

Enforcing International Fisheries Agreements

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EXECUTIVE SUMMARY

The world’s fisheries are in crisis. Experts report that 75% are significantly depleted, overexploited 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. There is little time left for governments to act decisively to reverse the trends of the last decades. Ironically enough, they know this. 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 cooperation 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, much of which is done under the protection and cover of Flags of Convenience.

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 Organizations (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.
- Transshipping 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 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:

1. Port State controls: port States must prevent IUU fishing and support vessels from using their harbours for transshipment, 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.
2. 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.
3. At-sea transshipment: Flag States must make it illegal for their transport vessels to transship fish caught by vessels engaged in IUU fishing.
4. 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.
5. 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 organization (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 recognized by fisheries experts.

The following report describes how illegal and unsustainable fishing is perpetuated, and makes policy recommendations to help provide fisheries with a sustainable future.

Details of the measures contained in the FAO International Plan of Action on IUU Fishing, which provides the most comprehensive plan to date to solve the problems

outlined in this report, are contained in Annex I. Annex II contains a Glossary of Acronyms which the reader may find useful in reading through the entire report.

INTRODUCTION

IUU fishing can be broadly defined¹ as fishing activities which violate or disregard relevant national or international rules governing fisheries. It takes place on the high seas and within the EEZs of many coastal States. Volumes could (and have been) written addressing the full range of issues and laws which could be included under this heading. This report primarily addresses IUU fishing on the high seas (especially under flags of convenience) and illegal fishing by distant water fleets in the EEZs of other States. With regard to the latter, key concerns are IUU fishing in the EEZs of developing countries (where there is little or no capacity to monitor or enforce fisheries agreements) and in remote areas such as the Southern Ocean.

PART 1: THE EXISTING LEGAL AND POLITICAL FRAMEWORK

A. OVERVIEW OF CONVENTIONS, AGREEMENTS, ORGANIZATIONS, LAWS AND OTHER INTERNATIONAL INSTRUMENTS

Law of the Sea Convention

The starting point for any discussion on the law relating to fisheries is the 1982 United Nations Convention on the Law of the Sea (UNCLOS, or the Law of the Sea Convention).² The Law of the Sea Convention resulted from the third U.N. Conference on the Law of the Sea, which met between December 1973 and December 1982. The 1982 Convention in effect superseded³ four Conventions: the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone⁴; the 1958 Convention on the High Seas⁵; the Convention on the Continental Shelf⁶; and the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas.⁷

The Law of the Sea Convention is important in a number of major respects. It formally established a legal regime governing activities on, over, and under the world's oceans. The Convention brought together the international law covering all the oceans, from territorial waters (which was set at 12 miles), to the high seas, as well as the seabed. It also introduced the 200-mile exclusive economic zone (EEZ). It set out to do nothing

¹ A detailed and internationally agreed definition for IUU fishing can be found in the International Plan of Action – IUU Fishing at <http://www.fao.org/DOCREP/005/Y3536E/y3536e04.htm#bm04.1>, copied below in Annex 1.

² United Nations Convention on the Law of the Sea. Signed at Montego Bay, Jamaica, 10 December 1982, entered into force 16 November 1994. At http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

³ The Geneva Conventions remain in force for States not Party to the 1982 Law of the Sea Convention.

⁴ 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, Geneva, 29 April 1958, in force 10 September 1964. 516 UNTS 205, copy at <http://www.oceanlaw.net/texts/genevats.htm>.

⁵ 1958 Geneva Convention on the High Seas, Geneva, 29 April 1958, in force 30 September 1962. 450 UNTS 11, copy at <http://www.oceanlaw.net/texts/genevahs.htm>.

⁶ 1958 Geneva Convention on the Continental Shelf, Geneva, 29 April 1958, in force 10 June 1964. 499 UNTS 311, copy at <http://www.oceanlaw.net/texts/genevacs.htm>.

⁷ 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, Geneva, 29 April 1958, in force 20 March 1966. 559 UNTS 285, copy at <http://www.oceanlaw.net/texts/genevafish.htm>.

less than 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 utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.⁸ It aimed to reduce and control marine pollution and conserve and manage marine living resources. To do so it introduced comprehensive environmental protection provisions and laid the framework for management and protection of marine life. It provided rules for scientific research, monitoring and consultation, environmental assessment, enforcement and liability.⁹ It initiated important dispute resolution provisions and in particular established the International Tribunal for the Law of the Sea.¹⁰ In some senses the Law of the Sea Convention is a framework convention in that it also provides the framework for further development of specific areas of oceans law.

However the Law of the Sea Convention now has a number of shortcomings. Firstly, it was finalized in 1982 and reflects the issues and environmental pressures existing at that time. It focuses primarily on fishing in the 200 mile EEZ, then a significant innovation, 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. For instance with respect to highly migratory stocks, the Law of the Sea Convention simply requires in vague terms cooperation with relevant international organizations.¹¹ There are no specific provisions at all with respect to straddling stocks. 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.

These deficiencies became manifest in the early 1990s in problems caused by overcapitalization and ever larger fishing boats, flags of convenience (FOC) and other deficiencies leading to what is now known as illegal, unregulated and unreported (IUU) fishing¹². An international response was the FAO Compliance Agreement, which was negotiated under the auspices of the Food and Agriculture Organization (FAO).¹³

FAO Compliance Agreement

The 1993 FAO Compliance Agreement¹⁴ entered into force on 24 April 2003. It was the first international legally-binding instrument to directly deal with reflagging and

⁸ Law of the Sea Convention Preamble

⁹ See Philippe Sands, *Principles of International Environmental Law I* (1995), 294.

¹⁰ Law of the Sea Convention Annex VI establishes the Statute of ITLOS

¹¹ Law of the Sea Convention article 64

¹² A detailed and internationally agreed definition for IUU fishing can be found in the International Plan of Action – IUU Fishing at <http://www.fao.org/DOCREP/005/Y3536E/y3536e04.htm#bm04.1>, copied below in Annex 1.

¹³ See FAO treaties website at <http://www.fao.org/Legal/TREATIES/Treaty-e.htm>.

¹⁴ FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. Rome, 24 November 1993. Copy at <http://www.fao.org/waicent/faoinfo/fishery/agreem/complian/complian.htm> .

other FOC issues, focussing on flag State compliance issues and in particular on strengthening flag State responsibility. The Agreement requires that:

- Each flag State must ensure that its vessels do not engage in any activity that undermines the effectiveness of international fisheries conservation and management measures;¹⁵
- No flag State shall allow any of its vessels to be used for fishing on the high seas without that State's authorization. ¹⁶
- No Party may so authorize any fishing vessel unless it is satisfied that it is able, taking into account the links that exist between it and the fishing vessel concerned, to exercise effectively its responsibilities under the Compliance Agreement in respect of that vessel.¹⁷
- Parties are to cooperate to ensure that fishing vessels flying the flags of non-parties do not engage in activities which undermine the effectiveness of international fisheries conservation and management measures.¹⁸ However, this provision must be 'consistent with international law'. In the words of one observer: "This focuses attention on the fundamental weakness of all attempts subsequent to the 1982 convention to build a more demanding compliance regime: it cannot bind non-signatories, and signatory states are bound to respect flag state rights under the 1982 convention no matter how disreputable their activities may be."¹⁹

Despite its weaknesses, the effect of the Compliance Agreement is that parties must control the activities of their flag vessels on the high seas, and must 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.²⁰

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

Article VI of the agreement requires Parties to exchange information about registered vessels, and to this end, FAO has established the High Seas Vessel Authorization Record (HSVAR). All countries with distant water fleets should be encouraged to participate in this registry.

¹⁵ FAO Compliance Agreement Article III(1)

¹⁶ FAO Compliance Agreement Article III(2)

¹⁷ FAO Compliance Agreement Article III(3)

¹⁸ FAO Compliance Agreement Article VIII(2)

¹⁹ 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>, page 6

²⁰ FAO Compliance Agreement Article VI

FAO Code of Conduct

The FAO Code of Conduct for Responsible Fisheries²¹ was concluded in October 1995. The Compliance Agreement was described by the FAO to be an integral part of the Code.²² The Code is to be interpreted to be consistent with the Law of the Sea Convention and the Fish Stocks Agreement, and in accordance with other applicable rules of international law, and in the light of the 1992 Declaration of Cancun, the 1992 Rio Declaration on Environment and Development, and Agenda 21 Chapter 17.²³

The Code of Conduct 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.²⁴ The latter, known as IPOA-IUU²⁵ was adopted in 2001²⁶ and is the most important of the four for the purposes of this paper (and is discussed in detail below). The IPOA on Capacity is also very relevant because unless excess capacity is addressed, IUU and otherwise unsustainable fishing will continue.

UN Fish Stocks Agreement

The 1995 Fish Stocks Agreement, formally known as the “Agreement for the Implementation of the Provisions of the United National 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” (also known as the Straddling Stocks Agreement or UN Fisheries Agreement)²⁷ came into force on 11 December 2001.

Negotiations were initiated at the Rio Earth Summit (UNCED) in 1992, and the agreement was completed and opened for signature in 1995. The objective of the Agreement is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Law of the Sea Convention.²⁸ In general it applies to straddling fish stocks and highly migratory fish stocks beyond areas under national jurisdiction.²⁹ The

²¹ FAO Code of Conduct for Responsible Fisheries. <http://www.fao.org/fi/agreem/codecond/ficonde.asp>

²² FAO Conference resolution 15/93, paragraph 3. At <http://www.fao.org/docrep/x5586E/x5586e09.htm#draft%20international%20agreement%20on%20the%20flagging%20of%20vessels%20fishing%20on%20the%20high%20sea>

²³ FAO Code Article 3.

²⁴ 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>.

²⁵ International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. At <http://www.fao.org/DOCREP/003/y1224e/y1224e00.HTM>.

²⁶ See background paper by Kevin Bray in October 2000, at http://europa.eu.int/comm/fisheries/news_corner/autres/control/bray.pdf.

²⁷ Agreement for the Implementation of the Provisions of the United National 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. The agreement was ratified by the requisite 30 countries and came into force on 11 December 2001. See text and list of ratifications at http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm

²⁸ Fish Stocks Agreement Article 2

²⁹ Fish Stocks Agreement Article 3

Agreement introduces objectives of long-term sustainability and optimum utilization.³⁰ Requirements of international cooperation also feature prominently in the Agreement.³¹

For the first time, the Agreement established that a precautionary approach is expressly required in fisheries management.³² This is important because previous agreements had been based on establishing the maximum sustainable yield (MSY), which required fisheries managers to have accurate data on such things as mortality rates, spawning stock biomass, and the number of juvenile fish joining the stock.³³ In practice, however, accurate data is not available and MSY cannot be established until after the stock is in decline.

Under the Agreement, States must take conservation measures such as assessing³⁴ and managing³⁵ species in the same ecosystem and species associated with or dependent on the target species to protect biodiversity,³⁶ addressing overfishing and excess fishing capacity,³⁷ and monitoring and controlling fisheries.³⁸

Another important innovation of the Fish Stocks Agreement is to allow boarding and inspection of vessels in the high seas, where (1) the area is covered by a RFMO, (2) the inspectors are from a State party to the RFMO and (3) the inspected vessel is flying the flag of a party to the Fish Stocks Agreement, but not necessarily the RFMO agreement in question.³⁹ If there is evidence of violations (which can include concealing evidence), the inspecting State may only secure evidence and notify the flag State.⁴⁰ If the flag State does not respond or take appropriate action, however, the inspectors may remain on board and secure evidence and may require the master to assist in further investigation including, where appropriate, by bringing the vessel without delay to port.⁴¹

The Fish Stocks Agreement also provides for measures which may be taken by a port State⁴² including inspections and prohibition of landings and transshipments.

Finally, it requires States which are not parties to sub-regional or regional fisheries management organizations to nonetheless cooperate 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 authorize their flagged vessels to engage in fishing operations for straddling or highly migratory fish stocks.⁴³

³⁰ Fish Stocks Agreement Article 5

³¹ Fish Stocks Agreement Article 8, 9(2), 10(1) etc.

³² Fish Stocks Agreement Articles 5(c) and 6

³³ Porter, Gareth, "Fisheries Subsidies, Overfishing and Trade"

<http://www.sdnbd.org/sdi/issues/environment/article/1.pdf>

³⁴ Fish Stocks Agreement Articles 5(d)

³⁵ Fish Stocks Agreement Articles 5(e)

³⁶ Fish Stocks Agreement Article 5(g)

³⁷ Fish Stocks Agreement Article 5(g/h)

³⁸ Fish Stocks Agreement Article 5(l)

³⁹ Fish Stocks Agreement Article 21(1)

⁴⁰ Fish Stocks Agreement Article 21(5)

⁴¹ Fish Stocks Agreement Article 21(8)

⁴² Fish Stocks Agreement Article 23. See details on page 36.

⁴³ Fish Stocks Agreement Article 17

IPOA- Management of Fishing Capacity

The IPOA-Capacity⁴⁴ was negotiated over the course of 1998, and endorsed by the FAO Council in June, 1991. It is a voluntary agreement which aims to: “achieve world-wide preferably by 2003, but not later than 2005, an efficient, equitable and transparent management of fishing capacity.” It outlines four major strategies for doing so:

- i. the conduct of national, regional and global assessments of capacity and improvement of the capability for monitoring fishing capacity;
- ii. the preparation and implementation of national plans to effectively manage fishing capacity and of immediate actions for coastal fisheries requiring urgent measures;
- iii. the strengthening of regional fisheries organizations and related mechanisms for improved management of fishing capacity at regional and global levels;
- iv. immediate actions for major transboundary, straddling, highly migratory and high seas fisheries requiring urgent measures.

IPOA on IUU Fishing (IPOA-IUU)

The IPOA- IUU was adopted by the FAO Committee on Fisheries (COFI) on 2 March 2001 and endorsed by the FAO Council on 23 June 2001. The objective of the IPOA-IUU⁴⁵ is to prevent, deter and eliminate IUU fishing,⁴⁶ 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. It is still soft law and not legally binding, however.

The following features of the IPOA are important for the purposes of this discussion:

All States should cooperate to identify those nationals who are the operators or beneficial owners of vessels involved in IUU fishing.⁴⁷ This is without doubt a step forward from regulating vessels, as had previously been the case under the Compliance Agreement. Likewise, States should ensure that sanctions for IUU fishing by nationals as well as vessels 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.⁴⁸

States are encouraged, as a matter of priority, to join the Law of the Sea Convention, the Fish Stocks Agreement and the FAO Compliance Agreement⁴⁹ and States are reminded to implement fully and effectively all relevant international fisheries instruments to

⁴⁴ Text of the Plan at <http://www.fao.org/docrep/006/x3170e/x3170e04.htm>

⁴⁵ 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>.

⁴⁶ IPOA-IUU III, para. 8.

⁴⁷ IPOA-IUU, IV para. 18

⁴⁸ IPOA-IUU, IV para. 21

⁴⁹ IPOA-IUU, IV para. 11

which they already are party.⁵⁰ States should also fully and effectively implement the Code of Conduct and its associated International Plans of Action,⁵¹ and in addition, States whose nationals fish on the high seas in fisheries not regulated by a relevant regional fisheries management organization should fully implement their obligations under Part VII of the 1982 UN Convention to take measures with respect to their nationals as may be necessary for the conservation of the living resources of the high seas.⁵² States are encouraged to cooperate by exchanging information and to develop responses to IUU fishing.⁵³

With regard to Monitoring, Control and Surveillance (MCS), States should undertake comprehensive and effective MCS measures from the commencement of fishing, through the point of landing, to the final destination of the catch,⁵⁴ including by implementing vessel monitoring systems (VMS) and observer programmes on their flag vessels. To this end, the International MCS Network⁵⁵ was established as an arrangement of national fisheries enforcement organizations and institutions which share information, coordinate and cooperate in order to prevent, deter and eliminate IUU fishing.⁵⁶

The IPOA-IUU clearly outlines the steps all States whose nationals are involved in the fishing industry should take. In summary (a more detailed description of these measures is attached as Annex 1, and should be used as a model / base point for any discussion on recommendations about what should be done to prevent IUU fishing):

- **National Legislation/ State Control of Nationals:** States should ensure that nationals subject to their jurisdiction do not support or engage in IUU fishing,⁵⁷ should cooperate to identify nationals who are the operators or beneficial owners of vessels involved in IUU fishing,⁵⁸ should discourage their nationals from flagging fishing vessels under flags of convenience⁵⁹ and should ensure that sanctions for IUU fishing by vessels and nationals are of sufficient severity to effectively prevent, deter and eliminate IUU fishing and to deprive offenders of the benefits accruing from such fishing. States should develop and implement, no later than three years after the adoption of the IPOA, national plans of action, and to update those national plans of action.⁶⁰ (See the discussion in the next section below on implementation of the IPOA-IUU.)

⁵⁰ IPOA-IUU, IV para. 12

⁵¹ IPOA-IUU, IV para. 14

⁵² IPOA-IUU, IV para. 15

⁵³ IPOA-IUU, IV para. 28

⁵⁴ IPOA-IUU, IV para. 24

⁵⁵ The Network's website is at <http://www.imcsnet.org/>

⁵⁶ Website at <http://www.imcsnet.org/>. The Executive Committee comprises Chile, Peru, United States of America, the European Commission, Australia, Canada, New Zealand, Norway, Forum Fisheries Association, and the FAO (as an observer).

<http://www.publicaffairs.noaa.gov/worldsummit/mcsdocument.html>

See technical terms of reference at <http://www.imcsnet.org/terms.htm>.

⁵⁷ IPOA-IUU, IV para. 18

⁵⁸ IPOA-IUU, IV para. 18

⁵⁹ IPOA-IUU, IV para. 19

⁶⁰ IPOA-IUU, IV para. 25

- **Flag States** should follow procedures in registration of fishing vessels⁶¹ and maintain records of fishing vessels,⁶² ensuring that only vessels authorized to do so fish on the high seas⁶³
- **Coastal States** should implement measures to prevent, deter and eliminate IUU fishing in the EEZ and to consider measures including effective monitoring, control and surveillance of fishing activities in the EEZ and controlling IUU fishing through licensing of fishing boats.⁶⁴
- **Port States** should take measures in order to prevent, deter and eliminate IUU fishing⁶⁵ including requiring prior permission of fishing and support vessels to enter their ports⁶⁶ and refusing to allow the vessel to land or transship fish in its ports where a port State has clear evidence that a vessel having been granted access to its ports has engaged in IUU fishing.⁶⁷
- **Port State** measures should be developed within RFMOs, building on the presumption that fishing vessels in the area which are flagged to non-parties to an RFMO may be engaging in IUU fishing. Such port State measures could include the prohibition of landings and transshipment of catch unless the identified vessel can establish that the catch was taken in a manner consistent with conservation and management measures.⁶⁸
- States should impose **market related measures** preventing IUU fish being traded or imported into their territories,⁶⁹ subject to WTO constraints⁷⁰ and multilateral trade-related measures, such as multilateral catch documentation and certification requirements and import and export controls or prohibitions are suggested.⁷¹ States should take measures to ensure that importers, transshippers, buyers and others are aware of the detrimental effect of doing business with vessels engaged in IUU fishing,⁷² and conversely that fishers are aware of the detrimental effect of doing business with importers, transshippers buyers and others identified as doing business with vessels identified in IUU fishing.⁷³ Legislation that makes it a violation to conduct business with IUU vessels or to trade in fish or fish products derived from IUU fishing is suggested.⁷⁴
- Traceability of fish or fish products is encouraged.⁷⁵ States should work towards using the Harmonized Commodity Description and Coding System for fish and

⁶¹ IPOA-IUU, IV para. 34-41

⁶² IPOA-IUU, IV para. 42-43

⁶³ IPOA-IUU, IV para. 44-50

⁶⁴ IPOA-IUU, IV para. 52

⁶⁵ IPOA-IUU, IV para. 52

⁶⁶ IPOA-IUU, IV para. 55

⁶⁷ IPOA-IUU, IV para. 59

⁶⁸ IPOA-IUU, IV para. 63

⁶⁹ IPOA-IUU, IV para. 66

⁷⁰ IPOA-IUU, IV para. 65

⁷¹ IPOA-IUU, IV para. 70

⁷² IPOA-IUU, IV para. 73

⁷³ IPOA-IUU, IV para. 74

⁷⁴ IPOA-IUU, IV para. 73, 74

⁷⁵ IPOA-IUU, IV para. 71

fisheries products in order to help promote the implementation of the IPOA,⁷⁶ and certification and documentation requirements should be standardized.⁷⁷ The Harmonized System is an international six-digit commodity classification developed by the World Customs Organization (WCO).⁷⁸ The system is used by over 177 countries and economies as a basis for customs tariffs and collection of trade statistics.⁷⁹

While it is an important step forward, the IPOA-IUU was weakened considerably during its negotiation. In May 2000, the Australian Government in cooperation with FAO hosted an Expert Consultation on IUU fishing. The meeting was attended by 57 experts acting in their personal capacity, and this group drafted the preliminary plan of action (known as the Sydney draft)⁸⁰. The plan was transmitted to a Technical Consultation convened in Rome later that year (October 2002) to work on the draft. At that stage it was considerably weakened.

