

Proposed Possible Solutions to Implement Port State Measures Agreement in Southeast Asia

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I. Introduction

The governance of the world's fisheries and aquaculture is a challenge that involves actors working across different sectors, and requires improved actions and synergies at the global level. The pursuit of sustainable development has led to the formulation of a wide spectrum of treaties, agreements, and instruments, with the ambition to reconcile its three pillars, namely the sustainability of natural resources, social equity and economic development.¹ As such these instruments. Treaties and agreement, are key to achieving sustainable development of the fisheries and aquaculture sector within a wider sustainable development framework.²

The international legal framework for ocean governance and fisheries is made up of a multitude of global, regional and bilateral binding and voluntary instruments. Key binding and voluntary international fisheries instruments have progressed to address prominent and emerging fisheries challenges, and have been influenced by the ongoing evolution of global milestones.³ Unfortunately, Illegal, Unreported and Unregulated (IUU) Fishing increasingly created very complicated problem which could not be solved by using single tools or single ad hoc approaches. Therefore, port State measures were established/introduced to be used as an effective tool to combat IUU fishing throughout the world, at global, regional and national levels.

Port State Measures for combating IUU fishing are quite new to the Southeast Asian countries, it is clear that all of them need relevant technical assistance from Food and Agriculture Organization (FAO) through international or regional workshop/training program in order to effectively and properly implement this measures at fishing port of each countries under its national jurisdiction. At present, as at 18 October 2017, there were 51 Parties to the PSMA and subject to the Southeast Asia, there are only Indonesia, Myanmar and Thailand be party of the 2009 FAO Port State Measures Agreement (through out this paper be called in short "PSMA")⁴

¹ Report of the FIRST MEETING OF THE PARTIES TO THE AGREEMENT ON PORT STATE MEASURES TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING, organized by FAO during 29-31 May 2017 at Oslo, Norway, APPENDIX E- Opening Speech by Mr. Arni Nathiesen, Assistance Director-General, FAO Fisheries and Aquaculture Department, p.26

² Ibid.

³ Ibid.

⁴ From the Fisheries and Aquaculture Department, FAO Website on the topic "Parties to the Port State Measures Agreement", p.1

The study on Proposed Possible Model to Implement Port State Measures in Southeast Asia which I am as the legal advisor for the Ministry of Agriculture and Cooperatives, Thailand realize that this issue is very significant for Southeast Asian region for enhancing regional cooperation and coordination in implementing port State measures. The FAO Port State Measures Agreement (PSMA) is a major legally-binding instrument for combating Illegal, Unreported and Unregulated Fishing (IUU Fishing) in the world particularly among all Southeast Asian countries.

The writer used to be assigned by FAO to study and write the paper on the topic of “National Coordination and Implementation of Port State Measures in Selected States in the Southeast Asian Region” under the supervision of Ms. Judith Swan, FAO senior expert in collaboration and communication with other staff of the relevant government agencies of relevant countries. The selected States of this study are Indonesia, the Philippines and Thailand. I have learned several fundamental factors such as 1) annual level and purpose of port calls made by non-national fishing vessels in each country and the number of major fishing ports, 2) the legal requirements and institutional mechanisms and practice for the implementation of port State measures as set out in the 1995 FAO Model Scheme on Port State Measures to Combat IUU Fishing for each country, including the following as they relate to non-national fishing vessels such as prior advance notice, denial of use of port, inspections of fishing vessels (including carries vessels where the fish had not been landed), communications with the Flag State – notification of grounds for believing the vessel has carried out IUU fishing, report of results of inspections, follow-up action taken where IUU fishing is discovered, training of port inspectors and information systems – national, regional (membership in RFMO), 3) identify and evaluate national-level coordination mechanism for the legal and administrative implementation of port State measures, 4) To identify also where coordination mechanisms are weak or do not exist, 5) To assess the strengths and weakness of implementation of port State measures in the Philippines, Indonesia and Thailand and 6) to make recommendations on how to overcome the constraints. However the said paper mostly made legal analysis and comparison based on information providing in questionnaire answered by respectively selected States.⁵



⁵ Pongthong Onoora, “National Coordination and Implementation of Port State Measures in Selected States in the Southeast Asian Region” in Report of FAO/APFIC/SEAFDEC Regional Workshop on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing, Appendix G, FAO Fisheries and Aquaculture Report No. 868, FIEL/R868 (En), ISSN 2070-6987, Bangkok, Thailand, 31 March – 4 April 2008, p.38-44

From the above-mentioned study, I, as the writer of the study, proposed my own recommendations in a number of ways to overcome existing constraints arisen from implementing port State measures for combating IUU fishing in the Southeast Asian region. Some major recommendations are the following issues;

- **developing of a model for the region to implement port State measures so that common concerns would be addressed;**
- **Requiring urgent need to develop specific law for establishing port State measures at national level to cover all national agencies;**
- **providing legal assistance to Southeast Asian countries to overcome some regulatory problems.**

The outcome of the study was noted that there are some differences regarding specific laws and regulations dealing with measures to combat IUU fishing among Thailand, Indonesia and Philippines particularly with respect to port State measures. Furthermore, there are some common concerns at the national level on challenging issues relating to combating IUU fishing activities in the Southeast Asian region such as **a lack of coordination and collaboration among different agencies concerned, inadequate laws and regulations to directly deal with the IUU fishing problems, inadequate qualified staffs, insufficiency of needed information, need to establish MCS network in the region and appropriate equipment to combat the IUU fishing especially through port State measures would be required by all State members at the present stage.**⁶ Moreover, the common area of interest such as capacity building, information sharing, the review and redrafting of specific laws or regulations dealing with the application of port State measures and the establishment of a regional MCS network in the Southeast Asian region are needed. **Nevertheless, to achieve our common goals, more time/cooperation/ participations and supporting of the relevant parties such as policy-makers, all stakeholders both government sector and private sector are desperately needed.**⁷

