

How to stop illegal fishing:

DENIAL OF PORT ENTRY AND USE



stop illegal fishing



**AFRICAN PORTS
NETWORK**
to stop illegal fishing



WHY DENY PORT ENTRY?

It is the right and duty of a port State to identify and take measures against vessels that have been involved in illegal, unreported and unregulated (IUU) fishing and related activities, no matter whether they occur within or beyond national waters, on the high seas or in the exclusive economic zones (EEZs) of other States.

The measures are anchored in the full sovereignty which States have over their ports. The vessel owner, operator, agent, and flag State are subjected to the laws of the port State and must ensure compliance with them – and with the directions of inspectors and national officials.

These measures are highly effective in deterring IUU fishing and related activities and can be costly to the vessel owner because IUU caught fish is blocked from landing. An example is the case of the South Korean flagged fishing vessel PREMIER, which having been caught fishing illegally in Liberia, attempted to relocate to the South West Indian Ocean, however a united approach stopped the vessel from fishing and from using ports to offload any catch in this region. These actions resulted in the vessel owner paying a sizeable fine to Liberia and the PREMIER sailing back to Asia to offload its catch at a reduced price.

RELATED ACTIVITIES

The measures may be taken against fishing vessels as well as carrier, supply and other vessels involved in related activities in support of IUU fishing. Related activities include landing, packaging, processing transshipping or transporting fish not previously landed, as well as provisioning of personnel, gear, fuel and other supplies at sea.

USES OF PORT

Uses of port to be denied include landing, transshipping, packaging, and processing of fish and for other port services including refuelling and resupplying, maintenance and drydocking.

WHO IS INVOLVED?

The primary responsibilities for taking action against IUU fishing vessels lie with the fisheries agency in cooperation with the port agency and other national agencies through communications and agreed procedures.

The fisheries agency should ensure that internal procedures and personnel are designated for each action and decision. The port State inspectors and decision-makers are in the front line and can make a big impact in combating IUU fishing and related activities worldwide. They must be armed with a full understanding of the standards and procedures and be ready to deny vessels entry into their ports or the use of their ports. They must act quickly and decisively, and above all not alone.

Teamwork must be built between fisheries and other national agencies, especially those that exercise authority for port entry, inspections, and legal matters. Good relations, clear decision-making authority, communications, information, and support are essential, this can be achieved through adoption of procedures or a memorandum of understanding. Competing agendas must be resolved, for example possibly prioritising port entry to allow increased revenue for port agencies.



LEGAL FRAMEWORK

Internationally agreed minimum standards exist within global or regional agreements and organisations. These must be incorporated into national procedures and legislation by the countries that are party to these agreements and organisations. Countries that are not party may incorporate or apply these standards as long as there is no conflict with national law. Therefore still cooperating and communicating with counterparts and contributing to combating IUU fishing and related activities by activating port State measures.

- The 2009 Food and Agriculture Organization (FAO) Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing (PSMA) sets the international minimum harmonised standards to take in relation to foreign vessels, including for port entry, inspection, and denial of port use. Parties must deny port entry and use in cases showing that the vessel has engaged in IUU fishing or related activities, as described below. By early 2021, 67 countries and the European Union were party.¹
- Regional Fisheries Management Organisations (RFMOs) have adopted port State measures consistent with the PSMA that are legally binding on their members. The Indian Ocean Tuna Commission (IOTC) has pioneered a system of electronic reporting, including for port entry and inspections and communications (e-PSM).
- Many countries have recently adopted legislation and procedures to implement their international and regional obligations. The legislation must include the minimum standards in the PSMA, including definitions of terms (use of port, vessel, other), designating ports that foreign fishing and carrier/support/supply vessels can enter, requirements for entry into and use of port, the obligation to deny entry and use in specified circumstances, inspection, communication, and fines and penalties for contravention.²

¹A list of parties is at: <http://www.fao.org/port-state-measures/background/parties-psma/en>

²A legislative template for implementation is at: <http://www.fao.org/in-action/commonoceans/news/detail-events/en/c/891618>



REQUEST FOR ENTRY INTO PORT

Before a fishing vessel is permitted entry into port the following steps are required: a request for entry into port must be received; an assessment of the information submitted on the request form; and a decision whether to permit or deny entry into and use of port.

