

PORT STATE CONTROL OF FOREIGN FISHING VESSELS

by

Terje Lobach

***FAO LEGAL PAPERS
ONLINE #29***

May 2002

FAO Legal Papers Online is a series of articles and reports on legal issues of contemporary interest in the areas of food policy, agriculture, rural development, biodiversity, environment and natural resource management.

Legal Papers Online are available at <http://www.fao.org/Legal/pub-e.htm>, or by opening the FAO homepage at <http://www.fao.org/>, and following the links to the FAO Legal Office Legal Studies page. For those without web access, email or paper copies of Legal Papers Online may be requested from the FAO Legal Office, FAO, 00100, Rome, Italy, dev-law@fao.org. Readers are encouraged to send any comments or reactions they may have regarding a Legal Paper Online to the same address.

The designations employed and the presentation of the material in this document do not imply the expression of any opinion whatsoever on the part of the United Nations or the Food and Agriculture Organization of the United Nations concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries.

The positions and opinions presented are those of the author, and do not necessarily, and are not intended to, represent the views of the Food and Agriculture Organization of the United Nations.

© FAO 2002

PORT STATE CONTROL OF FOREIGN FISHING VESSELS¹

by T. Lobach

The author prepared this paper while he was a visiting expert
at the Legal Office under the FAO Partnership Programme.

TABLE OF CONTENTS

1.	Introduction	1
2.	Justification for a harmonized system.....	2
3.	How to achieve a comprehensive and transparent system?.....	3
4.	Elements of a possible Memorandum Of Understanding.....	6
4.1	“Flag Of Convenience” in the context of port State control.....	6
4.2	IUU-vessels.....	8
4.3	Prior notice of port access.....	8
4.4	Denial of access to port.....	9
4.5	Port State obligations.....	10
4.6	Port inspections.....	10
4.7	Possible actions.....	11
4.7.1	Refusal to allow landing of catch.....	12
4.7.2	Detention.....	13
4.7.3	Forfeiture.....	14
4.8	Information and reporting.....	14
5.	Implementation of port State control of foreign fishing vessels into domestic legislation.....	15
Attachment 1	Draft Memorandum of Understanding.....	17
	Annex A, Inspection procedures of foreign fishing vessels.....	20
	Annex B, Minimum requirements.....	22
	Annex C, Training of port inspection officers.....	24
	Annex D, information system on inspections.....	25
Attachment 2	Draft provisions for the implementation of port State control of foreign fishing vessels into domestic legislation.....	26

¹ This paper has been prepared as a possible contribution to an anticipated international process for establishing comprehensive and harmonized port State control measures regarding foreign fishing vessels.

1. Introduction

The FAO Committee on Fisheries (COFI) agreed in March 2001 on an international plan of action (IPOA) to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing. The FAO Council endorsed the IPOA on 23 June 2001. The IPOA is a voluntary instrument that applies to all States and to all fishers. The objective of the plan is to guide flag States, coastal States, port States and regional fisheries management organizations (RFMOs) to take appropriate measures in order to address the issue of IUU fishing.

The plan may be considered as a toolbox from which States may choose relevant measures to implement into domestic legislation. However, there is a need to have a harmonized approach among States in some areas to give full effect to the IPOA. For example such an approach is important when dealing with port State measures. There is also a clear guidance in the IPOA on IUU fishing itself calling for cooperation in this field².

A joint FAO/IMO³ Working Group on IUU fishing met in October 2000⁴. The main issues examined by the group were related to flag State and port State control. Concerning port State control in brief it was noted that the majority of fishing vessels were not covered by IMO instruments either because fishing vessels were specifically excluded, were outside the size limitations or the flag States are not parties to the relevant instruments. Further it was noted that it might be difficult to introduce port State inspection procedures for fisheries management purposes and fishing vessel safety within existing regional MOUs (Memorandums Of Understanding) on port State control⁵. It was also recognized that the mechanism of international or regional MOUs relating to port State control could be used as an important and effective tool for enhancing fisheries management, and addressing IUU fishing. Finally the group agreed that FAO in cooperation with relevant organizations should consider the need to develop measures for port State control to all matters related to the management of fisheries resources. The Working Group developed a list of criteria for port State control of fishing vessels, which should be examined by FAO when considering the need to develop such measures.

It should also be mentioned that IMO, in its submission of 27 June 2001, to the General Assembly of the United Nations fifty-sixth session of Oceans and the law of the sea⁶ stated that "cooperation should be extended to FAO towards developing a port State control regime of its own through a sharing of IMO's experience and expertise in the matter".

² Paragraph 62 of the IPOA reads: States should cooperate, as appropriate, bilaterally, multilaterally and within the relevant regional fisheries management organizations, 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 and international systems.

³ International Maritime Organization

⁴ See Report of the joint ad hoc Working Group on illegal, unreported and unregulated fishing and related matters, Rome 9-11 October 2000

⁵ The concern about IUU fishing is first and foremost related to conservation and management measures and less to the safety of fishing vessels and pollution prevention standards. Thereby the IUU fishing is not the prime concern of IMO nor to shipping administrators, and thus the existing regional MOUs on port State control targeting substandard vessels are not the vehicles for seeking to compensate for the lack of effective flag State implementation of fisheries conservation and management measures.

⁶ On the implementation of the 1995 UN Fish Stocks Agreement

Following the adoption of the IPOA on IUU fishing and these recommendations by the joint FAO/IMO Working Group, States should consider adopting legislation, and regional fisheries management organizations (RFMOs) should consider adopting binding measures, to implement more effective port State controls, including through the development of new regional agreements or MOUs on port State measures⁷.

2. Justification for a harmonized system

The 1982 UN Convention⁸ established rules to guide port States by setting reasonable standards for interventions, inspections and violations⁹. When provisions for port State control were included in different treaties, it was assumed that their application would be of national concern. The port State control regime Paris MOU¹⁰ that was agreed in 1982 changed that, and was the first regional system in the world on port State control. The Paris MOU is an international agreement among 18 countries to establish a co-ordinated port State control system with respect to vessel safety and pollution prevention standards and equipment. One goal of the Paris MOU is for member States to inspect at least 25 percent of foreign merchant ships entering their respective ports each year¹¹. If deficiencies are discovered the ship will be detained and repairs must be completed before the ship can leave the port¹². IMO has developed a global strategy for port State control and has incorporated in the procedures for such control the professional profile, training and qualification requirements and general operating guidelines for control officers. This is to ensure that, while the systems may be regional, the standards applied will be universal.

The procedures instituted by the Paris MOU initiative provided an inspiration for the development of port State regimes around the world. Port State control regimes are now operated in Australia, the Asia-Pacific Region, the Caribbean Region, the Indian Ocean, in the Mediterranean Region, Latin America and in West and Central Africa. More than 90 countries are involved in these different systems and there are initiatives underway to take the process further by formalising the transfer of information between the different systems.

The development of port State control for the merchant fleet has increased the number of checks on international shipping and standards have undoubtedly improved. Regimes on port State control are most effective if such regimes have common goals with the flag State and are initiatives that supplement and do not substitute flag State control. The principle of flag State responsibility over vessels continues to be the fundamental principle in international shipping¹³.

⁷ In the Report of the expert consultations on illegal, unreported and unregulated fishing organized by the Government of Australia in cooperation with FAO, Sydney 15-19 May 2000 it is suggested that FAO, in concert with States and other agencies of relevant competence such as IMO, should convene a conference addressing the establishment of bilateral and multilateral instruments (such as Memoranda of Understanding on port State controls) to deter IUU fishing and related activities. The report also indicates items to be addressed by such a conference, see paragraph 52 of the Report. This idea is not, however, reflected in the final version of the IPOA on IUU fishing.

