**The shaky foundations of the FAO Port State Measures Agreement: howwatertight is the legal seal against port access for foreign fishing vessels?**

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The Port State Measures Agreement aims to influence fishing vessels’ high seas activities, normally under the exclusive jurisdiction of their flag States, by withholding access to parties’ ports to unload catch and resupply. This works *inter partes*, but many flag States are unlikely to become party to it. The Agreement assumes States may nonetheless exclude foreign vessels from their ports, giving parties leverage to impose conditions derived from it on vessels of non-parties seeking access. But this assumption is valid only if the port State retains its right to exclude; many have bargained it away, in old bilateral treaties or as WTO members with freedom of transit obligations. The settlement on terms favourable to the EU of both the *Swordfish* and *Herring* disputes, representing the flag State in one and port States in the other, suggests market power vulnerable to abuse, not jurisdictional authority, may have been the decisive factor.

Keywords: Port State Measures Agreement, jurisdiction, port access, fishing vessels, EU, FCN treaties, GATT Article V, WTO, Swordfish, Herring

**Introduction**

As a result of the inability or unwillingness of many flag States to effectively control fishing operations carried out by vessels flying their flag, the burden of combating overfishing has shifted to a considerable degree onto port States. With the 2009 Port State Measures Agreement negotiated under the auspices of the Food and Agriculture Organization of the United Nations (FAO) having only recently (June 2016) entered into force,[[1]](#footnote-1) it is timely to consider what will actually change as a result of this. In other words, what measures can port States now take that were formerly denied to them by the previous law? This depends in part on whether States already had the power to do what the Agreement calls on them to do. If so, the innovative element is not that they may do these things, but that (where so provided) they must, losing the discretion they once had in this regard. On the other hand, to the extent that the provisions go beyond this, i.e. they permit States, in this case port States, to take actions not hitherto open to them, the perennial problem of the applicability of treaties to non-parties may substantially impair its effectiveness. Since, as examined in the parallel paper by Swan,[[2]](#footnote-2) the Agreement is little different in substance from its most recent non-treaty precursor, the FAO Model Scheme,[[3]](#footnote-3) the possibly surprising answer is that the most important effect may be indirect: to leave free of doubt the ability of the measures contemplated by the Agreement to withstand critical scrutiny in the dispute settlement system of the World Trade Organization (WTO) and perhaps elsewhere) at the instance of States against whom they were employed.

Port State measures are requirements established or other actions taken by port States with which foreign fishing vessels must comply or to which they are subjected as a condition for using ports within those States. These include requirements related to prior notification of port entry, use of designated ports, restrictions on port entry and on landing or transhipment of fish, restrictions on supplies and services, documentation requirements and port inspections, as well as trade-related measures and even sanctions. In recent years there has been a trend, traced by the Swan paper, towards inclusion of such measures in both binding and non-binding international instruments. These rest on the well-established rule of customary international law that (other things being equal) foreign vessels have no right of entry to the internal waters and ports of a State, save for reasons of *force majeure* or distress, and even that is increasingly coming under question.[[4]](#footnote-4) Although it follows from the ability to exclude vessels that port States are in a strong position to impose conditions designed to reinforce precautionary fisheries management in return for allowing entry, potentially including conditions relating to acts and omissions of the vessel in areas not under their jurisdiction, there has historically been some reticence about making extensive use of this power. It appears that many States are more comfortable doing so under the political cover of an international instrument, and this now exists in the form of the 2009 Port State Measures Agreement, which aims to hinder, if not prevent altogether, illegally caught fish from entering international markets through ports. It requires port States to take action against operators known to be, or suspected of IUU fishing or activities in support of such fishing, which is defined by reference to paragraph 3 of the 2001 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing,[[5]](#footnote-5) such that the Agreement would apply not just to everything the earlier instrument defines as IUU fishing activities but also to landing, packaging, processing, transhipping or transporting of fish taken through, and providing personnel, fuel, gear or other supplies in support of, such activities.[[6]](#footnote-6)

Two broad criticisms may be levelled at the 2009 Agreement. One is that, while it may be effective *inter partes* in hardening into obligations the use of port State powers even if they already possessed these, to the extent that such actions were not previously available, it cannot affect the rights of, and is therefore ineffective against, other States that do not become party to the Agreement. The other issue, on which this paper is centred, is the risk that the legal foundations on which the policy edifice of the 2009 Agreement stands – the assumption that foreign ships, and thus fishing vessels, have no right of access to ports – may be shaky. We begin, however, by looking back at two of its principal antecedents.

**The main Law of the Sea treaties**

The United Nations Convention on the Law of the Sea (UNCLOS)[[7]](#footnote-7) provided in Article 218 a limited possibility for prosecution by port States of foreign vessels for pollution violations on the high seas, which is sometimes assumed, on the *expressio unius est exclusio alterius* principle, to indicate that no similar power exists for fisheries. But this is misconceived, partly because Article 218 simply makes it possible for port States to do directly what they could formerly do only indirectly under the customary international law rules of jurisdiction,[[8]](#footnote-8) but also because the nature of the enforcement actions it contemplates as likely to be taken by port States is quite different in the fisheries context from the pollution one. Pollution is not an activity but a mishap (if accidental) or an offence in itself (if deliberate, perhaps as a way of cutting operating costs), and the enforcement is geared towards imposition of some sort of penalty, possibly of a criminal nature, after the event. Fishing by contrast is an activity, and one that (recreational fishing aside) occurs not for the amusement of its practitioners but for direct economic gain, which will not be realised unless the fishing operators have a market in which to sell their fish. The fish are as a rule consumed on land and need to be brought into and discharged at a port as the first step towards entering the supply chain. Landing the fish contained in their holds is the principal reason for foreign fishing vessels to come into port, and the main subsidiary one is refuelling and revictualling, which may be necessary to allow a vessel to continue to ply its trade, though this can be avoided – if at some cost to the welfare of the crew – by making use of the services of bunkering and supply vessels such as featured in the *Saiga*[[9]](#footnote-9) and *Virginia G*[[10]](#footnote-10) cases.

