

**A GUIDE TO THE BACKGROUND AND IMPLEMENTATION OF THE  
2009 FAO AGREEMENT ON PORT STATE MEASURES TO PREVENT,  
DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED  
FISHING**



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by

**David J. Doulman**

Senior Fishery Liaison Officer

FAO Fisheries and Aquaculture Department

Rome, Italy

**Judith Swan**

FAO Consultant

Rome, Italy

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## PREPARATION OF THIS DOCUMENT

This Circular was prepared as part of the ongoing activities of the FAO Policy, Economics and Institutions Service to support capacity development in FAO member countries. The Circular is intended to meet calls from the FAO Committee on Fisheries to facilitate capacity development and to implement Article 21 of the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.

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### ABSTRACT

In the early 1990s, the international community moved to place emphasis on the use of port State measures as a fisheries management tool. This was because port State measures were seen as a cost-effective and efficient means to curb and combat illegal, unreported and unregulated fishing. It was recognized that using such measures could contribute towards promoting long-term sustainability in fisheries as called for by the 1992 United Nations Conference on Environment and Development, the 2002 World Summit on Sustainable Development and other important global and regional fora including the United Nations General Assembly, FAO Committee on Fisheries, FAO Council and FAO Conference and regional fishery bodies including regional fisheries management organizations and arrangements. This publication commences by tracing the development of port State measures as a fisheries management tool through a review of a number of internationally important instruments. This is followed by a discussion of the process for the conclusion of the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. The structure, examination and analysis of the Agreement are then addressed. Policy, legal and operational checklists for the implementation of the Agreement are presented, followed by a review of capacity development and requirements of developing countries in relation to port State measures. Concerns and challenges to the implementation of the Agreement are highlighted prior to the conclusions. The appendixes to the Circular provide important reference materials related to port State measures. This publication is not intended to be a definitive study on port State measures. Rather, it has been developed specifically to support FAO's capacity-development efforts in port State measures and, as appropriate, to be used as a reference tool for fisheries practitioners and students.



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## ABBREVIATIONS AND ACRONYMS

1982 UN Convention	1982 UN Convention on the Law of the Sea
1993 FAO Compliance Agreement	1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas
1995 FAO Code of Conduct	1995 FAO Code of Conduct for Responsible Fisheries
1995 UN Fish Stocks Agreement	1995 UN 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 Stocks
2005 FAO Model Scheme	2005 FAO Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing
2009 FAO Port State Measures Agreement	2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing
Agenda 21	Plan of Action for Sustainable Development adopted by the 1992 United Nations Conference on Environment and Development
CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources
CCLM	Committee on Constitutional and Legal Matters
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
CDS	Catch Documentation Scheme
CECAF	Fishery Committee for the Eastern Central Atlantic
CMM	conservation and management measure
CNM	cooperating non-member
COFI	FAO Committee on Fisheries
CP	Contracting Party
CPC	Cooperating non-contracting Party
CSD	Commission on Sustainable Development
EEZ	exclusive economic zone
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FFA	Pacific Islands Forum Fisheries Agency
GFCM	General Fisheries Commission for the Mediterranean
IATTC	Inter-American Tropical Tuna Commission
ICCAT	International Commission for the Conservation of Atlantic Tunas
ILO	International Labour Organization
IMO	International Maritime Organization
IOC	Indian Ocean Commission
IOTC	Indian Ocean Tuna Commission
IPOA	international plan of action
IPOA-IUU	2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing
IUU fishing	illegal, unreported and unregulated fishing
MCS	monitoring, control and surveillance
MOU	memorandum of understanding
NAFO	Northwest Atlantic Fisheries Organization
NEAFC	North East Atlantic Fisheries Commission
NGO	non-governmental organization
NCP	Non-contracting Party
NPOA	national plan of action
NPOA-IUU	national plan of action to combat IUU fishing
OECD	Organisation for Economic Co-operation and Development
Paris MOU	Paris Memorandum of Understanding on Port State Control
REIO	regional economic integration organization

RFB	regional fishery body
RFMO/A	regional fisheries management organization or arrangement
Rio Declaration	Rio Declaration on Environment and Development
SEAFDEC	Southeast Asian Fisheries Development Center
SEAFO	South East Atlantic Fisheries Organization
SBT	southern bluefin tuna
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNDOALAS	United Nations Office of Legal Affairs/Division for Ocean Affairs and the Law of the Sea
UNGA	United Nations General Assembly
VMS	vessel monitoring system
WCPFC	Western and Central Pacific Fisheries Commission
WHO	World Health Organization
WSSD	World Summit on Sustainable Development
WSSD-POI	World Summit on Sustainable Development Plan of Implementation

## **1. THE EVOLUTION OF PORT STATE MEASURES**

### **1.1 Introduction**

The evolution of port State measures for fisheries management and enforcement has progressed, slowly at first, through increasing recognition by the international community of their effectiveness and value in combating illegal, unreported and unregulated (IUU) fishing.

It has taken place on many fronts, including by progressive inclusion of requirements in internationally negotiated fisheries instruments, both binding and non-binding, and outcomes of international and regional fora such as the United Nations General Assembly (UNGA) and regional fishery bodies (RFBs). Importantly, port State measures have been developed against a backdrop of expanding global concern since the 1970s about the environment and the need for all countries to cooperate towards a sustainable future. All relevant developments are described in this document.

The evolution of the legal foundation for port State measures began with the 1982 United Nations Convention on the Law of the Sea (1982 UN Convention),<sup>1</sup> a landmark instrument described as a “Constitution for the Oceans”, which was some 14 years in the making. It provides the international legal basis for the protection and use of living and non-living resources of the world’s oceans. The Convention is the point of departure for most, if not all, binding and voluntary international fisheries instruments, such as those adopted by the Food and Agriculture Organization of the United Nations (FAO), as well as non-binding but politically significant fisheries resolutions, such as those adopted by the UNGA.

Port State measures are addressed in the 1982 Convention in Article 218. In this Article, the measures relate to port State enforcement against marine pollution. This is essentially an environmental rather than a fisheries issue, formulated with the merchant marine in mind. The 1982 UN Convention does not provide for port State measures to be used as a fisheries management tool to promote rational conservation and management or as a basis for framing sanctions against fishing vessels that have engaged in illicit activities.

While the importance of port State measures to strengthen fisheries management might have been recognized when the 1982 UN Convention was being negotiated, it was overshadowed by other more important jurisdictional and fisheries issues at the time such as the extension of maritime zones under national jurisdiction, high seas fisheries conservation and management and the treatment of certain fish stocks. Nonetheless, the thrust and basis of the fisheries provisions of the 1982 UN Convention could be interpreted to include port State measures as a means for promoting rational management even though they are not mentioned explicitly in this context. Other international fisheries instruments have built upon this foundation, as described in Sections 1.3 and 3.2.1–3.2.4 below.

### **1.2 Evolution of global environmental milestones and their impact on international instruments**

In the 1970s, the international community focused concern on the way in which the world’s natural resources were being utilized and managed. The 1972 UN Conference on the Human Environment (Stockholm Conference) was a seminal meeting, being the first international conference to bring developed and developing countries together to address environmental issues. The Conference, stimulated by a growing discussion about the impacts of population and development, pointed to a need to incorporate environmental matters into global growth and development equations.

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<sup>1</sup> United Nations Convention on the Law of the Sea of 10 December 1982. The Convention entered into force in November 1994. However, many of its provisions were being applied by the international community prior to the conclusion of negotiations in 1982.

Importantly, the Conference adopted a declaration with principles and an action plan, laying down the first blueprint of its type.<sup>2</sup>

A decade later, the United Nations (UN) convened the 1983 World Commission on Environment and Development. Its purpose was to evaluate the extent to which the outcomes of the Stockholm Conference had been implemented. Promoted strongly by a like-minded group of countries and supported by an eminent group of international scholars and civil society, the Commission, which ran for three years, focused sharply on the deterioration of the human environment and natural resources and the consequences of that degradation for global economic and social development. The trade-off between reducing poverty and protecting the environment was seen as a central and critical issue with the need for sustainable development being preeminent.<sup>3</sup> The Commission's 1987 published report, *inter alia*, defined, sustainable development, highlighting the need to find harmony between economic growth on the one hand and environmental and social issues on the other.<sup>4</sup>

Building on the work of the 1972 and the 1983 UN Conferences, the FAO/Netherlands Conference on Agriculture and the Environment, known as the Den Bosch Conference, was convened in 1991.<sup>5</sup> It adopted a Declaration and Agenda on Sustainable Agriculture and Rural Development. The conference was important because it stimulated and developed sustainable development concepts in relation to primary industries, providing input to the 1992 United Nations Conference on Environment and Development (UNCED) or Earth Summit.

The Den Bosch Conference agreed that sustainable development was “the management and conservation of the natural resource base and the orientation of technological and institutional change in such a manner as to ensure the attainment and continued satisfaction of human needs for the present and future generations. Such development (in agriculture, forestry and fisheries sectors) conserves land, water, plant and animal genetic resources and is environmentally non-degrading, technically appropriate, economically viable and socially acceptable.”<sup>6</sup>

In fisheries, the concept of sustainable development was new and forward-looking. It went beyond more traditional notions of conservation and management, referring to intergenerational resource access and equity, and introducing explicitly environmental, technical, economic and social dimensions. The Den Bosch Conference agreed that the concept should be applied broadly, taking into account challenges such as poverty and poverty eradication, food security, self-sufficiency, self-reliance and income generation. In the case of fisheries, although non-biological parameters had been identified as key considerations for management as early as the 1950s, these important social and economic factors were largely ignored in practice when fisheries management decisions were made.

The UNCED adopted Agenda 21 and the Rio Declaration, with sustainable development being a central tenet.<sup>7</sup> Non-binding but highly influential, Agenda 21 was strikingly innovative, promoting an international re-orientation about the utilization of natural resources, many of which were already

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<sup>2</sup> The report of the Conference is available at: [www.unep.org/Documents.Multilingual/Default.asp?documentid=97](http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97)

<sup>3</sup> “Sustainable development” is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: the concept of ‘needs’, in particular the essential needs of the world’s poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs.

<sup>4</sup> *Report of the World Commission on Environment and Development: Our Common Future*. The report is available at: [www.un-documents.net/wced-ocf.htm](http://www.un-documents.net/wced-ocf.htm)

<sup>5</sup> FAO. *FAO/Netherlands Conference on Agriculture and the Environment, ‘S-Hertogenbosch, The Netherlands, 15–19 April 1991. Report of the Conference*. 60 pp.

<sup>6</sup> *Ibid.* Although other definitions of “sustainable development” had currency at that time, it was the Den Bosch definition that the international community considered most appropriate and comprehensive.

<sup>7</sup> UN. 1992. *Earth Summit: Agenda 21 the United Nations Programme of Action from Rio*. New York, USA. 294 pp.

subject to excessive exploitation and depletion, with limited effort devoted to their rehabilitation and restoration.

The Rio Declaration, consisting of 27 principles relating to the environment and development, underscored a broad range of issues including those relating to national sovereignty, equity, poverty eradication, the special situation and needs of developing countries, international cooperation, the application of the precautionary approach, women, indigenous people and the peaceful settlement of disputes. Furthermore, the UNCED's pre-meeting negotiations and the Conference itself were significantly participatory in character, with civil society playing a highly visible and vocal role. Greater transparency and a more inclusive approach to consultation were apparent, signalling a radical change from previous UN negotiations. This open-door approach served to affect other processes within the UN system including the negotiation of the 1995 FAO Code of Conduct for Responsible Fisheries (1995 FAO Code of Conduct).<sup>8</sup>

Chapter 17 of Agenda 21 addressed fisheries. The chapter was entitled "Protection of the oceans, all kinds of seas, including enclosed and semi-enclosed seas, and coastal areas and the protection, rational use and development of their living resources". Comprehensive in approach and content, Chapter 17 considered fisheries and other issues under eight main headings, including:

- the sustainable development of coastal and marine areas including exclusive economic zones (EEZs);
- marine environmental protection;
- sustainable use and conservation of marine living resources of the high seas;
- sustainable use and conservation of marine resources under national jurisdiction;
- critical uncertainties for the management of the marine environment and climate change;
- strengthening regional and international cooperation and coordination; and
- the sustainable development of small islands.

Each heading was subdivided into standard captions relating to the basis for action (i.e. its rationale), objectives, activities (management, data and information, and regional and international cooperation and coordination) and means of implementation (finance, science and technology, human resource development and capacity building).

In the decade following the UNCED, an unprecedented number of global and regional fisheries agreements and instruments were concluded. This reflected in part concern about the unsustainable way in which many of the world's fisheries had been exploited (e.g. persistent levels of overfishing in so-called managed fisheries and the use of unsustainable, highly non-selective and wasteful fishing gear types such as large-scale pelagic driftnets) and a genuine and international commitment to redress past shortcomings. However, while negotiations moved ahead on different fronts and at different paces for new agreements and instruments, their implementation flagged, owing principally to capacity limitation in many developing countries, implementation overload as expressed by some FAO Members at the FAO Committee on Fisheries (COFI) in 1997, and a lack of priority in other countries.<sup>9</sup>

A decade after the UNCED, the 2002 World Summit on Sustainable Development (WSSD) was convened. Impatient with the rate of implementation of Agenda 21, the international community at the WSSD adopted the Johannesburg Declaration on Sustainable Development and World Summit on Sustainable Development Plan of Implementation (WSSD-POI) in an attempt to stimulate and reinvigorate the Agenda's implementation in a more concrete manner to achieve clear results.<sup>10</sup>

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<sup>8</sup> FAO. 1995. *Code of Conduct for Responsible Fisheries*. Rome. 41 pp.

<sup>9</sup> See Cochrane, K.L. and Douman, D.J. 2005. The rising tide of fisheries instruments and the struggle to keep afloat. *Philosophical Transactions of the Royal Society B*, 360(1453): 77–94.

<sup>10</sup> UN. 2003. *Johannesburg Declaration on Sustainable Development and the Plan of Implementation of the World Summit on Sustainable Development*. New York, USA. 88 pp.

The WSSD-POI was quite different in scope to Agenda 21. The WSSD-POI focused sharply on new and emerging fisheries issues but, more importantly, set optimistic time-bound objectives for the achievement of outcomes. For example, the WSSD-POI encouraged: implementation of the ecosystem approach to fisheries management by 2010; action to maintain or restore fish stocks to levels that could produce their maximum sustainable yield with the aim of achieving these goals for depleted stocks on an urgent basis and where possible not later than 2015; development of national and regional plans of action to combat illegal, unreported and unregulated (IUU) fishing by 2004 and for the management of fishing capacity by 2005, and establishment of marine protected area networks by 2012.

In part, the WSSD-POI referred to the non-binding 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU).<sup>11</sup> This instrument had its origins at the 1999 FAO Ministerial Meeting on Fisheries that adopted the FAO Rome Declaration on the Implementation of the Code of Conduct for Responsible Fisheries. Ministers agreed, *inter alia*, that countries should develop a global plan of action to deal effectively with all forms of IUU fishing, including fishing vessels flying “flags of convenience”.<sup>12</sup> This Declaration was the first global initiative against IUU fishing and related activities.<sup>13</sup> It provided the impetus for FAO to pursue a step-wise approach towards the elaboration of the IPOA-IUU and for other regional and international organizations to promote action against IUU fishing.

Despite nearly a decade of concerted international efforts to deal with IUU fishing, it continues to be elusive and a priority on the global fisheries agenda. IUU fishing is a grave concern because it undermines national and regional efforts to manage fisheries responsibly and in a long-term sustainable manner. It also prejudices fishing opportunities and livelihoods for authorized fishers, prevents the rehabilitation and restoration of overfished stocks, has negative impacts on biodiversity and the environment, and contributes to poverty and food insecurity in many developing countries. Largely for these reasons, the international community has devoted considerable resources to root out IUU fishing, addressing it at different levels and on different fronts.

In addition to the financial considerations driving IUU fishing, there are other issues that favour and facilitate such fishing. These issues include, *inter alia*, the existence of excess fleet capacity, fleet reduction programmes that result in the overseas transfer of vessels, the payment of so-called “bad” subsidies to support the construction and operation of vessels, and poor fisheries management. These issues require attention if IUU fishing is to be addressed more comprehensively and headway made in reducing its incidence and impact.

### **1.3 Post-UNCED fisheries instruments and the progressive development of port State measures as a fisheries management tool**

Since the UNCED, port State measures as a tool to promote more responsible fisheries and long-term sustainability have been introduced progressively in both binding and voluntary instruments. The movement towards the use of these measures for fisheries management purposes has been encouraged by the recognition that they are more cost-effective and efficient than alternative inspection tools involving air and sea platforms. Furthermore, it is recognized that port inspections are safer than at-sea inspections where boarding and control of fishing vessels can be hazardous. When vessels are voluntarily in port, authorized officers have the option of boarding vessels for routine inspections or to undertake more directed inspections if there is information or evidence to suggest that a vessel has engaged, or is suspected to have engaged, in IUU fishing. The boarding of vessels in port is straightforward, devoid of the obstacles and dangers associated with at-sea boarding.

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<sup>11</sup> FAO. 2001. *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*. Rome. 24 pp.

<sup>12</sup> The term “flag of convenience” is now referred to generally as “flag of non-compliance” to address the practice of States operating open registers without exercising effective control over their fishing vessels. Similarly, contemporary jargon refers to “ports of non-compliance” rather than “ports of convenience”.

<sup>13</sup> In this paper, IUU fishing refers, as appropriate, to IUU fishing and/or related activities.

Port State measures have an important regional dimension. Although countries implement measures in accordance with relevant national and international law, they are mindful that for maximum benefit and effect, regional cooperation and harmonization is required in order to ensure a degree of equivalency among national measures, especially in terms of their scope, structure, application and sanctions. It has been demonstrated that regional cooperation and harmonization are most effective where an established mechanism exists to underpin such cooperation.

A lack of harmonized port State measures among a regional grouping of States is likely to encourage “port hopping” by IUU fishing vessels as they seek to land or transship catches in those ports with lax or poorly enforced measures. Perhaps unwittingly, these ports foster IUU fishing because IUU fishers can dispose of their catches and are not held accountable for their actions. Regions that have implemented harmonized port State measures usually agree to close their ports to vessels known to have, or that are suspected of having, engaged in IUU fishing. Without port access in a region, IUU fishing vessels are required, often at considerable expense, to transit to other regions where port access is available. These additional tasks reduce the value of IUU fishing.

Since the UNCED, there has been an incremental development of port State measures to support fisheries management in international instruments. In a progressive manner, and building on precedent, port State measures have been strengthened with the promotion of new instruments. A feature of this process has been to implement non-binding port State measures in certain instruments (e.g. IPOA–IUU) as binding obligations (e.g. in national laws and conservation and management measures [CMMs] adopted by regional fisheries management organizations or arrangements [RFMO/As]).

Twenty years after the Earth Summit, the Rio+20 Conference will be held in June 2012. It will seek to secure renewed political commitment for sustainable development, assess the progress to date and the remaining gaps in the implementation of the outcomes of the major summits on sustainable development, and address new and emerging challenges. In doing so, the Conference will build heavily on the achievements of the follow-up to the 1992 Earth Summit and the 2002 WSSD, focusing on the green economy in the context of sustainable development and poverty alleviation and the institutional framework to support sustainable development. In pre-conference discussion, IUU fishing has been identified as an obstacle to sustainable fisheries. Although countries have taken steps to develop national plans of action against IUU fishing, the primary implementation mechanism of the IPOA–IUU, and develop and strengthen monitoring, control and surveillance (MCS), IUU fishing remains a global threat. Furthermore, it has been noted that poor enforcement of port State measures and flag State responsibilities, leading to the creation of ports and flags of “non-compliance”, continues to undermine efforts to secure sustainable fisheries.

### ***1.3.1 1993 FAO Compliance Agreement***

#### *Background*

The 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (1993 FAO Compliance Agreement)<sup>14</sup> was approved by the FAO Conference in Resolution 15/93 on 24 November 1993. It is an integral component of the 1995 FAO Code of Conduct. The Agreement entered into force on 24 April 2003 after 25 Parties had deposited their instruments of acceptance with the depositary, the Director-General of FAO. It currently has 39 acceptances.<sup>15</sup>

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<sup>14</sup> FAO. 1995. *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*. Rome. 12 pp.

<sup>15</sup> As at 1 December 2011. A list of the countries that have accepted the Compliance Agreement is available at: [www.fao.org/Legal/treaties/012s-e.htm](http://www.fao.org/Legal/treaties/012s-e.htm)

The rate of deposit of instruments of acceptance for the Compliance Agreement has been low and slow. However, FAO continues to urge its Members to become parties to the Agreement as a means of enhancing the management of high seas fisheries and combating IUU fishing.

The development of the 1993 FAO Compliance Agreement was led by FAO's Legal Office, being driven by the outcomes of the UNCED. Several technical negotiating meetings were convened at FAO headquarters, Rome, Italy, in 1992 and 1993. For cost and efficiency reasons, use was made also of other meetings, such as sessions of the Conference for the negotiation of the 1995 UN 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 Stocks (1995 UN Fish Stocks Agreement), for informal consultation with FAO Members.

The purpose of the 1993 FAO Compliance Agreement is to provide an instrument for countries to take effective action, consistent with international law, to ensure compliance with applicable international conservation and management measures for living marine resources of the high seas.<sup>16</sup> The Agreement stipulates the special responsibility of flag States to this end, in particular with respect to granting authorization to fish on the high seas. They may do so only when satisfied that they are able to exercise effectively their responsibilities, and they must comply with the detailed provisions of the Agreement concerning the granting of such authorization to vessels previously registered in the territory of another State. Such authorization should, as a result, enhance flag State control in high seas fisheries, enable these fisheries to be more effectively managed and contribute to a reduction in the incidence of IUU fishing on the high seas.

#### *International cooperation and port State measures*

Article V of the 1993 FAO Compliance Agreement addresses international cooperation. It requires Parties to exchange information concerning vessels reported to have engaged in activities undermining international conservation and management measures (i.e. binding measures put in place by RFMOs). The purpose of this cooperation and exchange of information is to assist flag States fulfil their obligations under the Agreement.

Furthermore, the 1993 FAO Compliance Agreement provides that, when a fishing vessel is voluntarily in the port of a Party to the Agreement and there are reasonable grounds for believing that the vessel has been used for activities that undermine international conservation and management measures, the flag State *shall* be notified by the port State.

Parties then have the option (i.e. *may*) to make arrangements with port States for *investigatory measures* to assess whether a vessel has operated contrary to the Agreement's provisions.<sup>17</sup> This provision creates an imbalance as there is an obligation for the port State Party to cooperate with the flag State, but no reciprocal obligation for the flag State to cooperate with the port State. In addition, it does not recognize fully the sovereignty of the port State.

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<sup>16</sup> Balton has pointed out that the most groundbreaking aspects of the FAO 1003 Compliance Agreement are three new rules regarding high seas fishing operations. These are: flag States must ensure that their vessels do not engage in any activity that undermines the effectiveness of international fishery CMMs, whether or not the flag State is a member of the RFMO that adopted such measures; no vessel shall be used for fishing on the high seas without specific flag State authorization; and no flag State shall grant such authority to a vessel unless the flag State is able to control the fishing activities of that vessel. Furthermore, Balton notes that these rules represent a new vision for high seas fisheries. To abide by these rules, flag States must actively oversee the high seas fishing operations of their vessels. They must decide case by case whether to authorize any vessel to fish on the high seas. Most importantly, they may not permit any vessel to fish on the high seas at all unless they are able to prevent the vessel from undermining agreed high seas conservation rules. See Balton, D. 2003. International instruments for international fisheries. *Economic Perspectives*, 8(1) [online]. [Cited 31 January 2012]. [www.gc.noaa.gov/documents/gcil\\_balton\\_8\\_econ.pdf](http://www.gc.noaa.gov/documents/gcil_balton_8_econ.pdf)

<sup>17</sup> The use of non-binding language in a binding instrument reduces its force and mandatory application. In the case of the 1993 FAO Compliance Agreement, the use of non-binding language reflects the difficulties that were encountered in the negotiation process to secure agreement on the text, especially by countries with distant-water fishing fleet interests that sought to minimize the influence of the port State in the Agreement, even when the port State could play a valuable and meaningful role to assist the flag State to meet its obligations under the Agreement.

The 1993 FAO Compliance Agreement seeks to enhance the role of flag States by strengthening control over their flag vessels on the high seas. Partly for this reason, the Agreement's port State provisions are significantly different, and weaker, than those found in subsequent instruments. Significantly, the Agreement does not foresee an active and independent port State role in the Agreement's implementation.

### ***1.3.2 1995 FAO Code of Conduct for Responsible Fisheries***

#### *Background*

The 1995 FAO Code of Conduct for Responsible Fisheries was adopted in Resolution 4/95 by the FAO Conference on 31 October 1995.<sup>18</sup> A ground-breaking, unique and voluntary instrument, the 1995 FAO Code of Conduct is probably the most cited, high-profile and widely diffused global fisheries instrument in the world after the 1982 UN Convention. With its comprehensive, all-embracing character, it is intended that the 1995 FAO Code of Conduct be implemented holistically by governments and stakeholders involved in fisheries and aquaculture.<sup>19</sup> The purpose of 1995 FAO Code of Conduct is to set international standards and norms for the development, management and utilization of fisheries and aquaculture resources. These standards may be implemented, as appropriate, at the national, subregional and regional levels and in promoting more responsible behaviour in the fisheries sector. It is anticipated that these standards and norms will lead to the achievement of long-term sustainable outcomes.

The broad framework of the 1995 FAO Code of Conduct accommodates both binding agreements and non-binding instruments that include:

- the 1993 FAO Compliance Agreement;
- four non-binding international plans of action (IPOAs) dealing with the management of seabirds, sharks and fleet capacity, and combating IUU fishing;
- two voluntary strategies for improving information on status and trends of capture fisheries, and aquaculture;
- voluntary guidelines such as those relating to the management of deep-sea fisheries in the high seas, the ecolabelling of fish and fishery products from marine capture fisheries, and inland fisheries;
- the non-binding 2005 Model Scheme on Port State Measures; and
- the binding 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2009 FAO Port State Measures Agreement).

The structure of the 1995 FAO Code of Conduct and the possibility of concluding both binding and voluntary instruments within its framework provide considerable flexibility to address matters of international fisheries concern without having to reopen and renegotiate the Code. The conclusion of instruments and agreements within its framework also enables greater detail and depth to be applied to issues (e.g. management of fleet capacity and IUU fishing) that would probably not be otherwise possible.

In its operative or substantive articles, the 1995 FAO Code of Conduct addresses seven thematic areas: general principles, fisheries management, fishing operations, aquaculture development, integration of fisheries into coastal area management, post-harvest practices and trade, and fisheries

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<sup>18</sup> FAO Conference Resolution 4/95, "The Code of Conduct for Responsible Fisheries", is available at: [www.fao.org/docrep/x5585E/x5585e05.htm#v.%20major%20trends%20and%20policies%20in%20food%20and%20agriculture](http://www.fao.org/docrep/x5585E/x5585e05.htm#v.%20major%20trends%20and%20policies%20in%20food%20and%20agriculture)

<sup>19</sup> Article 4.1 of the 1995 FAO Code of Conduct makes a call to "All members and non-members of FAO, fishing entities and relevant subregional, regional and global organizations, whether governmental or non-governmental, and all persons concerned with the conservation, management and utilization of fisheries resources and trade in fish and fishery products should collaborate in the fulfilment and implementation of the objectives and principles contained in the Code".

research. States and stakeholders are urged to implement the Code and report to FAO so that it is able to fulfil its monitoring role.<sup>20</sup> With its breadth and depth of coverage, the Code has become the benchmark against which many national and international fisheries achievements and failures are assessed.

Article 4 of the 1995 FAO Code of Conduct addresses implementation, monitoring and updating. FAO supports the Code's implementation and undertakes a monitoring role to try to assess the extent and pace of implementation. This task is undertaken both through regular analysis and reporting (biennially to COFI and its subsidiary bodies) and through the preparation of ad hoc reports.

The 1995 FAO Code of Conduct is supported by a series of technical guidelines. Advisory in nature and intended to provide "how to" information, the guidelines are prepared from time to time to assist in the implementation of the concepts and measures of the Code (e.g. the precautionary approach to fisheries). The guidelines have no formal status and may be revised to fit changing circumstances. They are elaborated in different ways by from individual and informal drafting groups to formal expert meetings and consultations.

### *Fishing operations and port State duties*

Fishing operations are addressed in Article 8 of the 1995 FAO Code of Conduct, and port State duties in Article 8.3. In the application of port State duties, countries are encouraged to act in a non-discriminatory and transparent manner. The Code encourages countries to establish measures in national law, in accordance with international law, to achieve, and to assist other States in achieving, the objectives of the Code. In addition, the Code provides that port States should provide assistance to flag States when their vessels are voluntarily in port, if requested to do so, in relation to non-compliance with conservation and management measures or with internationally agreed minimum standards for the prevention of pollution and for safety, health and conditions of work on board fishing vessels.

Article 8.3 essentially envisages a passive role for port States even though it does foresee a role, albeit weak, in combating IUU fishing (i.e. providing assistance to a flag State if and when requested to do so). For this reason, the port State duties of the 1995 FAO Code of Conduct might be considered rudimentary in terms of their capacity to act as a fisheries management tool. However, Article 8.3 makes a link to several other issues concerning the International Maritime Organization (IMO) (pollution and safety at sea), the International Labour Organization (ILO) (working condition on board fishing vessels) and the World Health Organization (WHO) (sanitary conditions on fishing vessels).

When the 1995 FAO Code of Conduct was being negotiated, the port State focus was largely on issues relating to safety at sea and compliance with then current IMO standards. At that time, international thinking was still in the early stages of evolving on the use of port State measures as an efficient and cost-effective fisheries management tool.

### **1.3.3 1995 UN Fish Stocks Agreement**

#### *Background*

The 1995 UN 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 (1995 UN Fish Stocks Agreement)<sup>21</sup> is a

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<sup>20</sup> FAO monitors implementation of the Code principally through a biennial questionnaire and other ad hoc reports. The analysis of information collected is transmitted to COFI for its consideration and review.

<sup>21</sup> FAO and UN. 1998. *International Fisheries Instruments with Index: 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*

highly influential fisheries instrument that elaborates certain aspects of the 1982 UN Convention. A complex, binding fisheries instrument, the Agreement was developed at the request of the UNGA as a direct outcome of the UNCED. The Agreement opened for signature on 4 December 1995 shortly after the adoption of the 1995 FAO Code of Conduct by the FAO Conference.<sup>22</sup> The 1995 UN Fish Stocks Agreement entered into force in December 2001 following the deposit of the thirtieth instrument of ratification or accession.

The 1995 UN Fish Stocks Agreement was negotiated in an intensive process extending over six sessions from April 1993 to August 1995.<sup>23</sup> The UN Fish Stocks Conference was well attended by UN Members and civil-society representatives.<sup>24</sup>

Since the entry into force of the 1995 UN Fish Stocks Agreement, its Parties have met annually on an informal basis essentially to monitor progress with the implementation of the Agreement. Typically, an annual informal meeting considers:

- subregional, regional and global implementation of the Agreement, including possible means of strengthening implementation and promoting wider participation;
- issues to be addressed in the next round of informal consultations;
- status of the Part VII Assistance Fund; and
- recommendations to be conveyed by Parties to the next UNGA session.

In addition to the annual informal meetings, Article 36 of the 1995 UN Fish Stocks Agreement provides for a review conference. The first such conference was convened at UN headquarters, New York, the United States of America, from 22 to 26 May 2006. Its purpose was to review and assess the adequacy of the provisions of the Agreement and, if necessary, propose means of strengthening the substance and methods to implement its provisions. Discussion focused on the conservation and management of stocks; mechanisms for international cooperation and non-members; MCS, compliance and enforcement, and developing States and non-Parties. The Review Conference expressed its support for the development of a binding international agreement on port State measures within FAO. It resumed at UN headquarters from 24 to 28 May 2010 and addressed similar matters to those in the initial session.<sup>25</sup>

The implementation of the 1995 UN Fish Stocks Agreement centres on “mechanisms for international cooperation”. In short, this means RFMOs, including regional arrangements. Their purpose is to bring together coastal States and fishing States operating on the high seas to cooperate in a single subregional or regional mechanism to ensure that straddling and highly migratory fish stocks are subject to conservation and management. Part III of the Agreement encapsulates core issues concerning the role and functions of subregional and regional fisheries management organizations, including more sensitive considerations such as the accommodation of new members in RFMOs and the need to promote transparency in the work of RFMOs. The negotiators of the Agreement

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*Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*. New York, USA, UN. 110 pp.

<sup>22</sup> As at 1 December 2011 the 1995 UN Fish Stocks Agreement has 78 Parties. The status of the Agreement’s accessions are available at: [www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm)

<sup>23</sup> Co-author of this publication, David J. Doulman, served as technical secretary to the 1995 UN Fish Stocks Conference.

<sup>24</sup> The 1995 sessions of the Conference were undertaken against the backdrop of a simmering fisheries conflict between Canada and Spain concerning what Canada claimed was illegal fishing just beyond its EEZ, in an area over which Canada had adopted a regulation to prohibit such fishing. An abandoned net, allegedly from a Spanish trawler fishing in that area, was recovered by Canadian authorities and paraded by the Canadians on the Hudson River in front of UN headquarters, New York, the United States of America, while the UN Fish Stocks Conference was in progress. The net was clearly visible from the conference room where the meeting was in progress. While this action had no formal association with the UN Fish Stocks Conference, it added colour and zest to the long and arduous negotiation process.

<sup>25</sup> The report of the Review Conference for both the 2006 and 2010 sessions is available at: [www.un.org/Depts/los/convention\\_agreements/review\\_conf\\_fish\\_stocks.htm](http://www.un.org/Depts/los/convention_agreements/review_conf_fish_stocks.htm)

recognized that a failure to resolve such issues could undermine the effectiveness of RFMOs and, in the longer term, the effectiveness of the Agreement itself.

The 1995 UN Fish Stocks Agreement focuses on the long-term conservation and management of some of the world's major commercial fisheries: straddling fish stocks and highly migratory fish stocks.<sup>26</sup> It consolidates certain provisions of the 1982 UN Convention relating to the conservation and management of the two types of stock, in particular, Articles 63, 64 and 116–120. The international community considered that the elaboration of these articles in the 1995 UN Fish Stocks Agreement was necessary because the 1982 UN Convention provided little practical guidance on how to achieve effective conservation and management.

The 1995 UN Fish Stocks Agreement addresses a range of sensitive issues, including those of a jurisdictional nature concerning the interface between fishing in zones under national jurisdiction and on the high seas and the need to ensure compatibility of conservation and management measures. The implementation of the Agreement hinges on regional cooperation and mechanisms, and flag States are obligated to ensure that their vessels are authorized to fish on the high seas and that they do not undermine binding regional conservation and management measures. The compliance and enforcement provisions of the Agreement are broad, requiring States to cooperate internationally to ensure that its objective Agreement is fulfilled.<sup>27</sup>

#### *Measures by a port State*

Article 23 concerns measures to be taken by a port State. It falls within Part VI of the 1995 UN Fish Stocks Agreement in relation to compliance and enforcement. It underscores the sovereignty of States over their ports in accordance with international law and provides that a port State has the right and duty to take non-discriminatory measures under international law to promote regional and global conservation and management measures in those areas. For practical purposes, the Agreement indicates the type of measures that a port State may undertake while a vessel is voluntarily in port. These measures include, for example, inspecting documents, fishing gear and catch on board a vessel. The use of the term “may” in Article 23 gives discretion to the port State to determine whether or not inspections should be undertaken.

Article 23 also considers the possibility of port States adopting regulations to prohibit landing and transshipment where it has been established that the catch has undermined regional and global conservation and management measures on the high seas. These provisions are also those found in later instruments. The 1995 UN Fish Stocks Agreement does not indicate the type of measures that may be included in the regulations, leaving this decision entirely to the port State. However, at a practical level, the Agreement implies at least a degree of cooperation among regional groupings of port States to adopt equivalent and harmonized national regulations aimed at prohibiting the landing and transshipment of unauthorized catches.

#### ***1.3.4 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing***

##### *Background*

The non-binding IPOA–IUU was negotiated within the framework of the 1995 FAO Code of Conduct, intending to give special consideration to the rising international concern about IUU fishing. Initially, the issue was brought to the attention of the 1999 Ministerial Meeting in a paper by the Australian Minister for Fisheries. The meeting was held at FAO headquarters, Rome, Italy, from 10 to

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<sup>26</sup> At the Review Conference of the 1995 UN Fish Stocks Agreement (May 2006), there was widespread acceptance that the Agreement should be applied to the management of discrete high seas stocks.

<sup>27</sup> The 1995 UN Fish Stocks Agreement does not use the term “IUU fishing” because, as noted below, the term did not originate until 1997 in the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR).

11 March 1999. The Minister expressed his concern about the impact of IUU fishing in the area adjacent to Australia in the Southern Ocean in the Commission for the Conservation of Antarctic Living Marine Resources (CCAMLR) Convention Area.<sup>28</sup>

Many ministers were aware that IUU fishing was undermining national and regional efforts to manage fisheries in a responsible and sustainable manner and, more importantly, threatening measures intended to rebuild stocks where they had been depleted and overfished in the past. Consequently, the proposal to initiate action against IUU fishing in a concerted and coherent manner found widespread support among many countries, including Canada, Japan, the United States of America and the members of the European Community. At the conclusion of their meeting, the ministers adopted the Rome Declaration on the Implementation of the Code of Conduct for Responsible Fisheries. In operative paragraph j) of the Rome Declaration, the ministers undertook to develop a global plan of action to deal effectively with all forms of IUU fishing including fishing vessels flying a “flag of convenience”. The Rome Declaration is in Appendix 1.

The FAO Ministerial Meeting was scheduled immediately prior to COFI, from 15 to 19 February 1999, so that COFI could consider and act upon recommendations made by the ministers. The report of the COFI session<sup>29</sup> stated that COFI placed a high level of importance on the implementation of the 1995 FAO Code of Conduct and was concerned about the increases in IUU fishing, including vessels flying “flags of non-compliance”. Some delegations urged FAO to convene a meeting of experts to identify suitable measures, followed by a technical consultation that would report to the next COFI session in 2001.

The FAO Ministerial Meeting on Fisheries and COFI gave FAO a clear mandate to commence work towards addressing IUU fishing within the framework of the 1995 FAO Code of Conduct. As a first step, an Expert Consultation on Illegal, Unreported and Unregulated Fishing was convened in Sydney, Australia, from 15 to 19 May 2000, by the Government of Australia in cooperation with FAO.<sup>30</sup> It was attended by a large number of experts with a range of professional backgrounds. Working with draft text prepared by FAO, the experts reviewed the draft and proceeded to develop a preliminary draft IPOA–IUU to be forwarded to the Technical Consultation as a basis for its negotiations if that was the will of FAO members. The Expert Consultation was a very intensive meeting where experts worked long hours to arrive at a preliminary draft text.

The FAO Technical Consultation on Illegal, Unreported and Unregulated Fishing was convened at FAO headquarters in Rome, Italy, from 2 to 6 October 2000.<sup>31</sup> Its purpose was to elaborate an IPOA to prevent, deter and eliminate IUU fishing. The Consultation agreed to use the Sydney preliminary text as a starting point. However, the October 2000 meeting was unable to finalize a text and it was agreed that a Second Technical Consultation<sup>32</sup> should be convened from 22 to 23 February 2001, immediately prior to the 2001 session of COFI. Outstanding work was completed by the second Consultation and the draft IPOA–IUU was adopted with the request that it be forwarded to COFI for consideration and eventual adoption. At COFI, it was noted that the draft IPOA was a compromise document concluded within the framework of the 1995 FAO Code of Conduct. The Committee

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<sup>28</sup> The term IUU fishing is relatively new in fisheries literature. It traces its origins to the 1997 session of the CCAMLR where it evolved from discussions concerning illegal and/or non CCAMLR-compliant fishing activities by Parties (illegal and unreported) and non-Parties (illegal and unregulated) in the Convention Area. Since 1997, the term IUU fishing has been used regularly at CCAMLR meetings and has subsequently been diffused into international fisheries discussions. By 1999, the term had found its way into meeting reports of the UN, FAO, IMO, CSD, RFMOs and a wide range of other fora.

<sup>29</sup> Paragraph 72 in FAO. 1999. *Report of the Twenty-third session of the Committee on Fisheries*. FAO Fisheries Report No. 535. Rome. 70 pp.

<sup>30</sup> FAO. 2000. *Report of and the papers presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing*. FAO Report No. 666. Rome. 306 pp.

<sup>31</sup> FAO. 2000. *Report of the Technical Consultation on Illegal, Unreported and Unregulated Fishing*. FAO Report No. 634. Rome. 39 pp.

<sup>32</sup> FAO. 2000. *Report of the Second Technical Consultation on Illegal, Unreported and Unregulated Fishing*. Rome. FAO Report No. 646. 38 pp.

recognized that concerted efforts on the part of all Members would be required to implement the IPOA. The FAO Council in June 2001 endorsed the IPOA–IUU.

The IPOA–IUU provides States with a set of comprehensive, effective and transparent measures, often referred to as a “toolbox” of measures, to be used directly by them, or indirectly through RFMOs, to combat IUU fishing. The IPOA–IUU is broad in scope, seeking to address IUU fishing in a holistic and flexible manner, depending on particular country and regional needs. It was acknowledged frequently in IPOA–IUU negotiations that different tools and approaches to IUU fishing would be required in order to meet different circumstances. As a non-binding instrument, the IPOA–IUU is drafted in the conditional tense using the term “should”. In this way, States are encouraged to undertake certain actions and activities rather than being obligated to do so.

#### *Port State measures*

The IPOA–IUU addresses port State measures in paragraphs 52–64.<sup>33</sup> It encourages States to implement measures in a fair, transparent and non-discriminatory manner, clarifying that admission of a vessel to a port refers to access by foreign vessels to ports and offshore terminals for activities such as transshipping and landing catch as well as refuelling and re-supplying. Vessels should be provided port access in cases of *force majeure*, distress or for rendering assistance to persons, ships or aircraft in danger or distress. Moreover, port States are encouraged to publicize ports where foreign vessels may seek admission and to have the capacity to carry out inspections in those ports.

Many countries require advance notice of foreign vessels wishing to enter port. This enables preliminary vessel checks to be undertaken, if needed, and for staff from national agencies (e.g. immigration, health, customs and fisheries) to be mobilized to carry out their respective functions, especially if the vessel is scheduled to arrive after normal working hours or at a weekend.

The IPOA–IUU contains a provision for foreign vessels to provide the port State with reasonable advance notice of their desire to enter the port, together with other documentation including authorizations to fish, fishing trip details and the amount of fish on board. A port State may seek additional information if this is necessary to determine whether a vessel may have engaged in, or supported, IUU fishing or if it is a requirement under national law. Where a vessel has been granted access to port and there is clear evidence that it has engaged in IUU fishing, the port State should not allow the vessel to use the services of the port and should report the matter to the flag State.

A practical problem for port States arises when a vessel in port is found to have engaged in IUU fishing and it should be denied the use of port services. However, denial could prevent the vessel from leaving port or making a safe journey to another port or its home port. These problems would have to be assessed on a case-by-case basis, preferably in consultation with the flag State. However, such consultation may not be possible in all cases, especially if a “flag of non-compliance” State fails to respond to communications or service of notices from a port State.

With respect to the operational aspects of vessel inspection, the IPOA–IUU indicates that port States should collect vessel details relating to the flag and identification, name, nationality and the qualifications of the master and fishing master, fishing gear, catch on board (including its origin, species, form and quantity), other information required by RFMOs or international agreements and total landed and transshipped catch. Information collected from vessels undergoing inspection should be forwarded to flag States and, as appropriate, RFMOs.

If as a result of an inspection a vessel is found to have engaged in, or supported, IUU fishing in areas of jurisdiction beyond the port State, the matter should be reported by the port State to the flag State and RFMOs, in addition to action that may be taken under international law. In this situation, the flag State may request the port State to take further action.

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<sup>33</sup> FAO. 2001. *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*. Rome. 24 pp.

To encourage a professional approach to the implementation and supervision of port State measures, the IPOA–IUU urges port States to publicize a national strategy and procedures for port State controls. Such a strategy and procedures could involve training and capacity development, technical support and qualification requirements for port State control officers. Furthermore, port States are encouraged to cooperate to develop compatible measures for port State controls. This is an issue of extreme importance for the regional implementation of measures to close loopholes and eliminate weak links.

The IPOA–IUU proposes that RFMOs identify fair, transparent and non-discriminatory measures (e.g. denial of access to port and its services) to be taken by their members against vessels unable to demonstrate that fish harvested in their respective areas was not taken in a manner consistent with the RFMO’s conservation and management measures. This situation might apply to vessels fishing in an RFMO area that were flying flags of States that were not Parties to that RFMO and that had not agreed to cooperate with the organization. Under these circumstances, these vessels could be presumed to be engaged in IUU fishing.

The exchange of information, especially between port and flag States, is a key consideration underpinning the success of the IPOA–IUU. It is foreseen also that the port State should communicate information to RFMOs. This information should be exchanged on a real-time, or near real-time, basis. Such exchanges entail transaction costs and a certain burden for port States.

In the IPOA–IUU, the role of the flag State is given a high profile despite the clear recognition of the sovereignty of the port State over its ports under international law. The instrument does not explicitly encourage flag States to cooperate with port States in the implementation of the IPOA–IUU. There is also the presumption that flag States will act upon information concerning IUU fishing by their vessels provided by port States following inspections. When dealing with responsible flag States, there should be few difficulties in addressing instances of IUU fishing. However, with an estimated 34 flags of non-compliance,<sup>34</sup> accounting for some 15 percent of total flags in the world, there is likely to be a large number of flag States that would not be interested in addressing instances of reported IUU fishing by their flag vessels.

### ***1.3.5 2005 FAO Model Scheme on Port State Measures***

#### *Background*

The 2005 FAO Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing (2005 FAO Model Scheme)<sup>35</sup> can be seen as a transitory step between the IPOA–IUU and the binding 2009 FAO Port State Measures Agreement. A voluntary instrument providing minimum standards, the 2005 FAO Model Scheme was endorsed by COFI at its 2005 session and later in the same year by the FAO Council.

Initial work on the development of the 2005 FAO Model Scheme commenced at an Expert Consultation at FAO headquarters, Rome, Italy, that was held from 4 to 6 November 2002. Its purpose was to develop recommendations, focusing on practical fisheries outcomes, leading to the implementation of effective port State measures to combat IUU fishing. The meeting worked with a paper prepared by a consultant.<sup>36</sup> Taking inspiration from the practice of the IMO in respect of the merchant fleet, the paper considered elements of a regional memorandum of understanding (MOU) on port State measures to combat IUU fishing. The experts recognized that such an MOU could serve as a cost-effective tool to enhance responsible fisheries management by reducing the incidence of IUU

<sup>34</sup> International Transport Workers’ Federation. See information available at: <http://www.itfglobal.org/flags-convenience/flags-convenien-183.cfm>

<sup>35</sup> FAO. 2007. *Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing*. Rome. 46 pp.

<sup>36</sup> Lobach, T. 2002. *Port State control of foreign fishing vessels* [online]. FAO Legal Papers Online No. 29. Rome, FAO. [Cited 31 January 2012]. [www.fao.org/legal/prs-ol/lpo29.pdf](http://www.fao.org/legal/prs-ol/lpo29.pdf)

fishing. With this idea in mind, the Expert Consultation prepared a draft Memorandum of Understanding on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing.<sup>37</sup>

In the IMO context, the 1982 Paris Memorandum of Understanding on Port State Control (Paris MOU) established a coordinated control system with respect to vessel safety and pollution prevention standards and equipment. The Paris MOU aims at eliminating the operation of substandard ships through a harmonized system of port State control. It is implemented by 27 maritime administrations, and its provisions include targeting of ships for inspection, databases, inspection, officers and detention. An inspection database is maintained.<sup>38</sup>

There are nine regional MOUs on port State control promoted by the IMO pursuant to Resolution A. 682 (17), concerning regional cooperation in the control of ships and their discharges. The regional port State regimes incorporate universal standards and were inspired by the important contribution to maritime safety and marine pollution prevention procedures agreed under the Paris MOU. These regional regimes operate in the Europe and North Atlantic region, the Asia and Pacific region, the Black Sea, the Caribbean Region, the Indian Ocean, Mediterranean, Latin America and West and Central Africa, involving 107 countries.<sup>39</sup> Many of the IMO technical conventions contain provisions for ships to be inspected when they visit foreign ports in order to ensure that they meet IMO requirements.<sup>40</sup>

In 2003, COFI considered the report of the 2002 Expert Consultation and endorsed its proposal to convene a Technical Consultation to address issues relating to the role of the port State and, as appropriate, principles and guidelines for the establishment of regional MOUs on port State measures to prevent, deter and eliminate IUU fishing.<sup>41</sup> Many Members saw this development as a major step in the right direction in the fight against IUU fishing.

The Technical Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing was held at FAO headquarters, Rome, Italy, from 31 August to 2 September 2004. The Technical Consultation was intended to address basic issues concerning the role of the port State in combating IUU fishing and principles and guidelines for establishing regional memoranda. Significantly, the meeting:

- approved a Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing;
- strongly supported a proposed programme of assistance to facilitate human development and institutional strengthening in developing countries to promote the full and effective implementation of port States measures; and
- supported the establishment of a database concerning relevant port State measures.<sup>42</sup>

In 2005, COFI considered the report and recommendations of the 2004 Technical Consultation and endorsed them.<sup>43</sup> In doing so, it recognized the need to strengthen port State measures, given that the

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<sup>37</sup> FAO. 2002. *Report of the Expert Consultation on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing*. FAO Fisheries Report No. 692. Rome. 22 pp.

<sup>38</sup> Annually, more than 20 000 inspections take place on board foreign ships in the Paris MOU ports, ensuring that these ships meet international safety, security and environmental standards, and that crew members have adequate living and working conditions. The MOU has been amended several times to accommodate new safety and marine environment requirements stemming from the IMO as well as other important developments such as the various European Union (EU) directives that address marine safety. See: [www.parismou.org](http://www.parismou.org)

<sup>39</sup> For example, see <http://caribbeanmou.org/links.php>

<sup>40</sup> See: [www.imo.org/OurWork/Safety/Implementation/Pages/PortStateControl.aspx](http://www.imo.org/OurWork/Safety/Implementation/Pages/PortStateControl.aspx)

<sup>41</sup> FAO. 2003. *Report of the Twenty-fifth Session of the Committee on Fisheries*. FAO Fisheries Report No. 702. Rome. 88 pp.

<sup>42</sup> FAO. 2004. *Report of the Technical Consultation to review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing*. FAO Fisheries Report No. 759. Rome. 34 pp.

<sup>43</sup> FAO. 2005. *Report of the Twenty-sixth Session of the Committee on Fisheries*. FAO Fisheries Report No. 780. Rome. 34 pp.

lack of agreed, binding measures provided a loophole. Furthermore, it was requested that these measures be promoted in RFMOs for the development or improvement of the port State aspects of regional control schemes. COFI agreed that follow-up work to the Technical Consultation should be undertaken, especially with respect to putting the 2005 FAO Model Scheme into operation. This outcome mandated FAO to develop a programme of assistance for developing countries with the express intention of facilitating the implementation of the Model Scheme. In June 2005, the FAO Council endorsed the COFI report and the Model Scheme.

A non-binding instrument, the 2005 FAO Model Scheme was designed to promote and reinforce the implementation of the IPOA–IUU and, downstream, serve as a departure point for the elaboration of a set of binding port State measures. At the time of the 2004 Technical Consultation, a large number of FAO Members were committed to the conclusion of a binding port State measures agreement. However, in the interests of “hastening slowly” and ensuring that there was broad consensual support for a suite of port State measures to combat IUU fishing, these Members were satisfied to move forward in a step-wise fashion. These countries saw the development of binding measures as being inevitable but recognized that some developing countries and States with distant-water fishing interests were not immediately in favour of a binding agreement because of either the perceived burden associated with their implementation or additional constraints that they could impose on fleet operations.

