

Environmental Protection of Ocean and Flag-State Jurisdiction

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1. Introduction

(1) The Relationship between Vessel-Source Pollution and the Principle of Flag State Jurisdiction Principle (the Flag State Principle)

① This presentation will principally deal with vessel-source pollution from the perspective of the possible reconsideration of the flag state principle and, at the same time, the freedom of navigation or navigational rights for the purpose of combating marine pollution.

As for types of marine pollution there are several types other than that of vessel-source pollution, such as, land-based sources pollution, pollution from sea-bed activities, pollution by dumping and so on. Thus, the United Nations Convention on the Law of the Sea (the UNCLOS) in its Part XII deals with those various types of marine pollution, and for each type it determines the distribution of prescriptive, enforcement and, in some sense, even judicial jurisdiction to flag states, coastal states, port states and others.

② Among such types of marine pollution, by the following reasons, my presentation in the very context of vessel-source pollution will examine possible reconsideration of the flag state principle and alternative strategy for the purpose of the marine environmental protection that has become more and more important factor constituting the wider concept of "Security of Oceans" in the Asia.

First, the flag state principle has so close a relationship with the principle of the freedom of navigation. This is because the freedom of navigation positively means that every state may have the right of navigation at high seas, on the one hand, and it also negatively means such navigation is guaranteed without interference by other states, on

the other hand. The flag state principle ensures that vessels on the high seas will not be interfered by other states than the state of the flag that it is flying. Accordingly, reconsideration of the flag state principle essentially extends to that of the freedom of navigation.

In this context, it should be noted the particular status of navigation among the uses of the sea. The freedom of navigation has continuously occupied the most principal status among the freedom of uses of the sea throughout the history of the development of the freedom of the high seas since the 17th century. In other words, the principle of the freedom of navigation is inseparable from the principle of the freedom of the high seas. In addition, practically thinking, almost all imaginable uses of the sea unavoidably accompanies navigation, such as fishing, constructing marine cables in the sea bed, scientific research, and so on.

Based upon such understandings, it can be safely said that the relationship between the freedom of the high seas and the flag-state principle, and also the relationship between the flag state principle and the freedom of navigation, both form the two sides of one coin.

Vessel-source pollution relate to the principle of freedom of navigation more than other types of marine pollution. Certainly, damping of harmful or hazardous substances to the marine environment from ships, as a type of marine pollution, is also conducted by using ships and, in this sense, it might be included in vessel-source pollution. However, for damping, ships are used only as means to transport hazardous or contaminating materials, and therefore, damping from ships can be distinguished from vessel-source pollution, at least in this presentation of mine.

Second, after major accidents of ships that caused disastrous damages to the marine environment, such as, sea casualties and accidents of the Torrey Canyon, the Amoco Cadiz, the Atlantic Empress, the Exxon Valdez, the Erika, international concern has swiftly intensified for coping with marine pollution by sea casualties and accidents of vessels. Those unfortunate experiences strongly motivated the international society to develop methods for preventing accidents of ships and for ensuring the safety of navigation of ships especially that are carrying hazardous or contaminating materials.

Actually the international regulation for that purpose has been realized and it has necessarily extended to the so-called CDEM elements of ships, namely, construction, equipment, design, and manning of ships. In addition, designation of sea-lanes, Vessel Reporting System or Vessel Traffic Service (VTS) are among the important tools of the international

regulation. These methods target not the conduct of pollution itself, but the ways of navigation or navigation itself of certain kind of ships. They unavoidably impact on the freedom of navigation, and at the same time, the flag state principle.

For these reasons, my presentation will reconsider the significance of the flag state principle in the context of vessel-source pollution without including the issue of damping by ships. In such analysis, it is always assumed the close relationship between the flag state principle and the freedom of navigation, for the reasons explained here.

(2) The Three Main Pillars of This Presentation

The following three points will be the main pillars of my presentation, and touched upon in that order.

