

Port State *Jurisdiction and Marine Pollution Under UNCLOS III*

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INTRODUCTION: UNCLOS III ENTERS FORCE

On 16 November 1994 the *United Nations Convention on Law of the Sea* 1982 (hereafter referred to as *LOSC* which is short for *Law of the Sea Convention*) entered into force. This represented a major development for the international law of the sea. The Convention which contains many articles binds, as conventional law, those States that **have** signed and ratified it. The Australian Government ratified the Convention on the 5th October 1994 and in this context it is important for Australian lawyers to develop an understanding of the key articles of the *LOSC*, for if we are bound by the Convention it will not be long before its effect starts surfacing in domestic law. This article examines one small part of the *LOSC*, namely, 'port state jurisdiction', in anticipation of its relevance to Australian lawyers.

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PART I: PORT STATE JURISDICTION

In international law the control and detention of ships by a port State for events occurring within the port can be readily justified, for 'the port', an inland water of Australia, is part of the territory of Australia and under international law the principle of territorial sovereignty generates/bestows jurisdiction over events happening within that territory. In short the fact that ports are within Australian territory gives the Australian State jurisdiction over what happens in them. It is important though at the outset to make the distinction between jurisdiction over ships for events occurring in port and the jurisdiction the *LOSC* confers over ships when in port in relation to actions occurring before they enter port. The former jurisdiction goes with the territory, the latter is extra-territorial and therefore extraordinary; the *LOSC* confers the latter. Motivating the move towards increased monitoring and regulation of ships has been the growing awareness of and sensitivity to marine environment issues.

Although the principle that events happening in port generate port state jurisdiction while events happening outside port do not, is a good starting point it is surrounded by some uncertainty. There is case law which suggests that the internal management of the ship is something that should not be interfered with by a port state. For instance, should the labour/industrial law of Australia which regulates the conditions of employment of ship hands be applied to a Liberian or Panamanian registered tanker while in an Australian port? The principle of territorial sovereignty suggests an affirmative answer, however the pre-existing nature of internal management (that is it arose before the ship entered port) and the primacy of flag state jurisdiction over ships have led courts to answer such a ques-

1 See *LOSC* articles 8 and 11.

2 Brownlie I., *Principles of Public International Law* 4th. ed. (1990) OUP Oxford 299ff. This jurisdiction is commonly called enforcement jurisdiction. Throughout this article 'jurisdiction' is meant to denote enforcement jurisdiction. On the difference between prescriptive and enforcement jurisdiction see: Dixon M., *International Law* (1990) Blackstone Press London 724.

3 *Lucres Steamship Co. Ltd v International Maritime Workers Union* 372 US 10 (1963).

tion in the negative. This is one reason why the *International Convention for the Prevention of Pollution from Ships* (1973) (hereafter referred to as *MARPOL*), an international agreement designed to prevent marine pollution through a system of inspection by port states, was created. There is no doubt that jurisdiction over ships in port for marine pollution occurring while in port exists due to the territorial sovereignty of the port state, however jurisdiction over ships in port for pre-existing defects which are not presently causing pollution of the port is more problematical in light of the case law on internal management. *MARPOL* circumvents this murky issue by giving port states jurisdiction to inspect ships and report their defects to the flag state and to detain the vessel until repairs are carried out.

The focus of this article is not on this idea of the regulation of sub standard ships pursuant to *MARPOL*, but rather the notion of port state jurisdiction under the *LOSC*. The purpose of this article is to introduce the international rules governing how and when the Australian State possesses jurisdiction over ships (in port) for events (usually in the form of marine pollution) happening beyond the territorial limits (or maritime zones, eg EEZ) of a State.

PART II: INTERNATIONAL LAW

The aim of this article, then, is to give an international law overview of port state jurisdiction under the *Law of the Sea Convention* 1982. The *LOSC* is an international treaty or convention. An international treaty is an agreement between states or between states and international institutions or between international institutions. Treaties can be bilateral or multilateral; that is they can have few parties or many. Under international law a State is bound, like we say we are in contractual situations, when it has ratified an operative treaty. Some treaties only come into effect after a certain number of States have ratified them. The *LOSC*, after many years waiting for the sixtieth

⁴ For an excellent summary of existing port state control over sub standard ships see: Sir Anthony Clarke, 'Port state control or sub standard ships: who is to blame? What is the cure?'(1994) LMCLQ 202.

ratification which was needed to enliven it, came into force on 16 November 1994.

The other major source of binding international law is that of customary international law, a concept that looks at state practice and the commitment of each state to be bound by that practice as law. International treaties that are not binding for one reason or another may evidence customary international law.

In Australia the executive arm of the Commonwealth Government signs treaties. The Commonwealth Parliament under the External Affairs power in the *Constitution* can implement the treaty. A treaty has no effect in the domestic courts of Australia until implemented through domestic legislation, although this view is slowly changing.⁵

The foregoing introduction to the basic principles of international law is a necessary prerequisite for an understanding of the complexities of the *LOSC*.

PART III: MARITIME ZONES

To understand port state jurisdiction under the *LOSC* one also needs to understand coastal territorial and zonal principles.

