Chapter 13

Port State Jurisdiction to Combat IUU Fishing: The Port State Measures Agreement

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Introduction

For a number of years, the international community has recognized, and expressed its concern about, the many threats posed by illegal, unreported and unregulated (IUU) fishing activities.[1] IUU fishing activities do not just threaten the status of targeted fish stocks but can also negatively affect the health of marine ecosystems, for instance by using fishing practices that are prohibited for 'legitimate' fishermen, resulting in unnecessary mortality of fish and non-fish species and other impacts on marine ecosystems. Living and working conditions on board many vessels engaged in IUU fishing activities are often appalling and pose dangers to the crew's health and lives. Moreover, the livelihoods and food security of coastal communities that depend on marine capture fisheries—in particular in developing states—are under direct threat of IUU fishing activities. The ensuing malnutrition, poverty, and social unrest destabilize communities and have led to increased migration and, in some cases, even piracy. The damage that is being caused by IUU fishing activities to the global marine ecosystem is difficult to estimate, but no one doubts that it is significant. In part this is of course attributable to the very different nature of each of the three components of the acronym IUU.

Especially since 2001, the urgent need for, and high potential of, port state measures to combat IUU fishing has been acknowledged by the international community in various fora. This is, *inter alia*, based on the recognition that

[1] For a description of the three separate components of IUU fishing, see paragraph 3 of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) (adopted by consensus by the Committee on Fisheries (COFI) of the Food and Agriculture Organization of the United Nations (FAO) on 2 March 2001 and endorsed by the FAO Council on 23 June 2001. Online: <http://www.fao.org/fishery/publications/ipoa/en> (accessed 15 February 2010)). In this chapter, the words 'IUU fishing' generally have a narrower meaning than 'IUU fishing activities'. For a definition of 'fishing' and 'fishing related activities' see Article 1(c) and (d) of the PSM Agreement (*Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, Rome, 22 November 2009. Not in force; FAO, *Report of the Conference of the FAO, Thirty-sixth Session, Rome, 18–23 November 2009*, Doc. C 2009/REP, Appendix E.).

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the high costs and risks of enforcement at sea make enforcement in port a cost-effective alternative. Broad international support for a legally binding global instrument on port state measures to combat IUU fishing (hereinafter PSM Agreement[2]) eventually culminated in a mandate for a negotiation process provided by the Committee on Fisheries (COFI) of the Food and Agriculture Organization of the United Nations (FAO) at its 27th Session in 2007. The PSM Agreement was eventually adopted by the Thirty-sixth Session of the FAO Conference on 22 November 2009.[3] This chapter analyzes some elements of this PSM Agreement in light of the international law of the sea.[4]

There are currently no definitions for the terms 'port state' or 'coastal state' in the United Nations Convention on the Law of the Sea (LOSC)[5] or another global instrument with (near-) universal participation. Nevertheless, when the term 'port state' is used in the sphere of the international law of the sea, it should be assumed to relate to foreign vessels and also to be distinct from the term 'coastal state'. The current chapter therefore uses the term port state in connection with foreign vessels in its ports[6] in the context of compliance with conservation and management measures whose spatial scope is not exclusively limited to the maritime zones of the port state.

The structure of this chapter is as follows. The next section provides an overview of the background to the negotiations on the PSM Agreement. The succeeding section then examines the rationale of the PSM Agreement, which is followed by a discussion on the position of the PSM Agreement in the international legal framework. Subsequently, there is a more in-depth analysis of some elements of the PSM Agreement, with subsections focusing on access to port, residual jurisdiction, extra-territorial port state jurisdiction, and linkages to regional fisheries management organizations (RFMOs).[7] The final section offers some conclusions.

Background to the Negotiations on the PSM Agreement

The start of the negotiations on the PSM Agreement in June 2008 (see further below) builds on more than a decade of efforts at the global, regional, and national

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[2] PSM Agreement, ibid.

[3] Ibid.

[4] For a more comprehensive discussion on port state jurisdiction, see E. J. Molenaar, "Port state jurisdiction: Towards comprehensive, mandatory and global coverage," *Ocean Development & International Law* 38, 2007, 225–257.

[5] *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 *U.N.T.S.* 396 (entered into force 16 November 1994). Online: <http://www.un.org/Depts/los>.

[6] See in this regard Article 3(1) of the PSM Agreement, supra note 1.

[7] In this chapter, the acronym RFMO encompasses the term "Arrangement" as defined in Article 1(1)(d) of UNFA (see supra note 10). For a similar solution see Article 1(i) of the PSM Agreement, supra note 1.

levels to increase the role and effectiveness of port state jurisdiction to combat IUU fishing activities. The 1989 Wellington Convention[8] was one of the first instances in which port state jurisdiction was introduced in the sphere of international fisheries law. Subsequently, the FAO Compliance Agreement,[9] United Nations Fish Stocks Agreement (UNFA)[10] and the FAO Code of Conduct for Responsible Fisheries[11] all dealt with port state jurisdiction, even though in different ways.[12] During more or less the same period, the leading RFMOs were also developing port state measures to combat IUU fishing.

