



HIGH SEAS GOVERNANCE

Meeting of the High Seas Task Force
Paris, 9 March 2005

Lack of strong and effective governance of high seas fisheries lies at the core of international fisheries problems, including IUU fishing. We identify the main governance-related problems and propose strategies for improving high seas governance within existing institutional frameworks so as to reduce the incentives and opportunities for IUU fishing. We recognize also however that merely making selective improvements to the existing system will inevitably fall short of resolving the most fundamental issues and that more far-reaching reform of high seas governance arrangements will inevitably require further attention.

HSTF/09
February 2005

For any further information please contact Michael Lodge or Frank Meere, Secretariat, High Seas Task Force, 2 rue André Pascal, 75016, Paris Cedex 16, tel: +33 1 45 24 95 76 / 96 42; fax: +33 1 45 24 84 08; email: Michael.Lodge@oecd.org/ Frank.Meere@oecd.org.

HIGH SEAS GOVERNANCE

A. INTRODUCTION

1. The issues raised by the problem of IUU fishing on the high seas cover all facets of high seas fisheries management including: institutional structures, decision-making, dispute settlement, allocation, access arrangements, stock assessment, scientific and economic research, and the full array of enforcement activities. Although there has been a tendency in the international debate about IUU fishing to group all the elements of IUU into one, it is important to bear in mind that the phenomenon of IUU fishing is rarely a single type of activity.¹

2. At a broader level, whilst illegal and unreported high seas fishing can be seen as a symptom of the failure to fully implement existing management arrangements, unregulated high seas fishing can be seen as the inevitable outcome of a system for global high seas governance that is fundamentally flawed. Lack of strong and effective governance of high seas fisheries lies at the core of international fisheries problems such as IUU fishing on the high seas. To effectively address IUU fishing, an international governance framework is required that provides appropriate long-term incentives for compliance by fishers, thereby reducing the incentive to operate outside of legal management regimes.

3. In this paper, we first consider ways in which high seas governance could be improved within existing institutional frameworks so as to reduce the incentives and opportunities for IUU fishing. Recognizing, however, that merely making selective improvements to the existing system will inevitably fall short of resolving the fundamental issues associated with the failure to manage the high seas as a global commons we also note that more far-reaching reform of high seas governance arrangements is an issue that will undoubtedly require further attention.

4. Unlike other HSTF recommendations, many of the proposals discussed in this paper can be achieved only if they can be implemented at international level. Given that it is beyond the power of Task Force members alone to secure such an outcome, these proposals are therefore couched as positions that Task Force members would commit themselves to advocate by way of a clear, united position in multilateral fora and regional organizations.

B. IMPROVING THE EXISTING SYSTEM FOR HIGH SEAS GOVERNANCE

5. The present system of international high seas governance has evolved over a period of several hundred years. An account of some of the historical background is given in annex I. The end result is a patchwork quilt of measures in the form of binding and non-binding instruments with differing geographical and legal reach and different levels of participation by States. For the most part these instruments have been developed over the past 20 years, and are built on the foundations established by the 1982 United Nations Convention on the Law of the Sea (LOSC). The most important recent instruments are the 1995 UN Fish Stocks Agreement (UNFSA), the FAO Compliance Agreement, the FAO Code of Conduct for Responsible Fisheries and the FAO International Plan of Action to Prevent, Deter and Eliminate IUU Fishing (IPOA-IUU).

6. While the cumulative 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.

7. Despite the existence of a strong legal framework for the conduct of activities in the oceans, based on the LOSC, there are serious concerns about the capacity of this framework to deliver effective management. This situation has come about in part because of a lack of political will to implement existing instruments but also because of the failure to manage domestic and regional overcapacity. An analysis of the discussions that have taken place recently in various international fora, including, for example, the debate on oceans and the law of the sea held during the fifty-ninth session of the General Assembly,² indicates broad agreement that the main governance-related problems are as follows:

- Failure of key States to participate in existing multilateral instruments as a critical constraint to effective implementation and enforcement.
- Inadequate implementation of existing instruments at the regional level, including lack of institutional standards, lack of coordination between regional bodies and inadequate harmonization of measures.
- Inadequate flag State control over fishing vessels.
- The existence of specific gaps in the system of ocean governance, both geographical and structural (such as mechanisms to regulate deep sea bottom trawling and protect biodiversity).

I. Failure of key States to participate in existing multilateral instruments as a critical constraint to effective implementation and enforcement.

8. Perhaps the most obvious and public manifestation of lack of political will is failure to sign up to basic international law instruments. Whilst it is undoubtedly true that not every country that becomes a party to an international legal instrument implements that instrument effectively, failure to become a party is the most public demonstration possible of a lack of commitment to the instrument. Most importantly, the rest of the international community cannot seriously start to talk about forcing compliance unless recalcitrant States take the basic first step of signing up to outcomes which have been generally agreed by the international community.

9. The most comprehensive global agreement relating to the conservation and management of high seas fish stocks is without doubt UNFSA. As a product of multilateral negotiations it may not be perfect, but it is indisputably a giant step in the right direction. But it cannot attain its full potential unless the most important coastal, fishing and flag States are parties to it. Except to the extent that UNFSA sets out rules binding on all States as customary international law, unless and until the relevant States become party to UNFSA and comply with its obligations, in particular those in article 8 in relation to regional fishery management organizations (RFMOs), unregulated high seas fishing, i.e. fishing by non-members outside the rules set by RFMOs, will remain a considerable problem. States will be tempted to ignore commitments made by others and act as 'free riders'. As the benefits of 'free riding' can be enjoyed by all nationals of a State, both natural and juridical persons, obtaining the nationality of a free rider State is highly attractive.

10. A key HSTF strategy therefore should be to secure broader and more effective participation in UNFSA. The need for this has been emphasized repeatedly in numerous resolutions of the UN and other international bodies.³ In the long-term it is important that all parties to the LOSC become parties to UNFSA, so that, as originally intended, there would be a seamless connection between the provisions of the LOSC and the provisions of the implementing agreement. However, this is likely to take time. In the short-term it is especially important that all high seas fishing nations and actual and potential flag States become parties to UNFSA as soon as possible so that the opportunities for 'free riding' can be minimized and so that as many high seas actors as possible are bound by the existing web of legal obligations.

