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# PSSAs and Transit Passage—Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS

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*On 22 July 2005, the International Maritime Organization (IMO) approved the extension of the Great Barrier Reef Particularly Sensitive Sea Area (PSSA) to the Torres Strait in Resolution MEPC.133(53). Australia amended its regulations and issued marine orders imposing a compulsory pilotage system in the Torres Strait. Australia's actions triggered protests from maritime states at the IMO and in bilateral diplomatic exchanges. This article examines the legal issues raised by Australia's establishment of a compulsory pilotage system in a strait used for international navigation, including the prospects for Australia being challenged under the compulsory dispute settlement provisions of the UN Convention on the Law of the Sea. It is recommended that the PSSA Guidelines of the IMO be amended to ensure that such legal issues do not arise in the future.*

**Keywords** compulsory pilotage, international straits, Particularly Sensitive Sea Areas (PSSAs), transit passage

## Introduction

In 2003, Australia and Papua New Guinea submitted a proposal to the International Maritime Organization (IMO) to extend the Great Barrier Reef Particularly Sensitive Sea Area (PSSA) to the Torres Strait and to extend the Great Barrier Reef compulsory pilotage system to the Torres Strait.[1] During the deliberations of the various IMO committees on the Australian proposal, questions were raised about whether it was legally permissible under the 1982 United Nations Convention on the Law of the Sea[2] (UNCLOS) to impose a system of compulsory pilotage in a strait used for international navigation. Questions were also raised on whether pilotage systems could be established by the IMO without a clear legal basis to do so under any IMO convention. These issues were not resolved in the discussions at the IMO. Nevertheless, the IMO approved the extension of the Great Barrier Reef PSSA to the Torres Strait in Resolution MEPC.133(53) on 22 July 2005.[3] The Resolution also recommended that governments inform ships flying their flag that they should act in accordance with Australia's system of pilotage when navigating the Torres Strait.

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In 2006, Australia issued Marine Notices advising that it was adopting regulations in the form of marine orders requiring that all merchant ships exercising transit passage through the Torres Strait were to use its pilotage scheme. The Marine Notices stated that the new pilotage laws were enforceable by severe penalties and that ships that failed to take on a pilot would be subject to arrest the next time they entered an Australian port.[4] Several states, including the United States and Singapore, challenged the Australian Marine Orders arguing that they were contrary to UNCLOS and not in line with the understandings reached at the IMO regarding Resolution MEPC.133(53). They maintained that the compulsory pilotage system imposed by Australia is inconsistent with Part III of UNCLOS with respect to straits used for international navigation.

The actions of Australia and the IMO raise several important issues of international law concerning the lawmaking process for regulation of shipping in PSSAs under IMO conventions and UNCLOS. This article will first analyze the UNCLOS provisions on the regulation of international shipping in straits used for international navigation and then briefly describe the concept of PSSAs and the previous actions taken by Australia and the IMO to enhance safety in the Great Barrier Reef and the Torres Strait. The history of the 2003 proposal at the IMO to extend the pilotage system in the Great Barrier Reef PSSA to the Torres Strait will be traced and the actions of the various committees evaluated. The reaction of maritime states to the Australian proposal and the current stalemate between these states and Australia will be outlined. The following issues that have been raised by the pilotage proposal and by the Australian decision to issue Marine Orders establishing a system of compulsory pilotage in the Torres Strait will be addressed:

1. Are Australia's regulations consistent with Resolution MEPC.133(53)?
2. Is the compulsory pilotage system consistent with UNCLOS?
3. Could the IMO establish a system of compulsory pilotage as an associated protective measure in a strait used for international navigation that is part of a PSSA?
4. Is any state likely to challenge Australia before a court or tribunal?
5. Is a negotiated compromise possible?

This article concludes with recommendations for amending the PSSA Guidelines to improve the procedures at the IMO for dealing with proposals for PSSAs and with some conclusions about the significance of the Torres Strait pilotage dispute.

## Overview of UNCLOS Provisions on Jurisdiction Over Ships

UNCLOS is the fundamental international constitutional document that sets out the rights and obligations of flag states, coastal states, and port states in using ocean space. With respect to the regulation of international shipping, it also provides for a role for the IMO as the competent international organization.[5] All actions of the IMO, including its conventions and other instruments, must be consistent with UNCLOS.

UNCLOS divides ocean space into two categories of maritime zones. The first category is maritime zones outside the sovereignty of coastal states, such as the high seas and the exclusive economic zone.[6] In these areas, all ships enjoy freedom of navigation.[7] The general principle on jurisdiction over ships in these zones is that ships are subject to the exclusive jurisdiction of the flag state.[8] Coastal states have jurisdiction to prohibit fishing and other forms of economic exploitation by foreign ships in their exclusive economic zone,[9] but they

have only limited powers to adopt laws and regulations relating to navigational safety and ship-source pollution by foreign ships in their exclusive economic zone.[10]

The second category is maritime zones within the sovereignty of the coastal state, such as the territorial sea[11] and archipelagic waters.[12] Ships of all states have the right of innocent passage through the territorial sea and archipelagic waters, which may not be impeded by coastal states.[13] At the same time, coastal states have fairly broad powers to adopt laws and regulations relating to navigational safety and pollution from ships exercising passage in their territorial sea and archipelagic waters.[14]

Special passage regimes apply, however, on major international shipping routes through straits used for international navigation, even when such straits are within the territorial sea of the coastal state. Coastal states have only a very limited power to adopt laws and regulations governing ships exercising the right of transit passage through straits used for international navigation.[15] Similar rules apply on routes used for international navigation through archipelagic states, even though archipelagic waters are under the sovereignty of the archipelagic state. All ships enjoy the right of archipelagic sea lanes passage through the archipelagic state on such routes and archipelagic states have only limited powers to adopt laws and regulations relating to navigation safety and pollution from ships exercising such passage.[16]

The IMO has the authority under UNCLOS to impose conditions on ships exercising the right of transit passage through straits used for international navigation or the right of archipelagic sea lanes passage through archipelagic states. Under Article 41 of UNCLOS, states bordering straits used for international navigation may designate sea lanes and prescribe traffic separation schemes in straits used for international navigation. Such sea lanes and traffic separation schemes must conform to generally accepted international regulations and be adopted by the IMO. The IMO provides for establishment of sea lanes and traffic separation schemes as routing measures under the International Convention for the Safety of Life at Sea (SOLAS) of 1974.[17] In addition, Rule 10 of the Convention on the International Regulations for Preventing Collisions at Sea (COLREGS) of 1972[18] provides for the behavior of vessels in or near traffic separation schemes adopted by the IMO. The Maritime Safety Committee (MSC) has been authorized to adopt and amend traffic separation schemes on behalf of the IMO.[19]

## Particularly Sensitive Sea Areas

A PSSA is a management tool which enables states to propose that the IMO review a particular area of their territorial sea or exclusive economic zone or both that is vulnerable to damage by international shipping with a view toward adopting specific measures to address that vulnerability in order to protect the marine environment. In general, to be identified as a PSSA, three elements must be present: (1) the area must have certain attributes (ecological, socioeconomic, or scientific); (2) the area must be vulnerable to damage by international shipping activities; and (3) there must be a measure with an identified legal basis that can be adopted by the IMO to prevent, reduce, or eliminate risks from these activities. If approved by the IMO, an area will be designated as a PSSA and the IMO will adopt one or more "associated protective measures" that ships must follow in the PSSA.[20]

The PSSA Guidelines[21] provide that the criteria for PSSAs can by used by the IMO to designate PSSAs beyond the territorial sea with a view toward the adoption of associated protective measures regarding pollution and other damage caused by ships. The PSSA Guidelines may also be used by national administrations to identify PSSAs within their

territorial seas. However, if a proposed PSSA is solely within the territorial sea of one coastal state, there may not be much advantage in declaring it a PSSA because the coastal state may have sufficient powers to adopt the same measures within its territorial sea without designating the area a PSSA. Therefore, PSSAs are most likely to be proposed by coastal states when the area concerned is within both their territorial sea and their exclusive economic zone. In this area, the coastal state may propose associated protective measures for ships that it would have no power to adopt on its own. Also, associated protective measures, such as routing systems and ship reporting systems, can be adopted by the IMO in a territorial sea without it being designated a PSSA. For example, the mandatory ship reporting system known as REEFREP was adopted in the Torres Strait before the Great Barrier Reef PSSA was extended to the Torres Strait.[22]

There is no provision in UNCLOS specifically referring to PSSAs. However, the authority for the IMO to designate an area within an exclusive economic zone as a PSSA is Article 211, paragraph 6, of UNCLOS. As a general rule, the prescriptive jurisdiction of coastal states over foreign ships in their exclusive economic zone is limited to adopting laws and regulations "conforming to and giving effect to generally accepted international rules and standards."[23] Article 211, paragraph 6, creates an exception and provides that coastal states can adopt stricter laws and regulations in a particular, clearly defined area of their respective exclusive economic zone if necessary for environmental reasons and if approved by the IMO.

The 2001 PSSA Guidelines[24] were in force in 2003 when Australia made its proposal to the IMO for compulsory pilotage in the Torres Strait. They provided that the associated protective measures that can be adopted in PSSAs were limited to actions within the purview of the IMO.[25] This included adoption of ships' routing and ship reporting systems under SOLAS and in accordance with the General Provisions on Ships' Routeing[26] and the Guidelines and Criteria for Ship Reporting Systems.[27] An example of a ships' routing measure would be to declare the PSSA as an "area to be avoided." The 2001 PSSA Guidelines also stated that associated protective measures might include other measures aimed at protecting specific sea areas against environmental damage from ships, such as "compulsory pilotage schemes,"[28] even though there was no regulation in Chapter V of SOLAS providing for the adoption of pilotage systems by the IMO.

The 2001 PSSA Guidelines acknowledged the primacy of UNCLOS in two respects. First, they provided that the application for a PSSA should clearly specify the category or categories of ships to which the proposed associated protective measures would apply, consistent with the provisions of UNCLOS, including provisions relating to vessels entitled to sovereign immunity.[29] Second, they provided that the proposing state was required to include in the application the details of action to be taken pursuant to domestic law for the failure of a ship to comply with the requirements of the associated protective measures and that any action taken should be consistent with international law as reflected in UNCLOS.[30]

The 2001 PSSA Guidelines contained no provisions on whether it would be possible to designate a PSSA within a strait used for international navigation and impose conditions on ships exercising transit passage through the strait. Similarly, they contained no provisions on whether it would be possible to designate a PSSA in archipelagic sea lanes and impose restrictions on ships exercising archipelagic sea lanes passage through the archipelagic state. However, the regulations issued under Chapter V of SOLAS for ships' routing, ship reporting systems, and vessel traffic services all contain the following savings clause with respect to the special regimes governing transit passage in straits used for international navigation and archipelagic sea lanes passage:

> Nothing in this regulation nor its associated guidelines and criteria shall prejudice the rights and duties of Governments under international law or the legal regimes of straits used for international navigation and archipelagic sea lanes.[31]

## Great Barrier Reef PSSA

PSSAs were developed by the Marine Environment Protection Committee (MEPC) from 1985 to 1991.[32] At its 30th session in November 1990, while the draft guidelines for PSSAs were still being debated, the MEPC adopted two resolutions in response to Australia's proposals with respect to the Great Barrier Reef. The first resolution identified the Great Barrier Reef as a PSSA.[33] The second resolution concerned a system of pilotage in the Great Barrier Reef. It provided that the MEPC:

> RECOMMENDS that Governments recognize the need for effective protection of the Great Barrier Reef region and inform ships flying their flag that they should act in accordance with Australia's system of pilotage.[34]

Australia amended its Great Barrier Reef Marine Park Act 1975 and the regulations requiring specified ships to take on pilots when navigating through two specified areas of the Great Barrier Reef Marine Park. The main area subject to compulsory pilotage was the northern section of the inner route of the Great Barrier Reef. This route is within the internal waters of Australia because it is landward of Australia's baselines.[35] The amendments came into force on 1 October 1991. They created offenses for failing to take on a pilot when navigating through the compulsory pilotage area and entering an Australian port on that journey or on a later journey.

The 1991 PSSA Guidelines were adopted by the IMO Assembly on 6 November 1991 after the Australian regulations establishing pilotage in the Great Barrier Reef came into force.

