International Straits, Compulsory Pilotage and the Protection of the Marine Environment

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Introduction

The literal meaning of the word ‘strait’ in English language is ‘narrow.’¹ However, though the Law of the Sea Convention (LOSC 1982) deals in Part III with ‘Straits Used for International Navigation’, it does not define what the word ‘strait’ means.² Despite attempts during the UNCLOS III to push for such a definition,³ it was generally felt at the Conference that it would be difficult to arrive at a satisfactory definition.⁴ The previous 1958 Geneva Conventions did not contain any definition of straits either.

Although there is no legal definition of straits, international law can look to the geographical definition for help. For instance, Bing Bing Jia points out as follows:

> “Geography has offered a definition, namely, ‘a narrow stretch of sea connecting two extensive areas of sea.’ ... However, the expression, ‘two large bodies of water’ may be seen by lawyers as having specific implications, involving the division between internal waters, the territorial sea, and the high seas, which concepts are distinctive in law.”⁵

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² See Art.1 of LOSC


Bruel in seeking “to lay down a geographical conception [of straits] so clearly defined that it may be of some assistance in determining the conception of straits in international law” ⁶ identifies four characteristics of a strait. First, the water of the strait must be a part of the sea. In other words, it must not be artificially created. He therefore excluded canals such as the Suez Canal, the Panama Canal and Kiel Canal from the conception of straits.⁷ Second, the waters must be of limited width (i.e. it must be narrow), though he admitted that it was impossible to state any definite limit. Third, the particular water must separate two areas of land, whether separating two continents, one continent and an island, two islands etc. Fourth, the water must connect two areas of sea that otherwise, without the strait, would have been separated. The size of the connected seas are unimportant and may be two oceans, an ocean and a by-ocean, two by-oceans or even two adjoining parts of the same ocean.⁸ Based on these four characteristics Bruel defines a strait in the geographical sense as “a contraction of the sea between two territories being of a certain limited width and connecting two seas otherwise separated at least in that particular place by the territories in question.”⁹ Further, he points out that functionally straits may either be one of interest to international intercourse and straits that are of no such interest.¹⁰ This appears to have been taken up by the LOSC, which by tagging Part III as ‘Straits used for international navigation’ clearly indicates that the interest of the Convention is with international straits. The ICJ in the Corfu Channel Case indicated that the definitive criterion to determine if a strait is an international one is “the fact of its being used for international navigation.”¹¹

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⁶ Bruel, op.cit.p.18
⁷ In the Anglo-Norwegian Case (United Kingdom v. Norway), (1951) ICJ Rep. at 132, the ICJ pointed out that the Norwegian “indreleia” was not a strait because it was “a navigational route prepared as such by means of artificial aids to navigation provided by Norway.”
⁸ Bruel, op.cit. at pp.18-19
⁹ Ibid. at p.19. For instance, in case of the Turkish straits (the Dardanelles and Bosphorous), the Dardanelles, which is about 38 nautical miles long with width varying between a maximum of 4 nautical miles and a minimum of 0.75 nautical miles, links the Aegean Sea to the Sea of Marmara, while the Bosphorous, which is 19 nautical miles has a rather narrow minimum width of 750 metres and connects the Sea of Marmara to the Black Sea. See Scovazzi, T., “Management regimes and responsibility for international straits: With special reference to the Mediterranean Straits”, (1995) 19(2) Marine Policy, p.137 at 147
¹⁰ Ibid. at pp.19-20
¹¹ United Kingdom v. Albania, (1949) ICJ Rep. at 28. See however de Yturriaga, op.cit. at pp.8-12 who points out the complexities in determining whether a strait is actually being used for international navigation.
Originally, interest in international straits was merely based on the need for free transit for military, political and commercial (i.e. promoting international trade) reasons. However, due to the potential that certain ships passing the straits have to cause devastating environmental pollution likely to have serious detrimental effect, especially on the border States, there has recently been a growing interest in the need to strengthen environmental protection of international straits. This paper shall examine the protection of the marine environment in international straits. It shall also explore the role of compulsory pilotage in environmental protection of international straits. Further, the paper would seek to determine whether compulsory pilotage in international straits is in line with current international law.