11. In annex II, we attempt a preliminary analysis of the gaps in participation in UNFSA and associated regional agreements. It is particularly interesting to note that of the 14 open-registry countries that had registered the largest number of fishing vessels between 1999 and 2003, 10 are not parties to UNFSA. Three of those countries are not even party to the LOSC, which sets out the basic obligations of flag States in a form accepted by the overwhelming majority of the international community (there are 148 parties to the LOSC). Ironically, in November 2004, most of these countries were present in the UN General Assembly and participated in the adoption of resolutions which, *inter alia*, called upon all States to become party to the LOSC and the UNFSA.

12. We **recommend** that the HSTF make special efforts to encourage specific countries to become party to UNFSA. These key countries include those that are already members of two or more regional arrangements (thus having a clear high seas fishing interest) as well as those that are significant flag States of high seas fishing vessels. Based on the preliminary analysis shown in annex II, the countries of most concern are:

Belize	Japan	Poland
Bolivia	Korea	Saint Vincent and the Grenadines
Cambodia	Mexico	Sierra Leone
Equatorial Guinea	Nicaragua	Vanuatu
Georgia	Panama	Venezuela
Honduras	Philippines	

13. Of course, mere participation, even universal participation, is not likely to offer a complete solution to the IUU problem. It is quite possible that bringing some of the current flags of non-compliance into existing governance systems will merely tend to push IUU operators to seek out ever more exotic and unlikely flag States, such as Mongolia.⁴ It has to be recognized that persuasion by HSTF members is hardly likely to result in a dramatic change to the slow pace of multilateral engagements. Nevertheless, getting a State to become a party to an international agreement is a necessary precondition to making that State live up to the obligations contained in it. As such it represents a step in the right direction, and a fundamental starting point for efforts to enhance the integrity of existing multilateral efforts.

14. The more focused action we have proposed is fully consistent with multilateral sentiments as expressed in General Assembly resolutions and the like. But this proposal also represents a type of action that HSTF members could, if necessary, pursue independently, without broader multilateral support; for example through exerting diplomatic pressure on individual States, or by naming and shaming particularly egregious offenders. Diplomatic pressure of this sort was successful recently in prompting several countries to join ICCAT after their vessels had been associated with IUU fishing. Some of the other HSTF proposals – the proposed flag State performance table, the proposed global information system on high seas fishing vessels and the use of enhanced port State controls – are also designed to exert pressure on individual States. Other ways in which leverage might be obtained might include the use of trade-related measures and exerting pressure through RFMOs.

II. Inadequate implementation of existing instruments at the regional level, including lack of institutional standards, lack of coordination between regional bodies and inadequate harmonization of measures.

15. One of the critical obstacles to the effectiveness of UNFSA is the fact that it relies on a disparate and relatively inefficient and incomplete network of RFMOs to implement its provisions.⁵

16. The LOSC establishes a general obligation on all States to cooperate in the conservation and management of the living resources of the high seas. Thus 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. In the case of straddling and highly migratory fish stocks the UNFSA designates the RFMO as the institution of choice to be the primary vehicle through which international cooperation for conservation and management is to be achieved. The essential purpose of an RFMO is to provide an effective forum within which States can agree on conservation and management measures. UNFSA defines the desirable institutional characteristics of an effective RFMO by listing, in a legally-binding form,⁶ the matters upon which States are expected to agree in order to achieve sustainable management of fisheries. Ultimately, UNFSA is intended to lead to the situation where (high seas) fishing can only be engaged in by vessels flying the flags of States that are members of RFMOs or that cooperate with them and within the rules set by the RFMO.

17. Unfortunately, what we have seen is that UNFSA provisions are not enough by themselves. RFMO coverage of high seas areas is incomplete.⁷ Some RFMOs lack capacity and in nearly all of them participation is not sufficiently broad to ensure compliance with conservation and management measures and eliminate the problem of free riders. A number of existing RFMOs pre-date UNFSA and do not live up to the institutional standards established by UNFSA.

18. We have identified some of the primary reasons why RFMOs have not been as effective as they might have been in addressing the problem of IUU fishing on the high seas as follows:

- Decision-making:
 - Consensus decision-making leads to paralysis and a tendency to defer management decisions until a crisis is approaching.
 - Opting-out procedures undermine conservation decisions.
 - Lack of will to implement difficult decisions.
 - Member States have diverse interests and may be motivated by interests other than conservation.
 - Decision-making, and actual management action by members, lags behind the reality of the fishery being managed.
- Science:
 - Deficiencies in the way in which objective scientific advice is incorporated into decision-making processes.
 - Failure to change the *status quo* where scientific evidence of negative impacts is inconclusive (i.e. failure to apply the precautionary approach correctly).
- Enforcement:
 - Deficiencies in the capacity of members to enforce conservation and management measures.
 - Decisions only enforceable in member countries, which restricts the scope and impact of management actions.
- Non-parties:
 - Failure to accommodate the interests of non-parties and new entrants.
 - Failure to deal with the problem of free riders, which removes the incentive for legitimate fishers to make difficult conservation decisions.
- Participation:
 - Developing countries lacking capacity and resources for effective participation.
 - Failure to accommodate the legitimate interests of developing countries.
 - Lack of direct stakeholder (industry) involvement.
 - Lack of transparency.

19. To address the above problems within the constraints of existing governance systems, we **recommend** three broad strategies to HSTF members. Like the measures relating to participation described above, these strategies may be pursued independently by HSTF members as well as by a coordinated and cohesive approach through established multilateral processes, including through RFMOs that HSTF members already participate in.

Strategy 1: Establish institutional standards for effective RFMOs, based on those outlined in UNFSA

20. Just as the HSTF could establish 'best practice' for flag States, so it could work to develop detailed criteria against which to assess the management ability and performance of RFMOs. As noted above, the progressive step that was introduced by UNFSA, articles 5, 6 and 10 (which are echoed in the FAO Code of Conduct for Responsible Fisheries) was 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 articles 5, 6 and 10.

