ANNO CXIX – TERZA SERIE
FASCICOLO II – APRILE-GIUGNO 2017

IL DIRITTO MARITTIMO

RIVISTA TRIMESTRALE DI DOTTRINA GIURISPRUDENZA LEGISLAZIONE
ITALIANA E STRANIERA
FONDATA NEL 1899 DA FRANCESCO BERLINGIERI

DIREZIONE - REDAZIONE ED AMMINISTRAZIONE
GENOVA - VIA ROMA, 10

SOMMARIO

GIURISPRUDENZA DELL'UNIONE EUROPEA*

GIURISPRUDENZA ITALIANA*

GIURISPRUDENZA INGLESE*

SOMMARIO DELLA GIURISPRUDENZA

GIURISPRUDENZA DELL'UNIONE EUROPEA

---

* I testi delle sentenze sono pubblicati sul sito web della *Rivista* www.dirmar.com

GIURISPRUDENZA ITALIANA

GIURISPRUDENZA INGLESE

CRONACHE E NOTE

NOTIZIARIO

RASSEGNA BIBLIOGRAFICA

Scritto sottoposto a doppio referaggio anonimo – This writing has been submitted to double blind peer review

LEGAL REGIME ON NAVIGATION THROUGH THE STRAIT OF GIBRALTAR: THE ROLE OF ITS COASTAL STATES

VÍCTOR LUIS GUTIÉRREZ CASTILLO*

ABSTRACT

The Strait of Gibraltar has all the characteristics of the straits used for international navigation. Its coastal states are signatories of the United Nations Convention on the Law of the Sea and accept the *transit passage regime*. The agreements between the international community and the States bordering the Strait regarding the definition of maritime navigation lanes, with particular stress on the rights and obligations of the said States, as well as the international commitments undertaken by both States in terms of environmental protection and how their pledge is affected by the applicable navigation regime in the Strait are discussed in this study.
Keywords: Strait of Gibraltar, maritime navigation, transit passage regime, coastal States, Spanish Law of Maritime Navigation.

I. *The Strait of Gibraltar and its importance to international navigation*

The Strait of Gibraltar is one of the main straits used for international navigation, just like the Strait of Hormuz (between the Persian Gulf and the Gulf of Oman), the Strait of Bab-el-Mandeb (between the Red Sea and the Gulf of Aden), and the Bering Strait (between the Bering Sea and the Beaufort Sea). It is also one of the international straits with the highest levels of maritime traffic worldwide, since it stands as a required passageway between the ports of the Atlantic and Northern

* Associate Professor of Public International Law, Universidad de Jaén, Spain. Member of the Scientific Council of the *Institut Économique du Droit de la Mer* in Monaco. Email: vlguti@ujaen.es

European ports and those in the Mediterranean Sea. The Strait's relevance to international navigation was expressly acknowledged in the studies made prior to the I United Nations Convention on the Law of the Sea, which included Gibraltar among the 33 straits "constituting routes used for international navigation". This classification has been confirmed in practice by official data stating that over 95.000 ships pass through the Strait every year, including a high number of oil tankers, taking into account that it has become one of the world's most active oil routes ever since the opening of the Suez Canal in 1975.

Because of its characteristics, this strait fulfills the necessary *physical, functional and legal* requirements to be considered as *a strait used for international navigation*. In fact, from the physical viewpoint, it is made up of the waterway flowing between the ends of the European and the African continents (between Trafalgar-Cape Spartel and Europa Point-Ceuta) that links the Atlantic Ocean and the Mediterranean Sea[1]. From the *functional viewpoint,* there is no question that it has already been used for international navigation and communications in far-off times, ever since the great maritime powers set their sights on the strait. What is certain is that it is important not only for strategic reasons, but also because of its role in facilitating maritime navigation and the access to resources on both sides of the Mediterranean Sea. Finally, from the *legal* viewpoint, the Strait would fall within the classification of "straits used for international navigation", in accordance with international regulations.

Now, beyond the theoretical classification of the Strait of Gibraltar, one of the most important topics to be discussed for the purposes of this article is the establishment of the legal regime governing its waters, which is essential to be aware of the sovereignty of its coastal states over the Strait and its use. In this connection, it is necessary to start from the classification made by the United Nations Convention on the Law of the Sea of 1982 (hereinafter referred to as UNCLOS), as well as from an analysis of the way that its provisions have been included in and implemented by the legislations of its coastal states.

Indeed, in broad terms, it is safe to say that UNCLOS makes a distinction between a) *straits providing the right to transit passage*: that is, those used for navigation between one part of the high seas or an exclusive economic zone (hereinafter EEZ) and another part of the high seas or an EEZ (Article 37), such as, e.g., the Strait of Bab-el-Mandeb and the Strait of Malacca; b) *straits under the regime of innocent passage*; that is, those formed by an island of a State bordering the strait and its mainland, if there exists seaward of the island a route through the high seas or through an EEZ (Article 38.I), such as, e.g., the Straits of Messina and of Corfu. Falling under this category would also

---

[1] Europe and Africa are separated by 7.7 nautical miles (nm) of ocean at the strait's narrowest point. The Strait's depth ranges between 300 and 900 metres (160 and 490 fathoms; 980 and 2,950 ft) which possibly interacted with the lower mean sea level of the last major glaciation 20,000 years ago when the level of the sea is believed to have been lower by 110–120 m (60–66 fathoms; 360–390 ft). Ferries cross between the two continents every day in as little as 35 minutes. Cf. J.L. Suárez de Vivero, *El nuevo orden oceánico. Consecuencias territoriales* (Junta de Andalucía, Sevilla, 1985), at 152.

be the straits located between a part of the high seas or an EEZ and the territorial sea of a foreign State -Article 45 I (b)- such as, e.g., the Strait of Tiran; c) *straits not included in the scope of Part III of* UNCLOS and which have a legal regime of their own. Such is the case of straits within *internal waters* (Article 35) and straits in which passage is regulated by long-standing conventions (Article 36). This would be the case of, among others, the Strait of Magellan.