A following important step was made by the incorporation of the main obligations and main elements of the above-mentioned measures in the non-legally binding International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU),[13] adopted in the framework of the FAO Code of Conduct. One of the main objectives of the IPOA-IUU was to establish international minimum standards for action by RFMOs and states in their various capacities, in order to combat IUU fishing. Even during the negotiations on the IPOA-IUU, however, a meeting took place which discussed options to further operationalize the provisions on port state measures that were expected to be incorporated in the IPOA-IUU.[14] Some of the outcomes were taken up in a paper by Løbach,[15] which was in turn used as the basis for the 2002 Expert Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing.[16] Subsequently, COFI at its 25th Session (2003), endorsed the Expert Consultation's proposal for a Technical Consultation, which eventually convened in August–September 2004[17] and led to the adoption of the FAO

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[8] *Convention for the Prohibition of Fishing with Long Drift-nets in the South Pacific*, 23 November 1989, 29 *I.L.M*. 1449 (1990) (entered into force 17 May 1991). See Article 3(2)(d).

[9] *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*, 24 November 1993, 33 *I.L.M*. 969 (1994) (entered into force 24 April 2003). Online: <http://www.fao.org/legal>. See Article V(2).

[10] *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*, 4 August 1995, 34 *I.L.M*. 1542 (1995) (entered into force 11 December 2001). Online: <http://www.un.org/Depts/los>. See Article 23.

[11] FAO, *Code of Conduct for Responsible Fisheries*, adopted by the Twenty-eight Session of the FAO Conference, Rome, 31 October 1995. Online: <http://www.fao.org/fi>. See Section 8.3.

[12] For a discussion see Molenaar, supra note 4, pp. 233–234.

[13] IPOA-IUU, supra note 1, para. 52–64.

[14] See FAO, "Report of the Joint FAO/IMO Ad Hoc Working Group on Illegal, Unreported and Unregulated Fishing and Related Matters, Rome, 9–11 October 2000," *FAO Fisheries Report* No. 637, Rome: FAO, 2000.

[15] T. Løbach, "Port State Control of Foreign Fishing Vessels," *FAO Legal Paper Online* No. 29, Rome: FAO, May 2002. Online: <http://www.fao.org/legal/prs-ol/lpo29.pdf> (accessed 22 July 2009).

[16] FAO, "Report of the Expert Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing, Rome, 4–6 November 2002," *FAO Fisheries Report* No. 692, Rome: FAO, 2002.

[17] FAO, "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*

Model Scheme on PSM.[18] The Scheme has a status similar to that of the IPOA-IUU, namely a non-legally binding international instrument developed by the FAO in the framework of the FAO Code of Conduct. The Scheme was implicitly endorsed by COFI at its 26th Session (2005).[19]

Even though a number of RFMOs have since implemented the Scheme,[20] the relevant paragraphs in the 2003 and 2005 COFI reports already reflect a desire by some FAO member states to develop a legally binding global instrument on port state measures to combat IUU fishing. Support for such an instrument steadily increased, culminating in the following mandate by COFI at its 27th Session (2007):

> Acknowledging the urgent need for a comprehensive suite of port State measures, the Committee took note of the strong support for the Norwegian proposal to develop a new legally binding instrument based on the [FAO Model Scheme on PSM] and the IPOA-IUU. … Many Members stressed that the new instrument would represent minimum standards for port States, with flexibility to adopt more stringent measures and some Members also stressed that it should not detract from other previously agreed measures such as the need for capacity reduction.[21]

Subsequently, the FAO Expert Consultation to Draft a Legally-Binding Instrument on Port State Measures was held in Washington, D.C., 4–8 September 2007.[22] As the Expert Consultation only had sufficient time to agree on drafts for the substantive provisions of the Draft PSM Agreement, drafts for the Preamble, Part 10 entitled 'Final Provisions', and the Annexes were developed during two separate meetings convened shortly after the Expert Consultation.[23]

The Technical Consultation to Draft a Legally-Binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (hereinafter Technical Consultation on the PSM Agreement) formally commenced its work on 23 June 2008 for a one-week session. Subsequently, three further resumed sessions were necessary: 26–30 January

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No. 759, Rome: FAO, 2004. Note also that the draft of what in the end became the FAO Model Scheme on PSM was still entitled "Draft Memorandum of Understanding on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing" when it was submitted to the Technical Consultation Committee in November 2002 (cf. *FAO Fisheries Report* No. 692, ibid., Appendix D).

[18] FAO, "Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing," as laid down in Annex E to *FAO Fisheries Report* No. 759, ibid.

[19] FAO, "Report of the Twenty-Sixth Session of the Committee on Fisheries, Rome, 7–11 March 2005," *FAO Fisheries Report* No. R780, Rome: FAO, 2005, para. 25.

[20] See, for instance, Annex III to *Port State Measures Final Report: Promoting Responsible Ports*, High Seas Task Force, 2006. Online: <http://www.high-seas.org> (accessed 22 July 2009).

[21] FAO, "Report of the Twenty-Seventh Session of the Committee on Fisheries," *FAO Fisheries Report* No. 830, Rome: FAO, 2007, para. 68.

[22] See FAO, "Report of the Expert Consultation to Draft a Legally-Binding Instrument on Port State Measures, Washington D.C., United States of America, 4–8 September 2007," *FAO Fisheries Report* No. 846, Rome: FAO 2007.

[23] Cf. the Prospectus for the June 2008 Session of the Technical Consultation.

