

Report of the

EXPERT CONSULTATION ON FLAG STATE PERFORMANCE

Rome, 23–26 June 2009



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PREPARATION OF THIS DOCUMENT

This is the final version of the report of the Expert Consultation on Flag State Performance that was held at FAO headquarters, Rome, Italy, from 23 to 26 June 2009.

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ABSTRACT

This document contains the report of the Expert Consultation on Flag State Performance that was held at FAO headquarters, Rome, from 23–26 June 2009. The Experts received a report on the “Expert’s Workshop on Flag State Responsibilities: Assessing Performance and Taking Action” that was organized by the Government of Canada from 25 to 28 March 2008 in Vancouver. The Consultation then considered a number of papers prepared by the experts and commentaries on them including criteria for assessing the performance of flag States, possible actions against vessels flying the flag of States not meeting the criteria for flag State performance, the role of national governments in implementing criteria and actions for flag States performance, the role of regional fisheries management organizations in implementing criteria and actions for flag State performance, the role of international institutions and instruments in implementing criteria and action for flag State performance and assistance to developing countries. The Consultation agreed to recommend to a Technical Consultation that international guidelines on criteria for assessing the performance of flag States and possible actions against vessels flying the flags of States not meeting such criteria should be developed. An assessment process would be an important part of such guidelines. Noting the basis provided by international law for such assessments, the experts agreed on the need for two processes: (i) one for self-assessment and (ii) another for international or multilateral assessment. The latter assessment would have to be undertaken in a spirit of cooperation and be consistent with the 1992 UN Convention on the Law of the Sea. The Consultation agreed upon draft criteria for flag State performance, processes for conducting assessments, post-assessment actions and assistance to developing countries to improve their performance as flag States. The experts considered that these criteria and actions would form an appropriate framework for review by a Technical Consultation.

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List of abbreviations and acronyms

AMSA	Australian Maritime Safety Authority
CCAMLR	Convention for the Conservation of Antarctic Marine Living Resources
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
CDS	Catch Documentation Scheme
CCRF	Code of Conduct for Responsible Fisheries
COFI	FAO Committee on Fisheries
Compliance Agreement	1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas
CP	Contracting Party
DEA&T	South African Department of Environmental Affairs and Tourism
EEZ	Exclusive economic zone
FAO	Food and Agriculture Organization of the United Nations
FONC	Flags of non-compliance
GFCM	General Fisheries Commission for the Mediterranean
GFETW	Global Fisheries Enforcement Training Workshop
HSTF	Inter-Ministerial High Seas Task Force
HSVAR	High Seas Fishing Vessel Authorization Record
IATTC	Inter-American Tropical Tuna Commission
ICCAT	International Commission for the Conservation of Atlantic Tunas
IMO	International Maritime Organization
IOTC	Indian Ocean Tuna Commission
IPHC	International Pacific Halibut Commission
IPOA	International Plan of Action
IPOA–Capacity	International Plan of Action for the Management of Fishing Capacity
IPOA–IUU	2001 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing
ITLOS	International Tribunal for the Law of the Sea
IUU fishing	Illegal, unreported and unregulated fishing and related activities
MCS	Monitoring, control and surveillance
NAFO	Northwest Atlantic Fisheries Organization
NASCO	North Atlantic Salmon Conservation Organization
NCP	Non-Contracting Party
NEAFC	North East Atlantic Fisheries Commission
NGO	Non-governmental Organization
OECD	Organization for Economic Cooperation and Development

PCIJ	Permanent Court of International Justice
PSM Agreement	Draft a Legally-binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing
RFB	Regional fishery body
RFMO	Regional fisheries management organization and arrangement
SAMSA	South African Maritime Safety Authority
SEAFO	Southeast Atlantic Fisheries Organization
SOFIA	State of World Fisheries and Aquaculture (biennial FAO report)
SOLAS	International Convention for the Safety of Life at Sea
1982 UN Convention (also UNCLOS and LOSC)	1982 United Nations Convention on the Law of the Sea
1995 UN Fish Stocks Agreement (also UNFSA)	1995 UN Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks
VMS	Vessel monitoring system
WCPFC	Western and Central Pacific Fisheries Commission
WTO	World Trade Organization

OPENING OF THE SESSION

1. The Director-General of the Food and Agriculture Organization of the United Nations (FAO), Mr Jacques Diouf, convened an Expert Consultation on Flag State Performance. The Consultation was held in Rome, Italy, from 23 to 36 June 2009.
2. The Consultation, which was funded by the FAO Regular Programme and the Government of Canada, was attended by 13 experts in their personal capacities and three Resource Persons. A list of experts, resource persons, FAO staff and consultants is attached as Appendix B. The documents placed before the Consultation are listed in Appendix C.
3. The Technical Secretary, Mr David Doulman, Senior Fishery Liaison Officer, Fisheries and Aquaculture Department, FAO, Rome, called the Expert Consultation to order.
4. Mr Ichiro Nomura, Assistant Director-General, Fisheries and Aquaculture Department, FAO, Rome, made an opening statement. He noted, *inter alia*, that experts were participating in the Consultation in their personal capacities. He referred to the need to combat illegal, unreported and unregulated fishing and related activities (IUU fishing) as well as to the role of flag States under international law. He outlined the objectives of the Consultation, adding that the report of the meeting would be forwarded to a FAO Technical Consultation that will be held, subject to the availability of funding, prior to the twenty-ninth session of the FAO Committee on Fisheries (COFI). Mr Nomura's statement is reproduced in Appendix D.

SELECTION OF CHAIRPERSON

5. Mr Serge Beslier was selected as Chairperson.
6. Mr Beslier expressed his pleasure at being selected to chair the Expert Consultation, adding that he looked forward to working with such an eminent group of experts and resource persons. He stressed that flag States must act responsibly and implement international obligations through tangible measures at the vessel level. He expressed the view that the linkage between healthy fisheries and efforts to combat IUU fishing should take into consideration the state of global politics.

ADOPTION OF THE AGENDA

7. The Consultation adopted the Agenda in Appendix A.
8. In adopting the Agenda, the Expert Consultation recognized the need to work within the mandate given by COFI at its twenty-seventh session. The Consultation agreed, as a point of clarification, that it would focus its discussions on flag State issues relating to efforts to combat IUU fishing and to the operation of fishing vessels on the high seas and in the exclusive economic zones (EEZs) of other countries.

REPORT ON THE EXPERT WORKSHOP ON FLAG STATE RESPONSIBILITIES: ASSESSING PERFORMANCE AND TAKING ACTION

9. Mr Brent Napier presented a synopsis of the Report on the Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action. He informed the meeting that the three-day Workshop was hosted by Canada and held in Vancouver, British Columbia, Canada, from 25 to 28 March 2008, as a result of a decision at the twenty-seventh session of COFI. Participants included experts from international fisheries and oceans law, fisheries managers and fisheries enforcement. The Workshop consisted of six presentations by invited speakers, followed by discussion sessions. The most notable of these discussions focused on diverse goals for assessing flag State performance and identifying possible avenues or methods for action to improve the way flag States meet their

responsibilities globally. Working sessions were devoted also to elaborating criteria to evaluate flag State performance and to identify the range of actions that could be taken in the event of flag States falling short of, or not complying with, international norms and standards for flag State control.

10. Mr Napier added that the Workshop had yielded fruitful and wide-ranging discussions on a number of issues, including a framework for developing the criteria for assessing flag State performance; draft criteria; the need for assessment processes that would use such criteria; possible actions against vessels and flag States not demonstrating compliance; potential ramifications of various actions; and possible mechanisms to assist developing countries.

11. Furthermore, Mr Napier informed the Expert Consultation that the Workshop had identified several areas for further exploration to address more effectively the flag State control issue. These areas included data gathering (identification of methods for improved data gathering and analysis), criteria development (further develop criteria for determining compliance of vessels and for evaluating the performance of flag States), assessment processes (exploration of different types of assessments; identification of how coastal States, regional fisheries management organizations and arrangements (RFMOs) and others might undertake and use an assessment; and development of options or guidelines for assessments), possible actions (identification and exploration of the practical and legal risks and benefits of various possible actions that might be taken by States other than the flag State, RFMOs or other intergovernmental organizations), legal research (conduct research on legal options with respect to risks and benefits of developing a non-binding instrument or a legal instrument) and assistance to developing countries (identification of areas for capacity building as well as ways and means of assisting developing countries to promote better flag State control).

12. The Chairperson recalled that he had participated in the Expert Workshop and that it had been a most successful meeting. He added that its outcomes had been highly positive and appreciated by the twenty-eight session of COFI. He added that they would provide useful inputs to the deliberations of the Expert Consultation.

RECOMMENDATIONS FOR FOLLOW-UP ACTION

Criteria for assessing the performance of flag States

13. Mr David Hogan made a presentation entitled “Criteria for assessing the performance of flag States.” The paper is reproduced in Appendix E.1. He summarized the paper’s elements related to the process of assessing flag State performance as a tool to address and combat IUU fishing activities and assist flag States in enhancing their performance, including through improving their legal and regulatory regimes as well as behaviour. He described key points in the context, aim and legal basis for developing criteria to assess flag State performance and highlighted the need to look at the implementation of flag State obligations and responsibilities as a manifestation of the cooperation called for under international law, as well as the opportunity costs to States and their concerned sectors when they fulfilled their responsibilities while others did not. He described the paper’s proposed criteria, noting that they were derived in part from prior discussions amongst experts and he emphasized the need to look at outcomes in the form of behaviours.

14. Ms Jane Willing commented on the paper. She pointed out that the vastly different national legislative and regulatory regimes created many difficulties when attempting to assess the performance of flag States. It would be useful to consider criteria that addressed the notion of equivalency in application of measures.

15. Ms Willing added that the globalization of the fish harvesting sector meant that decisions about where fishing took place could be influenced by seeking those countries with legal and regulatory regimes allowing for lower cost operations. There was therefore a need to consider the development of positive incentives relating to the benefits of flying “a flag of integrity”, such as facilitating or ensuring access for seafood products from such flags to high-value markets.

16. In the discussion that followed, the Consultation analysed the proposed criteria and identified several themes for consideration in their further elaboration.

17. The Consultation addressed how flag State performance assessment fitted into the overall approach of the international community's efforts to combat IUU fishing, noting the interrelationship between this topic and port State measures, market-based measures and international cooperation and assistance to developing States. Discussion included recognition of the importance of the economic drivers related to IUU fishing and reiteration of the context provided by the flag State provisions in the 1982 United Nations Convention on the Law of the Sea (1982 UN Convention), the 1995 UN Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995 UN Fish Stocks Agreement), the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement), the 1995 Code of Conduct for Responsible Fisheries and the 2001 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU), among other instruments. Some experts and resource persons expressed the view that criteria elaborated through FAO should recognize the current degree of evolution of approaches and objectives to international fisheries governance and should therefore include details and specifics reflecting this evolution.

18. The Consultation considered the globalized fisheries sector and the mobile nature of fishing vessels, underscoring the importance of developing strong criteria with regard to flag State implementation of the range of responsibilities related to national registries and records, as well as the authorization to fish.

19. There was extensive discussion concerning the relative importance of formal commitments to the range of international instruments related to fisheries in comparison to the fulfilment of the responsibilities therein and implementation of those responsibilities in practice. This discussion focused on the question of how to prioritize, or give weight to, the draft criteria in relation to being a Party to instruments such as the 1982 UN Convention, the 1995 UN Fish Stocks Agreement and the Compliance Agreement.

20. Some experts and resource persons were of the opinion that it was important to examine the existing legal requirements for any flag State that might be assessed. However, they recognized also the increased risk associated with lower degrees of flag State participation in international instruments. The Consultation agreed that a pragmatic approach should be adopted, focusing on the degree to which flag States implemented their responsibilities as well as on the outcomes of that implementation. This was considered particularly important due to the circumstance that some flag States might not be Party to one or more of the international instruments. Given this difference in status among flag States with regard to these instruments, the Consultation recognized the benefit of developing criteria that could give weight or priority to behaviours in order to determine comparability or equivalency of flag State implementation.

21. The Consultation considered how the criteria could be used most effectively. It was observed that they could be used as a tool in a number of respects including, for example, as a "gap analysis" tool rather than one of condemnation, as part of a positive process for self-assessment by States so as to allow them to verify if they were taking all necessary actions to ensure that their vessels fished responsibly as well as at international or multilateral levels, to encourage compliance and the adoption of appropriate actions to combat IUU fishing. It was recognized that some States could not be expected to be able to meet fully all the standards set by the criteria, which could be used then as an important check list to identify their needs for capacity building.

22. The draft Criteria for flag State performance proposed by the Expert Consultation are listed in Appendix F.1. It was recognized that further work was needed to develop these criteria and their content. In this regard, it was recommended that this task be carried out by a technical working group, a consultant or a resumed Expert Consultation prior to the submission of the whole document to the Technical Consultation.

Possible actions against vessels flying the flags of States not meeting the criteria for flag State performance

23. Ms Rosemary Rayfuse presented a paper entitled “Possible actions against vessels flying the flags of States not meeting the criteria for flag State performance”. The paper is reproduced in Appendix E.2. She noted that under international law it was the flag State itself, not the owners or operators of vessels that bore responsibility for ensuring that it complied with its flag State obligations. If a flag State failed to do so, then, according to the basic rules on State responsibility, it had breached its international obligations and other States had the right to respond. This however, presupposed that other States had complied themselves with their international obligations including the duty to cooperate and the duty to assist developing States. Ms Rayfuse also articulated the due process requirements that must be observed in any assessment of flag State performance. She provided frameworks for assessment processes.

24. Ms Rayfuse then presented an inventory of actions that might be taken against non-compliant flag States and/or their vessels and the legal bases for these actions. She distinguished between the consequences of a flag State’s failure to meet its obligations in respect of individual infractions by individual vessels and the consequences of a consistent pattern of failure on the part of the flag State, noting that the former might result in immediate consequences for individual vessels whereas the latter might result in longer-term consequences for both the flag State and its vessels. The nature of the action taken and the legal basis for such action would depend on the identity of the State or States taking the action. Noting that, in general, a right of flag State pre-emption would apply to actions taken against individual vessels by non-flag States, Ms Rayfuse suggested that where a flag State had exhibited a consistent pattern of lack of effective control over its vessels then the right of flag State pre-emption would be lost. In other words, the grant of flag would be non-opposable to other States whose rights and interests had been affected and vessels of the flag State could be subjected to the full jurisdiction of other States in situations where they were found to be engaged in IUU fishing or other activities that undermined international conservation and management measures. In addition, she noted that trade sanctions or other measures could be instituted against the flag State and its vessels.

25. Ms Carmen-Paz Marti Dominguez commented on the paper. She pointed out that the main cause of non-compliance by vessels was non-compliance by flag States with their primary responsibilities as set out in international law. As a consequence, coastal, port and market States needed to become involved and take actions, principally of an economic nature, against IUU fishing vessels flying flags of non-compliance (FONC). Other non-flag States that were directly affected, for example where their nationals were involved, needed political and legal grounds to act. To tackle the problem some RFMOs had established lists of countries and territories that failed to cooperate and applied trade measures against them. Several RFMOs had established also IUU fishing vessel lists for purposes of, *inter alia*, applying port State and market State measures. In relation to flag State performance, she noted that actions by RFMOs included listing States that issued FONCs as well as FONC vessels for possible actions.

26. Ms Marti Dominguez noted that the IPOA–IUU encouraged States to avoid flagging vessels with a history of non-compliance except where there had been a change in ownership, substantiated by evidence demonstrating that the previous owner or operator had no further legal, beneficial or financial interest in, or control of, the vessel.

27. Ms Marti Dominguez addressed also the issue of whether the Consultation should identify actions against States or vessels. She recalled that the Consultation’s mandate was to identify possible

actions against vessels flying the flag of States not meeting specified criteria. However, she expressed the view that, as a matter of international law, the flag State was responsible for its vessels. In this respect, the mandate implied that actions against States might also be identified. She added that positive and negative actions against States could be taken at national and regional levels. However, she stressed that actions should be taken in a spirit of cooperation and in accordance with democratic principles. The objective of such actions should be to encourage compliance and improve the behaviour of States identified as FONCs.

28. Ms Marti Dominguez added that in all cases, agreed procedures would be required before actions could be taken. The procedures should cover the implementation of criteria, undertaking assessments, development of timelines for recovery or remedial action by the flag State and measures to improve compliance by the flag State. A system of risk analysis would be an important element of the procedures, including qualitative and quantitative information. The consequences of being a non-compliant State should be made clear from the outset.

29. Ms Marti Dominguez made a distinction between taking action against a vessel because of its flag and not because of its actions and stressed the importance of such a distinction. It was noted that a FONC vessel could, *prima facie*, be considered as non-compliant, even if it acted in accordance with applicable laws and measures. In this respect, it would be important to provide a legal basis for action that could be taken, rather than actions that should be taken.

30. During the ensuing discussion, the Expert Consultation noted that a State identified as a FONC would keep the right to flag its vessels. However, this could be disadvantageous to vessels flying FONCs because they probably would not receive reasonable protection from the flag State.

31. The Consultation emphasized that any punitive measures or settlement process stemming from the failure to meet flag State responsibilities and criteria should be equitable and equally accessible and applicable to both developing and developed countries. Appropriate dispute resolution procedures should support such measures and processes.

32. It was recognized that measures must be identified to encourage compliance, such as assistance to flag States to enable them to meet their obligations under international law and cooperation through RFMOs. However, at the national level, a major problem was securing the cooperation of flag States to ensure compliance by their vessels, or to take remedial action.

33. The Consultation elaborated a framework and guidelines for assessing flag State performance and possible actions with respect to vessels flying the flags of States not meeting the criteria for flag State performance. The framework and guidelines are reproduced in Appendix F.2.

The role of national governments in implementing criteria and actions for flag State performance

34. Ms Gail Lugten presented a paper entitled “The role of national governments in implementing criteria and actions for flag State performance”. The paper, which is reproduced in Appendix E.3, examined the role of national governments in implementing actions to enhance flag State performance at the national, regional and international levels, in terms of legal, administrative/regulatory and other actions. The paper was structured as a comprehensive inventory or list of actions that could be taken, based primarily on hard and soft law instruments, which specifically addressed flag State duties and recommendations. Ms Lugten highlighted the duty in customary law of States to cooperate with each other and described the complementary roles of port and market States. At the national level, Ms Lugten emphasized the flag State’s role in reforming laws and policies in financially-related sectors, as well as the importance of establishing robust evidence laws. The duty to cooperate with RFMOs, and various actions and processes to be undertaken in that regard, were elaborated. Identification of means for dispute settlement was considered essential.

35. Ms Pongthong Onoora commented on the paper. She noted that identification and analysis of hard and soft law could be used to strengthen the introductory or contextual part of the criteria and that the recommendations to link vessel registration with fishing authorizations should be integrated into the criteria. She noted that the focus should remain on what the same flag State could or should do as a coastal, port and/or market State to complement its role, responsibility and actions as a flag State. Ms Onoora noted that other suggestions could be used to complement and elaborate the international and regional component of the behavioural criteria. She added that such suggestions might be considered for follow up action to the criteria. She concluded by presenting relevant examples of monitoring, control and surveillance (MCS) initiatives from the Southeast Asian region.

36. In the ensuing discussion, the Expert Consultation focused on the roles of various States to promote flag State performance. A parallel was drawn with the process to develop port State measures, where in such situations measures could be taken by one country (the port State) in respect of a vessel of another (the flag State). In cases where a flag State did not discharge its responsibilities, it could be the role of another State (for example, the port State, coastal State, market State or other) to take action to facilitate the resolution of this situation.

37. The Consultation considered fundamental that governments had an important role to play irrespective of whether they were flag States or not. It was agreed that flag States could perform self-assessments and identify constraints and weaknesses with a view to strengthening their performance and discharging their responsibilities under international law. At the international level, the role of States other than the flag State would be to undertake objective assessments and take appropriate action in conformity with international law with respect to flag States that were not fulfilling the performance criteria.

The role of regional fisheries management organizations in implementing criteria and actions for flag State performance

38. Mr Denzil Miller presented a paper entitled “The role of regional fisheries management organizations in implementing criteria and actions for flag State performance”. The paper is reproduced in Appendix E.4. The current duties and obligations of States members of RFMOs were outlined. A general feature was that all RFMOs flag State Contracting Parties (CPs) should control their vessels through authorizations to fish, as well as by adopting regulations to ensure that fishing was carried out in conformity with permitted RFMO terms and conditions (i.e. “measures”). To ascertain whether flag State duties had been complied with by RFMO CPs, potential breakdown areas for flag State performance were identified. These breakdown areas comprised establishment of vessel identity, exercise of vessel control, deterrence and sanctions for non-compliance and non-CP cooperation. Specified qualities for action and measures to guide RFMO CP flag State performance could then be used for further actions aimed at improving compliance with RFMO measures. Such actions could include developing (i) inventories of flag State measures; (ii) due diligence requirements for flagging of vessels; (iii) model flag State performance indicators; (iv) formal non-contracting party (NCP) cooperation policy; (v) streamlined and improved decision making, and (vi) periodic review of RFMO performance.

39. A risk-based evaluation procedure to address RFMO flag State compliance was offered as an example to identify (i) potential areas of flag State performance breakdowns and (ii) remedial action. A framework Non-Contracting Parties (NCPs) policy was provided also as a basis for discussion on improving participation by NCPs in RFMOs and to target areas requiring capacity building.

40. Noting that RFMOs were currently addressing many essential flag State performance indicators, Mr Miller emphasized that perceived breakdowns in RFMO flag State performance were largely matters of implementation rather than principles of failure arising from inadequate legal provisions. He concluded that there was a need to assess formally the risks of breakdown(s) in RFMO flag State performance. To this end RFMOs themselves should be made responsible for breakdown assessment and cooperation with NCPs. This cooperation should be formalized in clear policy directives.

41. Mr Takaaki Sakamoto commented on the paper. He observed that assessing the risk for each flag State performance breakdown could involve a degree of subjectivity and that the risk assessment process should be therefore designed carefully. He noted the importance of performance reviews and suggested that, for improved performance by RFMO members, the functions of the Compliance Committee should first be enhanced and reinforced so that the compliance status of members could be examined rigorously.

42. With respect to the roles of RFMOs in improving the performance of flag States for both members and non-members, the experience of the International Commission for the Conservation of Atlantic Tunas (ICCAT) was recalled, including efforts to strengthen its Compliance Committee and agreement on trade-related measures for IUU fishing by non-members.

43. During the ensuing discussion, the Expert Consultation considered IUU fishing in RFMO convention areas by FONC vessels. It was acknowledged that the rationale for such fishing was often related to RFMO allocation policies that resulted in a lack of fishing opportunities for new members or cooperating non-members. In such cases, RFMO self-assessment could be a useful tool to evaluate possible linkages between allocation policies and fishing by FONC vessels.

44. It was recognized that a State could behave more responsibly than a RFMO in controlling its vessels, including those fishing in an area of competence of a RFMO. In this regard, development of criteria for responsible RFMO behaviour could be a useful basis for RFMO self-assessment.

45. The key role of RFMOs in combating IUU fishing, together with relevant tools such as IUU fishing vessel lists, authorized vessels lists and catch documentation schemes, were underscored by the Expert Consultation. It was noted that RFMOs could play a key role in a process for assessing whether a flag State was meeting performance criteria. In discharging this role, the Consultation supported the identification of mechanisms for independent dispute resolution to engender trust in the process.

The role of international institutions and instruments in implementing criteria and actions for flag State performance

46. Mr Matthew Gianni made a presentation entitled “The role of international institutions and instruments in implementing criteria and actions for flag State performance”. He described the large number of international organizations that were involved in combating IUU fishing and, by extension, were working to enhance flag State performance in relation to international fisheries conservation and management measures. In addition, a number of international non-governmental organizations (NGOs) had expended considerable effort in addressing IUU fishing, including organizations from the fisheries and seafood sectors.

47. Mr Gianni flagged a key question for the Consultation. It was whether to draft minimum standards and criteria or aspirational criteria for flag State performance with respect to fishing and related activities. If both minimum standards and aspirational criteria were to be elaborated it would be important to make a distinction between the two. In developing either or both sets of criteria, it was important to recognize the need to avoid undermining international law with regard to flag State obligations through developing criteria less rigorous than the obligations already contained in international instruments. A wide range of possible indicators of poor flag State performance were described together with possible measures that non-flag States and international organizations could take to address poor performance.

48. Mr Gianni proposed that there would be merit in exploring the possibility of taking disputes to the International Tribunal for the Law of the Sea (ITLOS), the World Trade Organization (WTO) or to arbitration bodies designed to enhance flag State compliance with international standards and agreed measures for the conservation and management of high seas fisheries. He identified issues of equity as paramount to the fair application of international measures. It would be critical to ensure, for

example, that developing countries were not disadvantaged unduly and that developed countries were subject equally to sanctions if and where deemed necessary.

49. Mr Garth Broadhead commented on the presentation. He stated that the approach to encourage flag States to comply with conservation and management measures should be a bottom-up process and not top-down. While there should be consequences to States that repeatedly undermined conservation and management measures, there should be the possibility also to include States that desired to participate in a cooperative and a constructive manner. The possibility for an inclusive process could be achieved best by providing a dispute mechanism for aspiring States to resolve disputes and clarify rights and needs. Mr Broadhead noted that ITLOS was not a realistic mechanism for most States due to the cost and possible unintended consequences of submitting a dispute to the Tribunal and that these mechanisms were probably placed most appropriately within RFMOs.

50. During the ensuing discussion, the Consultation endorsed a global approach to the control of FONC vessels activities through international tools such as the establishment of a global IUU fishing vessel list, the establishment of a global record of fishing vessels and cooperation through the International Monitoring, Control and Surveillance Network. These tools could contribute usefully to an assessment process to determine whether actions should be taken against a FONC vessel.

51. The Consultation reviewed the advantages of having an international instrument to provide guidance to assess criteria for flag State performance.

Assistance to developing countries

52. Mr Fabio H. V. Hazin made a presentation entitled “Assistance to developing countries”. It is reproduced in Appendix E.5. He described several international instruments where the special requirements of developing States, in relation to the conservation of the living resources of the high seas, including flag State responsibilities, were recognized. He highlighted the importance of developing States to world fisheries and trade and addressed the needs and difficulties faced by developing States to discharge their responsibilities as a flag State, as well as a coastal State seeking to take action against vessels of States that did not meet agreed criteria for flag State performance. Relevant considerations included the legal and regulatory framework, institutional organization and infrastructure, MCS, scientific personnel and infrastructure and participation in high seas fisheries.

53. Mr Hazin emphasized that capacity building initiatives in five main areas listed in his paper would require significant investment in: (a) material resources (facilities, hardware and equipment); (b) human resources (training) and (c) financial resources. Developing States required to control adequately fishing vessels flying their flags and also needed assistance to improve their capacity to seek action against vessels of States that did not meet agreed criteria for flag State performance. It was suggested that although capacity building was required in all areas, MCS should be a clear priority, including both human capacity development and institutional strengthening.

54. Mr Hazin underscored that capacity building should be seen as a process and, as such, it should be approached and elaborated in a coherent and integrated manner. Sources of assistance to developing countries were outlined and RFMO obligations were defined. Mr Hazin recommended the establishment of a specific funding mechanism for assistance to developing States in order to improve their capacity to control fishing vessels flying their flags.

55. Mr Ibrahim Al-Busaidi commented on the presentation and agreed with the ranking of important weaknesses relating to priority areas and methods for development of human capacity and institutional strengthening. In addition, he supported the proposal for a coherent and integrated approach taking into account the different levels of capacity in countries including capacity for good governance.

56. Mr Al-Busaidi underlined the importance of the tools that would enable developing States to perform effectively as a flag State. These tools would include MCS, scientific capability and fisheries management infrastructure. For the means of delivering assistance, he highlighted the development assistance obligations of flag States that had fishing agreements with developing coastal States. He stated that assistance should be provided to make vessel monitoring systems (VMS) and other electronic surveillance technology more accessible and cost-effective for developing countries.

