PART IV

WAYS OF COMBATING IUU FISHING

The fourth session of the workshop focused on the various means available for deterring IUU fishing activities and assessed the costs and benefits of alternative strategies, drawing examples from governmental, industry and NGO experience. Possible loopholes in current regulatory arrangements were identified, and suggestions made for ways of dealing with them. The intention of this session was to have participants think "outside the box" and explore alternative ways to combat IUU fishing.

CHAPTER 18

ADVANCES IN PORT STATE CONTROL MEASURES

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Introduction

Illegal, unreported and unregulated (IUU) fishing is a major threat to sustainable fisheries management and marine biodiversity. It occurs in all fisheries, whether they are conducted within areas under national jurisdiction or on the high seas. A number of international instruments, which were developed during the 1990s for the management of world fishery resources, also address the issue of IUU fishing. Of particular importance in this regard are the 1995 UN Fish Stocks Agreement, the 1993 FAO Compliance Agreement, the Code of Conduct for Responsible Fisheries and the International Plan of Action (IPOA) on Illegal, Unreported and Unregulated (IUU) Fishing. These include both so-called hard instruments (which are legally binding on parties to the agreements) and soft instruments which serve more as guidelines and toolboxes, including some options for both states and regional management organisations (RFMOs) in addressing the issue of IUU fishing.

However, despite these agreements and plans, and despite the efforts made by global organisations, by regional bodies and by a great number of states, IUU fishing continues to persist. But the international community cannot give up the fight. Vessels engaged in IUU fishing move in and out of areas under jurisdiction of multiple states and operate within the areas of competence of several RFMOs. Thus, a key word in the combat against IUU fishing is co-operation. This could be co-operation in tracing IUU vessels, tracing owners of such vessels and tracing fish and fish products deriving from IUU fishing. Furthermore, in order to harmonise and facilitate co-operation among states and RFMOs, some minimum standards for port state measures should be developed.

Link to flag State responsibilities

If all flag States complied with their obligations concerning their fishing fleets, port State control would more or less be superfluous. But this is certainly not the case. Of particular concern is the growing trend in the use of “flags of convenience” (FOC) by fishing vessels. Flagging and re-flagging of vessels is very easy and in some cases just a few moments’ work on the internet is all that is required (for example there are sites offering registration services for named States with a turn-around of 24 hours or less). Under international law, the flag State is responsible for ensuring that vessels abide with relevant rules. However, some countries are willing to sell their flag with no questions asked, in exchange for a licence fee, while exerting no control over the vessel’s activities. “FOC” is a

term often used in relation to states with open shipping registers. In a fisheries context, the term would have a wider application as the problem with IUU fishing stems partly from it being "convenient" to use certain specific flags to avoid being bound by conservation and management measures. In principle, states with restricted shipping registers could thus be regarded as FOC in relation to fishing. The acronym "FONC" (Flag of Non-Compliance) avoids the political sensitivities attached to the term "Flag Of Convenience" and also applies to parties and non-parties to RFMOs.

Companies and individuals typically have nationalities that differ from those of the vessels themselves, and fish deriving from IUU activities are put into international trade. It is thus absolutely necessary that agencies, international organisations and states establish both formal and informal co-operation channels. This is the only way of achieving the goal of preventing, deterring and finally eliminating IUU fishing.

The call for port State measures is closely linked to the lack of flag State responsibilities. Thus, port State measures are highly relevant for counteracting IUU fishing and some initiatives have now been taken to address the issue.

Memoranda of Understanding (MOUs) for the merchant fleet

Port State regimes have gained international acceptance in recent years as a result of numerous agreements concerning the merchant shipping fleet. Inspired by the Paris MOU (Memorandum of Understanding), which was agreed among 18 countries in 1982, several MOUs have been adopted in different regions of the world in order to trace sub-standard vessels. Such mandatory port State control is tied to internationally agreed rules and standards. The International Maritime Organisation (IMO) has played an important role in this development, and in order to ensure universal standards, IMO has developed a global strategy for operating guidelines and training of control officers.

Joint FAO/IMO working group

Recalling an agreement between IMO and FAO on matters of mutual interest, a joint FAO/IMO Working Group on IUU fishing met in 2000. The main issues examined by the group were related to flag State and port State control. Concerning port State control, in brief it was noted that the majority of fishing vessels were not covered by IMO instruments, either because fishing vessels were specifically excluded, were outside the size limitations, or the flag States are not parties to the relevant instruments. Further it was noted that it might be difficult to introduce port State inspection procedures for fisheries management purposes and fishing vessel safety within existing regional MOUs on port State control. It was also recognised that the mechanism of international or regional MOUs relating to port State control could be used as an important and effective tool for enhancing fisheries management, and addressing IUU fishing. Finally the group agreed that FAO, in co-operation with relevant organisations, should consider the need to develop measures for port State control to all matters related to the management of fisheries resources.

Possible regional strategy

By examining internationally agreed instruments like the UN Fish Stocks Agreement and the IPOA on IUU fishing, as well as measures established by several RFMOs and unilateral approaches taken by some States, port State control was found to be highly relevant for fishery conservation and management. As the existing MOUs on port State control target the standards of the vessel itself, they seem not to be the right vehicles for seeking compliance with fisheries conservation and management measures. It would therefore be worth considering taking the now widely applicable regional MOUs on merchant shipping as a model for a regional approach to fisheries.

A regional system on port State control would require common procedures for inspection, qualification requirements for inspection officers, and agreed consequences for fishing vessels found to be in non-compliance.

The underlying principle formulated in Article 23 of the UN Fish Stocks Agreement is "the right and the duty" of a port State to take non-discriminatory measures in accordance with international law, in order to "promote the effectiveness of sub-regional, regional and global conservation and management measures". Emphasis needs to be put not only on the "right", but also on the "duty" and some minimum requirements for port State control should be agreed upon.

In order to establish an appropriate system, port States should adopt harmonised mandatory obligations for control of fishing vessels. Although some RFMOs have already introduced some port State duties for their members, these apply only to activities taking place in their areas of competence, which in most cases are outside areas under national jurisdiction of the parties. Furthermore, the schemes are of course limited to members of a particular RFMO, consequently creating “Ports of Convenience” in a region.

Current schemes for some RFMOs

In 1989 port State control of fishing vessels was introduced at a regional level for the first time with the adoption of the Convention for the Prohibition of Fishing with Long Drift-nets in the South Pacific (the Wellington Convention on Drift-nets). The Convention provides for restriction of both access to the ports and the use of service facilities in the ports of parties for vessels involved in drift-net fishing.

In recent years several RFMOs have established port control obligations, in particular targeting non-parties. In order to combat IUU Fishing by non-Contracting Party vessels, in 1997 the first RFMO, the Northwest Atlantic Fisheries Organization (NAFO), already adopted the “Scheme to Promote Compliance by Non-Contracting Party Vessels with Conservation and Enforcement Measures Established by NAFO”, which put certain obligations on the port States of NAFO. The Scheme presumes that a non-Contracting Party vessel that has been sighted engaging in fishing activities in the NAFO Regulatory Area (*i.e.* the area outside national jurisdiction of NAFO Parties) is undermining NAFO Conservation and Enforcement Measures. If such a vessel enters a Contracting Party port, it must be inspected. No landings or transhipments will be permitted in Contracting Party ports unless vessels can establish that certain species on board were caught outside the NAFO Regulatory Area, and that for certain other species the vessel applied the NAFO Conservation and Enforcement Measures. Contracting Parties must report the results of such port inspections to the NAFO Secretariat, all Contracting Parties and the flag State of the vessel. Similar schemes were later introduced in several other regional bodies.

Some of the schemes have later been amended to include blacklisting of IUU vessels. At its annual meeting in 2002, the Commission of the Conservation of Antarctic Marine Living Resources (CCAMLR) agreed to adopt a scheme to promote compliance with CCAMLR conservation measures by Contracting Party vessels and a scheme to promote compliance with CCAMLR conservation measures by non-Contracting Party vessels. These schemes imply that procedures were agreed upon for the establishment and maintenance of lists of fishing vessels (IUU Vessel list) found to have engaged in fishing activities in the CCAMLR-area in a manner which has diminished the effectiveness of CCAMLR-measures. Procedures for the removal of vessels from the IUU Vessel list have also been adopted. Further Contracting Parties of CCAMLR have agreed to take a number of appropriate domestic actions against vessels appearing on the IUU Vessel list, including not authorising landing or transhipment in ports.

The North East Atlantic Fisheries Commission (NEAFC) has established a similar system for non-party vessels, and NAFO is in the in the process of introducing a system of blacklisting both non-party IUU-vessels and IUU-vessels flying the flags of Contracting Parties.

The International Commission for the Conservation of Atlantic Tunas (ICCAT) has taken a different approach. ICCAT has adopted a measure concerning the establishment of a record of large-scale fishing vessels authorised to operate in the Convention area (a so-called "white list"). This implies that only vessels appearing on the list are regarded as being in conformity with applicable ICCAT-measures. Vessels that are not on the "white list" are deemed not to be authorised to fish for, retain on board, tranship or land tuna and tuna-like species. Parties to ICCAT shall take measures, under their applicable legislation, to prohibit, amongst other things, the transhipment and landing of tuna and tuna-like species by large-scale fishing vessels, which are not "white listed".

Even though parties to RFMOs have agreed to take some port measures, port control schemes which include inspection procedures, result indicators, and formats for the exchange of information are rather rare. The vast majority of RFMOs do not have in place appropriate port control schemes, though some do have quite vague references to port inspections. NAFO, for example, has established reciprocal port State control obligations. According to the relevant provision a "Contracting Party whose port is being used shall ensure that its inspector is present and that, on each occasion when catch is offloaded, an inspection takes place of the species and quantities caught". NAFO is, however, now considering strengthening the port State obligation by introducing a more comprehensive system, which includes, among other things, harmonised inspection procedures and protocols for exchange of information.

In ICCAT, parties are encouraged to enter into bilateral agreements/arrangements that allow for an inspector exchange programme designed to promote co-operation, share information and educate each party's inspectors on strategies and operations that promote compliance with ICCAT's management measures. The port inspection scheme recognises that most of the recommendations can only be enforced during off-loading and therefore found that port State enforcement is "the most fundamental and effective tool for monitoring and inspection".

It should also be mentioned that port control schemes have not been established by CCAMLR or NEAFC.

CCAMLR has, however, established a Catch Documentation Scheme for *Dissostichus* spp., which requires control by port States. The Scheme builds on the principle of flag State responsibility, but at the same time the Scheme requires that landings of *Dissostichus* Spp. at its ports and all transhipments of *Dissostichus* spp. to its vessels be accompanied by a completed catch document. The document will need to be countersigned by a port State official when the catch is landed. This signature will confirm that the catches landed agree with the details on the document.

Some states have established measures reaching further than those established by the regional fisheries management organisation to which those states are parties. States like Canada, Iceland, Norway and the United States are refusing access to port services for vessels undermining conservation and management measures on the high seas.

Application of a MOU

MOUs would have a wider application, as not all port States are parties to a RFMO, and required port measures might involve more than one RFMO. In principle, port State control should be related to *all areas* where marine capture fisheries take place. In a context of a possible MOU, such control

should be related to areas within the jurisdiction of the port State, areas within the jurisdiction of another State that is Party to the MOU, and on the high seas areas managed by a relevant RFMO. Port States should thus ensure that fishing undertaken in these areas has been in conformity with established conservation and management measures.

In addition, a port State should inspect vessels flying the flag of another State where fishing activities took place within the waters of that particular flag State. This last point is particularly important when conservation and management measures concerning shared stocks have been agreed upon between two or more States. Sometimes fishing is conducted within the EEZ of a party to such arrangements, but landed in the port of another State (due to port facilities, price factors, distance from fishing grounds, etc.). In these cases it is most likely that the fishing vessels leave the waters of a coastal State without being inspected to determine whether the fishing has been conducted in accordance with applicable legislation. This is also a general issue, however, as a coastal State may seek assistance from a port State to verify that fishing in the waters of that coastal State has been in accordance with relevant legislation. This may be the only way of obtaining the information required for assessing the situation.

In doing so, it is recommended that such an approach should be linked to the existing RFMOs. Most of the conservation and management measures for high seas fishing in different regions are established by such organisations. The internationally agreed measures that vessels should comply with will therefore be those of the relevant organisation. Consequently, there is a direct link between that particular organisation and port States in the region. In order to achieve a comprehensive system within a region, the RFMOs should be encouraged to enter into agreements on mandatory port State control with port States in the region that are not parties to the relevant regional fisheries body.

RFMOs were strengthened by the entry into force of the 1995 UN Fish Stock Agreement, and the importance of their role is underlined throughout the agreement. It has also inspired coastal States and distant water fishing nations to co-operate in order to establish organisations in regions previously not covered by such bodies. Further, these organisations are responsible for establishing relevant conservation and management measures in areas under respective purviews. Thus, an inspection in port should therefore examine if the fishing vessel in question has operated contrary to any conservation and management measures established by any RFMO. It is also recommended that co-operation between regional fisheries management organisations be formalized. Such co-operation would be essential in areas where IUU fishing is the concern of two or more regional bodies. For example, the conservation and management of fish resources in the Atlantic Ocean is the responsibility of several fisheries management organisations. A comprehensive system on port State control would require that IUU fishing within the area of responsibility of one specific organisation should have consequences for port States which have agreed on mandatory measures in another region.

In principle, port State control should relate to all areas where marine capture fishing operations take place. Port States should thus ensure that fishing undertaken in these areas have been in conformity with established conservation and management measures. In summary a port State should examine whether IUU fishing has taken place in:

a) the Regulatory Area (RA) by a Contracting Party of a RFMO;

b) the RA by a non-Contracting Party of a RFMO;

c) waters under national jurisdiction of a Contracting Party by a Contracting Party of a RFMO; and

d) waters under national jurisdiction of a Contracting Party by a non-Contracting Party of a RFMO.

IUU vessels move from one region to another and are therefore not the concern of one RFMO alone. In order to establish a tight system, a MOU on port State control between such bodies could be a way forward. In that context port States should have the duty to take action against vessels having participated in IUU fishing in areas managed also by other regional bodies. RFMOs should therefore be encouraged to enter into multilateral agreements on port State control. Such co-operation would be essential in areas where IUU fishing is the concern of two or more regional bodies.

FAO expert consultation

Following the recommendations by the joint FAO/IMO Working Group and the call for harmonised port State measures in a number of international instruments, FAO has convened an Expert Consultation to review port State measures to combat IUU fishing. The Consultation agreed that regional MOUs on port State measures also for fishing vessels are highly relevant and examined all aspects of possible MOUs.

The Consultation agreed that in terms of *scope,* a MOU should apply to all vessels engaged in, or supporting, fishing activities including fishing vessels and vessels transporting fish and fishery products. Criteria for targeting specific vessels might be developed for a given MOU. For instance, vessels flying a "flag of non compliance" (FONC), or vessels having a history of non-compliance established by a RFMO can be particularly targeted.

The Consultation noted that the Parties should determine whether a MOU is binding or not. A MOU will, however, include only the minimum requirements for port State measures. The question remained open with respect to the impact of and the effect of the MOU on third parties. To encourage wider application of a MOU, the Consultation observed that some IMO instruments provide that the parties to these instruments apply the requirements in the same manner to vessels of non-parties, as may be necessary, to ensure that "no more favourable treatment" is given to such vessels.

The Consultation agreed that port States should require all foreign vessels that have engaged in fishing activities or transporting fish and fishery products to provide a *prior notice* of the intention to use a port, its landing or transhipment facilities. While failure to provide satisfactory information submitted in the prior notification might be a reason for denial of access to port, the Consultation noted that it might be advisable to allow a vessel into port in order to ascertain whether a vessel has engaged in or supported IUU fishing.

The Consultation further noted that port States might, on the basis of objective and non discriminatory criteria, *set out conditions of entry to their ports or deny access* to their ports by foreign fishing vessels that have engaged in, or supported, IUU fishing. In cases of distress and *force majeure*, vessels have a right to entry to ports under customary international law. In addition, bilateral or multilateral arrangements might be in place providing reciprocal free access to ports, as well as dealing with trade-related matters. It was also observed that denial of port access in order to combat IUU fishing might not always be appropriate in practice.

The need for *harmonised and co-ordinated approaches for inspection* was discussed in the Consultation and it received wide support. The Consultation considered that the use of a single fishing vessel numbering system could be a useful tool for the effective implementation of a MOU on port State measures. It noted that a system for numbering vessels is applied in IMO. This system is based on the Lloyds register fair-play system.

The Consultation also observed that a harmonised system of certification of fishing vessels, including the clear identification of the vessel owners and managers, could be useful to facilitate the inspection of vessels in port States.

Concerning *sanctions*, the Consultation recognised that if a vessel is found to have violated applicable legislation in waters under the jurisdiction of the port State, the latter should exercise jurisdiction as a coastal State and initiate proceedings accordingly. In other situations, port States could choose between several possible actions. With the exception of detention, arrest or other measures against crew, a port State could take other more appropriate action. Such action could include refusal to allow the landing of fish and fishery products, forfeiture of fish and fishery products, or refusal to permit a vessel to leave its port pending consultation with the flag State of the vessel.

The Consultation recognised that awareness about, and *capacity building* in, port State measures, especially in developing countries, is vital to the wide application of port State measures to prevent, deter and eliminate effectively IUU fishing.

The Consultation noted that the *exchange of information and data* would be crucial for effective implementation of port State measures to combat IUU fishing.

Following discussions and an in-depth review of the elements that might be included in regional MOUs, the Expert Consultation elaborated a draft MOU on Port State Measures to combat IUU Fishing. This could be used as a template in cases where initiatives are taken to develop regional MOUs.

COFI (FAO Committee of Fisheries) agreed in March last year that FAO should convene a Technical Consultation to Address Substantive Issues Relating to the Role of the Port State to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, which will take place at FAO headquarters in late August 2004.

Conclusion

The conclusion is thus very brief. States should recognise that a number of international agreed instruments call for the establishment of compatible measures for port State control, and participate actively in the upcoming FAO consultation to develop a MOU that can serve as a model in this regard.

ANNEX 18.A.

DRAFT MEMORANDUM OF UNDERSTANDING ON PORT STATE MEASURES TO COMBAT ILLEGAL, UNREPORTED AND UNREGULATED FISHING[1]

The Parties to this Memorandum,

Concerned that illegal, unreported and unregulated (IUU) fishing continues to persist;

Emphasizing that effective action by port States is required to prevent, deter and eliminate IUU fishing;

Noting that the relevant international instruments call for port States to establish measures to promote the effectiveness of subregional, regional and global conservation and management measures;

Recognizing that the Code of Conduct for Responsible Fisheries and the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, promote the use of measures for port State control of fishing vessels in order to meet the objectives of the Code and the plan;

Desiring to achieve co-operation and co-ordination in fisheries-related port State control in accordance with international law;

Emphasizing the need for non-Parties and fishing entities to take action consistent with this Memorandum;

have agreed as follows:

Scope

In this Memorandum,

references to fishing vessel includes vessels transporting fish and fishery products unless otherwise provided for in the text of the Memorandum; and

references to ports include offshore terminals and other installations for landing, transhipping, refuelling or re-supplying.

[1] Expert Consultation to review port state measures to combat illegal, unreported and unregulated fishing, Rome 4-6 November 2002.

Commitments

Each Party to this Memorandum undertakes to:

give effect to the provisions of the present Memorandum and the Annexes thereto, which constitute an integral part of the Memorandum;

maintain an effective system of port State control with a view to ensure that foreign fishing vessels calling at its port, comply with relevant[2] conservation and management measures;

require prior to allowing a foreign fishing vessel port access that the vessel provides notice at least xx hours in advance which includes vessel identification, the authorization(s) to fish, details of their fishing trip, quantities of fish on board and other documentation[3];

require prior to allowing a vessel transporting fish and fishery products port access that the vessel provides notice at least xx hours in advance which includes vessel identification, the transport document(s), quantities of fish and fishery products on board and other documentation[4];

where there are reasonable grounds to believe that a fishing vessel has engaged in or supported IUU fishing in waters beyond the limits of its fisheries jurisdiction, either refuse to allow the vessel to use its port for landing, transhipping, refuelling or re-supplying or to take measures such as forfeiture of fish and fishery products, as may be provided for under its national legislation;

not to allow a vessel to use its ports for landing, transhipping or processing fish if the vessel which caught the fish is entitled to fly the flag of a State that is not a contracting or collaborating party of a regional fisheries management organisation or has been identified as being engaged in fishing activities in the area of that particular regional fisheries management organisation, unless the vessel can establish that the catch was taken in a manner consistent with the conservation and management measures;

not to allow a vessel to use its ports for landing or transhipment where it has been established that the vessel has been identified by a regional fisheries management organisation as having a history of non-compliance with its conservation and management measures;[5]

designate and publicize ports to which foreign fishing vessels may be permitted admission and ensure that these ports have the capacity to conduct port inspections;

ensure that port inspections take place in accordance with Appendix 18.A;[6]

obtain in the course of such inspections, at least the information listed in Appendix 18.B; and

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2 The creation of a list of relevant conservation and management measures for a particular MOU might be required.

3 The details to be provided for in a prior notice should be agreed upon for each MOU.

4 See footnote 2

5 The RFMO should identify such vessels through agreed procedures in a fair, transparent and non-discriminatory manner.

6 An annual total number of inspections corresponding to at least XX % of the number of individual vessels to which the MOU applies should be agreed upon.

consult, co-operate and exchange information with other Parties in order to further the aims of this Memorandum.

Inspections

In fulfilling its commitments under this Memorandum each Party undertakes to:

carry out inspections in its ports for the purpose of monitoring compliance with relevant[7] conservation and management measures;

ensure that inspections are carried out by properly qualified persons authorised for that purpose, having regard in particular to Appendix 18.C;

ensure that prior to an inspection, inspectors shall be required to submit to the master of the vessel an appropriate identity document;

ensure that an inspector can examine all areas of the fishing vessel, the catch (whether processed or not), the nets or other gear, equipment, and any document which the inspector deems necessary to verify compliance with relevant[8] conservation and management measures; and

ensure that the master of the vessel is required to give the inspector all necessary assistance and information, produce relevant material and documents as may be required, or certify copies thereof.

Subject to appropriate arrangements with the flag State of a vessel, the inspecting port State may invite the flag State to carry out or participate in the inspection.

When exercising inspections the port State will make all possible efforts to avoid unduly delaying a vessel.

Actions

If an inspector finds that there are reasonable grounds for believing that a foreign fishing vessel has engaged in activities including, *inter alia*, the following[9];

a) fishing without a valid licence, authorization or permit issued by the flag State;

b) failing to maintain accurate records of catch and catch-related data;

c) fishing in a closed area, fishing during a closed season or without, or after attainment of, a quota;

d) directed fishing for a stock which is subject to a moratorium or for which fishing is prohibited;

e) using prohibited fishing gear;

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7 See footnote 1

8 See footnote 1

9 Activities other than those listed below may be specified in procedures established by a relevant RFMO (one particular example is failure to comply with Vessel Monitoring Systems (VMS) requirements).

f) falsifying or concealing the markings, identity or registration of the vessel;

g) concealing, tampering with or disposing of evidence relating to an investigation; or

h) conducting activities which together might be regarded as seriously undermining applicable conservation and management measures then the port State shall promptly notify the flag State of the vessel and, where appropriate, the relevant coastal States and regional fisheries management organisations.[10]

The port State shall take due note of any reply or any actions imposed or taken by the flag State of the inspected vessel.[11] Unless the port State is satisfied that the flag State has taken or will take adequate action, the vessel shall not be allowed to land or tranship fish in its ports.

Information

Each Party undertakes to report on the results of its inspections under this Memorandum to the flag State of the inspected vessel, the parties to this Memorandum, and to relevant regional fisheries management organisations.

Each Party undertakes to establish a communication mechanism that allows for direct, computerized exchange of messages between relevant States, entities and institutions, with due regard to appropriate confidentiality requirements.

The information will be handled in a standardized form and in accordance with the established procedures as set out in Appendix 18.D.

[10] In each region there may be reference to applicable international instruments.

[11] It is recommended to establish a list of contact points in the relevant administration of each Party to the Memorandum.

APPENDIX 18.A.
Inspection Procedures of Foreign Fishing Vessels

Vessel identification

The inspector shall

be satisfied that the certificate of registry is valid;

be assured that the flag, the external identification number (and IMO-number if available) and the international radio call sign are correct;

examine whether the vessel has been re-flagged and if so, note the previous name(s) and flag(s);

note the port of registration, name and address of the owner (and operator if different from the owner) and the name of the master of the vessel; and

note name(s) and address(es) of previous owner(s), if any.

Authorization(s)

The inspector shall be satisfied that the authorization(s) to fish or transport fish and fishery products are compatible with the information obtained under paragraph 1 and examine the duration of the authorization(s) and their application to areas, species and fishing gear.

Other documentation

The inspector shall review all relevant documentation[12] which may include various logbooks, in particular the fishing logbook, stowage plans and drawings or descriptions of fish holds. Such holds or areas may be inspected in order to verify whether their size and composition correspond to these drawings or descriptions and whether the stowage is in accordance with the stowage plans.

Fish and fishery products

The inspector shall, to the greatest extent possible, examine whether the fish on board is harvested in accordance with the conditions set out in the authorization. In doing so, the inspector shall examine the fishing logbook, reports submitted, including those resulting from a vessel monitoring system (VMS).

If the inspector has reasonable grounds to believe that a vessel has engaged in or supported IUU fishing the inspector may review the amount and composition of all catch on board to verify whether the fish has been taken in the areas as recorded in the relevant documents.

[12] It is understood that documentation includes documents in electronic format.

In order to determine the quantities and species which are fresh on ice, frozen but not packed, processed, packed or in bulk, the inspector [shall/may][13] examine the fish in the hold or during the landing. In doing so, the inspector may open cartons where the fish has been pre-packed and move the fish or cartons to ascertain the integrity of fish holds.

If the vessel is discharging, the inspector shall verify the species and quantities landed. Such verification shall include presentation (product form), live weight (quantities determined from the logbook) and the conversion factor used for calculating processed weight to live weight. The inspector shall also examine any possible quantities retained on board.

Fishing gear

The inspector shall be satisfied that the fishing gear on board is in conformity with the conditions of the authorization(s). The gear [shall/may][14] also be checked to ensure that the mesh size(s) (and possible devices), length of nets, hook sizes etc. are in conformity with applicable regulations and that identification marks of the gear correspond to those authorised for the vessel.

The inspector [shall/may][15] also search the vessel for any fishing gear stowed out of sight.

Report

The result of a port inspection shall be presented to the master of the vessel and a report shall be completed, signed by the inspector and the master. The master shall be permitted the opportunity to add any comments to the report.

13 In view of certain practical problems of such inspections, this has been presented in the alternative “shall/may”.

14 See footnote 12

15 See footnote 12

APPENDIX 18.B.
Results of Port Inspections

Results of port inspections shall include at least the following information:

Inspection references

Inspecting authority (name of inspecting authority or the alternate body nominated by the authority);

name of inspector;

port of inspection (place where the vessel is inspected); and

date (date the report is completed).

Vessel identification

Name of the vessel;

type of vessel;

external identification number (side number of the vessel) and IMO-number (if available) or other number as appropriate;

international Radio Call Sign;

MMSI-number (Maritime Mobile Service Identity number), if available;

flag State (State where the vessel is registered);

previous name(s) and flag(s), if any;

whether the flag State is party to a particular regional fisheries management organisation;

home port (port of registration of the vessel) and previous home ports;

vessel owner (name and address of the vessel owner);

vessel operator, responsible for using the vessel if different from the vessel owner;

name(s) and address(es) of previous owner(s), if any; and

name and certificate(s) of master.

Fishing authorization (licenses/permits)

The vessel's authorization(s) to fish;

State(s) issuing the authorization(s);

areas, scope and duration of the authorization(s);

species and fishing gear authorised; and

transhipment records and documents[16] (where applicable).

Trip information

Date trip commenced (date when the current trip started);

areas visited (entry to and exit from different areas);

ports visited (entry into and exit from different ports); and

date trip ended (date when the current trip ended).

Result of the inspection on discharge

Start and end (date) of discharge;

fish species;

presentation (product form);

live weight (quantities determined from the log book);

conversion factor (as defined by the master for the corresponding species, size and presentation);

processed weight (quantities landed by species and presentation);

equivalent live weight (quantities landed in equivalent live weight, as "product weight multiplied with the conversion factor"); and

intended destination of fish and fishery products discharged.

Quantities retained on board the vessel

Fish species;

presentation (product form);

conversion factor (as defined by the master for the corresponding species, size and presentation);

processed weight; and

equivalent live weight.

Results of gear inspection

Details of gear type inspected and attachments, if any.