The entry into force of the 2009 FAO Port State Measures Agreement to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA will be shortly used throughout this paper) on 5 June 2016 has activated a set of duties and responsibilities for States Parties and other relevant entities. ***Global Relevant constraints include:*** (i) shortcomings in national policies, laws and by-laws; (ii) weak institutional and operational capacities, particularly with regard to Monitoring, Control and Surveillance (MCS); and, (iii) **poor cooperation and coordination nationally, among states as well as at the regional level.**⁸ In response, FAO has formulated a global capacity development Programme to “Support the Implementation of the FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing and Complementary Instruments”. The goal of this Programme was to contribute to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing and to improve the sustainability of fisheries. Its development outcome is to achieve the cohesive implementation at national and regional levels of the provisions of the PSMA and complementary international instruments and regional mechanisms to combat IUU fishing.⁹

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

From my legal point of view, it is obvious that the possible solutions to implement PSM need to be studied/analysed and **set up as a Southeast Asian Criteria/Standard**, furthermore the said model will be proposed to all Southeast Asian countries as Possible Model to implement port State measures for combating IUU fishing with clear guidance in the same direction among the Southeast Asian countries concerns. This study is created through documentary review to **extract the major legal obligations and criteria of port State measures** as a significant tool to combat IUU fishing which designate



in the 2009 FAO Port State Measures Agreement (PSMA) and then collect common constraints/problems and proposed solution/activities to solve those problems/constraints of Southeast Asian countries. By this means of study, it is shown that what the fundamental NEEDs for effectively implementing PSMA of Southeast Asian countries are. After that, ways to create possible model through step-by step mood are; 1) to select some major obligations of PSMA which require all States to comply with, 2) to set up the group of common constraints/problems especially proposed solution/activities made by each country concerns, 3) to collect various international recommendations particularly FAO legal/technical advises during several workshops/training program organized by FAO in the region, 4) to mix and match all relevant information as outcome of working in step 1), 2) and 3) by organizing in separate section/topic and finally 5) to propose Possible Solutions to Implement Port State Measures Agreement in Southeast Asia,

II. Global/Regional Initiatives:

1. The benefits of ratifying and implementing the 2009 FAO Port State Measures Agreement

The PSMA was adopted by the FAO Conference in 2009.¹⁰ The main purpose of the PSMA is to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing through the implementation of port State measures. The PSMA envisages that parties, in their capacities as port States, will apply the PSMA in **an effective manner to foreign Fishing vessels when seeking entry to ports or while they are in port**. The application of the measures set out in the PSMA will, inter alia, contribute to harmonize port State measures, enhanced regional and international cooperation and block the flow of IUU-caught fish into national and international markets. The PSMA will enter into force 30 days after the deposit of the 25th instrument of ratification, acceptance, approval or accession. The PSMA is binding and stipulates *minimum standard of port States measures*. However, countries are free to adopt more stringent measures than those outlined in the PSMA.¹¹

¹⁰ FAO Conference Resolution 12/2009 approving the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.

¹¹ Fisheries and Aquaculture, FAO Website

In order to have full effect and to be enforced on a national level, *the requirements of the PSMA should be incorporated into national legislation*. Even before the PSMA has entered into force, States, including those that do not wish to become a party, could implement the port State measures set out in the PSMA Through its regular work and contacts with countries, FAO encourages them to include port State measures in their national legislation, and actively promotes the implementation of the PSMA in project work. It might not be obvious to countries why port State measures are important in fight against IUU fishing, and why they should be addressed in updating existing, or adopting new, legislation. A brief review of the benefits of ratifying and acceding to the PSMA and implementing its provisions is useful. These considerations are in addition to the positive effect of ratification and accession of the PSMA by as many States as possible, as soon as possible, so as to lead to its early entry into force and its universal acceptance.¹²



IUU fishing is a major problem in capture fisheries and poses a serious threat to the effective conservation and management of many fish stocks. IUU fishing can at worst lead to the total collapse of a fishery or at least seriously impair the condition of fish stocks, including efforts to rebuild stocks that have been over fished. These situations, in turn, are likely to lead to a loss of economic revenue, both directly through fish

sales, and indirectly through social opportunities, such as employment.¹³ Enhanced port State measures have an important role in combating IUU fishing, principally because it complements the efforts of flag States in fulfilling their responsibilities under international law. The PSMA provides a legal right to port States in inspecting and verifying that vessels not flying their flags and seeking permission to access their ports, or already in their ports, have not engaged in IUU fishing activities.

Moreover, the PSMA provides right for flag State in controlling over vessels as the PSMA requires the flag State to take certain actions, at the request of the port State, or when vessels flying their flag are determined to have been involved in IUU fishing activities. This responsibility for flag States should ensure that they continue to exercise control over vessels flying their flags in areas beyond their national jurisdiction. The PSMA requires also better and more effective cooperation and information exchange among coastal States, flag States and regional fisheries management organization and arrangements (RFMOs).¹⁴

In addition, the PSMA seeks to prevent the occurrence of so-called ports of non-compliance (formerly known as ports of convenience). Countries operating ports of non-compliance do not regulate effectively the fishing and fishing-related activities that take place

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

in the ports, including determining whether IUU-caught fish are landed, transhipped, processed and sold in the ports. Ratifying or acceding to the PSMA and implementing its measures robustly will reduce the number of ports of non-compliance and opportunities for vessels to dispose of IUU-caught fish with relative ease. Moreover, being party and its implementation of PSMA will contribute to strengthened fisheries management and governance at all levels.¹⁵ Port State measures are a cost-effective tool in ensuring compliance with national law and regional conservation and management measures adopted by RFMOs. This is because port States do not have to expend time, effort and resources in monitoring, pursuing and inspecting vessels at sea. Port inspections and controls are very much cheaper and safer than alternative, more conventional air and surface compliance tools. Port State measures, if used in conjunction with catch documentation schemes (CDS), have the potential to be one of the most cost-effective and efficient means of combating IUU fishing.

