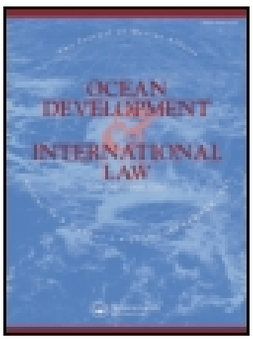

Ocean Development & International Law

ISSN: 0090-8320 (Print) 1521-0642 (Online) Journal homepage: https://www.tandfonline.com/loi/uodl20

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To cite this article: Erik Jaap Molenaar (2007) Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage, Ocean Development & International Law, 38:1-2, 225-257, DOI: 10.1080/00908320601071520

To link to this article: https://doi.org/10.1080/00908320601071520

Ocean Development & International Law, 38:225–257, 2007

ISSN: 0090-8320 print / 1521-0642 online
DOI: 10.1080/00908320601071520

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Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage

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This article examines the scope and extent of port state jurisdiction in regard to marine pollution and marine capture fisheries and looks at such issues as access to port, conditions for entry into port, extraterritorial prescription, and in-port enforcement. One of the arguments put forward is that the justifiability of extraterritorial port state jurisdiction depends not only on an adequate jurisdictional basis, but also on the type of enforcement action taken. Port state jurisdiction is gradually moving from a voluntary basis regarding limited subject areas toward being comprehensive and mandatory through regional and global arrangements. The notion of a "responsible port state," a state committed to making the fullest possible use of its jurisdiction under international law in furtherance of not just its own rights and interests, but also those of the international community, could play a key role in optimizing the use of port state jurisdiction (balanced by appropriate safeguards) and achieving mandatory coverage through regional and global arrangements.

Keywords fisheries, jurisdiction, marine pollution, port state

Introduction

Like land borders, seaports give access to the landmass of a state for persons and goods and therefore are logical points of control for, *inter alia*, customs, immigration, sanitation, and national security purposes. Ports also provide an opportunity for verifying if visiting foreign ships comply with certain types of national or international technical standards or if they have engaged in certain illegal behavior in the port state's maritime zones, in the maritime zones of other states, or on the high seas. The costs and difficulties of enforcement at sea also mean that, despite its shortcomings, in-port enforcement is often the only option.

Port state jurisdiction clearly does not just serve the national interests, but can also further the interests of the international community[1] by, among other things, ensuring safety at sea (maritime safety), marine environmental protection, and sustainable utilization of marine

Received 28 April 2006; accepted 5 May 2006.

The author thanks T. Løbach, B. Martin-Castex, H. Ringbom, I. Snijders, H. Vonk, and an anonymous reviewer for assistance or comments on an earlier version. Any errors or omissions remain the responsibility of the author.

A shorter version of this article has appeared as "Port State Jurisdiction: Towards Mandatory and Comprehensive Use," in *The Law of the Sea: Progress and Prospects*, eds. D. Freestone, R. Barnes and D. Ong, (Oxford: Oxford University Press, 2006), 192–209.

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living resources; safeguarding marine biodiversity; and combating international terrorism. For instance, illegal, unreported, and unregulated (IUU) fishing and illegal vessel-source pollution on the high seas often have transboundary effects on species or the broader marine environment within the port state's maritime zones. By complementing the flag state's responsibility over its ships, port states can make an important contribution to ensuring compliance with international regulatory efforts.[2] Flag states, (beneficial) owners and operators that benefit as "free riders" or "flags of convenience" from the primacy of flag state jurisdiction and the consensual nature of international law can, through port state jurisdiction, be deprived of competitive advantages created by lower operating costs and avoidance of restrictions. The level playing field for maritime activities thereby promoted is an essential component of, or even a prerequisite for, safeguarding many of the aforementioned interests of the international community. However, if port state jurisdiction remains optional, it will allow port states to benefit as free riders from the consensual nature of international law by operating "ports of convenience."

There are various incentives for operating ports of convenience. Visiting foreign ships can be crucial for sustaining the local economy of the port, *inter alia*, through port fees, use of port services (e.g., loading, off-loading, refueling, and resupplying), processing of cargo, or linkages with transport on land. The importance of visiting ships also can go far beyond the economy of the port, for instance, where the port state is heavily dependent on the import of certain products. These incentives may lead to situations where internationally agreed standards, like those adopted within the International Maritime Organization (IMO), the International Labor Organization (ILO), or by regional fisheries management organizations (RFMOs), are not vigorously enforced or not enforced at all so that a port can attract the business of ships which have violated these standards.

One of the arguments in this article is that, subject to certain conditions, general international law allows port states to prescribe and enforce more stringent rules and standards than those agreed to at the appropriate international level. However, due to the wide range of potential repercussions, unilateral approaches by port states, even if in accordance with international law, are not likely to be pursued unless a policy assessment of its overall cost-effectiveness indicates that the expected benefits to the port state outweigh the expected risks and losses.

Among the risks are that a state's ports will become less convenient than those of its neighbors. Global or regional uniformity in standards relating to maritime activities therefore does not just contribute to a level playing field for such activities, but also for ports.[3] In addition, other states *may* pursue unilateral approaches by retaliation and thereby affect an initiating port state in various ways, for instance, by restricting access to foreign ports and markets of vessels flying its flag. A broader resort to unilateralism will also undermine the effectiveness and credibility of competent international organizations such as the IMO. Additionally, unilateralism may spread to, and trigger repercussions in, spheres that are unrelated to maritime activities.

Nevertheless, a state may feel that the expected risks (losses) are outweighed by the expected benefits; for instance, enhanced environmental protection, security, and sanitation in its ports and also indirectly for its coasts and maritime zones. A unilateral approach may also be aimed at stimulating progress within international institutions. However, more stringent conditions for entry into port than those agreed to at the appropriate international level may also be a guise for giving a state's own industries, for example, the shipbuilding sector, a competitive advantage. Moreover, by limiting access to ports, a state may use its relative proximity to high seas fishing grounds to give its own fishing and supporting fleet a competitive advantage.

The focus in this article is mainly on port state jurisdiction respecting subject matter within the competence of the IMO, ILO, and RFMOs. While there are no definitions of "port state" or "coastal state" in the United Nations Convention on the Law of the Sea (LOS Convention)[4] or any other global instrument with universal participation, this article will use "port state" in a broad sense encompassing prescriptive and enforcement jurisdiction over the port's own maritime zones (in its capacity as a coastal state) as well as in certain situations over vessel activities on high seas and in the maritime zones of other coastal states. The international law perspective of this article directs that the issue of interest is port state jurisdiction over visiting foreign vessels.

Instead of the more limited focus on port state control (PSC), this article deals with port state jurisdiction. The notion of PSC is best understood in light of the rationale of the Paris Memorandum of Understanding (MOU)[5] and other regional merchant shipping PSC regimes modeled thereon, which were established to enhance vessel compliance with internationally agreed standards by means of commitments by port authorities to carry out inspections and to take predominantly corrective enforcement action (i.e., detention for the purpose rectification) regarding visiting foreign vessels.[6] These regional PSC agreements, even though non-legally binding, contain savings clauses[7] to ensure that nothing in them affects the jurisdiction of a port state. Thus, a port state is not restrained from prescribing more stringent standards than those internationally agreed or to take more onerous enforcement measures.[8]

The next section examines the scope and extent of port state jurisdiction under current general international law and addresses, *inter alia*, access to port, conditions for entry into port, extraterritorial prescription, and in-port enforcement as well as the implications of international trade law. The argument that the justifiability of extraterritorial port state jurisdiction depends not only on an adequate jurisdictional basis, but also on the type of enforcement action taken, is examined by means of four case studies. The following three sections discuss the broadening scope of port state jurisdiction, optimizing the use of the jurisdiction and the move toward mandatory port state jurisdiction and global coverage. The section on optimizing the use of port state jurisdiction elaborates on various exercises of port state jurisdiction which have recently developed or which remain underutilized.

Port State Jurisdiction Under General International Law

Access to Ports

Because ports lie wholly within a state's territory and therefore fall under its territorial sovereignty, customary international law acknowledges a port state's wide discretion in exercising jurisdiction over its ports. This was explicitly stated by the International Court of Justice in the *Nicaragua* case[9] and is implicitly confirmed by, *inter alia*, Articles 25(2), 211(3), and 255 of the LOS Convention. While there often may be a presumption of a right of access to ports, customary international law gives to foreign vessels no right of access to ports.[10] The Statute to the Convention on the International Regime of Maritime Ports,[11] which provides in Article 2 for access to ports based on the basis of national treatment and reciprocity, does not affect this conclusion due to the limited state participation in the Convention[12] and the fact that the conditional right which it establishes is further qualified, for instance, in relation to fishing vessels and warships.[13] The plethora of bilateral port access agreements in existence is a further indication of the absence of a right of access to ports under customary international law.[14]

A widely acknowledged exception to the above-mentioned discretion is for ships in distress or in a *force majeure* situation. Even in these cases, however, the specific circumstances may be such that the interests of the port state override those of the ship.[15] The IMO "Guidelines on Places of Refuge for Ships in Need of Assistance"[16] adopted in the aftermath of the *Prestige* disaster in 2002, confirm the need to balance the various interests attached to the ship and its crew with those of the coastal state.[17]

Conditions for Entry into Port

Apart from the exceptions discussed above, does a port state have unrestricted jurisdiction to regulate entry into port based on the rationale "who can do more can also do less"? It has been suggested that conditions that are patently unreasonable or discriminatory may amount to an abuse of rights.[18] However, these situations are largely academic. Port states are well aware of the wide range of the potential economic repercussions of arbitrary action. Moreover, most states today have limited their discretion regarding entry to port regulation by being contracting parties to a wide range of treaties that supports the principle of nondiscrimination. For instance, nondiscrimination is widely recognized in the international law of the sea,[19] international fisheries law,[20] IMO instruments, [21] regional merchant shipping PSC regimes,[22] and international trade law.[23]

It also is widely recognized that port states commonly do not exercise jurisdiction with regard to affairs that are essentially internal to the ship and do not affect the interests of the port state. This, however, is a matter of comity and policy and does not prejudice a port state's legal entitlement to exercise such jurisdiction.[24] The limitations arising from diplomatic immunities and sovereign immunities for foreign warships and other government ships operated for noncommercial purposes are a different situation yet again.[25]

Another general limitation on jurisdiction imposed by general international law is the need for a sufficiently close or substantial connection with the person, fact, or event and the state exercising jurisdiction.[26] This is not a hard and fast rule, but requires states to "exercise moderation and restraint as to the extent of jurisdiction assumed by its courts in cases having a foreign element, and to avoid encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by another state."[27] Until states are bound to more precise limitations on jurisdiction, for instance, through their adherence to treaties, it will be up to an international court or tribunal to rule on the sufficiency of a jurisdictional link in a particular case.[28]

The jurisdictional basis in international law for port state authority can either be territorial, quasi-territorial, or extraterritorial. The sufficiency of the territorial principle as a basis for jurisdiction can be presumed unless international law specifically provides otherwise. Illegal behavior occurring in port can be addressed by a port state on the basis of territorial jurisdiction. One of the case studies below deals with this in the context of port state jurisdiction over construction, design, equipment, and manning (CDEM) standards for foreign vessels in port.[29]

With regard to vessel behavior prior to entry, port states can rely on territorial jurisdiction where the behavior took place within their internal waters, archipelagic waters, or territorial sea. Jurisdiction over vessel behavior beyond the port state's territory can either be quasiterritorial or extraterritorial. The term "quasi-territorial" is used for jurisdiction by the port state over its exclusive economic zone (EEZ) or (outer) continental shelf pursuant to Articles 56 and 77 of the LOS Convention, to be exercised in conformity with the limitations in these and other provisions of the LOS Convention.[30] The resource-related

sovereign rights and interests of the coastal state in these maritime zones are the rationale behind this jurisdiction. It is submitted that this form of jurisdiction by now has become part of customary international law and therefore is also available for states which are not parties to the LOS Convention.

It is submitted that truly extraterritorial jurisdiction exercisable by a port state relates to vessel behavior occurring beyond its own maritime zones—vessel behavior on the high seas or in the maritime zones of other states. It is submitted that such jurisdiction *could* be justified by:

1. a treaty, whatever its underlying rationale;
2. the universality principle, which relates to activities directed against the interests of the international community regardless of where the activity takes place;
3. the effects or impact principle, which covers extraterritorial activities that have a significant effect on the state exercising jurisdiction;
4. the protective or security principle, which is similar to the effects or impact principle with the difference that the activities affect the vital interests of a state;
5. interests of the international community;[31] or
6. a combination of international community interests on the one hand and the effects or impact principle, or the protective or security principle on the other hand.

The view that jurisdiction merely *could* be justifiable is directly related to the absence of a right of access to ports under customary international law. However, the absence of this right does not mean that extraterritorial port state jurisdiction is exempt from the need for a sufficient jurisdictional basis. It is nevertheless submitted that the legality or justifiability of extraterritorial port state jurisdiction depends, in addition to the above-mentioned jurisdictional bases, on the type of enforcement action taken. This argument is developed in the next subsection.

Extraterritorial Prescription and In-Port Enforcement

Examples of port state enforcement measures include:[32]

1. prohibiting the landing, transshipment, or processing of cargo;
2. prohibiting the use of other port services, such as refueling, other forms of resupplying (water, food, equipment, bait), changing crew, making repairs, and so forth;
3. denial of access to ports (*ad hoc* or through *a priori* banning);
4. boarding and inspection of a vessel in port;
5. detention of a vessel until national legislation is complied with (e.g., repairs to meet CDEM standards); and
6. monetary or other penalties (including confiscation of ship or cargo) for violations of national legislation.

