

**LEGAL ASPECTS OF THE COLLECTION OF FISHERIES DATA**



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by

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## PREPARATION OF THIS DOCUMENT

An earlier version of this paper was prepared for presentation as a working document to the eighteenth session of the Coordinating Working Party on Fishery Statistics (CWP) (Luxembourg, Grand Duchy, 6-9 July 1999). The present version takes account of some of the discussions at the CWP meeting and includes the final version of the criteria adopted by the CWP for assigning catches to countries.

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### ABSTRACT

This paper reviews legal aspects of the collection of fisheries data, particularly in relation to the criteria used to assign responsibilities in relation to the collection and reporting of fishery data and for recording catch data by country. The matter is of concern as a lack of accepted criteria can lead to non-reporting or double reporting of fishery data. This paper reviews the provisions of the principal international fisheries instruments concerning the collection and exchange of fisheries data. It describes the development of criteria by the Coordinating Working Party on Fishery Statistics (CWP) in the late 1970s and some of their shortcomings. It concludes with presenting refined criteria which were adopted by the CWP in 1999.

## TABLE OF CONTENTS

	<b>Page</b>
<b>1. INTRODUCTION</b>	<b>1</b>
<b>2. THE INTERNATIONAL LAW REGIME</b>	<b>1</b>
<b>2.1 Internal waters, archipelagic waters and the territorial sea</b>	<b>1</b>
<b>2.2 The Exclusive Economic Zone (EEZ)</b>	<b>2</b>
<b>2.3 The High seas</b>	<b>3</b>
<b>2.4 UN Fish Stocks Agreement</b>	<b>4</b>
<b>2.5 Other International Instruments</b>	<b>6</b>
<b>2.6 Some General Conclusions</b>	<b>7</b>
<b>3. THE PURPOSE FOR WHICH FISHERIES DATA IS COLLECTED</b>	<b>8</b>
<b>4. THE PHRASE “NATIONALITY OF CATCHES”</b>	<b>9</b>
<b>4.1 The European Community</b>	<b>10</b>
<b>5. NATIONAL LAWS</b>	<b>11</b>
<b>6. THE TEST USED BY CWP</b>	<b>14</b>
<b>ANNEX 1 – Extract from M. Tsamenyi and K. Mfodwo</b>	<b>17</b>

## 1. INTRODUCTION

The purpose of this paper is to outline the provisions of the principal international fisheries instruments concerning the collection and exchange of fisheries data. These instruments are: the UN Convention on the Law of the Sea, 1982 (hereafter referred to as the 1982 UN Convention), 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 (hereafter referred to as the UN Fish Stocks Agreement), the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, (hereafter referred to as the FAO Compliance Agreement), and the FAO Code of Conduct for Responsible Fisheries, hereafter referred to as the Code of Conduct). The paper will then consider briefly other uses to which these data might be put for a purpose different to the main purpose for collecting the data. It will then consider the phrase "nationality of catches", as well as some situations in national law where uncertainties may arise as to where responsibility should lie (usually as between the coastal State and the flag State) for the provision of data.

## 2. THE INTERNATIONAL LAW REGIME

### 2.1 INTERNAL WATERS, ARCHIPELAGIC WATERS AND THE TERRITORIAL SEA

The 1982 UN Convention does not make any reference whatever to the collection of data in these areas, indeed, it makes only passing references to fishing in respect of innocent passage and in respect of transit passage. Thus any specific obligation to report such data will need to be found in regional or sub-regional agreements. Further, in several countries, it is the policy not to permit foreign fishing in such waters. It is an interesting legal question which need not concern us here whether there exists a basic legal obligation at least to obtain data in order to base a minimum level of management responsibility with respect to the fisheries in such waters.<sup>1</sup>

