



Fisheries and Oceans  
Canada

Pêches et Océans  
Canada



# Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action

25 – 28 March 2008  
Vancouver, Canada



Canada 



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The Department of Fisheries and Oceans of Canada hosted this workshop, in collaboration with the Food and Agriculture Organization of the United Nations (FAO). Support for hosting the workshop was also provided by the European Commission and the Law of the Sea Institute of Iceland. Views and opinions expressed in this report constitute those of the participants only and do not necessarily represent the views and opinions of the Government of Canada, the European Commission, the Law of the Sea Institute of Iceland, or FAO.



## 1. Introduction

At the Twenty-seventh Session of the United Nations Food and Agriculture Organization (FAO) Committee on Fisheries (COFI) in March 2007, members requested FAO to “consider the possibility, subject to the availability of funds, of an expert consultation to develop criteria for assessing the performance of flag States, as well as to examine possible actions against vessels flying the flags of States not meeting such criteria”<sup>1</sup>. As an initial step in undertaking this initiative, Canada hosted, by invitation, a workshop on flag State responsibilities in Vancouver, Canada, March 25-28, 2008, with assistance, advice, and participation of FAO.

Participants began the workshop with the understanding that the ultimate goal of the COFI initiative is to improve international understanding of flag State responsibilities in the context of combating illegal, unreported, and unregulated (IUU) fishing<sup>2</sup>. It was also their understanding that the initiative was to facilitate the meeting of obligations or commitments under relevant international instruments, as well as to ensure that recommendations made in fora other than COFI, which require flag State control for proper implementation, are adequately addressed (e.g., relevant commitments in the 2006 United Nations General Assembly (UNGA) Sustainable Fisheries Resolution 61/105).

The workshop comprised a full day of presentations by invited speakers, which provided the basis for wide-ranging discussions on a number of issues. The most notable of these discussions focused on diverse goals for assessing flag State performance and identifying possible avenues or methods for taking action to improve the meeting of flag State responsibilities globally.

The following two days of discussions were devoted to elaborating criteria to evaluate flag State performance and to identifying the range of actions that can be taken in the event of flag States falling short of, or not complying with, international norms and standards for flag State control. Workshop participants endeavoured to identify performance assessment criteria, the potential role for such criteria, compliance mechanisms, and appropriate instruments to promote implementation, as well as possible actions against vessels and flag States not demonstrating compliance. Possible mechanisms to assist developing countries were also discussed.

The workshop results are outlined in this report. Participants will also prepare a Guidance Document for possible future use in FAO consultation processes.

<sup>1</sup> FAO. Report of the Twenty-Seventh Session of the Committee on Fisheries. Rome, 5–9 March 2007. FAO Fisheries Report. No. 830. Rome, FAO. 2007. 74p. (Paragraph 71).

<sup>2</sup> A definition of IUU fishing is offered in paragraph 3 of the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.

## 2. Participants

Participants included experts in international fisheries and oceans law, fisheries management, fisheries enforcement, and ocean policy. Three senior officials from FAO also participated. The list of participants can be found in Annex 1. The prospectus for the workshop can be found in Annex 2.

## 3. Presentations

Six presentations addressed various aspects of flag State control. Each presentation was followed by a discussion session<sup>3</sup>. The presentations are summarised below along with conclusions and areas for further work. Three discussion sessions were held in order to produce a Guidance Document for further development through additional expert work, as well as potential formal FAO processes. These sessions focused on 1) criteria and assessment; 2) possible actions against non-compliant vessels and their flag States; and 3) assisting developing countries.

### 3.1 Overview of Legal Framework and International Obligations for Flag States (Serge Beslier)

This presentation indicated that flag State responsibilities are already clearly defined in international law in both *hard* (legally binding) and *soft* (non-legally binding) instruments, as well as in the form of political commitments (e.g., UNGA Resolutions). While hard law outlines obligations at a high level, specific requirements and responsibilities are contained in soft law and political commitments. For specific or emerging responsibilities on flag State control, policy, and strategic guidance currently exists as non-binding or political commitments.

The basic provisions of the 1982 United Nations Convention on the Law of the Sea apply to all vessels and allow for a characterization of the *genuine link* between a vessel and its flag State. Unfortunately, a global and binding definition of this link remains elusive, a situation confirmed by the jurisprudence of the International Tribunal on the Law of the Sea (ITLOS).

Rather than attempt to define this *link* legally, the presentation contended that it is preferable to confine discussion to specific performance requirements applicable to fishing vessels, noting that freedom of fishing on the high seas is a conditional freedom. The primary responsibility for jurisdiction over vessels on the high seas rests with the flag State. In effect, a flag State should not register a fishing vessel without regulating its fishing activities, which requires the establishment of a permanent and efficient system to control its vessels.

### Discussion

Noting that the fishing sector uses the oceans in a different way than the merchant shipping sector, the participants considered the need to focus on specific requirements for fishing vessels rather than identifying generic requirements for all vessels. Although agreement among participants was limited as to which sector (fishing versus merchant shipping) was further ahead in terms of having developed regimes to assess and impose control of vessels, there was general agreement that a permanent and effective system of flag State control remains a key objective.

Legal instruments provide the basis for criteria to assess flag State responsibilities and many political commitments also attempt to identify criteria for evaluating performance<sup>4</sup>. The main question is how such criteria may be utilized to improve flag State

<sup>3</sup> The presentations, discussions, and views outlined in this report might not be formally endorsed by the workshop participants or presenters in all cases. The discussions are recorded to provide the full range of considerations discussed by the expert participants.

