

## UNITED NATIONS ACTIVITIES

FAO

## Preventing, Deterring and Eliminating IUU Fishing – Port State Measures –

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Illegal, unreported and unregulated (IUU) fishing jeopardises the livelihoods of people around the world, threatens valuable marine resources and undermines the credibility and efforts of fisheries management measures. However, the global community's awareness of these problems has failed to motivate international action. To date, countries have generally failed to address the situation with tangible effect. Resource-deficient flag State agencies, regional fisheries management organisations (RFMOs) and international voluntary regulatory instruments struggle to keep up with motivated and dynamic fleets of IUU fishing vessels.<sup>1</sup> Fortunately, there is a bold, effective solution. The Food and Agriculture Organization of the United Nations (FAO) recently developed and adopted the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSM Agreement), a landmark global legally binding instrument that strikes at the key reason behind IUU fishing – economic profit.<sup>2</sup> The 36<sup>th</sup> session of FAO's highest governing body – the FAO Conference – acclaimed the PSM Agreement as “a milestone in the international efforts to ensure responsible and sustainable fisheries” and urged FAO Members “to sign and ratify, accept, approve or accede to the Agreement as soon as possible so as to bring it into force at the earliest possible time”.<sup>3</sup>

Yet, despite widespread consensus and commitment among FAO members on its provisions and despite the arguments put forward for the early adoption of the PSM Agreement by the FAO Conference, only 23 countries had signed the Agreement – and none had ratified it – by 19 November 2010.<sup>4</sup> Given this underwhelming, though not wholly uncharacteristic response, there is a dire need for the ratification process to begin in earnest, both to honour the expressions of commitment that were made during the 36<sup>th</sup> session of the FAO Conference,<sup>5</sup> and to bring the Agreement into force with the same urgency of purpose with which it was drafted. The first anniversary of the PSM Agreement's approval passed on 21 November 2010, highlighting the pressing need for action, especially if the community of States hopes to avoid the criticism that it keeps adding to the growing number of international instruments while making no real effort to ratify and implement them.

This article is essentially an independent call to concerned persons and States to ensure the swift ratification of this vital Agreement and for the immediate implementation of its provisions for sustained action against IUU fishing. To this end, it examines the operative provisions of the Agreement and, where appropriate, illustrates them with examples of existing national legislation to demonstrate that the PSM Agreement provides the central framework necessary for effective national implementing legislation or that existing legislative provisions can be used to implement certain aspects of the PSM Agreement. The article then concludes by advocating that States quickly ratify and implement the PSM Agreement. The background to the negotiation and adoption of the PSM Agreement is set out briefly to provide a useful backdrop to the analysis and to emphasise the necessity for this global Agreement and its immediate implementation.

### From Voluntary Standards to the Adoption of a Binding PSM Agreement

Until recently, the focus of international action against IUU fishing was on ensuring effective action by flag States to exercise control over vessels entitled to fly their flags particularly when such vessels operated on the high seas. The principal international law instruments on fisheries, namely the United Nations Convention on the Law of the Sea (UNCLOS),<sup>6</sup> 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 (UNFSA) and the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement), reflect this approach based on customary international law. In this context, port States play a secondary role. For example, the Compliance Agreement sought to put a stop to fishing behaviour that undermines international conservation and management measures by, *inter alia*, imposing tighter regulations for the actions by flag States over vessels entitled to fly their flags while requiring that the port State coordinate with the flag State in case of a violation.<sup>7</sup> The UNFSA went further by saying that port States have “the right and the duty” to promote “global conservation

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and management measures".<sup>8</sup> In carrying out this duty, the UNFSA states that port States "may" take action against foreign fishing vessels including inspections and denial of port access, thus recognising the importance of the port State in controlling IUU fishing.<sup>9</sup> However, the focus remained on flag States throughout the bulk of the UNFSA. The same is true for the FAO Code of Conduct for Responsible Fisheries (Code of Conduct), which simply encourages port States to assist flag States in their duties.<sup>10</sup> Although these instruments and the practice of States did not deny the sovereignty of States within their ports as recognised under customary international law,

port State measures (PSMs) to achieve an internationally established objective or agreement is inherent in customary international law as reflected in Chapter 12 of UNCLOS. However, while UNCLOS recognises this possibility by noting port States' broad powers to regulate foreign vessels regarding pollution at sea, including investigating incidents outside of the port State's area of national jurisdiction, by failing to mention fisheries, it seemingly minimises their importance.

