



PROMOTING RESPONSIBLE PORTS

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Active use of port State powers can be an effective weapon against IUU operations. We propose that HSTF members promote universal acceptance of the notion of the responsible port State and commit to action consistent with that notion. We recommend that HSTF members support the adoption of the FAO Port State Model Scheme and promote its application internationally. We also propose that HSTF members demonstrate their commitment to the objective of global coverage of port State control for marine capture fisheries by adopting an MOU based on the minimum standards set out in the FAO Port State Model Scheme. We recommend that HSTF members consider domestic legislation similar to the U.S. Lacey Act as a means of dealing with landings and transshipment of fish caught in ways that undermine international conservation and management measures.

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For any further information please contact Michael Lodge or Frank Meere, Secretariat, High Seas Task Force, 2 rue André Pascal, 75016, Paris Cedex 16, tel: +33 1 45 24 95 76 / 96 42; fax: +33 1 45 24 84 08; email: Michael.Lodge@oecd.org/ Frank.Meere@oecd.org.

RESPONSIBLE PORT STATES

A. INTRODUCTION

1. Active use of port State powers can be an effective weapon against IUU operations. Once a vessel is in one of its ports, the port State needs to be able to act decisively and effectively. This means that necessary domestic legislation must be in place as well as cooperative mechanisms to coordinate action with other port States, flag States and market States. A regionally or globally harmonized and coordinated approach to port State control can help to overcome some practical limitations (e.g. IUU operators rapidly shifting operations from one port to another or transshipping at sea) and can act as a disincentive to IUU operators by increasing the cost of their operations (e.g. by forcing them to seek out more remote and hence more costly ports). More effective use of port State controls by HSTF members will increase the effectiveness of many of the other measures recommended to HSTF members. The key is to ensure that port State controls are applied widely and consistently in order to avoid the development of so-called ports of convenience.

2. Port State regimes have a well-established track record in the area of merchant shipping. They have had a particularly significant impact on the problem of substandard shipping. These regimes are generally aimed at ensuring mandatory inspection of vessels when they enter ports and are tied to internationally agreed rules and standards for shipping, especially those developed through the International Maritime Organization (IMO) and International Labour Organization (ILO).

3. In recent years, there has been increased interest in the possibility of applying similar schemes to internationally or regionally agreed standards relating to fisheries. The wide discretion of States to exercise their jurisdiction over vessels voluntarily present in their ports is recognized in article 23 of UNFSA. Although it is doubtful that article 23 adds anything to general international, the provision acknowledges that a port State “has the right and the duty” to take non-discriminatory measures in order to “promote the effectiveness of sub-regional, regional and global conservation and management measures”.¹ The same principle is reflected in the IPOA-IUU and increasingly in State practice.

4. Port State regimes for fishing vessels have been developed by a number of RFMOs. Some of these are outlined briefly in this paper. In 2004, agreement was reached within FAO on a non-binding international instrument (FAO Port State Model Scheme)² describing basic and minimum port State measures that should be applied either through adoption of regional memoranda of understanding, through RFMOs or at the level of individual port States. We recommend that the HSTF endorse the FAO Port State Model Scheme as representing a minimum standard to be applied by responsible port States and RFMOs.

5. There are close linkages between increased use of port State measures and other HSTF measures. For example, coordinated port State controls may be used to increase the effectiveness of trade-related measures such as catch documentation schemes and controls over transshipment at sea. There are also important linkages between the implementation of port State controls and the proposed dedicated high seas MCS network as well as very specific linkages between the proposed global information system on high seas fishing vessels and the information that can be generated and used as a result of port State inspection regimes. The HSTF may also wish to explore the potential for better integration of port State controls over fishing-related activity in other areas, such as working conditions, maritime safety, maritime security and customs.

B. PORT STATE CONTROL UNDER INTERNATIONAL LAW

6. As ports lie wholly within a State's territory and fall on that account under its territorial sovereignty, general international law acknowledges that a State has wide discretion in exercising jurisdiction over its ports. This is reflected, *inter alia*, in article 25(2) of the 1982 UN Convention on the Law of the Sea (LOSC). That provision allows a port State to deny foreign fishing vessels access to its ports or to set conditions for access. Article 211 also permits States to establish requirements for the prevention, reduction and control of pollution as a condition of entry of foreign vessels into their ports. Foreign vessels therefore have no general right of access to ports under general international law. Widely acknowledged exceptions to this general rule are ships in distress or in situations of *force majeure*. Even in these cases, however, the specific circumstances may be such that the (environmental) interests of the port (or coastal) State override those of the ship. A good example of the sort of conditions that port States might apply in order to combat IUU fishing is found in Chile's policy for the use of national ports by foreign fishing vessels.³ This requires, *inter alia*, all foreign fishing vessels to fully comply with applicable conservation and management measures and to use a vessel monitoring system.

