THE CASE CONCERNING INTERDICTION OF MARITIME TRAFFIC IN THE SEA OF TRANQULLITY

Memorial submitted on behalf of the Government of the Peoples' Republic of Industria

A. The court has jurisdiction to entertain the dispute pursuant to articles 287 (1) (b) and 297 (1)(a) of UNCLOS

1. Introduction

It is the submission of Industria that the International Court of Justice has jurisdiction to entertain the present dispute. First, it is submitted that the ICJ is competent to adjudicate this case under Art. 36(1) of its Statute and Arts. 287 and 297(1)(a) of the United Nations Convention on the Law of the Sea[1]. Secondly, it is submitted that the jurisdiction of the Court is not affected by the conclusion of the bilateral treaty on the Protection of the Marine Environment (hereinafter referred to as the TOPMEN) between Hedonista and Industria.

2. The ICJ is competent to entertain the present dispute under Art. 36(1) of its Statute and under Art. 287 and 297(1)(a) of the UNCLOS

2.1. Jurisdiction of the ICJ under Art. 36 of its Statute

Jurisdiction can be defined as the power of a court to decide upon a dispute submitted to it[2]. The jurisdiction of the ICJ is provided in Art. 36 of its Statute. Under Art. 36, the ICJ can entertain a dispute only under the condition that the parties have consented to it, as the Court held in the *Anglo-Iranian Oil Co.* and *Nottebohm cases*[3]. Consequently, if the parties have not clearly expressed their consent to the jurisdiction of the ICJ, the Court cannot be considered competent to adjudicate upon the merits of the dispute, as held by the PCIJ in the *Case concerning the Factory at Chorzów* and later on by the ICJ in the *Ambatielos case*[4].

Under Art. 36(1) of the Statute of the ICJ, the jurisdiction of the Court comprises of all cases which the parties refer to it. It also comprises of all matters specially provided for in the Charter of the United Nations (hereinafter referred to as the UN Charter) or in treaties and conventions in force. Article 36(1) regulates *inter alia* the jurisdiction of the Court under a provision included in a treaty, stipulating that a dispute between the parties to the treaty relevant to the application or interpretation of the treaty shall be referred to the Court. Such provisions, common in multilateral treaties, provide States with the opportunity to express their consent to the jurisdiction of the ICJ. Once States express in any way their will to refer their disputes to the ICJ, then this provision of the treaty can be characterised as a compromissory clause according to the provisions of the Art. 36(1) of the Statute[5].

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1. *United Nations Convention on the Law of the Sea*, Montego Bay, 10 December 1982, 1833 UNTS 397 (hereinafter referred to as the UNCLOS).

2. *Rosenne S.*, The Law and Practice of the International Court 1920-1996, Vol. II (Jurisdiction), 3rd ed., Martinus Nijhoff Publishers, 1997, p. 536; *Mann F.A.*, Studies in International Law, Clarendon Press, Oxford, 1973, p. 6.

3. *Anglo-Iranian Oil Co. case*, (United Kingdom v. Iran), Preliminary Objections, ICJ Reports 1952, p. 93 at pp. 102-103; *Nottebohm case*, (Liechtenstein v. Guatemala), Preliminary Objections, ICJ Reports 1953, p. 111 at p. 122.

4. *Case concerning the Factory at Chorzów (Claim for Indemnity),* (Germany v. Poland), 1927 PCIJ Series A, Vol. 2, No. 9, p. 5 at p. 32; *Ambatielos case*, (Greece v. United Kingdom), Preliminary Objections, ICJ Reports 1952, p. 28 at p. 39-40.

5. *Dinh N.Q., Daillier P. et Pellet A.*, Droit International Public, 4ème ed., Librairie Generale de Droit et de Jurisprudence (L.G.D.J.), Paris, 1992, p. 826; *Wallace R.*, International Law, 4th ed., Cambridge University Press, Cam-

A necessary condition, however, is that the relevant treaty or convention is in force when the proceedings are instituted[6]. Under Art. 24(1) of the Vienna Convention[7], the manner and the date of the entry into force of a treaty may be stipulated by the treaty itself or by special agreement of the negotiating States. Treaties usually come into force as soon as all negotiating States deposit their instruments of ratification expressing in that way their intention to be bound by the treaty. However, States may derogate from this general rule and prescribe special conditions under which the treaty should come into effect. Frequently, multilateral treaties stipulate that they will become operative upon a certain date or after a determined period of time following the last ratification. It is common place for multilateral treaties to provide for entry into force upon ratification by a certain number of States[8].

2.2. Peaceful settlement of disputes under the UNCLOS

The UNCLOS contains provisions imposing on Contracting Parties the obligation to settle their disputes arising from its application or interpretation by peaceful means. In accordance with Article 2(3) of the UN Charter, Art. 279 of UNCLOS, in particular, stipulates the peaceful settlement of disputes by the means prescribed in Art. 33 paragraph 1 of the UN Charter. Furthermore, Article 280 of the UNCLOS offers the opportunity to States parties to select at any time the peaceful means of their choice.

Apart from their general obligation to settle their disputes by peaceful means under Articles 279 and 280 of the UNCLOS, the parties have the discretion to select a procedure of those referred to in Article 287(1) of the UNCLOS. This Article provides *inter alia* that States, when becoming Contracting Parties to it shall be able to choose, by means of a written declaration, among several other means of peaceful settlement of disputes, the ICJ. Once States have accompanied their ratifications with such declarations, Art. 287(1) operates as a compromissory clause[9]. As a consequence, States which have agreed to be bound by Article 287 shall refer their dispute to the means included in this Article. In case they have opted for the jurisdiction of the ICJ, they shall have recourse to it[10]. Moreover, Art.297(1)(a) stipulates that disputes concerning the alleged violation by a coastal State of the UNCLOS provisions with respect to the freedom of navigation, shall be subject to the procedures provided in section 2 of Part XV of the UNCLOS, namely, those provided in Art. 287(1).

