

ILLEGAL, UNREPORTED AND UNREGULATED FISHING: AN ANALYSIS OF THE LEGAL, ECONOMIC AND HISTORICAL FACTORS RELEVANT TO ITS DEVELOPMENT AND PERSISTENCE

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[The state of global marine fisheries is of common concern to humankind. The emergence and persistence of noncompliant fisheries practices conveniently (though sometimes confusingly) labelled 'Illegal, Unreported and Unregulated fishing' ('IUU fishing'), is of particular concern for the international community, regional fisheries management organisations and coastal states. A number of factors have contributed to the emergence of IUU fishing. Historical and economic developments have shaped the evolution of modern fisheries and whilst not always desirable, they are influences that must be accepted and understood. Factors facilitating the persistence of IUU fishing tend to be primarily legal in nature. Hence there is scope to address these matters with the aim of creating a legal environment where IUU fishing becomes less attractive. It has been acknowledged that there is no one single solution to the problem of IUU fishing. It is argued that this is because there is no one single contributing factor. Rather, noncompliant fishing is a product of the development of the law of the sea, in particular over the past two centuries. The law of the sea is itself a product of the political, economic and sometimes legal, interests of states.]

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I INTRODUCTION

It is estimated that up to 78 per cent of marine capture fisheries are overfished.¹ Given that the global marine catch increased from 18 million tonnes in 1950 to 92 million tonnes by 2001,² overfishing is not surprising. Responsibility cannot rest solely upon high seas fishing states nor coastal states, since a number of interrelated factors have contributed to the situation. Developments such as the extension of coastal state sovereign rights over living and non-living resources in the water column and seabed to a limit of 200 nautical miles, and the corresponding displacement of fishing fleets from what had hitherto been regarded as high seas, had a marked impact on the regulation and practice of marine fisheries. Further, rapid advancements in technology which improved vessel efficiency, significant capital investment in the fishing industry and an over capacity in the global fishing fleet must also be considered when evaluating influences on marine fisheries. Marine fisheries are characterised by too many vessels — and efficient ones at that — pursuing fewer fish in a greatly reduced area.³ When the cumulative impact of these historical and economic factors is assessed, one appreciates the profound way in which the nature of fishing, particularly in the latter half of the 20th century, has been altered. This shift is comparable to a transformation from a ‘trade to a science’.⁴

Therefore, it is not unexpected that in an environment of competition for fewer resources, a phenomenon called illegal, unreported and unregulated fishing — now commonly termed ‘IUU fishing’⁵ — emerged, and has become more prominent in the last decade of the 20th century. The term is one of broad application, encompassing a suite of activities with the common aim of avoiding regulation, be they on the high seas, in areas regulated by Regional Fisheries Management Organisations (‘RFMOs’) or in coastal state waters. The operators and owners of IUU fishing vessels have become increasingly sophisticated in their planning and execution of fishing expeditions. Tactics such as sharing intelligence, reflagging to non-members of RFMOs, changing the vessel name

¹ Food and Agriculture Organization, *State of the World Fisheries and Aquaculture* (2000) The State of World Fisheries and Aquaculture Part 1 <http://www.fao.org/DOCREP/003/X8002E/x8002e04.htm#P0_0> at 1 October 2004. The Food and Agriculture Organization is hereafter referred to as ‘FAO’.

² Ibid; FAO, *State of the World Fisheries and Aquaculture* (2002) <http://www.fao.org/docrep/005/y7300e/y7300e04.htm#P3_47> at 1 October 2004.

³ See Jacques Diouf, FAO Director General, ‘Too Many Vessels Chasing Too Few Fish’ (Press Release, 1 October 2001) <http://www.fao.org/WAICENT/OIS/PRESS_NE/PRESSENG/2001/pren0158.htm> at 1 October 2004. He stated: ‘Consequently today there are too many vessels chasing too few fish’.

⁴ David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (2nd ed, 2002) 674.

⁵ See discussion in Part II of this article.

and call sign, and creating elaborate corporate webs to conceal ownership are indicative of an emerging corporate element in IUU fishing. Furthermore, IUU fishers have exploited limitations in the international law of the sea which were not apparent when the *United Nations Convention on the Law of the Sea*⁶ was negotiated.

The historical and developmental factors which have shaped the evolution of modern marine fisheries are primarily nonlegal in nature, the principal drivers for change being economic and political self-interest. Whilst nothing can be done to turn back the clock and reorganise the framework within which marine fisheries are regulated, it is nevertheless helpful to understand the combination of factors that have driven state practice. It is interesting to observe that the factors facilitating the persistence of IUU fishing, however, are principally legal in nature. Hence there is scope to address these factors with the aim of eliminating legal loopholes exploited by IUU fishers.

This article examines the range of factors which have contributed to the development of IUU fishing and, arguably, facilitated its persistence. It is divided into four parts. Part II examines the use of the term 'IUU fishing' and reviews why IUU fishing is now a global problem. Part III reviews historical and nonlegal factors that have affected marine fisheries. Part IV identifies and examines legal limitations in international law exploited by IUU fishers. The analysis supports the conclusion that, given the gradual development of conditions favourable to the conduct of IUU fishing, there is no one single solution which can be utilised to eliminate its practice. Indeed it was noted at the close of the Organisation for Economic Co-operation and Development Workshop on IUU fishing in April 2004, that the solution to IUU fishing will require a 'multi-pronged approach'.⁷ An understanding of the factors contributing to the development and facilitating the continued existence of IUU fishing will assist in the formulation of the scope of such an approach. Lastly, Part V identifies some possible solutions or strategies for the deterrence of IUU fishing.

II UNDERSTANDING IUU FISHING

IUU fishing as a term is broadly defined. It encompasses a range of behaviour principally categorised according to wherever the fishing takes place. The Commission established under the *Convention on the Conservation of Antarctic Marine Living Resources*⁸ is credited with being the first RFMO to give formal recognition to the problem of noncompliant fishers and to coin the phrase 'IUU fishing'.⁹ The 1997 Report of the Standing Committee on Observation and Inspection noted that vessels flagged to CCAMLR members had been observed

⁶ Opened for signature 10 December 1982, 1834 UNTS 3 (entered into force 16 November 1994) ('UNCLOS').

⁷ OECD, *Workshop on Illegal, Unreported and Unregulated (IUU) Fishing Activities — Key Observations and Findings by the Workshop Chairs* (2004) 2 ('OECD Workshop').

⁸ Opened for signature 20 May 1980, 1329 UNTS 47 (entered into force 7 April 1982) ('CCAMLR'). The Commission for the Conservation of Antarctic Marine Living Resources is hereafter referred to as the 'CCAMLR Commission'.

⁹ CCAMLR Commission, *Report of the Sixteenth Meeting of the Commission* (27 October – 7 November 1997) [8.7]–[8.13] <<http://www.ccamlr.org/pu/E/pubs/cr/97/cc-xvi-all.pdf>> at 1 October 2004.

fishing illegally within *CCAMLR* waters¹⁰ and the Exclusive Economic Zones ('EEZs') adjacent to the Prince Edward Islands (South Africa), Crozet Islands and the Kerguelen Islands (France) and the Heard and McDonald Islands (Australia).¹¹ The *CCAMLR* Commission also noted the increasing incidence of fishing within the *Convention* Area by non-contracting states. This activity was classified as 'unreported and unregulated fishing by non-Members'.¹²

Whilst the Standing Committee on Observation and Inspection and the *CCAMLR* Commission made a distinction between illegal fishing, and unreported and unregulated fishing, the international community has partially blurred the distinction. Instead, 'IUU fishing' has been used as a generic description of fishing activity which 'undermines efforts to conserve and manage fish stocks in all capture fisheries'.¹³ It is true that IUU fishing activities may overlap. For example, illegal fishing is also unreported by its nature. However, it is important to recognise that the term is often used to describe specific situations such as fishing within coastal state waters without coastal state permission, or fishing within RFMO waters by a flag vessel of a state party in contravention of the relevant RFMO conservation measures. In this context, the term illegal fishing would be more accurate to describe the factual situation.¹⁴

This article draws on several examples from the practice of illegal fishers detected and arrested within Australian waters adjacent to the Heard and McDonald Islands. In this context the specific term 'illegal fishing' is applicable. On other occasions when commenting generally on the practice of noncompliant fishing, the generic term 'IUU fishing' is employed. In the main, the historical nonlegal factors reviewed in Part III have created an environment where the emergence of IUU fishing has been almost inevitable. However, the legal factors, which are examined in Part IV, principally relate to illegal fishing, since unreported and unregulated fishing occurs on seas governed by RFMOs or the high seas and consequently is not governed by rules relevant to the enforcement of coastal state jurisdiction.¹⁵

A *IUU Fishing as a Global Problem*

The persistent and global nature of IUU fishing was noted in a statement made at the close of the FAO's 25th Committee on Fisheries ('COFI') in March

¹⁰ *CCAMLR*, above n 8, art 1, defines the *Convention* Area in terms of its application to 'Antarctic marine living resources of the area south of 60 degrees south latitude and the Antarctic marine living resources of the area between that latitude and the Antarctic Convergence which form part of the Antarctic marine ecosystem'.

¹¹ *CCAMLR* Commission, *Report of the Sixteenth Meeting of the Commission*, above n 9, annex 5 [1.5].

¹² *Ibid* annex 5 [1.20].

¹³ The Committee on Fisheries, FAO, *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (2001) [1] <<http://www.fao.org/DOCREP/003/y1224e/y1224e00.HTM>> at 1 October 2004 ('*IPOA-IUU*').

¹⁴ *Ibid*. The *IPOA-IUU* does define the illegal, unreported and unregulated fishing separately: at [3.1]–[3.3].

¹⁵ Although it is noted, as mentioned above, that unreported fishing can occur within coastal state waters, this is usually when linked to illegal fishing.

2003. It was acknowledged by the members of COFI that 'IUU fishing and its impact on resource sustainability is a matter of international concern'.¹⁶

The international community has galvanised itself behind the cause of deterring and eliminating IUU fishing. In December 2003, five states agreed to participate in the OECD Taskforce to tackle IUU Fishing.¹⁷ To this end, in April 2004 the OECD hosted a workshop on IUU fishing attended by approximately 120 experts. The aim of the workshop was to gather information on the extent of IUU fishing and to identify the economic and social drivers for its existence.¹⁸ It was noted, *inter alia*, that the impact of IUU fishing is not restricted to specific habitats. Tuna, which is classed as a highly migratory species,¹⁹ is also significantly affected. More recently, 84 FAO member states met in late June 2004 to discuss methods of strengthening international cooperation to combat IUU fishing.²⁰ Recommendations included increased cooperation on trade controls, and the creation of a central FAO database of information on IUU fishing activities.²¹

The impact of organised IUU fishing has been felt particularly in the Southern Ocean and within the EEZs located adjacent to a number of sub-Antarctic islands. The remote location of these EEZs, coupled with the freezing and mountainous seas encountered in the Southern Ocean, magnifies the difficulties experienced by coastal state authorities in regulating their maritime zones and deterring illegal fishers. Excepting the pockets of coastal state jurisdiction, the Southern Ocean south of 60 degrees south latitude is governed by the Commission established by the *CCAMLR*.²² Beyond this, the ocean is considered high seas. However, states who are not members of *CCAMLR* regard all of the Southern Ocean, with the exception of the remote EEZs, as high seas.²³ The

¹⁶ FAO, 'Strong Support for Firmer Action against IUU Fishing' (Press Release, 3 March 2003) <<http://www.fao.org/english/newsroom/news/2003/14660-en.html>> at 1 October 2004.

¹⁷ Ian Macdonald, Minister for Fisheries, Forestry and Conservation, Australia, 'Illegal Fishing under Pressure from International Action' (Press Release, 10 December 2003) <<http://www.mffc.gov.au/releases/2003/03272m.html>> at 1 October 2004. The states are Australia, Chile, Namibia, New Zealand and the United Kingdom.

¹⁸ OECD, *OECD Workshop*, above n 7, 2.

¹⁹ Eight species of tuna are listed in *UNCLOS*, above n 6, annex I.

²⁰ FAO, 'Countries Debate Strategies for Managing Fleet Capacities and Combating Illegal Fishing' (Press Release, 1 July 2004) <<http://www.fao.org/newsroom/en/news/2004/47649/>> at 1 October 2004.

²¹ *Ibid.* These methods are mentioned further in Part V of this article.

²² See generally *CCAMLR*, above n 8.

²³ The validity of remote EEZs such as the Heard and McDonald Islands EEZ has been raised by Judge Vukas in two cases before the International Tribunal for the Law of the Sea ('ITLOS'): see *The Monte Confurco Case (Seychelles v France)* ITLOS Case No 6 (Unreported, Declaration of Judge Vukas, 18 December 2000) ('*Monte Confurco Case*'); *The Volga Case (The Russian Federation v Australia)* ITLOS Case No 11 (Unreported, Declaration of Vice-President Vukas, 23 December 2002) ('*Volga Case*'). See Chris Masters (Reporter) and Lin Buckfield (Producer), 'The Toothfish Pirates', *ABC Four Corners Program*, 30 September 2002 ('*Four Corners*'), where one of the officers on board the *Lena* when she was apprehended in February 2002 is on the record as having stated: 'We ... the fishermen ... do not understand the Australian waters as Australian waters'. In this context, the dissenting judgement of Vice-President Vukas might be viewed as supportive of claims by IUU fishermen that all areas of the Southern Ocean are high seas, including those regions of purported coastal state jurisdiction. If this argument were taken to its logical conclusion, one would argue that there can be no illegal fishing in the Southern Ocean.

application of differing legal regimes concerning the Southern Ocean makes it imperative to be precise when employing the term IUU fishing.

