Cruise Tourism and the Rights of Coastal States: A Developing World Perspective

By

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December 7 – 9, 2016

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Cruise Tourism and the Rights of Coastal States - A Developing World Perspective

Abstract

Cruise tourism is a growing industry that holds the promise of economic benefits to many Caribbean Small Island Developing States (SIDS). Can coastal states regulate cruising within their jurisdiction and to what extent? This paper examines the legal and normative issues related to cruising and the law of the sea as they have evolved from the 1982 UNCLOS III to today. It uses the conceptual framework of the changing significance of ocean space in international relations to question whether the changing rights and responsibilities of states over their space as it relates to the environment and human rights can also apply to their rights over private commercial activities e.g. cruise operation, within their jurisdictions. States have traditionally regulated their maritime jurisdictions for reasons of health and safety, national security and more recently for the environment. The UNCLOS III extended the economic jurisdiction of states to 200 miles from the baseline of coastal states but left in place the sacrosanct principles of freedom of navigation. This principle has been restricted in recent years as environmental stewardship, security concerns and a greater desire to institute sustainable management of marine biodiversity resources has led States to the creation of marine protected areas.

SIDS, in the face of dwindling external aid and more competitive global economy, are increasingly looking toward their large marine spaces to provide the recourse base which can become the new “growth engines. The exponential growth in cruise tourism over the last decades has caught the attention of SIDS. So the important questions to be asked are: conceptually, have the changing meanings and significance of ocean space provided room for a review of what freedom of navigation can mean for cruise tourism, and what are the implications, with respect to the law of the sea convention and other international agreements under which the regulation of cruise ships and cruise tourism within national waters fall?
Background

On December 10, 1982 a number of world leaders, or their representatives, gathered in Montego Bay, Jamaica, and affixed their signature and country seal to the United Nations Convention on the Law of the Sea (UNCLOS)\(^1\) giving birth to a new order in oceans management, a significant departure from the state of anarchy which had characterized use of the oceans and claims to its resources. Such was the significance of this Convention that Ambassador Tommy Koh of Singapore, President of the Third United Nations Conference on the Law of the Sea, termed it a “Constitution for the Oceans” (Koh 2013) given its achievements in codifying customary law as well as creating a new convention in international law.

One of the new features of this piece of international law which has now been signed and ratified by 165\(^2\) countries of the world, including all of the independent states of the Caribbean Community (CARICOM), is Article 55, which created the concept of the Exclusive Economic Zone (EEZ). Article 55 defines the EEZ as “...an area beyond and adjacent to the territorial sea... under which the rights and jurisdiction of the coastal State and the rights and freedom of other States are governed by the relevant provisions of this Convention” (UNCLOS 1982). Beyond this description of the EEZ, Article 56 (1) proceeds to state specifically, that in the EEZ, the Coastal State has:

\[(a)\] Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; (UN 1982, 45)

The coming into effect of UNCLOS\(^3\) on 16 November 1994, and in particular, the application of Article 56, had a significant and transformative effect on maritime affairs and international relations, placing a vast amount of ocean space under coastal state jurisdiction, consequently conferring on these ‘landlords’, a range of obligations, responsibilities and economic opportunities which they could exploit, both individually and collectively, depending on the geographic space occupied and resources identified, for their own benefit. Small Island

\[^1\] On the first day it was opened for signature 119 countries signed on to the Convention. This was the first time in the history of international law that a convention had gathered that much support, and from a broad range of countries from both the developed and developing world.

\[^2\] DOLOS, 2015.

\[^3\] Also referred to as the Law of the Sea Convention (LOSC), or The Convention.
Developing States (SIDS) faced with dwindling external aid and limited resources are looking to their large marine space to provide the resource base which can become the new “growth engines”. Even then, the challenges of technological requirements and financial constraints limit the opportunities to exploit their ocean resources. The exponential growth in cruise tourism over the last two decades has caught the attention of SIDS and is one of the few ocean based industries which hold any great promise. Conceptually, has the changing ocean governance regime resulted in significant changes in the management of ocean space and has that change provided room for a review of what freedom of navigation means in the context of cruise tourism?

Among the plethora of resources provided by the oceans and which have been extensively explored and exploited is tourism, and in particular, cruise tourism. Though not recognized as an industry in 1973, cruise tourism has emerged as a significant global industry and a contributor to the economic growth of economies in several SIDS. Whilst cruise tourism is easily recognized as a major ocean based industry (Park, & Kildow, 2014), any attempt to rely on the Law of the Sea Convention for direction in determining whether or not cruise tourism constitutes an economic activity falling under the sovereign rights or jurisdiction of the coastal State activity is fraught with difficulties as the Convention is totally silent on the specific issue of cruise tourism in the EEZ. Likewise, it is equally silent on what constitutes an economic activity and what factors or criteria will be used to determine when an activity taking place in the EEZ of coastal states should fall under the jurisdiction of the coastal state. This lacuna in UNCLOS has allowed for cruise tourism to operate in the EEZ of coastal States as if it were a “High Sea” activity, not falling under the jurisdiction of the coastal State, and benefiting from the customary practice of “Freedom of Navigation”.