Synergy soon emerged between the different approaches and roles of port States, as the scheme developed to counter IUU fishing adopted the approach initially undertaken



Group photo of the Signing Ceremony of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. The first eleven FAO members – Angola, Brazil, Chile, the European Community, Indonesia, Iceland, Norway, Samoa, Sierra Leone, the United States and Uruguay – signed the treaty immediately following its approval by the Conference. Courtesy: FAO

they did not emphasise the potency of port State action against IUU fishing that occurs in areas beyond national jurisdiction.

International regulation of shipping under the auspices of the International Maritime Organization (IMO) followed a different track. There, the world community widely recognised the sovereignty of States to inspect foreign merchant vessels in their ports for compliance with universal standards for vessel safety and pollution prevention. Certain IMO members seized the opportunity to exercise such sovereignty in a collective and concerted manner by establishing a regional port State compliance regime called the Paris Memorandum of Understanding on Port State Control of 1982 (Paris MOU).<sup>11</sup> The Paris MOU, while acknowledging the primary responsibility of flag States, inspired other regional blocs of States' maritime authorities to enact similar MOUs coordinating and harmonising port State control measures that subject vessels calling in those States' ports to inspections to ensure that those vessels comply with the standards and requirements established by relevant IMO and International Labor Organization instruments.<sup>12</sup> The Tokyo MOU and subsequent regional MOUs<sup>13</sup> are modelled on the Paris MOU. The ability of port States to implement

in the domain of merchant shipping. A significant step forward in this regard was the 2001 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU). The IPOA-IUU prods States to implement a broad array of PSMs, including refusing port access to fishing vessels which fail to prove that they have not engaged in IUU fishing, relying on the principle that customary international law authorises States' to prohibit or regulate entry of foreign vessels in their ports.<sup>14</sup> Yet despite increased emphasis on PSMs, the voluntary nature of the IPOA-IUU considerably limits the instrument's potency, leaving the world community in need of further action.

The attempts within FAO to adopt a regional port State approach similar to that of the merchant shipping domain were not successful. A FAO Expert Consultation convened in 2002 to facilitate the IPOA-IUU's implementation with a particular focus on PSMs. The Expert Consultation discussed a possible Memorandum of Understanding on PSMs to enhance responsible fisheries management. Some voices considered a MOU the best way to clamp down on IUU fishing,<sup>15</sup> but many delegations viewed such an instrument as too associated with regional merchant port State control regimes and worried that a

MOU would overlap RFMO efforts with the effect of undermining the power of RFMOs.<sup>16</sup> Consequently, the Technical Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing was convened in 2004 and developed the Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing (Model Scheme) which addressed both substantive issues for port States, and principles and guidelines for memoranda on PSMs.<sup>17</sup> The world witnessed progress in 2005 when the FAO Committee on Fisheries (COFI) approved the Model Scheme, which called for minimum PSMs in ports worldwide and sought to increase the burden on foreign fishing vessels to prove the legality of their catches.<sup>18</sup> Although the Model Scheme is more elaborate than the IPOA-IUU in terms of its focus on PSMs, its potential success would be limited by its voluntary nature.

The unsatisfactory extent of this progress was evidenced by several UN resolutions that called on States to negotiate a binding agreement under the auspices of FAO.<sup>19</sup> The UN Open-Ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS) in its 2005 report to the General Assembly also promoted a legally binding instrument based on the Model Scheme.<sup>20</sup> In March 2007, COFI called for a legally binding PSM agreement to help remedy the situation.<sup>21</sup> An Expert Consultation convened in September 2007 to develop a draft for such an instrument.<sup>22</sup> Following several Technical Consultation drafting meetings to revise and further develop this draft Agreement,<sup>23</sup> the Agreement was submitted through the Council of FAO to the FAO Governing Conference.<sup>24</sup> On 22 November 2009, the FAO Governing Conference approved the Agreement.<sup>25</sup> When 25 parties have ratified, accepted, approved or acceded to the Agreement, it will enter into force after 30 days.<sup>26</sup> The Agreement was open for signature only until 21 November 2010. National accession to the Treaty will still be possible, after that one-year anniversary.<sup>27</sup>

### **The Intent and Core Elements of the PSM Agreement**

The PSM Agreement takes IUU fishing very seriously. As then-Assistant Director-General Nomura of FAO's Fisheries and Aquaculture Department stated, the proper way to view IUU fishing is as an "environmental crime, not simply as an administrative offence".<sup>28</sup> Measures outlined in the PSM Agreement would impose a more stringent and uniform regulatory regime that would restrict "port shopping" (eliminating "ports of convenience")<sup>29</sup> and would tighten penalties applicable when authorities apprehend IUU fishers.

