Chapter 4

The EU Acting as a Flag State

4.1. Flag State Jurisdiction in International Law

Flag State jurisdiction has always represented the core form of jurisdiction over ships and its legitimacy is not in dispute, despite certain uncertainties with respect to its theoretical foundation.¹ The traditional justification for flag State jurisdiction relied on the flag State’s jurisdiction over the shipowning company and the circumstance that the flag State was the only State that was capable of exercising effective (enforcement) jurisdiction over its ships. The loosening of the link between the flag State and the shipowning company through the development of ‘open registers’ (or ‘flags of convenience’) since the end of the Second World War has gradually called into question the legitimacy of the exclusive flag State jurisdiction and has increased the need for complementary jurisdiction over ships by port and coastal States.

Under UNCLOS, the flag State’s duty to prescribe and enforce rules and standards for ships flying its flag is in principle exclusive and applies irrespective of the location of the ship.² However, when the ship is located in the ports or coastal waters of another State, the port/coastal State has concurrent jurisdiction and the ship is required to comply with the laws of the coastal State, insofar as they are adopted in accordance with international law.³ Neither UNCLOS nor general international law provides clear rules for resolving competing claims to jurisdiction,⁴ but a common presumption is that territorial jurisdiction generally

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¹ See Bodansky (1991), p. 736 with further references, noting that the juridical basis of flag State jurisdiction “has always been somewhat murky”. He identifies three alternative theories for flag State jurisdiction, based on 1) territoriality (a ship represents a floating part of the State’s territory); 2) nationality (the ship possesses the nationality of its flag State); or 3) based on pragmatic considerations (in the absence of other appropriate jurisdictional bases for standard-setting and enforcement). On the meaning of the word ‘jurisdiction’ in this context, see also Meyers (1967), pp. 33–40.
² See e.g. UNCLOS Articles 92(1), 94, 211(2) and 217.
³ See e.g. UNCLOS Articles 21(4), 39(2), 42(4) and 58(3).
⁴ See also section 5.4.4 below.
overrides jurisdiction claimed on other grounds.\(^5\) The primary enforcement jurisdiction therefore lies with the coastal State when the ship is located in its internal waters or territorial sea,\(^6\) while the coastal State’s powers to enforce certain environmental offences in the EEZ do not necessarily affect the flag State’s concurrent jurisdiction.\(^7\) On the high seas, the flag State’s jurisdiction is exclusive, “save in exceptional cases expressly provided for” in UNCLOS or other international conventions.\(^8\)

With respect to the content of individual flag States’ legislation, UNCLOS imposes a number of minimum obligations, by reference to the ‘generally accepted’ international rules and standards.\(^9\) These minimum obligations apply irrespective of whether the flag State has formally signed up to the rules and standards in question.\(^10\) Similarly, UNCLOS imposes obligations on flag States to ensure compliance with the “applicable international rules and standards” and to prohibit ships that fail to meet those requirements from sailing.\(^11\) UNCLOS, in other words,

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\(^6\) See ibid., and Hakapää (1981), p. 155. However, the primacy of port/coastal State jurisdiction is not upheld regarding matters which are essentially ‘internal’ to the foreign ship. See section 5.1.2.2 below.


\(^8\) UNCLOS Article 92(1).

\(^9\) UNCLOS Article 94(5) provides that “[i]n taking the measures called for in paragraphs 3 and 4 [to ensure the safe construction, equipment, manning and the seaworthiness of ships] each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance”, while Article 211(2) requires States to “adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry. Such laws and regulations shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organisation or general diplomatic conference.”

\(^10\) The final report of the International Law Association’s Committee on Coastal State Jurisdiction Relating to Marine Pollution (hereinafter ILA Final Report (2000)) concludes that the purpose of the reference is “to make compulsory for all states certain rules which had not taken the form of an international convention in force for the states concerned, but which were nevertheless respected by most states” (Conclusion No. 2). Accordingly, “[b]y becoming a party to the 1982 Convention, states ipso facto accept the legal technique of law-making by reference inherent in the very notion of generally accepted international rules and standards. This implies … that … [f]lag states … incur the obligation to prescribe in their national legislation norms which at least reach that same level.” (Conclusion No. 6). According to the Restatement (Third) on Foreign Relations Law, para. 502, Reporters’ Note No. 2, the obligation in Article 94(5) “has become binding on all flag states as a matter of customary international law”. See also section 6.1.5.1 below.

\(^11\) Article 217(1) and (2). On the meaning of ‘applicable’, see section 6.1.5.2.