<sup>4</sup> The 1995 United Nations 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 (United Nations Fish Stocks Agreement), the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (FAO Compliance Agreement), the 1995 FAO Code of Conduct for Responsible Fisheries, and the FAO International Plans of Action to Prevent, Deter and Eliminate Illegal Unreported and Unregulated Fishing and for the Management of Fishing Capacity.

control of fishing vessels, given that details regarding flag State obligations mostly reside within soft law and political commitments. In this regard, consolidated guidance on the range of obligations would aid in providing a comprehensive understanding of the obligations for a responsible flag State made to date.

Participants emphasized that rights under international law and applicable international instruments come with obligations and responsibilities that are not being implemented to the fullest. Further discussion revealed recognition of the need to improve the implementation of flag State responsibilities, as well as the need for more legal clarity concerning the exact obligations of all parties associated with a fishing operation.

The distinction between States that are *unwilling* to control vessels flying their flags from those that are *unable* to do so was then raised. There was also some initial discussion on whether open registries *per se* are actually problematic (see below).

An underlying context for discussions was the important influence that globalization has had on fisheries management. In this respect, participants noted that there is a need to recognize that capital and labour flows are global, which in turn has implications for IUU fishing operations in terms of supplying financial capital and personnel. The important role of regional fisheries management organizations (RFMOs) to address such issues in a coordinated and coherent way was recognized.

### 3.2 Track Record of Flag State Performance (Matthew Gianni)

This presentation updated the author's 2005 report on flag State responsibilities. A combined RFMO IUU vessel list (as of March 2008) was presented, where it was noted that most of the vessels on the combined

list were either flagged to open registries or listed as "flag unknown". Additional data were provided on the numbers of large-scale fishing vessels (> 24m length) listed on the Lloyd's Register of Ships<sup>5</sup> as flagged to 14 *flags of convenience* (FOC) countries that had been identified in the author's 2005 report. A 20% decrease in fishing vessels registered to these 14 countries was noted, along with an overall increase in the number of "flag unknown" entries. Between 2005 and 2008, the number of fishing vessels declined for most of the 14 FOC countries. However, in some countries (Cambodia, Georgia, Panama, Sierra Leone, and Vanuatu) the number of registered fishing vessels has risen. Altogether, the number of fishing vessels flagged to one of the 14 FOC vessels or listed as "flag unknown", on the Lloyd's Registry of Ships remains high at 2,760 vessels. Research has also revealed that a number of vessels owned or operated by known IUU fishing companies previously flagged to FOCs have re-flagged to a member country of an RFMO (i.e., *Contracting Parties of convenience* are created).

The presentation noted that much of the information on the Lloyd's Register of Ships is not entirely accurate, but that the degree of inaccuracy is unknown, which reinforces the need for a more complete and reliable global register of fishing vessels. Furthermore, anecdotal evidence indicates that there may be serious safety concerns with IUU fishing vessels, which renders the issue of updated research to obtain accurate data for these vessels even more important. This updated research will recommend that an International Maritime Organization (IMO) number be assigned to all vessels larger than 400 gross registered tonnes and will also take a closer look at cargo vessels<sup>6</sup>.

<sup>5</sup> Lloyd's Register of Ships, Lloyd's Register – Fairplay (UK).

<sup>6</sup> Updated information on fishing vessels, fish carriers and refrigerated cargo vessels has been produced in a report. Gianni M. *Real and Present Danger: Flag State Failure and Maritime Security and Safety*. World Wide Fund for Nature (WWF) and the International Transport Workers' Federation. 2008. Chapter 6, pages 23-30.

## Discussion

It was recognized that the data presented are useful as they provide some quantifiable indicators of the current problems and general trends in the use of open registries and *flags of convenience* by fishing vessels. However, the participants felt that the lack of reliable data also makes it rather difficult to draw definitive conclusions on where and how often vessels are flagged and re-flagged. For example, where the term “flag unknown” appears several times in the data, it is unclear whether this is an indication of actual trend in the data, or a data failure. Since a vessel on the high seas is a manifestation of its flag State’s control, then a “flag unknown” designation could mean that the vessel has moved into obscurity, or is in the process of being re-flagged, or has been scrapped, etc. Such observations raise questions about the informational content of the data, as well as their veracity.

Noting that data collection methodologies tend to target so-called *flags of convenience* countries, the issue of open registries was discussed at length. Generally, it was agreed that the use of such terms can be a distraction, since the real issue at hand is whether States regulate their registries or control their vessels, or both. Participants agreed that proper terminology is *flag of non-compliance* and noted that open registries *per se* are not the issue. It was observed that open registries of countries that do not exercise effective flag State control over their fishing vessels often complicate efforts to conserve and manage high seas fisheries. This presents problems in determining the *real interest* of a flag State in relation to Article 8(3) of UNFSA. There was also a clear recognition that not all *national* or *closed* registries entail effective flag State control over high seas fishing activities. Consequently, it may be too simplistic to merely condemn open registries; it was

recommended that the global community make some effort to consider the motives of vessel owners when they re-flag vessels to particular countries. In this regard, it was noted that the FAO initiative to develop a Global Record of Fishing Vessels<sup>7</sup> is a significant development. Such a record should attempt to garner information relating to beneficial ownership, owners and operators, and so on, in order to provide complete information and serve as a useful tool for consolidating knowledge about flag State control. Concepts, such as risk/uncertainty, *real interest*, and *real* flag States were all seen as important elements in this particular discussion.

