the only circumstances in which the banning of single hull tankers, such as in the case of Spain, could be recognized in international law. It provides that:

> Coastal States, for the purpose of enforcement as provided for in section 6, may in respect of their exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards established through the competent international organization or general diplomatic conference.[19]

Clearly, therefore, the banning of single hull tankers should only be justified if it has become a "generally accepted international rule and standard established through the competent international organization or general diplomatic conference." Such is the

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[17] Norges Rederiforbund, online: http://www.rederi.no/Article.asp? (accessed on 10th August, 2004). Note also that Portugal and France made moves similar to that of Spain. All three countries have since continued with efforts to protect the area. See the discussion on the EU and PSSAs later in this chapter.

[18] 24343 Royal Decree-Law 9/2002 of 13th December; Online: INTERTANKO newsdesk, online: http://www.intertanko.com/communications/issues (accessed on 10th August, 2004). Note that the decree does not mention the EEZ. Hence, in the absence of any other instrument, the Spanish ban was not expressly provided for. For details, see: The MaritimeAdvocate.com, online: http://www.maritimeadvocate.com (accessed on 10th August, 2004).

[19] UNCLOS 82, online: http:/www.un.org/depts/los/losdocs.htm (accessed on 10th August, 2004).

ideal. However, it is important to note in this regard that the accelerated phase-out of single hull tankers (with a deadline in 2010) was decided through a compromise agreement between the IMO and the EU, as opposed to having a "generally accepted international rule and standard" on the subject.

Finally, it will be recalled that, for purposes of international navigation, the EEZ may be assimilated to the high seas regime, which implies that coastal states in their EEZ accord to foreign shipping the right of freedom of navigation as clearly spelt out in article 58 of UNCLOS 82, as follows:

> 58(1) In the exclusive economic zone all states, whether coastal or landlocked, enjoy, subject to the relevant provisions of this Convention, the freedom referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.[20]

Article 58(3), for its part, highlights the notion of 'due regard' in the following terms:

> In exercising their right and performing their duties under this Convention in the EEZ, states shall have due regard to the rights and duties of the coastal state and shall comply with the laws and regulations adopted by the coastal state in accordance with provisions of this Convention and other rules of international law in so far as they are not incompatible with this part.[21]

From the foregoing, it follows that Spain's ban amounted to a wanton interference with the freedom of navigation. The flag states, such as Norway, for their part, were right in contesting or protesting the ban, since it was based on national law rather than international law as provided for under articles 211(5) and 58(1) and (3) of UNCLOS 82.

[20] Ibid.
[21] Ibid.

### 4.2.3 National laws claiming greater rights within maritime zones

It will be recalled that the previous chapter showed how UNCLOS 82 spells out the coastal state's rights and duties within each maritime zone, vis-à-vis international navigation. However, while a few states are not parties to UNCLOS 82, those that have implemented the Convention have not always done so to the letter.[22] This subsection gives examples of states that have, through their national legislation (and contrary to UNCLOS), claimed greater rights within certain maritime zones. The example of India is discussed. Such naked unilateralism is considered here in terms of how it could potentially impact on international navigation rights.

It is well known that, on the strength of article 58 of UNCLOS 82, ships enjoy the right of freedom of navigation in the EEZ, subject only to the relevant provisions of the Convention. However, the Maldives and Guinea accord to foreign shipping the right, not of freedom of navigation, but of innocent passage, in their EEZs.[23] Similarly, possible unjustifiable interference with navigation may result from the legislation of Guyana, Mauritius, Pakistan, India and Seychelles, each of which claims the competence to designate certain areas of its EEZ for resource exploitation.[24]

A somewhat detailed examination of the legislation of one of the above states (India) will give some insight into what this unilateralism concerns. The instrument to refer to is the Indian Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zone Act, 1976 (hereinafter referred to as the India Act), article 7(6) of which is quite revealing. It reads:

> The Central Government may, by notification in the Official Gazette –
> (a) declare any area of the EEZ to be a designated area; and
> (b) make such provisions as it may deem necessary with respect to –

[22] Note that the divide between UNCLOS 82 state parties and non-state parties may no longer be particularly relevant, because it is generally accepted that UNCLOS 82 has passed into customary international law. For details on this opinion, see footnote 7 of this chapter, *supra*.
[23] Molenaar, *supra* note 3 at 237.
[24] Ibid.

i. the exploration, exploitation and protection of the resources of such designated area; or
ii. other activities for the economic exploitation and exploration of such designated area such as the production of energy from tides, winds and currents; or
iii. the safety and protection of artificial islands, offshore terminals, installations and other structures and devices in such designated area; or
iv. the protection of the marine environment of such designated area; or
v. customs and other fiscal matter in relation to such designated area.[25]

Clearly, by being potentially limited to the 'designated areas' concept, the above national legislation seemingly giving effect to article 211 of UNCLOS 82 does not contain all the elements of compromise on which the article was based.[26] By so doing, India is likely to give priority to her own interests with secondary regard for international navigation rights.

### 4.2.4 EU move to ban single hull tankers

Steps taken by the EU to ban single hull tankers from European waters after the Erika disaster fall within what this writer would like to refer to as "regional unilateralism", which is different from regionalism as discussed later in this chapter. Regional unilateralism simply implies that a region may be taking actions that diverge from mainstream international law, which affect third states that do not belong to that region in treaty terms. It would be recalled that regional law, like bilateral law, does not permit state parties to violate the international environmental rights of third countries, but it could well adjust the rights and responsibilities of the state parties among themselves.[27] Given the international nature of shipping, regionalism has actually come to mean actions taken within a region under the auspices of an international organization, as is the case with PSSAs, for example.

[25] The India Act, online: http://dgshipping.nic.in/notices (accessed on 25/08/2004).
[26] Molenaar, supra note 3 at 429.
[27] Fred L. Morrison and Rűdiger Wolfrum, eds., *International, Regional and National Environmental Law* (The Hague: Kluwer Law International, 2000) 126-127.

As concerns the Erika accident, it was on 12 December 1999, that the Maltese registered single hull oil tanker, the Erika, broke in two in the Bay of Biscay, off the southwest coast of Brittany, France, and sank.[28] The first of the thick fuel oil hit the French Atlantic coast and washed up at dozens of points simultaneously, and eventually about 400 km of beaches, including many popular holiday resorts were polluted by the oil, with thousands of seabirds being covered in it.[29]

The EU, beginning 21 March 2000, moved quickly to adopt a wide range of measures, contained in the Erika I and Erika II packages. In this regard, Uwe K. Jenisch reminds us that the EU (former European Economic Community (EEC)) has a long-standing history of taking stricter measures in the aftermath of dramatic accidents, such as those involving the *Amoco Cadiz*, the *Exxon Valdez*, and the *Herald of Free Enterprise*.[30] However, while the "pre-Erika phase" was characterized by what has been called an administrative (or bureaucratic) approach, the new "Erika phase" was marked by vigour and determination on the part of EU members.[31] Such is the backdrop against which to appreciate the Erika packages that followed the *Erika* and later the *Prestige*.

As far as rights of international navigation are concerned, Erika I proposed, notably, that there should be faster phasing out of single hull tankers entering Europeans waters for all oil tankers of 600 tonnes deadweight and above flying the flag of a Member State.[32] Concerned about the likely impact of this phasing out measure on international shipping and in keeping with UNCLOS 82 which encourages multilateral design and construction standards for ships, the IMO agreed to an EU regulation on the subject by revising its own Regulation 13G of Annex I to the

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[28] Z. Oya Özçayir, *Port State Control* (Hong Kong: LLP, 2001) 239.
[29] Ibid.
[30] Uwe K Jenisch, "EU Maritime Policy Transport – Maritime Policy, Legislation and Administration", *WMU Journal of Maritime Affairs* – April 2004, vol. 3, No.1 (Malmö: World Maritime University, 2004) 73.
[31] Ibid.
[32] Özçayir, *supra* note 28 at 266.