[16] The transhipment records and documents must include the information provided for in paragraphs 1-3 of this Appendix 18.B.

APPENDIX 18.C.
Training of Port Inspection Officers[17]

Elements that shall be included in a training programme:

Overview of conservation and management measures applicable for a particular Memorandum of Understanding;

information sources, such as log books and other electronic information that may be useful for the validation of information given by the master of the vessel;

fish species identification;

catch landing monitoring, including determining conversion factors for the various species and products;

vessel boarding/inspection, hold inspections and calculation of vessel hold volumes;

gear inspections;

gathering, evaluating and preservation of evidence; and

range of measures available following the inspection.

[17] More extensive criteria should be developed for the qualification (*e.g.* skills and knowledge) of inspectors. The skills and knowledge listed below are minimum requirements.

APPENDIX 18.D.
Information System on Inspections

Computerized Communication between States and between States and relevant RFMOs would require the following:

Data characters;

structure for data transmission:

protocols for the transmission; and

formats for transmission including data element with a corresponding field code and a more detailed definition and explanation of the various codes.

International Agreed Codes shall be used for the Identification of the following items:

States: 3-ISO Country Code;

fish species: FAO 3-alpha code;

fishing vessels: FAO alpha code;

gear types: FAO alpha code;

devices/attachments: FAO 3-alpha code; and

ports: UN LO-code.

Data Elements Shall at least include the following:

Inspection references;

vessel identification;

fishing authorization(s) (licenses/permits);

trip information;

result of the inspection on discharge;

quantities staying on board the vessel;

result of gear inspection;

irregularities detected;

actions taken; and

information from the flag State.

CHAPTER 19

POTENTIAL LINK BETWEEN IUU FISHING AND THE STATUS OF SAFETY-RELATED INTERNATIONAL INSTRUMENTS APPLICABLE TO FISHING VESSELS AND FISHERS

Brice Martin-Castex, International Maritime Organisation (IMO)

This presentation aims at highlighting the potential link between *i)* the lack of international instruments in force addressing the safety of fishing vessels and the training of fishermen, and *ii)* the conduct of illegal fishing activities, in the current context of limited control and inspection measures applying both to maritime safety and fisheries management.

In the future, the IMO will use its specific experience to identify the substantial differences between merchant marine activities and fishing activities as far as the international legal framework is concerned.

The IMO will address the following issues in order to illustrate the areas where specific efforts are being made to improve compliance with international regulations and standards:

- harmonisation of port State control activities;
- search and rescue;
- self-assessment of flag State performance;
- Code for the implementation of [mandatory] IMO instruments;
- IMO Voluntary Member States Audit Scheme;
- non-convention ships;
- increased collaboration between flag States and port/coastal states; and
- transparency.

These areas of particular interest for the IMO will be assessed *vis-à-vis* the identified specificities of the fishing industry.

The key aspects of the recommended future activities aimed at deterring IUU fishing will be considered in the context of identified bottlenecks preventing the entry into force and implementation of international standards, highlighting the areas where increased co-operation and partnership may be needed.

CHAPTER 20

ENFORCEMENT AND SURVEILLANCE: WHAT ARE OUR TECHNICAL CAPACITIES AND HOW MUCH ARE WE WILLING TO PAY?[1]

Serge Beslier, European Commission

Introduction

The role of our political institutions, whether national or international, is to draw up rules of law that are conducive to the harmonious and sustainable development of society.

If those rules are to be effective, they must be enforced. Law without enforcement and without sanctions is non-existent.

Enforcement comes at a cost. It is therefore important for policy makers to be aware of that cost when drawing up the rules governing any economic activity. In the fishing industry, costs can be assessed in a variety of ways. The term "cost" can be defined alternatively as financial or economic.

First there is the budgetary cost. What financial resources are the public authorities ready to allocate to enforcement in a given industry? Then there is the environmental cost. What are the risks to the environment when inadequate funding is allocated to the goal of achieving sustainable fisheries management? What are the risks to endangered species and biodiversity? Finally there is the economic and social cost. What are the repercussions on stock management if these measures are not conducive to optimal yields, and what are the implications for firms and workers?

No one would dispute the need for sound enforcement, which is crucial to sustainable fishing as well as being in the interests of society at large, and firms and workers in particular.

The real issue is the cost to society and how much we are willing to pay. The current trend is towards budgetary restraint, and the OECD is the first to stress the need for spending controls. Another aspect of the issue is the cost to firms, and the subsequent implications for competitiveness and fair competition at international level.

[1] Paper translated from French original.

The cost to society

Monitoring at sea is costly. This is nothing new, merely a fact that has to be faced. However, there is some uncertainty clouding the issue. This is why the European Commission attaches so much importance to the work being done by the OECD to assess the economic and social effects of IUU fishing.

The overall cost of monitoring fishing activities in the EU and its member states amounts to some EUR 300 million. That may be a somewhat conservative figure, however, as fishery surveillance is not always targeted and there is no approved method for collecting such information. The figure should be set against the value of landings by EU fishing vessels, estimated at around EUR 5.5 billion. This puts monitoring and surveillance costs at around 5% of the value of production. In the specific case of NAFO, the cost of monitoring EU vessels amounts to some €4 million, for a total of around EUR 55 million in landings (in 2002), *i.e.* over 7% of the value of production.

These two examples highlight the relatively high cost of enforcement and surveillance in this industry. It certainly exceeds fishing firms' profit margins. Consequently, the cost of this type of government action cannot be viewed solely in terms of the benefits to the sector directly concerned, but should instead be assessed in terms of the industry as a whole and – even harder – its impact on society (including environmental and other effects).

Those are just the direct costs of fisheries enforcement and surveillance. But there is also a need to assess the cost of customs inspections for fishery products. The EU market, along with the Japanese and North American markets, is one of the three major outlets for fishery products. So both the EU authorities and the customs authorities in individual member states have their part to play here. Yet it should be borne in mind that trafficking in illegal fishery products is not the only form of international crime of concern to the authorities. Others are considered to be far more of a threat to social equilibrium, including drug trafficking, people trafficking, arms dealing and money laundering, all of which take up a huge amount of resources and energy. However, all of these different forms of crime stem from the same rationale, namely unbridled globalisation and the inability of individual countries to resolve such problems alone.

It is clear that, in an open environment like the sea, international co-operation is vital. It is – not without reason – one of the pillars of the United Nations Convention on the Law of the Sea. International co-operation is not only an obligation in terms of conserving and managing fishery resources, it is also a necessity in terms of enforcement and surveillance. It has become even more vital now that budget constraints demand that the system be as cost-effective as possible.

International co-operation is all the more necessary because the economic interests of the countries concerned may not necessarily converge. The interests of a coastal state are not those of a flag State, which in turn differ from those of a port state or the state in which fishery products are actually used.

As part of its work on Common Fisheries Policy reform, the European Union looked into the efficiency of the EU system. It concluded that the separation of powers in the traditional system, with the EU wielding legislative powers and member states the executive powers, did not satisfactorily meet the need for co-operation, including co-operation between EU member states.

This is one of the reasons why the European Union is envisaging the creation of a Community Fisheries Control Agency. This would not only enhance the quality and effectiveness of the EU control system, but also give better value for money in terms of EU and member state budget

expenditure. Another advantage of the new Agency would be to foster international co-operation with the introduction of a system of information exchange as it would, for instance, be a member of the MCS (monitoring, control and surveillance) network currently under development.

International co-operation necessarily involves the regional fishing organisations (RFO) too. The introduction of streamlined control schemes in all of the RFOs is bound to generate savings and improve efficiency. The EU attaches great importance to the fact that the inspection and control schemes in each RFO are tailored to the profile of the relevant fishery. One example is the process used by the Indian Ocean Tuna Commission (IOTC) to develop its own inspection and control scheme, namely by systematically analysing all known control techniques and selecting the most cost-effective for the Indian Ocean tuna fishery. The process also took account of the capacities of each contracting party, since the RFO includes among its members both developed and developing countries. This goes to show that economic assessment and monitoring tools are diverse, and their costs may vary considerably. So the question is therefore how to optimise the financial resources invested in control and achieve optimal synergy between the various types of monitoring, whether at sea, from the air, at the dockside, or at the import stage. To date, the analysis appears to have been more empirical than rational. Economic analysis may provide scope to find the most appropriate mix of monitoring tools.

The drive for a more cost-effective approach calls for the use of more readily controllable techniques, such as lists of vessels authorised to fish. This should help to counter the practice of "open registries", also known by the non-legal term of "flag registries", which deliver what are commonly called flags of convenience.

The European Union is increasingly turning to technologies that combine performance with cost-savings. The development of satellite systems has led to remarkable advances in this field. There are currently plans to make the VMS – Vessel Monitoring System – compulsory for all vessels over 15 metres in length. Satellite monitoring makes it possible to track vessels that are not necessarily fitted with transceivers, and the technology certainly holds as yet untapped development potential for the fishing industry. Satellites combined with computers are also offering scope to improve fishing and fishery surveillance, for instance with electronic log-books for real-time monitoring.

These techniques are both efficient and relatively cheap, and in any case less of a burden on the public purse than the classic at-sea monitoring or quayside-inspection techniques. An overview conducted some time ago showed VMS to be cost-effective if it could achieve a 10% cut in the cost of at-sea monitoring.

Enforcement and surveillance costs are not confined to the public purse, however, and companies have to shoulder a growing share.

The cost to firms

Fishing firms have to compete on two fronts. There is not only competition for the resource but also competition for access to the fishery product market.

The economic conditions governing access to fishery resources determine how competitive firms must be to gain access to the markets. For fishing fleets, inspection costs are a decisive factor when it comes to competitiveness.

The constraints imposed on firms by monitoring and inspection costs can be measured at two levels:

- At the firm or microeconomic level, vessel-owners must shoulder the cost of keeping log-books, declaring catches, installing VMS transceivers and using selective fishing techniques. The fact that vessels flying flags of convenience avoid these costs is bound to give them a competitive advantage. However, the factor that most seriously distorts competition may not lie there but, more importantly, in the opportunities those vessels have to avoid compliance with conservation and management rules, and in particular restrictions on catches. Vessels that do comply with such restrictions are clearly not competing on an equal footing with vessels that have no limitations on their fishing. Another point to bear in mind is that the vessels involved in IUU fishing are also the first to breach the standards on navigational safety, vessel safety, crew safety and conservation of the marine environment.

- At the macroeconomic level, that of the economic environment in which firms operate, the absence of an enforcement and surveillance policy is a major competitive advantage for vessel-owners. Whether monitoring and inspection costs are passed on to firms *via* a cost-recovery scheme (ITQs, licence-fees or a similar system) or there is a beneficial tax regime, vessel registration under a flag of convenience often goes hand in hand with company registration in a tax haven, and gives owners operating under flags of convenience a competitive advantage over their competitors operating under the flags of "civilised" countries.

If fishery management systems were watertight, control cost assessments would focus mainly on the costs that governments are willing to pay.

Paradoxically, the more resources are allocated to fisheries enforcement and surveillance, the more vessel-owners are tempted to circumvent the system.

Even if fraud is not confined to fishing by vessels flying flags of convenience, the scope for avoiding increasingly tighter controls is certainly encouraging some owners to change flags. The ease with which they can re-register their vessels is specific to the marine environment, and common to maritime transport and sea fishing. In both industries, it only takes an entry in a register for firms to relocate under a new flag, whereas land-based firms would also have to move premises.

The "convenience" issue is not confined to flags. Fishing vessels are so mobile that they can choose where to land their catches and hence where to market them and obtain the best prices. That choice may be based on legitimate economic criteria such as proximity to fishing grounds, markets for specific catches or the commercial performance of port operators. But ports may be chosen for illegal reasons, for instance the absence of inspections. So the problem is not just flags of convenience but ports of convenience. There is fairly little incentive for a country to inspect catches landed in its ports when those catches are not from stocks harvested by its own fleet. It can enjoy the economic spin-offs from its port activities, without suffering any loss or unfair competition from the predatory harvesting of its own stocks.

Because of the competitive distortion they bring to economic relations, flags of convenience and ports of convenience – by their very existence – hamper the development of enforcement and surveillance schemes by countries wishing to set up sustainable resource management systems, combined with effective control mechanisms.

An economic analysis of all these factors should provide policy makers with more insight into the implications of their decisions on the conservation and management of fish stocks, and the controls that necessarily accompany them. It should enable them to identify the most urgent areas for improvement in the international legal system and tackle the challenges facing the international

community, if the formal commitments made by governments to promote sustainable development are not to remain devoid of meaning.

CHAPTER 21

WORKING TOGETHER - WHAT INDUSTRY CAN DO TO HELP

Martin Exel, COLTO, Australia

The Coalition of Legal Toothfish Operators (COLTO) is a group of legal industry members, working to assist governments, environmental organisations and other authorities to eliminate illegal, unregulated and unreported fishing for toothfish in sub-Antarctic and Antarctic waters. The unique environment of these southern oceans, together with their remoteness and hostile environment has meant that effective enforcement is extremely difficult to achieve by government actions alone.

Governments are more classically regarded as "responsible" for the enforcement of fisheries management regimes, including surveillance and compliance of rules and regulations. It became very clear to legal operators that IUU fishing was able to deplete stocks of toothfish fisheries to non-commercially viable levels faster than governments could eliminate or control IUU operations. It was essential that industry help government agencies to "clean up" IUU fishing, or there would be no future for the legal toothfish industry.

The main driver that made legal operators decide to work together against IUU fishing operations was the vital need to provide for toothfish stock sustainability into the future. Management measures in the Commission for the Conservation of Marine Living Resources (CCAMLR) are amongst the most precautionary in the World, and IUU fishing was directly jeopardising a number of stocks in the CCAMLR region. IUU fishing was therefore, in turn, directly reducing available quantities of fish to legal operators, as well as making legal fishing non-viable.

COLTO was launched in May 2003. It comprised 27 companies from 10 separate countries, and is fully industry funded. Over the course of its first eleven months of operation, COLTO has:

- set up a website at www.colto.org with details on IUU vessels, as well as recent press articles or reports;
- had a global "Wanted" campaign, with rewards offered up to USD 100 000 for information leading to the conviction of illegal operators;
- created a database of information on vessel movements, product unloading, individuals and companies involved in IUU fishing;

- participated as an official observer at CCAMLR in November 2003;
- produced a public report, titled "Rogues Gallery" summarising IUU operations;
- provided information either on request or informally to governments and government agencies;
- provided analyses of vessels for identification where names and/or flags have been changed;
- worked to encourage publicity against IUU fishing, and to support governments in their actions against IUU operators.

The concept of industry working closely with governments has been mooted often, and works in a number of smaller fisheries. The real test for COLTO was the ability to bring together varied operators from different countries with differing views on IUU approaches and make a positive contribution. To date, the impacts have been positive and, with sufficient energy and responsiveness from authorities to information provided by industry, COLTO will continue to provide a central role of linkage between legal operators, conservation groups, and governments.

Industry members are motivated primarily by the maintenance of their livelihoods – and that is only going to come with access-right security, well-managed fisheries that are ecologically sustainable, clarity of management measures, and effective enforcement and compliance arrangements in the fishery. This, in the case of toothfish, is going to necessitate new concepts of management for the RFMO to control more effectively not just the high seas areas, but also those States party to CCAMLR who are not as effectively implementing their flag State responsibilities over vessels and IUU operators.

The weaknesses in the system that need to be addressed include:

- the need for government agencies to develop effective and rapid mechanisms to exchange information and data on vessels that are identified as IUU;
- CCAMLR to consider the regular publication of “white lists” of legitimate operators in addition to the existing black list;
- CCAMLR to develop effective access-right security management arrangements for high seas areas, as opposed to competitive TAC arrangements;
- consideration of changes on the current IUU loopholes that are facilitated under UNCLOS, such as the “freedom of the high seas” which enables re-flagging to non-party States by IUU boats;
- development and/or enhancement of market-based mechanisms such as paper trails for trade in toothfish which can be used to assist the identification of legal catches.

These challenges are not unique to CCAMLR or toothfish fisheries, and many agencies and governments have been working to achieve the best results possible. The biggest challenge is to achieve the desired results before IUU fishing undermines management measures to the extent that legal fishing is no longer viable, and stocks are reduced to critically low levels.

CHAPTER 22

PRIVATE INITIATIVES: A POSSIBLE WAY FORWARD?

Hiroya Sano and Yuichiro Harada, OPRT, Japan

Introduction

We welcome this opportunity to present the views of the Organization for the Promotion of Responsible Tuna Fisheries (OPRT) on the question of whether private initiatives are a way forward to address the problem of illegal, unreported, and unregulated (IUU) fishing activities.

From the outset, one of OPRT's main goals was to combat IUU tuna fishing. This paper recounts OPRT's experience and describes how the organization has been dealing with the problem of IUU tuna fishing.

The establishment of OPRT is in itself the result of private initiatives. Since the introduction of the Positive List Scheme on a global scale towards the end of last year, tuna caught by IUU tuna longline fishing vessels can no longer be traded in international markets. This ensures that in the case of tuna caught by large-scale longliners, IUU fishing cannot survive. The tuna longline fishing industry itself has become aware that it is necessary to promote responsible fisheries, show the legitimacy of their fishing activities to the international community and make efforts to increase the transparency of their fishing operations. It has actually been a long, difficult journey for private stakeholders to finally come together to this end. Private stakeholders took every possible action available to eliminate IUU tuna fishing. This paper will focus on just a few of the most important private initiatives taken.

OPRT's private initiatives were solely targeted to IUU tuna longline fishing activities, and may not be applicable to the wider IUU fishing problem. However, there are many lessons to be learned, and these may contribute to the ongoing effort to combat other types of IUU fishing operations.

What is IUU tuna longline fishing?

In order to provide more in-depth understanding of the problems specific to IUU tuna longline fishing, some of the basic facts are outlined below:

a) A large-scale tuna longline fishing vessel is defined as a fishing vessel of over 24 meters in length, equipped with longline gears and a super-freezing capacity of minus 60 degrees

Celsius in order to keep the catch fresh. These vessels are highly mobile, and are able to operate in the Pacific, the Atlantic and the Indian Ocean in pursuit of tunas throughout the entire year. They are subject to the Positive List Scheme.

b) The motivation for IUU tuna longline fishing vessel operations is their ability to sell their catch to the Japanese sashimi market. The nature of the Japanese sashimi market is as follows:

   - First, high-quality tuna is consumed in fresh and raw form in the traditional Japanese dishes "sashimi" and "sushi."

   - Second, the Japanese tuna market demand is large and stable. About one third of the world's tunas catches are consumed in Japan, mainly as "sashimi" and "sushi".

   - Third, prices in Japan's tuna market are very high. Prices differ by species, but they are 10 to 30 times higher than in other markets, including the canned tuna market.

   - Fourth, Japan's tuna market is *the* international market. The number of countries exporting tuna to Japan has more than doubled over the last 15 years, and about 70 countries now export tuna to Japan.

Why was OPRT established?

OPRT was established on December 8, 2000 in Tokyo, Japan. The letter of intent for its establishment by the founding parties states that OPRT aims to contribute to the development of tuna fisheries in accordance with international and social responsibility, to promote the sustainable use of tuna resources through measures to reinforce the conservation and management of tuna, to foster healthy tuna markets, and to further international co-operation among fishermen.

The initial members were the tuna longline fishing industries in Japan and Chinese Taipei along with organisations of traders, distributors and consumers in Japan. Membership gradually grew to include like-minded tuna longline fishing industries in Korea, Indonesia, the Philippines, the Peoples Republic of China, and Ecuador. As of the end of March 2004, 1 460 large-scale tuna longline fishing vessels were registered with OPRT. This number includes almost all of the large-scale tuna longline fishing vessels around the world.

The initiative to establish OPRT originally came from the Japanese tuna fishing industry. The organisation's main goal is to eliminate IUU tuna longline fishing vessels. There was a clear motive for the industry to take such an initiative. The Japanese government had urged the industry to reduce the number of vessels in response to the United Nations FAO's International Plan of Action for the Management of Fishing Capacity, adopted in February 1999. The Plan stated that the world's tuna resources are being excessively exploited and indicated the need for urgent action to reduce the world's large-scale tuna longline fishing fleets by 20 to 30%. With financial support from the Japanese government, the Japanese industry scrapped 132 large-scale tuna longline fishing vessels, equivalent to 20% of its total fleet, in the expectation that other tuna longline fishing industries would also reduce their fleets. The goal was to stop the excessive exploitation of tuna and ensure the sustainability of tuna resources.

Given this development, the Japanese tuna fishing industry was greatly concerned by the fishing activities of flag-of-convenience tuna fishing vessels (also referred to as IUU vessels) that operate without adhering to international tuna fishery management measures. There were reportedly 250 such

vessels, and an analysis of trade statistics showed that they exported all of their catch to the Japanese market. The industry realised that the benefits to tuna resource sustainability through the reduction of its fleet would be nullified unless IUU tuna longline fishing activities were eliminated.

Since it was known that the effective source of IUU fishing was Chinese Taipei vessel owners who conducted IUU tuna longline fishing using Japanese second-hand tuna longline fishing vessels, the Japanese tuna industry proposed consultations with the tuna fishing industry of Chinese Taipei. These consultations continued for almost two years, culminating in a Joint Action Plan to eliminate IUU tuna fishing vessels. The plan consists of projects to scrap Japanese secondhand IUU tuna longline fishing vessels, and also to re-register Chinese Taipei built fishing vessels to the Chinese Taipei registry. It was necessary to find financial compensation for the vessels to be scrapped. With the support of the Japanese government, a compensation fund of JPY 3.2 billion (USD 30 million) was arranged by the Japanese and Chinese Taipei industries to implement the scrapping of these IUU tuna longline fishing vessels, and the OPRT was established to implement the scrapping project. Forty-three vessels were scrapped by OPRT during the 3-year project period, from 2001 to 2003.

Why did IUU tuna fishing vessel owners accept the scrapping of their vessels?

It was not easy to get IUU tuna fishing vessel owners to agree to scrap their vessels. The Japanese tuna fishing industry pointed out that the elimination of IUU tuna fishing vessels would eventually benefit both industries by ensuring sustainable tuna resources. This argument seemed to be partially understood, but it was not in itself successful.

A carrot and stick approach was necessary. The carrot was the compensation fund, and the stick was an anti-IUU tuna fishing vessel campaign. The level of compensation was the subject of lengthy negotiations between the two industries, but agreement on the scrapping project over a 3-year period was finally reached. During the consultations, the Japanese tuna fishing industry carried out an extensive, continuous campaign to raise public and government awareness of the problem of IUU tuna longline fishing, emphasising the fact that Japan is virtually the only market in the world for products from IUU tuna longline fishing operations. The industry asked the Japanese government and Diet Members to take appropriate measures to eliminate IUU tuna longline fishing vessels, emphasising that Japan is responsible for ensuring the sustainable tuna resources because it is not only a major tuna fishing nation but also one of the largest tuna consuming nations. The Japanese market was, in effect, providing the economic incentive for IUU tuna fishing activities. The industry therefore also asked importers, distributors, and the public to refrain from buying IUU tuna. In order to increase public awareness of the problem, meetings, seminars, TV interviews, etc. were conducted. Also, trade information on tuna caught by IUU tuna longline fishing vessels was continuously monitored.

The Japanese tuna industry also took the problem to the international community. The issue was brought before the International Coalition of Fisheries Associations (ICFA), a non-governmental organisation founded in 1988 with membership open to national fishery organisations. ICFA brings together leaders from the world's seafood industry to ensure the health of the private sector involved in commercial fisheries and to provide a united voice for presentation in international forums.

ICFA is actually another example of a private initiative that is working to combat IUU fishing. ICFA has been making strong efforts to support the elimination of IUU fishing through participation in relevant international forums, such as FAO's Committee on Fisheries. ICFA has distributed information which includes the problem of IUU fishing, and has adopted a resolution supporting OPRT's activities against IUU fishing. ICFA's other efforts to combat IUU fishing include educational activities through appeals on its website and press releases. Additionally, ICFA members have worked with their national governments to seek support on national and international levels to

fight against IUU fishing. An ICFA resolution passed at its meeting in 2003 calls upon the WTO to widen its consideration of the application of trade measures to encourage compliance with multilateral environmental arrangements, in particular regional fisheries management organisations, including the application of such measures to non-parties to these arrangements or agreements. It is obvious that unless these trade measures are widely applied, IUU fishing can escape this sanction simply by being associated with a flag government that does not belong to the relevant organisation. This matter therefore needs to be addressed and supported by governments in the WTO discussion.

Finally, the international community became aware of the IUU tuna longline fishing problem, and concern was expressed at various levels. Pressure on IUU tuna longline fishing vessel owners and Chinese Taipei increased, leading to an agreement to abandon IUU tuna longline fishing.

It is estimated that there are still about 25 IUU large-scale tuna longline fishing vessels, but they are reportedly no longer used as tuna fishing vessels because of their age.

Lessons from taking action

Having conducted such a campaign, it became apparent that the elimination of IUU fishing activities would not be possible simply through the efforts of tuna fishermen, but that it would be necessary to have the co-operation of all stakeholders. However, it was not easy to get the different sectors of stakeholders to understand and support OPRT's efforts to tackle IUU fishing. In reality, traders and distributors were somewhat reluctant to support the elimination of IUU tuna fishing because, in all honesty, they would be losing a profitable business when they could no longer purchase fish from flag-of convenience operations. Similarly, it was difficult for consumers to understand and support the initiative. They buy tuna based on quality and price, and are not aware of, or overly interested in, conservation and management issues.

This matter of different interests among sectors was also true within the producing sectors of different OPRT members. The main interest of many producers from countries other than Japan was to maintain their access to the lucrative Japanese tuna market. The point is that it was a difficult and lengthy process to convince producers from all the countries concerned to join OPRT and work together to promote responsible tuna fisheries.

We also learned that the activities of IUU tuna fishing vessels must be closely monitored in a timely manner. This was achieved by the careful monitoring and analysing of import data by OPRT. Since all the IUU tuna products were exported only to the Japanese market, the activities of each IUU tuna longline fishing vessel became transparent through the data and its analysis. It was found that IUU fishing vessels changed the names of vessels and changed registration countries in order to circumvent sanctions imposed by regional fishery management organisations like ICCAT.

In addition, IUU vessels transhipped their products to legally licensed vessels. This began when the Japanese government required importers to submit records of the fishing vessel's previous national registry in order to determine whether the vessel had operated as an IUU fishing vessel. These cases were also detected by the analysis of trade information. For example, several legally licensed vessels suddenly increased their exports by 3 to 4 times in one year. Practically, this was not possible, given the limited capacity of the fishing vessel. Through such findings, the urgent need to introduce the Positive List Scheme was recognised and supported by OPRT members. Action was taken to urge national governments and international management organisations to adopt such a scheme.

In fact, most Chinese Taipei tuna longline fishing operators had been operating both legitimate fishing vessels and IUU fishing vessels. The involvement of these Chinese Taipei fishing operators in

OPRT's private initiatives as OPRT members was highly effective in promoting the elimination of IUU tuna longline fishing. Chinese Taipei fishing vessel operators became aware of the need and the moral obligation to conduct fishing in a responsible manner, through direct communication on a private level, such as the case of consultations concerning the introduction of the Positive List Scheme.

Conclusion

Private initiatives play a very important role in the fight against illegal fishing but cannot, by themselves, be successful. Private initiatives must be part of a broad mosaic most of which is composed of government and international elements. By participating in private initiatives by OPRT, traders and dealers who had dealt with tuna harvested by IUU fishing were forced to change their business practices. Actions by the private sector cannot flourish unless they operate within a legal framework and international rules supported by governments.

It is also true that any single segment of private industry cannot be successful in dealing with IUU fishing. For example, initiatives by fishermen or vessel owners must be accompanied by initiatives involving buyers, traders, distributors, processors, as well as consumers. All sectors must work together. And in an increasingly globalised world, where the economies of many nations impact each other and where the industries of different nations often have close relations and connections, the private sectors of all nations involved must work together. This is especially true when dealing with highly migratory species such as tuna, which are fished in all of the world's oceans and on the high seas, and found in the markets of many countries.

While the private sector can do much to discourage IUU fishing, actions by the private sector cannot flourish unless they operate within a legal framework and in an atmosphere of opposition to IUU activities provided by international rules supported by governments. Otherwise, private initiatives can only be voluntary, and while there might be a place for voluntary action, it cannot be expected to be overly effective.

It is therefore extremely important that efforts continue at the international level to combat IUU fishing. This is indispensable if the private sector is to play its part. The FAO International Plan of Action and the actions taken by the international tuna management organisations are crucial to the success of the overall effort.

Ongoing private initiatives have contributed much to the elimination of IUU fishing in the case of tuna. As mentioned, these private initiatives started with tuna fishers who had suffered severe financial losses in their businesses, many of which had been built up over a number of years. This hard experience was the catalyst for their strong motivation to eliminate IUU tuna fishing vessels.

