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Fisheries – Port State Measures

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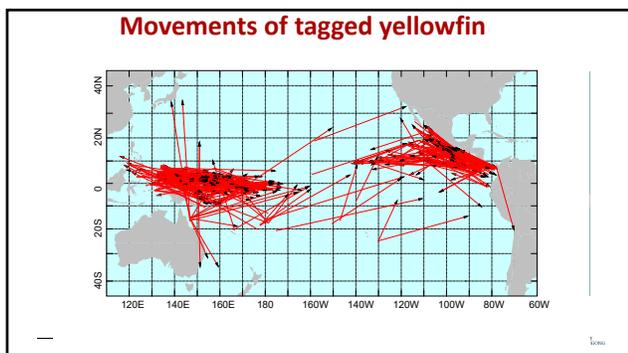


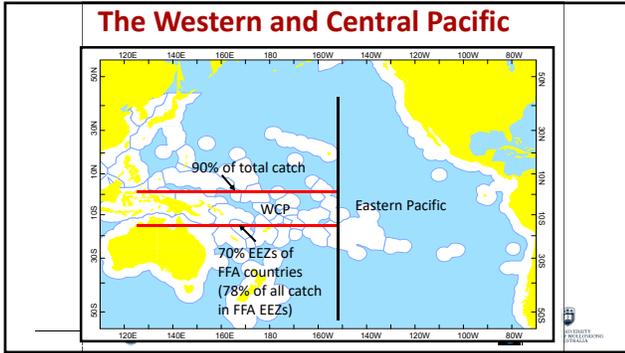
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Various types of illegal fishing

- Fishing without legal permit, illegal entry into EEZ
- Unauthorized fishing gears, in unauthorized fishing ground, port of call
- Fake document regarding transfer of foreign fishing vessels, document falsification
- Transshipment at sea without reporting to the assigned fishing ports
- Double flagging or sailing under coastal State flag
- Fictitious company address and forgery of documents issued by other institutions







Arrests for EEZ fisheries offences

LOSC Art 73(2)

“Arrested vessels and their crews shall be *promptly released upon the posting of reasonable bond or other security*”

Fisheries Port State Measures - Outline

- Port State jurisdiction
- Relevant provisions in international instruments
- FAO Model Scheme
- FAO Port State Measures Agreement
- State practice

A photograph showing a person from behind, wearing a blue shirt with 'FISHERIES ENFORCEMENT' written on it, looking out at a fishing vessel on the water.

Relevance of Port State Measures

“Active use of port State jurisdiction can be an effective weapon against illegal, unreported and unregulated (IUU) fishing operations. Port State controls can act as a disincentive to IUU operators by increasing the cost of their operations (e.g. by forcing them to seek out more remote and hence more costly ports).”

High Seas Task Force - *Promoting Responsible Ports*



FV Thunder / Wuhan N4 / Ming 62m



- Part of a group of 6 IUU vessels, fishing in Southern Ocean
- April 2013 – Interpol notice for the ship
- May 2014 – stopped by Malaysia for illegal fishing; released after payment of \$90,000 fine
- Pursued by Sea Shepherd
- Scuttled off Sao Tome and Principe
- Senior crew from Spain, Chile and Portugal - convicted



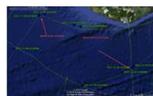
Source: CCAMLR



FV Premier



- Cooperation between Liberia and Mauritius
- Liberian Government requested Mauritian Ministry of Fisheries to inspect the vessel. This was done (providing copies of the fishing catch log and forged Liberian fishing licence)
- Other States denied *Premier* a fishing licence (Kenya, Mozambique)
- Seychelles and Mauritius denied permission to offload catch
- Tanzania refused to renew fishing licence
- Comoros stated it will deny any fishing application
- Eventually fish offloaded in Sri Lanka after owners paid US\$2m fine to Liberia



Port State jurisdiction under customary international law

- Ports traditionally regarded as part of the sovereignty of the State
- Jurisdiction in internal waters apply
- Local jurisdiction is asserted when peace and good order of the port is affected
- Right of access and right to leave ports subject to conditions
- Non-discrimination
- Immunity from coastal State jurisdiction in case of *force majeure*/distress

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Force majeure/ distress

- “Force majeure”/distress
 - (Act of God/ beyond the control of the master) etc
- Vessel must have “voluntarily” entered into port
 - on its own steam
- High standard of proof

It must be an urgent distress; it must be something of grave necessity; such as ... where a ship is said to be driven in by stress of weather. It is not sufficient to say it was done to avoid a little bad weather, or in consequence of foul winds, the danger must be such as to cause apprehension in the mind of an honest and firm man ... Then again, where the party justifies the act upon the plea of distress, it must not be a distress which he has created himself; by putting on board an insufficient quantity of water or of provisions for such a voyage, for there the distress is only a part of the mechanism of the fraud, and cannot be set up in excuse for it; and in the next place the distress must be proved by the claimant in a clear and satisfactory manner.