For example, the October meeting deleted from the draft a paragraph calling on states to make it a violation to trade in fish or fish products derived from IUU fishing and to adopt sanctions under domestic law (though it was later reintroduced in a weakened form). In general, the text weakened provisions aimed at deterring and preventing IUU fishing through closing markets and ports, mainly due to objections on free trade grounds.⁸¹ The final plan, as adopted by COFI in March 2001, repaired some of the damage done by the October meeting, but was nonetheless weaker than the Sydney draft.

Implementation of the IPOA-IUU

Progress in implementing the IPOA-IUU has been slow. The FAO has written a guide on implementation to assist the process.⁸² Examples of countries working towards implementation include:

EU

In May, 2002, the European Commission developed a draft action plan to implement the IPOA-IUU.⁸³ In addressing ports of convenience, the plan suggested an international conference to negotiate an international agreement defining the rights and

⁷⁶ IPOA-IUU, IV para. 75

⁷⁷ IPOA-IUU, IV para. 76

⁷⁸ website at <http://www.wcoomd.org/ie/index.html>.

⁷⁹ International Convention for the Harmonized Commodity Description and Coding System. Signed at Brussels 14 June 1983, entered into force 1 January 1988. At

http://www.jurisint.org/pub/01/en/doc/235_1.htm.

See description of the HS at

http://www.wcoomd.org/ie/En/Topics_Issues/HarmonizedSystem/Hsconve2.pdf.

⁸⁰ Plan available at <http://www.fao.org/docrep/meeting/x7798e.htm>

⁸¹ See Comments Received by the Secretariat on the draft IPOA-IUU, at

<http://www.fao.org/docrep/meeting/003/x8896e.htm>.

⁸² "Implementation of the International Plan of Action to Deter, Prevent and Eliminate Illegal, Unreported and Unregulated Fishing," <http://www.fao.org/DOCREP/005/Y3536E/Y3536E00.HTM>

⁸³ Communication from the European Commission, Community action plan for the eradication of illegal, unreported and unregulated fishing, COM(2002) 180 final, 28 May 2002. At

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

responsibilities of port States concerning access by fishing vessels to port facilities.⁸⁴ However this initiative would seem to depend firstly on reaching consensus and secondly on States operating ports of convenience ratifying any resulting agreement. Thus more immediate and concrete measures are required. Actions can be taken unilaterally by the European Community itself, along with its member States, in implementing the IPOA-IUU recommendations described above. For instance they could require information prior to ships docking and refuse entry to fishing boats which have been engaged in IUU.

The action plan as proposed by the Commission was accepted by the Council, to be implemented through:

- the amendment of existing EU legislation (for instance stricter landing/transshipment requirements in regulation 2847/93 on control);
- the adoption of new legislation;
- the "sponsoring" of international conferences/negotiations on specific issues such as port control and genuine link.

However, the Common Fisheries Policy (CFP) has not been modified yet to implement the action plan.⁸⁵

SPAIN

Spain proposed a national plan of action in November 2002.⁸⁶ That plan proposed a Decree⁸⁷ applying sanctions to Spanish nationals enlisted on FOC vessels and preventing the landing of catches from IUU vessels. Spain also proposed a decree on the control and management of all operations involved in fishing, from the initial sale through marketing to the consumer, and all imports through all channels (sea, land and air). Spain identified the importance of traceability, and thus of labelling, in this context.

It appears from recent landing data from the ports of Las Palmas and Tenerife, that little progress has been made since the Decree was adopted in November 2003.

USA

The United States has formulated a draft Plan of Action to implement the IPOA-IUU.⁸⁸ On sanctions and control of nationals, the draft suggests increasing penalties for nationals, implementation of a national VMS system, and participation in the International MCS Network. On port State control measures, nothing radical is suggested: it proposes strengthening the scheme for inspecting foreign vessels landing or transshipping fish upon arrival in port, requiring foreign fishing vessels seeking access to U.S. ports to provide a copy of their authorization to fish, details of their

⁸⁴ EU action plan, 4.4, Action 4.

⁸⁵ Bours, H el ene, personal communication

⁸⁶ National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (NPOA-IUU), November 2003, at http://www.mapya.es/pesca/pags/ilegal/pdf/National_plan_action.pdf.

⁸⁷ Royal Decree 1134/2002 of 31 October 2002, under article 90 of Act 3/2001

⁸⁸ Draft National Plan of Action to Prevent, Deter, and Eliminate Illegal, Unregulated, and Unreported Fishing, February 20 2003, at <http://www.state.gov/g/oes/rls/or/18488.htm>.

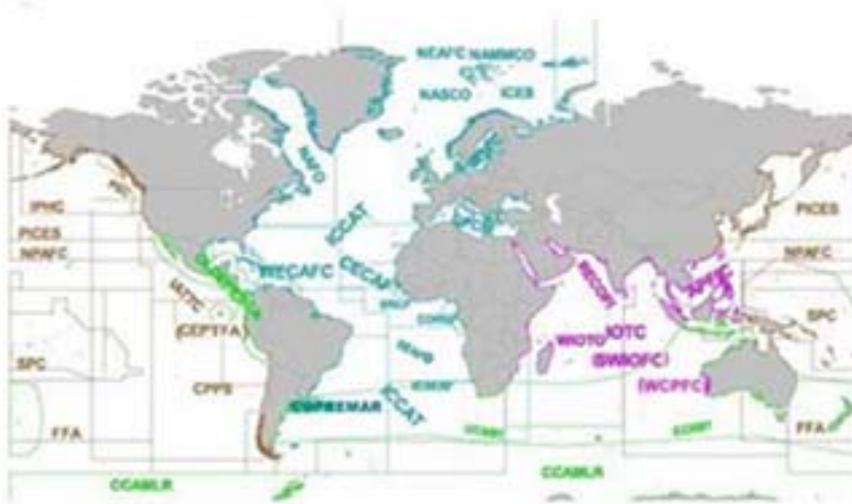
fishing trip, and quantities of fish on board and supporting FAO work following the Expert Consultation on IUU fishing in November 2002.⁸⁹

With respect to market related measures, the US plan considers CITES as another potential tool to combat IUU fishing and believes that the listing of some commercially harvested fish species on Appendix II could help to prevent IUU fishing for those species, and cites Queen Conch as an example. The plan supports a proposed MOU between the FAO and CITES to explore this avenue.

In addition, the Plan supports the expanded use by RFMOs of market-related measures to combat IUU fishing, including new import prohibitions, landing restrictions, and catch certification and trade documentation schemes, and cites specifically the ICCAT, IATTC and CCAMLR catch documentation schemes.

REGIONAL FISHERIES MANAGEMENT ORGANISATIONS (RFMOs)

In management terms, the world's oceans are a patchwork of overlapping regions. Approximately 30 regional and sub-regional RFMOs have been created since 1945.^{90,91}



Source: http://www.fao.org/fi/body/rfb/Big_RFB_map.htm

Some of the most important regional organizations relevant to high seas fisheries include:

ICCAT - www.iccat.es – Atlantic Tuna, Swordfish

The International Commission for the Conservation of Atlantic Tunas (ICCAT) was established in 1969 and is headquartered in Madrid.⁹² Its purpose is “[t]o study the

⁸⁹ See discussion on page 67.

⁹⁰ FAO, *The State of World Fisheries and Aquaculture 2002*, p.48, at <http://www.fao.org/docrep/005/y7300e/y7300e00.htm>

⁹¹ For a thorough listing of relevant organizations, see Swan, Judith, FAO Fisheries Circular No. 985, “Summary Information on the Role of International Fishery Organizations or Arrangements and Other Bodies Concerned with the Conservation and Management of Living Aquatic Resources,” Rome, 2003, Appendix 1 <http://www.fao.org/DOCREP/005/Y4455E/y4455e0c.htm#bm12> for information on these bodies. See <http://www.fao.org/DOCREP/005/Y4455E/y4455e0d.htm#bm13> for contact information.

population of tuna and tuna-like fishes; to make recommendations designed to maintain these populations at levels permitting maximum sustainable catch.”⁹³ ICCAT has taken a number of important steps to deter IUU fishing.

It has taken up the monitoring and control of transshipments at sea, for example, to address the practice of transferring fish to reefers (transport vessels), which then intermingle IUU and legitimately caught fish, thus in effect laundering the IUU fish. ICCAT recommends that vessels flying the flag of Contracting Parties only transfer to and receive from vessels of Contracting Parties and Cooperating Parties, entities or fishing entities⁹⁴ and recommends inspection of fish from vessels flying the flag of a non-Contracting Party, entity or fishing entity and prohibiting the transshipment or landing of that fish unless the vessel can show that the fish have been caught in compliance with ICCAT conservation measures or outside the ICCAT convention area.⁹⁵ These are useful steps towards addressing transshipment at sea. Unfortunately, at this stage they are only theoretical, and illegal transshipments happen on a regular basis.⁹⁶ Consequently, ICCAT has attempted to tighten control of transshipments but with no success.

ICCAT also has a Revised Port Inspection Scheme⁹⁷ but the scheme is reliant on flag States for follow-up action.

ICCAT has imposed⁹⁸ bans on the importation of bluefin tuna and swordfish from vessels flying the flags of FOC countries, including Belize, Honduras⁹⁹ and Equatorial Guinea¹⁰⁰ for tuna, and Belize and Honduras¹⁰¹ for swordfish. In 2000, ICCAT extended the bluefin ban and added a ban on the importation of bigeye tuna¹⁰² from vessels flagged by Belize, Honduras, Equatorial Guinea, St. Vincent and the Grenadines and

⁹² International Convention for the Conservation of Atlantic Tunas. Text of the Agreement at <http://www.iccat.es/Documents/BasicTexts.pdf>. ICCAT recommendations

⁹³ Swan, Judith, FAO Fisheries Circular No. 985, Summary Information on the Role of International Fishery Organizations or Arrangements and Other Bodies Concerned with the Conservation and Management of Living Aquatic Resources, Rome, 2003, Appendix 1
<http://www.fao.org/DOCREP/005/Y4455E/y4455e0c.htm#bm12>

⁹⁴ ICCAT Recommendation 97-11 on Transshipments and Vessel Sightings. Entered into force June 13 1998. <http://www.iccat.es/Documents/Recs/compendiopdf-e/1997-11-e.pdf>. Active ICCAT Recommendations are listed at <http://www.iccat.es/Documents/Recs/ActiveRegs.zip>.

⁹⁵ ICCAT Recommendation 98-11: Ban on Landing and Transshipments
<http://www.iccat.es/Documents/Recs/compendiopdf-e/1998-11-e.pdf>

⁹⁶ Bours, Hélène, personal communication, based on her experience during Greenpeace’s 2000 pirate fishing Expedition on the MV Greenpeace.

⁹⁷ ICCAT Recommendation 97-10

⁹⁸ ICCAT Recommendations are legally binding, whereas Resolutions are not.

⁹⁹ See ICCAT Recommendation 86-11, Recommendation by ICCAT regarding Belize and Honduras pursuant to the 1994 Bluefin Tuna Action Plan Resolution (imposing a bluefin tuna ban)

¹⁰⁰ ICCAT Recommendation 00-16, Recommendation by ICCAT regarding Equatorial Guinea pursuant to the 1998 Resolution concerning the unreported and unregulated catches of tuna by large-scale longline vessels in the Convention area.

¹⁰¹ ICCAT Recommendation 99-8, Recommendation by ICCAT regarding Belize and Honduras pursuant to the 1995 Swordfish Action Plan Resolution (imposing a swordfish ban)

¹⁰² ICCAT Recommendation 01-15: Recommendation by ICCAT concerning the importation of bluefin tuna and swordfish and their products from Honduras.

Cambodia.¹⁰³ It is important to note that ICCAT imposes trade sanctions on both Contracting and Non-Contracting Parties.

In 2002 it lifted the Bigeye tuna ban on Honduras, citing reduction in numbers of tuna fishing vessels¹⁰⁴ and effective in 2004 it conditionally lifted the ban on Belize and St. Vincent & the Grenadines, citing deletion of ships from their registers and other steps, but still expressing concern.¹⁰⁵ It should be noted, however, that a reduction in the number of fishing vessels on a FOC registry may simply mean those vessels have been reflagged elsewhere.

The procedure to impose and lift trade sanctions has been developed in an ad hoc manner over the years and therefore is being criticized for not being transparent and non-discriminatory. It is based on three different instruments (Bluefin Action Plan, Swordfish Action Plan and the 1998 UU Resolution which covers fishing for bigeye tuna, and other tunas not covered under the two action plans). ICCAT is in the process of harmonizing the system.

SUMMARY OF ICCAT MEASURES (PRIOR TO 2003 MEETING)

A. IMPORT BANS (YEAR OF ENTRY INTO FORCE WITH RECOMMENDATIONS)

	Bluefin (BFT Action Plan)		Swordfish (SWO Action Plan)		Bigeye (1998 UU Resolution)	
Belize	1997 – 2003 #	Rec 96/11 Rec 02/16	2000 – 2003 #	Rec 99/8 Rec 02/16	2001 - 2003 #	Rec 00/15 Rec 02/16
Bolivia					2003 -	Rec 02/17
Cambodia					2001 -	Rec 00/15
Equatorial Guinea *	2000 -	Rec 99/10			2001 -	Rec 00/16
Honduras *	1997 - 2002	Rec 96/11 Rec 01/15	2000 - 2002	Rec 99/8 Rec 01/15	2001 - 2003	Rec 00/15 Rec 02/18
Panama *	1998 - 2000	Rec 96/12 Rec 99/9				
Saint Vincent					2001 - 2003 #	Rec 01/14 Rec 02/20
Sierra Leone	2003 -	Rec 02/19	2003 -	Rec 02/19	2003 -	Rec 02/19

provisional (ICCAT decided at its 2002 meeting to provisionally agree to lift the ban by 1 January 2004 and revisit the case at its 2003 meeting to make a final decision).

¹⁰³ ICCAT Recommendation 00-15. See Bours, Gianni and Mather et al, "Pirate Fishing Plundering the Oceans", Greenpeace International, February 2001, page 10.

¹⁰⁴ ICCAT Recommendation 02-18: Recommendation by ICCAT concerning the importation of Bigeye Tuna and its Products from Honduras

¹⁰⁵ See ICCAT Recommendation 02-16: Recommendation by ICCAT concerning the importation of Atlantic bluefin tuna, Atlantic swordfish, and Atlantic bigeye tuna and their products from Belize.

B. IDENTIFICATION BY COUNTRY (YEAR OF MEETING)

	BFT Action Plan	SWO Action Plan	UU Action Plan
Bolivia		2002	2001
Georgia			2002
Guinea *			1999
Indonesia			2001, 2002
Kenya			1999
Panama *		1998	2001
Philippines	1999		1999
Sierra Leone	2001	2001	1999, 2001
Seychelles			2002
Singapore	1999		1999
Trinidad & Tobago *			1999
Vanuatu		2000	2001, 2002

* Contracting Party

It should be noted that trade measures taken by ICCAT and IOTC (see page 24) are precedent setting in asserting the primacy of Multilateral Environment Agreements (MEAs) over WTO trade rules. Import restrictions were agreed by all members of the relevant RFMOs (including the EU, China, the US, and a number of developing countries).¹⁰⁶

ICCAT is developing a ‘white list’ which will list vessels over 24 meters in length which may fish in the Convention area. Parties are to prohibit fishing and landing of tuna by non-listed vessels.¹⁰⁷ It also has a black list and intends to keep both white and black lists for awhile, as it considers the two to be complementary. The black list of vessels suspected to be involved in IUU fishing is based on a variety of data. Information on specific vessels may be obtained as a result of at-sea observations (rarely), port inspections, or trade data. The latter is the most concrete basis upon which to identify misbehaving flag States and provides the means to impose possible trade measures.

IATTC – <http://www.iattc.org> - Tuna in the Eastern Tropical Pacific

The Inter-American Tropical Tuna Commission (IATTC) was established in 1950 and is responsible for the conservation and management of fisheries for tunas and other species taken by tuna-fishing vessels in the eastern Pacific Ocean.¹⁰⁸ It is headquartered

¹⁰⁶ Gianni, Matthew, pers. comm.

¹⁰⁷ ICATT 02-22: Recommendation by ICCAT concerning the establishment of an ICCAT record of vessels over 24 meters authorized to operate in the Convention area

¹⁰⁸ Convention for the Establishment of an Interamerican Tropical Tuna Commission, signed at Washington 31 May 1949, entered into force 3 March 1950. Text is at http://www.iattc.org/PDFFiles/IATTC_convention_1949.pdf. Amended by Protocol to Amend the 1949

in La Jolla, California. One of the key conservation issues addressed by IATTC is the high dolphin mortality rates from tuna purse seining, which led to the creation of the International Dolphin Conservation Program (IDCP).¹⁰⁹ According to IATTC, “During 2002 94% of all sets made on tuna associated with dolphins were accomplished with no mortality or serious injury to the dolphins. Furthermore, the total mortality of dolphins in the fishery has been reduced from about 132,000 in 1986 to less than 1,500 in 2002-- about 0.02% of the population.”¹¹⁰

CCAMLR – www.ccamlr.org – Antarctic Marine Ecosystem (All Species)

The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), was established under the Convention¹¹¹ of the same name in 1982. CCAMLR applies to the Antarctic marine living resources of the area south of 60 degrees South latitude and to the Antarctic marine living resources of the area between 60 degrees South and the Antarctic Convergence which form part of the Antarctic marine ecosystem.¹¹² CCAMLR has its headquarters in Hobart, Australia.

One of the most important innovations of CCAMLR is that it has adopted, at least in theory, an ecosystem approach¹¹³ which takes account not only of target species but also dependent and related species such as whales, seals and penguins.

It has had a catch documentation scheme (CDS)¹¹⁴ in place for Patagonian toothfish (*Dissostichus* spp.) since 2000.¹¹⁵ However the CDS suffers from the relatively narrow membership of CCAMLR and from inadequate verification and validation procedures as well as the absence of an enforcement protocol.¹¹⁶ The scheme can be and is

Convention on the Establishment of an Interamerican Tropical Tuna Commission, at <http://www.oceanlaw.net/texts/iattc2.pdf>.

Website at www.iattc.org. Its members include Costa Rica, Guatemala, Panama, Ecuador, Japan, Peru, El Salvador, Mexico, United States, France, Nicaragua, Vanuatu, and Venezuela. The Antigua Convention at <http://www.iattc.org/PDFFiles2/Antigua%20Convention%20Jun%202003.pdf> broadened the membership base to include regional organizations.

¹⁰⁹ Agreement on the International Dolphin Conservation Program (AIDCP), signed at Washington, 21 May 1998, as amended. Text (as amended) at http://www.iattc.org/PDFFiles/AIDCP%20_amended%20Jun%202003_.pdf.

¹¹⁰ <http://www.iattc.org/DolphinSafeENG.htm>

¹¹¹ Convention on the Conservation of Antarctic Marine Living Resources, done at Canberra, 20 May 1980, entered into force 7 April 1982. The text of the convention can be found at <http://www.ccamlr.org/pu/e/pubs/bd/pt1.pdf>. Members include Argentina, Australia, Belgium, Brazil, Chile, European Community, France, Germany, India, Italy, Japan, Korea (Rep. of), New Zealand, Norway, Poland, Russia, South Africa, Spain, Sweden, Ukraine, United Kingdom, United States, and Uruguay.

