The Establishment of Mandatory Sealanes by Unilateral Action

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COMMENTS

The Establishment of Mandatory Sealanes by Unilateral Action

Introduction

On the morning of March 18, 1967, the S.S. Torrey Canyon, a tanker of 120,890 deadweight tons, ran aground off the southwest coast of England. She ultimately released 118,000 tons of crude oil into the English Channel. In January 1971, the 17,000 ton tanker, Arizona Standard, proceeding into San Francisco Bay, collided with her sister ship, Oregon Standard, which was outbound with a cargo of bunker oil. This collision resulted in the release of 840,000 gallons of oil into the bay and along the Pacific coast. The possibility of more catastrophic oil spills is very real. Aside from any oil pollution which may occur as a result of such incidents, there is always the overriding consideration of the immediate loss of life and property. Preventive measures must be taken now to reduce the risk of these incidents to the lowest possible level. The immediate consequences of such incidents involving the release of petroleum into the sea are well known. The long range injury caused to our environment is yet to be determined. One of the methods of pollution control which can reduce the possibility of these incidents is the use of mandatory sealanes.

Immediately after the Torrey Canyon disaster, the British government submitted a note to the Third Extraordinary Session of the Inter-Governmental Maritime Consultative Organization (hereinafter cited as IMCO) Council. The note suggested, inter alia, that preventive measures of a technical nature, such as mandatory sealanes, be explored to reduce the risk of future incidents. The use of mandatory sealanes has also been recom-

1. N.Y. Times, Mar. 28, 1967, at 1, col. 5.
mended by other groups. One panel recommended that "[f]urther study be made on designation of sealanes for control of tanker routing and that steps be taken to develop and implement a U.S. plan for avoidance of hazardous or unique areas by tankers carrying oil and other hazardous substances. Every effort should be made to make use of designated sealanes mandatory rather than at the option of the tanker Captain."\(^5\) The purpose of this paper is to present a general analysis in international law of the concept of mandatory sealanes. The major portion of the paper is concerned with the unilateral approach to the establishment of mandatory sealanes.

*The Basic Scheme*

In this paper the term "sealane" is used in the same way as the term is employed by IMCO, to connote a traffic separation scheme in which the main purpose is to "produce an orderly flow of traffic for the purpose of reducing the risk of collisions and/or strandings mainly in areas of converging routes or high traffic density."\(^6\) The basic element in the sealane concept is that of establishing a buffer zone between opposite flows of traffic. This can be done by establishing a buoy system or by using natural obstacles to regulate the flow of traffic.

Such schemes require rules to ensure a smooth flow of traffic. Adherence to these rules by all vessels is, of course, of utmost importance. It has been argued that even if as little as ten percent of the vessels operating in a sealane fail to comply with the rules, the sealane concept is incapable of meeting its objective.\(^7\) The validity of this contention seems quite reasonable when the situation at sea is compared with the havoc caused on highways by the small minority of automobile drivers who fail to abide by the rules.

In order to ensure that the rules of the sealanes are obeyed, some type of enforcement procedure must be followed. There are three approaches which can be taken in implementing a sealane. First, a plan could be developed such that the lanes are recommended to all vessels; but there would be no legal requirement that lanes be used, or if used, the rules obeyed. Thus, no legal enforcement would be possible. There would, however, be other procedures whereby strong pressures could be placed on vessels failing to adhere to the rules. This could be done by the shipping organizations. A second approach could be made by having recommended lanes, but com-

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pulsory obedience to the rules when the lanes are used. Since the areas most in need of sealanes are straits and channels, this plan would be similar to the third approach, the concept of mandatory sealanes, and basically would present the same problems of enforcement. Vessels using routes where mandatory sealanes are established would be required to use the sealanes and adhere to their rules. Vessels such as fishing boats and pleasure craft would also be required to adhere to certain rules and procedures while crossing a sealane.

If either of these last two schemes is developed, either unilaterally or by multilateral agreement, there are grave enforcement problems which must be solved. Although a large majority of the work involved with the establishment of sealanes is now being performed through international organizations, particularly IMCO, there are several real advantages to the unilateral approach.

Establishment of mandatory sealanes by unilateral action could be performed with greater rapidity than the conventional approach, since there would be no requirement to obtain the agreement of other states. Such a unilateral scheme would allow a coastal state to seize the initiative in developing a preferable system which could serve as an example for other states. In addition, the objectives and mechanics of the scheme would not be subject to dilution or compromise through the bargaining process of international conventions.

Admittedly, there are disadvantages to a unilaterally established system. Basically, sealanes are an international problem. Treating such an international problem on a unilateral basis could increase world conflict, provide for a lack of uniformity, and would be difficult to enforce. There is also the chance that other states may reciprocate with even more stringent laws for foreign vessels in their waters and ports. Nevertheless, the need to prevent marine oil pollution exists now. It is not enough merely to mitigate or compensate for loss as provided for in the Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties and the Convention on Civil Liability for Oil Pollution Damage. The only international agreement dealing broadly with the preventive aspects of oil pollution of the oceans, the 1954 International Convention for the Prevention of Pollution of the Sea by Oil, does not confer any authority on coastal states to assert

jurisdiction for pollution control purposes beyond the 12-mile contiguous zone. This convention leaves enforcement of its prohibitions to the flag state of the offending vessel, rather than the interested coastal state.

Must a coastal state allow the risk of even greater catastrophies to continue while awaiting the results of possibly years of bargaining at an international convention? Instead, should not a state be allowed to take action to protect its special interests as long as the action is reasonably compatible with the rights of other states and is both necessary and reasonable?