⁸ United Nations Convention on the Law of the Sea of 10 December 1982

⁹ Basically the 1982 UN Convention said nothing about port States except for the articles dealing with pollution, see Articles 218 – 220 where it was assumed that ports are subject to sovereignty of the coastal State as they are parts of internal waters.

¹⁰ Paris Memorandum Of Understanding on Port State Control.

¹¹ Section 1.3 of the Paris MOU.

¹² See Section 3.7.1 of the Paris MOU.

¹³ Critics have claimed that the port State control imposes a burden on port States which should be borne by the flag State. But the key question is how the international society can deal with vessels flying the flag of States not taking that responsibility.

The approaches to fisheries-related port State control such as Article 8.3 of the Code of Conduct¹⁴, Article 23 of the 1995 UN Fish Stocks Agreement¹⁵, Article V(2) of the FAO Compliance Agreement¹⁶, paragraphs 52 - 64 of the IPOA on IUU fishing and several regional management agreements, suggest that the concept of port State control is highly relevant for fishery conservation and management. There may therefore be an idea to take the now widely applicable regional MOUs on merchant shipping as a model and see if some regional approaches to fisheries can be developed.

A coastal State has, with minor exceptions not relevant in this context, full jurisdiction within its internal waters. These waters, which include ports, are regarded as part of the land over which the coastal State has sovereignty. A number of port States already exercise individual port State control over foreign fishing vessels voluntarily in their ports, but the IUU fishing experience strongly suggests the need for a network of mandatory port State controls. The underlying principle formulated in Article 23(1) of the 1995 UN Fish Stocks Agreement is "the right and the duty" of a port State to take non-discriminatory measures¹⁷ in accordance with international law, in order to "promote the effectiveness of sub-regional, regional and global conservation and management measures". Paragraph 2 specifies, *inter alia*, inspections of documents, fishing gear and catch on board which the port State may take on vessels voluntarily in port. Emphasis needs to be put not only on the "right" in Article 23 of the 1995 UN Fish Stocks Agreement, but also on the "duty".

Some States have already enacted into their domestic legislation to give effect to the obligations set out in Article 23 of the 1995 UN Fish Stocks Agreement. It is, however, questionable if all the relevant port States will take relevant actions within a reasonable time frame. It is recognized that port State control may be an effective tool to curb IUU fishing, especially if that is undertaken in the context of an international agreement. Such an agreement might be a binding convention¹⁸, a MOU which may be binding or not or other voluntary instruments such as the newly adopted IPOA on IUU¹⁹.

3. How to achieve a comprehensive and transparent system?

In order to establish a workable system, port States should adopt harmonized mandatory obligations for control of foreign fishing vessels. It may be appropriate to link such a system to the existing RFMOs.

¹⁴ FAO Code of Conduct for Responsible Fisheries

¹⁵ 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, September 1995

¹⁶ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas

¹⁷ SEAFo (South East Atlantic Fisheries Organization) has incorporated these elements in Article 15 of the Convention, except the last sentence of paragraph 1 of Article 23 of the 1995 UN Fish Stocks Agreement where it refers to that "when taking such measures a port State shall not discriminate in form or in fact against the vessels of any State. This was deliberately left out as parties felt that such discrimination could take place against Flag of Convenience (FOC) vessels.

¹⁸ In paragraph 53 of the Report of the expert consultations on IUU fishing, Sydney 15-19 May 2000 it is proposed that States should elaborate a binding international agreement on port State controls to deter IUU fishing. This is not, however, included in the final version of the IPOA on IUU fishing.

¹⁹ In this paper the concept of a MOU is considered. Whether such a MOU should be binding or voluntary is of course for the States involved to decide. However, in order to counteract IUU fishing, a binding instrument would probably be more effective than a voluntary instrument. When elaborating on a MOU, other possible instruments such as a binding convention or a voluntary International Plan Of Action is not disregarded and the ideas and suggestions in this paper may easily be transformed into such instruments if so decided.

Some Conventions that establish RFMOs include provisions on port State control over foreign fishing vessels. Some other RFMOs have adopted such controls as part of their suite of fishery conservation and management measures. However, most of these bodies have not worked out an adequate policy to put such provisions into effect. Nevertheless, a regional approach to port State control of fishing vessel's compliance with conservation and management measures may be founded on these organizations.

There are at least three reasons for that. Firstly, RFMOs were strengthened by the entry into force of the 1995 UN Fish Stock Agreement and their important role is underlined throughout the agreement. The 1995 UN Fish Stock Agreement has also inspired coastal States and distant water fishing nations to cooperate in order to establish such organizations in regions previously not covered by such bodies. Secondly, these organizations are responsible for establishing relevant conservation and management measures in areas under respective purviews. Thus, an inspection in port should therefore examine if the fishing vessel in question has violated any conservation and management measures established by any RFMO. In addition, compliance with global conservation measures such as the UN-resolution on the global moratorium on all large-scale pelagic drift-net fishing on the high seas²⁰ should of course be examined. Thirdly, most of these bodies have secretariats, which are up and running and a lot of expertise and experience on fisheries matters are gathered within those organizations.

For some RFMOs the Convention area also includes areas under national jurisdiction, but the competence to establish conservation and management measures is restricted to areas beyond the limits of such jurisdiction²¹ and there are RFMOs where no distinction between areas of jurisdiction is made for management purposes²². There are also regional bodies in which the convention areas apply only to the high seas²³

IUU fishing may take place by foreign vessels in waters under the jurisdiction of a port State, by vessels flying the flag of parties to a relevant RFMO or by non-parties to that RFMO on the high seas. Port States should thus carry out control related to at least these three situations. In addition a port State should inspect vessels flying the flag of another State where fishing activities took place within the waters of that particular flag State. This last point is in particular important when conservation and management measures concerning shared stocks have been agreed upon between two or more States. Sometimes fishing is conducted within the EEZ of a party to such arrangements, but landed in the port of another State (due to port facilities, price factors, distance from fishing grounds etc.). In these cases it is most likely that the fishing vessels leave the waters of a coastal State without being inspected to determine whether the fishing has been conducted in accordance with applicable legislation. This is also, however, a general issue as a coastal State may seek assistance from a port State to verify that fishing in the waters of that coastal State has been in accordance with relevant legislation. This may be the only way of obtaining the information required for assessing the situation. It should be mentioned that for example Norway has entered into agreements about cooperation

²⁰ UNGA Resolution 46/215.

²¹ However, a RFMO may regulate also within waters under national jurisdiction with the consent of the coastal State, see for example Article 6 of the NEAFC Convention.

²² This is the case for bodies managing highly migratory species.

²³ See the SEAFO Convention (signed in April 2001, but not entered into force) and the draft for a new RFMO in the South Indian Ocean (Madagascar, September 2001).

in the field of monitoring, control and surveillance with a number of States²⁴. This includes the exchange of information of mutual inspections in ports by parties to the agreements.

In principle port State control should be related to all areas where marine capture fisheries take place. Port States should thus examine that fishing undertaken in these areas have been in conformity with established conservation and management measures. In summary a port State should examine whether IUU fishing have taken place in; 1) the Regulatory Area²⁵ (RA) by a Contracting Party of a RFMO, 2) the RA by a non-Contracting Party of a RFMO, 3) waters under national jurisdiction of a Contracting Party by a Contracting Party of a RFMO and 4) waters under national jurisdiction of a Contracting Party by a non-Contracting Party of a RFMO.

Parties to a RFMO are most likely both fishing nations and States having responsibilities as port States. This may facilitate mandatory port State control for both Contracting and non-Contracting Party vessels as a part of the organization's conservation measures that could have a great impact on IUU fishing. However, vessels conducting IUU fishing move from one region to another and are therefore not the concern of one RFMO alone. In order to establish a comprehensive system, developing a MOU on port State control between such bodies could be a way forward. In that context port States should have the duty to take action against vessels having participated in IUU fishing in areas managed also by other regional bodies. Therefore RFMOs should be encouraged to enter into multilateral agreements on port State control. Such cooperation would be essential in areas where IUU fishing is the concern of two or more regional bodies.

