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From UNCLOS 82 to The Prestige: Towards safeguarding a balance between coastal state jurisdiction and commercial navigation rights from a vessel-source marine pollution perspective[1]

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Abstract

Like flag states, coastal states have always had an interest in, and the right to use the ocean space, but the exercise of coastal jurisdiction and commercial navigation rights has at times been subject to conflict. Among other things, the United Nations Convention on the Law of the Sea or - "UNCLOS 1982" was developed to protect the interests of both coastal states and flag states with respect to navigation rights within the respective maritime zones. However, due to reasons such as the desire to stem vessel-source marine pollution and its adverse effects, coastal states have tended to adopt increasingly restrictive measures concerning commercial navigation rights, and questions arise as to the future of the UNCLOS 82 regime. For coastal jurisdiction and navigation rights to be reconcilable it is crucial for states to continue to appreciate their personal interests in relation to the rationale and merits of the UNCLOS regime. This article thus revisits some instances of state (and regional) practice up to The Prestige incident of 2002 in a bid to highlight those fundamentals of international law that need to be safeguarded, at least from a vessel-source marine pollution perspective. The conclusion is that there is indeed a trend towards increased coastal state jurisdiction at the expense of international commercial navigation rights. The way forward is for coastal states and flag states to continue to negotiate within the International Maritime Organization prospective and actual coastal state actions that may impede navigation rights rather than resort to deviant unilateralism/regionalism.

Keywords: Coastal State, Flag State, Jurisdiction, Navigation Rights, Deviant State Practice

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[1] This article is an adaptation from the author's M.Sc. dissertation submitted to the World Maritime University in 2004, titled, "Balancing Coastal State Jurisdiction and International Navigation Rights: A Vessel-source Marine Pollution Perspective", available at: https://commons.wmu.se/cgi/viewcontent.cgi?article=1371&context=all_dissertations). However, while the arguments developed herein are drawn extensively from the said dissertation,there has been a deliberate effort to improve on the referencing and writing style.

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Introduction

The story about the vast oceans of the world often involves two basic and perhaps obvious facts concerning 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 and the two sometimes have opposing interests in that regard. Secondly, 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 two facts are today reflected in UNCLOS 82, which is an international instrument that seeks, inter alia, to strike a balance between the interests of the coastal state and those of the flag state.

The objective of this article is to use instances of deviant state (and regional) practice during the period up to The Prestige incident of November 2002 in order to appraise the manner in which state practice interferes with international navigation rights from a vessel-source marine pollution perspective.

Historically, the law of the sea has been characterized by a continual conflict between two opposing, yet complementary, fundamental concepts - namely, 'territorial sovereignty' and 'freedom of the high seas'.[4] On the one hand, coastal states at different times had territorial sovereignty over a specific geographical area of the sea, but the extent of that sovereignty and the enforcement of the law over vessels using the area would often be disputed. By contrast, the freedom of the sea with regard to navigation and fishing 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). Thus, 'coastal state jurisdiction' as used in this article goes with mare clausum, while 'international navigation rights' is associated with 'mare liberum'. The obvious inference here is that the relationship between these two concepts has in several respects been a dynamic one, underpinned at different times by various intellectual views and practical considerations. It has been stated in this regard 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 uphold 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

[4] E. D. Brown, The International Law of the Sea, Introductory Manual, Aldershot: Dartmouth, Vol. 1, (1994).

[5] R.R. Churchill and A.V. Brown, The Law of the Sea - 3rd Ed., Manchester: Juris Publishing, (1999).

some early attempts, such as with the 1930 Hague Conference, the Geneva Conventions on the Law of the Sea, l958 marked the first significant effort to codify the law of the sea. However, the key international instrument to refer to today is UNCLOS 82, which itself has absorbed, for the most part, the 1958 Geneva Conventions and non-codified customary law.[6] 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'.[7] At the same time, the Convention recognizes exceptional enforcement contexts for the coastal state (e.g. '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 (and regions) 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 article thus discusses some instances of deviant coastal state practice that are inconsistent with international law and comes up with a proposal on how to reconcile contemporary state practice with the UNCLOS 82 regime. The expression "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.