Finally, it was noted that there seems to be a misperception that IUU fishing is a problem confined to developed countries and that it is created only by industrial fishing activities. However, other forms and sources of IUU fishing should not be overlooked. It was agreed that, at a fundamental level, IUU fishing is most often undertaken because it is economically profitable with a calculated risk being taken in the face of possible detection and sanction. As such, it is a crime that is committed by both large and small operators to gain economic advantage at the expense of responsible resource users or operators or at the expense of the health of the resource itself. The crime undermines the ability to ensure a level playing field for fishing operations, as well as in the trade of fish and seafood products. Therefore, understanding the motives of those that engage in IUU fishing activities and gaining a better understanding of why vessels re-flag are both key factors necessary for addressing IUU fishing effectively.

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<sup>7</sup> The FAO Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels agreed that the Global Record should also include refrigerated vessels and fishing support vessels.



### 3.3 On the Water: How Vessels Exploit Gaps in the International Regulatory Regime (Angelo Mouzouropoulos)

This presentation highlighted the definition of a *flag of convenience* promoted by the International Transport Workers' Federation as part of its campaign to protect the jobs of seafarers from developed countries by forcing vessels back to the national flags of their beneficial owners. In IMO terminology, there is no such concept as an FOC and the presenter noted that the use of this pejorative acronym should be discontinued. More importantly, the presenter argued that there are two types of ship registry: *open* or *closed*. In respect of compliance with flag State responsibilities, there are also two categories of registry: *compliant* or *non-compliant* with international obligations. The latter may also be referred to as *flags of non-compliance* (FNCs). Open registries are inherently not illegal. The presentation noted that international agreements that try to limit open registries (e.g., the United Nations Convention on Conditions for the Registration of Ships) have not entered into force, as responsible open registries serve useful economic functions for merchant shipping in general.

The presentation provided examples of responsible open registries and the participants benefited directly from the practical lessons regarding Belize's transformation over two years (2001-2003) from an FNC to a responsible flag State. In that time, Belize, on its own, managed to de-flag over 500 fishing vessels. This transformation was made possible through the development of a closer relationship between two key functions that are often separated within governments: those who flag the vessel and those who manage fisheries (and understand fisheries management obligations, both domestic and international).

Also, and in subsequent years, Belize joined the relevant legal agreements including UNFSA and the FAO Compliance Agreement. It also became a full member of, or a cooperating non-contracting party

to, several RFMOs, and now has no vessel on any RFMO IUU fishing lists. This was achieved by internal governance changes, which linked the Belizean fishing registry to simultaneous and enforced fishing authorizations.

The presentation described an owner/operator's mindset when wishing to engage in IUU fishing activity as this related to the choice of fishing vessel and criteria for selection of an FNC. It also explained the operation of such a fishing vessel, the use of transshipment, support/supply vessels and small tankers, and the practice of time chartering refrigerated cargo vessels by receivers/buyers of fish in developed countries. The transshipment of fish in ports of States that are oblivious to, or fail in enforcing, regulations to combat IUU fishing was seen as having some bearing on how IUU fishing operators conduct their business.

The presentation recommended the following measures to close some of the key gaps in the international regulatory regime aimed at combating IUU fishing:

1. FAO should be advised to circulate a detailed questionnaire to all flag States, as well as national ministries responsible for fishing, to identify the nature and extent of each State's fishing activities and regulation thereof. From the responses, it should be possible, *inter alia*, to identify FNCs.
2. The initiative to draft a *Legally-Binding Instrument on Port State Measures to Prevent, Deter, and Eliminate IUU Fishing* is commended. However, its introduction is an interim measure and a more comprehensive approach is preferred, such as a new Convention on the *Conditions for the Registration and Acceptance of Vessels engaged in Fishing Activities*.
3. The need for traceability of the responsibility for vessels is supported and FAO's development of a comprehensive Global Record of Fishing Vessels, Refrigerated Vessels and Fishing Support Vessels should be afforded high priority.

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4. To improve their compliance with international law, including fisheries regulations on the high seas, the IMO Unique Company and Registered Owner Identification Number Scheme for Owning Companies and Operator Companies should be applied to fishing vessels. In addition, the emphasis of the scheme should be changed from owning companies to operator companies and their directors.
5. The IMO Continuous Synopsis Record Scheme should be applied to fishing vessels.
6. The strengthening of the existing transshipment-at-sea regulations should be introduced by RFMOs and several gaps therein have been identified. It is also proposed that, at the request of FAO, the IMO should issue guidelines to flag States for the control of vessels engaged in the transshipment/transportation of fish and of vessels supporting fishing activities.
7. RFMO IUU vessel lists should be more comprehensive to include: FNCs, owner and operator names and their contact details (including beneficial owners), time charterer details, and identification of all buyers/receivers of IUU fish.

Finally, the presentation emphasized that the efficacy of any measure combating IUU fishing depends on a collective global will to succeed. A comprehensive legal approach could be useful along with parallel work on developing practical actions.

### Discussion

Discussion emphasized that it is not *flags of convenience* (i.e., open registries) alone that contribute to IUU fishing. Rather, such a focus diverts attention away from the responsibilities of flag States onto the nationality of registries. The problem is thus more properly defined as that of *flags of non-compliance*, rather than whether a registry is open or closed.

