

CONSOLIDATED LIST OF LEGAL, SCIENCE, ECONOMICS AND TRADE, AND ENFORCEMENT ISSUES FOR INITIAL CONSIDERATION BY THE HIGH SEAS TASK FORCE

I. INTRODUCTORY

A. Background

1. As a direct result of a Ministerial meeting convened by the Round Table on Sustainable Development at the OECD in June 2003, a ministerially-led task force has been established to deal with the problem of Illegal, Unreported and Unregulated (IUU) Fishing on the High Seas. The High Seas Task Force was launched by its Chair, Elliot Morley MP (UK Environment Minister), in December 2003. The goal is to prepare a report and action plan of practical and achievable actions that all members will commit to implement (see www.high-seas.org for further information).
2. Initial ministerial membership of the Task Force, in addition to Minister Morley, includes fisheries ministers from Australia, Canada, Chile, Namibia and New Zealand. Other high-level membership includes the chief executives of leading international NGOs and responsible industry including: the Earth Institute, WWF International, IUCN, the Marine Stewardship Council (MSC) and the Coalition of Legal Toothfish Operators (COLTO).
3. The Task Force is being hosted by the Round Table on Sustainable Development which in turn is hosted by the OECD at its headquarters in Paris. It has a small Secretariat (three staff only) who will coordinate activities and draft the report. There is no shortage of material on the IUU problem and what needs to be done to fix it. However, within these varying assessments there has not been a detailed analysis of key outcomes, their potential impact, the likelihood of their being implemented and any potential flow-on or spill-over effects. This is what the Task Force will be attempting to do.
4. The Secretariat needs to be able to ensure that its conclusions and recommendations are robust and to this end has established four small peer review groups covering legal, scientific, economics and trade and management/enforcement issues. Each of these groups is formed of approximately six leading international experts in their respective fields. The idea is that the working groups will act as peer review groups to critique the analyses and conclusions proposed for consideration by the Task Force and as advisory bodies on specific aspects of the work of the Task Force.

B. Scope

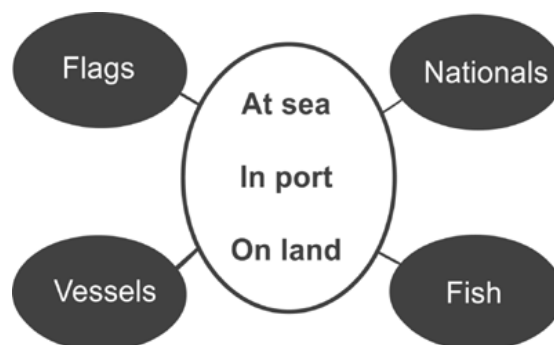
5. For the purposes of its work, the Task Force has provisionally chosen to define IUU fishing as:
 - Fishing in violation of international laws and obligations;
 - Fishing of high seas fish stocks where there are no formal management arrangements in place but which is in contravention of the broader responsibilities of States under the law of the sea to conserve and manage the marine living resources of the high seas;

- Fishing conducted by vessels without nationality, or by those flying the flag of a State not party to a relevant regional fishery management organization (RFMO), or by a fishing entity, in a manner inconsistent with, or which contravenes, the conservation and management measures adopted by the RFMO or broader international obligations;
- Fishing conducted by nationals of or vessels flying the flag of States that are parties to a relevant RFMO in contravention of the conservation and management measures adopted by that organization or relevant provisions of the applicable international law;
- Fishing, including fishing within the area of an RFMO, which has not been reported, or has been misreported, to the relevant national/international authorities, in contravention of international laws and regulations;

6. Inevitably, what happens on the high seas affects the territorial waters and exclusive economic zones (EEZs) of coastal states. So, while the Task Force's principal focus is on the high seas, it will also concern itself with IUU fishing in EEZs to the extent that this represents a continuous illegal activity.

