



Submitted on 1st October 2008

Dear Prof. Fabio Hazin (Chair),

Canada welcomes the progress completed to date on the Port State negotiations and, as requested, is forwarding text proposals and rationales for the upcoming second session of the Technical Consultation in January 2009. As is likely well understood from the first negotiating session, Canada looks forward to the development of a minimum standard that is robust and achievable by signatory parties, ultimately resulting in an effective global port state regime to combat illegal, unreported, and unregulated (IUU) fishing.

The attached proposed edits are restricted to the remaining text, except the final provisions (i.e., Articles 11 to 25). Proposals for the Chair's text of 30 July 2008 are not included at this stage. However, a number of Canada's proposed edits for Articles 11 through 25 reflect revised terminology contained in the Chair's text. We hope that such suggestions, and those of others, will enable consistency and coherence throughout the text and lighten the need for such reconciliation at the end of the process when the whole document is reviewed for internal coherence and consistency. As prior, we also make reference to proper legal terminology where appropriate so as to avoid the need for such adjustments later in the process.

While the attached document outlines some specific changes to key Articles, it does not constitute an exhaustive list of changes that Canada might propose for the instrument. As is clearly noted, some positions will depend on outcomes of the discussions in November of the Annexes.

Canada is committed to working with other delegations to develop an effective port state instrument, welcomes the opportunity to discuss text proposals in advance of the January session, and looks forward to productive negotiations in early 2009.

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## Canada's Proposed Changes to Draft Text (Articles 11-25)

### FAO Technical Consultation to Draft a Legally-Binding Instrument on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing

#### *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 shall give priority to:
  - (a) vessels that have **previously** been ~~denied the use of~~ **prohibited from entering or using** a port in accordance with ~~Articles 9 or 17~~ of this Agreement; and

**Rationale:** The addition of the concept of “prohibiting entry” is necessary for the text to be consistent with Articles 8 and 9, as currently negotiated. Thus, the word “previously” is required to eliminate any confusion and indicate that a vessel should be inspected as a priority if another port state took action against it in relation to an earlier infraction.

It is also suggested that consistent terminology be used throughout the text. The term “denial” should be used in the context of a request (e.g., a request to enter port). Where the issue is the actual port state measure, the term “prohibition” is proposed. The term “entry” should be used instead of the term “access”, which can create confusion, as it has been used to mean both “entry / access to port” and “use / access to port services” within this instrument.

Reference to specific Articles is eliminated, as entry and use provisions are found throughout the text.

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

**Rationale:** The addition of “Parties” broadens the provision to include those bound by this Agreement who might otherwise not be included in the term “States”; Parties can include not just States, but also entities and regional economic integration organizations.

3. 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.

**Rationale:** It seems counterproductive to coordinate the level of inspections, as each Party must apply the minimum level of inspections, or better.

*Article 12*  
*Conduct of inspections*

Comment: Canada would like to indicate that potential changes it might propose to this Article depend on discussions of Annexes at the Technical Meeting in November, based on the assumption that this Meeting aims to clearly identify mandatory and voluntary elements for the Annexes in order to create minimum standards and recommended practices.

*Article 13*  
*Results of inspections*

Each Party shall, as a minimum standard, ~~require~~ **include** the information set out in Annex C ~~to be included~~ in the report of the results of each inspection.

Rationale: The proposed formulation is intended to provide clarity of intent.

*Article 14*  
*Transmittal of results by Party*

Each Party shall ~~take measures to~~ transmit each inspection to the flag State of the inspected vessel and, as appropriate, to:

- (a) other relevant **Parties and States**;
- (b) relevant regional fisheries management organizations; and
- (c) FAO and other relevant international organizations.

Rationale: The proposed formulation is intended to provide consistency with proposed text in the previous Articles.

*Article 15*  
*Electronic exchange of information*

Comment: There should be consistency between Article 15 and Article 6. Additional changes to this Article will also depend on discussions of Annexes at the Technical Meeting in November, based on the assumption that this Meeting aims to clearly identify mandatory and voluntary elements for the Annexes in order to create minimum standards and recommended practices.

1. To facilitate implementation of this Part of the Agreement, each Party shall, where possible, establish a communication mechanism that allows for direct, **secure**, electronic exchange of messages ~~between relevant States, entities, and institutions~~, with due regard to appropriate confidentiality requirements.

