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ARTICLE

CONTROL BEGINS AT HOME: TACKLING FLAGS OF CONVENIENCE AND IUU FISHING

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INTRODUCTION

In 1999, French authorities arrested a vessel named the *Camouco*, flagged to Panama, for illegally fishing Patagonian toothfish near the Crozet Islands. After Panama successfully petitioned the International Tribunal for the Law of the Sea for its release,[1] the vessel was renamed the *Arvisa 1* and flagged to Uruguay. In January 2002, an Australian research vessel spotted the *Arvisa 1* fishing near Prydz Bay in eastern Antarctica; at the time the vessel claimed to be the Mauritanian-flagged *Kambott*. By July 2002, now named the *Eternal* and flagged to the Netherlands Antilles, she was again arrested for

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[1] *See* Press Release, Int'l Tribunal for the Law of the Sea (Panama v. France) 35, (February 7, 2000) for a summary of the judgment awarding prompt release in the Camouco Case, *available at* http://www.itlos.org/news/press_release/2000/press_release_35_en.pdf (last visited March 17, 2004).

illegally harvesting Patagonian toothfish in the French Exclusive Economic Zone (hereinafter "EEZ") off Kerguelen Island.[2]

While the case of the vessel above is an extreme, it clearly illustrates the problems that vessels flying flags of convenience[3] pose to international fisheries management. Vessels like the *Camouco* exploit the ease of changing names and registries to avoid both effective control by their flag states and compliance with regional fisheries management rules. And even when, like the *Camouco*, they are caught engaging in illegal fishing, the principle of exclusive flag state jurisdiction severely limits the international community's ability to prosecute these vessels.

The sorts of fishing activities commonly labeled illegal, unreported, and unregulated (hereinafter "IUU") are broad in scope and universal in occurrence;[4] fishing conducted by vessels flying flags of convenience is only one small part of the global IUU fishing phenomenon. Nonetheless, these vessels tend to have high catch rates and are subject to little if any flag state control or oversight. As such, they represent a threat to sustainable fisheries management disproportionate to their overall number,[5] and they have been the focus of much of the last decade's international efforts to impose order on high seas fisheries.

States and international organizations may disagree on the most effective approach to controlling or eliminating this type of fishing, but most agree on the urgency of the situation. Fully seventy-five percent of the world's fisheries resources are being harvested at or beyond sustainable levels,[6] and those

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[2] *See* Australia's 2001-2002 Rep. of Member's Activities to the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), *available at* http://www.ccamlr.org/pu/E/pubs/ma/01-02/Australia-02.pdf, 4 (last visited March 17, 2004).

[3] There is no agreed legal definition for "flag of convenience" or "open registry." Although some States and international organizations make distinctions between the two terms, in this paper they are treated as synonyms. *See* Section II, *infra*.

[4] *See* the definitions of IUU fishing in Section II of the *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, Food and Agriculture Organization, 2001 [hereinafter IPOA-IUU].

[5] The average length of fishing vessels flying flags of convenience in 1999 was almost fifty meters; vessels this size represent a formidable catching power. *See* Greenpeace International, 2001, *Pirate Fishing: Plundering the Oceans*, 8, (2001).

[6] Food and Agriculture Organization, Fisheries Department, *The State of World Fisheries and Aquaculture 2002*, 23 [hereinafter *SOFIA*].

primarily fished on the high seas are among the hardest hit. At the same time, the value of fish has increased tremendously in the last decade — international trade in fish products hit a record high of over $55 billion in 2000 following four percent annual growth since 1990.[7] The incentive to circumvent increasingly strict conservation and management regimes and capitalize on ever-increasing market demand is powerful, and some flag states either are not able or are not willing to ensure compliance by their vessels.

This article looks at the efforts to control fishing by vessels flying flags of convenience from a global, regional, and national perspective. The international community has struggled for decades with notions of flag State control over fishing vessels and what kind of "genuine link" ought to exist between a vessel and its State of registry. Global instruments negotiated in the 1990's looked for ways to elaborate the broad principles laid out in international law up until that time. Regional fisheries management organizations stepped in and developed a broad suite of tools for combating IUU fishing in the fisheries under their purview. And individual nations have taken up efforts to exert control over vessels flying their flag and, in some cases, to assist others to do the same.

I. THE PROBLEM

Sources vary on exactly which states maintain open registries. One author has determined three categories of States in regard to registration of ships: 1) those who maintain open registries, *i.e.* offer flags of convenience; 2) those who maintain closed registries and set clear requirements for ownership and control; and 3) those who maintain "compromise" registries, that is, they set some conditions for registration but do not require the same level of connection between owners/operators and the State as closed registers do.[8] The United Nations Conference on Trade and Development (hereinafter "UNCTAD") draws a distinction between what it calls "international registries" where the proportion of vessels owned by nationals of the

[7] *Id.* at 3.

[8] K.X. Li and J. Wonham, 1999, "New Developments in Ship Registration", 14 *International Journal of Marine and Coastal Law* 137.

flag State is at least thirty percent, and "open registries" where the share owned by nationals of the flag State is ten percent or less.[9] The International Transport Workers' Federation (hereinafter "ITF") defines flags of convenience simply as those who "rent out their flags to ship owners seeking to evade their own country's rules."[10]

In assessing the prevalence of fishing vessels flying flags of convenience, the Food and Agriculture Organization of the United Nations (hereinafter "FAO") used a combination of these standards to identify thirty-two open registry States that include or have included fishing vessels, as of March 2002 — a sharp increase from eleven in 1980.[11] Likewise, the number of fishing vessels on open registries has risen in recent years; in 1998 they constituted about ten percent of the world's fishing fleet but grew to about 12.5 percent in 2001.[12] Because many of these vessels re-flag multiple times within a year, or even maintain more than one registration, Lloyds Maritime Information Services listed over 1,300 fishing vessels flying an "unknown flag" in 2001, a sharp increase from only fourteen in 1998.[13]

By definition, flag of convenience fishing vessels have little or no connection to the territory of their state of registry. It follows, then, that these vessels do not fish in the EEZ of their flag; as the ITF asserts, "there is little to be gained from registering a fishing vessel within an FOC, apart from either being able to circumvent the applicable management regime or to fish illegally."[14] States that offer open registries to fishing ves-

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[9] UNCTAD Secretariat, *Review of Maritime Transport, 2003* (UNCTAD/RMT/2003), 54.

[10] International Transport Workers' Federation, 2003, *Steering the Right Course: Towards an Era of Responsible Flag States and Effective International Governance of Oceans and Seas*, 11.

[11] Judith Swan, 2002, *Fishing Vessels Operating under Open Registers and the Exercise of Flag State Responsibilities. Information and Options*, FAO Fisheries Circular 980, 4 and App. 1. Most sources concur that Belize, Panama, Honduras, and St. Vincent and the Grenadines top the list of major fisheries flags of convenience.

[12] ITF 2003 at 25.

[13] International Confederation of Free Trade Unions, Trade Union Advisory Committee to the OECD, International Transport Workers' Federation, and Greenpeace International, 2002, *More Troubled Waters: Fishing, Pollution and FOCs*, Major group submission for the World Summit on Sustainable Development, Johannesburg, 26 Aug. - 6 Sept. 2002, 18, though some of these vessels may have been removed from their original registers prior to being scrapped. *See SOFIA* at 21.

[14] *More Troubled Waters, supra* at 19.

sels rarely offer much in the way of monitoring and control over those vessels. Few of the most notorious flag of convenience States are members of the regional fisheries management organizations charged with the maintenance of the stocks these vessels target. And none has ratified the major international instruments governing fisheries on the high seas.

The lack of oversight by open registries does not just jeopardize sustainable fisheries management; vessels flying these flags are also much more likely to ignore other standards. Of the major open registries, only Panama has enacted national legislation covering each of the existing standards set by the International Labour Organization for work in the fisheries sector.[15] The safety and environmental protection track record of these vessels is also poor — in 2001, seven of the top ten flag states for ship detentions in ports of countries party to the Paris Memorandum of Understanding on Port State Control were open registries. These vessels accounted for 774 of just over 1000 total detentions.[16] Recent investigations are also uncovering increasing evidence that these vessels are connected through their beneficial owners to international criminal networks.[17]

IUU fishing by vessels flying flags of convenience undermines international efforts to conserve and manage shared fisheries resources, disadvantages legitimate fishers, jeopardizes food security, and is often associated with a general disregard for labor rights and environmental protection.[18] The past decade has seen concerted efforts to find ways to address these problems within international law. The international community has searched for a way to compel flag States to fulfill their

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[15] *See generally* International Labour Office, 2003, *Conditions of Work in the Fishing Sector. A Comprehensive Standard (a Convention Supplemented by a Recommendation) on Work in the Fishing Sector*, Report V (1) for the 92nd Session of the International Labour Conference, 1 - 17 June 2004. (On file with the author)

[16] *More Troubled Waters*, *supra* note 13, at 12.