A distinction needs to be made between measures 1–3 and measures 5–6. The principal aim of the first three measures is to withhold benefits to which foreign vessels have no entitlement under general international law. The latter two, however, have a punitive element. While the punitive character of detention for the purpose of making repairs appears less onerous than that of a monetary penalty, owners or operators of large merchant vessels may often prefer the latter. For such ships, an extra day or even a couple of hours of idleness in port may amount to a significant loss of income.

There are two general rules in internation law on the relationship between prescription and enforcement. First, enforcement is only lawful if based on legislation that has been enacted in accordance with international law, which presumes a sufficient jurisdictional link, and which is applicable to the specific circumstances of the event calling for enforcement.[33] Second, national legislation enacted in accordance with international law does not necessarily bring unlimited enforcement powers. The provisions in the LOS Convention on coastal state prescription and enforcement are a good example where a state has prescriptive authority, but not enforcement authority.[34]

The argument that the legality or justifiability of extraterritorial port state jurisdiction depends, in addition to a sufficient jurisdictional basis, on the type of enforcement action taken will be examined below for four case studies: (1) national CDEM standards applied in port; (2) national CDEM standards relating to the EEZ, but applied in port; (3) unregulated fishing on the high seas; and (4) illegal discharges on the high seas.

National CDEM Standards Applied in Port. Articles 25(2), 211(3), and 219 of the LOS Convention are all relevant to the port state's competence to prescribe and enforce CDEM standards to foreign vessels in ports. Article 25(2) acknowledges the right of port states to prevent a breach of conditions for the entry into port. Implicit in this preventative enforcement power is not only a competence to prescribe conditions for entry, but arguably also an enforcement power in case conditions have been breached.[35] Article 211(3), the last sentence of which refers to Article 25(2), implicitly acknowledges a port state's right to "establish particular requirements for the prevention, reduction and control of pollution of the marine environment" as a condition for entry into port. Significantly, neither Article 25(2) nor Article 211(3) impose any substantive restrictions on a port state's prescriptive and enforcement jurisdiction. Conversely, coastal state prescription of CDEM standards for foreign vessels in the territorial sea or the EEZ must conform to the level of generally accepted international rules or standards.[36] Article 219 imposes a qualified obligation on port states to take certain enforcement measures where the seaworthiness of a vessel threatens damage to the marine environment, but this does not affect the port state's prescriptive competence or the possibility to impose more onerous enforcement measures. In fact, the imposition of this qualified obligation to take enforcement action could be regarded as evidence of the existence of such a right in general international law, as it seems unlikely that obligations to exercise jurisdiction would be created without there having first been a right to exercise such jurisdiction.

Due to their static nature, the level of compliance by vessels with CDEM standards commonly is uniform throughout a vessel's voyage. This is quite different from discharge standards and many types of fisheries conservation and management measures, where a vessel's noncompliance may occur only during part of a vessel's voyage. Unlike CDEM standards, these standards and measures clearly seek to regulate behavior. Irrespective of the question as to whether or not CDEM standards seek to regulate behavior, it is conclusive for the jurisdictional basis that noncompliance continues to occur in port. State's jurisdiction over CDEM standards with respect to a foreign vessel in port can safely be founded on the territorial principle. Even though the need for compliance in port commonly requires the vessel to comply throughout its voyage, this is not problematic if this extraterritorial effect is incidental rather than its purpose.

While the LOS Convention does not constrain a port state's wide discretion to prescribe vessel standards, this can occur through adherence to relevant IMO and ILO instruments. The LOS Convention explicitly recognizes this possibility in Article 237. However, while some specific provisions in relevant IMO and ILO instruments constrain a

port state's right to prescribe more stringently (referred to as a port state's "residual" prescriptive jurisdiction[37]), such constraints do not necessarily arise from adherence to these instruments.[38] Several provisions in IMO instruments explicitly confirm a port state's residual prescriptive jurisdiction[39] and this is also implicitly confirmed by the inclusion of the no-more-favorable-treatment (NMFT) clause in several IMO instruments[40] because an obligation to impose treaty norms on vessels flying the flag of nonparties must logically be based on a preexisting right under customary international law. If not, it would violate the fundamental principle of *pacta tertiis*.

The view advocated above[41]—that port states derive their right, to exercise jurisdiction from general international law, even though IMO and ILO instruments may constrain that right, is in opposition with the view that the NMFT clause and other provisions in those instruments are constitutive and create the rights for port states to prescribe and enforce vessel standards.[42] The view advocated is supported by limited, but significant, state practice, including the 1990 Oil Pollution Act (OPA)[43] of the United States,[44] the 1996 Stockholm Ro-Ro Passenger Ships Agreement,[45] and the European Union (EU) Regulation No. 417/2002.[46] EU Regulation No. 417/2002 was amended in 2003 to ensure that transport of heavy grade oils to or from EU ports would occur only by double-hull oil tankers. Because the EU was prepared to act unilaterally and exercise its residual jurisdiction as a port state, Annex I to MARPOL 73/78[47] was eventually amended to remove the main inconsistencies with the European Community (EC) Regulation.[48]

The 2005 amendments to Council Directive 1999/32/EC[49] are a further exercise of residual jurisdiction by, *inter alia*: (a) requiring passenger ships operating on regular services to or from any Community port not to use fuel with a sulfur content exceeding 1.5% by mass; and (b) requiring vessels at berth in Community ports not to use fuels with a sulfur content exceeding 0.1% by mass. These requirements apply to vessels of all flags.[50] It must be noted that it is unclear if and to what extent there are passenger ships operating on regular services to or from any Community port that fly flags of non-EU Member States.

Whether or not the EU's efforts to reduce nitrogen oxide (NO_x) emissions has a port state dimension is not yet clear.[51] A recent case before the Environmental Court of Appeal of Sweden may have an impact in this regard.[52] In this case the Court of Appeal ruled, *inter alia*, that nothing in the LOS Convention or MARPOL 73/78 prevents a port state from requiring foreign vessels to install stricter (than MARPOL 73/78) equipment to reduce NO_x emissions, provided these are justified according to national environmental legislation and nondiscriminatory.[53] In addition to the aforementioned enactments, there are other indications that the EU is not hesitant to use the residual jurisdiction of a port state.[54]

Pursuant to its Foreign Ships Act,[55] the Netherlands can require foreign ships that seek access to port to comply with maritime safety standards agreed to within the EU even if these would be more stringent than IMO standards. In view of the increasingly pervasive nature of EU regulation in the sphere of maritime safety and vessel-source pollution, EU Member states appear to have lost much of their residual port state jurisdiction in the absence of prior agreement at the EU level.[56]

However, there is also state practice in support of the contrasting view. In the *Sellers* case[57] before the New Zealand Court of Appeal, the issue was whether or not the Maltese-flagged pleasure craft *Nimbus* was, pursuant to Section 21(1) of the Maritime Transport Act of New Zealand, required to carry radio and emergency locator beacon equipment even though such a CDEM standard did not then exist in any international treaty. As to the relevant rules of international law, the Court concluded that:

> [A] port state has no general power to unilaterally impose its own requirements on foreign ships relating to their construction, their safety and other equipment and their crewing if the requirements are to have an effect on the high seas. Any requirements cannot go beyond those generally accepted, especially in the maritime conventions and regulations[58]

The words "are to have an effect on the high seas" indicate that the Court's conclusion was not limited to exercises of port state jurisdiction where the extraterritorial effect is the only purpose of the legislation. It is submitted that the New Zealand decision is flawed. The Court appears to have: misinterpreted Article 211(3) of the LOS Convention, failed to discuss the absence of a right of access to ports under general international law and Article 25(2) of the LOS Convention, incorrectly linking the notion of "generally accepted" to port state jurisdiction, misinterpreted the function of regional merchant shipping PSC regimes, and failed to refer to the savings clauses therein.[59] Nevertheless, the New Zealand Court's decision has been commented on favorably by some writers.[60]

With regard to the type of enforcement measures a port state can impose for noncompliance with a CDEM standard in port, a distinction should be made between national and international (generally accepted) CDEM standards. It is submitted that noncompliance with international CDEM standards entitles port states to use onerous enforcement measures, such as monetary penalties.[61] This view is supported by the fact such enforcement measures, would also be allowed for noncompliance by a foreign vessel in the territorial sea pursuant to Article 220(1) of the LOS Convention. The practice of port states nevertheless reveals that they commonly require rectification of the noncompliance. This practice could either be based on commitments to do so within regional merchant shipping PSC regimes[62] or by obligations under European or international law.[63] The punitive character of detention for the purpose of rectification as well as the potential repercussions of unilateralism undoubtedly have been instrumental in this practice. This notwithstanding, the commitments and obligations with respect to rectification must be interpreted as minimum requirements only and do not prejudice a port state's legal right to take more onerous enforcement measures.[64] This view is supported by the practice under the Paris MOU and EU law that shipowners or operators bear the costs of inspections that result in detention.[65] In addition, a survey carried out in 2005 among coastal state members of the EU,[66] indicated that several states have the legislative power to impose monetary penalties on foreign vessels for noncompliance with norms in the sphere of MARPOL 73/78 and the 1974 Safety of Life at Sea Convention (SOLAS 74)[67] and that a few states[68] had imposed such penalties.

Finally, in view of the port state's residual prescriptive jurisdiction and the territorial principle on which it relies, there is no reason why noncompliance with CDEM standards would not entitle the port state to use more onerous enforcement measures.[69] The same policy reasons for restraint apply here as well though. There seems to be little or no practice by states in this regard.[70]

National CDEM Standards Relating to the EEZ, but Applied in Port. Pursuant to Article 58(1) of the LOS Convention, the freedom of navigation also applies in the EEZ, but is subject to the jurisdiction over vessel-source pollution granted to the coastal state in accordance with, *inter alia*, Article 56 and Part XII. Pursuant to the 1990 OPA of the United States, tank vessels above 300 gross tons that wish to visit a U.S. port need to have certificates of financial responsibility and to comply with, among other things, a double hull standard.[71] Quite exceptionally, however, these requirements are also applicable to any vessel that uses the EEZ of the United States to "transship or lighter oil destined for a place

subject to the jurisdiction of the United States," which includes ports.[72] Access to ports by receiving vessels is therefore subject to compliance with these CDEM standards in the EEZ by both the receiving as well as the delivering vessels.

It should be noted that at the time of the OPA's enactment, MARPOL 73/78 did not contain a double-hull standard. This was adopted on March 6, 1992, and entered into force on July 6, 1993.[73] However, the United States used its right under Article 16(2)(f)(ii) of MARPOL 73/78 to opt out from these amendments. This was the first time that the opting out procedure under MARPOL 73/78 was ever used.[74] Differences between the OPA and MARPOL 73/78 continue to exist.[75] In some instances, the stringency level of the OPA exceeds "generally accepted" set out in Article 211(5) of the LOS Convention. In the absence of a treaty basis, this uncommon exercise of extraterritorial port state jurisdiction could perhaps be justified by the broad implicit prescriptive and enforcement powers under Articles 25(2) and 211(3) of the LOS Convention.[76] As this would require that only the less onerous enforcement powers be resorted to, the fact that OPA contains various provisions which provide for the more onerous enforcement measures such as monetary penalties[77] is of concern. It is nevertheless unclear whether these monetary penalties are in principle applicable involving foreign vessels and, if so, whether they have in fact ever been applied.

Unregulated Fishing on the High Seas. Article 116 of the LOS Convention recognizes that all states have a right to fish on the high seas. This right is safeguarded by the primacy of flag state jurisdiction on the high seas laid down in Articles 89 and 92(1), subject to various limited exceptions for at-sea enforcement, for instance those, in Articles 109–111. The extent to which these safeguards affect the discretion of port states pursuant to Article 25(2)[78] is at the heart of our discussion. The freedom to fish on the high seas is subject to, *inter alia*, the obligation to cooperate with coastal states and other states fishing on the high seas pursuant to Articles 63(2), 64–67, and 116–119. This duty to cooperate is strengthened by Article 8(3) of the Fish Stocks Agreement,[79] by which states fishing for straddling or highly migratory fish stocks are obliged to cooperate with or become a member of the relevant RFMO. Article 8(4) stipulates that only members or cooperating nonmembers are to have access to the relevant fishery resources.

Pursuant to Article 23(1) of the Fish Stocks Agreement, a port state "has the right and the duty" to take certain measures in its ports. These measures include, *inter alia*, the inspection of documents, fishing gear, and catch and, when it has been established that a catch was "taken in a manner which undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas," to prohibit landings and transshipments.[80] The IPOA on IUU Fishing regards high seas fishing by vessels flying the flag of non-(cooperating) members of relevant RFMOs in contravention of those RFMOs' conservation and management measures as one form of unregulated fishing on the high seas and urges port states to "not allow the vessel to land or transship fish."[81] It should be noted that measures taken against unregulated high seas fishing by states through an RFMO should be considered in light of that RFMO's practices on the issues of participation and allocation.[82] However, even if these practices were not consistent with international law, this would not constrain a port state's discretion under general international law to exercise jurisdiction with respect to a foreign fishing vessel in port.

Article 23 of the Fish Stocks Agreement is a significant departure from Article V(2) of the Food and Agriculture Organization of the United Nations (FAO) Compliance Agreement.[83] The latter provision imposes a duty of notification on port states, but makes no reference to the rights of port states to take other action, does not contain a savings clause (see further below), and appears to make in-port inspections subject to prior arrangements

with the flag state. This may be explained by the Compliance Agreement's relatively narrow focus on flag state responsibility. The FAO Code of Conduct for Responsible Fisheries, a non-legally binding international instrument under the framework of which the IPOA on IUU Fishing was adopted, also deals with port state duties in less specific terms as compared to Article 23 of the Fish Stocks Agreement.[84]

Article 23 of the Fish Stocks Agreement does not explicitly mention the right of port States to institute proceedings or to impose monetary or other penalties. This is an important distinction from Article 218 of the LOS Convention.[85] Some uncertainty is created nevertheless by paragraph (4) of Article 23, which reads: "Nothing in this article affects the exercise by States of their sovereignty over ports in their territory in accordance with international law." There seem to be two views of the purpose of this savings clause. First, the purpose of Article 23(4) is merely to confirm the powers that port states already have under general international law.[86] Thus, the savings clause ensures that the port State measures referred to in Article 23 are not just applicable to other state parties to the Fish Stocks Agreement, but are also applicable against vessels flying the flag of nonparties to the Fish Stocks Agreement. Under this reading, the innovation of Article 23 is that port state jurisdiction is no longer optional. However, even though the use of the word "duty" in paragraph (1) of Article 23 establishes mandatory port state jurisdiction as a general rule, this is softened by using "may" in relation to the specific enforcement measures referenced.