21. Whilst there has also been a growing international recognition of the need for RFMOs to perform better both individually and collectively, as well as the need for increased cooperation between RFMOs on issues of common concern, it remains the case that the mandates of many RFMOs established prior to the entry into force of UNFSA still do not adequately reflect the minimum requirements which are now set out in article 10 of UNFSA.⁸ This has been recognized by FAO, which has concluded that, in order to promote effective implementation of international fishery instruments at subregional and regional level, it was necessary to strengthen regional fishery bodies to ensure that they (a) meet the standards established by the relevant international fishery instruments; (b) possess the necessary mandates to enable them to address factors of unsustainability in fisheries; and (c) are equipped to carry out the functions ascribed to them, including by having an adequate resource base and by providing mechanisms for effective participation in their work.⁹

22. We **recommend** that the HSTF conduct an assessment of the performance of high seas RFMOs against objective criteria based on the standards prescribed by relevant international instruments.

Strategy 2: Promote better coordination between RFMOs and increased harmonization of measures

23. There are more than 30 RFMOs worldwide (not all of these deal with high seas fish stocks). More than half of these have been established since the LOSC was adopted. The reason why there has been such a proliferation of regional bodies is that each one is designed to cover the geographical range of the stocks they are intended to manage. This reflects the basic Darwinian notion that the unit of management is the fish stock; and that to be effective, conservation and management measures should be effective throughout the range of the stock concerned. It is increasingly being recognized however, that, in the case of some species, the boundaries adopted for the RFMO are inappropriate given the geographical range of the stocks it was instituted to manage,¹⁰ whilst in the case of highly migratory species (and specifically tunas), there are important interactions between the fisheries and the management measures taken in each region.

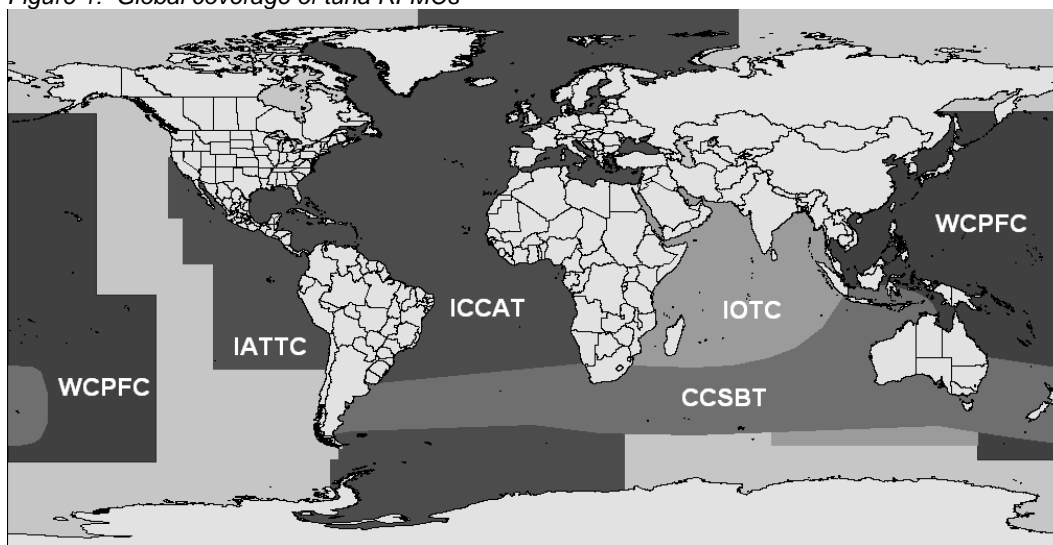
24. A particularly compelling justification for greater coordination (and possibly even rationalization) between RFMOs is the fact that only the most developed countries are in a position to service the ever-growing list of international bodies. This perpetuates the unfair advantage of developed countries, especially those that are members of all RFMOs, over developing countries, many of which are unable to service even one RFMO. Even in developed countries, it is recognized

that there is insufficient scientific expertise to properly service multiple high seas RFMOs if these continue to be created at too fine a spatial scale.

25. All these factors argue strongly in favour of better coordination between RFMOs. There has been increased recognition of this need in recent years. For example, FAO sponsors a biannual meeting of regional fishery bodies but this has not so far produced concrete results.

26. A first step for HSTF members may be to examine the synergies between the five RFMOs with jurisdiction over highly migratory tunas (CCSBT, IATTC, ICCAT, IOTC and WCPFC) with a view to finding areas for future interaction. With the recent establishment of the WCPFC, coverage by tuna RFMOs is almost global (see figure 1) and there are significant opportunities for global interactions in a number of key areas. Tuna is an international commodity, traded on a relatively small number of international markets irrespective of its source. The fleets that fish for tuna are highly mobile and readily transfer their efforts from one region to another (recently, for example, 60 Taiwanese vessels displaced from the Eastern Pacific moved to the Indian Ocean). But the measures adopted by the tuna RFMOs to date tend to be region-specific. The fact that all these RFMOs are dominated by the same group of high seas fishing countries would tend to suggest that more effort should be made to adopt harmonized measures. Interestingly, the need for greater consistency between tuna RFMOs has also been noted by industry. In November 2004, three of the largest European tuna producing companies made a joint representation to ICCAT, IOTC, IATTC and WCPFC commenting on the 'degradation of the decision-making process' in RFMOs and recommending a series of steps to improve the quality of international regulation.¹¹

Figure 1: Global coverage of tuna RFMOs



27. All the tuna RFMOs have provisions in their constituent instruments that encourage cooperation with other RFMOs. To date, however, cooperation has largely been confined to administrative cooperation between secretariats. Some of the areas where strengthened cooperation is likely to produce tangible results are as follows:

- **Shared vessel registers:** All tuna RFMOs either operate, or are considering operating, registers of fishing vessels. In addition, vessel registers are maintained by FFA in the Pacific region and, globally, by FAO (the high seas fishing vessel register under the FAO Compliance Agreement). Given the movements of vessels between oceans, as well as reflagging, these registers need to be made compatible both in terms of data contained in them as well as in ensuring traceability between, for example, shipping registers and data on related operations such as transshipment. It should be possible for related RFMOs (such as the five tuna RFMOs) to maintain a common vessel list from which individual RFMOs would have an

identified subset of vessels for its fishery. This vessel list could be linked to other common measures, such as catch documentation schemes and port inspection schemes.