International Convention on the Prevention of Pollution from Ships (MARPOL) 73/78, as amended.[33]

Under Erika I, and II, the EU came up with a number of other proposals in areas such as community monitoring, control and information system for maritime traffic. However, the key point is that, as concerns the phasing in of double hull tankers, the IMO did strike an overall compromise with the EU.[34] Such EU-IMO compromise brings to mind at least three things. First, even though the US regulations on double hull remained stricter in some respects, the IMO and the EU had now both endorsed the double hull requirement that had in 1990 been condemned as a US unilateral initiative. Secondly, the EU had been prevented from acting unilaterally, and lastly, the EU succeeded in pushing the IMO faster along the double hull requirement path, while phasing out single hulls. It should be noted that already following OPA 90, the IMO established double hull standards in MARPOL in 1992.[35]

Meanwhile, the sinking of the *Prestige*[36] produced much movement within the European Union. However, suffice it to note that after the sinking, the EU has continued to act to protect European waters. This aspect will be considered under PSSAs below (see 4.3.2 *infra*).

### 4.2.5 The attitude of coastal states with regard to ships in distress

"Ships in distress" is a concept that refers to a situation where a ship may wish to head to the port or internal waters of the coastal state, not voluntarily, but exceptionally, in case of emergency. The question then arises whether the coastal state will be willing to accept such a ship in its waters. The point is to understand

[33] Obviously, this was a compromise between the IMO and the EU. In effect, the timetable for the phase-in of the double hull design or equivalent requirement that were eventually adopted at the EU and the IMO were less ambitious than those initially proposed by the European Commission. For further details, see: Commission of the European Communities 2002/0310 (COD), online: http://europa.eu.int/comm/transport/maritime (accessed on 14/08/2004).
[34] Özçayir, *supra* note 28.
[35] Ibid. at 268.
[36] See Spanish unilateral action, discussed earlier.

whether the practice today is for coastal states to consistently allow vessels in such circumstances to enjoy customary navigation and refuge rights.[37]

All ports lie usually wholly within a state territory and fall on that account under its territorial sovereignty. Customary international law acknowledges in principle full coastal state sovereignty within ports. Based on the principle of territoriality, this authority allows a port state not only to deny in principle access but also to prescribe non-discriminatory laws and regulations that determine conditions for the entry into its ports.[38]

The debate over the need for coastal states to provide places of refuge for ships in distress came to the limelight once more following the *Erika* and the *Castor*. The tankers in both cases were denied refuge, and it is believed that the circumstances were such that assistance was genuinely needed, which, if granted, could possibly have minimized the danger.[39] The additional dimension to this problem is that some coastal states can be so apprehensive as to go beyond merely refusing refuge in their ports to ships in distress. Indeed, details about the *Castor* and the *Prestige* show that some countries like Spain and Portugal actually turned away the tankers in distress from their EEZs or coastal waters.

The issue has always been to balance the interest of the coastal state against the danger facing the ship in distress. The IMO has in recent years been active in this domain. In November 2003, the IMO Assembly adopted two resolutions addressing the issue of places of refuge for ships in distress.

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[37] Ships in distress enjoy a clear customary right of entry into ports in special cases. See 3.1.2 (c ) of chapter 3 supra. Note that although UNCLOS 82 does not clearly provide for rights and duties with regard to places of refuge, the IMO has taken up the matter very seriously in recent years, as discussed later in this sub-section.

[38] Molenaar, *Coastal State Jurisdiction Over Vessel-source Pollution* (The Hague: Kluwer Law International, 1998) 428.