Per Sir William Scott (Lord Stowell) *The Eleanor*, (1809) Edw. 135

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Port State powers in international law

- Regulated by customary international law
- Full sovereignty as on land
 - Qualified only by international obligations
- In practice States are unwilling to accept any qualifications to their sovereignty in internal waters

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Port State powers in international law

- "... States have jurisdiction over vessels in their ports and foreign States cannot generally claim rights of passage into ports... When a vessel enters a New Zealand port it subjects itself to New Zealand's laws" [para. 61]
- "...not only is New Zealand able to regulate matters within its jurisdiction in whatever manner it wishes, its obligations at international law do not limit its powers in respect of vessels entering its port" [para. 63]

[Per Mallon J., in *Omunkete Fishing (Pty) Ltd v. The Minister of Fisheries and the Minister of Foreign Affairs and Trade*, High Court of New Zealand, 1 July 2008]

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Definition of port in the fisheries context

- Port includes offshore terminals and other installations for landing, transshipping, packaging, processing, refuelling, and resupplying (FAO Port State Measures Agreement, Art 1(g))

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LOSC Article 25(2)

Rights of protection of the coastal State

2. In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, **the coastal State also has the right to take the necessary steps** to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject

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UN Fish stocks Agreement, Article 23

1. A port State has the right and the duty to take measures, in accordance with international law, to promote the effectiveness of subregional, regional and global conservation and management measures. When taking such measures a port State shall not discriminate in form or in fact against the vessels of any State.
2. A port State may, inter alia, inspect documents, fishing gear and catch on board fishing vessels, when such vessels are voluntarily in its ports or at its offshore terminals.
3. States may adopt regulations empowering the relevant national authorities to prohibit landings and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas.
4. Nothing in this article affects the exercise by States of their sovereignty over ports in their territory in accordance with international law.

Introduced a new approach: a port State has the right and the duty.....

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FAO Compliance Agreement, V(2)

2. When a fishing vessel is voluntarily in the port of a Party other than its flag State, that Party, where it has reasonable grounds for believing that the fishing vessel has been used for an activity that undermines the effectiveness of international conservation and management measures, shall promptly notify the flag State accordingly. Parties may make arrangements regarding the **undertaking by port States of such investigatory measures as may be considered necessary** to establish whether the fishing vessel has indeed been used contrary to the provisions of this Agreement.

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IPOA-IUU, paras 52-64

- Reasonable advance notice of entry
 - Copy of authorisation to fish
 - Details of fishing trip
- Inspection of fishing vessels
- Prohibition of landing and transshipment of fish
- Publication of port State measures
- Cooperation with other States



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FAO Code of Conduct

- When a fishing vessel is voluntarily in a port or an offshore terminal of the port State and the flag State requests for assistance with respect to determining the compliance of that vessel to regional and international standards, the port State should render assistance

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FAO Model Scheme to Combat IUU Fishing

- Purpose is to implement effective action by port States to prevent, deter and eliminate IUU fishing
- Addresses issues relating to the following:
 - inspection of vessels while they are in port
 - actions to be taken when an inspector finds there is reasonable evidence for believing that a foreign fishing vessel has engaged in, or supported, IUU fishing activities
 - information that the port State should provide to the flag State
- Provided examples of IUU fishing activities
- Provides minimum standards

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FAO Port State Measures Agreement to prevent, Deter, and Eliminate IUU Fishing

- Opened for signature 22 November 2009 until 21 November 2010
- Entry into force after deposit of 25th instrument of ratification or accession
 - **5 June 2016**

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Parties to PSM Agreement

- Albania
- **Australia**
- Bahamas
- Barbados
- Cape Verde
- Chile
- Costa Rica
- Cuba
- Denmark
- Djibouti
- Dominica
- Ecuador
- European Union (as a member organization)
- **Fiji**
- France
- Gabon
- Gambia
- Ghana
- Grenada
- Guinea
- Guyana
- Iceland
- **Indonesia**
- **Japan**
- Kenya
- Liberia
- Libya
- Madagascar
- **Maldives**
- Mauritania
- Mauritius
- Montenegro
- Mozambique
- **Myanmar**
- Namibia
- **New Zealand**
- Norway
- Oman
- **Palau**
- Panama
- **Philippines**
- **Republic of Korea**
- Saint Kitts and Nevis
- St Vincent & the Gren.
- Sao Tome & Principe
- Senegal
- Seychelles
- Sierra Leone
- Somalia
- South Africa
- **Sri Lanka**
- Sudan
- **Thailand**
- Togo
- **Tonga**
- Turkey
- United States
- Uruguay
- Vanuatu
- Viet Nam

