

Halting IUU Fishing: 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. Governments generally recognise that there is little time left to act decisively to reverse the trends of the last decades. The question is whether the political will exists (and by extension, whether sufficient resources will be made available) to take the necessary measures to do so.

The most important factor undermining the effectiveness of international 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.

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

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

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

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

THE EXISTING LEGAL AND POLITICAL FRAMEWORK

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

The Law of the Sea Convention: UNCLOS aimed to establish a legal order for the seas and oceans which would facilitate international communication, and promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.¹ It also initiated important dispute resolution

¹ Law of the Sea Convention Preamble

provisions and in particular established the International Tribunal for the Law of the Sea.²

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

FAO Compliance Agreement: It was the first international legally-binding instrument to directly deal with reflagging and other FOC issues, focussing on flag State compliance issues and in particular on strengthening flag State responsibility. It requires parties to control the activities of their flag vessels on the high seas, and ensure that its vessels do not undermine international fishery conservation and management measures. Additionally, flag States must give information to the FAO about high seas fishing vessels.³

The Agreement has failed to gain widespread acceptance, which explains why the agreement only came into force in 2003, ten years after its conclusion. It is largely restricted to actions taken by flag States rather than port States, and does not address catches. Its efficacy is limited 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.

FAO Code of Conduct for Responsible Fisheries:⁴ The Code of Conduct, concluded in 1995. is voluntary or 'soft' law. Pursuant to the Code, four International Plans of Action (IPOA) have been developed on seabirds, sharks, managing fishing capacity, and IUU fishing.⁵ **The IPOA- IUU**⁶ adopted in 2001 aims to prevent, deter and eliminate IUU fishing,⁷ and addresses the problem of FOCs particularly in relation to RFMOs. It goes further and is more detailed than the Compliance Agreement and calls on States to take measures to ensure that nationals subject to their jurisdiction do not support or engage in IUU fishing. However, it is still soft law and not legally binding.

² Law of the Sea Convention Annex VI establishes the Statute of ITLOS

³ FAO Compliance Agreement Article VI

⁴ FAO Code of Conduct for Responsible Fisheries. <http://www.fao.org/fi/agreem/codecond/ficonde.asp>

⁵ 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>.

⁶ 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>.

⁷ IPOA-IUU III, para. 8.

The 1995 Fish Stocks Agreement: For the first time, it was established that a precautionary approach is expressly required in fisheries management.⁸ States must take conservation measures such as assessing⁹ and managing¹⁰ species in the same ecosystem and species associated with or dependent on the target species to protect biodiversity,¹¹ addressing overfishing and excess fishing capacity,¹² and monitoring and controlling fisheries.¹³ It allows for boarding and inspection of vessels in the high seas under certain circumstances, and provides for measures which may be taken by a port State¹⁴ 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.¹⁵

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

Most recently at the 58th Session of the UN General Assembly, two resolutions on the oceans were passed (available at http://www.un.org/Depts/los/general_assembly/general_assembly_resolutions.htm). The resolution on the Law of the Sea has clear language on flag and port State control including a call for the IMO to further examine and clarify the meaning of establishing a ‘genuine link.’

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

LEGAL ISSUES AND FINANCIAL INCENTIVES REGARDING IUU FISHING AND FLAGS OF CONVENIENCE

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

⁸ Fish Stocks Agreement Articles 5(c) and 6

⁹ Fish Stocks Agreement Articles 5(d)

¹⁰ Fish Stocks Agreement Articles 5(e)

¹¹ Fish Stocks Agreement Article 5(g)

¹² Fish Stocks Agreement Article 5(g/h)

¹³ Fish Stocks Agreement Article 5(l)

¹⁴ Fish Stocks Agreement Article 23.

