The Impact on the Freedom of Navigation by International Regulation for the Purpose of Fishery Resources Conservation and Marine Environmental Protection

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1. Introduction

The object of this paper is to examine the impact on the traditional structure of the law of the sea for maintaining the freedom of navigation by the recent tendency found in international and national practices of regulation for the purpose of fishery resources conservation (FRC) and marine environmental protection (MEP)[1].

The freedom of navigation is the most traditional one among the freedoms of uses of the sea. As firmly established positive law Article 2 of the Convention on the High Seas (CHS) and Article 87 (1) of the United Nations Convention on the Law of the Sea (LOSC) prescribe the freedom of navigation as well as the freedoms of other uses of the sea. At the same time no state may validly purport to subject any part of the high seas to its sovereignty (Article 2 of CHS and Article 89 of LOSC) and a flag State holds exclusive jurisdiction over a ship flying its flag on the high seas (Article 6 (1) of CHS and Article 92 (1) of LOSC). These two aspects of the freedom of the high seas are related to each other in that the freedom of navigation is ensured with prohibition of any interference by foreign States upon ships on the high seas without special legal grounds[2].

An infringement of the freedom of navigation is claimed in reflecting such two

aspects of the freedom of the high seas: first, an infringement of the flag State's right due to interference with its ship on the high seas by a foreign State without legal justification, and second, an obstruction of navigation, for instance, by the fact that sea lanes are closed by setting a security or safety zone on the occasion of a weapon test on the high seas.[3] In comparison with them, in order to find possible coordination between the freedom of navigation and effective regulation for the purpose of FRC or MEP different consideration is needed.

Until recently there has not been keen motivation for examining the following issues: How and to what extent may navigation be restricted for the purpose of FRC or MEP in maintaining the freedom of navigation as a principle?; More fundamentally what is navigation or its core element to be maintained as being free according to the principle of the freedom of navigation? These are questions similar or related to the second type of infringement of the freedom of navigation above. However, the development of the law of the sea in the 20th century demands answers being pertinent to those questions.[4]

First, especially since the latter half of the 20th century the law of the sea has tremendously progressed in terms of international regulation for the purpose of FRC and MEP. The regulation reaches as far as a mode of navigation or navigation itself of fishing vessels and ships that are carrying substances harmful to the marine environment. Second, particularly in the exclusive economic zone (EZ), LOSC distributes rights among States based upon "matters" such as navigation, FRC, MEP, scientific research and so on. It is essential and critical to define the "matters or each type of use of the sea (navigation, fishing, pollution)" and establish demarcation among them in order for undisputable distribution of rights among States.

Under these circumstances, in EZ, the issue of coordination between the freedom of navigation and regulation in order for realizing FRC and MEP, on the one hand, and the issue of distribution of rights and jurisdiction between coastal States and flag States, on the other hand, substantially coincide. In this particular sense, the two aspects of an infringement of the freedom of navigation above merge together and form one critical issue of demarcation among the uses of the sea, namely, navigation, fishing and pollution. For this reason, the present paper mainly focuses upon the issues in relation to EZ, although, both on the high seas and in EZ the same kind of question should be considered, since on the high seas, too, international regulation for the purpose of FRC and MEP has developed.[5]

LOSC, in seeking a subtle balance among various interests, constructs a fundamental structure for coordination between the freedom of navigation of a flag State and

effective regulation by a coastal State for the purpose of FRC and MEP. Recent international and national practices are not only incompatible with individual provisions of LOSC but also may encroach upon its fundamental structure for the coordination that LOSC intends to achieve. In addition, a tendency has emerged in the recent practices to challenge the distribution of rights based upon "matters" under LOSC. In the arguments for the prevention of marine environmental damage that could be caused by an accident or a terrorist attack against ships carrying plutonium, the safety of navigation, prevention of crimes on the sea, maintaining of the good order on the sea and national or international maritime security would mix in the legal interests to be protected as well as that of MEP.[6] Such an "in all" approach would neglect the distribution of rights according to "matters" under LOSC and proceed toward restriction of the freedom of navigation.[7]

If the new direction found in the international and national practices is motivated by actual and practical necessity for achieving effective international regulation for the purpose of FRC and MEP, it should not be denied or cannot be obstructed. It would even require amendments and changes of LOSC. The most important thing is to recognize the true impact of the new trend upon the traditional structure of the law of the sea before moving into the new era of it. This is because the freedom of navigation has a long tradition in both theory and practice, and the law of the sea has built and maintained the pertinent structure to guarantee it. If a radical change is introduced in this structure by the new trend, it should be explicitly acknowledged as such and thoroughly analyzed.

Based upon these considerations, part two of this paper will begin with an analysis on navigation and the freedom of navigation under CHS and LOSC. Part three will depict the fundamental structure of LOSC in order to maintain the freedom of navigation in relation to effective regulation by a coastal State of EZ for the purpose of FRC and MEP. Part four and five will examine the international and national practices in the field of FRC and MEP and asses their compatibility with LOSC. As a conclusion, some remarks will be given concerning the coordination between the freedom of navigation and effective regulation for the purpose of FRC and MEP.

2. The Freedom of Navigation

(1) Meaning of Navigation and Significance of the Freedom of Navigation

① Neither CHS nor LOSC gives a definition of navigation.[8] Traditionally the freedom of navigation was closely connected to trade and communication.[9] This is typical in that Grotius developed his doctrine on the freedom of the sea based on the

necessity of ensuring transportation for the purpose of maintaining Dutch trade with the Dutch East India Company.[10] His doctrine purported to refute the Portuguese hindrance to the navigation of vessels belonging to other States by claiming the old doctrine of *dominium maris*.[11] Even antagonists to Grotius recognized the necessity of the freedom of navigation at least to a certain degree.[12] On the broader basis of a right of communication, *jus communicationis*——humankind enjoys a right to communicate and exchange with people in other regions in the world——marine traffic and navigation were required to be free.[13] As history reveals, the Mercantilism strongly supported this idea of the freedom of navigation.[14]

② Logically, considering that ships navigate almost always with certain purposes, such as trade, communication, exchange, transport, fishing, damping and so on, navigation may be thought of as "incidental" to these activities not as an independent use of the sea. For instance, it can be said that a fishing vessel navigates for the purpose of reaching a fishing ground and that this navigation is only incidental to or part of fishing not an independent use of the sea. The same argument may hold true to a ship carrying substances harmful to the marine environment. Taking such a stance, navigation of those vessels and ships would be easily subject to regulation for the purpose of FRC or MEP. That is likely to open a way for the idea that the navigation is restricted, because they are fishing vessels or ships carrying harmful substances, in other words, an idea of regulation on navigation for the reason of type of ship or cargo.

The law of the sea, however, has not taken this stance. It has never chosen to regard navigation as incidental to or only part of the activities that ships purport to do and are engaged in. Irrespective of the historical fact that the freedom of navigation had always been treated in a close connection with needs of trade, communication and transport, it has coherently considered the freedom of navigation as keeping its own independent significance.[15]

The positive law of the sea confirms this traditional position concerning the freedom of navigation. Both Article 2 of CHS and Article 87 (1) of LOSC provide the freedom of navigation first and independently. Both of these conventions are silent concerning whether they purport to place a certain weight on the freedom of navigation since navigation is incidental to any of activities on the sea, or whether they do so in intending to emphasize the independent significance of the freedom of navigation in relation to the freedoms of other uses of the sea. At least, however, it can be derived that they treat navigation as such and as being irrespective of activities that ships intend to do or are engaged in, so that they give the freedom of

navigation to any ships irrespective of their activities, and also irrespective of kind of ship or cargo. Fishing vessels, passenger ships, cargo ships, warships, ships carrying harmful substances, without exception, initially hold the freedom of navigation.[16)]

③ Although neither CHS nor LOSC defines navigation, doctrines generally consider navigation as motion (movement and standstill) and presence of ships.[17)] "Navigation" also includes activities to enable motion of ships as are incidental to it, such as bunkering, provisioning, servicing, repairing and maintaining. This seems a physically natural conclusion considering the necessity of refueling and others for motion of all ships.

Legally it is said that the freedom of navigation encompasses freedoms of observation, exploration, maneuvers, movement of things of military nature and so on.[18)] This all-inclusive concept of the freedom of navigation may take its justification in the inconclusiveness of the legal nature of the high seas.[19)] In the history of the law of the sea several ideas, such as *res communis, res nullius, res publicum* have been almost interchangeably used to define and explain its legal nature.[20)] At the First United Nations Conference on the Law of the Sea they did not recognize much significance in arguments concerning this issue in using those concepts, and Article 2 of CHS solely confirms that the high seas are free from the sovereignty of any States and free for any of its uses, which is no more than "the logical conclusion" ascribed to the legal nature of the high seas as free or simply a vicious circle argument. Article 87 (1) and Article 89 of LOSC have succeeded to this stance of CHS.[21)] However, the following questions still remain to be asked: Why should the high seas be free? Through what justifications may this freedom be restricted? Does the freedom submit *ab initio* to some limitation for the common interests of the world? The law of the sea has not yet established logically determined answers for these fundamental questions. As a result, when on the high seas a new type of activity is technically realized, the law of the sea does not provide any reason to deny the freedom of that activity beyond the requirement of the due consideration of other rights of uses of the sea that is prescribed under Article 2 of CHS and Article 87 (2) of LOSC.[22)] In these situations, it has not been necessary to seriously limit the contents or elements of the freedom of navigation.[23)]

This point relates to an interpretation of Article 58 (1) of LOSC that provides for the freedoms of the use of the sea "related to" the freedoms contained in Article 87 (1) and selected by Article 58 (1). From a standpoint that the freedoms of the uses related to navigation have been already recognized by a customary international

rule as being included in the freedom of navigation, it is criticized that this reference by Article 58 (1) to the freedom of the uses "related to" navigation could raise certain doubt about the established status of this customary rule.[24] If the reference to Article 87 by Article 58 (1) purports to confirm application of the freedom of navigation on the high seas as such in EZ, too, this criticism has a reason. However Article 58 (1) means to decide in EZ which freedoms under Article 87 (1) may be enjoyed and to what extent they are applied, and in this context it prescribes the freedom of the uses related to navigation. According to the same understanding, especially Latin American States argued for the limitation of military operations and maneuvers by foreign States in EZ, although traditionally these activities have been included in the freedom of navigation on the high seas.[25]

④ It can be summarized that as to the freedom of navigation CHS and LOSC accept the freedom of motion (movement and standstill) and presence of ships and the freedoms of uses related to navigation. Not only the former but also the latter are confirmed in EZ, too. Motion and presence of ships have no relation to activities that ships purport to do or are engaged in: and moreover, the freedom of navigation is enjoyed by any ships irrespective of their activities and also irrespective of kind of ship or cargo.

There are international and national practices in the filed of FRC and MEP in EZ that contain regulative measures, such as prior notification of entry into EZ, various means for a vessel monitoring system, restriction of navigation on fishing vessels or ships carrying substances harmful to the environment and restriction of refueling and transshipment of fishing vessels. These regulative measures motivate a shift from the inclusive concept of the freedom of navigation to regulation of navigation according to type of ship and cargo. They could even proceed to regulation of refueling and provisioning as if they were related to fishing, while they have been regarded as incidental to or physically necessary for navigation. Such tendency will be examined in-depth in parts four and five below.

3. The Principle of the Freedom of Navigation and Its Fundamental Structure in LOSC

(1) Coordination among Uses of the Sea

① If a clear demarcation line is drawn among uses of the sea, such as navigation, overflight, laying submarine cables and pipelines, and other internationally lawful uses of the sea relating to them, on the one hand, and fishing, the establishment and use of artificial islands, installations and structures, marine scientific research and

the protection and preservation of the marine environment, on the other hand, a possible conflict between the freedom of one use by a foreign State and a right of a coastal State of EZ over the other should be reconciled according to the due regard principle found in Article 56（2）and Article 58（3）of LOSC. When the distinction itself is contested because of a difference of opinions regarding the definition of the uses, to establish an explicit definition for each use is critical to resolve that dispute.[26] Article 1（1）（4）only defines pollution of the marine environment that is a negative form of a use of the sea.

