

Scuttling IUU Fishing and Rewarding Sustainable Fishing: Enhancing the Effectiveness of the Port State Measures Agreement with Trade-Related Measures

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I. INTRODUCTION

Illegal, unreported, and unregulated fishing (IUU fishing) is a substantial threat to global food security and a recurring problem for global fishery managers already facing difficult baseline situations exacerbated by climate change, including warming oceans and increasing acidification. There is nothing historically new about IUU fishing; there have always been poachers who take advantage of operating in the shadows of legal commercial fishing.¹ What is new is the extent to which marine poaching has industrialized. It is estimated that 19% of the worldwide value of marine catches are unlawful.² The problem is not limited to developing states. For example, even though the United States, through the work of the U.S. Coast Guard, has been actively combatting IUU fishing for decades, all is not well at U.S. ports. A 2014 study found that up to 32% of wild-caught seafood, including shrimp, crab, salmon, pollock, and tuna, imported into the United States may be illegally harvested.³

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1. *See, e.g.*, CALLUM ROBERTS, *THE UNNATURAL HISTORY OF THE SEA* 133 (2008) (describing the continued use of trawling in eighteenth-century England in spite of limitations placed on the practice).

2. EUROPEAN COMM'N, *HANDBOOK ON THE PRACTICAL APPLICATION OF COUNCIL REGULATION (EC) NO. 1005/2008 OF 29 SEPTEMBER 2008 ESTABLISHING A COMMUNITY SYSTEM TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING* 6 (2009), available at http://ec.europa.eu/fisheries/cfp/illegal_fishing/info/handbook_original_en.pdf.

3. Ganapathiraju Pramod et al., *Estimates of Illegal and Unreported Fish in Seafood Imports to the USA*, 48 *MARINE POL'Y* 102, 105 (2014).

While the United States has adequate access to protein resources, many other countries, such as Sierra Leone, whose populations depend upon fish as a primary protein source, face tremendous challenges with combatting IUU fishing.⁴ As global populations increase, but critical food resources decrease, it is evident there is a critical need to “re-tool” the food system to eliminate the pressures of IUU fishing.

Nations have responded to this threat with a number of binding and nonbinding agreements negotiated under the auspices of the Food and Agriculture Organization (FAO) or within Regional Fisheries Management Organizations (RFMOs). The most recent of these agreements is the 2009 FAO Port State Measures Agreement (PSMA).⁵ The legally binding PSMA has the objective of preventing, deterring, and eliminating IUU fishing. This Article argues that the long-term success of PSMA will depend on the ability of states to link their port state measures to trade-related enforcement, including potential closures of markets and requirements for traceability. Without a reasonable ability to sanction flag states through trade measures, there will be minimal interruption in the current IUU fishing chain. With all of the existing marine challenges inherent in responding to warming oceans and acidification, there can be little hope of marine fish and shellfish stocks adapting to changing environmental conditions if these existing stocks fail to recover due to over-exploitation.⁶

This Article starts with a brief introduction to the complexities of ocean governance with its multiple delineations of jurisdiction and its multiple actors, including flag states, coastal states, and port states. The Article continues with an introduction to the international legal responses to IUU fishing that culminated in the negotiation of the PSMA. The third Part details the United States’ support of the PSMA and current efforts, as of 2015, to implement the PSMA. The final Part highlights trade-related language from the International Plan of Action on IUU Fishing, and recommends that the United States and other states who are creating

4. See MARIE-CAROLINE BADJECK ET AL., THE VULNERABILITY OF FISHING-DEPENDENT ECONOMIES TO DISASTERS 12 (2013), available at <http://www.fao.org/3/a-i3328e.pdf> (listing a number of developing states whose nutrition depends on fish); S.A. Freetown, *Good Catch*, ECONOMIST (Oct. 18, 2012), <http://www.economist.com/blogs/baobab/2012/10/fishing-sierra-leone> (observing that it is estimated to cost West Africa up to \$1.5 billion a year).

5. United Nations Conference of the Food and Agricultural Organization, Rome, Italy, Nov. 18–23, 2009, *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, FAO Doc. C 2009/LIM/11-Rev1 (Nov. 22, 2009) [hereinafter PSMA], available at http://www.fao.org/fileadmin/user_upload/legal/docs/2_037t-e.pdf.

6. FOOD & AGRIC. ORG. OF THE UNITED NATIONS, STATE OF THE WORLD FISHERIES AND AQUACULTURE 37 (2014), available at <http://www.fao.org/3/a-i3720e/i3720e01.pdf> [hereinafter FAO, STATE OF THE WORLD FISHERIES AND AQUACULTURE].

or revising legislation to implement the PSMA consider including trade-related measures to bolster the objectives of the PSMA.

II. COMPLEX MULTI-ACTOR OCEAN GOVERNANCE

States have been historically reluctant to restrict fishing access by vessels flagged to their nation because they have generally assumed a right to take bountiful and renewable resources from the oceans, especially on the high seas.⁷ With the negotiation of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), states agreed to a paradigm shift in ocean jurisdiction.⁸ UNCLOS divides responsibilities among flag states, coastal states, and port states.⁹ Concerned about the depletion of ocean resources, particularly living marine stocks, states agreed to create exclusive economic zones (EEZ). In these zones, coastal states would be empowered to create and enforce conservation and management measures to protect living marine resources from ongoing depletion.¹⁰ Of particular note for this Article about PSMA, states also agreed under UNCLOS to empower port states to assert legislative and enforcement jurisdiction over incidents involving marine pollution.¹¹

In spite of this new jurisdictional regime recognizing coastal and port states' authority in particular circumstances, states were generally unprepared to depart from known marine legal customs governing individual vessels. The flag state retained its primacy as the state asserting primary enforcement powers over vessels registered to its flag. For instance, under UNCLOS Article 94, where there are concerns about whether "proper jurisdiction and control" has been exercised in relation to a ship, the state with concerns may contact the flag state, who must investigate the concerns and then "if appropriate, take any action necessary to remedy the situation."¹² Likewise, under UNCLOS Article 217,

7. FOOD & AGRIC. ORG. OF THE UNITED NATIONS, AGREEMENT TO PROMOTE COMPLIANCE WITH INTERNATIONAL CONSERVATION AND MANAGEMENT MEASURES BY FISHING VESSELS ON THE HIGH SEAS (1995), available at <http://www.fao.org/docrep/MEETING/003/X3130m/X3130E00.HTM>.

8. United Nations Convention on Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 31363 [hereinafter UNCLOS], available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201833/v1833.pdf>.

9. *Id.* The term "flag state" refers to the state that registers a vessel and permits the vessel to fly the flag of the state; every vessel must be registered to a flag state. In many cases, the owner and crew of a vessel will not be nationals of the flag state. The term "coastal state" refers to the state that asserts control over fisheries management within the exclusive economic zone, a 200 nautical mile zone typically measured from the coast. The term "port state" refers to the state whose ports are either used for off-loading and on-loading of cargo or to obtain port services such as refueling.

10. *See id.* at arts. 61, 62, 73.

11. *See id.* at art. 218.

12. *Id.* at art. 94(6).

flag states have the responsibility to enforce national and international rules, standards, law, and regulations to prevent, reduce, and control marine pollution “irrespective of where a violation occurs.”¹³ As part of their obligations, flag states are expected to “periodically” inspect vessels and to prosecute violators “irrespective of where the violation occurred or where the pollution caused by such violation has occurred or has been spotted.”¹⁴ While there is no similarly structured language for flag states to provide oversight of their fishing fleets, the Convention leaves it to flag states to punish IUU fishing beyond the assignment of fines.¹⁵

As the global market for fishery products has increased, a growing side effect is that there is often little correlation between the owners of fishing fleets and the states that flag these fleets.¹⁶ Beneficial owners of fleets, especially IUU fishing fleets, obtain registration in states that are unlikely or unable to enforce conservation and management measures.¹⁷ In some fleets, the beneficial owners who profit from a fleet’s fishing activities lack any “genuine link” to the states that provided registration.¹⁸ At best, the links between a vessel and a state may exist in the form of a shell company that might also provide a tax haven.¹⁹ Originally obtained to circumvent labor rules, safety regulations, and tax laws, these vessel registrations are generically referred to as “open registries,” “flags of convenience,” or “flags of non-compliance” (hereinafter referred to as

13. *Id.* at art. 217(1).

14. *See id.* at art. 217(3)–(4).

15. *See id.* at art. 73. Within an exclusive economic zone, a coastal state may impose a penalty but may not impose imprisonment unless there is an agreement between the coastal state and flag state. *Id.* A coastal state must inform a flag state of any detention or arrest of any vessels registered with the flag state. *Id.* Agreements exist for the transfer of piracy suspects, but a search of public databases containing bilateral ocean agreements provides no agreements between coastal and flag states specifically referencing UNCLOS Article 73. *See, e.g.,* R. CHUCK MASON, CONG. RESEARCH SERV., R41455, PIRACY: A LEGAL DEFINITION 6 (2010), available at <http://fas.org/sgp/crs/misc/R41455.pdf> (describing bilateral agreements by the United States, the United Kingdom, the European Union, and others with governments in the Horn of Africa region that define procedures for the detention, transfer, and prosecution of captured pirate suspects).

16. *See* Michael Scott Moore, *Lowering Flags of Convenience for Fish Poachers*, PAC. STANDARD MAG. (Jan. 12, 2012), <http://www.psmag.com/politics-and-law/lowering-flags-of-convenience-for-fish-poachers-39127> (describing Spanish practices of flagging in Belize).

17. *Id.*

18. ROBIN R. CHURCHILL ET AL., THE MEANING OF THE “GENUINE LINK” REQUIREMENT IN RELATION TO THE NATIONALITY OF SHIPS 30 (2000), available at <http://orca.cf.ac.uk/45062/1/ITF-Oct2000.pdf> (describing how a Danish owned, Danish crewed vessel’s only link to the flag state of Panama was “the administrative formality of registration”) (quoting Case C-286/90, *Anklagemyndigheden v. Poulsen and Diva Navigat*, 1992 E.C.R. I-6019).

19. Serge Beslier, *Enforcement and Surveillance: What are Our Technical Capacities and How Much Are We Willing to Pay?*, in ORG. FOR ECON. COOPERATION & DEV., FISH PIRACY 314 (2004), available at ftp://ftp.fao.org/fi/document/cwp/cwp_23/inf3e.pdf.