¹⁵ Fish Stocks Agreement Article 17

of their vessels and they regularly reflag the vessels in States that continue to maintain open registries.”¹⁶

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

Beneficial ownership is often in Taiwan, Japan, Korea and European countries. According to a Greenpeace report,¹⁷ 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 albatross¹⁸ (all 21 species of which are now on the IUCN endangered list), positive action to bring FOC practices to an end has not been forthcoming. Calls to close ports to vessels engaged in IUU fishing and their support vessels, to close markets to fish caught from IUU fishing activities, and to take enforcement action on the international level against such activities have not been sufficiently heeded.

In the meantime, the FOC fishing fleet continues to grow. An International Transport Workers’ Federation (ITF) report stated that in the 20 years from 1980 to 2000, the number of open registers grew from 11 to 29.¹⁹ 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).²⁰ The shift in specific countries was in some cases dramatic: For example the number of

¹⁶ <http://www.fao.org/docrep/005/y3536e/y3536e06.htm#bm06.2.5> Section 3.2.5

¹⁷ Greenpeace International, “Pirate Fishing Plundering the Oceans,” February 2001, at <http://www.greenpeace.org/~oceans/reports/pirateen.pdf>, page 20.

¹⁸ 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

¹⁹ As reported in Swan, 2002

²⁰ 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.

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).²¹

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

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

States wishing to put a stop to this could impose strict conditions on deregistration of vessels flying their flags. Under Article 91 of the Law of the Sea Convention, every State is required to fix the conditions for granting its nationality to ships, for registering ships in its territory, and for granting them the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. Putting stringent conditions on DEREGISTERING ships (as opposed to registering, which is where much of the discussion has been focused) could amount to an implementation of the IPOA-IUU which provides that flag States should deter vessels from reflagging for the purposes of non-compliance with conservation and management measures or provisions adopted at a national, regional or global level²² and that States should take all practicable steps to prevent "flag hopping".²³ 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

²¹ Greenpeace, *Dodging the Rules: flags of Convenience fishing*, at <http://archive.greenpeace.org/oceans/piratefishing/dodgingrules.html>

²² IPOA-IUU para 38

²³ IPOA-IUU para 39

offloaded to reefer (transport) ships.²⁴ Transshipment of the catch in this way allows, in essence, a ‘whitewashing’ of illegal fish by the time it arrives on the market.

Avoiding Serious Punishment

Penalties 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 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\$1,920,000.²⁵

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.²⁶ 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 29).

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.²⁷ 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.²⁸

Financial benefits from IUU fishing through FOC practices accrue to at least three different parties: Flag States, Port States, and Fishing Companies / Vessels

²⁴ Bours, Gianni, Mather, “Pirate Fishing Plundering the Oceans,” Greenpeace, February 2001

²⁵ See discussion of the *Volga* case on page 28

²⁶ Law of the Sea convention Article 73(3)

²⁷ 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>

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

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 report²⁹, 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 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.³⁰ 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.³¹ 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.³²
- 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.³³ FOC vessels don't have this problem.

²⁹ 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.

³⁰ 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.

³¹ Greenpeace, "Witnessing the Plunder: A Report on the *MV Greenpeace* Expedition Investigating Pirate Fishing in West Africa," November 2001

³² 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>

³³ 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.

- 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.³⁴ In the not too distant past, however, a high quality tuna would bring in as much as \$50-\$60 per pound, or \$25,000 -\$30,000 per fish.³⁵

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.³⁶

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.³⁷

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.³⁸ A recent FAO study demonstrates this problem quite clearly:³⁹

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%

³⁴ <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.

³⁵ http://www.eagletribune.com/news/stories/19980927/FP_001.htm

³⁶ Greenpeace International, "Mauritius, Indian Ocean Haven for Pirate Fishing Vessels", March 2000

³⁷ Porter, Gareth, "Fisheries Subsidies, Overfishing and Trade"

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

³⁸ ITF, Greenpeace, "More Troubled Waters fishing, pollution and FOCs" August 2002 at:

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

³⁹ 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>

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.⁴⁰ The worst offenders are reportedly the EU Japan, and China.⁴¹ 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):⁴²

- 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).

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.