I. Impact of treaties

7. Multilateral or bilateral treaties may affect the discretion of port States in some circumstances. Some treaty provisions create rights for port States beyond those under general international law; other treaty provisions impose obligations that constrain the discretion under general international law. An important example of a treaty creating rights for port States is article 218 of the LOSC. This provision authorizes port State enforcement jurisdiction over illegal discharges that have occurred beyond the port State's own maritime zones. Procedural safeguards are set out in article 226. Article 23 of UNFSA speaks of both rights and obligations by acknowledging that a port State "has the right and the duty" to take certain measures in its ports. These measures include the inspection of documents, fishing gear and catch and, when it has been established that the catch was illegally taken, to prohibit landings and transshipments (paragraphs (2) and (3)).

8. Many of the IMO treaties contain provisions on in-port inspections. In general, these provisions do not necessarily oblige port States to carry out inspections but rather stipulate that where they do decide to inspect, such inspections are limited in certain ways, for example to a certificate check. This was one of the main reasons for the creation of the 1982 Paris Memorandum of Understanding on Port State Control (Paris MOU), by which participating maritime authorities agreed to harmonize and coordinate port State control procedures, *inter alia* by means of a commitment to inspect a certain minimum percentage of all merchant ships visiting their ports. In 1991 the IMO acknowledged the value of the Paris MOU and commenced efforts to create a global network of regional merchant shipping MOUs. This is in essence what the FAO Port State Model Scheme also seeks to achieve for fisheries.

II. Strengthening port State jurisdiction

9. The rules and standards used for port State jurisdiction in the spheres of safety at sea, pollution prevention and maritime security are predominantly established at the global level within IMO and ILO. Conservation and management measures relating to fishing, on the other hand, are mostly established at the regional level within RFMOs. As a general rule, IMO and ILO standards deal with design, construction, equipment and manning standards, which should be complied with at all times, whereas 'fishing' standards are more often than not behavioural standards. Using port State jurisdiction to ensure compliance with the latter type of standards is therefore more likely to result in extra-territorial jurisdiction. This is not objectionable where the standards in question are agreed to multilaterally and the enforcement action is related to rules and standards that have been agreed to multilaterally and in accordance with relevant rules of international law.

10. In order to ensure consistency with international trade law it is critical that all port State enforcement action is applied in a transparent manner that avoids unjustifiable discrimination between foreign vessels as well as between national and foreign vessels.⁴ This is in fact in full conformity with the general LOSC requirement of non-discrimination (LOSC, articles 119 (3) and 227) which is also reflected in paragraph 52 of the IPOA-IUU. The latter stipulates that port State measures “should be implemented in a fair, transparent and non-discriminatory manner.” It is important to emphasize that what is to be avoided is unjustifiable discrimination. For example, denial of access to ports or services to a vessel flying the flag of a State that is not a member or cooperating non-member of a relevant RFMO and is unable to establish that the catch was taken in a manner consistent with the RFMO’s conservation and management measures is a form of discrimination, but one that can be justified. This currently occurs in various port States that cooperate with CCAMLR in relation to its catch documentation scheme for toothfish.

11. Examples of enforcement measures that might be applied by port States are:

- Denial of access to ports altogether;
- Prohibiting the landing, transshipment or processing of catch;
- Prohibiting the use of other port services, such as refuelling, other forms of re-supplying (water, food, equipment, bait), making repairs, etc.; and
- Punitive or corrective action in case of violations of the domestic legislation of the port State.

12. A particularly powerful example of the last item in the list is the Lacey Act in the United States.⁵ This makes it an offence under domestic law to, *inter alia*, import into, export from and even possess in the United States, fish that has been taken in violation of a treaty or the domestic legislation of a foreign State (subject of course to proof of the foreign law or treaty and the violation thereof). The Lacey Act does not expressly cover acts in violation of conservation and management measures that may be adopted by RFMOs. Nevertheless, the United States has used the Lacey Act successfully to prosecute U.S. nationals who engage in certain forms of IUU fishing. In case of a conviction, not only can the fish be seized but both civil and criminal penalties can be imposed.⁶ As such, this goes well beyond mere inspection of documents and catch by port States.

