# PART I

## OVERVIEW OF THE STATE OF PLAY ON ILLEGAL, UNREPORTED AND UNREGULATED FISHING

*The first session of the workshop provided participants with an overview of the state of play and the political, economic and environmental problems that we face. It set the stage for more detailed discussion of the social and economic aspects of IUU fishing and new and alternate ways to combat it.*


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## CHAPTER 1

# REGULATING IUU FISHING OR COMBATING IUU OPERATIONS?

*Olav Schram Stokke and Davor Vidas, Fridtjof Nansen Institute, Norway*

## Introduction

*Why is this study needed?* The past decade has produced a large number of measures aimed at combating the phenomenon now commonly referred to as 'illegal, unregulated and unreported' (IUU) fishing. Most of these measures are contained in legal instruments falling within the sphere of the law of the sea, including fisheries management and conservation. Among the global instruments, major milestones following on the 1982 UN Law of the Sea Convention were the 1993 FAO Compliance Agreement, the 1995 Fish Stocks Agreement,[1] as well as the 2001 International Plan of Action against IUU Fishing. Regional fisheries bodies also adopted a great many specific measures. Various national measures have been adopted as well.

-However, there has been no significant reduction in the IUU fishing activity against which those numerous measures are targeted. Indeed, in some regions it is even on the rise. Where sharp decreases of IUU fishing have been documented, this seems to be in areas where fish stocks have been exposed to over-fishing, so that incentives for (IUU) fishing have ceased to exist.

What is the reason for the weak correspondence between the measures adopted and their impact? Should we start by studying the measures? Or should we return to 'square one' and ask: Do we have the right 'diagnosis' of the problem?

The next section of this study re-examines the diagnosis, asking: Is our current understanding of the problem comprehensive enough? Does it focus on all the segments we need to address in order to deal with it effectively? This discussion is followed by three sections that review various existing measures to combat IUU fishing and examine the extent to which they respond to the diagnosis. Might it be that the main thrust of present measures has focused on curing the symptoms rather than addressing the causes? In each of those sections, we seek to identify potentials for improvement. How can the effect of current measures be enhanced, and which areas merit more attention? Our ambition

[1] 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.

here is not to enter into detailed proposals for new measures, but rather to pinpoint those areas where we see potential for improvements, and identify some of the actors who could be engaged.

**The problem: do we have the right diagnosis?**

*What is our current understanding of the problem?* While no mandatory definition of the problem is available, a commonly accepted one is found in the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU). The 'nature and scope' of the problem is defined as being illegal, unreported and unregulated fishing. Here, 'illegal' fishing refers to 'activities conducted by vessels operating in contravention to national laws or international measures'. 'Unregulated' refers to 'fishing activities conducted by vessels that, while not in formal conflict with laws and regulations, are nevertheless inconsistent with conservation measures or broader state responsibilities to this effect'. This diagnosis therefore describes 'fishing activity' and 'vessel operations' – which are either illegal, unregulated or unreported (or all at the same time) – as being the constituent elements of the problem. Accordingly, the recommended measures to 'prevent, deter and eliminate' this problem primarily concern vessels and their (IUU) fishing activity.

The operation of vessels involved in IUU fishing is indeed an important *manifestation* of the problem, and has visible impacts on the status of fish stocks. In this study, however, we wish to offer several hypotheses about the diagnosis of the problem. First, fishing vessel activities engaged in IUU fishing are not the origin of the problem. Second, that IUU fishing has proven resilient to regulatory efforts is not only because of jurisdictional obstacles in regulating the activities of fishing vessels at sea. Third, vessel operations and their fishing activity are not the ultimate purpose of IUU operators' engagement.

If those hypotheses prove correct – as will be argued in this section – they would suggest that the main effort so far has involved treating symptoms rather than causes; dealing with manifestations of the problem rather than the purposes of those who create it. Moreover, this has often been done by relying on means that are relatively costly, such as enforcement at sea; or on concepts that have proven controversial, such as attempting to define what constitutes a 'genuine link' between the vessel and the flag state.

The scope of the problem is, we maintain, far broader than indicated by the commonly accepted diagnosis of the problem as 'IUU fishing'. Accordingly, the prevailing focus of the currently available measures needs to be re-examined. While one should indeed combat IUU fishing, it is not necessarily the case that this can be done exclusively and directly in the area where such activity occurs – its main drivers, just as its facilitators, are to be found elsewhere.

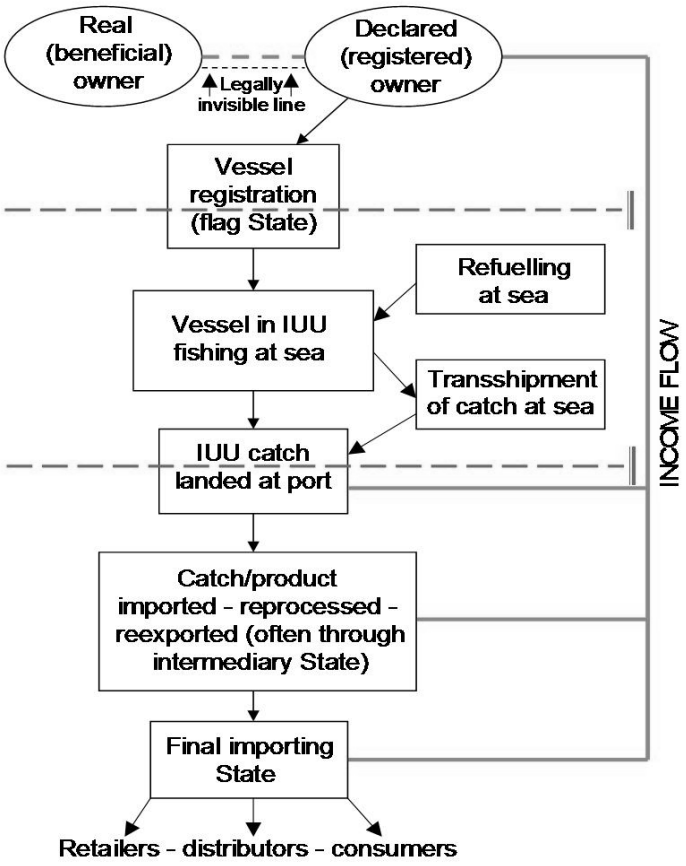
Fishing *per se* constitutes only one segment of the overall problem. In Figure 1 below, the sphere of IUU fishing is indicated by dotted lines. As can be seen, this is clearly only a part of a larger whole. It seems more correct to understand the problem as an inter-related *chain* of various links – of which 'at sea'[2] operations are only a part. What we need to do is to expose the problem by defining and analysing various links in the chain of an 'IUU operation' – a more accurate term than 'IUU fishing'.

[2] 'At sea' we understand here in sense used in the Law of the Sea, thus from vessel registration to the landing of catch in a port.

As illustrated in Figure 1.1, an IUU operation *for the purpose of international trade* can be understood as a chain composed of several main links:[3]

1. Purchase of a fishing vessel and its transfer from the real (beneficiary) to the declared (registered) owner.
2. Vessel registration in a national registry, so that vessel acquires a flag state.
3. Vessel involved in IUU fishing at sea (including refuelling at sea, and transhipment of catch at sea).
4. IUU catch landed at a port.
5. Catch/product imported, then often reprocessed and re-exported, as a rule through an intermediary state.
6. Catch/product imported by final importing state.
7. Fish product reaching retailers, distributors and end-consumers.

**Figure 1.1 The IUU Operation**




[3] IUU fishing can be conducted either for the market of the port state or for international trade. Our study focuses on international trade only, which generally applies to lucrative IUU fishing for high-value fish species.

*Source:* D. Vidas, speech at the University of Berkeley, California, 21-22 February 2003.

Those links cluster in *three* segments of an IUU operation, each of which can be targeted by measures designed to combat IUU operations:

- First, *fishing vessel activity*, from vessel registration to landing of fish at a port. This is the international segment 'at sea', and corresponds largely to what is understood as 'IUU fishing'. However, this is in many ways a manifestation of the problem.

- Second, the *logistical* aspect of an IUU operation addresses the organisation of supplies and services, and is largely played out in a transnational sphere.[4] This is where the main strength of any IUU operation is created: its flexibility.

- The third segment is *catch/product* in international trade and market. This is where income-flows occur and net incomes are generated; this is the main purpose and the driving force for IUU operations.

Those three segments, then, constitute our diagnosis of the problem. Its manifestation is fishing vessel operations; its resilience and flexibility are enhanced by the transnational mode of its logistical activities; and its ultimate purpose is to generate net income. Measures that primarily address 'at sea' activities, as do most of the measures elaborated so far, are hampered by the considerable flexibility available to IUU operators – all the way from vessel registration to the landing of the catch at a port. Such measures have only a limited potential to impact on the main purpose of any IUU operation: the generation of net income.

Measures to address an IUU operation effectively will need to deal with all three segments of the phenomenon. In addition, they must exploit potentials to cut across those three segments. This is in line with the perspective enshrined in the general objectives of IPOA-IUU. There, a 'comprehensive and integrated approach' is formulated, according to which 'States should embrace measures building on the primary responsibility of the flag State and using all available jurisdictions in accordance with international law, including port State measures, coastal State measures, market-related measures and measures to ensure that nationals do not support or engage in IUU fishing' (para. 9.3 of IPOA-IUU). This comprehensive and integrated approach, while perhaps not yet elaborated in all aspects, corresponds to our understanding of the problem as being one of IUU *operations* rather than IUU *fishing* only.

According to the Introduction to IPOA-IUU, '[e]xisting international instruments addressing IUU fishing have not been effective due to a lack of political will, priority, capacity and resources to ratify or accede to and implement them.' There is no reason to dispute this view. Rather, the issue is whether we today have measures suited to deal with the complexity of an IUU operation. And what is the best way to proceed: More measures? Better integration among existing ones? Or a shift of emphasis among such measures?

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4 'Transnationality' is marked by *direct* involvement of individuals and/or companies from one state in the jurisdictional sphere of another state or states, and is thus different from the 'international' sphere, where subjects of international law, such as states, interact. This transnational element provides many options for flexibility of an IUU operation, by utilising the comparative advantages, and loopholes, of varying legal systems.

In the following sections, we will explore measures as responding to the three main segments of the IUU problem: the vessels at sea; the transnational logistics, and the catch in trade. We will not enter into descriptive details of the measures devised so far, as the intention here is to examine whether various categories of measures are responsive to the diagnosis of an IUU operation. Further, we want to pinpoint the main reasons for their (in) effectiveness, and explore ways and conditions for overcoming existing limitations. An additional aim here is to indicate institutions and stakeholders that may have a potential to contribute to such enhanced effectiveness.

**Measures targeting IUU vessels: the Law of the Sea domain**

The sphere covered by the Law of the Sea governs an IUU operation from vessel registration to landing in a port. Here, we will focus on three main stages:

- vessel registration, through which IUU operators acquire a flag state (vessel nationality);
- jurisdiction, control and enforcement regarding fishing vessel operation at sea – the balance of flag state and coastal state competences; and between the flag state jurisdiction, on the one hand, and measures of regional fisheries organisations, on the other;
- landing in port and port state jurisdiction regarding fisheries.

In the following section, we take a closer look at each of those three stages of 'at sea' IUU operations, inquiring as to the reach of measures addressing these stages.

***Vessel registration and acquiring of nationality of a flag state***

Vessel registration can be described by various legal definitions; essentially, based as a rule on registration, a state grants its nationality to a ship. Every state has the right to sail vessels under its own flag. This is a fundamental right under the Law of the Sea, and in itself is not disputable. So far, states have not been able to reach any widely accepted agreement on whether this basic right can be made conditional by internationally agreed requirements that specify the nature and content of the link between a vessel and a state.[5] Consequently, conditions for registration are today determined by states largely at their own discretion.[6] When a vessel acquires the nationality of a certain state, that state becomes its flag state and thereby assumes primary responsibility and jurisdiction over the vessel. This is, in very simplified terms, how vessel registration, nationality, and flag state principle operate – as seen from the perspective of states.

There is another perspective to the same issue: that of the operator. This can be a physical person, though as a rule it is a juridical person, *e.g.* a company. Numerous companies have the opportunity to register business activity in more than one state. This is a core feature of international business and trade, and is in itself not controversial. However, a company may well have a perspective on vessel registration that differs considerably from that of a state. If the company is an IUU operator, vessel registration will be understood as a formal step by which that operator equips a vessel at its disposal with a *suitable* flag. Whether a flag is a suitable one will depend on circumstances, which in the case of fishing are more fluid than those related to the use of 'flags of convenience' in world shipping.

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5 The contents and fate of the (stillborn) 1986 UN Convention on Conditions for Registration of Ships is good proof to that effect.

6 See Art. 91 of the UN Law of the Sea Convention. For a discussion, see Vukas and Vidas (2001).

When the two perspectives are combined, the result is that many companies – whether IUU operators or not – may choose from among many national arenas where to conduct their businesses. Setting up a one-ship company in one country and registering a vessel there, in order to obtain nominal nationality and a flag on a vessel, is essentially an initial phase of a business operation which at that stage cannot easily be considered to be illegal, unregulated or unreported. Even if the 'company' may consist of a post-box address only, and this may remain its main connection to the 'host' country, in many countries this does not contravene national law. Likewise, having a vessel registered in a registry without any real attachment to the country, other than formal registration and payment of fees, is in many countries not contrary to national law. It is therefore not illegal, not unreported, and – albeit somewhat unregulated – it is not prohibited.

From here, an IUU operation will start its voyage. What can international law, or for that matter the law of the sea, do to assist in combating IUU operations at the stage of vessel registration and, subsequently, the licensing of a vessel to fish? Instead of re-opening the eternal discussion about 'genuine link' and 'flags of convenience', let us start by identifying the elements that an IUU operator needs at this stage. First, he needs to find a suitable flag state. Second, he needs to have at his disposal a suitable fishing vessel that can be entered in that country's register and thereafter licensed. Those are the two firm elements. The rest (like setting up a company) may be an abstraction only, or generally too difficult to trace (*e.g.*, the hiring of crew). We will therefore focus on those two firm elements: a state and a vessel.

Is international law, or international co-operation, entirely impotent here? Or is there still some potential for further action in the sphere of vessel registration and licensing?[7] Can international co-operation help to make some *states* less suitable for the purposes of IUU operators? Similarly, is it possible to make *vessels* less suitable for the purposes of IUU operators?