**LOSC 1982 Part III**

Due to the significant role of international straits in international navigation, there is a need to balance the sometimes competing interests between the border States and the users of the straits. For instance, the competing interest between the concern of the border States to secure their security and environmental interests, on the one hand, and the concern of the users to free and unimpeded transit passage through the straits. There are examples of various bilateral and multilateral treaties that have been entered by these stakeholders in respect of straits. For instance, the 1857 Agreement that governed the Danish strait that connects the Baltic sea with the North sea and the 1936 Montreux Convention in respect of the Turkish straits.

After UNCLOS I the 1958 Geneva Conventions did not dedicate a separate part therein to deal with straits, but rather, this issue was explored in relation to the territorial sea, which at that time had rather narrow breadths. Consequently, the focus

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12 For instance, it has been pointed out that the Convention regarding the Regime of the Turkish Straits (the Montreux Convention, 20 July 1936) lacked provision for the protection of the environment and the prevention of pollution. See Scovazzi, op.cit. at p.148.


14 Art.38 (2) of LOSC defines transit passage as “the exercise in accordance with [Part III] of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.” It is however pointed out that “the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.”

was more on a few rather narrow straits that overlapped with the territorial sea. The principal concern at this time was merely to ensure that the right to innocent passage was guaranteed in respect of these straits. The only mention of straits was Article 16(4) of the 1958 Convention on the Territorial Sea and Contiguous Zone which states: "There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State." However, with claims of wider territorial seas and the eventual adoption of a breadth of 12 nautical miles for the territorial sea, a significant number of straits now fell within the territorial seas of the bordering States. A number of States, including some major maritime powers, at the UNCLOS III therefore insisted on the need to have a separate regime to deal with straits in order to promote free navigation for ships and overflights. Unlike the 1958 Conventions, the LOSC 1982 in Part III dedicates a whole part (consisting of 12 Articles) to deal with straits used for international navigation. Scovazzi points out that the 'core of the new regime is the concept of transit passage'.

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16 For instance, at the time of the League of Nations the Committee of Experts on the Codification of International Law proposed the following: "The regime of straits at present subject to special conventions is reserved. In straits of which both shores belong to the same State the sea shall be territorial even if the distance between the shores exceeds 12 miles, provided that that distance is not exceeded at either entrance to the strait." Straits not exceeding 12 miles in width whose shores belong to different States shall form part of the territorial sea as far as the middle line.” Documents from the League of Nations Committee of Experts for the Progressive Codification of International Law,” (1926) 20 American Journal of International Law(Special Suppl.), pp. 1 at 90

17 See Art.45 of LOSC 1982 for a substantially similar provision.

18 Art.3 of LOSC.

19 See UNCLOS III, Official Records, Vol.I, p.68 para.68 (USSR); p.110, paras 32-40(UK) and p.160, para.27 (USA). See on the other hand, para.3 of the Declaration of the Organisation of African Unity (OAU) on the Issues of the Law of the Sea, Document A/CONF.62/33 which, favoured more of a regime of innocent passage and states: “That the African States in view of the importance of international navigation through straits used as such endorse the regime of innocent passage in principle but recognise the need for further precision of the regime.” Also, see the position of the representative of Spain who noted that: "there was no reason to separate the question of straits from that of the territorial sea, since straits used for international navigation were an integral part of the territorial sea in so far as they lay within territorial waters. Any attempt to set up separate regimes for the territorial sea and for straits would clearly violate the fundamental principle of the sovereignty of the coastal State over its territorial sea; accordingly, any such attempt was quite unacceptable to his delegation.” (1973) quoted from Nandan, S.N., Rosenne, S, Grandy, N.R. and Allen, M.C.,(eds.) United Nations Convention on the Law of the Sea 1982: A Commentary, Vol.II, (Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1993), pp.284-285. For an extensive examination of the historical development of straits see Jose A. de Yturriaga, Straits Used for International Navigation: A Spanish Perspective, op.cit.pp.23-162.

