



United States Department of State

*Bureau of Oceans and International
Environmental and Scientific Affairs*

Washington, D.C. 20520

September 25, 2008

Dr. Fabio Hazin
Special Secretary, Fisheries & Aquaculture
Recife
Brazil

Dear Dr. Hazin:

Thank you for inviting us to share our drafting suggestions for Articles 11 through 38 of the draft instrument on port State measures to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing. Those suggestions are enclosed.

We note that the Chairperson's draft that came out of the Technical Consultations in Rome, Italy from June 23 to 27, 2008, includes a simplified definition of IUU fishing in Article 1 (e) that is intended to be elaborated in a new Annex A. In that regard, we have also enclosed a proposed new Annex A setting forth a definition of fishing and fishing related activities that would constitute "IUU fishing" for the purposes of the draft instrument.

Our proposal for Annex A is based largely on paragraph 3 of the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (the IPOA). We have proposed a number of adjustments to the language of the IPOA, with the intention of creating a more precise definition of IUU fishing that would be appropriate for a legally binding instrument.

If the draft instrument includes a detailed definition of IUU fishing along the lines that we have proposed, we believe that it may be possible to delete the list of examples of IUU fishing that currently appears in Article 17 of the draft instrument. If other delegations prefer to retain such a list of examples, however, we are prepared to help develop such a list, but suggest that it also be moved from Article 17 to an Annex, or to a related document providing guidance on implementation of the agreement.

We have not proposed any specific language to address the issue of “fishing entities.” But we do believe that the draft instrument will need to apply to fishing entities and look forward to working with other delegations to craft appropriate language to that effect.

Again, thank you for this opportunity to share our drafting suggestions.

Sincerely,

A handwritten signature in black ink, appearing to read "David Balton". The signature is fluid and cursive, with the first name "David" being more prominent than the last name "Balton".

Ambassador David Balton
Deputy Assistant Secretary for
Oceans and Fisheries

Enclosures: as stated.

CC: Mr, Jean Francois Pulvenis, FAO Department of Fisheries and Aquaculture
Mr. David Doulman, FAO Department of Fisheries and Aquaculture

U.S. DRAFTING SUGGESTIONS, 9/25/08

**TECHNICAL CONSULTATION TO DRAFT A LEGALLY-BINDING
INSTRUMENT ON PORT STATE MEASURES TO PREVENT,
DETER AND ELIMINATE ILLEGAL, UNREPORTED AND
UNREGULATED FISHING
Rome, Italy, 23 to 27 June 2008
DRAFT AGREEMENT ON PORT STATE MEASURES
TO PREVENT, DETER AND ELIMINATE
ILLEGAL, UNREPORTED AND UNREGULATED FISHING**

**PART 4
INSPECTIONS AND FOLLOW-UP ACTIONS**

*Article 11
Levels and priorities for inspection*

1. Each Party shall endeavour to inspect a number of vessels in its ports required to reach an annual level of inspections ~~sufficient necessary~~ to achieve the objective of this Agreement.
2. In determining which vessels to inspect, a Party shall give priority to:
 - (a) vessels that have been denied the use of a port in accordance with Articles 9 or 17 of this Agreement; and
 - (b) requests from other relevant States or regional fisheries management organizations that particular vessels be inspected, provided that such requests are supported by evidence of illegal, unreported and unregulated fishing by the vessel in question.
3. Parties shall seek to agree, through regional fisheries management organizations or otherwise, on minimum levels for inspections of vessels, with a view to reaching a coordinated level of inspections necessary to achieve the objective of this Agreement.

