

# **Development Toward the Adoption of the FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing**

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*On November 25, 2009, during its governing conference in Rome, the Food and Agriculture Organization of the United Nations (FAO) approved a new treaty aimed at closing fishing ports to ships involved in illegal, unreported, and unregulated (IUU) fishing. This article is designed to give an illustration on the development of efforts by the international community as a response to the problems brought by IUU fishing practices. It will start with a description on the background, then on port state control. It will then be followed with an analysis of the international legal basis for port state jurisdiction. The next part will discuss the case of IUU fishing, and finally on the FAO Model Scheme on Port State Measures to Combat IUU Fishing, and the recent Agreement on Port State Measures.*

**Keywords:** law of the sea, port state, illegal, unreported, and unregulated fishing

## **I. Introduction**

On November 25, 2009, during its governing conference in Rome, the Food and Agriculture Organization of the United Nations (FAO) approved a new treaty aimed at closing fishing ports to ships involved in illegal, unreported, and unregulated (IUU) fishing. For its entry into force the Agreement requires ratification by twenty-five countries, this treaty will then be the first legally binding international treaty focused specifically on this problem. This Agreement aims to prevent illegally caught fish from entering international markets. Under the terms of the treaty, foreign vessels will need special docking permission,

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countries will conduct regular inspections, and information sharing networks must be created. FAO Assistant-Director General for Fisheries and Aquaculture Ichiro Nomura said:<sup>2</sup>

“By frustrating responsible management, IUU fishing damages the productivity of fisheries — or leads to their collapse. That’s a serious problem for the people who depend on them for food and income. This treaty represents a real, palpable advance in the ongoing effort to stamp it out.”

This article is designed to give an illustration on the development of efforts by the international community as a response to the problems brought by IUU fishing practices. It will start with a description on the background, then on port state control. It will then be followed with an analysis of the international legal basis for port state jurisdiction. The next part will discuss the case of IUU fishing, and finally on the FAO Model Scheme on Port State Measures to Combat IUU Fishing, and the recent Agreement on Port State Measures.

For several decades, flag state control has increasingly become an inadequate regulatory mechanism, resulting in the need for port states to patrol their own waters for ships not operating in conformity with internationally recognized maritime standards.<sup>3</sup> As is well known in the past, ship owners turned to open registries, or “flags of convenience,” as a way of registering their vessels while avoiding burdensome regulations.<sup>4</sup>

Only through the increased use of port state control, maritime standards begun to be improved. Through various international agreements,<sup>5</sup> port state control has shown its success in monitoring ships and has become a recognized

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<sup>2</sup> Anthony Clark Arend, “New Treaty : The Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing”, September 2, 2009.

<sup>3</sup> Fernando Plaza, “The Future for Flag State Implementation and Port State Control,” in Myron H. Nordquist & John Norton Moore eds., *Current Maritime Issues and the International Maritime Organization*, Center for Oceans Law and Policy, 1999, p.199, 201, as is cited in Antarctic and Southern Ocean Coalition, “Port State Control : International Law Approaches to Regulate Vessels Engaged in Antarctic Non-governmental Activities,” Madrid 9-20 June 2003.

<sup>4</sup> The primary reason for such practice is to avoid burdensome and costly manning regulations, and also to avoid particular taxation regimes, and environmental rules.

<sup>5</sup> For instance, the International Convention on Load Lines, 1966; International Convention for the Safety of Life at Sea (SOLAS), 1974; International Convention for the Prevention of Pollution from Ships (MARPOL) 1973/78; International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW), 1978; United Nations Convention on the Law of the Sea (UNCLOS) 1982; and the Paris Memorandum of Understanding on Port State Control (Paris MOU), 1982.

and accepted form of jurisdiction in international law. Port state control is then a fully accepted feature of international maritime law.<sup>6</sup>

Under international law only states party to a treaty are bound by it, therefore, states that have not ratified or acceded to certain maritime conventions setting out regulations for safety of life at sea and for the protection and preservation of the environment, may regard themselves not to be bound by these rules. However, many of the rules laid out by these conventions have become rules of customary international law. In addition to that, it is generally recognized in international law that a ship voluntarily entering a foreign port accepts the jurisdiction of that foreign state.