Future of OPRT

OPRT continues to monitor trade information to ensure that IUU tuna fishing activities do not reappear. OPRT will also extend the scope of its work ensuring responsible tuna fisheries by addressing other issues, such as the control of fishing capacity of large-scale tuna longline fishing vessels, the incidental catch of non-target species such as sea birds, sharks and sea turtles, and the promotion of responsible purse seine fisheries. OPRT is now particularly concerned with the rapid increase of large-scale purse seiners and their excessive fishing pressure on tuna resources. This increase appears to have resulted from the termination of IUU tuna longline fishing activities. Vessel construction funds seemed to turn to the construction of large-scale purse seiners. The effectiveness of OPRTs past efforts to ensure the sustainability of tuna resources may be nullified by the uncontrolled

expansion of large scale purse seiners. In order to ensure the sustainability of tuna resources, the problem of the rapid expansion of large-scale purse seiners needs to be addressed. OPRT hopes that the European Union and the United States will take the initiative in this matter, as the major markets for purse seiners. Our experience in dealing with IUU tuna longline fishing activities shows that monitoring trade information is an important measure.

It is a difficult task to eliminate IUU fishing. It requires unrelenting efforts from a wide range of players, but if everyone concerned works together in a co-operative manner, we will ultimately be successful.

CHAPTER 23

PROMOTING CORPORATE RESPONSIBILITY: THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

Kathryn Gordon, OECD

The Workshop organisers asked me to present the OECD's core corporate responsibility instrument – the OECD Guidelines for Multinational Enterprises. These Guidelines are a comprehensive code of conduct for international business with a distinctive, government-backed follow-up mechanism. The OECD Investment Committee has oversight responsibility for this instrument, but it often works in partnership with other policy communities. It would therefore be useful to reflect on a possible role for the OECD Guidelines in the broader approach to controlling IUU fishing.

It would seem that some of the corporate responsibility issues currently being dealt with under the Guidelines resemble those encountered in IUU fishing. For example, the Guidelines are currently being used to look at illegal or unethical exploitation of natural resources in the Democratic Republic of Congo, where the OECD Investment Committee is following up on a request for co-operation made by the UN Security Council as part of its peace-making efforts in that troubled country.

In reviewing some of the papers prepared for this workshop, I noted at least four common features linking the two resource-exploitation problems:

i) Significant shortcomings in transparency, disclosure and reporting. When Upton and Vitalis state that the IUU fish harvest is an "unknown percentage of an ill-defined resource" they could just as easily have been talking about many forms of mineral exploitation in the DRC. I also note that the many product-tracking and reporting schemes in both sectors – fisheries and, for example, diamonds – have shown both their potential and their practical limitations in their market and policy contexts.

ii) Problems straddling many areas of corporate responsibility. In both sectors, problems of corporate responsibility manifest themselves in multiple and inter-connected ways. Illegal exploitation of minerals in the DRC is associated with a whole host of problems – corruption, environmental mismanagement, money laundering, non-compliance with laws of all sorts, serious violations of human rights, including such basic labour standards as freedom from forced labour and reasonable guarantees of occupational health and safety. For the fisheries sector this multiplicity of CR problems is shown quite clearly in Jon Whitlow's paper on the

social dimension of IUU fishing, while environmental, corruption and other compliance problems are described in some of the other papers prepared for this workshop.

iii) Interaction between corporate irresponsibility and government irresponsibility. This is a long-standing theme of the Investment Committee's work on corporate responsibility and I see that it is also relevant for IUU fishing. The Investment Committee has seen many instances where policy environments are not only weak, but deliberately weak – weak policy frameworks reflect not only a genuine lack of capacity in some countries, but also deliberate opportunism, guile and overt wrongdoing on the part of some public officials. This inseparable relationship between wrongdoing in the public and private sectors shows up clearly in David Bolton's paper on dealing with bad actors of ocean fisheries.

iv) Comparative ineffectiveness of formal law enforcement and deterrence in coming to grips with the wrongdoing. This is shown *inter alia* in the Agnew-Barnes paper on economic aspects and drivers of IUU fishing. Their paper's description of complex company ownership structures and laundering of products could equally apply to illegal exploitation of mineral resources in the DRC. I should stress that while deterrence is not especially effective – in preventing either illegal exploitation of Africa's mineral wealth or IUU fishing – it nevertheless has an essential role to play in a durable solution to both problems.

All in all, then, what we have before us is a pretty dreary picture – there are enormous and intractable problems of illegal resource exploitation. The purpose of this presentation is to suggest that the Workshop might want to consider what contribution, if any, the OECD Guidelines could make to the broader strategy for fighting IUU fishing, just as the UN Security Council has asked the Guidelines institutions to assist it in looking into illegal exploitation of natural resources in the DRC.

First let me tell you a bit more about the instrument. The OECD Guidelines for Multinational Enterprises express the shared views of 38 adhering governments on ethical business conduct.

Key features of the Guidelines are[1]:

- They contain voluntary recommendations to multinational enterprises (MNEs) in such areas as human rights, labour and environmental standards, corporate governance, disclosure of information and transparency, anti-corruption, taxation, and consumer protection. Thus, they provide a means of looking at the wide range of corporate responsibility issues presented by IUU fishing.

- While the observance of the Guidelines is voluntary for companies, the 38 adhering governments sign a binding commitment to promote them among multinational enterprises operating in or from their territories. Thus, the Guidelines embody a unique combination of voluntary and binding elements.

- Since the Guidelines are the only comprehensive corporate responsibility instrument backed up by an inter-governmental implementation process, their comparative advantage lies in dealing with issues located at the intersection of corporate responsibility and government responsibility. I would suggest that IUU fishing lies precisely at this intersection – it involves both business and government actors, a very challenging enforcement environment and

[1] For fuller information on the Guidelines, see www.oecd.org/daf/investment/guidelines/.

somewhat patchy policy framework. This might well be a situation in which to test government use of the Guidelines to complement "harder" law enforcement efforts.

- The values expressed in the Guidelines are so fundamental to the OECD that countries are required to sign up to them when they become OECD members. In some sense, the Guidelines help to define what it means to be a member of the OECD. The OECD Investment Committee is the official guardian of the instrument, but other committees have worked or plan to help the Investment Committee explore what the Guidelines mean for companies operating in their policy area. Recent examples include the Environment, Agriculture, Development Assistance and the Labour and Social Affairs Committees. There would seem to be no reason that the Fisheries Committee would not do the same thing. In this way, the Fisheries Committee could contribute to a broader, OECD-wide exploration of the meaning of responsible business conduct in today's globalizing world.

- The most visible sign of adhering governments' commitment to the Guidelines is their participation in the instrument's distinctive follow-up mechanisms. These include the operations of so-called National Contact Points (NCPs), which are government offices charged with promoting the Guidelines and handling enquiries in the national context. The fisheries policy community is in a good position to engage with the National Contact Points on IUU fishing – indeed, flags of convenience and occupational health and safety on the high seas has already come to NCPs attention in a number of contexts. One role of the fisheries community could be to ensure that the important issue of IUU is given the attention it deserves.

The purpose of Guidelines-related activities is to encourage companies to act responsibly. The Guidelines implementation procedures create a number of channels for doing this. We have seen that in dealing with the small mining companies active in the Democratic Republic of Congo, the National Contact Points have formally engaged with companies that had become accustomed to the lack of monitoring and accountability that comes from operating in one of the least transparent countries in the world. These companies have seen that they are indeed being watched – the Guidelines provide one of the few means by which governments can impress upon these companies that they too are subject to external scrutiny. While this is probably a small thing in relation to the magnitude of the DRC's problems, it is nevertheless an important step in the right direction. If the Fisheries Committee is interested in working with the Guidelines institutions the exact modalities of such co-operation would have to be explored.

The goal of the Guidelines is to help governments, business, labour unions and NGOs to align private business initiatives with public policy goals so that business works in greater harmony with surrounding societies. I think that Mr. Hiroya Sano got the positioning of this sort of co-operation right - he stated that "Private initiatives play a very important role in the fight against illegal fishing but cannot, by themselves, be successful. Private initiatives must be part of a broad mosaic most of which is composed of government and international elements. Actions by the private sector cannot flourish unless they operate within a legal framework and international rules supported by governments." I would invite the members of this Workshop to consider whether it is not worth finding ways for governments and other actors to engage with companies to try to find ways to make the fight against IUU fishing more effective.

CHAPTER 24

WHAT ROLE FOR RFMOS?

Denzil G.M. Miller of CCAMLR, Tasmania, Australia [1]

This presentation focuses on the role that Regional Fishing Management Organisations (RFMOs) could be called on to play in global efforts to combat Illegal, Unreported and Unregulated (IUU) fishing. The key elements entail the need to improve operational efficiency and to mobilise political will.

Two possible approaches open to RFMOs are identified:

a) Ignore IUU fishing until stocks become self-regulating (*i.e.* fishing is no longer sustainable); or

b) Improve current, and develop new, initiatives to combat IUU fishing.

Option a) is dismissed since it is contrary to current "best practice" and is certainly not sanctioned by international law. Option b) is examined in more detail.

Effective coastal State enforcement is seen as essential to option (b). However, it is relatively expensive and generally not fully applicable to high seas areas, given the nature of these fisheries and their geographic extent. A series of specific considerations are elaborated in Table 7.1, (see Chapter 7) and an additional five are also discussed. These five considerations relate to potential synergies, and/or contradictions, concerning trade measures, port-flag State modalities, institutional competencies and the role of related measures.

Finally, the elements of "political will" necessary to combat IUU fishing are discussed and it is suggested that there may be merit in considering development of an international fisheries policing organisation (FISHPOL), following the precedent of INTERPOL and building on the current Monitoring Control and Surveillance Network (MCS Network).

[1] (email: denzil@ccamlr.org).Many of the points raised in this summary are discussed in more detail in Chapter 7.

Box 24.1: Some Issues to be Addressed in Improving RFMO Enforcement

Resolve Jurisdictional Issues [Flag/Coastal State]
[Avoid "Creeping" Expansion of Coastal State Rights]

Operationalize Key *LOSC* Provisions
[Especially Articles 116-119]

Improve Institutional Enforcement & Co-operation

Improve Links between Vessels & Flags [FOC]

Improve Compatibility between National/International Measures

Elaborate "Nationals" [Beneficiaries] Responsibilities/Obligations
[*e.g.* Following *LOSC* 116-119 & *UNFSA* Article 10.(l)]

Standardise Sanctions
[*e.g.* As per *SADC Fisheries Protocol* Article 8.4.(b)]

Address *NCP* Role in *RFMOs* [*UNFSA* Article 17]

Promote Cult of Responsible Fishing Activity
[As per *FAO Code of Conduct*]

Implement FAO IPOA-IUU

Build Regional/National Enforcement Capacity
[As per *UNFSA Articles* 24-26]

CHAPTER 25

THE DEVELOPMENT AND ENFORCEMENT OF NATIONAL PLANS OF ACTION: THE SPANISH CASE

Ignacio Escobar, Secretaria General de Pesca Maritima, Spain

Introduction

In response to the International Plan of Action (IPOA-IUU), adopted by the International Community in FAO in 2001, Spain developed its National Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing (NPOA) in November 2002.

Although the national plan of action only dates from 2002, Spain has been implementing an IUU control scheme since the year 2000, so we have accumulated four years' experience in dealing with different cases of IUU fishing.

Combating IUU fishing is a complex task that requires a global approach, an idea which was borne in mind by Spain when developing its national plan of action. Indeed, our plan includes measures concerning state responsibilities, flag State responsibilities, coastal state measures, port State measures, internationally agreed market-related measures, scientific research, co-operation with regional fisheries management organisations, and the special requirements of developing countries.

Legal and administrative instruments

Spain's main body of legislation dealing with fishing activities is Act 3/2001 on Marine Fisheries, which is applied to all national vessels wherever they are fishing, and to third-country vessels operating in waters under Spanish sovereignty or jurisdiction. It comprises a system of offences and penalties in the area of marine fishing (both within the EEZ and on the high seas), management of the fishing sector and trade of fishing products. Port State control is considered as the basic and essential tool to deal with IUU fishing.

Other legal instruments to combat IUU fishing are as follows:

- Royal Decree 1797/1999, on the monitoring of fishing operations by vessels of third Countries in waters under Spanish sovereignty or jurisdiction.
- Royal Decree 1134/2002, on the application of penalties to Spanish nationals employed on flag-of-convenience vessels.
- Royal Decree 176/2003, regulating control and inspection of fishing activities.

- Ministerial Order of 12 November 1988, concerning a satellite-based vessel monitoring system.
- Royal Decree 2287/1998, which defines the criteria and conditions of interventions with a structural purpose in the fisheries sector.
- Royal Decree 601/1999, regulating the Official Register of Fisheries Companies in Third Countries.
- Royal Decree 3448/2000, with the basic regulations for structural support in the fisheries sector.

Enforcement

Spain strongly believes that one of the most efficient ways to combat IUU fishing is through cutting off access to markets. This is why Spain has concentrated its efforts in this area, which implies stringent port and customs controls.

Through the European Community, Spain has fostered the adoption of binding instruments in the main RFMOs concerning monitoring, control and surveillance schemes, as well as catch documentation schemes and countermeasures against countries or territories that engage in IUU fishing or do not exercise control over their fleets. In any case, the adoption of the so-called "positive" lists of vessels and bluefin, bigeye, swordfish and toothfish statistical documents have proved to be an effective tool in combating IUU fishing. The landing, transhipment and import of fish products from third countries are subject to other systematic controls. Both Customs and Fisheries Control must grant dual approval before the entry of products is permitted.

Identification of vessels has emerged as another major issue. Foreign vessels coming into Spanish ports are subject to being photographed, and copies of hold plans are made.

Another difficult point is the ownership of vessels. Spain has started a project aimed at determining the actual links between the vessel owners. A team of economists, lawyers and fisheries technicians has been created, but there is a need for increased co-operation among interested countries.

Vessel laundering is another way to avoid controls, and this is why Spain has adopted regulations to prevent flag-hopping. It is extremely difficult to determine the actual ownership of a vessel when it is covered by off-shore companies in tax-havens.

Following the adoption of Royal Decree 1134/2002 on the application of penalties to Spanish nationals employed on flag-of-convenience vessels, a number of actions have been taken, especially in the field of co-operation with arresting States. It must, however, be pointed out that this legal instrument has a subsidiary nature, and is only applicable in such cases where the flag country or another country involved has not punished the infringing vessels.

One of the main obstacles Spain has encountered when trying to implement this Decree is the lack of official co-operation with both the flag State and the country that detained the IUU vessel. It is very difficult to start any punitive procedures without having official supporting evidence. Although considerable information on IUU activities or specific vessels can be found in press articles or NGO documentation, it does not guarantee success in a court of law or administrative procedure.

In any case, the most important aspect of combating IUU fishing is whether or not there is the political will and the subsequent allocation of adequate human and financial means to tackle the issue.

Co-operation with other countries has also proved to be an excellent tool.

CHAPTER 26

OECD INTRUMENTS AND IUU FISHING[1]

Ursula A. Wynhoven, Consultant

Introduction and Executive Summary

The context for this paper is the problem of illegal, unregulated and unreported (IUU) fishing, its impact on world fisheries, and the associated serious economic, environmental and social consequences. The number and complexity of the factors driving IUU activities demands a multidisciplinary and multifaceted response.[2] One avenue of investigation is to examine the instruments and follow-up mechanisms that already exist to determine their potential contribution to a solution. One category of existing instruments, and the focus of this paper, is the OECD's investment instruments.

This paper focuses on the OECD's investment instruments with a view to assessing their utility in combating IUU fishing. The instruments are: the OECD Codes on Liberalisation, the OECD Declaration and Decisions on International Investment and Multinational Enterprises (including the OECD Guidelines for Multinational Enterprises), and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

The paper presents a brief overview of the nature and scope of each instrument and an analysis of how the instrument could be used in a way that could contribute to the fight against IUU fishing and/or how the instrument could present an obstacle. Though none of them explicitly address the problem of IUU fishing, their potential contribution is significant. Some of the more promising possibilities are:

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1 This paper was submitted as a background document to the workshop. The author wishes to thank Kathryn Gordon and Eva Thiel, both of the OECD's Directorate for Financial, Fiscal and Enterprise Affairs, for their guidance on the accuracy of facts in this paper, especially the sections on the OECD Guidelines for Multinational Enterprises and the OECD Codes of Liberalisation. The opinions expressed, and any mistakes, are the author's own.

2 A description and analysis of the economic and social drivers of IUU, including market control, price distortion, effect of the global economy and world fishing opportunities, international regulations, fishing agreements, re-flagging, national fisheries management policy (including subsidies, excess capacity and surveillance activities) is contained D.J. Agnew and C.T. Barnes, "The Economic and Social Effects of IUU/FOC Fishing," February 2003.

- Using the OECD Guidelines on Multinational Enterprises – a set of recommendations on good corporate behaviour by 38 governments to the multinational enterprises operating in or from their territories – to start a dialogue about corporate responsibility for IUU fishing and/or to raise awareness generally of IUU activities as a corporate responsibility problem. Specific recommendations in the Guidelines could be used to encourage enterprises to, among other things, respect the environment, disclose more information about their activities and corporate structure, provide protection for whistleblowers, apply pressure to their suppliers and other business partners to act more responsibly, not engage in bribery, refrain from seeking or accepting exemptions not contemplated in relevant statutory or regulatory frameworks, use fair marketing and advertising practices etc.

- Bringing to the attention of the relevant adhering country National Contact Point (NCP) situations of alleged corporate failure to observe the OECD Guidelines on Multinational Enterprises in connection with IUU and/or related activities. This would then invoke a set of procedures – described in Box 2 below – pursuant to which the NCP would deal with the situation.

- Referencing the OECD Declaration and Decisions on International Investment and Multinational Enterprises in encouraging adhering countries to address the impact of investment incentives and disincentives on the drivers of IUU.

- Prosecuting, under national legislation implementing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, persons who have bribed a foreign public official in connection with IUU or related activities. The Convention makes it a crime to offer, promise or give a bribe to a foreign public official in order to obtain or retain international business deals.

- Using the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and domestic legislation implementing it, as a demonstration of the legal possibility of holding a country's own nationals responsible for their conduct engaged in abroad.

- Using peer review mechanisms – of which there are many examples currently in use across the OECD – as a model for devising a peer review mechanism for country efforts to deal with IUU fishing.

However, the non-discrimination and national treatment principles embodied in the OECD's investment instruments may also present some potential obstacles:

- National treatment is the commitment by a country to treat enterprises operating on its territory, but controlled by the national of another country, no less favourably than domestic enterprises in similar situations. This may mean that measures aimed at curbing IUU fishing should not single out foreign-controlled enterprises or vessels (either in general or the enterprises or vessels of particular countries) for less favourable treatment than is accorded national enterprises or vessels in gaining access to the country's fisheries. This is despite the fact that the enterprises and vessels flying flags of particular countries may be statistically more likely to be involved in IUU activities.

- The OECD Codes of Liberalisation require OECD countries to move progressively towards open markets and liberalisation, whereas some measures aimed at discouraging IUU fishing and related activities could, at least theoretically, be construed as moving in the opposite

direction. Examples of such measures might be a law prohibiting nationals from registering their ships in another country, and boycotts or blacklists of foreign vessels or the entities owning them that cause Foreign Service providers difficulties in entering the market of the country imposing the sanctions.

These possible contributions and obstacles are discussed in more detail below. The paper concludes with some suggested future actions that the OECD Fisheries Committee and others may wish to take.

The OECD's investment instruments

The OECD has a number of legal instruments on international investment and trade in services.[3] They are:

- The OECD Codes of Liberalisation;
- The Declaration and Decisions on International Investment and Multinational Enterprises (which incorporates the OECD Guidelines on Multinational Enterprises);
- The Convention on Combating Bribery of Foreign Officials in International Business Transactions.

Together, these instruments establish the "rules of the game" for adhering countries and multinational enterprises based in or operating in their countries for capital movements, international investment and trade in services. These are instruments to which all member countries of the OECD must adhere. In addition, some of these instruments are open for adherence by non-member countries.

None of the instruments discussed in this paper expressly deal with IUU fishing. Nevertheless, they can make a contribution in the fight against it. This part of the paper explores the nature and scope of each instrument and presents an analysis of how the instrument could be used in this context and/or possible obstacles to be overcome. Each instrument is introduced with a brief overview explaining what it is, to whom it applies and how it is implemented. A copy of each of the instruments is included in the appendices.

OECD Codes of Liberalisation

What they are

The Codes of Liberalisation is a collective term for two separate instruments: the Code of Liberalisation of Capital Movements; and the Code of Liberalisation of Current Invisible Operations.

[3] Another OECD legal instrument on international investment was negotiated between 1995 and 1998. However, negotiations were abandoned in December 1998 after a six month hiatus, during which no official meetings of negotiators took place. The instrument, which was called the draft Multilateral Agreement on Investment (MAI), was to be a "free standing international treaty, open to all OECD Members and the European Communities, and to accession by non-OECD Member Countries" and its proposed objective was to "provide a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures." A key reason for the cessation of negotiations was that public interest groups were concerned about the impact of globalization on labour and human rights, the environment and consumer and development issues. See OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users' Guide, OECD, April 2003, p. 13.

They prescribe progressive, non-discriminatory liberalisation of capital movements, the right of establishment and current invisible transactions (mainly services).[4] Both were formally adopted in 1961 and have been revised and expanded in scope a number of times. Though not a treaty or an international agreement, they are, nevertheless, legally binding rules of behaviour for the governments of OECD countries.

The Codes are very similar, sharing many provisions in common. The main difference is that one Code concerns capital movements and the other invisible transactions and transfers. The structure of each Code is as follows: In Article 1 members commit to eliminating, between one another, restrictions on capital and current account operations. The remainder of each Code sets out the framework for working towards this objective. Each Code has two principal annexes: a list of economic activities covered, and a list of countries' current reservations.

In the Code of Liberalisation of Capital Movements, 16 categories of economic activities are covered, including direct investment, liquidation of direct investment, credits directly linked with international transactions or with the rendering of international services, and a large number of other short- and long-term capital movements.[5] Both capital inflows and capital outflows are covered, as are actions initiated by non-residents in the country concerned and actions abroad initiated by non-residents.[6] For example, it addresses direct investment – including creating, acquiring or participating in a new or existing business – both in the country concerned by non-residents, or abroad by residents.

The coverage of the Code of Liberalisation of Current Invisible Operations is more limited. It is concerned with liberalisation of cross-border trade in services, namely, the supply of services to residents by non-resident service-providers and *vice versa*. A variety of sectors is covered, including banking and financial services, insurance, professional services, maritime[7] and road transport, and travel and tourism.

The kinds of restrictions that members are expected to eliminate progressively are laws, decrees, regulations, policies and practices taken by authorities that may restrict the conclusion or execution of economic activities covered by the Codes.[8] Non-discrimination is a key principle of the Codes: OECD members are expected to grant the benefits of open markets to residents of all other OECD member countries.[9] A measure is a restriction if it discriminates between residents and non-residents. Although

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4 The Codes are actually Decisions of the OECD Council, which are legally binding on OECD member governments. See OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users' Guide, April 2003, p. 6.

5 Annex A, OECD Code of Liberalisation of Capital Movements.

6 OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users' Guide, OECD April 2003, p. 22.

7 The Code of Liberalisation of Current Invisible Operations covers maritime freights (including chartering, harbour expenses, disbursements for fishing vessels, etc.), maritime transport (including bunkering and provisioning, maintenance, repairs, expenses for crews, etc) and other items that have a direct or indirect bearing on international maritime transport. It is intended to give residents of one member country the unrestricted opportunity to avail themselves of, and pay for, all services in connection with international maritime transport that are offered by residents of any other member country. See Notes to Annex A of the Code of Liberalisation of Current Invisible Operations, Note 1.

8 OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users' Guide, OECD April 2003, p. 17.

9 Article 9 of the Codes.

"resident" is not synonymous with "national," nationality requirements are generally considered incompatible with the Codes.[10] Non-discrimination is not to be confused with preferential treatment, which non-residents are not entitled to.[11] Non-residents are also subject to the same general regulations as residents.[12] The treatment of residents and non-residents need not be identical as long as it is equivalent.[13] Reservations are generally not permitted to the non-discrimination principle.[14]

A copy of the Codes can be found in Appendices 1 and 2 respectively.

To whom they apply

The Codes create rights and obligations for OECD member countries only.[15] However, members have agreed to use their best offices to extend the benefits of liberalisation to all members of the IMF.[16] Moreover, the adoption of the General Agreement on Trade in Services (GATS) has meant that a number of the economic activities covered by the Codes, especially establishment and cross-border trade in services, are now also subject to the liberalisation obligations in the GATS.[17] The result is that where OECD members have committed themselves to non-discrimination between GATS members, liberalisation benefits under the Codes overlapping with those in the GATS are also to be extended to all GATS signatories.[18]

How they are implemented

The Codes ask OECD member countries to implement their obligations through necessary measures at the national level. Non-conforming measures are required to be listed in country reservations lodged under the Codes, and members are expected to progress at their own pace towards open markets, that is, the full abolition of restrictions.

Further implementation or follow-up occurs through policy reviews and country examinations, which rely on peer pressure to encourage unilateral liberalisation. These take place in the context of the OECD Committee on Capital Movements and Invisible Transactions (CMIT), which is the forum where member countries meet to discuss application and implementation of the Codes. There are no direct sanctions involved in the compliance review process. Nevertheless, peer review and peer

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10 OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users' Guide, OECD April 2003, p. 18.

11 OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users' Guide, OECD April 2003, p. 18.

12 *Ibid* at 22.

13 *Ibid* at 18.

14 Note, however, that Article 10 provides (paraphrasing) that Members that are part of a special customs or monetary system, such as the European Community, are permitted to liberalise more rapidly or widely among themselves, or, in other words, to maintain more restrictions in relation to other members that are not in their special customs or monetary system

15 In addition, the entities subject to the liberalisation obligation are government authorities, not private entities. *Ibid.* at 16.

16 Article 1(d) of the Codes.

17 OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users' Guide, OECD April 2003.

18 *Idem.*

pressure in a multilateral setting have provided strong incentives for authorities to undertake policy adjustments through "benchmarking" regulations and administrative procedures against those adopted and enforced by peer members.[19]

Neither individuals nor enterprises can directly invoke rights to invest abroad, move funds or provide cross-border services under the Codes. Their complaints can only be raised through their own (OECD) governments, which could then raise a case under the Codes with the CMIT.

How they could be used to tackle IUU fishing

The Codes are aimed at liberalisation – in the sense of removing unnecessary barriers to the free circulation of capital and services. As such, it is difficult to see what contribution they could make in the fight against IUU fishing, which seems to need more restrictions rather than less. For this reason, the Codes could actually present an obstacle in searching for new ways to deal with IUU fishing insofar as they have the potential to restrict the ability of a country to take certain measures to deter IUU fishing and related activities. However, most, perhaps all, of these obstacles could be avoided if law makers consult with their international investment colleagues to ensure that the proposed measures will not contravene the country's liberalisation commitments.

Peer reviews that are conducted as part of the Codes implementation process and/or elsewhere at the OECD could also present an interesting model for dealing with IUU fishing. Having used them since its inception, the OECD has developed a comparative advantage in conducting peer reviews – the assessment of the policies and performance of a country by other countries with a view to improving the first country's policies and helping it comply with established standards and principles.[20] A recent analysis of peer review processes at the OECD observed that there was no other international organisation in which the practice of peer review has been so extensively developed.[21] The analysis also articulated a (best practice) model based on the different peer review mechanisms in operation across the OECD. This model and the OECD's expertise in this area could perhaps be used to help construct a peer review process for country efforts to deal with IUU fishing.

Potential limitations to their use in combating IUU fishing

At least in theory, the Codes have the potential to constrain a member country's ability to introduce and maintain measures to deal with IUU fishing, especially where those measures distinguish between residents and non-residents or between nationals and foreigners. For example, a country's efforts aimed at actively discouraging insurance, banking, and shipping industries and other related sectors from providing products and services to vessels and companies from certain flag of convenience countries, closing ports to them or refusing to grant them licences and approvals on a blanket basis because of their flag, could be inconsistent with its obligations under the Codes to progressively liberalise. Similarly, measures aimed at restricting their own residents from registering their fishing vessels in other states or being involved in the fishing industry in other states could also implicate the Codes. In practical terms, however, the impact of the Codes on measures designed to tackle IUU fishing may be minimal because of the way concepts in the Codes have been interpreted, exceptions in the Codes themselves, and reservations that countries have lodged.

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19 "Successful Capital Movements Liberalisation: A Question of Governance – Recent OECD Experience" in *International Investment Perspectives*, No. 1 2002, p. 118.