Without an international PSM Agreement, port States may be reluctant to exercise authority over foreign IUU fishing vessels in port if the fishing activity in question takes place outside that port State's national jurisdiction (such as on the high seas).<sup>30</sup> The PSM Agreement confirms port States' jurisdiction by emphasising States' residual jurisdiction over their ports individually or in concert, through RFMOs, including the right to deny access, and to adopt more stringent PSMs than those of the

Agreement.<sup>31</sup> The PSM Agreement seeks to clarify States' jurisdiction and to require States – authorised by customary international law – to take appropriate action within their ports to aggressively deter IUU fishing.

Due to lack of resources or political will, flag States are often unable or unwilling to implement effective anti-IUU fishing laws.<sup>32</sup> But while fishing vessels can avoid the authorities of flag States and coastal States,<sup>33</sup> they must come into port to bring their fish to market. Although they can use ports of their flag State without restriction if the flag State so chooses, doing so is not always economically viable. Strengthening the authority of the port State is effective because of the commercial nature of the port's role as the place where fish enter the market. This is a crucial economic choke point in the IUU fishing industry supply chain. When States apply uniform PSMs, "ports of convenience" will cease to exist and the choke point will tighten. IUU fishers will be intercepted before they can sell their fish, thus preventing the economic incentives that drive IUU fishing from ever reaching fruition and depriving IUU fishers of the profit necessary to continue operating.<sup>34</sup>

Enabling national legislation, if not already in existence, is a prerequisite for implementing the Agreement's provisions. National laws translate the international obligations of the PSM Agreement, which would otherwise apply only to States, into appropriate national implementation obligations so that rights or obligations are transferred to individuals and can be enforced at the national level. The articles considered to be the essential provisions of the PSM Agreement are grouped under convenient labels and are described and analysed below to demonstrate that it should not be such a difficult task to legislate or implement the measures established by the PSM Agreement. Where appropriate, examples of existing national legislation<sup>35</sup> accompany descriptions and analyses of the articles to illustrate how the stated measure may be legislated.

### **Principles and Application**

Article 3 stipulates that Parties shall apply the Agreement to all ports globally in a fair, transparent, and non-discriminatory manner to all vessels carrying fish, with specific exempt categories. It also defines the scope of the Agreement. Articles 3 and 4 seek to assure Parties of their rights under customary international law, ensure that Parties are guided by agreed-upon principles in their actions, and that they should strive to rigorously apply minimum standards outlined in subsequent articles with the purpose of deterring IUU fishing while preserving their ability to apply more stringent measures than those stipulated in the Agreement. The European Union (EU), through its regulation establishing a common system to prevent, deter and eliminate IUU fishing uses the basic rights of States under customary international law to establish a comprehensive PSMs regime which also requires the implementation of more stringent measures.<sup>36</sup>

### **National Coordination**

Article 5 recognises that domestic interagency or multi-sectoral coordination is vital for effective implementation.

It requires parties to enhance coordination and integration of laws and administration regarding IUU fishing at the national level. This might be achieved as the United States has done by requiring multiple Department Secretaries to coordinate in determining whether foreign fishing vessels are complying with international conservation measures and in reporting those findings to FAO, and flag States when violations occur.<sup>37</sup>

### Cooperation and Information Exchange

Several provisions of the PSM Agreement recognise the importance of cooperation to assist all ports in benefiting from any information obtained regarding IUU fishing activities. This mutual assistance increases the resources for all ports and ensures greater uniformity among them. Article 6 requires cooperation and exchange of information among Parties and between Parties and



Benin Ambassador Daniel Zinsou Danhin signing Port State Measures flanked by Lorraine Bernadine Williams, Legal Office

Courtesy: FAO

relevant organisations. This provision may be implemented in the manner of the EU's new comprehensive port State measures regime which dictates cooperation among States and RFMOs for such activities as identification and black-listing of IUU fishing vessels.<sup>38</sup> Article 16 further requires the electronic exchange of information among States and RFMOs, coordinated by FAO. As mentioned above, the United States already requires its agencies to coordinate and report to FAO on whether or not fishing vessels are obeying international conservation measures.<sup>39</sup> The Republic of South Africa also specifies that the Minister may exchange information with other Parties on international conservation and management measures to enhance the fulfilment of those measures, but does not specifically dictate such an exchange.<sup>40</sup>