### 2.2 THE EXCLUSIVE ECONOMIC ZONE (EEZ)

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<sup>1</sup> Indeed, it may be noted here that the provisions of the 1995 UN Fish Stocks Agreement concerning the precautionary approach (Article 6) and the compatibility of conservation and management measures (Article 7) also apply to "areas under national jurisdiction", while the general principles set out in Article 5 apply with respect to the exercise of sovereign rights for the purpose of exploring and exploiting, conserving and managing straddling fish stocks and highly migratory fish stocks within areas under national jurisdiction. In the latter, the reference to sovereign rights combined with the objective of the 1995 UN Fish Stocks Agreement to effectively implement the relevant provisions of the 1982 UN Convention dealing with such stocks would support a limited interpretation of the phrase to apply to the exclusive economic zone only; however, the normal meaning of the phrase "areas under national jurisdiction" is capable of embracing the territorial sea, archipelagic waters and internal waters. Further, Article 3 refers to "areas under national jurisdiction, subject to the different legal regimes that apply within areas under national jurisdiction and in areas beyond national jurisdiction", which implies an application to more than just the EEZ, while the phrase "different legal regimes" here also in its ordinary meaning would include internal waters, the territorial sea, and archipelagic waters. Cf the use of "regime" in Article 7 (3) of the 1982 UN Convention. The question becomes important in two quite distinct areas: in regions where there are archipelagic states, such as the Western Pacific, where substantial areas of water would be included or excluded depending on the interpretation adopted, and in the Mediterranean where there exist for the most part only territorial seas and where a literal interpretation of Article 63(2) combined with a narrow interpretation of the "areas under national jurisdiction" that covers only the EEZ might lead to a very limited application of these provisions of the 1995 UN Fish Stocks Agreement. Notwithstanding their ordinary meanings, both of these phrases are also quite ambiguous. It is beyond the scope of this paper to explore this ambiguity further here.

The basic provisions concerning the EEZ are set out in Part V of the 1982 UN Convention. In this zone, the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing *inter alia* the living marine resources. In Article 61 (2), the coastal State is required, taking into account the best scientific evidence available to it to ensure through proper conservation and management measures that the maintenance of the living resources in the EEZ is not endangered by over-exploitation. This duty would at least imply a responsibility on the part of the coastal State to collect such data if none were available.

The most important provision concerning data is set out in Article 61 (5), which deals with the conservation of the living resources.

It states:

*"Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional, or global, where appropriate and with participation by all States concerned, including States whose nationals are allowed to fish in the exclusive economic zone"*

The words "available scientific information" were probably employed in part to avoid imposing too onerous a burden on countries in the collection of data, especially developing States, or in the need to undertake scientific assessments of the living marine resources. This phrase was most probably linked to the requirement in Article 61 (2) that the coastal State shall take "into account the best scientific information available to it".

Article 61 (5) reflects the increasing importance that was attached to exchange of information through international organizations. The reference to "*including states whose nationals are allowed to fish in the exclusive economic zone*" does not of itself emphasise a primary role of the flag state in providing data, indeed, it seems merely to underline the intention at that time for available information to be exchanged.

The other provisions in Part V which have a bearing on the issue are to be found in Article 62 which deals with the utilisation of the living resources. These are:

Article 62.4 (d) which allows the coastal State to impose on "*nationals of other States fishing in the exclusive economic zone*", amongst a number of other conditions, laws and regulations relating to "*specifying the information required of fishing vessels, including catch and vessel statistics and vessel position reports*"

Another article of relevance is Article 62 4 (i), which relates to "*terms and conditions relating to joint ventures or other co-operative arrangements*".

These two provisions would allow a coastal State, as a condition of allowing foreign fishing in its EEZ, to impose conditions regarding the provision of catch data (format, content, frequency, to whom the reports should be made, etc), and indeed, this is the normal situation.

Overall, Part V does not mandate any specific or primary responsibility to collect data with respect to fishing in the EEZ. Thus, it would be open to the coastal State to do this, either in respect of its own vessels fishing in the EEZ or in respect of foreign vessels being authorised to fish in the EEZ as a condition of fishing. It would also be open to the flag State of a foreign fishing vessel to collect data, either as a condition of a licence imposed by the coastal State under a bilateral access agreement, or under a joint venture agreement, or it could be provided voluntarily.

What is made clear however is that there exists an obligation to exchange available information through competent international organizations, and that would imply the capacity on the part of such bodies to set data reporting standards for States to follow.

For the sake of completeness, it should be added that a coastal State does have the power to control marine scientific research in its EEZ or on its continental shelf. The coastal state should in normal circumstances grant its consent to undertake marine science research projects, though it has a discretion to withhold that consent if it is of direct significance for the exploitation of the natural resources of the zone. (Article 246, 1982 UN Convention).

### 2.3 THE HIGH SEAS

As with the EEZ, the 1982 UN Convention did not mandate any specific responsibility with regard to the collection of scientific data. The principal provision is Article 119 (2) which provides: *"available scientific information, catch and fishing effort statistics, and other scientific data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned"*

This obligation mirrors that which was found in respect of Article 61 concerning the EEZ, namely that there is an obligation to exchange information, etc. For practical purposes, this would only be information provided by the flag State.

