

U O W

The High Seas
Port State and Flag State Powers and Responsibilities
Places of Refuge

China-ASEAN Academy on Ocean Law and Governance
1st Special Program of Maritime Law Enforcement

National Institute for South China Sea Studies (NISCS)
China-Southeast Asia Research Center on the South China Seas (CSARC)
Australian National Centre for Ocean Resources and Security (ANCORS)
20-26 October 2019, Haikou, China

Anthony Morrison, PhD (amorriso@uow.edu.au)
Research Fellow, Australian National Centre for Ocean Resources and Security (ANCORS)

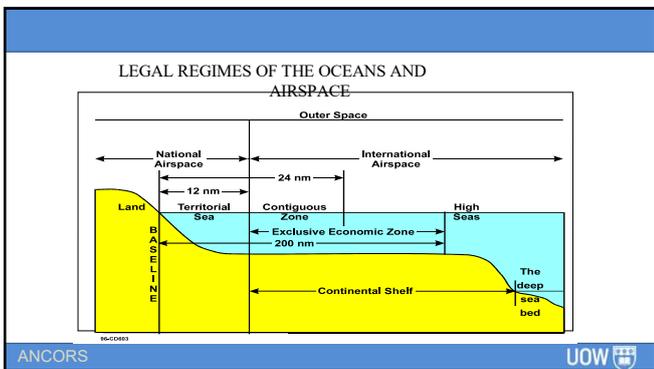




THE HIGH SEAS

ANCORS
AUSTRALIAN NATIONAL CENTRE FOR
OCEAN RESOURCES & SECURITY

ANCORS UOW



Definition
1958 High Seas Convention (Art.1)
 “Parts of the sea not included in the territorial sea or internal waters of a State”
Law of the Sea Convention (Art 86)
 • “All parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State”

ANCORS UOW 

Freedom of High Seas
 1958 Convention Art. 2:
 •The freedom of the High Seas comprises inter alia:
 •Freedom of navigation
 •Freedom of fishing.
 •Freedom to lay submarine cables and pipelines.
 •Freedom to fly over the high seas.

ANCORS UOW 

Article 87(1) Law of the Sea Convention
 Freedom of the High Seas comprises inter alia:
 • (a) Freedom of navigation;
 • (b) Freedom of over-flight;
 • (c) Freedom to lay submarine cables and pipelines, subject to Part VI;
 • (d) Freedom to construct artificial islands and other installation permitted under international law, subject to Part VI;
 • (e) Freedom of fishing, subject to the conditions laid down in section 2;
 • (f) Freedom of scientific research, subject to Parts VI and XIII

ANCORS UOW 

EEZ & High Seas

Art 86: "All parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State"

- Art. 58: Reserves certain high seas freedoms in the EEZ

ANCORS UOW 

What is the legal consequence of Art.58?

- Does the high seas exclude the EEZ?
- Is the EEZ a zone of high seas subject to special rights of coastal States?

ANCORS UOW 

Article 88
"The high seas shall be reserved for peaceful purposes"

Article 89
"No State may validly purport to subject any part of the high seas to its sovereignty"

ANCORS UOW 

Duty to render assistance (Art 98)
Status of Ships(Art 92)
Universal jurisdiction (Art 101):
–Piracy
–Slave traders
–Without nationality
–Unauthorised broadcasting

ANCORS UOW

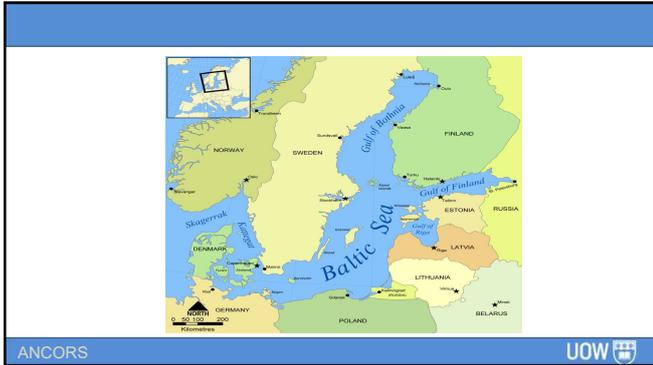


**FLAG STATE AND
PORT STATE DUTIES**

ANCORS UOW

- Shipping most regulated industry in world
- Regulations concerning shipping safety, marine pollution and search and rescue established at international level
- Regulations enforced nationally
- There must be uniformity to avoid administrative confusion and trade distortion eg Baltic Sea and Caribbean Sea

ANCORS UOW





UNCTAD Review of Maritime Transport 2018

- Over 94,000 ships
- Over 1.6 million seafarers
- 10.7 billion tonnes of cargo carried annually
- Distance of 57 billion tonne miles
- US\$500 billion in freight rates
- 1.9 billion gross tons of shipping registered in over 150 flag States
- 25 largest flag States account for 90% of world tonnage.