### *Port State measures*

The 2005 FAO Model Scheme is directed towards the operations of foreign flag vessels and reducing the incidence of IUU fishing. It addresses general issues, the modalities to be observed in respect of vessel inspections, actions to be taken by the port State following inspections, the role of information and other matters.

The general provisions of the 2005 FAO Model Scheme essentially provide clarification concerning its application (e.g. references to ports and fishing vessels) and the role of the port State in giving effect to the Scheme. With respect to inspections, port States should ensure that they are carried out by qualified personnel in an orderly manner, inspectors are given access to any area of a fishing vessel and that there is cooperation between crew and the inspectors. In addition, vessels should not be delayed, harassment should not occur, interpretation should be provided where possible and copies of inspection reports should be presented to the vessel masters for signature and so that pertinent comments can be made if so desired. The masters should have the opportunity to contact the flag State if they have serious difficulty in understanding a report.

The section of the 2005 FAO Model Scheme concerning actions provides guidance for port States as to what they should do in the event that there is reasonable evidence that a foreign fishing vessel has engaged in, or supported, IUU fishing activities. In these circumstances, the port State should contact the flag State and interested coastal States and RFMOs. Port services should be denied the vessel unless the port State is satisfied that the flag State will take adequate action against the vessel.

This actions section includes an open-ended list of IUU fishing activities that constitute IUU fishing. It is based on the list of serious violations in Article 21, concerning subregional and regional cooperation in enforcement of the 1995 UN Fish Stocks Agreement. The negotiators of the 2005 FAO Model Scheme drew on the list of offences in the 1995 UN Fish Stocks Agreement so as to promote consistency between serious fishing offences and IUU fishing activities. This approach underscores the serious nature of IUU fishing and related activities, reinforcing the view that such fishing and activities are not trivial.

Information exchange underpins the effective operation of the 2005 FAO Model Scheme. It encourages port States to transmit, electronically, standardized information concerning suspected and actual incidences of IUU fishing to flag States, States and RFMOs. The burden of transmitting information falls on the port State.

Significantly, the 2005 FAO Model Scheme has five technical appendixes upon which its operation depends to a large extent. The appendixes focus on:

- information to be provided in advance by foreign fishing vessels;
- port State inspection procedures of foreign fishing vessels;
- results of port State inspections;
- training of port State inspectors; and
- information on port State inspections.

As it was envisaged that the 2005 FAO Model Scheme would be implemented regionally, the purpose of the appendixes is to promote the uniform and harmonized application of the Scheme among countries and to make it easier for foreign fishing vessel masters to comply with port States measures adopted regionally. Moreover, the appendixes seek to place countries on a similar footing so that the Scheme could be administered in a similar, if not equivalent, manner.

#### *Capacity development and training*

With its mandate to proceed with the development of a programme of assistance to promote the implementation of the 2005 FAO Model Scheme, FAO called for extrabudgetary funds to support the initiative and developed a comprehensive training programme, to be delivered globally, taking account of regional fisheries' needs and differences. The programme's objective was to develop national capacity and promote regional coordination so that countries would be better placed to strengthen and harmonize port State measures and, as a result, implement the relevant IPOA-IUU tools and the 2005 FAO Model Scheme, and contribute to the development of a legally binding instrument on port State measures. The training took place in a series of regional workshops coordinated by FAO in partnership with relevant regional organizations.

It was expected that the general outcome of the programme's regional workshops would be to improve human and technical capacity for countries to strengthen and coordinate their port State measures with the overall objective of preventing, deterring and eliminating IUU fishing. More specifically, it was expected that the workshops would:

- raise participants' awareness of the deleterious effects of IUU fishing and the need for strengthened and coordinated port State measures, so that countries may act in a concerted and decisive manner to prevent, deter and eliminate such fishing;
- assure the comprehensive understanding of the regional requirements and relevant international instruments, including the Model Scheme on port State measures, and their relation to participants' countries;
- reach a clear understanding of the role of administrative arrangements in maximizing the effectiveness of port State measures;
- identify clear steps that national fisheries administrations might take to develop port State measures that implement the 2005 FAO Model Scheme and relevant measures in the IPOA-IUU;
- build shared understanding and harmonization, as appropriate, of port State measures needed in the region to prevent, deter and eliminate IUU fishing; and
- reach a clear understanding of the process and issues for the development of a legally binding international instrument on port State measures.

The workshops are described in greater detail in Section 5.2, and summary details of the global series of regional workshops held between 2007 and 2009 are given in Appendix 2.

From the assessments provided by participants in the workshops, it was clear that they were highly appreciated. However, while it was difficult to evaluate the impact of short-term training activity, it was apparent that not all regions benefited to the same degree. This could be attributed to a divergence of fisheries issues among countries and regions, and the different levels of importance that countries assigned to achieving long-term sustainability in fisheries. The differences between regions were stark in a few instances. Whereas, for example, the uptake of port State measures as a fisheries

management tool in one region could be described as dramatic, in another region the view of senior officials was that such a workshop was not a high priority and should not be delivered.

#### **1.4 Summary comments**

The broad goal of achieving sustainable development in capture fisheries is entrenched to a greater or lesser extent in all international fisheries instruments concluded since the UNCED. While the 1982 UN Convention does not refer specifically to port State measures as a fisheries management tool in respect of fishing vessels, since 1992 these measures have been seen as a means to enhance fisheries conservation and management and combat IUU fishing. Commencing with the introduction of port State measures as a management tool in the 1993 FAO Compliance Agreement, they evolved and strengthened progressively to the point where an international binding agreement on port State measures was concluded in 2010.

## 2. PROCESS FOR THE CONCLUSION OF THE 2009 FAO PORT STATE MEASURES AGREEMENT

### 2.1 Background

After an intense round of four negotiation sessions extending from June 2008 to August 2009,<sup>44</sup> the FAO Conference on 22 November 2009 approved the 2009 FAO Port State Measures Agreement as an Article XIV instrument under the FAO Constitution.<sup>45</sup> Immediately following its approval, the Agreement opened for signature and remained open for one year. The Agreement will enter into force 30 days after the date of the deposit of the twenty-fifth instrument of ratification, acceptance, approval or accession with the depositary, the Director-General of FAO. A copy of the Agreement is in Appendix 3.

The 2009 FAO Port State Measures Agreement is binding. It seeks to prevent, deter and eliminate IUU fishing through the implementation of effective port State measures as a means of ensuring the long-term conservation and sustainable use of living marine resources and marine ecosystems. The intention is that the Agreement will be applied widely and effectively by Parties, in their capacities as port States, to vessels<sup>46</sup> not entitled to fly their flags when seeking entry to Parties' ports or while they are in port. Certain artisanal fishing and container vessels were exempted from the Agreement.

Many FAO Members were keen to see a binding international instrument concluded when the 2004 process was initiated for the negotiation of the 2005 FAO Model Scheme. However, other Members were not ready for such an ambitious step. Nonetheless, the seed for a legally binding agreement had been sown by the time the 2004 Technical Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing was convened.

The 2006 session of the 1995 UN Fish Stocks Agreement Review Conference supported the idea of developing a global legally binding instrument on port State measures. Such an agreement was seen as a necessary step against "ports of convenience". The Parties to the 1995 UN Fish Stocks Agreement desired stronger and more effective measures against IUU fishing. They believed it was imperative that port States played a frontline role given that flag States in many cases were unable, or unwilling, to control the operation of their flag vessels in accordance with international law. The 2005 FAO Model Scheme was a welcome development because it provided, for the first time, an international minimum standard for port State control and a necessary reference point, or building block, for the downstream development of a binding global instrument.

Importantly, the 2006 Review Conference recommended that States, individually and collectively through RFMOs, adopt port State measures, consistent with Article 23 of the 1995 UN Fish Stocks Agreement, and particularly those envisaged in the 2005 FAO Model Scheme, and promote minimum standards at the regional level. Parties to the Agreement recognized that the regional promotion of global minimum standards would ensure that similar measures would be promoted around the world, and this was seen as a very positive development.

In parallel, the 2006 Review Conference proposed that States and RFMOs initiate, as soon as possible, a process within FAO to develop a legally binding instrument on minimum standards for port State measures, building on the 2005 FAO Model Scheme and the IPOA-IUU. This

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<sup>44</sup> FAO. 2009. *Report of the Technical Consultation to Draft a Legally-binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*. FAO Fisheries and Aquaculture Report No. 914. Rome. 77 pp.

<sup>45</sup> During consideration of the proposed Agreement by Conference, a vote was taken on a proposed resolution to refer the document back to COFI prior to adoption by Conference, which would have extended the approval process significantly. The proposal failed by a large margin; in fact, 104 votes were cast against this proposal. The Agreement was adopted by well over the two-thirds majority of votes cast: a majority of 61 votes was required, and 106 votes were cast in favour of adopting the Agreement.

<sup>46</sup> The Agreement comprehensively defines a "vessel" as 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.

recommendation by the Parties to the 1995 UN Fish Stocks Agreement provided a strong impetus for the international community to move ahead with a global binding agreement.

Reference to port State measures as a tool for combating IUU fishing was introduced in annual UNGA resolutions<sup>47</sup> on sustainable fisheries, beginning in 2006 at its sixty-first session. Addressed in several paragraphs of this resolution,<sup>48</sup> it urged, *inter alia*:

- States to take all necessary measures where there was evidence that a vessel had engaged in IUU fishing;
- States to enhance port State measures to combat IUU fishing especially at the regional level, particularly those identified in the 2005 FAO Model Scheme; and
- FAO to proceed with the development of a legally binding agreement on port State measures.

The sentiments in the 2006 resolution echoed and reinforced the views of the 2006 Review Conference on the 1995 UN Fish Stocks Agreement, which was convened a short period before the negotiations commenced for the 2006 UNGA resolution.

In 2007, COFI revisited port State measures and recognized the urgent need for a comprehensive suite of port State measures, noting strong support to develop a legally binding instrument based on the IPOA–IUU and the 2005 FAO Model Scheme. In an untypical move and to express its concern, COFI endorsed a timetable to convene an Expert Consultation in 2007 to prepare a draft agreement and a Technical Consultation to finalize the text of the instrument in 2008 so that it would be ready for COFI in 2009.

At the 2007 COFI session, many Members stressed that the new instrument would represent minimum global standards for port States, with the flexibility for countries to adopt more stringent measures if they so desired. Some Members also stressed that the development of the instrument should not detract from other previously agreed measures, such as the need to reduce fleet capacity. This was an important consideration because of the nexus between excess fleet capacity and IUU fishing. This relationship had been addressed in a 2004 FAO Technical Consultation concerning implementation of the IPOA–IUU and the IPOA capacity. The Consultation adopted a set of recommendations, but many observers believed that they were formulated weakly and did not go to the heart of the problem, especially with respect to the management of fishing capacity, which continues to constrain sustainable fisheries.<sup>49</sup>

In July 2007, the Second Session of the Joint FAO/IMO Ad Hoc Working Group on Illegal, Unreported and Unregulated Fishing and Related Matters was convened. The issue of port State control/port State measures was discussed in detail, including FAO's plans to move forward for the elaboration of a legally binding instrument. The meeting highlighted the significant differences between the IMO and FAO approaches to port State issues. In particular, the IMO focused on maritime shipping, ships and crews, while FAO targeted fishing vessels and compliance with fisheries conservation and management measures. The meeting urged the two Organizations to collaborate on port State issues.

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<sup>47</sup> Resolutions of the UNGA are not binding on UN Members. However, States are urged to adopt and implement the measures and initiatives proposed in them as a mark of their political commitment to the international common good.

<sup>48</sup> See, in particular, paragraphs 39, 42 and 43 of UN. 2007. *Resolution adopted by the General Assembly 61/105* [online]. New York, USA. [Cited 31 January 2012]. [www.un.org/Depts/los/general\\_assembly/general\\_assembly\\_resolutions.htm](http://www.un.org/Depts/los/general_assembly/general_assembly_resolutions.htm)

<sup>49</sup> FAO. 2004. *Technical Consultation to Review Progress and Promote the Full Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing and the International Plan of Action for the management of Fishing Capacity*. FAO Fisheries Report No. 753. Rome. 43 pp.

## 2.2 Process and difficult negotiation issues

The September 2007 FAO Expert Consultation to Draft a Legally-binding Instrument on Port State Measures was convened in Washington, DC, the United States of America. Experts were selected on a global basis taking account of their respective expertise and geographic distribution.<sup>50</sup> Experts from the IMO, ILO and North East Atlantic Fisheries Commission (NEAFC) also participated. The purpose of the meeting was to prepare a draft text of a legally binding instrument on port State measures, based on the IPOA–IUU and the 2005 FAO Model Scheme. The Expert Consultation based its work on a preliminary draft of an agreement on port State measures prepared by FAO.<sup>51</sup>

On the basis of the initial draft, the Expert Consultation was requested by FAO to review systematically and methodically the structure, form and content of the preliminary draft instrument, ensuring that it was not overly complex and that it would be practical to implement. Experts were advised that their output would be submitted to the Technical Consultation on Port State Measures to be used, if the Consultation agreed, as a text for negotiation. FAO saw the outcome of the Expert Consultation as being very important, considering that, because of time constraints, the Consultation was unable to review the Preamble, Final Clauses and Annexes of the preliminary draft, and recommended that FAO review the Annexes and present them in a revised format for the Technical Consultation.<sup>52</sup>

Following the Expert Consultation, FAO convened an informal, open-ended technical working group in December 2007 consisting of representatives from a number of FAO Members, external technical experts from the IMO and NEAFC, and senior FAO technical and legal officers. The Annexes were highly technical in nature and required the participation of individuals who had a sound operational knowledge of how port State measures were applied. The composition of the working group provided a good balance of technical input and ensured transparency because of its open-ended character. The meeting revised and streamlined the Annexes, bringing them into line with current port State practice, ensuring that they could be used as global minimum standards and making them more user-friendly to implement. A few Members proposed that the Annexes should be considered as guidelines rather than minimum standards but this suggestion did not find general support in the working group.

In consultation with the chairperson of the Expert Consultation, FAO reviewed the Preamble and Final Clauses of the draft Agreement. The revised Annexes, Preamble and Final Clauses were incorporated into the draft Agreement that was submitted to the Technical Consultation.

The 2007 UNGA Resolution 62/177 on Sustainable Fisheries referred again to port State measures.<sup>53</sup> It reiterated the need for stronger port State measures to combat IUU fishing and the promotion and application of minimum regional standards. It also welcomed the FAO process to develop a legally binding instrument, the convening of the Expert Consultation on Port State Measures and the scheduled Technical Consultation in June 2008.<sup>54</sup>

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<sup>50</sup> Experts selected by FAO to participate in Expert Consultations serve in their individual capacities and not as representatives of the governments or organizations for which they work. Experts are chosen for the unique professional and geographic experience that they bring to these meetings.

<sup>51</sup> This is standard practice in FAO Fisheries and Aquaculture Department meetings of this type so as to facilitate and expedite the work of consultations.

<sup>52</sup> The draft Agreement that was the product of the Expert Consultation is in: FAO. 2007. *Report of the Expert Consultation to Draft a Legally-binding Instrument on Port State Measures. Washington DC, United States of America, 4–8 September 2007*. FAO Fisheries Report No. 846. Rome. 22 pp. (also available at: <ftp://ftp.fao.org/docrep/fao/010/a1375e/a1375e00.pdf>).

<sup>53</sup> This approach is followed in the annual negotiation process for sustainable fisheries resolutions. It builds on previous resolutions, while incorporating new and significant fisheries developments that have occurred since the adoption of the last resolution. This approach provides continuity and stability between resolutions while facilitating the negotiation process itself.

<sup>54</sup> See in particular paragraphs 49 and 51 of: UN. 2008. *Resolution adopted by the General Assembly 62/177* [online]. New York, USA. [Cited 31 January 2012]. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/474/39/PDF/N0747439.pdf?OpenElement>

The Technical Consultation on Port State Measures commenced its work in June 2008. Its mandate was clear: to prepare a draft legally binding Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing that would be transmitted to COFI in 2009. Many FAO Members were of the view that it would be possible to conclude the negotiations for an agreement in a single, five-day meeting.

At the commencement of the Technical Consultation, it was agreed that the draft Agreement from the Expert Consultation would be used as the negotiation document. While this outcome was anticipated widely, some Members that did not have experts at the Washington, DC, meeting were uneasy about this approach. Some of them believed that an Expert Consultation was in fact an intergovernmental meeting rather than a meeting of experts and, as a result, some countries would have an unfair advantage in the negotiation process. Nonetheless, they joined the consensus on the document. This was an important decision because any other regarding the use of the draft Agreement from the Expert Consultation would have hindered and delayed severely the negotiation process.

The first session was largely taken up with a first reading of the draft Agreement, and with Members mapping out and delineating their initial negotiating positions on issues of importance to them. Major points of disagreement were not addressed, but discussions enabled the Technical Consultation to identify, quite early, issues that would be controversial and sticking points in the negotiations. Ground rules for the work of the Technical Consultation were laid down.<sup>55</sup> Little substantive progress was made and it was agreed that a further session would be required prior to COFI in 2009.

The second session of the Technical Consultation was convened in January 2009, about six weeks prior to COFI. It was anticipated that it might be possible to conclude negotiations at this session but that some weeks would be required to finalize the draft Agreement for presentation to COFI in March 2009. However, progress at the second session was slow and at times bogged down, and as a consequence the negotiations were not concluded. The Technical Consultation began to consider tougher issues but it was too early in the process for some Members to start to yield on certain issues and move towards consensus. With the prospect of a third session being needed to complete the negotiations, pressure started to mount on delegations to hasten the process and to reach agreement. The small number of Members that financially supported the Technical Consultation were also frustrated with the pace of negotiations and the refusal of a wider group of Members to contribute financially.

At the second session, there was heavy caucusing by regional groups almost on a daily basis and some consultation among groups (e.g. the African and South Pacific groups). Such intensive consultation had not been a feature of past FAO negotiations for fisheries instruments and agreements. It continued through until the conclusion of negotiations even though it was evident that there were wide divisions in some regional groups, reflecting their Members' different positions, interests and concerns about IUU fishing, and in some cases the role of regional cooperation in fisheries and the work of RFMOs.

At this session, there was a very frank exchange of views between two Members and a non-governmental organization (NGO). One of the Members, probably expressing the sentiment of many other Members, requested that another Member refrain from blocking consensus on key points of negotiation. The request provoked a fiery response. An NGO, possibly with support from some Members, also made a similar call. Such exchanges are not common in FAO negotiations, but in this case they reflected the high level of frustration felt by many Members with the slow response in negotiations and with what was seen as an attempt to slow the rate of progress and purge the draft Agreement of critical elements.

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<sup>55</sup> For example, there was strong opposition by some Members to convening working groups to address particular issues outside the plenary session. They claimed that, as the Agreement would be binding in nature, all matters should be discussed in plenary. This approach, they argued, would also facilitate transparency. However, other Members saw considerable merit in convening working groups and even smaller special interest groups to streamline drafting and to seek resolution on certain issues. Some of the Members believed that requiring all matters to be addressed in plenary, even if they were of concern to a small number of delegations, was a delaying tactic to impede progress in the negotiation of the Agreement.

During the second session, there was considerable discussion about the burden associated with the implementation of the Agreement. This point had been raised by developing countries, but it found support among a number of developed counterparts. Underlying the concern were two considerations: (i) that the administration of the Agreement might be unduly complex and could prejudice the interests of the developing port States; and (ii) that flag States, through the Agreement, could transfer some of their obligations onto the port State, thereby increasing the administrative burden on the port State.

A recurring issue for developing countries in the Technical Consultation was the need for interagency coordination at the national level to implement the Agreement. It was stressed that effective coordination across national agencies (e.g. fisheries, immigration, health/quarantine, port, and police), a type of seamless coordination, was essential. Developing countries, while recognizing this point, expressed reservations about achieving such coordination for a range of reasons, including institutional rigidities in their respective administration.

At the heart of the Agreement is the need for cooperation among countries and the electronic (i.e. real-time) exchange of information. This matter was not controversial as it was recognized by the Technical Consultation that the prompt exchange of information was essential if the Agreement was to function efficiently. So important was the issue, that a reference to communications and technology was included in the Preamble. In different articles of the Agreement, Parties are expected to provide information on a range of issues, including the designation of ports and, more importantly, communication with flag States, coastal States, RFMOs and FAO. The underlying reason for the prompt and electronic exchange of information is to try to ensure that IUU fishing vessels are not permitted to continue their IUU activities or to benefit financially from such activities.

In 2008, UNGA Resolution 63/112 on Sustainable Fisheries mirrored the contents of the previous resolution to a large extent.<sup>56</sup> It urged, *inter alia*, States to adopt port measures and welcomed the FAO Technical Consultation to develop a legally binding agreement.

In 2009, COFI reviewed the progress of the negotiations for the draft Agreement and expressed general satisfaction.<sup>57</sup> Significantly, it reaffirmed that IUU fishing remained one of the principal threats to sustainable fisheries and underscored the importance of the ongoing work to negotiate a draft legally binding instrument. In relation to the status of the Agreement, many Members supported the view that it be adopted under Article XIV of the FAO Constitution. However, other Members expressed their strong preference for the Agreement to be adopted outside FAO.<sup>58</sup>

During the meeting, COFI referred to its commitment to a successful outcome for the negotiation process and stressed the importance that the resulting instrument be effective and widely accepted. In relation to the need for universality, many Members stressed the need that the special requirements of developing countries be recognized and to ensure that they received appropriate assistance, particularly in capacity building, to enable them to accept and implement the Agreement.

The third session of the Technical Consultation was convened in May 2009. It was a turning point in the negotiations, characterized by intense and often difficult discussion. However, there was a noticeable loosening and movement by some delegations on key negotiating issues, although all delegations insisted that they would need to review the Agreement as a package prior to consenting to it.

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<sup>56</sup> See, in particular, paragraphs 52 and 53 of: UN. 2009. *Resolution adopted by the General Assembly 63/112* [online]. New York, USA. [Cited 31 January 2012].

[www.un.org/Depts/los/general\\_assembly/general\\_assembly\\_resolutions.htm](http://www.un.org/Depts/los/general_assembly/general_assembly_resolutions.htm)

<sup>57</sup> FAO. 2009. *Report of the Twenty-eighth Session of the Committee on Fisheries*. FAO Fisheries and Aquaculture Report No. 902. Rome. 64 pp.

<sup>58</sup> Importantly, some Members pointed out that if the Agreement were adopted under Article XIV, an important fishing entity, Taiwan Province of China, and a major port, would be excluded from participation in the Agreement and that this could cause a serious problem in terms of the Agreement's application and implementation.

A central issue addressed in the third session was the status of the Agreement. After protracted debate that did not move towards consensus, the Chairperson called for an informal vote on whether the Agreement should be an Article XIV instrument or outside FAO. The vote resulted in a clear split between G-77 and Organisation for Economic Co-operation and Development (OECD) countries, with the G-77 prevailing on numbers in support of an Article XIV Agreement under the FAO Constitution. The G-77 countries expressed the view in debate that, if the Agreement were concluded outside FAO, they might not receive support from the Organization to accept and implement it. The Assistant Director-General for Fisheries and Aquaculture explained to the Consultation that, as a result of recent FAO Conference decisions, resources would not be available to support the Agreement if it were an Article XIV-type instrument. However, this intervention, repeated twice during the Technical Consultation, did not sway the position of G-77 Members, even though the Pacific Island Group was concerned about the exclusion of fishing entities given the regional and global fishing presence of Taiwan Province of China, which extends to more than 30 000 industrial fishing vessels.

The concerns of the OECD countries focused more on the inclusiveness of the Agreement and hinted their preference that it be concluded outside FAO. There was also the issue of amendment of the Agreement that would require a different model to the 1993 FAO Compliance Agreement. Under this Agreement, amendments are made by the FAO Conference, enabling non-Parties to participate in the amendment process by virtue of their FAO membership and being present and voting in the Conference. However, as an alternative to this model, the amendment procedures for the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture were suggested. Article 23 of this treaty provides that amendments must be proposed and adopted by consensus of the contracting Parties present at the session of the governing body. Ultimately, the Agreement followed the latter model.

The fourth session of the Technical Consultation was convened in August 2009. Members were aware that it would be the last session and that it was necessary to secure consensus on a number of outstanding issues and to wrap up the Agreement so that it could be finalized. With the pressure of completion hanging over their heads, Members worked to agree on bracketed text and on the Agreement as a whole. Members moved to accept compromise positions, and the sharp exchanges of previous sessions were absent. There was concurrence that the Technical Consultation should adopt the Agreement by consensus, avoiding a vote, so as to ensure universal acceptance of the instrument. In adopting the report of the Technical Consultation, and hence the Agreement that was appended thereto, many Members requested that their positions be reflected in the report.

A procedural point of disagreement in adopting the report was whether the Agreement should be submitted to COFI for review or directly to the 2009 sessions of the FAO Council and Conference. Some Members from a regional grouping wanted the draft Agreement to go to COFI before the Governing Bodies, arguing that this was customary and in keeping with the spirit of FAO's independent external evaluation reform process. However, routing the draft Agreement to COFI would have significantly slowed the approval process through the FAO Governing Bodies by up to nearly two years. A large majority of Members did not favour this approach, and it was agreed that the draft Agreement would not be forwarded to COFI from the Technical Consultation.

Prior to its consideration by the FAO Council and Conference, the Committee on Constitutional and Legal Matters (CCLM) in September 2009 reviewed and endorsed the draft Agreement and a draft Conference resolution. This review is an internal FAO requirement that is followed for all instruments of this type. The CCLM agreed to forward both documents to the FAO Council for subsequent transmission to the FAO Conference for approval.

In late September 2009, the FAO Council reviewed the CCLM report and transmitted the draft Agreement and draft Conference resolution to the FAO Conference for consideration and approval.

The FAO Conference looked at the draft Agreement in a very positive light. It commended FAO and its Members for their efforts in preparing the draft legally binding Agreement on Port State Measures

to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. The Conference approved the Agreement on 22 November 2009 under Article XIV, paragraph 1, of the FAO Constitution. It opened for signature the same day.

The development of the text from the FAO preliminary draft Agreement, through the process described above to the final version, took some significant turns. It had been recognized that a strong FAO preliminary draft Agreement should be prepared, foreshadowing the likelihood that the text would be “negotiated down”, or weakened by countries that might not support robust standards. In fact, the opposite happened. Much of the original text was enhanced or expanded by the Expert and Technical Consultations. This reflected the collective will of the international community to produce a powerful and enduring instrument that would serve as a basis for effectively combating IUU fishing well into the future. A brief analysis of the development of the text from the FAO preliminary draft through the Expert Consultation to the final version appears in Appendix 4. A comprehensive legal analysis of the final text of the Agreement is given in Chapter 3 (below).

In early December 2009, UNGA Resolution 64/72 on Sustainable Fisheries was adopted. It took note of the approval of the FAO Conference of the Agreement. It encouraged, *inter alia*, States to sign and ratify, accept, approve or accede to the Agreement with a view to bringing it into force as soon as possible.<sup>59</sup>

At the 2010 resumed session of the 1995 UN Fish Stocks Agreement Review Conference, the use of port State measures to promote sustainable fisheries and the 2009 FAO Port State Measures Agreement were important issues for discussion. The adoption of the Agreement in November 2009 was greeted warmly, and its ratification was encouraged because the Agreement was considered a major development in combating IUU fishing. Moreover, the Review Conference noted that the Agreement should reduce the economic benefits accruing to IUU fishers from their illicit activities and, in turn, assist in ensuring that only legally caught fish would be landed, transshipped, packaged and processed. The Review Conference recommended that States and regional economic integration organizations (REIOs), individually and collectively through RFMOs, consider becoming Parties to the 2009 FAO Port State Measures Agreement with a view to its early entry into force, and adopt port State measures consistent with the Agreement through RFMOs if they had not already done so.

In fact, a number of RFMOs have adopted measures relating to port State control and are increasingly adopting the relevant provisions as they appear in the Agreement, such as the Indian Ocean Tuna Commission (IOTC) Resolution 10/11 on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, adopted in 2010. A table showing some port State measures adopted by RFMOs is in Appendix 5.

The FAO Sub-Committee on Fish Trade, at its twelfth session, held in April 2010, underlined the importance of the Agreement and its potential role in contributing to more sustainable fisheries and trade.

When the 2009 FAO Port State Measures Agreement closed for signature on 21 November 2010, 17 FAO Members had signed it: Angola, Australia, Benin, Brazil, Chile, European Union (EU), Gabon, Iceland, Indonesia, New Zealand, Norway, Peru, Russian Federation, Samoa, Sierra Leone, United States of America and Uruguay. However, many of the Members that took high-profile positions in the negotiations of the Agreement did not sign it.

In February 2011, the Twenty-ninth Session of COFI agreed that port State measures were a potent and cost-effective tool to combat IUU fishing. The Committee noted the adoption of the Agreement, and that many Members had their domestic processes in train for the ratification, acceptance, approval or accession to the Agreement. By that time an additional six Members had signed the Agreement

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<sup>59</sup> See, in particular, paragraphs 54 and 55 of: UN. 2009. *Resolution adopted by the General Assembly 64/72* [online]. New York, USA. [Cited 31 January 2012]. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/466/15/PDF/N0946615.pdf?OpenElement>

(Canada, France, Ghana, Kenya, Mozambique and Turkey) and two Members had acceded (Myanmar and Sri Lanka).

It is expected that the Agreement's entry into force is likely to take three to five years. A review conference will be held four years after the entry into force of the Agreement. This conference will enable Parties and FAO to assess progress with implementation and, as needed, devise ways and means of encouraging greater participation in the Agreement.

FAO will have a high-profile role in administering and supporting the implementation of the Agreement, requiring cooperation across several departments of the Organization. The Legal and Ethics Office essentially takes responsibility for the administration of the Agreement, while the Fisheries and Aquaculture Department will have responsibility for ongoing technical matters to support implementation. The Office of Corporate Communications and External Relations will also be involved from time to time in promoting political and media activities related to the Agreement.

### **2.3 The technical role of FAO in the implementation of the Agreement**

Many of the articles of the 2009 FAO Port State Measures Agreement refer to FAO's technical role. Some of the Organization's responsibilities are passive in nature (e.g. Article 6 cooperation and exchange of information, Article 7 designation of ports, and Article 15 transmittal of inspection results) while others require a proactive FAO role (see below). Even where FAO has a passive role, the Organization would be expected to collate and manage information provided to it by Parties so that it can be retrieved and provided in a consolidated or otherwise restricted format to other or all Parties, as required.

The areas where FAO should adopt a proactive role in the implementation of the Agreement are shown below:

- Article 16 foresees a coordination role for FAO to facilitate the exchange of information with existing databases.
- Article 21, taking inspiration from the 1995 UN Fish Stocks Agreement, anticipates that FAO will have responsibility for the administration of the ad hoc working group to support developing State Parties, including matters relating to the scheme of contributions, identification and mobilization of funds, the development of criteria and procedures to guide implementation, and progress in the implementation of the funding mechanisms. Related activities would involve the assessment of the needs of developing State Parties, the availability and timely disbursement of funds, and accountability of the recipient developing State Parties in the agreed use of funds.<sup>60</sup> The Twenty-ninth Session of COFI requested FAO to form an open-ended working group or similar mechanism to draft terms of reference for the ad hoc working group envisioned in Article 21 of the Agreement. This group would also assess capacity needs and explore funding mechanisms.
- Article 24 relates to FAO's role in monitoring and reviewing the implementation of the Agreement and coordinating the review conference.

These activities have significant financial and human resource implications for FAO. Their cost will need to be incorporated into the regular programme budget of the FAO Fisheries and Aquaculture Department because, as ongoing and permanent activities, they must be funded from a secure and stable source. It would be inappropriate to consider funding these costs from extrabudgetary sources because of the high level of insecurity associated with such funding.

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<sup>60</sup> FAO, in cooperation with the United Nations Office of Legal Affairs/Division for Ocean Affairs and the Law of the Sea (UNDOALOS), administers the Part VII Assistance Fund under the 1995 UN Fish Stocks Agreement. For FAO, these administration and accounting functions are extremely burdensome and time-consuming, absorbing significant person hours of both general service and professional staff.

Future UNGA resolutions will continue to urge States to ratify, accept, approve or accede to the Agreement until it enters into force. After that time, the focus of resolutions will then probably turn to encouraging those States that have not accepted the Agreement to do so while urging those States that have done so to implement it fully.

Appendix 6 provides a chronological summary of events leading to the finalization and adoption of the Agreement by the FAO Conference.

#### **2.4 Flag State performance: a complementary issue**

To complement the on 2009 FAO Port State Measures Agreement, FAO will embark in 2012, subject to the availability of funding, on a process to development guidelines on flag State performance. In considering IUU fishing at COFI in 2007, some Members referred to “irresponsible flag States” and, as a consequence, it was proposed that criteria be developed for assessing the performance of flag States as well as examining possible actions against vessels flying the flags of States not meeting the criteria. Following an expert workshop convened by Canada with the support of the European Commission and Iceland’s Law of the Sea Institute, the matter of flag State performance was addressed again in 2009 by COFI. As agreed by COFI, an Expert Consultation was convened in June 2009, to be followed by a Technical Consultation.<sup>61</sup>

The task assigned to the Expert Consultation was quite ambitious. Participants used as a starting point and general reference a number of technical papers relating to the issues to be discussed as well as the outcomes of the Canadian Expert Workshop. In their deliberations, experts were requested to consider, and make recommendations on: criteria for assessing the performance of flag States; possible actions against vessels flying the flags of States not meeting the criteria identified; the role of national governments, RFMOs, international institutions, international instruments and civil society in implementing the criteria and actions for flag State performance; and assistance to developing countries to help them to meet the criteria, take action and fulfil their respective roles as appropriate.

The Expert Consultation agreed to recommend to a Technical Consultation that international guidelines on criteria for assessing the performance of flag States and possible actions against vessels flying the flags of States not meeting such criteria be developed.<sup>62</sup> An assessment process would be an important part of such guidelines. Noting the basis provided by international law for such assessments, the Expert Consultation agreed on the need for two processes: one for self-assessment, and another for international or multilateral assessment. The latter assessment should be undertaken in a spirit of international cooperation, consistent with the 1982 UN Convention. The Expert Consultation further agreed upon draft criteria for flag State performance, processes for conducting assessments, post-assessment actions and assistance to developing countries to improve their performance as flag States. The experts considered that these criteria and actions should form an appropriate framework for review by a Technical Consultation.

#### **2.5 Summary comments**

The incidence and impact of IUU fishing is not diminishing. It continues to be a major concern for countries and RFMOs attempting to promote long-term sustainable development in fisheries, including efforts to rebuild overexploited and fragile stocks, and to ensure that fishing does not affect ecosystems in a negative manner. It was against this background that the international community, through the United Nations, FAO and other fora, called on FAO to proceed with the development of a binding international instrument on port State measures. This involved substantial international attention, as discussed above and summarized in Appendix 7, which shows the major decisions by

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<sup>61</sup> The Technical Consultation was scheduled for July 2010 but then postponed because extrabudgetary funding was not forthcoming to support the meeting. However, the first session of the Consultation was held in May 2011, and the second session will be convened in March 2012 if extrabudgetary funds are available.

<sup>62</sup> FAO. 2009. *Report of the Expert Consultation on Flag State Performance*. FAO Fisheries and Aquaculture Report No. 918. Rome. 94 pp.

FAO governing bodies and other meetings and the UNGA concerning the development of the Agreement.

The conclusion of the 2009 FAO Port State Measures Agreement heralded an advance in international law and a major development in efforts to deal more effectively with IUU fishing. Significantly, the Agreement extends the port State measure provisions of the 1982 UN Convention and entrenches these measures as a fisheries management tool.

The Agreement marked a move away from the strong international focus and reliance on flag State enforcement as a means of attempting to control IUU fishing vessels. The Agreement placed port State measures at the centre of international efforts to combat IUU fishing. This shift in emphasis reflected several factors including:

- the increase in the number of irresponsible States over the past two decades operating open registries, offering “flags of non compliance”;<sup>63</sup>
- international impatience with flag States over their inability or unwillingness to exercise effective control over vessels flying their flags in accordance with international law; and
- the realization that port State measures in respect of fishing vessels should be elaborated given their lack of presence in international law.

As a fisheries management tool, port State measures have many advantages. In particular, they have the capacity to promote compliance with national and regional conservation and management requirements and, at the same time, to facilitate enhanced regional cooperation and harmonization. Furthermore, the measures should serve to hinder and block the movement of IUU-caught fish onto national and international markets. These additional marketing difficulties should, in turn, have knock-on effects by causing IUU-caught fish prices to fall, thereby reducing the revenue and consequently the incentive for fishers to continue to engage in illicit activities.

If implemented and enforced effectively the 2009 FAO Port State Measures Agreement has the potential to strengthen fisheries conservation and management by: contributing to more accurate and comprehensive data collection (quantity, species, location and bycatch and discards); enhancing vessel reporting to national administrations and RFMOs; permitting assessments concerning the extent to which vessels have complied with operational authorizations and licences to fish; promoting regional fisheries cooperation among coastal States and other RFMO Members; and facilitating the more rigorous implementation of international labour, safety and pollution standards on vessels.

Port State measures have the advantage of being cheaper and safer than alternative, more conventional air and surface compliance tools. By having access to vessel logs and other operational information, port inspectors have a “long-arm” capability, in that they can check on fishing activities beyond EEZs (e.g. in the EEZs of neighbouring countries and high seas areas covered by RFMOs). Moreover, port inspections are considerably less expensive in terms of money and less dangerous than are those carried out at sea.

As all negotiated instruments, the Port State Measures Agreement is a compromise document. Many FAO Members were not satisfied entirely with it and had to move positions on key issues to join the consensus to adopt the Agreement. While important matters such as the flag State certification of catches were lost during negotiations, making it a weaker tool for dealing with IUU fishing, if accepted widely and applied fully and effectively, the Agreement should contribute to reducing IUU fishing.

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<sup>63</sup>These States sell flags to raise revenue. This lack of control creates a gap in flag State enforcement, encouraging fishing vessels to engage in IUU fishing. It has been shown that the sale of flags to fishing vessels is not a lucrative revenue source. See: Swan, J. 2002. *Fishing vessels operating under open registers and the exercise of flag State responsibilities. Information and options*. FAO Fisheries Circular No. 980. Rome, FAO. 65 pp.

The international community is aware that, on its own, the 2009 FAO Port State Measures Agreement will not solve the world's IUU fishing problems. They must be addressed comprehensively and in different, mutually reinforcing ways. However, blocking the movement of IUU-caught fish into ports and onto national and international markets, which is a fundamental goal of the Agreement, should reduce cost-effectively the incentive for fishers to engage in IUU fishing and related activities.

The real-time exchange of information is a key aspect of the Agreement. Indeed, its success will hinge, to a large degree, on the extent to which Parties are prepared and capable of exchanging information relating to vessels suspected of engaging, or found to have engaged, in IUU fishing. The Agreement provides for clear procedures for vessels to follow when requesting port entry and, similarly, for port States in relation to vessel inspections and other responsibilities such as the transmittal of inspection results. The Annexes, an integral part of the Agreement, contain the advance information to be provided by vessels seeking entry to Parties' ports as well as guidelines for inspection procedures, the handling of inspection results, information systems and training requirements.

Central to the Agreement is the Article concerning the requirements of developing States that underscores the issue of capacity building to facilitate the Agreement's implementation. It recognizes the need to ensure that all Parties, irrespective of their geographic location and development status, have the human and material means to implement the Agreement. This is a fundamental concern because capacity-poor States could inhibit regional efforts to implement the Agreement in a harmonized manner.

### 3. STRUCTURE, EXAMINATION AND ANALYSIS OF THE 2009 FAO PORT STATE MEASURES AGREEMENT

#### 3.1 Structure of the Agreement

The 2009 FAO Port State Measures Agreement represents the culmination of broad-based cooperation by the international community and serves as a catalyst for efforts by States and RFMOs to combat IUU fishing activities through the implementation of effective port State measures. It is through such measures that IUU fishing activities can be effectively detected and addressed in a powerful and cost-effective manner, even where they occur far out to sea.<sup>64</sup>

The objective of the Agreement, to ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems, underpins a carefully constructed framework that is grounded in and builds upon the international fisheries instruments described in Chapter 1.<sup>65</sup> It is recognized in the Agreement that, in the exercise of their sovereignty over their ports, States may adopt more stringent measures.

The Agreement is structured into ten Parts and five Annexes as shown in Figure 1. In essence:

- Part 1 lays the groundwork for interpretation and application of the Agreement, and includes fundamental international law and practice.
- Parts 2–4 provide step-by-step requirements and procedures for vessels and port States, from the time prior to entry into port of a vessel through the use of ports, inspections and follow-up actions by the port State.
- Parts 5 and 6 contain important related considerations regarding the role of flag States and the requirements of developing States.
- Parts 7–10 address topics commonly included in international agreements on dispute settlement, non-Parties, monitoring, review and assessment and final provisions including entry into force.

**Figure 1: Structure of the 2009 FAO Port State Measures Agreement**

Preamble	
Part 1	General provisions
Part 2	Entry into port
Part 3	Use of ports
Part 4	Inspections and follow-up actions
Part 5	Role of flag States
Part 6	Requirements of developing States
Part 7	Dispute settlement
Part 8	Non-Parties
Part 9	Monitoring, review and assessment
Part 10	Final provisions
Annex A	Information to be provided in advance by vessels requesting port entry

<sup>64</sup> For a summary review of the considerations taken prior to, and during negotiation of the Agreement and the Agreement itself, see: Kuemlangan, B. and Press, M. 2010. Preventing, Deterring and eliminating IUU fishing – port State measures. *Environmental Policy and Law*, 40(6): 262–268.

<sup>65</sup> These include the 1982 UN Convention, 1995 UN Fish Stocks Agreement, 1993 FAO Compliance Agreement, 1995 FAO Code of Conduct, IPOA–IUU and 2005 FAO Model Scheme.

Annex B Port State inspection procedures
Annex C Report of the results of the inspection
Annex D Information systems on port State measures
Annex E Guidelines for the training of inspectors

### 3.2 Legal synopsis of the evolving elements of port State measures and innovative areas in the Agreement

Continuously changing circumstances worldwide provide a major impetus that drives the evolution of international agreements and laws. This was described in Chapter 1, where the evolution of port State measures as a fisheries management tool was traced. It was noted that the 1982 UN Convention, the starting point of the study, referred to port State enforcement but in the context of environmental concerns. The only reference in the 1982 UN Convention, Article 218, related to enforcement by port States in respect of discharges from vessels voluntarily in port.

It is important to understand the scope of Article 218 because it gave the port State broad enforcement powers in respect of actions outside its maritime zones concerning marine pollution that did not occur in respect of fisheries until many years later, and then they evolved in a different manner that recognized to a greater extent the primary responsibility of the flag State to control the vessel.

In fact, Article 218 empowered the port State to undertake investigations and institute proceedings in respect of any discharge outside its waters in violation of applicable international rules and standards. In addition, other States could request the port State to institute proceedings under three circumstances: where the discharge had taken place in the waters of that other State; where it was the flag State; or where it was damaged or threatened by the discharge violation. The port State was therefore at liberty to institute proceedings itself or at the request of affected States, including the flag State.<sup>66</sup>

In contrast, the concept of flag State responsibility for fisheries enforcement beyond areas of national jurisdiction has consistently been paramount. In the earlier instruments, port State measures, even investigation, could not be taken without the agreement of flag States, but as shown in Chapter 1 of this document, international law and practice have evolved significantly.

In order to appreciate the innovations in the most recent instrument, the 2009 FAO Port State Measures Agreement, a brief legal synopsis showing how key measures have been introduced, broadened and strengthened in previous instruments is presented. It complements information in Chapter 1 of this document, which summarized the aim and content of the instruments, by tracing the evolution of particular legal aspects. The synopsis highlights how the evolution of some key components of port State measures has resulted in changed legal obligations or voluntary measures. It could be useful for any review of relevant national legislation that was based on previous instruments.

#### 3.2.1 1993 FAO Compliance Agreement and the 1995 FAO Code of Conduct

As noted in Chapter 1 of this document, both the 1993 FAO Compliance Agreement<sup>67</sup> and the 1995 FAO Code of Conduct<sup>68</sup> contained four very basic elements:

<sup>66</sup> See: Molenaar, E.K. 2010. Port State jurisdiction to combat IUU fishing: the Port State Measures Agreement In D.A. Russell and D.L. VanderZwaag, eds. *Recasting transboundary fisheries management arrangements*, pp. 369–386. The Netherlands, Koninklijke Brill NV.

<sup>67</sup> In Article V.

<sup>68</sup> In Article 8.3.

- application to foreign fishing vessels, i.e. those used for commercial fishing operations;
- requiring a foreign fishing vessel to be voluntarily in port;<sup>69</sup>
- notifying the flag State where there were grounds for believing that conservation and management measures had been undermined; and
- the necessity of arrangements between the flag State and the port State for the latter to undertake investigatory measures.

In both instruments, it was the port State that was obliged to give assistance to the flag State, not vice versa, and port State sovereignty was not expressly recognized.

### **3.2.2 1995 UN Fish Stocks Agreement**

The 1995 UN Fish Stocks Agreement significantly strengthened the use of port State measures as a fisheries management tool. Three legal elements that appeared in the previous instruments were maintained: application to fishing operations; the requirement for fishing vessels to be “voluntarily” in port; and the focus on supporting the effectiveness of conservation and management measures. However, no reference was made to the flag State. New legal elements in the Article 23 of the Port State Measures Agreement were:

- the “right and duty” of a port State to take non-discriminatory measures;
- the discretion to inspect documents, fishing gear and catch on board;
- the discretion to prohibit landings and transshipments; and
- the express recognition of State sovereignty over ports in their territory.

### **3.2.3 2001 FAO IPOA–IUU**

The IPOA–IUU<sup>70</sup> built upon the 1995 UN Fish Stocks Agreement and again expanded the elements of port State measures. It reinforced the port State’s sovereignty and its right and duty to take non-discriminatory measures including prohibiting landings and transshipments, and elaborated the inspection process. Subsequent instruments continued these themes.

Similar to the preceding instruments, the IPOA–IUU focused on fishing vessels, but this was expanded in the following two situations to include vessels that carry out related activities<sup>71</sup> that support IUU fishing:

- the need for “fishing vessels and vessels involved in fishing related activities” to provide advance notice of entry into port;<sup>72</sup> and
- the development of a national strategy for port State control of “vessels involved in fishing and related activities”.<sup>73</sup>

The requirement for the vessel to be “voluntarily” in port did not appear in this or subsequent instruments; however, the context primarily involved step-by-step situations where port access had been requested and/or granted.

Reference to the flag State, which had not appeared in the 1995 UN Fish Stocks Agreement in the context of port State measures, was re-introduced. The port State was encouraged to report the matter immediately to the flag State, in addition to any other actions it may take consistent with international law. The port State could take other action with the consent, or upon the request, of the flag State.

<sup>69</sup> All instruments refer to the port or “offshore terminal”, consistent with the 1982 UN Convention.

<sup>70</sup> Paragraphs 52–64.

<sup>71</sup> The IPOA–IUU did not define related activities (in fact, the only use of the terms was in relation to port State measures), but they commonly included activities such as transshipment, transport refuelling and resupply.

<sup>72</sup> Paragraph 55.

<sup>73</sup> Paragraph 61.

Significantly, and logically, the IPOA–IUU shifted the focus from “undermining conservation and management measures” to cases where there was “clear evidence of IUU fishing activity” beyond areas of national jurisdiction of the port State. The latter is much broader in scope because, based on definitions of IUU fishing activity in the IPOA–IUU,<sup>74</sup> this could apply to areas under the jurisdiction of other coastal States or on the high seas where there are no conservation and management measures.<sup>75</sup>

The IPOA–IUU encouraged compatibility and information exchange while endorsing the predominant role of the flag State in taking action. The following new or expanded areas appeared in the IPOA–IUU.

- **Port Access:** The concept of port access was significantly expanded in four major ways. It was defined as admission for foreign fishing vessels to ports for the purpose of, *inter alia*, refuelling, resupplying, transshipping and landing. (However, prohibitions on the use of a port only extended to landing and transshipping.) Situations were identified where a vessel should be provided port access (e.g. *force majeure* or distress), but, significantly, the IPOA–IUU encouraged the port State to require a prior request for permission to enter port as well as advance notice and information. Port States should also publish the ports to which foreign vessels may have access and also should ensure that there is the capacity to conduct inspections at those ports.
- **Inspection and information:** Six areas for inspection were identified together with details of information required in relation to the vessel, vessel master, catch (on board, landed, transshipped) and information required by RFMOs. The IPOA–IUU encouraged States to remit the information to the flag State and the relevant RFMO, except where the confidentiality should be safeguarded.
- **National strategy, capacity-building needs:** For the first time in an international instrument, the IPOA–IUU encouraged the establishment of a national strategy and procedures for port State control of fishing vessels, including *inter alia* training and consideration of capacity-building needs.
- **Cooperation to develop compatible port State measures:** The IPOA–IUU introduced the concept of cooperation to develop compatible measures for port State control on information to be collected by port States, procedures for information collection and measures for dealing with suspected infringements by the vessel. In addition, States were encouraged to enhance cooperation, including by the flow of relevant information, among and between RFMOs and States.
- **Development of port State measures within RFMOs:** The development within RFMOs of port State measures that prohibit landings and transshipments was encouraged, building on the presumption that fishing vessels of non-cooperating Parties that were fishing in the RFMO Area may be engaging in IUU fishing.

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<sup>74</sup> Paragraph 3.

<sup>75</sup> For example, the following activities are included in the definition of IUU fishing activities:

- conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;
- in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization;
- which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; and
- in areas or for fish stocks in relation to which there are no applicable conservation and management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.

### **3.2.4 2005 Model Scheme on Port State Measures**

The 2005 FAO Model Scheme on Port State Measures to Combat IUU Fishing addressed inspections, actions and information exchange, similar to the IPOA–IUU but expanding upon these themes as described below.

The 2005 FAO Model Scheme maintained the broadened definition of port access in the IPOA–IUU and, for the first time, included in the term “fishing vessel” support ships, carrier vessels and any other vessels directly involved in fishing operations.

The 2005 FAO Model Scheme also maintained recognition of the sovereignty of the port State and the paramountcy of the flag State. In this regard, it provided that the port State should prohibit landings or transshipments unless it was satisfied that the flag State has taken or would take adequate action. The port State may only take other actions with the consent or upon the request of the flag State.

The 2005 FAO Model Scheme reinforced the focus of the IPOA–IUU – combating IUU fishing activities – but also reintroduced the objective of promoting the effectiveness of conservation and management measures. In particular, it encouraged inspections to be carried out to monitor compliance with relevant conservation and management measures, but actions to be taken where there was evidence that a foreign fishing vessel had engaged in or supported IUU fishing activities. Examples of such activities were given.

Other key areas of expansion or new elements of port State measures in the Model Scheme are shown below:

- Prohibitions on the use of a port included landing, transshipping –
  - where an RFMO had identified it as engaged in or supporting fishing activities in contravention of its conservation and management measures;
  - or processing, if the vessel was a non-contracting or cooperating Party of an RFMO or was engaged in IUU fishing in a coastal State;
  - refuelling or resupplying, where there were clear grounds for believing that a fishing vessel had engaged in or supported fishing in waters beyond the limits of its fisheries jurisdiction.
- In order to provide a detailed minimum standard that would enable harmonized or compatible port State measures to be developed, the 2005 FAO Model Scheme included five appendixes containing details relating to: information to be provided in advance by foreign fishing vessels; inspection procedures of foreign fishing vessels; results of inspection; training of port State inspectors; and an information system on port State inspections.
- Inspection duties and procedures were elaborated.
- Communication was encouraged in various contexts with the flag State, relevant coastal States and RFMOs.

