

## PORT STATE CONTROL OF FOREIGN FISHING VESSELS



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## **PORT STATE CONTROL OF FOREIGN FISHING VESSELS**

by  
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## PREPARATION OF THIS DOCUMENT

This document is a revised version of a report presented and deliberated at the Expert Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing that was held at FAO Headquarters, Rome, Italy, from 4 to 6 November 2002. The Expert Consultation was convened by the Director-General of FAO with a view to facilitating the implementation of the 2001 FAO International Plan of Action to Deter, Prevent and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU). The Expert Consultation was arranged in conjunction with the Fishery Policy and Planning Division, the Fishery Industries Division, and the Development Law Service under the auspices of FishCode, the FAO Interregional Programme of Assistance to Developing Countries for Implementation of the Code of Conduct for Responsible Fisheries. Funds were provided through the FAO Regular Programme and FishCode project GCP/INT/849/USA (“Support for Implementation of the International Plan of Action on Illegal, Unregulated and Unreported (IUU) Fishing”).

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### ABSTRACT

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 plan may be considered as a toolbox from which States may choose relevant measures to implement into domestic legislation. A joint FAO/IMO Working Group on IUU fishing met in October 2000 and agreed that FAO in cooperation with relevant organizations should consider the need to develop measures for port State control related to the management of fisheries resources. In order to facilitate possible future developments in this field, FAO convened in November 2002 an Expert Consultation to Review Port State Measures to Combat IUU Fishing. The present document draws on the experiences of IMO in developing port State control regimes with respect to vessel safety and pollution prevention standards and equipment. It looks into the reasons for the adoption of port State measures under the auspices of an agreement or a memorandum of understanding at regional level and into the means for achieving a transparent and efficient system. The paper further discusses elements of a possible Memorandum including possible actions by port States.



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**ABBREVIATIONS**

CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources
COFI	Committee on Fisheries
EEZ	Exclusive Economic Zones
FOC	Flag of Convenience
FONC	Flag of Non-Compliance
GATT/WTO	General Agreement on Tariffs and Trade/World Trade Organization
GT	Gross Ton
ICCAT	International Commission for the Conservation of Atlantic Tunas
IMO	International Maritime Organization
IOTC	Indian Ocean Tuna Commission
ISM	International Safety Management
IUU fishing	Illegal, Unreported and Unregulated fishing
MOU	Memorandum of Understanding
NAFO	Northwest Atlantic Fisheries Organization
NEAFC	North East Atlantic Fisheries Commission
Paris MOU	Paris Memorandum of Understanding on Port State Control
RA	The Regulatory Area
RFMOs	Regional Fisheries Management Organizations
SEAFO	South East Atlantic Fisheries Organization
VMS	Vessel Monitoring System

## 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 (hereinafter referred to as "IPOA on 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 field.<sup>1</sup>

A joint FAO/IMO<sup>2</sup> Working Group on IUU fishing met in October 2000.<sup>3</sup> 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 Memorandum of Understanding (MOUs) on port State control<sup>4</sup>. 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 dealing with 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 relevant measures.

It should also be mentioned that IMO, in its submission of 27 June 2001<sup>5</sup>, to the General Assembly of the United Nations fifty-sixth session of Oceans and the Law of the Sea 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".

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<sup>1</sup> 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.*"

<sup>2</sup> International Maritime Organization.

<sup>3</sup> See Report of the joint Ad Hoc Working Group on illegal, unreported and unregulated fishing and related matters, Rome 9-11 October 2000.

<sup>4</sup> 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 or of 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 enforcement of fisheries conservation and management measures.

<sup>5</sup> On the implementation of the 1995 UN Fish Stocks Agreement.

Following the adoption of the IPOA on IUU fishing and in the light of the recommendations by the joint FAO/IMO Working Group, States should consider adopting legislation, and 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 measures.<sup>6</sup> In order to facilitate possible future developments in this field, FAO convened in November 2002 an Expert Consultation to Review Port State Measures to Combat IUU Fishing.<sup>7</sup>

## 2. JUSTIFICATION FOR A HARMONIZED SYSTEM

The 1982 UN Convention<sup>8</sup> establishes rules to guide port States by setting reasonable standards for interventions, inspections and violations. Basically it says very little about port States jurisdiction. References to port States are primarily found in the articles dealing with marine pollution, see Articles 218–220 where it is assumed that ports are subject to sovereignty of the coastal State as they are parts of internal waters.

