

PEW ENVIRONMENTAL GROUP*

**POSITION PAPER ON THE DRAFT AGREEMENT ON PORT STATE
MEASURES TO PREVENT, DETER AND ELIMINATE ILLEGAL,
UNREPORTED AND UNREGULATED FISHING**

Proposed Amendments to Articles 11 to 38

September 2008

Port States have a critical role to play in the global effort to prevent, deter and eliminate IUU fishing. The importance of port State action is reflected in the UN Fish Stocks Agreement, the UN FAO IPOA on IUU fishing, and by a number of regional fisheries management organizations (RFMOs) which, over the past several years, have adopted port State measures to combat IUU fishing. The Pew Environment Group welcomes the effort to negotiate a legally binding instrument on Port State Measures.

While flag States bear the primary responsibility for ensuring that fishing vessels flying their flag operate in compliance with all relevant conservation and management measures, port States can and should exercise their independent authority to ensure that their ports do not serve to support IUU fishing activities or allow IUU fish products into the marketplace. The port State has an important role to play in assisting flag States in this regard or otherwise deterring IUU fishing in the event that a flag State cannot or is unwilling to discharge its obligations to do so.

At the same time, it is important to acknowledge the need to establish more effective measures by port States as States and RFMOs make increasing efforts to better regulate, and in some cases prohibit, at-sea transshipments of fish as well as establish market measures which may depend, in part, on effective port State monitoring of landings and transshipments.

The Draft Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (UN FAO document TC-PSM/208/2) provides a solid basis for negotiation. However, if such a regime is to be as effective as possible, a number of the elements of the draft text should be strengthened.

Denial of port access and port services

Article 17: This Article as currently drafted is fundamental to an effective effort on the part of port States to combat IUU fishing and related activities. However, this Article should not make a distinction between prohibition of landing, transshipment and processing of fish and the prohibition of access to port services, such as refueling and resupplying. Rather it should be strengthened to require port States to deny IUU vessels the use of ports for landing, transshipping or processing fish AND for refueling, resupply and other related port services. The same should apply to Article 9.

To the extent that any amendments to this or other Articles of the draft Agreement regarding the role of the flag State are considered, they should support the aims and objectives of these Articles and not provide for, or otherwise allow, flag States to impede the duties of port States to take the measures outlined in Article 17 as well as Article 9 and other relevant Articles of the Agreement.

Special funds to assist MCS capacity building in developing States

Any difficulty that developing States may encounter to fully implement the Port State Agreement due to lack of capacity should be addressed through adequate funding mechanisms. Lowering certain minimum standards to reduce the costs of implementation would only undermine the effectiveness of the Agreement, to the benefit of IUU fishing operators.

Article 22: The establishment of a fund pursuant to Article 22.3 to assist developing States in meeting the objectives of the Agreement is paramount. To this end, developed States should agree to commit resources to such a fund, as well as provide technical and human resource assistance, and work with relevant international agencies to provide such assistance. States are encouraged to announce their commitment(s) to do so even before the negotiations are finalized.

Transparency and sharing of information

Article 25: Fishing vessels and fishery products frequently travel through many jurisdictions. It is essential to the success of controlling IUU fishing practices that all relevant authorities and market actors be able to keep track of enforcement actions so that they can focus inspection and monitoring resources on vessels known to pose a risk. The Draft Agreement could be improved by adding to Article 25 a paragraph establishing *a global* record of inspections and detentions, including actions taken by port States under Articles 9 and 17, and flag States under Article 21. A centralized data-sharing mechanism would be an efficient mechanism for ensuring ready access to this global database for port States and RFMOs.

Articles 15 and 17: In addition to establishing such global record of inspections and detentions, further steps could be taken to improve information sharing by introducing some small amendments to Articles 15 and 17 and Article 9. This will be especially important to ensure effective the implementation of the provisions of Article 9. Lack of swift and ‘real-time’ communication among Parties can create a loophole, especially in the case of denial of the use of port by one Party. In order to avoid this gap, prompt notification to all other Parties of actions taken in relation to an IUU vessel should be required, so as to prevent such a vessel entry into and use of the ports of another Party.

Establish an adequate structure for monitoring and reviewing the implementation of the Agreement

Part 9: This Part of the Agreement should be amended to include an article or articles establishing adequate institutional arrangements that would ensure effective monitoring and review of the implementation of the Agreement, including a centralized data-sharing mechanism. Appropriate articles of the Agreement should reflect the duty of the Parties to transmit all information related to the implementation of the Agreement to a secretariat or to an equivalent institutional arrangement, including the duty to provide periodic reports on their implementation of the Agreement.