Implementing port State measures through national legislation will give an incentive to establish coordinated procedures and facilitate intra-agency cooperation. As a compliance and enforcement tool, port State measures will have a positive influence on fisheries conservation and management by contributing to more accurate and comprehensive data collection, enhancing vessel reporting to national administrations and RFMOs, permitting assessments concerning the extent to which vessels have complied with operational authorizations and licenses to fish, promoting regional fisheries cooperation and harmonization among coastal States and RFMO Members.



However, regional cooperation can assist port States and other States that are RFMO members by ensuring that **they benefit from information obtained through the implementation of port State measures.**¹⁶ The PSMA facilitates and strengthens regional cooperation, including harmonization through RFMOs' role in implementing the PSMA.

The PSMA's provisions focus on denial of access to ports, port inspections, prohibition of landing, and detention and sanction which can be believed to prevent fish caught from IUU fishing activities before reaching national and international markets. By making it more difficult to market fish through the application of port State measures, the economic incentive to engage in IUU fishing is reduced. In addition, many countries have also decided to prohibit trade with countries that do not have port State measures in place.¹⁷

The adoption of the PSMA sought to enhance fisheries conservation and management, to

¹⁵ Ibid.

¹⁶ Ibid

¹⁷ Ibid, p.2

combat IUU fishing and to reduce the volume of IUU-caught product entering national and international markets. By reducing incomes from IUU fishing activities, the international community was of the view that the incentive to engage in such fishing would be reduced. Used in combination with other tools, port State measures should reduce the level of IUU fishing globally.

2. FAO's efforts in support of the implementation of the Port State Measures Agreement

FAO provided several technical supports to implement the PSMA for example;

2.1 Technical meeting

In accordance with a request from the FAO Committee on Fisheries (COFI) in 2011, FAO convened an informal open-ended technical meeting in November 2011 to review draft terms of reference (TORs) for the ad hoc working group, referred to in paragraph 6 of Article 21 of the PSMA, concerned with the requirements of developing States.

2.2 Capacity development

FAO has initiated a global series of regional workshops which aim to:

- provide essential information about the PSMA focusing on the role, responsibilities and obligations of the port State
- raising awareness about the benefits of implementing the PSMA
- facilitate knowledge building and skills development for managers and inspectors in relation to the PSMA implementation
- review stakeholders' perspective on port State measures and good governance issues
- **promote the strengthening and harmonization of port State measures at regional level**
- highlight the importance of developing concerted actions between port States and flag States in implementing port State measures effectively
- encourage the reinforcement of the implementation of existing Regional Plans of Action to combat IUU fishing and the development of new ones
- facilitate exchange of national experiences in combating IUU fishing, including through participation in group problem solving exercises and other participatory activities dealing with real world situations
- highlight the role of regional fisheries management organizations and arrangements (RFMOs/RFMAs) in the implementation of the PSMA
- draw up related national and regional action plans and recommendations in general, legal and policy, institutional and capacity development and operations terms
- identify opportunities for regional cooperation to implement port State measures

Moreover, FAO's Technical Cooperation Program and Projects for assistance and capacity building provided technical assistance to some developing countries such as Ghana, Thailand St.Kitts and Nevis, Bahamas by having areas of technical assistance in;

- Legislative review and drafting
- National Plan of Action on IUU Fishing
- Action Plan to address EU IUU fishing concerns
- Training on monitoring, compliance and surveillance
- Boarding and Port Inspection Training
- Law enforcement training
- Training of Magistrates and other judicial officers
- Inter-agency cooperation¹⁸

For Southeast Asia, there are several series of regional workshops which were organized by FAO/APFIC and SEAFDEC, for example;

- FAO/APFIC/SEAFDEC Regional Workshop on Port States Measures to Combat Illegal, Unreported and Unregulated Fishing” Bangkok, Thailand, 31 March - 4 April 2008
- The FAO/APFIC Regional Workshop to Support the Implementation of the 2009 FAO Port State Measures Agreement, Bangkok, Thailand during 23-27 April 2012
- The Experts Group Meeting on Port State Measures in Southeast Asia, organized by SEAFDEC, 12-14 November 2012, Bangkok, Thailand
- The Workshop on Regional Cooperation for Implementation of Port State Measures to Improve Fisheries Management and Reduce IUU Fishing in Southeast Asia, organized by SEAFDEC, 7-10 November 2016 in Bangkok, Thailand
- The Experts Meeting on Regional Cooperation to Support the Implementation of Port State Measures in Southeast Asian Region, organized by SEAFDEC, 2-4 February 2016, Bangkok, Thailand
- FAO Workshop on Formulation of a National Strategy and Action Plan for Compliance with the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, organized by FAO/RAP, 4 – 8 September 2017, Bangkok, Thailand

III. Some Major Recommendations from FAO to Southeast Asian Region for Implementing Port State Measures to Combat IUU Fishing¹⁹ ;

- Subject to General Aspect, Southeast Asian Fisheries Bodies should
 - Conduct regional workshop to promote the benefits of Port State Measures (PSM)
 - Set up a regional network to improve bilateral and multilateral cooperation particularly in information-sharing, support from existing

¹⁸ Blaise Kuemlangan, “FAO’s Initiatives to fight Illegal, Unreported and Unregulated Fishing”, Development Law Service, Food and Agriculture Organization of the United Nations, Powerpoint Presentation during FAO Workshop, p.6

¹⁹ Report of FAO/APFIC Regional Workshop to Support the Implementation of the FAO Port State Measures Agreement, Bangkok, Thailand, during 23 – 27 April 2012