It is useful at this point to comment on the vitality of state practice in international law. According to the Vattelian tradition of acquiescence and consent, rules of international law have been promulgated by reference to the practice of states.[8] In that light, when the rules of international 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.[9] It is however important to underscore 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 article lies in the fact that while there may be widespread agreement on UNCLOS 82, generally, the rules contained therein are not always definite, clear or comprehensive.

[6] A. Bernaerts, Bernaerts' Guide to the 1982 United Nations Convention on the Law of the Sea, Surrey: Fairplay Publications (1988)
[7] Ibid
[8] D. P. O'Connell, The International Law of the Sea - vol. 1, Oxford: Clarendon Press, (1982).
[9] Ibid
[10] Ibid

In concrete terms, what the authors of this article have done is use UNCLOS 82 and related instruments such as the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) to examine state practice in terms of the apparently increasing legislative and enforcement powers of coastal states by comparison with international navigation rights. This calls for a discussion concerning the following:

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' from the UNCLOS 82 perspective; and

c) Post-UNCLOS 82 practices and trends up to The Prestige incident.

Historical Context

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 channeled through it. To regulate such huge trade, a code on marine and commercial law, called Rhodian law, was developed.[11] 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. [12]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. [13]What all this means is that where there were no exceptional, restrictive rules to the contrary as 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:

[11] Ibid
[12] R. Bernhardt, Law of the Sea, History in Bernhardt, R., (Ed.), Encyclopedia of Public International Law - vol. 3, Amsterdam: North Holland & Elsevier Science, (1999).
[13] Ibid

1. Mare Liberum

Grotius' treatise Mare Liberum was published in 1609. The work was initially part of a legal defense he gave in favour of the Dutch East India Company early in the 17th century. [14] 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)" [15]

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. [16] 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, Grotius advocated that the sea was free to all and belonged to no one. It is important to note 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 recognized, belongs rather to Queen Elizabeth than to the Dutch publicist .[17]

In fact, 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 Vasquez and Francisco de Vitoria, and of the Italian jurist Alberico Gentih.[18]

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

1. 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

[14] Ibid
[15] R.P. Anand, Origin and Development of the Law of the Sea, The Hague: Martinus Nijhoff Publishers, (1982).

[16] Ibid
[17] T. W. Fulton, The Sovereignty of the Sea, Millwood: Kraus Reprint Co., (1976).
[18] Ibid

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, [19]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". [20] Relying on historical data and state practice at the time in Europe, Selden sought 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".[21]

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. This view was consistent with the persistent idea at the time of fixed limits to the rights of the coastal state within its neighbouring sea, a principle appropriately embodied in the cannon-shot rule. [22] All in all, there seems to be enough evidence that Selden, like Grotius before him, had built this view on the accumulated knowledge of history. Indeed, one writer has stated 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.'[23]

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,[24] it was clearly recognized 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 centered on determining the extent of the territorial sea as seen in the cannon-shot rule. Then developed arguments for extending this jurisdiction in some form, as discussed below:

[19] Ibid
[20] Ibid
[21] G.P. Smith II, Restricting the Concept of Free Seas: Modern Maritime Law Re- Evaluated, New York: Robert E. Krieger Publishing Co. INC., (1980).
[22] Ibid
[23] Ibid
[24] The principle of mare clausum started losing its hold in the later eighteenth and early nineteenth centuries, under pressure of the Commercial and later 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.

1. Territorial Waters [25]

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 waters in its own interest has been generally recognized.[26] 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 parts of the neighboring sea.[27] 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.[28] 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. Contiguous Zone

One reason for the lack of agreement on the extent of territorial waters 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[29]

This narrow belt is what was referred to as 'contiguous zone'. 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 .[30] The Acts had effect from 1736 until their repeal in 1876.[31]

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 century.[32] This, like the other maritime zones that later developed, was indicative of the creeping nature of coastal state jurisdiction.

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[25] 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. For more on this, see Churchill and Lowe, supra note 11at p.75.

[26] Ibid

[27] Ibid

[28] Ibid

[29] Ibid

[30] Ibid

[31] Ibid

[32] 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 subsequent pages

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.[33] 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*".[34]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. [35]

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. Not only was navigation unobstructed in the high seas, no state had a preferential right of fisheries near other states' shores.[36]

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 were all considered in discussions during the first maritime conference in the 1880s. 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.