[39] See Aldo Chircop, "Ships in Distress, Environmental Threats to Coastal States, and Places of Refuge: New Directions for an *Ancien Régime*?" *Ocean Development and International Law*, vol. 33 No. 2 (2002) 208.

The first is Resolution A.949 (23) – Guidelines on Places of Refuge.[40] The guidelines recognize that, when a ship has suffered an incident, the best way of preventing damage or pollution from its progressive deterioration is to mend the situation, and that such an operation is best carried out in a safe area.[41] However, coastal states are expected to balance the interest of the affected ship with those of the environment and their own socio-economic aspects.

The second is Resolution A. 950 (23) – Maritime Assistance Services (MAS). It recommends that all coastal states should establish a maritime assistance service (MAS). The principal purposes would be, among other things, to receive the various reports, consultations and notifications required in a number of IMO instruments, as well as monitoring a ship's situation if such a report indicates that an incident may give rise to a situation whereby the ship may be in need of assistance.[42]

It is obvious that the above-mentioned IMO resolutions are fairly recent. These are soft law instruments and it seems that the strong desire by coastal states to avoid the risk of pollution does not favour the rather weak customary navigation rights of ships in distress, at least as far as internal waters are concerned. One may even wonder whether coastal states would not act pursuant to article 221 of UNCLOS 82 and the relevant provisions of the Intervention Convention[43] well before any ship in distress got anywhere close to their waters, depending on how serious the pollution threat is. This is usually a decision for the coastal state to make in such difficult circumstances.

[40] For further details of IMO information on places of refuge, see: http://www.imo.org/safety/mainframe.asp? (accessed on 13/08/2004).
[41] Ibid.
[42] Ibid.
[43] See the discussion on the Intervention Convention in Chapter 3 *supra*.

## 4.3 Regional Action

This section explores the extent to which coastal states through regional practice have acted within or beyond the scope of UNCLOS 82, in terms of imposing upon international navigation rights. Focus will be on special areas and PSSAs, with the European Union serving as the main illustrating region.

UNCLOS 82 recognises that regional considerations may lead to regional standards. Indeed, article 197 of the Convention provides that:

> States shall co-operate on a global basis and, as appropriate, on a regional basis, directly or through competent international organisations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.[44]

Meanwhile, the key UNCLOS 82 provision relating to special areas and PSSAs is article 211(6).[45]

### 4.3.1 Special Areas

UNCLOS 82 provides for extended coastal state enforcement powers in areas with specific characteristics. MARPOL 73/78 (Annexes I, II, and V) defines certain areas as special areas, in which, for technical reasons relating to their oceanographic and ecological condition and to their sea traffic, the adoption of special mandatory methods for the prevention of sea pollution is required.[46] It is also important to note that MARPOL Annex VI allows for special emission restrictions, such as is the case with Sulphur oxides (SOx) in the Baltic. In such circumstances, the coastal state has

[44] UNCLOS 82, online: http://www.un.org/depts/los/losdocs.htm (accessed on 10/08/2004).
[45] Ibid.
[46] See Ibid. Note also that the criteria for the identification of PSSAs and the criteria for the designation of special areas are not mutually exclusive. In many cases a PSSA may be identified within a special area and vice-versa. For more details, see online: http://www.imo.org/environment/mainframe.asp? (accessed on 14/08/2004).

the right to adopt the measures that have been developed by the IMO for such areas.[47]

Noteworthy also is article 211 (6) (c) of UNCLOS, which, separately from MARPOL 73/78, provides for special areas as follows:

> If the coastal state intends to adopt additional laws and regulations for the same area for the prevention, reduction and control of pollution from vessels, they shall, when submitting the aforesaid communication, at the same time notify the organisation thereof. Such additional laws and regulations may relate to discharges or navigational practices but shall not require foreign vessels to observe design, construction, manning or equipment standards other than generally accepted international rules and standards: they shall become applicable to foreign vessels 15 months after the submission of the communication to the organization, provided that the organisation agrees within 12 months after the submission of the communication.[48]