The obligation to establish conservation measures for the high seas set out in Article 119 (1) presupposes that the State undertaking the fishing of these high seas stocks has access to the necessary data, or is able to provide it in order to arrive at meaningful conservation measures.

The simple regime laid down in the 1982 UN Convention for the high seas is now modified substantially by the UN Fish Stocks Agreement. Indeed, insofar as straddling fish stocks and highly migratory fish stocks are concerned, we will see that it has also had some impact on the EEZ.

### 2.4 UN FISH STOCKS AGREEMENT

The UN Fish Stocks Agreement is not yet in force, but it reflects a much more elaborate and sophisticated approach to the collection of data. Whereas the 1982 UN

Convention only addressed the question of collection and exchange of data in passing, it had come to be recognized that it should be addressed much more vigorously. Further, it imposes quite specific obligations on States that are in contrast to those found in the 1982 UN Convention, some of which, we have seen, are at best implied.

The Agreement is also quite complex in its operation. Although it is not yet in force, that may be less important in respect of data collection than it at first appears, as there is nothing to prevent States from collecting and sharing the information required under the Agreement even before it comes into force. Indeed, something like that is already happening with the FAO Compliance Agreement as some States are already providing the information they are required to provide before it has come into force, and there is no reason why States should not be able to do the same with respect to the obligations under the UN Fish Stocks Agreement.

It is also important to note that the UN Fish Stocks Agreement only applies to highly migratory fish stocks and straddling fish stocks beyond areas under national jurisdiction, though some of its provisions also apply in areas under national jurisdiction<sup>2</sup>. In particular, the coastal State is to apply *mutatis mutandis* the general principles set out in Article 5, while Articles 6 (Precautionary Approach) and 7 (Compatibility of Conservation and Management Measures) shall also apply to such areas.

The introduction to Article 5 itself is interesting, for it states: "In order to conserve and manage straddling fish stocks and highly migratory fish stocks, coastal States and States fishing on the high seas shall, in giving effect to their duty to cooperate in accordance with the Convention." This picks up the various duties in the 1982 UN Convention to cooperate, which would include those referred to above with respect to exchange of data, limited though it is to the particular stocks to which the Agreement applies.

One of the general principles stated in Article 5 is of direct concern to us here. Paragraph (j) provides: "*collect and share, in a timely manner, complete and accurate data concerning fishing activities on, inter alia, vessel position, catch of target and non-target species and fishing effort, as set out in Annex I, as well as information from national and international research programmes*"

Article 6, which sets out the precautionary approach which is to be applied by "States", also makes reference to the need to collect data, for paragraph (d) provides: "*develop data collection and research programmes to assess the impact of fishing on non-target and associated or dependent species and their environment....*"

It will be noted that these two provisions are cast in general terms. Where the fishing is taking place on the high seas, this will in almost all situations place the primary burden on the flag State.

The UN Fish Stocks Agreement also makes specific provision for the responsibility of the flag State. Article 14 sets out the following:

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<sup>2</sup> See footnote 1 above.

*"States shall ensure that fishing vessels flying their flag provide such information as may be necessary in order to fulfil their obligations under this Agreement. To this end States shall in accordance with Annex I..."*

Here follows a number of detailed conditions regarding the collection and exchange of scientific, technical and statistical data.

This is backed up by Article 18 which sets out Duties of the Flag State, which include among the measures to be taken by the flag State in paragraph 3 e) *"requirements for recording and timely reporting of vessel position, catch of target and non-target species, fishing effort and other relevant fisheries data in accordance with subregional, regional, and global standards for the collection of such data."*

The new regime set out in the UN Fish Stocks Agreement is complemented by Articles 9 (Subregional and regional fisheries organizations and arrangements) and 10 (Functions of subregional and regional fisheries management organizations and arrangements). The most important provision for our purposes is found in paragraphs (d), (e), and (f) of Article 10. These state:

(d) *"obtain and evaluate scientific advice, review the status of the stocks and assess the impact of fishing on non-target and associated or dependent species"*

*"(e) agree on standards for collection, reporting, verification and exchange of data on fisheries for the stocks"*

(f) *"compile and disseminate accurate and complete statistical data as described in Annex I, to ensure the best scientific evidence is available, while maintaining confidentiality where appropriate"*