[17] Gavin Hayman and Duncan Brack, 2002, *International Environmental Crime: The Nature and Control of Environmental Black Markets*, Report of the Royal Institute of International Affairs experts workshop of the same name, London, 27 - 28 May 2002. (On file with the author)

[18] Food and Agriculture Organization, 2002, "Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing", *FAO Technical Guidelines for Responsible Fisheries* No. 9, 1 [hereinafter FAO].

duties to control these vessels or, when they cannot or will not do so, to find a way to act in their stead.

II. FREEDOM OF THE HIGH SEAS AND THE EXCLUSIVITY OF FLAG STATE JURISDICTION

The 1982 United Nations Convention on the Law of the Sea (hereinafter "UNCLOS")[19] codified two principles of customary international law — the fundamental freedom of the high seas and the exclusivity of flag state jurisdiction over vessels on the high seas. Neither of these principles is, however, absolute. The freedom to use the high seas is to be exercised with due regard for both "the interests of other States in their exercise of the freedom of the high seas" and "the rights under this Convention with respect to activities" on the high seas.[20] Article 92 allows exceptions to exclusive flag State jurisdiction both under other parts of UNCLOS itself and under other international treaties.

Even in some of its earliest articulations, the concept of free access to the oceans was conditioned on the need for some degree of order on the high seas.[21] Particularly for fisheries, as more and more nations began in the 1950's to build fleets capable of harvesting on the high seas, the principle of open use began to evolve into one of reasonable use.[22] The 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas (1958 Fishing Convention),[23] one of four treaties that grew out of the UN's efforts, through the International Law Commission, to codify international law relating to the oceans, tempered the freedom to fish on the high seas with the recognition of the rights of other states to do the same. At the same time, the 1958 Geneva Convention on the High Seas (High

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[19] United Nations Convention on the Law of the Sea, 1982, 21 *ILM* 1245, in force November 1994 [hereinafter UNCLOS].

[20] UNCLOS Article 87.

[21] UN "Memorandum on the Regime of the High Seas" UN Document A/CN.4/32, *Yearbook of the International Law Commission*, 1950, 69.

[22] Francisco Orrego Vicuña, "The International Law of High Seas Fisheries: From Freedom of Fishing to Sustainable Use," *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes*, 24, (Olav Schram Stokke, ed. 2001).

[23] Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas, 559 *United Nations Treaty Series* 285 (1958) [hereinafter 1958 Fishing Convention]. This Convention entered into force in 1966, but it was never ratified by several major fishing States (*e.g.*. Canada, Japan, China, Iceland, Norway).

Seas Convention)[24] set a broad standard that the high seas were open to all nations, whether coastal or not, though this freedom "shall be exercised by all States with reasonable regard to the interest of other States in their exercise of the freedom of the high seas."[25]

If, as stated in Article 2 of the High Seas Convention, "no State may validly purport to subject any part of [the high seas] to its sovereignty," it follows that, with few exceptions, no State has the right to prevent another from using the high seas, or to exert its jurisdiction over another State's vessel on the high seas.[26] A vessel can therefore be viewed as a floating piece of the territory of the nation whose flag it flies; save in specific circumstance such as piracy or the existence of an international treaty to the contrary, a flag State has the same exclusive right to exercise legal and enforcement jurisdiction over its vessels on the high seas as over its own territory.[27]

In 1956, the International Law Commission emphasized the fundamental role of exclusive flag State jurisdiction to the maintenance of order on the high seas, noting that the "absence of any authority over ships sailing the high seas would lead to chaos. One of the essential adjuncts to the principle of the freedom of the seas is that a ship must fly the flag of a single State."[28] The High Seas Convention acknowledged this point in Article 6(1)[29] and UNCLOS lifted the language of this Article almost verbatim into Article 92.

With the rights of exclusive jurisdiction came responsibilities to exercise that jurisdiction effectively to preserve the order of the high seas. The High Seas Convention laid out a few responsibilities for flag States to, *inter alia*, take necessary measures to ensure safety at sea, prevent pollution, and punish

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[24] Geneva Convention on the High Seas, 450 *United Nations Treaty Series* 11 (1958) [hereinafter High Seas Convention].

[25] *Id.* at Art. 2.

[26] R.R. Churchill and A.V. Lowe, 1999, *The Law of the Sea,* 3rd ed., 166.

[27] *See* Rachel Canty, 1998, "Limits of Coast Guard Authority to Board Foreign Flag Vessels on the High Seas," 23 *Tulane Maritime Law Journal*, 125.

[28] Report of the International Law Commission on the work of its seventh session, 23 April - 4 July 1956 (UN Doc. A/3159), in *Yearbook of the International Law Commission, 1956, Vol. II* (UN Doc. A/CN.4/SER.A/1956/Add.1), 279.

[29] "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas."

the transport of slaves.[30] But UNCLOS built upon those requirements by including, in Article 94, both a general exhortation to all States to "effectively exercise its jurisdiction and control in administrative, technical and social mattes over ships flying its flag" and a specific, though not exhaustive, list of flag state duties.

UNCLOS also brought in aspects of the 1958 Fishing Convention related to flag states' duties to adopt measures for the conservation of fisheries resources on the high seas and to cooperate with other states in the same. However, in establishing the regime of the EEZ, UNCLOS expanded these principles, setting out specific duties to cooperate in the management of particular stocks, such as anadromous or highly migratory species, that occur both on the high seas and in coastal States' internal waters or EEZs.[31] It also reinforced the duty to conserve resources on the high seas through specifying an obligation to determine total allowable catch within and beyond the EEZs and take "such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas."[32]

The responsibility of a flag state to control its vessels and cooperate with other States as an essential complement to exclusive flag State jurisdiction was central to the global fisheries instruments that grew out of UNCLOS in the 1990s. First, while noting that "the adoption, monitoring and enforcement of effective conservation measures, is inadequate in many areas," the 1992 Cancun Declaration instructed the UN Food and Agriculture Organization to take the lead in creating a code of conduct for responsible fisheries.[33] The Code, finalized in 1995, is a voluntary instrument that, nonetheless, includes specific flag State duties not only to cooperate in the sustainable management of fisheries resources but also to "take enforcement measures in respect of fishing vessels entitled to fly their flag

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[30] *See, e.g.*, High Seas Convention Articles 10, 13, 24, and 25.

[31] *See generally* UNCLOS Article 63-67 for provisions dealing with straddling, highly migratory, anadromous, and catadromous stocks, as well as marine mammals.

[32] UNCLOS Article 117. See generally Articles 116-120 regarding conservation and management of the living resources of the high seas.

[33] *Declaration of the International Conference on Responsible Fishing*, Cancun, Mexico, 6-8 May 1992, *available at* http://wwwoceanlaw.net/texts/cancun.htm (last visited March 17, 2004).

which have been found by them to have contravened applicable conservation and management measures."[34]

The Cancun Declaration also called upon states to "take effective action, consistent with international law, to deter reflagging of vessels as a means of avoiding compliance with applicable conservation and management rules for fishing activities on the high seas." This was echoed in the Agenda 21 chapter on the oceans adopted during the UN Conference on Environment and Development,[35] and resulted in the negotiation of the FAO Compliance Agreement in 1993.[36] The Compliance Agreement fully elaborates the responsibilities of flag States whose vessels fish on the high seas, in particular establishing a requirement that each such vessel must have an authorization to fish issued by its flag State.[37]

Although its fundamental premise is the primary jurisdiction of the flag state over its vessels fishing on the high seas, and the duties that comprise the exercise of that jurisdiction,[38] the Compliance Agreement also calls upon all states to cooperate in regard to vessels that do not fulfill the obligation to comply with agreed international measures. Much of this cooperation is to be effected through information exchange facilitated by the FAO; specifically, through a database of all registered fishing vessels over 24 meters in length.[39] The cooperation should also be bilateral; Article V also states that non-flag States may make a determination that a vessel in its port has engaged in activities that undermine the effectiveness of international conservation and management measures. But it also

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[34] FAO, 1995, *Code of Conduct for Responsible Fisheries*, Art. 8.2.7.

[35] Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3 - 4 June 1992 (UN Doc. A/CONF.151/26, Vol. II) Agenda 21, para. 17.52.

[36] Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1993, 33 *ILM* 969, in force April 2003 [hereinafter Compliance Agreement].

