

CHAPTER II

THE FAO AGREEMENT ON PORT STATE MEASURES

In order to give more data for the analysis in this chapter of undergraduate thesis, the writer will explain about the general understanding of port state measures such as the emergence of Illegal, Unreported, and Unregulated (IUU) fishing, port state measures, and also the development of FAO Port State Measures (FAO PSMA) starting with the 1993 FAO Compliance Agreement, 1995 FAO Code of Conduct for Responsible Fisheries, 1995 UN Fish Stocks Agreement, 2001 FAO International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing, 2005 FAO Model Scheme on Port State Measures, and lastly the 2009 FAO Port State Measures Agreement.

A. General Understanding

1. Background

Illegal Unreported and Unregulated (IUU) fishing is the new global threat toward the sustainability of fisheries and marine sectors. The practice of IUU fishing caused the decline of world's fish stocks and marine habitat destruction. According to Food and Agriculture Organization, up to 78 per cent of marine capture fisheries is overfished. It made the rapid income for fisheries sectors since the global marine catch increased from 18 million tons in 1950 to 92 tons by 2001.¹ Besides, the rate of the legal fishing is less than the amount of fishing through IUU

¹ Fisheries and Aquaculture Department, 'Fisheries Resources: Trends in Production, Utilization and Trade', *FAO Corporate Document Repository's web site*, on 1 October 2014, <http://www.fao.org/docrep/005/y7300e/y7300e04.htm#P3_47>, [accessed on 20 January 2017].

fishing. The comparison between the legal fishing and IUU fishing will be shown in Table 2.1.

Figure 1.1 Estimates of IUU Fishing (In Tons) from 1996-1997 to 2001-2002

Fishing Season	1996-97	1997-98	1998-99	2000-01	2001-02
Estimated IUU Catch	32 673	15 106	5868	8802	11 812
Total Catch	45 071	28 424	19 643	25 308	24 834
IUU Catch as % of Total	73%	53%	30%	30%	48%

Source: Illegal, Unreported and Unregulated Fishing: An Analysis of the Legal, Economic and Historical Factor Relevant to Its Development and Persistence, 2014

The overfishing that could lead to the marine habitat destruction is caused by interrelated factors, for instances the regulation of the high seas fishing, the responsibility from the coastal states, significant capital investment in the fishing industry, and an over capacity in the global fishing fleet. Besides, the rapid advancement in technology gives significant impact on these problems. It referred to the vessel efficiency that could make the vessels to sail further.²

In the last decade, the marine fisheries were characterized by too many vessels which are much sophisticated than the ancient ones. These are pursuing foreign fishing vessels to catch more fishes in an efficient time. This method led to the degradation on the availability of fish stocks. Therefore, it was not unexpected

² WWF, 'Overfishing', in *World Wide Life's website*, on 11 March 2016, <<https://www.worldwildlife.org/threats/overfishing>>, [accessed on 20 January 2017].

that in an environment of competition for fewer resources, it resulted in a new trend called illegal, unreported, and unregulated fishing.³

2. Port State Measures

Port State Measures (PSMs) are the requirements or conditions addressed to fishing vessels by a port state.⁴ The implementation of fisheries management and its enforcement today are results of a long journey. The awareness toward the fisheries sustainability was developed through the increasing recognition by the international community in combating Illegal, Unreported, and Unregulated (IUU) fishing.⁵ It has taken place on many fronts among fisheries instrument and turned into several international and regional outcomes, for instance as the United Nation General Assembly (UNGA) and Regional Fisheries Bodies (RFBs).

The establishment of the idea on port state measures started on 1970s when the global society started to focus on how they manage and utilize world's natural resources. It was notably through the first international conference on environmental issues held by UN conference on the human environment in 1972 in Stockholm. This conference is commonly known as Stockholm Conference, discusses the impacts of population and development, and highlights the incorporate environmental matters into global growth and development equations.⁶

³ APFIC, 'Implementation of Port State Measures', in *Journal of Technical Guide to Port Inspection of Fishing Vessels vol. 1*, 2013, p. 6.