For many centuries States have been regarded as having sovereignty over a belt of sea adjacent to their coastlines; commonly called the territorial sea. The width of this territory has varied between 3 and 12 miles. In this territory the State is given almost unlimited jurisdiction except over the innocent passage of vessels.

Under the *LOSC* the notion of an Exclusive Economic Zone (EEZ) was developed. This is a zone beyond the territorial sea which extends 200 miles out from the territorial sea baselines. In the EEZ the coastal State possesses sovereign rights for the purpose of exploring and exploiting and conserving the natural resources of the sea

5 See Fitzgerald B., 'International Human Rights and the High Court (1994) 1 *James Cook University LR* 78.

6 See Brownlie *supra* n 3 at 180 ff.

7 See *LOSC* articles 55-57.

within the zone. The Australian Commonwealth Parliament recently enacted the *Maritime Legislation Amendment Act 1994* (Cth) which declared an EEZ for Australia thereby replacing the existing Fishing Zone.

The *LOSC* also recognises sovereign rights over the continental shelf up to 200 miles or to the outer edge of the shelf but the latter type of claim cannot exceed 350 miles. The rights to exploit the natural resources in the shelf are exclusive to the coastal State. Beyond that there are waters called the High Seas which are *prima facie* the property of no one state but of all the States.

PART IV: FREEDOM OF THE HIGH SEAS

The dominant theme in the international law of the sea dating from the late eighteenth century has been that the high seas are *res communis* — common property — and not capable of acquisition by any one State. Before the eighteenth century a notion of closed seas had existed in which acquisition of the high seas was possible. Commercial and naval interests though brought an end to *mare clausum* and ushered in the concept of *mare liberum* — freedom of the seas.

Remembering the classic presumption in international law is that if you have sovereignty over the territory you have jurisdiction over the events occurring in that territory, it was natural to presume that no one nation could have jurisdiction over ships navigating and fishing on the high seas because the high seas could not be acquired by any one nation as territory. However international law had also developed the notion of flag state jurisdiction; that is the State whose flag the ship carried had jurisdiction over the ship wherever it may be, including the high seas. This was vital to maintaining public order for without flag state jurisdiction, ships on the high seas would have been beyond all commands.

8 Shearer I., 'Problems of Jurisdiction and Law Enforcement Against Delinquent Vessels' (1986) 35ICLQ 320.

9 See Brownlie *supra* n 3 at 178 and 233-4; see the modern restatement in *LOSC* Article 87.

So the primacy of flag state jurisdiction grew.¹⁰ Of course there were limited exceptions — piracy, flying without a flag and hot pursuit gave some jurisdiction to non flag states. And more recently the *Intervention Convention* 1969 which allowed coastal states to intervene in disasters occurring on the high seas that threatened their coasts (and now embodied in Article 221 LOSC). However the general principle was that what happened to ships on the high seas remained in the control of the flag state.

The first law of the sea conferences in the late 1950's did little more than codify the existing international law. The 1960's and 1970's saw the Torrey Canyon and Amoco Cadiz disasters in which major oil spills occurred. The perceived lack of interest of flag states developing shipping standards (especially flag of convenience states) motivated international interest in extending jurisdiction over the high seas. The concept of public order of the oceans was now demanding that other States have greater control.

The LOSC, a convention drafted through a nine year conference (The Third United Nations Conference on Law of the Sea known as *UNCLOS HI*), introduced the notion of port state jurisdiction over marine pollution occurring outside the territorial waters and maritime zones of the port state. This convention came to bestow on port states jurisdiction over events happening beyond their territory — this was a major innovation.

The high seas were losing their freedom once again. Or more properly there was no longer an implied freedom to pollute the high seas free of regulation by non flag states. The great common of the world was to come under the auspices of a new trustee—the port state.

PART V: UNCLOS III

The LOSC presents a major restatement on the public order of the oceans. Its objective is to establish a legal order for the oceans which

¹⁰ And is evidenced by LOSC Article 92.

¹¹ Birnie *supra* n 4 Chapter 7.

will facilitate international communications and promote the peaceful uses of the seas and oceans, the equitable and efficient utilisation of their resources, the conservation of their living resources and the study, protection and preservation of the marine environment. It is and was an ambitious project, a project seeking a universal solution through consensus — it was very much a negotiation and compromise. The forces at play were—east v west, developing v developed, landlocked v maritime, fish seeking v fish holding, archipelagic v non archipelagic and many more.

Under the *LOSC* there are three States which have a particular interest in regulating marine pollution and the standards of ships. They are the flag State, the coastal State and the port State. The focus here is on the port State. As far as the coastal State is concerned it has jurisdiction over ships in the territorial sea (subject to innocent passage rights) and limited jurisdiction in the EEZ — the criterion activating jurisdiction in the EEZ is clear objective evidence of pollution which threatens to cause major damage to the coastal state.

Under Article 308, the *LOSC* does not enter into force until 12 months after the 60th ratification; there needs to be 60 ratifications. The sixtieth ratification was deposited in November 1993. As a treaty the *LOSC* will only legally bind those parties that have ratified the Convention. To determine the legal obligations of States not bound by the Convention as treaty law, it is necessary to establish whether the *LOSC* represents customary international law.

