

THE GROWTH OF PARTICULARLY SENSITIVE SEA AREAS. ARE WE HEADING TOWARDS A NEW “BOOKISH BATTLE” IN THE XXI CENTURY?

DAVID ENRIQUEZ*

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I. APPROACH

As it will be analysed along this article, both Special Marine Zones as well as Particularly Sensitive Sea Areas (PSSA) are areas that due to their characteristics represent limitations to freedom of navigation, which tend to the protection of marine environment.

The two concepts referred —freedom of navigation and marine zones of both categories— have solid grounds in the formal sources of the law of the sea and maritime law, respectively.¹ However, the recent proliferation of PSSA requests before the International Maritime Organization (IMO) submitted by several countries and groups of countries shall not prevent us from stopping in the way, and reflect

* Doctor of Law, national researcher level 1 (SNI) principal researcher of Instituto Panamericano de Jurisprudencia (UP), Representative of the Mexican government (SCT) before IMO, FIDAC, ILO, OECD and APEC, among other international bodies.

¹ See United Nations Convention on the Law of the Sea, 1982 (UNCLOS), articles 192-194 and 211 (6); International Convention for the Prevention of Pollution from Ships, 1973, amended by the Protocol of 1978 (MARPOL 73/78), attachments I, II and V, Resolution A.927 (22) of the IMO's Assembly.

on both the justification of some requests as well as on the possible need to review the applicable international instruments.²

Therefore, we have two legally protected rights—free international navigation and protection of the marine biodiversity—and an important challenge to achieve: the harmonization of both, in such a way that the designation of PSSA does not represent a step backwards to legitimate freedom of navigation; one of the prime conquests of the law of the sea, gained after centuries of wars, debates and international negotiations.³

In this context, the purpose of this study is to analyse the debate that to this date several States member of IMO hold regarding the legality of several PSSA recently designated or to be designated, and departing from there briefly, describe the revisionist trends on the subject that may exist in the short term.

To offer an orderly presentation of the discussion, its content has been divided into five epigraphs along which we attempt to refer to freedom of navigation in the law of the sea, the applicable international instruments in the designation of PSSA, the confrontation generated in the case of PSSA of Western Europe, as well as the international trends which call for an orderly review of the PSSA Guidelines. In addition to the foregoing, as conclusions, there is the course that in a future may take this matter so particularly sensitive.

II. FREEDOM OF NAVIGATION

1. Background

The principle of freedom on the seas, in which falls into the current normative concept known as freedom of navigation, is one of the pillars of the evolution of international law. Its importance is such, that without its effective application it would be impossible to think in maritime commerce on which an important part of the world economy is based.⁴

² See Document IMO, MEPC 51/WP.9 and MEPC 49/22.

³ For the introduction to the study of the law of the sea; see among others Cervera, Jose, *El derecho del mar*, Madrid, Editorial Naval, 1992, pp. 37 and the pages that follow; Gomez-Robledo, Alonso, *Derecho del mar*, Mexico, UNAM, Instituto de Legal Investigations, pp. 105 and the pages that follow; Szekely, Alberto, *Derecho del mar*, Mexico, UNAM, Instituto de Investigaciones Jurídicas, 1991, pp. 27 and the pages that follow; Scovazzi, Tullio, *Elementos de derecho internacional del mar*, Madrid, Tecnos, 1994, pp. 55 and the pages that follow; Sobarzo, Alejandro, *Regimen jurídico del alta mar*, Mexico, Porrúa, 1985, pp. 55 and the pages that follow; Castañeda, Jorge, *Obras completas. Derecho del mar*, Mexico, IMRED, 1995, pp. 101 and the pages that follow; Enriquez, David, *Historia del derecho marítimo mexicano*, Colima, Government of the State of Colima, 1997, pp. 2 and the pages that follow.

⁴ See the historical debate on the principle of the freedom of seas, perpetuated currently in UNCLOS, article 87, in Grocio, Hugo, *De la libertad de los mares*, trad. of Blanco García y García Arias, Madrid, Civitas, 1979, pp. 53 and ss.; Fulton, Thomas, *The Sovereignty of the Sea*, London, 1911, pp. 17 and ss.; García, Luis, *Historia del principio de la libertad de los mares*, Santiago de Compostela, 1948, pp. 9 and the pages that follow; Enriquez, David, “La libertad de navegación”, *Revista Jurídica Jalisciense*, Guadalajara, January-April, 1997.

While the Western Old Times were characterized by the exclusive imposition of the exercise of navigation among the conqueror peoples, as in were the Phoenicians in their time, the Carthaginian or the Hellenes regarding the Mediterranean, the age of the Roman peace for the first time considered the criterion of jurists, among them Ulpiano and Celso, who gave a connotation of common use to the maritime spaces.⁵

Of course, the interpretation given by the Roman governors to the criteria of their legal consultants may not have another dimension than guaranteeing the free exercise of navigation within the Roman Empire itself, with which, the enforceability of the principle of freedom of the seas among different jurisdictions, is at that time, naturally questionable.

With the fall of the Roman Empire and the consolidation of the prosper City-States during the Middle Age grew the confrontation between maritime powers, such as Venice or Genoa, which aimed at claiming exclusive rights on strategic maritime zones for their commercial interests. Similar conflicts arose not only in the Mediterranean Sea but also in the Baltic sea and the North Sea; where Sweden, Denmark and England attempted to take over the international routes.

It was without a doubt the beginning of colonization, which led to the discussion to the highest point on the predominance in the seas. Therein, the crowns' pretensions increased in proportions unknown until that moment: Spain claimed exclusive rights on the Pacific Ocean and the Gulf of Mexico, and Portugal, on the Indic Ocean and on the South Atlantic.⁶

2. The Bookish Battle

Although the cause for the most famous study for the defense of the freedom of the seas was not necessarily academic or altruistic, there is no doubt that it took the debate from a simple political and military discussion among the maritime powers to a true legal debate among thinkers, which in the end would influence the consolidation of the international law of the sea. We refer to the works of Hugo Grocio, known as *Mare Liberum* dated 1605.⁷

⁵ See D. 8.4.13 and D. 43.8.3.

⁶ The disputes for the control of the seas are, without a doubt, the cradle of international law. Although the hierarchy that this dispute took on the evolution of international law, which is not the purpose of this analysis, we can recommend among others: Basave, Agustin, *Filosofía del derecho internacional*, Mexico, UNAM, IJ, 1992, pp. 238 and the pages that follow; Sorensen, Max, *Manual de derecho internacional publico*, México, FCE, 1968, pp. 344 and the pages that follow; Sepulveda, Cesar, *Derecho internacional*, Mexico, Porrúa, 1991, pp. 463 and the pages that follow.