13. The Lacey Act approach warrants further investigation. It is relevant not only in the context of port State controls, but also in the context of exerting greater control over nationals. We propose that the HSTF task the Secretariat to conduct a more detailed analysis of how similar “long-arm” approaches might be adapted to support enforcement of internationally-agreed conservation and management measures. Such approaches may be adopted by HSTF members individually or collectively. A reciprocal regime could be developed whereby HSTF members could agree to apply similar legislative measures between themselves – a form of prior flag State consent. This approach could be progressively extended, for example by HSTF members routinely requesting non-HSTF flag States to consent to punitive or corrective action against their vessels in any case where high seas IUU fishing has been ascertained.

14. A final comment is made on vessels without nationality, or stateless vessels. The LOSC does not provide a definition of stateless vessels, but stipulates in article 92(2) that “A ship which sails under the flags of two or more States, using them according to convenience, (...) may be assimilated to a ship without nationality.” The consequences of statelessness are not spelt out in the Convention, but a growing number of RFMOs have adopted measures which require their members to board, search and, if it has been fishing in a manner which undermines the RFMO’s conservation and management measures, arrest and prosecute a stateless vessel.⁷ While such action is most likely to take place on the high seas, it is certainly not ruled out that IUU vessels that try to land or tranship catch in ports are at that moment without registration. HSTF members should therefore ensure that

they have in place domestic legislation that allows them to take enforcement action against stateless vessels on the high seas as well as within their ports and maritime zones.

III. Port State control within RFMOs

15. The earliest regional example of port State control of fishing vessels is the Wellington (Driftnet) Convention.⁸ That treaty provides for restrictions on access to ports and the use of port service facilities for vessels involved in driftnet fishing.⁹ Since then, no doubt as a result of instruments such as UNFSA, the FAO Code of Conduct and the IPOA-IUU, several RFMOs have established port State control obligations. Many of these are aimed in particular at IUU fishing by the vessels of non-contracting parties.¹⁰

16. This document does not attempt a comprehensive examination of current practice within RFMOs. Some analyses are available elsewhere,¹¹ but as RFMOs commonly meet at least once a year, practice is in a constant state of flux. The following general comments on port State control in RFMOs can nevertheless be made:

- First, most of the RFMOs that deal with straddling, highly migratory or discrete high seas fish stocks have some form of port State control, even if implicit.¹² Those that do not have anything¹³ should find guidance in the FAO Port State Model Scheme or the practice of other RFMOs;
- Second, there are no RFMOs that explicitly authorize, let alone stipulate, punitive or corrective enforcement action;¹⁴
- Third, many of the port State control regimes are voluntary.¹⁵ This means that even among the members of RFMOs, some ports are more convenient than others to IUU fishers;
- Fourth, some port State control regimes only apply to vessels flying the flag of non-members of the RFMO.¹⁶ Such discrimination may be unjustifiable and thereby inconsistent with international trade law;
- Fifth, many port State control regimes are weak procedurally. This is likely to cause a lack of uniformity which thereby again makes some ports more convenient than others. Such regimes could be improved by taking account of the guidance in the FAO Port State Model Scheme.

17. We suggest that a comprehensive and up-to-date analysis of current practice would provide the HSTF and other interested States with a more precise assessment of the margins of discretion in port State jurisdiction and would thereby help to develop better informed strategies for progressively developing international law in this area. In this respect, many of the participants in the FAO Technical Consultation strongly supported the establishment of an FAO database concerning relevant port State measures (even though only few of the delegations represented at that consultation seemed prepared to come up with additional funding for this purpose). We recommend that the HSTF support this proposal by commissioning such an analysis, which could then form a good basis for the development of the proposed FAO database on port State measures, to be kept updated by FAO.¹⁷

C. THE FAO MODEL SCHEME ON PORT STATE MEASURES TO COMBAT ILLEGAL, UNREPORTED AND UNREGULATED FISHING

18. The purpose of the FAO Port State Model Scheme is to describe basic and minimum port State measures to be applied either through adoption of regional memoranda of understanding (MOUs), through RFMOs or by individual port States. The Model Scheme was agreed to in September 2004 by a Technical Consultation and is expected to be adopted at the FAO COFI meeting in March 2005. While some participants at the Technical Consultation were hopeful that the model scheme

would be a first step towards developing a legally binding instrument at the global level, the end result is a model that is not legally binding and sets out only minimum requirements, but which does not prevent the adoption of additional and eventually stricter measures, provided, of course, they are in accordance with international law. In our view, the minimum standards contained in the FAO Model Scheme are consistent with international law and provide a sound basis for working towards the long-term objective of global coverage of port State controls.