Global Record of Fishing Vessels

For some time there has been consensus that the creation of a Global Record of Fishing Vessels, assigning a unique identifier to each vessel that would remain with it permanently, would greatly enhance the ability of flag, port and coastal States, and RFMOs, to track vessels and their catch.

We believe that the rapid implementation of the Global Record, including information on beneficial owners and operators of fishing vessels as envisioned in the draft Agreement's annexes, will assist not only port States but coastal States, market States and others in tracking vessels and companies having been engaged in IUU fishing and related activities. This information is crucial to an effective, global effort to combat IUU fishing.

Recommendations for amending the Draft Agreement Articles 11 to 38 as per the comments and recommendations above are outlined below. The bold, underlined text contains proposed additions to the text:

Article 11
Levels and priorities for inspection

1. Each Party shall ~~endeavour to~~ inspect a number of vessels in its ports required to reach an annual level of inspections necessary to achieve the objective of this Agreement.
2. In determining which vessels to inspect, a Party shall give priority to:
 - (a) vessels that have been denied the use of a port in accordance with Articles 9 or 17 of this Agreement; ~~and~~
 - (b) requests from other relevant States or regional fisheries management organizations that particular vessels be inspected;
 - (c) [new sub-paragraph]: vessels flying the flag of a State whose vessels have appeared more than once on lists of IUU vessels compiled by regional fisheries management organizations;**
 - (d) [new sub-paragraph]: vessels lacking tamper proof VMS, lacking a fully operational VMS at any time during the voyage prior to entry into port, or lacking an observer required by a regional fisheries management organization;**
 - (e) [new sub-paragraph]: any other vessels where there are reasonable grounds for suspecting the vessel has engaged in activities undermining applicable conservation and management measures; and**
 - (f) [new sub-paragraph]: any fish carrier or refrigerated cargo vessel known or likely to have been engaged in at-sea transshipment of fish, including such vessels calling in port to resupply or refuel only.**

Article 12
Conduct of inspections

- (j) [new sub-paragraph]: ensure that the requirements of any Catch Documentation Scheme are observed.**

Article 14
Transmittal of results by Party

Each Party shall take measures to transmit the results of each inspection to the flag State of the

inspected vessel and, as appropriate, to:

- (a) other relevant States;
- (b) relevant regional fisheries management organizations; and
- (c) FAO and other relevant international organizations,

and make this information publicly available.

Article 15
Electronic exchange of information

“1. To facilitate implementation of this Part of the Agreement, each Party shall, where possible, establish a communication mechanism that allows for direct electronic exchange of ~~messages~~ **information** between relevant States, entities and institutions, with due regard to appropriate confidentiality requirements.

Article 17
Port State actions following inspection

17.1 When, following an inspection, there is reasonable evidence for believing that a vessel has engaged in, or supported, illegal, unreported and unregulated fishing which can include, but is not limited to, the following

[- subparagraphs a-k -]

- (d) ~~significant~~ fishing in a closed area, during a closed season or contrary to applicable effort or quota requirements **or other any other condition applicable to fishing in the area;**
- (f) using fishing gear that is significantly inconsistent with authorized gear, **or in a manner contrary to applicable conservation and management measures;**

the Party shall promptly notify, **preferably by a mechanism established pursuant to Article 15, the flag State of the vessel, Parties to this Agreement,** and, as appropriate, other relevant States and regional fisheries management organizations and other relevant organizations and shall deny use of its port to the vessel for landing, transshipping or processing of fish **and deny access to port services including *inter alia*, refuelling, non-essential maintenance and resupplying** if these measures have not already been taken in respect of the vessel.

17.3. A Party may take measures in addition to those specified in paragraphs 1 and 2 of this Article that are consistent with international law where there is evidence that a vessel has engaged in one or more of the activities set forth in paragraph 1, provided that:

- (a) the measures are provided for in its national laws and regulations;
- (b) the flag State of the vessel has consented to the taking of such measures or requested such measures to be taken, or a relevant coastal State has requested the taking of such measures in respect of a violation that has occurred in an area under its national jurisdiction;

(b) bis [new sub-paragraph]: the flag State has not responded to requests by the port State for the information necessary to determine whether the vessel has been in compliance with the flag States' authorization to fish and/or applicable conservation and management measures established by relevant regional fishery management organisations and/or coastal States;

(c) the vessel is without nationality, or **has concealed or recently altered its markings;**