There is no indication that port state practices arising from RFMOs distinguish between vessels flying the flag of a party or a nonparty to the Fish Stocks Agreement. This supports the conclusion that port state measures are part of customary international law. This port state practice predates the adoption of the Fish Stocks Agreement and supports the conclusion that Article 23 serves a confirmatory purpose.

According to a second interpretation, however, the savings clause (Article 23(4)) serves the *additional* purpose of upholding more extensive rights—residual jurisdiction—to which a port state would be entitled under customary international law. This could be the prescription of unilateral, rather than subregional, regional, or global, conservation and management measures as well as the use of more onerous enforcement measures than provided for under these arrangements. The broad wording of paragraph (4) justifies such an interpretation. The words "*inter alia*" in Article 23(2) do not appear to offer a complementary argument to support this[87] because they are linked to the initial phase of boarding and inspection rather than to the more onerous measures associated with the more advanced phase of enforcement in paragraph (3).

Paragraph 59 of the IPOA on IUU Fishing, which urges port states to take "any other actions [. . .] consistent with international law," does not lessen the ambiguity created by paragraph (4) of Article 23. Apart from the fact that it is a non-legally binding international instrument, the words "other actions" are too general to be interpreted as an implicit reference to more onerous enforcement measures. The reference to flag state consent in the last sentence of paragraph 59 also does not affect the ambiguity. This is somewhat different from the phrase "or to take measures such as the forfeiture of fish and fishery products, as may be provided for under [the port state's] national legislation"[88] which was included in the draft to paragraph 2.6 of what eventually became the FAO Port state Model Scheme.[89] The fact that this phrase was removed from the final text could be interpreted as a lack of broad international support that such enforcement measures are within the competence of port states under customary international law.

State practice indicates that a port state's residual jurisdiction exists mainly in relation to prescription and reliance on less onerous enforcement measures. Many port states refuse access to port to foreign vessels that: engage in unregulated high seas fishing activities,

violate conservation and management measures of RFMOs applicable to the vessels, or where the port state takes the view that the vessels' flag state has not discharged its obligation to cooperate with the port state or its obligation to exercise effective jurisdiction and control over its vessels.[90] In rare instances, port states make access to port conditional on compliance with conservation and management measures that apply to their fishing vessels on the high seas.[91] There is no indication that onerous measures (monetary penalties or vessel detention) have been resorted to in any of these cases. Also, no RFMO currently explicitly authorizes, let alone stipulates, such onerous enforcement measures by port states for vessels engaged in unregulated fishing activities on the high seas.[92] The 1992 judgment by the European Court of Justice in the *Poulsen* case, which upheld in principle the confiscation of catch taken on the high seas by a vessel not flying the flag of an EU Member State,[93] has not led to an established practice in the EU.

The fact that optional enforcement powers are granted by a treaty provision implies that they are not part of customary international law. And, if enforcement powers are not part of customary international law for illegal discharges on the high seas (since they are provided for in Article 218 of the LOS Convention), there is no reason why they would be for unregulated fishing on the high seas.

In conclusion, it is submitted that current international law entitles port states to exercise extraterritorial jurisdiction (prescription as well as enforcement) with respect to foreign vessels engaged in unregulated fishing on the high seas. However, state practice indicates that only the less onerous measures are imposed and thereby suggests that port state jurisdiction is not unlimited. State practice does not support the view that Article 25(2) of the LOS Convention and Article 23(4) of the Fish Stocks Agreement confirm unlimited port state jurisdiction. It cannot be ruled out, however, that the absence of more onerous enforcement measures in state practice is motivated by considerations of policy rather than by *opinio iuris*.

Illegal Discharges on the High Seas. Article 87(a) of the LOS Convention confirms that freedom of navigation is part of the freedom of the high seas. Similar to the case study on unregulated fishing on the high seas, the freedom of navigation is safeguarded by the primacy of flag state jurisdiction on the high seas. In contrast with that case study, however, Article 25(2) is not the only relevant provision of the LOS Convention on port state jurisdiction. Articles 211(3), 218, 219, and 220(1) as well as the safeguards in Section 7 of Part XII of the LOS Convention and the prompt release procedure in Article 292 are all relevant. However, only Article 218, which is in Section 6 "Enforcement" of Part XII, explicitly relates to illegal discharges on the high seas.

Article 218(1) authorizes port states to institute proceedings with respect to illegal discharges that have occurred beyond its maritime zones. The illegality of the discharges is a result of a "violation of applicable international rules and standards." These rules include the discharge standards contained in the Annexes to MARPOL 73/78, which have achieved the level of "generally accepted," as well as other rules and standards that are applicable in the mutual enforcement relationship of the states concerned.[94] The right of a port state to institute proceedings against a foreign vessel is subject to: various conditions in other paragraphs of Article 218; the safeguards in Section 7, in particular Articles 226, 228, 230, and 231; and the prompt release procedure in Article 292.[95] Even though the port state enforcement powers in Article 218 are more extensive than in comparison with those set out in Article 23 of the Fish Stocks Agreement, the former are still significantly constrained.

A comparison with Article 23 of the Fish Stocks Agreement and the provisions on flag and coastal state jurisdiction over vessel-source pollution in the LOS Convention reveals

two important differences. First, Article 218, does not contain an explicit right of inspection, nor an explicit basis for prescription to match the explicit basis for enforcement. For the purpose of Article 218, this is not really problematic as these can be implied.[96] The question is, however, if these were intentionally omitted. And, if so, was this because they were regarded as unnecessary in view of the explicit enforcement basis in Article 218 or as unnecessary in view of the implicit broad jurisdiction of a port state to prescribe under Article 211(3) as well as the implicit broad jurisdiction to prescribe and enforce under Article 25(2)?

If the latter explanation is correct, this would mean that Articles 25(2) and 211(3) of the LOS Convention were regarded as having a similar effect as the savings clause in Article 23(4) of the Fish Stocks Agreement. It is difficult to determine whether or not, prior to the adoption or entry into force of the LOS Convention, port states were entitled to make entry into port conditional on compliance with discharge standards beyond its own maritime zones, but not entitled to institute proceedings against a foreign vessel if in port. Existing legislation containing all or part of the elements of Article 218 seems to have been enacted only after 1982.[97] On the other hand, the absence of state practice could be based on considerations of policy.

Despite the near universal participation in the LOS Convention,[98] it is even difficult to say with certainty that the enforcement powers in Article 218 have become part of customary international law. Provided Article 218 is properly transposed and enforced, in particular against vessels flying the flag of nonparties to the LOS Convention, EU Directive 2005/35/EC in conjunction with EU Framework Decision 2005/667/JHA could be an important step in this regard.[99]

With regard to the institution of proceedings for illegal discharges on the high seas, there does not appear to have been any enforcement. The aforementioned EU enactments will not only require EU Member States to inspect, but also to institute criminal proceedings where reasonable evidence is present of discharges on the high seas and this will contribute to strengthening the mandatory nature of port state jurisdiction for extraterritorial discharges.

In view of the above, it is submitted that while port states may have been entitled, prior to the adoption or entry into force of the LOS Convention, to exercise prescriptive and enforcement jurisdiction over illegal high seas discharges by foreign vessels in port, this cannot be ascertained from state practice. In view of the fact that state practice in relation to the institution of proceedings does not appear to have existed prior to 1982, as well as the fact that the nature of the powers in Article 218 are optional rather than mandatory (which would presume a preexisting right), Article 218 can safely be regarded as a progressive development of international law. The international legality of the enforcement measures is derived from a treaty provision whose underlying rationale is the interests of the international community. Nothing in Article 218 suggests that "effects" on the port state are part of the rationale for enforcement.[100]

While it is acknowledged that Article 218 grants port states more extensive enforcement powers than exists under customary international law, to what extent does Article 218 limit the port state's prescriptive and enforcement powers that exist under customary international law by creating "an exhaustive code" on illegal discharges beyond the port state's own maritime zones?[101] Even though the LOS Convention was to be a "Constitution for the Oceans," it was never intended to be a static instrument. In addition to amendment procedures, the practice of implementation agreements, the recognized implementation role of international organizations and the indirectly binding effect of rules by reference, the LOS Convention affirms in its last preambular paragraph "that matters not regulated by this Convention continue to be governed by the rules and principles of general international law."

Consequently, as the underlying rationale of Article 218 does not proceed from the "effects" principle, but from the interests of the international community, nothing in the LOS Convention would at first sight prohibit a port state from exercising prescriptive and enforcement jurisdiction over a foreign vessel in relation to discharges which occur on the high seas but still affect its sovereignty, sovereign rights, or interests through pollution in its maritime zones.[102]

It is submitted that the stringency of the prescribed discharge standard by a port state determines whether this is correct or not. In a case where the stringency level is not set higher than that of generally accepted discharge standards (i.e., those in MARPOL 73/78), it would be unreasonable to allow the port state to exercise the enforcement powers under Article 218 only in the absence, but not in the presence of adverse effects. Support for this view is found in paragraph (2) of Article 218, which authorizes a port state to institute proceedings for illegal discharges committed in the maritime zones of another state if the discharge results in damage in its maritime zones. Significant state practice on this point exists in the form of EU Framework Decision 2005/667/JHA.[103] It is nevertheless submitted that, in this scenario, the occurrence of adverse effects does not justify more onerous enforcement powers than a port state would be entitled to for violations of generally accepted discharge standards in its own EEZ pursuant to Article 220(1) of the LOS Convention. These enforcement powers would be subject to the safeguards in Section 7 of Part XII and the prompt release procedure of Article 292 of the LOS Convention. Attention should also be drawn to Article 229 which upholds a port state's right to institute "civil proceedings in respect of any claim for loss or damage resulting from pollution of the marine environment."

The situation is different in a case where the prescribed discharge standard by a port state is more stringent than generally accepted and also does not qualify as applicable due to the mutual enforcement relationship of the states concerned. It seems that the stringency of the discharge standards in MARPOL 73/78 is probably such that "effects" will be minor and difficult to quantify. This also means that the institution of civil proceedings is not likely to be succesful. Allowing the port state to institute criminal or adminstrative proceedings in this scenario, while discharge violations in the EEZ are linked to the level of generally accepted, would effectively constitute an extension of port states at the cost of flag states and thereby alter the jurisdictional balance in the LOS Convention. However, in view of its broad implicit prescriptive and enforcement powers under Articles 25(2) and 211(3), the port state is still entitled to resort to less onerous enforcement measures, such as refusal of vessel entry or use of port services.

Implications of International Trade Law

Thus far, the rights and obligations of port states have been examined mainly from the perspective of general international law under which vessels have no right of access to foreign ports and port states have broad powers to prescribe and enforce over vessels in port with the legality or justification of extraterritorial port state jurisdiction depending not only on a sufficient jurisdictional basis, but also on the type of enforcement action taken. A port state's adherence to treaties, however, can constrain its jurisdiction. A significant example is the General Agreement on Tariffs and Trade (GATT) 1994,[104] which, *inter alia*, lays down the freedom of transit and the prohibition of quantitative restrictions in Articles V(3) and XI. In 2000, these two provisions were invoked by the EC when it instituted a World Trade Organization (WTO) dispute settlement procedure against Chile for prohibiting Spanish fishing vessels from landing swordfish in Chilean ports, even for the purpose of transshipment.[105] The large number of states that reserved their third-party rights in this

procedure bears witness to the significance of the issues and interests involved.[106] Shortly thereafter, Chile instituted a dispute settlement procedure against the EC under the LOS Convention.[107] In 2001, the parties agreed to suspend both procedures while reserving the right to unilaterally revive them.[108] The uncertainty of the impact of GATT 1994 and international trade law on the enforcement jurisdiction of port states with respect to foreign flag vessels under the international law of the sea therefore remains in place.

The Chilean measures were based on Article 165 of the General Law of Fisheries and Acquaculture of Chile, as consolidated by the Supreme Decree 430 of September 28, 1991.[109] Article 165 gives the power to prescribe conservation and management measures for fish stocks and associated species which occur in the Chilean EEZ as well as on the high seas and to make compliance with these measures a condition on all vessels (foreign and Chilean) for landing fish in Chile. This power was exercised in relation to horse mackerel by means of Decree No. 361 of July 13, 1999,[110] and in relation to swordfish by means of Decree No. 598 of October 15, 1999.[111] Pursuant to these Decrees, various Chilean conservation and management measures applicable to vessels targeting these species in the Chilean EEZ, such as minimum size, fishing techniques, and equipment and, in the case of horse mackerel, even Total Allowable Catch (TACs), were made applicable to foreign fishers. Compliance with these measures became a condition for landing and, presumably, for transhipping the species by foreign vessels in Chilean ports.

More recent is Decree No. 123 of May 3, 2004, which lays down Chile's policy on the use of national ports by foreign fishing vessels that fish in the adjacent high seas. Among the conditions for access to Chilean ports are that the flag state exercises effective jurisdiction over its vessels and cooperates with Chile in the conservation of straddling and highly migratory fish stocks.[112] However, as the chapeau to the policy emphasizes that this is without prejudice to landing regulations, the policy complements Decrees No. 361–99 and No. 598–99, but does not replace them.