[37] *Id. at* Art. III.2. This requirement may be waived by flag States for vessels less than 24 meters in length, but only if the State determines such an exemption would not "undermine the object and purpose" of the Agreement. *Id. at* Art. II.2.

[38] *Id. at* Art. III.3 "No Party shall authorize any fishing vessel entitled to fly its flag to be used for fishing on the high seas unless the Party is satisfied that it is able, taking into account the links that exist between it and the fishing vessel concerned, to exercise effectively its responsibilities under this Agreement in respect of that fishing vessel."

[39] *Id. at* Art. VI.

goes on to say that the next step after such a determination is to notify the flag state and make arrangements what additional investigation, if any, the port state may undertake. Presumably, if the flag state is unwilling or unable to exert effective control over the vessel, under the Compliance Agreement, the port State has little recourse to further action.

The 1995 United Nations Fish Stocks Agreement[40] echoes the general concept of flag State responsibility contained in the Compliance Agreement and UNCLOS before it. But the Fish Stocks Agreement allows less discretion to flag States and explicitly, in Article 18(1), requires compliance with subregional and regional conservation and management measures.[41] Notably, it was the first global instrument to spell out circumstances — other than those specified by an international agreement or treaty — where a non-flag state may take action against a vessel undermining the effectiveness of international fisheries conservation and management measures. Article 21(1) allows States party to the Fish Stocks Agreement and also a member of a regional fisheries organization or arrangement to board and inspect fishing vessels of any other State party to the Fish Stocks Agreement, whether or not that State is a member of the regional body in question. In essence, states party to the Fish Stocks Agreement are bound to apply even conservation and management measures adopted under a regional agreement to which it is not a party.[42] Article 20(7) further allows states party to the Fish Stocks Agreement and members of regional bodies or arrangements to take actions, in accordance with international law, "to deter vessels which have engaged in activities which undermine the effectiveness of or otherwise violate the conservation and management measures established by that organization or arrangement from fishing on the high seas ... until such time as appropriate action is taken by the flag State."

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[40] 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, 1995, 34 *ILM* 1542, in force December 2001 [hereinafter Fish Stocks Agreement].

[41] Budislav Vukas & Davor Vidas, "Flags of Convenience and High Seas Fishing: The Emergence of a Legal Framework" 69 (Olav Schram Stokke ed., 2001).

[42] *Id. at* 76.

The result is an affirmative duty beyond the general obligation for flag states to cooperate in earlier instruments; that is, under the Fish Stocks Agreement, no one can fish in a high seas area covered by a regional organization except through the regional organization or by observing the conservation and management rules established by the organization.[43] The International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing (IUU-IPOA),[44] adopted by FAO in 2001 as one of four voluntary plans of action developed within the framework of the Code of Conduct, reiterated this principle in regard to all states; states have a responsibility to ensure that their nationals, not just vessels, comply with relevant fisheries conservation and management measures.[45] Since negotiation of the Fish Stocks Agreement, many regional fisheries management organizations have given effect to this principle through measures that seek the compliance of both members and non-members.

III. A "GENUINE LINK"

As described above, recent global fisheries instruments have elaborated the responsibility of a flag state to maintain effective control over its vessels on the high Seas and, increasingly, have acknowledged circumstances whereby other states may act if the flag State cannot or will not exercise that control. But an important consideration in regard to a flag state's ability to control its vessels fishing on the high seas is what standards, if any, exist governing the conditions under which a State grants its flag in the first place.

In general, international law has held that States have the discretion to determine how and why they grant their nationality to ships. In 1905, the Permanent Court of Arbitration noted

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[43] Satya Nandan "The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks and its Potential Impact on Pacific Island Tuna Fisheries," statement made at the Conference on Achieving Goals for Sustainable Living in the Aquatic Continent, Hawaii, 19 - 23 Sept. 1995, cited in Vicuña, *supra* note 22 at 42.

[44] *See supra* note 4.

[45] *See e.g. id.* at para. 17, "In the light of relevant provisions of the 1982 UN Convention, and without prejudice to the primary responsibility of the flag State on the high seas, each State should, to the greatest extent possible, take measures or cooperate to ensure that nationals subject to their jurisdiction do not support or engage in IUU fishing. All States should cooperate to identify those nationals who are the operators or beneficial owners of vessels involved in IUU fishing."

that, "it belongs to every sovereign to decide to whom he will accord the right to fly his flag and to prescribe the rules governing such grants."[46] This sentiment was also expressed by the special rapporteur for the Law of the Sea in his 1950 report to the International Law Commission, but he further went on to note that no State's standards should differ from those in common practice.[47]

An early draft of the text that would become Article 5(1) of the High Seas Convention set out unambiguous criteria for determining the "national character" of a ship, specifically that the vessel must either be property of the state in question or be at least 50 percent owned by a national, partnership, or company of that state.[48] In the comments accompanying this draft, the International Law Commission noted a parallel between granting nationality to a person and issuing registration to a vessel and further highlighted a concern that "control and jurisdiction by a state over ships flying its flag can only be effectively exercised when there is in fact a relationship between the state and the ship other than that based on mere registration."[49]

In the end, Article 5(1) of the High Seas Convention enshrined the notion that each State determines the terms for granting its nationality to ships, registering ships in its territory, and allowing vessels to fly its flag. But it goes on to require a "genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."

What constitutes a "genuine link" has been the subject of considerable debate ever since. It is not a term with established meaning in international law. The High Seas Convention was the first to use it; it does not appear in any other con-

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[46] *Muscat Dhows* (France v. Great Britain), 2 *AJIL* 921, 924 cited in Churchill and Lowe, *supra* note 26, 205.

[47] Report of the International Law Commission on the work of its second session, 5 June to 29 July 1950 (UN Doc. A/1316) in *Yearbook of the International Law Commission, 1950, Vol. II* (UN Doc. A/CN.4/SER.A/1950/Add.1).

[48] Report of the International Law Commission on the work of its seventh session, 2 May to 8 July 1955 (UN Doc. A/2934), in *Yearbook of the International Law Commission, 1955, Vol. I*, (UN Doc. A/CN.4/SER.A/1955).

[49] *Yearbook of the International Law Commission, Vol. II*, (UN Doc. A/CN.4/SER.A/1955/Add. 1), 23 (1955).

ventions dealing with nationality of individuals or aircraft.[50] One clue as to the intention may be found in Article 6(1) High Seas Convention, which states, "a ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or a change of registry." The implication of the phrase "real transfer of ownership" of the vessel suggests the registration of the vessel and the owner's real connection with the State of nationality are directly related.[51]

In UNCLOS, which separates the provisions dealing with the granting of nationality from those describing flag State duties,[52] the meaning of the "genuine link" requirement is even less clear (though the notion of "real change of ownership" persists in Article 92). By the early 1990s, concerns over the detrimental effects of fishing vessels re-flagging to avoid compliance with conservation and management rules revived interest in clarifying what constituted a genuine link between flag state and vessel.

The original focus of the FAO conference that led to the creation of the Compliance Agreement was to come to agreement on means to deter re-flagging, and in fact the initial draft had provisions instructing a State to refuse to grant its flag to a fishing vessel unless it was "satisfied, in accordance with its own national legislation, that there exists a genuine link."[53] The draft went on to set criteria for determining such a link, including the nationality or residence of the owners. Disagreement over how, or even whether, the new agreement should address issues of registration and the nature of the genuine link led negotiators to shift the focus of the final Agreement from re-flagging to flag State responsibility.[54]

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[50] For a thorough study of the legal interpretation of the "genuine link" requirements in both UNCLOS and the High Seas Convention, see Robin R. Churchill with Christopher Hedley, 2000, *The Meaning of the "Genuine Link" Requirement in Relation to the Nationality of Ships*, study prepared for the International Transport Workers Federation, *available at* http://www.oceanlaw.net/hedley/pubs/ITF-Oct2000.pdf (last visited March 17, 2004).

[51] *Id.* at 13.

[52] UNCLOS Art. 91 deals with nationality of ships; Art. 94 as noted above addresses flag State duties.

[53] Draft Agreement on the Flagging of Vessels Fishing on the High Seas to Promote Compliance with Internationally Agreed Conservation and Management Measures, Art. IV(1) (FAO Document COFI/93/10, Annex 2).

[54] David A. Balton, "The Compliance Agreement," *Developments in International Fisheries Law*, 31 (Ellen Hey, ed. 1999).