Such a possible MOU on port State control between RFMOs is envisaged to be binding on all parties of those bodies. It seems not to be contrary to any legal instrument to enter into agreements of this kind. From a practical point of view negotiations could be carried out by representatives empowered by each of the regional bodies, followed by a process within the RFMOs adopting the result of such negotiations. Members will then have an obligation to implement these international agreed standards into their respective domestic legislation.

A specific problem occurs where a State is not directly involved in fishing, but acts as a port State only. The question is whether a State with no fishing activity in the area of a RFMO may qualify to become a member solely by operating as a port State that receives landings of fish or facilitates service for the fleet. It is doubtful if such activities meet the concept of «real interests» in Article 8.3 the 1995 UN Fish Stocks Agreement. If not, such a State may not be entitled to become a member of a RFMO²⁶. However, concerning the duty to cooperate, the Article refers to relevant coastal States in general, which includes port States. This may indicate that a State acting solely as a port State also may become a member of a RFMO if it so wishes. If that is not the case, such a State should be approached by relevant organizations to become party either to a relevant RFMO or to a possible MOU on port State control.

²⁴ Such agreements have been concluded with Denmark, Faroe Islands, France, Germany, Iceland, Ireland, Netherlands, Sweden, Russia and United Kingdom.

²⁵ «The Regulatory Area» is the area of competence to establish conservation and management measures within a RFMO.

²⁶ Attempts to define the concept «real interests» have been carried out without success both in NAFO (Northwest Atlantic Fisheries Organization) and in the process of establishing SEAFO (South East Atlantic Fisheries Organization).

4. Elements of a possible Memorandum Of Understanding²⁷

Some general standards and harmonized procedures should be worked out. A system may also include measures dealing in particular with the problem of “Flag Of Convenience” (FOC)-vessels, as there is a close link between port State control and activities undertaken by such vessels. As mentioned above, the joint FAO/IMO Working Group developed a list of criteria for port State control, which should be examined when considering developing such measures. The IPOA on IUU fishing also includes a number of possible measures that should be looked at in this context. It is further of importance to agree internationally on consequences for vessels found to be in non-compliance.

4.1. “Flag Of Convenience” in the context of port State control

Under international law the flag State is primarily responsible for ensuring compliance with international minimum standards. Article 94 of the 1982 UN Convention reaffirms this fundamental principle, but also makes clear that flag states have certain obligations especially with regard to ensuring compliance with international minimum safety, pollution prevention and social standards. Similarly, Article 217 of the 1982 UN Convention sets out an obligation on flag States to effectively enforce international rules, standards and regulations, irrespective of where the violation occurs. These requirements were incorporated in IMO Resolution Guidelines to Assist Flag States in the Implementation of IMO Instruments (A. 847 [20]).

Article 91 of the 1982 UN Convention requires there to be a “genuine link” between the vessel and the flag State. Although the “genuine link” is not expressly defined in the 1982 UN Convention, other Articles, especially Article 217, implicitly point to the requirement for at least an “economic link”. This indicates that there should exist within the flag State a substantial entity which can be made responsible for actions of the vessel and on which penalties of adequate severity can be levied so as to discourage violations of applicable international minimum rules and standards, wherever they occur.

The FAO Compliance Agreement introduced the concept of flag State responsibility in the fisheries context to the global level²⁸. In many respects the 1995 UN Fish Stocks Agreement²⁹ reiterates the concept of flag State responsibility as elaborated in the FAO Compliance Agreement. It should also be noted that Section 7.8 of the Code of Conduct in a way addressed the problems caused by re-flagging of fishing vessels to FOC-registers in order to escape controls. The IPOA on IUU fishing sets out a number of measures aiming at strengthening the flag State obligations in the context of fisheries³⁰.

It is commonly acknowledged that one major factor related to the problem of IUU fishing are the activities undertaken by FOC-vessels which are defined as vessels flying the flag of States with open shipping registers. In 1998 the First Joint Ministerial Conference of the Paris and Tokyo Memorandums of Understanding on Port State Control agreed, in their joint ministerial declaration, to take action within IMO for the adoption of comprehensive binding quality criteria for flag State administrations and ship registers and to apply all reasonable measures to induce flag State administrations with a record of being unable or unwilling to exercise adequate control over their vessels to do so.

²⁷ A draft MOU is developed in Attachment 1 to this paper.

²⁸ The basic provision being Article III(1)(a), but details spelled out in the remains of that Article .

²⁹ Cf. Article 18.

³⁰ IPOA paragraphs 34 – 50.

As outlined above there have been a number of global attempts to address the issue of FOC-vessels in relation to IUU fishing by strengthening the flag State obligations. It is unlikely that the problem with open shipping registers will be solved within the foreseeable future. Thus, new avenues should be explored in order to deal with this challenge and in particular measures in the context of port State control should be considered.

A new approach was discussed at the 20th Annual meeting of CCAMLR (Convention on the Conservation of Antarctic Marine Living Resources), 22 October – 2 November 2001. It was proposed to list certain States (non-Contracting Parties to CCAMLR) identified as for many years having flagged vessels engaged in IUU fishing in the Convention Area. Such States were considered to be named “CCAMLR Flag Of Convenience States” as it is “convenient” to use that specific flag to avoid being bound by CCAMLR-measures. Certain actions were foreseen, among them measures to be taken if a vessel from a listed flag State arrived voluntarily in a port of a Contracting Party of CCAMLR. Rather than searching for the “genuine link” between the flag State and a fishing vessel flying its flag, such a development may be important to increasing the effectiveness of RFMO’s faced with non-Party vessels fishing contrary to applicable measures whether or not these vessels are under a traditional definition of “Flag Of Convenience”. No measures were agreed to at that meeting, but such an approach, including listing criteria, will be raised again at CCAMLR XXI.

Some RFMOs and States already operate lists of vessels regarded as being IUU-vessels. This idea discussed at CCAMLR has a wider application, as all fishing vessels from a named State would be regarded as IUU-vessels when operating in the CCAMLR-area.³¹

In this context it is also appropriate to mention that ICCAT (International Commission for the Conservation of Atlantic Tunas) has adopted the concept of listing specific IUU States by agreeing on a measure identifying States whose vessels have been fishing for tuna and tuna-like species in a manner which diminishes the effectiveness of ICCAT conservation and management measures. Contracting Parties of ICCAT shall prohibit import of Atlantic bigeye tuna from the States listed³². IOTC (Indian Ocean Tuna Commission) has not gone as far as ICCAT by listing States, but has agreed on a resolution calling upon the parties to refuse port access to “flag of convenience vessels, which are engaged in fishing activities diminishing the effectiveness of measures adopted by IOTC”³³. However, in determining which vessels this resolution is targeting, there has to be some kind of understanding between the parties of IOTC about which flags such vessels are flying.

Although many IUU-vessels tend to be flagged to States with so-called open registers, the point of the approach discussed in CCAMLR is to get around the general problem of “Flag Of Convenience” related to such registers. In principle States with restricted shipping registers could also be regarded a FOC in a CCAMLR context if it is “convenient” to fly the flag of that State to conduct IUU-fishing in the Convention Area. In order to distinguish between

³¹ It should also be mentioned that for example Canada grants access to its waters and ports only to fishing vessels from a State with which Canada has favourable fishery relations. The listed States are those that consistently co-operate with Canada on international fisheries conservation objectives, including sound conservation and management of fish stocks off the coasts of Canada.

³² Cf. Recommendation by ICCAT regarding Belize, Cambodia, Honduras and St. Vincent and the Grenadines pursuant to the 1998 resolution concerning the unreported and unregulated catches of tunas by large-scale longline vessels in the Convention Area, entered into force 15 October 2001.

