

Unclassified

AGR/FI/IUU/RD(2004)2

Organisation de Coopération et de Développement Economiques  
Organisation for Economic Co-operation and Development

06-Apr-2004

English text only

**DIRECTORATE FOR FOOD, AGRICULTURE AND FISHERIES  
FISHERIES COMMITTEE**

AGR/FI/IUU/RD(2004)2  
Unclassified

**IUU Fishing and State Control over Nationals**

**19-20 April 2004**

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*This paper has been submitted to the IUU Workshop, 19-20 April 2004, as a background document.*

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**JT00161553**

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## IUU FISHING AND STATE CONTROL OVER NATIONALS<sup>1</sup>

“What giants?” said Sancho Panza.

“Those thou seest there,” answered his master, “with the long arms, and some have them nearly two leagues long.”

“Look, your worship,” said Sancho, “what we see there are not giants but windmills, and what seem to be their arms are the sails that turned by the wind make the millstone go.”

“It is easy to see,” replied Don Quixote, “that thou art not used to this business of adventures; those are giants; and if thou art afraid, away with thee out of this and betake thyself to prayer while I engage them in fierce and unequal combat.”<sup>2</sup>

### Introduction

1. The negotiation of the FAO International Plan of Action on Illegal, Unreported and Unregulated Fishing in many ways brought to mind the adventures of Don Quixote. Like Cervantes' hero, some of us involved in that negotiation saw ourselves as engaged “in fierce and unequal combat” against the bad actors of world fisheries, as we tried to restore a system of ethical rules to guide human activity in this field. Perhaps other saw us as tilting at windmills.

2. The IPOA takes an approach to the problem of IUU fishing that would have made Don Quixote proud, one that is universal in scope and resolute in temperament. All FAO Members have undertaken meaningful commitments under the IPOA, both in their general capacity as States as well as in their more particular capacities as flag States, port States, coastal States, market States and as members of regional fishery management organizations.

3. My presentation today will focus on one aspect of the IPOA that has not received much attention – State control over nationals. One reason why IUU fishing has been such a persistent problem is that many States have not been successful in controlling the fishing activities by their nationals that take place in the waters of other States or aboard vessels registered in other States. Admittedly, it may be difficult for many States to control, or even to be aware of, such activities. States may also have difficulty in preventing their nationals from reflagging fishing vessels in other States with the intent to engage in IUU fishing.

4. The IPOA nevertheless calls on all States to take measures or cooperate to ensure that their nationals do not support or engage in IUU fishing. This presentation will consider a number of measures that States have taken in this regard and will also take another look at the “reflagging problem” that,

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<sup>1</sup> This paper was prepared by David A. Balton, Director, Office of Marine Conservation, U.S. Department of State at the International Conference Against Illegal, Unreported and Unregulated Fishing, Santiago de Compostela, Spain, 25-26 November 2002.

<sup>2</sup> Miguel de Cervantes, *Don Quixote* (1605), John Ormsby, trans.

unfortunately, remains with us to this day. I will also suggest some additional steps for addressing IUU fishing.

### **Existing measures**

5. Under international law, a State is free to enact laws prohibiting its nationals from engaging in IUU fishing, even if the activity in question would take place aboard a foreign vessel or in waters under the jurisdiction of another State.<sup>3</sup> Some States have already done so.

6. For example, 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. The goal of this measure is to prevent Japanese nationals from becoming involved in IUU fishing aboard foreign vessels. Japan also intends to deny permission to any Japanese national to work aboard a foreign fishing vessel in any other fishery, if the vessel's flag State is not a member of the regional fishery management organization (RFMO) regulating that fishery.<sup>4</sup> New Zealand and Australia have also enacted legislation restricting the activities of their respective nationals aboard foreign vessels registered in States meeting certain criteria.

