

ADVOCACY NOTE

PROMOTING DOMESTICATION OF INTERNATIONAL INSTRUMENTS IN FISHERIES AND AQUACULTURE

Key Messages

Low domestication of international instruments compromises efforts by AU Member States to achieve long-term sustainability of fisheries resources.

- States should actively be involved in the negotiation process for the formulation of international instruments and be represented at such negotiations by competent staffs who are themselves subject matter specialists, if possible.
- AU MS, Contracting Parties to ICCAT and IOTC, should endeavor to domesticate the UN Fish Stocks Agreement and PSMA to better fulfill their technical obligations to the RFMOs.
- All coastal States are encouraged to ratify, accede and/or accept, domesticate and implement the provisions of key fishery-related instruments.
- AU MS are urged to increase the level of understanding of State and non-State actors on the relevance, benefits and constraints of domesticating and implementing relevant fisheries instruments.
- States in the same region, are

urged to update and harmonize their legislations to facilitate the application of these international instruments in such areas as the combat of IUU fishing, providing access rights to foreign fleets, and to promote the long-term sustainable development of fisheries in the region.

- States are encouraged to operationalize the Framework Action Plan for Domestication and Implementation of International Instruments.
- States may be willing but not able to domesticate and implement international instruments, in that case they should seek external assistance.

What is the Problem?

The reluctance or the inability of AU Member States (AU MS) to adopt fisheries-specific international instruments into their domestic legal systems, integrate the treaty/instrument into their national standard and make it domestic law, negatively affects the contribution fisheries and aquaculture sector make to poverty reduction, improved livelihoods and wealth generation.



Background

Following the adoption in 1982 of the United Nations Convention on the Law of the Sea (UNCLOS) and the conclusion of the United Nations Conference on Environment and Development (UNCED) in 1992, the rate of development (negotiation and adoption) of global and regional instruments impacting on fisheries and aquaculture has increased considerably and continues to do so.

The key binding instruments, include the 1995 United Nations 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 (UN Fish Stocks Agreement); the Food and Agriculture Organization (FAO) 1993 Agreement to Promote Compliance with International Conservation Measures by Fishing Vessels on the High Seas (Compliance Agreement); 2009 FAO Port State Measures Agreement (PSMA) to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated (IUU) Fishing. The main non-binding instruments include the 1995 FAO Code of Conduct for Responsible Fisheries, and its four International Plans of Action on sharks, seabirds, fishing capacity and combating IUU fishing, The FAO Code of Conduct continues to evolve through the formulation of international plans of action, strategies, and international guidelines on specific emerging issues.

These fisheries-specific instruments provide the legal and policy framework that guide States in regulating fishing activities under areas of national jurisdiction and in cooperating with one another to conserve and manage resources in shared areas and on the high seas. They also embody and promote key concepts and principles that are inter-related and have similar application in fisheries management and aquaculture development. These principles include sustainable utilization of fisheries and aquaculture resources, ecosystem approach, precautionary approach, effective data collection and management, effective monitoring, control and surveillance (MCS), responsible fish trade and the duty to cooperate among States.

There are also other non-fisheries specific instruments which contain provisions and address other relevant aspects of fisheries in the realm of trade, fish health and food safety, working conditions and safety of fishing vessels, and environmental protection. These instruments include the Convention on Biological Diversity (CBD), Convention on the International Trade in Endangered Species on Wild Flora and Fauna (CITES), and a number of World Trade Organization (WTO), International Maritime Organization (IMO), and International Labor Organization (ILO) agreements. Other voluntary guidelines have also been adopted to assist States in meeting legal obligations and implementing management principles in fisheries.

While only some of the international fisheries-related instruments apply to aquaculture development and management, several provisions in environmental instruments such as the Convention on Wetlands of Importance especially as Waterfowl Habitat (RAMSAR Convention), Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Convention on Biological Diversity (CBD), and the Framework Convention on Climate change (UNFCCC) are relevant to the sector.