This Chilean practice contrasts with the practice of the United States of banning the import, and thereby the landing in port, of Patagonian toothfish (*Dissostichus eleginoides*) declared as being caught on the high seas in FAO Statistical Areas No. 51 and 57 (Indian Ocean) adjacent to the regulatory area of the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR).[113] While such a ban has not been explicitly agreed to by the CCAMLR Commission, the U.S. action is supported by CCAMLR Resolution 18/XXI[114] and therefore, is, arguably not unilateral. Also not truly unilateral is the practice by the United States pursuant to the Lacey Act.[115]

From the perspective of general international law, the Chilean exercise of extraterritorial port state jurisdiction is *prima facie* problematic in view of the freedom of fishing on the high seas and the primacy of flag state jurisdiction over its vessels on the high seas recognized by Articles 87 and 89 of the LOS Convention. However, as there is no indication that more onerous enforcement measures are resorted to than nonadmission to ports, the Chilean measure may be justifiable under the law of the sea. But, from the perspective of international trade law, it may be an entirely different matter.

For the sake of discussion, it is presumed that the norms of GATT 1994 invoked by the EC would be applicable to fishing vessels as such.[116] Even in the unlikely event that a ruling would reject this, it should be noted that the Chilean Decrees apply to landings of the designated fish species or products derived therefrom and say nothing about the type of ship or the purpose of landing.[117] Chile would rely on the conservation exception in Article XX(g) of GATT 1994.[118] Successfully relying on Article XX(g) requires that the Chilean regulations not constitute unjustifiable or arbitrary discrimination or a disguised restriction of international trade and this depends on Chile's serious and good faith negotiation efforts

with the EC The WTO *Shrimp-Turtle* case accepted implicitly that if serious and good faith negotiation efforts do not lead to multilateral agreement, unilateral measures may not be in violation of international trade law.[119] The more recent phases in the *Shrimp-Turtle* case have explicitly upheld unilateral trade measures.[120] It seems that the need for a multilateral solution needs to be weighed and balanced against the gravity of the concerns for the protection and preservation and the marine environment, the safeguarding of marine biodiversity, and the urgency for regulatory action.

It has been reorted that in 1989 the EC alleged that Canada had violated Article V of the GATT as a result of, *inter alia*, Canada's policy to make access to port dependent on an absence of competitiveness with Canadian fishing activities as well as on economic benefits for Canada.[122] Apparently, however, as soon as Canada removed the linkages with competitiveness and economic benefits from its ports policy, the EC withdrew its complaint even though the linkages of the Canadian policy with conservation (overfishing of depleted stocks) were maintained.[123] One reason why the EC may have decided to discontinue the procedure against Canada, but to persevere with its procedure against Chile, could be that the EC perceived Canada's ports policy as justified because it promoted the effectiveness of regional conservation and management measures, namely, those of the Northwest Atlantic Fisheries Organization (NAFO).[123]

Conversely, the Chilean rules for entry into port in the *Swordfish* case were strictly unilateral and not covered by Article 23 of the Fish Stocks Agreement, which refers to subregional, regional, or global measures. It is not ruled out that Chile's involvement in the negotiation of the Galapagos Agreement[124] may be problematic for invoking the Article XX(g) exception. Even though the Galapagos Agreement does not specifically deal with swordfish or horse mackerel, it is a framework agreement that *could* include these species. Also, the Agreement was negotiated exclusively between coastal states without an opportunity for the EC or others to participate, and many of its provisions give coastal states a more preferential status than under relevant provisions of the Fish Stocks Agreement.[125]

The fact that Chile and the EC have agreed on multiple extensions of the two pending dispute settlement procedures in the *Swordfish* case indicates that both feel this to be beneficial for their interests. In the meantime, negotiations are continuing in the framework of the International Consultations on Multilateral Conservation and Management of Swordfish in the South East Pacific[126] in which the EC and Chile participate together with other coastal states and high seas fishing states. Moreover, the trilateral initiative by Australia, Chile, and New Zealand to establish an RFMO in the South Pacific may eventually address the concerns of some high seas fishing states[127] on Chile's horse mackerel Decree, No. 361 of July 13, 1999, as this species would be within the new RFMO's competence.[128]

Broadening Scope

Port state jurisdiction has been used for many centuries for the purpose of immigration, sanitation, customs, and national security. Within the sphere of the international law of the sea, port state jurisdiction has become increasingly accepted as a remedy for the failure of flag states to exercise effective jurisdiction and control over their ships. Provisions on port state control or jurisdiction have been inserted in all of the relevant IMO and ILO instruments. A milestone outside the sphere of IMO was the adoption of the 1982 Paris MOU, through which participating maritime authorities harmonized and coordinated port state control procedures, *inter alia,* by means of a commitment to inspect a certain minimum percentage of all merchant ships visiting their ports.[129]

Initially, the inspections under the Paris MOU were predominantly focused on vessel CDEM standards adopted at the international level within the IMO. Although many of these standards are aimed at ensuring maritime safety as well as marine environmental protection, inspections were mainly carried out with the former objective in mind. Gradually, however, efforts have been directed at enforcement of navigation standards[130] and the standards on working and living conditions developed by the ILO.

In the early and mid-1990s, standard setting within the IMO focused on the so-called "human element" in merchant shipping. This led to operational standards which ensure that the crew is able to fulfil certain tasks on board, as well as to efforts to improve safety and quality of management in merchant shipping, which culminated in the International Management Code for the Safe Operation of Ships and for Pollution Prevention (the ISM Code).[131] The more recent standard setting activities within IMO relate to vessel-source air pollution, maritime security, antifouling systems, ballast water management, and, in the near future, ship recycling. All these expansions have or will have a port state control or jurisdiction component. Also noteworthy is that the Paris MOU now makes reference to the International Convention on Civil Liability for Oil Pollution Damage[132] as one of the relevant instruments, even though the Convention itself does not contain provisions on port state control or jurisdiction. The 2005 draft ILO Convention concerning Work in the Fishing Sector, in which Article 43(2) provides for optional port state control to verify compliance with the living and working standards in the draft Convention, was in the end not adopted but will be discussed by the International Labour Conference again in 2007.[133]

Significant developments outside the sphere of the IMO and ILO include the adoption of the United Nations Educational, Scientific and Cultural Organization (UNESCO) Underwater Cultural Heritage Convention,[134] which imposes an obligation on port states in Article 15. Also, the World Health Organization (WHO) adopted the 2005 International Health Regulations (IHR).[135] Upon entry into force on May 23, 2007, these will replace the 1969 International Health Regulations. Among other things, the 2005 IHR will broaden the obligations of port states while at the same time acknowledging their residual jurisdiction.[136]

The 1989 Wellington Convention on Driftnets was one of the first instances in which port state jurisdiction was introduced in the sphere of international fisheries.[137] As noted, port state jurisdiction featured prominently in the Fish Stocks Agreement and the IPOA on IUU Fishing. Moreover, most RFMOs have established port state practices and these are expected to be strengthened due to the adoption of the FAO Port State Model Scheme.[138] The increasing support for the protection of marine biodiversity and for ecosystem-based fisheries management may also eventually have implications for port state jurisdiction.

This short overview shows that the scope of port state jurisdiction has expanded enormously, not just due to the updating of relevant international instruments, but also due to their continuous expansion into related or entirely new subject areas. Also, not only have the number, duration, and complexity of in-port inspections increased, this is also likely to be true for the frequency of multiple inspections and the involvement of multiple national inspection authorities. Integrated forms of in-port enforcement at the national level[139] and increased coordination at the regional and interregional levels are required to address these issues of capacity and logistics.

Significantly, integrated in-port enforcement also offers opportunities for combating IUU fishing. Vessels suspected of having engaged in or supported (transshipping, bunkering, etc.) IUU fishing frequently escape prosecution either because the activity is classified as "unregulated" or due to lack of evidence. Integrated in-port enforcement would address these difficulties by subjecting such suspected vessels to enforcement for purposes other than conservation and management of marine living resources.

Vessels suspected of having engaged in or supported IUU fishing could be targeted for enforcement for the purpose of customs, standards on living and working conditions, maritime safety, and marine environmental protection. For example, in the absence of internationally agreed standards on living and working conditions for fishing vessels,[140] a port state can use its residual jurisdiction to prescribe reasonable minimum standards and penalties for noncompliance. Likewise, residual port state jurisdiction could also be resorted to in the absence of legally binding maritime safety standards for fishing vessels.[141]

Unwittingly, the international efforts on maritime security also offer tools for combating IUU fishing.[142] As the International Ship and Port Facility Security (ISPS) Code requires the keeping of records of ship-to-ship contacts for the purpose of maritime security,[143] these records can be used as evidence of illegal or unregulated transshipments at sea as well as of illegal or unregulated fishing. During in-port inspections, evidence of transshipments obtained through, for example, aerial surveillance, can be verified by means of these records. Either the records are incorrect and the master can be charged for furnishing false information or the records are correct, which means that the landing can be prohibited and action possibly can be taken against the other vessels involved in the transshipments.

It should be pointed out that the opportunities offered by integrated in-port enforcement requires states to carefully scrutinize their legislation's scope of application to ensure, for instance, that enforcement competence does not apply only to fishing vessels but also to support vessels.

Optimizing the Use of Port State Jurisdiction

Paragraph 59 of the IPOA on IUU Fishing urges port states to take "any other actions [. . .] consistent with international law."[144] This general wording advocates the fullest possible use of port state jurisdiction under international law. As a first step, this would require port states to examine which exercises of jurisdiction remain underutilized or unexplored. The analyses carried out by the FAO[145] and the Secretariat of the Ministerial-led Task Force on Illegal, Unreported and Unregulated Fishing on the High Seas (High Seas Task Force)[146] offers guidance in this respect.

The following subsections discuss exercises of port state jurisdiction which have recently developed or which remain underutilized. These are: (a) departure from state jurisdiction, (b) providing satellite-based vessel monitoring system (VMS) data; (c) penalties for furnishing false information, (d) Lacey Act approaches, and (e) stateless vessels. The optimal use of port state jurisdiction, both in terms of prescription and enforcement, should be accompanied by appropriate safeguards to prevent abuse of rights and provide recourse to dispute settlement procedures at the national and international levels.[147]

Departure State Jurisdiction

In view of the broad prescriptive powers of port states, in principle there is no objection to setting conditions for the departure from ports as a condition for entry.[148] This so-called "departure state jurisdiction" could be used to ensure mandatory disposal of all types of waste in port to ensure that these will not be illegally discharged after departure. This approach is being pursued in EU Directive 2000/59/EC.[149] In order to combat vessel-source air pollution, ports could require as a condition for entry into port that ships off-load all fuels with sulfur contents exceeding certain limits and to bunker other types of fuel. Requirements such as these would be especially helpful for ships departing for Antarctica, where normal coastal or port state jurisdiction is not possible.[150]

Providing VMS Data

Pursuant to paragraph 63 of the IPOA on IUU Fishing,[151] States should consider using the presumption that fishing vessels not flying the flag of RFMO members or cooperating non-parties to relevant RFMOs are engaged in unregulated high seas fishing and are prohibited from landing or transshipping catch in port unless the vessel establishes that the catch was taken in a manner consistent with relevant conservation and management measures of that RFMO. Various RFMOs currently utilize this presumption.[152] One way in which vessels could establish that their catch was "legal" is by providing satellite-based VMS data. Port states that require VMS data as a condition for landing a catch, use of port services, or even access to ports would be able to verify if a foreign vessel has engaged in fishing activities within the port state's maritime zones, those of other states, or on the high seas in a way that is consistent with national or international regulation. Where inconsistency is found, this may lead to an exercise of coastal or flag state jurisdiction or even to charges such as furnishing false information. There are similar opportunities to link a vessel to illegal polluting discharges by requiring ships to be fitted with an automatic identification system (AIS) and a voyage data recorder (VDR) as a condition for entry into port.[153] Examples of international support for such conditions for entry into port in the sphere of fisheries are CCAMLR Conservation Measure 10–05 (2005)[154] and paragraph 2.4 of the FAO Port State Model Scheme.[155] Examples of states that set this condition are Chile in relation to all foreign fishing vessels[156] and the United States in relation to foreign fishing vessels targeting toothfish.[157] EU legislation obliges EU Member States in certain situations to require VMS data for the landing of toothfish.[158]

Furnishing False Information

The port state could use its criminal or administrative law to lay charges against foreign flag vessels such as furnishing false information or obstruction of inspection in connection with, but not based on, behavior prior to entry into port. It could, for instance, be a condition for entry into port that a written statement be provided that a vessel has not engaged in, or supported, behavior like IUU fishing or illegal discharges in the maritime zones of the port state, in the maritime zones of other coastal states, or on the high seas. The above charges could then be laid if an inspection reveals that such activities had in fact taken place. CCAMLR Conservation Measure 10–03 (2002)[159] imposes an obligation on Contracting Parties to require such a statement for IUU fishing for toothfish, but is silent on what should happen in the event that statements turn out to be false. This approach is also pursued by EU legislation in relation to IUU fishing for toothfish.[160] The above-mentioned charges could also be used for falsified VMS data provided as a condition for entry into port.