Article 308(1) of the UNCLOS refers to the date and the manner upon which this convention shall enter into force. The date of its entry into force was settled 12 months after the deposit of the sixtieth ratification or accession, which was deposited on November 16, 1993[11]. Therefore, the conditions of Article 308(1) were fulfilled and the UNCLOS came into force on November 16, 1994[12], although its text was adopted on December 10, 1982.

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bridge, 1997, p. 274; *Higgins R.*, Problems and Process (International Law and how we use it), Clarendon Press, Oxford, 1994, p. 188; *Merrillis J.G.*, International Dispute Settlement, Sweet & Maxwell, London, 1984, p. 94; *Wallace - Bruce N.L.*, The Settlement of International Disputes: Contribution of Australia and New Zealand, Martinus Nijhoff Publishers, 1998, p. 126; *Collier J. and Lowe V.*, The Settlement of Disputes in International Law: Institutions and Procedures, Oxford University Press, New York, 1997, p. 137.

6. *Rosenne S.*, supra note 2, p. 661.

7. *Convention on the Law of Treaties*, Vienna, 22 May 1969, 1155 UNTS 331 (hereinafter referred to as the Vienna Convention).

8. *Carreau D.*, Droit International, 3ème ed., A. Pedone, Paris, 1991, p. 122; *Starke J.G.*, Introduction to International Law, 10th ed., Butterworths, London, 1989, p. 459; *Dinh N.Q., Daillier P. et Pellet A.*, supra note 5, p. 155; *Oppenheim's International Law,* Vol. I, 9th ed., (by Jennings R. and Watts A.), Longman, 1992, p. 1239.

9. *Oxman B.*, Complementary Agreements and Compulsory Jurisdiction, 95 AJIL 277 (2001), p. 278.

10. *Collier J. and Lowe V.*, supra note 5, p. 93.

11. *Status of the United Nations Convention on the Law of the Sea*, 33 ILM 309 (1994).

12. id.; *Nordquist M.H. and Moore J.N.*, Entry into Force of the Law of the Sea Convention (Rhodes Papers

2.3. The dispute between Hedonista and Industria falls within the jurisdiction of the ICJ

Both Hedonista and Industria are Contracting Parties to the UNCLOS. The UNCLOS has been in force since November 16, 1994, and is currently binding upon all Contracting Parties. Therefore, Hedonista and Industria are bound by Article 287(1) of the UNCLOS, since they have both accepted the jurisdiction of the ICJ when ratifying it. It is, therefore, submitted that as the present dispute arises from the application or interpretation of this Convention and falls within the terms of Art. 297(1)(a) of the UNCLOS, shall be entertained by the ICJ.

In 2003, several oil tankers flying Industria's flag were intercepted while sailing within the EEZ of Hedonista. It is submitted that this act constitutes a violation of Articles 56(2), 58(1), 87(1) and 211(5) of the UNCLOS. The dispute emerging from this violation is relevant to the application of the UNCLOS and, therefore, Articles 287(1) and 297(1)(a) are applicable.

In conclusion, it is submitted that the ICJ has jurisdiction under Article 36(1) of its Statute and Articles 287(1) and 297(1)(a) of the UNCLOS to entertain the dispute and reach to a final and binding decision.

3. The jurisdiction of the ICJ is not affected by the TOPMEN

3.1. The TOPMEN is irrelevant to the present dispute

The bilateral treaty (TOPMEN) concluded by Hedonista and Industria, regulates the relations and refers to disputes concerning the protection of the marine environment within the EEZ of Hedonista and Industria. On the contrary, the object of the dispute between the two States is the violation of the freedom of navigation. Therefore, the object of the bilateral

treaty, limited to the protection of the marine environment, is irrelevant to that of the dispute and consequently to that of the recourse of the ICJ. As a consequence, the bilateral treaty cannot be applied to the extent that it regulates a subject matter different from that of the dispute referred to the Court.

3.2. The UNCLOS is lex posterioris in comparison to the TOPMEN

It may be the case that a contracting party to a treaty subsequently enters into another treaty, bilateral or multilateral, relating to the same subject matter. In case where the provisions of these two treaties are mutually inconsistent, then Article 30 of the Vienna Convention is applicable[13]. Under Art. 30, insofar as the conclusion of the later in time treaty does not terminate or suspend it, the earlier in time treaty remains in force. Thus, when a State, which is already a party to an earlier treaty, concludes a later treaty, then the second one does not usually in law affect the application and operation of the first one.

Additionally, Art. 30(3) of the Vienna Convention stipulates that even if a treaty is more recent than another it does not follow that the earlier treaty is not applicable. The provisions of the earlier treaty may be applied insofar as they are compatible with those of the more recent one[14]. This was also held by the PCIJ in the *Mavromatis case*[15]. However, in case they contain overlapping provisions, then the later prevails over the earlier one[16].

1994), Martinus Nijhoff Publishers, 1995, p. xi; *Platzoder R.*, Substantive Changes in a Multilateral Treaty before its Entry into Force: The case of the 1982 United Nations Convention on the Law of the Sea, 4 EJIL 390 (1993), p. 390.

13. *Akehurst's Modern Introduction to International Law,* 7th ed., (by Malanczuk P.), Routledge, London, 1997, p. 137.

14. *Oppenheim's,* supra note 8, p. 1300.