Given the exponential growth of the industry and the increasing dependence of economies of Caribbean states on revenues from the tourism industry, the question is: to what extent is the use of ocean space for cruise tourism, in conflict with the fundamental concept and principles of EEZ as defined in UNCLOS III – namely the sovereign rights of coastal states to explore and exploit living and non-living resources? Finding an answer to this question will entail an examination of the debates which dominated early discourse between the proponents of the concepts of Mare Liberum who were advocating for a free sea and Mare Clausum, on the other hand, who were arguing for a closed sea. In more recent times, with the adoption of the Law of the Sea Convention the debate has continued with those arguing for freedom of navigation, a customary norm in international law, as opposed to the rights of coastal States, emanating from the newly established EEZ regime which confers sovereign rights and jurisdiction over a number of activities taking place in their 200 mile exclusive economic zone.
Evolution of the Exclusive Economic Zone

The creation of the 200 mile EEA (Articles 55 & 57) was, in many ways, a repudiation of the “Mare Liberum” concept credited to Hugo Grotius, considered by many to be the father of International Law, who posited a concept of navigational freedom in which no state could claim ownership or sovereignty of the ocean. In his famous 1609 publication, Mare Liberum (The Freedom of the Sea), Grotius argued that the use of the ocean and its resources should belong to all mankind (Grotius, Magoffin and Scott 1916). However, whilst this concept would go on to receive international acclaim and become the fundamental principle on which ocean use will be predicated for the next 370 years, it must be understood that Mare Liberum was written at a time when the Dutch, having gained their independence from Spain in 1851, had developed a thriving commercial fishing industry, were on an expansionist agenda to gain access to markets of the East Indies (Borschberg 2005; Baird 1996), and were engaged in “cut-throat competition” with the Portuguese and the Spanish, who sought to exclude them from the lucrative trade in silks, spices, porcelain, and other luxury goods, which had opened up in the Asian sub-continent.

So logical and compelling were Grotius’ arguments at that time, that despite opposition from the traditional foes (Spain and Portugal), the French and Great Britain, and literary battles with several other leading world scholars who argued that the state could extend control over ocean space, Grotius’ principle of navigational freedom became etched into customary international law. This concept proved to be germane to the development of a thriving maritime trade and in the post war years, the exploitation of fishery resources as a lucrative source of food from the sea. Even more fundamental to international relations was the naval significance of ocean space, as it became a battlefield which contributed significantly to the fluctuating fortunes of some maritime powers and ultimately to the emergence of United States, Great Britain and Russia as maritime superpowers.

In the aftermath of World War II and the industrial revolution, the value of the ocean was extended to its living and nonliving resources as new technologies enabled the superpowers and other maritime states to exploit fishery resources found in their nearshore waters as well as further offshore, in order to meet growing demands for food. Likewise, technological advancement also permitted exploration for oil and gas further offshore and at greater depths. It was this realization of wealth in the ocean (fisheries and oil and gas) which prompted United States President Harry Truman to issue, in 1947, two proclamations establishing sovereignty over fishery resources in the coastal waters of the United States as well as oil and gas resources in the continental shelf.

Immediately following the unilateral proclamation by the United States, several countries in Latin America and the Caribbean proceeded to lay claims to vast areas of ocean space and ocean
resources, some of which far exceeded the claims by the United States. Despite the fact that some of these claims exceeded the generally accepted territorial sea of three nautical miles, the United States was unable to protest these developments as they had acted unilaterally in claiming rights to the resources in their water and seabed. This sentiment was echoed by Friedheim (1982: 21) who stated that the United States had “set in train a bifurcated policy - simultaneously attempting to enforce its new claims to exclusive use of its near-shore waters and its old claims to ‘free and unimpeded navigation’ in near-shore waters everywhere - that continues to the present day”. This unilateral claim by the United States, made effective by the Truman Proclamations of 1947, had let the proverbial “genie out of the bottle” and was tantamount to a starters’ gun signaling the commencement of the mad rush to lay extended claims to ocean space and resources as a means of securing potential benefits for their self-interest and on behalf of their nationals (Friedheim 1982, 21).

This ascendancy of interests in control over ocean space and resources continued into the post-World War II period with the commencement of the Cold War and the post-colonial period. What then emerged was that several independent states began to believe that their current underdeveloped status relative to the established power blocs gave them an assumed right to harness all of their land and ocean resources towards meeting the development challenges which confronted them. This, along with the claims of free and unimpeded navigation and the subsequent mad rush at ocean grabbing, served as a backdrop for the convening of two international conferences, under the auspices of the newly formed United Nations, to establish some order in the oceans and most important of all, set limits on unilateral claims to ocean space. However, despite two attempts (1958 and 1960) and four Conventions, the main issue – breadth of the territorial sea, remained unresolved.

In the wake of the failure of the two previous Conventions to resolve the dispute over the breadth of the territorial sea and given the general concern regarding the expansion of state interest in exploiting resources of the sea, it was agreed that a third UN Conference on the Law of the Sea would be convened. The significance of that conference, and the growing importance of ocean resources was evident in the monumental speech by Arvid Pardo (Maltase Ambassador to the United Nations), before the Twenty Second Session of the General Assembly of the United Nations in 1967, in which he, specifically targeting mineral resources on the floor of the seabed, arguing that resources of the ocean beyond national jurisdiction should be exploited for the

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4 Two UN Conferences on the Law of the Sea were convened in 1958 (UNCLOS I), and 1960, UNCLOS II. The Four Conventions adopted were: (1) Convention on the Territorial Sea and Contiguous Zone; (2) Convention on the High Seas; (3) Convention on the Continental Shelf; and (4) Convention on Fishing and Conversation of the Living Resources of the High Seas.
benefit of all mankind, particularly with future generations in mind (Pardo 1967). This concept of the Common Heritage of Mankind is now an essential component of the Law of the Sea Convention (Articles 136 – 140) and forms the basis on which resources (solid, liquid or gaseous mineral resources) found in the Area (beyond national jurisdiction) are classified as belonging to all mankind (UNDOLOS 1982).

EEZ and the Importance of Ocean Resources

The conferring of sovereign rights on coastal States for the exploration and exploration of natural resources, whether living or non-living is of particular importance, given the fact that the ocean is recognized as providing, and having the potential to provide enormous economic benefits as a result of the services, direct and indirect, arising from these resources. Acknowledging that an internationally agreed definition and statistical terminology for ocean-based activities does not yet exist, Park and Kildow (2014), there is, however, emerging consensus that any definition ocean industries or ocean economy must include all the “sectoral and cross-sectoral economic activities related to the oceans, seas, and coasts (OECD 2016). In that regard, ocean economy can be defined as “economic activities that take place in the ocean, receive outputs from the ocean, and provide goods and services to the ocean. In other words, ocean economy can be defined as the economic activities that directly or indirectly take place in the ocean and use outputs from the ocean, while incorporating goods and services into the ocean’s economic activities” (Park, & Kildow, 2014).