[33] Ibid
[34] Ibid
[35] See discussion on continental shelf and the exclusive economic zone (EEZ) later in this article.
[36] Ibid

Codification Attempts

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

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 1 920s, 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, one writer 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.[37]

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 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 .[38]

[37] D.P. O'Connell, The International Law of the Sea - Vol. 1, Oxford: Clarendon Press, (1982).
[38] Ibid

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 and under the auspices of this 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.[39]

In the meantime, two important laws 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.[40]

As concerns the first development, President Truman on 28 September 1945 made a twin proclamation relating to fisheries and the continental shelf.[41] 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 .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.[42]

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, this 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 .[43]

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 (UNCLOSI). 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 these authors 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

[39] Ibid
[40] Anglo-Norwegian Fisheries Case (1951) ICJ Report 116 at 8 (cited in Churchill and Lowe, supra, note 11 at p.35).
[41] Ibid
[42] Ibid
[43] Ibid

their key principles that are related to UNCLOS 82 as discussed later. 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.[44]

The second Geneva Convention of importance here is the High Seas Convention. It should be evident from earlier discussion in this article 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 over-flight.[45] It is worth noting 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.[46]

All said and done, the 1958 Geneva Conference, 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 at 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." [47]

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.[48] This Committee on the Peaceful Uses of the Seabed and Ocean Floor beyond the Limits of National Jurisdiction became (from 1968 to 1973) the most important forum for preliminary negotiations on a new law of the sea.[49]

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

[44] Ibid
[45] Ibid
[46] Ibid
[47] Ibid
[48] Ibid
[49] Ibid

Coastal State Jurisdiction and International Navigation Rights under UNCLOS 82: A Search for a New Equilibrium

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 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 sub-section sets out to examine. While the discussion may be unavoidably pervading, vessel-source marine pollution remains the main focus.

This sub-section 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 relation to 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 goes landward across the maritime zones. Maritime zones are discussed 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.

Also discussed under this sub-section are special coastal state enforcement powers in two different contexts–i.e., the doctrine of 'hot pursuit' and the 1969 International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, respectively.

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.

Internal Waters

The definition of 'internal waters' and the rights of the coastal state within internal waters will be considered.

Internal Waters: Definition and Rights of Coastal States

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 are separated from the territorial sea by the baseline.[50] 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.[51]

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.

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. [52] However, Article 8 (2) of UNCLOS 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."

The exercise of sovereignty within internal waters implies that coastal State jurisdiction in this case is, in principle, somewhat unlimited.[53] Not surprisingly, therefore, UNCLOS 82 provisions on coastal state in-port enforcement essentially refer to coastal state prescriptive jurisdiction, which refers essentially to regulatory conventions issues. [54] 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. 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

[50] F. Ngantcha, The Right of Innocent Passage and the Evolution of the International Law of the Sea, London: Pinter Publishers, (1999).
[51] Ibid
[52] Ibid
[53] E. J. Molenaar, Coastal State Jurisdiction over Vessel-source Pollution, The Hague: Kluwer Law International, (1998).
[54] Ibid

waters. Such limitations may arise under international customary law or pursuant to treaties entered into by the coastal state.[55]

Passage through Internal Waters and Access to Ports and Other Internal Waters

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. 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*."[56]

It is noteworthy that even more important than the unilateral measures which a coastal state may adopt are the provisions in international treaties envisaging 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). In this regard, it is useful to refer to articles 25(2), 211(3) and 225 of UNCLOS itself where it is implied that states may set conditions for entry to their ports. 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 .[57]

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 the discussion below on 'commercial treaties' and 'ships in distress' is a relevant part of this article, notwithstanding the fact that it is not based on UNCLOS 82.

Rights of Entry based on Commercial Treaties

The relevance of commercial treaties lies in the fact 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 entitled to enjoy a right of access to ports by virtue of a treaty of commerce and navigation or friendship.[58]

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.

