



DO WE NEED TO CONTROL NATIONALS?

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One avenue for increased control over IUU fishing is to require governments to take greater responsibility for the activities of their nationals. Making the activities of citizens abroad liable to domestic sanctions is a powerful disincentive to illegal activity that would also enhance the effectiveness of other HSTF measures. We propose that HSTF members endorse the recommendations for action relating to nationals contained in the FAO IPOA-IUU Fishing and also task the Secretariat to conduct a more detailed analysis of “long-arm” approaches to enforcement of internationally-agreed conservation and management measures.

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A. INTRODUCTION

1. Fishing is conducted by individuals. In many cases, the fishing vessels that are used for IUU fishing are simply disposable tools. Fishing operations are conducted by vessel masters and fishing masters who are ultimately responsible to the owners of fishing companies. The corporate entity behind the fishing operation, the vessel master, the fishing master and the crew of the vessel may each be of different nationalities. Two recent cases before the International Tribunal for the Law of the Sea clearly demonstrate this phenomenon. In the *Juno Trader* case,¹ the vessel concerned was owned by a branch of a South African seafood company incorporated in the British Virgin Islands but flagged to Saint Vincent and the Grenadines. The Master was a Russian national. In the case of the *Grand Prince*² the vessel was flagged to Belize and owned by a company incorporated in Belize. According to the vessel's class certificate, the real owner of the vessel was a Spanish corporation. At the time of her detention, the vessel was in the process of being reflagged and registered in Brazil where she had been allocated a fishing licence. The Master of the vessel was a Spanish national and her crew of 37 was made up of nationals of Spain and Chile. Numerous other examples exist.³

2. One avenue for increased control over the activities of such vessels 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 involved. Making the activities of citizens abroad liable to domestic sanctions is a powerful disincentive that would not only enhance the effectiveness of other HSTF measures but also send a powerful signal to other potentially willing countries.

B. CONTROL OVER NATIONALS

3. The exercise of greater control over nationals is an issue that has been taken up in both the UN Fish Stocks Agreement and in the IPOA-IUU Fishing. The latter calls on States to "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."⁴ This might include situations where (1) a national of one State owns or controls a fishing vessel registered in another State that engages in IUU fishing; (2) a national of one State is employed as a master or crew member of a fishing vessel registered in another State that engages in IUU fishing; and (3) nationals of one State knowingly import IUU-caught fish or fish products from another State. The IPOA also contains an exhortation to States to cooperate to identify those nationals who are the operators or beneficial owners of vessels involved in IUU fishing and to discourage them from flagging fishing vessels to States that do not meet their flag State responsibilities.⁵ Both UNFSA and the IPOA-IUU require that sanctions for IUU fishing are to be of sufficient severity to effectively prevent, deter and eliminate IUU fishing and to deprive offenders of the benefits accruing from such fishing. States are required to ensure the consistent and transparent application of sanctions.⁶

4. The FAO Technical Guidelines on implementation of the IPOA-IUU Fishing⁷ contain the following specific recommendations for action:

- Each State should make it a violation of its law for its nationals to engage in fishing activities that violate the fishery conservation and management laws of any other State or that undermine the effectiveness of conservation and management measures adopted by an RFMO.

- Sanctions against nationals that have engaged in IUU fishing could include monetary fines, confiscation of fishing licences and fishing gear and denial of future fishing licences.
- Each flag State should take measures to deter its nationals from reflagging fishing vessels or from initially registering new vessels in States that are identified by an RFMO as undermining the effectiveness of its conservation and management measures. Such measures may include controls on deletion of vessels from national registers, controls on the export of fishing vessels, publicity campaigns to make vessel owners aware of those States that have been so identified and a prohibition on allowing vessels that have been registered in such States ever to be re-registered in the initial flag State.
- As specified in paragraphs 73 and 74 of the IPOA-IUU,⁸ each State should ensure that its nationals are aware of the detrimental effects of IUU fishing and should find ways to discourage such individuals from doing business with those engaged in IUU fishing.