Some of the provisions of the *LOSC* no doubt evidence customary international law and are enforceable norms of international law. For example the notion of an EEZ has achieved a customary international law status, but other provisions are not so well accepted. The provisions on port state jurisdiction could hardly be called norms of customary international law,¹⁴ and therefore are not applicable to States not parties to the Convention.

12 *Bimie supra n 4* at 274 *If*.

13 *Tunisia v Libya* 1982 ICJ Rep 18 at para 100; *Libya v Malta* 1985 ICJ Rep 13 at para 34; *Denmark v Norway (Jan Mayen Case)* 1993 ICJ Rep 38; Attard D., *Exclusive Economic Zone* (1987) OUP Oxford Chapter 8.

Up until the LOSC, *MARPOL* had done at least two significant things regarding port state control. While still focusing on the flag state to enforce the standards of ships through prosecution etc it gave the port state the power to inspect ships and report any evidence of a breach of *MARPOL* outside its waters to the flag State and what is more it gave the port State approval to inspect ships for seaworthiness and detain them until they had been fixed. Breaches of the port state's pollution laws whilst in port would under the principle of territorial sovereignty render the persons in control of the foreign ship liable to prosecution by the port state.

The LOSC takes the jurisdiction further. Article 218 (1) of the *LOSC* provides that port States can institute proceedings in respect of any discharge from a vessel outside the internal waters, territorial sea or exclusive economic zone of the port State in violation of applicable international rules and standards (primarily *MARPOL*) established through the competent international organisation (commonly agreed to be the IMO). Article 218 (2) says that no proceedings under the first paragraph shall be instituted regarding a violation in the internal waters, territorial sea or EEZ of another State unless requested by that State, the flag State, or a State threatened by the discharge violation or unless the violation has caused or is likely to cause pollution in the internal waters, territorial sea or EEZ of the State instituting the proceedings. This is a far reaching power even though it remains very much contingent upon the wishes of the flag State and the coast State.

Article 218 (3) requires the port State to investigate possible discharge violations when requested by the flag or coastal State. The coastal State is the State off whose coast the violation is alleged to have occurred. Under Article 218 (4) proceedings commenced pursuant to the requested investigation must be suspended at request of the State where the violation occurred.

14 Birnie *supra* n 4 at 282.

15 Birnie *supra* n 4 at 266 ff.

16 Churchill R, and A. Lowe, *The Law of the Sea* 2nd ed.(1988) Manchester University Press Manchester 257 ff.

Article 219 asks port States to prevent unseaworthy vessels from sailing. Article 94 (6) asks port States to notify the flag State if a ship fails conditions required to be upheld by the flag State under Article 94.

Pursuant to Article 226 detention can be for no longer than is essential for the purposes of investigation. Article 226 (1) (b) requires prompt release once a violation is found but a bond or financial security must be given before release — what constitutes prompt release can be litigated before the Law of the Sea Tribunal (which is not yet set up) under article 292.

Under article 228 the flag State has a right of pre-emption. If it starts proceedings within 6 months the port State's proceedings are suspended. If the flag State is notorious for its reluctance in enforcing international standards the proceedings are not suspended.

A penalty cannot be imposed after three years from the date of the violation: Article 228(2). Pursuant to Article 230 money penalties are demanded but there are some exceptions. Article 231 requires notification to the flag State and other States concerned of measures taken. Under Article 233 (subject to article 42) an incident occurring in a strait used for international navigation is exempt from this port State control. Article 236 explains the provisions do not apply to war ships or ships claiming sovereign immunity.

The *LOSC* is saying then, that a port State can enforce its public law jurisdiction (usually criminal law) over a ship flying the flag of another country for violations occurring in the high seas. This represents a significant change, for previously such an enforcement jurisdiction had been almost entirely the sole domain of the flag state. Port state jurisdiction over marine pollution is not yet customary international law although it will as of 16 November 1994 be binding under the *LOSC* on some 60 or more States, including Australia, as conventional law. What a jurisdiction it promises to be. It forces the flag State to take action and if it will not the port State takes on an international responsibility to clean up ships and prevent marine disasters.

CONCLUSION: TOWARDS 2000

Over the next few years it is very likely that port state jurisdiction over extra-territorial violations will become a widely enforceable norm of international law either through treaty or custom. It will certainly be a new look operation for sea carriers especially where flag states ignore their international responsibility.

For many of us society is becoming increasingly global; for sea carriers that has probably always been the case. Amidst this globalisation the great common of the world, the ocean, is set to be put in the hands of new trustees, one being the port State.

The flag State system has unacceptable deficiencies. A marine disaster in this age of rapid transit has world wide effects. Port state jurisdiction over marine pollution promises to be a very interesting catalyst for the responsible management of shipping.

The ethic must no doubt be, like in all areas of life, that a dean ship is an efficient ship — efficient in terms of money and environment — sustainable development — if you do not believe that perhaps over the next decade the old and new port state jurisdiction will educate you in that ethic.