These areas formed an important foundation for the development of the Agreement, which began in 2006, only one year after endorsement of the 2005 FAO Model Scheme.

### **3.2.5 Innovative areas in the Agreement**

The 2009 FAO Port State Measures Agreement, although grounded in many of the elements of the previous instruments, contained several features that underscored the commitment of the international community to strengthen this increasingly important tool for fisheries management. The broad scope of the Agreement reflects this commitment; it expressly applies to IUU fishing as defined in the

IPOA-IUU and, in , extends to fishing related activities in support of such fishing (“related activities”).<sup>76</sup>

The role of the port State is significantly fortified throughout the Agreement in key innovative areas, including: expansion of the list of uses of the port which must, or may, be denied to fishing vessels; identification of three points of time at which port States must, or may, deny the use of a port; and elaboration of the role of flag States, providing for balanced cooperation with the port State. These and other innovative areas are described below.

All of the recent instruments identify denial of the use of the port as a key measure that a port State can take. This targets the profitability of the vessel and operates as a powerful disincentive for IUU fishing. The Agreement has extended the types of uses of a port that may be denied to fishing vessels. In previous instruments, such uses evolved from the denial of landing and transshipping where there was clear evidence that conservation and management measures had been contravened, to denial of processing, refuelling or even resupply in additional circumstances.

However, denial of the use of a port was usually only encouraged where it was clear that there had been a contravention of conservation and management measures or, in later instruments, where there had been IUU fishing and the flag State would not take any measures.

The Agreement goes much further in two respects. First, it provides a full suite of uses that may, or must, be denied in every case: “landing, transshipping, packaging and processing of fish that have not been previously landed and other port services including, *inter alia*, refuelling and re-supplying, maintenance and dry docking”.

Second, the denial of use of ports is required at three separate points of time: prior to entry into port, upon entry into port and after inspection.

- Prior to entry into port, denial of the use of port is required if a vessel is on an IUU Vessel List of an RFMO (unless other appropriate actions are taken).<sup>77</sup>
- Where a vessel has entered port, denial of the use of port is required if certain conditions exist: the vessel does not have a valid authorization required by its flag State or relevant coastal State; there is evidence that the fish was taken illegally from the waters of a coastal State; the flag State does not confirm that the catch complied with requirements of an RFMO; or there is other evidence.<sup>78</sup>
- After inspection, States must deny the use of a port where there are clear grounds for believing that a vessel has engaged in IUU fishing or fishing related activities.<sup>79</sup>

The Preamble to the Agreement recognizes that measures to combat IUU fishing should build on the primary responsibility of flag States and use all available jurisdiction in international law. In this regard, and to strengthen the cooperation between flag States and port States and, therefore, the effectiveness of measures taken by both, the Agreement defines the role of flag States.<sup>80</sup>

This innovative provision requires Parties in their capacity as flag States to cooperate with port States, request inspections where their vessels are believed to have engaged in IUU fishing or fishing related activities, encourage its vessels to use ports of States that act consistently with the Agreement, immediately investigate upon receipt of a port State inspection report, report actions it has taken in respect of its vessels, and ensure that it takes effective measures in respect of its vessels to combat IUU fishing.

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<sup>76</sup> Article 3(3).

<sup>77</sup> Article 9(4) and (5).

<sup>78</sup> Article 11.

<sup>79</sup> Article 18.

<sup>80</sup> Article 20.

The Agreement, building upon encouragements for port States to cooperate with flag States, each other, coastal States and RFMOs in previous instruments, introduced a range of new requirements for information sharing and communication at the international level. In this way, and by providing clear linkages to RFMO conservation and management measures and IUU vessel lists, the Agreement provides the potential for strengthening the effectiveness of RFMO governance.

At the national level, the Agreement took a fresh approach, not appearing in other instruments, towards promoting integration and coordination of port State measures with the broader system of port State controls and with other measures to combat IUU fishing.<sup>81</sup>

Many recent regional and international agreements refer to assistance for developing States, as noted in Chapters 1, 2 and 5. This reflects the recognition by the international community of the costs and the benefits of the broadest and deepest possible implementation. The Agreement recognized the requirements of developing States,<sup>82</sup> which are particularly prone to the adverse effects of IUU fishing and usually lack the capacity to monitor and enforce capture fishery regulations effectively. It provided a comprehensive basis for assistance in order to develop a legal basis and capacity for implementation, facilitate participation in international organizations and technical assistance. Parties must cooperate to establish funding mechanisms for certain purposes, and establish an ad hoc working group for this purpose, as described in Section 3.4, below.

Effective communication is a necessary companion to the implementation of the port-related measures taken by a Party at every step of the way. The essence of the Agreement is to combat IUU fishing not only at national level, but also through coordination and cooperation with others. Therefore, communication must be prompt, transparent and effective, and promote coordinated action among Parties, as well as with flag States, coastal States, and relevant RFMOs and international organizations. The Agreement contains a number of robust requirements for port States and flag States relating to notification, communication and information. These are shown in tabular form in Appendix 8.

The five Appendixes developed for the Model Scheme were updated and further elaborated in the Annexes of the Agreement. The Annexes incorporated up-to-date international standards for prior reporting by vessels seeking entry into port, inspection procedures, inspection reports, information systems and training guidelines.

### **3.3 Overview of the framework of the Agreement**

The framework of the Agreement, shown in Figure 1, clearly and comprehensively addresses port State measures and actions or requirements that support the measures, as well as relevant international law. This chapter provides a summary description of the main elements of each Part of the framework.

The Preamble, introducing the reasons for concluding the Agreement, refers to deep concern about the continuation of IUU fishing, its detrimental effect and the increasing need for food security. It reflects the strength of the Agreement by, among other things, recognizing that port State measures provide a “powerful and cost-effective means” of combating IUU fishing and referring to the need for increasing coordination at regional and interregional levels, the rapidly developing databases and networks that support port State measures, and the need for assistance to developing countries. Importantly, the measures to combat IUU fishing should build on the primary responsibility of flag States and use all available jurisdiction under international law. It is noted that port State sovereignty allows States to adopt more stringent measures than those in the Agreement.

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<sup>81</sup> Article 5.

<sup>82</sup> Article 21.

**Part 1 – General provisions**, contains Articles of a broad introductory nature that provide a foundation for the entire Agreement and are vital for its interpretation and application. They include definitions of key terms, the objective of the Agreement and its application (and manner of application) to designated vessels, areas, activities and ports. The interpretation and application of the Agreement as it relates to international law and other international instruments are set out, as are requirements at the national level for integration and coordination. General cooperation and exchange of information is promoted for the effective implementation of the Agreement.

**Part 2 – Entry into port**, requires Parties to designate and publicize the ports to which vessels may request entry and to require vessels to provide in advance certain information before granting entry. There are several requirements relating to port entry, authorization or denial, based on a Party's decision whether to allow or deny entry. A vessel must be authorized by the port State before it enters port. Where there is sufficient proof of IUU fishing or fishing related activities, a Party must deny entry, with certain exceptions, and where the vessel has already entered, deny the use of its ports. The uses to be denied are defined, and used consistently throughout the Agreement. However, the Agreement does not affect the entry for reasons of *force majeure* or distress.

**Part 3 – Use of ports**, sets out criteria where Parties are required to deny the use of its ports to vessels that have already entered port, with certain exceptions, and obligates the Party to notify promptly others of its decision.

**Part 4 – Inspections and follow-up actions**, requires Parties to carry out an annual level of inspections necessary to achieve the objective of the Agreement, and to seek to agree on minimum levels for inspection through RFMOs, FAO or otherwise. Priorities for inspections are identified. Elaborate provisions guide the conduct of inspections, and a form is provided for information to be included in the report of the results of inspections. Parties must transmit inspection results to the inspected vessel and, as appropriate, designated States and organizations, establish communication mechanisms for the electronic exchange of information and handle such information as required. Parties are encouraged to establish an information-sharing mechanism, preferably coordinated by FAO. Guidelines for training inspectors are given. Where an inspection reveals evidence of IUU fishing, port State follow-up actions must include notifying the flag State and others, and denying the use of port. Parties are to provide information to a vessel with regard to any recourse it may have under national laws concerning port State measures that have been taken.

**Part 5 – Role of flag States**, requires Parties also in their capacity as flag States to play a significant role in the implementation of the Agreement, including by requiring their vessels to cooperate with the port State in inspections, requesting the port State to inspect their vessels believed to have engaged in IUU fishing, encouraging their vessels to use ports of States acting consistently with the Agreement, fully investigating their vessels upon receipt of an investigation, reporting actions it has taken as a result of port State measures, and ensuring that effective measures are applied to their vessels determined to have engaged in IUU fishing activities.

**Part 6 – Requirements of developing States**, requires Parties to provide assistance to developing States Parties to develop a legal basis and capacity for the implementation of effective port State measures, facilitate participation in international organizations and technical assistance. Parties must establish appropriate funding mechanisms for certain purposes and an ad hoc working group to make recommendations on establishing such mechanisms. The capacity building needs for developing States are described in Chapter 5 of this document.

**Part 7 – Dispute settlement**, seeks to promote the peaceful settlement of any dispute that may arise in the implementation of the Agreement. It incorporates the dispute settlement requirements in the 1993 FAO Compliance Agreement.

**Part 8 – Non-Parties**, requires Parties to encourage non-Parties to become Parties and/or to implement the Agreement. Parties are also to deter activities of non-Parties that undermine the effective implementation of the Agreement.

**Part 9 – Monitoring, review and assessment**, requires regular and systematic monitoring of the implementation of the Agreement. Similar to provisions in some other recent fisheries instruments such as the 1995 UN Fish Stocks Agreement, it requires FAO to convene a meeting of the Parties four years after the Agreement enters into force, to review and assess the effectiveness of the Agreement in achieving its objective.

**Part 10 – Final provisions**, contains standard provisions in treaties governing processes and participation, including its entry into force, amendments and the duties of the Depositary. Importantly, similar to provisions in other recent fisheries instruments such as the 1995 UN Fish Stocks Agreement, there is a mechanism for provisional application of the Agreement whereby States and REIOs may consent to provisional application of the Agreement, before it enters into force for them, by notifying the Depositary.

### 3.4 Implementing the Agreement: overview of the Articles of the Agreement

This section sets out the framework of the Agreement shown in Figure 1 and describes the main features of each Article in each Part. A summary is given for each Article that describes the main purpose of the Article, whether it should be implemented in national law or procedures, and its main legal elements. A narrative then elaborates the provisions of the Article and provides general background and examples of how and/or why it should be implemented. The Final Provisions in Part 10, however, all relate to treaty law and are simply summarized for ease of understanding.

## PART 1 GENERAL PROVISIONS

### Article 1 Use of terms

*Purpose: Essential for a clear and common understanding and interpretation of the Agreement, implementing its provisions and avoiding disputes.*

*National law: These definitions should be included in national law, unless national law is more stringent.*

*Terms: conservation and management measures, fish, fishing, fishing related activities, illegal, unreported and unregulated fishing, Party, port, regional economic integration organization, regional fisheries management organization, vessel.*

All of the terms defined in the Agreement are based on international best practices but some signal a strengthening and broadening of port State measures, especially those that define port, fishing related activities and vessel. It is important, also, to understand the meaning of fish and fishing, and to be aware that the definition of IUU fishing in the IPOA–IUU (a voluntary instrument) was incorporated. Some of the terms, and their implications, are shown below.

- “fish” means all species of living marine resources, whether processed or not.

This applies to fish products, such as those that may be transshipped or transported.

- “fishing” means searching for, attracting, locating, catching, taking or harvesting fish or any activity that can reasonably be expected to result in the attracting, locating, catching, taking or harvesting of fish.

This can include, for example, the use of aircraft to search for fish or the deployment of a fish aggregating device.

- “*fishing related activities*” means 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, as well as provisioning of personnel, fuel, gear and other supplies at sea.

This signals that the Agreement extends to support vessels, and means that the use of ports can be denied to them where they support IUU fishing activities. It closes a sizeable loophole that would otherwise encourage IUU fishing vessels to continue their activities when supported by other vessels. In addition, it reflects the reasons why the use of ports may be denied – i.e. for landing, packaging, processing, transshipping or transporting of fish.

- “*port*” includes offshore terminals and other installations for landing, transshipping, packaging, processing, refuelling or resupplying.

This is broader than those in other instruments and builds on the reference of the 2005 FAO Model Scheme, which did not include packaging.

- “*vessel*” means any vessel, ship of another type or boat used for, equipped for, equipped to be used for, or intended to be used for, fishing or fishing related activities.

Importantly, this includes vessels used for fishing related activities. The Agreement applies to foreign vessels, so artisanal vessels of neighbouring States are also included, but an exception for such vessels is provided in Article 3(1)(a).

## **Article 2 Objective**

*Purpose:* Essential for understanding the aim of the Agreement and its provisions.

*National law:* This may also be implemented as an objective or principle of a national law as appropriate, but otherwise implementation is not required.

*Objective:* Prevent, deter and eliminate IUU fishing through the implementation of port State measures and thereby ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems.

The objective reflects the aim of the international community to agree on binding port State measures: combat IUU fishing and ensure sustainable use of resources and marine ecosystems. It recognizes that all IUU catches are ultimately landed at port for landing or transshipment and that there are powerful economic consequences of internationally coordinated regulation or denial of port entry and/or the use of port services on those involved in IUU fishing activities, consequently reducing incentives for IUU fishing and related activities.

The role of the port State is to ensure, through adoption of minimum standards, that the vessel will not have an opportunity to land or sell fish harvested by IUU fishers, and, therefore, lower the incidence of IUU fishing.

## **Article 3 Application**

*Purpose:* Essential for understanding how, where, to whom or what to apply the Agreement.

*National law:* The application of the Agreement to vessels and activities defined in the Agreement must be included in national law. In practice, it must be applied in the manner described in the Agreement.

*Application:* To foreign vessels<sup>83</sup> seeking port entry, with two exceptions:

- artisanal vessels of neighbouring States engaged in subsistence fishing;
- container vessels carrying no fish or fish that have been previously landed, if there are clear grounds for suspecting support to IUU fishing.

*Exception:* does not apply to vessels chartered by nationals exclusively for fishing under areas of national jurisdiction, but they are subject to measures as effective as those applied in relation to flag vessels.

*To IUU fishing and related activities in marine areas.*

*In a fair, transparent and non-discriminatory manner, consistent with international law.*

*The Agreement is global in scope and applies to all ports; entities that may not become Party may commit to act consistently with provisions of Agreement.*

The Agreement does not apply to national vessels, in recognition of the sovereignty of the port State over its own flag vessels. The two categories of foreign vessels that may be excepted are described.

In many adjacent or neighbouring countries, most of which are developing States, great numbers of artisanal fishers migrate across borders to follow the fish and, because there is no limitation on the definition of a fishing vessel, these vessels would be subject to the Agreement. It would be onerous for each country to require port inspections of these vessels. Therefore, the Agreement encourages cooperation to ensure that those vessels do not engage in IUU fishing.

The second exception, container vessels, may carry fish that has been landed and processed, such as anchovy topping on frozen pizza. It can be very difficult or even impossible for the vessel operators to trace whether the fish has been caught in IUU fishing activities. In addition, the fish products could constitute only a small fraction of the total cargo of the vessel, further complicating the issue. In such cases, there must be clear grounds for suspecting that such vessels have engaged in fishing related activities in support of IUU fishing.

Chartered vessels are an exception to the application of the Agreement. The situation is complicated by the fact that charter arrangements are often made so that a foreign vessel can be chartered by a national of the coastal State (also the port State in this case), for the purpose of fishing in its waters under a licence issued by the coastal State. In that way, it can avoid regulation as a foreign vessel. A Party may decide not to apply the Agreement to such vessels, but must subject them to measures as effective as those applied to its own vessels.

It is fundamental to the strength and breadth of the Agreement that Parties apply it to IUU fishing in marine areas, and to related activities. The definition of IUU fishing, taken from the IPOA-IUU, includes activities in all marine areas and is discussed in Section 3.2.3 of this document (above).

The application of the Agreement in a fair, transparent and non-discriminatory manner, consistent with international law, is a standard provision to ensure that favouritism or harassment does not occur.

The issue of entities that may not be recognized as States and are not eligible to become Party to the Agreement is addressed in this Article. It provides that the Agreement, being global in scope, applies to all ports and that Parties must encourage all other entities to apply measures consistent with its provisions. Those that may not become Parties may express their commitment to act consistently with its provisions.

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<sup>83</sup> Legally described as “vessels not entitled to fly its flag”.

#### **Article 4 Relationship with international law and other international instruments**

*Purpose: Clarify rights and duties of Parties under relevant international law.*

*National law: The Parties should take note of their international rights and obligations in the implementation of the Agreement. This does not require incorporation in national law.*

*Relationship with international law and other international instruments:*

*Recognizes State sovereignty, clarifies what is binding and non-binding, requires conformity with international law and good faith of Parties.*

In agreeing to become Party to a binding international instrument, States undertake new legal obligations. Some of these obligations may appear to diminish the State's sovereignty, jurisdiction or rights under international law. Or, if the instrument requires Parties to take certain actions based on a decision of an organization to which they do not belong, it may appear that the States are bound by all decisions of that organization, even if that is not the case.

For this reason, it is important to clarify the relationship of that instrument with international law and with other international instruments. It is therefore standard for States to agree that the instrument must be applied consistently with international law, that a Party's rights under international law are not prejudiced, and that a Party does not necessarily recognize and is not bound by instruments or organizations to which it is not a Party.

For example, port States could be concerned that the instrument derogates from the sovereignty they exercise over their ports or that it would prevent them from exercising their rights under international law. Such rights could include denying port entry to any vessel they wished, or taking stronger measures than those in the instrument. Article 4(1) addresses these concerns by providing that nothing in the Agreement affects the sovereignty or sovereign rights of a Party over their waters or their ports. They have the right to deny entry into port and to adopt more stringent measures.

Another type of concern arises where it could be implied that a State, in implementing the instrument, recognizes and feels bound by a different instrument to which it is not Party. For example, the Agreement requires that vessels on an RFMO IUU Vessel List be denied entry into a port. The port State may not be a member of the RFMO, so Article 4(2) makes it clear that a Party, in applying the Agreement, does not become bound by measures or decisions of, or recognize, an RFMO of which it is not a member. Article 4(3) reinforces this by stating that a Party is not obliged to give effect to any measure or decision of an RFMO unless it was adopted in conformity with international law.

International law governs the interpretation and application of the Agreement, and to this end Article 4(4) provides that Parties must take into account applicable international rules and standards, including those established through the IMO. In this regard, the Agreement acknowledges the coordinated system of controls over merchant vessels operated under the IMO.<sup>84</sup>

Parties are obligated to fulfil in good faith their obligations and not to abuse their rights under the Agreement under Article 4(5). An abuse of right occurs when one Party exercises a right in a manner that it receives benefits that are substantially disproportionate to the resulting losses incurred by another Party.

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<sup>84</sup> This includes the 1982 Paris MOU on Port State Controls, the IMO Technical Conventions and the IMO Global Strategy.

## **Article 5      Integration and coordination at the national level**

*Purpose:*            *Promote a holistic approach to the national implementation of port State measures within broader contexts, ensure effective communication systems.*

*National law:*   *This is a matter of coordination, which may be done for example under Memoranda of Understanding (MOUs) among relevant government agencies. National laws may provide for cross-authorization of inspecting officers.*

*Integration and coordination at the national level:*

*Require integration and coordination of port State measures with other systems of port controls and other measures against IUU fishing and promote the exchange of information.*

As indicated in Chapter 1, port State controls are applicable to both fishing and merchant vessels, and are imposed for a range of reasons, including health, safety, labour, pollution and fishing. Inspectors may be tasked by government agencies responsible for fisheries, ports, law enforcement or other areas.

Many countries experience problems because the various administrations do not communicate effectively with one another and, as a result, vessels could be subject to inspections by several different inspectors. In addition, the vessels may be required to make many different reports, often submitting the same information such as vessel specifications to different agencies.

To address this situation, Article 5(a) of the Agreement requires Parties, to the extent possible, to integrate or coordinate fisheries related port State measures with the broader system of port controls.

On another front, a port State may take other types of measures taken to combat IUU fishing activity – for example, in its role of coastal State, flag State or member of an RFMO. The integration of port State measures with such other measures, taking into account as appropriate the IPOA–IUU, is required under Article 5(b).

A third situation is based on the need for information exchange to avoid duplication of efforts and to alert other agencies to relevant information. For example, inspectors from one agency should inform other agencies of any relevant evidence found upon inspection, or if it is known that relevant actions or measures have been taken by other States or RFMOs against a vessel. Article 5(c) of the Agreement therefore requires Parties, to the extent possible, to take measures to exchange information among relevant national agencies and to coordinate their implementation activities.

At an early stage, Parties should identify the relevant national authorities and develop strategies to coordinate their efforts. For example, a Party may establish a joint working task force comprising the national authorities that can develop clear guidelines regarding jurisdiction and powers of enforcement. Establishing a clear framework in which national agencies can operate prevents confusion and dispute.

## **Article 6      Cooperation and exchange of information**

*Purpose:*            *Promote the effective implementation of the Agreement through cooperation and exchange of information.*

*National law:*   *National laws should be implemented on the confidentiality of information to be exchanged to protect sensitive information. National laws and procedures should have the potential to support conservation and management measures taken by other States and international organizations.*

*Cooperation and exchange of information:*

*Cooperate and exchange information with relevant States/FAO/international organizations/RFMOs, take measures to support those adopted by other States/international organizations and cooperate in the effective implementation of the Agreement.*

The objective of the Agreement is to combat IUU fishing and ensure the long-term sustainable use of the living marine resources and marine ecosystems. Cooperation and the exchange of information at all levels are essential in meeting this objective. Cooperation takes many forms and covers many situations; for example, cooperation in:

- MCS efforts in relation to highly mobile IUU fishers;
- determination of the identities and nationality of those responsible for IUU fishing operations;
- the denial of market access for IUU-caught fish in international trade; and
- provision by RFMO members to the relevant Secretariat of information on visits made by IUU-listed vessels to their ports.

In recent years, States, RFMOs, FAO and other organizations have increasingly made progress in achieving a higher level of cooperation and information exchange, but it was clear that vast improvements were still needed. States saw that the development of the Agreement would provide a more coordinated process to exchange information on IUU fishing operations at all levels.

Given the necessary breadth and depth of cooperation needed, a general framework for cooperation was agreed under which specific roles to Parties or others, such as the responsibility for setting up databases, could later be elaborated.

Parties have a duty under Article 6(1) to cooperate and exchange information with relevant States, FAO, other international organizations and RFMOs to promote the effective implementation of the Agreement. Specific reference is made to exchanging information on RFMO measures that relate to the objective of the Agreement, but other information and data would also fall within this Article. For example, the UNGA has encouraged flag States and port States to share data on landings and catch quotas.<sup>85</sup>

Parties are required under Article 6(2) to take measures in support of conservation and management measures adopted by other States and other relevant international organisations. The term “measures” is not defined, so the potential scope is broad: it could relate to areas such as fisheries management, market-related measures or support to developing States through training, capacity development and other assistance.

A general requirement for Parties to cooperate at all levels in the effective implementation of the Agreement is in Article 6(3). It specifically includes cooperation through FAO or RFMOs where appropriate. This reinforces the duty to cooperate under paragraph (1) and emphasizes the importance of regional and global cooperation.

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<sup>85</sup> See in particular paragraph 57 of UN. 2009. *Resolution adopted by the General Assembly 64/72* [online]. New York, USA. [Cited 31 January 2012]. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/466/15/PDF/N0946615.pdf?OpenElement>

## PART 2      ENTRY INTO PORT

### **Article 7      Designation of ports**

*Purpose:*      *Ensure that foreign vessels call only at designated ports.*

*National law:*      *National law should provide a mechanism for the designation of ports (e.g. by notice in the gazette) and penalties for foreign vessels that call on ports that have not been designated.*

*Designation of ports:*

*Designate and publicize ports to which entry may be requested, ensure sufficient capacity to conduct inspections.*

It is important to control the ports to which foreign vessels are allowed entry for two reasons: to exercise control over the vessels and over the human capacity required for inspections. Or else, IUU vessels could escape detection by landing fish or fish products at ports that otherwise may not expect a call by foreign vessels or may not be equipped to control landings and other activities.

Article 7(1) requires port States are to designate and publicize the ports to which vessels may request entry. Parties must provide a list of its designated ports to FAO, which will also give it due publicity. This will ensure that the information is easily available at a global level as well, where it would provide “one stop shopping” for vessels that are making several port calls and pre-empt the claim by operators of ignorance of the law.

Mindful of the need for further capacity building to implement the Agreement, particularly in developing States, Article 7(2) requires Parties, to the greatest extent possible, to ensure that designated ports have sufficient capacity to conduct inspections. This recognizes that developing and other States may not have optimum human capacity, but must do what is possible under the circumstances.

### **Article 8      Advance request for port entry**

*Purpose:*      *Ensure that port State has sufficient advance information on which to base a decision to grant or deny a foreign vessel entry into port.*

*National law:*      *The information requirements and reporting time must be implemented in national law, and procedures should be established that allow adequate time for the examination of the information and decision-making on whether to grant or deny entry into port.*

*Advance request for port entry:*

*Require vessels to provide information in Annex A of the Agreement, at a specified time period prior to entry into port. This is a minimum standard, and additional information may be required.*

Before a port State can consider a request by a foreign vessel to enter one of its ports, it must have information on which to base its decision on whether to allow entry. Given the high mobility of many foreign vessels, there is a corresponding need for rapid communication with other States, RFMOs and international organizations to verify the information or ask if there are grounds to suspect IUU fishing or related activities.

Such communications are facilitated by using a common or harmonized information base, which is also designed to facilitate identification of vessels used for IUU fishing or related activities. In this regard, for example, information such as the IMO number of the vessel has been useful in tracking vessels on RFMO IUU Vessel Lists.

Article 8(1) therefore provides that Parties must require that the vessel provides the information in Annex A before entry is granted. Additional information may be required, but Parties must at least receive all information in Annex A. There are 22 headings of information, which include the proposed place, time and purposes of the port call, vessel information including vessel owner and master, various IDs (international radio call sign, certificate of registry, IMO, External, RFMO), vessel monitoring system (VMS), vessel specifications, authorizations, transshipments concerning donor vessels and total catch on board, with further catch details required under the last three areas.

Once the information has been provided to the port State, it then needs adequate time in which to review it and make a decision, mindful that once a vessel is in port it should not be unduly delayed. Authorities may have to initiate communications with other States and RFMOs, coordinate with other government agencies, and arrange for the presence of inspectors even if it means transporting them from one port to another.

Geography is also important in determining how much in advance a vessel must provide the information; for example, national laws can require it at least 24, 28 or 72 hours prior to entry into port, but it would be more reasonable to designate a longer time where the ports are further apart such as in the Pacific Islands, and a shorter time where they are closer together, such as in the Caribbean Islands.

For these reasons, Article 8(2) requires Parties to require the information sufficiently in advance to allow adequate time for the port State to examine it. When a Party is deciding how to set minimum time limits, it should also consider the practical requirements needed to make a determination to authorize or deny entry and what procedures, if any, need to be initiated by domestic authorities for inspection purposes.

#### **Article 9 Port entry, authorization and denial**

*Purpose:* Ensure that only authorized vessels enter port and that, where there is sufficient proof of IUU fishing activities, vessels either do not enter port or are subject to other actions as effective as denial of entry.

*National law:* Requirements must be implemented in national law governing the process for entry into port and prohibition of entry where there is sufficient proof of IUU fishing activities. Communications should be established with the flag State and other States as appropriate.

*Port entry, authorization or denial:*

*Require prior authorization of entry into port and presentation of authorization upon entry into port, where entry is denied inform the flag State and others, deny entry where there is sufficient proof of IUU fishing or take other actions as effective as denial of entry.*

Port State sovereignty means that a foreign vessel does not automatically have the right to enter port. It may be denied entry, even for activities unrelated to IUU fishing such as refuelling or resupplying. This could have serious consequences for the operation and the profitability of the vessel, and serves as a strong deterrent because it goes far beyond a prohibition to land fish, which could be done at the next port.

Under the Agreement, a vessel can enter a port only when it is authorized by the port State. Before an authorization can be issued, the port State must first assess whether the vessel has undertaken IUU fishing or related activities, based on information provided under Article 8 and other information it may require. In this regard, the port State may wish to contact an RFMO or coastal State. Article 9(1) requires Parties to decide on the basis of such information whether to authorize or deny the entry into port, and to communicate its decision to the vessel or its representative.

Where the port State has authorized entry, the vessel or its representative must present the authorization upon its arrival in port in accordance with Article 9(2). This requirement guards against vessels falsely claiming that they were authorized to enter port so they may land or transship IUU caught fish.

Where the port State denies entry, Article 9(3) requires it to inform the flag State and – as appropriate and to the extent possible – relevant coastal States, RFMOs and international organizations. At this point, it is of critical importance that others know immediately of the decision, so they may take appropriate action. For example, a flag State may launch an investigation, an RFMO may advise its members, and a coastal State may decide to prohibit the vessel from entering its ports.

Entry must be denied under Article 9(4) where the port State has sufficient proof that a vessel has engaged in IUU fishing or related activities, in particular where it is on an RFMO IUU Vessel List.

However, the Agreement recognizes that there may be circumstances where it would be better to allow the vessel entry into port for inspection and take other action that would be at least as effective as denial of port entry. For example, a useful way of establishing whether there had been IUU fishing would be to allow the vessel into port, inspect the vessel and obtain information about the vessel's fishing activities and catch on board. The information could then be widely disseminated to RFMOs and others.

To address this situation, Article 9(5) provides that a Party may allow such a vessel into its ports exclusively for the purpose of inspecting it and taking other appropriate actions at least as effective as denial of entry to combat IUU fishing. This could include taking market-related measures or, as appropriate, initiating legal proceedings under national law. Article 9(6) requires the use of port to be denied where the vessel is allowed into the port under these circumstances.

#### **Article 10**     *Force majeure or distress*

*Purpose:*             *Provide refuge for vessels genuinely in distress.*

*National law:*     *Designate in national law an authority with the power to decide whether to allow vessels to enter port for reasons of force majeure or distress and a requirement that such entry is exclusively for rendering assistance.*

*Force majeure or distress:*

*Permit vessels to enter into port for force majeure or distress in accordance with international law and exclusively for rendering assistance to persons, ships or aircraft in danger or distress. Designate an authority responsible for determining whether, and the conditions under which, a vessel claiming force majeure or distress is allowed into port, and a consultation process for making such a determination.*

Vessels may claim that they must enter into port because of *force majeure* or distress. For example, a vessel may be splitting apart or a crew member may be ill. In the worst case scenario, an IUU fishing vessel might falsely claim *force majeure* so that it can enter into port and then attempt to land or transship the catch illegally.

*Force majeure* is a doctrine of international law that confers limited legal immunity upon vessels that are forced to seek refuge or repairs within the jurisdiction of another State as a result of uncontrollable external forces or conditions. This limited immunity prohibits coastal State enforcement of its laws that were breached owing to the vessel's entry under *force majeure*.

There is no commonly agreed definition in international law of what constitutes *force majeure* or distress,<sup>86</sup> but it is generally agreed that the port State has the discretion to consider entry into port on these grounds. The port State is not obliged to allow such entry because of its rights of sovereignty and self-defence.<sup>87</sup> For example, where a vessel is breaking apart and is likely to cause extensive damage to the marine environment, a State may refuse entry on grounds of self-defence or direct it to a location that is not the port of its choice.

The burden of proof that a vessel has a valid claim of *force majeure* rests with the vessel, its master and owner. A claim of *force majeure* is supported only by the existence of overwhelming conditions or forces of such magnitude (e.g. severe storm, fire, disablement or mutiny) that they threaten the loss of the vessel, crew or cargo unless immediate action is taken. Conversely, an invalid claim of *force majeure* has no effect on the authority of the coastal State to take all appropriate law enforcement action against an entering vessel.

Article 10 adopts this approach by providing that nothing in the Agreement “affects the entry of vessels into port in accordance with international law for reasons of *force majeure* or distress”. It is clear that there is no right of entry. In addition, a port State is not prevented from permitting entry into port to a vessel “exclusively for the purpose of rendering assistance to persons, ships or aircraft in danger or distress”.

Institutional arrangements should be made to designate an authority with the responsibility to verify and then accept or reject claims of *force majeure* for the purposes of enforcing applicable laws. The authority should be able to take action under national law to remove a hazard to life or property. For example, in the event of fire, flooding, or damage caused by a collision that may affect the safety of a vessel or its cargo, the condition of the vessel must first be ascertained and the existence of any hazard to the port determined. A decision should be made that is consistent with the right of entry under *force majeure* and the protection of the port.

### PART 3 USE OF PORTS

#### Article 11 Use of ports

*Purpose:* *Require denial of the use of a port where a vessel has entered port and specified conditions are not met, notification obligations and conditions for withdrawal of denial of the use of a port.*

*National law:* *Implement requirements for denial of the use of ports, including the type of use that is denied, and establish procedures for notification obligations and for decisions to withdraw denial of the use of a port.*

*Use of ports:* *Must be denied if:*

- *vessel does not have authorization for fishing or fishing related activities required by port State;*
- *vessel does not have authorization for fishing or fishing related activities required by a coastal State in respect of its waters;*
- *Party receives clear evidence that the fish on board was taken in contravention of coastal State requirements in respect of its waters;*

<sup>86</sup> A related concept, ships in need of assistance, is defined as follows in the 2003 IMO Guidelines on Places of Refuge for Ships in need of Assistance: a ship in a situation, apart from one requiring rescue of persons on board, that could give rise to loss of the vessel or an environmental or navigational hazard. IMO Res. A/23/Res.949.

<sup>87</sup> The Paris MOU provides, for example, that access to a specific port “may” be permitted by the relevant authority of that port State in the event of force majeure or overriding safety considerations, or to reduce or minimize the risk of pollution, provided that adequate measures to the satisfaction of the competent authority of such State have been implemented by the owner, the operator or the master of the ship to ensure safe entry (Article 3.12.2).

- *flag State does not confirm within a reasonable time, at the request of the port State, that the fish on board was taken in accordance with applicable requirements of a relevant RFMO;*
- *Party has reasonable grounds to believe that the vessel was otherwise engaged in IUU fishing or fishing related activities unless it can establish specified reasons why such grounds are inapplicable.*

*Procedures should be established to notify relevant coastal States, RFMOs and other relevant international organizations.*

*Denial must be withdrawn only if there is sufficient proof that the grounds for denial were inadequate or erroneous or that they no longer apply.*

*Withdrawal of denial must be promptly notified to those that had been notified of the denial of use of a port.*

As noted above in Section 3.2.5, the Agreement provides three points of time and conditions for which a vessel must be denied the use of port: prior to entry, upon entry and after inspection. Article 11 requires a port to deny the use where a vessel has entered a port. As further noted above in Section 3.2.5, the use of port always applies to the landing, transshipping, packaging and processing of fish that have not been previously landed and for other port services, including refuelling and resupplying, maintenance and dry docking. This is a comprehensive suite of uses, but the port State may also prohibit other uses of its ports.

Article 11(1) sets out five situations where a port State is required to deny the use of its port to a vessel. It generally applies to vessels that were engaged in either fishing or fishing related activities.

The Agreement requires the use of port to be denied where a vessel does not have an authorization for fishing or fishing related activities as required by its flag State (Article 11[1][a]).

The key is to identify the requirements of the flag State for vessel authorization, which could differ from State to State. International instruments, such as the 1995 UN Fish Stocks Agreement, and some RFMOs require States to authorize their vessels for fishing outside areas of national jurisdiction, i.e. the high seas and in the waters of coastal States. Under such authorizations, vessels have certain obligations, such as reporting information about their fishing trip and catch and, where they engage in fishing in a coastal State's waters, holding a licence from the coastal State.

However, not all States require their vessels to hold authorizations for fishing or related activities beyond areas under national jurisdiction and/or in the waters of other States. Therefore, it is essential to establish the requirements either through direct contact with the flag State, RFMOs or other sources.

Once it is established that an authorization is required by the flag State and a vessel produces such an authorization, it should be checked to verify whether all conditions have been met, including that it is:

- valid for the time period(s) and location(s) in which fishing or related activities took place;
- as appropriate, applicable for the species that have been caught;
- as appropriate, applicable for the related activities that have been undertaken; and
- applicable to the vessel.

In order to facilitate the process, the national authorities should have access to real-time communication and contacts for the relevant flag State and coastal State.

The use of a port must be denied where the vessel does not have an authorization required by a coastal State in its waters for fishing or fishing related activities (Article 11[1][b]). Similar to action taken

under subparagraph (a), the port State should seek this information from the relevant coastal State, RFMO or others, and should check to verify whether all conditions have been met.

The third situation where the use of port must be denied is where the port State receives clear evidence that the fish on board was taken in contravention of a coastal State's requirements in respect of its waters (Article 11[1][c]). This could apply to relevant fishing vessels as well as support vessels, for example, where there had been illegal at-sea transshipment. The "clear evidence" will vary from case to case, but it may include reports from the coastal State of illegal activity together with evidence, inspection reports or information from an RFMO or photographic evidence. It will be important to receive evidence both of the violation and the exact coastal State requirements that have been violated.

The port State should establish an information system that addresses the receipt of such information, particularly where notification of violations are received as a matter of course and without a specific request. The information should be logged in and disseminated to the appropriate authorities for information, such as senior fisheries managers and port authorities, and should be stored to allow for easy and timely access by relevant authorities. Where the information is received at the time the vessel is in port, wider dissemination may be necessary, for example, to legal counsel, in order that it can be established that the evidence is in fact clear.

The fourth requirement for denying a vessel the use of a port relates to flag State confirmation that the fish on board (either caught or transhipped) was taken in accordance with the requirements of a relevant RFMO (Article 11[1][d]). The port State must first request such confirmation by the flag State, and the flag State must give confirmation within a reasonable time. Where there is no such confirmation or where it is not given within a reasonable time, the use of port must be denied. Some RFMOs have adopted similar requirements.

The determination of what constitutes a "reasonable time" could be made in advance by the port State for each case in a fair and transparent manner, and notified to the flag State at the time of the request.

The key questions: What is a "relevant RFMO"? and What measures or decisions of that RFMO are binding on the flag State? The Agreement provides that Parties are not bound by measures or decisions of RFMOs to which they are not Party, nor are they obliged to give effect to RFMO measures or decisions that have not been adopted in conformity with international law (Article 4[2] and 4[3], respectively).

However, the requirement in paragraph (d) refers to the request of the "port State" and the confirmation by the "flag State"; it does not refer to Parties, unlike the other four paragraphs in Article 11(1).

Therefore, the following would be exempted from the requirement for a flag State to confirm that the catch on board was taken in conformity with RFMO measures or decisions:

- Parties in their role as flag States where they are not members of an RFMO; and
- Parties in their role of flag States where they claim that an RFMO measure or decision was not taken in accordance with international law.

Otherwise, the requirement in paragraph (d) does not appear to be qualified, so "relevant RFMO" could be given a very broad interpretation based on the failure of the flag State to confirm, within a reasonable time, that the fish on board the vessel had not been taken in accordance with its requirements.

There is no onus on the port State to ensure that "clear evidence" of IUU fishing exists in this case. However, the port State would have to identify the "relevant RFMO" and, for this, there should be some indication that a vessel could have been carrying out IUU fishing in its area of competence, or otherwise contravening its requirements.

There is a possibility that a flag State may declare that an RFMO is not “relevant” because it is not a member or a cooperating non-member, and may also refuse to issue a confirmation because it is not a Party to the Agreement. However, the bottom line is State sovereignty and, if a port State implements this requirement in national law in a fair and transparent manner consistent with international law, including defining “relevant RFMO”, the vessel must then be denied the use of port where the flag State fails to confirm in a reasonable time.

To cover situations not addressed by the preceding requirements for denial of use of port, the fifth option in Article 11(1)(e) refers to cases where the Party has reasonable grounds to believe that the vessel was “otherwise engaged in IUU fishing or fishing related activities in support of such fishing”, including supporting a vessel that had been denied entry into port under Article 9(4). In such a situation, however, the Agreement excepts cases where the vessel can establish:

- that it was acting in a manner consistent with relevant conservation and management measures; or
- in the case of provisioning personnel, fuel, gear and other supplies at sea, that the provisioned vessel was not, at the time of provisioning, a vessel that had been denied entry into port under Article 9(4).

Parties must not deny a vessel the use of port services as required in Article 11(1) in two situations. First, where they are essential for the safety or health of crew or safety of the vessel and where the needs are duly proven (Article 11[2][a]). The port State could establish a process and guidelines or laws relating to the standard of proof in such cases to enable a fair determination to be made. The Article does not put the burden of proof on the vessel, so the proof could also come from other quarters such as independent experts or organizations advising on vessel safety.

The second situation where the use of port services must not be denied is where the vessel is to be scrapped (Article 11[2][b]). This would address situations where the vessel is not making a port call simply to offload or resupply or for related purposes before it continues its journey. For example, the vessel may be unable to remedy its safety-related problems and has reached the end of its useful life. Scrapping the vessel in port would be an alternative to turning it back to sea with the probability that it would break apart and sink, possibly involving loss of life.

Where a Party has denied the use of port services to a vessel, it must promptly notify its decision to the flag State, and, as appropriate, relevant coastal States, RFMOs and other international organizations (Article 11[3]). The Agreement encourages the widest possible dissemination of this information in order that actions among port States against IUU vessels can be harmonized in real time.

A Party may withdraw its denial of the use of its ports to a vessel only if there is sufficient proof that the grounds on which the use was denied were inadequate or erroneous, or that such grounds no longer apply (Article 11[4]). Parties may wish to consider identifying an appeal or review process that would be able to determine, clearly and within a reasonable time, whether these conditions have been met. Article 19 of the Agreement is also relevant because it requires a port State to provide information on recourse established under its laws concerning port State measures taken pursuant to this Article, as well as Articles 9, 13 or 18.

Where a Party has withdrawn its denial, it must promptly notify those that were originally notified (Article 11[5]). Failure to alert the others to the withdrawal of denial may result in undue negative consequences for the vessel. A Party should, as appropriate, use the same contact and method of communication for notification of both the denial and withdrawal of denial.

## PART 4 INSPECTIONS AND FOLLOW-UP ACTIONS

### Article 12 Levels and priorities for inspection

*Purpose:* Ensure adequate levels and priorities for inspection at national, regional and other levels sufficient to achieve the objective of the Agreement.

*National law:* Identify a process to determine the annual level of inspections, and require priorities for inspection in regulations or protocols, including those in the Agreement.

*Levels and priorities for inspection:*

*Inspect an annual level of vessels sufficient to achieve the objective of the Agreement, and seek to agree on minimum inspection levels through RFMOs, FAO or otherwise.*

*Give priority to inspecting vessels: that have been denied entry into a port in accordance with the Agreement; upon request from other Parties, States or RFMOs, with supporting evidence of IUU fishing or related activities; for which there are clear grounds for suspecting IUU fishing or related activities.*

The human capacity to inspect vessels varies among port States, as does the number of vessels that call at port on an annual basis. It has long been recognized that, regardless of these variables, it is necessary for each State to plan to carry out an appropriate number of port State inspections to achieve the objective of undertaking the inspections.

Inspection levels have long been set at international or regional levels both for merchant ships and fishing vessels. The Paris MOU required that the level of ships to be inspected by a State is 25 percent of foreign merchant ships that have entered its ports during the three last calendar years for which statistics are available,<sup>88</sup> but this has been recently amended in a new MOU that includes the principles of the New Inspection Scheme, effective from 1 January 2011.<sup>89</sup> The Tokyo Regional MOU on Port State Control charges a committee with endeavouring to attain a regional annual inspection rate of 80 percent of the total number of merchant vessels operating in the region.<sup>90</sup> Some other regional MOUs aim for annual levels of around 10–15 percent of the estimated number of merchant ships, that call into port, to be implemented by national governments.<sup>91</sup>

For fishing vessels, some RFMOs have agreed on different levels for inspection of landings and transshipments in port by the contracting Parties, for example a level of 5 percent has been adopted by the IOTC<sup>92</sup> and 15 percent by the NEAFC and the Northwest Atlantic Fisheries Organization (NAFO).

The Agreement took a more flexible approach in recognizing the difference in the capacity of States to inspect the vessels. It obligates each Party to inspect the number of vessels in its ports required to reach an annual level of inspections sufficient to achieve the objective of the Agreement (Article 12[1]). Parties must therefore assess their capacity to inspect vessels, and adopt annual levels accordingly.

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<sup>88</sup> Section 1 (1.3).

<sup>89</sup> There is a shared commitment for full coverage of inspecting all ships visiting ports and anchorages in the MOU region as a whole. The Target Factor will be replaced by the Ship Risk Profile, which classifies ships into Low Risk Ships (LRS) and High Risk Ships (HRS). If a ship is neither Low Risk or High Risk it is classified as Standard Risk Ship (SRS).

<sup>90</sup> Section 1.4 of the Memorandum of Understanding on Port State Control in the Asia-Pacific Region (available at: [www.tokyo-mou.org/](http://www.tokyo-mou.org/)).

<sup>91</sup> For example, a level of 10 percent is required by the Indian Ocean and the Riyadh MOUs on Port State Control, and 15 percent by the Black Sea MOU on Port State Control.

<sup>92</sup> The IOTC also applies this requirement to non-contracting cooperating Parties.

In addition, it is important for States to harmonize inspection levels at regional and international levels to discourage the emergence of “ports of convenience” where IUU vessels may use ports with minimal risk of inspection. Parties are therefore required to agree on minimum inspection levels through RFMOs, FAO or otherwise (Article 12[2]). This would also apply to an agreement among States, for example, under an MOU.

The Agreement requires Parties to give priority to inspecting vessels that meet certain criteria that focus on IUU fishing activities (Article 12[3]). The criteria guide States to inspect vessels where there is a higher probability of IUU fishing, thereby enhancing the value and effectiveness of inspections. The criteria are:

- vessels that have previously been denied entry or use of a port;
- requests from other Parties, States or RFMOs that particular vessels be inspected, particularly where they are supported by evidence of IUU fishing or related activities; and
- other vessels for which there are clear grounds for suspecting IUU fishing or related activities.

Fishers who have previously engaged in IUU fishing or related activities will usually continue their activities as long as they can avoid detection. By prioritizing inspection of vessels that meet the above criteria and taking appropriate action where IUU fishing or related activities are established, a port State may succeed in deterring future such activities by the vessel and others.

In implementing these priorities, Parties should ensure the availability of information on vessels that have previously been denied entry or the use of a port and its accessibility for national authorities. They should also have the capacity to assess promptly evidence of IUU fishing or related activities.

To facilitate implementation of these priorities, Parties should develop a formal process for the national authorities to ensure information availability, administrative coordination and the means for effective assessment of evidence that IUU fishing or related activities have been carried out.

### **Article 13      Conduct of inspections**

*Purpose:*                *Ensure minimum standards for the conduct of inspections, including the functions of inspectors and obligations of the Parties.*

*National law:*      *Ensure the inspection procedures and functions of inspectors are implemented in relevant regulations or procedures as appropriate.*

*Conduct of inspections:*

*Ensure inspectors perform functions of verification, review, examination, determination and evaluation and the procedures in Annex B of the Agreement to the extent possible, and that the obligations of the port State as Party to the Agreement are discharged.*

A principal objective of inspections is to ensure that all relevant information is secured, and for this reason it is of vital importance for inspections to be of a high standard and as thorough as possible. Minimum standards, functions and procedures for inspections are needed in order to ensure that there is no haven where IUU vessels can count on relaxed standards of inspection.

In this regard, the Agreement provides minimum standards for both the functions of the inspectors and the obligations of the Parties in carrying out the inspections in its ports (Article 13[1] and [2], respectively).

The functions of inspectors are set out in Annex B of the Agreement, which contains a set of ten procedures that should be followed as minimum standards. The inspector’s functions include

verification, review, examination, determination and evaluation, and include the following procedures that generally should be carried out to the extent possible.

- a) *Verify vessel identification documentation on board and information relating to the owner.* This is needed because vessels may change identity or fly the flags of more than one State to avoid detection. Also, if an authorization is transferred without the approval of the flag State, the authorization becomes invalid.
- b) *Verify that the vessel's flags and markings are consistent with the documentation.* Some IUU vessels attempt to avoid detection by registering their vessel in more than one jurisdiction or changing their markings and flag at sea.
- c) *Verify that the authorizations for fishing are true, complete and correct and consistent with the information submitted by a vessel prior to entry into port.* Port States may wish to verify this information with flag States.
- d) *Review all other relevant documentation and records held on board, including those in electronic format and VMS data.* This may provide information on IUU fishing or related activities and reveal any inconsistencies between documents on board and reports made to the port State or others.
- e) *Examine any relevant fishing gear on board and verify that it conforms to the conditions of the authorizations; check the fishing gear for specified features and markings.* This will indicate whether the vessel is targeting unauthorized fish, is using prohibited gear or does not carry required devices, such as turtle excluder devices.
- f) *Determine if the fish on board was harvested in accordance with the applicable authorization.* For example, fish may have been harvested in an area where they are not authorized to fish.
- g) *Examine the fish on board to determine its quantity and composition.* This includes opening containers, ensuring integrity of fish holds and inspection of product type. It is to ensure that no fish are hidden or falsely relabelled and that the quantity and composition are accurately reported.
- h) *Evaluate whether there is clear evidence for believing that a vessel has engaged in IUU or related activities.* Parties should ensure that inspectors receive sufficient training to evaluate such evidence.
- i) *Provide the master of the vessel with the inspection report, including possible measures that could be taken, for signature as well as the opportunity to add comments or objections and contact the flag State, and provide him/her with a copy.* This promotes transparency and accountability and provides a solid evidentiary and legal basis for further action by the port State, the flag State and other relevant bodies or organizations.
- j) *Arrange where necessary and possible for translation of relevant documentation.* In many cases, States require in their national laws that reports and documents be submitted in a specified language, e.g. English. In cases where the language of relevant documentation is not understood, either by the port State or the vessel, translation should be arranged.

Parties have certain obligations to discharge when inspections are being carried out under Article 13(2), as described below.

- a) *Ensure that inspectors are qualified and authorized to conduct inspections.* The standard of the inspections depends upon the training and qualifications of the inspectors. Parties should have clear standards in their regulations or other rules that specify the qualifications required for the authorization of inspectors. The qualifications should include proper training, as set out in Article 17. Parties should also require in their laws or regulations that only persons who have been authorized may conduct inspections. It would be useful for inspectors to be trained consistently on a regional level.
- b) *Ensure that, prior to an inspection, inspectors present appropriate identification to the master of the vessel.* This is a necessary action for transparency and legitimacy and should be required in national law or regulations.
- c) *Ensure that inspectors examine all relevant areas of the vessel, fish on board, nets and other gear, equipment and documents which are relevant to verifying compliance with*

*conservation and management measures.* The port State could fulfil this obligation by adopting a standard procedure for inspections that covers all these areas. The procedures should include requirements to check for illegal spaces, such as hidden fish holds, to confirm that the condition of gear reflects the legal usage (e.g. where illegal gear is used the legal gear may be in pristine condition) and assess whether logbooks are accurate or false “dummy” logbooks produced for inspection purposes. Inspectors must also be familiar with the relevant conservation and management measures of the port State, another coastal State or RFMO in order to verify compliance.