20 Scovazzi, T., “Management regimes and responsibility for international straits: With special reference to the Mediterranean Straits”,op.cit at p.138
The LOSC makes it clear that the regime of passage through these straits as established in this Part shall not in other respects affect the legal status of the waters forming such straits or the exercise by the border states of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil. It however points out that the sovereignty or jurisdiction of the border states is exercised subject to Part III and to other rules of international law. The LOSC makes it clear that Part III does not affect any areas of internal waters within a strait (except where the application of the straight baseline method as set out in LOSC results in the effect of enclosing as internal waters areas which had not previously been considered as such); the legal status of the waters beyond the territorial seas of the border states, that is the EEZ and the High Seas, or the legal regime in straits in which passage is regulated in whole or in part by long-standing treaties in force that specifically relate to such straits.

Neither does this part apply to a strait used for international navigation if there exists through the strait a route through the high seas or through an EEZ of similar convenience with respect to navigational and hydrographical characteristics. Ships and aircrafts while exercising the right of transit passage through international straits are expected to comply with certain duties. For ships and aircrafts they are to proceed without delay through or over the strait; refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of the States bordering the straits or in any other manner in violation of the principles of international law embodied in the UN Charter; refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary.

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21 Scovassi identifies seven categories of straits under the LOSC, namely: Straits in which passage is regulated in whole or in part by long standing Conventions in force specifically relating to such straits[Art.35(c)]; Straits between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone (He calls this the typical category of straits); Straits formed by an island of a State bordering the strait and its mainland, if there exists seaward of the islands a route through the high seas or an exclusive economic zone of similar convenience with respect to navigational or hydrographical characteristics[Art.38(1)]; Straits between a part of the high seas or an exclusive economic zone and the territorial sea of a foreign State[Art.45(b)]; Straits which include a route through the high seas or an exclusive economic zone, if this route is of similar convenience with respect to navigational and hydrographical characteristics[Art.36]; Straits which include a route through the high seas or an exclusive economic zone, if this route is not of similar convenience with respect to navigational and hydrographical characteristics[Art.36] and Straits in which passage is regulated by non long-standing international conventions. Ibid. at pp.143-144

22 Art.34

23 Art.35. See for e.g. the Torres Strait (Treaty between Papua New Guinea and Australia, 1978, 18); the Strait of Tiran (Treaty between Egypt and Israel, 1979); the Strait of Dover (Agreement between the UK and France, 1988); Straits of Megellan and the Beagle Channel (Treaty between Argentina and Chile, 1984). See Nandan, Rosenne, Grandy and Allen(eds.), *United Nations Convention on the Law of the Sea 1982*, op.cit.pp.291-292

24 Art.36
by force majeure or by distress and to comply with other relevant provisions of Part III. In addition, ships in transit passage are required to comply with generally accepted international regulations, procedures and practices for safety at sea (including International Regulations for Preventing Collisions at Sea) and for the prevention, reduction and control of pollution from ships. On the other hand, States bordering the straits have a duty not to hamper transit passage and to give appropriate publicity to any danger to navigation or overflight within or over the strait of which they have knowledge. The LOSC is emphatic that there shall be no suspension of transit passage by the States bordering the straits. However, they may in conformity with Part III designate sea lanes and prescribe traffic separation schemes that must conform to generally accepted international regulations (which they may substitute with others when circumstances require and after giving due publicity thereto) for navigation in straits where necessary to promote the safe passage of ships. Before designating or substituting sea lanes or prescribing or substituting traffic separation schemes, States bordering straits are required to refer the proposals to a competent international organisation with a view to adoption. In respect of straits where the sea lanes or traffic separation schemes through the waters of two or more States bordering the straits are being proposed, all such States are required to cooperate in the formulation of the proposals in consultation with the competent international organisation. These sea-lanes and traffic separation schemes are to be designated or prescribed by the States bordering straits on charts to which due publicity should be given. Ships in transit passage are required to respect such applicable sea-lanes and traffic separation schemes established. Part III further allows States bordering straits to adopt laws and regulations relating to transit passage through the straits in respect of the safety of navigation and the regulation of maritime traffic; the prevention, reduction and control of pollution, by giving effect to applicable regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait; with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear and the loading or unloading of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary laws and regulations of