57. Mr André Tahindro provided further comment on the presentation and indicated that he shared fully the view concerning the importance of the role played by developing countries in global fisheries production and trade. He also concurred with the opinion expressed in the guidance document that the failure of a developing country to adequately exercise flag State responsibilities derived often from a lack of sufficient awareness of the legal consequences of flagging a vessel as well as from the practical inability to control registered vessels. However, he stressed that in many cases such failure was not caused by an unwillingness of those countries to control their fishing vessels appropriately.

58. Mr Tahindro pointed out that in several developing countries the legal and regulatory framework to control fishing vessels flying their flags, such as required under Article 18 of the 1995 UN Fish Stocks Agreement, was missing. A number of countries also lacked laws and regulations that governed fishing on the high seas by vessels flying their flags. Laws and regulations should be adopted and, as appropriate, updated.

59. Mr Tahindro supported the view that where a developing country operated an “open registry” for fishing vessels, this should not necessarily be seen in a negative light because, in many cases, it was a response to economic conditions. He therefore believed that only “flags of non-compliance” should be condemned, not flags of “open registries”. In this connection, he drew attention to the importance of coordination between the registering and the licensing authorities. Mr Tahindro pointed out that flag State implementation of MCS tools was an indication of a serious approach towards controlling the activities of fishing vessels, but drew attention to the expense involved in the use of VMS, air and surface surveillance, and the ineffectiveness in some cases of the use of national observers or inspectors, particularly in the case of foreign fishing vessels operating in the EEZ under access agreements.

60. With regard to capacity-building, Mr Tahindro noted that the lack of a professional environment in some developing countries did not encourage fisheries scientists and fisheries managers to perform effectively in their respective areas of competence. He stressed that it was important that only those officers who actually participated in fisheries management should be permitted to participate in regional or global technical meetings. The Part VII Assistance Fund of the 1995 UN Fish Stocks Agreement could assist developing States Parties in this respect.

61. In discussion, the Consultation emphasized that assistance to developing countries would be essential to allow them to develop national capacity, MCS and other areas so that they could meet the criteria for flag State performance. It was recognized also that there was an obligation to cooperate in order to facilitate access by developing countries to fisheries, particularly to those managed by RFMOs.

62. The Consultation noted the value of self-assessment for developing countries to enable them to evaluate areas where strengthening of their own flag State performance could be necessary. Experts suggested that this self-assessment process could form the basis of a “gaps analysis” to structure the delivery of technical assistance.

63. The Consultation agreed on an approach for assistance to developing countries to improve their performance as flag States. It is reproduced in Appendix F.3.

SOME OPTIONS AND APPROACHES, FOR CONSIDERATION AT A TECHNICAL CONSULTATION, FOR THE DEVELOPMENT OF CRITERIA FOR ASSESSING THE PERFORMANCE OF FLAG STATES AND POSSIBLE ACTIONS AGAINST VESSELS FLYING THE FLAGS OF STATES NOT MEETING SUCH CRITERIA

64. The Expert Consultation agreed to recommend to the Technical Consultation that international guidelines on criteria for assessing the performance of flag States and possible actions against vessels flying the flags of States not meeting such criteria should be developed. An assessment process would be an important part of such guidelines. Noting the basis provided by international law for such assessments, the Expert Consultation agreed on the need for two processes (i) one for self-assessment and (ii) another for international or multilateral assessment. The latter must be undertaken in a spirit of cooperation and consistent with the 1982 UN Convention.

65. The Expert Consultation considered that a framework for review by a Technical Consultation, reflecting the outcomes of the Expert Consultation should include the following:

1. The context for assessing flag State performance, governance and IUU fishing:
 - (a) The basis for conducting assessments derived from the COFI mandate, the Canadian Expert Workshop and Expert Consultation.
 - (b) The relationship between flag State performance and international fisheries governance and the consequences of poor flag State performance that allowed for, or facilitated, IUU fishing activities.
 - (c) The goals and objectives of assessment, including the identification of gaps and areas for flag State improvement, self-reform and identification of targets for assistance to developing States.
2. Draft Criteria for flag State performance: Appendix F.1.
3. Processes for conducting assessment: Appendix F.2 (part 1).
 - (a) self-assessment, and
 - (b) international and multilateral assessment.
4. Post-assessment actions: Appendix F.2 (part 2).
5. Assistance to developing countries to improve their performance as flag States: Appendix F.3.

66. The Expert Consultation noted that further elaboration of elements of this framework, including the deliberation of relevant Appendices, would be required prior to the Technical Consultation, through the convening of technical working groups, the contracting of consultants or the holding of an additional Expert Consultation, as appropriate.

ANY OTHER MATTERS

67. There were no other matters.

ADOPTION OF THE REPORT

68. The Consultation agreed that the report should be circulated electronically for adoption. It was adopted on 13 October 2009.

Agenda

1. Opening of the session
2. Arrangements for the session
3. Selection of Chairperson
4. Adoption of the agenda
5. Report on the Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action, Vancouver, Canada, 25–28 March 2008
6. Development of recommendations for:
 - a. criteria for assessing the performance of flag States;
 - b. possible actions against vessels flying the flags of States not meeting the criteria for flag State performance;
 - c. the role of national governments in implementing criteria and actions for flag State performance;
 - d. the role of regional fisheries management organizations in implementing criteria and actions for flag State performance;
 - e. the role of international institutions and instruments in implementing criteria and actions for flag State performance; and
 - f. assistance to developing countries.
7. Some options and approaches, for consideration at a Technical Consultation, for the development of criteria for assessing the performance of flag States and possible actions against vessels flying the flags of States not meeting such criteria
8. Any other matters
9. Adoption of the report

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List of documents

EC:FSP/2009/1	Agenda and timetable
EC:FSP/2009/2	Criteria for assessing the performance of flag States
EC:FSP/2009/3	Possible actions against vessels flying the flags of States not meeting the criteria for flag State performance
EC:FSP/2009/4	The role of national governments in implementing criteria and actions for flag State performance
EC:FSP/2009/5	The role of Regional Fisheries Management Organizations in implementing criteria and actions for flag State performance
EC:FSP/2009/6	The role of international institutions and instruments, civil society in implementing criteria and actions for flag State performance
EC:FSP/2009/7	Assistance to developing countries
EC:FSP/2009/Inf.1	List of documents

Opening statement
by
Mr Ichiro Nomura
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FAO, Rome

Distinguished Experts, friends and colleagues:

On behalf of the Director-General of the Food and Agriculture Organization of the United Nations (FAO), Mr Jacques Diouf, it gives me great pleasure to welcome you to Rome for this Expert Consultation on Flag State Performance. Expert Consultations are an important means for generating robust and forward-looking technical advice that can serve as a solid foundation for the development of fresh approaches for the promotion of sustainable fisheries.

All experts are here in their personal capacity, and bring to the discussions unique professional experience and varying geographical perspectives. FAO is pleased that such an eminent group of people will be contributing to the process focusing on flag State performance as a possible means of combating illegal, unreported and unregulated (IUU) fishing.

We are all aware that under international law flag States have the primary responsibility to exercise effective control over their fishing vessels and ensure compliance with relevant laws and conservation and management measures. However, it has been of increasing international concern that the performance of many flag States in this regard is inadequate; they are either unable or unwilling to exercise effective control over their fishing fleets, many of which engage in IUU fishing activities in areas beyond the national jurisdiction of the flag State.

As a result of this situation, the burden to control these fleets, which has a high price tag, is shifted to other States, including coastal States, port States and members of regional fisheries management organizations and arrangements (RFMO). These States and RFMOs must develop human resources and compliance tools and implement them together with up-to-date mechanisms for legal, administrative, trade and other appropriate actions that can be taken to combat the IUU fishing activities by vessels flying flags of “non-compliance”.

A number of FAO Members addressed issues relating to irresponsible flag States at the twenty-seventh session of the Committee on Fisheries (COFI) in March, 2007. Many Members suggested the need to develop criteria for assessing the performance of flag States as well as to examine possible actions against vessels flying the flags of States not meeting such criteria. An expert consultation was proposed and, subject to the availability of funds, FAO was requested to further consider this possibility. The twenty-eighth session of COFI in March 2009 reconfirmed the call for the Expert Consultation and agreed that this meeting should be followed by a Technical Consultation, i.e. an FAO Forum for intergovernmental meeting.

In the meantime, an Expert Workshop, “Flag State Responsibilities: Assessing Performance and Taking Action”, held in Vancouver, Canada, from 25 to 28 March 2008, was hosted by the Government of Canada with funding support from the European Commission and the Law of the Sea Institute of Iceland and technical support from FAO. The preliminary work of the Canadian Expert Workshop was noted with appreciation by COFI. The resulting Report and Guidance Document will serve as a useful background to discussions at this meeting.

The Government of Canada is furthering the preliminary work undertaken in Vancouver by providing funding to support this Expert Consultation. We are all deeply grateful for this, and for their commitment to the development of international criteria and actions relating to flag State performance.

The objective of this Expert Consultation is to consider and make recommendations on:

- criteria for assessing the performance of flag States;
- possible actions against vessels flying the flags of States not meeting the criteria identified;
- the role of national governments, RFMOs, international institutions, international instruments and civil society in implementing the criteria and actions for flag State performance; and
- assistance to developing countries to assist them in meeting the criteria, taking actions and fulfilling their respective roles as appropriate.

The outcomes of your deliberations will be reported to a FAO Technical Consultation that will be held before the next COFI Session, subject to the availability of funding. The agenda before you is both broad and challenging, and involves the important task of elaborating new standards and measures that may eventually become part of “soft” or “hard” international law. I am confident that you will identify strong and sensible ways forward that will help combat IUU fishing in a concrete and realistic manner.

In conclusion, I wish you a productive and successful meeting and look forward to learning the outcomes of your discussions over the next four days. I hope that you will also be able to take some time to enjoy the culture and warmth of our Roman summer during your stay.

Thank you very much for your attention.

Papers presented at the Expert Consultation

- E.1 “Criteria for assessing the performance of flag States”, David Hogan
- E.2 “Possible actions against vessels flying the flags of States not meeting the criteria for flag State performance”, Rosemary Rayfuse
- E.3 “The role of national governments in implementing criteria and actions for flag State performance”, Gail Lugten
- E.4 “The role of regional fisheries management organizations in implementing criteria and actions for flag State performance”, Denzil Miller
- E.5 “Assistance to developing countries”, Fabio H.V. Hazin

Criteria for assessing the performance of flag States¹**ABSTRACT**

Assessing flag State performance can be an additional tool to address and combat illegal, unregulated and unreported (IUU) fishing activities, and can also assist flag States in improving their regimes. Such assessment should be based on comprehensive criteria that measure efforts and results in fulfilling the existing range of obligations and responsibilities existing in international law and relevant global, regional and subregional instruments and arrangements. These criteria should also be developed through a multilateral process that affords the opportunity to take into account the technical and legal nature of the relevant issues. This paper seeks to establish the context, aim and legal basis for developing criteria to assess flag State performance, and suggests some general criteria, based on prior discussions amongst experts, that can serve as the basis for deliberation and further elaboration by the international community.

BACKGROUND

1. International fisheries governance has evolved in a number of key directions, at times simultaneously, in order to address the nexus of challenges facing fishing, coastal and market States as they seek to combat illegal, unreported and unregulated (IUU) fishing activities that contribute to overfishing and undermine effective fisheries conservation and management. Over the last two decades, the recognition of the need to address the multiple facets of IUU fishing has resulted in steps being taken at the global, multilateral/regional, subregional and national levels to find or develop methods that can begin to identify the actors, biological and ecosystem impacts, and market implications for IUU fishing activities and their products, and to use this information to craft tools to combat these highly detrimental activities.

2. The concept of flag State assessment is one of the more recent efforts to address one aspect of IUU fishing, but it appears to be an initiative that has potential to be more broadly applied beyond only IUU fishing and address more fundamental issues of oceans and fisheries governance. Examining this in the context of identifying options for assessment activities and criteria leads to the discussion of accountability for all flag-State responsibilities, stretching from preventing and addressing IUU fishing to acting responsibly within modern context of fisheries conservation, management and resource stewardship, as well as the multiple legal reference points that apply, in different configurations for different States, almost wherever vessels fish.

3. The breadth of existing flag State responsibilities is well documented in the international instruments that set out fisheries norms, whether they are legally binding treaties or voluntary arrangements. These collectively include instruments such as the 1982 UN Convention on the Law of the Sea (UNCLOS), the 1995 Agreement for the Implementation of the Law of the Sea Convention Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA), the 1993 Agreement To Promote Compliance With International Conservation And Management Measures By Fishing Vessels On The High Seas (Compliance Agreement) and the Code of Conduct for Responsible Fisheries (CCRF). Added into this are regional and/or multilateral obligations derived from either legally binding or voluntary measures adopted by Regional Fisheries Management Organizations (RFMOs). In addition, there are other non-binding agreements, arrangement and guidelines that help to comprise the “soft law” responsibilities for flag States, such as the FAO international plans of action (IPOAs) and similar instruments.

¹ This paper was prepared by Mr David Hogan, Deputy Director, Office of Marine Conservation (OES/OMC). The views expressed in this paper are solely those of the author acting in his personal capacity and are reflective of the author’s personal experiences and interactions; they are not to be considered policies or positions of the United States Government.

4. For many flag States the range of obligations and responsibilities is addressed via differing national legislative and regulatory structures. For example, States vary in terms of the approach they take to their maritime registries (open, closed). They also vary in the level and degree of authority provided by their central government to the agencies and authorities with responsibility for overseeing the operation of fishing and support vessels. These agencies and authorities then vary in approach to carrying out their mandate, ranging from nominal licences or permits to comprehensive regimes for documentation, safety inspection, and monitoring, control and surveillance (MCS) programmes. States also frequently have responsibilities split between agencies within a national framework. In some cases, legislation and regulations that govern the fisheries sector, and in particular the authorities invested in maritime and fishing agencies, lag in time behind the current policy environment and may reflect outdated approaches and obsolete values (i.e. penalties for violations that are not maintained over time in real terms).

5. The characteristics of their fishing fleets, and other vessels that comprise their fishing operations, vary widely as well, from near-shore fleets that include artisanal vessels that may not be required to be flagged, to large-scale, industrial distant-water fishing vessels. While some States may have a well-defined and implemented fisheries development strategy, often the current suite of measures, structures and other efforts for implementation of flag State responsibilities is ad hoc.

AIM

6. In such circumstances, flag States that do not fulfil or maintain their responsibilities or adapt their regimes over time, for whatever reason, become attractive to vessel operators that seek to operate in an environment of little or no control by the flag State. This desire to operate without oversight can be a manifestation of the tendency for fishers to be independent, but most often it is a business decision taken to facilitate activities and behaviours that comprise elements of IUU fishing. While assessing flag State performance can assist flag States in improving their practices and approaches in order to eliminate them as attractive flag States for potential IUU fishing, it can also be useful in identifying those States that either are unaware that they are facilitating IUU fishing through their policies or inaction, or that do not place a priority on correcting those circumstances. This can then allow for focusing additional scrutiny and pressure, as well as direct action where and if warranted, by the international community with a view towards closing any gaps.

7. In addition to combating IUU fishing, there are other bases for pursuing flag State assessments. Many, if not most, of the general flag State responsibilities apply to all flag States, yet because of their varying conditions and approaches, inherent cohesiveness between flag States in terms of their capacity and motivation to execute flag State responsibilities is difficult to expect. And with those responsibilities come costs associated with government actions to implement them, as well as operating costs for the private sector in complying with government requirements.

8. Politically, when a government agency must take on these responsibilities, and their sectors must comply with them, they expect that other States and their agencies and sectors will do the same, regardless of the differences in internal legal or other frameworks, or lack of capacities. In fact this reciprocity is itself viewed by some States as a responsibility, or even a moral obligation. This is particularly true in the case of common resources such as high seas fisheries (beyond areas of national jurisdiction) or fisheries for shared and/or transboundary stocks.

9. Actions by governments to exert control over vessels, document, licence or permit them, and adjudicate any problem behaviour require resources, including funds, personnel and time. Actions by the private sector, including vessel owners and operators, to comply with governmental requirements include both financial costs as well as opportunity costs.

10. For example, if the requirements include abiding by fisheries conservation and management measures, either national or multilateral, that call for vessels or companies to forego fishing opportunities, those that are compliant are not harvesting resources and/or converting them to

revenue. Vessels or companies that do not follow that same course of action due to inadequate flag State control regimes and/or a lack of a credible deterrent for non-compliance can continue to harvest or utilize the fishery resources. Any disparity between States, and between the costs that arise from a lack of action or fulfilment of their flag State obligations and responsibilities, whether unintentional or otherwise, creates an inequity that can lead, under certain circumstances, to disadvantages to States whose nationals, vessels and products compete for resources or markets.

APPLICABILITY

11. In terms of applicability, because the right to fish, concurrent with the responsibility to cooperate by generally acting in concert with international norms and obligations, is shared by all States, any State that flags vessels to fish on the sea may be considered eligible for assessment of their performance. This may not necessarily be limited to only those vessels that fish on the high seas. In the case of shared transboundary stocks and highly migratory stocks that can be fished within zones of national jurisdiction as well as on the high seas during their migration, the actions or inactions of a flag State, and any resultant lack of compliance with and implementation of international obligations, can have an impact without their vessels leaving their zones.

LEGAL BASIS

12. The legal basis for taking steps to assess vessel compliance, and subsequently flag State performance, is both implicit and explicit. With the obligation under UNCLOS to cooperate internationally for the conservation and management of common living marine resources, and in light of the numerous established flag State responsibilities reiterated in many hard and soft law fisheries instruments, there is a tacit responsibility to manifest or be accountable for such cooperation, and therein lies the implicit authority. Flag State performance assessment is a measurement of cooperation.

13. If adopted by an international body such as a RFMO, a performance assessment process can also be explicitly authorized, either in a legally binding way or as a voluntary process, depending on how the RFMO approaches the topic. Though no RFMOs have formally instituted such a process, it is already underway in an iterative or incremental way through compliance committees, or similarly-functioning subsidiary bodies, within the RFMOs, though many of those types of bodies examine compliance only with parochial, specific RFMO measures without rendering broader judgments on overall flag State performance. This is also the case where a RFMO may have adopted a measure calling on members to implement trade measures for States identified as having undermined the applicable conservation and management rules of the RFMO, including by the actions of its vessels.

OPTIONS FOR CRITERIA DEVELOPMENT

14. In examining the options for development of the criteria, a number of questions and points are raised that are relevant to, and provide the context for, promulgation of such criteria. Many of these aspects were discussed and elaborated in the expert workshop that provided source material for this follow-on international work.

15. Criteria can be, and arguably should be, based on both effort and results. They should take into account the steps “on paper” that States take to implement, codify, or otherwise incorporate into their national regime(s) the principles of international law and their consequent operational requirements and restrictions. This should be done in a way that not only makes an explicit link between the existing framework of obligations and the expression of the State to fulfil those obligations but by also making them applicable to their own fleets and governmental agencies.

16. The creation of that explicit link in developing laws, regulations, policies, and directives is necessary, but is only a first step. It is a representation of political will to meet flag State obligations insofar as it is backed up by the sequential and incremental steps and results that together must be

evaluated in consideration of overall flag State performance. The efforts made in the creation of legal tools should be optimized by the use of those tools, including the willingness and legal authority to not only create and implement a regulatory framework governing the actions of vessels, but to investigate and adjudicate any potential infractions of national or international rules.

17. The use of such tools should be taken up in concert with a range of actions and mechanisms that reflect contemporary flag State MCS. Whether this is within the administrative purview of fisheries or other maritime organizations, the ability to collect information on the behaviour of the fishing vessels that are subject to the regulatory framework is the only way to make it effective. However, this is often a resource-intensive component of a flag State's responsibilities and thus is implemented in some cases through multilateral efforts.

18. The use of legal tools should also be supported by a real-world penalty schedule for violations. Relying on antiquated frameworks that have not been maintained in contemporary terms (relative or specific monetary amounts for fines or other civil or criminal penalties) can render adjudication of violations ineffectual or obsolete in the context of inflation, the price of the fish harvested, and the costs of the fishing operation (costs of doing business), and thus provide no real punitive and/or deterrent effect.

19. For those States that flag vessels for high seas fishing operations, and more importantly distant-water fishing activities, there are additional efforts that should be made to make effective any MCS activities. While vessel monitoring systems are an adequate method to track the location of vessels, there are many cases of high-seas and distant-water fleets where the fishing activities and port visits (for landing catch or other purposes) are far from flag State jurisdiction. In many cases they are outside the adjacent high seas areas or areas of competence of the closest regional RFMOs, if not in entirely separate oceans. MCS measures traditionally relied upon for adjacent waters can prove less than adequate in such circumstances, and a system or programme for inspections, whether in foreign ports or upon mandatory flag State port visits (for coastal States), may be necessary or advisable.

20. By creating a regime that appears to include measures for a significant range of flag State oversight, a flag State could present a picture of implementation of flag State responsibilities and obligations that on its face appears to be adequate relative to other countries and the provisions of the applicable international legal instruments. However, the nature and scope of application of the regulatory regime is also important, as well as the willingness and ability of the flag State to continually assess its own performance, analyse the continuing relevance of its regime in a very dynamic environment of international fisheries, and take steps to maintain the effectiveness of its regime.

21. In an external assessment of flag State performance, it is therefore necessary to examine and analyse the behaviour of the flag State's fleet, even in some cases down to individual vessel performance and behaviour, as well as the flag State's reactions to such behaviour and any subsequent policy or operational adjustments, in order to determine the actual effectiveness and adaptability of the efforts that a flag State may take. The results of those efforts, in the context of their sophistication and use, will provide a better and more useful indication of areas of success of the flag State, and actions that may be necessary to correct deficiencies that allow for or even facilitate negative behaviour such as IUU fishing.

22. Such a detailed examination may become difficult in a data-poor environment, particularly when the flag State may not be cooperating with or otherwise positively or voluntarily engaged in the external assessment. Therefore, any assessment procedure may benefit from some protocols that indicate when a vessel-by-vessel review may be necessary or useful to the overall flag State assessment. In some cases, thresholds for additional policy or enforcement attention have been established based on a finding that there is a pattern of infractions, based upon repeated or multiple infractions within a defined time frame. This may be useful in to take into account when establishing the terms of reference for any flag State performance assessment.

FRAMEWORK AND IMPLEMENTATION

23. While it is clear that the fundamental basis of a flag State performance assessment should be criteria that provide a measurement of the flag State's actions, the initial or primary development of general or standardized flag State performance criteria may be, and arguably should be, a process that precedes and is separate from the development of an assessment process itself and its implementation, either or both in terms of timing or venue. In order for the highest level of confidence that criteria will be equitable, comprehensive and objective, the debate over the criteria should be taken up in a multilateral forum where there are no specific targets already in mind, or at least none previously identified to which the criteria under development would be immediately applicable. While the international fishing community has already taken steps to identify specific IUU vessels or States in the context of national or multilateral exercises, such as the IUU lists generated by RFMOs, there is not yet a comprehensive flag State assessment process under way in the sense that is discussed in this paper. In that light, and prior to the initiating of any formal process, particularly in a multilateral forum, it would be valuable to establish a framework of criteria that is developed through multilateral discussion in a form that has recognized technical competence to address fisheries matters. This should be done in a way that also brings in the transportation, international law and socio-economic considerations that may be relevant. A process such as the envisioned Technical Consultation under the FAO, or a similarly relevant global forum with broad participation from coastal and fishing States and experience in matters of legal and operational implementation of common resource conservation, management and other governance issues, would be appropriate to establish the general criteria and any process considerations that should serve as the basic framework to be taken into account when any international or national entity develops a flag State assessment procedure.

24. An example of a similar approach was the recent initiation of tuna RFMO performance assessments, which were based on a common set of criteria that were developed, based on international law and guidance, through multilateral consultation and debate prior to implementation at the regional level.

25. Given the nature and legal basis for the criteria, and in the context of an international process to develop and articulate such criteria, it would be difficult to establish a widely accepted prioritization of the broad range of criteria that may be considered. Instead, it would be most useful if the general criteria were comprehensive in scope and relevance, leaving the prioritization or weighting to the entity that may decide to take up the challenge of implementing a flag State performance assessment procedure on its own terms, taking into account procedural aspects such as due process.

26. Different entities may have different concerns or approaches with regard to flag State performance. A RFMO process may focus on national implementation of its multilateral measures. A port State process may focus on safety, pollution controls, permitting/licensing, catch documentation and similar considerations. Therefore, a comprehensive framework that could provide the basis to draw conclusions on flag State performance under a wide range of application, and be adaptable to specific circumstances, is preferable.

EXAMPLES OF CRITERIA

27. In considering a general set of criteria, taking into account the need for evaluating both the efforts at creating a regulatory regime and the results and behaviour, it may be useful to consider three categories of flag State performance for both the effort- and results-based criteria: international stance; national vessel registry; and national fisheries regime. The following general criteria, based closely on those previously discussed in preceding expert fora, are organized within that context.

Broad range of regulatory criteria identified

International stance

28. The State is a party to key international instruments, or accepts and commits to implement them, or the State commits to implement, at minimum, the flag State provisions contained in the:

- UNCLOS;
- UN ; and
- FAO Compliance Agreement.

29. Other possible instruments to consider in this context, as indicators of related international commitments:

- International Convention for the Safety of Life at Sea (SOLAS) and other relevant International Maritime Organization (IMO) instruments;
- United Nations Convention on the Registration of Ships; and
- Torremolinos Protocol.

30. The State has incorporated the international commitments that are embodied in soft law or political commitments into its domestic laws, regulations, policies and/or practices.

31. For high seas fisheries where its vessels fish or with which it shares stocks within its areas of jurisdiction, the State is a member of or participates in regional fisheries management organizations/arrangements (RFMO/As), or the State accepts and implements the conservation and management measures adopted by the RFMO/A.

32. For fisheries in waters within the national jurisdiction of others, the State has access agreements with coastal States or has mechanisms to verify that its vessels operate under due authorization of the coastal State.

33. The State participates in international organizations or other relevant fora in relation to international fisheries governance (e.g. FAO, IMO, Organization for Economic Cooperation and Development (OECD), etc.).

National vessel registry

34. Minimum information requirements are followed, such as:

- vessel data meet minimum FAO requirements regarding vessel markings;
- information on owner/operators can identify effective beneficial owners/operators; and
- information on the history of the vessel can identify prior flag/name changes.

35. Registration procedures are followed, which include:

- verification of history and grounds for refusal of registration (including that the vessel is on an IUU vessel list or record, or is registered in two or more States);
- de-registration procedures;
- notification of changes and/or regular update requirements; and
- coordination of registration amongst relevant agencies (e.g. fisheries, merchant marine) and with prior flag States (to determine whether there are pending investigations or sanctions that may provide a motive for flag-hopping).

36. The registration procedures are transparent.

National fisheries regime

37. An institutional, legal, technical foundation/framework for fisheries management has been established (such as that referred to in Article 7.1 of the FAO Code of Conduct for Responsible Fisheries), that could include:

- government agency or statutory authority or statutory oversight of an agency or a body with a clear mandate and accountability for the results of fisheries management policy;
- agency authority to issue regulations and ensure control and enforcement;
- internal organization for interdepartmental coordination, in particular coordination between fisheries authorities and vessel registry operators; and
- scientific advice infrastructure.

38. Conservation and management measures are in place, which could comprise:

- internationally agreed measures (e.g. relevant provisions of UNGA Sustainable Fisheries Resolutions or various FAO guidelines and any applicable RFMO measures); and
- a national framework for addressing capacity and IUU fishing (e.g. having national plans or programmes to reduce fleet capacity and to combat IUU fishing).

39. A regime for authorizing (e.g. licensing) fishing activities is in place which includes:

- appropriate scope for authorization of fishing and fishing-related activities within and beyond areas of national jurisdiction;
- prior assessment of a vessel's capacity to comply with applicable measures, including assessment of actual capacity; and
- minimum information requirements (paragraph 46 of the IPOA-IUU) that allow identification of accountable persons.