As noted above, the Compliance Agreement deals with the issuance of an authorization to fish on the high seas and the elaboration of the duties of the flag state granting that authorization. Its only remaining nod to the "genuine link" requirement is in Article III[55] where flag States are directed to assess their ability to exercise control over their vessels before issuing authorizations to fish on the high seas.

It remains, however, that meaningful flag State control is very difficult where vessels operate far from the flag state and may, in fact, never have any contact with the territory or officials of the flag state. As one author notes, in appearing to sidestep the "genuine link" issue, focusing instead on the issue of flag State responsibility, international law leaves considerable room for flag of convenience fishing vessels to undermine international conservation and management efforts with impunity. Unless international fisheries instruments are widely implemented, the problems identified at the root of IUU fishing remain.[56]

IV. REGIONAL INITIATIVES

At the same time the international community was realizing the need to build on the general provisions in UNCLOS to elaborate a new regime for international fisheries, regional fisheries management organizations (hereinafter "RFMOs") began to develop their own initiatives. Efforts to bolster conservation and management measures went hand-in-hand with a push to compel all states fishing for the stocks under their purview to comply.

From the beginning, the focus of their efforts were the vessels of non-contracting parties, specifically those flagged to states offering open registries and little oversight or control. Two types of mechanisms have evolved within the various RFMOs: trade-based measures that attempt to limit access to markets of IUU-caught fish, and enforcement-based measures

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[55] *See supra* note 38.

[56] A. Van Houtte, 2003, "Flag State Responsibility and the Contribution of Recent International Instruments in Preventing, Deterring, and Eliminating IUU Fishing," as presented to the Expert Consultation on Fishing Vessels Operating Under Open Registries and their Impact on Illegal, Unreported, and Unregulated Fishing, Miami, Fl. 23 - 25 Sept. 2003, *FAO Fisheries Report No. 722*, 59 (on file with the author).

that establish a presumption of illegal fishing and mandate inspections and other enforcement actions to prevent IUU-caught fish from being landed.

In general, trade-based measures have been most widely used where either the final market or the area of the fishery for the fish products in question are very limited. Enforcement-based measures were originally developed in RFMOs where either the market patterns or the nature of the fisheries themselves are too complicated to allow easy trade tracking.

As the problems of IUU fishing have continued to grow, more and more RFMOs have expanded the tools at their disposal to combat them. Most RFMOs are now moving towards an integrated suite of both trade-based and enforcement-based measures to prevent fishing by non-members. Further, as different RFMOs have had some success in halting IUU fishing by non-members, there is an even bigger priority being placed on equivalent measures to address problems caused by members' fleets.

1. ICCAT

The International Commission for the Conservation of Atlantic Tunas (hereinafter "ICCAT") was the first RFMO to tackle the problems of non-member fishing in a comprehensive way. At its 1991 Annual Meeting, the Commission had noted the presence of many non-member vessels targeting ICCAT-managed stocks, particularly Western Atlantic bluefin tuna.[57] Many of these vessels were flagged to States with open registries, such as Panama, Honduras, and Belize, who maintained little or no control over the fishing vessels flying their flag. At the time, scientific advice showing that bluefin tuna stocks were continuing to decline[58] also led ICCAT to adopt a four-year

[57] Hoping to curb this non-member fishing, ICCAT adopted 91-2, "Resolution by ICCAT Concerning Catches of Bluefin Tuna by Non-Contracting Parties," which called for developing comprehensive management policies designed to improve reporting and ensure ICCAT compliance through standardizing statistical reporting and an international trade monitoring system. The new policies were also to include "other measures ... consistent with the General Agreement on Tariffs and Trade (GATT)."

[58] The situation was so bad that, shortly after the 1991 ICCAT meeting, Sweden announced its plans to introduce a proposal to list Atlantic bluefin tuna under the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES). *See Report of the Eighth Conference of the Parties, Kyoto, Japan, March 1992.* Sweden's proposal would have recommended that Western Atlantic bluefin tuna be

"enhancement" of current management measures for western Atlantic bluefin tuna, as a first step toward a recovery program for that stock.[59] Given the high levels of fishing by non-members — estimates at the time indicated approximately twenty percent of total landings of north Atlantic bluefin tuna came from vessels of non-members[60] — there was a clear realization that the proposed restrictions on harvests by ICCAT parties would be insufficient without a accompanying reduction in non-member fishing.

ICCAT followed up in 1992 by taking two steps towards exerting control over non-member fishing. The first was the establishment of a system to track trade of frozen bluefin tuna. The Bluefin Tuna Statistical Document Program[61] required any bluefin tuna product imported into the territory of a Contracting Party to be accompanied by a document that, among others, indicated the country issuing the document, names of the importer and exporter, and the area of harvest. The document had to be validated by a government official of the flag state of the vessel that harvested the tuna.[62] In requiring all imports into ICCAT member countries to be documented, it effectively bound even non-members to comply with ICCAT. The vast majority of Atlantic bluefin tuna entering trade is destined for ICCAT member - country markets. Japan alone is the recipient of more than ninety percent of the total Atlantic bluefin tuna in

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listed on CITES Appendix I, which would have prevented all international trade, and Eastern Atlantic bluefin tuna (assessed to be in slightly better shape) be listed on CITES Appendix II, which, among other restrictions, would have required all trade to be documented and tracked. It was withdrawn before it could come to a vote.

[59] 91-1, "Recommendation by ICCAT (Made in 1991) for the Enhancement of the Current Management of Western Atlantic Bluefin Tuna." In its 1992 bluefin tuna stock assessment, the scientific body of ICCAT estimated that Western Atlantic bluefin tuna populations had fallen to about ten percent of their 1975 levels.

[60] *See Report of the ICCAT Standing Committee on Research and Statistics, 155* (1992).

[61] 92-1, "Recommendation by ICCAT Concerning the ICCAT Bluefin Tuna Statistical Document Program." The requirement was originally limited to frozen products only, then expanded to fresh bluefin tuna the following year. *See* 93-3, "Recommendation by ICCAT Concerning the Implementation of the ICCAT Bluefin Tuna Statistical Document Program on Fresh Products."

[62] This was later expanded to include designated non-governmental institutions, but only for members of the Commission "in good standing" who provided ICCAT-required statistical information. See 93-1 "Resolution by ICCAT Concerning Validation by a Government Official of the Bluefin Tuna Statistical Document."

trade[63] — so non-contracting parties who did not utilize the statistical document effectively lost access to all international markets. Implementation of the statistical document therefore gave the first clear picture of the true levels of both member and non-member fishing for bluefin tuna, and, most usefully, allowed ICCAT to identify which non-member countries were fishing at levels that could jeopardize ICCAT's attempts to manage the stocks.

The second innovation of the 1992 ICCAT Annual Meeting was the creation of a new subsidiary body to administer and oversee the new statistical document program and, more generally, track fishing by non-members and make recommendations to ICCAT based upon its review. The terms of reference also included a specific mandate "to consider and outlining measures to prevent the re-flagging of vessels of Contracting Parties for the purpose of avoiding fisheries management measures established by the Commission."[64] In its 1991 resolution concerning non-contracting party fishing,[65] ICCAT had already noted that problems in data collection and stock assessment had been exacerbated by a significant number of contracting party vessels re-flagging to non-member states. Many of the subsequent measures ICCAT developed therefore had the effect of bringing those contracting parties' vessels that had attempted to evade ICCAT by re-flagging to open registries back into compliance with ICCAT.

With a way to track trade and a better understanding of the quantities and origins of much of the unreported catch, ICCAT fulfilled the final mandate of the 1991 resolution with its 1994 adoption of the Bluefin Tuna Action Plan.[66] The action plan established a process by which ICCAT identified States whose vessels fished for Atlantic bluefin tuna "in a manner which diminishes the effectiveness" of ICCAT conservation and

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[63] According to 2002 Bluefin Tuna Statistical Document data, Japan imported almost ninety-five percent of all Atlantic bluefin tuna tracked by the program. Other importers include the United States, the European Union, and Korea.

[64] 92-2, "Resolution by ICCAT to Establish a Permanent Working Group for the Improvement of ICCAT Statistics and Conservation Measures and the Terms of Reference of the Working Group."

[65] *See supra* at note 57.

[66] 93-2 "Resolution by ICCAT on the Bluefin Tuna Action Plan."

management measures.[67] ICCAT was to request the identified States to rectify the situation. If, in the next year, the vessels continued to undermine ICCAT, the action plan allowed ICCAT to recommend that its Contracting Parties take additional measures, including multilateral import restrictions, on bluefin tuna products from the flag State.

