

Spain and the Law of the Sea: 20 years under LOSC

Maritime zones under sovereignty and navigation

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(A) SPAIN'S TERRITORIAL SEA CLAIM. SPANISH INTERNAL WATERS

It has been argued that Spain already had a 6-mile territorial sea since the mid-17th century, (more specifically, since the Royal Charter of 17 December 1760 against tobacco and salt smuggling in the waters adjacent to the Spanish coast up to 2 leagues offshore).¹ However, until 1977 the Spanish legislation and conventional practice only allowed us to speak (strictly) of Spain's exercise of jurisdiction in different fields (defence, customs and fisheries) in the waters adjacent to its coast.² On the other hand, the so-called "Spanish Territorial Waters" did not exceed 6 miles until the 1967 Fisheries Act, enacted upon the ratification of the 1964 European Fisheries Convention, which extended them to 12 miles for fishing purposes.³

It was in 1977—almost six years after acceding to the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone—⁴ when Spain formally claimed its territorial sea through the 1977 Territorial Sea Act.⁵ Its breadth is set at 12 miles from the baseline, following other countries' practice and the *opinio juris* of the majority of states participating in the Third United Nations Conference on the Law of the Sea—and in the preparatory committee before that.

For the purpose of measurement, the 1977 Territorial Sea Act provides that the inner limit shall be determined by the "low-water line and by such straight baselines as may be established by the Government" (Art. 2). However, Royal Decree 627/1976, adopted by the Spanish Government as an implementing regulation of the 1967 Fisheries Act, had previously established straight baselines both

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¹ Statement made by the Spanish representative to the United Nations Seabed Committee, 16 March 1971; taken from S. Martínez Caro, "Mar territorial: naturaleza, anchura y delimitación", in A. Poch (ed.), *La actual revisión del Derecho del mar. Una perspectiva Española* (Instituto de Estudios Políticos, Madrid, 1975) vol. I (1), 233-284, at 265.

² J.A. Pastor Ridruejo, *Curso de Derecho internacional público y organizaciones internacionales* (21th ed., Tecnos, 2017), at 360.

³ Law 20/1967, 8 April 1967, Extending the Jurisdictional Waters to Twelve Miles for Fishing Purposes ([BOE No. 86](#), 11 April 1967). Decree 3281/1968 extended jurisdictional waters to twelve miles for tax purposes ([BOE No. 17](#), 20 January 1969).

⁴ Instrument of accession deposited on 25 February 1971 ([BOE No. 307](#), 24 December 1971).

⁵ Law 10/1977, 4 January, on the Territorial Sea ([BOE No. 7](#), 8 January 1977). Law 28/1969, of 26 April, on Coasts ([BOE No. 101](#), 28 April 1969), already referred to the territorial sea, without setting its breadth and declaring it under public domain by means of its Art. 1. Before that, Art. 1 of Law 48/1960, of 21 July, on Air Navigation, claimed that Spanish sovereignty extended to the airspace over the territorial sea ([BOE No. 176](#), 23 July 1960).

in the mainland coast and in the Balearic and Canary Islands.⁶ The wording of this regulation was similar to that of the 1977 Territorial Sea Act, providing also that the low-water lines of natural harbours or bays should be considered as baselines whenever they exceeded 24 nautical miles. The aforesaid 1976 Royal Decree was later replaced by Royal Decree 2510/1997 in view of the errors identified in the drawing of straight baselines.⁷

Royal Decree 2510/1997, currently in force, draws 123 straight baselines, most of which do not exceed 24 nautical miles.⁸ These lines, however, do not cover all Spanish coast, either because there are no geographical features allowing for it (for instance, in certain parts of the coast of the Balearic Islands), or for political reasons (in Algeciras Bay, bathing the territory of Gibraltar, and in Ceuta, Melilla and the Mediterranean islands, islets and island rocks close to the African coast). It is worth noting the drawing of straight baselines in river mouths without using the low-water points of riverbanks as reference, but also without deviating significantly from the rules later laid down in the 1982 UN Convention on the Law of the Sea (LOS).⁹

The adoption of the 2010 Canary Islands Waters Act does not change the application of the referred baselines regime to the Canary Islands. This Act establishes the so-called “Canary waters” as a maritime zone of the Autonomous Region of the Canary Islands, based on a perimeter outline of the outermost points of the islands and rocks.¹⁰

According to former 1967 Fisheries Act As, the internal waters were those waters included within the baselines used to measure such area (Art. 2). Later, the 1977 Territorial Sea Act (currently in force) declared that the Spanish sovereignty extends over these waters (Art. 1: “The sovereignty of the Spanish state shall extend, beyond its land territory and its internal waters, to the territorial sea [...]”), without further specifications.

Currently, the 2011 State Ports and Merchant Marine Act¹¹ provides that “Spanish internal maritime waters are, for the purposes of this Act, those on the landward side of the baselines of the territorial sea”, adding that these waters “include ports and any other permanently connected to the sea where it becomes sensitive to the effect of tidal and navigable stretches of rivers to where there are ports of general interest” (Art. 8(1)).¹² It defines seaports as “all territorial spaces, maritime waters and

⁶ Royal Decree 627/1976, 5 March 1976, of April 8, on the extension of Spanish jurisdictional waters to 12 miles, for fishing purposes ([BOE No. 77](#), 30 March 1976).

