Navigation, Freedom of
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A. Historical Background

1 International law has been involved in the regulation of navigation and fishing since the earliest times. It was the voyages of discovery of the 15th and 16th centuries that led to claims of ownership by States such as Spain and Portugal over the newly discovered areas, including exclusive rights to the high seas, resulting in these States claiming control over vast areas of ocean space. Such excessive claims gave rise to disputes with other trading nations who demanded access to the seas and the freedom of trade with other nations by maintaining that the seas should be free from appropriation and control and open for the use of all.

2 The concept of freedom of navigation has its origins in the advice of the Dutch jurist, Hugo Grotius, to the Dutch East India Company arguing the latter’s right to take part in the East India trade despite Portugal’s monopoly on trade and claims of sovereignty over the Indian Ocean. In his famous treatise Mare Liberum (1609) Grotius asserted that the oceans are incapable of appropriation by States and that the ships of any State should navigate freely across the world’s oceans. This doctrine of freedom of the seas was challenged by writers such as John Selden who in his work Mare Clausum: of the Dominion, or, Ownership of the Sea ([The Lawbook Exchange Clark reprinted 2004] [1635]) advanced the notion that national dominium could extend to the high seas in defence of British interests and claims of control of the seas around its territories.

3 Freedom of navigation prevailed mainly because States needed unhindered access to the seas for trading purposes and as a means for maritime powers to secure passage to other areas of political or military influence or to maintain contact with their overseas colonies and dominiums and, perhaps most importantly, due to the inability of States to sustain their claims of control over such vast areas of the ocean. Gradually the excessive claims gave way to a general acceptance amongst States to divide the sea into two main areas, namely, the territorial sea, where coastal States could exercise exclusive sovereignty but where foreign vessels enjoy certain rights of navigation, and the high seas, where there is an absence of State sovereignty and all States enjoy complete freedom of navigation. This became the basis of ocean law during the 19th century until the middle of the 20th century and any new claims of exclusive rights over ocean space or resources have been met with resistance and viewed as derogating from the freedom of the high seas.

4 Recent developments, in particular, the emergence of newly independent States and their desire to gain control over the economic resources in the seas adjacent to their coasts as well as the gradual extension of coastal State jurisdiction to areas beyond the territorial sea, raised some serious concerns over the effect it might have on pre-existing freedoms of the high seas. Through State practice and the development of customary international law and attempts to codify the law, these freedoms, including freedom of navigation, became more restricted within these extended maritime areas.

5 Freedom of the high seas includes not only the freedoms of navigation and fishing but also the freedoms of laying of submarine cables and pipelines and of overflight, as mentioned in Art. 2 Convention on the High Seas (‘High Seas Convention’). Two other freedoms, namely, the freedom to construct artificial islands and other installations (Artificial Islands, Installations and Structures), and the freedom of scientific research, have been added in Art. 87 UN Convention on the Law of the Sea. There is no numeros clausus of freedoms and other freedoms recognized under the general principles of international law that may be added. Military activities, even if not explicitly stated, have been included among the traditional freedoms of the high seas. The freedom of navigation has been viewed as encompassing the free movement of warships across the high seas.

6 High seas, previously defined as ‘all parts of the sea that are not included in the territorial sea or in the internal waters of a State’ (Art. 1 High Seas Convention), now also exclude the exclusive economic zones (‘EEZ’) and archipelagic waters (Art. 86 UN Convention on the Law of the Sea).
Different navigational regimes apply to ships on the high seas and in the maritime zones over which coastal States exercise jurisdiction such as internal waters, territorial seas, contiguous zones, archipelagic waters, the EEZs, and through straits.

B. Navigational Rights in Internal Waters

7 All waters inside a coastal State’s baselines are internal waters where foreign ships enjoy no rights of navigation except as otherwise provided in a treaty that may confer a right of access, or where before its enclosure by straight baselines, the internal waters were part of the territorial sea in which case a right of innocent passage shall apply (Art. 5 (2) Convention on the Territorial Sea and the Contiguous Zone [“TSC”]; Art. 8 (2) UN Convention on the Law of the Sea). Ports are an integral part of a coastal State’s territory and although they are generally open to foreign shipping, access is subject to coastal State regulation. A coastal State has the sovereign right to nominate ports that are open for international traffic and may close ports if necessary for peace, safety and convenience.