When provisions for port State control were included in different treaties, it was foreseen that their application would be of national concern. The port State control regime introduced by the Paris Memorandum of Understanding on Port State Control<sup>9</sup>, adopted in 1982, changed this situation and constituted the first regional system in the world on port State control. The 1982 Paris MOU is an international agreement among 18 countries to establish a coordinated 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 year.<sup>10</sup> If deficiencies that are clearly hazardous to safety, health or environment are discovered the ship will be detained and repairs will need to be completed before the ship can leave the port.<sup>11</sup> 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 inspired the development of port State regimes around the world. Port State control regimes are now operated in Australia, the Asia-Pacific Region, the Black Sea, 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.

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<sup>6</sup> In the Report of the Expert Consultation 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, convenes 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.

<sup>7</sup> See Report of the Expert Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing, Rome, Italy, 4-6 November 2002.

<sup>8</sup> United Nations Convention on the Law of the Sea of 10 December 1982.

<sup>9</sup> Further referred to as Paris MOU.

<sup>10</sup> Section 1.3 of the Paris MOU.

<sup>11</sup> See Section 3.7.1 of the Paris MOU.

The development of port State control for the merchant fleet has increased the number of inspections on international shipping and consequently 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 shipping.<sup>12</sup>

A limited role for port State intervention has been envisaged under the MARPOL 73/78 Convention regarding inspection of certificates and reporting and prosecution of certain violations.<sup>13</sup> Article 218 of the 1982 UN Convention allows for actions related to violations which took place on the high seas and other areas and was quite innovative at the time with respect to combating marine pollution. It provides indeed that a port State may also take legal proceedings against a vessel in one of its ports that is alleged to have discharged a polluting matter outside that State's territorial waters or Exclusive Economic Zone "in violation of applicable international rules and standards established through the competent international organization or general diplomatic conference". It should also be noted that when the 1993 Torremolinos Protocol<sup>14</sup> and the 1995 STCW-F Convention<sup>15</sup> will enter into force, these instruments might eventually contribute more effectively towards harmonizing the port State control regimes addressing safety of navigation and prevention of pollution with regimes addressing IUU fishing.

The approaches to fisheries-related port State control contemplated in Article 8.3 of the Code of Conduct<sup>16</sup>, Article 23 of the 1995 UN Fish Stocks Agreement<sup>17</sup>, Article V (2) of the 1993 FAO Compliance Agreement<sup>18</sup>, 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.<sup>19</sup> 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.<sup>20</sup>

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

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<sup>12</sup> Critics have claimed that the port State control imposes a burden on port States that 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.

<sup>13</sup> International Convention for the Prevention of Pollution from Ships 1973, as modified by the protocol of 1978 related thereto, Articles 5(2)-(3) and 6(2)-(5).

<sup>14</sup> The Torremolinos International Convention for the Safety of Fishing Vessels, superseded by the 1993 Protocol.

<sup>15</sup> International Convention on Standards of Training and Watch Keeping for Fishing Vessel Personnel, 1995.

<sup>16</sup> FAO Code of Conduct for Responsible Fisheries.

<sup>17</sup> 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 adopted in 1995.

<sup>18</sup> Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. adopted in 1993.

<sup>19</sup> The Santiago de Compostela International Conference on Illegal, Unreported and Unregulated Fishing (25 and 26 November 2002) established that IUU fishing takes advantage of a number of factors including the lack of agreed, effective, compatible and stringent port State measures. The Conference further urged the international community to give further consideration to, among other things, use port State and market State measures to prevent IUU caught fish from entering markets, including bans on importation, landing and transshipment.

<sup>20</sup> The Expert Consultation to Review Port State Measures to Combat IUU Fishing (4-6 November 2002) recognized that a possible MOU constitutes one of numerous tools to prevent, deter and eliminate IUU fishing and considered a range of elements that might be included in a regional MOU.

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 measures<sup>21</sup> 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. The use of the wording "*inter alia*" indicates that other measures may well be taken. It should be noted that the port State may take action in its own right and it does not need a request from another State to do so. Thus, 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 provisions 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 measures may constitute an effective tool to curb IUU fishing, especially if that is undertaken in the context of an international arrangement. Such an arrangement might be a binding agreement<sup>22</sup>, a MOU which may be binding or not or other voluntary instruments such as the newly adopted IPOA on IUU.<sup>23</sup> The parties should determine the legal nature of the instrument.