First, in respect to vessel-source pollution, there has been a shift of concern of the international society from intentional discharges of oils or other substances to the marine environment onto the accidental spills of harmful substances by accidents and sea casualties. If that is recognized, the fundamental assumption of the UNCLOS might be forced to be changed, since it places much weight on (mainly intentional) discharges of oils and other harmful substances as the target of international regulation for combating vessel-source pollution.

Second, by that change of the shift in the international concern regarding vessel-source pollution, the significance of the flag state principle and the freedom of navigation should be also reconsidered. The developing international regulation for the purpose of preventing of accidents of ships and securing the safety of navigation may raise a harsh conflict between such expected regulation and the principle of the freedom of navigation, which, so to speak, is the reverse side of the flag state principle.

Third, the recent international practices will be evaluated from the perspective of the first and the second points. Among the relevant international practices, there is non-flag state jurisdiction to be exercised for the purpose of the marine environmental protection, such as jurisdiction by coastal states and port states. A brief comparison with the practices of non-flag state measures that have emerged in the field of combating illegal fishing or IUU fishing will be added.

After the examination of these three points my presentation will reach tentative conclusions. Departing from the typical way of thinking such as “exceptions to the flag state principle”, practical and necessary

perspective is proposed, that is seeking for “what function flag states should fulfill to achieve the object of the protection of the marine environment.”

Now, I am getting started with an examination of the first point mentioned here.

2. The Shift of Meaning of Vessel-Source Pollution from Intentional Discharges onto Accidental Discharges

(1) “Discharge” As the Principal Factor of Vessel-Source Pollution under the UNCLOS

①Article 1, Paragraph 1, Subparagraph (1) of the UNCLOS provides its definition of “pollution of the marine environment” as the introduction by man directly or indirectly of substances or energy in to the marine environment. The term “introduction” does not necessarily exclude introduction by negligence and accidental introduction by sea casualties, for instance. However, as for the relevant provisions concerning vessel-source pollution, the UNCLOS clearly assumes discharges of harmful substances to the marine environment with intention as the typical conduct of vessel-source pollution. It deals with the pollution by marine casualties under different Article 221.

In respect to vessel-source pollution, the relevant provisions of the UNCLOS are mainly Articles 211, 217, 218, 219 and 220. Among them the most important provisions are Articles 218 and 220 from the perspective of the flag state principle and its compromise with other states’ concurrent jurisdiction. This is because they provides for enforcement jurisdiction and its distribution among flag states, coastal states and port states. In addition, needless to say, exception in enforcement jurisdiction to the flag state principle generally means direct and physical interference with foreign vessels, and thus, it can cause a harsh conflict among the interested states.

Article 220 in distributing jurisdiction concerning vessel-source pollution, seeks a balance of the interests between flag states, on the one hand, and coastal states of territorial seas and exclusive economic zones, on the other hand. It provides for the distribution in detail according to the place of violation and the current position of the vessel concerned. When the particular requirements under the Article are satisfied, non-flag states, such as, coastal states, may (not shall) exercise their enforcement jurisdiction. Article 220 also sets force stages of procedures and measures that non-flag states may take according to the degree of seriousness of violations and situations.

Article 218, Paragraph 1 allows port state to take some enforcement measures concerning violations and discharges from foreign vessels at high seas, when the vessel concerned is voluntarily within a port or at an off-shore terminal of the port state.

②Based upon the understanding that Articles 218 and 220 are the core provisions for reconsideration of the significance of the flag-state principle in the domain of vessel-source pollution, and looking carefully into these provisions, it is undeniably noticeable that the key word for triggering the exercise of the jurisdiction by non-flag states is “discharge.” The “discharge” usually means intentional discharge and that by some negligence of oils, ballast waters, and other harmful substances.

Preceding the adoption of the UNCLOS in 1982, since 1950’s there had been already development of international regulation regarding the discharge of oils and others from vessels that was realized by the energetic and continuous work of the International Maritime Organization. Here, it is enough to recall the International Convention for the Prevention of marine Pollution from Ships of 1973 and the Protocol of 1978 thereto (MARPOL 73/78). Under many various Articles of the UNCLOS in its Part XII (twelve) such phrases are found as “international rules and standards established thorough the competent international organization or general diplomatic conference.” Concerning “the competent international organization” all the party states and scholars on the law of the sea would agree that this expression assumes, first of all, the International Maritime Organization.

