Submitted 15 September 2008

WWF International

Comments by WWF International
Port State Control Measures Technical Consultation
September 2008

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15 September 2008

Dear Mr Hazin,

WWF very much appreciates your invitation to all participants in the June 2008 Technical Consultation on Port State Measures to contribute to your work as chairperson in preparing for the next Technical Consultation in January 2009. To this end, I have set out below some brief comments that I trust will assist you in your work. I have also attached:

- the WWF Position Statement for the June 2008 Technical Consultation (which provides comments and suggestions on those Articles 11 and onwards which have yet to be discussed as well as those earlier Articles that have been the subject of some discussion already); and
- a memo prepared at the request of some delegates at the last Technical Consultation setting out the WWF interventions and contributions to that Consultation (while this focuses on Articles 1-10, it raises several issues relevant to discussions on subsequent Articles and key points are identified below).

1. The Agreement needs to include an obligation to refuse access and services to those engaged in 'unregulated' fishing.

While it is hard to use the exercise of flag state responsibility to effectively prevent unregulated fishing (fishing on the high seas without a licence or permit from a competent regional body), it is clearly within the competency of port states to do so. It is important that, in Articles 8-10 & 17, a clear obligation is created to refuse port access to

'freeloading' vessels engaging in unregulated fishing. Under no circumstances should freeloaders be excused because '.. the catch was taken in a manner consistent with relevant … measures'. They were either compliant with them or they were not.

The UNGA, in recent Fisheries Resolutions, has urged flag states to ensure that their vessels do not operate outside regional management arrangements – to very little effect. It is time for port states to do their bit. Indeed, any binding agreement that did not oblige port states to refuse access and services to unregulated freeloaders could be regarded as actually undermining efforts by the international community to deal with IUU fishing.

Importantly, the negotiated definition of IUU fishing as set out in the FAO IPOA in 2002 no longer reflects international norms and commitments. It is thus important that a new definition is negotiated that fits the current commitments and expectations of states – especially responsible port states - which include a desire to prevent unregulated fishers (including company directors and beneficial owners) from benefiting from freeloading.

2. The Agreement needs to include a penalty regime

This issue is covered in point 3 (pp.3-4) of the attached WWF June 2008 Position Statement. In summary, key points raised by WWF are:

- Port states should adopt national legislation equivalent to the USA's Lacey Act (allowing for the imposition of trade sanctions proportional to the offences involved);
- Port states should revise or adopt 'Admiralty Rules' legislation (pursuant to the Brussels 1952 Convention on the arrest o seagoing ships) to improve their capacity to assist and support other states in pursuing IUU fishers;
- Port states should adopt legislation allowing for the prosecution of any of their nationals involved in IUU activities elsewhere (equivalent to Spain's Royal Decree of October 2002);
- Delegations and FAO need to come to an understanding that a best practice port state agreement needs to be a stand alone agreement, not an FAO instrument (it's unrealistic to expect FAO to be a comfortable custodian of such an inherently judgmental regime as a binding port state control agreement especially if it includes a penalty regime); and
- Article 17 needs an explicit penalty regime – if a vessel that has been allowed into port and a subsequent inspection reveals non compliance in any way, a proportionate civil penalty should be imposed including forfeiture of vessel and catch (and criminal sanction in particularly grave situations) – it is simply not enough to merely deny access to services leaving the vessel free to try some other port.

If there is no penalty regime that sets realistic bottom lines, there is a serious risk that 'ports of convenience' will continue to facilitate IUU fishing while being in full compliance with the agreement thus negating the purpose of the negotiations. Variable

penalty regimes among EC countries, for instance, already results in 'regime shopping' by fishers to the detriment of the EU's fisheries management regime. It is important that this agreement does not encourage 'port shopping'.

A key concern is that it is unsound to rely on promises and commitments of flag states as the basis for allowing suspect vessels into port and non-compliant vessels access to services. The port state must be clearly empowered – and obliged - to take action against any party in default of the provisions of this Agreement (and to detain any relevant vessel pending the outcome of any such action).

If flag states and vessel owners are concerned about the impacts on commercial activities of such a provision, it could be worth allowing owners to post a bond with the relevant port state authority. Such bond being recoverable if the relevant flag state does adequately penalize the vessels owners and operators for the offences identified.

3. Part 5 needs expanding to include new Articles on the role of market states and on the control of nationals

The current draft is to be commended for its inclusion of an article aimed at clarifying the duties and obligations of flag states to cooperate with port authorities in other jurisdictions (and to ensure the cooperation of personnel responsible for vessels flying its flag). Such duties and obligations also need clarifying with respect to other states' responsibility to control access to their markets and to control the activities of their nationals not only in support of port authorities in other jurisdictions but also pursuant to their general obligations to combat IUU fishing. In particular:

There needs to be a new Article on 'Role of Market States' that obliges market states to cooperate with port authorities in other states:

- to facilitate prompt investigation of any matters pursuant to requests to enter port and/or subsequent inspections;
- to facilitate notification of potentially impacted traders and to ensure their cooperation in any such investigations; and
- to provide relevant information not only in response to a particular investigation but also by prompt submission of relevant trade information to any central databases that might be established pursuant to this agreement.