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Application of FAO PSM Agreement

- Applies to foreign fishing vessels
- Exemptions
 - Vessels of a neighbouring State that are engaged in artisanal fishing for subsistence
 - Container vessels that are not carrying fish or, if carrying fish, provided that there are no clear grounds for suspecting that such vessels have engaged in fishing related activities in support of IUU fishing
 - (optional) vessels chartered by its nationals exclusively for fishing in areas under its national jurisdiction and operating under its authority

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Relationship of FAO PSM Agreement with other international instruments

- Art 4(1) "Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of Parties under international law
 - Sovereignty and sovereign rights of Parties
 - Sovereignty over ports, including the right to deny entry into port or adopt more stringent measures
- Art 4(2) "A Party does not thereby become bound by measures or decisions of, or recognise, any regional fisheries management organization of which it is not a member"

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Provisions of FAO PSM Agreement

- Integration or coordination of fisheries-related port State measures with broader system of port controls
- Cooperation and exchange of information
- Entry into port
 - Emphasis on the denial of entry into port
- Use of ports
- Inspections and follow up actions
 - Priority in inspection
- Role of the flag States
- Requirements of developing States
- Dispute settlement
- Non-parties

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FAO PSM Agreement Annexes

- Information to be provided in advance by vessels requesting port entry
- Port State inspection procedure
- Report of the results of the inspection
- Information system on port State measures
- Guidelines for the training of inspectors

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Examples of RFMO Port State Measures

- ICCAT, NAFO, NEAFC, CCAMLR, and IOTC
- Designation of ports
- Advanced notice of port entry
 - CCAMLR (advanced notice of entry + written declaration that the vessel did not engage or support IUU fishing)
 - NAFO (legality of the catch)
- Prior authorisation to land or transship fish
- Inspection of fishing vessels
- Port enforcement actions
 - Noting infringement in inspection reports
 - Prohibition of landing and transshipment of fish
 - NEAFC (prohibition of supply of provisions fuel and other services)
 - CCAMLR (denial of port access)

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Summary of standards in applying port State measures

- Application of fair, transparent and non-discriminatory measures
- In accordance with international law
- Render assistance to vessels in distress
- Confidentiality of information
- Clear grounds for believing that a vessel has conducted IUU fishing
- Avoid unduly delaying or interfering with the vessel
- Cooperation

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Summary of port State measures according to international instruments

- Designation of ports
- Advanced notice of entry
- Inspection of fishing vessels
- Prohibition of landing and transshipment of fish
- Denial of port entry
- Notification of measures to flag States and relevant RFMOs

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Issues related to the application of port State measures

- Ineffective port State control
- Non-harmonised port State measures
 - different measures applied to domestic and foreign vessels
 - application of minimum standards
- Ports of convenience
- Abuse of fish workers on board IUU vessels
 - Is this investigated at the port level?
- Port State measures acting as disguised barriers to trade

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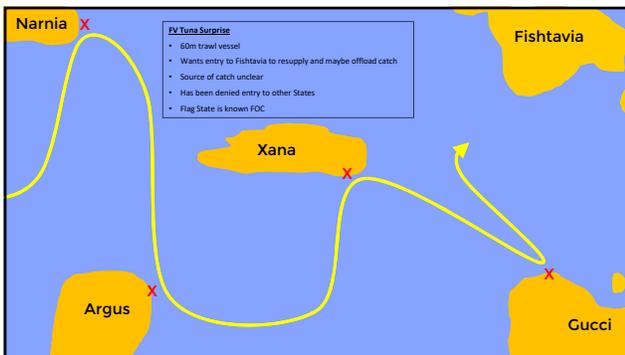


Fisheries - PSM Hypothetical Exercise 1

- PV Tuna Surprise**
- 60m trawl vessel
 - Wants entry to Fishtavia to resupply and maybe offload catch
 - Source of catch unclear
 - Has been denied entry to other States
 - Flag State is known FOC

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Fisheries - PSM Hypothetical Exercise 2

- MV Ocean Kitchen**
- 80m transhipment vessel
 - Wants entry to Balenciaga to offload catch
 - States source of catch is high seas fishing, but Tiffany has raised concerns about illegal fishing in its EEZ by possible rendezvous with ship PV Alg Tuna
 - Flag State is not known FOC

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Fisheries - PSM Hypothetical Exercise 3

PV Tuna Surprise

- 60m purse seine vessel
- Flag State: FOC
- Suspected of illegal fishing in EEZs in Bula and Weila
- About to reach the high seas
- Cooperation is sought for arrest

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