15. *Mavrommatis Palestine Concessions case*, (Greek Republic v. His Britannic Majesty), 1924 PCIJ Series A, No. 2, p. 7 at pp. 29-32.

16. *Brownlie I.*, Principles of Public International Law, 6th ed., Oxford University Press, New York, 2003, p. 600.

Hedonista and Industria concluded a bilateral treaty, the TOPMEN, which came into force on the day of its adoption in 1990. This treaty refers to the protection of the marine environment of the Sea of Tranquillity, which lies within the EEZ of the signatory States. It provides in Art. 23(1) that any dispute which may arise between the parties relating to the interpretation or application of this treaty shall be determined by peaceful means of their own choice. Under Art. 23(2), in case where the dispute fails to be resolved by the means referred in para (1) of this Article or where the parties fail to agree on the means of resolving the dispute, then, the parties shall have recourse to arbitration.

However, both States have also ratified the UNCLOS after 1990. When ratifying the UNCLOS, both States decided to refer any disputes regarding this convention directly to the ICJ, in accordance to Art. 287(1) of the UNCLOS.

It is submitted that the provisions of the UNCLOS on dispute settlement are incompatible to those of the TOPMEN. On the one hand, Art. 23 of the TOPMEN does not provide for the right of unilateral recourse to the ICJ. On the contrary, the phrase "of their own choice" implies that, should the ICJ be seized, this shall take place jointly. One the other hand, once the parties have opted for the jurisdiction of the ICJ under Art. 287(1) of the UNCLOS, each party has the right of unilateral recourse to the ICJ.

It should be noted that both Hedonista and Industria ratified the UNCLOS very well aware of the provisions of the TOPMEN on dispute settlement. However, both States opted for the jurisdiction of the ICJ when ratifying the UNCLOS. This is indicative of their intention to replace the dispute settlement procedure of the TOPMEN with that of the UNCLOS. As a result and in this case, Art. 30(3) of the Vienna Convention cannot be applied because the condition of the compatibility is not fulfilled.

Consequently, it is submitted that the UNCLOS, as a later in time treaty prevails upon the TOPMEN and recourse to the ICJ is the means chosen by both States for the settlement of their disputes.

3.3. Hedonista is estopped from invoking the TOPMEN

The principle of estoppel originates in domestic law. However, it has also been applied on the international plane by international tribunals[17]. Estoppel applies in cases of reliance in good faith upon previous acts or conduct, which are in contradiction with present claims[18]. The main element of estoppel is reliance upon a statement in good faith. However, this statement shall be clear and unambiguous. It shall also be voluntary, unconditional and authorized. It is of great importance that this principle applies vice versa; both in favour of the State making the statement and the State relying on it[19].

The most recent instance of the conduct of Hedonista with respect to the settlement of disputes about the Sea of Tranquillity is the UNCLOS. The settlement of disputes provisions of the UNCLOS establish a right of unilateral recourse directly to the ICJ. Industria relied upon this instance in good faith. It is, therefore, submitted that Hedonista is estopped from invoking the TOPMEN to override its obligations arising under Art. 287(1) of the UNCLOS.

3.4. The jurisdiction of the ICJ may be established independently of the TOPMEN

Treaty provisions, which establish jurisdiction of different judicial institutes are autonomous and independent. This was held by the ICJ in the *case concerning Border and Transborder Armed Ac-*

17. Dissenting Opinion of Judge Urrutia Holguin in Case concerning the Arbitral Award made by the King of Spain on 23 December 1906, (Honduras v. Nicaragua), Merits, ICJ Reports 1960, p. 192 at pp. 222, 236; *Land*, Island and Maritime Frontier Dispute case, (El Salvador v. Honduras), Merits, ICJ Reports 1992, p. 351 at p. 577, para 364.

18. *Case concerning the Temple of Preah Vihear*, (Cambodia v. Thailand), Merits, ICJ Reports 1962, p. 6 at p. 32.

19. *Bronwlie I.*, supra note 16, p. 615.

tions[20]. This also applies particularly if a dispute may be referred to the Court under one treaty and to arbitration under another, as held by the PCIJ in the *Upper Silesia case*[21].

In the present case, the ICJ may find grounds for jurisdiction in two conventions, namely in UNCLOS and TOPMEN. In the first place, disputes arising from the UNCLOS may be submitted to the ICJ by one of the parties to the dispute. On the other hand, TOPMEN provides for a general framework of dispute settlement, which incorporates the ICJ as means of the peaceful settlement of disputes. In case where no agreement on the peaceful means by the parties is achieved, then the dispute shall be referred to arbitration.

In fact, UNCLOS and TOPMEN provide two different and separate grounds for jurisdiction. Therefore, recourse to the ICJ is not dependent on the application of TOPMEN, since the UNCLOS operates autonomously. However, the ICJ in order to establish jurisdiction, needs only one ground for jurisdiction. As a result, once the ICJ establishes jurisdiction under the UNCLOS, it may proceed with the merits of the case.

Consequently, it is submitted that once the provisions of UNCLOS concerning dispute settlement and particularly those referring to the ICJ operate autonomously and without the prior application of TOPMEN as a condition, recourse to the ICJ can be achieved directly on the basis of the UNCLOS.

B. Hedonista violated its obligations under UNCLOS and the customary international law in restricting the exercise by industrial vessels of their freedom of navigation as embodied in article 87 of UNCLOS

1.1. Hedonista has violated the freedom of navigation

1.1.1. Freedom of navigation under the customary international law

The freedom of navigation is a traditional and well-recognized right of the freedom of the seas[22]. This freedom is exercised from time immemorial, by all nations. According to Grotius, every nation shall have free access to communication with every other nation[23]. The ICJ in the *Corfu Channel case*, upheld the principle of the freedom of maritime communications as a general and well-recognized principle[24].