¹¹² CCAMLR article I(1). Antarctic marine living resources means the populations of fin fish, molluscs, crustaceans and all other species of living organisms, including birds, found south of the Antarctic Convergence. Article I(2)

¹¹³ CCAMLR article III(c) and IX(2)(i)

¹¹⁴ <http://www.ccamlr.org/pu/e/cds/intro.htm>

¹¹⁵ See CCAMLR Conservation Measure 10-05 (2002), at <http://www.ccamlr.org/pu/e/cds/p1.htm>, Resolution 13/XIX on Flagging and Licensing of Non-Contracting Party Vessels, Resolution 14/XIX on Catch Documentation Scheme: Implementation by Acceding States and Non-Contracting Parties, Resolution 15/XIX on Use of Ports not Implementing the Catch Documentation Scheme for *Dissostichus* spp., at <http://www.ccamlr.org/pu/e/cds/p3.htm>.

¹¹⁶ See ASOC, ASOC Evaluation of the CDS, October 2001, at http://www.asoc.org/Documents/XXCCAMLR_2001/CDS_Analysis_2001_FINAL.doc.



circumvented by inaccurate and unverified documentation made by captains filing documentation which claims fish were caught outside the CCAMLR area¹¹⁷.

As a result, an IUU fishery for Patagonian toothfish has circumvented many of CCAMLR's conservation measures and sparked international protests by NGOs and complaints from legal toothfish operators, such as COLTO, a coalition of legal toothfish operators.¹¹⁸ It has been estimated that for every ton of legally caught toothfish, five or six tons are caught illegally.¹¹⁹ Hence environmental organizations such as ASOC¹²⁰ and Greenpeace as well as COLTO have been pushing for

Patagonian toothfish to be regulated by CITES, which has far wider participation and a more effective enforcement mechanism.¹²¹ COLTO has gone a step further than most: it is offering rewards of up to US \$100,000 for information leading to the conviction of illegal toothfish pirates.¹²²

The alleged involvement of the largest fish trading corporations behind IUU toothfishing operations¹²³ highlights the need to address IUU fishing in Antarctica in a comprehensive and global approach.

Last year, CCAMLR adopted measures that establish black lists of both member and non-member vessels of any kind that are diminishing the effectiveness of CCAMLR.¹²⁴ Under the CCAMLR measures, the flag State of vessels on the lists may be identified and subject to further action, but the vessels themselves are also subject to prohibitions on access to CCAMLR fisheries or the fisheries of Parties to the Convention (such as in their EEZs), prohibitions on transshipments or landing of catches, chartering, and reflagging, and other sanctions.

¹¹⁷ ASOC Evaluation of the CDS, October 2001, at http://www.asoc.org/Documents/XXCCAMLR_2001/CDS_Analysis_2001_FINAL.doc.

¹¹⁸ Website at www.colto.org.

¹¹⁹ National Environmental Trust, at <http://www.asoc.org/Long%20Live%20Chilean%20Sea%20Bass.htm>.

¹²⁰ Antarctic and Southern Ocean Coalition. Website at <http://www.asoc.org>.

¹²¹ See Greenpeace critique of CDS at <http://www.greenpeace.org/~oceans/reports/ccamlarcritque.pdf> and ASOC report September 2002 at <http://www.asoc.org/Documents/ATCMXXV%20ASOC%20PAPERS/IP%2084%20ASOC%20Report.htm>.

¹²² Wanted poster at: http://www.colto.org/wanted_poster.htm.

¹²³ See account of the involvement of Pacific Andes International Holdings in the COLTO report 'The Alphabet Boats', at http://www.colto.org/Case_Study.htm and Greenpeace briefing on the Volga arrest, at http://www.greenpeace.org.au/features/pdf/volga_briefing.pdf.

¹²⁴ CCAMLR Conservation Measure 10-06 (2002). At <http://www.ccamlr.org/pu/E/pubs/cm/02-03/10-06.pdf>

SEAFO <http://www.mfmr.gov.na/seafo/seafo.htm> - South Atlantic Fisheries

The Southeast Atlantic Fisheries Organization (SEAFO)¹²⁵ will be created under the Convention for the Conservation and Management of Fisheries Resources in the South East Atlantic Ocean. The Convention has just entered into force with its fourth ratification, and it will take some time for the organization to get up and running.¹²⁶ It is one of the first international fisheries agreements to be negotiated following the UN Fish Stocks Agreement. SEAFO will cover the high seas adjacent to the EEZs of Angola, Namibia, South Africa and Saint Helena Tristan da Cunha and Ascension Island, and will cover orange roughy, alfonso, armour head, wreck fish, deepwater hake and red crab. It will collect catch data and register of vessels fishing in the Convention Area.¹²⁷

NAFO - www.nafo.ca/ - Northwest Atlantic Fisheries

The Northwest Atlantic Fisheries Organization (NAFO)¹²⁸ is located at Dartmouth, Nova Scotia, Canada. Its convention¹²⁹ covers all fishery resources of the Northwest Atlantic area with the exception of sea mammals, sedentary species, and, in so far as they are dealt with by other international agreements, highly migratory species and anadromous stocks.

NAFO has VMS and Observer schemes in place. All Contracting Party vessels in the Regulatory Area must have a VMS device which sends position reports every 6 hours to the Secretariat and must have an observer onboard. It also has a scheme¹³⁰ to log and prohibit non-Contracting Party vessels in the Regulatory Area from landing or transshipping fish in the ports of Contracting Parties.

WCPFC - <http://www.ocean-affairs.com/> - Western and Central Pacific Migratory Fish Stocks

The Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC) will be created by the

¹²⁵ Convention for the Conservation and Management of Fisheries Resources in the South East Atlantic Ocean (SEAFO Convention) signed at Windhoek, 20 April 2001. Signatories include Angola, South Africa, Namibia and the United Kingdom (on behalf of St Helena and its dependencies of Tristan da Cunha and Ascension Island) and Iceland, Norway, Republic of Korea, United States of America and the European Community. Not in force. Text at <http://www.mfmr.gov.na/seafo/seafotext.htm>.

¹²⁶ For status of ratifications of the Convention see <http://www.mfmr.gov.na/seafo/status.htm>

¹²⁷ Interim arrangements provided in the Annex to the SEAFO Convention. At <http://www.mfmr.gov.na/seafo/seafointer.htm>.

¹²⁸ <http://www.nafo.ca/>

¹²⁹ Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, Done at Ottawa, 24 October 1978, Entered into force on 1 January 1979, at http://www.nafo.ca/About/MANDATE/Convention_2003.exe. Members are Bulgaria, Canada, Cuba, Denmark (in respect of Faroe Islands and Greenland), European Community, Estonia, France (in respect of St. Pierre and Miquelon), Iceland, Japan, Korea (Rep. of), Latvia, Lithuania, Norway, Poland, Romania, Russia, Ukraine, United States.

¹³⁰ See Scheme to Promote Compliance, at <http://www.nafo.ca/activities/Fisheries/gc03-02.pdf>.

Convention¹³¹ which opened for signature 5 September 2002. It was the first convention to be negotiated using the Fish Stocks Agreement as a model. It has not yet entered into force.¹³² WPCFC will manage all of the highly migratory fish stocks found in the area except sauries, with emphasis on tuna (especially skipjack, yellowfin, bigeye and southern albacore). Five preparatory conferences have taken place; the most recent was at Rarotonga in September 2003.¹³³ At Prepcon III, Japan introduced a resolution addressing IUU fishing, which was adopted by consensus. In its operative paragraphs the resolution urges all States and other entities to exercise reasonable restraint in respect of any expansion of fishing effort and capacity in the Convention Area and to apply the precautionary approach. It also urges all States and other entities concerned to take every appropriate measure, in accordance with their international obligations and with the FAO international plan of action on IUU fishing and other relevant international instruments to prevent, deter and eliminate IUU fishing in the Convention Area.¹³⁴ It should be noted that this represented a significant change for the Japanese government which had deeply opposed the strong conservation language (including the precautionary approach) in the Convention, and had in fact, along with Korea voted against its adoption.¹³⁵

FFA - www.ffa.int/ - South Pacific Fisheries

The Forum Fisheries Agency (FFA) was created in 1979 by the sixteen member states of the South Pacific Forum to oversee the sustainable management and development of tuna resources in the western and central Pacific Ocean.¹³⁶ The FFA has been instrumental in bringing about various agreements including the Nauru Agreement,¹³⁷ which standardizes licensing and terms and conditions of fisheries access, the Niue

¹³¹ Convention for the Conservation and Management of Highly Migratory Fish stocks in the Western and Central Pacific Ocean, signed at Honolulu on 5 September 2000, at <http://www.ocean-affairs.com/pdf/text.pdf>,

¹³² Entry into force is based on a formula requiring ratification by three states situated north of the 20° N parallel and seven states situated south of the same parallel. But if the Convention has not been ratified by the required three northern States, it enters into force following 13 instruments of ratification. See Article 36. Only four states – Fiji, Marshall Islands, PNG and Samoa - had ratified as November 2002: <http://www.ocean-affairs.com/pdf/WCPFC%20BP1%20Rev5.pdf>, though FSM has since ratified: <http://www.ocean-affairs.com/PrepCon.html>. Some have suggested that it may never enter into law due to opposition by Japan and Korea who are lobbying Latin American countries not to ratify. See <http://www.admiraltylaw.com/fisheries/Papers/unclos.htm>.

¹³³ <http://www.ocean-affairs.com/PrepCon.html>

¹³⁴ <http://www.ocean-affairs.com/PrepCon.html>

¹³⁵ Teaiwa, Tarte, Maclellan, Penjueli, “Turning the Tide: Towards a Pacific Solution to Conditional Aid”, Greenpeace Australia, June 2002

http://www.greenpeace.org.au/features/pdf/Turning_the_Tide_FINAL_large.pdf

¹³⁶ South Pacific Forum Fisheries Agency Convention, opened for signature at Honiara on 10 July 1979, entered into force 9 August 1979, at <http://svc098.bne147v.server-web.com/docs/convention.1979.pdf>. Web page is <http://www.ffa.int/www/index.cfm>. Members are Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Solomon Islands, Tonga, Tuvalu, Vanuatu and Western Samoa.

¹³⁷ Nauru Agreement Concerning Cooperation in the Management of Fisheries of Common Interest, signed at Nauru, 11 February 1982, at <http://www.oceanlaw.net/texts/nauru.htm>

Treaty,¹³⁸ which addresses cooperation as well as surveillance and enforcement, and a regional access treaty with the United States.¹³⁹

FFA has maintained since 1993 a regional register of fishing vessels to keep track of foreign fishing vessels operating in the area. Vessels which are licensed to an FFA member country are placed on the register, and are automatically declared to be in ‘good standing.’ If a vessel is caught violating conservation or management measures, it loses its good standing and is prohibited from operating in the waters of any FFA country.¹⁴⁰ Permanent withdrawal of good standing can be obtained with the support of three FFA member States. The list of vessels which have been withdrawn in this way is essentially a black list, as member States do not issue licenses to vessels which are not in good standing.

IOTC – www.iotc.org – Indian Ocean Tuna and Tuna-Like Species

The Indian Ocean Tuna Commission (IOTC)¹⁴¹ manages tuna and tuna-like species such as marlin and swordfish in the Indian Ocean and adjacent seas north of the Antarctic Convergence, insofar as it is necessary to cover such seas for the purpose of conserving and managing stocks that migrate into or out of the Indian Ocean.

In 1999 the Commission adopted an innovative resolution calling for actions against fishing activities by large-scale FOC longline vessels. The resolution provides that Parties shall deny fishing licenses to IUU vessels, refuse port access to FOC vessels which are engaged in fishing activities diminishing the effectiveness of measures adopted by IOTC, urge importers, transporters and others to refrain from transacting in and transshipping tunas and tuna-like species caught by vessels carrying out FOC fishing activities, and instructed the Secretariat to prepare possible measures including trade restrictive measures to prevent or eliminate FOC fishing activities.¹⁴²

Inspections, including port and at-sea inspections (which were not favoured), were discussed at a special meeting in 2001¹⁴³ and a scheme to promote compliance by non-Contracting Party vessels was agreed later in the year.¹⁴⁴ The scheme prohibits landings and transshipments in all Contracting Party ports of all fish from (Non-Contracting)

¹³⁸ Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region, opened for signature at Honiara on 9 July 1992, at <http://www.oceanlaw.net/texts/niue.htm>.

¹³⁹ Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America, done at Port Moresby 2 April 1987, at <http://www.oceanlaw.net/texts/pacisles.htm>.

¹⁴⁰ FAO, “Implementation of the International Plan of Action to Deter, Prevent, and Eliminate Illegal, Unreported and Unregulated Fishing, FAO Technical Guideline for Responsible Fisheries” Rome, 2002 <http://www.fao.org/DOCREP/005/Y3536E/y3536e00.htm#Contents>

¹⁴¹ Agreement for the establishment of the Indian Ocean Tuna Commission, adopted at Rome on 25 November 1993, entered into force on 27 March 1996, at <http://www.iotc.org/English/info/basictext.php>. Members are Australia, Eritrea, European Community, France, India, Japan, Korea (Rep. of), Madagascar, Mauritius, Pakistan, Seychelles, Sri Lanka, Sudan, Thailand, and the United Kingdom.

¹⁴² Resolution 99/02, at http://www.iotc.org/English/meetings/comm/history/resolutions/reso_99_02.php. The Commission used the term FOC pending the finalization of the term IUU. See <http://www.iotc.org/English/meetings/comm/history/comm5.php>.

¹⁴³ <http://www.iotc.org/English/meetings/comm/history/comm2s.php>

¹⁴⁴ Resolution IOTC 01/03 at http://www.iotc.org/English/meetings/comm/history/resolutions/reso_01_03.php

vessels where an inspection shows the vessel has IOTC species onboard, unless the vessel can show that the fish were caught outside the IOTC Area or in compliance with the relevant IOTC conservation measures.

A pilot program for satellite based VMS was agreed at the 2002 meeting¹⁴⁵ for 10% of vessels. Another resolution¹⁴⁶ established that a list of IUU vessels should be compiled from information sent by Contracting Parties based on stated criteria.¹⁴⁷ Measures to be taken in relation to vessels on the IUU list include that fishing vessels, mother-ships and/or cargo vessels flying the flag of Parties may not participate in any transshipment with vessels registered on the IUU list. IUU vessels that enter ports voluntarily are not authorized to land or transship in Parties' ports. Parties must prohibit the chartering of a vessel included on the IUU list and must in general refuse to grant their flags to vessels included on the IUU list. Parties must prohibit the import, landing and/or transshipment, of tuna and tuna-like species from vessels included on the IUU list.

Another resolution¹⁴⁸ prevents the laundering of catches by IUU vessels, by ensuring prior authorization for transshipment at sea and checking of documentation from transshipment vessels.

CCSBT - <http://www.ccsbt.org/> - Southern Bluefin Tuna

The Commission for the Conservation of Southern Bluefin Tuna (CCSBT) was established in May, 1994 and is headquartered in Canberra, Australia. The Convention represented the formalization of a voluntary agreement which had been in place amongst three predominant nations fishing for Southern Bluefin Tuna (SBT): Australia, New Zealand and Japan. However there were (and are) additional States fishing for SBT in the region, including South Korea, Taiwan and Indonesia, which has created problems for the management of the fishery. In addition, there are vessels operating in the fishery under a number of flags of convenience. Korea and Taiwan have now joined the CCSBT. Indonesia, South Africa and the Philippines have expressed interest in becoming Cooperating Non-Members of the Commission (which can participate in meetings but have no right to vote) and will be invited to apply for admission to the Extended Commission in 2004.¹⁴⁹

CCSBT is notable for a case New Zealand and Australia brought against Japan before the International Tribunal for the Law of the Sea (ITLOS)¹⁵⁰ over Japan's fishing of SBT and in particular Japan's 'experimental fishing program' involving catches of SBT above the agreed quota. ITLOS ordered that the parties should each ensure that their catches did not exceed the annual national allocations they had last agreed and that they should each refrain from conducting experimental fishing programs except with the agreement of the others. The Tribunal also made orders for negotiations to agree

¹⁴⁵ Resolution IOTC 02/02 at http://www.iotc.org/English/resolutions/reso_detail.php?reso=20.

¹⁴⁶ Resolution IOTC 02/04 at http://www.iotc.org/English/resolutions/reso_detail.php?reso=22.

¹⁴⁷ The list of 10 criteria include Harvest tunas and tuna-like species in the IOTC Area and are not registered on the IOTC list of vessels authorised to fish for tuna and tuna-like species in the IOTC area, make false reports, transship with vessels on the IUU list, etc.

¹⁴⁸ Resolution 02/07 at http://www.iotc.org/English/resolutions/reso_detail.php?reso=25.

¹⁴⁹ <http://www.ccsbt.org/>

¹⁵⁰ Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan, Provisional Measures, Order 27 August 1999, at http://www.itlos.org/case_documents/2001/document_en_116.doc.

measures for the conservation and management of SBT. However an arbitral tribunal later ruled that it did not have jurisdiction and revoked the orders on the basis of the dispute resolution provisions in the CCSBT Convention.¹⁵¹ Following negotiations, Japan agreed to refrain from experimental fishing and the Republic Korea joined the Convention in 2001.¹⁵² It has been argued that the ITLOS litigation had the effect of restoring the working relationship within the Commission which had broken down, being unable to agree a Total Allowable Catch (TAC).¹⁵³

NEAFC - <http://www.neafc.org/> - Northeast Atlantic Fisheries

The Northeast Atlantic Fisheries Commission (NEAFC) was established in 1982¹⁵⁴ and covers the Northeast Atlantic, including dependent seas, but not the Baltic Sea and the Belts or the Mediterranean Sea and its dependent seas. The Commission covers all fishery resources of the Northeast Atlantic, except marine mammals, sedentary species and, insofar as they are dealt with by other international agreements, highly migratory species and anadromous stocks. Its secretariat is based in London.

NEAFC is developing VMS measures (vessels are now required to report to their flag States via VMS¹⁵⁵), controls on transshipments and a list of IUU vessels. During its most recent meeting it was due to discuss possible actions on IUU fishing. The outcome has not yet been posted to their website. Its Permanent Committee on Control and Enforcement (PECCOE) met in October 2003 and was due to discuss port state control (and other) measures.¹⁵⁶

NPAFC - <http://www.npafc.org/> - North Pacific Anadromous Fish

NPAFC (North Pacific Anadromous Fish Commission)¹⁵⁷ is seated in Vancouver, Canada, and covers the international waters of the North Pacific Ocean and its adjacent seas, north of 33°N latitude (the area between Russia and North America). It exists to promote the conservation of the anadromous species in the Convention area (chum salmon, coho salmon, pink salmon, sockeye salmon, chinook salmon, cherry salmon

¹⁵¹ Southern Bluefin Tuna Case, Australia and New Zealand v Japan, Award on Jurisdiction and Admissibility, ICSID, August 4 2000, at <http://www.worldbank.org/icsid/bluefintuna/award080400.pdf>.

¹⁵² See NZ Ministry of Foreign Affairs account of the dispute and negotiations at <http://www.mft.govt.nz/support/legal/disputes/disputeontuna.html#The%20Arbitral%20Tribunal%20Decision>

¹⁵³ Bill Mansfield, counsel to the New Zealand government, in a reply to Barbara Kwiatkowska, at <http://www.mft.govt.nz/support/legal/disputes/seapol.html>.

¹⁵⁴ Northeast Atlantic Fisheries Convention, signed on 18 November 1980, entered into force 17 March 1982, at <http://www.neafc.org/Convention.pdf>. Members are Denmark (in respect of Faroe Islands and Greenland), the European Community, Iceland, Norway, Poland and Russia. The NEAFC was originally the 1946 Permanent Commission, but was reconstituted after the 7 EU members withdrew.

¹⁵⁵ "Report of the Food and Agriculture Organization Concerning United Nations General Assembly Resolutions A/Res/57/141 on Oceans and the Law of the Sea," January, 2003 at http://www.un.org/Depts/los/general_assembly/contributions_texts/fao.pdf

¹⁵⁶ <http://www.neafc.org/PECCOE%202003.doc>.

¹⁵⁷ The Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean, signed at Moscow February 11 1992, entered into force February 16, 1993, at <http://www.npafc.org/organization/convention.html>. Members are Canada, Japan, the Russian Federation and the United States. Originally governed by the 1952 International Convention for the High Seas Fisheries of the North Pacific Ocean.

and steelhead trout.)¹⁵⁸ Specifically, it was negotiated to implement a provision in UNCLOS which prohibits high seas fishing for salmonids, to which the Japanese North Pacific high seas salmon fishery had long been an exception.¹⁵⁹ In addition to the Commission, there is a Committee on Enforcement (ENFO), and under that an Enforcement Procedures Working Group, in addition to the Committee on Scientific Research on Statistics and its subcommittees, and the secretariat. Its enforcement activities focus on cooperation and minimization of incidental taking (and the return to the sea of incidental taking) of anadromous fish.