It is not within the scope of this article to examine the extent to which coastal states and RFMOs have generally been plagued by IUU fishing.²⁴ Nonetheless, it is sufficient to say that there are reports of IUU fishing in varying levels of severity, in relation to several species of tuna, reef sharks in the Western Central Pacific, oceanic redfish in the North-East Atlantic Ocean and lobster in waters adjacent to Oman.²⁵ Furthermore, in terms of illegal fishing for toothfish in the Southern Ocean EEZs and unreported and unregulated fishing within *CCAMLR* waters, the illegal trade has been described as ‘probably more profitable than running drugs or smuggling people’.²⁶

B *IUU Fishing in the Southern Ocean*

Concerns were first raised in 1993 about illegal fishing activities in the Southern Ocean. The *CCAMLR* Scientific Committee reported that toothfish stocks around South Georgia Island may have been depleted to approximately 30 per cent of the original stock levels.²⁷ Signs of active management appear in the agenda for the 1995 *CCAMLR* annual meeting.²⁸ The Working Group on Fish Stock Assessment reported that ‘[t]he unreported catch was either of the same order or higher than the reported catch’.²⁹ It was also observed that over the previous four years, the reported catch represented just 40 per cent of the estimated total catch harvested from within sub-area 48.3 (South Georgia Island) and adjacent areas.³⁰

It is difficult to verify estimates of the quantity of toothfish harvested by the IUU fishing industry. However, IUU fishing as a percentage of the total catch of toothfish within the *Convention* Area is significant. Table 1 below illustrates the extent of the problem raised by IUU fishing. Whilst the peak of IUU fishing appears to have passed for the time being, it remains a significant management problem for the *CCAMLR* Commission. In any case, the estimates in Table 1 for the 2001–02 fishing year suggest that IUU fishing, at least for toothfish fishing, is on the rise once more.

²⁴ There are many papers addressing this area, particularly the existence of IUU fishing in the Southern Ocean: See, eg, David Agnew, ‘The Illegal and Unregulated Fishery for the Toothfish in the Southern Ocean and the *CCAMLR* Catch Documentation Scheme’ (2000) 24 *Marine Policy* 361; Denzil Miller, Eugene Sabourenkov and Natasha Slicer, ‘Unregulated Fishing — the Toothfish Experience’ in Michael Richardson and Davor Vidas (eds), *The Antarctic System for the 21st Century* (forthcoming 2004); Judith Swan, FAO Fisheries Department, *FAO Fisheries Circular No 996: International Action and Responses by Regional Fishery Bodies or Arrangements to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (2004) FAO Doc FIPL/C996.

²⁵ Swan, *FAO Fisheries Circular No 996*, above n 24, 29–30.

²⁶ Bruce Montgomery, ‘A Fishy Business’, *The Weekend Australian* (Sydney, Australia), 26 October 2002, 28.

²⁷ Scientific Committee for the Conservation of Antarctic Marine Living Resources, *Report of the Twelfth Meeting of the Scientific Committee* (25–29 October 1993) [3.34]. Note the word ‘may’ was used as there was in 1993 and remains today, uncertainty about exact population levels. See also Agnew, above n 24, 362.

²⁸ Scientific Committee for the Conservation of Antarctic Marine Living Resources, *Report of the Fourteenth Meeting of the Scientific Committee* (23–27 October 1995).

²⁹ *Ibid* [4.16].

³⁰ *Ibid* [4.17]. The ‘Fishing Season’ referred to in Table 1 runs from 1 December – 30 November.

TABLE 1: CCAMLR ESTIMATES OF IUU TOOTHFISH FISHING (IN TONNES) WITHIN THE CONVENTION AREA FROM 1996–97 TO 2001–02³¹

Fishing Season	1996–97	1997–98	1998–99	1999–00	2000–01	2001–02
Estimated IUU Catch	32 673	15 106	5868	7644	8802	11 812
Total Catch	45 071	28 424	19 643	25 308	22 527	24 834
IUU Catch as % of Total	73%	53%	30%	30%	39%	48%

During discussions at the 1997 *CCAMLR* meeting, many member states expressed concern for the growing incidence of IUU fishing within the *Convention Area*. The European Community ('EC') representative stated that the EC 'considered that [the] *CCAMLR* [Commission] faced a major challenge resulting from the blatantly illegal and/or non-notified fishing activities'.³² The *CCAMLR* Commission concluded, at the 1997 meeting, that fisheries management is aggravated by the fact that

illegal, unregulated fisheries and unreported catches today exceed reported fishing by a factor several times over. No less aggravating is the fact that more than half of the vessels presumed to engage in illegal, unregulated and unreported fishing fly the flags of *CCAMLR* Member States. That underlines the urgent need for *CCAMLR* and *CCAMLR* Member States to bring their own house in order.³³

The *CCAMLR* Commission has adopted a number of conservation measures specifically aimed at eliminating or at least deterring IUU fishing within the *Convention Area*, having noted in 2003 that 'current levels of IUU fishing are unsustainable'.³⁴

³¹ Miller, Sabourenkov and Slicer, above n 24: Table 1 of this article is reproduced from Table 4 of the chapter.

³² *CCAMLR* Commission, *Report of the Sixteenth Meeting of the Commission*, above n 9, [5.2].

³³ *Ibid* [5.8].

³⁴ *CCAMLR* Commission, *Report of the Twenty-Second Meeting of the Commission* (27 October–7 November 2003) [8.3] <<http://www.ccamlr.org/pu/E/pubs/cr/03/all.pdf>> at 1 October 2004. While it is not within the scope of this article to review the measures adopted under the *CCAMLR*, see generally Agnew, above n 24; Miller, Sabourenkov and Slicer, above n 24; Erik Jaap Molenaar 'CCAMLR and Southern Ocean Fisheries' (2001) 16 *International Journal of Marine and Coastal Law* 465, for an overview of Conservation Measures.

III HISTORICAL AND ECONOMIC FACTORS AS INFLUENCES ON THE DEVELOPMENT OF MARINE FISHERIES

A *The Creation of the EEZ and the Displacement of High Seas Fishing Vessels*

Although now it is simply a fact of history, the impact on marine fisheries of the high seas fishing fleet relocating beyond the newly declared EEZs is an important factor in understanding IUU fishing. In addition to the inevitable impact upon resource management, the reduction and restriction of high seas freedoms challenges the fundamental belief in the freedom of those seas — a freedom which has long been championed by seafaring states — principally for the purpose of protecting navigational and fishing rights.

The enclosure of vast tracts of sea within declared EEZs reduced the area of high seas significantly. It is estimated that approximately 35 per cent of the world's oceans are now enclosed within coastal state waters.³⁵ The creation of EEZs therefore excluded high seas fishing states from waters that had, until 1982, been regarded as traditional high seas and thus open to the exercise of the right to the freedom of fishing. Whilst art 62 of *UNCLOS* does cast an obligation on coastal states to give other states access to the surplus allowable catch in circumstances where they do not have the capacity to harvest the entire allowable catch within their EEZ, the practical effect was the exclusion of high seas fishing states from participation in these fisheries. The high seas fishing states and their many vessels were forced to seek catches from waters further than 200 miles from the coast.

Given that more than 95 per cent of the marine catch comes from seas within coastal state jurisdiction,³⁶ one could be excused for dismissing as unimportant the remnants of the marine fisheries located in the high seas. However, the recognition of EEZs and the enforcement of associated coastal state rights shifted the focus of high seas fishing 200 nautical miles out to sea, resulting in the concentration of an unprecedented fishing effort in a smaller resource pool. High seas fishing states continued to exercise their rights in these adjacent high seas areas, albeit subject to the limitations within arts 116–19 of *UNCLOS*.

Catch estimates from the FAO reflect the impact of this shift in focus upon previously under fished stocks. Catches of oceanic species almost tripled from three million tonnes in 1976 to eight and a half million tonnes in 2000.³⁷ Specifically, a striking example of the impact of the relocation of the high seas

³⁵ Jean Carroz, 'Institutional Aspects of Fishery Management under the New Regime of the Oceans' (1984) 21 *San Diego Law Review* 513, 513.

³⁶ *Ibid.* See also Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea* (2nd ed, 1988) 232; Division for Ocean Affairs and the Law of the Sea ('DOALOS'), Office of Legal Affairs, UN, *The United Nations Convention on the Law of the Sea — A Historical Perspective* (1998) Overview — Convention & Related Agreements <http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm> at 1 October 2004.

³⁷ FAO, *State of the World Fisheries and Aquaculture* (2002) The State of World Fisheries and Aquaculture Table of Contents <<http://www.fao.org/docrep/005/y7300e/y7300e00.htm>> at 1 October 2004. Whilst the FAO noted it is difficult to assess the development of fishing on the high seas because reports to FAO of marine catches make no distinction between those taken within EEZs and those taken on the high seas, the analyses of the FAO catch database of 116 oceanic species items (epipelagic and deep water species that occur principally on the high seas) revealed the increase.

fishing fleet was the commercial extinction of the Central Bering Sea pollock during the 1980s. In 1977, both the former USSR and the US declared extended fisheries jurisdictions into the Central Bering Sea. Prior to this date the US had claimed only three miles under the authority of a territorial sea and the former Union of Soviet Socialist Republics a 12 mile territorial sea.³⁸ The resulting expansion of state sovereignty left only 50 000 square miles of high seas in the 875 000 square mile Bering Sea. The enclave of remaining high seas was named the ‘Donut Hole’ due to the appearance of a ‘hole’ of high seas surrounded by the Soviet and American fishing zones on redrawn maps. A number of high seas fishing states had traditionally fished in the Bering Sea, including Japan, the Republic of Korea, the People’s Republic of China and Poland. These states were gradually excluded from the newly-declared US and USSR fishing zones as the coastal states began phasing out foreign fishing allocations.³⁹

The consequences of this revised delimitation underscore the impact of the relocation or displacement of the high seas fishing fleet. The traditional high seas fishing states turned their attention to the previously unfished waters of the ‘Donut Hole’. Recorded pollock catches rose rapidly from negligible amounts at the close of the Third United Nations Conference on the Law of the Sea (‘UNCLOS Conference III’) to 1.4 million metric tonnes within a decade.⁴⁰ Figure 1 below illustrates the intensity of fishing and the rapid decline in recorded catches as the pollock stocks were fished to the brink of collapse.

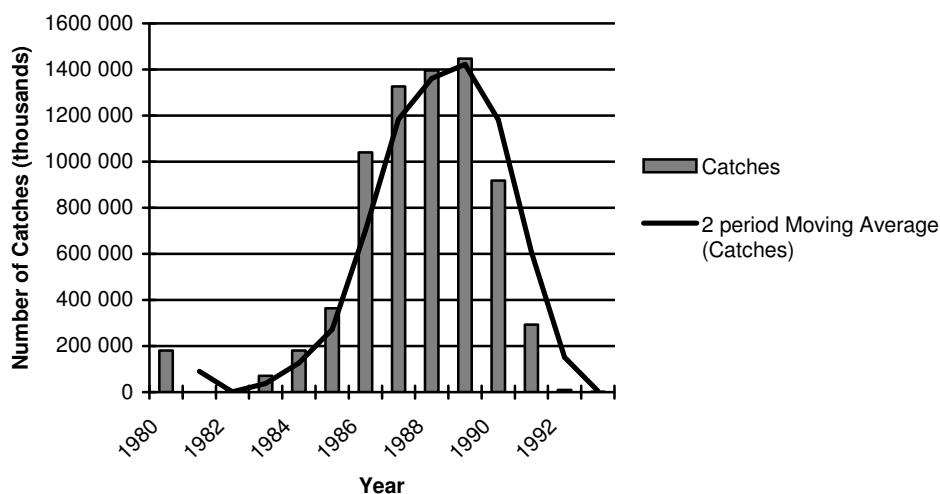


FIGURE 1: *Pollock Catches in the Bering Sea ‘Donut Hole’*⁴¹

³⁸ David Balton, ‘The *Bering Sea Doughnut Hole Convention*: Regional Solution, Global Implications’ in Olav Stokke (ed), *Governing High Seas Fisheries: The Interplay of Global and Regional Rules* (2001) 143, 144.

³⁹ Evelyne Meltzer, ‘Global Overview of Straddling and Highly Migratory Fish Stocks: The Nonsustainable Nature of High Seas Fisheries’ (1994) 25 *Ocean Development and International Law* 255, 283.

⁴⁰ Ibid 286.

⁴¹ See *ibid* 287, for the raw data upon which Figure 1 is based.

The displacement of the high seas fishing fleet increased fishing effort on smaller numbers of fish, resulting in increased competition amongst states, and the emergence of IUU fishing. The need to regulate the new fisheries, such as that of the pollock, became apparent when fish populations collapsed. Furthermore, the high seas fishing states objected to attempts by coastal states to regulate high seas fisheries (including straddling fish stocks and highly migratory fish stocks), arguing that coastal state interests had already been advanced at the expense of high seas fishing states through the recognition of the 200 mile EEZ.⁴²

B *Capital Investment in Marine Fisheries*

Significant capital investment in marine fisheries resulted in rapid advances in technology and increases in the size of the world fishing fleet. In turn, this has meant that more fish are being harvested in less time, by a greater number of vessels. The impact of overfishing, excess fleet capacity, and overcapitalisation in world fisheries was noted in 1995 at the Rome Consensus on World Fisheries.⁴³

During the late 19th century and the 20th century, the fishing industry benefited from great advances in technology. These advances have been described in terms of transforming fishing from a 'trade to a science'.⁴⁴ Fishing vessels became mechanised in the late 1800s, which allowed trawl nets to be wound in within 30 minutes, whereas previously it had taken three hours by hand.⁴⁵ This enabled nets to be recast more frequently, thereby taking advantage of short patches of good weather, with a corresponding increase in the number of catches that could be made. Other developments included the introduction of nylon nets, outboard motors, sonar and tracking devices, and improvements in communications.⁴⁶ Improvements in technology also led to improved boat design and navigational equipment, allowing fishers to travel further afield, in greater safety, to search for new fish populations.⁴⁷

During and immediately after World War II, high powered ships, drag nets and on board freezers transformed fishing vessels into huge factory ships, thereby revolutionising the fishing industry. The ability to process fish on board provided vessel operators with the capacity to freeze the catch at sea and enabled

⁴² An attempt at the 11th Session of *UNCLOS* Conference III by coastal states, including Australia, to insert additional wording into art 63(2) of *UNCLOS*, directing Tribunals to take coastal state conservation measures into account when settling disputes over the management of straddling fish stocks, was rejected by the high seas fishing states on the ground that it was a form of creeping jurisdiction by coastal states: Department of Foreign Affairs and Trade, *Third United Nations Conference on the Law of the Sea: Report of the Australian Delegation*, UN Doc A/CONF.62/L.114 (1982).