## **II. Port State Control**

Because not all flag states are party to the safety and environmental maritime conventions, and because of several flag states' inability to maintain the minimum standards on ships flying their flags, substandard ships have brought significant safety hazards and pollution risks to the environment. As a consequence of such condition, several States invoke port state control to protect their ports and territorial waters from such potential dangers.<sup>7</sup> Orrego-Vicuña indicated that the reasons behind all this is that:<sup>8</sup>

"It is precisely because exclusive flag state enforcement in the high seas as envisaged under traditional international law has become a rather limited and many times unreliable mechanism for the adequate observance of the legal order that other alternatives began to emerge."

The followings are international legal basis for port state jurisdiction.

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<sup>6</sup> In this regard is the concept of port state jurisdiction, which gives port states the authority to intervene in matters concerning the marine environment and fisheries. Similar jurisdiction also can be found under the MARPOL 73/78 Convention regarding inspection of certificates and the reporting and prosecution of certain violations, and also in Article 218 of the 1982 UNCLOS) in respect of marine pollution.

<sup>7</sup> Flag States are responsible for ensuring that ships flying their flags meet the standards under the IMO conventions such as SOLAS, STCW and MARPOL 73/78 Conventions, however, these conventions also give governments the right to inspect ships visiting their ports to ensure that they meet the conventions' requirements. Port State control, therefore, has become more important because flag States alone has proven to be unable to detect and eliminate substandard shipping.

<sup>8</sup> Francisco Orrego Vicuña, "Port State Jurisdiction in Antarctica: A New Approach to Inspection, Control and Enforcement," in Davor Vidas (ed.), *Implementing the Environmental Protection Regime for the Antarctic*, 2000, page 5.

A. **The United Nations Convention on the Law of the Sea (UNCLOS) 1982**  
The United Nations Convention on the Law of the Sea (UNCLOS) 1982 acknowledges that States exercise its full sovereignty over its ports as they generally lie in internal waters and occasionally on the territorial sea. To that effect, article 25(2) is particularly significant, under the title "Rights of protection of the coastal State":

"In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject."

Article 218 of the UN Law of the Sea Convention gives clear references to port State jurisdiction and control over marine pollution, by providing port states with the authority to investigate pollution violations wherever they occur. That Article provides in pertinent part, that:

"(1) When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference."

Article 219 further gives port States the right to apply administrative measures, in cases, as follows :

"Subject to section 7, States which, upon request or on their own initiative, have ascertained that a vessel within one of their ports or at one of their offshore terminals is in violation of applicable international rules and standards relating to seaworthiness of vessels and thereby threatens damage to the marine environment shall, as far as practicable, take administrative measures to prevent the vessel from sailing. Such States may permit the vessel to proceed only to the nearest appropriate repair yard and, upon removal of the causes of the violation, shall permit the vessel to continue immediately."

In addition to that Article 226 (1c) provides that:

"(1)(c) "Without prejudice to applicable international rules and standards relating to the seaworthiness of vessels, the release of a vessel may, whenever it would present an unreasonable threat of damage to the marine environment, be refused or made conditional upon proceeding to the nearest appropriate repair yard. Where release has been refused or made conditional, the flag State of the vessel must be promptly notified, and may seek release of the vessel in accordance with Part XV."



**B. The 1993 FAO Compliance Agreement**

In 1993 the FAO Compliance Agreement<sup>9</sup> introduced a general requirement for port States to notify the flag State when it has reasonable grounds to believe that a vessel entering its ports has undermined international conservation and management measures. However, if investigations were to be conducted by the port State, the Compliance Agreement establishes that arrangements should be made jointly with the flag State. Article V paragraph (2) of this Agreement, states that:

“When a fishing vessel is voluntarily in the port of a Party other than its flag State, that Party, where it has reasonable grounds for believing that the fishing vessel has been used for an activity that undermines the effectiveness of international conservation and management measures, shall promptly notify the flag State accordingly. Parties may make arrangements regarding the undertaking by port States of such investigatory measures as may be considered necessary to establish whether the fishing vessel has indeed been used contrary to the provisions of this Agreement.”