There are also regional instruments such as 2002 Nairobi Declaration on the conservation of aquatic biodiversity and use of genetically improved and alien species for aquaculture in Africa and the Policy Framework and Reform Strategy for Fisheries and Aquaculture in Africa (PFRS).

Collectively these instruments provide a very comprehensive and elaborate framework for addressing the major challenges facing the sustainable use of marine living resources and the development of environmentally friendly aquaculture. These challenges include overexploitation of fisheries resources, IUU fishing, incomplete fisheries data, inadequate monitoring, control and surveillance (MCS), lack of effective fisheries management measures, environmental pollution, climate change impact, and other issues.

National policy and legislation guide fisheries management and aquaculture development in the

African Union member States. These instruments are mainly adopted to regulate fishing and farming practices in national waters and territories, as well as set standards for marketing, trade and utilization of fisheries and aquaculture products. However, in general, most of these national instruments are inadequate in addressing contemporary fisheries management and aquaculture challenges such as IUU fishing, environmental degradation, climate change, marine disasters, and fisheries conflicts arising from the overexploitation of resources

It is in this context that one of the expected outcomes of the Policy Framework and Reform Strategy for Fisheries and Aquaculture in Africa (PFRS) endorsed by the Summit of African Heads of State and Government in Malabo, Equatorial Guinea, June 2014 is that “Member States are assisted to meet their obligations under national and international fisheries, aquaculture and natural resource management instruments.”

Who are the potential major actors?

The major actors concerned with redressing the situation include: the central ministry responsible for fisheries and/or aquaculture in the respective countries, the 8 AU recognized Regional Economic Communities, the 16 regional fishery bodies and arrangements, of which seven have regulatory and management powers (Regional Fisheries Management Organizations) operating in African inland waters and AU MS' Exclusive Economic Zone (EEZ) and adjacent high seas, as well as Africa's 7 Large Marine Ecosystem (LME) Programs/ Commission that encircle the continent. The failure by States to domesticate fisheries specific and fisheries related international instruments negatively impacts the work of these organizations.

Besides the above, a number of line ministries in particular Planning and Economy, Judiciary, Finance, Defense, Veterinary, Transport Merchant Marine, depending on the specificities of each state, would also play critical or facilitating roles. Key or relevant stakeholders in the different countries including fishers (both industrial and small-scale), fish farmers, processors, fish traders, the private sector and civil society organizations, who are directly affected by the

situation also have advocacy role to play to garner support for the domestication of these instruments.

What is Domestication of international instruments?

Domestication

International treaties will continue to be mere documents in countries that are signatories to them if their significance is not felt by the people. It is not enough for a sovereign state to ratify a treaty in the international community framework; it is more important for such a state to adopt it into her domestic legal system, integrate the treaty into her national standard and make it domestic law. Instruments ratified by states may be binding to states but might not be applied or enforced domestically against natural or juridical persons unless they are reflected in enabling legislation.

Why is Domestication of international instruments important?

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The common practice of States is that even if an international agreement is treated as part of domestic law, a legislation is still enacted to ensure that the executive and judicial departments can give practical effect to a treaty. In the fisheries context, this is particularly important to ensure that fishing companies, vessels, and fishers are clearly informed of the legal requirements of fishing. Indeed, many binding instruments contain issues or generic obligations that Parties are required to reflect in their national legislations or regulations.

How is it accomplished?

A State may express its consent to be bound by a treaty, which thereby becomes applicable to it at the international plane, by: signature, exchange of instruments constituting a treaty, ratification,

acceptance, approval, or accession, or by any other means if so agreed. However, how States may then bring about the implementation domestically of the treaties, which they have made applicable to them internationally, is a question to be settled by each State in accordance with its legal system.

Every State, has its own rule as regards domestic application of international treaties. While treaty provisions, in a few states, automatically acquire the force of law upon ratification, many others insist that such treaty must have been domesticated by a legislative instrument before same becomes enforceable within the national legal order. The ratification, acceptance or approval of international fisheries related instruments vary amongst countries although they follow a pattern that relates closely to the needs and fisheries characteristics.

What is the status of ratification of international instruments?