- **Common catch documentation schemes:** Several RFMOs have developed trade information schemes and catch documentation schemes at varying levels of complexity (ICCAT, CCSBT, CCAMLR). Although preliminary indications are that some such schemes work as a means of combating IUU fishing, much more work needs to be done in terms of ensuring compatibility between catch documentation schemes in different regions and in terms of ensuring that such schemes are watertight. One particular area of current concern would be trade flows in bigeye tuna caught in the Indian and Pacific oceans (using, as a precedent, the work done by TRAFFIC in relation to Patagonian toothfish).
- **Trade and finance flows:** The seasonal and migratory nature of the global tuna fishery means that tuna is a global commodity. Raw material for canneries is frequently transported long distances by sea, from the fishing grounds to the main processing regions. There is likely to be considerable commonality between transshipment operations and trade flows to and from all regions. Detailed study of these flows might help to determine useful points of intervention for exposing or influencing the underlying finance flows supporting unsustainable fishing.

28. We **recommend** that HSTF members support efforts to develop greater harmonization of measures between tuna RFMOs and explore further the areas in which there is scope for better coordination between other related RFMOs. We note that the HSTF proposal to establish a global information system for high seas fishing vessels is fully consistent with the objective of greater harmonization of measures and will contribute significantly to its achievement.

Strategy 3: Monitor the performance of RFMOs, including increased oversight at the global level

29. One weakness of the UNFSA is that it provides no mechanism whereby RFMOs (and States who fish in an area but fail to join the relevant RFMO) can be held to account. We would suggest that, in combination with the measures outlined above, increased oversight at the global level could significantly reinforce regional and national measures to effectively implement UNFSA. Such oversight could also promote a more systematic approach to improving the conformity of regional conservation and management measures with UNFSA.¹² The absence of a systematic approach in most RFMOs to implementation of UNFSA was noted as a significant obstacle to implementation by the UN Secretary-General in his report on the status of UNFSA.¹³ There are several ways in which such an oversight mechanism may be developed. One possibility, elaborated further below, is to give the annual meeting of States Parties to UNFSA a specific mandate to evaluate and make recommendations on the performance of RFMOs. Another strategy, suggested by the UN, might be to build on the biannual meeting of RFMOs hosted by FAO to establish a more targeted agenda through which RFMOs could work together to implement UNFSA. A third way may be for RFMOs to conduct self-assessments or invite third party expert auditors to review their conservation and management measures against agreed criteria. Whichever methodology is preferred, the key is to develop clear performance indicators for RFMOs and systematic checking of conservation and management measures for their consistency with UNFSA.¹⁴

30. Other matters which might better be determined and applied at a global level may include a framework treaty for surveillance cooperation, clearly setting out the rights and duties of States, global agreement on the applicability of market-related measures and their consistency with WTO rules and criteria and procedures for the establishment of high seas marine protected areas (MPAs) to protect vulnerable areas and species.

31. In the short term, and in keeping with the HSTF objective to adopt practical measures, we **recommend** that HSTF members give their support to efforts to give a greater role to the annual

meeting of States Parties to UNFSA in setting global standards for RFMOs. UNFSA is a global agreement for the implementation of the LOSC and has close links to the LOSC; for example, the provisions relating to the settlement of disputes in UNFSA are linked to the provisions of Part XV of the LOSC. The body responsible for the global oversight of questions relating to the oceans and the law of the sea is the General Assembly of the United Nations. There is a close organic link between the meeting of States Parties to UNFSA and related law of the sea meetings (for example, the UN informal consultative meeting on oceans affairs and law of the sea) which also feed into the annual General Assembly debate on the law of the sea. Thus it would seem logical, to preserve the integrity of the system for global oversight of the law of the sea, to give the meeting of States Parties to UNFSA a key role in the oversight of the implementation of the agreement at the regional level.

32. In the longer term, there is scope for the development of more formal levels of oversight. One suggestion is the establishment of a mechanism for the provision of independent scientific advice (for example by a standing panel of internationally-recognized experts) on a global basis which could also operate as a standardized, independent and transparent process for reviewing the scientific information relied on by the different RFMOs. As well as addressing some of the shortcomings identified in the existing scientific advisory processes of RFMOs, such a mechanism would also enable the provision at a global level of unbiased, objective scientific advice on complex issues of a global nature, such as the influence of climate-driven cyclic regime shifts on fisheries and their ecosystems and the use of single-species models to manage complex multi-species fisheries. A parallel for such an initiative may be found in the recent decision by the World Conference on Sustainable Development (WSSD) to establish ‘... a regular process under the United Nations for global reporting and assessment of the state of the marine environment, including socioeconomic aspects, both current and foreseeable, building on existing regional assessments.’ Efforts to implement this decision are currently ongoing. We suggest that this is an area deserving of more detailed consideration by the HSTF and that the Secretariat develop the concept further through a meeting with relevant agencies and members of the science working group.

III. Inadequate flag State control over fishing vessels.

33. We discuss the general issue of flag State responsibility in the papers on flag State performance (HSTF/07) and the global information system on high seas fishing vessels (HSTF/05). The recommendations contained in those papers are designed to encourage better performance by flag States.

IV. The existence of specific gaps in the system of ocean governance, both geographical and structural.

34. We noted above (paragraph 17) the existence of geographical gaps in the coverage of UNFSA. It is important that these gaps are filled. HSTF members should support initiatives to bring presently unregulated fish stocks under international management.