② In EZ it should be noted that LOSC gives an equal status to the freedom of navigation of a flag State and sovereign rights and jurisdiction of a coastal State. The contrast between Article 56（2）and Article 58（3）reflects such a basic standpoint of LOSC.[27] A flag State shall comply with laws and regulations of a coastal State as far as they are adopted in accordance with LOSC and are not incompatible with its Part V. Only flag States seem to owe on a *one-sided basis* this obligation. However they comply with laws and regulations of coastal States only as far as they are adopted in accordance with LOSC and are not incompatible with its Part V. Furthermore, it is meaningless for LOSC to provide for a corresponding obligation of a coastal State to comply with laws and regulations of a flag State.[28] Accordingly, the obligation of a flag State to comply with laws and regulations of a coastal State does not in any way change the equal status which LOSC attributes to rights of a flag State, on the one hand, and to rights and jurisdiction of a coastal State, on the other hand. The remaining issue is to establish the demarcation between the freedom of navigation of a flag State, and sovereign rights and jurisdiction of a coastal State of EZ.[29]

⑵ Actual or Concrete Activities as Targets of Regulation under LOSC
——In Cases of Regulation for the Purpose of FRC

① With respect to the targets of regulation, LOSC in principle places a weight upon actual or concrete acts and activities, namely fishing activities and discharges as the principal targets of regulative measures for the purpose of FRC and MEP. On the one hand, under LOSC navigation is interpreted as motion and presence of ships irrespective of activities which ships purport to do or are engaged in, and on the other hand, for the regulative measures for the purpose of FRC and MEP, it focuses actual acts or activities in terms of fishing and pollution. This means that LOSC allows regulation or restriction on navigation, as far as it has close or substantial connection with these actual activities. By taking this basic stance, LOSC can seek a certain balance between the freedom of navigation and effective

regulation for the purpose of FRC and MEP.

② A coastal State of EZ has a sovereign right over the conservation and management of fishery resources. Article 73 (1), which prescribes the condition for the enforcement jurisdiction of a coastal State, only provides for "measures ...as may be necessary to ensure compliance with laws and regulations" adopted by a coastal State.[30] These laws and regulations must be in conformity with LOSC and Article 62 (4) sets out a non-exhaustive list of the matters for regulation that national laws of a coastal State may contain.[31] Among them, landing of the catch in the ports of a coastal State, terms and conditions relating to joint ventures, and transfer of fishery technology (h, i, j), for the time being, are not directly related to navigation, the subject of the present paper. The matters, such as licensing, the species and quotas of catch, fishing gears, season and areas of fishing, the age and size of fish (a, b, c, d) are modes of fishing activities and the very matters closely related to actual or concrete fishing activities.

Article 62 (4) (k) stipulates enforcement procedures.[32] A coastal State, however, does not have full discretion in deciding its enforcement measures in that it must in accordance with LOSC adopt laws and regulations that deal with the enforcement measures. Article 62 (4) that provides for the matters for regulation by laws and regulations of a coastal State focuses upon mainly actual or concrete fishing activities as the matters. Although it sets out a non-exhaustive list, and other factors may be included in the matters for regulation, that principle must be respected. According to it, a coastal State is allowed to restrict navigation or movement of foreign fishing vessels at both prescriptive and enforcement stages as far as the navigation or movement has a substantial or close connection with actual fishing activities.

Article 62 (4) (e) deals with information about fishing vessels including vessel position reports, but it is in relation to catch and fishing effort statistics or to data-collection. It does not offer a legal justification for a coastal State to oblige fishing vessels that are not engaged in or are just about to engage in fishing in its EZ to inform of their positions for the purpose of enforcement. There is State practice of imposing an obligation to report vessel position on a foreign fishing vessel without a close connection to its actual fishing activities, which is to be examined later.

③ The same principle that Article 62 (4) pursues is confirmed in case of foreign fishing vessels in TS. Under Article 19 (2) (i), "fishing activities" create a presumption of non-innocence of the foreign vessel concerned. Whether or not non-stowage of fishing gears relates to non-innocence of a foreign fishing vessel has been

argued since the drafting stage of the Convention on the Territorial Sea and Contiguors Zone.[33] Under Article 19 (2) (i) of LOSC non-stowage of fishing gears is not explicitly recognized as a factor lending a presumption of non-innocence.[34] Article 19 (1) may be interpreted differently from Article 19 (2) in allowing a coastal State to deny innocence of foreign ships for the reason of their type or cargo.[35] Such an argument traditionally focused mainly upon warships and not fishing vessels. It is difficult for fishing vessels to be prejudicial to the peace, good order or security of a coastal State solely because they are fishing vessels.

(3) Actual or Concrete Activities as Targets of Regulation under LOSC
——In Cases of Regulation for the Purpose of MEP

① A coastal State of EZ has jurisdiction over the protection and preservation of the marine environment. This jurisdiction should be exercised according to Part XII of LOSC which distributes jurisdiction among flag States, coastal States and port States. From the perspective of coordination between the freedom of navigation and regulation for the purpose of MEP, an examination of provisions mainly concerning vessel-source pollution seems to be appropriate.[36]

A coastal State has prescriptive jurisdiction under Article 211 (5), and its laws and regulations must conform to generally accepted international rules and standards established through the competent international organization or general diplomatic conference (hereinafter referred to as "the international standards").[37] It may adopt laws and regulations for the purpose of enforcement as provided in Section 6 of Part XII of LOSC. Article 220 (3), (5) and (6) set forth the way of exercising enforcement measures by a coastal State of EZ according to the place of a breach of its laws and regulations and the place of vessels concerned.[38]

Under Article 220 (3) a coastal State may require information where there are clear grounds for believing that a vessel has committed a violation of the international standards or its laws and regulations. Beyond the requirement of information, under Article 220 (5) and (6), a coastal State may take, to the more serious extent than only requiring information, coercive measures, such as physical inspection, and may institute proceedings including detention of vessels. Although concurrently a flag State has prescriptive and enforcement jurisdiction in those cases, by exercise of a coastal State of the enforcement jurisdiction the navigation of the vessel concerned is seriously interfered. The very core element that entitles the coastal State to do so is "a discharge," in other words, an actual harmful activity.

② This policy of LOSC is understood as a result of consideration of a balance in EZ between the freedom of navigation and the regulation by a coastal State for the

purpose of MEP. A comparative analysis is meaningful on the distribution of jurisdiction in TS and in case of a port State.

Article 220 (2), which deals with a case of a violation of laws and regulations in TS by a foreign vessel navigating in TS at the time of the enforcement by a coastal State, entitles the coastal State to undertake a physical inspection and institute proceedings including detention of the vessel concerned. Here "a discharge" is not required. If the phrase "without prejudice to the application of the relevant provisions of Part II, Section 3" leads to an interpretation that according to Article 19 (2) (h) an "act of willful and serious pollution contrary to" LOSC is needed for a coastal State to take enforcement measures under Article 220 (2), the difference between Article 220 (2), and Article 220 (5) and (6) consists in that between "an act of pollution" and "a discharge."[39] "An act of pollution" in the broader context of the innocent passage under Article 19 (2) can be particularized as "a discharge" in the context of the vessel-source pollution under Article 220 (2). In that sense both provisions, namely Article 220 (2), and Article 220 (5) and (6), indicate the same stance of LOSC that in order to balance the right of innocent passage or the freedom of navigation, and the regulation for the purpose of MEP of a coastal State of TS or EZ, an actual harmful activity is needed to enable the coastal State to exercise those enforcement measures against the foreign vessel. In any event, if there is any difference between "an act of pollution" and "a discharge", it is because of the difference between the right of innocent passage in TS and the freedom of navigation in EZ.[40]

With respect to a port State, while Article 218 (1) requires "a discharge" for a port State to take enforcement measures, Article 219, concerning seaworthiness, entitles it to take administrative measures where there are threats of damage to the marine environment.[41] In the latter case, a port State holds the most appropriate position to assess almost objectively the seaworthiness of the ship concerned. This may furnish a reason why Article 219 does not require "a discharge" to put in motion the port State jurisdiction. The fact that Article 218 (1), and Article 220 (5) and (6) coherently require "a discharge" is interpreted as a result of seeking a balance between the freedom of navigation in EZ and on the high seas, and the enforcement by a coastal State and a port State.

(4) From the examination above, the following is confirmed. On the one hand, LOSC regards navigation as an independent use of the sea including activities incidental to it, and irrespective of the activities that ships intend to do or are engaged in. Bunkering, provisioning and other uses related to navigation are

regarded as incidental to navigation and the freedom of these activities is recognized. This principle should apply invariably to those activities incidental to navigation of fishing vessels or ships carrying substances harmful to the marine environment. Type of ship or cargo does not lend a legal ground for restriction of the freedom of navigation. On the other hand, as for the regulation by a coastal State for the purpose of FRC and MEP, LOSC limits to actual or concrete fishing activities or discharges as, at least, principal targets of the regulation. This is a conclusion to be derived from the interpretation of the relevant provisions dealing with the prescriptive and enforcement jurisdiction (with a serious impact on the freedom of navigation) of a coastal State of EZ. Thus, while LOSC recognizes the regulation by a coastal State of EZ on actual or concrete fishing activities and discharges, it maintains the freedom of navigation of ships unless they have a substantial or close connection to those actual activities.

4. Features of Recent International and National Practices of Regulation for FRC

(1) Regulation of Navigation of a Fishing Vessel

① Before the adoption of LOSC, there were, and subsequent to its adoption there have been, national laws establishing EZ containing regulation over navigation of foreign fishing vessels in EZ.[42] The regulation takes various forms, such as prohibition of entry into EZ without consent,[43] designation of sea lanes,[44] requiring report of entry,[45] stowage requirement of fishing gears,[46] and treatment of foreign fishing vessels as if they were in TS.[47] The last type of national legislation provides a coastal State with so broad a right as to require foreign fishing vessels to notify their entry into and departure from EZ, for instance. While not a type of regulation on navigation itself, some coastal States oblige foreign fishing vessels carrying catch to prove that it is not from its EZ.[48] This method is a sort of restriction on the basis of cargo.

② As for international conventions, there are examples that adopt a vessel monitoring system (VMS) for fishing vessels and oblige them to make prior notification before entry into the designated area under the convention. Among them is, for instance, Article 11 (3) of the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea.[49] The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (SSA) prescribes measures to be taken by flag States, and Article 18 (3) (g) provides for monitoring, control and surveillance of such vessels,

their fishing operations and related activities through, *inter alia*: (i)..., (ii)..., (iii) the development and implementation of vessel monitoring systems. Within the framework of the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), long debate has continued among the party States on the introduction of a VMS.[50] The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC) under Article 24 (8) provides for an obligation of flag States to require their ships that fish for highly migratory fish stocks on the high seas in the Convention area to use near real-time satellite position-fixing transmitters while in such an area. Standards, specifications and procedures for the use of such transmitters shall be established by the Commission for the Convention.[51]

③ Where party States of LOSC enact those national laws their compatibility comes into question with Articles 56 (1) (a), 58 (1) and (2), 62 (4), and 73 (1). SSA (Article 4) and WCPFC (Articles 2 and 4) declare themselves to be implementing agreements of LOSC or stipulate for its consistency with LOSC; nevertheless, their compatibility with LOSC does so, too.

Under LOSC, on the high seas and in EZ any ships including fishing vessels have the freedom of navigation. Judging from the relevant provisions, especially Articles 62 (4) and 73 (1), LOSC rests on the general policy that a coastal State may regulate and take enforcement measures over actual fishing activities or activities at least closely related to actual fishing. According to this, restriction of entry into EZ, designation of sea lanes and obligation of prior notification of entry into and/or departure from EZ, as far as they are exercised against fishing vessels that do not have a close connection to actual fishing activities, are out of the reach of the rights and jurisdiction given to a coastal State under LOSC. Regarding designation of sea lanes, even a coastal State of TS may do so only in accordance with Articles 22 and 23.

