# Theme 6 – Industrial Impact

## Presentation: Major Waterways: International Law and the Commons

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The terms 'international waterway' and 'the commons' are not clearly defined in either custom or treaty. The Shorter Oxford Dictionary offers as a definition in the case of the former, 'a route for travel or transport of water; a river or canal or a portion of the sea or lake viewed as a medium of transit; an opening for the passage or leaving of vessels'. It defines the latter only in terms of 'the commonality, the lower orders; provision for a community in common; the share due to each member'. 'Common,' however, is defined as 'belonging equally to more than one, belonging to all mankind alike ... belonging to the community; free to be used by everyone'. It has been left to international law to endeavour to refine and update these concepts to accord more clearly with contemporary environmental and developmental realities falling within its sphere.

In the intervening years, however, international law has been invoked to establish a variety of regimes for rivers, canals, lakes and straits, by means of both conclusion of treaties and development of new customary principles and concepts, which not only lay down the terms of use by bordering states and other users, but also aim to preserve and protect the marine environment. These culminated, in the case of the seas, in the United Nations Convention on the Law of the Sea (UNCLOS 1982), which aims to establish a 'legal order for the seas and oceans' to 'facilitate international communication, promote the peaceful uses of the seas and oceans, the equitable and efficient utilisation of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment' (Preamble). Achievement of these goals is recognised as contributing to 'a just and equitable international economic order which takes into account the interests and needs of mankind as a whole'. However, only the seabed and ocean floor and their subsoil beyond the limits of national jurisdiction and their resources are recognised as constituting 'the common heritage of mankind' (the Area), all rights to which are vested in mankind as a whole, on whose behalf an Authority instituted by the UNCLOS shall act on terms and conditions specified by it, as prescribed by the Convention and a modifying Agreement concluded in 1994. This Authority, however, is responsible for adopting measures to protect the marine environment from harmful effects which may arise from such activities in the Area.

Over recent years international law has subjected coastal waters to increasing national jurisdiction and control, while recognising that some areas (such as the high seas and the deep seabed) remain beyond national jurisdiction. In such areas, often loosely referred to as the 'global commons', states have certain common interests. In the case of the deep seabed, a doctrine of 'common heritage' has been applied. This resulted in the unique establishment by the UNCLOS in 1982 of an International Seabed Authority to administer it on mankind's behalf. No such 'Area' exists in the narrow confines of the almost enclosed Black Sea, however. In certain special cases international law has acknowledged the existence of 'common interest' in activities or resources that take place or are found wholly or partly within areas falling under national jurisdiction. Thus measures have been agreed aimed at protecting certain living resources, the atmosphere, biological diversity, or discharge of gases that might cause climate change. On the other hand, resources found and taken in the high seas beyond national jurisdiction have long been regarded as 'common property', which could be exploited and appropriated by citizens of all states on a 'first come first served' basis.

The concept of parts of the seas and oceans as some form of commons has been with us for a long time. It first came to the attention of lawyers during the great doctrinal debates started by Hugo de Groot (Grotius), a Dutch lawyer, in 1609. It has been evolving to adapt to different situations ever since, and still retains its usefulness in introducing ethical considerations into the international decision-making processes.

Ever since man developed the ability to sail far from home, disputes have inevitably arisen concerning the legal status of the waters navigated and the respective jurisdictional rights of coastal states and the states whose flag a vessel flies. Grotius instituted, in the phrase mare liberum, a standard that established awareness of international community interests, rather than exclusively national ones. He contended that states could not acquire title to areas of the seas by occupation, since such areas were res communis omnium, property that belonged to everyone.

Other states and jurists, however, opposed this view throughout the seventeenth and eighteenth centuries, supporting the concept of mare clausum, the ability of states to close areas of sea to foreigners, mainly foreign fishermen. By the late eighteenth century most national claims to vast sea areas had died away and by 1930, when the first Law of the Sea Conference was held at The Hague under the auspices of the League of Nations, one of its rapporteurs found it to be 'an unimpeachable axiom that every nation is free to travel to every other nation and trade with it'. Moreover, he regarded this as an axiom laid down by God himself through nature 'because not every place has the necessaries of life'. The sea was seen as 'God's highway'.

