Freedom of Navigation in the Exclusive Economic Zone

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An EU Approach

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CHAPTER I

INTRODUCTION

Seas and oceans cover about 70 per cent of the Earth's surface.[1] They are vital to the humankind and all other living things on the Earth. They are not only a major source of protein and economic well-being to humankind but also an indispensable means of communication connecting different parts of the world.[2] In addition, they serve as the regulator of the Earth atmosphere and a huge waste disposal system. The importance and significance of the seas and oceans makes them inherently international by nature, and not only a source of cooperation but also a source of competition and conflict between and among States, particularly in light of trade-based prosperity and any scarcity of resources on land. Against this background, legal agreements respecting the access to and the use of the seas and oceans have long been a matter of international concern. Prior to 1958, regulation of the access to and the use of the seas and oceans primarily relied on customary law.[3] Since 1958, there have been three global attempts to codify and progressively develop the international law of the sea, namely the First United Nations Conference on the Law of the Sea in 1958 (UNCLOS I), the Second United Nations Conference on the Law of the Sea in 1960 (UNCLOS II), and the Third United Nations Conference on the Law of the Sea, 1973-1982, (UNCLOS III).[4]

Traditionally, the law of the sea was essentially concerned with navigation on the surface.[5] In other words, the law of the sea primarily centred on the entitlement of ships to navigate freely at sea, save for in foreign territorial seas when the freedom of navigation was replaced by the right of innocent passage.[6] As such, the traditional law of the sea appeared one-dimensional. Other uses of the seas and oceans were not of major concern to the body of law governing the seas and oceans then, because the resources to be found there, particularly fish, were well regarded as unlimited or inexhaustible.[7]

The contemporary law of the sea, on the other hand, is concerned with multiple dimensions of the seas, which not only include use of and access to the water surface but also, among others, the water under the surface, the airspace above the surface, use of and access to the resources of the seas, the protection and preservation of the marine environment, and the

settlement of disputes arising therefrom.[8] As time goes by, knowledge about the seas and oceans deepens thanks to continued scientific research and advanced technology; the needs to further explore and exploit the seas and oceans grows for the sake of the rapidly growing world population; and the capability of doing so is unceasingly improved and strengthened. In this context, the law of the sea, like any other body of law, has not been static but subject to change in response to human needs in each particular period of time. Even though the law of the sea has become multi-dimensional and subject to further development, and tends to remain so, the freedom of navigation continues to be at the centre of the law of the sea.

Freedom of navigation is a concept that dominated the law of the sea for the past three centuries during which the freedom of the seas primarily meant freedom of navigation and freedom of fishing.[9] This concept denotes that all States are entitled to free navigation at sea without interference. Nevertheless, free navigation at sea is not a right, which a State may exercise without taking into account the interests of other States exercising that right or other freedoms granted to them at sea. In other words, it is implied that whenever a State exercises its free navigation at sea, that State assumes an obligation towards other States which are also exercising the same right or other legitimate freedoms of the seas. This obligation requires each and every State exercising free navigation to pay due regard to the rights and interests of other States exercising their freedoms at sea. In addition, under contemporary international law in general and the law of the sea in particular, the user State is also obliged to protect and preserve the marine environment and to cooperate with other States to protect it. The freedom of navigation, like many other concepts of international law, is not absolute but subject to certain restricted and explicitly defined exceptions. For instance, a ship of any State navigating beyond the outer limit of the territorial sea may be subject to the right of visit by other States if it is allegedly engaged in piracy or slavery trade, according to the existing law of the sea.

Freedom of navigation in the exclusive economic zone (EEZ) – a new maritime zone provided for under the United Nations Convention on the Law of the Sea in 1982 (the UNCLOS)[10] - is well regarded as a continuation of the freedom of navigation on the high seas. It is a right enjoyed by all States, whether coastal or not. Like the freedom of navigation on the high seas, it is not an absolute freedom under the UNCLOS. In addition, it is even deemed more conditional than the freedom of navigation on the high seas, given the resource-related rights and obligations of coastal States in the EEZ. Specifically, apart from respecting the freedom of navigation or other freedoms being exercised by other States in the area, a user State is duty

bound to pay due regard to the rights granted to coastal States under the UNCLOS.

In addition to the apparently inherent conditional free navigation granted to other States in the EEZ as mentioned above, this freedom appears to be even more conditional or curtailed in practice, given the challenges facing the law of the sea,[11] including the seemingly never ending phenomenon of coastal State creeping jurisdiction over maritime spaces,[12] particularly the EEZ. The challenges, if not properly addressed, will undoubtedly result in further restriction of the freedom of navigation. Consequently, the world economy in general and the economies of States largely relying on maritime mobility and unimpeded commerce in particular will be affected. In short, though the maintenance of the freedom of navigation in the EEZ, which was regarded as a precondition for the emergence of the zone and attracted, and tends to continuously attract, wide support of States and international community, the freedom of navigation does encounter the danger of being challenged and eroded by virtue of unilateral acts which appear to be in favour of coastal States but not completely compatible with the existing EEZ legal regime. In other words, the freedom of navigation in the EEZ is, to a large extent, the most critical but at the same time also vulnerable right enjoyed by other States in that zone under the UNCLOS, given the coastal State functional sovereign rights and jurisdiction therein.[13]