From the above definitions it is clear that the ocean economy consists of resources which provide direct economic benefit, as a result of tradable goods (e.g., fisheries, oil and gas) found within the oceans and on the sea bed, direct and indirect marketable services (transportation, tourism, telecommunications, and scientific research), as well as some ‘non-market’ benefits such as climate regulation, carbon sequestration, habitat and biodiversity conservation, among many others. Apart from these established industries, the oceans also hold/create promises for developing new industries, including marine aquaculture, offshore wind energy, marine biotechnology (OECD 2014) and new forms of recreation, all of which have the potential of contributing to the growth and development of coastal states.

Ocean resources and related economic activity are a major contributor to global economic development, contributing an estimated US$1.5 Trillion a year to global gross value added and 2.8 million jobs per annum (OECD, 2016, 23) through a number of ocean based industries. Of that amount, the offshore oil and gas sector “accounted for about one-third of total value added of the ocean-based industries, followed by maritime and coastal tourism (26%), ports (13%). The other industries accounted for shares of 5% or less (OECD, 2016,24). The ocean and its resources, as championed by several international organizations, are also recognized as being part of our
Common Heritage of mankind (Article 136) and an important part of many cultures, whose beliefs and practices are closely associated with the marine and coastal environment. The protection of both natural and cultural marine resources can foster sustainable development, especially in developing countries and SIDS where the livelihoods of a large number of citizens are dependent on the exploitation of these resources (UNESCO 2012).

It is estimated that ocean fisheries and aquaculture alone support some 250 million livelihoods around the world and produce seafood with a sale value of more than US$190 billion (World Bank 2012). For SIDS in the Pacific, fisheries and tourism are estimated to generate US$3.3 billion on an annual basis (Holthus, 2015). In 2007, 1.4 billion tonnes of oil, the equivalent of about 37 per cent of annual oil production, were derived from the ocean (World Ocean Resources 2010). International shipping and transport, a key aspect of global commerce, accounts for more than ninety percent of global trade (World Ocean Resources 2010).

Importance of Tourism to the Caribbean

Coming out of the post-colonial era, Caribbean countries were heavily dependent on primary products agriculture (bananas, sugar and coffee) and bauxite for their economic development. With the introduction of free trade policies and competitive markets these islands lost their market preferences and were no longer able to compete with other larger producers in Central and South America. A greater emphasis was therefore placed on tourism, given their relatively close proximity to the US market and the natural attractions (sun, sea, sand, scenery, food, and culture) which these islands provided. Described as “the engine of growth” tourism not only surpassed agriculture but became the single, most important source of foreign exchange earnings, accounting for more than 40% of the Gross Domestic Product (GDP) of some of the countries of the Caribbean (Célimène and Marques 2008).

Recent data (See Table 1.) provided by the World Travel and Tourism Council (WTTC), the world’s leading authority on the economic and social contribution of Travel and Tourism, indicated that in 2014, the direct contribution of Travel and Tourism to GDP in the Caribbean was USD16.1bn (4.5% of total GDP). That amount is forecast to rise 3.0% in 2015, and to rise by 3.3% per annum from 2015-2025. Likewise, in respect of employment, the report noted that the tourism sector directly supported 692,000 jobs which accounted for 4.0% of total employment. This is expected to rise by 2.4% in 2015 and 2.2% per annum to 879,000 jobs (4.5% of total employment) in 2025 (WTTC 2015).

In their survey of 30 countries of the region, the authors noted that the ratio of International Tourism Earnings (ITE) to GDP varied from country to country ranging from less than 10% in some destinations, to more than 40% in in countries where there was a strong dependence on tourism.
Table 1. Contribution of Travel and Tourism to GDP

<table>
<thead>
<tr>
<th>GDP</th>
<th>Total (USD) billion</th>
<th>% GDP (2014)</th>
<th>% Increase 2015*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Direct Contribution</td>
<td>16.1</td>
<td>4.5</td>
<td>3.0</td>
</tr>
<tr>
<td>Total Contributions</td>
<td>51.9</td>
<td>14.6</td>
<td>2.9</td>
</tr>
<tr>
<td>Employment</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Direct Contribution</td>
<td>692,000</td>
<td>4.0%</td>
<td>2.4%</td>
</tr>
<tr>
<td>Total Contribution</td>
<td>2,231,500</td>
<td>13%</td>
<td>2.2%</td>
</tr>
</tbody>
</table>

Not only is the Caribbean heavily dependent on tourism, but it is also the most tourism-dependent region in the world (Thomas, 2015). Tourism is a key generator of foreign exchange and employment as well as a contributor to sustainable development (Cabeza 2008). Of the twelve regions[^6] of the world for which data was collected by the WTTC, the Caribbean ranked first in terms of tourism’s contribution to GDP (14.6%), employment (13%), total capital investment (12.2%), and total exports (17.8%); third in terms of direct contribution to GDP (4.0%), and sixth in terms of contribution to direct employment (WTTC 2015). Using a broader measure of economic activity, such as the total value-added contribution which takes into account indirect and induced contributions, Thomas (2015), noted that the tourism contribution of 19% “is almost three times the world average and considerably higher than those of other regions”.

A key segment of the tourism industry is cruise tourism which has grown phenomenally worldwide, since the 1970s with the development of the North American industry (Butler 2010). This new era of cruising, sometimes referred to as the ‘Modern Cruise Industry’ (Pinnock 2012), to distinguish it from the earlier forms of cruising which utilised luxury liners and primarily engaged in transporting passengers from one port to another, is characterised by mega luxury ships, more appropriately fitting the description of floating resorts or cities. These mega ships provide passengers accommodation, recreation, entertainment and just about all the amenities found on land-based resorts, while allowing them to visit several destinations on itineraries of various (3, 5, 10 or 14 days) durations.