Considering a VMS in EZ, although Article 62 (4) (e) mentions vessel position reports, it does not necessarily suppose a VMS to be enforcement measures on navigation of fishing vessels. There are various types of measures of VMS. In LOSC there are no clear grounds for a coastal State of EZ to oblige fishing vessels in EZ to have specific equipment, such as a transponder, to be used for a VMS. Depending on type of VMS, if it requires fishing vessels to overwhelmingly laden with certain equipment, it obstructs even indirectly but substantially the navigation of them. In relation to construction, equipment, design and manning (CEDM) of a ship, even in TS under Article 21 (2) a coastal State is not allowed to apply its laws

and regulations to foreign vessels unless they are giving effect to generally accepted international rules and standards. Under Article 93 (3), which is among the provisions to be applied to EZ in accordance with Article 58 (2), it is a flag State that has an obligation to exercise its jurisdiction over a vessel flying its flag relating to CEDM. These regulative measures such as a VMS, if taken in EZ by a coastal State, are likely to be remote from regulation on actual fishing activities, and thus, they may come to restrict navigation itself of foreign vessels simply because they are fishing vessels.[52)]

(2) Enlargement of the Definitions of Fishing and a Fishing Vessel

① The target of the regulation on navigation is fishing vessels, and by enlarging the meaning of fishing and a fishing vessel the tendency of restriction on navigation is thrust further.

② According to FAO Legislative Study, there is a general tendency in national practice that the definition of a fishing vessel includes fishery support vessels, including motherships, transport ships, and refueling ships in addition to vessels actually engaged in fishing operations.[53)] For instance, Article 9 of the 1996 Japan's Law on the Exercise of Sovereign Rights with Regard to Fisheries and Other Activities, and on Other Matters, in EZ, requires foreigners who intend to conduct activities accompanying fishing and other activities in connection with fishing to obtain approval. The "activities accompanying fishing and other activities" mean the exploration for or gathering of fish, the storing or processing of fish, the transport of harvested fish or its products, the supply of ships.[54)] The 1996 Republic of Korea' s Act on the Exercise of Sovereign Rights on Foreigners' Fishing has the similar provision. EEC Council Regulation No 2847/93 of 12 October 1993 in Article 2 requires monitoring of fishing activity and related activities: keeping logbooks, recording catches by species and area, and processing, transshipment and transport of fish. There are national legislations that include refueling in fishing activities, such as United States, South Africa, Seychelles, Australia, Barbados, Canada, Grenada, Guinea-Bissau, New Zealand, Sierra Leone, and Trinidad Tobago.[55)]

These national legislations commonly include in fishing activities or related activities to it processing, transport and transshipment. On the other hand, with respect to bunkering of a fishing vessel in EZ, some States include it in fishing activities or related activities to it, but other States do not.[56)]

③ During the United Nations Conference on SSA, there were proposals that a fishing vessel include any ship or boat or any other description of vessel used in or equipped for fishing or processing or transporting fish from fishing grounds; or

provisioning, servicing, repairing or maintaining any vessels of a fishing fleet while at sea.[57] However, SSA does not contain any definition of a fishing vessel in Article 1 which sets forth the definition of terms used in the Agreement.[58]

The party States to CCAMLR agreed in 1995 on a non-exhaustive list of elements which characterize fishing and it contains use and non-stowage of fishing gears, processing in the Convention area and catch from the Convention area on board.[59] The Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea under Article 11 (1) defines a fishing vessel as any vessel used or intended for use for the purpose of the commercial exploitation of living marine resources, including mother ships and any other vessels directly engaged in such fishing operations. WCPFC forms an example of enlargement in the definition of fishing. According to its Article 1 (d), "fishing" includes, among others, engaging in any activities which can reasonably be expected to result in the locating, catching, taking or harvesting of fish for any purpose. It also contains any operations at sea directly in support of, or in preparation for, any activities, such as searching for, catching, taking or harvesting fish and attempting to search for catch, take or harvest fish. Transshipment, too, is included in fishing. Article 1 (e) defines "a fishing vessel" as any vessel used or intended for use for the purpose of fishing, including support ships, carrier vessels and any other vessel directly involved in such fishing operations. Under these definitions, bunkering of fishing ships, for instance, may be included in the meaning of "in support of, or in preparation for" fishing activities and in that case, bunkering is understood as fishing and bunkering ships as fishing vessels.[60] A vessel may be a fishing vessel when it is approaching the location of transshipment, and when it is carrying the catch transshipped.

④ The various regulative measures on navigation found in those international and national practices examined above have an impact upon navigation of all "fishing vessels" regarded as so according to the enlarged meaning. A vessel that is included in the widened concept does not necessarily have a close relation to actual or concrete fishing activities. The regulation on navigation exercised inclusively for all the fishing vessels will bear significantly on restricting navigation of a "fishing vessel" rather than regulation on the actual or concrete fishing operations. Such regulation of navigation is a diversion from the basic policy of LOSC that it does not restrict navigation according to type of ship.

(3) A Shift from Regulation of Fishing Activities to Regulation over a Fishing Vessel——Relation between Bunkering and Navigation in Case of a Fishing Vessel

① In *the M/V "Saiga" (No. 2)* Case relating to the bunkering of the fishing vessels concerned, while St. Vincent and the Grenadines regarded it as an activity incidental to navigation, Guinea defined it as a commercial activity——sale of gasoil[61]——. The International Tribunal for the Law of the Sea (ITLOS) not answering directly to this question[62], decided that Guinea was not justified by LOSC and other international law rules to apply its customs law in the sea area concerned[63]. In comparison with this, as a preceding case, in *La Bretagne* Case, the tribunal interpreted strictly the sovereign rights of a coastal State of EZ under Article 56 (1) of LOSC[64]. Considering the nature of the matters for regulation under Article 62 (4), it decided that the regulation of filleting at sea cannot *a priori* be justified by coastal State powers[65].

② St. Vincent and the Grenadines argued that the action of the Guinea (*inter alia* the attack on the M/V *Saiga* and its crew in the EZ of Sierra Leone, its subsequent arrest, its detention and so on) violated the right of St. Vincent and the Grenadines and vessels flying its flag to enjoy freedom of navigation and/or other internationally lawful uses of the sea related to the freedom of navigation, as set forth in Articles 56 (2) and 58 and related provisions of LOSC[66]. "The freedoms of navigation and internationally lawful uses of the sea related to the freedom of navigation" in this contention are those of the M/V *Saiga* (and St. Vincent and the Grenadines, as its flag State), and St. Vincent and the Grenadines claimed their violation due to the arrest and detention of the M/V *Saiga* and its crew without legal justification.

Guinea maintained that bunkering was not an exercise of the freedom of navigation or any of the internationally lawful uses of the sea related to freedom of navigation, but a commercial activity. It further contended that bunkering in EZ may not have the same status in all cases and suggested that different considerations might apply to bunkering of ships operating in EZ, as opposed to the supply of oil to ships that were in transit[67].

Considering the general understanding that bunkering does enable ships to move, it should be regarded as being included in the navigation of its recipient ships or a related use of the sea to the recipient's navigation. Accordingly as far as the recipient ships are exercising the freedom of navigation, a bunkering ship is engaged in a lawful activity that is a part of its recipient ship's navigation or is related to the navigation. A bunkering ship itself has the freedom of navigation, too. On the other hand, if bunkering of a fishing vessel is thought of as a part of fishing activities or related conduct to them, such bunkering could have a different nature or status

under LOSC. Guinea' s contention did not reach to that extent, and it did not argue that bunkering of a fishing vessel was, in general, a part of its fishing activities or a related conduct to them. Guinea did not intend to justify its enforcement action against the M/V *Saiga* by claiming its sovereign right over the matters of FRC in EZ.[68] Rather Guinea claimed that it took the measures concerned against "unwarranted commercial activities" such as bunkering and not against the freedom of navigation or the freedoms of any of the internationally lawful uses of the sea related to the freedom of navigation under Article 58 (1) of LOSC.[69] It further argued that rights and jurisdiction, which LOSC did not expressly attribute to a coastal State, did not automatically fall under the freedom of the high seas.[70] ITLOS did not characterize the bunkering of a fishing vessel as being related or incidental to fishing activities, either. Accordingly, both parties to the case and ITLOS took a different position from the tendency shown by the international and national practices that bunkering of a fishing vessel is regarded as being related or incidental to fishing.

In his Separate Opinion Judge Anderson in taking a similar position to that of Guinea emphasized a variety of circumstances where bunkering is conducted. According to his line of logic, when bunkering of a fishing vessel enables it to continue fishing on the fishing ground without returning to a port for the purpose of refueling, such bunkering may be understood as conduct incidental to fishing. This can be compared to a situation of bunkering of a fishing vessel that is in transit of EZ of a foreign State.[71]

③ From *the M/V Saiga (No. 2)* Case the following points can be noted. First, as Judge Vukas indicated in his Separate Opinion, bunkering directly enables a ship to move and so it has been considered as incidental to navigation.[72] The fact that a recipient vessel is a fishing vessel does not make any difference to this rule. Second, if taking a position that the legal status of bunkering should be judged depending on the circumstances where it is conducted, it may be arguable that under certain conditions bunkering is incidental to or a part of fishing activities of recipient fishing vessel. In some cases bunkering of a fishing vessel enables it to conduct or continue its fishing activities really in a very effective manner. Third, if bunkering of a fishing vessel is thought of even without a connection with actual fishing activities *a priori* as being incidental to or a part of its fishing activities, this would go beyond the position of both parties to *the M/V Saiga (No. 2)* Case and that of ITLOS.[73]

To consider bunkering of a fishing vessel *a priori* as a part of fishing activities it would diverge from the fundamental structure of LOSC examined above, and would result in, at least relating to an element of bunkering, diminution of the independent

significance of navigation. This is because LOSC guarantees on the one hand, the freedom of motion and presence of ships as the freedom of navigation and the freedom of related uses, including refueling, to navigation as well, and targets actual or concrete fishing activities as matters to be regulated for the purpose of FRC, on the other hand. As far as navigation is understood as motion and presence of ships irrespective of their purpose, destination and activities which they purport to do or are engaged in, this rule concerning bunkering invariably applies to any bunkering of any type of ship. From a perspective of effective regulation of fishing by a coastal State of EZ, a possible middle way is to allow a coastal State to regulate bunkering of a fishing vessel, not in general, but on the condition that the bunkering really enables the recipient fishing vessel to conduct or continue effectively its fishing activities. This regulation might be based upon the sovereign right of a coastal State of EZ under Article 56 (1) (a). In that case, too, the tendency is not denied that the element——bunkering——of navigation loses, at least partly, its significance in case of a fishing vessel.

As Guinea contended in *the M/V Saiga (No. 2)* Case, if bunkering is a commercial activity and an independent use of the sea from both navigation and fishing, whether such a use is included in the freedoms of uses of the sea, or whether a coastal State has rights or jurisdiction over it would be answered by an interpretation of Article 59.[74]

5. Features of Recent International and National Practices of Regulation for MEP

(1) Increasing a Risk of Pollution by Accidents

Two facts have a significant impact on the field of MEP. First, there has occurred a sequence of serious oil pollution accidents caused by the *Torry Canion,* the *Amoco Cadiz,* the *Exxon Valdez* and the *Erika*.[75] Second, shipment of substances harmful to the marine environment, especially plutonium shipments, has awakened a keen international concern.[76] These have brought the following consequences that may diverge from the basic structure of LOSC for realizing coordination between the freedom of navigation and effective regulation for the purpose of MEP.