The bottom left corner of the slide has the text 'ANCORS' and the bottom right corner has the 'UOW' logo.

- Article 94 of the LOSC duties of flag states
- Article 94(1) of LOSC: 'Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.'
- Article 94(2) – register ships; enact domestic legislation
- Article 94(3) of LOSC imposes obligations on flag States to ensure safety at sea

ANCORS UOW

- Flag State may elect to exercise its duty itself, or it may elect to entrust some or all of these duties to Recognized Organizations (ROs).
- If statutory duties are delegated to ROs the flag State must ensure that audits and independent flag State inspections are carried out to ensure that these duties are being effectively carried out by the RO.

ANCORS UOW

Flag State Technical Duties

- Article 94(4)(a) ensure seaworthiness by proper, regular inspections and surveys
- Article 94(4)(b) ensure safety at sea by properly trained officers and crew
- Article 94(4)(c) officers and crew conversant with international regulations
- Article 94(5) – conform to generally accepted international regulations, procedures and practices

ANCORS UOW

Flag State Social Duties

- every State to assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of social matters concerning the ship.
- LOSC requires each State to take such measures for ships flying its flag as are necessary to ensure safety at sea with regard to: "...the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments."

ANCORS UOW 

- States are required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.
- includes compliance with ILO conventions in relation to crewing conditions as well as IMO conventions of training under STCW and sufficiency of crew under SOLAS (Chapter 5 reg 13).

ANCORS UOW 

- **Effective Flag State Control**
 - an effective national maritime administration
 - adequately resourced, both financially and with appropriately qualified and experienced personnel
 - embedded into the Government structure
 - Flag State, as a contracting party to Conventions, must have the political will and legal capacity to bring these Conventions into effect in its internal law
 - The maritime administration should have the ability and resources to register and administer the ships flying its flag on a worldwide basis, and to effectively monitor organizations to which it has delegated statutory responsibilities.

ANCORS UOW 

- The principal maritime and labour Conventions should be brought into effect through the State's internal law
- active participation in appropriate standards setting international organisations such as the IMO, ILO, and port State control regimes.
- Regular reporting of the flag State's activities should be made to the IMO and ILO as required by various instruments.

ANCORS UOW 

Port State Control

- Port State Control (PSC) is the inspection of foreign ships in national ports to verify that the condition of the ship and its equipment comply with the requirements of international regulations and that the ship is manned and operated in compliance with these rules.
- These inspections were originally intended to be a back up to flag State implementation, but experience has shown that they can be extremely effective, especially if organized on a regional basis.
- once a ship voluntarily enters port it becomes fully subject to the laws and regulations prescribed by the laws of that State
- The primary responsibility for ships' standards rests with the flag State - but port State control provides a "safety net" to catch substandard ships.

ANCORS UOW 

- Now, PSC inspections are conducted to ensure that
 - foreign ships are seaworthy;
 - do not pose a pollution risk;
 - provide a healthy and safe working environment;
 - do not pose a threat to the security of a port State; and
 - comply with the relevant International Conventions.

ANCORS UOW 

- Regional PSC Agreements arose in response to the public and industry-created demand for a cooperative or *regional* approach to encourage port states to enhance enforcement of marine pollution and vessel safety laws against visiting vessels.
- Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and Protection of the Marine Environment, 1982 (Paris MOU)
- Memorandum of Understanding on Port State Control in the Asia-Pacific Region, 1993 (Tokyo MOU).

ANCORS UOW 

- Since the setting up of the Paris MOU, the value of regional co-operation has been recognised and a number of regional agreements have been signed by countries with an interest in promoting safer, cleaner and secure seas.
- nine regional PSC Memoranda of Understanding plus the United States Coastguard.

ANCORS UOW 

- 1982 Paris MOU (North Atlantic)
- 1992 Acuerdo de Vina del Mar (South and Central America)
- 1993 Tokyo MOU (Pacific Ocean)
- 1996 Caribbean MOU
- 1997 Mediterranean MOU
- 1998 Indian Ocean MOU
- 1999 West and Central African MOU
- 2000 Black Sea MOU
- 2004 Riyadh MOU

ANCORS UOW 

- The MOU establishes a permanent secretariat to co-ordinate the various national activities and provide for a regional database.
- The Parties agree to inspect an agreed number of foreign-flag ships visiting their ports each year.
- In general, ships inspected within the previous six months are not re-inspected unless there are clear grounds for doing so.
- Another reason for co-operating with other ports in the region is to ensure that identified substandard ships are effectively monitored.