The unilateral approach will be investigated by analyzing the authority and enforcement problems in the coastal states' internal waters11 and territorial waters,12 and finally on the high seas.13 The type of vessel considered in this paper is limited to privately owned commercial vessels or government vessels used as commercial vessels.

The History of Sealanes

The basic concept of such sealanes is one which has been used in the past.14 In 1847, Lt. Matthew Fontaine Maury of the U.S. Navy proposed a ship routing system which was based on seasonal weather patterns. He sought to reduce travel time between major ports, rather than to provide for safety at sea. Later, in 1855, after the advent of the steam-powered vessels and the disastrous collision between the Artic and the Vesta, Maury published a work entitled Lanes for Steamers Crossing the Atlantic. The purpose of this traffic separation scheme was to reduce the risk of collision. According to the plan the east-bound and west-bound lane of the Atlantic were separated by a distance of 200 miles. The system was mandatory for U.S. Navy vessels.

In 1911, a traffic separation scheme was developed on the Great Lakes by the Lake Carriers' Association, and today the success of the scheme is a generally accepted fact, borne out by the significant reduction in the rate of

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11. Internal waters include ports, harbors, bay and other enclosed areas of the sea along the coast which are on the landward side of the baseline of the territorial sea. See Article 5(1) of the Convention on the Territorial Sea and the Contiguous Zone, done at Geneva on April 29, 1958, [1964], 2 U.S.T. 1607, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [hereinafter cited as Territorial Sea Convention].

12. "The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea." Territorial Sea Convention, Art. 1(1).


14. This brief history of sealanes was taken exclusively from A. Manning, supra note 7.
collision. Another ship routing scheme which has been used was developed during World War II. This system is the Northern European and Mediterranean Routing Instructions (NEMEDRI) which identifies mine swept channels. This system is still in use, and proposals have been developed to widen the NEMEDRI routes and transform them into traffic separation schemes.

In the Gulf of Mexico a shipping safety fairway system has been developed. The main purpose of these fairways is to maintain a safe lane for shipping through the oil rigs which have been placed in growing numbers on the continental shelf. In 1966 the United States Coast Guard realized the potential danger in confining shipping to these fairways and proposed the adoption of traffic separation schemes. However, since the traffic separation schemes need approximately three times the sea area required for the fairway system, there has been strong resistance from the powerful Gulf oil interests.

As of March 1971 the Maritime Safety Committee of IMCO has adopted 65 traffic separation schemes throughout the world and is actively considering additional schemes. These schemes are only recommended routes and are not mandatory; or even if the waters are used, there are no mandatory rules. The member governments of the organization have been invited to advise their vessels to use the routes and to obey the rules. In October 1971, however, IMCO recommended “that Member Governments of the Organization should make it an offense for ships of their flag which use any traffic separation scheme adopted by the Organization to proceed against the established direction of traffic flow.” At the same time in another resolution, IMCO recommended the adoption of a new regulation to the International Convention for the Safety of Life at Sea, 1960. This regulation, inter alia, recommends the use of sealanes to all ships concerned, directs the contracting governments to use their influence to secure the appropriate use of adopted routes and requires ships which use sealanes to proceed in the specified direction of traffic flow. It appears that this regulation is a significant step in the implementation of the second type of scheme mentioned above, i.e., recommended sealanes and mandatory rules. The adoption and enforcement of this regulation would alleviate to some extent the need for unilateral action.

15. IMCO, supra note 6, at 4.
Mandatory Sealanes

Mandatory Sealanes In Internal Waters

The fact that a state has the same competence over its internal waters as it has over the land areas within its boundaries has long been established. Due to the physical proximity of internal waters, their use has a direct effect on the state. Thus, comprehensive control of its own internal waters is generally thought to be indispensable for the protection and promotion of the reasonable interests of any state.\(^8\) These interests of the state may be protected by the regulation of all vessels entering its internal waters. The state claims sole jurisdiction to regulate all activities in these waters. Such activities include movement and anchorage of vessels, sanitary and safety conditions, fees and payments for services, and assignment of berths. These regulations are so common that arguments by foreign states against a coastal state's authority to regulate are virtually nonexistent.\(^9\)

Enforcement in Internal Waters

Since the coastal state's authority over foreign vessels in internal waters is fully comprehensive, specific enforcement methods would best be applied with the concepts of reciprocity and the comity of nations in mind. One possible method of enforcement is to subject the owner or captain of a guilty ship to a criminal charge involving a fine—just like a driver running a red light. There is another method which has been suggested that invites analysis. This is to deny entry to the ports of the coastal state to those vessels of a foreign state not complying with the sealane regulations. Such refusal to allow entry could be applied to all vessels of a state whose vessels have generally failed to comply, or refusal could be on an individual basis.

In addition to the political and economic problems involved in this "closed port" concept, there are at least three legal grounds on which a foreign state may argue in support of its right of access to the coastal state's ports. These legal grounds are based upon both customary and conventional international law.

1. Customary International Law

First, there is support in customary international law for the assertion that in time of peace, foreign merchant vessels have a right of free access to the

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18. McDougal & Burke, The Public Order of the Oceans 64 (1965) [hereinafter cited as McDougal].
19. Id. at 96. In the United States the authority to establish mandatory sealanes has recently been clarified by the enactment of the Ports and Waterways Safety Act of 1972. Basically, the Act gives the Secretary of the department in which the Coast Guard operates the authority to establish, operate, and maintain vessel traffic systems which include vessel traffic routing schemes. P.L. No. 92-340 (July 1972).
ports of coastal states. The rationale behind this argument is the promotion of the smooth operation of the international transportation system and full utilization of the oceans. Nevertheless, the vast majority of writers still believe that the coastal state has full authority to deny entry to foreign vessels arbitrarily. An American court reflected this belief in *Khedivial Line, S.A.E. v. Seafarers' International Union*, where it was argued that a United Arab Republic vessel had an unrestricted right of access to an American port. The Court of Appeals for the Second Circuit noted that the plaintiff had presented no precedents or arguments to show that the law of nations records such a right.