³³ IOTC Resolution 99/02.

general FOC-States/vessels and this possible new approach it could be an idea to use the terminology “Flag Of Non-Compliance” (FONC).

It is important to agree on criteria for characterizing a State as a FONC-State which could include: possible reply and action (or rather non-action) by the flag State when approached by the relevant RFMO; number of vessels engaged in IUU fishing; whether the flag State has a “history” of non-compliance; record in areas under the responsibilities of other RFMOs etc. It is equally important to agree on procedures to maintain such a list, including the deletion of States, which after being listed have taken appropriate actions to cooperate with the relevant RFMOs.

To give full effect to such an approach, it would be important that also other regional bodies adopt similar measures and that this might be included into a MOU on port State control. A possible consequence of being regarded as a FONC-State would be that specific actions should be taken if a vessel flying the flag of that State calls at a port of a party to a RFMO, for example denial of access to its ports.

4.2. IUU-vessels

CCAMLR and NEAFC (North East Atlantic Fisheries Commission) have agreed to adopt resolutions urging all Contracting Parties, consistent with their domestic legislation, to avoid flagging a non-Contracting Party vessel or licensing such a vessel to fish in waters under their fisheries jurisdiction, if that particular vessel has a history of engagement in IUU fishing³⁴. This measure implies that the physical vessel should be denied such rights also when operated by others than those who participated in the fishing. The adoptions of these resolutions were inspired by the Norwegian experience over a number of years showing that with such measures in place vessel owners think twice before engaging in IUU fishing. Some have seen the second hand value of their vessels decrease dramatically as the market for IUU-vessels in the North Atlantic almost disappeared. This is due to the fact that shipping brokers are aware of these vessels and advise potential buyers.

The secretariats of these bodies maintain lists of vessels that should be examined in this context. There may be cases where vessels could be regarded as IUU-vessels even if the flag State is not considered to be a FONC-State. This is due to the fact that being regarded as a FONC-State would require some kind of a record of non-compliance as a flag State. Just one or two incidents would hardly be enough, but a single vessel could be characterized as an IUU-vessel. It should thus be considered also to deny vessels appearing on those listings access to ports of parties to a possible MOU.

4.3. Prior notice of port access

Port States should require all foreign vessels having engaged in fishing activities to provide prior notice of the intention to use port, landing or transshipment facilities.

Paragraph 55 of the IPOA on IUU fishing sets out some minimum requirements for prior notification in order to ascertain whether the vessel has engaged in or supported IUU fishing. Elements mentioned are information related to the identity of the vessel, including its authorization to fish and activities undertaken.

³⁴ CCAMLR adopted the resolution at the 19th Annual meeting (23 October – 3 November 2000) and NEAFC agreed at the 20th Annual meeting (5 – 9 November 2001).

The following vessel-related information might be required: Name of vessel, registration number (IMO number, if available)³⁵, flag of vessel, register and port of registration, international radio call sign, name and address of owner (telephone numbers, fax, e-mail). In order to get a complete picture it should be considered to request the following additional information: Length, vessel monitoring system (VMS), gross ton (GT), navigational equipment, previous flag and date of change, previous names and date of change including their names and address.

Concerning fishing licences (authorizations/permits) the following information should be given to the port authorities: Vessel authorized to fish, including conditions such as areas, scope and duration, identification of species and fishing gear authorized.

An advance notification should be given within a reasonable time limit enabling the port authorities to verify the information submitted and to be prepared for an inspection (if the vessel is allowed into port).

4.4. Denial of access to port

As the concept of "port state denial" has become established within the maritime industry as a mechanism to ensure compliance with the International Safety Management (ISM) Code, it may be possible to seek to utilise such mechanism to curb IUU fishing.

Whether such a measure is in full conformity with general international law has been subject to some debate. Through this debate, the evidence concerning customary law and State practice reinforces the view that the coastal State has the right to exclude foreign merchant vessels from entering its ports. Exceptions from this basic principle would be for reasons of *force majeure* or distress or for rendering assistance to persons or vessels in danger or distress. It is also generally recognized that the right of the coastal State to deny access to its ports in respect of fishing vessels is not in dispute.

According to paragraph 56 of the IPOA on IUU fishing the port State should not allow the vessel to land or transship fish in its ports if a port State has clear evidence that the vessel which has been granted access to port has engaged in IUU fishing. By using the term "having been granted access" there is an indication that such access also may be denied if the port State so decides. It should also be mentioned that some States have implemented into their domestic legislation provisions banning the use of ports by vessels participating in IUU fishing³⁶.

All port States should consider denying port access to vessels that engage in or support IUU fishing. If parties to a MOU on port State control agree to develop lists of FONC-vessels and FONC-States, it should be considered to deny access to its ports for vessels on the list or vessels flying the flag of that particular State. In addition vessels may not be allowed into

³⁵ More and more States are examining the "history" of fishing vessels in an IUU context. It could be a difficult task as vessels tend to change ownership, flag, name and international radio call sign. The IMO-number (perhaps also the Lloyds-register) would probably be the most consistent historical sources of information.

³⁶ Canada (cf. Coastal Fisheries Protection Act (R.S.C. 1970,c.C.21) Sections 3 and 4, and Coastal Fisheries Protection Regulations (C.R.C. 1978, c.413), Section 5, , Iceland (cf. Article 3 of Act No 228 April 1988 concerning fishing and processing by foreign vessels in Iceland's exclusive economic zone), Norway (cf. Regulation No. 1130 of 23 December 1994 concerning the entry into and passage through Norwegian territorial waters).

ports of the parties if the port State when considering the prior notification by the vessel is not satisfied with the information submitted.

However, to deny access for a vessel that has been fishing within waters under jurisdiction of a port State might not be appropriate at all. This is due to the fact that in a case of non-compliance, the port State would have a number of reactions available, including prosecution and might welcome such a vessel to its port in order to take institute legal proceedings against the vessel.

4.5. Port State obligations

According to Article 23 of the 1995 UN Fish Stocks Agreement, port States shall not discriminate in form or in fact against the vessels of any State. This suggests that as a basic principle control of flag vessels should be on equal terms as foreign vessels. It could be argued that other means of control of flag vessels³⁷ may replace the obligation on mandatory port State control. As mentioned before, the Paris MOU requires that at least 25% of the merchant fleet be inspected. A similar approach, with different level of inspection frequency, could be considered also for MOUs on port State control of fishing vessels. Other parameters such as the size of vessels, FONC or FOC-vessels, production vessels etc. could also be relevant. There are, however, good reasons for arguing that all foreign fishing vessels should be subject to mandatory port State control.

Paragraph 57 of the IPOA on IUU fishing provides that States should publicize ports to which foreign flagged vessels may be permitted admission. Some States have so many ports that it would almost be impossible to man them 24 hours a day all year round. So this may be a way forward where lack of resources is a challenge. It should also be mentioned that some States have singled out just a few ports to where the foreign fishing fleet has access³⁸. Paragraph 57 also requires that States should ensure that such designated ports have the capacity to conduct inspections. This would mean that the responsible authorities are capable of conducting the foreseen inspections and that these are finalized within a reasonable time frame.

4.6. Port inspections

Vessel inspections are a key management tool for monitoring and control. Port inspections are considerably easier to conduct than those at sea due to the safety factor of not having to deal with the motion of the sea on boarding and disembarking, or during the inspection itself. Naturally, it will be impossible to see the fishing and processing operations during an inspection in port, but it should be possible to reconstruct the fishing activities of the vessel. In addition to formalities such as identification etc, a port inspector should be able to determine the fishing pattern, catches, and verify the fish on board through an inspection. It should also be possible to check the hold and construction of the fishing gear. Even if not landed, information about the fish on board the vessel may in some cases also be determined as precisely as desired.