⁴ Dunn, S., Smith, F. S., & Lee, R., 'Implementation of Port State Measures', in *Technical Guide to Port Inspection of Fishing Vessels*, Bangkok: FAO Regional Office for Asia and The Pacific, 2013, p. 21.

⁵ Douman, J. D., & Swan, J., *A Guide to the Background and Implementation of the 2009 FAO Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing*, Rome: FAO Publication, 2012.

⁶ *Ibid.*,

A decade later, in 1983 the United Nations held an assembly of world commission on environmental and development. It aimed to evaluate the outcomes of Stockholm Conference. This conference argued that the Stockholm Conference which has been run for three years successfully increased the interest of civil society on the deterioration of the human environment and natural resources and the consequences of that degradation for global economic and social development.⁷

Thus, realizing that these matters should be taken care carefully, United Nations need to find an independent institution to take care each of it. Then in 1987 The Commission's 1987 decided to create several councils in order to pursue the target on each matter, such as in economic, environmental, and social issues.⁸

Furthermore, in 1991, FAO or Netherlands Conferences on agriculture and the environment, known as the Den Bosch Conference was convened. It adopted a declaration and agenda on sustainable agriculture and rural development. The conference was important because it stimulated and developed the issue of natural resources and environment, especially in agriculture, forestry, and fisheries sectors. Later on, the Netherlands Conferences were used as the basic data that provided input to the 1992 United Nations Conference on Environment and Development (UNCED) or Earth Summit. The UNCED was actually an adaption conference from the Agenda 21 and the Rio Declaration, with uphold sustainable development as its

⁷ Doulman, J. D., & Swan, J., *loc. cit.*

⁸ United Nations, 'Report of the World Commission on Environment and Development: Our Common Future', in *UN Documents: Gathering a Body of Global Agreements*, on 3 March 2016, <<http://www.un-documents.net/wced-ocf.htm>>, [accessed on 8 March 2017].

major discussion.⁹ The idea of fisheries issues emerged on the chapter 17 of Agenda 21 which was entitled “Protection of the oceans, all kinds of seas, including enclosed and semi-enclosed seas, and coastal areas and the protection, rational use and development of their living resources”. In this chapter, there are eight main headings about fisheries, including the sustainable development of coastal and marine areas including exclusive economic zones (EEZs), marine environmental protection, sustainable use and conservation of marine living resources of the high seas, sustainable use and conservation of marine resources under national jurisdiction, critical uncertainties for the management of the marine environment and climate change, strengthening regional and international cooperation and coordination, and the sustainable development of small islands.

Later on, a decade after the UNCED, another agenda focused on the fisheries and marine sectors held in Rome. World Summit on Sustainable Development (WSSD) was held to stimulate and achieve clearer result about fisheries and marine issues. However, the earlier conference was considered as ineffective agenda and the international community decided to adopt Johannesburg Declaration on Sustainable Development and World Summit on Sustainable Development Plan of Implementation (WSSD-POI) in order to enhance the process to achieve clear results.¹⁰

⁹ United Nations, ‘Earth Summit: Agenda 21 the United Nations Programme of Action from Rio’, in *United Nations Sustainable Development’s website*, on 1992, <<https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>>, [accessed on 8 March 2017].

¹⁰ United Nations, *Johannesburg Declaration on Sustainable Development and the Plan of Implementation of the World Summit on Sustainable Development*, New York: UN Publication, 2003, p. 88.

Since the UNCED and WSSD-POI were held, the idea of port state measures as a tool to promote the responsible fisheries have been introduced progressively. The port state measures turned out to be the more cost-effective and efficient method than another alternative inspection which used air and sea as its platforms. Besides, PSMs recognized that the use of port inspection is safer than sea inspections where boarding and control of fishing vessels can be hazardous.

