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

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The Department of Fisheries and Oceans of Canada hosted this workshop in March 2008, 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 Guidance Document 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, FAO, or the participants' respective governments, institutions, or organizations.

The report of the *Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action* was published in February 2009 and is available from Fisheries and Oceans Canada and its website.

# 1. Introduction

Under international law, the flag State has responsibility for controlling the activities of its vessels, regardless of where a vessel operates on the high seas or what type of vessel it is. Thus, the primary responsibility for ensuring compliance by fishing vessels with fisheries management measures and other requirements rests with flag States. The freedom to fish, as articulated in the United Nations Convention on the Law of the Sea, is conditioned by the obligation to cooperate for conservation purposes.

Flag State obligations regarding flagging and controlling fishing vessels are outlined in a number of international legal instruments, including the United Nations Convention on the Law of the Sea, the United Nations Fish Stocks Agreement<sup>1</sup> (UNFSA), and the constitutive treaties of regional fisheries management organizations (RFMOs), recognizing that treaty obligations are only binding on their parties. While flag State obligations binding on all States also exist under customary international law, the precise content and scope of these obligations is unclear. In addition to “hard law,” specific and emerging requirements and responsibilities for flag States in controlling fishing vessels are contained in various internationally-agreed “soft law” instruments, such as the FAO Code of Conduct for Responsible Fisheries, and the International Plan of Action to prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) and political commitments.

Given the current level of global overfishing and estimated illegal, unreported, and unregulated (IUU) fishing, it is clear that there is a lack of control of fishing vessels and vessels that support fishing activities by certain flag States. Indeed, lack of effective flag State control has been cited as the

primary cause of IUU fishing.<sup>2</sup> Improved flag State control is the foundation for responsible fisheries management and is a duty incumbent on all flag States, regardless of RFMO membership or the area in which a fishing operation or an activity in support of such operations takes place. The fisheries sector is expected to demonstrate that it takes seriously its obligations to ensure that oceans resources are sustainably managed and that the habitats and ecosystems upon which fisheries resources depend are respected.

The current complex global legal framework, along with voluntary commitments, makes it difficult to determine whether a flag State is adequately implementing its obligations and what actions can be taken by non-flag States to address the situation. As such, the report of the 27<sup>th</sup> session of the FAO Committee on Fisheries (COFI) indicates that “[a] number of Members spoke about irresponsible flag States. Many Members suggested the need 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>3</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 the assistance, advice and participation of FAO. Support for hosting the workshop was also provided by the European Commission and the Law of the Sea Institute of Iceland. A meeting report of the *Expert Workshop on Flag State Responsibilities: Assessing Performance and Taking Action* was published in March 2009<sup>4</sup> and made available at the 28<sup>th</sup> session of FAO-COFI. The meeting report describes the six presentations that were made at the workshop and summarizes the discussions following those presentations.

<sup>1</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.

<sup>2</sup> FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (2001).

<sup>3</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. 74 p. (Paragraph 71).

<sup>4</sup> English version: <http://www.dfo-mpo.gc.ca/overfishing-surpeche/documents/flag-state-eng.htm>  
French version: <http://www.dfo-mpo.gc.ca/overfishing-surpeche/documents/flag-state-fra.htm>

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The experts identified that there is indeed a need for special fishing-related guidelines for flag State performance, particularly because of the extractive nature of the fishing sector, which distinguishes it from the marine shipping sector. The experts concluded that consolidating existing “hard law” and “soft law”, as well as recent political commitments, is essential. This work would provide more legal clarity concerning the exact flag State obligations associated with a fishing operation.

While the basic provisions of the 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, a global and binding definition of this link remains elusive. However, several experts were convinced that the concept of a *genuine link*, and further legal work to define it, remain valuable efforts, in addition to the work contemplated by COFI and the Vancouver workshop. This FAO initiative would lead to the development of a practical approach to determining flag State performance through the elaboration of criteria and assessment processes.

In identifying criteria, the experts did not have specific views on their use. While the experts agreed that there was a need for detailed guidance on clarifying flag State responsibilities for the fisheries sector, there was no common vision of what mechanism would be most useful to achieve this goal. Suggestions included: adoption of an international instrument; a United Nations General Assembly (UNGA) resolution declaring the internationally agreed minimum standards and content of flag State responsibility; a possible International Plan of Action on Flag State Control; or FAO international guidelines. Determining how the criteria might be used would provide direction on whether and how such criteria should be refined.

