CHAPTER 3

Navigational Rights and Freedoms in a European Regional Context

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Introduction

The main focus of this chapter is on developments in relation to navigational rights in the territorial sea and straits in the European region, in times of peace. The analysis of the regimes of innocent passage in the territorial sea and the regime of transit passage in straits used for international navigation as defined in Section 3 of Part II and Part III of UNCLOS, has been undertaken elsewhere.[2] Occasionally, however, certain developments may inevitably call for reflections on these regimes. The emphasis will be mainly on state practice in the form of declarations and legislation,[3] now and then with special reference to vessel-source pollution. Attention will primarily be given to special cases or cases in which conformity with international law may sometimes be questionable.

The scope will be limited to developments in the 'European region',[4] which is a term that is nowhere clearly defined; something which this chapter will not attempt to change. For practical purposes it is decided to concentrate on coastal States which are Members of the European Union, including Norway and Iceland, or which border the Baltic Sea (but not the Russian Federation), or the Mediterranean Sea to the North, including Malta and Turkey. These 26 States[5] will be referred to as: 'the European coastal States'.

1 The author wishes to express his gratitude to Glen Plant, Alex Oude Elferink and Henrik Ringbom for commenting on an earlier version of this chapter.

2 See the Chapters by Rothwell and Bateman.

3 The cited legislation has frequently been incorporated in publications of the United Nations Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs (DOALOS, formerly OALOS). Abbreviations such as *UN DOALOS Leg. TS 1995* refer to these.

4 For a globally oriented examination see *inter alia*, Erik Jaap Molenaar *Coastal State Jurisdiction over Vessel-Source Pollution* (1998); and Kari Hakapää and Erik Jaap Molenaar "Innocent Passage – Past and Present" (1999) 23 *Marine Policy* 131-145.

5 In alphabetical order: Albania, Belgium, Bosnia & Herzegovina, Croatia, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Latvia, Lithuania, Malta, the Netherlands, Norway, Poland, Portugal, Slovenia, Spain, Sweden, Turkey, the United Kingdom and Yugoslavia (Federal Republic).

D.R. Rothwell and S. Bateman (eds.),
Navigational Rights and Freedoms and the New Law of the Sea, 22–46.

This chapter will first provide some background information needed for the subsequent analysis of substantive issues. The body of the chapter is then divided in two main parts: Territorial Sea, and Straits Used for International Navigation. Each part will be devoted to recognition of applicable navigational rights, traffic regulation, and special regimes for warships and ships carrying hazardous cargoes.[6]

Background

The Law of the Sea Convention in Europe

When discussing navigational rights and freedoms, the inevitable point of departure is UNCLOS, to which 130 States and International Organizations had ratified, acceded or succeeded as of 1 July 1999.[7] Of the European coastal States the following 6 have not yet become parties: Albania, Denmark, Estonia, Latvia, Lithuania and Turkey. Except for Turkey, there seem to be no clear reasons why these States will not also become parties to UNCLOS. Turkey is one of the few States that decided not to sign UNCLOS at its adoption in 1982. This was mainly motivated by the Convention's failure to take special account of areas with geographical configurations such as in the Aegean Sea, which separates Turkey and Greece.[8]

European Maritime Claims

As regards the type and geographical scope of the relevant maritime zones established or claimed by the European coastal States, it is noteworthy that three States have decided not to extend their territorial sea to a maximum of 12 nm. Norway has opted for a territorial sea of 4 nm and Greece and Turkey of 6 nm.[9] This takes no account of the fact that maritime delimitation may occasionally have led to territorial seas with

6 For a definition of 'warship' see UNCLOS, Art. 29. Hazardous cargoes include in any case the 'nuclear or other inherently dangerous or noxious substances or materials' referred to in UNCLOS, Art. 22(2), although States occasionally use broader formulations.

7 See Table showing the current status of the United Nations Convention on the Law of the Sea and of the Agreement relating to Implementation of Part XI of the Convention, at <www.un.org/Depts/los/los94st.html> (16 December 1999). The European Community deposited its instrument of formal confirmation on 1 April 1998.

8 These issues will resurface below. On problems of maritime delimitation in the Aegean Sea see Faraj Abdullah Ahnish *The International Law of Maritime Boundaries and the Practice of States in the Mediterranean Sea* (1993) 356-383; Jon M. Van Dyke "The Aegean Sea Dispute: Options and Avenues" (1996) 20 *Marine Policy* 397-404; and E. Roucounas "Greece and the Law of the Sea" in Tullio Treves and Laura Pineschi (eds) *The Law of the Sea. The European Union and its Member States* (1997) 225-259.

9 Also, Greece claims a 10 nm territorial sea for the purpose of aviation and Turkey claims a 12 nm territorial sea off its coast in the Black Sea and in the Mediterranean Sea.

a lesser width than 12 nm. Also, several European coastal States have decided not to extend the width of their territorial sea to the fullest extent in order to retain a high seas/EEZ corridor.[10] This is of particular importance in relation to the regime of transit passage discussed below.

Continental Archipelagoes

Although no European coastal States have claimed archipelagic status, some have in fact established 'continental archipelagoes' by drawing straight baselines around islands that do not fringe their coasts. Although UNCLOS Article 46 cannot always provide sufficient guidance in applying the concepts of 'archipelagic State' and 'archipelago' to concrete situations, there exists general agreement that 'continental archipelagos' ~~are excluded from Part IV of the~~ UNCLOS.[11] This has not stopped Denmark and Portugal from establishing 'continental archipelagoes' in relation to the Faroe Islands and the Madeira and Azores Islands respectively.[12] The legal status of the waters enclosed by these straight baselines seems to be internal waters,[13] where pursuant to UNCLOS Article 8(2) in principle a right of innocent passage exists. Even so, in case there exist 'routes normally used for international navigation' this would result in a stricter regime than under archipelagic sea lanes passage.[14] Furthermore, Spain claims the possibility to draw archipelagic baselines in relation to the Canary Islands.[15]

Territorial Sea

Acceptance of the Right of Innocent Passage

It is hardly necessary to question the widespread acceptance which exists in the international community of States that foreign merchant ships have a right of innocent

10 Denmark, Estonia, Finland, Germany and Sweden.

11 *Cf.* Satya N. Nandan and Shabtai Rosenne (eds) *United Nations Convention on the Law of the Sea 1982: A Commentary* Vol II (1993) 403. Robin Rolf Churchill and Alan Vaughan Lowe *The Law of the Sea* (3rd, 1999) 120 submit that this 'seems an unnecessary and unreasonable restriction'.

12 Danish Ordinance No. 599 on the Delimitation of the Territorial Sea around the Faroe Islands, of 21 December 1976, *UN DOALOS Leg. TS 1995*, 102; Portuguese Decree-Law No. 495/85, of 29 November 1985, *UN OALOS Baselines 1989*, 260 (see also the Portuguese declaration upon ratification of UNCLOS). See protest by the United States in J. Ashley Roach and Robert W. Smith *United States Responses to Excessive Maritime Claims* (2nd, 1996) 112-117 and 214.

