

## Section-by-Section Analysis

The following is a brief section-by-section analysis of the implementing legislation:

### **Section 1. Short Title and Table of Contents.**

Section 1 designates the Act as the “Port State Measures Agreement Act of 2011.”

### **Section 2. Purpose**

Section 2 identifies the purpose of the Act to implement the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, adopted by the Conference of the Food and Agriculture Organization of the United Nations on November 23, 2009.

### **Section 3. Definitions**

Section 3 defines the terms used in the bill, including terms specific to the structure of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Agreement), in addition to the following:

- “Authorized officer,” defined as any commissioned, warrant, or petty officer of the United States Coast Guard including Coast Guard personnel acting under such officer’s direction, any special agent or fishery enforcement officer of the National Marine Fisheries Service, and any officer designated by the head of any Federal or state agency that has entered into an agreement with the Department of Commerce or United States Coast Guard to enforce the provisions of the Magnuson-Stevens Act (18 U.S.C. §1801 *et seq.*) or any other statute administered by NOAA.
- “fish,” defined as all species of living marine resources, whether processed or not.
- “fishing,” defined as searching for, attracting, locating, catching, taking or harvesting fish or any activity which can reasonably be expected to result in the attracting, locating, catching, taking or harvesting of fish.
- “fishing-related activities” defined as any operation in support of, or in preparation for, fishing, including the landing, packaging, processing, transshipping or transporting of fish that have not been previously landed at a port or place, as well as the provisioning of personnel, fuel, gear and other supplies at sea.
- “IUU,” or illegal, unreported and unregulated fishing, which refers to the following activities:
  - (a) those conducted by national or foreign vessels in waters under the jurisdiction of a nation without the permission of that nation, or in contravention of its laws and regulations, including activities that have not been reported, or have been misreported, to the relevant national authority of that nation in contravention of its laws and regulations;

- (b) those conducted by vessels flying the flag of a nation that is a member of a regional fisheries management organization in contravention of the conservation and management measures adopted by that organization and by which that nation is bound, including activities that have not been reported, or have been misreported, in contravention of the reporting requirements of that organization;
  - (c) those conducted by vessels flying the flag of a nation that is a cooperating non-member of a regional fisheries management organization that are inconsistent with the commitments undertaken by that nation as a cooperating non-member of that organization, including activities that have not been reported, or have been misreported, in a manner that is inconsistent with those commitments; or
  - (d) those conducted in the area of application of a regional fisheries management organization by vessels without nationality, or by vessels flying the flag of a nation that is neither a member nor a cooperating non-member of that organization and that undermine the effectiveness of the conservation and management measures of that organization.
- “landing,” which means to begin to offload fish, or to offload fish from any vessel in port or at a dock, berth, beach seawall or ramp, but does not include transshipment.
  - “listed IUU vessel” defined as a vessel that is included in a list, adopted by a regional fisheries management organization (RFMO), of vessels having engaged in IUU fishing or fishing-related activities in support of such fishing.
  - “port,” which includes roadsteads, offshore terminals and other installations or places for landing, transshipping, packaging, processing, refueling or resupplying.
  - “processing,” defined as the preparation or packaging of fish to render it suitable for human consumption, retail sale, industrial uses, export, or long-term storage.
  - “transshipment” means to offload and onload or otherwise transfer fish or fish products from one vessel to another.
  - “vessel” means any vessel, ship of another type, or boat used for, equipped to be used for, or intended to be used for, fishing or fishing-related activities.

#### **Section 4. Application**

Section 4 sets forth the types of vessels to which this Act applies, specifically foreign vessels seeking entry to, or in, a U.S. port. This does not include foreign container vessels that are not carrying fish or are carrying only fish that have been previously landed, *provided that* the Secretary of Commerce has no clear grounds for suspecting that such container vessel has been engaged in IUU fishing or fishing-related activities in support of such fishing. This Act also applies to U.S. vessels seeking entry to, or in, the port of another part to the Agreement (with the same exceptions as apply to foreign vessels in U.S. ports) as well as persons subject to U.S. jurisdiction.

## **Section 5. Duties of the Secretary**

Section 5 authorizes the Secretary of Commerce (Secretary) to promulgate regulations, and requires development of procedures that are necessary to carry out the purposes of this Act, as well as designation and publication, in consultation with the Coast Guard, the ports of entry for vessels covered by this Act, and to designate a point of contact to implement the requirements of the Agreement regarding electronic exchange of information.

This section also requires the Secretary to maintain publicly accessible information regarding any legal recourse available to persons affected by action taken under this Act. Upon written request, the Secretary shall provide such information to the owner, operator, master or representative of an affected vessel.