*States less suitable for IUU operators.* While there may be numerous companies, the number of states in the world is limited, and many states are simply not suitable for IUU operators. Those that are, fall into two categories. One group consists of states not members of a certain regional fisheries management organisation; among those, only states that do not exercise their flag state responsibility will qualify as suitable for IUU operators. The other group is usually quite limited, but also a significant feature in IUU operations: states members of regional fisheries management organisations that lack either the will or the capability to exercise their flag state responsibility.

Common to all states suitable for IUU operators is, therefore, the absence of flag state responsibility. Applying the commonly accepted label of 'flags of convenience' for those states is neither correct nor productive.[8] A recent FAO study noted that the flags used in IUU fishing are actually 'flags of non-compliance'; soon afterwards, that term was adopted by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR).[9] While possibly attractive in the

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7 Here we will not enter into discussion of economic measures (such as subsidies) or national legislative measures (such as vessel registration denial by some countries), but will remain on the level of international co-operation and international law. Issues of subsidies and denial are discussed later in this chapter.

8 Essentially, the term as such is also misleading, due to its relative nature. The notion of 'convenience' is accurate only from the perspective of IUU operators; for all others, these are essentially 'flags of inconvenience'.

9 See: Port State Control of Fishing Vessels, FAO Fisheries Circular No. 987 (Rome: UN Food and Agriculture Organisation, 2003). See also CCAMLR, Resolution 19/XXI: 'Flags of Non-Compliance', adopted in November 2002; text in: Commission for the Conservation of Antarctic

context of duty to co-operate, this reasoning is nevertheless open to one (formal) objection: not all states are obliged to comply with the conservation measures of RFMOs – only those that are members of the RFMO in question, or parties to the UN Fish Stocks Agreement. Other states, if they so wish, may remain in non-compliance as long as that does not conflict with duties they have accepted or are bound to under general international law. However, there is one minimal requirement that remains valid for all flag states: All states are to be responsible for exercising some degree of control over vessels flying their flag. That is their *flag state responsibility*. Those who flag vessels without exerting any form of control over their activities, fail to exercise their basic responsibility as states in relation to vessels having their nationality. The flags of such states deserve to be labelled *flags of no responsibility*.

Some states may accept the label 'convenient' but hardly any state will accept being branded irresponsible. In international co-operation, 'naming and shaming' can be a powerful measure.[10] This can be done through a range of steps – from direct correspondence to the flag state by secretariats, through diplomatic demarches, etc. The more states (and with higher prominence in the particular context) join in exerting such pressure, the greater will be the sense of exposure, and thus embarrassment for the state in question. Greater transparency of this action will result in increased embarrassment. The use of an appropriate label may further add to the convincing strength – and a label related to the lack of 'flag state responsibility' would be firmly based on the development of international law over the past decade.

Any such label will be essentially relative, being linked to the context of a particular fishery only. However, it may easily become perceived as absolute. This is a dilemma that regional organisations, such as CCAMLR, have had to face when discussing proposals for the listing of flags. Enhanced co-ordination between RFMOs should be able to assist in making this label less relative.

*Vessels less suitable for IUU operators*. A vessel will be seen as less suitable for an IUU operator if registering it in various national registers is difficult, or if it can be expected that the vessel will be denied a license to fish. For this, a vessel needs a 'history', a bad record of involvement in IUU fishing. Herein lies a potential for international co-operation: it can become a vehicle for establishing a record of IUU fishing for some vessels. Recently, CCAMLR parties agreed to prohibit issuing a license to fish to vessels appearing in the newly established CCAMLR–IUU Vessel List, both for fishing in the Convention Area and in any waters under the fisheries jurisdiction of the parties.[11] While the CCAMLR Secretariat compiles this list, the Commission approves it; however, the list is available only on password-protected pages of the CCAMLR website.[12]

Echoing the FAO Compliance Agreement, the IPOA–IUU contains clear limitations. While it holds that flag states should avoid flagging vessels with a history of non-compliance, the IPOA–IUU allows exceptions where ownership of the vessel has subsequently changed, or if the flag state determines that flagging the vessel would not result in IUU fishing.[13]

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Marine Living Resources, Schedule of Conservation Measures in Force, 2002/03 (Hobart: CCAMLR, November 2002), pp. 125–126.

10 See also section on shaming below.

11 CCAMLR Conservation Measure 10-06 (2002).

12 Para. 15 of CCAMLR Conservation Measure 10-06 (2002).

13 Para 36 of IPOA-IUU.

Ultimately, where is the problem with all the measures that can be used through international co-operation in this area? While they do exert some effect, gradually narrowing down the scope of movement for IUU operators, they share one pervasive feature of international co-operation: they are slowed down by cumbersome procedures. Many RFMOs meet only once a year, and while their secretariats may operate year-round, decision-making occurs at an annual pace – and in organisations where consensus is the rule, it may take several years before a decision is agreed upon by all.

It will take far less time for an IUU operator to change a flag on a vessel, or to otherwise adjust to the emerging situation. Today, vessels can be re-flagged by a few clicks on a PC connected to the Internet. There are several specialised websites that offer full services, from Q & A to assisting in prompt company setting and vessel flagging, probably the best-known of these being (www.flagsofconvenience.com).

While international co-operation is slow and operates through firm principles of international law, business – such as setting up an IUU operation – is swift and operates not according to these principles but in the loopholes between them. This may be contrary to moral norms, but today – a decade after the adoption of the FAO Compliance Agreement and the UN Fish Stocks Agreement – IUU operators can still easily obtain flags and fish licenses for their vessels from several states. From there, the IUU operation can set sail.

***Jurisdiction, control and enforcement at sea***

At sea, the Law of the Sea operates through a balance of sovereignty, sovereign rights and jurisdiction between the coastal state and the flag state. On the one hand, the rights of the coastal state decrease as the zones are more remote from its coasts or baselines; and in respect of fisheries management, individual coastal state rights cease at the outer limit of that state's EEZ. On the other hand, the rights of the flag state in respect of fisheries are valid to their full extent on the high seas, where the freedom of fishing governs; correspondingly, the rights of the flag state over the vessel flying its flag decrease in the direction of any coast other than its own. In between this balance are RFMOs, which can adopt conservation and management measures on the high seas (as well as in coastal zones) within their area of application. Enforcement capability, however, rests with states.

From the legal perspective, the coastal state is entitled to exert control and enforcement over fisheries activities in its various *coastal zones*. In this connection, it has often been said that the only truly effective means against IUU fishing is a patrol boat at sea.[14] While the coastal state can indeed arrest a foreign fishing vessel involved in IUU fishing in its EEZ, there are still legal limitations: the flag state can require the prompt release of a vessel from detention upon the posting of a 'reasonable bond'.[15]

From a practical perspective, in areas where this is possible, a patrol boat at sea can indeed be an effective means of control and enforcement. However, in many coastal waters, especially in EEZs and even in the territorial seas of many developing countries, this is difficult due to the combination of poor capacity, high costs and extensive fishing grounds. Difficulties are also encountered in areas of

14 In reality, this is comparable with the view that the only effective way to fight crime is a police constable patrolling the street. Neither the causes nor most of the consequences can be dealt with in this way; moreover, it is very costly.

15 Arts. 292 and 73(2) of the UN Law of the Sea Convention. Several prompt release cases have been decided upon in recent years by the International Tribunal for the Law of the Sea, all originating in IUU fishing for Patagonian toothfish in EEZs around sub-Antarctic islands under French and Australian sovereignty.

disputed sovereignty, or in remote areas such as the coastal zones around the various sub-Antarctic islands.

For an IUU operator, the abstract legal construction of coastal state jurisdiction in coastal zones matters only to the extent that effective physical control at sea can be expected. Where this expectation is higher, IUU fishing will depend on a simple risk assessment: probable net income from fish likely to be caught in a season *vs*. the value of a vessel likely to be sacrificed in the case of arrest.[16] Where the likelihood of arrest is negligible and fish resources well identified, an IUU operation will emerge from the risk assessment as a safe and good investment.

In this area, it is not realistic to contemplate any more significant conceptual legal developments in the foreseeable future, other than perhaps more rigorous ITLOS interpretation of what should be understood as a 'reasonable bond'.[17] In respect of international co-operation, one available avenue is more intensive co-operation between the coastal state and the flag state – for instance, in cases where observation has enabled identification of a vessel, but without other control or enforcement interventions taking place.

On the *high seas*, the situation is different, both from the legal and, as a rule, from the practical perspective as well. Unfortunately, both work in favour of an IUU operator. Here, what applies is one of the basic legal principles of international law of the sea: *freedom of fishing*, which all states enjoy. Today, this is a freedom subject to conservation and management of marine living resources. RFMOs are a mechanism increasingly used to specify conservation and management measures. However, those measures are legally binding only on members of an RFMO; all other states remain 'third parties'. Here one other basic principle of international law comes into play: *pacta tertiis*, the principle that international treaties do not oblige third states without their consent.[18]

On the high seas, thus, not only practical impediments but also basic legal principles work in favour of IUU operators. Fishing here is free for all, and although there has been an increase in conservation measures by RFMOs, these are not binding on third states and, accordingly, on the vessels under their jurisdiction.

In this area, post-UNCLOS law of the sea has seen some important developments, prompted primarily by innovative regional solutions. These needed global sanction, which was acquired through the 1993 FAO Compliance Agreement and, especially, the 1995 UN Fish Stocks Agreement, now both legally in force. The development here can be summed up as going in two directions: extending the effect of measures adopted by RFMOs to third parties; and extending the reach of the 'patrol boat' from zones under national jurisdiction to the high seas. For international law, those were significant, almost revolutionary developments. As to their practical impact, however, in many areas this has remained moderate, with few prospects for improvement.

As to the first of these developments, Article 8(3) of the UN Fish Stocks Agreement specifies how a flag state fishing on the high seas, where conservation measures adopted by RFMOs apply, is to

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16 Also for this reason, many IUU operators use fishing fleets in which vessels have different roles (fuel supply, storage etc). One of these roles may, sometimes, be that of the vessel to be sacrificed in order that other, more valuable, vessels can escape. This was likely the role of 'Lena', apprehended in the same action together with 'Volga', both under Russian flag; the rest of that fleet, comprising more advanced vessels flying flags of third parties, escaped with the fish that had been caught.

17 This trend can be observed in ITLOS, especially after the 'Volga' case in December 2002.

18 Art. 34 of the Vienna Convention on the Law of Treaties.

give effect to its otherwise general duty to co-operate: by becoming a member to the RFMO or by agreeing to apply the measures in question. Moreover, Article 8(4) provides that only those flag states who act accordingly shall have access to the fishery resources to which the measures by the RFMO apply. Many RFMOs have followed up with more specific requirements. However, among the parties to the UN Fish Stocks Agreement, there are only a small number of flag states truly addressed by those provisions. And, perhaps of even graver concern, many problems of IUU fishing are caused by states that are parties to various RFMOs, but that fail to implement their conservation measures or to exercise their flag state responsibility.[19] In such cases, as has been demonstrated, the resort to persuasion by other members of that RFMO may require years of systematic follow-up – with the burden of proof regularly resting on those seeking to prove the offence.

As to the second major legal breakthrough, Article 21 of the UN Fish Stocks Agreement authorises states parties to the Agreement that are members of a RFMO to board and inspect fishing vessels flying the flag of any other state party to the Agreement, regardless of whether this state is a member of the RFMO in question. This means moving a 'patrol boat' to the high seas, though it is limited to inspections. While certainly a useful solution in the specific regional context from which it originates,[20] and in areas of geographic and geopolitical proximity (*e.g.*, the Barents Sea), or potentially in a semi-enclosed/enclosed sea not divided into EEZs (such as the Mediterranean Sea), in many other cases this innovation is of little practical value.[21] In the Southern Ocean, for instance, this would mean patrolling high seas fishing areas like the Ob and Lena Banks, several thousand kilometres away from the nearest harbours – only to carry out inspections, not arrests (and only in respect of vessels flying the flag of a party to the UN Fish Stocks Agreement). Moreover, inspections in the Southern Ocean are done almost exclusively in maritime zones under (disputed or not) sovereignty, and those cover only a small fraction of the entire toothfish fishing area.

This is not to say that RFMOs have no role to play in high seas control: on the contrary, information collection, its transparency,[22] and collective pressure on the flag state are all important mechanisms. This system, however, may function only in respect of those states that do exercise their flag state responsibility, or those who may decide to exercise it when faced with increased international pressure.

In addition, for those areas where internationally agreed management and conservation measures apply, RFMOs do have a role to play by introducing and implementing catch certification and trade documentation schemes. Their operation begins at sea, and it is often at this stage that the fraud regarding documentation originates.[23]

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19 Let alone being unwilling or unable to control the activities of their *nationals* pursued under jurisdictions of other states.

20 The provision is in many respects modelled after the Bering Sea Doughnut Hole Convention.

21 However, that provision may be an additional impediment for some states to ratify the UN Fish Stocks Agreement. As to regions such as the Mediterranean, where this type of compliance mechanism can be conceived of, there is as yet little evidence that it would be relevant in practice.

22 It is, however, transparency which is often difficult to achieve, with information about fisheries often being comprised by commercial privacy of data. A further obstacle is reliability of information, and thus an additional reason for caution when transparency is required. See the next two sections, and the Conclusions of this chapter.

23 Catch certification and documentation are discussed further below.

***Port state jurisdiction and control regarding fisheries***

The final point where an IUU operator meets the Law of the Sea is while landing a catch in a port. Port state control in respect of fisheries is a relatively new development. After some initial regional experiments, it first emerged on the global level in the 1993 FAO Compliance Agreement. Under that Agreement, however, the power of the port state is quite limited: if it has reasonable grounds for believing that a vessel has been involved in IUU fishing, all the port state can do is to promptly notify the flag state about this.[24] The 1995 UN Fish Stocks Agreement goes further: it is 'the right and the duty' of the port state to take non-discriminatory measures against IUU fishing.[25] The Agreement entitles (and instructs) the port state to, *inter alia*, inspect documents, fishing gear and catch on board the fishing vessel. If it is established that the catch originates in IUU fishing, the port state may, pursuant to its laws, prohibit landings and transhipment. Its power stops short of detaining the vessel, however.[26]

At present, fighting IUU operations in ports would seem another weak point of the Law of the Sea. True, waiting for the catch to arrive in port is far cheaper than chasing the fishing vessel on the sea. Nevertheless, in the world there are many port states, and many more ports, and it is difficult to know in which of those an IUU catch will be landed. The history of landings of IUU catches of Patagonian toothfish can serve as an illustration. When this IUU fishing started on a larger scale in the early to mid-1990s, the initial ports used for landing were in South America. Then, as IUU fishing moved to the Indian Ocean sector, initially Southern African ports were used, first in Namibia and Mozambique and, then increasingly, Mauritius. Although Mauritius is still cited today, this is largely 'outdated' – the major landings have now moved to ports in Asia.