[55] 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
[56] Ibid
[57] Ibid
[58] Ibid

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. [59]

Rights of Entry for Ships in Distress

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. One writer 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."[60]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 to enter ports or internal waters in order to save its cargo, where human life or important environmental concern is not at risk.[61]

Territorial Sea

The discussion here aims at understanding the term 'territorial sea' and the rights of the coastal state within it.

Breadth of Territorial Sea and Rights of the 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. The sovereignty of the coastal state over the territorial sea has been recognized at least since the 1930 Hague Conference.[62]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.[63]

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. Article 17 of UNCLOS provides that ships of all states, whether coastal or landlocked, enjoy the right of innocent

[59] Ibid
[60] Ibid
[61] Ibid
[62] Ibid
[63] Ibid

passage through the territorial sea.[64] 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'.[65] 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 that:"

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.

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 rendered necessary by force majeure or distress (Article 18(2)). It also covers navigation by ships that come from or head to a port or internal waters.[66] One may thus assert, as one writer puts it, that ships 'cruising', 'hovering' or merely 'lying in' the territorial sea cannot claim their passage to be continuous and expeditious. [67]On the meaning of "innocence", Article 19 of UNCLOS provides that:

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 willful and serious pollution contrary to this Convention; (...)

(i) any other activity not having direct bearing on passage.

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

[64] Ibid
[65] Ibid
[66] Ibid
[67] Ibid

acts, which include any activity not having a direct bearing on passage, will automatically render the passage non-innocent .[68]

Finally, the term "activity" (as used in Article l9 (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 the context of 'ship in the territorial sea', are not factors to be taken into account.[69] Thus in pollution cases, for example, actual 'discharges', if 'serious' and 'willful', can render a passage 'non-innocent'.

The right of innocent passage may therefore 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.

Right of Transit Passage through Straits

The aim here is to consider the meaning and types of straits.

Meaning of Straits

A strait falls within what has been described as the regime of narrow international ocean waterways.[70] 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.[71]

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.[72]

Types of Straits and Corresponding Types of Transit Passage

Writers differ in their assessment of the types of straits provided for under UNCLOS 82. Brown, for example, states that there are five types of straits, to which correspond five separate types of

[68] Ibid
[69]Ibid
[70] I. M. Alexander, Navigational Restrictions within the New Law of the Sea Context: Geographical Implications for the US, Peace Dale: Offshore Consultants, (1986).

[71] Ibid

[72] Ibid

Rights of Passage.[73] However, another writer has stated that by using a combination of geographical criteria such as high seas, 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,[74] 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 the 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	Strait of Messina between Italy and Sicily

[73] Ibid

[74] M. George, Transit Passage and Pollution Control in Straits under UNCLOS 82, ODIL - vol.33, pp. 189-205, (2002).

		mainland, and seaward of the island there exists high seas or an EEZ.	
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 George, M., (2002), *Transit Passage and Pollution Control in Straits under the 1982 Law of the Sea Convention*, in 'Ocean Development and International Law' - Vol. 33, pp. 189-205, Taylor and Francis: New York.

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 that transit passage means the exercise in accordance with this Part of the freedom of navigation and of over flight solely for continuous and expeditious transit of the strait between one part of the high seas or an EEZ and another part of the high seas or an EEZ.

The key expressions in Article 38 (2) 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.[75] Thus, the implication of the transit passage regime for all strait states is that user states have unlimited and maximized freedom of passage 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 should be subjected to certain limiting rules designed to protect the interests of the coastal state and promote safety of navigation.[76] 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 that are not incidental to their normal modes of continuous and expeditious transit.[77]

Navigation through Archipelagic Waters

Archipelagic waters comprise all the maritime waters within archipelagic baselines.[78] 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. Article 46 also defines an archipelago 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 geographic, economic and political entity, or which historically have been regarded as such. As provided in Article 49 of UNCLOS, 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, as explained below.

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.

The term ‘innocent passage’ should be understood here in the same sense as discussed earlier under Articles 17, 18 and 19 of UNCLOS. In other words, and as per Article 520, 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.

[75]E.D. Brown, International Law of the Sea Vol. 1 - Introductory Manual Aldershot: Dartmouth Publishing, (1994).
[76] Ibid
[77] Ibid
[78] Ibid

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.[79] According to Article 53 (1), (2) and (9), sea-lanes must be designated in consultation with the "competent international organization", by which is meant the International Maritime Organization (hereinafter referred to as 'IMO').[80]

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 that 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.