The second argument against the concept of a closed port is based on the right of innocent passage. This argument may take the approach that since the right of innocent passage through a coastal state's territorial waters is generally based on the free flow of commerce, it would be defeating the purpose of this right to allow a vessel to sail through the territorial waters only to be denied access when internal waters are reached. This argument, however, ignores the comprehensive authority of the coastal state over its internal waters. Although there is little doubt concerning the right of innocent passage through the territorial waters of a coastal state, the validity of extending the right into internal waters is incompatible with the comprehensive authority which the coastal state exerts over the entry of persons and vessels into its territory.

2. *Conventional International Law*

There is also a basis in conventional international law for the second argument. Article 5(2) of the Territorial Sea Convention acknowledges a right to innocent passage in certain internal waters. This right, however, applies only to an exceptional situation. It is strictly limited to those unique cases where the territorial sea or high seas have been designated internal waters due to the straight baseline method of determining the baseline from

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22. 278 F.2d 49 (2d Cir. 1960).
23. *Id.* at 53.
24. Generally, the right of innocent passage is the right of a foreign vessel to navigate through the territorial sea of another state for the purpose of traversing that sea. This right has been codified in some detail in section III of the Territorial Sea Convention.
25. "Where the establishment of a straight baseline in accordance with article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as provided in articles 14 to 23, shall exist in those waters." Territorial Sea Convention, Art. 5(2).
which the breadth of the territorial sea is measured. This method is described in Article 4 of the Territorial Sea Convention and is generally applied only to those states with ragged coastlines and numerous islands immediately off-shore, e.g., Norway. Thus, while the waters are now internal waters, historically the right of innocent passage (if formerly territorial waters) or freedom of the seas (if formerly high seas) already existed in those areas. This is not the case in internal waters generally, or ports in particular.

The third counter-argument a state may have is under conventional international law. A state may have a specific treaty which permits it to have access to the ports and territories of the coastal state. These treaties are usually referred to as treaties of friendship, commerce and navigation. In the context of open ports, the main purpose of this type of treaty is to ensure that the foreign state will not be discriminated against with respect to national treatment or most-favored-nation treatment. The foreign country could argue that a “closed port” system is contrary to the treaty between it and the coastal state. Since the denial of entry, however, would be based on the violation of regulations which are applicable to all states and would be equally enforced, such action could not be considered discriminatory. Therefore, it would be unlikely that denial of access would be violative of the coastal state’s current treaty obligations of this specific type.

The preceding arguments of the foreign state, although not without merit, are not persuasive. The coastal state has the authority to prescribe, regulate, and enforce mandatory sealanes in its internal waters without violating international law. The right to enforce the proper use of the sealanes would include the right to deny access. The real issue is how best to enforce the regulations to assure compliance and at the same time instill a cooperative attitude from other states. Certainly, the denial of access would be a most severe sanction to be applied only after other enforcement methods have failed, and with the knowledge that possible undesirable actions could be taken by the foreign state under the guise of reciprocity.

27. Basically, a most-favored nation clause in a treaty would grant to contracting parties all favors which the other contracting party has granted in the past, or will grant in the future, to any third state. 1 L. Oppenheim, International Law, A Treatise 877 (7th ed. H. Lauterpacht 1948). E.g., Treaty with Japan on Friendship, Commerce and Navigation, April 2, 1953, [1953], 2 U.S.T. 2065, T.I.A.S. No. 2863.
28. This subject has also been treated by multilateral convention. Convention on the International Régime of Maritime Ports, signed at Geneva on December 9, 1923, 58 L.N.T.S. 285.
29. For an example of a situation where this possibility was recognized, see Program of Policy Studies in Science and Technology of George Washington University, Legal, Economic, and Technical Aspects of Liability and Financial Responsibility as Related to Oil Pollution 5-2 (December 1970) (unpublished study in Coast Guard Headquarters) [hereinafter cited as Program of Policy Studies].
Mandatory Sealanes in Territorial Seas

There are generally two theories concerning the authority which the coastal state exerts over the marginal maritime belt outside the internal waters of the state. The majority view reasons that this belt comprises part of the territory of the coastal state, thereby giving the state complete sovereignty over these "territorial seas." The minority view suggests that the powers of the coastal state in these seas fall short of complete sovereignty, the state having certain powers of control, jurisdiction, police, and the like in the interests of the safety of its coast.30

Even in the majority view, however, there is one important distinction between the coastal state's sovereignty over its internal waters and its territorial waters. This difference is the right of innocent passage.31 The doctrine of innocent passage is the primary objection which may prevent the coastal state from establishing mandatory sealanes in its territorial waters.

Presuming that a coastal state may not arbitrarily deny a foreign vessel the right of innocent passage in its territorial waters, to what extent may passage be regulated? The doctrine of the right of innocent passage is codified in section III of the Territorial Sea Convention and will be the focal point of this analysis.

A. Regulation of Vessels in Innocent Passage

At the 1958 United Nations Conference on the Law of the Sea, Article 17 of the Territorial Sea Convention was adopted as proposed by the International Law Commission (ILC) in Article 18 of its draft of a model convention.82 The Article provided:

Foreign ships exercising the right of passage shall comply with the laws and regulations enacted by the coastal State in conformity with the present rules and other rules of international law and, in particular, with the laws and regulations relating to transport and navigation.