The very next year, ICCAT identified Panama, Belize, and Honduras[68] under the new plan and, in 1996, agreed to impose trade sanctions against all three. After a parallel scheme covering Atlantic swordfish was adopted in 1995,[69] these same three states were identified as undermining ICCAT's swordfish management efforts as well. Belize and Honduras were eventually subject to import bans on Atlantic swordfish.[70]

These actions had immediate effects. In 1995, when it was first identified under the Bluefin Tuna Action Plan, Panama had almost 600 fishing vessels on its registry. By 1999, the year that sanctions were lifted upon Panama's joining ICCAT that number had fallen by almost 60 percent.[71] Largely in response to ICCAT's actions, Panama issued new regulations regulating the issuance of international fishing licenses and establishing grounds for cancellation of the license, including "proven violation of the conservation and management measures of regional and sub-regional fishery organizations."[72]

In that same period, there were two other important developments. The first was a surge in fishing vessels registered

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[67] This standard comes from the Pelly Amendment to the Fisherman's Protective Act of 1971 (22 U.S.C. 1978), which directs the required the Secretary of Commerce to determine if nationals of a foreign country are diminishing the effectiveness of an international fishery conservation program; such a determination can lead to import prohibitions on fish products from the offending nation. The UN Fish Stocks Agreement utilized similar language ("undermine the effectiveness" vice "diminish") in its call for States to ensure their fishing activities are consistent with subregional or regional conservation and management measures. *See* Article 17 at para. 4.

[68] 96-11, "Recommendation by ICCAT Regarding Belize and Honduras Pursuant to the 1994 Bluefin Tuna Action Plan" and 96-12, "Recommendation by ICCAT Concerning Panama Pursuant to the 1994 Bluefin Tuna Action Plan."

[69] 95-13, "Resolution by ICCAT Concerning an Action Plan to Ensure the Effectiveness of the Conservation Program for Atlantic Swordfish."

[70] 99-8, "Recommendation by ICCAT Regarding Belize and Honduras Pursuant to the 1995 Swordfish Action Plan Resolution." Although Panama was identified with Belize and Honduras under the Swordfish Action Plan in 1998, it had joined the Commission by the 1999 ICCAT annual meeting and therefore was no longer subject to the action plans.

[71] *SOFIA* at Figure 37, 66.

[72] Panamanian Executive Decree No. 49 (of 13 November 1997), Article 7.

to Belize, inversely proportional to the decline in Panama's registry.[73] The second was a sharp increase in unreported catches of some other ICCAT-managed species, particularly bigeye tuna.[74] As Panama began to impose discipline on its registry, and as markets for bluefin tuna were closed to the three biggest non-member fleets, IUU vessels sought either a new flag, a new fishery, or both.

Recognizing that, particularly in the case of highly mobile large-scale longline vessels, stock-specific measures merely routed the IUU fleet into new fisheries, ICCAT adopted a new measure in 1998 to identify States — ICCAT members or non-members alike — whose large scale longline vessels undermined the effectiveness of ICCAT conservation and management measures.[75] As with the action plans, the new resolution could eventually result in the imposition of trade restrictions, but in this case, the sanctions could apply to any species ICCAT identified as being harmed by the fishing activities in question. To facilitate its application, the UU Catches Resolution instructed ICCAT members to submit to the Commission information on vessels supplying imports of frozen tuna or swordfish.

ICCAT adopted its first list of IUU vessels pursuant to the UU Catches Resolution at its 1999 Annual Meeting.[76] It included 345 longline vessels, the vast majority of which were flagged to Belize, Honduras, Equatorial Guinea, and St. Vincent and the Grenadines. By 2002, the list totaled 378, but for fully 222 of those, the current flag was unknown. Once again, vessels were fleeing the registries of states under sanction and moving to another open registry.[77] Further, a Japanese analysis of import data, comparing alleged vessel catch rates and

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[73] *See supra* note 71.

[74] *See Report of the ICCAT Standing Committee on Research and Statistics* (2003), BET Fig. 2, 31.

[75] 98-18, "Resolution by ICCAT Concerning the Unreported and Unregulated Catches of Tunas by Large-Scale Longline Vessels in the Convention Area" [hereinafter UU Catches Resolution].

[76] ICCAT, *Report for the Biennial Period 1998-99, Part II (1999) - Vol. 1*, Appendix 11 to Annex 7.

[77] Belize, Bolivia, Cambodia, Equatorial Guinea, Georgia, Honduras, Sierra Leone, and St. Vincent and the Grenadines have each been sanctioned under this resolution; sanctions have subsequently been lifted from Belize, Honduras, and St. Vincent and the Grenadines.

ownership connections, showed that some vessel owners were "laundering" catch made by one vessel flagged to a state under sanction to another of the company's vessels under a "clean" flag.[78]

Clearly, actions focused at the flag State level were not enough to tackle IUU fishing in such a fluid environment. To counter, ICCAT adopted two vessel-based initiatives in 2002. The ICCAT Positive List[79] built upon an existing call for all ICCAT members to submit lists of their vessels over twenty-four meters licensed to fish in the ICCAT Convention Area for stocks under ICCAT's purview. The new recommendation however, was a binding measure that included clear requirements for flag states to maintain control over and a connection to the vessels it submitted to the record — in effect setting up an ICCAT-specific "genuine link." It also instructed ICCAT members to take measures "to prohibit the fishing for, the retaining on board, the transshipment and landing" of tuna from vessels not on the record,[80] and only to validate statistical documents for listed vessels. As the statistical document program had been expanded to include swordfish and bigeye tuna the year before, this effectively meant that, for the three highest-valued ICCAT stocks, no product caught by non-contracting parties to ICCAT could enter trade.

This measure was complemented by the adoption of a Negative List[81] that built upon the IUU list instituted under the UU Catches Resolution. In addition to formalizing the process for compiling the list each year, this recommendation instructed ICCAT members to, *inter alia*, prohibit landings, transshipment, and imports from vessels on the list. Although the Negative List initially includes only large-scale vessels of non-contracting parties, it is intended to be expanded to all vessels and all States in the next year.

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[78] *See* ICCAT, *Report for the Biennial Period 2002-03, Part I (2002) - Vol. 1*, Appendix 1 to Annex 12.

[79] 02-22, "Recommendation by ICCAT Concerning the Establishment of an ICCAT Record of Vessels over 24 Meters Authorized to Operate in the Convention Area."

[80] *Id.* at paragraph 7 a).

[81] 02-23, "Recommendation by ICCAT to Establish a List of Vessels Presumed to Have Carried Out Illegal, Unreported, and Unregulated Fishing Activities in the ICCAT Convention Area."

Finally, at its most recent annual meeting, ICCAT adopted a new, comprehensive measure that replaced the Bluefin Tuna Action Plan, the Swordfish Action Plan, and the UU Catches Resolution.[82] The new resolution sets a single process for enforcing all ICCAT conservation and management measures, replacing the piecemeal approach to using trade as a compliance tool that evolved over the past decade. It applies to both ICCAT members and non-members — members can be identified for not "taking measures or exercising effective control to ensure compliance with ICCAT conservation and management measures by the vessels flying their flag" and non-members are held to a similar standard, based on their obligation not to undermine the effectiveness of ICCAT measures. In so doing, it overcomes one of the biggest weaknesses of the old regime; there was no way to continue sanctions imposed under the former Action Plans once the sanctioned State joined ICCAT.[83] Most significantly, it gives binding effect to non-members' duty to cooperate enunciated in the Fish Stocks Agreement and UNCLOS before it.

2. *Other Tuna Organizations*

Other organizations whose mandate include highly-migratory stocks, such as the Commission for the Conservation of Southern Bluefin Tuna (CCSBT), the Indian Ocean Tuna Commission (IOTC), and the Inter-American Tropical Tuna Commission (IATTC), have taken a similar approach to ICCAT in recent years. All three have adopted some kind of statistical document program[84] coupled with a positive listing scheme

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[82] 03-15, "Resolution by ICCAT Concerning Trade Measures," *available at* http://www.iccat.es/Documents/Recs/Recs2003/2003-15-e.pdf (last visited March 17, 2004).

[83] When Panama became a contracting party in late 1998, ICCAT lifted the sanctions imposed under the Bluefin Tuna Action Plan, which applied only to non-contracting parties. At the time, several ICCAT members expressed serious concerns that Panama had not, in fact, rectified the problems that led to the sanctions. Indeed, in 2001 ICCAT identified Panama under the UU Catches Resolution after noting that a number of fishing vessels deleted from Panama's registry had returned and appeared to be undermining ICCAT's bigeye tuna measures.