Regardless of any doctrinal classifications, we agree with Professor Pastor Ridruejo when he says that the international laws governing the legal regime of straits provide in general three key ideas that prevail in their enforcement: 1) States bordering the straits have the right to regulate navigation in their waters; 2) Third States have the right that their ships shall not be prevented from enjoying transit passage, and 3) the exercise of the rights by States bordering the straits and third States is in general limited by good faith and the prohibition of abuse of authority[2].

Therefore, after an analysis of the legal regime governing the waters of the Strait of Gibraltar and its physical characteristics, it is safe to say that it falls under the "transit passage" provisions laid down in UNCLOS. That is, taking into account what the international regulations stipulate, the Strait of Gibraltar is submitted to a navigational legal regime marked by freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait. Known as *transit passage*, this regime, which we will discuss in further detail, is recognized by the international community and accepted by Spain and Morocco. Indeed, if we bear in mind the number of times that UNCLOS has been ratified and the fact that it accepts no *reservations*, it can be said that the conventional regulations governing transit passage enjoy widespread acceptance.

As to the Strait of Gibraltar, there is no doubt that the said regime (transit passage) is accepted by the States with direct interests in the strait (Spain, Morocco and the United Kingdom) as well as by the European Union (as an international organization signatory of the Convention) and the rest of the international community that abides by the aforesaid international law. It could even be said that some States, which are not signatories of UNCLOS and yet have interests in the area (such as the United States) also accept this regime because they acknowledge its customary nature[3].

---

[2] Cf. J. A. Pastor Ridruejo, *Aspectos jurídico-internacionales de la construcción de una comunicación fija a través del Estrecho de Gibraltar*, *Coloquio de Madrid. Coloquio internacional sobre la factibilidad de una comunicación fija a través del Estrecho de Gibraltar* (SECEG, Madrid, 1983) at 505.

[3] «...the United States... particularly rejects the assertions that the... right of transit passage through straits used for international navigation, as articulated in the [LOS] Convention, are contractual rights and not codification of existing customs or established usage. The regimes of... transit passage, as reflected in the Convention, are clearly based on customary practice of long standing and reflects the balance of rights and interests among all States, regardless of whether they have signed or ratified the Convention...». Complaint filed by the U.S. against Iran in a Diplomatic Note dated August 17, 1987. Cf. A. Carballo Leyda, *¿Puede Irán cerrar el estrecho de Ormuz? Algunas consideraciones jurídicas*, 14 *Instituto de Estudios Estratégicos*, (2012) at 1-9 [Doc.: 14/2012 on file at IEEE, www.ieee.es].

II. *Acceptance by States bordering the straits of the new navigation regime*

Spain's attitude after the Third United Nations Conference on the Law of the Sea (hereinafter III UNCLOS) has been particularly interesting. Throughout the Conference, Spain was without question the leader of the opposition to transit passage, to the extreme that, when his turn came to explain Spain's vote, Ambassador Lacleta Muñoz said on behalf of the Spanish delegation: "The Government of Spain finds that (…) the texts approved by the Conference fail to codify or express customary law"[4]. In fact, when Spain signed UNCLOS on December 4, 1984, it remained opposed to the new legal regime through statements and, quite particularly, to the provisions on overflight of these straits. According to Professor Bou Franch, this situation led a Spanish doctrinal sector to consider that the Spanish State had become a "persistent objector"[5].

Indeed, Spain was especially opposed to and described as unacceptable the drafting of the articles on overflight within or over the straits, since UNCLOS specifies neither the bans on aircraft activity nor the laws and regulations that a State can dictate regarding overflight. Nor is there any mention of the air corridors needed to guarantee safety, and the fact there are virtually no regulations on state-owned aircraft is particularly worrying, which places many upsetting question marks over Spain's interests. This explains why the Spanish government signed the Convention on December 5, 1984 by making an interpretative statement about it, pursuant to Article 310, regarding Article 39.III. Likewise, the Spanish Government made declarations about its interests in the strait at the time of UNCLOS ratification[6].

Now, despite these facts, it is clear even today that Spain, much like its neighbor Morocco, unconditionally and completely accepts the *transit passage* regime, judging by their ratification of the Convention on July 28, 1994 and May 31, 2007, respectively. Such decisions have been further supported by those of the United Kingdom of Great Britain and Northern Ireland (July 25, 1997) and the European Union (April 1, 1998).

Moreover, this situation had also become apparent through many cooperation (and coordination) agreements among Spain, Morocco and the IMO. Indeed, we must bear in mind that, regardless of any doctrinal debate and the steps taken by both countries, the States bordering the straits have respected the transit passage for decades (even before UNCLOS was ratified), which makes sense if we take into account that

---

[4] Cf. Third United Nations Convention on the Law of the Sea. Official Documents, vol. 16, at. 166, paragraphs 99-100. For an in-depth study of the maritime navigation (transit passage) see, M. FORNARI, *Il regime giuridico degli stretti utilizzati per la navigazione internazionale*, (Giuffrè Editore, Milano 2010).

[5] Cf. V. BOU FRANCH, *La navegación por el mar territorial, incluidos los Estrechos internacionales y las aguas archipelágicas en tiempos de paz* (Colegio de Oficiales de la Marina Mercante Española, Madrid, 1994) at 165.