During the meetings at the Conference there were numerous proposals to change the wording of the ILC Article 18.83 After a great deal of discus-

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30. 1 L. OPPENHEIM, INTERNATIONAL LAW, A TREATISE 487 (8th ed. H. Lauterpacht 1955) [hereinafter cited as OPPENHEIM].
31. McDougal 185.
32. Int'l Comm'n, Report, 11 U.N. GAOR Supp. 9, at 20, U.N. Doc. A/3159 (1956) [hereinafter cited as Report]. The United States proposed omitting the word "enacted" since this connoted formal legislative action. The position of the United States was that all laws and regulations of the coastal state which meet the other stated requirements should be given equal recognition. Id. at 221.
sion, all of these proposals were rejected. Both a Mexican and a Greek proposal were accepted provisionally, but failed to be accepted together in a final form. The Committee then returned to the basic ILC form and accepted it by a vote of 59 to 0 with three abstentions.

Although the commentaries to the ILC draft were not incorporated into the Convention on the Territorial Sea, they can be used to construe the meaning of a particular article of the Convention. Such use of the commentaries is particularly meaningful where, as in Article 17, the ILC draft was accepted as proposed. The commentary relating to this article states that international law recognizes the right of a coastal state to enact, in the general interest of navigation, special regulations applicable to ships exercising the right of passage. As examples of those interests subject to protection by regulation, the Commission noted, inter alia, the safety of traffic and the protection of the waters of the coastal state against pollution of any kind caused by ships. The commentary to ILC Article 18 also mentioned that the use of the route prescribed for international navigation was proposed for the list of examples of those interests subject to regulation. This routing clause, however, was not listed in the examples to ILC Article 18 since the enumeration was not meant to be exhaustive. Thus, Article 17 of the Convention is a proper source of authority for mandatory sealanes, provided they are in conformity with the other articles of the Convention and other rules of international law.

Articles of the Convention which may be used as arguments to prohibit mandatory sealanes are Articles 14(1-5), 15(1), and 16(4). Each of these articles, which confers the right of innocent passage and places certain duties on the coastal state, must be construed in the light of Article 17, which imposes certain duties on foreign ships during innocent passage. This relationship is expressed in Article 14(4), where it is stated that "[s]uch passage shall take place in conformity with these articles and with other rules of international law."

Allowing that the above noted articles do not prohibit the establishment of mandatory sealanes in territorial waters, the remaining issue is whether there are other rules of international law which would prohibit such a regu-

34. The proposed Mexican amendment would have applied "in conformity with the present rules and other rules of international law" to the foreign vessels in innocent passage and not to the enactment of laws and regulations by the coastal state. Id. at 96, 102. The Mexicans did acknowledge, however, that the laws and regulations must conform with the rules of international law as expressed by ILC. Article 1(2) and 17(1). Id. at 97.
36. Id.
37. Id.
lation. The purpose of innocent passage is to compromise the two competing policies—sovereignty and maximum use of the oceans. The establishment of mandatory sealanes would promote maximum use of the oceans by providing a plan to lessen the chance of collision or grounding. Thus, mandatory sealanes would seem to be compatible with the purpose of innocent passage as defined by the customs of international law. Regulation of foreign vessels exercising their right to innocent passage does not diminish, but rather enhances, the enjoyment of the right so that it may be utilized by all states in the safest and most beneficial manner.

In summary then, the sovereignty of the coastal state would be affirmed by this authority to police and exercise control in the territorial sea. This authority to order foreign vessels to take certain routes in territorial waters and to avoid others has been acknowledged in the past as a proper exercise of a coastal state's sovereign right.38

B. Enforcement of Mandatory Sealanes in Territorial Waters

Presuming for the moment that mandatory sealanes in territorial waters are not prohibited by conventional or customary international law, what action may the coastal state take to enforce the regulations on foreign vessels? Violation of such regulations would be a criminal offense, and thus does not involve the problems of the exercise of civil jurisdiction, although civil liabilities could be included.

There are three basic situations which are of concern in the enforcement of mandatory sealanes in territorial waters. These situations exist when a vessel violates the rules of, or completely fails to use, the required traffic scheme; and is either (1) enroute to the port of the coastal state, (2) sailing out of the port, or (3) only passing through the territorial sea. In the third situation the coastal state's connection with the foreign vessel is most tenuous, and therefore is the situation which will be analyzed.

1. Authority over Transient Vessels

Two methods of enforcement over transient vessels which violate sealane regulations that could possibly be applied by the coastal state are 1) exclusion from the territorial waters, and 2) diversion into port followed by proceedings against the master, owner, or vessel. These proceedings could culminate in a fine to, or even imprisonment of, the guilty party. Generally, both of these methods would result in substantial detriment to the foreign vessel, and certainly would be considered grave sanctions to apply. Either

38. OPPENHEIM 493.
practice would need to be viewed in the context of balancing the interests of the coastal state against the need for the smooth operation of world sea transportation. The interests sought to be protected by the coastal state must be substantial in order to overcome the right of innocent passage and the need for unhindered flow of commerce.

In an actual collision, there would be substantial interests affected, or likely to be affected, which would allow the coastal state officials to proceed with an investigation of the collision and the arrest of persons suspected of contributing to the cause of the collision by failure to obey the sealane procedures. Of primary importance, however, is the enforcement of the sealane regulations as a preventive measure, i.e., before any collision, rather than as retribution for the results of a violation. In the latter case the actual effect of a violation by a foreign vessel on the coastal state is of questionable substantiality. On the other hand, it may be argued that the threat of potential collision and resulting damage to the coastal state's interests is sufficient.