13 The 1976 Ordinance (Denmark), ibid, refers to 'internal territorial waters'.

14 See UNCLOS, Art. 53, in particular paras. (1), (2) and (12).

15 See Art. 1(1) and Final Provision No. 1 Act No. 15/1978 on the Exclusive Economic Zone, of 20 February 1978, *UN DOALOS EEZ 1993*, 347. Although these baselines have not yet been established by Decree, the Spanish Supreme Court has, in two sentences of 18 June and 1 December 1992, applied the archipelagic principle in the Canaries for fiscal ends; *cf* P.A. Sáenz de Santa Maria "Spain and the Law of the Sea: Selected Problems" (1993) 32 *Archiv des Völkerrechts* 202 at 212. The Greek statement discussed below in the part on Straits Used for International Navigation is also relevant to the issue of archipelagoes.

passage through the territorial sea. While a few States make the exercise of the right of innocent passage subject to reciprocity or other conditions, these are not among the European coastal States.[16] There are of course numerous ways in which States can express their acceptance of the right of innocent passage. Acceptance must for example be presumed when States become Parties to UNCLOS where the right of innocent passage has been laid down in a quite detailed manner in Articles 17 to 19. Various European coastal States have expressly accepted the right by incorporating it into their national legislation, even though this has been pursued in several ways. Croatia and France have enacted legislation which closely follows or copies UNCLOS Articles 18 and 19, including a list of activities modeled on Article 19(2).[17] Poland and Yugoslavia have taken the same approach although the incorporated list of activities show some differences with Article 19(2).[18] Estonia, Norway and the United Kingdom explicitly mention the right of innocent passage, even though a list of activities has not been added.[19]

The other European coastal States have not incorporated the right of innocent passage in their legislation, but could of course have expressed their acceptance in other ways, for example in proceedings before their national courts. In view of the widespread acceptance, in any case by way of treaty obligation, there should also be a presumption of acceptance rather than a presumption of denial or rejection. A good example in this context is the United States' protest against Section 5 of the 1971 Act of Malta,[20] which contains a wide range of subjects on which jurisdiction is

16 See Federal Act relating to the Sea, of 9 January 1986, Art. 10 (Mexico) (*UN DOALOS EEZ 1993*, 217); the declaration upon ratification of UNCLOS by Saudi Arabia; Law No. 37 on the Territorial Sea and Ports, of 10 September 1972, Art. 9 (1) (Somalia) (*UN DOALOS Leg. TS 1995*, 347); and the declaration upon signature of UNCLOS by Uruguay.

17 Maritime Code, of 27 January 1994, Arts. 20-24 (Croatia) (*Official Gazette*, 7 March 1994, No. 17); Decree No. 85/185 regulating the Passage of Foreign Ships through French Territorial Waters, of 6 February 1985, Arts. 1-3 (France) (1985) 6 *Law of the Sea Bulletin* 14.

18 Act concerning the Maritime Areas of the Polish Republic and the Marine Administration, of 21 March 1991, Arts. 7-9 (Poland) (1992) 21 *Law of the Sea Bulletin* 66); Act concerning the Coastal Sea and the Continental Shelf, of 23 July 1987, Art. 18 (8) (Yugoslavia) (1991) 18 *Law of the Sea Bulletin* 9.

19 Decision No. 202 on Navigation of Ships Through the Territorial Sea and the Internal Waters of the Estonian Republic, of 13 July 1992, Paras. 1 and 14 (Estonia) (unofficial translation in *UN DOALOS Leg. TS 1995* 125); Regulations No. 1130 concerning the Entry into and Passage through Norwegian Territorial Waters in Peacetime of Foreign, Non-Military Vessels, of 23 December 1994, s. 10 (Norway); and Merchant Shipping Act 1995, s. 2A (UK), as amended by the Merchant Shipping and Maritime Security Act 1997 (UK).

20 Territorial Waters and Contiguous Zone Act No. 32, of 1971, as amended in 1975, 1978 and 1981 (*UN DOALOS Leg. TS 1995*, 208). For United States protest see Roach and Smith, note 12 at 268.

claimed, but without a provision explicitly confirming the right of innocent passage.[21] While such an explicit confirmation would have removed all doubt and is therefore certainly preferable, the absence thereof should not immediately lead to the conclusion that the existence of a right of innocent passage is denied.

Traffic Regulation

The fact that foreign merchant ships are in principle given a right of innocent passage in the territorial sea does of course not preclude a coastal State to prescribe and enforce laws and regulations, provided innocent passage is not unreasonably hampered.[22] Examples of lawful prescriptive activity by European coastal States include the 1991 and 1992 Decrees of Italy which prohibit all ships to transit, stop, and anchor in areas within 1 nm from the islands of Asinara and Pianosa, on which high security prisons are located.[23] Furthermore, Spain and the United Kingdom regulate anchoring in the territorial sea in order to bring an end to the parking of tankers.[24] Under these circumstances anchoring is not 'incidental to ordinary navigation' pursuant to UNCLOS Article 18(2). Article 8 of the 1996 Decree of the Netherlands makes it possible to subject anchoring in certain parts of the territorial sea to prior consent.[25] As this is done to ensure the safety of navigation in approaches to harbors, this would also be in accordance with UNCLOS.

Section 130 of the Merchant Shipping Act 1995 (UK) allows for the regulation of transfer of cargo, stores, bunker fuel or ballast between ships in the territorial sea in order to prevent pollution, danger to health or to navigation, or hazards to the environment or to natural resources. This seems justifiable as entering the territorial sea for the purpose of transferring cargo cannot be considered an exercise of the right of innocent passage.[26]

Article 12 of the 1990 Law of Latvia establishes a procedure which foreign ships must follow before the territorial sea can be entered.[27] This procedure is 'specified in

21 See Roach and Smith, note 12 at 268.

22 UNCLOS, Arts. 21 and 24.

23 Noted in Tullio Treves "Italy and the Law of the Sea" in Treves and Pineschi, note 8, 327 at 333.

24 Order on the Regulation of Anchoring by Tankers in Jurisdictional Waters or the Exclusive Economic Zone of Spain, of 17 April 1991, Art. 2 (Spain) (*Boletín Oficial*, 18 April 1991, No. 93/1991, 12061) uses a system of prior authorization; Merchant Shipping Act 1995 s. 100C (UK) provides for the competence to order foreign ships to be moved from the territorial sea; see David H. Anderson "British Accession to the UN Convention on the Law of the Sea" (1997) 46 *ICLQ* 761 at 770.

25 Decree Establishing Shipping Regulations for the Territorial Sea, of 27 February 1996 *Staatsblad* 170.

26 *Cf.* Anderson, note 24 at 770.

27 Law on the State Boundary of the Republic of Latvia, of 20 December 1990 (Latvia) (*UN DOALOS Leg. TS 1995*, 190).

acts of legislation of [Latvia] and international treaties recognized by [Latvia]'. What this exactly amounts to is uncertain. More or less similar is Article 10(3) of the 1992 Law of Lithuania.[28]

Warships

As the right of innocent passage is in both UNCLOS and its predecessor, the 1958 Convention on the Territorial Sea and Contiguous Zone (CTSCZ)[29] applicable to 'all ships',[30] warships (and other government ships operated for non-commercial purposes) would be entitled to exercise the right of innocent passage. However, when exercising this right, submarines are required to navigate on the surface.[31] Many States have nevertheless continued to contest the existence of an unqualified right of innocent passage for warships and have argued that coastal States have the right to subject warships to prior notification or authorization. Fervent opponents to such coastal State rights, under European coastal States, are: France, Germany, Italy, the Netherlands, and the United Kingdom. Those claiming a right of prior notification include Croatia, and Yugoslavia. Those claiming a right of prior authorization include Albania and Poland.[32] Important to note here is that both Finland and Sweden originally favored prior notification but later abandoned their corresponding statutes and did not renew pertinent declarations upon ratification of UNCLOS.

Ships Carrying Hazardous Cargoes

The issue of coastal State rights to require prior notification or authorization has also arisen, together with claims to deny passage altogether, in relation to ships carrying hazardous cargoes.[33] Although the issue of prior notification was briefly addressed during LOSC III, it never entered the text of UNCLOS.[34] The issue surfaced once more during the negotiations leading to the adoption of the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Waste and Their Disposal

28 Law on the State Boundary of the Republic of Lithuania, of 25 June 1992 (Lithuania) (unofficial translation in *UN DOALOS Leg. TS 1995*, 199).

29 1958 Convention on the Territorial Sea and the Contiguous Zone 526 UNTS 205.

30 UNCLOS, Art. 17 and CTSCZ, Art. 14.

31 UNCLOS, Art. 20.

32 1994 Code Art. 23 (Croatia), note 17; 1987 Act Art. 6 (Yugoslavia), note 18. Views on Albania and Poland based on Roach and Smith, note 12 at 260 and 264.

33 See on this subject: Laura Pineschi "The Transit of Ships Carrying Hazardous Wastes through Foreign Coastal Zones" in Francisco Francioni and Tullio Scovazzi (eds) *International Responsibility for Environmental Harm* (1991) 299-316; and Jon M. Van Dyke "Applying the Precautionary Principle to Ocean Shipments of Radioactive Materials" (1996) 27 *ODIL* 379-397.