In sum, the basic stance of the UNCLOS toward vessel-source pollution is to combat above all intentional discharges or that by some negligence of oil and ballast waters, and other harmful substances to the marine environment.

(2) Non-Flag State Jurisdiction with Respect to Intentional Discharges That Significantly Impacts upon the Principle of the Freedom of Navigation

① The flag state principle and the freedom of the high seas are, as mentioned before, so to speak, two sides of a coin. Also among the freedom of various uses of the high seas the freedom of navigation ranks above other freedom of uses, since all the other uses of the high seas, such as, fishing, laying submarine cables, scientific research are necessarily accompanied by navigation. Further the freedom of navigation means that all vessels may navigate at high seas without interference by states other than the states of

the flag which they are flying.

If discharge is the main target for combating the marine environmental pollution from vessel-source, and if non-flag states are allowed to exercise enforcement jurisdiction against the discharges by foreign vessels on site at high seas, at least practically it would be the most remarkable and the most conflict-raising exception to the flag state principle. That impedes seriously and physically the freedom of navigation.

② The UNCLOS does not admit such non-flag state enforcement measures at high seas except for measures of coastal states to be taken at high seas under Article 221 of the UNCLOS. In place of it, it establishes the legal regime of the EEZ that totally covers thirty-six per cent of the sea areas on the earth and confers on its coastal state concurrent jurisdiction concerning the marine environmental protection with flag state jurisdiction. Particularly regarding vessel-source pollution, as confirmed above, Article 220 distributes enforcement jurisdiction between flag states and coastal states of EEZs.

Concerning the legal nature of the EEZ in respect to the marine environmental protection, on the one hand, it is frequently indicated that the jurisdiction of the EEZ's coastal state assumes jurisdiction for the protection of the common interest of the marine environmental protection rather than subjective interests of the coastal states. On the other hand, the UNCLOS maintains the freedom of navigation of foreign vessels in EEZs. Therefore, under Articles 211 and 220, it very carefully seeks a balance of the interests between flag states and coastal states of EEZs in distributing prescriptive and enforcement jurisdiction.

Taking into consideration of these stances of the UNCLOS in an integrated manner, it might be interpreted that, the UNCLOS instituted new legal regime of the EEZ differently from that of the high seas in seeking a balance between the freedom of navigation and the tightened regulation for the purpose of the marine environmental protection. The latter is realized by concurrent jurisdiction distributed to flag states and also coastal states. The coastal state's jurisdiction is expected to fulfill a function of guardianship of the marine environmental protection for the international society. Unfortunately, in reality, state practices of coastal states of EEZs demonstrate a tendency of making the nature of their concurrent jurisdiction subjective for realizing their own coastal interests. However, the basic understanding of the significance of the legal regime of the EEZ explained here should not be necessarily denied by these unilateral practices.

③ The UNCLOS has also introduced a new type of port state jurisdiction for the purpose of the marine environmental protection. Under Article 218 port State may exercise some enforcement jurisdiction over foreign vessels that have conducted discharges at high seas. Such jurisdiction of a port state takes on a sort of guardianship of the marine environmental protection for the international society, since it may be exercised without any relation to the subjective interests of the port state concerned.

The port state enforcement does not mean any direct interference upon the navigation of foreign vessels on site at high seas, physical encroachment upon the freedom of navigation, either. However, as being analyzed below, depending on the kinds of measures of port state enforcement, it can have significant impact on the freedom of navigation. From this perspective, newly developed port state measures within the framework of international or regional cooperation deserve attention.

Before conducting that examination, it is meaningful to survey the recent target of international or regional regulation in the field of the marine environmental protection.