⁷ This work, which full title is originally *Mare liberum sive de jure quod Batavis competit ad Indicana comercia dissertatio* is really one of the chapters of *De iure praede commentarius*, in which Grocio argued in favor of the Dutch East Indian Company Orientals, which in turn tried to convince its Mennonite shareholders to accept the financial benefits of the Portuguese old galleon "Catalina", captured in the Malaca Peninsula coastline at the Asian Southeast by Heemskerck in 1602. The work was written between 1604 and 1605, when its author was only twenty years old. See Luis Garcia preface in Grocio, Hugo, *op. cit.*, note 4, pp. 10 and the pages that follows. Also see Brown, James, "La



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Essentially, *Mare Liberum* was an interesting argument written against Portugal, published in opposition to Spain, and used to the detriment of England, by Dutch maritime traders, who far from defending the philosophical postulate of the freedom of the seas —whose authentic foundation was really carved by the intellectual Spaniards Francisco de Vitoria and Fernando Vazquez de Menchaca, half a century before— pretended to have access to better traffic and plentiful fishing zones in the neighbouring seas.

Therefore, by means of the systematization of Vitoria and Vazquez de Menchaca's postulates, the argumentative building of young Grocio relied on three columns, well explained by Luis Garcia with the wording of the original text:⁸

Due to *ius communicationis*, the Spaniards may not ban the Dutch access to East India since: (i) the Lusitanian do not have sovereignty over India, nor may they present in their favor legitimate titles, which cannot be based on *ius inventionis*, the pontifical donation or *ius belli*; (ii) they do not have the ownership over the sea or over navigation, neither by means of discovery nor occupation, pontifical donation, acquisitive prescription or custom; and (iii) they are not entitled to prevent commerce, which is free by the law of nations, not by occupation, nor by pontifical donation, acquisitive prescription or custom, the Dutch shall keep commerce with East India, whether in peace, truce or war, against whoever opposes.

The famous work of Grocio gave rise to one of the more interesting debates generated in international law, the so called "great bookish battle", an intellectual controversy —with political and even bellicose dimensions— among legal experts of various nationalities, who defended in one sense or another freedom or the exclusivity of the seas.

Although within their contexts influential documents were written as the one of William Welwood or Fray Serafin de Freitas, it would be until 1618 that the English John Seldein wrote *De dominio maris regio*, published in 1635 under the controversial title of *Mare clausum*; in this work, opposite to *Mare liberum* of Grocio, he would brilliantly argue from a historical perspective in favour of the English exclusivist policy of the seas.⁹

As accurately explained by Alejandro Sobarzo, the seed planted by Grocio found fertile ground. Despite the swinging of the argumentation and the political pressure among maritime leading nations, the balance would clearly incline

gènese du Traité du Droit de la Guerre et de la Paix", *Revue de Droit International et de Législation Comparée*, Brussels, 1925, t. VI, pp. 489 and the pages that follow.

⁸ See Garcia, Luis, *op. cit.*, note 4, pp. 10 and the pages that follow. The author makes an excellent list of the authors, works and argumentative sense of the famous and controversial bookish battle which took place during a significant part of the XVII century.

⁹ *Idem*. See also Fulton, Thomas, *The Sovereignty of the Sea*, London, Pitman, 1911, pp. 346 and the pages that follow.

towards the principle of freedom of the seas opposite to the pretended exclusivity of diverse leading nations, specially England.

Consequently, another Dutchman, Cornelio Van Bynkershoek, would conclude in 1702 with a century of discussion by the publication of his study, *De dominio maris dissetatio*, in which he would outline the reality of a principle: right to land ends where the force of arms ends. With the foregoing, the division between territorial sea and overseas had one sole effective measure: the force of the battle cannon.¹⁰

3. The United Nations Convention on the Law of the Sea

Finally, already in the first quarter of the XIX century, the balance of maritime leading nations generated by the consolidation of great land armies made the principle of freedom of the seas unquestionable. However, it would be necessary that one and a half century passed so that mentioned principle was embodied into the most important and widely penalized instrument of the history of the law of the seas: The United Nations Convention on the Law of the Sea of Montego Bay, Jamaica, of 1982 (UNCLOS). In this instrument there is established for once and forever that no State may legitimately pretend to subject any part of overseas to its sovereignty.¹¹

In fact, there would be needed three conferences of the United Nations about the Law of the Sea to grant full formal validity to freedom of navigation. With a work initiated in 1949 by the United Nations International Law Commission and developed along more than three decades until the Jamaica Convention, freedom of navigation shall be understood as one of the six rights recognized by UNCLOS to their States member.

So, pursuant to article 87 of said international instrument, freedom of navigation, freedom of over flight, freedom of laying of submarine cables and pipelines, freedom of constructing artificial islands and other facilities permitted by international law, freedom of fishing and freedom of scientific investigation constitute the charter of rights recognized to all States, whether they possess a coast or not.

The freedom in the exercise of the mentioned rights overseas is subjected to the limits both of UNCLOS as well as the limits of other international law regulations; and there must always be considered the interests of other States in their legitimate exercise.

¹⁰ Along the negotiations to unify the aspirations over the exclusive rights overseas, at last, in UNCLOS of 1982, a consensus was reached which consists in that every State has the right to establish the amplitude of their territorial sea up to a limit not exceeding 12 marine miles from the base lines determined in compliance with the convention. UNCLOS, article 3.

¹¹ UNCLOS, article 89.



III. PARTICULARLY SENSITIVE SEA AREAS

1. UNCLOS and other International Regulations

In addition to the general duties imposed to each State party to the UNCLOS as correlated to its rights overseas and over the remainder of marine zones, every party State has the obligation of protecting and preserving the marine environment.

Within the measures to prevent, reduce and control the pollution of marine environment, we must stress that since it is a subject on which PSSA has an interest, the obligation that, among the measures taken pursuant to UNCLOS, are the ones necessary to protect and preserve rare or vulnerable ecosystems, as well as the habitat of species or marine life forms that are decimated, threatened or endangered.¹²

Before going deep in the environmental regulations of UNCLOS, it is convenient to briefly reflect on the net of special international maritime regulations, aiming at directly or indirectly protecting marine environment. As it can be seen from the different compulsory and not binding instruments of IMO, the purpose of them all —and particularly of SOLAS and MARPOL— is regulating the structural integrity of ships, their equipment, their crew and generally, its functioning. The regulations recorded in the mentioned conventions promote the safety in maritime transportation and consequently, they protect marine environments from pollution.

In this sense, the work of IMO for marine environment protection —direct or indirect— may be summarized in four categories of measures: (i) SOLAS Convention, designed for the safety of the shipping sector and its indirect effect in environmental protection; (ii) MARPOL Convention in which there is established a basic level for the protection of the environment both of operating discharges as well as accidental discharges; (iii) the organization measures for maritime traffic, approved to increase navigation safety and which in turn assist in the protection of marine environment; and (iv) the designation of special zones —SMZ— in which the discharge stipulations are stricter in compliance with the stipulations detailed in attachments I, II and V of MARPOL; and PSSA in the cases commented in this document.