⁴⁰ Milazzo, M. World Bank Technical Paper No. 406 "Subsidies in World Fisheries: A Reexamination," Washington, D.C. 1998

⁴¹ Arnason, Ragnar, "Fisheries subsidies, overcapitalisation and economic losses"

⁴² Steenblik, Ronald P. and Wallis, Paul F. "Subsidies to Marine Capture Fisheries: The International Information Gap, <http://biodiversityeconomics.org/incentives/toics-340-00.htm>

They are assisted by planes, satellite images and sonar systems which identify concentrations of fish even in depleted fisheries.⁴³ Moreover, boats which have been retired from one registry or fishery may simply be re-flagged and/or displaced to another.^{44, 45}

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.”⁴⁶ 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.⁴⁷

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.⁴⁸

(With regard to the Mediterranean, a 2001 English Nature report⁴⁹ 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.)

⁴³ Porter, Gareth, “Fisheries Subsidies, Overfishing and Trade”

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

⁴⁴ 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.

⁴⁵ Arnason, Ragnar, “Fisheries subsidies, overcapitalisation and economic losses”

⁴⁶ Porter, Gareth, “Fisheries Subsidies, Overfishing and Trade”

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

⁴⁷ Arnason, Ragnar, “Fisheries subsidies, overcapitalisation and economic losses”

⁴⁸ Porter, Gareth, “Fisheries Subsidies, Overfishing and Trade”

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

⁴⁹ Clare Coffey for English Nature, Mediterranean Issues: Towards Effective Fisheries Management, 12, at <http://www.jncc.gov.uk/marine/fisheries/pdf/Mediterranean2.pdf>, 12.

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, and concluded that no single definition could be agreed to.⁵⁰ 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.”⁵¹

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

NOTE: many developing countries are opposed to the elimination of subsidies that they consider necessary for the development of their fishing capacity and industry in general. Developing countries are negatively affected by highly 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.⁵²

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.⁵³ 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

⁵⁰ 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>

⁵¹ 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>

⁵² Bours, Hélène, personal communication

⁵³ Agreement on Subsidies and Countervailing Measures http://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm

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.)⁵⁴ 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.⁵⁵

There is a provision in the Agreement which states that countries should not cause ‘serious prejudice’ to the interests of other members.⁵⁶ 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.⁵⁷ However, solving the problem by bringing isolated cases before the WTO based on the Subsidies Agreement would be time consuming, costly, and inefficient.

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

Japan, Korea and the European Union – three delegations from countries with highly subsidised fishing fleets and which have consistently denied the existence of a link between over-capacity and high levels of subsidies – have been on the opposing side of this discussion.⁵⁸

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**

⁵⁴ For a comprehensive consideration of the Doha Agenda, see http://www.wto.org/english/tratop_e/dda_e/dda_e.htm

⁵⁵ “Understanding the WTO: The Agreements” at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm

⁵⁶ Article 5c

⁵⁷ Article 6, and see discussion in Porter, “Fisheries Subsidies, Overfishing and Trade” <http://www.sdnbd.org/sdi/issues/environment/article/1.pdf>

⁵⁸ 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.

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.**⁵⁹

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;
- (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 28.⁶⁰

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.

⁵⁹ Abstracted from Paragraph 28 of the Doha Main Ministerial Declaration, Paragraph 28, WTO Rules, emphasis added.

⁶⁰ Doha Main Declaration, Paragraph 31, *Trade and Environment*, emphasis added

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."⁶¹ 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 sector⁶² provides that Article 7(3)(b) be amended with the following addition:

"(iv) if the third country to which the vessel is to be transferred is not a Contracting or Cooperating party to relevant regional fisheries organisations, that country has not been identified by such organisations as one which permits fishing in a manner which jeopardises the effectiveness of international conservation measures. The Commission shall publish a list 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%⁶³) countries are under constant pressure to reduce them.