[6] For further information, see J.C. DÍAZ GONZÁLEZ, *El Derecho del mar y los problemas de seguridad del sobrevuelo del estrecho de Gibraltar*, in J. Juste Ruiz and V. Bou Franch (eds.), *Derecho del mar y sostenibilidad ambiental en el Mediterráneo* (Tirant Lo Blanch, Valencia, 2014) at 105-117.

by signing UNCLOS in the 1980s they committed themselves (as per Article 18 of the Vienna Convention on the Law of Treaties) to refrain from acts which would defeat the object and purpose of an international treaty. Besides, in the case of Spain, this *de facto* acceptance became obvious when it joined the North Atlantic Treaty Organization (NATO), an alliance clearly in favor of navigation through international straits[7].

To Morocco, however, acceptance has been a rather slow, if equally effective process. Just like Spain, this country was at first opposed to the establishment of the new navigational legal regime by the III UNCLOS, although it eventually accepted it. The Moroccan delegation went through three stages: rejection of the special status applicable to the strait that stemmed from the 1904 Convention; support of the *innocent passage* regime; and, finally, acceptance of the *transit passage* after the signature and ratification of UNCLOS. Worthy of notice is the fact that, on the occasion of both the ratification and the signature of the Convention, the Moroccan Government made no mention whatsoever of this topic in its statements, which were only focused on matters of sovereignty over the territories on both sides of the Mediterranean Sea and, incidentally, opposed by Spain.

Concerning the internal regulation by both States of the navigational regime for the strait, it is worth mentioning that we found very little information. In the case of Spain, we found a specific reference in Article 2 of the Royal Decree of April 4, 2007, on measures applicable to passing ships that dump contaminant waste in Spanish waters:

> *"This royal decree applies to the discharge of contaminant substances in Spanish territorial waters, in straits used for international navigation subject to transit passage regime under Spanish jurisdiction (…)"*[8].

Moreover, Article 19 of Spanish law of maritime navigation (Law 14/2014, 24 July 2014[9]) specifically points out the following:

> *"Navigation in Spanish maritime spaces, either to cross them sideways or to enter or leave ports or terminals along the national coastline, shall abide by the provisions of the United Nations Convention on the Law of the Sea, signed in Montego Bay on December 10, 1982, respecting in all cases the restrictions and requirements laid down in the present Act as appropriate in accordance with the legislation on security, defense, customs, public health, and immigration".*

However, we found no specific reference to *transit passage* in the Moroccan legislation, unlike the case of *innocent passage*, a regime often mentioned throughout the text but considered as superseded following the signature and ratification of UNCLOS.

---

[7] Suffice it to mention, e.g., the events in 1986 when U.S. fighter planes overflew Spanish waters in the Strait during the conflicto in Libya, as a result of which the Spanish Government categorically stated that the passage of those aircraft over the Strait of Gibraltar, within Spanish territorial waters, "was not a violation of Spain's airspace". Taken from V. Bou Franch, *La navegación …, supra* n. at 165.

[8] *Official Gazzette* (BOE) No. 81, 4 April 2007.

[9] BOE No. 180, 25 July 2014.

III. *Maritime spatial planning and the sea lanes in the waters of the Strait*

a. The Strait of Gibraltar: sovereignty and jurisdictional boundaries

In order to better understand the layout of sea lanes in the Strait, we should analyze the sovereignty and jurisdictional boundaries of both its coastal States. Although the demarcation of borderlines is not essential to study navigation in the Strait, we must bear in mind that their definition always has two sides: a negative one involving the recognition of spatial boundaries for exercising authority (sovereignty and/or jurisdiction); and a positive one that favors the necessary and, in this case, essential cross-border cooperation between neighboring States[10].

We are aware that the optimal solution to trace out boundaries in the Strait of Gibraltar would come through a bilateral agreement, similar to the one that France and the United Kingdom once signed concerning the English Channel. First of all, and without detriment of a more detailed explanation, we must point out that both Spain and Morocco have sovereignty and jurisdiction over all the waters of the Strait, in keeping with their own internal legislations[11]. Now, we all know about the areas of conflict in the Strait of Gibraltar, caused by Morocco's standing claims for the Spanish possessions on the north of Africa (Ceuta[12], Perejil Island[13], Peñón de Alhucemas, the Alboran Island waters…) and the controversial situation of the waters surrounding the British colony of Gibraltar, over which Spain has kept a centuries-old dispute[14].

Very briefly, we could say that, pursuant to international law, the States bordering the Strait can extend their sovereignty and/or jurisdiction over their coastal

---

[10] Cf. P. WECKEL, *Le droit international et la frontière*, *Frontières en Mediterranée. Hommage au Doyen Maurice Torrelli* (CEDS, Univ. de Nice-Sophia Antipolis, Nice, 1991) at. 20-41.

[11] Morocco: Dahir concerning Act No. 1-73-211 of 26 Muharram 1393 (2 March 1973) establishing the limits of the territorial waters. Spain: Law No. 10/1977 of 4 January 1977. See Office for Ocean Affairs and the Law of the Sea. *The Law of the Sea. Baselines: National Legislation with Illustrative Maps* (UN, New York, 1989) at 228-229 and 353.

[12] The city of Ceuta has an extension of 19 square kilometers. It has been part of the Spanish Crown since the 15th century. The Moroccan Government has been claiming this portion of the Spanish territory located in the African coast, in the middle of the Strait of Gibraltar has been, as well as the city of Melilla, the Rock of Vélez de la Gomera, the Rock of Alhucemas and the Chafarinas Islands, since 1956. Even though the territories mentioned are not in the United Nations' list of non-self-governing territories, Morocco has pursued a policy of territorial claims since it became independent, which has been expressed not only through international declarations but also through its intern legislation and its policy of delimitation and exploitation of the marine spaces.