Almost all the States have ratified the key framework conventions such as UNCLOS and UNFCCC and also major environmental and trade related conventions for example CBD, RAMSAR, CITES, SPS Agreement, MARPOL, etc. On the other hand, the ratifications of fisheries-specific instruments such as the FAO Compliance Agreement, UN Fish Stocks Agreement and in particular the FAO Port State Measures Agreement, until of recent been limited to a few coastal States. These coastal States have significant marine fishing interests within the EEZ and the adjacent seas. Some coastal States are members of regional fisheries management

organizations and in some cases the coastal states have fisheries access agreements with Distant Water Fishing Nations (DWFNs) and hence benefit from ratification of major fisheries instruments.

The Compliance Agreement and PSMA are vital to combat IUU fishing, a phenomenon that is rampant in the region. IUU fishing depletes fish stocks, destroys marine habitats, distorts competition, puts honest fishers at an unfair disadvantage, and weakens coastal and riparian communities, with negative social and economic consequences for States in general and small-scale fish workers in particular. States which are members of RFMOs but have yet to adhere to these instruments, adherence will enable them fulfill their technical responsibilities to these organizations. Generally, the ratification of these instruments by coastal states can facilitate enhanced regional cooperation and harmonization of fisheries legislations and regulations. As these instruments in principle concern coastal states, it is important to note that thirty-eight (38) African countries are either coastal or island states.

As of May 2018, twelve (12) AU Member States are Parties to the UN Fish Stocks Agreement, thirteen (13) AU-MS are Parties to the FAO Compliance Agreement and nineteen (19) AU-MS are Parties to the Port State Measures Agreement; that is, these States have either ratified, acceded to, or accepted the Instruments (Table 1). Over 90 percent of the ratifications or accessions to the PSMA occurred between February 2016 and July 2017.

Table 1: AU Member States Parties to Key International Fisheries Instruments as of May 2018

Instruments	Parties to the Instruments	Signatories to the Instruments
UN Fish Stocks Agreement	Benin, Ghana, Guinea, Kenya, Liberia, Mauritius, Mozambique, Namibia, Nigeria, Senegal, Seychelles, South Africa	Cote d'Ivoire, Egypt, Mauritania, Uganda
FAO Compliance Agreement	Angola, Benin, Cape Verde, Egypt, Ghana, Madagascar, Mauritius, Morocco, Mozambique, Namibia, Senegal, Seychelles, United Republic of Tanzania	
Port State Measures Agreement	Cape Verde, Djibouti, Gabon, Gambia, Ghana, Guinea, Kenya, Madagascar, Mauritania, Mauritius, Mozambique, Namibia, Sao Tome et Principe, Senegal, Seychelles, Somalia, South Africa, Sudan, Togo	Angola, Benin, Sierra Leone

Why is the ratification rate of fisheries-specific instruments low?

The key reasons for the low ratification of fisheries specific agreements include: lack of awareness of the existence and/or the provisions of the instrument; the nature of a country's fisheries and relevance of the instrument, nature of the international agreement, policy, legislative and operational changes required from States, and cost of implementation.

Lack of awareness: Many key stakeholders are not aware of the existence of the fisheries specific instruments, the objectives and relevance to their livelihoods in terms of improved fisheries management and sustainability. This lack of awareness and knowledge translates to lack of ownership at the grassroots levels, and lack of involvement and motivation among those who should advocate for the changes.

Characteristics of the fisheries and relevance of the instrument: States accept instruments when their governments have concluded that the instruments are in their interest. For some of the countries non-adherence to the UN Fish Stocks Agreement appears appropriate but for States that are Contracting Parties to RFMOs ratification and implementation of the Compliance Agreement, UNFSA and PSMA seem essential to enable them fulfill their obligations to the regional fisheries management organization. It is a paradox that many coastal States have not ratified these instruments which are vital to combat IUU fishing. Analysis of the reports on the negotiations processes of three fisheries-specific and binding instruments (Compliance Agreement, UN Fish Stocks Agreement and Port State Measures Agreement) indicate that African States were not actively involved in the negotiation processes of the first two. It is not clear if this hinders ratification, but studies have shown that participation in the negotiation process permits countries to draw leadership on the issue from the scientific community; increases the participants' knowledge of the issue and contribute in making them more committed and effective in promoting the domestic implementation of the instruments – the "Champion or Leader phenomenon".