7. There is a complex and evolving web of binding and non-binding international instruments aimed at IUU fishing. For the most part these have been developed over the past 20 years, and are built on the foundations established by the 1982 Law of the Sea Convention (LOSC). Chief amongst these are the 1995 UN Fish Stocks Agreement (UNFSA), the FAO Code of Conduct for Responsible Fisheries (including the FAO Compliance Agreement) and the FAO International Plan of Action to Prevent, Deter and Eliminate IUU Fishing (IPOA-IUU). What these instruments have in common is that they seek to elaborate upon (and in some cases qualify) the relevant provisions of the LOSC that deal with the conservation and management of high seas living resources. The result is a patchwork quilt of measures with differing geographical and legal reach and different levels of participation by States. While the effect of these instruments has undoubtedly been to change the nature and the location of grossly unsustainable high seas fishing, they have not stopped it. Indeed, the correlation between the measures adopted and their impact on the activity they are intended to reduce is often weak. Each new intervention potentially moves the problem somewhere else. One key problem is what appears to be a lack of willingness on the part of some States to participate in multilateral arrangements and secondly to participate effectively in them (which begs the questions whether there is any way to ensure that States have a common view of their responsibilities so that agreed actions are implemented and desired outcomes achieved).

8. For the purposes of the Task Force it is suggested that an appropriate diagnostic and analytical matrix may be to approach the problem from the perspective of each of the major 'actors' (flags, vessels, nationals and fish) in relation to the location where activities take place (at sea, on land, in port).



This should enable identification of cross-linkages between the various stages of or activities comprising the IUU fishing operation and opportunities for the application of tighter or more effective control points which will address the causes of IUU fishing rather than just the symptoms.

II. IDENTIFICATION OF KEY ISSUES

9. In order to inform future discussions by each of the working groups and the secretariat, the present document presents a list of subjects and issues that may be relevant for consideration by the Task Force. This list is not necessarily exhaustive and does not preclude later consideration of matters not included in this document. The objective at this stage is to ensure that we have correctly identified the key drivers which facilitate IUU activity so that we can then determine what actions can be recommended to modify how these drivers can be modified in order to minimize IUU operations.

A: Legal

10. Gudmundur Eiriksson (Iceland) has agreed to lead the working group which will address international law issues. With the above background in mind, the legal working group needs to focus on identifying the gaps in the current arrangements and identifying possible solutions that would fill these gaps and have a measurable impact on the problem of IUU fishing. Many of these gaps are well known and are summarized in, for example, the papers prepared for the OECD Workshop on IUU Fishing. Others may also be revealed in an analysis of the various prompt release proceedings that have taken place before the International Tribunal for the Law of the Sea.

11. Applying the principles set out in the various international legal instruments, we could therefore consider the legal issues relating to IUU fishing operations as they relate in turn to:

- flag States and vessels;
- the powers of port states;
- the market in IUU fish;
- measures directed at nationals;
- RFMOs;
- high seas governance.

12. The following is a highly summarized list of the key issues and questions that arise under each of the above headings.

1. Issues relating to flag States and vessels

13. One of the defining characteristics of IUU fishing is that those controlling the operation frequently exploit the opportunity that is legitimately available to them under existing international law to flag their vessels in States where the conditions for registration are suitably flexible (typified by a one-vessel holding company with nominee shareholders). Whilst it may be the case that attempting to define the genuine link under the LOSC is probably not a point of departure for a number of well-established reasons (the failure of the Registration of Ships Convention, the fact that fishing vessels are a small minority of global tonnage, the reluctance of IMO to address the genuine link) it is clearly essential to find ways to strengthen links between flags and vessel owners and reduce the incentives for States to accept IUU fishing vessels on to their registers, thus making it more difficult for IUU vessels to operate?

14. Some specific questions worthy of investigation may be:

- Is it possible, within the existing constraints of international law and the law of international commerce, to develop measures relating exclusively to fishing vessels aimed at promoting transparency and deterring anonymity in shipping registers? (e.g. the measures proposed by the OECD Maritime Transport Committee and Financial Action Task Force).
- How can we make it more difficult for IUU vessels to operate, in terms of insurance, port access, crew etc.?