We may compare the effectiveness of unilaterally implemented port state control measures with the effectiveness of traffic police waiting at the very end of a highway, hoping to apprehend here all those who have gone too fast on the entire highway. Just as there are many exits from a highway, there is always 'some other port' (and port facilities may be under private control). Second, just as one can slow down before passing a speed control, IUU operators can adjust the usage of the flag on the vessel, or even adjust the vessel itself, before appearing in port. The landing of an IUU catch can be done by 'some other flag', due to re-flagging, or by 'some other vessel', due to the prevalence of transhipment at sea.

Despite such practical limitations, port state measures seem to be an area with potential for development, perhaps more than any other Law of the Sea mechanism. There are probably three areas in which – based on the development of RFMO practice, indications from IPOA–IUU, and the on-going processes in the FAO – we can expect further elaboration of port state measures as a mechanism against IUU fishing.[27]

First, any meaningful port state control must be based on co-ordinated efforts, resulting in compatible measures. Recently, this understanding has led to the process towards developing such

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24 Art. V(2) of the FAO Compliance Agreement.

25 The exact wording is given in Art. 23(1) of the UN Fish Stocks Agreement.

26 Some states, like the United States under the Lacey Act, do have stronger national measures; many other states deny access under some circumstances. However, those measures largely lack co-ordination.

27 The resulting measures will need to be fair, transparent and non-discriminatory, as stated in IPOA–IUU.

measures at the FAO, first through an Expert Consultation in November 2002, while a Technical Consultation is scheduled for the second half of 2004.

Second, broadening the extent of port state measures is a discernible trend in state practice, in RFMO measures and in consecutive global instruments. The direction here is towards not merely sitting and waiting for a vessel to arrive in port, but also undertaking port state measures before that. Through state practice some requirements have developed in this respect, now formulated in IPOA–IUU: reasonable advance notice before entry into port, providing a copy of the authorisation to fish, and specifying details of the fishing trip and quantities of fish on board.[28] If this would lead to 'clear evidence' that the vessel has been involved in IUU fishing, landing or transhipment can be denied. Since re-directing of the vessel may add to the financial burden for the IUU operator, this approach is worth considering for wider global sanction.

Third, strengthening of the content of port state measures, as well as further specification of these, is also a trend evident from recent practice and reflected in IPOA–IUU. Reversal of the burden of proof, placing it on the vessel to establish that the catch was taken in a manner consistent with conservation measures, is already enshrined in IPOA–IUU (para. 63). Attention can also be drawn to the degree to which RFMOs need to provide proof of a vessel being involved in IUU fishing: actual 'sighting' of a non-member vessel in an area of conservation measures is gradually becoming replaced by a non-member vessel being 'identified' as engaged in fishing activities.[29]

Finally, there is the economic aspect. Due to greater cost-efficiency, the advantage of port state measures over enforcement at sea is especially attractive for developing countries. On the other hand, implementation of port state measures requires adequate training in fishery inspection: this is an area where international assistance projects should be stimulated.[30] This could also be an additional mechanism to persuade some states to forgo the benefits from transhipment activities related to IUU fishing.[31]

What general conclusions can be drawn about the reach of the Law of the Sea measures that are applicable 'at sea' – from vessel registration, to the landing of catch in port? First, the Law of the Sea as an effective tool for combating IUU fishing is clearly limited by general legal principles otherwise necessary for upholding legal security. These principles, however, provide IUU operators with ample room for manoeuvre. While international law by its nature needs to be stable, IUU operators, by the nature of their business, need to be efficient, flexible and creative. Second, the development of legal measures, whether through regional or through global international co-operation, is a slow process; and when it brings results, these tend to come in small portions. Furthermore, today's IUU operators have access to modern information technology, enabling them to react and adjust to changes quickly. Third, enforcement at sea is a costly operation; even for states with good enforcement machinery at their disposal, the financial cost can exceed the value of the fish resources to be protected. Moreover,

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28 Para. 55 of IPOA–IUU, stressing also due regard to confidentiality of data. For an overview of state and RFMO practice, see: 'Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing', *FAO Technical Guidelines for Responsible Fisheries*, No. 9 (Rome: FAO, 2002), pp. 41–45.

29 See *ibid*, comments at p. 46.

30 The FAO Fish Code Programme is one vehicle for such assistance; see (www.fao.org/fi/projects/fishcode/aboutfishcode.html), especially the project 'Support for the Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IUU Fishing)'.

31 On the latter aspect, see also comments in *ibid*, p. 45.

states may operate on the basis of various policy considerations, not only economic ones. For an IUU operator, the cost-benefit analysis is simpler, and a risk assessment rather straightforward; moreover, the relevant areas are vast, measured in millions of square kilometres, without any legal possibility of direct enforcement. All this combines to give clear advantages to IUU operators.

Nonetheless, the measures developed so far to combat IUU fishing have been predominantly in the Law of the Sea sphere of regulation. After some advances on the harmonisation of port state control measures likely in the near future, the arsenal of the Law of the Sea will largely be exhausted for some time. However, the real impact of those measures so far has not been in direct enforcement, but in their indirect effects. With more information available about IUU operations and with increased pressure from states, often through RFMOs, some flag states have improved the exercise of their flag state responsibilities. With some waters being more effectively patrolled, IUU operators have found it necessary either to change their fishing grounds or become involved in higher-risk operations.[32] With greater international attention focused on IUU fishing, some loose grips – such as a 'reasonable bond' under the Law of the Sea Convention – are now becoming firmer through judiciary practice. With fewer ports fully open to IUU operators, for such operators there is less flexibility and often higher costs involved in circumventing new regulations, either by fraud or by changing port. All the same, these are rather modest outcomes in view of the sizeable investments in time, resources and political attention directed to the problem of IUU fishing throughout the whole of the past decade.

There is thus an obvious need to target an IUU operation at links where there is less opportunity for avoidance of regulation, where the implementation of measures is less costly, and where the measures can more directly target the basic profit-earning purpose of an IUU operation (not only its visible manifestation), and its flexible transnational character.

**Measures targeting IUU logistical activities**

Such a complex operation as an IUU activity involves the organisation of capital, manpower, supplies and services. Accordingly, this section will discuss governmental and private initiatives to create *frictions* by reducing the availability, or enhancing the cost, of various resources needed for the smooth operation of IUU activities. Such resources include access to national waters, equipment and bunkering, and financial, legal, insurance, freight and processing services. Three sets of tools are addressed here: specific and hard measures that seek to restrict access to desired input factors; softer means that target the reputation of companies associated with IUU operations; and more general efforts aimed at reducing the overcapacity in world fisheries, which is believed to be a root cause of many IUU operations.

***Denial***

The strategy underlying the first set of measures discussed here is denial: IUU operators, or those who co-operate with and support them, can be denied access to inputs or outlets that are controlled by actors prepared to use access as leverage. Government blacklists of vessels with a history of IUU fishing is an instructive example. Such lists can serve as a basis for refusing access to national resources, ports or services. More generally, three questions arise when classifying denial measures and considering expansion of existing measures. First, who is the denier: governmental or private actors? Second, what is being denied: port access, landing rights, fishing rights, particular services, or any combination of these? Third, who is targeted for denial: the flag state, the beneficiary vessel

[32] However, increased patrolling in some areas, including around some sub-Antarctic islands, is often a result of political considerations, not necessarily primary prompted by the needs of marine living resources management and conservation, and can thus change if the motivation changes.

owner, only the vessel, or only the cargo believed to stem from IUU fishing? Or is denial extended to 'IUU complicits', such as those who provide transhipment services, bunkering, insurance etc.?

To illustrate, the CCAMLR IUU Vessel List is an instance of multilaterally co-ordinated denial that makes use of member states' authority to licence individual vessels for harvesting in the CCAMLR area and in national waters. For its part, the Norwegian blacklist system[33] implemented in order to close the Barents Sea Loophole was a unilateral initiative that extended beyond licensing to cover port access too. The result was to reduce the second-hand value of vessels with a history of contravention of rules created by the Norwegian-Russian Fisheries Commission, especially on the European Community market. Corporate-level denial has also occurred in this region and has on some occasions even targeted companies or vessels that had provided inputs to IUU activities. For instance, during the peak years of the Loophole fishery, a series of private *boycott* actions were introduced, aimed at strangling Norwegian supplies of provisions, fuels, and services to Loophole vessels, as well as punishing domestic companies that failed to adhere to such boycotts (Stokke 2001). The Russian Fisheries Committee put similar pressure even on the ports of the most active high-seas fishing state by encouraging the Murmansk-based trawler industry to discontinue landings of cod in Iceland.

As discussed further in the section, Measures targeting IUU, denial can also be exercised indirectly by making landings and transhipment conditional on documents substantiating that the fish has been caught legally. While both blacklists and the 'white list' approach of documentation schemes can be circumvented by means such as document fraud, re-registering of vessels under new names, and laundering an illegal catch by mixing it with legal harvest, even such circumvention can be costly and will generally add friction to IUU operations.

Some reservations have been expressed with regard to the denial strategy, especially when applied by governments operating unilaterally. On one occasion, Iceland filed a complaint to the surveillance authority under the European Economic Area Agreement over Norway's refusal to render repair services to an Icelandic vessel that had been engaged in Loophole fishery.[34] More generally, the due process concerns articulated for instance by the United States with regard to blacklists[35] highlight the importance of transparency regarding criteria for being placed on such lists, the accuracy and verifiability of information on which such placement occurs, and opportunities for the targets of denial to be permitted to present their case.

Although the relationship is not unequivocal, such means to ensure due process can be hampered by the prevalent confidentiality that surrounds information about IUU operations compiled within governmental management regimes.[36] Lists of IUU vessels compiled within one co-operative framework are in some instances, such as CCAMLR, not available to other management regimes or to

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33 Norway, *St.prp*. 73 (1998-99), Sec. 2.2; legislation providing for blacklisting was introduced in 1994 but not used in practice until 'around 1997'; *ibid*.

34 The Authority indicated the occurrence of such a violation, but no further action was taken because 'the underlying conflict concerned a dispute between Norway and Iceland over Icelandic fishing rights in the Barents Sea' 'Freedom to Provide Services', *EFTA Surveillance Authority: Annual Report 1998* (http://www.efta.int/structure/SURV/efta-srv.cfm). Art. 5 of Protocol 9 to the EEA Agreement provides for access to ports and associated facilities but exemption is made for landings of fish from stocks, the management of which is subject to severe disagreement among the parties.

35 See Draft for Public Review and Comment of the National Plan of Action of the United States of America to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2003, Sec. 7.3.

36 The ambiguity arises from the argument that could be made that due process is best served if information about IUU operations is only acted upon in the context in which it was compiled.

the wider public. From one perspective, such confidentiality may be seen as constraining the effectiveness of the blacklist approach. Improved dissemination of the information contained in the list would enhance the ability of governments to act on it also in other geographic areas. On the other hand, awareness that information will be broadly exposed may significantly obstruct the provision of information to the regime secretariat.

If access to government-compiled IUU information becomes more broadly available, this would facilitate the mobilisation of private actors, including insurance and financial service providers or freighters, that might see it in their interest to refrain from doing business with IUU operators or even support the development of lists by volunteering information about the identity of IUU actors and the extent of their operations. One group of actors with such incentives are legitimate fishers, for instance the list of allegedly *rogue* vessels published by the Coalition of Legal Toothfish Operators (COLTO) in the Southern Ocean.[37] The same is also true for companies with strong brand names that are concerned with corporate environmental responsibility and their reputation.[38]

The effectiveness of the denial strategy is obviously enhanced if the number of deniers, or more accurately their share of the object desired by IUU operators, is high. As illustrated by the Northwest Atlantic Fisheries Organization (NAFO) and CCAMLR, regional fisheries management regimes are natural vehicles for co-ordinated denial: the challenge is often to persuade non-party providers to join a boycott. For some government-level measures, such as refusal of resource or port access, this can be done by *ad hoc* diplomatic means. In the 1990s, for instance, Norway ensured that annual fisheries agreements drawn up with states neighbouring the Barents Sea included provisions to prohibit landing of fish taken in international waters without a quota under the regional fisheries regime (Stokke 2001). As discussed in the previous section, broader options include memoranda of understanding among coastal states in conjunction with procedures for harmonised or even co-operative maintenance of lists of vessels or companies with a history of IUU engagement.

Turning to the objects being denied to IUU actors, any expansion from government-controlled objects, like port and resource access, into privately provided supplies, such as refuelling, freight and financial services, is constrained by the frequently fragmented structure of supply for such inputs. It has been argued that some important equipment, like means for satellite navigation and certain safety equipment, is sufficiently concentrated in supply to enable restrictions on access that might make acquisition more costly for IUU operators. Similarly, one study indicates that the number of reefers likely to be engaged in the transport of Japan-bound sashimi-grade tuna, a key IUU product, is not overwhelming (Gianni and Simpson 2004). Nevertheless, since most of the input factors needed by IUU operations have many potential providers based in many jurisdictions, the transparency of supply is low and collective action difficult. This is one of the reasons why the recent resolution by the International Coalition of Fisheries Associations – that governments, importers, freighters, traders and distributors should refrain from dealing with IUU catches (Wynhoven 2004:16) – cannot be expected to have much impact. Indeed, some of the input factors mentioned are probably of less importance to IUU operations than to legitimate fishers. Many vessels registered under flags of convenience are not fully insured or not insured at all; and equipment designed to improve environmental and worker safety is frequently sparse. Beyond this, many of the IUU operations in the tuna and toothfish sectors are parts of vertically integrated structures that, although sometimes loosely connected, ensure access to both supplies and outlets.

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37 See (www.colto.org).

38 See also the discussion of shaming below.

Denial measures may even extend to the manpower of IUU operations. Since wages make up a high proportion of the running costs of IUU operations, crews tend to be recruited in low-income countries where lack of alternative employment opportunities will continue to ensure stable supply of low-cost labour. Fishing masters and especially captains, however, are in many instances residents of wealthier countries, some of which are prepared to introduce measures to reduce the leeway for their nationals to take part in IUU fishing operations. Thus, in 2002 Spain introduced legislation that constrains the involvement of Spanish citizens in fishing operations of vessels flying flags of convenience.[39] While such measures are difficult to enforce, they may have some effect and over time strengthen the social norm among respected fishers that IUU involvement is unacceptable. That said, unemployment too is frequently perceived as unacceptable and will place limits on the effectiveness of this strategy.