5. We endorse these recommendations, many of which have already been adopted by HSTF members as well as other States. Naturally, the extent to which and manner in which these recommendations can be implemented in national law depends to a very great extent on the requirements of the domestic legal system. It is neither wise nor possible to be unduly prescriptive in this regard. It is useful, however, to cite some examples from the literature of the way in which different States have responded to the need to exert more control over nationals.

- **Japan** requires its nationals to obtain the permission of the Japanese Government before working aboard non-Japanese fishing vessels operating in the Atlantic bluefin tuna and Southern Bluefin Tuna fishing areas.
- **Japan** has also, since 1999, prohibited the export of large-scale tuna longline vessels.
- **Spanish** legislation provides for the suspension of a master's licence for up to five years for committing certain offences aboard flag of convenience vessels.
- **Norwegian** regulations provide that a licence may be refused if a vessel or an owner of the vessel has either taken part in fishing outside quota arrangements in international waters for a stock which is subject to regulation in waters under Norwegian fishery jurisdiction or has taken part in fishing operations that contravene regulatory measures laid down by RFMOs.⁹
- **New Zealand** domestic legislation makes it an offence for a national to use a vessel on the high seas for fishing except in accordance with an authorization issued by the flag State of the vessel under the UN Fish Stocks Agreement, the FAO Compliance Agreement or a regional arrangement.
- **Namibia's** fisheries laws enable the Minister to give domestic legal effect to any conservation and management measures adopted pursuant to any international agreement to which Namibia is a party.
- The **United States** Fisheries Act of 1998 prevents the return of large class fishing vessels to U.S. registry once they have been reflagged.

6. Similar measures have been endorsed by the OECD Fisheries Committee in the context of its work on the economics of IUU fishing. The analytical framework developed by OECD is useful because it demonstrates how domestic measures aimed at nationals may operate to affect the economics of IUU fishing.¹⁰ For example, the OECD document makes the case that:

- Systematically refusing to issue fishing licences to a company if one of its vessels has been convicted of IUU fishing significantly increases the risk factor of operating fleets of both legitimate and IUU vessels.
- Increasing the level of expected sanctions contributes to increasing the costs of IUU activity (although not as much perhaps as increasing the probability of being caught).
- Actions directed at improving social knowledge of the adverse economic, social and environmental costs of IUU fishing, through both private initiatives and public programmes (for example, a requirement of corporate disclosure of non-involvement in IUU activity), accompanied by IUU shaming initiatives, are likely to increase the moral/reputation costs to IUU fishers.
- Actions aimed at reducing the possibility of fraud (which includes bribery, corruption, repackaging, relabelling and money laundering) increase the cost to IUU operators of using fraudulent methods to circumvent regulations. Such actions may include implementation of the OECD Convention to combat bribery¹¹ and support for and cooperation with the initiatives of the OECD Financial Action Task Force on Money Laundering.

C. THE LACEY ACT

7. One indirect, but nonetheless extremely powerful, method of securing compliance with international obligations is a form of so-called “long-arm” jurisdiction based on the Lacey Act of the United States.¹² The Lacey Act makes it an offence for any person subject to the jurisdiction of the United States to “import, export, transport, sell, receive, acquire, possess or purchase any fish ... taken, possessed or sold in violation of any ... foreign .. law, treaty or regulation.” The United States has used the Lacey Act successfully to prosecute U.S. nationals who engage in certain forms of IUU fishing. However, such prosecutions occur only where there is some nexus between the activity in question and the United States, e.g., where the fish or fish products are landed, brought, or introduced into any place subject to the jurisdiction of the United States. Although the Lacey Act covers acts in violation of any “treaty,” it does not expressly cover acts in violation of conservation and management measures that may be adopted by RFMOs.¹³ Nevertheless, as Kuemlangan points out,¹⁴ Lacey Act provisions have the potential for adaptation to situations where the fish imported into a country is taken in violation of internationally agreed conservation and measures applicable on the high seas and as reflected in regional or national regulations. In addition, there is the potential for reciprocity in the application of Lacey Act provisions where similar provisions exist in the law of neighbouring States or through bilateral agreements relating to the remittance of penalties. Extensive adoption of Lacey Act provisions could become a direct deterrence for illegal fishing wherever it occurs.