20 Peer Review: A Tool for Co-operation and Change – An Analysis of an OECD Working Method, OECD, 2003 (SG/LEG(2002)1).

21 Ibid at 7.

The coverage of the Codes and the way they have been interpreted. Measures aimed at curbing IUU fishing and related activities will not necessarily fall foul of the Codes. For example, the Codes do not cover domestic transactions. Thus, if there is no international element, in the sense of involving residents of more than one OECD country, the Codes will not apply. As already described, the Codes also only address certain kinds of international transactions. If an anti-IUU fishing measure has no impact on one of these transactions, the Codes will not be relevant. In addition, if the measure does not discriminate it will not be inconsistent with the obligation of non-discrimination.[22] For example, encouraging service providers not to maintain business relations that they may have with vessels identified as engaging in IUU fishing does not discriminate and would be unlikely to contradict liberalisation obligations under the Codes.

Notwithstanding the potential for licensing requirements and other domestic regulations to affect operations under both Codes, the CMIT has generally considered that such measures do not constitute restrictions under the Codes as long as they are applied in a non-discriminatory manner.[23] This means that governments can be relatively confident that non-discriminatory licensing requirements and domestic regulations can be used in dealing with IUU and related activities without violating their obligations under the Codes. The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing also recognises the importance of non-discrimination, providing that "The IPOA should be developed and applied without discrimination in form or in fact against any State or its fishing vessels."[24]

Liberalisation obligations do not generally apply to subsidies or the conditions attached to them, or the levying of taxes, duties and other charges. However, if they have the effect of frustrating liberalisation, suggestions may be made to encourage their removal or modification.[25]

Exceptions in the Codes. The Codes also have a number of exceptions built in that preserve for countries a degree of latitude in taking actions that might otherwise fall within the scope of the Codes. There are exceptions for action that the member considers necessary for the maintenance of public order or the protection of public health, morals and safety; the protection of its essential security interests; and the fulfilment of its obligations relating to international peace and security.[26] These exceptions allow members to introduce, reintroduce or maintain restrictions that are not covered by

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22 The importance of non-discrimination is also emphasised in the European Commission's Community action plan for the eradication of illegal, unreported and unregulated fishing, 28 May 2002.

23 OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users' Guide, OECD, April 2003, p. 17. Article 16 of the Codes is concerned with situations where domestic regulations do not discriminate directly (*i.e.* on the face of the regulation), but nevertheless have an unreasonable discriminatory effect. In such situations, an affected member country can refer the situation to the OECD, which will make a determination as to whether the regulation does indeed have the effect of frustrating its measures of liberalisation and, if so, will make suggestions about removing or modifying it. An example of a regulation that had a discriminatory effect on or prejudiced foreigners would be any regulation that was much more difficult for foreigners to comply with than nationals.

24 See 9.6 Non-discrimination.

25 OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users' Guide, OECD, April 2003, p. 46.

26 Article 3 of the Codes.

reservations to the Code and to exempt them from the principle of progressive liberalisation.[27] More comfort would be provided, though, if there was also an exception for measures protecting the environment.[28] Another exception concerns obligations in existing multilateral international agreements.[29] However, this exception does not apply to obligations in agreements concluded after the adoption of the Codes.[30] Yet another important exception concerns law enforcement, specifically, the powers of members to verify the authenticity of transactions and transfers and to take any measures required to prevent the evasion of their laws or regulations.[31] A note by the Chairman of the Negotiating Group on the Multilateral Agreement on Investment (MAI) concluded that this exception presumably includes laws and regulations concerning the environment.[32] Members that are part of a special customs or monetary system, such as the European Community, are also permitted to liberalise more rapidly or widely among themselves, or, in other words, to maintain more restrictions in relation to other members that are not in their special customs or monetary system.[33]

Reservations to the Codes. By lodging a reservation, a member retains the right to maintain restrictions, as specific in the reservation, on the economic activity concerned.[34] Many OECD countries have reserved to themselves the right and power to regulate such things as ownership or registration of their flag vessels by non-residents,[35] and the ownership of a business engaged in commercial fishing or investment in fishing and/or primary fish processing by non-residents.[36] This means that the countries concerned would not be violating their obligations under the Codes if they maintain restrictions that are consistent with these reservations. Table 26.1 sets out some of these reservations.[37] There are, however, almost no reservations concerning outward direct investment, that

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27 OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users' Guide, OECD April 2003, p. 24. Nevertheless, in recent years, members have been encouraged to lodge reservations when introducing restrictions for national security concerns. Idem.

28 Note that even the General Agreement on Tariffs and Trade has an exception for measures "necessary to protect human, animal, or plant life or health" (Article XX(b)). This provision has attracted a lot of controversy because of its narrow scope/it has been interpreted narrowly. For example, a United States embargo on tuna products was ruled impermissible notwithstanding its stated aim was to protect dolphins. See GATT Dispute Settlement Panel Report on United States Restrictions on Impacts of Tuna, Aug. 16, 1991, 30 I.L.M. 1594 (1991) and June 16, 1994, 33 I.L.M. 839 (1994).

29 Article 4 of the Codes.

30 OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users' Guide, OECD April 2003, p. 25.

31 Article 5 of the Codes.

32 MAI and the Environment, Note by the Chairman, Negotiating Group on the Multilateral Agreement on Investment (MAI), 9 October 1996 (DAFFE/MAI(96)30).

33 Article 10 of the Codes.

34 The CMIT has taken special pains to ensure that the language of each reservation is as specific and narrow as possible so as to promote transparency and discourage backwards sliding.

35 See, for example, the reservations lodged by Australia, Austria, Belgium, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Netherlands, New Zealand, Norway, Poland, Portugal, Sweden, Switzerland, and the United Kingdom to the OECD Code of Liberalisation of Capital Movements (Annex B).

36 See, for example, the reservation lodged by Canada, Denmark, Iceland, Japan, Korea, Mexico, New Zealand, Norway and Sweden to the OECD Code of Liberalisation of Capital Movements (Annex B).

37 Table 26.1 shows only those reservations that relate to fishing, shipping and related activities.

is, abroad by residents.[38] In other words, restrictions on outward direct investment by residents will generally be inconsistent with the Codes and not allowed. In certain limited circumstances, it is possible to introduce new reservations.[39] However, even where it is possible to do so, lodging a reservation entails providing the reasons for doing so and submitting to an initial examination as well as subsequent periodic examinations.[40] Part of these examinations will involve the application of strong peer pressure to encourage the country concerned to justify its reservations, to narrow them, to look for other non-restrictive ways of achieving the same (legitimate) objectives, and to move progressively towards eliminating them. Adding, limiting or withdrawing a reservation requires a decision of the OECD Council.[41]

Declaration and decisions on international investment and multinational enterprises

What they are

The Declaration on International Investment and Multinational Enterprises (the "Declaration") is a policy commitment to improve the investment climate, encourage the positive contribution multinational enterprises can make to economic and social progress, and minimise and resolve difficulties that may arise from their operations. The Declaration is comprised of four elements, each of which is supported by a Decision of the OECD Council on follow-up procedures:

- The Guidelines for Multinational Enterprises, which are a set of recommendations by governments to multinational enterprises on responsible corporate conduct;

- National Treatment requiring that member countries accord to foreign-controlled enterprises on their territories no less favourable treatment than that accorded in like situations to domestic enterprises;

- Conflicting requirements obliging members to co-operate so as to avoid or minimise the imposition of conflicting requirements on multinational enterprises;

- International investment incentives and disincentives in relation to which members recognise the need to give due weight to the interest of members affected by laws and practices in this field and endeavour to make measures as transparent as possible.

The second, third and fourth elements are dealt with in this section. The first – the OECD Guidelines for Multinational Enterprises –is considered separately later in this paper because of its special focus on corporate responsibility – which is of key importance in the discussion of ways to tackle IUU activities.

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38 A notable exception appears to be Japan, which maintains an exception concerning direct investment abroad by residents applying only to investment in an enterprise engaged in fishing regulated by international treaties to which Japan is a party or fishing operations coming under the Japanese Fisheries Law.

39 The circumstances under which a new reservation can be lodged are set out in Article 2 of the Codes.

40 OECD Codes of Liberalisation of Capital Movements and Current Invisible Operations: Users' Guide, OECD April 2003, p. 23.

41 *Idem.*

Table 26.1. Examples of Reservations Lodged Under the OECD Code of Liberalisation of Capital Movements

Country	Reservation
Australia	Ownership of Australian flag vessels, except through an enterprise incorporated in Australia.
Austria	Acquisition of 25% or more in ships registered in Austria.
Belgium	Acquisition of Belgian flag vessels by shipping companies not having their principal office in Belgium.
Canada	Fish harvesting.
Denmark	Ownership of Danish flag vessels by non-EC residents except through an enterprise incorporated in Denmark. Ownership by non-EC residents of one-third or more of a business engaged in commercial fishing.
Finland	Ownership of Finnish flag vessels, including fishing vessels, except through an enterprise incorporated in Finland.
France	Ownership after acquisition of more than 50% of a French flag vessel, unless the vessel concerned is entirely owned by enterprises having their principal office in France.
Germany	Acquisition of a German flag vessel, except through an enterprise incorporated in Germany.
Greece	Ownership of more than 49% of the capital of a Greek flag vessel for fishing purposes.
Iceland	Investment in fishing and primary fish processing (excluding retail packaging and later stages of preparation of fish products for distribution and consumption). Ownership of Icelandic flag vessels, except through an enterprise incorporated in Iceland.
Ireland	Acquisition by non-EC nationals of sea fishing vessels registered in Ireland. Foreign acquisition of shipping vessels registered in Ireland is subject to a reciprocity requirement.
Italy	Purchase by foreigners other than EC residents of a majority interest in Italian flag vessels or of a controlling interest in ship owning companies having their headquarters in Italy. Purchase of Italian flag vessels used to fish in Italian territorial waters.
Japan	Investment in primary industry related to fisheries. (Abroad by residents) Investments in an enterprise engaged in fishing regulated by international treaties to which Japan is a party or fishing operations coming under the Japanese Fisheries Law.

Table 26.1. (cont.) Examples of Reservations Lodged Under the OECD Code of Liberalisation of Capital Movements

Country	Reservation
Korea	Fishing in internal waters, the territorial sea and the EEZ if foreign investors hold 50% or more of the share capital.
Mexico	Investment exceeding a total of 49% in fishing, other than aquaculture, in coastal and fresh waters or in the EEZ.
Netherlands	Ownership of Netherlands flag vessels, unless the investment is made by shipping companies incorporated under Netherlands law, established in the Kingdom and having their actual place of management in the Netherlands.
New Zealand	Acquisition, regardless of dollar value, of 25% or more of any class of shares or voting power in a New Zealand company engaged in commercial fishing. Acquisition, regardless of dollar value, of assets used, or proposed to be used, in a business engaged in commercial fishing.
Norway	Ownership of Norwegian flag vessels, except a) through a partnership or joint stock company where Norwegian citizens own at least 60% of the capital, b) by registering the vessel in the Norwegian International Ship Register under the applicable conditions. Investment in a registered fishing vessel bringing foreign ownership of the vessel above 40%.
Poland	Investment in a registered vessel, except through an enterprise incorporated in Poland.
Portugal	Ownership of Portuguese flag vessels other than through an enterprise incorporated in Portugal.
Sweden	Acquisition of 50% or more of Swedish flag vessels, except through an enterprise incorporated in Sweden. Establishment of, or acquisition of 50% or more of shares in, firms engaged in commercial fishing activities in Swedish waters, unless an authorisation is granted.
Switzerland	The registration of a ship in Switzerland serving two points on the Rhine.
United Kingdom	Acquisition of United Kingdom flag vessels, except through an enterprise incorporated in the United Kingdom.
United States	Fishing in the "Exclusive Economic Zone", and deepwater ports, except through an enterprise incorporated in the United States.

To whom they apply

The Declaration binds all countries that have adhered to it. At present, there are 38 adherents (OECD countries and 8 others).[42] Other countries that are willing and able to meet the Declaration's requirements are also welcome to apply to adhere. Although the Declaration itself is binding, national treatment of foreign controlled enterprises on their territories is only a voluntary commitment. Nevertheless, in 1988 there was a unanimous pledge not to introduce new exceptions to national treatment.

[42] The eight non-member countries that have adhered are: Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania, and Slovenia. The application of Singapore is currently being considered. Though not able to be an adherent itself, the European Commission is also an active participant in the administration of the Guidelines.

How they are implemented

Each of the four elements of the Declaration has its own distinct follow-up procedure. Implementation of the Guidelines and their unique follow-up procedures are discussed in the section devoted to the Guidelines. A description of the Declaration's treatment of the implementation and follow up of the national treatment, conflicting requirements and investment incentives, is provided below.

National treatment

The national treatment instrument consists of a declaration of principle in the Declaration and a procedural OECD Council Decision (December 1991), which requires adhering countries to notify their exceptions to national treatment and establishes follow-up procedures. The exceptions are subject to periodic examination by the Committee on International Investment and Multinational Enterprises (CIME), which, in turn, results in a decision of the OECD Council and proposals for action for the country concerned. Exceptions are usually confined to certain key sectors such as fisheries, or transport and communications, and are generally limited in scope.[43] Exceptions are limited or removed either by unilateral action by the country itself, or as a result of the examinations.

Conflicting requirements

The instrument on conflicting requirements also consists of a declaration of principle in the Declaration and an OECD Council Decision on procedures (June 1991). Under the Declaration, governments of adhering countries have committed themselves to co-operate with a view to avoiding or minimising the imposition of conflicting requirements on multinational enterprises and to take into account the General Considerations and Practical Approaches.[44] The aim of avoiding or minimising the imposition of conflicting requirements by governments is implemented through promoting co-operation among member countries, bilaterally and/or in the context of the CIME.[45]

Investment incentives and disincentives

The instrument on international incentives and disincentives is comprised of a declaration of principle in the Declaration and an OECD Council Decision (May 1984). Recognising that adhering countries may be adversely affected by investment incentives and disincentives provided by other adhering countries, the provisions ask that such measures be made as transparent as possible and encourage effective co-operation between adhering countries. The instrument prescribes consultations and review procedures, and asks that adhering countries provide information about their policies and participate in studies on investment incentives and disincentives. The consultations take place in the CIME at the request of an adhering country that considers that its interests may be adversely affected, with the objective of examining the possibility of reducing the adverse effects to a minimum.

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43 The exceptions are found in Annex A to the Third Revised Decision of the Council on National Treatment, December 1991. Countries that have notified exceptions in connection with the fishing sector include: Australia, Austria, Brazil, Canada, Chile, Greece, Iceland, Ireland, Italy, Japan, Korea, Lithuania, Mexico, New Zealand, Norway, Sweden and United States. These exceptions limit such things as access to fisheries by foreign flag vessels or foreign-controlled enterprises, and/or prescribe limits on ownership of registered fishing vessels by foreign-controlled enterprises.

44 General Considerations and Practical Approaches is a document setting out a process for co-operation between countries on the subject of conflicting requirements.

45 Decision of the OECD Council, June 1991.

How they could be used to tackle IUU fishing

Conflicting requirements

The conflicting requirements provisions offer a non-adversarial, co-operative mechanism for dealing with inconsistent requirements on multinational enterprises. The contribution that such provisions can make to the fight against IUU fishing is not immediately apparent. However, if, for example, measures aimed at curbing IUU activities resulted in different adhering governments imposing conflicting obligations on multinational enterprises, then the non-adversarial, co-operative approach might be helpful in responding to the conflict.

International investment incentives and disincentives

The OECD and others, including the WWF, have pointed to the role of various types of subsidies in keeping illegal fishing vessels in operation and/or encouraging the export of excess capacity to other areas of the world.[46] The WWF has also called for the urgent control of subsidies that assist in driving IUU fishing.[47] The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing also calls on States to avoid conferring economic support, including subsidies, to companies, vessels or persons that are involved in IUU fishing.[48]

Part IV of the Declaration – concerning international investment incentives and disincentives – contributes to the fight against IUU fishing by recognising that adhering countries need to strengthen their co-operation in the field of international direct investment, as well as pay attention to the interests of adhering governments affected by specific laws, regulations and administrative practices providing official incentives and disincentives to international direct investment. Under the Declaration, adhering governments also commit to try to make such incentives and disincentives as transparent as possible so that their importance and purpose can be ascertained and information on them can be readily available. Promoting transparency of such measures and encouraging dialogue and co-operation between adhering countries about them, could provide another entry point for discussions about the incentives and disincentives (including subsidies) that may fuel IUU activities.

Potential limitations to their use in combating IUU fishing

National treatment

Concerns about IUU fishing and scarce enforcement resources might prompt some countries to consider restricting access to their fisheries by foreign-controlled enterprises or vessels, either generally or by nationals from certain countries and/or vessels flying flags from countries that are

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46 See, for example, S.J. Cripps, A. Oliver and J. Cator, "International aspects of the control and eradication of IUU fishing – an NGO's perspective," Fisheries Monitoring, Control and Surveillance, Brussels 24-27 October 2000; "The Environmental, Economic and Social Issues and Effects of IUU/FOC Fishing Activities in the High Seas", OECD, 14 February 2003 (AGR/FI(2003)5); D.J. Agnew and C.T. Barnes "The Economic and Social Effects of IUU/FOC Fishing," February 2003.

47 S.J. Cripps, A. Oliver and J. Cator, "International aspects of the control and eradication of IUU fishing – an NGO's perspective," Fisheries Monitoring, Control and Surveillance, Brussels 24-27 October 2000.

48 Paragraph 23 (Economic Incentives).

well-known for their open registries, low standards and/or lax enforcement.[49] Alternatively, or in addition, some countries might seek to concentrate their scarce IUU fishing detection and enforcement resources on, or otherwise to treat less favourably, foreign-controlled vessels or enterprises from certain countries. Along similar lines, the International Coalition of Fisheries Associations has adopted a resolution calling on governments and the private sector to prevent flag of convenience vessels from gaining access to international markets; freighter companies to refrain from transporting any fish caught by flag of convenience fishing vessels; and trading and distribution companies to refrain from dealing in fish caught by flag of convenience vessels.[50] Others have also called for discouraging or preventing certain countries that cannot or will not exercise control over fishing vessels operating outside of their EEZs from registering large-scale fishing vessels, and for the closing of ports to flag of convenience fishing vessels.[51]

The requirement of according national treatment to foreign-owned or -controlled enterprises might present an obstacle to measures aimed at singling out foreign enterprises and vessels for worse treatment because they are foreign or because of the flag they are flying, particularly in the absence of proof that the vessels concerned had actually been engaged in IUU fishing or intended to do so.[52] Such a concern may, however, be mitigated, to some extent, by the fact that the obligation to accord national treatment is subject to adhering countries' needs to maintain public order, to protect their essential security interests and to fulfil commitments relating to international peace and security. Importantly, a number of countries have notified fishing-related exceptions to the national treatment principle. These exceptions limit such things as access to fisheries by foreign-flag vessels or foreign-controlled enterprises, and/or prescribe limits on ownership of registered fishing vessels by foreign-controlled enterprises. Table 26.2 lists the fishing-related exceptions to national treatment. Moreover, the obligation to accord national treatment is less strong with respect to non-adhering countries, which are more likely to be flags of convenience countries: adhering countries only "consider applying" national treatment to countries other than adhering countries. Lastly, the Declaration expressly states that it "does not deal with the right of adhering governments to regulate the entry of foreign investment or the conditions of establishment of foreign enterprises." Thus, if the measures being considered fell into this category, they would fall outside the national treatment instrument.

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49 Some flag states are of particular concern for the management of fisheries. See, for example, M. Gianni (for WWF), "Recommendations to OECD Countries on Measures to Prevent and Eliminate the Problem of Illegal, Unreported and Unregulated Fishing," February 2003, pp. 2-3.

50 "ICFA Calls for Elimination of Flag-of-Convenience (FOC) Fishing Vessels," press release, International Coalition of Fisheries Associations, 5 January 2000, available at http://www.icfa.net/?a=Press%20Releases&item=158.

51 See, for example, M. Gianni (for WWF), "Recommendations to OECD Countries on Measures to Prevent and Eliminate the Problem of Illegal, Unreported and Unregulated Fishing," February 2003, p. 6.

52 Beyond the desire to engage in IUU fishing, there are a host of other reasons, some legitimate, some not, why a vessel may have a particular flag.

Table 26.2. Fishing-related Exceptions to the National Treatment Principle

Adhering country	Exception
Australia	(Western Australia only) Foreign ownership in rock lobster processing is limited to 20%; restrictions are placed on non-residents becoming directors or office bearers in corporations undertaking rock lobster processing.
Austria	Requirements to obtain the national flag: citizenship, residence in Austria, and more than 75% local ownership. The flag is required for registration of vessels.
Brazil	Exploitation of internal waters, areas within the territorial sea and some other activities are reserved to native-born Brazilians or persons who have naturalised citizenship or must be undertaken by firms registered in Brazil. Foreign vessels need authorisation from the Ministry of Agriculture to develop fishing activities.
Canada	There is no limit on foreign ownership of fish processing companies that do not hold fishing licences. Canadian fish processing companies which have more than 49% foreign ownership are not permitted to hold Canadian commercial fishing licences. Fish harvesting firms with foreign participation are subject to the same rules and policies as wholly Canadian-owned firms (*e.g.* Canadian registry and Canadian crews for licensed fishing vessels). (British Columbia only) Nationality requirement to obtain a fish buyer's license.
Chile	Ownership of Chilean fishing vessels is limited to Chilean individuals or Chilean majority-owned corporations with principal domicile and real effective seat in Chile. However, an owner of a fishing vessel registered in Chile prior to 30 June 1990 is not subject to the nationality requirements. Fishing vessels specifically authorised by the maritime authorities, pursuant to powers conferred by law in cases of reciprocity granted to Chilean vessels by other States, may be exempted from the above-mentioned requirements on equivalent terms provided to Chilean vessels by that State.
Greece	Non-EC ownership of Greek flag vessels including fishing vessels is limited to 49%.
Iceland	Foreign investment in primary fish processing (*i.e.* excluding retail packaging and later stages of preparation of fish products for distribution and consumption) is prohibited. No foreign ownership limitations apply to further fish processing.
Ireland	Registration of fishing vessels requires ownership by citizens or companies from an EC Member State and a license to fish within Irish fishing limits. The acquisition by non-EC nationals of sea fishing vessels registered in Ireland may be restricted.
Italy	Fishing in territorial waters is reserved to nationals.
Japan	Foreign-controlled enterprises may be restricted from engaging in fisheries.
Korea	Enterprises with foreign participation require authorisation to be engaged in commercial fishing in internal waters, the territorial sea and the EEZ.
Lithuania	Access to Lithuania's waters is only possible for vessels with a Lithuanian flag and registered in Lithuania or for foreign country vessels on the basis of bilateral and multilateral agreements.

Table 26.2. (cont.) Fishing-related Exceptions to the National Treatment Principle

Adhering country	Exception
Mexico	Foreign investment is permitted up to 49% in fishing in coastal and fresh waters of in the EEZ and up to 100% in aquaculture.
New Zealand	Purchase of fishing quota is restricted to enterprises where 75% of more of the voting rights are held by New Zealand residents.
Norway	As a general rule, processing, packing or re-loading fish, crustaceans and mollusc or parts and products of these, is not allowed on a foreign-controlled vessel inside the fishing limits or the Norwegian EEZ. To obtain ownership (including part) of a registered fishing vessel, a 60% Norwegian ownership is required. Foreign-controlled enterprises may not fish with trawls from Norwegian vessels.
Sweden	A legal entity, owned up to 50% or more by foreign citizens, is subject to permission for having the right to pursue commercial fishing activities in Swedish waters without holding a private fishing right.
United States	Foreign-controlled enterprises may not engage in certain fishing operations involving coastwise trade. In addition, foreigners may not hold more than a minority of shares comprising ownership in companies owning vessels which operate in US fisheries. Also, corporate organisation requirements pertain to the registration of flag vessels for fishing in the US EEZ. Foreign-flag vessels may not fish or process fish in the 200 nautical mile US EEZ except under the terms of a Governing International Fisheries Agreement (GIFA), or other agreement consistent with US law.

OECD Guidelines for Multinational Enterprises

What they are

Though it forms part – Annex 1 – of the previously mentioned instrument (the Declaration), the OECD Guidelines for Multinational Enterprises (the Guidelines), are discussed separately here. The Guidelines are regarded as one of the world's foremost corporate responsibility instruments and are becoming an important international benchmark for corporate responsibility. They aim to promote the positive contributions multinational enterprises can make to economic, environmental and social progress. They contain ten short chapters of voluntary[53] principles and standards for responsible business conduct addressing such areas as human rights, disclosure of information, anti-corruption, taxation, labour relations, environment, and consumer protection. The principles and standards are in the form of recommendations by the 38 countries that have adhered to them to the multinational enterprises operating in or from their territories. They express the shared values of the governments of countries that are the source of most of the world's direct investment flows and home to most multinational enterprises. Box 1 presents a brief overview of the main Guidelines recommendations.

[53] Observance of the Guidelines is voluntary in the sense of not being legally enforceable (see I.1 of the Guidelines). However, as was pointed out in Corporate Responsibility: Private Initiatives and Public Goals, OECD 2001, p. 12, there are often powerful pressures acting on firms engaged with voluntary corporate responsibility initiatives.

Box 26.1. Main Recommendations of the OECD Guidelines for Multinational Enterprises[54]

The Preface situates the Guidelines in a globalizing world. The common aim of the governments adhering to the Guidelines is to encourage the positive contributions that multinational enterprises can make to economic, environmental and social progress, and to minimise the difficulties to which their various operations may give rise.

I. Concepts and Principles*:* sets out the principles that underlie the Guidelines, such as their voluntary character, their application worldwide and the fact that they reflect good practice for all enterprises.

II. General Policies*:* contains the first specific recommendations, including provisions on human rights, sustainable development, supply chain responsibility, and local capacity building, and more generally calls on enterprises to take full account of established policies in the countries in which they operate.

III. Disclosure*:* recommends disclosure on all material matters regarding the enterprise, such as its performance and ownership, and encourages communication in areas where reporting standards are still emerging, such as social, environmental and risk reporting.

IV. Employment and Industrial Relations*:* addresses major aspects of corporate behaviour in this area, including child and forced labour, non-discrimination and the right to *bona fide* employee representation and constructive negotiations.

V. Environment*:* encourages enterprises to raise their performance in protecting the environment, including performance with respect to health and safety impacts. Features of this chapter include recommendations concerning environmental management systems and the desirability of precaution where there are threats of serious damage to the environment.

VI. Combating Bribery*:* covers both public and private bribery, and addresses passive and active corruption.

VII. Consumer Interests*:* recommends that enterprises, when dealing with consumers, act in accordance with fair business, marketing and advertising practices, respect consumer privacy, and take all reasonable steps to ensure the safety and quality of goods or services provided.

VIII. Science and Technology*:* aims to promote the diffusion by multinational enterprises of the fruits of research and development activities among the countries where they operate, thereby contributing to the innovative capacities of host countries.

IX. Competition*:* emphasises the importance of an open and competitive business climate.

X. Taxation*:* calls on enterprises to respect both the letter and spirit of tax laws, and to co-operate with tax authorities.

To whom they apply

The Guidelines' principles apply to multinational enterprises operating in or from the territories of the 38 countries that have adhered to them.[55] These are the OECD countries and 8 others.[56] Other countries that are willing and able to meet the Declaration's requirements are also encouraged to apply

54 This box is reproduced from The OECD Guidelines for Multinational Enterprises: A Key Corporate Responsibility Instrument, OECD Policy Brief, June 2003.

55 I.2 of the Guidelines.

56 See note 44 above for the identity of the 8 non-OECD countries.

to adhere. Each additional country that adheres expands the reach of the Guidelines' recommendations to companies that operate in or from the new adhering country.

A precise definition of multinational enterprise is not provided. However, the Guidelines state that multinational enterprises "usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways."[57] The ownership of the enterprises – whether it is private, state or mixed – is irrelevant.[58] In addition, when the Guidelines apply to a particular multinational enterprise, they generally apply to all the entities it contains – parent companies and/or local entities.[59] Moreover, the Guidelines do not only apply to large enterprises: the adhering governments also encourage small and medium-sized enterprises to observe the Guidelines' recommendations to the fullest possible extent.[60]

Neither are the Guidelines aimed at introducing differences of treatment between multinational and domestic enterprises: they are intended to reflect good practice for all. Multinational enterprises and domestic enterprises are therefore subject to the same expectations in respect of their conduct wherever the Guidelines are relevant to both.[61]

How they are implemented

While the Guidelines are voluntary for companies, they are binding on the governments that have adhered to them. These governments are required to establish a National Contact Point (NCP) – typically a government office[62] – to encourage observance of the Guidelines and ensure that they are known and understood by the national business community and other interested persons.[63] An NCP's responsibilities include: promoting the Guidelines, handling enquiries about them, gathering information on national experiences with the Guidelines, and reporting annually to the OECD Committee on International Investment and Multinational Enterprises (CIME).