## Earlier Measures to Enhance Safety in the Torres Strait

Australia made several proposals to the IMO prior to 2003 to improve navigational safety and protect the marine environment in the Torres Strait. In 1991, Australia made a proposal to the IMO regarding pilotage in the Torres Strait. The result was IMO Resolution A.710(17), adopted on 6 November 1991, which recommended that all ships over 70 meters in length and all oil tankers, chemical tankers, and liquefied gas carriers use Australian pilotage services when navigating the Torres Strait.[36] Academic commentators from Australia have stated that the reason Australia proposed a voluntary system of pilotage in the Torres Strait in 1991 was that the Australian government took the view that it was not possible under international law to impose a system of pilotage in a strait used for international navigation.[37]

As noted above, in 1996 the IMO approved a mandatory ship reporting system called REEFREP in the Torres Strait region and the Inner Route of the Great Barrier Reef.[38] Amendments to REEFREP were adopted in 2003 and it is progressively being upgraded to become a Coastal Vessel Traffic Service.[39]

## The 2003 Australian Proposal to the IMO on the Torres Strait

In 2003, Australia and Papua New Guinea proposed to the IMO that the Great Barrier Reef PSSA be extended to the Torres Strait and that the compulsory pilotage system in the Great Barrier Reef be extended to the Torres Strait as an associated protective measure.[40] This was the first time that the IMO was faced with a proposal which raised the issue of whether it could adopt an associated protective measure in a PSSA that would require ships exercising the right of transit passage through straits used for international navigation to comply with a system of compulsory pilotage. The issue was further complicated by the fact that there was no specific regulation under Chapter V of SOLAS on pilotage systems. Therefore, it is not surprising that the proposal for compulsory pilotage ran into difficulties at the IMO.

### *Marine Environmental Protection Committee, 49th Session, 14–18 July 2003*

In their joint proposal to the MEPC for the extension of the existing Great Barrier Reef PSSA to include the Torres Strait region, Australia and Papua New Guinea proposed two associated protective measures to prevent damage from shipping activities.[41] First, they proposed that the existing routing measures in the waters of the Great North East Channel of the Torres Strait be amended to provide for a two-way route through the Torres Strait. Second, they proposed that the existing pilotage system in the Great Barrier Reef be extended to vessels navigating through the Torres Strait and Great North East Channel. Australia and Papua New Guinea stated that compulsory pilotage would be consistent with the UNCLOS citing: Article 42, paragraph 1(a); Article 211, paragraph 6; Article 39, paragraph 2; and Article 194, paragraph 1, in support of their position.

In the joint proposal, Australia and Papua New Guinea provided details about the unique and fragile ecosystem in the Torres Strait as well as hazards to shipping and the potential harm of a pollution incident in the strait. In support of their proposal for compulsory pilotage, they stated that compliance with the existing voluntary pilotage regime in the Torres Strait had been declining in recent years and that, as a result, the voluntary pilotage system was no longer providing an acceptable level of protection for the Torres Strait. They stated that the use of local pilots would reduce the risk of a shipping incident and that the cost of pilotage was negligible when compared to the cost, inconvenience, and delay that would be incurred by the shipowner in the event of even a minor maritime incident.

Three aspects of the joint proposal for the extension of the pilotage system to the Torres Strait should have raised "red flags" within the MEPC. First, the proposal did not clearly identify the authority under which the IMO could prescribe the pilotage system as was required by the 2001 PSSA Guidelines.[42] The proposal merely referred to the resolution establishing the existing recommended pilotage scheme and a 1968 IMO Assembly resolution which recommended that governments establish pilotage services.[43] Second, the reasoning as to why the submission was supported by and consistent with UNCLOS should have raised doubts in the mind of UNCLOS experts. The proposal appeared to use the authority in Article 41 with respect to traffic separation schemes to justify a pilotage system because it is a "necessary adjunct" to the traffic separation scheme. Third, the statement on enforcement provided that, in addition to a coastal state's powers under Article 233 of UNCLOS, the mandatory pilotage scheme "may also be enforced as a law regulating the recommended shipping route through the strait."[44] This statement may not meet the requirement in the 2001 PSSA Guidelines to include the details of action to be taken pursuant to domestic law for the failure of a ship to comply with the requirements

of the associated protective measures, or with the requirement in the PSSA Guidelines that the action taken be consistent with UNCLOS.[45] Arguably, the Informal Technical Group, established by the MEPC to review the Australia–Papua New Guinea proposal, should have demanded more particulars on the plans for enforcement given the limits on both the prescriptive and enforcement jurisdiction of states bordering straits with respect to ships exercising transit passage. In fact, none of the red flag issues were mentioned in the report of the Informal Technical Group, which seemed to have limited its review to the environmental concerns.[46] The Informal Technical Group reported that it unanimously agreed to recommend that, in principle, the Torres Strait area be designated as a PSSA and that the mandatory pilotage associated protective measure be referred to the Sub-Committee on Safety of Navigation (NAV Sub-Committee) for consideration. The MEPC approved the report and the recommendation of the Informal Technical Group.[47]

At the same 2003 session of the MEPC, the proposal for the establishment of the Western European PSSA was considered. It provoked much debate, including questions about the legality of the proposal and the need for the MEPC to examine the PSSA review process. As a result, the MEPC agreed to look into the possible improvement of its PSSA review process and requested interested delegations to submit proposals on how to improve the review process.[48]

### *Sub-Committee on Safety of Navigation, 50th Session, 5–9 July 2004*

To assist the NAV Sub-Committee, Australia and Papua New Guinea submitted a paper summarizing the compulsory pilotage issues.[49] The paper explained that IMO Resolution A.710(17) of November 1991 recommended the use of pilotage in the Torres Strait and asserted that the proposal for compulsory pilotage in the Torres Strait was consistent with UNCLOS.[50] In April 2004, Australia submitted an additional paper to the NAV Sub-Committee that informed the Sub-Committee about the results of a recent workshop conducted on the Torres Strait and support for the proposed associated protective measures.[51]

The chair of the NAV Sub-Committee took the position that no debate was necessary on the legal aspects of the proposal to extend the Great Barrier Reef pilotage system to the Torres Strait because the legal issues had been considered by the MEPC and, moreover, because the NAV Sub-Committee did not have competence to debate or resolve the legal issues.[52] The chair proposed that the Sub-Committee limit its review to the practical aspects of the proposal; however, the chair agreed that any interventions would be reflected in the report for possible further consideration by the MEPC and MSC in the final approval procedure. The delegations of the Russian Federation and Panama, with support by several other delegations, stated that they did not agree with the chair that the legal issues had been adequately considered by the MEPC.[53]

Among the legal issues raised were the following. Panama questioned whether the IMO had jurisdiction to consider proposals for compulsory pilotage in international waters in the absence of an appropriate IMO instrument setting out the requirements.[54] The Russian Federation stated that an amendment to an IMO convention such as SOLAS was necessary before the IMO could consider compulsory pilotage. Several delegations stated that compulsory pilotage could not be allowed in a strait used for international navigation because this would hamper the right of transit passage. Other delegations stated that they were sympathetic to the proposal, but had serious reservations in relation to its legal aspects.

The NAV Sub-Committee, taking into account a report from a working group, approved the following points with respect to the proposed system of pilotage in the Torres Strait:

- agreed that the proposed compulsory pilotage in the Torres Strait was operationally feasible and largely proportionate to provide protection to the marine environment;
- noted the opinion of a number of delegations that there was no clear legal basis to adopt a compulsory pilotage regime in international straits;
- invited MEPC 52 to refer the legal issue of compulsory pilotage in straits used for international navigation to the 89th session of the Legal Committee, in order to enable the MSC to consider the proposal at its 79th session with the issue of legal basis resolved;
- requested the Committee to consider whether there may be a need to develop guidelines and criteria for compulsory pilotage in straits used for international navigation notwithstanding the diverse views of delegations regarding the legal basis for such a regime.[55]

***Marine Environmental Protection Committee, 52nd Session, 11–15 October 2004***

On 6 August 2004, Australia and Papua New Guinea submitted a paper to the MEPC on compulsory pilotage in the Torres Strait.[56] The paper noted that the NAV Sub-Committee had invited the MEPC to refer to the Legal Committee the issues relating to the legal basis of the proposal to extend the Great Barrier Reef system of compulsory pilotage to the Torres Strait and stated that the paper was being submitted to assist the MEPC in its consideration of that issue. The paper stated that the proposal for compulsory pilotage was consistent with UNCLOS. It emphasized that the right of transit passage as provided in Part III of UNCLOS would not be impeded as a result of the pilotage proposal, noting that the use of a pilot could only enhance transit by ensuring that it takes place expeditiously and without incident. The paper further stated that fully trained and qualified pilots would be available to meet the demand.

At its 52nd session, the MEPC endorsed the recommendation of the NAV Sub-Committee to have the legal issues considered at the 89th session of the Legal Committee.[57]

***Legal Committee, 89th Session, 25–29 October 2004***

On 24 August 2004, Australia and Papua New Guinea submitted a paper to the Legal Committee that set out the case that the proposed system of compulsory pilotage in the Torres Strait was consistent with international law, including UNCLOS.[58] The Report of the Legal Committee on its 89th session summarized the arguments in the submission as follows:

> Australia introduced document LEG 89/15 which provided a legal analysis of this issue to assist the Legal Committee in its consideration of this matter. The Australian delegation states that there was no provision in the United Nations Convention on the Law of the Sea (UNCLOS) that would prevent the introduction of a scheme of compulsory pilotage and that it was entirely consistent with international law, in the unique circumstances of the Torres Strait. Indeed, the IMO guidelines on PSSAs expressly recognized compulsory pilotage as an appropriate special measure. The Australian delegation also added that the aim of introducing compulsory pilotage was to improve the safety of navigation, not to hamper the transit passage through a strait used for international navigation.[59]

During the discussion in the Legal Committee about the legality of the proposal, a range of views were expressed. Some delegations argued that there was no clear legal basis in any IMO instrument allowing for the imposition of compulsory pilotage. These views were summarized as follows:

> Some delegations suggested that, in order for the IMO to be able to consider any other proposal concerning compulsory pilotage, further instruments were needed and should be developed. Some suggested that a new regulation in SOLAS Chapter V could be adopted concerning compulsory pilotage and that the new regulation should be supported by the development of new guidelines and criteria for the adoption of pilotage schemes.[60]

The Legal Committee stalemated with the report concluding as follows: "In the final analysis, the Committee remained divided on resolving the legality of compulsory pilotage in straits used for international navigation."[61]

***Maritime Safety Committee, 79th Session, 1–10 December 2004***

The MSC, in December 2004, had the compulsory pilotage proposal on its agenda with the legal issues left unresolved. The MSC considered and adopted a compromise solution proposed by Australia and Papua New Guinea that was intended to enable the MSC to act on their proposal despite the stalemate on the legal issues.

In considering the Australia and Papua New Guinea proposal to extend the existing associated protective measure of a system of pilotage within the Great Barrier Reef to the Torres Strait, the MSC noted that the current system of pilotage in the Great Barrier Reef was contained in Resolution MEPC.45(30).[62] What Australia and Papua New Guinea proposed was the adoption of a new resolution by the MEPC with respect to pilotage in the Torres Strait that would be identical to Resolution MEPC.45(30), but would include the following:

- note the fact that Torres Strait has been identified as a PSSA;
- extend the existing associated protective measure of a system of pilotage with the Great Barrier Reef to include the Torres Strait; and
- revoke Resolution MEPC.45(30).[63]

The operative paragraph of the new MEPC resolution (paragraph 3) would read as follows:

> RECOMMENDS that Governments recognize the need for effective protection of the Great Barrier Reef and Torres Strait region and inform ships flying their flag that they should act in accordance with Australia's system of pilotage for merchant ships 70 m in length and over or oil tankers, chemical tankers and gas carriers, irrespective of size when navigating:
> . . .
> (b) the Torres Strait and the Great North East Channel between Bobby Island (latitude 10°36′S, longitude 141°54′E) and Bramble Cay (latitude 09°09′S, longitude 143°53′E).[64]

The MSC agreed that the joint proposal to extend the associated protective measure of a system of pilotage within the Great Barrier Reef to the Torres Strait should be adopted. It

also agreed with the proposal to incorporate the language of Resolution MEPC.45(30), as amended, into a new MEPC resolution. The MSC invited MEPC 53 to consider adopting the resolution as proposed by Australia and Papua New Guinea. In light of this decision, the MSC also decided that there was no need to develop guidelines and criteria for pilotage systems in straits used for international navigation as had been suggested by the NAV Sub-Committee.[65]

The MSC appears to have agreed to recommend the adoption of the Australia–Papua New Guinea draft resolution by the MEPC because it was a compromise solution that avoided the legal issues. The compromise was agreeing to extend the associated protective measure of a system of pilotage within the Great Barrier Reef to the Torres Strait, but not to include any language expressly stating that the pilotage scheme in the Torres Strait be compulsory or mandatory. The operative language in the new MEPC resolution, as in the MEPC.45(30) on pilotage in the Great Barrier Reef, would be framed in purely "recommendatory" language.

