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Port State Jurisdiction: Towards Mandatory and Comprehensive Use

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1. Introduction

Ports give access to the landmass of a State for persons and goods and are therefore logical points of control for, inter alia, customs, immigration, sanitation, and national security purposes. Ports are also an obvious place to verify if visiting foreign ships are in compliance with certain types of national or international technical standards or if they have engaged in certain illegal behaviour in the port State's own 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 preferable or, perhaps, the only option.

Port State jurisdiction clearly does not just serve immediate national interests but can also further the interests of the international community, by policing issues such as safety at sea, marine environmental protection, sustainable utilization of marine living resources, safeguarding of marine biodiversity, and combating international terrorism. The more immediate national interests and the interests of the international community frequently coincide. 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 primary responsibility over its ships, port States can make an important contribution to ensuring compliance with international regulatory efforts.[1] Ships, companies and flag States that benefit as 'free riders' or 'flags of convenience' from the primacy of flag State jurisdiction and the consensual

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[1] See para 44 of United Nations General Assembly (UNGA) Res 59/24, of 17 November 2004 (Doc A/RES/59/24, of 4 February 2005) and paras 31 and 38 of UNGA Res 59/25, of 17 November 2004 (Doc A/RES/59/25, of 17 January 2005).

nature of international law can, through port State jurisdiction, be deprived of competitive advantages created by lower operating costs or avoidance of catch restrictions. The level playing field for maritime activities thereby promoted is an essential component of, or even prerequisite for, safeguarding many of the previously listed interests of the international community. However, if port State jurisdiction remains entirely optional and port States are not obliged to take action on such issues, then some port States may themselves 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 vessels can be crucial for sustaining the local economy of the port, through, for example, port fees, use of port services (such as loading, off-loading, refuelling, and re-supplying), processing of cargo or linkages with transport on land. The importance of visiting ships can also go far beyond the economy of the port, for instance where the ports' State is heavily dependent on the import of certain products. In such a situation the result can be that internationally agreed standards, for instance, those adopted within the International Maritime Organization (IMO), the International Labour Organization (ILO), or by regional fisheries management organizations (RFMOs), are simply not enforced or are not enforced as rigorously as they need to be. Ports of convenience will therefore tend to attract the business of ships that have violated, or are in violation of, inter alia, IMO or ILO standards and of ships whose cargo has been obtained in violation of international standards (eg IUU fishing).

Due to the wide range of potential repercussions, a unilateral approach by a single port State, even if in accordance with international law, is not likely to be pursued without a policy assessment of its overall cost-effectiveness. Among other things, a port State *could* risk making its ports less convenient than those of its neighbours. Global or regional uniformity in standards relating to maritime activities therefore contributes not only to a level playing field for such activities but also for ports.[2] In addition, other States *may* pursue unilateral approaches by retaliation or simply through precedent and thereby affect the initiating port State in various ways, for instance on vessels flying its flag through restrictions on access to foreign ports and markets. A broader resort to unilateralism would also undermine the effectiveness and credibility of competent international organizations such as the IMO. Lastly, unilateralism may spread to, and trigger repercussions in, spheres that are entirely unrelated to maritime activities.

The focus in this chapter is mainly on port State jurisdiction in the realm of the competence of IMO, ILO, and RFMOs. As there are no definitions of 'port State' or 'coastal State' in the United Nations Convention on the Law of the Sea

[2] The Preamble to the Paris MOU (Memorandum of Understanding on Port State Control, Paris, 26 January 1982; in effect 1 July 1982, as regularly amended; text at http://www.parismou.org) contains both elements.

(LOSC),[3] this chapter will use 'port State' in a broad sense, encompassing jurisdiction over the port's own maritime zones (in its capacity as coastal State) as well as over the high seas and the maritime zones of other coastal States. The international law perspective of this chapter implies that port State jurisdiction concerns first of all foreign vessels.

Finally, instead of a more limited focus on port State control, this chapter deals with port State jurisdiction. The notion of port State control is best understood in the light of the rationale of the 1982 Paris Memorandum of Understanding (MOU)[4] and the other regional merchant shipping port State control (PSC) regimes modelled thereon, which were established to enhance compliance with internationally agreed standards by means of commitments to carry out inspections and to take predominantly corrective enforcement action, such as detention for the purpose of rectification. These regional agreements, even though non-legally binding, contain savings-clauses[5] to ensure that nothing in them adversely affects the jurisdiction of a port State. This allows port States to prescribe more stringent standards than those internationally agreed and to take more onerous enforcement measures.

Section 2 of this chapter 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, extra-territorial prescription, and in-port enforcement as well as the implications of international trade law. The next three sections discuss the broadening scope, optimizing use of jurisdiction and the move towards mandatory port State jurisdiction and global coverage. The chapter ends with some conclusions.

