

## **Chairperson's Report on the Resumed Session of the Technical Consultation on Flag State Performance**

**Rome, Italy, 5-9 March 2012**

1. The Technical Consultation on Flag State Performance reconvened on 5 March 2012 and adjourned on 9 March 2012.
2. In his opening statement the Chairperson noted the need to deliver an effective tool that would deal with illegal, unreported and unregulated (IUU) fishing and flags of non compliance. He observed that progress at the first session had been modest and called on all delegations to demonstrate energy and flexibility so as to make good progress at the resumed session.
3. Within its COFI mandate and the agenda adopted for the Technical Consultation (Appendix 1), it was agreed to organize the meeting's work around the following structure:
  - a. Statement of purpose and principles – why the guidelines are important, what they will achieve (preamble, introduction); purpose of Criteria;
  - b. Scope of application (geography, vessels);
  - c. Performance assessment Criteria;
  - d. Procedure for carrying out assessments;
  - e. Measures and incentives to encourage compliance by flag States; and
  - f. Cooperation with, and assistance to, developing countries with a view to capacity development.
4. Although some square bracketed text remains in the Chairperson's draft text, substantial progress was made on key aspects, particularly relating to the geographic scope of application and cooperation between flag States and coastal States. Most of the performance assessment Criteria were agreed together with cooperation with, and assistance to, developing countries. Additional work is required on the draft text relating to the procedure for carrying out assessment, encouraging compliance and deterring non-compliance by flag vessels, the role of FAO and the two Annexes relating to conditions of authorizations and monitoring, control and surveillance (MCS).
5. The session was characterized by a high degree of cooperation among all delegations. It was extremely heartening to see the good will shown by all delegations and their willingness to work hard towards achieving the goals of the Technical Consultation. Although it was not possible to complete the exercise during the session, I am confident that the meeting will make a positive recommendation to COFI so that the flag State Criteria can be finalized within a relatively short period of time.
6. The Chairperson's draft text is in Appendix 2. It reflects progress made in the meeting until the evening session on 8 March 2012. The progress made in the meeting on 9 March 2012 will be reflected in the Chairperson's draft text that will be posted on the FAO Website (<http://www.fao.org/fishery/nems/39660/en>) shortly after the conclusion of the meeting.

Johann Augustyn  
FAO Rome  
9 March 2012

## **Agenda**

1. Opening of the Session
2. Election of the Chairperson
3. Adoption of the Agenda and arrangements for the Technical Consultation
4. Election of the Vice-Chairperson and designation of the Rapporteur
5. Draft Criteria for assessing flag State performance:
  - Draft Criteria for flag State performance;
  - Assessing flag State performance and possible actions in accordance with international law to encourage compliance; and
  - Assistance to developing countries to improve their performance as flag States.
6. Any other matters
7. Adoption of the Report

## **DRAFT CRITERIA FOR FLAG STATE PERFORMANCE**

### ***Statement of purpose and principles***

1. The objective of the criteria for flag State performance is to prevent, deter and eliminate illegal, unreported and unregulated fishing (IUU fishing) and the fishing related activities referred to in paragraph 5 through the effective implementation of flag State responsibilities and thereby to ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems.

2. In its exercise of effective flag State responsibility, the flag State should:

- act in accordance with international law with respect to flag State duties;
- respect national sovereignty and coastal State rights;
- prevent, deter and eliminate IUU fishing and fishing related activities in support of such fishing;
- effectively exercise their jurisdiction and control over vessels flying their flag;
- take measures to ensure that persons subject to their jurisdiction, including owners and operators of vessels flying their flags, do not support or engage in IUU fishing and fishing related activities in support of such fishing;
- ensure the conservation and sustainable use of living marine resources;
- take effective action against non-compliance by vessels flying their flag;
- discharge their duty to cooperate in accordance with international law;
- exchange information and coordinate activities among relevant national agencies;
- exchange information with other States and give mutual legal assistance in investigation and judicial proceedings, as required by their respective international obligations; and
- recognize the special interests of developing States, in particular the least developed among them and small island developing States, and to cooperate to enhance their abilities as flag States including through capacity development.

## ***Scope of application***

### ***Geographical***

3. [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 RFMO/As) whose scope of application in relation to those fisheries includes the maritime areas under the jurisdiction of that flag State under the conditions established.]]

### ***Vessels***

4. These Criteria apply to any ship, boat or other type of vessel used, equipped to be used or designed to be used for fishing or fishing related activities, defined as any operation in support of, or in preparation for, fishing, including the landing, packaging, processing, transhipping or transporting of fish that have not been previously landed at a port, as well as the provisioning of personnel, fuel, gear and other supplies at sea, excluding fishing for subsistence.