Turning next to the UN Fish Stocks Agreement,[[11]](#footnote-11) Article 23 of this treaty does specifically address port States and indeed is headed “Measures taken by a port State”. Paragraph 1 affirms the port State’s “right and … duty to take measures, in accordance with international law, to promote the effectiveness of subregional, regional and global conservation and management measures”, as long as in doing so it does not discriminate in form or in fact against the vessels of any State. The novel element here to be stressed is the duty, since the right, similarly to UNCLOS Article 218, already existed, if only indirectly. What this might mean in practice is specified in the next couple of paragraphs. There is nothing particularly striking about paragraph 2, which allows a port State among other things to “inspect documents, fishing gear and catch on board fishing vessels” that are voluntarily in its ports or at its offshore terminals. Except in the rare cases where by some treaty a foreign fishing vessel has the right to enter a given port, that right would not exist and thus in consideration of allowing the vessel in, the port State can impose conditions for entry such as these, something expressly contemplated by Article 25(2) of UNCLOS, which refers to “conditions to which admission of...ships to internal waters or ... a [port] call is subject.” More specific is paragraph 3, which permits States “to prohibit landings and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas.” This is sufficiently broad to cover any fishing by a vessel flagged to a State that lacks a catch or effort quota from or under the relevant regional management organisation or arrangement, indeed arguably it does so irrespective of the reason for the flag State’s want of such a quota, including any discriminatory denial to it of one by States within the organisation or arrangement, even though that would be contrary to Article 8 of the same Agreement. The observant reader will notice that nothing in Article 23 so far authorises measures in support of conservation measures adopted unilaterally by a State, but here the saving clause of paragraph 4 by implication comes to the rescue, as it provides that “Nothing in this article affects the exercise by States of their sovereignty over ports in their territory in accordance with international law.”[[12]](#footnote-12)

**Opposability of the Port State Measures Agreement to non-parties**

Like all treaties dealing with global issues negotiated in order to overcome a significant policy problem, instruments like the Port State Measures Agreement tend to attract as parties mainly those States that are not the cause of the problem. The efficacy of the Agreement may thus ultimately be dependent less on the level of compliance with it by its parties, since the willingness of a State to become a party to it at all is in something like inverse proportion to the difficulty that full compliance poses to it, than on where it leaves non-parties, on whom it is not possible to impose such an obligation under the *pacta tertiis nec nocent nec prosunt* rule.[[13]](#footnote-13) This last point is reflected in the terms of Article 23 of the Agreement, by which parties are to encourage non-parties either to become party to it or at least to implement its provisions, and to take “fair, non-discriminatory and transparent measures” to deter activities of non-parties that undermine the effective implementation of the Agreement.

The answer to this problem may depend on how safe the underlying assumption of the Agreement is, namely that fishing vessels have no right to enter foreign ports except in situations of distress.[[14]](#footnote-14) The caveat at the beginning of this paper – that other things are equal – highlights the degree of caution with which this issue should be approached.

While the assumption holds true as a starting point, it can be and frequently is supplanted by a treaty obligation to admit vessels of particular nationalities to particular ports. Thus whether it can apply so as to justify refusal of access to any particular vessel depends on what other international obligations the port State may have, and in each case it will be necessary to exclude the possibility that it is party to any of the multiplicity of treaties by which States have guaranteed each other’s vessels access to their ports on a reciprocal basis, whether bilaterally (typically under a treaty of friendship, commerce and navigation (FCN)) or multilaterally.

(a) Bilateral port access commitments

If a pertinent bilateral treaty is not to apply according to its terms, it may be sufficient to argue that the Port State Measures Agreement, if it is in force for both parties, would override any contrary provision in the older treaty, either as a later treaty displacing an earlier one to the extent of any inconsistency (*lex posterior derogat legi priori*) or a specific one constituting an exception to a more general rule (*lex specialis derogat legi generali*). Yet, even though the Agreement is now in force, perhaps more importantly it remains to be seen how soon it acquires a critical mass of parties that would open the way to an argument that it expresses what, thanks in part to it, might become a new customary international law right to deny access to port in certain circumstances to fishing vessels even of non-parties to the Agreement[[15]](#footnote-15) notwithstanding any commitment under an older treaty to allow it. The answer, one suspects, is that this is at best a distant prospect, if indeed it ever occurs, but that in the years ahead we should be prepared to hear a lot of premature wishful thinking to this effect.

The conclusion is made all the more uncertain by the fact that many but by no means all FCN treaties exclude fishing vessels from the benefit of the relevant clause. To take but two examples of treaties of this class that have featured in cases before the International Court of Justice, Article XIX of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua[[16]](#footnote-16) and Article X of the Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran[[17]](#footnote-17) both provide in near-identical terms[[18]](#footnote-18) that:

3. Vessels of either [High Contracting] Party shall have liberty, on equal terms with vessels of the other [High Contracting] Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of such other [High Contracting] Party open to foreign commerce and navigation. Such vessels and cargoes shall in all respects be accorded national treatment and most-favored-nation treatment within the ports, places and waters of such other [High Contracting] Party; but each [High Contracting] Party may reserve exclusive rights and privileges to its own vessels with respect to the coasting trade, inland navigation and national fisheries.