Also in the North Pacific, PICES (North Pacific Marine Science Organization) promotes and coordinates marine research in the northern North Pacific. It does not recommend regulatory measures.¹⁶⁰

POLITICAL MECHANISMS

UN General Assembly

The open-ended United Nations Informal Consultative on Oceans and the Law of the Sea (UNICPOLOS, or UNICP) established by the UN General Assembly (UNGA) has become the channel whereby the attention of the UNGA is drawn to key ocean issues, including fisheries. The UNGA can subsequently guide by resolution the work of subsidiary UN bodies and organisations.

There are numerous references in UNGA Resolutions to the need to halt IUU fishing, including FOC practices. While these are not binding, they do provide some measure of the recognition of the seriousness of the problem by the international community.

For example, in February 2003 the UNGA urged States “to take all necessary steps to implement the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, adopted by the Committee on Fisheries of the Food and Agriculture Organization of the United Nations, including through relevant regional and subregional fisheries management organizations and arrangements.”¹⁶¹

For an overview of all relevant UNGA Resolutions, see

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

Resolution 54/32 from 1999 specifically addresses the need to eradicate IUU fishing, including by FOC vessels.¹⁶²

The UNICP guides the discussions of the General Assembly via recommendations contained in its annual report. The UNICP itself is informed by the annual report of the UN Secretary General on developments and issues related to Oceans and the Law of the Sea. The Secretary General’s 2003 report includes an extraordinary response to an initiative of WWF, ITF and Greenpeace on the need to further elaborate the concept of

¹⁵⁸ See NPFAC Convention article 2 and Annex.

¹⁵⁹ National Marine Fisheries Service, “Fisheries and the World Summit on Sustainable Development,” http://www.nmfs.noaa.gov/sfa/international/Reportcard_final.pdf.

¹⁶⁰ Convention for a North Pacific Marine Science Organization, signed at Ottawa, 12 December 1990, entered into force 24 March 1992. At <http://www.pices.int/About/convention.asp>. Members are Canada, Japan, China, Korea (Rep. of), Russia, United States.

¹⁶¹ A/Res/57/141

¹⁶² <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N00/237/87/PDF/N0023787.pdf?OpenElement>

the ‘genuine link’ (see the discussion on ‘genuine link’ on page 33): “In the wake of the Prestige disaster, the World Wide Fund for Nature, Greenpeace International and the International Transport Workers’ Federation wrote to the Secretary-General, expressing concern about the environmental and social consequences of the oil spill and requesting that he form a “task force” of relevant international bodies to examine the root causes of the problem. In their view, those causes related to the failure of certain flag States, in particular open registries, to fulfil their obligations under UNCLOS. In addition, they called for the revision of the 1986 United Nations Convention on the Conditions for the Registration of Ships to strengthen the requirement for a “genuine link” between flag States and the ships that they register. In response, the Division for Ocean Affairs and the Law of the Sea, on behalf of the Secretary-General, is currently engaged in consultations with other international bodies within and outside the United Nations system to ascertain their views on the establishment of such a task force.”¹⁶³

The 2003 UNICP Report to the UNGA reflects the support that some representatives expressed for this NGO proposal. It recognizes the problem of flag State responsibility and the need to elaborate a definition of ‘genuine link’.¹⁶⁴

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 reflects the concerns raised in the UNICP report. Paragraphs 27-33 are especially important, with clear language on flag and port State control and 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 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.

This issue is important since IUU fishing on the high seas is likely to remain problematic until a comprehensive management regime covering the high seas is put in place. The threat to seamounts and biodiversity, as well as historically abysmal management of deep sea fish stocks such as orange roughy, is likely to be a driving force behind the negotiation of such a regime over the long term, for example by extending the Fish Stocks Agreement to the high seas or the negotiation of a new similar agreement to cover fishing on the high seas.

In the short term, there are opportunities to tackle IUU fishing on the high seas through the UN General Assembly in relation to deep-sea biodiversity and fish stocks, since if the UN General Assembly were to declare a moratorium on all high seas bottom trawl fishing until such time as the problem of IUU fishing on the high seas (and a number of other important issues related to high seas fishing and the protection of biodiversity in the deep-sea) were resolved, many instances of IUU fishing on the high seas would be prevented, or at least would be carried out in breach of the moratorium if they involved bottom trawling on the high seas.

¹⁶³ UNSG Report, paragraph 243 A/58/65 at

http://www.un.org/Depts/los/general_assembly/general_assembly_reports.htm

¹⁶⁴ Paragraph 77 A/58/95 at http://www.un.org/Depts/los/consultative_process/consultative_process.htm

UN Commission on Sustainable Development

The Commission on Sustainable Development (CSD) was created to follow-up on the outcomes (as embodied in Agenda 21) of the 1992 Earth Summit (UN Conference on Environment and Development, UNCED). It has met annually since 1993. In 1998, a Special Session was held to examine progress five years after the Summit. During this meeting, the CSD program for the following years was agreed. In 1999, the seventh meeting of the CSD (CSD 7) included a focus on oceans and seas. The problem of IUU fishing, and FOC in particular was recognised to be a major problem. One of the outcomes of this session was the creation of an open-ended informal consultative process to make recommendations on oceans and seas to the UN General Assembly.¹⁶⁵ The next time the CSD is due to take up the issue of oceans and seas in its work program is 2014-2015.

CSD 9 and 10 took place in 2002, and served as preparatory sessions for the World Summit on Sustainable Development (Johannesburg Summit). One outcome of CSD 9 was the creation of an FAO/IMO Ad Hoc Working Group to work towards effective flag State control of fishing vessels, and in particular the role of the port State (for more information, see page 32).

The Johannesburg Summit Plan of Implementation of September 2002 contains a relatively large section on oceans and coasts (paragraphs 29-34), with several provisions regarding IUU fishing.¹⁶⁶

The Summit was severely criticised by major environmental and development organisations in Johannesburg for setting ‘Maximum Sustainable Yield’ as the goal of fisheries management and control in a formulation that represents a backward step compared to the precautionary approach as formulated in the 1995 UN Agreement on Straddling Fish Stocks (see page 9).¹⁶⁷ The Johannesburg text calls for States to:

“Maintain or restore stocks to levels that can **produce the maximum sustainable yield** with the aim of achieving these goals for depleted stocks on an urgent basis and where possible not later than 2015.”
(Paragraph 30(a), emphasis added).

However, it also adopted important language on IUU fishing:

Paragraph 30(b) (emphasis added): “**Ratify or accede to and effectively implement** the relevant United Nations and, where appropriate, associated regional fisheries agreements or arrangements, noting in particular **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 and the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas.**”

¹⁶⁵ For more information on CSD 7, see <http://www.iisd.ca/vol05/enb05132e.html>

¹⁶⁶ http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm

¹⁶⁷ See: “ECO coalition” bulletin, at <http://www.archive.greenpeace.org/earthsummit>

Paragraph 30(c) (emphasis added): **Implement the 1995 Code of Conduct for Responsible Fisheries**, taking note of the special requirements of developing countries as noted in its article 5, and the relevant Food and Agriculture Organization of the United Nations (FAO) international plans of action and technical guidelines;

These paragraphs provide a strong basis to push countries to ratify, accede and/or implement, these agreements, effectively calling on States to translate their words into action.

Paragraph 30(d) (emphasis added): **Urgently develop and implement national and, where appropriate, regional plans of action, to put into effect the FAO international plans of action**, in particular the international plan of action for the management of fishing capacity by 2005 and **the international plan of action to prevent, deter and eliminate illegal, unreported and unregulated fishing by 2004. Establish effective monitoring, reporting and enforcement, and control of fishing vessels, including by flag States, to further the international plan of action to prevent, deter and eliminate illegal, unreported and unregulated fishing;**

The urgency of the 2004 deadline (which stems from the IPOA-IUU itself¹⁶⁸) is clearly recognised.

Paragraph 30(f): **Eliminate subsidies that contribute to illegal, unreported and unregulated fishing and to over-capacity**, while completing the efforts undertaken at WTO to clarify and improve its disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries.

Although no deadline was set, the strong word ‘eliminate’ was accepted by consensus. This provides a solid basis for identifying such subsidies, and demanding their elimination via lobbying and/or litigation.

Pursuant to the WSSD and the adoption of the Implementation Plan, the 11th Session of the CSD (April-May, 2003) adopted the Commission's program of work for the next years. This will comprise of a session to consider the effectiveness of ongoing measures including Type 2 partnership initiatives, and another one to consider additional measures. As noted above, oceans, seas and marine resources have been put back to the 2014-2015 cycle. However, opportunities earlier in the program to support the fisheries agenda may exist (i.e. 2008-2009 Africa, 2010-2011 ten-year programs on consumption patterns, 2012-2013 biodiversity). Government policy-makers should be continually reminded that they must show concrete results by the 2014-2015 cycle (as opposed to more discussion, or the adoption of measures to reach such results), or they will be held accountable by the public.

Other CSD-related processes that are relevant to IUU fishing include:

1. The 10-year high-level review of the Barbados Program of Action for Sustainable Development of Small Island Developing States (SIDS) A summit will be held in August 2004 in Mauritius. Upon his appointment as Secretary

¹⁶⁸ IPOA-IV para. 25

General of the Mauritius conference by the UN General Assembly on 9 December, 2003 Anwarul K. Chowdhury identified sustainable fisheries as one of the key issues that need to be addressed in Mauritius: "Earlier in the General Assembly session, Mr. Chowdhury suggested that delegates identify priorities for the 2004 conference agenda, including the economic, social and environmental vulnerability of small island developing states (SIDS), poverty eradication measures, freshwater issues, climate change, renewable energy, **development of marine resources and sustainable fisheries**, reducing HIV/AIDS and increasing trade" (emphasis added).¹⁶⁹

2. The "Marrakech Process" to promote sustainable production and consumption patterns, which is likely to gain momentum in the coming years as the vehicle to implement Section III ("Changing unsustainable patterns of consumption and production"), Paragraph 15 (the development of a 10-year framework of programmes in support of regional and national initiatives to accelerate the shift towards sustainable consumption and production) of the Johannesburg Implementation Plan. This process is possibly the corner-stone of the plan in fact, and of sustainability at large.¹⁷⁰

FAO – COFI

The Committee on Fisheries (COFI) of the FAO, a subsidiary body of the FAO Council, is an intergovernmental forum which addresses the problems of major international fisheries.¹⁷¹ It has a number of sub-committees, including one on Trade and one on Subsidies. It meets bi-annually to review FAO's program of work on fisheries and aquaculture, and conducts periodic reviews in relation to international issues or problems. The Fisheries Department of the FAO publishes a report every two years on the State of the World's Fisheries and Aquaculture¹⁷² to aid such discussions.

OECD

The OECD has announced that a new, ministerial level, task force has been established to review the problem of IUU, led by the UK Minister of State for the Environment, Elliot Morley¹⁷³. The other members are Australia, New Zealand, Namibia and Chile. According to Simon Upton, Chair of the OECD Round Table on Sustainable Development, (as quoted in an OECD press release): "The challenge is to combine a top-down assertion of rights with a bottom-up attempt at management for the collective good. This has to happen before all international fish stocks are depleted. As long as the world is not prepared to lift the veil of flag state sovereignty we will be fighting IUU fishing with one hand tied firmly behind our backs." The work of the task force will be conducted over a period of 18 months to two years.

It should also be noted that OECD is currently doing research on the economics of IUU fishing. It will host a workshop in April, 2004 in an attempt to get reliable information

¹⁶⁹ UN Press Release "Annan Names Chowdhury Chief of Review Conference on Sustainable Development" New York, 9 Dec. 2003

¹⁷⁰ See: http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIChapter3.htm

¹⁷¹ <http://www.fao.org/fi/body/cofi/cofi.asp>

¹⁷² http://www.fao.org/sof/sofia/index_en.htm

¹⁷³ OECD press release, 1 December 2003 at:

http://www.oecd.org/document/51/0,2340,en_2649_201185_20897011_119690_1_1_1,00.html

onto the table. OECD's website which links to the workshop papers can be found at www.oecd.org/agr/fish.

International Maritime Organization (IMO) – www.imo.org

The IMO Convention (previously the Intergovernmental Maritime Consultative Organization (IMCO) Convention) entered into force in 1958, and the Organization met for the first time in 1959. Its purposes are: "to provide machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships."¹⁷⁴

The Convention originally established three main bodies: the Assembly, the Council, and the Maritime Safety Committee (MSC). The Assembly represents all member States; the Council (made up of 40 member states) is elected by the Assembly which meets every two years. The MSC was also originally an elected body, but it now represents all member States.

As a result of the 1967 Torrey Canyon oil spill, the Maritime Environment Protection Committee (MEPC) was established (originally as a sub-committee of the MSC, but in 1975 as a Committee of equal standing)¹⁷⁵. In addition, a Legal Committee was established to address issues relating to liability and compensation from oil spill damages. In addition, the purposes of the IMO Convention were amended to include the prevention and control of pollution from ships.

The MEPC and MSC have a sub-committee on flag State implementation. The last meeting took place in April 2003 and focused on port State control measures, looking at regional MOUs, mainly from the point of view of inspections on safety grounds. IUU fishing was not examined in depth.¹⁷⁶

An FAO/IMO Ad Hoc Working Group was set up in 2000 (as requested by CSD 9 the previous year) to look at means of achieving more effective flag state control of fishing vessels, and in particular to define what constitutes a genuine link (for more information on 'genuine link' see page 33). The report from the meeting of the working group in 2001 can be found at: <http://www.fao.org/docrep/meeting/003/X9349E.htm>. The Group emphasized the need to link the registration of a fishing vessel with its authorization to fish and made suggestions on flag and port State controls. Otherwise, it avoided the question of further elaborating the genuine link, arguing that there was little benefit in doing so.¹⁷⁷

¹⁷⁴ http://www.imo.org/Conventions/mainframe.asp?topic_id=771, Article 1

¹⁷⁵ http://www.imo.org/Conventions/mainframe.asp?topic_id=771, 1975 Amendments

¹⁷⁶ http://www.imo.org/includes/blastData.asp?doc_id=3173&type=body

¹⁷⁷ 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>

B. OVERVIEW OF LEGAL MECHANISMS WHICH RELATE TO FLAGS OF CONVENIENCE (FOC)

Every State has the right under international law to register ships under its flag. UNCLOS states that ships on the high seas are subject to the exclusive jurisdiction of the flag State (apart from exceptional cases expressly provided for in international treaties or in the Convention),¹⁷⁸ and nationality is decided exclusively by that State.¹⁷⁹

States maintain either open or closed registries. Open registries (i.e. flags of convenience) allow for the flagging of vessels owned by nationals from other States. There are no legal definitions for classifying registries as 'open' but in practice if the percentage of ships on the register owned by non-nationals of the flag State is higher than 99%, it is considered to be an FOC. If this percentage falls in the 80-90% range, the register is considered to be 'international'.¹⁸⁰

Under international law, the country whose flag a vessel flies is responsible for controlling the activities of that vessel to ensure that it abides by the relevant rules, such as fishing regulations, maritime safety and labour standards, of those instruments and Conventions to which it is a party. So if a country is not party to the relevant Conventions, it will not consider itself bound by their rules and will not penalize vessels for breaking them. FOC states are generally not parties to, nor do they generally cooperate with RFMOs. Vessels flying under the flags of such countries thus consider themselves relatively free of restrictions.

This is not to say that no provisions of international law apply to these vessels, as many FOC States are party to the Law of the Sea Convention.¹⁸¹ These provisions in theory require flag States to exercise their jurisdiction and control in administrative, technical and social matters over ships flying their flags.¹⁸²

UNCLOS also requires a 'genuine link' between the vessel and the flag State. Article 91 of the Law of the Sea Convention, which is the overarching provision, provides that

“1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.”

Unfortunately, the scope of this requirement is not defined and the system breaks down when flag States lack either the will or capacity to exercise control over their vessels.

¹⁷⁸ Law of the Sea Convention Article 92(1)

¹⁷⁹ Law of the Sea Convention Article 104

¹⁸⁰ 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”, 2002, see footnote 11. <http://www.fao.org/DOCREP/005/Y3824E/y3824e00.htm>

¹⁸¹ Belize, Honduras, Panama, St Vincent and the Grenadines, Equatorial Guinea, Cyprus, Sierra Leone Mauritius and Vanuatu are all party to the Law of the Sea Convention.

¹⁸² Law of the Sea Convention Article 94

Mechanisms for the Control of and Discouragement of FOC Vessels

DETER REFLAGGING AND REVEAL BENEFICIAL OWNERSHIP

Agenda 21¹⁸³ called on States to take effective action to deter reflagging of vessels by their nationals as a means of avoiding compliance with applicable conservation and management rules for fishing activities on the high seas. In 2001, more than 8 years later, the UN General Assembly¹⁸⁴ recalled that statement and called upon States to take measures to deter reflagging of fishing vessels flying their flag to avoid compliance with applicable obligations. Neither of these provisions are binding.

A major effort to reinforce and strengthen UNCLOS provisions for establishing a genuine link between vessels and the flag State resulted in the 1986 UN Convention on Conditions for Registration of Ships.¹⁸⁵ For example it requires the flag State to maintain information about operators as well as owners¹⁸⁶, and contains provisions aimed at preventing flag-hopping.¹⁸⁷ It does not apply to fishing vessels, and in any case has never entered into force due to the lobbying of flag States with major shipping interests, which insisted on inserting provisions requiring a sufficiently high number of ratifications to bring it into force and thus ensuring that their own non-participation could kill it.¹⁸⁸ It could nonetheless prove to be a useful starting point in any effort to further elaborate genuine link requirements for fishing vessels.

EXISTING PROVISIONS ON PORT STATE CONTROL

The 1923 Statute on the International Regime of Maritime Ports¹⁸⁹ forms the basis of international law regulating access to, and use of ports. It requires equality of treatment of a State's own vessels with those of any other State as regards freedom of access to the port, the use of the port, and the full enjoyment of the benefits as regards navigation and commercial operations which it affords to vessels, their cargoes and passengers. As long as vessels are treated equally, there is nothing in this agreement to prevent States from being restrictive (i.e. in support of conservation goals) rather than complacent. The statute does not require the port State to permit the transfer of goods of which the import or export is prohibited by its national laws.¹⁹⁰ Nor does it affect the measures which a Contracting State takes or may feel called upon to take in pursuance of general international conventions to which it is a party, including fisheries conventions.¹⁹¹

¹⁸³ Agenda 21, adopted at the United Nations Conference on Environment and Development, 1992, UN Sales No. E.93.I.8 and corrigenda, Chapter 17, **A/CONF.151/26 (Vol. II) 17.52**, at <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21chapter17.htm>.

¹⁸⁴ Resolution A/RES/55/8 (30 October 2000) on Large-scale pelagic drift-net fishing, unauthorized fishing in zones of national jurisdiction and on the high seas, fisheries by-catch and discards, and other developments, para. 12, at <http://daccess-ods.un.org/TMP/7023183.html>.

¹⁸⁵ <http://www.admiraltylawguide.com/conven/registration1986.html>

¹⁸⁶ Article 6.1

¹⁸⁷ Article 11.4

¹⁸⁸ 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>

¹⁸⁹ Statute on the International Regime of Maritime Ports, opened for signature at Geneva, 9 December 1923, article 2. Entered into force 26 July 1926.

¹⁹⁰ Maritime Ports Statute, Article 17

¹⁹¹ Maritime Ports Statute, Article 18

Perhaps it is largely a question of political will, but the 1923 Statute has not proved sufficient for addressing the problem of ports of convenience. The international community has therefore attempted to clarify and strengthen the responsibilities of port States to deter IUU fishing.

An example from the law of pollution is useful to consider. The Law of the Sea Convention provides in article 218 that when a vessel is voluntarily within a port or at an off-shore terminal of a State, that State may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules. However no such proceedings may be instituted if the discharge was committed in the internal waters, territorial sea or EEZ of another State unless requested by that State, the flag State, or a State damaged or threatened by the discharge violation, or unless the violation has caused or is likely to cause pollution in the internal waters, territorial sea or EEZ of the State instituting the proceedings.¹⁹² In other words, UNCLOS requires some direct or derived interest of the port State in the infringement in question.