C. Navigational Rights in the Territorial Sea

8 In the territorial sea foreign ships enjoy a right of innocent passage (Art. 14 TSC; Art. 17 UN Convention on the Law of the Sea). This right is subject to the laws and regulations that the coastal State may adopt in conformity with the conventions and other rules of international law relating to innocent passage. Coastal States may legislate in respect of navigation, protection of cables and pipelines and other facilities and installations, conservation of living resources, preservation of the environment, marine pollution (Marine Pollution from Ships, Prevention of and Responses to), marine scientific research and hydrographic surveys, and the regulation of customs, fiscal, immigration, and sanitary matters (Art. 21 (1) UN Convention on the Law of the Sea). A coastal State must give due publicity to such laws and all ships must comply with them while in the territorial sea (Art. 21 (3) (4) UN Convention on the Law of the Sea). Essentially all foreign ships are required to traverse the territorial sea in a continuous and expeditious way that is not prejudicial to the peace, good order, or security of the coastal State while navigating on the surface (Arts 18–20 UN Convention on the Law of the Sea). A coastal State may, without discriminating between foreign ships, temporarily suspend this right in specified areas for security purposes, including weapons exercises (Art. 25 (3) UN Convention on the Law of the Sea). The coastal State may also require foreign ships to use sea lanes designated or prescribed for passage through its territorial sea (Art. 22 UN Convention on the Law of the Sea).

9 The right of innocent passage is also available to warships provided they comply with the coastal State’s laws and regulations concerning passage (Art. 30 UN Convention on the Law of the Sea). In the Corfu Channel Case (1949), while dealing with passage through a strait, the International Court of Justice (ICJ) held that as long as the warship presents no threat to the coastal State it should be regarded as innocent. Nuclear powered ships and ships carrying radioactive materials are required to carry documents and to observe precautionary measures established for such ships by international agreements (Art. 23 UN Convention on the Law of the Sea). Some coastal States claim the right to demand prior notification or authorization for the passage of such ships through their territorial sea. Both the laws and regulations of the coastal State under Art. 21 UN Convention on the Law of the Sea and the internationally agreed precautionary measures mentioned in Art. 23 UN Convention on the Law of the Sea provide adequate means for coastal States to condition the right of innocent passage and to control such ships passing through their territorial sea. The imposition by the coastal State of any conditions or regulations outside these provisions could be considered as hampering, denying, or impairing the right of innocent passage (Art. 24 UN Convention on the Law of the Sea).
D. Navigational Rights through Straits

10 In straits used for international navigation between the high seas or the EEZ and the territorial sea of a foreign State, the right of innocent passage for foreign ships is guaranteed and may not be suspended (Art. 16 (4) TSC; Art. 45 (2) UN Convention on the Law of the Sea). The UN Convention on the Law of the Sea provides for a further regime of transit passage which applies to vessels navigating through an international strait between one part of the high seas or EEZ and another part of the high seas or EEZ (Arts 37–44 UN Convention on the Law of the Sea). Transit passage must be continuous and expeditious but does not preclude passage for the purpose of entering or leaving a State bordering the strait, subject to the entry requirements of that State (Art. 38 (2) UN Convention on the Law of the Sea). Passage must be without delay, threat or use of force or any activities other than those necessary for normal modes of navigation (Art. 39 (1) UN Convention on the Law of the Sea). Ships in transit are under an obligation to comply with general international regulations pertaining to safety and control of pollution (Art. 39 (2) UN Convention on the Law of the Sea).

11 Ships are guaranteed a right of transit passage and States bordering straits shall not hamper or suspend such passage (Art. 44 UN Convention on the Law of the Sea). Although a State bordering a strait may not block a ship from transiting the strait the ship must comply with the laws and regulations relating to transit passage that may be validly imposed by the State bordering the strait (Art. 42 UN Convention on the Law of the Sea).

