

1-1-2005

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## Recommended Citation

Hakapää, Kari (2005) "Foreign Ships in Vulnerable Waters: Coastal Jurisdiction over Vessel-Source Pollution with Special Reference to the Baltic Sea," *International Journal of Legal Information*: Vol. 33: Iss. 2, Article 9.

Available at: <http://scholarship.law.cornell.edu/ijli/vol33/iss2/9>

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## Foreign Ships in Vulnerable Waters: Coastal Jurisdiction over Vessel-Source Pollution with Special Reference to the Baltic Sea

KARI HAKAPÄÄ\*

### *Vessel-source pollution and short history of the Law of the Sea*

Protection and preservation of the marine environment is a topical issue around the Baltic Sea. Not least does it refer to vessel-source pollution. The Baltic Sea is a particularly vulnerable sea area with its narrow waters, often severe climatic conditions, and growing tanker traffic, especially to and from Russian ports at the far end of the Gulf of Finland. By way of example, oil transports in the Gulf of Finland tripled in 1995 to 2003, recently reaching to some 78 million tons a year.<sup>1</sup>

In the past, there have been several serious accidents resulting in oil release to the Baltic Sea. Moreover, ships frequently release oily waste – such as ballast or bilge waters – into the sea, thus adding to a cumulative degradation of the marine environment. Yet so far the Baltic Sea has avoided major disasters, such as the grounding of the *Amoco Cadiz* off the coast of Brittany in 1978. In that incident, more than 200,000 tons of oil gushed into the sea. More recently, there was the breaking apart of the *Prestige* off the Spanish coast in 2002. The biggest super tankers may not pass through the narrows of the Danish Straits, but ships having access to the Baltic Sea are certainly large enough to inflict serious environmental damage if they become involved in an accident.

In terms of jurisdiction, vessel-source pollution has the most international character of all the various sources of marine pollution. This is true except for vessel-source pollution, land and air-based pollution, pollution from seabed activities, deliberate dumping of waste from ships and a few other cases. Crossing the oceans, ships move from one maritime zone – and

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<sup>1</sup> See THE FINNISH ENVIRONMENT INSTITUTE (Syke), *Oil and Chemical spill response in Finland: Increased risk for oil accidents*, at <http://www.ymparisto.fi/download.asp?contentid=18074Ian=en>.

jurisdictional regime – to another. Effective control of vessel-source pollution necessarily assumes international cooperation, coordination and regulation. As such, it is part of the Law of the Sea constituting a traditional field of Public International Law.<sup>2</sup>

“Coastal jurisdiction” suggests one of the key elements in the Law of the Sea, directly applicable to vessel-source pollution. In general, it refers to three sets of jurisdiction: regulatory jurisdiction, enforcement jurisdiction and judicial jurisdiction. The present discussion will focus on the regulatory and enforcement powers states may exercise over foreign ships in order to protect their coastal waters from vessel-source pollution.

This may, first, take us some centuries back in the history of the Law of the Sea. In 1609, the Dutch scholar *Hugo Grotius* published his classic work, *MARE LIBERUM*, in which he propounded the freedom of the seas: oceans were not to be claimed by anyone but should be open to all nations. At the time, however, such a principle was far from well-adopted. It was challenged by the school of “closed seas” arguing that, like land territory, sea areas should be open to occupation. In fact, at the end of the 15th century the Pope issued a Papal bulletin awarding control of the oceans, then discovered by the Great Expeditions, to two states, Spain and Portugal.

Such claims, however, raised protests by other sea-going states, especially the Dutch and the British. For them, the principle of the freedom of the seas was the one to rule. As time passed, it also became the prevailing principle as applied to the “high seas,” where claims were not to be submitted to the jurisdiction of coastal states.