The freedom of navigation was codified in the 1958 Geneva Convention on the High Seas[25], which in Article 4 recognizes to all States the right of navigation of vessels flying their flag. This is furthermore provided in Art. 87 of the UNCLOS, which repeats Art. 4 of GCHS, and stipulates the freedom of the High Seas, an essential manifestation of which is the freedom of navigation. As far as the freedoms of the seas are concerned, the UNCLOS is a codification of customary international law. However, the UNCLOS, is more precise, by not simply affirming the freedom of navigation but also regulating it[26].

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20. *Case concerning Border and Transborder Armed Actions,* (Nicaragua v. Honduras), Preliminary Objections, ICJ Reports 1988, p. 69 at p. 85 para 36.

21. *Case concerning certain German Interests in Polish Upper Silesia,* (Germany v. Poland), 1925 PCIJ Series A, Vol. 1, No. 6, p. 5 at p. 20.

22. *Shaw M.N.*, International Law, 4th ed., Cambridge University Press, Cambridge, 1997, p. 419; *Extavour W.C.*, The Exclusive Economic Zone: A Study of the Evolution and Progressive Development of the International Law of the Sea, Institut Universitaire des Hautes Études Internationales, 1979, p. 235; *Churchill R. and Lowe V.*, The Law of the Sea, 3rd ed., Manchester University Press, Manchester, 1999, p. 255.

23. *Separate Opinion of Judge Vukas,* in the M/V Saiga case, (Saint Vincent and The Grenadines v. Guinea), www.itlos.org/cgi-bin/cases/case_detail.pl?id=2&lang=en, para 17.

24. *Corfu Channel case,* (United Kingdom v. Albania), Merits, ICJ Reports 1949, p. 4 at p. 22.

25. *Geneva Convention on the High Seas,* Geneva, 20 April 1958, 450 UNTS 82 (hereinafter referred to as the GCHS).

26. *Lucchini L. et Voelckel M.,* Droit de la Mer, Tome 2, A. Pedone, Paris, 1996, pp. 98-99.

As a result, and in any event, the freedom of navigation remains an essential component of the freedom of the seas[27], and as the ICJ held in the c*ase concerning Military and Paramilitary Activities in and Against Nicaragua*, continues to be binding as a rule of customary international law, despite the operation of the provisions of conventional law in which they have been incorporated[28].

1.1.2. Freedom of navigation under the UNCLOS

1.1.2.1. Freedom of navigation in the EEZ

One of the most important UNCLOS innovations is the introduction of the EEZ regime[29]. Even though the concept of the EEZ has been relatively recent, it is accepted in customary international law, as held by the ICJ in the *case concerning the Libya-Malta Continental Shelf*[30].

The EEZ is a maritime zone of a *sui generis* character, beyond and adjacent to the territorial sea[31]. The establishment of this zone constitutes an extension of coastal State jurisdiction over areas hitherto forming part of the High Seas, this results in the restriction of certain rights of third States while at the same time the coastal State is granted with certain sovereign rights[32].

However, despite the extension of national coastal State jurisdiction, the freedom of navigation exercised by third States within the EEZ is not restricted[33]. In particular, Art. 58 recognizes to third States the exercise of freedom of navigation and other lawful uses of the sea in accordance with Art. 87[34]. Moreover, the ICJ in the *case concerning Militatry and Paramilitary Activities in and Against Nicaragua*, held that since the freedom of navigation is guaranteed firstly in the EEZ and secondly on the High Seas, it follows that any State which enjoys the right to access to ports for its ships also enjoys the freedom necessary for maritime navigation[35].

It is noteworthy that most of the States that have adopted national legislation establishing an EEZ respect the freedom of navigation and recognize the need for its protection[36]. As a matter of fact, all important routes of international navigation pass through EEZs[37]. However, the concept of the EEZ, does

27. id.

28. *Case concerning Military and Paramilitary Activities in and Against Nicaragua*, (Nicaragua v. United States of America), Preliminary Objections, ICJ Reports 1984, p. 392 at pp. 424-425, para 73.

29. *Bardonnet D. et Virally M.*, Le Nouveau Droit International de la Mer, A. Pedone, Paris, 1983, p. 165; UNCLOS, supra note 1, part V, Arts. 55-75.

30. *Case concerning the Continental Shelf*, (Libya v. Malta), ICJ Reports 1985, p. 13 at p. 33, para 34.

31. *Churchill R. and Lowe V.*, supra note 22, p. 166; *Bates J. and Benson C.*, Marine Environment Law, Lloyd's of London Press Ltd, London and Hong Kong, 1993, para 2.42; *Evans M.*, International Law, Oxford University Press, New York, 2003, p. 645.

32. *Bardonnet D. et Virally M.*, supra note 29, p. 149.

33. *Pontavic E. et Cordier P.*, La Mer et le Droit, Tome 1, Presses Universitaires de France, Paris, 1984, p. 206; IMO Library Services, Information on the «Prestige» Accident, information sheet num. 35, Lloyd's list, 13 January 2003, www.imo.org/newsroom/mainframe.asp?, p. 14; The Netherlands' Objection, www.untreaty.un.org/english/sample/EnglishInternetBible/partl/chapterXXI/treaty6.htm.