⁶¹ http://europa.eu.int/comm/fisheries/scoreboard/fleet_en.htm

⁶² http://europa.eu.int/eur-lex/en/archive/2002/1_03120020201en.html

⁶³ 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

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.⁶⁴

POLICY RECOMMENDATIONS

1. Deterring FOC practices

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

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

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

DETER REFLAGGING

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

⁶⁴ Bours, H el ene, personal communication.

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 on 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.
- (6) The 1986 UN Convention on the Registration of Ships could be cloned, and applied to fishing vessels.⁶⁵ (In doing so, however, the provision requiring a specific number of fishing States to ratify should be eliminated: a set number of ratifications (e.g. 40) should be sufficient to bring it into force.)
- (7) The IMO initiative requiring a 'continuous synopsis' (showing a complete history of owners and flags) should be extended to cover fishing vessels.⁶⁶

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 is somewhat more akin to the detention of a vessel, but may be less problematic legally.

An FAO Expert Consultation to Review State Measures to Combat IUU Fishing, held in November 2002, concluded⁶⁷ that a Memorandum of Understanding on Port State

⁶⁵ 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.

⁶⁶ 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

measures would constitute one of the numerous useful tools to prevent, deter and eliminate IUU fishing.⁶⁸ Suggested elements⁶⁹ included provisions for inspections, prior notice of port access and exchange of information. A draft MOU was included.⁷⁰ It also suggested possible sanctions for IUU vessels, such as denial of permission to land fish or fishery products, forfeiture of fish or fishery products, and refusal to permit a vessel to leave port pending consultation with the flag State of the vessel.

An inspection and detention regime using the Paris MOU as a model clearly has benefits. It certainly would be of more value than the proposed EU conference to negotiate an agreement on rights and responsibilities of port States concerning access by fishing vessels to port facilities, although it is possible that the proposed conference could be used as a vehicle to negotiate the MOU. The point of an MOU would be to go further than existing law and allow detention of suspected IUU vessels. It would also improve 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 Controls

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

- (1) IUU vessels should be prevented from bunkering and discharging their catches.⁷¹
- (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, and implement any measures agreed in any MOU on port State control.
- (5) Concerned States should negotiate an MOU on port State control.

⁶⁷ 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>.

⁶⁸ <http://www.fao.org/DOCREP/005/Y8104E/y8104e06.htm#bm06>

⁶⁹ <http://www.fao.org/DOCREP/005/Y8104E/y8104e07.htm#bm07>

⁷⁰ <http://www.fao.org/DOCREP/005/Y8104E/y8104e0b.htm#bm11.5>

⁷¹ 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.

- (6) States should adopt new legally binding instruments at the national or regional level to implement the IPOA-IUU recommendations on port State control. Individual States or regional groupings such as the EU should implement a system of prior notification before entry into port, inspections, and denial of port facilities including bunkering and catch unloading to (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. (A step further based on the precautionary principle would be to deny access to facilities to all fishing boats NOT listed as being legal and responsible operators.)

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.

- (7) States should prohibit the landing of IUU fish. This will probably require a catch documentation scheme to be in place. For instance, in the EU, Control Regulation 2847/93⁷² should be amended accordingly. This Regulation currently allows vessels from third countries to offload fish that were caught on the high seas as long as the species were caught outside the regulatory areas of the relevant RFMOs of which the EU is a member, so does not necessarily prevent IUU fishing.
- (8) 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.

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'.⁷³

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.

⁷² 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

⁷³ 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>

- (2) States should impose higher tariffs for fish and fish products from identified States where vessels have frequently engaged in IUU fishing.⁷⁴ The tools to do this are already in place in the EU and should be used more.⁷⁵
- (3) States and/or RFMOs should take measures to deter companies from doing business with IUU operations, as recommended in the IPOA-IUU⁷⁶. 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 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 Regulations⁷⁷ 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.

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

⁷⁴ 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>.

⁷⁵ 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.

⁷⁶ IPOA-IUU Paragraph 73 <http://www.fao.org/DOCREP/003/y1224e/y1224e00.HTM>

⁷⁷ Regulation 2847/93

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.”⁷⁸ 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:

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.

