Chapter IV

Navigational Servitudes: Parallels – Conventional Law of the Sea

The Selden/Grotius dispute has produced parallel equitable principles for public trusts as protecting and preserving the navigational freedom principle. In doing so beneficial interests are balanced by servitudes applied to achieve the broadest public benefit, consistent with the applicable navigational interests involved. This has been the function of the territorial sea crucible.

Ultimately the Grotian high seas regime was conventionally established in the 20th century, but the interface of littoral State extended protective jurisdictions and high seas regime freedom of navigation remains an international law work-in-progress. Indeed that progress began with codification efforts for the 1930 Hague Codification Conference.1 And through to the 1958 Geneva Conventions on the Law of the Sea2 the balancing of jurisdiction requirements or ambitions of littoral States with high seas regime freedoms has continued. Notably the 1958 Geneva Conventions are a significant step forward and show the evolving international law res communis public trust.3 Later, in 1982, the provisions of the United Nations Convention on the Law

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1 See infra pp. 232–35.
3 “Public Trust” is “The principle that navigable waters are preserved for the public use, and that the state is responsible for protecting the public’s right to the use.” Black’s at 1246.
of the Sea (UNCLOS)\(^4\) carried the navigational freedom principle further in the ongoing process of balancing international law with municipal law extensions of protective jurisdiction. But the achievement of a high seas regime territorial sea definition for general navigation in innocent passage has not been the final crucible. The United States views UNCLOS in large part to reflect the custom and usage of States,\(^5\) and the significance of UNCLOS regardless of whether eventually ratified by the United States is its major contribution to the development of the *res communis* public trust – the next crucible.

### A. 1958 Geneva Law of the Sea Conventions/Public Trust and Servitudes

The 1958 First United Nations Conference on Law of the Sea produced four conventions,\(^6\) the Convention on the High Seas, the Convention on the Territorial Sea and Contiguous Zone, the Convention on the Continental Shelf, and the Convention on Fishing and Conservation of the Living Resources of the High Seas. Each of the Geneva Conventions provides for preservation of certain high seas uses, and together they purport to regulate those uses both within high seas waters (including superjacent airspace, water column, seabed and subsoil) and on the continental shelf, as well as within the territorial sea and contiguous zone.

The provisions of the 1958 Geneva Conventions in fact establish navigational servitudes for particular high seas usages, applied to aspects of the underlying navigational freedom principle inherited from the 17th century Selden/Grotius dispute. Those high seas regime servitudes are balanced in the territorial sea crucible with littoral State navigational servitudes as extended for protective jurisdiction. It is the acceptance of littoral State extended protective jurisdiction which provides the international law basis for acceptance of occupation and possession of closed coastal waters and the territorial sea

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\(^6\) See *supra* note 2.