



EXPEDITION YACHTS AND PUGNATIOUS COASTAL STATES

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In 1991, the newly declared Republic of Namibia sought to protect its abundant fisheries resources within its 200 mile fisheries zone and commenced concerted action to evict foreign fishing vessels fishing illegally within the zone. Having no coastal enforcement vessel at that time, they elected to send a helicopter with several armed soldiers to apprehend the vessels. The idea was that they would lower troops down onto each vessel, seize the vessels and direct the master to return the vessel to port. The first vessel that they happened upon, ignored the requests of the helicopter to stop and receive the troops, and when the helicopter attempted to manoeuvre over the vessel with a view to lowering the soldier onto the vessel, the enterprising skipper put the helm hard over, ordered the vessel full ahead and steered in erratic circles.

Much irritated, a soldier let rip with a volley of automatic fire across the stern of the vessel, fortunately injuring nobody but having the desired effect of making the vessel to heave to to receive the soldiers. The vessels were subsequently escorted into the port of Walvis Bay, and forfeited under the local fisheries legislation.

The vessel owner and the master were clearly in breach of several provisions of UNCLOS (United Nations Convention of the Law of the Sea) and the domestic fisheries legislation and the master was duly incarcerated in a Namibian jail. In defending the master, and grasping at whatever straw was available, I pointed out to the court that article 117 of UNCLOS required that seizures should only be carried out by warships or military aircraft clearly marked and identifiable as being on government service and authorised to that effect. In this case, a civilian helicopter was used and whilst the soldiers were clad in camouflage uniform, the master was adamant in his evidence that they could not be clearly identified from the vessel. This defence didn't avert the inevitable forfeiture and fine, but happily the master was released and the forfeiture of the vessel confirmed.

The signature of UNCLOS on 10 December 1982, after 14 years of international negotiation was accompanied by euphoria amongst the majority of the delegates then present. Some 22 years later, some of the compromises which resulted in diluted wording of the convention have become evident in practise and several articles are perhaps showing their age. The drafters did not contemplate the present international environment, where coastal states are increasingly preoccupied with building security to prevent terrorist incursions, preventing the illegal immigration of disadvantaged people into more advantaged countries, the prevention of drug running and others.

The recent implementation of the ISPS code has enhanced the focus. This has resulted in perhaps overzealous actions on the part of coastal states in protecting

their zones. What has resulted is that Coastal states, seek to legislate domestically to overcome the perceived inadequacies of UNCLOS.

In the case of the fishing vessel cited earlier, the vessel owner and its master were clearly in contravention of domestic Namibian law and in the context of the attempt to evade seizure, the use of force was (at a stretch) understandable. How do UNCLOS and domestic coastal state law interact?

UNCLOS introduced the previously unknown term of “contiguous zone”, which refers to an area of 12 nautical miles outside the territorial sea thus it extends 24 nautical miles from the baseline (the coast). Within the contiguous zone the coastal state may *exercise the control* necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws within its territory or territorial sea, and punish infringement of these laws committed within its territory or territorial seas. There is no jurisdiction within UNCLOS for the prescribing of, or enforcement of laws in respect of infringements committed within the Contiguous zone.

The Exclusive Economic Zone (EEZ) however is different. Within this zone Article 56 of UNCLOS states that a coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources within the EEZ. There is no reference to customs, fiscal and other jurisdiction within this zone.

Elsewhere in this publication the unpleasant experience of a New Zealand skipper aboard a BVI flagged expedition yacht is described. His report positioned the vessel outside of the contiguous zone, but within the EEZ of a pugnacious coastal state, when it was detained by an unmarked speed boat, whose parent vessel remained out of sight. The only indication that it was a military vessel appeared to be a gun toting soldier wearing what appeared to be a military uniform. Falstaff’s approach in Henry VIII ‘The better part of valour is discretion...’ served the master well and he allowed them on board to make their enquiries. Was the belligerent officer permitted to act as he did under international or domestic law?

Expedition yachts, by definition will find themselves and their well heeled passengers within these jurisdictions more and more often and should be aware of their rights within these jurisdictions. The bundle of rights possessed by the coastal state are a compendium of international law (mainly contained in UNCLOS) and domestic law enshrined in local legislation.

International law is fairly well settled other than minor grey areas caused by the increasing antiquity of UNCLOS. In the main if a vessel is in innocent passage through a coastal state’s EEZ and Contiguous Zone waters the coastal state should back off. It must be emphasised however that more often than not, the belligerent officer would be clothed with the authority of a domestic law, which may provide them with powers within the EEZ, which exceed that which I have described as deriving from UNCLOS. The fishing vessel I described earlier certainly falls within that category. In the case of the expedition yacht, would imagine that the domestic law of Nicaragua, Honduras, and Guatemala must be particularly sensitive to drug running and I would be surprised to find that they did not have a search and seizure jurisdiction within the EEZ.

Thus in summary, a foreign flagged vessel proceeding in innocent passage within the EEZ of a coastal state obeying the “rule of the road” such as a domestic traffic separation scheme, and is not causing a threat to the marine environment, has the right to proceed without harassment by enforcement officers of a coastal state. Domestic law may well extend the powers of a coastal state beyond the 12-mile

territorial sea to the contiguous zone and the EEZ. A typical extension of these powers would be found in domestic oil pollution legislation which would allow a coastal state to intervene where its coastline was threatened by pollution. The Prestige disaster off Spain comes to mind.

What if the vessel was stopped on the High Seas? Article 110 of UNCLOS, in dealing with the right (somewhat quaintly called) to “visit” a vessel on the High Seas, requires that where a warship encounters a vessel on the High Seas, it cannot board the vessel unless there are reasonable grounds for suspecting that the ship is engaged in piracy, slave trade, or in unauthorised broadcasting or is without nationality. Article 107 speaks about the seizure of the vessel suspected of piracy by warships, military craft or “other ships or aircraft clearly marked and identifiable as being on government service and authorised to that effect”.

The unfortunate expedition yacht was clearly not engaged in piracy, nor one would hope the slave trade nor, I suspect were they engaged upon unauthorised broadcasting, thus the rationale for a “visit” would not apply in this case. The lack of any clearly identifiable markings on the powerboat that conveyed the local constabulary to the expedition yacht would offend against Article 107 and be in breach of the spirit and intent of UNCLOS.

On a practical note I conclude by suggesting that BVI vessel owner of the expedition yacht, pepper the flag state with demands to send a strongly worded note of protest to the authorities of the offending coastal state, in order to cool their enthusiasm for harassment of this nature in the future. A pro-active flag which has multiple super yachts seeking the protection of its flag would seek to preserve its revenues generated from vessel registration by being seen to be taking up the cudgels on behalf of the vessel owner. I suspect however that it may be too hard and too much bother, in which case an alternative and more proactive flag should be sought.

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