

Navigating the High Seas: Flag and Port State Jurisdiction

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Lecture's structure

- Overview on the definition and regime of the high seas
- Overview on the principle of freedom of navigation
- Analysis of the principle of the exclusive jurisdiction of the flag State
 - Nationality of ships
 - Legal basis
 - Legal meaning
 - Scope of application
 - Exceptions (overview)
 - Flag State duties
- Port State Jurisdiction
 - Meaning
 - Scope of application
 - Legal rationale
 - Port State jurisdiction over the protection of marine environment from pollution from vessels
 - Port State jurisdiction over illegal, unreported, unregulated fishing
- Conclusions

High Seas: an Overview

- Spatial scope of the high seas
 - Article 86 UNCLOS: «*all parts of the sea which are not included in the EEZ, in the territorial sea or in internal waters of a State, or in the archipelagic waters of an archipelagic State.*»
- Principle of the freedom of the high seas
 - Article 89: «*[no] State may validly purport to subject any part of the high seas to its sovereignty*»
 - Article 87: «*1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:*
 - (a) *freedom of navigation;*
 - (b) *freedom of overflight;*
 - (c) *freedom to lay submarine cables and pipelines, subject to Part VI;*
 - (d) *freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;*
 - (e) *freedom of fishing, subject to the conditions laid down in section 2;*
 - (f) *freedom of scientific research, subject to Parts VI and XIII.*

High Seas: an Overview

- Freedom of the high seas is not absolute
- Article 87(2) stating that: «*These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.*»
- Article 88 «*The high seas shall be reserved for peaceful purposes.*»
- Article 301 «*In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.*»

Freedom of Navigation

- Oldest among the freedoms of the high seas
- Article 90 provides that: «*Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas*»
- **Meaning:** no interference on navigation by third States (negative concept)
- **Scope of application:** high seas, no internal waters in order to reach the high seas (ITLOS, *M/V Louisa* and *M/V Norstar* cases)

Principle of the Exclusive Flag State Jurisdiction

- Principle providing one of the principal ways of maintaining legal order over activities at sea
- Well established principle
- Article 92 UNCLOS codifies that «*Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. (...)*»
- Principle linked to the nationality and the flag being the symbol of that nationality

Flag State Exclusive Jurisdiction: the Nationality of Ships

- Article 91 UNCLOS «1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. *Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.*»
- Long-established rule
- ITLOS ruled in *M/V Saiga No. 2* that UNCLOS considers a ship as a unit and thus everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant
- Same conclusion repeated by ITLOS in *M/V Norstar* preliminary objections

Flag State Exclusive Jurisdiction: the Nationality of Ships

- Right for States to confer their flag to a vessel unconditional except for some limitations:
 - i) those contained in treaties to which the State is party
 - ii) the fact that the vessel has already the nationality of another State
 - iii) **the genuine link** between the ship and the flag State
- No conclusive and globally accepted definition of «genuine link»
 - Silence UNCLOS
 - Silence 1986 UN Convention on Conditions for Registration of Ships
 - Some clarifications from ITLOS

Flag State Exclusive Jurisdiction: the Nationality of Ships

- In *M/V Saiga No 2 Case* and *M/V Virginia G case*, a genuine link is not a pre-requisite for the grant of nationality to a ship
- Requirement only intended to secure effective implementation of the flag State duties
- Even if evidence of the absence of jurisdiction and control, States cannot refuse to recognize the right of a ship to fly the flag of the flag State
- In *Grand Prince case*, focus on the exercise of effective jurisdiction and control which are questions of fact
- Failure of attempts to define the «genuine link»
- Efforts to define specific performance requirements for the flag States
- Practice of «flags of convenience registries» and reflagging

Flag State Exclusive Jurisdiction: the Nationality of Ships

- Ships without nationalities or with more nationalities (Art. 92(2) UNCLOS «2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.»)
- They are not beyond the law
- They are under the jurisdiction of any State and role of the diplomatic protection principle (see Italy's arguments in the *M/V Enrica Lexie case*)

Flag State Exclusive Jurisdiction: Legal Basis

- Various theories, among them:
 - i) theory of the territoriality of the ship
 - ii) principle that a State may regulate the conduct of its nationals even when those nationals are acting outside of the State's territory
 - iii) corollary of the freedom of the high seas and the need to submit the high seas to law