⁴³ FAO, *The Rome Consensus on World Fisheries* (1995) [5] <<http://www.fao.org/DOCREP/006/AC441E/AC441E00.HTM>> at 1 October 2004.

⁴⁴ Hunter, Salzman and Zaelke, above n 4, 674.

⁴⁵ David Cushing, *The Provident Sea* (1988) 258, 296.

⁴⁶ Hunter, Salzman and Zaelke, above n 4, 674–5. The use of sonar enabled schools of fish to be spotted enabling trawlers to be directed to the target area.

⁴⁷ Jon Jacobson, 'International Fisheries in the Year 2010' (1985) 45 *Louisiana Law Review* 1161, 1164.

voyages to extend over many months. These improvements in technology significantly improved the cost-benefit ratio of each fishing voyage.⁴⁸

By 1958, however, the international community noted that years of unregulated fishing had caused serious consequences for marine living resources. The States Party to the *Convention on Fishing and Conservation of the Living Resources of the High Seas*⁴⁹ recognised that

the development of modern techniques for the exploitation of the living resources of the sea, increasing man's ability to meet the need of the world's expanding population for food, has exposed some of these resources to the danger of being over exploited[.]⁵⁰

Rather than self-regulating to adjust catch levels to account for the rapid advancements in fishing efficiency, high seas fishers have tended to intensify their efforts. This is because the principle of freedom of the seas has led to a situation where the oceans are owned by no one and managed by no one. The presumption arose amongst fishers and their flag states that any fish left behind would surely be harvested by other fishers.⁵¹ Hence there has been no incentive to manage catch levels to ensure the long-term sustainability of the renewable resources, or to delay harvests according to population fluctuations.

Consequently, far greater quantities of fish have been hauled from the oceans than Vattel,⁵² almost two centuries ago, or Huxley,⁵³ less than 70 years earlier, could ever have imagined. Whilst previously the oceans might have weathered intensive fishing utilising primitive methods, the systematic harvesting facilitated by new technologies has left fish nowhere to retreat. The impact on non-target species including sea birds has also increased significantly.⁵⁴

The effects of more efficient harvesting techniques have been compounded by an excess capacity in the world fishing fleet. Dr Diouf, the Director-General of

⁴⁸ Grant Hewison, 'Balancing the Freedom of Fishing and Coastal State Jurisdiction' in Ellen Hey (ed), *Developments in International Fisheries Law* (1999) 161, 166; Ludwik Teclaff, 'Jurisdiction over Offshore Fisheries — How Far Into the High Seas?' (1967) 35 *Fordham Law Review* 409, 412.

⁴⁹ Opened for signature 29 April 1958, 559 UNTS 286 (entered into force 20 March 1966).

⁵⁰ *Ibid* preamble.

⁵¹ See Garret Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243. Hardin first described this situation as the 'tragedy of the commons'. He stated that '[r]uin is the destination towards which all men rush, each pursuing his own interests in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all': at 1244.

⁵² Emmerich de Vattel, *The Law of Nations (or Principles of the Law of Nations Applying to the Conduct and Affairs of Nations and Sovereigns)* (Charles G Fenwick trans, 1916 ed) 106 [trans of: *Le Droit des Gens, ou Principes de la Loi Naturelle*]. Vattel observed that fish were common to all and sufficient to supply the needs of all.

⁵³ Thomas Henry Huxley, 'The Herring' (1880–81) 23 *Nature* 607, 612–13. Huxley stated that notwithstanding the harvesting of 2500 million herring from the North Sea and Atlantic ocean, there is 'not one particle of evidence that anything man does has an appreciable influence on the stocks of herrings': at 613.

⁵⁴ In particular, the technique of longlining increases the incidence of sea bird mortality. For example, the CCAMLR Commission considered a US report entitled 'Assessment and Avoidance of Incidental Mortality of Antarctic Marine Living Resources' in which it was observed there was 'growing evidence that ... significant numbers of non-target fish, birds, marine mammals, turtles and other marine organisms are being caught and killed in lost and discarded fishing gear and other debris, as well as caught and killed incidentally during certain fishing operations': CCAMLR Commission, *Report of the Third Meeting of the Commission* (1984) [20]–[21] <<http://www.ccamlr.org/pu/E/pubs/cr/84/all.pdf>> at 1 October 2004.

the FAO, has captured the essence of this threat to marine fisheries in the following statement:

The Great Oceans are indeed exhaustible. Despite the fact that the majority of all resources are now fully exploited, access to these resources remains open ... in far too many fisheries around the world. Consequently today there are too many vessels chasing too few fish.⁵⁵

Between 1970 and 1990, the global fishing fleet doubled from 585 000 to 1.2 million commercial fishing vessels.⁵⁶ In 1998, a report compiled by two former FAO Executives on behalf of Greenpeace called for a 50 per cent reduction in the world industrial fishing fleet.⁵⁷ This report refers to large-scale industrial vessels which are defined as being more than 24 metres in length⁵⁸ and measuring more than 100 gross tons.⁵⁹ Of the estimated 3.5 million fishing vessels worldwide, approximately 38 000 or just 1.7 per cent of vessels met these criteria. Notwithstanding this, they accounted for almost 60 per cent of the total capacity of global fishing vessels.⁶⁰ The size of the global fishing fleet has since been revised to 4.1 million decked and undecked vessels.⁶¹

Fleet capacity remains a significant issue. The OECD Taskforce has noted with concern that 'excess capacity in fisheries in OECD countries can lead to a spillover of capacity into IUU fishing activities'.⁶² It has also been observed that efforts to reduce fleet sizes, for example through the reduction of subsidies, can trigger an increase in IUU fishing activity as the displaced vessels seek alternative fishing areas.⁶³

Furthermore, the situation is compounded by government subsidies which have a long and troubled association with marine fisheries. Subsidies can 'artificially elevate profit'⁶⁴ such that economic indicators may fail to detect that a particular fishery is no longer economical. As such, 'fishing continues beyond reasonable limits and stocks can be decimated'.⁶⁵ The negative impact of subsidies on marine fisheries has been addressed at a number of international conferences⁶⁶ and was specifically targeted in the FAO International Plan of

⁵⁵ Diouf, above n 3.

⁵⁶ Hunter, Salzman and Zaelke, above n 4, 677.

⁵⁷ John Fitzpatrick and Chris Newton, Greenpeace International, *Assessment of the World's Fishing Fleet 1991–1997* (5 May 1998) <<http://archive.greenpeace.org/oceans/globaloverfishing/assessmentfishingfleet.html>> at 1 October 2004.

⁵⁸ *Ibid.* The European Union has also adopted this measurement. Proposed amendments to the *Fisheries Management Act 1990* (Cth) use this measurement as a trigger for increased fines: see further *Fisheries Management Act 1991* (Cth) s 100A(2)(a).

⁵⁹ Fitzpatrick and Newton, above n 57. There is no standard method of categorising fishing vessels. Lloyd's Maritime Information Services uses gross tonnage, but not length, as the measure for industrial fishing vessels.

⁶⁰ *Ibid.*

⁶¹ FAO, 'Countries Debate Strategies for Managing Fleet Capacity and Combating Illegal Fishing' (Press Release, 1 July 2004) <<http://www.fao.org/newsroom/en/news/2004/47649>> at 1 October 2004.

⁶² OECD, *OECD Workshop*, above n 7, 2.

⁶³ FAO, 'Excess Capacity and Illegal Fishing Challenges to Sustainable Fisheries' (Press Release, 1 July 2004) <<http://www.fao.org/newsroom/en/focus/2004/47127>> at 1 October 2004.

⁶⁴ William Schrank, FAO Fisheries Department, *Introducing Fisheries Subsidies* (2003) 31.

⁶⁵ *Ibid.* 32.

⁶⁶ *Ibid.* 44.

Action for the Management of Fishing Capacity.⁶⁷ Whilst the plan is voluntary, it calls on FAO member states to ‘assess the impact of subsidies which contribute to overcapacity’.⁶⁸

The impact of increasing numbers of industrialised vessels has been catastrophic for many fish species. It is now widely accepted within the scientific community that ‘ecological extinction caused by over-fishing precedes all other pervasive human disturbance to marine ecosystems, including pollution, the degradation of water quality and climate change’.⁶⁹

The advancements in technology and the resulting improved efficiency of vessels, coupled with a greater number of fishing vessels, led to increases in the recorded catch of global marine fish stocks. The increase between 1948 and 1995 is depicted in Figure 2 below. Although the intervals between the years in Figure 2 are not uniform, the rapid rise in catch levels is evident. Between 1950 and 1995, the global marine catch increased from 18 million tonnes to 84.3 million tonnes.⁷⁰ This represents an increase of 368 per cent.

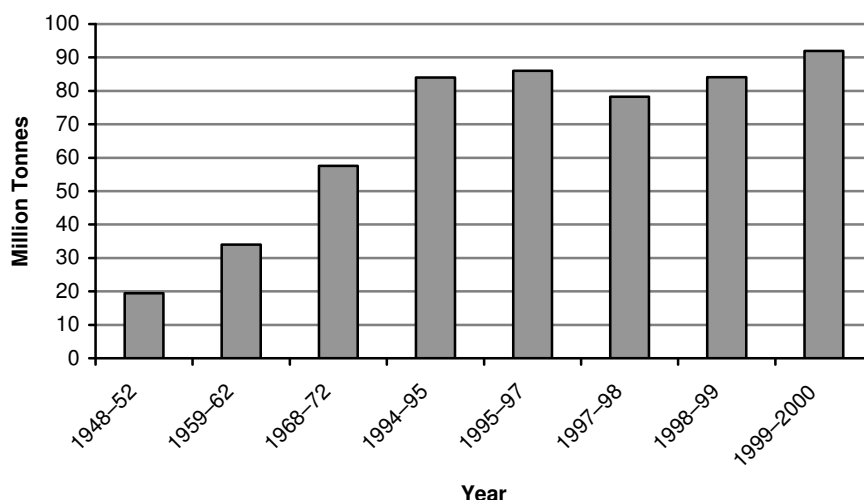


FIGURE 2: *Global Marine Catches During 1948–99*⁷¹

⁶⁷ FAO, *International Plan of Action for the Management of Fishing Capacity* (1999) <<http://www.fao.org/docrep/006/x3170e/x3170e04.htm>> at 1 October 2004.

⁶⁸ To this end, see FAO Fisheries Department, *Third Ad Hoc Meeting of Intergovernmental Organizations on Work Programmes related to Subsidies in Fisheries* (2003) FIPP/R719, 2.

⁶⁹ Jeremy Jackson et al, ‘Historical Overfishing and the Recent Collapse of Coastal Ecosystems’ (2001) 293 *Science* 629, 629.

⁷⁰ Ibid.

⁷¹ Figure 2 was prepared from statistics in: FAO, *State of the World Fisheries and Aquaculture* (1996) In Depth Study: Patterns of Marine Fishery Landings and Future Prospects <<http://www.fao.org/DOCREP/003/W3265E/w3265e03.htm#b1-Some%20trends%20in%20landings>> at 1 October 2004; FAO, *State of the World Fisheries and Aquaculture* (1998) World Review of Fisheries and Aquaculture <http://www.fao.org/docrep/W9900E/w9900e02.htm#P0_0> at 1 October 2004; FAO, *State of the World Fisheries and Aquaculture* (2000) World Review of Fisheries and Aquaculture <<http://www.fao.org/DOCREP/003/X8002E/x8002e04.htm#TopOfPage>> at 1 October 2004.

IV LEGAL LIMITATIONS ON THE ELIMINATION OF IUU FISHING

A *Flag State Control*

Fishers seeking to maintain profits in an environment of increased competition for fewer resources have increasingly resorted to illegal fishing, be it in coastal state waters or within areas of high seas regulated by RFMOs. Unreported and unregulated fishing has also increased. One factor in the avoidance of regulation is the practice of reflagging vessels. This involves vessels previously flagged to a state party reregistering with a non-member state, to avoid regulation by the RFMO. The practice of reflagging has persisted because the requirements for flag states to exercise control over their vessels are weak and subject to manipulation, as well as being based on state consent.

1 *The Practice of Reflagging*

An increasingly prevalent practice in the fishing industry is the concentrated ownership of fishing vessels by a handful of nations. It is a byproduct of the increased corporatisation of the commercial marine fishing industry. In seeking to avoid regulation, fishing vessel owners have developed a practice of changing flag status to find those flag states with minimum regulation over registered high seas fishing vessels. From 1991–95, 82 per cent of new vessel registrations were lodged with just 14 nations.⁷² More recent figures from the 2002 FAO State of World Fisheries and Agriculture Report support this trend.⁷³ Of the vessels reflagged in 2000, 36.3 per cent were with known flag of convenience states.⁷⁴

It should be noted that the term ‘flag of convenience’ is used throughout this article to refer to those states which do not require their flagged vessels to fish in compliance with RFMOs’ measures, or to fish in a responsible manner as required under *UNCLOS*, the FAO’s *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*⁷⁵ or the FAO *Code of Conduct for Responsible Fisheries 1995*.⁷⁶ The term refers to the fact that vessels have typically been deliberately deregistered from member states of relevant RFMOs and reregistered with non-member states. Hence, the vessel operators and their owners can avoid compliance with RFMO conservation and management measures by which they might otherwise be bound through their registration with member states.

Whilst the term ‘flag of convenience’ is still employed, new terminology is emerging which recognises the reality that these vessels are registered with

⁷² The list includes several flag of convenience states. The 14 States are Japan, the EU, Honduras, Russia, Peru, the former USSR, Chile, Liberia, Morocco, China, Argentina, Iran, South Korea and the US: Fitzpatrick and Newton, above n 57.

⁷³ FAO, *The State of World Fisheries and Aquaculture (2002)* <http://www.fao.org/docrep/005/y7300e/y7300e04.htm#P733_30672> at 1 October 2004.

⁷⁴ *Ibid.* This figure reflects only those registrations that were able to be tracked.