The MSC seemed to assume that any difficulties with respect to legal issues were resolved by wording the resolution in recommendatory terms. The report of the MSC made no specific reference to the outstanding legal issues. The report merely noted the discussion in the 50th session of the NAV Sub-Committee as well as the outcome of the consideration of the issue by the 52nd session of the MEPC and the 89th session of the Legal Committee.[66]

It does not appear from the MSC report that there was any discussion on the legal effect of the proposed draft resolution, or on whether Australia intended to use the resolution as a legal basis for imposing a system of compulsory pilotage in the Torres Strait. Given that Australia had enacted domestic legislation imposing a system of compulsory pilotage in the Great Barrier Reef following Resolution MEPC.45(30), despite its recommendatory language, one would expect that there would have been some discussion of the legal effect of the new MEPC resolution, unless the delegations with an interest in the issue had reached an understanding with Australia in private discussions.

### *Marine Environmental Protection Committee, 53rd Session, 18–22 July 2005*

In May 2005, Australia and Papua New Guinea submitted a document to the MEPC containing a draft resolution to designate the Torres Strait as an extension of the Great Barrier Reef PSSA and "give effect to associated protective measures applicable to the Torres Strait."[67] Unlike its previous proposals to the MEPC and its proposal to the Legal Committee, the document title did not include the term "compulsory pilotage." The submission cited: that the 49th session of the MEPC had given in principle approval to the proposal; that the 50th session of the NAV Sub-Committee had agreed that the proposed pilotage system was operationally feasible and largely proportionate; that the 79th session of the MSC had agreed that Australia's proposal to extend the system of pilotage in the Great Barrier Reef to the Torres Strait should be adopted; and that the 79th session of the MSC had invited the MEPC to adopt the resolution as proposed.

The main text of the draft resolution submitted by Australia and Papua New Guinea contained no preambular paragraph or other language suggesting that the intent of the resolution was to extend the current or existing system of pilotage in the Great Barrier Reef to the Torres Strait. Annex 2 to the draft resolution contained a summary of the proposed associated protective measures. Paragraph 2 of Annex 2 has a specific reference to the fact that the MSC agreed with the proposal to extend the system of pilotage in the Great Barrier Reef to the Torres Strait as an associated protective measure:

> Pilotage. The seventy-ninth session of the Maritime Safety Committee agreed with a proposal to extend the associated protective measure of a system of pilotage within the Great Barrier Reef to the Torres Strait. To give effect to the measure, the Maritime Safety Committee agreed with the proposal to incorporate a number of changes to resolution MEPC.45(30) into a new MEPC 53 resolution (see 10.14 to document MSC 79/23). This text is reproduced in paragraph 3 of this resolution.

The report of the MEPC noted, among other things, that the stalemated outcome in the Legal Committee on the pilotage issue "had been overtaken by events."[68] It was also noted that the 79th session of the MSC had agreed that Australia's proposal to extend the associated protective measure of a system of pilotage in the Torres Strait should be adopted. The report further noted that the draft resolution proposed by Australia and Papua New Guinea would designate the Torres Strait as an extension to the existing Great Barrier Reef PSSA and make the associated protective measures applicable to the Torres Strait. However, the MEPC only "notes" these matters; the report does not state that the MEPC agreed with any of these matters. The only agreement mentioned is that the MEPC agreed to instruct the PSSA Technical Committee to prepare a draft MEPC resolution on the designation of the Torres Strait as an extension to the Great Barrier Reef PSSA.

MEPC adopted the resolution proposed by Australia and Papua New Guinea with one significant change. Resolution MEPC.133(53) does not contain the paragraph quoted above in Annex 2 on associated protective measures. Instead, it merely says "Pilotage. Refer to paragraph 3 of this resolution."[69] The effect of this is that there is no language in MEPC.133(53) suggesting that the MEPC Resolution is intended to extend the pilotage system in the Great Barrier Reef to the Torres Strait as an associated protective measure.

The only language in Resolution MEPC.133(53) about pilotage as an associated protective measure is in paragraph 3 which "recommends" that governments recognize the need for effective protection and inform ships flying their flag that they should act in accordance with Australia's pilotage system.[70] Paragraph 3 is addressed to flag states and it "recommends" that governments inform ships flying their flag that they "should" comply with the system of pilotage.[71] It contains no language requiring all ships to comply with the pilotage system. The adopted language suggests that the Resolution did not intend that flag states were to be legally bound to take such measures as may be necessary to ensure that ships flying their flag comply with the system of pilotage. In addition, Resolution MEPC.133(53) does not authorize Australia to take any measures to make pilotage in the Torres Strait compulsory by adopting national regulations to make it an offense for a foreign ship to fail to take on a pilot.

The delegation of the United States made the following statement clarifying its position on the legal effect of the Resolution:

> [I]t must be recognized that this resolution was recommendatory and provided no international legal basis for mandatory pilotage for ships in transit in this or any other strait used for international navigation. The United States could not support the resolution if this Committee took a contrary view. Should the Committee adopt this resolution, the United States would implement its recommendations in a manner consistent with international law and the right of transit passage. The United States stressed that it would urge ships flying its flag to act in accordance with the recommendatory Australian system of

> pilotage for ships in transit through the Torres Strait to the extent that doing so did not deny, impair, hamper, or impede transit passage.[72]

Several delegations supported the statement by the United States, while the delegation of Australia indicated that it did not object to the statement by the United States.[73]

The MEPC, noting the views expressed by the United States and other delegations, instructed the PSSA Technical Group to prepare a draft MEPC resolution on the designation of the Torres Strait as an extension to the Great Barrier Reef PSSA.[74] The Technical Group recommended approval of the draft resolutions for the PSSAs that had already been approved in principle including the draft MEPC resolution on the designation of the extension of the Great Barrier Reef PSSA to the Torres Strait.[75] The draft resolution prepared by the Technical Group was then approved by the plenary session of the MEPC.[76]

The major maritime countries that had raised issues in the Legal Committee apparently were confident that Resolution MEPC.133(53) did not provide Australia with a legal basis for extending its compulsory pilotage system in the Great Barrier Reef to the Torres Strait as an associated protective measure. They apparently assumed that they had ensured this by the recommendatory language of the Resolution addressed to flag states, by the statement of the United States delegation on its legal effect, by the statements of support of the U.S. statement from other delegations, and by the statement of Australia that it did not object to the U.S. statement. They seemed to have interpreted the statement of the Australian delegation that it did not object to the U.S. statement as an affirmation that Australia could not use the Resolution as the legal basis for the imposition of a compulsory pilotage system in the Torres Strait.

It is unfortunate that the delegations from the major maritime states voted for the Resolution without seeking clarification from the Australian delegation at the MEPC meeting as to what measures, if any, Australia intended to take to implement the Resolution. It is interesting to note that at least one commentator stated in an academic article that he believed that Australia had every intention of using Resolution MEPC.133(53) as the legal basis for imposing a system of compulsory pilotage in the Torres Strait.[77]

## Australian Marine Notices and the Reactions of Maritime States

### *Australian Marine Notice 8/2006 of 16 May 2006*

On 16 May 2006, the Australian government issued Marine Notice 8/2006 entitled Revised Pilotage Requirements for Torres Strait.[78] It advised shipowners and operators of a new compulsory pilotage area for the Torres Strait commencing on 6 October 2006. It advised that significant penalties would apply to a master or owner who failed to comply with the compulsory pilotage requirements.[79] As justification for the compulsory pilotage requirements, the Marine Notice cited IMO Resolution MEPC.133(53).

### *Sub-Committee on Safety of Navigation, 52nd Session, 17–21 July 2006*

At the July 2006 session of the NAV Sub-Committee, under the agenda item "Any other business," the delegation of Singapore made a statement concerning Australia's actions in introducing the system of compulsory pilotage in the Torres Strait stating that IMO Resolution MEPC.133(53) did not provide a basis for introducing compulsory pilotage in the Torres Strait and that the actions of Australia were not in line with the outcome

and understanding reached at the 53rd session of the MEPC.[80] Further, they stated that the imposition of a system of a compulsory pilotage system in the Torres Strait would be in contravention of UNCLOS. The concerns raised by Singapore were shared by 14 other states, including several major maritime states. Australia replied by stating that it considered this matter was settled by previous meetings of the MSC and MEPC and, as such, it did not think it was appropriate to discuss this matter further in the NAV Sub-Committee.[81]

### *Diplomatic Notes by the United States and Singapore, July and August 2006*

Several states made their unhappiness with the Australian Marine Orders known, and at least two states, the United States and Singapore, sent diplomatic notes of protest to Australia. The U.S. diplomatic note of July 2006 stated that it was the firm position of the United States that there was no basis in the international law of the sea as reflected in UNCLOS for the institution of a system of compulsory pilotage in a strait used for international navigation. The United States urged Australia "to conform its laws and regulations with the law of the sea and the understandings reached at the IMO."[82] On 1 August 2006, Singapore sent a similar diplomatic note to Australia stating that there was no legal basis under UNCLOS for the institution of compulsory pilotage in a strait used for international navigation. The note also stated that Singapore's support for Resolution MEPC.133(53) was conditioned on Australia's acceptance of the statement by the United States that the resolution was "recommendatory and provided no international legal basis for mandatory pilotage in this or any other strait used for international navigation."[83] Singapore further stated that Australia's reliance on IMO Resolution MEPC.133(53) as the basis for its new pilotage requirements did not reflect the understanding reached at the 53rd session of the MEPC. It urged Australia to take steps to ensure that its laws and regulations were in compliance with UNCLOS and the understandings reached at the IMO.

### *Australia's Reply to the U.S. Diplomatic Note and the Revised Marine Notice*

On 11 August 2006, Australia replied to the United States.[84] The main points in its diplomatic note were as follows. First, it was noted that the text of the IMO Resolution had been prepared in close consultation with U.S. delegation and that the words of the Resolution and Australia's system of pilotage for the Torres Straits were well understood by the participants at the IMO. Second, with respect to the understanding at the 53rd session of the MEPC when the Resolution was adopted, the fact that Australia did not object to the statement by the United States did not imply that Australia accepted the position put forward by the United States as correct. Third, notwithstanding that no unanimous view of the international legal basis for the introduction of the measure emerged from the Legal Committee, it was the firm view of the Australia that its measure was consistent with UNCLOS. In the absence of any specific Articles in UNCLOS to either sanction or prevent compulsory pilotage, such a scheme was permitted to be introduced through IMO procedures.

The Australian statement that the text of the Resolution had been prepared in close consultation with the U.S. delegation seems to go to the source of the current dispute on whether the Resolution provides a legal basis for the imposition of compulsory pilotage. It appears that the delegations from Australia and the United States reached agreement on the text of the compromise Resolution without any agreement (or perhaps without any discussion) on whether that text would provide a legal basis for the imposition of

compulsory pilotage or on how the Resolution was to be implemented by Australia. In other words, they agreed on the text, but not on the legal effect of the text. The first open sign that there was a lack of consensus between the two sides on the legal effect of the Resolution was the U.S. statement at the MEPC meeting when the Resolution was adopted. When the Australian delegation stated that it did not object to the U.S. statement, the United States and its supporters assumed that Australia accepted the U.S. statement on the legal effect of the Resolution. It now appears that the Australian delegation made an intentionally vague statement implying that it accepted the U.S. statement, when in fact it did not. This may be because Australia feared that if it made clear that it considered the Resolution a legal basis for imposing compulsory pilotage in the Torres Strait, a debate would have ensued in the MEPC on the legal issues and the Resolution may not have been adopted.