7. In the United States of America, the Lacey Act makes it unlawful for any person subject to U.S. jurisdiction 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." Hence, a U.S. national may be prosecuted for engaging in certain forms of IUU fishing aboard foreign vessels or in waters under the jurisdiction of another State.<sup>5</sup>

### **A return to the "reflagging problem"**

8. The European Union now also appears to be moving to control IUU fishing by nationals of its Member States in a way that is bringing renewed attention to the "reflagging problem." In May 2002, the European Commission issued a "Community Action Plan for the Eradication of Illegal, Unreported and Unregulated Fishing." In considering measures to control nationals of EU Member States, this paper presents the following objective:

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<sup>3</sup> The principle that a State may apply its law to its nationals wherever they may be found is generally accepted. See, e.g., *Bartolus on the Conflict of Laws* 51 (Beale, trans. 1914); *Restatement (Third) of the Foreign Relations Law of the United States*, §402(2) (1987). For further discussion, see "Tools to Address IUU Fishing: The Current Legal Situation," by William Edeson, one of a series of papers prepared as background documents for the Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia in Cooperation with FAO, Sydney, Australia, 15-19 May 2000.

<sup>4</sup> See "The Importance of Taking Cooperative Action Against Specific Fishing Vessels that are Diminishing Effectiveness of Tuna Conservation and Management Measures," by Masayuki Komatsu, one of a series of papers prepared as background documents for the Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia in Cooperation with FAO, Sydney, Australia, 15-19 May 2000.

<sup>5</sup> See United States Code, Title 16, Chapter 53. For further discussion of how the Lacey Act might be adapted for other situations involving IUU fishing, see "National Legislative Options to Combat IUU Fishing," by Blaise Kuemlengan, one of a series of papers prepared as background documents for the Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia in Cooperation with FAO, Sydney, Australia, 15-19 May 2000.

to discourage Community Member State nationals from flagging their fishing vessels under the jurisdiction of a State which is failing to fulfill its flag State responsibilities and from committing infringements.

9. The articulation of this goal represents a positive development in the attitude of the European Commission toward the problem of vessel reflagging. We must recall that the international community recognized the gravity of this problem more than ten years ago. Agenda 21, adopted by the United Nations Conference on Environment and Development in Rio de Janeiro, called upon States to

take effective action, consistent with international law, to deter reflagging of vessels by their nationals as a means of avoiding compliance with applicable conservation and management rules for fishing activities on the high seas.<sup>6</sup>

10. Following the Earth Summit in Rio, the FAO served as the forum for the development of a new treaty to address the reflagging problem, which ultimately became the 1993 FAO Compliance Agreement. An original draft of this treaty would have required Parties to prohibit their nationals who owned fishing vessels from reflagging those vessels to other nations for the purpose of avoiding compliance with conservation and management measures adopted by RFMO. The original draft would also have required Parties to take practical steps to enforce this prohibition.

11. The European Union opposed this fundamental approach at that time. The EC delegation argued that fishing vessel owners frequently reflag their vessels for perfectly legitimate reasons, and that reflagging also often occurs legitimately when fishing vessels are sold to owners in other countries. At the time a fishing vessel is about to be reflagged, a government cannot know whether the vessel owner is reflagging the vessel with the intent to avoid compliance with conservation and management measures. Certainly, a fishing vessel owner on the verge of reflagging a vessel is unlikely to announce such intent. Many governments are not even aware of when vessels subject to their jurisdiction are in the process of being reflagged, making the regulation of reflagging quite difficult for them.

12. These concerns forced the negotiation of the FAO Compliance Agreement on to a different track. The Agreement, as adopted by FAO, imposes no obligations on Parties to take any action to deter their nationals from reflagging fishing vessels to notorious flag-of-convenience States. Instead, the Agreement focuses solely on the responsibility of flag States to control the fishing activities of their vessels.

13. The elaboration of specific flag State responsibilities in the FAO Compliance Agreement (and in a number of other international instruments, particularly the 1995 UN Fish Stocks Agreement) has contributed significantly in the fight against IUU fishing. The international community now has a well-recognized set of standards by which to measure the actions of flag States in exercising control over their fishing vessels.