2009,[24] 4–8 May 2009,[25] and 24–28 August 2009.[26] As noted above, the PSM Agreement was adopted by the FAO Conference on 22 November 2009 after a proposal by Members of the Group of Latin America and the Caribbean to have an Extraordinary Session of COFI did not attract the necessary votes.[27]

Rationale of the PSM agreement

While the cost-effectiveness of port state measures in comparison with at-sea enforcement has already been mentioned,[28] this does not explain the rationale of a global approach by means of the PSM Agreement. It is submitted that the rationale is directly related to the absence of a global legally binding obligation for port states to take specific measures to combat IUU fishing. While Article 23(1) of UNFA contains a general right and duty for port states "to take measures, in accordance with international law, to promote the effectiveness of subregional, regional and global conservation and management measures," port states are not required to take the more specific enforcement measures covered by paragraphs (2) and (3) of that provision, namely inspection and the prohibition of landings and transshipments. This is due to the use of "may" instead of "shall" in these paragraphs. Unfortunately, the IPOA-IUU cannot address this shortcoming due to its voluntary nature and FAO members are also not legally bound to implement the FAO Model Scheme on PSM.[29]

Without such a global legally binding obligation and (near-) universal adherence thereto, 'ports of convenience' continue to thrive. Such port states are unable or unwilling to take adequate enforcement action to support conservation and management measures adopted multilaterally, bilaterally, or by other coastal states. Foreign vessels that engage in IUU fishing can be important for a port due to the income and employment generated by the sale of catches, port fees, use of port services (e.g., loading, off-loading, re-fuelling, and re-supplying), and processing and re-export of catches. Just like flags of convenience, ports of convenience are 'free riders' that undermine the level playing field that national and international regulatory efforts depend on for success.

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[24] In the meantime an informal, open-ended Technical Meeting to Review the Annexes to the PSM Agreement had taken place in Rome, 25–27 November 2008.

[25] An informal inter-sessional meeting took place in New York in the middle of March 2009.

[26] The final draft was then reviewed by the FAO Committee on Constitutional and Legal Matters at its Eighty-eighth Session (23 to 25 September 2009) and by the FAO Council at its Hundred and Thirty-seventh Session (28 September to 2 October 2009).

[27] Doc. C 2009/REP, supra note 1, at p. 55, para. 146.

[28] See also the following preambular paragraph to the PSM Agreement, supra note 1: "*Recognizing* that port State measures provide a powerful and cost-effective means of preventing, deterring and eliminating illegal, unreported and unregulated fishing."

[29] See paragraphs 2.2 and 3.1 of the FAO Model Scheme on PSM, supra note 18.

It is submitted that a regional approach to port state measures is not an adequate alternative to a global approach. Regional approaches are essential but not sufficient as they need to be complemented by a global approach in order to create global minimum standards. Such standards would be able to minimize regional variations and would also apply in areas without regional port state measures. In the latter scenario, port state measures would be aimed at combating IUU fishing activities in particular regions. Reference can in this context be made to the common practice of transshipments at sea, which allows IUU catch to be landed in ports far from where it was caught, where officials commonly have little or no knowledge about stock status or the nature of the fisheries that target them. For example, IUU catches of toothfish (*Dissostichus* spp.) from the Southern Ocean are frequently landed in Southeast Asia and IUU catches of cod (*Gadus morhua*) from the Barents Sea are frequently landed in Europe or Northern Africa. The success of inter-regional cooperation can be illustrated by the case of the Panamese transshipment-vessel 'Polestar', which landed IUU catches of redfish (*Sebastes mentella*) from the Northeast Atlantic Ocean somewhere in Asia in 2006. However, this only occurred after the vessel's attempts to land the catches in Europe, Northern Africa, and elsewhere failed as a result of the efforts of members of the North East Atlantic Fisheries Commission (NEAFC) to deny the vessel access to their ports and to convince other states to do likewise.[30] The substantial additional cost of having to land the catches in Asia transformed this otherwise profitable IUU activity into a financial loss.

The Position of the PSM Agreement in the International Legal Framework

A very contentious issue in the negotiation process for the PSM Agreement was the Agreement's position in the international legal framework. Even though COFI provided the mandate for the negotiation process, the process followed the traditional FAO course of an Expert Consultation and a Technical Consultation, and all main sessions of the Technical Consultation to date have been held at FAO Headquarters in Rome. It took until the last resumed session to resolve the issue.

Article 34 of the Chairperson's Draft PSM Agreement of 18 May 2009 contained three possible options for this issue, namely (a) the Agreement is concluded outside FAO but FAO acts as a depositary, (b) the Agreement is concluded under

[30] See, *inter alia*, the information on the Greenpeace "International Blacklist." Online: <http://blacklist.greenpeace.org> (accessed 22 July 2009).

Article XIV of the FAO Constitution[31] using the FAO Compliance Agreement[32] as a precedent, and (c) the Agreement is concluded under Article XIV of the FAO Constitution using the FAO Treaty on Plant Genetic Resources[33] as a precedent.