4. Vessels of either [High Contracting] Party shall be accorded national treatment and most-favored-nation treatment by the other [High Contracting] Party with respect to the right to carry all products that may be carried by vessel to or from the territories of such other [High Contracting] Party; and such products shall be accorded treatment no less favorable than that accorded like products carried in vessels of such other [High Contracting] Party, with respect to: (a) duties and charges of all kinds, (b) the administration of the customs, and (c) bounties, drawbacks and other privileges of this nature.

The reference to “national fisheries” in paragraph 3, which would otherwise prompt a question as to whether it extends to national participation in international fisheries of the sort considered in this paper, is anomalous, since paragraph 6 of the relevant article of both treaties goes on to remove fishing vessels from the scope of the treaty, other than those in distress.

Most of the FCN treaties examined by the author to which the United States is party have similar exclusions; of a further 14 such treaties located,[[19]](#footnote-19) this is true of all but two of them: the Treaty of Amity and Economic Relations between the United States of America and Ethiopia[[20]](#footnote-20) and the Treaty of Friendship, Establishment and Navigation between the Kingdom of Belgium and the United States of America.[[21]](#footnote-21) Fishing vessels are similarly not excluded from the freedom of navigation clause in the Treaty of Friendship, Commerce and Navigation between the United Kingdom of Great Britain and Northern Ireland and the Sultanate of Muscat and Oman,[[22]](#footnote-22) the Trade Agreement between the Federal People’s Republic of Yugoslavia and the State of Israel,[[23]](#footnote-23) the Treaty of Friendship, Commerce and Navigation between Japan and the Argentine Republic,[[24]](#footnote-24) the Treaty on Commerce and Navigation between Japan and the Polish People’s Republic[[25]](#footnote-25) and the Treaty of Amity, Commerce and Navigation between Japan and the Republic of the Philippines.[[26]](#footnote-26) The same is true of all but a few of the treaties of trade and navigation (over 20) into which the former Soviet Union and latterly Russia entered – some, curiously, with landlocked States such as Austria and the former Czechoslovakia. The exceptions (i.e. fishing vessels are excluded) are the Treaty between the Government of the Union of Soviet Socialist Republics and the Government of the Italian Republic concerning Merchant Shipping,[[27]](#footnote-27) the Agreement between the Government of the Union of Soviet Socialist Republics and the Government of the Kingdom of Norway concerning Navigation,[[28]](#footnote-28) the Agreement between the Government of the Union of Soviet Socialist Republics and the Executive Council of the Republic of Zaire on Maritime Navigation,[[29]](#footnote-29) the Agreement between the Government of the Union of Soviet Socialist Republics and the Government of the United Mexican States concerning Shipping[[30]](#footnote-30) and the Agreement between the Government of the Union of Soviet Socialist Republics and the Government of the Democratic Republic of Madagascar on Commercial Maritime Navigation.[[31]](#footnote-31) Most of the Soviet Union treaties have a most favoured nation rule on port entry rather than a complete mutual opening of ports, but the effect is the same as long as each party’s ports are open to the vessels of at least one other State, as is the case in the treaties with Italy and Mexico listed above. There are also a great many 19th century FCN treaties to which the United Kingdom (UK) was or is party, mostly with Central and South American States as counterparties, though the search function on the Foreign and Commonwealth Office treaties website does not readily make it apparent which of them are still in force. Australia succeeded briefly to many of them in respect of some or all of the former colonies which federated to become Australia in 1901; most of these were eventually denounced but one was confirmed in 1971 as remaining in force for Australia even though this is no longer the case for the UK itself,[[32]](#footnote-32) and it predates the trend to exclusion of fishing vessels. It is possible that Canada, New Zealand and South Africa are also still party to some of these treaties even if the UK now is not. The overall sample of more than 40, which is likely to be far from complete as the diversity of nomenclature precludes any systematic search, is thus roughly equally divided on this point, and serves to illustrate that States tempted to assume that they can base their policies on a general power to deny entry to their ports to all foreign fishing vessels would be well advised to take stock of their old and perhaps forgotten bilateral treaty obligations regarding port access before doing so.

(b) Multilateral port access commitments

The other way in which the assumption of ports being closed to fishing vessels has been called into question is that this may be the consequence of a multilateral treaty. Providing for mutual access of a party’s ships to every other party’s ports, the Statute on the International Régime of Maritime Ports[[33]](#footnote-33) would be an example of this, were it not for Article 14 which excludes fishing vessels and their catches from its application. But this is clearly the effect of one or more provisions of the multilateral General Agreement on Tariffs and Trade[[34]](#footnote-34) (GATT). Twice in recent years this instrument has been invoked to challenge the closure by one State or group of States to fishing vessels of another State or group of States in the course of a wider fisheries dispute. Both of these disputes were pursued simultaneously under both the WTO Understanding on the Settlement of Disputes (commonly abbreviated to DSU)[[35]](#footnote-35) and UNCLOS and both, rather frustratingly, were settled, so that there is no judgment or panel decision either on the merits of the disputes or on the lawfulness of the denial of port access.