(3) Intensified Concern on the Accidental Spills of Harmful Substances to the Marine Environment from Marine Casualties

① There occurred disastrous marine casualties that caused serious pollution to the marine environment in a relatively short time sequence in the various sea areas in the world. Among those accidents are those of the Torrey Canyon, the Amoco Cadiz, the Exxon Valdez, the Erika and so on.

Strongly motivated by this fact the international concern shifted from the intentional discharge from vessels onto the pollution to the marine environment caused by marine casualties. As a result the international society has tried to further tighten the international regulation for the purpose of prevention of marine casualties and securing the safety of navigation. Here, it should be clearly noted that the two legal interests come to be closely related to each other, namely, that of the marine environmental protection and the safety of navigation. They are now almost inseparable.

② As efficient tools for tightening of the international regulation for that purpose, various measures have emerged. Some of them are taken unilaterally by coastal states of territorial seas and inland seas, such as, designation of sea lanes, prohibition or restriction of entering into ports upon vessels without required equipments, mandatory pilotage, compulsory vessel reporting system or VTS, VMS(vessel Monitoring

System), and so on. They are also realized by international or regional cooperation regarding port state measures.

These measures, when taken by non-flag states, are different from those taken by coastal states of territorial sea or exclusive economic zone under Article 220 and by port states under Article 218, paragraph 2 of the UNCLOS. The key factor that promoted the new type of non-flag state measures different from those under the UNCLOS resides in important difference between the relation of the acts of discharge to navigation, and that of accidental spills to navigation.

In the next section, from such perspective, I will analyze these relevant practices.

3. The Impact upon the Freedom of Navigation by the Recent Measures Taken by Non-Flag States for Combating Marine Pollution from Marine Casualties

(1) Recent Measures That are Emerging in International and Regional Practices

① Initially the principal measures for the marine environmental protection have been setting forth standards of discharges of oils and other harmful substances to the marine environment. The International Convention of 1973 and the Protocol of 1978 thereto are the typical ones, and by the continuous contribution by the International Maritime Organization these standards have developed and been strengthened. These standards are principally targeting intentional discharges of these substances from vessels.

In comparison with them, after the experience of marine casualties and serious marine environmental damage as their result, international and regional organizations, and even individual states unilaterally have initiated different kinds of methods.

② They are categorized in the following manner.

First, the International Maritime Organization have tried to make international agreements for the Vessel Traffic Service (the VTS) or the Vessel Monitoring System (the VMS) and there are proposals, by Australia, for instance, compulsory pilotage for vessels transporting harmful substances when they are navigating in the vulnerable sea areas to marine environmental pollution.

Second, since the 1980's several regions in the world have cooperatively instituted port stat jurisdiction, and some of them adopted Memorandum for that purpose. The major ones are Paris MOU, Tokyo MOU in the Asia-Pacific Region, Sea MOU adopted by Latin American

Countries, Abuja MOU in the West and Central Africa, Mediterranean MOU, Indian Ocean MOU, and so on. According to these commitments, the participating states establish some inspection and other variety of measures at their ports.

Third, some states individually and unilaterally take measures in respect to vessels that are carrying harmful substances to the marine environment. They are, for instance, setting conditions on that foreign vessels may enter their ports, designating sea lanes, requiring prior notification before entering to their jurisdictional sea areas and mandatory pilotage. Among the conditions or requirements are the double hull standard for tankers in the US Oil Pollution Act of 1990, transponders and voyage data recorders that were proposed under EU directives. There are also practices by coastal states of vulnerable sea areas and busy international straits. (I hope) Concerning the practices by states surrounding the Straits of Malacca and Singapore will be dealt with by Prof. Beckman in the next section of this Panel.

③ What are the impacts by those practices upon the flag state principle, if it is regarded as the reverse side of the coin of the principle of the freedom of navigation? In what sense, do those measures taken by non-flag states restrict the freedom of navigation in an inherent way to the field of the marine environmental protection? They are the questions that I would like to touch upon in the next.

Considering so-called CDEM elements, which are construction, design, equipment and manning of ships, coastal states may not apply their laws to foreign ships conducting the innocent passage. The restriction upon these factors by coastal states can be violations of Article 21, Paragraph 2 of the UNCLOS and impediment upon the right of the innocent passage. However, the issue of the conflict between coastal states' rights and the right of innocent passage is not within the reach of my presentation here.