The Territorial Sea Convention does not explicitly provide for the enforcement of the laws and regulations of the coastal state, nor does it specifically prescribe standards for penalties for violations. Authority for enforcement would, however, seem to be implicit in Article 17, particularly in the case of navigational regulations. Professor Sorensen, an influential participant in the 1958 Conference on the Law of the Sea, anticipated this interpretation when he stated:

It is made clear by Article 17 that foreign ships exercising the right of innocent passage shall comply with the laws and regulations of the coastal state, in particular those relating to transport and navigation. Thus, it follows that the coastal state is authorized to enforce its laws and regulations on foreign ships passing through the territorial sea.

Such an interpretation has also been supported by Sir Gerald Fitzmaurice and Professor Leo Gross.

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40. McDougal 293. In the case of the Franconia, however, the Court for Crown Case Reversed ruled against the assertion of jurisdiction proclaimed by a lower British court. In this criminal case a British and German vessel collided in territorial waters. Queen v. Keyn, 2 Ex. D. 63 (1876).
41. McDougal 273 n.236.
42. Id. Professor Gross stated: "Whether the text of Article 17 will obviate disputes relating to the applicable national enactments and their conformity with the Convention and customary international law remains to be seen. In particular it remains to be seen whether the right to enforce these enactments, implicitly recognized in Article 17, includes the right to prevent a ship from passing through the territorial sea." Gross, The Geneva Conference on the Law of the Sea and the Right of Innocent Passage Through the Gulf of Aqaba, 53 Am. J. Int'l L. 564, 592 (1959).
Philip C. Jessup many years earlier approached the question on the basis of customary international law and reached the conclusion that:

. . . [T]he right of innocent passage does not guarantee to the vessel exercising it a total immunity from the processes of the local laws. Only where the littoral sovereign's conduct amounts to an unreasonable interference with navigation can the flag state protest. 43

Thus, the standard of reasonableness in customary international law is available for challenging allegedly excessive sanctions.

a. Exclusion of a Vessel

i. Conventional International Law

The authority of a coastal state to exclude a vessel from its territorial sea is supported by Article 16(1) of the Territorial Sea Convention: "The coastal state may take the necessary steps in its territorial sea to prevent passage which is not innocent." The issue is, what is innocent passage? That passage may be denied because it is not innocent is clear; but does the violation of a coastal state's regulations pertaining to the required use of sealanes make the passage "non-innocent"? If the violation of the regulation can not be considered such as to label the passage non-innocent, can a vessel be excluded for violating the regulation without a finding of non-innocent passage?

The general criteria of passage which may be classed innocent is indicated in Article 14(4) of the Territorial Sea Convention:

Passage is innocent so long as it is not prejudicial to peace, good order or security of the coastal state. Such passage shall take place in conformity with these articles and with other rules of international law.

The United States' delegate to the Law of the Sea Conference stated that the second sentence in the above quotation was meant to indicate that a ship in innocent passage must conform to the laws and regulations of the coastal State. However, such laws and regulations could not prohibit innocent passage. 44 Arguably, this would seem to indicate that the position of the United States is that the laws and regulations of the coastal state (for example, those pertaining to sealane regulations) could not be enforced by prohibition of passage. On the other hand, it could mean that the laws cannot simply prohibit innocent passage without saying whether or not laws

44. OFFICIAL RECORDS 83.
could prescribe refusal of the right of innocent passage as a sanction for violation of the laws. As an example of the former argument it is interesting to note that the Water Quality Improvement Act of 1970 (WQIA) requires evidence of financial responsibility of both national and foreign vessels "using . . . the navigable waters of the United States for any purpose." One study of the Act contends that sections 11(p)(1) and (2) prohibit any foreign vessel from merely traversing the United States' territorial sea without complying with the WQIA requirements; and thus, is in violation of Article 14 and 15 of the Territorial Sea Convention.

The records are not clear whether the distinction between the coastal state prohibiting passage as non-innocent and the coastal state prescribing regulations to which the transient vessel must comply was ever accepted by the Conference. While there was an apparent compromise between those states which felt passage could only be non-innocent if there was a threat to the security (not the economy or ideology) of the state and those states which felt the coastal state could decide the question of innocence on the basis of its "interests," the United States' distinction is still arguably maintained by the two separate sentences which were adopted as Article 14(4) quoted above. One delegate to the Law of the Sea Conference has written that "[t]here must really be something going beyond the mere existence of local laws and regulations as such—something that could be considered as tainting the passage even if there happened not to be any specific domestic law or regulation under which it was locally illegal. These various ideas are reflected in paragraph 4 of Article 14 of the Convention. . . ."

With this ambiguity in the record there is certainly latitude for a coastal state to argue its right to exclude foreign vessels. There is, however, the test of reasonableness which must be applied. Although the coastal state may argue that it may exclude to protect interests other than "security," there would still seem to be a logical requirement that the threat of damage be substantial. The violation of a sealane rule or failure to use a sealane, by themselves would presumably fail to meet the necessary element of a substantial threat. In certain situations, however, the risk of collision or stranding may be so great that such a threat could be shown.

If violation of a sealane rule or failure to use prescribed sealanes does not make passage non-innocent, Article 16(4) of the Territorial Sea Convention

47. Program of Policy Studies 5-18, at n.34.
would prohibit the exclusion of a foreign vessel where the waters involved are straits as described in that article. However, in the case of narrow congested straits, the possibility of determining passage to be non-innocent as a result of a vessel's failure to use the prescribed sealanes would be a worthwhile case to argue since the risk of collision and the chances of substantial detrimental effect on the coastal state are very high in these waters.

ii. Customary International Law

There is evidence in customary international law of the right to exclude a vessel which claims the right of innocent passage. Prior to the codification of the right of innocent passage, the famous *Corfu Channel Case*\(^4^9\) examined some of the difficult problems dealing with innocent passage. In 1946, two British destroyers were damaged by mines while steaming through the Straits of Corfu, part of which is within the territorial waters of Albania and Greece. Great Britain thereafter sent minesweepers through the Straits and discovered a newly laid field of anchored mines near the place where the destroyers had been struck. Great Britain demanded compensation, while Albania protested the premeditated violation of its sovereignty. Of particular relevance is the manner in which the International Court of Justice assessed the reasonableness of the Albanian claim that both passages were non-innocent. While there is disagreement as to whether the predominant factor was the manner of conducting the passage, as opposed to the purpose of such passage,\(^5^0\) it appears that the court put great stress on the foreign vessel's version of its purpose.\(^5^1\) The court found the initial passage to have been innocent.

