

FREEDOM OF NAVIGATION. AN OUTDATED CONCEPT?

Background concepts to the lecture to be delivered by Dr. Agustín Blanco-Bazán at the IFLOS Summer Academy on 17 August 2007

Within the context of the lecture the concept of freedom of navigation will be addressed mainly in connection with that of flag State jurisdiction, namely as the right of ships to travel under the exclusive jurisdiction of the flag State without being interfered by action of any other State. The notion of *mare liberum* maintained its original *groetian* shape until the post World War II period. Then Grotius's approach to the freedom of the seas as a result of the notion of the sea as *res communis* not subject to territorial appropriation, began to be contested by claims to sovereign rights launched by coastal States over waters adjacent to their coast.

The progressive incorporation into customary and treaty law of the rights of coastal States in this regard necessarily led to interferences with the navigation of foreign ships in connection with issues such as the protection of the marine environment and the exploitation of natural resources.

A further limitation to freedom of navigation resulted out of the adoption of treaties regulating the right of States to inspect certificates and eventually board foreign ships voluntarily in their ports, in order to ensure that they comply with international regulations on safety of navigation, prevention of marine pollution, and conditions of work and welfare on board.

Even in the high seas flag State jurisdiction is no longer exclusive. In accordance with the 1982 United Nations Convention on the Law of the Sea (UNCLOS) States can take measures against foreign ships voluntarily in their ports in connection with violations of environmental treaties, or criminal acts, committed in the high seas. The alternative of intercepting vessels in the high seas to fight organized crime such as drug dealing or terrorism is also finding its way in international regulations.

In all these cases, the rights of coastal and port States to limit to freedom of navigation are themselves of a basically restrictive kind. They are only justified to prevent ship's activities detrimental to their rights as sovereign States or as members of the international community. Accordingly, the principle of freedom of navigation remains a residual fundamental freedom which can only be limited by regulations when the need to do so is demonstrated.

In recent years, the concept of freedom of navigation has been further challenged not only in the wake of catastrophic pollution incidents, but also bearing in mind unreported illegal fishing and the persistence of appalling conditions of work and welfare on board. There is a proliferation of specially protected areas which involve restrictions to navigation in vast sea zones.

While proposals are continuously developed to ensure that flag States abide to international labour standards and ever stricter international rules for the construction and operation of both fishing and non fishing vessels, questions are again raised regarding the degree to which existing law is sufficient to prevent profit making at the expenses of environmentally sound policies and the welfare of the seafarers. As a result, the regulation of subject matters closely related to the operation of flag State jurisdiction, such as conditions for registration, ownership and operation of ships, are called into question on account of what many consider as lack of effectiveness to ensure that responsibilities of shipowners and ship-operators are properly enforced.

In the wake of the *Prestige* incident, the International Maritime Organization (IMO), the specialized agency of the United Nations exclusively devoted to shipping, and other international organizations extensively deliberated on issues related to the enforcement of flag State jurisdiction. In particular, they held a meeting on the issue in 2005, the conclusions and recommendations of which were forwarded to the General Assembly of the United Nations. For ease of reference, the report of the meeting is attached to this summary. Although the report does not address the principle of freedom of navigation as such, it summarizes the work undertaken by the participating organizations in imposing obligations for flag States to abide to internationally set rules and standards, and the mechanisms available to coastal and port States to prevent and correct deficiencies preventing full implementation of such obligations.

Rather than becoming *outdated*, the principle of freedom of navigation has been *updated* by a copious set of international regulations which profusely regulate it, in order to ensure that freedom to navigate does not result in damage to rights and interests shaped as a result of the *post Grotius* evolution of international law and the law of the sea. Nevertheless, freedom of navigation is at the core of the principle according to which international trade by sea can only take place if the applicable law is *primarily* enforced by one State, irrespective of the sea zones where a ship may be. Necessarily, flag State jurisdiction remains the only option in this regard. Coastal and port State jurisdictions remain essentially corrective methods for cases of non-compliance by flag States.

The relentless progress towards internationalization of shipping law developed since the post war years has led to a legal order where flag States primarily apply international, rather than domestic legislation. Accordingly, freedom of navigation does not imply anymore freedom to navigate in accordance with the domestic law of the flag State. It rather implies travelling and trading within the framework of international safety, antipollution and labour and welfare rules. It also implies a careful balance between flag State jurisdiction on one side, and coastal State jurisdiction and port State control on the other. In this regard, the trend to increase coastal and port State jurisdiction at the expenses of flag State jurisdiction must have a limit. Otherwise it would destroy the balance required to ensure an equitable interplay among States in charge of monitoring compliance with international shipping law. It is within the legal framework established by a balanced interaction of flag, coastal and port State jurisdiction that international navigation, although heavily regulated, can still be conceived as an expression of freedom to travel and trade.