Port State control has been increasing in its acceptability since the Law of the Sea Convention was negotiated in 1982. Article 219 predicates the right to detain vessels if they are in breach of international rules and standards on seaworthiness, and as a result threaten to damage the marine environment. Where IUU fishing vessels have already, by their activities, caused damage to the marine environment and are in breach of international rules and standards, it is a short step to require port States to decline to aid and abet their activities.

The power contained in Article 219 is considerably expanded in the regional agreements to control substandard shipping, such as the Paris MOU on Port State Control¹⁹³ which addresses substandard shipping. It recognizes that effective action by port States is required to prevent the operation of substandard ships, and provides for detailed inspection procedures, rectification and detention and refusal of ships.¹⁹⁴

Article 226 went a step further than Article 219, in providing that if an investigation indicates a violation of applicable laws and regulations or international rules and standards for the protection and preservation of the marine environment, release shall be made promptly subject to reasonable procedures such as bonding or other appropriate financial security. The Paris MOU provides for detention if a deficiency is found.¹⁹⁵

Other provisions on Port State control have included the International Convention on Load Lines, the SOLAS Convention (including the new Chapter XI-2 and the newly

¹⁹² Law of the Sea Convention Article 219(2).

¹⁹³ Paris Memorandum of Understanding on Port State Control, signed at Paris 26 January 1982, at <http://www.parismou.org/PDF/25amend.pdf>

¹⁹⁴ Other agreements are the 1992 Latin American Agreement on Port State Control; 1993 Asia-Pacific MOU on Port State Control in the Asia-Pacific Region; 1996 MOU on Port State Control in the Caribbean Region; 1997 MOU on Port State Control for the Mediterranean Region, 1998 Indian Ocean MOU, and 1998 West and Central African MOU. See ASOC paper, note 307, page 5.

¹⁹⁵ Paris MOU, 3.10.1

elaborated ISPS code on maritime security),¹⁹⁶ the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78),¹⁹⁷ and the STCW Convention.¹⁹⁸

The international community has therefore attempted to clarify and strengthen the responsibilities of port States to deter IUU fishing.

The FAO Code of Conduct¹⁹⁹ provides that port States are to take such measures as are necessary to achieve and to assist other States in achieving the objectives of the Code.

The FAO Compliance Agreement²⁰⁰ fell far short of the mark in its provisions that a port State Party, where it has reasonable grounds for believing that the fishing vessel has been used for an activity that undermines the effectiveness of international conservation and management measures, shall promptly notify the flag State. Notification of the flag State will usually be of little use if the flag State is a flag of convenience.

The Fish Stocks Agreement²⁰¹ has more detailed provisions, and is thus more likely to be effective. It provides that:

A port State has the right and the duty to take measures, in accordance with international law, to promote the effectiveness of subregional, regional and global conservation and management measures. When taking such measures a port State shall not discriminate in form or in fact against the vessels of any State.

2. A port State may, *inter alia*, inspect documents, fishing gear and catch on board fishing vessels, when such vessels are voluntarily in its ports or at its offshore terminals.

3. States may adopt regulations empowering the relevant national authorities to prohibit landings and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas.

4. Nothing in this article affects the exercise by States of their sovereignty over ports in their territory in accordance with international law.

¹⁹⁶ International Convention for the Safety of Life at Sea (SOLAS) adopted 1 November 1974, entered into force 25 May 1980, e.g. Chapter I, Regulation 19. See http://www.imo.org/Conventions/contents.asp?topic_id=257&doc_id=647.

¹⁹⁷ International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), Article 5. See http://www.imo.org/Conventions/mainframe.asp?topic_id=258&doc_id=678.

¹⁹⁸ International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, adopted 7 July 1978, entered into force 28 April 1984, at http://www.imo.org/Conventions/mainframe.asp?topic_id=257&doc_id=651, article X. See general discussion of port state control in ASOC Paper “The Application of Port State Jurisdiction,” 8 October 2002, at <http://www.asoc.org/Documents/XXIICCAML/ASOC.Port%20State.htm>

¹⁹⁹ Article 8.3

²⁰⁰ FAO Compliance Agreement Article V(2)

²⁰¹ Fish Stocks Agreement Article 23

This article underlines the sovereignty of port States as well as their broad authority to promote the efficiency of conservation measures. It cannot be doubted in light of article 24 that States may, through regulations, prohibit landings and transshipments where appropriate, as well as undertake inspections. The wording of the article is broad and inclusive. The use of the term '*inter alia*' implies that inspection is only one of a number of powers.

Finally, the IPOA-IUU advocated port State control measures, including advance notice and information provisions,²⁰² collection of information on vessels in port²⁰³ and a clear statement that where a port State has clear evidence that a vessel having been granted access to its ports has engaged in IUU fishing activity, the port State should not allow the vessel to land or transship fish in its ports, and should report the matter to the flag State of the vessel.²⁰⁴ The port State should report suspected IUU fishing to the flag State and relevant fisheries management organizations.²⁰⁵

South Africa clearly takes the view that it has the authority to prohibit catch offloading where appropriate. In 2000 it effectively prohibited landing by vessels black-listed by RFMOs in all its ports, including Cape Town which historically has been a preferred destination of fishing pirates.²⁰⁶

INSPECTION AND DETENTION OF VESSELS

Inspection and detention of vessels is a more complex matter than the denial of port facilities (see discussion on port State controls beginning on page 34 above.)

One possible approach could be for a port State which is not satisfied that a flag State is willing to exercise effectively its responsibilities concerning the fishing vessel concerned, to detain the vessel until the flag State takes control over the vessel.²⁰⁷

Although an FAO Expert Consultation on this subject²⁰⁸ did not endorse detention of vessels, it did consider it appropriate for a port State to refuse to permit a fishing vessel to leave its port pending consultation with the flag State of the vessel.²⁰⁹

FORFEITURE OF CATCH

The IPOA-IUU calls on States to deprive nationals under its jurisdiction of the benefits accruing from IUU fishing.²¹⁰ The Code of Conduct contains similar provisions.²¹¹ This benefit could of course mean the catch. However the question arises whether port States can confiscate IUU catches from non-nationals where the vessel flies the flag of another State.

²⁰² IPOA-IUU para. 55

²⁰³ IPOA-IUU para. 55

²⁰⁴ IPOA-IUU para. 58

²⁰⁵ IPOA-IUU para. 59

²⁰⁶ Bours, H el ene, personal communication

²⁰⁷ Terje Lobach , "Port State Control of Foreign Fishing Vessels," 18, at <http://www.fao.org/fi/projects/fishcode/publications/other/y8387e00.pdf>.

²⁰⁸ FAO Report of the Expert Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing - Rome, 4-6 November 2002, <http://www.fao.org/DOCREP/005/Y8104E/Y8104E00.HTM>.

²⁰⁹ Lobach, page 19.

²¹⁰ IPOA-IUU para. 21

²¹¹ FAO Code of Conduct para. 8.2.7

It has been suggested that a vessel should be allowed or even ordered to land a catch derived from IUU fishing, but that the port State be allowed to confiscate the value of the catch, and that this may be preferable to sending the vessel to another port where it may unload with impunity.²¹² This may give rise to legal debate, but there is certainly an argument to be made that while detention or confiscation of the vessel itself may be problematic legally in the absence of an agreement with the flag State, by voluntarily coming into the jurisdiction of the port state the vessel has placed its cargo within the port's jurisdiction. This would therefore not present a problem with respect to catch from vessels fishing illegally in a coastal State's EEZ, but catches in international waters in breach of RFMO provisions may pose legal difficulties and may be best addressed in an agreement such as an MOU.

MONITORING, CONTROL AND SURVEILLANCE

The FAO Compliance Agreement, while it dodged the issue of port State controls, did focus on strengthening flag State controls. It establishes that each Party is to take such measures as may be necessary to ensure that fishing vessels flying its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures.²¹³ Vessels must supply the flag State with the necessary information on operations to enable the State to fulfil its obligations under the Agreement, in particular information pertaining to the area of its fishing operations and to catches and landings.²¹⁴ Clearly this requires an adequate monitoring system.

The IPOA-IUU specifically recommends²¹⁵ implementing a vessel monitoring system (VMS), in accordance with relevant national, regional or international standards, including the requirement for vessels under their jurisdiction to carry VMS on board as well as observer programs.

Satellite-based VMS is recognized to be one of the most cost-efficient means of monitoring fisheries activities on the high seas, apart from or in combination with other measures such as onboard observer programs or at-sea or aerial surveillance.

Vessel Monitoring Systems (VMS)

VMS systems involve the placement of electronic transmitters on fishing vessels which transmit information via satellite about the position of the ship to an onshore station. VMS systems enable management authorities to pinpoint a vessel's location at a specific point in time, and are thus an excellent tool for determining the legality of the catch. The system may determine a vessel's position at set intervals, or may 'poll' a vessel at random times. VMS is especially useful for monitoring fishing activities in expanses of ocean where at-sea or aerial surveillance is difficult due to weather conditions and/or large distances, and expensive.

VMS transmitting units cost between \$1,800 and \$5,800 to purchase in the US. Satellite transmission costs run about \$1.00 - \$5.00 per day.²¹⁶ Another estimate puts operational costs at \$845 per vessel per year under the FFA system in the Pacific, and

²¹² Lobach, page 19.

²¹³ FAO Compliance Agreement Article III(1)(a)

²¹⁴ FAO Compliance Agreement Article III(7)

²¹⁵ IPOA-IUU para 24

²¹⁶ See: <http://www.pcouncil.org/groundfish/gfvms.html>

\$410 per vessel per year in the US.²¹⁷ Costs vary depending on how often the vessels are polled. In addition, a base station to receive the information must be installed at a cost of approximately USD \$250 -300,000 (though South Africa purchased a minimal system for \$60,000 and Mozambique has a system utilizing the latest technology for a cost of \$1.3 – 2 million over a three-year period).²¹⁸ The question of who should be required to bear the costs is under discussion in some countries.

VMS is considered to be a cost-effective tool particularly when enforcing closed areas or seasons.²¹⁹ A comparison of costs to patrol the closed area in the Hawaiian longline fishery is a strong case in point: Prior to the installation of the VMS system, patrolling costs were \$5.6 million; post VMS they cost \$370,000.²²⁰ VMS can be used to verify the data contained in on-board logs, and to transmit important management information such as catch and effort data²²¹ and status of quotas.²²² In the face of an ICCAT ban on its members importing tuna from Panama in 1997, for example, Panama bowed to pressure and joined ICCAT in 1998. In so doing, it was required to sign an agreement that VMS systems would be installed on all of its fishing vessels, approximately 100 at the time, by the end of 1999. The ICCAT meeting held in November 1999 decided to repeal the ban.²²³

VMS is also of use to the fishing vessels themselves: they can serve as an important safety feature, and allow for the exchange of market data such that alternative choices for offloading fish can be made at sea (i.e. different ports) which can be a major financial benefit.²²⁴

As of 1 January 2000, all EU fishing vessels over 24 meters long operating in high-seas fisheries (in EEZs or in the Mediterranean) were required to install satellite-based VMS systems. The EU provided grants to vessels to offset the costs. The individual member states were required to establish monitoring centres to collect the data, and they in turn would work in cooperation with each other to monitor fishing activities. The system was reportedly the first such networked monitoring system in the world.²²⁵

²¹⁷ 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>

²¹⁸ 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>

²¹⁹ See: <http://www.gulfcouncil.org/newslet/nlet0902.pdf>

²²⁰ 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>

²²¹ See: <http://www.gulfcouncil.org/newslet/nlet0902.pdf>

²²² Essential Role of Monitoring, Control, and Surveillance in Fisheries Management, Section 6, UNFAO Committee on Fisheries, 22nd Sess., COFI/97/Inf.6, at para. 6 (Mar. 17-20, 1997), COFI/97/Inf.6

<http://www.fao.org/docrep/meeting/w3861e.htm>

²²³ ArgoNet newsletter #2 Fall, 1999 www.cls.fr

²²⁴ Essential Role of Monitoring, Control, and Surveillance in Fisheries Management, Section 6, UNFAO Committee on Fisheries, 22nd Sess., COFI/97/Inf.6, at para. 6 (Mar. 17-20, 1997), COFI/97/Inf.6

<http://www.fao.org/docrep/meeting/w3861e.htm>

²²⁵ ArgoNet newsletter #2, Fall, 1999 www.cls.fr

In December, 2002 Indonesia signed a contract to install VMS on 1,500 vessels, making it the largest ever VMS project. Peru has a system for 700 vessels.²²⁶ Namibia has purchased a system designed to track 400 vessels, 12 times per day.²²⁷ The FFA has a system involving 14 countries which tracks 1200 tuna fishing vessels.²²⁸

It should be noted, however that VMS only shows where the vessel is, not necessarily what it is doing or what it is catching or discarding. If the VMS system includes transmission of speed and direction, then for towed gears it can tell you whether the vessel is fishing or not. Other technologies are being developed similar to a plane's black box (called the "blue box") which would give more information. Japan is also developing a tamper-proof camera which takes a picture of the fishing deck every five seconds, though this will undoubtedly be costly. The frequency of transmission of data is also important. Frequency generally varies from 1 to 6 hours – one can do a lot in 6 hours. In the event there is a "deficiency" of the VMS, the vessel may be permitted to continue fishing – sometimes up to 2 months - before it must return to port to repair or replace it. Again, a lot can be done in that period of time. Finally, there is the question of what flag States do with the VMS information. All too often, it simply keeps the information to itself, though in some cases there are agreements to transmit the information to the coastal State in whose waters the vessels are fishing.

Electronic logbooks are also increasingly being used to enable VMS systems to report catch data in addition to vessel position.²²⁹

Agreements which require VMS systems include²³⁰:

- CCAMLR
- ICCAT (pilot project)
- NAFO
- FFA
- UN Fish Stocks Agreement
- WCPFC
- IOTC (pilot project)

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

²²⁶ ArgoNet newsletter #9, April, 2003 at

http://www.cls.fr/html/argos/peche/argonet_info/argonet_9_en.pdf

²²⁷ 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>

²²⁸ 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>

²²⁹ "Report of the Food and Agriculture Organization Concerning United Nations General Assembly Resolutions A/Res/57/141 on Oceans and the Law of the Sea," January, 2003 at

http://www.un.org/Depts/los/general_assembly/contributions_texts/fao.pdf

²³⁰ For a detailed listing of the provisions of international fishing agreements in relation to VMS see: http://www.lclark.edu/org/ielp/objects/comp_annexes.pdf starting at page 10.

Observer Systems

Onboard observers serve a variety of purposes. They may collect biological data on both target species and by-catch, describe operational aspects including catch effort, and search and capture techniques, verify log book entries, monitor catch composition and weight and discards of undersized fish or by-catch.²³¹ Scientific observers play a different role than enforcement officers.

Agreements which include mechanisms for onboard observers include²³²:

- CCAMLR – CCAMLR’s Scheme of International Scientific Observation invites Members of the Commission to designate scientific observers, and Members agree to take designated observers on board vessels operating under their flags.²³³ Many CCAMLR fisheries, such as the Patagonian toothfish fishery, require observers on all vessels at all times.²³⁴
- AIDCP – All vessels with a carrying capacity of more than 363 metric tons is required to carry an observer on all trips into the Agreement Area. At least half of the observers of each Member State must be IATTC observers. The rest may be observers from the State’s national program.²³⁵
- ICCAT – In 1999, ICCAT adopted a recommendation to establish a closed area / season from 1 November 1999 to 31 January 2000 for the use of Fish Aggregating Devices (FADs). During this period, all vessels were required to have an observer onboard to ensure that the ban was upheld.²³⁶
- NAFO – All vessels operating in the regulatory area are required to accept national observers onboard. If a Contracting Party is not able to supply an observer, other Parties are permitted to place observers on board, subject to the agreement of the Party.²³⁷
- Fish Stocks Agreement – Flag States are required to ensure that all vessels flying their flags are subject to monitor, control and surveillance. This includes implementing national, sub-regional and/or regional observer programs, including a requirement that vessels accept observers from other States as needed.²³⁸
- WCPFC – The Commission will be required to establish a regional observer program to be coordinated with other national, sub-regional or regional programs²³⁹.

²³¹ See for example <http://www.mragltd.com/SWindobs.htm>

²³² For a detailed listing of the provisions of international fishing agreements in relation to Onboard Observers see: http://www.lclark.edu/org/ielp/objects/comp_annexes.pdf starting at page 20.

²³³ CCAMLR Scheme of International Scientific Observation as adopted at CCAMLR-XI (paragraph 6.11) and amended at CCAMLR-XVI (paragraph 8.21)

²³⁴ See http://www.lclark.edu/org/ielp/objects/comp_annexes.pdf p. 23

²³⁵ AIDCP Annex II

²³⁶ See http://www.lclark.edu/org/ielp/objects/comp_annexes.pdf p. 26

²³⁷ NAFO Conservation and Enforcement Measures, Part VI – Program for Observers and Satellite Tracking, Section A – Observers

²³⁸ Fish Stocks Agreement, Article 18

²³⁹ Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Article 28

Onboard observer programs are labor- and skill-intensive, and problems can arise due to conflicts of interest. There are many reports of observers being subjected to threats, violence and corruption. The salary costs for onboard observers vary. In the Pacific, an observer may earn from \$25-\$45 / day depending on the level of experience (scientific observers are generally more highly educated than observers placed for enforcement purposes). In Namibia, annual salaries for observers range from \$3,500 – \$7,500.²⁴⁰ Given the weaknesses in VMS systems alone, observer systems form an important complement to electronic systems.

AT-SEA SURVEILLANCE

Offshore patrol vessels are used by many countries to monitor fishing activities within their EEZ. Vessels may be boarded at random, before, during and after the opening of a season, checking for violations on the take of prohibited species, gear compliance and other conditions of the license. The costs of purchasing vessels which can reach the outer limits of the EEZ (generally at least 30 meters long and capable of staying at sea for 20 days) varies between less than \$75,000 for an old vessel, and up to \$24.2 million for a modern naval vessel.²⁴¹

AERIAL SURVEILLANCE

Aerial surveillance serves to document the number of vessels and types of gear being used, as well as to collect images of and other information on individual vessels which can be maintained in a database to aid future identification. They are also effective for monitoring closed areas or seasons. However, aerial surveillance without the capacity to conduct at-sea inspection and arrests are generally not effective, as vessels just hide their markings and continue to fish.²⁴²

Long-range aircraft capable of patrolling the high seas can cost on the order of US\$20 million. Operational costs for such a plane in an OECD country are approximately \$945/ hour excluding crew salaries, and \$1,700 if crew is included (not counting ground support costs).²⁴³

In a recent development, it has just been announced that the EU is funding a new joint aerial monitoring program for the countries of the Southern Africa Development Community, including observation platforms and navy patrols.²⁴⁴

DOCKSIDE SURVEILLANCE

Dockside surveillance entails reporting on the landed catch, including the weight of the catch, sampling to determine compliance with license agreements, checking for prohibited species, size, etc. It is important as part of an integrated MCS system, but is

²⁴⁰ 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>

²⁴¹ 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>

²⁴² Bours, Hélène, personal communication

²⁴³ 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>

²⁴⁴ <http://www.fis.com/>

limited on its own. For example, dockside surveillance cannot determine the degree to which fish (undersized, by-catch and so forth) are discarded at sea.²⁴⁵ It should also be noted that the skills required to detect violations may be lacking in many countries.²⁴⁶

SATELLITE SURVEILLANCE

Australia is now conducting surveillance with the use of satellites, to detect vessels which are not reporting via VMS. Pilot studies are underway in the EU, Iceland, Canada and Norway, and it is expected that a program for EU fisheries will be put in place in 2004.²⁴⁷

CATCH DOCUMENTATION SCHEMES (CDS)

Catch Documentation or Certification Schemes are increasingly being used to distinguish between legally caught and IUU fish in the market place. Under Catch Documentation Schemes, fish that will be traded internationally are issued with documents at the time the fish is landed. Documentation is meant to accompany the fish until it reaches the marketplace. The difference with Catch Certification Schemes is that all fish (including those that are transshipped) are issued certificates at the time they are caught.