2. Port State Jurisdiction Under General International Law

(a) Access to ports

As ports lie wholly within a State's territory and fall on that account 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[6] and is implicitly confirmed by, inter alia, Articles 25(2), 211(3), and 255 of the LOSC. While there may often be a presumption of access to ports, customary international law gives

[3] United Nations Convention on the Law of the Sea 1982, 1833 UNTS 3; (1982) 21 ILM 1261; http://www.un.org/Depts/los.

[4] See above note 2.

[5] eg Sections 3.5 and 8.1 of the Paris MOU and Sections 3.2.2 and 8.1 of the Tokyo MOU (Asia-Pacific Memorandum of Understanding on Port State Control in the Asia-Pacific Region, Tokyo, 1 December 1993; in effect 1 April 1994, as regularly amended; text at http://www.tokyo-mou.org).

[6] *Case concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)* [1996] ICJ Reports 14, 111, para 123.

foreign vessels no general right of access to ports.[7] The plethora of bilateral port access agreements in existence today is a further indication of the absence of a general right of access to ports under customary international law.[8]

A widely acknowledged exception to the abovementioned discretion is a ship 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, for example in preventing pollution, override those of the ship.[9]

(b) Conditions for entry into port

Apart from the exceptions discussed above, does a port State otherwise have unrestricted jurisdiction to regulate entry into port based on the rationale 'who can do more can also do less'? It has for instance been suggested that conditions that are patently unreasonable or discriminatory may amount to an abuse of rights.[10] Perhaps situations like these are largely academic. Not only are port States well aware of the wide range of potential repercussions referred to earlier but many have also limited their discretion by becoming Contracting Parties to a wide range of treaties, including those in the sphere of international trade law (see below, 00). The principle of non-discrimination, for instance, is widely recognized in the international law of the sea,[11] international fisheries law,[12] IMO instruments,[13] and regional merchant shipping PSC regimes.[14]

It is widely recognized that port States commonly do not exercise jurisdiction with regard to matters that are essentially internal to the ship and which do not affect the interests of the port State. This, however, is merely a matter of comity and policy and does not affect a port State's entitlement to exercise such jurisdiction.[15]

[7] cf A V Lowe, 'The Right of Entry into Maritime Ports in International Law' (1977) 14 San Diego Law Review 597–622, 622; and Z Oya Özçayir, *Port State Control* (LLP, London 2001) 79 (but see 70).

[8] cf L A de La Fayette, 'Access to Ports in International Law' (1996) 11 IJMCL 1–22, 4.

[9] See E J Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution* (Kluwer Law International, The Hague/London 1998) 101.

[10] cf R R Churchill and A V Lowe, *The Law of the Sea* (3rd edn, Manchester University Press, Manchester 1999) 63. See eg Article 300 of the LOSC.

[11] See eg Articles 24(1)(b), 25(3) 119(3) and 227 of the LOSC.

[12] See Article 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 1995 (UNFSA) (1995) 34 ILM 1542; (http://www.un.org/Depts/los) and para 52 of the IPOA on IUU Fishing (International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. Adopted by consensus by FAO's Committee on Fisheries (COFI) on 2 March 2001 and endorsed by the FAO Council on 23 June 2001; text available at http://www.fao.org/fi).

[13] See eg Article 5(4) of MARPOL 73/78 (International Convention for the Prevention of Pollution from Ships, London, 2 November 1973, as modified by the 1978 Protocol (London, 1 June 1978) and as regularly amended. Entry into force varies for each Annex. At the time of writing Annexes I–VI were all in force.) Article 5(4) contains the no-more-favourable-treatment (NMFT) clause.

[14] See eg Section 1.2 of the Paris MOU and Section 1.3 of the Tokyo MOU.

[15] cf Churchill and Lowe, above note 10, 65–69.

Another general limitation on jurisdiction imposed by international law is the need for a sufficiently close or substantial connection with the person, fact or event and the State exercising jurisdiction.[16] This is clearly not a hard and fast rule but merely 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'.[17]

The jurisdictional basis for port State jurisdiction can either be territorial, quasi-territorial, or extra-territorial. The sufficiency of the territorial principle as a basis for jurisdiction, whatever its rationale, can be presumed unless international law specifically provides otherwise. Illegal behaviour occurring in port can be addressed through territorial jurisdiction. One of the case studies in the following section deals with port State jurisdiction on compliance with construction, design, equipment, and manning (CDEM) standards in port.