⁷⁵ Opened for signature 24 November 1993, 33 ILM 969 (entered into force 24 April 2003) (‘FAO Compliance Agreement’).

⁷⁶ FAO, *Code of Conduct for Responsible Fisheries 1995* <<http://www.fao.org/DOCREP/005/v9878e/v9878e00.htm>> at 1 October 2004 (‘FAO Code of Conduct’). It was adopted at the 28th Session of the FAO Conference on 31 October 1995. The FAO *Code of Conduct* is voluntary in its application, however it does refer to and rely upon rules of customary international law.

noncompliant states. The term ‘flag of noncompliance’ has been adopted by the CCAMLR Commission and Scientific Committee and is used in the identification of fishing vessels for the CCAMLR IUU vessel database.⁷⁷

In 2000, the Lloyd’s list of shipping indicated over 1000 fishing vessels were registered with Belize, Honduras, Panama, St Vincent and the Grenadines and Equatorial Guinea, all known as flag of convenience states.⁷⁸ Other states with open registers include: the Seychelles, Sao Tome and Principe, Netherland Antilles, Togo and Russia.⁷⁹ Another estimate suggests that up to 1200 flag of convenience fishing vessels are operating in the high seas without effective flag state control.⁸⁰ Estimates by the FAO in 2002 suggest that there are no fewer than 1500 vessels classified as flag of convenience vessels.⁸¹

The variation in the data on flag of convenience registrations sheds light on the nature of the emerging IUU fishing industry and the difficulties created for fisheries management bodies. The very nature of a flag of convenience means that vessel owners wish to avoid both detection and any obligations to comply with conservation and management measures, hence the lack of detail available about such registrations. Adding to the difficulties encountered by coastal states and RFMOs in exercising authority over IUU fishing vessels is the fact that flag of convenience vessels often fly no flag or have the vessel name and number painted over.⁸²

The problem of reflagging has been addressed at a number of international fora, including the 1992 Conference on Responsible Fishing in Cancún, Mexico

⁷⁷ CCAMLR Commission, *Resolution 19/XXI: Flags of Non-Compliance* (2002) <<http://www.ccamlr.org/pu/E/pubs/cm/03-04/res%2019-XXI.pdf>> at 1 October 2004.

⁷⁸ Martin Whitfield, ‘Plunder of the Seas’ (2000) 3 *Transport International* <http://www.itf.org.uk/itfweb/TI/TI3_3.htm> at 1 October 2004. The Lloyd’s List refers to the shipping List kept by Lloyds Insurance of London.

⁷⁹ Australian Statement to 23rd Committee on Fisheries, FAO, 15–19 February 2003, 2, available upon request from: Senator The Hon Ian Macdonald, Minister for Fisheries, Forestry and Conservation, Australia (2004) <<http://www.mffc.gov.au/index.html>> at 1 October 2004. An open register has been referred to as the situation where foreign vessel owners having no real connection with States maintaining open registers, register their vessels in such states to seek benefits such as avoiding the laws and controls of a state with which they might have a stronger connection: See also FAO, *Report of the Expert Consultation on Fishing Vessels Operating under Open Registries and Their Impact on Illegal, Unreported and Unregulated Fishing* (2003) FAO Doc FIP/R722 (‘FAO Report on Open Registries’).

⁸⁰ Antarctic and Southern Ocean Coalition, ‘Environmentalists and Trade Union Leaders Have Called for Urgent Action by the Governments to End Pirate Fishing in the World’s Oceans’ (Press Release, 25 April 1999) <http://www.seastead.org/localres/misc-articles/end_flag_con_04_25_1999.html> at 1 October 2004.

⁸¹ Judith Swan, Consultant, FAO, *Fishing Vessels Operating under Open Registers and the Exercise of Flag State Responsibilities — Information and Options* (2002) FAO Doc FIPL/C980, 22.

⁸² When the *South Tomi* was first detected, she was flying no flag: Interview with John Davis, Australian Fisheries Management Authority (In person, 4 June 2001). The *Viarsa* reportedly had a painted out name and vessel number: Mark Phillips, ‘Fish Poachers Show Colours’, *The Herald Sun* (Melbourne, Australia), 25 August 2003, 15.

and the 1992 UN Conference on Environment and Development ('UNCED').⁸³ The requirement for the flag states to exercise jurisdiction and control over its flag ships was recognised during *UNCLOS* Conference III. Articles 91 and 94 of *UNCLOS* reflect the extent to which the international community was able to agree on the nature of flag state responsibility. The examination below concludes that under current international law, flag state responsibility is a conceptual ideal rather than a reality.

2 The 'Genuine Link' Requirement

Whilst international law does seek to impose obligations on flag states to take responsibility for their flagged vessels, it has proven somewhat ineffective. Indeed it has recently been observed that '[i]nternational law appeared to sidestep the issue of "genuine link"'.⁸⁴ The obligations on flag states in *UNCLOS* have been accepted by 145 states and are reiterated in the *FAO Compliance Agreement* and the *FAO Code of Conduct*.⁸⁵ Flag state responsibility is addressed in art 94 of *UNCLOS* which requires every state to 'effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag'. In terms of the right to grant flag status to vessels, art 91(1) of *UNCLOS* requires that 'every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag'. In addition, art 91 provides that 'there must exist a 'genuine link' between the State and the ship'. There is however no definition of what amounts to a 'genuine link'.

The basic obligation to exercise effective control over flagged vessels has become a principle of customary international law.⁸⁶ However, the terms of arts 91 and 94 of *UNCLOS* are very general in nature and unhelpful in creating a benchmark against which the exercise of flag state responsibility can be gauged. Similarly, it is difficult to prove the absence of a 'genuine link' or flag state control.

The *FAO Compliance Agreement* specifically targets the practice of reflagging and reiterates the *UNCLOS* requirement for a 'genuine link' between vessel and state. Article III(2) requires that a state be satisfied, 'taking into account the link that exists between it and the fishing vessel concerned', that it is able 'to exercise effectively responsibilities under the *Agreement* in respect of that fishing vessel'. Whilst the *FAO Compliance Agreement* is in force, it has

⁸³ *The Declaration of the International Conference on Responsible Fishing* was made at the close of the 1992 International Conference on Responsible Fishing. One of the recommendations made at the close of the Conference was that the next decade be declared the Decade of Responsible Fishing. Agenda 21 was adopted at the close of the 1992 UNCED held in Rio de Janeiro: *Report of the United Nations Conference on Environment and Development*, UN GAOR, Agenda Item 21, UN Doc A/CONF.151/26 (1992). Chapter 17 listed broad problem areas including the reflagging of vessels to escape controls: at [17].

⁸⁴ *FAO, FAO Report on Open Registries*, above n 79, [10].

⁸⁵ *UNCLOS*, above n 6, arts 91, 94; *FAO Compliance Agreement*, above n 75, art III; *FAO Code of Conduct*, above n 76, art 6.11.

⁸⁶ In addition to being reflected in the three international agreements, the requirement for a genuine link was included in *Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 82, art 5(1) (entered into force 30 September 1962).

only been ratified by 28 states.⁸⁷ Thus, whilst this *Agreement* will potentially increase flag state responsibility by introducing, inter alia, obligations not to provide authorisation to vessels which have undermined the effectiveness of international conservation and management measures,⁸⁸ its success is dependent upon greater acceptance and implementation by the international community.

The FAO *Compliance Agreement* is also silent on a definition of the term 'genuine link'. However, the question has been considered by ITLOS in *The M/V Saiga (No 2) (Saint Vincent and the Grenadines v Guinea)*.⁸⁹ On 28 October 1997, a Guinean patrol boat arrested an oil tanker, the *Saiga*, near the Guinean EEZ.⁹⁰ One of the many issues canvassed during both the *M/V Saiga (No 1) Case* and the *M/V Saiga (No 2) Case* was the legitimacy of the 'hot pursuit' conducted by Guinea under art 111 of *UNCLOS*. In this context, the Tribunal considered an objection made by Guinea to the admissibility of the application for prompt release by the flag state. Guinea's objection was premised on the submission that no 'genuine link' existed between the *Saiga* and St Vincent and the Grenadines.⁹¹

Guinea argued that the flag state obligations to exercise jurisdiction over registered vessels imposed by art 94 of *UNCLOS* must be fulfilled to establish the 'genuine link' required under art 91. If this were to be accepted, it was further submitted that in the absence of the exercise of any such jurisdiction, no link between the ship and the flag state could exist. Hence, the claims made by St Vincent and the Grenadines could be dismissed on the ground that there was no 'genuine link' between the flag state and the *Saiga*.⁹² In essence, Guinea argued that the existence of a 'genuine link' was a prerequisite for the recognition of nationality.

The Guinean submission is an attractive one in terms of qualifying the nature of flag state responsibility. However, the 1958 *Convention on the High Seas* and *UNCLOS* do not support such a proposition. Article 5 of the *Convention on the High Seas*, which was the predecessor to arts 91 and 94 of *UNCLOS*, states that '[t]here must exist a genuine link between the State and the ship: in particular,

⁸⁷ As at 31 July 2004. None of these States, with the exception of the Seychelles and Uruguay have known open registers.

⁸⁸ FAO *Compliance Agreement*, above n 75, art III(5)(a).

⁸⁹ ITLOS Case No 2 (Unreported, President Mensah, Vice-President Wolfrun, Judges Zhao, Marotta Rangel, Yamamoto, Kolodkin, Park, Bamela Engo, Nelson, Chandrasekhara Rao, Warioba, Laing, Marsit and Ndiaye, 1 July 1999) ('*M/V Saiga (No 2) Case*').

⁹⁰ The *M/V Saiga* was arrested for allegedly smuggling gas oil into Guinean territory. The original case involved an application for prompt release under art 292 of *UNCLOS* by the flag State. ITLOS determined that the *M/V Saiga* be released upon the posting of a reasonable bond comprising US\$400 000 and the value of the gas oil on board when the *Saiga* was arrested: *The M/V Saiga (Saint Vincent and the Grenadines v Guinea)* ITLOS Case No 1 (Unreported, Judges Zhao, Caminos, Marotta Rangel, Yankov, Kolodkin, Bamela Engo, Akl, Warioba, Laing, Treves, Marsit and Eiriksson, 4 December 1997) [84]–[85] ('*M/V Saiga (No 1) Case*').

⁹¹ See generally *M/V Saiga (No 2) Case* ITLOS Case No 2 (Unreported, President Mensah, Vice-President Wolfrun, Judges Zhao, Marotta Rangel, Yamamoto, Kolodkin, Park, Bamela Engo, Nelson, Chandrasekhara Rao, Warioba, Laing, Marsit and Ndiaye, 1 July 1999) [55]–[75]. Guinea has also objected to the admissibility of claims on the basis that the *Saiga* was not registered in St Vincent and the Grenadines at the time of arrest and therefore did not have Vincentian nationality at the relevant time.

⁹² *Ibid* [76].

the State must effectively exercise its jurisdiction and control in administering technical and social matters over ships flying its flag’.

Article 5 of the *Convention on the High Seas* did not retain the recommendation made by the International Law Commission when formulating the 1956 Draft Articles on the Law of the Sea. Article 29 of the Draft Articles had stated that ‘for the purposes of recognition of the national character of the ship by other States, there must exist a genuine link between the state and the ship’.⁹³ The absence of a reference to nationality in arts 91 and 94 of *UNCLOS* led the Tribunal, in the *M/V Saiga (No 2) Case*, to conclude that the

provision of the *Convention* on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by others. The Tribunal also stated that there is nothing within the wording of art 94 to permit a state which discovers evidence indicating the absence of proper jurisdiction and control by a flag state over a ship to refuse to recognise the right of such a ship to fly the flag of that state.⁹⁴

This observation reinforces the customary international law principle of flag state authority.

Whilst the Tribunal’s conclusion is correct in law, it does highlight the limited value of current flag state responsibilities. In practice, the requirement in *UNCLOS* that a ‘genuine link’ exist between state and ship has not been effective in fostering flag state responsibility. The number of flag of convenience registrations is increasing, and the links between flag states and their vessels can be tenuous.⁹⁵

Another factor mitigating against state responsibility for flagged high seas fishing vessels is the now commonplace practice for the vessels to be crewed by nationals of many states, although Spanish nationals do predominate.⁹⁶ Invariably, the nationality of the crew has no link to the flag state of the vessel.

In some respects, the ineffectiveness of the requirement for a ‘genuine link’ between flag state and vessel is as much an example of the limitations of international law as an example of the corporatisation of IUU fishing. Corporate entities with access to international funds and expertise have entered the global marine fishing industry. The act of reflagging to states, which exhibit a lax attitude to the regulation of their registered high seas fishing fleet, is essentially a

⁹³ *M/V Saiga (No 2) Case* ITLOS Case No 2 (Unreported, President Mensah, Vice-President Wolfrum, Judges Zhao, Caminos, Marotta Rangel, Yankov, Yamamoto, Kolodkin, Park, Bamela Engo, Nelson, Chandrasekhara Rao, Akl, Anderson, Vukas, Laing, Treves, Marsit and Eiriksson, 1 July 1999) [80].

⁹⁴ *Ibid* [82]–[83].

⁹⁵ See, eg, the evidence submitted by Australia regarding the address of the registered owners of the *Volga: The Volga Case* ITLOS Case No 11 (Transcript of Proceedings, David Bennett, Counsel for Australia, 13 December 2002) 5. See also evidence submitted by Guinea in the *M/V Saiga (No 2) Case* where the vessel was owned by a Cypriot shipping company, managed by a Scottish company and crewed principally by Ukrainians: *M/V Saiga (No 2) Case* ITLOS Case No 2 (Unreported, President Mensah, Vice-President Wolfrum, Judges Zhao, Caminos, Marotta Rangel, Yankov, Kolodkin, Park, Bamela Engo, Nelson, Chandrasekhara Rao, Akl, Anderson, Vukas, Laing, Treves, Marsit and Eiriksson, 1 July 1999) [31].

⁹⁶ See the Australian Statement to FAO, *FAO Report on Open Registries*, above n 79.

tactical commercial decision. The lack of prescription within *UNCLOS* on the nature and scope of flag state obligations has been exploited by the IUU fishing industry to its full advantage.