Cruise tourism which is directly dependent on the use of ocean space, has increased by 68 percent in the last 10 years (CLIA 2015), and is now considered the world’s fastest growing industry. Since 1990 (See Figure 1.), the cruise industry has experienced a passenger compound annual growth rate of 6.55%, reaching a total of 22.2 million passengers and a global value estimated at $39.6 billion (a 6.9% increase over 2014) in 2015 (Cruise Market Watch 2016). The total global economic impact of cruise tourism is estimated at US$119.9 billion (CLIA 2015).

[^6]: North Africa, South East Asia, Caribbean, European Union, Latin America, Oceania. North East Asia, North America, Middle East, Sub Saharan Africa, Other Europe, and South Asia.
Increasing passenger numbers and growth in the cruise tourism sector have been attributed to the larger capacity of newly built ships, diversification of the product, more local ports, more destinations and new on-board/on-shore activities that match demands of consumers (Cruise Market Watch 2016). In 2015, 7 new ships with a total passenger capacity of 18,813 were added to the existing stock of ships, bring to 298 the number of cruise ships deployed worldwide and a capacity to transport 486,385 passengers. It is anticipated that by the end of 2016, 10 new ships with a capacity of 22,309 passengers will be deployed and by 2017, 15 more new cruise ships will come online adding 39,637 to world-wide passenger capacity, or 8.1%. Three cruise companies (The Big Three), Carnival Cruise Lines (48.11%), Royal Caribbean Limited (23.1% and Norwegian Cruise Lines (10.42%) account for 81.6 percent of the cruise passengers worldwide and 76.7 percent of the worldwide share of revenues. The ships added to the fleet in 2015 and 2016 are expected to add $3.6 billion in annual revenue to the cruise industry (Cruise Market Watch 2016).

The cruise ships being deployed are not only significantly larger in size, but provide a host of entertainment on-board. In November 2016, RCL, one of the Big Three cruise companies, commenced sailing of its latest and biggest of the mega, ultramodern, luxurious ship class “Harmony of the Sea” from Florida’s Port Everglades, in Fort Lauderdale. The luxury vessel, which has a capacity of 6,780, excluding crew, will operate a permanent schedule of voyages out of Port Everglades to the Caribbean. The 16-deck Harmony eclipses its sister ships Allure of the Seas and Oasis in size, design and features. But like its sisters, it features a neighbourhood concept that includes indoor and outdoor sports, kid’s entertainment and relaxation spaces. According to a Caribbean360.com news report, a major entertainment feature on Harmony of the Seas is the Ultimate Abyss, “a dramatic 10-story tall slide from near the top of the vessel, down to one of its lowest decks”. “The ship” the report noted, “also boasts a multi-deck water slide area and a
Bionic Bar where the drinks are served by robot Bartenders - a service first offered on Royal's Quantum of the Seas” (caribbean360.com 2016).

Although the growth of cruise tourism is a global phenomenon, the Caribbean region has been the most popular cruise tourism destination since the late 1950s (Wood 2000) and has continued to dominate the industry for the past two decades. In that time period, growth in cruise tourism has steadily outpaced stopover tourism. Whilst the proximity to the North American market is undoubtedly a significant contributor (58% of cruisers originate in North America) the appeal of visiting several destinations, in addition to the alluring appeal of the natural resources of the islands (sun, sea and sand) and intensive promotional promises of tremendous fun and pleasure, have made cruise tourism a major growth industry (Chin 2008), (CLIA 2015). Between 2007 and 2012, the Caribbean accounted for an average of 40% of all global itineraries (FCCA 2012). Since 2012, however, the percentage share of the Caribbean cruise tourism market has been on a slight decline See Table 2.), averaging around 33.7 percent of itineraries deployed globally.

Table 2. Cruise Deployment

<table>
<thead>
<tr>
<th>Region</th>
<th>Deployed Capacity Share (%)</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
<th>2016*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Caribbean/Bahamas</td>
<td></td>
<td>37.3</td>
<td>37.3</td>
<td>35.5</td>
<td>33.70%</td>
</tr>
<tr>
<td>Mediterranean</td>
<td></td>
<td>19.9</td>
<td>18.9</td>
<td>19.5</td>
<td>18.7</td>
</tr>
<tr>
<td>Europe w/o Med.</td>
<td></td>
<td>9.8</td>
<td>11.1</td>
<td>10.6</td>
<td>11.7</td>
</tr>
<tr>
<td>Asia</td>
<td></td>
<td>3.6</td>
<td>4.4</td>
<td>6.0</td>
<td>9.2</td>
</tr>
<tr>
<td>Australia/New Zealand/ South Pacific</td>
<td></td>
<td>4.1</td>
<td>5.9</td>
<td>6.0</td>
<td>6.1</td>
</tr>
<tr>
<td>Alaska</td>
<td></td>
<td>5.4</td>
<td>4.5</td>
<td>4.5</td>
<td>4.1</td>
</tr>
<tr>
<td>South America</td>
<td></td>
<td>3.4</td>
<td>3.3</td>
<td>2.9</td>
<td>2.7</td>
</tr>
<tr>
<td>Other Programs</td>
<td></td>
<td>16.5</td>
<td>14.5</td>
<td>15.0</td>
<td>13.8</td>
</tr>
</tbody>
</table>

Source: (FCCA 2013-14) & (CLI 2016)