## **Section 6. Advance Notice of Vessel Arrival; Authorization or Denial of Port Entry**

Subsection (a) requires all vessels covered by this Act to submit, in advance of their arrival into a U.S. port, information as required under the Agreement, in accordance with the regulations to be issued by the Department of Commerce, in collaboration with the Department of State and the Coast Guard. To the maximum extent possible, such regulations will utilize existing reporting mechanisms maintained and operated by the Coast Guard.

Subsection (b) states that, upon receipt of this information, the Secretary will decide whether to authorize or deny port entry and communicate this decision to the vessel or to its representative. The Secretary is authorized to deny entry to any listed IUU vessel, any vessel that the Secretary has reasonable grounds to believe has engaged in IUU fishing or fishing-related activities in support of such fishing, and any vessel that the Secretary has reasonable grounds to believe has violated any provision of this Act. However, the Secretary may allow a vessel entry into port to provide assistance to a vessel or person in danger or distress, to allow for the scrapping of the vessel, or for inspection or other enforcement action.

If the Secretary denies entry to a port, subsection (d) requires the Secretary to provide notification of this decision to the flag nation of the vessel and, as appropriate, to relevant coastal nations, RFMOs and other international organizations.

## **Section 7. Denial of Port Services**

Section 7 requires the Secretary of Commerce to deny the use of port services, i.e., use of a port for landing, transshipment, packaging or processing of fish, refueling, resupplying, maintenance, or drydocking, under the following circumstances:

- the vessel entered without authorization
- the vessel is a listed IUU vessel
- the Secretary has reasonable grounds to believe that the vessel lacks valid authorizations to engage in fishing or fishing-related activities as required by its flag nation or the relevant coastal nation
- the Secretary has reasonable grounds to believe that the fish on board was taken in violation of foreign law or in contravention of any conservation measure
- the Secretary has requested confirmation from the flag nation that the fish on board was taken in accordance with conservation and management measures, and the flag nation has failed to provide such confirmation

- the Secretary has reasonable grounds to believe that the vessel has engaged in IUU fishing or fishing-related activities in support of such fishing, including in support of a listed IUU vessel, unless the vessel can establish that:
  - it was acting in a manner consistent with conservation and management measures; or
  - in the case of the provision of personnel, fuel, gear and other supplies at sea, the vessel provisioned was not, at the time of provisioning, a listed IUU vessel.

The Secretary may allow the use of port services to a vessel, even under the circumstances described above, where such services are necessary for the health and safety of the crew, to allow for scrapping of the vessel, or to facilitate a required inspection or enforcement action.

Subsection (c) requires the Secretary to provide notification to the flag nation of the vessel, relevant coastal nations, RFMOs and other international organizations, of any decision to deny port services to a vessel. He or she may withdraw denial of the use of port services only upon a determination that the grounds for denial were inadequate, erroneous, or no longer apply.

### **Section 8. Inspections**

Subsection (a) requires the Secretary and the Coast Guard to conduct vessel inspections as necessary to achieve the purposes of the Agreement and this Act. In conducting such inspections, the Secretary may utilize equipment (including aircraft and vessels), and facilities of any other Federal agency, including all elements of the Department of Defense, and of any State agency. The Secretary is to prioritize such vessel inspections based on the following considerations:

- Vessels that have been denied entry or use of a port in accordance with the Agreement
- Requests from other relevant Parties, States or RFMOs that particular vessels be inspected, particularly where such requests are supported by evidence of IUU fishing or fishing-related activities in support of such fishing by the vessel in question; and
- Other vessels for which there are clear grounds for suspecting that they have engaged in IUU fishing or fishing-related activities in support of such fishing.

Subsection (b) requires the Secretary to transmit the results of an inspection to the flag nation of the inspected vessels and, as appropriate, to other relevant nations (i.e., the nation of which the vessel's master is a national), as well as the FAO and relevant RFMOs.

If an inspection provides the Secretary with reasonable grounds to believe that a foreign vessel has engaged in IUU fishing or fishing-related activities in support of such fishing, subsection (c) allows the Secretary to take enforcement action against that vessel and requires the denial of the use of port services to that vessel, in accordance with section 7.