The charges discussed above do not necessarily have to be linked to conditions for entry into port, but could also be applied in relation to information that is required for landing catch or for routine inspections in port. With regard to catch declarations for all landings by fishing vessels from non-EU Member States, EU legislation stipulates nothing more than: "Masters shall be responsible for the accuracy of such declarations."[161] Presumably, it is up to the EU Member State to decide if and what steps should be taken regarding false declarations. In a case under consideration in the United Kingdom, a master of a fishing vessel of a non-EU Member State faces a steep monetary penalty for furnishing false information in relation to high seas fishing activities.[162]

In the sphere of vessel-source pollution, the jurisdiction being discussed has significant potential in relation to the various record books (e.g., oil record book) required under

MARPOL 73/78.[163] Various states have imposed criminal or administrative monetary penalties for incorrect or missing entries in such record books[164] or for false statements relating to them.[165] The United States also seems to regularly impose penalties or institute proceedings for furnishing false information or obstructing inspection in the sphere of vessel-source pollution.[166]

Lacey Act Approaches

The U.S. Lacey Act, *inter alia*, makes it an offense to import, export, transport, sell, receive, acquire, or purchase any fish taken, possessed, transported, or sold in violation of a treaty or the domestic legislation of a foreign state.[167] These prohibitions link the "overlying" violation (import, export, etc.) with the "underlying" violation of foreign law. The threshold for the overlying violation is very low as the presence of a (fishing or transport) vessel in a U.S. port would suffice.[168] In fact, the mere presence of a vessel within the maritime zones of the United States or even the high seas may also be sufficient.[169] Due to standard of proof concerns, the United States mainly enforces the Lacey Act through civil administrative (monetary) penalties and forfeiture of illegal captured fish and wildlife.[170]

At first sight, the Lacey Act is powerless against unregulated fishing on the high seas. This is due to the fact that there is no "underlying" violation as the vessels engaged in such activities are commonly not violating the laws or regulations of their flag state, usually because these states are not members of the relevant RFMO. Even violations of the conservation and management measures of RFMOs by vessels flying the flag of members to those RFMOs are apparently not covered unless that member has directly implemented the obligations into national legislation.[171] Also, it is the policy of the United States not to proceed with prosecution unless the relevant foreign flag or coastal state supports the prosecution.[172] This notwithstanding, the Lacey Act enables prosecutions that are exclusively based on the "overlying" violation, for example, import of fish accompanied by falsified or inaccurate documents. This latter option is frequently used in relation to the documentation required pursuant to the catch documentation scheme operated by CCAMLR.[173]

A Lacey Act approach was proposed in paragraph 63 of the 2000 Sydney Draft[174] of the IPOA on IUU Fishing, but found insufficient support. However, justification for using a Lacey Act approach against unregulated fishing on the high seas can be based on the argument that while the jurisdiction is extraterritorial, it is not truly unilateral because it supports the interests of specific other states or the international community in general. The chances of such an argument being successful in an international dispute settlement procedure would be heightened significantly if Lacey Act approaches were pursued by a larger number of states. It will be interesting to see the follow-up to the recent proposals advocating Lacey Act approaches by the High Seas Task Force.[175]

An alternative and perhaps better way to bolster the justification for a Lacey Act approach is to make applicability of the legislation dependent (instead of merely a policy) on obtaining prior consent from the foreign flag or coastal state whose legislation has been violated.[176] Conflict of jurisdiction, one of the main risks of extraterritorial jurisdiction, could thereby be avoided.

Stateless Vessels

The LOS Convention does not provide a definition of stateless vessels, but stipulates in Article 92(2) that: "A ship which sails under the flag of two or more States, using them

according to convenience, [. . .] may be assimilated to a ship without nationality." Even though the consequences of statelessness are not spelled out in the LOS Convention, a growing number of RFMOs call on their members to board, search, and, if it has been fishing in a manner which undermines the relevant RFMOs' management and conservation measures, arrest and prosecute a stateless vessel.[177] As vessels engaged in or supporting IUU fishing frequently change registry, in part to avoid enforcement by a flag state or to avoid measures taken by states individually or through RFMOs against IUU vessels (e.g., through blacklisting), it is not illusory that such vessels may be without registry while in ports. Port states should ensure that their national legislation allows them to take enforcement action against stateless vessels within their ports, as well as on the high seas and within their maritime zones, for behavior that would have been illegal if committed by their own vessels.

Toward Mandatory Port State Jurisdiction and Global Coverage

While flag state jurisdiction is mandatory under the LOS Convention, port state jurisdiction is optional, with some limited exceptions.[178] This situation is similar in the IMO instruments. Whereas many of these instruments contain provisions for in-port inspection, they do not oblige port states to carry out inspections but rather stipulate that once they *do* inspect, such inspections are limited in certain ways, for example, to a certificate check.[179] The optional nature of port state jurisdiction and the ensuing emergence of ports of convenience were instrumental in the creation of the Paris MOU in 1982,[180] by which the participating maritime authorities made inspection commitments. The 1991 IMO Assembly Resolution A.682(17) "Regional Co-operation in the Control of Ships and Discharges" acknowledged the added value of the Paris MOU and commenced efforts to create a global network of regional merchant shipping PSC regimes.[181] The expansion in participation in the Paris MOU[182] and the creation and expansion of new PSC regimes[183] means that almost complete global coverage has now been achieved. The Southern Ocean is regarded by some as a gap in global coverage, in particular, in relation to Antarctic seaborne tourism through the so-called "gateway ports" to Antarctica.[184]

While EU Member States are legally bound to the 1995 Port State Control Directive,[185] whose substance and approach are highly similar, if not identical, to the Paris MOU, all the regional merchant shipping PSC regimes are non-legally binding international instruments.[186] Differences in the levels of effectiveness between the various regional merchant shipping PSC regimes are caused by needed updates of the constitutive instruments in view of developments at IMO and ILO and by the lack of adherence by the participating authorities with the underlying regulatory conventions. Obviously, if a state is not a party to a relevant regulatory convention, its substance cannot be enforced against foreign vessels.[187]

In the sphere of marine capture fisheries, states have committed to exercising port state jurisdiction through the IPOA on IUU Fishing and state parties to the Fish Stocks Agreement are legally bound to do so pursuant to Article 23. As noted, at the regional level, most RFMOs that deal with straddling, highly migratory, or discrete high seas fish stocks have developed port state practices.[188] However, none explicitly authorize, let alone stipulate, onerous enforcement measures.[189] Many of the regimes are optional or apply exclusively to vessels flying the flag of nonmembers of the RFMO.[190] Such discrimination may be unjustifiable and inconsistent with international trade law.

The FAO Port State Model Scheme[191] contributes to the creation of a global network of regional port state jurisdiction for the purpose of marine capture fisheries and offers guidance

and opportunities for harmonization in this respect. The terminology "Model Scheme" was preferred to "Memorandum of Understanding."[192] Many delegations took the view that the latter was too much associated with regional merchant shipping PSC regimes and feared it would stimulate duplication of the existing efforts within RFMOs and undermine the latters' primacy.

It is not clear if and to what extent the FAO Port State Model Scheme imposes obligations or commitments on FAO members. While the Scheme was adopted in 2004 by a Technical Consultation, subject to a reservation by Japan,[193] COFI endorsed the Report of the Consultation but not explicitly the Scheme and agreed that "follow-up work on the [Consultation] should be undertaken, especially with respect to operationalizing the model scheme agreed at the Consultation."[194] Only efforts, whether individually, within the context of RFMOs, the Ministeriallyled Task Force on IUU Fishing on the High Seas (HSTF),[195] or beyond at the subregional or regional level can ultimately achieve the goal of a global network of mandatory regional post state arrangements with respect to fisheries.

Since 2004 there have been few efforts to implement the FAO Port State Model Scheme by RFMOs or other groupings of states. Within the North-East Atlantic Fisheries Commission (NEAFC), Norway submitted a "Draft NEAFC Scheme on Port State Control in the Convention Area" in 2005.[196] However, as some NEAFC members, including the EC, had difficulties with the scope of the Scheme applying not only to IUU fishing activities in the NEAFC Regulatory Area, but also in the maritime zones of coastal states within the NEAFC Convention Area, the proposal was not adopted.[197] Norway also tabled a proposal on port state control at the Second Annual South East Atlantic Fisheries Commission (SEAFC) Meeting in 2005, which led to the adoption of SEAFC Conservation Measure 02/05 "on Interim Port State Measures," which uses Annexes B and C of the FAO Port state Model Scheme. Finally, the Western and Central Pacific Fisheries Commission (WCPFC) is to develop port state measures based on the FAO Scheme.[198] Hopefully, more efforts to strengthen port state jurisdiction or control within RFMOs will follow.

The success of the above efforts depends not only on the extent to which states recognize that they have legally binding obligations to do so, but also on their recognition of the need for mandatory port state jurisdiction and on adopting arrangements to ensure a level playing field and address free riders. In situations where decisions are made by consensus, this can be particularly difficult. This was illustrated during the 24th Annual CCAMLR Meeting in 2005, where Argentina opposed several amendments to CCAMLR Conservation Measure 10-03 on "Port inspections of vessels carrying toothfish," which would have required inspections of all vessels carrying toothfish, and not just fishing vessels.[199]

Finally, at various recent international meetings during the past few years, some states have voiced their support for a legally binding international instrument on the rights and obligations of port states in the sphere of marine capture fisheries.[200] It is submitted that support for such an instrument would depend on its objective and the ability of its proponents to convince states that they have more to gain than to lose from such an instrument. While states with ports of convenience obviously fear losing more than gaining, many coastal states are also concerned about the competitiveness of their own fleets that benefit from proximity to high seas fishing grounds. While distant water fishing states will benefit from rights of access, they also fear abuse of port state jurisdiction with possible spillover effects to merchant shipping where the financial interests are much larger. Moreover, rights of access to ports and other obligations for port states are direct constraints on sovereignty and are difficult to accept for many states. Finally, in view of the dispute between the EU and Chile that is still pending before the International Tribunal for the Law of the Sea (ITLOS) and the WTO, the forum in which negotiations would take place is not obvious.

At the Review Conference of the Fish Stocks Agreement held in May 2006, it was recommended to "initiate, as soon as possible, a process to develop within the FAO, as appropriate, a legally binding instrument on minimum standards for port State measures, building on the [FAO Port State Model Scheme] and the [IPOA on IUU Fishing]."[201] This recommendation originated in a Norwegian proposal that was supported by many delegations, including the EC and New Zealand, with Japan cautiously indicating a willingness to consider it.[202] Whether such a process will be initiated probably will be decided at the 27th Session of the FAO Committee on Fisheries (COFI) in March 2007. The fact that the objective of the envisaged process within the FAO would be limited to establishing "minimum standards for port State measures," seems to indicate that the delegates at the Review Conference were well aware of the considerations mentioned above. The challenge will be to ensure that, compared with the instruments on which it builds, the envisaged instrument adds value, *inter alia*, by addressing free rider issues.

Conclusions

Under general international law, vessels have no right of access to foreign ports and port states have broad powers to prescribe and enforce measures against visiting vessels. The legality or justifiability of port state jurisdiction for actions that take place outside the ocean space of a port state depends not only on a sufficient jurisdictional basis, but also on the type of enforcement action taken. A port state's "residual jurisdiction," namely, its competence to prescribe more stringent standards than those agreed to within competent international organizations such as IMO, is not affected by adherence to IMO instruments. The implications of international trade law on a port state's residual jurisdiction are unclear. However, due to the wide range of potential repercussions, a port state should not resort to residual jurisdiction unless a careful policy assessment of its overall cost-effectiveness indicates that the expected benefits outweigh the expected risks. The international community's interests, including not only such interests as the protection of marine biodiversity, but also the regulatory roles of competent international organizations, should be part of this assessment.

This article has shown that port state jurisdiction is gradually moving from being voluntary in limited subject areas toward being comprehensive and mandatory through regional and global arrangements. Due to the continuous updating of relevant international instruments and their expansion into new subject areas, the most rapid developments relate to the substantive scope of port state jurisdiction. Integrated forms of in-port enforcement at the national level and increased coordination at the regional and interregional levels are required to address issues of capacity and logistics. Integrated in-port enforcement also offers opportunities for combating IUU fishing, for instance, by subjecting suspected vessels to enforcement for purposes other than conservation and management of marine living resources or by using the records of ship-to-ship contacts required pursuant to the ISPS Code as evidence of illegal or unregulated transshipments at sea as well as of illegal or unregulated fishing.

The notion of a "responsible port state," namely, a state committed to making the fullest possible use of its jurisdiction under international law in furtherance of not just its own rights and interests, but also those of the international community,[203] could play a role in optimizing the use of port state jurisdiction, balanced by appropriate safeguards, and achieving mandatory coverage through regional and global arrangements. Suggestions for optimizing the use of port state jurisdiction are: departure state jurisdiction; providing VMS or VDR data as a condition for entry into port; using criminal or administrative law to lay

charges, such as furnishing false information; pursuing Lacey Act approaches; and taking action against stateless vessels.

Despite the near-global coverage by regional merchant shipping PSC regimes and the existence of port state practices in most RFMOs, the objective of mandatory and global coverage still lies ahead. Among other things, the remaining geographical gaps in global coverage need to be filled, in particular in relation to marine capture fisheries, and the performance level of individual regional arrangements and interregional uniformity need to be adequate. Developing states will need considerable assistance if this goal is to be reached.

The trend from optional to mandatory port state jurisdiction appears unavoidable. Awareness that the interests of the international community are not only undermined by free riders in their capacity as flag states, but also in their capacity as port states, is expected to spread due to current and future concerns, including those of international terrorism, marine biodiversity, and diseases. It therefore may not be long before the notion of a responsible port state becomes firmly established in law and policy.

Notes

1. See D. König, "Port State Control: An Assessment of European Practice," in *Marine Issues: From a Scientific, Political and Legal Perspective*, eds. P. Ehlers, E. Mann-Borgese, and R. Wolfrum, (The Hague: Kluwer Law International, 2002), 37–54, at 38.

2. United Nations General Assembly (UNGA) Resolution 60/30, of Nov 29, 2005 (Doc. A/RES/60/30, of Mar 8, 2006), para. 47 and UNGA Resolution 60/31, of Nov. 29, 2005 (Doc. A/RES/60/31, of Mar. 10, 2006), para 36 and 42. See D. Vidas, "IUU Fishing or IUU Operations? Some Observations on Diagnosis and Current Treatment," in *Bringing New Law to Ocean Water*, eds. D. N. Caron and H. Scheiber (Leiden: Martinus Nijhoff, 2004), 125–144, who argued that the international law of the sea is unable to make much progress on dealing with IUU fishing and that more progress can be made through international trade law.