Discussions also suggested that a *black list* of non-compliant flag States (similar to lists developed by the port State Memoranda of Understanding for

merchant shipping) could be developed, but questions arose as to how this could be accomplished given data gaps and lack of clarity on the organization that would have the authority to assume the task. It was agreed that information on where and when IUU fishing is taking place and the types of IUU fishing being undertaken are likely to be beneficial, and necessary, for the management of fishing activities. The participants were reminded that one recommendation of the Second Session of the Joint FAO-IMO Ad Hoc Working Group on Illegal, Unreported, and Unregulated Fishing and Related Matters was that RFMO Secretariats should attend the IMO Flag State Implementation Sub-Committee meetings to share information and participate in discussions.

The concept of *systematic patterns of failure* was also discussed as an indicator of problems in flag State compliance with fisheries regulations, not merely one-time violations. It was noted that actions against non-compliant vessels or a non-compliant State are a sign of a well-functioning regime, rather than a failed one. In turn, failures could be the result of unwillingness, inability, or ignorance of expectations related to flag State control. It was accepted that different types of failures require different responses. Where developing countries do not understand the expectations or their responsibilities, it was suggested that some outreach and education activities might be required.

Discussion during the workshop allowed participants to spend more time to explore various avenues for assistance to developing countries. These will be outlined in the Guidance Document.

### 3.4 Developing Fisheries-Specific Criteria for Flag State Responsibilities (Fuensanta Candela Castillo)

This presentation recalled that responsible flag State performance is an essential component of the international fisheries legal system. Assessing such performance is therefore a means to ensure the system's robustness, as well as to provide a possible basis for compensatory action by other States in case

of flag State failure(s). It was noted that the process can be carried out on a multilateral, bilateral, or self-review basis, around a well-defined set of criteria. The need to define assessment criteria is a response to an absence of consensus on what constitutes a genuine link between the State and its flagged vessels.

The presentation argued that this issue can be discussed in respect of specific fisheries governance requirements that differ from those characterizing the merchant shipping sector. In this respect, the main obstacle to progress on the genuine link issue (i.e., the requirement of nationality of the vessel owner coinciding with that of the registering State) is not an essential element in determining effective flag State jurisdiction over fishing vessels. Instead, it was argued that the flag State ultimately needs to ensure that the person accountable for the vessel operation is within reach of its enforcement system (i.e., falls within its jurisdiction).

The presentation identified two broad categories of criteria that could guide an assessment of flag State performance: regulatory and behavioural. Proposed criteria were presented and discussed under both these categories. These categories relate, respectively, to essential elements that a national set of rules should address so that the flag State may effectively operate as such. They also apply to the actual use that the flag State makes of relevant legal tools to ensure that its vessels operate in accordance with applicable measures and do not undermine conservation and management objectives. In both categories, the requirements relate to the State's standing in respect of key international instruments and obligations, to the design and operation of the national vessel registry, and to the development and implementation of national fisheries laws, including the national conservation and management regime, licensing and fishing authorization regime and monitoring, control and surveillance (MCS) scheme, as well as the State's enforcement laws and practices. The proposed framework for the criteria and the criteria themselves will be outlined in the Guidance Document.

## Discussion

Discussions revealed that it is not a simple matter of operationalizing legal, regulatory, and behavioural criteria that could be used to assess flag State responsibility. For instance, choices would have to be made between minimum requirements to define a responsible flag State, versus a comprehensive legal standard that would assist in embedding international requirements as customary law and would enable tools that might emulate some found in the merchant sector.

Subsequent discussion introduced the notion that once criteria have been developed, an assessment should be conducted before a State can determine an appropriate course of action – an element missing from the original COFI mandate. This raised further questions as to who would conduct such an assessment, with options including the State, the vessel captain, a judge (national or international), or an international organization. An analogy based on experience with environmental agreements was raised, where third-party assessments could be undertaken to provide recommendations for next steps. The ideas of a *prior assessment* and a *post assessment* or authorization process were explored by the participants. It was proposed that there could be several reasons for an assessment, including: authorizing fishing activities; identifying dispute resolution processes; providing feedback on how to cooperate for the purpose of capacity building; and so on.

Concern was expressed that State actions might focus solely on sanctions; actions should also include positive incentives, including opportunities for capacity building. This is a particular concern where developing countries might not have the capacity to ensure adequate flag State control. There was also general reluctance to rely solely on quota restrictions as a way to punish non-compliant States. Options such as de-flagging were discussed and concerns were raised about whether a State could deny de-flagging until due process is concluded (i.e., whether a State is obligated to continue to allow

a vessel to fly its flag while appeals or other judicial processes are underway). There was agreement that de-flagging a vessel should not be undertaken as a first measure. While the advantages and disadvantages of unilateral action and collective action against a non-compliant vessel or State were discussed, no consensus was reached on a preference. Moreover, the goal and use of criteria and guidelines in the short-term or longer-term would first need to be determined. Such direction might also provide a basis for determining capacity building priorities in developing countries.