### **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 RFMOs.

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. MOUs could have a wider application since not all port States are members of a RFMO, because there are regions where RFMOs are unlikely to be established and finally because appropriate port measures might involve more than one RFMO. Nevertheless, a regional approach to port State control of fishing vessel's compliance with conservation and management measures may be founded on these organizations.

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<sup>21</sup> 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.

<sup>22</sup> In paragraph 53 of the Report of the Expert Consultation on IUU fishing, Sydney 15-19 May 2000 it is proposed that States 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.

<sup>23</sup> 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.

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 seas<sup>24</sup> 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 jurisdiction<sup>25</sup> and there are RFMOs where no distinction between areas of jurisdiction is made for management purposes<sup>26</sup>. There are also regional bodies in which the convention areas apply only to the high seas<sup>27</sup>.

IUU fishing may take place by foreign vessels in waters under the jurisdiction of a port State, on the high seas by vessels flying the flag of parties or non-parties to a relevant RFMO. 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 in the field of monitoring, control and surveillance with a number of States.<sup>28</sup> This includes the exchange of information of mutual inspections in ports by parties to the agreements.

In principle port State control should relate to all areas where marine capture fishing operations 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 has taken place in: 1) the

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<sup>24</sup> UNGA Resolution 46/215.

<sup>25</sup> 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.

<sup>26</sup> This is the case for bodies managing highly migratory species.

<sup>27</sup> 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).

<sup>28</sup> Such agreements have been concluded with Denmark, Faroe Islands, France, Germany, Iceland, Ireland, Netherlands, Sweden, Russian Federation and United Kingdom.

Regulatory Area<sup>29</sup> (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 RFMO.<sup>30</sup> 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 and encouraged by relevant organizations to become party either to a relevant RFMO or to a possible MOU on port State control.

#### **4. ELEMENTS OF A POSSIBLE MEMORANDUM OF UNDERSTANDING<sup>31</sup>**

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. The call for port State measures is in many cases based on the lack of implementation of flag State responsibility. If all flag States complied with their obligations concerning their fishing fleets, port State control would more or less be superfluous. As mentioned above, the

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<sup>29</sup> “The Regulatory Area” is the area of competence to establish conservation and management measures within a RFMO.

<sup>30</sup> 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).

<sup>31</sup> The Expert Consultation to Review Port State Measures to Combat IUU Fishing (4-6 November 2002) developed a draft MOU that could be used as a template for regional approaches in this regard.

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 with international conservation and management measures. A MOU should apply to all vessels engaged in, or supporting, fishing activities including thus fishing vessels and vessels transporting fish and fishery products.

#### **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 such 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 level.<sup>32</sup> In many respects the 1995 UN Fish Stocks Agreement<sup>33</sup> 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 addresses 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 fisheries.<sup>34</sup>

It is commonly acknowledged that one major factor related to the problem of IUU fishing are the activities undertaken by FOC-vessels which often 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 shipping 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.

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

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<sup>32</sup> The basic provision being Article III (1)(a), but details are spelled out in the remains of that Article.

<sup>33</sup> Cf. Article 18.

<sup>34</sup> IPOA paragraphs 34–50.

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 and agreed upon at a recent annual meeting of CCAMLR (Convention on the Conservation of Antarctic Marine Living Resources) in 2002. The idea was that rather than searching for the “genuine link” between the flag State and a fishing vessel flying its flag, measures should be established whether or not these vessels are under a traditional definition of “Flag of Convenience”. Thus, States notorious for having flagged vessels engaged in IUU fishing should be identified, as it is “convenient” to use some specific flags to avoid being bound by conservation and management measures. Although many IUU-vessels tend to be flagged to States with so-called open registers, the point of this new approach 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 fishing context if it is “convenient” to fly the flag of that State to conduct IUU-fishing. In order to distinguish between general FOC-States/vessels and this new approach CCAMLR agreed to use the terminology “Flag of Non-Compliance” (FONC). CCAMLR adopted a resolution on FONC implying, among other things, that Contracting Parties and non-Contracting Parties cooperating with CCAMLR should prohibit landings and transshipments of fish and fish products from FONC-vessels.<sup>35</sup>

Some RFMOs and States already operate lists of vessels regarded as being IUU-vessels. The CCAMLR-resolution has a wider application, as all fishing vessels flying a FONC-flag would be regarded as IUU-vessels when operating in the CCAMLR-area.<sup>36</sup>

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 listed<sup>37</sup>. 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”.<sup>38</sup> 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.

