

## **EC suggestions on some provisions of the future agreement on port State measures against IUU fishing in view of the second round of the FAO Technical Consultation**

Through this informal paper, the EC would wish to present its views on some of the provisions contained in the draft agreement on port State measures against IUU fishing, for discussion with other delegations in the course of the FAO Technical Consultation.

This document builds upon the contribution transmitted to the FAO by the EC in September 2008 and takes account of contributions also sent to the FAO by other delegations.

### Definition of IUU fishing

The 2001 FAO International Plan of Action against IUU fishing contains a definition of illegal fishing, of unreported fishing and of unregulated fishing. This constitutes the internationally recognized definition of those terms. Measures adopted at national, regional and global levels to combat IUU fishing have been built upon this definition. Many RFMOs explicitly refer to this definition within their recommendations, which are legally-binding on their members (for example WCPFC Conservation and management measure 2006-09).

The EC considers that the future agreement on port State measures against IUU fishing should be consistent with other national, regional and international instruments aimed at combating those practices; therefore, the EC supports the view that the definition of illegal fishing, unreported fishing and unregulated fishing as provided for in the FAO IPOA should also feature in the future agreement on port State measures.

Given the importance of this notion for the structure and functioning of the future agreement, the EC believes that this definition should appear in the core of the text, rather than in an annex. Annexes should primarily be used for technical requirements and information necessary to implement the agreement.

In order to clearly indicate that IUU fishing activities encompass behaviours constitutive of illegal fishing or unreported fishing or unregulated fishing, the EC would suggest inserting in Article 1 of the text of the agreement a new subparagraph where the following definition of IUU would be reproduced:

*(subparagraph x)*

*1. 'illegal, unreported and unregulated fishing' or 'IUU fishing' means fishing activities which are illegal, unreported or unregulated.*

*2. 'Illegal fishing' means fishing activities:*

*(a) conducted by national or foreign fishing vessels in maritime waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;*

*(b) conducted by fishing vessels flying the flag of States that are contracting parties to a relevant regional fisheries management organisation, but which operate in contravention of the conservation and management measures adopted by that organisation and by which those States are bound, or of relevant provisions of the applicable international law; or*

*(c) conducted by fishing vessels in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organisation;*

*3. 'unreported fishing' means fishing activities:*

*(a) which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or*

*(b) which have been undertaken in the area of competence of a relevant regional fisheries management organisation and have not been reported, or have been misreported, in contravention of the reporting procedures of that organisation;*

*4. 'unregulated fishing' means fishing activities:*

*(a) conducted in the area of application of a relevant regional fisheries management organisation by fishing vessels without nationality, by fishing vessels flying the flag of a State not party to that organisation or by any other fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organisation; or*

*(b) conducted in areas or for fish stocks in relation to which there are no applicable conservation or management measures by fishing vessels in a manner that is not consistent with State responsibilities for the conservation of living marine resources under international law.*

### Link between the definition of IUU fishing and the list of infringements in Article 17(1)

The EC noted that in some proposals submitted to the FAO, it is suggested that a substantial part of draft article 17 is deleted. The rationale of these proposals would be that, owing to the insertion of a definition of IUU fishing, it would not necessary anymore to have a list of infringements reproduced under draft article 17(1).

The EC would like to recall first in the first instance that the list of violations in draft article 17(1) is not limitative.

The list is intended to provide examples of situations where a port State shall take action after inspection. The purpose of the list in article 17(1) is therefore specific, while the general definition of IUU fishing in Article 1 is to be applied throughout the whole text of the agreement. A general reference to IUU fishing is especially relevant for situations described in Articles 8 and 9 where vessels which are not yet in port are suspected by port State authorities of having carried out or supported IUU fishing activities; in such cases, port State authorities may not have sufficient indications as to real type of infringements committed by the vessel concerned and a general reference to IUU fishing activities is hence appropriate. The list in Article 17(1) on the contrary aims at rendering operational the general definition of IUU fishing in a situation where, further to inspection, a port State has elements as to the occurrence of an infringement. It would assist authorities of the Port State to identify clearly some cases where they need to take action further to inspection, via a list of concrete behaviours qualified as infringements requiring such follow-up action.