**C. The 1995 United Nations Fish Stocks Agreement (UNFSA)**

As a follow up of the 1982 UNCLOS, an important development in the area of port State can be found in the 1995 United Nations Fish Stocks Agreement (UNFSA),<sup>10</sup> which established not only a right of the port State to take measures upon fishing vessels, but also an obligation on those States to do so, as evidenced in the provision of Article 23, which stated that a port State has “the right and the duty to take non-discriminatory measures in accordance with international law, in order to promote the effectiveness of sub-regional, regional and global conservation and management measures”. According to this provision, the port State may, among others, carry out inspections of documents, fishing gear, and catch on board the fishing vessels.

Requirements for port state control have become more extensive in various IMO conventions, such as:

1. Article 21 of the 1966 International Convention on Load Lines, which stated that :

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<sup>9</sup> Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, adopted in Rome on 24 November 1993, (1993) 33 ILM 368.

<sup>10</sup> Agreement for the Implementation of 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 Doc. A/CONF.164/37, of 8 September 1995.

- (1) "Ships holding a certificate issued under Article 16 or Article 17 [issue of certificate by another government] are subject, when in the ports of other Contracting Governments, to control by officers duly authorized by such Governments. Contracting Governments shall ensure that such control is exercised as far as is reasonable and practicable with a view to verifying that there is on board a valid certificate under the present Convention. If there is a valid International Load Line Certificate (1966) on board the ship, such control shall be limited to the purpose of determining that:
  - (a) the ship is not loaded beyond the limits allowed by the certificate;
  - (b) the position of the load line of the ship corresponds with the certificate; and
  - (c) the ship has not been so materially altered in respect to the matters set out in sub-paragraphs (a) and (b) of paragraph (3) of Article 19 that the ship is manifestly unfit to proceed to sea without danger to human life.If there is a valid International Load Line Exemption Certificate on board, such control shall be limited to the purpose of determining that any conditions stipulated in that certificate are complied with.
- (2) If such control is exercised under sub-paragraph (c) of paragraph (1) of this Article, it shall only be exercised in so far as may be necessary to ensure that the ship shall not sail until it can proceed to sea without danger to the passenger or the crew.
- (3) In the event of the control provided for in this Article giving rise to intervention of any kind, the officer carrying out the control shall immediately inform in writing the Consul or the diplomatic representative of the State whose flag the ship is flying of this decision and of all the circumstances in which intervention was deemed to be necessary."

## 2. Chapter I, Regulation 19, of the 1974 International Convention for the Safety of Life at Sea (SOLAS):

"Every ship holding a certificate issued under Regulation 12 or Regulation 13 [Issue of Certificate by another Government] of this Chapter is subject in the ports of the other Contracting Governments to control by officers duly authorized by such Governments in so far as this control is directed towards verifying that there is on board a valid certificate. Such certificate shall be accepted unless there are *clear grounds* [emphasis added] for believing that the conditions of the ship or of its equipment does not correspond substantially with the particulars of that certificate. In that case, the officer carrying out the control shall take such steps as will ensure that the ship shall not sail until it can proceed to sea without danger to the passengers or the crew. In the event of this control giving rise to the intervention of any kind, the officer carrying out the control shall inform the Consul of the country in which the ship is registered in writing forthwith of all the circumstances in which intervention was deemed to be necessary, and the facts shall be reported to the Organization."

## 3. Article 5(2), of the 1973/78 International Convention for the Prevention of Pollution from Ships (MARPOL):

"A ship required to hold a certificate in accordance with the provisions of the Regulations is subject while in the ports or off-shore terminals under the jurisdiction of a Party to inspection by officers duly authorized by that Party. Any such inspection shall be limited to verifying that there is on board a valid certificate, unless there are *clear grounds* [emphasis added] for believing that the condition of the ship or its equipment does not correspond substantially with the particulars of that certificate. In that case, or if the ship does not carry a valid

certificate, the Party carrying out the inspection shall take such steps as will ensure that the ship shall not sail until it can proceed to sea without presenting an unreasonable threat of harm to the marine environment. That Party may, however, grant such a ship permission to leave the port or off-shore terminal for the purpose of proceeding to the nearest appropriate repair yard available."