### **Section 9. Prohibited Acts**

Section 9 lists the acts prohibited by this Act, which include:

- violation of any provision of this Act or any regulation promulgated thereunder;
- denying any authorized officer the ability to board, search, or inspect a vessel, conveyance, or shoreside facility for purposes of conducting any search, investigation, or inspection in connection with enforcement of this Act or any regulation promulgated thereunder;

- the forcible assault, resistance, opposition, impediment, intimidation, or interference with any authorized officer in the conduct of any search, investigation, or inspection described above;
- resisting arrest;
- interference with the apprehension, arrest, or detection of another person, knowing that such person has committed any act prohibited by this Act or any regulation promulgated thereunder;
- submission of false information pursuant to any requirement this Act or any regulation promulgated thereunder;
- the forcible assault, intimidation, harassment of, or interference with, observers, or data collectors carrying out responsibilities under this Act or any act administered by the Secretary;
- the import, export, transport, sale, or purchase in interstate or foreign commerce any fish or fish product taken, possessed, transported, or sold in violation of any foreign law or treaty addressing the conservation or management of living marine resources, or any conservation and management measure as defined in section 3(3); or
- submission of false records, accounts, or labels of, or any false identification of, any fish or fish product which has been, or is intended to be imported, exported, transported, sold, offered for sale, purchased, or received in interstate or foreign commerce.

### **Section 10. Enforcement**

Subsection (a) states that responsibility for carrying out the provisions of this Act falls on the Secretary and the Secretary of the Department in which the Coast Guard is operating.

Subsection (b) describes the powers of officers authorized to enforce the provisions of this Act, which includes:

- authority to arrest any person the officer has reasonable cause to believe has committed an act prohibited by this Act;
- authority to board, and search or inspect, any vessel which is subject to the provisions of this Act;
- authority to seize any vessel used or employed in the violation of any provision of this Act or any regulation promulgated thereunder;
- authority to seize any fish (wherever found) imported, exported, transported, sold, received, acquired, or purchased in any manner, in connection with or as a result of the violation of any provision of this Act;
- authority to seize any other evidence related to any violation of any provision of this Act or any regulation promulgated thereunder;
- authority to search or inspect any facility or conveyance used or employed in, or which reasonably appears to be used or employed in, the storage, processing, transport, or trade of fish or fish products;
- authority to inspect records pertaining to the storage, processing, transport, or trade of fish or fish products;
- authority to detain (or sell if deemed perishable) any shipment of fish or fish product imported into, landed on, introduced into, exported from, or transported within the jurisdiction of the United States;

- authority to search and seize, in accordance with any guidelines which may be issued by the Attorney General;
- authority to execute and serve any subpoena, arrest warrant, search warrant issued in accordance with rule 41 of the Federal Rules of Criminal Procedure, or other warrant or civil or criminal process issued by any officer or court of competent jurisdiction;
- authority to access, directly or indirectly, for enforcement purposes any data or information required to be provided under this Act or any regulation promulgated thereunder, including but not limited to data from vessel monitoring systems, satellite-based maritime distress and safety systems, or any similar system; and
- authority to exercise any other lawful authority.

Any officer authorized by the Secretary to enforce the provisions of this Act is authorized to, in accordance with guidelines issued by the Attorney General, carry firearms and make an arrest for any offense under the laws of the United States committed in the officer's presence, or for the commission of any felony under the laws of the United States, if the officer has reasonable grounds to believe that the person to be arrested has committed or is committing a felony.

Subsection (c) authorizes officers to issue a citation to the owner or operator of such vessel for violations of this Act in lieu of civil enforcement, civil forfeiture or criminal enforcement.

Subsection (d) authorizes the Secretary to issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, photographs, records, books, and documents in any form. This subsection also establishes jurisdiction of U.S. district courts to order the appearance of persons or documents in the case of contempt or refusal to obey a subpoena. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

Subsection (e) establishes the jurisdiction of the U.S. district courts over any actions arising under this Act. This subsection also establishes the appropriate U.S. district court for any possession of the United States in the Pacific Ocean and in Hawaii, Guam and Wake Island, Northern Mariana Islands. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any other district as authorized by law.

Subsection (f) outlines the civil enforcement procedures authorized by this Act. For civil administrative penalties, any person who is found, after notice and opportunity for a hearing, to have committed an act prohibited by section 9 is liable to the United States for a civil penalty not to exceed \$250,000 per violation. The penalty amounts are assessed by the Secretary, by written notice. Each day of a continuing violation constitutes a separate offense. In determining the penalty amount, the Secretary shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, as well as any history of prior offenses. The Secretary may also consider any information provided by the violator relating to the ability of the violator to pay, *provided that* the information is served on the Secretary at least 30 days prior to an administrative hearing. This subsection also allows the Secretary to compromise, modify, or remit any civil administrative penalty imposed under this subsection that has not been referred to the Attorney General for further enforcement action.