E. Navigational Rights in Archipelagic Waters

12 In archipelagic waters, where the archipelagic State exercises full sovereignty, foreign ships enjoy a right of archipelagic sea lane passage. The rules for archipelagic sea lane passage are essentially the same as for transit passage although the area in which this passage can be exercised is regulated. Passage must be in sea lanes designated by the archipelagic State or, in the absence of such designation, on routes normally used for international navigation through the archipelago. As with transit passage normal modes of navigation are permissible and such passage cannot be impeded or suspended (Art. 53 UN Convention on the Law of the Sea). The right of archipelagic sea lane passage is only available in sea lanes and if a ship navigates outside a sea lane it is only entitled to pass through archipelagic waters under a right of innocent passage, which may be temporarily suspended in specified areas by the archipelagic State for security purposes (Art. 52 UN Convention on the Law of the Sea).

F. Navigational Rights in the Contiguous Zone

13 Beyond the territorial sea all ships enjoy freedom of navigation under the exclusive jurisdiction of their flag State (Flag of Ships). This freedom is subject to certain limitations. In the contiguous zone, which is a zone contiguous to and beyond the territorial sea, a coastal State has the right to exercise the control necessary to prevent and punish infringements of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea (Art. 24 TSC; Art. 33 UN Convention on the Law of the Sea). This zone may not extend beyond 24 nautical miles from the coastal State’s baseline and is for navigational purposes treated as the high seas. Therefore, attempts by coastal States to extend their contiguous zone rights to include security interests or to claim security jurisdiction in this zone have been met by opposition from maritime States as representing a threat to their freedom of navigation.

G. Navigational Rights in the Exclusive Economic Zone

14 The most significant impact of the seaward extension of the jurisdiction of coastal States on the freedom of the high seas came with the introduction in the UN Convention on the Law of the Sea of
the EEZ. The EEZ is a zone extending up to 200 nautical miles from the baseline within which the coastal State enjoys sovereign rights over natural resources and other jurisdictional rights with regard to research and marine pollution (Arts 56, 57 UN Convention on the Law of the Sea; Natural Resources, Permanent Sovereignty over).

15 Although the area of the sea that constitutes the EEZ is no longer part of the high seas, the freedoms associated with the high seas as referred to in Art. 87 UN Convention on the Law of the Sea, including freedom of navigation, have been maintained by expressly incorporating it into the regime of the EEZ (Art. 58 UN Convention on the Law of the Sea). In order to maintain a balance between the interests of the coastal State and other States in the EEZ, it is incumbent on both to have due regard for the rights and duties accorded to the other under the convention (Arts 56 (2), 58 (3) UN Convention on the Law of the Sea). This means there is a duty on the foreign State in the exercise of freedom of navigation to refrain from activities that unreasonably interfere with the exercise of the rights of the coastal State. At the same time the coastal State has a duty to refrain from activities that unreasonably interfere with the foreign State exercising its freedom of navigation and other internationally unlawful uses of the sea relating thereto. In this regard a coastal State may not establish artificial islands, installations and structures and safety zones around them where it would cause interference to the use of recognized sea lanes essential for international navigation (Art. 60 UN Convention on the Law of the Sea).

16 States exercising their right of freedom of navigation have the obligation to comply with the laws and regulations adopted by the coastal State in accordance with the UN Convention on the Law of the Sea and other rules of international law (Art. 58(3) UN Convention on the Law of the Sea). Thus, foreign ships navigating through the EEZ would be subject to the coastal State’s jurisdiction relating to pollution and its control over the natural resources.

17 In recent times the issue of military activities, including exercises, intelligence gathering and surveillance, being conducted by a foreign State in a coastal State’s EEZ has become controversial. While the UN Convention on the Law of the Sea makes it clear that military exercises, weapons testing or any action aimed at prejudicing the defence or security of the coastal State in its territorial sea would be contrary to the regime of innocent passage (Art. 19 UN Convention on the Law of the Sea) no such restriction applies to the EEZ. No authorization exists with respect to such activities nor are these activities included in the list of high seas freedoms as they apply to the EEZ.

18 Some maritime States maintain that for purposes of conducting military exercises and other military activities the EEZ should be treated as high seas; that these activities are recognized rights associated with high seas freedoms that are preserved by Art. 58 UN Convention on the Law of the Sea and therefore not subject to the jurisdiction of the coastal State. Contrary to this position, many coastal States claim the right to limit military activities in their EEZ, insisting that some of these activities are prejudicial to their security interests. As a result some States have adopted and seek to enforce security-related restrictions similar to the regime of innocent passage in the territorial sea.