34 See Nandan and Rosenne, note 11, 206-209, and 218.

(Basel Convention).[35] Article 6 of the Basel Convention *inter alia* stipulates that the State of export shall notify the State(s) of transit of any proposed transboundary movement of wastes, and that such movement needs the prior consent of the State(s) of transit. Linked to the definitions of 'transboundary movements' and 'area under the national jurisdiction of a State',[36] these rights of prior notification and authorization were broad enough to encompass not only the transit State's territorial sea but also its exclusive economic zone (EEZ). However, fierce protests by maritime States finally led to the incorporation of Article 4 (12) which stipulates rather ambiguously that:

> Nothing in this Convention shall affect in any way the sovereignty of States over their territorial sea established in accordance with international law, and the sovereign rights and the jurisdiction which States have in their exclusive economic zones and their continental shelves in accordance with international law, and the exercise by ships and aircraft of all States of navigational rights and freedoms as provided for in international law and as reflected in relevant international instruments.

Clearly, this text is of little assistance in resolving the issue as it provides ammunition to both sides. Subsequently, initiatives on the regional level led to the adoption of five instruments on the transboundary movement of hazardous wastes. While the first three instruments[37] leave the *status quo* of the Basel Convention unaffected, the 1996 Izmir Protocol[38] to the 1976 Barcelona Convention for the Protection of the Mediterranean Against Pollution[39] embraces in Article 6(4) a right of prior notification for lateral passage through the territorial sea, but rejects prior authorization. As the Protocol will presumably be applied on an *inter se* basis only,[40] this would not seem to raise the problem of *pacta tertiis*.[41]

35 (1989) 28 ILM 657.

36 Basel Convention, Arts. 2(3) and 2(9).

37 1991 Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (1991) 30 ILM 775; 1992 Central American Regional Agreement on the Transboundary Movement of Hazardous Wastes (1992) 3 *YIEL* diskette doc. 10; 1995 Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region (1995) 6 *YIEL* diskette doc. 17.

38 1996 Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and Their Disposal, UN Doc. UNEP(OCA)/MED/IG.9/4 (11 October 1996).

39 (1976) 15 ILM 290.

40 The duty of prior notification is only applicable to the State of export, which is defined under Art. 1(l) as 'a Party from which a transboundary movement of hazardous wastes is planned to be initiated or is initiated'.

41 See also Pineschi, note 33 at 315 who invokes the 'spirit of the Basel Convention' as evidence of a trend towards an obligation of prior notification.

Also deviating from the 1989 Basel Convention is the 1998 Teheran Protocol[42] to the 1978 Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution.[43] The Protocol applies through Articles 1(1 and 4), 2(3) and 3 to transboundary movements of hazardous wastes through areas under the national jurisdiction of a State that lie within the 'Sea Area' as defined in the 1978 Kuwait Convention.[44] In light of the fact that the Protocol does not provide a definition for "area under the national jurisdiction of a State", the obligations imposed by the Protocol do not apply to land territory. Article 8(5) of the Protocol acknowledges that transit States have a right of prior consent of waste shipments through areas under their national jurisdiction, a right which they can also renounce. Similar to the 1996 Izmir Protocol, this is only applicable on an *inter se* basis.[45] In relation to non-Contracting Parties, the 1998 Teheran Protocol seeks conformity with international law in general, and UNCLOS and the Basel Convention in particular.[46] That prior notification or authorization is also asked of non-Contracting States is thus not entirely ruled out, certainly in view of the fact that several parties to the 1978 Kuwait Convention claim such coastal State rights.[47]

Both Protocols signify important steps towards the progressive acceptance of coastal State rights over ships carrying hazardous cargoes, even though their entry into force will take some time yet. As of 2 September 1999 no European coastal State has yet ratified the 1996 Izmir Protocol.[48] Moreover, discussions within IMO committees indicate that consensus is still far off. Many States are concerned that prior notification, and a *fortiori* prior authorization, could lead to the vetoing of transports and fear potential interference by terrorists.[49]

42 1998 Protocol on the Control of Marine Transboundary Movements and Disposal of Hazardous Wastes and Other Wastes. Not in force

43 1978 Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (1978) 17 ILM 511.

44 Ibid, Art, II (a).

45 Art. 8 is entitled Transboundary Movement of Hazardous Wastes and Other Wastes Between Contracting Parties. Para. (5) explicitly applies to: 'Each State of transit which is a Contracting State'.

46 See the Preamble, and Arts. 4(14) and 7(c).

47 It concerns Iran, Oman, Saudi Arabia and the United Arab Emirates. See also 1998 Teheran Protocol, Art. 12 which reproduces the substance of Basel Convention, Art. 4(11), which could reflect the importance attributed to unilateral approaches.

48 Out of 21 potential Contracting Parties, so far only Tunisia deposited its instrument of ratification (on 1 June 1998). The prospects for entry into force of the 1998 Teheran Protocol are a little better as, out of a possible eight contracting parties, Kuwait and Qatar had ratified the Protocol as of 1 October 1999.

49 See IMO Doc. LEG 74/13, paras. 97-102. The Legal Committee did not support either view but urged the delegations 'to engage in informal discussions on this subject' (para. 101). See also IMO Docs. MEPC 40/21, paras. 15.6-15.14 and MEPC 41/20, s. 14, which reflect no change.

Opponents of these special coastal State rights over ships carrying hazardous cargoes under the European coastal States include: Germany, Italy, the Netherlands and the United Kingdom. Prior authorization is required by Turkey, also for transit through the Turkish Straits (see below), and prior notification by Malta.[50] Although Ireland does not (yet) claim special coastal State rights in this context, it is continuously lobbying within IMO for a right of prior notification through the territorial sea.[51]

A development with a potentially fundamental impact on the issue took place recently in August/September 1999 when two British vessels, the *Pacific Teal* and the *Pacific Pintail*, departed with cargoes of recycled nuclear fuel from ports in France and the United Kingdom en route to Japan. In response to strong pressure, the French, Japanese and British corporations involved in the shipment and their respective governments, jointly agreed to disclose information on the transport route. Accordingly, two days prior to departure from Europe the following information was disclosed: the date of departure from Europe, the names of the transport ships, the number of fuel assemblies and the number of containers. Moreover, the transport route and the approximate date of arrival in Japan was publicly announced one day after departure from Europe.[52] Coastal States 'relevant' to the shipments are apparently also individually informed and care is apparently taken to avoid their maritime zones where possible. The shipments were nevertheless protested by a considerable number of States and international organizations.[53]

Despite the fact that exact details of the transport route are not given, this 'information disclosure policy' comes quite close to prior notification, and should be appreciated as a considerable concession to coastal States.[54] This concession is of course a voluntary one and France, Japan and the United Kingdom would naturally argue that it cannot be interpreted as recognition of a duty of prior notification under international law. Nevertheless, it would be difficult to end this voluntary information

50 1994 Regulations, Art. 30 (Turkey); and the Maltese declaration upon ratification of UNCLOS. Speaking on the 1994 Regulations, which apply primarily to the Turkish Straits, Turkey observes in IMO Doc. LEG 71/12/1, para. 4 that in accordance with the Basel Convention, prior permission is asked for lateral passage 'through the area under the national jurisdiction of Turkey'.

51 See *inter alia* IMO Doc. A/20/9/3 and *Lloyd's List* 18 January 1997.

52 Toshiya Hoshino "The Trans-shipment of Dangerous Cargoes Across Oceans: Cases of Nuclear Fuels and Waste" paper presented at the Fifth Meeting of the Maritime Cooperation Working Group of the Council for Security Cooperation in the Asia Pacific (CSCAP) Hanoi, 24-25 August 1999, at 2 (on file with author).

53 Including, Australia, Fiji, Ireland, Mauritius, New Zealand, South Africa, South Korea, the South Pacific Forum, and the Association of Caribbean States (CARICOM); see <www.greenpeace.org/~nuclear/> (16 December 1999).

54 A reason behind the cooperative attitude of the French could be the fact that France itself requires ships passing through its territorial sea to report the nature of their cargo before entering the territorial sea; see Decree No. 78-421 on Sea Pollution Caused by Shipping Incidents (24 March 1978), Art. 1 (France) (*Journal Officiel*, 26 March 1978, at 1338).

disclosure policy and likewise to prevent its eventual impact on the development of international law.