In addition to the work of IMO by means of instruments such as MARPOL or SOLAS, there are other sources of international law —plus the UNCLOS itself— to PSSA. In fact, the United Nations Convention on Biological Diversity is one international instrument by means of which, among others, there is established an



¹² UNCLOS, article 194.

appropriate framework to designate zones as particularly protected in sites where there have been found high concentrations of vulnerable biological resources.¹³

In the context of international law sources, UNCLOS recognizes certain categories of marine zones that require greater levels of environmental protection: these are precisely PSSA. Once the importance of PSSA and the need to apply stricter environmental regulations to them than to other marine spaces have been stressed, UNCLOS establishes the standing criterion in a series of regulations and the procedure for the determination of PSSA and their respective environmental protection measures:¹⁴

- a) Pursuant to UNCLOS, when the international regulations and standards to prevent, reduce and control the marine environmental pollution caused by ships are inadequate to face the special circumstances, and the coastal States have reasonable motives to believe that a particular and clearly defined area of their respective exclusive economic zones requires the adoption of special compulsory measures to prevent ship pollution, due to recognized technical reasons related due to their oceanographic and ecological conditions, as well as to the use or to the protection of their resources and the particular nature of its traffic, the coastal States, after holding the appropriate consultations by means of the organization —understood as IMO— with any other interested State, may address a communication to said international organization, by submitting scientific and technical tests to support them.
- b) Within the twelve following months upon receiving said communication —UNCLOS continues— the organization shall determine whether the conditions in that area correspond to the stated requirements. If the organization so determines, the coastal States may issue for said area laws and regulations intended to prevent, reduce and control pollution caused by ships, applying the regulations and standards or international navigation practices that, by means of the organization, have become applicable to special areas. Those laws and regulations shall not entry into force for foreign ships until fifteen months after the communication has been submitted before the organization. The coastal States shall publish the limits of said particular and clearly defined area.
- c) Upon submitting their request, the coastal States shall state whether they have the intention to issue addition laws and regulations on the PSSA to be determined by means of the process. Although said lays and regulations may refer to discharges or navigation practices, they may not bind foreign ships to comply with the accepted design standards.

¹³ See in particular the article 8 of said convention, in which the designation of protected zones is regulated and compare its provisions with the guidelines mentioned in this document.

¹⁴ UNCLOS, article 211.

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The new laws and regulations of the coastal State may be applied to foreign ships fifteen months after having submitted the request before the organization, with the condition that the organization grants its conformity within twelve months following the presentation.

d) The international regulations and standards to which we have referred before shall comprise, particularly those related to the speedy notification to the coastal States which coast or interrelated interest may result affected by incidents, including maritime accidents causing or may cause discharges.

1. IMO and International Guidelines

A. The Development of Guidelines

In addition to international before described obligations of UNCLOS, as correctly stated by Paul Nelson, PSSA have their technical origins in Resolution 9 of the International Conference on Ship-Vessel Safety and for the Prevention of Pollution dated 1978, in which there were included a series of measures on the design and operation of that type of ships, which were included in turn in the protocols to the international conventions to prevent ship pollution of the same year (MARPOL) and for the safety of human life in the sea (SOLAS).¹⁵

Resolution 9 recognized as PSSA to the marine zones, regarding which there was a special need for protection against marine pollution of ships and discharges, considering the renewable nature of the resources or otherwise the importance thereof for scientific purposes. From the reference of 1978 on PSSA, the Marine Environment Protection Committee (MEPC) of IMO dedicated to developing a series of objective criteria for identifying and determining PSSA. MEPC work continued for a term of several years, until 1991 when there was approved by IMO's Assembly of Resolution A.720(17) which contained the first Guidelines to identify and designate PSSA.

Despite of being ready to be used for the member countries in their PSSA, the Third PSSA Legal Expert International Session, held in the Netherlands in 1994, stated its concern, since from its approval in 1991 only one request—the Australian Great Coral Reef— had been submitted, with which there was decided to review the guidelines. Under these circumstances, in 1997 MEPC organized a group by post which would evaluate the need to review the guidelines. The work of the group resulted in the approval of the guidelines in force approved in compliance with Resolution A.927(22) of the IMO Assembly in November 2001.



¹⁵ Nelson, Paul, "Protecting areas that are vulnerable to damage by maritime activities: the reality of particularly sensitive sea areas", *Maritime Studies*, July-August, 2003, pp. 20 and the pages that follow.

The document, under the heading Guidelines for Designating Special zones due to MARPOL 73/78 and Guidelines to Determine and Designate Particularly Sensitive Sea Areas,¹⁶ is the instrument in force which all the States member should use as a basis for requesting PSSA, on which the competent IMO bodies should be based for their determination. Now then, in March 2003, MEPC approved a circular letter containing a pro-forma document which aims at serving as model for applicants of PSSA.¹⁷

B. Distinguishing Elements between SMZ and PSSA

To better understand the Guidelines content, it is convenient to first establish the difference between SMZ and PSSA. The SMZ are defined in MARPOL as any extension of sea in which, due to recognized technical reasons related to its oceanographic and ecological conditions, and the particular nature of maritime traffic, it is necessary to adopt special compulsory procedures to prevent sea pollution by hydrocarbons, liquid damaging substances or waste, accordingly.¹⁸

On the other hand, PSSA —which main foundation is in UNCLOS— are those zones that should be the object of special protection, in compliance with the measures adopted by IMO, in connection with its importance due to ecological, socio-economical or scientific recognized motives, and that their environment may suffer damages as a consequence of maritime activity.¹⁹

Due to the distinct characteristics and purposes between SMZ and PSSA, CEPC decided to derived Resolution A22/Res.927 of the assembly in two attachments: one for SMZ and another for PSSA. As it can be noticed, a SMZ does not have the stricter environmental connotation as PSSA. That is to say, a PSSA -but not a SMZ- is justified to the extent it is a rare or vulnerable ecosystem, as well as the habitat of species and other forms of marine life decimated, threatened or endangered.²⁰

Now then, pursuant to one of the criterion established by the Guidelines, in many cases there may be determined that a marine zone, within a special zone, is particularly sensitive, and vice versa. It should be said that the criteria to determine particularly sensitive sea areas and the criteria to designate special zones are not mutually excluding.

C. General Considerations in the Designations of PSSA

The Guidelines have three basic purposes. First, they aim at providing orientation to the IMO States member as to the formulation and presentation of requests for

¹⁶ Hereinafter, “the Guidelines”. Pursuant to Resolution A. 927(22) the resolutions A.720(17) and A.885(21) were revoked.

¹⁷ MEPC/Circ.398. Hereinafter “the Model Document”.

¹⁸ MARPOL 73/78, attachments I, II and V.

¹⁹ Guidelines, *op. cit.*, note 16, p. 7.