The first such dispute arose in 2000 between Chile and the European Community (as it then was) over fishing by Spanish vessels for swordfish on the high seas off Chile’s exclusive economic zone (EEZ). Chile closed to the Spanish vessels the ports where they had been landing their catch; from there the swordfish were transported on land to Santiago airport and flown to markets in the US and Europe. The Community launched dispute settlement proceedings in the WTO, invoking Articles V:2 and XI:1 of GATT, and a panel was created to rule on its complaint. Chile countersued under UNCLOS and by agreement of the parties a special chamber of the International Tribunal for the Law of the Sea (ITLOS) was established to hear the counterclaim. After a temporary arrangement was reached in 2001, the WTO case went into abeyance[[36]](#footnote-36) and the clock was repeatedly stopped on the timetable for memorials in the ITLOS case. Both cases were eventually settled in 2009.[[37]](#footnote-37)

The Article XI claim was weak, principally because it depends on the fish being the product of the “territory” of a State,[[38]](#footnote-38) which those captured on the high seas and not yet landed can scarcely be. This is so even though the Chilean measure, while falling short of a complete ban on imports of swordfish from the Community, as opposed to only those caught by its vessels from the south-eastern Pacific stock of that species imported directly from the high seas, could still be seen as a restriction on their importation, as occurred in *Colombia – Indicative Prices and Restrictions on Ports of Entry*,[[39]](#footnote-39) despite the restriction not being a quantitative one as the heading suggests it should be.

The Article V claim, though, is not so easily dismissed, because, in line with the heading, paragraph 2 grants the freedom of transit:

2.      There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.

This is significant for the Port State Measures Agreement, because, just as none of the swordfish previously unloaded in Chilean ports was destined for the local market, so little if any of the fish denied landing under the Agreement is likely to be sold in the port State. It is possible to argue (as the present author in fact did[[40]](#footnote-40)) that Article V:2, which specifies a number of reasons for which freedom of transit may not be impaired, should be interpreted as not preventing impairment for any other reason, including in support of an internationally binding limitation of the catch of the fish stock concerned that has been exceeded (a state of affairs to be discouraged, but one that invites repetition if the fish are allowed to be landed), but few would be completely confident that the panel or Appellate Body would have agreed had the *Swordfish* case proceeded this far. Chile might thus have found itself having to establish a defence under Article XX of GATT: that the measure was for the conservation of exhaustible resources and was not imposed by way of arbitrary or unjustifiable discrimination or as a disguised restriction on trade.[[41]](#footnote-41) This might not have been possible given that Chile at the time had no upper limit on its own landings of swordfish, merely a requirement that no more than a certain percentage of the catch by weight could consist of fish below a certain length.[[42]](#footnote-42) If the same dispute were to recur today and the Port State Measures Agreement were in force for both parties, Chile’s task might well be easier, as it could cite that agreement as a multilateral environmental agreement to which the WTO takes a relatively deferential attitude,[[43]](#footnote-43) but not if the European Union (EU) were not party to it. It appears, however, that there needs to be an “agreement”, i.e. in this context, a treaty-status instrument, in which case the 2009 Agreement would qualify for this treatment, but the 2004 FAO Model Scheme covering largely the same ground,[[44]](#footnote-44) discussed in the Swan paper,[[45]](#footnote-45) would not. It is in this way that the Agreement, despite its relative lack of novelty, achieves a fairly high degree of security for its parties that acts in conformity with its text will for that reason alone be safe from attack through the WTO.

More recently, a dispute brewing for some years between Denmark (in right of the Faroe Islands) and the EU over allocation of herring stocks in the North-East Atlantic came to a head in mid-2013 with the imposition by the EU of trade bans against both herring and mackerel from the Faroes and closure of its ports to vessels capturing them under licence from the Faroes. The dispute arose as a result of the Faroes’ claim to a larger share than hitherto of the Atlanto-Scandian herring catch, owing to the rising proportion of the stock found in its EEZ. The EU insisted on the Faroes retaining its previous share of 31,000 tonnes (5.16%); when agreement could not be reached, the Faroes announced a unilateral catch limit of 105,230 tonnes (this figure is equivalent to a *circa* 17% catch share if the total is unchanged because the extra tonnage comes at the expense of the other participants in the fishery, or *circa* 15% if the difference is simply added to the total).[[46]](#footnote-46) In reaction, the EU banned port calls by Faroese fishing vessels, pursuant to Regulation (EU) No 1026/2012,[[47]](#footnote-47) and landings of both herring and bycaught mackerel. (It appears to have conceded that its IUU Fishing Regulation[[48]](#footnote-48) was not applicable, but the action taken is much the same as is available there.)

The 2012 Regulation provides for acountry to be identified as allowing non-sustainable fishing if it (a) fails to cooperate in the management of a stock of common interest in compliance with UNCLOS and the UN Fish Stocks Agreement or other relevant international law; and (b) either fails to adopt necessary fishery management measures or adopts such measures without due regard to the rights, interests and duties of the EU and other countries which, in conjunction with measures taken by them, lead to fishing which could result in the stock being in an unsustainable state (including situations where this is avoided solely thanks to measures adopted by others).[[49]](#footnote-49) It then goes on to set out a number of measures that the Commission may adopt in respect of countries allowing non-sustainable fishing; the relevant ones for present purposes are:

(a) identifying that country as one allowing non-sustainable fishing;

(b) identifying specific vessels or fleets of that country to which certain measures are to apply;

(c) imposing quantitative restrictions on imports of fish from the stock of common interest caught under the control of that country and on imports of fishery products made of or containing such fish;

(d) imposing quantitative restrictions on imports of fish of any associated species, and fishery products made of or containing such fish, caught while conducting fisheries on the stock of common interest under the control of that country;