⁷ Royal Decree 2510/1977, 5 August 1977, on the drawing of straight baselines in development of Law 20/1967, of April 8, on the extension of Spanish jurisdictional waters to 12 miles, for fishing purposes ([BOE No. 234](#), 30 September 1977).

⁸ See V.L. Gutiérrez Castillo, “Análisis del sistema de líneas de base español a la luz de la Convención de Naciones Unidas sobre el Derecho del Mar de 1982”, in J.M. Sobrino Heredia (ed.), *Mares y océanos en un mundo en cambio* (Tirant lo Blanc, Valencia, 2007), 171-197, at 175.

⁹ *Ibid.*, at 186.

¹⁰ Law 44/2010, 30 December 2010, on the Canary Island Waters ([BOE No. 318](#), 31 December 2010). Sole additional provision provides that: “[T]he drawing of the perimeter outline shall not affect the delimitation of the maritime zones of the Canary Islands as established by the Spanish legal order under applicable international law”. See, in this regard, E. Orihuela Calatayud, “La delimitación de los espacios marinos en los archipiélagos de Estado. Reflexiones a la luz de la Ley 44/2010, de 30 de diciembre de aguas canarias”, 21 REEI (2011), 1-26, at 18.

¹¹ Royal Legislative Decree 2/2011 of September 5, approving the consolidated text of the State Ports and Merchant Marine Act ([BOE No. 253](#), 20 October 2011).

¹² Former Law 27/1992, of 24 November, on State Ports and Merchant Marine ([BOE No. 283](#), 25 November 1992).

facilities located on the shore of the sea or estuaries, with physical, natural or artificial and organizational conditions that enable the performance of port traffic operations [...]” (Art. 2).

(B) SPAIN’S TERRITORIAL SEA AND INTERNAL WATERS LEGAL REGIME

The 1977 Territorial Sea Act declares Spain’s sovereignty over its territorial sea and internal waters, and provides that such sovereignty “shall be exercised, in accordance with international law, over the water column, seabed, subsoil and resources of the territorial sea, and over the superadjacent airspace” (Art. 1). Also, the Spanish Constitution of 1978 (Art. 132(2)) and the 1988 Coastal Act¹³ (Art. 3(2)) establish that the territorial sea and the internal waters (including the seabed and subsoil) are “property of the state public domain”. Hence, they are inalienable (they cannot be sold), not subject to any statute of limitations (ownership cannot be obtained through acquisitive prescription) and exempt from seizure.¹⁴ Until 2014, the Spanish legislation said no more on the territorial sea regime, except for certain regulatory provisions referred to below.

The approval of the 2014 Maritime Navigation Act¹⁵ provided Spain with a rule governing navigation through the territorial sea. Incidentally, it also regulated other activities in this area. In particular, it enshrines the prohibition for foreign vessels to fish in the territorial sea—as well as in the internal waters— (Art. 24, which also establishes that foreign vessels shall not have their fishing nets ready for operation in any Spanish maritime zone). Moreover, research activities by foreign vessels (or foreign entities in Spanish vessels), either in the territorial sea or other maritime zones under Spanish sovereignty or jurisdiction, are subject to administrative authorization (Art. 25). Furthermore, the 2014 Maritime Navigation Act sets forth the following obligations for foreign vessels:

- (1) The obligation to comply with the applicable laws and regulations on navigation, border controls and immigration, customs, health and others of public security, as well as those related to the protection of the marine environment and the underwater cultural heritage (Art. 38); and
- (2) The prohibition, except where otherwise authorized, to carry out marine scientific research, underwater activities or any others that may damage cables, pipes or facilities and equipment serving navigation, research, measurement of the environment, or exploitation of marine resources. It also lays down the prohibition to use ancillary vessels (except in the event of failure or of search and rescue operations), to send out sound or light signals other than those provided by the rules on maritime safety and prevention of collisions at sea (Art. 39(1) and (3), see also Art. 25(3) in relation to research).¹⁶

wrongly included rivers, lakes and continental waters in the definition of internal waters (Art. 7). The 2011 State Ports and Merchant Marine Act also provides a broad definition of internal waters, since it includes non-maritime waters (“navigable stretches of rivers to where there are ports of general interest”).

¹³ Law 22/1988, 22 July 1988, on Coasts ([BOE No. 181](#), 29 July 1988).

¹⁴ According to Law 33/2003, on Assets of Government Bodies ([BOE No. 264](#), 4 November 2003).

¹⁵ Law 14/2014, 24 May 2014, on Maritime Navigation ([BOE No. 180](#), of 25 July 2014), an English version available [here](#).

¹⁶ With regard to marine research, Royal Decree 799/1981, of 27 February, concerning the Rules Applicable to Marine Scientific Research Activities in Areas under Spanish Jurisdiction ([BOE No. 110](#), 8 May 1981), requires prior authorization

With regard to internal waters, Spain does not have a specific rule defining their legal regime in a complete and detailed manner. Nevertheless, they are subject to the rest of the Spanish legislation and the decisions of the courts and other authorities. However, two sector-specific rules lay down the regime applicable to navigation through these waters, as well as to access and stay in ports. I am referring, on the one hand, to the abovementioned 2011 State Ports and Merchant Marine Act, which replaced the 1992 Act¹⁷ and, on the other, to the Maritime Navigation Act itself. To them should be added several regulatory provisions, the most relevant of which will be mentioned below.