- In particular, can we make vessels less attractive to IUU operators? A critical issue seems to be to ensure that RFMOs (as well as port and coastal States) have access to more information about fishing vessels and their operators than that traditionally contained in shipping registers. Even though not a requirement of vessel registration, is there any reason why, as a condition of entry to a fishing vessel register RFMOs should not demand more transparency on beneficial ownership, corporate structures, location of enterprise, vessel history, rules relating to deregistration).
- Can we clearly define what makes a responsible flag State and can we apply measures designed to expose “irresponsible flag States”?
- Has the FAO Compliance Agreement achieved its objectives? If not, why not? How could it be strengthened?
- Have the UNFSA provisions on high seas boarding and inspection worked in practice? How could these be improved? Is there scope for joint enforcement regimes in specific areas? (e.g. Niue Treaty, U.S.-China MOU, Southern Ocean arrangements)?
- If there were to be a watertight system of global registration for fishing vessels, could it be argued that lack of registration creates a prima facie right for other States to take action against an unregistered vessel on the high seas?

2. Issues relating to port States

15. Despite some significant practical limitations (e.g. IUU operators rapidly shifting operations from one port to another or transshipping at sea) it would appear that there is scope for widening the scope of port State jurisdiction as a means of fighting IUU operations. A coordinated approach to port State control, combined with other measures such as catch documentation schemes and controls over transshipment at sea, may act as a further deterrent to IUU operators by increasing the cost of their operations (e.g. by forcing them to seek ever more remote and hence more expensive ports) and may therefore be a cost-effective weapon.

16. The first task may be to define the current scope of port State jurisdiction, based on the provisions of the relevant international instruments and State practice, which has clearly evolved since UNFSA. Some specific questions worthy of investigation may be:

- Can we define the concept of a “responsible port State”?
- What forms of cooperation could HSTF members develop with responsible port States?
- What role can port States play in making measures adopted by RFMOs more effective?
- Is there scope for increased coordination between port States? Might this be reflected in MOUs adopted at the regional or global level?
- Is there scope for an international convention on the rights and duties of port States with respect to fisheries?
- Does the U.S. Lacey Act and similar legislation with extra-territorial effect offer a potential model for adoption by other States (relevant also to market controls and nationals)?

3. Issues relating to the market in IUU fish

17. The legal working group may also wish to examine the questions under paragraphs 31 to 33 (below) relating to trade measures and in particular the use of catch documentation schemes and CITES.

4. Issues relating to nationals

18. Fishing is conducted by individuals and therefore a potential avenue for increased control may be found in requiring governments to take greater responsibility for the activities of their own nationals within the context of regional regulation of high seas fisheries, irrespective of the flag carried by the fishing vessel(s) involved. Some specific questions worthy of investigation may be:

- How could we exert greater control over nationals to deter involvement in IUU fishing?¹
- How can we improve our ability to identify our own nationals who own or control vessels involved in IUU fishing (including through RFMOs)?
- What changes need to be made to national and international legal regimes to ensure that they can accommodate changing technology (e.g. VMS) and facilitate successful prosecutions? Is there merit in a central enforcement database relating to vessels and nationals?
- Should members of RFMOs commit to tighter control over nationals, e.g. prohibiting their nationals from high seas fishing within the area of jurisdiction of that RFMO unless using vessels flagged to the State of which they are nationals?
- Should States make it illegal for their nationals (including corporate entities) to engage in IUU fishing on the high seas? Should corporate entities be required to declare publicly that they do not engage in or support IUU fishing?
- Could we conceive of a system of liability for fishing vessel owners for the activities of their vessels similar to the system for liability of tanker owners under the International Oil Pollution Compensation Fund?

5. Issues relating to RFMOs

19. The LOSC makes it clear that, in respect of the high seas, individual States are the actors which are required to cooperate. The progressive step that was introduced by UNFSA (article 10) was to make it clear that the primary vehicle through which international cooperation for conservation and management will be achieved is the RFMO and to list comprehensively, in a legally-binding form, the matters upon which States are expected to be able to agree in order to achieve sustainable management of fisheries. By implication therefore, RFMOs used as the vehicle for such cooperation need to be structured in such a manner that their institutional arrangements are capable of delivering an environment which enables member States to agree on the matters set out in article 10.

20. This section could be further broken down into structural and institutional issues and implementation issues. Some specific questions worthy of investigation may be:

- Do existing RFMOs with high seas coverage presently live up to UNFSA standards? What can we do to improve them?

¹ See also para. 30 below.