Regional Fisheries Bodies and Arrangements to establish the network is desired

- Subject to Legal and Policy Aspect, Southeast Asian Fisheries Bodies should
 - conduct a regional training program on the legal interpretation of Port State Measures Agreement (PSMA) for legal experts and high ranking officials.
 - develop an advisory document on preliminary actions that support PSM within existing legislation.
 - promote sub-regional arrangements for cooperation on PSM and combating IUU fishing.
 - seek to harmonize policy and legislation bilaterally and at regional level (possibly through the ASEAN mechanism)
 - seek to include RFMOs in regional policy and IUU fishing related activities.
 - In preparation for implementing PSMA Article 6, promote a regional MOU between competent fishery organizations to share and update information on PSM;
 - establish a regional database on national PSM regulations,
 - develop consolidated information on national procedures for access to ports,
 - IOTC should support harmonization on PSM among her members.
- Subject to Institutional and Capacity Development, Southeast Asian Fisheries Bodies should, *as part of the recommendation to establish a MOU*:
 - convene a regional coordination meeting among relevant Regional Fisheries Bodies (RFBs) to find agreement on the establishment of a regional database and information system, including a record of authorized vessels, IUU vessel lists, list of designated ports and port inspection results.
 - strengthen the cooperation among existing RFBs, including through the drawing up of formal agreements and other mechanisms, such as coordination meetings, with the possible assistance of FAO.
- As part of the regional harmonization activities;
 - convene a regional working group from the representatives of each country to establish regional Standards of Practices (SOPs) for port inspections
 - strengthen the implementation of the RPOA-IUU, including securing additional technical and financial resources. In this regards the Secretariat and participating countries are encouraged to secure additional funding.
- Subject to Operations, under a regional MOU referred above;
 - Web-based information/toolkit for inspectors is made available.
 - Establish a scheme for joint and reciprocal inspections.

IV. Summary of Constraints/Problems, Challenges and Priority Activities on PSM Implementation

1. General Major Constraints in Implementing PSMA

There are many constraints and challenges to the implementation of the PSMA, particularly for developing countries. This is implicit in Article 21(4) of the PSMA, which



calls on Parties to cooperate to establish funding mechanisms to assist developing States in the implementation of the PSMA. The mechanisms are to be directed specifically towards: (i) developing national and international port State measures; (ii) developing and enhancing capacity, including for MCS and for training at the national and regional levels of port managers, inspectors, and enforcement and legal personnel;

and (iii) MCS and compliance activities relevant to port State measures, including access to technology and equipment.²⁰

One of the outcomes of the global series of FAO Regional Workshops to improve human and technical capacity for countries to strengthen and coordinate their port State measures, was to identify clear steps that national fisheries administration might take to develop port State measures. In this context, working groups in each of the Workshops identified constraints to the development of port State measures and proposed ways to overcome those constraints. The constraints identified were generally consistent throughout the various regions. They related mainly to institutional arrangements, technical requirements, legal considerations, financial needs, human resource development, and regional and international concerns. They form the basis for the elaboration of constraints and challenges.²¹

Subject to Legal considerations, the constraints regarding the implementation of the PSMA range from the national to international levels. At the regional level, many countries face constraints in ensuring full and effective legal implementation of measures and decisions of RFMOs in which they participate.²² These situations may result in the failure of national law to implement legally international and regional instruments and obligations. An associated problem is that national law could be inconsistent with requirements in the PSMA and associated instruments. To meet these

²⁰ David J. Doulman and 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”, FAO Fisheries and Aquaculture Circular No. 1074 – FIPI/1074 (En) : ISSN 2070-6065, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, Rome, 2012, p.87

²¹ Ibid.

²² Ibid.

challenges, it would be important to consider the legal checklist against national legislation, and identify gaps, inconsistencies and proposed revisions.²³

The challenges arisen from developing countries are, for example, as follows;

- Lack of integration of legislative requirements into national policy was cited in the FAO regional workshops²⁴ **as a constraint** to prioritizing legal implementation.
- weak or inadequate legal framework.
- Very old Fisheries and related laws, this occurs to a greater extent in developing countries
- to seek legal assistance from donor countries or organizations to review and update legislation.
- to promote the political will needed to adopt the new legislation.
- inadequacy of penalty levels and inconsistency of such levels throughout a region.
- to address penalty levels on a regional basis to promote their impact, consistency and effectiveness.
- the limited number of bilateral and/or multilateral arrangements between coastal States in many regions
- lack of harmonization or inconsistency of legislation in the region
- to seek harmonization through the implementation of the PSMA as a minimum standard.

2. Common Constraints/Problems among Southeast Asian Countries

2.1 Legal Constraints/Problems

- Subject to implementation of laws and regulations (insufficient legal provision), **challenges** of Brunei, Cambodia, Indonesia, Malaysia, Singapore, Thailand and Vietnam are;
 - Inconsistent law interpretation
 - Amendment/updating existing regulation
 - Reviews and updating Fisheries Act²⁵
- Regarding interpretation of PSMA, **challenges** of Brunei, Cambodia, Indonesia, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam are;
 - Interpretation of non-fisheries stakeholder is not comprehensive
 - Need MOU between concerned government agencies
 - Need assistance from legal officers of FAO in the correct interpretation of the provisions of PSMA for the law enforcement officers and managers.
 - Need assistance in the correct translation of PSMA into local language.

²³ Ibid.

²⁴ Ibid.

²⁵ Annex 23: Updating of Summary of Constraints/Problems, Challenges and Priority Activities on PSM Implementation, Report on Regional Cooperation of Port State Measures to Improve Fisheries Management and Reduce IUU Fishing in Southeast Asia, 7-10 November 2016, Bangkok, Thailand, p. 1

2.2 Operational Constraints/Problems

- Issues relating to standard operating procedures (SOP) in implementing PSM with any scale of foreign vessel (i.e. lack of, incomplete or out of date), **challenges** of Brunei, Cambodia, Indonesia, Myanmar, the Philippines, Singapore, and Vietnam are;
 - Renew and recognize fishing port operational procedure to support PSM
 - Development and updating of harmonized SOP on vessel inspection at port for more comprehensive and guidance of all AMS
 - Identify needs and capacity building for staff concerns on relevant PSM implementation
 - Difficulties in verification of vessel documentation and inspection
- For port management under different agency; insufficient inter-agency cooperation for PSM implementation, **challenges** of Brunei, Cambodia, Indonesia, Myanmar, the Philippines, and Vietnam are;
 - Sharing information on vessel entry permit among concerned agencies is importance such as DOF, Harbor Department, Custom, FMO
 - Establishment of ASEAN Fish Market Federation to promote and implement Asian Catch Documentation Scheme (ACDS)²⁶

2.3 Human Resource Constraints/Problems

Brunei, Cambodia, Indonesia, Myanmar, the Philippines, Thailand and Vietnam have common constraints on the limited capacity of implementing facilities and officer concerned and require 1) technical assistant to develop capabilities across all levels, e.g. policy makers, port managers, inspectors etc. and 2) technical support on how to operate communication equipment as their priority activities.