B *The Principle of Pacta Tertiis*

A basic rule of customary international law, *pacta tertiis nec nocent nec prosunt*, dates back to Roman law.⁹⁷ This principle is based on the premise of sovereign equality amongst all states. It was codified in the 1969 *Vienna Convention on the Law of Treaties*,⁹⁸ and has been described as a general rule ‘so well established that there is no need to cite extensive authority for it’.⁹⁹ The principle, as stated in the *VCLT*, is that ‘[a] treaty does not create either obligations or rights for a third State without its consent’.¹⁰⁰

The very nature of international law as a consensual arrangement between states¹⁰¹ is premised upon this fundamental principle.¹⁰² However, the operation of the *pacta tertiis* rule also exposes a weakness in international law. States may choose not to accept an obligation undertaken by a majority of states, sometimes benefiting from their noncompliance, as well as undermining attempts by the international community to regulate state practice.

In practical terms, this means that regional efforts to manage high seas fisheries can be undermined either by noncompliant third party states or by states who do ‘sign up’ to the relevant convention but who exercise their right to avoid compliance with selected measures. This latter possibility is a feature of many regional fisheries conventions. Contracting parties to *CCAMLR* may notify the Commission of their intention not to comply with a conservation measure within 90 days of receipt of notification of any new measure.¹⁰³ This is notwithstanding that the party assumedly supported the measures’ adoption, as measures on matters of substance are to be adopted by consensus. By way of example, until the 2003 meeting of *CCAMLR* Parties, Canada had repeatedly notified the *CCAMLR* Commission of an inability to comply with the Catch Documentation

⁹⁷ See generally Erik Franckx, *Pacta Tertiis and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (2000) 5–7 <<http://www.fao.org/legal/prs-ol/po8.pdf>> at 1 October 2004.

⁹⁸ Opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (*VCLT*).

⁹⁹ Robert Jennings and Arthur Watts (eds), *Oppenheim’s International Law* (9th ed, 1992) 1260–1.

¹⁰⁰ *VCLT*, above n 98, art 34.

¹⁰¹ International law has been defined as ‘that body of law which is composed for its greater part of the principles and rules of conduct which States feel themselves bound to observe, and therefore, do commonly observe in their relations with each other’: Ivan Shearer (ed), *Starke’s International Law* (11th ed, 1994) 3.

¹⁰² Although not directly relevant to this article, the consensual aspect of international law is also applicable in the development of customary international law. Recognition of the persistent objector doctrine has provided the opportunity for states who object to the development of a rule via state practice to assert they are not bound by that rule once it becomes part of customary international law: *Anglo-Norwegian Fisheries Case (UK v Norway) (Merits)* [1951] ICJ Rep 116, 138–9. See also Jonathon Charney ‘The Persistent Objector Rule and the Development of Customary International Law’ (1985) 56 *British Yearbook of International Law* 1.

¹⁰³ *CCAMLR*, above n 8, art IX(6). Although it is acknowledge that this has only occurred once during the history of the *CCAMLR*.

Scheme.¹⁰⁴ This stance was maintained notwithstanding diplomatic pressure to comply and approaches from other *CCAMLR* member states. Other regional fisheries conventions with similar provisions to opt out of conservation measures include the *Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries*¹⁰⁵ and the *Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea*.¹⁰⁶

In the context of identifying strategies for the elimination and deterrence of IUU fishing, the consent of flag states is required to impose tighter, more effective flag state controls. Flag state consent is also required for the effective implementation of the Catch Documentation Scheme and the Vessel Monitoring System ('VMS') — both of which have been adopted by *CCAMLR* — in addition to any further limitations on the freedoms of high seas fishing states. The only aspect of behaviour falling under the IUU banner which can be challenged in the absence of flag state consent is illegal fishing. Coastal states have the authority to regulate fishing activities within the EEZ. However the enforcement of that authority is governed, inter alia, by arts 73 and 111 of *UNCLOS*. As the following examination indicates, it is through the application of these articles that high seas fishing vessels are seeking to maximise their interest.

C *Striking the Right Balance under Article 73 of UNCLOS*

1 *Applications for Prompt Release: An Abuse of Process?*

Article 73 of *UNCLOS* allows a coastal state to exert its sovereign rights to

explore, exploit, conserve and manage the living resources in the exclusive economic zone, taking such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this *Convention*.

In the event that a foreign vessel is arrested within a coastal state's EEZ, the arresting state has an obligation under art 73(2) to release the vessel and crew promptly upon the 'posting of a reasonable bond or other security'.

¹⁰⁴ Although Canada is only an acceding state to the *CCAMLR*: See *CCAMLR Commission, Report of the Twenty-First Meeting of the Commission* (2002) [7.1]–[7.5] <<http://www.ccamlr.org/pu/E/pubs/cr/02/all.pdf>> at 1 October 2004; *CCAMLR Commission, Report of the Twenty-Second Meeting of the Commission* (2003) [7.2] <<http://www.ccamlr.org/pu/E/pubs/cr/03/all.pdf>> at 1 October 2004.

¹⁰⁵ Opened for signature 24 October 1978, 1135 UNTS 369, art XII(1) (entered into force 1 January 1979).

¹⁰⁶ Opened for signature 16 June 1994, 34 ILM 67, art VIII (entered into force 8 December 1995).

There have been a number of applications for prompt release under art 292 of *UNCLOS* in the short period since the inception of ITLOS.¹⁰⁷ Under this art, where a State Party has detained a vessel flying the flag of another State Party and it is alleged that the detaining state has not complied with the provisions of *UNCLOS* for the vessel's prompt release, the question of release may be submitted, inter alia, to ITLOS. During the most recent application for prompt release, the respondent state, Australia, raised concerns about the pressure on flag states to make such applications and the utilisation of these applications as a means of 'evading and undermining relevant coastal state enforcement measures'.¹⁰⁸

Both New Zealand and France supported the Australian submission via diplomatic notes. New Zealand observed rightly that ITLOS has a role to play in discouraging the scourge of illegal fishing activity in the Southern Ocean.¹⁰⁹ France made an even stronger statement noting that '[t]he French authorities are deeply concerned by the fact that the frequent resorting to Article 292 of the *Convention on the Law of the Sea* may be an obstacle to sustained efforts aimed at combating illegal fishing'.¹¹⁰

The judgments delivered by ITLOS in the prompt release cases to date do not evince full support or sympathy for the untenable position of many coastal states.¹¹¹ Indeed it has been observed that their earlier judgments delivered in

¹⁰⁷ The principle cases are: *The Camouco Case (Panama v France)* ITLOS Case No 5 (Unreported, President Chandrasekhara Rao, Vice-President Nelson, Judges Zhao, Caminos, Marotta Rangel, Yankov, Yamamoto, Kolodkin, Park, Bamela Engo, Mensah, Akl, Anderson, Vukas, Wolfrum, Laing, Treves, Marsit, Eiriksson, Ndiaye and Jesus, 7 February 2000) ('*Camouco Case*'); *Monte Confurco Case* ITLOS Case No 6 (Unreported, President Chandrasekhara Rao, Vice-President Nelson, Judges Caminos, Marotta Rangel, Yankov, Yamamoto, Kolodkin, Park, Bamela Engo, Mensah, Akl, Anderson, Vukas, Wolfrum, Laing, Treves, Marsit, Eiriksson, Ndiaye and Jesus, 18 December 2000); *The Grand Prince Case (Belize v France)* ITLOS Case No 8 (Unreported, President Chandrasekhara Rao, Vice-President Nelson, Judges Caminos, Marotta Rangel, Yankov, Yamamoto, Kolodkin, Park, Bamela Engo, Mensah, Akl, Anderson, Vukas, Wolfrum, Laing, Treves, Marsit, Eiriksson, Ndiaye, Jesus and Judge ad hoc Cot, 20 April 2001) ('*Grand Prince Case*'); *Volga Case* ITLOS Case No 11 (Unreported, President Nelson, Vice-President Vukas, Judges Caminos, Marotta Rangel, Yankov, Yamamoto, Kolodkin, Park, Bamela Engo, Mensah, Chandrasekhara Rao, Akl, Anderson, Wolfrum, Treves, Marsit, Ndiaye, Jesus, Ballah, Cot, and Judge ad hoc Shearer, 23 December 2002). The Tribunal found it did not have jurisdiction to hear the application in the *Grand Prince Case* and therefore did not deal with the merits of the case. See also *M/V Saiga (No 1) Case* ITLOS Case No 1 (Unreported, President Mensah, Vice-President Wolfrum, Judges Zhao, Caminos, Marotta Rangel, Yankov, Yamamoto, Kolodkin, Park, Bamela Engo, Nelson, Chandrasekhara Rao, Akl, Anderson, Vukas, Warioba, Laing, Treves, Marsit, Eiriksson and Ndiaye, 4 December 1997); *M/V Saiga (No 2) Case* ITLOS Case No 2 (Unreported, President Mensah, Vice-President Wolfrum, Judges Zhao, Caminos, Marotta Rangel, Yankov, Kolodkin, Park, Bamela Engo, Nelson, Chandrasekhara Rao, Akl, Anderson, Vukas, Warioba, Laing, Treves, Marsit, Eiriksson and Ndiaye, 1 July 1999).

¹⁰⁸ *Volga Case* ITLOS Case No 11 (Transcript of Proceedings, Judge Campbell, 12 December 2002) 6–7.

¹⁰⁹ *Ibid* 7.

¹¹⁰ *Ibid*.

¹¹¹ See, eg, *M/V Saiga (No 1) Case* ITLOS Case No 1 (Unreported, Vice-President Wolfrum, Judges Zhao, Caminos, Marotta Rangel, Yankov, Kolodkin, Bamela Engo, Akl, Warioba, Laing, Treves, Marsit and Eiriksson, 4 December 1997) [77], where the Tribunal found that 'the requirement of promptness has a value in itself and may prevail when the posting of the bond has not been possible, has been rejected or is not provided for in the coastal State's laws or when the alleged bond is unreasonable'.

2000, 'gave rise to some apprehension'¹¹² from the viewpoint of coastal states 'as to how their practice in setting bonds would withstand similar scrutiny by the ITLOS'.¹¹³

2 *The Tribunal's View of a Reasonable Bond*

The precise ambit of the required 'reasonable bond or security' has been the subject of a number of recent judgments delivered by ITLOS. Through a majority of judges, ITLOS initially adopted a rather narrow view of what constituted a reasonable bond¹¹⁴ and the factors that may be taken into account in settling the amount of the bond. In the *Camouco Case* and the *Monte Confurco Case*, the majority demonstrated an inclination to take into account, amongst other criteria, the value of the catch on board when the vessel was arrested.¹¹⁵ However, not all members of the Tribunal embraced this approach. Judge Jesus was critical of the consideration in the *Monte Confurco Case*, stating 'the majority decision was unwise to have taken the value of the fish seized as part of the bond, when domestic legislation makes it subject to confiscation'.¹¹⁶

The Tribunal altered its initial view on this very important point in its most recent decision. In the *Volga Case*, ITLOS decided that the value of the seized catch on board a seized vessel is not relevant to the calculation of the bond by the coastal state authority.¹¹⁷ This shift in thinking is a significant fillip for coastal states. If the value of the catch is to be held not relevant in terms of adjusting the amount of bond to be posted, those vessels arrested with sizeable catches would potentially enjoy the benefits of their illegal and unsustainable practices via a proportionately reduced bond.

¹¹² Andrew Serdy and Michael Bliss, 'Prompt Release of Fishing Vessels: State Practice in the Light of the Cases before the International Tribunal for the Law of the Sea' in Alex Oude Elferink and Donald Rothwell (eds), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (forthcoming 2004) 273, 273.

¹¹³ *Ibid* 273–5. The authors did note that the most recent case, the *Volga Case* does 'largely restore the balance of coastal State and flag State rights': at 275.

¹¹⁴ In doing so the Tribunal has exposed itself to criticism that it has entered the merits of the case before the domestic courts. In the *Monte Confurco Case* ITLOS Case No 6 (Unreported, Dissenting Opinion of Judge Mensah, 18 December 2000) 2; (Unreported, Dissenting Opinion of Judge Anderson, 18 December 2004) 2–3, the Tribunal reached a different conclusion as to what an appropriate amount for the bond might be and found the bond set by the domestic court to be unreasonable, without appearing to actually consider the reasonableness of the bond set.

¹¹⁵ *Monte Confurco Case* ITLOS Case No 6 (Unreported, President Chandrasekhara Rao, Vice-President Nelson, Judges Caminos, Marotta Rangel, Yankov, Yamamoto, Kolodkin, Park, Bamela Engo, Mensah, Akl, Wolfrum, Treves, Marsit, Eiriksson and Ndiaye, 18 December 2000) [76]; *Camouco Case* ITLOS Case No 5 (Unreported, President Chandrasekhara Rao, Vice-President Nelson, Judges Zhao, Caminos, Marotta Rangel, Yankov, Yamamoto, Kolodkin, Park, Bamela Engo, Mensah, Akl, Laing, Marsit, Eiriksson and Jesus, 7 February 2000) [67].

¹¹⁶ *Monte Confurco Case* ITLOS Case No 6 (Unreported, Dissenting Opinion of Judge Jesus, 18 December 2000) [32].

¹¹⁷ *Volga Case* ITLOS Case No 11 (Unreported, President Nelson, Judges Caminos, Marotta Rangel, Yankov, Yamamoto, Kolodkin, Park, Bamela Engo, Mensah, Chandrasekhara Rao, Akl, Wolfrum, Treves, Marsit, Ndiaye, Jesus, Ballah and Cot, 23 December 2002) [86].

3 *Excluding Non-Financial Conditions*

Whilst the decision in the *Volga Case* has been proclaimed as a success by Australia,¹¹⁸ one aspect of the judgment can only be viewed as decidedly unfavourable. It has become the practice of Australian authorities when setting the bond under art 73(2) of *UNCLOS*, to include a requirement that a VMS be installed on the vessel before its release. The terms of the bond typically stipulate that the VMS is to remain operational until the conclusion of proceedings against those members of the crew charged under the *Fisheries Management Act 1991* (Cth). It is, in essence, a ‘good behaviour bond’.

