

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

## The Spanish Contiguous Zone

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### (A) THE REGULATION OF THE CONTIGUOUS ZONE IN THE LAW ON MARITIME NAVIGATION

Before the entry into force of LOSC in Spain, the 1992 Law on State Ports and Merchant Marine consecrated for the first time the general regulation of the contiguous zone in Spanish law.<sup>1</sup> In effect, this Law (Revised Text of 2011) establishes in its Article 8(1) the width of the Spanish contiguous zone in 24 nm counted from the baselines from which the territorial sea is measured; and in the second Additional Provision gives the Government competence to adopt the necessary control measures in order to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea, as well as to sanction said infractions.<sup>2</sup>

More recently, the 2014 Law on Maritime Navigation (LMN)<sup>3</sup> has revisited the contiguous zone, proclaiming in its Article 23(1) the control competence of the State as follows:

“In the contiguous zone, the Spanish State shall exercise control over foreign ships to prevent breaches of the customs, tax, health and border control and immigration laws that may be committed in Spanish territory and in the territorial waters, as well as the Spanish criminal and administrative jurisdiction, to penalise those who commit offences against such laws.”

If in the 1992 Law the reference to smuggling was a redundancy, in the LMN it is the reference to immigration, not expressly mentioned in Article 33 LOSC. On the other hand, in this Article 23(1) State competence to exercise criminal and administrative jurisdiction is explicit, which is the logical corollary to the powers of control. By contrast, it is not easily understandable why the requirements are restricted to “foreign ships”, given that the laws and regulations on these matters do apply to all ships, whether Spanish or foreign.

It should be noted that the wording of the 2012 Draft of the LMN referred to the powers of the State to prevent and suppress violations in specified material areas “that may be committed within its borders, including the territorial sea,” which led the State Council (*Consejo de Estado*) to note that the

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<sup>1</sup> Law 27/1992, of 24 November, on State Ports and Merchant Marine ([BOE No. 283](#), 25 November 1992), Art. 7.1 and First Additional Provision.

<sup>2</sup> 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).

<sup>3</sup> Law 14/2014, 24 May 2014, on Maritime Navigation ([BOE No. 180](#), of 25 July 2014), an English version available [here](#).

article “transcribe[d] incorrectly article 33(1) of the Convention on the Law of the Sea by including, within the space delimited by the borders of the State, the territorial sea. This inclusion is contrary not only to the aforementioned Convention but also to the treaties signed by the Kingdom of Spain with its neighbours. In effect, according to the former and these treaties, the territory of the State is defined by the notion of border and, outside of this, is the territorial sea. For this reason, it is appropriate to replace ‘within its borders, including the territorial sea’ with the expression conforming with that used by the 1982 Convention: ‘within its territory or territorial sea’.”<sup>4</sup> The LMN finally took this observation into account.<sup>5</sup>

In any case, the prescriptions of Article 23(1) LMN on the control competencies and the exercise of jurisdiction are developed in Article 35 LMN, on the special measures to be adopted in the contiguous zone, which says:

“1. Whenever a competent Public Administration has knowledge that a foreign ship located in the contiguous zone has breached, is breaching or intends to breach the laws and regulations referred to in Article 23, it shall be entitled to intercept it, to request information or perform the appropriate inspection.

“2. Where necessary, other necessary and proportional measures may be adopted to prevent or penalise the offence, including arrest and escorting it to port.”

Actually, we are facing a specific manifestation of the right of persecution and visit regulated in Chapter V of the same Law (Articles 48-49), with the peculiarity that it attributes to the Administration the right of interception not only when it has knowledge that a vessel has infringed or is violating the laws and regulations on the contiguous zone but also when it considers that the vessel in question “intends to infringe”, which goes beyond the provisions of the LOSC, which rightfully does not contain this psychological element. On the other hand, due to its location, it is incomprehensibly disconnected from the special navigation regime in the contiguous zone established in Article 23 of the Law, which supposes a defect of legislative systematics.

#### (B) THE REFERENCE TO THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE IN THE CONTIGUOUS ZONE’S REGIME

The main novelty of the regime is in Article 23(2), where it is said that:

“Unauthorised extraction of archaeological and historic objects found on the seabed or subsoil of water in the contiguous zone shall be considered a breach of the laws and regulations referred to in the preceding Section, as well as of the provisions on underwater cultural heritage.”

This provision of the LMN is in line with recent international practice; and this is so despite the fact that some expert criticized such a provision at the time, because it was understood that “[t]he jurisdiction of the coastal States in the contiguous zone are limited; they only refer to the infractions that in these concrete matters ‘may be committed within their borders, including the territorial sea’. The unauthorized extraction of archaeological and historical objects in the contiguous zone of a State

<sup>4</sup> [Advisory Opinion No. 449/2013](#), 24 July 2013. The Draft Text may be seen in this Opinion.

<sup>5</sup> BOCG, Congreso, X Legislatura, Serie A, No. 73-1, 29 November 2013.

is only prosecutable if it is carried out within the first twelve miles that overlap with the territorial sea, because it is precisely territorial sea.”<sup>6</sup>

To some extent, this follows the ambiguity of Article 303(2) LOSC, dealing with the archaeological and historical objects found at sea, which establishing that “[i]n order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the [contiguous zone] without its approval” drives to the legal fiction that this removal would result in an infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.<sup>7</sup>

However, with the adoption of the UNESCO Convention on the Protection of the Underwater Cultural Heritage in 2001,<sup>8</sup> its Article 8 has reinforced the competence of the coastal State on this matter in the contiguous zone, as has been reflected in legislative practice of States. Consequently, it has been underlined that “State practice offers a general, quite uniform and constant evidence of the acceptance of a coastal State’s right to legislate on and to enforce the protection of underwater cultural heritage located in its contiguous zone”<sup>9</sup>, and therefore, it can be confirmed the crystallization of a new customary rule<sup>10</sup> that Spain contributes to strengthen through its recognition in domestic legislation of that new competence in its contiguous zone, as many other States have already done.

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<sup>6</sup> J.L. Meseguer Sánchez, “El proyecto de Ley General de Navegación Marítima y el régimen internacional de los espacios marítimos”, 7145 *Diario La Ley* (2009), at 3. The author referred to the then Art. 35(2) of the 2008 Bill, which was identical to 23”) of the LMN except in the final reference to the rules on underwater cultural heritage.

<sup>7</sup> D. de Pietri, “La redefinición de la zona contigua por la legislación interna de los Estados”, 62 *REDI* (2010), 125.

<sup>8</sup> Convention on the Protection of the Underwater Cultural Heritage, adopted 2 November 2001, entered into force 2 January 2009 (2562 UNTS 3) (BOE No. 55, 5 March 2009).

<sup>9</sup> M. J. Aznar, “The Contiguous Zone as an Archaeological Maritime Zone”, 29 *The International Journal of Marine and Coastal Law* (2014), p. 50.

<sup>10</sup> *Ibid.*, p. 51.