On 3 October 2006, Australia issued Marine Notice 16/2006 entitled "Further Information on Revised Pilotage Requirements for the Torres Strait."[85] The Notice clarified two points. First, that the new pilotage arrangements do not apply to vessels with sovereign immunity, including defense and other government-owned vessels.[86] This point had not been at issue. Second, the Notice provides that:

> In accordance with UNCLOS Articles 42.2 and 44, Australian authorities will not suspend, deny, hamper or impair transit passage and will not stop, arrest or board ships that do not take on a pilot. However, the owner, master and/or operator of the ship may be prosecuted on the next entry into an Australian port, for both ships on voyages to Australian ports and ships transiting the Torres Strait en route to other destinations.[87]

The Notice also pointed out that the Australian domestic legislation includes a defense to prosecution if a pilot could not be carried because of stress of weather, saving life at sea, or other unavoidable cause.

In summary, Australia made it clear that it did not intend to intercept ships exercising transit passage through the Torres Strait if they failed to take on a pilot, but that it would prosecute such vessels upon their next entry to an Australian port, even if the ship transited the Torres Strait without taking on a pilot while en route to a destination outside of Australia.

### *Marine Environmental Protection Committee, 55th Session, 9–13 October 2006*

On 10 August 2006, in anticipation of the 55th session of the MEPC, the major shipping organizations (International Chamber of Shipping [ICS], the Baltic and International Maritime Council [BIMCO], International Association of Dry Cargo Shipowners [INTERCARGO], and International Association of Independent Tanker Owners [INTERTANKO]) submitted a statement on the Torres Strait expressing concern with the Marine Notices published by Australia with respect to mandatory pilotage in the Torres Strait.[88] They drew attention to the U.S. statement that Resolution MEPC.133(53) provided no legal basis for mandatory pilotage for ships on transit passage in the Torres Strait or any other strait. They also highlighted the fact that several delegations supported the statement of the United States and that the delegation of Australia indicated that it did not object to the statement. Further, they stated that the imposition of compulsory pilotage for ships transiting a strait used for international navigation would be in contravention of UNCLOS. Finally, they invited the MEPC to consider the matter and to obtain clarification from Australia with respect to the application of Marine Notice 8/2006.

In introducing the document, the observer from the ICS, on behalf of the co-sponsors, invited the MEPC to reaffirm its understanding of this matter.[89] The chair of the MEPC stated

that, historically when the MEPC adopted resolutions with an operative paragraph beginning with the word "recommends," the content of the paragraph is of a recommendatory nature and that any different interpretation would necessitate the revision of all resolutions adopted by the MEPC. The chair requested the Committee to agree that, on adopting Resolution MEPC.133(53), the Committee was adopting it on a recommendatory basis. The Committee agreed with the chair that the Resolution was of a recommendatory nature. Following the decision of the Committee, Australia stated that it agreed with the chair's view, but not with all of the points in the document submitted by the shipping organizations.[90]

Singapore reiterated its understanding that Resolution MEPC.133(53) provided no international legal basis for mandatory pilotage for ships in transit in the Torres Strait or any other strait used for international navigation. Singapore urged Australia to review its positions as set out in Marine Notices 8/2006 and 16/2006 and to bring these into line with the understanding of the MEPC on the Resolution. Delegations from 21 countries associated themselves with the statement by Singapore.[91]

In response, Australia made a statement, and the delegations of two countries, Papua New Guinea and New Zealand, associated themselves with it, making the following points:[92]

1. That the words of the resolution and the nature of Australia's system of pilotage for the Torres Strait, as an extension of the existing pilotage arrangements in the Great Barrier Reef, were well understood by both IMO Committees and were accurately recorded in the reports.
2. That its domestic legislation requiring pilotage in the Torres Strait was in accordance with the requirements of its legal system and Australia's long-established practice of giving effect to the decisions of the IMO, and that it had followed exactly the same approach it had taken previously in giving effect to the 1991 resolution relating to pilotage in the Great Barrier Reef.
3. That issues relating to UNCLOS were fully addressed in its submission to the 89th session of the Legal Committee.
4. That it had promulgated additional information in the form of Marine Notice 16 of 2006, making it clear that Australia will not deny, hamper, or impair transit passage.
5. That the fact that Australia did not intervene following the U.S. Statement at the 53rd session of the MEPC does not mean that Australia accepted the U.S. position or that the resolution was conditional on the U.S. view, and that the alternative view of Australia and several other delegations is clearly noted in the same records.
6. That the Torres Strait PSSA proposal and the associated protective measures were in full compliance with the IMO Guidelines on PSSAs, and that subsequent actions to give effect to the measures in Australian domestic legislation are fully consistent with the wording of resolution MEPC.133(53).
7. The issue that is raised in document MEPC 55/8/3 is purely a legal issue and beyond the mandate of the MEPC, and that, therefore, Australia is of the view that there is nothing to be gained in discussing the matter further in this Committee.

The Australian statement appears to have been prepared in advance of the MEPC meeting, and does not address the implications of the decision of the MEPC to reaffirm that Resolution MEPC.133(53) was purely recommendatory. The major new point in the Australian statement is that the words of the Resolution were exactly the same as for the pilotage system in the Great Barrier Reef and that Australia had followed the same system of implementing this Resolution as with the previous Resolution. In other words, Australia argued that, since the Resolution establishing a system of pilotage in the Great Barrier Reef

used the same recommendatory language[93] and Australia had implemented that Resolution by adopting legislation making pilotage compulsory subject to heavy penalties, it could follow the same practice in implementing the new Resolution on the Torres Strait.

Australia's position that purely legal issues are beyond the mandate of the MEPC suggests that its position is that the issue of whether Australia's actions are in contravention of UNCLOS is beyond the mandate of the MEPC. Australia implied that the only IMO committee that would be able to consider this issue is the Legal Committee. What follows is that, since the Legal Committee was unable to reach a consensus on the legal issues, no committee of the IMO would be able to consider whether the Australia has acted contrary to UNCLOS.

### *Developments in Early 2007*

On 27 February 2007, Professor Tommy Koh, ambassador-at-large from Singapore, raised the profile of the dispute between Australia and Singapore by mentioning it in the 7th Cedric Barclay Memorial Lecture delivered at the 16th International Congress of Maritime Arbitrators in Singapore.[94] Professor Koh had spent 10 years negotiating UNCLOS for Singapore, and served as president of the U.N. diplomatic conference on the law of the sea in 1981 and 1982. Professor Koh voiced concern that attempts had been made and were being made by some coastal states to weaken the navigational rights regime under UNCLOS in the interest of protecting the marine environment. He cited the pilotage system in the Torres Strait as an example. He stated that, in his view, Australia's grounds for arguing that its pilotage scheme in the Torres Strait was consistent with UNCLOS and international law were very weak. He stated that he was concerned that Australia's action would set an unfortunate precedent. He also stated that Australia's actions contravened UNCLOS and showed a lack of respect for the IMO. He appealed to Australia to review its actions and to bring its conduct into conformity with UNCLOS.

In February 2007, the United States sent a second diplomatic note to Australia setting out in detail its position as to why the Australian system of pilotage was inconsistent with international law and UNCLOS.[95] The United States also had discussions with Australia in Canberra. Australia submitted a response to the United States after those discussions.[96] In effect, Australia acknowledged to the United States that a stalemate exists. Australia maintained that its pilotage system was consistent with international law, without indicating the legal basis for this conclusion or responding to the arguments of the United States. Australia stated that it respected that the United States holds a different view on the consistency of the scheme with international law. Australia stated that it was not in a position to amend or repeal its pilotage scheme, but that it was willing to work with the United States and other interested stakeholders to improve the system of pilotage in the Torres Strait. Australia also indicated that it would continue to operate the pilotage system in a manner consistent with the right of transit passage.

In summary, it seems apparent as of July 2007 that further meetings at the IMO are not likely to resolve the legal dispute unless action is taken by the highest body of the IMO, the Assembly. Discussions between Australia and user states are also unlikely to resolve the issue. Australia continues to maintain that its pilotage scheme was approved by the IMO and is consistent with international law and UNCLOS. It is not willing to consider repealing or amending its Marine Orders. Therefore, it appears that, if no state is willing to challenge the legality of the pilotage system before an international court or tribunal, it is likely that the compulsory pilotage system will remain in place.

The legal issues raise important policy questions on how UNCLOS is interpreted and applied by states and by the IMO, and what means are available for resolving disputes that arise when a state takes a unilateral action of questionable legality.

## Key Issues

### *Issue 1: Are Australia's Regulations Consistent with Resolution MEPC.133(53)?*

Australia's position is that its regulations extending the system of compulsory pilotage in the Great Barrier Reef to the Torres Strait are authorized by Resolution MEPC.133(53).

Resolution MEPC.133(53) designates the Torres Strait as an extension of the Great Barrier Reef. The Resolution contains no language to suggest that it was intended to extend the compulsory pilotage system of the Great Barrier Reef to the Torres Strait. In fact, the proposed language in the draft joint resolution which mentioned the agreement of the MSC to extend the Great Barrier Reef pilotage system to the Torres Strait as an associated protective measure[97] was not included in the final version of Resolution MEPC.133(53). Therefore, it is reasonable to conclude that the compromise language in paragraph 3 of Resolution MEPC.133(53) was intended only to make the recommendatory system of pilotage system in the Torres Strait an associated protective measure.

Even though a recommendatory system of pilotage was already in place in the Torres Strait,[98] the effect of Resolution MEPC.133(53) was not insignificant. The Resolution formally designated the Torres Strait as a PSSA and adopted the recommendatory system of pilotage as an associated protective measure, and this information would be indicated on all maritime charts. This would give the recommendatory pilotage system much greater legitimacy and ships would be more likely to comply with the recommended pilotage system when transiting the Torres Strait.

The text of paragraph 3 of MEPC.133(53) supports the conclusion that it does not purport to establish a system of compulsory pilotage in the Torres Strait as an associated protective measure. Resolution MEPC.133(53) is addressed only to flag states. It assumes that the obligation to comply with the system of pilotage is the responsibility of flag states. It "recommends" that governments advise ships flying their flag that they "should" comply with the pilotage system. The word "recommends" suggests that the IMO Resolution is not intending to require that states order all ships flying their flag to comply. The use of the word "should" rather than "shall" suggests that governments are not expected to impose an obligation on ships flying their flag to comply.

In situations where the MEPC has adopted mandatory associated protective measures for a PSSA, the language used makes it clear that all ships are to comply and that flag states are to use all means necessary to promote compliance. For example, the Resolution on the mandatory ship reporting system for the Torres Strait and the Inner Route of the Great Barrier Reef (REEFREP), which was amended in 2004, states that:

> Ships will be required to provide a full REEFREP Position Report (PR) at least two hours prior to entering the REEFREP area from seaward or when sailing from a port within the area.[99]

This language is mandatory, requiring all ships to comply. With respect to enforcement:

> All means will be used to encourage and promote the full participation of ships required to submit reports under SOLAS regulation V/11. If reports are not

> submitted and the ship can be positively identified, then information will be passed to the relevant flag State for investigation and possible prosecution in accordance with that State's legislation.[100]

This language on enforcement indicates that even when the MEPC intends to make an associated protective measure mandatory, it leaves the enforcement to flag states, not to coastal states.