14. Unfortunately, the elaboration of these standards is not enough. The FAO Compliance Agreement is not yet in force. The UN Fish Stocks Agreement, though it entered into force in 2001, has only 32 parties,<sup>7</sup> none of which could be considered notorious flag-of-convenience States. Meanwhile, there are still quite a few such States who offer their flag to fishing vessels without any real ability, or even intention, to control the fishing activities of those vessels.

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<sup>6</sup> Report of the United Nations Conference on Environment and Development, UN Doc A/CONF. 151/26, 1992, Agenda 21, ch. 17, para. 17.52.

<sup>7</sup> The European Union and its Member States, despite many statements of intention to become party to the UN Fish Stocks Agreement, have still not done so.

15. As evidenced by the IPOA on IUU Fishing, the international community has come to realize that reliance on flag State responsibility alone will not solve the problem of IUU fishing being committed by reflagged vessels. The “flagging out” States (that is, the States whose nationals are seeking to reflag their vessels) should take steps to control such reflagging. We cannot depend exclusively on the actions of the “flagging in” States (that is, the new flag State).

16. Of course, the concerns relating to the ability of the “flagging out” States to regulate reflagging remain, but there are ways to address them. Governments face similar circumstances in trying to regulate or prohibit any activity of their nationals, where one necessary element is the intent of the person undertaking the activity. In such situations, governments can adopt laws or regulations prohibiting persons from undertaking the activity in question, then penalize those who subsequently undertake the activity if evidence exists that such person had the requisite intent. Accordingly, if a government has evidence that a reflagged fishing vessel owned or operated by one of its nationals is committing IUU fishing, the government would have at least a *prima facie* case that the vessel owner or operator reflagged the vessel for that purpose.

17. On the strength of such evidence, the government could prosecute the owner and operator, assuming the government could obtain jurisdiction over such individuals. The government might also be able to take certain actions against the vessel directly (e.g., by prohibiting the vessel from ever being re-registered in the original flag State or by prohibiting it from landing or transshipping fish in its ports). In particularly egregious cases, it might even be possible for a government to take action against other vessels owned by the same owners that have not yet been reflagged (e.g., by revoking fishing permits applicable to them).

18. RFMOs can also play a role in this effort, particularly by identifying flag States whose vessels are undermining the effectiveness of their conservation and management measures.<sup>8</sup> States can then take measures to deter their nationals from reflagging fishing vessels, or from initially registering new vessels, in the identified States. Such measures could include controls on deletion of vessels from national registers, controls on the export of fishing vessels,<sup>9</sup> publicity campaigns to make vessel owners aware of those States that have been so identified, and a prohibition on allowing vessels that are or have been registered in such States ever to be re-registered in the initial flag State.

19. Accordingly, I hope that the European Community and all other members of the international community vigorously pursue efforts to control the reflagging of fishing vessels by nationals for the purpose of engaging in IUU fishing.

### **New initiatives**

20. However, States must do more to control the activities of their nationals than merely regulate the reflagging of fishing vessels. Owners and operators of fishing vessels sometimes register their vessels in responsible foreign States, but use those vessels to commit IUU fishing anyway. The flag State, of course,

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<sup>8</sup> The International Commission for the Conservation of Atlantic Tunas, for example, has been identifying flag States in this way for several years. Cf., article IV(3) of the Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean (“Each Party shall take appropriate measures aimed at preventing vessels registered under its laws and regulations from transferring their registration for the purpose of avoiding compliance with the provisions of this Convention”).

<sup>9</sup> Japan, for example, has since 1999 denied all requests to export large-scale tuna longline vessels. In addition, Japan has worked through industry channels to develop understandings that certain former Japanese vessels owned in Taiwan Province of China should be scrapped and that others constructed in Taiwan should either be registered and regulated there or scrapped.

has responsibility to take action against such IUU fishing, as do any other coastal States, port States or market States if the IUU fishing involves them.