40. A monitoring, control and surveillance (MCS) regime is in place, (such as that referred to in Article 3 of the FAO Compliance Agreement and Article 18 of the UNFSA), that could include:

- legal power to take control of the vessel (e.g. denial of sailing, recall to port, etc.);
- establishment and maintenance of a fishing vessel record;
- monitoring tools available, such as vessel monitoring systems (VMS), logbooks/documentation, observers, etc.;
- mandatory requirements regarding fishery-related data to be reported by vessels (catches, effort, bycatches and discards, etc.);
- inspection regime, including at sea, at port, and at customs clearance; and
- regulation of transshipments.

41. An enforcement regime is in place, which could include:

- ability to investigate violations;
- appropriate system for the treatment of evidence;
- a system of sanctions that should provide for adequate types and levels to ensure deterrent effects and deprive offenders of benefits; and
- information sharing/reporting arrangements with other States relating to enforcement, including the timeliness of action following requests for assistance.

Behavioural criteria

International stance

42. The State effectively contributes to the functioning of the RFMO in which it participates (i.e. the State implements its duties as a contracting party or as a cooperating non-party, including reporting requirements on fishing activities and on compliance by its vessels).
43. The State contributes to joint control and enforcement efforts, where required.
44. The State takes action in respect of identified IUU fishing vessels as required by the RFMO/A relevant measures.

National vessel registry

45. The national registry is regularly updated through timely reviews and updates.
46. Verification of vessel history/record is effectively carried out prior to registration and vessels determined to be engaged in IUU fishing activities or vessels with multiple registrations are refused.
47. The State cooperates with other States by exchanging information on reflagging vessels (both as part of the procedure to verify a vessel's history/record to register and in relation to vessels leaving its registry).
48. Registry data are available to all internal government users, particularly fisheries and vessel authorities.
49. Violations are sanctioned before resorting to deflagging.

National fisheries regime

50. The State's national laws and regulations are effectively implemented.
51. Conservation and management measures are effectively implemented, including:
 - the flag State ensures that the obligations incumbent upon the fishing vessel operators and crews are clearly accessible, transparent, and effectively communicated. It provides (technical) support to the fishing community in this respect; and
 - the flag State effectively manages capacity and allows deployment consistent with the level of fishing possibilities available.
52. A regime for authorizing (e.g. licensing) fishing activities is effectively implemented, which includes:
 - fishing authorizations are only issued when the flag State is satisfied that the holder is within reach of its enforcement jurisdiction;
 - the flag State effectively verifies the vessel's capacity to comply as a condition for issuance; and
 - where required, the flag State implements any other ex ante verifications (e.g. assessment of potential impacts of bottom contact fishing on vulnerable marine ecosystems).
53. A MCS regime is implemented, that could include:
 - fishing vessel record is kept current through regular, timely updates;
 - fisheries data are collected, processed and verified in a timely manner; and

- effective use of control means available.

54. An enforcement regime is implemented, that could include:

- diligent gathering and treatment of evidence regarding violations; and
- violations are investigated and procedures for sanctions initiated in accordance with domestic laws in a timely manner.

CONCLUSION

55. The development, and equitable, transparent and non-discriminatory use of criteria to assess the performance of flag States, and in so doing identify under-performing or non-compliant States, is a valuable, if not necessary, step in the international community's efforts to quantify and act against the circumstances, drivers and harm of IUU fishing, but it should not be seen only as an IUU tool. Instead, it can serve to help flag States improve their performance or identify systemic or political weaknesses that may not rise to the level of problems that IUU fishing resents but may still be detrimental to national or regional governance. From this perspective, the discussion and development of criteria, and the discussion and development of assessment procedures to apply those criteria, should be undertaken with a view toward generating a versatile and flexible system that not only can help to further constrain IUU fishing, but provide the basis for all States to continue to improve their own regimes in the spirit of cooperation and collaboration that must serve as the basis for any international success at meeting the challenges of effective and responsible fisheries conservation and management.

APPENDIX E.2

**Possible actions against vessels flying the flag States not meeting the criteria
for flag State performance¹**

ABSTRACT

It is a fundamental principle of international law that States are obliged to comply with their international obligations. Assessing flag State performance is a necessary element in determining whether flag States are complying with their international obligations and in determining what actions may be taken by other States in response to failures to comply with those obligations. However, assessing flag State performance for the purpose of determining legal consequences against States and their vessels requires objective assessment processes that comply with the requirements of due process. This paper discusses possible structures for assessment processes and then considers what actions may be taken, in what circumstances and by whom against States or vessels of States which fail to comply with the international obligations incumbent on flag States.

INTRODUCTION

1. According to the 2008 Report of the Secretary General on Oceans and the Law of the Sea, “there is now a prevailing view that fishing vessels on the high seas which are not effectively controlled by their flag States are liable to sanctions by other States should they happen to contravene international conservation and management measures”.² It is therefore necessary to assess the performance of flag States and to determine what actions can be taken by non-flag States in circumstances where the flag State has not adequately fulfilled its obligation of effective control.

2. In 2007, the FAO Committee on Fisheries (COFI) requested FAO to convene an expert consultation to:

- (1) develop criteria for assessing the performance of flag States; and
- (2) identify actions that can be taken against vessels flying the flag of State not meeting these criteria.³

This call was reiterated by the UNGA in 2007 and 2008.⁴

3. The substantive criteria for flag State performance will be addressed in other papers submitted to the Consultation. This paper addresses only the following issues:

- mechanisms for ensuring international due process in the assessment of flag State performance;
- actions that may be taken against States not meeting the criteria for flag State performance;
- actions that may be taken against vessels of States not meeting the criteria for flag State performance; and
- options for resolving disputes.

¹ This paper was prepared by Professor Rosemary Rayfuse, Faculty of Law, University of New South Wales. The views expressed in this paper are those of the author and do not necessarily reflect the views of FAO or of any of its Members.

² Report of the Secretary General on Oceans and Law of the Sea, UN Doc A/63/63, 10 March 2008, para. 249.

³ UNGA Resolution on Sustainable Fisheries, UN Doc A/62/177, 28 February 2008 para. 41; UNGA Resolution on Sustainable Fisheries, UN Doc A/63/112, 24 February 2009 para. 46.

⁴ FAO. 2007. Report of the twenty-seventh session of the FAO Committee on Fisheries. Rome, 5–9 March 2007; FAO Fisheries Reports No.830. 74p.

4. Many of these issues are extensively addressed in the Guidance Document which was prepared as an outcome of the Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action which was hosted by the Government of Canada in March 2008 and which, it is understood, will be submitted to this Consultation. This paper attempts to elaborate on portions of that document.

5. Before doing so, however, it is useful to consider the purposes of establishing detailed criteria for assessing flag State performance. In this respect it is imperative to remember that the rights to flag vessels and to fish, and their concomitant duties, are given to States, not to individuals or to vessels. It is trite, but nevertheless useful, to reiterate the basic, immutable proposition that States are obliged to comply with the international obligations incumbent on them as a matter of both conventional and customary international law. While there may be a presumption of compliance, that presumption is clearly rebuttable. Indeed, the continuing incidence of IUU fishing is testament to the continuing inability or unwillingness of at least some flag states to comply with their obligations to effectively control their vessels, to cooperate in the conservation and management of marine living resources and to prevent, deter and eliminate IUU fishing activities.

6. As a matter of principle, the underlying objective of any flag State performance assessment must be to assess a flag State's performance for the purpose of the application of the basic rules on State responsibility. While States may have the right to grant their flag, the public order of the oceans and the principles of equality of user, due regard and the duty to cooperate in the conservation of marine living resources, require the exercise of a reciprocal duty to effectively control their vessels and exercise jurisdiction over them in situations where the actions of their vessels interfere with the interests of other States. Thus, only those States which effectively control their vessels enjoy the freedom to fish. Where a flag State is unable or unwilling to effectively control its vessels it should decline to grant its flag. Grant of flag followed by a failure of effective control means the flag State has failed in its duty to exercise its responsibility and jurisdiction effectively, and the flag State will be internationally responsible to other States which then acquire a reciprocal right to take action. Assessing flag State performance against known criteria will assist in providing certainty for States in determining issues of State responsibility, avoiding and minimizing conflict, and enhancing the robustness of international governance and respect for the rule of law in the international order.

7. As a practical matter, the ultimate⁵ objective of assessing flag State performance must be to identify situations where a flag State has breached its international obligations by failing to meet the criteria required of a responsible flag State, thereby establishing the circumstances in which a State other than the flag State (a non-flag State) can take action either against the flag State or against the flag State's vessels, or both, to prevent, eliminate or deter IUU fishing or to otherwise protect either its interests or the interests of the international community as a whole in the conservation and sustainable long-term management of marine living resources.

8. As a first step, assessing flag State performance requires identification and articulation of the detailed content of the general duties of cooperation and effective control that are incumbent on a flag State and against which its performance will be measured. It is worth noting that a complex patchwork of different levels of responsibility and differing obligations of effective control may arise as a result of the differing treaty relations of States. While not specifically mentioned in the COFI mandate, and not considered further here, a statement articulating the flag State duties that are also now considered to be binding on all States as a matter of customary international law would be a useful tool in ensuring the robustness of assessments of flag State performance.

⁵ Other objectives may be to identify lacunae in flag State performance for the purpose of determining what assistance other States can give to flag States which are not able to meet their obligations due to lack of capacity. This issue is dealt with in other papers being prepared for this Consultation.

9. In addition, it must be remembered that it is the flag State's performance which is being assessed, not that of individual vessels; and it is the State which bears the consequences of a failure to meet its obligations. It is, however, necessary to distinguish between the consequences of a flag State's failure to meet its obligations in respect of individual infractions by individual vessels and the consequences of a consistent pattern of failure on the part of the flag State. The former situation may result in immediate consequences for individual vessels. However, this is in contradistinction to the consequences of a consistent pattern of failure on the part of the flag State which will result in longer term consequences for both the flag State and all its vessels.

10. The terminology of "flag of non-compliance" (FONC) is gaining currency as a descriptor for States which are determined to have exhibited a consistent pattern of failure and against whom action may be taken by other States.⁶ This term is useful as it can apply to any State which fails to comply with its international obligations. In this respect it is more precise in the legal sense than the terminology of IUU fishing. The term is therefore used in this paper.

ASSESSING FLAG STATE PERFORMANCE: MECHANISMS FOR ENSURING INTERNATIONAL DUE PROCESS

11. Assessing flag State performance for the purpose of determining legal consequences against States and their vessels requires objective assessment processes. Three types of processes can be identified: self-assessment, unilateral assessment or multilateral assessment.

12. Self-assessment (which may also be considered a form of unilateral assessment) involves an assessment by the flag State itself. It is a fundamental aspect of statehood that States are expected both to know and to comply with the international obligations incumbent on them. Self-assessment will therefore be particularly useful in assisting States to identify shortcomings in their own performance and areas of political, technical or financial inability or incapacity for which assistance can be sought from other States or from international organizations. The possible existence of obligations on non-flag States to assist flag States to meet their obligations will be discussed in other papers presented to this Consultation. Beyond this, however, self-assessment alone is a process potentially fraught with subjectivity. Moreover in failing to encompass considerations of the rights and interests of other States self-assessment does nothing to progress the enquiry as to what actions other States can take to protect their own interests where a flag State has failed to meet its obligations.

13. Unilateral assessments encompass assessments by any non-flag State whose rights and interests are implicated. This may include a coastal State, a port State, a market State, an individual member of an RFMO, or any other member of the international community, all of whom are themselves obliged to cooperate in the conservation and management of marine living resources and to implement the conservation and management measures adopted by RFMOs to which they are a party. Unilateral assessments will be relevant in situations where immediate action may be required in response to individual instances of flag State failure in response to individual vessel infringements. However, it is also open to individual non-flag States to form an opinion as to flag State performance on the basis of a consistent pattern of flag State behaviour over time and to take action accordingly. Unilateral assessments may also be fraught with subjectivity, this time on the part of the assessor rather than the assessed. Thus, while, the requirements of reciprocity, peaceful co-existence of States, and the possibility of adverse political or legal ramifications will operate in most, if not all, cases as a check on abuse, guidelines as to the recommended process will be most useful in ensuring equitable, fair and consistent unilateral assessments.

14. Multilateral assessment processes involve assessments of flag State performance by regional fisheries management organizations or arrangements (RFMOs) or other international organizations and are aimed at identifying both individual instances of non-performance as well as patterns of non-

⁶ The term appears to have originated in 2002 in the Commission on the Conservation of Antarctic Marine Living Resources.

performance over time. Given the multilateral nature of these processes they can be particularly useful in ensuring objectivity in determining whether the flag State has demonstrated a consistent pattern of non-performance. In this respect they are most effectively used in conjunction with self-assessments and unilateral assessments. However, these processes may be lengthy, time consuming, complicated, and may, where a consensus decision-making model is employed, be open to abuse by flag States which are able to block a consensus decision against themselves or their vessels. In addition, while these processes already exist in various forms in a number of RFMOs there is a lack of uniformity of mandates and a lack of universal application. Moreover, although some RFMOs are now cooperating in the production and sharing of IUU vessel lists from which FONC States can be identified, this level of cooperation is not yet global. Detailed guidelines establishing uniform and universal best practice in the design and application of multilateral assessment processes will decrease the burden on States of reporting obligations and assist in ensuring consistent outcomes globally.

15. For each of these processes an effective mechanism is necessary. Particularly in the context of unilateral and multilateral, or inter-State, assessments, mechanisms must embody internationally recognized principles of due process and natural justice. The concept of “due process” is more generally associated with the procedural requirements for ensuring respect for the legal rights of individuals. Fundamentally, due process guarantees are aimed at ensuring openness, impartiality and fairness.⁷ In short, a person must know the case against them and must be provided appropriate rights of representation, reply, and appeal as well as compensation in the case of arbitrary or otherwise wrongful arrest or detention. Due process guarantees operate together with the principles of natural justice, including the principle, *nemo debet esse iudex in propria causa* (no one may be a judge in their own case), to ensure transparency and accountability in legal proceedings.

16. Due process and natural justice obligations also apply in the inter-State context where international law further imposes requirements of proportionality, non-discrimination, good faith and a prohibition on abuse of rights.⁸ Extrapolating from these general principles, a framework for international due process in the context of inter-State assessments of flag State performance will require the following:

- a. the flag State must be informed immediately of the nature of any alleged shortcoming or breach by its vessel, must be provided with the available evidence, must be asked to rectify the situation and must be advised of the potential consequences of a failure to rectify the situation;
- b. the flag State must be provided a “reasonable time” in which to respond and to effectively exercise its jurisdiction or otherwise rectify the situation (for example by requesting another State to exercise jurisdiction on its behalf);
- c. the flag State must be given a fair and public opportunity to explain its actions (or lack thereof);
- d. however, the flag State must not be able to block consensus on whether the flag State has met its obligations;
- e. any determination made against the flag State must be made public;
- f. any action taken against a flag State or its vessels must be carried out in accordance with international law and must not be arbitrary, disproportionate or discriminatory;
- g. the flag State must be able to contest the determination through an international dispute settlement procedure;

⁷ International Covenant on Civil and Political Rights, Articles 9, 14 and 15.

⁸ Examples of these later requirements are found in the Law of the Sea Convention in, for example, the requirement that coastal States not discriminate in form or in fact against vessels of any State engaged in innocent passage (Art. 24), liability for seizure of a vessel suspected of piracy without adequate grounds (Art. 106) and the requirement that States fulfill their obligations in good faith and exercise their rights in a manner that does not constitute an abuse of right (Art. 300). These latter requirements are fundamental rules of customary international law, now codified in the Vienna Convention on the Law of Treaties.

- h. the flag State must receive reparation (ie, apology, satisfaction, compensation) if it is found that the action or the determination was unwarranted;
- i. any adverse determination must be reversed once it is established that the flag State is complying with its obligations.

Applying these general principles, it is possible to envisage more specific assessment processes.

Self-assessment

17. For the purposes of self-assessment, in order to ensure compliance with its international obligations on an on-going basis, flag States should be encouraged through the adoption of guidelines or the design of model legislation to establish institutional structures capable of coordinating and carrying out regular, ongoing reviews of that State's performance against the established criteria for flag State performance. Design of a common reporting format would increase the utility of these assessments at both the national and international level. As with reporting obligations under various international treaty regimes, self-assessment reports should contain a description of the international obligations binding on the State and the measures the State has introduced to ensure that these obligations are being implemented and effectively enforced. By way of guidance, a self-assessment report should include information on, *inter alia*:

- the relevant treaties or other arrangements to which the flag State is party;
- flagging, licensing and permitting requirements;
- data collection, catch monitoring and reporting programmes including observer programmes;
- implementation of or compliance with international conservation and management measures;
- implementation of catch documentation and trade tracking schemes, trade related measures including import and export controls;
- surveillance and enforcement programmes, including VMS, port controls, at-sea and dockside inspections;
- prosecutions in response to non-compliance and sufficient sanctions to support effective enforcement;
- participation by the flag State in technical assistance and capacity building programmes to address non-performance and enhance enforcement;
- participation by the flag State in voluntary international efforts to combat IUU fishing and other activities that undermine international conservation and management of marine living resources;
- participation by the flag State in RFMOs;
- the flag State's responses to IUU fishing and other activities that undermine international conservation and management of marine living resources; and
- cooperation with other governments in enforcement, apprehension and prosecution of any of its vessels which are engaged in IUU fishing or other activities that undermine international conservation and management of marine living resources.

Where a flag State implements alternative measures to those agreed internationally, the onus will be on the flag State to establish that these alternative measures are equally as effective as those required internationally.

Unilateral assessment

18. In the context of unilateral assessments all States should be encouraged, through the design of guidelines or model legislation, to establish detailed procedures for determining whether a flag State is a FONC. As a first step this requires a process to identify whether the vessels of a flag State have engaged in IUU fishing or other activities that violate the rights of that State as coastal, port, market, or other State, or otherwise undermine international measures for the conservation and management of marine living resources. The flag State must then be notified and encouraged to take corrective action to address the particular instance or instances of violative conduct. Any corrective action taken should be considered in deciding whether to proceed with the analysis of whether the flag State has

failed in its performance. If the analysis does proceed then corrective action, or the failure to take appropriate or adequate corrective action, should be considered along with the following factors in determining whether the flag State has adequately performed its obligations:

- whether the flag State has implemented and is enforcing measures that are comparable in effectiveness to international standards and to the standards implemented by the assessing State;
- whether the flag State is party to or a cooperating non-party to a relevant RFMO;
- whether or not the RFMO has adopted measures that the assessing State considers to be effective in addressing IUU or other activities that undermine conservation and management of marine living resources;
- if such measures exist, whether the flag State has implemented and is enforcing them; and
- whether adequate enforcement measures and capacity exist in the flag State to help promote compliance.

19. If the assessing State is satisfied on the basis of this enquiry that the flag State has not failed to meet the requisite performance criteria then the matter will go no further. If, however, the assessing State is not satisfied with the corrective action taken or with the ability or willingness of the flag State to meet its obligations then it may formally identify the flag State as a potential FONC. Procedures are then necessary *inter alia* to:

- notify the flag State, and other interested States and RFMOs of the determination;
- engage in consultations with the flag State aimed at encouraging relevant corrective action; and
- receive and assess information from the flag State on any corrective action taken.

Where a flag State fails to respond or to take corrective action a final determination may be made that the flag State is a FONC against whom the assessing State may then take further action.

20. In making its determinations, the assessing State should utilise a full range of evidentiary sources including, but not limited to, government agencies, foreign governments, international organizations (including but not limited to RFMOs), non-governmental organizations, industry groups, port inspectors, military, enforcement personnel, on-board or in-port observers, catch certification and other documentation programmes and private persons. However, care should be taken to ensure the credibility, veracity and reliability of the evidence relied upon. Unreliable, uncorroborated or inaccurate evidence must be rejected.

21. In addition, care must be taken to ensure that consideration is given to the extent to which corrective action taken by the flag State has effectively deterred future non-compliance and to any subsequent action by the flag State aimed at assisting it to improve its performance such as, for example, requests for assistance in building fisheries management and enforcement capacity.

22. Finally, a mechanism must be established to ensure that determinations that a flag State is a FONC are reviewed on a regular basis and reversed should the flag State subsequently become compliant.

Multilateral assessment

23. In the multilateral context RFMOs have a significant role to play in the identification of FONC States. Most have already adopted processes for establishing lists of vessels that have been involved in IUU fishing or other activities that undermine the measures adopted by the RFMO. These lists are useful in establishing a rebuttable presumption in respect of individual vessels. In other words, once listed, a vessel is presumed to be IUU fishing and subject to action by non-flag States. However, these lists are also extremely useful in identifying patterns of behaviour for the purposes of identifying non-

compliant flag States and establishing the basis for a determination that the flag State is a FONC from which consequences flow for the flag State itself.

24. As an aspect of fulfillment of the duty to cooperate, RFMOs should be further encouraged to adopt uniform procedures for assessing the performance of both member and non-member States. Procedures should be similar to those referred to above in the context of unilateral assessments and should be carried out by suitably mandated compliance committees charged with the ongoing review of self-assessment and unilateral assessment reports and all other available evidence relating to flag State performance. Based on this review the RFMO will:

- notify the flag State, and other interested States and RFMOs of the initial determination;
- engage in consultations with the flag State aimed at encouraging relevant corrective action; and
- receive and assess information from the flag State on any corrective action taken.

Where a flag State fails to respond or to take corrective action the RFMO may then make a determination that the flag State is a FONC against whom the RFMO may adopt measures for implementation by all RFMO members.

25. Uniform terms of reference for compliance committees will assist in ensuring best practice and consistency in application across RFMOs, while uniform powers to recommend remedial action and determinations of non-performance will assist in ensuring consistent outcomes globally. In addition, to ensure non-discrimination as between members and non-members of RFMOs, procedures are needed to ensure that flag State members cannot block consensus on whether they have met their obligations.

ACTIONS AGAINST STATES NOT MEETING THE CRITERIA FOR FLAG STATE PERFORMANCE

26. In a legal system premised on the ascription of flag State jurisdiction, it is the flag State – not owners or operators of vessels – which bears responsibility for ensuring that, in return for the rights granted to it, it complies with its flag State obligations. If a flag State fails to do so then it has breached its international obligations and other States have the right to respond.

27. Actions that may be taken against FONC States encompass a graduated scale of responses and reflect the stages and purposes of the unilateral and multilateral assessment processes. As a first step, diplomatic “demarches” may be used to notify the flag State of its shortcomings and to request compliance. The publicity associated with notifying other States and relevant RFMOs of a determination will then act as a form of public naming and shaming. Where a flag State still fails to take the corrective action required then other States will be entitled, indeed obliged, to take action consistent with their own international obligations to implement conservation and management measures that have been agreed on in RFMOs to which it is party.

28. Actions taken by coastal States in respect of violations of their exclusive economic zone may include termination or suspension of fisheries access agreements and imposition on the flag State of monitoring, control and enforcement guarantees.

29. Actions taken by port States may include denial of port privileges to all fishing vessels of the flag State and prohibition on the import of certain fish or fish products. Port States may decide to grant exemptions on a case by case basis in situations where the vessel is able to establish that the fish or fish product being landed or imported was taken in a manner consistent with relevant conservation and management measures.

30. Actions taken by coastal States whose interests in straddling or highly migratory fish stocks are affected or by relevant RFMOs and their members may include trade restrictive measures which must,

however, be implemented in accordance with international law including the World Trade Organization Agreement, in a fair, transparent and non-discriminatory manner. Market States may also take action to close their markets to fish and products from FONC States unless those products are certified as having been taken in a manner consistent with international conservation and management measures.

31. In addition, RFMOs may consider “institutional” responses such as withdrawal of quota from FONC States, withdrawal of cooperating non-contracting party status, withdrawal of voting rights for contracting parties, or other measures to restrict the participation of the FONC in the organization and its access to the resources managed by that organization.

A FRAMEWORK FOR ACTIONS AGAINST VESSELS OF FLAG STATES NOT MEETING THE CRITERIA FOR FLAG STATE PERFORMANCE

32. A flag State can fail in individual instances or it can exhibit a consistent pattern of non-performance. The former situation recognizes the need for prompt and sometimes immediate action to stop violative conduct, such as fishing in contravention of coastal State EEZ rights or in a manner that undermines the effectiveness of internationally adopted conservation and management measures, and may result in immediate consequences for individual vessels. The latter situation may lead to a determination that the flag State is a FONC which will have ramifications for both the flag State and all its vessels. A framework for taking action against the vessels of flag States not meeting the criteria of flag State performance must consider both scenarios.

33. With respect to individual infractions where the flag State has not been identified as a FONC a framework for actions against vessels will depend on which State is taking action.

- A coastal State will be entitled to take a full range of enforcement action (including arrest, prosecution and penalty) against vessels from other States which are fishing illegally within its exclusive economic zone.
- Port States may exercise their rights to control access to their ports and to control activities within their ports, so long as the actions taken do not discriminate in form or fact against the vessels of any State.
- States parties to the 1995 UN Fish Stocks Agreement (UNFSA) may take action pursuant to Articles 21-23 of that agreement.
- States may take action pursuant to any other relevant multilateral or bilateral treaty regimes to which the flag State is party or pursuant to schemes adopted by RFMOs.
- States may take action against a vessel in situations where the flag State has given its consent ad hoc.
- States may take action against stateless or suspected stateless vessels. Reasonable grounds for suspecting statelessness may include visual markers such as a failure to fly a flag, inconsistency between the flag and port of registry, or flying two flags. Other evidence to be considered will include whether the vessel responds to a request to verify flag. Failure on the part of the alleged flag State to verify flag may also be probative. Should, however, an initial determination of statelessness turn out to be incorrect, the State making the determination will be responsible to the flag State for any interference with the vessel.

34. However, with the exception of the case of stateless vessels which lack the protection of any flag State, and the cases of violations of a coastal State’s EEZ, the basic rule of primacy of flag State jurisdiction operates in individual situations to provide a right of flag State pre-emption unless the flag State has specifically relinquished it. In other words, a non-flag State may take action only until the flag State steps in to exercise its own jurisdiction over its vessels. The *bona fides* or adequacy of the exercise of flag State jurisdiction may not be questioned in individual cases. However, evidence of a pattern of lack of *bona fide* or effective exercise of flag State jurisdiction will be relevant in determining whether a flag State is a FONC State.

35. Where, as a result of a consistent pattern of failure on the part of the flag State to effectively exercise its jurisdiction, a determination has been made that a flag State is a FONC then arguably the right of flag State pre-emption ceases to exist. The right to grant flag brings with it the corresponding duty to do so only in cases where a flag State is willing and able to exercise effective control over their vessels. This includes taking effective enforcement action against its vessels and ensuring the application of sanctions adequate in severity to punish the offending conduct and deter future violations. Where a flag State fails in this regard and has been determined to be a FONC State, although it will retain the right to grant its flag to vessels, this grant of flag will be non-opposable to other States whose rights and interests have been affected. In other words, the vessels of FONC States may be assimilated to stateless and subject to the full jurisdiction of other States in situations where they are found to be engaged in IUU fishing or other activities that undermine international conservation and management measures.

36. This result is recognized, for example, in the marine pollution context in Article 228 of the Law of the Sea Convention, which provides for an over-ride of the right of flag State pre-emption with respect to legal proceedings for marine pollution matters where “those proceedings relate to a case of major damage to the coastal State or the flag State in question has repeatedly disregarded its obligation to enforce effectively the applicable international rules and standards to take proceedings and impose penalties in respect of violations committed by its vessels”.

37. It is important to note that this is not a denial of the right to grant flag, but only a denial of the opposability of that flag to other States (coastal, port, RFMO members, etc.) whose rights and interests have been injured. Where the vessel has not been engaged in IUU or other activities that undermine international conservation and management measures then the flag remains opposable as against the world and the normal rule of primacy of flag State jurisdiction will apply.