If it is the purpose of passage which determines the question of innocence, then there would seem to be little argument for a foreign merchant vessel in passage being classified as non-innocent merely for the violation of a sealane regulation. The purpose of merchant vessels would seldom be other than innocent. Thus, a foreign merchant vessel on a mission of peaceful trade could not be classified as being in non-innocent passage after the violation of sealane regulations. In summary, the establishment of mandatory sealanes in the territorial sea by a coastal state is most probably a legitimate exercise of its police power in controlling the manner of passage. By creating such sealanes the state is protecting legitimate interests and at the same time promoting the smooth flow of commerce. As in the case of internal waters, the major problem is enforcement. The problem, however, is dif-

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50. McDougall 243.
ferent in significant aspects. For example, where enforcement in internal waters is limited by self-restraint of the coastal state for political and economic reasons, enforcement in territorial waters is limited by an acknowledged right of international law. Although a state may properly exclude a vessel from innocent passage, exclusion for a sealane violation would most likely be justified only after a vessel had been warned and continued to violate the regulations, or if a particularly hazardous situation existed.

As a practical matter, the problems which face a coastal state seeking to exclude a foreign vessel in innocent passage would also be present when a coastal state diverts a vessel in innocent passage into port for judicial proceedings. Such an action could arguably cause more detriment to the foreign vessel than exclusion from passage and could be thought of as an even greater hampering of innocent passage.

Mandatory Sealanes on the High Seas

A. Freedom of the High Seas

1. Customary International Law

In 1604 Grotius wrote the *Mare Liberium* in which he proclaimed, explained, and practically fabricated the doctrine of the freedom of the seas.\(^5\) He based his argument on the "most specific and unimpeachable axiom of the Law of Nations, called a primary rule or first principle, the spirit of which is self-evident and immutable, to wit: Every nation is free to travel to every other nation, and to trade with it."\(^5\) Grotius emphasized that the sea could not be occupied nor its resources exhausted.\(^5\)

Today, the doctrine of freedom of the high seas is universally accepted; however, inroads have developed which limit its force and application, *e.g.*, contiguous zones, claims of 200 mile wide territorial seas, and the baseline theory of territorial waters. While the doctrine is still accepted, the reasoning in support of it has been replaced. No one can deny that several states now have the technology and armaments to successfully occupy almost any area of the high seas. Furthermore, there is ample evidence today that the resources of the sea can be destroyed or exhausted by both navigation and fishing.

The more acceptable reason for the freedom of the high seas is to allow freedom of communications and commerce between the states of the world which are separated by the seas. The seas act as international highways

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53. *Id.* at 7.
54. *Id.* at 28.
which connect distant lands, and therefore, should not be claimed by any state. In the interest of free intercourse between the states, the principle of the freedom of the high seas has become universally recognized and supported.  

As a general rule of international law an independent state may assert jurisdiction whenever such jurisdiction is not excluded by some principle of international law. As was stated by the Permanent Court of International Justice in the case of the *S.S. Lotus*:

The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of states cannot therefore be presumed.

The issue in this case was whether Turkey could institute criminal proceedings against the officer of a French merchant vessel which had entered Turkey's port after a collision on the high seas. As a result of the collision a Turkish vessel was damaged and Turkish lives were lost.

The Court also spoke specifically of vessels on the high seas:

It is certainly true that—apart from certain special cases which are defined by international law—vessels on the high seas are subject to no authority except that of the state whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no state may exercise any kind of jurisdiction over the vessels upon them.

The conclusion reached by the Court was that there is no rule of international law applicable to collision cases which states that criminal proceedings are exclusively within the jurisdiction of the state whose flag is flown. The Court based its jurisdiction on the fact that the collision took effect on a Turkish vessel which was assimilated to the territory of Turkey. The Court did not consider the idea of the nationality of the victim since this contention was based on the case where the nationality of the victim was the only criterion for jurisdiction. The Court, therefore, set forth the general rule that restrictions on the independence of states must be found in conventions or accepted usages. Then, finding no such convention or usage concerning criminal proceedings following a collision, the Court allowed Turkey to take jurisdiction on the assimilation theory.

55. Oppenheim 593.  
57. *Id.* at 25.
Mandatory Sealanes

Based on *The Lotus* reasoning it would be fair to say that a coastal state may assert jurisdiction over a foreign vessel on the high seas if the actions of the vessel have a detrimental effect on the territory of the coastal state. In the case of a violation of an established scalane there is a detrimental effect on the territory of the coastal state because of the potential for disaster.

Must the coastal state refrain from taking appropriate measures to protect itself until there is actual damage or violation of its laws? The Supreme Court of the United States has held that the law of nations allows a state to secure itself from injury by exercise of its power beyond the limits of its territory. In *Church v. Hubbart* the Court, in the context of a state's right to prohibit any commerce with its colonies, stated:

> Any attempt to violate the laws made to protect this right, is an injury to itself which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.\(^6^0\)

Thus, arguably the prevailing standards of any assertion of extra-territorial jurisdiction are "reasonableness" and "necessity."