“flags of convenience”).²⁰ Among the notorious flags of convenience for fishing vessels are states deemed to have high levels of corruption, including Honduras, Panama, and Belize.²¹

Because of the dispersed nature of the global fisheries market, vessels often land fishing cargo in countries besides their flag state.²² In practice, this means that the flag state is unlikely to ever inspect the cargo of vessels on its registry. This is especially true for distant water fishing fleets. China’s distant water tuna fleet is the largest in the world, with over 500 vessels, as compared to the U.S. distant water tuna fleet of approximately 39 vessels.²³ Around 70% of the Chinese distant water vessels appear to be privately owned.²⁴ It is unclear where some of the Chinese vessels are landing their catches. For example, of the 3.1 million tons of fish that Chinese vessels appear to be harvesting off the coast of Western Africa, 2.5 million tons appear to be unreported.²⁵ It is likely that some of the catch is ending up in one or more “ports of convenience”

20. *Why So Many Shipowners Find Panama’s Flag Convenient*, BBC NEWS (Aug. 5, 2014), <http://www.bbc.com/news/world-latin-america-28558480>.

21. MATTHEW GIANNI & WALTER SIMPSON, AUSTL. DEP’T OF AGRIC., FISHERIES AND FORESTRY, *THE CHANGING NATURE OF HIGH SEAS FISHING* 4 (2005), available at <http://www.wwf.org.uk/filelibrary/pdf/flagsofconvenience.pdf>. Transparency International ranked 171 states on “perceptions of corruption” with more transparent countries having lower ranking scores. See TRANSPARENCY INT’L, *CORRUPTION PERCEPTIONS INDEX 2014* (2014), available at http://files.transparency.org/content/download/1869/12486/file/CPI2014_map-and-country-results_EN.pdf. Among the states reviewed in 2014 that are considered significant flags of convenience, Honduras ranked 126, Panama ranked 94, and Belize was not given a ranking. *Id.*

22. Typically, port data is available through commercial data providers. For the public to track vessels, there are a number of websites that indicate the last port visits by a specific vessel. See, e.g., VESSELFINDER, <http://www.vesselfinder.com> (last visited Mar. 26, 2015) (providing the ability to see which vessels are in a given port based on Automatic Identification System (AIS) data or where they are currently operating). On March 17, 2015, the database identified 254 Panamanian-flagged fishing vessels with International Maritime Organization numbers. *Vessels Database: AIS Ship Data/Positions*, VESSELFINDER (Mar. 17, 2015), <http://www.vesselfinder.com/vessels?t=5&f=PA>. Curiously, only one Panamanian-flagged fishing vessel had a real-time location based on AIS data, which appeared to be recorded off the coast of Turkey. *Id.* A new website, *Global Fishing Watch*, created by Google, Skytruth, and Oceana may soon become available to provide additional public access to information about fishing and port activity based on AIS data. See GLOBAL FISHING WATCH, <http://globalfishingwatch.org> (last visited Mar. 26, 2015).

23. Tabitha Mallory, *China’s Distant Water Fishing Industry: Evolving Policies and Implications*, 38 *MARINE POL’Y* 99, 102, 105 (2013) (listing seiners and tuna vessels for 2008 and indicating an intent on the part of China to expand its distant water fishing fleet). See also NAT’L INST. FOR OCCUPATIONAL SAFETY & HEALTH, *COMMERCIAL FISHING MORBIDITY AND MORTALITY 1* (2014), available at <http://www.cdc.gov/niosh/docs/2014-126/pdfs/2014-126.pdf> (reporting 2012 numbers).

24. ROLAND BLOMEYER ET AL., EUROPEAN PARLIAMENT: DIRECTORATE GEN. FOR INTERNAL POLICIES, *THE ROLE OF CHINA IN WORLD FISHERIES 12* (June 22, 2012), available at http://www.europarl.europa.eu/meetdocs/2009_2014/documents/pech/dv/chi/china.pdf.

25. *Id.* at 11.

where it may be processed and then eventually enter the channels of trade.²⁶

Adding to this complex marine resource governance scheme are globalized fish processing services. With the exception of artisanal fisheries, the national link between a fishery, a fishing vessel, and the final market is increasingly tenuous.²⁷ In addition to the operation of distant water industrial fishing vessels that may employ international crews, there is a surprising amount of global processing that makes it difficult to trace the biological origin of fish in contrast to the trade origin.²⁸ Fish cargos that originate in one state are frequently shipped to another state, such as China, for processing and then are returned to the first state.²⁹ Because the fish and seafood processing often involves fileting or de-shelling, there is great latitude for both accidental and intentional mislabeling, and the mixing of legally and illegally obtained seafood.³⁰ China requires a “Certificate of Origin” to receive fish and shellfish for processing in order to assign tariffs, but has not used this certificate as a means to combat IUU fishing.³¹ What becomes clear from this overview of ocean governance is that tracking of fish products from ocean to port is critical in unraveling the web of IUU fishing.

III. EVOLVING INTERNATIONAL LEGAL RESPONSES TO IUU FISHING

Given the importance of fish as a primary protein source for a large number of people, especially from developing states, the international community has made several attempts, with varying degrees of success, to address the problem of IUU fishing. These efforts include the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (1993

26. Some of the illegal fish from the Chinese distant water fishing fleets is likely to be entering the European Union markets. *See generally id.* at 55 (outlining imports of Chinese fishing products by European Union states).

27. *Id.* at 12. This is reflected in the phenomenon of distant water fishing fleets that deploy to non-flag state waters and may ship products to non-flag state ports.

28. *The Surprising Source of Your Favorite Seafoods*, NAT’L OCEANIC & ATMOSPHERIC AGENCY, http://www.nmfs.noaa.gov/aquaculture/homepage_stories/09_13_12_top_seafood_consumed.html (last visited Mar. 26, 2015) (observing that the United States in 2011 imported about 91% of the seafood consumed in the United States, but of the portion caught by American fishermen, some portion of these imports were exported overseas for processing and then reimported to the United States).

29. BLOMEYER ET AL., *supra* note 24, at 13 (noting that China has 718 processing plants, freezer vessels, and factory vessels approved for export to the European Union).

30. SHELLEY CLARKE, *TRAFFIC EAST ASIA, UNDERSTANDING CHINA’S FISH TRADE AND TRACEABILITY SYSTEM* vi (2009).

31. *Id.* at vii.

Agreement),³² the 1995 Fish Stocks Agreement,³³ and the 2001 International Plan of Action on IUU Fishing (IPOA-IUU).³⁴ The most recent effort to end IUU fishing is the Port State Measures Agreement (PSMA), which is the primary subject of this Article.

Initial global legal efforts to end IUU fishing focused on the coastal states by setting necessary fishing conservation and management measures within their borders and RFMOs setting similar measures for the high seas.³⁵ Coastal states and RFMO members were provided with initial fisheries enforcement authority.³⁶ This approach to combatting IUU fishing works for states that can assert a similar degree of political power. It has been less successful for politically weak states with little bargaining capacity.³⁷

Because of the large number of developing states that have provided their flag for registration, states have opted to approach the IUU fishing problem as a capacity building problem. After UNCLOS, states have focused most of their legal efforts to combat IUU fishing on (1) strengthening flag state control; (2) empowering regional fishery bodies to apply their management measures to noncontracting parties; (3) creating networks for regional cooperation particularly for monitoring control and surveillance; and (4) providing developing states with technical and financial assistance.³⁸ While policymakers have acknowledged the signifi-

32. United Nations Food and Agriculture Organization, Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Res. 15/93, U.N. FAO Conference, 27th Sess., S. Treaty Doc. 103-24 (1993).

33. Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, 2167 U.N.T.S. 3 [hereinafter 1995 Fish Stocks Agreement], available at <https://treaties.un.org/doc/Publication/UNTS/Volume%202167/v2167.pdf>.

34. FOOD & AGRIC. ORG., INTERNATIONAL PLAN OF ACTION TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING (2001) [hereinafter IPOA-IUU], available at <http://www.fao.org/docrep/003/y1224e/y1224e00.htm>.

35. See UNCLOS, *supra* note 8, at arts. 61, 62, 118. The term “IUU fishing” does not appear in UNCLOS; it is first defined in the 2001 IPOA-IUU.

36. Under UNCLOS Article 73(1), coastal states may board, inspect, arrest, and undertake judicial proceedings against ships in contravention of conservation and management measures. *Id.* at art. 73(1).

37. See, e.g., *Senegalese Authorities Release Russian Trawler Detained Over IUU*, UNDERCURRENT NEWS (Jan. 22, 2014, 9:28 AM), <http://www.undercurrentnews.com/2014/01/22/senegalese-authorities-release-russian-trawler-detained-over-iuu/>.

38. See, e.g., JUDITH SWAN, FISHING VESSELS OPERATING UNDER OPEN REGISTERS AND THE EXERCISE OF FLAG STATE RESPONSIBILITIES (2002), available at <http://www.fao.org/docrep/005/y3824e/y3824e00.htm>; *About Us*, INT’L MCS NETWORK, <http://www.imcsnet.org/about-us/> (last visited Mar. 26, 2015); *Liberian Fisheries Observer from NOAA Program Helps Liberia Apprehend Alleged Illegal Fishing Vessel*, NOAA FISHERIES, http://www.nmfs.noaa.gov/stories/2011/09/06_liberian_fishery_observer.html (last visited Mar. 26, 2015).

cance of ports as the gateways to profitable markets, it has only recently been adopted as a primary strategy for ending IUU fishing.³⁹ The following paragraphs summarize the normative evolution towards binding port state management.

Historically, port states have rarely inspected foreign-flagged vessels for compliance with fishing and conservation measures even though ports are part of a state's internal waters and there is no debate that states can assert maximum enforcement jurisdiction over their internal waters.⁴⁰ As illustrated by the recent PSMA agreement, which focused almost exclusively on the role of port states, it is only recently that global attention has shifted to relying on port state authority to combat IUU fishing and end "port hopping" practices. While port state enforcement has its own complexities, it is generally considered less dangerous than at-sea boardings.⁴¹ As will be discussed below, much of the recent impetus behind bolstering port authority has been led by countries such as members of the European Union, who have been less able to effectively control their distant water fleets than to control their ports.

Early negotiations on the topic of port authority were slow to recognize the value in shifting from a regime where the flag state held primary authority, to one of parallel flag and port state authority. In 1993, parties to the FAO recognized that fishing on the high seas by certain vessels was undermining cooperative efforts by RFMOs and adopted an agreement to promote international conservation and management measures.⁴² States agreed that when a vessel was voluntarily in the port of a party to the 1993 Agreement, the port state must notify the flag state if the vessel is suspected of IUU fishing.⁴³ The flag state would then have the option of permitting the port state to investigate.⁴⁴

In 1995, the Fish Stocks Agreement provided specific recognition of the role of port states in combatting IUU fishing practices.⁴⁵ Article 23

39. IPOA-IUU, *supra* note 34, ¶ 52–64.

40. G.P. PAMBORIDES, *INTERNATIONAL SHIPPING LAW: LEGISLATION AND ENFORCEMENT* 26 (1999).

41. *See, e.g., NZ Navy Barred from Boarding Boats in Fishing Stand-Off*, BBC NEWS (Jan. 14, 2015), <http://www.bbc.com/news/world-asia-30808949> (illustrating the challenges associated with at sea boarding).

42. Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas art. V(2), Nov. 24, 1995, 2221 U.N.T.S. 189, *available at* <http://www.fao.org/docrep/MEETING/003/X3130m/X3130E00.HTM>.