There needs to be a new Article on 'Obligation to Control Nationals' that obliges all states:

- to ensure that current and relevant information on operators, directors and beneficial owners is provided to any such databases and to port authorities on request; and
- to ensure that they have adequate national legislation to effectively control their nationals and to impose proportionate yet deterrent penalties on those found to

have been involved in IUU fishing or in the trade in fish or fish products derived from such activities.

It is particularly important to bear in mind that it is some states'- often developed country market states' - nationals who are ultimately responsible for IUU fishing and that, unless the companies (and the directors and beneficial owners of those companies) can be held to account within their home jurisdictions for the activities of the vessels they ultimately control, governments' attempts to contain the scourge of IUU fishing will continue to be frustratingly inefficient.

4. There is a Need for a Central Clearinghouse as a Key Part of any Information Systems, including the proposed 'Global Record' of fishing vessels

With respect to Articles 6, 7, 9 & 12-15, & Annex D, there should be a new paragraph in Annex D which commits parties to establishing a central clearinghouse with a mandate to make relevant information available to participants in a timely and appropriate manner. This is critical to the successful implementation of any binding port state control agreement – port authorities must have real time, on line access to information relevant to the exercise of their responsibilities pursuant to this agreement. Only a well-maintained central database (or clearinghouse networking a number of databases) can deliver this essential support service for responsible port authorities.

Obviously, such an information system works best if port authorities (and a wide range of other interested parties such as coastal states, RFMOs, licenced fishers, and fish traders) submit relevant information in a timely manner. To which end, Article 14 should be expanded:

- to include in the chapeau an obligation to transmit the results of inspections as soon as practicable (whence failure to do so would become a tell-tale sign of a 'port of convenience'); and
- to include an obligation to transmit the results to any and all clearinghouses, databases and websites that might be established pursuant to Annex D;

There also needs to be an obligation created somewhere in Part 4 for port authorities to report port movements of all relevant vessels (including refusal of requests to enter port), not just the results of inspections of some vessels.

The responsibilities of this proposed central clearinghouse of information should include maintenance of the proposed Global Register of fishing vessels, currently being worked on by a separate FAO Expert Consultation. Ideally, the existing Lloyds Register of shipping would be used as the fundamental information system – it would be very inefficient and wasteful of scarce resources to fail to recognize and make the best use of this existing and well-maintained information system.

In particular, it is important to remember that port authorities customarily make frequent use of the Lloyds Register as part of their established responsibility to facilitate servicing of merchant shipping.

Use of the Lloyds Register would also serve to simplify procedures to meet the information needs set out in Annexes A & C. It would be sufficient to establish an obligation for owners of a vessel seeking port access to provide port authorities with the IMO-Lloyds Number of that vessel. It would then be up to owners to ensure that the Lloyds Register was kept up to date as any inconsistencies would result in infringement of conditions of port access. A port authoritity would then only have to satisfy itself that the vessel seeking port access was, indeed, the same as the vessel in the Register.

5. Support vessels need to be fully covered by the Agreement

The discussions at the last Consultation on the extent to which support vessels as well as catching vessels should be covered by this Agreement were very encouraging – if inconclusive. It is really important that, if transshipment at sea is to be allowed, then those merchant vessels receiving fish must be subject to port state controls in a manner analogous to catching vessels seeking to land fish directly.

- Article 7 needs amending to allow port states to designate different ports for fish landing (from catching vessels) and fish trading (from vessels to which fish have been transshipped). It is very important, however, that reefers (and other merchant vessels involved in transshipment) are required to use ports with facilities to conduct adequate inspections. Insofar as such inspections are somewhat different from those required of catching vessels, designation of different ports is appropriate to minimize potential disruption of trade. All such transshipment vessels should be given priority for inspection when entry to port is granted.
- Such vessels should be excused from priority for inspection if they are subject to appropriate observer coverage and that complete transshipment data and information, including observer reports, were provided to relevant authorities at the time of transshipment and no concerns have been raised subsequently by any of those authorities.
- Priority inspection should still be imposed, however, for all such transshipment vessels taking on board fish from any fishery not covered by an effective catch documentation scheme.

For the sake of clarity, appropriate text should be inserted in Articles 8-9 providing for port states to refuse entry to port to a transshipment vessel with a history of engagement in IUU fishing, including entry on any coastal state or RFMO blacklist – and to refuse entry to port of any such vessels flying the flag of a flag state with two or more of its vessels (either fishing or support vessels) with such histories and/or blacklistings.

