

## HIGH SEAS REGIME

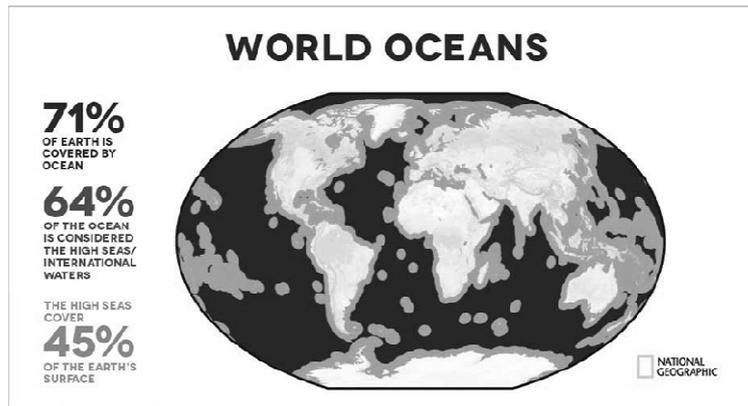
- maritime zone situated **beyond state jurisdiction**
- the high seas provisions 'apply to all parts of the sea that are not included in the **EEZ**, in the **TS** or in the **internal waters** of a State, or in the **archipelagic waters** of an archipelagic State'
- spatial limits of the high seas are **variable**
  - depend on State action (limits of the TS, institution of archipelagic waters and of EEZs)
  - \*waters adjacent to Antarctica
    - the States Parties to the Antarctic Treaty have agreed not to assert new claims of territorial sovereignty, nor to enlarge existing ones (institution of EEZ is precluded)
    - since the old claims which may extend to sea areas are suspended, as long as the Antarctic Treaty is in force all waters adjacent to the Antarctic are either high seas or should be assimilated to the high seas

### Relationship between high seas and other maritime zones

- Internal waters, territorial sea and archipelagic waters
- Contiguous zone → its institution on waters beyond the limits of the TS does not influence the nature of these waters as high seas (unless an EEZ has been created)
- EEZ → incorporation of fundamental principles and institutions of the high seas regime
- Continental shelf → the exercise by the coastal State of sovereign rights on the continental shelf is without prejudice to the nature of the superjacent waters as high seas
- Area → seabed beyond national jurisdiction has been proclaimed the common heritage of mankind; the regime of the international seabed area does not influence the status of the superjacent waters as high seas

### **High seas regime – basic principles:**

- Non-appropriation → ‘no State may validly purport to subject any part of the high seas to its sovereignty’ art. 89 LOSC
- Freedoms of high seas
- Exclusive flag state jurisdiction



### **Freedom of the High Seas**

- Article 87 (1) LOSC sets forth a list of freedoms of the high seas
  - freedom of navigation
  - freedom of overflight
  - freedom of laying submarine cables and pipelines
  - freedom of constructing artificial islands, installations, and structures
  - freedom of fishing
  - freedom of scientific research
- list in Art. 87 (1) LOSC → Art. 2 High Seas Convention
- exhaustive ? open-ended ?
  - introduced by the expression ‘inter alia’
  - consequence: the presumption is that the rule of freedom applies not only to activities mentioned in Art. 87 LOSC, but also to new or unnamed activities

### **Exclusive flag state jurisdiction**

- The exercise of the freedoms of the high seas presupposes that States engage in activities on the high seas through objects linked to them by a particular connection
  - the high seas being a space in which no sovereignty extends
  - States engage in activities through ships flying their flag [principle of non-interference]
- principle: the flag State has the monopoly of the exercise of sovereign power on its ships [essence of the freedom of the high seas]

### **Article 91 LOSC [Nationality of ships]**

- 1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.

### **Genuine link requirement**

- LOSC does not define what is meant by a genuine link nor it stipulates what consequences follow where no genuine link exists
- Ordinary meaning? Art. 31 VCLT
  - not a term with an established meaning in international law
  - Geneva Convention on High Seas - first treaty having provisions on the nationality of ships [no earlier history of the use of this or similar terms in treaties dealing with ships]
  - treaties concerned with the nationality of individuals or aircraft → do not use the term “genuine link” or any similar expression

Travaux préparatoires:

- Special Rapporteur François – lack of real connection between the flag State and the crew and ownership of the vessel, it would be difficult for the flag State to regulate the vessel properly
- 1951 ILC – “yet the general practice of States has established minimum requirements which must be met if the national character of the ship is to be recognised by other States” → minimum requirements reflected „**economic approach**”
- minimum requirements → the vessel must be either the property of the flag State; or be more than half owned by:
  - nationals of the flag State
  - a partnership in which the majority of the partners with personal liability are nationals of the flag State
  - a joint stock company formed under the laws of the flag State and having its registered office in the territory of the flag State

- 1956 – failure of economic approach, criteria deleted, instead: „Nevertheless, for purposes of recognition of the national character of the ship by other states, there must exist a genuine link between the state and the ship.”