43. *Id.*

44. *Id.* (providing that "[p]arties 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").

45. *See* 1995 Fish Stocks Agreement, *supra* note 33.

provided that port states have “the right and the duty to take measures, in accordance with international law, to promote the effectiveness of . . . conservation and management measures.”⁴⁶ The Fish Stocks Agreement, however, fell short of actually requiring anything from port states. Instead, the agreement simply provided that a port state “may” inspect documents, gear, and catch for boats that are voluntarily in port. Similarly, states “may” adopt regulations to prohibit landings and transshipments that potentially are IUU fishing products.⁴⁷

In spite of the effort to bring greater attention to the authority of the port state, both the 1993 Agreement and the 1995 Fish Stocks Agreement provided too much discretion for the port state, which could decide whether or not to invest resources in inspections. The IPOA-IUU, negotiated in connection with the 1995 FAO Code of Conduct for Responsible Fisheries, was an attempt to provide more guidance, standards, and norms for states.⁴⁸ In keeping with previously negotiated instruments, the 2001 IPOA-IUU retained its focus on the primacy of the flag state by providing that the port state could act, but needed the consent of the flag state.⁴⁹

While the IPOA-IUU is not binding on states that agree to implement it, the use of the words “should” and “may,” in contrast to “shall” or “must,” only further weakens any urgency to implement the IPOA-IUU on the part of any FAO member state.⁵⁰ For example, paragraph 55 provides that states “should” require fishing vessels seeking port access to provide prior notice. This notice includes documentation of fishing authorization, as well as information about the fishing voyage and quantities of fish on board.⁵¹ States “should not allow” a vessel to land or transship upon “clear evidence” that the vessel “has engaged in IUU fishing activity,” but should instead convey information about the activities to the vessel’s flag state.⁵² Finally, the IPOA-IUU provides that if during an inspection a port state has “reasonable grounds” to suspect that a vessel is engaged in or supporting IUU fishing, then the port state should alert the flag state and “may take other action with the consent of, or upon the request of, the flag State.”⁵³

46. *Id.* at art. 23(1).

47. *See id.* at arts. 23(2) and 23(3).

48. IPOA-IUU, *supra* note 34.

49. *See id.* ¶¶ 52–64.

50. *Id.* ¶ 4.

51. *Id.* ¶ 55.

52. *Id.* ¶¶ 56, 58.

53. *Id.* ¶ 59.

While well-intentioned, states' efforts under the 1993 Compliance Agreement, the 1995 Fish Stocks Agreement, and the 2001 IPOA-IUU that focused largely on flag states, failed to curb IUU fishing. Only recently have states decided to direct focused legal attention on creating multilateral uniform, transparent, and nondiscriminatory port state measures. The following sections describe efforts by the European Union (EU) and FAO member states to give port states primary authority to combat IUU fishing.

A. European Union Measures

In 2008, the EU adopted the EU-IUU agreement focused on port regulation that in many respects reflects a binding version of the IPOA-IUU. Further, the EU-IUU is a precursor for the PSMA described in the following section.⁵⁴ Specifically, the EU prohibited access to ports within the EU unless a third-country fishing vessel could demonstrate compliance with the requirements in the EU-IUU regulation.⁵⁵ Vessels flying a flag of the EU were also prohibited from transshipping out of a third-country fishing state unless the vessel was registered under a RFMO.⁵⁶ The EU-IUU regulation also requires the EU to designate specific ports for landings, and mandates that any fishing master from a third-country state provide prior notice of their request to enter the port. Further, copies of fishing permits and information about the catch, including quantities, species, and locations of catch, are required.⁵⁷ Finally, under the regulation, EU member states are expected to inspect at least 5% of fishing or transshipment vessels, but must inspect any vessel listed as an IUU vessel, observed to be an IUU vessel, or presumed to be IUU fishing.⁵⁸

The EU-IUU regulation further required that the flag state of a vessel certify that the quantities of fish listed on a catch certificate were caught in accordance with established EU laws, EU regulations, and international conservation and management measures.⁵⁹ In addition, the catch certificate should be submitted at least three working days prior to arriving at port to competent authorities in the EU member state where

54. *See generally* Council Regulation 1005/2008, of 29 September 2008 Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2008 O.J. (L 286) (EC) [hereinafter EU-IUU Fishing Regulation].

55. *Id.* at art. 4(2).

56. *Id.* at art. 4(4).

57. *Id.* at art. 5, 6.

58. *Id.* at art. 9 (citing Article 25, which references a number of sources of evidence upon which the EU can make a finding of presumed IUU fishing that must be reported to the vessel and the flag state of the vessel under Article 26).

59. *Id.* at art. 12(3).

the catch will be imported.⁶⁰ When a catch has been processed immediately before arriving in the EU, a processing plant certificate that connects the fish to a catch certificate must accompany the catch.⁶¹ The EU may choose to list a noncooperating country, which will have the option to either cooperate with conservation and management measures or lose market access.⁶² Because the EU is a large market for fish products, the success of its EU-IUU Regulation will depend on its ability to both discipline flags of convenience and close down ports of convenience.

The EU-IUU regulation reflects a significant evolution in state effort to combat IUU fishing because: (1) it requires affirmative verification from a flag state of catch certificates before access to ports are permitted, and (2) it has regulatory teeth in the form of trade sanctions. While the EU-IUU regulation must be applauded, in particular, for using restrictions on trade as a strong deterrent to IUU fishing, it is not enough for the EU by itself to close its borders to IUU fishing. As explained earlier, the ports of convenience provide too much potential trade leakage, as IUU fishing operations seek to launder their illegal fish through ports of convenience and back into the EU's markets.

B. Port State Measures Agreement (PSMA)

The international community has provided an additional framework for tackling ports of convenience with the introduction of the binding Port States Measures Agreement.⁶³ Negotiated by FAO members, the PSMA requires parties to deny port access to an IUU vessel and implement port measures to inspect foreign vessels to determine whether the foreign vessel may be an IUU vessel.

The concept of a port state imposing port measures on foreign vessels is not new. Since the early 1980s, states have negotiated memoranda of understanding (MOU) that require a certain percentage of all foreign vessels to be inspected, typically for safety and pollution standards.⁶⁴

60. *Id.* at art. 16(1).

61. *Id.* at art. 14.

62. *Id.* at Chapter VI. The EU has closed its markets to parties who are in violation of the EU-IUU regulations, including prohibiting all fishery products from Cambodia and Guinea. See *Questions and Answers on the EU's Fight Against Illegal, Unreported and Unregulated (IUU) Fishing*, EUR. COMMISSION (Dec. 12, 2014), http://ec.europa.eu/information_society/newsroom/cf/mare/itemdetail.cfm?item_id=19549.

63. See PSMA, *supra* note 5.

64. Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and Protection of the Marine Environment, Jan. 26, 1982, 21 I.L.M. 1 [hereinafter Paris MOU]; Memorandum of Understanding on Port State Control in the Asia-Pacific Region, Dec. 1, 1993, *available at* <http://www.tokyo-mou.org/doc/memorand.pdf> [hereinafter Tokyo MOU]. Additional regional MOUs include the Viña del Mar & Caribbean MOU, the Mediterranean MOU,

Port states agreed to these MOUs as a means of leveling the regulatory playing field in order to increase operational safety, particularly with regards to the commercial shipping fleet.⁶⁵ The safety and pollution prevention standards provided in these MOUs are now considered the basis for international standards.⁶⁶

The FAO understood the value of previous MOUs in improving region-wide port safety standards and, in 2004, proposed a Model Scheme on Port State Measures to Combat Illegal, Unreported, and Unregulated Fishing.⁶⁷ This scheme served as a draft for the PSMA that was concluded in 2009.⁶⁸ Ultimately, the PSMA, when fully implemented, is intended to operate as a harmonization tool like the former MOUs directed at safety and pollution prevention standards.⁶⁹

As a treaty concluded between sovereign nations, the PSMA leaves a great deal to the discretion of each party out of respect for state sovereignty.⁷⁰ Even though the PSMA affords states a wide degree of discretion, the PSMA reflects a critical normative shift in combatting IUU fishing, not just because of its binding nature, but also because it is one of the first legal agreements not to give substantial deference to the flag state. Even though the text recognizes the “primary responsibility of flag [s]tates,” it also implicitly recognizes that flag states, and particularly flags of convenience, are part of the problem.⁷¹ As a result, the PSMA requires that flag states that are parties ensure their vessels cooperate with port state inspections, and that the flag state will “immediately and fully investigate” any alleged IUU fishing and “upon sufficient evidence, take enforcement action without delay.”⁷² In addition, flag states must

the Indian MOU, and the Abuja MOU. See UK P&I CLUB LP BULLETIN, PARIS/TOKYO MOU (July 29, 2011), available at http://www.ukpandi.com/fileadmin/uploads/uk-pi/Photos/LP_Bulletin_Photos/Bulletin%20776.pdf.

65. These MOUs are binding on some states. The Paris MOU is binding on EU member states. 2 INT’L UNION FOR THE CONSERVATION OF NATURE, LEGAL MECHANISMS TO ADDRESS MARITIME IMPACTS ON MEDITERRANEAN BIODIVERSITY 32 (Nilufer Oral & Francois Simard eds., 2008).

66. UK P&I CLUB LP BULLETIN, *supra* note 64 (describing how practices associated with load lines in the Paris and Tokyo MOUs will become the basis for a concentrated inspection campaign).

67. See generally FOOD & AGRIC. ORG. OF THE UNITED NATIONS, MODEL SCHEME ON PORT STATE MEASURES TO COMBAT ILLEGAL, UNREPORTED AND UNREGULATED FISHING (2007), available at <http://www.fao.org/docrep/010/a0985t/a0985t00.pdf>.

68. PSMA, *supra* note 5.

69. Paris MOU, *supra* note 64; Tokyo MOU, *supra* note 64.

70. The current parties as of August 2014 to the PSMA are Chile, the European Union, Gabon, Mozambique, Myanmar, New Zealand, Norway, Oman, Seychelles, Sri Lanka, and Uruguay. AGREEMENT ON PORT STATE MEASURES TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING, available at http://www.fao.org/fileadmin/user_upload/legal/docs/6_037s-e.pdf (last updated Aug. 22, 2014).

