ANU College of Law Research Paper No. 11-31

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http://ssrn.com/AuthorID=371838
http://ssrn.com/abstract=1927648
Making or Breaking the International Law of Transit Passage? Meeting Environmental and Safety Challenges in the Torres Strait with Compulsory Pilotage

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presentation at the Symposium on:

“Safety, Security and Environmental Protection in Straits Used in International Navigation: Is International Law Meeting the Challenge?”
Istanbul, Turkey, September 9-11, 2011

Sponsored by
Center for Marine Law and Research, Istanbul Bilgi University
Law of the Sea Institute, School of Law, University of California Berkeley
Ocean Policy Research Foundation
Korea Ocean Research and Development Institute

I. INTRODUCTION

Good morning. Thank you to the organizers for the honor and privilege to be involved in this major symposium on straits. Today I want to talk about the normative position of compulsory pilotage in the Torres Strait – a contentious way that has been devised to prevent harm to the marine environment. In particular, I want to play the part of provocateur and suggest that over the last several years we have been witnessing customary international law in the making in one strait used for international navigation. I want to highlight at the outset that this is still very much a work in progress and conclusions reached today may change in light of new information.
That said, if we look at transit passage through the Torres Strait since October 2006, when pilotage became compulsory under Australian law, there seems to be a wide gulf today between what some states have said about the law, what many in that group no longer say, and what the majority of other silent states have done in practice. The actual practice of states in the Torres seems to point to a developing local or special custom of compulsory pilotage (even accepting that there may be persistent objectors). Similarly, for parties to UNCLOS, the practice of compulsory pilotage may be having influence on the meaning of transit passage through the Torres Strait – and I maintain only through the Torres – under Part III of the Convention.

The paper I have prepared for publication in the Symposium proceedings (and which has already been distributed to you) deals in great detail with the necessary background for my thesis but there is no time to spend even summarizing it here. Instead, I plan this morning to jump right to my thoughts on possible normative movement in the Torres. I should say that some back in Australia, while expressing support for this paper, also hope that it does not re-activate an issue that has not been raised for some time.
II. THE LEGAL DISPUTE ABOUT COMPULSORY PILOTAGE

Turning first to the legal debate: the controversy surrounding compulsory pilotage in the Torres pits the transit passage interests of maritime states against the increasing concern of bordering states about massive pollution and other harm that marine casualties in a strait could entail. The merits of the contending legal positions about the permissibility (or not) of compulsory pilotage in the Torres have been ably canvassed by a large number of commentators. It is not my intention to rehearse these arguments in any detail. Suffice to say that the dispute has revolved around whether or not compulsory pilotage illegally impedes, hampers, or impairs the right of transit passage under UNCLOS and, as asserted by some, its customary counterpart. In addition, Singapore in particular, but also Cyprus and Greece, have been attune to the possible normative suasion that compulsory pilotage in the Torres might have as “precedential” value outside the Strait and have expressed resistance for this reason.

Of course, like states, the commentators divide on legality. Some highlight the practical impediments to transit passage that taking a pilot on board involves. Others emphasise the safety and environmental dangers; and that, far from hampering transit passage,
compulsory pilotage ensures passage will not be impeded by an accident or grounding. Again, it is not really my purpose today to opine on which side has the best of it. I can see some merit in the arguments on both sides. I suppose, though, it has always seemed to me that Australia was long on the policy side of environmental protection and safety, but a bit short on the law – at least until custom and the forward interpretation of UNCLOS seemed available.

In the end, though, regardless of the merits of the arguments, unless and until a state becomes so dissatisfied with the status quo that it moves the disagreement over the interpretation of transit passage to compulsory third party dispute settlement under Part XV of the Convention, it would appear that a sort of acceptable stalemate has been reached.

II. COMPULSORY PILOTAGE AS AN EMERGING NORM IN THE TORRES STRAIT

But, of course, that is not the end of the matter. My central thesis is that the debate about the legality of compulsory pilotage in the Torres Strait is becoming increasingly irrelevant in light of navigational practice. As I say, a local custom may be emerging in the Torres that ordinarily requires vessels to take a pilot on board
when transiting. In order to reach this tentative conclusion it is necessary to examine what states have said about compulsory pilotage and what they have done. This can only be done in a cursory way in the time available. Much more detail is available in my paper.