To date, CDS has been implemented for three types of fish: tuna, swordfish and toothfish.²⁴⁸ ICCAT was the first RFMO to implement a CDS, in relation to bluefin tuna.²⁴⁹

Under the ICCAT CDS, fish imported into ICCAT member countries must have documentation establishing the country of origin. This allows the tracking of catch from non-member countries, and after a few years in operation provided ICCAT members with the necessary information to impose a ban on importing tuna from FOC States which were not complying with ICCAT management measures.

CCAMLR has also adopted a CDS, in this case to help track the trade in Patagonian toothfish taken from the Southern Ocean. Under the CCAMLR scheme, all toothfish landed in member ports must have a catch document which is authorized by the vessel's flag State, which is then verified by authorized flag or port State officials. The scheme is not foolproof, however. According to a Greenpeace report, "pirate companies are still finding ports to land their catches; toothfish importing countries such as China, which are not party to CCAMLR, are refusing to implement the scheme; and CCAMLR market countries are still importing toothfish from pirate port states."²⁵⁰ The Antarctic and Southern Ocean Coalition (ASOC) has put forward a number of recommendations

²⁴⁵ See for example http://www.thenavigatormagazine.com/back_issues/apr2001.htm

²⁴⁶ Aqorau, Transform, "Cooperative Management of Shared Fish Stocks in the South Pacific", FFA Legal Council at <http://www.fao.org/DOCREP/006/Y4652E/y4652e06.htm>

²⁴⁷ "Report of the Food and Agriculture Organization Concerning United Nations General Assembly Resolutions A/Res/57/141 on Oceans and the Law of the Sea," January, 2003 at http://www.un.org/Depts/los/general_assembly/contributions_texts/fao.pdf

²⁴⁸ 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>

²⁴⁹ FAO, "The State of World Fisheries and Aquaculture 2002, Part 2 Selected issues facing fishers and aquaculturists" . <http://www.fao.org/docrep/005/y7300e/y7300e00.htm>

²⁵⁰ Bours, Gianni, Mather, "Pirate Fishing Plundering the Oceans," Greenpeace International, 2001, page 16.

to close the loopholes in the CCAMLR CDS. It calls for: 1) establishing an electronic system for documentation which would allow verifiable data to be checked (such as ensuring that the landed weight and exported weight match); 2) ensuring that sanctions are applied to importers as well as the flag State of vessels which attempt to land fish without the proper documentation; 3) other measures to prevent the importation of IUU fish and the reflagging of IUU vessels.²⁵¹

Other RFMOs which utilize CDS systems include IATTC/ AIDCP (certification that catch is 'dolphin safe') and CCSBT.

Due to the increasing prevalence of CDS, the International Coalition of Fisheries Associations has requested that they be standardized. This is currently being addressed.

Enforcement Measures / Sanctions

Annex VI of UNCLOS establishes the International Tribunal for the Law of the Sea (ITLOS), the legal forum for resolving international disputes arising under UNCLOS. It is established in its own building Hamburg, with 21 international judges. While for complex reasons many disputes are settled by arbitration rather than by ITLOS itself, ITLOS does have jurisdiction to decide provisional measures, which are comparable to an injunction.²⁵²

To date, four cases have been heard at the Tribunal involving illegal fishing for Patagonian toothfish in the Southern Ocean. Three of these involved FOC countries (Panama, Seychelles and Belize). These cases involved applications for release of the vessels. While ITLOS has been developing its jurisprudence through these cases and gradually gaining more sophistication, the Judges are constrained to apply the law as it stands, which in general favors the flag State and release of fishing vessels. For more details on these cases, see pages 48 and 65.

Cases are also heard by national courts. For example, the *Salvora*, a ship owned by a Spanish corporation hiding behind a dummy company registered in Belize, was caught by Greenpeace in 1999 fishing illegally for Patagonian toothfish in the Australian EEZ near Heard and McDonald Islands. Greenpeace's *MV Arctic Sunrise* chased the *Salvora* over 2700 nautical miles for 15 days to Port Louis in Mauritius. An Australian frigate escorted the ship to Fremantle Australia, where a court fined the master over AUS\$1 million. Compared to the value of the catch on board (a several month fishing expedition can yield a catch worth something on the order of USD \$2 million²⁵³) this will not serve as a serious disincentive to other IUU vessels.

Conclusion

Part I has shown that flag State enforcement does not work. All of the agreements, binding and non-binding, which have been put into place since UNCLOS was adopted in 1982 have been negotiated without prejudice to the rights of non-party States.²⁵⁴ In

²⁵¹ "Priorities Issues and Recommendations of the Antarctic And Southern Ocean Coalition (ASOC) for the XXII Meeting of the Convention on the Conservation of Antarctic Marine Living Resources," October, 2003

²⁵² Law of the Sea Convention article 290

²⁵³ Daley, Beth, "With Fish Piracy on Rise, Agents Cast Worldwide Net," Boston Globe, 18 May 2003

²⁵⁴ 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>

other words, countries which do not sign the conventions, do not voluntarily abide by the Plans and Codes, or do not agree to be bound by the measures of the RFMOs to which they are not a party, are legally free to go about their business. Although UNCLOS signatories must abide by its provisions, these are clearly not sufficient to stop IUU fishing.

Nor can states such as Spain or Taiwan be relied upon to prevent their nationals from benefiting from IUU fishing through flags of convenience and sham corporations, or from being engaged on IUU vessels as captain and crew. Measures must be brought to discourage flagging in FOC states and to sanction FOC states which allow their vessels to engage in IUU fishing. Economic measures to discourage subsidies and overcapacity must likewise be brought in and sensible economic policies should be applied to discourage investment in IUU fishing activities. However any real progress must lie in modern enforcement mechanisms and techniques such as VMS and observer programs, combined with port State controls involving inspections and denial of port facilities to IUU vessels, and effective catch documentation schemes combined with trade measures to prevent trade in IUU fish. These will require careful drafting to fall within WTO rules and ultimately may require a confrontation with WTO to be effective. Finally, funding for developing countries to implement these recommendations will be essential.

It should be noted that all of these matters centre on the question of political will – they are not technical issues. Those who pretend otherwise do so in protection of their vested interests. When sufficient political will exists, nothing will stop governments from taking action, whether it be on the high seas, in the EEZ or in the harbour. Just as governments are taking action against shipments of illegal drugs, cigarettes, workers and weapons, they can take action against IUU fishing.

One possible step would be for one or more concerned coastal States to bring an action before ITLOS against a State which has failed to implement its responsibilities as a flag State. This could give ITLOS the opportunity to elaborate the concept of the genuine link, even exploring the idea whether a ship which does not have a genuine link with a State is a stateless ship and can thus be arrested on the high seas, and flag state responsibilities. This could also give ITLOS an opportunity to address IUU fishing in its own context instead of in the context of Article 73 bond cases, where ITLOS feels constrained to apply the law on the release of vessels even when it appreciates that this is running contrary to the need to address IUU fishing. See in this context ITLOS President Nelson's speech to the General Assembly²⁵⁵ in November 2003. A useful precedent is the Security Council resolution 787 of 1992 relating to sanctions against Serbia and Montenegro. That resolution stated that any vessel in which the majority or controlling interest was held by a person or undertaking operating from Yugoslavia shall be considered a vessel of Yugoslavia for the purposes of implementation of the

²⁵⁵ [In the Volga case], ' the Tribunal was for the first time faced with the issue of non-financial conditions attached by the detaining State to the security required for the release of the vessel. In this regard, the Tribunal held that the inclusion of additional non-financial conditions in such a security would defeat the object and purpose of article 73, paragraph 2, of the Convention.On the problem of continuing illegal, unregulated and unreported fishing in the Southern Ocean the Tribunal had this to say: "The Tribunal 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." [paragraph 68 of the Judgment]' Statement by Mr L. Dolliver M. Nelson, President of ITLOS to the General Assembly on 24 November 2003, <http://www.itlos.org/news/statements/58.GA.speech.24.11.03.doc>

relevant Security Council resolutions, regardless of the flag under which the vessel sailed.²⁵⁶

Such a case could additionally name the State of the national which owns or controls the vessel or fleet. This would help establish State responsibility for the actions of nationals.

PART II: EXISTING PRACTICES – UNSUSTAINABLE AND IUU FISHING

Part I described in essence how the system SHOULD work. In practice, however, the system has failed to prevent IUU fishing or to prevent the collapse or near-collapse of fisheries. According to the FAO, 10% of the world's fisheries are significantly depleted, and another 18% are considered to be overexploited with an increasing likelihood that stocks will decline further. 47% of the main stocks or species groups are fully exploited.²⁵⁷ This section describes the many in ways in which unscrupulous fishing operators evade international law, and why they do it.

Circumventing Protection Measures: Flags of Convenience

The lynchpin of IUU fishing is the system which allows vessels to operate under flags of convenience (FOC). See page 33 above for an overview of the legal system which permits FOC operations.

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 reflag the vessels in States that continue to maintain open registries."²⁵⁸

The requirement that there be a 'genuine link' between the flag State and the vessel or operator was described above on page 33. However this requirement 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.

²⁵⁶ SC Res 787 (1992) adopted 16 November 1992, S/RES/787 (1992), para. 10 at: <http://www.un.org/documents/sc/res/1992/scres92.htm>.

²⁵⁷ "The State of World Fisheries and Aquaculture 2002" FAO. <http://www.fao.org/docrep/005/y7300e/y7300e00.htm>

²⁵⁸ <http://www.fao.org/docrep/005/y3536e/y3536e06.htm#bm06.2.5> Section 3.2.5

Beneficial ownership is often in Taiwan, Japan, Korea and European countries. According to a Greenpeace report,²⁵⁹ Lloyds data for 1999 showed that the greatest number of beneficial ownerships of FOC vessels was held by Taiwanese 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.

Yet despite international concern about illegal fishing activities, and associated effects such as the by-catch of albatross²⁶⁰ (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 has grown. 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 29.²⁶¹ 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).²⁶² 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).²⁶³

FOC vessels undermine fishing conservation and management regimes by taking fish outside quotas, not reporting catches (making assessment difficult), taking by-catch

²⁵⁹ Greenpeace International, "Pirate Fishing Plundering the Oceans," February 2001, at <http://www.greenpeace.org/~oceans/reports/pirateen.pdf>, page 20.

²⁶⁰ Greenpeace has estimated that up to 93,000 Southern Ocean seabirds-including endangered species of albatross-have been caught and drowned as by-catch by pirate fishers in 2002 alone. http://www.greenpeace.org/international/en//press/release?item_id=89498&campaign_id=4022

²⁶¹ As reported in Swan, 2002

²⁶² 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.

²⁶³ Greenpeace, Dodging the Rules: flags of Convenience fishing, at <http://archive.greenpeace.org/oceans/piratefishing/dodgingrules.html>

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 reflagging for the purposes of non-compliance with conservation and management measures or provisions adopted at a national, regional or global level²⁶⁴ and that States should take all practicable steps to prevent "flag hopping".²⁶⁵ 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.²⁶⁶ Transshipment of the catch in this way allows, in essence, a 'whitewashing' of illegal fish by the time it arrives on the market. At-sea transshipments are prohibited by the IATTC for purse-seiners, but not for long-liners.

Avoiding Serious Punishment

Penalties at present 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

²⁶⁴ IPOA-IUU para 38

²⁶⁵ IPOA-IUU para 39

²⁶⁶ Bours, Gianni, Mather, "Pirate Fishing Plundering the Oceans," Greenpeace, February 2001

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 AU\$3,332,500 to AU\$1,920,000.²⁶⁷

A large bond would assist, 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 required 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.²⁶⁸ 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 that is to be imprisoned should suffice. Increasing fines is another and a very simple means to increase deterrence (see related recommendations on page 71).

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 the reports by RFMOs (for example 39% of total fishing in the CCAMLR region, 18% for ICCAT) and then extrapolated to arrive at global figures.²⁶⁹ 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.²⁷⁰

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 report²⁷¹, the total revenue from registering fishing vessels in 21 countries operating open registries amounted to just over US\$ 3 million, although this is likely to be an underestimate. While this figure may seem relatively small, it

²⁶⁷ See discussion of the *Volga* case on page 70

²⁶⁸ Law of the Sea convention Article 73(3)

²⁶⁹ 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>

²⁷⁰ 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>

²⁷¹ 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.

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.²⁷² 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.²⁷³ Other such ports include Port Louis, in Mauritius and (historically) Cape Town.

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 specialized safety gear, insurance in case of accidents, and the training of crew, can represent a significant financial burden. FOC registration helps keep those costs to a minimum. In addition, by sailing under an FOC flag, operators don't have to pay for licenses, VMS, observers, or the administration of Catch Documentation Systems.²⁷⁴
- Decisions by RFMOs to restrict access to fishing areas seasonally or year-round means that the most prized fish species are unavailable for certain periods.²⁷⁵ FOC vessels don't have this problem.
- 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 \$2 and \$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 \$1,000 to \$8,500 or more.²⁷⁶ In the not too distant past, however, a high quality tuna would bring

²⁷² 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.

²⁷³ Greenpeace, "Witnessing the Plunder: A Report on the *MV Greenpeace* Expedition Investigating Pirate Fishing in West Africa," November 2001

²⁷⁴ 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>

²⁷⁵ 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.

²⁷⁶ <http://www.capecodonline.com/cctimes/biz/tunaprices14.htm>. The current average price is \$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.

in as much as \$50-\$60 per pound, or \$25,000 -\$30,000 per fish.²⁷⁷

Another highly sought after species, Patagonian toothfish, sells for up to US\$1,000 per fish. In 1997, illegally caught Patagonian toothfish was valued at over US\$500 million.²⁷⁸

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.²⁷⁹

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 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.²⁸⁰ A recent FAO study demonstrates this problem quite clearly.²⁸¹

²⁷⁷ http://www.eagletribune.com/news/stories/19980927/FP_001.htm

²⁷⁸ Greenpeace International, "Mauritius, Indian Ocean Haven for Pirate Fishing Vessels", March 2000

²⁷⁹ Porter, Gareth, "Fisheries Subsidies, Overfishing and Trade"

<http://www.sdnbd.org/sdi/issues/environment/article/1.pdf>

²⁸⁰ ITF, Greenpeace, "More Troubled Waters fishing, pollution and FOCs" August 2002 at:

http://www.itf.org.uk/publications/pdf/more_troubled_waters.pdf

²⁸¹ 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>

Table 5.5: Estimating* the probability of being penalized 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 overcapacity or overcapitalization – too many (high-tech) boats catching too few fish. Overcapitalization 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 subsidizing IUU fishing.

Various studies have attempted to calculate the global level of fisheries subsidies. This is not an easy task, in part because there is no agreed definition of what constitutes a fisheries subsidy (for 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 US\$ 14-20 billion per year, or approximately 17-25% of global fishing industry revenues.²⁸² The worst offenders are reportedly the EU Japan, and China.²⁸³ Another study breaks it down as follows (reportedly in line with Milazzo's results, as the combined figures suggest a global level of \$15 billion per year):²⁸⁴

- 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: \$13 billion (study published in 2000);
- OECD, with 24 of its 30 members fishing countries: 6.3 billion, with Japan accounting for 2.9, the EU for 1.4, the US for .877 Spain .345 and Korea .342 (1997 data).

²⁸² Milazzo, M. World Bank Technical Paper No. 406 "Subsidies in World Fisheries: A Reexamination," Washington, D.C. 1998

²⁸³ Arnason, Ragnar, "Fisheries subsidies, overcapitalisation and economic losses"

²⁸⁴ Steenblik, Ronald P. and Wallis, Paul F. "Subsidies to Marine Capture Fisheries: The International Information Gap, <http://biodiversityeconomics.org/incentives/toics-340-00.htm>

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.²⁸⁵ Moreover, boats which have been retired from one registry or fishery may simply be re-flagged and/or displaced to another.²⁸⁶⁻²⁸⁷

As Porter describes it: “The main cause of overcapitalization 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 maximize 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 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.”²⁸⁸ 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.²⁸⁹

The EU in particular is saddled with an enormous problem of overcapacity, largely as a result of subsidies for fleet modernization in the 70’s and 80’s. 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 \$193 million a year to 15 African countries.²⁹⁰

²⁸⁵ Porter, Gareth, “Fisheries Subsidies, Overfishing and Trade”

<http://www.sdnbd.org/sdi/issues/environment/article/1.pdf>

²⁸⁶ 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.

²⁸⁷ Arnason, Ragnar, “Fisheries subsidies, overcapitalisation and economic losses”

²⁸⁸ Porter, Gareth, “Fisheries Subsidies, Overfishing and Trade”

<http://www.sdnbd.org/sdi/issues/environment/article/1.pdf>, page 12-13

²⁸⁹ Arnason, Ragnar, “Fisheries subsidies, overcapitalisation and economic losses”

²⁹⁰ Porter, Gareth, “Fisheries Subsidies, Overfishing and Trade”

<http://www.sdnbd.org/sdi/issues/environment/article/1.pdf>

(With regard to the Mediterranean, a 2001 English Nature report²⁹¹ 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. Thus FIFG has worked to increase fishing capacity, where it should be used to encourage technical measures.)

Subsidies Reform

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, which concluded that no single definition could be agreed to.²⁹² They did, however identify four different types of subsidies which could be used as a standard for classification purposes, which have been summarized 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.
- 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.”²⁹³

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. As noted elsewhere in this paper, developing countries are negatively affected by highly subsidized 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 industrialized 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 share of the resources.²⁹⁴

²⁹¹ Clare Coffey for English Nature, Mediterranean Issues: Towards Effective Fisheries Management, 12, at <http://www.jncc.gov.uk/marine/fisheries/pdf/Mediterranean2.pdf>, 12.

²⁹² 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>

²⁹³ 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>

²⁹⁴ Bours, H  l  ne, personal communication

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.²⁹⁵ 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 subsidized 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.)²⁹⁶ 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.²⁹⁷

There is a provision in the Agreement which states that countries should not cause 'serious prejudice' to the interests of other members.²⁹⁸ One of the conditions representing 'serious prejudice' would be for the subsidization of a product to exceed 5 percent of the value of the product exported by that country – a condition which applies to many fishing subsidies.²⁹⁹ 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

²⁹⁵ Agreement on Subsidies and Countervailing Measures http://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm

²⁹⁶ For a comprehensive consideration of the Doha Agenda, see http://www.wto.org/english/tratop_e/dda_e/dda_e.htm

²⁹⁷ "Understanding the WTO: The Agreements" at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm

²⁹⁸ Article 5c

²⁹⁹ Article 6, and see discussion in Porter, "Fisheries Subsidies, Overfishing and Trade" <http://www.sdnbd.org/sdi/issues/environment/article/1.pdf>

between over-capacity and high levels of subsidies – have been on the opposing side of this discussion.³⁰⁰

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.**³⁰¹

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 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;

³⁰⁰ 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.

³⁰¹ Abstracted from Paragraph 28 of the Doha Main Ministerial Declaration, Paragraph 28, WTO Rules, emphasis added.

(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 28.³⁰²

(This cross reference was made in part because the EU was the only delegation pushing in Doha for the inclusion of negotiations on the relationship between trade and environment. A number of countries which are opposed to such negotiations in principle, but which are members of the “Friends of the Fish” group, took the opportunity to pin down the EU on this point.)

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 resources are being deprived from their fisheries resources by EU and other subsidized 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 in 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."³⁰³ 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 sector³⁰⁴ 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

³⁰² Doha Main Declaration, Paragraph 31, *Trade and Environment*, emphasis added

³⁰³ http://europa.eu.int/comm/fisheries/scoreboard/fleet_en.htm

³⁰⁴ http://europa.eu.int/eur-lex/en/archive/2002/1_03120020201en.html

organisations as one which permits fishing in a manner which jeopardises the effectiveness of international conservation measures. The Commission shall publish a list 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 bi-lateral fishing agreements, which provides for the licensing of foreign vessels to fish in a country's EEZ. Major distant water fishing countries include Japan, Taiwan, Korea, US, and Spain, among others. 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%³⁰⁵) 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 wide-spread IUU fishing and 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). Whether this is a real change or a means to hide the business as usual effort to over-exploit other countries' waters to keep their own fleets active and to supply the large EU market remains to be seen.

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 subsidize access of EU fleets to developing countries waters, with no way to ensure that the waters where the fleets operate are properly controlled.³⁰⁶

Conclusions

As shown in Part I, the international community has taken many steps in the last decade to come to grips with the problem of IUU fishing on the high seas. International law, both hard and soft, is slowly working to tighten the net around the pirates. Part I has also shown, however, that there are some large holes in this net.