34. *Pharand D. et Leanza U.*, The Continental Shelf and the Exclusive Economic Zone: Delimitation and Legal Regime/Le Plateau Continental et La Zone Économique Exclusive, Martinus Nijhoff Publishers, Boston, 1993, pp. 222-223; *Subedi S.*, Land and Maritime Zones of Peace in International Law, Clarendon Press, Oxford, 1996, p. 45; *Spadi F.*, Navigation in the Marine Protected Areas: National and International Law, 31 ODIL 285 (2000), p. 294; *Bates J. and Benson C.*, supra note 31, para 2.44.

35. *Case concerning Military and Paramilitary Activities in and Against Nicaragua*, (Nicaragua v. United States of America), Merits, ICJ Reports 1986, p. 14 at pp. 111-112, para 214.

36. *Attard D.J.*, The Exclusive Economic Zone in International Law, Clarendon Press, Oxford, 1987, pp. 76-77 and 81; *Dupuy R.J. et Vignes D.D.*, Traité du Nouveau Droit de la Mer, Economica - Bruylant, Paris, 1985, p. 690.

37. *Lucchini L. et Voelckel M.*, supra note 26, pp. 190-191.

not impair the freedoms of navigation or overflight[38]. Indeed, coastal States have no right to adopt and impose measures, which affect in any way the freedom of navigation within the zone. As a consequence, all States enjoy their right to navigate freely in the EEZ in the same manner as on the High Seas[39].

1.1.2.2. Freedom of navigation on the High Seas

The exercise of the freedom of navigation by third States' vessels in the EEZ, is upheld in Art. 58 of UNCLOS by reference to Art. 87 of UNCLOS regarding the freedom of navigation on the High Seas. This article provides that the High Seas are open to all States and that all States enjoy among the freedoms of the High Seas, the freedom of navigation, which is one of the oldest and best-established principles of international law[40]. The freedom of navigation recognized in the EEZ is qualitatively the same to this traditionally exercised on the High Seas. This is the reason why for the purposes of navigation, the EEZ regime does not derogate from that of the High Seas[41].

Article 87 of UNCLOS provides six fundamental freedoms of the High Seas. Although the enumeration of these freedoms is not exhaustive, it is widely accepted that among the freedoms identified in UNCLOS, three of them are subject to the power and control of the coastal State in the context of its exercising of sovereign rights within the EEZ. At the same time, the other three, namely freedom of navigation, overflight and laying of cables and pipelines, can be exercised by third States with no interference on the part of the coastal State[42].

The essential content of the freedom of the High Seas regime is that no State enjoys territorial sovereignty upon it[43]. This means that vessels are only subject to the jurisdiction of the State whose flag they fly. As a result, no other State has the power of control over foreign vessels. In particular, the refraining from interference with foreign vessels is a basic attribute of the general principle of freedom of the High Seas[44]. Consequently, as the PCIJ held in the *Lotus case*, no State can prohibit the flag State to exercise jurisdiction upon its vessels[45].

1.2. Hedonista had no right to interfere with the freedom of navigation in the Sea of Tranquility

1.2.1. Rights of coastal States concerning the marine environment

The UNCLOS, permits coastal States to exercise jurisdiction in their EEZ, by adopting national laws and regulations, in order to protect and preserve the marine environment, by preventing and reducing pollution caused by foreign vessels navigating within the zone[46]. Pursuant to Art. 211(5) such laws and regulations shall conform to and give effect to generally accepted rules and standards[47]. Coastal States are re-

38. *Bardonnet D. et Virally M.*, supra note 29; *Lucchini L. et Voelckel M.*, supra note 26, p. 226.

39. *Separate Opinion of Judge Anderson in the MOX Plant case*, (Ireland v. United Kingdom), Provisional Measures, www.itlos.org/cgi-bin/cases/case_detail.pl?id=10&lang=en, p. 7.

40. *Davidson S.*, New Zealand ß Freedom of Navigation on the High Seas: Sellers v. Maritime Safety Inspector, 14 IJMCL 435 (1999), pp. 435-436.

41. *Robertson H.*, Navigation in the Exclusive Economic Zone, 24 Va JIL 865 (1984), p. 880.

42. *Evans M.*, supra note 31.

43. *Churchill R. and Lowe V.*, supra note 22, p. 204.

44. *Spadi F.*, supra note 34, p. 297; *Bates J. and Benson C.*, supra note 31, para 2.51; *Couper A. and Gold E.*, The Marine Environment and the Sustainable Development: Law, Policy and Science, The Law of the Sea Institute William S. Richardson School of Law University of Hawaii, Honolulu, 1993, p. 345; *Dupuy R.J. et Vignes D. D.*, supra note 36, pp. 688-689.

45. *The S.S. Lotus case*, (France v. Turkey), 1927 PCIJ Series A, No. 10, p. 5 at pp. 24-25.

46. *Dupuy R.J. et Vignes D.D.*, supra note 36, p. 711.

47. *Lotilla R.P.*, The Efficacy of the Anti-pollution Legislation Provisions of the 1982 Law of the Sea Convention: A View from the South East Asia, 41 ICLQ 137 (1992), pp. 139-140; *Kiss A. and Shelton D.*, International En-

quired to achieve this, either through a competent international organization – mainly through the IMO – or through a diplomatic conference. In no case are coastal States permitted to act unilaterally[48]. Although a coastal State possesses certain extensive rights, those concerning the freedom of navigation of third States, are limited.

Furthermore, the UNCLOS explicitly provides that coastal States shall respect and not affect in any way the freedom of navigation exercised by third States in the EEZ. In case of serious pollution or threat of imminent pollution of the marine environment, caused by violation of applicable rules of the coastal State in the EEZ, the latter may only take certain limited action against the vessel according to the provision of Art. 220 of the UNCLOS. Namely, it may require the vessel to give information *inter alia* with regard to its identity and port of registry. In case of non-compliance with its requests, the coastal may proceed to visit the vessel, once it has promptly notified the flag State that its vessel refuses to comply with its legislation and regulations. If the interests of the coastal State in the EEZ are under grave and major danger, it may even proceed with the detention of the vessel[49]. In any other case, the coastal State has no right to interfere with the freedom of navigation in its EEZ[50].