38. Thus far, the discussion has presupposed the existence of a positive legal right which arises as a result of flag State non-performance. However, if doubt as to the existence of a positive legal right exists, action may also be available to non-flag States as countermeasures.⁹

39. Countermeasures are acts taken by one State against another State, the internationally wrongful nature of which is precluded because they are taken, in conformity with certain requirements, in response to a prior internationally wrongful act committed by the State against whom they are taken.¹⁰ In other words, where a flag State commits an international wrongful act by failing to comply with its flag State obligations other States may take coercive actions which would otherwise be unlawful, as long as they comply with the requirements articulated by the International Court of Justice in the *Gabčíkovo-Nagymaros Project* case that these actions must be preceded by a demand for compliance, be proportionate and, must have as their purpose “to induce the wrongdoing State to comply with its obligations under international law, and ... must therefore be reversible”.¹¹ They must also not involve the threat or use of force in contravention of Article 2(4) of the UN Charter.¹² This does not, however, prohibit the use of force in self defence or in what are essentially “police actions” which are not directed against the territorial integrity or political independence of a State.¹³

40. Countermeasures may be taken in response to individual instances of non-performance or in response to a consistent pattern of flag State non-performance.

⁹ See R. Rayfuse, *Countermeasures and High Seas Fisheries Enforcement* (2004) 51 *Netherlands International Law Quarterly* 41–76.

¹⁰ International Law Commission Articles on State Responsibility, Article 22.

¹¹ [1997] ICJ Reports 7 at 55–57, paras 83–87.

¹² ILC Articles on State Responsibility, Articles 49 to 53.

¹³ Rayfuse, above note 8 at 73–75.

AN INVENTORY OF POSSIBLE ACTIONS AGAINST VESSELS

41. Within its exclusive economic zone (EEZ) a coastal State may take such measures as may be necessary to ensure compliance with its laws and regulations relating to the natural resources of the EEZ. Measures that may be taken by a coastal State in respect of violations by foreign fishing vessels that infringe its EEZ rights include:

- boarding and inspection of vessels;
- requiring a vessel to come to port;
- detention of suspect vessels pending further investigation;
- arrest of vessels;
- seizure of catch;
- confiscation of vessels;
- judicial proceedings, prosecution and sanction;
- the right of hot pursuit subject only to the obligation of prompt release of the vessel upon payment of reasonable security and the requirement that violation of fisheries laws not be punished by imprisonment or corporal punishment.

42. Actions that may be taken by port States include:

- designation of specific ports for unloading of fish;
- port entry advance notification requirements;
- inspection and investigation;
- prohibition of landing, transshipment or processing of fish unless the vessel has established that the fish were taken in a manner consistent with relevant conservation and management measures;
- withdrawal of port services;
- port closure;
- detention in port;
- prosecution and sanction.

43. Where the vessel's activities have occurred on the high seas, actions that may be taken by affected coastal States or members of RFMOs include:

- a request for cooperation to the vessel and the flag State including a request to stop the violative conduct providing a clear deadline by which time compliance is to be achieved;
- notification to the relevant RFMO and other States that the vessel is non-compliant
- a request to the flag State to recall the vessel to port; or
- a request to the flag State to consent to enforcement action by the non-flag State;
- where the flag State fails to take action or to consent to non-flag action, notification to the relevant RFMO or coastal State that the flag State has failed to do so;
- where the legal basis exists either positively or for countermeasures, prevention of non-compliant fishing activities including transshipment through actions targeted at the vessel including boarding and inspection, sealing of holds, arrest, detention, seizure, prosecution and application of appropriate penalties;

44. Mention should also be made of the actions that may be taken by market States. Denying IUU fishers the economic benefits associated with their activity is seen as a major element in the fight against IUU fishing. Thus, market States can play a significant role in eliminating IUU fishing by closing their markets to IUU fish. This may be achieved through:

- requiring imports and exports of fish and fish products to be certified pursuant to catch and trade documentation schemes adopted by RFMOs;

- adoption of national traceability or ecolabelling schemes which verify the provenance of fish and fish product imports as having been taken in accordance with international conservation and management measures.

OPTIONS FOR RESOLVING DISPUTES

45. Clearly, the main (albeit not the ultimate) objective of assessing flag State performance is to encourage flag States to comply with their international obligations. The more objective, inclusive and consultative the assessment process is, the less likelihood there will be for disputes to arise. However, it is probably inevitable that disputes will arise between flag States and non-flag States regarding the extent of compliance by flag States with their obligations, determinations of FONC status and the proportionality of actions taken by non-flag States in response to such determinations. Due process guarantees and the sovereign equality of States require the existence and availability of dispute settlement mechanisms.

46. In general, a plethora of dispute settlement options are available to States to resolve disputes arising out of the assessment process or out of actions taken by non-flag States against flag States and/or their vessels. These include the traditional international mechanisms of negotiation, conciliation, mediation, arbitration and judicial proceedings either in the International Tribunal for the Law of the Sea or the International Court of Justice. However, the availability of some mechanisms, particularly arbitration and judicial proceedings, will depend on the treaty obligations States have accepted and any declarations made under those treaties. It is possible to envisage situations where no arbitral or judicial tribunal has jurisdiction to hear a dispute between two States as well as situations where more than one tribunal has jurisdiction in respect of the same or different subject matter arising out of the same dispute.¹⁴ This complexity is an unfortunate but immutable aspect of the international legal order.¹⁵ However, as a general rule, for States parties to either or both the Law of the Sea Convention and the 1995 UN Fish Stocks Agreement, the procedures set out in Part XV of the Law of the Sea Convention will be applicable.

47. Part XV recites the general obligation on States to settle their disputes by agreement and to do so peacefully. When disputes arise States are to expeditiously exchange views regarding their settlement and may elect to proceed to voluntary conciliation although Part XV preserves the right for States to agree at any time to settle their disputes by a means of their choice. In this case the dispute is exempt from the Part XV procedures except where no settlement has been reached and the agreement does not exclude any further procedure.

48. Where dispute settlement procedures have been agreed to in other general, regional or bilateral agreements and they entail binding decisions, then these procedures are to apply in lieu of the Part XV procedures. However, where States have been unable to resolve their disputes and no other dispute resolution procedure has otherwise been agreed upon, they are obliged to submit their dispute to either the International Tribunal for the Law of the Sea, the International Court of Justice, an Arbitral Tribunal established pursuant to Annex VII or a special Arbitral Tribunal established pursuant to Annex VIII. The choice of tribunal will depend on prior declarations made by the parties, and when no common choice is agreed then Annex VII arbitration is the default position. In other words an Annex VII arbitral tribunal is the norm unless States have agreed otherwise. The court or tribunal so chosen has jurisdiction over any dispute concerning the interpretation or application of the Law of the Sea Convention, or the UNFSA as the case may be, or of any other international agreement related to the purposes of the Law of the Sea Convention or the UNFSA where the parties so agree, subject to a number of exceptions, one of which, the exception relating to the exercise by coastal States of their sovereign rights within the EEZ relating to conservation and management of living resources, may be relevant to some situations under consideration here.

¹⁴ As, for example in the *Southern Bluefin Tuna* and *EC/Chile Swordfish* cases.

¹⁵ See, e.g., Rayfuse, *The Future of Compulsory Dispute Settlement Under the Law of the Sea Convention* (2005). 36 *Victoria University of Wellington Law Review* 683–711.

49. The constituent treaties of some RFMOs provide for dispute resolution. However, the possibility exists, at least in the case of RFMOs, to streamline and strengthen their processes by establishing formal, internal dispute settlement mechanisms which are empowered to adjudicate disputes relating to the assessment and determination of flag State performance. While these procedures would *prima facie* only operate *inter-partes*, it would be possible for RFMOs to open these dispute settlement mechanisms to non-parties as well. This could be done consistently with general rules of treaty law¹⁶ through, for example, the adoption of a protocol to the RFMO constituent treaty.

50. Effective streamlining and design of new and/or use of existing dispute settlement mechanisms may provide ongoing contributions to the development of international law particularly as it relates to the obligations of effective flag State control, the duty to cooperate, and the duty to conserve and sustainably manage marine living resources.

¹⁶ In particular Articles 35 and 36 of the Vienna Convention on the Law of Treaties.

**The role of national governments in implementing criteria and actions
for flag State performance¹**

ABSTRACT

This paper presents an inventory of legal, institutional, administrative enforcement and other actions that may be taken at the national level by flag States, coastal States, port States and market States in order to implement criteria for flag State performance. In addition, it presents inventories of legal actions that may be taken by States at regional and international levels to implement such criteria.

INTRODUCTION

1. At the 2007 (twenty-seventh) session of COFI, a number of Members referred to the problem of irresponsible flag States and COFI requested FAO to convene an expert consultation to develop criteria for assessing the performance of flag States, as well as possible actions against vessels flying the flags of States not meeting such criteria. From 25 to 28 March 2008 Canada hosted an international Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action.²

2. At the 2009 (twenty-eighth) session of COFI, some Members noted with appreciation the preliminary work done by the Canadian Expert Workshop. As agreed by the twenty-seventh session of COFI, a FAO Expert Consultation on Flag State Performance is to be held in June 2009. The Committee agreed that this should be followed by a Technical Consultation on flag State performance.³

3. This paper is submitted to FAO as a discussion paper to be presented at the June 2009 Expert Consultation on Flag State Performance.⁴

FAO CONSTITUTION AND SCOPE OF THE PAPER

4. The Constitution of the Food and Agriculture Organization created FAO in order to improve efficiency in the production and distribution of food and agriculture products.⁵ “Food” includes fisheries and marine products.⁶ FAO powers include the ability to promote research, improve education and public knowledge, provide assistance to governments, encourage the adoption of international policies and make recommendations on the conservation of natural resources.⁷

5. This paper is written as a FAO discussion paper and in accordance with Articles 1.1-1.3 of the FAO Constitution. Therefore, this paper only discusses the subject of flag State performance

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² COFI/2009/6 “Combating Illegal, Unreported and Unregulated Fishing, Including through a Legally-binding Instrument on Port State Measures and the Establishment of a Global Record of Fishing Vessels”. Paragraphs 18–19.

³ COFI 2009 Final Report.

⁴ Terms of Reference for this paper are included as Annex A.

⁵ Preamble to FAO Constitution. Refer UNFAO Legal Office Basic Texts, www.fao.org

⁶ *Id.*, Article 1.1.

⁷ *Id.*, Article 1.2 and 1.3.

pertaining to fishing vessels⁸, (not, for example, merchant shipping).⁹ Similarly, the paper only examines those soft and hard international, regional and national laws that relate to fisheries management, not shipping regulations.¹⁰

LEGAL BACKGROUND ON FLAG STATE JURISDICTION

6. Since the publication of *Mare Liberum* in 1609, the Grotian thesis that the high seas are free to all and incapable of acquisition by occupation has been a core principle in the international law of the sea. International tribunals have always upheld the freedom of the high seas despite pressures for reform in areas such as conservation of fish stocks.¹¹

7. In 1927, the Permanent Court of International Justice (PCIJ) in the *Lotus* Case confirmed that although the high seas are free, “vessels on the high seas are exclusively subject to the authority of the State whose flag they fly”.¹² This principle of flag State jurisdiction was codified into the United Nations Convention on the Law of the Sea (the LOSC).¹³ Despite widespread acceptance of the LOSC, many flag States do not effectively discharge their legal duties under the Convention.

8. From a fisheries management perspective, the problem of poor flag State control of fishing vessels has led to a significant rise in illegal, unreported and unregulated fishing, both within zones of national jurisdiction and on the high seas. Furthermore, coastal States are hampered in their ability to take action against the vessels of non-compliant flag States because responsibility for the investigation of alleged offences and the imposition of penalties ultimately remains with flag States.

PURPOSE OF THIS PAPER

9. The purpose of this paper is to examine the role that all national governments can have in implementing criteria and actions for effective flag State performance. The format of this paper is an inventory of measures that could be taken at the national level (Part 5 of the paper), the regional level (Part 6 of the paper) and the international level (Part 7 of the paper) by all States.¹⁴ The inventory of measures consists of principles from a compilation of sources: hard law obligations, soft law recommendations, and observations from other learned bodies.¹⁵

⁸ For the purposes of the FAO workshop on Flag State performance it is appropriate to adopt the broad definition of “vessels” given in the FAO Draft Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing: “any vessel, ship of another type and boat used for, equipped to be used for, or intended to be used for, fishing or fishing related activities.”

⁹ Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action Guidance Document (Draft, April 2009, p.5) notes that other possible instruments to aid in assessing the international stance of a State as a flag State include:

- International Convention for the Safety of Life at Sea, and other relevant IMO instruments, particularly the:
- United Nations Convention on the Registration of Ships; and the
- Torremolinos Protocol.

¹⁰ The subject of flag State performance can directly relate to ships, vessels and boats and can pertain to a host of international, regional and domestic laws on subjects as broad as Safety of Life at Sea, Marine Pollution or the Tonnage Measurement of Ships.

¹¹ Refer for example the *Bering Sea Fisheries Arbitrations* (1893) Moore *Digest I*, para. 172.

¹² *France v Turkey* (1927) PCIJ (Series A) No. 10 (the *SS Lotus* Case).

¹³ United Nations Convention on the Law of the Sea (LOSC), done at Montego Bay, Jamaica, 10 December 1982 and entering into force on 16 November 1994. Reprinted in (1982) 21 *International Legal Materials* 1261-1354. At the time of writing, (May 2009), there are 158 ratifications, accessions to the Convention. The most recent State to ratify was Switzerland on 1 May 2009.

¹⁴ Particular focus is given to flag States, coastal States, port States and market States.

¹⁵ Including examples from State legislation, decisions of international courts and tribunals, and respected international bodies including the High Seas Task Force, *Closing the Net*, Available online at http://www.high-seas.org/docs/HSTFfinal/HSTFFINAL_web.pdf; and *Recommended Best Practices for Regional Fisheries Management Organizations: Report of an independent panel to develop a model for improved governance by Regional Fisheries Management Organizations*, London, Chatham House, 2007. Available online at http://www.chathamhouse.org.uk/files/10301_rfmo0807.pdf

AN INVENTORY OF LEGAL ACTIONS THAT MAY BE TAKEN AT THE NATIONAL LEVEL BY STATES IN ORDER TO IMPLEMENT CRITERIA FOR FLAG STATE PERFORMANCE

All States should ensure compliance with the international legal regime for marine capture fisheries including soft and hard laws, and relevant regional instruments

Soft and hard laws

10. In the law of marine capture fish stocks State obligations are described in a number of soft and hard law international fisheries instruments. These instruments have been constructed by the international community of States for the purpose of addressing weaknesses in the existing legal regime. Although these instruments vary in status and acceptance, they share many common principles on what constitutes basic levels of State behaviour. National governments should formally accept, accede to, or ratify the relevant treaties, and ensure compliance with the principles expressed in the numerous soft law instruments. Most significant are:

- the 1982 United Nations Law of the Sea Convention (hereafter the LOSC);¹⁶
- the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (hereafter referred to as the Compliance Agreement) and (for the purposes of this paper) its High Seas Fishing Vessel Authorization Record (hereafter referred to as HSVAR);¹⁷
- the Agreement for the Implementation of the Provision of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995 (hereafter the 1995 UN Fish Stocks Agreement);¹⁸ and the soft law
- FAO Code of Conduct for Responsible Fisheries (hereafter the Code of Conduct)¹⁹ and its subsidiary International Plans of Action constructed under the framework of the Code of Conduct, particularly the FAO International Plan of Action – Illegal, Unreported and Unregulated Fishing²⁰ (hereafter the IPOA–IUU) and the FAO International Plan of Action – Capacity²¹ (hereafter the IPOA–Capacity).

¹⁶ Note 13.

¹⁷ FAO, *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*, FAO, Rome, 1993, 41 ISBN 92-5-103834-1. In accordance with Article XI (1) of the Compliance Agreement, the Agreement entered into force on 24 April 2003 when the Republic of Korea became the twenty-fifth State to accept the Agreement. There are currently 38 instruments of acceptance: Albania, Angola, Argentina, Australia, Barbados, Belize, Benin, Brazil, Canada, Cape Verde, Chile, Cook Islands, Cyprus, Egypt, European Community, Georgia, Ghana, Japan, Madagascar, Mauritius, Mexico, Morocco, Mozambique, Myanmar, Namibia, New Zealand, Norway, Oman, Peru, Republic of Korea, St Kitts and Nevis, St Lucia, Seychelles, Sweden, Syrian Arab Republic, Tanzania, United States of America and Uruguay. (Note most recent acceptance by Brazil on 2 March 2009).

¹⁸ United Nations General Assembly A/CONF.164/37, 8 September 1995. At the time of writing, April 2009, the UNFSA has 75 instruments of accession or ratification. The most recent State to ratify the treaty was Tuvalu on 2 February 2009.

¹⁹ *Code of Conduct for Responsible Fisheries*, FAO, Rome. ISBN 92-5-103834-1. The Code is a voluntary instrument and as such, States do not accede to, or ratify, its provisions. Under the Code and the IPOAs, FAO is charged with monitoring State and RFB levels of compliance, then reporting to COFI on the levels of implementation. In May 2008 an FAO questionnaire on levels of implementing the Code and the IPOAs was dispatched to FAO Member States, twenty-seven NGOs and over thirty RFBs. The submission date of 7 July 2008 was later extended to 15 August 2008. In the 2008 questionnaire only 33 percent of FAO Member States responded, only 22 percent of NGOs responded, and only 41 percent of RFBs responded. These are disappointingly low levels of feedback which contribute to uncertainty regarding the true state of world marine capture fisheries, and restrict FAO's ability to coordinate effective response mechanisms. (COFI/2009/2). It is desirable for States to be more diligent in contributing feedback to FAO on their implementation of the Code and the IPOAs.

²⁰ Food and Agriculture Organization of the United Nations (FAO). International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA–IUU). The IPOA–IUU was adopted by consensus at the twenty-fourth session of COFI on 2 March 2001 and endorsed by the hundred and twentieth session of the FAO Council on 23 June 2001. Available online through Legal Materials at FAO homepage: www.fao.org.

²¹ IPOA–Capacity, available online at FAO on: www.fao.org/fishery/ipoa-capacity/2/en

11. Finally, national governments should be giving consideration to a new FAO instrument which in 2009 is currently in draft –

- the Draft a Legally-binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (hereafter the PSM Agreement).²²

12. In addition to the international instruments, States are encouraged to cooperate with other States at the regional and subregional levels. In particular, States are encouraged to establish and participate in regional and subregional fisheries management organizations and arrangements. Where such bodies exist, States should aim to ensure compliance with the mandates, objectives, and conservation measures of such bodies.

The customary law duty of States to cooperate with one another

13. Unlike soft and hard international laws, customary laws are difficult as they cannot clearly be identified or listed, and there is no formula for identifying when a practice becomes obligatory as customary law.²³ However, an increasing number of international lawyers believe that a customary law duty exists for States to cooperate with one another.²⁴

14. This duty has its origins in the general principles of the United Nations Charter which attempts to address the inequities between wealthy, developed States and a majority of weak, developing States by a world order based on States cooperating with one another.²⁵ The concept of State cooperation was included in the LOSC where provisions articulate specific obligations to cooperate on a variety of subjects, including, *inter alia*, the conservation and management of EEZ²⁶ and high seas²⁷ fisheries. Furthermore, Articles 61 and 119 of the LOSC elaborate on the duty to cooperate by specifically providing for cooperation through competent subregional, regional or global organizations. The duty to cooperate has been elaborated in subsequent treaties, particularly the Compliance Agreement and Article 8 of the 1995 UN Fish Stocks Agreement. A duty to cooperate can be effectuated in several ways, and the sharing of basic vessel data should be seen as a basic first step.

Legal measures to be taken by flag States

Flag States should maintain a register of fishing vessels

15. At the national level, a registry of fishing vessels involves the issuance of a certificate of registry, the right to fly the flag of a country, and is a record of ownership and associated mortgages and liens. By the process of registration, a State adopts the national and international responsibilities of a flag State in relation to the vessel. That is, any births, deaths, injuries, or damage incurred on or by a vessel on the high seas, will be dealt with inside the jurisdiction of the State with which it is registered.²⁸ The LOSC requires States to fix the conditions for their grant of nationality to vessels.²⁹ To ensure that a flag State can properly exercise its jurisdiction over ships flying its flag, the criteria for what constitutes nationality must be within the exclusive judgment of the State. Accordingly, the

²² The February 2009 Chairperson's text is the current formal draft of the Agreement which was presented to COFI in 2009. The text is available at: <ftp://ftp.fao.org/FI/DOCUMENT/tc-psm/2009/PSMAgreement.pdf>

²³ *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)* (Provisional Measures) ITLOS 27 August 1999, 38 International Legal Materials 1624, see Separate Opinion of Judge ad hoc Shearer at 1647.

²⁴ Chatham House Report, *Supra*, Note 15.

²⁵ Charter of the United Nations, available online at www.un.org/en/documents/charter/chapter9.shtml Note particularly the Preamble, Article 1(3) and the provisions of Chapter IX.

²⁶ Note 13. Refer Articles 61(2), 63, 64, 65, 66.

²⁷ *Ibid*, Articles 117 and 118.

²⁸ Middleton Justice J., "Ship Registration and the Role of the Flag" (Admiralty Education 2007) available online at www.fedcourt.gov.au/how/admiralty_papersandpublications20.rtf (Accessed 3 April 2009) p.2. The author goes on to note that the process of registration for ships is ancient. There is evidence of the process in surviving accounts from imperial Rome, and the 1660 English Navigation Act of Charles II requires vessel registration.

²⁹ Note 13, Articles 91 and 92.

criteria for the granting of nationality (flag State jurisdiction) for fishing vessels, varies between States.³⁰

16. Article 91(1) of the LOSC stipulates that there must be a “genuine link” between a vessel and the State whose nationality it possesses, and that the State can effectively exercise its jurisdiction and control over the vessel in administrative, technical and social matters. The question of what constitutes a “genuine link” has been considered by the International Tribunal for the Law of the Sea in the *M/V Saiga (No.2)* case.³¹ However, as the Expert Workshop on Flag State Responsibilities Guidance Document notes, “a global and binding definition of the link remains elusive”.³²

Flag States should conduct a prior investigation into a vessel’s history and ownership before registration

17. Flag States should, prior to registration, make comprehensive enquiries into a vessel’s history and its ownership. Vessels with a history of non-compliance should not be registered, unless there is a change of ownership and the previous non-compliant owners have no continuing legal or beneficial interest in the fishing vessel.

Flag States should only register vessels where the flag State can exercise control over the ownership, management and crew of the vessel

18. The flag State should have the ability to exercise control even when a vessel is at sea. Many open registers do not require individuals (such as the owners of a vessel) to be nationals of their flag State. In such instances, immediate control by the flag State is almost impossible as the owner is of a different nationality, or based in a different jurisdiction, or (more frequently) hidden behind a maze of front companies.³³

Flag States should ensure that their registered vessels have markings that comply with international standards

19. Article III of the FAO Compliance Agreement requires flag States to ensure that fishing vessels are identifiably marked in accordance with generally accepted standards, such as the FAO Standard Specifications and Guidelines for Marking and Identification of Fishing Vessels. The FAO Standard aims to allow for the rapid identification of a vessel. They are usually used in conjunction with international radio call signs.³⁴

Flag States should link fishing vessel registration with authorization to fish

20. Although authorization to fish is different to the vessel registration process, flag States should consider linking registration of a fishing vessel to the process of permission to fish in national waters

³⁰ Refer Annex B.

³¹ *Saint Vincent and the Grenadines v Guinea* (1999) 37 *International Legal Materials* 1202. The concept of genuine link has already been explored in presentations given to the 2008 Vancouver Workshop on Flag State Responsibilities.

³² Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action Guidance Document Draft April 2009.

³³ The front company will constitute the public face of a highly complex, transnational corporate structure that aims to deliberately disguise the identity of the beneficial owner with an equitable interest in the fishing vessel. The problem of the corporate veil in IUU fishing is elaborated in Griggs L. and Lugten G. “Veil Over the Nets: Unravelling Corporate Liability for IUU Fishing Offences” in (2007) 31 *Marine Policy* 159-168.

³⁴ The FAO Standard Specification and Guidelines for the Marking and Identification of Fishing Vessels can be found in Annex J of the FAO Fisheries Technical Paper No. 415, “Recent trends in monitoring, control and surveillance systems for capture fisheries”, Rome 2003.

or on the high seas.³⁵ The flag State should conduct an assessment of the vessel's capacity to comply with relevant conservation and management measures, prior to authorising permission to fish.

Flag States should have transparency of vessel registration processes and data sharing

21. Flag States should handle all vessel data and fishing authorizations in a transparent manner. The registration process should include procedures to ensure that this data is up-to-date and accurate. There should be periodic review of all data and procedures for notification of vessel registration change(s). There should be procedures for deregistration of vessels. Where a vessel has violated a relevant legal regime, sanctions should be imposed prior to deregistration.

Flag States should cooperate in the sharing of data

22. As part of the duty to cooperate, flag States should be prepared to exchange vessel data and fishing authorization data with other relevant and competent bodies at the:

- domestic level (between internal departments), and, in federal systems, between State and federal bodies;³⁶
- bilateral level (particularly where a coastal State is seeking assistance from a Flag State or where a Port State is seeking assistance from a Flag State);
- regional level through participation in appropriate regional fishery management organizations; and
- international level through competent organizations such as FAO.

Flag States should legislate for the conduct of their own citizens whilst they are travelling abroad

23. In international law, the nationality principle of criminal jurisdiction provides that a State has jurisdiction over its own citizens in respect of offences committed by them anywhere in the world. Citizens should be prohibited by national legislation from being involved with IUU fishing operators and vessels, beyond their domestic jurisdiction.³⁷

Legal measures to be taken by coastal States

Coastal States should have national fisheries legislation that includes provisions for enforcement

24. All States should have a domestic legal framework for their own fisheries management which includes a body mandated to (*inter alia*) conduct fisheries management, to issue fishing authorization licences, to provide scientific stock status advice and recommend catch levels, to liaise with other national departments which are responsible for fishing vessel registration, and to ensure that domestic policy complies with other relevant national, regional and international conservation and management

³⁵ Paragraphs 40 and 41 of the FAO IPOA-IUU (Note 18). Note for example South Africa and the Web site for South African Maritime Safety Authority (SAMSA) and the South African Department of Environmental Affairs and Tourism (DEA&T) for application to register a fishing vessel. The procedures note that "No fishing vessel will be registered without a fishing right and a permit to engage in fishing activities". Accessed 1 May 2009 at: www.services.gov.za/OrganisationServices/Permitsandlicences/AppPermitLicence/RegFishVessel.aspx?Language=en-ZA Refer Case Studies in Annex B.

³⁶ Refer Annex B and the Case Study of the United States as a jurisdiction with both federal and State provisions for vessel registration.

³⁷ Refer Spain's legislation 21181 Real Decreto 1134/2002, de 31 Octubre, sobre aplicación de sanciones en materia de pesca marítima a Españoles enrolados en buques con abanderamiento de conveniencia.

measures. As part of a precautionary approach to fisheries management, IUU fishing should be estimated and taken into account when setting quotas and management measures.

25. Where a coastal State wishes to take action against a vessel flagged to another State it should begin by contacting the flag State of the vessel and seeking cooperation. The flag State can give express or implied permission to a non-flag State to board, inspect and arrest.

In national waters

26. National Fishery Officers should be appointed under domestic legislation, and for the purposes of any national or foreign fishing vessel operating in national waters, the officers should be empowered to:

- order the vessel to stop fishing;
- require the captain to facilitate boarding of the vessel and examine the certificate of registry; fishing licence, logbooks, records of fish caught and any other official document;
- make a conclusion as to whether there are reasonable grounds to believe an offence has been committed, and order the captain to take the vessel to port for the purpose of investigation;
- arrest a person suspected of having committed an offence;
- seize the vessel's catch; and
- prosecute and sanction violations.