The majority in the *Volga Case* concluded that such a condition, together with the inclusion of a dollar amount to guarantee compliance, could not be included within the words ‘bond or financial security’ under art 73 of *UNCLOS*.¹¹⁹ The majority adopted a narrow and literal approach to the wording in art 73 finding that the reference to ‘bond or security’ must be limited to a bond or security of a financial nature.¹²⁰ In considering whether the VMS was bond or security for good behaviour, ITLOS found that art 73(2) is intended for the purposes of the release of arrested vessels and not to be used for the deterrence of future repeat offences.¹²¹

This decision is an unwelcome one in terms of preserving a balance between coastal state interests in the living resources in the EEZ and state interests in their flagged vessels. It has the potential to undermine attempts by coastal states to work legitimately, within the confines of international law, to bring illegal fishers and the owners of the fishing vessels, to account.

4 *A Broader Interpretation*

The judgments of Judge ad hoc Shearer and Judge Anderson, both of whom dissented on this point, are more persuasively reasoned deliberations. For example, Judge ad hoc Shearer stated that the words ‘bond or financial security’ should be given a

liberal and purposive approach in order to enable the Tribunal to take into full account the measures — including those made possible by modern technology — found necessary by coastal States ... to deter by way of judicial and administrative orders the plundering of the living resources of the sea.¹²²

¹¹⁸ Alexander Downer, Minister for Foreign Affairs, Darryl Williams, Attorney-General and Ian Macdonald, Minister for Forestry, Fisheries and Conservation, Australia, ‘Australia Strikes Another Blow against Illegal Fishing’, (Press Release, 24 December 2002) <<http://www.mffc.gov.au/releases/2002/02260mj.html>> at 1 October 2004.

¹¹⁹ *Volga Case* ITLOS Case No 11 (Unreported, President Nelson, Judges Caminos, Marotta Rangel, Yankov, Yamamoto, Kolodkin, Park, Bamela Engo, Mensah, Chandrasekhara Rao, Akl, Wolfrum, Treves, Marsit, Ndiaye, Jesus, Ballah and Cot, 23 December 2002) [77]–[79].

¹²⁰ *Ibid* [77].

¹²¹ *Ibid*.

¹²² *Volga Case* ITLOS Case No 11 (Unreported, Dissenting Opinion of Judge ad hoc Shearer, 23 December 2002) [17].

Judge Anderson formed a similar view, stating:

In Article 73, paragraph 2, the context is clearly not the financial meaning of ‘bond’ as a simple deed. Rather, the context is legal and precisely that of release of an accused person against a bail bond which may, and often does contain non-pecuniary conditions. Conditions may be temporal, financial or non-financial. All conditions form integral parts of a bail bond and are valid *prima facie*. No particular type of condition should be excluded *a priori*.¹²³

Judge Anderson concluded that as art 73 contained no ‘explicit restriction upon the imposition of non-financial conditions’,¹²⁴ the correct question is to consider whether the bond in all its elements is reasonable.¹²⁵ Support for this view is also found in art 292(3) which stipulates the release is to be ‘without prejudice to the merits’ of the case before the domestic courts.¹²⁶

After examining the past actions of the *Volga*, Judge Anderson concluded that the good behaviour bond and conditions imposed by Australia were not unreasonable within the terms of art 73(2) of *UNCLOS*.¹²⁷ These past actions included ignoring warnings to stay outside the Australian Fishing Zone and evidence that the *Volga* had operated within a fleet of other fishing vessels coordinated from offices in Indonesia and Las Palmas.¹²⁸ The evidence suggested that the *Volga* might rejoin the fleet after its release by Australian authorities. The condition that a VMS be carried on board the *Volga* was designed to deter further illegal fishing after the vessel was released by Australian authorities.¹²⁹

In light of these factors, Judge Anderson concluded that the conditions imposed by Australia in settling the bond under art 73 did not exceed the ‘margin of appreciation’¹³⁰ to be accorded to domestic courts and authorities,¹³¹ with the element of reasonableness involving their exercise of discretion. International

¹²³ *Volga Case* ITLOS Case No 11 (Unreported, Dissenting Opinion of Judge Anderson, 23 December 2002) [13].

¹²⁴ *Ibid* [7].

¹²⁵ *Ibid* [14].

¹²⁶ *Ibid* [13].

¹²⁷ *Ibid* [23].

¹²⁸ *Ibid* [22(a)], [22(b)].

¹²⁹ *Ibid* [75].

¹³⁰ *Ibid* [23]. Reference to the ‘margin of appreciation’ was also made by Judge Cot in his dissenting judgment: at [14]–[22]. The European Court of Human Rights has applied this principle in *Mellacher v Austria* (1989) 169 Eur Court HR (ser A) 25, [53], stating that:

Provided that the legislature remains within the bounds of its margin of appreciation, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way.

¹³¹ *Volga Case* ITLOS Case No 11 (Unreported, Dissenting Opinion of Judge Anderson, 23 December 2002) [23]–[24].

courts have consistently applied the concept of a 'margin of appreciation' when considering the reasonableness of the exercise of discretion by such bodies.¹³²

Preference should be given to the approach taken on this point by the dissenting judges. Quite rightly, Judge ad hoc Shearer noted that the balance struck between the interests of coastal states in managing resources within their EEZs and those of flag states over their vessels, established during *UNCLOS* Conference III, need not be 'preserved exactly as it was conceived'.¹³³

In relation to the role of the Tribunal in supporting coastal state attempts to deter the incidence of illegal fishing, Judge ad hoc Shearer noted that under art 19(2) of the *UN Fish Stocks Agreement*,¹³⁴ the necessity of deterrence is specifically recognised. National courts must take into account the gravity of the offences committed to set a penalty aimed at deterring further illegal fishing activity. Arguably both Australia and France have sought to do this. The role of ITLOS then is to 'be fully aware and supportive of these aims'.¹³⁵ It follows that the bond set under art 73 of *UNCLOS* ought to reflect the gravity of offences committed under national legislation.¹³⁶

Arguably, the balance struck during *UNCLOS* Conference III between coastal states and high seas states has been exploited by rogue illegal fishermen. 'A new balance has to be struck between vessel owners, operators and fishing companies on the one hand and coastal States on the other'.¹³⁷ Coastal states would have reason to be apprehensive in future prompt release cases before ITLOS, as the Tribunal appears to have ignored the evidence of increasingly professional IUU fishing operations.¹³⁸

5 *Excluding IUU Fishers from the Scope of Article 73*

At the 2002 meeting of *CCAMLR* member states, Australia submitted a proposal to amend the application of art 73(2) to ensure that it does not apply to vessels or support craft apprehended for IUU fishing within the *Convention*

¹³² See, eg, *Rights of Nationals of the United States of America in Morocco (France v United States of America) (Judgment)* [1952] ICJ Rep 176, 212; *North Sea Continental Shelf Case (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (Judgment)* [1969] ICJ Rep 3, 51. This concept is fully discussed in the *Volga Case* ITLOS Case No 11 (Unreported, Separate Opinion of Judge Cot, 23 December 2002) [14]–[21]. Note Judge Cot also agreed with the majority on the issue of imposing non-financial penalties in the bond: at [26]–[28].

¹³³ *Volga Case* ITLOS Case No 11 (Unreported, Dissenting Opinion of Judge ad hoc Shearer, 23 December 2002) [19].

¹³⁴ UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, *Agreement on the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 6th sess, art 19(2), UN Doc A/CONF.164/37 (1995) ('*UN Fish Stocks Agreement*').

¹³⁵ *Volga Case* ITLOS Case No 11 (Unreported, Dissenting Opinion of Judge ad hoc Shearer, 23 December 2002) [11].

¹³⁶ *Ibid* [13].

¹³⁷ *Ibid* [19].

¹³⁸ Indeed it has been recently noted that, 'it would be a mistake for coastal States to expect too much of the Tribunal in future prompt release cases': Donald Rothwell and Tim Stephens 'Illegal Southern Ocean Fishing and Prompt Release: Balancing Coastal and Flag State Rights and Interests' (2004) 53 *International and Comparative Law Quarterly* 171, 187.

Area.¹³⁹ The response to the Australian proposal within *CCAMLR*, a fisheries organisation plagued by IUU fishing since 1997, was decidedly unfavourable. Whilst *CCAMLR* members ‘sympathised with the sentiments’¹⁴⁰ expressed by Australia, the general consensus was that the balance achieved at *UNCLOS* Conference III between coastal state and high seas fishing states was an essential part of the package deal.¹⁴¹ The balance should neither be altered lightly nor without further study. The member states also noted that if there are concerns with the approach taken by *ITLOS*, this should be addressed by the Tribunal.¹⁴² Whilst the approaching 10 year anniversary of the entry into force of *UNCLOS* does theoretically provide an opportunity to propose amendments to the *Convention*, in practice it would be very difficult to secure the agreement of all *UNCLOS* member states.

D *Applying the Traditional Doctrine of ‘Hot Pursuit’ to Modern Fishing Practices*

1 *The Law regarding ‘Hot Pursuit’*

The doctrine of ‘hot pursuit’, codified originally in the 1958 *Convention on the High Seas*¹⁴³ and subsequently, in *UNCLOS*, is based upon principles of customary international law.¹⁴⁴ During the International Law Conference of 1930, the right of ‘hot pursuit’ by coastal state authorities was generally agreed to. This right was in fact included in the 1929 Harvard Draft Convention on Territorial Waters, which, as history has shown, was never adopted by the 1930 Conference parties.

The exercise of the right of ‘hot pursuit’ infringes on flag state authority on the high seas. It enables coastal states to enforce their laws into the high seas, provided the violation has occurred within the coastal states’ maritime zones. To ensure this infringement does not become a violation of flag state sovereignty and is legal under international law, a number of procedural requirements in art 111 of *UNCLOS* must be met. In the *M/V Saiga (No 2) Case*, *ITLOS* noted that ‘the conditions for the exercise of the right of hot pursuit ... are cumulative. Each of them has to be satisfied for the pursuit to be legitimate under the *Convention*’.¹⁴⁵

To protect the interest of flag states further, art 111(8) of *UNCLOS* stipulates that where a ‘ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage’.

¹³⁹ *CCAMLR* Commission, *Report of the Twenty-First Meeting of the Commission*, above n 104, [8.62].

¹⁴⁰ *Ibid* [8.64].

¹⁴¹ *Ibid* [8.65]–[8.67].

¹⁴² *Ibid* [8.67].

¹⁴³ *Convention on the High Seas*, above n 86, art 23.

¹⁴⁴ Nicholas Poulantzas, *The Right of Hot Pursuit in International Law* (1969) 39.

¹⁴⁵ *M/V Saiga (No 2) Case* *ITLOS* Case No 2 (Unreported, Judges Caminos, Marotta Rangel, Yankov, Kolodkin, Park, Bamela Engo, Nelson, Akl, Anderson, Vukas, Treves, Marsit and Eiriksson, 1 July 1999) [146].

2 Modern Fishing Practices

Recent practice indicates that flag states have exploited the strict and outdated procedural requirements within art 111.¹⁴⁶ In seven of the eight arrests of foreign fishing vessels by Australian authorities, the Australian Defence Force (primarily the Royal Australian Navy or Special Air Service Regiment) has been called upon to assist in boarding the vessel. The eighth vessel was arrested with the assistance of foreign government forces. Australian civilian patrol vessels, manned initially by the Australian Fisheries Management Authority and Coastwatch officers, began to carry armed Customs officers in June 2003. Despite this move, the inability of these authorities to apprehend illegal vessels has been highlighted by three recent ‘hot pursuits’ commenced in Australian waters, detailed in Table 2.

TABLE 2: RECENT ‘HOT PURSUITS’ BY AUSTRALIAN PATROL VESSELS IN THE SOUTHERN OCEAN¹⁴⁷

Vessel	Date	Length of pursuit	Outcome	Nature of any assistance
<i>South Tomi</i>	April 2001	3300 nautical miles (14 days)	Vessel arrested 320 nautical miles south of Cape Town on 12 April 2001 and escorted to Fremantle, Western Australia.	South African Navy assets and personnel utilised to make arrest.
<i>Lena</i>	February 2002	(14 days)	Vessel escaped arrest in December 2001 when civil patrol vessel the <i>Southern Supporter</i> ran low on fuel.	None.
<i>Viarsa</i>	August 2003	3900 nautical miles (21 days)	Vessel arrested 2000 nautical miles south west of Cape Town on 28 August 2003.	Support provided by armed South African enforcement officers on board the South African tug, the <i>John Ross</i> and UK fisheries patrol vessel, <i>Dorada</i> and the South African icebreaker the <i>Agulhas</i> during the arrest.

¹⁴⁶ See generally Craig Allen, ‘Doctrine of Hot Pursuit: A Functional Interpretation Adaptable to Emerging Maritime Law Enforcement Technologies and Practices’ (1989) 20 *Ocean Development and International Law* 309, 323–5. The author observed in 1989 that the traditional doctrine contains procedural requirements which might be invoked to limit or preclude the use of new technologies.

¹⁴⁷ The information in Table 2 was compiled by the author from the following Reports of the CCAMLR Commission: *Report of Member’s Activities in the Convention Area 2000–2001: Australia* (2001) [III]; *Report of Member’s Activities in the Convention Area 2001–2002: Australia* (2002) [2]; *Report of Member’s Activities in the Convention Area 2002–2003: Australia* (2003) [2].