The Guidelines' Procedural Guidance provides for a facility that allows interested parties to call a company's alleged non-observance of the Guidelines' recommendations (called a "specific instance") to the attention of an NCP. NCPs are required to offer a forum for discussion and assist the business community, employee organisations, civil society organisations and other parties concerned to deal with the issues raised.[64] The procedures to be used in providing this assistance are set out in Box 26.2.

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57 I.3 of the Guidelines.

58 *idem*

59 *idem*

60 I.5 of the Guidelines.

61 I.4 of the Guidelines.

62 There are four types of NCP structure presently in use: single government office, multi-departmental government office, tripartite body, and quadripartite body.

63 Decision of the OECD Council, June 2000.

64 Involving a range of persons and organisations in trying to resolve a problem is consistent the emphasis, in the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 9.1 Participation and co-ordination.

Box 26.2. Procedures to be Followed by NCPs in Handling Specific Instances Raised under the OECD Guidelines for Multinational Enterprises

The NCP will:

1. Make an initial assessment of whether the issues raised merit further examination and respond to the party or parties raising them.

2. Where the issues merit further examination, offer good offices to help the parties involved to resolve the issues. For this purpose, the NCP will consult with these parties and where relevant:

a) Seek advice from relevant authorities, and/or representatives of the business community, employee organisations, other non-governmental organisations, and relevant experts.

b) Consult the National Contact Points in the other country or countries concerned.

c) Seek the guidance of the CIME if it has doubts about the interpretation of the Guidelines in particular circumstances.

d) Offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist in dealing with the issues.

3. If the parties involved do not reach agreement on the issues raised, issue a statement, and make recommendations as appropriate, on the implementation of the Guidelines.

4. a) In order to facilitate resolution of the issues raised, take appropriate steps to protect sensitive business and other information. While the procedures under paragraph 2 are underway, confidentiality of the proceedings will be maintained. At the conclusion of the procedures, if the parties involved have not agreed on a resolution of the issues raised, they are free to communicate about and discuss these issues. However, information and views provided during the proceedings by another party involved will remain confidential, unless that other party agrees to their disclosure.

b) After consultation with the parties involved, make publicly available the results of these procedures unless preserving confidentiality would be in the best interests of effective implementation of the Guidelines.

5. If issues arise in non-adhering countries, take steps to develop an understanding of the issues involved, and follow these procedures where relevant and practicable.

In addition to the official OECD Guidelines Procedural Guidance, NGOs and labour organisations have produced manuals to assist those wishing to raise a specific instance to know how to do so and what to expect.[65] Some NCPs have also developed their own more detailed procedures.[66]

[65] See, for example, Friends of the Earth Netherlands, *Using the OECD Guidelines for Multinational Enterprises: A Critical Starter Kit for NGOs*, Amsterdam, Friends of the Earth Netherlands, 2002, available at www.foenl.org/publications/TK_ENG_DEF.PDF; Trade Union Advisory Committee (TUAC) to the OECD, *A User's Guide to the OECD Guidelines for Multinational* Enterprises, available at www.tuac.org/publicat/guidelines-EN.pdf.

The CIME also plays an important role in implementation. It is the OECD body responsible for overseeing the functioning of the Guidelines. It also supervises OECD research projects on the role and use of the Guidelines in particular contexts, and can issue clarifications on their application. It also regularly consults with a range of stakeholders – including business, labour and NGOs – on matters relating to the Guidelines and their implementation, as well as on other issues concerning international investment and multinational enterprises.

How they could be used to tackle IUU fishing

Corporate irresponsibility is clearly an important component of IUU fishing. Corporate entities are implicated in a wide range of IUU-related or IUU-facilitating activities. For example,

- Conducting IUU activities and registration of flags of convenience vessels engaged in IUU fishing.[67]
- Supporting IUU fishing by purchasing illegally caught fish.[68]
- Enabling or facilitating IUU fishing by providing products and services to vessels and persons involved in IUU fishing.

The part of the Guidelines that is most obviously relevant to the problem of IUU fishing is the environmental chapter, which broadly reflects the principles and objectives contained in the Rio Declaration on Environment and Development, in Agenda 21; the (Aarhus) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters; and the standards in instruments such as the ISO Standard on Environmental Management Systems. However, the Guidelines contain a number of general corporate responsibility principles of potential relevance to the fight against IUU fishing. In some cases, IUU activities may directly contradict a recommendation. For example, the Guidelines recommend that enterprises:

- Comply with local laws and policies: Enterprises are asked to take fully into account established policies in the countries in which they operate, and to consider the views of other stakeholders.[69] IUU activity, especially where it contravenes the law or policies on commercial fishing, may amount to a failure to observe this recommendation.
- Contribute to economic, social and environmental progress with a view to achieving sustainable development.[70] The environmental harm caused by IUU activities is the contrary of environmental progress.

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66 For example, the Australian NCP has developed and posted on their website at www.ausncp.gov.au procedures for raising a specific instance. These incorporate, but also build on, the OECD Guidelines Procedural Guidance.

67 See S.J. Cripps, A. Oliver and J. Cator, "International aspects of the control and eradication of IUU fishing – an NGO's perspective," Fisheries Monitoring, Control and Surveillance, Brussels 24-27 October 2000.

68 See S.J. Cripps, A. Oliver and J. Cator, "International aspects of the control and eradication of IUU fishing – an NGO's perspective," Fisheries Monitoring, Control and Surveillance, Brussels 24-27 October 2000.

69 II of the Guidelines.

70 II.1 of the Guidelines.

- Respect the human rights of those affected by their activities.[71] IUU activities may impact the enjoyment of a range of human rights, especially the economic rights of those whose livelihoods are detrimentally affected by IUU activities.
- Refrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to environmental, health, safety, labour, taxation, financial incentives, or other issues.[72] Some IUU activity may involve bribery and other such conduct that may be inconsistent with this recommendation.
- Within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.[73] IUU activity will not normally be consistent with taking due account of the need to protect the environment, or be consistent with sustainable development.
- Continually seek to improve corporate environmental performance.[74] IUU fishing is clearly a step in the opposite direction.
- Encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines.[75] This recommendation, concerning supply chain, is of particular relevance in the IUU fishing area given calls for enterprises to stop doing business with IUU fishing vessels and companies.[76]
- Not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage.[77] IUU fishing may require bribery.[78]
- The chapter on disclosure provides, among other things, that enterprises should ensure that timely, regular, reliable and relevant information is disclosed regarding their activities,

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71 II.2 of the Guidelines.

72 II.5 of the Guidelines.

73 V of the Guidelines.

74 V.6 of the Guidelines.

75 II.10 of the Guidelines.

76 See, for example, M. Gianni "Recommendations to OECD Countries on Measures to Prevent and Eliminate the Problem of Illegal, Unreported and Unregulated Fishing, p. 7. See also Communication from the Commission, Community action plan for the eradication of illegal, unreported and unregulated fishing, 28 May 2002, p.5, action 3 concerning the control of activities associated with IUU fishing. Paragraph 73 of the *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* also ask States to take measures to ensure that importers, transhippers, buyers, consumers, equipment suppliers, bankers, insurers, and other services suppliers and the public are aware of the detrimental effects of doing business with vessels identified as engaged in IUU fishing.

77 VI of the Guidelines.

78 D.J. Agnew and C.T. Barnes "The Economic and Social Effects of IUU/FOC Fishing," February 2003, para. 4.6.4. observe that corruption is a significant factor in gaining IUU access to EEZ waters in various parts of the world.

structure, financial situation and performance."[79] It also asks enterprises to disclose basic information showing their name, location, and structure, the name, address and telephone number of the parent enterprise and its main affiliates, its percentage ownership, direct and indirect in these affiliates, including shareholdings between them.[80] The availability of more information about ownership and control of vessels and companies engaged in IUU fishing could help better deal with the problem.[81]

- When dealing with consumers, act in accordance with fair business, marketing and advertising practices and take all reasonable steps to ensure the safety and quality of the goods and services they provide. In particular, they should not make representations or omissions, nor engage in any other practices, that are deceptive, misleading, fraudulent, or unfair.[82] IUU-related activities may entail using deceptive packaging and other practices to deceive consumers and the authorities as to the origin and nature of the fish concerned.[83]
- Contribute to the public finances of host countries by making timely payment of their tax liabilities, complying with the tax laws and regulations of all countries in which they operate, exerting every effort to act in accordance with both the letter and spirit of those laws and regulations, and providing to the relevant authorities the information necessary for the correct determination of taxes to be assessed.[84] Enterprises engaged in IUU fishing are unlikely to be paying their full share of taxes or to be providing to the relevant authorities full information about their activities.

Many IUU-related or IUU-facilitating activities may thus amount to a failure to observe the Guidelines, and could be raised as a specific instance with an NCP. Any interested person could do so – for example, it could be raised by an NGO concerned about IUU fishing, a competitor company, an employee, a concerned coastal community etc. Box 26.2, above, sets out the procedures that an NCP should follow in dealing with a specific instance brought to its attention.[85]

In addition, there are a number of recommendations in the Guidelines that are perhaps less clearly relevant in dealing with IUU fishing, but, if followed, would nevertheless help minimise the likelihood that enterprises would or even could engage in IUU fishing. These recommendations, also drawn from the ten Guidelines chapters, include techniques such as disclosure, communication, training,

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79 III.1 of the Guidelines.

80 III.3 of the Guidelines.

81 The desirability of such information is made clear by the FAO's Technical Guideline for Responsible Fishing, no. 9 (Implementation of the International Plan of Action to Deter, Prevent, and Eliminate Illegal, Unreported and Unregulated Fishing), which observes that "The beneficial owners of the vessels, who typically have nationalities that differ from those of their vessels, often succeed in preventing fisheries managers and law enforcement officials from ascertaining their identities."

82 VII.4 of the Guidelines.

83 See D.J. Agnew and C.T. Barnes "The Economic and Social Effects of IUU/FOC Fishing" February 2003, observing that enterprises engaged in IUU activities may be motivated to repackage and relabel fish to disguise its origin.

84 X of the Guidelines.

85 See note 68, above, for examples of manuals that civil society groups and labour organisations have prepared to help guide persons wishing to raise a specific instance. Some NCPs have developed their own guidance for persons raising specific instances. See, for example, the guidance referenced in note 69.

management systems, and whistleblower facilities. For example, the Guidelines recommend that enterprises:

- Support and uphold principles of good corporate governance, and develop and apply good corporate governance practices.[86]
- Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.[87]
- Promote employee awareness of, and compliance with, company policies through appropriate dissemination of these policies, including through training programmes.[88]
- Refrain from discriminatory or disciplinary action against employees who make *bona fide* reports to management or, as appropriate, to the competent public authorities, on practices that contravene the law, the Guidelines or the enterprise's policies.[89] If whistleblowers feel confident that there will be no adverse consequences for reporting IUU activities, they are likely to be more willing to disclose what they know.
- Apply high quality standards for disclosure, accounting and audit, and for non-financial information including environmental and social reporting where they exist.[90]
- Communicate additional information that could include: information on systems for managing risks and complying with laws, and on statements or codes of business conduct.[91]
- Provide the public and employees with adequate and timely information on the potential environment, health and safety impacts of their activities, and engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprises and by their implementation.[92]
- Maintain contingency plans for preventing, mitigating, and controlling serious environmental and health damage from their operations, and mechanisms for immediate reporting to the competent authorities.[93]
- Provide adequate education and training to employees in environmental health and safety matters, as well as more general environmental management areas.[94]
- Contribute to the development of environmentally meaningful and economically efficient public policy, for example, by means of partnerships or initiatives that will enhance environmental awareness and protection.[95]

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86 II.6 of the Guidelines.

87 II.7 of the Guidelines.

88 II.8 of the Guidelines.

89 II.9 of the Guidelines.

90 III.2 of the Guidelines.

91 III.5 b) of the Guidelines.

92 V.2 of the Guidelines.

93 V.5 of the Guidelines.

94 V.7 of the Guidelines.

95 V.8 of the Guidelines.

- Promote employee awareness of and compliance with company policies against bribery and extortion through appropriate dissemination of these policies and through training programmes and disciplinary procedures.[96]
- Adopt management control systems that discourage bribery and corrupt practices, and adopt financial and tax accounting and auditing practices that prevent the establishment of "off the books" or secret accounts or the creation of documents which do not properly and fairly record the transactions to which they relate.[97]

The standards articulated in the Guidelines are being promoted and reinforced in a variety of ways by adhering governments. For example, in addition to conferences and mailings to business, at least ten countries refer to the Guidelines as a benchmark for companies applying to their investment guarantee, export credit and investment promotion programmes.[98] Other voluntary standards, including those more directly responsive to the problem of IUU fishing, could perhaps be similarly used. In addition, governments could consider referring to the Guidelines in other related contexts, such as in granting licences and permits.

One of the OECD's core strengths is its creation of consensus-based, behavioural norms for governments and private actors.[99] The Guidelines are helping to shape and reinforce norms of good corporate behaviour in many spheres. In addition to promotional activities carried out by adhering countries and the OECD, their profile has been raised through the recognition they have received in high-level political declarations, such as the 2002 OECD ministerial meeting, the G8's 2002 Africa Action Plan, and the G8 finance ministers' statement in May 2003. They were also referenced in a report by a high-level panel of the United Nations Security Council. However, much more can be done by adhering countries to promote observance of the Guidelines by multinational enterprises. Referring to the Guidelines in the context of responses to IUU fishing could simultaneously help further raise the profile and understanding of the Guidelines as an important benchmark for enterprise behaviour, and focus more attention on IUU fishing as a corporate responsibility problem.

Potential limitations to their use in combating IUU fishing

The Guidelines could contribute to the fight against IUU fishing in a number of ways. There are, however, also some limitations.

The Guidelines articulate standards for responsible behaviour, while enterprises engaged in IUU fishing are likely to be the antithesis of responsible. Not only is any IUU activity irresponsible in itself, but the entities concerned also often fail to observe a range of other standards, for example taxation, health and safety, and labour conditions. Enterprises such as these, which deliberately act in an irresponsible way, are unlikely to be moved by the mere existence of the Guidelines. Nevertheless, through the supply chain recommendation, and measures by adhering countries to link the Guidelines to a variety of authorisations etc., there is scope for impacting even these enterprises. In addition, many other companies, perhaps less directly involved in IUU activities, either as an uninformed customer or as a supplier of products or services that unwittingly facilitates IUU activities, may be

96 VI.4 of the Guidelines.

97 V.5 of the Guidelines.

98 The OECD Guidelines for Multinational Enterprises: A Key Corporate Responsibility Instrument, OECD Policy Brief, June 2003.

99 "Multinational Enterprises and the Quality of Public Governance: A Case Study of Extractive Industries," in *International Investment Perspectives*, No. 1 2002, p. 110.

more susceptible to the pressures that adhering countries could bring to bear on them through the Guidelines process.

For a range of reasons, determining which IUU activities amount to a non-observance of the Guidelines is a matter of interpretation. On some topics – for example Employment and Industrial Relations – the Guidelines are quite specific. However, on many other topics, the Guidelines are very general. IUU fishing is not explicitly mentioned (nor is any other environmental issue) and thus to credibly claim that any particular IUU activity amounts to a failure to observe the Guidelines – and thus invoke the specific instance procedures – is likely to require a detailed analysis of the activity and the Guidelines.

The Guidelines apply to enterprises operating in or from an adhering country. Thus, while they apply to adhering country enterprises wherever they operate, they only apply to non-adhering country enterprises when they are operating within the territory of an adhering country. This means that a non-adhering country enterprise engaged in IUU fishing on the high seas or in the waters of another non-adhering country is beyond the reach of the Guidelines procedures. Since a significant amount of IUU fishing occurs in the waters of developing countries (most of which have not yet adhered to the Guidelines) and is carried out by vessels flying the flags of other countries, which are also not usually adhering countries, this may mean that a lot of IUU activity is beyond the reach of the Guidelines procedures. However, the Guidelines and their procedures could still be relevant if an adhering country enterprise is involved in some way, for example through the supply chain[100] or through its beneficial interest in the IUU activity. The Guidelines might also apply to distribution, that is, to customers, especially insofar as they can be construed as business partners.[101] The principles and standards that the Guidelines contain could thus be used in engaging in dialogue with enterprises and industry associations to encourage them to act responsibly in providing their products and services – such as equipment, banking, insurance – to those likely to be engaging in IUU activities.[102]

Around 64 specific instances have been raised since the Guidelines were reviewed in 2000. It can take several months or even longer for an NCP to handle a specific instance to its resolution. However, NCPs are now focusing on improving the transparency and effectiveness of the Guidelines procedures.[103] Without attracting additional resources, they are unlikely to have the capacity to handle a sudden surge in the number of specific instances. The Guidelines and their procedures can help

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100 Some examples might be where an adhering country enterprise has a business partner, including a supplier or sub-contractor, who is involved in IUU and yet does not encourage them to stop/adopt principles of corporate conduct compatible with the Guidelines.

101 Note, however, that a Roundtable on Corporate Responsibility: Supply Chains and the OECD Guidelines on Multinational Enterprises, held at the OECD in June 2002 did not discuss in any detail concerns about how customers might be using an enterprise's products or services and what the responsibilities of a supplier might be in this context. See OECD Guidelines for Multinational Enterprises: Focus on Responsible Supply Chain Management, Annual Report 2002.

102 Another potential starting point for a dialogue about customers is contained in the environmental chapter of the Guidelines. It is perhaps most likely to be relevant where the product or service itself may have direct environmental impacts rather than where it only enables an activity like IUU. V.6.c recommends that enterprises should continually seek to improve corporate environmental performance, by encouraging, where appropriate, such activities as promoting higher levels of awareness among customers of the environmental implications of using the products and services of the enterprise.

103 The OECD Guidelines for Multinational Enterprises: A Key Corporate Responsibility Instrument, OECD Policy Brief, June 2003.

resolve the particular specific instances under consideration, but as a mechanism for bringing about broader change, they suffer from many of the same limitations as other attempts to tackle IUU fishing: lack of resources and lack of political will.

Convention on combating bribery of foreign officials in international business transactions

What it is

The Convention on Combating Bribery of Foreign Officials in International Business Transactions (the Convention) requires states parties to criminalise the bribery of foreign public officials. The offences concerned include intentionally offering, promising or giving a bribe, or complicity in or authorisation of such a bribe.[104] The Convention also requires parties to take measures to prohibit the establishment of off-the-books accounts and other such accounting techniques for the purpose of bribing foreign public officials or of hiding such bribery.[105] A further reinforcing measure is found in a related text, the 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials (the 1996 Recommendation), which urges member countries that do not disallow the deductibility of bribes to deny this deductibility.[106]

The Convention also contains a number of provisions designed to assist with its implementation. For example, it calls for parties to provide legal assistance to each other to enable investigations and proceedings, and deems bribery of a foreign public official to be an extraditable offence.[107] The Convention, together with the 1996 Recommendation and the 1997 revised Recommendation on Combating Bribery in International Business Transactions, aim to eliminate the supply of bribes to foreign public officials. The Convention entered into force on 15 February 1999.

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104 Article 1(1) and (2) of the Convention provide as follows:

> 1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.
>
> 2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

105 Article 8(1) of the Convention provides that: In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.

106 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials, adopted by the OECD Council on 11 April 1996.

107 Articles 9 and 10 of the Convention.

To whom it applies

The Convention applies to those countries that have ratified it. To date, 35 countries have deposited their instrument of ratification with the Secretary-General of the OECD.[108] Under the Convention, each signatory state is responsible for the activities of its nationals and bribery that occurs on its own territory.[109]

How it is implemented

Compliance with the Convention and implementation of the 1997 revised Recommendation is monitored through country reviews conducted under the supervision of the OECD Working Group on Bribery in International Business Transactions, and is divided into two phases: Phase 1 and Phase 2. Phase 1 evaluated whether the legal texts through which participants implemented the Convention met the standard set by the Convention. Phase 2, which is currently under way, is studying the structures put in place to enforce the laws and rules implementing the Convention and to assess their application in practice. Monitoring is also seen as an opportunity to consult on difficulties in implementation and to learn from the solutions found by other countries.

How it could be used to tackle IUU fishing

Though it does not contain any provisions concerning IUU fishing or fisheries in general, the Convention is nevertheless relevant because of the connection between IUU fishing and corruption. In particular, in order to engage in IUU fishing or related activities, it may be necessary to bribe a foreign official.[110] Where a person directly or indirectly involved in bribing is a national of a country that has ratified the Convention, or bribing occurs on that country's territory, that person may be exposing themselves to the risk of prosecution for bribery, as well as to the possibility of civil or administrative sanctions.[111]

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108 These countries are OECD countries plus five others: Argentina, Brazil, Bulgaria, Chile, and Slovenia.

109 Article 4 of the Convention addresses states parties' jurisdiction to prosecute. It provides that:

> 1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.
>
> 2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.
>
> 3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.
>
> 4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps..

110 D.J. Agnew and C.T. Barnes "The Economic and Social Effects of IUU/FOC Fishing," February 2003, para. 4.6.4. observe that corruption is a significant factor in gaining IUU access to EEZ waters in various parts of the world.

111 Article 3(4) of the Convention. The Commentary to the Convention indicates that the range of possible civil or administrative sanctions, other than non-criminal fines, includes: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.

Beyond the direct application of the Convention and Recommendations to IUU fishing, there are also a number of aspects about the OECD's approach to dealing with the problem of corruption that could be applied in the fight against IUU fishing. For example, just as the Convention encourages countries to prosecute their nationals for bribery even for conduct occurring outside their own territories, a similar approach could perhaps be adopted with respect to IUU activities. Called the nationality principle, under international law States can generally regulate the conduct of their nationals, even when those nationals are abroad.[112] Given that many of the actual owners of IUU fishing vessels are nationals or residents of OECD countries,[113] the same principle could also be used by States as the basis for creating criminal offences connected with IUU activities engaged in by their nationals, whether at home or overseas. Some examples of possible offences that have been suggested include: owning, operating or knowingly working on a IUU fishing vessel as an officer or fishmaster.[114]

The 1997 revised Recommendation is also an interesting potential model for dealing with IUU fishing. It adopts a multidisciplinary approach to the problem, recommending that member countries take a number of diverse measures. In particular, it recommends that each member country examine seven different areas (with a view to tackling the problem on all fronts) and take concrete and meaningful steps to deter, prevent and combat bribery of foreign public officials. Many of these areas may also be relevant in dealing with the problem of IUU fishing. The seven areas of examination are (paraphrasing):

- Criminal laws and their application so as to criminalise bribery.
- Tax legislation, regulations and practice to eliminate any indirect support of bribery through tax deductions.
- Company and business accounting, external audit and internal control requirements and practices so that they are fully used to prevent and detect bribery of foreign public officials in international business.
- Banking, financial and other relevant provisions, to ensure that adequate records are kept and made available for inspection and investigation.
- Public subsidies, licences, government procurement contracts or other public advantages, so that advantages could be denied as a sanction for bribery in appropriate cases.
- Civil, commercial, and administrative laws and regulations, so that such bribery would be illegal.
- International co-operation in investigations and other legal proceedings.[115]

Since strengthening international co-operation in the detection of IUU fishing is often recommended as an important measure in tackling the problem, lessons learned about how to co-operate in the bribery context may be able to be applied in the context of IUU fishing.

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112 See, for example, G. Watson "Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction" 17 *Yale Journal of International Law* 41 (1992).

113 M. Gianni "Recommendations to OECD Countries on Measures to Prevent and Eliminate the Problem of Illegal, Unreported and Unregulated Fishing, February 2003.

114 *idem*

115 Revised Recommendation of the Council on Combating Bribery in International Business Transactions, Adopted by the Council on 23 May 1997.

The 1997 revised Recommendation provides detailed recommendations and guidance to member countries on the subject of accounting requirements, external audit and internal company controls. It articulates a set of principles and recommends that member countries take the steps necessary to bring their laws, rules and practices into line. Among the principles are (paraphrasing):

- Requiring companies to maintain adequate records of receipts and expenses, including identifying what they relate to, and prohibiting off-the-books transactions and accounts.
- Requiring countries to disclose the full range of material contingent liabilities in their financial statements.
- Adequate sanctioning of accounting omissions, falsifications and fraud.
- Considering whether requirements to submit to external audit are adequate.
- Maintain adequate standards to ensure the independence of external auditors.
- Requiring auditors who discover indications of bribery to report this discovery to management and, as appropriate, corporate monitoring bodies.
- Requiring auditors to report indications of bribery to competent authorities.
- Encouraging the development and adoption of adequate internal company controls, including standards of conduct.[116]

A variant of at least some of these principles, which are aimed at enhanced transparency, could be useful in tackling IUU fishing, for example, requiring certain persons to report to appropriate authorities indications of possible involvement in IUU or related activities. Enhanced information about ownership and control of vessels and companies engaged in IUU fishing could help better deal with the problem.[117] A recent OECD report has made a number of recommendations about measures that governments should consider taking to help combat misuse of the corporate form by acting to ensure the availability of information about ownership and control.[118] Among the suggestions made are that governments should consider taking action to:

- Require up-front disclosure of beneficial ownership and control information to the authorities upon the formation of the corporate vehicle.
- Oblige intermediaries involved in the formation and management of corporate vehicles to maintain such information.
- Develop the appropriate law enforcement infrastructure to enable them to launch investigations into beneficial ownership and control when illicit activity is suspected.

Another way in which the Convention and Recommendations could be of interest in the context of IUU fishing is that the country review mechanism for the Convention and 1997 revised Recommendation, or indeed another model of peer review in use at the OECD, might be useful if applied in an IUU fishing context to ascertain and encourage implementation of measures at the national level to combat the problem. The OECD's concept of peer review was introduced and discussed briefly above, under the section on the Codes of Liberalisation.

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116 *Ibid*, V.

117 See note 84 above.

118 Behind the Corporate Veil: Using Corporate Entities for Illicit Purposes, OECD, 2001.

Conclusion

The introduction and executive summary highlighted some of the main potential contributions or obstacles of the OECD's investment instruments to the fight against IUU fishing. But what practical steps might the OECD Fisheries Committee wish to take, based on the information and analysis contained in this paper? The Fisheries Committee:

- May find it fruitful to co-operate with the CMIT to better understand the work each group is doing and thus harmonise their activities to ensure that any potential for mutual support be realised.
- May wish to explore, in more detail, efforts being taken by other OECD bodies and individual member countries to refer to the OECD Guidelines for Multinational Enterprises as a benchmark for companies applying to investment guarantee, export credit and investment promotion programmes. There are potentially many other IUU-related areas where similar linkages could be made.
- Could use the principles and standards contained in the Guidelines in engaging in dialogue about corporate responsibility for IUU activities.
- May wish to promote the existence of the specific instance procedures under the Guidelines to civil society organisations and other interested persons and groups.
- Could offer to assist any NCP to deal with an IUU-related specific instance raised under the OECD Guidelines for Multinational Enterprises (in the event that one is raised in the future).
- May wish to indicate their support for outreach efforts to expand the reach of the Guidelines by encouraging more non-member countries to recommend respect for the principles and standards contained in the Guidelines to the companies operating in and from their territories.
- Could reference the OECD Declaration and Decisions on International Investment and Multinational Enterprises in encouraging adhering countries to address the impact of investment incentives and disincentives on the drivers of IUU fishing.
- May, using the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions as a model, wish to consider encouraging countries to hold their own nationals responsible for their IUU-related conduct whether engaged in at home or abroad.[119]
- Could encourage prosecution of instances of IUU-related corruption in accordance with the Convention.
- May wish to consider the possibility of developing a peer review mechanism – using already existing OECD peer review mechanisms as a model – to help countries with their efforts to fight IUU fishing.

[119] This would be consistent with provisions in the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 18, 19 (State Control over Nationals) and 21 (Sanctions).

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CHAPTER 27

MEASURES TAKEN BY CHINESE TAIPEI IN COMBATING FOC/IUU FISHING[1]

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Introduction

On June 23, 2001 the FAO Council endorsed an International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU). The content of IPOA-IUU in principle emphasises the implementation of the relevant international agreements and observance of the Code of Conduct for Responsible Fisheries by flag States, coastal states and port states. It also recommends that through participation in various regional fisheries management bodies and exchange of information, States co-operate with each other in combating IUU fishing activities. As the success of IPOA-IUU depends greatly on the extent of co-operation by individual States, it is therefore important to provide a framework for States that are willing to exert their efforts to combat and eliminate IUU fishing. Recently the issue of FOC/IUU fishing of large-scale tuna longline vessels has focused to an extent on Chinese Taipei. This paper tries to provide the background information of FOC/IUU fishing of large-scale tuna longline vessels, and summarise measures taken by the Chinese Taipei Government in combating and eliminating FOC/IUU fishing by large-scale tuna longline vessels.