3. The Preamble to the Paris Memorandum of Understanding on Port State Control, Paris, 26 January 1982, in effect July 1, 1982, as regularly amended (Paris MOU), contains both elements. Text at www.parismou.org.

4. Montego Bay, 10 December 1982. In force Nov. 16, 1994. 1833 *United Nations Treaty Series* 396 and at www.un.org/Depts/los.

5. Paris MOU, supra note 3.

6. The Paris MOU is consistently referred to as a "regional administrative agreement." See E. J. Molenaar, "EC Directive on Port State Control in Context," 11 *International Journal of Marine and Coastal Law* 241–288 (1996), at 245; and "A Short History of the Paris MOU," at www.parismou.org.

7. For example, see sec. 3.5 and 8.1 of the Paris MOU, supra note 3, and sec. 3.2.2 and 8.1 of the Asia-Pacific Memorandum of Understanding on Port State Control in the Asia-Pacific Region, Tokyo, Dec. 1, 1993, in effect April 1, 1994, as regularly amended (Tokyo MOU). The ninth amendment became effective on Jan. 1, 2006. Text at www.tokyo-mou.org.

8. See art. 19a of Directive 95/21/EC of 19 June 1995 "on port State control of shipping" (the EU Port State Control Directive) (consolidated version at europe.eu.int/eur-lex), which confirms the competence of European Union (EU). Member States to impose more onerous enforcement measures than those required by the E.U. Port State Directive.

9. *Case concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, [1986] *I.C.J. Rep.*, at. 111, para. 123.

10. See A. V. Lowe, "The Right of Entry into Maritime Ports in International Law," 14 *San Diego Law Review* 597–622 (1977), at 622; and Z. Oya Özçayir, *Port State Control* (London; LLP, 2001), at 79, but also at 70.

11. Geneva, 9 December 1923. In force 26 July 1926. 58 *League of Nations Treaty Series* 285 (1926–1927).

12. At the time of writing, there are approximately 40 Contracting Parties. See untreaty.un.org/English/bible/englishinternetbible/partII/treaty-20.asp.

13. Articles 13 and 14 of the Maritime Ports Convention. See also L. A. De La Fayette, "Access to Ports in International Law," 11 *International Journal of Marine and Coastal Law* 1–22 (1996), at 4, 17.

14. De La Fayette, supra note 13, at 4.

15. See E. J. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (The Hague: Kluwer Law International: 1998), at 101.

16. IMO Assembly Resolution A.949(23), of 5 December 2003, at www.imo.org.

17. *Ibid*., para. 31.12–3.14. See also H. Ringbom, "You Are Welcome, But. . . . Places of Refuge and Environmental Liability and Compensation, with Particular Reference to the EU," *Comité Maritime International Yearbook* 208–233 (2004). Pursuant to art. 20 of Directive 2002/59/EC of 27 June 2002 "establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC" (*OJ* 2002, L 208/10), EU Member States are required to develop plans for places of refuge.

18. R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed. (Manchester; United Kingdom: Manchester University Press, 1999), 63; and Molenaar, supra note 15, at 102. See art. 300 of the United Nations Convention on the Law of the Sea (LOS Convention).

19. See art. 24(1)(b), 25(3), 119(3), and 227 of the LOS Convention.

20. See art. 23(1) of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 August 1995. In force 11 December 2001, 34 *International Legal Materials* 1542 (1995) and at www.un.org/Depts/los and of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, adopted by consensus by the Food and Agriculture Organization (FAO) Committee on Fisheries (COFI) on 2 March 2001 and endorsed by the FAO Council on 23 June 2001, para. 52, text at www.fao.org/fi.

21. See for example, the no-more-favorable-treatment (NMFT) clause contained in art. 5(4) of the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), London, 2 November 1973, as modified by the 1978 Protocol (London, 1 June 1978) and as regularly amended, text at 1340 *United Nations Treaty Series* 61.

22. See for example, sec. 1.2 of the Paris MOU, supra note 3; and sec. 1.3 of the Tokyo MOU, supra note 7.

23. See art. XX of the 1994 General Agreement on Tariffs and Trade (GATT), text at www.wto.org.

24. Churchill and Lowe, supra note 18, at 65–69. D. H. Anderson, "Port States and Environmental Protection," in *International Law and Sustainable Development: Past Achievements and Future Challenges*, eds. A. Boyle and D. Freestone (Oxford: Oxford University Press, 1999), 325–344: p. 327 refers to a 1963 case before the Supreme Court of the United States, which ruled that U.S. labor standards could not be applied to foreign ships in its ports. However, the detailed analysis in the *Study on the Economic, Legal, Environmental and Practical Implications of a European Union System to Reduce Ship Emissions of SO_2 and NO_x* (Study for DG Environment of the EC Commission, August 2000; text at europa.eu.int/comm/environment/enveco). Appendix 4, Legal Analysis: Prescription, Enforcement and Observance, at A4.38-A4.44, shows that United States jurisprudence on the aforementioned issue lacks uniformity.

25. See T. L. McDorman, "Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention," 28 *Journal of Maritime Law and Commerce* 305–322 (1997), at 309.

26. A. Mann, "The Doctrine of Jurisdiction in International Law," 111 *Recueil des Cours de l'Académie de Droit International* 9–162 (1964), at 83.

27. Judge Fitzmaurice in the *Barcelona Traction* case [1970] *I.C.J. Rep*., at 105.

28. *Ibid*. See also the "Final Report of the International Law Association (ILA) Committee on Extraterritorial Jurisdiction," presented at the 1996 Helsinki ILA Conference, *Report of the Sixty-Seventh Conference*, 520–524.

29. See below "National CDEM Standards Applied to Foreign Vessels in Port."

30. See Molenaar, supra note 15, at 79.

31. It is noteworthy that the "Final Report of the ILA Committee on Extraterritorial Jurisdiction," note 28, at 524, acknowledged that internationally agreed interests "may serve as a legitimizing factor."

32. Churchill and Lowe, supra note 18, at 64, also referred to the possibility of arrest in civil actions or actions *in rem* against the ship itself.

33. O. Schachter, *International Law in Theory and Practice* (Dordrecht: Martinus Nijhoff, 1991), at 257.

34. See, for example, the limited enforcement powers in the exclusive economic zone (EEZ) pursuant to art. 220(5) and (6) of the LOS Convention.

35. See the discussion in infra note 61 and accompanying text.

36. See art. 21(2) and 211(5) of the LOS Convention.

37. For example, sec. 15(1) of Annex VI to MARPOL 73/78, supra note 21.

38. See Molenaar, supra note 15, at 110–120. See also L. S. Johnson, *Coastal State Regulation of International Shipping* (Dobbs Ferry: Oceana, 2004), at 44. Note also that the Joint Ministerial Declaration issued at the Second Joint Ministerial Conference of the Paris and Tokyo Memoranda of Understanding on Port State Control, Vancouver, 4 November 2004 (text at www.parismou.org), at 11:, para. 4.7 acknowledges "the prerogative of every State to exercise port State control."

39. For example, Regulation XI-2/2(4) of SOLAS 74 (on maritime security), para. B/4.34 of the International Ship and Port Facility Security Code (ISPS Code; IMO Doc. SOLAS/CONF.5/34, of 17 December 2002); Article 1(3) of the International Convention on the Control of Harmful Anti-Fouling Systems on Ships, London, 5 October 2001, not in force, IMO Doc. AFS/CONF/26, of 18 October 2001; and Article 2(3) of the International Convention for the Control and Management of Ships' Ballast Water and Sediments, London, 13 February 2004, not in force, IMO Doc. BWM/CONF/36, of 16 February 2004. The words "Subject to the provisions of international law" in Regulation 21(8)(2) of Annex I to MARPOL 73/78, supra note 21, is also regarded by some contracting parties as confirming a port state's residual jurisdiction.

40. See text in supra note 21.

41. Which appears to be shared by Anderson, supra note 24, at 342.

42. See, for instance, L. Schiano di Pepe, "Port State Control as an Instrument to Ensure Compliance with International Marine Environmental Obligations," in *International Marine Environmental Law: Institutions, Implementation and Innovations*, ed. A. Kirchner (The Hague: Kluwer Law International, 2003), 137–156, at 144, in the context of a discussion of art. 6(2) and (5) of MARPOL 73/78. Note that such an interpretation could also be inspired by IMO Assembly Resolution A.973(24), of 1 December 2005, "Code for the Implementation of Mandatory IMO Instruments," which makes no reference to the LOS Convention in para 50–58. References to the LOS Convention were deleted from earlier drafts of the Code "as it was felt that caution should be exercised in the referencing of instruments outside the purview of IMO" IMO Doc. FSI 13/23, of 31 March 2005, at 37, para 10.31.

43. Oil Pollution Act of 18 August 1990, Pub. L. No. 101–380, 104 Stat. 484 (1990), in 33 *United States Code* §§ 2701–2761 and 46 *United States Code* §§3701–3718.

44. See also Johnson, supra note 38, at 44, who observes that in 2003 at the IMO MEPC the United States made a statement "confirming the right of port States to adopt more stringent measures than are in MARPOL."

45. Agreement concerning Specific Stability Requirements for Ro-Ro Passenger Ships Undertaking Regular Scheduled International Voyages Between or to or from Designated Ports in North West Europe and the Baltic Sea, Stockholm 28 February 1996. In force 1 April 1997. IMO Doc. Circular Letter No. 1891, of 29 April 1996. See the discussion in Molenaar, supra note 15, at 117–119.

46. Regulation (EC) No. 417/2002 of 18 February 2002 "on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers, as amended by Regulation (EC) No. 1726/2003 of 22 July 2003" (consolidated version available at Europe.eu.int/eur-lex), art. 1. See also the overview of state practice in *The EU Ship Emissions to Air Study*, supra note 24 at Appendix 4, A4.46–A4.49.

47. MARPOL 73/78, supra note 21.

48. These amendments are included in IMO Resolution MEPC.111(50), of 4 December 2003. Note that whereas the amendments to Annex I entered into force on Apr. 5, 2005, the amended EU Regulation entered into force on Oct. 21, 2003 (*OJ* 2003, L 249/1). See also V. Frank, "Consequences of the *Prestige* Sinking for European and International Law," 20 *International Journal for Marine and Coastal Law* 1–64 (2005), at 21.

49. Council Directive 2005/33/EC of 6 July 2005 amending Directive 1999/32/EC of 26 April 1999 "relating to a reduction in the sulphur content of certain liquid fuels and amending Directive 93/12/EEC" (*OJ* 2005, L191/59).

50. See *ibid*. art 4a(4) and (5) and 4b(1). See also Regulation 14(1) Annex VI to MARPOL 73/78, supra note 21, which lays down a global cap of 4.5 % by mass and Regulation 14(4) a 1.5 % by mass limit for SO_x emission control areas. It is submitted that unilateral fuel requirements like these affect the objective of global uniformity in the regulation of international shipping (which is the rationale behind the exception in art. 21(2) of the LOS Convention) for the reason that compliance seems to require substantial and costly adjustments and such measures should therefore be treated analogous with CDEM standards. See also the analysis in *The EU Ship Emissions to Air Study*, supra note 24, at Appendix 4, A4.20–A4.22.

51. See COM(2002) 595 final, of 20 November 2002, "Communication from the Commission to the European Parliament. A European Union strategy to reduce atmospheric emissions from seagoing ships," vol. I, at 18. By means of IMO Doc. MEPC 53/4/4, of 15 April 2005, several EU Member States urged a revision of Annex VI to MARPOL 73/78 through the IMO.

52. Case No. M 8471-03, *Miljönämnden i Helsingborgs kommun./HH-ferries AB m fl,* Judgement of 24 May 2006.

53. Case No. M 8471-03, supra note 52, at 19–20, and based on information provided by G. Holmgren, City of Helsingborg, May 2006.

54. See, for example, preambular para. 11, 14, and 15 of Council Directive 1999/32/EC and COM(2005) final, Communication from the Commission, "Third package of legislative measures on maritime safety in the European Union," at 7, where it says "The Commission fully recognizes the added value of international action." Oya Özçayir, supra note 10, at 4–5 takes the view that the EU has decided to be a "force of change" within the IMO on this issue. See also H. Ringbom, "The EU's Exercise of Port and Coastal State Jurisdiction," paper presented at a seminar held at the University of Tromsø, Norway, on Feb. 23, 2006.

55. *Wet buitenlandse schepen*, Act of 6 June 2004, *Staatsblad* 2004, 349 and 553. See also *NILOS Newsletter* no. 22, at 3, text at www.law.uu/nilos.

56. See V. Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea: Implementing Global Obligations at the Regional Level*, PhD thesis, Utrecht University, 2006.

57. *Sellers v. Maritime Safety Inspector*, Case no. CA104/98, Judgment of 5 November 1998, see. 5 and 17. See also Churchill and Lowe, supra note 18, at 68–69.

58. *Sellers v. Maritime Safety*, supra note 57, at 17.

59. *Ibid*., at 13 and 16–17.

60. J. S. Davidson, "Freedom of Navigation on the High Seas: Sellers v. Maritime Safety Inspector," 14 *International Journal of Marine and Coastal Law* 435–439 (1999), at 438; D. Devine, "Port State Jurisdiction: A Judicial Contribution from New Zealand," 24 *Marine Policy* 215–219 (2000), at 218; and Oya Özçayir, supra note 10, at 91. *The EU Ship Emissions to Air Study*, supra note 24, at Appendix 4, A4.42–A4.43, is more cautious and eventually concedes this is not necessarily a legal issue.