Although briefly discussed after the other presentations, a longer discussion followed this presentation on the *genuine link*. It was agreed that the concept has been difficult to define, but participants were reluctant to dismiss it. It was suggested that a more productive way to deal with the issue would involve considering vessel owners' rights and duties, along with those of the flag State. The notion of *crime at sea* again raised the issue of the motives underlying IUU fishing. It was posited that if a vessel re-flags for IUU fishing, then an indication of criminal intent is more tenable. Nonetheless, the question of who bears the responsibility for undertaking an assessment to render such a determination remains. An analogy was drawn with the Organisation for Economic Co-operation and Development Finance Action Task Force (FATF), which has developed guidelines for offshore services and issues a *black list* of those involved in associated transactions. A member of the FATF can then decide on what action(s) to take, based on these guidelines. The fact that a vessel might re-flag for reasons other than criminal (e.g., economic or political) could also complicate any determination of intent associated with re-flagging.

### 3.5 Possible Options for Non-Flag Enforcement: Actions against Vessels and Flag States (Rosemary Rayfuse)

This presentation focused on the second aspect of the COFI mandate, which calls for the identification of actions that can be taken against vessels flying the

flags of States not meeting the criteria for a responsible flag State. It was noted that implicit in the mandate is that the actions identified are to be taken by non-flag States. Also implicit is the understanding that the vessel in question is itself in breach.

The presentation noted that developing criteria to assess flag State responsibilities requires a prior understanding of what those flag State responsibilities are, in other words, the specific content of the duties to cooperate and to effectively control vessels. The content of flag State responsibilities would vary depending on States' treaty obligations and the presentation suggested the need for a globally accepted statement of the minimum standards of flag State responsibilities binding on all States regardless of their treaty obligations. In any event, once the relevant responsibilities had been identified it would be possible to apply criteria for assessing compliance. A number of specific criteria were suggested, including participation in and compliance with relevant treaty regimes and the conservation and management measures adopted by RFMOs, as well as the effective adoption and implementation of domestic legislation. In this respect, it was noted that the presumption of flag State responsibility was a rebuttable one, always subject to rebuttal by instances of non-compliance.

Building on previous discussions, the presentation identified and further explored certain gaps in the COFI mandate:

1. Prior to taking action, an assessment would need to be made, based on the identified criteria, and a determination made as to whether, and if so what, action should be taken and by whom. Additional assessments might also be necessary on an on-going basis to determine whether there are additional rights to take action. This raises the issues of who is capable of making these assessments and what considerations and procedures should be followed to ensure due process.
2. If assessment of flag State responsibility is the goal, then there is an issue of potential consequences *for the flag State* – as opposed to merely its vessels – of the failure of flag State responsibility.



The development of a complex assessment procedure was not an articulated element of the COFI mandate. Nevertheless, the presentation provided guidance on the considerations relevant to the conduct of the assessment and suggested that assessment will be in the hands of interested parties, including affected coastal States, port States, market States, and members of RFMOs, who will have to act in accordance with international law.

In addition, given the parlous nature of the world's fisheries resources and the extractive nature of the activity (which distinguishes it from the shipping sector), it was noted that there is a need to be able to respond quickly to non-compliant behaviour. The focus of the COFI mandate is therefore on actions against the vessel. Nevertheless, a distinction exists between the consequences of flag State failure to exercise its responsibilities in respect of individual infractions by individual vessels, which may give rise to the right of non-flag States to take immediate action against the individual vessel, and the consequences of a consistent pattern of failure on the part of the flag State, which may result in longer-term consequences (such as the loss of the right for all its vessels to participate in fishing activities, as well as action by non-flag States against the flag State itself). The presentation and subsequent discussion therefore addressed *both* actions against vessels and actions against flag States.

## Discussion

The distinction between compliance/enforcement and sanctions/countermeasures was made by the presentation and during subsequent discussions. Such a distinction could provide a framework for considering actions by the State. Actions could include boarding and inspection under UNFSA, prohibitions on landing, flag State performance lists

for States within RFMOs, loss of quota, use of fines, naming and shaming, and *countermeasures*<sup>8</sup>.

The discussion clarified various issues, such as *enforcement* actions against vessels as part of a rigorous integrated system of MCS (as a legitimate part of primary jurisdiction derived from national or international law), versus *recourse* against *flag States* having a clear and systematic track record of irresponsibility, versus *countermeasures*.

Defining the conditions of intervention is the issue. Preliminary discussions revealed that given ITLOS rulings and the need for definitive and rigorous international assessment processes using accepted standards to act against States, the case might be more easily made in favour of countermeasures. In this context the workshop introduced the concept of a *model case* to clarify the conditions needed to avoid losing an ITLOS case against non-compliance that could, with better planning, have been won.

The participants agreed on the need for internationally accepted guidelines to be developed by FAO in the area of effective flag State control, so that systematic patterns of failure could be identified and addressed, not simply one-time violations. However, identifying such systematic failures would imply an external assessment process, an identification or knowledge of which legal entity (State, organization) would take action, and what actions might be taken. The possibility of RFMOs taking action was discussed, as RFMOs could establish detailed regulations and rules in light of their competence concerning target species and fishing activities within a given geographical area. The potential for regular self-assessment was also raised, as this is often conducted in other fields of economic activity, including in the marine shipping sector. A framework for identifying possible actions will be introduced in the Guidance Document.

<sup>8</sup> A countermeasure is an "illegal" action taken in response to another party's previous illegal activity that would be justified by the risks of the original act. It could be a reciprocal action that involves a temporary breach of an international obligation by a State in response to another State's prior wrongful act, in order to secure cessation or reparation. It is usually subject to certain conditions and limitations.