**4. Article X, of the 1978 International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW):**

- (1) "Ships, except those excluded by Article III, are subject, while in the ports of a Party, to control by officers duly authorized by that Party to verify that all seafarers on board who are required to be certificated by the Convention are so certificated or hold an appropriate dispensation. Such certificates shall be accepted unless there are clear grounds for believing that a certificate has been fraudulently obtained or that the holder of a certificate is not the person to whom that certificate was originally issued.
- (2) In the event that any deficiencies are found under paragraph (1) or under the procedures specified in Regulation I/4, 'Control Procedures', the officer carrying out the control shall forthwith inform, in writing, the master of the ship and the Consul or, in his absence, the nearest diplomatic representative or the maritime authority of the State whose flag the ship is entitled to fly, so that appropriate action may be taken. Such notification shall specify the details of the deficiencies found and the grounds on which the Party determines that these deficiencies pose a danger to persons, property or the environment.
- (3) In exercising the control under paragraph (1) if, taking into account the size and type of the ship and the length and nature of the voyage, the deficiencies referred to in paragraph (3) of the Regulation I/4 are not corrected and it is determined that this fact poses a danger to persons, property or the environment, the Party carrying out the control shall take steps to ensure that the ship will not sail unless and until these requirements are met to the extent that the danger has been removed. The facts concerning the action taken shall be reported promptly to the Secretary-General.
- (4) When exercising control under this Article, all possible efforts shall be made to avoid a ship being unduly detained or delayed. If a ship is so detained or delayed it shall be entitled to compensation for any loss or damage resulting therefrom.
- (5) This Article shall be applied as may be necessary to ensure that no more favourable treatment is given to ships entitled to fly the flag of a non-Party than is given to ships entitled to fly the flag of a Party."

**D. Regional Agreements**

To complement these international conventions, regional agreements also have been enacted, such as: Paris MOU on Port State Control, 1982; which set up a co-ordinated port State control system in the area of vessel safety and pollution prevention standards. One of its goals is for its 22 member countries to inspect at least 25% of foreign merchant ships entering their respective ports each year. The Paris MOU includes a scheme to ban ships that do not comply with agreed standards. After multiple detentions, these ships will be refused

access to any port in the region of the Memorandum. For greater publicity, the names of banned ships are posted on the Paris MOU website.<sup>11</sup>

The Paris MOU has inspired the development of similar port State regimes in different regions of the world, such as Viña del Mar Agreement, 1992 (Latin American Agreement on Port State Control); Tokyo MOU, 1993 (Asia-Pacific MOU on Port State Control in the Asia-Pacific Region); Caribbean MOU, 1996 (MOU on Port State Control in the Caribbean Region); Mediterranean MOU, 1997 (MOU on Port State Control for the Mediterranean Region); Indian Ocean MOU, 1998; and West and Central African MOU, 1998.

The emergence of such global port State control network composed of several regional agreements, poses new challenges to the IMO. There is a need for harmonization of procedures, a common code of conduct, interchange of information and coordination among the various regimes.<sup>12</sup> For this, IMO has developed a global project to provide assistance to emerging PSC agreements in order to facilitate the harmonization of procedures, inter-regional co-operation, and exchange of information between the various agreements.<sup>13</sup>

### **III. The case of Illegal, unregulated and unreported (IUU) fishing**

It is estimated that about one-fifth of all fish taken from the oceans have been fished illegally, and it undermines management efforts to control overfishing and pose a major threat to the sustainability of fish stocks. Illegal fishing also destruct the livelihoods of coastal communities. The developing countries have been victim to internationally operating companies that fish illegally, while at the same time fishing nations and port States find it difficult to share information, and cooperate to track these violators and enforce regulations. The result is widespread IUU fishing.

IUU fishing poses a direct and significant threat to effective conservation and management of many fish stocks. IUU fishing can lead to the collapse of a fishery or seriously impair efforts to rebuild depleted fish stocks, and may result in lost economic and social opportunities. IUU fishing, therefore, can completely negate the benefits of effective fisheries management.

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<sup>11</sup> Adriana Fabra, Virginia Gascón and Rodolfo Werner, "The Use of Port State Measures to Improve Fisheries Compliance : Issues and instruments,"

<sup>12</sup> Plaza, *supra*, n. 1, at 209.

<sup>13</sup> *Id.* at 206.



A number of international instruments regarding the management of world fishery resources which were developed during the 1990s, also address the issue of IUU fishing. Of particular importance in this regard are the 1995 UN Fish Stocks Agreement and the 1993 FAO Compliance Agreement already described above. In addition to that FAO has also adopted complementing instruments including the Code of Conduct for Responsible Fisheries (CCRF), 1995, and the International Plan of Action (IPOA) on IUU Fishing, 2001.<sup>14</sup> The IPOA-IUU, for example, in its paragraph 63 calls on States members of RFMOs to develop port State measures dealing with prevention of landings from vessels of non-members that have been engaged in fishing activities within the area of the organization, unless they can establish that catch was taken in a manner consistent with relevant conservation and management measures.

