Chapter 6

The EU Acting as a Coastal State

6.1. Coastal State Jurisdiction in the Law of the Sea

6.1.1. Introduction

Port-based requirements do not address all the potential concerns of a particular State or region. In particular, they do not cover ships in transit through coastal waters which, as the Prestige accident so clearly illustrated, may also pose significant safety and environmental risks. Over the past few years, the EU has taken a number of small steps towards increased coastal State regulation, in the field of prescription as well as the enforcement of maritime safety standards.

The extent to which a coastal State may lawfully regulate, or otherwise interfere with, the navigation of ships in transit through its coastal waters has been debated in the law of the sea ever since its inception, and was accordingly one of the key issues which UNCLOS III was set to resolve. The changed nature of the coastal zones and the emergence of new ones, such as straits used for international navigation and the EEZ, increased the importance of settling the matter. On the other hand, the convention in the making was of a ‘constitutional’ nature, meant to ‘last’ for a long time, and therefore needed to be flexible enough to encompass matters arising in the future which were not foreseen at the time of drafting. The principal vehicle which was introduced to achieve the competing aims of stability and flexibility in relation to ship-source pollution was the use of ‘rules of reference’, which limit coastal States’ regulatory authority to the application of international standards which have been accepted elsewhere. By linking the rights and obligations of States to those established by other international rules and standards, UNCLOS establishes a degree of stability without ‘freezing’ the jurisdictional

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1 See e.g. COM(2005) 585 final, p. 6, where it is stated that “Europe’s basic problem is transit traffic, outside the jurisdiction of the Member States, involving high-risk vessels flying the flag of third countries: some 200 million tonnes of crude oil and petroleum products are moved each year off our coasts without control being possible in a European Union port.” (Footnote omitted).

2 See e.g. Oxman (1991), p. 140.
balance at any given point in time.\(^3\) For coastal States, the price to be paid for this solution is that, in the absence of any international rules, UNCLOS leaves very limited jurisdiction to prescribe and enforce rules with respect to foreign ships.

Following a brief outline of the jurisdictional balance in the relevant maritime zones, as laid down in UNCLOS (sections 6.1.2–6.1.4), and a more detailed assessment of the ‘rules of reference’ (6.1.5) the remaining sections (6.2–6.7) analyse the use the EU has made of coastal State jurisdiction and how its rules relate to the jurisdictional regime under the law of the sea. It will become evident that, despite at times employing strong words about the flaws in UNCLOS and the need for tougher measures,\(^4\) the EU has – with a few exceptions – been relatively prudent in its exercise of coastal State jurisdiction and has, despite its environmental focus, normally taken care not to defy the balance between coastal and maritime interests as laid down in UNCLOS.

6.1.2. *The Territorial Sea*

The territorial sea is part of the territory of the coastal State, and can extend up to 12 nautical miles from the coast or baseline. In this area, the starting point is that of territorial sovereignty: the coastal State has general prescriptive and enforcement jurisdiction and may decide freely what legislation it wishes to implement in respect of this part of its territory.\(^5\) This starting point is, however, limited by the doctrine of ships’ right of ‘innocent passage’ in the territorial sea, which has been developed over the centuries to accommodate the competing interests of coastal States wishing to protect their territory and maritime States seeking to protect navigational freedoms. Whether or not a ship is in innocent passage is of crucial relevance for determining the measures it may be subjected to. If it is not, the ship is in principle subject to the full prescriptive and enforcement jurisdiction of the coastal State.\(^6\)

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\(^4\) See, notably, COM(2002) 681, pp. 12–13, where the Commission took the view that “The balance between maritime and environmental interests as laid down in [UNCLOS], … developed in the late 1970s, leans heavily in favour of the maritime interests. This bias towards the freedom of navigation, at the expense of environmental protection, does not reflect the attitudes of today’s society, nor those of the Commission.” See also para. 91 of the European Parliament’s Resolution on improving safety at sea in response to the *Prestige* accident (EP Doc. A5-0278/2003) calling for UNCLOS “to be strengthened in the area of safety at sea and protection of the environment” and para. 11 of the Council conclusions of 6 December 2002 (Council Doc. 15121/02 (Presse 380), p. 32). The most recent, but considerably softer, statement on the need to amend UNCLOS is found in COM(2006) 275 final, p. 42.

5 UNCLOS Article 2(1) provides that “[t]he sovereignty of a coastal State extends, beyond its land territory and internal waters … to an adjacent belt of sea, described as the territorial sea.”

\(^6\) Limitations imposed by general international law (such as those discussed in section 5.1.5 above) apply *a fortiori* in this case also. See also Hakapää (1981), p. 195; Smith (1988), p. 213;