Various options were discussed for a strategy to determine the practical and legal parameters of non-flag State action. A two-pronged strategy was proposed. First, it might be useful to define a model case to take to ITLOS for an interpretative ruling and setting of legal precedent. A second avenue could involve a coastal State taking action at-sea, including boarding a non-compliant third-party vessel. Views were split as to which option should be undertaken first. On the one hand, the need for due process and time to develop a body of case law was acknowledged. On the other hand, the option of prosecuting a model case was attractive. However, it was noted that ideally the outcome of a model case should be either predictable or reasonably certain to avoid an adverse judgement setting back the relevant jurisprudence. In this context, it was noted that dispute resolution is not a sign of failure and that “naming and shaming” can be a powerful tool in its own right.

### 3.6 Legal Tools for Effective Control (Tullio Treves)

This presentation addressed the possibilities for bringing cases concerning flag State obligations for high seas fishing to international courts and tribunals. The dispute settlement provisions of the United Nations Convention on the Law of the Sea provide compulsory and binding mechanisms, including provisional measures that can be requested to prevent serious harm to the environment. The same mechanism applies to disputes concerning UNFSA and also extends to disputes concerning RFMOs.

The presentation noted that the FAO Compliance Agreement does not have a compulsory dispute resolution system, but may be used as a relevant fisheries agreement to be taken into account when

addressing disputes under the UNFSA. In the wake of the *Saiga*<sup>9</sup> judgement, disputes concerning the existence of a genuine link are unlikely to succeed. Conversely, cases against a flag State for non-compliance with its responsibilities are possible and may be more useful in clarifying the scope of such responsibilities, as well as the consequences of non-compliance. However, the general reluctance of States to engage in court disputes with other States would need to be overcome. Moreover, in a number of cases the *jus standi*<sup>10</sup> of the plaintiff could be questioned, although a flag State may use prompt release procedures under Article 73(2) of the United Nations Convention on the Law of the Sea and act to protect the crew.

### Discussion

Ensuing discussion focused on the merits of a model case compared to developing some form of legal instrument to augment flag State control after which a model case could be seen as providing legal clarification. A judge would have to decide if the State had taken all necessary measures, even though a vessel could be *clearly* non-compliant. A non-flag State would have to demonstrate its jurisdiction and that it is the appropriate claimant or has judicial standing, with the latter perhaps depending on the violation. A group of States could come together as joint claimants under a declaration of general common interest.

However, fishery case law, scarce as it is under ITLOS, has confirmed that a lack of a demonstrated *genuine link* between a flag State and its vessel cannot be construed as evidence of non-nationality. It was noted that developing case law that outlines flag State responsibilities and actions that can be taken in the case of non-compliant vessels or non-cooperative flag States might proceed more quickly than

<sup>9</sup> The *M/V Saiga* Case (Saint Vincent and the Grenadines v. Guinea), Prompt Release and the *M/V Saiga* (No. 2) (Saint Vincent and the Grenadines v. Guinea) at [www.itlos.org](http://www.itlos.org). An oil tanker that was flagged to Saint Vincent and the Grenadines, the *Saiga*'s crew was seized by Guinea outside of the Guinean EEZ. Guinea claimed the seizure was the result of a hot pursuit; St. Vincent and the Grenadines claimed it was piracy. St. Vincent and the Grenadines brought the case to the Tribunal based on humanitarian concerns for the crew. Guinea argued that the Tribunal had no jurisdiction in the matter. However, the Tribunal found unanimously that it did have jurisdiction. (Guinea is a party to the United Nations Convention on the Law of the Sea). The Tribunal (split 12-9) ordered the immediate release of the vessel and its crew. In addition to the cargo of gasoil, Saint Vincent and the Grenadines were to deposit USD400,000 as a security for the release.

<sup>10</sup> right of standing or recognized right

undertaking the process to develop a new and appropriate legal instrument.

It was noted that the options for dispute resolution processes are broadening. However, experience thus far is that few cases against the flag State have been taken to ITLOS. As noted above, the major reasons why such legal recourse has not been more commonly employed is the seeming international aversion to the *hostility* of taking a State before ITLOS for non-cooperation. The issue is further complicated by the need to find a solid case to objectively test parameters that define the “obligation to cooperate”, as well as to maximize the likelihood of success in prosecuting a party that has allegedly failed in its flag State responsibilities. Noting that there are many

unknown factors in this regard, various scenarios were discussed. One scenario could involve a flag State deciding to defend its flagged vessel as opposed to leaving it up to the vessel owner to pay the State to defend the vessel.

Finally, it was reiterated that there is a fundamental lack of international case law in the fisheries domain. Most of the cases heard by ITLOS to date have comprised the bringing of action by non-complying flag State plaintiffs (i.e., most noticeably for cases involving the prompt release of fishing vessel/crew and not the failure to fulfill flag State *obligations*).

## 4. Conclusions and Recommendations

All participants welcomed the richness and intensity of the debate. They also considered the workshop as a fundamentally important initiative to launch a work program on flag State responsibilities, an undeniably complex issue, more so than initially anticipated by the participants. Moreover, the informality of the session, operating under *Chatham House rules*<sup>11</sup> facilitated open debate of sensitive issues.

To help maintain the momentum of the important work on flag State responsibilities, the workshop participants, drawing on their individual expertise, will develop a Guidance Document that can serve as a basis for completion of the tasks identified by COFI, including, by necessity, the need to consider assessment processes. The participants also recommended several areas for further exploration in understanding and addressing the flag State control issue. Some elements will be given further attention in the Guidance Document. However, a number of additional areas for some initial enquiry and work were identified. Some areas of work could be undertaken by States, academia, international organizations and non-governmental organizations, depending on their areas of interest and expertise.