Policy, legislative and operational requirements: The ratification of international agreements has a significant impact on the legislation, policies, and operational procedures of a State. For example, to be able to implement the FAO Port State Measures Agreement, a country is required to designate a port where foreign fishing vessels can land or transship its catch. This fish port would need to have the required administrative, technical, and enforcement procedures in place, as well as the capacity to inspect fishing vessels and their catch, communicate with other authorities, and apply enforcement actions in case of suspected IUU fishing activities. There are also reporting requirements for port States with respect to other States, including flag States and States requesting for assistance from a port authority, and regional fisheries management organizations. The implementation of such an international agreement often requires substantial financial and technical capacity which may be cumbersome for several States.

Cost restrictions: Besides the financial implications that may be linked to ratification of some instruments, there are other costs associated with ratifying international agreements. For example, ratifying a regional agreement may have long-term implications. A party to a regional agreement may be required to pay some annual dues which is based on an agreed formula. There are also other costs associated with regional membership such as attendance in meetings. The fishing industry are also required to abide by conservation and management measures established by RFMOs which may involve installing equipment onboard large commercial vessels fishing on the high seas or another State's EEZ to implement, for example, a vessel monitoring system, accommodate at-sea observers, and follow reporting requirements such as catch documentation and transshipment reports.

Have States gone beyond ratifying international instruments?

Transformation and reflection in national law is the second phase in domestication of fisheries instruments. Few States that have recently updated their Fisheries Legislations, have incorporated, or reflected the provisions of these international instruments. For many

States, their fisheries legislations are not consistent with the relatively recent developments in the sector and do not meet the requirements of the international legal regime aimed among others to better manage fisheries in the high seas, the management of transboundary and shared stocks, and combating IUU fishing. There are also weaknesses in the restrictions on fishing effort, the regulation on bycatch, licensing mechanisms, sanctions, monitoring, control and surveillance (MCS). There is a great need to work towards the harmonization of the legislations and regulations of States on a regional basis in order to promote the long-term sustainable development of fisheries.

What difficulties do States face in implementing International Fisheries Instruments?

Besides, the difficulties States face in deciding to ratify international instruments, States may be willing but are not capable to incorporate the instrument in its national legislation and implement the provisions of the instrument for several reasons. They are institutional, legal, financial, technical, and human resource.

Institutional challenges: One inherent challenge in the organizational framework is the fragmentation of fisheries management functions among several government agencies. For example, fishing vessel registration is often under a transport ministry or maritime authority which registers all types of vessels. Hence, there is often no fisheries management-specific requirements imposed on vessels when they apply for registration, such as evidence that would prove that a vessel has not conducted or engaged in IUU fishing. Similarly, issues related to the trading of fish products may be handled in the Ministry of Trade.

The multiplicity of agencies has the effect of diffusing government functions, which can further result in either overlapping of or gaps in fisheries management responsibilities. This can also lead to conflicts in jurisdiction and creation of non-complementing policies in fisheries. The lack of strong trade-related policies in fisheries, for example, may be ascribed to the lack of a clear institutional linkage between the functions of fisheries and trade ministries. The presence of illegal fishing and low level of prosecution of fishing offenders

may also be attributed to the ineffective coordination between law enforcement agencies, executive departments and courts.

Legal Considerations: One of the main legal considerations for States is the form that the principles and management measures should take within a domestic setting to ensure effective implementation. For States with outdated fisheries legislations, the process will entail a complete revision of the legislation. This is a lengthy process involving legislators and policymakers. Even for States that have some of the elements of a modern fisheries law, amendment of such pieces of legislation require an equally extensive process involving different stakeholders. The conservation and management measures adopted by regional fisheries organizations, as well as the trade-related policies of major importing nations are also continuously evolving, requiring constant reflection and action by States.

