



TECHNICAL CONSULTATION ON FLAG STATE PERFORMANCE

Rome, 2–6 May 2011, 5-9 March 2012, 4-8 February 2013

DRAFT REPORT

OPENING OF THE TECHNICAL CONSULTATION

1. On the recommendation of the Committee on Fisheries (COFI) of the Food and Agriculture Organization of the United Nations (FAO) at its Twenty-eighth session in 2009, the Director General of FAO, Mr Jacques Diouf, convened the Technical Consultation on Flag State Performance. The Technical Consultation was held at FAO Headquarters, Rome, Italy, from 2 to 6 May 2011, and resumed from 5 to 9 March 2012 and from 4 to 8 February 2013. The Consultation was funded by the Governments of Canada, New Zealand, Norway and United States of America and by the European Commission.

2. The Consultation was attended by 81 FAO Members and one Associate Member, by Representatives from one specialized agency of the United Nations, and by observers from 11 intergovernmental and international non-governmental organizations. The list of delegates and observers is in Appendix B. The documents that were placed before the Consultation are listed in Appendix C.

3. The Secretary called the Technical Consultation to order and welcomed delegates to FAO and the Consultation.

4. Mr Kevern Cochrane, Director, Fisheries and Aquaculture Resources Use and Conservation Division, FAO Fisheries and Aquaculture Department, on behalf of Mr Árni M. Mathiesen, Assistant Director-General, FAO Fisheries and Aquaculture Department, made an opening statement on behalf of the Director General of FAO. The statement referred, *inter alia*, to the flag States' primary responsibility under international law to exercise effective control over their fishing vessels and ensure compliance with relevant laws and conservation and management measures. However, it was pointed out that there had been increasing concern by the international community that the performance of many flag States in the fulfilment of their international obligations had been inadequate. These States were either unable for capacity reasons, or unwilling, to exercise effective control over their fishing fleets, many of which engaged in illegal, unreported and unregulated (IUU) fishing and related activities in geographic areas beyond the national jurisdiction of the flag State. Consequently the burden to control these fleets had shifted increasingly to others including coastal States, port States and regional fisheries management organizations and arrangements (RFMO/As). This implied the need for these States to develop human resources, compliance tools and up-to-date mechanisms that were costly, especially for developing countries.

5. Mr Cochrane also outlined the process and outcomes of the 2009 Expert Consultation on Flag State Performance. This Consultation considered, and made recommendations on, criteria for assessing the performance of flag States and possible actions against vessels flying the flags of States not meeting the identified criteria. In addition, the role of governments, RFMOs, international institutions and civil society in implementing the criteria and actions for flag State performance, as well as assisting developing countries to meet the criteria, was

addressed. The outcomes of the Expert Consultation formed the basis for the work of the Technical Consultation.

6. Mr Cochrane reminded the Technical Consultation that in keeping with existing FAO practice an administrative report would be prepared at the conclusion of the Consultation. He added that it would be factual in content and attached to it would be the guidelines, or whatever document was agreed. COFI would be informed of the outcome of the Consultation. The text of Mr Mathiesen's opening statement is attached as Appendix D.

ELECTION OF THE CHAIRPERSON

7. Dr Johann Augustyn, Chief Director, Fisheries Research and Development, Department of Agriculture, Forestry and Fisheries, Cape Town, South Africa, was elected Chairperson of the Consultation. He expressed his thanks to the Consultation for its confidence in electing him to the position.

ADOPTION OF THE AGENDA AND ARRANGEMENTS FOR THE TECHNICAL CONSULTATION

8. The Consultation adopted the agenda as given in Appendix A.

ELECTION OF VICE-CHAIRPERSONS AND DESIGNATION OF RAPPORTEUR

9. Dr Dean Swanson (United States of America), Ms Tritaporn Khomapat (Thailand) and Mr Terje Lobach (Norway) were elected First, Second and Third Vice-Chairpersons respectively. Ms Angela Bexten (Canada) was elected Rapporteur.

