

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

Navigation through the Strait of Gibraltar

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(A) INTRODUCTION

As already stated, the new navigation regime in international straits, as contained in the Part III of the United Nations Convention on the Law of the Sea of 1982¹, in particular Articles 38, 39, 41 and 42, which excludes the traditional innocent passage in favor of the new right of transit passage, was the main reason for Spain to abstain at the time of voting on the Draft Convention on the Law of the Sea in April 1982, and subsequently to resist the ratification of the LOSC, given that it poses a serious threat to both its sovereignty and its security; especially when it comes to the possibility of submarines sailing submerged and, above all, the recognition of the overflight right to all aircraft, including military aircraft.²

In effect, the first clear conclusion which can be deduced from Article 38 is that the transit passage is a right which is extensive to ships and aircraft that does not distinguish nationalities or ownership. All vessels, including warships, nuclear-driven vessels and those which transport harmful or hazardous substances have the right to transit passage. This is also a right which all aircraft have, an all-embracing expression sufficient to include not only the civil aircraft used in air navigation, but also the other civil aircraft, military aircraft and other State aircraft.

However, we cannot ignore that after 1982 there were drastic changes in Spain's position in this regard. After the consolidation and normalization of democracy, Spain chose to join its strategic future to that of the United States and NATO, which explains why it ceased to be a persistent objector to the new regime on international straits and embraced the advantages of the right to transit passage through the Strait of Gibraltar. In fact, Spain's allies were strongly in favor of this and it was considered that the effective control of the strait guaranteed by the regime of 1958 was more nominal and formal than real as Spain lacked a dissuasive military force to combat nuclear submarines with

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¹ UN Convention on the Law of the Sea, [1833 UNTS 3](#) (adopted 10 December 1982, entered into force 16 November 1994) (LOSC hereinafter).

² In this line of rejection, when Spain finally decided to sign the Convention on 4 December 1984, as we know, five out of the nine interpretative declarations accompanying the signature were related to the regime of transit passage. We can even say that the essential core of the declarations made at the time of ratification of the LOSC refer to the prospective application of the right of transit passage through the Strait of Gibraltar, although without questioning it. For the Spanish position throughout this process, see the contribution in this volume by de Yturriaga Barberán on "[Spain at UNCLOS](#)".

strategic nuclear weapons. In fact, in 1982 the effective control of Gibraltar was located in the British military base on the rock and the United States military base in Rota, which meant that Spain was superfluous and could only be invited to the banquet after joining NATO. Undoubtedly, these factors contributed to overcoming Spain's initial reluctance to this new regime and, consequently, to the final ratification of the LOSC in 1997, which we now commemorate.

The purpose of this paper is to point out the different aspects related to navigation through the Strait of Gibraltar that have taken place after the entry into force of the LOSC for Spain in line with the regulation envisaged by the latter³.

(B) SPANISH LEGISLATION IN RELATION TO NAVIGATION THROUGH THE STRAIT OF GIBRALTAR

According to the provisions of the LOSC, Spain has regulatory competence to adopt laws and regulations related to transit passage through its straits (Article 42), but in four specific material areas:

- (a) the safety of navigation and the regulation of maritime traffic;
- (b) the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait;
- (c) with respect to fishing vessels and the prevention of fishing;
- (d) the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations.

We must emphasize that such competences refer only to maritime navigation and not to air navigation. With respect to the latter, the LOSC does not expressly recognize any competence to the coastal States to adopt laws and regulations regarding overflight in transit passage through the straits. In relation to the exercise of this regulatory competence,⁴ we find that, although the Spanish ratification of the LOSC takes place in 1997, the fact is that the development in Spanish domestic law of the content of the aforementioned articles has certainly been late. Well, it was not until ten years later, in 2007, when the first legislative development took place in Spanish legislation.

This first reference is found in Article 2(2) of Royal Decree 394/2007, 31 March 2007, "on Measures Dealing with Ships in Transit that Perform Polluting Discharges in Spanish Waters",⁵ which provides

³ For the analysis of the situation in the waters of the Bay of Algeciras and the port and surrounding areas of Gibraltar see the contribution in this volume by del Valle Gálvez on "[Maritime zones around Gibraltar](#)".