2.4 Infrastructure Constraints/Problems

2.4.1 Brunei, Cambodia, Indonesia, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam have common constraints on the insufficient infrastructure for PSM, namely infrastructure for port and for information systems, thus they require 1) assistance to help for setting up or upgrading electronic databases and system i.e. electronic catch document scheme, database to record catch records, VMS, MCS, GPS/AIS/other communication systems, and 2) understanding on requirement and criteria of appropriate designated port as their priority activities.

v2.4.2 Brunei, Cambodia, Indonesia, Malaysia, Myanmar, the Philippines, and Vietnam have common constraints on the insufficient of budget for infrastructure to support PSM i.e. infrastructure for port and for information systems, thus they request 1) financial support from FAO for development and implementation of their port management system and 2) budget to help set up upgrade electronic databases and system i.e. electronic catch documentation scheme, database to record catch records, VMS and MCS and other communication systems²⁷ as their priority activities.

2.5 Information Constraints/Problems

2.5.1 Brunei, Cambodia, Indonesia, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam have common constraints on non-updated IUU fishing vessel list from RFMOs, thus they would like to propose FAO for publishing consolidated list of IUU fishing

²⁶ Ibid.

²⁷ Ibid, p.1-2

vessels on its website, to remove the need for countries to check various RFMO or international organization websites as their priority activities.

2.5.2 Brunei, Cambodia, Indonesia, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam have common constraints on lack of awareness about PSM among the stakeholder and concerned agencies, thus they need to have capacity building and awareness raising among government agencies and relevant stakeholders as their priority activities.

2.5.3 Cambodia, Indonesia and the Philippines have common constraints on lack of sharing information between agencies where control of ports fall under different port authorities, thus they would like to request assistance from FAO to propose the roles and responsibilities of the various agencies for PSM as their priority activities.²⁸

3. The 2009 FAO Port State Measures Agreement (PSMA) and Main Provisions

3.1 Key Elements of the PSMA

The PSMA entered into force on the date of 5 June 2016. As at 18 October 2017, there were 51 Parties to this agreement.²⁹

- **Framework –General**

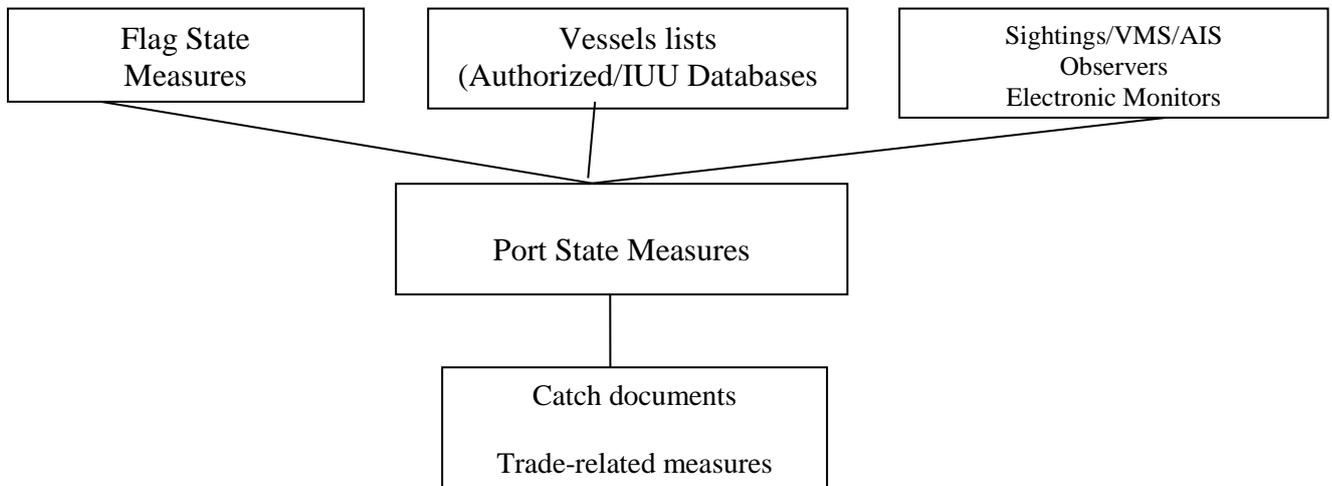
- Elaborates information requirements for vessel reporting and inspection reports
- Requires reports/information to be transmitted
- Provides guidelines for inspections and training of inspectors
- Elaborates the role of parties as flag States
- Provides for assistance to developing States
- Serves as a Minimum Standard for global harmonization of port State measures that will have strong economic and legal impacts for IUU vessel operators.

