UNIVERSITY OF
Southampton
School of Law

Committee Secretary
Joint Standing Committee on Treaties
PO Box 6021
Parliament House
Canberra ACT 2600
Australia

1 February 2014

Dear Sir/Madam

Please find on the following pages a submission to the Committee in relation to its inquiry into the **Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing** (Rome, 22 November 2009).

Yours faithfully

Andrew Serdy
Reader in Public International Law

Submission to the Joint Standing Committee on Treaties

Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Rome, 22 November 2009)

Andrew Serdy

Faculty of Business and Law

University of Southampton

United Kingdom

Summary

The Committee should support action by Australia to become party to this Treaty, but at the same time seek more information and make specific recommendations on two matters inadequately dealt with in or omitted altogether from the National Interest Analysis: (1) the concept of "responsible fishing nation"; (2) the question of whether the legally dubious treatment of unregulated fishing as equivalent to illegal fishing raises issues of consistency with the General Agreement on Tariffs and Trade.

Submission

The Treaty as a whole represents a useful step forward in the management of international fisheries, and a consequence nothing in what follows should be taken as a reason for the Committee to recommend against proceeding to take binding treaty action. There are, however, a number of references in the NIA and a potentially significant omission from it that the Committee may wish to explore further with Government witnesses in its forthcoming hearings on the Treaty. These are considered in turn.

(1) The concept of "responsible fishing nation"

Paragraphs 4 and 9 of the NIA state that ratification of the Treaty would enhance Australia's reputation as a "responsible fishing nation", and there is an additional reference in paragraph 7 to the apparently related concept of "responsible fishing practices", though neither of these terms is defined. While the wisdom of taking on international obligations of any kind solely or primarily for reputational reasons may be doubted, that is not in itself a cause for criticism here, as the other reasons given in the NIA for Australia to become a party to the Treaty are sound enough. More worrying, however, is the appearance in an official document of this type of these nebulous phrases. The Committee should press Government witnesses on what precisely they understand by "responsible fishing nation", in other words what a responsible fishing nation does, or refrains from doing, that distinguishes it from other nations engaged in fishing. Ideally the reply would be that a responsible fishing nation accepts and applies the full rigours of the international law doctrines of State responsibility to fishing conducted

wholly or partly on the high seas, as the best available tool in international law for ensuring that overfishing results in adverse legal consequences that dissuade States from authorising or tolerating it. Yet that is unlikely to be the response given, as the available evidence (see A. Serdy, "Accounting for Catch in Internationally Managed Fisheries: What Role for State Responsibility?" (2010) 15 *Ocean and Coastal Law Journal* 23-84) suggests that neither Australia nor any other State actually does promote State responsibility in any systematic way. Rather, the origin of the phrase appears to lie in the Cancún Declaration of 1992 adopted under the aegis of the Food and Agriculture Organization of the United Nations (FAO),[1] in which "responsible" seems to be no more than a term of general approbation devoid of any specific meaning, and subsequently this use has been perpetuated by the FAO Code of Conduct for Responsible Fisheries.[2] For as long as it continues to be nothing more than a rhetorical device, however, it cannot actually do anything to further the cause of the long-term biological and economic health of the fisheries in question. Thus, if Government officials cannot provide a sensible meaning for the phrase, this would indicate not only that it ought not to have been used in the NIA, but also that from now on it should be avoided in all other contexts too.

(2) Equation of unregulated fishing with illegal fishing and its implications for the Treaty's consistency with the General Agreement on Tariffs and Trade

It is not clear why the NIA did not mention, as it ought to have, that as early as 2004 Australia was suggesting in the annual United Nations General Assembly debate on Oceans and the Law of the Sea that the IUU acronym, standing for illegal, unreported and unregulated fishing, had begun to outlive its usefulness and that "IUU fishing is not one problem but three, each of which requires separate international responses. Those responses must hone in on flag States' responsibility over their vessels when fishing on the high seas, or in the exclusive economic zones of other States. Flag State accountability should be the focus of our efforts".[3]

The NIA appears to have lost sight of this, referring in paragraph 8 in the singular to the "practice of IUU fishing". The Committee may accordingly wish to ask Government witnesses to what extent, if at all, this view was discussed and found support in the negotiation of the Treaty.

---

[1] Declaration of the International Conference on Responsible Fishing, Cancún, Mexico, 6-8 May 1992, <http://legal.icsf.net/icsflegal/uploads/pdf/instruments/res0201.pdf>.

[2] FAO, *Code of Conduct for Responsible Fisheries*, adopted at the 28th session of the Conference of the FAO, 20-31 October 1995, <www.fao.org/DOCREP/005/v9878e/v9878e00.htm>.