⁴ It is important to note that, in line with this regulatory competence, Spain does not have the corresponding executive powers under the LOSC. The only reference appears in Art. 42(5), but there is no reference to the adoption of measures concerning the infringement of transit passage or its legislation by the coastal State. However, it does refer to the possibility that the coastal State has to demand the international liability of the flag State in the cases of failure of State ships to comply with its laws and regulations.

There is a particular provision, although not within Part III: Art. 233. This article recognizes the executive competence of the coastal States of international straits, although this refers to a very specific material area, which is the "protection and preservation of the marine environment", regulated in Part XII of the LOSC.

⁵ 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). This Royal Decree incorporates the provisions of Arts. 3 and 7 of this Directive on ship-source pollution and on the introduction of penalties for infringements which had not yet been transposed.

that it shall apply to discharges of polluting substances carried out “in straits used for international navigation subject to the regime of transit passage over which Spain exercises jurisdiction.” Under this general and plural reference to “straits used for international navigation”, we must, obviously, include the Strait of Gibraltar.⁶

Among other measures, in the case of a polluting discharge carried out by a ship sailing through territorial sea, which is causing or is likely to cause considerable damage to the natural resources of said waters or to the coast or related assets to it, Article 3 of the Royal Decree legitimates the Spanish Maritime Administration to take the necessary police measures, including the detention of the ship, and, if necessary, the commencement of the appropriate sanctioning file or the referral of the proceedings to the Prosecutor. In any case, the Spanish Ministry of Development shall approve the necessary provisions for the development and application of this Royal Decree.

As indicated, this provision is framed within the competences that characterize Spain as a coastal State of the Strait of Gibraltar, according to the provisions of Article 42 LOSC. More specifically, the aforementioned Royal Decree constitutes the practical application of Spain’s right to legislate in the terms set forth in section (b), insofar as it establishes various measures with the aim of preventing and avoiding pollution, which have been adopted in accordance with the International Convention for the Prevention of Pollution from Ships (1973) and its Protocol of 1978 (MARPOL 73/78).

Apart from that, we do not find any other specific Spanish legislation in relation to the regulation of the right of transit passage through the Strait of Gibraltar in the other three material areas in respect of which the LOSC grants jurisdiction. This is not to be understood as a deficiency or lack of diligence on the part of Spain insofar, according to the wording of Article 42, this is an absolutely optional possibility for coastal States.⁷

Beyond the regulatory powers on maritime navigation in the Strait of Gibraltar conferred by the LOSC, we do not find any other specific reference to such navigation until the adoption of Law 14/2014 on Maritime Navigation—in force since 25 September 2014—⁸, aiming to regulate legal situations, acts and relationships arising out of maritime navigation, such as that which is carried out

⁶ We must bear in mind that this is not the only international strait under Spanish sovereignty. Within this category equally falls, and is applicable the right of transit passage—and, consequently, this Royal Decree—the Channel of Menorca or Freu de Menorca, separating the islands of Mallorca and Menorca.

⁷ Apart from the specific legislation relating to the Strait, it is clear that there are other general rules which are equally relevant as they relate to different aspects of maritime navigation; in particular that relating to the territorial sea. This is the case, among others, of 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). This constitutes an important initiative aimed at the implementation of a uniform European system for the control of maritime navigation, making compatible the freedom of navigation in Community waters with the protection of maritime safety and the prevention of pollution of the marine environment.

Similarly, as regards air navigation, we can refer to Law 21/2003, 7 July 2003, on Air Safety ([BOE No. 162](#), 8 July 2003, consolidated text of 30 October 2015). Article 2 provides that, in establishing its scope of application, it “shall apply throughout the Spanish territory, within its jurisdictional waters, in the overlying air space and in the airspace over which the Spanish State exercises jurisdiction in accordance with the international treaties and conventions in force”.

⁸ Law 14/2014, 24 May 2014, on Maritime Navigation ([BOE No. 180](#), of 25 July 2014), an English version available [here](#).

by the sea waters and, where appropriate, also by the continental waters accessible to the vessels from the sea, but only as far as the effect of the tides is felt or, in the navigable rivers, in the sections where there are ports of general interest. Within the framework of this Law, Article 37(1) provides that:

“[...] Navigation through the Strait of Gibraltar shall be governed by the terms set forth in Part III of the United Nations Convention on the Law of the Sea of 1982.”