Financial Needs: Translating international fisheries management principles into domestic requirements require financial means. Consultations, attendance in international meetings, drafting of new or amending existing legislation or regulations, and establishing mechanisms to promote compliance amongst the fishing industry entail expenditure from the government. This represents a key challenge for States in undertaking international obligations in fisheries.

Technical Requirements: The domestication of international fisheries agreements does not only commence and end at the development of an appropriate legal framework. It also involves technical and human resource development. Implementing international fisheries agreements requires technical competence in translating legal to operational requirements for the fishing industry. Furthermore, it requires a high level of technological competence.

For example, to effectively combat IUU fishing, requires the integration or coordination of fisheries related port State measures with the broader system of port State controls, including other tools such as VMS and observer programmes, as well as port controls. The equipment is not only expensive but their

use and manipulation require the appropriate know-how. Integrated databases and information systems are also needed for quick and effective decision-making. The lack of such information systems including computerized communication can greatly hinder the effective implementation of international instruments.

The need to improve technical capacity in implementing international obligations in fisheries is recognized at the global and regional levels. Provision of technical assistance to developing States is clearly included in international instruments such as the UN Fish Stocks Agreement, FAO Port State Measures Agreement, WTO Agreements, and the FAO Code of Conduct for Responsible Fisheries. Such right under international agreements also become the basis for regional fisheries organizations to seek assistance on behalf of a coastal or landlocked State. Regional organizations further provide for increasing the technical capacity of States on various matters.

Human Resource Development: Capacity development is an ongoing concern in all the countries for many aspects of fisheries and aquaculture. The fisheries sector presents particularly fast-moving challenges to develop and maintain human capacity, given the elaboration of internationally agreed instruments in the past two decades, advances in technology and profit motives that contribute to promoting and sustaining IUU fishing and other poor fisheries and aquaculture practices leading to dwindling fish stocks and/or damage to the ecosystem.

Limitation in financial and technical capacity often results in constraints in developing government personnel, as well as in imparting knowledge to communities and the general public about the need to adopt international obligations in fisheries. Skilled fisheries and related personnel greatly improves the effectiveness of implementing global and regional fisheries instruments. Many types of capacity development tend to be stepwise and incremental in approach so that revision and recapitulation are often necessary. The challenges associated with human resources development are exacerbated in situations where there is a high degree of staff turnover.

What can be done to improve the situation?

With a view to assist Member States to meet their obligations under national and international fisheries, aquaculture and natural resource management instruments, a Framework Action Plan for Domestication and Implementation of International Instruments of five interrelated components is proposed. The Framework provides a clear national approach that will facilitate the domestication of international instruments relevant to fisheries and aquaculture by AU-MS to optimize the benefits offered by their living aquatic resources and to contribute to the sustainable development and management of these resources for food, livelihoods, and wealth. The components consist of a series of objectives and actions that are designed to maximize identified opportunities and to minimize constraints. Expected outcomes and responsibilities of the key stakeholders are detailed. The components span from encouraging appropriate public and political support; developing awareness, capacity building, and effective implementation to participatory monitoring and auditing systems, for domestication of instruments.

The overall goal of the framework is to create a clear national approach that will facilitate the domestication and effective implementation of appropriate international instruments relevant to fisheries and aquaculture by AU MS.

The rationale for the five components are:

Public and Political Support for domestication of Instruments: Public and political support is important for the domestication of international instruments. Public opinion influences political support. However, such opinion should be an educated one. The Fisheries Department in collaboration with other relevant stakeholders should elaborate a non-bias policy document outlining the benefits and potential difficulties of domesticating the international instrument(s). In some cases, the elaboration of the policy document may require external human and financial assistance.

Awareness raising and support for implementation of instruments: A fundamental ingredient for having the provisions of international and regional instruments implemented is to ensure the policy makers are

fully aware of the instrument, what it is designed to do, the relevance to the country and how it can be implemented. Awareness on the need to implement international obligations in fisheries and aquaculture has never been more important since the adoption of agreements post the Law of the Sea Convention.