All three dimensions of the denial strategy - the agent, the object, and the definition of the target - may be relevant to the compatibility of various denial measures with trade rules. If governmental denial of landing rights is applied at the level of flag states, for instance by targeting certain flags of convenience, this may contravene international trade rules. This is because such measures in effect would discriminate against vessels that have operated in consistence with RMFO regulations but fly a 'wrong' flag. If this happens, it could be seen as a violation of the national treatment and most-favoured nation principles of the World Trade Organisation (WTO).[40] That said, no complaint has been filed under WTO on the import bans implemented under the International Commission for the Conservation of Atlantic Tunas (ICCAT) on states whose vessels have been determined as harvesting bluefin tuna or swordfish in a manner not consistent with that regime (Chaytor et al. 2003). For its part, denial of access to national fish resources based on blacklists of individual vessels with a history of IUU harvesting is unlikely to be challenged under trade rules, since access to EEZ resources is usually not among the entitlements flowing from international trade regimes. Resource access does not fall within the category of a 'good' or a 'service' as understood under the WTO. As demonstrated in the Barents Sea Loophole case, measures that also prohibit port calls may become contested. An intermediate option could be to deny access to all vessels owned or operated by a blacklisted IUU company. This would probably be compatible with international trade rules, provided that national and foreign firms are treated identically, but is likely to be intractable in practice due to complex and rapidly shifting ownership situations. Nor would this option add much to effectiveness due to the prevalence among IUU operations of the one-vessel company structure. Exclusively private-level denial initiatives, like those implemented in the Barents Sea Loophole case, are not constrained by international trade rules since only states are bound by such rules.

***Shaming***

The naming and shaming of participants in IUU operations by actors who do not themselves control any input factors desired by IUU operators is a strategy that targets the reputation of named companies. Indirectly, it may also support denial measures, to the extent that public or private suppliers act on the information provided. The typical agents of shaming are business or environmental NGOs that provide vessel- or company-specific information about IUU operations. Sometimes, shaming can be extended to those who supply IUU operations with goods and services. Activities such as these have been undertaken in other environmental areas as well, starting in the 1970s but becoming more prominent in the 1990s (Haufler 2003). Underlying this 'corporate

[39] 'Royal Decree 1134/2002 of 31 October 2002, on the application of penalties to Spanish nationals employed on flag-of-convenience vessels', along with other national measures on the part of Spain and other OECD members, is summarised in OECD (2004).

[40] WTO agreements are downloadable at (www.wto.org).

accountability' movement is the belief that information that indicates lack of environmental or social responsibility may harm the companies involved by reducing their net incomes – either directly by influencing input access and outlets, or indirectly through loss of reputation or subsequent government regulation. A frequent problem with such initiatives, however, is that incriminating information, especially when it involves claims about illegal activities, can be very difficult to substantiate.

In the IUU context, the International Southern Oceans Longline Fisheries Information Clearing House (ISOFISH) initiative is notable. Established in 1997 by an Australian NGO and funded by legal toothfish operators and Australian authorities (Agnew 2000:369), this initiative aimed at compiling and disseminating information about the harvesting operations and corporate ownership of IUU fishing vessels in the region. More recently, COLTO has become the major vehicle for the shaming of unregulated harvesting in the Southern Ocean. In general, activities such as these can be argued to follow up on the encouragement articulated in the IPOA-IUU of efforts to 'promote industry knowledge and understanding… and… co-operative participation in, MSC activities to prevent, deter, and eliminate IUU fishing' (para. 24.6).

Normally, IUU operators are not particularly vulnerable to this kind of social pressure, but it is nevertheless of interest to pinpoint factors likely to shape its potential. For instance, it is widely believed that a number of Norwegian vessel owners disengaged from IUU operations in Antarctic waters largely as a consequence of ISOFISH publications having named them, drawn public attention to their activities and rendered such engagement socially unacceptable in the domestic vessel-owner community. A second factor is concern with brand name and reliance on environmentally conscious markets, and this could become relevant for IUU fishing operators. Pacific Andes, for instance, a large transnational claimed to be central in the Kerguelen Plateau fishery for toothfish, is reportedly planning to expand its market presence in Europe and Japan, where environmental awareness and political attention to the IUU fishing problem is higher than in its present stronghold, China.[41] This company has rejected any allegations of involvement in IUU operations.

A third factor is the prominence of the shamer. There is much to suggest that lists based on information compiled by an international organisation would be the most credible, since such shaming would usually require that a number of governments have decided to back the criticism. Being named and shamed by an individual government would also be severe. Although private advocacy groups are generally seen as less accountable and more confrontational than are governments and international bodies, there is considerable diversity among them with regard to public stature. It would be of interest to explore the possibilities for mobilising NGO heavyweights with extensive attention to fisheries matters but no economic stakes in the activity, such as Greenpeace or the World Wide Fund for Nature (WWF), in specific naming and shaming efforts. Legal issues would be relevant here, including the vulnerability of list makers to being sued by companies that reject charges of IUU involvement. In the United States, where resort to court action is a frequent aspect of environmental controversies, many states have passed legislation to ensure that the freedom of speech and the right to petition government policies is not unduly constrained by so-called 'strategic litigation against public participation' (SLAPs).[42] Where individuals or advocacy groups have been able to demonstrate that public statements brought to court for alleged defamation is a part of, or in support of, petitioning activity, charges have usually been dismissed even in cases where statements are found to be partially false, deceptive, or unethical (Potter 2001). Major NGOs with ample legal resources of their own are rarely

41 *The Standard* (Hong Kong newspaper), 12 January 2004, available at (www.thestandard.com.hk).

42 See generally (www.clasp.net).

targeted by SLAPs; and there are many examples where they have upheld shaming campaigns despite law suits by major companies.[43]

There are also more indirect causal pathways between private shaming and the resilience of transnational IUU operations. For example, company-level information compiled by private organisations such as ISOFISH and TRAFFIC (Lack and Sant 2001) has influenced the approach of international management bodies. By encouraging the examination of trade statistics, it has thus assisted in the development of CCAMLR's 'blacklist' system.

***Efforts to reduce overcapacity***

Overcapacity aggravates the problem of IUU operations in at least three ways. It reduces the opportunity and profitability of legal operations; the periodic idleness associated with it provides incentives for individual vessel owners to pursue IUU options; and overcapacity drives down the price of vessels, especially second-hand vessels but presumably new ones as well, thereby reducing the overall costs of illegitimate (as well as legitimate) harvesting operations. Efforts to reduce capacity and curb investments in vessels destined for IUU fishing are of several kinds but they have two features in common: counterforces are strong, and progress is likely to be limited, slow, or both.

One type of possible measure involves reduction or redirection of government subsidies. Figures on the amount of subsidies provided to the fisheries sector vary widely, a reflection partly of scattered knowledge and partly of different definitions or operationalisations (Milazzo 1998). Recent estimates suggest a level somewhere between 7 and 14 billion USD each year (Ruckes 2000). The effect of subsidies on capacity is particularly relevant in cases where management policies are unsatisfactory (Hannesson 2001:17–19; Cox 2003), including in many high-seas areas and developing-country zones where IUU harvesting is pervasive.[44] Demands for stronger disciplines on fisheries subsidies have been strong in recent years; the 2001 Doha Ministerial Declaration, which provides the mandate for the new 'Millennium Round' of multilateral trade negotiations, aims to 'clarify and improve WTO disciplines on fisheries subsidies'.[45] The 1994 Subsidies and Countervailing Measures (SCM) Agreement under the WTO umbrella provides detailed and legally binding rules concerning subsidies, supported by an elaborate compliance system that includes compulsory and binding procedures for dispute settlement and authorisation of countervailing trade sanctions. To date, however, no fisheries subsidy has been challenged under WTO rules, an important reason being that only a limited subset of direct or indirect financial transfers to the fisheries industry is clearly disciplined under present rules.[46]

Conceptual vagueness contributes to a general lack of information regarding the extent, nature and objective of subsidies. All proposals for enhanced checks on subsidies emphasise transparency and the need for improved information and notification measures (Grynberg 2003:503). Several

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43 For instances involving Greenpeace and Friends of the Earth respectively, see (http://archive.greenpeace.org/pressreleases/arctic/1997aug18.html) visited 29 February 2004 and (www.foe.co.uk/resource/press_releases/19990419174235.html), visited 29 February 2004.

44 Access conditions are generally believed to be the most important factor explaining cross-state variation in excess capacity (Cunningham and Gréboval 2001).

45 Doha Declaration, Art. 28; available at (www.wto.org/english/tratop_e/dda_e/dda_e.htm); fisheries subsidies are also addressed in Art. 31.

46 A study commissioned by the Asia-Pacific Economic Co-operation, which includes several of the world's foremost fisheries subsidy nations including Japan and South Korea, concluded that only 10 out of an inventory of 162 instances of fisheries subsidies in this region stood a high chance of being successfully challenged under the SCM Agreement (PricewaterhouseCoopers 2000).

international organisations, including the OECD and the FAO, have work programmes on the matter. Efforts to reduce fisheries subsidies are complicated by the fact that governments may have a whole range of worthy reasons for providing them, including employment in shipbuilding, harvesting or processing sectors, food security, or protection of settlements in sparsely inhabited or economically disadvantaged coastal regions.[47]

Related to the subsidies issue is a second possible measure: the development of governmental buyback schemes aimed at reducing harvesting capacity. The overall efficiency and environmental impact of buyback schemes have been questioned, even when they require scrapping of the vessels withdrawn from national fisheries.[48] Further reservations are appropriate with regard to arrangements that are parochial in their approach by allowing the vessels involved to be exported. The recent change in EU regulations of government subsidies, which imply that Community-financed buyback schemes can no longer permit disposal of vessels by sales to third countries,[49] reflects the growing appreciation of the global nature of the overcapacity problem and its role in threatening sustainable management. It also reflects the fact that fisheries subsidies have been a priority issue among European environmental organisations throughout the past decade.

A third measure in this category is regulation of foreign direct investments, notably with regard to flag-of-convenience countries. Many, if not most, IUU operations are believed to have beneficiary owners who are residents in OECD countries, and Wynhoven (2004) discusses how, among others, the OECD 1961 Code on Liberalisation may impact on efforts to curb IUU operations. The overall effect of that investment instrument, implemented by member states subject to OECD peer review procedures, may even be to constrain such efforts, since the guiding principle of the Code is non-discriminatory removal of restrictions on capital flows. Thus, the introduction of new restrictions targeting vessel investments in flag-of-convenience states would run counter to the spirit of this agreement, although reservations are permitted under certain conditions. According to Wynhoven (2004:10-12), only Japan maintains a reservation permitting it to restrict outward fisheries investments by its nationals, applying to enterprises engaged in fishing regulated by Japan or international treaties to which it is a party. More generally, in today's increasingly liberalised world economy, the tendency is for fewer rather than more restraints on global and regional capital flows.

On balance, the causal chain that may connect these various means to reduce the capacity of world fisheries to higher costs of IUU vessel purchase is a long one, and there is considerable opposition to the strengthening of international rules. Although reductions of fisheries subsidies will be a positive contribution, this is likely to be a slow process rather than an easily-mobilised policy measure. Subsidy reform and other capacity initiatives are relevant and important within a long-term strategy to combat IUU fishing, but they cannot be expected to yield rapid results.

This section has dealt with measures designed to make IUU operations more difficult and more expensive by seeking to constrain their access to various inputs and outlets. The effectiveness of these measures – whether denial, shaming, or various efforts to complicate new investments in IUU fishing capacity – will depend critically upon the flow and management of information about IUU activities. The same is true for measures to reduce the incomes flowing from such activities, addressed in the next section.

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47 See e.g. WT/CTE/W/175, 24 October 2000, available at www.docsonline.wto.org/gen_search.asp

48 See Porter (2002: 16-22); see also the discussion in Cox (2003).

49 EU, Council Regulation amending Regulation (EC) No 2792/1999 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector, COM(2002) 187 final.

**Measures targeting IUU catch**

Co-ordinated trade measures against non-members of international conservation regimes have been used since the early 1990s as inducements to join existing regimes, and later also as a compliance mechanism. One problem with early versions of this instrument is that they operated on a flag basis and thus did not permit differentiation between vessels that fish legitimately and those engaged in IUU fishing. In this regard, blacklisting of individual vessels was an important step forward.

This section addresses three categories of measures that seek to reduce incomes from IUU operations by targeting the products they bring to the markets. The first two categories are governmental, permit-based restrictions on imports and exports of certain commodities. Documentation schemes under regional fisheries regimes have been mentioned already; additionally we will discuss the possible use of a broader instrument, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The third set of measures discussed here concerns eco-labelling. This can be privately organised, and seeks to mobilise environmental awareness among retailers and consumers for purposes of enhancing the sustainability of harvesting operations.

***Catch documentation schemes***

Several fisheries regimes have developed schemes for documentation of catches, to promote better management and conservation of particular species. This represents a further step forward in differentiating between legal and IUU catches; these schemes target neither the flag state nor the vessel – only the cargo. Such schemes are especially relevant for IUU fishing carried out for international trade, as is the case with high-value tuna species and toothfish stocks.

ICCAT introduced trade documentation for bluefin tuna in the early 1990s. This has been followed by several other 'trade documentation' schemes developed on that model, especially within the tuna trade: those by CCSBT, IOTC, and by ICCAT for bigeye tuna and swordfish. The 'catch certification' system, as developed by CCAMLR since 2000, differs from these. In trade documentation systems, documents are issued at the point of *landing* and only for products that enter international trade; by contrast, in a catch certification system, the documents are issued at the point of *harvesting*, and are related to *all* fish to be landed or transhipped.[50] The CCAMLR catch documentation scheme (CDS)[51] covers toothfish catches taken in the Convention area as well as on the high seas outside that area. Participation in the CDS is open to CCAMLR parties and non-parties alike; to date, several non-parties with significant roles in various stages of toothfish catch movement between vessel and market have joined the CDS: China, Seychelles, Singapore and, partly, Mauritius. Most of the toothfish market is currently covered by countries participating in the CDS, including the United States, the European Union and Japan; other sections, however, are not (especially Canada). It has been estimated that countries involved in the CDS constitute about 90% of the market for international trade of toothfish; and that it is being applied to an area that is home to 90% of the global population.[52]

The purpose of the CDS is to place obstacles in the way of trade in IUU catches in several ways. First, toothfish caught in the Southern Ocean without a 'paper' should become more difficult to export

50 See discussion in Miller, Sabourenkov and Slicer (forthcoming 2004).

51 CDS is currently based on CCAMLR Conservation Measure 10-05 (2003), 'Catch Documentation Scheme for *Dissistichus* spp.' On CDS see especially Agnew (2000).