For quite some time, sea areas were divided into two jurisdictional zones. There was the narrow belt of territorial waters subject to coastal sovereignty, and, beyond territorial waters, there opened the high seas, which belonged to nobody. In the mid-twentieth century, new developments took place. First, the United States claimed rights over the natural resources of the continental shelf off its coast. Soon after, several Latin American states issued zonal claims over their coastal waters. Soon, such claims became typical of newly independent coastal states relieved from colonial rule and determined to secure their rights over natural resources (fish, oil, and gas) off

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<sup>2</sup> In general, see *e.g.* VESSEL-SOURCE POLLUTION AND COASTAL STATE JURISDICTION. THE WORK OF THE ILA COMMITTEE ON COASTAL STATE JURISDICTION RELATING TO MARINE POLLUTION (1991-2000) (Erik Franck, Ed. 2001); Erik Jaap Molenaar, COASTAL STATE JURISDICTION OVER VESSEL-SOURCE POLLUTION (1998); Kari Hakapää, MARINE POLLUTION IN INTERNATIONAL LAW. MATERIAL OBLIGATIONS AND JURISDICTION WITH SPECIAL REFERENCE TO THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA (1981).

their coasts. Some other states (like Iceland) that were heavily dependent on their fisheries, also followed suit.

The new developments were subject to discussion in the Law of the Sea Conferences convened by the United Nations in 1958 and 1960. In terms of zonal expansion, however, the results remained modest. The Conventions adopted in 1958 confirmed the continental shelf regime but otherwise refrained from extensive reform. The 1960 Conference failed to produce concrete results. In no time, however, pressures for a more drastic change grew, and a “new deal” of oceans was effected by the third UN Conference on the Law of the Sea when, in 1982, it adopted the presently prevailing UN Convention on the Law of the Sea.<sup>3</sup> The new Convention entered into force in 1994 and today has 148 Parties.

*The UN Convention on the Law of the Sea*

The 1982 Convention divides maritime areas into a number of jurisdictional zones: internal waters, territorial sea, contiguous zone, exclusive economic zone, continental shelf, high seas, and deep seabed. At the Conference, relevant discussions were often focused on jurisdictional issues, including vessel-source pollution.

Much of the argumentation took place between two major groups of states. “Coastal states” argued for more extensive powers to protect their coastal waters while “maritime states” attempted to protect their shipping interests. They also wished to retain optimum freedom of navigation for their ships. This also prompted the interests of the big military powers, especially the United States and the then Soviet Union, to secure passage rights for their warships and submarines. While the coastal states argued for more extensive national powers to control navigation off their coasts, maritime states stressed the need for international regulation and preferred flag state control to deal with vessel-source pollution.

Maritime states also sought compromise on environmental concerns as well. While shipping interests often challenged environmental considerations, maritime states also had to pay attention to the effective protection of their coastlines. Yet, the coastal-maritime confrontation characterized the Conference discussions on vessel-source pollution. Coastal

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<sup>3</sup> See SopS (*Finnish Treaty Series*) 49-50/1996; 21 INTERNATIONAL LEGAL MATERIALS 1245 (1982). In 1994, the Convention was complemented by the Agreement relating to the Implementation of Part XI [on the deep seabed “Area”] of the United Nations Convention on the Law of the Sea of 10 December 1982. See SopS 49-50/1996; 33 INTERNATIONAL LEGAL MATERIALS 1309 (1994).

views were advanced by developing coastal states as well as by such developed states as Canada, Australia and New Zealand. Some others, like Finland, balanced between their “maritime” and “coastal” interests with an emphasis on coastal needs for environmental protection where international regulation proved ineffective.

In the 1982 Convention, the interests of maritime states were addressed in different types of passage rights. In the territorial sea, navigation is traditionally governed by the regime of “innocent passage.” If, in the words of the 1982 Convention, the passage of a foreign ship is “not prejudicial to the peace, good order or security of the coastal state” it shall not be hampered by the coastal state.<sup>4</sup> The ship has the right to pass through the coastal state’s territorial sea. When it comes to environmental threats, the right is refused only if the vessel causes “wilful and serious” pollution.<sup>5</sup> This suggests that only harmful discharges, but not ship-related deficiencies such as its poor condition or inadequate equipment or the dangerous nature of its cargo, can deprive the ship of its right of innocent passage.