DRAFT CRITERIA FOR ASSESSING FLAG STATE PERFORMANCE

10. Following informal requests from several delegations, the Chair invited the Secretary to outline the documentation that had been prepared for the Technical Consultation. In doing so he noted that the report of the Expert Consultation on Flag State Performance was available together with two other documents. Document TC-FSP/2011/3 entitled “Draft Criteria for flag State performance” was Appendix F from the report of the Expert Consultation including reference to a number of specific provisions in existing international fisheries instruments. The Secretary explained that this information had been added by the Secretariat at the request of the experts.

11. The Secretary advised the Technical Consultation that the Expert Consultation on Flag State Performance had completed its work on 26 June 2009. He pointed out that in paragraph 66 of the report, the Expert Consultation had noted that further elaboration of elements of the framework for criteria for flag State performance, including relevant appendices, would be required prior to the Technical Consultation through convening of technical working groups, contracting consultants or holding an additional Expert Consultation. The Secretariat opted to contract a consultant to complete the work of the Expert Consultation on Flag State Performance.

12. In addition, document TC-FSP/2011/2 entitled “Draft Criteria for assessing flag State performance and possible actions against vessels flying the flags of States not meeting such Criteria” was elaborated by the Secretariat at the request of the Expert Consultation. This document referred specifically to paragraphs 32, 33 and 35 in document TC-FSP/2011/3 and provided an elaboration of criteria in five appendices.

13. For clarification, the Technical Consultation examined the COFI mandate for the Expert Consultation on Flag State Performance (FAO headquarters, Rome, 23-26 June 2009) as contained in paragraph 71 of the report of COFI 27 (2007). In addition the Consultation considered the mandate for the Technical Consultation in paragraph 70 of the report of COFI 28 (2009) where it stated, *inter alia*, “the Committee agreed that this meeting (the Expert Consultation) should be followed by a Technical Consultation on “Flag State Performance.” At COFI 29 (2011) in paragraph 34 of the session’s report, it was stated that “Considering that compliance by flag States with their duties under international law is an essential factor in achieving sustainable fisheries and combating IUU fishing, the Committee welcomed the arrangements made to convene the FAO Technical Consultation on Flag State Performance in May 2011” .

14. The Chairperson, noting the practice adopted by the Technical Consultation to draft a Legally-binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, advised the Technical Consultation that at the conclusion of the session on 6 May 2011, if the Consultation’s work was not completed, the text of the outcome of the Consultation would become a Chairperson’s draft text and would be placed on the FAO Website as such. In this way the text would be a “living document” subject to impartial review and amendment as the Consultation considered appropriate, but under the Chairperson’s responsibility until it was finalized.

15. As indicated in the opening statement by the Assistant Director-General of the FAO Fisheries and Aquaculture Department, in keeping with FAO practice, the report of the Technical Consultation would be adopted at the conclusion of the Consultation. However the Technical Consultation agreed that for each session of the Technical Consultation there would be a Chairperson’s interim report in English made available at the conclusion of each session.

A more elaborate report would be provided by the Chairperson following each session. These reports would be translated and placed on the FAO Website.

16. The Technical Consultation was informed that in keeping with past practice, submissions from Members would be posted on the FAO Website in their original languages. Consideration could be given to the translation of some papers depending on availability of extrabudgetary funds. Information related to the posting of documents on the Web would be made available on the Website. The address of the Website is www.fao.org/fishery/nems/40262/en.

17. Following these explanations and clarifications, the Chairperson invited delegates to make opening statements. There was a rich and wide-ranging exchange of views relating to issues that should be addressed in the Consultation and strong agreement that the flag State had a fundamental role to play in combating IUU fishing. The Technical Consultation acknowledged that this position was reflected already in a number of international fisheries instruments and that the relevant provisions of these instruments should be drawn upon in the current exercise rather than drafting new provisions relating to flag State responsibilities. It was underscored that the Consultation would not engage in drafting new norms or international law, or creating new obligations.