On the high seas

27. The enforcement actions that can be taken by a coastal State against a vessel suspected of illegal fishing on the high seas are limited. National Fishery Officers should be empowered to take similar action to that described above under "National Waters" where such enforcement action complies with international law. That is, the enforcement action is,

- against any fishing vessel which is flagged to their own State;
- against the vessel of another State in accordance with the doctrine of hot pursuit;
- in accordance with relevant international treaty laws. For example the 1995 UN Fish Stocks Agreement (Articles 21 and 22) has progressive provisions relating to international, regional and subregional cooperation in enforcement which includes boarding and inspection of fishing vessels on the high seas;
- arguably justifiable in accordance with international customary law.³⁸ Two customary laws may be relevant.
 - First, the defence of necessity. This doctrine provides that an act that would otherwise be a breach of an obligation is not wrongful if taken in a state of necessity. The doctrine of necessity applies when an essential interest of the State is threatened by a grave and imminent peril and there is no other means of averting it.³⁹
 - Second, the duty to cooperate in the conservation and management of fish stocks. Where a flag State fails to assist a coastal State, the flag State may be in breach of the duty to cooperate at customary law.
 - In addition, a breach of the duty to cooperate may have treaty law ramifications in that such behaviour is arguably a breach of Article 94 of the LOSC which lists the duties of a flag State.⁴⁰ Further, if there is a breach of the Article 94 duties of the flag State, this may

³⁸ As mentioned above at 5.1.3 the application of customary law is uncertain.

³⁹ Customary international law has sometimes justified interference with foreign ships on the high seas on the grounds of necessity. The classic case in this regard is the *Virginius* dispute from 1873, when Spain seized an American ship carrying weapons to be used in the Cuban insurrection against Spain.

⁴⁰ Particular attention can be given to Article 94(6): "A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised (that is, that the ship or fishing vessel has breached LOSC

arguably constitute evidence of the absence of a genuine link between the flag State and the vessel concerned, and thus be a breach of Article 91 of the LOSC.⁴¹

- bilateral and/or multilateral treaties, including the RFMO constitution, may include provision(s) for control and enforcement;
- stateless vessels (or suspected stateless vessels) should be boarded and asked to provide documents of nationality. A vessel that cannot or does not produce documents of flag State registration should be subject to reverse onus provisions in law. That is, it is the task of the vessel Master to prove that he was fishing legally, not of the coastal State prosecution to prove the vessel was fishing illegally.

Legal measures to be taken by Port States

States should support the FAO Legally-Binding Instrument on Port State Measures

28. Minimum permissible port State actions are set out in the FAO Legally-binding Instrument on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing. However, Port States are able to take additional measures and should ensure that their national laws entitle them to:⁴²

- inspect and investigate all fishing vessels in port (particularly those with an IUU history);
- inform relevant States, and/or regional, international bodies of their actions;
- deny entry to port or the use of port facilities/services;
- prohibit landing, transshipment, and processing;
- detain vessels pending a response from the flag State;
- apply sanctions.

Legal measures to be taken by market States

29. All market States should support measures to identify fish that have been caught by RFMO IUU-listed vessels and prevent such fish from being traded or imported into their territory. Market States should apply market-related measures that are consistent with the WTO rules, to support international and regional fisheries management instruments.

An inventory of institutional/administrative/enforcement actions that may be taken at the national level by States in order to implement criteria for flag State performance

Flag States to maintain a Record of fishing vessels

30. For a State to maintain a “Record of fishing vessels” is different to the process of registration.⁴³ A registry of fishing vessels is needed to accord a vessel with the legal personality of a flag State. A record of fishing vessels is more akin to a database and it is more an administrative mechanism than a legal requirement.

31. Article VI of the Compliance Agreement elaborates in detail the type of data that should be entered on national fishing vessel records and also notes that this data should be made available to FAO. There are two sets of provisions, one for mandatory data (Article VI(1)) and one for discretionary data (Article VI(2)).⁴⁴ However, a noticeable problem with these lists is that they do not

conservation and management measures) may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation” .

⁴¹ High Seas Task Force, *supra*, Note 15, p. 55.

⁴² Guidance Document, *supra*, Note 32.

⁴³ A definition of “record of fishing vessels” is provided by Article 1(d) of the Compliance Agreement as “a record of fishing vessels in which are recorded pertinent details of the fishing vessel. It may constitute a separate record for fishing vessels or form part of a general record of vessels” .

⁴⁴ Article VI(1) of the Compliance Agreement provides that each Party should collect the following data for each fishing vessel entered on its national records and make this information available to FAO:

include identification of the beneficial ownership of a vessel. It is submitted that a superior record list is provided by Paragraph 42 of the International Plan of Action – Illegal, Unreported and Unregulated Fishing.⁴⁵

Monitoring, control and surveillance

32. Having registered, recorded and licensed vessels to fish, States should implement a vessel monitoring system (VMS) that operates from the commencement of a voyage through to final destination. VMS can verify the location of fishing vessels, and aids as a tool of flag State control over vessels. It can take a sophisticated technological form such as satellite imagery, or more conventional means (*inter alia*):

- placement of independent observers on board vessels who monitor vessel positions and observe fishing operations;
- patrols at sea where vessels are known to fish;
- requiring vessels to report at regular intervals;
- mandatory recording of catch and effort data through log-books.

33. Staff involved in MCS should have ongoing training and education in the latest technological, regional and international developments.

An inventory of other actions that may be taken at the national level by States in order to implement criteria for flag State performance

Domestic law reform

34. There are several instances where States could enhance their ability to comply with, and enforce principles of, international law by implementing domestic law reforms in a number of key areas.

-
- (a) Name of fishing vessel, registration number, previous names (if known), and port of registry;
 - (b) Previous flag (if any);
 - (c) International Radio Call Sign (if any);
 - (d) Name and address of owner or owners;
 - (e) Where and when built;
 - (f) Type of Vessel;
 - (g) Length.

Article VI(2) provides that each Party shall, to the extent practicable, collect the following data for each fishing vessel entered on its national records and make this information available to FAO:

- (h) Name and address of operator (manager) or operators (managers) (if any);
- (i) Type of fishing method or methods;
- (j) Moulded depth;
- (k) Beam;
- (l) Gross register tonnage;
- (m) Power of main engine or engines.

It should be noted that the FAO HSVAR is a combination of the mandatory and discretionary requirements from the Compliance Agreement.

⁴⁵ This includes all the information from paragraphs 1 and 2 of Article VI of the Compliance Agreement (*Ibid*) plus:

- 42.1 the previous names of the vessel, if any and if known;
- 42.2 name, address and nationality of the natural or legal persons in whose name the vessel is registered;
- 42.3 name, street address, mailing address and nationality of the natural or legal persons responsible for managing the operations of the vessel;
- 42.4 name, street address, mailing address and nationality of natural or legal persons with beneficial ownership of the vessel;
- 42.5 name and ownership history, and, where this is known, the history of non-compliance by that vessel, in accordance with national laws, with conservation and management measures or provisions adopted at a national, regional or global level; and
- 42.6 vessel dimensions, and where appropriate, a photograph, taken at the time of registration or at the conclusion of any more recent structural alterations, showing a side profile view of the vessel.

Reform of fiscal policies

35. Governments should refrain from subsidising the fishing and fish processing industries. Such financial policies contribute to the gross overcapacity of the global fishing fleet and are a disincentive for those involved in the fishing industry to find alternative means of making a living.⁴⁶

Evidence law

36. Where an illegal fishing vessel is apprehended by a State and a decision is made to prosecute the Fishing Master and possibly some or all crew members,⁴⁷ States should ensure that their laws of Evidence are sufficiently up to date. For example, electronic evidence should be classed as admissible real evidence so that it does not fall foul of the hearsay rule. Further, an increasing number of jurisdictions have implemented reverse onus provisions in the case of environmental offences. This means that an accused operator of an illegal fishing vessel should have to prove that he was not engaging in illegal fishing, rather than the burden of proof being carried by the prosecution.

Sanctions

37. Penalties for illegal fishing are often inadequate and in international law they are circumscribed by the provisions of Article 73 of the LOSC. Yet the need for sanctions to include a real deterrent effect is recognized by most sentencing law regimes. In fishery offence case law the culpability of an accused should be assessed by factors such as:

- the offence is shown to have been a deliberate or reckless breach of the law, rather than the result of carelessness, or
- the defendant has acted from a financial motive, or
- the defendant's attitude towards the relevant environmental authority (national or regional) is dismissive or obstructive.

38. Where the culpability of beneficial owners, legal owners and vessel crews is high, and custodial sentences are not a viable option, convicted persons should be fined at least to the extent of their economic gain as a result of committing the fishing offence.

Corporate law

39. Deterrence should apply to vessel owners (as well as vessel operators) but it has already been shown that data pertaining to the beneficial ownership of fishing vessels is lacking from many national shipping registers and vessel databases, plus regional lists and the global HSVAR. The problem is that despite international recognition of the problem of hidden beneficial owners, both domestic and international law have traditionally maintained a rigid adherence to entity law that protects the identity of beneficial owners. To address this problem, States should investigate corporate law reform at the national level that will expose and record the true identities of corporate (or vessel) beneficial owners.⁴⁸ Such data needs to be recorded on both vessel registers and records, and made available to competent regional and international bodies as part of vessel data sharing.

⁴⁶ In 2009, the practice of Government subsidies was strongly condemned by the G20 leaders as a contributing factor to restricted global economic growth Refer London Summit Leaders' Statement www.g20.org/Documents/g20_communique_020409.pdf, 2 April 2009.

⁴⁷ Australian courts initially refrained from taking action against the crew of illegal fishing vessels based on the assumption that the crew were poorly educated and unaware of the vessel's location. However, in the cases of the *Viarsa* and *Maya V* a greater number of crew members were charged and convicted for the offence of fishing within the Australian Fishing Zone without authority. In the *Maya V* case, five year \$4 000 good behaviour bonds were placed on 32 convicted crew members. Should they reappear before an Australian Court on similar charges, they will as individuals, be subject to additional penalties for the first and then face prosecution and sentencing for the second offences.

⁴⁸ Griggs L. and Lugten G., *supra*, Note 33.

Taxation law

40. A facet of using a complex corporate structure which includes company registration in an international tax haven is that beneficial owners can accumulate profits free of tax. However some States employ “taxation accruals” regimes to prevent the accumulation of profits in companies residing in tax havens.⁴⁹ Often the accumulation of profits in tax havens is aimed at deferring the tax that would eventually need to be paid if the profits were repatriated to the country of residence of the owner. Essentially, a tax accruals regime taxes the owner of an interest in a foreign entity on the profits of that foreign entity when they are accumulated in that foreign entity and are not distributed back to the ultimate owner. Accordingly, tax accruals regimes can be used as a mechanism to tax the ultimate beneficial owners of an IUU vessel, on profits from IUU fishing activities that are accumulated in low tax jurisdictions. States which do not already use taxation accruals regimes in their domestic taxation laws should consider doing so.⁵⁰

AN INVENTORY OF LEGAL ACTIONS THAT MAY BE TAKEN AT THE REGIONAL LEVEL BY STATES IN ORDER TO IMPLEMENT CRITERIA FOR FLAG STATE PERFORMANCE

Flag States have a legal obligation to cooperate with regional fishery management organizations for the conservation and management of fish stocks

41. Although the LOSC makes only limited references to State participation in regional bodies, all subsequent United Nations and FAO fishery instruments have given an increasingly important role to regional cooperation. These include:

- Chapter 17 of Agenda 21 from the Earth Summit;
- Articles 7 and 8 of the Code of Conduct;
- the Preamble and Articles III, V, VI and VII of the Compliance Agreement;
- Articles 5, 8, 14, 18, 19 and 21 of the 1995 UN Fish Stocks Agreement; and
- the Preamble and Articles 1, 4, 6, 8, 9, 11, 14, 17, 21, and 22 of the Agreement on Port States Measures.

42. The international instruments also contain data collection and data sharing duties between States and regional fishery bodies, between the regional fishery bodies themselves, and between competent regional and international organizations.

43. Finally, it has also been suggested that the customary law duty to cooperate can be well demonstrated by State participation in regional fishery bodies.⁵¹

Flag States should adopt regional regulations at the national level

44. Flag States should look to the regulations or conservation measures adopted by regional fishery management organizations of which they are a member, and ensure that these harmonize with their own national legislation.

⁴⁹ The problem of tax havens, or “uncooperative jurisdictions” was addressed by the G20 in April 2009 and a recommended measure to deal with such jurisdictions has included increased monitoring and surveillance of tax haven economies by the IMF. Refer London Summit Leaders’ Statement www.g20.org/Documents/g20_communique_020409.pdf (2 April 2009). On further taxation law reforms to address the use of tax havens in IUU fishing, refer Bender P. and Lugten G. “Taxing Illegal Fishing: A Proposal For Using Taxation Law To Reduce Profiteering From IUU Fishing Offences” (2007) 22:4 *International Journal of Marine and Coastal Law* 513.

⁵⁰ Examples of States with Taxation Accruals Regimes include Australia, Japan, Spain, South Korea, United Kingdom and the United States of America.

⁵¹ Clark E. “The Duty of States to Cooperate in International Marine Capture Fisheries Law” in (2009) 13 *Antarctic and Southern Ocean Law and Policy* 57.

Cooperation between flag and port States within a RFMO

45. There is a need for pre and post fishing inspections by flag and port States within a RFMO to ensure vessel compliance with regional regulations, particularly for distant-water fishing vessels which rarely call at their home port. Flag States should cooperate with regional fishery bodies and port States to increase the effectiveness of regional regulations for trade- and market-based measures such as catch documentation schemes.

Actions against non-compliant flag States

46. A growing number of RFMOs have adopted measures that require their member States to board, search, arrest and prosecute a stateless vessel if it has been fishing in a manner that undermines the RFMOs conservation and management measures.⁵²

47. If a RFMO non member is a party to the LOSC, then one or more members of the RFMO which are also parties to the LOSC can seek to invoke the procedures of LOSC Part XV (Articles 279-296) and argue that the conduct of the flag State, in failing to exercise effective jurisdiction and control over their vessel, is considered to be inconsistent with the Article 94, 117, 118, and 119 duties of the flag State.⁵³

48. CCAMLR Resolution 25/XXV provides an example of RFMO policy to regulate a flag State which is a non member of the organization.

49. Finally Article 17 of the 1995 UN Fish Stocks Agreement States that a non-member of a RFMO is not discharged from the duty to cooperate.

Inventory of administrative/regulatory actions that may be taken at the regional level by a State in order to implement criteria for flag State performance

Flag States should recognize regional fishery organizations and their regulations

50. The 1995 UN Fish Stocks Agreement provides that where a competent regional fisheries management organization or arrangement exists, States should either become members of the body, OR they should agree to apply the conservation and management measures established by such organizations.⁵⁴ This includes recognizing the existence of the RFMO, its regulatory area and its conservation measures, including catch quotas. Further, the regulatory decisions of the RFMO should be taken into account by a flag State when that State is licensing a vessel to fish in any region that includes the regulatory area.

States should contribute to monitoring control and surveillance efforts of Regional Fishery Organizations

- Regional Fishery Management Organization members should contribute at-sea observers on vessels fishing in regional waters.
- Regional Fishery Management Organization members should engage in bilateral or multilateral surveillance and enforcement mechanisms within the regional body regulatory area.

⁵² As mentioned above in 5.3.3, reverse onus provisions in coastal State evidence law should apply to stateless vessels.

⁵³ Chatham House Report, note 15, p. 86. See also text accompanying footnote 40 above.

⁵⁴ Article 8(3).

Where a Regional Fishery Management Organization has a catch documentation scheme, States should ensure compliance with the scheme

51. The most commonly applied market measures to regulate trade in marine capture fisheries are the various catch documentation schemes employed by RFMOs. Flag, coastal, port and market States should work to ensure the viability of the CDS programmes. At the regional level, States should work to harmonize and tighten the various CDS programmes in order to ensure that they are resistant to fraud and applicable to all relevant markets.

AN INVENTORY OF LEGAL ACTIONS THAT MAY BE TAKEN AT THE INTERNATIONAL LEVEL BY STATES IN ORDER TO IMPLEMENT CRITERIA FOR FLAG STATE PERFORMANCE

Dispute settlement

52. Both the LOSC and the subsequent hard law treaties make provision for the peaceful settlement of disputes. Negotiation is the most common form of dispute settlement as it is usually done between the State protagonists and without the participation of a third party. In fact, several provisions within the LOSC urge States to attempt to settle their differences by cooperation. Disputes may be handled at a variety of negotiation levels ranging from bureaucratic or diplomatic negotiations, through to the executive level, or by political leaders. By demonstrating that States have made a bona fide attempt to resolve their dispute by cooperative negotiation, and this has been unsuccessful, a State can move on to other dispute settlement procedures: mediation, conciliation, arbitration, litigation.

53. Other peaceful measures that can be exercised against a non compliant flag State include trade-based market measures and loss of quota allocation through any relevant RFMO.

Test case on the duty to cooperate

54. A hypothetical test case (between friends) for the purpose of achieving a more explicit judicial pronouncement on the customary law duty to cooperate, would address the need for this uncertain area of law to be clarified. However, a conservative court finding could be a regressive measure that would deal international fisheries law a sharp blow. It is submitted that the concept of the duty to cooperate requires more scholarly research to fully explore the scope of the doctrine.

A Legally-binding Agreement on Flag State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing

55. A final legal tool that could be supported by States at the international level is a Legally-binding Agreement on Flag State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. It has been noted that the current regime of flag State laws are scattered between a host of international instruments at the soft and hard, international and regional, law level. There is a clear need to update and amalgamate these rights and duties into a new international hard law instrument which will compliment the FAO Port States Measures Agreement which is currently in draft. Furthermore, such a new instrument could be “purpose built” to specifically address IUU fishing both within zones of national jurisdiction and on the high seas.

Inventory of administrative/regulatory actions that may be taken at the international level by a State in order to implement criteria for flag State performance

States should contribute to regional and global databases of fishing vessels

56. Both regional and international organizations are taking an increasing interest in the use of fishing vessel listings. At the regional level, numerous RFMOs are compiling lists of IUU vessels as distinct from authorised vessels. An example was given to COFI 2009 of the current work being done

by the tuna RFBs on “unique vessel identifiers” and the compilation of a Global Record of Tuna Vessels.⁵⁵ At the international level, FAO hosts the poorly supported HSVAR.⁵⁶

57. The failings of the HSVAR have led FAO to work on developing a new global database for a comprehensive global record of fishing vessels, including refrigerated transport vessels and supply vessels (the FAO Global Record).⁵⁷

58. At COFI 2009, many members supported the development of the FAO Global Record but despite member enthusiasm, the future of the Global Record remains uncertain mainly due to a lack of funding.

59. States should endeavour to support these regional and global databases. It is desirable that fish products caught and processed by authorised vessels which are listed on the databases, will acquire market preference.

States should participate in the Global MCS network

60. The International Network for Cooperation and Coordination of Fisheries Related Monitoring, Control and Surveillance Activities was established to improve the efficiency and effectiveness of fisheries-related MCS activities through enhanced cooperation, coordination, information collection and exchange among national organizations and institutions responsible for fisheries-related monitoring, control and surveillance. Members conduct fisheries-related MCS activities in national waters, as well as on the high seas, and seek to increase global coordination to prevent, deter and eliminate IUU fishing. States which do not yet participate in this network should consider doing so.

Conclusion

61. On 1 May 2009 Switzerland (a land-locked State) became the 158th State Party of the UN Law of the Sea Convention. The global success of the LOSC tends to mask the fact that the Convention is increasingly becoming a framework convention which articulates core legal principles, but is unable to deliver an effective management regime. Those international agreements which do tackle the problems of the management regime, such as the 1995 UN Fish Stocks Agreement and the FAO Compliance Agreement, have not attracted the same levels of State support. The subject of non-compliant Flag States is a fundamental problem at the core of the global marine capture fisheries management regime. This paper has aimed to identify actions and measures by which individual States can contribute to better flag State performance.

⁵⁵ The five tuna RFMOs: IOTC, CCSBT, IATTC, WCPFC and ICCAT are looking at ways of sharing information on the global tuna fleet by working on their own global record of tuna vessels which is based on a system of unique vessel identifiers. The pilot programme has been noted and approved by FAO who are monitoring its implementation.

⁵⁶ Drafted in 1993, the Compliance Agreement was a prompt response to the international problem of reflagging of fishing vessels. However, the Agreement was never intended to remedy IUU fishing, and consequently, it has failed to do so. Its number of instruments of acceptance is sparse, and its global record of fishing vessels has never been effectively realised. Ultimately the HSVAR has too many weaknesses to be an effective database:

- Only State Parties to the FAO Compliance Agreement are obliged to provide data to the HSVAR and State Parties are low;⁵⁶
- The HSVAR has both poor quality of data and an inadequate quantity of data. Some State Parties do not provide any data, and those that do, will often provide incomplete data.
- The Compliance Agreement is specifically restricted to the high seas and most IUU fishing occurs within zones of national jurisdiction.
- Fishing vessels which are less than 24 metres in length are exempted from the Compliance Agreement, and an increasing number of vessels are being constructed which are “invisible” by being less than 24 metres.
- The HSVAR makes no provision to deal with the problem of beneficial ownership of vessels.
- The HSVAR gives inadequate recognition to the needs of developing States.
- The Compliance Agreement lacks any form of review mechanism.

⁵⁷ Lugten G. “The FAO Global Record of Fishing Vessels, Refrigerated Vessels and Fishing Support Vessels” (2008). 23:3 *International Journal of Marine and Coastal Law*48.

ANNEX A: TERMS OF REFERENCE

The terms of reference for the paper appear below. We have provided examples of considerations you may wish to take under some of the ToRs for guidance purposes only. You would also welcome to "think outside the box" and address any other matter you think appropriate.

The role of national governments in implementing criteria and actions for flag State performance

1. Provide a structured inventory of measures and actions that may be taken at national, regional and international levels by States to implement agreed criteria and actions for flag State performance, including flag States and States that seek to evaluate whether the criteria were met through, e.g.
 - legal measures and tools;
 - institutional/administrative, coordination, databases/information and enforcement mechanisms;
 - other means of ensuring commitment to and implementation of the criteria.

2. Describe linkages between implementation of criteria and actions for flag State performance and other national compliance tools to combat IUU fishing

As noted in our other e-mail, the papers should be from 3 000 to 5 000 words in length and as succinct as possible. They should be submitted to FAO by 18 May 2009 to allow time for electronic circulation to other participants.

ANNEX B: CASE STUDIES ON REGISTRATION OF VESSELS

Case Study 1: Australia

The law relating to the registration of ships is to be found in the *Shipping Registration Act 1981* (Cth). Certain ships are exempt from registration and these include ships of less than 24 metres in tonnage length, government ships, *fishing vessels* and pleasure craft.⁵⁸ However, s.14A permits any Australian-owned ship which is exempt from registration to be entitled to register if they wish to do so.⁵⁹ The Australian Register of Ships is maintained by the Shipping Registration Office of the Australian Maritime Safety Authority (AMSA) and the AMSA have a Web site encouraging fishing vessels to register, although they are not required to do so.⁶⁰ The register contains:

- physical details of the vessel;
- name and address of the registered owners;
- name and address of any mortgagees;
- name and address of any caveators; and
- a history of ownership since registration.

AMSA describe the benefits of Registration as being:

- a record of ownership (or title) to the vessel;
- Australian nationality for the vessel, and where a fishing vessel operates on the high seas or in foreign ports, some form of nationality is required;
- The ability to use the vessel as financial security for a mortgage; and
- Increasing the value of a vessel, and making it easier to sell the vessel.

Case Study 2: United States of America

In the United States of America, vessel registration is subject to both a national and State registration system.

S.67.7 of the Code of Federal Regulations provides that vessels requiring documentation are any vessel of at least five net tons which engages in fisheries on the navigable waters of the United States on in the Exclusive Economic Zone, Great Lakes trade, or coastwise trade, unless the vessel is exempt under S.67.9(c). To qualify for Federal documentation, a vessel must be completely owned by a United States citizen. Where the owner is a corporation, the corporation must be registered in a State or the United States, the chief executive officer and chairman of the board of directors must United States citizens, and no more than a minority of the number of directors necessary to constitute a quorum may be non-citizens. In addition, at least 75% of the corporate stock must be vested in United States citizens for a coastwise or fisheries endorsement.

Vessels under 5 tonnes can request a United States Coast Guard document, but they are not required to do so.

Domestic State registered vessels are also considered to be United States flagged vessels. Standards for State registration do not vary significantly, and the process is more akin to registering a car. The

⁵⁸ Section 13. A “fishing vessel” is defined in Section 3(1) as “a ship that is used, or is intended to be used, wholly or principally for the taking, catching or capturing of fish for trade or manufacturing purposes.”

⁵⁹ The question of ownership is relevant to the LOSC provisions on “genuine link”. Within the *Shipping Registration Act*, s.8 describes an Australian-owned ship as having one owner who is an Australian citizen, OR, where there are two or more owners in common, then more than half of the shares in the ship are owned by Australian nationals, OR where there are 3 or more persons as joint owners, then the majority of those owners must be Australian nationals.

⁶⁰ www.amsa.gov.au/Shipping_Registration/Guides/Who_owns_-_Yachts_Cruisers_Fishing_Boats.asp

Web site www.dmv.org/boat-registration.php lists each State requirement, forms and fees for vessel registration.⁶¹

Case Study 3: India

In December 2008, the Central Government of India announced that it would be mandatory for owners of all motorized boats to get them registered with an agency to be designated by each respective State government. The decision was taken in the wake of the recent terrorist attacks in Mumbai by terrorists who entered the city from the sea. The decision was taken at a high-level meeting chaired by Union Home Secretary and attended by senior officers of the Navy, Coast Guard, Intelligence Bureau, Research and Analysis Wing, Ministry of Defence, and the Bureau of Police Research and Development.

Indian Registration of fishing vessels with the Central Government has been in accordance with the Tamil Nadu Marine Fishing Regulation Act No. 8 of 1983. Section 3, item (e) defines a fishing vessel as meaning “a ship or boat, whether or not fitted with mechanical means of propulsion, which is engaged in sea-fishing for profit and includes:

- (i) a deep-sea fishing vessel;
- (ii) a mechanized fishing vessel;
- (iii) a catamaran;
- (iv) a country craft, including Vallam; or
- (v) a canoe;

engaged in sea-fishing.”

A “registered fishing vessel” means

- (i) a fishing vessel registered under Section 11 of the Marine Products Export Development Authority Act, 1972 (Central Act 13 of 1972), or
- (ii) a fishing vessel registered under section 10.

Section 10 provides:

Registration of fishing vessels – (1) The owner of every fishing vessel not being a fishing vessel registered under section 11 of the Marine Products Export Development Authority Act, 1972 (Central Act 13 of 1972) shall register such fishing vessel under this Act.

Thus, under the current law a vessel owner is given a choice to register his vessel either in accordance with Act 8 or Act 13 or both.⁶²

Case Study 4: Japan

The Fishing Vessels Law (Law No. 178 of 1950) prescribes procedures for the registration of fishing vessels. Except for fishing vessels which are under 1 gross ton and without engines, the following information must be registered:

- name and address of applicants;
- name of vessel;
- gross tonnage of vessel;

⁶¹ Information contributed in personal correspondence by v/r Captain M.B. Cerne, Coast Guard District 17 (Michael.B.Cerne@uscg.mil)

⁶² Erlingsson A. (Consultant to FAO) *Safety of Small Fishing Vessels in Four Selected Countries in the South-East Asia Region*, study and report carried out on behalf of FIIT, FAO, Rome Oct.–Dec. 2005. The Erlingsson Report examines fishing vessel registration procedures in India, Sri Lanka, Maldives and Thailand.

- length, width and depth of vessel;
- material of vessel (eg. wood, steel, FRP or light alloy);
- date of launching,
- name and address of dockyard,
- type and horsepower of propulsion engine,
- type of radio transmission and transmit power,
- name and address of operator,
- main port,
- type of fisheries or purpose.

This information is periodically reviewed.⁶³

Case Study 5: South Africa

A fishing vessel is a boat or ship that is used for, or equipped for the management, harvesting and exploitation of living marine resources, or in support of related activities. This includes any vessel aiding or assisting one or more vessels at sea in the performance of any permitted activity relating to fishing including – but not limited to – preparation, supply, storage, refrigeration, transportation, or processing. Both the South African Maritime Safety Authority (SAMSA) and the South African Department of Environmental Affairs and Tourism (DEA&T) must approve of a fishing vessel before registration. Number fishing vessel will be registered without a fishing right and a permit to engage in fishing activities. Registration requires the following information:

- name of the vessel;
- name and details of the vessel owner (including ownership shares);
- length of the vessel;
- horsepower and capacity of the vessel;
- flag of the State under which the vessel is currently registered (if chartered from or jointly owned with non-South African citizens); and
- the SAMSA safety certificate.