[13] Perejil Island, also known as *Leïla Island* or *Toura Island*, is a rocky islet that was originally part of the *Yebel Musa* Mountain. It is located 200 meters away from the Moroccan coast and less than 8 kilometers from Ceuta, between Almanza Point and Leona Point (one of the narrowest parts of the Strait of Gibraltar). Historically, Perejil Island has been part of Spain; however, it has been inhabited since 1960's. Due to its physical features (it cannot be inhabited by humans) and the lack of economic activity, this islet can be considered as a "rock" and not as an "island", according to the Article 121 of the UNCLOS; this means that it does not belong to any continental platform or EEZ, but it does belong to a territorial sea of up to 12 NM and an adjacent area of up to 24 NM.

[14] See T. SCOVAZZI, *See Bays and straight baselines in the mediterranean*, 19 *Ocean Development & International Law* 1988, at 401-420 [DOI:10.1080/00908328809545869]

waters in the following order of expansion: internal waters, territorial sea (up to 12 nm), contiguous zone (up to 24 nm), EEZ (up to 200 nm) and continental shelf (up to 200 nm). In addition to being recognized by UNCLOS, all these spaces are governed by the Spanish and Moroccan legislations. On the other hand, international law allows the measurement of these spaces from straight baselines established in cases of irregular (presence of coves, groups of islands…) or unstable (presence of deltas…) coastlines. This is the case of the Strait of Gibraltar, which explains why both Spain and Morocco have traced out straight baselines in their respective coastlines.

In keeping with its claims policy, Morocco relies on a number of straight baselines (Decree No. 2.75.311 of 11 Rajab -21 July 1975- defining the Closing Lines of Bays on the Coasts of Morocco and the Geographical Co-ordinates of the Limit of Territorial Waters and the Exclusive Fishing Zone[15]) enclosing Spanish territory. As a result, Spain objected to the said layout, thus giving rise to a conflict yet to be resolved, as evidenced by Morocco's declarations on the occasion of the ratification of UNCLOS in 2007[16] and Spain's opposition to the said statements in September 2008.

Regarding maritime spaces in the Strait, both countries have extended their rights of sovereignty and jurisdiction from their respective straight baselines (Cf. Article 4 of the Law No. 10/1977, 4 January 1977[17] and Article 2 of the *Dahir* concerning Act No. 1-73-211 of 26 Muharram 1393 (2 March 1973) establishing the limits of the territorial waters[18]). Taking into account the distance between both shorelines, it is clear that nearly all the waters of the Strait fall under the sovereignty and jurisdiction of its two coastal States, affected (but not rescinded) by transit passage. In this respect, Article 34 of UNCLOS expressly states: "The regime of passage through straits used for international navigation established in this Part shall not in other respects affect the legal status of the waters forming such straits or the

---

[15] Decree No. 2.75.311 of 11 Rajab 1395 (21 July 1975) defining the Closing Lines of Bays on the Coasts of Morocco and the Geographical Co-ordinates of the Limit of Territorial Waters and the Exclusive Fishing Zone (http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/MAR.htm)

[16] Declaration upon ratification (31 May 2007) "… [t]he Government of the Kingdom of Morocco affirms once again that Sebta, Melilia, the islet of Al-Hoceima, the rock of Badis and the Chafarinas Islands are Moroccan territories. Morocco has never ceased to demand the recovery of these territories, which are under Spanish occupation, in order to achieve its territorial unity. On ratifying the Convention, the Government of the Kingdom of Morocco declares that ratification may in no way be interpreted as recognition of that occupation".

[17] This article stipulates the following: "Failing agreement to the contrary, the territorial sea shall not, in relation to neighbouring countries and countries whose coasts are opposite to those of Spain, extend beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two countries is measured, such baselines being drawn in accordance with international law".

[18] Art. 2 "…in the absence of a specific agreement on the subject, the breadth of the territorial waters shall not extend beyond a median line every point of which is equidistant from the nearest points on the baselines of the Moroccan or adjacent coast".

exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil". On the basis of this premise, there is no doubt that international law entitles Spain and Morocco to exercise their sovereignty, which raises difficult questions, given the interests of the international community and the very nature of transit passage: can the States bordering the Strait build fixed facilities in the waters of the Strait under their sovereignty?

b. The Strait of Gibraltar: the role of its Coastal States in establishing sea lanes

The most obvious sign of balance between the interests of the coastal States and those of the international community is found in the provisions governing traffic separation schemes (TSS) for international navigation in the straits. As we have seen, Article 41 of UNCLOS stipulates that States bordering straits "may designate sea lanes and prescribe traffic separation schemes for navigation in straits where necessary to promote the safe passage of ships".

For this reason, it seems logical that the said designation should not be left only to the States bordering straits, since their definition comprises the interests of the international community[19]. This fact justifies that States bordering straits submit their proposals to the IMO before any sea lane is designated. In fact, it is so required by items 4 and 5 of Article 41, where it says:

> "4) Before designating or substituting sea lanes or prescribing or substituting traffic separation schemes, States bordering straits shall refer proposals to the competent international organization with a view to their adoption. The organization may adopt only such sea lanes and traffic separation schemes as may be agreed with the States bordering the straits, after which the States may designate, prescribe or substitute them. 5) In respect of a strait where sea lanes or traffic separation schemes through the waters of two or more States bordering the strait are being proposed, the States concerned shall cooperate in formulating proposals in consultation with the competent international organization".

It is worth mentioning in this regard that the article defines a narrower field of action than that applicable to waters under the innocent passage regime, according to Article 22 of UNCLOS. When it comes to international straits, it is essential that the IMO Member States and the States bordering straits harmonize their purposes, mainly when sea-lanes are being determined. It could be said in practice that the latter propose and the former decide, and then the sea lanes so established are announced. Consequently, an agreement among all the stakeholders involved is paramount, especially if we take into account that the vessels have an obligation to

---

[19] For an in-depth study of the role of Coastal States and the maritime navigation see M.P. Rizzo, *Sicurezza e libertà nell'esercizio della navigazione: il ruolo dello Stato costiero e dello Stato del porto*, in M.P. Rizzo-C. Ingatoci (eds), *Sicurezza e libertà nell'esercizio della navigazione*, (Giuffrè Editore, Milano 2014), at 355-377.

respect every sea lane and TSS hither to officially established (with IMO participation)[20].