All of these provisions are complemented by Annex I of the UN Fish Stocks Agreement. The chapeau to Article 1 of this Annex powerfully illustrates the progress made since the 1982 UN Convention in regard to increased recognition of the essential need for the collection of reliable data: *"The timely collection, compilation and analysis of data are fundamental to the effective conservation and management of straddling fish stocks and highly migratory fish stocks."* Only the limitation as to the stocks covered by the Agreement and the Annex (i.e. the straddling fish stocks and highly migratory fish stocks) obscures the progress made since 1982. The Annex sets out very elaborate provisions concerning data. It is important to note that the obligations are placed on both the flag State and more generally on States. Thus while the flag State has a specific obligation which is set out in Articles 14 and 18 above, it is clearly not put in such a way in this Annex as to exclude responsibility on the part of the coastal State from collecting data also.

However, in one very important respect, the Annex places particularly strong obligations on the flag State, for in Article 5, there is an obligation to ensure that vessels flying its flag send to its national fisheries administration, and where agreed, to the relevant subregional or regional fisheries management organization or arrangement, log book data on catch and effort, including data on fishing operations on the high seas. Likewise, in Article 7, concerning data exchange, it is stated: *"Data*

*collected by flag States must be shared with other flag States and relevant coastal States through appropriate subregional or regional fisheries management organizations or arrangements*". Such organizations are also to compile such data and make them freely available in a timely manner and in an agreed format to all interested States.

## 2.5 OTHER INTERNATIONAL INSTRUMENTS

It is useful to look briefly at other international instruments that might have a bearing on the question of data collection.<sup>3</sup>

The Code of Conduct has extensive provisions touching on fisheries data collection and exchange, though space limitations do not allow a fuller analysis here. The principal articles dealing with fisheries data are to be found in articles 7.3.4, 7.4, 8.1.3, and 12. The Code is neutral on the question of attributing primary responsibility for collecting data, placing the obligations on States, though the role of subregional or regional fisheries management organizations or arrangements is fully recognised (Article 7.4) As well there are references to States ensuring that "timely, complete and reliable statistics on catch and fishing effort are collected and maintained in accordance with applicable international standards, and in sufficient detail to allow sound statistical analysis" The Code also urges subregional and regional fisheries management organizations or arrangements to compile data and make them available, in a manner consistent with any applicable confidentiality requirements in a timely manner and in an agreed format to all members of these organizations and other interested parties in accordance with agreed procedures (Article 7.4.7).

The Compliance Agreement imposes obligations on flag States to exchange information with respect to vessels. Article VI requires parties to make readily available to FAO certain information with respect to each fishing vessel entered on its record of fishing vessels. This information is to be circulated periodically to all parties, and on request, to any individual Party, and, subject to any restrictions imposed by the party concerned, to any global, regional or subregional fisheries organization. This information does not address catch data, but the information that will be circulated will play an important part in helping to detect unauthorised fishing on the high seas.

## 2.6 SOME GENERAL CONCLUSIONS

It will be apparent from the above that there is no systematic obligation to obtain or to exchange data set out in the 1982 UN Convention. Certainly there is no single approach mandated to the collection of data under that Convention. The UN Fish Stocks Agreement comes closest in the clear obligation it imposes on the flag State to provide the relevant data. This obligation is not intended to exclude the responsibility of others. However, legally speaking, the UN Fish Stocks Agreement is

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<sup>3</sup> For a useful table summarizing the provisions of several regional agreements, see further M. Tsamenyi and K. Mfodwo, Integrated Fisheries Monitoring – the Legal Framework, pp 12-14. Paper presented at International Conference on Integrated Fisheries Monitoring, Sydney 1-5 February, 1999 The table is attached as an annex to this paper. They conclude: "The language of obligation set out in many of these treaties is weak by contrast with for example, the Straddling/Highly Migratory Stocks Agreement, and also in relation to the importance of the tasks." p12.

limited to straddling fish stocks and highly migratory fish stocks<sup>4</sup>, and in any event, like the Compliance Agreement, is not yet in force.

However, this aspect is less important than it might appear, as the action necessary i.e. to exchange data, is not of itself an activity which depends on the existence of an agreement. It is something that can be done by either the coastal State or the flag State under existing powers.<sup>5</sup> Indeed, the only constraint that could arise is if there were a provision under national law restricting the release of information.

There is of course another way of approaching the matter, namely that there exists a general duty to cooperate with respect to shared resources which brings with it at least a minimal duty to share basic information regarding such stocks. Without diminishing the importance of such an approach, it is suggested that it is too vague in setting relevant standards for data collection.

