

Observations of the European Community on the draft legally-binding instrument on port State measures to prevent, deter and eliminate illegal, unreported and unregulated fishing

- September 2008 -

As requested further to the first session of the FAO Technical Consultation to draft a legally-binding instrument on port State measures to prevent, deter and eliminate illegal, unreported and unregulated fishing, the delegation of the European Community (EC) wishes to present observations on the draft agreement and the Chairperson's draft.

Those observations are indicative and do not preclude the EC from tabling additional or other proposals during the resumed session of the Technical consultation.

General considerations

- The EC delegation views port State measures as essential tools in the fight against IUU fishing and strongly supports the adoption of a legally-binding instrument on Port State measures against IUU fishing, which would lay down minimum standards to be applied by all its Parties to foreign-flagged vessels.

- The EC delegation considers that the draft provided by the FAO and relevant experts constitutes a good basis for work in that respect.

- The EC delegation wishes to propose a limited number of modifications to the draft text, with a view to:

- a) Making it more deterrent towards operators and vessels engaging or supporting IUU fishing and ensuring consistency with existing international instruments and RFMOs Port State schemes, via the introduction of:
 1. a prior authorisation procedure to be applied by States towards foreign-flagged vessels wishing to enter into their ports;
 2. the prohibition of entry into port for vessels listed by RFMOs as engaged in or supporting IUU fishing activities;
 3. the denial of access to port services (except those essential to the safety, health and welfare of the crew) for vessels suspected to have engaged in or supported IUU fishing activities, in order to prevent vessels that should be inspected from leaving port before the Port State has the chance to act;
 4. the possibility for a State to take measures consistent with international law towards vessels in its ports if, further a request by this State, the flag State has not provided information pertaining to enforcement action towards vessels flying its flag despite evidence that the vessel has engaged in or supported IUU fishing activities;

- b) Simplifying elements which should be transmitted by vessel operators prior to entry into port ("advance notification") as well as information to be provided by Parties further to an inspection in port, in order to focus on information really necessary for inspection and control purpose and avoid creating excessive burden towards operators and administration;
- c) Clarifying elements relating to the non-discriminatory application of the future agreement in order to make sure that its implementation does not result in vessels flying the flag of a port State being treated more favourably than foreign-flagged vessels;
- d) Clarifying elements relating to the final provisions of the agreement (notably amendments and dispute settlements procedures).

- The EC delegation is committed to working constructively with other delegations during the technical consultation with a view to achieving substantial progress in the elaboration of a robust agreement on port State measures against IUU fishing.

Specific comments on the Chairperson's draft

As agreed, the comments by the EC delegation on the Chairperson's draft are limited to a few specific points. The EC delegation does not wish to provide observations at this stage on all the elements in bracket and will express its position on those elements when they are discussed during the resumed technical consultation.

- Two proposals made by the EC delegation during the first session of the Technical Consultation are missing in the Chairperson's draft and should appear in the text between brackets, as clearly stated during the meeting:

* In Article 8, the following new paragraph should be added, setting out the rules according to which the entry into port of vessels listed by a RFMO as engaged into IUU fishing should be prohibited:

"2. A Party shall prohibit a vessel to enter into its ports if the vessel is included in a list of vessels having engaged in, or supported, illegal, unreported and unregulated fishing adopted by a regional fisheries management organization in accordance with the rules and procedures of such organization";

* In article 9(3) the following provision in track changes should be inserted, according to which vessels without a proper authorisation should not only be prohibited from landing/processing/transshipping, but also from receiving port services.

"3. A Party shall not allow a vessel to use its ports for landing, transshipping, packaging or processing of fish [or other port services, including, inter alia, refuelling and resupplying] where [there are reasonable grounds for believing that] the vessel does not have a valid and applicable authorization to engage in fishing and fishing related activities (...)"

The EC delegation is concerned that those provisions are not reflected in the Chairperson's draft and invites the competent services to modify the text accordingly.

- In the Chairperson's draft, Article 4(1)(b) reads as follows:

"Article 4

Relationship with international law and other international instruments

1. Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of Parties under international law. In particular, nothing in this Agreement shall be construed to affect:

(...)

(b) the exercise by States of their sovereignty over ports in their territory in accordance with international law, including their right to deny access thereto as well as to adopt more stringent port State measures than those provided in this Agreement;"

The EC delegation considers that the provision contained in the draft text submitted by the expert consultation is more appropriate and wishes therefore to see the text of the Chairperson being amended as follows:

"Article 4

Relationship with international law and other international instruments

1. Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of Parties under international law. In particular, nothing in this Agreement shall be construed to affect:

(...)

(b) the exercise by States of their sovereignty over ports in their territory in accordance with international law, ~~which includes the right of States to regulate access to their territory, including their ports,~~ as well as to adopt more stringent port State measures than those provided in this Agreement;"

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Suggestions for changes on the remaining part of the draft agreement

The proposals of the EC delegation for changes to provisions contained in the part of the draft agreement which has not been discussed during the session of the Technical Consultation held in June 2008 are presented below.

Article 11
Levels and priorities for inspection

1. Each Party shall endeavour to inspect a number of vessels in its ports required to reach an annual level of inspections necessary to achieve the objective of this Agreement.

2. In determining which vessels to inspect, a Party use risk analysis means. In particular, a Party shall give priority to:

(a) vessels that have been denied the use of or entry into a port of another Party in accordance with Articles 9 or 17 of this Agreement; and

(b) requests from other relevant States or regional fisheries management organizations that particular vessels be inspected.