⁷⁸ *Grand Prince* (Belize v France), Judgment of 20 April 2001, at http://www.itlos.org/case_documents/2001/document_en_88.doc, paragraph 85.

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.

2. Monitoring, Control and Surveillance

Implementing the best available systems for Monitoring, Control, and Surveillance (MCS) is key to enforcing existing agreements to prevent IUU fishing. The IPOA-IUU (paragraph 24 for example) contains numerous references to the myriad of tools available to fisheries managers, "including (but not limited to) vessel monitoring systems (VMS), observer 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.”⁷⁹ 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.”⁸⁰ 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.⁸¹ 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.⁸² 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.⁸³ Germany’s GTZ has also provided support to Mauritania in developing its MCS program.⁸⁴

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

⁷⁹ <http://www.fao.org/docrep/005/y3536e/y3536e06.htm#bm06.2.5> Section 3.2.5

⁸⁰ Bours, Gianni, Mather, “Pirate Fishing Plundering the Oceans,” Greenpeace, February 2001, page 9

⁸¹ Fish Stocks Agreement, Part VII, Article 26

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

⁸² “Second Informal Consultations of the States Parties to the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York 23-25 July 2003) - Report” at

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

⁸³ Greenpeace, “Pirate Fishing: Plundering West Africa,” September 2001

⁸⁴ Greenpeace, “Witnessing the Plunder: A Report on the *MV Greenpeace* Expedition Investigating Pirate Fishing in West Africa,” November 2001

flag State vessel monitoring is insufficient.⁸⁵ 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 MCS by providing assistance and funding through whatever means possible. Such support should not be contingent upon the developed country getting (increased) access to the recipient country's fishing grounds. The results of such assistance should be monitored to 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 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

⁸⁵ ECO, 3 November 2003

vessels would need to be marked as being on government service⁸⁶ and would enjoy immunity as government vessels.⁸⁷ It should be noted that the requirements of hot pursuit when chasing, boarding and arresting vessels are exacting and should be followed.⁸⁸ 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.⁸⁹

Such an approach is in keeping with the recommendations of COLTO, the legal toothfish operators coalition: “Effective surveillance and enforcement can only come, we believe, by legal operators, conservation groups and government agencies working in partnership to combat IUU fishing.”⁹⁰

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.

3. Criminalize IUU Fishing

REVISE LAWS ON ARREST OF FISHING VESSELS TO BETTER SERVE AS A DETERRENT

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

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.
- (2) Coastal States should provide for penalties under their domestic legislation which will exceed the value of fishing vessels and their catch. Such penalties

⁸⁶ Law of the Sea Convention Article 111

⁸⁷ Law of the Sea Convention Article 96

⁸⁸ Law of the Sea Convention Article 111

⁸⁹ Law of the Sea Convention Article 111

⁹⁰ http://www.colto.org/About_Us.htm

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.⁹¹ 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.⁹²

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*⁹³ *Monte Confurco*,⁹⁴ and *Grand Prince*.⁹⁵

The IPOA-IUU stresses deterrence, however.⁹⁶ 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*)⁹⁷ 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 the carriage of a fully operational VMS and observance of CCAMLR conservation measures.

⁹¹ Law of the Sea Convention Article 73(2)

⁹² Law of the Sea Convention Article 292

⁹³ 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)

⁹⁴ 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)

⁹⁵ *Grand Prince* (*Belize v France*), Judgment of 20 April 2001, at http://www.itlos.org/case_documents/2001/document_en_88.doc, paragraph 85.

⁹⁶ 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.”

⁹⁷ See judgment at http://www.itlos.org/case_documents/2002/document_en_215.doc.

