

Flag State Performance – Non-Paper by Canada

All States, regardless of the role they have taken on, whether as flag States, port States, coastal States, or market States, have responsibilities associated with their roles in combating IUU fishing, which only persists to the extent that fishing enterprises have opportunities to exploit gaps and weaknesses in governance regimes.

Despite global efforts to curb over-fishing and IUU fishing, it is clear that a lack of control of fishing vessels continues to be a problem, because of either unwillingness or a lack of capacity. Under international law, the flag State is responsible for controlling the activities of its vessels, regardless of the type of vessel or where it operates on the high seas. Thus, the primary responsibility for ensuring compliance by fishing vessels with international law, established fisheries management regimes and other associated requirements, such as safety and crew well-being, lay with the flag State.

With this in mind, FAO members have agreed that additional tools (such as performance criteria and assessment schemes) are necessary to assist flag States to meet their obligations under international law. Criteria and assessment processes can assist the global fisheries community to work collectively towards capacity building and raising performance of flag States worldwide. The upcoming Technical Consultation (May 2-6, 2011) provides an opportunity to develop a product and establish processes to meet this objective.

Objective

The FAO Secretariat has prepared a detailed document “Draft criteria for assessing flag State performance and possible actions against vessels flying the flags of States not meeting such criteria,” based on the excellent work done by the expert workshop (2008) and an Expert Consultation (2009). Although a comprehensive document, Canada does not feel that its current structure will facilitate a discussion that will allow the Technical Consultation to finalize manageable criteria and assessment processes. Several substantive policy elements require consensus before criteria and processes can be elaborated (discussed below). Consensus on these issues will facilitate the development of a strong set of flag State performance criteria and self- and multilateral assessment schemes.

Outstanding Policy Issues

During the last session of COFI, Canada indicated that a successful outcome of the Technical Consultation should be a set of practical criteria, identification of assessment processes (both self- and multilateral assessments), and identification of actions to be taken to promote broad compliance. In support of this view, we believe that the following issues should be discussed and consensus reached before discussing the operational components.

1) What is the goal of the initiative?

Although the overall goal of the Technical Consultation is to assist flag States to better understand and implement their roles and responsibilities under international law, it is not clear from the document whether this initiative should serve as a baseline standard of what is required for a flag State or something more aspirational (e.g., a “model scheme”). Regardless of the approach chosen, a list of principles might be useful.

2) What should be the underlying approach for the initiative?

A document that outlines performance criteria and assessment processes, followed by a listing of possible actions to be taken against the flag State and its vessels could be seen as unnecessarily punitive. In other words, we are concerned that there could be little incentive to undertake a self-assessment or participate in a multilateral assessment if the next step in the process is perceived to be action against the flag State or the vessel. Rather, it could be recognized that criteria and assessments can facilitate capacity building to improve the global level of flag State control and that actions against a flag State or vessel only be taken as a matter of last resort when other options have failed.

3) What is the geographic scope of the initiative?

The assessment of flag State performance could be limited to the vessels on the high seas, or include those beyond national jurisdiction (i.e., high seas and foreign EEZs) or include all areas (both high seas and domestic and foreign EEZs).

4) What is the role of RFMOs?

A determination might need to be made as to whether specific advice or guidance needs to be provided to RFMOs and whether RFMOs could undertake a proposed multilateral assessment or whether a separate forum needs to be established.

Possible Format

The document provided as the basis for the Technical Consultation is very detailed, but could be considered overwhelming and daunting, even to developed States. In particular, the criteria should not create an excessive burden that could deter self-assessments.

There could be several approaches to creating a comprehensive, yet user-friendly, flag State performance framework. One such way is the development of multi-pronged approach, which is conceptually similar to the *IMO Code for the Implementation of Mandatory Instruments* and the *Procedures for Member State Audits*. We can envision developing one document with two parts: Part I containing performance criteria and self and multilateral assessment framework and guidelines, recognizing the need for capacity building, and Part II outlining possible actions against non-compliant flag States and vessels. This would put emphasis on global action to collectively build capacity, while recognizing the need for guidance on possible actions against non-compliance once such an approach is deemed necessary.

Part I – Assessing and Improving Flag State Performance

- **Performance Criteria** are practical and concise, recognizing a State's responsibilities and obligations related its role as a flag State (either through international or national legislation) and gives consideration the sovereign rights of flag States.
- A possible format for the performance criteria suggested by the flag State Expert Consultation was the tuna RFMO/ICCAT performance review criteria. This model performance criteria framework examines the (1) area of concern, (2) the general criteria and (3) a more detailed criteria. This approach is extremely concise and straightforward.
- **Self and multilateral assessment framework** includes performance indicators that are fair and objective and take into consideration the performance criteria.
- **Assessment tools and guidelines** are user-friendly, professional and ensure transparency and disclosure between flag State and the assessment team. Multilateral assessments should be conducted in such a way as to encourage all member States to volunteer for an assessment and provide clear direction for the flag State and the assessment team. The role of RFMOs might need to be considered as part of the discussion on multilateral assessments. Confidentiality of the information provided for assessments need also be considered.
- **Capacity Building provisions** recognize that each member has a different level of development, resources and institutional capacity both in advance of and as part of the assessment. The assessment can identify gaps to be addressed by future technical assistance.

Part II – Taking Action Where the Flag State Fails

Examples of possible actions that may be taken by a non-flag State against a non-compliant flag State and its vessels, as the case might warrant. This element is not intended to undermine a sovereign State's ability to take action against a vessel, but rather provide guidance to the non-flag State.