Clearly, therefore, where an article 211 (6) (a) special area exists, article 211 (6) (c) allows for additional measures to be taken by the same coastal state relating to discharges or navigational practices, provided that they are agreed to by the IMO.[49]

It is important not to confuse the notion of 'special areas' found in article 211 (6) (a) with the same term as appears in MARPOL 73/78, which can cover an entire sea such as the Black Sea or even the Mediterranean where entire EEZs are almost completely absent. It is stated in The Work of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution (1991-2000) that there are a number of differences between the article 211 (6) (a) and MARPOL 73/78 regimes. For example, article 211 (6) special areas are restricted in jurisdictional scope to the EEZ, while MARPOL special area provisions cover enclosed or semi-enclosed areas, which may include parts of the territorial sea, the EEZ and the high seas.[50]

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[47] See IMO Guidelines for designating special areas, online: http://www.imo.org/environment/mainframe.asp? (accessed on 15/08/2004).
[48] UNCLOS 82, online *supra* note 13.
[49] Erik Franckx, *Vessel-source Pollution and Coastal State Jurisdiction* (The Hague: Kluwer Law International, 2001) 97.
[50] Ibid.

Thus, coastal state enforcement powers do increase under the MARPOL special areas regime. As concerns navigational rights, this regime also implies that the flag state will have to play an important role with regard to this regime, based on its obligation to see to it that its vessels comply with the more restrictive conditions. This is so because of the general responsibility of flag states to ensure that vessels flying their flag comply with "applicable international rules and standards, established through the competent international organization for the prevention, reduction and control of pollution of the marine environment from vessels."[51]

Given the constant desire to reduce the risk of vessel-source marine pollution, many coastal states have in recent years applied through the IMO to have portions of their coastal areas designated as special areas.[52] The IMO Guidelines for the Designation of Special Areas under MARPOL 73/78 (as amended) referred to earlier are indicative of the desire to ensure that the interests of coastal states and flag states, among others, are thoroughly considered on the basis of relevant scientific, technical, economic and environmental information. The guidelines also provide for the assessment of any applications by the IMO.

However, many coastal states (including those under the special areas regime) have, still on the basis of article 211 of UNCLOS 82, since felt that their waters needed even more protection under the PSSAs regime. A case in point is the Western European Waters. It is now proposed to discuss PSSAs in light of moves by France, Spain, Portugal, UK, Belgium and Ireland, to have Western European Waters identified and designated as a PSSA.

[51] See article 217 (1) of UNCLOS 82 at UNCLOS 82, online, *supra* note 13.
[52] For a complete list of all the special areas as per Annexes I, II and III of MARPOL 73/78, see "Spcial Areas and Particluarly Sensitive Sea Areas", online: http://www.imo.org/Environment/mainframe.asp? (accessed on 15/08/2004).

### 4.3.2 Particularly Sensitive Sea Areas (PSSAs)

As with special areas, the legal basis of PSSAs is article 211 of UNCLOS 82. Article 211 (6) (a) provides:

> Where the international rules and standards referred to in paragraph 1 are inadequate to meet special circumstances and coastal states have reasonable grounds for believing that a particular, clearly defined area of their respective exclusive economic zones is an area where the adoption of special mandatory measure for the prevention of pollution from vessels is required for recognized technical reasons in relation to its oceanographic and ecological conditions, as well as its utilization or the protection of its resources and the particular character of its traffic, the coastal states, after appropriate consultations through the competent international organization with any other states concerned, may, for that area, direct a communication to that organization, submitting scientific and technical evidence in support and information on necessary reception facilities. Within 12 months after receiving such a communication, the organisation shall determine whether the conditions in that area correspond to the requirements set out above. If the organisation so determines, the coastal states may, for that area, adopt laws and regulations for the prevention, reduction and control of pollution from vessels implementing such international rules and standards or navigational practices as are made applicable, through the organization, for special areas. These laws and regulations shall not become applicable to foreign vessels until 15 months after the submission of the communication to the organization.[53]