Given the significance of the emergence of the EEZ, a great deal of research on the legal status of that zone has already been conducted. As a result, there is abundance of literature on the topic.[14] Most of the literature, if not all, however, primarily adopts a similar way of examining or reflecting the rights and duties of States in the EEZ. Therefore, another way of reflecting the rights and duties of States in the EEZ should be explored or applied.[15] As an integral part of the EEZ legal regime, the freedom of navigation one way or another has always been part of the literature on the EEZ. Separate literature on the freedom of navigation in the EEZ, however, remains limited, particularly when it comes to a regional approach relating thereto. The existing literature on the freedom of navigation in the EEZ is largely part of a broader one[16] either on the law of the sea or on the EEZ; hence, the linkage between a regional approach with respect to the prevention, reduction and control of ship-source pollution[17] and the freedom of navigation is almost untouched. On the other hand, the existing literature on vessel-source pollution is also abundant; some of which does, to a certain extent, discuss the EU ship-source pollution in the context of the UNCLOS and MARPOL 73/78.[18] Little attention, however, has been paid to the examination of EU ship-source pollution in the context of the freedom of navigation entitled to non EU Member States[19] in the EU waters and the

high seas. In this context, more attention is to be paid to the freedom of navigation in the EEZ in light of the EU ship-source pollution approach, given the great common interests of States and the international community in the maintenance of the freedom of navigation at sea in general and the freedom of navigation in the EEZ in particular, and given the increasingly influential and potential role of the EU with respect to the development of the law of the sea.

Against this background, the book aims at making a contribution to the existing literature on the freedom of navigation in the EEZ and the possibly first regional approach related thereto. This book gives an overview of the freedom of navigation under international law of the sea; a change in approach with regard to discussion of the rights and duties of States in the EEZ;[20] and the EU approach with respect to the prevention, reduction and control of ship-source pollution and its possible impacts on the freedom of navigation of other third States in the EU waters and beyond. This book also confirms that the freedom of navigation of other States in the EEZ is closely related to, and at times serves as a prerequisite for, their other freedoms and lawful uses of the sea therein. Accordingly, any impact on the freedom of navigation of other States in the EEZ may affect their other freedoms and rights therein.

In light of the said aim, there are two major research questions therein. Question one: Is there any discrepancy between the EU approach with respect to ship-source pollution and the existing international law binding upon the EU and its Member States? Question two: Are there any possible legal implications arising from the EU approach upon the freedom of navigation entitled to other States other than its Member States in the EU waters and beyond? To address the research questions, this book deals with four research issues, namely freedom of navigation under international law; rights and duties of States in the EEZ; jurisdiction over vessel-source pollution; and the EU approach and its possible implications. Against this backdrop, the book is divided into six chapters, the scope of which will be defined.

Chapter I and Chapter VI address introduction and conclusions respectively.

Chapter II chiefly focuses on the freedom of navigation under international law, the very basis, upon which the modern international law of the sea has been built. In this connection, Chapter I reviews various maritime zones and their respective legal regimes prior to the examination of the freedom of navigation under customary international law and under international treaty law.

Chapter III deals with the EEZ, a newly emerged extended maritime zone under international law of the sea. In this Chapter, the elucidation of

the rights and duties of States in the EEZ is the main focus. The rights and duties are grouped respectively into those of coastal States, and those of other States.

Chapter IV addresses the issue of jurisdiction over vessel-source pollution under the UNCLOS. In this regard, jurisdiction of coastal States, flag States, and port States with regard to the prevention, reduction and control of marine environmental pollution from ships in various maritime zones, namely the territorial sea, the contiguous zone, the EEZ, and the high seas, are examined.

Chapter V concentrates on the EU approach with respect to ship-source pollution. In this Chapter, the Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements, and the Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC, among others, are examined. In connection with the EU approach, the issues of the EU competence and the position of international law in the context of EU law are also investigated.

CHAPTER II

FREEDOM OF NAVIGATION UNDER INTERNATIONAL LAW OF THE SEA

1. Introduction

Freedom of navigation upon seas and oceans is a concept that has long been established and developed in public international law. Dating back to 1609, the year Hugo Grotius gave birth to his important work entitled *Mare Liberum* (Freedom of the Seas); this right has been confirmed as an inalienable right entitled to all States regardless of whether they were big or small.[21] Freedom of navigation is one of the freedoms of the seas, which has been codified in international treaties, giving rise to the well-recognised right of all States in respect of free navigation at sea.[22] From one point of view, freedom of navigation positively means that every State has a right to navigate the seas and oceans, which are beyond the limits of national jurisdiction of any State. From another point of view, freedom of navigation negatively means navigation beyond the limits of national jurisdiction is guaranteed without interference by other States.[23] To understand freedom of navigation in the EEZ, it is necessary to look at the relevant maritime zones and their respective legal regimes on the one hand, and to investigate freedom of navigation under international law of the sea, both customary and conventional, on the other hand. However, given the fact that many writers have already examined these issues in one way or another, particularly in connection with their evolution, it is not the purpose of this Chapter to reexamine all the aspects related to international law of the sea but only the most relevant topic-related aspects, namely maritime zones and their legal status, freedom of navigation under customary international law, and freedom of navigation under international conventional law, with a view to contributing to the realisation of the above set aim of the book.[24] In this regard, certain issues such as, *inter alia*, internal waters, bays, historic waters, baselines, delimitation, the Area, the Agreement on Part XI of the UNCLOS, and the Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks are not within the scope of the present examination.