First, for an enhanced sense of prevention of pollution by accidents, both "prevention" of pollution and prevention of "accidents" are required in a parallel way, and the protection of the marine environment and the safety of navigation have come to be more closely tied to each other than ever. These situations are a locomotive for regulation of construction of ships, a manner of navigation and navigation itself.[77]

Under Part XII, LOSC distributes jurisdiction concerning MEP according to various causes of pollution, and among them damping and vessel-source pollution are the types of pollution in which ships are involved. The issue of shipment of substances harmful to the marine environment might be included in that of the vessel-source pollution, not the damping. Some writers take or seem to take this position.[78] In *the Mox Plant* Case, Ireland maintained that the United Kingdom had breached its obligations under Articles 192 and 193 and/or Article 194 and/or Articles 211 and 213 of LOSC by failing to take necessary measures to prevent pollution of the marine environment from release of radioactive materials and/or wastes from the Mox plant and/or international movement associated with the Mox plant resulting from a terrorist act.[79] However, as to vessel-source pollution LOSC generally supposes pollution by discharges from vessels in their ordinary operation.[80] Until recently concerning vessel-source pollution international law has devoted much energy into setting forth internationally binding and non-binding standards of discharge from vessels.[81] Setting aside, for the time being, the question as to whether or not the issue of shipment of substances harmful to the marine environment is thought of as one among that of vessel-source pollution, it is true that after the experience of the serious marine pollution by those accidents, weight in regulative measures is going to shift from restriction of actual discharges from vessels in their ordinary operation, to prevention of marine pollution and prevention of accidents. Concerning oil tankers and ships carrying harmful cargoes, in TS, some national laws adopt a vessel reporting system or a vessel traffic service (VTS),[82] and require foreign ships to provide information including the nature of cargo or notification of their entry into TS.[83]

Second, depending on the nature of the harmful substances carried, as typically seen in the arguments concerning the shipment of plutonium, not only the safety of navigation and shipment, but also other legal interests are merging into the domain of protection of the marine environment, such as prevention of crimes on the sea or maintenance of the good order of the sea, and security against a terrorist attack.[84] The definition of a risk in the context of prevention of marine pollution is thus expanding to include various types of risks that need to be coped with. This tendency closely relates to the first point that there has been a shift from prohibition of actual discharges to avoidance of a risk of pollution.[85] If any kind of cause of damage to the marine environment should be prevented, prevention for the purpose of MEP would include prevention of accidents, crimes on the sea, and terrorist attacks against vessels carrying harmful substances. In such an in-all approach not

only MEP but also other legal interests would mix in the issue of MEP, for instance, the safety of navigation, maintenance of the good order of the sea and even security of the international society or the interested States, at the same time.

Under these two circumstances, the following questions have arisen: Whether regulation by a coastal State of EZ over navigation, a manner of navigation and construction of ships for the reason of the type of cargo（dangerous substances）are compatible with LOSC? Whether the regulation undermine the distribution of jurisdiction by LOSC according to "matters"? LOSC confers on a coastal State of EZ jurisdiction solely over MEP not over prevention of crimes on the sea or maintenance of（national or international）security. From these perspectives an analysis will be given of the relevant State practice.

(2) State Practice Concerning the Plutonium Shipments by Japan and Shipment of Dangerous Substances[86)]

① Argentina, Chile, Indonesia and the Philippines, for instance, showed the intention of not permitting the entry of the Japanese ship carrying plutonium into their TS. Including Fiji, it is said that there were States requiring non-entry of it even into EZ.[87)] Under Article 1（3）the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposals does not apply to radioactive wastes.[88)] If plutonium is not considered as "a waste" it still remains out of the reach of the Convention.[89)]

② Comparing to EZ, in TS, under Article 19（2）(h), non-innocence of a foreign ship is not presumed without an act of willful and serious pollution. Even if Article 19（1）is interpreted differently from Article 19（2）so as to allow a coastal State to determine non-innocence of a foreign ship without waiting for any concrete acts or activities, it is difficult to regard a ship carrying substances harmful to the marine environment as such, as prejudicial to "the peace, good order or security" of a coastal State.[90)]

Concerning a plutonium shipment, due to the vulnerable nature of plutonium to a risk of terrorist attacks, a foreign ship carrying plutonium may be prejudicial to the good order or security of a coastal State of TS under Article 19（1）. There would be cases in which plutonium is taken by someone and passed to a criminal group or in which it is taken by terrorists and used as means to threaten the coastal State. Further there could be an exceptional case in which a coastal State experiencing a serious social disorder could prove the danger to its security that would be caused with certain plausibility solely by the presence of such ships.[91)] This kind of interpretation of Article 19（1）, if taken in general, however, would raise a problem of

compatibility with the fact that Articles 22 and 23 premise the right of innocent passage enjoyed by a foreign ship carrying nuclear or other inherently dangerous or noxious substances.[92)]

In TS, Article 22 prescribes measures taken by a coastal State over foreign ships carrying inherently dangerous substances while they are exercising the right of innocent passage. Article 23 stipulates obligations of such ships. The existence itself of these provisions means that LOSC confers the right of innocent passage on those ships. Article 22 (1) mentions the safety of navigation, but the term "inherently dangerous" in these two Articles is interpreted at least principally as "inherently dangerous to the marine environment." Thus, a coastal State should carry the burden of proof that the cargoes concerned are inherently dangerous to the marine environment. When a shipping mode, packaging of substances and others are according to international standards adopted, for example, by the International Maritime Organization (IMO) and the International Atomic Energy Agency (IAEA), it is doubtful whether there still remains room for the carried substance to be considered inherently dangerous.[93)]

In addition, Article 22 (3) prescribes that in the designation of sea lanes and the prescription of traffic separation, a coastal State shall take into account the recommendation of the competent international organizations and other matters.[94)] The discretion of a coastal State in taking these measures is thus restricted. There are no provisions under LOSC that allow a coastal State of TS to impose upon foreign ships carrying dangerous substances an obligation of prior notification before its entry into the TS or a mandatory VTS. Although a coastal State may adopt laws and regulations concerning the safety of navigation or the prevention of the marine pollution under Article 21 (1) (a) and (f), it shall not hamper the innocent passage of a foreign ship under Article 24 (1). An overwhelmingly burdensome VTS would substantially contradict Article 24 (1), since it may hamper the right of innocent passage. Further, unless it falls under the measures to prevent non-innocent passage, prior notification or a mandatory VTS may not be imposed on a foreign ship[95)] under Article 25 (1).

③ In EZ a foreign ship has the freedom of navigation, and a coastal State holds jurisdiction over the protection and preservation of the marine environment. As examined before, if the issue of shipment of substances dangerous to the marine environment might be categorized as that of vessel-source pollution, the prescriptive jurisdiction of a coastal State concerning this issue must submit to Article 211 (5), and its enforcement jurisdiction should be exercised in accordance with Article 220

(3), (5) and (6).

Article 220 (3), (5) and (6) contain the phrase "a vessel navigating in the exclusive economic zone or the territorial sea", and they are interpreted as presupposing that the foreign vessel concerned enjoys the freedom of navigation[96], even if the vessels are carrying harmful substances and might cause pollution. This is the same line of logic as Articles 22 and 23 in that their existence itself proves the right of innocent passage conferred on foreign ships carrying inherently dangerous substances. Accordingly, there are no legal grounds in LOSC to prohibit or even restrict entry into EZ ships solely because of the fact that they are carrying substances dangerous to the marine environment.

The recent national laws and practices relating to the shipment of plutonium and other dangerous substances indicate a restriction on navigation by the reason of the cargoes of the ships. As discussed concerning fishing vessels, *in arguendo,* navigation of ships carrying dangerous substances is thought of as a part of or incidental to the transportation of the substances. By denying the independent significance of the navigation for such ships, their navigation can be automatically restricted due to the nature of their cargoes. It contradicts the fundamental structure of LOSC that recognizes the freedom of navigation irrespective of type of ship or cargo and that a coastal State of EZ is entitled to take regulative and enforcement measures for the purpose of MEP, at least principally targeting actual or concrete activities, such as discharges.

(3) Various Legal Interests Being Related to Prevention of Pollution of the Marine Environment

① With respect to plutonium shipments, the following are said to be causes of radioactive contamination of the marine environment by discharges or leaks, an inappropriate mode of packaging or shipment even in ordinary transportation, accidents, terrorist attacks against ships carrying plutonium and mistreatment after extortion of radioactive substances by terrorists or unauthorized persons[97]. Diversion of plutonium taken by a terrorist group to military purposes is also pointed out as a risk relating to plutonium shipments, but it does not directly relate to the issue of MEP[98].

Under Article 220 (5) and (6) certain qualified discharges are required for a coastal State of EZ to exercise physical inspection and to institute proceedings against the foreign ship concerned. If those discharges or leaks of radioactivity are considered to be among the discharges under Article 220 (5) and (6), a coastal State might take enforcement measures stipulated in them.

There is a doubt about compatibility with LOSC of encompassing inclusively all those causes as "a risk of damage to the marine environment" against which preventive measures are taken by a coastal State of EZ. In the case of oil discharges in the ordinary operation of ships, setting forth an allowable standard itself signifies the determination of the preventive measure against damage to the marine environment. Concerning vessel-source pollution IMO has continuously taken the initiative in establishing international standards of discharge from vessels. The preamble of MARPOL mentions not only intentional discharges but also accidental releases of oil and other harmful substances. Article 211 (1) of LOSC prescribes an obligation to promote routing system for minimizing the threat of accidents that cause pollution of the marine environment through the competent international organization or general diplomatic conference, and Article 211 (5) makes the laws and regulations of a coastal State of EZ submit to those international standards. Taking this into consideration, the vessel-source pollution under LOSC is interpreted as supposing discharges of oil or other substances from ships in their ordinary operation and it could cover accidental releases if the connection between vessel-source pollution and accidental releases accepted under Article 211 (1) is reflected in Article 211 (5) in the same manner. "Prevention" under Article 211 (5) has a limited meaning and the "prevention" of damage to the marine environment is understood at least mainly to mean establishing and effectively applying international standards on the discharges from ships in their ordinary operation and on the accidental releases.

Compared to this, if shipment of harmful substances including plutonium falls under the issues to be dealt with as one of vessel-source pollution, the discharges in Article 220 (5) and (6) would contain in addition to discharges from ships in their ordinary operation discharges or leaks by various causes, such as accidents, inappropriate packaging of the substances, mistreatment of them, terrorist attacks against ships carrying those substances and so on. Also "prevention" of damage to the marine environment from the discharges or leaks would be interpreted broadly enough so as to cover any factors in order for avoiding a risk of environmental damage that would occur. A coastal State of EZ, which exercises its prescriptive jurisdiction over these matters would acquire a creeping jurisdiction over what is not within its jurisdiction over MEP, since these matters concern legal interests of the safety of navigation, prevention of crimes or the maintenance of the good order of the sea, and security of an individual State or possibly of the international society.[99] This kind of mixing of other legal interests into that of MEP typically results in the

argument of Ireland in *the Mox Plant* Case, too.[100)]

② LOSC, on the one hand, confers on a coastal State of EZ jurisdiction over MEP, and on the other hand, it specifies and categorizes sources of marine pollution according to which it distributes jurisdiction among the interested States. By doing this, it restricts the jurisdiction of a coastal State over MEP, and maintains the freedom of navigation and the flag State principle. Further, as examined before, regarding the enforcement jurisdiction of a coastal State of EZ over vessel-source pollution in which the keenest conflict is expected between flag States and coastal States, the qualified actual discharges are the condition for the latter to exercise physical inspection and to institute proceedings. As a whole, these form the basic structure of LOSC in order for realizing coordination between the freedom of navigation and effective regulation for the purpose of MEP.

Regarding the relation between Article 56 (1) (b) (iii) and Part XII, the jurisdiction of a coastal State of EZ over MEP contained in the latter is confined to the sources of pollution and as the special law of the former, the latter prescribes the mode of exercise of that jurisdiction. Taking a different interpretation that the jurisdiction of a coastal State of EZ over MEP under Article 56 (1) (b) (iii) is broader than the jurisdiction which reaches only the sources of pollution included in Part XII, a coastal State could exercise the jurisdiction over other sources of pollution.[101)] Within Part XII, it might be argued that a coastal State of EZ should take enforcement measures based upon the general provisions, such as Articles 192 and 194, even beyond the limitations set under Articles 211 and 220. These interpretations, however, without determining or restricting the mode of exercise of the coastal State jurisdiction would undermine the object and purpose of LOSC in providing Part XII in order to seek a balance between the freedom of navigation and the coastal State jurisdiction by restricting the latter in terms of the mode of its exercise and also specifying the sources of pollution.