The WSSD-POI resulted the profitable outcome that becomes the basic framework for each conference in the future. For the example, it was used as the references for development of national and regional plans of action to combat Illegal, Unreported, and Unregulated (IUU) fishing by 2004, for the management of fishing capacity by 2005, the implementation of the ecosystem approach to fisheries management in 2010, establishment of marine protected area networks by 2012, and as the basic plan action to maintain or restore fish stocks to level that could produce the effective yet efficient method for the sustainable yields in combating IUU fishing by 2015.¹¹

Unfortunately, the implementation of the agreement was far from the expected results. The lack of harmonization and communication, both regional and international cooperation make the vessels to seek to land in several ports with lax or poor enforced measures. As long as the poor enforcement exists, then the effort to combat IUU fishing through port state measures is fruitless. Therefore in 2009,

¹¹ Doulman, J. D., & Swan, J., *loc. cit.*

Food and Agriculture Organization reorganized the detail of the agreement and committed to uphold the result as the firm steps to eliminate IUU fishing.

B. The Development of FAO Port State Measures Agreement (FAO-PSMA)

1. 1993 FAO Compliance Agreement

The 1993 FAO Compliance Agreement was held to promote compliance with international conservation and management measures by fishing vessels on high seas level.¹² The meetings were convened at FAO headquarters in Rome, Italy in 1992 and 1993. This agenda was the continuation of the outcomes from the UNCED.

The purpose of the 1993 FAO Compliance Agreement is to provide an instrument for countries to take effective actions toward the problem on the fisheries and marine sectors that are consistent with international law. Moreover, this agenda resulted the four basic elements for minimizing the practice of overfishing.

According to Article V of the 1993 FAO Compliance Agreement¹³, the four basic elements are application to foreign fishing vessels in order to know the precise purpose of the visiting vessels, requiring a foreign fishing vessels to be voluntary in port, notifying the flag State where there were grounds for believing that conservation and management measures had been undermined, and the necessity of

¹² FAO, 'Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas', in *A Guide to the Background and Implementation of the 2009 FAO Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing*, ed. by J. S. David J. Douman, Rome: FAO Publisher, 1995, p. 12.

¹³ Douman, J. D., & Swan, J., *loc. cit.*

the arrangement between flag State and the port State for the latter to undertake investigatory measures.

2. 1995 FAO Code of Conduct for Responsible Fisheries

The contribution of FAO to eliminate overfishing and preserving the marine ecosystem is shown in the 1995 FAO Code of Conduct for Responsible Fisheries. This agenda is known as one of the most cited, high-profile, and remarkable instruments in a global scale for the fisheries sector after the 1982 UN Convention. The purpose of this conference is to set international standards and norms for the development, management and utilization of fisheries and aquaculture resources. The standards were expected to be implemented by government and stakeholders involved in the fisheries and aquaculture sector at the national, sub-regional, and regional level.

The 1995 FAO Code of Conduct provides a series of technical guidelines. This conference addressed seven thematic areas related to the fisheries and aquaculture fields, namely general principles, fisheries management, fishing operations, aquaculture development, integration of fisheries into coastal area management, post-harvest practice and trade, and fisheries research. Meanwhile, the highlight of this agenda is the determination of fishing operations and port State duties. Fishing operations are examined in Article 8 of the 1995 FAO Code of Conduct and port State duties in Article 8.3.

According to this conference, the duties of a port state are encouraged to act in a non-discriminatory and transparent manner. Besides, a port state is obliged to establish measures in national law, in line with international law, in order to

achieve and to assist another state in achieving. Moreover, the code provides that port State should arrange an assistance to flag state when their vessels are voluntary in port. When the 1995 FAO Code of Conduct was being implemented, the port state duties were concerned on the issue related to safety on the sea and compliance with the current International Maritime Organization (IMO) standards.

3. 1995 UN Fish Stocks Agreement

The 1995 Fish Stocks Agreement is the highly influential instrument that elaborates several aspects from the previous conventions, for instance the 1982 UN Convention, the outcome of UNCED, and the 1995 FAO Code of Conduct.¹⁴ The major outcome from this convention addressed the long-term conservation and management of some of the world's major commercial fisheries such as straddling fish stocks and highly migratory fish stocks.