2. Maritime zones and their legal status

2.1. Maritime zones in the pre-1958 period

2.1.1. Territorial sea

In the pre-1958 period, the maritime domain belonging to the coastal State was not so clear until 1782 when the three - mile territorial sea, which originated from the cannon-shot rule,[25] appeared in the literature on international law.[26] The three-mile territorial sea limit[27] was long considered traditional and widely accepted by a majority of States in Europe.[28] The territorial sea[29] is a belt of sea adjacent to the coast, which was formerly sometimes also known as territorial waters.

Under the generally accepted rule, a coastal State could claim a territorial sea extending up to three nautical miles seaward from its coast.[30] The territorial sea was measured from a baseline - the line that followed the low-water mark along the coast.[31] The coastal State could exercise sovereignty[32] over the territorial sea, its airspace, and its bed and subsoil. In other words, the coastal State had jurisdiction and control over the resources, particularly fishery, therein, and other uses in the zone, including navigation of ships, and the overflight by aircraft.[33] However, ships of other States were still entitled to right of passage therein, provided that the sovereignty of the coast State over the zone was not prejudiced under international law.[34]

2.1.2. Fisheries zone

A fisheries zone, which has developed and crystallised into an exclusive fishery zone in the twentieth century, was a zone adjacent to the territorial sea, within which a coastal State claimed its right over fisheries. This zone was sometimes considered as a zone located in between the territorial sea and the high seas.[35] The fisheries zone was widely accepted and considered as part of international law then by States, particularly those in Europe in the nineteenth century and in the early twenty century.[36]

When claiming a fisheries zone, a coastal State pretends to have an exclusive fishing right therein.[37] Citizens of States making such a claim were entitled to an exclusive fishing right. Citizens of other States were not entitled to such a right unless they were granted permission by the relevant coastal State. In addition, a number of coastal States did not limit their claim to the exclusive right to fish in the fisheries zone but extended it to sales and purchase of liquor in that zone.[38] In the fisheries zone, apart from fishery

aspect (and liquor control claimed by certain countries, like the countries which were parties to the Convention respecting Liquor in the North Sea of 1887), the regime of the high seas remained. In other words, other States enjoyed the freedoms of the sea, except for the freedom of fishing (and freedom to trade liquor for certain States concerned).

2.1.3. High seas

As regards the high seas, they were "open access, common pool" to all.[39] They were sea areas that were beyond the outer limit of the territorial sea.[40] As Judge Weiss put it: "The high seas are free and *res nullius*, and, apart from certain exceptions or restrictions imposed in the interest of the common safety of States, they are subject to no territorial authority".[41] In other words, all States enjoyed freedoms of the seas,[42] including freedom of navigation and freedom of fishing, and freedom for other uses, such as recreation and even dumping in the high seas.[43]

Traditionally, the legal regime of the high seas had been characterised by the dominance of the principles of free use and the exclusive jurisdiction of the flag States, which were in sharp contrast to the powers of States over their coastal waters.[44] At later date, when need arose, and technology allowed, freedom to lay submarine cables and pipelines, and freedom to fly over the sea areas have been added.[45] In his Dissenting Opinion in the Fisheries Case, Sir Arnold McNair said: "If they are high seas, the foreign fishermen are authorised to fish there. If they are Norwegian waters, the foreign fishermen have no right to fish there except with the permission of Norway".[46] Also in his Dissenting Opinion, he quoted Lord Stowell in The Twee Gebroeders (1801): "In the sea, out of the range of cannon-shot, universal use is presumed…".[47] The vessels operating thereon were only subject to the jurisdiction of the State, to which they belonged. However, when it came to piracy in the high seas, all States had jurisdiction, for pirates were considered the enemy of all. All States had not only the right but also the obligation to fight piracy.

In the period of maritime exploration, which commenced in the sixteenth century, there was clear opposition to the notion of closed seas. In the seventeenth century, there was the doctrinal battle between the freedom of the seas represented by Grotius who, as noted before, had developed his ideas in "*Mare Liberum*" published in 1609, and the closed sea doctrine notably represented by Selden, who had argued this theory in his work entitled "*Mare Clausum*" published in 1635. The freedom of the seas advocated by Grotius was previously opposed by Albericus Gentilis.[48] The battle eventually resulted in victory for those who advocated the open seas,[49]

for the importance of freedom of navigation in the service of overseas and colonial trade overshadowed national interests in coastal fisheries, and the development of true naval power displaced national claims to sovereignty over the seas.[50] Accordingly, the freedom of navigation had been widely recognised, and accepted as an established principle of international law, according to which States were at liberty to use and exploit the high seas, and no State had the right to prevent ships of other States from using the high seas for any lawful purpose.[51]