25 Art.39(1)
26 Art.39 (2). For other duties of aircraft in transit, see Art.39 (3).
27 Art.44
28 The competent international organisation is the International Maritime Organisation(IMO)
29 Art.41
States bordering straits. Such laws and regulations shall not discriminate both in form nor in fact among foreign ships, neither shall their application have the practical effect of denying, hampering or impairing the right of transit passage as defined in this section. In addition, such laws and regulations are to be given due publicity and all foreign ships exercising transit passage are required to comply with the laws and regulations. The flag State of a ship or the State of registry of an aircraft entitled to immunity that acts in a manner contrary to such laws and regulations or any provision of Part III shall bear international responsibility for any loss or damage which results to States bordering straits.\textsuperscript{30} The User States and States bordering a strait are required by agreement to cooperate in the establishment and maintenance in a strait of necessary navigational and safety aids or other improvements in aid of international navigation and for the prevention, reduction and control of pollution from ships.\textsuperscript{31}

The States bordering straits are not to hamper transit passage and are to give appropriate publicity to any danger to navigation or overflight within or over the straits within their knowledge. In addition, there shall be no suspension of transit passage by these border States.\textsuperscript{32}

**Environmental Protection and International Straits**

With the increasing danger of marine pollution,\textsuperscript{33} especially from oil tankers, nuclear and chemical carriers, the LOSC has made extensive provision for the protection and preservation of the marine environment and a whole part of the Convention has been dedicated to this.\textsuperscript{34}

A general obligation is imposed by the LOSC on States Parties to protect and preserve the marine environment.\textsuperscript{35} In carrying out this obligation they are required to take, either jointly or individually, measures to prevent, reduce and control of the marine

\textsuperscript{30} Art.42  
\textsuperscript{31} Art.43  
\textsuperscript{32} Art.44  
\textsuperscript{33} See for e.g. the Torrey Canyon incident (1967) where a supertanker carrying a cargo of about 120,000 tons of crude oil was shipwrecked off the coast of Cornwall England causing a major environmental disaster and the Amoco Cadiz incident (1978) where a very large crude carrier ran aground and caused a major oil spillage off the coast of Brittany, France. See generally, M’ Gonigle, R.M and Zacher, M.W., *Pollution, Politics, and International Law: Tankers at Sea*, (Berkeley/Los Angeles/London, University of California Press, 1979)  
\textsuperscript{34} Part XII  
\textsuperscript{35} Art.192
environment, including using “the best practicable means at their disposal and in accordance with their capabilities” to achieve this. Specifically for international straits Article 42(1)(b) of the LOSC allows States bordering straits to adopt laws and regulations relating to transit passage through straits in respect of “the prevention, reduction and control of pollution, by giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait.” Some commentators argue that this provision appears to be rather restrictive in safeguarding the marine environment of international straits. For instance, De Yturriaga points out that Article 42(1) (b) is limited to “oil, oily wastes and other noxious substances” and does not apply to ‘wastes’ which are not oily wastes. Second, the use of ‘applicable international regulations’ rather than an alternative phrase – ‘generally accepted international regulations’ as suggested by the Spanish delegation at UNCLOS III appears to limit the scope of this provision. He points out that ‘Generally accepted international regulations’ refer to “rules and standards recognized by international customs or embodied in international treaties, irrespective as to whether they are in force or not, provided that they have received general acceptance by the international community.” While ‘applicable international regulations’ refer to ‘rules and standards which are binding only for a State which has expressed its consent to be bound by such regulations contained in an international treaty, and when that treaty is in force.” He further points out that the use of the restrictive term in Article 42(1) (b) “means that a regulation concerning preservation of the marine environment, however reasonable and widely supported by the international community might be, cannot be applied to a State and to the ships flying its flag, if the international treaty in which it is contained has not entered into force or – even if this is the case – the State concerned is not a party to the said treaty.” It has been pointed out that the use of the phrase ‘applicable international regulations’ was to ensure that the border State did not adopt laws and regulations that are substantially different from or more stringent than the applicable standards. The idea was to seek to balance the concern of border States, on the one hand, in respect

36 Art.194
38 de Yturriaga, Ibid at p.176
39 Ibid.
of the possibility of discharges of oil and other pollutants by transiting ships, with the concern, on the other hand, that pollution regulations and laws would not be used as an excuse by border States to impede freedom of transit through the straits.\textsuperscript{40}

Article 233 of LOSC grants the border States limited enforcement over foreign ships for pollution in the straits by stating:

“...However, if a foreign ship other than those referred to in section 10[ships entitled to sovereign immunity] has committed a violation of the laws and regulations referred to in article 42, paragraph 1(a) and (b), causing or threatening major damage to the marine environment of the straits, the States bordering the straits may take appropriate enforcement measures and if so shall respect mutatis mutandis the provisions of this section.”