Flag State Exclusive Jurisdiction: Legal Meaning

- Does the concept of jurisdiction include prescriptive, enforcement and adjudicative jurisdiction?
- Various positions on this point
 - i) minority in favour of an overall jurisdiction
 - ii) majority limiting the concept to enforcement jurisdiction
 - *Arctic Sunrise* Arbitration, where it is ruled that: «As a result of the exclusive jurisdiction of the flag State over ships in the high seas, a coastal State may only exercise jurisdiction, involving law enforcement measures, over a ship, with the prior consent of the flag State. This principle is subject to exceptions, some of which are discussed below.»
 - Exceptions in UNCLOS to the principle
- It confers immunity upon a ship from interference by foreign government vessels

Flag State Exclusive Jurisdiction: Legal Meaning

- Flag State exclusive enforcement jurisdiction over its national vessels on the high seas (subject to exceptions based on consent, treaty law and custom).
- Flag State jurisdiction does not prevent other States from attaching consequences to the conduct of their nationals on the high seas, even when aboard foreign vessels
- There may be concurrent prescriptive jurisdiction over activities on the high seas
- Article 97 UNCLOS(1) on penal jurisdiction on the high seas «1. In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.» (see *M/V Enrica Lexie* case parties' arguments)

Flag State Exclusive Jurisdiction: Scope of Application

- Flag State exclusive jurisdiction concerns enforcement conducted on the high seas with regard to activities **exercised on the high seas**
- Exclusivity principle attached to the *location of the vessel*, limited spatially and temporally (when sailing *on* the high seas)
- Relative relevance of the locus of the enforcement
- ITLOS, in the *M/V Norstar* case concluded that: «(...) the locus of enforcement is *not* the sole criterion in this regard. Contrary to Italy's argument, even when enforcement is carried out in internal waters, article 87 may still be applicable and be breached if a State extends its criminal and customs laws extraterritorially to activities of foreign ships on the high seas and criminalizes them.»

Flag State Exclusive Jurisdiction: Exceptions (Overview)

- On the high seas, the flag State enjoys exclusive jurisdiction subject to certain well-established exceptions
 - Right of visit (Art. 110 UNCLOS)
 - Right of hot pursuit (Art. 111 UNCLOS)
 - Constructive presence
- Few and not uniform exceptions
- With reference to ships suspected of engaging in the slave trade or in unauthorized broadcasting, the warship must have an established basis of jurisdiction to justify the arrest of the ship (Arts 99, 109 UNCLOS)
- Only in relation to piracy there is universal jurisdiction allowing the warship of any State to visit, search and arrest a pirate ship (Art. 105 UNCLOS)

Flag State Exclusive Jurisdiction: Exceptions (Overview)

- Full immunity for warships and ships owned or operated by a State and used only on government non-commercial service (Arts. 95, 96 CLOS)
- Beyond these exceptions UNCLOS does not permit the non-consensual boarding of a foreign ship on the high seas
- Neither do other treaties (except for the 1995 Straddling Fish Stocks Agreement) notwithstanding the emergence of new instances in recent times (drug trafficking, illegal migrant smuggling terrorism, weapons of mass destruction 'WMD', and other security concerns)
- Role of the UN Security Council

Flag State duties

- Article 94(1) provides that every State is required to «*effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag*»
- ITLOS in advisory opinion no. 21/2015 (SRFC): «[...] [t]o achieve this purpose, the flag State is required by article 94, paragraph 2, subparagraph (b), to ‘assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship’.»

Flag State duties

- In the subsequent paragraphs of Article 94 are listed various duties of the flag State
- The enumerated flag State responsibilities are non-exhaustive
- Flag States play a vital role in the governance of shipping, e.g. by ensuring that its ships conform to international rules and standards concerning matters such as safety at sea, pollution control, IUU fishing, and communication regulations
- The unwillingness or inability of a flag State to comply with its international obligations stemming from the exclusive jurisdiction principle is a major problem
- The problem is partially solved in UNCLOS and other treaties by giving relevance to the port State jurisdiction with regard to certain activities on the high seas

Port State Jurisdiction: Meaning

- Port State jurisdiction 'PSJ' wider concept than:
 - Port State control 'PSC' (e.g. 1982 Paris MOU) to eliminate the operation of sub-standard ships through a harmonized system of port State control (mainly enforcement actions)
 - Port State control in fishing activities = Port State measures (2009 Agreement on PSM to Prevent, Deter, and Eliminate Illegal, Unregulated, Unreported and Fishing (both prescriptive and enforcement actions))