The United States has in the past asserted limited jurisdiction outside its territory. In 1935 legislation was passed which authorized the President to declare, under specific conditions, a "customs enforcement area" which could extend 50 miles outward from the 12 mile limit of customs waters and for 200 miles along the coast. Within this area, customs officials were authorized to board, search and seize national and foreign vessels when enforcing any law respecting the revenue.\(^6^0\) Again, in this case the proponents of the bill argued, "[t]hat the only test of the extent to which a nation may extend its jurisdiction in proximate areas of the high seas is the test of reasonableness."\(^6^1\)

The United States has also asserted limited jurisdiction on the high seas in prescribing danger zone regulations which give exclusive use for a limited time to United States military vessels.\(^6^2\) In most cases the claimed right to

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59. *Id.* at 235 (emphasis added). *Contra*, Rose v. Himely, 8 U.S. (4 Cranch) 241, 279 (1808), where the Court stated: "... [A] seizure of a person not a subject, or of a vessel not belonging to a subject, made on the high seas, for the breach of a municipal regulation, is an act which the sovereign cannot authorize."
62. 33 C.F.R. 88 204.1-204.232 (1971 Supp.).
exclude is for only a brief period, but in some instances authority has been asserted for several years. A direct analogy to limited jurisdiction on the high seas is the regulation of the air space over these seas. In this regard, the United States has established Air Defense Identification Zones in air spaces which are partly over the high seas. When flying through these zones the United States requires that all aircraft must file position reports either when it enters a zone or when not less than one hour and not more than two hours average cruising distance from the United States via the most direct route.

The precedents given above are based either on the right of self-defense or protection of customs. The British have also made similar extensions of jurisdictions based on the right of self-defense and customs, e.g., the so-called Hovering Acts, and later the Customs Consolidation Act of 1876 which declared British right to seize foreign vessels within an undefined distance of the coast. In a recent order, effective November 22, 1971, the British government has extended its power to control and even destroy oil tankers threatening to pollute the United Kingdom's coastline. After the effective date the power applies to foreign vessels outside British territorial seas. The authority for this order was derived from the Oil in Navigable Waters Act of 1971.

The Canadians have also taken unilateral action to combat oil pollution on the high seas by enacting stringent and comprehensive anti-pollution legislation which declares an anti-pollution zone covering all waters within 100 miles of the Canadian Arctic coast. The Act forbids pollution in that zone, imposes penalties and civil liabilities for all violations, and empowers the Governor in Council to prescribe regulations relating to navigation in designated Arctic waters. Among other matters, these regulations prescribe routes of passage. Vessels failing to comply with the regulations may be prohibited from navigating within certain zones. As a means of enforcement vessels may be boarded, seized, fined, or forfeited after seizure. The United

63. McDougal 593.
64. 14 C.F.R. §§ 620.12(b)(2) (1960 Supp.).
65. 9 Geo. 2, c.35 and 24 Geo. 3, c.47.
66. The Customs Consolidation Act of 1876, 39 and 40 Vict. c.36.
68. Oil in Navigable Waters Act 1971 c. 21, § 8.
69. Arctic Waters Pollution Prevention Act of 1970, CAN. REV. STAT. 1st Supp. c.2 (1970), 18 and 19 Eliz. 2, c.47. It has been suggested that the Act is part of Canada's plan to motivate the IMCO nations to reorder their priorities from compensation to prevention. D. Wilkes, International Administrative Due Process and Control of Pollution—The Canadian Arctic Waters Example, 2 J. MARITIME L. 499, 501 (1971).
70. Id. §§ 12.(1), 15.(3)(a), and 23.(1)-25.(1).
States has expressed strong opposition to Canada's unilateral approach to this problem.\footnote{71}

In response to Canada's argument that the Arctic Pollution Act was partly based on the right of self-defense, one writer contends that the argument is "both weak and dangerous: Article 51 of the United Nations Charter permits a right of self-defense only against 'armed attack,' and then under narrowly defined conditions. Broadening the basis for defensive action, as a matter of unilateral interpretation, raises obviously disturbing possibilities."\footnote{72}

2. Conventional International Law

This doctrine of freedom of the high seas has been codified in Article 2 of the High Seas Convention. As under customary international law, the two great freedoms enumerated in Article 2 are fishing and navigation.

The ILC commentary (5) to Article 27 of its draft (Article 2 of the High Seas Convention) acknowledges the need for some regulation of freedom of the seas.\footnote{73} At the convention the delegate from Mexico proposed that the following be incorporated into Article 27 (Article 2): "Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law," and explained that his amendment was based on the wording of paragraph 5 of the ILC commentary.\footnote{74} This amendment was accepted as part of Article 2 of the High Seas Convention. Although the commentaries were not incorporated into the Convention, they are, nevertheless, evidence that a certain amount of regulation of the high seas is allowed under international law.

There is further support for limited regulation of the high seas in the last sentence of Article 2 of the High Seas Convention, which provides:

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in the exercise of the freedom of the high seas.

\footnote{71}{"The United States does not recognize any exercise of coastal state jurisdiction over our vessels in the high seas and thus does not recognize the right of any state unilaterally to establish a territorial sea of more than 3 miles or exercise more limited jurisdiction in any area beyond 12 miles." Statement of Robert J. McCloskey, N.Y. Times, April 10, 1970, at 13, col. 3.}

\footnote{72}{R. Neuman, \textit{Oil on Troubled Waters: The International Control of Marine Pollution}, 2 J. MARITIME L. 349, 357-58 (1971).}

\footnote{73}{"Any freedom that is to be exercised in the interests of all entitled to enjoy it, must be regulated. Hence, the law of the high seas contains certain rules, most of them already recognized in positive international law, which are designed, not to limit or restrict the freedom of the high seas, but to safeguard its exercise in the interests of the entire international community. . . ." Report 24.}

\footnote{74}{4 OFFICIAL RECORDS 37.}
If the phrase "reasonable regard to the interests of other States" is to have any meaning, the coastal state should be the state best qualified to define those interests. If this qualification to define is allowed, it seems only reasonable that some amount of control also be acknowledged.