Miscellaneous Matters

Article 11 – inspection priority should also be given to all vessels on any RFMO blacklist **and** to all vessels on any coastal state's blacklist (it is important to remember that port states have as much a responsibility in international law to cooperate with coastal states in ensuring effective control of fishing within their EEZs as they do to cooperate with RFMOs) – without having to wait for a request to do so. Port authorities should also be obliged to give priority to inspecting any vessel flying the flag of a flag state with vessels listed on two or more such blacklists.

Priority should also be given to inspecting any vessels unable to provide a continuous VMS trace since their last port of call. Indeed, pursuant to Articles 8-9, any fishing vessel that cannot reasonably establish what it has been doing since last in port should be refused access to port.

Most importantly, however, priority for inspection should be given to merchant vessels carrying fish and/or product that cannot readily identify which consignments originated with which fishing vessels and that such fish were caught legitimately in compliance with relevant measures.

Article 15 – there needs to be a commitment to share information with interested non-governmental stakeholders – both fishing and fish trading industry and environmental groups – and with the general public. Governments cannot win the fight against IUU fishing on their own and information provision is the best way of reaching out to those in the wider community who stand ready – willing and able to complement the efforts of governments.

While there might be some classes of information relating to specific consignments of fish that might be kept confidential for justifiable commercial reasons, the vast majority of information likely to be gleaned by the operation of this Agreement does not warrant confidentiality. Indeed, it is fair to say that propensity to secretiveness on the part of government authorities is one of the most powerful aides to IUU fishing.

While we appreciate that the kind of cultural change we are recommending cannot be expected to occur overnight, we do think it reasonable that this Agreement urge and encourage parties to share appropriate information with stakeholders and with the media and general public.

Article 16 – training of inspectors needs to include accessing, using and contributing to whatever information systems are developed and identified as relevant in this regard. Additionally, priority should be given to developing DNA-based diagnostic testing kits for identifying species, stock and origin of fish and fish products.

Article 17 – pursuant to paragraph 17(3)(c), if a vessel is found to be without nationality, it should be seized and confiscated and the owners prosecuted. It is important to note, in this respect that, under UNCLOS, any reflagging should be done in port and not at sea. Indeed, reflagging at sea should be grounds for refusal of entry into port pursuant to Articles 8-9.

Article 19 – establishing a right to compensation where none currently exists is going too far. The right to appeal in Article 18 is sufficient. It would be a perverse outcome if the operation of this agreement were to discourage port states from exercising their sovereign right to control who enters their territory and on what conditions they may do so.

Article 21 – flag states should also be obliged to ensure that vessels flying their flag provide complete and timely information to port authorities. As discussed above, one aspect of this obligation should be to ensure that owners supply up to date information to their shipping registry and that this information is thence provided to Lloyds such that the Lloyds Register can be relied upon as eh source of such information.

Article 22 – see point 5 (pp.4-5) in WWF June 2008 Position Paper. This remains a key priority for WWF. There is a concern over sub-paragraph 22(3)(d), however, insofar as it could result in an extraordinarily perverse outcome whereby assistance could be provided to irresponsible flag states to capriciously dispute decisions of responsible port states in defence of IUU fishers. This concern could be met by making it clear that such assistance is restricted to developing port states.

Article 24 – it needs to be made clear that port state parties to this agreement are entitled to discriminate against non-parties in three crucial respects:

- If the last port of call was in a port of a non party, priority should be given to inspecting that vessel;
- If the last port of call was in a port of a non party known to have provided services to vessels that would have been refused such services, access to ports should be refused (that is to say, cooperation with 'ports of convenience' should be avoided); and
- Vessels flying the flag of flag states which allow their vessels to use such 'ports of convenience' should also be a priority for inspection.

Article 33 – insofar as port states already have the sovereign right to take any and all actions envisaged by the negotiators of this Agreement, there is no need for an Article which sanctions provisional application insofar as it implies that, without 'consent' such actions are inappropriate.

Article 37 – as above, it is inappropriate for FAO to be the Depositary for this Agreement. The effective implementation of the Agreement can be relied upon to cause difficulties for a number of FAO member states – including key developed state contributors as well as developing states to which assistance is provided. An independent, readily amendable instrument is a much more comfortable prospect.

Indeed, in this respect, it would be prudent to insert a provision requiring periodic, say three yearly, review of the Agreement (bearing in mind the frustrations attendant upon the Fish Stocks Agreement not having such a review provision).

Inevitably, improvements will be warranted and facilitating prompt updating should be built in – and choice of depositary is a key consideration. Finding a suitably independent and experienced host and coordinator for the information systems envisaged to support port authorities is likewise going to be important.

Annex B – with respect to paragraph (c), port states should have a clear and unambiguous obligation to verify the information provided by vessels seeking to enter port and/or subject to subsequent inspection. There should be no 'to the extent possible' wriggle room. We know from experience that one of the characteristics of a 'port of convenience' is that authorities do not take reasonable steps to verify such information. This is a key justification for other flag, port and market states to refuse to have dealings with a port authority that consistently fails to verify information provided and this Agreement must facilitate the making of such judgments.

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