### Designation of Ports

Article 7 is necessary to control more tightly what ports foreign vessels can use with the goal of a more comprehensive regulatory system that forces IUU fishers to operate through channels defined by the appropriate port authority. The article provides that Parties must designate ports to which vessels may request access and provide the ports with the necessary inspection resources. Several different legislative models of this measure exist. Turkey, for example, provides an annex that lists ports at which

particular species of fish must be landed to more tightly control the supply chain of certain species.<sup>41</sup> Cameroon, on the other hand, requires all fishermen to land their catches at ports designated by the administrative agency responsible for fisheries to allow for inspections and the collection of information.<sup>42</sup>

### Prior Notification of Port Entry

Article 8 stipulates that Parties must require vessels to provide advance notice of their intent to enter a port. This prevents surprise landings and allows the port State to prepare for the vessel's arrival through actions such as assigning inspectors and conducting background checks of the vessel. It also enables the port State to have information on the characteristics and activities of the vessel in advance so that an informed and early decision on whether to allow entry or deny access can be made. Namibia requires 48 hours advance notice from anyone seeking to land marine resources in a Namibian port so that the port inspectors can prepare for their arrival.<sup>43</sup> On the other hand, Canada only requires 24 hours advance notice.<sup>44</sup>

### Port Entry Authorisation

Article 9 provides that Parties shall authorise or deny access to a port and carry out inspections in order to determine a vessel's compliance with IUU fishing regulations. Venezuela can implement part of this requirement soon as it has a similar, but broader and all-inclusive law requiring all commercial vessels to obtain permission before entering a port or anchoring anywhere along its coast, not just for landing fish.<sup>45</sup> Mozambique's laws refer more specifically to the authorisation to land and tranship fish based on the information provided to the port concerning the fishing activities of the vessel.<sup>46</sup>

### Force majeure

Article 10 provides a *force majeure* exception for vessels in distress. Most States' legislation contains provisions to this effect. Benin<sup>47</sup> and Côte d'Ivoire<sup>48</sup> only permit vessels to dock at ports with customs offices, but both legal regimes ignore this restriction in cases of *force majeure*.

### Documentation

Article 11 stipulates that port States should deny port access to vessels without proper authorisation and documentation or absent proof that the vessel was engaged in fishing activities in accordance with laws and requirements of relevant fishing authorities. Upon denial of port access, the port State shall then notify the flag State, RFMOs and other relevant bodies. New Zealand requires that all required documentation be in order before a vessel may land or tranship fish.<sup>49</sup> The EU requires very complete information about the fish including species, size, and time and location of capture.<sup>50</sup>

### Port Inspections

Articles 12–15 describe the minimum elements for a port State inspection regime. Article 12 requires each Party to conduct what it considers to be an adequate

level of annual vessel inspections sufficient to achieve compliance with the Agreement and to set priorities as to what vessels should be inspected, with emphasis on vessels suspected of IUU fishing. Article 13 specifies that inspectors should have access to and inspect all relevant evidence, without unduly interfering with the vessel's operations or its crew. Canada already grants its inspectors similarly broad authority to inspect any vessel believed to be carrying fish and to have access to all appropriate cargo, containers and documents related to processing, transporting or marketing of fish.<sup>51</sup> Article 14 requires a minimum standard for information to be included in an inspector's report and Article 15 requires its transmission to appropriate parties including concerned States, RFMOs and FAO. Australia already imposes a very similarly detailed inspection regime extending beyond ports to Australian waters and the high seas. All Australian fishing vessels and, in some situations, foreign vessels on the high seas are also subject to inspection, although the law may need to be more comprehensive to satisfy the Agreement's inspections scheme.<sup>52</sup> Article 16 urges Parties to establish a communication mechanism which may allow for electronic exchanges of information while Article 17 requires Parties to ensure that inspectors are properly trained taking into account the minimum standards for training enumerated in Annex E. The EU may have very few changes to make to comply with these articles. In its recent regulations, it has decided to impose a minimum inspection requirement of 5 percent of landings and transshipments. Whether this percentage is sufficient remains to be seen. Inspectors are granted access to all vessel compartments, gear, equipment and documents necessary to determine compliance and are required to report on the results of inspections to the appropriate flag State, RFMO and other authorities.<sup>53</sup>