ADVANCE REQUEST FOR ENTRY INTO PORT

The owner or operator of a foreign vessel must request entry to a port officially designated for use by foreign vessels. Notifying its intention to enter port is not sufficient, because a port State has absolute authority to decide whether and in which ports entry is allowed.

An advance request to enter port (AREP) must be submitted before a specified time prior to entry e.g., 48 hours in advance. The AREP should contain all information required under the PSMA, an RFMO and/or national law. If a request for entry has not been received, or true and complete information as required has not been provided in the AREP, the vessel should not be permitted to enter port except for purposes of inspection.

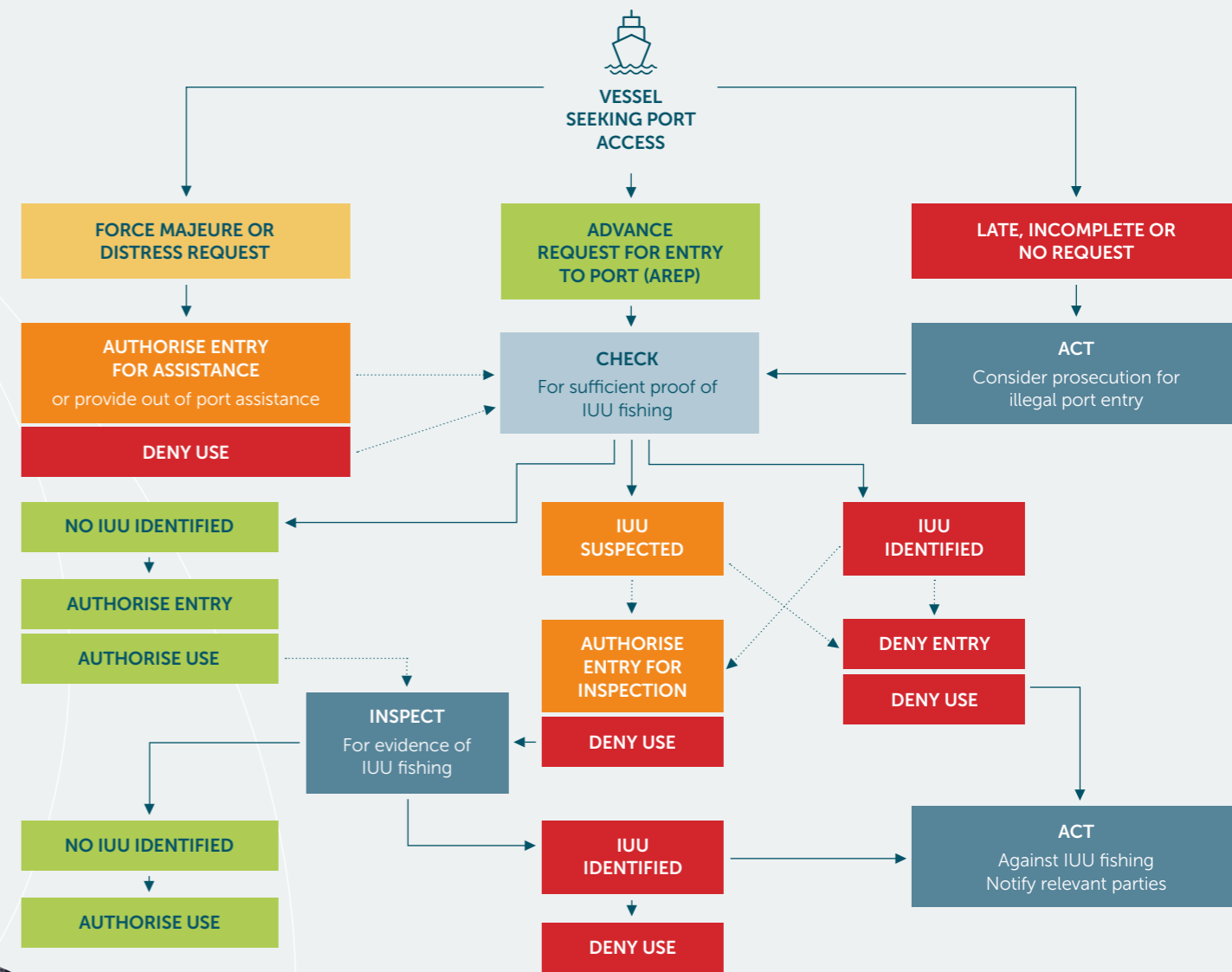
If such a vessel enters port without permission, it may be subject to prosecution under national legislation for doing so. The use of port should be denied, it should be inspected and the flag State and relevant RFMO should be advised.