Each of these options offered advantages and disadvantages for participants in the negotiation process. One of the consequences of pursuing option (b) is the involvement of FAO bodies in the amendment procedure.[34] If applied to the PSM Agreement, these provisions would entitle FAO members that are non-parties to the PSM Agreement to participate in decision making on amendments; non-parties could therefore block amendments supported by parties. As illustrated by the still ongoing debate within the Indian Ocean Tuna Commission (IOTC)[35] on ways to increase its effectiveness (especially in light of the restrictions imposed by Article VII, entitled 'Observers', of the IOTC Agreement in the context of Taiwan (Chinese Taipei)),[36] this may have undesirable consequences. Other implications of pursuing option (b) are the time-delays brought about by the involvement of

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[31] *Constitution of the Food and Agriculture Organization of the United Nations*, Quebec City. Opened for signature and entered into force on 16 October 1945. Online <http://www.fao.org/Legal>. Paragraphs (1) and (2) of Article XIV stipulate:

1. The Conference may, by a two-thirds majority of the votes cast and in conformity with rules adopted by the Conference, approve and submit to Member Nations conventions and agreements concerning questions relating to food and agriculture.
2. The Council, under rules to be adopted by the Conference, may, by a vote concurred in by at least two thirds of the membership of the Council, approve and submit to Member Nations:
   (a) agreements concerning questions relating to food and agriculture which are of particular interest to Member Nations of geographical areas specified in such agreements and are designed to apply only to such areas;
   (b) supplementary conventions or agreements designed to implement any convention or agreement which has come into force under paragraphs 1 or 2 (a).

[32] See the last preambular paragraph.

[33] *International Treaty on Plant Genetic Resources for Food and Agriculture*, approved by the FAO Conference, at its Thirty-first Session (November 2001), through Resolution 3/2001, entered into force 29 June 2004. Online: <http://www.fao.org/Legal>. See the last preambular paragraph.

[34] See Article XIII of the FAO Compliance Agreement, supra note 9, and Article 34 of the Chairperson's Draft PSM Agreement of 18 May 2009. These stipulations follow from Part R of the Basic Texts of FAO, entitled "Principles and Procedures which Should Govern Conventions and Agreements Concluded under Articles XIV and XV of the Constitution, and Commissions and Committees Established under Article VI of the Constitution." Of particular relevance is its appendix with the same title and paragraph 8 on amendments in Section A.

[35] Established by the IOTC Agreement (*Agreement for the Establishment of the Indian Ocean Tuna Commission*, Rome, 25 November 1993 (105th Session FAO Council), entered into force 27 March 1996. Online: <http://www.iotc.org>). See Article XX of the IOTC Agreement.

[36] See IOTC, "Report of the Eleventh Session of the Indian Ocean Tuna Commission" (2007), pp. 6–7; IOTC, "Report of the Twelfth Session of the Indian Ocean Tuna Commission" (2008), p. 6; and IOTC, "Report of the Thirteenth Session of the Indian Ocean Tuan Commission"(2009), pp. 6–7. See also the Report of the IOTC Performance Review Panel, January 2009, at p. 1 where it reads: "The limitation on participation to this RFMO, deriving from IOTC's legal status as an Article XIV Food and Agricultural Organisation of the United Nations (FAO) body, conflicts with provisions of United Nations Fish Stocks Agreement (UNFA) and prevents major fishing players in the Indian Ocean from discharging their obligations to cooperate in the work of the Commission."

FAO bodies in not only the amendment procedure but also the adoption of the Agreement as such. Options (a) and (c) do not provide a role for FAO bodies in amendment or adoption.[37]

The issue of the position of the PSM Agreement in the international legal framework was briefly raised at the June 2008 session of the Technical Consultation but the Chairperson wisely urged the delegations to focus efforts first of all on the substantive provisions and thereby may have avoided the derailing of the process as a whole. The resumed session in January 2009 saw a lengthy debate on the issue. A clear split existed between developing and developed states, with the former advocating an agreement within FAO and the latter outside FAO. In his address to the plenary, Assistant Secretary-General Nomura clarified on behalf of the FAO Secretariat that an agreement within FAO would not necessarily be preferable for budgetary reasons. One delegation observed that an agreement within FAO would ensure synergy with other FAO instruments and would offer practical advantages, for instance access to legal advice by the FAO Secretariat and use of the FAO's premises for meetings.[38] The distinction between options (b) and (c) was only introduced at the second resumed session in May 2009.

The third resumed session in August 2009 eventually selected option (c), which now appears with some adjustments in Article 33 of the PSM Agreement.

Some Elements of the PSM Agreement

Access to Port

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 (ICJ) in the *Nicaragua* case[39] and is implicitly confirmed by, *inter alia*, Articles 25(2), 211(3), and 255 of LOSC. While there may often be a presumption of access to ports, customary international law gives foreign vessels no general right of access to ports.[40] The Statute to the Convention on the International Regime of Maritime Ports,[41] which provides in Article 2 for

[37] See Article 23 of the Treaty on Plant Genetic Resources, supra note 33.

[38] Based on the author's notes during the resumed session in January 2009.

[39] Case concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua *v.* United States of America), 27 June 1986, *ICJ Reports* 1986, p. 14, at p. 111, para. 213.

[40] Cf. A. V. Lowe, "The right of entry into maritime ports in international law," *San Diego Law Review* 14, 1977, 597–622, at p. 622 and Z. Oya Özçayir, *Port State Control*, London: LLP, 2001, at p. 79 (but see p. 70).

[41] *Convention on the International Regime of Maritime Ports*, Geneva, 9 December 1923, 58 *League of Nations Treaty Series* 285 (1926–1927) (entered into force 26 July 1926).

access to ports based on national treatment and reciprocity, does not affect this conclusion due to the limited participation in the Convention,[42] as well as the fact that the conditional right which it establishes is further qualified, for instance in relation to fishing vessels and warships.[43] 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.[44]

Article 4(1) of the PSM Agreement is consistent with the above analysis and stipulates, where relevant:

> Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of Parties under international law. In particular, nothing in this Agreement shall be construed to affect:
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> (a) […]
>
> (b) the exercise by Parties of their sovereignty over ports in their territory in accordance with international law, including their right to deny access thereto as well as to adopt more stringent port State measures than those provided in this Agreement, including pursuant to a decision made by a regional fisheries management organization.[45]

As in other provisions in the PSM Agreement, the phrase "in accordance with international law" acts as a general safeguard. Other aspects of Article 4(1) are examined below.