35. There are also structural gaps which need to be dealt with. Experience has shown that UNFSA may not have gone far enough. Some consider that it does not cover sufficiently the problem of discrete high seas stocks, including deep sea fisheries, and is limited in application to straddling fish stocks and highly migratory fish stocks. Consideration should therefore be given to expanding the scope of application of UNFSA so as to include all fish stocks in the high seas. The same basic principles for conservation and management that apply to straddling and highly migratory fish stocks should be adapted to apply to other high seas fish stocks. This would have to be followed up with agreement on effective conservation and management measures for the specific fisheries. The present situation has led to serial depletion of several such fisheries and severe damage to benthic communities and associated biodiversity. Although there is limited information about the extent and scale of the problem on a global basis, it has produced what some might view as radical proposals for immediate action, such as proposals for blanket prohibitions on certain fishing practices.¹⁵ High seas

fishing is a global phenomenon and there needs to be a comprehensive global management framework, rather than piecemeal gap-filling.

V. Opportunities to pursue these objectives multilaterally

36. Some of the initiatives described above can be pursued by HSTF members acting individually or collectively. These include exerting pressure on States to become parties to international instruments and promoting standards for effective RFMOs. However, the full impact of many of the proposals will only be felt if they can be implemented at international level. The extent to which HSTF members can influence change in the various RFMOs of which they are members also depends to a great extent on the dynamics of the particular RFMO. At the same time, there are a number of opportunities in the near future for HSTF members to influence the international debate by advocating a clear and united position in multilateral fora. Foremost among these is an UNFSA Review Conference scheduled for 2006, as required by article 36 of UNFSA. Prior to the UNFSA Review Conference, the Government of Canada is to convene an international conference on high seas governance designed to provide an opportunity for the international community to join Canada in determining how management of high seas fisheries can be improved and identifying what steps need to be taken to rebuild fish stocks.¹⁶

C. REFORMING THE SYSTEM FOR HIGH SEAS GOVERNANCE

37. It is well known that, left unconstrained, the end result of States exercising the unrestricted right to fish on the high seas is Hardin's "tragedy of the commons." The LOSC addresses this by making the entitlement of all States for their nationals to fish on the high seas subject to over-riding obligations of conservation and cooperation with other States. Even a single State fishing alone on the high seas cannot ignore these obligations. UNFSA makes these obligations more explicit by introducing the notion of compatibility, elaborating how the precautionary approach should be applied and creating a balance and reciprocity between the concurrent rights and obligations of coastal States and distant water fishing States both in areas under national jurisdiction and on the high seas. These obligations were implicit in the LOSC and UNFSA cannot be interpreted and applied independently from the LOSC. It is against this background that the recommendations for action by the HSTF represent an incremental approach under which increasing pressure is put on IUU fishers and free riders to comply with their international obligations.

38. An underlying problem, however, is that present high seas governance structures are built on the assumption that the legal framework creates incentives for cooperation. This is too optimistic an assumption. Even if the HSTF is able successfully to address some or all of the problems identified above, it is unlikely that the problem of IUU fishing on the high seas by free riders can be fully resolved unless it is possible to deal with the issue of allocation of access in a way that creates incentives for sustainable utilization of resources. The problem is that neither UNFSA, nor the decision-rules of existing RFMOs, elaborate sufficiently mechanisms for allocation that balance conservation interests with the economic and social interests of States. In fact, most negotiated criteria for catch allocation are based on the notion of historical catch, which is the most powerful incentive possible to indulge in a race to fish. One of the perverse results of the exclusive nature of most RFMOs is that, faced with potential unregulated fishing by competitor non-parties, the primary motivation of member States within RFMOs is to achieve the largest possible catch allocation. Members routinely come under strong industry pressure to agree to catch levels that exceed sustainable limits, even in the face of clear scientific advice. An example of the equivocal approach of States to this issue is the recent trend in RFMOs towards according "cooperating non-party" status to States that are not members of an RFMO but are allowed to cooperate with it in order to gain access to high seas fish stocks. Several RFMOs (e.g. CCAMLR, WCPFC) have adopted subjective criteria for granting and withdrawing such status. There is a strong argument that this sort of approach, by preserving the exclusivity of the "club" whilst at the same time allowing non-parties to gain limited

benefits from the fishery without being compelled to make any real, legally-binding, commitment to membership of the RFMO, in fact undermines the basic intent of UNFSA. If the cooperating non-party approach is to be pursued, there needs to be a clear distinction between States that cooperate in order to assist in enforcing RFMO measures (such as cooperating port States) and those that benefit directly by fishing. The latter should clearly be compelled to fulfil their legal obligations by joining the relevant RFMO.

39. There can be no doubt that, under both LOSC and UNFSA, conservation is the over-riding objective. And it is clearly possible to achieve conservation objectives by, for example, setting and enforcing a total allowable catch – even if the outcome is economically inefficient. However, the incentives to cooperate in order to achieve conservation will be greatly enhanced if there is a universally accepted mechanism that can allocate clear rights to access the resource.¹⁷ Allocation of rights should therefore be viewed as an integral part of the conservation system. Factors such as technological developments, global fleet overcapacity, increased pressure on fish stocks and increased mobility in world fisheries and markets strongly suggest that in the longer-term the key to improved management of high seas fish stocks may well lie in the development of more economically efficient mechanisms for allocation. The Secretariat will have an opportunity to explore the issues in more detail prior to the finalization of the Task Force's report.

D. SUMMARY OF THE RECOMMENDATIONS IN THIS PAPER

40. The main recommendations from this paper for consideration by HTSF members can be summarized as follows:

- HSTF members agree to take active steps to encourage participation by key States in UNFSA.
- Recognizing that a key obstacle to improved governance is inadequate implementation of existing international fisheries instruments at the regional level, including lack of institutional standards, lack of coordination between regional bodies and inadequate harmonization of measures, HSTF members agree to the following specific measures and positions that they will commit to advocate internationally:
 - HSTF members will direct the Secretariat to conduct an assessment of the performance of high seas RFMOs against objective criteria based on the standards established by relevant international agreements.
 - HSTF members will support efforts to develop greater harmonization of measures between tuna RFMOs and explore further the areas in which there is scope for better coordination between other related RFMOs, with a view to greater efficiency and consistency in conservation and management measures.
 - HSTF members will support the idea of a mechanism for global oversight of RFMOs to promote a more systematic approach to the implementation of UNFSA, including through giving a greater role to the annual meeting of States Parties to UNFSA.
 - HSTF members will support initiatives to bring presently unregulated high seas fish stocks under international management.
 - HSTF agree that the scope of application of the UNFSA should be expanded to include all high seas fish stocks.