- Is there a need to look at decision-making mechanisms within RFMOs to ensure that they do not act as a bar to the adoption of measures to prevent IUU?
- Should States with a larger economic and conservation interests in a particular high seas stock have more say in its management?
- How to maximise the participation of all States with a “real interest” in a particular high seas stock. How to differentiate “interest” from longer-term allocation? Is there scope for alternative allocation mechanisms – high seas ITQs, user rights?
- What existing or new methods of dispute resolution may be better used to resolve disputes over allocations within RFMOs or to promote more effective decision-making?
- Is there scope for further development and crystallization with respect to the problem of non-Parties to RFMOs, (e.g. the “cooperating non-party” approach pursued by CCAMLR and other RFMOs)?

20. At present there are a number of sometimes overlapping management arrangements for different species/areas. RFMOs appear to work in relative isolation from one another with sometimes different management objectives (optimal utilization v’s stock conservation), different standards (vessel registers, black/white lists or VMS) and different governance arrangements (decision making – consensus or otherwise). To what extent is it possible to harmonize these arrangements so as to avoid duplication and overlap. In what areas is there scope for increased cooperation and coordination between RFMOs? How could this be achieved?²

6. Broader issues relating to high seas governance

21. The scope of IUU fishing also includes fishing of high seas fish stocks where there are no formal management arrangements in place but which is in contravention of the broader responsibilities of States under the law of the sea. In this respect, the Convention (and the UNFSA) establishes a general obligation on all States to cooperate in the conservation and management of the living resources of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, have an obligation to enter into negotiations with a view to taking the measures necessary for the conservation of the living resources. To this end, they are required, as appropriate, to cooperate to establish subregional and regional fisheries organizations. In addition, all States have the duty to take, or to cooperate with other States in taking, measures necessary for the compliance by their respective nationals with the regime for conservation and management of the living resources of the high seas (articles 117 and 118).

22. In recent years, the problem of fishing on seamounts and other deep-sea areas where there are discrete high seas stocks (and a lack of international regulation) has also become a pressing concern.

23. Some specific questions worthy of investigation may be:

- How to bring currently unmanaged high seas fisheries / areas under regional regulation?
- Is there a need to take the initiative to establish new RFMOs for dealing with discrete high seas fisheries?
- Does the UNFSA framework for high seas fisheries management meet expectations? How would we change it?

² See also para. 29 below.

- Have we exhausted the LOSC arsenal? What advances in LOS may be foreseen?
 - Developments in ITLOS, e.g. on size of bond
 - Port State norms?

24. A key emerging concern has to be how to accommodate the interests of developing countries (or perhaps new entrants in general) that wish to exercise their right to participate in high seas fishing. In order to persuade developing countries to commit to the objective of minimizing IUU fishing on the high seas, the Task Force will need to be able to specify what action items it can commit to, individually or collectively, as incentives to developing countries.

- How to provide the incentives to ensure that developing countries can participate legitimately in high seas fisheries?
- What are the special needs of developing countries when it comes to high seas IUU? How do we separate special needs from allocation issues?
- How can we better meet the requirements of Part VII UNFSA (developing country requirements)?
- How to improve the capacity of developing countries to fulfil their role in managing high seas fisheries?

B: Science

25. Dr Keith Sainsbury (CSIRO, Australia), has agreed to lead the working group which will address science and ecological issues. The working group will need to address the following key issues:

- Broadly, what fleets and gear types are used in which areas, when and for what targets? Essentially who is doing the IUU fishing and how does it relate to legitimate fishing?
- What are the ecological and fishery consequences of failure to manage the IUU portion of the catch on the high seas ?
- What is the relationship between IUU fishing on the high seas and fishing (legal or otherwise) within EEZs? What are the potential ecological and fishery consequences of high seas IUU on fishing in waters under national jurisdiction?
- What existing approaches are being used to characterize IUU activities and especially to estimate IUU catch and effort for input into scientific assessment of stocks and provision of advice to management? What are the ecological and fishery consequences of the present level of understanding and ability to estimate the level of IUU activity, catch and effort? What could be done to either improve existing approaches or develop new ones to characterize IUU and estimate IUU catch and effort? What is international good practice in measuring IUU activities and providing scientific management advice where IUU activities are at a significant level?
- Is there a need for better science? How could this be achieved?
- What are the critical gaps in the present state of the scientific knowledge necessary for proper management ?
 - What data and/or research is needed to fill these gaps and how would these requirements be prioritized?

