Chapter 14

Port State Powers in the Modern Law of the Sea*

The aim of the present chapter is to trace the many recent developments concerning port state powers. These powers of inspection and enforcement relate to internationally agreed rules and standards. They have been introduced progressively in different contexts, primarily shipping and fishing, in order to complement flag state powers of jurisdiction and control, powers that were all too often under used in practice. As the account of twenty-first century developments will indicate, the processes of introducing and harmonising the exercise of port state powers are continuing.

I Historical Background before 1950

Historically, in both French1 and Anglo-American practice, it was recognised that foreign merchant vessels voluntarily present in a port were, as a matter of legal theory, subject to the law and jurisdiction of the port state, as well as to the concurrent jurisdiction of the flag state. Thus, the British Government’s statement for the Hague Codification Conference of 1930 affirmed that “the State is entitled to exercise jurisdiction over a foreign merchant ship lying in its port and over persons and goods on

* This chapter is based upon a paper entitled “Port States and Environmental Protection” and first published in A. Boyle and D. Freestone, International Law and Sustainable Development (1999) 325. The text has been revised and updated.

1 Avis of the Conseil d’Etat of 1806, in Charteris, 1 BYBIL (1920) 45.
board. In practice, however, port states refrained from exercising their jurisdiction over matters internal to foreign vessels, and it was “not usual for the authorities to intervene and enforce the local jurisdiction” except in cases where the peace and tranquillity of the port were disturbed, e.g. by a murder on board ship, or where the intervention of the local authorities was requested by the Master. There existed widespread restraint over the exercise of jurisdiction, although there was no question of according immunity to merchant vessels, apart from those entering port in distress. Port states took account of the practical need to avoid interfering unnecessarily with a vessel present only temporarily in respect of matters affecting its internal economy, such as the terms of employment of the crew. Moreover, the port state did not normally have any reason to investigate incidents occurring or matters arising before the vessel’s arrival in the port. Beyond the narrow territorial sea, the rule was exclusive flag state jurisdiction on the high seas. The position in customary international law resulting from the decision in the case of the SS Lotus may have been that a port state such as Turkey had not acted contrary to the rules of international law in bringing criminal proceedings against an officer of a foreign ship in respect of a collision on the high seas. This decision was, in effect, reversed by the Brussels Convention of 1952 on Penal Jurisdiction in Matters of Collision.

Before the era of the United Nations, internationally agreed standards were rudimentary. Conventions such as those on Load Lines and the Safety of Life at Sea (SOLAS) laid down international standards for the safety of ships, but these standards were relatively few in number and narrow in scope. The Conventions established standards by the means of imposing obligations on states in respect of ships registered in ports in their territory, that is to say, flag state jurisdiction in modern terminology. The states parties were required to issue certificates to ships flying their flag, stating that the particular ship complied with the agreed standards. The states parties assumed “full responsibility”, according to the Conventions, for their certificates, but the means of policing the exercise of this responsibility were not specified. Other states, such as coastal states and port states, were not entitled to enforce the Conventions on the high seas: a ship holding a certificate could be inspected in port in order

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3 Ibid.
4 This reversal was repeated in article 11 of the Convention on the High Seas and again in article 97 of the LOS Convention. It would appear therefore that the rule of customary law must now have changed so as to coincide with the conventional rules. Article 97 implicitly excludes port state jurisdiction in high seas collision cases such as that of the Lotus by confining jurisdiction to the flag state and the state of which the defendant master or officer is a national.
6 International Convention on Safety of Life at Sea of 31 May 1929 (UK Treaty Series No. 34 (1932), Cmd.4198), replacing an earlier Convention adopted on 20 January 1914 in the aftermath of the loss of the Titanic.