- d) *Require the master of a vessel to give inspectors all necessary assistance and information and to present all documentation as may be required, or certified copies.* The port State should implement this requirement in its national law. Some States have more extensive provisions detailing a range of circumstances under which the master must provide assistance, such as allowing full access to all areas of the vessel, complying with the requests and directions of the inspector and not obstructing, intimidating or assaulting the inspector in any way.
- e) *Where there are arrangements with the flag State, the port State should invite it to participate in the inspection.* The flag States maintains primary responsibility for controlling the activities of their vessels but, largely because of the cost and logistical challenges of deploying inspectors to a foreign port, in practice they do not often participate in inspections by port States. Therefore, this provision refers to cases where there are already arrangements between the port State and flag State, such as an MOU or other understanding that would trigger an invitation by the port State for participation in an inspection.
- f) *Make all possible efforts to avoid unduly delaying the vessel to minimize interference and inconvenience and avoid action that would adversely affect the quality of the fish on board.* The objective of this requirement is to ensure that harassment, discrimination and inefficiency causing economic or other loss to the vessel are avoided, and fairness and efficiency promoted. The Party should adopt procedures to ensure that the inspections take place within a reasonable time period under the circumstances. For example, the CCAMLR requires inspection to be carried out within 48 hours of port entry and in an expeditious fashion.<sup>93</sup>
- g) *Make all possible efforts to facilitate communication with the master or senior crew members of the vessel, including where possible and where needed that the inspector is accompanied by an interpreter.* The port State should adopt procedures for such communication and facilitate translation where possible through the preparation of translations of relevant language (e.g. phrases for business and names of fish species) on waterproof cards. If many vessels of a certain nationality are inspected in port, it would be useful to identify an interpreter who could be called upon when needed.
- h) *Ensure that inspections are conducted in a fair, transparent and non-discriminatory manner and would not constitute harassment of any vessel.* The port State must ensure through standards of conduct or other rules that its authorized inspectors are required to conduct inspections in such a manner, and do not harass any vessel.
- i) *Not interfere with the ability of a master to communicate with the authorities of the flag State.* The port State should, in its laws or regulations, legally protect the right of a master to communicate with the authorities of the flag State. This recognizes that the flag State has primary responsibility for the control of its fishing vessels and ensures fairness in the inspection process.

#### **Article 14      Results of inspections**

*Purpose:*            *Require that inspection reports contain sufficient information of a common minimum standard that will effectively allow port States and others to assess whether there is evidence of IUU fishing and related activities.*

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<sup>93</sup> See CCAMLR Conservation Measure 10-03 (2009), Port Inspections of Vessels Carrying Toothfish, paragraph 2.

*National law: Require in national regulations that inspection reports contain the information in Annex C as a minimum standard.*

*Results of inspections:*

*Require information to be reported on the inspection, the vessel itself, VMS on board, the vessel's status in relevant RFMOs, authorizations for fishing or transshipment, catch, gear and records as well as findings by the inspector and apparent infringements.*

The inspection report is instrumental for the port State in assessing whether there is evidence that a vessel has been engaged in IUU fishing or related activities. For this reason, it must contain a wide range of information concerning the inspection, the vessel itself, VMS on board, the vessel's status in relevant RFMOs, authorizations for fishing or transshipment, catch, gear and records as well as findings by the inspector and apparent infringements.

The Agreement requires Parties to include a minimum standard of information in the report of the results of the inspection, including the range of information described above (Article 14, Annex C). In addition, the master may include his/her comments and the inspector must report on action taken. The master and inspector must both sign the report for purposes of evidence and transparency.

Where a port State suspects IUU fishing or related activities on the basis of this information, the report may then be transmitted to others for their information and/or for use as a basis for further action. The minimum standard of information required in the report will therefore facilitate the early detection of IUU fishing and related activities and promote a rapid and broad-based understanding among States, RFMOs and others.

#### **Article 15 Transmittal of inspection results**

*Purpose: Ensure that flag States are aware of the results of inspections of their vessels so they may exercise effective control and, as appropriate, ensure that other relevant States, RFMOs and international organizations are informed.*

*National law: National procedures should provide for the transmittal of each inspection report to the flag State and identify other recipients as appropriate.*

*Transmittal of inspection results:*

*Require the transmittal of inspection results to flag States, and identify, or establish a process for identifying other relevant Parties and States, RFMOs and international organizations which should also receive the inspection results.*

The obligation to transmit each inspection report to the flag State, required under to Article 15, permits better and more effective control over its vessels. In this way, the flag State is able to follow the progress of its vessels and to sort the compliant vessels from those that are less law-abiding and has the potential to exercise more effective control over the latter.

In addition, port States are encouraged to transmit the reports, as appropriate, to relevant Parties and States (including coastal States where there is evidence that the vessel had conducted IUU fishing or related activities their waters, and national States of the vessel's master), relevant RFMOs and FAO and other relevant international organizations.

States have a general duty to exercise control over their nationals – vessels and people – that undertake fishing or related activities beyond areas under national jurisdiction. They are free to regulate fishing activities aboard a foreign vessel or in waters under the jurisdiction of another State.

For example, New Zealand has enacted legislation restricting the activities of its nationals aboard foreign vessels registered in States meeting certain criteria.<sup>94</sup>

The IPOA–IUU calls on States to take measures or cooperate to ensure that nationals subject to their jurisdiction do not support or engage in IUU fishing and to cooperate to identify nationals who operate or are the beneficial owners of vessels involved with IUU fishing.<sup>95</sup>

One of the key steps in combating IUU fishing is the real-time dissemination of information regarding IUU fishing activities, and inspection reports are a key component in this information chain. Parties should ensure that inspection reports are transmitted in a timely manner, preferably by electronic means. Some RFMOs require members to transmit inspection reports within a certain period. For example, the IOTC requires contracting Parties to transmit the inspection report within three full working days of the completion of the inspection.<sup>96</sup>

The inspection results also serve as an excellent resource for future needs and should be integrated into databases on IUU fishing activities, including those kept by RFMOs. This already occurs in a number of RFMOs, which post the inspection reports on a secure section of their Web site where members may access them.<sup>97</sup>

In this regard, it would be essential for States and RFMOs to determine the rules and procedures for receiving, handling and publicizing the information, taking into account confidentiality requirements.

#### **Article 16      Electronic exchange of information**

*Purpose:*            *Promote the direct electronic exchange of information in common format and encourage the establishment of a global information-sharing mechanism.*

*National law:*   *National procedures should be established that designate a contact for the electronic exchange of information and implement the international coding system provided in the Agreement.*

*Electronic exchange of information:*

*Parties should establish a communication mechanism that allows for direct electronic exchange of information, and procedures that ensure the handling of information consistent with requirements in Annex D.*

*Parties should cooperate to establish an information-sharing mechanism, preferably coordinated by FAO, which must request and integrate information concerning RFMO decisions and measures relevant to the Agreement.*

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<sup>94</sup> For example, see New Zealand Fisheries Act 1996, Public Act 1996 No 88, section 113E, which prohibits New Zealand nationals from using vessels on the high seas not registered in New Zealand for certain purposes unless it was authorized by a State that meets certain criteria, including being Party to the 1995 UN Fish Stocks Agreement or the 1993 FAO Compliance Agreement, or is a member or cooperating non-member of a relevant RFMO. Moreover, Japan requires its nationals to obtain the permission of the Government of Japan before working aboard non-Japanese fishing vessels operating in the Atlantic bluefin tuna and southern bluefin tuna fishing areas. The goal of this measure is to prevent Japanese nationals from becoming involved in IUU fishing aboard foreign vessels.

<sup>95</sup> IPOA–IUU, paragraph 18.

<sup>96</sup> IOTC Resolution 10/11 on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, paragraph 13.1.

<sup>97</sup> For example, see NAFO Conservation and Enforcement Measures, NAFO/FC Doc. 10/1, updated December 2009, Chapter V Article 54.4, which requires information on inspections and any subsequent actions to be sent without delay to the Executive Secretary, who must post the information on the secured part of the NAFO Web site and inform the flag State, relevant RFMOs and other contracting Parties. In addition, Chapter V, Article 49.2, refers to the duties of the Executive Secretary to post such information.

*Each Party must designate a contact for the exchange of information under the Agreement.*

The exchange of information to combat IUU fishing takes many forms, such as direct contact with counterparts, communications through RFMOs and the electronic exchange of information. In fact, some RFMOs have already adopted protocols for the electronic exchange of information.<sup>98</sup> The Agreement in many places requires Parties to provide a range of information to other Parties, States, RFMOs and others as indicated in Appendix 8, but does not specifically require communication in electronic format in those contexts.<sup>99</sup>

Article 16 fills this gap in two respects for the stated purpose of facilitating the implementation of the Agreement. First, taking into account the uneven capacity of States, it requires Parties to, where possible, establish a “communication mechanism” for “direct electronic exchange of information” (Article 16[1]). Although no details of such a mechanism are proposed, it would need to be easily identifiable and operate under established procedures or protocols for direct communication with others, such as other Parties, flag States, coastal States and RFMOs. However, it must have regard for appropriate confidentiality requirements.

Direct electronic exchange of information would be especially useful where real-time information and communication is needed, for example, to prevent vessels that had been denied entry into, or use of a port under the Agreement from immediately accessing other ports, or to inform the port State that there were reasonable grounds to believe IUU fishing activities had taken place.

Developing countries may not have the human or technical capacity to establish and maintain such a communication mechanism, and, if so, assistance may be sought, for example, through a funding mechanism established under Article 21.

Second, and to the extent possible, Parties are encouraged to cooperate to establish an “information-sharing mechanism”, preferably coordinated by FAO in conjunction with other relevant multilateral and intergovernmental initiatives. A Stated objective is to facilitate the exchange of information with existing databases relevant to the Agreement (Article 16[2]). The potential value of such a global mechanism is clear; “one-stop shopping” would allow States to trace the activities of a vessel through different regions and among different RFMOs.

Guidelines or a framework describing the type of information that should be included in such a global mechanism were not provided. The Agreement left it open to Parties to design such a mechanism, which is clearly intended to consolidate relevant information from other governmental initiatives. Parties to the Agreement and FAO Members will need to consider the needs and process for its establishment and ensure continuing monitoring and support.

Some types of information that should be shared through such a mechanism will need to be identified, and could include national laws on port State measures (for which FAO has already established a database<sup>100</sup>), links to relevant information and databases of RFMOs (including information concerning their measures or decisions relating to the Agreement), designated ports, inspection reports and other reports of relevant actions taken by port States, flag States and others. It could also include, for example, information about national contacts, training courses for inspectors and other information relevant to the Agreement. In fact, Article 16(5) obligates FAO to integrate information into the

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<sup>98</sup> For example, the NEAFC and NAFO have developed a format and protocols (the North Atlantic Format) for electronic exchange of fisheries monitoring, inspection and surveillance information. This format, also now used by the CCAMLR and the South East Atlantic Fisheries Organization (SEAFO), could also be used for information exchange on control in ports.

<sup>99</sup> In fact, the only other references to information or records in electronic format are in Annexes B and E, where the format is incidental to other activities such as inspection procedures and training guidelines.

<sup>100</sup> Available at: <http://firms.fao.org/fishery/psm/search/en>

mechanism concerning the measures or decisions RFMOs have adopted and implemented that relate to the Agreement.

Every electronic information system must have a contact point for its effective operation, so the Agreement requires Parties to designate an authority as contact point for the exchange of information, and to notify this to FAO (Article 16[3]).

A protocol for handling the direct electronic exchange of information in electronic format is provided in the Agreement (Annex D), and Parties must act consistently with its requirements (Article 16[4]). This will facilitate compliance and ensure that information is communicated rapidly and understood universally. Annex D requires Parties to:

- seek to establish computerized communications;
- establish, to the extent possible, Web sites to publish designated ports and actions taken under the Agreement;
- identify, to the extent possible, each inspection report by a unique reference number starting with 3-alpha code of the port State and identification of the issuing agency;
- use, to the extent possible, a specified international coding system for information in Annexes A and C for countries, species, vessel types and gear types, and to translate any other coding system into the international system.

It is recognized that human and technical capacity will be somewhat uneven among Parties, so the Agreement obligates Parties to fulfil most of the above duties “to the extent possible”.

#### **Article 17      Training of inspectors**

*Purpose:*            *Provide a framework for training programmes that will foster an effective minimum standard for the qualifications of inspectors and a common basis for enforcement of the Agreement through inspections.*

*National law:*   *Implementation in national law or procedures is not necessary. The elements of the curriculum in Annex E should simply be integrated into training programmes for fisheries inspectors.*

*Training of inspectors:*

*The areas of a training programme for inspectors should include the 12 elements in Annex E referring to ethics, health, safety and security, applicable laws and measures at all levels, evidence, general inspection procedures, analysis of information, vessel boarding and inspection, verification and validation of certain information, identification of fish species and their biological parameters, identification of vessels and gear, equipment and operation of VMS and actions following an inspection.*

The role of inspectors is fundamental for Parties in establishing reasonable grounds for believing that a vessel has engaged in IUU fishing or related activities. This is underscored by Part 4 of the Agreement, with its detailed provisions on levels and priorities for inspection, the conduct of inspections, the results of inspections and the transmittal of inspection results, as well as its detailed Annexes on inspection procedures and report of the results of the inspection.

The calibre of the inspector therefore directly affects the effectiveness of the measures to detect and deter IUU fishing or related activities. For these reasons, Parties are required to ensure that inspections are carried out by properly qualified inspectors and that their inspectors are properly trained (Article 13[2][a] and Article 17, respectively).

To achieve this, Parties must take into account the guidelines for the training of inspectors in Annex E and, recognizing the benefits of cooperative training initiatives, they must also seek to cooperate in such training. In this way, Parties will have an adequate number of inspectors with the knowledge,

understanding and skills of a breadth and standard that will serve to implement the Agreement. Where States cooperate in training their inspectors, it can easily result in stronger collaboration and cooperation among the inspectors. They will “speak the same language” because of common qualifications and expertise. In addition, it is likely that informal networks can be established among the inspectors that could facilitate future communications as they return to their countries and carry out their duties.

On the regional level, it is important for Parties to harmonize the training of inspectors to ensure consistency. Currently, many RFMOs have guidelines in place for the training of inspectors. Three RFMOs have adopted or proposed the same, or essentially the same, guidelines as shown in Annex E since the signing of the Agreement: Inter-American Tropical Tuna Commission (IATTC),<sup>101</sup> Indian Ocean Tuna Commission (IOTC)<sup>102</sup> and South East Atlantic Fisheries Organization (SEAFO).<sup>103</sup>

Inspectors may be qualified to inspect both fishing vessels and merchant vessels, but even where they are trained to inspect the latter, they are not qualified to inspect vessels used for fishing and related activities. The 12 elements of a training programme for port State inspectors set out in Annex E are summarized below.

1. *Ethics*. This is at the top of the list and considered extremely important. The aim is to achieve effective inspections by instilling the values of honesty, reliability and transparency and, thereby, preventing collusion or collaboration by the inspector with any person associated with the inspected vessel.
2. *Health, safety and security issues*. These issues are important for assessing the conditions and cargo on board as well as protecting the inspector. For example, the inspector should know about any health risks, how to carry out inspections safely, including accessing a ship’s hold, and how to identify security risks to the port State.
3. *Applicable national laws and regulations, areas of competence and conservation and management measures of relevant RFMOs and applicable international law*. Inspectors should know the laws and measures at all levels in order to identify IUU fishing activities.
4. *Collection, evaluation and preservation of evidence*. The inspector must know which evidence is needed to prove IUU fishing or related activities and how to collect it so that the “chain of custody” is maintained in conformity with legal evidentiary requirements. Evaluation of evidence for its relevancy and preservation of evidence, including perishable evidence, must also be known.
5. *General inspection procedures such as report writing and interview techniques*. Port State inspection procedures are set out in Annex B and should be included in a training programme. Even more fundamentally, basic procedures should be learned that will uncover evidence, be admissible as evidentiary proof and clearly record the inspection (in standardized forms where required) for review, possible dissemination and future reference.
6. *Analysis of information, such as logbooks, electronic documentation and vessel history required for the validation of information given by the master of the vessel*. One of the functions of inspectors described in Annex B is to review all documentation and records held on board, and this element will train the inspector how to analyse them for purposes of detecting discrepancies between the information given by the master and what may have otherwise occurred.
7. *Vessel boarding and inspection, including hold inspection and calculation of vessel hold volumes*. The inspector must know in detail about the different types of vessels to be inspected, how to board them and the procedures for inspection. Hold inspection and

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<sup>101</sup> Included in the proposed Resolution on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, submitted for consideration at the Eighty-first Meeting in 2010.

<sup>102</sup> Resolution 10/11 on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.

<sup>103</sup> Included in the proposed Recommendation on a System of Observation, Inspection, Compliance and Enforcement for consideration at the Sixth Session in 2010.

calculation of vessel hold volumes are critical, especially considering that some fishing vessels are constructed with concealed fish holds.

8. *Verification and validation of information related to landings, transshipments, processing and fish remaining on board, including utilizing conversion factors for the various species and products.* Annex A requires the vessel to report on transshipments and catch on board before it enters into port, and the port State may require or have received other relevant reports. The reports may not be true, complete or accurate for reasons of incompetence or as a deliberate tactic to avoid detection. The inspector must verify and validate the information in the reports by certain means in an effort to uncover inconsistencies that show evidence of IUU fishing or related activities.
9. *Identification of fish species, and the measurement of length and other biological parameters.* This will indicate whether or not the fish on board was taken legally in conformity with the vessel's authorization. If the vessel was not authorized, the information will be useful for fisheries managers in determining future measures for the relevant species.
10. *Identification of vessels and gear, and techniques for the inspection and measurement of gear.* These skills are essential for inspection of any fishing vessel.
11. *Equipment and operation of VMS and other electronic tracking systems.* Requirements for VMS are normally quite stringent and the technical aspects will need to be accurately checked.
12. *Actions to be taken following an inspection.* The inspector should be aware of the range of potential consequences of the inspection in order that proper evidence and recommendations may be made, particularly if there are grounds for believing that IUU fishing or related activities have occurred.

The design and establishment of training programmes for inspectors involves additional considerations, including the capacity for training, the ability to retain inspectors once training has been completed, regional standards and any applicable requirements of relevant RFMOs. When assessing the needs for training, Parties may either elect to train a broader number of inspectors or to train fewer inspectors more intensively.

#### **Article 18 Port State actions following inspection**

*Purpose:* Following an inspection that shows clear grounds for believing that a vessel has engaged in IUU fishing or related activities, identify actions that the port State must, or may, take.

*National law:* The requirement to deny the use of port where there are clear grounds for believing the vessel has engaged in IUU fishing or related activities should be implemented in national law, and notification requirements should form part of a communications procedure.

*Port State actions following inspection:*

*Following inspection, where there are clear grounds for believing the vessel has engaged in IUU fishing or related activities, the inspecting Party must notify the flag State and, as appropriate, others and deny the vessel use of the port except for services essential for the safety or health of the crew or the safety of the vessel.*

*A Party may take other measures in conformity with international law, including those requested or consented to by a flag State.*

Article 18 addresses the actions that Parties must take after an inspection where there are clear grounds for believing that a vessel has engaged in IUU fishing or related activities. There is no standard definition of "clear grounds", but it is expected that a determination would be based on a standard of reasonableness under the circumstances.

Where such clear grounds have been established following an inspection, a Party must take two actions. First, it is required to notify its findings to the flag State and as appropriate relevant coastal States, RFMOs, other international organizations and the State of which the master is a national (Article 18[1][a]).

Second, it must deny the vessel the use of its port, in a manner consistent with the Agreement, if it has not already done so (Article 18[1][b]).

However, Parties must not deny the use of its port services where they are essential for the safety or health of the crew or the safety of the vessel (Article 18[2]). In such cases, the port services provided should be directly related to the reason for making the exception, such as supplying food, water or medical services. Parties may require the vessel to prove the need for such services.

A Party is at liberty to take additional measures, as long as they are in conformity with international law. It may include any measures that the flag State has expressly requested or to which it has consented (Article 18[3]). Such actions may include initiating legal proceedings against the vessel.

### **Article 19 Information on recourse in the port State**

*Purpose:* To ensure that, where a vessel wishes to seek recourse in the port State in relation to denial of entry into or use of port services or the conduct of inspections, the port State provides information on its relevant laws and regulations.

*National law:* Implementation in national law is not necessary. Procedures should be established to ensure that relevant information is maintained and made available.

*Information on recourse in the port State:*

*Information available to the public must be maintained and provided on request to a vessel owner, operator, master or representative with regard to any recourse under national laws and regulations concerning port State measures it has taken under Articles 9, 11, 13 or 18 of the Agreement, including information pertaining to the public services or judicial institutions and any right to seek compensation for any loss or damage suffered as a consequence of any alleged unlawful action by the port State.*

*The port State must inform: the flag State, owner, operator, master or representative of the outcome of the recourse; other Parties, States or international organizations already informed of its prior decision of any change.*

As noted above, the manner in which Parties must apply the Agreement and conduct inspections are clearly stated in the Agreement; this must be done in a fair, transparent and non-discriminatory manner, and one that does not constitute harassment (Articles 3[4] and 13[2][h], respectively).

A related, but separate issue is the implementation by the port State of Articles that relate to the denial of entry into or use of a port or port services (Articles 9, 11 and 18) and the conduct of inspections (Article 13). In such situations, the port State must apply its national laws.

The vessel that is subject to the implementation of these provisions may wish to contest any decision or action taken by the port State, for example, if it believes there are insufficient grounds for believing that IUU fishing or related activities had taken place or if it had suffered damage as a result of unlawful acts by the port State.

In such cases, Article 19 sets out the obligations of the port State to inform the vessel owner, operator or representative of any recourse available under national laws and regulations concerning port State measures taken under Articles 9, 11, 13 or 18. This does not constitute an automatic right of appeal or redress, but instead ensures that, upon request, such persons are informed of the available avenues for seeking recourse. It was acknowledged during negotiations that an automatic right of appeal would be

impractical, particularly for developing countries that do not have the capacity to handle what may be frivolous actions.

The port State Party must maintain and provide the relevant information available to the public in this regard, as well as that pertaining to the public services or judicial institutions available for recourse. If there is any loss or damage suffered as a consequence of any alleged unlawful action by the port State Party, it must provide information on whether there is any right to seek compensation under its national laws and regulations (Article 9[1]).

Where recourse is undertaken, the Party must inform the flag State, owner, operator, master or representative of any outcome (Article 19[2]). Where other Parties, States, RFMOs or international organizations have been informed of the prior decision made pursuant to Articles 9, 11, 13 or 18 and as a result of the outcome the Party has changed its decision, it must notify them of any change.

In this way, after recourse has been taken and the decision of the port State consequently changed, for example, to permit a vessel use of a port, that vessel will not experience difficulties in entering the port of another Party.

## **PART 5 ROLE OF FLAG STATES**

### **Article 20 Role of flag States**

*Purpose: Require Parties, in their capacity as flag States, to undertake certain supportive actions in relation to port State measures.*

*National law: National law should implement the requirement for its vessels to cooperate in inspections of its vessels by a port State, and as appropriate in inspection and related actions in its national ports. Procedures should include communication mechanisms for the purposes of requesting the port State to carry out inspections and of informing others of the actions they have taken as a consequence of a port State inspection report indicating IUU fishing or related activities.*

*Role of flag States:*

*Require their vessels to cooperate with port inspections.*

*Request the port State to inspect their vessels where there are clear grounds to believe IUU fishing or related activities have taken place.*

*Encourage their vessels to use ports that act in accordance with or in a manner consistent with the Agreement.*

*Immediately and fully investigate port inspection reports of their vessels showing clear grounds to believe IUU fishing or related activities, and upon sufficient evidence take enforcement action without delay.*

*Report to other Parties and others on actions it has taken in respect of its vessels determined to have engaged in IUU fishing or related activities.*

*Ensure that measures applied to its vessels are at least as effective as those applied to foreign vessels.*

The international community has increasingly recognized that flag States, although having primary responsibility for the control of their vessels, have been discharging their duties unevenly, resulting in a greater opportunity for vessels to engage in IUU fishing where there is minimal control.

As a result, recent international instruments have progressively broadened the role of flag States by providing detailed duties and responsibilities in relation to the effective control of their vessels fishing beyond areas of national jurisdiction, including the 1995 UN Fish Stocks Agreement<sup>104</sup> and the IPOA-IUU.<sup>105</sup>

It is recognized in the Agreement that, although the focus is on port State measures, vessels may not cooperate with the port State, and Parties that are also flag States have an important supportive role to play. In this regard, they are bound to take a number of actions in fulfilling their role and, in so doing, they will be exercising more effective control over their vessels.

The first duty of a flag State is to require its vessels to cooperate with the port State in inspections carried out pursuant to the Agreement (Article 20[1]). This can be implemented as a condition of any fishing authorization granted by the flag State to the vessel.

Flag States may have clear grounds to suspect a vessel of IUU fishing or related activity, for example, by information from VMS reports, a coastal State or an RFMO. Where such a vessel is seeking entry into or is in the port of another State, the flag State must, as appropriate, request that State to inspect the vessel or take other measures consistent with the Agreement (Article 20[2]).

This is useful in promoting cooperation in enforcement and in immediately preventing the vessel from undertaking further IUU fishing or related activities. It also assists where developing country flag States may not have the capacity to take proper enforcement actions.

It is well known that, to avoid detection, many IUU fishing vessels offload their catch at “ports of convenience” where a higher priority is put on the economic benefits of a port call than combating IUU fishing activities. To address this situation, flag States must encourage their vessels to use ports of States that act in accordance with, or in a manner consistent with, the Agreement.

The prospect of being considered a “positive” port State that acts consistently with the Agreement, even if it is not a Party, could serve as an incentive for States that wish to attract business for their ports. However, many complexities would be involved in developing a list of criteria for a “positive” port State, so the Agreement takes a different approach. Instead, it encourages identification of those States that may not be acting in accordance with, or in a manner consistent with, the Agreement. To this end, the Agreement encourages the development of fair, transparent and non-discriminatory procedures for identifying such States, including through RFMOs and FAO (Article 20[3]).

Otherwise, there are various potential mechanisms for encouraging vessels to use positive ports, such as financial incentives and market-related measures.

The flag State must immediately and fully investigate inspection reports received from a port State that indicate clear grounds for believing that IUU fishing or related activity had been carried out by one of its vessels. Where there is sufficient evidence, the flag State is required to take enforcement action in accordance with its laws and regulations (Article 20[4]). This does not prevent the flag State from seeking the assistance of the port State or other States in taking enforcement action.

Where it has been determined, as a result of port State measures, that IUU fishing or related activities have been carried out and the flag State takes any action in respect of its vessel, it must report such actions to other Parties, relevant port States and, as appropriate, other relevant States, RFMOs and FAO (Article 20[5]).

The Agreement applies to foreign-flagged vessels and not to national vessels of port States. This respects the sovereignty of port States, but leaves the door open for port States to take stronger measures in respect of the foreign vessels. To promote an equitable application of port State measures,

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<sup>104</sup> Article 18.

<sup>105</sup> Paragraphs 34–50.

Parties (including port States in their capacity as flag States) must ensure that measures applied to their own vessels are at least as effective as measures applied to foreign-flagged vessels in combating IUU fishing and related activities (Article 20[6]). This could include, for example, subjecting national vessels to port inspection and subsequent legal action including seizure of the vessel and all fish and fish products.

## **PART 6 REQUIREMENTS OF DEVELOPING STATES**

### **Article 21 Requirements of developing States**

*Purpose: Facilitate implementation of the Agreement by developing States through promoting cooperation and establishing mechanisms to provide assistance to them for stated purposes.*

*National law: Implementation in national law or procedures is not necessary.*

*Requirements of developing States:*

*Parties must give full recognition to the special requirements of developing States Parties and provide assistance, inter alia, to:*

- *enhance their ability to develop a legal basis and capacity for implementing effective port State measures;*
- *facilitate their participation in international organizations that promote the effective development of port State measures; and*
- *facilitate technical assistance to strengthen the development and implementation of port State measures by developing States, in coordination with relevant international mechanisms.*

*Ensure that a disproportionate burden resulting from the implementation of the Agreement is not transferred to developing port States Parties, or where it has, cooperate to facilitate implementation.*

*Assess, directly or through FAO, the special requirements of developing States Parties concerning the implementation of the Agreement.*

*Establish funding mechanisms to be directed towards:*

- *developing national and international port State measures;*
- *developing and enhancing capacity, including for MCS and training;*
- *MCS and compliance activities; and*
- *assisting with the costs involved in any proceedings for the settlement of disputes resulting from actions taken pursuant to the Agreement.*

*Cooperation for purposes set out in this Article may include provision of technical and financial assistance.*

*Establish an ad hoc working group to report and make recommendations on the establishment of specified funding mechanisms, which must take into account:*

- *assessment of the needs of developing States Parties;*
- *availability and timely disbursement of funds;*
- *transparency of decision-making and management processes concerning fundraising and allocations; and*
- *accountability of the recipient developing States Parties in the agreed use of funds.*

*Take into account the reports and recommendations of the ad hoc Working Group and take appropriate action.*

This Article is fully described in Section 5.1 (below).

## **PART 7 DISPUTE SETTLEMENT**

### **Article 22 Peaceful settlement of disputes**

*Purpose: Provide an agreed process for settling disputes between Parties relating to the application or interpretation of the Agreement.*

*National law: Implementation in national law or procedures is not necessary.*

*Peaceful settlement of disputes:*

*Parties may seek consultations with other Parties on any dispute with regard to the interpretation and application of the Agreement.*

*Where the dispute is not resolved through consultations within a reasonable period of time, the Parties must consult as soon as possible with a view to having the dispute settled by other means, such as negotiation, mediation, etc.*

*Where the dispute is not resolved through other means, and with the consent of all Parties involved, it must be referred to the International Court of Justice, the International Tribunal for the Law of the Sea or arbitration, or, if there is no agreement, consultations must continue to settle the dispute in accordance with international law relating to the conservation of living marine resources.*

Dispute settlement provisions in international instruments serve two valuable purposes. First, they can facilitate agreement between Parties that have different views on the interpretation or application of the instrument by encouraging communications. Then, where the Parties cannot agree, they provide agreed options for settlement by third Parties. Otherwise, Parties that already have clear differences could only add to the problems by disagreeing on the possible means for settling their dispute. These objectives are met by Article 22, which is the same dispute settlement provision that appears in the 1993 FAO Compliance Agreement.

Accordingly, the Agreement provides that Parties may seek consultations with other Parties on any dispute with regard to the interpretation or application of the Agreement with a view to reaching a mutually satisfactory solution as soon as possible (Article 22[1]).

If the consultations do not resolve the dispute within a reasonable time, Parties must consult among themselves as soon as possible with a view to having the dispute settled by some other means. This may include negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or such other peaceful means that they may elect (Article 20[2]).

If the dispute still remains unresolved, and with the consent of all Parties to the dispute, it must be referred to the International Court of Justice, International Law of the Sea Tribunal or arbitration. If the Parties do not agree to any of these options, they must continue to consult and cooperate with a view to settling the dispute in accordance with international law relating to the conservation of living marine resources (Article 20[3]).

## **PART 8 NON-PARTIES**

### **Article 23 Non-Parties to this Agreement**

*Purpose: Promote implementation of the Agreement by non-Parties.*

*National law: Measures to deter the activities of non-Parties may be considered for implementation, providing they meet the criteria in Article 23.*

*Non-Parties to the Agreement:*

*Parties must encourage non-Parties to become Parties and/or adopt laws and regulations and implement measures consistent with the Agreement.*

*Parties must deter the activities of non-Parties by taking fair, non-discriminatory and transparent measures consistent with the Agreement and international law.*

Non-Parties increasingly have a role to play in support of international instruments. In many cases, non-Parties voluntarily express their intention to act consistently with the instrument but do not, or are unable to, become Party for a range of reasons, such as inability to meet financial obligations, a decision to ensure that implementing legislation is in place before they become Party, or for political considerations. In recent international fisheries instruments and RFMO agreements or measures, the role of non-Parties has been strengthened.

For example, the 1995 UN Fish Stocks Agreement refers to non-members of RFMOs that do not agree to apply the RFMO conservation and management measures, and provides that they are not discharged from the obligation to cooperate in the conservation and management of the relevant straddling fish stocks and highly migratory fish stocks. In addition, RFMO members are required to take measures to deter activities of non-members' vessels that undermine the effectiveness of subregional or regional conservation and management measures.<sup>106</sup>

For many years, RFMOs have designated a special status for cooperating non-Parties. The applicable rules are similar, but vary from one RFMO to another. In essence, this status means that the State agrees to comply with the conservation and management measures, and in turn the conservation and management measures refer to the duties of cooperating non-contracting Parties. As a matter of course, RFMO Secretariats routinely invite non-Parties that have an interest in their area of competence to become members or cooperate as non-Parties.

In a similar vein, Article 23 of the Agreement encourages non-Parties to become Parties to the Agreement and/or adopt laws and implement measures consistent with its provisions (Article 23[1]). It also requires Parties to deter the activities of non-Parties that undermine effective implementation of the Agreement by taking fair, non-discriminatory and transparent measures consistent with the Agreement and other international law (Article 23[2]).

## **PART 9 MONITORING, REVIEW AND ASSESSMENT**

### **Article 24 Monitoring, review and assessment**

*Purpose: Promote the effective implementation of the agreement through monitoring, review and assessment by Parties.*

*National law: Implementation in national laws or procedures is not necessary.*

*Monitoring, review and assessment:*

*Parties must ensure the regular and systematic monitoring and review of the implementation of the Agreement, and assessment of the progress made towards achieving its objective. This must be done within the framework of FAO and its relevant bodies.*

*Four years after the Agreement enters into force, FAO must convene a meeting of the Parties to review and assess the effectiveness of the Agreement in achieving its objective. Parties will decide on further meetings as necessary.*

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<sup>106</sup> Article 17.

Many recent international fisheries instruments contain provisions to ensure that Parties monitor and assess their implementation. In this way, strengths and weaknesses can be identified, and Parties can cooperate to address and rectify any concerns in order to strengthen the effectiveness of implementation and address any evolving circumstances.

For example, as described in Chapter 1, the Secretary-General of the UN convened a Review Conference in 2006 (resumed in 2010), pursuant to Article 36 of the 1995 UN Fish Stocks Agreement, which requires this to be done four years after the Agreement entered into force. It also mandates the Review Conference to review and assess the adequacy of the provisions of the Agreement and, if necessary, propose means of strengthening their substance and methods of implementation. The Review Conference in 2006 made a wide range of recommendations and the Resumed Review Conference in 2010, among other things, assessed their implementation based on information provided by States and RFMOs.

Article 24 of the Agreement took a similar approach. Parties are required to ensure the regular and systematic monitoring and review of the implementation of the Agreement, as well as the assessment of progress made towards achieving its objective. It must be done within the framework of FAO and its relevant bodies (Article 24[1]).

In addition, FAO is called upon to convene a meeting of the Parties four years after the entry into force of the Agreement to review and assess the effectiveness of the Agreement in meeting its objective. Parties may then decide on further meetings as necessary (Article 24[2]).

## **PART 10 FINAL PROVISIONS**

It is standard for international instruments to include a part titled Final Provisions, which does not relate to the subject matter of the instrument but instead to treaty-making requirements in international law. The Agreement is no different, and contains Articles in Part 10 on: signature; ratification, acceptance or approval; accession; participation by regional economic integration organizations; entry into force; reservations and exceptions; declarations and Statements; provisional application; amendments; annexes; withdrawal; the Depositary; and authentic texts.

As noted in Part 1, the Agreement is legally binding. This means that Parties are legally accountable at the international level to other Parties for implementing all the requirements in the Agreement after it enters into force. This is different from non-binding instruments, which may take many forms such as guidelines, IPOAs, strategies and UNGA Resolutions. States do not formally sign or otherwise approve them and do not have any legal obligation, but they may still implement non-binding instruments in national law and procedures.

States are legally bound by the Agreement only after it enters into force and they have agreed to become Parties by depositing an instrument of ratification, acceptance, approval or accession, as described below. The Agreement enters into force 30 days after the twenty-fifth instrument of ratification, acceptance, approval or accession is deposited with the Depositary (the Director-General of FAO) (Article 29).

As a first step to becoming a Party, a State or, in the case of the EU, REIO, could sign the Agreement within one year of its adoption on 22 November 2009 (Article 25). A total of 23 signatures were received during that time.<sup>107</sup> This did not legally bind the signatory or even promise that the State would become a Party; it was at most an indication that the terms of the instrument were satisfactory to the executive branch of the State. The national laws of most countries require subsequent legislative approval before ratification or other formal consent to be bound is given. However, in accordance with treaty law, the signatory should not do anything to defeat the object and purpose of

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<sup>107</sup> For the current status of the Agreement, including signatures, ratifications, acceptances, approvals and accessions, see: [www.fao.org/legal/treaties/037s-e.htm](http://www.fao.org/legal/treaties/037s-e.htm)

the Agreement after signature, until such time as it may make its intent clear not to become a Party to the Agreement.<sup>108</sup>

A State or REIO may express its consent to be bound by the Agreement in various forms. For those that did not sign within the one-year period, the Agreement is open for accession,<sup>109</sup> (Article 27) and otherwise may formally ratify, accept or approve the Agreement (Article 28) under such processes as may be required at national level, and deposit the instrument of ratification, accession or other form of acceptance with the Depositary (Articles 26 and 27). It cannot make any reservations or exceptions to the Agreement (Article 30) but may make a declaration as long as it does not purport to exclude or modify the legal effect of the provisions of the Agreement (Articles 30 and 31). For example, a declaration may describe the competences of the Parties in relation to the EU or specify provisions in the instrument where the Party's consent to be bound does not prejudice its position in respect of general international law.<sup>110</sup>

Thirty days after ratification or accession, the State becomes a Party and is legally bound on condition that the Agreement itself has entered into force as described above.

When the State achieves the status of a Party, it should have in place appropriate national legislation and processes that implement the terms of the Agreement. Otherwise, it could be accountable to other Parties at the international level if it is unable to discharge its responsibilities.

It can often take some years before an international instrument enters into force. To allow for early and effective implementation, instruments often encourage States to apply its provisions provisionally during the waiting period.<sup>111</sup> Formal provisional application of the Agreement, until its entry into force, may be effected by notifying the Depositary in writing (Article 32). However, this is voluntary and not legally binding.

A procedure for amendments is provided in the Agreement (Article 33), which may not be activated until two years after entry into force. This will give the Parties time to assess the implementation of the Agreement and identify any adjustments that should be made. The amendment process involves consideration of the amendment proposal at a meeting convened for the purpose, and adoption by consensus.

The Annexes form an integral part of the Agreement, but the amendment process differs somewhat from that to be used for the text of the Agreement (Article 34[1]). Most of the Annexes are oriented towards technical matters, including the information that must be communicated by vessels seeking entry into port, requirements for the electronic exchange of information and reports on the results of inspection.

There have been rapid changes in technology in recent years that have affected fisheries governance and enforcement, such as the development of VMS and agreement by tuna RFMOs on unique identifiers for vessels. Such developments, in turn, have a consequence for legal technical requirements. This is reflected by the fact that some parts of the Appendixes in the 2005 FAO Model Scheme – which formed the basis for the Annexes in the Agreement – already needed updating as the Agreement was being developed.

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<sup>108</sup> 1969 Vienna Convention on the Law of Treaties, Article 18.

<sup>109</sup> Accession is the act whereby a State that has not signed a treaty expresses its consent to become a Party to that treaty by depositing an “instrument of accession”. Accession has the same legal effect as ratification, acceptance or approval. Accession is generally employed by States wishing to express their consent to be bound by a treaty where the deadline for signature has passed.

<sup>110</sup> For example, Article 43 of the 1995 UN Fish Stocks Agreement permits Declarations. At the time of writing, 34 parties had made Declarations, available at:

[www.un.org/Depts/los/convention\\_agreements/fish\\_stocks\\_agreement\\_declarations.htm](http://www.un.org/Depts/los/convention_agreements/fish_stocks_agreement_declarations.htm).

<sup>111</sup> For example, Article 41 of the UN Fish Stocks Agreement.

Therefore, it was recognized that there was a need for more flexibility in the amendment procedures for the Annexes owing to their technical nature. Because consensus operates on a “no objection” basis, only one Party may defeat the proposal by objecting to it. Therefore, as a first step, the Agreement encourages Parties to agree by consensus at a meeting to consider the proposed amendment; then, if no consensus is reached, an amendment may be adopted by two-thirds of the Parties present.

Any Party may withdraw from the Agreement except during the first year it is Party to the Agreement (Article 35).

The Director-General of FAO, as Depositary, has certain duties that are standard in international instruments, involving registration of the Agreement with the Secretariat of the UN and informing signatories of certain information, including entry into force of the Agreement (Article 36).

All texts of the Agreement are equally authentic: Arabic, Chinese, English, French, Russian and Spanish (Article 37).

### **3.5 Summary comments**

The legal synopsis of the evolving elements of port State measures in Section 3.2, together with a description of innovative areas in the Agreement, shows rapid and robust agreement by the international community on the compelling need for port State measures to combat IUU fishing as well as the resolve to strengthen incrementally such measures in successive international instruments.

In fact, the Agreement itself is generally broader and deeper than the draft Agreement developed by the FAO Expert Consultation for negotiation in the FAO Technical Consultation. As shown in Section 3.2.5, there are many innovative areas in the Agreement that set potentially effective standards. The Agreement comprehensively addresses the measures and key areas for cooperation and communication.

However, the inability of the port State to take enforcement action in respect of IUU fishing in areas beyond its national jurisdiction is a clear limitation of the Agreement, particularly when compared with Article 218 of the 1982 UN Convention, described above in Section 3.2. There, the port State was empowered to undertake investigations and institute proceedings in respect of discharges outside of its waters in violation of applicable international rules.

This raises an important question: How is it possible to know whether a flag State Party – or even a flag State non-Party – will take appropriate action when requested by a port State?

As described in Section 3.4, the key measures that may be taken by the port State relate to the entry into and use of a port, informing other relevant States and organizations of the evidence of IUU fishing or related activities and taking other measures in conformity with international law, including measures requested by the flag State or to which it has consented.

Parties in their capacity as flag States must immediately and fully investigate the matter and, if there is sufficient evidence, take enforcement action without delay. However, a flag State may decide there is insufficient evidence for taking enforcement action or it may take no action. Where Parties believe that the evidence is sufficient but the flag State takes no action, this could trigger dispute settlement procedures under the Agreement.

However, where the flag State is not a Party to the Agreement, the port State will have to resort to taking other measures in conformity with international law. Market-related measures taken in accordance with international law are particularly effective but were not expressly included in the Agreement because it was not intended as a trade instrument.

In any situation, the primary means of combating the alleged IUU fishing or related activities by the vessel is the concerted and coordinated action among port States to implement the Agreement and, where circumstances warrant, to ensure that the entry into or use of port is consistently prohibited from one port to the next. This would be economically devastating for those financing IUU fishing or related activities and would effectively achieve the aim of the Agreement.

The RFMOs will also contribute to the effective implementation of the Agreement. They have a key supporting role to play in terms of their own enforcement tools such as IUU vessel lists and agreed actions that must be taken in respect of such vessels. A port State may call on relevant RFMOs where a flag State does not take appropriate action.

The Agreement builds upon a foundation of national, regional and international law and practice. It is strong and forward-looking. Provisional application of the Agreement by States and early implementation of its provisions into national laws and procedures would provide a formidable means of combating IUU fishing through the effective use of port State measures.

## **4. POLICY, LEGAL AND OPERATIONAL CHECKLISTS FOR IMPLEMENTATION OF THE 2009 FAO PORT STATE MEASURES AGREEMENT**

### **4.1 Policy**

Implementation of the 2009 FAO Port State Measures Agreement requires an approach that includes policy decisions, legal revision and new operational procedures. In turn, decisions taken in these three interrelated areas could affect the institutional arrangements necessary to support effective implementation.

It is vital for States to move forward in a coherent and logical manner. Policy must be the driver and guide. States must first take decisions on broad policy matters that will affect how the legislation and operational procedures will be structured and what they will contain, and that will assist in identifying priorities, responsibilities and time lines.

Policy can also serve as a strong support to the implementation of activities by prioritizing them on the national agenda. In this way, human and financial resources can be identified and protected for legal, operational and other related activities.

States and RFMOs may provisionally implement the Agreement before it enters into force, or without becoming Party. In order to meet their international obligations effectively, States should have the policy, legislation and operational procedures in place at the time of becoming Party to the Agreement.

Checklists for implementation of the Agreement in policy, legal and operational arenas are shown in Appendix 9. Key elements of the checklists are summarized below.

#### ***4.1.1 General considerations***

There is a broad general policy issue that should be considered first of all: whether to implement the Agreement as a minimum standard, or whether to incorporate the relevant provisions into national law and practice. Many States and RFMOs will implement more stringent measures, and this general approach should be agreed before embarking on implementation.

#### ***4.1.2 Implementation of the Agreement***

*Application of the Agreement.* The Agreement gives some discretion to each Party to decide its application; for example, to vessels chartered by nationals and operating in its waters and under its authority. As a related policy matter outside the Agreement, States may also wish to apply port inspection requirements to certain classes of national vessels, such as those fishing in RFMO areas.

The Agreement does not require Parties to recognize decisions or measures of RFMOs of which they are not a member or cooperating non-member.<sup>112</sup> However, in demonstrating their commitment to promote long-term sustainable development in fisheries and to combat IUU fishing, States may recognize and implement relevant decisions and measures of such RFMOs, and, if so, these decisions should form part of policy. A benefit of this approach would be to promote compliance with conservation and management measures in general as well as compliance measures such as recognition of an RFMO IUU vessel list.

*Integration, coordination at national level.* At the national level, a policy should encourage the integration or coordination of fisheries related port State measures with the broader system of port State controls, including other tools to combat IUU fishing such as VMS and observer programmes, as well as port controls applicable to merchant vessels. This will standardize approaches for all

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<sup>112</sup> This is a fundamental issue in international law. States are not bound by instruments to which they are not Party.

vessels and maximize the effectiveness of related programmes and procedures, including training and institutional strengthening. In many States, one of the weakest features of port inspections and a major concern for governments is the inherent lack of coordination and information sharing among government agencies. A national policy that promotes and requires such coordination would assist greatly in achieving the effective implementation of the Agreement.

*Entry into port.* Policy should call for a reasonable level of inspections sufficient to achieve the objective of the Agreement, both at the national level and through RFMOs, FAO or otherwise. To support and achieve such a level, and where relevant, the policy should encourage directed training and institutional strengthening.

*Inspections and follow-up actions.* Part 4 of the Agreement has a range of provisions relating to inspections and follow-up actions. Policy should call for inspections to be conducted in such a way as to discharge effectively the State's obligations under the Agreement. In addition to setting the level of inspections,<sup>113</sup> this would include the conduct of inspections, electronic exchange of information, training of inspectors and port State actions following inspections. The latter action has important policy implications: Should the State take measures additional to those in the Agreement in conformity with international law, such as market-related measures?

*Role of flag States.* The Agreement identifies the role of flag States and requires flag State Parties to take specified measures in the exercise of effective control over their vessels, including immediate investigation and cooperation with a port State. As a policy matter, States should ensure that they undertake to discharge effectively their roles as flag States.

*Non-Parties.* States should encourage, at policy level, actions and measures that are fair, non-discriminatory, transparent and consistent with the Agreement and international law to deter the activities of non-Parties that undermine the effective implementation of the Agreement.

## **4.2 Legislation**

### **4.2.1 General considerations**

*Aim and context of legislative review.* As each State embarks upon implementing the Agreement's legal requirements in its national legislation, it should undertake a broader and deeper review of its national laws, regulations and practices relating to IUU fishing. The aim of the review should be to rationalize and strengthen the legal regime to make possible the use of all relevant measures in the Agreement as well as to ensure a strong legal basis for tools to combat IUU fishing that are linked to port State measures. In addition, attention should be paid to ensuring that laws can be applied in a straightforward manner, with sanctions being sufficient to deter IUU fishing and related activities.

*Scope of the Agreement.* States must also be mindful that the Agreement is not restricted to IUU fishing activities, but also covers "fishing related activities". This gives the Agreement very broad scope and coverage. The related activities are defined in Article 1 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 port, as well as the provisioning of personnel, fuel, gear and other supplies at sea".

A "vessel" includes vessels used for, equipped to be used for, or intended to be used for, fishing or fishing related activities. Therefore, the legal review will need to have a much wider focus than fisheries legislation. It should take into account legislation that relates to fishing vessels and a range of others such as factory ships (including those that process fish while in port), supply ships, refrigerated vessels, carrier vessels and transport vessels. The implementing legislation should regulate access to

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<sup>113</sup> It would be desirable to plan the level of inspections in terms of number, frequency and location. Such forward planning would facilitate interagency cooperation for inspections.

port and the activities of these vessels, ensure clear administrative authority for regulation and apply the Agreement's MCS and enforcement requirements to them. States should also ensure that legislation regulating non-fishing vessels is consistent with the implementing legislation.

*Form of legislation.* One of the first decisions that will be necessary is the form the legislation should take: laws, regulations or other suitable legal instruments. The requirements of the national legal system will have to be met in this regard, but attention should be paid also to the need for strong provisions and deterrent fines and penalties for both foreign and national vessels. Importantly, penalties could also extend to persons (natural or legal) that provide port services to a vessel that has been denied use of port, including refuelling, resupplying or landing.

*Institutional arrangements and coordination.* Depending on national institutional arrangements, the approach towards the review and development of implementing legislation should not be confined to the strict letter of the law, restricted to incorporating provisions of the Agreement that are not already in national legislation. It should aim more broadly at providing a firm foundation for actions and measures and consider whether legislation is required to strengthen institutional arrangements and coordination, for example, for international relations, enforcement and exchange of information. Duties and powers of the official lead authority (such as a minister or permanent secretary) should be clearly set out as well as enforcement responsibility and powers of authorized officers or inspectors.

*Evidentiary standards and admissibility.* The legal review should address evidentiary standards and admissibility and should not exclude the use of electronic evidence and new technologies that are likely to evolve over time. Another evidentiary matter to consider is the use of presumptions to combat IUU fishing or related activities. For example, where it may be easier – but no less fair – for an honest vessel master to prove that the fish was legally caught than for an inspector to prove that it was caught during IUU fishing activities, it is common for fisheries laws to include a provision such as unless it can be otherwise proved, all fish on board is presumed to have been taken during IUU fishing activities or related activities.

*Areas beyond national jurisdiction.* Importantly, the review should evaluate whether domestic legislation is sufficient to regulate and enforce against IUU fishing or related activities that take place beyond its areas of national jurisdiction. In this regard, there are three key issues. The first is to ensure that legislation prohibits the State's nationals (vessels or persons) from engaging in IUU fishing activities or related activities beyond areas under national jurisdiction. A requirement for national vessels to be authorized to fish in such areas, which is standard in most countries, would complement such a prohibition.

The second issue relates to fish that were caught in violation of the laws of another country but brought to port. A standard legal provision, based on the United States Lacey Act, makes it an offence for any person to undertake certain activities, such as importing, trading or selling such fish or fish products. This is a highly effective "long-arm" provision that strengthens regional cooperation among States and acts as a means of deterring and preventing IUU fishing and related activities.

The third issue relates to giving legal effect to RFMO measures or decisions to which the State is not a Party or cooperating non-Party for purposes of implementing the Agreement. This could include prohibiting port entry to, or use of, vessels engaging in fishing or related activities in contravention of the conservation and management measures of such an RFMO or to vessels included on its IUU vessel list. Although States are not bound by treaties to which they are not Party, increasingly international instruments contain provisions relating to non-Parties and their duty under international law to cooperate with those organizations and their members.

In fisheries instruments, this duty is based on provisions of the 1982 UN Convention and includes a duty for non-Parties to cooperate with RFMOs, as provided in the 1995 UN Fish Stocks

Agreement.<sup>114</sup> It requires that States cooperate, as appropriate, bilaterally, multilaterally and within relevant RFMOs to develop compatible measures for port State control of fishing vessels. Such measures should deal with the information to be collected by port States, procedures for information collection, and measures for dealing with suspected infringements by the vessel of measures adopted under these national, regional or international systems. This should include non-Parties to the 1995 UN Fish Stocks Agreement.

In addition to the general issues described above that should form an important part of a legal review for implementation of the Agreement, many of its provisions will require direct implementation. Each State should check its existing laws against the Agreement to ensure there are no gaps or inconsistencies, and in turn, identify provisions that need amendment or introduction into the law. A comprehensive legal checklist appears in Appendix 9, and some of the key areas for implementation are described below.