When examining the record of a particular vessel, the inspector should be in possession of all relevant conservation and management measures in force for the area/areas where the vessel

³⁷ Vessels are equipped with VMS (Vessel Monitoring Systems), observers on board etc.

³⁸ It could be questioned whether such a designation of just a few ports would be in conflict with trade regulations as this may affect the distribution of catches to the fishing plants.

conducted its fishing. The vast majority of RFMOs have published the conservation and management measures in force on their respective web sites.

In exercising their duties, a port State inspector must be properly qualified and authorized by the port State authority to carry out port State inspections. Thus minimum standards for port State inspectors should be agreed upon. In order to achieve the qualifications required adequate training courses should be developed. Such courses may include elements such as an overview of the relevant conservation and management measures that apply, information sources which should be examined such as log books, vessel monitoring systems (VMS) for validation of information given by the master of the fishing vessel, species identification, catch landing monitoring, including determining conversion factors for the various species and products, fishing vessel boarding/inspection, hold inspections and calculation of vessel hold volumes. Furthermore inspectors should be trained in gear inspections and guided in collection of evidence in order to be prepared for a possible challenge by the flag State or for a possible court case.

The procedures for inspections would also require common understanding and internationally accepted standards. Thus a checklist for inspection should be worked out.

Paragraph 58 of the IPOA on IUU fishing lists information that should be collected during an inspection in port. This list of information may be considered as minimum requirements and include information regarding: the flag State of the vessel and identification details; name, nationality and qualifications of the master/fishing master; fishing gear, catch on board, including origin, species, form and quantity and total landed/transhipped catch. It is referred also to other information required by relevant RFMO's or other international agreements. Such additional information might include information regarding fishing licences (authorizations and permits to fish), "the history" of a vessel such as previous flag, previous name, previous owner etc., the fishing trip itself (commencement of fishing, which areas have been visited, when the trip ended etc.) and quantities staying on board after discharge (if relevant).

It might be considered, as it is contained in the Paris MOU, to establish a two-step approach; an initial inspection of the vessel, followed by a more detailed inspection if the vessel during the initial inspection becomes suspected of failing to meet the required standards. However, a comprehensive inspection of fishing vessel would be required to verify if it has conducted IUU fishing or not.

A port State inspector should decide on the consequences if the vessel is found to be in non-compliance with conservation and management measures established for areas to which the MOU applies.

4.7. Possible actions

If there are reasonable grounds for believing that a foreign fishing vessel has been fishing contrary to applicable conservation and management measures, the port State should choose from among several possible courses of action. The appropriateness of such actions would of course depend on the seriousness of the violations in question. The crucial point is to ascertain whether an activity or activities could be defined as «undermining» agreed measures. It might be an idea to draw upon the list of activities that are characterised as serious violations in Article 21.11 of the 1995 UN Fish Stocks Agreement and use it as a guideline for when to

take action against a fishing vessel also in port. It should be mentioned that the European Union³⁹ and NEAFC⁴⁰ have worked out similar lists.

Paragraph 59 of the IPOA on IUU fishing advises that the port State may take actions with the consent of, or upon the request of, the flag State. Possible actions with the concurrence of the flag State may include a wide range of options pursuant to relevant domestic legislation of the flag State. In this context, however, the challenge is to agree on actions that may be taken against a vessel by the port State without the concurrence of the flag State.

Paragraphs 56 and 59 of the IPOA on IUU fishing include actions that should be taken by port States if a foreign vessel is found to have engaged in IUU fishing. Two commitments are specifically mentioned; it should not allow the vessel to discharge/tranship and the matter should be reported to the flag State of the vessel and to the relevant RFMO. There is, however, a reference to any other action consistent with international law. As mentioned above, a port State has full jurisdiction over its ports and may consider a wide range of reactions. In a possible MOU the challenge will be to agree on certain additional minimum standards for actions against vessels found to be conducting IUU fishing.

Further it is self-evident that if a vessel is found to have violated applicable legislation in waters under jurisdiction of the port State; it should exercise jurisdiction as a coastal State and institute proceedings accordingly.

Generally speaking, a State is not normally entitled under international law to institute legal proceedings against a foreign vessel for fishing violations that have taken place solely in areas outside the national jurisdiction of that State. There are, however, exceptions to this rule. One exception concerns vessels without nationality fishing on the high seas. The IPOA on IUU fishing calls on all States (including port States) to take action against such vessels. At least some States take the view that a vessel without nationality on the high seas is subject to the jurisdiction of any State. The domestic laws of Canada, Norway, and the United States respectively authorise each of those States to take enforcement action against such vessels under certain circumstances.

An alternative concept could be to make it an offence to arrive in port having conducted IUU fishing irrespective whether the activities have been undertaken within waters under the jurisdiction of the port State, within waters under the jurisdiction of another State or on the high seas. Such an offence will thus be committed upon entry into port itself and thereby avoiding jurisdictional problems and the fishing vessel may be prosecuted under domestic legislation.

If this last idea is not considered appropriate, prosecution in general would be excluded and alternative measures, so-called administrative reactions, should be agreed upon.

4.7.1. Refusal to allow landing of catch

Several RFMOs⁴¹ have introduced the concept of refusal to allow landing catches resulting from IUU fishing. A direct reference to such an approach is also set out in Article 23.3 of the

³⁹ Council Regulation (EC) establishing a list of types of behaviour which seriously infringe the rules of the common fisheries policy (1999/C 105/03).

⁴⁰ Article 20 of the Recommendation on a Scheme of Control and Enforcement in respect of Fishing Vessels fishing in Areas beyond the Limits of National Jurisdiction in the Convention Area.

1995 UN Fish Stocks Agreement. Such measures are included in schemes dealing with non-Contracting Party vessels engaged in fishing activities in the areas of competence of a particular RFMO. It is presumed that a non-Party vessel observed fishing in that area is undermining applicable conservation and management measures and requires such vessels to be inspected before they are allowed to unload. No landings or transshipments will be permitted in a Contracting Party port unless vessels can establish that the fish were caught outside the area of application or in conformity with conservation and management measures in force. The master of the vessel may however rebut the presumption of IUU fishing. Also the IPOA on IUU fishing refers to similar measures in paragraph 63.

Norway has taken a more radical approach by establishing a general prohibition on landing of catches presumed to be derived from IUU fishing⁴². It is a ban on landing of fish from stocks that are subject to Norwegian regulatory measures and have not been taken pursuant to a fisheries agreement between Norway and the flag State or by a vessel registered in a State with which Norway does not have a fisheries agreement. Further it is prohibited to land in a Norwegian port catches consisting of fish caught in contravention of provisions laid down by RFMOs, including catches taken by nationals of States that are not parties to such a RFMO. These prohibitions apply irrespective of whether the fish has been caught in an area under jurisdiction of a particular State or in international waters.

If a vessel is found to have participated in IUU fishing, the minimum action taken by the port State should be to refuse to allow landing or transshipment of catches regardless of whether the specific fish derive from IUU fishing.

4.7.2. Detention

At the Third Session of the Conference on the Straddling Fish Stocks⁴³ a clause that would enable the port States to detain a foreign vessel was included in the Revised Negotiating Text prepared by the Chairman of the Conference⁴⁴. In later drafts, however, further mention of detention of vessels was excluded. This does not mean that the concept is without value in this context, and it should be kept in mind for future considerations. It should be mentioned that the Paris MOU includes provisions for detention of vessels until a deficiency is rectified⁴⁵.