[3] See (2006) 25 *Australian Yearbook of International Law* 485 and also Statement by Senator Robert Ray Parliamentary Adviser to the Australian Mission to the United Nations, made on 28 November 2005, <*http://www.unny.mission.gov.au/unny/il_281105.html*>.

The term's origin was in an agenda item at the 1997 annual meeting of the Commission for the Conservation of Antarctic Marine Living Resources,[4] but it was not defined there. It was prompted by the report of the Commission's Scientific Committee, where the words "illegal", "unreported" and "unregulated" occasionally appear together, but mostly singly.[5] The term served and probably continues to serve a useful purpose in the original CCAMLR context, where it gets around the problem that not all members accept that in Antarctica there are coastal States, but is inapt for the widespread use that has since been made of it outside that context, beginning with General Assembly resolution 54/32 (in which it remained undefined).[6] It was left to Article 3 of the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing[7] (IPOA) to define each of the elements, as listed in paragraph 5 of the NIA.

Although the drafters of the definition appear to have put considerable work into distinguishing the three elements of IUU fishing, it is largely in vain, for the IPOA's great weakness is that, apart from the introductory text and a single mention of assistance to a State in "deterring trade in fish and fish products illegally harvested in its jurisdiction," all the measures within it are aimed simply at "IUU" fishing without any further distinction among its elements. The same is true of the Treaty now before the Committee.

For **illegal fishing** and to a lesser extent **unreported fishing** this is largely unproblematic, since there is probably relatively little harm done in treating them identically. This cannot, however, be said of **unregulated fishing**, which is affected by a great deal of confusion that neither the Treaty nor the NIA does anything to dispel. Dissecting the phrase "prevent, deter, and eliminate IUU fishing," in the Treaty's title, it is easy to see why States want to prevent, deter, and eliminate illegal and unreported fishing, but it is unclear how literally one should take their desire to "eliminate" unregulated fishing in view of paragraph 3.4 of the IPOA, which concedes that not all unregulated fishing necessarily violates international law and therefore may not require the application of measures under the IPOA (and, by extension, the Treaty). This is understandable, as few States actually forbid their vessels to fish in parts of the high seas where no fisheries commission yet exists, or one that does exist has only partial species coverage and the vessels fish for species outside its mandate.

The situation is not helped by paragraph 3.3.1 of the definition of unregulated fishing ("in a manner that is not consistent with or contravenes the conservation and management measures of that organization"). This is because, if a State is neither a member of the commission, nor a cooperating non-member that has agreed to abide by the conservation measures, then to say that either the State or the fishing by its vessels "contravenes" such measures defies the basic

---

[4] See CCAMLR, *Report of the Sixteenth Meeting of the Commission, Hobart, Australia, 27 October – 7 November, 1997*, <http://www.ccamlr.org/pu/e/e_pubs/cr/97/all.pdf>, pp 8-13.

[5] CCAMLR, *Report of the Sixteenth Meeting of the Scientific Committee, Hobart, Australia, 27 – 31 October, 1997*, <http://www.ccamlr.org/pu/e/e_pubs/sr/97/all.pdf>, *passim*.

[6] UN doc A/RES/54/32 (19 January 2000), paragraph 10 (see also the 13th preambular paragraph).

[7] See <http://www.fao.org/DOCREP/003/y1224e/y1224e00.HTM>.

principle of the law of treaties that treaties (and obligations under them like international fisheries regulations) bind only their parties and not third States without their consent.

This is not merely a problem of drafting, as it might have been if the phrase "eliminate illegal, unreported and unregulated fishing" had been chosen for the sake of euphony, and what States really wanted to eliminate was not unregulated fishing, but the *unregulatedness* of fishing wherever it remains. That, though it trips far less easily off the tongue than the "IUU" acronym, would be well worth doing, as a necessary step towards the sound management of high seas fisheries. Yet there is no evidence that this is what States meant. Rather, it is the underlying concept itself that is faulty, as, consciously or not, many States seem to favour eliminating unregulated fishing by assimilating it to illegal fishing, at least when done by others. To take just one example, the European Union's 2007 strategy against IUU fishing[8] as well as the 2008 Regulation to which it led, whose preamble says "Transhipments at sea…constitute a…way for operators carrying out IUU fishing to dissimulate the *illegal* nature of their catches",[9] wrongly assume that unregulated fishing is also illegal.