Notwithstanding this slight decline in capacity share, cruise tourism arrivals and revenues have continued to increase, despite periodic fluctuations in global economic conditions, specifically in the North American market, where there are periodic decreases in arrivals. According to an FCCA-commissioned study undertaken by Business Research and Economic Advisors (BREA), Caribbean regional cruise tourism in 2011-2012 generated just over $1.9 billion in direct expenditures, accounted for 45,000 jobs and contributed $728 million in employee wages among 21 destinations7 surveyed (FCCA 2012). A 2015 BREA survey of passenger expenditure revealed that during the 2014/2015 year, cruise tourism generated $3.16 billion in direct expenditures, accounted for 75,050 jobs and $976 million in employee wages among the 35 destinations of the wider Caribbean (BREA 2016). According to the FCCA, these passengers spent $2.45 billion for

7 Inclusive of Central Caribbean (Mexico and Central America), Northern and Southern Caribbean.
shore excursions and other goods and services during the 2014/2015 cruise year. Average per passenger expenditures ranged from a low of $42.58 in Trinidad and Tobago, to a high of $191.26 in St. Maarten and averaged $103.83 per passenger visit across the 35 destinations (BREA 2016).

Many in the academic field have questioned those high numbers originating from BREA, carried out on behalf of the FCCA, as being a little too optimistic as they seem to exaggerate the expenditure by passengers, particularly expenditure by the crew, whose wages are pitifully low. Given the fact that a large percentage of shore excursions are pre-sold on the ship itself, the profit margins for the tour operators are quite small. According to some critiques, the amount of revenues generated by locals, after all the leakages are factored in, amount to less than five percent of the industry’s revenue (Pinnock 2012).

Table 3: Cruise Passenger Typical Expenditure

<table>
<thead>
<tr>
<th>Activity</th>
<th>Revenue</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ticket</td>
<td>$1,350</td>
</tr>
<tr>
<td>Onboard Spending</td>
<td>$429</td>
</tr>
<tr>
<td>-Casino &amp; Bar</td>
<td>$236</td>
</tr>
<tr>
<td>-Shore excursions (cruise line portion)</td>
<td>$86</td>
</tr>
<tr>
<td>-Spa</td>
<td>$43</td>
</tr>
<tr>
<td>-All other onboard spending</td>
<td>$64</td>
</tr>
<tr>
<td>Total spending</td>
<td>$1,779</td>
</tr>
<tr>
<td>Total expenditure</td>
<td>$1,553</td>
</tr>
<tr>
<td><strong>Profits (before tax)</strong></td>
<td><strong>$226</strong></td>
</tr>
</tbody>
</table>

Source: Cruise Market Watch

Based on a recent survey by Cruise Market Watch (2016), a cruise passenger spends an average of US $1,779.00 on a typical 7-day cruise and in terms of shore excursions, a passenger spends $86.00. The survey also indicated that cruise revenue for all cruise lines averaged $226.00 per passenger. Carnival Cruise, the industry leader of the Big Three, reported for the 2013 financial year, $15 billion in revenue, $2.2 billion in profits, and a taxation rate of approximately 1% (Oyogoa 2016, 32). Very little of those profits are taxed (Chin 2008) because the ships are registered in the ‘Flag States’ which provide them with a tax haven, instead of countries where most of their business is conducted.

Significance of Ocean Resources & Cruise Tourism to the Caribbean

A recent World Bank study estimated that the value of the Caribbean Sea to the region, including all its services is US$407 billion per year based on 2012 data, or just shy of 18 per cent of the region’s total GDP (Patil et al. 2016). That assertion is supported by a 2016 Organisation for Economic Cooperation and Development (OECD) study (2016) which valued the global ocean
economy output in 2010 \(^8\) at USD 1.5 trillion in value added, or approximately 2.5 percent of world gross value added (GVA), and estimated that this would reach USD 3.2 trillion in 2030 in a sustainable scenario (OECD 2016, 32). “Ocean-based industries”, the report noted, “offer vast opportunities for addressing many of the big economic, social and environmental challenges facing humankind in the years ahead” (OECD 2016, 19). However, the report notes that these emerging industries will require the application of a range of scientific and technological innovations, as well as massive investments and coherent policy support to exploit the ocean’s resources more safely and sustainably (OECD 2016).

In respect of anticipated revenues, three sectors (Shipping, Oil and Gas and Tourism) are responsible for generating more than 90 percent of that revenue. Shipping, the largest of the three is estimated to generate USD 311.3 billion (See Table 3) or 76 percent of the projected revenues (See Figure 2). This amount, however, is primarily due to the cargo container traffic and represents the “global shipping revenues that flow through the Caribbean, including the Panama Canal” (Patil et al. 2016, 27). Tourism, including cruise tourism, comes in second at 11 percent, generating an estimated USD 47.1 billion in revenues and represents, for many of the countries, the only viable marine resource sector which is capable of realising the economic benefits projected to be generated by the ocean economy.

Table 4: Ocean Economy of the Caribbean in 2012: A Snapshot

<table>
<thead>
<tr>
<th>Type of Activity</th>
<th>Ocean Service</th>
<th>Economic Sector/Industry</th>
<th>Indicative Annual Gross Revenues (US Billions in 2012)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Islands</td>
</tr>
<tr>
<td>Harvesting of living resources</td>
<td>Seafood</td>
<td>Fisheries</td>
<td>0.37</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Aquaculture</td>
<td>0.04</td>
</tr>
<tr>
<td>Extraction of non-living resources</td>
<td>Energy</td>
<td>Oil &amp; Gas</td>
<td>5.64</td>
</tr>
<tr>
<td>Commerce &amp; trade</td>
<td>Transport &amp; trade</td>
<td>Shipping</td>
<td>n/a</td>
</tr>
<tr>
<td>Tourism</td>
<td>Tourism &amp; recreation</td>
<td>Tourism</td>
<td>47.1</td>
</tr>
<tr>
<td>Others</td>
<td>Others</td>
<td>Others</td>
<td>2.6</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td></td>
<td><strong>53.17</strong></td>
</tr>
</tbody>
</table>

Source: Adapted from Toward a Blue Economy (Patil et al. 2016)

In respect of Oil and Gas, it has been estimated that this industry (the islands only) generated approximately USD 5.64 billion in revenue. Of that amount, one, country, Trinidad and Tobago is responsible for 66 percent of the offshore oil produced and another country, Cuba, 29 percent.