#### **4.2.2 Implementation of the Agreement**

*General provisions.* It is of fundamental importance that the terms as defined in the Agreement are implemented fully in national legislation. They are the building blocks for clear and effective understanding and implementation and promote the harmonization of actions by Parties. National law should be consistent with the objective of the Agreement, and States should ensure that the law applies to certain vessels and persons. Where necessary and appropriate, States should ensure that the legislation provides sufficient authority for integration and coordination among national agencies, as well as a framework for cooperation and exchange of information both nationally and internationally. In this respect, requirements relating to the confidentiality of information will be important and should not be overlooked.

*Entry into port.* Although most, if not all, States currently regulate entry by vessels into port, the requirements in the Agreement are very specific, hence, it is likely that legislation will need to be updated. These requirements relate to an advance request for port entry (including a required process and information), the decision-making to authorize or deny port entry, and the process of authorization.

Because of the sovereignty that States exercise over their ports, they have the right under the 1982 UN Convention to exclude any non-national vessel from entering port. However, it is normal for States to have legislation and/or policy on *force majeure* or distress that applies to all vessels, allowing port entry in accordance with international law and under specified circumstances. The Agreement is clear that a State may allow vessels to enter port for reasons of *force majeure* or distress, but in order to limit possible activities in port relating to fish taken during IUU fishing activities, it provides that the port State is not prevented from permitting entry into port of a vessel “exclusively for the purpose of rendering assistance to persons, ships or aircraft in danger or distress”. States should ensure that legislation of this nature relating to all vessels should be consistent with the Agreement.

*Use of ports.* At the core of the Agreement are the obligations for States to deny the use of a port under specified circumstances, in some cases where inspection is not required and in other cases after inspection. States should ensure that these requirements are incorporated in their national laws; they should be non-negotiable so as to prevent any sidestepping or attempts to elude the measures or opportunities to engage in corrupt behaviour. States should also ensure that their laws refer to all of the uses of port that must be denied under the Agreement: landing, transshipping, packaging and processing and other port services, including, *inter alia*, refuelling and resupplying, maintenance and

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<sup>114</sup> Article 8(3) provides: Where a subregional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to cooperate by becoming members of such organization or participants in such arrangement, or by agreeing to apply the conservation and management measures established by such organization or arrangement.

dry docking. Significantly, States may decide to include other port services in the list of uses that must be denied.

*Inspections and follow-up actions.* Inspections and follow-up actions provided in the Agreement describe operational processes. Legislation should designate the responsibility of national agencies to set levels and priorities for inspection and, as appropriate, regulate procedures for the conduct of inspections. Legislation should, as a minimum, require information in the Agreement to be included in the written reports of each inspection and provide for the transmittal of inspection results and the electronic exchange of information. Requiring minimum training standards for inspectors, as provided in the Agreement, may be considered recognizing that the standards could eventually be strengthened.

The authority and responsibilities for taking action following an inspection where there are clear grounds to believe that a foreign vessel has engaged in IUU fishing or related activities should be set out in legislation. Actions that the port State may take, consistent with the Agreement and international law, should be identified clearly in the legislation.

*Role of flag States.* The role of flag States is described in the Agreement, and to implement these provisions States should ensure that legislation requires their flag vessels to cooperate with authorities of port States in inspections carried out pursuant to the Agreement. States should also ensure a non-discriminatory legislative basis for applying measures to its flag vessels that are as effective as those it applies to foreign vessels. In general, legislation should encourage and enable flag States to exercise effective control over their vessels for fishing and related activities beyond areas of national jurisdiction, for example, by requiring authorizations, reporting and the use of MCS tools such as VMS and observer programmes.

*Non-Parties to the Agreement.* Fair, non-discriminatory and transparent legal provisions may be considered to deter the activities of non-Parties that undermine the effective implementation of the Agreement. They should be consistent with international law and, although not specifically referenced in the Agreement, may include market-related measures.

## **4.3 Operations**

### ***4.3.1 General considerations***

Operational considerations for implementing the Agreement are potentially complex and require cooperation and communication at the national, regional and international levels. They will vary from one country to another based on national circumstances and conditions. Moreover, they will require a clear “roadmap” and be based on legislation and officially approved and publicized standard operating procedures.

The most effective way of ensuring robust operational standards would be for States to establish and publicize a national strategy and procedures for port State control of vessels involved in fishing and related activities, including training, technical support, qualification requirements and general operating guidelines for port State control officers. States should also consider capacity-development needs in the elaboration and implementation of this strategy.

### ***4.3.2 Implementation of the Agreement***

*General.* The Agreement contains a number of provisions that will require the strengthening of existing procedures or development of new ones. In general, operational personnel will need to have a good understanding of the scope and application of the Agreement. To this end, they will need to be aware of the way in which relevant activities are defined in the Agreement and national law, such as IUU fishing and activities related to fishing. At the regional level, operational personnel should know well the context within which the Agreement is being implemented including colleagues in other countries, regional frameworks and mechanisms for cooperation, and the logistics of implementation.

*Application of the Agreement.* Some decisions relating to the application of the Agreement should be taken at policy and/or legal levels, for example, the recognition of decisions and measures of RFMOs of which the State is not a member or participating non-member, how to deal with artisanal vessels of a neighbouring State and vessels chartered by its nationals for fishing in national waters. Once such decisions are taken, operational procedures should be developed and, as appropriate, responsibilities should be established. For example, procedures would be needed for determining whether vessels are properly authorized and whether container vessels are carrying fish not previously landed. Procedures should ensure that the Agreement is applied in a fair, transparent and non-discriminatory manner, consistent with international law.

*Cooperation and exchange of information.* Procedures will need to be strengthened or established that will promote the cooperation and exchange of information with other States and through RFMOs, including those that support conservation and management measures of other States and international organizations. They could include designation of contact points, identification of official contacts in other States and international organizations and establishment and operation of information systems such as those described in Annex D of the Agreement.

*Entry into port.* A wide range of operational and procedural actions are essential for activities relating to entry into port. A sufficient number of trained workers will be required to conduct inspections at designated ports in order to meet the State's targeted level of inspections for each year. Procedures will be needed to receive information from a vessel requesting port entry, as appropriate identify irregularities and/or seek additional information and take a timely decision. Where entry is denied, this must be reported to the flag State and, where it is authorized, procedures must be in place for collection of the authorization upon port entry. Procedures should also be in place for vessels that are permitted to enter port because of *force majeure* or distress, to ensure that port is used exclusively for rendering assistance to persons, ships or aircraft in danger or distress.

*Use of ports.* When a vessel enters port and without first being inspected, it may be denied the use of port for a range of reasons including failure to hold an authorization required by the flag State and coastal State, contravention of the laws of a coastal State, failure by the flag State to confirm at the request of the port State that the fish on board was taken in accordance with RFMO measures, and that there were reasonable grounds to believe the vessel had engaged in IUU fishing or related activities.<sup>115</sup>

There are some exceptions to the denial of use of a port: port services cannot be denied if they are proven to be essential to the safety or health of the crew or the safety of the vessel or for the scrapping of the vessel.

Procedures should be in place for an assessment of the vessel's activities, communication, investigation and decision-making in these areas. This would require, for example, having information or points of contact on hand relating to authorization requirements of the relevant flag State and coastal State, points of contact to request confirmation by the flag State that the fish on board was taken legally.

As appropriate, where national law prohibits the provision of port services to vessels that have been denied the use of a port (for example, by persons in the port State who provide fuel or landing facilities), procedures should be in place to ensure that such provisioning is identified and terminated and violations are dealt with.

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<sup>115</sup> As noted in Section 3.2, the scope of the Agreement is not as broad as Article 218 of the 1982 UN Convention, which related to enforcement by port States in respect of discharges from vessels voluntarily in port. That Article empowered the port State to undertake investigations and institute proceedings in respect of any discharge outside its waters in violation of applicable international rules and standards. In addition, other States could request the port State to institute proceedings under certain circumstances.

Procedures for securing and dealing with evidence should be established, including evidence showing reasonable grounds to believe that the vessel was engaged in IUU fishing or that port services are essential for safety or health purposes. Responsibilities for decision-making and notification should be clear. For example, if it is necessary for legally trained officials to be consulted or to decide on the sufficiency of evidence, this should be designated.

*Inspections.* Procedures should address the levels and priorities for and the conduct of inspections, as well as the reporting, transmittal of inspection results, electronic exchange of information and training of inspectors. They should include as a minimum standard that inspectors carry out the functions described in Annex B of the Agreement and the duties in accordance with the requirements of Article 13(2). Protocols could be developed for handling information electronically and standards for the training of inspectors should be based on the Guidelines in Annex E of the Agreement. As noted above, these elements could be included in a national strategy and operationalized in procedures.

Following inspections, procedures should designate the action to be taken where it is believed that the vessel has engaged in IUU fishing. In this regard, relevant notifications will have to be made, including to the flag State. As appropriate, the flag State could be requested to consent to specified measures, but procedures should also foreshadow situations where the flag State requests the port State to take certain measures.

Where it is not possible to contact the flag State or the flag State does not respond within a reasonable time, operational procedures should specify the next steps. The Agreement does not prevent a Party from taking measures in conformity with international law in addition to the denial of the use of a port, so the procedures could involve referring the matter to fisheries, legal or trade authorities as appropriate for their decision and action. To ensure there is a broad scope for decision-making in this regard, it would be useful for countries to ensure that the national legislation specifies that the courts have jurisdiction over IUU fishing and related activities that occur beyond areas of national jurisdiction, as described in Section 4.2.1 above (an example of such legislation is the United States Lacey Act) as well as having the authority to implement and enforce conservation and management measures of specified RFMOs.

*Role of the flag State.* The Agreement gives flag State Parties certain responsibilities to ensure effective control of their vessels, and supportive procedures would include: requesting the port State to inspect the flag vessels where there are clear grounds to believe that IUU fishing or related activities had taken place; encouraging flag vessels to use ports that act consistently with the Agreement; immediately investigating port inspection reports of their flag vessels that show clear grounds to believe that IUU fishing or related had taken place; and reporting to Parties, relevant RFMOs and others on actions it has taken in respect of its vessels determined to have engaged in IUU fishing or related activities.

*Non-Parties.* Fair, non-discriminatory and transparent procedures should be developed to implement legal or policy measures to deter the activities of non-Parties that undermine the effective implementation of the Agreement.

#### **4.4 Summary comments**

It is clear from the above issues and considerations that implementation of the Agreement must embrace the realms of policy, law, institutional and operational matters. The checklists show that the task of implementation should be done in a methodical and comprehensive manner.

For those States and RFMOs that have not yet developed effective port State measures or harmonized them on the subregional, regional or international levels, the way ahead may seem daunting. However, it is facilitated by the fact that the Agreement itself takes a step-by-step approach that is clear, logical and aims for strong and globally cooperative measures to combat IUU fishing.

For those States and RFMOs that have already taken some action to implement the 2005 FAO Model Scheme or that have already implemented a system of port controls, the way forward should include a review of the effectiveness of those priorities and measures. This would be done to revise the priorities and strengthen the measures, using the Agreement as a minimum standard.

In either case, a strategy that implements the Agreement as part of a broader and integrated toolkit to combat IUU fishing and promote sustainable fisheries should serve as the solid foundation for a stronger future.

## 5. CAPACITY DEVELOPMENT AND THE REQUIREMENTS OF DEVELOPING COUNTRIES IN RELATION TO PORT STATE MEASURES

Recognition of the need for capacity development<sup>116</sup> and, more broadly, the special requirements of developing countries to support their efforts to implement international fisheries instruments has been a common feature of many instruments concluded since the mid-1990s. In many respect this trend reflects the thrust of decisions at the 1992 Earth Summit<sup>117</sup> and the more practical issue that not all countries have equivalent capacity and resources to implement instruments and that this inequality, especially where regional cooperation and harmonization of activities are required, is likely to create implementation imbalances by so-called weak links.

The first international fisheries instrument that addressed capacity building directly was the 1993 FAO Compliance Agreement. However, it was the binding 1995 UN Fish Stocks Agreement that devoted an entire section to capacity development, including providing for the establishment of an assistance fund to address the requirements of developing countries. The 1995 UN Fish Stocks Agreement made a direct link between capacity development and the need for the financial means to support development, as envisaged in Agenda 21.

As explained in Chapter 1, the negotiators of the 2009 FAO Port State Measures Agreement drew inspiration from the capacity development provision in the 1995 UN Fish Stocks Agreement, especially concerning the establishment of appropriate funding mechanisms to support the implementation of the Agreement. The mechanism itself is described in Chapter 2 and Section 3.4. One of the mechanisms is an assistance fund for States Parties to the Agreement, similar in concept and approach to the fund established in 2005 for the 1995 UN Fish Stocks Agreement.

### 5.1 Synopsis of capacity-development requirements in post-UNCED fisheries instruments

#### 5.1.1 1993 FAO Compliance Agreement

Article VII of the 1993 FAO Compliance Agreement addresses cooperation with developing countries. It requires that Parties cooperate alone and with the support of FAO and other organizations to provide assistance to developing State Parties to help them fulfil their obligations under the Agreement. To some extent, this Agreement mirrored the negotiations that were under way at the time in the United Nations for the binding 1995 UN Fish Stocks Agreement and in FAO for the non-binding 1995 FAO Code of Conduct for Responsible Fisheries (1995 FAO Code of Conduct).<sup>118</sup> The 1993 FAO Compliance Agreement is an integral part of the 1995 FAO Code of Conduct although different in legal status.<sup>119</sup>

FAO has not conducted dedicated workshops or other capacity development initiatives to promote the implementation of the 1993 FAO Compliance Agreement, although the instrument has been promoted widely in national and regional 1995 FAO Code of Conduct workshops and other meetings and initiatives including COFI sessions and UNGA resolutions.<sup>120</sup>

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<sup>116</sup> “Capacity development” as opposed to “capacity building” focuses on the use of external assistance to support and facilitate domestic processes in developing countries with an increased emphasis on national ownership and endogenous change processes. This shift in emphasis in FAO reflects the general movement in the UN System, especially with reference to the achievement of the Millennium Development Goals. The terminology was introduced formally in the UN system in UNGA Resolution 59/250 entitled “Triennial comprehensive policy review of operational activities for development of the United Nations system” (available at: [www.un.org/esa/coordination/A-59-250.pdf](http://www.un.org/esa/coordination/A-59-250.pdf)).

<sup>117</sup> UN. 1992. *Earth Summit: Agenda 21 – the United Nations Programme of Action from Rio*. New York, USA. 294 pp.

<sup>118</sup> FAO. 1995. *Code of Conduct for Responsible Fisheries*. Rome. 41 pp. It was adopted unanimously by the FAO Conference at its Twenty-eighth Session in October 1995.

<sup>119</sup> See Preamble to the Agreement and FAO Conference Resolution 15/93.

<sup>120</sup> FAO’s Legal Office conducted a workshop in the Caribbean Subregion to encourage countries to accept and implement the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement. The Legal Office

### **5.1.2 1995 FAO Code of Conduct for Responsible Fisheries**

FAO Conference Resolution 4/95 that adopted the 1995 FAO Code of Conduct, *inter alia*, urged that Article 5 of the Code be taken into account in implementing the Code's provisions. Article 5 addresses the special requirements of developing countries. The resolution requested also that FAO elaborate an inter-regional programme for external assistance to support the Code's implementation. The purpose of this programme would be to target the upgrading of developing countries' capabilities so that they would be better placed to meet the Code's requirements.

Article 5 of the Code seeks to ensure that developing countries have the means to implement the 1995 FAO Code of Conduct in terms of both conserving and managing fisheries resources in a long-term sustainable manner, and providing for sustainable development. Furthermore, Article 5 encourages the international community to work for the adoption of measures to address the needs of developing countries, especially in the areas of: financial and technical assistance; technology transfer; training and scientific cooperation; and development of national fisheries and participation in high seas fisheries.

The 1995 FAO Code of Conduct does not provide guidance to developing countries or the international donor community on how Article 5 might be put into operation. Rather, in a very non-prescriptive manner consistent with a non-binding instrument, the Code relies on the political commitment and goodwill of the international community to devise and implement measures, projects and programmes that will give life to Article 5. However, the Article, in an indirect manner, provides direction to developing countries as to the areas for which they might seek financial assistance from the international community.

FAO has channelled a significant amount of resources to support the implementation of the 1995 FAO Code of Conduct in all regions of the world. Funding has come from the FAO Regular Programme and non-FAO resources. To ensure that there was a tightly focused programme to assist countries in implementing the Code, a dedicated programme within the FAO Fisheries and Aquaculture Department was developed. The programme operated until about 2000 when it was replaced by a more elaborate, better funded and more flexible FishCode Programme. A significant amount of FishCode Programme funding has been devoted to assisting countries in implementing programmes to combat IUU fishing, including capacity development for the implementation of port State measures.

In 2009, an FAO study attempted to assess the impact of the implementation of the 1995 FAO Code of Conduct. It noted that the cost of implementing more sustainable and responsible fisheries regimes was a significant challenge for developing countries. Not surprisingly, this finding points to the need for ongoing and additional development assistance from the international community to support human resource development, institutional strengthening, policy formulation and legislative review and revision. Capacity development remains a high priority for developing countries if traction is to be maintained and further inroads made to promote sustainability in fisheries.<sup>121</sup>

### **5.1.3 1995 UN Fish Stocks Agreement**

Part VII of the 1995 UN Fish Stocks Agreement addresses the requirements of developing States. It consists of three articles addressing the recognition of the special requirements of developing States; forms of cooperation with developing States, and special assistance in the implementation of the Agreement.

Article 24 of Part VII elaborates the "duty to cooperate in the establishment of conservation and management measures" requiring that States take into account: the vulnerability of developing States;

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also urged countries, when providing assistance to revise their legislation, to incorporate the provisions of the 1993 FAO Compliance Agreement.

<sup>121</sup> Hosch, G. 2009. An Analysis of the Implementation and Impact of the FAO Code of Conduct for Responsible Fisheries. FAO Fisheries and Aquaculture Circular No. 1038. Rome. FAO. 99 pp.

the need to avoid adverse impacts on small-scale and related fisheries; and the need to ensure that developing countries do not shoulder disproportionate burden in the implementation of conservation action.

Implicitly, this Article has a strong livelihoods and food security focus, attempting to ensure that developing countries are not disadvantaged by the Agreement. Indeed, when it was being negotiated developing countries were concerned, as they were when the 2009 FAO Port State Measures Agreement was being negotiated, that they should not be disadvantaged by the Agreement's implementation requirements through the assumption of burdensome administrative and technical requirements.<sup>122</sup>

Article 25 of the 1995 UN Fish Stocks Agreement requires States to cooperate to: enhance the ability of developing States to conserve and manage fish stocks; enable developing States to participate in high seas fisheries; and facilitate the participation of developing countries in the work of RFMOs.

Article 25 also requires that cooperation be extended broadly to cover different types of assistance, including that of a financial, human resource development and technical nature as well as technology transfer and advisory services. Moreover, it requires that the assistance be directed specifically to: improved conservation and management; stock assessment and research; MCS; compliance and enforcement, including training and capacity development; and the development and funding of observer programmes, access to technology and equipment.

Notably missing from this list is reference to social, economic, legal and institutional aspects of fisheries management. Rather, the list reflects a more traditional science-bound approach to conservation and management, emphasizing stock status/resource management considerations.

The final Article in Part VII, Article 26, concerns special assistance to developing countries and the establishment of a special fund. The Article requires that the fund shall be established. However, its language is softened in the second paragraph where it States that the international community should assist developing countries to establish new, or strengthen existing, RFMOs for the conservation and management of fish stocks.

As noted in Chapter 2, the 1995 UN Fish Stocks Agreement went one step further than the 1993 FAO Compliance Agreement by including a requirement to establish a dedicated fund to support developing countries to implement the 1995 UN Fish Stocks Agreement. This requirement was given life when terms of reference for the fund were negotiated and agreed by the Parties to the Agreement and the UNGA endorsed the establishment of the fund.<sup>123</sup> Importantly, the assistance fund, known commonly as the Part VII Assistance Fund, has operated successfully since its inception in 2005.

Between 2005 and December 2010, the Part VII Assistance Fund received US\$984 045 in donor contributions and interest to support the implementation of the 1995 UN Fish Stocks Agreement.<sup>124</sup> Of this total, about US\$735 000 has been expended on activities intended to promote the participation of developing State Parties in technical and annuals sessions of RFMOs (24 percent); participation in meetings of global organizations (23 percent); participation in negotiations to establish new RFMOs (13 percent); finalization of a regional shark plan for the Pacific Islands(14 percent); capacity-building activities for tuna data management, stock assessment, ecosystem and bycatch in the Pacific Islands (22 percent); and administration of the Fund (4 percent).

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<sup>122</sup> In the negotiation of the 2009 FAO Port States Measures Agreement, some developed countries (e.g. the Netherlands) also expressed concerns about the increased administrative burden associated with the implementation of the Agreement.

<sup>123</sup> In November 2003, the UNGA, in Resolution A/RES/58/14, established an Assistance Fund under Part VII of the 1995 UN Fish Stocks Agreement. The Fund is administered by FAO in consultation with UNDOALOS.

<sup>124</sup> FAO report on the Part VII Assistance Fund prepared for the May 2010 Review Conference of the 1995 UN Fish Stocks Agreement. The document is available on the UN Web site at: [www.un.org/Depts/los/convention\\_agreements/fishstocktrustfund/fishstocktrustfund.htm](http://www.un.org/Depts/los/convention_agreements/fishstocktrustfund/fishstocktrustfund.htm)

No assessment of the Part VII Assistance Fund has been undertaken to determine the extent of its effectiveness in supporting the implementation of the 1995 UN Fish Stocks Agreement. However, it is clear that the Fund has facilitated increased participation by developing countries in regional and international meetings, having a voice where this probably would not have been the case. The Fund has also enabled technical work and capacity development that might have not been undertaken if such activities had been dependent on funding from other sources.

#### ***5.1.4 2001 FAO International Plan of Action to Combat Illegal, Unreported and Unregulated Fishing***

Part V of the IPOA–IUU concerns the special requirements of developing countries. It encourages the international community to support training and capacity building in developing countries by providing financial, technical and other assistance so that they can more fully meet their commitments under the IPOA–IUU and obligations under international law, including their duties as flag and port States. Assistance for the development of national plans of action (NPOAs) to combat IUU fishing (NPOAs–IUU)<sup>125</sup> was highlighted as being particularly important.<sup>126</sup> In addition, the IPOA–IUU urged the international community to support developing countries to: review and revise their fisheries legislation and regional regulatory frameworks; improve and harmonize fisheries and related data collection; strengthen regional institutions; and strengthen and enhance integrated MCS systems, including VMS.

FAO received funding support to assist developing countries enhance their capacity to implement the IPOA–IUU. Funding support came from both the FAO Regular Programme and non-FAO resources. In its efforts to promote action against IUU fishing and related activities, FAO continues to encourage countries to develop and revise NPOAs–IUU as a means of promoting effective national action against IUU fishing together with coherent and coordinated regional action.

#### ***5.1.5 2005 FAO Model Scheme***

The 2005 FAO Model Scheme does not address capacity development specifically. However, its implementation presupposes a significant capacity development and institutional strengthening input. This is to ensure that adequate and trained human resources are available to implement the port State measures envisaged in the 2005 FAO Model Scheme and that the institutions that underpin their operation are stable and resilient.

Appendix D of the 2005 FAO Model Scheme outlines the type of training that port State inspectors should undergo in order to carry out a vessel inspection in the most efficient manner and with minimum inconvenience to the crew and the vessel. The training that inspectors should undergo is broad in character, ranging from inspection procedures and species identification to language training.

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<sup>125</sup> NPOAs–IUU are versatile tools for dealing with IUU fishing primarily because they enable countries to develop consistent and comprehensive approaches to IUU fishing. They can be used also to assess gaps in national policies and measures.

<sup>126</sup> FAO conducted a global series of workshops to assist Members develop their NPOAs–IUU. The workshops were held in Eastern and Southern Africa (November 2003), Southeast Asia (October 2004), Caribbean (November 2004), Pacific Islands (September 2005), West Africa (December 2005), Near East (December 2005), Members of the Permanent Commission of the South Pacific (November 2005), countries of the Latin American Isthmus (December 2005), and South Asia (June 2006). A total of 192 persons (19 percent women) from 98 countries received training in the workshops. See Annex VI in Hosch, G. 2009. *An analysis of the implementation and impact of the FAO Code of Conduct for Responsible Fisheries*. FAO Fisheries and Aquaculture Circular No. 1038. Rome, FAO. 99 pp.

### **5.1.6 2009 FAO Port State Measures Agreement**

Article 21 of the 2009 FAO Port State Measures Agreement is a comprehensive Article devoted to the requirements of developing countries. In the negotiation of the Agreement, it was agreed that all reference to developing countries should be consolidated in a single article rather than being distributed over different articles throughout the instrument.

At the second session of the negotiations of the Agreement, there was a clear convergence of views between two regional groupings of developing countries. Both the Africa and Pacific Island groups had developed draft text for the requirements of developing countries and, following consultation, they presented a joint text to the meeting. The consolidated text was accepted by the Technical Consultation with little modification. The joint input was appreciated by the Consultation, recognizing that it represented the views of a considerable number of developing countries. While it is common for regional groupings of countries to present texts in negotiations and meetings, it is relatively uncommon for different groups to consolidate their positions and present a joint position.

Article 21(1) calls for the international community, including RFMOs, to provide assistance to developing State Parties to the Agreement to enhance their capacity to develop a legal basis for the implementation of effective port State measures; facilitate their participation in international organizations promoting the implementation of effective port State measures; and facilitate technical assistance to strengthen the development and implementation of port State measures in coordination with relevant international mechanisms.<sup>127</sup> Article 21(1) provides the general framework for measures and assistance to support developing countries in ratifying or acceding to the Agreement and in turn participate in a meaningful way in the work of international organizations and RFMOs to implement port State measures.

An important feature of the Part VII Assistance Fund established under the 1995 UN Fish Stocks Agreement is that it has facilitated and enabled developing countries to increase their visibility and presence in international meetings and contribute more robustly to RFMO decision-making processes.<sup>128</sup> The final part of Article 25 of the 1995 UN Fish Stocks Agreement obliges State Parties and other organizations to facilitate technical assistance to developing State Parties, enabling them to meet their obligations under the Agreement. The modalities and types of assistance provided are detailed below.

During the second session of the Technical Consultation on Port State Measures in January 2009, some countries expressed their deep concern about the administrative burden associated with the operation of the Agreement after it had entered into force. Developing countries were fearful that there could be an attempt by other countries to shift the administrative burden of the Agreement in their direction as a means of avoiding or lowering transaction costs. With this possibility in mind, developing countries in Article 21(2) negotiated tough language to the effect that Parties, with due regard to the special requirements of developing port States, would ensure that a disproportionate share of the burden resulting from the implementation the Agreement would not be transferred to developing countries. Furthermore, if such a burden shift were demonstrated, developing States Parties affected by the action would have redress and Parties would be obliged to cooperate with them to facilitate the implementation of obligations.

Article 21(3) requires that Parties assess the special requirements of developing States Parties concerning the implementation of the Agreement. No guidance is provided as to how this assessment should be done and what it should cover. It is a bald requirement open to interpretation by Parties acting alone or through FAO. At a practical level, it is likely that such assessments will be made on a

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<sup>127</sup> For example, international mechanisms could include other international or regional instruments that deal with port State measures such as those concluded by IMO and ILO.

<sup>128</sup> For example, the Part VII Assistance Fund enabled representatives from developing countries to contribute to the negotiations for the 2009 FAO Port State Measures Agreement. Many of these countries would not have participated in the Technical Consultation if this source of funding had not been available.

case-by-case basis for countries that have become Party to the Agreement rather than an across-the-board assessment for all developing States Parties. However, it might be envisaged that assessments could be carried out on a subregional or regional basis where characteristics of countries are similar (e.g. groups of small-island developing States Parties).

A key provision of Article 21(4) is the requirement to establish funding mechanisms to assist developing State Parties to implement the Agreement. This will assist developing State Parties in meeting the obligations they have assumed in ratifying or acceding to the Agreement. The types of funding mechanisms are not indicated, and this provides flexibility in implementation of the Agreement, although broad examples of the types of assistance that might be provided are listed. These types of assistance could include:

- Developing national and international port State measures. There are no restrictions on the nature of assistance that could be provided. It could include policy, legal, technical and institutional support for the elaboration of measures.
- Developing and enhancing capacity, including MCS capacity and national and regional training for port personnel (managers, inspectors, enforcement and legal officers). Under this category of assistance, capacity development could involve both initial and more advanced training in the area of MCS. Furthermore, in the Agreement, there is a clear capacity-development/training focus for personnel working in ports to ensure that they can undertake inspections in a professional and competent manner. Article 21(4)(b) is linked to Appendix E of the Agreement addressing the training of port inspectors.
- Facilitating MCS and compliance activities for port State measures including access to technology and equipment. This type of assistance could involve the hiring of consultants and the purchase of capital assets by developing State Parties. It creates practical problems because of FAO's strict financial regulations and procedures, and the inability to transfer funds directly to countries. The regulations have made the administration of the Part VII Assistance Fund complex as it is administered by FAO in accordance with its financial regulations and other applicable rules.<sup>129</sup>
- Assisting developing State Parties with the costs of dispute settlement proceedings results from actions they have taken under the Agreement.<sup>130</sup> Part 7 of the Agreement encourages the peaceful settlement of disputes in the event that they arise. Article 21(4)(d) recognizes that developing State Parties, because of their more limited resources and often weaker bargaining positions *vis-à-vis* their developed country counterparts, could be disadvantaged in dispute settlement if financial assistance were unavailable. This type of provision is not new, mirroring closely the sentiment and drafting of Article 26(1) of the 1995 UN Fish Stocks Agreement.

Article 21(5) of the Agreement encourages States Parties to cooperate with developing State Parties, and for developing State Parties to cooperate with one another, in relation to technical and financial assistance. This assistance could be pursued and delivered through bilateral, multilateral and regional means, including South–South cooperation. This latter type of cooperation is encouraged by FAO. Developing Members, especially in technical areas, are urged to cooperate with one another. The Organization's South–South Cooperation programme facilitates the exchange of technicians and experts from emerging developing countries to work directly with farmers in host countries, sharing their knowledge and skills.<sup>131</sup>

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<sup>129</sup> FAO and UN. 2008 (Revised). Assistance Fund under Part VII of 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: Terms of Reference. Rome. FAO. 6 pp. Available at:

[www.un.org/Depts/los/convention\\_agreements/fishstocktrustfund/fishstocktrustfund.htm](http://www.un.org/Depts/los/convention_agreements/fishstocktrustfund/fishstocktrustfund.htm)

<sup>130</sup> The terms of reference for the Part VII Assistance Fund provide for assistance of this type. However, since the Fund's inception there have been no requests for assistance involving dispute settlement.

<sup>131</sup> Information relating to FAO's South–South Cooperation programme is available at: [www.fao.org/spfs/south-south-spfs/ssc-spfs/en/](http://www.fao.org/spfs/south-south-spfs/ssc-spfs/en/)

The final paragraph in Article 21 requires State Parties to establish ad hoc working group to report periodically and make recommendations on the establishment of funding mechanisms including: a scheme of contributions; identification and mobilization of funds; the development of criteria and procedures to guide implementation; and progress in the implementation of funding mechanisms.

Furthermore, the ad hoc group shall take into account, among other things: an assessment of developing State Parties' needs; the availability and disbursement of funds; transparency of decision-making and management processes concerning fund raising and allocations; and accountability of the recipient development State Parties in the agreed use of the funds.

Finally, the State Parties are bound to take account of the reports and recommendations of the ad hoc working group and to take action on them. This is an attempt to ensure that the interests of developing countries are not overlooked and that they are locked into predetermined decision-making processes.

Article 21(6) is linked closely to Article 21(4). Article 21(6) provides elaborates details for the operation of Article 21(4), although there remains considerable discretion for the State Parties to work out specifics. However, Article 21(6) should assist in implementing the Agreement in a structured, robust and complete manner.

The precise modalities for the implementation of Article 21 of the Agreement have yet to be worked out. It is unlikely that this will be done prior to the entry into force of the instrument. As a first step, consultation will be needed among States Parties to ascertain how the aspirations and requirements of Article 21 will be put into operation. In particular: the composition, role and functions of the ad hoc working group will have to be defined, and the mechanisms to support the implementation of the Agreement will have to be agreed, as will the purposes for which funding can be obtained, and a range of other practical issues.

At the Twenty-ninth Session of COFI in 2011, the Committee recognized the critical role of capacity development as a means of assisting developing countries to combat IUU fishing through port State measures. The Committee welcomed FAO's capacity-development initiatives and noted that there was strong support for FAO to commence preparatory work aimed at the future implementation of Article 21 of the Agreement. The Committee requested FAO to report to the Thirtieth Session of COFI concerning progress with the implementation of its capacity-development work to support port State measures.

The Committee supported the statement concerning the Agreement by the Africa Group that requested the Committee to support the rapid implementation and entry into force of the Agreement. The Committee requested FAO to form an open-ended working group or similar mechanism to draft terms of reference for the ad hoc working group envisioned in Article 21 of the Agreement. This group would also assess capacity needs and explore funding mechanisms.

## **5.2 FAO initiatives to promote capacity development in port State measures**

FAO has a fundamental commitment to capacity development. Since its inception in 1945, FAO has promoted human resource development and institution strengthening in developing countries, recognizing that they were key components to facilitate national social and economic development in agriculture, forestry and fisheries. Capacity development in fisheries and aquaculture is of fundamental concern to COFI. Reports of COFI sessions stress the importance of encouraging and assisting fisheries management and promoting the development of aquaculture in a long-term sustainable and responsible manner.

In 2006, FAO mounted a global series of workshops to promote and encourage the implementation of port State measures as envisaged by FAO Members when COFI endorsed the FAO Model Scheme in 2005. The approach to, and methodology employed in, the workshops drew heavily on a previous

series of global workshops that FAO had supported for the implementation of the IPOA–IUU and the development of NPOAs to combat IUU fishing.<sup>132</sup>

The objective of the regional port State measures workshops was to develop national capacity and promote bilateral, subregional and/or regional coordination so that countries would be better placed to strengthen and harmonize port State measures and, as a result, implement the relevant IPOA–IUU tools, the 2005 FAO Model Scheme and the legally binding instrument on port State measures after it was negotiated and agreed. In this respect, the workshops were forward-looking in character. They were structured to obtain national information on port State measures from the participants prior to the workshop so that the information collected could be collated and analysed for use as teaching material in the workshops and to promote maximum engagement by participants with a sharp focus on group activities and problem-solving.

An important aspect of the workshops was that they were delivered in cooperation with regional partners. This was done to ensure that the workshops had a regional orientation and that there could be regional follow-up after they had been delivered. The synergies between FAO and its regional partners in the delivery were extremely effective. Regional partners that participated in the delivery of the workshops included the Association of South East Asian Nations, CCAMLR, Asia Pacific Fisheries Commission, General Fisheries Commission for the Mediterranean (GFCM), Fishery Committee for the Eastern Central Atlantic (CECAF), International Commission for the Conservation of Atlantic Tunas (ICCAT), Indian Ocean Commission (IOC), IOTC, Pacific Islands Forum Fisheries Agency (FFA), Southeast Asian Fisheries Development Center (SEAFDEC) and Western and Central Pacific Fisheries Commission (WCPFC). Many of the host and participating governments and some regional partners contributed financially and in kind – especially in terms of funding their experts and organizing field study tours – to the workshops. Donors supporting the workshops included the Government of Norway through the FAO Trust Fund for Port State Measures, a consortium of donors through the FAO FishCode Programme, the Government of the United States of America, and Department for International Development of the United Kingdom of Great Britain and Northern Ireland. The FAO Regular Programme contributed heavily in terms of staff time and travel costs.

The assessments of the workshops by participants were, for the most part, very positive. Assessments were undertaken at the conclusion of each meeting and they confirmed the expected outcomes that were to: raise participants' awareness of the deleterious effects of IUU fishing and the need for strengthened and coordinated port State measures, so that countries may act in a concerted and decisive manner to prevent, deter and eliminate such fishing; assure the comprehensive understanding of the regional requirements and relevant international instruments, including the Model Scheme and the draft Agreement on Port State Measures, and their relation to participants' countries; reach a clear understanding of the role of administrative arrangements in maximizing the effectiveness of port State measures; identify clear steps that national fisheries administrations might take to develop port State measures that implement relevant measures in the IPOA–IUU, the 2005 FAO Model Scheme and the legally-binding instrument on port State measures; and build shared understanding and harmonization, as appropriate, of port State measures needed in the subregion to prevent, deter and eliminate IUU fishing.

Appendix 2 provides a summary of the capacity-development workshops. A total of 195 persons, 18 percent of whom were women, from 84 countries, 1 territory and the European Community participated in the workshops. It was not possible to conduct workshops in Latin America and the Caribbean owing to a lack of funds and the relatively fast pace at which the 2009 FAO Port State Measures Agreement was concluded.

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<sup>132</sup> See Annex VI for details of the workshops in Hosch, G. 2009. *An analysis of the implementation and impact of the FAO Code of Conduct for Responsible Fisheries*. FAO Fisheries and Aquaculture Circular No. 1038. Rome, FAO. 99 pp.

FAO has commenced a programme to raised funds to fund the conduct of further workshops based on the 2009 FAO Port State Measures Agreement. The availability of non-FAO resources to support human resource development in port State measures is the major constraint to initiating the workshops. The focus of the new round of workshops will be on the practical aspects of the Agreement's implementation.

An as independent initiative, but in collaboration with FAO, FFA Members sought funding from the Part VII Assistance Fund under the 1995 UN Fish Stocks Agreement to convene a workshop on port State measures in September 2010 in Honiara, Solomon Islands. Its aim was to raise awareness among FFA members about the 2009 FAO Agreement on Port State Measures and identify an appropriate framework for the implementation of port State measures including the elements of the proposed WCPFC Port State Conservation and Management Measures.

### **5.3 Summary comments**

Capacity development is an ongoing concern in developing countries for all sectors of the economy. The fisheries sector presents particularly fast-moving challenges to develop and maintain human capacity, given the rapid proliferation of internationally agreed instruments in the past two decades, advances in technology and profit motives that contribute to promoting and sustaining IUU fishing leading to dwindling fish stocks and damage to the ecosystem.

In order for the intentions in the instruments to become realities in everyday life, countries need adequately trained human resources to address the three stages of development and implementation: (i) participating in their development, including at the subregional and regional levels; (ii) developing strategies, plans and laws at the national level to implement the agreed provisions; and (iii) operationalizing the agreed rights, duties and obligations.

These three interrelated needs have been recognized in the instruments themselves, and the increasing participation of developing States in their negotiation and development has led to increasingly sophisticated mechanisms to be established for the next two stages. In addition to requirements in some instruments for the establishment of funding mechanisms to support capacity development, FAO and other donors have channelled a significant amount of resources to support their implementation in all regions of the world.

The Agreement contains a forward-looking mechanism for assistance to developing countries, and, at the time of writing, preparatory work is under way aiming at the future implementation of the provision.

Prior to and during the four sessions of the Technical Consultation to negotiate the Agreement, FAO presented a series of capacity-development workshops that spanned many regions and kept pace with the issues as they were discussed and agreed in the negotiations. At the time of writing, efforts are under way to raise funds for a new global series of capacity development to focus on the practical aspect of the Agreement's implementation.

## **6. CONSTRAINTS AND CHALLENGES TO THE IMPLEMENTATION OF THE 2009 FAO PORT STATE MEASURES AGREEMENT**

### **6.1 Introduction**

There are many constraints and challenges to the implementation of the 2009 FAO Port State Measures Agreement, particularly for developing countries. This is implicit in Article 21(4) of the Agreement, which calls on Parties to cooperate to establish funding mechanisms to assist developing States in the implementation of the Agreement. The mechanisms are to be directed specifically towards: (i) developing national and international port State measures; (ii) developing and enhancing capacity, including for MCS and for training at the national and regional levels of port managers, inspectors, and enforcement and legal personnel; and (iii) MCS and compliance activities relevant to port State measures, including access to technology and equipment.

One of the outcomes of the global series of FAO Regional Workshops to improve human and technical capacity for countries to strengthen and coordinate their port State measures, described in Sections 1.3 and 5.2 (above), was to identify clear steps that national fisheries administrations might take to develop port State measures. In this context, working groups in each of the Workshops identified constraints to the development of port State measures and proposed ways to overcome the constraints.

The constraints identified were generally consistent throughout the various regions. They related mainly to institutional arrangements, technical requirements, legal considerations, financial needs, human resource development, and regional and international concerns. They form the basis for the elaboration of constraints and challenges below.

### **6.2 Key constraints and challenges**

*Institutional arrangements.* These are regarded as a constraint from various points of view. A major concern is the need for stronger interagency relationships. In many governments, this is caused by unclear mandates of agencies and lack of interagency cooperation, and results in a poor exchange of information or lack of information sharing. For example, there should be clear lines of authority and decision-making between the agency responsible for fisheries and those responsible for broader port controls, general enforcement matters, legal decision-making (e.g. as to whether there is sufficient evidence of IUU fishing) and, as appropriate, market-related measures.

In this regard, identification of mechanisms for enhanced coordination and cooperation are always a challenge but could be achieved, for example, through development of a national strategy or policy with provisions for a consultative mechanism. They should ensure that information can be exchanged and verified and that decisions can be taken in a timely manner.

Another serious problem is the lack of infrastructure and resources to implement the Agreement. In particular, the challenge is to ensure that government agencies have:

- clear mandates that cover all activities under the Agreement;
- human capacity with the mandates and training required to implement the Agreement including senior fisheries managers, legal personnel, inspectors and enforcement officers;
- databases containing a wide range of information described under Technical Requirements, below; and
- the capability for effective follow-up of inspections.

The availability of financial resources for such infrastructure and resources can be a major constraint, especially for developing countries, so eligible countries should seek support including from bilateral or multilateral donor or technical assistance programmes, including the mechanisms described in Chapter 5.

Finally, port facilities themselves may not be adequate for the operational aspects, and the challenges would include cooperating with the broader port authority and identifying necessary financial resources to ensure that suitable facilities are provided.

*Technical requirements – information systems.* The technical constraints most often identified in the FAO regional workshops related to the lack of information systems and need for improved information exchange. The information system requirements under Annex D in the Agreement include seeking to establish computerized communication, establishing Web sites to publicize the list of designated ports and actions taken under the Agreement, identification of each inspection report by a unique reference number, and using a designated international coding system.

In addition, integrated databases and information systems are needed for quick and effective decision-making, particularly when considering whether a vessel should be allowed to enter port or, once in port and possibly before inspection, whether the use of port should be denied. A related constraint is the general lack of information technology resources.

In this respect, the challenge is to establish an integrated information system so that officials or inspectors can access a broad range of information easily and swiftly, including the following:

- requirements of flag States and coastal States for authorizations for fishing or related activities;
- RFMO IUU vessel lists;
- RFMO conservation and management measures;
- VMS information;
- observer programme information (national and regional);
- lists of contacts/network of focal points of other States, RFMOs, FAO and other organizations;
- activities involving transshipment at sea;
- historical information on vessels; and
- vessel information required by broader port control authorities.

Collecting the required information from foreign vessels can also be a constraint because of language barriers, and language was also identified as a constraint for international communication and participation. The challenge is to minimize the barriers through such means as language training, interpreters and language cards.

Flag States may be called upon to provide information to the port State at different points of time, including prior to the vessel's entry, after entry and after inspection. If at any time the port State finds that there are clear grounds to suspect IUU fishing or related activities, it must communicate this to the flag State, which then must decide whether to investigate or to request further actions by the port State. In addition, the flag State may be asked to confirm that the catch on board was taken in accordance with RFMO measures. In any of these situations, where there is no response from the flag State within a reasonable period of time, the port State could face constraints in determining whether there was clear evidence that the vessel had engaged in IUU fishing or related activities and therefore in taking appropriate measures. It could severely hamper the effective implementation of the Agreement by the port State.

The challenge in such circumstances would be for the port State, recognizing that there are some flag States that do not discharge their responsibilities to exercise control over their vessels, to develop guidelines or procedures that would specify the time frame within which the flag State should respond, inform the flag State of such a time frame, and, if no response is received, to identify actions that should be taken.

*Legal considerations.* The constraints relating to legal considerations in implementing the Agreement range from the national to international levels. It is emphasized that countries may apply the

Agreement provisionally before it enters into force, or may implement its terms without being a Party. The legal considerations are therefore relevant in such circumstances.

It was believed by some participants at the FAO regional workshops that there was limited awareness about evolving international law in their countries, including the Agreement and other fisheries instruments described in Chapter 1. At the regional level, many countries face constraints in ensuring full and effective legal implementation of measures and decisions of RFMOs in which they participate. These situations may result in the failure of national law to implement legally international and regional instruments and obligations.

An associated problem is that national law could be inconsistent with requirements in the Agreement and associated instruments. To meet these challenges, it would be important to consider the legal checklist in Appendix 9 against national legislation, and identify gaps, inconsistencies and proposed revisions.

More broadly, the lack of integration of legislative requirements into national policy was cited in the FAO regional workshops as a constraint to prioritizing legal implementation. The challenge for meeting these constraints would include reviewing national policy initiatives in the context of the policy checklist in Appendix 9 and ensuring that legal implementation of port State measures forms part of a broader national policy to combat IUU fishing and related activities.

Importantly, a significant constraint for some countries is a generally weak or inadequate legal framework. Fisheries and related laws are sometimes very old and pre-date the international instruments developed since the mid-1990s. This occurs to a greater extent in developing countries, and the challenge is to seek legal assistance from donor countries or organizations to review and update legislation. It should provide a firm basis for actions required under the Agreement, including follow-up actions to inspections. An accompanying and ongoing challenge is to promote the political will needed to adopt the new legislation.

Another broad-based legal consideration at the national level is the inadequacy of penalty levels and the inconsistency of such levels throughout a region. This does not serve as an adequate deterrent and could jeopardize or dilute the outcomes of the MCS operations. One challenge is to address penalty levels on a regional basis to promote their impact, consistency and effectiveness.

National legislation on confidentiality can be a constraint where information is needed, for example, on fishing areas and such information is deemed to be confidential even for purposes of taking measures in relation to fishing beyond areas of national jurisdiction. Confidentiality laws should therefore be reviewed to ensure that such information can be released for purposes of taking port State measures by the national government, coastal State or flag State.

At the regional level, a broad-based constraint is the limited number of bilateral and/or multilateral arrangements between coastal States in many regions, as well as the lack of harmonization or inconsistency of legislation. There is great potential for arrangements that cover areas such as joint or reciprocal enforcement matters and information exchange. As noted in Chapter 4, adoption of Lacey Act-type provisions, which prohibit the import, sale and other activities relating to fish that are taken in violation of the laws of another country, can enhance bilateral or multilateral arrangements.

A related constraint is the lack of harmonization of laws in a region, and the challenge is for countries to seek harmonization through the implementation of the Agreement as a minimum standard.

*Financial needs.* The lack of financial means, which provide the support for all activities to implement the Agreement, may be considered as one of the most formidable constraints. It was identified as a constraint by participants in all of the FAO regional workshops.

However, it should be recognized that port State measures offer one of the most cost-effective ways of combating IUU fishing. Other MCS tools, such as at-sea patrols and aerial surveillance, are far more

expensive and, while they are complementary tools, they may not be as productive in identifying vessels that have been engaged in IUU fishing or related activities. Vessel owners would lose revenue if they were denied landing privileges and other services, necessitating additional port calls, and/or if they had to submit to an expensive legal process, substantial fines or penalties and other measures in the port State.

In this light, the challenge is to estimate the cost of operations for port State measures and the resulting benefits for fisheries management, and consider it as part of an overall national strategy for prioritization of financial resources and/or requests for assistance by developing countries and/or partnerships to meet the needs. The bottom line is the sustainability of the fish stocks and the success in combating IUU fishing.

Under certain circumstances, the port State may have recourse through the national legal process against a non-national vessel that has engaged in IUU fishing or related activities. In such cases and where there is applicable national law, prosecutions could be undertaken, deterrent levels of fines and penalties could be sought, and the port State could seek payment from the vessel owner for all expenses involved in the legal action. In this regard, some examples of relevant circumstances are:

- where the vessel has undertaken IUU fishing in the port State's waters;
- where the vessel has not complied with reporting or other requirements, or not given true, complete and accurate information as required by national law;
- where the port State has adopted Lacey Act-type legislation;
- under a bilateral or multilateral arrangement that provides for port State enforcement of the relevant violation;
- pursuant to relevant measures under an RFMO;
- where the flag State requests the port State to take legal action; and
- where the port State imposes other measures consistent with international law.

An argument could probably be made that denial of port entry or port services does not contribute to the financial needs of the country because it results in a loss of revenue to the economy and in particular to the suppliers of relevant services. However, the port State stands to lose much more than it would gain by allowing entry or use of services in specified circumstances. The reason for this is the actions and measures that the international community may take against States with "ports of convenience".

For example, Article 20 of the Agreement requires flag State Parties to encourage vessels entitled to fly their flag to land, transship, package and process fish, and use other port services, in ports of States that are acting in accordance with, or in a manner consistent with, the Agreement. Parties are encouraged to develop, including through RFMOs and FAO, fair, transparent and non-discriminatory procedures for identifying any State that may not be acting in accordance with, or in a manner consistent with, the Agreement.

*Market State measures.* These measures are being used increasingly to combat IUU fishing. Their purpose is to prevent IUU-caught product from entering national and international markets. These measures can include the banning of products from States found to be undermining conservation and management measures, or rejecting shipments that lack the required documentation of their legal provenance. Initially, trade measures to combat IUU fishing were implemented mainly by RFMOs but they have now been implemented at the regional level by the EU and nationally by the United States of America. The international community accepts that market State measures can be a powerful tool against IUU fishing without creating unnecessary or hidden barriers to trade.

The EU Council Regulation on IUU fishing entered into force in January 2010.<sup>133</sup> Its purpose is also to dissuade “port of convenience” behaviour. The IUU Regulation contains a catch certification scheme that is intended to improve the traceability of all marine fishery products traded with the European Community Members and facilitate the control of their compliance with conservation and management measures, in cooperation with third countries. The IUU Regulation prohibits trade with the EU in fishery products obtained from IUU fishing.<sup>134</sup>

The scheme was intended to establish a legal system at the international level to ensure that fishery products internationally traded stem from non-IUU catches. It contributes to closing the loophole that allowed products derived from IUU catches to compete virtually without any restriction with products obtained from legitimate catches. Blocking the movement of IUU-caught fish into ports and onto national and international markets should cost-effectively reduce the incentive for fishers to engage in IUU fishing or related activities.

In January 2009,<sup>135</sup> the United States of America produced its first biennial report<sup>136</sup> of countries identified as having vessels engaged in IUU fishing. This included a description of efforts taken by listed nations to take appropriate corrective action and a report of progress at the international level to strengthen the efforts of RFMOs against IUU fishing. The United States of America also sought to strengthen RFMOs to address IUU fishing through the adoption of IUU vessel lists, stronger port State controls, market-related measures, and other actions. The approach of the United States of America provides that once a country has been identified as having vessels engaged in IUU fishing, the United States of America will work with and encourage identified countries to take appropriate corrective action to address IUU fishing. The absence of steps by these countries to take remedial action against IUU fishing may lead to prohibitions on the importation of certain fisheries products into the United States of America.

*Human resource development.* The FAO regional workshops identified a wide range of constraints relating to human resource development. These included: the lack of trained personnel; inadequately trained personnel (including MCS officers, legal officers and other stakeholders); and insufficient training programmes. These must all be addressed, and Chapter 5 demonstrates the will of the international community to do so.