(e) imposing restrictions on the use of EU ports by vessels of that country fishing the stock of common interest and/or associated species and by vessels transporting fish and fishery products stemming from that stock and/or associated species caught by vessels of that country or authorised by it[.][[50]](#footnote-50)

Like the *Swordfish* case, actions proceeded both under UNCLOS Part XV, where the issue was the interpretation and application of Article 63(1) on shared stocks,[[51]](#footnote-51) and in the WTO[[52]](#footnote-52) where breach of GATT Articles I, V and XI was alleged,[[53]](#footnote-53) but with the difference that on this occasion the same party (Denmark) instituted both sets of proceedings. Both parts of the dispute were settled in 2014,[[54]](#footnote-54) with agreement on a Faroese quota of 40,000 tonnes of herring from the stock in question and the lifting of the European port ban.[[55]](#footnote-55)

**Lessons from how the disputes were settled: the market State factor**

From the last-mentioned figure, it is clear that the negotiated outcome of the herring dispute was much closer to the EU’s original position than the Faroes’, even if the latter was an inflated ambit claim (i.e. even if in 2013 the Faroes would have been prepared to accept much less than a 17% share). The same is true of the settlement of the *Swordfish* dispute, which comprised the following elements:

1) a more structured framework of fisheries cooperation to replace and transform the 2001 bilateral Provisional Arrangement into a definitive commitment to cooperate for the long-term conservation and management of the swordfish stocks in the South Eastern Pacific[;]

2) conducting their respective swordfish fisheries to catch levels commensurate with the objective of ensuring the sustainability of these resources as well as safeguarding the marine ecosystem[;]

3) **freezing of the fishing effort by both Parties at the 2008 level or at the maximum historical peak[;]**

4) establishment of a Bilateral Scientific and Technical Committee…with the following tasks: exchange of information and data on catch and fishing effort, as well as on stock status; providing scientifically-based advice to…stock managers to assist them in ensuring the sustainability of the fishing activities of both Parties; advising Parties on the adoption of further conservation measures if needed[;]

5) […]

6) agreement that **EU vessels fishing for swordfish in the high seas** in accordance with the objectives contained in the new Understanding **shall be granted access to designated Chilean ports for landings, transshipments, replenishing or repairs.[[56]](#footnote-56)**

The combination of the continuation of the maximum historical peak of Spanish fishing effort in the third element (bolded) with the resumption of access to Chilean ports in the sixth element, even if only those designated for the purpose, also makes it evident that in the end the EU very much had the upper hand. Yet in the *Swordfish* dispute the EU was on the opposite side of the argument from the position it took in the *Herring and Mackerel* dispute; in the former it was insisting on access against the wishes of the port State, while denying it in the latter where *mutatis mutandis* it donned that mantle itself. The fact that, even so, the outcome of the negotiations favoured it in both instances gives rise to the inference that the ultimately decisive factor in each case was less the administrative power of the port State or its rights under international law but far more the economic clout of the market State.

A related question is whether actions like those of Chile and the EU would or should be permissible under the Port State Measures Agreement. This may depend on whether the fishing of Spain and the Faroes was “unregulated”, which is partly a problem of the overly wide definition of unregulated fishing, and partly of its assimilation to illegal fishing, regrettably carried into the Agreement from the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate IUU Fishing. Irrespective of the outcomes that either of these cases would have had on their merits, and of whether the Port State Measures Agreement now that it is in force would produce a different result, it may be asked whether Chile ought under that instrument to be able not only to close its own ports to the Spanish vessels, but also to require third States to refuse them entry to their ports to land their swordfish caught on the high seas, or whether the EU should be able to make the same demand of third States in respect of the herring and mackerel catch of the Faroese vessels, bearing in mind moreover that the affected mackerel were not directly in dispute but bycatch from the herring fishery. It is one thing to say that coastal or for that matter distant-water fishing States should not, merely by dint of being port States, be compelled under the GATT to assist their competitors to maximise the value of their catch by not being able to exclude them from their conveniently located ports when that catch, because of an allocation dispute, may be temporarily unregulated,[[57]](#footnote-57) but quite another to allow them to dictate that the catch should in effect become unsaleable altogether merely because it is unregulated, as opposed to illegal or unreported. That, however, is a broader problem with the concept of IUU fishing that lies beyond the scope of this paper.

**Conclusions**

There is a double irony in the position adopted by the EU in its dispute with the Faroe Islands over herring and mackerel quotas: not only is it the opposite to that which it had taken in the swordfish dispute with Chile a decade earlier, but it also sits uneasily with its prominent role in the coalition that succeeded in the Uruguay Round of multilateral trade negotiations in putting an end to what a leading textbook calls “vigilante justice”.[[58]](#footnote-58) This refers to the practice in the pre-WTO era in which one party to the GATT would impose trade restrictions against another based on unilateral determination by the first party of breach by the other party of some international trade law obligation. This is not unknown to public international law; though normally wrongful, breach of an obligation is excused when it meets the tests for a countermeasure against a prior breach by another State against which it is targeted,[[59]](#footnote-59) but is always risky, since it relies on the unilateral determination that a prior breach has occurred being correct, an assessment that the determining State will not always have made objectively, and within the WTO system is now prevented by Article 23(2) of the DSU.[[60]](#footnote-60) On the other hand, the same provision is silent as to whether such measures are acceptable if it is some other obligation outside the WTO system that is asserted to have been breached. This is how the EU’s 2012 regulation operates; it now seems to be relying on trade restrictions being permissible if they are based on a unilateral and possibly self-serving determination of breach by the vessel’s flag State of the fisheries provisions of UNCLOS, and to that extent has adopted the position of its antagonist Chile in the earlier dispute. In doing so it is wielding market State economic power primarily and port State legal authority only incidentally. True, if the EU was entitled to exclude Faroese fishing vessels from its ports to prevent their catch of these herring and mackerel stocks reaching its market while they were in disagreement about their catch shares, then so too would the Faroes have been able to keep EU vessels out, but as the commercial traffic is all one way, that would have been of no use to it. This suggests that the next international fisheries instrument to be drafted at a multilateral level in relation to powers to place obstacles in the way of trade in the service of conservation goals should be aimed at market States,[[61]](#footnote-61) but if the occasion to develop one arises, the opportunity should also be taken to diminish the risk of abuse by differentiating between how it handles unregulated catch on one hand and illegal and unreported catch on the other.