[84] *See* CCSBT "Southern Bluefin Tuna Statistical Document Program", Attachment J to the *Report of the Sixth Meeting (Second Part) of the CCSBT, March 2000;* IOTC "Resolution 01/06 Concerning the IOTC Bigeye Tuna Statistical Document Programme"; IATTC C-03-01 "Resolution on IATTC Bigeye Tuna Statistical Document Program."

nearly identical to that of ICCAT for vessels over twenty-four meters in length.[85] The result of this coordination is that, with the exception of those in the Central and Western Pacific Ocean, most bluefin and bigeye tuna fisheries and all major markets are off-limits to states who are not members of the relevant RFMO. When the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean[86] enters into force, this loophole will close.

To date, only CCSBT has also adopted a scheme to impose trade-restrictive measures on non-members whose vessels are identified as catching southern bluefin tuna in a manner that diminishes the effectiveness of the relevant conservation and management measures.[87] Since its adoption in 2000, CCSBT has identified Belize, Cambodia, Honduras, Seychelles, and Equatorial Guinea under the plan, but has not moved to the imposition of trade sanctions against any of these states.

3. *North Atlantic*

The Northwest Atlantic Fisheries Organization (NAFO) was plagued by a serious non-member fishing problem from shortly after its inception in 1979. From the mid-1980s to the early 1990s, more than 30 non-member vessels were spotted in the NAFO Regulatory Area each year; most of these were flagged to open registry States such as Panama, Honduras, and Sierra Leone.[88] This coincided with the organization contemplating drastic cutbacks in key groundfish fisheries like cod as many of the major NAFO stocks began to flounder.

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[85] *See* CCSBT "Resolution Illegal, Unregulated and Unreported Fishing (IUU) and Establishment of a CCSBT Record of Vessels over 24 Meters Authorized to Fish for Southern Bluefin Tuna", Attachment 10 to Appendix 3 of the *Report of the Tenth Meeting of the CCSBT, October 2003*; IOTC "Resolution 02/05 Concerning the Establishment of an IOTC Record of Vessels over 24 Metres Authorised to Operate in the IOTC Area"; IATTC C-03-07 "Resolution on the Establishment of a List of Longline Fishing Vessels over 24 Meters (LSTLFVs) Authorized to Operate in the Eastern Pacific Ocean."

[86] Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, done at Honolulu 5 September 2000.

[87] CCSBT "Action Plan", Attachment I to the *Report of the Sixth Meeting (Second Part) of the CCSBT, March 2000.*

[88] *See Annual Report of the Northwest Atlantic Fisheries Organization*, 1985-93.

In 1990, NAFO established a new body to monitor non-member fishing and identify options to address the problem. The terms of reference for this group included both a call to prevent the re-flagging of NAFO member vessels to fish under the flags of non-contracting parties and to examine means to control imports of fish caught by non-members.[89] That same year, NAFO also adopted a resolution requesting its members to deal directly with non-contracting parties fishing in NAFO waters, both through diplomatic channels and by taking "effective measures to reduce the benefits of any fishing activities" of those States' vessels. The resolution also contemplated the development of a certificate to accompany imports of all NAFO-managed stocks taken by non-contracting parties indicating the fish were not harvested within the NAFO area.[90]

NAFO fisheries tend to be mixed — a certain percentage of bycatch of other species are expected in most cases — and are traded in a wide range of markets. The logistics of implementing a catch certification scheme or trying to control imports in the NAFO context were too complicated. Rather than focus on trade as the primary tool for compliance, as ICCAT had done, NAFO instead built upon the port state control provisions of the Compliance Agreement and the Fish Stocks Agreement. The resulting non-contracting party scheme,[91] adopted in 1997, first set a presumption that any non-contracting party vessel sighted fishing in the NAFO Regulatory Area, or receiving transshipped fish from any such vessel, is undermining the effectiveness of NAFO conservation and management measures. The sighting information is then disseminated quickly to all NAFO members and to the flag state, and if the vessel enters the port of any NAFO member it is subject to port inspection and barred from landing or transshipping its fish unless it can demonstrate it was not caught in the Regulatory Area.

Implementation of the Scheme, coupled with a continuation of the diplomatic contacts between NAFO members and

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[89] *See* NAFO Proposal 3/90, "Proposal for Establishment of the Standing Committee on Fishing Activity of Non-Contracting Parties on the Regulatory Area (STACFAC)."

[90] 1/90, "Resolution of the General Council of the Northwest Atlantic Fisheries Organization on non-NAFO Fishing Activities, adopted by the General Council on 14 September 1990."

[91] "Scheme to Promote Compliance by Non-Contracting Party Vessels with the Conservation and Enforcement Measures Established by NAFO," NAFO/GC Doc. 97/6.

the flag states of non-contracting party vessels, led to a significant drop-off in sightings. In 2000 and 2001, no non-member vessels at all were seen fishing in the Regulatory Area. But in 2002, sightings resumed, this time in a newly-developed oceanic redfish fishery shared by the North-East Atlantic Fisheries Commission (NEAFC).[92] NEAFC had adopted an identical non-contracting party scheme in 1999,[93] and, as the same vessels were seen fishing in both areas, NAFO and NEAFC agreed to share sighting information under the schemes.

Concern over the apparent resurgence of non-contracting party fishing revived an interest in implementing additional trade restrictive measures in NAFO and NEAFC. While NAFO considered such a proposal at its 2003 meeting and will work on it further in 2004,[94] NEAFC adopted a revised non-contracting party scheme at its annual meeting in November 2003.[95] This new measure, which replaces the former scheme, maintains its predecessor's presumption applied to sighted non-member vessels and prohibitions on landings and transshipments from those vessels following a port inspection. All sighted vessels are now also placed on an "IUU vessel list" to be publicized on the NEAFC website, and NEAFC parties are to, *inter alia*, prohibit imports of any fish, whether or not caught under NEAFC's jurisdiction, from vessels on the list. The scheme takes the final step of providing for trade restrictive measures on the flag states of listed vessels if they do not rectify the fishing activities of their vessels.

4. CCAMLR

The fisheries managed by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) are among the hardest to control and the most tempting for IUU fishers to exploit. The size and isolation of the CCAMLR convention area — encompassing vast areas of the southern ocean

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[92] *See NAFO Meeting Proceedings 2002*, Part III, Report of the Standing Committee on Fishing Activity of Non-Contracting Parties on the Regulatory Area, 343 - 347.

[93] "Scheme to Promote Compliance by Non-Contracting Party Vessels with Recommendations Established by NEAFC," adopted November 1998.

[94] *See* NAFO, *Report of the General Council, 25th Annual Meeting, 15 - 19 September 2003*, NAFO/GC Doc. 03/3, 70 and Annex 6. (Advance copy, on file with the author)

[95] NEAFC Doc. AM 2003/34, in force 1 January 2004. (On file with the author)

— makes traditional enforcement impossible. The chief fish stocks under CCAMLR's purview, Patagonian toothfish and Antarctic toothfish, only began being widely commercially exploited in the early 1990s,[96] but by 1995 the unreported catch was estimated to be at least equal to if not more than legal catches.[97] Once again, a major source of the IUU fishing was flag of convenience vessels from states such as Panama and Belize, and in particular vessels either owned by firms in CCAMLR member states but flagged elsewhere or reflagged to non-member states to avoid compliance with CCAMLR measures.[98] In this instance there were also significant numbers of vessels from CCAMLR member countries like Russia and Uruguay fishing illegally.[99]

Two years later, CCAMLR members called for additional action to improve compliance with conservation and management measures by both members and non-members. The first measures focused on strengthening the ability of members to control their own fleets,[100] and included mandatory licensing[101] and mandatory use of satellite tracking systems[102] on all member vessels fishing in the CCAMLR zone. But CCAMLR also adopted a non-contracting party scheme.[103] Like the NAFO Scheme adopted the same year, this measure established a presumption that non-contracting party vessels sighted fishing in the CCAMLR convention area were undermining CCAMLR conservation and management measures, required a port inspection of any sighted vessels, and allowed members to prohibit landings or transshipments of toothfish found on board.

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[96] Mary Lack and Glenn Sant, 2001, "Patagonian Toothfish: Are Conservation and Trade Measures Working?" *TRAFFIC Bulletin Vol. 19 No. 1*, 3.

[97] CCAMLR, 1995, *Report of the Fourteenth Meeting of the Commission*, 11.

[98] Richard Herr, "The International Regulation on Patagonian Toothfish: CCAMLR and High Seas Management," 316 (Olav Schram Stokke, ed. 2001).

[99] *See, e.g.*. CCAMLR, 2002, *Report of the Twenty-First Meeting of the Commission*, Annex 5, Report of the Standing Committee on Observation and Inspection.