5. Where a coastal State authorizes any vessel chartered by its nationals to fish exclusively in areas subject to its national jurisdiction and under its control, such vessels shall be subject to measures by the coastal State that are as effective as measures applied in relation to vessels entitled to fly its flag while in waters of the coastal State.

## ***Performance assessment criteria***

### ***International***

6. The flag State has incorporated the flag State principles and rules that are binding on it in accordance with international law into its domestic laws, regulations, policies and/or practices.

7. The flag State has taken such measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness

of international conservation and management measures or the flag State accepts and implements the conservation and management measures adopted by a relevant regional fisheries management organization or arrangement (RFMO/A).

8. The flag State ensures that vessels flying its flag do not conduct unauthorized fishing within areas under the national jurisdiction of other States.

9. The flag State supports cooperation among flag States on managing capacity and fishing effort, catch limits and output controls.

#### *National vessel registries and records*

10. The flag State follows minimum information requirements, such as:

- the vessel data meets the requirements of the FAO Standard Specifications and Guidelines for Marking and Identification of Fishing Vessels and relevant requirements of the International Maritime Organization;
- 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.

11. The flag State follows registration procedures, which include:

- verification of vessel history;
- grounds for refusal of registration of the vessel, including, to the extent possible, 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.

12. The flag State's registration procedures are accessible and transparent.

13. The flag State avoids registration of vessels with a history of non-compliance, 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.

14. The flag State conducts functions of registration of a vessel and issuing of an authorization to fish 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.

15. The flag State maintains a record of fishing vessels entitled to fly its flag, 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.

16. The flag State requires records to be kept in accordance with relevant subregional, regional and international standards and requirements.

*National fisheries management regime*

17. The flag State has established an institutional, legal, technical foundation/framework for fisheries management (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.

18. The flag State has adopted laws, regulations or other arrangements implementing conservation and management measures, which should include, at a minimum:

- principles, rules and standards [contained in the relevant provisions of the instruments listed] referred to in paragraph xx as well as any applicable RFMO/A conservation and management measures;
- a national framework, such as national plans or programmes, to manage capacity and fishing effort, catch limits and output control and to combat IUU fishing; and

- regulation of transshipment.

19. The flag State has in place a regime for authorizing fishing activities (e.g. licensing), 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;
  - 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 paragraph 47 up to and including 47.10 of the IPOA-IUU.

20. The flag State implements a control regime that includes, 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 fisheries-related data that must be recorded and/or reported in a timely manner by vessels (e.g. catches, effort, bycatches and discards, landings and transshipments); and



- an inspection regime, including at sea and at port (including landing controls).

21. The flag State has in place an enforcement regime, which includes, as a minimum:

- capacity to detect and take enforcement action with respect to violations;
- 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(s);
- 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, and deprive offenders of benefits accruing from their illegal activities;
- cooperation and mutual legal assistance, including as appropriate information sharing/reporting arrangements with other States, international organizations and RFMO/As 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 relevant subregional or regional conservation and management measures applicable to the high seas, 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.

22. The flag State undertakes comprehensive and effective monitoring, control and surveillance (MCS) of fishing, including, to the extent possible, measures and actions described in paragraph 24 of the IPOA-IUU..

### ***International***

23. The flag State effectively contributes to the functioning of the RFMO/A in which it participates (i.e. the flag State implements its duties as a contracting party or as a cooperating non-party, including reporting requirements on fishing activities and through compliance by its vessels).

24. The flag State contributes to joint control and enforcement efforts where applicable.

25. The flag State takes action in respect of vessels flying its flag and identified as participating in IUU fishing or fishing related activities.

***National vessel registries and records***

26. The flag State regularly updates national vessel registries and records.

27. The flag State effectively carries out, prior to registration, verification of vessel records and, where applicable, history.

28. The flag State refuses registration to vessels with multiple registrations.

29. The flag State avoids registration of vessels with a history of non-compliance 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 or fishing related activities in support of such fishing.

30. The flag State cooperates with other States by exchanging information on flagging and deregistering or suspending the registration of vessels, both as part of the procedure to verify a vessel's record and, where applicable, history for registration and deregistration.

31. The flag State makes registry data available to relevant internal government users.

32. The flag State makes registry data publicly available and easily accessible subject to any applicable confidentiality requirements.

33. The flag State takes all practicable steps, including denial to a vessel of 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 which have been adopted at a national, regional or global level or of facilitating non-compliance with such measures or provisions.