The origins of the concept of PSSAs lie in the resolution adopted in 1978 requesting the IMO to, *inter alia*, "initiate studies aimed at making an inventory of such areas, the need for protection, and the measures that might be considered."[54] It was not until 1991 that the first IMO resolution containing the guidelines for the designation of special areas and the identification of PSSAs was adopted. The current version of the Guidelines is: A. 927(22) of 15 January 2002.[55]

Guidelines for the designation of special areas under MARPOL 73/78 and guidelines for the identification and designation of PSSAs include a number of criteria such as ecological criteria (unique or rare ecosystem, diversity of the ecosystem or

[53] UNCLOS 82 online, *supra* note 13.
[54] Molenaar, *supra* note 3 at 438.
[55] A.927(22) Guidelines for the Designation of Special Areas under MARPOL 73/78 (as amended) and for Identification and Designation of PSSAs. See Lee Adamson, et al., eds., *IMO News* No. 2, Issue 1 p.7.

vulnerability to degradation by natural events or human activities), social, cultural and economic criteria, such as significance of the area for recreation or tourism, and scientific and educational criteria, such as biological research or historical value.[56]

When an area is approved as a PSSA, specific additional measures can be used to control the maritime activities in that area. Examples of such measures are: routing, mandatory ship reporting systems, and vessel traffic services (VTS).[57] This means that PSSA measures are more far reaching than possible under article 211 (6) of UNCLOS, which is restricted to the definition of "pollution of the marine environment".[58] It is important to note that PSSAs can be established within or beyond the limits of the territorial sea, and there are no indications that a PSSA could not also be established in the high seas beyond the EEZ.[59]

As concerns how a PSSA may have an impact in terms of the coastal state – flag state divide regarding navigation rights, it is now proposed to discuss the current European proposal on the designation of a Western European PSSA.

Six coastal European countries (including France and Spain) in their document MEPC 49/8/1 submitted an application to IMO to designate the Western European region as a PSSA.[60] Having discussed the issue, the MEPC approved, in principle, the designation of the Western European Waters as a PSSA. However, the associated protective measures (APM) (that is, the 48-hour reporting APM) put forward by the European countries contained two main areas of gross contention - the 48-hour reporting for double hulls and the sheer size of the area to be covered.[61] The area includes entire EEZs of the proponent countries in the North-east Atlantic Channel.

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[56] Ibid.
[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] IMO LEG 87/16/1 of 15 September 2003, online: http://www.ccaimo.mil.br/see IMO (accessed on 12/08/04).
[61] Ibid.

At the other end of the scale, Liberia, Panama and Russia submitted a proposal (MEPC 51/8/3) to the 51st meeting of the MEPC to revise the Guidelines for the identification and designation of PSSAs and to suspend consideration of all PSSA proposals until the Guidelines have been revised.[62] In this regard, Russia has indeed argued, rather vehemently and consistently, that designation of entire EEZs was not intended at UNCLOS III. In any event, as things stand now, it remains to be seen what future awaits the application to designate the Western European region as a PSSA.

The discussion on PSSAs above reveals two things. First, PSSAs tend to enable coastal states to impose on international navigation rights. Secondly, flag states have a strong tendency to fight back in terms of making sure that the balance between coastal state jurisdiction and international navigation rights remain reasonably within the confines of anything contemplated by UNCLOS 82.

### 4.4 Conclusion

This chapter reminds us that coastal state practice takes different forms. First we have mainstream coastal state practice. The presumption in this regard is that most coastal states do generally respect the balance between coastal state jurisdiction and international navigation rights as carefully provided for under UNCLOS 82. However, we do have different forms of deviant state practice as well.