Rationale: The addition of the word “secure” reinforces the importance of privacy of information. This is linked to Article 6, which may need to be revisited following discussion of Article 15. Eliminating the list of contacts is also suggested, since the intent of this Article is the establishment of secure information technology (IT) capability only, and in order to ensure this Article does not limit who might be contacted.

2. Each Party shall ~~handle information to be transmitted through any mechanism established under paragraph 1 in a standardized form consistent with Annex D~~ **use Annex D as a minimum standard for content, format, and coding of inspection reports, made pursuant to this Agreement.**

Rationale: This proposed wording simplifies the intent of the provision, focusing on the desired result rather than internal procedures. It is anticipated that discussions in November will result in Annex D being revised to make it a minimum standard.

*Article 16*  
*Training of inspectors*

Comment: Additional changes to this Article will depend on discussions of Annexes at the Technical Meeting in November, based on the assumption that this Meeting aims to clearly identify mandatory and recommended elements for the Annexes in order to establish minimum standards and recommended practices.

~~Each Party shall ensure that requirements are established for the certification of its inspectors. Such requirements shall take into account the guidelines for the training of inspectors in Annex E.~~ **apply Annex E as a minimum standard for the training, leading to accreditation of its inspectors.**

Rationale: The proposed text focuses on the desired result, i.e., inspectors are trained to a minimum standard and being issued credentials as inspectors.

Article 17

Port State actions following inspection

Comment: A re-formulation of Article 17 is proposed, based on the current structure. As such, the original text is not copied here. The first paragraph should focus on the inspection standard, whereas the second paragraph should focus on the follow-up action. Therefore, the second part of paragraph 1 has been inserted into paragraph 2. Paragraph 3 remains in its current position.

**1. In carrying out inspections pursuant to this Agreement, each Party shall inspect for evidence of illegal, unreported or unregulated fishing or fishing-related activities.**

Rationale: The June negotiations produced agreement on a definition of IUU fishing and fishing-related activities as outlined in Article 1(e) of the Chair's text ("illegal, unreported and unregulated fishing" has the meaning set out in Annex A and applies to all marine fisheries). In light of this definition, the illustrative list of IUU fishing activities in paragraph 1 is now unnecessary. In fact, it may be confusing because it might be misinterpreted by some as the standard for port state inspection (i.e., it might be incorrectly understood that port inspectors are required to inspect only for the violations listed in paragraph 1). Accordingly, a re-draft of paragraph 1 is proposed along with a deletion of the list from (a) to (k). If delegations consider that the definition in Article 1(e) of the Chair's text is insufficient as a precise standard to guide the conduct of port State inspections, Canada would be prepared to work with others to develop such a standard.

**2. Where, following inspection, there are clear grounds for believing that a vessel has engaged in, illegal, unreported and unregulated fishing or fishing-related activities, the inspecting Party shall promptly notify the flag State of the vessel, other Parties, relevant States, regional fisheries management organizations or other organizations, as appropriate, and shall prohibit the vessel from landing or transshipping any catch on board or using any services in its port, including *inter alia*, refuelling and resupplying.**

Rationale: By including the last part of paragraph 1 into this new paragraph 2, the follow-up actions are combined into a single paragraph. The original paragraphs 1 and 2 created an asymmetry between the follow-up actions proposed. The original paragraph 1 stipulates that the port state prohibit landing and transshipping, while the original paragraph 2 would have the port state prohibit use of other port services "including *inter alia*, refuelling and resupplying". It is not clear that this is a desirable distinction. Instead, where upon inspection in port there are clear grounds for believing a fishing vessel or a fisheries support vessel has engaged in IUU activities it should be prohibited from landing or transshipping and, subject to the exception of *force majeure*, from using any other port services.

This result should be distinguished from Article 9 that deals with whether to allow a vessel entry and use of port services, i.e., actions to be taken before the vessel is inspected in port. That said, both fishing vessels and fisheries support vessels should be screened for IUU fishing activities and no distinction should be drawn between these types of vessels where they are either presumed to have engaged in IUU fishing activities prior to entry (Article 9) or where following inspection there are clear grounds for believing they have engaged in IUU fishing activities.

Concerning terminology, the standard text of “clear grounds for believing” should be used throughout the document in place of the various expressions now found in the text. This expression is used in both UNCLOS and UNFSA. Accordingly, its meaning is clearly understood and its use generally accepted.

**3. Nothing in this Agreement shall be construed to prevent a Party from taking additional measures consistent with international law in relation to a vessel identified pursuant to paragraph 2.**

Rationale: The purpose of this provision is similar to that of Article 8.2bis of the Chair's text, currently in square brackets, that deals with pre-entry port State authorization:

Nothing in this agreement shall be interpreted to prevent a Party from allowing entry into its ports of a vessel for the purpose of taking action which are as effective as the measures referred to in paragraph \*\*.