A widely acknowledged exception to the above-mentioned 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 or coastal state override those of the ship. The International Maritime Organization (IMO) Guidelines on Places of Refuge for Ships in Need of Assistance[46]—adopted in the aftermath of the disaster with the 'Prestige' in 2002—confirm the need to balance the various interests attached to the ship and its crew with those of the port or coastal state.[47] Finally, it is worth mentioning that at its session in January 2009, a majority within IMO's Legal Committee did not see the need for a convention on places of refuge when discussing a draft instrument developed by the Comité Maritime

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[42] See <http://treaties.un.org>.

[43] See Articles 13 and 14 of the Statute, supra note 37. Cf. L. A. De La Fayette, "Access to ports in international law," *International Journal of Marine and Coastal Law* 11, 1996, 1–22, at pp. 4 and 17.

[44] Cf. De La Fayette, ibid., p. 4.

[45] Note also the following preambular paragraph: "*Bearing in mind* that in the exercise of their sovereignty over ports located in their territory, States may adopt more stringent measures, in accordance with international law."

[46] *Guidelines on Places of Refuge for Ships in Need of Assistance*, IMO Assembly Resolution A.949(23), 5 December 2003, IMO Doc. A 23/Res.949, 5 March 2004. These 2003 Guidelines have been complemented by the Guidelines on the Control of Ships in an Emergency, adopted by IMO's Maritime Safety Committee (MSC.1/Circ.1251) on 19 October 2007.

[47] See, *inter alia*, ibid., para. 3.12–3.14.

International (CMI). Article 10 of the PSM Agreement is in line with this balanced approach. It reads:

> Nothing in this Agreement affects the entry of vessels to port in accordance with international law for reasons of force majeure or distress, or prevents a port State from permitting entry into port to a vessel exclusively for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

Residual Jurisdiction

A port state's jurisdiction to prescribe conditions for entry into port is subject to a number of restrictions. Some of these ensue from its participation in specific treaties. The principle of non-discrimination, for instance, is widely recognized in the international law of the sea[48] and international trade law.[49] Restrictions may also be quite specific.[50] Moreover, port states commonly do not exercise jurisdiction with regard to affairs that are essentially internal to the ship and that do not affect the interests of the port state. Many commentators argue that this is merely a matter of comity and policy and that it does not prejudice a port state's entitlement to exercise such jurisdiction.[51] The limitations arising from diplomatic immunities and sovereign immunities for foreign warships and other government ships operated for non-commercial purposes can be mentioned here as well.

The PSM Agreement explicitly confirms the so-called 'residual' jurisdiction of the port state in Article 4(1)(b), which is reproduced in the subsection above, by means of the words "more stringent … than." While the PSM Agreement does not define the term 'port State measures', its provisions give no indication that it is limited to prescriptive jurisdiction, i.e. conditions for entry into port, and that it does not also encompass enforcement jurisdiction (see also below). Moreover, the phrase "including pursuant to a decision made by a regional fisheries management organization" at the very end of paragraph (1)(b) of Article 4, also confirms a similar residual competence of RFMOs.

Another general limitation on jurisdiction imposed by general international law is the need for a sufficiently close or substantial connection with the person, fact or event and the state exercising jurisdiction. This aims at creating order by minimizing overlaps in jurisdiction. However, unless and until states are bound to more precise limitations on jurisdiction, for instance through their adherence to

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[48] LOSC, supra note 5, Articles 24(1)(b), 25(3), 119(3) and 227.

[49] See Article XX of GATT 1994 (*General Agreement on Tariffs and Trade*, 15 April 1994, entered into force 1 January 1995. Online: <http://www.wto.org>).

[50] E.g., Sec. 15(1) of Annex VI to MARPOL 73/78 (*International Convention for the Prevention of Pollution from Ships*, London, 2 November 1973, 1340 *U.N.T.S.* 184, as modified by the *1978 Protocol* (London, 1 June 1978), 1340 *U.N.T.S.* 61, and as regularly amended. Annex IV to MARPOL 73/78 is contained in the *1997 Protocol* (London, 26 September 1997; IMO doc. MP/CONF.3/34. Entry into force varies for each Annex. At the time of writing Annexes I–VI were all in force).

[51] Cf. R. R. Churchill and A. V. Lowe, *The Law of the Sea*, Manchester: Manchester University Press, 1999 (3rd edition), pp. 65–69.

treaties, it will be up to an international court or tribunal to rule on the sufficiency of a jurisdictional link in a particular case.

Extra-Territorial Port State Jurisdiction

Introduction

The legal 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 can be presumed unless international law specifically provides otherwise. Illegal behavior occurring in port can be addressed through territorial jurisdiction. As regards behavior prior to entry, port states can still rely on territorial jurisdiction in case the behavior took place within maritime zones that fall within their territory, namely their internal waters, archipelagic waters, or territorial sea.