¹ In order to enable the key points of leverage to be identified with precision, it is intended in the final report to offer a precise operational definition for each component of IUU fishing – illegal high seas fishing, unreported high seas fishing and unregulated high seas fishing.

² See in particular General Assembly resolution A/59/25 of 17 November 2004.

³ A/RES/58/14, Op. §4; A/RES/58/240, Op. §1.

⁴ Mongolia, for example, established an open registry in 2003, administered from an office in Singapore. The registry's website (http://www.maritimechain.com/ship_registry/msr) advertises competitive fees, no restrictions on crew nationality and no taxes and claims to be able to issue certificates "within the hour". However, the Round Table of International Shipping Associations, in the most recent update of its *Shipping Industry Flag State Performance Table* (December 2004), states "A recent arrival amongst flags offering services to shipping is Mongolia, which is listed by the Round Table for the first time and is already amongst those with the poorest performance." (<http://www.bimco.dk>).

⁵ In this paper, we use the term 'RFMO' with specific reference to those existing RFMOs with competence over high seas areas. These include ICCAT, NAFO, NEAFC, IATTC, WCPFC, CCAMLR, CCSBT, IOTC and SEAFO. There is also the 1994 Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, which establishes a management arrangement for the Bering Sea "donut hole", but does not create an international organization for this purpose.

⁶ UNFSA, article 10.

⁷ The United Nations suggests that there are potential gaps in RFMO coverage in the South-East Pacific Ocean, South-West Atlantic, South-West Indian Ocean (discrete high seas stocks), Western Pacific (discrete high seas stocks), Caribbean and the high seas adjacent to the CCAMLR zone. (UN Doc. A/58/215).

⁸ Some progress has been made; for example, IATTC adopted in 2003 the Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention between the United States of America and the Republic of Costa Rica ("Antigua Convention"), IATTC Resolution C-03-02. The new Convention has yet to enter into force.

⁹ Gréboval (ed.), Report and Recommendations of an International Workshop on Factors Contributing to Unsustainability and Overexploitation in Fisheries, FAO 2002 (p. 40)

¹⁰ E.g., CCAMLR and Patagonian toothfish north of the CCAMLR Area.

¹¹ Open letter from OPAGAC (Spain), OPTUC-ANABAC (Spain) and ORTHONGEL (France) to IATTC, ICCAT, IOTC and WCPFC, dated 24 November 2004.

¹² This proposal is consistent with a proposal made by IUCN to the Informal Meeting of States Parties to UNFSA, 2004.

¹³ UN Doc. 58/215.

¹⁴ UN Doc. 58/215, para. 71.

¹⁵ For example, proposals for a global moratorium on bottom trawling on the high seas.

¹⁶ Conference on the Governance of High Seas Fisheries and the UN Fish Agreement – Moving from Words to Action, St. John's, Newfoundland, 1 – 5 May 2005, http://www.dfo-mpo.gc.ca/fgc-cgp/index_e.htm

¹⁷ Serge Garcia and Jean Boncouer, *Allocation and conservation of ocean fishery resources* (2004).

ANNEX I

BACKGROUND ON THE THEORETICAL BASIS FOR HIGH SEAS GOVERNANCE

The current international regime governing access to high seas resources is effectively the traditional rule of capture, which provides that ownership of natural resources coming from a common source of supply is recognized once it has been reduced to dominion and control.¹ The reason for this state of affairs is largely historical. From the 1500s until the middle of the twentieth century, the jurisprudential basis for the legal framework for ocean governance has been the Grotian doctrine of the freedom of the seas – *mare liberum*. Under this doctrine, the seas and their resources were open to use and exploitation by all nations without distinction and could not be appropriated save in strictly limited circumstances, usually confined by technological capabilities to inshore waters. This led to broad acceptance of the general principle that coastal States have jurisdiction over a narrow strip of the sea along the coast, but that all other waters are freely accessible to all States. This basic division of the seas into areas of territorial waters and high seas, and the availability of the high seas as a shared resource, continued to be the dominant legal and political theory until well into the twentieth century.

Although theories of global governance began to emerge as early as the late nineteenth century,² the idea of internationalization of the high seas proved too radical a concept for the First and Second United Nations Conferences on the Law of the Sea (UNCLOS I and II) – despite the progress that was being made at the same time with respect to Antarctica.³ The debates at those conferences centred on the breadth of the territorial sea and jurisdiction over the continental shelf. The concerns for the international community were reflected in the provision that the freedoms of the high seas, including the freedom of fishing, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedoms of the high seas.

In the 1960s concerns for resource sustainability took second place to the desire to minimize the potential for escalation of the arms race and the need to contain superpower rivalry and expansionism. Thus between 1961 and 1967 it was possible to negotiate a binding legal regime for outer space, under which outer space and the celestial bodies may not be subject to national appropriation. By 1967 the United Nations was also able to agree that the other major global commons – the seabed and ocean floor beyond the limits of national jurisdiction (wherever they were) – should not be subject to claims of national sovereignty or used for other than exclusively peaceful purposes. Despite these areas of agreement, however, there followed some 15 years of controversy and debate over how the global commons should be administered and what form of international machinery should be developed to administer the area beyond national jurisdiction.