With respect to accidents that can be a cause of marine environmental damage, Article 194 (3) (b) and (d), Article 211 (1) and (6), Article 217 (2), and Article 221 directly or indirectly indicate a close link between the safety of navigation and MEP. Article 211 deals with vessel-source pollution and according to Article 211 (1), as mentioned before a State, acting through the competent international organization or general diplomatic conference shall promote the adoption of routing systems designed to minimize the threat of accidents which might cause pollution of the marine environment. If such adoption of routing systems is realized, a coastal State of EZ could adopt laws and regulations including these routing systems, even

though Article 211 (5) does not mention this explicitly. Concerning a clearly defined area of EZ with special circumstances a coastal State, according to the procedure determined by Article 211 (6) may adopt laws and regulations to be applied to the special areas for the prevention, reduction and control of pollution from vessels implementing such international rules and standards or navigational practices as are made applicable.

As far as these provisions are concerned, a coastal State of EZ may take prescriptive measures including the matters of routing systems and navigational practices that are closely related to the safety of navigation, within the context of prevention of vessel-source pollution. Unilateral measures taken by coastal States, such as a mandatory VTS, designation of sea lanes, and requirements of prior notification concerning matters including cargoes do not conform to Article 211 (5) unless they are measures giving effect to the international standards referred to by Article 211.[102)]

With respect to enforcement jurisdiction, under Article 220 (5) and (6) certain qualified discharges are required for a coastal State of EZ to undertake physical inspection or institute proceedings including detention of the vessel concerned. These discharges may be interpreted to contain those by accidents of vessels, based upon the interpretation that Article 211 (5) and (6) allow a coastal State of EZ, according to the international standards, to adopt laws and regulations dealing with routing systems and navigational practices. These interpretations do not contradict Article 221 that properly prescribes enforcement measures taken by a coastal State in case of maritime casualties beyond their TS.

According to Article 211 (5) laws and regulations of a coastal State of EZ over MEP must be in conformity with the international standards. These international standards that have a restricting function of the prescriptive jurisdiction of a coastal State should be only those dealing with the matters of MEP. Otherwise, the prescriptive jurisdiction of a coastal State would in a creeping way be enlarged beyond the matters of MEP, in allowing a coastal State to adopt laws and regulations conforming to the international standards for matters other than MEP. In this regard, the recent tendency should be noted with caution that various legal interests, which initially do not have a relation to an international convention, are merging into the framework of a convention by its amendments or additions.

In the framework of the Convention for the Safety of Life at Sea (SOLAS), which already contains provisions concerning shipment of radioactive substances in relation to MEP, a proposal for a VTS, especially that for a mandatory VTS from the perspective of MEP faced a negative attitude.[103)] It is understandable that in the

SOLAS context of the safety of navigation the factors concerning MEP should not be necessarily included without confirming a certain connection between the two matters. Further, in 2002, the Conference of Contracting Governments to SOLAS adopted a series of amendments aiming at enhancing maritime security, backed up by the strong consciousness of the necessity for coping with terrorist atrocities. In the Conference, however, there was a strong doubt voiced by critics to such amendments, since *maritime security* does not at least directly fall under the purview of the safety of navigation.[104)]

The international standards that under Articles 211 and 220 laws and regulations of a coastal State of EZ must conform to or give effect to are to be those concerning MEP, and they may be relating to a matter of the safety of navigation only where there is a close connection to the vessel-source pollution. Considering the tendency that different legal interests are merging into a framework of international conventions, the selection of those international standards that are referred to under Articles 211 and 220 requires much circumspection.[105)]

Concerning shipment of radioactive substances, prevention of terrorist attacks is said to be included in the measures in order to prevent, reduce and control pollution of the marine environment from a vessel-source.[106)] However, as examined above, it is difficult to interpret the vessel-source pollution in LOSC as containing causes like terrorist acts or attacks. If this interpretation is allowed, the prescriptive and enforcement jurisdiction of a coastal State of EZ would reach the matters of prevention of crimes on the sea and maritime national or possibly international security. As far as pollution caused by terrorist acts or attacks against ships carrying radioactive substances or mistreatment of those substances after extortion is concerned, it is not included in any categories of pollution under LOSC; regarding this issue LOSC does not establish the distribution of rights and obligations among the interested States. Such distribution should be devised according to Article 59 of it.

6. Conclusion

Traditionally the law of the sea has conferred upon navigation the legal significance as a primary or initial use of the sea even though almost always navigation is connected with other uses or activities at sea, such as commerce, communication, fishing, transportation, and so on. The freedom of navigation has continuously kept the pivotal position in relation to the other uses of the sea. It also encompasses the freedoms of other related uses to navigation. Both CHS and LOSC, as positive

international law of the sea, currently in force, succeed to and confirm this traditional legal meaning of the freedom of navigation. Every ship enjoys the freedom of navigation irrespective of type of ship or cargo, and also irrespective of the activities that it purports to do or is engaged in. The distribution of rights and jurisdiction according to "matters", not to spaces, is preeminent under LOSC——particularly under its EZ regime——and LOSC has to devise a method to draw a line of demarcation between the "matters (or uses of the sea)" in order to achieve the difficult end: in maintaining the freedom of navigation to enable a coastal State of EZ to realize the effective regulation for the purpose of FRC and MEP. As a fine solution, LOSC takes a basic stance that it guarantees the freedom of motion and presence of a ship irrespective of its type or cargo unless it has a substantial and close connection with fishing activities or discharges, on the one hand, and that it permits a coastal State of EZ to take regulative or enforcement measures principally targeting actual or concrete fishing activities, or discharges, on the other hand.

In both domains of FRC and MEP, national and international practices have shown a tendency of instituting regulative measures that extend to the mode of navigation, CEDM, and navigation itself, even where a ship is not engaged in or about to engage in fishing or discharging harmful substances. In this sense, especially in EZ, the freedom of navigation of a foreign ship has been restricted more than LOSC allows. Further, and in particular, the regulations for the purpose of MEP are embracing those for protecting legal interests other than MEP, and they are moving toward tightening restriction over navigation in the name of *prevention* of the marine environmental pollution. By undermining the distribution of rights and jurisdiction in EZ according to "matters" under LOSC, a coastal State of EZ is trying to acquire new justification for the regulation over the freedom of navigation of a foreign ship.

Those unilateral measures taken by a coastal State of EZ raise a serious doubt concerning their compatibility with LOSC. They not only diverge from the relevant provisions of LOSC but also introduce an idea of navigation that is different from or contradictory to that of LOSC and the customary law of the sea. Even an international convention, such as WCPFC, that declares its compatibility with LOSC is establishing similar regulative measures. The grave result cannot be overemphasized that in those practices navigation is being dealt with as if it were a part of or incidental to fishing activities or to carrying substances harmful to the marine environment. The independent significance of the navigation and of the freedom of navigation is gradually being undermined.

Considering such a serious situation caused by the radical change of the meaning of the freedom of navigation, true international consent is really required for that change and practices should be cautiously confirmed, before we recognize the change as an element of the new or emerging law of the sea. On the other hand, the current situation is not only newly arising but also it reflects, in the two following senses, a negative inheritance of the tradition of the law of the sea.

First, the flag State principle, while it has been firmly established, cannot in reality lend a guarantee for the observation of the law regarding fishing activities and the prevention of the marine environmental pollution. Under Article 58 (3) and Article 217, a flag State has the obligation to ensure that a ship flying its flag respects the laws and regulations of coastal States in the field of FRC, and in the field of MEP respects those that are in conformity with the international standards.[107)]

The flag State principle is the sole general method to maintain the good order of the high seas, and in EZ of a foreign State, depending on matters the flag state's jurisdiction over a ship flying its flag dose not loose its supremacy over that of a coastal State. However there has not been yet established an effective control mechanism in order to ensure the flag State's control over a ship flying its flag. On this somewhat fragile basis of the good order under the fundamental principle of the freedom of the sea, international law is now instituting regulations for the purpose of FRC and MEP both on the high seas and in EZ. As far as a flag State does not effectively guarantee the observance of rules regarding activities of its ships in the field of FRC and MEP in EZ of a foreign coastal State, a coastal State is urged to take more restrictive measures for the purpose of FRC and MEP including regulative measures over navigation of ships concerned.

Second, the vast zone of 200-mile EZ is sometimes beyond the effective control of its coastal State.[108)] As the history of the law of the sea reveals, the limits of various sea zones——TS, Continental Shelf, EZ, for instance——have not been established solely according to capacity of their coastal States in managing and controlling activities in the entire area of the zone.[109)] Lack of the capacity again motivates a coastal State of EZ to take not only the measures targeting actual fishing activities or discharges but also "more preventive" measures extending to a mode of navigation and navigation itself of fishing vessels or ships carrying harmful substances.[110)] This tendency will move forward where regarding ships carrying substances harmful to the marine environment various international interests merge into that of MEP, such as safety of navigation, maintaining the good order of the sea, and national or international security, as seen in the case of plutonium shipments.

The current situation of the international and national practices examined in this paper is, at least partly, ascribed to these two factors that the history of the law of the sea has created. In other words, a solution for the problem that the law of the sea is currently facing provides a certain solution also for the problems that law of the sea has traditionally held.

In addition, the international character of and international expectation on the flag State principle and the coastal State's rights and jurisdiction should be well considered. The flag State principle negatively means that no foreign States may interfere with ships on the high seas unless there are legal justifications under positive rules. It positively fulfills a function of maintaining the good order on the high seas in expecting control over ships by their flag States. Because of such an expectation, a right of navigation needs to be a right of a flag State, not of a ship. On the other hand, the coastal State's jurisdiction in EZ over MEP is regarded as bearing international character in that it should exercise the jurisdiction in a manner fulfilling its international duty for international society.[111] Even the sovereign right of a coastal State of EZ over FRC may have international character in the sense that it should take conservation measures "for the benefit of all."[112] This idea is reflected in Articles 61 and 62 of LOSC that *oblige* a coastal State of EZ to take measures for conservation and management of the living resources taking into consideration the designated factors, even concerning the living resources wholly existing within its EZ.

For realizing in an appropriate manner the international character of the rights of both a flag State and a coastal State of EZ, and for finding a solution for the current difficult situation in the field of FRC and MEP and a solution for the problems that the law of the sea has traditionally faced, consent of States in international society is truly required. This simple but most fundamental policy has a vital significance.

1) As for general works on these fields, for instance, E. Hey ed., *Development in International Fisheries Law* (1999); O. S. Stokke, *Governing High Seas Fisheries—— The Interplay of Global and Regional Regimes——* (2001); J. A. de Yturriaga, *The Intertnational Regime of Fisheries from UNCLOS 1982 to the Presential Sea* (1997); M. Le Hardy, *Que reste-t-il de la liberté de la pêche en haute mer——essai sur régime juridique de l' exploitation des ressources biologiques de la haute mer——* (2002); D. Brubaker, *Marine Pollution and International Law* (1993); M. H. Nordquist and J. N. Moore eds., *Current Environmental Issues and the Internaitonal Tribunal for the Law of the Sea* (2001); E. Franckx ed., *Vessel-source Pollution and Coastal State Jurisdiction——The Work of the ILA Committee on Coastal State Jurisdiction Relating to*

Marine Pllution（1991-2000）（2001）; H. Ringbom ed., *Competing Norms in the Law of Marine Environmental Protection*（1997）.

2) G. Gidel, *Le droit international public de la mer*（1932）, Tome I, pp. 236-239; As examined below, international law has not yet established a method to effectively control the flag State jurisdiction and this forms a historical problem of the international law of the sea. D. P. O' Connell, *The International Law of the Sea*（1982）, Vol. I, pp. 794-795; R.- J. Dupuy and D, Vignes, *A Handbook of the New Law of the Sea*（1991）, Vol. 2, p. 836.

