Chapter V

Navigational Servitudes: Parallels – Historic Waters, Cases, Conferences & Publicists

In the era before agreement and implementation of conventional baseline delimitation rules the enclosure of closed coastal waters and bays as inland or internal waters became an individualized matter. This has given us the evolved concept of historic waters which references titles achieved through a historic acquisition process antedating conventional juridical bays and now recognized by the delimitation servitudes as eventually agreed at Geneva in 1958 and Montego Bay for UNCLOS in 1982. The driving issue, of course, is occupation and possession. In this context the Grotius/Selden dispute came to fix the landward bounds for high seas regime navigational servitudes.

A. The Crucible Focused

The territorial sea regime governs an area of transitional control where overlapping high seas navigational servitudes interface and, over time, have adjusted in mutual accommodation with littoral State extended navigational protective jurisdiction. This has been a melting process since before the Selden/Grotius dispute of the 17th century. The high seas regime and its res communis public navigation requirements became balanced with the littoral State territorial sea regime for extended protective jurisdictions as governmental navigational servitudes – a process which may have matured with UNCLOS and supporting customary law.

Customary law, together with the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, and the 1982 UNCLOS preserve the high seas regime freedom of innocent passage as an a priori navigational
servitude\(^1\) within the territorial sea, while equally recognizing littoral State sovereignty over the territorial sea, water column, seabed and subsoil.\(^2\) Both municipal and high seas regime navigational servitudes are applied within the territorial sea so that the littoral State controls navigation as necessary for governmental, criminal, regulatory, defense and economic purposes – protective jurisdiction – as well as holds underlying sovereignty based on occupation and possession from shore. But littoral State sovereignty landward of the territorial sea is complete, absolute and exclusive of any high seas regime servitudes over enclosed coastal waters. Establishing the baseline separating such enclosed territorial or inland coastal waters from the territorial sea is a significant part of the definitional crucible for the territorial sea.

International law does not protect navigation hostile to municipal jurisdiction of littoral States, and limits that territorial sea sovereignty of the littoral State only for high seas regime non-hostile general voyaging uses by other States. In balance, the high seas regime right of innocent passage is preserved where international use of the marginal seas as well as the high seas is needed for commercial navigation, a use established and antedating the acquisition of littoral State territorial sea sovereignty.\(^3\) Importantly, and a reflection of the juridical evolutionary process under way, the concept of a territorial sea is one of international law rather than municipal law. That is why the littoral State extensions of protective jurisdiction are subject to the high seas regime \emph{a priori} rights of innocent passage and its derivatives. So delimitation of the territorial sea baselines should be understood as within the high seas regime servitudes and therefore must meet the equitable principles standard of the \emph{res communis} public trust.

The territorial baseline sets the landward extent for application of high seas regime navigational servitudes, including marginal sea delimitation requirements, and marks the beginning of international high seas navigational servitudes. Landward of that territorial sea baseline, control of all navigation and its derivative navigable waters uses passes to the littoral State. Importantly

---

\(^1\) The International Court of Justice confirmed the right of innocent passage in The Corfu Channel Case (U.K. v. Albania), 1949 I.C.J. 4, 22, 28.


\(^3\) \textit{Supra} pp. 150–67. Queen Elizabeth I understood the use of the sea and the air to be free to all. \textit{Susan Brigden, New Worlds, Lost Worlds} 275 (2000).