The experts also noted that an assessment, based on the criteria, should be conducted before a course of action can be determined. This step – an assessment process – was recognized as a potential gap in the original tasking from COFI in 2007. Experts explored the notions that criteria could form the basis of a self-assessment tool, or could be used in recourse actions. However, questions about who would conduct such an assessment were raised (a State, a vessel captain, a judge), without specific views being agreed. The experts noted that State actions should not solely focus on sanctions or quota restrictions, but could also include positive incentives, including opportunities for capacity building.

Experts also considered, as requested by COFI in 2007, the issues related to recourse when flag State control is missing and determined that this is a very complex issue related to assessment processes. A distinction exists between a) the consequences of flag State failure to exercise its responsibilities in respect of individual infractions by individual vessels and the right of a non-flag State to take immediate action against a non-compliant vessel, and b) the consequences of a consistent pattern of failure on the part of the flag State. The potential options for recourse also depend on the various treaties to which the flag State and the non-flag State are Parties. The experts considered the idea of developing a “*model case*” to take to the International Tribunal on the Law of the Sea as a way of seeking legal guidance on how a case could be planned for a positive outcome.

Throughout the workshop, the experts noted that a lack of flag State control might be due to the flag State being unaware of the requirements, being unable to implement the requirements, or lacking the political will to do so. As a result, experts also discussed options for providing assistance to developing countries to raise awareness and to build capacity.

In addition to the six presentations, the workshop participants engaged in three exploratory discussion sessions in order to develop criteria, consider potential actions against non-compliant vessels or flag States, and identify ways to assist developing countries. Given that an assessment stage is an integral step, questions surrounding assessments were identified for further exploration. This document, therefore, addresses the COFI mandate on flag State responsibilities under the following headings:

- Criteria for assessing flag State responsibilities;
- Assessment procedures;
- Actions that can be taken against States and vessels of States who do not meet the criteria of a responsible flag State; and
- Assistance to developing countries.

This document could form a basis from which the development of specific tools or mechanisms could be drawn or further explored. Further development, however, requires a determination of the purpose of a flag State performance tool. There are short-term requirements (i.e., the need and right of non-flag States to take immediate action against an individual vessel) and long-term needs to develop guidance and build capacity (i.e., the need to improve flag State performance generally). A tool to guide the taking of action against a specific vessel for one-time or multiple violations would likely differ from a tool to guide the taking of action against an unresponsive or systematically non-compliant flag State.

It should be underlined that the experts understood “vessels” as being that defined in the draft *Legally-Binding Instrument on Port State Measures to Prevent, Deter and Eliminate IUU Fishing*. Thus, a vessel means “any vessel, ship of another type and boat used for, equipped to be used for, or intended to be used for fishing and fishing-related activities,”<sup>5</sup> where fishing and fishing-related activities are also defined. In this regard, vessels that support fishing activities, such as transshipment and supply vessels, could be assessed as to whether they support fishing vessels that undermine efforts to conserve and manage fish stocks. Reference to the “State” throughout the document should be broadly interpreted to include State, entity, or regional economic integration organization that might have fishing interests.

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<sup>5</sup> FAO. *Draft Legally-Binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*. Rome (at the time of the workshop, the negotiations had not yet started).

## Criteria for Assessing Flag State Responsibilities

Ultimately, the flag State needs to ensure that the person accountable for a vessel's operation is within reach of its enforcement system. The proposed set of criteria seeks to provide indicators as to whether a flag State has the tools to effectively implement its enforcement regime and whether it in fact does. Given these two parameters, the criteria have been divided in two basic categories: Regulatory and Behavioural.

The purpose of regulatory criteria is to identify whether the flag State has implemented a national legal framework that is based on international standards, which are outlined in international law (whether treaty or customary law) as well as in globally-accepted voluntary instruments and political commitments.

Regulatory criteria provide a *prima facie* indicator in that they help to verify that a State is equipped to function as an effective flag State. For example, if a State lacks a legal framework to issue fishing authorizations or permits, then it might be argued that it lacks the ability to impose conditions or limits on the fishing activities that its flagged vessels may engage in. As such, the flag State might lack the primary instrument to ensure compliance with applicable international conservation and management measures. The purpose of the behavioural criteria is to determine whether the flag State makes use of such legal and administrative tools and to what effect. These two types of criteria are further sub-divided into three areas of interest: international stance; national vessel registry; and national fisheries regime, including registration and licensing, monitoring, control and surveillance, and enforcement.