In the contexts of Articles 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 'areas of exclusive economic zone.[81] Indeed, it has been noted based on 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.[82]

It is obvious that each type of waters has its own specificities. However, whatever the relationship between innocent passage, transit passage and archipelagic sea-lane passage regarding legislative and enforcement jurisdiction, it is noteworthy that 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 (rights of the flag) on the other.

The Contiguous Zone

The definition of 'contiguous zone' and its related jurisdictional issues are considered in this portion.

Definition of 'Contiguous Zone'

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.

[79] Ibid
[80] Ibid
[81] Ibid
[82] Ibid

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.[83]

Jurisdiction within the Contiguous Zone

As per Article 33(2) of UNCLOS, the contiguous zone falls within the exclusive economic zone, the consequence being in theory that the presumption against coastal state jurisdiction is removed.[84] Article 33(1) provides that 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. It has been noted that a coastal state's rights in the contiguous zone is a functional and protective measure.[85] Indeed, the preventive control authorized under Article 33(1) is exercisable only in relation to incoming vessels, and it is clear that the Article does not recognize the prescriptive or enforcement authority of the coastal state to protect the environment of the contiguous zone itself.[86]

Obviously, therefore, the right of the coastal state in the contiguous zone does not amount to an exercise of sovereignty (or exclusive jurisdiction).[87] One may thus simply say that all vessels in principle enjoy freedom of navigation within the contiguous zone, subject only to the limitations under Article 33 (1) of UNCLOS.[88]

Continental Shelf

This sub-section defines the term 'continental shelf' and sheds some light on continental shelf jurisdiction.

Continental Shelf: Definition

According to Article 76(1) of UNCLOS, 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. 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.

[83] Ibid
[84] Ibid
[85] L.P. Özçayir, Port State Control, London: LLP, (2001).
[86] Ibid
[87] Ibid
[88] Ibid

Continental Shelf Jurisdiction

Based on Article 78(1) of UNCLOS, 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. 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 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.[89]

In the area governed by the high seas regime, the freedoms guaranteed under international law will apply to third states. However, differences have arisen from the need for coastal states to exercise their rights.[90] 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.

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 actions not absolutely essential for the exercise of its freedoms."[91]

The Exclusive Economic Zone

The Exclusive Economic Zone (hereinafter referred to as EEZ) is discussed here in terms of its definition and jurisdiction.

The EEZ: Definition

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 authority principally for certain economic purposes.[92] According to Article 57 of UNCLOS, 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. The right to claim an EEZ is discretionary rather than mandatory.

[89] C. L. Rozakis, Continental Shelf, in Bernhardt, R. (Ed.), Encyclopedia of Public International Law - Vol. 1, Amsterdam: North Holland and Elsevier Science, (1992).
[90] Ibid
[91] Ibid
[92] S. Oda, Exclusive Economic Zone, in Bernhardt, R. (Ed.), Encyclopedia of Public International Law - vol. 2, Amsterdam: North Holland and Elsevier Science, (1992).

Aspects of EEZ jurisdiction

The general principle, as per Article 60 of UNCLOS, 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.[93] All other states, whether coastal or landlocked, continue to enjoy in the EEZ the freedoms of navigation and over flight, 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.[94] 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.

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 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.[95]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, 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.[96]

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

[93] Ibid
[94] Ibid
[95] Supra
[96] See Article 211 (5) of UNCLOS 82.

described as "functional" in that jurisdiction is accorded for specific purposes.[97] Finally, the requirement that the coastal state should have due regard for the rights and interests of other states is a crucial one.