### Denial of Use

Denial of use of ports is one of the most important port State measure under the Agreement. Without the ability to deny IUU fishing vessels use of port facilities, "ports of convenience" will continue to exist. Article 11 requires that port States deny the use of ports to vessels fishing without authorisation, in contravention of relevant fishery management requirements, or if there are reasonable grounds for believing the vessel was engaged in IUU fishing activities. Article 18 provides that if an inspection yields clear evidence that a vessel has engaged in or assisted IUU fishing, the port State shall deny the vessel use of its port. Both Articles 11 and 18 require that the port State notify the flag State and other relevant States and organisations of its findings when denial of use occurs. According to Article 9, denial of use of ports includes refusing use of the port for landing, transshipping, packaging and processing fish as well as other services such as refuelling, resupplying, maintenance and dry-docking. Denial of use also requires notifying the flag State of the situation. Article 19 stipulates necessary record-keeping and details how one may obtain recourse for damage caused by an alleged unlawful action. New Zealand already has legislation that allows denial

of port access if the appropriate Minister is satisfied that the vessel has undermined international conservation and management measures.<sup>54</sup> Gambia – with legislation that more specifically targets a particular problem – categorically denies access to all vessels that engage in driftnet fishing.<sup>55</sup>

The following articles help promote an environment in which the PSM Agreement can operate effectively.

### Flag States

Article 20 requires flag States to take responsibility for and be involved in the policing of their vessels. Combating IUU fishing is primarily the responsibility of flag States. This principle is restated here to emphasise the responsibility of States in their capacity as flag States and ensure that they continue to dutifully fulfil that role. Pragmatically, the Agreement holds flag States responsible for vessels that are entitled to fly their flag and that engage in IUU fishing, by requiring that the flag State be notified and that follow-up be conducted when a vessel is denied access to a port. National vessels are likely to be treated similarly to foreign vessels and are likely to be subject to the same or very similar laws.

### Assistance for Developing Countries

Article 21 recognises that not all Parties are endowed with adequate resources or capacity to ensure effective implementation of the Agreement. It therefore requires assistance to developing States to enhance their capacity to comply with the terms of the Agreement.

### Monitoring and Review

Article 24 recognises that there will be challenges and developments that affect efficient implementation of the PSM Agreement or that adjustment will have to be made in the implementation of certain provisions of the Agreement. The Article stipulates that Parties shall engage in monitoring and review of the implementation of the Agreement to assess progress towards achieving the Agreement's objectives.<sup>56</sup>

There are several key summarising points to make about the strategies the PSM Agreement uses. First, it clarifies and confirms the ability of port States to take action against fishing and fishing-related activity in areas beyond national jurisdiction through collective and effective exercise of port State sovereignty. This is important as port States have always been in a strategic position for combating IUU fishing through control of foreign traffic in their ports, but traditionally have lacked the will to do so. Second, the PSM Agreement establishes legally binding minimum standards that must be enforced so that no port can be considered a "port of convenience". States can exceed the minimum requirements of the PSM Agreement by imposing more stringent standards, but requiring a definitive baseline is necessary to end "port shopping". Third, the PSM Agreement sets out these minimum standards (PSMs) that operate in a linked and mutually reinforcing manner. Designation of ports, prior notification, authorisation of access, inspections,

authorisation to land, *etc.*, follow the chain of activities vessels employ or privileges vessels take advantage of before fish enter the market. The PSM Agreement prompts port States to establish checks at each point within this chain so that IUU fishing can be detected and stemmed at each point. Fourth, the PSM Agreement provides a framework for cooperation and exchange of information and review, including performance review and the review of minimum standards set by the PSM Agreement, by laying out the PSM Agreement's minimum standards in the annexes. This enhances the PSM Agreement's flexibility by allowing technological development and changes to inform the amendment of implementation actions.

### The Urgent Need for Ratification and Implementation

Increasing incidence of IUU fishing highlights the fact that RFMOs and voluntary measures have thus far been largely ineffective.<sup>57</sup> Voluntary instruments cannot oblige States to commit resources or muster political will to adequately address IUU fishing.<sup>58</sup> Although certain instruments such as the Code of Conduct have fared well in terms of State implementation, these shortcomings continue to plague voluntary instruments. The adoption of the PSM Agreement was a response to this deficiency. However, the PSM Agreement means very little without the willingness of countries to prove their commitment by signing and becoming a party to it.



Toothfish

Speedy entry into force of the Agreement will demonstrate to the international community that States are committed to addressing IUU fishing. It will enable cohesive action and sustain the momentum and keen interest as was demonstrated by the Agreement's fast-track negotiation and adoption, thereby facilitating pragmatic action through port State measures to prevent, deter and eliminate IUU fishing.