- **Linkages PSM and other key Monitoring, Control and Surveillance (MCS) tools**

²⁸ Ibid, p.3

²⁹ From Website of Fisheries and Aquaculture Department, Food and Agriculture Organization of the United Nations, detail has been shown in Annex 1 of this paper

LINKAGES
PSM AND OTHER KEY MCS TOOLS³⁰



- **Example Role and Activities of RFMOs in the PSMA³¹**
 - Tools for assessment of evidence of IUU fishing such as IUU/Authorized Vessel Lists and reporting, and Catch Document Scheme (CDS)
 - Communication and notification requirements as all stages (entry, inspection, denial of use)
 - RFMO to develop procedures to identify “ports of non-compliance”
- **Example Impact of PSMA to RFMOs**
 - Strengthened, cost-effective PSM
 - Strengthened linkages, i.e. comprehensive MCS system
 - RFMO port State measures are binding on members
 - Support for developing State members³²
 - Ratify this agreement and strengthen RFMO measures
 - Implementation – Integration in several relevant areas of work in
 - Legislation
 - Procedures
 - Interagency cooperation
 - Capacity Building

³⁰ Judith Swan, “FAO PORT STATE MEASURES AGREEMENT”, presented as a powerpoint presentation for ILLEGAL, UNREPORTED AND UNREGULATED FISHING: 10TH INTERNATIONAL FORUM, held during 16-17 March 2017, Chatham House, London, p. 2.

³¹ Ibid, p.4.

³² Ibid, p.5

- Strengthen Information and Communication Systems
- Strengthen flag State measures
- Support ongoing assessment and implementation of port State measures at all levels³³

3.2 Basic Framework for the Implementation of PSMA

The basic framework for implementing PSMA consists of major following actions;

3.2.1 Definitions (Art.1)

The relevant questions are 1) Are some core definition such as “vessels”, “fishing related activities” consistent with the provision of PSMA? 2) Are all the relevant definitions included in the national legislation? 3) Definition should be in law but also should be understandable among law enforcers. Those are some of the main topics to be analyzed and discussed among authorities concerns.

3.2.2 Designated port (Art.7)

The designation of Ports is a key element for the implementation of the PSMA and is the main issues that shall be covered by the national law of each State to achieve this provision of the PSMA.

3.2.3 Requirements for port entry/use of port (Art.8 to 11)

- Foreign vessels must be obliged to request entry and provide required information, The question is “How far in advance is the information required?”, this issue still differently implement in each port State because of different national legislation required.
- Port State must issue written authorization, the question is whether or not “Is there a requirement in law for the vessel to present the authorization?”
- Vessel (or agent) must be obliged to present a authorization upon arrival.

As well as the Deny of port entry, according to the PSMA, Denial of Use of Port after entry is a key element in the implementation of the PSMA.³⁴ However, the Party should ensure that the legal power to Denial the Use of Port AFTER ENTRY in the following cases: Also noted that in those cases, no inspection is required.

- When there are No Authorization by flag State and/or coastal State
- Where there is CLEAR evidence of violations within waters of a coastal State
- When there are NO confirmation from the flag State, if requested

³³ Ibid, p.8.

³⁴ Blaise Kuemlangan, “The Implementation of the Agreement”, Development Law Service, Food and Agriculture Organization of the United Nations, Powerpoint Presentation during FAO Workshop on Formulation of a National Strategy and Action Plan for Compliance with the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, organized by FAO/RAP, 4 – 8 September 2017, Bangkok, Thailand, p.10

- When there are Reasonable Grounds to believe IUU fishing, unless rebutted by the vessel³⁵

3.2.4 Denial of port entry (Art. 9)

Vessels must be denied port entry where there is sufficient proof of IUU fishing, including where it is on an RFMO IUU Vessel List. The question is whether or not “Is there power in national legislation to deny entry?” And other question is “How is the determination made around “sufficient proof”? Furthermore, the PSMA requires the State to have in law provisions to ensure the legal power to deny the use of port after entry, when AFTER INSPECTION there are reasonable ground to believe IUU fishing has taken place.³⁶

3.2.5 Denial of port use after entry-no inspection required (Art.11)

This legal action for denying of port use after entry will be enforced with the following cases;

- No authorization by flag State and/or coastal State
- Clear evidence of violations within waters of a coastal State
- No confirmation from the flag State, if requested
- Reasonable grounds to believe IUU fishing, unless rebutted by the vessel

Denial of use of port after entry-following an inspection (Art.12), will apply to the case which has already been inspected and there are reasonable grounds to believe IUU fishing has taken place, moreover, the question may arise whether or not “is there legal powers in national legislation to act when there are enough evidence mentioned earlier?” and also another question may come up whether or not “Are there adequate penalties in place?”³⁷ In place means available in the national legislation of port State.

3.2.6 Inspection procedures and results (Art. 13 and Art.14)

After finishing all procedures of inspection, the report of inspection results must be provided by port State concerns, however some questions may be arisen whether or not “Does the entity have a clear process for determining priority for inspection?” or “Is there a requirement to produce reports of inspection consistent with Annex C regarding report of the results of the inspection of the PSMA?”³⁸

3.2.7 Transmittal of inspection results (Art.15)

The PSMA requires a port State provides transmittal of inspection results to flag State, coastal States, national State of master RFMOs, nevertheless the question would be raised whether or not “Is there a requirement under the national law (of port State) to transmit the results of inspections to those relevant States?”

³⁵ Ibid.

³⁶ Ibid, p.11

³⁷ Ibid, p.13

³⁸ THE 2009 FAO AGREEMENT ON PORT STATE MEASURES TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING

3.2.8 Penalties – To assess the effective implementation of the PSMA, it is important to update the penalties in force and make the necessary adjustments to ensure adequate penalties for illegal use of port by foreign vessel and for assisting in the use of port by suppliers etc., where use has been denied.³⁹

3.2.9 Integration and Coordination – Subject to an integration and coordination among authorities from various governmental agencies concerns, core operational factors/issues are as follows;

- Cross-authorization officers for fisheries enforcement
- MOUs, other arrangements between governmental agencies
- Protocols for information exchange⁴⁰

3.3 The Implementation of the PSMA⁴¹ to combat IUU fishing

3.3.1 Policy:

- Setting PSMA as a Minimum Standard
- Integration and development of relevant policies, plans or strategies

3.3.2 Legal:

- Conformity and strong linkages between national laws, regulation and practices and the PSMA