52 Miller, Sabourenkov and Slicer (forthcoming 2004).

and import, and therefore less attractive to the market – which would mean diminished net income to IUU operators. Soon after the CDS was introduced, it was estimated that the price of toothfish not accompanied by a valid catch document was as much as 25–40% lower;[53] and even higher differences have been cited.[54]

Second, the CDS operates in tandem with other CCAMLR measures, and with national legislation in some countries. Port state measures are especially relevant. On the basis of CDS information, landing and transhipment in ports can be denied. The burden of proof is placed on the operator, who must establish that the toothfish has been caught legitimately outside the Convention area or within the CCAMLR area in accordance with applicable conservation measures.[55] Such denial targets both exports and imports, and is strengthened by national legislation in major market countries, such as the United States.

Third, an important purpose of the system is to supply parties and the CCAMLR secretariat with data on toothfish trade and to assist in verification of such data. With the obligatory Vessel Monitoring System (VMS) for parties fishing in the CCAMLR area,[56] against the backdrop of license requirements authorising fishing in the Convention area, the flag state can determine the catch location and certify the catch *before* it is landed or transhipped. The introduction of electronic, web-based CDS, currently as a pilot project, aims at almost real-time data and at further facilitating cross-checking and verification capabilities.

While the CDS targets a weak spot of an IUU operation, some loopholes remain. After CCAMLR introduced the CDS, an increasing amount of toothfish has been reported as caught in FAO Statistical Areas 51 and others, in the Southern Ocean just beyond the area of application of CCAMLR conservation measures. Current scientific knowledge suggests, however, that it is unlikely that such amounts of toothfish can in fact be found in those areas. Difficulties related to VMS verification and the fact that VMS data are not sent directly to the CCAMLR secretariat, but only *via* the flag state (and coastal state, for fishing licensed within its EEZ), have facilitated this situation. Some CCAMLR parties have advocated the adoption of a centralised reporting system, modelled after NAFO or North East Atlantic Fisheries Commission (NEAFC), which would enable direct (parallel) sending of satellite data to the CCAMLR secretariat, but no consensus has been reached. Several CCAMLR parties are, however, now participating in a voluntary centralised system as a 'pilot project'.

Import restrictions such as documentation schemes, co-ordinated under regional management regimes and pertaining to fish caught in violation of regional conservation measures, could be challenged under WTO rules, especially by non-parties to the relevant management regime, as implying discrimination against 'like products' (Chaytor *et al.* 2003). In designing the CCAMLR documentation scheme, the parties were highly attentive to this possibility and drew upon the dispute settlement reports on the tuna/dolphin cases and the more recent shrimp/turtle case (Agnew 2000:369-

53 Para. 2.3 of the 'Report of the Standing Committee on Observation and Inspection (SCOI)' (Hobart: CCAMLR, 2000).

54 Miller, Sabourenkov and Slicer (forthcoming 2004) indicate prices at 8.40 USD/kg for fish with catch document against 3 USD/kg for fish not accompanied with the document.

55 CCAMLR Conservation Measure 10-03 (2002), 'Port Inspections of Vessels Carrying Toothfish'; in accordance with that conservation measure, advance notice is required, as well as a declaration of not being engaged or supporting IUU fishing, and access to the port can be denied. On trends in port state measures, see relevant section above.

56 See CCAMLR Conservation Measure 10-04 (2002), 'Automated Satellite-Linked Vessel Monitoring System (VMS)'.

70). Like ICCAT before it, the CCAMLR Secretariat has also presented and discussed its documentation scheme with the WTO Committee on Environment and Development, with a view to minimising tensions.[57] The conservation measure that established the documentation scheme placed it explicitly in the range of policies that may be justified under the WTO environmental exceptions. Moreover, the non-effectiveness of less trade-restrictive measures was emphasised, as was the placement of the scheme in an inclusive and transparent multilateral process that would render usage for protectionist purposes difficult. Failure to exhaust measures that would impinge less on international trade, notably under multilateral environmental regimes, has been severely criticised in WTO dispute settlement reports. Moreover, to avoid charges of discrimination, the CCAMLR scheme is implemented on domestic as well as foreign vessels; it is open for participation by non-parties to CCAMLR; and it extends also beyond the CCAMLR area.

***Use of a broader instrument: species-oriented trade restrictions***

The objective of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is to remove or reduce the pressure exerted by profitable international trade on the survival of threatened species. This goal is pursued through a set of appendices containing lists of species that are subject to varying degrees of restrictions on export, import, and introduction from the sea, involving national permits, quotas, or a combination of the two.[58] The prominence of CITES in discussion of IUU measures is due to the attempt by Australia, encouraged by domestic advocacy organisations, to muster support for Annex II listing of species of toothfish and the opposition that was mounted against this initiative. Such listing would imply that export or re-export of toothfish would require a national permit that, according to CITES provisions, can be granted on two conditions only. First, a nominated scientific authority must confirm that trade will not be detrimental to the survival of the species; and second, a nominated management authority must confirm that the toothfish has been acquired lawfully (Art. IV). Correspondingly, imports of toothfish by a CITES party would require presentation of an export or re-export permit. For catch 'introduced from the sea', *i.e.* 'taken in the marine environment not under the jurisdiction of any State', the requirements are somewhat softer, as no lawfulness assessment is necessary.[59] Landings of catch taken in national waters for domestic consumption do not fall within the scope of the convention.

The term 'species' in the CITES Convention is defined as 'any species, subspecies, *or geographically separate population thereof*',[60] thus permitting the listing of individual stocks. The main rationale for proposing listing of stocks subject to IUU fishing would be threefold. First, as CITES has a membership of 162, applying its provisions would constrain more flag states, port states, export states, and import states than does any relevant regional fisheries regime. Although CCAMLR has successfully expanded participation in its measures to combat IUU operations, for instance by the accession of new parties and the participation in its catch documentation scheme of non-parties important in the toothfish trade, the availability of flags and ports that do not require any catch documents remains a limitation of the system.[61] Second, the geographic scope of CITES includes high-seas harvesting areas that fall outside the ambit of regional regimes; and third, CITES has a more

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57 WT/CTE/W/148, 30 June 2000, The Commission for the Conservation of Antarctic Marine Living Resources, Communication from the CCAMLR Secretariat.

58 The Convention, appendices, and resolutions are available at (www.cites.org).

59 CITES Convention, Arts. I (definition) and IV (substantive requirements).

60 CITES Convention, Art. I (a), italics added.

61 But, according to Miller and Sabourenkov (2004), the overall coverage of the CCAMLR catch documentation scheme is more than 90% of the world trade in toothfish.

forceful compliance system than those of most fisheries regimes. The Conference of the Parties of CITES has on several occasions recommended effective suspension of trade in one or more listed species with states that had failed to implement its obligations under the Convention.[62]

That said, CITES listing of fish species has been highly controversial, both within CITES and in other international organisations. One set of objections focuses on the *appropriateness* of CITES as an instrument for management of commercially exploited marine species. The suitability of the listing criteria for fisheries management has been questioned, especially the guidelines on how to apply the population decline criterion. Two FAO expert consultations have been held on the matter (FAO 2001), and CITES is presently reviewing its criteria and guidelines in response to, *inter alia*, FAO input.[63] Concern has also been expressed about the CITES process of scientific evaluation, including the role played by non-governmental organisations. The forging of stronger links to the scientific bodies of existing regional fisheries regimes has been advocated.[64] Finally, the decision-making procedures of CITES, especially the infrequency of meetings and the high procedural threshold for de-listing species, have been criticised as inadequate for adaptive fisheries management.

A second set of objections concern certain *indirect effects* of CITES listing. In particular, many fishing nations perceive CITES as an excessively blunt management tool that would be likely to elevate trade barriers not only for products that originate in IUU operations but for those extracted from well-managed stocks as well. There are several reasons for this concern. First, the difficulties associated with differentiating products in trade according to the stocks from which they originate suggest considerable implementation problems for any stock-specific listing (FAO 2000:48). Second, the Convention provides that, if necessary to ensure the effective control of trade of a threatened species, other species that 'a non-expert, with reasonable effort, is unlikely to be able to distinguish' from the listed species shall also be listed.[65] Many fishing states worry about the possible impacts of this expansive 'look-alike' provision if any future CITES listing should involve a stock of a commercially important species such as cod or other major whitefish. Another type of indirect effect of CITES listing was prominent in the heated CCAMLR debate on Australia's proposal for listing of toothfish. Many delegations expressed deep concern that CITES listing of species falling under the competence of CCAMLR would undermine the legitimacy of this regional regime in the world community.[66]

For stocks that are threatened by extensive IUU fishing, proposals for listing under CITES are likely to be forwarded also in the future. In some cases, such listing would enhance the possibility to monitor and regulate trade in products that originate from threatened stocks. On the other hand, political impediments to such listing, based on a perception among many fishing nations that CITES is not an appropriate instrument for fisheries management, will not be easily overcome without substantive or procedural changes in the CITES regime itself.

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62 *Yearbook of International Co-operation on Environment and Development 2003/2004*, p. 209; on the procedure, see CITES Convention, Arts. XI and XIII.

63 CITES Decision 12.7 provides for the drafting of a Memorandum of Understanding between CITES and FAO; see (www.cites.org).

64 See for instance CCAMLR (2002), item 10.

65 CITES Convention, Art II 2 (b); citation is from Annex 2b to Resolution Conf. 9.24 (available at www.cites.org) which clarified the interpretation of Art. II.

66 See CCAMLR (2002), item 10. For a broader discussion of this aspect of resource management in the Antarctic, see Stokke and Vidas (eds. 1996).

**Eco-labelling**

Eco-labelling schemes are a third set of market-oriented measures that could be relevant in combating IUU operations. Unlike the permit-based schemes discussed above, eco-labelling is 'a voluntary multiple-criteria-based third-party programme that… authorises the use of environmental labels on products indicating overall environmental preferability… based on life cycle considerations'.[67] Its history in fisheries is relatively brief. The most prominent example is the US government-backed 'dolphin safe' tuna label issued in conjunction with the decision of the major US tuna processing companies that they would buy fish only from harvesters who adhered to by-catch provisions based on the US Marine Mammals Protection Act (Carr and Scheiber 2002). This particular initiative is widely seen as highly effective – but the conditions were also unusually favourable (Teisl *et al*. 2002).

Multi-criteria, global, third-party certification schemes are even more recent, starting with the initiative taken by WWF and Unilever in 1996 to establish the Marine Stewardship Council (MSC) (Schmidt 1998). To date, only rather small fisheries have been certified under this scheme, but this is now changing, especially with the ongoing Alaska pollack process.[68] If such schemes manage to establish themselves in major seafood markets, they can provide a competitive edge for legal fishers. Under MSC, certification is conducted by means of criteria based on three key principles. First, the harvesting pressure must be consistent with the precautionary approach; second, ecosystem impacts must be considered; and third, effective management structures must be in place. As shown in the South Georgia toothfish longline fishery application, the effective management principle indicates that measures to deal with IUU fishing can be an important criterion for awarding a certificate.[69]

A general limitation of eco-labelling initiatives is their geographic scope: they feed on 'green consumerism', and that is a phenomenon largely restricted to certain parts of the world. Thus, the MSC is firmly established only in some Northern European markets, especially the UK; and its area of expansion is, predictably, Australasia and North America (*cf.* British Columbia salmon and Alaska pollack). MSC officials are much less optimistic about Japan, for instance (May *et al*. 2003:28). Even within environment-conscious markets, the effectiveness of eco-labelling programmes may be jeopardised by the presence of several green labels. This fact can be exploited by industry whenever existing labelling schemes are seen as detrimental to their interests. For instance, the National Fisheries Institute – which, despite its name, is the primary trade association of the US commercial fishing industry – has set up the Responsible Fisheries Society charged with developing an alternative programme to MSC (Carr and Scheiber 2002). From the perspective of combating IUU, such a proliferation of labels need not be problematic, provided that other labels too include among their certification criteria that firms and management authorities take adequate measures against IUU operations and have structures adequate for implementing such criteria.

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67 WT/CTE/GEN/1, 19 November 2002, Progress in Environmental Management Systems (EMS) Standardization. Statement by the International Organization for Standardization (ISO); the definition is contained in ISO 14024:1999, 'Environmental labels and declarations – Type I environmental labelling – Principles and procedures.' The life-cycle approach implies an assessment of environmental impacts not only from the use and disposal of a product but also from its production – sometimes referred to as 'cradle-to-grave' analysis.

68 Information about past and ongoing certification processes is available at (www.msc.org/).

69 Annual catches in the 2000-2002 period were around 5,000 tons. While IUU fishing is an issue also in the South Georgia area, it is much less pervasive than on the Kerguelen Plateau of the Indian Ocean. Agnew *et al.* (2002:4) estimate the IUU share of the 2000/2001 South Georgia IUU catch at only 5% and on its way down.

Another specific challenge to management-oriented labelling lies in the diversity, complexity and length of the chains of custody associated with most seafood products (May *et al.* 2003:15). This is amplified in the IUU context by the unlawful activities frequently associated with it, such as 'laundering' of illegally obtained fish, and bribing customs officials. Accordingly, under MSC a chain-of-custody certification distinct from the fishery certification is designed to ensure that products carrying the MSC logo actually originate in a certified fishery. Particular attention is directed at the processing stage, and production plants must document satisfactory control systems for keeping MSC produce apart from other inputs (Scott 2003: 89-91). Main components are MSC-endorsed chain-of-custody certificates issued by suppliers, physical or temporal separation of certified and non-certified products, product labelling, output identification, and adequate record keeping.