Scovazzi points out that by the very nature of international straits, which are narrow and frequented waterways, the risk of marine accidents, involving collisions, strandings and groundings of ships, near the border States resulting in pollution is probably higher than in open sea spaces.\textsuperscript{41} In spite, of this he notes that the LOSC would seem to be less protective of the straits from environmental pollution than other parts of the sea.\textsuperscript{42} He rightly predicted, as far back as 1995, that concerns about environmental protection of straits(a shift from merely focusing on political and military concerns) would generate more interest in the future and forecasted that this would “\textit{provoke particular interpretations of the provisions[of LOSC] or even lead to the development of new rules.}”\textsuperscript{43} The increasing concern of border States in respect of the danger of massive pollution of their coastlines has led them to put in place various measures to seek to avoid such pollution. One of such measures is to require compulsory pilotage within the straits. Recently, Helen Kelly, commenting on the Australian Great Barrier Reef Marine Park area, identified the view of proponents of the compulsory pilotage system that if this system had been adopted earlier it “\textit{could have prevented more than 50 major shipping incidents since 1975}”.\textsuperscript{44}

\textsuperscript{40} Nandan, Rosenne, Grandy and Allen (eds.), \textit{United Nations Convention on the Law of the Sea 1982}, op.cit. at p.375
\textsuperscript{41} Scovazzi, “Management regimes and responsibility for international straits; With special reference to the Mediterranean Straits”, op.cit. at p.140
\textsuperscript{42} Ibid
\textsuperscript{43} Ibid at p.142
\textsuperscript{44} International Maritime Organization, Maritime Knowledge Centre, \textit{Current Awareness Bulletin}, Vol.XXII-No.4, April 2010 at p.15
Amongst international law scholars, there has been much debate on whether the idea of compulsory pilotage through international straits is in line with international law. Specifically, the question has been raised on whether compulsory pilotage through international straits is in line with the LOSC provisions? There are also concerns on whether there is a conflict of norms between Part III (dealing with the regime of free transit of straits) and Part XII (dealing with the Protection and Preservation of Marine Environment)? If so, how can this be resolved?

The subsequent sections of this paper would seek to explore these rather intriguing issues. Recent interest in compulsory pilotage in international straits as a tool to protect the environment in international straits has been generated due to the Australian regulation requiring compulsory pilotage in respect of the Torres Strait. Consequently, this paper shall focus mainly on exploring the status of compulsory pilotage under international law in relation to the recent Australian State practice.

**Compulsory Pilotage and International Straits: The Case of the Torres Strait**

Sometime in 2003 Australia and Papua New Guinea, two border States of the strait of Torres, submitted a proposal to the International Maritime Organisation (IMO) to extend the Great Barrier Reef Particularly Sensitive Area (PSSA) designation to the Torres Strait and also to extend the compulsory pilotage system in the Great Barrier Reef to the Torres Strait. Although there were concerns by some States about

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45 See also Decree issued by the Italian Government on 8 May 1985 in response to the collision in the strait of Messina between the Greek tanker Patmos and the Spanish tanker Castillo de Monte Aragon which led to a large quantity of oil being spilled. In this Decree Pilotage was made compulsory for merchant ships over 15,000 tons or for ships over 6000 tons, if they carry oil or other substances which are harmful to the marine environment. It also prohibited navigation in the strait by ships over 50,000 tons carrying oil or other substances harmful to the marine environment as defined by international treaties in force for Italy. See Scovassi, op.cit. at pp.149-150.