Background of FOC/IUU fishing of large-scale tuna longline vessels

The large-scale tuna longline fishery in Chinese Taipei has a history going back nearly half a century. According to the existing fisheries law in Chinese Taipei, all the fishing vessels are owned by its citizens, who are required to apply for fishing licenses and observe fisheries laws and regulations as promulgated by the government. In 1989, a policy on limited entry was implemented. In other words, building of vessels is only permitted after the scrapping of an old vessel or decommission of a vessel due to an incident, on a one-ton-to-one-ton basis. The total tonnage of vessels is therefore controlled at a certain level and will not increase. In order to reduce the fleet size, between 1991 and 1995 an overall vessel reduction programme was launched, during which a total of 2,337 fishing vessels of various sizes was scrapped, among which 136 were longliners over 100 GRT. In 1995 a further measure was adopted to forbid new vessel building when a licensed vessel has been exported, to avoid a further increase of the global size of the tuna longline fleet.

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

However, the price of tuna in Japan increased significantly during the period from the end of 1980 and the beginning of 1990. To increase the supply of tuna to meet the demand in the Japanese market, the export of secondhand fishing vessels by Japan triggered the Chinese Taipei idea of buying these secondhand vessels, and operating on the high seas. As the exportation of Japanese secondhand longline vessels could not meet the growing demand, in 1995 the operators in Chinese Taipei started building new tuna longline vessels in the local shipyards.

Most of these vessels – including secondhand Japanese vessels and Chinese Taipei-built new vessels – were registered in countries such as Belize, Cambodia, Honduras and Equatorial Guinea, as flag of convenience (FOC) vessels, where the management and control of vessels were lenient or even non-existent. The operators were not required to provide catch reports to the flag States. Even worse, the flag States of FOC vessels did not join regional fisheries management organisations and hence did not comply with the conservation and management measures adopted by these organisations, causing problems in the management of fisheries resources and unfair competition in fish trade. Such irresponsible FOC/IUU fishing activities have become a focal point of international community concern, especially the regional fisheries management organisations. To achieve the goal of sustainable utilization of tuna resources in the Atlantic, ICCAT adopted a resolution calling Japan and Chinese Taipei to work together to combat and eliminate the FOC/IUU fishing by large-scale tuna longline vessels.

Efforts in combating FOC/IUU fishing by large-scale tuna longline vessels

In view of the serious impact of FOC/IUU fishing by large-scale tuna longline vessels on fisheries resources, which undermines the effectiveness of management measures adopted by regional fisheries management organisations, for the past few years the Chinese Taipei government has taken the following measures to effectively combat and eliminate FOC/IUU fishing:

Joint effort of Chinese Taipei and Japan on the elimination of FOC/IUU fishing by large-scale tuna longline vessels

In February 1999, in response to the ICCAT resolution, Chinese Taipei and Japan signed an Action Plan under which Japan was to scrap those secondhand longline vessels it exported, and Chinese Taipei was to encourage those longline vessels built in its shipyards to acquire registration so that they would be properly managed and controlled. To effectively implement the content of the Action Plan, the Chinese Taipei government has taken the following efforts and measures:

Establishment of a mechanism for Chinese Taipei-built FOC/IUU vessels under Chinese Taipei registration

In 2001 and 2003, the Chinese Taipei Fisheries Agency amended the fisheries law and regulation prohibiting the importation of any type of fishing vessels, making allowance for the Chinese Taipei–built FOC/IUU vessels to acquire Chinese Taipei registration. Later, the Chinese Taipei Fisheries Agency promulgated the procedure for the importation of non-Chinese Taipei registered fishing vessels which were built in Chinese Taipei and operated by Chinese Taipei, to allow those Chinese Taipei-built FOC/IUU vessels to apply for registration.

During the transition period before these Chinese Taipei-built vessels complete the registration process, they are required to submit catch reports and install VMS on board, in order to provide a linkage with our fisheries authority in preparation for genuine control over these vessels. To avoid further growth of the Chinese Taipei tuna longline fleet, such re-registered Chinese Taipei-built tuna longline vessels still must comply with the policy of limited entry. In other words, it is required to

scrap an old vessel when any re-registered vessel comes back to Chinese Taipei. In this way, the total number of Chinese Taipei large-scale tuna longline vessels will not increase.

Providing financial support to Japan's scrapping programme and assisting Japan in consulting with FOC/IUU vessel owners

To assist Japan in achieving the goals of its scrapping programme, at Japan's request, the Chinese Taipei Fisheries Agency agreed with the commitment made by the owners of legitimate tuna longline vessels under Chinese Taipei registration to provide financial support to Japan's scrapping programme. In addition, again at the request of Japan, Chinese Taipei also arranged at least nine rounds of consultations between Japanese delegates and Japan-built longline vessel owners, encouraging them to join the scrapping programme.

At the moment, 48 Chinese Taipei large-scale tuna longline vessels have obtained registration in Chinese Taipei, while Japan has purchased 42 secondhand longline vessels it exported for scrapping. In addition, a new joint action plan between Chinese Taipei and Japan, agreed in April 2003, concluded a special arrangement between the two countries, in co-operation with Vanuatu and Seychelles, to legitimize 69 FOC/IUU tuna longline vessels. And so, after years of joint efforts by Chinese Taipei and Japan, almost all the FOC/IUU large-scale tuna longline vessels have been scrapped, registered or legitimized.

Measures taken domestically in combating FOC/IUU fishing by large-scale tuna longline vessels

1. Prohibiting the export of fishing vessels to countries that are subject to trade sanctions imposed by regional fisheries management organisations, due to the operation of IUU fisheries by means of FOC vessels.

2. Prohibiting fishing vessels on the IUU list or registered under countries subject to trade sanctions to enter into the port of Chinese Taipei.

3. In addition, the Chinese Taipei Fisheries Agency has also made efforts to combat FOC/IUU fishing, such as educating the general public, vessel owners and shipyards against becoming involved in FOC/IUU fishing activities, and fishermen have been advised not to work on a FOC/IUU vessel. Information also has been provided to local banks, convincing them not to provide credits for the construction of new FOC/IUU vessels.

Co-operation with regional fisheries management organisations

Despite the efforts exerted by both Chinese Taipei and Japan in solving the problem of FOC/IUU fishing, without effective global constraint to discourage such activities, FOC/IUU fishing by large-scale tuna longline vessels will continue. Therefore, unless the international community takes appropriate action to refuse imports by market countries on tuna catch from IUU fishing, refuse port entry by port states to IUU vessels and refuse registration of IUU vessels by all States to prevent them from flag-hopping, the joint efforts of Chinese Taipei and Japan will not be effective. Therefore, curbing IUU fishing by large-scale tuna longline vessels requires concerted efforts in compliance with the management measures adopted by regional fisheries management organisations. In this respect, Chinese Taipei has not only co-operated with regional fisheries management organisations, but has also made its greatest effort in implementing those management measures as adopted by the respective regional fisheries management organisations.

For example, Chinese Taipei has provided information on FOC/IUU fishing vessels to the relevant regional fisheries management organisations, and complied with management measures such as the mechanism of a "white list", IUU list, catch certificate and trade documentation, adopted by the respective regional fisheries management organisations. Such information exchange has enabled the parties concerned to work together to combat FOC/IUU fishing. Compliance with management measures also discourages the owners of FOC/IUU vessel to continue their IUU fishing activities.

To sum up, with the efforts made by Chinese Taipei, Japan and respective regional fisheries management organisations, almost all the FOC/IUU large-scale tuna longline vessels have been scrapped, registered or legitimized. In my opinion, the major reason for this was that regional fisheries management organisations allowed Chinese Taipei to participate in their work, creating an opportunity for Chinese Taipei to understand the importance of combating and eliminating FOC/IUU fishing. Such increased participation in the work of a regional fisheries management organisation also helped the Chinese Taipei Fisheries Agency to obtain support from Congress.

At the moment, Chinese Taipei is a member of the Commission of WCPFC and IATTC. At present Chinese Taipei is a member of the Extended Commission of CCSBT, and a co-operating non-contracting member of ICCAT. However, for political reasons, the Chinese Taipei fisheries authority could not join and participate in the activities of IOTC.

Conclusion

Chinese Taipei has invested enormous efforts to effectively combat and eliminate FOC/IUU fishing. From its experience in dealing with FOC/IUU fishing by large-scale tuna longline vessels, Chinese Taipei learned that the issue of FOC/IUU fishing is extremely complicated. Not only flag States are involved, but port States (including the state whose transport vessels delivered the catch from IUU fishing) and the market States concerned are all involved, too. Teamwork among states can solve this problem. It is therefore very important that the international community, especially the international and regional fisheries management organisations, continue to support Chinese Taipei's participation in their work, creating more scope for Chinese Taipei participation, especially in the field of fisheries issues, under the auspices of the FAO.

CHAPTER 28

HALTING IUU FISHING: ENFORCING INTERNATIONAL FISHERIES AGREEMENTS[1]

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Executive summary

The world's fisheries are in crisis. Experts report that 75% are significantly depleted, over-exploited or fully exploited. Behind these statistics are the stories of countless families whose livelihoods have been destroyed as the once-bountiful resources of the oceans have dwindled. Governments generally recognise that there is little time left to act decisively to reverse the trends of the last decades. The question is whether the political will exists (and by extension, whether sufficient resources will be made available) to take the necessary measures to do so.

The most important factor undermining the effectiveness of international co-operation and management of fisheries on straddling and highly migratory stocks and fisheries on the high seas is the prevalence of illegal, unregulated and unreported (IUU) fishing.

Oceana has conducted a detailed study (of which this paper is a summary version) into the legal and regulatory frameworks governing fishing on the high seas which aim to ensure the sustainable management of fisheries resources, but which ultimately perpetuate IUU fishing. It can be concluded from this study that, on paper, there is a complex network of binding and non-binding agreements ('hard' and 'soft' law) which forms a solid basis in international law for promoting the development of sustainable fisheries, and for preventing or eliminating IUU fishing.

In practice, however, there are weaknesses and loopholes, the most important ones being:

- Flags of Convenience (FOC), or open registries, allow unscrupulous operators to avoid any regulation of their activities. They fish anywhere and anytime they want to, in contravention of the regulations put in place by Regional Fisheries Management Organisations (RFMOs) to manage and conserve fish stocks.

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

- As one country or region more aggressively acts to deter IUU fishing, activities are displaced to another which is less willing or able to do so. As one flag tightens its registry, vessels simply re-flag to another less restrictive State. And as more States tighten their registers, new FOC countries emerge.

- Transhipping at sea means that vessels need never enter ports with their illegally caught fish. The mingling of illegally and legally caught fish onboard reefers essentially serves to whitewash the contraband fish.

- Monitoring, control and surveillance of the high seas and within the Exclusive Economic Zones (EEZs) of many countries (particularly poorer developing countries) are insufficient to ensure that illegal fishers will be apprehended. Even when they do get caught, bonds and fines are set too low to serve as any kind of deterrent. Such fines are simply considered a cost of doing business; vessels invariably return to the fishing grounds, and carry on as before.

The solutions to these problems are not all easy to implement, but they are clearly identifiable.

The single most effective step to combat IUU fishing would be to close the loophole in international law that allows States to issue flags of convenience to vessels with which they have no genuine link and then fail to exercise control over those vessels. A combination of existing instruments, the negotiation of new instruments, and litigation at the International Tribunal for the Law of the Sea could be used to accomplish this.

1. Unless and until the FOC system is effectively eliminated, it is important that States do everything in their power to prevent, deter and eliminate IUU fishing through the following means:

2. Port State controls: port States must prevent IUU fishing and support vessels from using their harbours for transhipment, resupply and other activities and/or must where possible take action to arrest or detain IUU vessels in the event such vessels enter their ports.

3. Market measures: States must adopt and enforce legislation to make it illegal to import or trade in IUU-caught fish. Moreover, States should make it illegal or otherwise discourage companies (*e.g.* insurers, resuppliers, fishing gear manufacturers) from doing business with companies engaged in IUU fishing.

4. At-sea transhipment: Flag States must make it illegal for their transport vessels to tranship fish caught by vessels engaged in IUU fishing.

5. Companies and nationals: States must make it illegal for their nationals and for companies within their jurisdiction to engage in IUU fishing, including the use of fines, penalties and, as necessary, prison sentences of sufficient severity to deter IUU fishing activities.

6. Comprehensive management regime for the high seas: IUU fishing not only involves illegally fishing within an EEZ or in contravention of any regional fisheries management organisation (RFMO) agreements in place on the high seas. It also includes fishing on the high seas in regions where there is no fisheries management regime in place at all. Fishing (mainly bottom trawling) on seamounts and other deep-sea areas on the high seas, which is largely free of any international management agreement to date, has recently become an issue of international

concern. The UN General Assembly is now calling attention to the problem, and its urgency has been widely recognised by fisheries experts.

This paper is derived from the study, focusing in particular on the issues under discussion at the OECD workshop on IUU fishing and providing a wide variety of policy recommendations to help provide fisheries with a sustainable future.

The existing legal and political framework

An impressive array of conventions, agreements, organisations, laws and other international instruments provides for a system in which sustainable fisheries management should be possible, yet weaknesses inherent in each must still be overcome:

The Law of the Sea Convention: UNCLOS aimed to establish a legal order for the seas and oceans which would facilitate international communication, and promote the peaceful uses of the seas and oceans, the equitable and efficient utilisation of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.[2] It also initiated important dispute resolution provisions and in particular established the International Tribunal for the Law of the Sea.[3]

However, it focuses primarily on fishing within the 200 mile EEZ, which was a significant innovation at the time it was negotiated. But now much fishing – particularly of migratory stocks such as tuna and swordfish, and straddling stocks such as cod and turbot as well as deep sea fish such as orange roughy – takes place in international waters. It placed great reliance on the concept of the maximum sustainable yield in managing fisheries, whereas it has become clear that other paradigms are required, and in particular the precautionary principle and a more ecosystem-oriented approach have evolved. Possibly its greatest shortcoming is its heavy reliance on flag States for enforcement of environmental and maritime protection provisions, when it has become evident that some flag States have neither the capacity nor the intention of exercising that control.

FAO Compliance Agreement: It was the first international legally-binding instrument to directly deal with reflagging and other FOC issues, focusing on flag State compliance issues and in particular on strengthening flag State responsibility. It requires parties to control the activities of their flag vessels on the high seas, and ensure that its vessels do not undermine international fishery conservation and management measures. Additionally, flag States must give information to the FAO about high seas fishing vessels.[4]

The Agreement has failed to gain widespread acceptance, which explains why it only came into force in 2003, ten years after its conclusion. It is largely restricted to actions taken by flag States rather than port States, and does not address catches. Its efficacy is limited due to the small number of ratifications, and in particular the failure to ratify of FOC States and other States whose vessels may be involved in IUU fishing.

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2 Law of the Sea Convention Preamble.

3 Law of the Sea Convention Annex VI establishes the Statute of ITLOS.

4 FAO Compliance Agreement Article VI.

FAO Code of Conduct for Responsible Fisheries:[5] The Code of Conduct, concluded in 1995, is voluntary or 'soft' law. Pursuant to the Code, four International Plans of Action (IPOA) have been developed on seabirds, sharks, managing fishing capacity, and IUU fishing.[6] **The IPOA- IUU**[7] adopted in 2001 aims to prevent, deter and eliminate IUU fishing,[8] and addresses the problem of FOCs particularly in relation to RFMOs. It goes further and is more detailed than the Compliance Agreement and calls on States to take measures to ensure that nationals subject to their jurisdiction do not support or engage in IUU fishing. However, it is still soft law and not legally binding.

The 1995 Fish Stocks Agreement: For the first time, it was established that a precautionary approach is expressly required in fisheries management.[9] States must take conservation measures such as assessing[10] and managing[11] species in the same ecosystem and species associated with or dependent on the target species to protect biodiversity,[12] addressing overfishing and excess fishing capacity,[13] and monitoring and controlling fisheries.[14] It allows for boarding and inspecting vessels on the high seas under certain circumstances, and provides for measures which may be taken by a port State[15] including inspections and prohibition of landings and transhipments.

Finally, it requires States which are not parties to sub-regional or regional fisheries management organisations to nonetheless co-operate in the conservation and management of the relevant fish stocks. Moreover, States parties to the Fish Stocks Agreement, which are not members of the relevant RFMO, may not authorise their flagged vessels to engage in fishing operations for straddling or highly migratory fish stocks.[16]

UN General Assembly (UNGA): UNGA Resolutions which call for a halt to IUU fishing, including FOC practices, are not binding, but they do provide some measure of the recognition of the seriousness of the problem by the international community.

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5 FAO Code of Conduct for Responsible Fisheries. http://www.fao.org/fi/agreem/codecond/ficonde.asp.

6 See http://www.fao.org/fi/ipa/ipae.asp. International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries - 1999, International Plan of Action for the Conservation and Management of Sharks - 1999 and International Plan of Action for the Management of Fishing Capacity - 1999. All three of these texts can be found at:

http://www.fao.org/docrep/006/x3170e/X3170E00.HTM.

7 Food and Agriculture Organization "International Plan Of Action To Prevent, Deter And Eliminate Illegal, Unreported And Unregulated Fishing"**, (**IPOA-IUU) adopted by consensus at the Twenty-fourth Session of COFI on 2 March 2001 and endorsed by the Hundred and Twentieth Session of the FAO Council on 23 June 2001, at:

http://www.fao.org/DOCREP/003/y1224e/y1224e00.HTM.

8 IPOA-IUU III, para. 8.

9 Fish Stocks Agreement Articles 5(c) and 6.

10 Fish Stocks Agreement Articles 5(d).

11 Fish Stocks Agreement Articles 5(e).

12 Fish Stocks Agreement Article 5(g).

13 Fish Stocks Agreement Article 5(g\h).

14 Fish Stocks Agreement Article 5(l).

15 Fish Stocks Agreement Article 23.

16 Fish Stocks Agreement Article 17.

Most recently at the 58th Session of the UN General Assembly, two resolutions on the oceans were passed (available at:

http://www.un.org/Depts/los/general_assembly/general_assembly_resolutions.htm).

The resolution on the Law of the Sea has clear language on flag and port State control including a call for the IMO to further examine and clarify the meaning of establishing a 'genuine link.'

In the resolution on sustainable fisheries, the UN General Assembly has called on States to take action on IUU fishing, in particular to implement the IPOA-IUU. It also calls on the Secretary General, in consultation with the FAO, RFMOs and States to consider the risks to the biodiversity of seamounts and other deep ocean areas.

Legal issues and financial incentives regarding IUU fishing and flags of convenience

The FAO Technical Guidelines on Responsible Fisheries sums up the situation quite succinctly: "IUU fishers must evade detection in order to succeed. As noted above, the operators of IUU vessels often conduct fishing operations in areas where MCS is lacking, particularly in remote high seas regions or in waters under the jurisdiction of coastal States, particularly developing States that do not have the ability to stop such fishing. The owners of these vessels also seek to avoid detection through deceptive business practices. For example, they create extended and complex corporate arrangements to hamper investigators, they repeatedly change the names and call signs of their vessels and they regularly re-flag the vessels in States that continue to maintain open registries."[17]

The UNCLOS requirement that there be a 'genuine link' between the flag State and the vessel or operator is ignored or circumvented under the FOC system. A fishing interest wishing to engage in IUU fishing will usually incorporate a shell company in the flag State, often with bearer shares. Shares in the shell company will then be held by other shell interests, with the real beneficial owner being hidden. Thus even if the State of the national had the will to exercise jurisdiction over the national, the interest of the owner may be well hidden. A look at www.flagsofconvenience.com shows a one-stop shop for flag registration and incorporation of shell companies in offshore jurisdictions.

Beneficial ownership is often in Chinese Taipei, Japan, Korea and European countries. According to a Greenpeace report,[18] Lloyds data for 1999 showed that the greatest number of beneficial ownerships of FOC vessels was held by Chinese Taipei companies, followed by the EU (of which the vast majority was held by Spain/Canary Islands), Singapore, South Korea, Japan and China (leaving aside beneficial interest showing to reside in FOC countries).

Thus control over vessels through the flag is essentially negated by lack of control of FOC flag States and by lack of control over the owners.

IUU fishing is not restricted to traditional FOC countries. Vessels caught in IUU fishing activities for Patagonian toothfish have been sailing under the flags of Russia and Uruguay, as well as Panama.

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17 http://www.fao.org/docrep/005/y3536e/y3536e06.htm#bm06.2.5 Section 3.2.5.

18 Greenpeace International, "Pirate Fishing Plundering the Oceans," February 2001, at http://www.greenpeace.org/~oceans/reports/pirateen.pdf, page 20.

Yet despite international concern about illegal fishing activities, and associated effects such as the by-catch of albatross[19] (all 21 species of which are now on the IUCN endangered list), positive action to bring FOC practices to an end has not been forthcoming. Calls to close ports to vessels engaged in IUU fishing and their support vessels, to close markets to fish caught from IUU fishing activities, and to take enforcement action on the international level against such activities have not been sufficiently heeded.

In the meantime, the FOC fishing fleet continues to grow. An International Transport Workers' Federation (ITF) report stated that in the 20 years from 1980 to 2000, the number of open registers grew from 11 to 29.[20] An FAO report from 2002 examines the data from 1997 to 2001, which shows that the number of vessels registered on open registries increased by 208 vessels, to just over 1500 vessels in total (though it is not clear whether the proportion of FOC as a percentage of the global fleet has increased). [21] The shift in specific countries was in some cases dramatic: For example the number of fishing vessels on Belize's register more than tripled during this period, while Panama's decreased by 54% (or 70% by percentage).

In 1999, Greenpeace listed the worst offenders of the FOC countries, accounting for 80% of the flags of convenience, as being Belize (with 404 vessels), Honduras (with 395 vessels), Panama (with 214 vessels), and St. Vincent & the Grenadines (with 108 vessels). Smaller flags were Equatorial Guinea (56 vessels), Cyprus (45 vessels), Vanuatu (34 vessels), Sierra Leone (27 vessels), Mauritius (22 vessels) and the Netherlands Antilles (18 vessels). [22]

FOC vessels undermine fishing conservation and management regimes by taking fish outside quotas, not reporting catches (making assessment difficult), taking by-catch such as non-target birds and species including albatrosses and dolphins, and poaching fish in EEZs which are difficult to police due to isolation or lack of capacity by developing coastal states.

Under the FOC system, there is nothing to prevent ships from changing registries as often as they like, for example in response to countries' efforts to curtail IUU fishing or to better implement the decisions of RFMOs. And this is exactly what IUU vessels regularly do.

States wishing to put a stop to this could impose strict conditions on deregistration of vessels flying their flags. Under Article 91 of the Law of the Sea Convention, every State is required to fix the conditions for granting its nationality to ships, for registering ships in its territory, and for granting them the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. Putting stringent conditions on deregistering ships (as opposed to registering, which is where much of the discussion has been focused) could amount to an implementation of the IPOA-IUU which provides that flag States should deter vessels from re-flagging for the purposes of non-compliance with conservation and management measures or provisions adopted at a national, regional or global level[23]

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19 Greenpeace has estimated that in 2002 alone, up to 93,000 Southern Ocean seabirds – including endangered species of albatross – have been caught and drowned as by-catch by pirate fishers. http://www.greenpeace.org/international_en//press/release?item_id=89498&campaign_id=4022

20 As reported in Swan, 2002.

21 Swan, Judith, FAO Fisheries Circular No. 980 FIPP/C980, "Fishing Vessels Operating Under Open Registers and the Exercise of Flag State Responsibilities – Information and Options. Rome, 2002. The figures used in the paper were obtained from Lloyd's Maritime Information Services.

22 Greenpeace, Dodging the Rules: flags of Convenience fishing, at http://archive.greenpeace.org/oceans/piratefishing/dodgingrules.html

23 IPOA-IUU para 38.

and that States should take all practicable steps to prevent "flag hopping".[24] While those measures are directed at flag acquisition, there is nothing to prevent them being applied to deregistration as well.

Means of avoiding detection

Vessels flying flags of convenience, such as the *Salvora*, often carry concealed or no markings to mask their identities at sea.

In areas where VMS systems are in place, hardware, software and data are frequently tampered with.

Transfer of catch on the high seas

Another means by which IUU fishing remains undetected – arguably the biggest loophole in fisheries management agreements – is by vessels rarely or never entering the ports of countries which maintain adequate port State control measures. The largest vessels are able to remain at sea for months at a time (or even years if they are re-supplied at sea), taking more than half of the annual global catch of fish which is simply offloaded to reefer (transport) ships.[25] Transhipment of the catch in this way allows, in essence, a 'whitewashing' of illegal fish by the time it arrives on the market.

Avoiding serious punishment

Penalties for owners, operators, captains and crew of IUU are at present largely financial. This means that the decision to engage in IUU activities is reduced to a cost/benefit analysis, where the calculus involves the probabilities of getting caught, the entry cost, the potential rewards and the penalties if the vessel is caught. In the case of the owner, the probability of any penalty other than the loss of the fishing boat is negligible. In the unlikely event that a fishing boat is arrested, the owner can demand release of the vessel and if the bond set by the arresting state is significant, engage counsel to take a case to ITLOS to have the bond reduced. Most such cases have succeeded, the most recent being the *Volga* in late 2002 where the bond was reduced from AUD 3 332 500 to AUD 1 920 000.[26]

A large bond would help, and in this respect large financial penalties would enable arresting States to justify a higher bond, but ultimately jail time not only for captains, but for beneficial owners, is necessary to act as a real deterrent. At present, the Law of the Sea Convention prohibits imprisonment for violations of fisheries laws and regulations in the EEZ, in the absence of agreements to the contrary by the States concerned.[27] However, this does not preclude States from imposing prison terms for violation of national laws by beneficial owners and those who aid and abet IUU fishing, and imprisonment for captains can be agreed in an MOU or other document between States. UNCLOS Article 73 does not necessarily require agreement by the flag State: agreement by the flag of the national who is to be imprisoned should suffice. Increasing fines is another and a very simple means to increase deterrence (see related recommendations at the end of this chapter).

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24 IPOA-IUU para 39.

25 Bours, Gianni, Mather, "Pirate Fishing Plundering the Oceans," Greenpeace, February 2001.

26 See discussion of the *Volga* case in section 3.

27 Law of the Sea convention Article 73(3).

Incentives and disincentives for IUU fishing

Incentives

The scale of the problem, and by extension the amount of money which is being made by IUU fishing operations, is poorly understood – given that these people obviously do not report on their activities. Estimates of the scale of IUU fishing can be compiled on the basis of reports by RFMOs (for example 39% of total fishing in the CCAMLR region, 18% for ICCAT) and then extrapolated to estimate global figures.[28] An alternative means of assessing the scale is to compare trade figures (which include IUU fish) and catch data (which does not). This approach suggests that the problem is even worse than is being reported by the RFMOs.[29]

Financial benefits from IUU fishing through FOC practices accrue to at least three different parties: flag States, port States, and fishing companies/vessels

Flag States

The FOC countries, which on the whole are smaller developing countries, earn revenue by charging fishing boats fees to fly their flag. In return, FOC countries turn a blind eye to IUU fishing activities, leaving fishing boats largely free to ignore international laws.

According to a 2002 FAO report[30], the total revenue from registering fishing vessels in 21 countries operating open registries amounted to just over USD 3 million, although this is likely to be an underestimate. While this figure may seem relatively small, it should be noted that fishing vessels represented only 7% of all the vessels registered in these States, and only 4.9% of the income. Given that these States incur few costs from implementing international agreements, the FOC system is clearly a lucrative one from the standpoint of open registry States.

Port States

Las Palmas de Gran Canaria is one of the major ports of convenience.[31] It serves as the main distribution centre for fish caught off Africa, provides services to IUU fleets, and hosts a number of companies which operate pirate vessels.[32] Other such ports include Port Louis, in Mauritius and (historically) Cape Town.

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28 Upton, Simon and Vitalis, Vangelis, "Stopping the High Seas Robbers: Coming to Grips with Illegal, Unreported and Unregulated Fishing on the High Seas," OECD, 2003 at: http://www.oecd.org/dataoecd/15/16/16801381.pdf

29 Upton, Simon and Vitalis, Vangelis, *op cit*.

30 Swan, Judith, FAO Fisheries Circular No. 980 FIPP/C980, "Fishing Vessels Operating Under Open Registers and the Exercise of Flag State Responsibilities – Information and Options", Rome, 2002. The figures used in the paper were obtained from Lloyd's Maritime Information Services.