*Article 12
Conduct of inspections*

1. Each Party shall ensure that its inspectors carry out the functions set forth in Annex B ~~the inspection procedures in Annex B are implemented~~ 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 persons authorized for that purpose, having regard in particular to Article 16 of this Agreement;
 - (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) ~~authorize the inspector to examine~~ ~~ensure that the inspector examines~~ all areas of the vessel that are required, fish on board, the nets and any other gear, equipment, and any document or record which the inspector deems necessary to verify compliance with relevant conservation and management measures;

(d) ~~require that the master of the vessel give the inspector all necessary assistance and information, and present~~ ~~ensure that the master of the vessel is required to give the inspector all necessary assistance and information, and to present~~ relevant material and documents as may be required, or certified copies thereof;

(e) subject to appropriate arrangements with the flag State of the vessel, invite the flag State to participate in the inspection;

(f) make all possible efforts to avoid unduly delaying the vessel and ~~to~~ ensure that the vessel suffers the minimum interference and inconvenience and that unnecessary degradation of the quality of the fish is avoided;

(g) ensure that an inspector is able to communicate with the master or senior crew members of the vessel, or that the inspector is accompanied, where possible and where needed, by an interpreter;

(h) ensure that inspections are not conducted in a manner that would constitute harassment of any vessel; and

(i) ensure that the result of an inspection is presented to the master of the vessel for review and signature, and that the report is completed and signed by the inspector. The master shall be given the opportunity to add any comment to the report and, as appropriate, to contact the relevant authorities of the flag State, in particular when the master has serious difficulties in understanding the contents of the report. A copy of the report shall be provided to the master for retention on board the vessel.

Article 13 Results of inspections

Each Party shall, as a minimum standard, require the information set out in Annex C to be included in the report of the results of each inspection.

Article 14 Transmittal of results by Party

Each Party shall take measures to transmit the results of each inspection to the flag State of the inspected vessel and, as appropriate, to:

- (a) other relevant States;
- (b) relevant regional fisheries management organizations; and
- (c) FAO and other relevant international organizations.

Article 15
Electronic exchange of information

1. To facilitate implementation of this Part of the Agreement, each Party shall, where possible, establish a communication mechanism that allows for direct electronic exchange of messages between relevant States, entities and institutions, with due regard to appropriate confidentiality requirements.
2. Each Party shall handle information to be transmitted through any mechanism established under paragraph 1 in a standardized form consistent with Annex D.

Article 16
Training of inspectors

Each Party shall ensure that requirements are established for the certification of its inspectors. Such requirements shall take into account the guidelines for the training of inspectors in Annex E.

Article 17
Port State actions following inspection

1. When, following an inspection, there is reasonable evidence for believing that a vessel has during the relevant period engaged in, or supported, illegal, unreported and unregulated fishing, ~~which can include, but is not limited to, the following:~~

- ~~(a) fishing without a valid license, authorization or permit issued by the flag State or the relevant coastal State;~~
- ~~(b) serious failure to maintain accurate records of catch and catch-related data;~~
- ~~(c) serious misreporting of catch;~~
- ~~(d) significant fishing in a closed area, during a closed season or contrary to applicable effort or quota requirements;~~
- ~~(e) directed fishing for a stock which is subject to a moratorium or for which fishing is prohibited;~~
- ~~(e bis) fishing contrary to applicable bycatch measures;~~
- ~~(f) using fishing gear that is significantly inconsistent with authorized gear;~~
- ~~(g) falsifying or concealing the markings, identity or registration of the vessel;~~
- ~~(h) concealing, tampering with or disposing of evidence relating to an investigation;~~
- ~~(i) serious failure to comply with requirements for vessel monitoring systems (hereafter VMS);~~
- ~~(j) taking or landing significant amounts of undersized fish in contravention of relevant conservation and management measures; or~~

~~(k) committing multiple violations which together constitute a serious disregard of relevant conservation and management measures;~~

the Party shall:

(a) promptly notify the flag State of the vessel and, as appropriate, other relevant States and regional fisheries management organizations and other relevant organizations; and

~~(b) shall deny use of its port to the vessel for landing, transshipping, or processing and packaging~~ of fish, if these measures have not already been taken in respect of the vessel.

2. A Party shall, in appropriate situations, deny a vessel referred to in paragraph 1 of this Article, access to port services, including, *inter alia*, refueling and resupplying but not including services essential to the safety, health and welfare of the crew.