As regards behaviour prior to entry, port States can still rely on territorial jurisdiction if the behaviour took place within their internal waters, archipelagic waters, or territorial sea. Jurisdiction over behaviour beyond the port State's territory can be either quasi-territorial or extra-territorial. The term quasi-territorial is selected to reflect the jurisdiction of the port State over its own Exclusive Economic Zone (EEZ) or (outer) continental shelf pursuant to Articles 56 and 77 of the LOSC, to be exercised in conformity with the limitations in these and other provisions of the LOSC.

It is submitted that truly extra-territorial jurisdiction exercised by the port State relates to behaviour occurring beyond its own maritime zones; therefore on the high seas or in the maritime zones of other States. It is submitted that such jurisdiction *could* be justified by:

- a treaty basis, whatever its underlying rationale;
- the universality principle, which relates to activities directed against the interests of the international community, regardless of where the activity takes place;
- the effects or impact principle, which covers extra-territorial activities that have a significant effect on the State exercising jurisdiction;
- the protective or security principle, which is similar to the effects or impact principle with the difference that the activities affect vital interests of a State;
- interests of the international community;[18] or

[16] cf A Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 Recueil des Cours de l'Académie de Droit International 9–162, 83.

[17] Judge Fitzmaurice in the *Barcelona Traction Case* [1970] ICJ Rep 3, 105.

[18] cf 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) 524.

- 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 extra-territorial port State jurisdiction is exempt from the need for a sufficient jurisdictional link. It is nevertheless submitted that the legality or justifiability of extra-territorial port State jurisdiction depends, in addition to the abovementioned jurisdictional bases, on the type of enforcement action taken. This argument is developed in the next subsection.

(c) Extra-territorial prescription and in-port enforcement

Examples of port State enforcement measures include:

- prohibiting the landing, transshipment or processing of cargo;
- prohibiting the use of other port services, such as refuelling, other forms of re-supplying (water, food, equipment, bait, etc), making repairs, etc;
- denial of access to ports (ad hoc or through banning);
- boarding and inspection;
- detention until the requirements of national legislation are complied with (eg repairs to meet CDEM standards); and
- monetary or other penalties (including confiscation of ship or cargo) for violations of national legislation.

The last two are the more onerous enforcement measures with a clear punitive element. However, 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 extra hours of idleness in port may amount to a significant loss of income.

There are basically two general rules 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 therefore presumes a sufficient jurisdictional link, and which is applicable to the specific circumstances of the event calling for enforcement. Second, national legislation enacted in accordance with international law does not necessarily bring unlimited enforcement powers. The provisions in the LOSC on coastal State prescription and enforcement are a good example.[19]

[19] See, eg, the limited enforcement powers in the EEZ pursuant to Article 220(5) and (6).

The argument that the legality or justifiability of extra-territorial port State jurisdiction depends, in addition to an adequate jurisdictional basis, on the type of enforcement action taken will now be examined for two case studies: (1) national CDEM standards in port, and (2) unregulated fishing on the high seas.

(i) National CDEM standards in port

Articles 25(2), 211(3), and 219 of the LOSC are all relevant to the port State's competence to prescribe and enforce CDEM standards in ports. Significantly, neither Article 25(2) nor Article 211(3) imposes any substantive restrictions on port State prescriptive and enforcement jurisdiction. Conversely, coastal State prescription of CDEM standards relating to the territorial sea or the EEZ must conform to the level of 'generally accepted'.[20] The circumstance that Article 219 imposes a qualified obligation on port States to take certain enforcement measures does not affect their prescriptive competence or their ability to impose more onerous enforcement measures.

Due to their static nature, the level of compliance or non-compliance by vessels with CDEM standards is commonly uniform throughout a vessel's voyage. Regardless of whether CDEM standards seek to regulate behaviour or not, it seems conclusive for the jurisdictional basis for port State jurisdiction over CDEM standards that non-compliance exists in port. Jurisdiction can therefore 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 extra-territorial effect is incidental rather than its primary purpose.

Even though the LOSC does not constrain the port State's wide discretion to prescribe, this could occur through adherence to relevant IMO and ILO instruments. The LOSC 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 or, in other words, utilize its 'residual' prescriptive jurisdiction,[21] such constraints do not arise from mere adherence to these instruments.[22] In fact, several of these instruments implicitly or explicitly confirm the port State's residual prescriptive jurisdiction.[23]

[20] See LOSC, Articles 21(2) and 211(5).

[21] eg Section 15(1) of Annex VI to MARPOL 73/78.

[22] See Molenaar, above note 9, 110–120.

[23] It is submitted that an insertion of the NMFT-clause (see above note 13) reflects implicit recognition. Explicit recognition occurs in eg 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 Anti-Fouling Convention (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 BWM Convention (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 (new) reg 21(8)(2)) of Annex I to MARPOL 73/78 are also regarded by some Contracting Parties as confirming the port State's residual jurisdiction.