31 See *The European Union Action Plan to Eradicate IUU Fishing: A Greenpeace Critique*, at: http://web.greenpeace.org/multimedia/download/1/40628/0/pirate_fishing_critique.rtf.

32 Greenpeace, "Witnessing the Plunder: A Report on the *MV Greenpeace* Expedition Investigating Pirate Fishing in West Africa," November 2001.

Fishing companies/vessels

Operators have a variety of incentives to engage in IUU fishing in general, and to operate under flags of convenience in particular:

- Avoiding regulatory or legal obligations: The IMO is increasingly stringent in its requirements for the safe operation of vessels. These requirements, including the acquisition of specialised safety gear, accident insurance, and crew training, can be very costly. FOC registration helps keep those costs to a minimum. In addition, by sailing under an FOC flag, operators do not have to pay for licences, VMS, observers, or the administration of Catch Documentation Systems.[33]

- RFMO decisions to restrict access to fishing areas seasonally or year-round means that the most prized fish species are unavailable for certain periods.[34] This is not a problem for FOC vessels.

- FOC registration is quick, easy and cheap: A couple of clicks at www.flagsofconvenience.com and a few hundred or thousand dollars will buy a registration.

- Short-term profit: Bluefin tuna, for example, currently brings fishermen between USD 2 and USD 17 per pound, depending on a variety of factors (quality of the fish, fat content, value of the yen since Japan is the primary market, etc.). These fish weigh upwards of 500 pounds, so a single fish can bring in USD 1 000 to USD 8 500 or more.[35] In the not too distant past, however, a high quality tuna would bring in as much as USD 50-60 per pound, or USD 25 000-30 000 per fish.[36]

- Another highly sought after species, Patagonian toothfish, sells for up to USD 1 000 per fish. In 1997, illegally caught Patagonian toothfish was valued at over USD 500 million.[37]

- To give an example of the scale of the catch taken by individual vessels, the largest super trawlers can process 50-80 tons of fish per day, and have nets capable of catching 400 tons of fish.[38]

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33 Upton, Simon and Vitalis, Vangelis, "Stopping the High Seas Robbers: Coming to Grips with Illegal, Unreported and Unregulated Fishing on the High Seas," OECD, 2003 at: http://www.oecd.org/dataoecd/15/16/16801381.pdf

34 Swan, Judith, FAO Fisheries Circular No. 980 FIPP/C980, "Fishing Vessels Operating Under Open Registers and the Exercise of Flag State Responsibilities – Information and Options. Rome, 2002. However, according to this report, it is not always the case that vessels re-flag to countries which are not bound to RFMOs. Spanish fishing vessels, for example, flag out primarily to Honduras, Panama and Morocco, which are members of ICCAT. The main issue appears to be whether a country actively implements those agreements or not.

35 http://www.capecodonline.com/cctimes/biz/tunaprices14.htm. The current average price is USD 6-8 per pound. Prices are under pressure due to the increase of tuna-penning: fish are caught, penned, and fed until they are fat enough to bring a good price on the Japanese market.

36 http://www.eagletribune.com/news/stories/19980927/FP_001.htm

37 Greenpeace International, "Mauritius, Indian Ocean Haven for Pirate Fishing Vessels", March 2000

Disincentives for IUU fishing

At present, there are unfortunately few disincentives for IUU fishing. As RFMOs and their member States tighten agreements, including through the application of trade sanctions, pirate fishing vessels simply change registries, or operate under no flag at all.

Clearly the main disincentive to fish legally is the knowledge that the vessel is unlikely to be caught, and even if it is, that it is unlikely to incur a fine large enough to hurt. For many older fishing vessels, even the threat of impoundment provides little disincentive because their value is minimal.[39] A recent FAO study demonstrates this problem quite clearly:[40]

Table 28.1. Estimating* the Probability of Being Penalised for a Violation at Sea in an OECD Country

Sampled vessels	
Average number of fishing days/yr	257
Perceived average boardings/vessel/year (from interviews)	4
Probability of being boarded/day (from interview/MCS records)	1.56%
All vessels	
Total fishing vessel targets/day (av. of samples from high level radar)*...(a)	195
Boardings per patrol day (1999).....(b)	0.98
Probability of being boarded/day (all vessels) (b/a).....(A)	0.5%
Probability of detection of violation per boarding (from MCS records)	15%
Probability of detention (arrest) at sea.....(B)	3%
Probability of penalty if detained (ratio prosecutions/penalties).....(C)	66%
Probability of paying a penalty in a given fishing day.....(A*B*C)	0.01%

*Actual example from an OECD country.

*Source:*http://www.fao.org/DOCREP/005/Y3780E/y3780e00.htm#Contents

The role of subsidies

The depletion of global fisheries is largely due to over-capacity or overcapitalisation – too many (high-tech) boats catching too few fish. Overcapitalisation is exacerbated by direct and indirect government subsidies to the fishing industry. No distinction has been made up until now between legal and pirate fishermen when it comes to providing subsidies. It is therefore safe to assume that governments are subsidising IUU fishing.

Various studies have attempted to calculate the global level of fisheries subsidies. This is not an easy task, partly because there is no agreed definition of what constitutes a fisheries subsidy (for

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38 Porter, Gareth, "Fisheries Subsidies, Overfishing and Trade" at: http://www.sdnbd.org/sdi/issues/environment/article/1.pdf

39 ITF, Greenpeace, "More Troubled Waters fishing, pollution and FOCs" August 2002 at: http://www.itf.org.uk/publications/pdf/more_troubled_waters.pdf

40 Kelleher, Kieran, "The Costs of Monitoring, Control and Surveillance of Fisheries in Developing Countries", FAO Fisheries Circular 976, Rome, 2002 http://www.fao.org/DOCREP/005/Y3780E/y3780e00.htm#Contents

example should fuel subsidies for all sectors – which are enormous – or port improvements be counted?). Most researchers cite the results of a 1998 study by M. Milazzo which estimates the level at USD14-20 billion per year, or approximately 17-25% of global fishing industry revenues.[41] The worst offenders are reportedly the EU, Japan, and China.[42] Another study breaks it down as follows (reportedly in line with Milazzo's results, as the combined figures suggest a global level of USD 15 billion per year):[43]

- Asia-Pacific Economic Co-operation (APEC) with 21 countries along the Pacific Rim, accounting for 85% of the world's fish catch on a tonnage basis: USD 13 billion (study published in 2000);

- OECD, with 24 fishing countries out of its 30 members: 6.3 billion, with Japan accounting for 2.9, the EU for 1.4, the US for 0.877, Spain 0.345 and Korea 0.342 billion (1997 data).

Even subsidies which purport to promote responsible fishing by encouraging vessel retirement have contributed to overcapacity. Subsidies granted to fishers to retire their old boats are often reinvested in more modern boats with even greater capacity. Even if the total number of boats decreases, there will still be an increase in capacity. This is because the level of capacity of the fleet is not measured by the number of boats, but by fleet tonnage, engine power, and the advanced nature of the fishing gear. Large super trawlers (greater than 1,000 gross tons) with powerful engines can travel greater distances, in worse weather, reaching areas which would otherwise be inaccessible. They are assisted by planes, satellite images and sonar systems which identify concentrations of fish even in depleted fisheries.[44] Moreover, boats which have been retired from one registry or fishery may simply be re-flagged and/or displaced to another.[45, 46]

As Porter describes it: "The main cause of overcapitalisation may be the 'open access' nature of most of the world's marine fisheries. An open access system of management for any resource is one in which no individual producer has the right to exclude any other producer from harvesting or otherwise using any part of the resource. Fishers continue to enter the fishing industry because there are no effective limits on access to the resource. And they maximise their fishing effort because, without any effective property right to the resource, they calculate that fish left in the water will be caught by someone else. Eventually this expansion of aggregate fishing reduces the fish stock, and catch per unit of effort declines, along with economic returns to producers. Producers will continue to increase fishing effort, however, as long as they have hopes of achieving some level of profit. Finally, stocks are reduced to the point that total fishing costs are equal to the value of the harvest and profitability in

41 Milazzo, M. World Bank Technical Paper No. 406 "Subsidies in World Fisheries: A Reexamination," Washington, D.C. 1998.

42 Arnason, Ragnar, "Fisheries subsidies, overcapitalisation and economic losses".

43 Steenblik, Ronald P. and Wallis, Paul F. "Subsidies to Marine Capture Fisheries: The International Information Gap", http://biodiversityeconomics.org/incentives/toics-340-00.htm

44 Porter, Gareth, "Fisheries Subsidies, Overfishing and Trade" http://www.sdnbd.org/sdi/issues/environment/article/1.pdf

45 Swan, Judith, FAO Fisheries Circular No. 980 FIPP/C980, "Fishing Vessels Operating Under Open Registers and the Exercise of Flag State Responsibilities – Information and Options". Rome, 2002.

46 Arnason, Ragnar, "Fisheries subsidies, overcapitalisation and economic losses"

the fishery is zero. Then fishing capacity cease [sic] to increase. But by that time, the fishery is already in a state of serious depletion."[47] IUU fishing is by definition 'open access.'

Moreover, once this process plays out, and the fishing industry heads for crisis, additional subsidies are often granted to ensure survival and thus discourage fishers from withdrawing from the industry. Indeed, while the short-term financial benefits to fishers may be substantial, they are inevitably negated by the loss of profit due to unsustainably high fishing levels.[48]

The EU in particular is saddled with an enormous problem of over-capacity, largely as a result of subsidies for fleet modernisation in the 1970s and 80s. One solution has been for the EU to ensure access for its fleets to distant water fisheries, for example by buying access to the fishing grounds of African countries for example. This in itself represents a subsidy – by 1996, the EU was paying USD 193 million a year to 15 African countries. [49]

With regard to the Mediterranean, a 2001 English Nature report[50] notes that aid under the Financial Instrument for Fisheries Guidance (FIFG) continues to be available to encourage the adoption of more selective fishing gear, but there is no explicit linkage with compliance with technical compliance rules. The FIFG has thus worked to increase fishing capacity, where it should be used to encourage technical measures.

Subsidy reforms

Major fishing countries have been wrestling with options for dealing with the subsidies problem for the last ten years, impeded in part by the problem of defining the term 'subsidy'. An FAO Expert Consultation on the subject was held in December 2000, and concluded that no single definition could be agreed.[51] They did, however, identify four different types of subsidies which could be used as a standard for classification purposes, which have been summarised as follows:

- "Set 1 Subsidies: Government financial transfers that reduce the costs and/or increase the revenues of producers in the short term.
- Set 2 Subsidies: Government interventions – regardless of whether or not they involve financial transfers – that reduce the costs and/or increase the revenues of producers in the short term.
- Set 3 Subsidies: Subsidies in set 3 are set 2 subsidies plus the short-term benefits to producers that result from the absence or lack of interventions by government to correct distortions (imperfections) in production and markets, which can potentially affect fishery resources and trade.

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47 Porter, Gareth, "Fisheries Subsidies, Overfishing and Trade" http://www.sdnbd.org/sdi/issues/environment/article/1.pdf, page 12-13.

48 Arnason, Ragnar, "Fisheries subsidies, overcapitalisation and economic losses".

49 Porter, Gareth, "Fisheries Subsidies, Overfishing and Trade" http://www.sdnbd.org/sdi/issues/environment/article/1.pdf

50 Clare Coffey for English Nature, Mediterranean Issues: Towards Effective Fisheries Management, 12, at http://www.jncc.gov.uk/marine/fisheries/pdf/Mediterranean2.pdf, 12.

51 FAO, "The State of World Fisheries and Aquaculture 2002, Part 2 Selected issues facing fishers and aquaculturists" at http://www.fao.org/docrep/005/y7300e/y7300e00.htm

- Set 4 Subsidies: Subsidies in set 4 are government interventions, or the absence of correcting interventions, that affect the costs and/or revenues of producing and marketing fish and fish products in the short, medium, or long term."[52]

On the basis of these guidelines, fishing countries are now working to classify subsidies and assess their impacts.

Note: many developing countries are opposed to the elimination of subsidies that they consider necessary for the development of their fishing capacity and industry in general. Developing countries are negatively affected by highly subsidised distant water fishing fleets. At the same time, developing countries are facing a situation where fish stocks are declining, ever stricter management rules and standards are being imposed (which increase the costs of management) and industrialised countries have a quasi-monopoly on access to resources. It is therefore no surprise that they perceive moves to eliminate subsidies as yet another obstacle in getting what they consider to be an equitable a share of the resources.[53]

WTO

The GATS Agreement on Subsidies and Countervailing Measures of 1994, generally known as the Agreement on Subsidies, arose out of the Uruguay Round and provided for the first time a clear definition of a subsidy.[54] Article VI deals with the use of subsidies and the actions that countries may take to counter the adverse effects of subsidies from a third party (countervailing measures). Under the Agreement, a country can use the WTO's dispute-settlement procedure to seek the withdrawal of a subsidy, or it can launch its own review and ultimately charge extra duty on subsidised imports that are found to be distorting its domestic market ("countervailing duty").

The Agreement makes a distinction between Prohibited Subsidies (subsidies that require the recipients to meet certain export targets or to use domestic goods instead of imported ones, which are designed to distort international trade) and Actionable Subsidies (subsidies that have an adverse effect on the interests of the plaintiff – environmental harm is not currently listed as a potentially adverse effect.)[55] Prohibited subsidies can be challenged in the WTO dispute settlement procedure under an accelerated time-table, and if it is determined that the subsidy is indeed prohibited it must be withdrawn immediately. In the case of actionable subsidies, if it is determined that the subsidy has an adverse effect, the country must withdraw it, or modify it so that the adverse effect disappears.[56]

There is a provision in the Agreement which states that countries should not cause 'serious prejudice' to the interests of other members.[57] One of the conditions representing 'serious prejudice' would be for the subsidisation of a product to exceed 5 per cent of the value of the product exported by

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52 FAO, "The State of World Fisheries and Aquaculture 2002, Part 2 Selected issues facing fishers and aquaculturists" pages 93-95 at http://www.fao.org/docrep/005/y7300e/y7300e00.htm

53 Bours, Hélène, personal communication.

54 Agreement on Subsidies and Countervailing Measures at: http://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm

55 For a comprehensive consideration of the Doha Agenda, see: http://www.wto.org/english/tratop_e/dda_e/dda_e.htm

56 "Understanding the WTO: The Agreements" at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm

57 Article 5c.

that country – a condition which applies to many fishing subsidies.[58] However, solving the problem by bringing isolated cases before the WTO based on the Subsidies Agreement would be time consuming, costly, and inefficient.

Within the WTO, for several years a group of countries (known in Geneva as the "Friends of the Fish" made up of Australia, Chile, Iceland, New Zealand, Peru, the Philippines and the USA), have been promoting the reduction and/or elimination of fisheries subsidies on the basis that these are trade-distorting, environmentally harmful, and inconsistent with the free-trade *mantra* of the WTO.

Japan, Korea and the European Union – three delegations from countries with highly subsidised fishing fleets and which have consistently denied the existence of a link between over-capacity and high levels of subsidies – have been on the opposing side of this discussion.[59]

At its Fourth Ministerial Conference held in Doha in November 2001, the WTO agreed to put fisheries subsidies on the agenda of the *Doha Round* of trade liberalisation, scheduled (at least before the failed Cancun stock-taking ministerial conference of September 2003) to be concluded on 1 January 2005. Reference is made twice to the elimination of fisheries in the Doha Declaration:

In Paragraph 28 (emphasis added):

> In the light of experience and of the increasing application of these instruments by members, **we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures**, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. **In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase**. In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries. We note that **fisheries subsidies are also referred to in paragraph 31**.[60]

And in Paragraph 31, "Trade and Environment", in order to emphasise that the environmentally harmful aspect of fisheries subsidies also forms part of their review (emphasis added):

> With a view to **enhancing the mutual supportiveness of trade and environment**, we agree to negotiations, without prejudging their outcome, on:
>
> (i) the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The

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58 Article 6, and see discussion in Porter, "Fisheries Subsidies, Overfishing and Trade" http://www.sdnbd.org/sdi/issues/environment/article/1.pdf

59 Although after (and in part as a result of) the Doha WTO Conference, the EU undertook its Common Fisheries Policy reform, which provides for the progressive elimination of some EU subsidies in the fisheries sector.

60 Abstracted from Paragraph 28 of the Doha Main Ministerial Declaration, Paragraph 28, WTO Rules, emphasis added.

negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;

(ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status;

(iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.

We note that fisheries subsidies form part of the negotiations provided for in paragraph 28.[61]

Testing the ability of the WTO to recognise the importance of environmental harm in the framework of the negotiation launched with Paragraph 28 of the Doha Declaration can be of paramount importance for countries (in Southern and West Africa for example) whose fisheries are being deprived from their fisheries resources by EU and other subsidised fleets. However, the comment above about the perceptions of developing countries with regard to subsidies should be borne in mind.

EU

Although it is commonly accepted that fishing capacity must be brought into balance with available resources (one of the major objectives of the EU Common Fisheries Policy), governments are reluctant to effectively reduce fishing fleets.

In June 2003, the European Commission wrote: "While fishing capacity (defined in terms of vessels' tonnage and engine power) has been somewhat reduced through Multi-Annual Guidance Programmes (MAGPs), recent reduction targets under MAGP IV have been too modest. Moreover, increasing fleet efficiency and dwindling stocks have meant that, in some segments, the fleet is still too large for the stocks it is targeting."[62] Fleet reductions have also been achieved through the transfer of vessels to other flags, including flags of convenience. Under the current EU fisheries subsidy policy (Financial Instrument for Fisheries Guidance - FIFG), the premium to transfer a vessel to another country in the framework of a joint enterprise can be up to 80% of the premium to scrap the vessel. But the owner has been able to keep his vessel and continue to fish.

In December 2001, EU fisheries ministers agreed to amend the FIFG to prohibit the use of EU subsidies to transfer an EU-flagged vessel to certain countries such as those operating open registries.

Council Regulation (EC) No 179/2002 of 28 January 2002 amending Regulation (EC) No 2792 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector[63] provides that Article 7(3)(b) be amended with the following addition:

"(iv) If the third country to which the vessel is to be transferred is not a Contracting or Cooperating party to relevant regional fisheries organisations, that country has not been identified by such organisations as one which permits fishing in a manner which jeopardises the effectiveness of international conservation measures. The Commission shall publish a list

61 Doha Main Declaration, Paragraph 31, *Trade and Environment*, emphasis added.

62 http://europa.eu.int/comm/fisheries/scoreboard/fleet_en.htm

63 http://europa.eu.int/eur-lex/en/archive/2002/l_03120020201en.html

of the countries concerned on a regular basis in the series C of the Official Journal of the European Communities."

Bilateral fishing agreements

Developing countries are often heavily dependent on the revenues stemming from distant water fishing fleets. Revenues are obtained through bilateral fishing agreements, which provide for the licensing of foreign vessels to fish in a country's EEZ. Major distant water fishing countries include Japan, Chinese Taipei, Korea, US, and Spain. Despite the fact that the revenues generated by licensing fees are extremely low in relation to the value of the landed catch by foreign vessels (for example in the Pacific, it is roughly 5%[64]), countries are under constant pressure to reduce them.

Revenues may be augmented by tied aid. Japan is widely cited as providing aid to coastal developing countries in exchange for access by its distant water fleet to important fishing grounds.

Most developing countries with which the EU, Japan, and others have bilateral fisheries agreements do not have the means to control activities in their EEZ. That results in widespread IUU fishing and the destruction of fish stocks, the marine environment and coastal communities' livelihoods.

The EU is in the process of adapting its policy on fisheries agreements (now branded "partnership agreements") to make it look more coherent with its own environmental and development policies as well as international commitments (for example those made at the WSSD). It remains to be seen whether this is a real change or simply a means of hiding the "business as usual" effort to over-exploit other countries' waters to keep their own fleets active and to supply the large EU market.

The EU is also claiming to help fight IUU fishing in developing countries' waters by allocating some of the financial contribution paid for access to what they call "targeted actions". The amounts vary significantly between agreements. In the case of Guinea Conakry, for example, EU money supposedly dedicated to control and surveillance is very obviously not used for that purpose. The EU Commission has admitted that it has no way to demand or even ensure that the money is used for the agreed purpose. The bottom line is that EU public money is used to subsidise the access of EU fleets to developing countries' waters, with no way to ensure that the waters where the fleets operate are properly controlled.[65]

Policy recommendations

Deterring FOC practices

There are essentially four ways of deterring FOC practices under existing laws:

1. Deter reflagging;

2. Increase controls over vessels in ports;

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64 Teaiwa, Tarte, Maclellan, Penjueli, "Turning the Tide: Towards a Pacific Solution to Conditional Aid," Greenpeace Australia/Pacific, June 2002 http://www.greenpeace.org.au/features/pdf/Turning_the_Tide_FINAL_large.pdf

65 Bours, Hélène, personal communication.

3. Apply market and other sanctions to encourage flag States to *i)* join relevant fisheries agreements and *ii)* force their flagged vessels to comply or remove (or specifically NOT remove them as discussed on page 374) from their registries; or

4. Increase control over nationals.

In addition, there are a variety of measures which could be taken to strengthen existing laws, such as the elaboration of 'the genuine link' and new agreements to strengthen port State controls. Litigation under ITLOS is another avenue which could be more creatively approached.

Deter re-flagging

In practical terms, designing measures which cannot be circumvented under existing law to deter nationals from re-flagging will be difficult. However financial incentives and taxation measures can be used to deter the re-flagging of vessels. It is more straightforward legally to impose controls over nationals' (including corporations') fishing activities, but a number of measures could be taken in line with both approaches.

Recommendations on re-flagging

1) States should require (such as in taxation legislation) nationals to disclose beneficial interests in foreign flagged vessels.
2) States should negotiate agreements for information sharing between flag States as to beneficial ownership of vessels.
3) Information sharing should be promoted between flag States and RFMOs to increase transparency in ship-owning arrangements.
4) Port States should co-operate to acquire, exchange and make available to enforcement authorities detailed information which would reveal the true beneficial ownership of fishing companies and vessels. For instance, details of vendors of fish catches, purchases of bunkers and stores, agents of vessels, bank accounts, etc. should be logged and kept in a central register.
5) States should impose stringent conditions on vessel deregistration.
6) The 1986 UN Convention on the Registration of Ships could be cloned, and applied to fishing vessels.[66] [In doing so, however, the provision requiring a specific number of fishing States to ratify should be eliminated: a set number of ratifications (*e.g.* 40) should be sufficient to bring it into force.]
7) The IMO initiative requiring a 'continuous synopsis' (showing a complete history of owners and flags) should be extended to cover fishing vessels.[67]

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66 Currently a ship is defined as any self-propelled sea-going vessel used in international seaborne trade for the transport of goods, passengers, or both – with the exception of vessels of less than 500 gross registered tons: Article 2.

67 Proposed by Swan, in FAO Fisheries Circular No. 980 FIPP/C980, "Fishing Vessels Operating Under Open Registers and the Exercise of Flag State Responsibilities – Information and Options." Rome, 2002.

Increasing controls over vessels in port

The legal basis of port State jurisdiction is complex. The starting point is that a port State has sovereignty over its own territory and that a vessel subjects itself to that sovereignty by entering its port. An argument can be made that by voluntarily seeking admission to the port of a State, a vessel accepts the jurisdiction of that State. The question then arises as to how far that jurisdiction goes. It seems clear that a state can deny facilities, with the possible exception of vessels in distress, subject to non-discrimination requirements. Much legal discussion surrounds the issue of any arrest and detention of a vessel. This distinction must be borne in mind: denial of port access, and, even more so, of offloading or other facilities, are much more straightforward from a legal perspective than the detention or arrest of a ship. Forfeiture of catch is somewhat more akin to the detention of a vessel, but may be less problematic legally.

An FAO Expert Consultation to Review State Measures to Combat IUU Fishing, held in November 2002, concluded[68] that a Memorandum of Understanding on Port State measures would constitute one of the numerous useful tools to prevent, deter and eliminate IUU fishing.[69] Suggested elements[70] included provisions for inspections, prior notice of port access and exchange of information. A draft MOU was included.[71] It also suggested possible sanctions for IUU vessels, such as denial of permission to land fish or fishery products, forfeiture of fish or fishery products, and refusal to permit a vessel to leave port pending consultation with the flag State of the vessel.

An inspection and detention regime using the Paris MOU as a model clearly has benefits. It certainly would be of more value than the proposed EU conference to negotiate an agreement on the rights and responsibilities of port States concerning access by fishing vessels to port facilities, although it is possible that the proposed conference could be used as a vehicle to negotiate the MOU. The point of an MOU would be to go further than existing law and allow detention of suspected IUU vessels. It would also improve co-operation measures and put the legality of inspection and denial of port facilities beyond doubt. An MOU could, as the FAO has suggested, improve the current permissive approach and make port State controls mandatory, and in addition could help harmonise the various port State controls. Improving the linkages with regional fisheries management organisations would allow States to benefit from the knowledge and experience of their secretariats as well as to provide a two-way flow of information.

Recommendations on port State controls

To start with, port States should conduct rigorous inspections of all open registry ships which aim to use port facilities. If such inspections reveal evidence of IUU fishing, (or if a vessel is blacklisted by an RFMO) a number of specific measures could be taken (1-4 below). In addition, further measures should be adopted:

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68 FAO Report of the Expert Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing - Rome, 4-6 November 2002 at: http://www.fao.org/DOCREP/005/Y8104E/Y8104E00.HTM.

69 http://www.fao.org/DOCREP/005/Y8104E/y8104e06.htm#bm06

70 http://www.fao.org/DOCREP/005/Y8104E/y8104e07.htm#bm07

71 http://www.fao.org/DOCREP/005/Y8104E/y8104e0b.htm#bm11.5

1) IUU vessels should be prevented from bunkering and discharging their catches.[72]

2) Such sanctions should be extended to support vessels including cargo vessels and tankers.

3) All such vessels should be inspected, and port States should co-operate with other states to verify the status of any fish on board.

4) States should implement provisions in national legislation for penalties on vessels fishing in the port State's EEZ, including inspection and forfeiture of any catch and deterrent penalties, and with respect to vessels fishing in the high seas, and implement any measures agreed in any MOU on port State control.

5) Concerned states should negotiate an MOU on port State control.

6) States should adopt new legally binding instruments at the national or regional level to implement the IPOA-IUU recommendations on port State control. Individual states or regional groupings such as the EU should implement a system of prior notification before entry into port, inspections, and denial of port facilities including bunkering and catch unloading to *i)* vessels which inspections find to have engaged in IUU activities and *ii)* vessels on an IUU blacklist. Such a blacklist could be adapted from the CCAMLR or ICCAT lists. (A step further based on the precautionary principle would be to deny access to facilities to all fishing boats NOT listed as being legal and responsible operators.)

7) State legislation should make it an offence simply to be in port with IUU fish on board. This would not include a reference to where the fish was caught, and would thus avoid a number of jurisdictional problems.

8) States should prohibit the landing of IUU fish. This will probably require a catch documentation scheme to be in place. For instance, in the EU, Control Regulation 2847/93[73] should be amended accordingly. This Regulation currently allows vessels from third countries to offload fish that were caught on the high seas as long as the species were caught outside the regulatory areas of the relevant RFMOs of which the EU is a member, so does not necessarily prevent IUU fishing.

9) States should provide for the forfeiture of catches of IUU vessels. This can be achieved a) for nationals under a state's jurisdiction and vessels flying its flag and b) otherwise, in an MOU with relevant states.

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72 See with respect to Antarctica: ASOC, "The Application of Port State Jurisdiction, " attaching paper "Port State Jurisdiction: An Appropriate International Law Mechanism To Regulate Vessels Engaged In Antarctic Tourism" (8 October 2002), at: http://www.asoc.org/Documents/XXIICCAMLR/ASOC.Port%20State.doc. The paper proposes a memorandum of understanding modelled on the Paris MOU to implement an effective port state control regime to regulate vessels engaged in Antarctic tourism.

73 Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy, at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31993R2847&model=guichett

Market sanctions

Market-based sanctions have proven effective. ICCAT import controls on FOC states such as Honduras and Belize doubtless had an influence on the reduction of fishing boats on their registries and on efforts to reduce IUU fishing activities. It should be noted, however, that in order for trade sanctions not to violate WTO rules, they must be non-discriminatory, transparent, and linked to a policy of 'conserving an exhaustible natural resource'.[74]

Recommendations on market sanctions

1. Other RFMOs should adopt the ICCAT system so that member states prohibit the import of fish products from non-complying parties.

2. States should impose higher tariffs for fish and fish products from identified states where vessels have frequently engaged in IUU fishing.[75] The tools to do this are already in place in the EU and should be used more.[76]

3. States and/or RFMOs should take measures to deter companies from doing business with IUU operations, as recommended in the IPOA-IUU.[77] Companies identified in the IPOA include: importers, transhippers, buyers, consumers, equipment suppliers, bankers, insurers, other services suppliers and the public.