As is well-known, UNCLOS III (1972-1982) resulted in the adoption of the 1982 United Nations Convention on the Law of the Sea (LOS). The LOS resolved a number of critical issues, some of which had eluded agreement for centuries and is recognized as the basis of the modern law of the sea. A substantial body of literature describes the contribution of the LOS to international peace and security and the way in which it succeeds in achieving a delicate balance between competing interests in the use of the oceans and their resources by taking a functional approach to establishing the various maritime zones and the rights and duties of States in those zones. With respect to areas beyond national jurisdiction, however, the LOS was less successful. The comprehensive management concept for the oceans envisaged by many in the 1960s, under which the concepts of freedom of the seas and sovereignty of States would yield to a broader public interest in conservation and equitable distribution of benefits, was realized, at best, only incompletely. The idea of an international body to administer the global commons was clearly not going to be acceptable to the major maritime powers

in so far as it may have constrained their right to act unilaterally in their own national interest. Thus, although the LOSC establishes an innovative regime for the development of the mineral resources of the deep seabed, the extent of this regime is strictly limited.⁴

In terms of fisheries, the LOSC recognizes the sovereignty, sovereign rights and jurisdiction of coastal States with respect to marine living resources within their national maritime zones⁵ but retains the right for all States for their nationals to engage in fishing on the high seas.⁶ These rights are qualified by inchoate obligations that States owe to each other⁷ and to the international community. The latter obligations are aimed at safeguarding such international community interests as conservation and optimum utilization of marine living resources and the protection and preservation of the marine environment.⁸ The former include the duty placed on all States to cooperate in the conservation and management of living resources of the high seas, including through the establishment of regional and subregional fisheries management organizations and arrangements.

By the 1990s it had become apparent that the regime established by the LOSC – which in practice amounted to unrestrained freedom to fish on the high seas subject only to voluntary cooperation between States to conserve and manage fish stocks through regional agreements – was inadequate to prevent depletion of the world's fish stocks.⁹ The problems were particularly acute for straddling and highly migratory fish stocks and as a result of the attention paid to the growing crisis in world fisheries by Heads of Government at the Earth Summit (UNCED) in Rio de Janeiro in 1992 the United Nations General Assembly was motivated to mandate a global conference to seek means of promoting the effective implementation of the provisions of the LOSC with respect to straddling fish stocks and highly migratory fish stocks.

The result of that conference was the adoption of the 1995 UN Fish Stocks Agreement (UNFSA), a global agreement that is intrinsically linked to the LOSC and which now, along with a number of related hard and soft-law instruments, forms the basis for the global system for high seas governance.¹⁰ What all 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. Thus, while the basic fishing entitlements of the LOSC remain unaltered, the exercise of these entitlements is increasingly qualified. The widening and deepening of relevant international obligations is also evident, for instance the elaboration in both the Convention on Biological Diversity and UNFSA of basic obligations to conserve biological diversity and to apply the precautionary approach.¹¹

In essence, UNFSA provides for the conservation and sustainable use of the fish resources in the oceans. It is built on three essential pillars. First, it sets out principles on which conservation and management of the stocks must be based and establishes that such management must be based on the precautionary approach and the best available scientific information. The second pillar ensures that the conservation and management measures are adhered to and complied with, and that they are not undermined by those who fish for the stocks. For this purpose, the primary responsibility of the flag State is reaffirmed and the framework for action by States other than the flag States is set out with clear safeguards against abuse. The third pillar is the provision for peaceful settlement of disputes. While providing for various possibilities of non-binding settlement, in the end result every dispute can be submitted to a court or tribunal for a binding decision.

In providing for a framework that promotes good order in the oceans and the effective management and conservation of high seas resources, UNFSA, *inter alia*, establishes detailed minimum international standards for the conservation and management of the two types of stocks (both within and beyond national jurisdiction); seeks to ensure that the measures taken for the conservation and management of those stocks in areas under national jurisdiction and in the adjacent high seas are compatible and coherent; seeks to ensure that there are effective mechanisms for compliance and enforcement of those measures on the high seas; and recognizes the special requirements of developing States in relation to conservation and management as well as the development and participation in fisheries for the two types of stocks.

No area of the high seas is not subject to the LOSC and UNFSA. The duty to cooperate, to exchange information, to exercise restraint, and to take into consideration all the matters specified in article 119 LOSC, applies globally. To fish in contravention of these international obligations is IUU fishing. There is flexibility inherent in UNFSA as to the means by which the conservation objectives may be attained, but the end is to ensure that no area of the high seas is unregulated. UNFSA accords a key role to regional fisheries management organizations and arrangements (RMFOs) as the appropriate vehicle through which States are to cooperate to achieve and enforce conservation objectives.

¹ Dennis W. Arrow, “The Customary Norm Process and the Deep Seabed”, *Ocean Development and International Law* 9 (1-2) 1981, 1 – 59; Also T. W. Fulton, *The Sovereignty of the Sea* (1911)

² For example, as long ago as 1898, the French jurist A. G. de Lapradelle advanced the idea that the oceans should be “*le patrimoine de l’humanité*” and suggested that their living resources should be administered by the society of nations. In 1924, in his report to the Committee of Experts on the Progressive Codification of International Law, the Argentinean jurist José León Suarez described “the riches of the sea” as the “patrimony of the whole human race” and suggested that “To save this wealth, which, being today the uncontrolled property of all, belongs to nobody, the only thing to be done is to discard the obsolete rules of the existing treaties, which were drawn up with other objects, to take a wider view, and to base a new jurisprudence . . . on the scientific and economic considerations which . . . may be put forward, compared and discussed at a technical conference by the countries concerned.”

³ Culminating in the adoption of the Antarctic Treaty in 1959.

⁴ Under the LOSC, the deep seabed is known as “the Area”. The mineral resources of the Area are described as the common heritage of mankind and responsibility for managing these resources for the benefit of mankind as a whole is given to an international institution – the International Seabed Authority. The International Seabed Authority has no jurisdiction over the waters superjacent to the Area, which essentially remain as a global commons.

⁵ Articles 2(1), 49(1), 56(1)(a), 56(3) and 77 of the LOSC.

⁶ Article 116. See also article 92(1).

⁷ E.g. articles 63(2) and 116(b).

⁸ See e.g. articles 61(2), 62(1), 117-119, 192 and 194(5) of the LOSC.

⁹ In particular it was evident that coverage of high seas fisheries by regional agreements was incomplete. Even where they existed, in many cases regional agreements had failed to provide adequate enforcement mechanisms; failed to resolve disagreements over allocations among fishing States; failed to resolve the question of the respective rights, duties, and interests of coastal States vis-à-vis those fishing on the high seas; and failed to deal with the question of the rights and obligations of new entrants in a fishery.