3. A Party may take measures in addition to those specified in paragraphs 1 and 2 of this Article in respect of the vessel in question that are consistent with international law, ~~where there is evidence that a vessel has engaged in one or more of the activities set forth in paragraph 1, provided that:~~

~~(a) the measures are provided for in its national laws and regulations;~~

~~(b) the flag State of the vessel has consented to the taking of such measures or requested such measures to be taken, or a relevant coastal State has requested the taking of such measures in respect of a violation that has occurred in an area under its national jurisdiction;~~

~~(c) the vessel is without nationality; or~~

~~(d) the additional measures gives effect to a decision of a regional fisheries management organization or is taken pursuant to other international agreements.~~

Article 18

Appeals concerning Reconsideration of actions by the port State

A Party shall ensure that the owner, operator or representative of a vessel that has been the subject of port State measures taken pursuant to Articles 9 and 17 of this Agreement may seek reconsideration of appeal the decision. Reconsideration An appeal will not cause such measures to be suspended while the reconsideration appeal is pending. The master of the vessel shall be informed that he or she may seek such reconsideration of the right of appeal.

Article 19

Compensation

Each Party shall ensure that the owner or operator of a vessel is entitled to compensation for any loss or damage suffered as a consequence of undue delay. In any instance of alleged delay, the burden of proof lies with the owner or operator of the vessel.

Article 20

Force majeure or distress

Nothing in this Agreement affects the access of vessels to port in accordance with international law for reasons of force majeure or distress.

PART 5 ROLE OF FLAG STATES

Article 21 Role of flag States

1. Each Party shall, in its capacity as a flag State, cooperate with port States and relevant coastal States, regional fisheries management organizations and other international organizations in the implementation of this Agreement.

1bis. Each Party shall require that masters of its vessels:

(a) grant to port inspectors access to all areas of the vessel that are required by the inspection, including, *inter alia*, fish on board, the nets and any other gear, equipment, and any document or record which the inspector deems necessary to verify compliance with relevant conservation and management measures, and:

(b) give port inspectors all necessary assistance and information, and present relevant material and documents, or certified copies thereof.

2. When a Party has reasonable grounds to believe that a vessel flying its flag has engaged in or supported illegal, unreported and unregulated fishing and is seeking access 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~~ ~~ensure that~~ vessels entitled to fly its flag to land, transship 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, through regional fisheries management organizations, fair, transparent and non-discriminatory procedures for identifying States that are not acting in accordance with, or in a manner consistent with, this Agreement.

4. Each Party shall, in its capacity as a flag State, report to relevant port States and, as appropriate, other relevant States, regional fisheries management organizations and FAO on actions they have taken in respect of vessels flying their flags that, as a result of port State measures taken under this Agreement, have been determined to have engaged in, or supported, illegal, unreported and unregulated fishing.

PART 6 REQUIREMENTS OF DEVELOPING STATES

Article 22 Requirements of developing States

1. Each Party shall give full recognition to the special requirements of developing States in relation to the implementation of port State measures. To this end, Parties shall, either directly or through FAO

and other specialized agencies of the United Nations and other appropriate international and regional organizations and bodies including regional fisheries management organizations, provide assistance to developing States in order to:

- (a) enhance the ability of developing States, in particular the least-developed among them and small island developing States, to develop a legal basis and human capacity for the implementation of effective port State measures;
- (b) facilitate the participation of developing States in any subregional, regional and international organizations that promote the effective development and implementation of port State measures; and
- (c) facilitate technical assistance to strengthen the implementation of port State measures by developing States, in coordination with relevant regional and international measures and mechanisms.

2. In implementing this Agreement, Parties shall give due regard to the need to ensure that a disproportionate burden is not transferred directly or indirectly onto developing port States.

3. Parties shall cooperate to establish special funds to assist developing States Parties in the implementation of this Agreement. These funds shall be directed specifically towards:

- (a) developing national, regional and international port State measures;
- (b) developing human capacity, including for fisheries managers, inspectors, monitoring, control and surveillance and legal personnel, including training and capacity-building at national and regional levels;
- (c) monitoring, control, surveillance and compliance activities relevant to port State measures; and
- (d) assisting developing States Parties to meet the costs involved in any proceedings for the settlement of disputes that results from action they have taken pursuant to this Agreement.