This view is also supported by limited but significant State practice, including the 1990 Oil Pollution Act (OPA)[24] of the United States, the 1996 Stockholm Agreement[25] and, more recently, European Union (EU) Regulation (EC) No 417/2002.[26] The last of these was amended in 2003 to ensure that transport of heavy grades oil to or from EU ports would occur only by double-hull oil tankers. As the EU was prepared to act unilaterally and exercise its residual jurisdiction as a port State, Annex I to MARPOL 73/78 was eventually amended to remove the main inconsistencies with the EC Regulation.[27]

However, there is also State practice in support of a contrasting view in the form of a judgment of the New Zealand Court of Appeal in the *Sellers* case,[28] which has been welcomed by several authors.[29] The Court of Appeal may have ruled differently if the extra-territorial effect of the prescribed unilateral standard would have been incidental rather than its sole purpose. This notwithstanding, the judgment appears flawed, among other things, for misinterpreting Article 211(3) of the LOSC, failing to discuss the issue of access to ports under general international law and Article 25(2) of the LOSC, incorrectly linking the notion of 'generally accepted' to port State jurisdiction, misinterpreting the function of regional merchant shipping PSC regimes, and failing to refer to savings-clauses therein.[30]

As regards the type of enforcement measure a port State can impose for non-compliance with a CDEM standard in port, a distinction should be made between national and international CDEM standards. Non-compliance with international CDEM standards entitles port States also to use the more onerous enforcement measures.[31] However, the considerable punitive character of detention for the

[24] Oil Pollution Act of 18 August 1990, Pub L No 101-380, 104 Stat 484 (1990), in 33 US Code §§ 2701–2761 and 46 US Code §§ 3701–3718.

[25] 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 by Molenaar, above note 9, 117–119.

[26] 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 at http://europe.eu.int/eur-lex). See Article 1.

[27] 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 5 April 2005, the amended EU Regulation already entered into force on 21 October 2003 ([2003] OJ L249/1). See also V Frank, 'Consequences of the *Prestige* sinking for European and International Law' (2005) 20 IJMCL 1–64, 21.

[28] *Sellers v Maritime Safety Inspector*, case No CA104/98, Judgment of 5 November 1998. See 5 and 17.

[29] J S Davidson, 'New Zealand Freedom of Navigation on the High Seas: Sellers v. Maritime Safety Inspector' (1999) 14 IJMCL 435–439, 438; D Devine, 'Port State Jurisdiction: A Judicial Contribution from New Zealand' (2000) 24 Marine Policy 215–219, 218; Oya Özçayir, above note 7, 91.

[30] See 13 and 16–17.

[31] cf Churchill and Lowe, above note 10, 276 and T L McDorman, 'Regional Port State Control Agreements: Some Issues of International Law' (2000) 5 Ocean and Coastal Law Journal 207–225, 223.

purpose of rectification referred to earlier explains in part why port States commonly require rectification or commit themselves to such practice within regional merchant shipping PSC regimes.[32] This practice, whether unilateral or through commitments at the regional level, also avoids the potential repercussions discussed at the outset of this chapter. There may nevertheless be exceptions to this practice.[33]

Finally, in view of the port State's residual prescriptive jurisdiction and the territorial principle on which it relies, there is in principle no reason why non-compliance with national CDEM standards would not entitle the port State to use more onerous enforcement measures. The same policy reasons for restraint apply here as well though.

(ii) Unregulated fishing on the high seas

Article 116 of the LOSC 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 the various exceptions for at-sea enforcement in Articles 109–111. However, 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 117–119. This duty to cooperate is strengthened by Article 8(3) of the UNFSA,[34] by which States fishing for straddling or highly migratory fish stocks have to cooperate with or become a member of the relevant RFMO. Paragraph (4) of that provision stipulates that only members or cooperating non-members shall have access to the relevant fishery resources.

Pursuant to Article 23(1) of the UNFSA, a port State 'has the right and the duty' to take certain measures in its ports. These measures are, inter alia, the inspection of documents, fishing gear and catch and, when it has been established that the catch was 'taken in a manner which undermines the effectiveness of sub-regional, regional or global conservation and management measures on the high seas', to prohibit landings and transhipments (paragraphs (2) and (3)). The International Plan of Action (IPOA) on IUU Fishing[35] 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 tranship fish'.[36]

Nevertheless, Article 23 of the UNFSA does not explicitly mention the right of port States to institute proceedings or to impose monetary or other penalties. This is an important distinction with Article 218 of the LOSC, which *does* explicitly

[32] See subsections 3.9.1–3.9.2, 3.10.1–3.10.4 and 3.11 of the Paris MOU. But see also above note 5 on savings-clauses.