3) In carrying out atmospheric tests of nuclear devices, France created "Dangerous Zones" for aircraft and shipping in order to exclude aircraft and shipping from the area of the tests center. In its Application in the *Nuclear Tests* Case, Australia contended that the interference with ships and aircraft on the high seas and in the superjacent airspace, and the pollution of the high seas by radioactive fall-out, constituted infringements of the freedom of the high seas, *Nuclear Tests* Case（Australia v. France）, *Pleadings, Oral Arguments, Documents,* 1973, Vol. 1, p. 14; On the occasion of armed conflicts, as the United Kingdom established a "maritime exclusion zone" and later a "total exclusion zone" in the 1982 naval conflict over the Falkland Islands/Islas Malvinas, there has been practice that combatants exclude and forbid certain ships entering it. The issue of the possible justifications for such obstruction of the freedom of navigation is beyond the examination of this paper. See, e.g., R. R. Churchill and A. V. Lowe, *The Law of the Sea,* Third Edition（1999）, pp. 424-425.

4) As for these questions, in addition to the citations in the footnotes below, see generally, W. T. Burke, *The New International Law of Fisheries——UNCLOS 1982 and Beyond*（1994）, 7. Enforcement; W. T. Burke, "National Legislation on Ocean Authority Zones and the Contemporary Law of the Sea," *Ocean Development and International Law,* Vol. 9（1981）, pp. 289-322; D. Anderson, "The Regulation of Fishing and Related Activities in Exclusive Economic Zones," E. Franckx and Ph. Gautier eds., *La zone économique exclusive et la convention des nations unies sur le droit de la mer, 1982-2000: un premier bilan de la pratique des états*（2003）, pp. 31-50; D. R. Rothwell, "Navigational Rights and Freedoms in the Asia Pacific Following Entry into Force of the Law of the Sea Convention," *Virginia Journal of International Law,* Vol. 35（1995）, pp. 587-631.; T. Treves, "Le navire et la compatibilité entre les utilizations de la mer," Société française pour le droit international, *Le navire en droit internaitonal*（1992）, pp. 152-168; International Law Association, *Report of the 61st Conference*（1984）, pp. 195-196.

5) See the works cited at *supra* n. 1.

6) For example, see, J. M. Van Dyke, "Sea Shipping of Japanese Plutonium under International Law," *Ocean Development and International Law,* Vol. 24（1993）, pp. 399-430. Regarding Japanese plutonium shipments, see, N. Okuwaki, "'Kiken Mataha Yugaisei' wo Naizai Suru Gaikoku Senpaku no Ryokai Tuko（Passage in Territorial

Sea of Foreign Ships Carrying Inherently Dangerous or Noxious Substances)," Nihon Kaiyoho Kyokai ed., *Kaiyoho Jirei Kenkyu* (*Case Studies on the Law of the Sea*), Vol. 1 (1993), pp. 37-61; Sh. Sakamoto, "Genshiryokusen Oyobi Kiken Mataha Yugai na Busshitsu wo Unpan Suru Senpaku no Mugai Tsukoken (The Right of Innocent Passage of Nuclear-Powered Ships and Ships Carrying Inherently Dangerous or Noxious Substances)," Nihon Kaiyoho Kyokai ed., *Kaiyoho Kankei no Hikaku Kenkyu* (*A Comparative Analysis of National Legislative Practices*), Vol. 1 (1995), pp. 3-20.

7) As examined below, the tendency of an "in-all" or "mixture of legal interests" approach is preeminent when a combating mechanism against terrorism is considered within an existing framework of an international convention, such as the International Convention for the Safety of Life at Sea.

8) In respect to innocent passage, Article 18 of LOSC defines "passage" and its Article 38 defines "transit passage."

9) As excellent historical surveys, C. J. Colombos, *The International Law of the Sea,* The Revised Edition (1854), pp. 40-48; T. Scovazzi, "Evolution of International Law," *Recueil des cours,* Tome 286 (2000), Chap. I.; Soji Yamamoto, *Kaiyoho (The Law of the Sea)* (1992), pp. 21-29; O' Connell, op cit., *supra* n. 2, Chapter 1, especially, pp. 1-20; Gidel, op cit., *supra* n. 2, pp. 123-212.

10) H. Grotius, *Mare liberum (The Freedom of the Seas),* translated with a revision of the Latin text of 1633 by R. V. D. Magoffin (1916).

11) Id., Chap. I, V and VI. H. Ito, *Gurothiusu no Jiyuukairon (The Gtorian Theory on the Freedom of the Sea)* (1984), pp. 203-206, 218-244.

12) J. Selden, *Mare clausum,* lib. 1, c. 20.

13) Grotius, op. cit., *supra* n. 10, Chap. I.

14) Regarding the other factors that had impacts on the establishment of the principle of the freedom of the sea, see, the citatious at *supra* n. 9.

15) On the occasion of *the M/V "Saiga" (No. 2)* Case, in his Separate Opinion, Judge Vukas, looking at the drafting history of Part V of LOSC, referred to the Note circulated by the President of the Conference at the Fifth Session of the United Nations Conference on the Law of the Sea which read that "...the sovereign rights and jurisdiction accorded to the coastal State are compatible with well established and long recognized rights of communication and navigation which are indispensable for the maintenance of international relations, commercial and otherwise..." *International Legal Materials,* Vol. 38 (1999), p. 1401, para. 17. Judge Vukas emphasized here the close relation among navigation, communication and commercial activities, such as bunkering of ships in the context of arguing the legality of the bunkering concerned in the case. Contrary to this, Judge Zhao, in his Separate Opinion, contended that international law should at all times distinguish between navigation and the commercial activities, and that international lawyers always draw a distinction between the freedom of navigation and the freedom to trade, the freedom to carry goods and the

freedom of movement of shipping, id., p. 1383. Both opinions correctly express the following two points concerning the freedom of navigation: first, in the history the freedom of navigation had been argued almost always with the necessity of trade, communication and transportation, etc.; second, however, the freedom of navigation has always been isolated as one freedom of one use of the sea, at least since the beginning of the codification of the law of the sea in the 20th century.

16) Under Article 19 (1) there is a room for an interpretation that a coastal State of the territorial sea (TS) may deny innocence of foreign ships for the reason of kind of ship or their purpose and intention. In that argument warships are chiefly targeted and not fishing vessels or ships carrying harmful substances that are the main subjects of this paper.

17) Dupuy and Vignes, op cit., *supra* n. 2, p. 845. Definition of navigation closely relates to that of a ship, and as for its definition, see, for instance, Gidel, op cit., *supra* n. 2, p. 66; Treves, op cit., *supra* n. 4, p. 152

18) Burke, op cit., (National Legislation...), *supra* n. 4, pp. 310-311.

19) A. Kanehara "Kokaiseido no Gendaiteki Igi (The Modern Significance of the Freedom of the High Seas)," Hogakukyoshitsu (Lecture pour le futur), No. 281 (2004), pp. 16-17.

20) O' Connell, op cit., *supra* n. 2, pp. 1-20, 792-796.

21) As for the Report by the Special Rapporteur J. P. A. François, *Yearbook of the International Law Commission 1950,* Vol. II, pp. 37-38, para. 9. For the discussion on this issue within the International Law Commission, *Yearbook of the International Law Commission 1950,* Vol. I, pp. 183-184, paras. 33-38.

22) O' Connell, op cit., *supra* n. 2, pp. 796-799.

23) Dupuy and Vignes, op cit., *supra* n. 2, p. 845.

24) Burke, op cit., *supra* n. 4 (National Legislation...), pp. 310-311.

25) Dupuy and Vignes, op cit., *supra* n. 2, pp. 846-847. With respect to the attitude toward Article 58 and national legislation of Latin American States, F. H. Paulillo, "The Exclusive Zone in Latin American Practice and Legislation," *Ocean Development and International Law,* Vol. 26 (1995), pp. 105-125.

26) These two types of conflicts are not always clearly distinguished, and many writers place much weight on the due regard principle for resolving the conflict between a flag State and a coastal State concerning an infringement on the freedom of navigation of the former by regulation exercised by the latter for the purpose of FRC or MEP, see, for instance, Treves, op cit., *supra* n. 4, pp. 154, 156-159; Dupuy and Vignes, op cit., *supra* n. 2, pp. 889-893; Burke, op cit., *supra* n. 4 (National Legislation...), pp. 302-303; Churchill and Lowe, op cit., supra n. 3, p. 175; Separate Opinion of Judge Vukas to the Judgment of *the M/V "Saiga" (No. 2)* Case, op cit., *supra* n. 3, p. 1399, para. 11. As for an analysis of the different views, Burke, op cit., *supra* n. 4 (The New International Law of Fisheries), pp. 315-318.

27) Also Article 59 takes the same stance.

28) Dupuy and Vigne, op cit., *supra* n. 2, pp. 889-890.

29) A. Kanehara, "Gyogyo Shigen Hozon Joyaku ni Okeru Kisei Shuho to Koko no Jiyu tono Seigosei (Impacts on the Freedom of Navigation by Regulations for Conservation of Fishery Resources)," Kaijo Hoan Kyokai ed. *Kaijo Hoan Kokusai Hunso Jirei no Kenkyu* (*Studies of International Disputes on the Law of the Sea*), Vol. 3 (2002), pp. 46-77.

30) In comparison with Article 220 (3), (5) and (6) that prescribe the enforcement jurisdiction of a coastal State of EZ concerning vessel-source pollution, Article 73 (1) does not set forth in detail the conditions for a coastal State to take enforcement measures. With respect to the question as to whether Article 73 (1) applies in the exercise of the sovereign rights of a coastal State over non-living resources, see, de Yturriaga, op. cit., *supra* n. 1, p. 139; S. N. Nandan and Shabtai Rosenne, *United Nations Convention on the Law of the Sea 1982: A Commentary,* Vol. II (1993), p. 794. There is an opinion that the jurisdiction of a coastal State over MEP is regarded as directly linked to the sovereign rights contained in Article 73 (1), and accordingly Article 220 should be applied as a *lex specialis* to Article 73, Franckx, op cit., *supra* n. 1, p. 94.

31) As examined below, in *La Bretagne* Case, the tribunal restrictively interpreted the sovereign rights of a coastal State under Article 56 (1), considering the nature of the matters for regulation under Article 62 (4). See, *infra* n. 64)

32) The placing of observers contained in Article 62 (4) (g) may relate to the enforcement measures.

33) Official Records, Vol. III (1958), pp. 76-77.

34) In comparison with this, in straits for international navigation under Article 42 (2) States bordering straits may include stowage of fishing gears in the matters for regulation. The tendency of considering the non-stowage of fishing gears as a proof of fishing activities is found in international and national practices. This will be mentioned later.

35) The issue of how to determine non-innocence of a foreign ship has a long history, and it goes beyond the reach of this paper. Nowadays, a purpose or intention of ships is said to be considered as a determining factor of non-innocence, for example, intention to deploy an anti-government campaign, J. P. Quénuedec, "La réglementation du passage des navires étrangers dans les eaux territorial française," *Annuaire française de droit international,* Tome XXXI (1985), pp. 788-789; Soji Yamamoto, op cit., *supra* n. 9, pp. 123-135. As for various opinions, see, for instance, O' Connell, op cit., *supra* n. 2, pp. 270-274; Churchill and Lowe, op cit., supra n. 3, pp. 82-86. Concerning the North Korean spy ship incidents and the concept of innocent passage, A. Kanehara, "Engankoku Toshiteno Nihon no Kokunaisochi (National Practice of Japan as a Coastal State)," *Jurisuto* (*Jurist*), No. 1232 (2002), pp. 63-64; A. Kanehara, "The Incident of an Unidentified Vessel in Japan's Exclusive Economic Zone," *The Japanese Annual of International Law,* No. 45 (2002), pp. 116-126; A. Kanehara, "The

Japanese Legal System Concerning Innocent Passage of Foreign Vessels (1990-1998)," *The Japanese Annual of International Law,* No. 42 (1999), pp. 90-110.

36) As extensive examinations of the coastal State jurisdiction over vessel-source pollution, Franckx, op cit., *supra* n. 1; E. J. Molenaar, *Coastal State Jurisdiction over Vessel-source Pollution* (1998).