However, a consideration not often recognized, or overlooked, by some members of the international donor community is that capacity-building activities are inherently long-term in character, especially those activities that are not highly task-specific. This is because 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 capacity development are exacerbated in situations where there is a high degree of staff turnover. This is typically an issue in small-island developing States, for example, where trained and skilled persons from ministries of fisheries are promoted within government, move to the private sector or migrate overseas.

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<sup>133</sup> Council Regulation No. 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing.

<sup>134</sup> Fishery products can only be imported into the Community when accompanied by a catch certificate. Through this instrument, the competent authorities of the flag State of the catching vessel must certify that the catches concerned have been made in accordance with applicable laws, regulations and international CMMs. This certificate must be validated by the competent authority of the flag State and, if necessary, other documents envisaged by the certification scheme in the event of an indirect import after transshipment, transit or processing of the products in another country.

<sup>135</sup> See Title IV of the Magnuson-Stevens Fishery Conservation and Management Act, available at: [www.nmfs.noaa.gov/msa2005/docs/MSA\\_amended\\_msa%20\\_20070112\\_FINAL.pdf](http://www.nmfs.noaa.gov/msa2005/docs/MSA_amended_msa%20_20070112_FINAL.pdf)

<sup>136</sup> In its initial report, the United States of America identified six nations whose fishing vessels were engaged in IUU fishing. The identification has been followed by consultations to urge those nations to adopt corrective measures. Following consultations, the United States of America will formally certify each of the six nations, either as adopting effective measures to stop IUU fishing, or as having vessels still engaged in IUU fishing. If a nation is found to be still engaged in IUU fishing, that nation’s vessels may be denied entry into United States ports, and imports of certain fish products from that nation may be prohibited.

*Regional fisheries management organizations and arrangements.* Several RFMOs have adopted a variety of measures for port controls over the years, as shown in Appendix 5, and at the time of writing one RFMO, the IOTC, has adopted almost all of the relevant provisions of the Agreement.<sup>137</sup> As other RFMOs follow this precedent, the challenge will be for members to implement the policy, legal, institutional and operational aspects at the national level and ensure training of relevant personnel. Such implementation by developing countries could be supported by international assistance, along the lines of that provided by the EU for five IOTC ACP Members under the ACP Fish II Programme.<sup>138</sup>

However, a deeper problem exists in some RFMOs where Members do not have the capacity, or at times the political will, to implement many of the measures and decisions taken at the regional level. This challenge is being met in part through assistance programmes established in the RFMOs, for example to strengthen data reporting and exchange and implementation of relevant recommendations of performance review panels.

A potential constraint for non-participants in RFMOs is swift and easy access to information needed by managers as a prerequisite for taking port State measures, such as whether a vessel is on an IUU vessel list or the applicable conservation and management measures. Most RFMOs have clear and current information on their Web sites, and the tuna RFMOs have a joint Web site<sup>139</sup> that consolidates information relevant to port State measures, including IUU vessel lists and authorized vessel lists. The challenge would be to develop a mechanism for “one-stop shopping” containing information held by RFMOs that national managers would need to make decisions on port control. It could be universal or as a first step could operate according to the relevant region, mandate, geography or species of RFMOs.

A major constraint exists where there are no RFMO/As, or even MCS networks at the regional or subregional levels. This may result in the absence of uniform guidelines and objectives for the region and weak cooperation and communication between countries. The challenge in such cases is to explore possibilities through other means, as is undertaken in the Southern African Development Community region for the establishment of an MCS network, or in Lake Victoria and the Southeast Asian region through the development of regional plans of action to combat IUU fishing.

### **6.3 Summary comments**

The constraints discussed are interrelated and not insurmountable. Political will and good governance are essential prerequisites to meet the challenges of overcoming the constraints. Although, in many cases, the FAO regional workshops identified the lack of political will and good governance as a major constraint, a need for raising awareness was also indicated as a possible solution to overcoming the problems.

The international community has successfully continued and expanded the process of awareness-raising about the adverse impacts of IUU fishing on long-term sustainable fisheries management and the benefits of port State measures as a cost-effective means to combat such fishing. This is reflected in the number of FAO Members that had signed or acceded to the Agreement and had their domestic processes in train for the ratification, acceptance, approval or accession to the Agreement at the time of writing. In addition, several countries have undertaken legal reviews, and implementation at the regional level has been broadening.

The various constraints described may always exist, but knowledge of the problems and identification of challenges that should be addressed in achieving solutions will contribute to overcoming the obstacles. They must be addressed comprehensively and in different, mutually reinforcing ways.

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<sup>137</sup> IOTC Resolution 10/11, which entered into force on 1 March 2011.

<sup>138</sup> Strengthening implementation of the IOTC Port State Measures Resolution through assessment and training in five countries: Kenya, Mauritius, Mozambique, Seychelles and the United Republic of Tanzania.

<sup>139</sup> Available at: <http://tuna-org/>

## 7. CONCLUSIONS

The relationship between a vessel offloading fish at port and an international negotiation at a UN organization may seem remote, and the connection almost incomprehensible. The vessel master is interested in maximizing profit while the international community is interested in the long-term sustainable use of the fisheries resource and marine ecosystem as well as broader related issues such as vessel safety, pollution, and equitable and just employment conditions for workers on fishing vessels.

The vessel master must comply with many requirements imposed by the laws and procedures of the flag State, the coastal State and the port State, and through them applicable RFMOs. It is well known that this does not always happen and that flag States, in particular those States that are considered to offer vessels flags of non-compliance, are often unable or unwilling to exercise the necessary control over their vessels.

The international community must assess a range of issues and problems including those associated with vessel non-compliance, the effectiveness of existing or potential tools to combat IUU fishing and related activities, and the potential need for human capacity. The international community must agree on the way forward before it is too late and irreparable damage is done to the fisheries resources. Agreement on voluntary guidelines and schemes could result in a broader array of actions and measures that should be taken, but this path may or may not result in strengthened requirements at the national level. However, it is often necessary, as a first step, to focus on voluntary approaches that may lead towards strengthened political will to conclude and implement a binding instrument.

In the case of port State measures, and considering the compelling need for this tool as shown by its status in post-UNCED fisheries instruments and support in international fora and RFMOs, the international community agreed on a binding, comprehensive legal and operational framework that can be practically and realistically implemented by all countries.

The process for the conclusion of the 2009 FAO Port State Measures Agreement took into account a wide range of issues. Some of them presented difficulties in reaching agreement but they were not insurmountable. The approval of the Agreement by the FAO Conference in November 2009 marked a noticeable movement away from the traditional international approach that the flag States had the primary responsibility for effectively controlling their vessels. This was recognized by the international community, and despite its broad endorsement in international law, flag State performance was simply not working.

In fact, port State measures in the 1982 UN Convention were not directed at fishing vessels, so it was clearly time to elaborate an instrument to fill this gap. It was also timely to establish communication requirements that employed modern technology and information systems, including real-time exchange of information.

States must take policy, legal and operational measures to implement the Agreement. They are logical and can be approached on a step-by-step basis, as shown in the text above and in the checklists in Appendix 9. Ideally, the measures should form part of a coherent and integrated national strategy for implementation. The legal provisions build on existing law and practice, and the objective of using the Agreement as a minimum standard does not prevent States from taking more stringent measures.

To promote the implementation of the Agreement broadly, and particularly in developing States, capacity development is acknowledged as a clear priority, particularly through the inclusion in the Agreement of a robust mechanism for assistance to developing countries. This has precedent in similar mechanisms contained in other fisheries instruments. In addition, capacity-development initiatives by FAO and other donors, including the series of forward-looking FAO regional workshops on port State measures, have reached a wide audience. Many participants in those workshops have already used the training in the processes to negotiate and implement the Agreement.

Adoption and entry into force of the Agreement represent another new beginning in the efforts to combat IUU fishing and related activities. There are many constraints that countries face in their efforts to ensure that the agreed framework will directly affect the masters of the fishing vessels at port – as well as the others associated with them such as the owners, exporters and processors involved in IUU fishing activities. In this respect, the objective of this publication is not only to guide the implementation of the Agreement through providing a clear understanding of its background, objective and requirements. It is also to offer support where obstacles may be confronted, and identify actions that may be taken to overcome them.

The Agreement promises to be a powerful tool to meet its objective, that 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. As this is achieved, the vessels and associated businesses can hope to enjoy sustainable profit and, most importantly, the contribution of fisheries to global food security can be better assured.

Finally, the Agreement on its own cannot be expected to solve the world's IUU fishing problems. They must be addressed comprehensively and in different, mutually reinforcing ways. However, blocking the movement of IUU-caught fish into ports and onto national and international markets as well as making the operations of vessels engaged in IUU fishing more difficult should reduce cost-effectively the incentive for fishers to take part in such fishing and related activities.

## **THE 1999 ROME DECLARATION ON THE IMPLEMENTATION OF THE CODE OF CONDUCT FOR RESPONSIBLE FISHERIES**

**Adopted by the FAO Ministerial Meeting on Fisheries  
Rome, 10–11 March 1999**

1. At the invitation of the Director-General of FAO, the Ministers responsible for fisheries met in Rome on 10 and 11 March 1999 as a sign of their attachment to the implementation of the Code of Conduct for Responsible Fisheries adopted by the FAO Conference at its Twenty-eighth Session in October 1995. In this regard, the Ministerial Meeting was especially appreciative of FAO's role in promoting the application of the Code of Conduct for Responsible Fisheries and the increasingly wide adoption of the Code by States and concerned organizations.
2. The Ministerial Meeting emphasized that the achievement of the sustainable management of both capture fisheries and aquaculture was of great importance for world food security, for the attainment of national economic and social goals and for the well-being and livelihoods of individuals and families involved in fisheries. It was thus concerned that many of the world's major marine fishery resources were subject to overfishing, destructive and wasteful fishing practices and excess capacity, resulting in a reduction in yields and economic returns. It was similarly concerned at the growing amount of illegal, unregulated and unreported fishing activities being carried out, including fishing vessels flying 'flags of convenience', as discussed in paragraph 33 of Annex G of the Report of the Consultation on the Management of Fishing Capacity, Shark Fisheries and Incidental Catch of Seabirds in Longline Fisheries, that met in Rome in October 1998. In this regard, while pleased at the entry into force of the United Nations Convention on the Law of the Sea, the Meeting noted that only a small number of countries had so far ratified the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas and the United Nations Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.
3. The Ministerial Meeting recognized the growing importance of environmentally sound aquaculture as a source of fish supplies for human consumption and attached high priority to ensuring the contribution of sustainable aquaculture to food security, income and rural development.
4. The Ministerial Meeting welcomed the adoption by the FAO Committee on Fisheries at its Twenty-third Session in February 1999 of International Plans of Action, within the framework of the Code of Conduct, for the Management of Fishing Capacity, for the Conservation and Management of Sharks and for Reducing Incidental Catch of Seabirds in Long-line Fisheries.
5. It was recognized that the full implementation of the Code of Conduct and the Plans of Action required considerable resources and would be achieved neither quickly nor easily if measures already adopted are not pursued. Many countries require substantial further technical assistance and financial support, through multilateral and/or bilateral arrangements and through FAO, to assist them in applying the Code of Conduct and Plans of Action.
6. The Ministerial Meeting noted that greater consideration should be given to the development of more appropriate eco-system approaches to fisheries development and management.
7. The Ministerial Meeting noted that aspects of trade and environment related to fisheries and aquaculture need to be addressed within the framework of the Code of Conduct for Responsible Fisheries.
8. The Ministerial Meeting underlined the important role that regional fishery management organizations can play in respect of the implementation of the Code of Conduct.

9. The Ministerial Meeting noted the growing importance of recreational fishing and stressed the need for it to be conducted in a sustainable manner and consistent with the Code of Conduct for Responsible Fisheries.

10. The Ministerial Meeting noted that there were still articles of the Code of Conduct to be further developed such as post-harvest practices, the improvement of fishing operations, responsible trade and the promotion of research.

11. It recalled the importance of the Rome Declaration on World Food Security and the World Food Summit Plan of Action, especially paragraph 33(d), which refers to the Kyoto Declaration and Plan of Action, which were adopted in November 1996, which the Ministerial Meeting believed should be fundamental points of reference for the elaboration of the FAO Strategic Framework 2000–2015.

12. In conclusion, the Ministerial Meeting made the following Declaration on the Implementation of the Code of Conduct for Responsible Fisheries.

We, the Ministers<sup>1</sup> and Ministers' representatives meeting in Rome on 10 and 11 March 1999, declare that, without prejudice to the rights and obligations of States under international law:

a) Affirm that FAO and its governing bodies make an essential contribution to international fisheries governance and that, together with regional fishery management bodies, FAO is the most appropriate forum for addressing vital global fisheries issues and accordingly call on the Organization to assign higher priority and increased share of FAO's regular programme resources to its fisheries programme activities;

b) Stress the continued high priority placed upon implementing the Rome Declaration on World Food Security and the World Food Summit Plan of Action;

c) Accord highest priority to achieving sustainability of both capture fisheries and aquaculture within the framework of the ecosystem approach, bearing in mind the special circumstances and needs of developing countries, in particular the small island developing States;

d) Will collaborate with other States and relevant intergovernmental and non-governmental organizations and financial institutions to promote the effective implementation of the Code of Conduct for Responsible Fisheries;

e) Encourage FAO to develop further technical guidelines on various aspects of the Code of Conduct in order to support its national implementation;

f) Attach high priority to the implementation of the International Plans of Action for the Management of Fishing Capacity, for the Conservation and Management of Sharks and for Reducing Incidental Catch of Seabirds in Longline Fisheries and to the putting into place within the framework of national plans, measures to achieve a balance between harvesting capacity and available fisheries resources;

g) Ask FAO to continue its efforts to strengthen the functions and responsibilities of FAO regional fishery bodies and their cooperation with other regional fishery management bodies in order to effectively implement the Code of Conduct;

h) Will take necessary actions on a priority basis to become Parties to the UN Convention on the Law of the Sea, the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas and the United Nations Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks so that their entry into force will be possible;

- i) Urge FAO to aid developing countries as they seek to implement the Code of Conduct and invite donor agencies and funding institutions to increase their technical assistance and financial support to this end;
- j) Will develop a global plan of action to deal effectively with all forms of illegal, unregulated and unreported fishing including fishing vessels flying 'flags of convenience', as discussed in paragraph 33 of Annex G of the Report of the Consultation on the Management of Fishing Capacity, Shark Fisheries and Incidental Catch of Seabirds in Longline Fisheries, which met in Rome in October 1998, through coordinated efforts by States, FAO, regional fishery management bodies and other relevant international agencies such as the International Maritime Organization (IMO), as provided in Article IV of the Code of Conduct;
- k) Will address aspects of trade and environment related to fisheries and aquaculture within the framework of the Code of Conduct for Responsible Fisheries;
- l) Call upon all users of fisheries resources to apply the Code of Conduct for Responsible Fisheries;
- m) Encourage FAO to continue to place emphasis in its Strategic Framework 2000–2015 on partnerships and interdisciplinarity as part of FAO's efforts to build upon its comparative advantage;
- n) Will work together, through FAO and in collaboration with all other organizations concerned with fisheries, to seek the optimum and sustainable use of the world's fishery resources, to reduce wastage and destructive fishing practices by promoting responsible fisheries practices, effective and integrated fisheries monitoring, an ecosystem approach to fisheries management and encouraging the further growth in sustainable aquaculture, thus securing the contribution of fisheries to national economic and social goals and to the attainment of world food security.

**SUMMARY OF CAPACITY DEVELOPMENT WORKSHOPS TO ENHANCE THE IMPLEMENTATION OF PORT STATE MEASURES TO PREVENT, DETER AND ELIMINATE IUU FISHING AND IN PARTICULAR TO SUPPORT THE IMPLEMENTATION OF THE 2005 FAO MODEL SCHEME TO COMBAT ILLEGAL, UNREPORTED AND UNREGULATED FISHING**

**FAO/FFA regional workshop to promote the full and effective implementation of port State measures to combat illegal, unreported and unregulated fishing, Nadi, Fiji, 28 August–1 September 2006**  
**FAO Fisheries Report No. 810. Rome, FAO. 2007. 198 pp.**  
**(also available at [www.fao.org/docrep/009/a0912e/a0912e00.htm](http://www.fao.org/docrep/009/a0912e/a0912e00.htm))**

<b>Purpose</b>	To develop national capacity and promote regional coordination so that countries would be better placed to strengthen and harmonize port State measures and to meet the requirements of relevant RFMOs and to implement relevant IPOA–IUU tools and the 2005 FAO Model Scheme on Port State Measures
<b>Number of participants</b>	Male: 19; Female: 8; Total: 27
<b>Technical cooperating partner organizations</b>	Pacific Islands Forum Fisheries Agency and Western Central Pacific Fisheries Commission
<b>Funding sources and partners</b>	FAO Regular Programme, FishCode Programme, Pacific Islands Forum Fisheries Agency, the Western and Central Pacific Fisheries Commission, the Western Pacific regional Fisheries Management Council and the Governments of the Federated States of Micronesia, New Zealand, Tokelau, Tonga, United States of America and Vanuatu
<b>Countries and territories represented and statistics (excluding FAO staff)</b>	Cook Islands, Federated States of Micronesia, Fiji, Guam, Kiribati, New Zealand, Niue, Nauru, Marshall Islands, Palau, Papua New Guinea, Northern Mariana Islands, Samoa, Solomon Islands, Tokelau, Tonga and Vanuatu.

**IOC/FAO/IOTC symposium and workshop to strengthen port State measures in the Indian Ocean, Port Louis, Mauritius, 18–22 June 2007**  
**FAO Fisheries Report No. 844. Rome, FAO. 2007. 69 pp.**  
**(also available at [www.fao.org/docrep/010/a1342e/a1342e00.htm](http://www.fao.org/docrep/010/a1342e/a1342e00.htm))**

<b>Purpose</b>	To raise general awareness about the potential effectiveness of strengthened and coordinated port State measures and to develop national capacity and promote regional coordination so that countries will be better placed to improve management of offshore fisheries and combat IUU fishing in the Indian Ocean region and, as a result, meet the requirements of relevant RFMOs
<b>Number of participants</b>	Male: 38; Female: 10; Total: 48
<b>Technical cooperating partner organizations</b>	Indian Ocean Commission, the Indian Ocean Tuna Commission, Pacific Islands Forum Fisheries Agency and Commission for the Conservation and Management of Marine Living Resources
<b>Funding sources and partners</b>	FAO Regular Programme, FishCode Programme and the FAO Trust Fund for Port State Measures
<b>Countries and territories represented and statistics (excluding FAO staff)</b>	Comoros, India, Indonesia, Kenya, Madagascar, Maldives, Mauritius, Mozambique, Seychelles, Sri Lanka, Somalia and United Republic of Tanzania.

**FAO/GFCM Regional workshop on port State measures to combat illegal, unreported and unregulated fishing, Rome, Italy, 10–12 December 2007.**

**FAO Fisheries Report No. 857. Rome, FAO. 2008. 86 pp.**  
(also available at <ftp://ftp.fao.org/docrep/fao/010/i0074e/i0074e00.pdf>)

<b>Purpose</b>	To strengthen national capacity and to promote regional coordination with the view to facilitate the process toward consolidating and harmonizing port State measures by GFCM Members and the implementation of the relevant provisions of the 2005 General Guidelines for a GFCM Control and Enforcement Scheme; the GFCM recommendations relating to vessel monitoring systems and transshipment and the FAO Model Scheme. To follow-up on the outcomes of the 2004 GFCM Workshop on Illegal, Unreported and Unregulated Fishing in the Mediterranean.
<b>Number of participants</b>	Male: 17; Female: 3; Total: 20
<b>Technical cooperating partner organizations</b>	General Fisheries Commission for the Mediterranean
<b>Funding sources and partners</b>	FAO Regular Programme, FishCode Programme, the FAO Trust Fund for Port State Measures and the General Fisheries Commission for the Mediterranean
<b>Countries and territories represented and statistics (excluding FAO staff)</b>	Albania, Algeria, European Community, Egypt, France, Italy, Malta, Montenegro, Morocco, Spain, Syrian Arab Republic, Tunisia and Turkey.

**FAO regional workshop on port State measures to combat IUU fishing, Cape Town, South Africa, 28–31 January 2008.**

**FAO Fisheries Report No. 859. Rome, FAO. 2008. 42 pp.**  
(also available at <ftp://ftp.fao.org/docrep/fao/010/i0049e/i0049e00.pdf>)

<b>Purpose</b>	To develop national capacity and promote bilateral, subregional and/or regional coordination so that countries will be better placed to strengthen and harmonize port State measures and, as a result, implement the relevant IPOA–IUU tools and the 2005 FAO Model Scheme and contribute to the development of a legally binding instrument on port State measures.
<b>Number of participants</b>	Male: 15; Female: 7; Total: 22
<b>Technical cooperating partner organizations</b>	Southern African Development Community, Commission for the Conservation of Antarctic Marine Living Resources, International Commission for the Conservation of Atlantic Tunas, South East Atlantic Fisheries Organization
<b>Funding sources and partners</b>	FAO Regular Programme, FishCode Programme, FAO Trust Fund for Port State Measures and the Department for International Development (United Kingdom)
<b>Countries and territories represented and statistics</b>	Angola, Madagascar, Mauritius, Mozambique, Namibia, South Africa and United Republic of Tanzania.

**FAO/APFIC/SEAFDEC regional workshop on port State measures to combat IUU fishing, Bangkok, Thailand, 31 March–4 April 2008.**

**FAO Fisheries and Aquaculture Report No. 868. Rome, FAO. 2008. 79 pp.**

**(also available at <ftp://ftp.fao.org/docrep/fao/011/i0422e/i0422e.pdf>)**

<b>Purpose</b>	To develop national capacity and promote bilateral, subregional and/or regional coordination so that countries will be better placed to strengthen and harmonize port State measures and, as a result, implement the relevant IPOA–IUU tools and the FAO Model Scheme and contribute to the development of a legally binding instrument on port State measures. In this way, the Workshop will contribute directly to the implementation of the call to develop port State measures contained in the 2007 RPOA adopted by certain Southeast Asian and other States to combat IUU fishing
<b>Number of participants</b>	Male: 26; Female: 4; Total: 30
<b>Technical cooperating partner organizations</b>	Asia Pacific Fisheries Commission, Southeast Asian Fisheries Development Center and Association of South East Asian Nations
<b>Funding sources and partners</b>	FAO Regular Programme, FishCode Programme and FAO Trust Fund for Port State Measures
<b>Countries and territories represented and statistics</b>	Cambodia, China, Indonesia, Malaysia, Myanmar, Philippines, Singapore, Thailand, Timor-Leste, Viet Nam.

**FAO/APFIC regional workshop on port State measures to combat illegal, unreported and unregulated fishing for the South Asian Subregion.**

**Bangkok, Thailand, 10–13 February 2009.**

**FAO Fisheries and Aquaculture Report No. 896. Rome, FAO. 2009. 43 pp.**

**(also available at [www.fao.org/docrep/011/i0763e/i0763e00.htm](http://www.fao.org/docrep/011/i0763e/i0763e00.htm))**

<b>Purpose</b>	To develop national capacity and promote bilateral, subregional and/or regional coordination so that countries would be better placed to strengthen and harmonize port State measures and, as a result, implement further the 2001 FAO IPOA to Prevent, Deter and Eliminate IUU Fishing, the 2005 FAO Model Scheme on Port State Measures to Combat IUU Fishing and the Chairperson’s Draft Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing, if and when it enters into force.
<b>Number of participants</b>	Male: 10; Female: 0; Total: 10
<b>Technical cooperating partner organizations</b>	Asia Pacific Fisheries Commission
<b>Funding sources and partners</b>	FAO Regular Programme, FishCode and FAO Trust Fund for Port State Measures
<b>Countries and territories represented and statistics</b>	Bangladesh, India, Maldives, Pakistan, Sri Lanka.

**FAO/RECOFI workshop on combating illegal, unreported and unregulated fishing, Muscat, Oman, 30 March–2 April 2009.**

**FAO Fisheries Report No. 889. Rome, FAO. 2008. 65 pp.**

**(also available at [www.fao.org/docrep/011/i0664e/i0664e00.htm](http://www.fao.org/docrep/011/i0664e/i0664e00.htm))**

<b>Purpose</b>	To develop national capacity and promote regional coordination so that countries will be better placed to combat IUU fishing activities, including by development and implementation of relevant international fisheries instruments, taking appropriate measures at regional level and elaborating NPOAs–IUU.
<b>Number of participants</b>	Male: 11; Female: 0; Total: 11
<b>Technical cooperating partner organizations</b>	Indian Ocean Tuna Commission
<b>Funding sources and partners</b>	FAO Regular Programme and RECOFI Members
<b>Countries and territories represented and statistics</b>	Bahrain, Iran (Islamic Republic of), Iraq, Kuwait, Oman, Qatar, Saudi Arabia and United Arab Emirates.

**FAO/CECAF workshop on port State measures to combat illegal, unreported and unregulated fishing for the West African Subregion, Accra, Ghana, 9–12 June 2009.**

**FAO Fisheries Report No. 910. Rome, FAO. 2009. 43 pp.**

**(also available at [www.fao.org/docrep/012/i1106e/i1106e00.pdf](http://www.fao.org/docrep/012/i1106e/i1106e00.pdf))**

<b>Purpose</b>	To develop national capacity and promote bilateral, subregional and regional coordination so that countries would be better placed to strengthen and harmonize port State measures and, as a result, implement the relevant tools of the IPOA–IUU, the Model Scheme and the 2009 Chairperson’s draft Agreement when it enters into force.
<b>Number of participants</b>	Male: 24; Female: 3; Total: 27
<b>Technical cooperating partner organizations</b>	Fishery Committee for the Eastern Central Atlantic
<b>Funding sources and partners</b>	FAO Regular Programme and FishCode
<b>Countries and territories represented and statistics</b>	Benin, Cape Verde, Côte d’Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mauritania, Nigeria, Senegal, Sierra Leone, Togo.

**2009 FAO AGREEMENT ON PORT STATE MEASURES TO PREVENT, DETER AND  
ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING**

**PREAMBLE**

The Parties to this Agreement,

*Deeply concerned* about the continuation of illegal, unreported and unregulated fishing and its detrimental effect upon fish stocks, marine ecosystems and the livelihoods of legitimate fishers, and the increasing need for food security on a global basis,

*Conscious* of the role of the port State in the adoption of effective measures to promote the sustainable use and the long-term conservation of living marine resources,

*Recognizing* that measures to combat illegal, unreported and unregulated fishing should build on the primary responsibility of flag States and use all available jurisdiction in accordance with international law, including port State measures, coastal State measures, market related measures and measures to ensure that nationals do not support or engage in illegal, unreported and unregulated fishing,

*Recognizing* that port State measures provide a powerful and cost-effective means of preventing, deterring and eliminating illegal, unreported and unregulated fishing,

*Aware of* the need for increasing coordination at the regional and interregional levels to combat illegal, unreported and unregulated fishing through port State measures,

*Acknowledging* the rapidly developing communications technology, databases, networks and global records that support port State measures,

*Recognizing* the need for assistance to developing countries to adopt and implement port State measures,

*Taking note of* the calls by the international community through the United Nations System, including the United Nations General Assembly and the Committee on Fisheries of the Food and Agriculture Organization of the United Nations, hereinafter referred to as 'FAO', for a binding international instrument on minimum standards for port State measures, based on the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing and the 2005 FAO Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing,

*Bearing in mind* that, in the exercise of their sovereignty over ports located in their territory, States may adopt more stringent measures, in accordance with international law,

*Recalling* the relevant provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, hereinafter referred to as the 'Convention',

*Recalling* 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 of 4 December 1995, the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas of 24 November 1993 and the 1995 FAO Code of Conduct for Responsible Fisheries,

*Recognizing* the need to conclude an international agreement within the framework of FAO, under Article XIV of the FAO Constitution,

*Have agreed as follows:*

**PART 1  
GENERAL PROVISIONS**

**Article 1  
Use of terms**

For the purposes of this Agreement:

- (a) “conservation and management measures” means measures to conserve and manage living marine resources that are adopted and applied consistently with the relevant rules of international law including those reflected in the Convention;
- (b) “fish” means all species of living marine resources, whether processed or not;
- (c) “fishing” means 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;
- (d) “fishing related activities” means 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, as well as the provisioning of personnel, fuel, gear and other supplies at sea;
- (e) “illegal, unreported and unregulated fishing” refers to the activities set out in paragraph 3 of the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, hereinafter referred to as ‘IUU fishing’;
- (f) “Party” means a State or regional economic integration organization that has consented to be bound by this Agreement and for which this Agreement is in force;
- (g) “port” includes offshore terminals and other installations for landing, transshipping, packaging, processing, refuelling or resupplying;
- (h) “regional economic integration organization” means a regional economic integration organization to which its member States have transferred competence over matters covered by this Agreement, including the authority to make decisions binding on its member States in respect of those matters;
- (i) “regional fisheries management organization” means an intergovernmental fisheries organization or arrangement, as appropriate, that has the competence to establish conservation and management measures; and
- (j) “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.

**Article 2  
Objective**

The objective of this Agreement 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.

### **Article 3 Application**

1. Each Party shall, in its capacity as a port State, apply this Agreement in respect of vessels not entitled to fly its flag that are seeking entry to its ports or are in one of its ports, except for:
  - (a) vessels of a neighbouring State that are engaged in artisanal fishing for subsistence, provided that the port State and the flag State cooperate to ensure that such vessels do not engage in IUU fishing or fishing related activities in support of such fishing ; and
  - (b) container vessels that are not carrying fish or, if carrying fish, only fish that have been previously landed, provided that there are no clear grounds for suspecting that such vessels have engaged in fishing related activities in support of IUU fishing.
2. A Party may, in its capacity as a port State, decide not to apply this Agreement to vessels chartered by its nationals exclusively for fishing in areas under its national jurisdiction and operating under its authority therein. Such vessels shall be subject to measures by the Party which are as effective as measures applied in relation to vessels entitled to fly its flag.
3. This Agreement shall apply to fishing conducted in marine areas that is illegal, unreported or unregulated, as defined in Article 1(e) of this Agreement, and to fishing related activities in support of such fishing.
4. This Agreement shall be applied in a fair, transparent and non-discriminatory manner, consistent with international law.
5. As this Agreement is global in scope and applies to all ports, the Parties shall encourage all other entities to apply measures consistent with its provisions. Those that may not otherwise become Parties to this Agreement may express their commitment to act consistently with its provisions.

### **Article 4 Relationship with international law and other international instruments**

1. Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of Parties under international law. In particular, nothing in this Agreement shall be construed to affect:
  - (a) the sovereignty of Parties over their internal, archipelagic and territorial waters or their sovereign rights over their continental shelf and in their exclusive economic zones;
  - (b) the exercise by Parties of their sovereignty over ports in their territory in accordance with international law, including their right to deny entry thereto as well as to adopt more stringent port State measures than those provided for in this Agreement, including such measures adopted pursuant to a decision of a regional fisheries management organization.
2. In applying this Agreement, a Party does not thereby become bound by measures or decisions of, or recognize, any regional fisheries management organization of which it is not a member.
3. In no case is a Party obliged under this Agreement to give effect to measures or decisions of a regional fisheries management organization if those measures or decisions have not been adopted in conformity with international law.
4. This Agreement shall be interpreted and applied in conformity with international law taking into account applicable international rules and standards, including those established through the International Maritime Organization, as well as other international instruments.

5. Parties shall fulfil in good faith the obligations assumed pursuant to this Agreement and shall exercise the rights recognized herein in a manner that would not constitute an abuse of right.

**Article 5**  
**Integration and coordination at the national level**

Each Party shall, to the greatest extent possible:

- (a) integrate or coordinate fisheries related port State measures with the broader system of port State controls;
- (b) integrate port State measures with other measures to prevent, deter and eliminate IUU fishing and fishing related activities in support of such fishing, taking into account as appropriate the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing; and
- (c) take measures to exchange information among relevant national agencies and to coordinate the activities of such agencies in the implementation of this Agreement.

**Article 6**  
**Cooperation and exchange of information**

1. In order to promote the effective implementation of this Agreement and with due regard to appropriate confidentiality requirements, Parties shall cooperate and exchange information with relevant States, FAO, other international organizations and regional fisheries management organizations, including on the measures adopted by such regional fisheries management organizations in relation to the objective of this Agreement.

2. Each Party shall, to the greatest extent possible, take measures in support of conservation and management measures adopted by other States and other relevant international organizations.

3. Parties shall cooperate, at the subregional, regional and global levels, in the effective implementation of this Agreement including, where appropriate, through FAO or regional fisheries management organizations and arrangements.

**PART 2**  
**ENTRY INTO PORT**

**Article 7**  
**Designation of ports**

1. Each Party shall designate and publicize the ports to which vessels may request entry pursuant to this Agreement. Each Party shall provide a list of its designated ports to FAO, which shall give it due publicity.

2. Each Party shall, to the greatest extent possible, ensure that every port designated and publicized in accordance with paragraph 1 of this Article has sufficient capacity to conduct inspections pursuant to this Agreement.

**Article 8**  
**Advance request for port entry**

1. Each Party shall require, as a minimum standard, the information requested in Annex A to be provided before granting entry to a vessel to its port.

2. Each Party shall require the information referred to in paragraph 1 of this Article to be provided sufficiently in advance to allow adequate time for the port State to examine such information.

### **Article 9** **Port entry, authorization or denial**

1. After receiving the relevant information required pursuant to Article 8, as well as such other information as it may require to determine whether the vessel requesting entry into its port has engaged in IUU fishing or fishing related activities in support of such fishing, each Party shall decide whether to authorize or deny the entry of the vessel into its port and shall communicate this decision to the vessel or to its representative.

2. In the case of authorization of entry, the master of the vessel or the vessel's representative shall be required to present the authorization for entry to the competent authorities of the Party upon the vessel's arrival at port.

3. In the case of denial of entry, each Party shall communicate its decision taken pursuant to paragraph 1 of this Article to the flag State of the vessel and, as appropriate and to the extent possible, relevant coastal States, regional fisheries management organizations and other international organizations.

4. Without prejudice to paragraph 1 of this Article, when a Party has sufficient proof that a vessel seeking entry into its port has engaged in IUU fishing or fishing related activities in support of such fishing, in particular the inclusion of a vessel on a list of vessels having engaged in such fishing or fishing related activities adopted by a relevant regional fisheries management organization in accordance with the rules and procedures of such organization and in conformity with international law, the Party shall deny that vessel entry into its ports, taking into due account paragraphs 2 and 3 of Article 4.

5. Notwithstanding paragraphs 3 and 4 of this Article, a Party may allow entry into its ports of a vessel referred to in those paragraphs exclusively for the purpose of inspecting it and taking other appropriate actions in conformity with international law which are at least as effective as denial of port entry in preventing, deterring and eliminating IUU fishing and fishing related activities in support of such fishing.

6. Where a vessel referred to in paragraph 4 or 5 of this Article is in port for any reason, a Party shall deny such vessel the use of its ports for landing, transshipping, packaging, and processing of fish and for other port services including, *inter alia*, refuelling and resupplying, maintenance and dry docking. Paragraphs 2 and 3 of Article 11 apply *mutatis mutandis* in such cases. Denial of such use of ports shall be in conformity with international law.

### **Article 10** ***Force majeure* or distress**

Nothing in this Agreement affects the entry of vessels to port in accordance with international law for reasons of *force majeure* or distress, or prevents a port State from permitting entry into port to a vessel exclusively for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

**PART 3**  
**USE OF PORTS**

**Article 11**  
**Use of ports**

1. Where a vessel has entered one of its ports, a Party shall deny, pursuant to its laws and regulations and consistent with international law, including this Agreement, that vessel the use of the port for landing, transshipping, packaging and processing of fish that have not been previously landed and for other port services, including, *inter alia*, refuelling and resupplying, maintenance and dry docking, if:

- (a) the Party finds that the vessel does not have a valid and applicable authorization to engage in fishing or fishing related activities required by its flag State;
- (b) the Party finds that the vessel does not have a valid and applicable authorization to engage in fishing or fishing related activities required by a coastal State in respect of areas under the national jurisdiction of that State;
- (c) the Party receives clear evidence that the fish on board was taken in contravention of applicable requirements of a coastal State in respect of areas under the national jurisdiction of that State;
- (d) the flag State does not confirm within a reasonable period of time, on the request of the port State, that the fish on board was taken in accordance with applicable requirements of a relevant regional fisheries management organization taking into due account paragraphs 2 and 3 of Article 4; or
- (e) the Party has reasonable grounds to believe that the vessel was otherwise engaged in IUU fishing or fishing related activities in support of such fishing, including in support of a vessel referred to in paragraph 4 of Article 9, unless the vessel can establish:
  - (i) that it was acting in a manner consistent with relevant conservation and management measures; or
  - (ii) in the case of provision of personnel, fuel, gear and other supplies at sea, that the vessel that was provisioned was not, at the time of provisioning, a vessel referred to in paragraph 4 of Article 9.

2. Notwithstanding paragraph 1 of this Article, a Party shall not deny a vessel referred to in that paragraph the use of port services:

- (a) essential to the safety or health of the crew or the safety of the vessel, provided these needs are duly proven; or
- (b) where appropriate, for the scrapping of the vessel.

3. Where a Party has denied the use of its port in accordance with this Article, it shall promptly notify the flag State and, as appropriate, relevant coastal States, regional fisheries management organizations and other relevant international organizations of its decision.

4. A Party shall withdraw its denial of the use of its port pursuant to paragraph 1 of this Article in respect of a vessel only if there is sufficient proof that the grounds on which use was denied were inadequate or erroneous or that such grounds no longer apply.

5. Where a Party has withdrawn its denial pursuant to paragraph 4 of this Article, it shall promptly notify those to whom a notification was issued pursuant to paragraph 3 of this Article.

## **PART 4 INSPECTIONS AND FOLLOW-UP ACTIONS**

### **Article 12 Levels and priorities for inspection**

1. Each Party shall inspect the number of vessels in its ports required to reach an annual level of inspections sufficient to achieve the objective of this Agreement.
2. Parties shall seek to agree on the minimum levels for inspection of vessels through, as appropriate, regional fisheries management organizations, FAO or otherwise.
3. In determining which vessels to inspect, a Party shall give priority to:
  - (a) vessels that have been denied entry or use of a port in accordance with this Agreement;
  - (b) requests from other relevant Parties, States or regional fisheries management organizations 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
  - (c) 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.

### **Article 13 Conduct of inspections**

1. Each Party shall ensure that its inspectors carry out the functions set forth in Annex B as a minimum standard.
2. Each Party shall, in carrying out inspections in its ports:
  - (a) ensure that inspections are carried out by properly qualified inspectors authorized for that purpose, having regard in particular to Article 17;
  - (b) ensure that, prior to an inspection, inspectors are required to present to the master of the vessel an appropriate document identifying the inspectors as such;
  - (c) ensure that inspectors examine all relevant areas of the vessel, the fish on board, the nets and any other gear, equipment, and any document or record on board that is relevant to verifying compliance with relevant conservation and management measures;
  - (d) require the master of the vessel to give inspectors all necessary assistance and information, and to present relevant material and documents as may be required, or certified copies thereof;
  - (e) in case of appropriate arrangements with the flag State of the vessel, invite that State to participate in the inspection;

- (f) make all possible efforts to avoid unduly delaying the vessel to minimize interference and inconvenience, including any unnecessary presence of inspectors on board, and to avoid action that would adversely affect the quality of the fish on board;
- (g) make all possible efforts to facilitate communication with the master or senior crew members of the vessel, including where possible and where needed that the inspector is accompanied by an interpreter;
- (h) ensure that inspections are conducted in a fair, transparent and non-discriminatory manner and would not constitute harassment of any vessel; and
- (i) not interfere with the master's ability, in conformity with international law, to communicate with the authorities of the flag State.

#### **Article 14 Results of inspections**

Each Party shall, as a minimum standard, include the information set out in Annex C in the written report of the results of each inspection.

#### **Article 15 Transmittal of inspection results**

Each Party shall transmit the results of each inspection to the flag State of the inspected vessel and, as appropriate, to:

- (a) relevant Parties and States, including:
  - (i) those States for which there is evidence through inspection that the vessel has engaged in IUU fishing or fishing related activities in support of such fishing within waters under their national jurisdiction; and
  - (ii) the State of which the vessel's master is a national;
- (b) relevant regional fisheries management organizations; and
- (c) FAO and other relevant international organizations.

#### **Article 16 Electronic exchange of information**

1. To facilitate implementation of this Agreement, each Party shall, where possible, establish a communication mechanism that allows for direct electronic exchange of information, with due regard to appropriate confidentiality requirements.

2. To the extent possible and with due regard to appropriate confidentiality requirements, Parties should cooperate to establish an information-sharing mechanism, preferably coordinated by FAO, in conjunction with other relevant multilateral and intergovernmental initiatives, and to facilitate the exchange of information with existing databases relevant to this Agreement.

3. Each Party shall designate an authority that shall act as a contact point for the exchange of information under this Agreement. Each Party shall notify the pertinent designation to FAO.

4. Each Party shall handle information to be transmitted through any mechanism established under paragraph 1 of this Article consistent with Annex D.

5. FAO shall request relevant regional fisheries management organizations to provide information concerning the measures or decisions they have adopted and implemented which relate to this Agreement for their integration, to the extent possible and taking due account of the appropriate confidentiality requirements, into the information-sharing mechanism referred to in paragraph 2 of this Article.

### **Article 17**

#### **Training of inspectors**

Each Party shall ensure that its inspectors are properly trained taking into account the guidelines for the training of inspectors in Annex E. Parties shall seek to cooperate in this regard.

### **Article 18**

#### **Port State actions following inspection**

1. Where, following an inspection, there are clear grounds for believing that a vessel has engaged in IUU fishing or fishing related activities in support of such fishing, the inspecting Party shall:

- (a) promptly notify the flag State and, as appropriate, relevant coastal States, regional fisheries management organizations and other international organizations, and the State of which the vessel's master is a national of its findings; and
- (b) deny the vessel the use of its port for landing, transshipping, packaging and processing of fish that have not been previously landed and for other port services, including, *inter alia*, refuelling and resupplying, maintenance and dry docking, if these actions have not already been taken in respect of the vessel, in a manner consistent with this Agreement, including Article 4.

2. Notwithstanding paragraph 1 of this Article, a Party shall not deny a vessel referred to in that paragraph the use of port services essential for the safety or health of the crew or the safety of the vessel.

3. Nothing in this Agreement prevents a Party from taking measures that are in conformity with international law in addition to those specified in paragraphs 1 and 2 of this Article, including such measures as the flag State of the vessel has expressly requested or to which it has consented.

### **Article 19**

#### **Information on recourse in the port State**

1. A Party shall maintain the relevant information available to the public and provide such information, upon written request, to the owner, operator, master or representative of a vessel with regard to any recourse established in accordance with its national laws and regulations concerning port State measures taken by that Party pursuant to Articles 9, 11, 13 or 18, including information pertaining to the public services or judicial institutions available for this purpose, as well as information on whether there is any right to seek compensation in accordance with its national laws and regulations in the event of any loss or damage suffered as a consequence of any alleged unlawful action by the Party.

2. The Party shall inform the flag State, the owner, operator, master or representative, as appropriate, of the outcome of any such recourse. Where other Parties, States or international organizations have been informed of the prior decision pursuant to Articles 9, 11, 13 or 18, the Party shall inform them of any change in its decision.

**PART 5**  
**ROLE OF FLAG STATES**

**Article 20**  
**Role of flag States**

1. Each Party shall require the vessels entitled to fly its flag to cooperate with the port State in inspections carried out pursuant to this Agreement.
2. When a Party has clear grounds to believe that a vessel entitled to fly its flag has engaged in IUU fishing or fishing related activities in support of such fishing and is seeking entry to or is in the port of another State, it shall, as appropriate, request that State to inspect the vessel or to take other measures consistent with this Agreement.
3. Each Party shall encourage vessels entitled to fly its flag to land, transship, package and process fish, and use other port services, in ports of States that are acting in accordance with, or in a manner consistent with this Agreement. Parties are encouraged to develop, including through regional fisheries management organizations and FAO, fair, transparent and non-discriminatory procedures for identifying any State that may not be acting in accordance with, or in a manner consistent with, this Agreement.
4. Where, following port State inspection, a flag State Party receives an inspection report indicating that there are clear grounds to believe that a vessel entitled to fly its flag has engaged in IUU fishing or fishing related activities in support of such fishing, it shall immediately and fully investigate the matter and shall, upon sufficient evidence, take enforcement action without delay in accordance with its laws and regulations.
5. Each Party shall, in its capacity as a flag State, report to other Parties, relevant port States and, as appropriate, other relevant States, regional fisheries management organizations and FAO on actions it has taken in respect of vessels entitled to fly its flag that, as a result of port State measures taken pursuant to this Agreement, have been determined to have engaged in IUU fishing or fishing related activities in support of such fishing.
6. Each Party shall ensure that measures applied to vessels entitled to fly its flag are at least as effective in preventing, deterring, and eliminating IUU fishing and fishing related activities in support of such fishing as measures applied to vessels referred to in paragraph 1 of Article 3.

**PART 6**  
**REQUIREMENTS OF DEVELOPING STATES**

**Article 21**  
**Requirements of developing States**

1. Parties shall give full recognition to the special requirements of developing States Parties in relation to the implementation of port State measures consistent with this Agreement. To this end, Parties shall, either directly or through FAO, other specialized agencies of the United Nations or other appropriate international organizations and bodies, including regional fisheries management organizations, provide assistance to developing States Parties in order to, *inter alia*:
  - (a) enhance their ability, in particular the least-developed among them and small island developing States, to develop a legal basis and capacity for the implementation of effective port State measures;

- (b) facilitate their participation in any international organizations that promote the effective development and implementation of port State measures; and
- (c) facilitate technical assistance to strengthen the development and implementation of port State measures by them, in coordination with relevant international mechanisms.

2. Parties shall give due regard to the special requirements of developing port States Parties, in particular the least-developed among them and small island developing States, to ensure that a disproportionate burden resulting from the implementation of this Agreement is not transferred directly or indirectly to them. In cases where the transfer of a disproportionate burden has been demonstrated, Parties shall cooperate to facilitate the implementation by the relevant developing States Parties of specific obligations under this Agreement.

3. Parties shall, either directly or through FAO, assess the special requirements of developing States Parties concerning the implementation of this Agreement.

4. Parties shall cooperate to establish appropriate funding mechanisms to assist developing States in the implementation of this Agreement. These mechanisms shall, *inter alia*, be directed specifically towards:

- (a) developing national and international port State measures;
- (b) developing and enhancing capacity, including for monitoring, control and surveillance and for training at the national and regional levels of port managers, inspectors, and enforcement and legal personnel;
- (c) monitoring, control, surveillance and compliance activities relevant to port State measures, including access to technology and equipment; and
- (d) assisting developing States Parties with the costs involved in any proceedings for the settlement of disputes that result from actions they have taken pursuant to this Agreement.

5. Cooperation with and among developing States Parties for the purposes set out in this Article may include the provision of technical and financial assistance through bilateral, multilateral and regional channels, including South-South cooperation.

6. Parties shall establish an ad hoc working group to periodically report and make recommendations to the Parties on the establishment of funding mechanisms including a scheme for contributions, identification and mobilization of funds, the development of criteria and procedures to guide implementation, and progress in the implementation of the funding mechanisms. In addition to the considerations provided in this Article, the ad hoc working group shall take into account, *inter alia*:

- (a) the assessment of the needs of developing States Parties, in particular the least developed among them and small island developing States;
- (b) the availability and timely disbursement of funds;
- (c) transparency of decision-making and management processes concerning fundraising and allocations; and
- (d) accountability of the recipient developing States Parties in the agreed use of funds.

Parties shall take into account the reports and any recommendations of the ad hoc working group and take appropriate action.

## **PART 7 DISPUTE SETTLEMENT**

### **Article 22 Peaceful settlement of disputes**

1. Any Party may seek consultations with any other Party or Parties on any dispute with regard to the interpretation or application of the provisions of this Agreement with a view to reaching a mutually satisfactory solution as soon as possible.
2. In the event that the dispute is not resolved through these consultations within a reasonable period of time, the Parties in question shall consult among themselves as soon as possible with a view to having the dispute settled by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.
3. Any dispute of this character not so resolved shall, with the consent of all Parties to the dispute, be referred for settlement to the International Court of Justice, to the International Tribunal for the Law of the Sea or to arbitration. In the case of failure to reach agreement on referral to the International Court of Justice, to the International Tribunal for the Law of the Sea or to arbitration, the Parties shall continue to consult and cooperate with a view to reaching settlement of the dispute in accordance with the rules of international law relating to the conservation of living marine resources.

## **PART 8 NON-PARTIES**

### **Article 23 Non-Parties to this Agreement**

1. Parties shall encourage non-Parties to this Agreement to become Parties thereto and/or to adopt laws and regulations and implement measures consistent with its provisions.
2. Parties shall take fair, non-discriminatory and transparent measures consistent with this Agreement and other applicable international law to deter the activities of non-Parties which undermine the effective implementation of this Agreement.

## **PART 9 MONITORING, REVIEW AND ASSESSMENT**

### **Article 24 Monitoring, review and assessment**

1. Parties shall, within the framework of FAO and its relevant bodies, ensure the regular and systematic monitoring and review of the implementation of this Agreement as well as the assessment of progress made towards achieving its objective.
2. Four years after the entry into force of this Agreement, FAO shall convene a meeting of the Parties to review and assess the effectiveness of this Agreement in achieving its objective. The Parties shall decide on further such meetings as necessary.

**PART 10**  
**FINAL PROVISIONS**

**Article 25**  
**Signature**

This Agreement shall be open for signature at FAO from the Twenty-second day of November 2009 until the Twenty-first day of November 2010 by all States and regional economic integration organizations.

**Article 26**  
**Ratification, acceptance or approval**

1. This Agreement shall be subject to ratification, acceptance or approval by the signatories.
2. Instruments of ratification, acceptance or approval shall be deposited with the Depositary.

**Article 27**  
**Accession**

1. After the period in which this Agreement is open for signature, it shall be open for accession by any State or regional economic integration organization.
2. Instruments of accession shall be deposited with the Depositary.

**Article 28**  
**Participation by Regional Economic Integration Organizations**

1. In cases where a regional economic integration organization that is an international organization referred to in Annex IX, Article 1, of the Convention does not have competence over all the matters governed by this Agreement, Annex IX to the Convention shall apply *mutatis mutandis* to participation by such regional economic integration organization in this Agreement, except that the following provisions of that Annex shall not apply:

- (a) Article 2, first sentence; and
- (b) Article 3, paragraph 1.

2. In cases where a regional economic integration organization that is an international organization referred to in Annex IX, Article 1, of the Convention has competence over all the matters governed by this Agreement, the following provisions shall apply to participation by the regional economic integration organization in this Agreement:

- (a) at the time of signature or accession, such organization shall make a declaration stating:
  - (i) that it has competence over all the matters governed by this Agreement;
  - (ii) that, for this reason, its member States shall not become States Parties, except in respect of their territories for which the organization has no responsibility; and
  - (iii) that it accepts the rights and obligations of States under this Agreement;
- (b) participation of such an organization shall in no case confer any rights under this Agreement on member States of the organization;

- (c) in the event of a conflict between the obligations of such organization under this Agreement and its obligations under the Agreement establishing the organization or any acts relating to it, the obligations under this Agreement shall prevail.

### **Article 29**

#### **Entry into force**

1. This Agreement shall enter into force thirty days after the date of deposit with the Depositary of the twenty-fifth instrument of ratification, acceptance, approval or accession in accordance with Article 26 or 27.
2. For each signatory which ratifies, accepts or approves this Agreement after its entry into force, this Agreement shall enter into force thirty days after the date of the deposit of its instrument of ratification, acceptance or approval.
3. For each State or regional economic integration organization which accedes to this Agreement after its entry into force, this Agreement shall enter into force thirty days after the date of the deposit of its instrument of accession.
4. For the purposes of this Article, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by its Member States.

### **Article 30**

#### **Reservations and exceptions**

No reservations or exceptions may be made to this Agreement.