71. PSMA, *supra* note 5, at 1–2.

72. *Id.* at art. 20(4).

report to other parties regarding what actions they have taken to support the PSMA.⁷³

The core of the ten-part PSMA is found in Parts 1 through 4. Part 1, the definition section of the PSMA, makes it clear that IUU fishing includes a broad array of activities that cover both actual IUU fishing as well as supporting activities, such as transshipping and processing.⁷⁴ State parties to the agreement are expected to apply the PSMA to all vessels, which “means any vessel, ship of another type or boat used for, equipped for, or intended to be used for, fishing or fishing related activities.”⁷⁵ This extends the application of IUU fishing port state measures beyond traditional fishing vessels to transshipment vessels, processing vessels, and any other relevant transport vessels. Artisanal vessels and container vessels where fish have already been landed are exempt from the reach of the PSMA.⁷⁶

In Part 2 of the PSMA, minimal standards are set for reviewing the entry of a vessel into port.⁷⁷ Every state must designate and publicize at which ports vessels may request entry.⁷⁸ States are expected to require certain information before giving entry to a vessel, including name of the flag state, physical information about the vessel, the vessel owner’s name, the vessel master’s name and nationality, identification details about the vessel, relevant fishing authorization (including fishing areas), transshipment authorizations, total catch on board, and the catch to be offloaded.⁷⁹ Parties then have the option to either authorize or deny the entry of a vessel.⁸⁰

A PSMA party must deny entry to its ports for landing, transshipping, packaging, processing, refueling and resupplying, maintenance, and

73. *Id.* at art. 20(5). Under this article, it is possible that a state will simply deregister a vessel so that it would no longer be in the position of a flag state. Under the PSMA, it is not clear what specific continuing obligations if any it would have after deregistration beyond a shared responsibility with other parties to the PSMA under Article 23 to take “fair, non-discriminatory, and transparent measures consistent” with the PSMA. *Id.* at art. 23.

74. *Id.* at art. 1(c)–(e). The definition in Article 1(e) of the PSMA for IUU fishing incorporates by reference § 3 of 2001 IPOA-IUU, which uses the terms “activities” and “fishing activities.” Neither of these terms are defined in the 2001 IPOA-IUU. The 2009 PSMA defines “fishing” in Article 1(c) and “fishing related activities” in Article 1(d), which when read together encompass the object of the PSMA.

75. *Id.* at art. 3 (referencing the definition of vessel in Article 1(j)).

76. *Id.*

77. *Id.* at arts. 7–10.

78. *Id.* at art. 7.

79. *Id.* at art. 8 (referring to Annex A). It is interesting that the nationality of the vessel owner is not required. Identifying beneficial ownership of fishing vessels, and particularly IUU vessels, is a recurring problem.

80. *Id.* at art. 9.

dry docking if it has “sufficient proof” that the vessel “has engaged in IUU fishing.”⁸¹ This would be the case, for example, if the vessel is on a RFMO IUU fishing vessel list.⁸² If a party denies entry, it must communicate that decision not just to the vessel, but also to the vessel’s flag state, and “as appropriate and to the extent possible” to “relevant coastal States, regional fisheries management organizations[,] and other international organizations.”⁸³

For a party that worries about a suspect vessel fleeing, a party “may allow entry . . . exclusively for the purpose of inspecting” the vessel and then may take actions that are “at least as effective as denial of port entry in preventing, deterring[,] and eliminating IUU fishing and fishing related activities.”⁸⁴ The Background Guide to the PSMA indicates that these actions might “include taking market-related measures or, as appropriate, initiating legal proceedings under national law.”⁸⁵

In Part 3, parties that have permitted a vessel into port must deny the use of the port if: (1) the vessel lacks an authorization for fishing or fishing-related activities required either by the port state or a coastal state; (2) there is “clear evidence” that the fish on board were taken in violation of coastal state requirements; (3) the flag state did not provide confirmation “within a reasonable period of time” that the fish on board were taken in conformity with RFMO rules; or (4) if a party has “reasonable grounds” to believe that a vessel was engaged in IUU fishing.⁸⁶

Finally in Part 4, because no minimum number of inspections are required under the PSMA, parties must establish an appropriate level of inspection.⁸⁷ States do not have much guidance under the PSMA, although they might look to the implementation of existing port MOUs for help. For example, under the Tokyo MOU, states have agreed to inspect 80% of the merchant vessels operating in an area for safety violations.⁸⁸

81. *Id.* at art. 9(4), 9(6).

82. *Id.*

83. *Id.* at art. 9(3).

84. *Id.* at art. 9(4).

85. DAVID J. DOULMAN & JUDITH SWAN, A GUIDE TO THE BACKGROUND AND IMPLEMENTATION OF THE 2009 FAO AGREEMENT ON PORT STATE MEASURES TO PREVENT DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING 45 (2012) [hereinafter BACKGROUND GUIDE], available at <http://www.fao.org/docrep/015/i2590e/i2590e00.pdf>.

86. PSMA, *supra* note 5, at art. 11(1). A vessel suspected under “reasonable grounds” of IUU fishing may assume the burden of proof to demonstrate “that it was acting in a manner consistent with relevant conservation and management measures[,]” or in the case of a provisioning boat being suspected of IUU fishing activities that the vessel receiving supplies and crew from the provisioning boat was not an IUU vessel. *Id.*

87. *Id.* at art. 12.

88. BACKGROUND GUIDE, *supra* note 85, at 50.

Annex B of the PSMA does provide standards for IUU fishing inspections, such that inspectors must follow protocols that will avoid “unduly delaying the vessel” and avoid “action that would adversely affect the quality of the fish on board.”⁸⁹ Inspectors, “in case of appropriate arrangements with the flag State,” shall invite the flag state to participate.⁹⁰ Parties must provide a written report for each inspection that would be sent to the flag state and, “as appropriate,” the state of nationality for the vessel master, RFMOs, the FAO, any states that may have been affected by IUU fishing, and any other relevant international organization.⁹¹ Where an inspection yields evidence of IUU fishing, the vessel must be denied port access for all uses unrelated to the safety or health of the crew or vessel.⁹² If the party has unlawfully conducted the inspection and there is recourse available in the party’s law, then the party must inform the public.⁹³

Parties operating “within the framework of the FAO” are expected to provide for “regular and systematic monitoring and review of the implementation of the PSMA,” including holding a meeting of the parties four years after the PSMA enters into force.⁹⁴ Dispute resolution is available under the treaty with final referrals based on “the consent of all parties to the dispute” being referred to the International Court of Justice, International Tribunal for the Law of the Sea (ITLOS), or arbitration.⁹⁵ A failure to reach consensus results in the parties returning to a status quo of consultation and cooperation.⁹⁶

Whether the PSMA will be a successful treaty in combatting IUU fishing remains a function of the level of participation that the agreement attracts by port states. Parties are encouraged to solicit membership in the treaty by nonparties, but there does not seem to be either an incentive or disincentive scheme for not joining.⁹⁷ If the PSMA becomes as widely adopted as the various MOUs on safety and pollution, it will be an effective legal tool for creating a network of port states that are proactively

89. PSMA, *supra* note 5, at art. 13(f).

90. *Id.* at art. 13(e). No further explanation has been given in FAO documentation regarding what constitutes “appropriate arrangements.”

91. *Id.* at art. 15.

92. *Id.* at art. 18.

93. *Id.* at art. 19. There is no automatic right to appeal the inspection results.

94. *Id.* at art. 24. PSMA Article 29 provides that the party will enter into force thirty days after the deposit of the 25th instrument of ratification, acceptance, approval or accession. *Id.* at art. 29.

95. *Id.* at art. 22(3).

96. *Id.*

97. *Id.* at art. 23; *cf.* The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, art. 4, Sept. 16, 1987, 26 I.L.M.1550 (describing control of trade with nonparties including trade bans on certain ozone depleting substances).

denying access to known IUU fishing vessels and inspecting vessels suspected of IUU fishing. The PSMA marks a notable improvement over former negotiated instruments designed to assist in combatting IUU fishing because it binds parties. Now, when parties fail to make a good faith effort to intervene in the case of a suspected IUU vessel, other states may have recourse at least to dispute resolution. The next Part describes the imminent adoption of the obligations of the PSMA in the United States.

IV. IMPLEMENTATION OF THE PORT STATE MEASURES AGREEMENT IN THE UNITED STATES

The United States already has existing legislation and regulations to combat IUU fishing. The Magnuson–Stevens Act on fisheries provides that the United States must support regional fisheries management organization efforts to end IUU fishing, including import prohibitions and import restrictions based on multilateral findings.⁹⁸ The Nicholson Act, found in the shipping code, prevents foreign-flagged fishing vessels and refrigerated cargo ships from landing their high seas catches in most ports under U.S. jurisdiction.⁹⁹ This legislation, however, has not been applied to fish cargos that are originating from the Exclusive Economic Zone (EEZ) of the United States.¹⁰⁰

What happens in practice is that fish cargo from both U.S. vessels and foreign-flagged vessels is often transshipped without any inspection from the National Marine Fisheries Service.¹⁰¹ Some fish that may have been illegally harvested will end up laundered into the market with legally harvested fish. Regulations from the 1990s addressed this loophole by making it illegal for any foreign-flagged vessels to “ship, transport, offer for sale, sell, purchase, import, export, or have custody, control, or possession of any fish taken or retained in violation of the Magnuson–Stevens Act.”¹⁰² As the large number of suspected illegal fish entering into U.S. markets suggests, enforcement has been challenging. Existing

98. Magnuson–Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1826(i) (2014).

99. Unloading Fish from Foreign Vessels, 46 U.S.C. § 55114 (2014). American Samoa, Guam, and the U.S. Virgin Islands are exempt from this requirement. *See Testimony of James Walsh, Before the Subcomm. on Fisheries, Wildlife, Ocean, & Insular Affairs of the H. Comm. on Natural Res.*, 113th Cong. (2014), available at <http://www.dwt.com/files/Publication/26a7ce7e-ed94-4fb9-a1d8-ed69d3083312/Presentation/PublicationAttachment/e9687a78-ba83-4ebb-b80f-ed6ceba193be/IUU%20Testimony.pdf>.

100. ORG. OF ECON. COOPERATION & DEV., WHY FISH PIRACY PERSISTS 272 (2005).

101. *Id.*

102. 50 C.F.R. § 600.505 (2014).

laws have largely confined market prohibitions and restrictions to instances where there are “multilateral related market measures.”¹⁰³

The United States has demonstrated a clear intent to become a party to the PSMA. Participation by major consumer states whose ports receive large cargos of fish is critical to the long-term success of the PSMA. As of 2015, only nine states and the European Union are members, with pending ratification from the United States.¹⁰⁴ The low ratification numbers are less problematic than the notable consumer states that have not yet joined the treaty. The top importers of seafood in the world in terms of value are Japan, the United States, and China.¹⁰⁵ There has been no indication on official webpages that Japan or China intend to join the PSMA in the near future.¹⁰⁶

On April 3, 2014, the United States Senate, in an executive session, gave advice and consent to U.S. ratification of the PSMA.¹⁰⁷ As part of the advice and consent, the Senate also declared that the PSMA would not be self-executing, which means that implementing legislation is required for the treaty obligations to bind the United States.¹⁰⁸ As of this Article’s publication date, Congress has not yet passed implementing legislation, though it is presumed that it will do so shortly whereupon the President is highly likely to approve the implementing legislation and submit a ratification instrument on behalf of the United States. The President has publicly declared that in 2015, the Executive Branch will seek to ensure that the PSMA goes into force with the required twenty-five signatories to regulate all fish landings from foreign-flagged transport and supply vessels. This addition has the potential to increase the re-

103. 16 U.S.C. § 1826(i) (1996).