2.2. Maritime zones under the 1958 Geneva conventions

In light of the outstanding problems left unsettled from the Hague Conference,[52] namely the limit of the territorial sea and coastal State jurisdiction over fisheries,[53] which had somehow become complicated by virtue of the fact that more coastal States extended their sovereignty beyond (and some even far beyond) the then widely accepted three- mile rule,[54] codification and progressive development of the law of the sea was greatly required, particularly with the emergence of the UN International Law Commission, which was primarily set up for that purpose. Such a requirement was additionally strengthened for the sake of international peace and security, given the sufferings and consequences caused by WWII facing the whole of mankind, which led to the appearance of the UN and its Charter. Against this background, the UNCLOS I was convened in 1958 in Geneva. The UNCLOS I gave birth to four conventions, namely the Convention on the Territorial Seas and Contiguous Zone, 1958 (hereinafter referred to as Geneva TS&CZC), the Convention on the Continental Shelf, 1958 (hereinafter referred to as Geneva CSC), the Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958 (hereinafter referred to as Geneva FCLRC), and the Convention on the High Seas, 1958 (hereinafter referred to as Geneva HSC). Under those conventions, there are four maritime zones: the territorial sea, the contiguous zone, the continental shelf, and the high seas.

2.2.1. Territorial sea

Under the Geneva TS&CZC, the territorial sea of a State is a belt of sea adjacent to its coast, beyond its land territory and its internal waters. The coastal State has sovereignty over its territorial sea, its airspace, and its bed and subsoil. The sovereignty is exercised subject to the relevant provisions of the convention, and other rules of international law. In other words, the sovereignty over the territorial sea is by no means absolute or unlimited. For

instance, the coastal State is not allowed to hamper innocent passage throughout its territorial sea, which will be dealt below in section 4.1 of this Chapter.[55] The convention, however, fails to specify the limit of the territorial sea. Such failure stemmed from the fact that the participating States at the UNCLOS I failed to agree with one another on the issue,[56] thus leaving the limit of the territorial sea unresolved. In other words, at the very moment in time when the UNCLOS I took place, the traditional three-mile limit for the territorial sea still attracted far more support from the States participating therein than any other alternative.

However, Article 24, paragraph 2, of the aforesaid convention, may be construed to mean that the maximum possible limit of territorial sea must be twelve miles, given that the maximum breadth of the territorial sea together with the contiguous zone could not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured. Given this provision, it may be understood that, even though the limit of the territorial sea was left undefined, allowing for some flexibility that way, the participating States had nevertheless succeeded in limiting its maximum of twelve miles. In other words, the aforementioned provision implies a kind of compromise reached among the participating States at the UNCLOS I regarding the limit of the territorial sea. Even though no precise width of the territorial sea could be agreed upon, the negotiators were at least able to avoid the complete failure that befell the Hague Conference.[57] As a result, the territorial sea has been successfully codified for the first time in international law, though certain issues were left unsettled until the UNCLOS III which resulted in the conclusion of the UNCLOS.

Concerning other States, their ships are entitled to the right of innocent passage in the territorial sea. The passage may include stopping and anchoring but only if the latter are incidental to ordinary navigation or are rendered necessary by force majeure or by distress.[58] However, the exercise of the right of the innocent passage is subject to relevant provisions of the aforesaid convention. Pursuant to the Article 14 of the convention, “passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State”. Such passage shall take place in conformity with the relevant provisions of the convention and with other rules of international law. In the case of submarines, they are required to navigate on the surface and to show their flag. Further details will be supplemented below in section 4.1 of Chapter I.

2.2.2. Contiguous zone

Under the Geneva TS&CZC, the contiguous zone is a zone of the high seas contiguous to the territorial sea that may not extend beyond twelve miles from the baseline used to measure the breadth of the territorial sea. In this zone, the coastal State may exercise the necessary control to prevent the infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea, and to punish infringements of these regulations committed within its territory or territorial sea.[59] Other States are entitled to the freedoms of the high seas in the contiguous zone, for the waters thereof form part of the high seas. According to the Geneva TS&CZC, the rights and duties of the coastal States and other States in the territorial sea or the contiguous zone are without prejudice to their rights and duties provided for under other existing international instruments, by which they have been previously bound.[60]

2.2.3. Continental shelf

According to Article 1 of the Geneva CSC, the continental shelf[61] is the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits the exploitation of the natural resources of the said areas. The continental shelf is also the seabed and subsoil of similar submarine areas adjacent to the coast of islands. According to Article 2 of the convention, the coastal State has sovereign rights over the continental shelf for the purpose of the exploration and exploitation of the natural resources thereof.[62] The rights here are exclusive, and do not depend on occupation, effective or notional, or on any express proclamation. However, according to Article 3 of the convention, the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters. In addition, according Article 5 of the convention, the exploration of the continental shelf and the exploitation of its natural resources shall not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication.[63] In other words, the rights of other States to freedoms of the high seas, including the freedom of laying or maintenance of submarine cables or pipelines on the continental shelf, should not be affected or hampered.