Activities undertaken by a vessel are under the primary responsibility of the State allowing that particular vessel to fly its flag. In a fisheries context this concept of “flag State responsibility” means in essence that the State shall ensure that fishing vessels operating under its flag do not engage in activities undermining the effectiveness of conservation and management measures. Some States, however, appear unable or unwilling to fulfil this responsibility. There may be situations where a port State has clear grounds for believing that a vessel will continue IUU fishing if it is allowed to proceed to sea. A possible approach would be that a port State which is not satisfied that a flag State is willing to exercise

⁴¹ See NAFO/GC doc. 97/6, CCAMLR Conservation Measure 118/XVII and Annex F of the Report of 17th Annual Meeting of NEAFC

⁴² Cf. Regulation of 6 August 1993 relating to a prohibition on landing fish caught in waters outside Norwegian jurisdiction, amended 29 June 1999

⁴³ United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks (14-31 March 1994).

⁴⁴ Draft text: «The port State may detain a vessel for such reasonable period as is necessary for the flag State to take control of the vessel or otherwise take responsibility for enforcement purposes. If the port State detains a vessel for this purpose it must promptly inform the flag State».

⁴⁵ Paris MOU, Section 3.7.1 ff.

effectively its responsibilities concerning the fishing vessel concerned (based on established criteria), may detain the vessel until the flag State takes control over the vessel.

4.7.3. Forfeiture

Many States have established legislation allowing an appropriate body to confiscate vessels, gear and equipment used for unlawful fishing and any fish derived from such activities. Generally speaking, forfeiture by a port State of a vessel that has operated outside waters under its jurisdiction would not be in accordance with international law. Concerning gear and equipment, confiscation would hardly be accepted by the international community. It could be argued that for fish derived from IUU fishing, the situation would be different.

Paragraph 21 of the IPOA on IUU fishing provides that States should, among other measures, deprive nationals under its jurisdiction of the benefits accruing from IUU fishing. In a case related to a fishing vessel, such benefits would of course be the value of the catch. This paragraph is included in the section of the IPOA promoting responsibilities for all States. A similar provision is included in the Code of Conduct, but in the section promoting flag State duties⁴⁶. Even if the IPOA on IUU fishing limits such actions to nationals of a State, it should be considered to widen the application of such measures for all States to take actions, irrespective of the nationality of the IUU-fishers. This would be especially relevant for IUU-catches intended for landing in a port of another State than the flag State. Thus, there may be circumstances where a vessel should be allowed or ordered to land a catch derived from IUU fishing, but the value of the catch might be confiscated by the port State. In some cases such an approach would actually be a better solution than a refusal to allow landing and thus let the fishing vessel search for another port State allowing it to discharge.

4.8. Information and reporting

Paragraph 64 of the IPOA on IUU fishing provides that States should enhance cooperation, including the flow of relevant information, among and between relevant RFMOs and States.

In order to enhance transparency and better efficiency of the implementation of agreed conservation and management measures, results of port inspections should be communicated to the relevant States and bodies without delay. Furthermore, a standard report form would assist in harmonizing results of port inspections. In this context it should be mentioned that NEAFC and the Northwest Atlantic Fisheries Organization (NAFO) have agreed on a format and protocols for electronic exchange of fisheries monitoring, inspection and surveillance information (The North Atlantic Format)⁴⁷. This includes in principle also results of port inspections⁴⁸.

When developing a harmonized communication system for port inspections, it is important that various elements can be easily identified. For this purpose the agreed international codes

⁴⁶ Cf. paragraph 8.2.7. of the Code of Conduct.

⁴⁷ Data exchange protocols for electronic transmission shall be X.25 and X.400. The format includes: category, data element, field code, type, content and definitions.

⁴⁸ NEAFC has not yet agreed on a system of port State control, but this will be considered in a meeting scheduled for March 2002. However, NEAFC has established a full fledged computerized system for the purpose of flow of other information. NAFO has adopted harmonized port State control which includes electronic exchange of information based on the North Atlantic Format.

for States, fish species, vessel categories, vessel activities and fishing gear including their devices and attachments should be used⁴⁹.

As rapid exchange of information is essential, a system should embrace a communication facility which, allows for a direct, computerised exchange of messages between States and between port States and RFMOs. If this is working, notorious IUU-vessels will have nowhere to hide. Port State control data that is being made available through a transparent system may in itself change the attitude among IUU-operators.

It should be considered to use the newly developed North Atlantic Format for exchange of information as a format for the flow of information in the context of a possible MOU.

Also the establishment of a database could be an important tool for port State inspectors in enabling them to identify the flags, fishing vessels and operators that need to be checked more closely or specific actions taken. In order to assist port States, it is essential to have at their disposal up to-date information on individual vessels which have a record of IUU fishing. Such a database could be established and maintained by FAO, granting access to the information contained in the base to RFMOs, relevant coastal States, port States of such organizations and other co-operating port States.

5. Implementation of port State control of foreign fishing vessels into domestic legislation⁵⁰

The design of legislation on port State control will of course differ from State to State in line with policy objectives and legislative traditions. Some points are, however, universal. There is surely need for clarity, simplicity and flexibility. Further the legislation should be easy to implement. In order to respond to changing needs regarding fisheries management, the details of the system would require certain flexibility. This would imply that rules that are liable to frequent modifications should be expressed in subsidiary legislation. In practice the appropriate level will depend upon the degree of flexibility required. However, the main lines of the administrative system, which includes the administration of the control services and the power of fisheries inspectors, should be laid down in the basic law. Most legislative traditions would also require that the power to make subsidiary legislation is clearly spelled out in the law itself and so are penalties and clauses setting out offences which sometimes are drafted in very precise and detailed language.

Many States have also included in the fisheries law specific clauses dealing with forfeiture. This would be actions that could be taken in addition to or instead of penalties.

Possible regulations or other subsidiary legislation might build on the elements discussed above which would include: scope of application, prior notice of access, denial of access, inspection procedures, criteria for the evaluation of compliance (characterizing IUU fishing), reporting requirements and reactions.

It might also be considered whether these measures shall apply to all foreign fishing vessels or whether separate legislation should apply for vessels having fished within areas of

⁴⁹ ISO-3 flag State code, FAO 3-alpha code for fish species, FAO Alpha code for fishing vessels, FAO Alpha code for vessel activities, FAO Alpha Code for gear types and FAO 3-alpha code for attachment or device.

⁵⁰ Draft provisions (a template) for the implementation of port State control of foreign fishing vessels into domestic legislation are set out in attachment 2 to this document.

jurisdiction of the port State. As outlined above, prosecution would generally be excluded when IUU fishing has taken place outside areas under the jurisdiction of the port State so other means of reaction would have to be established⁵¹. However, most of the remaining elements would be relevant for both categories of fishing vessels.

⁵¹ This would be even more important the idea is not pursued of making it an offence to enter a port if IUU fishing has been conducted.

Attachment 1

Draft Memorandum Of Understanding

The Parties to this Memorandum⁵²,

Concerned that illegal, unreported and unregulated (IUU) fishing continues to persist;

Emphasizing that effective action by port States is required to prevent, deter and eliminate IUU fishing;

Recognizing that the Code of Conduct for Responsible Fisheries, 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 Convention and the Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1993 call for port States to establish measures to promote the effectiveness of subregional, regional and global conservation and management measures;

Further recognizing that the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, promotes the use of measures for port State control of fishing vessels in order to meet the objectives of the plan;

Desiring to achieve co-operation and co-ordination in fisheries-related port State control;

Calling upon States which are not parties to this Memorandum and which serve as port States for fishing vessels to become parties to this instrument, or otherwise to take action consistent with it;

have agreed as follows:

Commitments

The Parties to this Memorandum

will give effect to the provisions of the present Memorandum and the Annexes thereto, which constitutes an integral part of the Memorandum;

will maintain an effective system of port State control with a view to ensuring that foreign fishing vessels calling at a port of its State, comply with relevant conservation and management measures;

shall prior to allowing a foreign fishing vessel port access require the vessel to provide a notice at least xx hours in advance which includes vessel identification, the authorization to fish, details of their fishing trip and quantities of fish on board;

⁵² This refers to the members of particular RFMOs which have entered into an agreement of this kind. In addition States may agree as non-members of such a regional body.

shall, where there are reasonable grounds to believe that a fishing vessel has engaged in IUU fishing in waters beyond the limits of the fisheries jurisdiction of the port State, refuse to allow the vessel to use its port for landing, transshipping, refuelling or re-supplying;

shall not allow the vessel to use its ports if the vessel is flying the flag of a State, which has been identified by a regional fisheries management organization as having a history of non-compliance or if the vessel itself has been identified by such a body as having a history of non-compliance;

will publicize ports to which foreign fishing vessels may be permitted admission and will ensure that these ports have the capacity to conduct port inspections;

will ensure that port inspections take place in accordance with Annex A on any occasion when a foreign fishing vessel is discharging catch;

will, in the course of such inspections, obtain at least the information listed in Annex B;

will consult, cooperate and exchange information with other Parties in order to further the aims of the Memorandum.