ANCORS UOW

Physical Inspection

- PSCO inspects certificates issued under a number of conventions including – SOLAS, MARPOL etc.
- If the certificates are valid and the PSCO’s general impression and visual observations on board confirm a good standard of maintenance, the PSCO should generally confine the inspection to reported or observed deficiencies, if any.

ANCORS UOW

- The PSCO can form an impression as to the general condition of the ship, its equipment and crew, but cannot take any action to delay or detain the vessel unless there are “clear grounds” for believing that the condition of the ship, its equipment, or the crew do not substantially correspond with the particulars of the certificates. can look behind documents if there are “clear grounds” for doing so

ANCORS UOW

• Clear grounds include:

- ships with overriding and unexpected factors as set out in Annex 8;
- evidence from examination of certificates;
- evidence from the ship's log or other record books such as an oil record book on a tanker;
- STCW records are issued by a country that has not itself ratified the convention;
- absence of up to date muster lists or crew members;
- complaints about working conditions or other omissions under MLC or other conventions; or
- that the master or crew are not familiar with essential shipboard operations relating to the safety of the ship or the prevention of pollution, or that such operations have not been carried out.

ANCORS UOW

- each ship is categorised into high risk, standard risk and low risk;
- flag States categorised based on the results of its flagged ships into "white", "grey" and "black" and correspond roughly to the three levels of vessel.

ANCORS UOW

- For HRS – between 5-6 months after the last inspection in the MoU region.
- For SRS – between 10-12 months after the last inspection in the MoU region.
- For LRS – between 24-36 months after the last inspection in the MoU region.

ANCORS UOW



Places of Refuge

ANCORS UOW

Definition:

- Place where a ship in need of assistance can take action to stabilize its condition, reduce the hazard to navigation, protect human life and the environment.
- Ship in Need of Assistance means a ship in a situation, apart from one requiring rescue of persons on board, that could give rise to a loss of the vessel or an environmental or navigational hazard

IMO Guidelines on Places of Refuge for Ships in Need of Assistance adopted by Resolution A.949(23), 5 December 2003

ANCORS UOW

- Until recently, granting of refuge to ships in distress was a long accepted custom of the sea
- Refuge was not always requested but when it was requested was rarely refused
- In recent times coastal States have increasingly refused refuge particularly where there is a risk of oil pollution or other environmental harm
- Three examples highlight this new trend – “Erika”, “Castor” and “Prestige”

ANCORS UOW

- Problem essentially flows from the sovereign right of States to refuse access to ports
- No provisions in the Law of the Sea Convention or IMO instruments requiring the granting of a Place of Refuge.
- Access to ports can be permitted conditioned or refused by the coastal State
- What of ships in distress?
- Access under customary international law now restricted to humanitarian risk

ANCORS 

Changes to Custom

- Humanitarian v property considerations
- Effect of salvage laws
- Causes of change
 - Changes to shipping industry
 - Growth of environmental consciousness and environmental law
 - Changes to maritime law
 - Changes to salvage law and salvage industry

ANCORS 

- **Conflict of Interests**
 - Shipping Interests
 - Shipowners, charterers, cargo owners, insurers, masters and crew, salvors
 - Regulatory Interests
 - Flag States, Port States, Classification Societies
 - Coastal State Interests
 - National and regional governments, port authorities, coastal communities, media, environmentalists

ANCORS 

- After the "Erika", "Castor" and "Prestige", to avoid future incidents, steps have been taken by IMO by issuing IMO Guidelines A.949(23) on 5 December 2003
- Adopted after the *Prestige* disaster
- Where possible ships in distress should be repaired in a sheltered place and access should be given
- Whether to grant access to a place of refuge is up to coastal state
- Decision should be based on criteria for assessment of places of refuge and event specific assessment
- Guidelines do not deal with rescue of persons at sea (SAR Convention applies)

ANCORS UOW 

- Risk management tool and its purpose is to provide framework for masters and salvors and coastal States.
- masters and salvors when requesting refuge are to
 - appraise the situation,
 - identify the hazards and assess associated risks,
 - identify the required actions,
 - contact the authority of the coastal state,
 - establish responsibilities and communications with all parties involved,
 - take any necessary response actions and
 - establish reporting procedures

ANCORS UOW 

- Coastal States should
 - establish procedures to address issues related to places of refuge;
 - establish a Maritime Assistance Service (MAS)
 - Conduct Assessment of places of refuge –establish procedures based on present guidelines: generic and event-specific.
 - Establish "decision-making" process for the use of places of refuge.

ANCORS UOW 
