Freedom of Navigation: New Challenges

Rüdiger Wolfrum

Abstract

Freedom of navigation is one of the oldest and most recognized principles in the legal regime governing ocean space. The UN Convention on the Law of the Sea makes ample reference thereto such as in Article 36 (freedom of navigation in straits used for international navigation), Article 38 (transit passage), Article 58 (freedom of navigation in the Exclusive Economic Zone), Article 78 and Article 87 (high seas). Nevertheless, this right which is qualified as a right of states is being challenged for several reasons and on the basis of different sources.

Coastal States have jurisdiction to adopt laws and regulations relating to navigational safety and ship source pollution by foreign ships in their Exclusive Economic Zone. They also have powers in this respect concerning their territorial sea and their archipelagic waters although ships under a foreign flag enjoy the right of innocent passage in these maritime areas. Special regimes apply, though, for major international shipping routes through straits used for international navigation even if such straits are within the territorial sea of the coastal State.

Further, the IMO has the authority to impose conditions on ships exercising the right of transit passage through straits used for international navigation or the right of archipelagic sea lanes passage through archipelagic States. The IMO provides for the establishment of sea lanes and traffic separation schemes as routing measures under the International Convention for the Safety of Life at Sea. Rule 10 of the Convention on the

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1 Director at the Max Planck Institute for Comparative Public Law and International Law and President of the International Tribunal for the Law of the Sea
International Regulations for Preventing Collisions at Sea provides for rules concerning the movement of ships in or near traffic separation schemes adopted by the IMO. Finally, the IMO has developed the system of Particularly Sensitive Sea Areas.

The presentation will discuss whether measures by coastal States or international organizations taken together are likely to spoil the balance between freedom of navigation and environmental and security interests of coastal States as well as the international community.

I. Introduction

Freedom of navigation is one of the oldest and most recognized principles in the legal regime governing ocean space. It may safely be said that, since it was enshrined in the chapter ‘De mare liberum’ (‘On the freedom of the sea’) in the treatise—actually it was a legal opinion—of Hugo Grotius ‘De iure praedae’ of 1609, this principle constitutes one of the pillars of the law of the sea and was at the origins of modern international law. It is still worth re-emphasizing the arguments Grotius advanced in defence of this principle. Amongst other things, he stated that the sea was the fundamental avenue for communication and cooperation among states and therefore such avenue should be free and not controlled by one state—in his time, this would have been Spain or Portugal. He further argued that a resource or an area which could be used by all without deterioration or depletion should not be monopolized by one state but should be open to all. And finally he argued that a state could only claim an area which it was able to administer and control effectively, emphasizing that no state could control the sea permanently and effectively. This latter argument may not be as convincing today as it was

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2 For the principle of freedom of navigation, see: M.A. Becker, The shifting public order of the oceans: freedom of navigation and the interdiction of ships at sea, *Harvard*