The first type of deviant state practice is that shown by the EU, even though that body's actions do end up assuming an international dimension through the IMO. In this connection, it is important to note that several coastal states do seek to have their coastal waters designated either as special areas or particularly sensitive sea areas.

[62] See the World Conservation Union, online: http://www.greenpeace.se/files (accessed on 12/08/04). However, it was recommended that the Committee should continue to utilize the current PSSA Guidelines (adopted as Assembly Resolution A.927(22) to analyze and progress proposals for PSSAs until such time as the Assembly adopts new guidelines for this purpose).

The more these are identified and designated, the higher the trend toward enhanced coastal state jurisdiction to the likely disadvantage of international navigation rights.

The second type of deviant state practice is that seen in OPA 90. Although unilateral *par excellence*, they could contribute to "the development of international law" by setting the example. However, such actions are few and highly resented.

Finally, as some unilateral coastal state actions show, there is also deviant state practice that is diametrically opposed to the tenets of international law. A good example is the decision by Spain to ban all single hull tankers out of its EEZ.

All in all, coastal states should be expected to use environmental concerns to justify their desire to have their sea areas protected. However, some have acted internationally while others have not. Equally important is the fact that as the volume of international trade grows everyday, so does the need for vessels to be able to navigate freely, hence the importance of maintaining some sort of balance as contemplated under UNCLOS. The trend nevertheless seems to be towards enhanced coastal state jurisdiction at the expense of flag states.

Chapter five, the general conclusion, comments on the legal significance of this trend. The chapter is also a reflection on the way forward in terms of the balance between coastal state jurisdiction and international navigation rights.

CHAPTER FIVE

# CONCLUSION

This dissertation has conducted a discussion in three main parts. The first is a panoramic view of the history of the relationship between coastal state jurisdiction and international navigation rights. The second is a discussion of the UNCLOS 82 regime with regard to the theme under consideration. The last is an assessment of post-UNCLOS 82 state practice to determine the trend and to reflect on the way forward.

As concerns the historical portion, this work points to the fact that the concepts of coastal state jurisdiction and international navigation rights were the natural upshot of the recognition that coastal states, like flag states, had an interest in, and the right to use, the oceans. The historical period shows that customary practices alone were not enough to settle the constant conflict between the two categories of states. The use of power or the show of it was inadequate to secure coastal state legitimacy in the assertion of jurisdiction over international navigation rights. The international character of shipping soon meant that it was necessary to give an international dimension to the manner in which the relationship between coastal state jurisdiction and international navigation was regulated.

Prior to UNCLOS negotiations, vessel-source marine pollution could hardly be considered as a major concern for the coastal state to the same extent as security and sea resource use, especially fishing. However, what the period does show is that the constant effort by coastal states to protect their interests naturally impacted on

navigation rights, a situation that set the stage for the period when marine pollution started becoming an important issue.

Another important point to note about the historical portion is that balancing coastal state jurisdiction and international navigation rights meant devising some way of protecting the two interests. It was not simply a question of the coastal state defending its own interest and deciding what to leave to the flag state in terms of navigation. There was an implicit recognition that the two had important interests to defend, hence the emergence of the concept of 'freedom of the high seas'.

Finally, what obtained then was essentially a sort of 'exclusive jurisdiction' for both the flag state and the coastal state expressed in boundary terms. The least one can say is that such an approach to the matter failed to recognize the complicated and delicate nature of the relationship between coastal state jurisdiction and international navigation rights.

The second portion of this dissertation concerns the UNCLOS 82 regime. UNCLOS negotiations were a frantic effort by the international community to, among other things, carefully balance the relationship between coastal state jurisdiction and international navigation rights. UNCLOS 82 takes into account the complex nature of the relationship as well as the new challenging issues involved, including vessel-source marine pollution concerns.