As such, the Convention’s regime of “innocent passage” appears to favour the maritime approach. At the same time, even vessels in innocent passage are subject to coastal laws and regulations (where established in conformity with the Convention) which may relate, for instance, to the prevention, reduction and control of pollution.<sup>6</sup> The right of innocent passage may not extend to “rustbuckets” that are in notoriously bad shape and that would pose an immediate threat to the coastal environment.<sup>7</sup>

The logic of this regime is based on the maritime argument not to establish a “mosaic” of national regulations to hamper the passage of ships. In a system of national regulation, a foreign ship passing through the territorial seas of different countries might have to meet with coastal states’ requirements of equally different standards of ship construction, equipment, crews and so on. This would cause much hardship for international navigation. Instead, uniform international rules and standards should be established to assure the international shipping community that meeting with the international standards also satisfies coastal requirements.

The objective of international regulation was recognized by coastal states, as well. Their main concern related to provisions preventing coastal measures of protection, even where no effective international standards

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<sup>4</sup> Articles 19, 24.

<sup>5</sup> Art. 19 (2h).

<sup>6</sup> See Art. 21.

<sup>7</sup> See VESSEL-SOURCE POLLUTION AND COASTAL STATE JURISDICTION, *supra* n. 4, at

existed. This was an obvious shortcoming in the Convention, though numerous developments in international regulation have since alleviated some coastal states' concerns.

In the exclusive economic zone bordering the territorial sea, coastal competence to control vessel-source pollution is limited. The main rule is that of free passage and non-interference by coastal states. However, even in the exclusive economic zone, foreign ships may be stopped, forced to coastal port and legal proceedings may be instituted against them if a discharge violation has caused *major* pollution damage or threat of such damage to the coastal state.<sup>8</sup> This right was also the result of a compromise: freedom of passage as claimed by maritime states was to prevail, but in serious cases of pollution the coastal state, nevertheless, is entitled to intervene. This provides for more coastal powers than the case was before the 1982 Convention. Prior to 1982, what is now economic zone was high seas, effectively beyond coastal jurisdiction. Economic zones have also altered the zonal pattern of the Baltic Sea. Upon the recent establishment of a Finnish exclusive economic zone, all Baltic Sea states have an exclusive economic zone replacing areas previously designated as high seas.<sup>9</sup>

#### *Special and regional arrangements*

The 1982 Convention provides for a general jurisdictional framework for pollution protection in the marine environment. It is, however, by no means the only Convention to provide for the prevention and protection of the marine environment. In fact, the Convention, itself, obliges states to formulate and elaborate "international rules, standards and recommended practices and procedures" for the protection and preservation of the marine environment.<sup>10</sup> All such measures shall, however, remain consistent with the Law of the Sea Convention.

For vessel-source pollution, the international organization in focus is the International Maritime Organization (IMO), having its headquarters in London. Under IMO's auspices, a good number of conventions have been established and other measures taken to prevent or reduce vessel-source pollution, including regulations on prohibited discharges, ship construction and equipment, training of crews and so on. For example, IMO recently adopted accelerated schedules for the phase-out of single-hull tankers starting

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<sup>8</sup> See Art. 220.

<sup>9</sup> Laki Suomen, Talousvyöhykkeestä (Law on the Finnish Economic Zone), SopS (Finnish Treaty Series) 1058/2004.

<sup>10</sup> Art. 197.

in 2005, so that in the future all tankers should have double-hull construction to avert oil release in case of shipping accidents.<sup>11</sup>

Another recent development includes instalment of radio transponders in ships, automatically sending information of the ship and its passage to coastal receivers. The arrangement enables the coastal state to follow in real time vessel traffic off its coastline, thus to be better prepared to take necessary action for the prevention of environmental damage. This new arrangement will take effect in a time schedule adopted under one of the major conventions in the field, the so-called SOLAS (Safety of Life at Sea) Convention.<sup>12</sup> Other types of notification arrangements are also in operation, such as the one in the Gulf of Finland.

Such measures of environmental protection are accompanied by many others. Today, there is in operation a whole network of international conventions aimed at the protection of the marine environment against pollution from vessels. While hardly perfect, this body of regulation is extensive in scope and provides for various measures of protection, whether in terms of discharge standards, technical requirements, cooperation in damage prevention or responsibility and liability for damage inflicted.