Straits Used for International Navigation

Introduction

The importance of so-called 'choke-points' for international navigation resulted at LOSC III in a separate Part III of UNCLOS entitled 'Straits Used for International Navigation'. Part III mainly seeks to balance the economic and military interests of maritime States in unimpeded navigation with coastal (strait) State interests in the protection and preservation of the marine environment. Worth keeping in mind as well is that the compromises made in Part III should also be seen in the light of the overall package-deal character of UNCLOS, in particular the extension of the breadth of the territorial sea to 12 nm and the recognition of the EEZ concept.

Well-known straits used for international navigation in the European region are the Strait of Dover (or Calais) between France and the United Kingdom, the Danish Straits between Denmark and Sweden, the Strait of Gibraltar between Morocco and Spain, and the Straits of Istanbul and Çanakkale (the Turkish Straits) through Turkey. While there seems to be no doubt that these straits should be regarded as 'straits used for international navigation' in the meaning of UNCLOS Part III, there might be other straits for which this is less obvious. However, even infrequent transits would seem to qualify as 'used', and future usage could also bring a strait under the scope of application of Part III.[55]

Application of the Transit Passage Regime

Even if classified as 'strait used for international navigation', this does not necessarily mean that the regime of transit passage in Section 2 of Part III is applicable. While the particularities of the transit passage regime cannot be comprehensively dealt with here,[56] it is imperative to point at two situations in which it is not applicable. The first exception is incorporated in Article 35(c) and concerns 'straits in which passage

55 *Cf* W.M. Reisman "The Regime of Straits and National Security: An Appraisal of International Lawmaking" (1980) 74 *AJIL* 48 at 66; see also discussion in Satya N. Nandan and David H. Anderson "Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982" (1989) 60 *BYIL* 159 at 168-169; Hugo Caminos "The Legal Regime of Straits" (1989) 205 *Recueil des Cours* 13 at 143. This broad interpretation is consistent with the ICJ's observations on the question of 'use' in the *Corfu Channel* Case (United Kingdom v. Albania) [1949] *ICJ Reports* 28. See Nandan and Rosenne, note 11 at 290 who reject temporal implications of the words 'which are' appearing between 'straits' and 'used for international navigation' in UNCLOS Art. 37.

56 See Chapter by Bateman, and Caminos, note 55.

is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits'. Article 35(c) does not presume that passage under long-standing conventions is more liberal than under transit passage, but simply provides that the UNCLOS does not affect such regimes. The phrase 'in whole or in part' indicates that where passage is not exhaustively regulated, relevant rules of international law still apply. Residual jurisdiction is therefore not necessarily with the strait State, but depends on applicable rules of customary law, UNCLOS, and relevant regulatory conventions.[57]

The second exception, which is laid down in Article 38(1), is the so-called 'Messina-exception' and deals with the situation in which:

> the strait is formed by an island of a State bordering the strait and its mainland ... if there exists seaward of the island a route through the high seas or through the exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.

This latter exception was named after the Strait of Messina which separates Sicily from the mainland of Italy. Article 45(1)(a) stipulates that within such straits a regime of non-suspendable innocent passage applies instead of transit passage.

Widespread agreement exists that the Danish and Turkish Straits fall under the Article 35(c) exception due to the existence of the 1857 Copenhagen Treaty and the 1936 Montreux Convention respectively (see also below).[58] The application of Article 35(c) to the Strait of Gibraltar is more controversial as navigation is allegedly covered by the 1904 Anglo-French Declaration[59] which mentions the object of securing free passage in Article 7. It seems, however, that this provision is primarily concerned with the neutralization of the shore, and not with navigation as such.[60] The Strait of Gibraltar would therefore seem to fall under the UNCLOS transit passage regime.

57 *Cf.* Churchill and Lowe, note 11, at 104-110; Glen Plant "Navigation Regime in the Turkish Straits for Merchant Ships in Peacetime" (1996) 20 *Marine Policy* 15 at 15. On the issue of residual jurisdiction see also Erik Jaap Molenaar "Residual Jurisdiction under IMO Regulatory Conventions" in Henrik Ringbom (ed) *Competing Norms in the Law of Marine Environmental Protection* (1997) 201-216.

58 1857 Treaty for the Redemption of the Sound Dues 116 CTS 357; 1936 Convention regarding the Regime of the Straits 173 LNTS 213.

59 1904 Declaration between the United Kingdom and France respecting Egypt and Morocco 195 CTS 198.

60 *Cf.* Churchill and Lowe, note 11, at 114. Roach and Smith, note 12, at 302, n. 60 argue that "free passage of the Straits of Gibraltar was agreed to in a series of agreements between France, Spain and Great Britain" of which the 1904 Declaration is only one example. Neither Spain nor Morocco regards this 1904 Declaration as a "long-standing international convention". See the statements at LOSC III contained in UN Doc. A/AC.138/SC.II/SR.70 (Spain), and UN Doc. A/AC.138/SC.II/SR.72 (Morocco); see, however, the statements by Italy (UN Doc. A/AC.138/SC.II/SR.66 and UN Doc. A/AC.138/SC.II/SR.72) and the Soviet Union (UN Doc. A/AC.138/SC.II/SR.69).

Finland and Sweden both claim that the Article 35(c) exception also applies to the Ahvenanrauma Strait between the mainland of Sweden and the Finnish Åland Islands.[61] Passage through this strait is, in part, regulated by the 1921 Geneva Convention[62] which provides in Article 5 that the:

> prohibition to send warships into [the waters of the Åland Islands] or to station them there, shall not prejudice the freedom of innocent passage through the territorial waters. Such passage shall continue to be governed by the international rules and usage in force.

Finland and Sweden currently only grant a right of innocent passage for foreign ships in the Ahvenanrauma Strait. However, since Article 2(II) sets the territorial sea at 3 nm,[63] the argument could be made that the remainder of the strait would fall under the transit passage regime.[64] Conversely, Finland and Sweden seem to reason that the Ahvenanrauma Strait is subject to Article 35(c) as a whole on account of the words "in part" in that provision. This would thus accord the words "in part" a spatial instead of a functional meaning.[65]

Acceptance of the Transit Passage Regime

Consensus on a separate regime for straits proved to be a very contentious issue at LOSC III. The major maritime States led by the United States faced a group of strait States that were unwilling to accept a special regime for areas falling under their sovereignty. The fact that Part III ended up in the final text of UNCLOS does not necessarily mean that all opposition has faded.

61 See the Finnish and Swedish declarations upon signature of UNCLOS. Similar statements were made by the delegates of Finland and Sweden during LOSC III (*Official Records*, Vol. XVII, 187th meeting, para. 222).

62 1921 Convention relating to the Non-fortification and Neutralization of the Åland Islands 9 LNTS 212.

63 Note that both Finland and Sweden have now in principle a 12 nm territorial sea.

64 Roach and Smith, note 12, at 297-298 make this argument and observe that the United States "has never recognized this strait as falling within" the Art. 35(c) exception. According to Marie Jacobson "Sweden and the Law of the Sea" in Treves and Pineschi, note 8, 495 at 502, n. 26, the applicability of the Art. 35(c) exception was confirmed "bilaterally by members of the United States delegation" during UNCLOS III. Kari Hakapää "National Interests and Policies of Finland in the Baltic Sea: A Law of the Sea Perspective" in Renate Platzöder and Philomene Verlaan (eds) *The Baltic Sea: New Developments in National Policies and International Cooperation* (1996) 387 at 397 submits that no State has officially protested against the Finnish and Swedish declarations upon signature of the UNCLOS.

65 See Hakapää, ibid at 396.

Spain

Spain, which was an active member of this group of strait States, declared upon signing UNCLOS that:

> the régime established in Part III of the [Convention] is compatible with the right of the coastal States to issue and apply its own air regulations in the air space of the straits used for international navigation so long as this does not impede the transit passage of aircraft.
>
> ...
>
> 3. With regard to Article 39, paragraph 3, it takes the word 'normally' to mean 'except in cases of force *majeure* or distress'.
> 4. With regard to Article 42, it considers that the provisions of paragraph 1(b) do not prevent it from issuing, in accordance with international law, laws and regulations giving effect to generally accepted international regulations.
>
> ...
>
> 6. It interprets the provisions of Article 221 as not depriving the coastal State of a strait used for international navigation of its powers recognized by international law, to intervene in the case of the casualties referred to in that article.
> 7. It considers that Article 233 must be interpreted, in any case, in conjunction with the provisions of Article 34.