2.2.4. High seas

The high seas are all parts of the sea, which are not included in the territorial sea or in the internal waters of a State.[64] The high seas are open to all nations, and no State may validly purport to subject any part of them to its sovereignty.[65] All States are entitled to the freedom of the high seas,[66] including, *inter alia*, freedom of navigation, freedom of fishing, freedom to lay submarine cables and pipelines, and freedom to fly over the high seas. The language of the convention suggests that this list of freedoms in the high seas is far from an exhaustive list.[67] However, this list of examples was not conventionally extended until the appearance of the UNCLOS, which will be touched upon in section 2.3 of this Chapter below. Furthermore, the exercise of these freedoms by States must be in accordance with the relevant provisions of the convention, and with other rules of international law.[68]

2.3. Maritime zones under the UNCLOS

Given the failure of the UNCLOS II,[69] and the increasing importance of the seas and oceans to the world in general and coastal States in particular, especially in the field of economic development, the UNCLOS III was convened in 1973 and concluded its work in 1982. As a result, the UNCLOS, being known as a constitution for the oceans, has come into the picture, providing for a legal framework with respect to the use of and access to the seas and oceans. In other words, the emergence of the UNCLOS has brought about a new era of international law of the sea - a new ocean legal order - under which the problems facing the UNCLOS I and the UNCLOS II have been addressed. The UNCLOS also achieved an acceptable accommodation of the interests of different States as well as those of the international community in respect of the seas and oceans.[70] In light of the framework of the present thesis and the aim of this Chapter, this section primarily focuses on the relevant maritime zones under the UNCLOS.

2.3.1. Territorial sea

Under the UNCLOS, the territorial sea is an adjacent belt of sea beyond the land territory and internal waters of a coastal State, and beyond the archipelagic waters in the case of an archipelagic State.[71] The sovereignty of the coastal State and the archipelagic State extends to the territorial sea, the air space over it, and its bed and subsoil.[72] And like the Geneva TS&CZC, the sovereignty over the territorial sea is exercised subject to the UNCLOS and other rules of international law.[73]

Concerning the breadth of the territorial sea, every State has the right to establish the breadth of its territorial sea up to a limit not exceeding twelve nautical miles, measured from baselines determined in accordance with the UNCLOS.[74] In this regard, it can be said that the UNCLOS has been able to remedy the major weaknesses which had troubled the Hague Conference, and which has been considered as an inherent ambiguity in the Geneva TS&CZC. In other words, having succeeded in reaching an agreement on the limit of the territorial sea, the world has for the first time been able to witness a comprehensive and detailed legal regime regulating the access to, and the use of, the seas and oceans, thanks to, *inter alia*, the provision on the limit of the territorial sea.

Concerning other States, their ships are entitled to enjoy the right of innocent passage in the territorial sea.[75] The innocent passage regime in place renders the sovereignty of the coastal State not unrestricted or at least not the same as the sovereignty that a State exercises over its territory. In other words, the coastal State is under an obligation to respect passage[76] of ships of other States in its territorial waters in accordance with the convention and other rules of international law. The coastal State can only intervene in navigation of ships of other States in the defined circumstances provided under the convention, such as if navigation is not innocent or for reasons of national security of the coastal State.[77] Further details will be dealt below with in section 4.2 of this Chapter. In addition, unlike the 1958 Geneva conventions, the UNCLOS has given rise to a new regime: archipelagic waters and their air space, bed and subsoil, and the resources therein, over which an archipelagic State has in principle sovereignty. All ships[78] of other States enjoy the right of archipelagic sealanes passage through routes normally used for international navigation through such archipelagic waters. The archipelagic sealanes passage is the right of navigation and overflight in the normal mode by ships and/or aircraft of other States solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an EEZ and another part of the high seas or an EEZ.[79]

2.3.2. Contiguous zone

The contiguous zone is a maritime zone contiguous to, and seaward of, the territorial sea of a coastal State, which may not extend beyond twenty-four nautical miles from the baselines from which the breadth of the territorial sea is measured, and within which the coastal State may exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial

sea or to punish infringement of the above laws and regulations committed within its territory or territorial sea.[80]

In addition, the contiguous zone has been extended to archaeological and historical objects. Such rights were not available under the 1958 Geneva conventions. In short, like the right of the coastal State under the Geneva TS&CZC, the coastal State may only enjoy the enforcement jurisdiction in the contiguous zone.[81] In light of the UNCLOS, the contiguous zone may overlap with the EEZ of the coastal State. However, if the coastal State fails to declare an EEZ but claims a contiguous zone, the coastal State may not exercise the control necessary as provided, for the waters within the contiguous zone are deemed to be part of the high seas and therefore the freedoms enjoyed by other States and the international community therein are presumed to prevail over the rights claimed by the coastal State therein. In other words, in light of the UNCLOS and in the absence of an EEZ proclamation by the coastal State, the existence of the high seas status is presumed to start beyond the outer limit of its territorial sea onward, and hence takes precedence over the existence of the coastal State jurisdiction over foreign ships in its claimed contiguous zone.[82]

2.3.3. EEZ

The EEZ is a maritime area beyond and adjacent to the territorial sea of a coastal State, which may not exceed 200 nautical miles from the baseline from which the breadth of the territorial sea is measured. In this zone the coastal State not only has sovereign rights for the purpose of exploration and exploitation of natural resources therein, jurisdiction over marine scientific research, the protection and preservation of the marine environment, and the establishment of artificial islands, installations or structures in the zone, but also obligations to give due regard to the rights and duties of other States and the international community. Other States not only possess freedom of navigation, freedom of overflight, and freedom of the laying of submarine cables and pipelines, but also the obligation to give due regard to the rights and duties of the coastal States in that zone. More details about the EEZ will be discussed in the Chapter III below.