(2) The Restriction on the Freedom of Navigation by Non-Flag States Measures in an Inherent Way for the Purpose of the Marine Environmental Protection

① As explained above, under the UNCLOS coastal states of EEZs and port states have concurrent jurisdiction with flag states concerning the marine environmental protection.

The former in a direct way may take enforcement measures to the conduct of discharges in the vast sea areas of the world integrated into EEZs of states. The latter only indirectly do the same. In that sense,

these non-flag state measures by coastal states and port states mean interference with the navigation of the foreign vessels in the EEZs and at high seas. This is the way how the concurrent enforcement jurisdiction given to coastal states and port states combat the discharges from vessels, on the one hand, and at the same time, restricts the freedom of navigation of foreign vessels in the field of the vessel-source pollution, on the other hand.

② In comparison, after the occurrence of major accidents that caused serious damage to the marine environment in several regions of the world, coastal states began to unilaterally take measures and many regional schemes of port state jurisdiction were agreed. In focusing upon the schemes of port state jurisdiction, they instituted not only measures of questioning and inspection but also measures of mandatory pilotage, designating sea lanes, requiring prior notification, standardizing CDEM elements in part or whole and so on.

The recent port state measures found in regional agreements and memoranda indicate a shift from the enforcement measures by port states, even if indirectly, against discharges, onto the regulation of the CDEM of vessels, the ways of navigation and navigation itself. That is to say, these measures are targeting risk of navigation in order for preventing spills of harmful substances by sea casualties and accidents, rather than targeting the conduct of discharge itself. In that point, the recent international and regional practices of port state measures place weight on the navigation itself more than on intentional polluting activities from vessels.

(3) Closer Relationship between the Issue of the Marine Environmental Protection and That of the Safety of Navigation

① What motivated such tendency of practices is the intensified international concern for serious damage to the marine environment caused by sea casualties. The issue of the marine environmental protection and that of the safety of navigation have become related to each other closer and closer than ever. As a result, international and regional legal methods for preventing the marine environmental harms have head toward restriction upon the ways of navigation and navigation itself rather than intentional polluting activities.

In addition, it should be noted that while the recently developed port state measures are taken within ports, they have heavy impacts upon navigation not only within jurisdictional sea areas of some states but also at high seas, too. That is easily understood by considering the

fact that certain CDEM elements and transponders are required, and that without entering ports navigation practically cannot be safely conducted. Thus, the port state measures restricting the ways of navigation and standardizing CDEM elements of vessels actually have really limiting effect upon navigation in general unless vessel can find "ports of/ in convenience."

② The close relationship finds its reason that is inherent to the field of the marine environmental protection from vessel-source pollution, and therefore, it does not necessarily hold true in other fields, such as illegal fishing, illegal migration by sea etc.

Among various uses of the sea navigation has special status, since it indispensably accompanies almost all the other uses of the sea, and in that sense, commonly every use of the sea has inevitably some connection with navigation. In this regard, any uses of the sea have close relationship with navigation. However, what should be remarked is that each use of the sea may have that relation with navigation in an inherent way to each use.

As being examined here, the issue of the marine environmental protection from vessel-source pollution is connected to the issue of the safety of navigation after the disastrous experiences of sea casualties. With this particular background, for the purpose of the marine environmental protection the international and regional practices of legal regulation emerged that placed much weight upon regulation of CDEM elements, the ways of navigation and navigation itself.

The UNCLOS admits concurrent jurisdiction to coastal states of EEZs and port states concerning vessel-source pollution. These concurrent jurisdictions are regarded as principally targeting the concrete conduct of discharge. In comparison, the recent international and regional practices of legal regulation realized by port state measures may have possibility to diverge from the fundamental stance of the UNCLOS concerning vessel-source pollution.