34. Pending sanctions against a vessel are settled before a flag State deregisters it where applicable.

*[[National fisheries] Management regime] [International (continued)]*

35. The flag State effectively implements conservation and management measures, including the following.

- The flag State ensures that the obligations incumbent upon the fishing vessel owners, operators and crews are clearly accessible and communicated to them.
- The flag State provides guidance to the fishing sector to meet these obligations.
- The flag State effectively manages the fisheries activities of the vessels flying its flag in a manner that ensures the conservation and sustainable use of living marine resources.

36. The flag State effectively implements a regime for authorizing fishing and fishing related activities (e.g. licensing), including the following.

- A fishing authorization is issued only where the flag State is satisfied that:
  - the vessel has the ability to comply with the terms and conditions of the fishing authorization;
  - it can effectively exercise its jurisdiction and control over the vessel to ensure compliance with applicable conservation and management measures; and
  - it can effectively exercise its enforcement jurisdiction and authority over the holder of the authorization.

37. Where the flag State implements an enforcement regime, where the evidence regarding violations is diligently gathered and treated, including making available to enforcement authorities of other States and, if applicable, to RFMO/As evidence relating to alleged violations to the extent permitted by domestic law. Violations are investigated and procedures for sanctions initiated in accordance with domestic laws, regulations, policies and/or practices in a timely manner.

38. Where the flag State implements an enforcement regime, where actions that may lead to enforcement by flag States are adopted by an RFMO/A, such States ensures that adequate and timely mechanisms to resolve disputes in respect of those actions exist within the relevant RFMO/A.

39. The flag State implements effective and timely sanctions, that include the following.

- Sanctions are applied in proportion to the seriousness of the violation and are 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.
- The flag State promotes knowledge and understanding of MCS issues within national judicial and administrative systems.
- The flag State has in place judicial and/or administrative processes capable of meeting these criteria, to the extent possible, in a timely and effective manner.
- The flag State is capable of ensuring that sanctions are complied with including, where appropriate, preventing the vessel from fishing or undertaking fishing related activities until sanctions are satisfied.
- The flag State responds in a timely manner to requests from other States or, if applicable, RFMO/As to take measures in respect of its flag vessels.

### ***Cooperation between flag States and coastal States***

40. The flag State should not enter into fisheries access agreements with a coastal State unless the flag State has received assurances from the coastal State that it effectively exercises its exclusive rights and jurisdiction on conservation and management of living marine resources, the flag State is ready to cooperate with the coastal State in that regard and such

coastal State effectively implements control and enforcement regimes as set out in paragraphs 21 and 22 of these Criteria.

41. The flag State should [prohibit] [not allow] vessels flying its flag from acquiring [fishing licenses outside the framework of paragraph 40] [a [private]]fishing permit] in the maritime areas under the jurisdiction of another State unless [the flag State [has received assurances from the coastal State] [is satisfied that such other State] that it effectively exercises its exclusive rights and jurisdiction on conservation and management of living marine resources and] it is satisfied that such State effectively implements control and enforcement regimes as set out in paragraphs 21 and 22 of these Criteria.

42. Where fisheries access to maritime areas under the jurisdiction of coastal States is sought or acquired otherwise than by entering into inter-State access agreements, the flag State should not allow vessels flying its flag to utilize the relevant permit to operate in such areas unless the coastal State effectively exercises its exclusive rights and jurisdiction on conservation and management of living marine resources and such coastal State effectively implements control and enforcement regimes as set out in paragraphs 21 and 22 of these Criteria.

43. The flag State, consistent with its legislation and its international obligations, should impose sanctions on vessels flying its flag that have violated fisheries laws of a coastal State, in addition to those applicable by the coastal State,

44. The flag State, consistent with its legislation and its international obligations, should share, in cooperation with a coastal State, all information it has regarding the activities of the vessels flying its flag with regard to operations by such vessels in maritime areas of such coastal State.

### ***Procedure for carrying out assessment***

45. All flag States are encouraged to have performance assessments conducted periodically, whether self-assessments (by the flag State) or external assessments (by another State or States or an entity other than the flag State). The flag State may decide to undertake a

self-assessment or [an external assessment may be undertaken by an entity different from the flag State. Such entity could be another State [bound by an agreement with the flag State] or a multilateral organization [provided that they are carried out in consultation and with the prior consent of the flag State.]] [may request an entity to undertake an external assessment.] [If assessments are undertaken at the initiative of a State other than the flag State or a multilateral organization to which the flag State is party, such assessments should be done provided that they are carried out in consultation and with the prior consent of the flag State.] [Assessments may also be undertaken at the initiative of [a State] [an entity] [other than the flag State] [or a multilateral organization], [which includes an] [RFMO/A] [to which] [the flag State is party] [both States are party] provided that they are carried out in consultation and with the [prior] consent of the flag State.] When these assessments are conducted, the recommendations in paragraphs 44, 45 and 46 should be considered as appropriate.