What is more important from a legal point of view is that the national law of the flag State or of the coastal State in question mandates the provision of data in a form that enables it to provide this information to an international forum and in a meaningful form.

More importantly, there are clear obligations to share available information, and it is appropriate that this should be collected in an internationally agreed manner. All the references in the 1982 UN Convention refer to co-operation through competent global, regional sub-regional organizations. The UN Fish Stocks Agreement goes further in that it imposes an obligation to provide the information in accordance with “sub-regional, regional and global standards for the collection of such data” (Article 19 Duties of the flag State), while Annex I itself provides the basis for formulating standard requirements for the collection and sharing of data.

Thus the approach of the Co-ordinating Working Party on Fishery Statistics (CWP) becomes of critical importance in setting those internationally agreed standards.

### **3. THE PURPOSE FOR WHICH FISHERIES DATA IS COLLECTED**

Both the 1982 UN Convention and the UN Fish Stocks Agreement make it clear that the purpose of collecting fisheries data is to underpin decisions with respect to conservation and management of the resources, in the case of the 1995 UN Fish Stocks Agreement, with respect to straddling fish stocks and highly migratory fish stocks. That said, it is unlikely that these statistics, having been collected, will be used only for that purpose. Thus, the data might be used, for example, directly or indirectly, to assist in identifying the origin of a catch for the purposes of trade rules

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<sup>4</sup> Though it should be noted that Article 18 is worded generally, while Article 14 is clearly limited to straddling fish stocks and highly migratory fish stocks, while Annex I is also clearly limited to those stocks.

<sup>5</sup> An example of this can be found in the present situation regarding the FAO Compliance Agreement in respect of its obligation to provide data on certain vessels operating on the high seas. This can already be provided by the flag State, and already Canada and US are providing that information.

concerning the origin of a particular item in trade (subject to any applicable confidentiality restrictions). However, it is important to keep in mind the basic purpose of the data collected, and that same information might only partly serve another purpose in another context. For example, in the area of fish processing, sales, and trade in the product, the data will have to be adapted to meet that purpose.

Fisheries data will also play an important role in determining the financial contributions to certain management organizations, as for example is the case with the Indian Ocean Tuna Commission. Thus, Article XIII of the Agreement for the Establishment of the Indian Ocean Tuna Commission, which deals with finances, states, that a scheme for contributions shall be adopted by the Commission, which shall involve an equal basic fee and a variable fee, which shall be based "*inter alia on the total catch and landing of species covered by the Agreement in the area,*" and the per capita income of each Member. However, it will be apparent that simply answering this question by reference to the flag of the vessel making the catch will not be sufficient information.

Fisheries data will also of course be useful in negotiations concerning access to exclusive economic zones where one of the issues is catch history. Indeed, Article 62(3) of the 1982 UN Convention requires the coastal state to take into account a number of factors, including the need to "minimise economic dislocation in States whose nationals have habitually fished in the [EEZ]".<sup>6</sup>

Another area where the data might also play a role is in determining the parties to a negotiation on the management of a particular straddling fish stock or highly migratory fish stock. Here, the information would need to be looked at more closely in order to determine if, in fact, the stock in question was actually found in the EEZ of a particular coastal State. It would not be enough merely to work from data made by the flag State (unless of course, it was provided in enough detail to permit such a more detailed analysis). Related to this question is the "catch history" of a particular country in a particular area, which will often be a major issue in negotiations.

Another instance where the catch data can be used is to cross check the accuracy of the statistics provided in respect of landings.

There are no doubt numerous other instances where such data can (or does) serve another purpose.

#### **4. THE PHRASE "NATIONALITY OF CATCHES"**

It is proposed now to address in particular the problem that has arisen in regard to the "nationality of catches", and to consider some possible areas where some problems might arise in allocating responsibility. It is, in particular, hoped to clarify what is meant by the phrase the "nationality of catches" in view of the fact that it is sometimes used as a basis for allocating responsibility for providing information.

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<sup>6</sup> Note also, for example, other provisions where catch data will become important: Articles 66 (Anadromous stocks), 67 (Catadromous species), 69 (rights of landlocked States) and 70 (rights of geographically disadvantaged States).

If the phrase is used as a means of identifying the responsibility of the party to compile the data, there should be no problem with its use. For example, if it is said that catch has the nationality of the flag State where it is the flag state making the reporting, or that it has the nationality of the coastal State where it has been caught by a vessel of the flag State, there can be no problem. The problem arises once the phrase is used as a basis for making decisions about who should report; in fact, it is not very helpful to talk about the nationality of a catch for the purpose of data collection, except as a short hand expression to indicate where the responsibility lies.

