CHAPTER 17

The European Court of Justice and Its Role in (Re-)defining EU Member States’ Jurisdiction over Ships

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Introduction

The role of the European Union (EU) as an actor under public international law has been analyzed on various occasions.¹ In contrast, the relevant jurisprudence of the Court of Justice of the European Union (CJEU), in particular as far as the existence of a consistent approach towards international law is concerned, has only attracted limited attention. This is all the more true with regard to the specific field of the international law of the sea,² where the issue of jurisdiction over ships has ever since played a dominating role. As is well known, no state may subject any part of the areas beyond the limits of national jurisdiction, i.e. the high seas and the area, to its sovereignty.³ The principle of flag state jurisdiction thus constitutes the central link between a state and its ships navigating these areas.⁴ At the same time, the question when, where and how a port state may exercise jurisdiction over foreign ships located within the

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⁴ See UNCLOS Art. 92(1).
areas under its national jurisdiction has been an issue of major controversy in state practice as well as legal scholarship. Indeed, the importance of port state jurisdiction has increased commensurate with the growing frustration with lax and ineffective exercise of the pertinent duties by flag states on the fields of, e.g., maritime safety standards, fishing and protection of the marine environment.

Taking into account that the EU has been allocated a shared competence to regulate matters of transport, and bearing in mind that the common transport policy of the EU (CTP) also encompasses the field of sea transport, it is about time to examine in detail the jurisprudence of the CJEU in respect of flag and port state jurisdiction, and to attempt to undertake a critical assessment of the approach taken by the Court on this practically important field of international relations. To this aim, the examination will start by addressing the case-law of the Court concerning the relationship between EU law and the international law of the sea in general, before then turning to judgments in which the CJEU has been directly concerned with issues of flag, coastal and port state jurisdiction. As will be demonstrated, the CJEU has—maybe unsurprisingly—followed a comparatively strict autonomy-oriented approach to the rules and principles codified in the pertinent agreements, that has at times challenged rather than strengthened a coherent implementation of the international law of the sea amongst the EU member states. With regard to its own jurisdiction, this approach became particularly manifest in its MOX Plant decision where it emphasized that

an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures under Article 220 EC. That exclusive jurisdiction of the Court is confirmed

6 See Art. 4(2)(g) TFEU.
7 Cf. Art. 100(2) TFEU: “The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport. They shall act after consulting the Economic and Social Committee and the Committee of the Regions.”—In its judgment in Commission v. Council, the CJEU held that even if and to the extent to which a secondary EU law measure is designed to “ensure the efficacy of the rules adopted in the field of maritime safety, non-compliance with which may have serious environmental consequences, by requiring Member States to apply criminal penalties to certain forms of conduct”, it can validly be adopted on the basis of Art. 100(2) TFEU; see CJEU, Case C-440/05, Commission v. Council [2007], ECR I-9097, para. 69.