**Lack of genuine link → legal consequences:****P.C. Jessup Separate Opinion (Barcelona Traction case 1970)**

- „If a State purports to confer its nationality on ships by allowing them to fly its flag, without assuring that they meet such tests as management, ownership, jurisdiction and control, other States are not bound to recognize the asserted nationality of the ship”

**ITLOS, *M/V Saiga (No 2)* case [Saint Vincent and the Grenadines v. Guinea]**

- „the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States” (par. 83)

**ITLOS, *Grand Prince* case [Belize v. France]**

- Belize had not *locus standi*, because it could not prove to be the flag State of the detained fishing vessel
- ITLOS did not refer expressly to the genuine link requirement, but the judgment seems to indicate that properly documented registration in the Belizean shipping register would have sufficed to establish genuine link between vessel and flag State

**Definition of stateless vessel**

- vessel is sailing under two or more flags using them as a matter of convenience
- vessel is flying under the flag of a state which is not recognized by the questioning state
- the flag state deprived the vessel of the use of its flag
- the state denies granting the nationality to a vessel which is claiming it

**States jurisdiction with regard to stateless vessel**

- Art. 110 LOSC → right of visit
- Legal theory:
  - United States and United Kingdom assume that a vessel without nationality can be seized by any state because it enjoys no protection

- international community: to seize a stateless vessel further jurisdictional nexus or permissive rule of international law is required [only if the activity affects the state in some way and fulfil the requirement of the effects or protective ground for jurisdiction]
- Even though, such as ship is deprived of diplomatic protection, it shall not be regarded as a vessel without law. The nationality of the owner or other criteria linking the vessel to a state should be taken into consideration.

#### Rules on Interference

- customary international law: interference with the exercise of high seas freedoms is **reserved to warships and to military aircraft** (Arts 107, 110, and 111 LOSC)
  - warships (Art. 95 LOSC) and ships owned or operated by a State and used only on government non-commercial service' (Art. 96 LOSC) have **complete immunity** from the jurisdiction of any State other than the flag State
- **purpose**: protect fundamental interests of the international community
- **forms of interference [scope of enforcement measures]**
  - right of visit → approach; verify nationality; board and inspection
  - right of hot pursuit → pursue, stop and arrest
  - suppression of piracy → the strongest measure of interference seizure

- unauthorized broadcasting → arrest of ship and individuals, seizure of broadcasting apparatus; States directly affected:
  - the flag State of the ship;
  - the State of registry of the installation;
  - the State of which the person is a national;
  - any State where the transmissions can be received; or
  - any State where authorized radio communication is suffering interference
- threatened or actual damage to the coastline caused by a maritime casualty
  - rule crystallized with the Torrey Canyon incident in 1967
  - codified in the International Convention relating to Intervention of the High Seas in Cases of Oil Pollution Casualties (1969) and in Art. 221 LOSC
  - controversy: an independent rule or the consequence of principles such as self-defence or necessity

#### **Treaty-Based Cases of Interference [confirmation of the pre-eminence of the flag state]**

- **slavery** → Slavery Convention 1926 and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956
- **narcotic drugs and psychotropic substances** → United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
- **maritime terrorism** → 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the Protocol of 2005 to the SUA Convention
- **fisheries** → 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement)
- **immigration** → Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (2000)

### **Interference on Foreign Ships on the High Seas as a Countermeasure or as Self-Defence**

- non-compliance with obligations set out for the protection of collective interests in multilateral treaties and in UNSC resolutions, justify that States Parties to the relevant treaty: board and inspect the delinquent ships and possibly arrest and perform other enforcement action
- countermeasure in respect of the wrongful act committed by another State Party
  - by not complying with its obligation of co-operation and conservation and of effectively controlling the fishing vessel flying its flag
  - or for non-compliance with binding decisions of the UNSC
- ‘specially affected’ by the non-compliance, and on whether the prohibition of the use of force comes into play [requirements]

### **COMMON HERITAGE OF MANKIND – AREA**

- **Area as the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction** [art. 1 (1) LOSC ]
  - the outer limit of the continental shelf constitutes the decisive criterion with regard to the extension of the Area
- 1967, **Arvid Pardo**, Maltese ambassador to the UN, proposed a legal regime for the seabed and subsoil beyond the limits of a narrowly defined continental shelf, based on the perception of this area constituting the common heritage of mankind
- **UNGA resolution on the peaceful uses of the seabed and the ocean floor beyond the limits of national jurisdiction** 1967:
  - militarization and national appropriation of the area should be prohibited
  - use of the resources should be put under the trusteeship of an international institution