[100] Herr, *supra* note 98, at note 53.

[101] Conservation Measure 10-02 (2001) "Licensing and Inspection Obligations of Contracting Parties with regard to their Flag Vessels Operating in the Convention Area," originally adopted in 1997 as Conservation Measure 119/XVI.

[102] Conservation Measure 10-04 (2002) "Automated Satellite-Linked Vessel Monitoring Systems (VMS)", originally adopted in 1997 as Resolution 12/XVI.

[103] Conservation Measure 10-07 (2002) "Scheme to Promote Compliance by Non-Contracting Party Vessels with CCAMLR Conservation Measures," originally adopted in 1997 as Conservation Measure 118/XVI.

Estimates of unreported catch began to fall after the implementation of these measures,[104] but CCAMLR's most effective innovation to combat IUU fishing was the introduction of its Catch Documentation Scheme (hereinafter "CDS") in 2000.[105] Unlike the tuna statistical documents adopted in ICCAT and elsewhere, which only attached to a product once it entered trade, the CDS covers all harvests of toothfish from CCAMLR waters from the moment it comes on board. Vessels must fill in a catch document for every harvest of toothfish to be landed or transshipped and report the particulars of its trip and catches to the flag State. The flag State then verifies if each harvest is consistent with the vessel's fishing authorization; only shipments accompanied by a catch document thus confirmed can be landed, transshipped or imported into member States. The CDS, like the tuna tracking programs, serves to close the major markets to illegally-caught fish, but it also affords members more effective control of landings and, more importantly, transshipments from their own vessels.

In recent years, CCAMLR has also strengthened its measures that deal with problem vessels. First, the non-contracting party scheme was modified in 2002 to create an IUU list containing the vessels sighted or denied landing or transshipment under the scheme. Second, CCAMLR adopted a new scheme the same year that established an IUU list of contracting party vessels as well.[106] In both instances, CCAMLR members may now prohibit imports, as well as landings and transshipments, from listed vessels and further may agree to impose trade sanctions on the flag states if they fail to rectify their vessels' illegal fishing activities. Notably, the language of the new measures, which build upon the original ICCAT model, is virtually identical to that just adopted in NEAFC and under consideration in NAFO.

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[104] TRAFFIC Bulletin, *supra* note 96, 7.

[105] Conservation Measure 10-05 (2002) "Catch Documentation Scheme for *Dissostichus* spp.," originally adopted in 1999 as Conservation Measure 170/XVIII.

[106] Conservation Measure 10-06 (2002), "Scheme to Promote Compliance by Contracting Party Vessels with CCAMLR Conservation Measures."

V. NATIONAL EFFORTS

Recognizing that a large number of Japan- and Taiwan-built longline vessels had reflagged in the 1990's, Japan undertook to facilitate a program with Taiwan whereby these vessels were either rolled back into Taiwan registry or scrapped. With the backing of its government, a Japanese industry group called the Organization for the Promotion of Responsible Tuna Fisheries (hereinafter "OPRT"), concluded an agreement with Taiwan's FOC Fishing Vessels Association to scrap up to sixty-two Japanese-built former flag of convenience longliners by the end of 2002 and re-register sixty-seven longliners to Taiwan by the end of 2005.[107] As part of the arrangement, Taiwan agreed to absorb the re-registered vessels without increasing the total number of its tuna longline vessels currently in operation. The program got off to a slow start, but as of November 2003, Japan had scrapped forty-three former flag of convenience vessels and Taiwan had accepted forty-seven back to its registry. In addition, Japan negotiated a Cooperative Management Framework with Vanuatu and Seychelles to take an additional sixty-nine former flag of convenience longline vessels onto their registries, where they are now bound to comply with relevant conservation and management measures.[108]

Following the imposition of trade sanctions by ICCAT members, both Belize and St. Vincent and the Grenadines enacted a series of regulatory and legislative changes to gain greater control over their respective registries. By October 2002, Belize could report to ICCAT that it had deregistered 513 fishing vessels in the previous year[109] and had created a new high seas fisheries licensing regime[110] modeled on the principles of the Compliance Agreement and IPOA-IUU. The new law established a fisheries administration to work with Belize's registration agency to administer the granting of fishing licenses, maintain catch reporting, and oversee enforcement. All

[107] OPRT Press Release 2001/06/01 (on file with the author).

[108] "Report on the Progress in the Measures to Eliminate Illegal, Unreported and Unregulated Large-Scale Tuna Longline Fishing Vessels" Submitted by Japan to the 18th Regular Meeting of ICCAT, November 2003, ICCAT Working Doc. No. PWG-051 (on file with the author).

[109] Submission by the Observer from Belize to the PWG, Appendix 3 to Annex 11 of ICCAT, *Report for the Biennial Period 2002-03, Part I (2002) - Vol 1.*

[110] *See* Belize High Seas Fishing Act, 31 January 2003.

vessels fishing on the high seas must be authorized and, as of October 2003, must complete and submit detailed catch and effort reports. In 2003 sightings of Belizean vessels, fishing illegally showed a dramatic drop across the board,[111] and ICCAT agreed to allow sanctions on Belize to lift as of January 1, 2004.[112]

St. Vincent's efforts were similar.[113] In 2001, it ceased registering any new high sea fishing vessels and began to develop a comprehensive fisheries management administration. St. Vincent's revised legislation and subsequent regulations[114] require the issuance of a high seas fishing authorization, mandatory satellite monitoring, observer coverage, and daily catch reporting. It is also developing port inspection schemes with agents in Trinidad and Tobago and Brazil, where the majority of St. Vincent's high seas fleet lands its catch, although St. Vincent hopes to have all of its vessels landing in its own territory when a port development project in Kingstown is complete. Supported by a ninety percent reduction in albacore tuna catches in 2002, ICCAT agreed to lift sanctions as of January 2004.[115]

Each state made statements at the time that ICCAT agreed to lift their respective sanctions committing to prevent its vessels from targeting ICCAT stocks for which it had no quota and to avoid registering and licensing IUU vessels.[116] St. Vincent's statement contained a specific undertaking to give "serious consideration to reduce fishing vessels owned by non-CARICOM nationals," in line with its intention to eventually nationalize its fleet and have its fishing vessels land in its ter-

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[111] *See e.g.*, two sighted by NAFO, three on ICCAT's IUU list, and none on CCAMLR's.

[112] 02-16, "Recommendation by ICCAT Concerning the Importation of Atlantic Bluefin Tuna, Atlantic Swordfish, and Atlantic Bluefin Tuna and their Products from Belize."

[113] The information in this paragraph comes from statements of St. Vincent and the Grenadines to the 2001 to 2003 Annual Meetings of ICCAT and personal communications with the author.

[114] Merchant Shipping Act, as amended, July 2001, High Seas Fishing Act, September 2001, and High Seas Fishing Regulations, published 4 November 2003.

[115] 02-20, "Recommendation by ICCAT Concerning the Trade Sanction against St. Vincent and the Grenadines."

[116] *See* "Statement of Belize," ICCAT 2003 Working Doc. PWG-134, and "Statement of St. Vincent and the Grenadines," ICCAT 2003 Working Doc. PWG-135 (on file with the author).

ritory. Belize on the other hand, continues to maintain an open registry for fishing vessels, but it is attempting to impose monitoring and control on these vessels from a distance through the use of satellite monitoring and port inspections conducted by contracted agents.[117]

VI. GLOBAL FOLLOW-UP

The IPOA-IUU was adopted in June 2001 as a comprehensive "toolbox" of measures that states could take, both individually and collectively, to address the problem of IUU fishing. Among its provisions is a call for States to develop their own national plans of action to achieve the objectives of the IPOA-IUU and for FAO to biennially evaluate the progress towards its implementation. Since then, FAO has hosted two expert consultations aimed at exploring more effective implementation of elements of the IPOA-IUU; one looked at strengthening port State control[118] and the other addressed fishing by open registries.[119] The former initiative would open a new avenue for combating IUU fishing through regional port state Memoranda of Understanding setting out conditions of entry to ports or denying access to ports by foreign fishing vessels that have engaged in, or supported, IUU fishing. At its Twenty-fifth session in February 2003, FAO's Committee on Fisheries called for additional work on these issues and for convening a technical consultation to review overall progress and promote the full implementation of the IPOA-IUU; the latter session will be held in June 2004.[120]

Outside the auspices of the FAO, other organizations have initiatives underway that could provide innovative ways to tackle IUU fishing in general, and the problems related to flag of convenience fishing in particular. The Organization for Eco-

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[117] Per presentation by the observer from Belize to informal sessions of the PWG at the 2003 ICCAT meeting, November 2003.