It is suggested that the list of measures a port State may take, currently found in this paragraph, is not necessary, since the paragraph already requires that port state actions be consistent with international law. The list might be misinterpreted as restricting port state sovereignty in its ports. Therefore, elements (a) to (d) can be deleted.

References to safety of the crew can be removed as Article 20 on *force majeure* will be moved to an earlier section of the text, as agreed at the June negotiation session.

*Article 18*

*Appeals concerning actions by the port State*

~~A Party shall ensure that the owner, operator or representative of a vessel that has been the subject of port State measures taken pursuant to Articles 9 and 17 of this Agreement may appeal the decision. An appeal will not cause such measures to be suspended while the appeal is pending. The master of the vessel shall be informed of the right of appeal.~~

*Article 19*

*Compensation*

~~Each Party shall ensure that the owner or operator of a vessel is entitled to compensation for any loss or damage suffered as a consequence of undue delay. In any instance of alleged delay, the burden of proof lies with the owner or operator of the vessel.~~

Rationale: Canada proposes to delete Articles 18 and 19. Landing, transshipping, and use of port services are privileges that a State may confer at its discretion. However, these Articles amount to encroachment on port state sovereignty, as they (a) confer new private rights of appeal and of compensation to an owner, operator or representative against a sovereign State – a private right of recourse which does not currently exist in customary international law; and (b) establish a new duty on the port State to inform the master of his new right of appeal against a sovereign decision. Under current customary international law, where an internationally wrongful act is committed by a port state against a foreign fishing vessel or national on board such a vessel in its port, the flag state or state of nationality may pursue diplomatic protection on a state-to-state basis. Canada is fundamentally opposed to establishing new private rights in this Agreement.

*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 ~~fly~~ **entitled to fly** its flag has engaged in ~~or supported~~ illegal, unreported and unregulated fishing **or fishing-related activities** and is seeking ~~access~~ **entry** 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.

Rationale: Text changes ensure proper legal terminology and consistency with proposed text changes elsewhere in the instrument.

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, 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, this Agreement.~~

Rationale: The second sentence of this paragraph should be moved to Article 25, where monitoring and review of this Agreement are addressed more broadly.

- 3. bis. Where, following port State inspection, a flag State Party receives an inspection report indicating that there are reasonable grounds to believe that a vessel entitled to fly its flag has engaged in illegal, unreported or unregulated fishing, or fishing related activities, it shall refer the case to its authorities for immediate and full investigation and shall, upon sufficient evidence, institute proceedings without delay in accordance with its laws.**

Rationale: To ensure proper balance of obligations between the port and flag State, each port State Party to this Agreement that is also a flag State should take appropriate compliance and enforcement action, in its capacity as flag State, against vessels entitled to fly its flag identified by another port State as having engaged in IUU fishing. This will round out the scope of this Agreement as a framework for minimum port State action and will constitute an effective deterrent against IUU fishing and fishing-related activities.



4. Each Party shall, in its capacity as a flag State, report **annually** 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~~ **entitled to fly** 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 **or fishing-related activities**.

Rationale: It would be helpful to include a timeframe for reporting. Other proposed edits are to ensure proper legal terminology and consistency with proposed text changes elsewhere in the instrument.

### *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 party to a dispute of this character not so resolved may refer the dispute for settlement to the International Court of Justice, to the International Tribunal for the Law of the Sea or to arbitration.]

Rationale: This Article should be put in square brackets pending results of negotiations on other Articles. Once the substantive negotiations are concluded, the agreement should be assessed in its entirety for a decision on whether compulsory, binding procedures for the peaceful settlement of disputes are appropriate.

*Article 25*  
*Monitoring and review*

1. Parties shall[, within the framework of FAO and its relevant Bodies,] ensure the regular and systematic monitoring of the implementation of this Agreement and the assessment of the progress made towards achieving its objective.

Rationale: These square brackets are necessary until a decision is made on role of the FAO and the status of this Agreement.

**1bis. Parties are encouraged to develop, through regional fisheries management organizations or other relevant international organizations, fair, transparent and non-discriminatory procedures for identifying States that are not acting in accordance with, or in a manner consistent with, this Agreement.**

Rationale: Under Article 21.3, it was proposed that this text be moved to Article 25, as a general provision for monitoring and review.