In this respect, although we can affirm that this Law supposes the full consecration of Spain's acceptance of the regime of transit passage as the pertinent one for navigation by the Strait of Gibraltar, we also find that the Spanish law-makers—as usual practice—have abandoned the creation of a detailed regulation on this matter, opting for the referral technique to international standards in this field, that is, those that are consecrated by the LOSC.

(C) MARITIME TRAFFIC REGULATION

In addition, Spain also has regulatory powers in this field for designating sea lanes and prescribing schemes for the separation of traffic in these lanes (Article 41), and also to modify or replace them when necessary to make the transit safe. While such competence is not unilateral, since it is a Strait with two coastal States, they will cooperate in order to present a joint proposal to the IMO. These sea lanes and traffic separation schemes are limited only to sea navigation and they are adjusted to generally accepted international regulations.⁹

In this respect, as with normative competences, the LOSC does not contemplate any further competence in favor of coastal States to establish the necessary air corridors in the regime of transit passage similar to the contemplated maritime routes.

However, unlike what happens with the innocent passage, the competence of the Strait's coastal States is not absolute when it comes to the transit passage. The latter is specified in a proposal power of mutual agreement to the IMO—competent international organization in this field—, who will be the one to determine the corresponding sea lanes and the schemes for the separation of traffic in these lanes.

(1) Traffic Separation Scheme of the Strait of Gibraltar

Prior to the Spanish ratification of the LOSC, the IMO had already established a Traffic Separation System (TSS) in the Strait of Gibraltar to channel traffic flows in the East and West directions, operating since 1970 (A.284 (VIII)). Since 1972 it was mandatory to respect the established channels to enter and leave the Mediterranean Sea. Being a device established by the IMO, the 1972 International

⁹ We must understand these to be Regulation V/8 of SOLAS, Rules 1 d) and 10 of COLREG 1972 and the General Provisions on Ships' Routing of the IMO contained in Resolution A.572 (14), as amended by Resolution MSC.71 (69). In addition, we must take Resolution A.858 (20) regarding the Procedure for the adoption and amendment of traffic separation schemes into consideration. Also of interest are Resolution A.857 (20) which establishes the Guidelines for Vessel Traffic Services, Resolution A.851 (20) which includes the General Principles for Ship Reporting Systems and Ship Reporting Requirements, including Guidelines for Reporting incidents involving Dangerous Goods, Harmful Substances and/or Marine Pollutants.

Regulations for Preventing Collisions at Sea (COLREGs) apply.

The Regulations have been amended three times. The first, very mild, in 1994 (COLREG.2/Circ.40.40). More important is the one approved in 2006. The construction and entry into service of the new Tanger-Med port made it necessary for Spain and Morocco to jointly design a modification of the existing TSS to securely integrate the new traffic flows generated by that port and to encourage ships to navigate extremely cautious near the Eastern end area of the TSS. Submitted by both States to the IMO, it was adopted by the Maritime Safety Committee on 11 December 2006 and was implemented at 12:00 A.M. UTC on 1 July 2007 (COLREG.2/Circ.58).

The last amendments to the existing Traffic Separation Schemes —changing only some geographical positions— have been adopted by the Maritime Safety Committee on 21 November 2014 and were implemented at 12:00 A.M. UTC on 1 June 2015 (COLREG.2/Circ.66).

The TSS of the Strait of Gibraltar consists of: two separation zones of half a mile wide; two traffic lanes for West-bounded traffic; two traffic lanes for East-bounded traffic; two precautionary areas (one in front of Tanger-Med port and another between Algeciras and Ceuta). There is also a Northern-coastal navigation zone.

(2) Compulsory Notification System for Vessels

In certain TSSs there is a compulsory notification system whereby ships notify their position when passing through certain points. Notification systems are essential to respond to emergencies at sea, such as search and rescue operations or protection of the marine environment.

Since 3 June 1997 there is a “Notification System for Vessels” in the area of the TSS of the Strait of Gibraltar (GIBREP) adopted by the IMO Maritime Safety Committee (MSC.63(67)), which arose from a proposal made by Spain in cooperation with Morocco, on 12 August 1996 (NAV.42/23, p. 5.4).¹⁰ On 17 May 2010, as a result of the start-up of the Vessel Traffic Service of Tanger in January 2010 (TANGIER TRAFFIC), the resolution MSC.300(87) was adopted by the IMO, modifying the system of mandatory notification for ships in the Strait of Gibraltar, which entered into force at 12:00 A.M. UTC on 1 December 2010.