This conference significantly strengthened the used of port state measures as the fisheries management tool. There are some modifications from the previous legal element at this conference. The new legal elements are placed in the Article 23 and explained that the port State measures were the “right and duty” of port state to take non-discriminatory measures; the discretion to inspect the documents fishing, gear and catch on board; the discretion to prohibit landing and transshipments; and the express recognition of State sovereignty over ports in their territory.

¹⁴ United Nations, ‘The 1995 UN Fish Stocks Agreement’, in *United Nations Publication’s website*, on 1 December 2011, <www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm>, [accessed on 25 January 2017].

4. 2001 FAO International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing (IPOA-IUU)

The IPOA-IUU is the repercussion from the 1995 UN Fish Stocks Agreement that focused in the reinforcement of the port State's sovereignty and its right and duty to take non-discriminatory measures including prohibiting landings and transshipments, and elaborating the inspection process. In general, the different outcome of IPOA-IUU is the changed focus from "undermining conservation and management measures" to the direct action to settle the cases related to the vessels which indicate the practice of IUU fishing.

The IPOA-IUU encouraged the use of flag state in order to make the identification process easier. Besides, it also boosted the compatibility and information exchange for creating a good communication among the listed country of IPOA-IUU. Moreover, in the IPOA-IUU has expanded several points from the 1995 UN Fish Stocks Agreement regarding port access, inspection and information, national strategy and capacity building, and development of port State measures within RFMOs.

The port access used four major ways to identify the legal visiting vessels by port State. It was defined as admission for foreign fishing vessels to port for purpose of, *inter alia*, refueling, resupplying, transshipping and landing. After all the IPOA-IUU suggested the port state for requiring a prior request for permission to enter port with prior notice and information. Besides, the port states should also publish the port which foreign fishing vessels may have access and ensure that there is the capacity to conduct inspection at those ports.

The inspection of foreign fishing vessels which visit the port state covered the six points to fulfill the identification process. These are related to vessel, vessel master, catch (on board, landed, transshipped), and information required by RFMOs. The IPOA-IUU also suggested the port states to consign the information to the flag state and the relevant RFMO, except to the special case where the confidentiality should be kept.

The new point in the IPOA-IUU is the establishment of a national strategy and procedures for port state to control fishing vessels in term of training and consideration of capacity-building needs. These policies were supported by the newly released concept about cooperation to develop compatible port state measures. A port state is expected to be capable in collecting information related to the foreign vessels by the procedures that have been settled. Thus, in order to strengthen the cooperation among members of port states, each of port states should share relevant information among and between RFMOs and States. It can be concluded that the port States is the foremost responsible action to eliminate the practice of IUU fishing. Therefore, when a country cannot follow this regulation, it is considered as the non-cooperating parties. Once they were fishing in the RFMO area, they may be engaging in IUU fishing.

5. 2005 FAO Model Scheme on Port State Measures

The FAO Model Scheme was arranged since 2004 and approved by the FAO Committee on Fisheries in 2005.¹⁵ The 2005 FAO Model Scheme is a non-binding

¹⁵ FAO, 'Report to the Twenty-sixth Session of the FAO Committee on Fisheries', in *Hundred and Twenty-Eight Session*, ed. by FAO, Rome: FAO Publications, 2005, p. 25.

international instrument which describes basic regulation on the minimum port State measures that should be applied by the responsible port state and RFMOs countries.¹⁶ It is quite different with the IPOA-IUU because on this conference, the focus is addressed on the broadened definition of port access and contained with several innovative ideas.