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.⁹⁸ 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.⁹⁹ 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.”¹⁰⁰ 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’.”¹⁰¹

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* judgment¹⁰² 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.¹⁰³

Similarly, Judge Nelson in his separate opinion¹⁰⁴ in the *Camouco* case said that “in my opinion, this Tribunal ... should also take account of what, in the introduction to the Statement in Response of the French Republic, was referred to as “the context of illegal, uncontrolled and undeclared fishing in the Antarctic Ocean and more especially in the exclusive economic zone of the Crozet Islands where the facts of the case occurred”.

⁹⁸ *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.

⁹⁹ Judge Shearer accepted this in his dissent at para. 15, at http://www.itlos.org/case_documents/2002/document_en_220.doc.

¹⁰⁰ *Volga* Judgment, para. 68.

¹⁰¹ Anderson dissenting opinion in *Volga*, para. 2, at http://www.itlos.org/case_documents/2002/document_en_219.doc.

¹⁰² *Volga* Judgment, para. 63.

¹⁰³ See Anderson dissenting opinion, note 101, paragraph 16.

¹⁰⁴ *Camouco (Panama v France)* , Prompt Release, Judgment of 7 February 2000, Vice President Nelson separate opinion, at http://www.itlos.org/case_documents/2001/document_en_129.doc

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.

4. Subsidies Reform

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

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

Recommendations on Subsidy Reforms

- (1) Subsidies which promote IUU or otherwise unsustainable fishing activity should be identified. On the basis of the language in the Johannesburg Plan of Implementation and the Doha Declaration, such subsidies should be eliminated or redirected (e.g. to scrap vessels, or help developing countries to develop control capacity or local, sustainable fishing capacity).
- (2) States wishing to protect their fisheries from the activities of foreign subsidised fleets should consider the possibility of launching a WTO dispute.

5. 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. 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.¹⁰⁵ 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 a plan to eradicate IUU fishing.¹⁰⁶ (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,¹⁰⁷ A Council Regulation Laying Down Measures Concerning Incidental Catches of Cetaceans in Fisheries and Amending Regulation (EC) No 88/98,¹⁰⁸ Strategy for Sustainable Development of European Aquaculture,¹⁰⁹ Integration of Environmental Protection Requirements into the CFP,¹¹⁰ Measures to Counter the Social, Economic and Regional Consequences of Fleet Restructuring,¹¹¹

¹⁰⁵ Introduction to the CFP at http://europa.eu.int/comm/fisheries/doc_et_publ/cfp_en.htm

¹⁰⁶ Plan available at:

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

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

¹⁰⁸ http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0451en01.pdf

¹⁰⁹ http://www.europa.eu.int/eur-lex/en/com/cnc/2002/com2002_0511en01.pdf

¹¹⁰

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

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

Plan to Reduce Discards of Fish,¹¹² and a Communication Towards Uniform and Effective Implementation of the CFP (i.e. plan to introduce a uniform CMS system).¹¹³ However, the CFP has not yet been adapted to implement the IPOA-IUU.

FINAL CONCLUSIONS

On paper, there is a complex network of binding and non-binding agreements ('hard' and 'soft' law) which forms a solid basis in international law for promoting the development of sustainable fisheries, and for preventing or eliminating IUU fishing.

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

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

- Port State controls: port States must prevent IUU fishing and support vessels from using their harbours for transshipment, resupply and other activities and/or

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

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

must where possible take action to arrest or detain IUU vessels in the event such vessels enter their ports.

- Market measures: States must adopt and enforce legislation to make it illegal to import or trade in IUU caught fish. Moreover, States should make it illegal or otherwise discourage companies (e.g. insurers, resuppliers, fishing gear manufacturers) from doing business with companies engaged in IUU fishing.
- At-sea transshipment: Flag States must make it illegal for their transport vessels to transship fish caught by vessels engaged in IUU fishing.
- Companies and nationals: States must make it illegal for their nationals and for companies within their jurisdiction to engage in IUU fishing, including the use of fines, penalties and, as necessary, prison sentences of sufficient severity to deter IUU fishing activities.
- Comprehensive management regime for the high seas: IUU fishing not only involves illegally fishing within an EEZ or in contravention of any regional fisheries management 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.