Coastal State Jurisdiction with Respect to Marine Pollution—Some Recent Developments and Future Challenges

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Introduction

The 1982 LOS Convention\(^1\) certainly represents a major milestone in the development of the legal regime relating to marine pollution. When compared with its predecessors, i.e. the four 1958 Geneva Conventions on the law of the sea,\(^2\) the conclusion must be reached that the provisions concerning the protection and preservation of the marine environment were completely overhauled. Leaving apart those totally novel elements of the 1982 Convention, such as the EEZ and deep sea-bed, and maybe also the provisions on the settlement of disputes, Part XII of the 1982 Convention (Protection and Preservation of the Marine Environment) is probably the area where the changes were most fundamental.\(^3\) But even when looked upon from a broader perspective, transcending the law of the sea as such, this Convention has been described recently as “the strongest comprehensive environmental treaty now in existence or likely to emerge for quite some time”.\(^4\)

On 16 November 1994 this 1982 Convention entered into force.\(^5\) It appears therefore a most appropriate time to study the precise contours of these radical changes introduced by the 1982 Convention. If the general result of the third United Nations Conference on the Law of the Sea\(^6\) is usually characterized as a

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3 See also A. Boyle, Marine Pollution under the Law of the Sea Convention (1985) 79 American Journal of International Law 347, 350.


6 Which lasted for almost 10 years (1973-1982). Hereinafter cited as UNCLOS III.
package deal arrived at by means of a consensus procedure, it necessarily implies, first of all, that the provisions of the 1982 Convention very often reflect the lowest common denominator acceptable to all the parties involved. As such, the vague and ambiguous terminology encountered in some of the articles of the 1982 Convention is most certainly not to be attributed to poor draftsmanship, but has rather to be understood as a sort of agreement between participants to further disagree. This oxymoron constitutes the heart of a second logical consequence of the procedures followed, and can best be illustrated by reference to the new delimitation provisions with respect to the EEZ and the continental shelf to be found in the 1982 Convention.\footnote{See Articles 74 (1) and 83 (1). Also the final wording of the third para. of both articles perfectly illustrates this point of view.}

This complex procedure certainly played a crucial role while shaping the legal framework of the protection and preservation of the marine environment. Indeed, in a general setting of growing international environmental concern, the interests of the shipping states more than once collided with those of the coastal states. As could be expected, this resulted in the introduction of many novel concepts in the 1982 Convention the exact content of which was not always clearly elaborated. To give only a few examples, reference can be made to Articles 211 (2)\footnote{Concerns the obligations for flag states to adopt pollution regulations for their own vessels which “at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference”. Does this mean that flag states may be obliged under certain circumstances to prescribe for their own vessels provisions to be found in conventions to which they are not parties?} & (3)\footnote{Concerns the jurisdiction of the port state to establish port entry conditions for the prevention, reduction and control of pollution of the marine environment. The question whether the marine environment envisaged is restricted to that of the coastal/port state or not remains open to conjecture.} and 211 (5).\footnote{This article relates to the competence of the coastal state to adopt laws and regulations for the prevention, reduction and control of pollution from vessels in respect of its EEZ. What exactly has to be understood by the provision that these laws and regulations have to give effect “to generally accepted international rules and standards established through the competent international organization or general diplomatic conference” remains uncertain.} With respect to other provisions, it will be necessary to determine whether they already reflect customary law or not in order to appraise with any certainty the juridical position of non-parties to the 1982 Convention. Examples here are, for instance, the Articles 19 (2)(h),\footnote{Introduction of the qualifications “wilful and serious” as necessary requirements before pollution effectuated by a foreign vessel in the territorial sea can be considered as taking away the innocent character of the passage. Does this reflect customary law?} 218\footnote{This article introduces the competence of port states to investigate and prosecute, under certain conditions, discharge violations wherever they occur. Again the question remains whether this novel development reflects customary law or not.}