Inspections

In fulfilling their commitments the Parties will carry out inspections in their own ports for the purpose of monitoring compliance with relevant conservation and management measures.

Inspections shall be carried out by properly qualified persons authorized for that purpose by the Party concerned and acting under its responsibility, having regard in particular to Annex C. Prior to an inspection, inspectors shall produce an identity card issued by the Party concerned.

An inspector may examine all relevant areas, decks and rooms of the vessel, catch (whether processed or not), nets or other gear, equipment, and any relevant documents which the inspector deems necessary to verify compliance with relevant conservation and management measures. The master of the vessel shall give the inspector any necessary assistance and information, produce relevant objects and documents etc. and certify possible copies.

Parties whose vessels use land or transship in ports other than their own to land or transship fish caught in waters under jurisdiction of that Party, can send their own inspectors to inspect their own vessels, having previously obtained an invitation from the port State in which the inspection shall be carried out. Such an approach may also be agreed upon by the Parties involved concerning a fishing vessel flying the flag of another State which has conducted fishing operations within waters under jurisdiction of that Party.

Actions

For the purposes of this Memorandum Of Understanding IUU fishing⁵³ means:

- a) fishing without a valid licence, authorization or permit issued by the flag State;

⁵³ Other activities than those listed below may of course be specified in procedures established by a relevant RFMO (one particular example is failure to comply with Vessel Monitoring Systems [VMS]).

- b) failing to maintain accurate records of catch and catch-related data;
- c) fishing in a closed area, fishing during a closed season or without, or after attainment of a quota;
- d) directed fishing for a stock which is subject to a moratorium or for which fishing is prohibited;
- e) using prohibited fishing gear;
- f) falsifying or concealing the markings, identity or registration of the vessel;
- g) concealing, tampering with or disposing of evidence relating to an investigation; or
- h) conducting activities which together might be regarded as serious undermining of applicable conservation and management measures.

If an inspector finds that there are reasonable grounds for believing that a foreign fishing vessel has engaged in or supported IUU fishing, the inspector shall promptly notify the flag State of the vessel and, where appropriate, the relevant coastal States and regional fisheries management organizations. The inspector shall take due note of any possible reply or any possible actions taken by the flag State.

Unless the inspector is satisfied that the flag State has taken or will take will take adequate action in response to the violation, the vessel shall not be allowed to land or transship fish in its ports.

Information

Each Party will report on the results of its inspections under the Memorandum to the flag State, to parties of this Memorandum, and to relevant regional fisheries management organizations.

In order to enhance transparency and to promote implementation of agreed conservation and management measures, the parties to this Memorandum undertake to establish a communication mechanism that allows for direct, computerized exchange of messages between relevant parties.

The information will be handled in a standardized form and in accordance with the established procedures as set out in Annex D.

ANNEXES

Annex A. Inspection procedures of foreign fishing vessels

1. Vessel identification

The inspector shall

be satisfied that the certificate of registry is valid;

be assured that the flag, the external identification number (and IMO-number if available) and the international radio call sign are correct;

examine whether the vessel has been re-flagged and if so; note the previous name (s) and flag (s); and

note the port of registration, name and address of the owner (and operator if different from the owner) and the name of the master;

note name(s) and address of previous owner(s), if any.

2. Fishing authorization

The inspector shall be satisfied that the authorization to fish is compatible with the information obtained under paragraph 1 and examine the duration of the authorization and its application to areas, species and fishing gear.

3. Other documentation

The inspector shall review all relevant documents which may include various logbooks, in particular the fishing logbook and drawings or descriptions of fish rooms. Such rooms or areas shall be inspected to verify whether their size and composition correspond to these drawings or descriptions.

4. Catch

The inspector shall examine whether the fish on board is harvested in accordance with the conditions set out in the authorization. In doing so, the inspector shall examine the fishing logbook, possible reports submitted, including those descending from a vessel monitoring system (VMS).

The inspector shall identify the amount and composition of all catch on board and establish whether the catch could have been taken in the areas as recorded in the fishing logbook.

In order to determine the quantities and species which are fresh on ice, frozen but not packed, processed, packed or in bulk, the inspector shall examine the fish in the hold. In doing so, the inspector may open cartoons where the fish has already been pre-packed and move the fish or cartoons to ascertain the integrity of fish rooms.

If the vessel is discharging the catch, the inspector shall verify the species and quantities landed. Such a verification shall include; presentation (product form), live weight (quantities determined from the logbook) and the conversion factor used for calculating processed weight to live weight. The inspector shall also examine any possible quantities retained on board.

5. Fishing gear

The inspector shall be satisfied that the fishing gear on board is in conformity with the conditions of the authorization. The gear shall also be checked to ensure that the possible mesh size (s) (and possible devices), length of possible nets, possible hook sizes etc. are in conformity with applicable regulations and that possible identification marks to the gear correspond to those of the vessel.

The inspector shall also search the vessel for any fishing gear stowed out of sight.

6. Actions

If the inspector finds that there are reasonable grounds for believing that the vessel has been fishing contrary to the authorization or any applicable conservation measures, the inspector shall act in accordance with the relevant parts of the Memorandum.

7. Report

The result of a port inspection shall be presented to the master of the vessel and a report shall be completed, signed by the inspector and the master. The master is free to add any comments to the report.

The inspector shall without delay transmit the report to the flag State and to the relevant regional fisheries management organization (s).

Annex B. Minimum requirements

Results of port inspections shall include at least the following information:

1. Inspection references

Inspection authority (Name of inspection authority or the alternate body nominated by the authority);
date (date the report is completed); and
port of inspection (place where the vessel is inspected).

2. Vessel identification

Name of the vessel;
external identification number (side number of the vessel) and IMO-number if available;
international Radio Call Sign;
flag State (State where the vessel is registered);
previous name and flag;
party to a particular regional fisheries management organization;
home port (port of registration of the vessel or homeport);
vessel owner (name and address of the vessel owner);
vessel operator (responsible for using the vessel if different from the vessel owner);
name and address of previous owners; and
master name.

3. Fishing licences (authorizations/permits)

The vessel's authorization to fish;
areas, scope and duration of the licence/permit; and
species and fishing gear authorized.

4. Trip information

Date trip commenced (date when the current fishing trip started);
areas visited (entry to and exit from different areas); and
date trip ended (date when the current fishing trip ended).

5. Result of the inspection on discharge

Start and end (date) of discharge;
species;
presentation (product form);
live weight (quantities determined from the log book);
conversion factor (conversion factor as defined by the master for the corresponding species, size and presentation);
processed weight (quantities landed by species and presentation); and
equivalent live weight (quantities landed in equivalent live weight, as "product weight x conversion factor").

6. Quantities staying on board the vessel

Species;
presentation (product form);
conversion factor;
processed weight; and
equivalent live weight.