A. The Reaction of States: What State’s Say (2004-2011)

Starting in July 2004 a relatively small group of states led by Singapore and the U.S. began to question whether compulsory pilotage in the Torres would be lawful. The membership and size of this group varied over time and it is not always possible to learn the exact number or identity of the states challenging the legality at any particular stage. It appears, however, that at its peak in 2006, twenty-two states were in this group. It also appears that from 2004 through 2008 there were 8 recorded significant milestones of protest by states. After 2008, there was no recorded protest at all for two years until compulsory pilotage in the Strait of Bonifacio was mooted in 2010.

B. The Practice of States (2006-2011): What States Have Done

That is a much too much abbreviated version of what states have said. My paper shows significant objections and protest from 2004 through 2008. However, it is more important here to consider
what states have done in the Torres Strait. If one surveys the navigational practice of states since the introduction of compulsory pilotage, one gets a sense that the arguments surrounding illegality may be becoming beside the point. Several factors, I think, tend point in this direction.

First, reliable anecdotal evidence in the process of being formalized reveals that from the outset, compliance with the piloting requirement apparently has been perfect, even by objecting states. Indeed, the evidence indicates that since the Torres Strait was included in the Great Barrier Reef PSSA, there has been 100% compliance from ships of all flags, regardless of whether they are bound for an Australian port or not. It is true that both the United States and Singapore (and the UK until 2009) have stated that they “choose” to comply, but no other state that I can find has qualified its compliance in this way.

Second, all states, even those challenging the legality of the pilotage requirement, have recognised the ecological importance and fragility of the Torres Strait, as well as its cultural and economic significance to its indigenous inhabitants. As a result, from the outset
even objecting states have emphasised that they, in fact, encourage ships with their flags to take a pilot in the Torres Strait.

Third, it is important to recognise that the apparently perfect compliance with pilot requirements has persisted for over five years in the Torres. Just as importantly, the frequency, volume, and number of states involved in protest and objection has significantly abated. Protests were raised at every opportunity in every relevant IMO forum during 2005-2007. Since then, the issue has been raised once, in 2010. In the UN General Assembly the issue has been completely off the agenda since 2008. Moreover, the vast majority of states have never protested at all and by 2008, only Singapore, the United States, Japan and Sri Lanka were still vocal. Since December 2008, it has only been the U.S. and Singapore as far as I can determine.

C. The Emergence of Local Custom in the Torres Strait?

In light of what states have said and done in the Torres Strait, one obvious question is how the practice should be read. In thinking about this, one is reminded of the protests surrounding Canada’s 1970s unilateral establishment of an “anti-pollution” zone 100 nautical miles off its Arctic coast and Lou Henkin’s question about whether Canada was making or breaking international law. Henkin
was of the view that Canada could have done things better, but in the end it turned out that Canada was making international law.

What about Torres? Is Australia making or breaking the international law of transit passage? In order to provide a tentative answer I assume (without taking a position) the worst case for Australia; namely, that both customary international law and the Convention prohibited the unilateral imposition of compulsory pilotage in 2006, even in a designated PSSA, when Australia brought it in.

In starting my analysis, I want to be clear that I am only talking about normativity in the Torres Strait. As I see it, the practice of transit pilotage in the Torres Strait relates only to the Torres Strait. It does not have universal implications because the only place that the practice is relevant is the Torres Strait, which is the only strait in which pilotage is compelled by a border state. In this context, it is important to recall that the Right of Passage case teaches that it is possible to have a local custom that relates to and is bound up with a specific geography and goes no further.
1. Pilotage as Local Custom outside the Convention

Let us now consider the normative possibilities. Turning first to a potential local custom outside the Convention applicable to non-parties --- from a positivist’s point of view, like other customary rules, a local custom mandating pilotage in the Torres requires a constant, uniform and durable practice and the conviction that the practice is obligatory. Perhaps more importantly, per the Asylum case it would be incumbent on Australia to prove opposability against all parties in any particular dispute by proving that those states were engaged in the actual practice and had the requisite conviction. Tacit acceptance would not be enough.