It is true that there are States that have adopted measures for the protection of the marine environment in their EEZ, which limit the freedom of navigation. However, it is also true that most States strongly oppose this practice, as it is doubtful whether such practice is in conformity with the law of the sea[51]. It is, therefore, submitted that there is no general and consistent practice of restricting the freedom of navigation in the EEZ for the protection of the marine environment, beyond the prescriptions of the UNCLOS.

1.2.2. The rights of coastal States and their limits

The EEZ, is a zone where coastal States enjoy some sovereign rights concerning only their economic interests. Therefore, coastal States have no territorial sovereignty over the zone[52], but only some specifically prescribed sovereign rights relating to the exploration and exploitation of their natural resources. Such rights are irrelevant to the freedom of navigation, which must not be interfered with[53].

In effect, neither the UNCLOS nor any other rule of international law enables coastal States to prohibit, suspend, hamper or regulate the access of foreign vessels in their EEZ. In particular, the UNCLOS does not authorize the coastal State to make the navigation of ships in the EEZ dependent on prior consent or notification, provided that such navigation is in accordance with the applicable rules of international law[54]. Even the Secretary General of the United Nations has recently declared that, the initiative

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vironmental Law, Transnational Publishers and Graham & Trotman, 1991, p. 175; *Birnie P.*, Protection on the Marine Environment: The Public International Law Approach in Colin M. De La Rue, Liability for Damage to that Marine Environment, Lloyd's of London Press Ltd, 1993, p. 16; *Oxman B.*, supra note 9, p. 300.

48. *Brown E.D.*, The Law of the Sea, Dartmouth Publishing Company Ltd, Aldershot, 1994, p. 237; *Laursen F.*, Small Powers at Sea, Martinus Nijhoff Publishers, 1993, p. 144.

49. *Phillips I.C.*, The Exclusive Economic Zone as a Concept in International Law, 26 ICLQ 585 (1977), p. 593; *Robertson H.*, supra note 41, pp. 899-900; *Kiss A. and Shelton D.*, supra note 47, p. 172; *Bates J. and Benson C.*, supra note 31, para 2.47; *Bardonnet D. et Virally M.*, supra note 29, p. 261.

50. *Laursen F.*, supra note 48, p. 149.

51. *Report of the Secretary General*, Fifty-eighth Session, Oceans and Law of the Sea, 3 March 2003, UN Doc. A/58/65, www.un.org/Depts/los, item 53 of the preliminary list A/58/50, p. 21, para 56; *Robertson H.*, supra note 41, pp. 895-896; *Boyle A.*, Marine Pollution under the Law of the Sea Convention, 79 AJIL 347 (1985), p. 358.

52. *Brown E.D.*, supra note 48, p. 220.

53. *Bardonnet D. et Virally M.*, supra note 29, pp. 150-151 and 166; *Phararnd D. et Leasza U.*, supra note 34.

54. *Charleston C.*, The Responsibilities of Coastal States on Ratification/Accession to UNCLOS in *Blake C., Schofield C.* (et als), International Boundaries and Environmental Security: Frameworks for Regional Co-operation, Kluwer Law International, 1997, p. 21; *Lucchini L. et Voelckel M.*, supra note 26, p. 192.

of three European countries to ban from their EEZ vessels carrying heavy fuel was not in accordance with Article 58 of UNCLOS[55].

Therefore, the sovereign rights of the coastal States shall not operate to the detriment of flag States[56]. It must be stressed, that a freedom is a concept much larger than a right[57]. As a consequence the right of coastal States to impose measures regarding the protection of the marine environment in their EEZ is a notion much more limited than the freedom of third States to navigation.

1.2.3. Balancing of rights in the EEZ

The general principle of the equitable use of the maritime zones first appeared in GCHS. Under Art. 2 of this convention, States shall exercise their freedoms on the High Seas by taking the interests of other States reasonably into account. This theory of the reasonable use of the High Seas indicates that in principle no activity exercised on the High Seas can be prohibited by its nature only. The determinative factor is the manner this activity is exercised. In fact, the High Seas are open to all States in order to exercise their maritime freedoms. Consequently, no activity can be condemned in advance as being illicit unless it is exercised in an unreasonable way or expressly prohibited by the law[58].

Similarly, the same concept permeates UNCLOS as far as the use of the maritime zones is concerned. The provisions of this convention, however, are clarified further by explicitly providing that both coastal and third States shall have due regard to each others' rights. In particular, UNCLOS establishes a general principle, which can ensure the compatibility of different and maybe contradictory rights of States in the EEZ[59]. The most significant example is the balancing of the powers of coastal States with the freedoms of third States and mainly with the freedom of navigation, which is upheld in the EEZ[60].

Admittedly, coastal States have some sovereign rights within their EEZ. However it does not follow that third States are automatically precluded from exercising their own rights. On the contrary, most of their rights, including freedom of navigation, are preserved within this zone[61]. Therefore, while coastal States have the power to exercise all necessary activities for exploration and exploitation of their natural resources, equally third States are permitted to enjoy their freedoms and exercise all indispensable activities concerning communication and navigation[62]. In this respect both coastal States and third States have concurrent jurisdiction on some uses of the EEZ, since a variety of uses on the part of different States co-exist in the zone[63].