A third challenge is the potentially trade-distortive effect of eco-labelling schemes (Vitalis 2001). The Doha Declaration also mentioned environmental labelling as one of the areas where WTO rules might be in need of clarification.[70] However, while most eco-labelling schemes are non-state and voluntary, WTO rules have focused on mandatory governmental labelling schemes. The Technical Barriers to Trade (TBT) Agreement explicitly acknowledges that unrestricted trade may sometimes collide with other legitimate objectives such as national security or protection of human health and the environment.[71] If this happens, measures like labelling regulations or standards may be introduced. To ensure that such rules are non-discriminatory and not unnecessarily restrictive, however, the Agreement obliges governments to ensure a high level of harmonisation and transparency of such regulations and standards. Accordingly, even governmental labelling schemes are explicitly permitted, provided they include reasonable operational safeguards against protectionist abuse. Harmonisation and transparency provisions under the WTO are softer for regulations and standards upheld by local government or non-governmental bodies, such as MSC. Notification rules are not as strict and the role of member states is indirect. Governments are required only to 'take such reasonable measures as may be available' to ensure that harmonisation and transparency rules are accepted and complied with by those other bodies, and to refrain from measures that 'require or encourage' violation of those rules.[72]

Eco-labelling programmes are in line with a few other measures to improve environmental sustainability in the fisheries sector, including shaming of IUU activities, the active involvement of private organisations and even individual consumers. As such, this measure may enhance societal awareness about the problem of IUU and support more extensive public efforts to combat it. Eco-labelling in fisheries is still a fairly new phenomenon and one that has yet to take off. The recent MSC certification processes involving larger fisheries may change that situation: it is encouraging to note that IUU activities receive considerable attention when certification criteria are operationalised.

**Conclusions**

Focusing on three segments of an IUU operation – vessel at sea, transnational logistics, and catch in trade – this paper has examined the varieties and limitations of measures designed to combat this problem. An underlying theme is that if they are to succeed, efforts aimed at dealing with such a complex, transnational, and evasive phenomenon must apply the broadest range of tools. When seen alone, each of the measures in question has severe limitations and cannot be expected to deliver the

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70 WT/MIN(01)/DEC/1**,** 20 November 2001, Ministerial Declaration. Adopted 14 November 2001; see Art. 32.

71 Agreement on Technical Barriers to Trade (TBT), Arts. 2.2, 2.10, 5.4 and 5.7, available at (www.wto.org). Labelling is also addressed in the Agreement on Sanitary and Phytosanitary (SPS) measures but only in the context of food safety.

72 TBT Agreement, Arts. 3, 7, and 8.

goods. When the various measures are seen in conjunction and given time to mature, the accumulated costs they impose on IUU operations and their complicits can become substantial and thus make such activities less lucrative and limit their scope.

The following conclusions seem warranted. First, the range of global and regional instruments developed within the sphere of the *Law of the Sea* to address IUU fishing is quite impressive, especially given the short time that has passed since this issue gained prominence on the political agenda. Nevertheless, it is clear that measures that primarily target the vessel at the stage of registration and at sea attack the chain of an IUU operation at its most robust links. Activities conducted here enjoy a high degree of insulation from those who may seek to constrain them. This is due to general legal principles, especially the primacy of flag state jurisdiction and the rule that treaties do not create obligations for third states without their consent – as well as the physical remoteness of much IUU harvesting.

It is necessary to target IUU operations at links where there are fewer possibilities of avoiding regulation and where enforcement can be made in more cost-efficient ways. After all, the basic purpose of an IUU operation is not fishing *per se*, or for avoidance of legal measures: it is a profit-making venture that seeks to maximise net income. Further development of port state measures would seem to be a promising avenue, especially with regard to regional harmonisation and pre-entry documentation procedures that reverse the burden of proof by obliging vessels to show that a catch has been taken legally.

Second, measures targeting the *logistical* activities of IUU operations have the potential to involve a large number of states and non-governmental actors. There is, however, a need to improve the generation and management of relevant information. The denial strategy, frequently in the form of 'blacklists' of vessels with a history of IUU fishing and subsequently denied licensing or even port or supply access, relies upon information that must be both extensive and reliable – two requirements that are sometimes difficult to combine. Due process concerns and the need to comply with international trade rules dictate transparency and harmonisation of the procedures that guide various denial measures, and regional fisheries management regimes can be important vehicles in achieving this.

Mobilising non-governmental organisations, including other harvesters and environmental advocacy groups, to generate and disseminate information about IUU activities has been important also for exposing corporate irresponsibility on the part of individual firms and vessel-owners. When the amount and quality of information permits, this shaming strategy can be extended to those who provide necessary inputs to IUU operations. Both flexible company structures and rapidly shifting ownership situations place limits on the effectiveness of such measures. However, the number of IUU vessels engaged over extended periods of time in a given fishery is usually not very high. There is much to suggest, therefore, that time will work in favour of strategies involving denial and shaming.

Third, long-term efforts aimed at reducing or checking the growth of fishing capacity face strong counterforces, including the resilience of governmental subsidies in some countries and liberalisation of capital flows. That said, some progress has been made in recent years, and the issue remains high on the political agenda.

Fourth, measures targeting the final segment of IUU operations, the *commodities* brought to market, are promising also because they are less dependent upon costly monitoring and physical surveillance activities. Still, catch documentation schemes work best in practice when other components of the monitoring and enforcement system, especially port state co-ordination and VMS coverage, are well advanced. The design of recent schemes involves minimal tension with international trade rules. The use of CITES in the combat of IUU operations could expand the

coverage of permit-based documentation schemes based in fisheries regimes, but it remains politically contested by many fishing states. Eco-labelling schemes in the fisheries sector are still at a rather early stage and it is too early to pass judgement on the role they may come to play in combating IUU fishing. It is promising, however, that procedures for certification under the Marine Stewardship Council include assessment of the level of IUU fishing and the adequacy of measures taken to combat it.

Finally, in all the segments we reviewed in this paper, the impact of *information* about IUU operations is a crucial factor. Regarding the vessel at sea, where the size of the marine area is huge but the number of flag states involved is actually relatively small, international pressure, when based on accurate information, can support the exercise of flag state responsibilities. Regarding the logistics of an IUU operation, its resilience is enhanced by the 'grey zones' of transnationality and becomes considerably diminished when exposed by means of accurate information. And regarding the flows of IUU catch in international trade, if current catch documentation schemes are backed up by timely and accurate information, fraud can be significantly reduced. Technology limitations do play a role here, but these are not the main concern. The strength of information as a tool for combating IUU operations is enhanced if it can be made transparent. Among the impediments should be mentioned the fact that commercial data are involved, and some stakeholders will be less willing to provide information knowing that it can become public. Moreover, other stakeholders may provide information that, at times, is not sufficiently substantiated. Improving the quality and management of information about IUU operations is a key task, and one that involves governments, international institutions, as well as non-governmental organisations.

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## CHAPTER 2

# GLOBAL REVIEW OF ILLEGAL, UNREPORTED AND UNREGULATED FISHING ISSUES: WHAT'S THE PROBLEM?

*David A. Balton, Deputy Assistant Secretary for Oceans and Fisheries,*
*U.S. Department of State*

IUU fishing, and the related issue of fishing by vessels flying flags of convenience, is not a single phenomenon. As noted by the Food and Agriculture Organization of the United Nations, IUU fishing "occurs in virtually all capture fisheries, whether they are conducted within areas under national jurisdiction or on the high seas." Examples include re-flagging of fishing vessels to evade controls, fishing in areas of national jurisdiction without authorisation by the coastal state and failure to report (or misreporting) catches. But the list of activities encompassed by the term "IUU fishing" is really much broader.

Just as IUU fishing is a multifaceted phenomenon, the problems caused by IUU fishing are many and diverse. Among the obvious adverse consequences are:

1) Diminished effectiveness of fisheries management.

2) Lost economic opportunities for legitimate fishers.

3) Reduction in food security.

Those who conduct IUU fishing are also unlikely to observe rules designed to protect the marine environment from the harmful effects of some fishing activity, including, for example, restrictions on the harvest of juvenile fish, gear restrictions established to minimise waste and by-catch of non-target species, and prohibitions on fishing in known spawning areas. To avoid detection, IUU fishers often violate certain basic safety requirements, such as keeping navigation lights lit at night, which puts other users of the oceans at risk. Operators of IUU vessels also tend to deny to crew members fundamental rights concerning the terms and conditions of their labour, including those concerning wages, safety standards and other living and working conditions.

In addition to its detrimental economic, social, environmental and safety consequences, the very unfairness of IUU fishing raises serious concerns. By definition, IUU fishing is either an expressly illegal activity or, at a minimum, an activity undertaken with little regard for applicable standards. IUU fishers gain an unjust advantage over legitimate fishers. In this sense, IUU fishers are "free

riders" who benefit unfairly from the sacrifices made by others for the sake of proper fisheries conservation and management. This situation undermines the morale of legitimate fishers and, perhaps more importantly, encourages them to disregard the rules as well. Thus, IUU fishing tends to promote additional IUU fishing, creating a downward cycle.

Given the diversity of the phenomenon we call IUU fishing and the multiple problems it causes, we must take a multi-tiered approach to combating it. The FAO International Plan of Action on IUU Fishing sets forth such an approach. The IPOA is conceived of as a "toolbox" – a set of tools for use in dealing with IUU fishing in its various manifestations. Obviously, not all tools in the toolbox are appropriate for use in all situations. Still, it is now incumbent on all FAO Members to fulfil their commitments under the IPOA, both in their general capacity as states as well as in their more particular capacities as flag states, port states, coastal states, market states and as members of regional fishery management organisations.

Other international institutions, including the OECD, also clearly have a role to play in the fight against IUU fishing. Through workshops such as this and follow-up activities, the OECD can shed further light on the economic drivers of IUU fishing, help refine the tools currently being used in response to IUU fishing and contribute to the development of new tools as well.

## CHAPTER 3

# IUU FISHING AND STATE CONTROL OVER NATIONALS[1]

*David A. Balton, Deputy Assistant Secretary for Oceans and Fisheries,*
*U.S. Department of State*

> "What giants?" said Sancho Panza.
>
> "Those thou seest there," answered his master, "with the long arms, and some have them nearly two leagues long."
>
> "Look, your worship," said Sancho, "what we see there are not giants but windmills, and what seem to be their arms are the sails that turned by the wind make the millstone go."
>
> "It is easy to see," replied Don Quixote, "that thou art not used to this business of adventures; those are giants; and if thou art afraid, away with thee out of this and betake thyself to prayer while I engage them in fierce and unequal combat."[2]

## Introduction

The negotiation of the FAO International Plan of Action on Illegal, Unreported and Unregulated Fishing in many ways brought to mind the adventures of Don Quixote. Like Cervantes' hero, some of us involved in that negotiation saw ourselves as engaged "in fierce and unequal combat" against the bad actors of world fisheries, as we tried to restore a system of ethical rules to guide human activity in this field. Perhaps other saw us as tilting at windmills.

The IPOA takes an approach to the problem of IUU fishing that would have made Don Quixote proud, one that is universal in scope and resolute in temperament. All FAO Members have undertaken meaningful commitments under the IPOA, both in their general capacity as states as well as in their more particular capacities as flag states, port states, coastal states, market states and as members of regional fishery management organisations.

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1 This paper was submitted to the IUU Workshop as a background paper.

2 Miguel de Cervantes, *Don Quixote* (1605), John Ormsby, trans.

One aspect of the IPOA that has not received much attention – state control over nationals – merits closer study. One reason why IUU fishing has been such a persistent problem is that many states have not been successful in controlling the fishing activities by their nationals that take place in the waters of other states or aboard vessels registered in other states. Admittedly, it may be difficult for many states to control, or even to be aware of, such activities. States may also have difficulty in preventing their nationals from re-flagging fishing vessels in other states with the intent to engage in IUU fishing.

The IPOA nevertheless calls on all states to take measures or co-operate to ensure that their nationals do not support or engage in IUU fishing. This paper will consider a number of measures that states have taken in this regard and will also take another look at the "re-flagging problem" that, unfortunately, remains with us to this day. It will also suggest some additional steps for addressing IUU fishing.

**Existing measures**

Under international law, a state is free to enact laws prohibiting its nationals from engaging in IUU fishing, even if the activity in question would take place aboard a foreign vessel or in waters under the jurisdiction of another state.[3] Some states have already done so.

For example, Japan requires its nationals to obtain the permission of the Japanese government before working aboard non-Japanese fishing vessels operating in the Atlantic bluefin tuna and southern bluefin tuna fishing areas. The goal of this measure is to prevent Japanese nationals from becoming involved in IUU fishing aboard foreign vessels. Japan also intends to deny permission to any Japanese national to work aboard a foreign fishing vessel in any other fishery, if the vessel's flag state is not a member of the regional fishery management organisation (RFMO) regulating that fishery.[4] New Zealand and Australia have also enacted legislation restricting the activities of their respective nationals aboard foreign vessels registered in states meeting certain criteria.

In the United States of America, the Lacey Act makes it unlawful for any person subject to U.S. jurisdiction to "import, export, transport, sell, receive, acquire, possess or purchase any fish ... taken, possessed or sold in violation of any ... foreign ... law, treaty or regulation." Hence, a U.S. national may be prosecuted for engaging in certain forms of IUU fishing aboard foreign vessels or in waters under the jurisdiction of another state.[5]

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3 The principle that a state may apply its law to its nationals wherever the may be found is generally accepted. See, *e.g.*, *Bartolus on the Conflict of Laws* 51 (Beale, trans. 1914); *Restatement (Third) of the Foreign Relations Law of the United States*, §402(2) (1987). For further discussion, see "Tools to Address IUU Fishing: The Current Legal Situation," by William Edeson, one of a series of papers prepared as background documents for the Expert Consultation on Illegal, Unreported and Unregulated Fishing organised by the Government of Australia in co-operation with FAO, Sydney, Australia, 15-19 May 2000.

4 See "The Importance of Taking Co-operative Action Against Specific Fishing Vessels that are Diminishing Effectiveness of Tuna Conservation and Management Measures," by Masayuki Komatsu, one of a series of papers prepared as background documents for the Expert Consultation on Illegal, Unreported and Unregulated Fishing Organised by the Government of Australia in co-operation with FAO, Sydney, Australia, 15-19 May 2000.