19 This tension between navigational freedom and the right of coastal States to restrict the movement of ships in their EEZ could be resolved by applying the ‘due regard’ principle referred to in Arts 58 (3) and 56 (2) UN Convention on the Law of the Sea. In addition, the obligation imposed on States by Art. 88 UN Convention on the Law of the Sea to use the ocean ‘for peaceful purposes’ also applies to the EEZ through Art. 58 (2). Peaceful purposes include the obligation to refrain from the threat or use of force. This is also in accordance with the general obligation in Art. 301 UN Convention on the Law of the Sea, namely, when exercising their rights and performing their duties under the UN Convention on the Law of the Sea, States must refrain from any threat or use of force against the territorial integrity or political independence of any State.

20 Furthermore, where the UN Convention on the Law of the Sea does not attribute rights or
jurisdiction to the coastal State or to other States within the EEZ and a conflict arises between the interests of the coastal State and any other State, provision is made in Art. 59 UN Convention on the Law of the Sea for the conflict to be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

H. Navigational Rights on the High Seas

21 Even in the high seas, freedom of navigation is not without limitations. Although the high seas are open to all States, whether coastal or land-locked, and no State may validly purport to subject any part thereof to its sovereignty, the freedoms under this regime must be exercised subject to the conditions laid down by the UN Convention on the Law of the Sea and by other rules of international law (Art. 82 (1) UN Convention on the Law of the Sea). States exercising their navigational rights in the high seas shall do so with due regard for the interests of other States in their exercising of high seas freedoms. This principle of due or reasonable regard, as reflected in Art. 87 (2) UN Convention on the Law of the Sea and Art. 2 High Seas Convention, is similar to that applied in the EEZ and seeks to maintain the balance between the rights and interests of States when exercising their respective high seas freedoms. It further ensures that the rights of others are protected with respect to activities in the International Seabed Area (Art. 87 (2) UN Convention on the Law of the Sea). This principle provides an objective test which international courts and tribunals may apply where there is a conflict between two uses of the high seas.

22 Freedom of navigation provides ships of any States with the right to traverse the high seas with no or minimal interference from any other State. A key aspect of freedom of navigation is that it is exercised under the exclusive jurisdiction of the flag State (Art. 92 (1) UN Convention on the Law of the Sea; Art. 6 (1) High Seas Convention). The Permanent Court of International Justice (PCIJ) in The 'Lotus' (France v Turkey) (1927) (Lotus, The) confirmed that, except in limited instances expressly recognized by international law, ships on the high seas are not subject to any authority other than the State whose flag they fly. For a ship to fly the flag of a State there must be a genuine link between the State and the ship (Art. 91 (1) UN Convention on the Law of the Sea). Exclusive flag State jurisdiction extends to the exercise of both legislative and enforcement jurisdiction (Maritime Jurisdiction). A State may consent to another State exercising jurisdiction over its ships and many acts of interference are derived from powers conferred by treaty. Any ship when navigating on the high seas is subject to all relevant international obligations which have been undertaken by its flag State. A right of States to formulate specific agreements to permit the boarding and possible seizure of ships has been accorded in response to efforts to suppress certain criminal acts (Ships, Visit and Search). An example is the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (28 ILM 497) that allows the interception on the high seas of a ship suspected of illicit drug-trafficking by a State other than the flag State. Permission must be requested if a State party wishes to board a ship of another State party.

23 Interference with freedom of navigation on the high seas is limited to those instances circumscribed in the UN Convention on the Law of the Sea, namely the rights of visit and hot pursuit. The right of hot pursuit is available to a coastal State who has good reason to believe that a foreign ship has violated its laws and regulations and allows its warship or military aircraft to pursue the ship unto the high seas and to arrest it there (Art. 111 UN Convention on the Law of the Sea). The right of visit, where a warship may stop and board a foreign ship on the high seas, exists only in circumstances in which there are reasonable grounds for suspecting the ship to be engaged in piracy, slave trading, unauthorized broadcasting (Pirate Broadcasting), or where its nationality is under suspicion (Art. 110 UN Convention on the Law of the Sea). These designated instances are few in number and are not uniform in establishing legislative and enforcement jurisdiction over the suspected ships. Both for ships suspected of engaging in the slave trade or in unauthorized broadcasting, the warship must have an established basis of jurisdiction to justify the arrest of the
ship (Arts 99, 109 UN Convention on the Law of the Sea). It is only in relation to piracy that universal jurisdiction exists, allowing the warship of any State to visit, search and arrest a pirate ship or a ship taken by piracy (Art. 105 UN Convention on the Law of the Sea). Beyond these specified instances the UN Convention on the Law of the Sea does not permit the non-consensual boarding of a foreign ship on the high seas.