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\(^8\) 2010 was the base year for the calculations and subsequent scenarios to 2030.
The World Bank report went on to add further, that the harvesting of living resources is on a declining slope and unless some drastic measures are introduced, it is unlikely to recover anytime soon (Patil et al. 2016).

Figure 2: Percentage Distribution of Ocean Resources in the Caribbean

![Percentage Distribution of Ocean Resources in the Caribbean](image)

What this data suggests is that in the Caribbean, apart from the exploration for fossil fuel, the most recognizable use of ocean space is cruise tourism, which as was noted in the World Bank report amounted to US$47 billion (Patil et al. 2016). With the Caribbean featuring so prominently as a cruise destination and the industry generating huge profits, it is reasonable to expect that coastal States, in whose EEZ cruise ships operate, should obtain a fair share of the benefits derived from these activities. Pinnock (2012,19), a former shipping executive and Group Managing Director of the largest cruise shipping agency in the Caribbean, points out that though the Caribbean accounts “for over fifty percent of the world’s market share of cruise ship passenger deployment” it generates “less than five percent of the industry's revenue while imposing significant financial and environmental costs” on Caribbean countries which are obliged to invest heavily in infrastructural improvements such as ports to accommodate the larger vessels.

With the World Bank and the OECD now estimating that Caribbean economies have a significant opportunity to realize economic growth from their ocean resources, and given the tremendous revenues generated by cruise tourism, the question is how Caribbean countries, undoubtedly the number one cruise destination, and so dependent tourism, and specifically cruise tourism claim

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9 Caribbean, for geographical purposes, is defined as all those countries washed by the Caribbean Sea. This will include all the mainland States, islands and territories whose shores are washed by the waters of the Caribbean Sea or the Gulf of Mexico.
a greater share of profits being generated by in their ocean space, as a result of the use of their natural resources?

This business model is very much unlike what pertains in other ocean industries (fisheries, oil and gas exploration and seabed mining) all of which have been recognized as falling under the jurisdiction of the adjacent state, and all of which earn or have the potential to generate substantial revenue for the adjacent States as a result of being accorded sovereign rights to explore and exploit (UNCLOS Articles 56(1)(a) the living and non-living resources for their own economic benefit. What this means is that while coastal States can and have exercised sovereign rights over the exploitation of fish, and the exploration of oil and gas and also exercise control over the undertaking of scientific research in their EEZ, no similar right has been proclaimed or exercised in respect of cruise tourism.

Since 1994 when the convention entered into force, giving states legal rights to claim jurisdiction over the use of resources found in their EEZ there has not been any attempt to claim such jurisdiction over cruise tourism, neither has there been any attempt to claim a portion of the revenues earned by the industry as a result of the operation of cruise tourism in the EEZ of coastal States. Instead, individual countries in the Caribbean charge a small, much disputed and robustly-resisted10 “Head Tax” based on the number of passengers coming ashore at the respective destinations. However, with the cruise industry commissioning and using “mega-ships,” increasing the amount of on-board entertainment provided to passengers, and the general trend (UNWTO 2012) of cruise lines to increase the number and variety of on-board services provided to passengers at sea, they are not only engaging in direct competition with land-based tourism providers, but signalling their intention to ensure that a greater share of the tourist dollar is spent on-board the ship, as opposed to the destination.

Given all the services now being provided on-board the ship and the tendency of industry executives to also play off destinations against each other by using the threat of withdrawal of a ship to gain a concession or hinting at additional calls to reward acceptable behaviour, it is not difficult to envisage that, very soon, there will be little need for ships to visit as many ports on their various itineraries. The trend towards mega-ships (virtual floating islands), and exclusive islands, combined with all-inclusive, on-board entertainment and hedonistic pleasures, all intended to capture the interest and ultimately, the wallets of the cruise passenger, runs counter

10 Several of the English-speaking Caribbean countries have on various occasions held discussions towards agreeing on a common head tax which will be applied in all the countries. Those efforts have received little success as there have been disagreement on the amount that should be charged. Much more troubling was the concerted effort by the cruise industry, both individually and collectively, through the FCCA to play-off one country against the other.
to the professed claims by the industry professionals and some analysts that increasing arrivals will bring increased revenue to the coastal state.

While there is little doubt that jobs will be created in the localities of the destinations, they are miniscule compared to what is generated through the controlled excursions ashore, which, in most instances, are all paid for on board the ship and not at the destinations. This will undoubtedly result in a reduction of revenue (taxes and expenditure) as fewer passengers will likely be coming ashore, and more significantly impact negatively on the economies of countries which are heavily dependent on tourism. Looking at the business model which pertains, the following questions can be asked: why is there such an anomaly between the revenues generated by the cruise industry and very small percentage retained or injected into the economies of coastal states in the Caribbean; and why is cruise tourism permitted to operate in the EEZ and allowed to bypass the jurisdiction of coastal states, given the express provisions of Article 56?

Several commentators have offered various views as to why cruise tourism and its seemingly liberal use of ocean space are going unchallenged or operate within the ocean space of multiple countries as if they were the high seas. Woods (2006) postulates that globalisation and the popular embrace of the concept of Flag of Convenience (FOC) permit cruise operators to operate globally, beyond the scope of any one jurisdiction. This new era of globalization is also described by Oyogoa (2016) as one wherein the neoliberal agenda prevails. “Specifically”, he notes, “cruise companies founded in the United States during the 1970s have grown into massive transnational corporations that enjoy minimal government oversight, a large pool of cheap and disposable labour dispersed across the globe, high profit margins, and minimal taxation” (Oyogoa 2016, 33).