The following categories of vessels are required to participate in the reporting system: all vessels 300 gross tons and over; all vessels, regardless of gross tonnage, carrying hazardous and/or potentially polluting cargo; vessels engaged in towing or pushing another vessel regardless of gross tonnage; any category of vessel less than 300 gross tons which is using the appropriate traffic lane or separation zone in order to engage in fishing; any category of vessel less than 300 gross tons which is using the appropriate traffic lane or separation zone in an emergency in order to avoid immediate danger.

¹⁰ This system affects all the vessels with a length of more than 50 meters, all the vessels which transport hazardous substances as per the definition given by resolution MSC.43 (64), the vessels are over 50 meters long are hooked to or pushed by another vessel, any category of vessel shorter than 50 meters but which uses the traffic lane or the separation zone in order to work, and any type of vessel shorter than 50 meters which is using the traffic lane or the separation zone in an emergency in order to avoid an imminent danger.

(3) Maritime Traffic Control of the Strait of Gibraltar by Spain

TSS and other traffic management systems may be combined with a Vessel Traffic Service (VTS), which aims to control their proper functioning. In Spain, the competent Spanish body in this regard is *Salvamento Marítimo*, operating through its Rescue Coordination Centers of the Maritime Rescue and Safety Society. The operational center in the Strait of Gibraltar is the Tarifa Rescue Coordination Center (TARIFA TRAFFIC), under the Ministry of Development.

By delegation from the IMO, TARIFA TRAFFIC is the Center that also serves the Compulsory Notification System of the Strait of Gibraltar. It is an authority of passage with the power to sanction and even immobilize in port the ships that do not respect its indications.¹¹ Since 1 December 2010, when the Tangier maritime traffic control tower initiates its official activity, both VTS centers — Tarifa and Tangier— act in a coordinated manner in the reception of notifications.

Furthermore, there are four other Spanish centers with various competences in the area, contributing to the smooth operation and maritime and air traffic safety in the Strait of Gibraltar:¹²

- The Comprehensive External Surveillance System (SIVE) of the Civil Guard of Algeciras, under the Ministry of the Interior. Its operation began in 2002, and its main objectives are the fight against drug trafficking and irregular immigration, although it can also act in the fight against illegal fishing, piracy, and terrorism, protection of resources, defense of ports, search and rescue tasks or environmental accidents.
- The Strait Control Station (CIFAS-EMAD) of Tarifa —under the Ministry of Defense— and the Spanish Army Electronic War Battalion I/32 (REW-32) of Algeciras. They are responsible for collecting maritime information from the electronic systems operating the platforms that cross the Strait, as well as interfering the possible hostile use of the emissions.
- The Coastal Artillery Operations Center (COACTA-COVAM) of El Bujeo, Spanish Army/Navy, in charge of the defense and close control of the coast.
- The Air Surveillance Squadron (EVA) no. 11 of Alcalá de los Gazules, Spanish Air Force, and the Army Radar AAA Hawk Group I/74 (Tarifa) are responsible for the surveillance and airspace safety of the Strait.

In this regard, we must point out that the security threats posed by both jihadist terrorism and increasingly illegal immigration, which have the Strait of Gibraltar as their entry point, make it an area of geostrategic interest which has led to the adoption of the ‘Comprehensive Maritime Safety Plan for the Strait of Gibraltar’ (MARES) in January 2015. The Plan’s aim is to transfer the vision of the National Maritime Safety Strategy to this area, in order to achieve an adequate coordination and cooperation of all centers and agencies belonging to the various ministries with presence in the area, as a response strategy to resolve a serious incident in the maritime safety field in the Strait of Gibraltar and its accesses.

¹¹ In this regard, entering the Strait area, ships are required to contact Tarifa traffic through VHF channel 16 and communicate their geographic position, speed, number of crew, port of origin and destination, as well as their estimated time of arrival.

¹² See, in this regard, L. Romero Bartumeus, “Los actores que intervienen en la estrategia del Estrecho de Gibraltar”, 2 *Cuadernos de Gibraltar* (2016-2017), 147-223.

Lastly, it is equally important to mention that, given that the Strait of Gibraltar is one of the world's busiest areas supporting a greater density of maritime traffic, since it is an obligatory passage point for all ships whose lines connect the ports of the Atlantic Ocean and the North Sea of Europe with those of the Mediterranean Sea and even with the most important ports in Asia and the Persian Gulf, the risks of *accidents* —navigation accidents, polluting spills, etc.— are a constant reality. It is just enough to mention some of the best known.