While lack of space prevents a thorough analysis of each individual statement, what may readily be appreciated is that taken together they reflect a considerable measure of resistance to the transit passage regime. Some of the statements would perhaps even classify as prohibited reservations or exceptions under UNCLOS Article 309, and would neither be allowed under Article 310 as they would "purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State". The United States has protested against these statements.[66]

Statement (6) seems not unreasonable as the interests of navigation are under such circumstances not compelling enough to override a State's sovereignty. On the other hand, by emphasizing strait State sovereignty in Article 34, statement (7) seems to claim a presumption of strait State enforcement powers even though Article 233 only authorizes enforcement in very specific situations. Statement (4) uses 'generally accepted' where Article 42 uses 'applicable' and does not reproduce the latter part of Article 42(1)(b). Both aspects were the subject of Spanish proposals that failed to be accepted at LOSC III,[67] and seek to expand strait State jurisdiction over vessel-source pollution.

66 See Roach and Smith, note 12 at 307-309.

67 See UN Doc. A/CONF.62/L.136, of 28 April 1982 (*Official Records*, XVI, 243). It has been contended that the proposal was unable to meet the necessary majority due to reasons that have little to do with the substantive issue; Jose A. De Yturriaga *Straits Used for International Navigation. A Spanish Perspective* (1991) 177 mentions the "tactical opposition of the Argentinean delegation and the indecisiveness of Chairman Aguilar" and the fact that "the negative votes cast were due to the objections of principle by various delegations to introduce whatsoever change in the text of the Draft Convention".

In its declaration upon ratification of UNCLOS, Spain repeats previous statements (3) and (6), but does not withdraw the others, and moreover submits to understand that:

> The regime established in Part III of the [UNCLOS] is compatible with the right of the bordering State to enact and enforce in straits used for international navigation its own regulations, provided that such regulations do not interfere with the right of transit passage.

Although the precise meaning of this statement is hard to determine, it once more has a unilateral stance, despite the fact that strait State prescriptive and enforcement jurisdiction is not to "interfere with the right of innocent passage". Although Spain mentions the right of transit passage in both declarations, there is still considerable doubt on its acceptance of the concept as such. Significant is the fact that Article 11 of the 1985 Order[68] still categorically grants warships only a right of innocent passage while prohibiting activities that would be allowed during transit passage, and that submarines are required to navigate on the surface.[69] Taken together these are signs that Spain will not change its previously held approach of applying legislation of the territorial sea also to the Strait of Gibraltar and the less important Strait of Minorca, without suspending innocent passage.[70]

Germany

A less far-reaching statement whose compatibility with UNCLOS Articles 309 and 310 is nevertheless questionable, is made by Germany in its declaration upon accession to the Convention:

> Article 38 limits the right of transit passage only in cases where a route of similar convenience exists in respect of navigational and hydrographical characteristics, which include the economic aspect of shipping.

This declaration seems to aim at limiting the situations in which the 'route of similar convenience' applies, and thus reflects a preference for transit passage above non-suspendable innocent passage. The argument that 'the economic aspect of shipping' should be taken into account in assessing the application of the 'Messina-exception', was not raised at LOSC III. Nevertheless, some commentators argue that "the

68 Order No. 25/1985 on the Approval of Rules for Foreign Warships Calling at Ports or Anchorages of Spain and their Passage through the Territorial Sea of Spain in Times of Peace, of 23 April 1985 (*Boletín Oficial*, 14 May 1985, No. 115/1985, 13761).

69 See Valentin Bou and R. Bermejo "L'Espagne et le Droit de la Mer" in Treves and Pineschi, note 12, 449 at 461.

70 Ibid at 459. See also Sáenz de Santa Maria, note 15, 213-218.

exception should not be interpreted too mechanically, and should be applied using common sense, taking into account the relevant geographical and other circumstances".[71] That they had "the economic aspect of shipping" in mind is certainly not evident.

Greece

In its declaration upon signature and confirmed upon ratification of UNCLOS, Greece makes the following interpretative declaration:

> In areas where there are numerous spread out islands that form a great number of alternative straits which serve in fact one and the same route of international navigation, it is the understanding of Greece, that the coastal state concerned has the responsibility to designate the route or routes, in the said alternative straits, through which ships and aircraft of third countries could pass under the transit passage regime, in such a way as on the one hand the requirements of international navigation and overflight are satisfied, and on the other hand the minimum security requirements of both the ships and aircraft in transit as well as those of the coastal state are fulfilled.[72]

Through this interpretation Greece seeks to establish a special regime in areas with "numerous spread out islands", a regime which has not been provided for in UNCLOS. The Greek declaration should, as Turkey maintains in its 1995 Communication,[73] certainly be seen in light of the Greek failure to secure acceptance for the applicability of the archipelagic regime to continental States. However, it is submitted that the interests in unimpeded navigation do not justify the restriction of coastal/strait State jurisdiction that would be brought about by a rigid application of the UNCLOS transit passage regime to the particular geographical situation of Greece. With the present width of the Greek territorial sea set at 6 nm, the issue of the possible applicability of the UNCLOS transit passage regime is of uncertain significance. If Greece would actually decide to extend its territorial sea to the maximum of 12 nm, then the Aegean Sea would indeed lose most of its high seas corridors.[74] The reasonableness of the Greek claim would then depend on its application in practice.[75]

71 Nandan and Rosenne, note 11, at 329.

72 Also contained in UN Doc. A/CONF.62/WS/26, of 30 April 1982 (*Official Records*, XVI, 266).

73 Communication from the Government of Turkey in relation to [UNCLOS], of 21 December 1995 (1996) 30 *Law of the Sea Bulletin* 9. Greece replied through the Note regarding the Turkish Notification dated 22 February 1996 on the Interpretative Statement Made by Greece at the Time of Both Signature and Ratification of the United Nations Convention on the Law of the Sea, of 30 June 1997 (1997) 35 *Law of the Sea Bulletin* 11.

74 Law No. 2321/1995 on the Ratification of the Law of the Sea Convention, Art 2 (Greece) (*Official Gazette*, A' 136/1995) which claims the "inalienable right (...) to extend at any time the breadth of its territorial sea up" to 12 nm.

75 See on this subject Roucounas, note 8 at 231-238.

Yugoslavia

In its declaration upon ratification of UNCLOS, Yugoslavia made a statement which is somewhat similar as that of Greece, by claiming the competence to determine 'which of the straits used for international navigation in the territorial sea of the Socialist Federal Republic of Yugoslavia will retain the regime of innocent passage, as appropriate'.[76] Slovenia, in its declaration upon succession to UNCLOS, considered itself not bound to the above statement, but there is no indication that Yugoslavia takes a similar view.[77]

Traffic Regulation

Strait of Bonifacio

The 1993 Order[78] of France and the 1993 Decree[79] of Italy prohibit transit through the Strait of Bonifacio of ships flying their own flag which transport hydrocarbons or other dangerous substances. IMO Resolution A.766(18) recommends other States to 'prohibit or at least strongly discourage the transit' of ships flying their flags. Although the Strait of Bonifacio is thus not covered by strait State jurisdiction in excess of UNCLOS, it seems likely that navigation therein will deviate from that normally occurring in straits used for international navigation.

Strait of Messina

Although the UNCLOS regime of transit passage does not apply to the Strait of Messina, it is worth noting here that Article 6 of the 1985 Decree[80] of Italy prohibits passage through the Strait of Messina of all ships of 50,000 tons or more carrying oil products and other substances hazardous to the marine environment. Moreover:

- all other ships have to comply with a traffic separation scheme (TSS);
- compulsory pilotage is established for certain ships depending on the size of the ship and the nature of the cargo; and
- all ships are subject to a mandatory ship reporting system (SRS).[81]

76 See protest by the United States in Roach and Smith, note 12 at 291.

77 Croatia, in its declaration upon succession to UNCLOS, does not refer to this issue.

78 Prefectural Order No. 1/93 Prohibiting the Movement in the Bouches de Bonifacio of Tankers Carrying Oil and Ships Carrying Dangerous or Toxic Substances, of 15 February 1993 (1994) 25 *Law of the Sea Bulletin* 65. Note that Art. 2 also applies to all ships 'engaged in cabotage navigation between two French ports'.