1. The [Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing](http://www.fao.org/fileadmin/user_upload/legal/docs/037t-e.pdf), <http://www.fao.org/fileadmin/user_upload/legal/docs/037t-e.pdf> (visited on 19 April 2016), was approved by the FAO Conference at its Thirty-sixth Session on 22 November 2009 by Resolution 12/2009 and was opened for signature on that day. At the end of the 12 months during which it was open for signature, it had received 23 signatures: see the status list maintained by the depositary at <http://www.fao.org/fileadmin/user_upload/legal/docs/037s-e.pdf> (visited on 13 June 2016). Pursuant to Article 29, it entered into force 30 days after the depositary (the Director-General of the FAO) received the twenty-fifth instrument of ratification, acceptance, approval or accession, which occurred on 6 May 2016: *ibid*. [↑](#footnote-ref-1)
2. Editors: pls insert appropriate cross-reference. [↑](#footnote-ref-2)
3. FAO Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing (Appendix E to FAO Fisheries Report No. 759, *Report of the Technical Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing, Rome, 31 August - 2 September 2004* (Rome: FAO, 2004)), 24. [↑](#footnote-ref-3)
4. E.J. Molenaar, “Port State Jurisdiction: Towards Comprehensive, Mandatory and Global Coverage” (2007) 38 *Ocean Development & International Law* 225 at 227-228. The underlying rationale of the rule is to preserve human (crew and passenger) lives, which in bygone times was most readily achieved by allowing stricken vessels entry into port, but more recent technological advances make earlier rescue from long distances offshore a much more realistic possibility, at the same time avoiding dangers to populations ashore and to the marine environment from dangerous cargoes as well as spilt bunkers, hence rigid adherence to the old rule may not always be required or even justified. [↑](#footnote-ref-4)
5. Adopted by the FAO’s Committee on Fisheries at its 24th Session on 2 March 2001 and endorsed by the 120th Session of the FAO Council on 23 June 2001, <<http://www.fao.org/docrep/003/y1224e/y1224e00.HTM>> (visited on 19 April 2016). The term IUU fishing is defined by paragraph 3 to encompass fishing in waters within the jurisdiction of a coastal State without that State’s consent; fishing in contravention of a conservation and management measure adopted by a regional fisheries management organisation (RFMO) to which the flag State of the vessel is a party; fishing in violation of national laws or international obligations; failing to report or misreporting fishing activities, in contravention of national laws and regulations or reporting procedures established by RFMOs; fishing in an area governed by an RFMO by a vessel flagged to a State that is not its member, or is without nationality; fishing in an area governed by an RFMO in a manner that is inconsistent with or contravenes conservation and management measures adopted by that organisation; and fishing in an area where no RFMO exists in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law. [↑](#footnote-ref-5)
6. Port State Measures Agreement, *supra* n 1, Art 1(d) and (e). [↑](#footnote-ref-6)
7. Montego Bay, 10 December 1982; 1833 UNTS 3. [↑](#footnote-ref-7)
8. As long as the port State was not under an obligation to admit the vessel to its ports, an assumption tested below, it could impose a condition of entry requiring the master or owner to certify that it had not caused any pollution in any area outside the port State’s jurisdiction. Should this later be shown to be untrue, the offence of making a false declaration would have been committed either actually or constructively within its territorial jurisdiction. [↑](#footnote-ref-8)
9. *The* *M/V Saiga (No 2) (Saint Vincent and the Grenadines v. Guinea)*, ITLOS Reports 1999, p.10. [↑](#footnote-ref-9)
10. *The M/V “Virginia G” (Panama/Guinea-Bissau), Judgment,* ITLOS Reports 2014, p.4. [↑](#footnote-ref-10)
11. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 December 1995); 2167 UNTS 3. [↑](#footnote-ref-11)
12. See *Military and Paramilitary Activities in and against Nicaragua, Judgment*, ICJ Reports 1986, p.14 at 111 (paragraph213). Art 4(1)(b) of the Port State Measures Agreement, *supra* n 1, expands on this by confirming that it “include[s] their right to deny entry thereto as well as to adopt more stringent port State measures than those provided for in this Agreement, including such measures adopted pursuant to a decision of a regional fisheries management organization.” [↑](#footnote-ref-12)