104. AGREEMENT ON PORT STATE MEASURES TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING, *supra* note 70 (stating that twenty-seven states have signed the PSMA).

105. FAO, STATE OF THE WORLD FISHERIES AND AQUACULTURE, *supra* note 6, at 50. It is worth noting that even though China imports large amounts of fish, the statistics do not capture fish that is imported and then reexported. The largest market for fishery products is the European Union. It is not counted as a state in the FAO statistics. *Id.*

106. The author searched for the term “port state measures agreement” at the English version of the Japanese Fisheries Agency at <http://www.jfa.maff.go.jp/e/>, the English version of the Ministry of Foreign Affairs at <http://www.mofa.go.jp/>, and the English version of the Chinese Foreign Ministry at http://www.fmprc.gov.cn/mfa_eng/.

107. *Thursday April 3, 2014*, U.S. SENATE DAILY PRESS (Apr. 3, 2014), <http://www.dailypress.senate.gov/?p=891>. There appears to have been little controversy since the Senate gave its advice and consent to four treaties in twenty minutes. The advice and consent was given by a division vote where the presiding officer requests the senators to stand for those voting yes and those voting no in order to confirm the voice vote.

108. *Id.*

sources that the United States dedicates to ending illegal trade in IUU fishing products.¹⁰⁹

The various legislative bills proposed by Congress have addressed the significant extension to transport vessels. Three of the bills, the 2014 Pirate Fishing Elimination Act, as well as the House and Senate versions of the IUU Fishing Enforcement Act of 2015, are briefly discussed here.

A. 2014 Pirate Fishing Elimination Act

The Senate Committee on Commerce, Science, and Transportation supported the Pirate Fishing Elimination Act on January 8, 2014. The Act is designed “to make the changes to domestic law necessary for the United States to implement” the PSMA and to cover both foreign vessels seeking entry to ports under U.S. jurisdiction, as well as U.S. vessels seeking entry to ports subject to the jurisdiction of a party to the PSMA.¹¹⁰

In keeping with the basic design of the PSMA, the Pirate Fishing Elimination Act would have empowered the Secretary of Commerce to deny entry to a known IUU vessel or a vessel suspected to be engaged in IUU fishing activities.¹¹¹ Port state services would be denied if a vessel enters without prior authorization, is a listed IUU vessel, or is suspected to be “in violation of foreign law or any conservation and management measures.”¹¹² Criminal prosecution, civil penalties, and administrative fines would serve as the enforcement mechanism for the Pirate Fishing Elimination Act.¹¹³ While this bill did not make it to the floor for a vote, the substance of the bill reappears in the latest version of implementing legislation described below.

B. IUU Fishing Enforcement Act of 2015

The U.S. House of Representatives and Senate are both currently considering bills named the IUU Fishing Enforcement Act of 2015, which provides for implementation of the PSMA as well as amendments to eleven existing U.S. fishery management statutes to broaden enforcement powers and the implementation of the Convention for the Strength-

109. PSMA, *supra* note 5, at art. 29; *U.S. to Push Ratification of Pact to Fight Illegal Fishing*, PEW CHARITABLE TRUSTS (Mar. 16, 2015), <http://www.pewtrusts.org/en/about/news-room/news/2015/03/16/us-to-push-ratification-of-pact-to-fight-illegal-fishing>.

110. Pirate Fishing Elimination Act, S. 267, 113th Cong. (2014); S. REP. NO. 113-132, § 4 (2014). A former version of the Pirate Fishing Elimination Act was introduced in the 112th Congress as S. 1980, 112th Cong. (2012). *See also* S. REP. NO. 112-255 (2012).

111. S. REP. NO. 113-132, § 5 (2014).

112. *Id.* § 7.

113. *Id.* § 10.

ening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention Between the United States of America and the Republic of Costa Rica, signed at Washington, November 14, 2003.¹¹⁴ Except for the order of definitions, the substantive language is identical in both bills. Under both bills, a “vessel” subject to the PSMA is defined broadly to include “any vessel, ship of another type, or boat used for, equipped to be used for, or intended to be used for, fishing or fishing-related activities, including container vessels that are carrying fish that have not been previously landed.” The Secretary of Commerce has the power to authorize or deny port entry depending on whether a vessel is on a RFMO IUU list or there are “reasonable grounds to believe” that the vessel “engaged in IUU fishing or fishing-related activities in support of such fishing.”¹¹⁵ Both versions of the IUU Fishing Enforcement Act also provide for civil and criminal enforcement.¹¹⁶

The IUU Fishing Enforcement Act of 2015 will likely become the implementation legislation for the PSMA. While this legislation will provide a clear structure for how to implement port state measures particularly aimed at regulating foreign-flagged cargo ships, it may not address one of the chronic issues with combatting IUU fishing. As long as there is a market for IUU fish products, there will continue to be IUU fishing activity. For the proposed legislation to be optimally effective at addressing the underlying IUU fishing issues, this Article suggests that addition of language specific to trade measures should be included in whatever version of implementing legislation is ultimately adopted. Part V of this Article explores the role that trade measures might play in enhancing the effectiveness of existing port state measures.

114. IUU Fishing Enforcement Act, H.R. 774, 114th Cong. (2015) [hereinafter House IUU Fishing Enforcement Act]. IUU Fishing Enforcement Act, S.1334, 114th Cong. (2015) [hereinafter Senate IUU Fishing Enforcement Act]. The bills include amendments providing additional enforcement mechanisms under the High Seas Driftnet Fishing Moratorium Protection Act, the High Seas Driftnet Fisheries Enforcement Act, the North Pacific Anadromous Stocks Act of 1992, the Pacific Salmon Treaty Act of 1985, the Western and Central Pacific Fisheries Convention Implementation Act, the South Pacific Tuna Act of 1988, the Antarctic Marine Living Resources Convention Act, the Atlantic Tunas Convention Act, the High Seas Fishing Compliance Act of 1965, the Dolphin Protection Consumer Information Act, the Northern Pacific Halibut Act of 1982, the Northwest Atlantic Fisheries Convention Act of 1995, and the Magnuson–Stevens Fishery Conservation and Management Act.

115. House IUU Fishing Enforcement Act, *supra* note 114, §§ 303(8), 305(b); Senate IUU Fishing Enforcement Act, *supra* note 114, §§ 303(10), 305(b).

116. House IUU Fishing Enforcement Act, *supra* note 114, § 308; Senate IUU Fishing Enforcement Act, *supra* note 114, § 308.

V. ENHANCING PORT STATE MEASURES THROUGH INCORPORATING
TRADE-RELATED MEASURES INTO IMPLEMENTATION LEGISLATION

It is curious that the PSMA makes only two allusions to trade, and neither of these references are in the primary text. The first reference, in Annex B, requires inspectors to look at all relevant documentation onboard a vessel, including trade documents required by the Convention on International Trade in Endangered Species.¹¹⁷ The second reference, in Annex C, provides a form that requests information regarding whether a catch complies with the trade information scheme.¹¹⁸ The PSMA makes one allusion to the market in its preamble, which distinguishes between port state measures, coastal state measures, and market-related measures. As will be suggested below, port state measures and market-related measures need not be differentiated since effective port state measures rely upon the credible threat of market measures.

This Part suggests that if the PSMA is to be effective, it should be reimagined by its parties as a trade-related agreement and not simply an enforcement agreement. The first section reviews the significance of trade in marine fish for the global economy and suggests that trade is a significant driver for changing behavior. The Part then looks at the international support of market measures and specifically the United States' support of market measures as part of its efforts to combat IUU fishing activity. Finally, the Part proposes that implementation legislation for parties to the PSMA specifically allow for unilateral import prohibitions. This Part argues that in spite of the disfavor with which the international community has regarded unilateral trade prohibitions, a carefully targeted ban by one or more states would be WTO compliant.

*A. Significance of Global Fisheries Trade and Trade Measures as
Drivers for Changing Behavior*

Including trade-related measures in IUU prevention efforts would increase their effectiveness because trade in fisheries products is significant. In 2012, 200 countries reported exporting fish or fish products.¹¹⁹ Fish products account for 10% of total agricultural exports and provide about 1% of the value of all world merchandise (\$102 billion).¹²⁰ The percentage of fish products that are exported worldwide reached a new

117. PSMA, *supra* note 5, at Annex B(d).

118. *Id.* at Annex C(34).

119. FAO, THE STATE OF WORLD FISHERIES AND AQUACULTURE, *supra* note 6, at 46.

120. *Id.* at 47.

record value in 2013 of \$136 billion.¹²¹ Asian states in particular are fueling some of the recent increases in fishery export numbers.¹²²

Market states are increasingly dependent on global trade. For example, 100% of the pollock that enters the European market is imported, 50% of which is imported from China.¹²³ In the United States, 71% of cod imports, 96% of pollock imports, and 16% of salmon imports come from China.¹²⁴ Imports of fish products into Europe, the United States, and Canada today exceed exports.¹²⁵ Reflecting further global links in the fish products trade is the fact that much of the pollock that is listed as an import of China and finds its way onto European and U.S. dinner plates originates in Russia.¹²⁶

Given the significance of international trade for a state's economy, trade measures can provide a strong driver to influence state behavior. For example, when the moratorium on commercial whaling went into effect under the International Convention on the Regulation of Whaling, Japan rejected the moratorium.¹²⁷ However, because of threatened trade restrictions by the United States, Japan eventually restricted its own right to commercially whale by entering into an executive agreement with the United States to end commercial whaling by 1988.¹²⁸ The threat of market closures by the EU has encouraged states in the context of fishing to make substantial changes in the management of their registered vessels.¹²⁹

B. International Efforts to Promote Trade Measures to Combat IUU Fishing

The international community has understood the potential effectiveness of trade measures in improving IUU prevention efforts. In the

121. *Id.*

122. See FOOD & AGRIC. ORG. OF THE UNITED NATIONS, *FAO YEARBOOK: FISHERY AND AQUACULTURE STATISTICS 2012*, at 45–46 (2014) [hereinafter *FAO YEARBOOK*], available at <http://www.fao.org/3/478cfa2b-90f0-4902-a836-94a5ddd6730/i3740t.pdf>.

123. SHELLEY CLARKE & GILLES HOSCH, *TRACEABILITY, LEGAL PROVENANCE & THE EU IUU REGULATION 6* (2013), available at http://sasama.info/en/pdf/reports_17.pdf.

124. *Id.* at 7.

125. See *FAO YEARBOOK*, *supra* note 122, at 51–54.

126. CLARKE & HOSCH, *supra* note 123, at 7.

127. Susan Geha, *International Regulation of Whaling: The United States' Compromise*, 27 *NAT. RESOURCES J.* 931, 933 (1987).