The 2005 Model Scheme was arranged as the newest method to combat IUU fishing by adopting inclusive approach and applying the inspection stage not only to fishing vessels but also to any vessels that were directly involved in fishing operations, such as support ships and carrier vessels. It is intended to close the possible gate for the illegal fisheries to enter the port states and treat the visiting vessels equally.¹⁷

The Model Scheme revised the previous agreement about the purpose of the visiting fishing vessels by the port states. Previously, the visiting fishing vessels were allowed to use the port for board, landed, and transshipped matters. Then, it turned into every fishing vessel was prohibited to use port for landing and transshipping in the areas marked by RFMO as the fishing vessels that committed to illegal fishing or any other crimes. The same recommendations are also applied to treat fishing vessels that do not cooperate with the RFMO member states and for those that fishing in waters beyond the limits of its fisheries jurisdiction.¹⁸

¹⁶ Lobach, T., 'Port State Measures to Combat IUU Fishing', in *FAO/FFA Regional Workshop*, on 28 August 2006, p. 24.

¹⁷ CCAMLR. 'The Use of Port State Measures to Improve Fisheries Compliance at the International Level', in *The Antarctic and Southern Ocean Coalition (ASOC)*, on October 2006, p. 7.

¹⁸ Doulman, J. D., & Swan, J., *loc. cit.*

In order to increase the standards for port inspection, the Model Scheme introduced five attachments that were prepared for inspections. It covered the prior notification from foreign fishing vessels in order to facilitate inspections such as vessel identification, fishing license, VMS, information on catch and fishing trips. Moreover, the vocal discussion in this conference was placed on how to build communication among the port state. Then, it resulted that the foreign fishing vessels should place flag states as the prior symbol of their identities.¹⁹

6. 2009 FAO Port State Measures Agreement

The sixth phase of agreement about the use of port States has been placed in an intense negotiation. It took four negotiation sessions from June 2008 to August 2009 to have an approval as the legal instrument which was placed as Article XIV under the FAO Constitution.²⁰ In order to show the concern for eliminating the practice of IUU fishing, the committee of 2009 FAO Port State Measures Agreement decided to put it as a binding agreement. The binding agreement was expected to turn as effective method to combat IUU fishing and ensure the long-term conservation and sustainable method for living marine resources and ecosystems.²¹

The major concern of this agreement is on how the agreement can be effectively applied in every port state in order to detect and treat the foreign fishing

¹⁹ CCAMLR, *op. cit.*, p. 8.

²⁰ FAO, *Report of the Technical Consultation to Draft a Legally-binding Instrument on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing*, Rome: FAO Fisheries and Aquaculture Report, 2009.

²¹ Doulman, J. D., & Swan, J., *loc. cit.*

vessels which are indicated as the suspects of IUU fishing.²² Therefore, during the negotiation process, the FAO committee invited various elements for gaining support from all aspects. Thus, this agreement represented broad based cooperation, not only attended by the marine countries, but also by international community which were concerned on the preservation of fisheries and world's marine.²³

2009 FAO Port State Measures stated that the objective of this agreement is determining the long-term conservation and sustainable use of living marine resources and marine ecosystem. The agreement promotes collaboration between fishermen, port authorities, coast guards and navies to strengthen inspections and control procedures at ports and on vessels.²⁴ These purposes are equivalent with the frameworks that have been built upon the international fisheries instruments. This agreement is structured into ten parts and five annexes as shown in Figure 2.2.

Figure 2.2 Structure of the 2009 FAO Port State Measures Agreement

Preamble	
Part 1	General provisions
Part 2	Entry into port
Part 3	Use of ports
Part 4	Inspections and follow-up actions
Part 5	Role of flag States
Part 6	Requirements of developing States
Part 7	Dispute settlement
Part 8	Non-Parties
Part 9	Monitoring, review and assessment
Part 10	Final provisions

²² Keumlang, B., & Press, M., 'Preventing, Detering, and Eliminating IUU Fishing - Port State Measures', in *Journal of Environmental Policy and Law*, 2010, pp. 262-268.

²³ Gracis, M. S., & Rosenberg, A. A., 'Food Security and Marine Capture Fisheries: Characteristics, Trends, Drivers and Future', in *Philosophical Transactions: Biological Sciences Vol. 365 No. 1554 Food security: Feeding the World in 2050*, p. 3, <<https://www.jstor.org/stable/pdf/20752984.pdf>>, [accessed on 13 March 2017].