It is important to agree on criteria for characterizing a State as a FONC-State. Such criteria 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

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<sup>35</sup> See Resolution 19/XXI.

<sup>36</sup> 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.

<sup>37</sup> 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.

<sup>38</sup> IOTC Resolution 99/02 calling for Action Against Fishing Activities by Large-Scale Flag of Convenience Longline Vessels.

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, other regional bodies should adopt similar measures. This issue might be considered for inclusion into a MOU on port State control. As possible consequence of being regarded as a FONC-State specific actions, for example denial of access to its ports, could be taken when a vessel flying the flag of that State calls at a port of a party to a RFMO.

## 4.2 Listing of vessels

At its annual meeting in 2002 CCAMLR agreed to adopt a scheme to promote compliance with CCAMLR conservation measures<sup>39</sup> by Contracting Party vessels and a scheme to promote compliance with CCAMLR conservation measures by non-Contracting Party vessels<sup>40</sup>. These schemes imply that procedures were agreed upon for the establishment and maintenance of lists of fishing vessels (IUU Vessel list) found to have engaged in fishing activities in the CCAMLR-area in a manner, which has diminished the effectiveness of CCAMLR-measures. Also procedures for the removal of vessels from the IUU Vessel list have been adopted. Further Contracting Parties of CCAMLR have agreed to take a number of appropriate domestic actions against vessels appearing on the IUU Vessel list, such as the refusal of the granting of their flag and not authorizing landing or transshipment in ports. This measure might imply that the physical vessel could be denied such rights also when operated by others than those who participated in the fishing. This option is 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.

During the 7th session of the IOTC<sup>41</sup>, a resolution was adopted to establishing a list of vessels presumed to have carried out IUU fishing in the IOTC Area.<sup>42</sup> It identifies *inter alia* criteria for establishing such presumption, provides for listing and “deleting from list” mechanisms as well as sharing of information. The resolution applies primarily to large-scale fishing vessels flying the flag of non-contracting parties. At its annual meeting in 2003, the resolution will be reviewed and as appropriate revised with a view “to extend it to other types of IUU fishing activities of non-Contracting Party vessels and, to Contracting Party, Co-operating non-Contracting Party vessels”.<sup>43</sup>

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 the vessel responsible for those incidents 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.

<sup>39</sup> Cf. CCAMLR Conservation Measure 10-06 (2002).

<sup>40</sup> Cf. CCAMLR Conservation Measure 10-07 (2002).

<sup>41</sup> It was held in Victoria, Seychelles, on 2-6 December 2002,

<sup>42</sup> Resolution 02/05 was adopted on “Establishing a List of Vessels Presumed to Have Carried Out Illegal, Unregulated and Unreported Fishing in the IOTC Area.”

<sup>43</sup> Resolution 02/05, paragraph 11.

NEAFC (North East Atlantic Fisheries Commission) is working towards the establishment of a similar system.<sup>44</sup>

ICCAT has taken a different approach. At the annual meeting in 2002, ICCAT adopted a measure concerning the establishment of a record of large scale fishing vessels<sup>45</sup> authorized to operate in the Convention area (a so-called “white list”).<sup>46</sup> This implies that only vessels appearing on the list are regarded as being fishing in conformity with applicable ICCAT-measures. The record is maintained by the ICCAT-secretariat based on information submitted by Contracting Parties, co-operating non-Contracting Parties or a fishing Entity. Vessels that are not entered into the record are deemed not to be authorized to fish for, retain on board, tranship or land tuna and tuna-like species. The measure puts a number of obligations on the parties concerning their vessels that are included in the record. Parties to ICCAT shall take measures, under their applicable legislation, to prohibit, amongst other things, the transshipment and landing of tuna and tuna-like species by large scale fishing vessels which are not entered into the ICCAT record. IOTC has taken up a similar approach at its annual meeting in 2002<sup>47</sup> during which it adopted a resolution<sup>48</sup> concerning the establishment of an IOTC record of vessels over 24 meters authorised to operate in the IOTC Area as well as a recommendation<sup>49</sup> with a view to prevent those IUU fishing vessels from being entered in the IOTC Record before the former Resolution enters into force.

### **4.3 Prior notice of port access**

Port States should require all foreign vessels having engaged in fishing activities or transporting fish and fishery products to provide prior notice of the intention to use a port, its 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.

The following vessel-related information might be required: Name of vessel, registration number (IMO number, if available)<sup>50</sup>, 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

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<sup>44</sup> See the Report of PECCOE (Permanent Committee on Control and Enforcement), 3-4 October 2002.