128. *Id.*

129. For example, because of the threat by the EU of a closed market, Korea adopted the Distant Waters Fisheries Development Act to control Korea's fleets. *Bold Action Taken by Korea to Combat Illegal, Unreported and Unregulated (IUU) Fishing Shows EU IUU Regulation is Working*, ENVTL. JUST. FOUND. (Jan. 29, 2015), <http://www.ejfoundation.org/news/bold-action-taken-korea-combat-illegal-unreported-and-unregulated-iuu-fishing-shows-eu-iuu>.

nonbinding standards set under the IPOA-IUU, FAO states acknowledged the critical link between trade and ending IUU fishing, but suggested that the measures “should only be used in exceptional circumstances, where other measures have proven unsuccessful to prevent, deter[,] and eliminate IUU fishing, and only after prior consultation with interested States.”¹³⁰ States “should cooperate” to “adopt appropriate multilaterally agreed trade-related measures, consistent with the WTO, that may be necessary to prevent, deter[,] and eliminate IUU fishing for specific fish stocks or species.”¹³¹

Among the trade-related measures proposed for potential multilateral implementation under the IPOA-IUU were “catch documentation and certification requirements” and “import and export controls or prohibitions.”¹³² In particular, states were expected to improve traceability of products and work “towards using the Harmonized Commodity Description and Coding System for fish and fisheries products in order to help promote the implementation of the IPOA.”¹³³ Many of these concepts have not yet been fully realized across global fisheries.

When the PSMA was being negotiated, the concept of trade was contemplated as a subject for cooperation, but the reference to “trade” was dropped from the text after a 2006 Expert Consultation.¹³⁴ This reflects a lost opportunity to enhance the effectiveness of the PSMA since most of the exported fish will enter into trade through a port. The FAO, in its background guide to the PSMA, recognized this gap when it commented that “market-related measures taken in accordance with international law are particularly effective.”¹³⁵ Yet, as the guide then noted, given the PSMA’s negotiation history, the PSMA “was not intended as a trade instrument.”¹³⁶ In spite of this language, the FAO background guide goes on to recommend that among the prohibited acts that states should incorporate into their domestic legislation are the PSMA prohibitions on “trade in fish or fish products taken, possessed, etc. in violation of any treaty or binding conservation measure adopted by an RFMO.”¹³⁷ This language by experts on PSMA implementation recognizes that address-

130. IPOA-IUU, *supra* note 34, ¶ 66.

131. *Id.* ¶ 68 (referring approvingly to the efforts by ICCAT and other RFMOs to impose trade moratoria).

132. *Id.* ¶ 69.

133. *Id.* ¶¶ 71, 75.

134. BACKGROUND GUIDE, *supra* note 85, at 125.

135. *Id.* at 68.

136. *Id.*

137. *Id.* at 159 (providing a legal checklist).

ing trade linkages is an integral part of ending IUU fishing since IUU fishing is fueled by the potential profits of international trade.

Independent of the FAO's work on the IPOA-IUU and the PSMA, RFMOs have been employing a variety of trade mechanisms to control IUU fishing. For example, the Commission for the Conservation of Antarctic Marine Living Resources has required catch and trade documentation schemes to create pressure to reduce illegally caught Patagonian toothfish.¹³⁸ In 1996, the International Commission on the Conservation of Atlantic Tuna (ICCAT) recommended that its parties prohibit the importation of bluefin tuna from Belize, Honduras, and Panama, which were nonparties at the time.¹³⁹ Similar recommendations were made for swordfish landed from vessels registered to Belize, Honduras, and Equatorial Guinea.¹⁴⁰ Through the 2000s, the ICCAT recommended prohibiting the importation of various products from vessels flagged to Belize, Honduras, Cambodia, Equatorial Guinea, Sierra Leone, and St. Vincent and the Grenadines.¹⁴¹

138. CATHY ROHEIM & JON G. SUTINEN, TRADE AND MARKETPLACE MEASURES TO PROMOTE SUSTAINABLE FISHING PRACTICES 5 (2006), available at http://www.ictsd.org/downloads/2008/06/roheim_sutinen_20061.pdf.

139. Int'l Comm'n for the Conservation of Atlantic Tuna [ICCAT], *Recommendation by ICCAT Regarding Belize and Honduras Pursuant to the 1994 Bluefin Tuna Action Plan Resolution*, ICCAT Recommendation 96-11 (Aug. 4, 1997), available at <http://www.iccat.int/Documents%5CRecs%5Ccompendiopdf-e%5C1996-11-e.pdf>; Int'l Comm'n for the Conservation of Atlantic Tuna [ICCAT], *Recommendation by ICCAT Regarding Panama Pursuant to the 1994 ICCAT Bluefin Tuna Action Plan Resolution*, ICCAT Recommendation 96-12 (Aug. 4, 1997), available at <http://www.iccat.int/Documents%5CRecs%5Ccompendiopdf-e%5C1996-12-e.pdf>.

140. Int'l Comm'n for the Conservation of Atlantic Tuna [ICCAT], *Recommendation by ICCAT Regarding Equatorial Guinea Pursuant to the 1996 "Recommendation Regarding Compliance in the Bluefin Tuna and North Atlantic Swordfish Fisheries"*, ICCAT Recommendation 99-10 (June 15, 2000), available at <http://www.iccat.int/Documents%5CRecs%5Ccompendiopdf-e%5C1999-10-e.pdf>; Int'l Comm'n for the Conservation of Atlantic Tuna [ICCAT], *Recommendation by ICCAT Regarding Belize and Honduras Pursuant to the 1995 Swordfish Action Plan*, ICCAT Recommendation 99-08 (June 15, 2000), available at <http://www.iccat.int/Documents%5CRecs%5Ccompendiopdf-e%5C1999-08-e.pdf>.

141. See, e.g., Int'l Comm'n for the Conservation of Atlantic Tuna [ICCAT], *Recommendation by ICCAT Regarding Belize, Cambodia, Honduras, St. Vincent and the Grenadines Pursuant to the 1998 IUU Resolution*, ICCAT Recommendation 00-15 (Oct. 15, 2001), available at <http://www.iccat.int/Documents%5CRecs%5Ccompendiopdf-e%5C2000-15-e.pdf>; Int'l Comm'n for the Conservation of Atlantic Tuna [ICCAT], *Recommendation by ICCAT Regarding Equatorial Guinea Pursuant to the 1998 IUU Resolution*, ICCAT Recommendation 00-16 (June 26, 2001), available at <http://www.iccat.int/Documents%5CRecs%5Ccompendiopdf-e%5C2000-16-e.pdf>; Int'l Comm'n for the Conservation of Atlantic Tuna [ICCAT], *Recommendation by ICCAT Concerning the Importation of Bigeye Tuna and Bigeye Tuna Products from St. Vincent and the Grenadines*, ICCAT Recommendation 01-14 (Sept. 21, 2002), available at <http://www.iccat.int/Documents%5CRecs%5Ccompendiopdf-e%5C2001-14-e.pdf>; Int'l Comm'n for the Conservation of Atlantic Tuna [ICCAT], *Recommendation by ICCAT for Trade Restrictive Measures on Sierra Leone*, ICCAT Recommendation 02-19 (2002), available at <http://www.iccat.int/Documents%5CRecs%5>

Supranational entities, including the European Union, have responded to continued increasing trends in IUU fishing by passing trade legislation that prohibits trade in specific species from specific states suspected of condoning IUU fishing.¹⁴² With the exception of the European Union's efforts, which may be considered multilateral because fisheries policy within the EU resides in the European Commission, all of the RFMOs efforts have been multilateral.¹⁴³ Multilateral efforts that limit trade as a means to achieving shared environmental objectives such as the Montreal Protocol and CITES have not been deemed to be trade-restrictive.¹⁴⁴ Likewise, any multilateral effort to limit trade-related to the PSMA by RFMOs will not be deemed trade-restrictive.

Yet PSMA members need not wait for RFMO action before taking trade-related actions to meet the objectives of the PSMA to prevent, deter, and eliminate IUU fishing. Even though the PSMA does not explicitly contemplate the use of trade-related mechanisms in its text, is it possible for PSMA members, operating within the multilateral context of the PSMA, to invoke unilateral trade-restrictive mechanisms in order to achieve the objectives of the PSMA. State parties must have the flexibility not just to restrict access to ports, which may increase traffic into ports of convenience, but also to eliminate trade opportunities with states that host ports of convenience. The following section suggests that unilateral, WTO-compliant trade measures can be applied through PSMA implementing legislation to bolster the effectiveness of the PSMA.

C. Incorporating Unilateral Trade Measures into Port State Measures Implementation Legislation

While states such as the United States have agreed to support multilateral trade-restrictive efforts adopted through the RFMOs, this approach has limited the ability of the United States and other concerned

Ccompendiopdf-e%5C2002-19-e.pdf.

142. See, e.g., Council Regulation 827/2004, 2004 O.J. (L 127) 21; Council Regulation 828/2004, 2004 O.J. (L 127) 23; and Council Regulation 829/2004, 2004 O.J. (L 127) 25.

143. *The Common Fisheries Policy (CFP)*, EUR. COMMISSION, http://ec.europa.eu/fisheries/cfp/index_en.htm (last visited May 2, 2015).

144. Eric Neumayer, *Trade Measures in Multilateral Environmental Agreements and WTO Rules: Potential for Conflict, Scope for Reconciliation*, 55(3) *AUSSENWIRTSCHAFT* 1, 15 (2000), available at <http://www.lse.ac.uk/geographyAndEnvironment/whosWho/profiles/neumayer/pdf/Article%20in%20Aussenwirtschaft.pdf> (identifying CITES and the Montreal Protocol as non-discriminatory).

states to act quickly to use trade as a shield against suspected illegal activity that is not being regulated by a flag state.¹⁴⁵

As a result, parties to the PSMA, irrespective of various efforts of the RFMOs, should contemplate adopting domestic implementation legislation for the PSMA that: (1) requires trade documentation certificates before accepting landing of fisheries products, and (2) allows parties to unilaterally close access to their domestic markets to IUU fish sales where trade documentation is either inadequate or suspected as fraudulent. In the case of the United States, these additions to any implementing legislation for the PSMA would greatly strengthen a legislative framework that directly contemplates the use of market closures.¹⁴⁶

D. Trade Documentation Schemes and Customs Codes

Fish and other seafood have become fungible commodities with increasingly complex delivery chains. As the 2014 FAO report on the status of global fisheries notes, fisheries products “may well cross national boundaries several times before final consumption.”¹⁴⁷ For example, Russian fish that are sent to China for processing to be exported to the European Union are listed for trade purposes as Chinese fish filets.¹⁴⁸ While this may be the correct approach, based on existing trade rules that require the country of origin to be China if a product increases 40% in value from the processing, it also eliminates significant information for understanding the trade flows of fishery products.¹⁴⁹

Historically, processing used to take place in the state that harvested the fish or in the state that was consuming the fish. Today, due to decreases in transportation costs and savings on labor, a sizable amount of fish are being processed by countries that neither harvest the fish nor consume the fish—third-country processors.¹⁵⁰ This situation creates an increased opportunity for fraud with the addition of numerous intervention points. For example, seafood companies located in states from which

145. While there are working meetings throughout the year, RFMOs generally have one annual meeting of the Commission at which organizational decisions are made.