Moreover, the 2014 Maritime Navigation Act prevents foreign vessels (except when authorized by the marine authorities) from carrying out the activities mentioned above in internal waters (Art. 39(4)). Foreign vessels are also prohibited from fishing, unless authorized by the competent authority, and subject to international treaties (Art. 24(2)).

(C) GENERAL REGIME APPLICABLE TO NAVIGATION THROUGH THE TERRITORIAL SEA

Until the 2014 Maritime Navigation Act, Spain did not have a detailed regulation of navigation through its territorial sea, except, as we shall see, for warships. The 1977 Territorial Sea Act merely stated that the sovereignty in such area was to be exercised in accordance with international law. However, the Spanish practice reflects the long-standing acceptance of international standards on innocent passage.¹⁸

In line with LOSC provisions, the 2014 Maritime Navigation Act provides the application of the innocent passage regime in the territorial sea (without it being subject to charges, except for the services provided during the passage; see Art. 41). It also specifies that such passage must be expeditious and uninterrupted, without threatening the peace, the good order or the safety of Spain (Art. 37(1) and (2)). Submarines and other underwater vessels are required to navigate on the surface and to show their flag (Art. 22(3)). With respect to overflying aircrafts, passage may be allowed through a special permit or pursuant to the treaties to which Spain is a party (Art. 47). Besides, reference is made to LOSC¹⁹ for navigation through the Strait of Gibraltar (covered by the territorial sea of both Spain and Morocco). Furthermore, this Act requires all vessels navigating through Spanish zones to be registered in only one state, to show their name and registration number, and, pursuant to maritime uses, to fly the Spanish flag along with theirs.

As regards stopping and anchoring, reference is made to LOSC (Art. 37(3), which refers to Art. 18 LOSC). Ships that are forced to stop or anchor in any Spanish maritime zone due to *force majeure* or distress shall immediately notify the nearest maritime authorities (Art. 21(2)).

Furthermore, under the 2014 Maritime Navigation Act, the Government is entitled to temporarily

to carry out research activities in these areas (Art. 1).

¹⁷ Law 22/992, cited above.

¹⁸ See J.D. González Campos, “Navegación por el mar territorial, incluidos los estrechos”, in Poch *supra* n. 1, vol. I (1), 285-398, at 386.

¹⁹ On this question, see the contribution in this volume by López Martín on “[Navigation through the Strait of Gibraltar](#)”.

suspend innocent passage in certain zones without discrimination between flags. But, unlike LOSC, which restricts the exercise of such power by the coastal state to cases when it “is essential for the protection of its security, including weapons exercises” (Art. 25(3)), the Spanish Act states that the suspension must be “in order to defend the general interest and, in particular, to safeguard safety of navigation” (Art. 42). On the other hand, it provides for the establishment of 500-meter safety-of-navigation zones around artefacts and platforms located in any Spanish maritime zone, which can be larger when so permitted by the applicable international standards (Art. 31).

A previous chapter of the Act (Chapter III, of rather vague content), referred to the “general regime” of maritime navigation through the “Spanish Maritime Zones” (sic), sets forth other possible limitations to navigation in such zones (including the territorial sea). In particular, navigation can be restricted, conditioned or prohibited in certain places for reasons of maritime safety or protection, especially in cases of naval exercises and operations of the Armed Forces, or whenever the passage of foreign vessels through the territorial sea is not innocent (Art. 20(1)). Such measures can also be adopted in order to protect the marine biodiversity or the underwater cultural heritage, subject to any applicable international agreements. Furthermore, it is stated that such measures can be taken by the competent authorities, without discriminating between flags and with respect to certain categories of ships, whenever it may be necessary to prevent certain unlawful activities or any prohibited trade (Art. 20(2)). Undoubtedly, the wording of this provision, formulated in very broad terms, is hardly consistent with LOSC provisions. Nevertheless, it should be borne in mind that Article 2 of the 2014 Maritime Navigation Act provides that it shall be applied “as long as it does not oppose the terms set forth in the international treaties in force in Spain”. In any case, the provisions of the act must be interpreted in accordance with such treaties.

Regarding environmental protection, the 2014 Maritime Navigation Act includes certain limitations to navigation that seem compatible with LOSC and subsequent practice:²⁰

- (1) Passage of foreign ships shall not be considered innocent when they perform any act of intentional and severe pollution, nor when their state of failure or seaworthiness are a serious threat to the environment (Art. 39(2));
- (2) Ships carrying radioactive or other hazardous or noxious substances shall have the relevant documents on board and comply with the precautionary measures provided in the applicable treaties, and they shall pass through the lanes and systems established for that purpose, following the instructions of the maritime authorities (Art. 40);²¹ and
- (3) The masters of ships must immediately notify any pollution incidents caused by oil or other noxious or potentially hazardous substances of which they are aware (Art. 33).

To these provisions should be added those contained in the 1964 Nuclear Energy Act, to which the

²⁰ On the practice subsequent to LOSC, see, in the Spanish literature: J. Juste Ruiz, “Libertad de navegación e intereses de los Estados ribereños”, in Sobrino Heredia, *supra* n. 8, 259-295, at 268.