²⁰ UNCLOS, article 194.



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designating PSSA. Second, they pretend to guarantee that in that process all the interests, both the coastal State's as the flag State's, are carefully considered, the groups interested in environment and the maritime transportation sector; considering the scientific, technical, economic and environmental pertinent information on the zone exposed to risk due to international maritime activities, as well as the protection measures to reduce said risks to the minimum. Finally, the Guidelines have the intention to foresee the technical elements necessary for IMO to evaluate the requests.

Now then, the determination of PSSA and the adoption of the corresponding protection measures demand to examine three elements: i) the environmental conditions specific to the zone that is to be determined; ii) the vulnerability of said zone to damages caused by the international maritime activities; and iii) the proficiency of IMO to dispose of the corresponding protection measures before the risks of maritime activities.²¹

D. International Maritime Activities and the Marine Environment

To know the way in which maritime activities affect a determined zone, it is necessary to first know the risk categories said zone may suffer. In general, ordinary maritime activities are likely to produce three types of environmental danger: i) discharges resulting from operations; ii) accidental or intentional pollution; and iii) physical damage to marine habitat or organisms.

As explained in the Guidelines, during normal operation and in accidents, ships may discharge a wide variety of pollutant substances, whether directly in the marine environment or indirectly through the atmosphere. Those pollutants may be hydrocarbons and oily mixtures, liquid damaging substances, polluted waters, waste, solid harming substances, antifouling painting, foreign organisms and even noise.

Many of these elements may negatively affect marine environment and the live resources of the sea. Likewise, pollutants may harm environment in case of maritime accident. Moreover, the ships may cause harm to marine organisms and to their habitats due to physical impact. Beached may asphyxiate habitats and there have even been cases of collisions between ships and great cetaceans such as whales.

E. Ecological, Socio-Economic, and Scientific Criteria for Determining a PSSA

So that IMO classifies a zone as PSSA, said zone in question shall, on the one hand, meet at least with one of the ecological, socio-economic or scientific criteria mentioned in this section; and on the other hand, it shall be vulnerable to international maritime activities from the factors indicated in the following section. Thus, first it



²¹ Guidelines, *op. cit.*, note 16, p. 8.

is explained each one of the criterion to be considered, to later refer to the vulnerability factors derived from maritime activities.

a. Ecological Criteria

Singularity or rareness. Ecosystems may be unique or rare. One zone or environment are unique when there is only one in its kind. One example of such zones are the habitats of rare, threatened or endangered species that occur in one only zone. One zone or ecosystem are rare when they are given only in some places or when all the ones of their kind are in a proven regression. Ecosystems may go beyond national frontiers and have great regional or international importance. Farms or determined feeding zones may also be unique or rare.

Critical habitats. A marine zone may be a critical habitat for a fish population or rare or endangered marine species, or otherwise, it may have a decisive importance to maintain great marine ecosystems.

Dependency. The ecological phenomena such as the zones that depend on great measure on the biotic structure of the systems.²² Frequently, those ecosystems with a biotic structure have a great diversity which depends on the organisms that constitute it. The dependency also comprises zones that are fish, reptile, bird and mammal migration routes.

Representative nature. The zones are extremely representative of ecological phenomena, of the types of community or habitat or of other natural characteristics. The representativeness corresponds to the degree in which the zone represents a type of habitat, an ecological phenomenon, a biologic community, a physio-geographical or another natural characteristic.

Diversity. The zones have a wide variety of species or genetic diversity, or include multiple ecosystems, habitats and communities. However, this criterion may not be applicable to certain simpler ecosystems, for example to some pioneer communities or in ecological balance, or zones subjected to destructive forces, such as coasts exposed to the violent action of the waves.

Productivity. The zone has a great natural biological productivity. That production is the result of biological and physic processes which end in a net increase in the biomass of great natural productivity zones, such as oceanic fronts, ascending current zones and some oceanic gyres.

Spawning or reproduction zones. The zone may be a spawning or reproduction site of marine species that pass the rest of their vital cycle in other zones, or a bird or marine mammals migratory routes.

Natural nature. The zone has a highly natural nature for having escaped to the perturbations and degradation caused by the humankind.

²² For example, coral reefs, brown algae, mangrove and sea-grass beds, and marine algae.

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Integrity. The zone is a biological functional unit, that is to say, a viable autonomous ecological entity. The more ecologically self-sufficient the zone is, the more likely its value may be effectively protected.

Vulnerability. The zone is very susceptible to degradation caused by natural phenomena or human activity. Biotic communities of coastal habitats may present low tolerance to changes in environmental conditions, or exist close its tolerance threshold.²³ Likewise, they may be exposed to natural perturbations, such as storms or prolonged emersion, determining the limits of its development. Other unfavourable conditions²⁴ may determine the total or partial recovery of the zone from the effects of natural perturbations, or its destruction.

Moreover, some oceanographic and meteorological factors may make a zone vulnerable or increase its vulnerability; for example, causing the concentration or retention of harming substances in water or sediments, or causing that the harming substances be exposed. Said factors include particular types of water circulation, such as convergence zones, oceanic fronts and gyres, or prolonged presence time resulting from low dispersion rate, a stratification by permanent or seasonal density which may lead to an impoverishment of oxygen of a layer of bottom, as well as unfavourable conditions of ice or wind. A zone which environment is already subjected to tensions produced by human activity or natural phenomena²⁵ may need special protection against additional tensions. including those tensions derived from international maritime activity.

Bio-geographical importance. The zone has bio-geographical characteristics that are not common or representative of a bio-geographical type or types, or that has unique, or not common, geological characteristics.

b. Socio-Economic and Cultural Criteria

Economic benefits. The zone has special importance for seizing live marine resources.

Recreation. The zone offers an important particular interest for recreation activities and tourism.

Human dependency. The zone is particularly important for sustenance modes and/or traditional cultural needs of the local population.

c. Scientific and Pedagogical Criteria

Investigation. The zone has great scientific interest.



²³ Determined by the temperature, salinity, turbidity, or depth of waters.

²⁴ Such as domestic or industrial pollution, excessive reduction of salinity and increase in turbidity provoked due to a bad management of the basin.

²⁵ For example, infiltration of hydrocarbons.

Referred and surveillance studies. The zone compiles the appropriate conditions referred as to biota or environmental characteristics.

Education. The zone offers the opportunity to demonstrate determined natural phenomena.

F. Vulnerability Factors Derived from Maritime Activities

a. Maritime Traffic Factors

Operational factors. Types of maritime activities in the zone proposed that may increase risk for navigation safety.²⁶

Types of ships. The types of ships that pass by the zone or by an adjacent zone to the one proposed.²⁷

Characteristics of traffic. Traffic volume or concentration, the interaction among ships, the distance to the coast or other dangers for navigation that increase the risk of boarding or beaching.