### Data Gathering

There was recognition that better data are needed to improve understanding of the flag State control problem. However, workshop participants wondered if vessel lists, while useful, were too narrowly focused. More information to be included in lists kept by RFMOs may therefore be necessary to improve current flag State control. Such information should include all actors in the system (vessel owners (including beneficial owners), operators, and charterers) in order to gain a more complete picture

of fishing vessel operations internationally, as well as on the high seas. Some participants asked about lists created by individual States.

Some recommended areas for future work include:

- Identify methods for improved data gathering:
  - Improve and expand RFMO IUU fishing vessel lists;
  - Promote information sharing between RFMOs and the IMO;
  - Create and maintain a comprehensive and reliable global record or register of fishing vessels;
  - Subject fishing vessels to the IMO registration schemes;
- Identify how to improve analysis of information being conveyed by the data; and
- Survey countries for information on how flag State responsibilities are implemented.

### Criteria Development

There was general agreement that additional expert work of the kind undertaken during the workshop is still required to further promote effective flag State control of fishing vessels. It was recognised that the issue raises sensitive international issues, such as the respective roles and standing of developing and developed States, as well as realistic incentives for cooperation, including the need to consider links between resource access and allocation issues. Other important considerations include sovereignty issues and the recognition of State freedoms under international law, questions related to external (or third-party) scrutiny, and the role, if any, to be played by peer review of flag State performance, noting that peer review processes seem more rarely found in the fishing sector than in other economic sectors, including merchant shipping.

<sup>11</sup> non-attribution of comments and views



Furthermore, it was agreed that the identification of criteria for assessing flag State performance should focus on management outcomes (and not be distracted by concepts such as *flags of convenience*). A global debate on different types of registries diverts attention from the real problem, which is the need for greater flag State control of vessels, regardless of whether the registry is open or closed.

Some recommended areas for future work include:

- Further develop criteria for determining compliance of vessels; and
- Further develop criteria for evaluating the performance of flag States.

## Assessment Processes

It was agreed that an objectively defined assessment process is a key element for demonstrating compliance (through self-assessments or third-party assessments) or for identifying non-compliant vessels along with the actions to be taken against them or the flag State concerned, or both. Since the COFI mandate is, as written, confined to the two elements of (a) developing criteria for assessing the performance of flag States and (b) examining possible actions against vessels flying the flags of States not meeting such criteria, the COFI tasking might be missing essential elements, such as the need to provide guidance on how assessments should be undertaken. From a practical point of view, it is not clear what the effect or consequences of an assessment would be, who would conduct it, and who would take action following an assessment. Different purposes for assessments would require different forms of assessment, ranging from voluntary self-assessment for capacity building, to vessel-based methods, to fully-fledged international assessments as a prelude to action against non-compliant States themselves.

Some recommended areas for future work include:

- Further explore different types of assessments, including self-assessment, prior assessment and post assessment, outlining the uses, risks, and benefits of each;
- Identify how coastal States, RFMOs, and others might undertake and use an assessment; and
- Develop options or guidelines for assessments.

## Possible Actions

Participants emphasized that the issue of flag State control cannot only be addressed in the context of IUU fishing, as is often the case, and which unhelpfully focuses attention on non-compliance with internationally agreed conservation measures by RFMO non-contracting parties. Rather, improved flag State control is a foundation for responsible fisheries management. It is thus required by RFMO contracting parties and flag States with vessels needing to comply with obligations outside RFMO areas, and for domestic fisheries control. For instance, the 2006 UN Sustainable Fisheries Resolution 61/105 explicitly refers to flag State obligations with respect to protecting vulnerable marine ecosystems in high seas areas not under the jurisdiction of an RFMO; demonstrated flag State control is essential to meet this commitment.

There was a general view that the current situation regarding exercise of flag State responsibilities reveals a complex web of interactions and effects, both intended and unintended. Legal or binding obligations exist, but are not always specific to the fishing sector. More detailed guidance for the fishing sector can be found in non-binding measures. Moreover, there are failures of application even at the most basic level. Such failures may result from a flag State's unwillingness to comply with, inability to implement, or ignorance of the rules, in some cases due to lack of capacity within developing countries. There appears to be a need to further explore what implications such characteristics of non-compliance might hold for non-flag State action.

It was noted that in terms of free markets and employment opportunities, globalization complicates a State's ability to address flag State control problems, either individually or collectively. In their failure, however, flag State weaknesses create burdens for the rest of the global management system, including financial costs to flag States and fishing companies operating within internationally agreed rules and regulations. As a result, issues of compliance are likely to be inexorably intertwined with the need for incentives, whereby it would cost more, financially and strategically, to be non-compliant than to be compliant. In the fisheries management context, such incentives might include access to quota; however, such action is not without risk. In the IUU fishery context, some countries might seek income substitution options in order to ameliorate economic losses incurred by giving up their practices of flagging vessels over which they are unwilling or unable to exercise full flag State control.

Some recommended areas for future work include:

- Identify and explore the practical and legal risks and benefits of various possible actions that may be taken in respect of:
  - individual infractions by individual vessels, which may give rise to the right of non-flag States to take immediate action;
  - a consistent pattern of failure on the part of the flag State to comply with any or all of its various responsibilities, which may result in longer term consequences; and
- Identify what actions can be taken by non-flag States, by RFMOs or by other intergovernmental organizations, and whether they differ depending on the organization.