Furthermore, Resolution MEPC.133(53) does not purport to authorize Australia to take any action to enforce the system of pilotage in the Torres Strait. It does not give Australia jurisdiction to adopt laws and regulations to enforce the pilotage scheme in the Torres Strait. This is understandable given that the IMO does not have the power to expand the jurisdiction of littoral states to enforce IMO regulations. The degree to which coastal states may enforce IMO Regulations or IMO Resolutions is governed by UNCLOS.[101]

The circumstances of the adoption of Resolution MEPC.133(53) support the conclusion that the MEPC did not intend to either compel flag states to comply with the system of pilotage or authorize Australia to institute a system of compulsory pilotage in the Torres Strait. The statement of the United States at the MEPC, supported by several delegations, made this expressly clear.[102] The delegation of Australia indicated that it did not object to the statement by delegation of the United States.[103]

In addition, whatever doubts may have existed with respect to the legal effect of Resolution MEPC.133(53) were clarified in October 2006 at the 55th session of the MEPC. The MEPC reconsidered the issue and reaffirmed that the Resolution was only of a recommendatory nature.[104] In addition, more than 20 delegations, including many maritime states, expressed concern over Australia's actions and strongly urged Australia to review its Marine Notices on pilotage in the Torres Strait to bring them in line with the understanding of the Committee. Only two delegations, Papua New Guinea and New Zealand, stated that they supported Australia's action.[105]

Given the wording of the Resolution MEPC.133(53), the circumstances surrounding its adoption, and the subsequent conduct of states at the MEPC with respect to its intention and meaning, it is very difficult for Australia to make a credible argument that the IMO Resolution MEPC.133(53) authorized it to establish a system of compulsory pilotage in the Torres Strait.

In support of its argument that Resolution MEPC.133(53) authorized Australia to extend the compulsory pilotage system in the Great Barrier Reef to the Torres Strait, Australia has pointed out that the words of the Resolution and the nature of Australia's system of pilotage for the Torres Strait, as an extension of the existing pilotage arrangements in the Great Barrier Reef, were well understood by both the IMO Committees and were accurately recorded in the reports.[106] As explained earlier, the wording of paragraph 3 of Resolution MEPC.133(53) is the same as that relating to pilotage in the Great Barrier Reef, with necessary modifications. However, although the 79th session of the MSC approved the extension of the existing pilotage system in the Great Barrier Reef to the Torres Strait, Resolution MEPC.133(53) contains no reference to the extension of the existing pilotage system in the Great Barrier Reef to the Torres Strait. It merely extended the Great Barrier Reef PSSA to the Torres Strait and used the recommendatory language in paragraph 3 with respect to pilotage.

It is true that the Great Barrier Reef Resolution contained the same recommendatory language and that, to implement the Resolution, Australia adopted laws and regulations making pilotage compulsory by imposing severe criminal penalties on ships that failed to take on a pilot. However, the pilotage system on the Inner Route of the Great Barrier Reef

is in Australia's internal waters where foreign ships have no rights of passage or in its territorial sea where ships have only a right of innocent passage. Therefore, although the IMO Resolution used only recommendatory language with respect to the system of pilotage in the Great Barrier Reef, Australia had authority under international law (UNCLOS) to adopt laws and regulations making the system of pilotage compulsory in the Great Barrier Reef.[107] Unlike the Great Barrier Reef, the Torres Strait is a strait used for international navigation, subject to the provisions in Part III of UNCLOS. As will be explained in the next section, Australia does not have jurisdiction under UNCLOS to adopt laws and regulations establishing a system of compulsory pilotage in a strait used for international navigation.

Australia has also justified its laws and regulations by stating that it was following its established practice in implementing IMO Resolutions and decisions and making them part of Australia's domestic law. Resolution MEPC.133(53) recommends that flag states advise ships flying their flag that they should comply with the pilotage system. To implement this, Australia could adopt laws and regulations encouraging or requiring ships flying its flag to comply with the pilotage system in the Torres Strait. The Resolution did not purport to authorize Australia to take any measures or to adopt any laws and regulations to ensure that foreign ships exercising transit passage through the Torres Strait comply with the pilotage system. In addition, 2001 PSSA Guidelines make it clear that the enforcement of associated protective measures adopted in PSSAs must be consistent with international law as reflected in UNCLOS.[108]

In conclusion, Australia's regulations establishing a system of compulsory pilotage in the Torres Strait are not consistent with Resolution MEPC.133(53). Furthermore, the method of implementation provided for in the Resolution was to recommend to states that they advise ships flying their flag that they should comply with the pilotage system. The Resolution did not authorize Australia to take any actions under its domestic law to make it an offense for a foreign ship to fail to comply with the pilotage system in the Torres Strait.

***Issue 2: Is the Compulsory Pilotage System Consistent with UNCLOS?***

There is no legal dispute as to the status of the Torres Strait or the applicability of Part III of UNCLOS. Australia has explicitly acknowledged that the Torres Strait is a strait used for international navigation to which Part III of UNCLOS applies.[109]

Article 34, paragraph 2, of UNCLOS provides that the sovereignty and jurisdiction of states bordering straits must be exercised subject to Part III and other rules of international law. Therefore, even though the Torres Strait lies with its internal waters and territorial sea, Australia's power to regulate ships exercising the right of transit passage through the strait are restricted by Part III of UNCLOS.[110]

The crucial question is whether Australia has exercised its jurisdiction in accordance with Part III of UNCLOS or whether it has acted in excess of its jurisdiction.

*The Regulations Are in Excess of Prescriptive Jurisdiction in Article 42.* Australia's regulations make it an offense for foreign ships to transit the Torres Strait without taking on a pilot. Although Australia has declared that it will not intercept and arrest a foreign ship that passes through the Torres Strait without taking on a pilot, it has declared that it will charge them with an offense if they voluntary enter a port in Australia any time within 3 years after the passage.[111]

Australia has argued that in the absence of any specific articles in UNCLOS to either sanction or prevent compulsory pilotage, such a scheme can be adopted through IMO procedures and that Australia can implement an IMO Resolution through its domestic

regulations. However, this argument ignores Article 42, paragraph 1, which restricts the prescriptive jurisdiction of states bordering straits used for international navigation relating to transit passage.

With respect to navigational safety, Article 42, paragraph 1(a), provides that a coastal state may only adopt laws and regulations designating sea lanes and traffic separation schemes, as provided in Article 41. Article 41 provides that such sea lanes and traffic separation schemes must conform to generally accepted international regulations established by IMO instruments and that they must be adopted by the IMO as the competent international organization. With respect to the prevention, reduction, and control of pollution from ships, Article 42, paragraph 1(b), provides that coastal states may only adopt laws and regulations that give effect to applicable international regulations regarding the discharge of oil, oily wastes, and other noxious substances." Therefore, a coastal state is limited to adopting laws and regulations that give effect to the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto, as amended (MARPOL 73/78). This would include Annexes I to III on oil, oily wastes, and noxious substances, but not the additional annexes on garbage, sewage, and air pollution.[112]

Pilotage is not one of matters specified in Article 42, paragraph 1. Therefore, Australia has exceeded its jurisdictional powers when it adopted regulations requiring ships exercising transit passage through the Torres Strait to comply with its pilotage scheme.

This restrictive interpretation of the prescriptive jurisdiction of states bordering straits used for international navigation is supported by the legislative history of Article 42.[113] The Third United Nations Conference on the Law of the Sea (UN Conference) was convened in 1973 to prepare a comprehensive treaty governing all aspects of the law of the sea. At the second session in 1974, the United Kingdom put forward a set of draft articles in two parts, one on the territorial sea and the other on straits with its proposals on straits including the new concept of transit passage.[114] The final wording of Article 42, paragraphs 1(a) and (b), is almost exactly the same wording as that in the 1973 UK proposal. Suggestions to expand the list of matters on which states bordering straits used for international navigation could adopt laws and regulations were made by several states;[115] however, none of the proposed amendments were accepted.[116]

This restrictive interpretation of Article 42, paragraph 1, is also consistent with the policy underlying the scheme in Part III on transit passage straits used for international navigation. Part III gives ships of all states the right of transit passage through straits used for international navigation and provides under Article 39, paragraph 2 that ships exercising this right must comply with "generally accepted international regulations, procedures and practices" relating to navigational safety and environmental protection. It gives the IMO wide powers to adopt such international regulations, which are to be enforced by flag states. At the same time, it severely restricts the jurisdictional power of the states bordering straits used for international navigation to adopt and enforce laws and regulations relating to the transit passage. The obvious intent of Part III is to require ships exercising the right of transit passage through a strait used for international navigation to comply with international regulations adopted by the IMO. At the same time, the intent of Part III is to severely restrict the jurisdiction of states bordering such straits so that ships on international shipping routes are not faced with numerous "local regulations" that might interfere with their right of transit passage.

Australia has maintained that it can adopt regulations requiring ships transiting the Torres Strait to take on a pilot because the regulations and Marine Orders do not have the practical effect of hindering or impairing the right of transit passage under Article 42, paragraph 2. However, this argument ignores the fact that Australia's prescriptive

jurisdiction over ships exercising transit passage is restricted to the matters specified in Article 42, paragraph 1, and that pilotage is not one of the specified matters. Article 42, paragraph 2, applies only if the regulations are within the matters specified in paragraph 1. If states bordering straits adopt laws and regulations on the specific matters set out in paragraph 1, paragraph 2 provides that such laws and regulations are subject to two further restrictions. First, they are not to discriminate in form or in fact among foreign ships. Second, they must not in their application have the practical effect of denying, hampering, or impairing the right of transit passage.

Arguments have also been put forward that Australia's regulations are in breach of Article 42, paragraph 2. Some delegations at the IMO have taken the position that any system of compulsory pilotage in a strait used for international navigation would have the practical effecting of impairing or hampering the right of transit passage.[117] This is because the ships must stop to take on a pilot and pay for the pilotage service. Other states have argued that the master or owner of a ship transiting the Torres Strait would be forced to comply with the pilotage scheme even if they have no present intent to enter an Australian port if that ship might possibly enter an Australian port in the future, and that this has the practical effect of impairing or hindering passage.

*The Regulations Are in Excess of Enforcement Jurisdiction as a Port State.* The second reason Australia's regulations imposing compulsory pilotage in the Torres Straits are not consistent with UNCLOS is that Australia has no enforcement jurisdiction under UNCLOS to prosecute foreign ships that refuse to take on a pilot when they voluntarily enter an Australian port at some future date. The limit on the enforcement jurisdiction of port states to protect and preserve the marine environment is set out in Part XII of UNCLOS. The enforcement jurisdiction of port states is limited to violations relating to the discharge of oil, as set out in Article 218 of UNCLOS.

*Provisions Cited by Australia Do Not Justify Its Regulations.* In August 2004, Australia set out its position on why its proposal for compulsory pilotage in the Torres Strait was consistent with UNCLOS.[118]

The Articles from UNCLOS that Australia cited in support of the establishment of a compulsory pilotage scheme are Article 41, Article 39, paragraph 2, and Article 211, paragraph 6. With respect to Article 41, Australia argues that, since the IMO has agreed to sea lanes to ensure the safety of navigation through the Torres Strait, the specific and unique circumstances of the Torres Straits require a system of pilotage "as a necessary adjunct" to ensure the safe passage of ships through those sea lanes.[119] However, Australia presents no argument as to how the language of Article 41 authorizes the establishment of a system of compulsory pilotage in the Torres Strait "as a necessary adjunct." Article 41 by its terms is confined to the establishment of sea lanes and traffic separation schemes. Article 41 does not use wider terms such as "measures" or "routing measures." Nothing in the language of Article 41 or its *travaux préparatoires* suggests that it was intended to include measures such as pilotage schemes as adjuncts to sea lanes and traffic separation schemes.[120]

Australia also cites Article 39, paragraph 2, as a legal basis for the establishment of a system of compulsory pilotage in the Torres Straits.[121] Article 39, paragraph 2, requires ships exercising transit passage to comply with generally accepted international regulations, standards, and practices adopted by the IMO. However, the enforcement of such international regulations, standards, and practices is the responsibility of flag states. Article 39, paragraph 2, provides no legal basis for Australia as a state bordering the strait to adopt laws and regulations on ships exercising transit passage. The power of states

bordering straits to adopt any laws and regulations relating to ships exercising passage by foreign ships is subject to the specific limitations set out in Article 42.

Australia also cites Article 211, paragraph 6, in support of its case.[122] Article 211 is found in Part XII of UNCLOS on the Protection and Preservation of the Marine Environment. Article 211, paragraph 6, is an exception to the general principle in Article 211, paragraph 5, which provides that the prescriptive jurisdiction of coastal states over ships in their exclusive economic zone is limited to adopting laws and regulations "conforming to and giving effect to generally accepted international rules and standards." Article 211, paragraph 6, provides that coastal states can adopt stricter laws and regulations in a particular, clearly defined area of their exclusive economic zone if necessary for environmental reasons and if approved by the IMO.

