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NORWAY COMMENTS

DRAFT CRITERIA FOR FLAG STATE PERFORMANCE; GEOGRAPHICAL SCOPE OF APPLICATION – NORWEGIAN INPUT

One of the outstanding issues from the second session of the Technical Consultation on flag State performance (the TC) in March 2012, is that of the geographical scope of application, cf. paragraph 3 of the draft Criteria.

When the discussions started, Norway suggested as broad a geographical scope as possible, and suggested the Criteria to be global in scope and to apply to all marine areas. This proposal gained some support, while others suggested the application be restricted to those areas outside national jurisdiction of any state (the high seas). Following extensive and constructive discussions, including agreeing on a section concerning cooperation between flag States and coastal States, the TC was adjourned with the following draft text in brackets:

“These Criteria apply to all maritime areas beyond national jurisdiction of the flag State without prejudice to paragraphs xx on cooperation with coastal States. They may also apply to fisheries within the national jurisdiction of the flag State only to the extent it is bound as a party to an international treaty (such as those establishing RFMOs) whose scope of application in relation to those fisheries includes the maritime areas under the jurisdiction of that flag State under the conditions established”.

The major obstacle in finding consensus was whether the scope of application should be clearly stated, or whether the application clause could be regarded as a “constructive ambiguity”, and consequently reflects a compromise between the different views. Thus the application will be on the discretion of each State. The suggestion of those supporting this approach was that the first sentence should state: *“These Criteria apply to all maritime areas beyond national jurisdiction without prejudice to paragraphs xx on cooperation with coastal States”.*

The objective of the Criteria is to combat illegal, unreported and unregulated (IUU) fishing and fishing related activities. The core of the global IUU problem is vessels flying flags of non-compliance illegally entering the national waters of developing countries with little or no capacity or means to enforce their sovereign rights, and then, in fact, stealing their fish. Thus, it is crucial that the Criteria apply to marine areas under the jurisdiction of other States than the flag State, and this should be clearly stated in the application clause. As mentioned above, the TC developed a comprehensive section on cooperation between flag States and coastal States, which in essence addresses issues of those concerned that the Criteria in some way or another may have a possible impact on the sovereign rights of the coastal States.

Norway would suggest the following first sentence of paragraph 3:

“These Criteria apply to all marine areas beyond national jurisdiction of the flag State, including areas subject to paragraphs (xx) on cooperation between flag States and coastal States”.

The reference to “including areas subject to” might be replaced by “including areas in accordance with” or “including areas taking due account of”.

Concerning the possible application of the Criteria to marine areas of the flag State, the TC agreed this to be limited to those bound by RFMO/As with some competence related to national waters of their parties. In order to make this clearer, Norway would suggest the following sentence to replace the current second sentence of paragraph 3:

“These Criteria may also apply to marine areas and species within the national jurisdiction of the flag State if those areas or species are covered by an RFMO/A, in accordance with the provisions of the treaty establishing the RFMO/A, and any applicable conservation and management measures established by it.”

By combining these two elements into one paragraph, it will read as follows:

“These Criteria apply to all marine areas beyond national jurisdiction of the flag State including areas subject to paragraphs (xx) on cooperation between flag States and coastal States. These Criteria may also apply to marine areas and species within the national jurisdiction of the flag State if those areas or species are covered by an RFMO/A, in accordance with the provisions of the treaty establishing the RFMO/A, and any applicable conservation and management measures established by it.”