In this connection, and on the basis of UNCLOS provisions, Article 30 of Spanish Law 14/2014, 24 July 2014, says "in the interest of safety in navigation and pursuant to the applicable international regulations, the Government shall establish procedures to designate, replace or eliminate, in Spanish maritime spaces, mandatory sea navigation systems". Furthermore, the said Law decrees that the use of these systems "shall be mandatory to all ships once they are approved and published at international level, as necessary" and that the systems "shall be mandatory only to ships navigating through Spain's internal or territorial waters and, if approved by the International Maritime Organization, through the exclusive economic zone".

As to the Strait of Gibraltar, we must point out that it has not been affected by any disagreements between its bordering States and the IMO. In fact, the TSS in Gibraltar was the first ones adopted by this international organization. There is, e.g., Resolution A/284 (VIII) of November 20, 1973 on the approval of a TSS intended to increase safety in the area[21]. A clear indication of good cooperation between the States bordering the strait and the IMO is the adoption of the Mandatory Ship Reporting System that came into force on June 3, 1997, which compels ships of certain size to report States bordering straits that they are entering the area[22]; or the definition of a "precautionary zone" on the eastern end, next to the TSS, to reduce the number of collisions between the ships moving lengthwise and those sailing crosswise from and to the ports of Algeciras, Ceuta and Tangier.

The old separation scheme of 1973 defined an area of around 20 nm, distributed as follows: a central TSS along the strait (neutral navigation zone), half a mile wide, that divides the strait into two axes: a northern route headed toward the Atlantic (on the Spanish side, between the Punta Carnero meridian and Tarifa) and a 2-nm-long entry route into the Mediterranean (south of the strait, along the Moroccan coastline, between the aforesaid meridian and that of Cape Malabata in Morocco). This scheme was partially amended in 2007, when the Tanger-Med port, 2 nm southwest of Point Cires, was opened[23]. The intention is that ships step up security measures near the eastern end of the TSS. Presented jointly by Spain and Morocco to the IMO, the amendment was approved by the Maritime Safety Committee and came into force on July 1, 2007 at 00:00 UTC (COLREG.2/Circ.58 Anexo 4)[24].

---

[20] For an in-depth study of the TSS, see F. PELLEGRINO, *Il controllo del traffico marítimo: i servizi di VTS*, in M.P. Rizzo-C. Ingatoci (eds), *Sicurezza e libertà nell'esercizio della navigazione*, (Giuffrè Editore, Milano 2014), at 377-399.

[21] See M.A. CEPILLO GALVÍN, *El dispositivo de separación del tráfico marítimo en el estrecho de Gibraltar*, in J. M. Sobrino Heredia (eds), *The contribution of the United Nations Convention on the Law of the Sea to good governance of the oceans and seas, Papers of the international Association of the Law of the Sea*, (Editorial Scientifica, Napoli 2014) at 731-745.

[22] This proposal was made jointly by Spain and Morocco [Doc. Nav.42/23, paragraph 5. 4].

[23] For an in-depth study of the TSS.

[24] From the website of the Spanish Ministry of Public Works. file: ///Users/victorluis/Dropbox/SEGESA/Web%20Oficial%20Salvamento%20Mar%C3%ADtimo.webarchive

The new device lays down two precautionary zones: one in front of the new Tanger-Med port and the other between Algeciras and Ceuta. In the former are recommended voluntary routes to enter or leave the area. Likewise, the new scheme allows ships headed for or leaving from Tanger-Med and intended to enter or leave the East or West sea lane to ignore the recommended directions if navigation becomes difficult. We must also bear in mind that IMO decisions fall under the Convention on the International Regulations for Preventing Collisions at Sea of 1972 (COLREGs).

IV. *Limitation of rights of the States bordering straits: the rights of ships and aircrafts during navigation*

As stated before, navigation in the strait is subject to the *transit passage* regime, whereas the *innocent passage* regime applies only to some of its waters (e.g., ships sailing between two ports). Expressly regulated in UNCLOS, this specific regime (innocent passage) entails the right to navigate through the territorial sea without entering internal waters or calling at a roadstead or port facility outside internal waters (Article 18 of UNCLOS). In order to avoid confusion about the meaning, UNCLOS stipulates that this right is to be understood as *a passage that it is not prejudicial to the peace, good order or security of the coastal State*. Besides, ships in this passage must abide by international law and, particularly, by the rules and regulations of the coastal States, as per Article 21 of UNCLOS. In this regard, coastal States may adopt rules and regulations related to, among other things, navigation safety, maritime traffic, protection of cables and pipelines, conservation of the living resources of the sea, and the prevention of infringement of fisheries laws and regulations. Moreover, ships exercising the right of innocent passage shall comply with all such laws and regulations and all generally accepted international regulations relating to the prevention of collisions at sea.

In light of this, we insist that in the case of the Strait of Gibraltar, transit passage is the main regime, applicable to ships navigating across or along the coastline, that is, between one part of the high seas or an EEZ and another. Therefore, navigation perpendicular to the coastline (that is, toward a port in the strait or between two ports in the same strait) is subject to innocent passage and excluded from the transit passage regime[25].