Right of Hot Pursuit

The doctrine of Hot Pursuit is regarded as an important enforcement right of coastal states.[98] Hot pursuit is provided for under Article 111 of UNCLOS. Based on that Article and other sources, 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.[99]

'Hot pursuit' is closely related to the principle of the freedom of the high seas since it constitutes one of the traditional limitations to that freedom.[100] It follows that the doctrine is an exception to the rule of exclusive jurisdiction of the flag state on the high seas over vessels flying its flag.[101] 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, Molenaar has made three pertinent conclusions regarding hot pursuit, viz. 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 tight of hot pursuit does not exist in circumstances which would in the territorial sea amount to unreasonably hampering innocent passage.[102]

[97] A. D. Couper and E. Gold, E., (Eds.), The Marine Environment and Sustainable Development: Law, Policy, and Science, Honolulu: University of Hawaii Law of the Sea Institute, (1993).
[98] N.M. Poulantzas, The Right of Hot Pursuit in International Law, The Hague: Martinus Nijhoff Publishers, (2002).

[99] See also N.M. Poulantzas, The right of Hot Pursuit in International Law, 2nd ed., The Hague: Martinus Nijhoff Publishers, pp. 42, (2002).
[100] Ibid
[101] Ibid
[102] Ibid

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.

The High Seas

The discussion at this juncture focuses on the definition of the high seas and jurisdictional issues concerning it.

Definition of '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. Under article 86 of UNCLOS, 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. 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 sea and the institution of archipelagic waters and of exclusive economic zones.[103]

Jurisdictional Issues Relating to the High Seas

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

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[104]. 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[...].

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).

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. Examples of such exceptions include 'hot pursuit' (discussed earlier in relation

[103] T. Treves, T., High Seas, in Bernhardt, R. (Ed.), Encyclopedia of Public International Law - vol. 2, Amsterdam: North Holland and Elsevier Science, (1992).
[104] Tullio Treves, "High Sea" in Rudolf Bernhardt, ed., Encyclopedia of Public International Law , vol. 2 (Amsterdam: North Holland and Elsevier Science, pp. 702, (1992).

to the EEZ) and the international Convention Relating to intervention on the High Seas in Cases of Oil Pollution Casualties, 1969 (The Intervention Convention 1969), as amended. It is now proposed to discuss the latter in relation to the high seas.

The Intervention Convention 1969

According to Molenaar, The Intervention Convention 1969, as amended, 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.[105]

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. 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. Indeed, that right is included in Article 221 of UNCLOS 82. Article 221 is to the effect that coastal states have the right (pursuant to both customary and conventional law), to take and enforce measures beyond the territorial seas proportionate to the actual or threatened damage to protect their coastlines or related interests, including fishing. The protection could be from pollution or threat of pollution following upon a maritime casualty or act relating to such a casualty, which may reasonably be expected to result in major harmful consequences. 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 vessel or cargo.

There are at least four limitations to the application to the Intervention Convention as regards the coastal state, viz.[106] 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, standings, and other navigational accidents, or occurrences on board or 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

[105] Ibid

[106] These limitations are drawn by the author from several sources – e.g. Churchill and Lowe, 1999; Rozakis, 1992; etc.

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.

Coastal state Jurisdiction and International Navigation Rights post-UNCLOS 82: Disrupting the Equilibrium?

When UNCLOS 82 entered into force on 16 November 1994 it was clear that the Convention did not necessarily cover the length and breadth of every aspect of the law of the sea, all the more so because developments have continued to take place since it was signed and eventually entered into force. However, the convention does take into account the fact that the development of the law of the sea is a progressive one. 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 Environmental Protection - GESAMP), non-governmental organizations, 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.

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

According to 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.[107] Molenaar adds that state practice may be said to originate in both the collective and the individual spheres.[108] Collective state practice exists in the form of bilateral or multilateral conventions or other international instruments such as IMO resolutions.[109] 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

[107] 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 opinion jurissive necessitates.
[108] Ibid
[109] Ibid

practice, for its part, may consist of unilateral declarations, legislation, and actual exercises of enforcement.[110]

The discussion will now proceed with sub-sections considered under 'cases of unilateral state action'. The European Union move to ban single hull tankers will also be discussed as an example of unilateral regional action.

State 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 EEZ, seems to be the most striking illustration of the cumulative effect of unilateral Acts (O'Connell, 1982). As concerns post-UNCLOS 82 and international navigation rights, it is proposed to discuss unilateralism in the following cases:

- United States and their Oil Pollution Act (OPA) 1990;
- The Prestige and Spain's decision to ban single hull tankers from its EEZ;
- Use of national legislation by some coastal states to claim greater rights within maritime zones than permitted under UNCLOS;
- Attitude of coastal states with regard to ships in distress; and
- "regional unilateralism" as seen in the European Union's accelerated phase-out of single hull tankers.