Paragraph 8 of the NIA affirms the Treaty's consistency with the UN Convention on the Law of the Sea ([1994] ATS 31) and the FAO Compliance Agreement ([2004] ATS 26), but overlooks the General Agreement on Tariffs and Trade (GATT), now annexed to the Marrakesh Agreement establishing the World Trade Organization ([1995] ATS 8). This is a surprising omission, as one of the consequences of ignoring the distinction between illegal and unregulated fishing is to weaken the justification for trade measures against fishing that is merely unregulated. For instance, the compatibility with WTO rules of Article 12(1) of the EU Regulation mentioned above, which prohibits importation of "fishery products obtained from IUU fishing" was questioned in 2010 at the annual informal meeting of the States Parties to the UN Fish Stocks Agreement ([2001] ATS 8), although the reasons for the doubts were left unstated.[10]

---

[8] Commission of the European Communities, COM(2007) 601 final (17 October 2007), *On a new strategy for the Community to prevent, deter and eliminate Illegal, Unreported and Unregulated fishing*.

[9] 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, 11th preambular paragraph (emphasis added). The definitions of the elements of IUU fishing closely follow those of the IPOA, but significantly there is no equivalent of paragraph 3(4) of the IPOA discussed above.

[10] UN doc ICSP9/UNFSA/INF.4 (5 April 2010), *Ninth round of Informal Consultations of States Parties to the 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, 16–17 March 2010), Report* <http://www.un.org/Depts/los/convention_agreements/fishstocksmeetings/icsp9report.pdf>, p. 7 (paragraph 20)).

Bans as contemplated in the Treaty on the unloading in parties' ports (i.e. importation) of the product of illegal and unreported fishing would probably survive a GATT challenge as long as a similar prohibition on other fishery commission members' own vessels were being rigorously enforced. The same cannot, however, be predicted with confidence in respect of the product of unregulated fishing, where such bans may fail the test of the chapeau of GATT Article XX, which protects only measures "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail...". This could well invalidate trade measures used by any State asserting a right to fish a stock while denying it to others, which is the essence of trying to eliminate unregulated fishing by such means. When a fishery commission acts against IUU fishing, from the IPOA's definition this must be in support of its own conservation measures. But it is noticeable that members' overcatch is usually treated quite leniently, which negates the rationale for treating catch by non-members any differently. Members of such bodies have a weak political and legal case for insisting on non-members living by rules that they themselves repeatedly prove unwilling to enforce against each other, discriminating against outsiders while excusing each other's overfishing.[11] Assimilation of unregulated to illegal fishing thus all too frequently amounts to States urging disciplines on others that they are not prepared to accept for themselves, a constant temptation to which fisheries commissions repeatedly succumb, including the five of which Australia is a member.

This is unfortunate, as there is a compelling economic case for eliminating unregulated fishing in depleted fisheries by closing them to new entrants,[12] as the only means of ensuring sufficient incentive to reverse the depletion. Yet it is striking how States seeking to benefit from policies to entrench exclusive access rights are reluctant to acknowledge and defend them openly, preferring instead to pursue them silently under cover of the "fight against IUU fishing," creating guilt by association with its other components.

Conclusion

This submission agrees with most of the arguments advanced in the NIA for Australia to become party to the Treaty. In addition, however, it urges that, rather than simply expressing approval for this step, the Committee could do a service to Australia's protection of its economic and legal interests in the fish stocks to be managed under treaties to which Australia is already party by taking a close interest in some of the implications of those arguments and formulating recommendations accordingly. In particular, if rebuilding of stocks requires abolition of the residual freedom of high seas fishing, which this submission

---

[11] An example in point is that the IUU list scheme of the Northwest Atlantic Fisheries Organization (NAFO) applies only to non-member vessels: see Chapter VIII of NAFO's Conservation and Enforcement Measures 2014, <http://www.nafo.int/fisheries/frames/iuu.html>.

[12] The case is made in G.R. Munro, "The Management of Shared Fish Stocks", in *Papers Presented at the Norway-FAO Expert Consultation on the Management of Shared Fish Stocks - Bergen, Norway, 7-10 October 2002* (Rome: FAO, 2003; FAO Fisheries Report 695 (Supplement)), 2 at pp 19 onwards.

does not dispute, then attention needs to turn to how States are to be persuaded of this, and to working out a widely accepted method for deciding who can close a stock to new entrants and on what grounds. This would do much to blunt any GATT-based objection to trade measures directed against fishing that is unregulated but not illegal or unreported. Assimilating "unregulated" to "illegal", though in economic terms perhaps a necessary condition for any lasting solution to overfishing, is something that should be done openly and after proper debate, not unwittingly or by terminological sleight of hand. Since the Treaty makes no contribution to this, Australia should promote and take a leading role in such a debate, as without it a legitimate goal risks being discredited by being reached via an illegitimate short-cut.