Chapter Nine

High Seas and the International Seabed Area

9.1. High Seas

9.1.1. Extent and Status

The high seas include all the waters of the sea outside of the internal waters, archipelagic waters, territorial seas and EEZs of the coastal States. The high seas are not subject to the sovereignty of any State. Those principles are part of customary international law as well as South African law, in the absence of any statutory provision to the contrary.

Because the high seas are not subject to the sovereignty of any State, they are open to all coastal and landlocked States, which are free to use the high seas as they please, "under the conditions laid down by [LOSC] and by other rules of international law". This freedom includes inter alia freedom of navigation, freedom of over flight, freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations, freedom of fishing and freedom of scientific research. The freedom of the high seas is part of customary international law as well as South African law, in the absence, once again, of any statutory provision to the contrary.

The freedom of the high seas is limited in a number of ways. As far as LOSC is concerned, States must, firstly, take into account that the high seas

---

1 See art. 86 LOSC.
2 Article 89 LOSC.
4 See ch. 1 above.
5 Article 87(1) LOSC.
6 See further art. 90 LOSC and ch. 10 below.
7 Article 112 LOSC read with art. 79(5) LOSC confirms that all States are “entitled to lay submarine cables and pipelines on the bed of the high seas beyond the continental shelf”, having “due regard to cables or pipelines already in position” and without prejudicing “possibilities of repairing existing cables or pipelines”.
8 See further ch. 11 below.
9 Article 87(1) LOSC.
10 Churchill & Lowe (n. 3) 205–206.
11 See ch. 1 above.
are “reserved for peaceful purposes”. Secondly, States must have “due regard for the interests of other States in their exercise of the freedom of the high seas”. Thirdly, States must also have due regard for rights in terms of LOSC with respect to activities in the international seabed area. Fourthly, freedom of navigation is limited by the many duties of the flag States with regard to ships flying their flag. Fifthly, the freedom to lay submarine cables and pipelines as well as the freedom to construct artificial islands and other installations are subject to the rights of the coastal State wherever the high seas are above the continental shelf of such a State. Sixthly, freedom of fishing is subject to duties with regard to conservation and management of the living resources of the high seas. Finally, freedom of scientific research is subject to the rights of the coastal State wherever the high seas are above the continental shelf of such a State as well as the general provisions of LOSC relating to marine scientific research. Moreover, freedom of the high seas is further limited by any relevant bilateral or multilateral instruments binding on the State concerned.

During the last few years, multiplying threats to, and a fast growing interest in, the resources of the high seas, especially genetic resources, has created “an urgent need to ensure greater transparency and increased participation by stakeholders in managing” those resources.

12 Article 88 LOSC. See further art. 301 LOSC and ch. 14 below.
13 Article 87(2) LOSC. This requirement means that “States are bound to refrain from any acts that might adversely affect the use of the high seas by nationals of other” States [G.K. Walker “Defining terms in the 1982 Law of the Sea Convention IV: The last round of definitions proposed by the International Law Association (American Branch) Law of the Sea Committee” (2005) 36 California Western International Law Journal 174]. With regard to the disposal of radioactive waste on the high seas, see ch. 13 below. With regard to security measures, see ch. 14 below.
14 Article 87(2) LOSC. See further para. 9.2 below.
15 See art. 94, 98 and 99 LOSC as well as ch. 10 below.
16 Article 87(1)(c)–(d) LOSC. See especially art. 79–80 LOSC, as well as art. 113–115 LOSC with regard to breaking or injury of a submarine cable or pipeline.
17 Article 87(1)(e) LOSC. See art. 116–120 LOSC and ch. 11 below.
18 Article 87(1)(f) LOSC. See further art. 238–265 LOSC.
19 Churchill & Lowe (n. 3) 208.