Indeed, there is no specific mention in the international text of which navigation regime applies to perpendicular navigation (between any two ports in the strait), although it is easy to infer from Articles 38.III and 34.IV of UNCLOS since, on one

[25] Art. 38 "… [t]ransit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State".

hand, Article 38.III says: "Any activity which is not an exercise of the right of transit passage through a strait remains subject to the other applicable provisions of this Convention" and, on the other, Article 34.I holds that the regime of passage "shall not in other respects affect the legal status of the waters forming such straits or the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil". Hence we can conclude that innocent passage refers to the residual regime for the "main" international straits, applicable in the case of the Strait of Gibraltar to navigation not intended to link both ends of the said geographical feature.

As to ships and aircraft exercising the right of transit passage, UNCLOS lays down a set of common obligations to be fulfilled, stating the following in Article 39:

> "…. Ships and aircraft, while exercising the right of transit passage, shall: (a) proceed without delay through or over the strait; (b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations; (c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress; (d) comply with other relevant provisions of this Part".

Ships in transit passage shall comply with both the relevant sea lanes and TSS and the generally accepted international maritime regulations, procedures and practices for safety at sea – including the International Regulations for Preventing Collisions at Sea – as well as those related to the prevention, reduction and control of pollution from vessels[26]. Aircraft shall observe the Rules of the Air established by the International Civil Aviation Organization as they apply to civil aircraft and at all times monitor the radio frequency assigned by the competent internationally designated air traffic control authority or the appropriate international distress radio frequency[27]. During transit passage, no ship (including scientific vessels) may carry out any research or survey activity without the prior authorization of the States bordering straits.

Pursuant to Article 42.V of UNCLOS, failure by the flag State of a ship or the State of registry of an aircraft to comply with the transit passage provisions or the laws and regulations validly published by the States bordering straits shall bear international responsibility. This idea stems from Rule 10 of the Regulations for Preventing Collisions, annexed to the London Convention of October 23, (signed by Spain and Morocco), which established that ships shall comply with the IMO-adopted TSS. It is also specifically underscored in Article 30.II of Spain's Law 14/2014, 24 July 2014, stating that the systems to organize maritime traffic "shall be mandatory to all ships once they are approved and published at international level, as necessary".

---

[26] Cf. Art. 39. II of UNCLOS.
[27] Cf. Art. 39. III of UNCLOS.

As to the ships in transit passage, it must be understood, pursuant to international law, that they shall not stop or anchor except as rendered necessary by force majeure or distress and shall use every means available to immediately inform the situation to the nearest maritime authority. This can be inferred from an interpretation of Article 42 of UNCLOS in Article 22 of the Spanish law on the display of the flag and the submarines".

V. *Nuclear-powered ships in the Strait and Spanish Law of Maritime Navigation (Law 14/2014, 24 July 2014)*

Passed on 24 July 2014 and published on 25 July in the *Boletín Oficial del Estado* (BOE, Spanish Official Journal), the Law 14/2014 finally came into force on 25 September 2014 after a long drafting period. This is the single most important piece of maritime legislation in Spain, which regulates the basic regime governing maritime navigation and shipping in a way similar to the legislations of other European Union (EU) countries. The Law establishes an all-encompassing regime that covers almost all maritime questions, including both elements of public and private law. This, as shown below, has some negative effects. However, the new Law represents an important step forward insofar as it brings to an end the prior regulation stemming from the Third Book of the 1885 Code of Commerce. This regime was not only outdated in terms of the social reality it was expected to regulate, but it also was at variance with international treaties to which Spain is a party and with other pieces of Spanish legislation[28].

In this Law we only found two specific references to the Gibraltar waters: a generic statement in Article 37 that navigation in the strait shall comply with Part III of UNCLOS, and Final Provision No. 7, which expressly denies any recognition of rights to the United Kingdom beyond the provisions of the Treaty of Utrecht of 1713. As we have seen, this clause is found in international and national texts affecting Spain's interests regarding the law of the sea, e.g., the statements made by the Spanish Government upon the signature and ratification of UNCLOS or, before that, the drafting of the domestic law (Law 10/77 of January 4 about Spain's territorial seas[29]…).

It is interesting in this connection that the Spanish Law overlooked a possible contradiction that still exists to the international law. Our legislator seems to be unaware that, under the said Convention, the regime of navigation through international straits is incompatible with some Spanish provisions in Article 13 Law of Maritime Navigation, which regulates the passage of nuclear-powered ships by

---

[28] For a study of Spanish Law of Maritime Navigation see J.L García-Pita y Lastres / A. Díaz de la Rosa, *Consideraciones sobre los sujetos de la navegacion, en la ley nº 14/2014, de 24 de julio, de navegación maritima*, in this *Review*, nº. 1, 2016 and V. L. gutiérrez Castillo & J. J. García Blesa, *Critical Analysis of the Law 14/2014 on Maritime Navigation*, 18 *Spanish Yearbook of International Law* (2013-2014) 1 – 34 [DOI: 10.1703/sybil.18.17]

[29] BOE No. 7, 8 January 1977.

saying literally that "(…), the regime of navigation, entry into and stay in a port (…) shall comply with the provisions of Law 25/1964 of April 29 about nuclear power". This Law, born before UNCLOS, says in Article 74 that the Spanish authorities can inspect any nuclear-powered ship crossing Spanish territorial waters, something at odds with both UNCLOS and Article 37 of Law 14/2014, which indirectly recognize the Spanish Government's limitations to restrict navigation in the strait by saying, literally, that "navigation in the Strait of Gibraltar shall comply with Part III of UNCLOS".

The contradiction is that Law 25/1964 on nuclear power makes the passage of nuclear ships through Spain's jurisdictional waters contingent on the authorization of the coastal State (Spain in this case) without any distinctions as to the navigation regime. So it is established in Articles 70 and 74, where it says that "the national maritime authorities shall inspect nuclear ships passing through their jurisdictional waters and check their safety and operation measures before they are permitted to enter their ports or waters", which is contrary to the text of Articles 22, 23, 24, 38 and 39 of UNCLOS.