13. Article 34 of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969); 1155 UNTS 331 (codifying a principle of customary international law) states that “A treaty does not create either obligations or rights for a third State without its consent.” [↑](#footnote-ref-13)
14. Article 10 of the Agreement provides that “[n]othing in this Agreement affects the entry of vessels to port in accordance with international law for reasons of force majeure or distress, or prevents a port State from permitting entry into port to a vessel exclusively for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.” [↑](#footnote-ref-14)
15. Article 38 of the Vienna Convention on the Law of Treaties, *supra* n 24, provides that “Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such.” [↑](#footnote-ref-15)
16. Managua, 21 January 1956; 367 UNTS 3. [↑](#footnote-ref-16)
17. Tehran, 15 August 1955; 284 UNTS 93. [↑](#footnote-ref-17)
18. The sole difference is the insignificant words in square brackets which are present in the US-Nicaragua treaty only. [↑](#footnote-ref-18)
19. Thanks are owed to Li Chenxuan for extensive research assistance for this point. Editors: this footnote could be shifted to the beginning and generalised if appropriate. [↑](#footnote-ref-19)
20. Addis Ababa, 7 September 1951; 206 UNTS 41 (Art XIV(2)). [↑](#footnote-ref-20)
21. Brussels, 21 February 1961; 480 UNTS 149 (Art 12(3)). [↑](#footnote-ref-21)
22. Muscat, 20 December 1951; 149 UNTS 247 (Art 1(3)). [↑](#footnote-ref-22)
23. Jerusalem, 11 December 1958; 386 UNTS 271 (Art I(2)). [↑](#footnote-ref-23)
24. Tokyo, 20 December 1961; 613 UNTS 323 (Art XII(7)). [↑](#footnote-ref-24)
25. Tokyo, 16 November 1978; 1272 UNTS 215 (Art 10(2)). [↑](#footnote-ref-25)
26. Manila, 10 May 1979; 1272 UNTS 235 (Art XI(8)). [↑](#footnote-ref-26)
27. Moscow, 26 October 1972; 990 UNTS 171 (Art 16(b)). [↑](#footnote-ref-27)
28. Moscow, 18 March 1974; 1208 UNTS 203 (Art 5(2)(k)). [↑](#footnote-ref-28)
29. Moscow, 10 December 1976; 1196 UNTS 3 (Art 2). [↑](#footnote-ref-29)
30. Moscow, 7 July 1978; 1196 UNTS 167 (Art X(2)(c)). [↑](#footnote-ref-30)
31. Antananarivo, 18 November 1979; 1223 UNTS 369 (Art 1(3)). [↑](#footnote-ref-31)
32. Treaty of Amity, Commerce and Navigation between the United Kingdom of Great Britain and Ireland and the United Provinces of Rio de la Plata [Argentina], (Buenos Ayres [*sic*], 2 February 1825), Australian Treaty Series (ATS) 1901 No 2 (electronic), http://www.austlii.edu.au/au/other/dfat/treaties/1901/2.html (visited on 16 June 1016), but terminated as between its original parties in 1975: see United Kingdom Treaty Series 1976 No. 86 (Cmnd. 6621) p. 3). [↑](#footnote-ref-32)
33. Geneva, 15 November 1923; 58 LNTS 285. [↑](#footnote-ref-33)
34. The GATT, though not drafted as a treaty in its own right in its original form, nonetheless indirectly gained that status through the Protocol of Provisional Application of the General Agreement on Tariffs and Trade (Geneva, 30 October 1947; 55 UNTS 308). Since 1995 GATT has been maintained in force among Members of the World Trade Organization pursuant to the Agreement Establishing the World Trade Organization (Marrakesh, 15 April 1994; 1867 UNTS 3), Article II (2) and (4). [↑](#footnote-ref-34)
35. The DSU forms Annex 2 to the Marrakesh Agreement, *ibid*. [↑](#footnote-ref-35)
36. See WTO doc WT/DS193/3 (6 April 2001), “Chile – Measures Affecting the Transit and Importation of Swordfish: Arrangement between the European Communities and Chile”. [↑](#footnote-ref-36)
37. The discontinuation of proceedings in the WTO is noted in WTO doc WT/DS193/4 (3 June 2010), *Chile – Measures Affecting the Transit and Importation of Swordfish, Joint Communication from the European Union and Chile*, and in the parallel proceedings before the Special Chamber of ITLOS in *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Union),* *Order of 16 December 2009*, ITLOS Reports 2008-2010, p.13. See generally M.A. Orellana, “The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO”, (2002) 71 *Nordic Journal of International Law* 55. [↑](#footnote-ref-37)
38. The first paragraph of Article XI, headed General Elimination of Quantitative Restrictions, is in the following terms (emphasis added):