19. The Model Scheme prescribes detailed information requirements and gives guidance on the procedures and safeguards for the conduct of port inspections. Importantly, it provides that “All measures provided for under this Model Scheme should be implemented in a fair, transparent and non-discriminatory manner.” It sets out three grounds for taking enforcement measures (short of punitive or corrective action):

- Where the vessel is flying the flag of a State that is not a member or cooperating non-member to a relevant RFMO and is unable to establish that the catch was taken in a manner consistent with that RFMO’s conservation and management measures;
- Where there are clear grounds for believing that the vessel has engaged in or supported high seas IUU fishing; and
- Where the vessel is listed on a blacklist or IUU Vessel List of an RFMO.

20. The Model Scheme offers many linkages with other HSTF proposals, particularly the proposal for a global information system for high seas fishing vessels. Annexes A-C to the Model Scheme contain lists of data that should be provided by foreign vessels and by port inspectors. These data could be fed into a global information system as well as to the high seas MCS network. Annex E to the Model Scheme in fact envisages a global information system on port State inspections.

D. PROPOSALS FOR ACTION BY HSTF MEMBERS

21. We propose that HSTF members promote universal acceptance of the notion of the **responsible port State**. In doing so, HSTF members would also aim to broaden and strengthen the rights and obligations of port States in the sphere of marine capture fisheries.

22. We also propose that HSTF members commit to specific actions that support a long-term objective of **global coverage of port State control for marine capture fisheries**.

I. The Responsible Port State

23. A responsible port State is 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 the international community’s interests in sustainable management and conservation of high seas marine living resources and safeguarding biodiversity. We propose that HSTF members advocate universal acceptance of this definition of the responsible port State. To demonstrate their own commitment to acting as responsible port States, we propose that HSTF member States agree to:

- routinely use the full range of enforcement measures in relation to IUU vessels, including prohibition of port services;
- routinely request flag State consent for punitive or corrective action against vessels after the detection of IUU fishing activities (as envisaged in the LOSC, article 228);
- pass domestic legislation that allows enforcement action to be taken against stateless vessels on the high seas as well as within ports and maritime zones;

- require captains of fishing vessels capable of fishing on the high seas, and vessels which wish to land fish transhipped at sea from fishing vessels, as a condition for entry into port, to declare their catch (species, tonnage and area of capture) in advance of entering the port and sign a statement that their vessel has not engaged in or supported IUU fishing activities and, if inspection reveals non-compliance, prosecute captains under domestic law for lying to an inspector or frustrating inspection procedures;
- require production of the national authorization for fishing to fish on the high seas for the area and species reported;
- develop a list of vulnerable species on which IUU fishing is possible or likely, and target their inspection and port state activities preferentially on fishing and transhipment vessels requiring landing facilities for these species. This list may vary with port State, depending upon the prevailing IUU problem in that part of the world;
- for fish species which are on the port State's IUU list, require, during an inspection, that the captain of the fishing or transhipment vessel provide evidence which may include VMS records demonstrating that the fish are not IUU;
- consider adopting legislation similar to the U.S. Lacey Act on a reciprocal basis;
- provide information on port State inspections identified in the Annexes to the FAO Port State Model Scheme to relevant international organizations;
- strengthen port State control within the RFMOs of which they are members, using the FAO Port State Model Scheme as guidance, for example by;
 - demanding mandatory port State control;
 - subjecting all fishing vessels, both national and foreign, to liability to in-port inspection;
 - within each RFMO, identifying so-called ports of convenience and ensuring that these port States cooperate with the RFMO's port State control regime (for example by MOU between the cooperating port State and the RFMO).

II. Global coverage of port State control for marine capture fisheries

24. In addition to strengthening port State control in the RFMOs of which they are members, we propose that HSTF members should also encourage a harmonized approach to port State control between RFMOs. This might well include the development of MOUs between RFMOs, so that port States have the duty to take action against vessels having participated in IUU fishing in areas managed by other regional bodies.

25. Global acceptance of the notion of the responsible port State may lead in time to a legally-binding international instrument on port State control for marine capture fisheries. For the present time, we foresee the development of networks of regional MOUs based on the minimum standards contained in the FAO Model Scheme. Such networks can operate at the following levels:

1. HSTF members acting jointly;
2. HSTF members acting through RFMOs of which they are members;
3. HSTF members extending the reach of (1) through cooperating State arrangements;
4. HSTF members working through RFMOs to extend the reach of (2) through cooperating State arrangements; and
5. A network of MOUs between RFMOs.

26. HSTF members should also identify the need for regional port State control regimes where there are no relevant RFMOs.