5 See United States Code, Title 16, Chapter 53. For further discussion of how the Lacey Act might be adapted for other situations involving IUU fishing, see "National Legislative Options to Combat IUU Fishing," by Blaise Kuemlangan, one of a series of papers prepared as background documents for the

**A return to the "re-flagging problem"**

The European Union now also appears to be moving to control IUU fishing by nationals of its member states in a way that is bringing renewed attention to the "re-flagging problem." In May 2002, the European Commission issued a "Community Action Plan for the Eradication of Illegal, Unreported and Unregulated Fishing." In considering measures to control nationals of EU member states, this paper presents the following objective:

> *to discourage Community member state nationals from flagging their fishing vessels under the jurisdiction of a state which is failing to fulfil its flag-state responsibilities and from committing infringements.*

The articulation of this goal represents a positive development in the attitude of the European Commission toward the problem of vessel re-flagging. We must recall that the international community recognised the gravity of this problem more than ten years ago. Agenda 21, adopted by the United Nations Conference on Environment and Development in Rio de Janeiro, called upon states to:

> *take effective action, consistent with international law, to deter re-flagging of vessels by their nationals as a means of avoiding compliance with applicable conservation and management rules for fishing activities on the high seas.*[6]

Following the Earth Summit in Rio, the FAO served as the forum for the development of a new treaty to address the re-flagging problem, which ultimately became the 1993 FAO Compliance Agreement. An original draft of this treaty would have required Parties to prohibit their nationals who owned fishing vessels from re-flagging those vessels to other nations for the purpose of avoiding compliance with conservation and management measures adopted by RFMO. The original draft would also have required Parties to take practical steps to enforce this prohibition.

The European Union opposed this fundamental approach at that time. The EC delegation argued that fishing vessel owners frequently re-flag their vessels for perfectly legitimate reasons, and that re-flagging also often occurs legitimately when fishing vessels are sold to owners in other countries. At the time a fishing vessel is about to be re-flagged, a government cannot know whether the vessel owner is re-flagging the vessel with the intent to avoid compliance with conservation and management measures. Certainly, a fishing vessel owner on the verge of re-flagging a vessel is unlikely to announce such intent. Many governments are not even aware of when vessels subject to their jurisdiction are in the process of being re-flagged, making the regulation of re-flagging quite difficult for them.

These concerns forced the negotiation of the FAO Compliance Agreement on to a different track. The Agreement, as adopted by FAO, imposes no obligations on Parties to take any action to deter their nationals from re-flagging fishing vessels to notorious flag-of-convenience states. Instead, the Agreement focuses solely on the responsibility of flag states to control the fishing activities of their vessels.

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Expert Consultation on Illegal, Unreported and Unregulated Fishing organised by the Government of Australia in co-operation with FAO, Sydney, Australia, 15-19 May 2000.

6 Report of the United Nations Conference on Environment and Development, UN Doc A/CONF. 151/26, 1992, Agenda 21, ch. 17, para. 17.52.

The elaboration of specific flag-state responsibilities in the FAO Compliance Agreement (and in a number of other international instruments, particularly the 1995 UN Fish Stocks Agreement) has contributed significantly in the fight against IUU fishing. The international community now has a well-recognised set of standards by which to measure the actions of flag states in exercising control over their fishing vessels.

Unfortunately, the elaboration of these standards is not enough. The FAO Compliance Agreement is not yet in force. The UN Fish Stocks Agreement, though it entered into force in 2001, has only 32 parties,[7] none of which could be considered notorious flag-of-convenience states. Meanwhile, there are still quite a few such states who offer their flag to fishing vessels without any real ability, or even intention, to control the fishing activities of those vessels.

As evidenced by the IPOA on IUU Fishing, the international community has come to realise that reliance on flag-state responsibility alone will not solve the problem of IUU fishing being committed by re-flagged vessels. The "flagging out" states (that is, the states whose nationals are seeking to re-flag their vessels) should take steps to control such re-flagging. We cannot depend exclusively on the actions of the "flagging in" states (that is, the new flag state).

Of course, the concerns relating to the ability of the "flagging out" states to regulate re-flagging remain, but there are ways to address them. Governments face similar circumstances in trying to regulate or prohibit any activity of their nationals, where one necessary element is the intent of the person undertaking the activity. In such situations, governments can adopt laws or regulations prohibiting persons from undertaking the activity in question, then penalise those who subsequently undertake the activity if evidence exists that such persons had the requisite intent. Accordingly, if a government has evidence that a re-flagged fishing vessel owned or operated by one of its nationals is committing IUU fishing, the government would have at least a *prima facie* case that the vessel owner or operator re-flagged the vessel for that purpose.

On the strength of such evidence, the government could prosecute the owner and operator, assuming the government could obtain jurisdiction over such individuals. The government might also be able to take certain actions against the vessel directly (*e.g.*, by prohibiting the vessel from ever being re-registered in the original flag state or by prohibiting it from landing or transhipping fish in its ports). In particularly egregious cases, it might even be possible for a government to take action against other vessels owned by the same owners that have not yet been re-flagged (*e.g.*, by revoking fishing permits applicable to them).

RFMOs can also play a role in this effort, particularly by identifying flag states whose vessels are undermining the effectiveness of their conservation and management measures.[8] States can then take measures to deter their nationals from re-flagging fishing vessels, or from initially registering new vessels, in the identified states. Such measures could include controls on deletion of vessels from national registers, controls on the export of fishing vessels,[9] publicity campaigns to make vessel

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7 The European Union and its member states, despite many statements of intention to become party to the UN Fish Stocks Agreement, have still not done so.

8 The International Commission for the Conservation of Atlantic Tunas, for example, has been identifying flag states in this way for several years. *Cf.*, article IV(3) of the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean ("Each Party shall take appropriate measures aimed at preventing vessels registered under its laws and regulations from transferring their registration for the purpose of avoiding compliance with the provisions of this Convention").

9 Japan, for example, has since 1999 denied all requests to export large-scale tuna longline vessels. In addition, Japan has worked through industry channels to develop understandings that certain former

owners aware of those states that have been so identified, and a prohibition on allowing vessels that are or have been registered in such states ever to be re-registered in the initial flag state.

Accordingly, it is to be hoped that the European Community and all other members of the international community vigorously pursue efforts to control the re-flagging of fishing vessels by nationals for the purpose of engaging in IUU fishing.

**New initiatives**

However, states must do more to control the activities of their nationals than merely regulate the re-flagging of fishing vessels. Owners and operators of fishing vessels sometimes register their vessels in responsible foreign states, but use those vessels to commit IUU fishing anyway. The flag state, of course, has responsibility to take action against such IUU fishing, as do any other coastal states, port states or market states if the IUU fishing involves them.

But the state of nationality of the owner or operator of the vessel can also act. For example, the state of nationality can make it a violation of its law for its nationals to engage in fishing activities that violate the fishery conservation and management laws of any other state or that undermine the effectiveness of conservation and management measures adopted by a RFMO. Such a law could be drafted as follows:

> A person subject to the jurisdiction of [state] who:
>
> a) on his or her own account, or as partner, agent or employee of another person, lands, imports, exports, transports, sells, receives, acquires or purchases; or
>
> b) causes or permits a person acting on his behalf, or uses a fishing vessel, to land, import, export, transport, sell, receive, acquire or purchase, any fish taken, possessed, transported or sold contrary to the law of another state or in a manner that undermines the effectiveness of conservation and management measures adopted by a Regional Fisheries Management Organisation shall be guilty of an offence and shall be liable to pay a fine not exceeding [insert monetary value].

Sanctions against nationals who have engaged in such IUU fishing could include, for example, monetary fines, confiscation of fishing vessels and fishing gear and denial of future fishing licenses.[10]

As detailed in paragraphs 73 and 74 of the IPOA, each state should ensure that its nationals (as well as other individuals under their jurisdiction) are aware of the detrimental effects of IUU fishing and should find ways to discourage such individuals from doing business with those engaged in IUU operations.

To complement the actions of states in controlling their nationals, we must also see greater efforts to press flag states to fulfil their responsibilities. As one step in this process, the United States has provided funding to FAO to host an event designed to remind governments that maintain open vessel registers of the measures that need to be taken to help control IUU fishing and to urge them to take those measures.

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Japanese vessels owned in Chinese Taipei should be scrapped, and that others constructed in Chinese Taipei should either be registered and regulated there or scrapped.

[10] Spanish legislation, for example, provides for the suspension of a captain's licence for up to five years for committing certain offences aboard flag-of-convenience vessels.

FAO also hosted a meeting of experts earlier this month to consider further action that port states might take to combat IUU fishing. A number of ideas surfaced at this meeting that are worth pursuing, particularly the possibility of developing regional port state memoranda of understanding (MOUs) in the field of fisheries, drawing on the experience we have gained through the regional port state MOUs that are in force in the fields of vessel safety and pollution.

RFMOs must also continue to adopt strong measures to control IUU fishing. The United States was pleased that ICCAT, at its most recent meeting in Bilbao, adopted decisions to enhance its use of a vessel "blacklist" and also to develop a complementary vessel "white list." Since the ICCAT blacklist will now be used to take action against individual vessels (and not only flag states), we believe that ICCAT acted properly in making the process for listing and de-listing vessels more rigorous, so as to provide greater due process and certainty. CCAMLR also took steps at its most recent meeting to control IUU fishing further, including through the creation of a pilot programme for electronic control of its toothfish Catch Documentation Scheme, a commitment not to allow vessels with bad records to re-register in the territories of CCAMLR members and movement toward a centralised Vessel Monitoring System.

Finally, we also must recognise than any effective action to combat IUU fishing cannot take place in isolation from other related initiatives underway in the field of international fisheries. In particular, efforts to reduce fishing capacity in oversubscribed fisheries and efforts to eliminate subsidies that contribute to overcapacity and overfishing must be key parts of our overall strategy. Governments must use available public funds to reduce overcapacity, not to exacerbate it. Governments have no justification, for example, in providing assistance toward the construction of new fishing vessels that are likely to seek to enter fisheries that are already fully subscribed.

**Conclusion**

Don Quixote de la Mancha represented the bold idealism of the human spirit untarnished by realism. To succeed in the struggle against IUU fishing, we must tap the well of this bold idealism, but channel our efforts in realistic ways. In a very real sense, the world has shrunk in the years since Cervantes wrote his masterpiece. People can move from place to place with an ease that Cervantes probably never even imagined. People who own or operate fishing vessels can also move their vessels from ocean to ocean – and from registry to registry – with remarkable ease today. In such a world, governments must use all the tools at their disposal to ensure that all people subject to their jurisdiction use fishing vessels responsibly.

## CHAPTER 4

# DEALING WITH THE "BAD ACTORS" OF OCEAN FISHERIES[1]

*David A. Balton, Deputy Assistant Secretary for Oceans and Fisheries,*
*U.S. Department of State*

### Introduction

The great British poet, William Wordsworth, once wrote in praise of "a few strong instincts, and a few plain rules." The international community has begun to develop a few strong instincts in the face of declining ocean fisheries. Politicians, fisheries managers, environmental organisations – and responsible industry leaders – now instinctively call for a stronger conservation ethic to govern marine fishing activities. Their instincts also tell them to act upon sound scientific advice, rather than merely to pay lip service to science. They also know, instinctively, that to achieve sustainable fisheries, we must support the "good actors" of ocean fisheries: those flag states and vessel owners who play by agreed rules.

To support the good actors of ocean fisheries, the international community has also begun to develop a few plain rules to deal effectively with the "bad actors." Today, I hope to describe briefly who those bad actors are, how their actions jeopardize sustainable fisheries, and how the international community has, in fits and starts, been creating a few plain rules for dealing with them.

### The bad actors

Just who are these bad actors? They take several forms and their actions are also diverse, making a simple definition elusive. But as a U.S. Supreme Court Justice once said about pornography: although it's difficult to define, I know it when I see it. Similarly, those of us engaged in the effort to achieve sustainable fisheries through international co-operation know the bad actors when we see them, even if their activities are not easy to describe concisely.

Just a few weeks ago, the United Nations Commission on Sustainable Development adopted some language to describe some of the bad actors of ocean fishing:

[1] This paper was submitted to the IUU Workshop as a background paper.

> *... States which do not fulfil their responsibilities under international law as flag states with respect to their fishing vessels, and in particular those which do not exercise effectively their jurisdiction and control over their vessels which may operate in a manner that contravenes or undermines relevant rules of international law and international conservation and management measures.*

As we say in the United States, this is quite a mouthful. To help further the discussion, I will try to give some concrete examples of the bad actors in action.

The classic bad actor is a fishing vessel owner who re-flags his vessel for the purpose of avoiding internationally agreed fishery regulations. When fishing vessels are re-flagged for this purpose, we say that they have obtained "flags of convenience," because the states who allow such vessels to fly their flags offer a convenient way for the vessels to avoid being bound by the agreed rules. These "flag of convenience states" are often unwilling or unable to control the fishing activities of the re-flagged vessels; indeed, such lack of control is precisely what makes these states so attractive and convenient to irresponsible vessel owners. The vessels typically have no real connection to such a flag state. The master, crew and real financial control all derive from elsewhere.[2]

In such situations, the governments of flag of convenience states are bad actors, too. Without them, this type of re-flagging could not occur.

Not all vessels operating under flags of convenience are re-flagged vessels. Some vessels are registered in flag of convenience states from the time they are built. When such vessels, and their re-flagged cousins, fish for stocks that are under the regulation of a regional fishery management organisation, they produce the phenomenon of "non-member" fishing.

Why are owners of these non-member vessels such bad actors? As you may know, a family of regional fisheries organisations and arrangements now exists around the world. Some, such as the Northwest Atlantic Fisheries Organisation and the International Commission for the Conservation of Atlantic Tunas, are formal bodies; others are less formal arrangements. But formal or informal, these organisations are the best means – really the only means – available to the international community to regulate fishing for shared marine stocks.

Unfortunately, given the present depleted status of such stocks, fishing opportunities are – or should be – limited. It thus follows that the regional fisheries organisations have had to become more and more parsimonious in the quotas they adopt and more and more restrictive in the other fishery rules they set.

These smaller quotas and tighter restrictions, in turn, require significant sacrifice on the part of the member states of regional fishery organisations. Every year the member states work hard at the meetings of these organisations to adopt agreed fishing rules. The negotiations are often arduous, and only succeed – if they succeed – through the application of considerable political will. At the end of these meetings, the member states then have the unenviable task of enforcing upon their unhappy fishing industries the smaller allocations and more onerous regulations just adopted.

Responsible vessel owners accept the smaller allocations and tighter regulations in the hope that today's conservation efforts will yield greater fishing opportunities tomorrow. Other owners, however,

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[2] Of course, not all vessel owners re-flag their vessels in order to avoid fishing restrictions. Many times fishing vessels are re-flagged for completely legitimate reasons, including to gain legal access to regulated fisheries.

re-flag their vessels (or initially flag their new vessels) in states that are not members of the organisation in question precisely to avoid these restrictions. These vessels then proceed to fish for the very same stocks in the very same region, unbound by the agreed rules. These non-member vessels are essentially free riders – enjoying the benefits of conservation efforts and scientific research undertaken by member states without bearing any of the costs. Not only is this grossly unfair – it also greatly compromises the integrity of the agreed rules and undermines the willingness of the remaining "good actors" to comply with them.