7. Results of gear inspection

Gear type inspected ; and
when otter trawl – attachments; mesh type (square meshes, diamond meshes), mesh
size in millimetres.

Annex C. Training of port inspection officers

Elements that shall be included into a training program:

Overview of the relevant conservation and management measures that applies;
information sources, such as log books, vessel monitoring systems (VMS) for validation of information given by the master of the fishing vessel;
species identification;
catch landing monitoring, including determining conversion factors for the various species and products;
fishing vessel boarding/inspection, hold inspections and calculation of vessel hold volumes;
gear inspections;
reserving of evidence; and
actions that should be considered.

Annex D. Information system on inspections

1. Computerized communication between States and between States and relevant RFMOs would require the following:

Data characters (for example in accordance with ISO 8859.1);
 structure for data transmission;
 protocols for the transmission (for example X. 25 or X. 400); and
 formats for transmission including data element (flag State, international radio call sign, port name etc.) with a corresponding field code (for example FS for flag State, RC for international radio call sign, PO for port name etc.) and a more detailed definition and explanation of the various codes.

2. International agreed codes shall be used for the identification of the following items:

States; 3-ISO Country Code (CAN for Canada, NOR for Norway etc.);
 fish species; FAO 3-alpha code (ALF for alfonsinos, ARG for Argentines etc.);
 fishing vessels; FAO alpha code (LL for long liner, TO for trawler etc.);
 gear types; FAO alpha code (OTB for bottom trawl, GND for drift nets etc.); and
 devices/attachments; FAO 3-alpha code (BSC for bottom-side chafer, RST for round strap etc.).

3. Data elements shall at least be the following:

Inspection references;
 vessel identification ;
 fishing licences (authorizations/permits);
 trip information;
 result of the inspection on discharge;
 quantities staying on board the vessel;
 result of gear inspection; and
 possible actions taken.

Attachment 2

Draft provisions for the implementation of port State control of foreign fishing vessels into domestic legislation⁵⁴

A. Fisheries law:

Administration

xx⁵⁵ shall ensure compliance with the provisions of this Law and regulations issued pursuant thereto.

Power of fishery control services (and port inspectors)

When exercising its control duties, xx shall be given unimpeded access to fishing vessels.

Power to establish regulations

The Minister/Ministry may lay down regulations concerning control and enforcement, including port control and inspections.

Penalties⁵⁶

Any person who wilfully or negligently contravenes or is accessory to the contravention of any provisions set out in this Law or provisions issued pursuant thereto, is liable to a fine⁵⁷.

Forfeiture

In the case of infringement of provisions set out in or issued pursuant to this Law, the vessel involved in the commission of that infringement, together with its gear, equipment and any fish caught unlawfully may be forfeited. Instead of the object, its value may be forfeited wholly or in part. When lawful and unlawful catches have been mixed together, the entire catch may be forfeited.

B. Regulation relating to port control of foreign fishing vessel which have been conducting fishing operations in areas beyond the limits of the fisheries jurisdiction of xx⁵⁸

⁵⁴ Some legislative traditions would require quite a detailed description of the relevant provisions. Here, however, a very simple approach has been chosen for the Law itself for indicating the basic elements of such provisions.

⁵⁵ Name of the body empowered to carry out control and enforcement, including port inspections.

⁵⁶ The use of penalties would be limited to infringements within waters of national jurisdiction of the port State and to vessels flying the flag of the port State.

⁵⁷ In cases of infringements by foreign vessels imprisonment should not be applicable, cf. Article 73.3 of the 1982 UN Convention.

⁵⁸ Name of the port State

1. Scope of application

This regulation applies to all foreign fishing vessels⁵⁹ which have been conducting fishing operations in waters under the fisheries jurisdiction of another State or in areas beyond the limits of national fisheries jurisdiction of any State.

2. Prior notice of access

A foreign fishing vessel shall seek permission to enter a port at least xx hours in advance. Such an application shall contain the following: vessel identification (name of the vessel; external identification number; international radio call sign; flag State), fishing authorization (natural or legal person authorized; areas, scope and duration of the authorization; species and fishing gear authorized); trip information (for each area visited the date of commencement and finish); species and quantities (including their product form) on board.

3. Denial of access

A foreign fishing vessel shall be denied access to any port for refuelling, re-supplying, transshipping, landing etc. if the information submitted pursuant to paragraph 2 is not complete or there are reasonable grounds to believe that the vessel has conducted fishing contrary to applicable conservation and management measures within an area of competence of a regional fisheries management organization or within waters of fisheries jurisdiction of another State. Such access shall also be denied if a foreign fishing vessel is flying the flag of a State which by a regional fisheries management organization is regarded as having a history of non-compliance or if a particular vessel is regarded as having a history of non-compliance.

4. Inspections

A port inspector shall examine all relevant areas, decks and rooms of the foreign fishing vessel, catch (whether processed or not), nets or other gear, equipment, and any relevant documents which the inspector deems necessary to verify the compliance with relevant conservation and management measures. The master or any person designated by the master shall give the inspector any necessary assistance and information, produce relevant objects and documents etc. and certify possible copies.

5. Criteria for evaluating compliance

The port inspector shall take actions as described in paragraph 6 if there are reasonable grounds to believe that the vessel has:

- a) fished without a valid licence, authorization or permit issued by the flag State;
- b) failed to maintain accurate records of catch and catch-related data;
- c) fished in a closed area, fishing during a closed season or without, or after attainment of a quota;
- d) directly fished for a stock which is subject to a moratorium or for which fishing is prohibited;
- e) used prohibited fishing gear;
- f) falsified or concealed the markings, identity or registration of the vessel;

⁵⁹ A foreign fishing vessel is defined as a vessel flying the flag of another State.

- g) concealed, tampered with or disposed evidence relating to an investigation; or
- h) conducted activities which together might be regarded as serious undermining of applicable conservation and management measures.

6. Actions

If it during an inspection in port appears that there are reasonable grounds for believing that a foreign fishing vessel has engaged in any activity contrary to relevant conservation and management measures, the flag State shall be notified as soon as possible. The port inspector shall take duly note of any possible reply or actions taken by the flag State.

Unless in special circumstances, the vessel shall not be allowed use the port or any other port for landing, transshipping, refuelling or re-supplying.

C. Regulation relating to port control of foreign fishing vessels which have been conducting fishing operations within areas under the fisheries jurisdiction of xx

1. Scope of application

This regulation applies to all foreign fishing vessels⁶⁰ which have been conducting fishing operations in waters under the fisheries jurisdiction of xx.

2. Prior notice of access

A foreign fishing vessel shall seek permission to enter a port at least xx hours in advance. Such an application shall contain the following: vessel identification (name of the vessel; external identification number; international radio call sign; flag State), fishing authorization (natural or legal person authorized; areas, scope and duration of the authorization; species and fishing gear authorized); trip information (for each area visited the date of commencement and finish); species and quantities (including their product form) on board.

3. Inspections

A port inspector shall examine all relevant areas, decks and rooms of the foreign fishing vessel, catch (whether processed or not), nets or other gear, equipment, and any relevant documents which the inspector deems necessary to verify the compliance with relevant conservation and management measures. The master or any person designated by the master shall give the inspector any necessary assistance and information, produce relevant objects and documents etc. and certify possible copies.

4. Penal measures

Any wilful or negligent violation of provisions set out in these regulations or issued pursuant thereto is subject to a penalty pursuant to (the penal provision of the Law).

⁶⁰ A foreign fishing vessel is defined as a vessel flying the flag of another State.

5. Forfeiture

In the case of infringement of provisions set out in or issued pursuant to this Law, the vessel involved in the commission of that infringement, together with its gear, equipment and any fish caught unlawfully may be forfeited. Instead of the object, its value may be forfeited wholly or in part. When lawful and unlawful catches have been mixed together, the entire catch may be forfeited.