Jurisdiction under the territorial principle might also be used as a basis if extra-territorial jurisdiction is not possible, for instance with regard to unregulated high seas fishing (see the following subsection). In that case the focus of enforcement is no longer on illegal behavior beyond port but on illegal behavior within port. Obstruction of in-port inspection and investigation or providing false or incomplete information to the inspection authorities (e.g., oil record books or declarations of not having engaged in IUU fishing activities) could be options in that regard.

Jurisdiction over behavior that occurs beyond the port state's territory can either be quasi-territorial or extra-territorial. The former relates to jurisdiction over the port state's own exclusive economic zone (EEZ) or continental shelf pursuant to Articles 56 and 77 of LOSC. Proceeding from this understanding of quasi-territorial jurisdiction, truly extra-territorial jurisdiction exercised by a port state relates to behavior that occurs beyond its own maritime zones, i.e. on the high seas, in the Area, or in the maritime zones of other states.

It is submitted that the legality of extra-territorial port state jurisdiction under international law depends on two aspects, namely a sufficient jurisdictional basis and the type of enforcement measure taken. A sufficient jurisdictional basis could, for instance, be provided by a treaty—whatever its underlying rationale—or by justifiable reliance on a jurisdictional principle, such as the universality principle or the security principle. The relevance of the type of enforcement measures opted for is directly related to the absence of a right of access to ports under customary international law. Examples of port state enforcement measures include:

(a) Prohibiting the landing, transshipment or processing of cargo
(b) Prohibiting the use of other port services, such as refuelling, other forms of re-supplying (e.g., water, food, equipment and bait), changing crew, and making repairs
(c) Denial of access to ports (ad hoc or *a priori*)

(d) Boarding and inspection
(e) Detention until standards are complied with (e.g., repairs to meet technical standards)
(f) Monetary or other penalties (including confiscation of ship or cargo) for violations of national legislation

A distinction can be made between measures (a)–(c) on the one hand and measures (e)–(f) on the other hand. The principal aim of the former three is to withhold benefits to which foreign vessels are not entitled to under general international law. The latter two, however, are either punitive or have a punitive character. While the punitive character of detention for the purpose of making repairs appears at first sight 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 can be very costly.

Illegal Discharges and Unregulated Fishing on the High Seas

The view advocated in the previous subsection that the legality of extra-territorial port state jurisdiction depends above all on a sufficient jurisdictional basis and the type of enforcement measure taken, can be illustrated by comparing the scenario of illegal discharges on the high seas with that of unregulated fishing on the high seas. In the first scenario, Article 218 of LOSC grants port states the right to institute proceedings and to impose monetary penalties for illegal discharges that have occurred beyond their own maritime zones. The illegality of the discharges arises through a "violation of applicable international rules and standards." This set of rules would seem to include at any rate the discharge standards contained in the annexes to MARPOL 73/78,[52] which have achieved the level of 'generally accepted', as well as other rules and standards that are applicable in the mutual enforcement relationship of the states concerned. The right to institute proceedings granted by Article 218 is subject to various conditions in its other paragraphs, the safeguards in Section 7—in particular Articles 226, 228, 230, and 231—and the prompt release procedure in Article 292. Whereas various states have enacted national legislation to implement Article 218, it is not clear if this has also led to actual enforcement measures being taken or to the institution of proceedings.

This scenario contrasts sharply with the scenario of unregulated fishing on the high seas. Article 116 of LOSC recognizes that all states have a right for their nationals to fish on the high seas. This right is subject to, *inter alia*, the obligation to cooperate with coastal states and other high seas fishing states.[53] This obligation to cooperate is strengthened by Article 8(3) of UNFA by which states fishing for

[52] Supra note 50.
[53] LOSC, supra note 5, Articles 63(2), 64–67 and 116–119.

straddling or highly migratory fish stocks are obliged to cooperate with, or become a member of, the relevant RFMO. Article 8(4) stipulates that only members or cooperating non-members shall have access to the relevant fishery resources. Thus, unregulated high seas fishing essentially means fishing by flag states that fail to comply with the obligation as expressed by Article 8(3) of UNFA.

Pursuant to Article 23(1) of UNFA, 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 subregional, regional or global conservation and management measures on the high seas," the prohibition of landings and transshipments (paragraphs (2) and (3)). However, neither LOSC nor UNFA contains a provision similar to Article 218 of LOSC but tailored to the scenario of unregulated high seas fishing.

Some uncertainty is nevertheless caused by the saving clause in Article 23(4) of UNFA, 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 Article 23(4). According to the first, its purpose is merely to confirm the powers that port states already have under general international law. By emphasizing that this is not a progressive development of international law, the saving clause ensures that the measures referred to cannot just be applied on an *inter se* basis but also against vessels flying the flag of non-parties to UNFA. 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 the use of the optional "may" in relation to all the specific enforcement measures referred to in the subsequent paragraphs.

