

# CHALLENGES TO THE UNCLOS REGIME: NATIONAL LEGISLATION WHICH IS INCOMPATIBLE WITH INTERNATIONAL LAW

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## Abstract

The complex legal regime established in the 1982 UN Convention on the Law of the Sea (UNCLOS) was premised on a compromise between the interests of those coastal states that favoured expansion of jurisdiction, and those of maritime nations arguing for preservation of freedom of the seas in naval operations, shipping, marine scientific research and, in some cases, resource exploitation. The end result allowed for the geographical expansion of coastal state jurisdiction, but with limits imposed on the nature of the laws to be applied in the various zones.

With respect to shipping, the compromise is reflected in the provisions which protect the freedom of navigation for foreign flagged vessels in the EEZ and, to a lesser extent, in the territorial sea, centred on three main concerns: First, coastal state prescription of rules for pollution control in the EEZ are to be based on agreed international standards. Second, UNCLOS prohibits the application of regulations related to design, manning and equipment of vessels, other than international standards, even for vessels in innocent passage in the territorial sea. Third, some provisions are designed to prevent precipitous or unfair enforcement, through a graduated approach to investigation and arrest of vessels (coupled with obligations for release on payment of a security), and through protection of masters and crew from the imposition of non-monetary sanctions.

In recent years the compromise at the heart of the UNCLOS regime for shipping has been subjected to increasing challenges by coastal states which, often in response to short-term political pressures, have moved beyond the permissible scope of coastal state regulation under UNCLOS. Examples include legislative initiatives which exceed international standards in MARPOL, more intrusive pilotage schemes, species-based pollution standards and arrests and detentions of mariners. The recent introduction of the EU Directive On Ship Source Pollution, which can be seen as imposing rules beyond what is allowed under UNCLOS, is a significant example, involving an important regional bloc.

This paper examines the history and implications of the trend towards expansion of coastal state jurisdiction over navigation in the EEZ and territorial sea, with a particular focus on the EU Directive and the recent decision of the European Court of Justice, which rejected a challenge launched by a coalition of shipping interests. It is argued that the stability and long-term sustainability of the UNCLOS regime for shipping is at stake, in that an industry that is inherently global cannot operate effectively under a patchwork of regional and national legal regimes with varying standards.