Subsection (f) also states that violators of this Act are subject to civil judicial penalty not to exceed \$300,000 per violation. The Attorney General, upon the request of the Secretary, may commence a civil action in an appropriate U.S. District Court against any person who violates any provision of this Act, or any regulation promulgated or permit issued thereunder. Such court has jurisdiction to award civil penalties and such other relief as justice may require. In determining the amount of a civil penalty, the court shall take into account the same considerations as the Secretary in determining the amount for administrative penalties. In imposing such penalty, the district court may also consider information related to the ability of the violator to pay.

Additionally, subsection (f) states that a vessel used in the commission of an act prohibited by section 9 is liable in rem for any civil penalty assessed under this section and may be proceeded against in any district court of the United States with jurisdiction. Such a penalty constitutes a maritime lien, and may be recovered in an action in rem in the district court of the United States having jurisdiction over the vessel.

Finally, subsection (f) authorizes the Secretary to take action against any person who fails to pay an assessment of a civil administrative penalty. In such action, the validity and appropriateness of the final order imposing the civil penalty is not subject to review. Any person who fails to pay, on a timely basis, the amount of an assessment of a civil penalty is required to pay, in addition to such amount plus interest, attorney's fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists.

Subsection (g) establishes the process for forfeiture of property in criminal or civil proceedings under this Act. A person who is convicted of a criminal offense in violation of this Act shall forfeit to the United States any real or personal property traceable to the gross proceeds obtained as a result of the offense, or any real or personal property used or intended to be used to commit the offense. For civil proceedings, any real or personal property traceable to the gross proceeds obtained as a result of the offense, or any real or personal property used or intended to be used to commit the offense, is subject to forfeiture to the United States in accordance with the provisions of chapter 46 of title 18, United States Code, and no property right shall exist in it.

Subsection (g) also states that all provisions of law relating to seizure, summary judgment, and judicial forfeiture and condemnation for violation of the customs laws, the disposition of the property forfeited or condemned or the proceeds from the sale thereof, the remission or mitigation of such forfeitures, and the compromise of claims shall apply to seizures and forfeitures incurred under this Act where applicable. For seizures and forfeitures of property by the Secretary, such duties as are imposed upon the customs officer may be performed by such officers as are designated by the Secretary.

Finally, subsection (g) states that there is a rebuttable presumption that all fish, or components thereof, found on board a vessel that is used or seized in connection with a violation were taken, obtained, or retained as a result of IUU fishing or fishing-related activities in support of such fishing.

Subsection (h) outlines the provisions for criminal enforcement of violations of this Act. Any person (other than a foreign government agency, or entity wholly owned and controlled by a foreign government) who knowingly commits any act prohibited by section 9 shall be imprisoned for not more than five years or fined not more than \$500,000 for individuals or \$1,000,000 for an organization, or both. If the individual uses a dangerous weapon in commission of an offense, or engages in conduct that causes bodily injury, or causes fear of imminent bodily injury to any authorized officer, the maximum term of imprisonment is not more than ten years. Any person (other than a foreign government agency, or entity wholly owned and controlled by a foreign government) who violates the provisions of paragraph (2), (3), (4), (5) or (6) of section 9, and who, in the exercise of due care should know that such person's conduct violates such provisions, shall be fined, or imprisoned for no more than one year, or both.

Subsection (i) states that any person assessed a civil penalty for, or convicted of, any violation of this Act is liable for the reasonable costs incurred by the Secretary for storage, care, and maintenance of any property seized in connection with the violation.

### **Section 11. International Cooperation and Assistance**

Section 11 establishes guidelines for providing assistance to developing nations and international organizations from member nations for meeting their obligations under the Agreement. In carrying out this section the Secretary of Commerce may utilize the personnel, services, equipment, and facilities of any individual, corporation, partnership, association, or other entity, and any Federal, State, local, or foreign government or any entity of any such government.

This section also authorizes the Secretary of Commerce to transfer funds to any foreign government, international, non-governmental, or intergovernmental organization for purposes related to carrying out the international responsibilities of this Act or any statute administered by the Secretary.

### **Section 12. Relationship to Other Laws**

Section 12 states that where more stringent requirements regarding port entry or access to port services exist under other federal law, those more stringent requirements shall apply. This section also states that nothing in this Act affects a vessel's entry into port, in accordance with international law and for reasons of *force majeure* or distress.

### **Section 13. Authorization of Appropriations**

Section 13 authorizes appropriations to the Department of Commerce to carry out this Act.