37) Regarding the meaning of "the international standards," Franckx, op cit., *supra* n. 1, pp. 27-30; L. B. Sohn, "'Generally Accepted' International Rules," *Washington Law Review,* Vol. 61 (1986), pp. 1073-1080.

38) As for the interpretation of Article 220, A. Kanehara, "Kankyohogo ni Kansuru Kankeihorei to Sono Shikko——Senpakukiin no Kaiyoosen wo Chuusin Toshite——(National Legislation and Enforcement in the Domain of the Marine Environmental Protection——In Case of Vessel-source Pollution——)," Kaijo Hoan Kyokai ed., *Shinkaiyoho no Tenkai to Kaijohoan* (*The Development of the New Law of the Sea and Coast Guard*), Vol. 2 (1998), pp. 104-120; E. Franckx, "Vessel-source Pollution and Coastal State Jurisdiction: General Framework," *South African Yearbook of International Law,* Vol. 24 (1999), p. 23. Under Article 220 due to the lack of a provision dealing with the case in which a vessel, passing EZ, has violated laws and regulations of the coastal State in TS, some flexibilty remains regarding the following point: What is the standard according to which the mode of enforcement is determined, the place of violation, or the place of the vessel concerned at the time of the enforcement?

39) As in a case of fishing vessels, non-innocence of foreign ships in relation to MEP may be presumed only by "an act of pollution," namely, a concrete activity.

40) Judging from the structure of Article 220, it is interpreted that the distribution of jurisdiction among the interested States is primarily depending on the place of a violation and "a discharge," not on the place of the vessel concerned at the time of the enforcement by a coastal State. Some flexibility remains, as mentioned before, since Article 220 does not cover a case in which a violation is committed in TS by a foreign vessel navigating in EZ at the time of the enforcement, Franckx, op cit., *supra* n. 1, p. 94; Kanehara, op cit., *supra* n. 38, pp. 114-117.

41) The port State jurisdiction has a double nature. First, it may coincide with that of the coastal State jurisdiction. This is a case of the port State jurisdiction contained in Article 211 (3) and Article 220 (1). Second, Articles 218 and 219 provide for the port State jurisdiction as a sort of guardianship for the marine environment. Regarding the double nature of the port State jurisdiction, Dupuy and Vignes, op cit., *supra* n. 2, pp. 1206-1209.

42) W. T. Burke, "Exclusive Fisheries Zones and Freedom of Navigation," 20 *San Diego Law Review,* Vol. 20 (1983), p. 606-623; Burke, op cit., *supra* n. 4 (National Legislation...), pp. 304-311; Burke, op cit., *supra* n. 4 (The New International Law of Fisheries), pp. 319-335.

43) Law No. 32/76 of 5 Dec. 1976, Relating to the Navigation and Passage by Foreign

Ships and Aircraft through the Airspace, Territorial Waters, and the Economic Zone of the Republic of Maldives, Article 1, M. Nordquist and K. Simmons eds., *New Directions in the Law of the Sea,* Vol. 9 (1980), p. 295. Fisheries Law of Yemen Arab Republic, Article 2, cited by Burke, op cit., *supra* n. 4 (National Legislation...), p. 610. El Salvador and Costa Rica are included in the States that have this type of national laws, Burke, op cit., *supra* n. 4 (The New International Law of Fisheries), p. 322.

44) As examples that have an effect of designating sea lanes, for instance, Indian law provides for the declaration of a designated area and explanation was given that a notification may provide for the regulation of entry into and passage through the designated area by the establishment of sea lanes, traffic separation, mode of ensuring freedom of navigation and so on which is not prejudicial to the interests of India, The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zone Act, 1976, Article 7 (6), *United Nations National Legislation on the Exclusive Economic Zone* (1983), p. 136; Australia' s Fisheries Act 1975, Article 5 (13 AB) (1), No, 11837/75, AUSTL. C. ACTS. and Section 15 (d) (iii) of Fisheries Amendment Act of 1978, Nordquist and Simmons, op cit., *supra* n. 43, Vol. 7, pp. 79-80; Article 4 (1) of Pakistan's Exclusive Fishing Zone Act, 1975, may have the same effect, Nordquist and Simmons, op cit., *supra* n. 43, Vol. 9, p. 119.

45) Canadian Law has this effect, Coastal Fisheries Protection Regulations, Section 15 (2), R. Churchill, M. Nordquist and S. Lay eds., *New Directions in the Law of the Sea,* Vol. 5 (1977), p. 70.

46) Many States adopt this measure, such as Australia, New Zealand, Seychelles, Siera Leone, Solomon Islands, Spain, Canada, the Gambia, Maldives, and United Kingdom, Burke, op cit., *supra* n. 4 (National Legislations...), pp. 620-621.

47) Malaysia's Fisheries Act, 1985, Sections. 16, 35, FAO Legislation, No. 2 (1986), p. 58; Article 7 (7), (9) of the Indian Law, *supra* n. 44; Pakistan's Territorial Waters and Maritime Zones Act, 1976, Article 6, (5) and Article 4 of Pakistan's Law, *supra* n. 44.

48) Seychelles' Control of Foreign Fishing Vessel Decree, 1979, § 15 (2), Burke, op cit., *supra* n. 4 (National Legislation...), p. 619; Bahamas Fisheries Resources (Jurisdiction and Conservation) Act, 1977, § 19 (2), Nordquist and Simmons, op cit., *supra* n. 44, Vol. 7, p. 98. Articles 2 and 4 of Law No. 66-400 of 18 June 1966, as amended by the Law of 18 November 1997, on Sea Fishing and the Exploitation of Marine Products in the French Southern and Antarctic Territories. This Law among others triggered *the "Camouco"* Case entertained by ITLOS. *The International Legal Materials,* Vol. 39 (2000), p. 674, para. 39.

49) Concerning the Convention, see, W. V. Dunlap, "Bering Sea," *The International Journal of Marine and Coastal Law,* Vol. 10 (1995), pp. 114-126.

50) R. Rayfuse, "Enforcement of High Seas Fisheries Agreements: Observation and Inspection under the Convention on the Conservation of Antarctic Marine Living Resources," *The International Journal of Marine and Coastal Law,* Vol. 13 (1998), pp.

595-598.

51) Whether the vessels over which this regulative measures are to be taken have a connection to actual fishing activities depends on the meaning of "their ships that fish" in this Article. The definition of a fishing vessel in WCPFC will be examined below.

52) Both SSA and WCPFC prescribe certain measures of surveillance over fishing vessels on the high seas that are to be taken by a flag State. If those measures are exercised over fishing vessels without a substantial relation to actual fishing activities, on the high seas the freedom of navigation would be restricted solely because they are fishing vessels. The balance between the freedom of navigation and conservation or management of fishing resources would shift toward the latter.

53) *FAO Legislative Study* No. 21, Rev. 4 (1993), chapter 12 "Coastal State Requirements for Foreign Fishing, Part One," section 4 (a), p. 713.

54) M. Hayashi, "Japan-New Law of the Sea Legislation," *International Journal of Marine and Coastal Law,* vol. 11 (1996), p. 570 et seq.

55) As a survey in detail of these national legislations, Anderson, op cit., *supra* n. 4, p. 42.

56) Ibid.

57) A/CONF.164/L.11. A similar proposal was found in A/CONF.164/L.44. J.- P. Lévy and G. G. Schram, *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks* (1996).

58) Relating to transshipment, Article 18 (3) prescribes measures to be taken by a flag State and (h) deals with regulation of transshipment on the high seas to ensure that the effectiveness of conservation and management measures is not undermined. Article 18 (3) (f) includes supervision of transshipment among the means for verifying the catch of target and non-target species.

59) Rayfuse, op cit., *supra* n. 50, p. 596.

60) Whether bunkering of a fishing vessel, in principle, is considered as "in support of, or in preparation for" fishing activities, depends on the interpretation of "in support of, or in preparation for fishing activities." This issue will be examined below again.

61) Op cit., *supra* n. 15, pp. 1331-1334, paras. 28, 30.

62) In this regard, Judge Vukas in his Separate Opinion pointed out the necessity of analyzing the relevant provision of LOSC in order to inquire about the legality of the actions of Guinea, and he confirmed that the conflict point between the parties was only concerning the bunkering of a fishing vessel, not bunkering in general, id., pp. 1398-1399, paras. 6-10.

63) Id., pp. 1350, 1352, paras. 123-124, 136-138.

64) *International Law Reports* Vol. 82 (1986), pp. 590-670.

65) Id., pp. 627-630, paras. 50-52.

66) Op cit., *supra* n. 15, pp. 1331-1332, para. 28.

67) Id., pp. 1334, 1350, 1352, paras. 30, 124, 137.

68) Ibid.

69) Id., p. 1350, para. 124.

70) Id., p. 1350, para. 125. In this regard, Article 40 of the Merchant Marine Code of Guinea prescribes its sovereign rights in EZ concerning "other activities bearing on the exploration and exploitation of the zone for economic purpose," id., p. 1348, para. 113.

71) Separate Opinion of Judge Anderson, id., p. 1395; Anderson, op cit., *supra* n. 4, pp. 46-47. As examined before, the definition of "fishing" under WCPFC includes "in support of, or in preparation for" fishing activities. A certain amount of subsequent practice is required in order to establish a definite interpretation of the meaning of "in support of, or in preparation for" fishing activities. A possible interpretation is that only where bunkering and other aiding activities are really enable the fishing vessel concerned to effectively realize or continue its fishing activities, they are regarded as "in support of, or in preparation for" the fishing activities.

72) Op cit., *supra* n. 15, pp. 1401-1402, para. 17.

73) The issue of the relation between a bunkering or supplying vessel and a fishing vessel has some relation to that of "other craft working as a team" under Article 111, paragraph 4 of LOSC. In some cases, a supplying vessel to a fishing vessel may be regarded as a part of a team that exercises the fishing activities together and in cooperation. That in *the M/V Saiga (No. 2)* Case Guinea treated the bunkering as a commercial activity means to focus upon the independent and commercial nature of bunkering rather than stressing the connection between the bunkering and fishing activities of the recipient fishing vessel.

74) When bunkering, as a commercial activity at sea becomes a large industry, it would require some international legal treatment. However, as Judge Nelson confirmed in his Separate Opinion, since the African States' proposal of jurisdiction of a coastal State over custom and fiscal matters were rejected at the United Nations Conference on the Law of the Sea, the relevant provision of LOSC, such as Article 56 is not interpreted to recognize such a right or jurisdiction for a coastal State of EZ, op cit., *supra* n. 15, pp. 1388-1389. Further Judge Vukas in his Separate Opinion, indicated the African States' recent practice which is opposite to this tendency. id., pp. 1402-1403, paras. 18-20.

75) As for the impact on the law of the sea by these accidents and the marine environment pollution, see, H. Ringbom, "The Erika Accident and Its Effect on EU Maritime Regulation," Nordquist and Moore, op. cit., *supra* n. 1, pp. 265-290; J. Angelo, "Erika Aftermath: Development at IMO on Double Hulls (A U. S. Perspective)," id., pp. 309-318; D. R. Robinson, "Recourse Against Flag States for Breaches of Their International Obligations under the 1982 Law of the Sea Convention," id., pp. 371-384; E. Franckx, "Coastal State Jurisdiction with Respect to Marine Pollution—— Some Recent Development and Future Challenges," *The International Journal of Marine and Coastal Law,* Vol. 10 (1995), pp. 253-280; Q. Bargate and A. Mumma, "Marine Pollution and Safety; Practical Proposals for Action," *European Environ-*

mental Law Review (1993), pp. 103-107; P. M. Mcgrath and M. Julian, "Protection of the Marine Environment from Shipping Operations: Australian and International Responses," D. R. Rothwell and S. Bateman ed., *Navigational Rights and Freedoms and the New Law of the Sea* (2000), pp. 188-208.