The core of the issue, perhaps, is not any more in the creation of new stronger rules but rather in the effective implementation of the present ones. Here, one is faced with what is known the *flag-of-convenience* issue. A number of states not only offer ships in their registries financial benefits in terms of lower taxes and shipping fees, but may also fail to exercise adequate control over the vessels flying their flags as regards safety of navigation and environmentally sound operation. Much would be gained if all shipping states both joined the existing Conventions and also effectively implemented them in the exercise of their governmental powers over vessels flying their flags.<sup>13</sup>

It is well understood that vessel-source pollution requires both global and regional regulation. Geographically narrow sea areas like the Baltic Sea pose particular environmental dangers and require special measures of protection. For this purpose, different sets of regimes have been elaborated. One relates to the 1973/1978 MARPOL arrangement (Convention/ Protocol)

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<sup>11</sup> See MARINE ENVIRONMENT PROTECTION COMMITTEE (MEPC) 50th SESSION: 1 AND 4 DECEMBER 2003, *IMO meeting adopts accelerated single-hull tanker phase-out, new regulation on carriage of heavy fuel oil*, at [http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=109&doc\\_id=3155](http://www.imo.org/Newsroom/mainframe.asp?topic_id=109&doc_id=3155).

<sup>12</sup> Regulation 19.2.5, Chapter V of the Annex to the Convention, IMO Doc. MSC 73/21/Add.2 (2001).

<sup>13</sup> In general, see R. R. Churchill & A. V. Lowe: *THE LAW OF THE SEA* 257-263 (1999).

designating a number of sea areas for special protection.<sup>14</sup> For instance, the Baltic Sea is identified as an area in need of particularly strict rules and standards on pollution by oil and noxious liquid chemicals or disposal of garbage. With some variation, similar rules apply to the Mediterranean, the Black Sea, the Red Sea, the Antarctic waters and others.

The MARPOL regime, however, did not expand the coastal states' enforcement powers, but in this regard the regime operates within the jurisdictional framework of the 1982 Law of the Sea Convention. The Law of the Sea Convention also includes provisions on the establishment of "special areas" within the exclusive economic zones where adoption of "additional" coastal laws and regulations, nevertheless, is limited in scope and subject to the approval of the "competent international organization", meaning, in practice, the IMO.<sup>15</sup>

In a number of sea areas, regional conventions have been elaborated for the protection and preservation of the marine environment. The pioneer document was the Convention on the Protection of the Marine Environment of the Baltic Sea Area, adopted in 1974.<sup>16</sup> Its major achievement was to be the first regional convention to cover all the different sources of pollution within a specific sea area. A new version of the Convention was adopted in 1992.<sup>17</sup> In jurisdictional terms, however, the regional conventions, as well, have to adapt to the regulatory framework of the 1982 Law of the Sea Convention: the Parties to the regional Conventions cannot apply to ships of non-Parties protection measures stricter than what is allowed by the 1982 Convention. Accordingly, the passage rights as provided for in the 1982 Convention also apply to the regional seas.

A more recent arrangement of special protection deals with "Particularly Sensitive Sea Areas" (PSSAs) provided for by resolutions adopted by the IMO. On the basis of their environmental vulnerability, such areas are established by the IMO, which also specifies the protective measures to be applied. The measures may include, for instance, routing arrangements for navigation, strict discharge rules or equipment requirements for ships or improved cooperation in terms of information and assistance services relating to navigation in the area.<sup>18</sup>

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<sup>14</sup> SopS 51/1983; 17 INTERNATIONAL LEGAL MATERIALS 546 (1978) (amendments).

<sup>15</sup> See Art. 211 (6), Art. 220 (8).

<sup>16</sup> See Sops 11-12/1980; 13 INTERNATIONAL LEGAL MATERIALS 585 (1974).

<sup>17</sup> See SopS 2/2000 (amendments).