[33] See Oya Özçayir, above note 7, 2 for an exception relating to Gabon.

[34] See above note 12. [35] See above note 12.

[36] cf paras 3.3.1 and 56 of the IPOA on IUU Fishing.

mention the right to institute proceedings. Some uncertainty is nevertheless caused 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 on the purpose of this savings-clause. According to the first, it is merely to confirm the powers that port States already have under general international law.[37] By emphasizing that this is not a progressive development of international law, the savings-clause ensures that the port State measures referred to cannot just be applied between the parties to the UNFSA on an inter se basis, but also against vessels flying the flag of non-parties. In this reading, the real innovation of Article 23 is that port State jurisdiction is no longer exclusively optional. However, even though the use of 'duty' in paragraph (1) of Article 23 establishes mandatory port State jurisdiction as a general rule, this is considerably softened by using the optional 'may' in relation to all the specific stages of enforcement referred to.

There is no indication that the current port State practices within RFMOs distinguish between vessels flying the flag of a party or a non-party to the UNFSA. This supports the conclusion that such port State measures are at any rate part of the *current* customary international law. If it were to be ascertained that such practice predated the entry into force or even adoption of the Fish Stocks Agreement, which seems likely, it also supports the conclusion that Article 23 merely serves a codificatory purpose.

According to a second interpretation, the savings-clause serves the *additional* purpose of upholding more extensive rights to which a port State would be entitled under customary international law. The broad wording of paragraph (4) would indeed justify such an interpretation. Examples of such more extensive rights are the prescription of unilateral, rather than sub-regional, regional or global, conservation and management measures as well as the use of more onerous enforcement measures. However, no RFMO currently explicitly authorizes, let alone stipulates, more onerous enforcement measures.[38]

There are nevertheless many instances in which port States have made access to ports conditional on compliance with unilateral conservation and management measures relating to high seas fishing.[39] There is no indication, however, that the more onerous enforcement measures were resorted to in those cases.

In conclusion, it is submitted that current general international law entitles port States to exercise extra-territorial jurisdiction over unregulated fishing on the

[37] See the discussion by D H Anderson, 'Port States and Environmental Protection', in A Boyle and D Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press, Oxford 1999) 325–344, 338–342.

[38] cf R G Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Martinus Nijhoff, Leiden/Boston 2004) 336.

[39] See the State practice discussed in de La Fayette, above note 8, and the practice by Norway mentioned by Anderson, above note 37, 341–342. See also the practice by Chile discussed below, 205.

high seas. While Article 25(2) of the LOSC and Article 23(4) of the UNFSA support the view that port State jurisdiction is in principle unlimited, this is not reflected in State practice on enforcement. 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*.

(d) Implications of international trade law

While port States enjoy wide discretion under general international law and relevant IMO and ILO instruments, this may be significantly constrained by a State's adherence to treaties in the sphere of international trade law. A potentially very significant example is the 1994 General Agreement on Tariffs and Trade (GATT 1994), which inter alia contains the freedom of transit and the prohibition of quantitative restrictions in Articles V(3) and XI. In 2000 the European Community (EC) invoked these two provisions when it instituted a World Trade Organization (WTO) dispute settlement procedure against Chile for prohibiting Spanish fishing vessels from landing swordfish caught on the high seas in Chilean ports. 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.[40] Shortly thereafter, Chile instituted a dispute settlement procedure against the EC under the LOSC.[41] As both proceedings were suspended in 2001,[42] the uncertainty as to the impact of GATT 1994 and international trade law on the discretion of port States under the international law of the sea remains in place.

3. Broadening Scope

Port State jurisdiction is likely to have 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 became gradually more and more widely known 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 were gradually inserted in all of the relevant IMO and ILO instruments. A milestone 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.

[40] These were: Australia, Canada, Ecuador, India, Norway, Iceland, and the US.

[41] *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (No 7)(Chile/European Community)*, pending (see http://www.itlos.org).

[42] *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (No 7)(Chile/European Community)* (Provisional Measures, Order of 16 December 2003) ITLOS Reports 2000.

Initially, the inspections under the Paris MOU were predominantly focused on 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 were also directed at enforcement of discharge violations, navigation standards, and the standards on working and living conditions developed by the ILO.

In the early and mid 1990s, standard setting within 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 more recent expansions of standard setting within IMO relate to vessel-source air pollution, maritime security,[43] ballast water management and, in the near future, ship scrapping. All these expansions have or will have a port State jurisdiction component. Also noteworthy is that the text of the Paris MOU now makes reference to the 1992 International Convention on Civil Liability for Oil Pollution Damage as one of the relevant instruments, even though the Convention itself does not contain provisions on port State control or jurisdiction.