Damaging substances transported. Type and amount of substances on board, whether freight, combustible or supplies, that would be damaging if discharged in the sea.

b. Natural Factors of the Zone

Hydro-graphical. Depth of the water, marine bed and coastal topography, absence of proximate and safe anchorage, and other factors requiring the adoption of greater precautionary measures in navigation.

Meteorological. Preponderant time, force and direction of the wind, atmospheric visibility and other factors increasing the boarding and beaching risk, as well as the risk for the zone to suffer damage should a leak occur.

Oceanographic. Tide currents, oceanic currents, ice and other factors increasing the risk of boarding and beaching, as well as the risk for the zone to suffer damage should a leak occur.

G. Relevant Protection Measures

As already commented, the determination of a PSSA by itself has no sense if it is not accompanied by a series of protection measure that consider ecological, socio-economic and scientific criteria, in addition to PSSA own vulnerability factors in question. Of course, protection measures are limited to the scope of IMO authority and are described in the following catalogue:

²⁶ For example, small fishing ships, small recreational ships, oil and gas platforms, etcetera.

²⁷ For example, great speed ships, large dimension ship-vessels or bulk-carrier ships of low water depth under the keel.

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- a) Designating the site in question as special zone due to attachments I, II or V of MARPOL Convention, or a control zone of Sox emissions due to attachment VI of the same Convention; or otherwise applying special restrictions to the discharges of ships operating in said zone.²⁸
- b) Elaborating notification systems for ships and organization systems of maritime traffic, under the SOLAS Convention, and in compliance with the general provisions on organization of maritime traffic and the Guidelines and criteria related to notification systems for ships, in PSSA and their surrounding areas.²⁹
- c) Elaborating and adopting other measures addressed to protect determined marine zones against environmental damages caused by ships, such as compulsory pilotage systems or maritime traffic regulating systems. In fact, this category of protection measures is sufficiently broad to pursuant to the specific case, the requesting State member designs the specific measure necessary for protecting the zone.

In addition to the protection measures authorized by IMO from the request, so as to strengthen the hierarchy of PSSA as such, it is convenient to examine the possibility to include it in the List of World Heritage; to pronounce it Biosphere Reserve; or otherwise to include it in the list of international, regional or national importance zone. Likewise, it is necessary that the requesting party stipulates whether the zone is the international, regional or national preservation measures or agreements.³⁰

If PSSA circumstances in questions deserve so, the proposal may also include a separation zone; this is to say, an adjacent area to a specific site or central zone that is to be protected from maritime traffic. For the foregoing, it is necessary to justify the need of the separation zone and the extent in which it provides effective protection of the central zone.

H. Procedure for Designation of PSSA and its Protection Measures

When requests for designation of PSSA that do not contain proposals for the adoption of protection measures are presented, the requesting State member shall inform the type of measures that are contemplating. It shall be considered that in a

²⁸ It must be highlighted that the procedures and criteria for the designation of control zones of Sox emissions are included in attachment VI of MARPOL.

²⁹ In this protection measure there are in fact three alternatives to be regulated: (i) avoid the zone completely; (ii) establish special organization measures for maritime traffic; or otherwise, (iii) establish measures for notifying ships.

³⁰ In the case of Mexico it shall be necessary to indicate whether the marine zone proposed to IMO is in the National System of Protected Areas, and as the case may be, which is the technical and legal treatment thereof. Although IMO is not bound to reflect the protection measures authorized by the regulations of the requesting country—in this case Mexico—naturally what has been already regulated and practiced by the requesting government shall be considered.

term of no more than two years, from the approval at the beginning of a PSSA by MEPC shall present at least the relevant protection measure proposal.³¹

The request shall contain a summary of the objectives of the proposal, of the situation of the zone, the need to protect it and the relevant protection measures requested. The summary shall explain the arguments for which the relevant protection measures are the preference method to protect the zone which PSSA determination is requested.

Essentially, the designation requests shall contemplate all the considerations and criteria stipulated in the Guidelines and include information demonstrating each of them; and if possible, the treatment and measures that the State member is already applying to protect the marine zone aimed at raising its category as PSSA. Likewise, it is necessary to point out the national regulations on penalization due to infraction that the State member shall establish in its legislation regarding ships not complying with the protection measures to be authorized by IMO.

The request shall be divided in two parts: the first part shall be dedicated to the description, importance and vulnerability of the zone; the second part shall describe in detail the relevant protection measures and stress the competency of IMO to adopt them in compliance with the applicable international conventions. In the evaluation case by case of the requests, IMO is bound to consider several elements of the Guidelines, and particularly if the three following criteria are exhausted:

- a) The group of available protection measures, and it shall be determined whether the relevant protection measures being proposed are appropriate to effectively face the assessed risk that determined international maritime activities produce damage in the proposed zone.
- b) Whether such measures would increase the possibility that the aforementioned international maritime activities have important negative effects in the environment outside the PSSA proposed.
- c) Whether the length of the zone is limited to the necessary extension to meet the identified needs.

Once the request has been presented to MEPC, in compliance with the Guidelines, IMO, pursuant to the evaluation criteria stated above, shall exhaust the following analysis and resolution procedure in six specific stages briefly described herein below:

³¹ There are cases in which IMO, before the PSSA request by the State member, has adopted certain protection measures for all the zone or otherwise for a part of the zone, or even for a group of zones. In those cases, it is necessary that the requesting party indicates how the already adopted measures contribute to the protection of the PSSA in question.

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- a) MEPC is the first responsible for studying the PSSA determination requests, therefore all the requests shall be presented —as already mentioned— first before said committee.
- b) MEPC shall initially examine the request to establish whether said requests adjust to the provisions stipulated in the Guidelines. Should it be in the affirmative, the committee may approve in principle the determination of the zone proposed as PSSA, and shall send the request, along with its relative protection measures, to the subcommittee or competent committee in charge of the corresponding concrete protection measures proposed for the zone. Said committee in turn may ask for counselling to MEPC regarding matters related to the request. In any case, MEPC is prohibited from making the final decision as to its determination, until the subcommittee or pertinent committee has studied the relevant protection measures;³²
- c) As to the measures that demand the approval of the Maritime Safety Committee (MSC), the sub-committee shall present MSC the recommendation that said measures be approved; or otherwise, should they be rejected, the sub-committee shall inform both MEPC as well as MSC, explaining the reasons for said decision. On the other hand, MSC shall study the recommendations made and, if it decides that the measures are adopted, it shall notify the foregoing to MEPC.
- d) If a request in which the relevant protection measures are not proposed, MEPC may approve in principle the determination of the zone as PSSA, subject to a term of no more than two years from the approval, at least a relevant protection measure proposal is presented and immediately thereafter it is approved at least one of said protection measures.³³
- e) If the request is rejected, MEPC shall inform the proposing State member thereof and shall make a presentation of the facts giving grounds to its decision.
- f) Once the competent committee or sub-committee has approved the relevant protection measures, MEPC may designate the zone -definitively- as PSSA.