<sup>18</sup> See *Special Areas and Particularly Sensitive Sea Areas*, at [http://www.imo.org/Environment/mainframe.asp?topic\\_id=760](http://www.imo.org/Environment/mainframe.asp?topic_id=760); J. Ashley Roach, *Particularly Sensitive Sea Areas: Current Developments*, in THE STOCKHOLM



So far, seven PSSAs have been established, including the Great Barrier Reef in Australia, an archipelagic area in Cuba, an island area in Colombia, the Florida Keys area in the United States, the Wadden Sea in the North Sea, a national reserve area in Peru, and certain Western European Waters. IMO's Marine Environment Committee has also approved "in principle" some other areas for the purpose, including the Baltic Sea. However, while other coastal or maritime states agreed to apply for a PSSA status for the Baltic Sea, the Russian Federation refrained, with the result that the Baltic Sea PSSA excludes "Russian waters."

Protection of the Baltic Sea environment is also advanced by a regional commission - HELCOM - which is the body to coordinate cooperation under the Baltic Sea Marine Environment Protection Convention. The Commission has adopted numerous recommendations for the implementation of the Convention's objectives, including a recent one on the "Safety of Winter Navigation in the Baltic Sea Area."<sup>19</sup> Even in the special areas and regional seas, coastal jurisdiction has its limits and has, in particular, to conform to the relevant provisions of the 1982 Law of the Sea Convention.

In the 1982 Convention, however, there is one instance where coastal states have particularly broad powers to control vessel-source pollution. Article 234 on "Ice-covered areas" authorizes the coastal states of areas within the limits of their economic zones and "covered by ice for most of the year" to establish and enforce national regulations on vessel-source pollution stricter than the international rules and standards. Among others, this applies to legislation on the construction and equipment of ships solely to be governed by international rules and standards in the relevant zones in other sea areas. While the wording of the arrangement calls for interpretation regarding its geographical scope, its negotiating history shows that it was specifically drafted for Arctic waters, not least in view of Canadian concerns over environmental threats posed by international navigation off its coasts.

### *New challenges*

In the full 20 years since the adoption of the UN Law of the Sea Convention, there has been growing awareness of the threats to the marine environment and the need for its effective protection. Concern has also been expressed that the regime established in the 1982 Convention for the

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DECLARATION AND LAW OF THE MARINE ENVIRONMENT 311 (Myron H. Nordquist, John Norton Moore & Said Mahmoudi eds., 2003).

<sup>19</sup> HELCOM Recommendation 25/7 (2 March 2004), available at <http://www.helcom.fi/recommendations/Rec25-7.pdf>.

prevention, reduction and control of vessel-source pollution may not any more meet with the requirements of effective environmental protection.

This has, in particular, related to coastal jurisdiction. After, the *Prestige* accident some countries - France, Spain, Portugal - have taken to national enforcement measures in their exclusive economic zones, apparently exceeding the coastal rights of interference with foreign ships under the Law of the Sea Convention.<sup>20</sup> The 1982 Convention does not allow preventive interference in the exclusive economic zone, but presumes the occurrence of an illegal discharge as a prerequisite of coastal intervention. The main rule of navigation in the economic zone is that of free passage.

After the *Prestige*, the European Commission (the Commission of the European Union) suggested to the European Council that EU take “the initiative in proposing the revision of the United Nations Convention of the Law of the Sea to afford better protection for coastal states, including within the 200-mile exclusive economic area, against risks associated with the passage of ships constituting a danger to the environment and which do not comply with safety standards.”<sup>21</sup> The European Council, however, did not accept the suggestion, but rather called for “exploring possibilities within the framework of the UN Convention on the Law of the Sea to afford better protection for coastal states.”<sup>22</sup>

The position of the European Council reflects the sensitive nature of amending the Law of the Sea Convention. The Convention provides a “package deal” where everything is balanced on everything else: suggestions to amend some of its provisions may readily open Pandora’s box and lead to further suggestions for amendments, thereby shaking the whole of the Convention. As a result, it is perhaps best not to touch upon the Convention’s provisions but rather to promote its objectives by effective application and flexible interpretation of the Convention in its present form.<sup>23</sup> Time will show how the states’ parties will react to future challenges to the Convention regime; according to its provisions, “normal” amendment procedures may be

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<sup>20</sup> See *Oceans and the law of the sea*. Report of the Secretary-General. UN GA A/58/65 (3 March 2003), para. 57.