79 Decree of the Minister of the Merchant Marine, of 26 February 1993 (*UN DOALOS State Practice IV 1995*, 69).

80 Decree of the Minister of the Merchant Marine concerning the Regulation of Maritime Traffic in the Strait of Messina, of 8 May 1985 (*Gazetta Ufficiale*, 11 May 1985, No. 110).

81 See ibid, Arts. 1-5.

The protest of the United States against the 1985 Decree seems exclusively concerned with the prohibition of passage for certain ships and not with the other measures. Only this prohibition is inconsistent with coastal State jurisdiction to regulate passage in the territorial sea.[82]

Turkey and the Turkish Straits

In stark contrast with the modest extent of traffic regulation in these previous cases are the steps taken by Turkey in relation to the Turkish Straits. The applicability of the Article 35(c) exception is based on Article 2 of the 1936 Montreux Convention, which guarantees merchant vessels in times of peace "complete freedom of transit and navigation (...) by day and by night, under any flag and with any kind of cargo". Furthermore, pilotage and towage remain optional. The absence in the 1936 Montreux Convention of regulations ensuring the safety of navigation and environmental protection in the Turkish Straits led Turkey to issue its 1994 Regulations,[83] which were subsequently discussed in IMO's Maritime Safety Committee (MSC).[84] Worth recalling here is that Turkey is not a Party to the UNCLOS, and is not likely to become one in the near future. The transit passage regime does therefore not bind Turkey as treaty law, and it is not altogether clear whether it applies as customary law in its entirety.[85]

After due consideration the MSC adopted in May 1994 the 'Rules and Recommendations on Navigation through the Strait of Istanbul, the Strait of Çanakkale and the Marmara Sea' (IMO Rules and Recommendations),[86] which were confirmed by IMO Resolution A.827(19) and became effective on 24 November 1994. IMO Resolution A.827(19) confirms that the IMO Rules and Recommendations:

82 For protest by the United States see Roach and Smith, note 12, 240 and 323-328. Tullio Scovazzi "Management Regimes and Responsibility for International Straits With Special Reference to the Mediterranean Straits" (1995) 19 *Marine Policy* 137 at 150 admits that "it is hard to find a precise legal justification" for these measures, although "in light of the inadequacy of present treaty provisions on environmental concerns in straits, they may not be altogether unreasonable". Treves, note 23 at 336 suggests UNCLOS Art. 233 was invoked by Italy.

83 Maritime Traffic Regulations for the Turkish Straits and the Marmara Region, of 11 January 1994 (in force 1 July 1994) (1995) 27 *Law of the Sea Bulletin* 62 (1994 Regulations).

84 'Rules for Ships Navigating in the Straits of Istanbul and Çanakkale' (IMO Doc. MSC/63/7/2). The Strait of Istanbul is also known as 'the Bosporus'; the Strait of Çanakkale as 'the Dardanelles'. For legislation prior to the 1994 Regulations, see Plant, note 57 at 16.

85 It is certainly not evident that Turkey's position at LOSC III is to be regarded as that of a persistent objector against the transit passage regime. See the statements by Turkey in *UN DOALOS Straits II*, 12, 52, 117 and 121.

86 The fact that a distinction is made between 'Rules' on the one hand, and 'Recommendations' on the other, should not distract from the fact that both are in principle non-legally binding; *cf.* Plant, note 57 at 21.

> are established purely for the purpose of safety of navigation and environmental protection and are not intended in any way to affect or prejudice the rights of any ship using the Straits under international law, including the [UNCLOS] and the 1936 Montreux Convention, and that national regulations promulgated by the coastal State should be in total conformity with the said rules and recommendations; (...).

Important to recognize is that the IMO Rules and Recommendations are of a much more general nature than the 1994 Regulations of Turkey. Consequently, it cannot be determined with absolute certainty that the 1994 Regulations conform entirely to the IMO Rules and Recommendations. In order to bring the 1994 Regulations into line with the IMO Rules and Recommendations, Turkey amended the 1994 Regulations and issued the 1994 Instructions,[87] which aim at resolving remaining inconsistencies. Turkey also issued the 1995 Routeing Guide,[88] which is an explanatory brochure on the 1994 Regulations. As the 1994 Regulations are too detailed to describe here at length, only some main characteristics are touched upon, without claiming to be comprehensive. Likewise, remarks on compatibility with UNCLOS and/or the IMO Rules and Recommendations cannot be exhaustively dealt with either.[89]

Articles 7 and 8 of the 1994 Regulations contain notification requirements for vessels in general. With respect to large vessels, Article 29 observes that applicants for passage will be informed of "the outcome of [the] review". This choice of words does not immediately reject the interpretation that authorization could also be withheld.[90] Prior authorization is in any case required for vessels carrying nuclear, dangerous or noxious cargo or waste, which includes vessels carrying MARPOL 73/78 Annex II substances.[91] These provisions seem to be contrary to Paragraphs 2.1-2.3 IMO Rules and Recommendations which strongly recommend participating in the ship reporting system, strongly advise giving prior notification, and recommend making use of information broadcasts, but without going as far as making these mandatory.

87 The Basis, Principles, Rules and Modalities in Implementing the Maritime Traffic Regulations for the Turkish Straits (The Straits of Istanbul, the Marmara Sea and the Strait of Çannakale), Turkish Government Doc. FIL9925.B04, No. B.02.1.DNU/D.61-00289, of 24 November 1994, attached to Turkish Circular Note UKDH/II/495, of 28 November 1994, partly reproduced in Plant, note 57 at 25-26.

88 *The Strait of Istanbul, Sea of Marmara and the Strait of Çanakkale Routeing Guide* (2nd, 1995) (on file with author).

89 See the excellent analysis by Plant, note 57.

90 *Cf.* Plant, note 57 at 24, n. 141. The Russian Federation in IMO Doc. LEG 71/12, 2 takes a similar view.

91 1994 Regulations, Arts. 2 (h) and 30 (Turkey). Turkey in IMO Doc. LEG 71/12/1, para. 4 argues that prior permission is limited to ships carrying "hazardous or noxious waste as defined" in the Basel Convention. It is submitted that the wording of the 1994 Regulations, Art. 30 seems to contradict such an interpretation; *cf.* Plant, note 57 at 24, n. 137.

Where a large vessel with hazardous cargo enters either Strait, Articles 42 and 52 permit prohibiting the entry of a similar vessel from the opposite direction.[92] This conflicts with Paragraph 1.3 IMO Rules and Recommendations, which only allows one-way traffic "[i]n order to ensure safe transit of vessels which cannot comply with the TSS".[93] Article 24 of the 1994 Regulations permits temporary suspension of passage on a number of grounds, such as "construction work including underwater work, drilling, fire extinguishing, scientific and sports activities, salvage and rescue operations, prevention and eradication of maritime pollution, pursuing criminals, accidents and similar cases". Apart from the fact that this list is apparently non-exhaustive, a temporary closure for "sports activities" seems particularly questionable.[94] Some of these grounds, however, seem not unreasonable in the light of a strait State's right to intervene on a similar basis as under UNCLOS Article 221, or constitute concrete examples of *force majeure* situations.[95] It is submitted that Turkey should in any event take the interests of other States into account, but that a temporary suspension is not in itself unreasonable.

Other examples of provisions in the 1994 Regulations which cannot be directly brought under the IMO Rules and Recommendations are:

- the list of operational requirements – Art. 6;
- a speed restriction – Art. 17;
- overtaking regulations – Art. 18;
- a zero-discharge limit for *inter alia* refuse, bilge water, ecologically harmful or unsanitary material, oil and other pollutants in the Straits and Marmara region – Art. 33;

92 Note that the term 'large vessel with hazardous cargo' has not been specifically defined in the 1994 Regulations. Moreover, with respect to the Strait of Çanakkale, the minimum distance between two such vessels proceeding in the same direction is established at 20 nm.

