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Продовольственная и
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TECHNICAL CONSULTATION ON FLAG STATE PERFORMANCE

Rome, Italy, 2 – 6 May 2011

DRAFT CRITERIA FOR FLAG STATE PERFORMANCE

Appendix F from the Report of the Expert Consultation on Flag State
Performance. Rome, 23-26 June 2009

APPENDIX F.1

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

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

[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
- 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?

ANNEX 1**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.

ANNEX 2**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.

ANNEX 3**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.

APPENDIX 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**

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.

APPENDIX F.3**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.