RISK ASSESSMENT

The AREP should be assessed at the earliest time prior to the proposed port entry to determine the level of risk associated with the vessel. This may involve communications with the vessel master or agent requesting them to complete, correct or verify the information given.

Additional communications may be needed for liaison, fact-gathering or fact-checking, including with other national agencies, the flag State, coastal States, relevant RFMOs or networks established for fisheries monitoring, control and surveillance (MCS). Validation of information through online databases will assist to verify if the vessel is on a relevant RFMO IUU vessels list or record of authorised vessels.

An assessment report should include whether there was full, partial or no compliance with AREP requirements of information and advance submission time, contain relevant information from any additional communications, and describe any evidence of IUU fishing or related activities arising from the assessment.



.....> Indicates an optional decision or action



DENIAL OF PORT ENTRY

The PSMA requires denial of entry into port where there is 'sufficient proof' that the vessel seeking entry has engaged in IUU fishing or related activities, particularly if it is on an RFMO IUU vessels list.



DENYING ENTRY

Sufficient proof will depend upon the circumstances and reliability of the information and evidence, for example:

- **was the vessel:**
 - fishing, transhipping or engaged in other related activities on the high seas or within EEZs of any country without a required licence or authorisation;
 - fishing in prohibited areas;
 - contravening coastal State laws or RFMO measures;
 - on an RFMO IUU vessel list or the required record of authorised vessels?
- **was the information given:**
 - by a trustworthy source;
 - confirmed as appropriate through reliable contacts?
- **is the evidence:**
 - technically acceptable e.g. from VMS system, online surveillance;
 - sufficiently verifiable;
 - consistent with national evidentiary requirements?