Significant developments outside the sphere of sphere of IMO and ILO include the adoption of the Underwater Cultural Heritage Convention,[44] which imposes an obligation on port States in Article 15. Moreover, the World Health Organization (WHO) adopted the 2005 International Health Regulations (IHR).[45] Upon entry into force on 23 May 2007, these will replace the 1969 IHR. Among other things, the 2005 IHR will broaden the obligations of port States.[46]

The 1989 Wellington Convention[47] is one of the first instances in which port State jurisdiction was introduced in the sphere of international fisheries. The discussion above, 00, showed that, at the time of writing, it featured prominently in the UNFSA and the IPOA on IUU Fishing. Moreover, most of the main RFMOs have established port State practices, and these are expected to be strengthened as a consequence of the adoption of the FAO Port State Model Scheme[48] in 2005 (see below, 208).[49] The increasing support for the protection of marine biodiversity

[43] See above note 23.

[44] Convention on the Protection of Underwater Cultural Heritage 2001 (2002) 41 ILM 40.

[45] WHO Doc WHA58.3, of 23 May 2005 (text at http://www.who.int/csr/ihr).

[46] See WHO media release of 23 May 2005 at http://www.who.int/csr/ihr.

[47] Convention for the Prohibition of Fishing with Long Drift-nets in the South Pacific, 1989 (1990) 29 ILM 1449; http://www.oceanlaw.net. See Article 3(2)(d).

[48] 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 Report* No 759 (FAO, Rome 2004)).

[49] See also T Løbach, *Port State Measures* (OECD Doc AGR/FI/IUU (2004) 9, of 8 April 2004).

and the use of ecosystem-based fisheries management may eventually have implications for port State jurisdiction as well.

This short overview illustrates the point that port State jurisdiction has become increasingly complex. This is not just a consequence of the updating of relevant international instruments but also of their continuous expansion into related or entirely new subject areas. Not only have the number, duration and complexity of inspections increased, this is also likely to be true for the frequency of multiple inspections and the involvement of multiple national inspection authorities. While integrated forms of in-port inspections may be used in some port States, many still have consecutive and uncoordinated inspections by officials from different authorities.

4. Optimizing Use of Jurisdiction

Paragraph 59 of the IPOA on IUU Fishing urges port States to take 'any other actions . . . consistent with international law'. This general wording advocates the fullest possible use of their jurisdiction under international law. As a first step, this would require port States to examine which exercises of jurisdiction remain under-utilized or unexplored. The analyses carried out by the FAO[50] and the Secretariat of the Ministerial-led Task Force on Illegal, Unreported and Unregulated Fishing on the High Seas (High Seas Task Force)[51] may offer guidance in this respect.

The following subsections discuss exercises of port State jurisdiction which have recently developed or which remain under-utilized. These are (a) departure State jurisdiction; (b) providing VMS data; and (c) penalties for furnishing false information. It must be observed that optimizing use of port State jurisdiction, both in terms of legislation 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.[52]

(a) Departure State jurisdiction

In view of the broad prescriptive powers of port States, there is in principle no objection to setting conditions for the departure from ports as a condition for

[50] In the context of the recommended database concerning relevant port State measures (*FAO Fisheries Report* No 759, above note 48, para 27. However, COFI in March 2005 left the funding of this database unresolved ('Report of the twenty-sixth session of the Committee on Fisheries', Rome, 7–11 March 2005 (*FAO Fisheries Report* No. 780 (FAO, Rome 2005)), para 31).

[51] See Docs HSTF/06, of 25 February 2005, Promoting responsible port States and Doc HSTF/10, of 14 March 2005, 'First Meeting of the High Seas Task Force. Summary of Outcomes', 3 (texts at http://www.high-seas.org).

[52] Such safeguards are inter alia incorporated in Section 7 to Part XII of the LOSC Convention; Sections 3.10.2, 3.14 and 3.16 of the Paris MOU as well as the Paris MOU Review Panel, Section 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 paras 3.1–3.10 and Annex D of the FAO Port State Model Scheme.

entry.[53] This so-called 'departure State jurisdiction' can, for example, 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, for example, pursued by EU legislation.[54] Such requirements would be especially helpful for ships departing for Antarctica, where normal coastal or port State jurisdiction is not possible.