For nearly 400 years the principle that the seas are a global commons has served us well, since it requires us to evaluate, against the interests of the community as a whole, the propriety and legitimacy of every individual state's claim to diminish the commons in some way.

That said, however, even Grotius recognised that coastal states could exercise what he called imperium (sovereign rights) over a narrow belt of sea round their coasts in order to protect their interests in fishing and security, as well as international interests in freedom of navigation. Ensuring free navigation for other states in what became known as the territorial sea became the coastal state's responsibility. This evolved into the doctrine of 'innocent passage' - passage which did not threaten the peace, good order and security of the coastal state. This doctrine was not finally settled in its modern form until the conclusion of the UNCLOS 1982. By this time the threat of pollution by deliberate discharges or through accidents involving ships carrying oil, radioactive materials or other hazardous cargoes was causing concern to many coastal states. They challenged the 'innocence' of such passage and contended that passage of vessels posing environmental threats could be denied by coastal states.

The limit for this coastal belt was eventually settled at 12 nautical miles by the UNCLOS 1982. Various new types of zones were introduced and the powers states could exercise within them were refined and balanced. However, some straits used for international navigation fell wholly within the territorial sea of one or more of the bordering states that faced each other across them. A few states in this situation had, from the late nineteenth century onwards, negotiated a special treaty regime with other states concerned, including the flag states whose vessels were navigating such straits. This was the case in the series of treaties concerning the Bosphorus, the Sea of Marmara and the Dardanelles which culminated in the Montreux Convention of 1936 covering passage through these Turkish Straits. These treaties opened up international access to the Black Sea, which had been closed until 1774.

The UNCLOS 1982 preserves such existing treaties but establishes a new regime - a right of unimpeded 'transit passage' - through most other international straits. Bordering states cannot impede passage though they can regulate it in respect of the prevention, reduction and control of pollution. They can also designate sea lanes and prescribe traffic separation schemes for navigation where necessary to promote safe passage.

The UNCLOS also introduced a new jurisdictional zone, the 200 nautical mile Exclusive Economic Zone (EEZ). In this zone, coastal states are awarded 'sovereign rights' for purposes of living and non-living resource exploitation and 'jurisdiction' (the power to make and enforce laws and regulations) with regard to protection and preservation of the marine environment and marine scientific research. However, in order to protect the common interest in freedom of navigation, promotion of marine scientific research, preservation of the health of the oceans and other international concerns, these powers were made subject to other relevant provisions of the convention.

Acceptance of the 12 n.m. territorial sea and the 200 n.m. EEZ further eroded the area that Grotius had regarded as the res communis. To take account of this, the coastal states, in return for international acceptance of the extension of their jurisdiction, undertook to have regard to the rights of other states and act compatibly with the UNCLOS provisions, including those on preservation of the marine environment and conservation of its living resources.

During the 1960s and early 1970s the number of members of the United Nations and other international bodies rapidly increased as former colonies became independent and the UNCLOS III enabled new states to challenge some of the existing concepts of the law of the sea. Environmentally concerned states and non-governmental groups also seized the opportunity to press their interests. In 1972 the United Nations Stockholm Conference on the Human Environment (UNCHE) had adopted a Declaration of Principles and Action Plan and established the United Nations Environment Programme to promote them. These principles recognised the need to provide man with an environment of quality and also his responsibility to protect and improve it for present and future generations. They pronounced that toxic substances and other pollutants should not be discharged in quantities that exceeded the environment's (including the marine environment's) capacity to render them harmless and must be halted to ensure that serious or irretrievable damage is not inflicted on ecosystems (Principles 1 and 6 respectively). States were required to take all steps to prevent pollution from substances likely to cause hazards to human health, harm to living resources and marine life, damage amenities or to interfere with other legitimate uses of the sea (Principle 7). The right of states to exploit their own resources pursuant to their own environmental policies was recognised, but was coupled with the responsibility to ensure that activities within their jurisdiction or control did not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction (Principle 21). All these principles, which protect both the common interest and the international commons itself, were incorporated into the UNCLOS 1982 in the part devoted to 'Preservation and Protection of the Marine Environment'(Part XII).