²¹ Also worth considering are the provisions of the International Convention for the Prevention of Pollution from Ships, 1973 and the Protocol of 1978 related thereto (MARPOL 73/78), to which Spain is a party, as well as Royal Decree 394/2007, 31 March 2007, on Measures Dealing with Ships in Transit that Perform Polluting Discharges in Spanish Waters, transposing EP and Council Directive 2005/35/EC (OJ 2005 L 255/11) ([BOE No. 81](#), 4 April 2007).

2014 Maritime Navigation Act itself refers. The Nuclear Energy Act considers the passage of nuclear ships through territorial waters as an exception to the “right of innocent passage”. Therefore, the government of the flag state certifying the safety of the nuclear devices and facilities of the ships is required to verify and ensure protection against ionizing radiations, as well as to guarantee the coverage for civil liability that may arise from any accident (Arts. 70 to 73).²² Hence, the Act deviates from Article 23 LOSC, which has drawn severe criticism from Spanish experts.²³

Also worth mentioning are the provisions of the Act concerning maritime security, which require the vessels to comply with:

- (1) The rules on lights, signals, course and steering contained in the applicable regulations, in particular the international regulations for preventing collisions at sea (Art. 27).
- (2) The maritime traffic organization systems, once they have obtained the required international approval and publication (Art. 30). The Act also specifies that ships carrying radioactive or other hazardous or noxious substances must pass through the appropriate lanes, devices and systems, and they shall follow the special navigation instructions that may be issued by the maritime authorities.

The 1974 International Convention for the Safety of Life at Sea (SOLAS), to which Spain is a party, provides that the adoption of maritime traffic organization systems should be subject to the International Maritime Organization (IMO). However, they can also be implemented without IMO’s approval, in which case they are required to comply, to the extent possible, with its guidelines and criteria (Rule 10 of Chapter V).²⁴ Royal Decree 210/2004, establishing a Maritime Traffic Monitoring and Information System,²⁵ envisages these systems (adopted and not adopted by the IMO). Spain currently has traffic separation schemes in Finisterre, Tarifa (for traffic in the Strait of Gibraltar), Cabo de Gata, East Canary Islands and West Canary Islands.

The aforementioned Royal Decree 210/2014, adopted after the “Prestige” crisis, also puts in place detailed rules on ship reporting and monitoring, notification of dangerous or polluting goods on board ships, and monitoring of hazardous ships.²⁶ These rules aim at increasing maritime safety, imposing certain requirements on merchant ships over 300 GRT to ensure their monitoring (reporting, use of identification systems, etc.). Moreover, the Royal Decree establishes that the maritime authorities shall adopt the relevant measures to ensure that ships entering the territorial sea

²² Law 25/1964, 29 April 1964, on Nuclear Energy ([BOE No. 107](#), 4 May 1964).

²³ See J.A. de Yturriaga Barberán, “La Convención de Naciones Unidas sobre el Derecho del Mar. Balance de 15 años de aplicación”, in J. Martín y Pérez de Nanclares (ed.), *España y la práctica del Derecho Internacional* (Colección Escuela Diplomática, MAEC, Madrid, 2014), 95-113, at 100. See also V.L. Gutiérrez Castillo, “Legal Regime on Navigation through the Strait of Gibraltar: The Role of its Coastal States”, 2 *Il Diritto Marittimo* (2017), 349-365, at 361. For an opposite approach, see my work “Régimen de navegación de los buques de guerra extranjeros por el mar territorial español y de sus escalas en puertos españoles”, 2 *REDI* (1986), 543-569, at 552.

²⁴ See IMO Assembly Resolution A.572(14), of 20 November 1985, “General Provisions on Ships’ Routeing”.

²⁵ Royal Decree 210/2004, 6 February 2004, establishing a monitoring and information system on maritime traffic, transposing EP and Council Directive 2002/59/EC (OJ 2002 L 208/10) ([BOE No. 39](#), 14 February 2004), amended by Royal Decree 1593/2010, 26 November 2010, transposing EP and Council Directive 2009/17/EC (OJ 2009 L 131/101) ([BOE No. 289](#), 30 November 2010), and Royal Decree 201/2012, 23 January 2012, transposing Commission Directive 2011/15/EU (OJ 2011 L 49/33) ([BOE No. 30](#), 4 February 2012).

²⁶ See J. Juste and V. Bou, “After the Prestige Oil Spill: Measures Taken by Spain in an Evolving Legal Framework”, 10 *SYIL* (2004), 1-37, at 20-22.

comply with the specific rules in areas of applicability of Vessel Traffic Systems (VTS) based on the guidelines developed by the IMO (Art. 8).

(D) NAVIGATION REGIME APPLICABLE TO GOVERNMENT SHIPS IN THE TERRITORIAL SEA

With regard to navigation of Government ships (warships and other ships used exclusively on government non-commercial service), the 2014 Maritime Navigation Act lays down the following special provisions:

- (1) They are not required to fly the Spanish flag (Art. 22(2)), but only to fly their own flag;
- (2) Passage shall not be considered innocent when it involves performance of manoeuvres or other exercises with weapons, acts aimed at collecting information by electromagnetic means or the launching, landing or taking on board of any aircraft or military device (Art. 52);
- (3) Government submarines shall also navigate on the surface and show their flag, unless otherwise authorized to take part in military exercises or manoeuvres (Art. 53); and
- (4) The Government may regulate their navigation in accordance with the provisions of that Act and international law (Art. 55).