93 Turkey in IMO Doc. LEG 71/12/1, para. 4 argues that 1994 Regulations, Arts. 42 and 52: "concern[s] the temporary suspension of two-way traffic and management of one-way traffic for the safe transit of large vessels carrying hazardous cargo which cannot comply with the TSS". While 1994 Regulations, Arts. 42 and 52 could certainly be used for such cases, they seem to allow a broader application as well. Turkey does not mention the minimum distance rule. Plant, note 57 at 24 thinks this rule to "exceed any reasonable estimate of a 'safe distance'". 1994 Instructions, para. 16 provides that Arts. 42 and 52 'will be executed in line with the corresponding IMO rules 1.2 and 1.3'. See the objections by the Russian Federation in IMO Doc. MSC 65/19/3, para. 7.

94 *Cf.* Plant, note 57 at 24. Turkey in IMO Doc. LEG 71/12/1, para. 4 argues that traffic will only be suspended on "compulsory and reasonable grounds". 1994 Instructions, para. 20 limits application of Art. 24 to "exceptional and unavoidable cases" and "in a manner that would affect the flow of traffic negligibly".

95 The Russian Federation in IMO Doc. LEG 71/12 takes the view that temporary suspension is only possible in cases of *force majeure*.

- maximum air draught – Art. 38;
- regulation of passage due to currents – Arts. 40 and 50; and,
- regulation of passage due to limited visibility – Arts. 41 and 51.

Admittedly, some of these regulations are in principle beneficial to the vessel's safety as well. Conversely, other regulations such as the zero-discharge standard are clearly exercises of unilateral prescription and support the view that Turkey only grants a (non-suspendable) right of innocent passage where at least a right of transit passage could have been expected.

This brief analysis shows that many inconsistencies still seem to exist between the IMO Rules and Recommendations and the 1994 Regulations as modified by the 1994 Instructions; an opinion shared by a considerable number of States.[96] Turkey has nevertheless repeatedly stated that its 1994 Regulations are in conformity with the IMO Rules and Recommendations. Much seems therefore to depend on the way in which the 1994 Regulations are applied in practice.[97] Accusations have been made that Turkey applies the 1994 Regulations in a discriminatory manner, for example by suspending two-way traffic predominantly for non-Turkish flagged vessels.[98] Motives underlying such a course could be related to Turkish plans to transport oil through a pipeline that connects Azerbaijan with the Mediterranean coast of Turkey.[99]

Nevertheless, in order to remove all doubt about inconsistencies with the IMO Rules and Recommendations in particular or UNCLOS in general, Turkey could have avoided the bulk of criticism by opting for more carefully formulated regulations.[100] Turkish statements indicate that, within the Turkish Straits, in particular traffic regulation but probably more generally jurisdiction over vessel-source pollution, is first of all the competence of Turkey, and "not of other countries".[101] While it cannot be denied that, for example a traffic separation scheme (TSS), cannot be amended without the consent of the strait State, it is of course an important precondition that the original TSS was adopted with IMO approval. Moreover, Turkey observes that "the rationale behind adopting rules within the IMO, such as the TSSs, can only be the safety of navigation and protection of the marine environment",[102]

96 See IMO Doc. MSC 65/25, paras. 19.5-19.17 and the statements in IMO Doc. MSC 65/25/Add. 2, Annexes 34 to 39.

97 See the concern expressed by Greece in IMO Doc. MSC 95/19/4, para. 6.

98 See IMO Doc. NAV 43/15, Annex 10, para. 1.12.

99 Plant, note 57 at 17. In October 1999, BP AMOCO seems to have announced its support for a Ceyhan-Baku pipeline and are actively negotiating towards this option.

100 The Russian Federation in IMO Doc. MSC 65/19/3, paras. 2 and 13 objects to the existence alongside each-other of the 1994 Regulations and the 1994 Instructions.

101 IMO Doc. NAV 43/15, Annex 11, 3.

102 Ibid. The Russian Federation, in Annex 12, objects to what Turkey perceives as the goal of "acceleration of the navigation in the Straits".

This attributes obviously more significance to aspects of maritime safety and environmental protection than to the interest in the free flow of navigation.

During the 43rd session of IMO's Sub-Committee on Safety of Navigation (NAV 43), Turkey rejected a working group's proposals to achieve a higher degree of uniformity between the IMO Rules and Recommendations and the 1994 Regulations, but promised to "initiate any action needed".[103] At the MSC 69, Turkey declared that its 1994 Regulations were being revised[104] and was willing to co-operate in NAV 44 towards a "new report covering all aspects of safety and environmental protection, including the review of the [IMO Rules and Recommendations]".[105] The preparation of this report was mainly carried out by a 'Working Group on Ships' Routeing' and took place throughout NAV 44, MSC 70 and MSC 71. After convening parallel to MSC 71 in May 1999, the Working Group informed MSC 71 that it been unable to finalize the preparation of the new report and that the majority took the view that it should discontinue this effort. The reasons behind this majority view were as follows:

1 the existing IMO-adopted routeing system had been effective;
2 Turkey was not contemplating an amendment to the existing IMO-adopted routeing system and the associated Rules and Recommendations;
3 the working group, after extensive technical discussion, had not reached any firm conclusion that any change would make a clear and definitive contribution to the safety of navigation in the Straits;
4 there was no serious prospect of reaching an agreement on amendment(s) to the existing IMO-adopted routeing system in the near future, as the coastal State presently saw no need for any amendment(s); and
5 the agreement of the coastal State was required in accordance with section 3.4 of the General Provisions on Ships' Routeing before IMO could adopt or amend any routeing system.[106]

The MSC Chairman concluded that the view of the Working Group was shared by the majority of the delegations in the MSC and that "discussions of all aspects of this subject" would therefore be discontinued.[107] Cyprus, Greece, the Russian Federation and, to a lesser degree, Ukraine were among the minority that opposed the Working Group's findings. The first main thrust of their opposition focused on the first and

103 IMO Doc. NAV 43/15, paras. 3.41-3.48. See also the amendments to the IMO Rules and Recommendations proposed by the Russian Federation in IMO Doc. NAV 43/3/1.

104 See IMO Doc. MSC 69/INF.26.

105 IMO Doc. MSC 69/22, para. 5.49 and Annex 24.

106 IMO Doc. MSC 71/23, para. 22.31. The deliberations on the subject in MSC are reproduced in paras. 22.14-22.39. The draft report contained in IMO Doc. MSC 70/23/Add.2, Annex 12 therefore remained unchanged.

107 IMO Doc. MSC 71/23, para. 22.39.

third of the conclusions listed above as these failed to take sufficient account of passage rights and the economic implications if these are hampered. In fact, the Working Group admitted that its 'reference basis' had been exclusively the safety of navigation and environmental protection and that this did not include any economic aspect.[108]

Secondly, their statements more or less implicitly object to the second, fourth and fifth conclusion by observing that inconsistencies between the IMO Rules and Recommendations and the 1994 Regulations of Turkey remain unresolved. Moreover, these conclusions also fail to acknowledge the crucial importance of the fact that the IMO Rules and Recommendations were adopted in response to the unilaterally enacted 1994 Regulations. It seems certainly not so evident that, under such circumstances, this much consideration should be given to the requirement of coastal State consent.

It is not unlikely that support for the discontinuation of the discussions was to an important extent driven by irritation with the highly political and legal nature of the conflict and therefore not suitable for an essentially technical organization like the IMO. As the discussions have dragged on since 1994 and taken up considerable time and effort, this is of course understandable. Be that as it may, the conflict is effectively resolved in favor of Turkey. The fact that Turkey has agreed to further enhance the safety of navigation and environmental protection and the fact that the IMO Rules and Recommendations "will continue to apply",[109] do not affect this fundamental point. The collective efforts of a large number of States have therefore been unable to neutralize unilateralism. While the impact may of course be confined to situations where the Article 35(c) exception applies, the risk always exists that unilateralism spills over to other areas.[110]

Warships and Ships Carrying Hazardous Cargoes

With respect to warships, it may be clear that States that oppose special coastal State rights in relation to the territorial sea, *a fortiori* oppose these in straits used for international navigation. Denmark argues that the 1857 Copenhagen Treaty does in principle not apply to warships even though Danish state practice has extended the right of free passage to them. The requirement of prior notification applies only in case of simultaneous passage of three or more warships of the same nationality, and submarines may only pass the Danish Straits by surface.[111] As observed above, Spain seems to grant warships only a right of innocent passage, prohibits activities that

108 Ibid, para. 22.28.

109 Ibid, para. 22.39.

110 *Cf.* the concern expressed by Greece in IMO Doc. MSC 71/23, para. 22.33.