The proposed set of criteria does not prioritize the range of considerations. It seeks, rather, to provide a comprehensive reference framework, the result of which could reasonably provide a conclusion on whether flag State performance meets international standards. In this respect, an initial review of a State's laws and regulations should be complemented by an examination of the actual use the State makes of its own legal instruments and powers to act. In some cases, the outcome of a review might be more positive in respect of a State whose laws are basic but effectively enforced than in respect of a State with an impressive regulatory array in place that is actually poorly implemented or enforced in practice. It is also important to note that an assessment of performance might require the identification of a pattern of behaviour before credible conclusions can be drawn.

As guided by the proposed set of criteria, an assessment of flag State performance, should be carried out with enough flexibility to respect the variety of situations that any such assessment is likely to encounter.

### I. Broad Range of Regulatory Criteria Identified

#### A. International Stance

1. The State is a party to key international instruments, or accepts and commits to implement them, or the State commits to implement, at minimum, the flag State provisions contained in the:
  - United Nations Convention on the Law of the Sea;
  - UNFSA; and
  - FAO Compliance Agreement<sup>6</sup>.

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<sup>6</sup> The 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas.



Other possible instruments to consider in this context, as indicators of good international standing could be:

- International Convention for the Safety of Life at Sea (SOLAS) and other relevant International Maritime Organization (IMO) instruments;
  - United Nations Convention on the Registration of Ships; and
  - Torremolinos Protocol<sup>7</sup>.
2. The State has incorporated the international commitments that are embodied in soft law or political commitments through incorporation into its domestic laws, regulations, policies and/or practices.
  3. For high seas fisheries, the State is a member of or participates in regional fisheries management organizations/arrangements (RFMO/As), or the State accepts and implements the conservation and management measures adopted by the RFMO/A.<sup>8</sup>
  4. For fisheries in waters within the national jurisdiction of others, the State has agreements with coastal States, or at least has mechanisms to verify that its vessels operate under due authorisation of the coastal State.
  5. The State participates in international organizations or other relevant fora in relation to international fisheries governance (e.g., FAO, IMO, Organisation for Economic Co-operation and Development (OECD), etc).

## B. National Vessel Registry

1. Minimum information requirements are followed, such as:
  - vessel data meet minimum FAO requirements regarding vessel markings;
  - information on owner/operators can identify effective beneficial owners/operators; and
  - information on the history of the vessel can identify prior flag/name changes.
2. Registration procedures are followed, which include:
  - verification of history and grounds for refusal of registration (including that the vessel is on an IUU 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 amongst relevant agencies (e.g., fisheries, merchant marine).
3. The registration procedures are transparent.

## C. National Fisheries Regime

1. An institutional, legal, technical foundation/framework for fisheries management has been established (such as that referred to in Article 7.1 of the FAO Code of Conduct for Responsible Fisheries), that could include:
  - 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;

<sup>7</sup> The 1993 Protocol to the Torremolinos International Convention for the Safety of Fishing Vessels (1977).

<sup>8</sup> I.e., in cases when the flag State intends to authorize vessels to operate in the relevant RFMO fisheries or membership has been sought, but refused.



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- agency authority to issue regulations and ensure control and enforcement;
  - internal organization for inter-departmental coordination, in particular coordination between fisheries authorities and vessel registry operators; and
  - scientific advice infrastructure.
2. Conservation and management measures are in place, which could comprise:
- internationally agreed measures (e.g., relevant provisions of UNGA Sustainable Fisheries Resolutions or various FAO guidelines); and
  - a national framework for addressing capacity and IUU fishing (e.g., having national plans or programs to reduce fleet capacity and to combat IUU fishing).
3. A regime for authorizing (e.g., licensing) fishing activities is in place, which includes:
- appropriate scope for authorization of fishing and fishing-related activities within and beyond areas of national jurisdiction;
  - prior assessment of a vessel's capacity to comply with applicable measures, including assessment of actual capacity; and
  - minimum information requirements (paragraph 46 of the IPOA-IUU) that allow identification of accountable persons.<sup>9</sup>
4. A monitoring, control and surveillance (MCS) regime is in place, (such as that referred to in Article 3 of the FAO Compliance Agreement), that could include:
- legal power to take control of the vessel (e.g., denial of sailing, recall to port, etc.);
  - establishment and maintenance of a fishing vessel record;
  - monitoring tools available, such as vessel monitoring systems (VMS), logbooks/documentation, observers, etc.;
  - mandatory requirements regarding fishery-related data to be reported by vessels (catches, effort, by-catches and discards, etc.);
  - inspection regime, including at sea, at port, and at customs clearance; and
  - regulation of transshipments.
5. An enforcement regime is in place, that could include:
- ability to investigate violations;
  - appropriate system for the treatment of evidence;
  - a system of sanctions that should provide for adequate types and levels to ensure deterrent effects and deprive offenders of benefits<sup>10</sup>; and
  - information sharing/reporting arrangements with other States relating to enforcement, including the timeliness of action following requests for assistance.