These instruments consist of both what is called "hard laws" which are legally binding on parties to the agreements, and "soft laws" which serve more as guidelines and measures, including some options for both States and RFMOs in addressing the issue of IUU fishing. These measures are designed for use by all States, complemented with others that are customized for application by flag States, coastal States and port States.

Port State measures are considered to be one of the most powerful and cost-effective means of combating IUU fishing, however, there has been lack of consistent application of such measures by port States. While on the one hand many States have blocked their ports to vessels having engaged in IUU fishing, others continued to grant such vessels with access to services in their ports, thereby supporting the illegal activity.

Lately, there has been an intensified global focus on the role of port States. Since IUU fishers eventually need to land or tranship their catch in port, port controls are seen as a cost-effective way to combat their activities. Coordination of port State measures will be necessary to maximize the benefit from such controls.

FAO and IMO have adopted resolutions and other instruments relating to port state control as means for controlling illegal, unregulated and unreported (IUU) fishing, and also enforcing other international environmental and resource laws and regulations. For instance FAO has adopted measures to promote the adoption of a regional port state control schemes, and IMO considered reporting procedures for port state control detentions of foreign-flagged vessels found to be not in compliance with generally accepted international rules and regula-

tions for vessel construction, design, equipment and manning (CDEM), as well as vessel operation.<sup>15</sup>

The Committee on Fisheries (COFI) of FAO also produced a report on port state control schemes.<sup>16</sup> FAO has played a leading role in this regard, culminating in the acknowledgment by COFI at its Twenty-sixth Session in 2005 that there was a need to strengthen port State measures as means of combating IUU fishing in a more substantive manner for the reason that the lack of agreed, binding measures presents a loophole.

#### **IV. What are Port State Measures?**

Through port state measures, States established requirements with which foreign vessels must comply as a condition of entry and use of the ports within that State. Such measures can include, for example, denial of port entry and use of port services, requirements for pre-port entry notification and designation of ports that permit landings, documentation requirements, and in-port inspections.<sup>17</sup>

Port State Measures (PSM) can also be considered as requirements established or interventions undertaken by port states where a foreign fishing vessel must comply with or is subjected to as a condition for use of ports within the port state. The requirements are among others, related to prior notification of port entry, use of designated ports, restrictions on port entry and landing/transshipment of fish, restrictions on supplies and services, documentation requirements and port inspections, as well as related measures, such as IUU vessel listing, trade-related measures and sanctions.<sup>18</sup>

##### **A. Port State Measures through RFMOs**

Port State measures have been increasingly adopted by RFMOs,<sup>19</sup> and

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<sup>14</sup> The IPOA-IUU was adopted by consensus at the 24th Session of the FAO Committee on Fisheries on March 2001 and endorsed by the 120th Session of the FAO Council on 23 June 2001. Port State measures are dealt with in Paragraphs 52-64.

<sup>15</sup> IMO Assembly Resolution A.925(22) (November 2001), Entry into Force and Implementation of the 1993 Torremolinos Protocol and the 1995 STCW-F Convention.

<sup>16</sup> FAO, COFI, 25th Sess. (Feb. 2003).

Report of the Expert Consultation to Review Port State Measures to Combat Illegal, Unregulated and Unreported Fishing (4-6 Nov. 2002).

are also addressed in a number of international instruments. These organizations had introduced systems of blacklisting IUU vessels, requiring, among other things, port States to take specific actions against such vessels. Actions agreed by the RFMOs varied significantly with some denying access while others allowing such vessels to enter port and be subject to a thorough inspection. In addition, some organizations had established authorized vessel lists, implying that port State actions shall be taken against vessels not included in those lists.

In the report on FAO Regional Workshop on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing held in Cape Town, South Africa, from 28 to 31 January 2008, there have been indicated several examples on port state measures taken by some RFMOs.<sup>20</sup>

Article 15 of the SEAFO Convention, for instance, empowered a port State to inspect documents, fishing gear and catch on board the fishing vessels when such vessels were voluntarily in its ports or at its offshore terminals. It further prohibited landings and transshipments by vessels flying the flag of non-Parties to the Convention engaged in IUU fishing activities.