In any case, pursuant to the Guidelines, IMO shall work as the forum for the revision and a new evaluation of all the protection measures taken, accordingly, bearing in mind the comments, reports and pertinent observations on the measures.



³² It is a matter of interest that the Guidelines stipulate that the competent committee may be MEPC, therefore, MEPC would remit the case to itself. Nonetheless, nothing prevents from, if doing so, MEPC may form a working group to assess the determination request and the related protection measures.

³³ The foregoing is so, except for the case in which there are no proposed protection measures, because IMO had previously adopted them.

The governments whose ships have operations in PSSA are entitled to inform IMO the questions they have regarding the protection measures, so that the pertinent modifications to the measures may be made.³⁴

Finally, upon evaluating each case, IMO shall consider the technical and financial resources available for the developing States member, or those whose economies are going through a system transition period. This regulation is an acknowledgment to the rising of prices that a change of route may represent for ships that navigate by or nearby said specific PSSA.

I. Implantation of PSSA and Relevant Protection Measures

Since the request for a PSSA determination and their respective protection measures are the greatest priority in environmental policy for any country, after IMO's authorization, once having exhausted the procedure, it is bound to guarantee that the effective implantation date is as soon as possible, in compliance with the applicable regulations.

Once the designation of a PSSA is approved, the relevant protection measures must be indicated in all the nautical charts, using the symbols and methods of the International Hydrographic Organization (IHO). Although the proposing States member may also write in the charts the PSSA designated with the pertinent national symbols, if IHO adopts an international symbol, the State member is bound to signal the PSSA in question, by using said symbol and the methods recommended by IHO.

The States member are bound to adopt all the measures necessary to guarantee that the ships bearing their flag comply with the relevant protection measures adopted to protect the PSSA designated. In this context, the States member receiving information on the alleged infraction of a protection measure by a ship with their flag, shall facilitate the government notifying the infraction the detailed information of all the measures adopted in this regard.

J. The Guidelines and the Law of the Sea

The Guidelines constantly state the respect that must be kept in the designation of a PSSA and its respective protection measures with the international law of the seas, encompassed in UNCLOS. In fact, as noticed at the beginning of this work, the recognition of freedom of navigation has been the subject of a long road, to become what it is today, therefore, all the international instruments that somehow limit such freedom, attempt to highlight the respect to the law of the sea.

PSSA and, above all, the protection measures mean the authentic limitations to freedom of navigation for a higher legal right protected by the law: the protec-

³⁴ Of course, the requesting party of the PSSA determination are also legitimated to inform IMO any additional questions or measure proposals or amendments of said relevant protection measures.

tion of the marine environment. This protection, as it has been also noted, keeps perfect harmony with UNCLOS since navigational freedom may not be understood as an unrestricted right of the States or their nationals, but to the extent that they serve to preserve their higher value for the international community.

Therefore, a PSSA determination and its respective protection measures that do not comply with the criteria established in the Guidelines, or otherwise, that have formally complied with them and attempt to go beyond the Guidelines, would be an authentic abuse of law. The delicate balance reached between the legitimate right of the States to request the PSSA determination and freedom of navigation of the ships of remainder States makes that potential abuses in the requests or in the procedures question the effective enforceability of the law of the sea.³⁵

Thus, IMO and the countries that conform it shall always be oversee that the PSSA requests be valid and reasonable, so that the alluded harmony between the regulation for protecting marine environment and freedom of navigation co-exist without abuses, of the countries or regions that have the economic and technical means necessary to pass as authentic PSSA marine zones that, although relevant, do not gather sufficient characteristics to be validly recognized as such by the international communities. Likewise, it is necessary to watch over so that the lack of economic or technical resources of developing or transitioning countries is not a limiting factor so that marine zones that really deserve being recognized as PSSA have said recognition.

Until this moment we have reviewed the evolution of the law of the sea and the regulation on PSSA and its respective protection measures. It has been noticed the need to keep a balance between the protection of the environment and freedom of navigation. Now, we need to analyse, under the light of current practical cases —particularly regarding Western Europe PSSA— whether there are sufficient reasons or not to fear that the enforceability of the very old principle of freedom of the seas is in franc decay due to the authorization of PSSA of doubtful validity.

IV. THE CASE OF WESTERN EUROPE PSSA

1. The Proposal: General Aspects

In the scope of the 49th assembly of MEPC dated April 2003, several countries members of the European Union —Belgium, Spain, France, Ireland, Portugal and the United Kingdom— presented a proposal to determine a PSSA in Western Eu-



³⁵ See UNCLOS, articles 87 and 89.

rope that would go from the Shetland Isles to the North to San Vicente Cape, to the South, as well as the English Channel and its access routes.³⁶

Among the general justification stressed by the requesting States there are dramatic maritime accidents that have occurred during the last years in European waters,³⁷ and how such accidents have demonstrated the deficiencies in the international regulations, both as to maritime safety as well as to the protection of marine and coastal environment against accidental pollution.

The PSSA proposal of Western Europe shall be understood as a package of orchestrated strategic measures by the European Commission, after the accident of the Prestige in 2003. Said measures mainly comprise: a) the accelerated retreat of single hull tanker ships of European waters; b) the creation of an additional indemnity fund for hydrocarbon leak victims, in the scope of the International Oil Pollution Compensation Funds —IOPCF—; and c) the determination of a Western Europe PSSA with strict protection measures.

Upon justifying the request according to the importance and vulnerability of the marine zone in question, the requesting States remarked that a so diverse region implies a great importance due to the high number of marine mammals and marine birds, migration and hibernation of birds, the fish species (including rare and threatened fish species), the variety of coastal habitats providing reproduction spaces for fish, crustaceans and molluscs, food for birds; as well as the diversity of habitats for plants.

In the opinion of the requesting States, the zone complies with all the ecological criteria to obtain the name of PSSA. Furthermore, there was indicated how the parts of the zone have great economic importance or are meaningful from the touristic or leisure perspective. Likewise, there was explained how there are places within the zone that have a special significance in scientific or educational terms. However, the international maritime transportation activity implies a serious risk for the zone. Factors to consider are the type of loads transported, the conditions of the ships and traffic intensity, combined with the natural, hydrographic, oceanographic and meteorological conditions. The protection measures originally requested —to become effective as of July 2004— comprised the following elements:

- a) Prohibiting the transportation of heavy hydrocarbons through PSSA in ships weighing more than 600 tons death weight, unless they are double

³⁶ Western Europe PSSA include determined parts of the special zone known as “Waters of Northwest Europe”, as defined in Regulation 10 (1) (h) of the attachment of MARPOL Convention; determined parts of the pollution control zone of the United Kingdom; determined parts of the response zone to pollution of Ireland; and determined parts of economic zones exclusive to Belgium, France, Spain and Portugal. The presentation of the document before IMO caused a great publicity in the maritime field. See *Tradewinds*, July 25, 2003 and Lloyd’s List, July 16, 2003, among others.