Furthermore, by establishing a special enforcement jurisdiction for the coastal state, UNCLOS 82 has put an end to the traditional concept of "freedom of the high seas", as the earlier discussion on the Intervention Convention 1969 shows. The balance between coastal state jurisdiction and international navigation rights under UNCLOS 82 is thus 'qualitative' rather than 'quantitative'; it is sometimes concurrent rather than exclusive. UNCLOS prioritizes the concept of "due regard" and emphasizes the need for states to act responsibly. Simply put, UNCLOS 82 is a regime of 'checks

and balances' with regard to the relationship between coastal state jurisdiction and international navigation rights.

It is submitted that, but for deviant state practice, UNCLOS 82 should have been a source of hope, for three reasons. First, it is sufficiently detailed and methodical in spelling out the issues relating to the balance between coastal state jurisdiction and international navigation rights. Secondly, it leaves room for the application of other treaties in the domain as well as other customary practices. Thirdly, and perhaps most importantly, it ensures that IMO remains, among other things, a vital forum wherein to address the balance between coastal state jurisdiction and international navigation rights with regard to vessel-source marine pollution. Indeed, UNCLOS 82 is not only the law; it is diplomacy at work as well!

However, while remaining a reasonably flexible document, in the sense of recognizing the continuous development of the law of the sea, UNCLOS 82 emits an important caveat, namely, that actions taken within or outside the context of the Convention should be consistent with international law. Since state practice is such a vital part of international law, it is interesting to now reflect on post-UNCLOS 82 coastal state practice.

There is no denying the fact that, generally, the majority of coastal states do respect international navigation rights, otherwise there would be total anarchy. However, there are also instances of deviant state practice as shown in chapter four *supra*. It is important to note that the trend, as per the discussion in this dissertation, is towards increased coastal state jurisdiction at the expense of flag states. This trend is the result not only of state practice that is consistent with international law, but of that which is inconsistent as well. The question then is, given the multi-faceted nature of state practice, what should be the way forward in terms of making sure that the relationship under consideration remains appropriately balanced?

Whether regionally or individually, coastal states should strive to give an international dimension to their initiatives, in terms of initiating action that could impact negatively on international navigation.

Where very important interests are to be defended, it is crucial to use the IMO, which constitutes the proper forum wherein to answer tough questions through negotiation between flag states and coastal states. A good example of how this could work can be seen in the compromise that was struck between the EU and IMO over the phasing in of double-hull tankers, discussed in chapter four *supra*.

The idea of several coastal states working in concert with IMO is very relevant in the case of special areas and PSSAs. As more of these are designated, there will likely continue to be an impact on navigation rights, even if the designation of these areas is not always motivated by vessel-source marine pollution concerns alone. It is good for all interested parties to agree, at least to some extent, on what measures to adopt in this regard. Negotiation under the auspices of the IMO is the way forward because, as the competent international organization in this field, it provides a legal and diplomatic basis on which to proceed.

At a purely individual state level, it is submitted that individual maritime nations, however powerful, should not act alone. It should not be a question of the survival of the fittest, or of jungle justice. Even Truman's declaration on the continental shelf, though unilateral, was preceded by some diplomacy, and this writer would argue that had the contents of the declaration been put forward in due form as a proposal at an international forum, an adoption would have been guaranteed. Recent history in other areas such as security shows that the IMO can act fast to address issues proposed by state parties, even though such issues may at first sight appear to be essentially a unilateral initiative.

All in all, although vessel-source marine pollution concerns tend to give coastal states more enforcement powers at the expense of flag states, what matters is that this be done through the IMO. In this regard, unilateral action that amounts to gross violation of international law should be discouraged and protested by the international community. Perhaps one good way out would be to take recalcitrant states to the international courts, notably the International Tribunal for the Law of the Sea. Even an advisory opinion would be helpful. What is crucial is for every state to respect the balanced regime carved out by UNCLOS 82 and diligently followed by IMO.

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