21. But the State of nationality of the owner or operator of the vessel can also act. For example, the State of nationality can 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 a RFMO. Such a law could be drafted as follows:

A person subject to the jurisdiction of [State] who –

- a) on his or her own account, or as partner, agent or employee of another person, lands, imports, exports, transports, sells, receives, acquires or purchases; or
- b) causes or permits a person acting on his behalf, or uses a fishing vessel, to land, import, export, transport, sell, receive, acquire or purchase,

any fish taken, possessed, transported or sold contrary to the law of another State or in a manner that undermines the effectiveness of conservation and management measures adopted by a Regional Fisheries Management Organization shall be guilty of an offence and shall be liable to pay a fine not exceeding [insert monetary value].

22. Sanctions against nationals that have engaged in such IUU fishing could include, for example, monetary fines, confiscation of fishing vessels and fishing gear and denial of future fishing licenses.<sup>10</sup>

23. As detailed in paragraphs 73 and 74 of the IPOA, each State should ensure that its nationals (as well as other individuals under their jurisdiction) 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.

24. To complement the actions of States in controlling their nationals, we must also see greater efforts to press flag States to fulfill their responsibilities. As one step in this process, the United States has provided funding to FAO to host an event designed to remind governments that maintain open vessel registers of the measures that need to be taken to help control IUU fishing and to urge them to take those measures. The event is being planned for mid-2003, tentatively in Miami. FAO is intending to invite representatives from governments of States that maintain open registers, as well as certain other individuals with relevant expertise, to make presentations in their individual capacities.<sup>11</sup>

25. FAO also hosted a meeting of experts earlier this month to consider further action that port States might take to combat IUU fishing. A number of ideas surfaced at this meeting that are worth pursuing, particularly the possibility of developing regional port State MOUs in the field of fisheries, drawing on the experience we have gained through the regional port State MOUs that are in force in the fields of vessel safety and pollution.

26. RFMOs must also continue to adopt strong measures to control IUU fishing. The United States was pleased that ICCAT, at its most recent meeting in Bilbao, adopted decisions to enhance its use of a vessel “black list” and also to develop a complementary vessel “white list.” Since the ICCAT black list

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<sup>10</sup> Spanish legislation, for example, provides for the suspension of a captain’s license for up to five years for committing certain offenses aboard flag-of-convenience vessels.

<sup>11</sup> For a recent review of the subject, see “Fishing Vessels Operating Under Open Registers and the Exercise of Flag State Responsibilities: Information and Options,” FAO Fisheries Circular No. 980 (2002).

will now be used to take action against individual vessels (and not only flag States), we believe that ICCAT acted properly in making the process for listing and de-listing vessels more rigorous, so as to provide greater due process and certainty. CCAMLR also took steps at its most recent meeting to control IUU fishing further, including through the creation of a pilot program for electronic control of its toothfish Catch Documentation Scheme, a commitment not to allow vessels with bad records to re-register in the territories of CCAMLR members and movement toward a centralized Vessel Monitoring System.

27. Finally, we also must recognize that any effective action to combat IUU fishing cannot take place in isolation from other related initiatives underway in the field of international fisheries. In particular, efforts to reduce fishing capacity in oversubscribed fisheries and efforts to eliminate subsidies that contribute to overcapacity and overfishing must be key parts of our overall strategy. Governments must use available public funds to reduce overcapacity, not to exacerbate it. Governments have no justification, for example, in providing assistance toward the construction of new fishing vessels that are likely to seek to enter fisheries that are already fully subscribed.

### **Conclusion**

28. Don Quixote de la Mancha represented the bold idealism of the human spirit untarnished by realism. To succeed in the struggle against IUU fishing, we must tap the well of this bold idealism, but channel our efforts in realistic ways. In a very real sense, the world has shrunk in the years since Cervantes wrote his masterpiece. People can move from place to place with an ease that Cervantes probably never even imagined. People who own or operate fishing vessels can also move their vessels from ocean to ocean – and from registry to registry – with remarkable ease today. In such a world, governments must use all the tools at their disposal to ensure that all people subject to their jurisdiction use fishing vessels responsibly.