But States need not wait until after ratification to begin implementing the Agreement's provisions. Instead, States can and should begin the implementation process immediately. The exercise in the second part of this article demonstrates that immediate implementation of this milestone agreement is possible. Working toward ratifi-

cation and implementation concurrently using whatever legislative instruments States have available will begin the elimination of "ports of convenience".

Many States have already developed and implemented PSMs. New Zealand, Namibia and Canada already have extensive PSMs including prior notification, port entry authorisation, port inspections, documentation requirements, sanctions, and restrictions on landing and transshipment.<sup>59</sup> The EU even created a comprehensive PSM regime similar to the PSM Agreement that entered into force on 1 January, 2010.<sup>60</sup>

Support tools for States to draw from or for States to use in order to draft appropriate legislation or to implement the Agreement already exist. For example, FAO maintains FAOLEX, a database of national legislation and international agreements,<sup>61</sup> and the Port State Measures Database (PORTLEX) which provides access to PSMs adopted nationally by States to combat IUU fishing,<sup>62</sup> both of which are invaluable reference resources for best practice and trends in legislation.

RFMOs have a significant role to play in the implementation of the Agreement. RFMOs may be able to develop region-specific PSMs that take into account their peculiar needs and challenges. RFMOs like NEAFC,<sup>63</sup> due to, *inter alia*, the homogeneity of their membership or the relative ease of reaching consensus in a smaller group are able to foster implementation in a timely manner. The Agreement, as an expression of international commitment, guide, and testament of minimum standards, can be used as a model for more robust and tailored RFMO PSM schemes.

FAO occupies a special position as a facilitator in helping States implement treaties such as this Agreement, as evident from the numerous regional capacity-building and training workshops that have been held and will continue to be held frequently around the world.<sup>64</sup> As specified in numerous articles of the PSM Agreement, FAO will play an integral role by acting as a central point of contact, increasing information sharing, and encouraging collaboration with other organisations. Through this enhanced unification of purpose, the deleterious effects of IUU fishing can finally be met with the requisite force to ensure their swift decline. The framework exists, it is now the responsibility of the States to prove their commitment to ending IUU fishing by ratifying and implementing this historic Agreement.

### Notes

1 Erceg, D. 2006. "Deterring IUU fishing through state control over nationals". *Marine Policy* 30: 173–179, at 173; The Pew Environment Group, "Port State Performance". Available online at [http://www.portstateperformance.org/index.php/\\_templates/content/execsummary](http://www.portstateperformance.org/index.php/_templates/content/execsummary).

2 FAO Legal Office. "United Nations Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing" [hereinafter PSM Agreement] was approved by the FAO Conference at its Thirty-sixth Session on 22 November 2009, through Resolution No 12/2009, under Article XIV, paragraph 1 of the FAO Constitution. Available online at: <http://www.fao.org/Legal/treaties/037s-e.htm>.

3 FAO Conf. Res. 12/2009, at 2, U.N. Doc. C 2009/LIM/11-Rev. 1 (Nov. 22, 2009) [hereinafter Conference Report].

4 FAO Legal Office, *supra* note 2. Current signatories include: Angola, Australia, Benin, Brazil, Canada, Chile, European Union – Member Organization, France (for its Territories), Gabon, Ghana, Iceland, Indonesia, Kenya, Mozambique, New Zealand, Norway, Peru, Russian Federation, Samoa, Sierra Leone, Turkey, United States of America, and Uruguay. ➔