Having such a list of infringements would not be a novelty for an international fisheries instrument. A similar list is to be found in article 21(11) of UN Fish Stocks Agreement (UNFSA). Lists of infringements have also been adopted by RFMOs in the framework of their schemes for control and surveillance. The EC considers that the list contained in the draft Agreement should be streamlined in order to be consistent with similar provisions in existing international instruments, and notably the UNFSA. The EC therefore proposes some changes in the list. In addition, the EC considers that the gravity of the infringement should be taken into account to determine when a port State should take action further to inspection. To this end, the EC suggests an addition in the "chapeau" of Article 17(1).

*Wording suggested by the EC in its submission to the FAO on draft article 17, para 1*

*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:

- (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;
- (c) misreporting of catch;
- (d) fishing in a closed area, during a closed season or contrary to applicable effort or quota requirements;
- (e) directed fishing for a stock which is subject to a moratorium or for which fishing is prohibited;
- (f) using prohibited fishing gear;
- (g) falsifying or concealing the markings, identity or registration of the vessel;
- (h) concealing, tampering with or disposing of evidence relating to an investigation;
- (i) failing to comply with requirements for vessel monitoring systems (hereafter VMS);
- (j) taking or landing amounts of undersized fish in contravention of conservation and management measures; or
- (k) committing multiple violations which together constitute a disregard of conservation and management measures;
- (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.

## Foreign-flagged and domestic vessels

The EC agrees that the future agreement should apply to foreign-flagged vessels. The EC considers however essential that the future agreement does not result in obliging a port State to take measures towards foreign-flagged vessels while domestic vessels would not be subject to any kind of similar measures.

IUU fishing activities are not only carried out by foreign-flagged vessels but also by domestic vessels fishing in the EEZ under the sovereignty over their flag State. Combating IUU fishing activities via port State measures should rely on a comprehensive policy. In that perspective, domestic vessels should be subject to adequate control measures when using ports under the jurisdiction of their flag State. The principle of non discrimination towards foreign vessels is reflected in Article 227 of UNCLOS in respect of measures taken for the protection of marine environment and the EC deems it appropriate that this principle also applies in respect of port State measures against IUU fishing.

The EC is aware that States have full jurisdiction over vessels flying their flag and carrying out their activities in the EEZ of that State. Against this background, the EC does not propose to include such vessels in the scope of the future agreement, which would entail the application of the whole set of measures contained in the provisions of this agreement. The EC proposes that the future agreement contains a clear clause according to which domestic vessels should be subject to measures which are at least as effective as those applying to foreign-flagged vessels pursuant to the agreement. Under such provisions, the corresponding State would commit itself to ensure a control over its domestic vessels when they are in its ports, but would remain completely sovereign as to the types of measures which it considers the most appropriate.

With this in mind, the EC wishes to reiterate its support for the provision on this issue which is reflected in Article 3(2) of the Chairperson's text:

### *Article 3 Application*

(...)

2. Each Party shall ensure that port State measures applied in relation to vessels flying its flag are as effective as measures applied in relation to vessels referred to in paragraph 1 of this Article.

## Entry and use of ports

Provisions on entry and use of ports form the cornerstone of the draft Agreement. It is essential that the future Agreement contains strong provisions on the measures that States should be taking towards vessels which wish to enter and use their ports. During the first session of the FAO Technical Consultation, a number of proposals have been made on those issues, which are reflected in the Chairperson's draft (Articles 7 to 11).

The EC wishes to expose its views on those points and table drafting suggestions.

1. The EC supports the principle that entry into port should be prohibited for those vessels listed by RFMOs as having engaged or supporting IUU fishing activities. Many RFMOs have enacted such prohibition, which target vessels which have been found responsible for engaging in or supporting IUU fishing and for which the responsible flag State has not taken appropriate corrective action. This is a simple and deterrent measure. It would result in shutting down entry into all ports of the Parties to the agreement to those vessels, thereby depriving them of the possibility to carry out commercial operations and to benefit from services which would support the continuation of their activities in those ports. An exception to this prohibition could be agreed on the condition that the State concerned intentionally lets those IUU-listed vessels enter into its ports in order to carry out thorough inspections onboard and subsequently prosecute the wrongdoers, as appropriate. The corresponding provisions feature, between brackets, in Article 8(2) and 8(2bis) of the Chair's draft text.
2. For those vessels suspected of being engaged or supporting IUU fishing activities, the EC endorses the position that they could be authorised to enter ports of Parties on the condition that they are subject to a systematic inspection. In order to guarantee that those vessels are properly inspected in port, they shall not be entitled to land/tranship/process and to receive port services. It is indeed necessary that such vessels are not entitled to land/tranship/process in port before inspection to avoid that possible evidence of infringement disappears. It is also necessary to prohibit that they receive port services (i.e. refuelling) as this may allow them to leave the port before the inspection effectively takes place.