146. The United States already has the power to impose trade sanctions on foreign states for violations of conservation measures. *See, e.g.*, Pelly Amendment, 22 U.S.C. § 1978 (1999). Under the Pelly Amendment, the President may impose trade sanctions by ordering the United States Trade Representative to prohibit imports of wildlife related products from a country whose nationals have been determined to be diminishing the effectiveness of any international program to protect endangered or threatened species. *See id.*

147. FAO, STATE OF THE WORLD FISHERIES AND AQUACULTURE, *supra* note 6, at 46.

148. CLARKE & HOSCH, *supra* note 123, at 5.

149. *Id.* at 5 & n.3.

150. FAO, STATE OF THE WORLD FISHERIES AND AQUACULTURE, *supra* note 6, at 46.

the fish originated may be duped if third-country processors “dilute” their fish quality by adding low quality fish that cannot easily be distinguished in filet form to the other processed fish in return shipments. Third-country processors could also mix illegally obtained seafood with legally obtained seafood of the same species as a means of “laundering” into the market fish that might not otherwise be acceptable for import. In addition, some seafood companies might work in collusion with third-country processors to “dilute” the legality of a catch by mixing IUU fish catches with legal fish catches, thereby increasing potential profits.

Traceability has become an increasing concern for countries such as the United States that are concerned about food safety. Recent reports suggest that a relatively large quantity of fish have been mislabeled at the point of sale.¹⁵¹ The U.S. government is investigating the source of mislabeling.¹⁵² Whether the mislabeled fish was legally harvested is likely to be unknown because available documentation regarding the trade fish is likely to be for a different species than the actual fish.

In order to counter potentially fraudulent practices associated with trade, an increasing need exists to accurately track the chain of custody from ocean to plate in a way that ensures no mixing of legal and illegal products. Some privately led initiatives, such as the Marine Stewardship Council, are promoting traceability efforts.¹⁵³ In light of the need for port state measures to be harmonized at some level across states, a single uniform practice for creating chain of custody documentation becomes even more important for a state in determining whether to potentially seize an illegal cargo to prevent it from entering the channels of trade. While the Marine Stewardship Council, with its third-party verification, may become the gold standard in the industry, this is an important subject for negotiation among all FAO members that desire to have trade-related measures as part of their port state measures. The last work by the FAO on this topic is from 2009 and does not reflect any coordination with the adoption of port state measures.¹⁵⁴ Presently, there is a proliferation of

151. See OCEANA, OCEANA STUDY REVEALS SEAFOOD FRAUD NATIONWIDE (2011), available at http://oceana.org/sites/default/files/National_Seafood_Fraud_Testing_Results_Highlights_FINAL.pdf.

152. Recommendations of the Presidential Task Force on Combating Illegal, Unreported and Unregulated Fishing and Seafood Fraud, 79 Fed. Reg. 75536 (2014).

153. MARINE STEWARDSHIP COUNCIL, MSC CHAIN OF CUSTODY STANDARD (2011), available at <http://www.msc.org/documents/scheme-documents/msc-standards/msc-coc-standard-v3>.

154. FOOD & AGRIC. ORG. OF THE UNITED NATIONS, GUIDELINES FOR THE ECOLABELLING OF FISH AND FISHERY PRODUCTS FROM MARINE CAPTURE FISHERIES: REVISION 1 (2009), available at <http://www.fao.org/docrep/012/i1119t/i1119t.pdf>.

traceability standards and no single opportunity to review custody chains that might reveal IUU fishing practices.¹⁵⁵

Trade documentation schemes become an increasingly important tool for assisting port officials in their efforts to identify potential IUU cargo. While a number of regional fisheries management organizations require some catch documentation, this documentation is not coordinated in a single, searchable database.¹⁵⁶ Because the PSMA contemplates the exchange of information among states, the FAO, and RFMOs regarding port state measures, this information-sharing obligation could be implemented by requiring states to exchange all available trade documentation related to the cargo on a particular vessel.¹⁵⁷ It would be extremely valuable for chain of custody information to also be exchanged as part of the sharing of information needed by ports to make decisions.¹⁵⁸ Each state could theoretically enact its own system of trade documentation, but ultimately coordination will be needed amongst all systems.

In light of the size of the fisheries market in both the United States and the EU, the United States' recent clear commitment to traceability, and the EU's IUU regulation, the United States and the EU can set a reporting standard to be adopted by other states. For ease of coordination, the United States has been creating an electronic database to store trade-related information for exports of certain highly migratory species.¹⁵⁹ A similar effort would be appropriate for imports into U.S. ports in order to improve traceability.

Implementing legislation for the PSMA should require vessels to provide traceability information of their cargo. Preferably, traceability information would be reported in a uniform fashion to make it easier for national enforcement officials to cooperate and coordinate with other states. A pattern of incomplete traceability information associated with

155. See VINCENT ANDRE, FAO SUBCOMM. ON FISH TRADE, REVIEW AND ANALYSIS OF CURRENT TRACEABILITY PRACTICES (2013), <http://www.fao.org/cofi/39777-03016d7904191838c67f5d7da55b3430f.pdf>.

156. See COMM'N FOR THE CONSERVATION OF SOUTHERN BLUEFIN TUNA, RESOLUTION ON THE IMPLEMENTATION OF A CCSBT CATCH DOCUMENTATION SCHEME (2014), available at http://www.ccsbt.org/userfiles/file/docs_english/operational_resolutions/Resolution_CDS.pdf; *Bluefin Tuna Catch Documentation Scheme*, INT'L COMMISSION FOR THE CONSERVATION OF ATLANTIC TUNA, <https://www.iccat.int/en/BCD.asp> (last visited May 2, 2015). The Western and Central Pacific Fisheries Commission is also exploring the possibility of implementing a catch documentation scheme. *Catch Documentation Scheme Intersessional Working Group 2014*, W. & CENT. PAC. FISHERIES COMMISSION, <https://www.wcpfc.int/node/19850> (last visited May 2, 2015).

157. See PSMA, *supra* note 5, at art. 6.

158. See *id.*

159. NOAA *Bluefin Tuna Catch Document System*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <http://www.st.nmfs.noaa.gov/noaabcd/external/> (last visited May 2, 2015).

certain states may give rise to the need for unilateral or multilateral market closures.

E. Market Closures

The PSMA framework provides a baseline for states, it does not provide a ceiling. As Article 4 indicates, states may “adopt more stringent port measures than those provided for in this Agreement.”¹⁶⁰

Mandated traceability provides the first step to determine whether a given cargo was obtained illegally. If the cargo is deemed to have been obtained illegally, or there is pattern of a repeat lack of enforcement by a flag state, parties to the PSMA must be able to act quickly and independently of RFMO actions to be able to restrict trade on fishery products originating from particular regions or processed in certain countries. Simply closing a port for landing from fishing or transport vessels as the PSMA contemplates will not be sufficient to combat the preexisting problems of ports of convenience because IUU fishing products can still be laundered into the markets of states who are parties to the PSMA.

Unilateral trade actions have generally been condemned because they have the potential to violate WTO principles of most-favored-nation treatment and nondiscrimination. Yet sometimes, achieving the objectives of a multilateral environmental agreement such as the PSMA may require unilateral action.¹⁶¹ Flag states have argued in the past that the unilateral closure of a port violates trade provisions under WTO rules. However, the WTO has never decided the legality of closing a port for alleged conservation purposes.¹⁶²

The text of the PSMA makes no specific allusion to the availability of market closures as a means to combat IUU fishing, but the availability of market closure can be inferred. In most cases, while states are not permitted to place import embargos on goods, IUU fish are not ordinary goods.¹⁶³ Because IUU fish are more akin to narcotics and contraband, extraordinary domestic measures can be implemented to prevent trade in

160. PSMA, *supra* note 5, at art. 4.

161. *See, e.g.*, Panel Report, *United States—Restrictions on Imports of Tuna*, ¶¶ 3.12–3.14, WT/DS29/R (June 16, 1994), available at <http://www.worldtradelaw.net/reports/gattpanels/tunadolphinII.pdf.download#page=1> (The United States argued that some multilateral environmental agreements may require unilateral trade restrictive action to achieve environmental objectives).

162. *See generally* General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 187 [hereinafter GATT]; Request for Consultations by the European Communities, *Chile—Measures Affecting the Transit and Importing of Swordfish*, WT/DS193/1 (Apr. 19, 2000) (EU argued that Chile had created an illegal trade restriction when Chile closed its ports to EU vessels because of alleged violations of conservation and management measures).

163. GATT, *supra* note 162, at art. 11.

these fish products. If properly implemented, market closures could be a particularly potent tool for regulating trade in IUU fish because these closures would make it more expensive for IUU fishing operations to reach their desired destinations. If closed markets force fishing vessels to offload in another continent, thereby slowing the entrance of the fish into the stream of commerce, IUU fishing may become less attractive as a revenue-generating activity for all but the most profitable products, such as sushi-grade tuna, crab, and abalones.

One mechanism that should be explored in conjunction with PSMA implementation is for parties to the Agreement to assert pressure on non-compliant flag states by prohibiting trade in fisheries products with problematic states. The CITES Secretariat used this approach when it requested treaty-parties to end trade in wildlife and wildlife products with Thailand until Thailand responded to address its illicit trade problem.¹⁶⁴

It might also be possible for existing parties to the PSMA to end any trade in fish products with states that are not parties to PSMA and cannot demonstrate domestic port state measures that are equivalent to the measures being implemented by parties under the Agreement. The PSMA implicitly contemplates this possibility in Article 23 when it states: "Parties shall take fair, non-discriminatory and transparent measures consistent with this Agreement and other applicable international law to deter the activities of non-Parties which undermine the effective implementation of this Agreement."¹⁶⁵ The justification for such a closure would be that the failure of third-party states to participate in the agreement undermines the objective and purpose of the treaty to eliminate IUU fishing. Thus, as long as ports of convenience continue to exist as alternative landing sites, and thereby undermine the application of strict port measures, the PSMA cannot be adequately implemented without either trade-specific measures or some reference to trade relations.¹⁶⁶

Market closures under implementing legislation for the PSMA would be particularly appropriate for species where scientific data indicates that a given species is severely overfished and not likely to recover quickly. For example, Atlantic bluefin tuna are currently reported to be at risk of depletion. Regenerating stocks of bluefin tuna will require time since mature tuna do not begin to spawn until they are 8–12 years old

164. CITES Secretariat Notification to the Parties No. 636, Thailand Ban on CITES Trade, (Apr. 22, 1991), available at <http://www.cites.org/eng/notif/2014.php>.