46 “A Particularly Sensitive Sea Area (PSSA) is an area that needs special protection through action by IMO because of its significance for recognized ecological or socio-economic or scientific reasons and which may be vulnerable to damage by international maritime activities. The criteria for the identification of particularly sensitive sea areas and the criteria for the designation of special areas are not mutually exclusive. In many cases a Particularly Sensitive Sea Area may be identified within a Special Area and vice versa.” See IMO Revised Guidelines for the Identification and Designation of Particularly Sensitive Areas (PSSAs)(Resolution A.982(24)) adopted by the 24th Session of the IMO Assembly in July 2005 to update resolution A.927(22) Guidelines for the Designation of Special Areas under MARPOL 73/78 and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas. The following PSSAs have been designated by the IMO: the Great Barrier Reef, Australia (1990); the Sabana-Camagüey Archipelago in Cuba (1997); Malpelo Island, Colombia (2002); the sea around the Florida Keys, United States (2002); the Wadden Sea, Denmark, Germany, Netherlands (2002); Paracas National Reserve, Peru (2003); Western European Waters (2004); Extension of the existing Great Barrier Reef PSSA to include the Torres Strait (proposed by Australia and Papua New Guinea) (2005); Canary Islands, Spain (2005); the Galapagos Archipelago, Ecuador (2005); the Baltic Sea area, Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland and Sweden (2005) and the Papahanaumokuakea Marine National Monument, United States(2007). See IMO website,
whether a system of compulsory pilotage in an international strait was in line with the LOSC, the IMO, after various deliberations on this, in July 2005 approved the extension of the designation of the Great Barrier Reef as a PSSA to the Torres Strait. It also recommended that governments inform ships flying their flag to act in accordance with Australia’s system of pilotage when navigating through the Torres Strait. In 2006, purportedly acting on the IMO resolution, the Australian government issued Marine Notices advising that it was adopting a compulsory pilotage system in respect of the Torres Strait. By this regulation, pilotage is compulsory for all vessels over 70 metres and all oil, chemical and liquefied gas carriers. It imposes significant penalties against a master or owner that failed to comply with the compulsory pilotage requirements. A vessel in breach of the requirements of compulsory pilotage would not be stopped from transiting the strait but would be subject to legal proceedings when next it enters the Australian port. It provides some legal defences such as the defence that the owner has taken all reasonable precautions and exercised all due diligence to ensure that the ship did not navigate in contravention of the provisions of the regulation, and that a pilot could not be carried because of stress or weather, saving life at sea, or other unavoidable cause. The Australian Regulation, in line with the concept of sovereign immunity (albeit the qualified sovereign immunity) excludes warships and other government vessels not used for commercial service. It further provides pilotage exemption for commercial vessels that have bridge teams that meet the requirements of skill and experience.

**Legality of Compulsory Pilotage in International Straits under the LOSC 82**

The Australian regulation introducing Compulsory Pilotage in the Torres Strait has generated extensive debate amongst various government representatives at various


49 The master and the owner are each liable to a maximum fine of A$55,000 and A$275,000 respectively.
international forums and amongst academics about whether compulsory pilotage in international straits is contrary to LOSC. The LOSC does not have specific provision on compulsory pilotage in international straits. The crux of the debate therefore is whether the relevant provision of the LOSC can be rightly interpreted as permitting compulsory pilotage system in international Straits used for international navigation. Further, whether there are other rules of international law or international regulations that permit such pilotage system in international straits.

Those who argue that compulsory pilotage in international straits is contrary to LOSC hold the view that this system has the “the practical effect of denying, hampering or impairing the right of transit passage” as provided by the LOSC. Transit passage is defined as follows:

“the exercise in accordance with [Part III of LOSC] of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.”

It has been pointed out that the requirement that foreign ships transiting through the strait should stop to take on a pilot and also to pay for the pilotage service under the Australian compulsory pilotage system in the Torres Strait has the practical effect of denying, hampering or impairing transit passage. On the other hand, those in support of the compulsory pilotage system in straits argue that it does not deny, hamper or

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52 Art.42 (2) of LOSC.