27. Sharing of information derived from harmonized port State inspections is fundamental. As noted in paragraph 20 above, such sharing of information is envisaged by the FAO Port State Model Scheme and should be regarded as one of the attributes of a responsible port State. Access to such information is one of the key potential benefits of our proposal for a global information system for high seas fishing vessels.

28. As first steps towards the long-term objective, and as a practical demonstration of their commitment to the longer-term objective, we propose that HSTF members:

(a) Commission an inventory and analysis of the current practice of States and RFMOs with respect to port State controls, which could then form a good basis for the development of the proposed FAO database on port State measures, to be kept updated by FAO; and

(b) Take the initiative to adopt between themselves an MOU on Port State Control which would require them to apply port State control for all foreign fishing vessels visiting their ports, regardless of the type of vessel, the type of fishing technique and the type of species that are to be landed.

¹ Article 8(3) of the FAO Code of Conduct also contains a (non-legally binding) commitment for port States to take the necessary measures to achieve the objectives of the Code.

² FAO Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing.

³ *Aprueba política de uso de puertos nacionales por naves pesqueras de bandera extranjera que pescan en el alta mar adyacente*, D.S. No. 123, Santiago 3 May 2004.

⁴ The question of the impact of international trade law on the discretion of port States under the international law of the sea is quite complex. In 2000, the European Community invoked articles V(3) and XI of the 1994 General Agreement on Tariffs and Trade (which refer to the freedom of transit and the prohibition of quantitative restrictions) when it instituted a World Trade Organization dispute settlement procedure against Chile in relation to Chile's prohibition of landings of swordfish by Spanish fishing vessels in Chilean ports. Shortly thereafter, Chile instituted a dispute settlement procedure against the Community under the Law of the Sea Convention. However, as both proceedings were suspended in 2001, there has been no definitive ruling on the matter. Given that non-discrimination is such an important rule of international trade law, the only clear determination that can be made is to emphasize the importance of applying measures in conformity with the general LOSC requirement of non-discrimination.

⁵ 16 *United States Code* Section 3371 *et seq.*

⁶ Robert S Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, <http://www.animallaw.info/articles/arus16publlr27.htm>. The important point about the Lacey Act is that the U.S. court does not assimilate foreign law, and thereby gain extra-territorial jurisdiction, but merely looks to see if the foreign law has been violated and, if so, applies the Lacey Act, not the procedures or penalties of the foreign law. Considered in this manner, the Lacey Act does not delegate power to foreign governments, and therefore does not violate Article I of the U.S. Constitution.

⁷ Cf. R.G. Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Leiden/Boston, Martinus Nijhoff Publishers: 2004), at p. 330. See e.g. ICCAT (International Commission on the Conservation of Atlantic Tunas) Recommendation 97-11, at para. (2).

⁸ Wellington Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, 1990.

⁹ Terje Løbach, *Advances in Port State Control Measures*, In *Fish Piracy: Combating IUU Fishing*, OECD Fisheries Committee (2004), p.292.

¹⁰ For example, the NEAFC Non-Contracting Party Scheme (2004) requires that when a non-Contracting Party vessel enters the port of any Contracting Party, it shall be inspected and shall not be allowed to land or tranship fish until inspection has been completed.

¹¹ For some analysis see Terje Løbach, *Port State Measures*, OECD Doc. AGR/FI/IUU(2004)9. For a more comprehensive analysis of practice by the main RFMOs see Rayfuse, *op. cit.*

¹² The CCSBT (Commission for the Conservation of Southern Bluefin Tuna) has an implicit port State control regime due to its 2003 Resolution on IUU fishing and the establishment of a CCSBT record of vessels over 24

metres authorized to fish for Southern Bluefin Tuna, according to which members will not allow the import and implicitly also the landing of catch by vessels not listed on the record.

¹³ An example seems to be the GFCM (General Fisheries Commission for the Mediterranean).

¹⁴ Cf. Rayfuse, *op. cit.*, at p. 336.

¹⁵ For instance, IOTC (Indian Ocean Tuna Commission) Resolution 02/01 relating to the establishment of an IOTC programme of inspection in port.

¹⁶ E.g. IOTC Resolution 02/01, note 15, which provides in para. (7): “While recognizing that inspection in port should be carried out in a non-discriminatory basis, in a first phase, priority should be given to inspection of vessels from Non-Contracting Parties.”

¹⁷ A useful start has been made by the OECD Fisheries Committee in its survey of national measures against IUU fishing (AGR/FI/IUU(2004)6/PROV).