As we see it, the provisions of the 1964 regulations could be understood as repealed *de facto* by virtue of Article 96 of the Spanish Constitution. We must bear in mind that the Constitution holds that "once they are officially published in Spain, the validly agreed international treaties shall be part of the domestic legislation". This is why, by virtue of the chronological criterion of the Spanish legislation (*lex posterior derogat priori*), anything in an earlier law that is inconsistent with a more recent law must be considered as null and void. Therefore, in practice, the provisions of Law 25/1964 must be considered inapplicable.

We believe that it would have made more sense to make the most of this new Spanish law of 2014 to dispel any doubts about its implementation, which would have been possible by making reference to this fact in the single derogatory Provision of the Law that specifically recognizes the annulment of some important provisions, since this derogatory regulation, together with the rest of the final provisions, intends to meet the needs of harmonization with other laws, as in the cases of consumption, electronic contracts or warships. Hence the modification of, among others, the Law of Civil Prosecution 1/2000 of January 7 and the Adapted Text of the Law of the State Ports and Merchant Navy approved by Royal Legislative Decree 2/2011 of September 5.

VI. *Rights and obligations of States bordering straits*

Pursuant to UNCLOS, Spain and Morocco may designate sea lanes and prescribe TSS for navigation in straits where necessary to promote the safe passage of ships. Actually, as per Article 41.II, they may substitute other sea lanes or TSS for those that they previously designated or prescribed as long as they conform to generally accepted international regulations. Likewise, international law entitles them to adopt laws and regulations relating to *transit passage* through straits in respect of the safety of navigation and the regulation of maritime traffic, as well as of the

reduction and control of pollution and the prevention of fishing (Article 42 of UNCLOS).

Now, these rights recognized by the law and which Spain and Morocco can therefore enjoy, are neither unlimited nor unconditional. On the contrary, they are limited by and subject to international law. The main limitation is that the exercise of the said rights cannot involve denying or hampering the right to transit passage recognized by UNCLOS. Nor can the coastal States exercise their rights in a discriminatory or arbitrary way in respect of foreign ships. Besides, as per Article 41 of UNCLOS, before designating/replacing sea-lanes or prescribing/replacing TSS in the Strait, Spain and Morocco shall refer proposals to the competent international organization (the IMO in this case, as they are both Member States) with a view to their adoption.

Cooperation among States bordering the Strait of Gibraltar is necessary (even mandatory) and in consultation with the IMO, as established by UNCLOS, regarding "sea lanes or TSS within the waters or two or more coastal States". This situation concerns Spain and Morocco. Another obligation, the least burdensome and most obvious one, is that States bordering straits shall clearly indicate all sea lanes and TSS established by them in charts to which due publicity shall be given. All these obligations, in the case of Spain, are covered in Article 28 of the Law 14/2014, 24 July 2014.

Despite these restrictions, it is worth mentioning that the obligations imposed by the Convention on the coastal States are in keeping with the exercise of their rights in good faith (Article 300 of UNCLOS) within the waters of the Strait. This harmony would be possible through the designation of sea-lanes and the prescription of TSS (Article 41.I of UNCLOS) in cooperation with IMO, so as to promote the safe passage of ships and the protection of the marine environment (Articles 41.I and V of UNCLOS). In fact, the international law is not alien to the interests of the States in creating facilities in the sea, or to possible conflicts of interests therefrom. Therefore, we can conclude from Article 60 that the States can construct artificial islands and installations in their respective EEZ and continental shelves provided of safety zones not exceeding a distance of 500 meters around them[30]. In this regard, this statement seems to be also part of Article 31 of the Spanish Law 14/2014, 24 of July 2014, under the title "special rules for fixed artifacts and platforms", where it says that "the deployment of naval artifacts and platforms or fixed artificial structures in Spanish navigation zones shall be duly marked according to the indications issued by State ports".

Now, even if these rights may be covered by international law, we understand that the construction of any fixed structure in the Strait of Gibraltar should take place within the framework of bilateral cooperation between both countries. In this regard, cooperation in matters of environmental protection stands as an obligation

[30] Cf. Art. 60. VI of UNCLOS.

taken on by the Spanish Administration from the international and domestic viewpoints. For instance, bear in mind the many international treaties signed by Spain and, particularly, the Bilateral Cooperation Agreement between the Kingdom of Spain and the Kingdom of Morocco in environmental matters concluded in Madrid on November 20, 2000[31]. This is covered by item 3 of Article 34 of the Spanish Law 14/2014, 24 of July 2014.

VII. *Environmental safety and protection during navigation in the Strait: bilateral cooperation*

We agree with Professor Mary George when she says the Guarantee of Freedom of Navigation - Environmental Impact Statement is a proposal meant to address two conflicting rights: the users' right of unimpeded transit or ships and the straits states' right of marine pollution enforcement and sustainable development of the waterway[32]. Under the proposed statement, Part III, 1982 LOSC will continue to recognise the right of unimpeded transit passage for all ships and at the same time express clearly that state responsibility for enforcement and for reduction and control of marine pollution lies with the strait states and the user states. So far as marine pollution is concerned, either Part III should override Article 233 or Article 233 should be amended to reflect that it also applies to strait states and thus complements and supports Part III. By interpreting Part III in this way strait states will be empowered toenforce marine pollution regulations against user states.

There is a general obligation (addressed by Article 7 of the Declaration of Stockholm of 1972 and echoed by Article 196 of UNCLOS) that Spain and Morocco, as States bordering the Strait of Gibraltar, must fulfill by taking "all measures necessary to prevent, reduce and control pollution of the marine environment resulting from the use of technologies under their jurisdiction or control". Obviously, in most cases these measures cannot be taken unilaterally, but in the context of bilateral, regional and international cooperation.