3.3.3 Institutional

- Capacity and cooperation
- Cost-Benefit analysis
- No clear mandate
- Insufficient capacity
- Poor inter-agency cooperation
- Poor information, communication mechanisms
- Financial needs

In general, the PSMA aims Parties to make adjustments at the national level for the implementation of the PSMA. Those adjustment may include: policy, law and institution but also MCS, operations, procedures and regional mechanism. In terms of policy, the implementation of the PSMA requires an approach that includes policy decisions, legal review and operational procedures. In an opposite way, decisions taken in these three areas could affect the institutional arrangement necessary to support its effective implementation. It is important for States to move

³⁹Blaise Kuemlangan, “The Implementation of the Agreement”, Development Law Service, Food and Agriculture Organization of the United Nations, Powerpoint Presentation during FAO Workshop on Formulation of a National Strategy and Action Plan for Compliance with the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, organized by FAO/RAP, 4 – 8 September 2017, Bangkok, Thailand, p. 13

⁴⁰ Ibid, p.14

⁴¹Ibid, p.1

forward in a coherent manner. Policy must be the driver and guide. States have to first take decisions on broad policy matters that will affect how the legislation and institutional arrangements will be structured and what they will contain. Policies can also provide a strong support to the implementation of actions by prioritizing them on the national and sectorial agenda, including the implementation of the PSMA as a minimum standard.⁴²

At the legal level, the implementation of the PSMA assumes that the State will do some legal adjustments to warranty conformity and strong linkages between national framework and the PSMA contents. It includes the development of the national legislation required for the effective implementation of the Annexes of the PSMA through national fisheries laws and regulations.⁴³

At the institutional level, the implementation of the PSMA assumes to develop or improve institutional capabilities in general (human, financial, more technology) and to strengthen cooperation among national agencies (developing inter-agencies agreements, sharing information mechanisms) and other States i.e. port, flag, coastal and market State.

3.4 Possible Constraints Regarding the Implementation of PSMA at National level

At national level, the Checklist Document suggests to take some initial considerations for the implementation of the PSMA when a State become a Party of the PSMA, shown below;

- Review and collect the national legislation and procedures in relation with the implementation of PSM, as well as flag, coastal and market State responsibilities and duties.
- Identify and collect information in relation to integration and coordination mechanisms at the national, sub-regional, regional and international levels. In this matter, it is important to review if the legislation ensure the integration and coordination of fisheries related port State measures with the broader system of port State controls, including for example vessel monitoring system (VMS) and observer programs.⁴⁴
- In relation with the role of a Party as a flag State, the PSMA gives some discretion to each Party to decide the application of the PSMA, but it will promote a better compliance of conservation and management measures in general.
- Finally, identify needs for assistance, training and cooperation should be very useful when a State become a Party.⁴⁵

⁴² Ibid.

⁴³ Ibid, p.2.

⁴⁴ Ibid, p.6.

⁴⁵ Ibid.

4. Framework of Proposed Possible Solutions to Implement port State Measures in Southeast Asia

The key issues for future actions and regional cooperation in effectively implementing port State measures to combat IUU fishing in the Southeast Asian Region are;

1. Ensuring political will and regional supports;
2. Harmonization and standardization;
3. Legal framework;
4. Regional MCS network;
5. Capacity building and/or Subject Needed; and
6. Information sharing and activity coordination.

Issue 1: Ensuring political will and regional supports

- Involve APFIC, ASEAN and SEAFDEC;
- Raise public awareness through communication strategies and campaigns, and

Issue 2: Harmonization and standardization

- Develop regional minimum standards for port State measures,
- Agree on appropriate mechanisms, under APFIC, SEAFDEC, ASEAN and/or the RPOA;
- Elaborate standard operation procedures and
- Designate ports where port State measures will be implemented.

Issue 3: Legal framework

- Cooperate on a regional level to develop a legal instrument to implement port State measures, based on relevant international instruments;
- Consider the establishment of a regional legal working group to address implementation, strengthening and harmonisation of port State measures
- Identify key legal constraints and needs for the region;
- Establish a framework of cooperation and networking among countries for sharing information/knowledge, lesson learned, successful cases and relevant practices;
- Review/Revise and update national legislation to effectively implement port State measures;
- Discuss and develop bilateral and/or regional mechanisms to implement port State measures in the region;
- Request expert assistance to set up the legal framework to implement port State measures, and

Issue 4: Regional and sub-regional MCS networks

- Engage with other initiatives dealing with topics relating to oceans and coastal environment, where IUU fishing is also an issue, and
- Sharing of MCS tools.

Issue 5: Capacity Building and/or subject needed

- Port inspection and boarding procedures and transmittal of inspection reports;
- Orientation on systematic cooperation and sharing information;
- Dealing with presumed fishing vessel to have engaged in IUU fishing;
- Techniques on how to detect IUU fishing fraudulent document, mis-declaration of species, vessel renaming and reflagging

Issue 6: Information sharing and activity coordination

- inter- and intra-government coordination;
- timely coordination between SEAFDEC member port States;
- coordination among national authorities, and
- promote inter-agency cooperation within governments, and
- coordinate with industry, mindful that it will be closely involved in the implementation of port State measures and possible traceability schemes.