³⁷ Among these: *Aegean Sea*, *Braer*, *Sea Empress*, *Erika*, *Ievoli Sun* and *Prestige*; as well as other accidents that were about to happen for other ships such as *Mimosa* and *Princess Eva*.



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hull tanker ships, which will be obligated to notify themselves at least 48 hours in advance. The foregoing, in the understanding that heavy hydrocarbons are defined as follows:

- b) heavy oils are those which have a density higher than 900 kg/m³ at 15° C (which means one API degree lower than 25.7); ii) heavy fuels are the ones that have a density higher than 900 kg/m³ at 15° C or a kinematic viscosity higher than 180 mm²/s at 50° C; and iii) asphalt, tar and emulsions. For all tanker ships between 600 and 5000 tons death weight, the provision was requested to be applied as of 2008.
- c) Aligned with the Guidelines, the requesting States reserve their right to propose other measures related to the foregoing, during the PSSA determination proceeding in question.³⁸

Before underlining the interesting debate that at its time generated the proposal for Western Europe PSSA, it is convenient to consider the tremendous support from the World Wildlife Fund (WWF) which stated in addition to the adjacent marine zones, such as the Ireland Sea, the Eastern coast of Scotland and England to East Anglia also comply with the criteria to be PSSA, and therefore, they should be included in the proposal. Moreover, WWF pointed out that the only prohibition measure of single hulls was insufficient, and stated its belief that the protection measure should be stricter to what had been requested by the European countries.

2. The Debate on Validity

The interesting debate on validity of PSSA of Western Europe held during the 49th MEPC assembly on April 2003 is susceptible to be analysed in three stages: a) initial positioning; b) the negotiations of the unofficial group; and c) MEPC decision. Essentially, the discussion was polarized between the proposing states on the one hand, and three segments of countries that considered that have suffered a detriment due to distinct reasons for each one.

The first segment of critics to the PSSA request was made out of the States representing the worldwide navigation industry; this is, the principal records open: Panama and Liberia. The second group, headed by Norway, although it did not represent its Nordic neighbours, it did state the environmental concern that the new PSSA would bring forth for their coast. Lastly, the third group —also without express representation— led the commercial regional cause which consisted in the excessive cost for tanker ships to be able to navigate from and towards their ports, should the PSSA be approved.³⁹



³⁸ Guidelines, attachment II, 8.4.

³⁹ The principal reference document to further the debate is MEPC 49/22.

Therefore, considering this first vision as a whole, both the stages of the debate as well as the speakers, hereafter are stated the more relevant topics in the discussion which resulted, to begin with, in the approval of Western Europe PSSA.

- a) Concerns regarding the great dimensions of the zone proposed, and the possibility of creating a precedent to determine other zones of the same dimensions as PSSA.⁴⁰
- b) Uneasiness that the proposal would create a precedent compromising the innocent passage and freedom of navigation, as well as the possible violation of international law upon banning passage of single hull ships through international straits.
- c) The potential negative consequences that the proposed protection measures would have in navigation safety, since single hull tanker ships would be obligated to navigate by waters farther away from the coast and dangerous.⁴¹
- d) Doubt regarding the legal grounds of the proposed protection measures.

In addition to the four main concerns questioning the validity and convenience of the requested PSSA, there were also stated other concerns, such as the lack of clarity on the form in which said protection measures would be implemented; the repercussions that the proposed protection measures may have over the arrival of ships into refuge ports; and lastly, the definition of the term double hull.

From all these observations and criticisms to the proposal, MEPC decided to form an unofficial technical group under the order of investigation whether the proposal complied or not with the criteria dictated by the Guidelines. The work group did not come to a generalized consensus to support the proposal, however, it made change in the position of the requesting States, which consisted of said States withdrawing the portion of the proposal dealing with the prohibition of single hull tankerships.⁴²

Anyway, one of the topics of the agreement was the need to recommend reviewing the Guidelines so as to guarantee the appropriate designation of PSSA in the future.

⁴⁰ In this regard, the answer of the requesting States was to appoint that there are already precedents as the one of the Great Coral Reef.

⁴¹ Norway pointed out that the relevant protection measures that single hull oil tankers transporting heavy hydrocarbons from the Baltic region will navigate closer to Norway's coasts.

⁴² However, for the industry and the great records open such as Panama and Liberia it was a reason to suspect that the withdrawal of the portion in the propose, since without it, the designation of the region as a PSSA should be questioned. These delegations have stated their concern for possible protection measures to be adopted in a future. Therefore, although the withdrawal of said portion of the proposal generated a greater acceptance, skepticism of its critics remains. See LEG 87/16/1.

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In this manner was like, with a majority of the support, MEPC approved in principle the designation of a PSSA in Western Europe waters, with the exception that the zone would be reduced, so that its East limit at the level of Shetland islands would be located at 0° longitude.⁴³ Nonetheless, before the persistence of the Russian Federation that the Legal Committee analysed the proposal and rendered a report in advance to MEPC assembly of October 2004, in which it would be finally approved the designation of the Western Europe PSSA, there was agreed that the interested delegations would send their legal observations to said committee so that MEPC would be in the sufficient conditions to make a final decision.

When the designation of the Western Europe PSSA was approved in principle in MEPC assembly dated April 2003, and in the understanding that the final designation would not take place until October 2004, the ship industry, the principal countries or free registry and some other affected nations, such as the Russian Federation, decided to hold a battle —until then lost for them— in a different front: before the Legal Committee.⁴⁴ In it, they posed once more their legal considerations. Essentially, the arguments posed were the following:

- a) Although, upon developing regulations regarding the zones in need for special environmental protection, UNCLOS had considered regions such as the Great Coral Reef, there was not being considered zones so broad and diverse as the ones requested by Western Europe, since said zone does not have one single and clearly defined ecosystem. Therefore, the designation of such an extensive and diverse zone would go beyond the PSSA concept itself, eroding the importance of current PSSA and questioning every reason of being a mechanism so important as pollution prevention.
- b) UNCLOS authorizes the coastal States to adopt exceptional measures by means of which they limit the navigation in zones that demand special protection. However, these exceptional measures have to be well founded and have to be carefully examined since they represent a deviation of the general rules of the convention. So, in the opinion of the delegations referred hereto, if such a extensive and diverse zone of the ocean is designated as PSSA, and protection measures consisting in limitations to navigation were to be applied, there is the risk that the exception becomes a rule and erode the fundamental principles of UNCLOS.
- c) It is questioned the objective and effects of the protection measure proposed which consist in the requirement of notifying 48 hours in advance.