To address CCAMLR's IUU fishing problem in the Patagonian toothfish fishery, measures had been taken by the Commission to address it, consisting of five measures: the Catch Documentation Scheme (CDS), licensing, port inspections, centralized vessel monitoring system (VMS) reporting and the IUU Vessel List, all of which provided tools for port States to combat IUU fishing. The measures combined had contributed to a reduction of 90 percent in IUU catches of toothfish over the past decade and more than halved the active IUU fishing fleet in that area.

Measures, resolutions and recommendations adopted by ICCAT pertaining to IUU fishing and port State measures included among others that, ICCAT

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<sup>17</sup> Fisheries and Iceans, Canada. "United Nations Food and Agriculture Organization's Port State Measures," [www.dfa-mpa.gc.ca](http://www.dfa-mpa.gc.ca)

<sup>18</sup> FAO, Fisheries and Aquaculture Department, Database on Port State Measures, <http://www.fao.org/fishery/psm/en>, downloaded on 30 September 2010 at 11.05 a.m.

<sup>19</sup> For instance, the Commission for the Conservation of Antarctic Living Marine Resources (CCAMLR), the International Commission for the Conservation of Atlantic Tunas (ICCAT), the Indian Ocean Tuna Commission (IOTC), the Northwest Atlantic Fisheries Organization (NAFO), the North East Atlantic Fisheries Commission (NEAFC) and the South East Atlantic Fisheries Organization (SEAFO).

<sup>20</sup> FAO Fisheries Report No. 859, Rome 2008.

maintained lists of authorized and IUU fishing vessels (vessels greater than 24 metres) including carrier vessels. In respect of bluefin tuna, it also maintain records of fishing and farming vessels, farming facilities, traps and landing and transshipment ports.

South West Indian Ocean Fisheries Commission (SWIOFC), addressed regional cooperation on MCS through the Southern and Eastern African Forum to Counter IUU Fishing which included positive inputs for the formulation of a SADC Fisheries Ministers' Declaration on IUU fishing; the possibility of the Indian Ocean Commission (IOC), SWIOFC and IOTC fostering enhanced regional cooperation; the need to avoid duplication with existing and new MCS initiatives in the region because of the limited availability of resources and the general lack of MCS capacity and support in continental countries in the region compared to island countries.

#### **B. FAO Model Scheme on Port State Measures to Combat IUU Fishing (2005)**

The Model Scheme on Port State Measures to Combat IUU Fishing which was developed at the FAO Technical Consultation to Review Port State Measures to Combat IUU Fishing held in Rome on 31 August-2 September 2004, and adopted by COFI in 2005 is addressed to all States, fishing entities and regional fisheries management organizations. Its purpose is to facilitate the implementation of effective action by port States to prevent, deter and eliminate IUU fishing. Following the Preamble, the Scheme addresses general considerations, issues relating to the inspection of vessels while they are in port, actions to be taken when it is found that there is reasonable evidence to assume that a foreign fishing vessel has engaged in, or supported, IUU fishing activities, and information that the port State should provide to the flag State. The final section of the Scheme focuses on other matters including the provision that it should be implemented in a fair, transparent and non-discriminatory manner.<sup>21</sup>

A number of international organizations and fora have promoted or endorsed the FAO Model Scheme on Port State Measures to Combat IUU Fish-

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<sup>21</sup> For full description of the FAO Model Scheme, see Terje Lobach, "Port State Measures to Combat IUU Fishing: The FAO Model Scheme on Port State Measures," FAO/FFA Regional Workshop to Promote the Full and Effective Implementation of Port State Measures to Combat IUU Fishing, Mocambo Hotel, Nadi, Fiji, 28 August – 1 September 2006.



ing, including the 2006 UNFSA Review Conference,<sup>22</sup> and have called for a legally binding instrument setting minimum standards for port State measures. This culminated at the Twenty-seventh Session of COFI in March 2007 when the Committee acknowledged the urgent need for a comprehensive port State measures and the strong support expressed on the proposal to develop a new legally-binding instrument which would be based on the 2001 FAO IPOA-IUU and the 2005 FAO Model Scheme on Port State Measures to Combat IUU Fishing.