2.3.4. Continental shelf

The continental shelf of a coastal State is a zone of seabed and subsoil of the submarine areas that extends 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. Where the continental margin extends beyond 200 nautical miles from the baselines used to measure the breadth of the territorial sea, the outer edge of the continental margin cannot exceed 350 nautical miles from the baselines used to measure the breadth of the territorial sea or 100 nautical miles beyond the 2,500 metres isobath, which is a line connecting the depth of 2,500 metres.[83] The coastal State has exclusive sovereign rights to the non living resources and the living organisms belonging to sedentary species of the continental shelf.[84] However, in case of an extended continental shelf, which reaches beyond 200 nautical miles but does not exceed 350 nautical miles from the baselines used to measure the breadth of the territorial sea, the coastal State has to pay or contribute in kind in terms of the exploitation of its non living resources. As far as all production after the first five years of operation at a particular site is concerned, the coastal State has to make payment or contribute in kind on an annual basis. Starting from the sixth year, the rate of payment or contribution must be 1 percent of the value or volume of production at that site. The rate must increase by 1 percent each subsequent year until the twelfth year and remains at 7 percent thereafter. All these payments and contributions must be made through to the Authority, which must distribute them to State Parties to the UNCLOS, in accordance with its relevant provisions.[85]

Like the Geneva CSC, the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters. The exercise of the rights of the coastal State over the continental shelf must not violate or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for by the UNCLOS.[86] Unlike the rights over the EEZ, which the coastal State has to claim expressly, the rights of the coastal State over the continental shelf exist independent from occupation, effective or notional, or on any express proclamation.[87] However, given the appearance of the EEZ, which did not exist under the 1958 Geneva conventions, and given the possibility for States to establish an EEZ in accordance with the UNCLOS, there exists a special relation between the two zones, because they both regulate the seabed subject to the sovereign rights of the coastal State.[88]

In addition, while the outer limit of the EEZ is solely determined by a distance from the baseline used to measure the breadth of the territorial sea, regardless of the depth of the water, and regardless of whether there is the continental margin or not, the outer limits of the continental shelf can be

determined by the distance from the baseline and/or the depth of the seabed.[89]

2.3.5. High seas

The high seas are all parts of sea that are not included in the EEZ, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.[90] In other words, the high seas comprise the ocean space beyond the jurisdiction of coastal States, the waters superjacent to the seabed, the ocean surface, and the atmosphere above.[91] The high seas are open to all States, whether coastal or landlocked. No State may validly purport to subject any part of the high seas to its sovereignty.[92] Every State, both coastal and landlocked, has the right to sail ships flying its flag on the high seas.[93] The State, whose flag those ships fly, possesses exclusive jurisdiction, except in a few exceptional circumstances, which have been expressly provided under the UNCLOS or under other treaties, by which the State concerned is bound.[94] No authority other than that of the flag State can order the arrest or detention of the ships, even as a measure of investigation. In case of a collision or any other incident of navigation regarding a ship on the high seas, involving the penal or disciplinary proceedings of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.[95] This provision deems to have overruled the rule established by the PCIJ in the Case of the S.S. Lotus in 1927 that allowed concurrent jurisdiction in case of a collision on the high seas between two vessels flying different flags.[96]

In the high seas, all States are entitled to, *inter alia*, freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations, freedom of fishing, and freedom of scientific research in accordance with the UNCLOS. However, when exercising these freedoms, all States must pay due regard to the interests of other States in their exercise of the same freedoms of the high seas in accordance with the convention.[97]

Like the Geneva HSC, the aforesaid list of freedoms is by no means an exhaustive list. In other words, other activities on the high seas that are in line with the status of the high seas should be accepted as freedoms of the high seas, save they are prohibited or excluded by a specific rule of law.[98] As far as the activities on the high seas other than those listed in the UNCLOS are concerned, there is a presumption that is in favour of an established use as against a new use. However, the reality shows that

stronger States have, more often than not, been able to insist upon their own uses of the high seas even if such uses may appear newer to the uses of other States.[99]

3. Freedom of navigation under customary international law

Freedom of navigation upon seas and oceans has long been established under customary international law. As aforesaid, freedom of navigation played a dominant part in the law of the sea for about three hundred years, commencing from the 17th century, during which the freedom of the seas primarily focused on the freedom of navigation.[100] According to Rüdiger Wolfrum, former President of ITLOS between October 2005 and September 2008, freedom of navigation is one of the oldest and most recognised principles in the legal regime regulating ocean space. And this principle represents one of the pillars of the law of the sea and was at the origins of modern international law.[101]

According to Philipp Wendel, freedom of navigation has traditionally been one of the most important principles in public international law, particularly the law of the sea.[102] Two basic components of its content include the right to enter upon the oceans and to pass them unimpeded by any other State or entity, and the exclusive jurisdiction of a State over its vessels flying its flag.[103] These two aspects of freedom of navigation are closely connected with each other.[104] As stated in the Le Louis case, in accordance with the principle of the equality of independent States, all States have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation, and no State is authorised to interfere with the navigation of other States on the high seas in times of peace except in the case of piracy by law of nations or in extraordinary cases of self-defence.[105] In the S.S. Lotus case, the PCIJ held that "[i]t is certainly true that -- apart from certain special cases which are defined by international law -- vessels on the high seas are subject to no authority except that of the State whose flag they fly".[106] In other words, by virtue of the principle of freedom of navigation, no State may exercise any kind of jurisdiction over foreign vessels on the high seas.[107] And as a matter of fact, it is universally admitted that a ship on the high seas is, for jurisdictional purposes, to be considered as a part of the territory of the flag State.[108]