165. PSMA, *supra* note 5, at art. 23.

166. Other treaty regimes such as the Montreal Protocol have allowed for states to eliminate trade with nonparties for substances that would undermine the effectiveness of the treaty regime. *See, e.g.*, Montreal Protocol art. 4, Jan. 1, 1989, 1552 U.N.T.S. 29.

and they only spawn once a year.¹⁶⁷ Bigeye and yellowfin tuna stocks from the western central Pacific Ocean may also be overfished.¹⁶⁸

However, while market closures for noncomplying states that fail to provide adequate trade documentation or for highly overfished species are viable options for implementing the PSMA, states that link market closures to port measures must be prepared to respond to leakages in the market. When vessels are no longer permitted in certain ports, they will attempt to deliver their cargo to ports of convenience that may welcome additional business. In the short term, these noncooperating states may reap financial benefits because the mechanisms for closing markets rely on appropriate due process and are slow to respond. For example, the EU closed its market almost three years after notifying Sri Lanka that the EU suspected that country of supporting IUU fishing.¹⁶⁹

In order to address the problems with leakage, domestic implementation of the PSMA requires a uniform approach across a given region. In some instances, RFMOs offer harmonized regional responses such as the former ICCAT restrictions on bluefin tuna landings by vessels from Belize, Honduras, or Panama. But there are still numerous regions and fisheries where explicit trade restrictions have not been considered as a strategy to respond to known IUU fishing practices.¹⁷⁰ Regional cooperation will be essential under the PSMA for effective enforcement of port state measures, but the cooperation does not necessarily require the engagement of an RFMO, even though this may be preferable in many instances.

In an ideal world, an IUU fishing vessel or a vessel transshipping IUU fish products would not be able to find a berth, but this reality is unlikely to be realized in the near future. In the meantime, if PSMA parties were to harmonize their port enforcement fishery laws to require traceability and to enable market closures, there may be very real opportunities to focus resources on IUU enforcement efforts in more concentrated geographical areas.

167. *Atlantic Bluefin Tuna*, WORLD WILDLIFE FUND, http://wwf.panda.org/what_we_do/endangered_species/tuna/atlantic_bluefin_tuna/ (last visited May 2, 2015).

168. See A. LANGLEY ET AL., STOCK ASSESSMENT OF BIG EYE TUNA IN THE WESTERN AND CENTRAL PACIFIC OCEAN, INCLUDING AN ANALYSIS OF MANAGEMENT OPTIONS (2009); JOHN HAMPTON ET AL., STOCK ASSESSMENT OF YELLOWFIN TUNA IN THE WESTERN AND CENTRAL PACIFIC OCEAN (2002).

169. *Illegal Fisheries: Green Cards for Five Countries, but Red Card for Sri Lanka*, EUR. COMMISSION (Oct. 14, 2014), http://europa.eu/rapid/press-release_IP-14-1132_en.htm.

170. For example, the Western Central Pacific Fisheries Commission is still developing, as of 2015, a Catch Documentation Scheme.

F. Potential Conflicts with Existing Trade Law Measures

Any application of port state measures will be “interpreted and applied in conformity with international law,” which would include international trade law negotiated within the framework of the World Trade Organization (WTO).¹⁷¹

Closure of a market or imposition of a required customs coding would not violate existing obligations under existing trade treaties as long as these measures are applied in a nondiscriminatory fashion.¹⁷² The General Agreement on Tariffs and Trade (GATT) contemplates that WTO members can apply measures to promote conservation as long as they do not create “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.”¹⁷³

The existing PSMA and any implementing legislation providing for trade-related measures should survive legal scrutiny because the agreement focuses on identifying vessels engaged in any IUU fishing versus vessels engaged in legal fishing. Any trade-related measures would also be supported under GATT Article XX’s exception, including Article XX(d)’s exception for measures necessary to secure compliance with “the prevention of deceptive practices,” and Article XX(g)’s exception “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”¹⁷⁴ The PSMA, as a treaty, raises some minor questions about the differential treatment, for purposes of inspection, of foreign-flagged vessels and nationally flagged vessels. The inference is that states that become members to the PSMA will also be regulating their nationally flagged vessels for IUU fishing activity, though there is no requirement that the same measures be applied to both foreign vessels and nationally flagged vessels.¹⁷⁵

U.S. participation in the PSMA is significant not only because it should support conservation objectives, but because U.S. participation also defuses any concerns about U.S. port closure practices creating trade barriers. As noted above, the United States already closes most of its

171. PSMA, *supra* note 5, at art. 4(4).

172. Bertrand Le Gallic, *The Use of Trade Measures Against Illicit Fishing: Economic and Legal Considerations*, 64(4) *ECOLOGICAL ECON.* 858, 865 (2008).

173. GATT, *supra* note 162, at art. XX.

174. *Id.* at art. XX(d), (g).

175. PSMA, *supra* note 5, at art. 20(6) (“Each Party shall ensure that measures applied to vessels entitled to fly its flag are at least as effective in preventing, deterring and eliminating IUU fishing and fishing related activities in support of such fishing as measures applied to” foreign vessels.).

ports to landings from foreign-flagged vessels.¹⁷⁶ This legislation might be open to a potential trade challenge. While ports are within the territorial waters of a state, and access to ports has been considered a privilege for states,¹⁷⁷ states that are unhappy with the practice of closing access to vessels hoping to land fish for a domestic market might be in a position to argue that laws closing port access run afoul of the National Treatment provisions under GATT.¹⁷⁸

A state claiming injury may also be able to argue for a most-favored-nation violation if the United States grants RFMO members different access to the ports than that granted to other non-RFMO members.¹⁷⁹ Even if the United States or Canada—which has similar port closing laws—were to survive a GATT challenge by relying on Article XX(d) and (g), each state would still have the potentially onerous burden of proving the necessity to close its ports to foreign-flagged vessels that intend to supply a particular market.

When a state closes its ports and potentially creates a barrier to a market, the burden would be on the state to prove that there are legitimate conservation concerns related to the particular species that a vessel was planning on introducing into the channels of trade. A recent case involving the European Union and the Faroe Islands raised potential trade law questions about when a state can close its market. While the parties ultimately settled their dispute independently of the WTO, the Faroe Islands brought a case against the EU to challenge the EU's closure of its markets to Faroe Island mackerel and Atlanto-Scandian herring.¹⁸⁰ The EU claimed in August 2013, that the Faroe Islands fleet was fishing unsustainably when it unilaterally increased its harvest of herring and mackerel. Specifically, the Faroe Islands challenged the EU action as discriminating under most-favored-nation treatment, GATT Article V on Freedom of Transit, and quantitative restrictions on trade.¹⁸¹ This case

176. See *supra* text accompanying note 99.

177. See, e.g., ORG. OF ECON. COOPERATION & DEV., FISHERIES SERVICES: CANADA, available at <http://www.oecd.org/canada/39926170.pdf> (last visited May 2, 2015) (“[A]ccess is a privilege that the Minister of Fisheries and Oceans may choose to grant in accordance with the provisions of the Coastal Fisheries Protection Regulations.”).

178. “National treatment” under the WTO prohibits a state from using government regulations to discriminate between imported and domestically produced goods. See generally *Principles of the Trading System*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Apr. 26, 2015).

179. The “most favored nation” principle under the WTO requires that a state not discriminate between its trading partners. *Id.*

180. Request for Consultations by Denmark in Respect of Faroe Islands, *European Union—Measures on Atlanto-Scandian Herring*, WT/DS469/1 (Nov. 7, 2013).

181. *Id.*

suggests that a “wronged” state might be willing to bring a trade dispute to reopen markets.¹⁸² These disputes are unlikely to be successful for suspected IUU fishing products given the preexisting history of market closures to combat IUU fishing, the justification under GATT Article XX, and the support for the PSMA by a number of key fishing import states.

It is important that states attempt to harmonize some level of practice in applying port state measures. A broad challenge of a series of port state measures adopted across an RFMO would likely survive judicial scrutiny under the Technical Barriers to Trade (TBT) agreement as part of a newly emerging international standard as long as the RFMO is open to WTO members.¹⁸³ If a single state under Article 4 implements “more stringent port measures than those provided for” in the PSMA, such as closing all ports to flags of convenience or prohibiting landings by foreign-flagged vessels, it may be possible for a state to launch a TBT claim, though past case law suggests that conservation-related trade measures that are limited in scope to ending IUU fishing activities are likely to be considered legitimate trade measures.¹⁸⁴

VI. CONCLUSION

The PSMA offers a unique opportunity to combat the chronic problems with lax flag state enforcement of vessels engaged in IUU fishing. Nearly universal adoption of the PSMA will be necessary to end the practice of ports of convenience. In the meantime, while states are weighing the pros and cons of becoming a party to the PSMA, those states that adopt the PSMA should also consider adopting trade-related measures, including rules requiring trade-related documentation and customs coding. Basic transparency will not be easy to achieve in the fishing industry, but the future of sustainable fisheries depends on taking a holistic approach to combatting IUU fishing.

182. *Id.*

183. MARGARET YOUNG, *TRADING FISH, SAVING FISH: THE INTERACTION BETWEEN REGIMES IN INTERNATIONAL LAW* 116 (2011).

184. Two WTO cases that might be useful by analogy for thinking about potential WTO cases related to implementation of the PSMA are: (1) Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS401/AB/R (May 22, 2014) (adopted June 18, 2014) (The WTO Appellate Body upheld the Dispute Panel’s finding that the EU Seal Regime is “necessary to protect public morals” within the meaning of Article XX(a) of the GATT 1994); and (2) Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS 381/AB/R (May 16, 2012) (adopted June 13, 2012) (finding that the U.S. labeling provisions were inconsistent with TBT 2.1 requiring national treatment in relation to products but also finding that the labeling provision was not more trade restrictive than necessary to fulfill legitimate U.S. objectives).

As this Article goes to press, several IUU vessels are fishing in Antarctic waters that are believed to be linked to Vidal Armadores, a Spanish fishing syndicate with a history of illegal fishing.¹⁸⁵ Will the “sea bass” cargo on these ships become dinner in a U.S. restaurant after being potentially transshipped at sea under the cover of darkness? Ultimately, the answer will depend on the traceability of this cargo, the willingness of states to investigate vessels in port, and the ability of states to unilaterally or jointly close their markets.

185. Murray McCully, *International Push to Bring Poachers to Justice*, NATIONAL (Jan. 16, 2015), <https://www.national.org.nz/news/news/media-releases/detail/2015/01/16/international-push-to-bring-poachers-to-justice> (describing how the vessels are registered to a company called Stanley Management that might be a shell company for Vidal Armadores); Kate Wilson & Mar Cabra, *'Pirate' Fleet Owner Convicted of Fish Fraud*, ICIJ.ORG (Nov. 17, 2011), <http://www.icij.org/project/looting-seas-ii/pirate-fleet-owner-convicted-fish-fraud>.