For example, fish caught within an EEZ of a particular State might be said to have the nationality of that State, but the term could be quite misleading if it is intended to suggest that catches have a nationality simply because the fish have been caught in the EEZ of a particular State, or at another extreme that they have a nationality simply because they were caught by a vessel flying the flag of a particular State.

In this regard (i.e. on the "nationality" of a catch) the 1982 UN Convention is silent. All it does is give sovereign rights over the marine living resources to the coastal State, but until the fish are caught, they can hardly be said to have a nationality or indeed, to be owned. Once caught e.g. within an EEZ, the fish may well be regarded as belonging to (i.e. having the nationality of) the coastal State for certain purposes under national law. They may well continue, (depending how the national law has chosen to characterise the matter, if at all) to be fish having the nationality of the coastal State even though caught by another flag State. But, if for statistical purposes, it is thought better to have the information provided by the flag State, even though caught within the EEZ, then that could be acceptable. However, it is most probably better not to talk about "nationality" in this context except possibly as shorthand for the obligation of the flag State or the coastal State to provide that information.

In other words, the nationality of a catch is at bottom not an important issue for conservation and management purposes, though it could become so in other contexts, as was discussed in the preceding heading 3. As mentioned, the provisions of the 1982 UN Convention regarding the collection of data are for the most part silent on who should provide the information, emphasising instead the need to provide it. It is only in the UN Fish Stocks Agreement that an obligation is placed squarely on the flag State, but even there it is not placed on the flag State exclusively.

It is interesting to note that the CWP itself uses the term "nationality of catch" and "nationality of catch data" interchangeably in its Report of the 17<sup>th</sup> Session, 1997, (paragraphs 19-24). It is suggested that the term "nationality of catch data" is preferred inasmuch as it lessens the impression that the nationality of the catch is important for fisheries conservation and management; such a phrase also emphasises more the origin of the catch data, which is more important.

#### 4.1 THE EUROPEAN COMMUNITY

Before turning to consider the situation under national laws, it is proposed to consider the situation arising under European Community law, which raises another

dimension to the use of the term "nationality of catch", and which shows how origin of catch issues can arise under European Community law. It has to be stressed however, that the issues raised here are peculiar to the European Community. What follows is a brief summary of one case that was considered by the European Court of Justice, but it should not be thought that this case is dispositive of the entire matter, as similar issues of interpretation can arise under other Community laws

The facts of the case are as follows: some British trawlers cast empty nets into the Baltic Sea some 40 to 80 miles off the Polish coast. These nets were then taken over by Polish trawlers, which trawled with them though without taking them on board, nor did the British vessels enter Polish Territorial Waters. When the trawl was completed, the British trawlers lifted the nets, the ends of which had been passed to them by the Polish vessels, the contents of the nets were taken on board the British trawlers, which then took the fish to UK. In UK, they were treated as being of Community origin and thus entitled to duty free admission. However, this view was contested by the EC. Following an exchange of letters, the matter ended up in the European Court of Justice, and after a lengthy analysis of the Regulation in question, the court declared:

*"that by not levying customs duties on the importation into its territory of fish caught during joint fishing operations in which vessels flying the British flag took part together with vessels flying the flag of a non-member country, the latter having performed the essential part of the operation of catching the fish and the former having merely raised the nets out of the water, the United Kingdom has failed to fulfil its obligations under article 4 ( 2 ) ( f ) of Regulation (EEC) no 802/68 of the council on the common definition of the origin of goods and under Regulation (EEC) no 950/68 of the Council on the common customs tariff, as amended by Regulation no 3000/79 "*<sup>7</sup>

This case is a very useful illustration of the problems which can arise once we enter the realm of the domestic laws of particular countries, for although it was Community law being applied. It was in effect the equivalent of national law for our purposes. Further, it shows how a matter such as origin of catch can become enmeshed with a question of nationality of catch, when in truth the legal core of the issue was not either of these, but the interpretation of an EC regulation, and in particular of the words *"taken from the sea"* and *"originating in the country in which the last substantial process or operation that is economically justified was performed"*. Applying these words to the facts, the conclusion of the court was that the most significant "operation in fishing was carried out by Polish vessels".

Similar issues can arise under national laws, e.g. because of the way the import laws of the country are drafted, or because of federal structures which introduce such complications.