111 Ordinance Governing the Admission of Foreign Warships and Military Aircraft to Danish Territory in Time of Peace, of 16 April 1999, ss. 3(1) and 6(2) (Denmark) (on file with author). See Kaare Bangert "Denmark and the Law of the Sea" in Treves and Pineschi, note 8, 97 at 106-107, and the objections by the United States in Roach and Smith, note 12, 354-355.

would be allowed during transit passage, and requires submarines to navigate on the surface. As regards the Turkish Straits, Section II of the 1936 Montreux Convention restricts the passage of warships of Black Sea and non-Black Sea States in different ways, depending on the type of warship and whether or not Turkey is a belligerent. Finally, as mentioned above, Croatia and Yugoslavia require prior notification and Albania prior authorization with respect to their territorial sea. It cannot be determined in this context whether these States have 'straits used for international navigation' in areas under their national jurisdiction, which passage regime would be applicable, and whether legislation contains special provisions on the issue of notification/authorization in relation to these areas.[112]

With respect to ships carrying hazardous cargoes it should be repeated that Turkey not only explicitly requires prior authorization for such ships if these intend to pass through the Turkish Straits, but also requires prior notification for all other ships, including information on cargo.[113]

Conclusion

The analysis undertaken in this chapter has merely a regional scope and, due to space constraints, could not be comprehensive either. Restraint is thus called for when it comes to drawing conclusions, in particular if these are intended to have global application. Even though the right of innocent passage as such is presumed to have customary status, and no evidence could be identified which challenges this, adequate certainty can only be provided by a global analysis. Nevertheless, state practice indicates that it is still quite uncertain if acceptance of the right of innocent passage also extends to the detailed elements of UNCLOS Article 19.

Enough evidence exists to conclude that acceptance of the transit passage regime as such, is less widespread than acceptance of the right of innocent passage. Conflicting views also abound on the question which navigational regime applies under which geographical and other circumstances. However, this has in essence little do with the recognition of navigational regimes proper.

State practice by European coastal States reflects a lack of uniformity on the issues of special coastal State rights over warships and ships carrying hazardous cargoes. There are nevertheless indications of a growing acceptance of a coastal State right of prior notification for ships carrying hazardous cargoes in lateral passage through the territorial sea, but not beyond or in straits used for international navigation.

Turkish traffic regulation in the Turkish Straits has been one of the most pressing issues in the European region since 1994 and this could remain so in the future. The

112 Available legislation does not contain such provisions; see 1994 Code (Croatia), note 17; 1987 Act (Yugoslavia), note 18.

113 1994 Regulations, Arts. 7, 29 and 30 (Turkey).

controversy centres around the question of residual jurisdiction in situations where the UNCLOS Article 35(c) exception applies. Although UNCLOS does not contain an explicit regime for traffic regulation in situations where Article 35(c) applies and the question of residual jurisdiction arises, much is to be said in favour of the "cooperative legislative competence" in UNCLOS Article 41.[114] Nevertheless, by unilaterally adopting its 1994 Regulations, Turkey holds the view that residual jurisdiction is with the strait State. Since 1994, discussions have taken place at IMO to ensure that the 1994 Regulations are amended to take more account of the flag States' interest in unhampered navigation.

The decision to discontinue these discussions in May 1999 appears to resolve the conflict in favour of Turkey and sets an unwelcome precedent for unilateralism. At the same time, however, this decision should not too readily be equated with IMO approval. The particular way in which Turkey has handled the matter has not secured widespread consent in the international community and compliance with its 1994 Regulations is therefore expected to be under continuous pressure. Whether the Turkish approach outweighs the benefits of securing IMO approval remains to be seen.

As the controversy over passage rights for warships and ships carrying hazardous cargoes is not typical of European coastal States, what really stands out in the above analysis is the uncooperative attitude of Turkey. Practice by other States is generally in conformity with UNCLOS. A commitment to regulation at the international level is, at any rate with respect to vessel-source pollution, also reflected in the efforts under the 1982 Paris Memorandum of Understanding on Port State Control.[115]

The same can be said of the regulatory restraint which the European Community has so far exercised in this field. Whereas unilateralism can never be entirely ruled out, for instance if progress at the IMO is perceived as inadequate,[116] something

114 See the view of Bulgaria in IMO Docs. MSC 67/22/Add. 2, Annex 29, 4-5 and NAV 43/15, Annex 15). Plant, note 57 at 16 considers "provisions on passage and coastal State jurisdiction as appear in Part III" as customary law.

115 Signed at Paris, 26 January 1982. In effect 1 July 1982 (the 21st amendment entered into force on 1 July 1999), text available at: <www.parismou.org> (16 December 1999). As of 1 October 1999 participating Maritime Authorities come from: Belgium, Canada, Croatia, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, Norway, Poland, Portugal, the Russian Federation, Spain, Sweden and the United Kingdom.

116 This could for instance happen if the 1997 Protocol to MARPOL 73/78, which contains Annex VI: 'Regulations for the Prevention of Air Pollution from Ships' (London, 26 September 1997. IMO Doc. MP/CONF.3/34), takes too long to enter into force. As of 1 October 1999, only Norway and Sweden had ratified it, although the 15 EU Member States are expected to ratify in 2000. Both Baltic and North Sea States (and the European Commission) are determined to tackle vessel-source air pollution (see also Council Directive 1999/32/EC, of 26 April 1999, relating to a reduction in the sulphur content of certain liquid fuels and amending Directive 93/

comparable to the United States' enactment of the 1990 OPA[117] is not likely to happen. Finally, some concern is also warranted on the distribution of competence between the European Community and its Member States. With regard to vessel-source pollution, competence is shared, but how exactly is unclear.[118] The complexities to which this can lead is aptly illustrated in the United States, where Washington state regulations conflict not only with those set at the federal level, but also with international regulations.[119] This motivated several European coastal States to issue a *Note Verbale* to the United States Department of State in which they observed that "[d]iffering regimes in different parts of the US would create uncertainty and confusion" and that the United States is therefore urged "to pursue a regulatory regime, on a national basis, which is consistent with agreed international standards".[120] These concerns should in fact be taken into account by all federal States, including for that matter the European Community, where the regulation of international shipping is not an exclusive federal competence.

12/EEC, OJ 1999, L 121/13). The issue of designation of the North Sea/English Channel as an SOx Emission Control Area will be taken up once more, this time at MEPC 44 (which convenes in March 2000).

117 Oil Pollution Act 1990, 33 U.S.C. (United States Code) §§ 2701-2761, 46 U.S.C. §§ 3701-3718 as amended (USA).

118 See the complex formulation in the European Community's instrument of formal confirmation of UNCLOS. See also André Nollkaemper "The External Competence of the Community with Regard to the Law of Marine Environmental Protection: The Frail Legal Support for Grand Ambitions" in Ringbom, note 58 at 165-186.

119 Washington Rev. Code §§ 88.46.010(2)-(3); 88.46.040(3), and Washington Admin. Code §§ 317-21-010 to 317-21-910 (USA). These have led to *The International Association of Independent Tanker Owners v. Lowry (or Locke), et al.* (District Court) 947 F. Supp. (Federal Supplement) 1484 (1996) (USA); (Court of Appeals for the Ninth Circuit) F. (Federal) 3d, (1998) (USA), Slip Opinion at 6105-6139, amended in part, reversed in part, and remanded. The Court of Appeals left most of the Washington state regulations unaffected, even though these would have to be complied with throughout a ship's voyage. In first instance, the District Court even saw support for the absence of the need to comply with international standards in the fact that some provisions in the 1990 OPA were not intended to conform to international standards either; ibid, Order 11. On 10 September 1999 the U.S. Supreme Court announced that it would review the Ninth Circuit's disposition on an expedited basis. Briefs will be filed in late October 1999 and argument before the Supreme Court will take place in early December 1999 (information kindly provided by Mr. J. Benner).

120 Issued by the Royal Danish Embassy, Washington D.C. (File No. 60.USA.1/4), dated 14 June 1996. It concerns the Governments of Belgium, Denmark, Finland, France, Germany, Greece, Italy, Japan, the Netherlands, Norway, Portugal, Spain, Sweden, and the Commission of the European Community.