Article 211, paragraph 6, applies only to the exclusive economic zone. It is not relevant because the parts of the Torres Strait where the pilotage scheme applies lie completely within the internal waters and territorial sea.[123] Furthermore, nothing in the language of the paragraph suggests that this provision could somehow legitimize the adoption of laws and regulations by states bordering straits on ships exercising transit passage through straits used for international navigation. In fact, Article 233 of UNCLOS specifically provides that: "Nothing in sections 5, 6 and 7 [of Part XII] affects the legal regime of straits used for international navigation." Because Article 211 is within section 5 of Part XII of UNCLOS, it cannot be used to attempt to modify or change the provisions in Part III on straits used for international navigation.

The conclusion is that the provisions of UNCLOS cited by Australia do not support the position that its regulations establishing a system of compulsory pilotage in the Torres Strait are consistent with UNCLOS.

### *Issue 3: Can the IMO Establish a System of Compulsory Pilotage as an Associated Protective Measure in a Strait Used for International Navigation that Is Part of a PSSA?*

*Can the IMO Establish Pilotage in a Strait Used for International Navigation? Article 39, paragraph 2, provides that ships exercising transit passage must comply with the generally accepted international regulations, procedures, and practices on navigational safety and ship-source pollution. It provides that:*

> *Ships in transit passage shall:*
>
> *(a) comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea;*
>
> *(b) comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships.*

It is accepted that the IMO is the competent international organization with the authority to adopt regulations, procedures, and practices with respect to navigational safety and ship-source pollution.[124] Article 39, paragraph 2, was cast in deliberately wide terms. It was intended to include international conventions adopted by the IMO that have secured wide acceptance, as well as subsidiary or related instruments and decisions setting out procedures and practices.[125] It is reasonable to conclude that ships' routing measures, ship reporting systems, and vessel traffic services adopted by the IMO under Chapter V of SOLAS[126] would be considered "generally accepted international regulations, procedures

and practices for safety at sea" within Article 39, paragraph 2(a), and that all ships exercising transit passage would have to comply with them.

There is no reason why pilotage systems proposed for straits used for international navigation should not be treated in the same way as routing measures, ship reporting systems, and vessel traffic services. If there were a clear legal basis for the IMO to adopt compulsory pilotage systems, and they were adopted by the IMO according to its authority, procedures, and practices, all ships exercising transit passage would be bound to comply with them under Article 39 of UNCLOS. Also, all states would be required to ensure that ships flying their flag complied with the international regulation establishing the pilotage system.

*Can the IMO Impose Pilotage as an Associated Protective Measure in a PSSA?* The designation of an area as a PSSA does not give the IMO the power to impose measures that it could not impose if the area were not a PSSA. The IMO may only adopt associated protective measures in PSSAs that are within its purview.[127] The proposed associated protective measures may include any measure that is already available in an existing IMO Convention as well as any measure that does not yet exist, but that should be available as a generally applicable measure and that falls within the competence of the IMO.[128]

Pilotage systems were expressly mentioned as possible associated protective measures in the 2001 PSSA Guidelines. However, as was pointed out by some delegations at the 89th session of the Legal Committee in 2004, there is no clear legal basis in any IMO Conventions or other instruments for the imposition of compulsory pilotage systems by the IMO in a strait used for international navigation.[129] In fact, there seems to be no clear legal basis for the adoption of compulsory pilotage systems by the IMO in any maritime zones. There are no regulations in Chapter V of SOLAS on pilotage systems[130] and there are no IMO Assembly Resolutions giving any IMO Committee the power to establish compulsory pilotage systems.

Given the requirement in the 2001 PSSA Guidelines that there must be a clear legal basis for any proposed associate protective measure, the IMO might consider taking up the suggestion made in the NAV Sub-Committee in July 2004 to amend SOLAS to add a new regulation on pilotage systems.[131] Any new IMO Regulation should be accompanied by detailed guidelines, criteria, and procedures for the establishment of pilotage systems. The PSSA Guidelines should then also be amended to provide that pilotage systems can be imposed as an associated protective measure in certain limited circumstances. Like other measures that may be adopted by the IMO on navigational safety, any new regulation to SOLAS on pilotage systems should include a savings clause which provides that nothing in the regulation "shall prejudice the rights and duties of Governments under international law as reflected in UNCLOS, including the legal regimes of straits used for international navigation and archipelagic sea lanes."

*Who Would Enforce a Pilotage System Adopted as an Associated Protective Measure in a Strait Used for International Navigation that Is Part of a PSSA?* If the IMO did have a clear legal basis for the adoption of pilotage systems, a pilotage system could be imposed in straits used for international navigation. All ships exercising transit passage would then be legally bound to comply with the pilotage system under Article 39 of UNCLOS. However, the enforcement of such systems would continue to be the responsibility of flag states and not the littoral states. The prescriptive jurisdiction and enforcement jurisdiction of littoral states is still limited by Part III and Article 233 of UNCLOS. Therefore, even if the IMO were to impose a system of compulsory pilotage in the Torres Strait, this would

not give Australia the right to adopt laws and regulations making it a criminal offense for foreign ships exercising the right of transit passage through the strait not to take on a pilot. Australia's prescriptive jurisdiction is limited by Article 42 of UNCLOS.

There is only one circumstance in which a littoral state has the power to intercept vessels exercising the right of transit passage. Article 233 provides that littoral states may take necessary enforcement action if a foreign merchant ship exercising transit passage 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.

Similarly, states bordering straits used for international navigation would have no power as port states to arrest foreign ships that voluntarily enter one of its ports for not taking on a pilot during a previous passage through the Torres Strait. A state's authority to exercise jurisdiction as a port state is limited to discharge violations as set out in Article 218 of UNCLOS. The most a port state could do would be to deny entry to its ports to ships that have failed to comply with an IMO system of compulsory pilotage.[132]

### *Issue 4: Is Any State Likely to Challenge Australia Before a Court or Arbitral Tribunal?*

Given the current stalemate, it appears that the compulsory pilotage system in the Torres Strait will remain in place unless a state party to UNCLOS is willing to challenge the legality of Australia's regulations by invoking the compulsory dispute settlement system in Part XV of UNCLOS.[133]

Australia does not appear to be interested in further discussions or negotiations because it has achieved its objectives and is satisfied with the status quo. It has implemented a compulsory pilotage scheme in the Torres Strait that it believes is essential to protect its marine environment. It has used the Resolution MEPC.133(53) to legitimize its actions, even though many states disagree with Australia's interpretation of the Resolution. Reports have indicated that there has been 100% compliance with the compulsory pilotage scheme since it went into force in 2006.[134] This is not surprising because shipmasters and shipowners are not likely to defy the pilotage scheme given the heavy penalties for noncompliance.

Australia seems to be assuming that no state party to UNCLOS has a sufficient interest in the issue to challenge its actions before an international court or arbitral tribunal. The United States is not able to challenge Australia before an international court or tribunal because it is not a party to UNCLOS and only parties have access to the dispute settlement procedures in Part XV. Other maritime states parties to UNCLOS could invoke Part XV. However, the issue is whether any of these states believes that the potential benefits of a legal challenge outweigh the costs. The costs are not merely the costs of litigation. If any state formally challenges Australia, it will also have to be prepared for possible repercussions in other areas of its bilateral relations. Australia may decide that it should review its bilateral relations with any state that mounts a legal challenge on an issue which it considers of great importance to its environment.

The likelihood of a state making a litigation challenge increases if a state views the issue not just in terms of Australia's actions, but as a dangerous precedent. Australia has taken pains to argue that its pilotage scheme in the Torres Strait is unique and that it does not establish a precedent that could be followed in other straits used for international navigation.[135] However, the Torres Strait precedent is likely to be carefully studied by other littoral states that are not entirely happy with the provisions on straits used in international navigation in UNCLOS and that might wish to consider the possibility of adopting laws

and regulations on foreign ships exercising transit passage beyond those authorized to be adopted in Article 42.

The issue of a precedent is likely to be the greatest concern for states whose economies are dependent on transit passage through the Strait of Malacca and Singapore, such as Japan, China, Korea, and Singapore. These straits are arguably the most important in the world. Currently, more than 90,000 vessels pass through them annually, carrying half the world's trade and two-thirds of its oil supplies.

Some maritime states are likely to share the concern expressed by Professor Koh that the actions of Australia in the Torres Strait are an example of a growing trend of unilateral actions by coastal states which threaten the regimes of navigation and passage in UNCLOS.[136] The fear of "creeping jurisdiction" by coastal states was one of the fears of the maritime powers during the negotiating of UNCLOS. It is the reason that maritime states insisted that UNCLOS contain a system for compulsory binding dispute settlement. They anticipated that states would take unilateral actions of questionable legality under UNCLOS and understood that the only way to ensure that the balance set out in UNCLOS could be maintained would be to enable the maritime states to challenge unilateral actions of questionable legality by coastal states.

If any of the leading maritime states view the actions of Australia in this wider context, they may be more likely to challenge Australia before an international court or tribunal. If the challenge were successful, the decision of the court or arbitral tribunal would be an authoritative precedent on the interpretation of Part III of UNCLOS, especially the powers of littoral states under Article 42. Furthermore, the very fact that a legal challenge was mounted would send an important message to coastal states that, if they adopt unilateral actions of questionable legality which pose a threat to the navigation and passage in UNCLOS, they are likely to be challenged successfully by maritime states in an international court or tribunal.

If a maritime state were to take a leadership role in challenging Australia's compulsory pilotage measures for the Torres Strait, their challenge would likely be supported by the leading international shipping organizations, such as INTERTANKO, BIMCO, and ICS. Another possibility would be for several maritime states to jointly challenge Australia by invoking the dispute settlement procedures in Part XV. If several maritime states jointly challenged Australia, it would be much more difficult for Australia to target actions against them on other bilateral matters.

### *Issue 5: Is a Negotiated Compromise Possible?*

If one or more maritime states take action to challenge Australia before an international court or tribunal, it is likely to trigger serious negotiations to try to resolve the dispute, given that Australia's legal position is relatively weak. Would it be possible to reach a negotiated solution that meets the interests of both sides? A compromise might be possible where the parties first recognize the interests of the other side and search for a solution that meets both their interests. On the one hand, the maritime states would have to recognize that Australia believes strongly that compliance with its system of pilotage in the Torres Strait is essential to protect the fragile marine environment in the strait. On the other hand, Australia would have to recognize that the maritime states believe strongly that Australia's actions threaten the regime of transit passage in UNCLOS by creating a dangerous precedent. The common ground that meets the interests of both is to establish a system to ensure close to 100% compliance with a voluntary system of pilotage in the Torres Strait in a manner that is

consistent with UNCLOS. This would protect the fragile ecosystem in the Torres Strait without posing a threat to the transit passage regime set out in UNCLOS.

The fact that the Great Barrier Reef PSSA has been extended to the Torres Strait should assist such efforts[137] because the PSSA will be clearly designated on mariners' charts and maps. Australia could offer to amend its regulations in exchange for the major maritime powers and shipping organizations agreeing to promote compliance with a voluntary system of pilotage. Australia could establish a system of publicizing the names of "green states and green organizations" that are promoting compliance with the pilotage system and publish the names and flags of vessels that do not make use of the voluntary pilotage system. Australia could also request flag states whose ships have not utilized the voluntary pilotage system to take measures to promote compliance by ships flying their flag. In addition, Australia could provide financial incentives for ships entering its ports that have used the system of voluntary pilotage when transiting the Torres Strait. Australia could also pass a regulation denying entry into Australian ports to any ship that passes through the Torres Strait en route to Australia without taking on a pilot.

On their side, maritime states could offer to strongly encourage ships flying their flag to make use of Australia's system of pilotage in the Torres Straits. International shipping organizations, such as INTERTANKO and BIMCO, could also work with their members to ensure that they comply with the voluntary system of pilotage in the Torres Strait.

The above measures, if adopted, could lead to almost full compliance with the system of pilotage in the Torres Strait in a manner that is consistent with UNCLOS and international law and achieve the objectives of both Australia and the maritime states.