In this regard, mention should be made of Order 25/1985 of the Ministry of Defence, providing that no special authorization is required for the passage of foreign warships through the territorial sea, and prohibiting them from stopping, towing vessels, flying aircrafts, performing manoeuvres or exercises of any kind, and from carrying out hydrographic or oceanographic works.²⁷ The Order also requires a diplomatic authorization to perform any exercise or operation beyond simple passage.

(E) GENERAL REGIME APPLICABLE TO NAVIGATION THROUGH INTERNAL WATERS AND
ACCESS TO PORTS

The 2014 Maritime Navigation Act contains some scattered provisions on navigation of foreign vessels through internal waters and detailed regulations on their access and stay in ports.

The point of departure is the principle of free access to ports open to navigation, subject only to the authorization of the port authority and to the provisions of the Act and other laws and regulations on ports, safety, customs, borders and immigration, police, health, the environment and fishing, as well as the operating conditions established (Arts. 7(1) and (3)).

Nevertheless, it should be borne in mind that the 2011 State Ports and Merchant Marine Act provides that internal navigation and coastal navigation (*cabotage*) with commercial purposes are reserved to Spanish commercial ships,²⁸ except as provided in this regard by EU law (Art. 256(1)),

²⁷ Order 25/1985, 23 April 1985, of the Ministry of Defence, approving the Rules on Warships' Port Calls to Spanish Ports or Anchorages and their Passage through the Spanish Territorial sea in Times of Peace ([BOE No. 115](#), 14 May 1985).

²⁸ Internal navigation means navigation which takes place wholly within the area of a given port or other Spanish internal waters, and coastal navigation ("cabotage") means navigation other than internal navigation which is carried out between ports or points in areas under Spanish sovereignty, sovereign rights or jurisdiction (Art. 8(2) of the 2011 State Ports and Merchant Marine Act).

including the Regulations on the freedom to provide services to maritime transport between Member States and between Member States and third countries, as well as cabotage services.²⁹

However, the right to navigate through internal waters, in the above terms, does not include stopping or anchoring outside the service areas of ports, except in the event of force majeure (in which case notification to the nearest maritime authority is required), when expressly authorized, or when it concerns recreational craft (Art. 21). On the other hand, just like in the territorial sea, foreign ships must fly the flag of only one state, and they must show their name and registration number, flying their flag along with the Spanish one. They are also required to navigate on the surface (Art. 22).

Spanish legislation does not make any reference whatsoever to internal waters enclosed as a result of the drawing of straight baselines under Royal Decree 2510/1977. Pursuant to LOSC, these waters are subject to innocent passage (Art. 8(2)).

As for the access and stay in ports, the following provisions of the 2014 Maritime Navigation Act should be highlighted:

- (1) Entry to ports may be prohibited or conditioned for emergency reasons or risks to public health, safety of navigation, protection of traffic and port facilities, fight against illegal fishing or environmental sustainability, in accordance with the applicable legislation (Art. 7(2)).
- (2) Port authorities may order temporary closure pursuant to the regulations in force. Furthermore, maritime authorities may provisionally propose prohibition of navigation in ports and their access channels, as well as entry or exit of ships, when so advised by the weather or water conditions, when there are obstacles to navigation, or on grounds of protection, emergency, public security, and environmental or public security reasons. Such prohibition or the establishment of conditions may also be proposed with regard to ships that may be a hazard to the safety of persons, property or the environment (Art. 8).
- (3) In the event of forced docking, the vessel owner, master or agent must inform the maritime authority of the causes to, which shall verify them and state the formalities and requirements to be fulfilled. The maritime authority may impose requirements and conditions for entry to ports or places of shelter of potentially polluting ships (Art. 9).
- (4) Navigation and entry and stay in ports of nuclear-powered ships are governed by the aforementioned 1964 Nuclear Energy Act and the applicable treaties (Art. 13). This Act provides for refusing stay in port if the vessel does not comply with the relevant conditions.
- (5) Entry to internal waters and ports of ships carrying radioactive substances is subject to technical and operational specifications established by the Government. Entry and stay in ports is in any case subject to any verification required for the protection of the environment, which may result in an order to leave the internal waters (Art. 14).

²⁹ Council Regulation 4055/86/EEC applying the Principle of Freedom to Provide Services to Maritime Transport between Member States and between Member States and Third Countries (OJ 1986 L 378/1) and Council Regulation 3577/92/EEC applying the Principle of Freedom to Provide Services to Maritime Transport within Member States (Maritime Cabotage)(OJ 1992 L 364/7).

(6) Special conditions may be established for the entry and stay in ports of ships carrying hazardous goods. In any event, these conditions must comply with the applicable international treaties (Art. 15).