<sup>21</sup> 52003DC0105 *Communication from the Commission*. Report to the European Council on action to deal with the effects of the Prestige disaster/\* COM/2003/0105 final \*/.

<sup>22</sup> Brussels European Council 20 and 21 March 2003, *Presidency Conclusions*, Council of the European Union, Brussels, 5 May 2003.

<sup>23</sup> On this, see Kari Hakapää, *Jurisdictional Developments and the Law of the Sea Convention: Some Observations on Vessel-Source Pollution*, in THE STOCKHOLM DECLARATION AND LAW OF THE MARINE ENVIRONMENT, *supra* n.17, at 277.

pursued after the expiry of a period of 10 years from the entry into force of the Convention.<sup>24</sup> That date took effect on 16 November 2004.

*The “Port State Alternative”*

Discussions on vessel-source pollution often focus on “coastal state jurisdiction.” For obvious reasons, there has been a tendency among coastal states to seek more control over shipping activities off their coasts. However, extension of coastal interference may also raise practical questions of maritime safety. Due to weather conditions, stopping and arresting ships out in the sea may pose risks to all involved. In this regard, a better alternative is “port state jurisdiction.” When a foreign ship enters a coastal port it submits herself to the full authority of the coastal state. There is but little limitation to the port state’s powers to exercise jurisdiction over the ship. At the same time, necessary enforcement measures are taken safely, without concern for climatic conditions or the swell of the sea.

Port state jurisdiction is recognized by the UN Law of the Sea Convention. Even if a discharge violation had taken place on the other side of the world, a state whose port the ship thereafter visits may institute legal proceedings in its courts against the ship. Those who commit discharge violations may be brought to justice by the first port state wishing to do so.<sup>25</sup> This was an important development in the elaboration of a more effective jurisdictional regime over vessel-source pollution. In practice, however, it still remains to be seen how prepared and willing port states actually will be to use the authority they are vested with in the 1982 Convention.

There have also been other developments in port state jurisdiction. Several regional arrangements, for instance in Europe, have been negotiated to recognize the port state’s right to inspect foreign vessels in order to verify whether they meet with international construction and equipment standards.<sup>26</sup> If not, the ship may be detained in port until necessary reparation is made. Within the European Union there is also regulation excluding from EU ports all single-hull tankers carrying heavy crude oil.<sup>27</sup> Only double-hull tankers are admitted to ports when carrying such cargo.

Obviously, this kind of prohibition is most efficient in controlling vessel-source pollution. If every port denied entry for sub-standard tankers,

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<sup>24</sup> See Art. 312.

<sup>25</sup> See Art. 218.

<sup>26</sup> See Molenaar, *supra* n. 4, at 121-129.

<sup>27</sup> Regulation (EC) No 1726/2003 of the European Parliament and of the Council of 22 July 2003 amending Regulation (EC) No 417/2002 on the accelerated phasing-in of double-hull or equivalent design requirements for single-hull oil tankers.

they would soon vanish from the seas, being of no use to their owners. The international community has not yet reached this point. There may also be different views on the standards to be required. In the Baltic Sea, for instance, the EU ban on single-hull tankers carrying heavy crude oil applies to all coastal or maritime states except one. As the Russian Federation is not an EU member, it may keep its ports open to ships banned by EU regulation from the other Baltic Sea ports. At the same time, the Russian Federation, too, has to heed international requirements as may be established in binding terms, for instance, under the auspices of the IMO.

Port state jurisdiction will hardly efface coastal jurisdiction. Presumably, both are needed and will also be invoked in the future. The trend in development, however, points to more comprehensive use of port state enforcement. It may offer the best potential for securing effective compliance with international environmental standards by the shipping community. At the same time, future developments will no doubt remain determined by various factors, not only environmental, but also political, economic, and geographic in nature.