There is a growing international support for the establishment of a legally binding global instrument on port state measures based on the FAO Model Scheme. The 2006 UNFSA Review Conference, for example, identified port State control as a cost-effective second line of defence in the face of uneven flag State performance. This Review Conference Report also recommends that States adopt all necessary port State measures consistent with Article 23 of UNFSA, and commence a process within FAO to develop a "legally binding instrument on minimum standards for port State measures, building on the FAO Model Scheme and the IPOA-IUU".<sup>23</sup>

The twenty-sixth session of the FAO-COFI, held in 2005, in endorsing the report and recommendations of the 2004 FAO Technical Consultation to Review Port States Measures to Combat IUU Fishing, agreed that follow-up work to the Consultation should be undertaken, especially with respect to operationalizing the Model Scheme.

#### **C. Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2009)**

Following an Expert Consultation meeting in September 2007, four rounds of Technical Consultation were held at the FAO Headquarters in Rome in 2008 and 2009, sanctioned by COFI to finalize a draft Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. The Technical Consultation, which was attended by 91 FAO Members, finalized the draft Agreement on 28 August 2009.<sup>24</sup>

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<sup>22</sup> Review Conference on 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, 22 to 26 May 2006.

<sup>23</sup> Adriana Fabra, Virginia Gascón and Rodolfo Werner, *supra*, n. 11.

Finally on November 25, 2009, the Food and Agriculture Organization of the United Nations (FAO) approved the draft agreement to secure fishing ports from ships involved in illegal, unreported, and unregulated (IUU) fishing. The Agreement on Port State Measures will be the first ever global treaty focused specifically on the problem of IUU fishing. Its objective is to prevent, deter and eliminate IUU fishing through the implementation of effective port State measures, and thereby to ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems.

FAO member States who were the first to have signed the treaty are Angola, Brazil, Chile, the European Community, Iceland, Indonesia, Norway, Samoa, Sierra Leone, the United States, and Uruguay. This group of eleven are thus committing themselves to prevent, deter and eventually eliminate IUU fishing by taking steps to guard their ports against vessels engaged in IUU fishing, thereby preventing fish from such vessels from entering international markets. In 2010 there are additional signatory States including Australia (27 April 2010), Gabon (26 April 2010), Peru (3 March 2010), New Zealand (15 December 2009) and the Russian Federation (29 April 2010).

The Agreement consists of 37 articles grouped into 10 parts. Part 1 consists of provisions dealing with the objective; application; relationship with international law and other international instruments; integration and coordination at the national level; and cooperation and exchange of information. Part 2 contains regulations on entry into port through the provisions on the designation of ports; advance request for port entry; port entry, authorization or denial; and *force majeure* or distress. Part 3 provides regulations on the use of ports. Part 4 deals with inspections and follow-up actions including the levels and priorities for inspection; conduct of inspections; results of inspections; transmittal of in-

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<sup>24</sup> FAO Members involved in the talks included: Algeria, Angola, Argentina, Australia, Bangladesh, Benin, Brazil, Bulgaria, Burkina Faso, Burundi, Canada, Central African Republic, Chile, China, Cook Islands, Costa Rica, Cote d'Ivoire, Cyprus, Congo DR, Dominican Republic, Ecuador, Egypt, Eritrea, Ethiopia, European Community, Fiji, France, Gabon, Gambia, Germany, Ghana, Greece, Guatemala, Guinea, Guinea Bissau, Haiti, Honduras, Iceland, India, Indonesia, Iran, Ireland, Italy, Japan, Kenya, Kiribati, Kuwait, Lesotho, Libya, Madagascar, Malaysia, Malta, Marshall Islands, Mauritania, Mexico, Morocco, Mozambique, Namibia, Netherlands, New Zealand, Norway, Oman, Panama, Papua New Guinea, Peru, Poland, Portugal, Republic of Korea, Russian Federation, Samoa, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Slovenia, Somalia, South Africa, Spain, Sudan, Sweden, Tanzania, Thailand, Togo, Tunisia, Turkey, Uganda, Ukraine, USA, Uruguay, Venezuela, Viet Nam, Zambia and FAO Associate Member, Faeroe Islands.

spection results; electronic exchange of information; training of inspectors; port State actions following inspection; and information on recourse in the port State. Part 5 deals with the role of flag States; while Part 6 contains a provision on requirements of developing States. Parts 7, 8, and 9 consecutively contains provisions on peaceful settlement of disputes; Non-parties to the Agreement; and monitoring, review and assessment. Included in Part 10 are the final provisions regarding signature; ratification, acceptance or approval; accession; participation by Regional Economic Integration Organizations; entry into force; reservations and exceptions; declaration and statements; provisional application; amendments; annexes; withdrawal; the depositary; and authentic texts.