Though acknowledging both the globalization phenomenon and the latitude allowed by FOC principles, Chin (2008), inaccurately stated that cruising takes place in ‘international waters’. The irony of this mistake is that it not only highlights the misunderstanding of what constitutes international waters from the EEZ, but also lays open the possibility that the Common Heritage principle could also apply to resources found within this zone. The EEZ, is definitely not international waters since the LOS Convention specifically states that countries have sovereign rights over their twelve-mile territorial sea and sovereign rights to exploit and explore resources in their 200 mile EEZ. It is therefore mischievously inaccurate to claim that cruise tourism takes place in international waters or that it is a form of transportation protected by the high seas notion of freedom of navigation.

Freedom of Navigation has long been recognized as an entrenched customary norm in the use of maritime space (Churchill and Lowe 1999), (Pedrozo 2010), and (Etzioni 2015). That norm has, to some extent, been reaffirmed in the 1982 UNCLOS, even within the newly created EEZ. However, growing awareness of the importance of ocean space and uses of the sea, particularly
to coastal states, have spurned an enclosure movement which relies on the provisions of the LOS Convention, and in particular, the EEZ, to claim and assert sovereign rights and jurisdiction, not just over economic resources, but over a range of issues relating to pollution control, environmental management, health and safety, national security (Blanco-Bazán 2007).

In this newly emerging movement, concepts of ocean space, sovereign rights of coastal states, and the economic significance of activities taking place in that space must be examined against the background of Freedom of Navigation (FoN), and the extent to which the emergence of those norms may or may not be consistent with intentions of the framers of the Convention and the extent to which the significance of FoN are diminished, if not significantly limited. The epistemological foundation of FoN, when placed within the context of the EEZ, can seemingly accommodate diverse and contradictory interpretations and practices ranging from transportation, a benign and uninterrupted movement of vessels from one point to another, to cruising, which is not only concerned with navigation but more importantly providing accommodation, and a wide range of amenities akin to a tourist resort. However, it can also be argued that the ontological foundation of the exclusive economic zone principles and its stated sovereign rights and jurisdiction, when framed within the context of the industrial revolution, the dismantling of the old Colonial Empire and the emergence of newly independent states, the search for new paths for development, the proclamation of a New International Economic Order (NEIO) and the UN General Assembly declaration of the seas beyond national jurisdiction as “the Common Heritage of Mankind” sends a clear message that the economic interests of coastal States far supersedes the wider, *laissez faire* system which characterises the customary norm of freedom of navigation.

### Emerging Norms and Interests in Respect of Ocean Space

The debates between the advocates of FoN and EEZ rights have persisted due to the fact that the language of UNCLOS, in giving rise to the EEZ, and in particular Article 56(1), together with emerging trends seems to inject sufficient ambiguity into the interpretation of both the principles of the EEZ as outlined in the Convention and the customary practice of FoN, suggesting that what currently pertains, as it relates to the operations of cruise vessels in the EEZ, may not be in keeping with the real intentions of the framers of the Convention, which was to provide coastal States with greater control and jurisdiction over their coastal resources. The LOSC, despite conferring sovereign rights and jurisdiction on coastal States to explore and exploit their living and non-living resources in the EEZ, placed an obligation on coastal States to have “due regard to the rights and duties of other States” (Article 56(2), which includes freedom of navigation as defined in Article 87. The LOSC, according to several publicists is neither completely free or severely restrictive. It is *sui generis*, that is, it is in a class of its own kind, being both an economic
zone “because the coastal State has varying rights to anything of economic value in the zone” (Bailey 1985), and having certain high seas rights guaranteed.

Another reason for this ongoing debate stems from the fact that since the adoption and ratification of the Convention new concerns have been raised in respect of security, anti-terrorism, environmental pollution, navigational safety and a desire to safeguard and protect natural resources, all of which have served to place limits on the concept of freedom of navigation (Blanco-Bazán 2007), (Orbach 2003) and (Prows 2006). According to Van Dyke (2000, 18) "...it is no longer accurate to say that the freedom of navigation exists in the exclusive economic zone of other countries to the same extent that it exists on the high seas. His conclusion is that as the “balance between navigation and other national interests continue to develop” some navigational freedoms will disappear (Van Dyke 2000,18).

In this ensuing evolutionary process coastal States have acted to control such navigation “...to protect their coastal living resources, to guard against marine pollution, and to protect the security of coastal populations, and it can be anticipated that such assertions of coastal state control will continue” (Van Dyke 2000,18). The question, however, is not whether this is established law, or whether after thirty years any state or group of states can mount a challenge to this established customary practice. Sufficient precedents exist to suggest that international law recognized how over time, through practice and opinio juris, new norms can be recognized as being part of international law (Harrison 2007).

There is also the concern that the expansion of control over resources in the EEZ is an attempt to expand territorial claims beyond the 12-mile territorial sea, which poses a serious threat to supremacy of the world’s powerful elite naval forces (Kraska 2011), and a fundamental threat to their dominance of global maritime commerce (Germond 2015). On the other hand, there are also some publicists who are advocating for a more nuanced understanding of changing realities in the use of ocean space brought about by technological advances making it much easier and economical for coastal States to engage in the exploration, exploitation and management of ocean resources.

However, none of those concerns are of material interests since any attempt by coastal States to harness the resources of their ocean space poses no threat to maritime commerce enjoyed by all countries of the world, or the naval interests of the maritime superpowers. What is of concern is that an economic activity taking place in the exclusive economic zone of coastal States, which is growing exponentially and realizing huge profits, is being transformed in such a manner that less of the profits remain in the jurisdictions providing the resource base. Amidst these new and emerging norms and interests, coastal States are of the belief that not only are they capable of exercising greater control over the management of their ocean resources, but that they are
entitled to a greater share of the benefits derived from ocean resources occurring within their EEZ. It is this reality which gives rise to the question: Is cruise tourism an economic activity, and when operational, as currently practiced, is it not in conflict with the fundamental principles of the EEZ which now governs the use of ocean space in the 200 miles’ coastal littoral?