53 Art.38(2) of LOSC

54 Beckman, op.cit. at p.345
impair the right of transit passage but rather it facilitates safe and expeditious passage through ‘treacherous and narrow waters’ of the Torres strait and also reduces significantly the likelihood of grounding of ships.\(^{55}\) While no doubt pilotage by pilots familiar with the straits would have the effect of facilitating safe and expeditious passage; the regulatory requirement, which does not give masters of the foreign ships the opportunity of declining such pilotage, does appear to have the practical effect of denying, hampering or impairing transit passage in the strait.

Further, those against Australian compulsory pilotage system have argued that the enforcement jurisdiction in this system is contrary to Article 233 of LOSC. This article allows border States to take enforcement action for a violation of the laws and regulations made pursuant to Article 42(1) (a) and (b), “causing or threatening major damage to the marine environment of the straits.” It has been argued that under this article enforcement action could not be taken against a vessel, which merely fails to take on a pilot but proceeds through the strait without causing any actual major damage or imminent threat of such damage to the marine environment of the strait.\(^{56}\) Although Bateman & White points out that, the Australian compulsory pilotage system does comply with Article 233 of the LOSC, as its key objective is to “reduce the risks of pollution.”\(^{57}\) This is not convincing, as they were not able to identify how compulsory pilotage system in an international strait, where there is no major damage or imminent threat of such major damage, complies with Article 233.

A further point is whether the IMO resolution upon which the Australian compulsory pilotage system is purported based upon could be regarded as an international regulation that permits this system. It has been pointed out that this resolution was merely a recommendation that governments recognise the need for effective protection and thus inform their flagships to comply with the Australian system of pilotage.\(^{58}\) Bateman & White sought to argue that though the IMO resolution was a recommendation that it could be interpreted as allowing compulsory pilotage. They stated: “The argument against the Australian position on this point is that the MEPC

\(^{55}\) See Australia’s position at the General Assembly, A/62/PV.77 at p.19 and Bateman and White, op.cit. at pp.195-196.
\(^{56}\) Roberts, op.cit. at pp.105-106
\(^{57}\) Bateman & White, op.cit. at p. 198
\(^{58}\) Beckman, op.cit. at pp.334-336
[the IMO] resolution does not clearly and expressly authorize compulsory pilotage for the Torres Strait. This is true and carries some weight. The argument on the other side, however, is that the resolution does not prohibit compulsory pilotage and it was inferentially open if Australia so chose to include it.”59 This argument again is not convincing. If the IMO resolution was merely a recommendation to other States it is difficult to appreciate how it could be inferred that it permits Australia to implement a compulsory pilotage system in the Torres Strait.

While the Australian government certainly has good reasons to be concerned about the possibility of environmental pollution in the Torres Strait by the users of the strait, there is nothing in the provisions of the LOSC, as it presently stands, to support the system of compulsory pilotage in the Torres Strait or any international straits. Neither does the international regulation of the IMO support such compulsory pilotage system in the strait. What is left is to determine whether there is adequate state practice that may be relevant in interpreting the provisions of the LOSC as permitting a compulsory pilotage system in international straits for the purposes of protecting the marine environment.

Compulsory Pilotage in International Straits and State Practice
The Vienna Convention on the Law of Treaties 1969 states as follows:

“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose ...

3. There shall be taken into account, together with the context:

(a)...

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.”

There have been divergent views expressed by States on whether the compulsory pilotage system is in line with the LOSC. For instance, at the General Assembly,

59 Bateman & White, op.cit. at p.197
some States have expressed the view that compulsory pilotage in straits is contrary to the LOSC. Some of such views are as follows:

“Singapore continues to take a very serious view of Australia’s compulsory pilotage system, which we see as a contravention of the Convention...We have to point out that Australia’s actions have broader implications for the integrity of the Convention. This is not just about what happens in the Torres Strait. If the international community allows this implementation of compulsory pilotage to go uncensored, this could potentially lead to an erosion of the right of transit passage in international Straits, as well as navigational rights in other maritime zones enshrined by the Convention. This would have a serious impact on strategic shipping, economic and energy interests all over the world.” (Singapore at 65th Plenary Session of General Assembly, Sixty-Second Session)\(^{60}\)