(b) Providing VMS data

As a condition for entry, port States can require the provision of satellite-based vessel monitoring system (VMS) data. If provided, this could enable them 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 inconsistent with national or international regulation. This may then lead to an exercise of coastal or flag State jurisdiction or even to charges such as furnishing false information. There may well be similar opportunities to link a vessel to illegal discharges. Examples of international support for such conditions for entry into port in the sphere of fisheries are Conservation Measure 10-05 (2004)[55] of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) and paragraph 2.4 of the FAO Port State Model Scheme. Examples of States that set this condition are Chile in relation to all foreign fishing vessels,[56] and the US in relation to foreign fishing vessels targeting toothfish.[57] EU legislation obliges EU Member States in certain situations to require VMS data for landings of toothfish.[58]

(c) Furnishing false information

The port State could use its criminal or administrative law to lay charges such as furnishing false information or obstruction of inspection in connection with, but not based on, behaviour 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, behaviour such as IUU fishing or illegal discharges in

[53] cf Churchill and Lowe, above note 10, 64. Contra Oya Özçayir, above note 7, 88.

[54] Directive 2000/59/EC of the European Parliament and of the Council of 27 November 2000 on port reception facilities for ship-generated waste and cargo residues [2000] OJ L332/81. See Article 7.

[55] Catch Documentation Scheme for *Dissostichus* spp, para 14. 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'.

[56] Article 1(d) of the Chilean Decree DS No 123, of 3 May 2004, on the Policy on the Use of National Ports by Foreign Fishing Vessels that Fish in the Adjacent High Seas (*Aprueba Política de uso de Puertos Nacionales por Naves Pesqueras de Bandera Extranjera que pescan en Alta Mar Adyacente* (DS No 123–04; available at http://www.subpesca.cl).

[57] cf CCAMLR COMM CIRC 04/83, of 14 September 2004.

[58] Council Regulation (EC) No 1035/2001 establishing a catch documentation scheme for Dissostichus spp; consolidated version, Article 13(2).

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 illegal activities have in fact taken place. CCAMLR Conservation Measure 10-03 (2002)[59] 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.[60] The abovementioned charges could also be used for falsified VMS data provided as a condition for entry into port (see above, 205).

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.[61] 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'.[62] Presumably, it is up to the individual EU Member State to decide if and what steps should be taken for false declarations. In a case under consideration in the UK at the time of writing, a fishing vessel of a non-EU Member State possibly faced a steep monetary penalty for furnishing false information in relation to high seas fishing activities.[63] Examples of States that impose penalties or institute proceedings for furnishing false information or obstructing inspection in the sphere of vessel-source pollution are the Netherlands[64] and the US.[65]

5. Towards Mandatory Port State Jurisdiction and Global Coverage

While flag State jurisdiction is compulsory under the LOSC, port State jurisdiction is optional, with some limited exceptions.[66] This situation is essentially similar

[59] Port inspections of vessels carrying toothfish, para 2.

[60] 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' [2004] OJ L97/16, Article 27(2).

[61] See also Anderson, above note 37, 330 on the issue of incorrect or absent entries in oil record books.

[62] See Article 28f of Council Regulation (EEC) No 2847/93, of 12 October 1993, 'establishing a control system applicable to the common fisheries policy'.

[63] The case is based on Sea Fishing (Enforcement of Community Control Measures) Order 2000, SI 2000/SI; text at http://www.opsi.gov.uk), Articles 3(2) and 4(3). Information provided by G Owen, DEFRA, July 2005.

[64] Based on Article 11(3) of the 1983 Prevention of Pollution from Ships Act (*Wet voorkoming verontreiniging door schepen*) and Article 225(2) of the 1881 Penal Code (*Wetboek van Strafrecht*).

[65] See, eg, the *United States v. Royal Caribbean Cruises Ltd* (1998–1999) case referred to in IMO Doc MEPC 51/14, of 26 January 2004, 2 (also discussed by Molenaar, above note 9, 466–467).

[66] See in particular Articles 25(2) and 218(1) as opposed to Articles 94, 211(2), and 217. One of the exceptions is Article 219.

in IMO instruments. Whereas many of these instruments contain provisions on in-port inspections, 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.[67] The voluntary nature of port State jurisdiction and the ensuing emergence of ports of convenience were instrumental in the creation of the Paris MOU, by which the participating Maritime Authorities committed to inspect a certain minimum percentage of visiting foreign merchant vessels. The 1991 IMO Assembly Resolution A.682(17) 'Regional Co-operation in the Control of Ships and Discharges'[68] acknowledged the added value of the Paris MOU and commenced efforts to create a global network of regional merchant shipping PSC regimes. The expansion in participation in the Paris MOU and creation and expansion of new PSC regimes since then[69] 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 sea-borne tourism through the so-called 'gateway ports' to Antarctica.[70]

While EU Member States are legally bound to the Port State Control Directive,[71] which is highly similar to the Paris MOU, all the regional merchant shipping PSC regimes are non-legally binding international instruments.[72] This does not necessarily say something about their effectiveness, however. On the other hand, geographical coverage does not necessarily mean that the level of effectiveness achieved by the Paris and Tokyo MOUs is also achieved by the other regimes.