Royal Decree-Law 9/2002, adopted after the “Prestige” disaster, is also worth mentioning. It bans all single-hull oil tankers (regardless of the flag) carrying bunker fuel, asphaltic bitumen or heavy crude oil from entering Spanish ports, terminals and anchorage areas.³⁰

As regards fishing vessels, the 2001 Fisheries Act governs landing in ports by vessels under flags of EU Member States.³¹ Landing of third country ships is governed by Royal Decree 1797/1999, which requires a previous authorization,³² and by Council Regulation 1005/2008/CE, which sets forth a scheme of inspections in port for third country fishing vessels to prevent, deter and eliminate illegal fishing.³³ Pursuant to this Regulation, access to ports is prohibited for third country fishing vessels unless they meet the relevant requirements, except in cases of force majeure or distress (Art. 4).

Also relevant is the maritime traffic monitoring and information system established by the aforementioned Royal Decree 210/2004, which lays down certain reporting and information obligations for merchant ships over 300 GRT bound for Spanish ports, including the obligation to use automatic identification systems. Following IMO’s guidelines, the Royal Decree also regulates access to places of shelter of ships in need of assistance (Arts. 22-24).³⁴ Royal Decree 1334/2012 governs the formalities for merchant ships arriving in or departing from ports of Member States, and generalizes the electronic transmission of the information required.³⁵

(F) REGIME APPLICABLE TO GOVERNMENT SHIPS IN TERRITORIAL WATERS AND REGARDING THEIR ACCESS TO PORTS

Concerning Government ships, the 2014 Maritime Navigation Act provides the following (Art 51):

(1) Warships may enter internal waters and visit open ports with the prior authorization of the Ministry of Defence, which shall be processed through diplomatic channels.

³⁰ Royal Law Decree 9/2002, 13 December 2002, adopting Measures for Tankers Carrying Hazardous or Polluting Cargoes ([BOE No. 299](#), 14 December 2002).

³¹ Law 3/2001, of 20 March, on State Marine Fisheries ([BOE No. 75](#), 28 March 2001).

³² Royal Decree 1797/1999, 26 November 1999, on the Monitoring of Fishing Operations by Vessels of Third Countries in Waters under Spanish Sovereignty or Jurisdiction ([BOE No. 301](#), 17 December 1999).

³³ Council Regulation 1005/2008/EC establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, OJ 2008 L 286/1, based on the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, the conclusion of which by the EU was approved by Council Decision 2011/443, OJ 2011 L 191/1. See also Order ARM/2007/2010 for the Access of Vessels from Third Countries, Transit Operations, Transshipment, Import and Export of Fishing Products to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing ([BOE No. 185](#), 31 July 2010).

³⁴ With Regard to the relevant provisions of Royal Decree 210/2004 before the amendment introduced by the aforementioned Royal Decree 1593/2010, see B. Sánchez Ramos, “Nuevos avances en el acceso a lugares de refugio: las directrices sobre lugares de refugio para buques en peligro adoptadas por la Organización Marítima Internacional”, 8 REEI (2004), 1-15, at 12-14.

³⁵ Royal Decree 1334/2012, 21 September 2012 (transposing EP and Council Directive 2010/65/EU on Reporting Formalities for Ships Arriving in and/or Departing from Ports of the Member States, OJ 2010 L 283/1) ([BOE No. 229](#), 22 September 2012).

- (2) For other Government ships (used exclusively on government non-commercial service), the authorization of the maritime authorities shall suffice.
- (3) By way of exception, such authorization is not required in the event of failure, bad weather, or for any other urgent reason. In such cases, the master or commander of the ship shall immediately inform the nearest maritime authority or the Navy, if it is a warship, and it shall follow the instructions until the relevant authorization is issued through diplomatic channels.
- (4) Nuclear-powered ships or ships carrying hazardous substances are subject to the same provisions of the 1964 Nuclear Energy Act applicable to merchant ships.

It is worth recalling the aforementioned Order 25/1985 of the Ministry of Defence, applicable to warships. Regarding their access to Spanish ports, a distinction is made between accidental calls (forced docking and force majeure), non-official calls, and official calls. The Order details, among other things, the authorization procedure for each type of call, as well as the obligations and prohibitions for such ships in the port of call.

Finally, calls made by US warships to Spanish ports are governed by Annex 3 of the 1988 Agreement of Defence Cooperation between the U.S.A. and the Kingdom of Spain,³⁶ as well as by the rules contained in the NATO STANAG 1100, also applicable to the ships from other NATO Member States.

(G) JURISDICTION OVER FOREIGN VESSELS IN THE TERRITORIAL SEA AND INTERNAL WATERS

Article 50 of the 2014 Maritime Navigation Act asserts, in general, immunity from jurisdiction of warships and Government ships (used exclusively on government non-commercial service), with the exceptions provided under international law. Those ships shall only be subject to the jurisdiction of their flag state. In this regard, the recent 2015 Foreign Immunities Act³⁷ –which fails to mention the 2014 Maritime Navigation Act– establishes that: “Unless otherwise agreed by the states concerned, warships and foreign Government ships shall enjoy immunity from jurisdiction and enforcement before Spanish courts, even when they are in Spanish internal waters or the Spanish territorial sea”.³⁸ However, just like the LOSC, the 2014 Maritime Navigation Act expressly preserves:

- (1) The power to require them to abandon their attitude and, as the case may be, to leave the internal waters or the territorial sea if they fail to comply with the law (Art. 54(1)).

³⁶ Agreement of Defence Cooperation between the United States of America and the Kingdom of Spain of 1 December 1988, [1539 UNTS 91](#) (BOE No. 108, 6 May 1989).