“Japan is very concerned that some States’ bordering straits have adopted laws and regulations, such as compulsory pilotage, which in practice restrain the right of transit passage of other States. We fully understand that due consideration must be paid to the interests of bordering States; however, we strongly hope that all States will take action in an appropriate manner, so as to avoid imposing constraints upon the right of transit passage provided in the Convention.” (Japan at 77th Plenary Session of General Assembly, Sixty-Second Session)\(^{61}\)

“Article 42 of the Convention provides that laws and regulations adopted by States bordering straits should not ‘have the practical effect of denying, hampering or impairing or impairing the right of transit passage’. That is pertinent in order not to threaten the delicate balance in the Convention between the interests of coastal States and the interests of user States in straits used for international navigation.” (Nigeria at 77th Plenary Session of General Assembly, Sixty-Second Session)\(^{62}\)

On the other hand, Australia has defended its position at the General Assembly that the compulsory pilotage system in the Torres Strait is in line with the LOSC:

“...Australia enacted measures designed to ensure the safety of navigation and the protection of sensitive sea areas, including the environmentally fragile Torres Strait...they adopted in a manner entirely consistent with international law, including the Convention...Australia unequivocally rebuts the assertion that its system of pilotage in the Torres Strait has the practical effect of denying, hampering or impairing the

\(^{60}\) General Assembly Official Records, A/62/PV.65 of 10 December 2007 at pp.22-23
\(^{61}\) General Assembly Official Records, A/62/PV.77 of 18 December 2007 at p.5
\(^{62}\) Ibid at p.13
right of transit passage. On the contrary, the system of pilotage promotes transit passage, by ensuring that the Strait remains open by significantly reducing the likelihood of grounding. These measures were endorsed by the relevant international body, the International Maritime Organization (IMO), "(Australia at 77th Plenary Session of General Assembly, Sixty-Second Session)".63

Further, in the debate before the 89 session of the Legal Committee of the IMO there were divergent views on the legality of compulsory pilotage scheme in international straits.64 A number of States were of the view that there was no clear legal basis under international law that permits the adoption of compulsory pilotage in international straits.65 While some others were of the view that nothing in international law prevents the introduction of a scheme of compulsory pilotage in order to protect the marine environment of the strait.66 Clearly, the subsequent State practice to the LOSC does not reflect any agreement on the legality of the compulsory pilotage scheme in international straits and therefore cannot be taken into account in seeking to argue that such scheme is allowed for the purpose of protecting the marine environment of the straits. Further, the divergent views of States indicates that there is no general, uniform and consistent State Practice accompanied by opinion juris that would justify an argument that the adoption of a compulsory pilotage scheme in international straits to protect the marine environment of the straits have emerged as a recognised rule of customary international law (i.e. a relevant rule of international law) that should be taken into account in interpreting the LOSC.67

**Conclusion**

The provisions of the LOSC are inadequate to deal with the very valid concerns that bordering States of International Straits have in respect the possibility of massive environmental pollution by users of the straits. Whenever, the law is inadequate there is the tendency for the subjects of the system where the law operates to seek to identify creative ways to interpret the law to deal with such concerns. In a centralised domestic system, the courts may play a critical role in interpreting an inadequate

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63 Ibid at 18-19
64 IMO Report of the Legal Committee on the Work of its Eighty-Ninth Session, LEG 89/16 of 4 November 2004, Agenda O
65 Ibid, Paras 224;232-233
66 Ibid.Paras.225-228
legislation in a manner that addresses current concerns, which were not fully anticipated by the lawmakers when the legislation was enacted. Unfortunately, this is not as straightforward in the case of the decentralised international system where the States are actually involved in making the laws, whether by way of treaties or CIL. Here there is sometimes such a strong divergence of interpretation among State actors in the international community that it becomes unclear as to what the correct interpretation of a rule is. What comes out clearly from the whole debate on the legality or otherwise of compulsory pilotage in international straits, which has been developed as a response to a valid concern of border States about environmental pollution of straits by users, is that there is an urgent need to clarify the exact status of the system of compulsory pilotage in international straits under international law. Unilateral or regional regimes on compulsory pilotage, which impose requirements beyond the LOSC and applicable international regulations, must be reviewed more closely to ensure that legitimate concerns on environmental protection by border States do not detract from equally important concerns by users to free and unimpeded transit passage through international straits.