According to a second interpretation, however, the saving clause serves the additional purpose of upholding more extensive rights—residual jurisdiction—to which a port state would be entitled under customary international law. This could be the prescription of unilateral—rather than subregional, regional, or global—conservation and management measures, as well as the use of more onerous enforcement measures. In view of the discussion above, the more onerous enforcement measures are the most controversial. There seems to be no unambiguous support for this aspect of the second interpretation, either in other relevant international fisheries instruments or in the practice of individual states. A few RFMOs nevertheless authorize or even require their members to confiscate catch of foreign vessels in their ports in a few very specific scenarios.[54]

[54] E.g., pursuant to paragraph 22(iv)(b)(i) of CCAMLR (Commission for the Conservation of Antarctic Marine Living Resources) Conservation Measure 10–07 (2009) "Scheme to promote

The PSM Agreement

Two provisions in the PSM Agreement are directly relevant to the issue of extra-territorial port state jurisdiction. The first is Article 4(1)(b), which was reproduced above, and the second is Article 18(3), which reads:

> Nothing in this Agreement prevents a Party from taking measures that are in conformity with international law *in addition to* those specified in paragraphs 1 and 2 of this Article, including such measures as the flag State of the vessel has expressly requested or to which it has consented. [emphasis added]

It is submitted that as the port state measures in paragraphs (1) and (2) of Article 18 are not punitive or have a punitive character, this provision does not fundamentally depart from the substance of paragraph 5 of the FAO Model Scheme on PSM and paragraph 59 of the IPOA-IUU. A useful addition is the phrase "including … consented" as it alerts both port and flag states to the possibility of imposing additional enforcement measures. The requirement of consent nevertheless marks a clear difference with Article 218 of LOSC.

It is in this context interesting to note that Article 17(3) of the Chairperson's Draft PSM Agreement of 5 February 2009 still contained a provision inspired by Article 218 of LOSC and the limited practice within RFMOs mentioned at the end of preceding subsection. This provision would have allowed states parties to take additional measures provided it "gives effect to a decision of a regional fisheries management organization or is taken pursuant to other international agreements."[55] RFMOs would thereby have been mandated by the PSM Agreement to progressively develop international law on this issue, ensuring tailor-made solutions for diverging scenarios. Arguably, however, the phrase "pursuant to a decision made by a regional fisheries management organization" in Article 4(1)(b) of the PSM Agreement could still be interpreted as implicitly acknowledging the competence of RFMOs in that regard. This argument was in fact used by several delegations at the second resumed session in May 2009 in support of deleting Article 17(3) altogether.

Linkages to RFMOs

As expressed in the Preamble to the PSM Agreement, one of its objectives is to increase "coordination at regional and interregional levels to combat illegal, unreported and unregulated fishing through port State measures." There are several ways in which the PSM Agreement pursues this objective. The most obvious

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compliance by non-Contracting Party vessels with CCAMLR conservation measures" and Article 23(3) of the NEAFC "Scheme of Control and Enforcement" (version in effect from 6 February 2010).

[55] Chairperson's Draft PSM Agreement of 5 February 2009, Article 17(3)(d).

provision in this regard is Article 6, entitled 'Cooperation and exchange of information', which reads:

1. In order to promote the effective implementation of this Agreement and with due regard to appropriate confidentiality requirements, Parties shall cooperate and exchange information with relevant States, FAO, other international organizations and regional fisheries management organizations, including the measures adopted by such regional fisheries management organizations in relation to the objectives of this Agreement.
2. Each Party shall, to the greatest extent possible, take measures in support of conservation and management measures adopted by other States and other relevant international organizations.
3. Parties shall cooperate, at the subregional, regional and global levels, in the effective implementation of this Agreement including, where appropriate, through FAO or regional fisheries management organizations and arrangements.[56]

It can be noted that paragraphs (1) and (3) both refer to RFMOs and that paragraphs (1) and (2) both refer to "measures." However, the wording in paragraph (1) is not sufficiently clear as to whether the duty to cooperate is linked to relevant measures of RFMOs or if the linkage only applies between the duty to exchange information and the measures of RFMOs. Some rewording, for instance with respect to the phrase "including the measures," could have provided such clarity. Significantly, paragraph (2) does not refer to measures in combination with RFMOs. All in all, it is submitted that the obligations for port states under Article 6 to cooperate with or within RFMOs and in support of their measures are less explicit and more qualified in comparison with a flag state's obligation to cooperate with RFMOs under Article 8(3) of UNFA. It is also a missed opportunity that the PSM Agreement does not incorporate a notion of 'port state responsibility' modeled on Article III of the FAO Compliance Agreement and Article 8(3) of UNFA.

The main[57] specific linkage to measures of RFMOs is contained in paragraph (4) of Article 9, entitled 'Port entry, authorization or denial', of the PSM Agreement, which stipulates:

> Without prejudice to paragraph 1 of this Article, when a Party has sufficient proof that a vessel seeking entry into its port has engaged in IUU fishing or fishing related activities in support of such fishing, in particular the inclusion of a vessel on a list of vessels having engaged in such fishing or fishing related activities adopted by a relevant regional

[56] The words "and arrangements" in paragraph (3) would not seem to be necessary in light of the definition of "regional fisheries management organization" in Article 1(i).

[57] Another linkage is contained in Article 9(1)(e), but this actually cross-refers to Article 8*bis*(3).

> fisheries management organization in accordance with the rules and procedures of such organization and in conformity with international law, the Party shall deny that vessel entry into its ports, taking into due account paragraphs 2 and 3 of Article 4.

The list which is referred to in this provision is of course an RFMOs' IUU vessel list. Such a linkage is also included in paragraph 2.7 of the FAO Model Scheme on PSM. The last phrase—starting with "taking into"—constituted the core of an impasse on linkages to RFMOs in the negotiation process on the PSM Agreement. The two paragraphs that are referred to read:

> (2) In applying this Agreement, a Party does not thereby become bound by measures or decisions of, or recognize, any regional fisheries management organization of which it is not a member.
>
> (3) In no case is a Party obliged under this Agreement to give effect to measures or decisions of a regional fisheries management organization if those measures or decisions have not been adopted in conformity with international law.