PART 7 DISPUTE SETTLEMENT

Article 23 Peaceful settlement of disputes

1. The provisions relating to the settlement of disputes set out in Part XV of the Convention shall apply mutatis mutandis to any dispute between Parties to this Agreement concerning the interpretation or application of this Agreement, whether or not they are also Parties to the Convention.

2. Any procedure accepted by a Party to this Agreement and the Convention pursuant to article 287 of the Convention shall apply to settlement of disputes under this Article, unless that Party, when signing, ratifying or acceding to this Agreement, or at any time thereafter, has accepted another procedure pursuant to article 287 for the settlement of disputes under this Article.

3. A Party to this Agreement, which is not a Party to the Convention, when signing, ratifying, or acceding to this Agreement, or at any time thereafter, shall be free to choose, by means of a written declaration, one or more of the means set out in article 287, paragraph 1, of the Convention for the settlement of disputes under this Article. Article 287 shall apply to such a declaration, as well as to any dispute to which such State is a party which is not covered by a declaration in force. For the purposes of arbitration in accordance with Annexes VII and VIII to the Convention, such State shall be entitled to nominate arbitrators and experts to be included in the lists referred to in Annex VII, article 2 and Annex VIII, article 2, for the settlement of disputes under this Article.

~~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 party to a dispute of this character not so resolved may refer the dispute for settlement to the International Court of Justice, to the International Tribunal for the Law of the Sea or to arbitration.~~

PART 8 NON-PARTIES

Article 24 Non-Parties to this Agreement

1. Parties shall encourage non-Parties to this Agreement to become Parties thereto and to adopt laws and regulations consistent with its provisions.

2. Parties shall take fair, non-discriminatory and transparent measures consistent with this Agreement and their respective international obligations, including those established by the WTO agreements, ~~and international law~~ to deter the activities of non-Parties which undermine the effective implementation of this Agreement.

PART 9 MONITORING AND REVIEW

Article 25 Monitoring and review

Parties shall, within the framework of FAO and its relevant Bodies, ensure the regular and systematic monitoring of the implementation of this Agreement and the assessment of the progress made towards achieving its objective.

PART 10 FINAL PROVISIONS

Article 26
Signature

This Agreement shall be open for signature at ** from ** until **, by all States and regional economic integration organizations as referred to in Article 1(m).

Article 27
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 Depository.

Article 28
Accession

1. ~~After the period in which this Agreement is open for signature, T~~After the period in which this Agreement is open for signature, This Agreement shall be open for accession, ~~after its closure for signature,~~ by any State or regional economic integration organization as referred to in Article 1(1).
2. Instruments of accession shall be deposited with the Depository.

Article 29
Regional Economic Integration Organizations

1. When a regional economic integration organization becomes a Party to this Agreement, it shall notify any change regarding its distribution of competence as may be relevant to this Agreement. Any Party to this Agreement may, at any time, request a regional economic integration organization that is a Party to this Agreement to provide information as to which, as between such Organization and its Member States, is responsible for the implementation of any particular matter covered by this Agreement. The regional economic integration organization shall provide this information within a reasonable time.

~~2. Instruments of ratification, acceptance, approval, amendment or withdrawal deposited by a regional economic integration organization shall not be counted as additional to those deposited by its Member States.~~

Article 30
Entry into force

1. This Agreement shall enter into force ** days after the date of deposit with the Depository of the ** instrument of ratification, acceptance, approval or accession in accordance with Article 27 or 28.
2. For each signatory which ratifies, accepts or approves this Convention after entry into force, this Agreement shall enter into force [~~**~~ ** days after the date of/upon] 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 [~~**~~ days after the date of/upon] the deposit of its instrument of accession.

4. For 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 31
Reservations and exceptions

No reservations ~~or exceptions~~ may be made to this Agreement.

Article 32
Declarations and statements

Article 31 does not preclude a State or regional economic integration organization, when signing, ratifying, accepting, 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 declarations or statements do not purport to ~~exclude or to modify~~ the legal affect of the provisions of this Agreement in their application to that State or regional economic integration organization.