## II. Behavioural Criteria

### A. International Stance

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

<sup>9</sup> Other possible elements could include those from paragraphs 44 to 50 of the FAO IPOA-IUU.

<sup>10</sup> As per article 19.2 of UNFSA and article 3.8 of the FAO Compliance Agreement.

2. The State contributes to joint control and enforcement efforts, where required.
3. The State takes action in respect of identified IUU fishing vessels as required by the RFMO/A relevant measures.

## B. National Vessel Registry

1. The national registry is regularly updated through timely reviews and updates.
2. Verification of vessel history/record is effectively carried out prior to registration and registration of IUU fishing vessels and multiple registrations are refused.
3. The State cooperates with other States by exchanging information on reflagging vessels (both as part of the procedure to verify record to register and in relation to vessels leaving its registry).
4. Registry data are available to all internal government users, particularly fisheries and vessel authorities.
5. Violations are sanctioned before resorting to deflagging.

## C. National Fisheries Regime

1. The State's national laws and regulations are effectively implemented.
2. Conservation and management measures are effectively implemented, including:
  - The flag State ensures that the obligations incumbent upon the fishing vessel operators and crews are clearly accessible, transparent, and effectively communicated. It provides (technical) support to the fisheries sector in this respect; and

- The flag State effectively manages capacity and allows deployment consistent with the level of fishing possibilities available.
3. A regime for authorizing (e.g., licensing) fishing activities is effectively implemented, which includes:
    - fishing authorizations are only issued when the flag State is satisfied that the holder is within reach of its enforcement jurisdiction;
    - the flag State effectively verifies the vessel's capacity to comply as a condition for issuance; and
    - where required, the flag State implements any other ex ante verifications (e.g., assessment of potential impacts of bottom contact fishing on vulnerable marine ecosystems<sup>11</sup>).
  4. An MCS regime is implemented, that could include:
    - fishing vessel record is kept current through regular, timely updates;
    - fisheries data are collected, processed and verified in a timely manner; and
    - effective use of control means available.
  5. An enforcement regime is implemented, that could include:
    - diligent gathering and treatment of evidence regarding violations; and
    - violations are investigated and procedures for sanctions initiated in accordance with domestic laws in a timely manner.

<sup>11</sup> As per the relevant provisions of the 2006 UN General Assembly Sustainable Fisheries Resolution 61/105 on the protection of vulnerable marine ecosystems.

## The Assessment Procedure

While not specifically outlined in the mandate from COFI 2007, it became evident to the experts that an assessment process is needed in order to operationalize the criteria before the relevant method of action or recourse can be determined. The experts raised, but did not explore, questions as to who would conduct such an assessment or how. Several different purposes for an assessment process were also identified. A prior assessment could be undertaken by the relevant coastal State before authorizing fishing activities. A post-assessment could be conducted on a regular basis or after a specific violation in order to provide feedback from the non-flag State to the flag State on how to better cooperate or to identify dispute resolution processes. Self-assessment by the flag State was another option discussed by the experts, using, as a model, those that are conducted under the auspices of the IMO for flag States to identify gaps and improve control of their vessels through a transparent process, which could lead towards capacity building among flag States. Additional assessments might also be necessary on an on-going basis to determine whether there are additional rights to take action or other legal guidance that needs further development.

Assessments could be conducted by several different parties, depending on the ultimate purpose of any flag State performance tool. The affected coastal State, the port State, the market State, members of RFMOs, or an ITLOS judge were among the options discussed.

Without greater clarity on the ultimate goal of a flag State performance tool, the experts asked and explored several questions regarding assessments that would require further consideration and development.

### *1. Who assesses flag State performance?*

Some options for which parties might undertake an assessment are listed below. A State, party or organization might choose to undertake one sole option, or it could choose a combination of options in a logical sequence (e.g., start with a self-assessment).

