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Combating Illegal, Unreported and Unregulated Fishing:
The Agreement on Port State Measures

Abstract

The coastal State enjoys under customary international law full territorial sovereignty over its internal waters. From that follows that foreign vessels generally do not enjoy the right to enter a State's ports. A State therefore decides whether to permit foreign vessels access to its ports or not. An exception only applies in the case of *force majeure* or distress.

Although port State measures are one of the most powerful and cost-effective means of combating illegal, unreported and unregulated fishing (IUU fishing), there has been lack of coherent application of such measures by port States. While many States have closed their ports to vessels having engaged in IUU fishing, other States have continued to provide such vessels with services in their ports, thereby supporting the illegal activity. Therefore the international community, including the United Nations General Assembly (UNGA) and the FAO Committee on Fisheries (COFI), has been calling for a legally binding international instrument on minimum standards for port State measures, based on the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate IUU Fishing (IPOA) and the 2005 FAO Model Scheme on Port State Measures to Combat IUU Fishing.

Following an Expert Consultation in 2007, four one-week rounds of Technical Consultation were held in the FAO Headquarters in Rome in 2008-2009, authorized by COFI to finalize a draft Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. The Technical Consultation, which was attended by 91 FAO Members, finalized the draft Agreement on 28 August 2009.

The Agreement on Port State Measures will be the first ever global treaty focused specifically on the problem of IUU fishing. Its objective is to prevent, deter and eliminate IUU fishing through the implementation of effective port State measures, and thereby to ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems.

Each Party shall, in its capacity as a port State, apply the Agreement in respect of *foreign vessels* that are seeking entry to its ports or are in one of its ports.

The Agreement applies to fishing conducted in marine areas that is illegal, unreported or unregulated, as defined in the IPOA, and to fishing related activities in support of such fishing. "Fishing related activities" means any operation in support of, or in preparation for, fishing, including the landing, packaging, processing, transshipping or transporting of fish that have not been previously landed at a port, as well as the provisioning of personnel, fuel, gear and other supplies at sea.

The Agreement provides *minimum standards* for port State measures and describes both the measures and the conditions for them to be taken. Nothing in the Agreement affects the exercise by Parties of their sovereignty over their ports in accordance with international law, including

their right to deny entry thereto as well as to adopt more stringent port State measures than those provided for in the Agreement.

The Agreement stipulates the minimum standards for port State measures in Parts 2, 3 and 4 which constitute the core of the Agreement. Generally speaking, a Party has the obligation to prohibit entry into and use of its ports by vessels that have engaged in IUU fishing or fishing related activities in support of such fishing. The prohibition on the use of port applies to landing, transshipping, packaging and processing of fish that have not been previously landed as well as to all other port services, including refuelling and resupplying, maintenance and drydocking.

Part 2 of the Agreement deals with the situation before a vessel has entered into port. Vessels requesting entry into port will be required to submit in advance information on their fishing activities and the fish they have on board. After receiving the relevant information, the port State shall decide whether to authorize or deny the entry of the vessel into its port. Part 3 deals with the situation where a vessel has for any reason entered into port and Part 4 deals with inspections of vessels in ports and port State actions following inspection. The port State may conclude at any of these three stages that a vessel has engaged in IUU fishing or fishing related activities in support of such fishing, and shall then take action accordingly.

Nothing in the Agreement affects the entry of vessels to port in accordance with international law for reasons of force majeure or distress, or prevents a port State from permitting entry into port to a vessel exclusively for the purpose of rendering assistance to persons, ships or aircraft in danger or distress. Furthermore, a State shall not deny a vessel that has entered into its port the use of port services a) essential to the safety or health of the crew or the safety of the vessel, or b) where appropriate, for the scrapping of the vessel.

The Agreement recognizes that measures to combat IUU fishing should build on the primary responsibility of flag States. It describes the duties of the flag State with respect to vessels flying its flag and regarding cooperation with the port State. Each Party shall ensure that measures applied to vessels flying its flag are at least as effective in combating IUU fishing as measures applied to foreign vessels.

The Agreement recognizes the need for assistance to developing countries to adopt and implement port State measures in accordance with the Agreement. Parties shall, either directly or through international organizations, provide assistance to developing countries in implementing the Agreement and cooperate to establish appropriate funding mechanisms to this effect.

The Agreement is concluded within the framework of FAO, under article XIV of the FAO Constitution. However, it was agreed to make exceptions to a few standard provisions of article XIV agreements in this case to ensure, *inter alia*, that only Parties to the Agreement will make decisions on any future amendments to the Agreement, rather than all FAO Members.

The Agreement on Port State Measures will presumably be adopted and opened for signature at the FAO Conference in Rome in November 2009. It will enter into force thirty days after 25 States have ratified it. In light of the broad and active participation of States in the negotiations of the Agreement and the great interest shown in it, it is to be expected that the Agreement will be ratified and implemented both widely and expeditiously.