In the sphere of fisheries, States have committed to exercising port State jurisdiction through the IPOA on IUU Fishing, and States parties to the UNFSA are legally bound to do so pursuant to its Article 23. At the regional level, most RFMOs that deal with straddling, highly migratory and/or discrete high seas fish stocks have developed port State practices.[73] However, none explicitly authorizes, let alone stipulates, more onerous enforcement measures.[74] Many of the regimes are also optional or apply exclusively to vessels flying the flag of non-members of the RFMO.[75] Such discrimination may be unjustifiable and thereby inconsistent with international trade law.

[67] See eg Article 11 of the Anti-Fouling Convention, above note 23, and Article 5 of MARPOL 73/78. Pursuant to Article 4(2) of MARPOL 73/78, port States are still entitled to defer the matter to the flag State.

[68] See also IMO's PSC Procedures, above note 52.

[69] These are: Asia and the Pacific (Tokyo MOU); Latin America (Acuerdo de Viña del Mar); Caribbean (Caribbean MOU); West and Central Africa (Abuja MOU); the Black Sea region (Black Sea MOU); the Mediterranean (Mediterranean MOU); the Indian Ocean (Indian Ocean MOU); and the Arab States of the Gulf (GCC MOU (Riyadh MOU)).

[70] The Caspian Sea may be another gap.

[71] Council Directive 95/21/EC of 19 June 1995 on 'port State control of shipping', as amended.

[72] See also the Preamble to the Tokyo MOU.

[73] For a more comprehensive analysis of practice by the main RFMOs see Rayfuse, above note 38.

[74] cf Rayfuse, above note 38, 336.

[75] Eg paras (3) and (7) of IOTC (Indian Ocean Tuna Commission) Resolution 05/03 'Relating to the Establishment of an IOTC Programme of Inspection in Port'.

The FAO Port State Model Scheme[76] aims to contribute 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. This is essentially similar to the objectives of the 1991 IMO Assembly Resolution A.682(17) and IMO's PSC Procedures.[77] However, it is not clear if and to what extent the Scheme itself imposes obligations or commitments on FAO Members. Whereas the Scheme was adopted in 2004 by a Technical Consultation subject to a reservation by Japan,[78] the Committee on Fisheries[79] endorsed the Report of the Consultation but not the Scheme itself and agreed that 'follow-up work on the [Consultation] should be undertaken, especially with respect to operationalizing the model scheme agreed at the Consultation'.[80] Only such efforts, whether individually, within the context of RFMOs, the HSTF[81] or beyond at the sub-regional, or regional, level can ultimately achieve the goal of a global network of mandatory regional arrangements. Finally, at the Technical Consultation in 2004, some FAO Members expressed their support for an international legally-binding instrument on the rights and obligations of port States.[82] While such preferences still existed at the time of writing, no concrete steps towards negotiation had been undertaken.

6. Conclusions

Under general international law, vessels have no right of access to foreign ports and port States have broad powers to prescribe and enforce. The legality or justifiability of extra-territorial port State jurisdiction 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 nevertheless unclear. Moreover, residual jurisdiction may not be exercised in view of the wide range of repercussions that such a unilateral approach may have.

Port State jurisdiction is moving from voluntary use in limited subject areas towards comprehensive and mandatory use through regional and global arrangements. Due to the continuous updating of relevant international instruments and their expansion into related or entirely new subject areas, the most rapid development relates to the substantive scope of jurisdiction. Much less rapid is the expansion of the rights and obligations of port States.

[76] See above note 48. [77] See above note 52.
[78] *FAO Fisheries Report* No 759, above note 48, 4, paras 15–19. [79] See above note 12.
[80] *FAO Fisheries Report* No 780, above note 50, xi and 4–5.
[81] See Doc HSTF/10, above note 51, 3 by which HSTF members inter alia agreed to adopt an MOU on Port State Control by 2006.
[82] *FAO Fisheries Report* No 759, above note 48, 3, para 10.

Suggestions for optimizing the use of port State jurisdiction relate to departure State jurisdiction, providing VMS data as a condition for entry into port, and using criminal or administrative law to lay charges such as furnishing false information. Despite the near-global coverage by regional merchant shipping PSC regimes, the existence of port State practices in most of the main RFMOs and the adoption of the FAO Port State Model Scheme, the objective of mandatory global coverage still lies far ahead. Ports of convenience will continue to undermine these objectives until the remaining geographical gaps in global coverage are filled and the performance level of individual regional arrangements as well as inter-regional uniformity are adequate. Developing States will need considerable assistance if this goal is to be reached.

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,[83] 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. Pro-active States should embrace this notion in their drive for change and ultimately see it firmly established as a benchmark in regional and global arrangements.

[83] Doc HSTF/10, above note 51, 3.