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Australia's Pilotage System in the Torres Strait: A threat to Transit Passage?

Robert Beckman *

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IN May and October 2006, Australia issued Marine Notices to the international shipping community advising that it was establishing a system of compulsory pilotage in the Torres Strait. It is now an offence under Australian law for a ship to navigate through the Torres Strait without first taking on an Australian pilot. The master and owner of any ship passing through the Torres Strait which fails to comply with the compulsory pilotage requirements will be subject to prosecution the next time the ship enters an Australian port. If convicted, they will face significant penalties.

Questionable legality

This legislation by Australia is of questionable legality under international law. The Torres Strait is a strait used for international navigation and is governed by Part III of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Part III of UNCLOS provides that all ships have the right of transit passage through straits used for international navigation. Transit passage means the exercise in accordance with Part III of the freedom of navigation for the purpose of continuous and expeditious transit of the strait.

UNCLOS provides that ships exercising the right of transit passage must comply with generally accepted international regulations, procedures and practices established by the International Maritime Organization (IMO). This gives the IMO, working together with the states bordering a strait, a wide mandate to establish international rules and regulations governing the exercise of transit passage through straits used for international navigation. Under this scheme, various measures have been adopted by the IMO, in consultation with Indonesia, Malaysia and Singapore, to govern ships exercising the right of transit passage through the Straits of Malacca and Singapore. The measures adopted by the IMO include the establishment of a traffic separation scheme and a system of mandatory ship reporting. All states are obligated to ensure that ships flying their flag which exercise the right of transit through the straits comply with these measures.

As a general rule, coastal states have sovereignty in the 12-nautical-mile territorial sea adjacent to their coast. This gives them fairly broad jurisdictional powers to regulate ships passing through their territorial sea. However, UNCLOS specifically provides that if part of the territorial sea comprises a strait used for international navigation, the sovereignty and jurisdiction of the states bordering the strait must be exercised *subject to the provisions in Part III* of UNCLOS.

Limits of Rights of Bordering States

Part III of UNCLOS strictly limits the right of states bordering straits to adopt laws and regulations relating to the exercise of transit passage. It provides that they may adopt laws and regulations on only two matters relating to navigational safety and ship-source pollution. First, they may adopt legislation establishing a traffic separation scheme that has been approved by the IMO. Second, they may adopt legislation giving effect to “applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait”. States bordering straits have no authority to adopt laws and regulations requiring ships exercising transit passage to comply with a system of compulsory pilotage. Therefore, Australia’s actions establishing compulsory pilotage in the Torres Strait are a *prima facie* breach of their obligations under UNCLOS.

Australia’s position is that the IMO has authorized the system of compulsory pilotage in the Torres Strait. Their argument is that the IMO passed a resolution extending the Great Barrier Reef, as a Particularly Sensitive Sea Area (PSSA), to the Torres Strait. As such, it argues, the compulsory pilotage scheme in the Great Barrier Reef PSSA now applies to the Torres Strait.

However, the legal position of Australia is questionable for several reasons. First, the wording of the IMO resolution extending the Great Barrier Reef to the Torres Strait does not purport to make the compulsory pilotage scheme in the Torres Strait mandatory, as it uses only recommendatory language. Second, at the IMO meeting at which the IMO resolution was adopted, the United States and several other delegations made it clear that they did not regard the resolution as legal authority for the establishment of a mandatory system of pilotage in the Torres Strait. Third, even if the IMO did intend to establish a system of compulsory pilotage in the Torres Strait, the enforcement of that system would be the responsibility of flag states. Australia would have no right to prosecute foreign ships that failed to comply with the pilotage scheme because it has no authority under UNCLOS to adopt laws and regulations requiring that ships exercising transit passage take on a pilot.

Implications of Canberra’s stance

The actions by Australia threaten the delicate balance in UNCLOS between the interests of coastal states and the interests of user states in straits used for international navigation. The regime in Part III on straits used for international navigation is one of the most important compromises achieved in the nine years of negotiations leading to the adoption of UNCLOS. The regime of transit passage is vital to the commercial and security interests of major maritime states like Singapore. It is also vital to the commercial shipping community.

It appears there is a fundamental difference of opinion between Australia and several major user states on the legal effect of the IMO resolution and on the interpretation or application of the UNCLOS provisions relating to the exercise of transit passage in the Torres Strait. Further discussions in IMO committees on the lawfulness of Australia’s legislation are not likely to resolve these issues. Therefore, third party dispute settlement may be the only way the legal issues can be resolved.

If Australia prosecutes the master or owner of a foreign ship for exercising transit passage through the Torres Strait without taking on a pilot, the flag state could elect to invoke the dispute settlement procedures in UNCLOS and challenge the legality of Australia’s legislation. The system of compulsory and binding dispute settlement in UNCLOS can be

unilaterally invoked by a state party when a dispute arises with another state party as to the interpretation or application of the provisions of the Convention.

One option is to refer the dispute to the International Tribunal for the Law of the Sea (ITLOS) in Hamburg, Germany. ITLOS is a specialized court with jurisdiction to hear disputes between states concerning the interpretation and application of the Convention. It has demonstrated that it is able to render justice in a speedy, efficient and cost-effective manner.

Another possibility is that a group of states interested in maintaining the integrity of the provisions of UNCLOS on the rights of navigation in vital sea lanes could agree in advance to share the costs of litigation or arbitration if one of them invokes the dispute settlement system against Australia. Also, international shipping organizations may fear that Australia's actions in the Torres Strait will set a dangerous precedent for other straits used for international navigation. If so, they might also be willing to assist a flag state that invokes the dispute settlement system to challenge Australia's legislation.

Any decision by an international court or tribunal on the legality of Australia's legislation would be binding only on the parties to the case. However, the decision would be significant. It would provide authoritative guidance to the IMO and to states on the international regime regulating the right of transit passage through straits used for international navigation.

* *Robert Beckman is a Visiting Senior Fellow at the Institute of Defence and Strategic Studies, Nanyang Technological University. He is on sabbatical leave from the Faculty of Law of the National University of Singapore, where he is an Associate Professor.*