²⁴ FAO, 'The Path to Ratification: Port State Measures Agreement Gains Momentum', in *Blue Growth Blog*, on 13 March 2017, <<http://www.fao.org/blogs/blue-growth-blog/the-path-to-ratification-port-state-measures-agreement-gains-momentum/en/>>, [28 January 2017].

<p>Annex A Information to be provided in advance by vessels requesting port entry</p> <p>Annex B Port State inspection procedures</p> <p>Annex C Report State inspection procedures</p> <p>Annex D Information system on port State measures</p> <p>Annex E Guidelines for the training of inspectors</p>

Source: *Structure of the Agreement*. In A Guide to the Background and Implementation of the 2009 FAO Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing by David J. Doulman & Judith Swan (2012). Rome: FAO Publication.

In order to make a binding agreement, FAO invited all States and regional economic integration organizations for signing and ratifying this agreement from 22 November 2009 until 21 November 2010.²⁵ In line with the Article 2 of Vienna Convention 1969, to make a binding agreement, countries should ratify the paper. Further information on signature and deposit of instrument is provided below.

Figure 2.3 List of Signature and Deposit of the 2009 FAO Port State Measures Agreement

Participant	Signature	Ratification	Acceptance	Approval	Accession
Angola	22 Nov 2009				
Australia	27 Apr 2010	20 Jul 2015			
Bahamas					7 Oct 2016
Barbados					2 Feb 2016
Benin	28 Sep 2010				
Brazil	22 Nov 2009				
Cobo Verde					23 Jun 2016
Canada	19 Nov 2010				
Chile	22 Nov 2009	28 Aug 2012			
Costa Rica					4 Dec 2015
Cuba					25 Mar 2016
Dominica					6 May 2016
European Union – Member Organization	22 Nov 2009			7 Jul 2011	
France	19 Nov 2010			11 Jul 2016	
Gabon	26 Apr 2010		15 Nov 2013		

²⁵ FAO, 'Status of Port State Measures Agreement. Retrieved from Food and Agriculture Organization', in FAO's website, on 13 January 2017, <http://www.fao.org/fileadmin/user_upload/legal/docs/037s-e.pdf>. [28 January 2017].

Gambia					29 Jul 2016
Ghana	28 Oct 2010	29 Nov 2016			
Grenada					17 Jun 2016
Guinea					3 Jun 2016
Guyana					7 Mar 2016
Iceland	22 Nov 2009	16 Jun 2015			
Indonesia	22 Nov 2009	23 Jun 2016			
Kenya	19 Nov 2010				
Mauritania					23 Jan 2017
Mauritius					31 Aug 2015
Mozambique	4 Nov 2010	19 Aug 2014			
Myanmar					22 Nov 2010
New Zealand	15 Dec 2009	21 Feb 2014			
Norway	22 Nov 2009	20 Jul 2011			
Oman			1 Aug 2013		
Palau					30 Nov 2015
Panama					21 Nov 2016
Peru	3 Mar 2010				
Republic of Korea					14 Jan 2016
Russian Federation	29 Apr 2010				
Samoa	22 Nov 2009				
Saint Kitts and Nevis					9 Dec 2015
Saint Vincent and the Grenadines					23 Jun 2016
Sao Tome and Principe					22 Nov 2016
Seychelles					19 Jun 2013
Sierra Leone	23 Nov 2009				
Somalia					9 Nov 2015
South Africa					16 Feb 2016
Sri Lanka					20 Jan 2011
Sudan					12 May 2016
Thailand					6 May 2016
Togo					2 Dec 2016
Tonga					6 May 2016
Turkey	9 Nov 2010				
USA	22 Nov 2009	26 Feb 2016			
Uruguay	22 Nov 2009	28 Feb 2013			
Vanuatu					6 May 2016

Source: *Information on Signature and Deposit of Instruments*. In The Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing by FAO (2016). Retrieved from http://www.fao.org/fileadmin/user_upload/legal/docs/037s-e.pdf on March, 30 2017