

Explanatory Memorandum

on the establishment of the *ad hoc* Working Group under Part 6 of the FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, and related issues

Article 21 of the FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (hereinafter referred to as “the Agreement”) requires Parties to give full recognition to the special requirements of developing States Parties in relation to the implementation of port State measures consistent with the Agreement. This document provides some guidance as to how this could be achieved. The aim is to enhance the ability of developing States to formulate a legal basis and capacity for implementation, to facilitate developing State participation in relevant international organizations, and to facilitate developing State technical assistance. Parties shall furthermore assess the special requirements of developing States Parties concerning the implementation of the Agreement, and Parties shall cooperate to establish funding mechanisms to assist developing States in the implementation of the Agreement. It should be noted that this latter requirement is related to developing States in general, and not as in other parts of Article 21 referring to “developing States Parties”. It is not clear whether this is an intended distinction, or an oversight when developing the text of the Agreement. It could be argued that in the context of the other elements of Article 21, in particular the general statement in paragraph 1 as well as those concerning special needs assessments in paragraphs 3 and 6 (a), and other possible technical and financial sources in paragraph 5, there is an indication that the funding mechanisms referred to in paragraph 4 are intended to cover only developing States Parties. This interpretation is further supported by the accountability provision in paragraph 6 (d). On the other hand, it must be acknowledged that some developing States will need financial support before they can become a party to the Agreement, and in order to be capable of swift implementation when they are ratifying or acceding to the Agreement. Anyway, those Parties establishing funding mechanisms are probably free to decide among themselves who should benefit from the available funds. In this regard it should be noted that financial assistance under the Part VII Fund established in accordance with Article 26 of the 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 (hereinafter referred to as the UN Fish Stocks Agreement) is limited to Parties of the UN Fish Stocks Agreement, although Part VII, and in particular Article 26 refer to developing States in general.

Paragraph 6 of Article 21 of the Agreement requires Parties to establish an *ad hoc* working group that will periodically report and make recommendations to the Parties on the establishment of funding mechanisms. It is understood that this group cannot be established before 25 instruments of ratification, acceptance, approval or accession have been deposited at the FAO, and the Agreement consequently has entered into force. It should also be considered whether the *ad hoc* working group shall meet within a certain time frame after the

Agreement is in force, as well as the frequency of meetings, including requests for meetings by Parties if need occurs. The Agreement requires the *ad hoc* working group to periodically report and make recommendations. Thus the duration of this body seems to be of permanent character. Parties to the Agreement would be entitled to participate in the work of the *ad hoc* working group. Furthermore the *ad hoc* working group will need a chairperson, and perhaps a vice chairperson, who could be elected among the Parties to the Agreement. It should also be considered whether these persons should be elected for a stipulated time period, or for a particular meeting only.

Another question would be concerning possible additional participation in the group, by States and entities other than the Parties, in particular signatories to the Agreement, and relevant intergovernmental organizations. Thus there might be an idea to establish some kind of observer status within the *ad hoc* working group.

As the Agreement is under the auspices of the FAO, it seems appropriate and adequate that the FAO provides technical assistance to the *ad hoc* working group, both in meetings of the group as well as in preparation to and follow-up after meetings.

The question of language is sometimes a sensitive issue within the FAO, in particular concerning irregular meetings. There are six official languages; Arabic, Chinese, English, French, Russian and Spanish, and in principle these should be treated on equal terms, both concerning translation of documents and interpretation. Simultaneous interpretation during sessions is very expensive, and the cost of translation of documents has also escalated in recent years. In order to save costs, it should be considered that the group shall work in English only.

If Parties agree to work in one language only, expenses related to the work of this group in essence will be for hiring meeting rooms, technical equipment, printing etc. The FAO does not foresee that those expenses will be covered by FAO's ordinary programs and budgets. Thus funding has to be found from other sources, and the usual approach has been that the FAO has contacted various states asking for donations. To follow such an approach for this group seems to create an unsatisfactory situation. It is important that the *ad hoc* working group operates within a stable economical framework, and it is suggested that Parties contribute to a budget in equal proportions. Another option might be to demand fees for participation in a particular meeting.

Although some regional fisheries management organizations adopt recommendations, it is presumed that the reference to "make recommendations" in paragraph 6 means a follow-up by Parties in another forum. Thus the Parties have to establish a mechanism to periodically receive reports and to decide on recommendations by the *ad hoc* working group. An option might be to use the meetings of the FAO Committee of Fisheries, or its margins for this purpose.

The *ad hoc* working group shall report and make recommendations on a scheme for contribution, identification and mobilization of funds, the development criteria and procedures to guide implementation, and progress in the implementation of the funding

mechanisms. Although it is not clearly stated in paragraph 6, it is noted that other known comparable mechanisms are based on voluntary contributions. The identification and mobilization of funds could be done by approaching States and regional economic integration organizations, intergovernmental organizations, international financial institutions, national institutions, and non-governmental organizations to make such voluntary financial contributions. As indicated above, one development criteria might be related to applicant's status in relation to the Agreement. Developing State Parties have made a clear commitment to implement the Agreement, and they should consequently be subjects for assistance, if needed. Subparagraphs (a)-(d) of paragraph 6 give additional guidance on issues to take into account.

The *ad hoc* working group might also give priorities for the use of the funding mechanism, both concerning applicants and the purposes of assistance. Some guidance is given in Article 21. In cases where transfer of a disproportionate burden resulting from the implementation of the Agreement has been demonstrated, paragraph 2 of Article 21 requests Parties to cooperate to facilitate the implementation by the relevant developing States Parties. Furthermore, it should be noted that the Agreement recognizes the need for increasing coordination at regional and interregional levels as well as cooperation with, and among developing State Parties, which also might be considered in the context of a funding mechanism. When it comes to procedures to guide implementation of funding mechanisms and progress made, recipients could be required to report on results and deliverables on a regular basis.

Draft terms of reference for the *ad hoc* Working Group have been prepared, duly noting the provisions of Article 21, as well as taking into account the comments and assessments above.

It is of course unpractical for the *ad hoc* working group to manage the running of a funding mechanism under the Agreement. In accordance with part VII of the UN Fish Stocks Agreement, the Parties have established a fund to assist developing States in implementing that agreement, which is administered by the FAO and includes the establishment of a panel to assist the FAO in considering applications. A similar approach could be taken for this funding mechanism. Also other elements of the so-called Part VII Fund are relevant in this context. Consequently, the draft in annex II is to a great extent inspired by those established under the UN Fish Stocks Agreement, but of course adjusted and amended to take into account that this is an FAO Agreement, and the guidance given in Article 21 on purposes of assistance as well as the assessments above.