Article 33
Provisional application

1. Before its entry into force, this Agreement may 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 34
Amendments

1. This Agreement may be amended by consensus ~~a [two-thirds majority]~~ of the Parties.

1bis. Any regional economic integration organization, when participating in decision-making in matters within its competence under this article, shall not exercise its right to participate in decision-making if any of its member States exercises their rights, and vice versa.

2. Any Party may propose an amendment to the Agreement by providing to the Depositary the text of a proposed amendment.

3. An amendments to this Agreement shall enter into force for the Parties having accepted it [ninety (90)] days after notification of acceptance or approval to the Depository by [two-thirds] of the Parties.

3bis. For 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.

4. States or regional economic integration organizations that become Parties after the entry into force of amendments to this Agreement shall be considered to be Party to the Agreement as amended.

Article 35

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. The Annexes may be amended, or new Annexes may be added, revised from time to time by consensus of the Parties. An amendment to an Annex or addition of a new Annex Notwithstanding the provisions of Article 34, if a revision to an Annex is adopted by consensus at a meeting of Parties, it shall be incorporated in this Agreement and shall enter into force for all Parties to this Agreement one year after the date of communication by the Depository to such Parties of the adoption of such amendment or Annex, take effect from the date of its adoption or from such other date as may be specified in the amendment or Annex, except for those Parties that have notified the Depository in writing within that period of their non-acceptance of such amendment or Annex revision. Such amendment or Annex shall enter into force for Parties that withdraw their notification of non-acceptance on the ninetieth day after the date on which withdrawal of such notification has been received by the Depository. If a revision to an Annex is not adopted by consensus, the amendment procedures set out in Article 34 shall apply.

Article 36

Withdrawal

Any Party may withdraw from this Agreement at any time after the expiry of [two years] from the date upon which the Agreement entered into force with respect to that Party, by giving written notice of such withdrawal to the Depository. Withdrawal shall become effective [** days/months] after receipt of the notice of withdrawal by the Depository.

Article 37

The Depository

The Director-General of the Food and Agriculture Organization of the United Nations shall be the Depository of this Agreement. The Depository 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 all signatories of and Parties to this Agreement of all:

- (i) signatures and instruments of ratification, acceptance, approval and accession deposited under Articles 26, 27 and 28;
- (ii) the date of entry into force of this Agreement in accordance with Article 30;
- (iii) proposals for amendment to this Agreement and their entry into force in accordance with Article 34;
- (iv) proposals for amendment to the Annexes in accordance with Article 35; and
- (v) withdrawals from this Agreement in accordance with Article 36.

Article 38
Authentic texts

~~The Arabic, Chinese, English, French, Russian and Spanish texts of this Agreement are equally authentic.~~

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, having been duly authorized by their respective Governments, have signed this Convention.

DONE at **, on this ** day of **, 200*, in Arabic, Chinese, English, French, [Russian] and Spanish, all six texts being equally authentic.

ANNEX A

For the purposes of this Agreement, “illegal, unreported, and unregulated fishing” refers to fishing and fishing related activities:

- (a) 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, including activities that have not been reported, or have been misreported, to the relevant national authority of that State in contravention of its laws and regulations;¹
- (b) conducted by vessels flying the flag of a State that is a member of a regional fisheries management organization in contravention of the conservation and management measures adopted by that organization and by which that State is bound, including activities that have not been reported, or have been misreported, in contravention of the reporting requirements of that organization;²
- (c) conducted by vessels flying the flag of a State that is a cooperating non-member of a regional fisheries management organization that are inconsistent with the commitments undertaken by that State as a cooperating non-member of that organization, including activities that have not been reported, or have been misreported, in a manner that is inconsistent with those commitments;³ or
- (d) conducted in the area of application of a regional fisheries management organization by vessels without nationality, or by vessels flying the flag of a State that is not a member nor a cooperating non-member of that organization and that undermine the effectiveness of the conservation and management measures of that organization.⁴

¹ Based on IPOA Paragraphs 3.1.1 and 3.2.1

² Based on IPOA Paragraphs 3.1.2 and 3.2.2

³ Based on IPOA Paragraph 3.1.3

⁴ Based on IPOA Paragraph 3.3.1