And when the good actors – those fishing vessel owners who do not change flags – start to violate the agreed rules, they become bad actors too.

I would include as a final category of bad actors those vessels that fish illegally within waters under the fishery jurisdiction of coastal states. The advent of Exclusive Economic Zones (EEZs) several decades ago placed vast areas of the planet's surface under the fisheries jurisdiction of the world's coastal states. For many of these states, however, their regulatory control over their EEZs remains nominal – they have little ability to police fishing activities occurring more than a short distance from shore. In the face of dwindling stocks, the temptation to fish illegally in these areas often becomes too great to resist. The phenomenon of such illegal fishing is certainly growing; the only question is: by how much?

From these examples, perhaps we can distil a working definition of the bad actors of ocean fisheries: fishing vessel owners who do not observe agreed fishing rules (or EEZ fishing rules) and the flag states that fail to take action against them.

**International law framework**

Although the bad actors have undoubtedly been around for some time, their activities have only begun to draw serious political attention in the last decade or so, when a number of the world's key fish stocks began to collapse from overfishing. Until this decade, however, few international law tools existed to deal with the bad actors. The 1982 United Nations Convention on the Law of the Sea calls upon states to prevent overfishing within their EEZs, to ensure that their vessels only fished in other state's EEZs with permission, and to co-operate with other states in the conservation of high seas fisheries. The general obligations constitute a vital regulatory framework, but have not proved specific or comprehensive enough to achieve sustainable fisheries overall.

The 1982 Law of the Sea Convention also reaffirmed the well-established principle of *exclusive flag state jurisdiction* over vessels on the high seas. Under the Convention, generally speaking, only the flag state may exercise fisheries jurisdiction over vessels operating on the high seas. In recent years, this principle has become something of a safe haven for the bad actors. The flag states that are unable or unwilling to regulate their fishing vessels on the high seas often hide behind the principle of exclusive flag state jurisdiction to deny any *other* state the ability to take action against such vessels when they undermine agreed fishery rules. What results is an unfair dual system – smaller quotas and stricter fishing regulations for the good actors and a regulatory vacuum for the bad actors.

Virtually all members of the international community continue to endorse the principle of exclusive flag state jurisdiction as reaffirmed in the Law of the Sea Convention. However, as I hope to demonstrate, the international community has now articulated a related principle: the exclusive jurisdiction over high seas fishing vessels enjoyed by flag states necessarily implies a corresponding duty. Flag states must ensure that their fishing vessels on the high seas do not undermine agreed fishery rules. Failure of flag states to fulfil this duty will have consequences, including, in some cases, some loss of exclusive authority over those vessels.

**1993 FAO Compliance Agreement**

The first treaty of global application that sought to address this problem of bad actors is the 1993 FAO Compliance Agreement, whose formal name is the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. The Compliance Agreement is an integral part of the Code of Conduct for Responsible Fisheries and is the only part of the Code that is legally binding.

The FAO Compliance Agreement in fact began specifically as an effort to combat the practice of the re-flagging of fishing vessels to avoid agreed fishing rules. As the negotiations on the Compliance Agreement proceeded, the scope of its provisions became broader. Instead of dealing solely with the re-flagging phenomenon, the Compliance Agreement elaborates a set of specific duties for *all* flag states to ensure that their vessels do not undermine conservation rules.

Under the Compliance Agreement, a flag state may only permit its fishing vessel to operate on the high seas pursuant to specific authorisation. A flag state may not grant such authorisation unless it is able to control the fishing operations of the vessel. If a vessel undermines fishery rules established by a regional fishery organisation, the flag state must take action against the vessel including, in many cases, rescinding the vessel's authorisation to fish on the high seas – even if the flag state is not a member of the regional fishery organisation.

In elaborating these duties, the Compliance Agreement does not explicitly alter the principle of exclusive flag state jurisdiction. Indeed, one might say that the Compliance Agreement is *premised* on the principle of exclusive flag state jurisdiction. Implicitly, however, the Compliance Agreement is sending another message to the bad actors: if flag states do not bring their high seas fishing vessels under control, the international community will be forced to find other ways to deal with the problem.

**1995 UN Fish Stocks Agreement**

The 1995 UN Fish Stocks Agreement basically incorporates these provisions of the Compliance Agreement in Article 18, concerning "Duties of the Flag State," and in Article 19, concerning "Compliance and Enforcement by the Flag State." One explanation for this overlap between the two treaties is that the negotiations on both of them took place at roughly the same time (although the Fish Stocks Agreement took considerably longer to conclude) and were conducted by many of the same individuals.

The Fish Stocks Agreement nevertheless takes matters a step farther than the Compliance Agreement in dealing with bad actors.

Rather than review the entirety of the Fish Stocks Agreement, with which the participants in this workshop are already familiar, I would like to highlight a few key provisions that are already proving helpful in dealing with the bad actors of ocean fisheries.

Articles 8(3) and 8(4) of the Fish Stocks Agreement seek to promote the integrity of regional fisheries organisations and the measures they adopt. To this end, they set forth "a few plain rules" that are particularly pertinent to the phenomenon of "non-member fishing." The first rule is that all states whose vessels fish for marine stocks regulated by regional fishery organisations should either join those organisations or, at a minimum, apply the fishing restrictions adopted by those organisations to their flag vessels. The second rule follows from the first: regional fishery organisations should be open to all states with a real interest in the fisheries concerned. The final rule also builds on the others: only

member states of regional fishery organisations (or other states that apply the fishing restrictions adopted by those organisations) shall have access to the regulated fishery resources.

When President Clinton transmitted the Fish Stocks Agreement to the U.S. Senate, he stated that these rules, "if properly implemented, would greatly reduce the problems of 'non-member' fishing that have undermined the effectiveness of regional fishery organisations." I believe this assessment remains true today. If all flag states took these few plain rules to heart, non-member fishing would, almost by definition, largely disappear.

To bolster these few plain rules, the Fish Stocks Agreement also includes Article 17, concerning "Non-Members and Non-Participants." This Article provides quite simply that states which do not join regional fishery organisations, and which do not apply the fishing restrictions adopted by those organisations to their flag vessels, are not discharged from their obligation to co-operate with other states. In particular, they shall not authorise their vessels to fish for the regulated stocks.

Article 17 further requires the member states of the relevant organisation to take affirmative measures to deter non-member fishing, providing such measures are consistent with the Fish Stocks Agreement and international law in general. As I will discuss below, this notion of joint action to deter non-member fishing is already taking root in a number of regional fishery organisations.

But, as professors used to ask in seminars on arms control, what if deterrence fails? For such situations, the Fish Stocks Agreement contains Articles 21 and 22. These articles are a set of carefully negotiated provisions that permit, under certain circumstances, states other than flag states to board and inspect fishing vessels on the high seas and, where they find evidence that the vessels have engaged in serious violations of agreed fishing restrictions, to take limited enforcement action to prevent further violations.

A number of governments that have not yet ratified the Fish Stocks Agreement have expressed concerns that these provisions stray too far from the principle of exclusive flag state jurisdiction. The more I have considered these provisions, however, the more I have come to see how they mostly codify existing international practice.

First, a number of regional fishery organisations and arrangements, including NAFO, the North Pacific Anadromous Fish Commission and the Central Bering Sea Pollock Convention, had set up joint boarding and inspection regimes even before the Fish Stocks Agreement was negotiated. Second, the Fish Stocks Agreement retains the very crux of exclusive flag state jurisdiction: no other state may take action against a fishing vessel on the high seas without the consent of the flag state. However, like the NAFO, NPAFC and Central Bering Sea Conventions that preceded it, the Fish Stocks Agreement gives flag states a mechanism to provide such consent in advance – by becoming party to the Fish Stocks Agreement.

Finally, and perhaps most importantly, the Fish Stocks Agreement expressly recognises the authority of the flag state to require any other state that may be taking enforcement action against one of its vessels to turn over that vessel to the flag state – provided that the flag state is ready, willing and able to take effective enforcement action against the vessel itself.

In short, the Fish Stocks Agreement secures the rights and prerogatives of responsible flag states, while giving other responsible states certain limited authority to deal with bad actors who have not been deterred from their bad actions.

At least two other provisions of the Fish Stocks Agreement that are designed to address illegal fishing in EEZs merit attention. In cases where there is evidence of such fishing, Article 20(6) requires the flag state to co-operate with the coastal state in taking enforcement action. Moreover, Article 25, which provides for co-operation with developing states, calls specifically upon Parties to render assistance to developing coastal states to help them achieve greater enforcement capacity within their EEZs.

Finally, Article 23 of the Fish Stocks Agreement calls upon port states to exercise their prerogatives in ways that can address the problems caused by the bad actors. Along these lines, some RFMOs have already adopted schemes, discussed below, to prevent the landing of fish caught by non-member vessels in ways that undermine agreed fishing rules.

**Examples of regional fishery organisation actions**

Today, neither the FAO Compliance Agreement nor the Fish Stocks Agreement is yet in force. But the principles and approaches contained in those treaties are already having effect, and a number of the regional fishery bodies are beginning to take decisive action against the bad actors involved in their fisheries.

To date, two approaches have been adopted to deal with the problem of non-member fishing. One approach uses trade as a lever. This approach was developed by the International Commission for the Conservation of Atlantic Tunas (ICCAT) in response to growing evidence that fishing activities of vessels from several non-members of ICCAT were adversely affecting ICCAT's efforts to conserve bluefin tuna and swordfish.

In 1994, ICCAT adopted the Bluefin Action Plan Resolution. This Plan provides a process for identifying non-members whose vessels are engaged in fishing activities that diminish the effectiveness of ICCAT measures for bluefin tuna. Such non-members are given a year to rectify their fishing practices. If they do not do so, ICCAT can authorise its members to prohibit the importation of bluefin tuna products from the non-members in question.

The very next year, ICCAT identified Belize, Honduras and Panama as non-members whose vessels were fishing in a manner that diminished the effectiveness of ICCAT's bluefin tuna measures. When the governments of these nations failed to rectify the fishing practices of their vessels, ICCAT instructed its members to prohibit the importation of bluefin tuna products from them. These trade embargoes remain in effect.[3]

ICCAT has also adopted a similar approach for dealing with non-member fishing that diminishes the effectiveness of ICCAT's swordfish measures. ICCAT has recently identified the same three states under this procedure, but has not yet imposed trade restrictions.

ICCAT's use of multilateral trade restrictions represents the first time that such measures have been authorised by an international fishery management organisation to ensure co-operation with agreed conservation and management measures. One would expect that other regional fishery organisations will consider similar steps if non-member fishing is not otherwise brought under control.

[3] One of the nations under ICCAT's bluefin tuna trade embargo recently took the step of joining ICCAT, presumably for the purpose of having the trade embargo lifted. Panamanian vessels will henceforth be bound to observe all ICCAT measures.

The other approach, first developed by the NAFO, involves restrictions on landings of fish caught by non-member vessels. Many fish stocks managed by NAFO are in serious trouble. NAFO members have imposed moratoria on fishing for several stocks, causing considerable hardship on those who formerly depended on these harvests for their livelihoods. NAFO enjoys one advantage over ICCAT, however. Because the NAFO Regulatory Area is a relatively compact high seas area, a NAFO joint inspection regime allows for close monitoring of all fishing activity in the Regulatory Area, by members and non-members alike.

In 1997, NAFO adopted a "Scheme to Promote Compliance with the Conservation and Enforcement Measures Established by NAFO." The Scheme sets up a presumption that any non-member vessel that has been observed fishing in the Regulatory Area is undermining the NAFO fishing restrictions. This presumption reflects the fact that all of the valuable groundfish stocks in the Regulatory Area are under moratorium or fully allocated. Even fishing activity for less valuable fish stocks cannot be undertaken without serious, adverse by-catch of depleted fish stocks. If a non-member vessel sighted fishing in the Regulatory Area later enters a port of a NAFO member, the NAFO member may not permit the vessel to land or tranship any fish until the vessel has been inspected. If the inspection shows that the vessel has on board any species regulated by NAFO, landings and transhipments are prohibited unless the vessel can demonstrate that the species were either harvested outside the Regulatory Area or otherwise in a manner that did not undermine NAFO rules.

The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) has also adopted a modified version of the NAFO Scheme and is currently considering other related measures, including a catch certification scheme. I am also aware that, for matters closer to Europe, the North-East Atlantic Fisheries Commission is also working to adopt its own programme, which will be based on the NAFO experience.

**FAO initiatives**

In the spring of 2004, the international community has devoted substantial additional attention to the problem of bad actors. The government of Australia, in particular, is to be commended for its leading role in this endeavour and for coming up with a new acronym – IUU fishing – which stands for "illegal, unauthorised and unregulated" fishing. This phrase, although perhaps not as mellifluous as one might hope, may come as close as the English language permits in capturing the problems posed by the bad actors in a succinct way.

In February, the FAO Committee on Fisheries adopted a far-sighted International Plan of Action to address the problem of overcapacity in many of the world's fisheries. One aspect of that Plan of Action calls upon states to work together in addressing IUU fishing. Two weeks after the COFI meeting, the FAO convened a follow-up ministerial-level meeting on global fisheries issues. At this meeting, the fisheries ministers of the world issued a declaration in which they agreed that the FAO would give priority to develop a full Plan of Action dealing exclusively with IUU fishing, a step that the Commission on Sustainable Development endorsed in March 2004.

Where will these actions take us? It is too soon to tell. One promising development is that policy makers are beginning to think more creatively in approaching the problem of bad actors. For example, within the International Maritime Organisation (IMO), efforts have been underway to control the bad actors of *ocean shipping* – those flag states and vessel owners who do not abide by agreed rules in that area. In light of this, in March 2004 the CSD encouraged the IMO to work with the FAO and the UN itself in dealing with the parallel problems together.

## Conclusion

The recent efforts of the international community to deal with the bad actors reflect “a few strong instincts” toward conservation and a heightened need for fair play in ocean fisheries. The international community, on both global and regional bases, is developing “a few plain rules” for the bad actors as well. In time, we may see the plainest rule of all: unless bad actors become good actors, their right to fish will be in jeopardy.

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