⁶³ E-mail correspondence from Takaaki Sakamoto Assistant Director, International Affairs Division, Fisheries Agency of Japan (takaaki_sakamoto@nm.maff.go.jp).

The role of regional fisheries management organizations in implementing criteria and actions for flag State performance¹

ABSTRACT

This paper identifies various measures to be used in addressing flag State performance by Regional Fisheries Management Organization Contracting Parties. A risk-based management process is offered as an example of how such performance could be assessed and addressed. Future actions are suggested to be aimed at overcoming current shortcomings in dealing with flag State performance breakdowns.

INTRODUCTION

1. Flag State duties are outlined in the 1982 United Nations Law of the Sea Convention (UNCLOS). These comprise general duties set out in Article 94 of the Convention and specific duties relating to pollution from vessels in Article 217. For fishing vessels, Articles 117 to 119 outline general duties, most notably the duty of States to cooperate in taking measures “for the conservation of the living resources of the high seas”.

2. The above duties are elaborated further in Article III of the 1993 FAO Compliance Agreement and in Articles 17 to 19 of the 1995 United Nations Fish Stocks Agreement (UNFSA). Under these provisions, Regional Fisheries Management Organizations (RFMOs) are tasked with promoting conservation of straddling stocks (Article 63 of UNCLOS), highly migratory species (Article 64 of UNCLOS) and discrete high seas stocks (Article 118 of UNCLOS). Consequently, flag States are obliged to authorise their vessels to fish in accordance with UNCLOS, UNFSA and relevant RFMO provisions. Such vessels should not only comply with RFMO conservation and management measures, but they should also not undermine their effectiveness (e.g. Article 18(1) of UNFSA). Article 20.(7) of UNFSA goes further and authorizes RFMO Members individually, or in concert, to take action to deter vessels not complying with relevant RFMO measures until such time as appropriate action is taken by the vessel’s flag State. Similar duties are supplemented by Article 8 of the 1995 FAO Code of Conduct for Responsible Fisheries (CCRF).

3. In practice, RFMO implementation of conservation and management measures places obligations on flag State Contracting Parties (CPs) of such organizations. These take the form of compliance and enforcement measures that require CPs, for example, to “prohibit fishing by their vessels” unless authorized (e.g. CCAMLR Conservation Measure 10-02). Other measures may be directed at vessel masters or the vessels themselves, but the flag State remains responsible to the RFMO concerned for ensuring compliance with the latter’s measures and for addressing violations of measures by the State’s flagged vessels.

4. A general feature of all RFMOs is that flag State CPs are required to control their vessels through the issuing of authorizations (i.e. licences) to fish, as well as by adopting regulations to ensure that fishing is carried out in conformity with permitted terms and conditions. Some RFMOs require their CPs to only authorize fishing if they can exercise control over their flagged vessels in a way that promotes compliance under the regional fishing arrangement concerned. Other, more recently negotiated, RFMOs have largely assumed the flag State duties set out in Article 18 of UNFSA.

¹ This paper was prepared by Mr Denzil Miller, Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) Secretariat. The opinions expressed are those of the author and should not be taken as reflecting the official views of CCAMLR. The author thanks Ms Natasha Slicer for assistance in compiling the information for this paper.

5. While many RFMOs have appropriate fishery regulatory measures in place, it is sometimes difficult to ascertain whether flag State duties have been complied with (Lodge *et al.*, 2007)². Most notably, it is difficult to address persistent failures by some flag States to exercise effective jurisdiction over their fishing vessels and thereby control their activities. These States include both RFMO CPs and Non-Contracting Parties (NCPs).

6. This paper attempts to identify key performance indicators for flag State performance at RFMO level. Indicators largely infer a need to promote compliance with, and effective enforcement of, RFMO-agreed conservation and management measures generically. As such effective fisheries monitoring, control and surveillance (MCS) activities constitute tangible actions aimed at ensuring that the information necessary for evaluation of such indicators is accrued and that compliance is monitored. The paper also considers potential constraints on RFMO application of conservation and management measures – solutions to address perceived shortcomings are provided.

FLAG STATE DUTIES

7. As indicated, flag State CPs are responsible for ensuring that their vessels act in accordance with RFMO conservation and management measures in force. Furthermore, Article 17 of UNFSA does not discharge NCPs from the obligation to co-operate with RFMOs in the conservation and management of relevant straddling and highly migratory stocks; an obligation that is also implied for high seas stocks under Article II7 of UNCLOS.

8. With illegal, unreported and unregulated (IUU) fishing being the primary activity undermining RFMO management and conservation of fish stocks in all capture fisheries, paragraph 84 of the 2001 *FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (IPOA–IUU) notes that:

When a State fails to ensure that fishing vessels entitled to fly its flag, or, to the greatest extent possible, its nationals, do not engage in IUU fishing activities that affect the fish stocks covered by a regional fisheries management organization, the member States, acting through the organization, should draw the problem to the attention of that State. If the problem is not rectified, members of the organization may agree to adopt appropriate measures, through agreed procedures, in accordance with international law.

9. Outcomes from both the *Inter-Ministerial High Seas Task Force* (HSTF)³ and 2006 *UNFSA Review Conference*⁴ further emphasize the key role played by persistently unsatisfactory flag State performance; particularly that which allows IUU fishing to take place. The *Conference* (paragraph 61 of its Annex.) emphasized the need to develop “...appropriate processes to assess flag State performance with respect to implementing the obligations regarding vessels flying its flag set out in the Agreement and other relevant international instruments...”. In the current context, the question becomes:

How can flag State performance be assessed in operational terms?

10. Returning to the specific problem of IUU fishing, it is possible to identify particular elements that either individually, or collectively, characterize an operational failure in flag State performance. A list of five such elements is provided in Table 1, along with the international obligation, or duty, they

² Lodge, M.W., Anderson, D., Løbach, T., Munro, G., Sainsbury, K. and Willock, A. 2007. *Recommended Best Practices for Regional Fisheries Management Organizations*. Chatham House, London. 141 pp.

³ High Seas Task Force 2006. *Closing the Net: Stopping Illegal Fishing on the High Seas*. Governments of Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom, WWF, IUCN and the Earth Institute at Columbia University. Proposal 5: p. 63–64. www.high-seas.org/docs/HSTFfinal/HSTFFINAL_web.pdf.

⁴ United Nations. 2006. *Report of the Review Conference on the Agreement on the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*. UN DOC. A/CONF.210/2006/15, Section 56.

address and their perceived effect(s). These elements are based on specific qualities implied by the various flag State duties outlined above and from practical examples of failed behaviour associated with non-compliant IUU activities. They are therefore essentially “high-order” indicators of potential performance breakdown(s).

11. In most cases, the elements in Table 1 can be categorized into constituent sub-elements. Together elements, sub-elements and their attached qualities in Table 2 are used to identify RFMO operational (i.e. “practical”) measures aimed at improving CP flag State performance. In so doing, the potential role played by NCPs is recognized and is dealt with in the same way as for RFMO CPs.

12. Two examples illustrate how the information in Table 2 may be applied. First, the Measures attached to the Vessel Identity element are used to assess flag State performance by an RFMO CP in terms of providing and disseminating information relevant to the various Attached Qualities that constitute a Vessel Register. Similarly, the Measure attached to Non-Compliance Deterrence provides the necessary tools to address the Attached Qualities essential for an effective MCS regime.

INVENTORY OF RFMO FLAG STATE DIRECTED MEASURES

13. Taking matters further, the Measures outlined in Table 2 are used to provide an inventory of measures being implemented, or planned, by 12 RFMOs to address CP flag State performance. The potential involvement of NCPs in undermining such measures is an additional key element considered. The results are presented in Table 3 with the inventory being derived from public domain information sourced on the Internet. With the exception of CCAMLR-related information, an exact marriage of measures with RFMO actions was not always possible due to a lack of detailed information. For example, WPFCLicensing Obligations refer to a situation where both licences to fish in the RFMO’s and national waters exist. Similarly, ICCAT Trade Reporting is limited to trade certification measures alone. A strong case can therefore be made for more detailed analyses and that these should take into account the unique character of the RFMO concerned (see below).

14. Of the 12 RFMOs identified (Table 3), CCAMLR is alone in developing measures to deal with all elements, sub-elements and attributes of RFMO Flag State Performance provided in Tables 1 and 2. However, it should be noted that while a wide suite of measures has been developed, they are only applied to some of the fisheries for which CCAMLR is responsible. In the case of Fishery Access Control, measures are confined to certain *Dissostichus* fisheries and the crab fishery. Transshipment Regulation is limited to specific *Dissostichus* fisheries, and to the crab and Icefish (*Champtocephalus gunnari*) fisheries. Scientific Observation is confined to finfish fisheries, and is not yet applied in the krill fishery. Trade Reporting and Catch Certification/Documentation are limited to *Dissostichus* fisheries. CCAMLR does not implement Catch Certification *per se*, but its Catch Documentation Scheme (CDS) includes both certification and documentation provisions. Finally, the CCAMLR vessel monitoring system (VMS) is centralized with fishing vessel position reporting being directed predominantly to the CCAMLR Secretariat, or to the Secretariat *via* the Fisheries Authority of the CP concerned.

15. To effect standardization of future analysis such as those in Table 3, it is suggested that each RFMO should undertake its own analyses. Obviously, any attached assessment should be as objective and standardized as possible for CP flag State performance. However, it should also take into account the unique character of the RFMO concerned. An obvious analogy would be the independent, but comparable, approaches followed by various RFMOs in their recent assessments of institutional performance⁵. Furthermore, and in terms of detail, focus should be given to “core” standards rather

⁵ Refer: CCAMLR – www.ccamlr.org/pu/E/revpanrep.htm
 ICCAT – www.iccat.int/com2008/ENG/PLE-106.pdf
 NEAFC – www.neafc.org/news/docs/performance-review-final-edited.pdf.

than “absolute” standards in determining “best practice”. For example, deployment of scientific observers is not the same as 100% observer coverage. The former is a core standard while the latter is an elaboration of that standard which may reflect the RFMO’s needs as well as features unique to it. In these terms, the latter is an “absolute” standard. Consequently, “best practice” should be common for all RFMOs in order to facilitate overall performance in relation to higher order elements and qualities, as identified in Table 2.

SHORTCOMINGS AND SOLUTIONS

16. Clearly, successful execution of RFMO flag State performance is largely dependent on the capacity, and willingness, of CPs, individually and together, to implement measures such as outlined in Table 3. However, it is likely to be extremely difficult to determine how well this is achieved for any particular RFMO in its own right, particularly when compared to any other RFMO. In this context, there are six important considerations.

17. First, many of the 12 RFMOs considered do not lay down “due diligence” requirements for further flagging of vessels that have been shown to participate in IUU fishing. Paragraphs 9 and 13 of CCAMLR Conservation Measures 10-06 and 10-07 are very clear in this regard (Table 4). The CCAMLR provisions are also largely consistent with Article III of the *Compliance Agreement* and thus may have a place in other RFMOs efforts to improve CP flag State performance.

18. Second, no RFMO has yet developed a procedure for evaluating CP flag State performance. Following the approach outlined here, key flag State compliance elements and sub-elements should first be selected and prioritized. To be truly effective, the prioritization process would be risk-based and comprise:

- identification of potential risks attached to CP flag State performance through analysis and assessment of performance breakdowns;
- nomination of high risk items to be addressed;
- precise definition of risk items to be targeted;
- development of metrics (e.g. numerical ranks from Low to High) to assess potential impacts of targeted risk items;
- development of strategies, unique to targeted risk items, to provide remedial action and reduce negative effects of CP flag State performance breakdown(s);
- development and implementation of a formalized flag State compliance implementation plan to monitor, review and adjust remedial action for, and risk mitigation of, CP flag State performance breakdown(s); and
- development of appropriate reporting procedures to disseminate information on above throughout RFMO and between RFMOs.

19. Such an evaluation procedure is illustrated in its entirety in Figure 1. It comprises three basic steps – (a) setting higher order objective to bound the context of risk attached to any perceived breakdown of flag State performance; (b) an assessment process to identify, analyse and evaluate risk, and finally (c) a treatment of risk. As a whole, the process aims to provide a systematic, and objective, approach aimed at addressing flag State performance breakdowns in the interests of improving RFMO measure implementation.

20. Third, there is a need to ensure that NCPs do not undermine RFMO measures. As far as possible, NCPs should be encouraged to respect such measures (i.e. as mandated by Article 17 of UNFSA and Articles 116-118 of UNCLOS). To achieve this, generalized provisions (Table 5), based on CCAMLR Resolution 25/XXV, are offered to illustrate how RFMOs may formally outline a common approach to deal with NCP flag State performance in a manner consistent with both RFMO measures and UNFSA provisions. The illustration is in three parts: (a) a general policy consistent with relevant international law requirements (Table 6); (b) steps to encourage NCP reporting of vital

information (Table 7), and (c) recognition that, to be truly effective, the policy should be combined with formal cooperation enhancement targeting the NCPs concerned (Table 8).

21. Obviously, from Tables 6 to 8, it is implicit that active capacity building is necessary for NCPs unable to meet their flag State obligations. This further implies that financial support would be essential to ensure that appropriate actions can be taken. An RFMO-based *NCP Cooperation Enhancement Fund* is suggested as a way to fulfil this need. The *Fund* would draw on contributions, voluntary or otherwise, from RFMO Members themselves, or equally could be financed by donor agencies, individuals, fishing companies and other interested parties.

22. Fourth, any efforts to improve RFMO flag State performance will stand or fall on the effectiveness of decision-making in the RFMO concerned. Only with adequate buy-in from all CPs will such efforts attain the necessary legitimacy to make them effective. In these terms, decision-making should be sufficiently flexible to accommodate CP interests while sufficiently robust to avoid impasses serving no purpose other than allowing inactivity to flourish.

23. For example, in the face of a potential dispute, an RFMO could create an independent subsidiary bureau to deal with the matter at hand (e.g. a flag State performance breakdown). The decisions of such a bureau would effectively be binding, or the RFMO could agree that they would be binding unless a specific objection was offered. Such a process is largely similar to that of the World Trade Organization (WTO) dispute settlement procedure, which allows the supreme political body (DSB) to cast a decision of the Appellate Board⁶. As a consequence, a decision by the RFMO bureau on flag State performance breakdown, or application of associated conservation or management measure, would be binding unless the RFMO decided not to accept the decision by consensus. The system is essentially *quasi-judicial* in the sense that any resultant decision will generally be binding, but it also provides the RFMO with the ability to decide otherwise as a last resort. However, it must be emphasized that such a procedure would only be invoked when circumstances demand it (i.e. a deadlock exists). Furthermore, it implies that remedies for flag State performance breakdowns will normally be achieved through RFMO consultation, inquiry and negotiation.

24. Fifth, consideration should be given to the delicate question of how RFMO CPs might sanction States that persistently undermine an organization's measures by inadequate execution of their flag State duties. The application of sanctions by one State, or group of States, against another is usually applied as a last resort and for serious breaches of international law, such as genocide or violation of a commercial treaty. The general purpose is to enforce legal obligations in such a way that violations result in the loss of corresponding legal rights and privileges⁷.

25. Various RFMO-based sanctions have been applied against non-compliant flag State CPs and natural legal persons. These include blacklisting of vessels, quota reduction, trade measures, control of nationals and "long-arm" enforcement such the US Lacey Act. For NCPs, they include vessel blacklisting and flag State listings. The penalties for violation of such sanctions should be uniform across the RFMO CPs to address impartiality and non-discrimination considerations. Equally, they should aim to ensure that vessels do not "jurisdiction hop" in an attempt to secure lower penalties or to avoid RFMO CP sanctions completely. At the institutional level, the application of collective sanctions has not progressed much further than diplomatic *démarches* by the RFMO, or bilateral/multilateral approaches by CPs, to individual States, or groups of States. A notable exception has been the prohibition by ICCAT of trade in Atlantic bluefin tuna from Equatorial Guinea.

⁶ See Article 16, paragraph 4 and Article 17, paragraph 14 of WTO 1986–1994 *The Dispute Settlement Understanding of the World Trade Organization*. (www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#16); (www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#17)

⁷ Dixon, M. 2005. *Textbook on International Law*. Oxford University Press, 350 pp. (p. 8)

26. Together, such sanctions and enforcement measures do cause embarrassment and hardship to the delinquent State. However, they are complicated by political and economic considerations which render them less than effective for enforcing international legal obligations. But, as Dixon⁸ has emphasized, they are preferable “to overt displays of force” and appear better suited to “dealing with violations of international good practice”. Therefore, there may still be benefit in invoking the dispute procedures against an intransigent, underperforming flag State under Part XV (Sections 1 and 2) of UNCLOS⁹. It would then need to be shown that the flag State has not exercised effective jurisdiction and control over its vessel(s), and is thereby failing in its flag State duties as defined in Articles 94 and 117 to 119 of UNCLOS. While the attached litigation might be risky, it could also set a precedent to strengthen the position of an RFMO when making representation to intransigent flag States.

27. Sixth, and finally, as Lodge *et al.*¹⁰ have recognized, it is imperative that periodic review of RFMO performance directly focus on specific issues of concern. Flag State performance is obviously one such concern.

⁸ See Footnote 7 (above).

⁹ See Footnote 2 (above)(p. 69).

¹⁰ See Footnote 2 (above).

Table 1: Characteristic higher-order elements underpinning fishing vessel flag State performance by RFMO Members for their flagged vessels

ELEMENT	DUTY/OBLIGATION/AGREEMENT	EFFECT(s)
Vessel identity	Fix vessel nationality (UNCLOS Article 91) Fishing vessel record (Compliance Agreement Article IV)	Formally link vessel to flag State
Vessel control	Coastal stocks (UNCLOS Articles 56 and 62) Straddling and highly migratory stocks (UNCLOS Article 63 and 64; UNFSA Article 18) High Seas Stocks (UNCLOS Articles 116-117; Compliance Agreement Article III, Code of Conduct Article 8.2)	Exercise control over fishing vessels
Non-compliance deterrence	Duty to cooperate (UNCLOS Articles 61.2, 61.5, 63, 64, 117-118) (UNFSA Articles 20 and 21) (Compliance Agreement Article V) Deterrent measures (UNFSA Articles 18.3 and 18.4, Articles 17 and 19) Strengthen RFMOs (UNFSA Article 13)	Deter non-compliance by action, cooperation and improved RFMO performance
Non-compliance sanction	Act against non-compliant vessels (UNFSA Articles 18.1 and 20.7) Ensure compatible measures (UNFSA Article 18.4) Expeditious judicial proceedings UNCLOS Article 73, UNFSA Article 19.2)	Promote action against non-compliant vessels, ensure comparability of measures and expedite judicial proceedings for compliance failures
Non-member cooperation	Obligation to cooperate with RFMOs even if not a Member, exchange information, etc. (UNFSA Article 17)	Promote global application of RFMO measures

Table 2: Elements, sub-elements, attached qualities for action and measures underpinning fishing vessel flag State performance by RFMO Members for their flagged vessels. [“CP” – RFMO contracting Party; “NCP” – RFMO non-contracting Party]

ELEMENT	SUB-ELEMENT	ATTACHED QUALITIES FOR ACTION	MEASURES
Vessel identity	Vessel register	Unique vessel identifier (IMO No.) Port of registry Vessel details (size, tonnage, etc.) Identity of owner Identity of beneficial owner Identity of charter operator Identity of master Radio call sign Vessel marking Vessel photograph Fishing gear marking	Licensing obligations Control of nationals Reporting obligations Vessel marking standards Fishing gear marking standards Inspection scheme
Vessel control	Authority to fish	Fishing licence Specified area of operation Specified time of operation General and catch location Reporting requirements Inspection and observation	Fishing permit Control of nationals Reporting obligations Vessel Monitoring Systems (VMS) Catch reporting Inspection scheme CP “white” vessels lists Information exchange
Non-compliance deterrence	MCS	At-sea surveillance At-sea inspection Catch monitoring Home port inspection Trade monitoring	Aerial/maritime patrol support Fishery access control Inspection scheme Observation scheme Reporting obligations

MEASURES	CCAMLR	CCSBT	GFCM	IATTC	ICCAT	IPHC	IOTC	NAFO	NASCO	NEAFC	SEAFO	WCPFC
Information exchange												
<u>NON-COMPLIANCE DETERRENCE</u>												
Fishery patrol support												
Fishery access control												
Inspection scheme												
Observation scheme												
Reporting obligations												
Catch reporting												
Trade reporting												
Transshipment regulation												
Catch certification and/or documentation												
<u>NON-COMPLIANCE DETERRENCE</u>												
CP black lists												
Fishing measures												
Environmental measures												
Information exchange												
<u>NON-COMPLIANCE SANCTION</u>												
Reporting obligations												
Information exchange												
<u>NCP COOPERATION</u>												
NCP IUU vessel lists												
Capacity building												
Diplomatic démarche												
Information exchange												

Key for Table 3 on implementation of RFMO flag State measures

	Measure implemented
	Developing measure or not applied or only applied in some fisheries
	No measure in place
	Insufficient information to evaluate or not applicable

Table 4: Provisions of CCAMLR conservation measures 10-06 and 10-07 directly reflecting due diligence application in respect to CP flagging of vessels.

PARAGRAPH 9 OF CCAMLR CONSERVATION MEASURE 10-06

9. Contracting Parties shall take all necessary measures, to the extent possible in accordance with their applicable laws and regulations, in order that:
- (i) they do not register or de-register vessels that have been placed on the Provisional CP-IUU List until such time as the Commission has had the opportunity to examine the List and has made its determination;
 - (ii) if they do de-register a vessel on the Provisional CP-IUU Vessel List they inform, where possible, the Executive Secretary of the proposed new Flag State of the vessel, whereupon the Executive Secretary shall inform that State that the vessel is on the Provisional CP-IUU Vessel List and urge that State not to register the vessel.

PARAGRAPH 13 OF CCAMLR CONSERVATION MEASURE 10-07

13. Contracting Parties shall take all necessary measures, to the extent possible in accordance with their applicable laws and regulations, in order that:
- (i) they do not register vessels that have been placed on the Provisional NCP-IUU Vessel List until such time as the Commission has had the opportunity to examine the List and has made its determination;
 - (ii) if they do de-register a vessel on the Provisional NCP-IUU Vessel List they inform, where possible, the Executive Secretary of the proposed new Flag State of the vessel, whereupon the Executive Secretary shall inform that State that the vessel is on the Provisional NCP-IUU Vessel List and urge that State not to register the vessel.

Table 5: Generalized provisions for RFMO policy to combat IUU fishing by Non-Contracting Party flag vessels (Based on CCAMLR Resolution 25/XXV).

The RFMO:

Concerned about the increasing number of vessels repeatedly fishing in an illegal, unreported or unregulated (IUU) manner,

Recognizing that such fishing is causing potentially irreversible damage to fish stocks and other marine species and preventing the RFMO from achieving its objective of conservation of marine living resources in the RFMO Area,

Concerned that many of these vessels are flagged to non-Contracting Parties that have failed to respond to correspondence from the RFMO and diplomatic and other representations by RFMO Members, seeking that they cooperate with the RFMO,

Acknowledging that many of the above non-Contracting Parties are Parties to the United Nations Convention on the Law of the Sea (UNCLOS),

Desiring to promote recognition that RFMO conservation measures constitute relevant standards needed to achieve conservation of marine living resources in the RFMO Area,

Noting that the 2001 FAO International Plan of Action to prevent, deter and eliminate IUU fishing (IPOA-IUU) urges States to ensure that fishing vessels entitled to fly their flag do not engage in or support IUU fishing and requires that a flag State be in a position to exercise its responsibility to control any vessel it registers and ensure such vessels do not engage in or support IUU fishing,

Determined to pursue diplomatic and other action, in accordance with international law, with non-Contracting Parties that fail to cooperate with the RFMO, including by failing to direct their flag vessels to cease IUU fishing and failing to take legal and other action against their flag vessels that disobey such directions,

Recognizing the value of cooperation and joint diplomatic approaches by RFMO Contracting Parties in undertaking such action and exerting influence, urges all Contracting Parties to individually and collectively, including in other relevant international fora such as the United Nations Food and Agriculture Organization and regional fisheries management organizations, to the extent possible in accordance with their applicable laws and regulations:

1. Pursue diplomatic and other action, in accordance with international law, with non-contracting Party flag States, seeking, as appropriate, that they:

- (i) Recognize that RFMO conservation measures constitute relevant standards needed to achieve conservation and use of marine living resources in the RFMO Area;
- (ii) Investigate the activities of vessels fishing under their flag in the RFMO Area, in accordance with Article 94 of UNCLOS, and report findings of such investigations to the RFMO;
- (iii) Join the RFMO and cooperate with it and, until such time as they do, direct their flag vessels not to fish in the RFMO Area and take legal and other action against those vessels that disobey this directive;
- (iv) Grant permission for boarding and inspection by designated RFMO inspectors of their flag vessels suspected of, or found to be, fishing in an IUU manner in the RFMO Area.

2. Seek the cooperation of non-Contracting Party Port States when IUU fishing vessels seek to use the ports of non-Contracting Parties, urging them to take the steps in accordance with applicable RFMO measures.

Table 6: *Pro forma* policy for enhancing cooperation between RFMOs and Non-Contracting Parties (NCPs)

The RFMO, in order to:

- ensure the effectiveness of its conservation and management measures;
- enhance cooperation with Non-Contracting Parties, including those implicated in fishing which undermines the effectiveness of those measures (hereafter referred to as illegal, unreported and unregulated fishing (IUU) fishing); and
- eliminate IUU fishing, including that by non-Contracting Parties,

Hereby adopts the following policy:

- I. The Executive Secretary is requested to develop a list of Non-Contracting Parties implicated in IUU fishing and/or trade either after the adoption of this policy or during the three years prior, which has undermined the effectiveness of RFMO conservation and management measures.
- II. The RFMO Chair shall write to the Minister for Foreign Affairs of each Non-Contracting Party included in the abovementioned list explaining how IUU fishing undermines the effectiveness of RFMO conservation and management measures. The letter, as appropriate, will:
 - (a) invite and encourage Non-Contracting Parties to attend as observers at meetings of the RFMO in order to improve their understanding of the RFMO's work and the effects of IUU fishing on its measures;

- (b) encourage Non-Contracting Parties to accede to, or become Members of, the RFMO;
- (c) inform Non-Contracting Parties of development and implementation of RFMO conservation and management measures and provide copies of such measures with the explanatory memoranda attached;
- (d) encourage Non-Contracting Parties to cooperate with the RFMO in the implementation of management and conservation measures and draw their attention to the consequences of non-cooperation and participation;
- (e) highlight the NCP Cooperation Enhancement Fund as a potential source of assistance for projects aimed at preventing, deterring and eliminating IUU fishing in the RFMO Area and encourage Non-Contracting Parties to request such assistance from the RFMO by contacting the Secretariat with information on the support required for consideration at the regular RFMO meeting(s);
- (f) request Non-Contracting Parties to prevent their flag vessels from fishing in the RFMO Area in a manner which undermines the effectiveness of measures adopted by the RFMO to ensure conservation and sustainably managed fisheries;
- (g) if their flag vessels are involved in IUU fishing, request Non-Contracting Parties to provide information to the CCAMLR Secretariat on their vessels' activities, including catch and effort data;
- (h) seek the assistance of Non-Contracting Parties in investigating the activities of their flag vessels suspected of being involved in IUU fishing, including inspecting such vessels when they next reach port;
- (i) request Non-Contracting Parties to report to the RFMO Secretariat on landings and transshipments in their ports in accordance with the format specified in Table 7 below; and
- (j) request Non-Contracting Parties to deny landing or transshipments in their ports for fish harvested in RFMO waters not taken in compliance with RFMO conservation and management measures and requirements under the RFMO Convention.