According to the Agreement, all signatories are then under the obligation to implement, among others, the following measures:<sup>25</sup>

1. Designating ports that permit landings;
2. Foreign fishing vessels wishing to dock will be required to request permission from designated ports ahead of time, transmitting information related to their activities and the fish they have on board. This will give authorities an opportunity to spot any red flags in advance;
3. Prohibiting entry into port or use of port services for known or suspected IUU fishing vessels and vessels that supply IUU fishing vessels;
4. Standardizing requirements for information from vessels seeking entry to port;
5. Improving sharing of information, including verifications of fishing authorizations, between the flag State and the port State;
6. Port States will conduct regular inspections of ships according to a common set of standards. Reviews of ship papers, surveys of fishing gear, examining catches, and checking ship records can often reveal if a ship has engaged in IUU fishing.
7. Standardizing vessel inspections and the training of inspectors: they must ensure that ports are adequately equipped and inspectors properly trained.
8. When a vessel is denied access, port states must communicate that information publicly, and national authorities of the country whose flag the

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<sup>25</sup> FAO, "New treaty will leave fish pirates without safe haven - 91 FAO Members have agreed on an international agreement to implement "port state measures" to combat illegal fishing," Sep 1, 2009, available at YubaNet.com. See also Fisheries and Oceans Canada, "United Nations Food and Agriculture Organization's Port State Measures," available at [www.dfo-mpo.gc.ca](http://www.dfo-mpo.gc.ca).

vessel is flying must take follow-up action; and

9. Recognizing the need for assistance to developing countries for their implementation of the instrument.

Significantly, there are five detailed Annexes to the Agreement. They will serve to facilitate harmonisation and provide a basis for the following measures and actions:

1. Information to be provided in advance by vessels requesting port entry;
2. Port State inspection procedures;
3. Report of the results of the inspection;
4. Information systems on port State inspections; and
5. Guidelines for the training of inspectors.

To ensure compliance, all members must monitor the implementation of these measures, with a major review scheduled to occur four years after the Agreement takes effect.<sup>26</sup>

The Agreement falls under Article XIV of the FAO Constitution, with FAO's Director-General acting as legal depository for countries' ratifications. The Agreement has to be reviewed by FAO's Committee on Constitutional and Legal Matters, and from there it has to go to FAO's Council and the FAO Conference for final review and formal adoption. The Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing was finally approved by the FAO Conference at its Thirty-sixth Session on 22 November 2009. In order to enter into force the Agreement requires 25 States have done so, it will enter into force after 30 days.

In attempting to implement this Agreement there are challenges that countries, especially developing countries, will be faced with for effective port State measures, including:<sup>27</sup>

1. Too few and poorly trained fishery inspectors who did not have any training in port State measures procedures;
2. An inability to track foreign fishing vessel activity once authorised to enter a port State's exclusive economic zone (EEZ);

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<sup>26</sup> Article 24.

<sup>27</sup> Judith Swan, "Port State Measures," FAO Regional Workshop on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing. Cape Town, South Africa, 28–31 January 2008. FAO Fisheries Report. No. 859. Rome, FAO. 2008



3. Poor or no coordination between government departments, including those responsible for fisheries, port authorities and trade; and
4. A lack of financial resources.

## **V. Conclusion**

**“Port state measures” like those prescribed in the Agreement are widely considered as one of the most effective and cost-effective weapons in the fight against IUU fishing.**

**However, David Doulman, an expert on the issue at FAO said that :**

**“Of course, the effectiveness of port state measures depends in large part on how well countries implement them, . . . So the focus now is to make sure that countries and other involved parties have the means and know-how to enforce it and are living up to their commitments. Importantly, the Agreement provides for assistance and support to developing countries to help them with implementation.”<sup>28</sup>**

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<sup>28</sup> As cited in FAO, *supra*, n. 25.