(d) the additional measures gives effect to a decision of a regional fisheries management organization or is taken pursuant to other international agreements; **or**

(e) **[new sub-paragraph]: the flag State does not provide confirmation that it will impose sanctions on the vessel owners or operators applicable in respect of the activities in paragraph 17.1 which will be adequate in severity to be effective in securing compliance, discourage violations wherever they occur, and deprive the offender(s) of the benefits accruing from their IUU activities.**

The Party shall promptly notify, preferably by a mechanism established pursuant to Article 15, Parties to this agreement and, as appropriate, other relevant States and regional fisheries management organizations and other relevant organizations of any additional measures taken and of all relevant information necessary to enable other Port States to identify and take appropriate action with respect to the vessel.

Article 25 bis

Parties shall establish a global record of port calls, inspections, detentions, denials of port services or port access to vessels, and all other information gathered and actions taken by Parties pursuant to this Agreement, including all information obtained from flag States and information gathered on the basis of the procedures outlined in the Annexes to the Agreement. Parties shall transmit this information in a timely manner to allow for real time access to the information by all Parties and relevant organizations. The record shall be made publicly accessible and available.

In addition to the comments on Articles 11-38, as requested by the Chair, the Pew Environment Group would like to reiterate its recommendations for amendments to Articles 1, 7 and 9 of the Draft Port State Measures Agreement:

Article 1 Use of terms

1. For the purposes of this Agreement:

(g) "fishing related activities" means any operation in support of, or in preparation for, fishing, including the processing, transshipment or transport of fish ~~that have not been previously landed and offloaded at a port~~, as well as the provision of personnel, fuel, gear and other supplies at sea;

[...].

Article 7
Designation of ports

2. Each Party shall, ~~to the greatest extent possible,~~ ensure that every port designated and publicized in accordance with paragraph 1 has sufficient capacity to conduct inspections and take other measures in accordance with this Agreement.

Article 8
Ports

A Party shall deny access to its ports if the vessel is included in a list of vessels having engaged in, or supported, illegal, unreported and unregulated fishing adopted by a regional fisheries management organization in accordance with the rules and procedures of such organization.

Article 9
Denial of use of port

1. A Party shall not allow a vessel to use its ports for landing, transshipping or processing of fish **and shall deny access to port services, including, *inter alia*, refuelling, non-urgent maintenance and resupplying,** if the vessel:

- (a) at the relevant time was engaged in fishing in an area and for fish under the competence of a regional fisheries management organization and was not flying the flag of a State that is a member or cooperating non-member of that organization; or
- (b) has been ~~sighted~~ **identified** as being engaged in, or supporting, illegal, unreported and unregulated fishing in the area of competence of a relevant regional fisheries management organization or in areas under the national jurisdiction of a relevant coastal State.

unless the vessel can establish that the catch was taken in a manner consistent with relevant conservation and management measures.

~~2. A Party shall not allow a vessel to **enter its ports** use its ports for landing, transshipping or processing of fish if the vessel is included in a list of vessels having engaged in, or supported, illegal, unreported and unregulated fishing adopted by a regional fisheries management organization in accordance with the rules and procedures of such organization.~~

3.2. A Party shall not allow a vessel to **enter its ports or otherwise** use its ports for landing, transshipping or processing of fish **and other port services, including, *inter alia*, refuelling, non-urgent maintenance and resupplying** where there are reasonable grounds for believing that the vessel does not have a valid and applicable authorization to engage in fishing and fishing related activities required by a relevant regional fisheries management organization for its area of competence or by a coastal State for areas under its national jurisdiction.

4.3. A Party shall ~~not, in appropriate situations,~~ deny a vessel referred to in paragraphs 1, 2 or 3 of this Article, access to port services, ~~including, *inter alia*, refuelling and resupplying but not including services~~ essential to the safety, health and welfare of the crew.

* The Pew Environment Group is the conservation arm of the Pew Charitable Trusts, an independent non-profit organization with headquarters in Philadelphia, USA. The Pew Environment Group has recently opened an office in the European Union and has, for the past several years, run a number of programs related to fisheries and marine conservation on the high seas, around Antarctica, and in the South Pacific. Pew's Mission is to harness science in order to better understand the causes and consequences of environmental problems, and to propose innovative policy solutions to address and manage these problems more effectively. Pew's efforts are focused on marine fisheries, amongst other global environmental issues, and designed to promote the development of sustainable marine fisheries policies, and raise public awareness about the increasing environmental problems affecting our oceans and seas. For more information see www.pewtrusts.org.