III. Parties shall individually and collectively take all appropriate efforts to implement or assist in the implementation of this policy; such efforts may include taking concerted action on joint demarches on Non-Contracting Parties to complement correspondence from the Chair.

IV. The Commission will annually review the effectiveness of the implementation of this policy.

V. The Executive Secretary will inform Non-Contracting Parties concerned of new conservation and management measures adopted by the RFMO after each of its regular meetings.

Table 7: *Pro forma* policy for Submission of information by Non-Contracting Parties in respect of catches, landings and transshipments of marine living resources subject to RFMO measures

To the extent possible the required information should be submitted to the RFMO in the following format:

- (i) Whether the vessel is a fishing or cargo vessel. If it is a fishing vessel, the vessel type (e.g. trawler, longliner etc.) should be identified.
- (ii) Vessel name, international call sign and registration number.
- (iii) Vessel flag and port of registration.
- (iv) Whether an inspection had been conducted by the Port State and, if so, its findings, including information on the vessel's fishing licence.

- (v) The fish species involved, including the location, weight and form of catch, and whether it was landed or transhipped.
- (vi) For a fishing vessel, the location(s) of operation according to the vessel's records and where it reported the catch as having been taken (RFMO or non-RFMO area).
- (vii) The nature of any matter(s) requiring further investigation by the flag State.

Table 8: *Pro forma* policy for RFMO cooperation enhancement programme

OBJECTIVES

The aim of this cooperation enhancement programme is to encourage and build the capacity of Non-Contracting Parties to cooperate with the RFMO. The ultimate desired outcome is more flag States working with the RFMO to combat illegal, unreported and unregulated (IUU) fishing on the water and in their ports.

Cooperation between Non-Contracting Parties and the RFMO may entail:

- exchange of information about IUU fishing with the RFMO;
- participation in key RFMO initiatives, such as Catch Documentation, or Certification, Schemes through the implementation of relevant measures;
- acceding to, and/or joining, the RFMO, as appropriate.

GUIDING PRINCIPLES

The cooperation enhancement programme has the following attributes:

- a focus on technical cooperation;
- flexibility to tailor cooperation to meet the needs of both the RFMO and recipient State on a case-by-case basis;
- a partnership model involving the RFMO Secretariat, experienced RFMO Member(s) as sponsors and the recipient State(s);
- matching of sponsors and recipients based on expertise, historical relationships between States and geographic proximity;
- a central repository of information and training material held by the RFMO Secretariat.

RESOURCING

RFMO members and the Secretariat are able to submit proposals for consideration by the RFMO under the auspices of the *NCP Cooperation Enhancement Fund*. Proposals will be considered by the RFMO at its annual meeting against agreed provisions. RFMO Contracting Parties are encouraged to make contributions into the Fund.

RFMO members may develop their own training materials at any time as required. To encourage consistency and ensure effective use of resources, RFMO members should actively share training materials. This will be facilitated by the Secretariat maintaining a central repository of relevant materials and information on the RFMO Web site. RFMO members will form the basis of technical and training cooperation. The RFMO, and/or donors, will fund the development of a standing training package that will be available to all Members.

Table 8/cont.**SELECTING NON-CONTRACTING PARTIES FOR CAPACITY BUILDING**

The RFMO will agree a priority list of Non-Contracting Parties that may benefit from technical cooperation and update this list as required. The list will be developed from information submitted by Members, including reports on the activity and movement of IUU fishing vessels and their interactions with Non-Contracting Parties.

Inclusion of countries on the list will be guided by the following criteria:

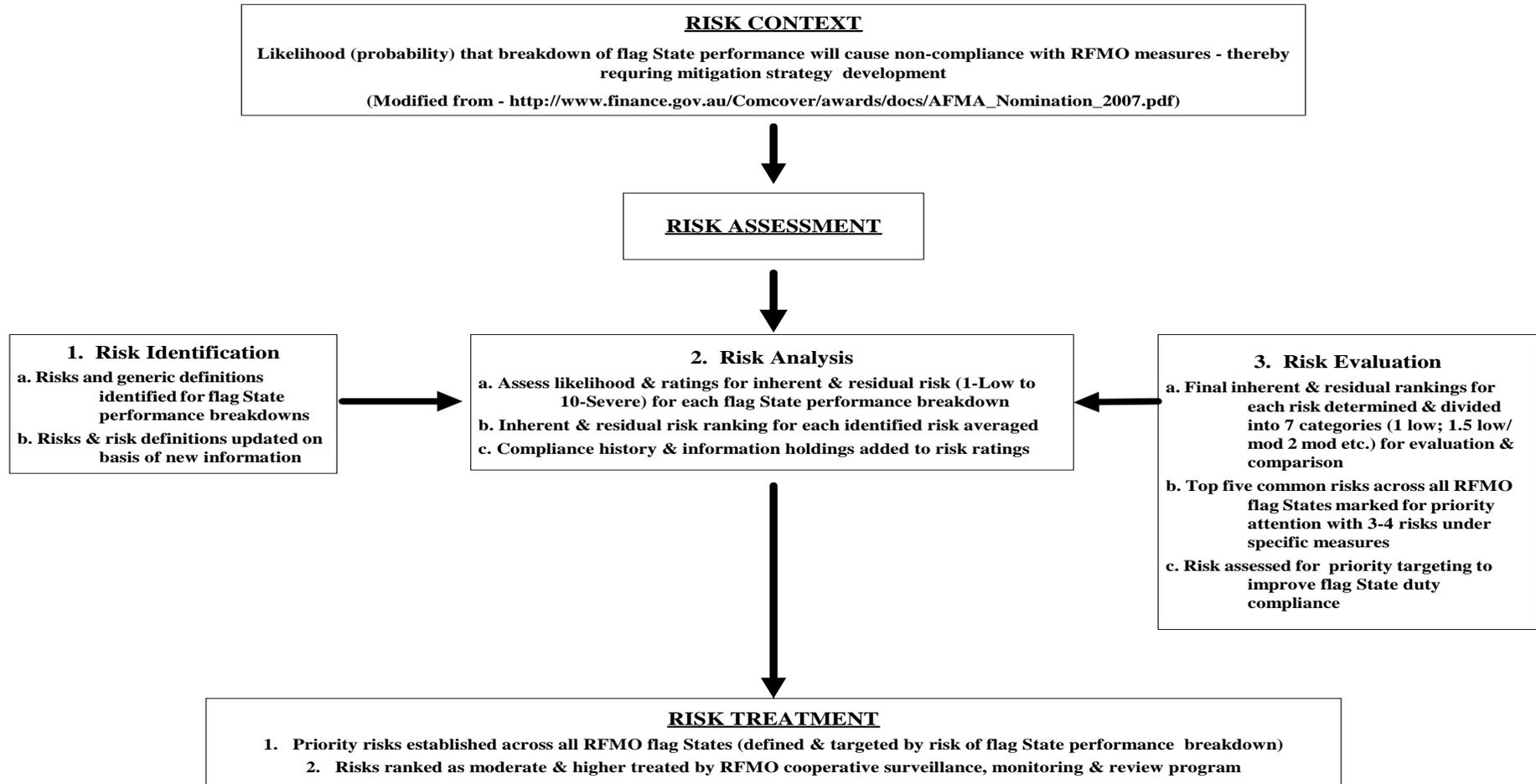
- The Non-Contracting Party is a key Flag for vessels fishing marine living resources managed by the RFMO, and its cooperation would assist the RFMO to better control IUU fishing and the trade of fish caught in an IUU manner and/or achieve the RFMO's objectives.
- The Non-Contracting Party is open to change and there is genuine political will to cooperate with the RFMO and combat IUU fishing, but the Non-Contracting Party is unable to do so as it lacks necessary resources or expertise.
- With training and technical assistance, the Non-Contracting Party will eventually be able to implement relevant measures in their own right.
- The Non-Contracting Party has appropriate government structures to commit the necessary time and resources to allow it to effectively participate in technical cooperation and is prepared to commit to such cooperation (for example, by nominating a competent authority for implementation of RFMO measures).

REPORTING

RFMO members are encouraged to report on the nature and outcomes of their technical cooperation. This reporting is at the discretion of Members, but could take the form of an inter-Member circulation of information or a presentation at the RFMO meeting.

FIGURE 1

RFMO FLAG STATE PERFORMANCE RISK MANAGEMENT PROCESS



Assistance to developing countries¹

ABSTRACT

This paper reviews the special requirements of developing States, as flag States, coastal States and port States. It indicates priority areas and methods for human capacity development and institutional strengthening, and describes potential and existing methods and mechanisms for providing assistance to developing countries to improve flag State performance.

INTRODUCTION

1. The present document was prepared, as a basis for discussion, for the FAO Expert Consultation on Flag State Performance, according to the given Terms of Reference². The Consultation followed a request from COFI, in 2007, for FAO to consider the possibility of holding an expert consultation to develop criteria for assessing the performance of flag States, as well to examine possible actions against vessels flying the flags of States not meeting such criteria. As a first step in undertaking this initiative, Canada hosted, by invitation, an expert workshop on flag State responsibilities in Vancouver, from 25 to 28 March, with assistance, advice and participation of FAO. As a result of this expert workshop, a guidance document³ was prepared, in which the avenues for assistance to developing countries were examined. To the extent possible, the elements contained in that document were considered in the present paper, as an attempt to build on the previous work that had already been done.

2. The referred guidance document noted that the failure of a developing country to adequately exercise its flag State responsibilities could result from them being: 1) unaware of the responsibilities of flagging a vessel that are associated with ensuring fisheries conservation and management measures are respected; 2) unable to control their vessels due to a lack of technical and physical capacity, including lack of understanding of the functions of a registry, and 3) unwilling to control vessels flying their flags.

3. As it has been noted in the report of the Vancouver Workshop, flag State responsibilities are clearly defined in international law, in both hard (legally-binding) and soft (non-legally binding) instruments, as well as in the form of political commitments (e.g. UNGA Resolutions). The United Nations Convention on the Law of the Sea (UNCLOS), in its Article 94, sets out the duties of the flag State, establishing that every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. The duties of the flag State

¹ This paper was prepared by Mr Fabio Hazin, Director of the Fisheries and Aquaculture Department of Universidade Federal Rural de Pernambuco- UFRPE, Brazil. The opinions expressed are those of the author and should not be taken as reflecting the official views of FAO.

² Assistance to developing countries

1. Describe the special situation and needs of developing States (both flag States and States seeking to take action against vessels of States that do not meet agreed criteria for flag State performance), and particularly the constraints that they are facing, with regards to implementing criteria and actions for ensuring flag State compliance with its obligations under international law, and ways to overcome the constraints through programmes of assistance and other means.
2. Identify priority areas and methods for human capacity development and institutional strengthening.
3. Identify methods and mechanisms for providing assistance to developing countries to ensure improved flag State performance.

³ Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action. Guidance Document. May, 2009.

specifically related to the conservation and management of straddling and highly migratory fish stocks are well defined in Part V of UNFSA⁴ and Article 8.2 of the FAO Code of Conduct.

4. The special requirements of developing States are recognized in several clauses of UNCLOS. In relation to the conservation of the living resources of the high seas, there is a specific provision in Article 119, establishing that, in taking measures to maintain or restore fish populations at levels which can produce maximum sustainable yield, the special requirements of developing States shall be taken into account. Nevertheless, as for the flag State responsibilities, the special requirements of developing States, in relation to the conservation and management of straddling and highly migratory fish stocks, are addressed in a much more detailed manner in Part VII of UNFSA. Specific provisions can also be found in the FAO Code of Conduct, particularly in its Article V; in the 2001 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, in its Part V; and in Article VII of the Compliance Agreement.

5. Considering the present legal framework and international obligations in relation to flag State responsibilities, as well as the mandate from COFI, it seems clear that the FAO Expert Consultation on Flag State Performance should focus on the exercise of flag State responsibilities in areas outside its national jurisdiction and, as already pointed out by the Vancouver Workshop, in the context of combating illegal, unregulated and unreported fisheries.

THE SPECIAL SITUATION AND NEEDS OF DEVELOPING STATES

6. According to FAO, in 2006, 79 percent of the world fishery production took place in developing countries. Their exports represented 49 percent (US\$ 42.5 billion) of world exports of fish and fishery products in value terms and 59 percent (31.6 million tonnes, in live weight equivalent) in terms of quantity. Their share of the quantity of fish exports destined for human consumption, raised from 43%, in 1996, to 53%, in 2006 (FAO/SOFIA, 2008). The fishery net exports of developing countries (i.e. the total value of their exports less the total value of their imports) continue to be of vital importance to many of them and have increased significantly in recent decades, growing from US\$ 1.8 billion, in 1976, to US\$ 24.6 billion, in 2006. Developing States are, therefore, major players in the world fisheries. Some of them also have open registries for merchant ships, which may as well register fishing vessels. Nevertheless, as it was noted in the Vancouver workshop, open registries are not inherently illegal, since they may serve useful economic functions, in a rightful manner, provided they fulfil their obligations as a flag State. In the following two sections of this document, the needs and difficulties faced by developing States to discharge their responsibilities as a flag State, as well as a coastal State seeking to take action against vessels of States that do not meet agreed criteria for flag State performance are addressed.

The special requirements of developing States, as flag States

7. The special requirements of developing States, as flag States, involve different levels, areas and natures of activities needed for an adequate control of the fishing vessels flying their flag, so that they can meet internationally agreed criteria, including:

Legal and regulatory framework

8. Many developing countries do not have the legal and regulatory framework needed to assure an adequate control of the fishing vessels flying their flag, which should include a due process for registering a vessel as well as for authorizing it to carry out fishing activities. National laws and regulations need, therefore, in many instances, to be updated and harmonized with international commitments resulting from both hard and soft law. First of all, due to the different nature of their

⁴ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

activities and consequently control requirements, the process to register a merchant ship must be differentiated from the one needed to register a fishing vessel. In order to register a fishing vessel, the national vessel registry must demand, as a minimum, the vessel data required by FAO, as well as information on the history of the vessel, particularly in relation to possible changes of flag and name, in conjunction to possible past IUU fishing practices, as set out, for example, in Article III.5 of the Compliance Agreement⁵. The vessel should not be included in a RFMO list of vessels engaged in IUU fishing and fishing related activities and the effective owner and operator of the vessel must be clearly identified. It is also essential to ensure that a legal process is established to prosecute and penalize with adequate severity those owners/ operators of fishing vessels that engage in IUU Fishing.

Institutional organization and infrastructure

9. Many developing States do not have either the institutional organization or the required infrastructure to adequately control the fishing vessels flying their flag. As already pointed out in relation to the legal and regulatory framework, it is essential that the registry and the control of fishing vessels be clearly differentiated from merchant ships, which includes the need to have a specific government agency or statutory authority with a clear mandate and accountability for the results of the fisheries management policy and system in place. Such a body needs to have an adequate infra-structure and capable personnel to control and enforce the applicable fisheries regulations, particularly in relation to monitoring, control and surveillance (MCS) of the activities carried out by the fishing vessels flying their flag.

Monitoring, control and surveillance (MCS)

10. MCS measures, although essential for an adequate control of fishing vessels, are commonly very expensive and difficult to implement, particularly so by developing States. Any MCS system needs to include means for immediate contact with the vessel, so that it may be called back to port at any time. All fishing vessels to operate in the high seas need to be equipped with a satellite based, vessel monitoring system (VMS), which, in turn, leads to the necessity of having a monitoring central, capable of receiving and tracking the signal from all monitored vessels.

11. One of the best ways to ensure compliance by fishing vessels, however, is by having observers on board, who can not only inspect the fishing operations in a continuous and permanent basis, but can also gather valuable scientific information. Quite unfortunately, however, observers' programmes are generally quite expensive, so that the coverage rates are rather low, even in developed countries.

12. All fishing activities must be recorded in a fishing logsheet, which should include, in a daily basis, data on the time and position of fishing operations, technical details of the fishing gear employed and records of the catch, by species, in the most detailed way possible. Ideally, this information should be transmitted to the monitoring center of the flag State electronically, after every fishing operation, through a system that could be easily coupled with the VMS, although, again, at a price that is commonly not low.

13. Finally, all landing and transshipping operations of the fishing vessel should be monitored, and the data compared to the information available from the fishing logsheets. Very few, if any, developing States are prepared to implement such a MCS system, so considerable investments are needed in order to enhance their capacity in this regard.

⁵ Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas.

Scientific personnel and infrastructure

14. All information generated by the MCS system, particularly data from observers on board, fishing logsheets and landings/transshipment, need to be processed, analysed, and transmitted to the pertinent RFMO. Most developing countries do not have either the facilities for doing so (office space, computers, etc.), nor the personnel with the required scientific capabilities. Besides, in order to assure that the scientists involved in the process of data gathering and analysis are adequately motivated, it is essential to give them the opportunity to fully participate in the work done by the relevant RFMO, including the stock assessment exercises. When a scientist from a developing country, which is part of an RFMO, realizes that he is only good for providing data, but that he will not be granted the opportunity to participate in the exercise of analysing the data he helped to provide, of assessing the stock condition and of providing management advice in equal footing with the scientists from more developed nations, he will no longer care about the quality of the data he is gathering and providing. In order to improve data quality, therefore, it is essential to ensure full participation of scientists from all nations that take part in the fishery. That includes surely the need to provide travel support for scientists from developing countries to allow their participation in RFMO meetings, but, much more than that, it also requires heavy investments in capacity building, for the training of these scientists in several aspects of fisheries sciences. There are, however, two risks in this process that need to be highlighted. The first one is the selection of the right personnel to train. The capacity building initiative must ensure that the technicians and scientists to be trained are the ones really involved with the relevant fisheries. When a training chance arises, many times involving travel opportunities to a foreign country, quite unfortunately, it is not uncommon that the candidates indicated by the countries invited to participate are chosen much more for political reasons than for their real involvement with the fishery. The second problem, much more difficult to avoid, is that, many times, because of the better training acquired, the capacitated scientists tend to migrate to higher level jobs, quite often much more bureaucratic, and even to other countries, where they can get much better salaries. So, in any capacity building initiative, mechanisms to ensure that the personnel chosen to be trained are the ones effectively involved in the fishery management process, as well as to reduce the risk of their subsequent evasion from their original posts should be envisaged.

Participation in high seas fisheries

15. The commitment and willingness by developing States to exercise adequate control overfishing vessels flying their flag is also dependent on their perception that they too have the opportunity to participate in high seas fisheries. So, the capacity building efforts should not be restricted to improving their MCS and enforcement capabilities, but also to enhance their ability to develop their own fisheries for highly migratory fish stocks, including access to such fisheries, as clearly spelled out in Article 5 of the FAO Code of Conduct, Article 10 of the IPOA for the Management of Fishing Capacity and Article 25 of UNFSA. That also implies the need to incorporate in RFMO regimes transparent and equitable mechanisms for the allocation of fishing possibilities. Interestingly, this very important aspect of Part VII of UNFSA is often forgotten, with a great emphasis being usually placed on the need of capacity building exclusively for the purpose of making developing States more capable of controlling the vessels flying their flag.

16. Surely, capacity building initiatives in the five main areas above listed will require significant investments of three different natures:

- a) Material resources (facilities, hardware and equipment);
- b) Human resources (training); and
- c) Financial resources.

The special requirements of developing States, as coastal States or port States

17. Besides the needs of developing States to adequately control the fishing vessels flying their flag, so that they can meet internationally agreed criteria, they also need assistance to improve their

capacity to seek action against vessels of States that do not meet agreed criteria for flag State performance. That could happen in 2 different situations: a) developing States acting as coastal States, in relation to vessels flying the flag of a third country that are found to be operating illegally in the waters under their jurisdiction; and b) developing States acting as a port State, in relation to vessels willing to use their ports which might be involved in IUU fishing or fishing related activities. In regard to the last case, the issue has already been adequately addressed in the Agreement on Port State Measures, presently under negotiation in FAO, particularly in its Part VI, which has already been provisionally agreed (enclosed for reference, as Appendix 1), and therefore it will not be necessary for the Expert Consultation to deal with it. In relation to the first case, however, developing States do need a lot of capacity building in the areas of surveillance of their jurisdictional waters and of legal assistance, in those cases where a vessel has been eventually apprehended and a prosecution is consequently required.

PRIORITY AREAS AND METHODS FOR HUMAN CAPACITY DEVELOPMENT AND INSTITUTIONAL STRENGTHENING

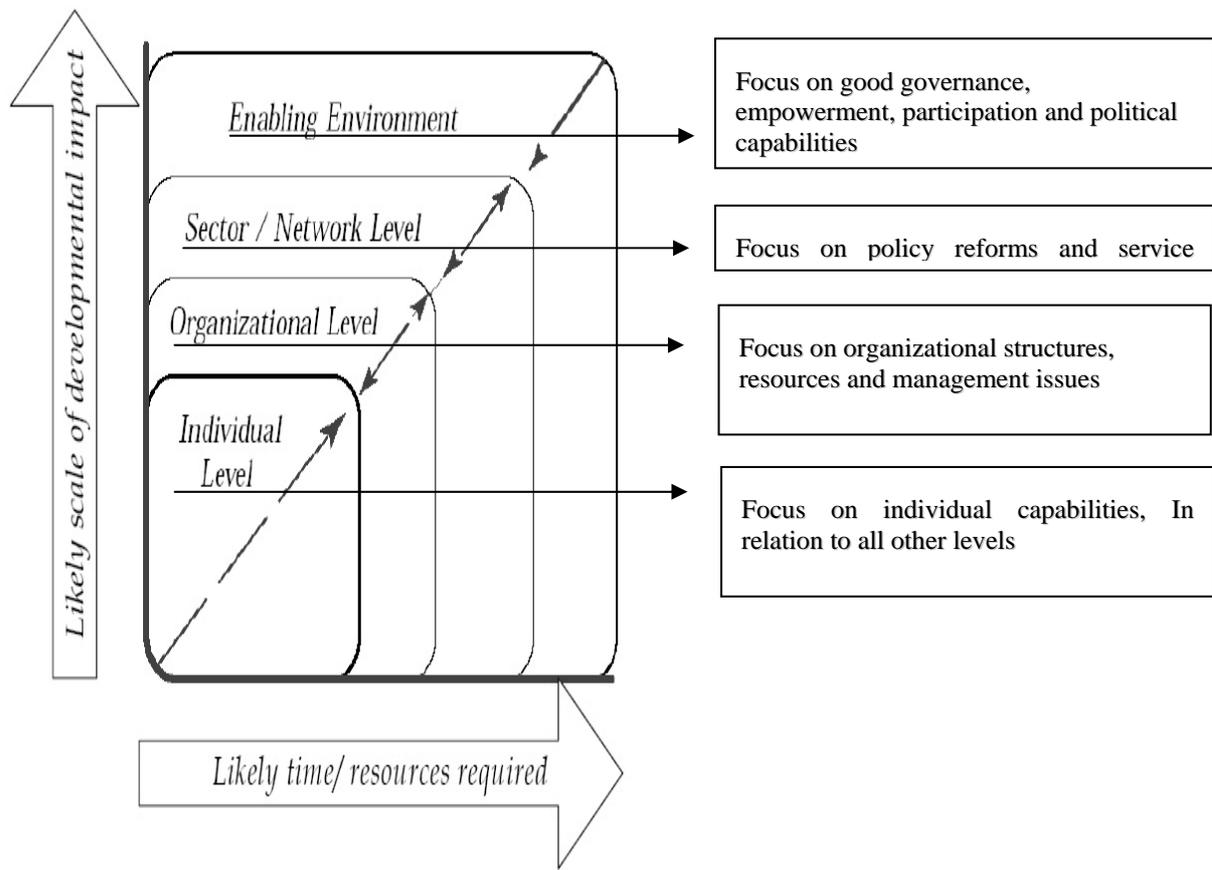
18. Although all the 5 areas above identified require capacity building efforts in developing States in order to make them able to adequately discharge their obligations as flag States, MCS should clearly be dealt with in a priority basis, including both human capacity development and institutional strengthening. The creation, in the scope of FAO, of a global record of fishing vessels, with an individual numbering system that would stick to the vessel throughout its life, could greatly facilitate the work of national registries in developing countries, particularly when they need to check the past history of a vessel prior to granting a fishing licence.

19. Another important initiative with regard to MCS is the International MCS network. Already comprised by more than 60 member nations, it aims at improving the efficiency and effectiveness of fisheries-related MCS activities through enhanced cooperation, coordination, information collection and exchange among national organizations and institutions responsible for fisheries-related monitoring, control and surveillance. According to their Web site (www.imcsnet.org), the network objectives are:

- ✓ efficient information exchange;
- ✓ preparing analyses and studies related to IUU fishing;
- ✓ recognizing the dangers of IUU fishing and seeking common solutions;
- ✓ facilitation of communications with and between members;
- ✓ develop cooperation and information sharing capabilities among member nations to work regionally and globally to prevent, deter and eliminate IUU fishing; and
- ✓ training and development of MCS officials in member nations to improve their operational effectiveness, enhance their skills and build their capacity to address IUU fishing.

20. In order to achieve its goals, the International MCS Network already conducted 2 Global Fisheries Enforcement Training Workshop (GFETW), the first one in 2005, in Malaysia, and the second one, in 2008, in Norway. Although the International MCS Network is a no-cost, voluntary organization of countries, it could possibly serve as a platform for launching capacity building initiatives in developing countries, particularly in relation to VMS.

21. It is important to note, however, that capacity building should not be conceived as an isolated action, punctual in time. It has to be understood as a process, and, as such, it has to be approached and developed, in a coherent and integrated manner, in its four different levels:



From Béné et al. (2007)⁶

22. Capacity building initiatives in regard to human development, in particular, must take a holistic/systemic approach. Human capacity development is “*the process by which individuals, groups, organizations, institutions, and societies develop their abilities – both individually and collectively – to set and achieve objectives, perform functions, solve problems and to develop the means and conditions required to enable this process*”. It is, therefore, a long-term process, whereby individual development becomes embedded in a sustainable shift in performance and collective behavior, which requires continued support through national initiatives and partnerships⁷. Human resource development, therefore, is much more than simply technical support through training in science, research and development. Incapacity to recognize this fact, often leads to failure of capacity building projects.

23. Besides training in several fields related to MCS, such as maritime legislation and international law, vessel monitoring systems, and fisheries management, as already pointed out, capacity building initiatives should also focus on fisheries science, particularly in fish population dynamics and stock assessment, in order to enhance the participation of scientists from developing countries in the scientific bodies of RFMOs.

⁶ Bené, C.; Macfadyen, G.; Allison, E. H. Increasing the contribution of small-scale fisheries to poverty alleviation and food security. *FAO Fisheries Technical Paper*. No. 481. Rome, FAO. 2007. 125p.

⁷ FAO Advisory Committee on Fisheries Research. Report of the first session of the Working Party on Human Capacity Development in Fisheries. Rome, 19–22 April 2004. *FAO Fisheries Report*. No. 745. Rome, FAO. 2004. 36 p.

METHODS AND MECHANISMS FOR PROVIDING ASSISTANCE TO DEVELOPING COUNTRIES TO IMPROVE FLAG STATE PERFORMANCE

24. Methods and mechanisms for providing assistance to developing countries to improve flag State performance could be achieved either directly, through bilateral arrangements, or through FAO and other specialized agencies of the United Nations, relevant intergovernmental and non-governmental organizations and financial institutions. For those who have joined UNFSA, the Part VII fund could be very well used for this purpose, since its objectives specifically include:

- ✓ to build capacity for activities in key areas such as effective exercise of flag State responsibilities, MCS, data collection and scientific research;
- ✓ to facilitate the exchange of information and experience on the implementation of the Agreement;
- ✓ to facilitate human resources development, technical training, and technical assistance in relation to conservation and management of straddling and highly migratory fish stocks and development of fisheries for such stocks; and
- ✓ to facilitate the participation in RFMO/A meetings.

25. RFMO/As, in particular, have the obligation to participate in capacity building efforts in developing countries in relation to training in data collection and analysis, and to facilitate the scientific participation of scientists from developing States in scientific meetings.