## Recommendations to Amend the PSSA Guidelines

PSSAs are an important management tool for ensuring that the marine environment of sensitive sea areas is protected from threats posed by ship-source pollution in a manner that balances the legitimate interests of coastal states and the major maritime states. The PSSA Guidelines[138] have been revised several times and further revisions are likely to be necessary. Given the problems and issues raised by Australia's measures for the Torres Strait, the MEPC should consider further amendments to the PSSA Guidelines.

First, to better take account of the UNCLOS provisions on the regulation of ships in various maritime zones, the PSSA Guidelines should be amended to require that a proposal for a PSSA should clearly specify whether it will affect passage regimes in the various maritime zones, including: (1) innocent passage in the territorial sea, (2) transit passage in a strait used for international navigation, (3) archipelagic sea lanes passage in an archipelagic sea lane, and/or (4) freedom of navigation in an exclusive economic zone.

Second, the PSSA Guidelines should be amended to require states proposing PSSAs to include specific information on the legal basis for the proposed associated protective measures, including specific references to the applicable IMO Conventions and Resolutions that provide a legal basis for the associated protective measures.

Third, the PSSA Guidelines should be amended to include a provision similar to that in Regulations 10 to 12 of Chapter V of SOLAS[139] which provides that nothing in the PSSA Guidelines is to prejudice the rights and duties of governments under international law as reflected in UNCLOS, including the legal regimes of straits used for international navigation and archipelagic sea lanes.

Fourth, the PSSA Guidelines should be amended to require PSSA proposals to include specific information on the measures that the proposing states intend to take to promote

compliance with or enforce any proposed associated protective measures. The information should include measures to be taken by flag states, port states, and coastal states. It should also indicate specifically how such measures are consistent with UNCLOS, with specific references to the relevant provisions of UNCLOS.

Fifth, the PSSA Guidelines should be amended to better reflect the fact that they are a management tool for balancing the interests of coastal states in protecting their marine environment with the interests of user states with rights of passage and navigation. When associated protective measures are proposed that would place limits on freedoms of navigation and rights of passage, the MEPC should be required to undertake a cost-benefit analysis or risk assessment in which the potential benefits to the marine environment are carefully weighed against the costs of imposing restrictions on freedoms of navigation and passage rights. The approach currently followed by the MEPC does not achieve this objective. The procedures should also ensure that the shipping organizations and maritime states are given an opportunity to express their views on the costs and benefits of proposed associated protective measures.

Finally, the PSSA Guidelines should be amended to require that any MEPC Resolution designating an area a PSSA and establishing associated protective measures include a paragraph stipulating how those measures are to implemented by flag states, port states, and coastal states.

## Conclusions

Australia's action in 2006 imposing a compulsory pilotage system in the Torres Strait raises fundamental issues on the powers and procedures of the IMO in adopting associated protective measures in PSSAs and on the powers of littoral states under UNCLOS to adopt regulations on ships exercising the right of transit passage in a strait used for international navigation. The conclusion of this article is that Australia's actions are inconsistent both with the wording and intent of the IMO-adopted Resolution on the Torres Strait[140] relied on by Australia as a justification for its actions and with the wording of UNCLOS.

If one or more maritime states challenge before an international court or arbitral tribunal Australia's regulations on compulsory pilotage, the chances are good that the challenge will succeed. This would create an authoritative precedent on the extent of the powers of littoral states under UNCLOS to regulate ships exercising the right of transit passage in straits used for international navigation.

If a court or tribunal were to rule that the powers of littoral states to regulate ships exercising transit passage in a strait used for international navigation are as limited as argued in this article, then pressure would be on the IMO to develop and adopt international regulations, procedures, and practices on the safety of navigation and ship-source pollution to meet the increasing environmental consciousness in coastal states to protect and preserve their marine environment. While UNCLOS limits the power of states bordering straits used for international navigation to adopt laws and regulations on transit passage, it gives wide powers to the IMO to establish international rules and standards on ships exercising transit passage. Because all ships exercising the right of transit passage are to comply with generally accepted international regulations, procedures, and practices, it is essential that the IMO continue to play its vital lawmaking role with respect to navigational safety and ship-source pollution.

If no maritime state challenges Australia's compulsory pilotage measures, the system in the Torres Strait will remain in place, despite serious questions as to its consistency

with UNCLOS. The issue then will be whether other states use the Australian actions as a precedent to legitimize their taking unilateral actions of questionable legality to regulate ships exercising transit passage in straits used for international navigation.

The Australian actions have already had an impact within the IMO. The 2005 Revised Guidelines on PSSAs contain no reference to pilotage systems as a possible associated protective measure.[141] The MEPC is likely to be much more careful before agreeing to any associated protective measures in a PSSA if the proposed measures might impose on the right of transit passage or the right of archipelagic sea lanes passage. Also, it is very likely that some members of the MEPC will argue against the adoption of any pilotage schemes in PSSAs until a clear legal basis is provided for pilotage schemes under SOLAS. Finally, the MEPC is likely to revise the PSSA Guidelines to take into account the impact of PSSAs on the rights of transit passage and archipelagic sea lanes passage.

Australia may yet decide to resolve this dispute through negotiation. As argued above, the issue of the pilotage system in the Torres Strait can be resolved through negotiation to reach a compromise solution that meets the interests of both parties. Australia could decide that it is not in its long-term interests to take unilateral actions of questionable international legality which may undermine carefully negotiated international agreements (e.g., UNCLOS), even when such actions serve its short-term interests. Instead, Australia could decide that, as a responsible member of the international community, its long-term interests lie in seeking solutions that not only serve its national interests, but are consistent with international law.

## Notes

1. "Extension of Existing Great Barrier Reef PSSA to include the Torres Strait Region," submitted by Australia and Papua New Guinea, Marine Environment Protection Committee (MEPC), 49th Sess., IMO Doc. MEPC 49/8, 10 April 2003 (hereafter MEPC 49/8).

2. Adopted in Montego Bay, Jamaica, on 10 December 1982, entered into force on 16 November 1994. As of 6 February 2007, there were 153 states parties to the Convention. Text and status are available at www.un.org/Depts/los/index.htm (hereafter UNCLOS).

3. "Designation of the Torres Strait as an Extension of the Great Barrier Reef Particularly Sensitive Sea Area," IMO Resolution MEPC.133(53), MEPC, 53rd Sess., adopted on 22 July 2005, IMO Doc. MEPC 53/24/Add.2, Annex 21 (hereafter Resolution MEPC.133(53)).

4. "Marine Notice 8/2006, Revised Pilotage Requirements for Torres Strait," Australian Maritime Safety Authority, 16 May 2006 and "Marine Notice 16/2006, Further Information on Revised Pilotage Requirements for Torres Strait," Australian Maritime Safety Authority, 3 October 2006; available at www.amsa.gov.au/Shipping_Safety/Marine_Notices/2006/. The regulations establishing the new compulsory pilotage system in the Torres Strait were specified in Marine Orders Part 54: Coastal Pilotage, Issue 4 (Order No. 10 of 2006), issued by the Australian Maritime and Safety Authority on 1 August 2006 to come into operation on 6 October 2006.

5. The expression "competent international organization," when used in the singular in UNCLOS, applies exclusively to the IMO as the specialized agency within the United Nations system responsible for the international regulation of shipping. IMO, *Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization*, 26 January 2005, LEG/MISC/4, at 2 (hereafter LEG/MISC/4).

6. UNCLOS, supra note 2, arts. 55 and 58.

7. UNCLOS, supra note 2, arts. 58 and 87.

8. UNCLOS, supra note 2, art. 92.

9. UNCLOS, supra note 2, arts. 56 and 73.

10. UNCLOS, supra note 2, arts. 56 and 211, paras. 5 and 6.

11. UNCLOS, supra note 2, art. 2.
12. UNCLOS, supra note 2, art. 49.
13. UNCLOS, supra note 2, arts. 17–19, 24, and 45.
14. UNCLOS, supra note 2, arts. 21 and 49.
15. UNCLOS, supra note 2, art. 42.
16. UNCLOS, supra note 2, arts. 42 and 54.
17. Adopted on 1 November 1974, entered into force on 25 May 1980. Text with amendments available at U.S. Coast Guard Navigation Center, www.navcen.uscg.gov./marcomms/imo/default.htm (hereafter SOLAS).
18. Adopted on 20 October 1972, entered into force on 15 July 1977. Text with amendments available at U.S. Coast Guard Navigation Center, www.navcen.uscg.gov./marcomms/imo/default.htm (hereafter COLREGS).
19. "Procedure for the Adoption and Amendment of Traffic Separation Schemes, Routeing Measures other than Traffic Separation Schemes, including Designation and Substitution of Archipelagic Sea Lanes, and Ship Reporting Systems," IMO Assembly Resolution A.858(20), 27 November 1997, para. 1.
20. On PSSAs generally, see the IMO home page at www.imo.org. On the history of PSSAs, see Gerard Peet, "Particularly Sensitive Sea Areas—A Documentary History," 9 *Int'l J. Marine and Coastal L.* 469–506 (1994).
21. "Guidelines for the Designation of Special Areas and the Identification of Particularly Sensitive Sea Areas," IMO Assembly Resolution A.720(17), adopted on 6 November 1991 (hereafter 1991 PSSA Guidelines); replaced by "Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas," IMO Assembly Resolution A.927(22), IMO Assembly, 22nd Sess., adopted on 29 November 2001 (hereafter 2001 PSSA Guidelines); replaced by "Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas," IMO Assembly Resolution A.982(24), IMO Assembly, 24th Sess., adopted on 1 December 2005 (hereafter 2005 Revised PSSA Guidelines).
22. REEFREP was established by "Mandatory Ship Reporting in the Torres Strait and Inner Route of the Great Barrier Reef," IMO Resolution MSC.52(66), which was adopted by the Maritime Safety Committee on 30 May 1996, MSC 66/24/Add.1 (hereafter REEFREP).
23. UNCLOS, supra note 2, art. 211, para. 5.
24. 2001 PSSA Guidelines, supra note 21.
25. 2001 PSSA Guidelines, supra note, 21, para. 6.1.
26. SOLAS, supra note 17, Chapter V, Regulation 8, provides for Routeing Measures. Annex 5 of Chapter V of SOLAS contains advice on the use of routing systems as provided in the General Provisions on Ships' Routeing, IMO Assembly Resolution A.572(14) as amended.
27. SOLAS, supra note 17, Chapter V, Regulation 11.
28. 2001 PSSA Guidelines, supra note 21, para. 6.1.3
29. 2001 PSSA Guidelines, supra note 21, para. 7.4.2.
30. 2001 PSSA Guidelines, supra note 21, para. 7.7.
31. SOLAS, supra note 17, Chapter V, Regulation 10, Ships' Routeing, para. 10; Regulation 11, Ship Reporting Systems, para. 9; and Regulation 12, Vessel Traffic Services, para. 5.
32. For a history of the development of PSSAs, see Peet, supra note 20. For a summary of developments leading to the 2001 PSSA Guidelines, see J. Ashley Roach, "Particularly Sensitive Sea Areas: Current Developments," in *The Stockholm Declaration and Law of the Marine Environment* (Myron H. Nordquist, John Norton Moore, and Said Mahmoudi, eds.), (Center of Oceans Law and Policy, Virginia, and Martinus Nijhoff Publishers, 2003), at 311–350.
33. "Report of the Marine Environment Protection Committee on Its Thirtieth Session," 8 January 1991, MEPC 30/24, Annex 17 (hereafter MEPC 30/24)
34. "Protection of the Great Barrier Reef Region," Resolution MEPC.45(30) in MEPC 30/24, supra note 33, Annex 18 (hereafter Resolution MEPC.45(30)).
35. A map of the pilotage areas in the Great Barrier Reef and Torres Straits is available at Torres Pilots, www.torrespilots.com.au.

36. "Use of Pilotage Services in the Torres Strait and the Great Barrier Reef North East Channel," IMO Assembly Resolution A.710(17), 6 November 1991 (hereafter IMO Resolution A.710(17)).

37. Stuart B. Kaye, "Regulation of Navigation in the Torres Strait: Law of the Sea Issues" in *Navigational Rights and Freedoms and the New Law of the Sea* (Donald R Rothwell and Sam Bateman, eds.) (Martinus Nijhoff, 2000), at 126 and Stuart B. Kay, *The Torres Strait* (Kluwer Law International, 1997), at 84–85.