1. The flag State could conduct a self-assessment, based on internationally agreed guidance or assessment tool. The results could be used to identify gaps and priorities, and to seek assistance, if necessary.
2. Individual States could conduct assessments, such as a coastal State in whose exclusive economic zone (EEZ) non-compliant fishing is taking place, a coastal State whose interest in a straddling or highly migratory fish stock is affected, or a member of an RFMO with vessels fishing for a particular stock.
3. An RFMO could conduct assessments, which may determine on a collective basis, through its compliance committee or other mechanism, that the flag State is not acting responsibly – either in an individual case or as a consistent pattern. This requires fair, transparent and non-discriminatory assessment processes, which are equally applicable to all States – both members and non-members. Assessments will then provide the basis for action against non-compliant vessels in individual situations or on-going action against vessels of flag States who demonstrate a consistent pattern of ‘non-responsibility’.
4. An internationally independent ‘assessment body’ could be established to conduct assessments. This option might be critical for identifying systematic patterns of failure and recommending broader (i.e., regional or global) action that could be taken, whether punitive (against the flag State itself) or corrective (either in terms of bringing greater global clarity to a particular aspect of flag State control, or in terms of building capacity of the flag State, or both).

## II. What is 'due process' for an assessment?

While there is a need to define what is meant by 'due process' and identify its elements, it is proposed that the criteria should be rigorous, yet flexible. Some guiding considerations to ensure 'due process' will depend on whether the assessment conducted and consequent actions taken are with respect to individual infringements or to systematic flag State failures.

1. With respect to individual infringements, several questions could be posed and considerations taken into account by the party conducting the assessment.
  - Is this the first breach by a vessel and its flag State? Or does the breach contribute to the demonstration of a pattern of non-compliance?

A pattern of non-compliance will be evidence of lack of flag State responsibility.

- How serious is the breach?

Where the vessel's actions are not of sufficient gravity to undermine the effectiveness of those measures, then flexibility could be taken.

- Has the flag State been notified of the breach and given an opportunity to rectify the situation by forcing its vessel to comply or by taking action against the vessel itself or authorizing another State to do so?

To be truly effective, calls for compliance need to immediately follow the violation and must require immediate response.

- Has the flag State responded/acted within a reasonable time?

What constitutes 'a reasonable time' will be hard to define (i.e., as per the UNFSA (3 days) or 4 hours in the maritime security context) and will undoubtedly depend on the circumstances of each case and could depend on factors such as past effectiveness of the flag State on controlling its vessels in general or this vessel in particular, the

seriousness of the violation being engaged in by the vessel, and the vessel's historical connections to the flag State.

2. With respect to patterns of flag State failure, the party conducting the assessment could pose several questions and take several considerations into account.

- Is this the first time the flag State has been asked to comply?

If so, then again some flexibility could be demonstrated. Where, however, this is not the first time the flag State has been asked to ensure compliance by one or more of its vessels, or where a particular violation is a serious one, or where the vessel has only recently been flagged in the flag State and is known to have engaged in IUU fishing or fishing-related activities under a previous flag, then a demand for immediate compliance could be considered reasonable. If such a demand is not complied with, it could constitute *prima facie* evidence of lack of responsibility.

- Has the flag State ignored requests for compliance in the past?
- Has the flag State purported to take action against its vessels in the past, but in fact failed to do so?

If it has, then it may also have breached the general duty of good faith.

- Has the flag State given satisfactory guarantees of compliance and non-repetition or previously shown its willingness and ability to effectively investigate and, where appropriate, prosecute and penalize breaches by its vessels?

If so, then it should be presumed that the flag State will take action as requested rather than there being a need for action to be taken by the non-flag State. If the flag State has repeatedly failed in the past, then the flag State should be presumed to be 'irresponsible' and consequences follow for both it and its vessels.

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3. Non-flag State action might need to be subject to a range of limitations and safeguards. For example, where the burden of proof lies requires further discussion and consideration.

Criteria should also be developed for revoking any adverse determination and clear guidance given to the flag State as to what needs to be done to rectify the situation as well as clear guidance given to other States as to what their obligations are to assist the flag State in demonstrating that it is a responsible flag State.

## Actions That May Be Taken Against States and Vessels of States Not Meeting the Criteria of a Responsible Flag State

As has been discussed, the exact nature of a flag State performance tool (or several tools) to improve flag State performance has not yet been determined.

The nature of the potential actions that could be taken would depend on: the circumstances; the State, organization or arrangement taking the measures; and the applicable rules of international law (i.e., United Nations Convention on the Law of the Sea, UNFSA, FAO Compliance Agreement, or rules of customary international law such as those on countermeasures and necessity).

The ability to take action might be dependent on a prior request for cooperation or compliance. The flag State can either take appropriate corrective action itself or consent to that action being taken by another State. However, if a request for corrective action has failed, the non-flag State, or an organization or arrangement of non-flag States, might be in a position to take action. In other words, the right to take action will depend on an assessment that the flag State has failed to exercise its responsibilities either in an individual case (for action against a specific non-compliant vessel) or as a consistent pattern (for action against all vessels of the flag State).