Once they are inspected in accordance with Articles 12 to 15, two situations may occur:

- if elements constitutive of IUU fishing are detected, provisions of article 17 would apply, according to which specific measures should be taken towards the vessel concerned;
- alternatively, if no infringement is detected, the denial of use of port should be withdrawn and the vessel will be free to operate, in accordance with Article 10 (and without prejudice to the rights of port States under their national legislations).

Drafting suggestions are included in the attached document on the provisions of Articles 7 to 11.

### Draft article 17, paragraph 3

The purpose of Article 17(3) is to entitle port States, in a certain number of situations, to take measures (in addition to the denial of use of ports) towards vessels for which there is evidence that they have engaged in or supported IUU fishing activities. Article 17(3) clearly states that such measures should be consistent with international law.

The EC considers it useful that the future agreement foresees that, once there is evidence that a vessel was engaged in or supported IUU fishing activities, a port State is entitled to take measures in certain circumstances, which would be described in Article 17(3). If Article 17(3) were only to mention that a port State has the possibility to act in accordance with international law, without referring to certain situations where this possibility is expressly provided for, Article 17(3) would simply recall what the current situation is. The EC would consider that the agreement could usefully provide an added-value compared to the existing situation. In that perspective, it seems relevant to the EC that Article 17(3) does provide for a list of circumstances warranting that a port State takes additional measures.

It is however essential that such provision does not restrict the ability of a port State to take such measures in *other circumstances*, provided that the measures are consistent with international law. Changes should be introduced to that effect in the draft Article 17(3).

In addition, the EC would like to clarify that the list in Article 17(3) should be seen as providing for alternative and not cumulative conditions. This should also lead to modifying the text of Article 17(3), via the use of "or" after each sub-paragraph.

Finally, the EC proposes to add a subparagraph in Article 17(3), whereby port States could be entitled to take action against a vessel found responsible for IUU fishing activities when the corresponding flag State does not respond to a request by the port State for taking action. In such circumstances, one should consider that the flag State has not been able to discharge its duty via prosecution and sanction of the corresponding vessel and that this failure to act entitles the port State to take appropriate action instead of the flag State. The EC is ready to discuss this question further during the FAO Technical Consultation.

*Wording suggested by the EC in its submission to the FAO on draft article 17, para 3*

"3. A Party, in addition to the measures specified in paragraphs 1 and 2 of this Article, may take other measures which 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, in particular when:

- (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 with 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."



## Draft articles 18/19 on appeals and compensation

The EC believes that the future agreement should contain provisions on the liability of a port State in cases of damages or loss resulting from unlawful acts and/or improper implementation of the provisions of the future agreement. Provisions on recourse in respect of such damage or loss should also be foreseen in the agreement.

The EC sees such provisions as logically deriving from principles of the rule of law according to which effective legal remedies should exist in cases of damages resulting from improper implementation of a legal act.

Several provisions in international agreements which are relevant in the domain of maritime affairs are similar to those of draft Articles 18 and 19 (i.e. UNCLOS - art. 232, UNFSA - art. 21.18, MARPOL - articles 4 and 7, Tokyo MOU - sections 3.13 and 3.15, Paris MOU - sections 3.16 and 3.18, inter alia).

Provisions contained in draft Articles 18 and 19 seem to be drawn from international conventions applying to maritime transport. The EC believes that a better approach would be to use as a point of reference relevant provisions in UNCLOS and UNFSA. They are more accurate to address situations which are likely to happen in the context of the implementation of the future agreement. In particular, they refer to "action (which) is unlawful or exceeds that reasonably required in the light of available information to implement the provisions of the agreement" rather than "undue delay", which is both difficult to evaluate and too limitative in scope. They also refer in general terms to the liability of Parties without granting specific rights to the operator or owner of the vessel while other actors (including the flag State) might have an interest to bring an action before the court of the port State. For this reason, the EC proposes to merge draft articles 18 and 19 into one article which would reproduce Article 232 of UNCLOS.

*Wording suggested by the EC for draft articles 18-19*

### *Article 18 Liability of port States*

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.