26. Finally, it is important to note that a specific funding mechanism for assistance to developing States, in order to improve their capacity to control the fishing vessels flying their flag, should be established, as it has been proposed in the draft agreement on Port State Measures (Article 22.6, Annex 1), possibly in the scope of FAO or other international institution, since Part VII of UNFSA is only available to those States party to it.

Annex 1**Chairperson's text as at 18 May 2009****CHAIRPERSON'S DRAFT AGREEMENT ON PORT STATE
MEASURES TO PREVENT, DETER AND ELIMINATE
ILLEGAL, UNREPORTED AND UNREGULATED FISHING****PART 6****REQUIREMENTS OF DEVELOPING STATES***Article 22**Requirements of developing States*

1. Parties shall give full recognition to the special requirements of developing States Parties in relation to the implementation of port State measures consistent with this Agreement. To this end, Parties shall, either directly or through FAO, other specialized agencies of the United Nations and other appropriate international organizations and bodies, including regional fisheries management organizations, provide assistance to developing States Parties in order to, *inter alia*:
 - (a) enhance their ability, in particular the least-developed among them and small island developing States, to develop a legal basis and capacity for the implementation of effective port State measures;
 - (b) facilitate their participation in any international organizations that promote the effective development and implementation of port State measures; and
 - (c) facilitate technical assistance to strengthen the development and implementation of port State measures by them, in coordination with relevant international mechanisms.
2. Parties shall give due regard to the special requirements of developing port States Parties, in particular the least developed among them and small island developing States to ensure that a disproportionate burden resulting from the implementation of this Agreement is not transferred directly or indirectly onto them. In cases where the transfer of a disproportionate burden has been demonstrated, Parties shall cooperate to facilitate the implementation by the relevant developing States Parties of specific commitments under this Agreement.
3. Parties shall, either directly or through FAO, assess the special requirements of developing States Parties concerning the implementation of this Agreement.
4. Parties shall cooperate to establish appropriate funding mechanisms to assist developing States in the implementation of this Agreement. These mechanisms shall, *inter alia*, be directed specifically towards:
 - (a) developing national and international port State measures;
 - (b) developing and enhancing capacity, including for monitoring, control and surveillance and for training at the national and regional levels of port managers, inspectors, and enforcement and legal personnel;
 - (c) monitoring, control, surveillance and compliance activities relevant to port State measures, including access to technology and equipment; and
 - (d) assisting developing States Parties with the costs involved in any proceedings for the settlement of disputes that result from action they have taken pursuant to this Agreement.

5. Cooperation with and among developing States Parties for the purposes set out in this Article may include the provision of technical and financial assistance through bilateral, multilateral and regional channels, including South-South cooperation.
6. Parties shall establish an ad hoc working group to periodically report and make recommendations to the Parties on the establishment of funding mechanisms including a scheme for contributions, identification and mobilisation of funds, the development of criteria and procedures to guide implementation, and progress in the implementation of the funding mechanisms. In addition to the considerations provided in this Article, the ad hoc working group shall take into account, *inter alia*:
 - (a) the assessment of the needs of developing States Parties in particular the least developed among them and small island developing States;
 - (b) the availability and timely disbursement of funds;
 - (c) transparency of decision-making and management processes concerning fundraising and allocations; and
 - (d) accountability of the recipient developing States Parties in the agreed use of funds.

Parties shall take into account the reports and any recommendations of the ad hoc working group and take appropriate action.

Outcomes of the Expert Consultation

- F.1 Draft criteria for flag State performance
- F.2 Assessing flag State performance and possible actions with respect to vessels flying the flags of States not meeting the criteria for flag State performance – framework and guidelines
- F.3 Assistance to developing countries to improve their performance as flag States

DRAFT CRITERIA FOR FLAG STATE PERFORMANCE

INTRODUCTION

The purpose of the draft Criteria for Flag State Performance is to enhance international fisheries governance, including the prevention, deterrence and elimination of illegal, unreported and unregulated fishing and related activities (IUU fishing). They are based largely on flag State responsibilities set out in existing international instruments, and take a pragmatic approach that focuses on the degree to which flag States implement their responsibilities and the outcomes of that implementation.

In developing a general set of criteria, the need to evaluate the efforts by a flag State to create a regulatory regime, as well as the outcomes and its behaviour, was recognized. Accordingly, the draft Criteria are elaborated as Regulatory and Behavioural Criteria, each of which address three categories of flag State performance: international; national vessel registry; and national fisheries management regime.

The draft Criteria could be used most effectively as a tool in a number of respects: as a “gap analysis” tool; as part of a positive process for self-assessment by States to ensure that they are taking necessary actions to ensure their vessels fish responsibly; and at international or multilateral levels to encourage compliance and combat IUU fishing. It was recognized that some States could not be expected to meet fully the standards set by the draft Criteria, and in this respect they would be important as a check list in identifying and assessing their needs for capacity building.

The Consultation recognized that, to a great extent, the Criteria were framed in general terms and detailed references for more effective implementation and use would be needed. In this regard, it agreed that further work was needed to develop these criteria and their content, prior to consideration by a Technical Consultation. This is shown in bold square brackets throughout the document as **[Pending]**. A preliminary review was undertaken by FAO and some of the work identified as pending by the Expert Consultation has been completed. Explanatory notes for the completed work are shown in bold italics in *(parentheses)*.

It is recommended that, after finalization by a Technical Consultation, Technical Guidelines should be prepared, as appropriate, to further elaborate detailed references to facilitate the implementation and use of the draft Criteria.

PART I REGULATORY CRITERIA

International

1. The flag State commits to implement, at minimum the flag State provisions contained in the:
 - 1982 UN Convention on the Law of the Sea;
 - 1993 FAO Compliance Agreement;
 - 1995 UN Fish Stocks Agreement;
 - 1995 FAO Code of Conduct and related instruments, including the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU);
 - 2008 FAO International Guidelines International Guidelines for the Management of Deep-Sea Fisheries in the High Seas, and

- Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.¹
2. Other possible complementary instruments to consider in this context, as indicators of related international commitments, include those that appear in Annex 1, as well as the applicable contents of relevant United Nations General Assembly Resolutions.
 3. The flag State has incorporated the relevant provisions of the instruments referred to in paragraph 1 into its domestic laws, regulations, policies and/or practices.
 4. For high seas fisheries where its vessels fish or with which it shares stocks within its areas of jurisdiction, the flag State is a member of or participates in regional fisheries management organizations and arrangements (RFMOs), or the flag State accepts and implements the conservation and management measures adopted by the RFMO.
 5. For fisheries in waters under the national jurisdiction of other States, the flag State has access agreements with the relevant coastal State or has mechanisms to verify and ensure that:
 - its vessels operate under due authorization of the relevant coastal State and comply with the applicable terms and conditions;
 - such fishing is carried out in a sustainable manner, including through impact assessments;
 - where appropriate, its vessels comply with applicable measures adopted by a competent regional fishery body; and
 - the flag State participates in international organizations or other relevant fora in relation to international fisheries governance.

National vessel registries and records

[Pending: Insert the definition of vessels: it was agreed to use the definition that appears in the Chairperson’s text of the draft Agreement on Port State Measures. *Definition appears in para 6 below.*]

6. For the purposes of these Criteria, “vessel” means any vessel, ship of another type and boat used for, equipped to be used for, or intended to be used for, fishing or fishing related activities.
7. Minimum information requirements are followed, such as:
 - the vessel data meets minimum FAO requirements regarding vessel markings;
 - information on owner/operators identifies effective beneficial owners/operators;
 - information on the history of the vessel identifies prior flag/name changes, and
 - information on the vessel.
8. Registration procedures are followed, which include:
 - verification of vessel history;
 - grounds for refusal of registration of the vessel, including that it is on an IUU fishing vessel list or record, or is registered in two or more States);
 - de-registration procedures;
 - notification of changes and/or regular update requirements, and

¹ Date and other relevant information to be added when finalized.

- coordination of registration among relevant agencies (e.g. fisheries, merchant marine) and with prior flag States to determine whether there are pending investigations or sanctions that may provide a motive for flag-hopping.

[Pending: Import the applicable provisions of the IPOA–IUU and complete them if necessary. (IPOA–IUU para 36 appears below)]

9. The registration procedures are accessible and transparent.
10. Registration of vessels with a history of non-compliance is avoided, except where:
 - the ownership of the vessel has subsequently changed and the new owner has provided sufficient evidence demonstrating that the previous owner or operator has no further legal, beneficial or financial interest in, or control of, the vessel; or
 - having taken into account all relevant facts, the flag State determines that flagging the vessel would not result in IUU fishing.

[Pending: Add reference to the need of coordination between the maritime and fisheries administrations. (IPOA–IUU para 40 appears below)]

11. The functions of registration of a vessel and issuing of an authorization to fish are conducted in a coordinated manner that ensures each gives appropriate consideration to the other, and appropriate links exist between the operation of the vessel registers and the records of fishing vessels. Where such functions are not undertaken by one agency, sufficient cooperation and information sharing exists between the agencies responsible for those functions.

[Pending: Add text linking registration to the authorization. (IPOA–IUU para 41 appears below)]

12. A decision to register a fishing vessel is conditional upon its being prepared to provide to the vessel an authorization to fish in waters under its jurisdiction, or on the high seas, or conditional upon an authorization to fish being issued by a coastal State to the vessel when it is under the control of the flag State.

[Pending: Add detailed information on the vessel. (IPOA–IUU para 42 appears below)]

13. A record of fishing vessels entitled to fly its flag is maintained, and includes, for vessels authorized to fish on the high seas, all the information set out in paragraphs 1 and 2 of Article VI of the 1993 FAO Compliance Agreement, and may also include, *inter alia*:
 - the previous names, if any and if known;
 - name, address and nationality of the natural or legal person in whose name the vessel is registered;
 - name, street address, mailing address and nationality of the natural or legal persons responsible for managing the operations of the vessel;
 - name, street address, mailing address and nationality of natural or legal persons with beneficial ownership of the vessel;
 - name and ownership history of the vessel, and, where this is known, the history of non-compliance by that vessel, in accordance with national laws, with conservation and management measures or provisions adopted at a national, regional or global level; and
 - vessel dimensions, and where appropriate, a photograph, taken at the time of registration or at the conclusion of any more recent structural alterations, showing a side profile view of the vessel.

[Pending: Add reference to the Global Record and other such records as appropriate, regional or subregional. (draft text appears below)]

14. Records are required to be kept in accordance with relevant subregional, regional and international standards and requirements, including, as appropriate, a global record.

[Pending: Add text of para 39, IPOA–IUU. (IPOA–IUU para 39 appears below)]

15. All practicable steps are taken, including denial to a vessel of an authorization to fish and the entitlement to fly that State’s flag, to prevent “flag hopping”; that is to say, the practice of repeated and rapid changes of a vessel’s flag for the purposes of circumventing conservation and management measures or provisions adopted at a national, regional or global level or of facilitating non-compliance with such measures or provisions.

National fisheries management regime

16. An institutional, legal, technical foundation/framework for fisheries management has been established (such as that referred to in Article 7.1 of the 1995 FAO Code of Conduct for Responsible Fisheries), that should include, at a minimum:

- a government agency or statutory authority or statutory oversight of an agency or a body with a clear mandate and accountability for the results of fisheries management policy;
- an agency or authority to issue regulations and ensure control and enforcement;
- internal organization for inter-departmental coordination, in particular coordination between fisheries authorities and vessel registry authorities, and
- infrastructure for scientific advice.

17. Laws, regulations or other arrangements implementing conservation and management measures have been adopted, which should include, at a minimum:

- principles, rules and standards contained in the relevant provisions of the instruments listed in paragraph 1 above, as well as any applicable RFMO conservation and management measures;
- a national framework, such as national plans or programmes, to manage fishing capacity and to combat IUU fishing, and
- regulation of transshipment.

[Pending: Import text from IPOA–IUU, paras 46 and 47 to chapeau, provide elaboration in Annex. (IPOA–IUU para 46 shown below in third bullet point, IPOA–IUU para 47 is referenced under last bullet point, details are in Annex 2)]

18. A regime for authorizing fishing activities (e.g. licensing) is in place, which ensures that no vessel is allowed to fish unless so authorized in a manner consistent with the sustainability of the exploited stocks, including:

- appropriate scope for authorization of fishing and fishing-related activities, including conditions for the protection of marine ecosystems, within and beyond areas of national jurisdiction;
- prior assessment of a vessel’s history of compliance and ability to comply with applicable measures; and
- minimum information requirements in the authorization that allow identification of accountable persons, areas and species, including:
 - the name of the vessel, and, where appropriate, the natural or legal person authorized to fish;
 - the areas, scope and duration of the authorization to fish, and

- the species, fishing gear authorized, and where appropriate, other applicable management measures, and
- relevant conditions under which an authorization is issued that may, where required, include those in Annex 2.

19. A control regime is in place that should include, as a minimum:

- legal power to take control of the vessel (e.g. denial of sailing, recall to port);
- establishment and maintenance of an up to date fishing vessels record;
- implementation of monitoring tools, such as vessel monitoring systems (VMS), logbooks/documentation, and observers;
- mandatory requirements regarding fishery-related data that must be recorded and/or reported by vessels (e.g. catches, effort, bycatches and discards, landings and transshipments);
- an inspection regime, including at sea and at port (including landing controls), and
- cooperation, including information sharing/reporting arrangements with other States, international organizations and RFMOs.

[Pending: Include Article 19(1)(e), 1995 UN Fish Stocks Agreement (*This was included in the last bullet point, the language was adapted to the context.*)]

20. An enforcement regime is in place, which should include, as a minimum:

- capacity to detect and take enforcement action with respect to violations wherever they may occur;
- authority and capacity to conduct timely investigations of violations, including the establishment of the identity of the violator(s) and the nature of the violation;
- an appropriate system for the acquisition, collection, preservation and maintenance of the integrity of evidence;
- a system of sanctions proportionate to the seriousness of the violation and adequate in severity to be effective in securing compliance and to discourage violations wherever they occur, and deprive offenders of benefits accruing from their illegal activities;
- cooperation, including information sharing/reporting arrangements with other States, international organizations and RFMOs relating to enforcement, including the timeliness of action following requests for assistance; and
- prohibition of high seas fishing operations by a vessel flying its flag where such vessel has been involved in the commission of a serious violation of subregional or regional conservation and management measures for straddling fish stocks and highly migratory fish stocks, until such time as all outstanding sanctions imposed by the flag State in respect of the violation have been complied with in accordance with its laws.

[Pending: Provide elaboration of enforcement in Annex. Refer to para 24 and import language from paras 47.1, 2, and 4 of the IPOA–IUU. (*IPOA–IUU para 24 (under “monitoring, control and enforcement”) appears below. IPOA–IUU para 47 is not included because it already appears in Annex 2 and in the IPOA–IUU is presented under “authorization to fish”, indicating that the measures are more related to control than enforcement.*)]

21. Comprehensive [and effective] monitoring, control and surveillance (MCS) of fishing is undertaken, and includes, to the extent possible, measures and actions described in Annex 3.

PART II BEHAVIOURAL CRITERIA

International

22. Does the State [effectively] contribute to the functioning of the RFMO in which it participates (i.e. does the State implement its duties as a contracting party or as a cooperating non-party, including reporting requirements on fishing activities and on compliance by its vessels)?
23. Does the State contribute to joint control and enforcement efforts where required, or on a voluntary basis as appropriate?
24. Does the State take action in respect of identified IUU fishing vessels flying its flag, including as required by relevant measures of the RFMO?

National vessel registries and records

25. Are the national registries and records regularly updated through timely reviews?
26. Is verification of vessel history/record [effectively] carried out prior to registration, and are vessels determined to be engaged in IUU fishing activities or vessels with multiple registrations refused?
27. Does the State cooperate with other States by exchanging information on flagging and deregistering vessels, both as part of the procedure to verify a vessel's history/record to register and in relation to vessels leaving its registry?
28. Is registry data available to all internal government users, particularly authorities with responsibilities for fisheries and vessels?
29. Is registry data publicly available and easily accessible?
30. Are violations sanctioned before resorting to deregistering?

National fisheries management regime

31. Are conservation and management measures [effectively] implemented, including the following?
- Does the flag State ensure that the obligations incumbent upon the fishing vessel owners, operators and crews are clearly accessible, transparent, and [formally] communicated to them? Does it provide (technical) support to the fishing sector in this respect?
 - Does the flag State [effectively] manage capacity and fishing effort, catch limits and output control and allow deployment consistent with the sustainable use of the fisheries resources [in accordance with the applicable measures adopted by coastal States and RFMOs]?

[Pending: include in an Annex a definition of the vessel's ability to comply with the terms and conditions of a fishing authorization; define "effectively exercises jurisdiction" (Each of these definitions would need to address a wide range of circumstances, and therefore should be broad enough to apply to different circumstances, such as through use of criteria, guidelines or a checklist. Technical Guidelines could elaborate details in this regard that would assist in determining whether a vessel had the ability to comply with an authorization, and in providing standards to determine the effective exercise of jurisdiction. The Consultation suggested that control is effective when the vessel has something to lose by not complying, and that other factors could include meeting regulatory criteria and having sufficient institutional and human capacity for implementation.)]

32. Is a regime for authorizing fishing activities (e.g. licensing) [effectively] implemented, including the following?

- Is a fishing authorization issued only where the flag State:
 - verifies the vessel's ability to comply with the terms and conditions of the fishing authorization;
 - is satisfied that it can effectively exercise its jurisdiction and control over the vessel to ensure compliance with applicable conservation and management measures; and
 - is satisfied that the holder of the authorization remains within reach of its enforcement jurisdiction?
- Is ongoing verification of the conditions for the granting of the authorization implemented by the flag State, where required (e.g. assessment of potential impacts of bottom contact fishing on vulnerable marine ecosystems)?

[Pending: elaborate each bullet point in an Annex. *These bullet points require technical input, and can be elaborated in Technical Guidelines.*]

33. Is a control regime implemented, that includes the following?

- Is a current fishing vessel record maintained through regular, timely updates?
- Is fisheries data collected, processed and verified in a timely manner?
- Are there effective means of control available?

34. Is an enforcement regime implemented, that could include the following?

- Is the evidence regarding violations diligently gathered and treated, including making available to enforcement authorities of other States and RFMOs evidence relating to alleged violations?
- Are violations investigated and procedures for sanctions initiated in accordance with domestic laws in a timely manner?

[Pending: proposal on judicial/administrative processes for cases. (A full proposal on these processes can be provided in Technical Guidelines. Some related concerns are met by new text in the second and third bullet points. The second bullet point is taken from IPOA-IUU paragraph 24.8, which also appears in Annex 3, and the text in the third bullet point is new.)]

35. Are sanctions effective, timely and implemented, including the following?

- Are sanctions applied in proportion to the seriousness of the violation and adequate in severity to be effective in securing compliance and to discourage violations wherever they occur and deprive offenders of benefits accruing from their illegal activities?
- Does the flag State promote knowledge and understanding of MCS issues within national judicial and administrative systems?
- Does the flag State have in place judicial and/or administrative processes capable of meeting these criteria, to the extent possible, in a timely and effective manner?
- Is the flag State capable of ensuring that sanctions are complied with, including where appropriate preventing the vessel from fishing until sanctions are satisfied?
- Does the flag State respond in a timely fashion to requests from other States or RFMOs to take measures in respect of its flag vessels?

INTERNATIONAL INSTRUMENTS RELEVANT TO FLAG STATE RESPONSIBILITY

Appendix F, paragraph 2

1974 International Convention for the Safety of Life at Sea;
 1986 United Nations Convention for Conditions on the Registration of Ships;
 1992 Convention on Biological Diversity;
 1993 Torremolinos Protocol;
 2007 ILO Work in Fishing Convention (Convention 188), and
 Relevant International Maritime Organization (IMO) instruments.

CONDITIONS OF AUTHORIZATIONS

Appendix F, paragraph 18

IPOA–IUU, paragraph 47

Conditions under which an authorization is issued may include, as appropriate:

1. vessel monitoring systems;
2. catch reporting conditions, such as:
 - 2.1 time series of catch and effort statistics by vessel;
 - 2.2 total catch in number, nominal weight, or both, by species (both target and non-target) as is appropriate to each fishery period (nominal weight is defined as the live weight equivalent of the catch);
 - 2.3 discard statistics, including estimates where necessary, reported as number or nominal weight by species, as is appropriate to each fishery;
 - 2.4 effort statistics appropriate to each fishing method, and
 - 2.5 fishing location, date and time fished and other statistics on fishing operations.
3. reporting and other conditions for transshipping, where transshipping is permitted;
4. observer coverage;
5. maintenance of fishing and related logbooks;
6. navigational equipment to ensure compliance with boundaries and in relation to restricted areas;
7. compliance with applicable international conventions and national laws and regulations in relation to maritime safety, protection of the marine environment, and conservation and management measures or provisions adopted at a national, regional or global level;
8. marking of its fishing vessels in accordance with internationally recognized standards, such as the FAO Standard Specification and Guidelines for the Marking and Identification of Fishing Vessels. Vessels' fishing gear should similarly be marked in accordance with internationally recognized standards;
9. where appropriate, compliance with other aspects of fisheries arrangements applicable to the flag State, and
10. the vessel having a unique, internationally recognized identification number, wherever possible, that enables it to be identified regardless of changes in registration or name over time.

MONITORING, CONTROL AND SURVEILLANCE**Appendix F, paragraph 21****IPOA–IUU, paragraph 24**

Comprehensive and effective monitoring, control and surveillance (MCS) of fishing may be undertaken from its commencement, through the point of landing, to final destination, including, as appropriate, by:

1. developing and implementing schemes for access to waters and resources, including authorization schemes for vessels;
2. maintaining records of all vessels and their current owners and operators authorized to undertake fishing subject to their jurisdiction;
3. implementing, where appropriate, a vessel monitoring system (VMS), in accordance with the relevant national, regional or international standards, including the requirement for vessels under their jurisdiction to carry VMS on board;
4. implementing, where appropriate, observer programmes in accordance with relevant national, regional or international standards, including the requirement for vessels under their jurisdiction to carry observers on board;
5. providing training and education to all persons involved in MCS operations;
6. planning, funding and undertaking MCS operations in a manner that will maximize their ability to prevent, deter and eliminate IUU fishing;
7. promoting industry knowledge and understanding of the need for, and their cooperative participation in, MCS activities to prevent, deter and eliminate IUU fishing;
8. promoting knowledge and understanding of MCS issues within national judicial systems;
9. establishing and maintaining systems for the acquisition, storage and dissemination of MCS data, taking into account applicable confidentiality requirements; and
10. ensuring effective implementation of national and, where appropriate, internationally agreed boarding and inspection regimes consistent with international law, recognizing the rights and obligations of masters and of inspection officers, and noting that such regimes are provided for in certain international agreements, such as the 1995 UN Fish Stocks Agreement, and only apply to the parties to those agreements.

**ASSESSING FLAG STATE PERFORMANCE,
AND
POSSIBLE ACTIONS WITH RESPECT TO VESSELS FLYING THE FLAGS OF STATES
NOT MEETING THE CRITERIA FOR FLAG STATE PERFORMANCE**

FRAMEWORK AND GUIDELINES

Before possible actions are taken with respect to vessels flying the flags of States not meeting the criteria for flag State performance, an assessment would need to be made to determine whether the criteria were met. Although this was not expressly included in the mandate for the Expert Consultation given by COFI, the Consultation took the view that assessments were an implicit and necessary part of the process.

The Consultation identified two processes for assessment that may be used: one for self-assessment by States; and the other for an international or multinational assessment.

A self-assessment would be made by a State with a view to identifying and overcoming gaps and constraints and strengthening its performance. This targets all States, developed and developing, but would be useful for determining the technical and other assistance needed for developing States.

An international assessment would be made externally on the basis of the relevant provisions of the 1982 UN Convention on the Law of the Sea,² and in the spirit of cooperation that it fosters. It could be made by any entity, such as a State, a regional fishery body (RFB), or non-government organization (NGO).

1 ASSESSING FLAG STATE PERFORMANCE: MECHANISMS FOR ENSURING INTERNATIONAL DUE PROCESS

1.1 Self-assessment (by the flag State)

- Undertaken through competent authorities and internal consultations, in a transparent process. The results should be made publicly available.
- Intervention of an external auditor, possibly appointed by an international organization, may be considered.
- International and regional mechanisms for self-assessment (including assistance) should be considered.
- A validation process should be developed.
- Link with multilateral assessment. This could constitute comprehensive self-assessment or sectoral self-assessment (e.g. tuna fishing).
- Consider possible linkage with a reformed FAO questionnaire on the implementation of the 1995 FAO Code of Conduct for Responsible Fisheries.
- Need for global consistency among self-assessments is important.
- Self-assessment targets all flag States, developed and developing.

1.2 External assessment (by an entity other than the flag State)

- International or multilateral assessment (or review of other assessment).
- Seek cooperation of the flag State in advance of the assessment.

² In particular, Article 94.

- Take into account the agreed criteria.
- Ensure there is due regard for international law.
- Link with the proposed capacity-building fund.

2 ACTIONS WITH RESPECT TO STATES NOT MEETING THE CRITERIA FOR FLAG STATE PERFORMANCE

2.1 Process for identification of non-performing States, preferably at an international level.

2.2 Process or framework for action:

2.2.1 Corrective actions taken by the flag State.

2.2.2 Actions by other States (the following sequence is indicative only).

- engage in consultations with flag State;
- provide assistance and capacity building as appropriate;
- notify other interested States and RFBs;
- diplomatic démarche;
- actions by States acting as port States;
- market-related measures by States;
- other economic or financial measures by companies, and
- dispute resolution (mediation and other means).

2.3 Keeping track of the status of the fish stocks and their sustainable use.

**ASSISTANCE TO DEVELOPING COUNTRIES TO IMPROVE THEIR PERFORMANCE
AS FLAG STATES**

1. Assistance is in the mutual interest of all States.
2. Identification of needs, *inter alia*:
 - legal and regulatory framework;
 - institutional organization and infrastructure;
 - monitoring, control and surveillance;
 - scientific personnel and infrastructure; and
 - enhancement of cooperation and participation in cooperative and governance mechanisms.
3. Assistance should enhance the ability of developing countries to participate in high seas fisheries, including access to such fisheries. It should ensure the right and means to fish responsibly and sustainably as a further incentive to improve their performance as flag States.
4. Assistance could include material, human and financial resources, and include the following:
 - strengthening administrative capacity;
 - enhanced transfer of technology; and
 - targeted training.
5. The organization of assistance should take into account:
 - sources of international assistance;
 - institutional framework for assistance;
 - the need for coordination among donors; and
 - policy coherence in recipient countries.
6. There is a need for continual review to evaluate the results of the assistance and to take corrective action in the event that objectives are not being met.

This document contains the report of the Expert Consultation on Flag State Performance that was held at FAO headquarters, Rome, from 23–26 June 2009. The Experts received a report on the “Expert’s Workshop on Flag State Responsibilities: Assessing Performance and Taking Action” that was organized by the Government of Canada from 25 to 28 March 2008 in Vancouver. The Consultation then considered a number of papers prepared by the experts and commentaries on them including criteria for assessing the performance of flag States, possible actions against vessels flying the flag of States not meeting the criteria for flag State performance, the role of national governments in implementing criteria and actions for flag States performance, the role of regional fisheries management organizations in implementing criteria and actions for flag State performance, the role of international institutions and instruments in implementing criteria and action for flag State performance and assistance to developing countries. The Consultation agreed to recommend to a Technical Consultation that international guidelines on criteria for assessing the performance of flag States and possible actions against vessels flying the flags of States not meeting such criteria should be developed. An assessment process would be an important part of such guidelines. Noting the basis provided by international law for such assessments, the experts agreed on the need for two processes (i) one for self-assessment and (ii) another for international or multilateral assessment. The latter assessment would have to be undertaken in a spirit of cooperation and be consistent with the 1992 UN Convention on the Law of the Sea. The Consultation agreed upon draft criteria for flag State performance, processes for conducting assessments, post-assessment actions and assistance to developing countries to improve their performance as flag States. The experts considered that these criteria and actions would form an appropriate framework for review by a Technical Consultation.

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