³⁰⁵ 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

³⁰⁶ Bours, H el ene, personal communication.

Part II explains how unscrupulous fishing interests have exploited the loopholes as open registry flag States look the other way. When flag States do take steps to bring their flagged vessels in line with international agreements, illegal operators easily evade the rules simply by hopping to another flag.

The blame does not lie with flag States alone. There are port States which continue to allow the landing of illegally caught fish, including Tenerife and Las Palmas de Gran Canaria in the EU. The reason that IUU fishing continues to exist, quite simply, is that powerful fishing interests are getting rich from it. What's worse, subsidy policy in many countries perpetuates this high seas robbery; public funds are going straight into the pockets of illegal fishing interests.

Even where the laws are clear, and the political will exists to stop IUU fishing, it is all too often the case that capacity and resources are lacking to stop the pirates, particularly in developing countries. Parts III and IV below outline a variety of options for closing the holes in the net.

PART III: OPTIONS FOR BETTER IMPLEMENTING EXISTING LAW

In the first instance, all of the existing instruments (including the Compliance Agreement, the FAO Code of Conduct and Plans of Action, and the Fish Stocks Agreement) should be ratified and implemented by all States involved with fishing or fish trade.

The international community has strongly argued in favour of ratifying and implementing these instruments. See page 29 above with regard to the Johannesburg Summit Plan of Implementation: governments agreed that all countries should: "ratify or accede to and effectively implement the relevant United Nations and, where appropriate, associated regional fisheries agreements or arrangements."

Implementing these agreements would go a long way towards solving the problem of unsustainable or IUU fishing.

It has already been shown, however, that reiterating or strengthening requirements for States to exercise controls over their flagged vessels will not be sufficient to deter FOC practices. Other controls are therefore required to bring FOC vessels into compliance.

Deterring FOC practices

There are essentially four ways of deterring FOC practices:

1. Deter reflagging;
2. Increase controls over vessels in ports;
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 48) from their registries; or
4. Increase control over nationals..

DETER REFLAGGING

In practical terms, designing measures which cannot be circumvented under existing law to deter nationals from reflagging will be difficult. However financial incentives

and taxation measures can be used to deter the reflagging 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 to Deter Reflagging

- (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 cooperate 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 (see page 48).

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 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 detention or arrest of a ship. Forfeiture of catch, discussed above on page 37, is somewhat more akin to the detention of a vessel, but may be less problematic legally.

Recommendations on Controls Over Vessels in Port

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) IUU vessels should be prevented from bunkering and discharging their catches.³⁰⁷
- (2) Such sanctions should be extended to support vessels including cargo vessels and tankers.

³⁰⁷ 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/XXIICCAML/ASOC.Port%20State.doc>. The paper proposes a memorandum of understanding modeled on the Paris MOU to implement an effective port state control regime to regulate vessels engaged in Antarctic tourism.

- (3) All such vessels should be inspected, and port States should cooperate 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, implement any measures agreed in any MOU on port State control.

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 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'.³⁰⁸

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.³⁰⁹ The tools to do this are already in place in the EU and should be used more.³¹⁰
- (3) States and/or RFMOs should take measures to deter companies from doing business with IUU operations, as recommended in the IPOA-IUU³¹¹
Companies identified in the IPOA include: importers, transshippers, 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 which own, crew and supply IUU fishing vessels, regardless of the flag under which it sails. 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

³⁰⁸ 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>

³⁰⁹ 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>.

³¹⁰ 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.

³¹¹ IPOA-IUU Paragraph 73 <http://www.fao.org/DOCREP/003/y1224e/y1224e00.HTM>

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.

- (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 Regulations³¹² already require Member States to ensure that appropriate measures are taken, including administrative action or criminal proceeding 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.

Monitoring, Control and Surveillance

Implementing the best available systems for Monitoring, Control, and Surveillance 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 programs, 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.”³¹³ 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.”³¹⁴ Existing agreements recognize 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.³¹⁵ This is being implemented for example through the creation of an Assistance Fund in collaboration with the FAO, bi-lateral partnerships between developed and developing countries, and assistance from the World Bank.³¹⁶

³¹² Regulation 2847/93

³¹³ <http://www.fao.org/docrep/005/y3536e/y3536e06.htm#bm06.2.5> Section 3.2.5

³¹⁴ Bours, Gianni, Mather, “Pirate Fishing Plundering the Oceans,” Greenpeace, February 2001, page 9

³¹⁵ Fish Stocks Agreement, Part VII, Article 26

http://www.un.org/Depts/los/convention_agreements/texts/fish_stocks_agreement/CONF164_37.htm

³¹⁶ “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

One positive example of a bi-lateral 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 cooperating to develop an MCS program.³¹⁷ Germany's GTZ has also provided support to Mauritania in developing its MCS program.³¹⁸

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 the Commission to require centralized VMS systems which transmit data in real time back to the Secretariat, arguing that flag State vessel monitoring is insufficient.³¹⁹ They cite the fact that NAFO already uses a centralized 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 CMS 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 insure 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 transshipments. 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 cooperation with RFMOs.
- (2) Likewise, trade documentation schemes should be implemented more widely, which would provide for documentation to accompany fish in trade starting from

23-25 July 2003) - Report" at

http://www.un.org/Depts/los/convention_agreements/FishStocksMeetings/UNFSTA_ICSP2003_Rep.pdf

³¹⁷ Greenpeace, "Pirate Fishing: Plundering West Africa," September 2001

³¹⁸ Greenpeace, "Witnessing the Plunder: A Report on the *MV Greenpeace* Expedition Investigating Pirate Fishing in West Africa," November 2001

³¹⁹ ECO, 3 November 2003

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 Taiwan) 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.

RECOGNIZE A FORMAL ROLE FOR NGO VESSELS

Coastal states could engage in cooperative discussions with NGOs and RFMOs to cooperate in information and evidence gathering and could for instance nominate authorized inspectors to go onboard private vessels such as those operated by NGOs and ensure that evidence gathered by NGOs can be used against apprehended IUU vessels. Close cooperation with NGOs will enable fisheries enforcement vessels to react to reports by NGOs and arrest IUU vessels. In some cases NGO vessels could be authorized 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 service³²⁰ and would enjoy immunity as government vessels.³²¹ It should be noted that the requirements of hot pursuit when chasing, boarding and arresting vessels are exacting and should be followed.³²² 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.³²³

Such an approach is in keeping with the recommendations of COLTO, the legal toothfish operators coalition (see page 21): “Effective surveillance and enforcement can only come, we believe, by legal operators, conservation groups and government agencies working in partnership to combat IUU fishing.”³²⁴

Recommendations on NGO vessel 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 MOU’s with NGOs where appropriate to assist in patrolling the EEZ.

³²⁰ Law of the Sea Convention Article 111

³²¹ Law of the Sea Convention Article 96

³²² Law of the Sea Convention Article 111

³²³ Law of the Sea Convention Article 111

³²⁴ http://www.colto.org/About_Us.htm

PART IV: OPTIONS FOR STRENGTHENING THE LEGAL SYSTEM

While the implementation of existing laws and agreements would go a long way towards resolving many of the problems created by IUU fishing, a number of additional steps should be considered.

Reflagging / Establishing Beneficial Ownership and Genuine Link

Recommendations on Reflagging

In addition to the measures described in Part III to better implement existing law,

- (1) Clone the 1986 UN Convention on the Registration of Ships (see page 34) to apply to fishing vessels.³²⁵ (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.)
- (2) Extend the IMO initiative requiring a ‘continuous synopsis’ (showing a complete history of owners and flags) to cover fishing vessels.³²⁶

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.”³²⁷ 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 €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 reflagging: “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:

³²⁵ 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.

³²⁶ 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

³²⁷ *Grand Prince* (Belize v France), Judgment of 20 April 2001, at http://www.itlos.org/case_documents/2001/document_en_88.doc, paragraph 85.

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

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 reflagging 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 reflag their vessels to other States.

39. States should take all practicable steps, including denial to a vessel of an authorization 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 authorization 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 cooperation 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 authorization to fish in waters under its jurisdiction, or on the high seas, or conditional upon an authorization 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 as suggested on page 45.

Port State Control

An FAO Expert Consultation to Review State Measures to Combat IUU Fishing, held in November 2002, concluded³²⁸ that a Memorandum of Understanding on Port State measures would constitute one of the numerous useful tools to prevent, deter and eliminate IUU fishing.³²⁹ Suggested elements³³⁰ included provisions for inspections, prior notice of port access and exchange of information. A draft MOU was included.³³¹ 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 discussed on page 35) as a model clearly has benefits. It certainly would be of more value than the proposed EU conference to negotiate an agreement on rights and responsibilities of port States concerning access by fishing vessels to port facilities (see page 14), 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 cooperation 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 harmonize the various port State controls. Improving the linkages with regional fisheries management organizations 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 Control

- (1) Concerned States should negotiate an MOU on port State control.
- (2) 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

³²⁸ 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>.

³²⁹ <http://www.fao.org/DOCREP/005/Y8104E/y8104e06.htm#bm06>

³³⁰ <http://www.fao.org/DOCREP/005/Y8104E/y8104e07.htm#bm07>

³³¹ <http://www.fao.org/DOCREP/005/Y8104E/y8104e0b.htm#bm11.5>

system of prior notification before entry into port, inspections, and denial of port facilities including bunkering and catch unloading to (1) vessels which inspections find to have engaged in IUU activities and (2) vessels on an IUU black list. Such a black list could be adapted from the CCAMLR or ICCAT lists.³³² (A step further based on the precautionary principle as discussed on page **¡Error! Marcador no definido.**, would be to deny access to facilities to all fishing boats NOT listed as being legal and responsible operators.)

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

- (3) States should prohibit the landing of IUU fish. This will probably require a catch documentation scheme to be in place (see page 43). For instance, in the EU, amend Control Regulation 2847/93³³³ 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.
- (4) 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.

Revise Laws on Arrest of Fishing Vessels to Better Serve as a Deterrent

As discussed on page 44, international law prohibits imprisonment for captains and crew of vessels fishing illegally and fines are often seen as a cost of doing business. International law favours the release of fishing vessels and as noted on page 65, 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.

Recommendations on Arrest of Fishing Vessels

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

³³² See discussion of CCAMLR measure on page 21.

³³³ 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

- (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 time for captains, owners and operators of IUU fishing vessels, and to allow permanent confiscation of IUU fishing boats.

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.³³⁴ 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.³³⁵

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*³³⁶ *Monte Confurco*,³³⁷ and *Grand Prince*.³³⁸

The IPOA-IUU stresses deterrence, however.³³⁹ 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*)³⁴⁰ involved a long-line 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 AU\$ 3,332,500 which included AU\$ 1,920,000 as security to cover the assessed value of the vessel, fuel, lubricants and fishing equipment, AU\$ 412,500 to secure payment of potential fines and a security of AU \$1,000,000 related to

³³⁴ Law of the Sea Convention Article 73(2)

³³⁵ Law of the Sea Convention Article 292

³³⁶ The bond in *Camouco* (*Panama v France*), 7 February 2000, at http://www.itlos.org/case_documents/2001/document_en_129.doc, of 20 million FF was reduced to 8 million FF (about 1.2 M Euros)

³³⁷ The bond in *Monte Confurco* (*Seychelles v France*) 18 December 2000, at http://www.itlos.org/case_documents/2001/document_en_115.doc, of 56,400,000 FF was reduced to 18 million FF (about 2.7 M Euros)

³³⁸ *Grand Prince* (*Belize v France*), Judgment of 20 April 2001, at http://www.itlos.org/case_documents/2001/document_en_88.doc, paragraph 85.

³³⁹ 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 organization which engage in IUU fishing.”

³⁴⁰ See judgment at http://www.itlos.org/case_documents/2002/document_en_215.doc.

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, read in conjunction with article 292 of the Convention.³⁴¹ 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.³⁴² 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.”³⁴³ Judge Anderson in his dissenting opinion 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’.”³⁴⁴

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 recognized in the *Volga* judgment³⁴⁵ 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.³⁴⁶

Similarly, Judge Nelson in his separate opinion³⁴⁷ 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,

³⁴¹ *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.

³⁴² Judge Shearer accepted this in his dissent at para. 15, at http://www.itlos.org/case_documents/2002/document_en_220.doc.

³⁴³ *Volga* Judgment, para. 68.

³⁴⁴ Anderson dissenting opinion in *Volga*, para. 2, at http://www.itlos.org/case_documents/2002/document_en_219.doc.

³⁴⁵ *Volga* Judgment, para. 63.

³⁴⁶ See Anderson dissenting opinion, note 344, paragraph 16.

³⁴⁷ *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

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 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 reoffending. This will help ensure that such decisions are upheld by ITLOS.

Subsidies Reform

As discussed on page 30, 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 (see discussion on page 55), 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 Harmonize National Legislation

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

Recommendations on National Legislation

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

THE 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.³⁴⁸ 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 harmonize 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 (as noted above on page 14) a plan to eradicate IUU fishing.³⁴⁹ (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,³⁵⁰ A Council Regulation Laying Down Measures Concerning Incidental Catches of Cetaceans in Fisheries and Amending Regulation (EC) No 88/98,³⁵¹ Strategy for Sustainable Development of European Aquaculture,³⁵² Integration of Environmental Protection Requirements into the CFP,³⁵³ Measures to Counter the Social, Economic and Regional Consequences of

³⁴⁸ Introduction to the CFP at http://europa.eu.int/comm/fisheries/doc_et_publ/cfp_en.htm

³⁴⁹ Plan available at:

http://europa.eu.int/comm/fisheries/doc_et_publ/factsheets/legal_texts/docscm/en/com_02_180_en.pdf

³⁵⁰

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

³⁵¹ http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0451en01.pdf

³⁵² http://www.europa.eu.int/eur-lex/en/com/cnc/2002/com2002_0511en01.pdf

³⁵³

http://europa.eu.int/comm/fisheries/doc_et_publ/factsheets/legal_texts/docscm/en/com_02_186_en.pdf

Fleet Restructuring,³⁵⁴ Plan to Reduce Discards of Fish,³⁵⁵ and a Communication Towards Uniform and Effective Implementation of the CFP (i.e. plan to introduce a uniform CMS system).³⁵⁶ However, the CFP has not yet been adapted to implement the IPOA-IUU.

Specific Measures for the Mediterranean

States are entitled to establish their territorial seas to a maximum of twelve nautical miles under article 2 of the Law of the Sea Convention. The Mediterranean, because its link with the Atlantic is so narrow, is regarded as a semi-enclosed sea where cooperation is strongly encouraged.³⁵⁷ Countries bordering the Mediterranean are to endeavor, directly or through an appropriate regional organization: (a) to co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea; (b) to co-ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment; (c) to co-ordinate their scientific research policies and undertake where appropriate joint programs of scientific research in the area; and (d) to invite, as appropriate, other interested States or international organizations to co-operate with them in furtherance of the provisions of these ends.³⁵⁸ The need for cooperation resulted in the Barcelona Convention³⁵⁹ and its protocols concerning pollution prevention and biodiversity conservation.

FISHERIES MANAGEMENT IN THE MEDITERRANEAN

GFCM: [HTTP://WWW.FAO.ORG/FI/BODY/RFB/GFCM/GFCM_HOME.HTM](http://www.fao.org/fi/body/rfb/GFCM/GFCM_HOME.HTM)

The General Fisheries Commission for the Mediterranean, or GFCM, applies to all marine living resources in the Mediterranean Sea, Black Sea and connecting waters.³⁶⁰ It exists to promote the development, conservation and management of living marine resources; to formulate and recommend conservation measures and to encourage training cooperative projects.³⁶¹ The EU joined in 1998.³⁶²

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http://europa.eu.int/comm/fisheries/doc_et_publ/factsheets/legal_texts/docscom/en/com_02_600_en.pdf

355

http://europa.eu.int/comm/fisheries/doc_et_publ/factsheets/legal_texts/docscom/en/com_02_656_en.pdf

356

http://europa.eu.int/comm/fisheries/doc_et_publ/factsheets/legal_texts/docscom/en/com_03_130_en.pdf

357 Law of the Sea Convention Article 122, 123

358 Law of the Sea Convention Article 123

359 Convention for the Protection of the Mediterranean Sea (Barcelona Convention) and Protocols, opened for signature at Geneva 3-3 April 1982 and at Madrid from 5 April 1982 to 2 April 1983, entered into force 12 February 1978.

360 FAO Statistical Area 37

361 See http://www.fao.org/fi/body/rfb/GFCM/gfcm_mandate.htm. [1949 Agreement for the establishment of a General Fisheries Council for the Mediterranean](#), signed at Rome 24 September 1949, entered into force 20 February 1952, as amended in 1963 at http://www.fao.org/fi/body/rfb/GFCM/gfcm_agreement_text.htm. Amended in 1997, to open membership to regional economic integration organizations (such as the EU), and extend to aquaculture: <http://www.oceanlaw.net/texts/gfcm2.htm> (not in force). Members are Albania, Algeria, Bulgaria, Croatia, Cyprus, Egypt, European Community, France, Greece, Israel, Italy, Japan, Lebanon, Libya, Malta, Monaco, Morocco, Romania, Spain, Syria, Tunisia, Turkey, Yugoslavia.

GFCM AND ICCAT

ICCAT (see page 16 above) is responsible for regulating Mediterranean stocks of bluefin tuna and swordfish.³⁶³ In 2000, ICCAT informed GFCM that the collaboration with ICCAT to combat IUU fishing was essential. Therefore, ICCAT requested GFCM to give due consideration to the various ICCAT measures aimed at curbing IUU activities in the Mediterranean. ICCAT has reported that measures which have proven to be very effective in reducing IUU activities (e.g. as evidenced by the reported reduction of IUU vessels in the Mediterranean) included:

- Discouraging the purchase of IUU fish;
- Contacts with flag States of IUU vessels, and
- Non-discriminatory, trade restrictive measures (consistent with international agreements).³⁶⁴

It has now become apparent that fisheries management in the Mediterranean has failed, however, and States would be well advised to extend Fisheries Protection Zones out to 200 miles. This could potentially be developed under EU Regulation 1624/94³⁶⁵ which applies to EU Mediterranean waters and EU flagged vessels operating in the Mediterranean. It regulates equipment (such as banning shores seines from 2 January 2002) and restricts certain fishing methods. Member States can draw up a list of protected zones in which fishing activities are restricted for biological reasons specific to those zones.³⁶⁶ However 1624/94 is due to be revised.³⁶⁷

As noted above, the EU has formulated a Community Action Plan for the Conservation and Exploitation of Fisheries in the Mediterranean Sea.³⁶⁸ The plan suggests creating Fisheries Protection Zones up to 200 miles from baselines as well as area and seasonal closures. Spain has declared a 49 mile zone.³⁶⁹

³⁶² The CIESM, International Commission for the Scientific Exploration of the Mediterranean Sea), based in Monaco, engages in scientific exploration and study of the Mediterranean.

<http://www.ciesm.org/>

³⁶³ The Second Diplomatic Conference on Fisheries Management in the Mediterranean, held at Venice 27-29 November 1996 noted that that the excessive fishing effort, in the Mediterranean and elsewhere in the world, is responsible for overfishing on a scale that threatens fish stocks. The Conference called for cooperation through and reinforcement of the RFMOs, being GFCM and ICCAT, and for cooperation and reduction in fishing efforts, and set up a working party to develop a system of conservation and management harmonized at the Mediterranean level, to report to the GFCM for its October 1997 session. Declaration at <http://www.faocoped.org/en/virtlib/gfcm/cfm10i5.htm>

³⁶⁴ Report of the twenty-fifth session of the General Fisheries Commission for the Mediterranean Sliema, Malta, 12-15 September 2000, at <http://www.fao.org/docrep/meeting/x8690e.htm>.

³⁶⁵ Council Regulation (EC) No 1626/94 of 27 June 1994 laying down certain technical measures for the conservation of fishery resources in the Mediterranean, article 4. At http://europa.eu.int/eur-lex/en/consleg/main/1994/en_1994R1626_index.html.

³⁶⁶ See EU Commission Biodiversity Action Plan for Fisheries, 27 March 2001 COM (2001) 162, at <http://europa.eu.int/eur-lex/en/com/pdf/2001/act0162en02/4.pdf>.