In November 1997, the vessel *J.P. Bobo* suffered an accident in front of the coast of Rota and poured into the sea 300,000 liters of kerosene intended for the maritime terminal of the Rota-Zaragoza military pipeline, located at the base. On 12 August 2007, after colliding with the oil tanker *Torm Gertrud* near Gibraltar, the *New Flame* ship loaded with 42,000 tons of scrap stranded in the bay of Algeciras causing contaminated spills for months. That same year there were four other serious accidents involving the *Sierra Nava* refrigerated vessel, the *Samothraki* and *Torm Gertrud* oil tankers, and the Egyptian-flagged merchant ship *Al Zahraa* getting stuck half a mile off the coast of Ceuta. The *Milenium Dos* high-speed catamaran ferry and bulk carrier *New Glory* collided on 13 January 2012 in the waters of the Strait, five miles north of Ceuta. On 3 September 2015, the *Hermanos Otero* vessel sank in the waters of the Strait and caused the disappearance of a sailor. On 22 July 2016, the nuclear submarine *HMS Ambush* causes an accident in the waters of the Strait near Gibraltar. On 21 December 2016, there was a spill of industrial oil in the Strait of Gibraltar due to the rupture of the *Red Eléctrica Española* submarine high-voltage cable between Tarifa (Cádiz) and Fardioua (Morocco).¹³

The body responsible for the investigation of accidents or incidents taking place in the Strait of Gibraltar is the *Permanent Commission for the Investigation of Maritime Accidents and Incidents*¹⁴, which is a Collegiate Body attached to the Under-secretariat of the Ministry of Development. Its main objective is the determination of the technical causes of maritime accidents occurring in waters where Spain exercises sovereignty, sovereign rights or jurisdiction —and on Spanish flag vessels—, as well as the formulation of the recommendations necessary to avoid similar accidents in the future.

However, it exists a high level of dispersion of information regarding maritime emergencies occurred in the Strait of Gibraltar. Due to this dispersion and the lack of clearly defined relationships among the historical records, it become necessary a previous compilation of the information, and the unification of criteria for the classification and its subsequent analysis. This all led to the creation of a special database called GIBSAR, which is the basic tool for the development of this historical analysis

¹³ To this we should add the reiterated and constant altercations between the Spanish Civil Guard and the Royal Navy taking place in the disputed waters near the Rock. Or, even, the controversy surrounding the crossing of the Russian Navy's flagship, the aircraft carrier *Admiral Kuznetsov*, since it sailed from its base at Severomorsk in the Barents Sea on 15 October 2016, until it reached the Syrian coasts, crossing for the Strait of Gibraltar. A controversy that began years ago, especially for the UK questioning the routine scales of supplies of ships and submarines of the Russian Navy in the Spanish port of Ceuta.

¹⁴ Regulated by Art. 265 of the Consolidated Text of the Law on State Ports and Merchant Marine, approved by 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). This Commission was created in 2008 to replace the previous Permanent Commission for the Investigation of Maritime Accidents, created by Order of the Ministry of Development of 14 April 1988 and regulated by Ministerial Order of 17 May 2001; it was attached to the General Directorate of the Merchant Marine.

of maritime accidents in the Strait of Gibraltar.¹⁵

(D) FINAL ASSESSMENT

The Spanish legislative practice in relation to the transit passage is certainly scarce and late, since of the four possible areas in respect of which Article 42 LOSC recognizes regulatory powers, there has been only a minimal regulatory development in the field of pollution prevention with the adoption of a Royal Decree on Measures Dealing with Ships in Transit that Perform Polluting Discharges in Spanish Waters in 2007, which is applicable in the straits. It seems that the Spanish law-makers have opted for full referral to international regulations, as remains clear from the provisions of the 2014 Maritime Navigation Law.

There is a greater commitment in relation to the regulation and control of maritime traffic, both with regard to the establishment of the traffic separation scheme and other measures, as well as in the establishment of various competent bodies whose objective is to ensure the safety of such traffic.

¹⁵ This database does not only compile information provided by the marine rescue coordination centers of Algeciras and Tarifa and the statistical series of data produce by the General Directorate of Merchant Marine, but it also establishes a scale for the assessment of effect, both for individuals and vessels, caused by the consequences of these events.