- **Declaration of Principles** Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction (UNGA 1970)
  - no 'State or person ... shall claim, exercise or acquire rights with respect to the area or its resources incompatible with the international regime to be established'
- legal relevance of this resolution was disputed
  - many developing countries regarded it as a binding statement of law rendering any unilateral mining in the area unlawful
  - most western States understood UNGA Resolution as containing a mere political statement (1958 Geneva Conventions):
    - did not address the issue of the deep seabed beyond the outer limits of the continental shelf at all
    - deep seabed mining was subject to the freedom of the high seas

- Deep seabed regime subject to common heritage of mankind principle:
  - **industrialized countries**
    - free exploitation of deep seabed resources
    - ensure economic independence from exporting countries (developing States)
  - **developing States**
    - prevent industrialized countries from reserving the wealth of the ocean floor on a 'first come, first served' basis
    - concept of the use of the resources of the deep seabed for the benefit of mankind in the sense that developing countries should get a fair share of the benefits deriving from mining operations

#### Tragedy of commons

- Economic *ratio legis* of the CHM principle
- Exploitation of certain resources founded upon competitive market rules leads to inefficient use
- Costs of the acquisition and enforcement of the proprietary rights over certain resources are greater than the benefits derived thereof
- Ocean living and non-living resources – expenses originate from:
  - Large spatial area
  - Exhaustive and fugitive character of the resources
  - Life cycle subject to the biological laws
  - Desire to maintain the freedom of use
  - Obstacles raised by those who could be excluded

- The provisions on the Area prevented many developed States from LOSC ratification:
  - compulsory transfer of technology to the Enterprise and developing countries (undermining the principles of intellectual property ownership)
  - lack of protection for substantial investments which had already taken place in seabed mining prior to the adoption of LOSC
- **The current legal regime for the Area is thus contained in:**
  - Part XI and Annex III LOSC
  - 1994 Implementation Agreement [Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea]
  - Regulations on Prospecting and Exploration for Polymetallic Nodules adopted by ISA

- **Scope of application [Area regime]**

- Article 133 (a) LOSC defines ‘resources’ as ‘all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules’.
- the term ‘activities in the Area’ given by Art. 1 (3) LOSC and used liberally in many provisions of Part XI LOSC, is very narrowly defined as referring to ‘all activities of exploration for, and exploitation of, the resources of the Area’, and, thus, incorporates the meaning of ‘resources’, including its restriction to minerals
- the living resources of the deep seabed are not included in the system of resource development foreseen by Secs 3 and 4 of Part XI LOSC

**Common Heritage of Mankind (Arts 136 and 140 LOSC)**

- aims at achieving material **equality between developed and developing States**
- the **non-appropriation of the deep seabed beyond the areas of national jurisdiction** (Art. 137 LOSC)
  - a *res nullius communis usus* – a space open to common utilization which does not belong to any State or group of States in terms of territorial sovereignty
  - emphasize the status of the Area as internationalized territory
- **peaceful purposes restriction** (art. 141 LOSC)
  - peaceful purpose clause was generally not to be understood in the sense of a complete demilitarization of the Area
- **freedom of scientific research** (art. 145 LOSC)
- protection and conservation of **marine environment** (art. 145 LOSC)

- **ISA –common management of the mineral resources exploration and exploitation**
  - decision-making functions in the field of deep seabed mining operations
  - empowered to issue secondary law: rules, regulations, and procedures in respect of individual subject-matters which are specifically mentioned in LOSC and its Annexes
    - system of production charges
    - administrative procedures relating to prospecting, exploration, and exploitation in the Area
    - directly effective
- a system of **benefit sharing** in respect of deep seabed mineral resources to be established by the ISA (Art. 140 (2) LOSC)

#### **System of exploration and exploitation**

- The system of deep seabed mining envisaged by Part XI LOSC is based on three stages:
  - prospecting (general search for seabed resources)
  - exploration (detailed pre-production surveying)
  - exploitation of the resources
- ISA role in the system of exploration and exploitation
  - prospecting is generally free—it only requires a notification to the ISA (in respect of the sites in which prospecting is conducted) and a written undertaking under Art. 2 (1) Annex III LOSC
  - exploration and exploitation presuppose specific authorization by the ISA (Art. 153 UN LOSC)

- obligation to submit a detailed plan of work to the ISA for approval
  - two sites of equal estimated commercial value
  - information on the resource situation
  - figures regarding the maximum mineral production expected
- ISA Legal and Technical Commission
  - review of the proposed plans
  - submission recommendations as to the acceptability of the applications to the Council of the ISA
- ISA Council
  - approval of the plan of work relating to one of the sites and enters into a contract with the applicant
  - the other site is designated as a 'reserved site'

- 'reserved site'
  - Enterprise enjoys priority if it decides to carry out deep seabed mining during an initial period of fifteen year or
  - the original contractor may submit a plan of work in respect of the 'reserved site' as long as it offers in good faith the position of a joint-venture partner to the Enterprise