Assuming that the customary law of the sea prohibited compulsory pilotage in 2006, we are immediately exposed to what Joel Tractman refers to as the zen like nature of custom -- i.e. law that is perpetually becoming and unbecoming. Our analysis must consider whether the practice of states outside the Convention, in complying with the compulsory pilotage requirement, is both disintegrating an established customary norm for the Torres, and replacing it with its antithesis.
Based on the factual account above, it seems plausible to assert that we may be witnessing such a legal change. Looking at practice first. Outside of the United States, which appears to be within the limited and contentious persistent objector rule – it seems to be the case that every other non-Convention state transiting through the Torres since 2008 has observed the compulsory pilot requirement without protest. Indeed, many states have never protested at all and would seem to have observed the requirement from its inception in 2006.

*Opinio juris* is a bit tougher to locate and offers a continuing research agenda. However, one might point to the numerous statements from non-objectors recognizing the strait’s ecological importance and its significance to local indigenous populations as a start. One might also mine the work of a number of scholars on the relevance of marine environmental norms to state behaviour in straits.

2. Subsequent practice within UNCLOS

Turning to UNCLOS. It could be that a subsequent practice regarding pilotage within the Convention is developing in the Torres, and this might give interpretive meaning to Part III of the Convention
for the Torres. Again, let’s start by assuming that in 2006 the proper interpretation of the Convention prohibited a border state from imposing compulsory pilotage. If this is so, then a subsequent practice consisting of compliance with compulsory pilotage requirements might establish the agreement of the parties regarding the interpretation of UNCLOS *a la* article 31, paragraph 3 of the Vienna Convention on the Law of Treaties.

There are, however, significant, and perhaps insurmountable, hurdles here. The biggest and most obvious is reflected in the view of a number of commentators that it is necessary for a practice to be permanent, continuous and uniform between *all* parties to a treaty to allow a new practice to essentially modify the text of a treaty under article 31(3) of the VCLT. Here, of course, it appears that Singapore, a party to the Convention, while complying, does so under apparent protest. More may be necessary.

**V. CONCLUSION**

To wrap up. The question put by the symposium organisers is whether “international law is meeting the environmental challenge in international straits”. The answer for the Torres Strait is mostly. In
2000, well before the introduction of the compulsory pilotage regime and the recent IMO extension of the ship reporting system following the grounding of the *Shen Neng 1*, Stuart Kaye concluded that “the Torres Strait has the most comprehensive maritime safety and environmental protection provisions of any international strait to which the transit passage regime applies”. It is even more robust today.

Regardless of the legal normativity of compulsory pilotage, the sort of *Pareto optimal* situation that David Victor wrote about in connection with the Whaling Convention seems to exist in the Torres Strait (although in the Torres Strait things are much happier than in the Whaling regime). Certainly, both sides seem to accept the status quo. As I suggest, however, over time and even now we may be witnessing the revision of law through practice in favour of compulsory pilotage in the Torres Strait. Here, it is well to recall the importance of the role of “effectiveness” in the international community highlighted by Nino Cassese: Cassese writes:

> International law is a realistic legal system. It takes account of existing power relationships and endeavours to translate them into legal rules. . . . [I]t provides that only those claims and situations which are effective can produce legal consequences. A situation is effective if it is solidly implanted in real life.
With a one hundred percent compliance rate since 2006, it appears that compulsory pilotage in the Torres Strait is firmly implanted in real life. Real life seems to have shown that compulsory pilotage may not be the impediment to transit passage that was once feared.

In the face of this effectiveness, even persistent objectors would do well to remember the words of Jon Charney that no persistent objector has ever:

   effectively maintained its status after the rule became well accepted in international law. … This is certainly the plight that befell the U.S., UK and Japan in the law of the sea. Their objections to expanded coastal state jurisdiction were ultimately to no avail ….

Thank you.