Once such a negative assessment has been made, it is conceivable that a number of actions may be taken by a range of States, including coastal States, port States (particularly if it is a Party to any global or regional binding measures on port State control), RFMO member States, and market States. Actions will include those taken at-sea, in port, or elsewhere.

Experts explored options for action against a non-compliant vessel (where its flag State has failed to demonstrate responsibility) and against a flag State that has persistently failed in the exercise of controlling its vessels. The possible actions that could be taken by an affected coastal state or an RFMO member against a non-compliant vessel depend, among other criteria, on where the violation has taken place, such as within the EEZ of the non-flag State, within the port of the non-flag State, or in regulated or unregulated areas of the high seas. Market States can also take action by denying the landing or import of certain fish.

### *1. Where an individual vessel is non-compliant and the flag State has been determined to have failed to exercise its responsibility*

This category recognizes the need for immediate action to stop a violation, such as fishing in contravention of coastal State EEZ rights or in a manner that undermines the effectiveness of conservation and management measures adopted by the international community, either in general or by RFMOs.

1. Actions can be taken by coastal States in respect of violations by vessels that infringe the rights of the coastal State in its EEZ. The legal basis for these measures is found in the United Nations Convention on the Law of the Sea and the sovereign rights of coastal States over marine living resources in their EEZ. These actions must be consistent with national laws. States may need to adopt national laws to allow them to undertake some of the following actions<sup>12</sup>:

- boarding and inspection;
- requiring vessel to enter to port;

<sup>12</sup> Subject to possible prompt release proceedings in the International Tribunal for the Law of the Sea (ITLOS).



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- detaining the vessel pending further investigation;
  - arresting the vessel;
  - seizing the vessel's catch; and
  - prosecuting and sanctioning (e.g., through fines).
2. Actions can be taken by port States in the exercise of their right to control activities in their ports. The legal basis for port State measures is the sovereign right of States to control access to their ports and activities and persons within their territory. At a minimum, required port State actions are those set out in the draft *Legally-Binding Instrument on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing*. However, port States are entitled, in the exercise of their sovereign rights, to take actions beyond those listed in this instrument. These actions must be consistent with national laws. States may need to adopt national laws to allow them to undertake some of the following actions:
- inspection and investigation<sup>13</sup>;
  - informing relevant RFMO, Interpol and/or relevant coastal State;
  - denial of port entry or port closures;
  - denial of use of port services;
  - prohibition of landing, transshipping, and processing;
  - detention of vessel pending flag State response, with the application of port State sanctions as appropriate, consistent with international law; and
  - application of sanctions that are expeditious and taken within a reasonable time, which depends on there being appropriate mechanisms in place for such action.
3. Actions can be taken on the high seas by an affected coastal State or by RFMO members, in accordance with international law. Experts noted that all the measures that apply on the high seas, particularly those that use some form of coercion, require a legal basis for such action. The legal basis for these actions may be found in several areas:
- multilateral treaties, i.e., Articles 21-22 of the UNFSA and treaties of RFMOs or other regional fisheries bodies<sup>14</sup>, particularly control and enforcement schemes adopted by RFMOs; and
  - bilateral treaties.
- Where there is evidence of suspicion of stateless and suspected stateless vessels (certainty is not required), national law must authorize high seas apprehension of a stateless vessel. The vessel captain can be asked for documents to establish the vessel's nationality.
4. *Ad hoc* consent can be given by a flag State in individual situations (i.e., consent to allow the non-flag State to board, inspect and arrest or consent to revoke the flag to render the vessel stateless allowing the other State to act). In addition, consent from the flag State can be implied if it fails to object to non-flag State action. Secondary jurisdiction can be exercised when a flag State has failed to exercise its primary jurisdiction and is therefore no longer a 'responsible flag State' in relation to either an individual vessel in individual cases or its entire fishing fleet in cases of a consistent pattern of failure by the flag State. Action can be taken on the basis of assessment or in circumstances that warrant prompt action to prevent or deter IUU fishing or activities that could include serious threats to the marine environment. It could be possible to develop an accelerated,

<sup>13</sup> Inspections may be mandatory standard operating procedures in certain fisheries. This does not necessarily constitute enforcement. Inspections are generally conducted when suspicions arise or there is a mandate, and can trigger a range of subsequent actions.

<sup>14</sup> There is a need to recognize linkages to other legal responsibilities e.g. vessel safety, labor conditions, organized crime. Non-compliance with these related requirements may signal non-compliance with fisheries laws. The United Nations Convention on the Law of the Sea requires the flag State to address administrative, social and technical matters (Article 94).



easier procedure to obtain flag State consent for boarding procedures at sea.