As mentioned above in the section 2 of this Chapter, freedom of navigation not only exists in the high seas but also in other maritime zones albeit different in extent and manifestation. In the territorial sea, it exists in the form of innocent passage,[109] which is one of the oldest and most universally recognised rules of public international law. As Jessup puts it

"as a general principle, the right of innocent passage requires no supporting argument or citation of authority; it is firmly established in international law".[110] In straits used for international navigation, it exists in the form of transit passage. In the archipelagic waters, it exists in the form of archipelagic sealanes passage. In the EEZ, it exists in the form of freedom of navigation, which is the same to that in the high seas. All these manifestations of freedom of navigation will be revisited and examined in detail in the section 4 of this Chapter. The regimes of innocent passage, transit passage, archipelagic sealanes passage, and freedom of navigation have been provided and/or incorporated in the UNCLOS, and appear to have crystallised into international customary rules.

In the pre-1958 period, under customary international law, States were entitled to the right of innocent passage in the territorial sea, and the straits comprised of territorial waters of one or more States.[111] The States also enjoyed open access to canals connecting one sea to another.[112] In the case of straits used for international navigation between two parts of the high seas, States enjoyed unsuspended innocent passage.[113] The Corfu Channel Case is an example that the right of innocent passage and the rules of innocent passage have been long established in straits used for international navigation, though the ICJ refrained from discussing the issue of the innocent passage in the territorial sea in general due to its irrelevance to the case in question. According to the ICJ, it is generally recognised and in accordance with customary international law that States, in time of peace, have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorisation of a coastal State, provided that the passage is innocent.[114] There is no right for a coastal State to prohibit such passage through straits in time of peace.[115]

According to Article 15 of the Articles concerning the law of the sea in the Report of the ILC on the work of its Eighth Session in 1956, submitted to the UNGA, "ships of all States, subject to the provisions of the present rules, shall enjoy the right of innocent passage through the territorial sea. Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters. Passage is innocent so long as the ship does not use the territorial sea for committing any acts prejudicial to the security of the coastal State or contrary to the present rules, or to other rules of international law. 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 by distress. Submarines are required to navigate on the surface".[116] Moreover,

for the sake of navigation, according to Article 16 of the aforementioned ILC Articles, the coastal State has the duty not to hamper innocent passage through the territorial sea. It is obliged to take steps to ensure the respect for the innocent passage. At the same time, it is obligated not to allow its territorial sea to be used for activities contrary to the rights of other States.[117]

However, for the sake of the coastal State, according to Article 17 of the said Articles concerning the law of the sea, it may take necessary measures, including temporary suspension of the passage by foreign ships in specified areas of its territorial sea if this is deemed necessary for the protection of its security or of its other rights provided for under the present rules or under other rules of international law. In this regard, due publicity is required on the part of the coastal State.[118] In case foreign ships are traversing its territorial sea for the purpose of entering its internal water, the coastal State may adopt necessary measures to prevent them from violating the conditions to which they are subject. However, when it comes to straits normally used for international navigation connecting two parts of the high seas, no suspension of the passage by foreign ships is allowed.[119]

In other maritime zones outside the outer limits of the territorial sea in the pre-1958 period, as mentioned in the section 2.1 of this Chapter, ships of all States were entitled to freedom of navigation, for the regime of the high seas was applied as far as navigation was concerned. According to Bing Bing Jia, freedom to pursue activities on the high seas, including freedom of navigation, has been part of customary law.[120] In the S.S. Lotus case, the PCIJ held that "it is certainly true that-apart from certain special cases which are defined by international law-vessels on the high seas are subject to no authority except that of the State whose flag they fly".[121] In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels. Thus, if a war vessel, happening to be at the spot where a collision occurs between a vessel flying its flag and a foreign vessel, were to send on board the latter an officer to make an investigation or to take evidence, such an act would undoubtedly be contrary to international law".[122] However, according to the PCIJ, in case of collision between ships of different countries on the high seas, there was no rule of international law precluding a State to which the ship on which the effects of the offence had taken place belonged, from considering the offence as having been committed in its territory and prosecuting the delinquent accordingly. In other words, in such a case, concurrent jurisdiction occurred.[123] President Wilson, in his fourteen-point speech to the Congress of the US on the 8th January 1918, upheld the "absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in

war, except as the seas may be closed in whole or in part by international action for the enforcement of international covenants".[124] At this point in time, the speech clearly represented the understanding of a major maritime power as far as freedom of navigation under then international law was concerned. In short, free navigation did exist outside the outer limit of territorial sea of coastal States during the said period. And in principle, ships in this case were subject only to the jurisdiction of the State whose flag they flied, save in exceptional circumstances.