46. Where the flag State undertakes self-assessment it is encouraged to:

- do so through competent authorities and internal consultations, in a transparent process. The results should be made publicly available;
- consider the participation of an assessor, possibly in cooperation with an international organization;
- consider international mechanisms for self-assessment (including assistance);
- develop a validation process;
- Consider possible linkages with multilateral assessment, including the need for global consistency among self-assessments.

47. Where a flag State decides to engage in an external assessment it is encouraged to invite another State or other States or a multilateral body (e.g. a RFMO/A) to undertake the assessment.

48. Where an external assessment is undertaken by an entity other than the flag State, the entity is encouraged to:

- seek cooperation with the flag State in advance of the assessment;
- take into account these Criteria; and
- ensure there is due regard for international law.

49. [Where the assessment is conducted at the initiative of an entity other than the flag State, this process would include the following phases:

50. Identification of the flag State to be assessed; application of criteria; dialogue with the flag State on the results of the assessment; conclusions.]

### ***Encouraging compliance and deterring non-compliance by flag States***

51. The measures and incentives should take into account the following:

- a) Corrective actions taken by the flag State.
- b) [Actions by other States, including:
  - engaging in consultations and undertaking diplomatic démarches with the flag State;
  - offering assistance and capacity development as appropriate;
  - notifying the conclusions of the assessment to other interested States and, if applicable, RFMO/As;
  - implementing port State measures;
  - [applying market-related measures consistent with the WTO;]
  - [facilitating access to markets and tariff elimination;]
  - [applying other economic or financial measures;] and
  - engaging in dispute resolution mechanisms as applicable.
  - [engaging its nationals, both natural and legal persons.]

[51 bis. These criteria are not intended to be used in the context of [unilateral] international trade-related measures.]

### ***Cooperation with and assistance to developing countries with a view to capacity development***

52. Providing assistance to developing countries to help them improve their performance as flag States is in the mutual interest of all States.

53. States should give full recognition to the special requirements of developing countries in relation to improving flag State performance consistent with these Criteria. States may,

either directly or through international organizations, including RFMO/As, provide assistance to developing States in order for them to enhance their ability to:

- a) develop an adequate legal and regulatory framework;
- b) strengthen institutional organization and infrastructure needed to ensure adequate control of vessels flying their flag;
- c) develop, implement and improve practical and effective MCS;
- d) build institutional and human resource capacity to process and analyse scientific and other data, and make it available to relevant users, including relevant RFMO/As; and
- e) participate in international organizations that promote flag State performance.

54. States should give due regard to the special requirements of developing flag States, in particular the least-developed among them and small island developing States, to ensure that they have the ability to implement these Criteria.

55. States and RFMO/As should enhance the ability of developing countries to participate in high seas fisheries, including access to such fisheries.

56. States may, either directly or through FAO, assess the special requirements of developing States to implement these Criteria.

57. States may cooperate to establish appropriate funding mechanisms to assist developing countries to implement these Criteria. These mechanisms may be directed specifically towards, *inter alia*:

- a) enhancing flag State performance;
- b) developing and enhancing capacity relevant to flag State performance, including for MCS and for training, at the national and regional levels, for MCS and administrative and legal personnel involved in enforcement; and



- c) MCS activities relevant to flag State performance, including access to technology and equipment

58. Cooperation with and among developing States for the purposes set out in these Criteria may include the provision of technical and financial assistance, including South-South cooperation.

59. States may establish an ad hoc working group to periodically report and make recommendations on the establishment of funding mechanisms.

### ***Role of FAO***

60. States should report to FAO on progress with the implementation of these Criteria and on the outcome of performance assessments conducted, whether self-assessments or external assessments, as part of their biennial reporting to FAO on the Code of Conduct for Responsible Fisheries. These reports should be published by FAO in a timely manner.

61. FAO should, including through the use of extra-budgetary funds, provide specific in-country technical assistance to States that request assistance in accordance with paragraph xx.

62. FAO will, as and to the extent directed by its Conference, collect relevant information on the global implementation of flag State performance assessment criteria and report this information, as requested, to COFI.