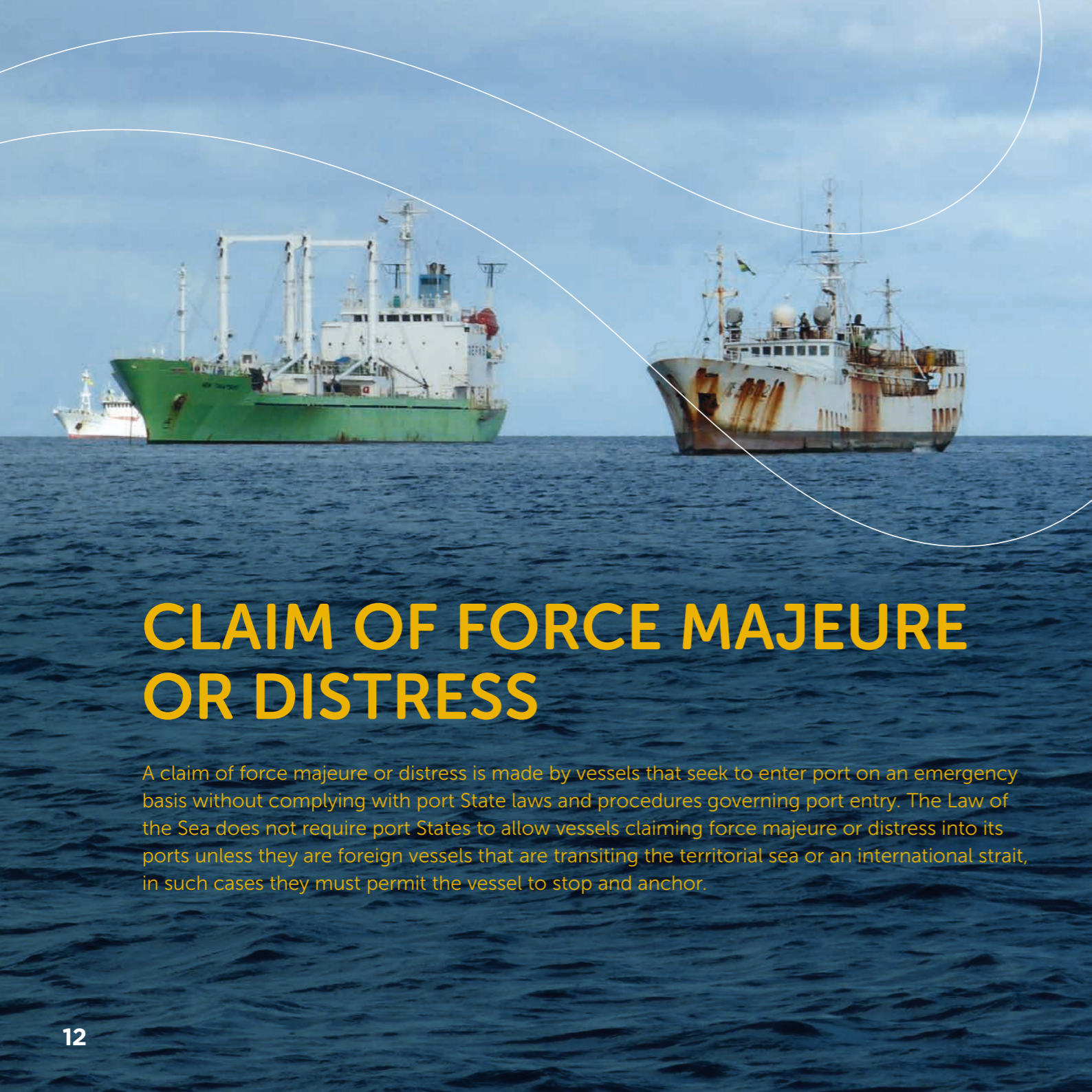
Entry may be denied for any reason not only because of suspected IUU fishing or related activities; for example, other reasons could be lack of technical capacity or political will to address potential problems. Typical situations could include an inability to stop offloading, repatriation of crew, or failure of national agencies to cooperate.

If there is any doubt about whether there is sufficient proof of IUU activities, it could be useful to consult with national legal experts. They will examine evidentiary requirements under national laws and advise whether the source and facts being alleged would stand up in a court of law.

It may be necessary to consider and seek resolution of potential conflicts between agendas of agencies in determining the priorities for denial of port entry and to ensure that the standard of sufficient proof is implemented.

A decision to deny entry must immediately be informed to the national port agency, vessel owner or operator and agent. The flag State of the vessel must be notified and, to the extent possible others including coastal States where the alleged IUU fishing or related activities occurred, relevant RFMOs and international organisations. The grounds for denial of entry – the evidence that formed the basis of the decision – should be included. There is no right to appeal the decision to deny entry, because of the absolute sovereignty of the port State.

However, the port State has the option to allow entry where 'sufficient proof' exists but *only for purposes of inspection*, and the use of port must be denied.



 **FORCE MAJEURE**

CLAIM OF FORCE MAJEURE OR DISTRESS

A claim of force majeure or distress is made by vessels that seek to enter port on an emergency basis without complying with port State laws and procedures governing port entry. The Law of the Sea does not require port States to allow vessels claiming force majeure or distress into its ports unless they are foreign vessels that are transiting the territorial sea or an international strait, in such cases they must permit the vessel to stop and anchor.

Claims of force majeure or distress generally indicate that the vessel was subject to natural and unavoidable catastrophes, such as damage from storms, mechanical problems or unanticipated serious injury or illness among crew members. French law applies three tests for force majeure – the event must be unforeseeable, external, and unavoidable.