### **Article 31**

#### **Declarations and Statements**

Article 30 does not preclude a State or regional economic integration organization, when signing, ratifying, accepting, approving or acceding to this Agreement, from making a declaration or Statement, however phrased or named, with a view to, *inter alia*, the harmonization of its laws and regulations with the provisions of this Agreement, provided that such declaration or statement does not purport to exclude or to modify the legal effect of the provisions of this Agreement in their application to that State or regional economic integration organization.

### **Article 32**

#### **Provisional application**

1. This Agreement shall be applied provisionally by States or regional economic integration organizations which consent to its provisional application by so notifying the Depositary in writing. Such provisional application shall become effective from the date of receipt of the notification.
2. Provisional application by a State or regional economic integration organization shall terminate upon the entry into force of this Agreement for that State or regional economic integration organization or upon notification by that State or regional economic integration organization to the Depositary in writing of its intention to terminate provisional application.

### **Article 33**

#### **Amendments**

1. Any Party may propose amendments to this Agreement after the expiry of a period of two years from the date of entry into force of this Agreement.

2. Any proposed amendment to this Agreement shall be transmitted by written communication to the Depositary along with a request for the convening of a meeting of the Parties to consider it. The Depositary shall circulate to all Parties such communication as well as all replies to the request received from Parties. Unless within six months from the date of circulation of the communication one half of the Parties object to the request, the Depositary shall convene a meeting of the Parties to consider the proposed amendment.

3. Subject to Article 34, any amendment to this Agreement shall only be adopted by consensus of the Parties present at the meeting at which it is proposed for adoption.

4. Subject to Article 34, any amendment adopted by the meeting of the Parties shall come into force among the Parties having ratified, accepted or approved it on the ninetieth day after the deposit of instruments of ratification, acceptance or approval by two-thirds of the Parties to this Agreement based on the number of Parties on the date of adoption of the amendment. Thereafter the amendment shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, acceptance or approval of the amendment.

5. For the purposes of this Article, an instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by its Member States.

#### **Article 34 Annexes**

1. The Annexes form an integral part of this Agreement and a reference to this Agreement shall constitute a reference to the Annexes.

2. An amendment to an Annex to this Agreement may be adopted by two-thirds of the Parties to this Agreement present at a meeting where the proposed amendment to the Annex is considered. Every effort shall however be made to reach agreement on any amendment to an Annex by way of consensus. An amendment to an Annex shall be incorporated in this Agreement and enter into force for those Parties that have expressed their acceptance from the date on which the Depositary receives notification of acceptance from one-third of the Parties to this Agreement, based on the number of Parties on the date of adoption of the amendment. The amendment shall thereafter enter into force for each remaining Party upon receipt by the Depositary of its acceptance.

#### **Article 35 Withdrawal**

Any Party may withdraw from this Agreement at any time after the expiry of one year from the date upon which the Agreement entered into force with respect to that Party, by giving written notice of such withdrawal to the Depositary. Withdrawal shall become effective one year after receipt of the notice of withdrawal by the Depositary.

#### **Article 36 The Depositary**

The Director-General of FAO shall be the Depositary of this Agreement. The Depositary shall:

- (a) transmit certified copies of this Agreement to each signatory and Party;
- (b) register this Agreement, upon its entry into force, with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations;
- (c) promptly inform each signatory and Party to this Agreement of all:

- (i) signatures and instruments of ratification, acceptance, approval and accession deposited under Articles 25, 26 and 27;
- (ii) the date of entry into force of this Agreement in accordance with Article 29;
- (iii) proposals for amendment to this Agreement and their adoption and entry into force in accordance with Article 33;
- (iv) proposals for amendment to the Annexes and their adoption and entry into force in accordance with Article 34; and
- (v) withdrawals from this Agreement in accordance with Article 35.

**Article 37**  
**Authentic texts**

The Arabic, Chinese, English, French, Russian and Spanish texts of this Agreement are equally authentic.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, being duly authorized, have signed this Agreement.

DONE in Rome on this Twenty-second day of November, 2009.

## Information to be provided in advance by vessels requesting port entry

<b>1. Intended port of call</b>										
<b>2. Port State</b>										
<b>3. Estimated date and time of arrival</b>										
<b>4. Purpose(s)</b>										
<b>5. Port and date of last port call</b>										
<b>6. Name of the vessel</b>										
<b>7. Flag State</b>										
<b>8. Type of vessel</b>										
<b>9. International Radio Call Sign</b>										
<b>10. Vessel contact information</b>										
<b>11. Vessel owner(s)</b>										
<b>12. Certificate of registry ID</b>										
<b>13. IMO ship ID, if available</b>										
<b>14. External ID, if available</b>										
<b>15. RFMO ID, if applicable</b>										
<b>16. VMS</b>			No	Yes: National	Yes: RFMO(s)	Type:				
<b>17. Vessel dimensions</b>			Length	Beam	Draft					
<b>18. Vessel master name and nationality</b>										
<b>19. Relevant fishing authorization(s)</b>										
<i>Identifier</i>	<i>Issued by</i>	<i>Validity</i>	<i>Fishing area(s)</i>	<i>Species</i>	<i>Gear</i>					
<b>20. Relevant transshipment authorization(s)</b>										
<i>Identifier</i>		<i>Issued by</i>		<i>Validity</i>						
<i>Identifier</i>		<i>Issued by</i>		<i>Validity</i>						
<b>21. Transshipment information concerning donor vessels</b>										
<i>Date</i>	<i>Location</i>	<i>Name</i>	<i>Flag State</i>	<i>ID number</i>	<i>Species</i>	<i>Product form</i>	<i>Catch area</i>	<i>Quantity</i>		
<b>22. Total catch on board</b>					<b>23. Catch to be offloaded</b>					
<i>Species</i>	<i>Product form</i>	<i>Catch area</i>	<i>Quantity</i>		<i>Quantity</i>					

**Port State inspection procedures**

Inspectors shall:

- a) verify, to the extent possible, that the vessel identification documentation on board and information relating to the owner of the vessel is true, complete and correct, including through appropriate contacts with the flag State or international records of vessels if necessary;
- b) verify that the vessel's flag and markings (e.g. name, external registration number, International Maritime Organization (IMO) ship identification number, international radio call sign and other markings, main dimensions) are consistent with information contained in the documentation;
- c) verify, to the extent possible, that the authorizations for fishing and fishing related activities are true, complete, correct and consistent with the information provided in accordance with Annex A;
- d) review all other relevant documentation and records held on board, including, to the extent possible, those in electronic format and vessel monitoring system (VMS) data from the flag State or relevant regional fisheries management organizations (RFMOs). Relevant documentation may include logbooks, catch, transshipment and trade documents, crew lists, stowage plans and drawings, descriptions of fish holds, and documents required pursuant to the Convention on International Trade in Endangered Species of Wild Fauna and Flora;
- e) examine, to the extent possible, all relevant fishing gear on board, including any gear stowed out of sight as well as related devices, and to the extent possible, verify that they are in conformity with the conditions of the authorizations. The fishing gear shall, to the extent possible, also be checked to ensure that features such as the mesh and twine size, devices and attachments, dimensions and configuration of nets, pots, dredges, hook sizes and numbers are in conformity with applicable regulations and that the markings correspond to those authorized for the vessel;
- f) determine, to the extent possible, whether the fish on board was harvested in accordance with the applicable authorizations;
- g) examine the fish, including by sampling, to determine its quantity and composition. In doing so, inspectors may open containers where the fish has been pre-packed and move the catch or containers to ascertain the integrity of fish holds. Such examination may include inspections of product type and determination of nominal weight;
- h) evaluate whether there is clear evidence for believing that a vessel has engaged in IUU fishing or fishing related activities in support of such fishing;
- i) provide the master of the vessel with the report containing the result of the inspection, including possible measures that could be taken, to be signed by the inspector and the master. The master's signature on the report shall serve only as acknowledgment of the receipt of a copy of the report. The master shall be given the opportunity to add any comments or objection to the report, and, as appropriate, to contact the relevant authorities of the flag State in particular where the master has serious difficulties in understanding the content of the report. A copy of the report shall be provided to the master; and
- j) arrange, where necessary and possible, for translation of relevant documentation.

## Report of the results of the inspection

<b>1. Inspection report no</b>				<b>2. Port State</b>			
<b>3. Inspecting authority</b>							
<b>4. Name of principal inspector</b>						<b>ID</b>	
<b>5. Port of inspection</b>							
<b>6. Commencement of inspection</b>				YYYY	MM	DD	HH
<b>7. Completion of inspection</b>				YYYY	MM	DD	HH
<b>8. Advanced notification received</b>				Yes		No	
<b>9. Purpose(s)</b>		LAN	TRX	PRO	OTH (specify)		
<b>10. Port and State and date of last port call</b>						YYYY	MM DD
<b>11. Vessel name</b>							
<b>12. Flag State</b>							
<b>13. Type of vessel</b>							
<b>14. International Radio Call Sign</b>							
<b>15. Certificate of registry ID</b>							
<b>16. IMO ship ID, if available</b>							
<b>17. External ID, if available</b>							
<b>18. Port of registry</b>							
<b>19. Vessel owner(s)</b>							
<b>20. Vessel beneficial owner(s), if known and different from vessel owner</b>							
<b>21. Vessel operator(s), if different from vessel owner</b>							
<b>22. Vessel master name and nationality</b>							
<b>23. Fishing master name and nationality</b>							
<b>24. Vessel agent</b>							
<b>25. VMS</b>		No	Yes: National	Yes: RFMOs	Type:		
<b>26. Status in RFMO areas where fishing or fishing related activities have been undertaken, including any IUU vessel listing</b>							
<i>Vessel identifier</i>	<i>RFMO</i>	<i>Flag State status</i>	<i>Vessel on authorized vessel list</i>	<i>Vessel on IUU vessel list</i>			
<b>27. Relevant fishing authorization(s)</b>							
<i>Identifier</i>	<i>Issued by</i>	<i>Validity</i>	<i>Fishing area(s)</i>	<i>Species</i>	<i>Gear</i>		
<b>28. Relevant transshipment authorization(s)</b>							
<i>Identifier</i>		<i>Issued by</i>		<i>Validity</i>			
<i>Identifier</i>		<i>Issued by</i>		<i>Validity</i>			
<b>29. Transshipment information concerning donor vessels</b>							
<i>Name</i>	<i>Flag State</i>	<i>ID no.</i>	<i>Species</i>	<i>Product form</i>	<i>Catch area(s)</i>	<i>Quantity</i>	
<b>30. Evaluation of offloaded catch (quantity)</b>							
<i>Species</i>	<i>Product form</i>	<i>Catch area(s)</i>	<i>Quantity declared</i>	<i>Quantity offloaded</i>	<i>Difference between quantity declared and quantity determined, if any</i>		

<b>31. Catch retained on board (quantity)</b>						
<i>Species</i>	<i>Product form</i>	<i>Catch area(s)</i>	<i>Quantity declared</i>	<i>Quantity retained</i>		<i>Difference between quantity declared and quantity determined, if any</i>
<b>32. Examination of logbook(s) and other documentation</b>				<i>Yes</i>	<i>No</i>	<i>Comments</i>
<b>33. Compliance with applicable catch documentation scheme(s)</b>				<i>Yes</i>	<i>No</i>	<i>Comments</i>
<b>34. Compliance with applicable trade information scheme(s)</b>				<i>Yes</i>	<i>No</i>	<i>Comments</i>
<b>35. Type of gear used</b>						
<b>36. Gear examined in accordance with paragraph e) of Annex B</b>				<i>Yes</i>	<i>No</i>	<i>Comments</i>
<b>37. Findings by inspector(s)</b>						
<b>38. Apparent infringement(s) noted including reference to relevant legal instrument(s)</b>						
<b>39. Comments by the master</b>						
<b>40. Action taken</b>						
<b>41. Master's signature</b>						
<b>42. Inspector's signature</b>						

**Information systems on port State measures**

In implementing this Agreement, each Party shall:

- a) seek to establish computerized communication in accordance with Article 16;
- b) establish, to the extent possible, websites to publicize the list of ports designated in accordance with Article 7 and the actions taken in accordance with the relevant provisions of this Agreement;
- c) identify, to the greatest extent possible, each inspection report by a unique reference number starting with 3-alpha code of the port State and identification of the issuing agency;
- d) utilize, to the extent possible, the international coding system below in Annexes A and C and translate any other coding system into the international system.

Countries/territories: ISO-3166 3-alpha Country Code

Species: ASFIS 3-alpha code (known as FAO 3-alpha code)

Vessel types: ISSCFV code (known as FAO alpha code)

Gear types: ISSCFG code (known as FAO alpha code)

### **Guidelines for the training of inspectors**

Elements of a training programme for port State inspectors should include at least the following areas:

1. Ethics;
2. Health, safety and security issues;
3. Applicable national laws and regulations, areas of competence and conservation and management measures of relevant RFMOs, and applicable international law;
4. Collection, evaluation and preservation of evidence;
5. General inspection procedures such as report writing and interview techniques;
6. Analysis of information, such as logbooks, electronic documentation and vessel history (name, ownership and flag State), required for the validation of information given by the master of the vessel;
7. Vessel boarding and inspection, including hold inspections and calculation of vessel hold volumes;
8. Verification and validation of information related to landings, transshipments, processing and fish remaining on board, including utilizing conversion factors for the various species and products;
9. Identification of fish species, and the measurement of length and other biological parameters;
10. Identification of vessels and gear, and techniques for the inspection and measurement of gear;
11. Equipment and operation of VMS and other electronic tracking systems; and
12. Actions to be taken following an inspection.

CERTIFIED TRUE COPY of the English version of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing which was approved on 22 November 2009 at the Thirty-sixth Session of the FAO Conference. In accordance with the provisions of paragraph 7 of Article XIV of the FAO Constitution, this has been certified by the Director-General of the Organization and the Chairperson of the Conference.

Jacques Diouf  
Director-General  
Food and Agriculture Organization of  
the United Nations

Kathleen Merrigan  
Chairperson of the Conference

## ANALYSIS OF THE EVOLUTION OF THE TEXT OF THE PORT STATE MEASURES AGREEMENT

### **The Preliminary draft text prepared by FAO as considered by the 2006 FAO Expert Consultation to draft a legally-binding instrument on port State measures (Expert Consultation)**

The preliminary draft of an agreement prepared by FAO drew on key international instruments, including the IPOA–IUU and the Model Scheme, as requested by COFI. Some key features of the FAO draft text included Parts on general provisions, rights and duties of port States, requirements prior to entry into port, access to port, information and inspections, port State actions following inspection, complementary compliance measures and mechanisms, non-Parties to the Agreement and requirements of developing States.

These areas and their draft Articles were all substantially incorporated in the draft Agreement elaborated by the Expert Consultation with some differences. The Expert Consultation re-tooled some language proposed in the FAO draft text and took a different approach in relation to some of the proposed provisions. It also strengthened certain areas proposed in the FAO draft text.

The FAO draft text took an approach that broadly underscored the need to comply with conservation and management measures of relevant RFMOs. It encouraged Parties, acting through relevant RFMOs, to develop and promote regional schemes on port State measures and develop and implement compliance measures which could include IUU vessel lists, an information system, catch documentation and trade certification schemes and internationally agreed market measures. The draft also encouraged Parties to cooperate in exchanging information from VMS and port States to take internationally agreed market-related measures.

The draft elaborated by the Expert Consultation did not take such a prescriptive approach. It did not indicate the actions that should be taken through RFMOs, nor did it maintain reference to catch documentation, trade certification, VMS or internationally agreed market-related measures. It also slightly amended the types of uses of ports that should be denied: “transporting” fish and “trade” were dropped.

Instead, it captured the essence of the FAO draft by simply requiring Parties to cooperate and exchange information at the subregional and regional levels in the effective and harmonized implementation of the Agreement through RFMOs or otherwise.

The “duties and responsibilities” of flag States, as elaborated in the FAO draft text, were similarly streamlined by the Expert Consultation to drop reference to specific actions a flag State should take to investigate a vessel upon the port State’s notification of evidence of IUU fishing. In addition, this area was strengthened by designating it as the “role” of the flag State and elaborating further the role.

A less prescriptive approach was also taken in relation to the application of the Agreement to national fishing vessels. The FAO text elaborated specified circumstances where national fishing vessels should be subject to the Agreement involving, e.g. activities beyond national jurisdiction. The Expert Consultation text instead referred to the general duty of a Party to ensure effective jurisdiction and control over the fishing and fishing related activities of vessels flying its flag, and that such measures should include *mutatis mutandis* the port State measures in the Agreement.

Key areas where the Expert Consultation strengthened the text included:

- adding comprehensive definitions “fishing related activities” and “vessel” in order to clarify and strengthen the scope and application of the Agreement;

- requiring Parties to seek to agree, through RFMOs or otherwise, on levels and priorities for inspection;
- requiring port States to deny the use of port services, and other measures that meet certain conditions, to a vessel after inspection revealed reasonable evidence of IUU fishing; and
- expanding the role of flag States.

**The draft text of the Expert Consultation as considered and developed by the 2008–09  
FAO Technical Consultation to draft a legally binding instrument on port State measures**

The final Agreement contained some limitations but significant expansion and strengthening of the draft initially proposed by the Expert Consultation.

The role of RFMOs was the key issue where the Agreement took a more limited approach. The Expert Consultation, as well as previous international instruments, had taken the approach that States that were not members of RFMOs were not discharged from the obligation to cooperate in the conservation and management of relevant fish stocks. The Agreement provides, however, that, in applying the Agreement, a Party does not become bound by measures or decisions of, or recognize, any RFMO of which it is not a member. Furthermore, it is not bound to give effect to measures or decisions of RFMOs that have not been adopted in conformity with international law.<sup>1</sup>

However, the application of the Agreement<sup>2</sup> was significantly expanded to apply specifically to IUU fishing in marine areas and fishing related activities. Introduction of this reference, together with the broad definition of IUU fishing in the IPOA–IUU, clearly means that the Agreement applies to all marine areas, not just the high seas or areas where there are RFMO conservation and management measures, as in previous instruments. Significantly, the global nature of its application is described and entities are invited to express their commitment to act consistently with its provisions. However, the Agreement sets out clear exceptions that relate to artisanal vessels and container vessels.

There is a new undertaking in relation to cooperation and exchange of information,<sup>3</sup> which obligates Parties to take measures in support of conservation and management measures adopted by other States and relevant international organizations.

The provisions in relation to port entry, authorization or denial were considerably expanded.<sup>4</sup> The Expert Consultation only focused on the reasons a port State must deny the use of its port. The Agreement amplifies the whole process by addressing the issue of port entry on a step-by-step basis.

The new provisions in the Agreement require the port State to consider the information provided with the request from a vessel for port entry, issue an authorization or deny entry and require the authorization to be produced upon entry.

In addition, the Agreement requires the denial of entry where there is sufficient proof of IUU fishing, unless other equally effective measures are taken, and denial of use of the port if the proof is received only after the vessel has entered port. The decision to deny entry must be communicated broadly: to the flag State, coastal State, relevant RFMO and other international organizations.

The situations for which the use of a port must be denied were broadened and strengthened.<sup>5</sup> The Agreement included requirements to deny use of a port where the vessel was not authorized as required by the flag State and failure by the flag State to confirm that the fish was taken in accordance with the requirements of a relevant RFMO.

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<sup>1</sup> Article 4.

<sup>2</sup> Article 5.

<sup>3</sup> Article 6.

<sup>4</sup> Article 9.

<sup>5</sup> Article 11.

The actual uses of the port that may be denied were also expanded. Initially, such uses were designated as landing, transshipping, processing refuelling and resupplying. The Agreement added “packaging, and other port services, including, *inter alia*, maintenance and dry docking.”

There is a requirement to transmit inspection results more widely than originally proposed, including to States for which there is evidence through inspection that there had been IUU fishing or fishing related activities in support of such fishing within their waters and the State of which the vessel’s master is a national.<sup>6</sup>

The Article on the electronic exchange of information<sup>7</sup> was significantly enhanced. The Agreement contains a provision encouraging Parties to establish an information-sharing mechanism, preferably coordinated by FAO, in conjunction with other multilateral and intergovernmental initiatives, to facilitate the exchange of information with relevant existing databases. FAO must ask RFMOs to provide certain information for this mechanism. In addition, Parties must designate contact points.

The role that flag States must play in supporting port State measures was maintained generally as proposed by the Expert Consultation, but was broadened in three respects.<sup>8</sup> First, when the flag State receives an inspection report showing clear grounds to believe there was IUU fishing or support of such fishing, it must immediately and fully investigate and take enforcement action. Second, it must report to a wide range of entities including other Parties, relevant port States, other relevant States, RFMOs and FAO on actions it has taken in respect of such vessels. Third, it must also ensure that measures applied to its vessels are at least as effective in combating IUU fishing and fishing related activities as measures applied to non-flag vessels.

The Agreement also broadened the scope of provisions relating to developing States by requiring an ad hoc working group to be established to make recommendations to the Parties on the establishment of funding mechanisms.<sup>9</sup> It strengthened the requirement for monitoring, review and assessment by requiring FAO to convene a review meeting of the Parties four years after the Agreement enters into force<sup>10</sup> and opening the door for further such meetings that the Parties think necessary.

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<sup>6</sup> Article 15.

<sup>7</sup> Article 16.

<sup>8</sup> Article 20.

<sup>9</sup> Article 21.

<sup>10</sup> Article 24.

**PORT STATE MEASURES ADOPTED, OR PROPOSED, FOR CERTAIN REGIONAL FISHERIES MANAGEMENT ORGANIZATIONS AND ARRANGEMENTS**

<b>TUNA RFMOs</b>	
<b>Commission for the Conservation of Southern Bluefin Tuna (CCSBT)</b>	
<b>Deakin, Australia</b>	
<b>Target species:</b>	Southern bluefin tuna (SBT)
<b>Measures:</b>	<p><b>Resolution on action plans to ensure compliance with conservation and management measures</b>                      Members and Cooperating Non-Members (CNMs) are required to develop and submit action plans which include port State measures. Members and CNMs should designate foreign ports of transshipment of SBT for their vessels, prohibit such transshipment at other foreign ports and communicate with these designated ports to share relevant information required for effective inspection.</p> <p><b>Resolution on amendment of the resolution on illegal, unregulated and unreported fishing (IUU) and establishment of a CCSBT record of vessels over 24 meters authorized to fish for southern Bluefin tuna</b>                      This resolution establishes a record of all vessels (regardless of size) that are authorized to fish for SBT. Fishing vessels not entered into the Record are deemed not to be authorized to fish for, retain on board, transship or land SBT. CCSBT Members and CNMs are required to take measures to prevent, amongst other things, the landing of SBT by fishing vessels that are not on the record.</p> <p><b>Resolution on the implementation of a CCSBT Catch Documentation Scheme (CDS).</b>                      This resolution requires, amongst other things, validated CCSBT CDS documents to accompany SBT from the point of kill to the first point of domestic sale. In addition, all whole SBT must be individually tagged during the same period. The resolution requires that:</p> <ul style="list-style-type: none"> <li>▪ No Member or CNM shall accept any SBT for transshipment, landing of domestic product, export, import, or re-export where any or all required documents do not accompany the relevant consignment of SBT, where fields of information required on the form are not completed, or where the form has not been validated as required by this resolution; and</li> <li>▪ Members and CNMs shall not permit whole SBT to be landed as domestic product, transshipped, exported, imported or re-exported without a tag.</li> </ul>
<b>Proposed measures:</b>	None

**Inter-American Tropical Tuna Commission (IATTC)  
La Jolla, United States of America**

<b>Target species:</b>	Tunas and other species taken by tuna-fishing vessels in the Eastern Pacific Ocean
<b>Measures:</b>	<p><b>Resolution C-11-09 on establishing a program for transshipments by large-scale fishing vessels</b> Transshipment operations are required to be undertaken in accordance with the procedures contained in Annex 1 of the resolution. These require the captain of a vessel to submit certain information to the port authorities prior to transshipment. The captain must submit certain information to the flag State at the time of transshipment. The port State and landing State must make efforts to verify the information received from vessels and submit information on inspections to IATTC.</p> <p><b>Resolution C-05-07 (para 9b) to establish a list of vessels presumed to have carried out illegal, unreported and unregulated fishing activities in the Eastern Pacific Ocean.</b> Contracting Parties (CPs) are required to ensure that vessels on the IATTC-IUU vessel list that enter ports voluntarily are not authorized to land or transship there. The resolution also expands the definition of an IUU-listed vessel of a non-contracting Party (NCP) by stating that it is regarded as an IUU-listed vessel if it is “under the control of the owner of any vessel on the IATTC-IUU vessel list”.</p> <p><b>Resolution C-09-01 (para 11) on a multiannual program for the conservation of tuna in the Eastern Pacific Ocean in 2011-2013.</b> CPs are required to prohibit landings and transshipments of tuna or tuna products that have been positively identified as originating from fishing activities that contravene resolution C-09-01.</p>
<b>Proposed measures:</b>	None

**International Commission for the Conservation of Atlantic Tunas (ICCAT)  
Madrid, Spain**

<b>Target species:</b>	Tuna and tuna-like species in the Atlantic Ocean
<b>Measures:</b>	<p><b>Resolution 94-9 vessel sighting</b> CPs should make every effort to collect information on the catch of bluefin tuna when vessels of NCPs enter their ports and report the information to the Commission.</p> <p><b>Recommendation 97-10 revised ICCAT port inspection scheme</b> Outlines port State inspection procedures.</p> <p><b>Recommendation 98-11 ban on landings and transshipments</b> When a vessel which is presumed to have undermined ICCAT conservation measures voluntarily enters port, CPs must inspect the catch and vessels shall not be allowed to land or transship until this inspection has taken place.</p> <p><b>Recommendation 08-05 amending the recommendation by ICCAT to establish a multiannual recovery plan for bluefin tuna in the Eastern Atlantic and Mediterranean</b></p>

Fishing vessels may only transship or land catch at a designated port. Vessels must transmit certain information to the relevant authorities prior to entry. During transshipment the port State is responsible for ensuring full inspection. Each landing or caging shall be subject to inspection by the port State

**Proposed measures:**

The EU proposed in 2010 “Draft Recommendation by ICCAT on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing” based on the FAO Technical Consultation to Draft Legally-binding Instrument on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing.

The proposal includes provisions for: integration of measures at a national level; cooperation and exchange of information; designation of ports; advance request for port entry; denial of entry where there is suspicion of IUU fishing; inspection procedures; use of ports; the role of the flag State; and requirements of developing States.

**Indian Ocean Tuna Commission (IOTC)**

**Victoria, Seychelles**

**Target species:**

Tuna and tuna-like species in the Indian Ocean and adjacent seas

**Measures:**

**Resolution 11/03 (para 16b) on establishing a list of vessels presumed to have carried out illegal, unreported and unregulated fishing activities in the IOTC Area**

Cooperating non-contracting Parties (CPCs) are required to ensure that vessels on the IOTC–IUU list enter ports voluntarily are not authorized to land, transship, refuel or engage in other commercial transactions.

**Resolution 11/05 on establishing a programme for transshipment by large-scale fishing vessels**

In port-transshipment operations are required to be undertaken in accordance with the conditions contained in Annex I of the resolution. These require the captain of a vessel to submit certain information to the port authorities prior to transshipment. The captain must submit certain information to the flag State at the time of transshipment. The port State and landing State must make efforts to verify the information received from vessels and submit information on inspections to IOTC.

**Resolution 10/11 on port State measures to prevent, deter and eliminate illegal, unreported and unregulated fishing**

IOTC Members and CPCs are required to designate and publicize ports to which vessels may request entry. Vessels are required to give at least 24 hours notice before entering port and submit certain information. Where a CPC has sufficient proof that a vessel has engaged in IUU fishing, it shall deny entry into its ports.

In certain circumstances a CPC shall deny the use of its ports to a vessel for landing, transshipping, packaging and processing of fish that have not been previously landed.

Each CPC shall carry out inspections of at least 5 percent of landings or transshipments in its ports. Detailed inspection procedures are provided and the results of all inspections must be transmitted to the master of the vessel, flag State and IOTC Secretariat within three days of the inspection.

Flag States are required to ensure that vessels entitled to fly its flag must cooperate with inspections, encourage vessels to utilize ports which are acting in accordance with the resolution and investigate and take enforcement action against its vessels when there is evidence to suggest the vessel has engaged in IUU fishing.

CPCs should give full recognition to the special requirements of CPCs developing States and provide technical assistance.

**Resolution 05/03 relating to the establishment of an IOTC programme of inspection in port**

This resolution authorizes CPCs to inspect fishing vessels that have voluntarily entered into port. Parties are required to prohibit landings or transshipments by non-contracting Party vessels where it has been established that the catch of the species covered by the Agreement establishing the IOTC has been taken in a manner which undermines the effectiveness of conservation and management measures adopted by the Commission. In the event that a Port State considers that there has been evidence of a violation by a contracting Party or a non-contracting Party vessel of a conservation and management measure adopted by the Commission, the port State shall draw this to the attention of the flag State concerned and, as appropriate, the Commission. Each CPC shall submit electronically to the Secretary by 1 July of each year, the list of foreign fishing vessels which have landed in their ports tuna and tuna like species caught in the IOTC area in the preceding year. This information shall detail the catch composition by weight and species landed.

**Proposed measures:**

None

**Western and Central Pacific Fisheries Commission (WCPFC)  
Kolonia, Federated States of Micronesia**

**Target species:  
Measures:**

Tuna and tuna-like species in the Western and Central Pacific

**Conservation and management measure CMM 2010-06 (para 22b) to establish a list of vessels presumed to have carried out illegal, unreported and unregulated fishing activities in the WCPO**

CCMs are required to ensure that vessels on the WCPFC-IUU list that enter ports voluntarily, are not authorized to land, transship, refuel, resupply therein but are inspected upon entry.

**Conservation and management measure CMM 2009-06 (para 4-5) on the regulation of transshipment**

In-port transshipment operations are required to be undertaken in accordance with national laws, and the Commission is required to develop procedures to obtain and verify data on the quantity and species transshipped. CCMs may notify the Executive Director a list of their designated ports for transshipment and the Executive Director must circulate such a list. "Port" includes offshore terminals and other installations for landing, transshipping, processing, refuelling or resupplying.

**Proposed measures:**

In 2010, the EU proposed a WCPFC Conservation and Management Measure on port State measures. The proposal aims at the implementation of port State measures to control the long-term conservation and sustainable use of living marine resources. It also takes into consideration SIDSs' disadvantages in implementing these measures, in terms of resources and capacities. In this regard, the proposal considers to establish, as appropriate, additional WCPFC funding mechanisms to assist the abovementioned States in meeting the requirements of port State measures. Provisions included are: integration of measures at a national level; cooperation on exchange of information; requirements of small island developing States; designation of ports; advance request for port entry; denial of entry where there is suspicious of IUU fishing; use of ports; inspections procedures and the role of the flag State.

**NON-TUNA RFMOs**

**Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)**

**Hobart, Australia**

**Target species:** Antarctic marine living resources defined by the Convention as: “the populations of finfish, molluscs, crustaceans, and all other species of living organisms, including birds, found south of the Antarctic Convergence”

**Measures:** **Convention Measure 10-03 (2009)**

Contracting Parties are required to undertake inspections for all fishing vessels carrying *Dissostichus* spp. which enter their ports. CCAMLR’s Catch Documentation Scheme (CDS) also requires the authorisation of all landings and transshipments in a port area of *Dissostichus* spp. Vessels are required to give advance notice of their entry into port and submit a written declaration that they have not engaged in or supported IUU fishing. Vessels which declare that they have been involved in IUU fishing or fail to make a declaration shall be denied port access, other than for emergency purposes. Where there is evidence that the vessel has fished in contravention of CCAMLR conservation measures, the catch shall not be landed or transhipped and can not be subsequently traded in the territories of contracting Parties. The port State contracting Party must then inform the flag State and take investigative action and sanctions as appropriate.

In the event that port access is denied, the Secretariat shall promptly convey such reports to all contracting Parties and all non-contracting Parties cooperating with the Commission.

Contracting Parties are required to submit the results of port inspections in the CCAMLR pro forma.

**Proposed measures:**

None

**General Fisheries Commission for the Mediterranean (GFCM)**

**FAO, Rome, Italy**

**Target species:** All living marine resources in the Convention area

**Measures:** **Recommendation GFCM/2008/1 on a regional scheme on port State measures to combat illegal, unreported and unregulated fishing in the GFCM area**

Contracting Parties are required to designate and publicize national ports to which foreign vessels may be permitted to access and ensure that there is sufficient capacity at the ports to conduct inspections. The GFCM is required to establish and maintain a register of designated and publicized national ports.

Prior to entry vessels are required to submit certain information at least 72 hours prior to the estimated time of entry. The Contracting Party must communicate a written authorization or denial for access to the port for landing, transshipping or processing of fish.

In certain circumstances a contracting Party shall not allow a vessel to use its ports for landing, transshipping or processing of fish. In the event of a denial, the decision must be communicated to the master of the vessel, flag State and, as appropriate, relevant coastal State(s), the GFCM Secretariat and other relevant organizations.

In the event that a vessel or vessel engaged in fishing related activities enters one of its ports without prior authorization, it shall automatically be subject to inspection.

There are provisions for inspections and how results should be provided.  
Information should be handled in a standardised form.

There are provisions outlining the role of the flag State which include: cooperating with other contracting Parties, ensuring that the vessels which are entitled to fly its flag act in a manner consistent with the Recommendation and that the master of the vessel shall cooperate with authorities when the vessel is being inspected.

The annexes contain: information required from vessels to be given in advance of entry into port, procedures for inspection of vessels, training of port State inspectors, what information is required after a port State inspection has been conducted and what information contracting Parties, the Secretariat and flag States will require.

**Proposed  
measures:**

None

**Northwest Atlantic Fisheries Organization (NAFO)  
Dartmouth, Canada**

**Target species:  
Measures:**

Most fishery resources of the Northwest Atlantic except salmon, tunas/marlins, whales, and sedentary species

**Chapter V of the 2009 NAFO Conservation and Enforcement Measures**

The contracting Party must designate ports to which fishing vessels may be permitted access for the purpose of landing or transshipment. A vessel must notify the contracting Party at least three working days before the estimated time of arrival using standardised forms. Contracting Parties may make provisions for another notification period. A contracting Party must notify the master of a fishing vessel of its decision without delay. A contracting Party is required to conduct inspections on at least 15 per cent of all such landings or transshipments during each reporting year. There are provisions for what information must be collected during an inspection and where this information must be transmitted to.

The flag State must ensure that the master of a fishing vessel entitled to fly its flag complies with their obligations. The flag State shall confirm, amongst other things, that the fishing vessel declared to have caught the fish had sufficient quota for the species declared and has been authorized to fish in the area declared.

The master of a fishing vessel is required to cooperate and provide assistance with the inspection of the vessel, provide access to the vessel and relevant information when requested by a port State inspector.

The Executive Secretary is responsible for ensuring certain information is posted on the public and secure section of the NAFO Web site.

Certain actions are considered to be serious infringements which include: preventing inspectors from carrying out their duties, landing or transshipping in a port not designated in accordance with the requirements, failure of a master to comply with the obligations listed in the chapter and landing or transshipping without authorization of the port State.

**Chapter VI of the 2009 NAFO Conservation and Enforcement Measures (art. 58)**

NAFO NCPs IUU-listed vessels are not allowed to use CP ports for landing, transshipping fish products and receiving port services; denial of port entry to NCP IUU-listed vessels is required.

**Proposed  
measures:**

None

**North East Atlantic Fisheries Commission (NEAFC)  
London, United Kingdom**

<b>Target species:</b>	Species living on the seabed in the Northeast Atlantic
<b>Measures:</b>	<p><b>2011 Chapter V of the NEAFC Scheme of Control and Enforcement</b></p> <p>The CP must designate ports to which fishing vessels may be permitted access for the purpose of landing or transshipment. A vessel must notify the CP at least three working days before the estimated time of arrival using standardized forms. CPs may make provisions for another notification period. A CP must notify the master of a fishing vessel of its decision without delay. The notification must be accompanied by two different forms, PSC1 (to be used where the vessel is landing its own catch) and PSC2 (to be used where the vessel has engaged in transshipment operations). A CP is required to conduct inspections on at least 15 per cent of all such landings or transshipments during each reporting year. There are provisions for what information must be collected during an inspection and where this information must be transmitted to.</p> <p>The flag State shall confirm, amongst other things, that the fishing vessel declared to have caught the fish had sufficient quota for the species declared and has been authorized to fish in the area declared.</p> <p>The master of a fishing vessel is required to cooperate and provide assistance with the inspection of the vessel, provide access to the vessel and relevant information when deemed necessary by the inspectors.</p> <p>The Secretary is responsible for ensuring copies of inspection reports are posted on the NEAFC Web site without delay.</p> <p>Certain actions are considered to be serious infringements which include: preventing inspectors from carrying out their duties, landing and transshipping in a port not designated in accordance with the requirements, failure of a master to comply with the obligations listed in the chapter and landing or transshipping without authorization of the port State.</p>
<b>Proposed measures:</b>	None

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**OUTLINE OF THE PROCESS FOR THE DEVELOPMENT OF THE 2009 FAO AGREEMENT ON PORT STATE MEASURES TO PREVENT, DETER AND ELIMINATE ILLEGAL AND UNREPORTED FISHING**

<b>Expert Consultation on Illegal, Unreported and Unregulated Fishing 15–19 May 2000; Sydney, Australia</b>	
<b>Chairperson/Secretary Participation</b>	G. Hurry (Australia) (Chairperson); K. Bray (Technical Secretary - Australia) Experts from Argentina, Australia, Brazil, Canada, Chile, China, European Community, India, Italy, Japan, Republic of Korea, Malaysia, Mauritius, Netherlands, New Zealand, Norway, Panama, Poland, Russian Federation, South Africa, Spain, Taiwan Province of China, Thailand, Trinidad and Tobago, Venezuela (Bolivarian Republic of), Viet Nam, United Arab Emirates, United Kingdom, United States of America. Resource persons from FAO.
<b>Outcome</b>	Preliminary draft International Plan of Action to Combat Illegal, Unreported and Unregulated Fishing
<b>Report reference</b>	FAO. 2000. <i>Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing</i> . FAO Fisheries Report No. 666. Rome. 306 pp. (also available at <a href="http://www.fao.org/DOCREP/005/Y3274E/Y3274E00.HTM">www.fao.org/DOCREP/005/Y3274E/Y3274E00.HTM</a> ).
<b>Technical Consultation on Illegal, Unreported and Unregulated Fishing 2–6 October 2000; FAO headquarters, Rome, Italy</b>	
<b>Chairperson/Secretary Participation</b>	A. Jackson (United Kingdom) (Chairperson); D.J. Doullman (Secretary – FAO) Representatives from 72 FAO Members and one non-FAO Member, 2 UN Agencies and observers from 10 intergovernmental organizations (IGOs) and 9 non-governmental organizations (NGOs)
<b>Outcome</b>	Revision to the draft International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing
<b>Report reference</b>	FAO. 2000. <i>Report of the Technical Consultation on Illegal, Unreported and Unregulated Fishing</i> . FAO Fisheries Report No. 634. Rome. 39 pp. (also available at <a href="http://www.fao.org/DOCREP/MEETING/005/X8623E.HTM">www.fao.org/DOCREP/MEETING/005/X8623E.HTM</a> ).
<b>Second Technical Consultation on Illegal, Unreported and Unregulated Fishing FAO headquarters, Rome, Italy</b>	
<b>Chairperson/Secretary Participation</b>	A. Jackson (United Kingdom) (Chairperson); D.J. Doullman (Secretary - FAO) Representatives from 57 FAO members, 1 non-FAO member, 1 UN Agency and observers from 12 IGOs and 7 NGOs
<b>Outcome</b>	2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing
<b>Report reference</b>	FAO. 2001. <i>Report of the Second Technical Consultation on Illegal, Unreported and Unregulated Fishing</i> . FAO Fisheries Report No. 646. Rome. 38 pp. (also available at <a href="http://www.fao.org/DOCREP/MEETING/003/Y0772E.HTM">www.fao.org/DOCREP/MEETING/003/Y0772E.HTM</a> ).
<b>Expert Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing 4–6 November 2002; FAO headquarters, Rome, Italy</b>	
<b>Chairperson/Secretary Participation</b>	T.A. Mensah (Ghana) (Chairperson); D.J. Doullman and A. Van Houtte (Secretaries – FAO) Experts from Australia, Belgium, Japan, Mauritius, Mexico, Spain, Thailand and the United States of America. Resource persons from Norway and the International Maritime Organization (IMO)
<b>Outcome</b>	Draft Memorandum of Understanding on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing

**Report reference** FAO. 2002. *Report of the Expert Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing*. FAO Fisheries Report No. 692. Rome. 22 pp. (also available at [www.fao.org/DOCREP/005/Y8104E/Y8104E00.HTM](http://www.fao.org/DOCREP/005/Y8104E/Y8104E00.HTM)).

**Technical Consultation to Review Progress and Promote the Full Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing and the International Plan of Action for the Management of Fishing Capacity  
24–29 June 2004; FAO headquarters, Rome, Italy**

**Chairperson/Secretary** M. Miyahara (Japan) (Chairperson); D.J. Doulman and D. Greboval (Secretaries - FAO)  
**Participation** Representatives from 78 FAO Members, one associate Member, 12 IGOs and 11 NGOs  
**Outcome** Agreed actions and major recommendations to be taken by FAO Members, regional fisheries management organizations (RFMOs) and International Non-governmental Organizations (INGOs) to implement the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing and the International Plan of Action for the Management of Fishing Capacity  
**Report reference** FAO. 2004. *Report of the Technical Consultation to Review Progress and Promote the Full Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing and the International Plan of Action for the Management of Fishing Capacity*. FAO Fisheries Report No. 753. Rome. 43 pp. (also available at [www.fao.org/docrep/007/y5681e/y5681e00.htm](http://www.fao.org/docrep/007/y5681e/y5681e00.htm)).

**Technical Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing  
31 August – 2 September 2004; FAO Headquarters, Rome, Italy**

**Chairperson/Secretary** T. Lobach (Norway) (Chairperson); D. J. Doulman and A. Van Houtte (Secretaries - FAO)  
**Participation** Representatives from 59 FAO Members and four UN agencies and observers from three IGOs and two NGOs  
**Outcome** Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing  
**Report reference** FAO. 2004. *Report of the Technical Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing*. FAO Fisheries Report No. 759. Rome. 34 pp. (also available at [www.fao.org/docrep/007/y5787e/y5787e00.htm](http://www.fao.org/docrep/007/y5787e/y5787e00.htm)).

**Expert Consultation on the Use of Vessel Monitoring Systems and Satellites for Fisheries Monitoring, Control and Surveillance  
24–26 October 2006: FAO headquarters, Rome, Italy**

**Chairperson/Secretary** M. Tsamenyi (Australia); D.J. Doulman (Technical Secretary – FAO)  
**Participation** Experts from Cook Islands, Chile, Gambia, Iceland, Italy, New Zealand, Malaysia, Solomon Islands, Spain and United Kingdom. Resource persons from AGRIFISH, IMO and United Nations Office of Legal Affairs/Division for Ocean Affairs and the Law of the Sea (UNDOALOS)  
**Outcome** Recommended future action on the use of vessel monitoring systems (VMS) and satellites and in particular the desirability of an FAO Technical Consultation  
**Report reference** FAO. 2006. *Report of the Expert Consultation on the Use of Vessel Monitoring Systems and Satellites for Fisheries Monitoring, Control and Surveillance*. FAO Fisheries Report No. 815. Rome. 68 pp. (also available at [www.fao.org/docrep/009/a0959e/a0959e00.htm](http://www.fao.org/docrep/009/a0959e/a0959e00.htm)).

**Expert Consultation to Draft a Legally-binding Instrument on Port State Measures  
4–8 September 2007; Washington, DC, United States of America**

<b>Chairperson/Secretary</b>	D. Balton (United States of America) (Chairperson); D.J. Doulman (Secretary – FAO)
<b>Participation</b>	Experts from Brazil, Canada, Japan, Oman, Netherlands, New Zealand, Norway, Senegal and Seychelles. Resource persons from International Labour Organization (ILO), IMO, International Tribunal for the Law of the Sea (ITLOS), North East Atlantic Fisheries Commission (NEAFC) and UNDOALOS
<b>Outcome</b>	Draft Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing
<b>Report reference</b>	FAO. 2007. <i>Report of the Expert Consultation to Draft a Legally-binding Instrument on Port State Measures</i> . FAO Fisheries Report No. 846. Rome. 22 pp. (also available at <a href="http://www.fao.org/docrep/010/a1375e/a1375e00.htm">www.fao.org/docrep/010/a1375e/a1375e00.htm</a> ).

**Technical Consultation to Draft a Legally-binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing**

**23–27 June 2008, 26–30 January 2009, 4–8 May 2009 and 24–28 August 2009; FAO headquarters, Rome, Italy**

<b>Chairperson/Secretary</b>	F. Hazin (Brazil) (Chairperson); D.J. Doulman (Secretary – FAO)
<b>Participation</b>	Representatives from 92 FAO Members, 1 associate Member and 3 UN agencies and observers from 20 IGOs and NGOs
<b>Outcome</b>	Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing
<b>Report reference</b>	FAO. 2009. <i>Report of Technical Consultation to Draft a Legally-binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing</i> . FAO Fisheries Report No. 914. Rome. 77 pp (also available at <a href="http://www.fao.org/docrep/012/i1122e/i1122e00.htm">www.fao.org/docrep/012/i1122e/i1122e00.htm</a> ).

**MAJOR DECISIONS BY FAO GOVERNING BODIES AND OTHER MEETINGS AND THE UNITED NATIONS GENERAL ASSEMBLY  
CONCERNING THE DEVELOPMENT OF A LEGALLY-BINDING INSTRUMENT ON PORT STATE MEASURES**

<b>FAO Committee on Fisheries (COFI) (Twenty-fourth Session) 26 February – 2 March 2001; FAO headquarters, Rome, Italy</b>	
<b>Action/Resolution</b>	COFI supported the adoption of the draft International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) while recognizing the important need to address IUU fishing in a broad and comprehensive manner. It was noted that the draft IPOA-IUU before the Committee was a compromise document concluded within the framework of the 1995 FAO Code of Conduct for Responsible Fisheries. The Committee further recognized that concerted efforts on the part of all Members would be required to implement the IPOA-IUU.
<b>Outcome</b>	IPOA-IUU adopted by COFI.
<b>Reference</b>	FAO. 2001. <i>Report of the twenty-fourth session of the Committee on Fisheries</i> . FAO Fisheries Report No. 655. Rome. 87 pp. (also available at <a href="http://www.fao.org/DOCREP/005/Y2161E/Y2161E00.HTM">www.fao.org/DOCREP/005/Y2161E/Y2161E00.HTM</a> ).
<b>Joint FAO/IMO Ad-hoc Working Group on Illegal, Unreported and Unregulated Fishing and Related Matters 9–11 October 2000; FAO headquarters, Rome, Italy</b>	
<b>Action/Resolution</b>	The meeting noted that the majority of fishing vessels were not covered by IMO conventions (because fishing vessels were excluded, they were outside the size limitations or flag States were not Party to the relevant instruments); recognized the possibility of controlling vessels engaged in the transshipment and transport of fish and re-supply of fishing vessels, as they are subject to port State control with respect to maritime safety, pollution prevention and living and working conditions; stressed that States, in the exercise of their sovereignty over their ports, had scope to introduce domestic legislation to deal with foreign fishing vessels entering or leaving their ports, and recognized that the mechanism of international or regional memorandum of understanding (MOUs) relating to port State control of fishing vessels could be used as an important and effective tool for enhancing fisheries management, and for addressing the issue of IUU fishing.
<b>Outcome</b>	A set of criteria for inspections of foreign flag fishing vessels by a port State were agreed that should be taken into account by FAO in its future work on port State measures.
<b>Reference</b>	FAO. 2001. <i>Report of the Joint FAO/IMO Ad hoc Working Group on Illegal, Unreported and Unregulated Fishing and Related Matters</i> . FAO Fisheries Report No. 637. Rome. 24 pp. (also available at <a href="ftp://ftp.fao.org/docrep/fao/005/x9436e/x9436e00.pdf">ftp://ftp.fao.org/docrep/fao/005/x9436e/x9436e00.pdf</a> ).
<b>FAO Council (Hundred and Twentieth Session) 18–23 June 2001; FAO headquarters, Rome, Italy</b>	
<b>Action/Resolution</b>	Council considered the IPOA-IUU in the context of reviewing the report of the twenty-fourth session of COFI and noted that the IPOA-IUU was timely and would help ensure that fisheries were more sustainably utilized.

**Outcome Reference** IPOA–IUU endorsed by the FAO Council.  
FAO. 2001. *Report of the Council of FAO* [online]. CL120REP. [Cited 31 January 2012].  
[www.fao.org/docrep/meeting/003/Y1120e/Y1120e00.htm](http://www.fao.org/docrep/meeting/003/Y1120e/Y1120e00.htm)

**COFI (Twenty-sixth Session)**

**7–11 March 2005; FAO headquarters, Rome, Italy**

**Action/Resolution** COFI acknowledged that there was a need to strengthen port State measures as a means of combating IUU fishing in a more substantive manner given that the lack of agreed, binding measures provided a loophole. Some Members requested that these measures be promoted in RFMOs for the development or improvement of the port State aspects of regional control schemes. In endorsing the report and the recommendations of the Technical Consultation, the Committee agreed that follow-up work on the 2004 FAO Technical Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing should be undertaken, especially with respect to operationalizing the 2005 FAO Model Scheme to Combat Illegal, Unreported and Unregulated Fishing (Model Scheme).

**Outcome Reference** Model Scheme endorsed by COFI.  
FAO. 2005. *Report of the twenty-sixth session of the Committee on Fisheries*. FAO Fisheries Report No. 780. Rome. 88 pp.  
(also available at [www.fao.org/docrep/008/a0008e/a0008e00.htm](http://www.fao.org/docrep/008/a0008e/a0008e00.htm)).

**Review Conference of the 1995 UN Fish Stocks Agreement**

**22–26 May 2006; UN headquarters, New York, United States of America**

**Action/Resolution** The Conference considered progress with the implementation of the implementation of the 1995 UN Fish Stocks Agreement and in relation to MCS and enforcement, recommended that States individually and collectively through RFMOs adopt all necessary port State measures consistent with Article 23 of the 1995 UN Fish Stocks Agreement, particularly those envisioned in the Model Scheme and promote minimum standards at the regional level.

**Outcome** Encouraged FAO to develop a legally-binding instrument on minimum standards for port State measures, building on the Model Scheme and the IPOA–IUU.

**Reference** United Nations. 2006. *Report of the 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*. A/CONF.210/2006/15. New York, USA. 43 pp.  
(also available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/422/95/PDF/N0642295.pdf?OpenElement>).

**United Nations General Assembly (UNGA)**

**8 December 2006; UN Headquarters, New York, United States of America**

**Action/Resolution** The UNGA resolution (i) recognized the need for enhanced port State controls to combat IUU fishing, urged States to cooperate, in particular at the regional level and through RFMOs to adopt all necessary port measures, consistent with international law taking into account Article 23 of the 1995 UN Fish Stocks Agreement, particularly those identified in the Model Scheme and to promote the development and application of minimum standards at the regional level; (ii) called attention to the need for more work to develop port State measures and schemes, and the critical need for cooperation with developing States to build their capacity; and (iii) encouraged States to initiate, as soon as possible, a process within FAO to develop, as appropriate, a legally-binding instrument on minimum standards for port State measures, building on the Model Scheme and the IPOA–IUU.

**Outcome Reference** UNGA Resolution 61/105  
UN. 2007. *Resolution adopted by the General Assembly 61/105: Sustainable fisheries, including through the 1995 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, and related instruments.* New York, USA. 21 pp. (also available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/500/73/PDF/N0650073.pdf?OpenElement>).