There has since then been an increasing use of non-binding means of augmenting or re-directing the goals and values of international society, such as declarations, resolutions, codes, charters, recommendations, guidelines and the like, and the promotion of generalised principles. The new United Nations members also introduced the concept that the areas of the deep seabed beyond national jurisdiction should be regarded as the 'common heritage of mankind', and persuaded the United Nations General Assembly to adopt a Declaration of 15 Principles proclaiming and giving effect to this approach in 1970. A key aspect of this concept is that the 'resources of the area' of the deep seabed shall be exploited only for peaceful purposes and for the benefit of mankind as a whole. This remains a key element of the UNCLOS 'package'.

The UNCLOS Part XII provisions state categorically that all states, flag states as well as coastal states, have the obligation to protect and preserve the marine environment from all sources of pollution. Moreover, states are required to cooperate and to harmonise their policies in this connection. They must protect and preserve rare or fragile ecosystems, as well as the habitats of depleted, threatened or endangered species and other forms of marine life. States

must not transfer damage or hazards from one area to another or transform one type of pollution into another. They are also required to cooperate on a global or regional basis in formulating rules, standards, recommended practices and procedures consistent with the UNCLOS, taking into account characteristic regional features.

The high seas, though much reduced in area by EEZs and by expansion of the limits of other forms of zone, still remain, in the common good, open to all states for the exercise of the traditional freedoms, although not subject to the common heritage approach applied to the deep seabed. Any formerly implied unfettered freedom to dispose of pollutants in the high seas, however, is not recognised in the UNCLOS. The UNCLOS encourages states bordering enclosed and semi-enclosed seas 'to co-ordinate the implementation of their rights and duties with respect to the marine environment' and undertake joint programmes of scientific research (Part IX). However, it is only quite recently that moving towards management of the seas as an integrated whole, rather than through a series of ad hoc regimes, has been seen to be desirable and necessary.

Negotiating highly specific global agreements has become very complex. In 1992 the United Nations Conference on Environment and Development, held in Rio de Janeiro, adopted a new Declaration of Principles on Environment and Development and an Agenda for action to make it operational into the twenty-first century (Agenda 21). These introduced new responsibilities and reformulated some of the older ones laid down in the UNCHE Declaration of 1972 and promoted the concept of 'sustainable development'.

Agenda 21, which sets out the actions required to fulfil the Rio Declaration's aims, includes a chapter (Chapter 17) which addresses the 'Protection of the Oceans, All Kinds of Seas Including Enclosed and Semi-Enclosed Coastal Areas and the Protection, Rational Use and Development of their Living Resources'. Whilst this does not describe the seas as 'commons' it does propose new approaches which involve that analogy and acknowledges that: 'international law, as reflected in the UNCLOS, provides the international basis on which to pursue the protection and sustainable development of the marine and coastal environment and its resources.'

Many existing treaties protecting the seas and oceans have been re-negotiated to reflect these requirements.

From the non-binding processes, often referred to as 'soft law', and including UN, UNCHE and UNCED declarations and resolutions, have emerged such new concepts and principles as 'common heritage', 'common interest', 'common concern', inter- and intra-generational equity, the polluter and user pays principles, the precautionary principle, and environmental impact assessment. Although not well defined, they augment both long-established and recently crystallised principles of international law, such as equity, good faith (bona fides), good neighbourliness, cooperation and communication and have already had considerable impact in redirecting international maritime and environmental law.

Non-governmental organisations have played a major role in creating public awareness and lobbying to bring about these changes in international law. The religions also have much to contribute in bringing the international community to the realisation that the seas remain, as lawyers of the Grotian period contended, 'God's Highway'.