³⁷ Organic Law 16/2015, 27 October 2015, on Privileges and Immunities of Foreign States, International Organizations with Headquarters or Office in Spain, and Conferences and International Meetings Held in Spain ([BOE No. 258](#), 28 October 2015).

³⁸ See C. Espósito, “Inmunidades respecto de los buques de guerra y aeronaves de Estado extranjeros”, in J. Martín y Pérez de Nanclares (ed.), *La Ley Orgánica 16/2015 sobre privilegios e inmunidades: gestión y contenido* (Cuadernos de la Escuela Diplomática, No. 55, MAEC, Madrid, 2016), 339–353.

- (2) The responsibility of the flag state for any loss or damages arising from breaches of the Spanish legislation, especially with regard to the passage through the territorial sea and the stay in ports and other internal waters (Art. 54(2)).

The question remains, however, as to whether the immunity of foreign Government ships covers also acts (in particular, crimes) committed on board in Spanish internal waters or in Spanish ports. In this regard, it should not be forgotten that the Spanish Criminal Procedural Act³⁹ provides for the entry to and search of foreign warships (without any reference to other Government ships) with the prior authorization of the Commander or the “Ambassador or Minister of the relevant country”. Also, criminal jurisdiction extends to such spaces (Art. 21(1) of the Organic Law on Judicial Power⁴⁰). Nevertheless, the practice seems to rule out this possibility, at least with regard to warships. Spanish scholars generally agree that the authorization required to access port entails Spain’s waiver to an effective exercise of jurisdiction.⁴¹

A different issue is the possibility of exercising jurisdiction over the crew of warships for acts committed on land, which is in any case limited by certain treaties concluded by Spain (Agreement of Defence Cooperation between the U.S.A. and the Kingdom of Spain and the NATO Status of Forces Agreement).

In this respect, the 2015 Foreign Immunities Act provides that the visiting Armed Forces of a NATO Member State or NATO’s Partnership for Peace (its civilian and military personnel and assets), when in Spanish territory, at the invitation or with the consent of Spain, shall be subject to the 1951 Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces (Art. 33(1)). These provisions shall also apply to the Armed Forces of any other foreign state under the principle of reciprocity and an agreement concluded for that purpose by the Spanish Ministry of Defence and the counterpart of the foreign state.

With regard to the rest of foreign vessels (other than Government ships), the 2014 Maritime Navigation Act restricts the exercise of civil and criminal jurisdiction to the territorial sea, in the same vein as LOSC. Therefore, along the lines of LOSC (Art. 28), the Spanish Maritime Navigation Act establishes:

- (1) The prohibition to stop or divert foreign ships for the purpose of exercising civil jurisdiction in relation to persons on board (Art. 43(1));
- (2) The possibility of adopting precautionary or enforcement measures with regard to such ships when they stop or anchor voluntarily while lying in the territorial sea or passing through it after leaving internal waters (Art. 43(2)), as well as with regard to ships on lateral passage, but only in respect of obligations or liabilities assumed or incurred during such passage (Art. 43(3)).

As for the exercise of criminal jurisdiction, the Act contains the following provisions:

³⁹ Criminal Procedural Act, approved by Royal Decree of 14 September 1882 (*Gaceta de Madrid*, 17 September 1882), which remains un-amended in that regard.

⁴⁰ Organic Law 6/1985, 1 July 1985, on the Judicial Power (*BOE No. 157*, 2 July 1985).

⁴¹ See, for all, A Remiro Brotons et al., *Derecho Internacional* (McGraw-Hill, Madrid, 1997), at 598.

(1) Reference is made to the Organic Act on the Judicial Power and to Article 27 LOSC (Art. 44). It is worth recalling that under Article 23(4)(d) of this Organic Act, Spanish courts are competent to hear cases relating to:

“Crimes of piracy, terrorism, illegal trafficking of toxic drugs, narcotic drugs and psychotropic substances, human trafficking, crimes against the rights of foreign citizens and crimes against shipping safety perpetrated at sea, in the cases provided for in the treaties ratified by Spain or in the regulatory acts of an International Organization to which Spain is a party”.⁴²

- (2) Spanish courts are expressly entitled to issue arrests warrants or conduct investigations committed on board of a foreign ship passing through the territorial sea after leaving internal waters (Art. 44, reproducing the content of Art. 27(2) LOSC).
- (3) Such measures may be adopted at the request of the master of the ship or a diplomatic or consular representative of the flag state, in which case the measures shall not be limited to ships coming from internal waters (Art. 45).
- (4) Before taking any steps, the competent court shall notify a diplomatic or consular agent of the flag state (Art. 46 of the Act and 27(3) LOSC).

Consideration should also be given to the Regulation governing inspections of foreign ships docked at Spanish ports (not applicable to warships).⁴³ Its purpose is to ensure compliance with international and EU law on maritime safety, maritime security, protection of the environment, and on-board living and working conditions of ships of all flags. It governs the inspections performed in the waters under Spanish sovereignty or jurisdiction (Arts. 1 and 3(1)).