**COFI (Twenty-seventh Session)**

**5–9 March 2007; FAO headquarters, Rome, Italy**

<b>Action/Resolution</b>	COFI acknowledged the urgent need for a comprehensive suite of port State measures and noted of the strong support for the proposal to develop a new legally-binding instrument based on the Model Scheme and the IPOA–IUU. COFI endorsed the following timetable: an Expert Consultation to be convened during the latter half of 2007 to prepare a draft agreement and a Technical Consultation to finalize the instrument’s text during the first half of 2008 and present it to the twenty-eighth COFI session in 2009. Many Members stressed that the new instrument would represent minimum standards for port States, with flexibility to adopt more stringent measures and some Members also stressed that it should not detract from other previously agreed measures such as the need for capacity reduction. It was noted that Norway advised the Committee that it was prepared to contribute financially to the required process within FAO.
<b>Outcome</b>	COFI agreed to plan of work to elaborate a legally-binding instrument on port State measures.
<b>Reference</b>	FAO. 2007. <i>Report of the twenty-seventh session of the Committee on Fisheries</i> . FAO Fisheries Report No. 830. Rome. 88 pp. (also available at <a href="http://www.fao.org/docrep/010/a1160e/a1160e00.htm">www.fao.org/docrep/010/a1160e/a1160e00.htm</a> ).

**FAO Council (Hundred and Thirty-second Session)**

**18–22 June 2007; FAO headquarters, Rome, Italy**

<b>Action/Resolution</b>	Council welcomed the initiative to commence a process leading to the adoption of a legally-binding international agreement establishing control measures in ports, based on the Model Scheme.
<b>Outcome</b>	Council considered the COFI report and noted that IUU fishing remained a serious concern.
<b>Reference</b>	FAO. 2007. <i>Report of the Council of FAO</i> [online]. CL132/REP. [Cited 31 January 2012]. <a href="ftp://ftp.fao.org/docrep/fao/meeting/011/j9797e.pdf">ftp://ftp.fao.org/docrep/fao/meeting/011/j9797e.pdf</a>

**Joint Second FAO/IMO Ad-hoc Working Group on Illegal, Unreported and Unregulated Fishing and Related Matters**

**16–18 July 2007; FAO headquarters, Rome, Italy**

<b>Action/Resolution</b>	The meeting commended COFI’s decision to proceed with the development of a binding instrument on port State measures. It recommended that FAO and IMO share information among regional organizations involving port State control regimes and RFMOs. In this context, it was proposed that FAO should attend the next IMO Global Workshop on Port State Control and jointly present a comparative study of the areas covered by the various regional organizations; identify enforcement options to act as incentives or deterrents and facilitate the harmonization of standards, definitions and terminologies.
<b>Outcome</b>	A set of recommendations on port State measures to further joint work between FAO and IMO.
<b>Reference</b>	FAO. 2007. <i>Report of the Joint Second FAO/IMO Ad-hoc Working Group on Illegal, Unreported and Unregulated Fishing and Related Matters</i> . FAO Fisheries Report No. 845. Rome. Report not finalized and published. Not available electronically.

**United Nations General Assembly (UNGA)**

**18 December 2007; UN headquarters, New York, United States of America**

<b>Action/Resolution</b>	The UNGA resolution (i) welcomed the adoption of agreed port State measures by several RFMOs that include the denial of port access to vessels appearing in the lists of vessels identified as engaged in IUU fishing established by these organizations; (ii) welcomed the initiation of a process within FAO to develop a legally binding instrument on minimum standards for port State measures based on the Model Scheme and the IPOA-IUU, noted the 2007 FAO Expert Consultation on Port State Measures and encouraged all relevant States to participate in the
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intergovernmental Technical Consultation to be held in Rome from 23 to 28 June 2008, so that the finalized instrument may be presented to the Committee on Fisheries at its twenty-eighth session, in 2009; (iii) Welcomed the cooperation between the FAO and the IMO and noted the outcomes, including the agreed priorities, of the second session of their Joint Ad Hoc Working Group on Illegal, Unreported and Unregulated Fishing and Related Matters, which are under consideration by those two organizations, and encourages ongoing collaboration between them to combat illegal, unreported and unregulated fishing, particularly in improving the implementation of flag State responsibilities and port State measures.

**Outcome  
Reference**

UNGA Resolution 62/177

UN. 2008. *Resolution adopted by the General Assembly 62/177: Sustainable fisheries, including through the 1995 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, and related instruments*. New York, USA. 23 pp. (also available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/474/39/PDF/N0747439.pdf?OpenElement>).

**United Nations General Assembly (UNGA)**

**5 December 2008; UN headquarters, New York, United States of America**

**Action/Resolution**

The UNGA resolution (i) called attention to the need for States, individually and through RFMOs to continue to develop and implement effective port State measures and schemes to combat overfishing and IUU fishing, and the critical the need for cooperation with developing States to build their capacity, taking note of FAO's work to develop a legally binding instrument on minimum standards for port State measures; (ii) recognized the need for enhanced port State measures to combat IUU fishing, and urged States to cooperate, in particular at the regional level and through RFMOs to adopt all necessary port measures, consistent with international law taking into account Article 23 of the 1995 UN Fish Stocks Agreement, particularly those identified in the Model Scheme and to promote the development and application of minimum standards at the regional level; (iii) encouraged all relevant States to participate in the resumed session of the Technical Consultation, to be held in Rome from 26 to 30 January 2009 with a view to presenting the finalized text of the instrument to COFI in 2009; and (iv) encouraged strengthened collaboration between FAO and IMO taking into account the respective competencies, mandates and experience of the two organizations, to combat IUU fishing particularly in improving the implementation of flag State responsibilities and port State measures. COFI encouraged negotiations to wrap up as soon as possible.

**Outcome  
Reference**

UNGA Resolution 63/112

UN. 2008. *Resolution adopted by the General Assembly 63/112: Sustainable fisheries, including through the 1995 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, and related instruments*. New York, USA. 21 pp. (also available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/477/51/PDF/N0847751.pdf?OpenElement>).

**COFI (Twenty-eighth Session)**

**2–6 March 2009; FAO headquarters, Rome, Italy**

**Action/Resolution**

COFI reviewed progress for the negotiation of an internationally-binding instrument on port State measures.

**Outcome**

COFI referred to its commitment to a successful outcome of the negotiation process and stressed the importance the resulting instrument be effective and accepted widely.

**Reference**

FAO. 2009. *Report of the twenty-eighth session of the Committee on Fisheries*. FAO Fisheries and Aquaculture Report No. 902. Rome. 64 pp. (also available at <ftp://ftp.fao.org/docrep/fao/012/i1017e/i1017e00.pdf>).

**FAO Council (Hundred and Thirty-sixth Session)  
15–19 June 2009; FAO Headquarters, Rome, Italy**

<b>Action/Resolution</b>	Council considered the report of the twenty-eighth session of the Committee on Fisheries. It underscored the importance of issues such as combating IUU fishing including the early finalization of a legally-binding instrument on port State measures,
<b>Outcome</b>	Council endorsed COFI's position to finalize the negotiations for the draft Agreement.
<b>Reference</b>	FAO. 2009. <i>Report of the Council of FAO</i> [online]. CL136/REP. [Cited 31 January 2012]. <a href="ftp://ftp.fao.org/docrep/fao/meeting/017/k4992e02.pdf">ftp://ftp.fao.org/docrep/fao/meeting/017/k4992e02.pdf</a>

**Technical Consultation to Draft a Legally-binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing**

**23–27 June 2008, 26–30 January 2009, 4–8 May 2009 and 24–28 August 2009; FAO headquarters, Rome, Italy**

<b>Action/Resolution</b>	Four negotiation sessions and an open-ended technical meeting to finalize the draft 2009 Agreement.
<b>Outcome</b>	The draft Agreement was finalized by the Technical Consultation on 26 August 2009.
<b>Reference</b>	FAO. 2009. <i>Technical Consultation to Draft a Legally-binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing</i> . FAO Fisheries and Aquaculture Report No. 914. Rome. 77 pp. (also available at <a href="http://www.fao.org/docrep/012/i1122e/i1122e00.pdf">www.fao.org/docrep/012/i1122e/i1122e00.pdf</a> )

**FAO Committee on Constitutional and Legal Matters (CCLM) (Eighty-eighth Session)  
23–25 September 2009; FAO headquarters, Rome, Italy**

<b>Action/Resolution</b>	CCLM reviewed the 2009 Agreement.
<b>Outcome</b>	The CCLM endorsed the draft Agreement, and a draft Conference Resolution and agreed to forward them to the FAO Council for subsequent transmission to the FAO Conference for approval under Article XIV, paragraph 1 of the Constitution.
<b>Reference</b>	FAO. 2009. <i>Report of the 88th Session of the Committee on Constitutional and Legal Matters (CCLM) (23–25 September 2009)</i> . Rome. 84 pp. (also available at <a href="ftp://ftp.fao.org/docrep/fao/meeting/017/k6037e1.pdf">ftp://ftp.fao.org/docrep/fao/meeting/017/k6037e1.pdf</a> ).

**FAO Council (Hundred and Thirty-seven Session)  
28 September – 2 October 2009; FAO headquarters, Rome, Italy**

<b>Action/Resolution</b>	Council reviewed the CCLM report and noted that the FAO secretariat, assisted by an open-ended group of legal experts and participants in the Technical Consultation, had carried out a detailed editorial review of the draft Agreement after its finalization by the Technical Consultation. Netherlands Stated that negotiations on a UNGA resolution on fisheries matters would be held at the United Nations from 16–23 November 2009. The adoption of the Agreement was a critical event to be taken into consideration in the context of those negotiations and it was highly desirable that the Agreement be adopted as early as possible at the Conference.
<b>Outcome</b>	Council transmitted the draft Agreement and draft Conference resolution to the FAO Conference for consideration and approval under Article XIV, paragraph 1 of the Constitution.
<b>Reference</b>	FAO. 2009. <i>Report of the Council of FAO</i> [online]. CL137/REP. [Cited 31 January 2012]. <a href="ftp://ftp.fao.org/docrep/fao/meeting/018/k5962e01.pdf">ftp://ftp.fao.org/docrep/fao/meeting/018/k5962e01.pdf</a>

**FAO Conference (Thirty-sixth Session)  
18–23 November 2009; FAO headquarters, Rome, Italy**

<b>Action/Resolution</b>	The Conference commended the efforts of FAO and its Members for its work in preparing a draft Legally-Binding Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. Several Members, while stressing the importance of combating IUU fishing, stated that the Draft Agreement presented difficulties for their approval and signature in its current form.
<b>Outcome</b>	2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing 12/09 adopted on 22 November 2009. Agreement opened for signature on 22 November 2009 and will remain open until 21 November 2010.
<b>Reference</b>	FAO. 2009. <i>Conference resolution 12/09 “Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing”</i> [online]. C 2009/REP. [Cited 31 January 2012]. <a href="http://www.fao.org/docrep/meeting/019/k6302e.pdf">http://www.fao.org/docrep/meeting/019/k6302e.pdf</a>

**United Nations General Assembly (UNGA)  
4 December 2009; UN headquarters, New York, United States of America**

<b>Action/Resolution</b>	The UNGA resolution (i) deplored that fish stocks in many parts of the world were overfished or subject to sparsely regulated and heavy fishing efforts, as a result of, inter alia, IUU fishing, inadequate flag State control and enforcement, overcapacity and inadequate port State control; (ii) recognized the need for States, individually and through RFMOs to continue to develop and implement, effective port State measures to combat overfishing and IUU fishing, the critical need for cooperation with developing States to build their capacity, and the importance of cooperation between FAO and IMO; (iii) welcomed the approval by the FAO Conference of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, unreported and Unregulated Fishing and its opening for signature on 22 November 2009; (iii) recognized the need for enhanced port State measures to combat IUU fishing and urged States to cooperate, in particular at the regional level and through RFMOs to adopt all necessary port measures, consistent with international law taking into account Article 23 of the 1995 UN Fish Stocks Agreement and to further promote the development and application of standards at the regional level; and (iv) encouraged States to consider signing and ratifying, accepting, approving or acceding to the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing with a view to its early entry into force.
<b>Outcome</b>	UNGA Resolution 64/72
<b>Reference</b>	UN. 2009. <i>Resolution adopted by the General Assembly 64/72: Sustainable fisheries, including through the 1995 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, and related instruments</i> . New York, USA. 26 pp. (also available at <a href="http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/466/15/PDF/N0946615.pdf?OpenElement">http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/466/15/PDF/N0946615.pdf?OpenElement</a> ).

**NOTIFICATION, COMMUNICATION AND INFORMATION REQUIREMENTS FOR PORT STATES AND FLAG STATES<sup>1</sup>**

**A. PORT STATES**

<b>ARTICLE</b>	<b>INFORMATION</b>	<b>RECIPIENTS</b>	<b>REQUIREMENTS</b>
<b>Article 7(1) Designation of ports</b>	<b>Publicize</b> the ports to which vessels may request entry		
	<b>Provide</b> a list of designated ports	<ul style="list-style-type: none"> <li>• FAO</li> </ul>	
<b>Article 9(1)(3) Port entry, authorization or denial</b>	<b>Communicate</b> the decision to authorize or deny the entry of the vessel into the port	<ul style="list-style-type: none"> <li>• The vessel requesting entry into the port or its representative</li> </ul>	
	<b>Communicate</b> the decision to deny the entry of the vessel into a port	<ul style="list-style-type: none"> <li>• The flag State</li> <li>• As appropriate and to the extent possible                             <ul style="list-style-type: none"> <li>○ relevant coastal States</li> <li>○ RFMOs</li> <li>○ other international organizations</li> </ul> </li> </ul>	
<b>Article 11(3)(5) Use of ports</b>	<b>Notify</b> the decision to deny the use of a port	<ul style="list-style-type: none"> <li>• The flag State</li> <li>• As appropriate                             <ul style="list-style-type: none"> <li>○ relevant coastal States</li> <li>○ RFMOs</li> <li>○ other relevant international organizations</li> </ul> </li> </ul>	Promptly
	<b>Notify</b> the withdrawal of the decision to deny the use of the port	<ul style="list-style-type: none"> <li>• The flag state</li> <li>• As appropriate                             <ul style="list-style-type: none"> <li>○ relevant coastal States</li> <li>○ RFMOs</li> <li>○ other relevant international organizations to whom the decision to deny the use of the port was issued</li> </ul> </li> </ul>	Promptly

<sup>1</sup> Requirements under Parts 1–9 of the Agreement.

ARTICLE	INFORMATION	RECIPIENTS	REQUIREMENTS
<p><b>Article 15</b> <b>Transmittal of inspection results</b></p>	<p><b>Transmit</b> the results of each inspection</p>	<ul style="list-style-type: none"> <li>• The flag State of the inspected vessel</li> <li>• As appropriate               <ul style="list-style-type: none"> <li>○ relevant Parties and States including                   <ul style="list-style-type: none"> <li>➤ those States for which there is evidence through inspection of IUU fishing or related activities within their waters</li> <li>➤ the State of which the vessel's master is a national</li> </ul> </li> <li>○ relevant RFMOs</li> <li>○ FAO</li> <li>○ other relevant international organizations</li> </ul> </li> </ul>	
<p><b>Article 16(3)(5)</b> <b>Electronic exchange of information</b></p>	<p><b>Notify</b> the Party's contact point for the exchange of information under the Agreement</p>	<ul style="list-style-type: none"> <li>• FAO</li> </ul>	
<p><b>Article 18(1a)</b> <b>Port State actions following inspection</b></p>	<p><b>Notify</b> the findings where, following an inspection, there are clear grounds for believing a vessel engaged in IUU fishing or related activities</p>	<ul style="list-style-type: none"> <li>• The flag State</li> <li>• As appropriate               <ul style="list-style-type: none"> <li>○ relevant coastal States</li> <li>○ RFMOs</li> <li>○ other international organizations</li> <li>○ the State of which the vessel's master is a national</li> </ul> </li> </ul>	<p>Promptly</p>

ARTICLE	INFORMATION	RECIPIENTS	REQUIREMENTS
<p><b>Article 19(1)(2)</b> <b>Information on recourse in the port State</b></p>	<p><b>Provide information</b> available to the public, with regard to any recourse established in accordance with national laws and regulations concerning port State measures taken by that Party pursuant to Articles 9, 11,13 or 18, including information</p> <ul style="list-style-type: none"> <li>• pertaining to the public services or judicial institutions available for this purpose</li> <li>• on whether there is any right to seek compensation in accordance with national laws and regulations in the event of any loss or damage suffered as a consequence of any alleged unlawful action by the Party</li> </ul>	<ul style="list-style-type: none"> <li>• The owner, operator, master or representative of a vessel</li> </ul>	<p>Upon written request</p>
	<p><b>Inform</b> the outcome of any such recourse and of any change in the decision</p>	<ul style="list-style-type: none"> <li>• The flag State, the owner, operator, master or representative as appropriate</li> <li>• Other Parties, States or international organizations if they have been informed of the prior decision pursuant to Articles 9, 11, 13 or 18</li> </ul>	

**B. FLAG STATES**

ARTICLE	INFORMATION	RECIPIENTS	REQUIREMENTS
<p><b>Article 20(5)</b> <b>Role of flag States</b></p>	<p><b>Report</b> on actions taken in respect of vessels entitled to fly its flag that, as a result of port state measures, have been determined to have engaged in IUU fishing or related activities</p>	<ul style="list-style-type: none"> <li>• Other Parties</li> <li>• Relevant port States</li> <li>• As appropriate <ul style="list-style-type: none"> <li>○ other relevant States</li> <li>○ RFMOs</li> <li>○ FAO</li> </ul> </li> </ul>	

### C. PORT STATES AND FLAG STATES

ARTICLE	INFORMATION	RECIPIENTS	REQUIREMENTS
<b>Article 6 Cooperation and exchange of information</b>	<b>Exchange</b> information, including the measures adopted by RFMOs in relation to the objective of the Agreement	<ul style="list-style-type: none"> <li>• Relevant States</li> <li>• FAO</li> <li>• Other international organizations</li> <li>• RFMOs</li> </ul>	
<b>Article 16(3)(5) Electronic exchange of information</b>	<b>Notify</b> the authority designated to act as a contact point for the exchange of information under this Agreement	<ul style="list-style-type: none"> <li>• FAO</li> </ul>	
<b>Article 32(1)(2) Provisional application</b>	<b>Notify</b> the consent to the provisional application of the Agreement	<ul style="list-style-type: none"> <li>• The Depositary</li> </ul>	In writing
	<b>Notify</b> the intention to terminate the provisional application of the Agreement	<ul style="list-style-type: none"> <li>• The Depositary</li> </ul>	In writing

**CHECKLISTS FOR IMPLEMENTING THE 2009 FAO PORT STATE MEASURES AGREEMENT: OPERATIONAL, POLICY AND LEGAL CHECKLISTS**

**OPERATIONAL CHECKLIST**

**Introduction**

This checklist describes procedures that should be established for the effective operational implementation of the Agreement. The procedures for each country will depend, to a great extent, on the country’s law, policy, institutional arrangements and human capacity. The checklist is presented as a framework of procedures that should be considered and details can be tailored to meet the situation of each country.

<b>ARTICLE</b>	<b>TITLE</b>	
<b>PART 1 GENERAL PROVISIONS</b>		
1	Use of Terms	Ensure operational understanding of key terms defined in the law.
3	Application	<p>Establish procedures to:</p> <ul style="list-style-type: none"> <li>• determine whether vessels flagged by other Parties are authorized by the relevant Party to fish beyond areas of national jurisdiction;</li> <li>• establish whether container vessels are not carrying fish, or, if carrying fish, are carrying only fish that have previously been landed; and</li> <li>• establish whether IUU fishing or related activities have been conducted in marine areas.</li> </ul> <p>Establish procedures and responsibility for:</p> <ul style="list-style-type: none"> <li>• ensuring that the Agreement is applied in a fair, transparent and non-discriminatory manner, consistent with international law; and</li> <li>• encouraging all other entities to apply measures consistent with the provisions of the Agreement.</li> </ul>
5	Integration and coordination at the national level	<p>Establish procedures:</p> <ul style="list-style-type: none"> <li>• that specify the roles, responsibilities, coordination and communication among government agencies, taking into account legal requirements; and</li> <li>• for interagency collection, maintenance and dissemination of information and data, taking into account the need to promote the exchange of information.</li> </ul>

ARTICLE	TITLE	
		Establish and maintain up-to-date integrated databases, as appropriate.
6	Cooperation and exchange of information	Establish procedures that will support conservation and management measures taken by other States and international organizations, including: <ul style="list-style-type: none"> <li>• exchange of information with relevant States/FAO/international organizations/RFMOs, including information on such measures; and</li> <li>• procedures for cooperation through regional, subregional and international organizations.</li> </ul>
<b>PART 2 ENTRY INTO PORT</b>		
7	Designation of ports	Ensure that procedures are in place for: <ul style="list-style-type: none"> <li>• the provision of a list of designated ports to FAO; and</li> <li>• providing for sufficient capacity to conduct inspections at all designated ports, e.g. through deployment of trained workers.</li> </ul>
8	Advance request for port entry	Ensure that procedures are in place: <ul style="list-style-type: none"> <li>• so that, once the vessel provides the required advance information, it can be processed and a decision can be made prior to the vessel's arrival;</li> <li>• in case of denial of entry into port, to prevent the vessel from entering port or, if it does enter port, to take the necessary action against the vessel;</li> <li>• to address situations where a vessel is permitted entry;               <ul style="list-style-type: none"> <li>○ for the purpose of rendering assistance to a vessel or person in danger for reasons of <i>force majeure</i> or distress;</li> <li>○ to allow, where appropriate, for the scrapping of the vessel; or</li> <li>○ for inspection or other enforcement action.</li> </ul> </li> <li>• to notify a decision to deny entry to the flag State and, as appropriate, to relevant coastal States, RFMOs and other international organizations.</li> </ul>
9	Port entry, authorization and denial	Ensure that procedures are in place, prior to the entry of a vessel into port, to: <ul style="list-style-type: none"> <li>• authorize a vessel to enter port;</li> <li>• communicate to the vessel or its representative the decision to authorize entry into port;</li> <li>• issue an authorization for the vessel to present upon entry into port;</li> <li>• receive and review the authorization once the vessel enters port, and notify authorities of any irregularities or</li> </ul>

ARTICLE	TITLE	
		<p>illegalities;</p> <ul style="list-style-type: none"> <li>• communicate the denial of entry into port to the vessel or its representative;</li> <li>• communicate the decision to deny entry to the flag State of the vessel and, as appropriate and to the extent possible, relevant coastal States, regional fisheries management organizations and other international organizations;</li> <li>• where a vessel that has been denied entry into port, or has been permitted to enter only for purposes of inspection – <ul style="list-style-type: none"> <li>○ as directed, take actions at least as effective as denial of port entry in combating IUU fishing and related activities;</li> <li>○ deny the use of the port for landing, transshipping, packaging, and processing of fish and for other port services including, <i>inter alia</i>, refuelling and resupplying, maintenance and dry docking;</li> </ul> </li> <li>• communicate the decision to deny the use of port to relevant persons (natural or legal) and/or organizations in order that they do not allow or participate in such use; and</li> <li>• take enforcement action against vessels, persons or organizations that use, or allow to be used, ports where such use has been denied.</li> </ul>
10	<i>Force majeure</i> or distress	<p>Ensure that procedures are in place for:</p> <ul style="list-style-type: none"> <li>• decision-making and communication of a decision to allow vessels to enter port for reasons of <i>force majeure</i> or distress;</li> <li>• communication to relevant persons (natural or legal) and/or organizations that such vessels may only receive the relevant assistance and are not allowed other uses of the port; and</li> <li>• ensuring that the vessel does not use the port except to receive the relevant assistance.</li> </ul>
<b>PART 3 USE OF PORTS</b>		
11	Use of ports	<p>Ensure that procedures are in place, after a vessel has entered port, to:</p> <ul style="list-style-type: none"> <li>• decide on the denial of the use of the port for landing, transshipping, packaging, and processing of fish and for other port services including, <i>inter alia</i>, refuelling and resupplying, maintenance and dry docking;</li> <li>• communicate the decision to deny the use of port to relevant persons (natural or legal) and/or organizations in order that they do not allow or participate in such use;</li> <li>• take enforcement action against vessels, persons or organizations that use, or allow to be used, ports where such use has been denied; and</li> <li>• notify the denial of port services (and if relevant the subsequent withdrawal of such denial) to the flag State and, as appropriate, relevant coastal States, RFMOs and international organizations.</li> </ul>

ARTICLE	TITLE	
<b>PART 4 INSPECTIONS AND FOLLOW-UP ACTIONS</b>		
12	Levels and priorities for inspection	Procedures should operationalize decisions taken regarding the level of, and priorities for, inspections.
13	Conduct of inspections	Procedures should ensure that, as a minimum standard: <ul style="list-style-type: none"> <li>• inspectors carry out the functions set out in Annex B of the Agreement; and</li> <li>• inspections are carried out in accordance with the requirements of Article 13(2) of the Agreement.</li> </ul>
14	Results of inspections	Procedures should ensure that information set out in Annex C of the Agreement is included in the written report of the results of each inspection.
15	Transmittal of inspection results	Procedures should ensure that the results of an inspection are transmitted to the flag State of the inspected vessel and as appropriate to: <ul style="list-style-type: none"> <li>• relevant Parties and States, including relevant coastal States where IUU fishing or related activities may have occurred and the State of which the vessel's master is a national;</li> <li>• relevant RFMOs; and</li> <li>• FAO and other relevant international organizations.</li> </ul>
16	Electronic exchange of information	A communication mechanism should be established that allows for direct electronic exchange of information, with due regard to appropriate confidentiality requirements.  A contact point for the exchange of information under the Agreement should be operationalized, and an official list drawn up of contacts in other government agencies, States, RFMOs and FAO.  Develop a protocol for the direct exchange of information, taking into account the need to: <ul style="list-style-type: none"> <li>• handle information to be transmitted through the communication mechanism that is consistent with Annex D of the Agreement; and</li> <li>• facilitate the exchange of information with existing databases relevant to the Agreement at national, regional and international levels.</li> </ul>
17	Training of inspectors	The Guidelines for the training of inspectors in Annex E of the Agreement should be taken into account in relation to training. Cooperation among States and with RFMOs should be encouraged to promote the training of inspectors.
18	Port State actions	Procedures should include:

ARTICLE	TITLE	
	following inspections	<ul style="list-style-type: none"> <li>• the action to be taken under the law where it is believed that the vessel has engaged in IUU fishing sufficient grounds have been established;</li> <li>• notification of the flag State, and, as appropriate, relevant coastal States, RFMOs and other international organizations, and the nation of which the vessel's master is national;</li> <li>• as appropriate, requesting the flag State to consent to specified enforcement measures; and</li> <li>• denial of the use of port services.</li> </ul>
<b>PART 5 ROLE OF FLAG STATES</b>		
19	Role of flag States	<p>Procedures should be developed in respect of flag State Parties for:</p> <ul style="list-style-type: none"> <li>• requesting the port State to inspect flag vessels where there are clear grounds to believe that IUU fishing or related activities had taken place;</li> <li>• encouraging flag vessels to use ports that act in accordance with or in a manner consistent with the Agreement;</li> <li>• the immediate and full investigation of port inspection reports of flag vessels showing clear grounds to believe IUU fishing or related activities had taken place, and upon sufficient evidence the taking of enforcement action without delay in accordance with applicable laws;</li> <li>• reporting to Parties and others on actions it has taken in respect of its vessels determined to have engaged in IUU fishing or related activities.</li> </ul>
<b>PART 8 NON-PARTIES</b>		
Article 23	Non-Parties to this Agreement	Procedures could be developed to implement measures specified by law or policy that are fair, non-discriminatory and transparent consistent with the Agreement and other applicable international law to deter the activities of non-Parties which undermine the effective implementation of the Agreement.

## LEGAL CHECKLIST

ARTICLE	TITLE	REQUIRED	OPTIONAL
<b>PART 1 GENERAL PROVISIONS</b>			
1	Use of Terms	<p>Ensure conformity between legal definitions in national law and Agreement, in particular for the following terms:</p> <ul style="list-style-type: none"> <li>• conservation and management measures</li> <li>• fish</li> <li>• fishing related activities</li> <li>• illegal, unreported and unregulated fishing</li> <li>• Party</li> <li>• port</li> <li>• vessel</li> </ul>	<p>Ensure definitions meet minimum requirements of Agreement:</p> <ul style="list-style-type: none"> <li>• FAO 2009 Agreement on Port State Measures</li> <li>• foreign vessel</li> <li>• landing</li> <li>• listed IUU fishing vessel</li> <li>• processing</li> <li>• regional fisheries management organization</li> </ul>
2	Objective	<p>Ensure that the purpose of the law reflects the objective of the Agreement, for example by defining that the purpose of the law is to implement the Agreement.</p>	
3	Application	<p>Ensure that the law applies to:</p> <p>(a) vessels, other than vessels of (country), seeking entry into, or in, a port subject to the jurisdiction of (country) except for container vessels that are not carrying fish or, if carrying fish, are carrying only fish that have previously been landed provided that the (designation of responsible official) 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;</p> <p>(b) vessels of the (country) seeking entry into, or in, a port subject to the jurisdiction of another Party to the Agreement; and</p> <p>(c) persons subject to the jurisdiction of (country).</p>	<ul style="list-style-type: none"> <li>• Should ensure that national vessels are required by law to hold authorizations to fish beyond areas of national jurisdiction .</li> <li>• May exclude vessels of a neighbouring State that are engaged in artisanal fishing for subsistence, provided that the port State and the flag State cooperate to ensure that such vessels do not engage in IUU fishing or fishing related activities in support of such fishing.</li> <li>• May decide not to apply this Agreement to vessels chartered by its nationals exclusively for fishing in areas under its national jurisdiction and operating under its authority</li> </ul>

ARTICLE	TITLE	REQUIRED	OPTIONAL
			therein. Such vessels must be subject to measures which are as effective as measures applied in relation to vessels entitled to fly its flag.
5	Integration and coordination at the national level		<p>Depending on integration and coordination arrangements:</p> <ul style="list-style-type: none"> <li>• cross-authorization of inspecting officers may be required in the law, e.g. authorizing as fisheries inspectors officials who are authorized to carry out similar functions in respect of other sectors;</li> <li>• MOUs or other formal arrangement between government agencies may be concluded;</li> <li>• Protocols establishing inter-agency systems for information collection, maintenance and dissemination, including confidentiality, may be established.</li> </ul>
6	Cooperation and exchange of information	<p>Ensure that the law:</p> <ul style="list-style-type: none"> <li>• underpins confidentiality requirements, as appropriate, for information obtained pursuant to the law;</li> <li>• designates an official authority responsible for making determinations and notifications to countries and international organizations necessary to carry out the purposes of the Agreement and the law.</li> </ul>	<ul style="list-style-type: none"> <li>• Establish legal measures that support conservation and management measures adopted by other States and relevant international organizations (e.g. United States Lacey Act).</li> </ul>
<b>PART 2 ENTRY INTO PORT</b>			
7	Designation of ports	<p>Ensure that:</p> <ul style="list-style-type: none"> <li>• the law designates the ports that may be used by foreign vessels, or provide a mechanism for designation (e.g. by Order, by Notice in the</li> </ul>	

ARTICLE	TITLE	REQUIRED	OPTIONAL
		<p>Gazette, by designating an official authorized to designate and publicize the ports);</p> <ul style="list-style-type: none"> <li>• an official authority is identified who is required to provide a list of designated ports to FAO;</li> <li>• deterrent penalty levels apply to vessels that use a non-designated port.</li> </ul>	
8	Advance request for port entry	<p>Ensure that the law:</p> <ul style="list-style-type: none"> <li>• requires each vessel to provide, as a minimum, operating information required under Annex A of the Agreement no less than xx hours prior to entry into port;</li> <li>• designates an authority with decision-making power to deny or permit entry;</li> <li>• requires denial of port entry for listed IUU vessels and any vessel where there are reasonable grounds to believe it has engaged in IUU fishing or fishing related activities in support of such fishing;</li> <li>• Notwithstanding the above, gives discretion to the authority to allow a vessel entry into port: <ul style="list-style-type: none"> <li>○ for the purpose of rendering assistance to a vessel or person in danger or distress;</li> <li>○ to allow, where appropriate, for the scrapping of the vessel; or</li> <li>○ for inspection or other enforcement action;</li> </ul> </li> <li>• requires the official to notify a decision to deny entry to the flag State and, as appropriate, to relevant coastal States, RFMOs and other international organizations.</li> </ul>	Empower designated officials (e.g. Secretary of fisheries in consultation with other government enforcement agencies) to promulgate regulations to establish a procedure for requiring, at a minimum, information under the Agreement, in order to sufficiently consider such information in advance of the vessel's arrival.
9	Port entry, authorization and denial	The law should ensure that the master of the vessel or the vessel's representative is required to present the authorization for entry to the competent authorities upon the vessel's arrival at port.	Provide a process for authorizing a vessel to enter port and issuing an authorization for the vessel to present upon entry into port.
10	<i>Force majeure</i> or distress	The law should designate an authority with the power to decide whether to allow vessels to enter port for reasons of <i>force majeure</i> or distress and a requirement that such entry is exclusively for rendering assistance.	

ARTICLE	TITLE	REQUIRED	OPTIONAL
<b>PART 3 USE OF PORTS</b>			
11	Use of ports	<p>Ensure that the law:</p> <ul style="list-style-type: none"> <li>• requires the denial of port services (the use of the port for landing, transshipment, packaging and processing of fish, refuelling, resupplying, maintenance and drydocking) to vessels: <ul style="list-style-type: none"> <li>○ where the vessel has entered without authorization required pursuant to (Article 9); and</li> <li>○ for reasons set out in Article 11 (1)(a)–(e) of the Agreement;</li> </ul> </li> <li>• Empowers the authority to allow the use of port services for reasons described in Article 11(2) of the Agreement;</li> <li>• Requires the authority to provide notification of a decision to deny the use of port services to the flag State and, as appropriate, relevant coastal States, RFMOs and international organizations;</li> <li>• Requires that denial must be withdrawn only if there is a determination by a designated authority that there was sufficient proof that the grounds on which the use of port services were denied were inadequate, erroneous or no longer apply. The authority must promptly provide notification of such withdrawal to all persons notified of the denial.</li> </ul>	
<b>PART 4 INSPECTIONS AND FOLLOW-UP ACTIONS</b>			
12	Levels and priorities for inspection	<p>Ensure that the relevant official authority/authorities (e.g. Secretaries of fisheries and Coast Guard) to:</p> <ul style="list-style-type: none"> <li>• conduct such inspections as are necessary to achieve the purposes of the Agreement and the law;</li> <li>• prioritize inspections in accordance with Article 12(3) of the Agreement, including giving priority to: <ul style="list-style-type: none"> <li>○ vessels that have been denied entry or use of a port in accordance with the Agreement;</li> <li>○ 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</li> </ul> </li> </ul>	

ARTICLE	TITLE	REQUIRED	OPTIONAL
		<p>activities in support of such fishing by the vessel in question; and</p> <ul style="list-style-type: none"> <li>○ 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.</li> </ul>	
13	Conduct of inspections		The law may require that the procedures for the conduct of inspections shall have regard to the requirements of Article 13 of the Agreement.
14	Results of inspections	The law should, as a minimum standard, require that information set out in Annex C of the Agreement is included in the written report of the results of each inspection.	
15	Transmittal of inspection results	<p>The law should require the official authority to transmit the results of an inspection carried out pursuant to the law to the flag State of the inspected vessel and as appropriate to:</p> <ul style="list-style-type: none"> <li>• relevant Parties and States, including relevant coastal States and the State of which the vessel's master is a national;</li> <li>• relevant RFMOs; and</li> <li>• FAO and other relevant international organizations.</li> </ul>	
16	Electronic exchange of information	<p>The law should:</p> <ul style="list-style-type: none"> <li>• authorize the official authority to designate a contact point for the exchange of information under the Agreement, and notify FAO of such designation; and</li> <li>• empower the official authority to cooperate in efforts to establish an information-sharing mechanism and facilitate the exchange of information with existing databases relevant to the Agreement.</li> </ul>	The law may require that information to be transmitted through any mechanism established under 16 (1) should be handled consistently with Annex D of the Agreement.
17	Training of inspectors		The law may require that, in setting requirements for the training of inspectors, the Guidelines in Annex E of the Agreement should be taken into account.

ARTICLE	TITLE	REQUIRED	OPTIONAL
18	Port State actions following inspections	<p>The law should provide that:</p> <ul style="list-style-type: none"> <li>• if, following an inspection, the official authority has reasonable/clear grounds to believe that a foreign vessel has engaged in IUU fishing or fishing related activities in support of such fishing, the Secretary may take enforcement action under this law or other applicable law and shall: <ul style="list-style-type: none"> <li>○ acting through (foreign affairs authority), promptly notify the flag State and, as appropriate, relevant coastal States, RFMOs and other international organizations, and the nation of which the vessel's master is national; and</li> <li>○ deny the vessel the use of port services, in accordance with the provision of Law that implements Article 11.</li> </ul> </li> </ul>	<p>The law may provide that other measures may be taken in conformity with international law, including those requested or consented to by a flag State, and may specify (<i>inter alia</i>) certain measures.</p>
<b>PART 5 ROLE OF FLAG STATES</b>			
19	Role of flag States	<p>The law should require:</p> <ul style="list-style-type: none"> <li>• their flag vessels to cooperate with the port State authorities of another Party in inspections carried out pursuant to the Agreement;</li> <li>• that measures applied to its flag vessels are at least as effective as those applied to foreign vessels.</li> </ul>	<p>The law may require procedures to be developed and published for :</p> <ul style="list-style-type: none"> <li>• requesting the port State to inspect flag vessels where there are clear grounds to believe that IUU fishing or related activities had taken place;</li> <li>• encouraging flag vessels to use ports that act in accordance with or in a manner consistent with the Agreement;</li> <li>• the immediate and full investigation of port inspection reports of their vessels showing clear grounds to believe IUU fishing or related activities had taken place, and upon sufficient evidence the taking of enforcement action without delay in accordance with applicable laws;</li> </ul>

ARTICLE	TITLE	REQUIRED	OPTIONAL
			<ul style="list-style-type: none"> <li>reporting to Parties and others on actions it has taken in respect of its vessels determined to have engaged in IUU fishing or related activities.</li> </ul>
<b>PART 8 NON-PARTIES</b>			
Article 23	Non-parties to this Agreement		Identify fair, non-discriminatory and transparent measures consistent with the Agreement and other applicable international law that may be taken to deter the activities of non-Parties which undermine the effective implementation of the Agreement.
<b>GENERAL</b>			
Prohibited acts	<p>Prohibited acts should, generally, adopt or elaborate relevant provisions of the general fisheries law relating to compliance with the law and MCS activities, and should also include trade in fish or fish products taken, possessed, etc. in violation of any treaty or binding conservation measure adopted by an RFMO.</p> <p>Some examples of unlawful acts are to:</p> <ul style="list-style-type: none"> <li>(a) violate any provision of this Law or any regulation promulgated thereunder;</li> <li>(b) refuse to permit any authorized officer to board, search, or inspect a vessel, conveyance, or shoreside facility that is subject to the person's control for purposes of conducting any search, investigation, or inspection in connection with the enforcement of this Law or any regulation promulgated thereunder;</li> <li>(c) forcibly assault, resist, oppose, impede, intimidate, or interfere with any authorized officer in the conduct of any search, investigation, or inspection described in paragraph (b);</li> <li>(d) resist a lawful arrest for any act prohibited by this Law;</li> <li>(e) interfere with, delay, or prevent, by any means, the apprehension, arrest, or detection of another person, knowing that such person has committed any act prohibited by this section;</li> <li>(f) submit any false information pursuant to any requirement under this law or any regulation promulgated under this law;</li> <li>(g) forcibly assault, resist, oppose, impede, intimidate, sexually harass, bribe, or interfere with any observer, or any data collector employed or under contract to carry out responsibilities under this law or any act administered by the Secretary;</li> </ul>		

ARTICLE	TITLE	REQUIRED	OPTIONAL
		<p>(h) import, export, transport, sell, receive, acquire, or purchase any fish or fish product taken, possessed, transported, or sold in violation of any treaty or binding conservation measure adopted by an RFMO; or</p> <p>(i) make or submit any false record, account, or label for, or any false identification of, any fish or fish product (including false identification of the species, harvesting vessel or nation, or the location where harvested) which has been, or is intended to be imported, exported, transported, sold, offered for sale, purchased, or received.</p>	
Duties of the official authority		<p>The duties of the official authority having responsibility for the law are generally set out under the various Articles above, but it may be useful to consolidate the major duties in one section. For example:</p> <p>(a) Regulations. – The official authority may promulgate such regulations, in accordance with (national law), as may be necessary to carry out the purposes of the Agreement and this law.</p> <p>(b) Procedures. – The official authority, in consultation with (other authorities) shall develop procedures for making determinations and notifications to nations and international organizations as may be necessary to carry of the purposes of the Agreement and this law.</p> <p>(c) Designation of ports. – The official authority, in consultation with (other authority) is authorized to designate and publicize the ports to which the vessels described in (section XX) may seek entry, and shall provide a list of such ports to the FAO.</p> <p>(d) Electronic exchange of information. – In order to implement the requirements of the Agreement regarding electronic exchange of information, the Secretary is authorized to designate a point of contact and notify FAO of such designation. The Secretary may cooperate, including by providing financial assistance, in efforts to establish an information-sharing mechanism and facilitate the exchange of information with existing databases relevant to the Agreement.</p> <p>(e) Information on available recourse. – The official authority shall maintain publicly-accessible information regarding any legal recourse available to persons affected by an action taken under this law and, upon written request, shall provide such information to the owner, operator, master or representative of an affected vessel.</p>	
Enforcement – responsibility		<p>The responsibility for the enforcement of the law should be defined. Where there is interagency enforcement (e.g. Fisheries and Coast Guard) the official authorities may be empowered to use personnel and facilities of any other government agency within the country, to conclude agreements with such other agency and authorize officers to enforce this law or regulation promulgated thereunder. The process for authorizing officers or inspectors to enforce the law or its regulations should be identified.</p> <p>An example of this type of arrangement and process for authorizing officers or inspectors follows.</p>	

ARTICLE	TITLE	REQUIRED	OPTIONAL
		<p>The provisions of this law shall be enforced by the Secretary and the Secretary of the department in which the Coast Guard is operating. In enforcing this law, such Secretaries may by agreement utilize, on a reimbursable basis or otherwise, the personnel, services, equipment (including aircraft and vessels), and facilities of any other national agency. Such Secretaries shall, and the head of any other agency that has entered into an agreement with either such Secretary under this section may (if the agreement so provides), authorize officers to enforce the provisions of this law or any regulation promulgated under this law.</p>	
Enforcement – powers of authorized officers		<p>Enforcement powers should, generally, adopt or elaborate relevant provisions of the general fisheries law relating to the compliance and other MCS powers of authorized officers or inspectors.</p> <p>For example,</p> <p>Any officer who is authorized to enforce the provisions of this law may, with or without a warrant or other process –</p> <ul style="list-style-type: none"> <li>(a) arrest any person, if the officer has reasonable cause to believe that such person has committed an act prohibited by section 109;</li> <li>(b) board, and search or inspect, any vessel which is subject to the provisions of this law;</li> <li>(c) seize any vessel (together with its fishing gear, furniture, appurtenances, stores, and cargo) used or employed in, or with respect to which it reasonably appears that such vessel was used or employed in, the violation of any provision of this law or any regulation promulgated under this law;</li> <li>(d) 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 law;</li> <li>(e) seize any other evidence related to any violation of any provision of this law or any regulation promulgated under this law;</li> <li>(f) 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;</li> <li>(g) inspect records pertaining to the storage, processing, transport, or trade of fish or fish products;</li> <li>(h) detain, for a period of up to 14 days, any shipment of fish or fish product imported into, landed on, introduced into, exported from, or transported within the jurisdiction of the United States, or, if such fish or fish product is deemed to be perishable, sell and retain the proceeds therefrom for a period of up to 14 days;</li> <li>(i) make an arrest, (in accordance with any e.g. procedures, guidelines, laws) for any violation of an applicable law of (country) if the officer has reasonable grounds to believe that the person to be arrested has committed or is committing a violation;</li> <li>(j) search and seize, in accordance with (relevant laws, guidelines etc);</li> <li>(k) execute and serve any subpoena, arrest warrant, search warrant issued (in accordance with Rules of Criminal Procedure, or other warrant or civil or criminal process issued by any officer or court of competent</li> </ul>	

ARTICLE	TITLE	REQUIRED	OPTIONAL
		jurisdiction; (l) access, directly or indirectly, for enforcement purposes any data or information required to be provided under this law or regulations promulgated under this law, including but not limited to data from vessel monitoring systems, satellite-based maritime distress and safety systems, or any similar system; and (m) exercise any other lawful authority.	
Jurisdiction of the court		Define the court(s) of competent jurisdiction, consistent with the fisheries legislation and providing that the court has authority to hear cases that occurred beyond areas of national jurisdiction.	
Evidence		Rebuttable presumptions that are contained in fisheries laws may be included, for example:  all fish, or components thereof, found on board a vessel that is used or seized in connection with a violation of this title or of any regulation promulgated under this title were taken, obtained, or retained as a result of IUU fishing or fishing related activities in support of such fishing.	
Fines and penalties		Levels of fines should be set, as applicable, for civil and criminal enforcement, as appropriate consistent with the fisheries legislation. Some elements could include: <ul style="list-style-type: none"> <li>• maximum civil administrative penalty;</li> <li>• maximum criminal fine;</li> <li>• each day of a continuing violation shall constitute a separate offence;</li> <li>• collection of unpaid penalties;</li> <li>• forfeiture;</li> <li>• payment of storage, care and other costs incurred by government;</li> <li>• imprisonment;</li> <li>• banning order against vessel/master from fishing in EEZ.</li> </ul>	

## POLICY CHECKLIST

ARTICLE	TITLE	POLICY
<b>PART 1 GENERAL PROVISIONS</b>		
GENERAL		<p>As a general policy matter, States should consider whether to implement the Agreement:</p> <ul style="list-style-type: none"> <li>• as a minimum standard so that more stringent provisions may be developed; or</li> <li>• by incorporating the provisions as they appear in the Agreement into national law and practice.</li> </ul>
2	Objective	National policy may adopt the objective as part of a broader national fisheries policy to promote long-term sustainability and combat IUU fishing.
3	Application	<p>As a policy matter, States should consider whether:</p> <ul style="list-style-type: none"> <li>• the Agreement should be applied to: <ul style="list-style-type: none"> <li>○ vessels chartered by its nationals exclusively for fishing in areas under its national jurisdiction and operating under its authority therein; and</li> <li>○ other national vessels, such as those that fish in areas beyond national jurisdiction and/or in RFMO Areas, in respect of port inspection requirements.</li> </ul> </li> <li>• cooperation with a neighbouring State with vessels engaged in artisanal subsistence fishing to ensure that the vessels do not engage in IUU fishing or related activities.</li> </ul> <p>National policy should call for the Agreement to be applied in a fair, transparent and non-discriminatory manner, consistent with international law.</p>
4	Relationship with international law and other international instruments	<p>As a policy matter, States should consider whether decisions and measures of RFMOs to which the State is not a member or cooperating non-member will be applied in the implementation of the Agreement, such as IUU vessel lists and conservation and management measures;</p> <p>National policy should call for:</p> <ul style="list-style-type: none"> <li>• the interpretation and application of the Agreement in conformity with international law taking into account applicable international rules and standards, including those established through the IMO, as well as other international instruments;</li> <li>• fulfilment in good faith of the obligations under the Agreement and the exercise of the rights under the Agreement in a manner that would not constitute an abuse of right.</li> </ul>
5	Integration and coordination at	As a policy matter, States should:

ARTICLE	TITLE	POLICY
	the national level	<ul style="list-style-type: none"> <li>• encourage integration or coordination of fisheries related port State measures with the broader system of port State controls, including other tools to combat IUU fishing such as VMS and observer programmes, as well as port controls applicable to merchant vessels; and</li> <li>• integrate port State measures with other measures to promote long-term sustainability and combat IUU fishing, including taking into account the IPOA-IUU.</li> </ul>
6	Cooperation and exchange of information	<p>As a policy matter, States should encourage:</p> <ul style="list-style-type: none"> <li>• cooperation and the exchange of information with relevant States/FAO/international organizations/RFMOS;</li> <li>• measures to support conservation and management measures adopted by other States and relevant international organizations; and</li> <li>• general cooperation at subregional, regional and global levels, in the effective implementation of the Agreement including through FAO and RFMOs.</li> </ul>
<b>PART 2 ENTRY INTO PORT</b>		
7	Designation of ports	As a policy matter, States should encourage human capacity development, as appropriate, to ensure there is sufficient capacity to conduct inspections at designated ports.
9	Port entry, authorization and denial	<p>As a policy matter, States should encourage:</p> <ul style="list-style-type: none"> <li>• the establishment and maintenance of official contacts in other States, RFMOs and international organizations in order to ensure swift and effective communications where actions are taken under Part 2, 3 or 4 of the Agreement; and</li> <li>• deterrent measures to be taken against vessels, persons or organizations that use, or allow to be used, ports where such use has been denied.</li> </ul>
10	Force majeure or distress	<p>As a policy matter States should permit vessels to enter port for genuine reasons of force majeure or distress, mindful that:</p> <ul style="list-style-type: none"> <li>• States have sovereignty over their ports and may deny entry under such conditions, particularly if it would have an adverse impact on the port State or be inconsistent with other policies or laws;</li> <li>• Such entry would be exclusively to render assistance to persons, ships or aircraft in danger or distress.</li> </ul>
<b>PART 3 USE OF PORTS</b>		
11	Use of ports	As a policy matter States should ensure that legislation and procedures are in place, including as appropriate cooperation among all relevant government agencies, to deny the use of its ports for landing, transshipment, packaging and processing of fish, refuelling, resupplying, maintenance and drydocking as required in the Agreement, particularly:

ARTICLE	TITLE	POLICY
		<ul style="list-style-type: none"> <li>• where the vessel has entered without authorization required pursuant to Article 9; and</li> <li>• for reasons set out in Article 11 (1)(a)–(e) of the Agreement.</li> </ul> <p>The policy should also address the need to notification relevant States and RFMOs and international organizations of the denial, and allow for withdrawal of denial in accordance with the Agreement.</p>
<b>PART 4 INSPECTIONS AND FOLLOW-UP ACTIONS</b>		
12	Levels and priorities for inspection	<p>As a policy matter, States should call for:</p> <ul style="list-style-type: none"> <li>• a reasonable level of inspections sufficient to achieve the objective of the Agreement; and</li> <li>• agreement on minimum inspection levels through RFMOs, FAO or otherwise.</li> </ul>
13	Conduct of inspections	<p>As a policy matter, States should call for inspections and post-inspection actions in this Part (including results of inspections and transmittal of inspection results) to be conducted in such a way as to effectively discharge the State's obligations under the Agreement.</p>
16	Electronic exchange of information	<p>As a policy matter, States should encourage effective systems to be established, consistent with the Agreement, for the electronic exchange of information.</p>
17	Training of inspectors	<p>As a policy matter, States should encourage training of inspectors under the Agreement at national level and in cooperation among States and with RFMOs.</p>
18	Port State actions following inspections	<p>As a policy matter, States should identify the type of measures that may be taken following inspections where there are clear grounds for believing that a vessel had engaged in IUU fishing or related activities, in conformity with international law.</p>
<b>PART 5 ROLE OF FLAG STATES</b>		
19	Role of flag States	<p>As a policy matter, States should call for full discharge of the obligations involved for flag States identified in the Agreement.</p>
<b>PART 8 NON-PARTIES</b>		
23	Non-parties to this Agreement	<p>As a policy matter, States should encourage actions and measures that are fair, non-discriminatory, transparent and consistent with the Agreement and other applicable international law to deter the activities of non-Parties which undermine the effective implementation of the Agreement.</p>

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