Control over nationals

Increasing control over nationals requires increased transparency in registries and corporate shareholding so that states are in fact able to monitor and control the activities of their nationals who own, crew and supply IUU fishing vessels, regardless of the flag under which they sail. This paper has already recommended that taxation policy be used to force nationals to disclose their beneficial interests in foreign flagged vessels. In addition, there are a number of specific things which can be done in the context of implementing the IPOA-IUU:

Recommendations on control of nationals

1) IPOA-IUU language on control of nationals should be implemented to ensure that nationals subject to a State's jurisdiction do not support or engage in IUU fishing. Measures include introducing prison sanctions for IUU fishing, including aiding and abetting, to prevent, deter and eliminate IUU fishing and depriving offenders of the benefits from IUU fishing. Sanctions could be extended to companies that do business with IUU operations, as provided for in IPOA-IUU paragraph 73. In other words, states should adopt measures to make it illegal to own or otherwise participate in any aspect of IUU fishing.

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74 Upton, Simon and Vitalis, Vangelis, "Stopping the High Seas Robbers: Coming to Grips with Illegal, Unreported and Unregulated Fishing on the High Seas," OECD, 2003 at: http://www.oecd.org/dataoecd/15/16/16801381.pdf

75 See EU Parliament draft report on the role of flags of convenience in the fisheries sector (2000/2302)(INI), 23 September 2001, at: http://www.europarl.eu.int/meetdocs/committees/pech/20011008/439060EN.pdf

76 Already in the EU Regulation 2820/98 article 22 allows for temporary withdrawal of tariff preferences in case of manifest infringement of the objectives or RFMOs.

77 IPOA-IUU Paragraph 73 http://www.fao.org/DOCREP/003/y1224e/y1224e00.HTM

2) A system for penalizing those nationals benefiting from IUU fishing should be implemented as suggested in the IPOA-IUU, to deprive them of benefits of such fishing and act as a deterrent.

3) EU Regulations[78] already require member states to ensure that appropriate measures are taken, including administrative action or criminal proceedings according to their national law, against natural or legal persons responsible. But the regulations only apply to vessels in EU waters and EU vessels in the high seas. They should be modified to apply to EU citizens wherever the vessel and whatever the flag.

Elaborate the definition of "genuine link"

ITLOS appears to be favourable to upholding the requirement to establish a genuine link between the flag State and the vessel. After two cases (the *Camouco* and *Monte Confurco* cases) wherein ITLOS reduced the amount of the bond levied by the French government, ITLOS reached a turning point with the *Grand Prince* case by declining jurisdiction and holding that "in the view of the tribunal, the assertion that the vessel is 'still considered as registered in Belize' contains an element of fiction, and does not provide sufficient basis for holding that Belize was the flag State of the vessel for the purposes of making an application under article 292 of the convention."[79] In other words, ITLOS did not accept that the vessel properly was entitled to the protection of Belize despite the fact that it was flying the Belize flag at the time it was arrested. ITLOS therefore let the bond of EUR 1.74 million set by the French government stand. Of course the entire flag of convenience system contains an element of fiction, and while the ITLOS decision turned on the facts of that case where the status of the registration was in doubt, the *Grand Prince* decision showed a welcome readiness to move back to requiring a genuine link.

Further elaboration of the concept of 'genuine link' would help to ensure that the flag State does its duty to force vessels to comply with the rules.

The IPOA-IUU could serve as a starting point. It goes some way towards cutting off the supply of vessels to be flagged under FOCs by preventing re-flagging: "19. States should discourage their nationals from flagging fishing vessels under the jurisdiction of a state that does not meet its flag State responsibilities."

It then lays out responsibilities for flag States:

> 35. A flag State should ensure, before it registers a fishing vessel, that it can exercise its responsibility to ensure that the vessel does not engage in IUU fishing.
>
> 36. Flag States should avoid flagging vessels with a history of non-compliance except where:
>
> 36.1 the ownership of the vessel has subsequently changed and the new owner has provided sufficient evidence demonstrating that the previous owner or operator has no further legal, beneficial or financial interest in, or control of, the vessel; or

78 Regulation 2847/93.

79 Grand Prince (Belize v France), Judgment of 20 April 2001, at: http://www.itlos.org/case_documents/2001/document_en_88.doc, paragraph 85.

36.2 having taken into account all relevant facts, the flag State determines that flagging the vessel would not result in IUU fishing.

37. All states involved in a chartering arrangement, including flag States and other states that accept such an arrangement, should, within the limits of their respective jurisdictions, take measures to ensure that chartered vessels do not engage in IUU fishing.

38. Flag States should deter vessels from re-flagging for the purposes of non-compliance with conservation and management measures or provisions adopted at a national, regional or global level. To the extent practicable, the actions and standards flag States adopt should be uniform, to avoid creating incentives for vessel owners to re-flag their vessels to other states.

39. States should take all practicable steps, including denial to a vessel of an authorisation to fish and the entitlement to fly that State's flag, to prevent "flag hopping"; that is to say, the practice of repeated and rapid changes of a vessel's flag for the purposes of circumventing conservation and management measures or provisions adopted at a national, regional or global level or of facilitating non-compliance with such measures or provisions.

40. Although the functions of registration of a vessel and issuing of an authorisation to fish are separate, flag States should consider conducting these functions in a manner which ensures each gives appropriate consideration to the other. Flag States should ensure appropriate links between the operation of their vessel registers and the record those states keep of their fishing vessels. Where such functions are not undertaken by one agency, states should ensure sufficient co-operation and information sharing between the agencies responsible for those functions.

41. A Flag State should consider making its decision to register a fishing vessel conditional upon its being prepared to provide to the vessel an authorisation to fish in waters under its jurisdiction, or on the high seas, or conditional upon an authorisation to fish being issued by a coastal State to the vessel when it is under the control of that flag State.

All of these provisions assume the will and capacity of FOC States to undertake these actions. Where, as is likely to be the case, the will or capacity is lacking, there must be the ability to pierce the corporate veil and apply sanctions to the true beneficial owner.

Recommendations on elaborating genuine link

1) Legally binding measures to implement paragraphs 19 and 35-41 of the IPOA-IUU should be adopted.

2) One or more States should take a case to ITLOS to elaborate the requirements for a genuine link as well as flag State (and even national State) responsibilities.

Monitoring, control and surveillance

Implementing the best available systems for Monitoring, Control, and Surveillance (MCS) is key to enforcing existing agreements to prevent IUU fishing. The IPOA-IUU (paragraph 24 for example) contains numerous references to the myriad of tools available to fisheries managers, "including (but not limited to) vessel monitoring systems (VMS), observer programmes, catch documentation schemes, inspections of vessels in port and at sea, denial of port access and/or privileges to suspected IUU vessels, maintenance of "black" and "white" lists, and the creation of presumptions against the

legitimacy of catches by Non-Party fishing vessels in areas regulated by RFMOs."[80] The exchange of information between management and enforcement officials, within and between regions, is also critical.

Unfortunately, MCS is not carried out globally. According to a 2001 Greenpeace report, "…fisheries control and surveillance are virtually non-existent on the high seas of the Atlantic Ocean. Most of the national exclusive economic zones (EEZs) off the west coast of Africa, where both legal and illegal foreign distant-water fishing fleets operate, are not sufficiently controlled either."[81] Existing agreements recognise the need for states to exercise their responsibilities to inspect, and ultimately to prosecute, those who violate the rules. While many states have invested in building up their capacity to do so, others, particularly poorer developing countries, do not have the resources to do so.

The UN Fish Stocks Agreement contains provisions for assistance, including financial, to developing country Parties.[82] This is being implemented for example through the creation of an Assistance Fund in collaboration with the FAO, bilateral partnerships between developed and developing countries, and assistance from the World Bank.[83] One positive example of a bilateral partnership is the support from the government of Luxembourg for the Sub-Regional Fisheries Commission (based in Senegal) and the Surveillance Operations Co-ordination Unit (Gambia) which are co-operating to develop an MCS programme.[84] Germany's GTZ has also provided support to Mauritania in developing its MCS programme.[85]

Recommendations on MCS

1) All States should introduce and/or expand their use of VMS systems as a cost-effective means of monitoring and surveillance, and to participate in the International MCS Network.

2) The current system used by some RFMOs to establish 'white' and 'black' lists of fishing vessels should be expanded. The precautionary principle, which has already been agreed in the UN Fish Stocks Agreement and other instruments, suggests that the burden of proof should be shifted to vessel owners. A new type of list, which identifies vessels which are known NOT to be engaged in IUU fishing, should be drawn up and used by fisheries management authorities. This would inherently require the use of VMS to demonstrate innocence.

3) Monitoring systems should be improved, for example by ensuring that devices cannot be disabled, or the data tampered with. NGOs attending CCAMLR meetings repeatedly call for

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80 http://www.fao.org/docrep/005/y3536e/y3536e06.htm#bm06.2.5 Section 3.2.5

81 Bours, Gianni, Mather, "Pirate Fishing Plundering the Oceans," Greenpeace, February 2001, page 9.

82 Fish Stocks Agreement, Part VII, Article 26: http://www.un.org/Depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm

83 "Second Informal Consultations of the States Parties to the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York 23-25 July 2003) - Report" at: http://www.un.org/Depts/los/convention_agreements/FishStocksMeetings/UNFSTA_ICSP2003_Rep.pdf

84 Greenpeace, "Pirate Fishing: Plundering West Africa," September 2001.

85 Greenpeace, "Witnessing the Plunder: A Report on the *MV Greenpeace* Expedition Investigating Pirate Fishing in West Africa," November 2001.

the Commission to require centralised VMS systems which transmit data in real time back to the Secretariat, arguing that flag State vessel monitoring is insufficient.[86] They cite the fact that NAFO already uses a centralised system. They propose that CCAMLR look at adopting the comprehensive measures to prevent tampering which Spain has put in place. Such measures should be adopted by CCAMLR, and extended to other RFMOs.

4) Developing countries should be assisted to increase their capacity to carry out MCS by providing assistance and funding through whatever means possible. Such support should not be contingent upon the developed country getting (increased) access to the recipient country's fishing grounds. The results of such assistance should be monitored to ensure that assistance achieves its intended result.

Recommendations on catch and trade documentation systems

1) Catch documentation schemes should be implemented more widely to help resolve the problems of transhipments. Catch documentation schemes must not be reliant on the filling in of forms by fishing captains, as is the case with the CCAMLR model, but must include verification and inspection protocols by national fishing officers in ports in co-operation with RFMOs.

2) Likewise, trade documentation schemes should be implemented more widely, which would provide for documentation to accompany fish in trade starting from the point it is caught, all the way through to the time it reaches the consumer. There should be a widespread system implemented to include important markets (such as Japan and Chinese Taipei) and ports (especially ports of convenience such as Las Palmas and Mauritius) to put into place effective labelling and tracing of fish products.

3) Consumers should be dissuaded from purchasing non-certified fish and fish products. In addition to ongoing campaigns *e.g.* not to buy Chilean sea bass, or the wallet guides to sustainably caught fish which many groups publish, consumers could be educated only to buy certified fish and fish products. This would of course be contingent on effective tracing and labelling regimes being in place.

4) States should make the import or export of non-certified fish products a criminal act under their domestic legislation, based on the CITES model.

Recognise a formal role for NGO vessels

Coastal states could engage in discussions with NGOs and RFMOs to co-operate in information and evidence gathering and could for instance nominate authorised inspectors to go on board private vessels such as those operated by NGOs and ensure that evidence gathered by NGOs can be used against apprehended IUU vessels. Close co-operation with NGOs will enable fisheries enforcement vessels to react to reports by NGOs and arrest IUU vessels. In some cases NGO vessels could be authorised to be on government service and thus even engage in inspections, boarding and arrest, under supervision of the inspectors, of vessels found fishing illegally. Such vessels would need to be marked as being on government service[87] and would enjoy immunity as government vessels.[88] It

86 ECO, 3 November 2003.

87 Law of the Sea Convention Article 111.

88 Law of the Sea Convention Article 96.

should be noted that the requirements of hot pursuit when chasing, boarding and arresting vessels are exacting and should be followed.[89] For instance there must be a visual or auditory message to stop, and the hot pursuit must begin when the fishing boat (or one of its boats) is within the EEZ, and may not be interrupted.[90]

Such an approach is in keeping with the recommendations of COLTO, the legal toothfish operators' coalition: "Effective surveillance and enforcement can only come, we believe, by legal operators, conservation groups and government agencies working in partnership to combat IUU fishing."[91]

Recommendation on NGO involvement in MCS

1) In many developing countries, there is a will to undertake effective MCS activities, but the capacity is simply not there, or not sufficient. Such countries should attempt to negotiate MOUs with NGOs, where appropriate, to assist in patrolling the EEZ.

Criminalise IUU fishing

Revise laws on arrest of fishing vessels to work better as a deterrent

International law prohibits imprisonment for captains and crew of vessels fishing illegally and fines are often seen as a cost of doing business. It favours the release of fishing vessels, and states may be forced to release arrested vessels which then reflag and carry on with IUU fishing. The negotiation of regional or even international agreements, such as MOUs on port State control, would go some way towards introducing new controls. But international agreements would need to specifically involve FOC States as parties to ensure truly effective deterrents such as confiscation of fishing vessels and imprisonment, as well as to provide for imprisonment of beneficial owners. Until such agreements are in place, it would assist considerably if states were to implement penalties which considerably exceed the value of the vessel and potential profits: in the millions or even tens of millions of dollars. This would allow ITLOS to sanction large bonds and would act as a significant deterrent. Legislation should ensure that catches or the value of catches are confiscated.

Recommendation on arrest of fishing vessels

1) States, particularly Spain where many IUU beneficial owners hold their nationality, should enact laws requiring prison sentences for beneficial owners and operators of IUU fishing vessels and for those who aid and abet them.

2) Coastal States should provide for penalties under their domestic legislation which will exceed the value of fishing vessels and their catch. Such penalties will be in the several millions of dollars and should in addition ensure that catches or the value of catches are confiscated.

3) Coastal States should negotiate agreements with other states, both within RFMOs and with other states such as EU member states, to allow for prison sentences for captains, owners and operators of IUU fishing vessels, and to allow permanent confiscation of IUU fishing boats.

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89 Law of the Sea Convention Article 111.

90 Law of the Sea Convention Article 111.

91 http://www.colto.org/About_Us.htm

Strengthen bond procedures to act as a deterrent

When a vessel is arrested and the arresting State wishes to detain the vessel, the Law of the Sea Convention requires that the arresting State set a reasonable bond for the release of the vessel.[92] The flag State may then apply to ITLOS for prompt release of the vessel, and in effect for a reduction in bond, claiming the bond set by the arresting State is not reasonable.[93]

ITLOS has frequently been asked to decide applications for prompt release of vessels under article 292 of the Law of the Sea Convention, for example the previously mentioned cases involving the *Camouco*[94] *Monte Confurco*,[95] *and Grand Prince.* [96]

The IPOA-IUU stresses deterrence, however.[97] The need for deterrence has yet to be fully implemented by ITLOS in its assessment of the reasonableness of the bond. A bond should not be held to be unreasonable if it is at a level necessary for a coastal State to ensure the effective enforcement of fisheries laws. Judge Anderson noted in the *Monte Confurco* case that "where there is persistent non-observance of the law, deterrent fines serve a legitimate purpose."

Recently the *Volga* case *(Russian Federation v Australia)*[98] involved a longline fishing vessel flying the Russian flag which was boarded in February 2002 by the Australian navy outside the EEZ of the Australian Territory of Heard Island and the McDonald Islands with over 131 tonnes of Patagonian toothfish (*Dissostichus eleginoides*). Australia sought a bond of AUD 3 332 500 which included AUD 1 920 000 as security to cover the assessed value of the vessel, fuel, lubricants and fishing equipment, AUD 412 500 to secure payment of potential fines and a security of AUD 1 000 000 related to the carriage of a fully operational VMS and observance of CCAMLR conservation measures.

The Tribunal held the first to be reasonable, and decided that the second would serve no practical purpose, since the crew had been granted bail so they could return to their native Spain. In doing so, the Tribunal held that a "good behaviour bond" to prevent future violations of the laws of a coastal State cannot be considered as a bond or security within the meaning of article 73(2) of the Convention,

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92 Law of the Sea Convention Article 73(2).

93 Law of the Sea Convention Article 292.

94 The bond in *Camouco (Panama v France)*, 7 February 2000, of 20 million FF was reduced to FF 8 million (about EUR 1.2 million) at: http://www.itlos.org/case_documents/2001/document_en_129.doc,

95 The bond of FF 56 400 000 in *Monte Confurco* (*Seychelles v France*) 18 December 2000 was reduced to FF 18 million (about EUR 2.7 million), at: http://www.itlos.org/case_documents/2001/document_en_115.doc,

96 Grand Prince (Belize v France), Judgment of 20 April 2001, at: http://www.itlos.org/case_documents/2001/document_en_88.doc, paragraph 85.

97 IPOA-IUU Para. 21 provides that "States should ensure that sanctions for IUU fishing by vessels and, to the greatest extent possible, nationals under its jurisdiction are of sufficient severity to effectively prevent, deter and eliminate IUU fishing and to deprive offenders of the benefits accruing from such fishing." Paragraph 22 states that "All possible steps should be taken, consistent with international law, to prevent, deter and eliminate the activities of non-cooperating States to a relevant regional fisheries management organisation which engage in IUU fishing."

98 See judgment at http://www.itlos.org/case_documents/2002/document_en_215.doc.

read in conjunction with article 292 of the Convention.[99] The Russian Federation argued that the proceeds of the sale of the catch should suffice as security given by the owner for the release of the vessel and its crew.

If accepted, this argument would have been analogous to the fruits of an alleged crime being considered as security.[100] ITLOS, however, held that the proceeds have no relevance to the bond to be set for the release of the vessel and the members of the crew. In doing so ITLOS moved forward from its previous position in *Monte Confurco*.

ITLOS also expressly noted that it "understands the international concerns about illegal, unregulated and unreported fishing and appreciates the objectives behind the measures taken by States, including the States Parties to CCAMLR, to deal with the problem."[101] In his dissenting opinion, Judge Anderson stated that "In my opinion, the duty of the coastal State to ensure the conservation of the living resources of the EEZ contained in article 61 of the Convention, as well as the obligations of Contracting Parties to CCAMLR to protect the Antarctic ecosystem, are relevant factors when determining in a case under article 292 whether or not the amount of the bail money demanded for the release of a vessel such as the *Volga* is 'reasonable'."[102]

Judge Anderson found that Article 73 contains no explicit restriction upon the imposition of non-financial conditions for release of arrested vessels. Indeed, the reasonableness of a good behaviour bond, bearing in mind the risk of re-offending, does seem fully consistent with the object and purpose of Article 73 and of the Convention as a whole. If the gravity of the alleged offences is a factor to be taken into account in assessing reasonableness, as it was in the *Monte Confurco* judgment and recognised in the *Volga* judgment[103] then *a fortiori* the imposition of a good behaviour bond should not be considered as unreasonable. Indeed, Article 73(1) itself empowers coastal States to take such measures as are "necessity to ensure compliance" with its laws and regulations.[104]

Similarly, Judge Nelson in his separate opinion[105] in the *Camouco* case said that "in my opinion, this Tribunal …should also take account of what, in the introduction to the Statement in Response of the French Republic, was referred to as "the context of illegal, uncontrolled and undeclared fishing in the Antarctic Ocean and more especially in the exclusive economic zone of the Crozet Islands where the facts of the case occurred". This material constitutes part of the "factual matrix" of the present case – the factual background surrounding the case. In my view this factor ought to have played some part, not by any means a dominant part, but a part nevertheless in the determination of a reasonable bond."

Judge Nelson was right to be concerned about deterrence. After its bond was reduced by ITLOS, the *Camouco* was reflagged under the Uruguay flag and renamed the *Arvisa* 1 and continued to fish

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99 *The "Volga" Case* (Russian Federation v Australia), Judgment of 23 December 2002, at: http://www.itlos.org/cgi-bin/cases/case_detail.pl?id=11&lang=en#judgement , para. 80.

100 Judge Shearer accepted this in his dissent at para. 15, at: http://www.itlos.org/case_documents/2002/document_en_220.doc.

101 *Volga* Judgment, para. 68.

102 Anderson dissenting opinion in *Volga*, para. 2, *at: http://www.itlos.org/case_documents/2002/document_en_219.doc*

103 Volga Judgment, para. 63.

104 See Anderson dissenting opinion, note 102, paragraph 16.

105 *Camouco (Panama v France)* , Prompt Release, Judgement of 7 February 2000, Vice President Nelson separate opinion, at http://www.itlos.org/case_documents/2001/document_en_129.doc

for Patagonian toothfish. Arvisa 1 was one of two vessels found fishing inside the CCAMLR Area by an Australian research vessel in January 2002 and was caught yet again, this time by the French Navy, in July 2002, this time having apparently been reflagged to the Netherlands Antilles. Clearly, its owners have not been deterred by the previous arrests.

There is already sufficient authority in the Law of the Sea Convention for ITLOS to treat the need for deterrence, prevention and innovative bonding arrangements as relevant matters for assessing whether bonds are reasonable under Article 73. Nonetheless, additional compliance mechanisms are required, such as including increased powers for port States, better regulation of markets, enforcement of the genuine link requirement of flag States and mechanisms to ensure the application of fisheries laws to flags of convenience.

Recommendations on bonding procedures

1) States should implement measures which set the maximum permissible fines for infringement of fisheries laws high enough to serve as a credible deterrent. This will allow States which have arrested IUU fishing boats to set a correspondingly high bond.

2) States should work together to discuss arrest and bonding procedures and devise effective and legal bonding arrangements to act as a deterrent and prevent vessels from re-offending. This will help ensure that such decisions are upheld by ITLOS.

Subsidy reforms

The Johannesburg Plan of Implementation called on States to eliminate subsidies that contribute to IUU fishing and over-capacity, even in advance of the WTO completing its efforts in this area.

With regard to the WTO, one option would be to use the WTO dispute settlement procedure by a country wishing to protect its own fisheries from the activities of foreign subsidised fleets.

Recommendations on subsidy reforms

1) Subsidies which promote IUU or otherwise unsustainable fishing activity should be identified. On the basis of the language in the Johannesburg Plan of Implementation and the Doha Declaration, such subsidies should be eliminated or redirected (*e.g.* to scrap vessels, or help developing countries to develop control capacity or local, sustainable fishing capacity).

2) States wishing to protect their fisheries from the activities of foreign subsidised fleets should consider the possibility of launching a WTO dispute.

Strengthen and harmonise national legislation

Paragraph 30(d) of the Johannesburg Plan of Action calls on States to put into effect the IPOA-IUU by 2004. This deadline was agreed by consensus.

Recommendations on national legislation

1) National legislation should be strengthened and harmonised on the basis of the measures included in the IPOA-IUU.

European Union

While it is beyond the scope of this paper to provide a detailed analysis of national legislation, it is important to touch on the legislation governing the European Union given that it is one of the major markets for IUU fish, has a major distant-water fishing fleet, and hosts a major port of convenience (Las Palmas).

The European Common Fisheries Policy (CFP) provides the framework for common EU positions in four areas: conservation, structures, markets, and relations with the outside world.[106] A revised CFP has been in effect since January, 2003. A number of changes in the CFP have bearing on the subject of this paper:

- It aims to take a long-term approach to fisheries management (as opposed to previously, when measures were adopted annually), and attempts to conserve the ecosystem as a whole, rather than individual fish stocks.

- It addresses fishing capacity, and in particular prohibits subsidies for renewing or modernizing fishing vessels.

- It aims to harmonise and strengthen measures at the national level on controls and sanctions.

Within the framework of the reform of the CFP, a number of action plans have been adopted, developed or proposed, including a plan to eradicate IUU fishing.[107] (Additional action plans include: Community Action Plan for the Conservation and Sustainable Exploitation of Fisheries Resources in the Mediterranean Sea Under the Common Fisheries Policy,[108] A Council Regulation Laying Down Measures Concerning Incidental Catches of Cetaceans in Fisheries and Amending Regulation (EC) No 88/98,[109] Strategy for Sustainable Development of European Aquaculture,[110] Integration of Environmental Protection Requirements into the CFP,[111] Measures to Counter the Social, Economic and Regional Consequences of Fleet Restructuring,[112] Plan to Reduce Discards of Fish,[113] and a Communication Towards Uniform and Effective Implementation of the CFP (*i.e.* plan to introduce a uniform CMS system).[114] However, the CFP has not yet been adapted to implement the IPOA-IUU.

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106 Introduction to the CFP at http://europa.eu.int/comm/fisheries/doc_et_publ/cfp_en.htm

107 Plan available at: http://europa.eu.int/comm/fisheries/doc_et_publ/factsheets/legal_texts/docscom/en/com_02_180_en.pdf

108 http://europa.eu.int/comm/fisheries/doc_et_publ/factsheets/legal_texts/docscom/en/com_02_535_en.pdf

109 http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0451en01.pdf

110 http://www.europa.eu.int/eur-lex/en/com/cnc/2002/com2002_0511en01.pdf

111 http://europa.eu.int/comm/fisheries/doc_et_publ/factsheets/legal_texts/docscom/en/com_02_186_en.pdf

112 http://europa.eu.int/comm/fisheries/doc_et_publ/factsheets/legal_texts/docscom/en/com_02_600_en.pdf

113 http://europa.eu.int/comm/fisheries/doc_et_publ/factsheets/legal_texts/docscom/en/com_02_656_en.pdf

114 http://europa.eu.int/comm/fisheries/doc_et_publ/factsheets/legal_texts/docscom/en/com_03_130_en.pdf

Final conclusions

On paper, there is a complex network of binding and non-binding agreements ('hard' and 'soft' law) which forms a solid basis in international law for promoting the development of sustainable fisheries, and for preventing or eliminating IUU fishing.

In practice, however, there are weaknesses and loopholes, the most important ones being:

- Flags of Convenience (FOC), or open registries, allow unscrupulous operators to avoid any regulation of their activities. They fish anywhere and anytime they want to, in contravention of the regulations put in place by Regional Fisheries Management Organisations (RFMOs) to manage and conserve fish stocks.

- As one country or region more aggressively acts to deter IUU fishing, activities are displaced to another which is less willing or able to do so. As one flag tightens its registry, vessels simply reflag to another less restrictive state. And as more states tighten their registers, new FOC countries emerge.

- Transhipping at sea means that vessels need never enter ports with their illegally caught fish. The mingling of illegally and legally caught fish on board reefers essentially serves to whitewash the contraband fish.

- Monitoring, control and surveillance of the high seas and within the Exclusive Economic Zones (EEZs) of many countries (particularly poorer developing countries) are insufficient to ensure that illegal fishers will be apprehended. Even when they do get caught, bonds and fines are set too low to serve as any kind of deterrent. Such fines are simply considered a cost of doing business; vessels invariably return to the fishing grounds, and carry on as before.

The solutions to these problems are not all easy to implement, but they are clearly identifiable.

The single most effective step to combat IUU fishing would be to close the loophole in international law that allows states to issue flags of convenience to vessels with which they have no genuine link and then fail to exercise control over those vessels. A combination of existing instruments, the negotiation of new instruments, and the litigation at the International Tribunal for the Law of the Sea could be used to accomplish this.

Unless and until the FOC system is effectively eliminated, it is important that States do everything in their power to prevent, deter and eliminate IUU fishing through the following means:

- Port State controls: port States must prevent IUU fishing and support vessels from using their harbours for transhipment, resupply and other activities and/or must where possible take action to arrest or detain IUU vessels in the event such vessels enter their ports.

- Market measures: states must adopt and enforce legislation to make it illegal to import or trade in IUU-caught fish. Moreover, states should make it illegal or otherwise discourage companies (*e.g.* insurers, re-suppliers, fishing gear manufacturers) from doing business with companies engaged in IUU fishing.

- At-sea transhipment: flag States must make it illegal for their transport vessels to tranship fish caught by vessels engaged in IUU fishing.

- Companies and nationals: states must make it illegal for their nationals and for companies within their jurisdiction to engage in IUU fishing, including the use of fines, penalties and, as necessary, prison sentences of sufficient severity to deter IUU fishing activities.

- Comprehensive management regime for the high seas: IUU fishing not only involves illegally fishing within an EEZ or in contravention of any regional fisheries management organisation (RFMO) agreements in place on the high seas. It also includes fishing on the high seas in regions where there is no fisheries management regime in place at all. The problem of fishing (mainly bottom trawling) on seamounts and other deep-sea areas on the high seas, which is largely free of any international management agreement to date, has recently become an issue of international concern. The UN General Assembly is now calling attention to the problem, and its urgency has been widely recognised by fisheries experts.

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