24 These exceptions to freedom of navigation and exclusive flag State control generally apply to all types of ships on the high seas unless otherwise indicated. The only instance where no interference under any circumstances is permitted is applied with respect to warships and ships owned or operated by a State and used only on government non-commercial service (State Ships). Because these ships are accorded complete immunity from the jurisdiction of any State other than the flag State, no other State may interfere or attempt to exercise jurisdiction over them on the high seas (Arts 95, 96 UN Convention on the Law of the Sea).

25 New instances have occurred in recent times where the sanctity of navigational freedom and the concomitant exclusive jurisdiction of the flag State have impeded efforts to respond to global security threats. These relate to terrorism, weapons of mass destruction (‘WMD’) and other security concerns which have led to interceptions on the high seas of ships suspected to be involved in such activities. Some of the interceptions were neither sanctioned by any international treaty or rule of international law nor mandated by the UN Security Council. The Proliferation Security Initiative (PSI) is the response by a number of maritime States to what they perceived to be a widening gap in maritime security created by the lack of options available under the UN Convention on the Law of the Sea for States to stop and board ships on the high seas if the situation so requires. PSI States have agreed to cooperate and to take appropriate action both under their national law and international law to stop and search ships in the respective maritime zones reasonably suspected of carrying WMD, delivery systems or related material to and from States or non-State actors of proliferation concern. Participating States are committed not only to take action to stop and search any ship flying their own flag but also to permit other States to stop and search those ships in pursuit of PSI objectives. Whether the PSI will succeed through a growing State practice of bilateral ship-boarding agreements and regional maritime security measures in creating a new right of visit on the high seas outside the legal authority of the UN Convention on the Law of the Sea remains doubtful. The ongoing deference to the flag State’s control indicates that this will not be the case. It is furthermore unlikely that States of proliferation concern will agree to the boarding on the high seas of ships under their flag.

26 The resistance against the creation of another exception to the principle of exclusive flag State jurisdiction was illustrated during the revision of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (‘SUA Convention’) and its related Protocol with a view to counter acts of piracy and terrorist threats more effectively. The discussion mainly focused on the incorporation of a shipboarding regime into the SUA Convention. Non-consensual boarding was rejected and instead the 2005 Protocol re-affirms that the boarding of a ship outside any State’s territorial sea shall be impermissible without the express consent of the flag State. Although the UN Security Council may authorize a warship to visit or search ships where the interests of international peace and security may be threatened, its repeated refusal to authorize non-consensual boarding as part of its nuclear proliferation-related measures is a further significant development in support of flag State consent.

I. Conclusion

27 Freedom of navigation remains an essential principle of the public order of the oceans. Notwithstanding the expansion of maritime zones and the extension of coastal State jurisdiction over large areas of the sea, the right of States to navigate the oceans without undue interference and to freely trade with one another is guaranteed in the relevant provisions of the UN Convention on the Law of the Sea. These provisions are designed not only to regulate competing rights and
interests but also to ensure that the balance between them is maintained. Any new challenges not foreseen or regulated by the UN Convention on the Law of the Sea may require additional measures that would allow States to legally intervene and to exercise legislative and enforcement jurisdiction over suspected ships. Whatever security-related initiatives States may wish to take on the high seas or within maritime zones under national jurisdiction would have to be in conformity with accepted norms and principles of international law. As with piracy, drug-trafficking, illegal fishing, etc., the measures for intervention should be circumscribed by treaty or custom with the general acceptance of States. The law of the sea is dynamic enough to meet these new challenges and to find a balance between navigational freedom and maritime security.

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