5. Countermeasures can be taken by the relevant (injured) non-flag State in response to an unlawful act by a vessel or flag State. A countermeasure can only be taken if there is no other choice of recourse in the face of grave and imminent implications of essential interest to the non-flag State. There needs to be a prior demand for compliance. The countermeasure must be temporary and reversible, be proportional to the illegal act perpetrated, and not include the use of force.

The type of action taken may be unilateral or collective and will depend on the circumstances, but could include:

- Before authorizing fishing in a coastal State's EEZ or landing in a State's port, it might make a prior request for cooperation from the flag State.
- The affected States or parties can inform the relevant RFMO that a vessel or flag State is non-compliant.
- The State, RFMO or other organization can develop a negative list of vessels in order to identify vessels against which action can be taken.
- A non-flag State can prevent non-compliant fishing activity, including transshipment, through actions targeted at a vessel, as long as life at sea (of fish harvesters or of inspectors) is not endangered. Such actions could include, among others: boarding and inspection; detention and seizure; request for port recall; sealing of holds; and sanctions.

## ***II. Where the flag State is determined to have exhibited a consistent pattern of failure to exercise its responsibility in relation to its vessels***

Action here is premised on the notion that an irresponsible flag State loses the right for its vessels to fish. In this case, demonstration of a systematic pattern of irresponsibility is key before measures can be taken against a flag State. However, this does not prejudice the right to take measures against an individual vessel in respect of individual failures. In this respect, a determination of lack of responsibility by a flag State may also serve as a useful circumstance in reacting to the individual IUU fishing and fishing-related activities. Measures taken against the vessels of a flag State on the basis of a consistent pattern of flag State failure must be non-discriminatory and directed against all fishing and fishing-related vessels of the flag State concerned. There may be certain events that trigger an all encompassing action. If there is no registry, for example, then there is a rebuttable presumption that the flag State is not in control of the vessel.

1. Unilateral measures against the flag State could include trade measures, diplomatic interventions, naming and shaming, and legal proceedings.
2. In the case of actions taken collectively by non-flag States through an RFMO, there is a need for a set of criteria that RFMOs could use to assess the flag States operating in their area of jurisdiction. These criteria could be developed by the individual RFMOs, based on a broader set of global criteria for assessing flag State performance. This would allow the flag State to rebut presumptions and evidence. Such an established due process would ensure adequate recourse to consequences of failure of responsibility and provide mechanisms for naming and shaming and further steps as necessary. Collective measures against the flag State could include:

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- trade measures;
  - coordinated diplomatic interventions;
  - naming and shaming, especially through an RFMO;
  - legal proceedings;
  - denial of right to fish;
  - loss of quota;
  - sanctions;
  - RFMO negative lists of non-compliant flag States;
  - development of joint/harmonized RFMO positive and negative lists; and
  - possible linking with IMO processes.
3. Responsible flag States can take measures in respect of their own nationals, which might be limited in some States by constitutional limitations on legislative powers. Measures in respect of nationals must be understood to be without prejudice to the primary responsibility of the flag State. These actions could include:
- prohibition of involvement or engagement with nationals or vessels of non-compliant flag States. This may require the development of criteria for national legislation to establish appropriate standards for conduct and sanctions for non-compliance;
  - restrictions on foreign investment or exclusions in investment treaties; and
  - restrictions on rights to export or import products, vessels, equipment, etc.

## Avenues for Assistance to Developing Countries

The experts noted that the failure of a developing country to adequately exercise its flag State responsibilities could be a result of various different conditions and reasons and, therefore, responses to a lack of flag State control by a non-flag State or the global community might differ. Distinctions were made among developing States that are 1) unaware of the responsibilities of flagging a vessel that are associated with ensuring fisheries conservation and management measures are respected, 2) unable to control their vessels due to lack of technical and physical capacity, including lack of understanding of the functions of a registry, and 3) unwilling to control vessels flying their flags.

The experts suggested that in the case of States that are unaware of their responsibilities, an aggressive program of outreach may be warranted. International assistance must be non-discriminatory, but may target States where either the risk of lack of responsibility is highest or the chances of success of the capacity building venture are greatest. Where a State refuses to accept assistance, this could be a relevant criterion in assessing whether it is a responsible flag State.

In the case of flag States that are unable to control their vessels, capacity building might be necessary. In the case of flag States that are unwilling to control their vessels, this could be cause for considering further action, collectively or individually, against the flag State that is systematically failing.