More recent issues such as fisheries crime, as well as the development of new rules and regulations on IUU fishing have also raised the need to inform, educate, and take action to promote sustainable and responsible fisheries. Raising awareness and support to adopt and implement global and regional instruments on fisheries and aquaculture is not only limited to ensuring stakeholder participation. It also involves validation of statements made by government through qualitative and quantitative research and analysis.

Capacity Development for Instrument Implementation: Capacity to ensure effective implementation of the instrument may be lacking or deficient. Personnel from all stakeholder groups require an understanding of the science behind the instrument as well as the content and what it means when put into practice. With this knowledge will come the understanding of the reasons for domesticating the instrument, resulting in a desire and pride in achieving implementation.

An international instrument is a comprehensive document for worldwide or regional application; most countries will wish (and is strongly advisable) to develop a national instrument, codes, plan of action, programmes, as the case may be which are tailor-made to their particular situations. The technical content in the international instrument will form the basis of the national or regional instrument.

A strategy for implementation may include: A clear statement identifying principles and measures in a policy or legal form, and the expected changes in application, if any; The various institutions involved in implementing the national instrument and their respective roles; Periodic review of the document adopted; Timeline of implementation; and Reporting format to FAO and other relevant international organizations

Implementation of Participatory Monitoring and Auditing Systems: Monitoring of instrument implementation at the ground level is important to determine the success or failure or more precisely the effectiveness of the instrument. Effectiveness is the result of not only how governments implement international instruments (the formal legislation or regulations that countries adopt to comply with the instrument) but also of compliance (the observance of those regulations and commitments contained in the instrument). It is essential that an initial audit be carried out to provide a baseline for comparison in the future. Annual follow-up monitoring will assess the level of compliance being achieved. This level can then be progressively raised over time as the instrument is fully implemented. The adoption of a participatory monitoring approach is consistent with management partnerships and inclusive approach and is necessary to ensure ownership of the process by all stakeholders.

What are the expected outcomes?

These include:

- Member States meet their obligations under national and international fisheries, aquaculture, and natural resource management instruments.
- Increase the level of understanding of State and non-State actors on the advantages of accepting, ratifying, or acceding to relevant fisheries instruments.
- Update legislation and policies to address contemporary issues in fisheries and aquaculture.
- Enable informed decision-making in fisheries and aquaculture through new information, research, and in-depth analysis.
- Justify necessary budget allocations and promote independence in undertaking fisheries related activities and programs.
- Bring government to act and promote coordination between agencies.
- Create cooperation in the relationships between national and local governments, industry, and communities.

Conclusion

AU-MS should strive to have a comprehensive updated domestic legal framework for the management of fisheries and aquaculture based on globally- and regionally-agreed principles and measures in order to achieve long-term sustainability of resources. The starting point for this is ensuring the domestication and transformation of the key international fisheries related instruments into their up-dated legislation. While this requires enormous legal, institutional, technical, financial, and human resource and capacity the long-term advantages outweigh inaction. Many of the international instruments contain provisions to provide assistance to developing States in order for them to enhance their ability to develop an adequate legal and regulatory framework and eventually the implementation of the instruments.

Further Reading

1. Domestic implementation of international instruments for fisheries management and aquaculture development by African Union Member States in the Central Region of Africa: Assessment and Analysis, Challenges, Constraints and possible Strategies for improvement; January 2016, AU-IBAR, Nairobi, Kenya
2. **Citation: AU-IBAR 2016.** Assessment of Constraints to the Implementation/Adoption of International Instruments for Fisheries Management and Aquaculture Development for Identification of Intervention Areas to Support African Union Member States in West Africa. AU-IBAR Reports
3. **Citation: AU-IBAR 2016.** Assessment of Constraints to the Implementation/Adoption of International Instruments for Fisheries Management and Aquaculture Development for Identification of Intervention Areas to Support African Union Member States in East Africa. AU-IBAR Reports
4. **Citation: AU-IBAR 2017.** Assessment of Constraints to the Implementation/Adoption of International Instruments for Fisheries Management and Aquaculture Development for Identification of Intervention Areas to Support African Union Member States: Southern African Region.

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