Indeed, by virtue of Article 43 of UNCLOS, Spain and Morocco are duty-bound to cooperate with user States in the establishment and maintenance of the necessary navigational and safety aids and to prevent, reduce and control pollution from ships. This effort should include unilateral actions to reinforce cooperation and the ratification of international treaties on safety and prevention of marine pollution.

Concerning the prevention of pollution in the Strait, we think that it would be convenient to develop an integrated safety device that includes not only the regulation of navigation in the Strait but also technical issues (e.g., lighthouses). At any rate, any initiative should be developed through bilateral cooperation (between

---

[31] BOE No. 172, 17 July 2008.

[32] M. GEORGE, *Transit Passage and Pollution Control in Straits under the 1982 Law of the Sea Convention*, 33 *Ocean Development & International Law* 2002, at 189–205 [DOI:10.1080/00908320290054765]

Spain and Morocco) and multilateral cooperation among international organizations.

In this connection, we believe that the IMO would be the ideal (and necessary) framework to develop such cooperation, making the most of the experience and skills of their technicians and of its legitimacy among the international community. A proper benchmark would be, e.g., the Manila Pact of February 24, 1977 among Malaysia, Indonesia and Singapore about the Strait of Malacca. This cooperation would be a means not only to reach the aforesaid goals but also to effectively fulfill the obligation established in Article 44 of UNCLOS, which stipulates that the States "shall give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge".

It is important to remark in this regard that, even today, Spain and Morocco are parties to the basic international treaties on environmental protection and conservation, as well as to those promoting navigation safety. However, it is interesting that some international agreements and protocols have only been ratified by one of these coastal States, which causes a "legal irregularity" in the responsibilities that they have taken on. In general, Spain and Morocco are responsible for the protection of the right to transit passage in the strait and the protection and conservation of the marine environment, as laid down in international safety rules. In practice, this means that both States must assume a certain number of preventive obligations to ensure safety of navigation in the strait, taking into account the outcome of initiatives such as the possible construction of artificial islands or fixed installations and similar structures[33].

Finally, within the EU, the Euro-Mediterranean agreement with Morocco, of 2000, provides for cooperation in the areas including monitoring and preventing pollution of the sea. And in the EU-Morocco Action Plan implementing the advanced status of 2013, the promotion and protection of the marine environment are expected, including conservation of marine ecosystems and the increase of cooperation under the Barcelona Convention and its protocols[34].

VIII. *Conclusions*

There is no doubt that the Strait of Gibraltar has all the geographical, legal and functional characteristics of a strait used for international navigation under the transit passage regime. This regime was assumed by Spain and Morocco after UNCLOSE was ratified, and its implementation in the strait means, among other things, that the

---

[33] For an in-depth study about the Environmental safety and protection during navigation in the Mediterranean Sea see F. PELLEGRINO, *Quaderni dalla Rivista di diritto dei trasporti e degli scambi internazionali, Sviluppo sostenibile dei trasporti marittimi nel Mediterraneo* (edizioni Scientifiche Italiane, Napoli 2013).

[34] For an in-depth study of bilateral cooperation and the environmental safety in the Strait see M. A. ACOSTA SÁNCHEZ, *Hacia una cooperación Hispano-Marroquí en materia de medio ambiente: La aplicación de la estrategia marina europea en la ciudad de Melilla*, 101 *Revista de estudios regionales,* 2014, at 17-42.

designation of sea lanes and the prescription of a TSS in its water, as well as their substitution, must be made according to the specific procedure laid down in Article 41 of UNCLOS.

Spain and Morocco have an obligation to respect the right of ships and aircraft to passage through the strait without being hampered. Nevertheless, this obligation is compatible with the right of the States bordering the Strait to exercise in good faith their sovereignty over its waters (Article 300 of UNCLOS). Balance and compatibility between the interests of the international community and those of the coastal States are achieved through the designation of sea lanes and the prescription of TSS (Article 41.1 of UNCLOS) together with the competent international authority (in this case the IMO) in order to promote safety of passage and protect the marine environment (Articles 41.1 and 5 of UNCLOS).

Therefore, it is essential that the international community (represented in the IMO) and the States bordering the Strait of Gibraltar (Spain and Morocco) harmonize their purposes: the latter propose and the former decide, and then sea lanes are determined as agreed. As a result, an agreement among all the stakeholders involved is paramount, especially if we take into account that the vessels have an obligation to respect every officially established sea lanes and TSS. In this regard, there have been no practical difficulties in the Strait concerning the definition of sea lanes and the prescription of TSS. In fact, the design of TSS has been the object of various modifications, always starting from a joint proposal of the coastal States, including the one made in 2007 following the construction and coming into service of the Tanger-Med port or the modification in 2010 of the system of mandatory notifications, in place since 1997.

As to the regulation of navigation in the national laws of the coastal States, it is worth mentioning that there is hardly any specific reference. In the case of Spain, things are not very different. There is no Spanish law that specifically governs navigation in the Strait of Gibraltar. There is only a relatively recent legal provision that governs general maritime navigation in Spain: Law 14/2014 of July 24, which seems to overlook the existing contradiction between its own regime and the one established by UNCLOS (accepted by Spain). Indeed, the Spanish Law 14/2014, 24 of July 2014 holds that the navigation regime for nuclear-powered ships shall be ruled by Law 25/1964 of April 29, in which Article 74 empowers the Spanish authorities to inspect nuclear ships passing through its territorial waters. This clearly runs counter to the transit passage regime laid down by UNCLOS and recognized in Article 37 of the Law 14/2014.

Finally, it is interesting that Spain and Morocco have not ratified the same international agreements on matters of environmental protection applicable to the waters of the Strait. While the two countries have ratified the main international and regional conventions about navigation safety and environmental protection, we must not lose sight of the fact that there are still some conventions yet to be signed by both States.

ISSN 0012-348x