<sup>45</sup> Fishing vessels larger than 24 metres in length overall.

<sup>46</sup> Cf. Recommendation by ICCAT concerning the establishment of an ICCAT record of vessels over 24 metres authorized to operate in the Convention Area which is expected to enter into force in June 2003.

<sup>47</sup> Held in Victoria, Seychelles, on 2-6 December 2002,

<sup>48</sup> Resolution 02/06 concerning the Establishment of an IOTC Record of Vessels Over 24 Meters Authorised To Operate In The IOTC Area.

<sup>49</sup> Recommendation 02/07 on the Implementation of the Resolution Concerning the IOTC Record of Vessels.

<sup>50</sup> 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 Expert Consultation to Review Port State Measures to Combat IUU Fishing (4-6 November 2002) considered that the use of a unique fishing vessel numbering system could be a useful tool for the effective implementation of a MOU on port State measures. It noted that a system for numbering vessels is applied in IMO based on the Lloyds register fair-play system.

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**

An aspect of some significance concerns access of fishing vessels to foreign ports. 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. States may of course grant right of access by means of treaties or other agreements that create a legal obligation. The 1995 UN Fish Stocks Agreement has rightly stated the governing principle of international law in that nothing in Article 23 "affects the exercise by States of their sovereignty over ports in their territory in accordance with international law".<sup>51</sup> According to paragraph 56 of the IPOA on IUU fishing the port State should not allow the vessel to land or tranship 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 is thus generally recognized that the right of the coastal State to deny access to its ports in respect of fishing vessels is not in dispute. In deciding whether to grant that consent, and subject only to agreed commitments, the port State is free to impose such conditions as it wishes. Thus, access to a port of another State is a privilege, not a right. 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 has been argued that restrictions on access of fishing vessels to foreign ports would be in contradiction to free trade and provisions of GATT/WTO<sup>52</sup> and in particular the argument has been made that the free transit provisions of Article V would be compromised by such restrictions. It should, however, be noted that nothing in the GATT/WTO regulations derogates from the basic principle of State sovereignty over ports. Furthermore no right of entry is established under these provisions.

Port States should consider denying port access to vessels that engage in or support IUU fishing. By granting an IUU-vessel the right to use its port, the port State might be, directly or indirectly, supporting IUU fishing if the vessel is allowed to refuel and re-supply. It should be

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<sup>51</sup> See Article 23 (4).

<sup>52</sup> General Agreement on Tariffs and Trade/World Trade Organization.

mentioned that some States have implemented into their domestic legislation provisions banning the use of ports by vessels participating in IUU fishing.<sup>53</sup>

If parties to a MOU on port State control agree to develop lists of IUU-vessels and FONC-States, it should be considered to deny access to ports for vessels on the list or vessels flying the flag of that particular State. In addition vessels may not be allowed into 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. Indeed 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 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 port States as a basic principle should treat their vessels and foreign vessels on equal terms. It could be argued that other means of control of vessels flagged to the port State<sup>54</sup> 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 access.<sup>55</sup> 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.

In order to have a wide application of port State measures for counteracting IUU fishing, it should be recognized that creating awareness about, and capacity building in port State measures, especially in developing countries is vital.<sup>56</sup>

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<sup>53</sup> 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).

<sup>54</sup> For instance, verifying that vessels are equipped with VMS (Vessel Monitoring Systems), observers on board etc.

<sup>55</sup> 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.

<sup>56</sup> The Expert Consultation to Review Port State Measures to Combat IUU Fishing (4-6 November 2002) recommended with respect to follow-up action by FAO that programmes of assistance to facilitate human resource development and institutional strengthening should be elaborated and implemented, including legal

## 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 observe fishing and processing operations during an inspection in port, but it should nevertheless 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 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 RFMOs 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).

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assistance, in developing countries so as to promote the full and effective implementation of port State measures to combat IUU fishing.

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 Union<sup>57</sup> and NEAFC<sup>58</sup> 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 the port State should at least take against a vessel 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 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

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<sup>57</sup> Council Regulation (EC) establishing a list of types of behaviour which seriously infringe the rules of the common fisheries policy (1999/C 105/03).

<sup>58</sup> 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.

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 RFMOs<sup>59</sup> 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 1995 UN Fish Stocks Agreement. These measures can be taken by any State individually and they do not require collective action. However, such measures are often 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.