The United States and Oil Pollution Act 90

In the wake of the Exxon Valdez disaster in 1989 off the coast of Alaska, the United States enacted the Oil Pollution Act (OPA) into law in August 1990. 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 U.S. 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.[111] The Act also created the nation's Oil Spill Liability Trust Fund, which is available to provide up to one billion dollars per spill incident.[112]

As concerns this article, the most far-reaching aspect of OPA 90 was the banning of single hull tankers within U.S. ports. Although the double hull requirement was considered at the time to be far-fetched, it could be argued that the United States was merely exercising its full sovereignty within its internal waters. However, while the United States measure may be in accordance with

[110] Ibid
[111] Ibid
[112] Ibid

the jurisdiction of port states under both customary law and UNCLOS, it may be questioned how far it is in accordance with the spirit of the convention, which aims to discourage "unilateral design" and construction standards for ships (emphasis added).[113] 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 UNCLOS82 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. . . ..

Furthermore, Article 94 (5) provides that 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.

Clearly, therefore, UNCLOS 82 encourages multilateral design and construction standards for ships. This will ensure that the delicate balance between coastal state 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 (O'Connell, 1982). 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 certain respects the epitome of coastal state unilateralism. Yet it is important to add that the EU and the IMO soon followed the US in enforcing the double hull requirement, even if the US regime remained stricter in some respects than the other.[114]

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 tons 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 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

[113] E.D. Brown, R.R. Churchill, and A.V. Lowe, The Law of the Sea (3rd ed.) Manchester: Juris Publishing, (1994).
[114] Ibid

out of the Spanish EEZ, in blatant violation of UNCLOS 82 (Özçayir, 2001).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. The obvious question one may ask at this point is how exactly did the Spanish ban violate UNCLOS 82? Article 211 (5) of UNCLOS 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 as follows:

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.

It is thus clear that cases like the banning of single hull tankers would only be "justified" when they become a "generally accepted international rule and standard established through the competent international organization or general diplomatic conference." Such is the 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 (notably article 58 (1)) in the following terms:

[I]n 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 of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

Meanwhile, concerning the notion of "due regard", Article 58 (3) states that in exercising their right and performing their duties under UNCLOS 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 UNCLOS and other compatible rules of international law.

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, because 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.

National Laws Claiming Greater Rights within Maritime Zones

It will be recalled that UNCLOS 82 spells out the coastal state's rights and duties within each maritime zone with regard to 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. 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 somewhat unilateral attitude is considered here in terms of how it could potentially impact on international navigation rights.

It is well known that ships enjoy the right of freedom of navigation in the EEZ based on Article 58 of UNCLOS, 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.[115] 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. A somewhat detailed examination of the legislation of India, one of the states mentioned above, will give some insight into what this kind of unilateralism is all about. 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 —

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

[115] Ibid

v. customs and other fiscal matter in relation to such designated area.[116]

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. By so doing, India is likely to give priority to her own interests with secondary regard for international navigation rights.[117]

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 whether the practice today is for coastal states to consistently allow vessels in such circumstances to enjoy customary navigation and refuge rights.[118] 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 (1998).

Erika and the Castor are two examples of a situation where the need for coastal states to provide places of refuge for ships in distress came to the limelight. 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.[119] An 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. The first is Resolution A.949 (23) - Guidelines on Places of Refuge.[120] The guidelines recognize that when a ship has suffered an incident the best way of preventing damage or

[116] See The India Act, online: http://dshipping.nic.th/notices (accessed on 25/07/2021)
[117] Ibid
[118] Ships in distress enjoy a clear customary right of entry into ports in special cases. Note that although UNCLOS 82 does not clearly provide for rights and duties with regard to places of refuge, IM0 has taken up the matter very seriously in recent years.
[119] A. Chircop, Ships in Distress, Environmental Threats to Coastal States, and Places of Refuge: New Directions for an Ancient Régime?, ODIL - vol. 33, pp. 207-226, (2002).