3. Each Party shall ensure that all vessels that:

(a) enter into its ports without prior authorization under Article 8bis, or

(b) have been prohibited the use of one of its ports in accordance with Article 9 of this Agreement

shall be subject to inspection.

4. Parties shall seek to agree, through regional fisheries management organizations or otherwise, on minimum levels for inspections of vessels, with a view to reaching a coordinated level of inspections necessary to achieve the objective of this Agreement.

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Article 14
Transmittal of results by Party

Each Party shall take measures to transmit the results of each inspection to the flag State of the inspected vessel and, insofar as this is appropriate for the implementation of this agreement or other regional or international instruments, to:

(a) other relevant States;

(b) relevant regional fisheries management organizations; and

(c) FAO and other relevant international organizations.

Article 17
Port State actions following inspection

1. When, following an inspection, there are reasonable grounds for believing that a vessel has engaged in, or supported, illegal, unreported and unregulated fishing which shall, depending on the gravity of the violation concerned, include, but is not limited to, the following:

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

(b) failing to maintain accurate records of catch and catch-related data;

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(c) serious misreporting of catch;

(d) fishing in a closed area, during a closed season or contrary to applicable effort or quota requirements;

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(e) directed fishing for a stock which is subject to a moratorium or for which fishing is prohibited;

(f) using prohibited fishing gear;

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(g) falsifying or concealing the markings, identity or registration of the vessel;

(h) concealing, tampering with or disposing of evidence relating to an investigation;

(i) failing to comply with requirements for vessel monitoring systems (hereafter VMS);

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(j) taking or landing amounts of undersized fish in contravention of conservation and management measures; or

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

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(l) such other violations as may be specified in procedures established by the relevant subregional or regional fisheries management organization or arrangement.

the Party shall promptly notify the flag State of the vessel and, as appropriate, other relevant States and regional fisheries management organizations and other relevant organizations and shall deny use of its port to the vessel for landing, transshipping or processing of fish, if these measures have not already been taken in respect of the vessel.

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

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

- (a) the measures are provided for in its national laws and regulations; or
- (b) the flag State of the vessel has consented to the taking of such measures or requested such measures to be taken, or a relevant coastal State has requested the taking of such measures in respect of a violation that has occurred in an area under its national jurisdiction; or
- (c) the flag State has not responded within a reasonable period of time to requests by the port State pertaining to enforcement measures taken by the flag State in respect of the vessel concerned; or
- (d) the vessel is without nationality; or
- (e) the additional measures gives effect to a decision of a regional fisheries management organization or is taken pursuant to other international agreements.

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*Article 19
Compensation*

Parties shall be liable for damage or loss attributable to them arising from action taken pursuant to this agreement when such action is unlawful or exceeds that reasonably required in the light of available information to implement the provisions of this agreement. Each Party shall provide for recourse in its courts for actions in respect of such damage or loss.

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*Article 21
Role of flag States*

1. Each Party shall, in its capacity as a flag State, cooperate with port States and relevant coastal States, regional fisheries management organizations and other international organizations in the implementation of this Agreement.
2. When a Party has reasonable grounds to believe that a vessel flying its flag has engaged in or supported illegal, unreported and unregulated fishing and is seeking access to or is in the port of another State, it shall, as appropriate, request that State to inspect the vessel or to take other measures consistent with this Agreement.
3. Each Party shall ensure that vessels entitled to fly its flag land, transship and process fish, and use other port services, in ports of States that are acting in accordance with, or in a manner consistent, with this Agreement. Parties are encouraged to develop, including through regional fisheries management organizations, fair, transparent and non-discriminatory

procedures for identifying States that are not acting in accordance with, or in a manner consistent with, their obligations to cooperate with other States and to take appropriate action in preventing, deterring and eliminating illegal, unreported and unregulated fishing with regard to vessels using their ports,

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

*Article 23
Peaceful settlement of disputes*

1. Any Party may seek consultations with any other Party or Parties on any dispute with regard to the interpretation or application of the provisions of this Agreement with a view to reaching a mutually satisfactory solution as soon as possible.

2. In the event that the dispute is not resolved through these consultations within a reasonable period of time, the Parties in question shall consult among themselves as soon as possible with a view to having the dispute settled by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.

3. Any dispute of this character not so resolved shall, with the consent of all Parties to the dispute, be referred to the International Court of Justice, to the International Tribunal for the Law of the Sea or to arbitration. In the case of failure to reach agreement on referral to the International Court of Justice, to the International Tribunal for the Law of the Sea or to arbitration, the Parties shall continue to consult and cooperate with a view to reaching settlement of the dispute in accordance with the rules of international law relating to the conservation of living marine resources.

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*Article 29
Regional Economic Integration Organizations*

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

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

Article 34
Amendments

1. This Agreement may be amended by a [two-thirds majority of the Parties].
2. Any Party may propose an amendment to the Agreement by providing to the Depository the text of a proposed amendment.
3. Amendments to this Agreement shall enter into force [ninety (90)] days after notification of acceptance or approval to the Depository by [two-thirds] of the Parties, for the Parties which have accepted or approved these amendments. Thereafter, for each Party accepting or approving an amendment after the deposit of the required number of notifications, the amendment shall enter into force on the (...) day following their acceptance or approval.
4. States or regional economic integration organizations that become Parties after the entry into force of amendments to this Agreement shall be considered to be Party to the Agreement as amended, and this shall apply *mutatis mutandis* to any fishing entity that declares its commitment to abide by this Agreement.

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