18. To provide structure and coherence to the debate and as a means of making progress, the Technical Consultation agreed to organize its discussion under the following headings:

- statement of purpose and principles – why the guidelines are important, what they will achieve (preamble, introduction), purpose of criteria;
- scope of application of the criteria (geography, vessels);
- performance assessment criteria;

- procedure for carrying out assessments;
- measures and incentives to encourage compliance by flag States; and
- cooperation with and assistance to developing countries with a view to capacity development.

19. At the start of the first resumed session in March 2012, the Assistant Director-General for Fisheries and Aquaculture, Mr Mathiesen, made a statement noting that disappointing progress had been made at the first session of the Technical Consultation. He outlined intersessional initiatives that had been undertaken both by FAO and some Members. Mr Mathiesen encouraged Members to make good progress at the meeting so that a positive recommendation could be made to the thirtieth session of COFI. His statement is in Appendix E.

20. The resumed session continued its discussion under agenda item 5: draft criteria for assessing flag State performance, merging the sections listed in paragraph 18 of this report and the text proposed for the Technical Consultation by the 2009 Expert Consultation on Flag State Performance.

21. The thirtieth session of COFI noted the need for further progress with the negotiation of the Criteria and requested the convening of the second resumed session of the Technical Consultation to make efforts to reach consensus.

22. The second resumed session focused on issues related to geographical scope, cooperation between flag States and coastal States, procedure for carrying out assessments, and encouragement of compliance and deterrence of non-compliance by flag States. The correlated text was reviewed and negotiated, with consensus being reached on all the text by the end of the session.

23. In the discussion on paragraph 42, a concern was raised by the delegate of Angola that the paragraph might give rise to a situation of double jeopardy thus prohibiting the coastal State from imposing a sanction in relation to a violation for which a sanction had already been imposed by the flag State. The Secretariat clarified that paragraph 42 does not create a concern as:

- the flag State and the coastal State would apply their respective laws to impose sanctions for violations;
- the elements constituting a violation would normally be different under coastal State and flag State laws thus creating different violations; and
- the national law ultimately determines whether national courts should sanction violations which may appear to have been sanctioned in foreign jurisdictions.

Consequently coastal States can impose sanctions for violations of its laws both prior to or after the flag State has imposed a sanction with respect to a violation that may originate from the same set of facts.

24. In the discussion on paragraph 13, it was noted that the processes for vessel registration and the authorization for fishing may be separate for some flag States and that assessments conducted under these Guidelines should consider whether these processes collectively satisfied the criteria.

25. Considering that the instrument is voluntary in nature, it was agreed that the title of the instrument should read “Voluntary Guidelines for Flag State Performance”.

26. The text of the Voluntary Guidelines for Flag State Performance, as agreed by the Technical Consultation, is in Appendix F. The Secretariat was requested by the Technical Consultation to review the text to ensure internal language and legal consistency, to reorganize the paragraphs under appropriate titles and subtitles and to edit the numbering

format as required, prior to submitting the Guidelines to COFI for its consideration in June 2014.

OTHER MATTERS

27. The delegate of Norway informed the Technical Consultation about a newly published study by the United Nations Office on Drugs and Crime on transnational organized crime in the fishing industry. This study found that human trafficking, especially of men and children, on board fishing vessels was linked to illegal fishing. Norway requested that FAO should take account of such criminal activity when addressing IUU fishing and flag State responsibility.

28. The European Union understands that the adoption of this instrument is without prejudice to actions and procedures foreseen under domestic legislation aiming to identify non-cooperating flag States in the fight against IUU fishing.

ADOPTION OF THE REPORT

29. The report of the Technical Consultation was adopted on 8 February 2013 at 14.45 hours.