## Legal Research

To complement improved data collection and policy advice, the need for more legal research was identified as a way to improve the definition of factors, such as the content of the duty to cooperate and the role of cooperation in addressing failures in flag State control. This research could also identify possible actions along with their attached risks and benefits.

It was clear that while there may be agreement on the need to develop guidelines for the effective exercise of flag State control, a common vision has not yet been developed on a mechanism, or its objectives, which is likely to be most useful for achieving this goal. Views expressed by the workshop ranged from a consolidated legal regime setting out minimum requirements to a comprehensive legal instrument. Other possibilities included developing an International Plan of Action on Flag State Control or developing FAO guidelines, as a first step. It was recognized that each of these alternatives could be used to address various needs or ends associated with promoting effective, internationally rigorous flag State control.

Some recommended areas for future work include:

- Conduct research on legal options with respect to:
  - Risks and benefits of developing a non-binding instrument;
  - Risks and benefits of developing a model case; and
  - Risks and benefits of developing a legal instrument.

## Assistance to Developing Countries

Participants acknowledged that some developing countries might be: unaware of the responsibilities associated with flagging vessels engaged in fishing activities; unable to implement those responsibilities due to lack of capacity; or unwilling in some way to undertake those responsibilities. Participants discussed whether and how such States should be informed of their responsibilities, assisted with developing the capacity to implement their responsibilities, or made aware of the costs and benefits, to individual States and the entire system of flagging vessels that are non-compliant. There was also some discussion on how to prioritize assistance and what criteria might be used to make such a determination. Participants did not agree on specific advice or direction in this regard, discussing only various methods for providing assistance (to be outlined in the Guidance Document).

Some recommended areas for future work include:

- Determine the capacity of developing countries to implement flag State responsibilities;
- Identify areas for capacity building; and
- Identify ways and means of assisting developing countries to ensure better flag State control.



## Annex 1 – List of Participants

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## 20 Expert Workshop on Flag State Responsibilities

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## Annex 2 – Workshop Prospectus

### Background:

At the Twenty-seventh Session of the FAO Committee on Fisheries in March 2007, members agreed that FAO should develop criteria for assessing the performance of flag States, and examine possible actions against vessels flying the flags of States not meeting such criteria. As an initial step in undertaking this initiative, Canada has proposed to host, by invitation only, an expert workshop on flag State responsibilities in Vancouver, Canada, March 25-28, 2008.

This workshop will contribute to this effort by FAO to identify definitive actions that can be taken to improve flag State performance. The workshop will invite experts in the field to present and consider a number of papers on the subject and will undertake to identify performance assessment criteria, compliance mechanisms, and appropriate instruments to promote implementation, as well as possible actions against vessels and flag States that do not demonstrate compliance. The workshop will also consider avenues to assist developing countries in this area.

The resulting criteria and possible actions will improve international understanding of flag State responsibilities in relation to combating illegal, unreported, and unregulated fishing and help to ensure that flag State commitments in other fora are adequately addressed (e.g., relevant commitments in the 2006 UNGA Sustainable Fisheries Resolution 61/105). It is expected that this workshop will make a contribution to a subsequent Expert Consultation convened by FAO to further develop the criteria and identify possible actions.

### Objectives:

The proposed workshop will undertake to identify:

- Criteria to assess performance of flag State responsibilities;
- Appropriate instruments and mechanisms to ensure commitment and implementation of the criteria;
- Compliance mechanisms;
- Possible actions against vessels in the event of non-compliance; and
- Avenues for assistance to developing countries to assist them in meeting commitments under these criteria.

### Dates/Location:

Canada will host the Expert Workshop in Vancouver, March 25-28, 2008. Attendance will be by invitation only, as participants are expected to develop a draft Guidance Document<sup>12</sup>. The workshop will be conducted in English.

### Agenda:

The workshop will consist of a pre-meeting (presenters and organizers only) in the afternoon and a reception for all workshop participants to meet each other in the evening of Tuesday, March 25<sup>th</sup>. The first full day will consist of presentations by the invited speakers, followed by discussions. Participants will then work to elaborate a draft Guidance Document that meets the five objectives outlined above. The workshop will conclude in the afternoon of Friday, March 28<sup>th</sup>. An agenda is available.

This draft document could serve as a basis for an FAO Expert Consultation in the near future.

<sup>12</sup> While the intention was to develop the Guidance Document at the workshop, lengthy discussions on the complex issues surrounding flag State responsibilities did not permit finalization of such a document at this session. The Guidance Document is still under development by the expert participants.

### Presenters:

The workshop will be limited to 18 invited participants, with support from staff of Fisheries and Oceans Canada. Discussions will be driven by keynote papers presented by the following international experts:

Angelo Mouzouropoulos, Director General,  
International Merchant Marine Registry of Belize

Matthew Gianni, Political and Policy Advisory,  
Deep Sea Conservation Coalition

Professor Rosemary Rayfuse, Professor of Law,  
University of New South Wales, Australia

Judge Tullio Treves, ITLOS Tribunal

Fuensanta Candela-Castillo, Fisheries and Maritime  
Affairs, European Commission, European Union

Serge Beslier, Consultant

### Additional Invited International Experts:

Gail Lugten, Senior Lecturer, University of Tasmania

Denzil Miller, Executive Secretary, Commission on the  
Conservation of Antarctic Marine Living Resources

Joji Morishita, Director for International  
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