61. Churchill and Lowe, supra note 18, at 276; and T. L. McDorman, "Regional Port State Control Agreements: Some Issues of International Law," 5 *Ocean and Coastal Law Journal* 207–225 (2000), at 223. It is unclear whether or not the safeguards in sec. 7 of part XII of the LOS Convention as well as the prompt release procedure under art. 292 of the LOS Convention are applicable. McDorman, at 223, argued they are not. With regard to art. 292, it is noteworthy that art. 226(1)(a) refers to inspections based on art. 216, 218,

and 220, while neither art. 218 nor 220(1) deal with noncompliance with CDEM standards in port.

62. See, for example, subsections 3.9.1–3.9.2, 3.10.1–3.10.4 and 3.11 of the Paris MOU, supra note 3.

63. For example, art. 9 and 9a of the E.U. Port State Directive, supra note 8, and art. 219 of the LOS Convention.

64. See supra notes 7 and 8, and accompanying text.

65. Section 3.15 of the Paris MOU, supra note 3; and art. 16 of the E.U. Port State Directive, supra note 8.

66. The survey was carried out by the author as part of a consultancy commissioned by the Netherlands Ministry of Transport, Public Works and Water Management.

67. International Convention for the Safety of Life at Sea, London, 1 November 1974, in force 25 May 1980, 1184 *U.N.T.S.* 2. The states are Cyprus, Estonia, Germany, Latvia, Lithuania, and Sweden.

68. Latvia and Lithuania.

69. See *The EU Ship Emissions to Air Study*, supra note 24, at Appendix 4, A4.49 and A4.55.

70. See also note 77 below and accompanying text for the practice of the United States, which may relate to compliance with national CDEM standards in port or in its own EEZ.

71. 33 *United States Code* § 2716(a)(1) and 46 *United States Code* § 3703(a).

72. 33 *United States Code* § 2716(a)(2) and 46 *United States Code* §§ 3715(a) and 3703(a). For a discussion see Molenaar, supra note 15, at 376–387.

73. Resolution MEPC.52(32). See also information at www.imo.org and supra note 21.

74. See IMO Doc. MEPC 35/2/1, of 14 January 1994, at 2.

75. *Ibid.*

76. See supra notes 34 and 35 and accompanying text.

77. See 33 *United States Code* § 2716a and 46 *United States Code* § 3718.

78. See supra note 34 and accompanying text.

79. Fish Stocks Agreement, supra note 20 .

80. *Ibid*., art. 23(2) and (3).

81. Para. 3.3.1 and 56 of the IPOA on IUU Fishing, supra note 20.

82. See E. J. Molenaar, "Participation, Allocation and Unregulated Fishing: The Practice of Regional Fisheries Management Organizations," 18 *International Journal of Marine and Coastal Law* 457–480 (2003).

83. Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Rome, 24 November 1993, in force 24 April 2003, 33 *International Legal Materials* 969 (1994) and at www.fao.org/legal.

84. Code of Conduct for Responsible Fisheries, adopted by the Twenty-eighth Session of the FAO Conference, Rome, 31 October 1995, text at www.fao.org/fi, sec. 8.3.

85. See below "Illegal Discharges on the High Seas."

86. Anderson, supra note 24, at 338–342.

87. This is argued by F. Orrego Vicuña, *The Changing International Law of High Seas Fisheries* (Cambridge: Cambridge University Press, 1999), at 261 and 264.

88. "Report of the Expert Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing, Rome 4–6 November 2002," *FAO Fisheries Rep*. no. 692 (2002), at Appendix E, 14.

89. Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing, Annex E to the "Report of the Technical Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing. Rome, 31 August–2 September 2004," *FAO Fisheries Rep*. no. 759 (Rome: FAO, 2004), endorsed by COFI at its Twenty-sixth Session in March 2005, "Report of the twenty-sixth session of the Committee on Fisheries. Rome, 7–11 March 2005," *FAO Fisheries Rep*. no. R780 (2005), at para. 25.

90. See the practice by Chile, infra note 112 below and accompanying text. See also the practice discussed in De La Fayette, supra note 13; and the practice by Norway mentioned by Anderson, supra

note 24, at 341–342. See also the practice by various states noted in *Promoting Responsible Ports*, High Seas Task Force Final Report (2006), available at www.highseas.org.

91. See the practice by Chile infra notes 110 and 111.

92. See R. G. Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Leiden/Boston: Martinus Nijhoff, 2004), at 336. It is interesting to note that at the 4th Meeting (Mar. 1999) of the negotiatons on the Convention on the Conservation and Management of the Fishery Resources in the South East Atlantic Ocean (Windhoek, 20 April 2001, in force 13 April 2003, 41 *International Legal Materials* 257 (2002) and at www.fao.org/Legal/treaties), a proposal by the United States that would have allowed port states to "detain the vessels for such reasonable period of time as is necessary for enforcement purposes" was not accepted. *Record of Proceedings*, Attachment 10, "US Proposal on Article 14."

93. *Anklagemyndigheden(Public Prosecutor) v. P.M. Poulsen and Diva Navigation Corp*, Case C-286/90, Judgment of 24 November 1992, (1992) ECR I-6019, para. 28–34. See also R. J. Long and P. A. Curran, *Enforcing the Common Fisheries Policy* (Oxford: Fishing News Books, 2000), at 87–91 and 128–130.

94. See Molenaar, supra note 15, at 183–184. See also Oya Özçayir, supra note 10, at 85.

95. See Molenaar, supra note 15, at 467, no 21, and 491–492.

96. See McDorman, supra note 25, at 315; and Molenaar, supra note 15, at 103. T. Keselj, "Port State Jurisdiction in Respect of Pollution from Ships: The 1982 United Nations Convention on the Law of the Sea and the Memoranda of Understanding," 30 *Ocean Development and International Law* 127–160 (1999), at 131–135, also attempted to resolve this ambiguity. Oya Özçayir, supra note 10, at 80, regarded art. 211(3) as the legislative basis for art. 218.

97. See Molenaar, supra note 15, at 109–110. Recent amendments to the Netherlands Prevention of Pollution from Ships Act (PPSA; *Wet voorkoming verontreiniging door schepen*, of 14 December 1983, *Staatsblad* 683 (1983)) allow enforcement based on art. 218 (Act of 20 January 2005, *Staatsblad* 49 (2005). For a brief discussion, see *NILOS Newsletter* no. 22 (May 2005), at 1–3, text at www.law.uu.nl/nilos.

98. As of Jan. 1, 2006, there were 149 parties to the LOS Convention. See www.un.org/Depts/los.

99. Directive 2005/35/EC of 7 September 2005 "on ship-source pollution and on the introduction of sanctions, including criminal sanctions, for pollution offences" (*OJ* 2005, L 255/11). See in particular, art. 3(1)(e), 3(2), 4, and 6(1). This should be read in conjunction with Council Framework Decision 2005/667/JHA of 12 July 2005 "to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution" (*OJ* 2005, L 255/164). See in particular, art. 7(1)(g).

100. See McDorman, supra note 25, at 318–319.

101. This question is answered affirmatively by McDorman, supra note 25, at 307 and 320–322.

102. *Ibid*., at 220–221, comes to this conclusion.

103. Directive 2005/35/EC, supra note 99, art. 7(1)(f).

104. GATT, supra note 23.

105. WTO Dispute No. WT/DS193: *Chile—Measures Affecting the Transit and Importation of Swordfish*; complainant: EC, at www.wto.org.

106. These were: Australia, Canada, Ecuador, India, Iceland, Norway, and the United States.

107. *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile v. European Community)*, Case No. 7 of the International Tribunal for the Law of the Sea (ITLOS), pending, see www.itlos.org.

108. By Order 2005/1, of 29 December 2005, the ITLOS extended the time limits for the suspension of the proceedings to Jan.1, 2008, acknowledging that both Chile and the EC reserve their right to revive the proceedings prior thereto. See www.illos.org. In Doc. WT/DS193/3/Add.3, of 22 December 2005, the EC informed the chair of the WTO Dispute Settlement Body that Chile and the EC had agreed to maintain the suspension of the process for the constitution of the Panel and that the EC reserved its right to revive the proceedings at any time. See www.wto.org.

109. *Ley General de Pesca y Acuicultura,* no. 18.892, text at www.subpesca.cl.

110. *Aplicación del Artículo 165 de la Ley General de Pesca y Acuicultura especie Jurel*, D. S. n. 361–99, text at www.subpesca.cl.

111. *Aplicación del artículo 165 de la Ley General de Pesca y Acuicultura a la especie Pez Espada*, D. S. n. 598–99, text at www.subpesca.cl.

112. *Aprueba Política de uso de Puertos Nacionales por Naves Pesqueras de Bandera Extranjera que Pescan en Alta Mar Adyacente*, D. S. n. 123–04, text at www.subpesca.cl. In *Fishing News International*, April 2005, at 44 it is noted that the Decree has been enforced only since October 2004.

113. 50 *Code of Federal Regulations* § 300.107(c)(iii). Convention on the Conservation of Antarctic Marine Living Resources, Canberra, 20 May 1980, in force 7 April 1982, 19 *International Legal Materials* 837 (1980), at www.ccamlr.org.

114. "Harvesting of *Dissostichus eleginoides* in Areas Outside of Coastal State Jurisdiction Adjacent to the CCAMLR Area in FAO Statistical Areas 51 and 57." See www.ccamlr.org.

115. See below "Lacey Act Approaches."

116. Orrego Vicuña, note 87, at 265, rejected this view. See, however, A. Serdy, "See You in Port—Australia and New Zealand as Third Parties in the Dispute Between Chile and the European Community over Chile's Denial of Port Access to Spanish Vessels Fishing for Swordfish on the High Seas," 3 *Melbourne Journal of International Law* 79–119 (2002), at 94–96.

117. See art. 3 of Decree no. 361–99, supra note 110; and art. 2 of Decree No. 598–99, supra note 111.

118. See Serdy, supra note 116, at 98–104.

119. *United States—Import Prohibition of Certain Shrimp and Shrimp Products*; Panel Report, WTO Doc. WT/DS58/R of 15 May 1998, para. 7.43, 7.55, and 9.1; and Appellate Body Report, WTO Doc. WT/DS58/AB/A, of 12 October 1998, at para. 186. Texts at www.wto.org.

120. See WTO Doc. WT/DS58/RW of 15 June 2001 and WTO Doc. WT/DS58/AB/RW of 22 October 2001, at para. 135–138. Texts at www.wto.org.

121. De La Fayette, supra note 13, at 20.

122. *Ibid.*

123. See generally, www.nafo.org.

124. Framework Agreement for the Conservation of the Living Marine Resources on the High Seas of the Southeast Pacific, Santiago, 14 August 2000, not in force (the Galapagos Agreement). See *Law of the Sea Bulletin*, 70–78, no. 45 (2001) and www.oceanlaw.net/texts/index.htm. At the time of writing, Chile, Peru, and Ecuador had ratified the Agreement, but Colombia had indicated that it was unable to ratify, while not excluding this for the future. On Nov 27, 2003, the four states adopted a Modification Protocol which replaces art. 19(1) of the Galapagos Agreement with the following provision: "This [Galapagos Agreement] shall enter into force on the thirtieth day after the date of deposition of the instrument of ratification by three of the Coastal States." The Modification Protocol also requires three ratifications for entry into force. While Chile ratified the Protocol on Mar. 22, 2004, and Ecuador on June 25, 2004, Peru still had to ratify at the time of writing. Information kindly provided by G. Pereira, CPPS.

125. See, for instance, *ibid*., the Preamble and art. 5(1)(E) and 12. Also note the definition of "other interested States" in art. 1(3) and the right pursuant to art. 16(3) of these states to accede to the Galapagos Agreement. The relevant provisions of the Fish Stocks Agreement, supra note 20, are art. 7(2) and 8(3).

126. See WTO Doc. WT/DS193/3, of 6 April 2001, available at www.wto.org.

127. As the Netherlands flagged *Maartje Theodora* commenced fishing for horse mackerel in the high seas off Chile in late 2005, this will also be a concern of the EC.

128. For information on this initiative, see www.southpacificrfmo.org.

129. Paris MOU, supra note 3. In the near future, the minimum percentage of inspections will be replaced by a risk-based approach.

130. In particular, Rule 10 of the Convention on the International Regulations for Preventing Collisions at Sea, London, 20 October 1972, in force 15 July 1977, as regularly amended, *U.K.T.S.* 77 Cmnd. 6962.

131. The 2002 ISM Code is available at www.imo.org.

132. The International Convention on Civil Liability for Oil Pollution Damage, Brussels, 29 November 1969, in force 19 June 1975, 973 *U.N.T.S.* 3, which was replaced by the 1992 Protocol, London, 27 November 1992, in force 30 May 1996.

133. See Provisional Record No. 25 of the International Labour Conference's Ninety-Third Session (2005). The draft Convention is included in *Provisional Record* No. *19*, at 96–121.

134. Convention on the Protection of the Underwater Cultural Heritage, Paris, 1 November 2001, not in force, 41 *International Legal Materials* 40 (2002) and at www.unesco.org.

135. WHO Doc. WHA58.3, of 23 May 2005, text at www.who.int/csr/ihr.

136. See art. 3(4) and 43 of the 2005 IHR, supra note 134; and see WHO media release of May 23, 2005, at www.who.int/csr/ihr.

137. Convention for the Prohibition of Fishing with Long Drift-nets in the South Pacific, Wellington, 23 November 1989, in force 17 May 1991, 29 *International Legal Materials* 1449 (1990) and at www.oceanlaw.net. See art. 3(2)(d). See also T. Løbach, *Port State Measures*, OECD Doc. AGR/FI/IUU (2004) 9, of Apr. 8, 2004.