③ From a different perspective, it is said that such recent restriction on CDEM elements, the ways of navigation or navigation itself is required as the most efficient and effective tool to prevent marine casualties and the environmental harm by the accidents of ships. It can be emphasized that these non-flag state measures demonstrate the necessity of reconsideration of the flag state principle for the purpose of instituting the most effective and the most efficient methods to protect the marine environment. Persistent adhesion to the flag state principle might prevent the international society from coping with the marine

environmental problems in a practical and effective manner.

④ In some, the examination of the non-flag state measures in the field of vessel-source pollution suggests the following facts.

First, non-flag state jurisdiction or measures form an exception to the flag state principle, and they have impact upon the freedom of navigation as the reverse side of a coin of the flag state principle.

Second, the issue of the marine environmental protection from vessel-source pollution has in a particular way a close relationship with the issue of the freedom of navigation. The way how the former relates to the latter has changed in the recent international and regional non-flag state measures from that of the assumption of the UNCLOS which targets the conduct of discharge in distributing concurrent jurisdiction to flag states, coastal states of EEZs and port states.

Third, non-flag state jurisdiction or measures that have recently developed were motivated to effectively cope with the marine casualties, since they can cause serious or even irreparable harms to the marine environment. Facing that realities non-flag state jurisdiction or measures are the practical choice by the international society of diverging from the historical flag state principle.

Before reaching the tentative conclusions, some comparison with the non-flag state measures that have remarkably emerged in the field of combating illegal fishing, or IUU Fishing would be meaningful.

(4) Development of Non-Flag State Measures in the Field of Combating Illegal Fishing and IUU Fishing

① In the field of combating illegal or IUU fishing, outside the UNCLOS framework the following developments deserve attention. They are found in international or regional agreements and unilateral measures taken by coastal states of especially EEZs.

First, typically the 1995 Agreement for the Implementation of the Provisions of the UNCLOS Relating to Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Articles 21 and 22) and the 2000 Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Article 26) institutes non-flag state enforcement measures at high seas against violations of the Conventions.

Second, according to international or regional conventions and domestic laws, foreign *fishing vessels* are required to conduct prior notification when entering conventional sea areas and EEZs, and to notify their location by the equipment of transponders to the authority of

the conventions or the coastal state of the EEZ.

Third, as in the field of the environmental protection, port state measures are used by regional agreements or memoranda and by coastal states of especially of EEZs. The measures vary to a wide extent, and among them are document inspection, cargo inspection, some enforcement procedures, such as detention of the vessel and the crew concerned, and so on. In addition, some coastal states unilaterally prohibit foreign vessels from entering their ports, using port facilities, and landing of the cargos when the vessels do not satisfy the requirements of the domestic law concerning fishing.

The first and the second significantly diverge from the flag state principle, and at the same time restrict the freedom of navigation of fishing vessels. The second point means restriction on the freedom of navigation of *fishing vessels*. Their navigation is restricted within the convention areas or EEZs of foreign states, simply because they are *fishing vessels*, not because of concrete or actual conducts of illegal fishing. The limitation of the freedom of navigation depends on the type of vessels as fishing vessels, rather than because of actual conducts of illegal fishing. The third point may have alternative function of enforcement measures against illegal fishing on the seas, and prohibition or restraint of entering ports practically has restrictive influence upon navigation of fishing vessels, considering that navigation generally needs periodically entering ports.

② In the field of the marine environmental protection from vessel-source pollution the strong motivation raised by the experience of disastrous harms to the marine environment by sea casualties provoked the international society to regulate the ways of navigation or navigation itself of vessels carrying harmful substances and oils, rather than actual conducts of discharge.

In the domain of fishing, mainly because illegal fishing has been so serious and so tactical, and because it is so difficult to effectively exercise enforcement measures on the sea against illegal fishing, the non-flag state measures at high seas have been inescapably adopted in addition to flag state measures.

While here is not the place to explore the concept and phenomena of the IUU fishing, some remarks are meaningful to understand the necessity of non-flag state measures. IUU fishing forms almost “an Industry of IUU Fishing,” and various tools for suppressing various process of the IUU Fishing are urgently required. The flag state measures at high seas cannot practically prevent it in a perfect manner.