In the process of balancing of rights and obligations, even the freedom of navigation sometimes yields to other rights. However, coastal States have a very limited authority to restrict the freedom of navigation, in exceptional circumstances. It is permissible only for serious reasons and only if the impact on international navigation is minimal[64].

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55. *UNSG Rep.*, supra note 51, p. 21, para 57.

56. *Boyle A.*, supra note 51, p. 362.

57. *Oppenheim's International Law,* supra note 8, p. 802.

58. *Dupuy R.J. et Vignes D.D.*, supra note 36, pp. 350-351.

59. id.; *Colloque de Toulon*, Le Navire en Droit International, A. Pedone, Paris, 1992, p. 167.

60. *IMO Library Services*, Information on the «Prestige» Accident, supra note 33, 5 June 2003, p. II; ILA in *Report of the Sixty-Ninth Conference*, Committee on Coastal State Jurisdiction Relating to Marine Pollution (Final Report), London 25-29 July 2000, p. 462.

61. *Brown E.D.*, supra note 48, p. 221.

62. *Nandan S.N. and Rosenne S.*, UNCLOS: A Commentary, Vol. II, Martinus Nijhoff Publishers, 1993, pp. 496 and 502.

63. *Pharand D. et Leanza U.*, supra note 34, pp. 223-224.

64. *Robertson H.*, supra note 41, p. 893.

1.2.4. Abuse of rights

Under Art. 300 of the UNCLOS, abuse of rights is prohibited. It is true that coastal States have some privileges in their EEZ. However, in no way shall these privileges annul the freedoms of third States[65]. It may happen that a coastal State exercises its right in the EEZ in an unreasonable manner, in this way impairing generally accepted rights of other States. In such a case, this State acts in violation of Art. 300 of the UNCLOS.

1.3. Hedonista violated its obligations under the UNCLOS and customary international law in suspending the freedom of navigation in its EEZ

The economy of Industria is based on the export of heavy fuels to many Asian States. Until recently, Industria exported its refined petroleum products to its eastern neighbours overland. However, the manufacturing of heavy oil in the last few years led oil companies to search for other markets that could absorb their new product. As a result prospective customers were found in western Asia.

Nevertheless, the new product due to its viscous nature could not be transported through pipelines. For this reason the Industrial oil company, Coagulate Oil Corporation, sought for an alternative way of transportation. It was finally decided that the new product would be transferred by sea. Due to the geography of the region, Industria found that the most optimal maritime route for vessels would be through the Sea of Tranquility. This route, which crosses the EEZ of Hedonista, has been established as a traditional maritime route because many third State vessels, other than Hedonista's and Industria's have been using it for a long period of time.

In November 2003, an Industrial oil tanker was involved in an accident on the High Seas. After that, on January 2nd 2003, Hedonista unexpectedly issued Presidential Decree No. 23, which banned all vessels carrying heavy fuels, irrespective of their flag. Thereafter, many tankers, including Industria's, were intercepted within the EEZ of Hedonista and were forced to leave the zone and return to their national ports.

Hedonista enjoys under Art. 56(1) of the UNCLOS, certain sovereign rights within its EEZ, concerning the exploration and exploitation of its natural resources. These rights are unrelated to the freedom of navigation. Furthermore, Hedonista is granted under Art. 56(1) of the UNCLOS, limited jurisdiction, regarding *inter alia* the protection and preservation of the marine environment. However, this power of Hedonista cannot extend to the point of banning, suspending or affecting in any way the freedom of navigation of third States in the EEZ. On the other hand, Industria enjoys under Arts. 58(1) and 87(1) of UNCLOS and the customary international law the well-established and generally accepted right of freedom of navigation. Ships flying the flag of Industria, may therefore exercise this freedom not only on the High Seas but also within the EEZ of Hedonista in the sea of Tranquility. It is, therefore, submitted that Hedonista, acting under Decree No. 23 violated the freedom of navigation of Industria.

If the intention of Hedonista was the adoption of measures in order to protect its marine environment from serious pollution or threat of pollution caused by vessels in its EEZ, it should have first communicated such measures to the IMO[66], seeking for its approval. The importance of this obligation lies in the fact that shipping is an industry vital to the global trade and to the world economy. This is the reason why it is necessary that all standards relating to safety control and pollution prevention, which

65. *Brown E.D.*, supra note 48, p. 220, para 5.1.

66. Developments in the aftermath of the "Prestige" accident, 8 January 2003, www.imo.org/Info Resource/ mainframe.asp?topic_id=758&doc_id=2705; Secretary General urges realistic pragmatic and well-balanced approach to tanker regulations as key meeting gets underway, 15 July 2003, Marine Environment Protection Committee (MEPC)- 49th Session: 14-18 July 2003, www.imo.org/InfoResource/ mainframe.asp?topic_id=758& doc_id=3029.

affect the industry, are developed and adopted by the international community through the IMO[67]. In any case, even if the measures adopted by Hedonista were approved by the IMO, it should have waited 15 months until the measures included in the Presidential Decree could become operative.

Hedonista had used the power that the UNCLOS provides coastal States for the protection of the marine environment, in a way, which is excessive. Indeed, Hedonista is attributed some specific rights under the UNCLOS, in order to protect its EEZ from vessel source pollution but in no way may these rights interfere with the freedom of navigation of third States. Consequently, its measure act to ban all vessels carrying heavy fuels oils regardless their flag consists an abuse of right under Art. 300 of the UNCLOS[68].