[120]For further details of IMO information on places of refuge, see: http://www.imoorg/safetv/majnframe.asp? (accessed on28/08/2021).

pollution from its progressive deterioration is to mend the situation, and that such an operation is best carried out in a safe area.[121] However, coastal states are expected to balance the interest of the affected ship with those of the environment and their own socio-economic considerations.

The second is Resolution A. 950 (23) - Maritime Assistance Services (MAS). It recommends that all coastal states should establish an 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.[122]

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 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.

EU move to ban single hull tankers as example of Regional Unilateralism

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.[123] 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.

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.[124] 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

[121] Ibid
[122] Ibid
[123] F. L. Morrison and R. Wolfrum, (Eds.), International, Regional and National Environmental Law, The Hague: Kluwer Law International, (2002).

[124] Ibid

it.[125] 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, one writer reminds us that the EU 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.[126] .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.[127] Such is the backdrop against which to appreciate the Erika packages that followed the Erika and later the Prestige.

Conclusion

This article begins with a succinct consideration of the historical relationship between 'coastal State jurisdiction' and 'commercial navigation rights' and proceeds with a discussion on how UNCLOS 82 set out to establish a delicate balance between these two concepts from a vessel-source marine pollution perspective. It further discusses instances of deviant state and regional practice in the post-UNCLOS 82 era (up to the2002 Prestige incident)in a bid to come up with proposals that could help safeguard the fundamentals of the UNCLOS 82 regime.

It would be safe to say that the balance between coastal state jurisdiction and international navigation rights under UNCLOS 82 is '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, as far as the relationship between coastal state jurisdiction and international navigation rights is concerned, UNCLOS 82 is a regime of 'checks and balances'. It is submitted that, despite the well-known instances of deviant state practice, UNCLOS 82 remains a major source of hope - and this 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 customary practices and other relevant treaties. Thirdly, and perhaps most importantly, it ensures that the UN system (notably through the work of IMO) remains a vital forum wherein to address issues relating to this balance between coastal state jurisdiction and international navigation rights. In fact, UNCLOS 82 is not only about the law; it is diplomacy at work as well!

There is no denying the fact that coastal States do generally respect international navigation rights, otherwise there would be total anarchy. However, there are also instances of deviant practice as this article shows. Obviously, as per the discussion herein, the trend is towards increased coastal state jurisdiction at the expense of flag states. Deviant state practice takes two

[125] Ibid

[126] U.K. Jenisch, EU Maritime Transport - Maritime Policy, Legislation and Administration, WMU Journal of Maritime Affairs - vol.3, pp. 67-83, (2004).

[127] Ibid

forms –it may either be consistent with the spirit of international law or simply deviate from both the letter and spirit of that law. Be that as it may, the challenge confronting the international maritime community concerns ways of ensuring that the relevant balance established under the UNCLOS regime is not irreparably compromised.

Whether acting individually or regionally, coastal states should strive to give an international dimension to their initiatives. Where important interests are to be defended, it is crucial to use the IMO, which constitutes the proper forum for flag States and coastal States to answer tough questions through negotiation. 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. Negotiation under the auspices of IMO is the way forward because, as the competent international organization in this field, this organization provides a legal and diplomatic basis upon which to proceed.

At a purely individual state level, it is submitted that individual maritime nations, however powerful, should not act alone. It should never be a case of 'survival of the fittest' or 'jungle justice'. Even Truman's declaration on the continental shelf, though unilateral, was preceded by some diplomacy, and one would even argue that had the contents of his declaration been put forward in due form as a proposal at an international forum, an adoption would have been guaranteed. Relatively recent history in other areas, such as security (e.g. International Ship and Port Facility Security or 'ISPS' Code) shows that the IMO can act quickly to address issues proposed by state parties, even though such issues may at first sight appear to be essentially unilateral in character.

All in all, although vessel-source marine pollution concerns tend to result in coastal States having more enforcement powers at the expense of flag states, what matters is that this be done through the IMO. The international community should muster every effort to discourage instances of deviant state or regional practice that is inconsistent with international law as the way forward is for coastal states 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 deviant unilateralism or regionalism.

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