Claims of force majeure or distress are sometimes made by foreign fishing vessels that seek entry into port to avoid submitting an AREP, a trick that has been used by known IUU vessels that have previously been denied entry.

Therefore, a port State must assess the claim, including by on-site inspection of the vessel outside port as may be needed, to determine, among others, its validity and whether it will affect the peace, good order, and security of the country. For example, where a vessel has been damaged it could disintegrate in port and pollute the harbour, or its crew could be infected with highly communicable diseases. In a recent case, during the COVID-19 pandemic, following a crew change for Spanish fishing vessels in the Seychelles, 97 out of 207 seafarers tested positive for COVID-19 and had to quarantine in the vessels in a demarcated zone outside Port Victoria.

If the force majeure or distress claim is considered valid but the health, environmental and other risks of allowing the vessel into port are too high to permit entry, other options may be considered for handling the situation. For example, medical experts and supplies or mechanical parts may be sent to the vessel outside the port.

If the claim of force majeure or distress is accepted as true, the vessel:

- may be permitted entry into port exclusively for the purpose of rendering the necessary assistance and no other purpose;
- may be requested in advance to submit an AREP, having regard to the time and nature of the emergency;
- should be inspected to verify the validity of the claim and check for evidence of IUU fishing or related activities. Where there is evidence the port State may take action under its national laws and notify relevant RFMOs and others.

If the claim of force majeure or distress is rejected and the vessel still seeks entry to port, the vessel:

- must be required to submit an AREP;
- where there is sufficient proof that the vessel has engaged in IUU fishing or related activities, it may be denied entry or allowed into port only for purposes of inspection.



ENTRY INTO PORT ALLOWED ONLY FOR INSPECTION

Where there is sufficient proof of IUU fishing or related activities, a vessel may be allowed entry into port exclusively for the purpose of inspection and taking other appropriate actions intended to be at least as effective as denying entry, in such situations the use of port must be denied.

Swift action must be taken to officially notify the vessel master, owner or operator and agent of the decision to deny port use and to issue an authorisation to enter port, which must be presented upon entry. All relevant government agencies and private sector concerns must be promptly informed that they must not allow or participate in the vessel's use of port.

The enforcement of the denial of port use requires that the vessel must not be permitted to use the port in any way – including for landing, transshipping, packaging, and processing of fish, refuelling resupplying, maintenance and drydocking.

Some countries may have national legislation that prohibits any person from allowing or assisting a vessel to use port, once denied. This is an offence both for the vessel owner, operator, or agent and those involved in supporting its use such as suppliers or processors. Otherwise, enforcement may rely on more general requirements related to conditions for port entry or other, and legal advice about this could be sought. Enforcement officers should determine how best to prevent use through their presence or other means.

The inspection functions and report should comply with minimum standards set in the PSMA and any applicable RFMO measure. The PSMA requires that, in determining which vessels to inspect, parties must give priority to vessels that have been denied use of port.

Where the evidence of IUU fishing is confirmed following an inspection, a decision should be made, as appropriate after national consultations with other agencies (e.g., legal, trade, foreign affairs), on actions that may be taken against the vessel owner or operator that would be at least as effective as denying port entry.

DENIAL OF USE OF PORT WITHOUT INSPECTION

The use of port may be denied after entry is permitted without inspection where certain conditions exist or after inspection where there are clear grounds for believing that a vessel has engaged in IUU fishing or related activities.

The PSMA requires denial of the use of port under the following circumstances, with no inspection necessary, if:

- the vessel does not have a valid and applicable authorisation for fishing or related activities required by its flag State;
- the vessel does not have a valid and applicable authorisation for fishing or related activities required by a coastal State in respect of areas under its national jurisdiction;
- there is evidence that the fish on board was taken in contravention of coastal State requirements in respect of areas under its national jurisdiction;
- the flag State does not confirm within a reasonable period of time, on request, that the fish on board was taken in accordance with applicable requirements of a relevant RFMO; or

- there are reasonable grounds to believe that the vessel was otherwise engaged in IUU fishing or related activities unless the vessel can establish:
 - that it was acting in a manner consistent with relevant conservation and management measures; or
 - in the case of provision of personnel, fuel, gear and other supplies at sea, that the provisioned vessel was not at the time on an RFMO IUU vessel list.