¹⁰ Chief amongst these are the FAO Code of Conduct for Responsible Fisheries, the FAO Compliance Agreement and the FAO International Plan of Action to Prevent, Deter and Eliminate IUU Fishing (IPOA-IUU Fishing). The other major post-UNCED global treaty relevant to high seas governance is the Convention on Biological Diversity.

¹¹ Articles 1 and 6 of the Convention on Biological Diversity and articles 5(c) and 6 and Annex II to UNFSA. It is worth emphasising, however, that, in areas beyond national jurisdiction, the general obligations under the Convention on Biological Diversity do not apply to components of biodiversity but only to processes and activities that have adverse effects on biodiversity (c.f. articles 4, 7(c) and 8(l); see also UN Doc. A/AC.259/8, of 22 May 2003, at pp. 4-5).

ANNEX II

GAPS IN PARTICIPATION IN UNFSA

As at February 2005, there were 148 parties to the LOSC. At the same date, there were 52 parties to UNFSA. In contrast, there were 121 parties to the other implementation agreement, the 1994 implementation agreement relating to deep seabed mining. A technical reason for this discrepancy is that, unlike the 1994 agreement, UNFSA has no automatic (provisional) application procedure, nor did it benefit from existing institutional links with the UN system. This notwithstanding, it is clear that many States which have an interest in the matters dealt with by UNFSA have as yet not decided to become parties, despite the understanding that, as an *implementing* agreement, it is consistent with the overarching provisions of the LOSC.

Also as at February 2005, there were only 28 parties to the FAO Compliance Agreement and only 11 parties to both UNFSA and the FAO Compliance Agreement. The latter statistic is particularly confusing since the flag State obligations in the FAO Compliance Agreement are almost identical to those in UNFSA and there would seem to be little justification for a party to UNFSA not to become a party to the Compliance Agreement.¹

The following table shows important non-members of UNFSA, defined by a survey of the membership of the major RFMOs with high seas coverage.² Each of these 48 countries is a member of at least one of these RFMOs. Most of the countries on the list could also be considered either fishing States, flag States or potential flag States. States in bold text are parties to the FAO Compliance Agreement, but not parties to UNFSA.

Table 1: Non-parties to UNFSA

Algeria	Cuba	Guatemala	Malaysia	Philippines
Angola	Ecuador *	Guinea (Conakry)	Mexico	Poland
Argentina	Egypt	Honduras	Morocco *	Saint Kitts and Nevis
Benin	El Salvador *	Japan	Myanmar	Sao Tome and Principe
Cape Verde	Equatorial Guinea	Kiribati	Nicaragua	Syrian Arab Republic *
Chile	Eritrea *	Korea	Niue *	Tanzania
China	Estonia *	Latvia	Oman	Thailand *
Comoros	Gabon	Libya *	Pakistan	Tuvalu
Cote d'Ivoire	Georgia	Lithuania	Panama	Vanuatu
Croatia	Ghana	Madagascar	Peru *	Venezuela *

* indicates NOT a party to LOSC

The list in Table 1 can be further refined by identifying those countries on the list that are members of two or more regional arrangements (thus impliedly having a clear fishing interest) but are not yet parties to the UNFSA. These countries are: Japan, Korea, Mexico, Nicaragua, Panama, Philippines, Poland, Vanuatu and Venezuela.

We can also draw some interesting conclusions if we compare the list in Table 1 with a list developed by Gianni and Simpson³ of the 14 open-registry countries that had registered the largest number of fishing vessels between 1999 and 2003.

Unsurprisingly, very few of the countries that appear in Table 2 are parties to UNFSA. Cambodia is not even prepared to join the overwhelming majority of the world community by becoming party to the LOSC despite its demonstrated interest in maritime matters. Belize and Cambodia (along with Liberia, another non-party to the LOSC, but not a significant fishing vessel registry) are consistently listed within the top ten flag States worldwide in terms of overall tonnages. Belize, Cambodia and St.

Vincent are not party to any of the regional fisheries arrangements, even though their vessels fish on the high seas.

Table 2: Open-registry countries with the largest number of fishing vessels (1999-2003)

	Non-party to UNFSA	Non-party to LOSC
Belize	X	
Bolivia	X	
Cambodia	X	X
Cyprus		
Equatorial Guinea	X	
Georgia	X	
Honduras	X	
Marshall Islands		
Mauritius		
Netherlands Antilles (Netherlands)		
Panama	X	
Saint Vincent and the Grenadines	X	
Sierra Leone	X	
Vanuatu	X	

The beneficial ownership of fishing vessels flagged to open registers is not well known. It is interesting to note, however, that, historically, a high proportion of the IUU tuna catch has been taken by Taiwanese owned vessels. One reliable estimate claimed that the number of Taiwanese-owned (but flagged to open-registries) large scale tuna longliners had increased from 77 in 1985 to 232 in 2000.⁴ In recent years, efforts have been made to reduce the number of such vessels through voluntary scrapping and re-registration through industry bodies such as the Organization for the Promotion of Responsible Tuna Fisheries (OPRT).⁵ However, as Hanafusa and Yagi point out, such efforts have been only partially successful and have not prevented the problem from arising again in respect of purse seine vessels.

¹ The reasons for this are not clear. One problem with the FAO Compliance Agreement, that was noted by a number of States at the time of its adoption, is that it is limited in application to fishing vessels of greater than 24 metres in length. No such limitation appears in the UNFSA. It is possible that States that have already ratified UNFSA do not see any added value in the FAO Agreement.

² We consider the high seas RFMOs for this purpose to be: ICCAT, NAFO, NEAFC, IATTC, WCPFC, CCAMLR, CCSBT, IOTC, SEAFO.

³ M. Gianni and W. Simpson, *Flags of convenience, transshipment, resupply and at sea infrastructure in relation to IUU fishing*, in *Fish Piracy: Combating IUU Fishing*, OECD, 2004, Chapter 6.

⁴ Hanafusa and Yagi, *Efforts to eliminate IUU large scale tuna longline vessels*, in *Fish Piracy: Combating IUU Fishing*, OECD, 2004, Chapter 15.

⁵ This is an organisation whose members include the tuna industries of Japan, Chinese Taipei, Korea, Indonesia, the Philippines, the Peoples Republic of China, and Ecuador.