Furthermore, not only measures taken on the seas but other methods should be instituted for the many stages of “the IUU Fishing Industry,” such as, gaining fishing vessels, re-flagging, illegal catch at sea, transshipment on the seas, landing at ports, selling at the market, etc. These situations explains, too, why not only actual conducts of illegal fishing but also navigation of fishing vessels itself is being the target of international or regional or national regulation. The restriction of navigation of *fishing vessels* is adopted, because vast sea areas make impossible for flag states to effectively prevent illegal fishing on the seas, and because “the IUU Fishing Industry” requires such restriction other than direct enforcement measures at sea.

The flag state principle can fulfill very little function to combat such “the IUU Fishing Industry” phenomena. Thus, non-flag measures are quite realistic and practical means to tighten international regulation for fishery resource conservation or orderly fishing.

Each field has its own reason and background in that non-flag state measures have developed. It does so, too, in that international or national regulation has shifts its weight from actual conduct of discharge of harmful substances and illegal fishing onto the ways of navigation and navigation of vessels that transport harmful substances and that are conducting illegal fishing.

4. Tentative Conclusions

In this presentation an examination was given to the non-flag state measures in the field of vessel-source pollution from the perspective of reconsideration of the traditional flag state principle. Some comparison with the field of combating illegal fishing is also given.

These non-flag state measures not only form an exception to the flag state principle, but also have remarkably restrictive impact upon the principle freedom of navigation. In addition, the way how the non-flag state measures interfere with the navigation of the target vessels has changed from the direct enforcement on the seas to the regulation of CDEM elements, the ways of navigation or navigation itself. While the similar characteristics can be found in both fields of the marine environmental protection and the combating illegal fishing, the newly developed international practices of the non-state measures were backed up with inherent situations to each field.

The flag state principle is the most traditional and the most firmly established principle in the law of the sea. It is undeniable. Therefore, non-flag state measures are always labeled as exception to the

flag state principle. However, it might be said that the international society is gradually proceeding toward new fundamental structure of the law of the sea. Persistent adhesion to the flag state principle would close eyes to the actual necessity of non-flag state measures to effectively cope with the modern phenomena of the marine environmental disaster and illegal fishing. Rather for that purpose, development of non-flag state measures may be evaluated as complementary tools to the flag state principle.

At high seas the flag state principle perfectly applies unless there is justification for non-flag state measures based upon international agreements. However, the delimitation between high seas and EEZs is determined by the international society considering political, economical, and other factors. Such artificial delimitation line between the different legal regimes does not guarantee that at high sea the flag state principle is the most effective tool for combating the marine pollution or illegal fishing. By the same line of thought, because of the coastal state jurisdiction regarding the marine environmental protection that is concurrent with flag state jurisdiction, and considering the guardianship nature of the coastal state jurisdiction, the legal regime of the EEZ that applies to vast sea areas on the earth reflect the necessity of reconsideration of the flag state principle.

A change in way of thinking may be expected. The flag state principle is not rigid one. What measures or jurisdiction do flag states maintain or monopoly for the purpose of realizing the common interests of the marine environmental protection and fishery resource conservation or orderly fishing? How should non-flag state measures complement to flag state measures for that purpose? Such way of thinking in a practical sense is needed to effectively cope with modern marine casualties and IUU fishing and other maritime problems.

It is undeniable that the non-flag state measures have really serious impact upon the freedom of navigation. This tendency has intensified in the domain of the vessel-source pollution, as analyzed in this presentation. The same holds true in that of combating illegal fishing. The reasons and necessity for the restriction of the freedom of navigation varies depending on each maritime issue and on the effective ways to achieve the objectives. Without practical justification, without necessity for the realization of the common interests of the international society, groundless restriction on the flag state principle and on the freedom of navigation should not be allowed. Thus, the most important task that remains for us is to determine essential restriction on the

freedom of navigation by seeking a balance between it and the interests of the marine environmental protection, fisheries resource conservation, and others.