76) In addition to the citations at *supra* n. 6, see, E. J. Molenaar, "Navigational Rights and Freedoms in a European Regional Context," id., pp. 47-73; B. Kwiatkowska and A. Soons, "Comment: Plutonium Shipment——A Supplement," *Ocean Development and International Law,* Vol. 25 (1994), pp. 419-429; L. Pineschi, "The Transit of Ships Carrying Hazardous Wastes through Foreign Coastal Zones," F. Franchioni and T. Scovazzi eds., *International Responsibility for Environmental Harm* (1991), pp. 299-316; E. B. Weinstein, "The Impact of Regulation of Transport of Hazardous Waste on Freedom of Navigation," *International Journal of Marine and Coastal Law,* Vol. 9 (1994), pp. 137-172; R. A. F. Pedrozo, "Transport of Nuclear Cargoes by Sea," *Journal of Maritime Law and Commerce,* Vol. 28 (1997), pp. 207-236.

77) Franckx, op cit., *supra* n. 75, pp. 260-272; Bargate and Mumma, op cit., supra n. 75, pp. 103-106; Mcgrath and Julian, op cit., *supra* n. 75, pp. 196-199; Pedrozo, op cit., *supra* n. 76, pp. 222-231; D. R. Rothwell, "Innocent Passage in the Territorial Sea: The UNCLOS Regime and Asia Pacific State Practice," Rothwell and Bateman, op cit., *supra* n. 75, pp. 81-83.

78) Pineschi, op cit., *supra* n. 76, p. 310; Molenaar, op cit., *supra* n. 36, pp. 396-397; Van Dyke, op cit., *supra* n. 6, pp. 408-409; Pedrozo, op cit., *supra* n. 76, pp. 227-228.

79) *The Mox Plant* Case, Request for Provisional Measures, *International Legal Materials* Vol. 41 (2002), pp. 408-409, para. 26.

80) As mentioned below, discharges from accidents are not excluded as far as Article 211 of LOSC presupposes a connection between vessel-source pollution and accidents.

81) The principal general conventions concerning vessel-source pollution are the 1954 International Convention for the Prevention of Pollution of the Sea (OILPOL) and the 1973 International Convention for the Prevention of Pollution from Ships by Oil and the 1978 Protocol to it (MARPOL).

82) According to Guidelines for Vessel Traffic Services, IMO doc. Res. A. 578 (14) of 20 November 1985, "A VTS is any service implemented by a competent authority, designed to improve safety and efficiency of traffic and the protection of the environment. It may range from the provision of a simple information message to extensive management of traffic within a port or waterway." See, also, G. Plant, "International Legal Aspects of Vessel Traffic Services," *Marine Policy,* Vol. 14 (1990), p. 71 et seq.

83) As for these national practices, Franckx, op cit., *supra* n. 75, pp. 260 et seq.; O. P. Sharma, "Enforcement Jurisdiction in the Exclusive Economic Zone——The Indian Experience," *Ocean Development and International Law,* Vol. 24 (1993), pp. 167-169. Rothwell, op cit., *supra* n. 4, pp. 601-608. Regarding the double hulls regulations including the 1990 US Oil Pollution Act and the development within the International Maritime Organization, Bargate and Mumma, op cit., *supra* n. 75, pp. 103-104; Ring-

bom, op cit., *supra* n. 75, pp. 271-273; Angelo, op cit., *supra* n. 75, pp. 313-316.

84) The security consideration against terrorism can have two aspects: national and international. When terrorism is construed as a crime against a particular targeted State, it is prejudicial to the security or good order of the State concerned. On the other hand, terrorism could be considered as against the international peace and security. In the latter case, an international agreement or consensus is needed to define terrorism as having such a nature and to develop measures combating it.

85) In this regard, the definition of "pollution of the marine environment" under Article 1 (1) (4) of LOSC is not so helpful. The "introduction" in that provision may be so broad to include any causes of pollution except for natural causes. It should still be questioned whether the types of causes of pollution contained in Part XII of LOSC covers this extensive definition of the pollution of the marine environment.

86) The two initial Japanese shipments of plutonium were before the entry into force of LOSC, so as a matter of fact, to these two precedents LOSC was not applied.

87) As for these counteractions toward the Japanese shipments of plutonium, see, Okuwaki, op cit., *supra* n. 6; Sakamoto, op cit., *supra* n. 6

88) Kwiatkowska and Soons, op cit., *supra* n. 76, p. 419. As a different opinion, Van Dyke, op cit., *supra* n. 6, p. 412, Note 178.

89) The rejection by Asian Pacific States of transit in TS and even in EZ of the Japanese ships carrying plutonium is said to be dictated by political considerations. The South Pacific Nuclear Free Zone Treaty under its Article 2 (2) guarantees the freedom of navigation under international law, I. Shearer, "Navigation Issues in the Asian Pacific Region," J. Crawford and D. R. Rothwell eds., *The Law of the Sea in the Asian Pacific Region* (1995), p. 221.

90) A. Kanehara, op cit., *supra* n. 35, p. 63; L. Lucchini, et M. Voelckel, *Droit de la mer,* Tome 2, Vol. 2 (1996), pp. 208-209.

91) Article 6 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (the SUA Convention) allows a targeted State by a terrorism to exercise judicial jurisdiction. Kanehara, op cit., *supra* n. 19, p. 20.

92) Article 18 of LOSC and Article 14 (2) of the Convention on the Territorial Sea and Contiguous Zone define the meaning of passage. There is the possibility that entry into TS of a ship that may cause harm to the coastal environment is not considered as "passage", where it is with a view to, for instance, beaching (after a ship carrying chemicals is on fire), transferring certain cargoes, or bunkering fuel. As for a similar case to the former, H. Meijers, "The State of the Netherlands v. Berings-en transport-bedrijf Van den Akker and Union de Remorquage et de Sauvetage, and the State of the Netherlands v. Diossotis Shipping Corporation, Supreme Court, 7 February 1986," *Netherlands Yearbook of International Law,* Vol. 18 (1987), pp. 402-406.

93) Regarding the safety of plutonium shipments and the fact that no incidents or accidents with serious radiological consequences have not been reported, Perdozo, op cit., *supra* n. 76, pp. 210-218.

94) Also according to Article 23 it is an obligation under the relevant international agreements that the foreign ships carrying inherently dangerous substances must comply with.

95) Regarding prior consent of transit States that include a coastal State of EZ, Article 4 (12) of the Basel Convention only places on an equal basis both the navigational right and the rights and jurisdiction of a coastal State. As far as LOSC admits the navigational rights of all ships irrespective of their cargoes, this interpretation should be reflected in that of Article 4 (12) of the Basel Convention. As for the progress of international practice after the Basel Convention, see, for instance, Molenaar, op cit., *supra* n. 76, pp. 27-31.

96) Article 58 (1) that admits the freedom of navigation of a foreign ship in EZ is a general rule in relation to Article 220. The latter, as a special rule, also confirms the freedom of navigation in EZ of a foreign ship which might cause the vessel-source pollution.

97) See, Van Dyke, op. cit., *supra* n. 6, p. 399.

98) An examination from a perspective of various risks concerning a plutonium shipment, see, Pedroze, op. cit., *supra* n. 76

99) Generally the safety of navigation means the safety of transportation and concerns the factors such as, seaworthiness of ships, collision avoidance, ships' routing, crewing and so on. In comparison, the preambre of the SUA Convention reads that unlawful acts against the safety of maritime navigation jeopardize the safety of persons and property, seriously affect the operation of maritime services, and undermine the confidence of the peoples of the world in the safety of maritime navigation.

100) As mentioned above, Ireland contended in relation to several Articles of LOSC including Article 211, the failure of the United Kingdom in preventing the release or radioactive materials from the Mox plant and/or the international movement associated with the Mox plant resulting from a terrorist act, op cit., *supra* n. 79.

101) This jurisdiction should be subject to the definition of "pollution of the marine environment" under Article 1 (1) (4).

102) In 1985 IMO adopted a set of guidelines for a VTS, see, *supra* n. 82. The question of the compatibility of a mandatory VTS with the freedom of navigation under LOSC has not been yet resolved. As for various types of VTSs and opinions on its compatibility with the relevant provisions of LOSC, see, Franckx, op cit., *supra* n. 38, pp. 5-11; Franckx, op cit., *supra* n. 75, pp. 266-271; D. R. Rothwell, oi cit., *supra* n. 77, pp. 81-84. Concerning the proposed new regime for the surveillance and control of navigation in EU coastal waters, see, Ringbom, op cit., *supra* n. 75, pp. 279-280.

103) Under the framework of SOLAS, in 1994 the amendment was carried out that introduced a ship reporting system. Its binding nature is argued. G. Plant, "The Relationship between International Navigational Rights and Environmental Protection: A Legal Analysis of Mandatory Ship Traffic Systems," Ringbom, op cit., *supra* n. 1, pp. 17-25.

104) Concerning these arguments, see, J. S. C. Mellor, "Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism," *American University International Law Review,* Vol. 18 (2002), pp. 365-367. At the time of writing this paper, under the framework of the SUA Convention, an act that uses a ship to cause damage to the marine environment, like a terrorist act on the sea, is proposed to be included in the acts to be criminalized.

105) State practice shows that the party States to LOSC generally regard IMO as the competent organ and rules and standards included in the conventions such as MARPOL and SOLAS as the international rules and standards under Article 211, Franckx, op cit., *supra* n.1, pp. 19-21, 44-52.

106) As for such opinions, see, *supra* n. 78

107) Article 5 of CHS and Article 94 of LOSC indicate this expectation in that they oblige flag States to effectively exercise their jurisdiction and control in administrative, technical and social matters over ships flying their flags. In addition, an indication of the international character of the flag State principle is found, too, in the obligatory provisions under LOSC in the field of FRC and MEP, such as Article 117 and Articles addressing flag States in Part XII.

108) From both aspects of FRC and MEP this problem is pointed out. See, for instance, Burke, op cit., *supra* n. 4 (The New International Law of Fisheries), p. 309; B. Boer, "Environmental Law and the South Pacific: Law of the Sea Issues," Crawford and Rothwell, op cit., *supra* n. 89, pp. 77-78.

109) Concerning the theoretical history of the effective control over the sea and practical results in the demarcation between TS and HS, O' Connell, op cit., *supra* n. 2, pp. 10-19, 59-80. As for the justification of the claims for EZ and its 200-mile limit, Scovazzi, op cit., *supra* n. 9, pp. 96-103; Churchill and Lowe, op cit., *supra* n. 3, pp. 162-163.

110) In *the Fisheries Jurisdiction* Case of 1998, Canada extended not its "preventive" measures but its enforcement measures against a Spanish fishing vessel including use of force over the 200-mile limit of EZ and on the high seas. The Application of Spain, *the Fisheries Jurisdiction* Case, ICJ Reports 1998, p. 437, para. 10. Scovazzi argues a possible justification for such measures taken on the high seas, op cit., *supra* n. 9, p. 134.

111) Dupuy and Vignes, op cit., *supra* n. 2, pp. 1196-1198. This argument holds true more to the port State jurisdiction under Articles 218 and 219, id., pp. 1206-1209. The problem remains as to the effective exercise of the port State jurisdiction especially where no polluting effect is expected to the coast of the port State. In this regard, see, D. Vignes, "La jurisdiction de l' état du port et le navire en droit international," Société française pour le droit international, *Le navire en droint international* (1992), pp. 149-150.

112) In *the Fisheries Jurisdiction* Case of 1974, ICJ declared: It is one of the advances in maritime international law resulting from intensification of fishing, that the former

laissez-faire treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all, ICJ Reports 1974, (United Kingdom v. Ireland), p. 31, para. 72, (Federal Republic of Germany v. Ireland), p. 200, para. 64. See, A. Kanehara, "A Critical Analysis of Changes and Recent Developments in the Concept of Conservation of Fishery Resources of the High Seas," *The Japanese Annual of International Law,* No. 41 (1998), pp. 7-9. In *La Bretagne* Case, the majority in the tribunal expressed the opinion that the sovereign right of a coastal State of EZ is above all an administrative function in the general interest, op cit., *supra* n. 64, para. 50.