Other sector-specific instruments should also be mentioned, including:

- (1) Royal Decree 394/2007, on Measures Applicable to Ships in Transit which Unload Pollutants in Spanish Maritime Waters,⁴⁴ which provides that, where there is decisive evidence of a polluting unload posing actual or potential material damages, maritime authorities shall adopt any necessary police measures. Such measures include detention of the vessel and initiation of disciplinary proceedings, or the transfer of proceedings to the Public Prosecutor’s Office, informing in any case the flag state.
- (2) The aforementioned 1964 Nuclear Energy Act, under which maritime authorities are entitled to perform inspections on nuclear ships within “territorial waters”, and to verify their safety and operating conditions before authorizing their passage through such waters (Art. 74).⁴⁵

As regards jurisdiction over foreign merchant ships in internal waters, the 2014 Maritime Navigation Act provides that both civil and criminal jurisdiction extend over them while they stay in national ports or in other internal waters. Such jurisdiction can also be exercised after the ships have left the

⁴² Art. 23(4) of Organic Law 6/1985 on the Judicial Power, cited above, according to the wording given by Organic Law 1/2014, 13 March 2014, on Universal Jurisdiction ([BOE No. 63](#), 14 March 2014).

⁴³ Royal Decree 1737/2010, 23 December 2010, transposing EP and Council Directive 2009/16/EC on Port State Control, and repealing Directive 95/21/EC (OJ 2009 L 131/57) ([BOE No. 317](#), 30 December 2010), amended by Royal Decree 1004/2014, 5 December 2014, transposing EP and Council Directive 2013/28/EU, amending Directive 2009/16/CE (OJ 2013 L 218/1) ([BOE No. 295](#), 6 December 2014).

⁴⁴ Royal Decree 394/2007, of 31 March, referred to above.

⁴⁵ The aforementioned Nuclear Energy Act leaves aside Government ships.

internal waters and are passing through the territorial sea, or if they are detained outside the territorial sea under the right of hot pursuit (Art. 12(1) and (3)). The Spanish legislation thus deviates from the practice of other states that restrict their jurisdiction over crimes committed on board of ships not affecting their security or public order.⁴⁶

On the other hand, the 2014 Maritime Navigation Act clarifies that the exercise of jurisdiction includes the power of judicial authorities to order measures of inquiry on board, as well as the entry to and search of the vessel, after notifying the consul of the flag state (Art. 12(2)). This provision is intended to replace a former article of the Code of Criminal Procedure (now repealed), which required prior authorization by the master or, failing that, by the Consul of the flag state.⁴⁷

It is worth recalling that, in its judgment of 2013 in the *M/V Louisa* case (Saint Vincent and the Grenadines v. Spain), the International Tribunal for the Law of the Sea held that the possibility of searching a vessel docked at a port, as provided in the Spanish legislation, is in line with international law. In this regard, referring to LOSC, it pointed out that “there is no provision in the Convention which requires a port state to notify the flag state or to obtain the authorization of the flag state or of the master of a foreign vessel operated for commercial purposes such as the M/V “Louisa” before boarding and searching such a vessel docked at its port.”⁴⁸

Also worth considering is the aforementioned Regulation governing inspections of foreign ships docked at Spanish ports. It derives from several Directives on port state control of ships adopted by the European Union from 1995 onwards.⁴⁹ The origins of these Directives lie, in turn, in the 1982 Paris Memorandum of Understanding, aimed at ensuring compliance with international conventions on maritime safety and prevention of pollution, adopted after the sinking of the “Amoco Cádiz”.

Finally, we would like to highlight that the Maritime Navigation Act requires maritime authorities to do everything possible to prevent ships from suffering unnecessary detention or delay in all Spanish maritime zones. Otherwise, the Spanish authorities shall compensate any damage caused (Art. 36).

(H) CONCLUDING REMARKS

Until 2014, Spain had a dispersed and incomplete regulation concerning its territorial sea and its internal waters, except for the regime applicable to its ports. The 2014 Maritime Navigation Act has changed this situation, governing in detail the navigation of foreign vessels through these maritime areas (as well as through the rest of the maritime areas under Spanish jurisdiction). Its provisions are based on LOSC. However, they enable the Spanish authorities to adopt measures restricting navigation in order to protect certain essential interests, such as the environment, which go beyond LOSC. The Spanish legislature has taken into consideration the post-LOSC practice and, in

⁴⁶ See P. Andrés Sáenz de Santa María, *Sistema de Derecho Internacional Público* (4th ed., Civitas-Thomson Reuters, Madrid, 2016), at 340.

⁴⁷ First paragraph of Art. 561 of the Criminal Procedural Act, cited above, repealed by Sole repeal provision of the 2014 Maritime Navigation Act.

⁴⁸ *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)*, Judgment, ITLOS Reports 2013, para. 125.

⁴⁹ Royal Decree 1737/2010, referred to above.

particular the experience of the catastrophes occurred near the coasts of Spain in recent years. The conformity of these provisions of the 2014 Maritime Navigation Act with LOSC should nevertheless be assessed in the light of the practice subsequent to the adoption of the Convention. In any event, the Act itself establishes the primacy over its own provisions of the treaties to which Spain is a party. This, in turn, is in line with the 2014 International Treaties Act, which provides such primacy on a general basis with respect to all Spanish laws and regulations (Art. 31).⁵⁰

⁵⁰ Law 25/2014, 27 November 2014, on Treaties and Other International Agreements ([BOE No. 288](#), 28 November 2014).