The argument has been made that also the prohibition of landing and transshipment would be contrary to the free transit provision in Article V of GATT/WTO. Beyond the question of access discussed above, measures restricting or banning landings and transshipment are associated with violation of conservation and management measures and thus could be regarded as a normal feature of environmental agreements aiming at the conservation of natural resources.<sup>60</sup>

Norway has taken a more radical approach by establishing a general prohibition on landing of catches presumed to deriving from IUU fishing.<sup>61</sup> 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

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<sup>59</sup> See NAFO/GC doc. 97/6, CCAMLR Conservation Measure 10-07(2002) and Annex F of the Report of 17<sup>th</sup> Annual Meeting of NEAFC. ICCAT has agreed that vessels with are not on their "white list" should be prohibited from landing or transshipping (this measure is expected to enter into force in June 2003).

<sup>60</sup> Article XX of the General Agreement on Tariffs and Trade 1994 permits a State to apply exceptions to free trade in certain circumstances. Article XX(b) deals with measures that are "necessary to protect human, animal, or plant life or health" and Article XX(g) which allows for measures "relating to conservation of exhaustible natural resources".

<sup>61</sup> Cf. Regulation of 6 August 1993 relating to a prohibition on landing fish caught in waters outside Norwegian jurisdiction, amended 29 June 1999.

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 Stocks<sup>62</sup> 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 Conference<sup>63</sup>. 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 rectified.<sup>64</sup>

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 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.

It is convenient to note that the Expert Consultation to Review Port State Measures to Combat IUU Fishing (4–6 November 2002) agreed that a port State could choose between several possible actions with the exception of detention, arrest or other corporal punishment against the crew. The Consultation considered, however, refusal to permit a fishing vessel to leave its port pending consultation with the flag State of the vessel to be an appropriate action.

#### **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, the international community would hardly accept confiscation. It could be argued that for fish derived from IUU fishing, the situation would be different.

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<sup>62</sup> United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks (14-31 March 1994).

<sup>63</sup> 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».

<sup>64</sup> Paris MOU, Section 3.7.1 ff.

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 duties<sup>65</sup>. 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 port State might confiscate the value of the catch. 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 NAFO (Northwest Atlantic Fisheries Organization) have agreed on a format and protocols for electronic exchange of fisheries monitoring, inspection and surveillance information (The North Atlantic Format)<sup>66</sup>. This includes in principle also results of port inspections.<sup>67</sup>

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 for States, fish species, vessel categories, vessel activities and fishing gear including their devices and attachments should be used.<sup>68</sup>

As rapid exchange of information is essential, a system should embrace a communication facility that allows for a direct, computerized 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.

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<sup>65</sup> Cf. paragraph 8.2.7. of the Code of Conduct.

<sup>66</sup> 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.

<sup>67</sup> NEAFC has not yet agreed on a system of port State control, but is discussing this within PECCOE (Permanent Committee on Control and Enforcement), see report of 3-4 October 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 that includes electronic exchange of information based on the North Atlantic Format.

<sup>68</sup> 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.

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 cooperating port States.<sup>69</sup>

## **5. IMPLEMENTATION OF PORT STATE CONTROL OF FOREIGN FISHING VESSELS INTO DOMESTIC LEGISLATION**

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 action 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 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. Other means of reaction would thus have to be established.<sup>70</sup> However, most of the remaining elements would be relevant for both categories of fishing vessels.

## **6. CONCLUSIONS**

The 1982 Law of the Sea Convention while providing very little on port State jurisdiction paves the way towards developing port state measures for combating IUU fishing. Besides these provisions, other international instruments conventions concerning namely marine

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<sup>69</sup> The Expert Consultation to Review Port State Measures to Combat IUU Fishing (4-6 November 2002) recommended with respect to follow-up action by FAO that the establishment of a database concerning relevant port State measures should be considered.

<sup>70</sup> This would be even more important in case the idea is not pursued of making it an offence to enter a port if IUU fishing has been conducted.

pollution, navigation and safety at sea are and will continue to be of enormous importance in crafting port State measures, at national, regional and global level. In the paper the author has sought to bring several sources together so as to give an initial overview of the complex framework of law and of the major developments that have allowed putting forward and considering possible elements of a Memorandum of Understanding on port State measures for combating IUU fishing. Inevitably the discussions must go on to support the effective development of such instrument, as appropriate, within one or more RFMOs.

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PORT STATE CONTROL OF FOREIGN FISHING VESSELS