In late December 2001, the *Lena* evaded a civilian patrol vessel for 14 days before finally escaping with her allegedly illegal hold of toothfish.¹⁴⁸ The *Lena* had been repainted and renamed the *Ana* when it was finally arrested in February 2002.¹⁴⁹

The *South Tomi* was detained after a 14 day pursuit which traversed 3300 nautical miles across the Southern Indian Ocean. Australian Defence Force personnel boarded the vessel south of Cape Town with the assistance of the South African navy.¹⁵⁰ The *Southern Supporter*, the civilian patrol vessel pursuing the *South Tomi*, had been unable to force the vessel to stop. The government officers and civilian crew on board the *Southern Supporter* were unarmed and there was no helicopter boarding capacity.¹⁵¹

Most recently, the *Viarsa* was pursued by the *Southern Supporter* for 21 days through treacherous and ice-packed seas.¹⁵² When ordered to accompany the *Southern Supporter*, the Customs and Fisheries patrol vessel, to port, the *Viarsa* sailed west towards Cape Horn. Hampered by rough seas and poor weather, lightly armed customs officers on board the *Southern Supporter* were unable to effect an arrest.¹⁵³

Illegal fishing vessels have demonstrated a willingness to attempt to outrun authorities when detected, even if this involves endangering the vessel, crew and the valuable catch on board.¹⁵⁴ The evidence also suggests that incursions into

¹⁴⁸ CCAMLR Commission, *Report of Member's Activities in the Convention Area 2001–2002: Australia* (2002) [2]; CCAMLR Commission, *Report of the Twenty-First Meeting of the Commission*, above n 104, [5.2].

¹⁴⁹ CCAMLR Commission, *Report of Member's Activities in the Convention Area 2001–2002: Australia* (2002) [2]. In the weeks since the December 2001 hot pursuit, the *Lena* had been repainted and renamed the *Ana*.

¹⁵⁰ Australian Fisheries Management Authority, 'Operation Cosmo — Hot Pursuit and Apprehension of Suspected Illegal Fishing Vessel' (Ministerial Media Release, accessed at 14 May 2001) (Copy on file with author). See also Melissa Fyfe, 'Poachers Lose in the Sail of the Century', *The Age* (Melbourne, Australia), 6 May 2001, 3.

¹⁵¹ Fyfe, above n 150, 3.

¹⁵² Ian Macdonald, Minister for Fisheries, Forestry and Conservation, Australia, 'Dangerous Ice Pursuit of *Viarsa* Now Longest in Australian Maritime History' (Press Release, 25 August 2003) <<http://www.mffc.gov.au/releases/2003/03166mj.html>> at 1 October 2004.

¹⁵³ *Ibid.* See also Ian Macdonald, Minister for Fisheries, Forestry and Conservation, Chris Ellison, Minister for Justice and Customs and Sharman Stone, Parliamentary Secretary to the Minister for the Environment and Heritage, Australia, 'Hot Pursuit of Fishing Vessel Continues as Australia Renews Call for Uruguay to Cooperate' (Press Release, 13 August 2003) <<http://www.mffc.gov.au/releases/2003/03152mj.html>> at 1 October 2004; Ian Macdonald, Minister for Fisheries, Forestry and Conservation, Chris Ellison, Minister for Justice and Customs and Sharman Stone, Parliamentary Secretary to the Minister for the Environment and Heritage, Australia, 'Australia Will Pursue Suspect Fishing Vessel Indefinitely' (Press Release, 14 August 2003) <<http://www.mffc.gov.au/releases/2003/03155mj.html>> at 1 October 2004; Ian Macdonald, Minister for Fisheries, Forestry and Conservation, Chris Ellison, Minister for Justice and Customs and Sharman Stone, Parliamentary Secretary to the Minister for the Environment and the Heritage, Australia, 'Australia Welcomes International Support for Hot Pursuit of Suspect Fishing Boat' (Press Release, 19 August 2003) <<http://www.mffc.gov.au/releases/2003/03158mj.html>> at 1 October 2004.

¹⁵⁴ Macdonald, 'Dangerous Ice Pursuit of *Viarsa*', above n 152. The *Viarsa* was reported to have taken a high risk course through ice-packed Antarctic waters compromising the safety of vessel and crew in order to evade the pursuing Australian patrol vessel. In 2000, the *Amur* sank in waters adjacent to or in the French Southern Ocean fishing zone. The owners of the vessel were alleged to have put the secrecy of the position of the two remaining vessels in the group ahead of the safety of the crew on the sinking vessel.

coastal state waters within the Southern Ocean are highly organised and that vessels operate under strict instructions not to surrender unless absolutely necessary.¹⁵⁵ High value catches of toothfish are at stake, perhaps more valuable to the corporate owners than the vessel and the crew.¹⁵⁶

The resistance to surrender unless coastal state vessels demonstrate an ability to force surrender creates practical problems for states commencing a 'hot pursuit'. The inhospitable weather conditions and treacherous seas through which the pursuits are conducted operate to the advantage of the illegal fishers. Boarding by inflatable dinghies requires calm weather and even helicopter boarding parties are placed at risk boarding in the rough seas typical of the Southern Ocean.

3 *Meeting the Procedural Requirements of Article 111 of UNCLOS*

Several of the requirements in art 111 seem rather straightforward. However, although determining whether a foreign ship is within a state's EEZ might seem a simple question of fact, it is often a point of disagreement between the coastal state and the flag state.

This issue was raised in submissions during the *Volga Case*. Counsel for the Australian Government stated that the requirement under art 111(4), that the foreign vessel be within the EEZ, is a subjective one. That is, it is for the pursuing vessel to satisfy itself that the foreign ship is within the EEZ.¹⁵⁷ It was argued that there is no requirement to prove as a matter of objective fact that the foreign vessel was within the EEZ and as such, the test should ask whether, using the practical means available, 'the coastal state considers the vessel to be within the exclusive economic zone. If this is the case, that is sufficient for a valid pursuit to have commenced'.¹⁵⁸

The argument was put by Australia in response to the assertion by Russia, the flag state of the *Volga*, that for the purposes of satisfying art 111, the foreign ship must be within the EEZ (or other maritime zone according to the particular facts) when the 'hot pursuit' commences.¹⁵⁹ However, the issue was not considered in the majority ITLOS judgment.¹⁶⁰ In the absence of guidance from ITLOS, the better conclusion would be to interpret the wording of art 111(4) to accept any

¹⁵⁵ Anecdotal evidence from discussions with AFMA Officers suggests the crew aboard the *South Tomi* was told to continue to attempt to outrun the Australian authorities until compelled by force (ie guns) to stop: Interview with John Davis, Australian Fisheries Management Authority (In person, 4 June 2001).

¹⁵⁶ The Master of the *Lena*, Jose Sanchez, was also reported as stating that the *Lena* was put to sea for about a million dollars and it took just four months for the owners to recover this amount: *Four Corners*, above n 23.

¹⁵⁷ *Volga Case* ITLOS Case No 11 (Transcript of Proceedings, Burmester QC, 12 December 2002) 12–14.

¹⁵⁸ *Ibid* 13–14.

¹⁵⁹ *Volga Case* ITLOS Case No 11 (Memorial of the Russian Federation, Application for Release of Vessel and Crew) pt 1, ch 4, 29–31.

¹⁶⁰ The issue was not considered as the Applicant (the Russian Federation) 'made it clear that it did not invite the Tribunal to consider the merits' of the seizure and the Tribunal formed the view that circumstances of the seizure of the *Volga* were not relevant to the application for prompt release under art 292 of *UNCLOS*: *Volga Case* ITLOS Case No 11 (Unreported, President Nelson, Vice-President Vukas, Judges Caminos, Marotta Rangel, Yankov, Yamamoto, Kolodkin, Park, Bamela Engo, Mensah, Chandrasekhara Rao, Akl, Wolfrum, Treves, Marsit, Ndiaye, Jesus, Ballah and Cot, 23 December 2002) [81]–[83].

reasonable evidence tendered by the pursuing state as to how it became satisfied that the foreign ship was within its relevant maritime zone.

Other requirements within art 111 are more problematic. This is due in part to the fact that some of the terms utilised within art 111 have not been defined within *UNCLOS*. One of the most critical words within art 111, in terms of fisheries enforcement, is the word 'interrupted'. In the current environment where illegal vessels are increasingly opting to attempt to outrun a patrol vessel, the requirement for the pursuit to continue uninterrupted is crucial. In the absence of a settled definition, demonstrating that a pursuit has not been interrupted can be difficult. Over a lengthy 'hot pursuit' such as the 3300 nautical mile pursuit of the *South Tomi* or the 3900 nautical mile pursuit of the *Viarsa*, there may be many opportunities to argue that the pursuit has been interrupted. For example the coastal state vessel may lose audio or visual contact but maintain radar contact at all times. The question then becomes does the traditional doctrine of 'hot pursuit' allow the pursuit to be maintained by the radar surveillance?

In this context, s 101B(4) of the *Fisheries Management Act 1991* (Cth) seeks to clarify the law on 'hot pursuit'. The sub-paragraph states that '[f]or the purposes of paragraph 3(a), a pursuit of a boat is not interrupted merely because some or all of the officers pursuing the boat lose sight of it or trace of it on a radar or other sensing device'.

Another potential difficulty faced by pursuing states in the 21st century is the requirement in art 111(4) that a visual or auditory signal, detectable by the foreign ship be given before the pursuit is commenced. During submissions in the *Volga Case*, evidence was produced to support the fact that a radio broadcast was made to the *Volga* by an Australian military helicopter, despatched from *HMAS Canberra*.¹⁶¹ Similarly, the crew on board the *South Tomi* was contacted via phone and radio.¹⁶² In the *M/V Saiga (No 2) Case*, Judge Anderson, in a separate opinion, considered radio messages broadcast over 40 nautical miles. In this context, he stated, 'even if the Tribunal had been willing to accept in principle to consider the possibility of accepting as an auditory signal a radio message sent over 40 miles or so ... there is no evidence of it being sent or received'.¹⁶³

Recent state practice, however, would suggest at minimum, the scope of art 111(4) includes a radio broadcast as a signal to stop. Radio signals were utilised in the pursuits of the *South Tomi* and the *Viarsa*. Further, the ILC observed, in relation to the form of 'hot pursuit' for art 23 of the *Geneva Convention on the High Seas*, that '[t]he important point was the fundamental right to give the order to stop and to undertake hot pursuit, not the specific means by which the right was exercised'.¹⁶⁴ It is unclear whether the wording of art 111(4) would extend to communications via email or facsimile.

¹⁶¹ *Volga Case* ITLOS Case No 11 (Memorial of the Russian Federation, Application for Release of Vessel and Crew) pt 1, ch 2, 9–10; *Volga Case* ITLOS Case No 11 (Transcript of Proceedings, Burmester QC, 12 December 2002) 11.

¹⁶² Interview with John Davis, Australian Fisheries Management Authority (In person, 4 June 2001).

¹⁶³ *M/V Saiga (No 2) Case* ITLOS Case No 2 (Unreported, Separate Opinion of Judge Anderson, 1 July 1999) 6–7.

¹⁶⁴ [1956] *Yearbook of the International Law Commission* Vol 1, 54.

Under art 111(3), the 'hot pursuit' is deemed to cease if the foreign ship enters the territorial sea of another state. Although this may not appear to be an issue for pursuits conducted in the expansive Southern Ocean, it was of real concern to Australian authorities in 2001 when pursuing the *South Tomi*.¹⁶⁵ It has been suggested that a 'short stay or passage of the pursued vessel through the territorial waters of a State, obviously undertaken with the intention of evading the law, does not preclude the resumption of hot pursuit'.¹⁶⁶ The basis for this proposition is that the pursued vessel is seeking to 'take advantage unjustifiably of a situation laid down in law', and therefore the activity should be 'deprived of its legal consequences'.¹⁶⁷

Another option for discounting the entry into the territorial waters of another state might be realised under the umbrella of cooperative regionalism. For example, the bilateral treaty signed between France and Australia in late 2003¹⁶⁸ provides, inter alia, for prior authorisation to continue the 'hot pursuit' through the territorial sea of the other state, provided the other party is informed and no physical law enforcement or other coercive action is taken against the vessel pursued whilst in the territorial waters.¹⁶⁹

Another requirement for a validly conducted 'hot pursuit' is that it must be conducted by a clearly marked government aircraft or vessel. Article 111(6) of *UNCLOS* allows a handover from a government aircraft which commences the pursuit and gives the order to stop, to another government aircraft or ship.¹⁷⁰ The article is silent on the handover of the pursuit from one government vessel to another, that is, from a civilian patrol vessel such as the *Southern Supporter* to a military vessel with the capacity to force the pursued vessel to stop. This is exactly what did happen with the pursuits of the *South Tomi* and the *Viarsa*, with the subsequent vessels joining in the pursuit also flying the flags of other states.

The better view would be to interpret art 111 as requiring only that the pursuit be uninterrupted. Should additional government vessels join the pursuit and assist in bringing it to a conclusion, the requirements of art 111 remain satisfied. This is the view taken by other authors¹⁷¹ and the interpretation given to the 1929 'hot pursuit' of the vessel *The I am Alone*. In that instance a second US vessel joined the pursuit of the Canadian vessel, and although the second vessel joined the pursuit from a different direction, the US argued that it was a valid

¹⁶⁵ The *South Tomi* came close to entering the territorial sea of France offshore the Kerguelen Isles.

¹⁶⁶ Poulantzas, above n 144, 231.

¹⁶⁷ Ibid.

¹⁶⁸ *Treaty between the Government of Australia and the Government of the French Republic on Co-operation in the Maritime Areas Adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and the McDonald Islands*, opened for signature 24 November 2003, [2003] ATNIF 20 (not yet in force) ('*Treaty between Australia and France*').

¹⁶⁹ Ibid art 4.

¹⁷⁰ This is what happened for example with the arrest of the *Volga* in 2002. An RAAF Hercules aircraft detected the vessel within the Australian Fishing Zone and informed the nearby HMAS *Canberra* which immediately changed heading and commenced pursuing the *Volga*: *Volga Case* ITLOS Case No 11 (Transcript of Proceedings, Burmester QC, 12 December 2002) 11.

¹⁷¹ Craig Allen states the relay principle in art 111 has been 'extended under customary law to allow a second vessel to relieve the vessel which initiates the hot pursuit': Allen, above n 146, 319.

continuation of the original pursuit.¹⁷² The question of the relay of vessels in a 'hot pursuit' was not discussed at the international level until the ILC reviewed the issue in 1955. Although there was some disagreement about the validity of relaying vessels,¹⁷³ the ILC finally voted in favour of recognising such an event.