8. Lacey Act provisions have been enacted by a number of other countries. One example is Papua New Guinea, which in 2000 successfully launched a prosecution against an IUU fishing vessel operator for illegal fishing in waters under the jurisdiction of Solomon Islands.¹⁵ We have made the suggestion, in the context of port State controls, that the Lacey Act approach warrants further investigation by the HSTF. We propose that the HSTF task the Secretariat to conduct a more detailed analysis of how similar “long-arm” approaches might be adapted to support enforcement of internationally-agreed conservation and management measures.

D. RELATIONSHIP TO OTHER HSTF PROPOSALS

9. There is a close relationship between the measures designed to exert greater control over nationals and other HSTF proposals. Enhancements to high seas MCS, as well as the establishment of the global information system on high seas fishing vessels will help HSTF members to better identify ownership or control by their nationals of vessels involved in IUU fishing, as well as participation by

nationals in trade in IUU product, and to take necessary action, such as denying fishing licences. Broadening and strengthening the use of port State controls also provides greater opportunity for enforcement against nationals. In the longer terms, the proposed high seas MCS unit could be used to maintain a centralized enforcement database relating to both vessels and nationals. One of the benefits of such a database would be to promote greater consistency and harmonization in the level of sanctions applied to IUU fishing. The global information system could, in time, also be extended to include background information on vessel masters and fishing masters.

E. PROPOSALS FOR ACTION

10. The Task Force is invited to:

(a) endorse the recommendations for action relating to nationals contained in the IPOA-IUU Fishing and the FAO Technical Guidelines and commit to implement these measures to the extent permitted by domestic law;

(b) take note of the additional measures suggested in the work of the OECD Fisheries Committee and consider how these might be implemented domestically; and

(c) task the Secretariat to conduct a more detailed analysis of how “long-arm” approaches based on the Lacey Act might be adapted to support enforcement of internationally-agreed conservation and management measures.

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¹ St. Vincent & the Grenadines v Guinea Bissau, ITLOS, Case No. 13.

² Belize v France, ITLOS, Case No. 8.

³ See, for example, www.colto.org

⁴ IPOA-IUU Fishing, paragraph 18.

⁵ IPOA-IUU Fishing, paragraphs 19 and 20.

⁶ UNFSA, article 19(2).

⁷ FAO Technical Guidelines for Responsible Fishing, No. 9 (2002).

⁸ Paragraphs 73 and 74 require States to “take measures to ensure that their [fishers] importers, transshippers, buyers, consumers, equipment suppliers, bankers, insurers, other services suppliers and the public are aware of the detrimental effects of doing business with vessels identified as engaged in IUU fishing, whether by the State under whose jurisdiction the vessel is operating or by the relevant regional fisheries management organizations in accordance with its agreed procedures, and should consider measures to deter such business. Such measures could include, to the extent possible under national law, legislation that makes it a violation to conduct such business or to trade in fish or fish products derived from IUU fishing. All identifications of vessels engaged in IUU fishing should be made in a fair, transparent and non-discriminatory manner.”

⁹ This is in addition to strict controls on port access.

¹⁰ OECD 2005, *Why Fish Piracy Survives: The Economics of IUU Fishing*, Chapter 2. AGR/FI(2005)1.

¹¹ OECD Convention on the Bribery of Foreign Public Officials.

¹² United States Code, Title 16, Chapter 53.

¹³ In the U.S., certain other laws make it unlawful for U.S. nationals (and other persons subject to U.S. jurisdiction) to engage in fishing activity in violation of such measures.

¹⁴ Blaise Kuemlangan, *National Legislative Options to Combat IUU Fishing*, FAO Doc. AUS:IUU/2000/9. Available at http://www.fao.org/documents/show_cdr.asp?url_file=/DOCREP/005/Y3274E/y3274e0b.htm.

¹⁵ Kuemlangan, *op. cit.*