Port State Jurisdiction: Geographical Scope of Application

- Ports provide an opportunity for verifying if visiting foreign ships comply with certain types of national or international technical standards or if they have engaged in certain illegal behaviour :
 - in the port state's maritime zones
 - in the the maritime zones of other States
 - on the high seas and the Area
 - in the maritime zones of the coastal State (Coastal State Jurisdiction)
- Port state jurisdiction does not just serve national interests, but also further the interests of the international community
- Port includes:
 - i) outermost permanent harbour works
 - ii) roadsteads beyond the outer limit of the territorial sea

Port State Jurisdiction: Legal Rationale

- Principle of territoriality with reference to PSJ over activities carried on in the port
- Principle of quasi-territoriality or functionality with reference to PSJ over activities carried on in the coastal State maritime zones
- International treaties with reference to PSJ over activities carried on outside the coastal State maritime zones or in other coastal States maritime zones
- Frequent attempts by States to expand their jurisdiction through practical solutions (e.g. absence of documentations, etc.)
- Theories proposed by scholars:
 - Vindication of common interests of UNCLOS States parties
 - Distinction between the adopted measures (punitive ones and measures to withhold benefits to which foreign ships are not entitled under international law)

Port State Jurisdiction and the Protection of the Marine Environment

- Article 218 UNCLOS «1. *When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference [...]*»
- Conditions for that extraterritorial jurisdiction:
 - Available only between UNCLOS States parties, no customary rule
 - Illegality as a result of a violation of applicable international rules and standards.

Port State Jurisdiction and the Protection of the Marine Environment

- No proceedings 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 (Art. 218(2))
 - Far reaching power even if contingent upon the wishes of the flag and the coastal State
- Investigation by the port State on possible violations when requested by the flag or coastal State (Art. 218(3)). Proceedings to be suspended at request of the State where the violation occurred (Art. 218(4))

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Port State Jurisdiction and the Protection of the Marine Environment

- Administrative measures by the port State to prevent the vessel from sailing if it is in violation of applicable international rules and standards relating to seaworthiness of vessels and thereby threatens damage to the marine environment.
- Possibility to permit the vessel to proceed only to the nearest appropriate repair yard and, upon removal of the causes of the violation, to continue immediately its voyage (Art. 219)
 - Very useful and commonly used measure.
- Need for the port State to notify the flag State if a ship fails conditions required to be upheld by the flag State under Article 94 (Art. 94(6))

Port State Jurisdiction and the Protection of the Marine Environment

- Detention can be for no longer than is essential for the purposes of investigation (Art. 226(1)) and prompt release once a violation is found but a bond or financial security must be given before release (Art. 226(1)(b))
- Right of pre-emption of the flag State. If it starts proceedings, within 6 months the port State's proceedings are suspended (Art. 228)
- Penalty cannot be imposed after 3 years from the date of the violation (Art. 228(2))
- Money penalties are demanded but there are some exceptions (Art. 230)
- Notification to the flag State and other concerned States of measures taken (Art. 231)
- Incidents occurring in a strait used for international navigation are exempt from port State control (Art. 233)
- Immunity for war ships or similar (Art. 236)

Port State Jurisdiction and the Protection of the Marine Environment

- No systematic and comprehensive regulation for PSJ in UNCLOS
- Strictly confined extra-territorial PSJ
- PSJ merely facultative while flag State jurisdiction compulsory
- The same in IMO instruments
- Attempts to react with Paris MOU in 1982, by which a commitment is made to inspect a certain minimum percentage of visiting foreign merchant vessels
- Global network of regional merchant shipping MOUs

Port State Jurisdiction and Fishing Activities

- No regulation in UNCLOS but in other international agreements
- **1993 Compliance Agreement** (Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas), Article V «[...] 2. *When a fishing vessel is voluntarily in the port of a Party other than its flag State, that Party, where it has reasonable grounds for believing that the fishing vessel has been used for an activity that undermines the effectiveness of international conservation and management measures, shall promptly notify the flag State accordingly. Parties may make arrangements regarding the undertaking by port States of such investigatory measures as may be considered necessary [...]*»