³⁶⁷ Community Action Plan for the Conservation and Exploitation of Fisheries in the Mediterranean Sea Under the Common Fisheries Policy (Com (2002)535)

³⁶⁸ Community Action Plan for the Conservation and Exploitation of Fisheries in the Mediterranean Sea Under the Common Fisheries Policy (Com (2002)535) at http://europa.eu.int/eur-lex/en/com/cnc/2002/com2002_0535en01.pdf

³⁶⁹ See Spanish Decree 1315/97 at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ESP_1997_Decree.pdf. See

A Fisheries Protection zone would make it possible to restrict fishing vessels from other countries currently fishing in international waters, and control fishing within the zones where desirable. It would bring into play the current provisions available to states which have declared EEZs. Due to potential political difficulties and difficulties in maritime delineation, the Community Action Plan recommends a multilateral approach. The Plan also recommends TACs and quotas be introduced for swordfish, and other highly migratory fish (such as albacore, small tunas and dolphin fish), as well as for anchovy, sardines and crustaceans (such as Norway lobster and red shrimps).³⁷⁰

According to a 1999 Traffic report on Swordfish and Bluefin Tuna,³⁷¹ Spain's longline fleet lands more swordfish than any other ICCAT party; its fleets also catch large quantities of Mediterranean bluefish and flouts the requirements on the minimum sizes of bluefin tuna. The report recommends no fishing zones as well as programs to record discards and by-catch. The report also recommends that an EU regulation be prepared to manage the Swordfish fishery of Member States in the Mediterranean, particularly Italy.³⁷²

Recommendations for the Mediterranean

- (1) Members should declare Fisheries Protection Zones beyond their 12 mile limit, (with an emphasis on the word Protection).
- (2) Closure of areas (no fishing zones) and by season should be implemented.
- (3) Depending on the revision of 1624/94, Member States should (a) designate as necessary new protected zones and (b) compile a list of all protected zones in which fishing activities are restricted for biological reasons specific to those zones under EU Regulation 1624/94.
- (4) Work within the GFCM should focus on (a) strengthening the GFCM, and adopting a comprehensive enforcement policy, including a comprehensive VMS system; (b) ensuring GFCM recommendations are adapted at a national level and (c) ensuring that GFCM implements the IPOA-IUU recommendations and that these recommendations are in turn implemented in national and EU legislation.
- (5) TACs and quotas should be introduced as recommended by the EU Community Action Plan

Eric Cujlat, "Enlarging Spain's Mediterranean EEZ – a New Special Protection for Bluefin Tuna," at <http://www.porttechnology.org/iczm/journals/eez.03/download/03.155.pdf> and Fabio Badalamenti, "Fishing Exclusion Zones in the EU Mediterranean Countries," at <http://www.pbs.port.ac.uk/econ/cemare/mezout5.pdf>.

³⁷⁰ Community Action Plan, page 14.

³⁷¹ C. Raymakers and J. Lynham, "Slipping the Net: Spain's compliance with ICCAT Recommendations for Swordfish and Bluefin Tuna," Traffic International, 30, at <http://www.traffic.org/news/ICCATreport.pdf>.

³⁷² Raymakers and Lyhham, ix

PART V: FINAL CONCLUSIONS AND SUMMARY OF RECOMMENDATIONS

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 Organizations (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.
- Transshipping 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 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:

6. Port State controls: port States must prevent IUU fishing and support vessels from using their harbours for transshipment, 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.
7. 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.

8. At-sea transshipment: Flag States must make it illegal for their transport vessels to transship fish caught by vessels engaged in IUU fishing.
9. 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.
10. 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 organization (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 recognized by fisheries experts.

Summary of Recommendations

Recommendations in Part III are directed at better implementing existing law, and in Part IV they are directed at strengthening it. As a result, recommendations on a single topic, e.g. port State responsibilities, are spread between different sections of the report. In this summary, the recommendations are grouped by topic.

Recommendations to Deter Reflagging (Part III, page 60)

- (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 cooperate 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 (see page 48).

Recommendations on Reflagging (Part IV, page 65)

In addition to the measures described in Part III to better implement existing law,

- (1) Clone the 1986 UN Convention on the Registration of Ships (see page 34) to apply to fishing vessels.³⁷³ (In doing so, however, do not include the provision requiring a specific number of fishing States to ratify it: a set number of ratifications (e.g. 40) should be sufficient to bring it into force.)
- (2) Extend the IMO initiative requiring a ‘continuous synopsis’ (showing a complete history of owners and flags) to cover fishing vessels.³⁷⁴

Recommendations on Controls Over Vessels in Port (Part III, page 60)

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) IUU vessels should be prevented from bunkering and discharging their catches.³⁷⁵
- (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 cooperate 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, implement any measures agreed in any MOU on port State control.

Recommendations on Port State Control (Part IV, page 67)

- (1) Concerned States should negotiate an MOU on port State control.
- (2) 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 (1) vessels which inspections find to have engaged in IUU activities and (2) vessels on an IUU black list. Such a black list could be adapted from the CCAMLR or ICCAT lists.³⁷⁶ (A step further based on the precautionary principle as discussed on page **¡Error! Marcador no definido.**, would be to deny access to facilities to all fishing boats NOT listed as being legal and responsible operators.)

³⁷³ 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.

³⁷⁴ 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

³⁷⁵ 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 modeled on the Paris MOU to implement an effective port state control regime to regulate vessels engaged in Antarctic tourism.

³⁷⁶ See discussion of CCAMLR measure on page 21.

State legislation should provide for it to be an offence simply to be at port with IUU fish onboard. This would not include a reference to where the fish was caught, and would thus avoid a number of jurisdictional problems.

- (3) States should prohibit the landing of IUU fish. This will probably require a catch documentation scheme to be in place (see page 43). For instance, in the EU, amend Control Regulation 2847/93³⁷⁷ 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.
- (4) 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.

Recommendations on Market Sanctions: (Part III, page 61)

- (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.³⁷⁸ The tools to do this are already in place in the EU and should be used more.³⁷⁹
- (3) States and/or RFMOs should take measures to deter companies from doing business with IUU operations, as recommended in the IPOA-IUU³⁸⁰
Companies identified in the IPOA include: importers, transshippers, buyers, consumers, equipment suppliers, bankers, insurers, other services suppliers and the public.

Recommendations on Control of Nationals (Part III, page 61)

- (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.

³⁷⁷ 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

³⁷⁸ 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>.

³⁷⁹ 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.

³⁸⁰ 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 Regulations³⁸¹ already require Member States to ensure that appropriate measures are taken, including administrative action or criminal proceeding 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.

Recommendations on MCS (Part III, page 63)

- (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 the Commission to require centralized VMS systems which transmit data in real time back to the Secretariat, arguing that flag State vessel monitoring is insufficient.³⁸² They cite the fact that NAFO already uses a centralized 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 CMS 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 insure that assistance achieves its intended result.

Recommendations on Catch and Trade Documentation Systems (Part III, page 63)

- (1) Catch documentation schemes should be implemented more widely to help resolve the problems of transshipments. 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 cooperation with RFMOs.

³⁸¹ Regulation 2847/93

³⁸² ECO, 3 November 2003

- (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 Taiwan) and ports (especially ports of convenience such as Las Palmas and Mauritius) to put into place effective labeling 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.

Recommendations on NGO vessel involvement in MCS (Part III, page 64)

- (2) 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 MOU's with NGOs where appropriate to assist in patrolling the EEZ.

Recommendations on Elaborating Genuine Link (Part IV, page 67)

- (1) Within the context of the FAO Technical Consultation, 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 as suggested on page 45.

Recommendations on Arrest of Fishing Vessels (Part IV, page 68)

- (1) States, particularly Spain where many IUU beneficial owners hold their nationality, should enact laws requiring prison time 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 time for captains, owners and operators of IUU fishing vessels, and to allow permanent confiscation of IUU fishing boats.

Recommendations on Bonding Procedures (Part IV, page 71)

- (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 reoffending. This will help ensure that such decisions are upheld by ITLOS.

Recommendations on Subsidy Reforms (Part IV, page 71)

- (3) 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).
- (4) States wishing to protect their fisheries from the activities of foreign subsidised fleets should consider the possibility of launching a WTO dispute.

Recommendations on National Legislation (Part IV, page 72)

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

Recommendations for the Mediterranean (Part IV, page 75)

- (1) Members should declare Fisheries Protection Zones beyond their 12 mile limit, (with an emphasis on the word Protection).
- (2) Closure of areas (no fishing zones) and by season should be implemented.
- (3) Depending on the revision of 1624/94, Member States should (a) designate as necessary new protected zones and (b) compile a list of all protected zones in which fishing activities are restricted for biological reasons specific to those zones under EU Regulation 1624/94.
- (4) Work with GFCM should focus on (a) strengthening the GFCM, and adopting a comprehensive enforcement policy, including a comprehensive VMS system; (b) ensuring GFCM recommendations are adapted at a national level and (c) ensuring that GFCM implements the IPOA-IUU recommendations and that these recommendations are in turn implemented in national and EU legislation.
- (5) TACs and quotas should be introduced as recommended by the EU Community Action Plan

ANNEX 1 – IPOA-IUU SPECIFIC MEASURES

DEFINITION OF IUU FISHING:

Illegal fishing refers to activities³⁸³:

3.1.1 conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;

3.1.2 conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or

3.1.3 in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.

Unreported fishing refers to fishing activities:

3.2.1 which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or

3.2.2 undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.

Unregulated fishing refers to fishing activities:

3.3.1 in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or

3.3.2 in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.

3.3.1 in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or

³⁸³ <http://www.fao.org/DOCREP/003/y1224e/y1224e00.HTM>

3.3.2 in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.

NATIONAL LEGISLATION

National legislation should address in an effective manner all aspects of IUU fishing.³⁸⁴

STATE CONTROL OF NATIONALS

Each State should take measures to ensure that nationals subject to their jurisdiction do not support or engage in IUU fishing.³⁸⁵ To try to address FOC fishing, all States should cooperate to identify those nationals who are the operators or beneficial owners of vessels involved in IUU fishing³⁸⁶ and States should discourage their nationals from flagging fishing vessels under the jurisdiction of a State that does not meet its flag State responsibilities.³⁸⁷

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. It is suggested that this may include the adoption of a civil sanction regime based on an administrative penalty scheme.³⁸⁸ States should develop and implement, no later than three years after the adoption of the IPOA, national plans of action, and to update those national plans of action.³⁸⁹

FLAG CONTROL MEASURES

States should take such steps as following procedures in registration of fishing vessels³⁹⁰ and maintaining records of fishing vessels,³⁹¹ ensuring only vessels that are authorized may fish on the high seas³⁹² Conditions under which authorization is issued may include where required VMS,³⁹³ catch reporting conditions,³⁹⁴ reporting and other conditions in relation to transshipping,³⁹⁵ observer coverage³⁹⁶, and other conditions.

COASTAL STATE MEASURES

Coastal States are to implement measures to prevent, deter and eliminate IUU fishing in the EEZ and to consider measures including effective monitoring, control and surveillance of fishing activities in the EEZ, cooperation, ensuring no vessel undertakes fishing activities within its waters without a valid authorization to fish issued by that

³⁸⁴ IPOA-IUU, IV para. 15

³⁸⁵ IPOA-IUU, IV para. 18

³⁸⁶ IPOA-IUU, IV para. 18

³⁸⁷ IPOA-IUU, IV para. 19

³⁸⁸ IPOA-IUU, IV para. 21

³⁸⁹ IPOA-IUU, IV para. 25

³⁹⁰ IPOA-IUU, IV para. 34-41

³⁹¹ IPOA-IUU, IV para. 42-43

³⁹² IPOA-IUU, IV para. 44-50

³⁹³ IPOA-IUU, IV para 47.1

³⁹⁴ IPOA-IUU, IV para. 47.2

³⁹⁵ IPOA-IUU, IV para. 47.3

³⁹⁶ IPOA-IUU, IV para. 47.4

coastal State, and that the authorization is entered on a record of vessels, ensuring that each vessel fishing in its waters maintains a logbook recording its fishing activities, ensuring that at-sea transshipment and processing of fish and fish products in coastal State waters are authorized by that coastal State, or conducted in conformity with appropriate management regulations, that regulation of fishing access to its waters in a manner which will help to prevent, deter and eliminate IUU fishing and avoiding licensing a vessel to fish in its waters if that particular vessel has a history of IUU fishing.³⁹⁷

PORT STATE MEASURES

States should use measures, in accordance with international law, for port State control of fishing vessels in order to prevent, deter and eliminate IUU fishing.³⁹⁸

Prior to allowing a vessel port access, States should require fishing vessels and vessels involved in fishing related activities seeking permission to enter their ports to provide (a) reasonable advance notice of their entry into port, (b) a copy of their authorization to fish, (c) details of their fishing trip and (d) quantities of fish on board, with due regard to confidentiality requirements, in order to ascertain whether the vessel may have engaged in, or supported, IUU fishing.³⁹⁹

Where a port State has clear evidence that a vessel having been granted access to its ports has engaged in IUU fishing activity, the port State should not allow the vessel to land or transship fish in its ports, and should report the matter to the flag State of the vessel.⁴⁰⁰

Port states are to convey information to flag states and the relevant fisheries management organization such as catch and vessel details and to report when vessels are suspected of IUU fishing.⁴⁰¹

In a provision relevant to FOC vessels, States should consider developing port State measures within the context of RFMOs. These measures should build on the presumption that fishing vessels flying the flag of States not parties to an RFMO and which have not agreed to cooperate with that RFMO, which are identified as being engaged in fishing activities in the area of that particular organization, may be engaging in IUU fishing. Such port State measures could include the prohibition of landings and transshipment of catch unless the identified vessel can establish that the catch was taken in a manner consistent with conservation and management measures.⁴⁰²

MARKET-RELATED MEASURES

States should take all steps necessary, consistent with international law, to prevent fish caught by vessels identified by the relevant regional fisheries management organization to have been engaged in IUU fishing being traded or imported into their territories.⁴⁰³ However trade related measures are subject to WTO constraints⁴⁰⁴ and trade-related

³⁹⁷ IPOA-IUU, IV para. 52

³⁹⁸ IPOA-IUU, IV para. 52

³⁹⁹ IPOA-IUU, IV para. 55

⁴⁰⁰ IPOA-IUU, IV para. 59

⁴⁰¹ IPOA-IUU, IV para. 58

⁴⁰² IPOA-IUU, IV para. 63

⁴⁰³ IPOA-IUU, IV para. 66

⁴⁰⁴ IPOA-IUU, IV para. 65

measures should only be used in exceptional circumstances, where other measures have proven unsuccessful to prevent, deter and eliminate IUU fishing, and only after prior consultation with interested States. Unilateral trade-related measures should be avoided.⁴⁰⁵

States should cooperate to adopt appropriately multilaterally agreed trade-related measures, consistent with the WTO, that may be necessary to prevent, deter and eliminate IUU fishing for specific fish stocks or species.⁴⁰⁶ Suggestions include multilateral catch documentation and certification requirements, and import and export controls or prohibitions.⁴⁰⁷ The observation has been made that stock or species-specific trade-related measures may be necessary to reduce or eliminate the economic incentive for vessels to engage in IUU fishing and the suggestion made that States should take steps to improve the transparency of their markets to allow the traceability of fish or fish products.⁴⁰⁸

States, when requested by an interested State, should assist any State in deterring trade in fish and fish products illegally harvested in its jurisdiction.⁴⁰⁹

States should take measures to ensure that importers, transshippers, buyers and others are aware of the detrimental effect of doing business with vessels engaged in IUU fishing,⁴¹⁰ and conversely that fishers are aware of the detrimental effect of doing business with importers, transshippers buyers and others identified as doing business with vessels identified in IUU fishing.⁴¹¹

States should consider measures to deter business with vessels identified as engaged in IUU fishing. Such measures could include legislation that makes it a violation to conduct such business or to trade in fish or fish products derived from IUU fishing.⁴¹²

States should work towards using the Harmonized Commodity Description and Coding System for fish and fisheries products in order to help promote the implementation of the IPOA,⁴¹³ and certification and documentation requirements should be standardized.⁴¹⁴ The Harmonized System is an international six-digit commodity classification developed by the World Customs Organization (WCO).⁴¹⁵ The system is used by over 177 countries and economies as a basis for customs tariffs and collection of trade statistics.⁴¹⁶

⁴⁰⁵ IPOA-IUU, IV para. 66

⁴⁰⁶ IPOA-IUU, IV para. 68

⁴⁰⁷ IPOA-IUU, IV para. 70

⁴⁰⁸ IPOA-IUU, IV para. 71

⁴⁰⁹ IPOA-IUU, IV para. 72

⁴¹⁰ IPOA-IUU, IV para. 73

⁴¹¹ IPOA-IUU, IV para. 74

⁴¹² IPOA-IUU, IV para. 73, 74

⁴¹³ IPOA-IUU, IV para. 75

⁴¹⁴ IPOA-IUU, IV para. 76

⁴¹⁵ website at <http://www.wcoomd.org/ie/index.html>.

⁴¹⁶ International Convention for the Harmonized Commodity Description and Coding System. Signed at Brussels 14 June 1983, entered into force 1 January 1988. At http://www.jurisint.org/pub/01/en/doc/235_1.htm.

See description of the HS at

http://www.wcoomd.org/ie/En/Topics_Issues/HarmonizedSystem/Hsconve2.pdf.

ANNEX II: GLOSSARY OF ACRONYMS

AIDCP: Agreement on the International Dolphin Conservation Program (Dolphin Conservation Agreement).

ASOC: Antarctic and Southern Ocean Coalition

CCAMLR: Commission (or Convention) on the Conservation of Antarctic Marine Living Resources

CCSBT: Commission for the Conservation of Southern Bluefin Tuna

CDS: Catch Documentation Scheme

CFP: European Common Fisheries Policy

CITES: Convention on the Trade in Endangered Species

COFI: Committee on Fisheries of the FAO

COLTO: Coalition of Legal Toothfish Operators

CSD: Commission on Sustainable Development

EEZ: Exclusive Economic Zone

FAO: Food and Agriculture Organization

FFA: Forum Fisheries Agency

FIFG: Financial Instrument for Fisheries Guidance

FOC: Flag of Convenience

GFCM: General Fisheries Commission for the Mediterranean

HSVAR: High Seas Vessel Authorization Record (FAO)

IATTC: Inter-American Tropical Tuna Commission

ICCAT: International Commission on the Conservation of Atlantic Tunas

ICES: International Council for the Exploration of the Seas

ICFA: International Coalition of Fisheries Associations

IDCP: International Dolphin Conservation Program

IMO: International Maritime Organization

IOTC: Indian Ocean Tuna Commission

IPOA-IUU: International Plan of Action – Illegal, Unreported and Unregulated Fishing

ITF: International Transport Workers' Federation

ITLOS: International Tribunal for the Law of the Sea

IUU: Illegal, Unreported and Unregulated fishing (definitions of IUU appear in the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing at <http://www.fao.org/DOCREP/003/y1224e/y1224e00.HTM>)

IWC: International Whaling Commission

MARPOL: International Convention for the Prevention of Pollution from Ships

MCS: Monitoring, Control and Surveillance

MEA: Multilateral Environment Agreement

MEPC: Maritime Environment Protection Committee

MOU: Memorandum of Understanding

MSC: Maritime Safety Committee

MSY: Maximum Sustainable Yield

NAFO: Northwest Atlantic Fisheries Organization

NEAFC: Northeast Atlantic Fisheries Commission

NPAFC: North Pacific Anadromous Fish Commission

PECCOE: Permanent Committee on Control and Enforcement (under NEAFC)

PICES: North Pacific Marine Science Organization

RFMO: Regional Fisheries Management Organization

SBT: Southern Bluefin Tuna

SEAFO: Southeast Atlantic Fisheries Organization

SIDS: Small Island Developing States

SOLAS: International Convention for the Safety of Life at Sea

STCW Convention: International Convention on Standards of Training, Certification and Watchkeeping for Seafarers

TAC: Total Allowable Catch

UNCED: United Nations Conference on Environment and Development (the Rio Earth Summit, 1992)

UNCLOS: United Nations Convention on the Law of the Sea

UNGA: UN General Assembly

UNICPOLOS, or UNICP United Nations Informal Consultative on Oceans and the Law of the Sea

VMS: Vessel Monitoring Systems

WCO: World Customs Organization

WCPFC: Western and Central Pacific Fisheries Commission (formally: Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean)

WSSD: World Summit on Sustainable Development

WTO: World Trade Organization

WWF: In the US, World Wildlife Fund. Elsewhere: Worldwide Fund for Nature