Hedonista is also obliged to respect the freedoms of other States in the EEZ under any circumstances according to the provisions of Art. 56(2) of UNCLOS. Particularly, the way that Hedonista acted towards Industria's vessels consists an infringement of the freedom of navigation the result of which is the transgression of commercial and economic interests of Industria whose economy is based on the transport of heavy fuels oil to western markets. Moreover, the excessive interference with international navigation is on balance disproportionate and results, under these circumstances, in the effective regulation of the freedom of navigation in the EEZ[69].

It is, therefore, submitted that Hedonista, in restricting the exercise of the freedom of navigation by vessels flying the flag of Hedonista has violated both the relevant provisions of the UNCLOS and the customary international law.

2. Industria has acted in conformity with its obligations

2.1. Industria acted in conformity with its obligations under the customary international law

Under international law, States are obliged to use their territory in such a manner so as not to injure the territory of other States, a principle known as *sic utere tuo ut alienum non laedas*. This was first held by the arbitral tribunal in the *Trail Smelter Arbitration*[70] and later on by the ICJ in the *Corfu Channel* case[71]. More recently the ICJ, in the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, upheld for the first time the environment as a fundamental area of interest for international law and it ruled that States are obliged to use their territory in such a manner so as to respect the environment of other States[72]. The *sic utere tuo* principle underlines the general obligation of the international community to protect the environment[73].

In the present case, Coagulate Oil Corporation constructed an oil loading terminal, observing all the stipulations of the Industrial law. Under Industrial law the participation of other States that may be interested in the proceedings of public consultation is not necessary. The approval for the construction was, finally, provided by the Minister of Energy and Mines. This approval, moreover, was dully published in Industria's Official Gazette and Hedonista was sufficiently informed on the new situation.

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67. European Union Regulation on single-hull oil tankers, www.imo.org/InfoResource/mainframe. asp?topic_id =758&doc_id=3223.

68. *IMO Library Services*, Information on the «Prestige» Accident, information sheet num. 35, Sea Trade, March/April 2003, www.imo.org/newsroom/mainframe.asp?, pp. 31-33.

69. *IMO Library Services*, Information on the «Prestige» Accident, supra note 33, 4 December 2002, p. 7.

70. *Trail Smelter Arbitration*, (Canada v. United States of America), *3 RIAA 1905* (1941), p. 1965.

71. *Corfu Channel case*, supra note 24.

72. *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, p. 1 at p. 15 para 29.

73. *Shaw M.*, supra note 22, p. 601; *Akehurtst.*, supra note 13, pp. 245-246; *Oliver C., Firmage E., Blakesley C., Scott R., William S.*, The International Legal System (Cases and Materials), 4th ed., The Foundation Press, New York, 1995, p. 442.

Industria adopted all necessary precautions under its national laws concerning the construction of the terminal, manifesting its intention to respect and protect the rights and interests of other States that could be possibly affected by the use of its territory and in particular by the operation of the Blackwater Bay Terminal. It is, therefore, submitted that Industria acted in conformity with the general principle *sic utere tuo ut alienum non laedas*.

2.2. Industria has acted in conformity with its obligations under UNCLOS and the customary international law

All States have the general obligation to protect and preserve the marine environment according to Art. 192 of the UNCLOS. This article introduces the legal regime for the protection of the marine environment under UNCLOS. In particular, under Art. 211(5), contracting parties are obliged to adopt all necessary measures in order to prevent, reduce and control pollution. Furthermore, this article provides that the laws and regulations adopted shall be in accordance with general accepted rules and standards, established by international organizations or general diplomatic conferences.

It must be noted that the flag State has in principle exclusive jurisdiction upon its vessels. It is the flag State that is obliged to adopt all necessary measures for the protection of the marine environment from pollution caused by vessels flying its flag. The fact that the coastal State's jurisdiction is extended in the EEZ does not in any case restrict the power of the flag State to exercise its jurisdiction on its vessels.

After one year of usage of the route without any problems, an accident involving an Industrial vessel happened on the High Seas. This accident caused a spillage of oil products in the Sea of Tranquility. Without delay the Ministry of Environment of Industria organized an effective operation to clean up the fuel oils and limit to the minimum level the possible damage in order to prevent the worst impact of pollution on both Hedonista and Industria, and in order to protect the marine environment. It is, therefore, submitted that Industria complied with its general obligation to preserve and protect the marine environment by doing anything possible on its part to restore the affected marine area to its former condition.

Furthermore, it is submitted that Industria acted in accordance with Art. 211(2), since it undertook all necessary measures regarding the seaworthiness of vessels flying its flag. In particular, all Industrial vessels comply with all requirements specifically provided in International Convention for Prevention of Pollution from Ships[74] and International Convention for the Safety of Life at Sea[75]. In fact, Hedonista has never disputed that Industrial vessels intercepted within its EEZ, met the standards of international construction and safety requirements provided in both treaties. Industria exhausted every possible means to protect the marine environment not only by way of enforcement but prevention as well. In conclusion, it is submitted that Industria has acted in conformity to its treaty obligations under the UNCLOS, the MARPOL and the SOLAS. It has also observed all standards and requirements by the IMO.

(i) Submissions

In view of the above, Industria respectfully requests the Court to adjudge and declare that:

a. The Court has jurisdiction to entertain the dispute pursuant to Article 287(1)(b) of UNCLOS.

b. Hedonista violated its obligations under UNCLOS and the customary international law in restricting the exercise by Industrial vessels of their freedom of navigation as reflected in Article 87 of UNCLOS.

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74. *International Convention for the Prevention of Pollution from Ships*, London, 2 November 1973, 12 ILM 1319 (1973) (hereinafter referred to as MARPOL).

75. *International Convention for Safety of Life at Sea*, London, 1 November 1974, 14 ILM 959 (1975) (hereinafter referred to as SOLAS).