[118] Report of the Expert Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing - Rome, 4-6 November 2002, *FAO Fisheries Report No. 692*.

[119] Report of the Expert Consultation on Fishing Vessels Operating Under Open Registries and their Impact on Illegal, Unreported, and Unregulated Fishing, Miami, Fl. Sep. 23-25, 2003, *FAO Fisheries Report No. 722*.

[120] *See* Report of the Twenty-fifth session of the Committee on Fisheries, Rome, 24–28 February 2003, *FAO Fisheries Report No. 702*, para. 23.

nomic Cooperation and Development (hereinafter "OECD") is in the midst of a multi-year project looking at the environmental, economic, and social issues and effects of IUU/flag of convenience fishing. This project will build upon earlier work that the OECD has done on the roles of subsidies and market dynamics in sustainable fisheries[121] and will pay particular attention to possible economic tools, including OECD instruments governing international investment and multinational commercial enterprises, to address the complex business connections that form the backbone of the flag of convenience fishing fleet.[122] The OECD Committee on Fisheries will host a workshop to discuss these issues in conjunction with its 93rd session in April 2004.

VII. CONCLUSIONS

The continued prevalence of fishing vessels re-flagging to avoid compliance with international conservation and management measures, and the growing numbers of fishing vessels flying flags of convenience, has resuscitated interest in examining the "genuine link" requirement. Both the set of recommendations emerging from the 2003 Report on the United Nations Open-Ended Informal Consultative Process on Oceans and Law of the Sea (hereinafter "UNICPOLOS") and the text of the latest fisheries resolution from the UN General Assembly invite the "International Maritime Organization [IMO] and other relevant competent international organizations to study, examine and clarify the role of the "genuine link" in relation to the duty of flag states to exercise effective control over ships flying their flag, including fishing vessels."[123] FAO and IMO have looked at these issues already; a 2000 joint working group

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[121] *See* OECD, 2003, *Liberalising Fisheries Markets: Scope and Effects* and OECD, 2002, *Transition to Responsible Fisheries: Economic and Policy Implications*.

[122] *See*, in particular, Ursula Wynhoven, 2003, *OECD Instruments and IUU Fishing*, OECD Doc. AGR/FI(2003)13/PART3 (on file with the author).

[123] UN General Assembly draft resolution on Oceans and the law of the sea: sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments, 17 Nov. 2003 (UN Doc. A/58/L.18), para 22. See also United Nations, *Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea*, 26 June 2003 (UN Doc. A/58/95), para. 18 (b).

meeting yielded a series of items that eventually were rolled into the IPOA-IUU, though they did not result in any new insight into the specific meaning of the "genuine link."[124]

In some ways, however, any elaboration of global instruments in this regard is becoming increasingly irrelevant. As noted above, recent measures adopted within RFMOs to address IUU fishing are virtually identical from one organization to the next. Almost all bluefin and bigeye tuna fisheries are covered (or will be covered) by very similar statistical document programs that are implemented through positive vessel listing schemes. And most RFMOs with responsibility for straddling and highly migratory fish stocks have implemented similar provisions that allow the imposition of trade sanctions on both the vessels on an agreed IUU list and, eventually, their flag States.[125] Although, as FAO notes, RFMOs are not supranational entities,[126] their scope of application has proven to be broader than the global treaties. Many states are members or participants in these bodies who have yet to become party to the Compliance Agreement or Fish Stocks Agreement — yet even these non-parties are now effectively bound by the provisions of those treaties as implemented through the RFMOs. Certification programs such as the tuna statistical documents and CCAMLR's CDS extend the influence of RFMOs to all participants in the respective fisheries, member or not.[127]

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[124] "Report of the Joint FAO/IMO Ad Hoc Working Group on Illegal, Unreported and Unregulated Fishing and Related Matters", Rome, 9 - 11 October 2000, *FAO Fisheries Report No. 937*.

[125] In all cases, the measures adopted within RFMOs instruct their contracting parties to adopt trade restrictive measures consist with domestic law and international obligations. This allows each State to make the determination, before imposing such sanctions, whether they are consistent with the principles of the 1994 General Agreement on Tariffs and Trade (33 ILM 1153) and the World Trade Organization (WTO). To date, no WTO challenges have been raised to sanctions imposed under ICCAT's trade measures. The WTO Appellate Body in 2001 upheld that, under Article XX (g) of the GATT trade measures can legitimately be used to support conservation goals, as long as they are non-discriminatory and applied transparently. *See Report of the Appellate Body: United States - Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of the DSU by Malaysia, AB-2001-4*, 22 Oct. 2001, WT/DS58/AB/RW.

[126] FAO, Progress Report to the Thirty-second Session on the Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated (IUU) Fishing, FAO Doc. C 2003/21, 2.

[127] As an example of the potential for RFMO measures to have even broader application, the 12th Conference of the Parties of CITES adopted a recommendation in 2002 that all 164 Parties adopt the CCAMLR CDS "and implement requirements for

Paradoxically, with the entry into force of the Compliance Agreement and Fish Stocks Agreement, there will likely be an even greater shift towards seeking solutions to global fisheries problems through RFMOs. As a first step in an effort to establish an integrated monitoring and control regime, ICCAT adopted measures at its 2003 Annual Meeting laying out a binding set of flag State duties.[128] The language tracks closely with that in Article III of the Compliance Agreement and the Flag State Duties section of the IPOA-IUU — as a result, even ICCAT members not party to the Compliance Agreement are now bound by its key flag state requirements. This is not just a symbolic requirement; the new comprehensive trade measures scheme adopted at the same meeting allows ICCAT to enforce these duties, as any compliance measure, through trade sanctions if necessary.[129] Further, with the deposit of instruments of ratification of the Fish Stocks Agreement by the European Community and all fifteen current member states at the end of 2003, the number of states overall, and major fishing states in particular, bound by that treaty's mutual boarding and inspection and other compliance provisions is now significant.[130] Still, it remains that almost none of the most notorious flag of convenience countries have ratified either instrument, though Belize for one has expressed an intention to do so.[131]

With its calls for action by individual states, RFMOs, and the international community as a whole, the IPOA-IUU points the way forward to gain control over flag of convenience fishing. If states implement the elements of the plan regarding

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verification in all cases where specimens of these species are introduced into or exported from or transit through the territory under their jurisdiction." See Resolution Conf 12.4, "Cooperation between CITES and the Commission for the Conservation of Antarctic Marine Living Resources regarding trade in toothfish."

[128] 03-12, "Recommendation by ICCAT Concerning the Duties of Contracting Parties and Cooperating Non-Contracting Parties, Entities, or Fishing Entities in Relation to their Vessels Fishing in the ICCAT Convention Area," *available at* http://www.iccat.es/Documents/Recs/Recs2003/2003-12-e.pdf (last visited March 17, 2004).

[129] *See supra* note 82.

[130] As of December 31, 2003, fifty States and the European Community have ratified or acceded to the Fish Stocks Agreement. This number will grow to at least sixty following the expansion of the EC in 2004 by ten more member States, and their subsequent accession to the Agreement. *See* United Nations Division for Ocean Affairs and Law of the Sea, *available at* http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.org (last visited March 17, 2004).

[131] *Supra* note 109. Belize is a signatory to the Fish Stocks Agreement.

control over their vessels and (perhaps more importantly) their markets and their ports, and RFMOs give effect to the call in the Fish Stocks Agreement to take necessary measures to ensure cooperation in the conservation and management of shared fisheries resources, IUU vessels will find it harder to evade agreed rules no matter where they are flagged. A key element will be information exchange, both through the FAO as established in the Compliance Agreement and through coordinated enforcement efforts like the MCS Network.[132] As one author notes, "we will never be able to assess the effectiveness of our attempts to eliminate IUU fishing unless we have a global IUU monitoring program that can tell us whether what we are doing is having any effect."[133]

[132] The International Monitoring, Control and Surveillance Network for Fisheries-Related Activities (MCS Network) is a network of enforcement professionals who agree to cooperate and coordinate in the direct exchange of fisheries MCS information and experiences. It is designed to support countries in satisfying their obligations under international agreements as well as in carrying out domestic enforcement, *available at* http://www.imcsnet.org (last visited March 17, 2004).

[133] David J. Agnew & Colin T. Barnes, *The Economic and Social Effects of IUU/FOC Fishing*, Background paper for OECD Workshop on Illegal, Unreported and Unregulated (IUU)/Flag of Convenience (FOC) Fishing Activities, 19 - 20 Apr. 2004, OECD Doc. AGR/FI/RD (2003)7, 11 (on file with author).