⁴³ In compliance with the Guidelines, there was agreed also to send to the NAV Sub-committee the measures to be analysed that would be compulsory notified in 48 hours, so as to have in October 2004 sufficient elements to finally approve the PSSA requested and their respective protection measures.

⁴⁴ Legal arguments were presented by Liberia, Panama, the Russian Federation, BIMCO, ICS, INTERCARGO, INTERTANKO and IPTA before the assembly of the Legal Committee dated April 2004. It is document LEG 87/16/1.

The proposed measure may result in the detention of ships, with which they would be prevented from exercising freedom of navigation and the right to innocent passage.

- d) It is deemed that instead of the designation of Western Europe PSSA, the appropriate strategy would be the adoption of stricter measures on traffic organization; with said measure, concerns on pollution of the region would be addressed effectively. Such measures should focus on areas where, pursuant to the precedents, there is a real risk, and where risk evaluation, which had concluded among other things with a study of traffic intensity, indicates that it is necessary to adopt the measures. Likewise, it should also be determined the convenience of designating smaller areas comprising unique ecosystems deemed exposed to risks as PSSA, along with the adoption of protection measures as the designation of “zones to avoid”.
- e) In conclusion, the group of countries and organizations indicated above requested an opinion from the Legal Committee on: a) whether the designation of a Western Europe PSSA, as the one proposed, is in compliance with UNCLOS ; and b) whether the protection measure consists of a previous 48 hour notification, as well as any other protection measure that may be provided regarding said PSSA is in compliance with UNCLOS provisions, especially with the provisions regarding freedom of navigation, transit through international straits and innocent passage.

To study and issue an opinion, the Legal Committee considered both the request for legal analysis on the validity of PSSA in question as well as the observations in this regard sent by the Division of Ocean Affairs and Law of the Sea of the United Nations (DOALOS) regarding the designation of PSSA and UNCLOS; particularly on article 211 6). It should be considered that although DOALOS observations are not binding, it is true that said body has the relevant authority for the Legal Committee, and generally for IMO and its States member.

In fact, the Legal Committee limit itself to describe several positions regarding the legal positioning and to stress DOALOS observations on the validity of the Western Europe PSSA determination. After an analysis on the coherence between the designation of PSSA and UNCLOS, from DOALOS opinion the following reasoning and conclusions may be pointed out:

- a) Although the Guidelines for PSSA designation are based on the provisions of article 211 6) of UNCLOS , said guidelines are detailed, and therein a more flexible approach has been adopted which is coherent with a more sophisticated scientific and general comprehension of the dangers posed by the ships for the marine environment, as well as an array of protection measures available in the broadest framework of IMO’s competence than the one existing when negotiations were hold with UNCLOS in the seven-

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- ties. The legality of the Guidelines for designating a PSSA has not been called into question, since it is in the framework of IMO's competence on the regulation of international maritime transportation activities and its possible consequences for marine environment. Additionally, the Guidelines adjust to the provisions stipulated in article 237 of the convention, since they are an agreement subsequently adopted by IMO's Assembly by means of which the established general principles in the convention are developed, particularly the ones contained in part XII.
- b) The proposal for the designation came along with sufficient detailed scientific information on the oceanographic and ecological conditions of the zone. In addition, data proving that maritime traffic in the zone is extremely dense were included, that many ships transport heavy hydrocarbons, and that numerous accidents with serious environmental consequences have occurred, including the ones provoked by the ships Aegean Sea, Erika and Prestige.
 - c) As to the surface of the zone, article 211 6) only stipulates that this should be "a particular and clearly defined area of their respective exclusive economic zones". Although from the text it can be inferred, in principle, that the area should not comprise all the exclusive economic zones, it does not establish a maximum limit as to its extension.
 - d) Although it is true that Western Europe PSSA comprises several ecosystems, in article 211 6) there is no provision specifying that the zone in question should only comprise one ecosystem. So, several ecosystems may be included, provided that all of them are vulnerable to pollution provoked by maritime traffic.
 - e) Regarding the proposed protection measures, it is clarified that article 211 does not ban the adoption of demands as to notification. So, IMO is the one determining the type of protection measures applicable. On the other hand, there is no provision in SOLAS Convention regarding a notification with an anticipatory term of 48 hours. Even though it has been stated the concern that the requirement of 48 hours is applied as a basis to ban the entrance to Western Europe PSSA, in contravention of the principle of freedom of navigation, if the NAV Sub-committee approves such measure, it would be also in compliance with UNCLOS, since this body remits to IMO as to the navigation rules, regulations and standards.
 - f) In conclusion, due to the reason explained, DOALOS deemed that the request presented by six countries members of IMO for the designation of PSSA of a Western Europe marine zone, it does not contravene UNCLOS provisions.⁴⁵



⁴⁵ It its conclusions, DOALOS considered the limitation in the original proposal of PSSA derived from MEPC work group of April 2003, as well as the mild reduction thereof requested by Norway.

V. CONCLUSIONS. TOWARDS A REVIEW OF PSSA GUIDELINES

Even if it is true that we are far from a debate as the one of the XVII century between the positions about *mare liberum* of Grocio and *mare clausum* of Seldein, it is also true that the Western Europe PSSA has generated an unprecedented concern in the navigation industry and in the regulating countries of convenience registration before the proposal of six European countries. So, freedom of navigation, transit through international straits and innocent passage are self-limiting in the light of the effective international protection of marine environment to prevent terrible environment damage, as the damage caused due to tanker ship accidents such as the Aegean Sea, Erika or Prestige in the coast of Europe.

Although at the beginning of this new attempt of “bookish battle” a high legal opinion has been held regarding the Legal Committee of the International Maritime Organization and of the Division of Oceanic Affairs and Law of the Sea of the United Nations, by means of the confirmation that nor geographical dimensions, neither varied ecosystems, or the proposed protection measures for new PSSA represent by themselves violations to UNCLOS, it shall be consider that the struggle for finding a balance between freedom of navigation and marine environment has not yet ended.

In fact, the voices that have risen to request a review of the Guidelines to designate PSSA has taken MEPC under the IMO in April 2004 to generate a new debate on the contents to be amended. Among the aspects subject to review referred to by diverse delegations are: a) the duty by the requesting State to clearly explain why the marine zone in question is deemed not to be duly protected by the existing measures under MARPOL Convention and under the measures of maritime traffic organization; b) the duty to provide evidence that all the measures available have been adopted by the pertinent coast States to reduce pollution originated in the land-based industries, as well as pollution from sea-based industry, whether due to international maritime transportation, in-sea exploration, in-sea energy sources, military exercises, fishing activities or the recreational sector.

With the foregoing, it is evident that although the ideological debate of the XVII century has been left behind, the need to preserve the environment in balance with the commercial interest of the ship industry are contemporary matters and are in deep change. It is everyone’s responsibility that the discussion for this balance considers the various perspectives from which it is necessary to attack the problem, facing a sustainable future of the activities that may be done in our planet’s oceans.