This limited right to define and control is acknowledged in Article 24 of the Convention on the Territorial Sea. The authority to prescribe mandatory sealanes could be reasonably supported by the authority granted by Article 24 para. 1(a) to prevent infringement of the coastal state's sanitary regulations within its territory or territorial sea. This authority, however, is limited to the maximum extent of the contiguous zone which is 12 miles from the baseline from which the breadth of the territorial sea is measured. Protection from oil spills would be required at a much greater distance. But even accepting the validity of a coastal state's limited competence in a contiguous zone, might not the state still exercise this right as far as is required for the effective protection of the interest at stake?

There are many factors to be considered in determining the reasonableness and necessity, and hence the legality, of asserting authority (not sovereignty) in contiguous zones. The interest that is sought to be protected should certainly be a substantial interest. Basically, the interest of the coastal state is protection from oil pollution and all of its effects on water and land. This interest is not only that of the immediate coastal state, but also that of adjacent states. The damages of oil pollution are not confined to the immediate area of a spill, but can be carried by the currents and winds to other areas and spoil the ocean resources used in common by all states.

The scope of authority asserted by the coastal state in unilaterally establishing sealanes is limited to regulation of passage and enforcement of these regulations. Such authority is certainly not insubstantial, but must be weighed in comparison with the interest at stake, and with the manner in which these regulations and enforcement procedures affect the nature and significance of the use of the vessels of all states. One significant factor in

75. "In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:
   (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
   (b) Punish infringement of the above regulations committed within its territory or territorial sea." Territorial Sea Convention, Art. 24(1).
77. "The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured." Territorial Sea Convention, Art. 24(2).
78. McDougal 579.
allowing limited coastal state authority beyond its territorial sea is that it would curtail the need for claims to wider and wider territorial seas.\(^7\)

It is also important to note that the basic rights of navigation and fishing would in no way be prohibited, but rather regulated to a limited extent. The regulations would allow a more beneficial use of the contiguous waters by all states, and yet, provide the coastal state with the protection of its more important interests.

Article 24 of the Convention on the High Seas provides:

> Every State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships. . . .

Conceivably, this Article could be relied on for authority to extend mandatory sealanes beyond the 12 mile limit of the contiguous zone. Such regulations would, however, be applicable only to the vessels of the enacting state, or else each vessel would be covered by a multitude of regulations. There is a strong counter-argument to be made for exclusive jurisdiction by the flag state. Article 6(1) of the High Seas Convention provides:

> Ships shall sail under the flag of one state only and, save in exceptional case expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas. . . .

This is the basis for the strong argument that unless a situation is covered by a specific treaty or another article, the coastal state would lack jurisdiction.

### B. Enforcement on the High Seas

Enforcement presents a particularly difficult problem in view of Article 11 of the High Seas Convention. This article, in effect, statutorily overrules the conclusion of the International Court of Justice in *Lotus* and declares that only the flag state or the state of nationality of the responsible person can take jurisdiction over such person in the event of a collision or other navigational incident.\(^8\) Furthermore, Article 11(3) limits the jurisdiction to arrest or detain the ship, even for investigation, to the flag state.

In view of the nature of the violation of the coastal state's law, the minor amount of actual effect on the coastal state, and the specific treaty obligations on the subject of arrest and detainment of vessels or personnel with regard to navigational incidents, enforcement of the sealanes would probably be best accomplished by indirect methods, *e.g.*, economic sanction. Or, in the event of collision, national courts in civil cases could apply presumptions of negligence for failure to use the sealane.

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79. McDougal 574.
80. High Seas Convention, Art. 11(1).
Undoubtedly, the high seas is the maritime area in which it is most difficult for a coastal state to validly assert authority to establish and enforce mandatory sealanes. As one may expect, as the distance from the terra firma of the coastal state increases, so does the strength of the counterarguments. The long established doctrine of freedom of the seas presents a strong bulwark against unilateral encroachments. Nevertheless, the tremendous damage caused by oil pollution requires that problems of multiuse of the oceans be approached with a view to the future and not stymied by a doctrine established under concepts which are no longer acceptable today. Reasonableness and necessity are the concepts which must be applied to facilitate the use of the high seas by all states and to minimize the risk of danger to interests of the coastal state without detriment to the legitimate interests of all states.

Conclusion

Mandatory sealanes are not the panacea for oil pollution caused by collisions and groundings. There are many practical problems involved with their establishment, operation and enforcement. It is presumed, however, that a workable scheme can be developed to alleviate such problems.

This writer feels that sealanes will someday be mandatory to all vessels within certain classes. Whether these schemes will be established and enforced by independent coastal states or international organizations such as IMCO is yet to be seen. If the objectives of the sealanes can be accomplished within a reasonable time through the efforts of an international organization, then this method is preferable to unilateral action. However, if the international approach proves to be unreasonably slow in developing an effective scheme, or after it is established, to lack the capability of proper enforcement, then the unilateral approach must be applied wherever it is reasonable and necessary to do so.

Perhaps the days of complete freedom to sail a vessel anywhere on the high seas should be forced into the past, and replaced by a more responsible doctrine which will place a greater burden on vessel owners. The injury resulting from one vessel going aground in the time of Grotius would be minute compared to the enormous damage possible today from a behemoth such as the Nisseki Maru which draws 89 feet of water and carries almost 3 million barrels of crude oil.\footnote{TIME, Dec. 6, 1971, at 50.}

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