The Chairperson's Draft Agreement of 18 May 2009 still contained an alternative text for paragraph (2), namely:

> [Nothing in this Agreement will mean acceptance or recognition by a State of any kind of commitment to ensure compliance by a port State with measures or decisions adopted by a regional fisheries management organization in which it is not a member.] [Nevertheless such State shall contribute to the extent possible in accordance with its laws and regulations to rendering effective the measures taken by such regional fisheries management organization.][58]

The first sentence of this paragraph was put forward by Argentina at the June 2008 session of the Technical Consultation. It was supported by two other delegations but otherwise met with very broad opposition. The second sentence was proposed as compromise text by the Chairperson.

The core of the problem with the agreed paragraphs (2) and (3) and the alternative proposed by Argentina is that they do not only hamper the crystallization of a general obligation under the international law of the sea for port states to cooperate with RFMOs but also restrict the effectiveness of the RFMOs' IUU vessel lists. The latter point is to some extent addressed by the growing practice whereby RFMOs automatically accept listings on other RFMOs' IUU vessel lists for incorporation into their own lists.[59] It is noteworthy in this context

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[58] See Article 4(1*bis*).

[59] For instance, the North Atlantic Fisheries Organization's (NAFO) recognition of the NEAFC IUU Vessel List pursuant to Articles 52(2) and 57(8) of the NAFO Conservation and Enforcement Measures (NAFO/FC Doc. 10/1)); NEAFC's recognition of the IUU vessel lists of CCAMLR, NAFO, and the South East Atlantic Fisheries Organisation (SEAFO) pursuant to Article 44(6) of the NEAFC Scheme of Control and Enforcement (version in effect from 6 February 2010); SEAFO's

that in 2007 Argentina blocked consensus on a proposal for such a practice within the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR).[60]

Argentina seemed to have various reasons for proposing its alternative text. Among these are, first of all, persistent objection to the notion that RFMOs are the preferred vehicles for the conservation and management of straddling and highly migratory fish stocks and the correlated restrictions on a coastal state's sovereign rights over marine living resources in its EEZ. This concern is of course directly related to the dispute on title to sovereignty over the *Islas Malvinas*/ Falklands Islands between Argentina and the United Kingdom. Second, Argentina may also oppose the very notion that the PSM Agreement would impose obligations on port states and thereby amount to restrictions on sovereignty. Third, Argentina seems to have serious concerns about practices within RFMOs on participation, allocation of fishing opportunities, and combating IUU fishing by means of IUU vessel lists, for the reasons that all these practices are in its view discriminatory to non-members, including new entrants. Similar concerns on RFMO practices on participation and allocation were voiced by a few other delegations at the June 2008 session of the Technical Consultation and—more recently and by many more delegations—at the 8th round of informal consultations of states parties to UNFA in March 2009.[61] In particular, these concerns challenge the fairness and equity of the extent to which developing states, in particular, are able to exercise their entitlements to marine resources under the current international law of the sea.

Within the negotiation process on the PSM Agreement, the challenge was to address the concerns of Argentina without losing the linkage with RFMOs and their measures, in particular the IUU vessel lists. The phrase "if those measures or decisions have not been adopted in conformity with international law" in Article 4(3) and the phrase "in accordance with the rules and procedures of such organization and in conformity with international law" in Article 9(4) of the PSM Agreement have succeeded in this.

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recognition of the IUU vessels lists of CCAMLR, NAFO, and NEAFC pursuant to paragraph 19 of SEAFO Conservation Measure 08/06 "Establishing A List Of Vessels Presumed To Have Carried Out Illegal, Unreported And Unregulated (IUU) Fishing Activities." Note also the intention of the five tuna RFMOs to establish a global IUU vessel list (see Doc. No. TRFMO2-011 /2009, of 4 May 2009, "A Unique Vessel Identifier (UVI) for Tuna Fishing Vessels and Harmonization of t-RFMO Vessel Lists." Online: <http://www.tuna-org.org/Documents/TRFMO2/15_ANNEX_5.7.pdf> (accessed 15 February 2010).

[60] Cf. para. 8.16, CCAMLR, *Report on the Twenty-Sixth Meeting of the Commission*, Hobart, Australia, 22 October – 2 November 2007.

[61] Based on notes of the author. See also the description of the interventions by China, the Marshall Islands, and Senegal on p. 5 of the *Earth Negotiations Bulletin*, 7, No. 64, 21 March 2009. Online: <http://www.iisd.ca/oceans/fsaic8> (accessed 15 February 2010).

Conclusion

The adoption of the PSM Agreement on 22 November 2009 is the culmination of growing recognition during more than a decade of the need for, and high potential of, port state measures to combat IUU fishing.

The elements of the PSM Agreement discussed in this chapter reveal a high level of consistency with the current international law of the sea, for instance on the issues of access to ports and residual port state jurisdiction. As regards extra-territorial port state jurisdiction, it is unfortunate that an opportunity was missed to progressively develop international law by explicitly empowering port states to impose punitive measures modeled on Article 218 of LOSC.

The issue of linkages to RFMOs proved to be particularly contentious in the negotiations. The impasse on this issue stemmed in part from concerns about practices within RFMOs on participation, allocation of fishing opportunities, and combating IUU fishing by means of IUU vessel lists. These are part of broader concerns on the fairness and equity of the extent to which developing states, in particular, are able to exercise their entitlements to marine resources under the current international law of the sea.