- 5 Conference Report, *supra* note 3.
- 6 United Nations Convention on the Law of the Sea of 10 December 1982.
- 7 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 24 November 1993, 33 ILM 368 [hereinafter Compliance Agreement]. Available online at <http://www.fao.org/docrep/meeting/003/x3130m/X3130E00.HTM>.
- 8 UNFSA Article 23(1) 4 August 1995.
- 9 *Ibid.*, Article 23(2), 23(3).
- 10 FAO Code of Conduct for Responsible Fisheries, Article 8.3, October 1995 [hereinafter Code of Conduct] (because the Code of Conduct is a non-legally binding instrument, there was no alternative approach such an instrument could have taken).
- 11 Lobach, T. 2000. "Measures to be Adopted by the Port State in Combating IUU Fishing". Document AUS:IUU/2000/15, ¶ 41; Molenaar, E.J. 2007. "Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage". *Ocean Development & International Law* 38(1): 225–257, at 227; Paris Memorandum of Understanding on Port State Control, Paris, 26 January 1982, available at <http://www.parismou.org>.
- 12 Lobach, *ibid.*, ¶ 42.
- 13 Asia-Pacific Memorandum of Understanding on Port State Control in the Asia-Pacific Region, 1 December 1993, available at <http://www.tokyo-mou.org>; Latin American Agreement on Port State Control of Vessels, 5 November 1992, available at <http://200.45.69.62/>; Memorandum of Understanding on Port State Control in the Caribbean Region, 9 February 1996, available at <http://www.caribbeanmou.org>; Mediterranean Memorandum of Understanding on Port State Control, 11 July 1997, available at <http://www.medmou.org>; Indian Ocean Memorandum of Understanding on Port State Control, 1 April 1999, available at <http://www.iomou.org/>; Black Sea Memorandum of Understanding on Port State Control, 1 April 2000, available at <http://www.bs mou.org>; The Riyadh Memorandum of Understanding on Port State Control in the Gulf Region, June 2005, available at <http://www.riyadh mou.org>.
- 14 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, ¶ 55–56, adopted by FAO Council 23 June 2001 [hereinafter IPOA-IUU].
- 15 Lobach, *supra* note 11.
- 16 Molenaar, *supra* note 11, 225 and 245.
- 17 Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing [hereinafter Model Scheme]. Full text (in English, French and Spanish) available online at: <http://www.fao.org/docrep/010/a0985/a0985t00.HTM>.
- 18 *Ibid.*
- 19 UN General Assembly Resolution A/RES/60/31, 2005, ¶¶ 33, 36, 42; UN General Assembly Resolution A/RES/61/105, 2006, ¶¶ 33, 39, 42–44.
- 20 UN General Assembly, A/60/99, Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its sixth meeting, ¶ 9(e). (2005).
- 21 FAO Committee on Fisheries, Combating Illegal, Unreported and Unregulated Fishing through Monitoring, Control and Surveillance, Port State Measures, and Other Means, Twenty-seventh Session, ¶ 52, 5–9 March 2007.
- 22 Report of the Expert Consultation to Draft a Legally-binding Instrument on Port State Measures, 4–8 September 2007 [hereinafter Expert Consultation].
- 23 Report of the Technical Consultation to Draft a Legally-binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 23–27 June 2008, 26–30 January 2009, 4–8 May 2009 and 24–28 August 2009 [hereinafter Technical Consultation].
- 24 Report of the One hundred and thirty-seventh session of the FAO Council, ¶ 61–63, 28 September–2 October 2009.
- 25 Report of the Thirty-sixth Session of the Conference, at 2, 18–23 November 2009.
- 26 *Ibid.*
- 27 FAO Legal Office, *supra* note 2.
- 28 Expert Consultation, *supra* note 22, at Appendix D, ¶ 4.
- 29 "Ports of convenience" are ports that are unable or unwilling to apply PSMs to support conservation and management measures. To stay operative, IUU fishers avoid ports that impose strict PSMs in favour of ports of convenience, a practice known as "port shopping". It is necessary to instil responsibility in port States to employ PSMs and empower them to do so, just as the international community sought to empower flag States to tackle the problem of "flags of convenience". See Molenaar, *supra* note 11, 226.
- 30 While no right of access to ports exists, States' claims of extraterritorial jurisdiction are limited to specific justifiable instances:
1. a treaty, whatever its underlying rationale;
  2. the universality principle, which relates to activities directed against the interests of the international community regardless of where the activity takes place;
  3. the effects or impact principle, which covers extraterritorial activities that have a significant effect on the State exercising jurisdiction;