- If these gaps could not be filled immediately (which is likely), are there approaches that could be used in the short to medium term to gauge the relative impact of IUU fishing?
- What combination of institutions is optimum for undertaking research functions? Would a centralized global scientific agency for the high seas be a feasible objective? What would be the purpose of such an organization; should it be focused solely on research to understand the oceans or should it have a role in advising regional fishery management organizations? If it provides input to regional fisheries management organizations, what are the links with governance issues that also need to be addressed?
- Assuming better management of high seas fishing (including minimizing IUU fishing), what is a realistic assessment of the potential gains from improved science knowledge to resource management and, more broadly, to scientific understanding of the oceans as a whole?
- How might one measure those gains in a meaningful way ? What alternative indicators may the working group wish to consider using?

C. Economics and Trade, and Enforcement

26. Dr Geoffrey Heal (Earth Institute, Columbia University) has agreed to lead the working group which will address economics and trade issues, while Michele Kuruc (NOAA, Assistant General Counsel) will lead the group dealing with enforcement issues, including monitoring, control and surveillance. These groups will need to address the following key questions.

1. How can we make it more difficult for IUU vessels to operate?

27. Much of the IUU activity currently undertaken appears to be well organised, making use of established structures and arrangements and a range of loopholes in current global management systems. Entrepreneurs are faced with commercial opportunities which require relatively low outlays to produce potentially high returns. This costs/return equation is facilitated by a number of separate but important economic signals. These are:

- High and growing demand for seafood products, at a time when existing wild capture fisheries have either reached or exceeded their sustainable harvest levels;
- the need to rebuild currently depleted fisheries and the limits on the extent to which aquaculture can fill increasing demand, including the environmental effects/consequences of using small fish to make bigger more valuable fish;
- increasing demand from health conscious consumers with the capacity to purchase healthy foods and a growing gap between demand and supply;
- Relatively low input costs, aided by substantial excess capacity in world fishing fleets;
- the continuing need to reduce capacity in managed fisheries and the subsidies provided to remove capacity, freeing up both labour and capital which in many cases has little or no alternative use in the short to medium term;
- Comparative disadvantage (high costs) of being a responsible fisher – vessel standards, crewing, insurance, purchase of fishing entitlement, management costs, catch limits, observers, data collection etc; compared with an IUU operation;

- Regulatory reform and the opening up of markets which has facilitated the flow of capital, the trade in goods and the establishment of new corporations around the world - has assisted the system of corporate structures used to “hide” beneficial owners and their activities.³ Greater mobility of resources, in particular capital and labour, has potentially worked against multilateral fisheries management arrangements and the existence of these “contradictory” signals (potential opportunities) may further encourage IUU activity;
- Gaps in broader resource management and other governance arrangements (laws which govern who does what, where, and with what) and non or half-hearted participation in existing arrangements by States some of whom benefit economically from ambiguity or half-hearted participation in these arrangements.

28. In light of the above:

- Are there other incentives to participate in IUU activity? If so, what are these? Is it just opportunistic or is it part of broader organized crime with well organized “teams” working together?
- What are the changes to economic and management arrangements which would have an immediate and dramatic effect (reduction) on IUU activity?
- What are the economic incentives to ignore RFMO and LOS requirements? What is to be lost/gained through enforcing the law?
- What is the extent of trade in IUU product and how much is it worth?
- Who are the main beneficiaries?

2. Cooperation between RFMOs

29. In what areas is there scope for increased cooperation and coordination between RFMOs?⁴

- Should unmanaged high seas fisheries be brought under existing management arrangements or should we develop entirely new arrangements?
- Is there a need to establish new RFMOs to deal with specific high seas fisheries? If yes, how do we rationalize RFMOs and ensure there is compatibility and sufficient commonality to ensure that data and other important management information can be exchanged?
- Are current (national and RFMO) authorization schemes for high seas fishing working? If not in what areas are they deficient and what do we need to do to improve them?