There was some discussion about how to determine which developing countries should be assisted, given that some might view IUU fishing as a criminal act that warrants punitive action. Some experts suggested that there must first be a demonstrable lack of political will to improve flag State control, despite the offers and provision of assistance, before punitive action could be considered.

### *I. What types of developing country qualify for assistance?*

All developing countries have the right to request assistance. A holistic, non-discriminatory approach to providing assistance was considered essential and, at the same time, reference was made to the priority needs of developing coastal States and least-developed States. Landlocked countries might entail special considerations, specifically in relation to inland fisheries.

It was recommended that the following factors should be considered when assessing requests for assistance:

- Cooperation and commitment to compliance by all relevant agencies in the applicant State, i.e., those ministries and agencies responsible for flag State control, port State control, and coastal State and fisheries activities;
- Ability to contribute financially in its development, e.g., through sale of fish;
- Progress in implementation of a State's fisheries development or management plan; and
- Any disproportionate burden by way of requirements set by other States on a particular flag State due to special circumstances.

### *II. What forms of assistance are available?*

Experts enumerated several types and sources of assistance to developing countries to improve their flag State control.

1. Financial assistance could be made available in the form of grants, soft loans, subsidies, and trust funds.
2. Technology could be transferred, such as:
  - Hardware: e.g., patrol boats, helicopters, equipment for development of port facilities, vessel monitoring strategy (VMS), global positioning systems (GPS), and mobile phones for fishing vessels; and

- Software: e.g., catch reporting systems, electronic logbooks, and intelligence gathering systems.
3. Human resources could be developed through:
    - Legal training in maritime legislation, including fishing related laws and regulations and enforcement, and judicial systems;
    - Technical training regarding flag State control, port State control, and coastal State and fisheries management responsibilities; and
    - Improved communication and knowledge in relation to sources of information.
  4. Initiatives for scientific cooperation could be undertaken to conduct stock assessments in the relevant EEZ, and develop and implement conservation and management measures. Participation of developing countries in the scientific bodies of RFMOs could be improved.
  5. Cooperative arrangements could be made between and among developing countries (i.e., South-South cooperation), with some supplementary assistance, as well as foster cooperative mechanisms among RFMOs in developing country regions.

### ***III. What are some sources of assistance?***

The experts noted the possibility of several avenues for assistance, either directly through bilateral arrangements or through FAO and other specialized agencies of the United Nations and other appropriate international and regional organizations and bodies, national government agencies, benevolent/charitable non-governmental organizations (NGOs), international aid agencies, partnerships, trust funds, exchanges, coast guards in developed countries, and so on.

It was noted that RFMOs can also provide assistance to developing countries to improve implementation of their flag State responsibilities, particularly through professional development exchange programs, development of port State catch documentation schemes, and sharing good practices.

### ***IV. How can the efficacy of assistance be measured in order to ensure lessons are shared and improvements are continuous?***

It was recommended that in order to ensure efficacy, assistance should be targeted, result-oriented (e.g., using short-term and long-term goals and milestones), and closely monitored. The experts emphasized that assistance should not be purely financial, but would need to include the provision of personnel on-site to help build capacity.

One challenge identified by the experts was that assistance is vulnerable to changes in personnel within governments and, in some cases, due to political instability. This is a risk that could be mitigated with the development of frameworks, strategies, guides and other mechanisms for knowledge transfer to ensure capacity building progresses. Such instruments would also be useful to ensure coherence, coordination and transparency within developing country agencies and among the developing States and the donor agencies and sources. Experts noted, however, that assistance should be withdrawn in the case of lack of commitment or progress and in the case of continued non-compliance. Appropriate sanctions might be applied if non-compliance continues.

## Conclusion

At the 27<sup>th</sup> session of FAO COFI, the country members identified a need for non-flag States to be able to address the issue of vessel non-compliance due to a lack of flag State control. This was the impetus for a request for the FAO to develop criteria to assess performance and to identify possible actions to take against non-compliance. Over the course of the three-day workshop, the experts engaged in open and frank discussions that allowed them to explore a wide range of issues related to flag State performance.

Further work will be required to address the issues, questions and gaps identified by the experts at the Vancouver workshop. As outlined in the meeting report, further work is required to improve data collection, further develop the criteria to assess performance, explore options for conducting assessments, identify possible actions to be taken by a non-flag State or other interested parties, conduct research on legal issues, and assist developing countries. This Guidance Document endeavours to address a few of these areas and provides a framework for further development of a tool (or several tools) to improve flag State performance.