138. FAO Port State Model Scheme, supra note 89.

139. See the 2004 Vancouver Declaration, note 38, at 39, action III(f)(6).

140. See supra note 133 and accompanying text.

141. While parts of SOLAS 74, supra note 67, apply to fishing vessels, many do not. At the time of writing, the International Convention for the Safety of Fishing Vessels, Torremolinos, 2 April 1977, its 1993 Protocol, and the International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel, London, 7 July 1995, had not yet entered into force. Note that Council Directive 97/70/EC, of 11 December 1997, "setting up a harmonised safety regime for fishing vessels of 24 metres in length and over" (consolidated version at europe.eu.int/eur-lex) applies the standards in the 1993 Torromolinos Protocol also to ships flying the flag of non-EU Member States. See in particular preambular para. 8, 13, and 16 and art. 1(1), 3(5), and 7.

142. The 2004 Vancouver Declaration, note 38, at 7, para. 2.14, notes that IUU fishing has "safety risk implications."

143. According to IMO Doc. MSC/Circ.1111, of 7 June 2004, Annex 1, at 5, keeping such records is required pursuant to Regulations XI-2/9.2.1.3, XI-2/9.2.1.4 and XI-2/9.2.1.5 of SOLAS 74, IMO Doc. SOLAS/CONF.5/32, of 12 December 2002. This is confirmed in para 4.37 and 4.38 of Part B of the ISPS Code, supra note 39 .

144. IPOA on IUU Fishing, supra note 20.

145. A database concerning relevant port state measures was recommended, *FAO Fisheries Rep.* no. 759, supra note 89, at para. 27; however, COFI in Mar. 2005 left the funding of this database unresolved. See *FAO Fisheries Rep.* no. R780, supra note 89, at para. 31.

146. See Doc. HSTF/06, of 25 February 2005, "Promoting responsible port States," Doc. HSTF/10, of 14 March 2005, "First Meeting of the High Seas Task Force. Summary of Outcomes," at 3; and *Promoting Responsible Ports*, supra note 90, texts at www.high-seas.org.

147. Such safeguards are incorporated in sec. 7 to part XII of the LOS Convention; sec. 3.10.2, 3.14, and 3.16 of the Paris MOU, supra note 3, and the Paris MOU Review Panel, info at www.parismou.org; sec. 2.4 of IMO's PSC Procedures (IMO Assembly Resolution A.787(19), of 23 November 1995, "Procedures for Port State Control," as amended by IMO Assembly Resolution A.882(21), of 25 November 1999); and para. 3.1–3.10 and Annex D of the FAO Port State Model Scheme, supra note 89.

148. See Churchill and Lowe, supra note 18, at 64. For a contrary view, see Oya Özçayir, supra note 10, at 88.

149. Directive 2000/59/EC, of 27 November 2000, "on port reception facilities for ship-generated waste and cargo residues" (*OJ* 2000 L 332/81). See art. 7.

150. See F. Orrego Vicuña, "Port State Jurisdiction in Antarctica: A New Approach to Inspection, Control and Enforcement," in *Implementing the Environmental Protection Regime for the Antarctic*, ed. D. Vidas (Dordrecht: Kluwer Academic, 2000), 45–69.

151. IPOA on IUU Fishing, supra note 20.

152. For example, CCAMLR Conservation Measure 10-07 (2005) "Scheme to promote compliance by non-Contracting Party vessels with CCAMLR conservation measures," para. 4 and 5, see www.ccamlr.org; art. 42(1) of the Northwest Atlantic Fisheries Organization, Conservation and Enforcement Measures, at www.nafo.org; and the International Commission on the Conservation of Atlantic Tunas, Recommendation 02–23 "to establish a list of vessels presumed to have carried out illegal, unreported and unregulated fishing activities in the ICCAT Convention area," at para. 1, at www.iccat.es.

153. See, for example, art. 6 and 10 and Annex II to Directive 2002/59/EC, supra note 17.

154. Catch Documentation Scheme for *Dissostichus* spp. (CDS), at para. 15. See www.ccamlr.org. See also CCAMLR Resolution 17/XX "Use of VMS and other Measures for the Verification of CDS Catch Data for Areas Outside the Convention Area, in particular, in FAO Statistical Area 51."

155. FAO Port State Model Scheme, supra note 89.

156. Article 1(d) of the Chilean Decree D. S. No. 123, of 3 May 2004, supra note 112. However, the wording of this provision seems to suggest that more is required than providing VMS data.

157. See CCAMLR Circular (COMM CIRC) 04/83, of 14 September 2004. On file with the author.

158. Council Regulation (EC) No. 1035/2001 "establishing a catch documentation scheme for Dissostichus spp," (consolidated version available at Europe.en.int/eur-lex), see art. 13(2).

159. CCAMLR Conservation Measure 10-03 (2005) "Port inspections of vessels carrying toothfish," at para. 2, at www.ccamlr.org.

160. Council Regulation (EC) No. 601/2004 of 22 March 2004 "laying down certain control measures applicable to fishing activities in the area covered by the Convention on the conservation of Antarctic marine living resources and repealing Regulations (EEC) No 3943/90, (EC) No 66/98 and (EC) No 1721/1999" (*OJ* 2004, L 97/16). See art. 27(2).

161. See art. 28f of Council Regulation (EEC) No. 2847/93 of 12 October 1993 "establishing a control system applicable to the common fisheries policy" (consolidated version available at Europe.eu.int/eur-lex).

162. The case is based on Sea Fishing (Enforcement of Community Control Measures) Order 2000, *SI* 51-2000 and text at www.opsi.gov.uk, art. 3(2) and 4(3). Information provided by R. Irish, DEFRA, Apr. 2006.

163. On this issue, see also Anderson, supra note 24, at 330.

164. These include Latvia and Lithuania (based on the survey referred to in supra note 66). See also Helsinki Commission Recommendation 19/14, of 26 March 1998, "A Harmonized System of Fines in Case a Ship Violates Anti-Pollution Regulations," text at www.helcom.fi, which stipulates in para. I(1) of the Attached Criteria that violations of obligations to keep the Oil and/or Cargo Record Books or not having signatures thereto are regarded as violations of MARPOL 73/78, supra note 21, and the Convention on the Protection of the Marine Environment of the Baltic Sea Area, Helsinki, 9 April 1992, in force 17 January 2000, text at www.helcom.fi.

165. The Netherlands, based on art. 11(3) of the 1983 PPSA, supra note 97, and art. 225(2) of the 1881 Penal Code (*Wetboek van Strafrecht*).

166. See, for instance, the *United States v.Royal Caribbean Cruises Ltd.* (1998–1999) case referred to in IMO Doc. MEPC 51/14, of 26 January 2004, at 2. Also discussed by Molenaar, supra note 15, at 466–467.

167. 16 *United States Code* § 3371 *et seq*. The "prohibited acts" are set out in 16 *United States Code* § 3372. For a general overview, see R. S. Anderson, "The Lacey Act: America's Premier Weapon in the Fight against Unlawful Wildlife Trafficking," text at animallaw.info/articles/arus16publlr27.htm.

168. See the broad definition of "import" in 16 *United States Code*, sec. 3371(b), which would also cover transshipments. No consideration seems to have been given to the "innocence" of the vessel's presence.

169. 16 *United States Code* sec. 3372(a)(3) seems to extend the locus of the overlying violation to the possession of such fish within the "special maritime and territorial jurisdiction of the United

States" as defined in 18 *United States Code* sec. 7. This may include the EEZ of the United States and possibly even the high seas. However, P. A. Ortiz, "An Overview of the U.S. Lacey Act Amendments of 1981 and A Proposal for a Model Port State Fisheries Enforcement Act," draft document prepared for the High Seas Task Force (November 2005), see www.high-seas.org, at 17 argues that "a showing that the vessel entered the U.S. continguous zone (. . .) would be sufficient to show an import under the Lacey Act." For a party to the LOS Convention, which the United States is not, this would be problematic in view of art. 33 of the LOS Convention. Also, the definition of "import" in the Model Port State Fisheries Enforcement Act, set out by Ortiz, at 30, explicitly refers to the EEZ, which would be problematic in view of art. 56 of the LOS Convention.

170. Ortiz, supra note 169, at 7–8 and 13.

171. *Ibid*., at 6–7.

172. *Ibid*., at 12.

173. See supra note 154 and see *ibid*., at 24.

174. The Sydney Draft is contained in Appendix D to the *Report of the Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia in Cooperation with FAO*, Sydney, Australia, 15–19 May 2000, Doc. AUS:IUU/2000/3, on file with author.

175. See Doc. HSTF/06, supra note 146; Doc. HSTF/10, supra note 146, at 3, and the draft document prepared by Ortiz, supra note 169.

176. D. H. Anderson, "The Roles of Flag States, Port States, Coastal States and International Organisations in the Enforcement of International Rules and Standards Governing the Safety of Navigation and the Prevention of Pollution from Ships Under the UN Convention on the Law of the Sea and Other International Agreements," 2 *Singapore Journal of International and Comparative Law* 557–578 (1998), at 558, noted that the collision rules in sec. 424 of the Merchant Shipping Act 1894 of the United Kingdom were applicable to foreign ships priovided their flag state had given its prior consent.

177. See Rayfuse, supra note 92, at 330, and, for example. ICCAT Recommendation 97-11, at para. (2), see www.iccat.es.

178. See, in particular, art. 25(2) and 218(1) of the LOS Convention as opposed to art. 94, 211(2), and 217. One of the exceptions is art. 219.

179. See art. 5 of MARPOL 73/78, supra note 21; art. 11 of the Anti-Fouling Convention, supra note 39; art. 9 of the Ballast Water Management Convention, supra note 39; and Reg. XI-2/9(1) of SOLAS 74, supra note 143. Pursuant to art. 4(2) of MARPOL 73/78, supra note 21, port states are to defer the matter to the flag state.

180. Paris MOU, supra note 3.

181. See also IMO's PSC Procedures, supra note 147.

182. While 14 Maritime Authorities participated in the Paris MOU from the outset, this had increased to 22 by Jan 1, 2006. Five of these were from nonmembers of the EU Canada, Croatia, Iceland, Norway, and the Russian Federation. See www.parismou.org.

183. These are: Asia and the Pacific (Tokyo MOU, supra note 7); Latin America (Acuerdo de Viña del Mar, at.www.acuerdolatino.int.ar); Caribbean (Caribbean MOU, at.www.caribbeanmou.org); West and Central Africa (Abuja MOU, no Web site); the Black Sea region (Black Sea MOU, at.www.bsmou.org); the Mediterranean (Mediterranean MOU, at. www.medmou.org); the Indian Ocean (Indian Ocean MOU, at.www.iomou.org); and the Arab States of the Gulf (Riyadh MOU, no Web site).

184. See *inter alia* Doc. ATCM XXVI/IP/44 (2003), "Port State Control: An Update on International Law Approaches to Regulate Vessels Engaged in Antarctic Non-Governmental Activities. Submitted by the Antarctic and Southern Ocean Coalition (ASOC)."

185. See E.U. Port State Control Directive, supra note 8.

186. See Molenaar, supra note 6, at 246. Note, however, that the IMO Assembly approved at its 24th Session (2005) Agreements between the IMO and various regional merchant shipping PSC regimes.

187. See sec. 2.3 of the Paris MOU, supra note 3; and sec. 2.4 of the Tokyo MOU, supra note 7.

188. See Rayfuse, supra note 92; and see *Promoting Responsible Ports*, supra note 90.

189. Rayfuse, supra note 92, at 336.

190. For example, para. (3) and (7) of the Indian Ocean Tuna Commission Resolution 05/03 "Relating to the Establishment of an IOTC Programme of Inspection in Port," text available at www.iotc.org.

191. FAO Port State Model Scheme, supra note 89.

192. "Report of the Expert Consultations," supra note 88.

193. See *FAO Fisheries Rep*. no. 759, supra note 89, at 4, para. 15–19.

194. See *FAO Fisheries Rep*. no. R780, supra note 89, at xi and 4–5.

195. See Doc. HSTF/10, supra note 146, at 3, by which HSTF members agreed to adopt an MOU on Port State Control by 2006. This is not stated in *Promoting Responsible Ports*, the HSTF Final Report, supra note 89, at para. 83.

196. Available at www.neafc.org.

197. See the Report of the Extraordinary Meeting of Permanent Committee on Control and Enforcement (PECCOE), Apr. 11, 2005, at 1–3; Report of the Annual PECCOE Meeting, Oct. 2005, at 14–17 and Annex 7; and Report of the Annual NEAFC Meeting (2005), at 29–30. All the reports are available at www.neafc.org.

198. See the Summary Report of the First Meeting of the Technical and Compliance Committee of the WCPFC, Doc. WCPFC-TCC1, at para. 43, and the Summary Record of the Second Session of the WCPFC, at para. 54. Documents available at www.wcpfc.org.

199. See Report of the 24th Annual CCAMLR Meeting, 2005, Doc. CCAMLR-XXIV (2005), para. 11.16–11.17, 16.9, and 17.3–17.4. Available at www.ccamlr.org.

200. See statements made during the 2004 Technical Consultation on the FAO Port State Model Scheme, *FAO Fisheries Rep*. no. 759, supra note 89, at 3, para. 10; para. 13(D) of the Ministerial Declaration and the summary of the workshop no. 5, included in the Report of the Conference, "The Governance of High Seas Fisheries and the UN Fish Agreement—Moving from Words to Action" (St. John's, Newfoundland, and Labrador, Canada, May 1–5, 2005, available at www.dfo-mpo.gc.ca/fgc-cgp/index_e.htm); U.N. General Assembly Resolution 60/31, supra note 2, para. 42. By way of COM(2002) 180 final, of 28 May 2002, *Communication from the Commission, Community action plan for the eradication of illegal, unreported and unregulated fishing*, the EU expressed its intention to negotiate a multilateral agreement on port state jurisdiction.

201. At the time of writing, only a Draft Report (Doc. A/CONF.210/2006. . .) was available at www.un.org/Depts/los. See, at 36, para 58.

202. *Earth Negotiations Bulletin*, vol 7, no. 59, at 1–2, available at www.iisd.ca.

203. See Doc. HSTF/10, supra note 146, at 3.