Such an interpretation supports the circumstances of the arrest of the *South Tomi* in April 2001. Unable to convince or force the Master of the *South Tomi* to stop, the civilian patrol vessel the *Southern Supporter* called for assistance from the Australian authorities. Contact with the *South Tomi* was maintained by the *Southern Supporter* and daily calls were made repeating the order to stop.¹⁷⁴ Given that Australian naval vessels docked in Fremantle could not catch up with the 'hot pursuit', Australian Defence Force personnel were flown to Cape Town, South Africa, from where they boarded a South African naval vessel. The *South Tomi* was then arrested by a boarding party south of Cape Town and outside the South African territorial sea.¹⁷⁵ Similar circumstances arose during the arrest of the *Viarsa*. The assistance of South African and British vessels brought a 21 day 'hot pursuit' to a close.¹⁷⁶

The law on 'hot pursuit' has not been fully considered by ITLOS. However, the cumulative elements of a valid pursuit under art 111 provide IUU fishers with opportunities to challenge the individual details of a pursuit. There have been murmurs of dissent in the *M/V Saiga (No 1) Case* and the *Volga Case*, and it is only a matter of time until a flag state is requested to lend its name to an ITLOS application in relation to the interpretation of art 111. In light of the approach taken by ITLOS in construing art 73 narrowly, and in placing little weight in the powerful evidence of IUU fishing, coastal states should take the necessary steps to ensure art 111 is complied with to the letter.

V STRATEGIES FOR MINIMISING IUU FISHING

It is evident that strategies for minimising IUU fishing should accommodate the forces currently shaping marine fisheries. As outlined earlier in this article, the increased pressure on high seas fisheries caused by the relocation of high seas fishing vessels and the increased efficiency of fishing vessels are exacerbated by an over capacity in the global fishing fleet. IUU fishing has been an inevitable byproduct of increased competition for dwindling resources. Whilst it is probable that the practice of IUU fishing will never be completely eliminated, several strategies currently employed by the CCAMLR Commission are proving effective in reducing its incidence.

¹⁷² Poulantzas, above n 144, 224.

¹⁷³ Ibid 225. For example, Professor Spiropoulos stated that existing law would demand the same vessel initiate and conclude the pursuit.

¹⁷⁴ Interview with John Davis, Australian Fisheries Management Authority (In person, 4 June 2001).

¹⁷⁵ Ibid. See also Graeme Leech, 'Illegal Fishers Caught after 4100km Chase', *The Weekend Australian* (Sydney, Australia), 14 April 2001, 5; Australian Fisheries Management Authority News, *Operation Cosmo*, above n 150, 2.

¹⁷⁶ Ian Macdonald, Minister for Fisheries, Forestry and Conservation, Chris Ellison, Minister for Justice and Customs and Sharman Stone, Parliamentary Secretary to the Minister for the Environment and Heritage, Australia, 'Viarsa is Boarded' (Press Release, 28 August 2003) <<http://www.mffc.gov.au/releases/2003/03171mj.html>> at 1 October 2004.

The requirement for flag state consent minimises the range of effective strategies that may be employed to deter IUU fishing. Whilst the limitations in the existing international law of the sea primarily affect coastal state efforts to curb illegal fishing, they are nevertheless a relevant factor to be considered in identifying alternative strategies. The options listed below do not depend on flag state consent and, when applied uniformly, have the potential to remove the economic incentives for pursuing IUU fishing. In addition to the listed options, RFMOs and coastal states have benefited from the exchange of information, the use of non-governmental and legitimate fishing industry information, publicity and diplomatic approaches.

A *Port and Market State Controls*

As a general rule of international law, states have jurisdiction over vessels in their ports.¹⁷⁷ This principle of customary international law has been reflected in many international agreements. For example, *UNCLOS*, the *UN Fish Stocks Agreement*, *IPOA-IUU* and the *CCAMLR* (through conservation measures and Resolutions) contain references to port state controls¹⁷⁸ and are evidence of state practice of increased use of such controls to regulate the activities of vessels in port.

Port states may require that the vessel Master submit the fishing vessel and documents to inspection as a condition of entry to port. Existing International Maritime Organization ('IMO') Memorandums of Understanding regulate vessel safety, pollution and crew living and working conditions. The Joint FAO/IMO ad hoc Working Group on IUU Fishing and Related Matters agreed that the FAO 'should consider the need to develop measures for port State control'.¹⁷⁹ This would involve a harmonised system of port state measures, designed to facilitate a coordinated approach to preventing, deterring and eliminating IUU fishing.

A draft Memorandum on Port State Measures has been developed under the auspices of the FAO.¹⁸⁰ It addresses a number of issues including:

- A requirement that the foreign fishing vessel provide advance notification of its intention to seek port access. The notification is to be accompanied by details of the vessel's identity, fishing licence, nature of the fishing trip and fish on board;
- The obligation on port states to refuse port access to vessels that have engaged in IUU fishing, including known offenders. (The use of a vessel of noncompliance database is complementary to this aspect of port state control); and
- Port inspections of vessels and documentation. The *CCAMLR* Catch Documentation Scheme, which has been continually refined since its

¹⁷⁷ See, eg, A V Lowe, 'The Right of Entry Into Maritime Ports in International Law' (1977) 14 *San Diego Law Review* 597, 597.

¹⁷⁸ See, eg, *UNCLOS*, above n 6, art 218; *UN Fish Stocks Agreement*, above n 134, arts 21(2), 21(8), 23(1); *IPOA-IUU*, above n 13, [9.3], [52]–[64]; *CCAMLR*, above n 8, art XI.

¹⁷⁹ FAO Committee of Fisheries, *Summary of the Report of the Joint FAO/IMO ad Hoc Working Group on IUU Fishing and Related Matters* (2001) 3.

¹⁸⁰ Terje Lobach, *Port State Control of Foreign Fishing Vessels* (2002) 17–25 <<http://www.fao.org/Legal/prs-ol/lpo29.pdf>> at 1 October 2004.

adoption in 1999, provides an existing working model for this aspect of port state control.

Under the *CCAMLR* Catch Documentation Scheme, member and non-member states are encouraged to implement controls on the landing of and world trade in, toothfish, whether caught within or outside the *Convention* Area. With the announcement by the Canadian delegation at the 2003 *CCAMLR* meeting that their Government was in a position to implement the Catch Documentation Scheme, all member states now comply with the Scheme.¹⁸¹ In addition, a number of non-member states also apply the *CCAMLR* Catch Documentation Scheme.¹⁸²

Whilst port state controls can be implemented on a regional basis through RFMOs, vessels flagged to non-member states can visit the ports of other non-members and thereby avoid the regional controls. This may lead to new 'open ports' being developed outside the geographical reach of RFMOs. The *CCAMLR* has had a degree of success in encouraging non-member states to implement the Catch Documentation Scheme, effectively widening the circle of ports and thus enhancing the effectiveness of the Scheme in regulating IUU fishing. However, *CCAMLR* has also experienced the development of new 'open port' states such as Jakarta and Mozambique, both of which have been approached to implement the Catch Documentation Scheme.¹⁸³

Market state controls operate on a similar basis to port state controls. By regulating the import and export of toothfish and toothfish products, states can potentially restrict the movement of any product with IUU origins. Australia was successful in 2003 in encouraging the US to seize a shipment of 31 tonnes of toothfish bound for US markets. The shipment was traced to the *Arvisa I*, and Australia was concerned that the vessel had been engaging in IUU fishing.¹⁸⁴

The effective implementation of port state controls may provide market states with some measure of comfort that imported toothfish have been caught in accordance with the conservation measures either of coastal states or of RFMOs. However, this does not lessen the need for uniform market state controls. Operating as a second line of regulation, market state controls can contribute to the prevention, deterrence and elimination of IUU fishing for straddling fish stocks.

B *IUU Vessel Database*

In 2002 the *CCAMLR* Commission agreed to confer upon the Secretariat the task of establishing two IUU vessel databases. Both were to list flags of noncompliance vessels, with the two lists separating non-member and member flagged vessels.

The establishment of these 'black lists' or IUU Vessel Lists has been controversial. There are evidentiary problems with establishing that a vessel is a vessel of noncompliance, as well as significant financial consequences flowing from listing. An IUU Vessel List may have a similar effect to the Contaminated

¹⁸¹ *CCAMLR* Commission, *Report of the Twenty-Second Meeting of the Commission*, above n 34, [7.2].

¹⁸² *CCAMLR* Commission, *Report of the Twenty-First Meeting of the Commission*, above n 104, [2.8].

¹⁸³ *Ibid* [2.9], [7.9].

¹⁸⁴ *Ibid* [7.5].

Land Registers employed by some governments in seeking to manage the economic cost of land pollution. The value of land merely listed for investigation for a possible listing on the Contaminated Land Register, falls immediately. Similarly, a nomination for inclusion on the IUU Vessel List can damage a vessel's reputation and have an impact on its ability to land and transfer catches, given the proposed obligation on port states to deny port access to known IUU offenders. The *CCAMLR* Commission is still working through the issue of requirements for, and the practicalities of, listing.

To facilitate cooperative regionalism, an FAO-sponsored, centrally managed IUU Vessel List would provide an effective means of regulating vessel activity as it would allow any coastal state or RFMO to search for new vessels entering their area of regulation. The globalisation of IUU fishing means that vessels can move between regional fisheries and take advantage of a lack of information exchange between coastal states or RFMOs. Additionally, an FAO-sponsored list would enable a uniform approach to the listing and delisting of vessels. Finally, the support of the FAO would provide credibility which is currently lacking in the lists compiled by Greenpeace and the Coalition of Legal Toothfish Operators.

However there are practical difficulties with pursuing an FAO sponsored list. Apart from issues of funding and membership of any subcommittee, the main obstacle to a centralised IUU Vessel List is state consent. This issue of consent currently plagues the *CCAMLR* IUU Vessel Lists. Both Russia and Spain voiced concerns with the *CCAMLR* system of listing at the 2003 meeting. The Russian delegate stated that the rights and duties of the flag state had been violated.¹⁸⁵ Interestingly, neither Russia nor Spain was concerned about the IUU List for non-member states.

Whilst the actual listing of a flag of noncompliance vessel does not require flag state consent, the establishment of an IUU Vessel List does require state support. Hence, RFMOs do need to be sensitive to members' concerns about the factual evidence required before a listing can be made.

C *Cooperative Surveillance and Enforcement*

The necessity for a coordinated approach to surveillance is emphasised by the nature of IUU fishing. As one observer has stated, '[w]e are talking about highly organised criminal syndicates. They're very very difficult to pin down. They're very liquid in their approach'.¹⁸⁶

To this end, France and Australia signed a bilateral treaty for cooperative surveillance in their Southern Ocean EEZs in late 2003.¹⁸⁷ This *Treaty* has been negotiated over a number of years and represents a significant step towards achieving effective management of the remote Australian and French EEZs. The preamble to the *Treaty* notes that 'cooperative action between the parties should encompass cooperative surveillance and law enforcement operations, including through developing further agreements or arrangements'.

¹⁸⁵ *CCAMLR* Commission, *Report of the Twenty-Second Meeting of the Commission*, above n 34, [8.44].

¹⁸⁶ Alison Rehn, 'More Illicitly Profitable than the Drug Trade, Demand for this Delicacy Translates into \$1M for Each Ship Load; Toothfish Pirates of the High Seas', *The Advertiser* (Adelaide, Australia), 23 August 2003, 38.

¹⁸⁷ *Treaty between Australia and France*, above n 168.

Not only does the *Treaty* provide for cooperative surveillance, it states that either party may request the assistance of the other party when engaged in a 'hot pursuit'.¹⁸⁸ The *Treaty* also facilitates the exchange of information on such details as the location or movement of fishing vessels (including licensed vessels) within the *Treaty* area.¹⁸⁹ Finally, the *Treaty* does contemplate the negotiation of further agreements for law enforcement operations.¹⁹⁰

Encouragingly, Australia and South Africa are engaged in bilateral negotiations aimed at achieving greater cooperation between the respective governments and joint responsibility in patrolling and protectin marine resources in their Southern Ocean EEZs.¹⁹¹ The enhanced cooperation between either coastal states or RFMO states can positively impact on efforts to deter and eliminate IUU fishing via port and market controls and IUU vessel databases.

VI CONCLUSION

A number of developments have shaped the practice of IUU fishing and these have been reviewed in this article. Together these developments have created an economic, political and legal environment in which the emergence of IUU fishing was inevitable. In fact, IUU fishing has become one of the single biggest threats to the sustainable management of high seas and coastal state fisheries. Its persistence has prompted global reactions in the form of the *IPOA-IUU*¹⁹² and OECD Workshop on IUU Fishing. Regionally, RFMOs such as the *CCAMLR* Commission are actively pursuing strategies to curb the growth of IUU fishing. Coastal state authorities are facing similar pressures to take effective action against illegal fishing and are even more hamstrung by the limitations in international law as identified in Part IV. The significant limitations in the application of arts 73 and 111 of *UNCLOS* are, in theory, able to be addressed at the 10th anniversary of the entry into force of *UNCLOS* later this year. However, any amendment which further increases coastal state authority at the expense of the freedom of high seas fishing states is likely to be interpreted as evidence of 'creeping' coastal state jurisdiction rather than a legitimate attempt to close legal loopholes being taken advantage of by IUU fishers.

The historical factors which created the existing legal framework for fisheries management under *UNCLOS* must be accommodated by future management plans. It might be possible to ease global fishing fleet numbers gradually. However, the efficiency of the fishing vessels and the impact of their relocation to the marine areas beyond the 200 mile EEZs are permanent factors in the marine fishing industry. There is potential to address the legal limitations identified in Part IV through the adoption of measures which do not require flag state consent. If effective, these measures could minimise the economic incentives for IUU fishing and its appeal could thus be diminished.

¹⁸⁸ Ibid arts 3(2), 3(3).

¹⁸⁹ Ibid art 5.

¹⁹⁰ Ibid annex III, art 2.

¹⁹¹ WWF, 'Pirate Fishing Vessel Nabbed after High Seas Chase' (Press Release, 28 August 2003) <http://www.panda.org/news_facts/newsroom/news.cfm?uNewsId=8581&uLangId=1> at 1 October 2004.

¹⁹² See *IPOA-IUU*, above n 13.