## 5. NATIONAL LAWS

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<sup>7</sup> Judgment of the court, 28 March, 1985. European Court Reports 1985, p 1169

It is proposed now to give a brief overview of different situations which might arise under national law and which might cause confusion as to who should report data. (It needs to be said at the outset here that there is no problem about who should report data concerning fishing on the high seas as that will for all practical purposes be the flag State only).

First, what might be called a straight forward licensing regime, where the coastal State issues licenses to its own vessels in its own EEZ. In such a situation, there could be little doubt that responsibility should fall on to the coastal State to collect and to exchange relevant data.

Second, where the coastal State issues licenses or permits for foreign vessels to fish in its EEZ (or for that matter, its territorial sea and internal waters). There are two situations which need to be considered here. First, where the coastal State has granted the license directly to a foreign vessel, second, where it has granted the authority to fish under a bilateral access agreement.

In the first case, the provision of data would presumably be a condition of the license, in the second, it would presumably be a provision of the access agreement in which the flag State has agreed to ensure that its vessels collect such information.

In both of these situations, the present approach would appear to be that the flag State will be responsible for the provision of such data even though the fishing itself is being conducted entirely within the EEZ of the coastal state authorizing the fishing. However the point should be made that there is nothing that mandates that solution, for in the EEZ, as we have seen, there is no particular obligation imposed by the 1982 UN Convention to achieve that result.

Thus the selection of the flag State is based on the assumption that it is best placed to provide that data. From the point of view of nationality of the catch, however, in both of these situations, if the fish were to have any “nationality”, it would be that of the coastal State.

Under the UN Fish Stocks Agreement, the situation is different inasmuch as the flag State has particular reporting responsibilities imposed on it wherever it has been fishing for the stocks to which the Agreement applies. However, the coastal State also has responsibilities in respect of its vessels, though worded somewhat less stringently.

Similar to the access agreement situation is where the fish is obtained under a joint venture or a charter arrangement. In the case of the joint venture, the range of possibilities is in theory very wide. They could involve at one extreme a very small coastal State interest in the venture, e.g. as low as 10% of the total venture, where the coastal State partner has provided nothing more than the access to the local resource, though with the fishing being done by the foreign partner. Depending on the local law of the coastal State in question, it may be difficult to distinguish between such a vessel and a foreign flag vessel. Some countries also have a category of “locally based foreign fishing vessels”, where the foreign vessel obtains certain benefits

because of its commitment to the coastal State, e.g. because it lands all or most of its catch in a port in the coastal State.

Similar situations can arise under charter arrangements, where a chartered vessel is, though flagged in another country, fishing as a local fishing vessel in terms of the authorization it has received. This is possible under the laws of quite a few countries, though the particular solutions adopted will vary considerably.

In fact, the range of possibilities is quite wide here when you allow for the fact that there are different arrangements that can be made according to the type of legal system we are dealing with (e.g. common law, civil law, socialist legal systems, economies in transition, etc). However, this theoretical range of possibilities should not be overstated, as most arrangements tend to fall into a number of fairly easily predictable types. The point which has to be made however, is that if you start to become too closely involved in the details and possible permutations of national law, then the range of possibilities makes it unlikely that a solution will be found which is clear cut for all purposes.

Thus by focussing on e.g. the flag State, even when the vessel is fishing in the internal waters, territorial waters or EEZ, it provides a clear cut solution to the provision of data that avoids getting into the niceties of different national laws, and how a vessel is authorized to fish in the EEZ. It also provides a workable solution where the fishing takes place across national zones, not only with the straddling fish stocks and highly migratory fish stocks covered by the UN Fish Stocks Agreement, but also in respect of shared stocks between two EEZ's.<sup>8</sup>

The problem which needs to be addressed, therefore, is how we can reduce the problem of nonreporting or double reporting.

At the seventeenth session of CWP, a paper was presented which identified the following problem areas.

*FAO has recently reviewed some specific situations in which difficulties in assigning a nationality existed and led to misreporting and double counting. This is the case of New Zealand, Namibia, Peru, and probably Argentina, for which statistics of catches taken under joint-venture or concession agreements between these countries and a number of countries, including Japan, Rep. of Korea, Taiwan, etc., were over-reported.*

*In the case of New Zealand, the problem had first been emphasized a few years ago by anomalies in the food balance sheets constructed by FAO to estimate fish consumption. As of 1 April 1978, when the New Zealand 200 mile EEZ was declared, a number of joint-venture agreements were approved and these arrangements continue until 1 April 1983, when a "deepwater trawl policy" was introduced, allocating quotas to New Zealand-owned companies. These companies were permitted to catch their quotas using foreign chartered vessels*

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<sup>8</sup> See Article 63 (1) on the 1982 UN Convention.