In the post-UNCLOS I period, the aforesaid rules concerning the freedom of navigation, including the innocent passage, were subsequently incorporated in the Geneva TS&CZC,[125] and then basically reconfirmed in the UNCLOS.[126] In this period, due to the appearance of new maritime zones (continental shelf, and later the EEZ),[127] the freedom of navigation appears much more conditional than that in the pre-UNCLOS I period. In addition, freedom of navigation outside the outer limit of the territorial sea but within the EEZ also deems to have been subject to further constraints in comparison with that in the high seas during the post-UNCLOS I period. This may have happened in spite of the fact that the rights of coastal States over the continental shelf and over the EEZ, do not affect the freedom of navigation enjoyed by other States in the superjacent waters (above the continental shelf) and in the EEZ, and that both the continental shelf and the EEZ have become part of the customary international law.[128] Also the obligation not to interfere unjustifiably with the freedom of navigation forms part of customary law, and has been in existence long before the Geneva CSC of 1958.[129] In brief, the freedom of navigation is one of the principles of customary international law,[130] which binds all States, regardless of its codification. This stems from the fact that customary international law exists and operates independently from international treaty law, which may have principles of customary law codified or enshrined therein.[131]

4. Freedom of navigation under international conventional law

4.1. Freedom of navigation under the 1958 Geneva conventions

It can be said that 1958 was a first, but important success of the community of nations with respect to the codification and progressive development of the international law of the sea, leading to the adoption of four conventions[132] dealing with, and somehow addressing, major areas of concerns[133] of States in respect of the access to, and the use of, the oceans.

Freedom of navigation was one of the major concerns, which has basically been addressed by virtue of these conventions.

Under the Geneva TS&CZC, freedom of navigation took the form of the right of innocent passage through territorial seas of coastal States. Ships of all States, either coastal or not, do enjoy the right of innocent passage. Also under the convention, passage is innocent when it is not prejudicial to the peace, good order or security of the coastal State. Submarines have to navigate on the surface and to show their flag when navigating through the territorial sea. Fishing vessels are regarded innocent only when they comply with the relevant provisions of the convention, other rules of international law, and laws and regulations of the coastal State made and published to the effect of precluding them from fishing in the territorial sea.[134]

As examined in the section 3 above, innocent passage is a manifestation of freedom of navigation but in a different and limited manner. As mentioned in the convention, passage means navigation through the territorial sea for the purpose either of traversing it without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters,[135] and that the passage includes stopping and anchoring, but only insofar as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress.[136] According to Slonim, the right of innocent passage derogates from the authority and sovereignty of a coastal State over its territorial sea.[137] However, unlike the freedom of navigation upon the high seas, and the innocent passage in the straits used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of another State,[138] the innocent passage in the territorial sea may be suspended.[139] This possibility may have resulted from an assumption that the concept of innocent passage is seen as an outcome of an attempt to reconcile the freedom of navigation with the theory of territorial seas,[140] over which the coastal State exercises sovereignty.[141] In short, the right of innocent passage of ships of other States through the territorial seas of coastal States is one of the oldest and most universally recognised rules of public international law.[142]

Under the Geneva CSC, even though no provision providing for freedom of navigation is to be found, there remain several provisions of relevance for the protection of this freedom. According to Article 3 of the convention, the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, upon which all States enjoy freedom of navigation. This will be examined below. According to Article 5 of the convention, the exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, and neither installations or devices, nor safety

zones around them, may be established where interference may be caused to the use of recognised sea lanes essential to international navigation. In a nutshell, in spite of the fact that the coastal States have the exclusive sovereign rights over the continental shelf, they must refrain from activities, which may hinder or impede the freedom of navigation upon its superjacent waters. Accordingly, in light of the convention, even though the freedom of navigation is not clearly mentioned, the language of the relevant provisions has the effect of obliging the coastal States not to prejudice and/or hurt the interests of other States, particularly with respect to navigation.

Under the Geneva HSC, the freedom of navigation upon the high seas has for the first time been codified as one of the four enumerated freedoms[143] of the high seas.[144] All States, including States having no sea coast, are entitled to exercise the freedom with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.[145] More specifically, every State, whether coastal or not, has the right to sail ships under its flag on the high seas.[146] And unless express exceptions are provided for under international treaties, it is only the State whose flag the ships fly that can exercise jurisdiction over these ships. In other words, the flag State has exclusive jurisdiction over the ships flying its flag, save few exceptional cases clearly prescribed in international treaty law.[147] However, in case of warships on the high seas or ships owned or operated by a State and used only for non commercial purposes, no State other than the flag State may have jurisdiction over them. These ships are granted complete immunity from jurisdiction of foreign States.[148]

In the event of a collision or of any other incident of navigation concerning a ship on the high seas, no penal or disciplinary proceedings may be instituted against any persons on board the ship before competent authorities of any State, except those either of the flag State or of the State of which such a person is a national. No arrest or detention of the ship, even as a measure of investigation, can be ordered by any authorities other than those of the flag State.[149] This provision has been succeeded or maintained by the UNCLOS,[150] and has apparently had the effect of overturning the decision by the PCIJ in the above-mentioned Lotus case.

4.2. Freedom of navigation under the UNCLOS

The appearance of the UNCLOS[151] has widely been considered as the turning point and one of the greatest achievements in the history of codification and development of international law under the auspices of the UN. UNCLOS has attracted global recognition and application,[152] and widely been seen as the most comprehensive treaty ever regulating and