Port State Jurisdiction and Fishing Activities

- Providing the first explicit global fisheries agreement role for PSJ.
- Main role for the flag State
- Very limited PSJ: obligation for Port State only to initiate the process by informing flag States of reasonable suspicions
- Applicable only amongst States parties (around 34)

Port State Jurisdiction and Fishing Activities

- The voluntary [1995 Code of Conduct for Responsible Fisheries](#), Article 8 «8.3.1 Port States should take [...] such measures as are necessary to achieve and to assist other States in achieving the objectives of this Code [...]. 8.3.2 Port States should provide such assistance to flag States as is appropriate [...] when a fishing vessel is voluntarily in a port or at an offshore terminal of the port State and the flag State of the vessel requests the port State for assistance in respect of non-compliance with subregional, regional or global conservation and management measures or with internationally agreed minimum standards for the prevention of pollution and for safety, health and conditions of work on board fishing vessels.»
- Furthering international standards and norms, while promoting PSMs
- The emphasis of explicit port State duties remains upon assisting flag States on their request

Port State Jurisdiction and Fishing Activities

- The [1995 UN Fish Stocks Agreement](#), Article 23 «A port State *has the right and the duty to take measures, in accordance with international law, to promote the effectiveness of subregional, regional and global conservation and management measures. When taking such measures a port State shall not discriminate in form or in fact against the vessels of any State.*
- 2. A port State may, *inter alia, inspect documents, fishing gear and catch on board fishing vessels, when such vessels are voluntarily in its ports or at its offshore terminals.*
- 3. States may adopt regulations empowering the relevant national authorities *to prohibit landings and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas.*
- 4. *Nothing in this article affects the exercise by States of their sovereignty over ports in their territory in accordance with international law.»*
- The right to take these measures is within the discretion that port States already have under general international law

Port State Jurisdiction and IUU Fishing

- The 2009 Agreement on Port State Measures ([PSMA](#)), the first binding international agreement to target illegal, unreported and unregulated (IUU) fishing (more than 70 States)
- Its objective is to prevent, deter and eliminate IUU fishing by preventing vessels engaged in IUU fishing from using ports and landing their catches (Art. 2)
- The provisions of the PSMA apply to fishing vessels seeking entry into a designated port of a State which is different to their flag State
- The PSMA sets out the minimum controls a State should use when foreign fishing vessels enter, or apply to enter one of its ports, and to verify that all fish landed are legally caught
- The 'port State' designates which of its ports can be used by foreign vessels (Art. 7) and follows a set of standardised procedures to decide whether to allow the vessel to enter (Arts. 8 and 9), to inspect the vessel and to report and share the results of the inspection with other port States (Arts 11-15)

Port State Jurisdiction and IUU Fishing

- The primary actions available to a Port State under the Agreement are:
 - that the port State requires prior notice of a foreign fishing vessel's arrival in its port
 - that the port State has the ability to prohibit the vessel's entry to port
 - that the port State has the right to inspect vessels
 - that the port State has the ability to deny a vessel the *use* of its port to unload fish and access services

Port State Jurisdiction and IUU Fishing

- Flag States shall:
 - encourage their vessels to only use ports in States that apply the Agreement's measures
 - require their vessels to cooperate with the port State's inspections and
 - if necessary, request that port States take measures against their flagged vessels

Port State Jurisdiction and IUU Fishing

- Port State control in [Regional fisheries management organisations \(RFMOs\)](#):
 - Most of the RFMOs have some form of port State control, even if implicit
 - There are no RFMOs that explicitly authorize punitive/corrective enforcement action
 - Many of the port State control regimes are facultative
 - Some port State control regimes only apply to vessels flying the flag of non-members of the RFMO
 - Many port State control regimes are weak procedurally
 - State practice

Port State Jurisdiction and IUU Fishing

- Examples of enforcement action that can be taken by the port State
 - Denial of access to ports altogether
 - Prohibiting the landing, transshipment or processing of fish or other cargo
 - Prohibiting the use of other port services, such as refuelling, other forms of re-supplying (water, food, equipment, bait), making repairs, etc.
 - Rectification (making repairs); and
 - Punitive/corrective action (**controversial**)

Conclusions

- Flag State jurisdiction and PSJ are complementary
- They have completely different legal basis
- They are completely different in legal nature
- Port State jurisdiction is very fragmented
- Port State jurisdiction is developing very slowly especially with regard to Port State rights
- The flag State jurisdiction is still a rule with few limited exceptions and limitations