    1.     No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product *of the territory* of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party. [↑](#footnote-ref-38)
39. WTO doc WT/DS366/R **(**27 April 2009). This case was brought by Panama in response to a Colombian measure whereby *inter alia* all textiles, clothing and footwear from the Free Zone of Colón in Panama had to be imported through either the Special Customs Administration of Bogotá or the Barranquilla customs office, a requirement that did not extend to goods arriving directly from third countries. [↑](#footnote-ref-39)
40. A. Serdy, “See You in Port: Australia and New Zealand as Third Parties in the Dispute between Chile and the European Community over Chile’s Denial of Port Access to Spanish Vessels Fishing for Swordfish on the High Seas” (2002) 3 *Melbourne Journal of International Law* 79. [↑](#footnote-ref-40)
41. Article XX reads, so far as material:

    Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

    ...

    (*g*) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption[.] [↑](#footnote-ref-41)
42. Orellana, *supra* n 33, at 60. [↑](#footnote-ref-42)
43. Although it is theoretically possible that a measure required or permitted by a multilateral environmental agreement could be contrary to some provision of WTO law if it discriminates between those WTO Members that are parties to the agreement and those that are not, no case of this nature has ever been pursued. Neither does anything in the negotiations in the WTO’s Committee on Trade and Environment on the relationship between the two bodies of law, part of the long-running Doha Round launched in 2001, indicate that this relationship is or should be a hostile one, with extensive collaboration between the secretariats of the WTO and the other agreements. See https://www.wto.org/english/tratop\_e/envir\_e/envir\_neg\_mea\_e.htm (visited on 27 April 2016). [↑](#footnote-ref-43)
44. FAO Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing (Appendix E to FAO Fisheries Report No. 759, *Report of the Technical Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing, Rome, 31 August - 2 September 2004* (Rome: FAO, 2004)), 24. [↑](#footnote-ref-44)
45. Editors: pls insert appropriate cross-reference. Although by their nature not directly opposable to States, instruments that do not have the status of a treaty can nonetheless be influential in determining whether States have complied with their treaty obligations. In the fisheries context this is seen in Article 27(5) of the UN Fish Stocks Agreement, *supra* n 15, which directs a court or tribunal hearing a dispute under the compulsory mechanism of that treaty to apply not just UNCLOS, the Agreement itself and other applicable fisheries treaties, but also “generally accepted standards for the conservation and management of living marine resources and other rules of international law not incompatible with [UNCLOS].” [↑](#footnote-ref-45)
46. Y. Ishikawa, “The EU-Faroe Islands Herring Stock Dispute at the WTO: the Environmental Justification”, ASIL Insights Vol 18 No 4 (14 February 2014), https://www.asil.org/insights/volume/18/issue/4/eu-faroe-islands-herring-stock-dispute-wto-environmental-justification (visited on 25 April 2016). [↑](#footnote-ref-46)
47. Regulation (EU) No 1026/2012 of the European Parliament and of the Council of 25 October 2012on certain measures for the purpose of the conservation of fish stocks in relation to countries allowing non-sustainable fishing (OJ L 316 of 14 November 2012, p.34). [↑](#footnote-ref-47)
48. Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No 2847/93, (EC) No 1936/2001 and (EC) No 601/2004 and repealing Regulations (EC) No 1093/94 and (EC) No 1447/1999 (OJ L 286 of 29 October 2008, p. 1), 11th preambular paragraph. The definitions of the elements of IUU fishing closely follow those of the FAO International Plan of Action, *supra* n 8, but significantly there is no equivalent of paragraph 3(4) of that instrument, which concedes that not all unregulated fishing necessarily violates international law and therefore may not require the application of measures under it (and, by extension, under the Port State Measures Agreement). For a recent survey of how the Regulation has been applied, see C. Elvestad and I. Kvalvik, “Implementing the EU-IUU Regulation: Enhancing Flag State Performance Through Trade Measures” (2015) 46 *Ocean Development & International Law* 241. [↑](#footnote-ref-48)
49. Regulation (EU) No 1026/2012, *supra* n 38, Article 3. [↑](#footnote-ref-49)
50. *Ibid*., Article 4(1). [↑](#footnote-ref-50)
51. See <http://pcacases.com/web/view/25> (visited on 25 April 2016). [↑](#footnote-ref-51)
52. See WTO doc WT/DS469/2 (10 January 2014), “European Union – Measures on Atlanto-Scandian Herring: Request for the Establishment of a Panel by Denmark in Respect of the Faroe Islands”. [↑](#footnote-ref-52)
53. Of these, only the first has not already been quoted:

    **Article I: General Most-Favoured-Nation Treatment**

    1.       With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties. [↑](#footnote-ref-53)
54. See WTO doc WT/DS469/3 (25 August 2014), “European Union – Measures on Atlanto-Scandian Herring: Joint Communication from Denmark in respect of the Faroe Islands and the European Union” and the Permanent Court of Arbitration Press Release of 24 September 2014 announcing the termination order, http://pcacases.com/web/sendAttach/782 (visited on 25 April 2016). [↑](#footnote-ref-54)
55. European Commission press release (18 August 2014), “Herring dispute: EU lifts measures against the Faroe Islands”, http://europa.eu/rapid/press-release\_IP-14-931\_en.htm (visited on 25 April 2016). [↑](#footnote-ref-55)
56. ITLOS Order of 16 December 2009, *supra* n 30, at 17-18 (paragraph 12; emphasis added). [↑](#footnote-ref-56)
57. It is also possible that the dispute itself may be about how to regulate the fishery for the first time. [↑](#footnote-ref-57)
58. P. van den Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization* (Cambridge, Cambridge University Press, 2013; 3rd edn), at 183. [↑](#footnote-ref-58)
59. See Articles 22 and 49-54 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, in UN doc A/56/10, *Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001)*, reprinted in UN, *Yearbook of the International Law Commission 2001*, Vol. II, Part Two (New York and Geneva: UN, 2007), 26 at 27 and 30. [↑](#footnote-ref-59)
60. Article 23 of the DSU is headed “Strengthening of the Multilateral System” and provides in pertinent part:

    1. When Members seek the redress of a violation of obligations…under the covered agreements…, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

    2. In such cases, Members shall:

    (a) not make a determination to the effect that a violation has occurred…except through recourse to dispute settlement in accordance with…this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB [Dispute Settlement Body] or an arbitration award rendered under this Understanding; […] [↑](#footnote-ref-60)
61. This could, for example, be by way of a central register of regional and global measures limiting catch or effort in relation to particular fish stocks coupled with a duty on parties to suppress demand for fish caught in excess of such limits or not properly documented by prohibiting their import as well as sale, thus reducing the incentive to supply them. [↑](#footnote-ref-61)