However, use of port should not be denied for port services essential to the needs of safety or health of the crew or the safety of the vessel or where appropriate for the scrapping of the vessel.

Where use has been denied, prompt notification of the decision must be given to the flag State and, as appropriate, relevant coastal States, RFMOs and other relevant international organisations.

DENIAL OF USE OF PORT AFTER INSPECTION

The PSMA and RFMO measures set levels and priorities for inspection of vessels that have entered port and provide detailed minimum standards for the conduct of inspections and training of inspectors.

The results of the inspection must be recorded in the template form provided in the PSMA or by an RFMO. When completed they must be distributed to: the coastal States where evidence shows that IUU fishing or related activities occurred; the master's national State; and relevant RFMOs and international organisations.

Following an inspection, where there are clear grounds for believing that a vessel has engaged in IUU fishing or related activities, the PSMA requires denial of use of port if not already denied. However, port services that are essential for the safety or health of the crew or the safety of the vessel must not be denied.

Additional measures against the vessel should be considered; they are expressly allowed in the PSMA, and include measures that the flag State has requested, or to which it has consented. National legal and foreign affairs officials should be consulted, as there may be a violation of national laws or the possibility of international sanctions. Procedures to propose the vessel for listing on an RFMO IUU vessel list may also be undertaken.

Enforcement of the measures – including denial of port use and any other measures that may be taken – will be required, and cooperation with other government agencies may be needed.

RESOURCES

CASES FEATURING DENIAL OF PORT ACCESS AND USE:

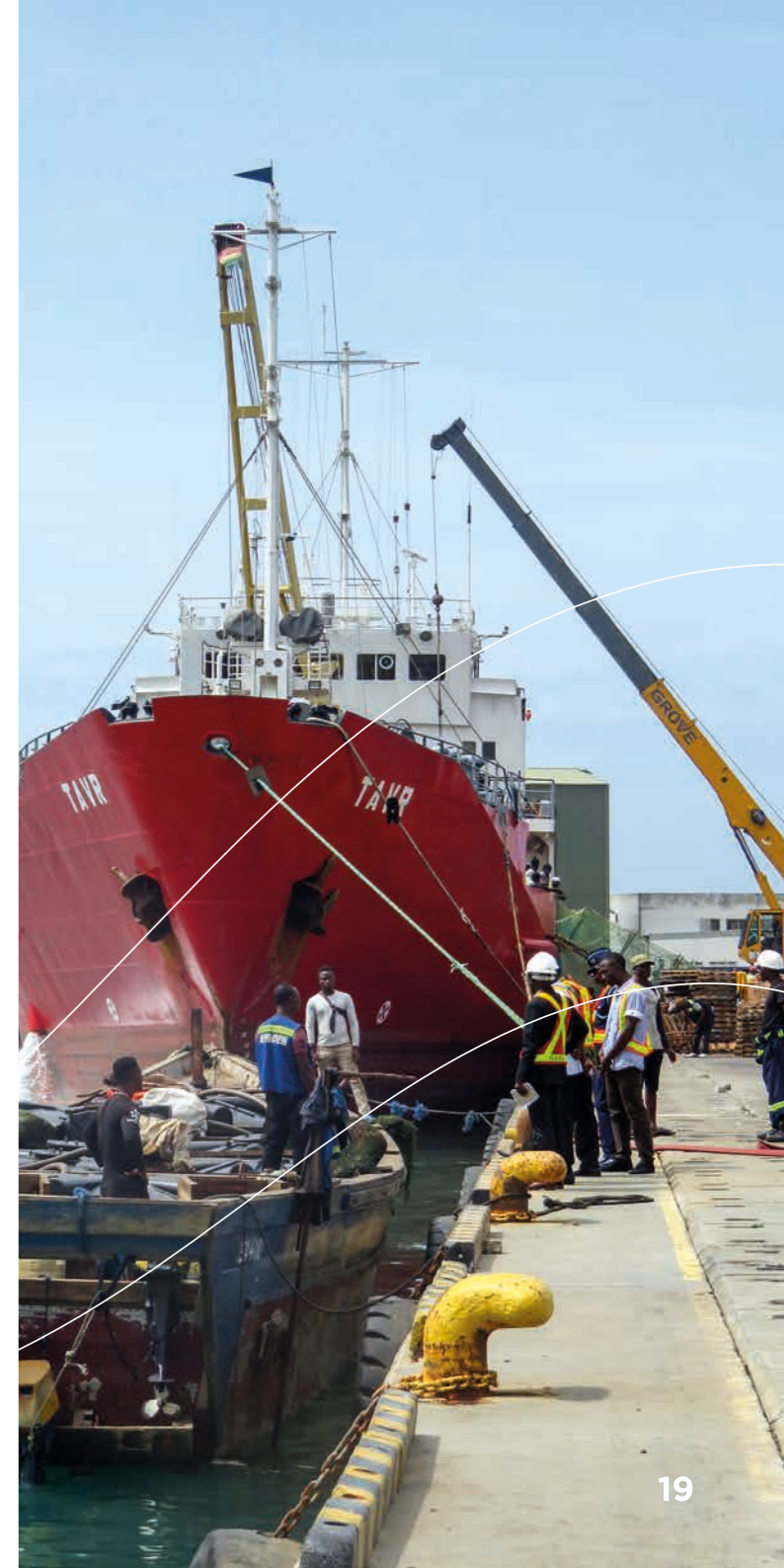
- FISH-i Africa's First Success: The PREMIER (FISH-i Africa investigation No.1)
- Rogues or Ghosts? (FISH-i Africa investigation No.11)
- Dual Identity Vessel on the Run (FISH-i Africa investigation No.13)
- Regional and International Cooperation Nets Illegal Vessel (FISH-i Africa investigation No.16)
- Africa Unites and Illegal Fishing Industry Pays (SIF Case Study 07)
- A Ghost Vessel in Somali waters: GREKO 1 (SIF Case Study 13)