  4. the protective or security principle, which is similar to the effects or impact principle with the difference that the activities affect the vital interests of a State;
- 51 interests of the international community; or
6. a combination of international community interests on the one hand and the effects or impact principle, or the protective or security principle on the other hand.
- See Molenaar, *supra* note 11, 229. Depending on the circumstances, negotiation of the Agreement could correspond to all six exceptions, but 1, 2 and 5 will always be pertinent.
- 31 PSM Agreement, *supra* note 2, Article 4(1).
- 32 Erceg, *supra* note 1, 176; FAO. 1999. International Plan of Action for the Management of Fishing Capacity [IPOA-FC], 24.
- 33 The Pew Environment Group, *supra* note 1.
- 34 FAO. 2009. "Report of the FAO/APFIC Regional Workshop on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing for the South Asian Sub-region, Bangkok". ¶ 10, UN Doc. FIEL/R896 (En), 10–13 February.
- 35 All of the national laws mentioned in this section can be found at one or both of the following: FAO Fisheries and Aquaculture Department, Database on Port State Measures, <http://www.fao.org/fishery/psm/search/en> [hereinafter PORTLEX]; FAO Legal Office, FAOLEX, <http://faolex.fao.org/>.
- 36 Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, Article 1.
- 37 Fisheries Act of 1995, 16 U.S.C.A. § 5504. United States Code Annotated, Title 16, Conservation. Chapter 75, High Seas Fishing Compliance, § 5504 (1995).
- 38 Council Regulation (EC) No 1005/2008, *supra* note 36, Articles 25–30.
- 39 Fisheries Act of 1995, *supra* note 37.
- 40 Marine Living Resources Act, Chapter 3, Part 7 (S. Afr.) (available at FAO Legal Office, FAOLEX, LEX-FAOC015984, <http://faolex.fao.org/docs/pdf/saf15984.pdf>).
- 41 Notification 1/1 Regulating Commercial Fishing (2007–43), Article 7(1)(d) (Turk.).
- 42 Décret n° 95/413/PM du 20 juin 1995 fixant certaines modalités d'application du régime de la pêche, Article 35 (Cameroun).
- 43 Regulations relating to the exploitation of marine resources (No. 241 of 2001), regulation 36(1) (Namib.).
- 44 Port Authorities Operations Regulations (SOR/2000-55), section 32(3) (Can.).
- 45 Ley General de Marinas y Actividades Conexas. Gaceta Oficial N° 37.570, de fecha 14 de noviembre de 2002, artículo 36 (Venez.).
- 46 Decreto no. 43/2003. Regulamento Geral da Pesca Marítima, Article 98, 100, 131 (Mozam.).
- 47 Code des Douanes de la République du Bénin du 21 novembre 1967, Article 59 (Benin).
- 48 Code des Douanes Loi n° 64–291 du 1er août 1964 telle que modifiée par l'ordonnance n° 88–225 du 2 mars 1988, article 56 (Côte d'Ivoire).
- 49 Fisheries (Commercial Fishing) regulations 2001, regulations 19(1), 19(5), 84(3) and 85(4) (N.Z.).
- 50 Council Regulation (EC) No. 1005/2008, *supra* note 36, Annex II.
- 51 Coastal Fisheries Protection Act 1985 (C-33), section 7 (Can.).
- 52 Fisheries Management Act 1991. Act No. 162 of 1991, as amended by Act No. 104 of 2007, sec. 84, 87C (Austl.); Fisheries Management Regulations 1992, Consolidating S.R. No. 20 of 1992, Incorporating amendments up to SLI No. 1 of 2010.
- 53 Council Regulation (EC) No 1005/2008, *supra* note 36, Articles 9–11.
- 54 Fisheries Act 1996, (No. 88 of 1996), section 113ZD (2),(3),(5) (N.Z.).
- 55 Fisheries Act 2007, section 64(3) (Gam.).
- 56 PSM Agreement, *supra* note 2, Articles 3, 5–21, 24.
- 57 Flothman, S. et al. 2010. "Closing Loopholes: Getting Illegal Fishing Under Control". *Science Express* 1, 20 May. Available online at: [http://www.pewtrusts.org/our\\_work\\_detail.aspx?id=940](http://www.pewtrusts.org/our_work_detail.aspx?id=940).
- 58 IPOA-FC, *supra* note 32.
- 59 PORTLEX, *supra* note 35.
- 60 Council Regulation (EC) No. 1005/2008, *supra* note 36.
- 61 FAOLEX, *supra* note 35.
- 62 PORTLEX, *supra* note 35.
- 63 North East Atlantic Fisheries Commission, Scheme of Control and Enforcement, Articles 20–27 (2010); Northwest Atlantic Fisheries Organization, Conservation and Enforcement Measures, Articles 45–50, (2009); South Indian Ocean Fisheries Agreement, Article 12 (2006).
- 64 See e.g., FAO, Report of the FAO/FFA Regional Workshop to promote the Full and Effective Implementation of Port State Measures to Combat Illegal, Unreported and Unregulated Fishing, Nadi, 2006; FAO, Report of the FAO Regional Workshop on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing, Cape Town, 2008; FAO, *supra* note 34; Report of the FAO/CECAF Workshop on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing for the West African Sub-region, Accra, 2009; Report of the FAO/RECOFI Regional Workshop to Combat Illegal, Unreported and Unregulated Fishing, Muscat, 2009.