4.1 Possible Model for a Party of PSMA

At present, Indonesia, Myanmar and Thailand became a Party of PSMA, while some countries are during domestic process to ratify/access/accept the PSMA in the future. Thus the possible model for Party will be proposed below by analysing the obligations set forth in the PSMA and capabilities of Party of PSMA in this region;

4.1.1 Duties of Party of PSMA

a. Policy – to implement PSMA as a minimum standard of her country

-to enact specific national laws and regulations to support the implementation of port State measures in its own countries

- to make legal adjustments at the national level for the implementation of the PSMA

- to integrate and develop relevant policies, plans or strategies

- to provide a strong support to the implementation of actions by prioritizing them on the national and sectorial agenda

- to cooperate and exchange information with relevant RFMOs, including measures adopted by RFMOs in relation to objectives of the PSMA⁴⁶

- to move forward in a coherent manner

b. Legal – conformity and strong linkages between national laws, regulation and practices and the provision of PSMA

- review and collect the national legislation and procedures in relation with the implementation of the PSMA, as well as flag, coastal and market State responsibilities and duties

⁴⁶ Judith Swan, FAO Consultant, Common Oceans ABNJ Tuna Project, Rome, Italy, “Implementation of Port State Measures : Legislative Template Framework for Procedures Role of Regional Fisheries Management Organizations”, Food and Agriculture Organization, Rome, 2016, p.81

national legislation

- designate legal power to Denial the Use of port AFTER ENTRY in national legislation
- ensure that there are specific provisions in the national legislation to support in implementation of PSMA especially for providing legal authority for officials and inspectors
- to amend relevant penalties in national legislation for violating the provisions of PSMA

- c. Institutional**
- strengthen capacity and cooperation
 - encourage to do cost-benefit analysis
 - identify clear mandate
 - promote inter-agency cooperation
 - develop information, communication mechanisms
 - seek for financial support from regional donors

d. Capacity Building – to identify needs for assistance, training and cooperation should be very useful when a State become a Party of PSMA

4.1.2 Possible Solutions to implement the PSMA for non-Party

Legal Framework:

Non-Party should

- consider to implement port State measures (PSM) while they have no legal obligation to comply with the provisions of PSMA
- provide essential information about the PSMA focusing on role, responsibilities and obligations of the port State
- raising awareness among nationals about the benefits of implementing the PSMA
- Promote ways to strengthen coordination and collaboration among various agencies concerned at national, regional and global level
- review stakeholders' perspective on port State measures and good governance issues
- participate in related national and regional action plans and recommendations in general, legal and policy, institutional and capacity development and operations terms
- review and redrafting of specific laws and/or regulations dealing with the application of port State measures

Regional Fisheries Bodies/Arrangements should

- highlight the importance of developing concerted actions between port States and flag States in implementing port State measures effectively
- to establish a regional MCS network in the Southeast Asian region
- encourage the reinforcement of the implementation of existing Regional Plans of Action to combat IUU fishing and the development of new ones
- facilitate exchange of national experiences in combating IUU fishing, including through participation in group problem solving exercises and other participatory activities dealing with real world situations

- identify opportunities for regional cooperation to implement port State measures
- conduct regional workshop to promote the benefits of Port State Measures (PSM)
- set up a regional network to improve bilateral and multilateral cooperation particularly in information-sharing, to establish the network is desired

Legal and Policy Aspect:

Regional Fisheries Bodies/Arrangements should

- conduct regional training program on the legal interpretation of PSMA for legal experts, high ranking officials and relevant authorities
- promote sub-regional arrangements for cooperation on PSM and combating IUU fishing.
- seek to harmonise policy and legislation bilaterally and at regional level (possibly through the ASEAN mechanism)
- establish a regional database on national PSM regulations
- IOTC should support harmonization on PSM among her members
- convene a regional coordination meeting among relevant Regional Fisheries Bodies (RFBs) to find agreement on the establishment of a regional database and information system, including a record of authorized vessels, IUU vessel lists, list of designated ports and port inspection results
- establish a MOU among countries in the region for cooperating in data sharing, transfer of technology and other related actions as part of the regional harmonization activities;
- strengthen the implementation of the RPOA-IUU, including securing additional technical and financial resources as part of the regional harmonization activities;
- convene a regional working group from the representatives of each country to establish regional Standards of Practices (SOPs) for port inspections
- prepare for implementing PSMA Article 6, promote a regional MOU between competent fishery organizations to share and update information on PSM;

Non-Party should

- promote ways to strengthen coordination and collaboration among various agencies concerned at national, regional and global level
- develop an advisory document on preliminary actions that support PSM within existing legislation.
- establish MCS network in the region and appropriate equipment to combat the IUU fishing especially through port State measures
- assist setting up or upgrading electronic databases and system such as electronic catch document scheme
- initiate more training for trainers program as many as possible throughout the country to make more qualified staffs who well understand on port State measures and conservation and management measures
- prepare for implementing PSMA Article 6, promote a regional MOU between competent fishery organizations to share and update information on PSM;
- develop consolidated information on national procedures for access to ports

- sharing lesson-learned experiences and expertise with neighbouring countries in order to solve common difficulties among ourselves

5. Conclusive and Recommendation

This study explores existing situation of combatting IUU fishing through port State measures of Southeast Asian countries, it is obvious that there are variety of means/ways to combat IUU fishing by implementing port State measures through the 2009 FAO Port State Measures Agreement so called PSMA. It depends on legal system, policy of fisheries management, development of port inspection, integration among several agencies and officials concerns in solving



problems arisen from illegal, unreported and unregulated fishing. However, the political will of leader of each country is very significant to lead nations into correct or incorrect way. To achieve our common goals, the common areas of interest such as capacity building, information sharing, more cooperation/ participations and supporting of the relevant parties such as policy-makers, all stakeholders both government sector and private sector are positively needed.

Due to the variety of important factors in implementing port State measures in Southeast Asian region, the writer has a strong believe that the possible solutions to implement port State measures in this region needs to be developed and proposed for implementing in the real world. In addition, this study would be the first step of all countries concerned in this region to internationally develop/establish some essential actions to cooperate and coordinate with some global fisheries organizations/bodies/arrangements to promote the implementation of PSMA for combating IUU fishing activities within Southeast Asian waters.

The writer also hope that this proposed possible solutions will be widely used as an initially significant step to enhance closer cooperation and coordination in the implementation of Port State Measures Agreement (PSMA) among Southeast Asian nations in the near future. Furthermore, this proposed possible solutions can be open-ended instrument for Southeast Asian nations to be used as regional guidance for Southeast Asian countries to implement Port State Measures Agreement based on this proposed possible solutions for the common benefit to close cooperation and coordination in combating IUU Fishing in our region.

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