RESOURCES TO ASSIST WITH THE IDENTIFICATION OF HIGH-RISK AND IUU VESSELS:

- FAO PSMA portal
- Combined IUU Vessel List
- RFMO Conservation and Management Measures on Port State Measures
- Regional MCS Centres
- Regional Task Forces
- African Ports Network
- Document Verification Manual for Fisheries Enforcement
- Photo Manual for Fisheries Enforcement

ACRONYMS

- AREP** Advance request for entry into port
- BMZ** German Federal Ministry for Economic Cooperation and Development
- EEZ** Exclusive economic zone
- FAO** Food and Agriculture Organization of the United Nations
- GIZ** Deutsche Gesellschaft für Internationale Zusammenarbeit
- IOTC** Indian Ocean Tuna Commission
- IUU** Illegal, unreported and unregulated fishing
- MCS** Monitoring, control and surveillance
- PSMA** Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing
- PSM-SIF** Port State Measures to Stop Illegal Fishing
- RFMO** Regional fisheries management organisation
- SIF** Stop Illegal Fishing
- UNCLOS** United Nations Convention on the Law of the Sea



The 'How to Stop Illegal Fishing' series aims to improve awareness and understanding of the roles and responsibilities of different actors in stopping illegal fishing. It targets the needs of African fisheries and countries, is based on evidence and analysis, and places legality in the fisheries sector as an essential element of sustainable development.

This guidance has been compiled with the assistance of Judith Swan and has drawn on evidence produced by the FISH-i Africa Task Force and the Stop Illegal Fishing Investigative Unit.

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Stop Illegal Fishing is working at a practical and policy level to support coastal, flag, port, market and crew States to take action against illegal fishing. This publication is part of the Port State Toolkit. This publication should be cited as Stop Illegal Fishing (2021) How to Stop Illegal Fishing: Denial of Port Entry and Port Use.

For more information on stopping illegal fishing visit www.stopillegalfishing.org



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