3. Control over nationals

30. How can we exert greater control over nationals to deter IUU fishing?

- At present due to the current ability to invest with little or no restrictions in many parts of the world, how do governments monitor and control the activities of their nationals? What (if anything) can they do if they find one of their nationals is involved (skipper or owner) in this activity?

³ See para. 14 above.

⁴ See paras. 20 and 21 above.

- As more and more restrictions are placed on responsible fishers, economic incentives will lead them to look at alternative bases for their operations. How do responsible States ensure that their management arrangements do not act as an incentive for their nationals to seek less onerous management arrangements in other states?
- Do we need to encourage national legislation similar to the U.S. Lacey Act which makes it an offence to deal in illegally caught product? If so, what if any changes would you make to this sort of legislation?

4. Trade measures

31. There are an increasing number of trade or catch schemes being introduced by RFMOs in a bid to monitor and distinguish between legal and illegal product and to enable the market to separate both categories and price them accordingly. The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) has introduced a catch documentation scheme (CDS) for toothfish. The scheme is designed to track the landings and trade flows of a specified species caught within the area managed by CCAMLR or in adjacent waters. Anecdotal evidence on the scheme, suggests that it has helped to differentiate between product and results in a higher price for the legally caught product.

- What are the desirable characteristics of CDS schemes? What are the likely flaws/problems (forged documents or states not implementing the scheme at the required level)?
- Are these schemes effective and should they be extended? At what costs?
- Are there broader implications for trade in seafood of these schemes?
- Will enhancements to these schemes run the risk of infringing WTO rules?

32. In terms of monitoring and tracking legal and illegal product and vessels what scope exists for increased cooperation between port states? How could this be achieved? What are the potential problems with such a scheme? Would such a scheme be subject to the same problems as other multilateral arrangements – be implemented at different levels by different states resulting in the management at the lowest common denominator, not at the level required?

33. Is there a role for the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in helping to minimise IUU activity? CITES is an international agreement between Governments which aims to ensure that international trade in specimens of wild animals and plants does not threaten their survival.

- What are the pros and cons of a CITES listing? It is a highly effective trade monitoring system but can it be used for other purposes? What additional costs would be imposed? Could it potentially be hijacked by selected interest groups and used for purposes other than that intended?

5. Monitoring, control and surveillance (MCS)

34. MCS is at the heart of an effective management regime. There is no point in having sophisticated legal, management and trade arrangements if they are not enforced. Apart from the MCS Network there appears to be no coordinated MCS arrangements between individual states or RFMOs.

- Is there a need for greater consistency in monitoring, control and surveillance across management arrangements/agencies? If so how would this best be achieved?

- Does there need to be an effective agency/network which allows information to be shared amongst countries, RFMOs and other bodies? (some sort of global fisheries surveillance/information body?)
 - What are the requirements for developing long term workable arrangements? How do we establish and fund these?
 - What issues would such a body raise – sensitivity on data collection and maintenance, interaction/duplication with broader intelligence arrangements for collecting information, national security issues, legal issues, interaction with other international law enforcement agencies - other?
 - Where should such a body be housed? How could it be funded? Should it have other functions (vessel registry – see below)?
 - What protocols are needed for the collection maintenance and storage of this sort of data?

35. Such a body would allow for the establishment of direct and effective links between enforcement agencies, RFMOs and others with a need to access this information – What problems could you see with such an approach?

36. It has been suggested that to keep track of vessels, owners and where they are licensed to fish, a world wide fishing vessel register should be established. Such a register would include all licensed vessels, a non digital photograph of each vessel and could be linked to survey requirements or vessel registration and/or fishing authorization. It could also be linked to standard surveillance tools such as a vessel monitoring system (VMS). The register would need to be maintained in a standard format and information shared between states and RFMOs.⁵

- Is such a register desirable? Would it duplicate any existing registers? If so would it add significantly to our knowledge base and enforcement capability?
- What are the key elements for an efficient vessel register? What should it include? Who should maintain it? How should it be funded?
- What arrangements need to be put in place for the exchange of data on vessels, owners, vessel authorizations, fishing undertaken etc?

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⁵ See para. 14 above.