38. REEFREP, supra note 22.

39. "Amendments to the Mandatory Ship Reporting in the Torres Strait and Inner Route of the Great Barrier Reef (REEFREP)," submitted by Australia, 28 March 2003, NAV 49/3/5, para. 7 (hereafter NAV 49/3/5).

40. MEPC 49/8, supra note 1.

41. MEPC 49/8, supra note 1.

42. 2001 PSSA Guidelines, supra note 21, para. 7.4.2.

43. "Recommendation on Pilotage," IMO Assembly Resolution A.159 (ES.IV), 27 November 1968.

44. MEPC 49/8, supra note 1, para. 6.2.1.

45. 2001 PSSA Guidelines, supra note 21, para. 7.7.

46. "Report of the Informal Technical Group," MEPC 49th Sess., 16 July 2003, IMO Doc. MEPC 49/WP.10.

47. "Report of the Marine Environment Protection Committee on Its Forty-ninth Session," MEPC 49th Sess., 8 August 2003, IMO Doc. MEPC 49/22, para. 8.19 (hereafter MEPC 49/22).

48. See MEPC 49/22, supra note 47, paras. 8.26–8.27.

49. "Torres Strait PSSA Associated Protective Measure—Compulsory Pilotage," submitted by Australia and Papua New Guinea, NAV Sub-Committee, 50th Sess., 16 July 2003, IMO Doc. NAV 50/3 (hereafter NAV 50/3).

50. NAV 50/3, supra note 49, paras. 5.9–5.13.

51. "Results of a Safety of Navigation Assessment Conducted for the Torres Strait," submitted by Australia, NAV Sub-Committee, 50th Sess., 2 April 2004, IMO Doc. NAV 50/INF.2.

52. "Report to the Maritime Safety Committee," NAV Sub-Committee, 50th Sess., 28 July 2004, IMO Doc. NAV 50/19, para. 3.15 (hereafter NAV 50/19).

53. NAV 50/19, supra note 52, para. 3.16.

54. NAV 50/19, supra note 52, paras. 3.22–3.23.

55. NAV 50/19, supra note 52, para. 3.29, subparas. 14–17.

56. "Torres Strait PSSA Associated Protective Measure—Compulsory Pilotage," submitted by Australia and Papua New Guinea, MEPC, 52nd Sess., 6 August 2004, IMO Doc. MEPC 52/10/3.

57. "Report of the Marine Environment Protection Committee on Its Fifty-second Session," MEPC, 52nd Sess., 18 October 2004, IMO Doc. MEPC 52/24.

58. "Torres Strait PSSA Associated Protective Measure—Compulsory Pilotage," submitted by Australia and Papua New Guinea, Legal Committee, 89th Sess., 24 August 2004, IMO Doc. LEG 89/15 (hereafter LEG 89/15).

59. "Report of the Legal Committee on the Work of Its Eighty-ninth Session," Legal Committee, 89th Sess., 4 November 2004, IMO Doc. LEG 89/16, para.225 (hereafter LEG 89/16).

60. LEG 89/16, supra note 59, para. 237.

61. LEG 89/16, supra note 59, para. 241.

62. MEPC.45(30), supra note 34.

63. "Report of the Maritime Safety Committee on Its Seventy-ninth Session," IMO Doc. MSC 79/23, 15 December 2004, para. 10.13 (hereafter MSC 79/23).

64. MSC 79/23, supra note 63, para. 10.13.

65. MSC 79/23, supra note 63, paras. 10.14–10.16.

66. MSC 79/23, supra note 63, para. 10.12.

67. "Extension of the Great Barrier Reef to Include the Torres Strait," submitted by Australia and Papua New Guinea, MEPC, 53rd Sess., 13 May 2005, IMO Doc. MEPC 53/8/3.

68. "Report of the Marine Environment Protection Committee on Its Fifty-third Session," MEPC 53rd Sess., 25 July 2005, IMO Doc. MEPC 53/24, paras. 8.1–8.2 (hereafter MEPC 53/24).

69. MEPC.133(53), supra note 3.

70. MEPC.133(53), supra note 3, para. 3, reproduced at supra note 64.

71. MEPC.133(53), supra note 3, para. 3.

72. MEPC 53/24, supra note 68, para. 8.5.

73. MEPC 53/24, supra note 68, para. 8.6.

74. MEPC 53/24, supra note 68, para. 8.7.

75. "Report of the Technical Group on Particularly Sensitive Sea Areas (PSSAs)," MEPC 53rd Sess., 20 July 2005, IMO Doc. MEPC 53/WP.15, para. 3.1.

76. MEPC.133(53), supra note 3.

77. Julian Roberts, "Compulsory Pilotage in International Straits: The Torres Strait PSSA Proposal," 37 *Ocean Development and Int'l L.*, 93–112 (2006).

78. "Marine Notice 8/2006," supra note 4.

79. Under the regulations, the master and owner are each liable to a maximum fine of A$55,000 and A$275,000 respectively, for navigating without a pilot in an area subject to compulsory pilotage.

80. "Report to the Maritime Safety Committee, NAV Sub-Committee," 52nd Sess., 15 August 2006, IMO Doc. NAV 52/18, paras. 17.74–17.76 (hereafter NAV 52/18). The full statement by Singapore is included in Annex 17 of the Report.

81. NAV 52/18, supra note 80, para. 17.76.

82. Text of diplomatic note of the United States to Australia provided to the author.

83. Text of diplomatic note of Singapore to Australia provided to the author.

84. Text of Australian reply to diplomatic note of the United States provided to the author.

85. "Marine Notice 16/2006," supra note 4.

86. This is consistent with the principle of sovereign immunity and with Articles 95 and 96 of UNCLOS which provide that warships and ships used only on government noncommercial service have immunity from the jurisdiction of any state other than the flag state. However, today most of the sustainment cargo for military forces is carried on non-sovereign immune vessels.

87. "Marine Notice 16/2006," supra note 4.

88. "Torres Strait", submitted by International Chamber of Commerce (ICS), BIMCO, INTERCARGO, and INTERTANKO, MEPC 55th Sess., 10 August 2006, IMO Doc. MEPC 55/8/3.

89. "Report of the Marine Environment Protection Committee on Its Fifty-fifth Session," MEPC 55th Sess., 16 October 2006, IMO Doc. MEPC 55/23 (hereafter MEPC 55/23). The full text of the statement by the ICS is in Annex 21 of the Report.

90. MEPC 55/23, supra note 89, paras. 8.9–8.11.

91. MEPC 55/23, supra note 89, para. 8.12. The full text of the statement by Singapore is in Annex 22 of the Report.

92. MEPC 55/23, supra note 89, para.8.13. The full text of the statement by Australia is in Annex 23 of the Report.

93. Resolution MEPC.45(30), supra note 34.

94. Tommy Koh, "A Passage to Safety," 7th Cedric Barclay Memorial Lecture, International Congress of Maritime Arbitrators, Singapore, 27 February 2007. The lecture was reprinted in *Straits Times* on 28 February 2007 and published on the same day in *Straits Times Interactive*, available at www.straitstimes.com/.

95. Information provided to the author from U.S. State Department, Office of the Legal Advisor.

96. Information provided to the author from U.S. State Department, Office of the Legal Advisor.

97. MSC 79/23, supra note 63, para. 10.14.

98. IMO Resolution A.710(17), supra note 36.

99. "Amendments to the Existing Mandatory Ship Reporting System for the Torres Strait and the Inner Route of the Great Barrier Reef (REEFREP)," Resolution MSC.161(78) of 17 May 2004,

Sub-Committee on the Safety of Navigation, Report to the Maritime Safety Committee, 28 July 2003, IMO Doc NAV49/19, Annex 4, at 2, para. 3.1 (hereafter Resolution MSC.161(78)).

100. MSC.161(78), supra note 99, at 9, para. 9.1.

101. LEG/MISC/4, supra note 5, at 8.

102. MEPC 53/24, supra note 68, paragraph quoted at length at supra note 72.

103. MEPC 53/24, supra note 68, para. 8.6.

104. MEPC 55/23, supra note 89.

105. MEPC 53/24, supra note 68, paras. 8.9–9.12.

106. MEPC 55/23, supra note 89, Annex 23.

107. A state has broad powers to regulate passage in its internal waters because they are subject to its sovereignty. It also has powers to regulate ships exercising the right of innocent passage in its territorial sea under Article 21 of UNCLOS, supra note 2.

108. 2001 PSSA Guidelines, supra note 21, para. 7.7

109. See LEG 89/15, supra note 58, paras. 9 and 20.

110. Technically, one of the compulsory pilotage areas in the Torres Strait passes through internal waters because they are inside the straight baselines connecting small islands. However, Article 8, paragraph 2, of UNCLOS provides that, when the use of straight baselines has the effect of enclosing as internal waters areas that had not previously been considered as such, rights of passage apply in those waters. This has been acknowledged by Australia.

111. "Marine Notice 16/2006," supra note 4, and "Marine Notice 8/2006," supra note 4.

112. International Convention for the Prevention of Pollution from Ships 1973 (1973), 12 *International Legal Materials* 1319, as amended by the Protocol Relating to the International Convention for the Prevention of Pollution from Ships 1978 (1978), 17 *International Legal Materials* 546 (known together as MARPOL 73/78). MARPOL 73/78, together with Annexes I and II, entered into force on 2 October 1983. The text of the Convention, as amended, is available on the home page of the IMO at http://www.imo.org under "Information Resources."

113. On the legislative history of Part III, see *Straits Used for International Navigation, Legislative History of Part III of the United Nations Convention on the Law of the Sea,* vol. II (UN Division of Ocean Affairs and the Law of the Sea, United Nations, New York, 1992); S. N. Nandan and D. H. Anderson, "Straits Used for International Navigation: A Commentary on Part III of the United Nations Convention on the Law of the Sea 1982," 60 *Brit Y.B. Int'l L.* 159–204 (1989); and *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (Satya N. Nandan and Shabtai Rosenne, eds., Martinus Nijhoff Publishers, 1993).

114. "Draft Articles on the Territorial Sea and Straits Submitted by the United Kingdom," UN Doc. A/CONF.62/C.2/L.3. For text of the UK proposal and statement by the UK delegation when introducing the proposal, see *Legislative History*, supra note 113, at 14–17 and 32–33.

115. For a summary of the informal proposals for amendments, see Nandan and Rosenne, supra note 113, at 372–374.

116. *Legislative History*, supra note 113, at 107, and Nandan and Anderson, supra note 113, at 191, n.117.

117. See LEG 89/16, supra note 59, paras. 232 and 233.

118. See LEG 89/15, supra note 58.

119. LEG 89/15, supra note 58, para. 24.

120. See Nandan and Rosenne, supra note 113, at 354–366.

121. LEG 89/15, supra note 58, para. 25–26.

122. LEG 89/15, supra note 58, para. 27.

123. NAV 50/19, supra note 52, para. 3.18.

124. Nandan and Rosenne, supra note 113, at 344.

125. Nandan and Anderson, supra note 113, at 185.

126. SOLAS, supra note 17.

127. 2001 PSSA Guidelines, supra note 21, para. 6.1.

128. 2001 PSSA Guidelines, supra note 21, para. 7.4.2.

129. LEG 89/16, supra note 59, para. 237.

130. SOLAS, supra note 17.

131. NAV 50/19, supra note 53, para. 3.29, point 16.

132. UNCLOS, supra note 2, art. 211, para. 3, allows states to impose conditions on the entry of vessels to their ports.

133. UNCLOS, supra note 2, arts. 279–299. For a detailed discussion of the dispute settlement regime in UNCLOS, see Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2005).

134. "Compulsory Pilotage in the Torres Strait," *Semaphore*, Issue 7, April 2007, at 2, available at www.navy.gov.au/spc.

135. LEG 89/15, supra note 58, para. 9. Australia's written reply to the United States in March 2007 states that: "Australia continues to believe that the circumstances in the Torres Strait are unique and that our scheme does not establish a precedent adaptable elsewhere."

136. Koh, supra note 94.

137. MEPC.133(53), supra note 3.

138. See supra note 21.

139. SOLAS, supra note 26.

140. MEPC.133(5), supra note 3.

141. 2005 Revised Guidelines, supra note 21, para. 6.1.3.</EN>