**Law of the Sea and Construction of Ocean Space**

Assuming, therefore, that cruising is seen as “transportation” and consequently falling under the doctrine of “Freedom of Navigation” there is a need to investigate and test the tenets on which those definitions have been established. Cruising, as practiced today is much different from what pertained thirty years ago (Wood 2000), (Chin 2008), Pinnock 2012), and (Rodrique and Notteboom 2013). Whereas cruise tourism originated as a passenger service as an auxiliary to the movement of cargo, and then a passenger service in its own right, the modern day cruise vessel and the concept of cruising has shifted the focus from transportation, to the vessel itself, the accommodation on offer, and the extremely wide range of services, akin to what pertains on any high end land-based resort hotel.

Having established, also, that the ocean sector is a source of numerous resources, contributing and capable of providing a range of goods and services, some of which have established market values or tradable services, the question therefore is to what extent those services occur inside or outside of the EEZ. As pointed out earlier, some commentators have wrongly claimed that cruising takes place in international waters. The fact that the entire Caribbean Sea falls within the EEZ boundaries of a coastal State rules out the possibility that it is international waters. More importantly, the size and make of these “ocean behemoths” would severely restrict their ability to spend too much time on the high seas, unless when they are crossing from one ocean space into another. The fact then that cruise tourism takes place in the EEZ of various coastal states and considering that it generates more revenue than oil and gas exploration in the same space, would suggest that it is a highly specialised ocean industry which, under the definition of the EEZ, represents an exploitation of a resource, the benefits of which do not currently accrue to those coastal states which have legitimately been assigned sovereign rights and jurisdiction.

Whilst scholarly literature and countries, whose economies are heavily dependent on cruise tourism, have been slow to acknowledge the importance of anchoring this very lucrative activity within the context of an economic resource occurring within the ocean space of coastal States, they have also been constrained to labelling it as an exploitation of the resources of that zone. However, there is growing awareness that the oceans have the potential to contribute significantly to the economic development of coastal States, and in particular, SIDS, which have a limited range of resources to drawn on and whose economies are heavily dependent on the use of the ocean space and harnessing the resources capable of being exploited.
The aggressive posture\textsuperscript{11} adopted by the cruise industry to block the introduction of passenger duty tax as well as an environmental tax by the Organisation of Eastern Caribbean States (OECS) and Caribbean Community (CARICOM) countries in the late 1990s suggest that they will not relinquish their stranglehold on profits generated from cruising in the EEZ of these coastal States. There is no suggestion here, however, that this should be pursued individually by any one of these countries. This is a discussion which requires the attention and input of the global community given the globalized nature of the cruise industry and the recognition that a cruise ship, on any one of its itineraries occurs in the ocean space of several countries. Given all of the arguments establishing the need for a recognition that cruise tourism is a significant contributor to the global ocean economy, and given the transboundary operational nature of cruise tourism, there is a need for the establishment of an international regime to govern the management of that resource in a similar manner to the Straddling Fish Stocks Agreement\textsuperscript{12} which coordinates the management of trans-boundary marine resources.

\textbf{Conclusion}

Whilst some have argued that the EEZ regime is \textit{sui generis} and indeed it is, there is little doubt that the fundamental nature of this regime is radically different to the \textit{laissez faire} regime propounded by Grotius, which had few controls in terms of navigation, and was deliberately fashioned, and evolved through customary practice in a manner which suited the interests of large maritime powers. The EEZ, on the other hand, was deliberately fashioned in a manner which was intended, on the one hand, to benefit coastal States by assigning to them sovereign rights over economic resources up to a distance of 200 miles, while also recognizing some high-sea rights which permitted those customary practices such as maritime commerce, which benefited the global community and allowed for navigational practices aimed at security controls and environmental protection.

In 1609 one man stood before his national court and argued successfully for a "free sea" to enrich the financial holdings of one entity, the Dutch East Indian Company. That decision allowed the

\textsuperscript{11} In the late 1990s an attempt was made by a number of countries in the Caribbean to impose a USD 2.50 head tax on all arriving cruise passengers. The cruise industry, with the support of the FCCA played off one country against each other by threatening to discontinue calls to ports which implemented the tax. Some countries resisted, but others either reduced the amount collected or eventually abandoned the tax completely.

\textsuperscript{12} The Straddling Fish Stocks Agreement, signed on December 4, 1995, and made effective on December 11, 2001, is a multilateral treaty created by the UN to enhance the cooperative management of fishery resources that straddle or migrate over wide areas, across boundaries of several countries and are of economic and environmental concern to these nations.
company to confiscate the vessel and bounty of another national (Spanish), surreptitiously ushering into global usage, four hundred years of laisse fair governance of ocean transportation and trade. Four hundred and ten years later thirty-four countries of the Caribbean are better poised to argue before an international court of eminent jurist that the decision of one hundred and sixty-four countries in establishing a constitution for the ocean including the establishment of the EEZ should not be ignored and that three companies, cannot continue to hold the international community ransom because of their loose interpretation of the law.

The introduction of the concept of freedom of navigation was not initially embraced by the world community, especially those who saw it as an assault on their trading and fishing rights. Likewise, it is anticipated that the aggressive manner in which corporate elites who now control the modern cruise business have sought to resist any efforts to share their profits with the countries which provide the island amenities which are so attractive to passengers, will envisage similar threats to their operations and seek to curtail any inroads into their profits. Those concerns should not deter the world governing body from acting in the best interests of the wider community by ensuring that efforts are made to fully accede to the intentions of the framers of the LOS Convention who envisaged coastal States deriving greater benefits from the exploration and exploitation of ocean resources in their adjacent ocean space.
Bibliography