*and/or their own trawlers. Squid jigging and purse seining charter agreements continued as previously. In accordance with generally recommended practice, also accepted by FAO, these quantities caught by foreign fishing boats under charter arrangements have been recorded by the local authorities as New Zealand production. Some of the catches taken by these foreign vessels are landed in countries other than New Zealand, and these quantities are treated in the New Zealand statistics as exports. Unfortunately, these same catches are, in many cases, also reported as national catches (instead of national imports) in order to avoid import duties, by the flag States of the foreign fishing vessels operating in the New Zealand waters under joint-venture agreement. This, of course, has the effect of greatly inflating the reported catch figures in the Southwest Pacific (Area 81). This problem was solved, in agreement with the New Zealand fishery authorities, who provided FAO with data on catches by vessels from other countries fishing in New Zealand waters under charter or licence agreements, broken down by country, species, and quantity landed in New Zealand and outside New Zealand.*

*A similar situation pertained in Namibia, where the fisheries management authorities allocate catch quotas to Namibian companies, which often enter into joint-ventures with foreign companies which provided the vessels. There was some double reporting of catches (which are all landed in Namibia) which was subsequently resolved by asking Namibia to separate catches by flag of vessel.*

*In the case of Peru, the quantities over-reported referred exclusively to the Giant Squid (*Dosidicus gigas*). In April 1994 a Reorganization Plan for the rational and sustained exploitation of Giant Squid was approved. This plan seeks to maximise economic benefits resulting from the harvesting of this resource, by using its high availability to cover the sector's requirements of research reorganization, planning and development. As a result of these measures, the Ministry of Fisheries has so far received money from fishing concessions, awarded through public tenders, issued to foreign flag vessels using special tackle for the harvesting of this species. These large quantities (60,998 Mt. in 1991, 93,852 in 1992, 132,586 in 1993 and 167,132 in 1994) misreported by the Peruvian fishery authorities under the Peruvian catch, were removed because they were already included under the catch of foreign flag vessels, in particular Korean, Japanese and Taiwanese vessels.*

*With regard to the Argentinian catch data, it will be necessary to investigate if the quantity (or part) produced by Asian jigger boats (about 100,000 m.t.) under a charter regime, is also recorded in the statistics of the chartered flags of Japan, Taiwan and Rep. of Korea, fishing respectively with 44, 13 and 11 jigger vessels.*

It will be apparent that it is in the area of joint ventures and charters that the greatest uncertainty as to responsibility for reporting will arise. It will be noted that in

each of the situations referred to, the end result was to attribute the responsibility to the flag State to provide the catch data. Given the already heavy reliance on the flag State, it would seem advisable to strengthen that commitment to all but the most exceptional cases. In other areas, there are no reports of uncertainty as to where the responsibility does or should lie.

## **6. THE TEST USED BY CWP**

In 1954 the United Nations Statistical Commission decided that fish catches should be assigned to the country of the flag flown by the fishing vessel. This concept was adopted by all member agencies of the Co-ordinating Working Party on Fishery Statistics (CWP) at its Ninth Session (1977) and defined more precisely at the CWP's Tenth Session (1980) as follows:

*The flag of the vessel performing the essential part of the operation catching the fish, should be considered the paramount indication of the nationality assigned to the catch data and this indication overridden only when one of the following arrangements between a foreign flag vessel and the host country exists:*

- a) *the vessel is chartered by the host country to augment its fishing fleet; or*
- b) *the vessel fishes for the country by joint venture contract or similar agreements (as opposed to the ad hoc practice of a vessel selling catches to a foreign vessel or landing catches at a foreign port) and the operation of such vessel is an integral part of the economy of the host country.*

*When governments negotiate joint ventures or other contracts in which vessels of one country land their catches at ports of another country or unload their catches to vessels of another country and the one of the above-mentioned criteria is applicable, the assignment of nationality to such catches and landings data should be specified in the agreement.*

This formulation had, it appears, worked quite well, except in the area of charters and joint ventures. The Eighteenth Session of CWP (Luxembourg, 6-9 July 1999) refined the criteria further by seeking to strengthen the role of the flag State even more and endeavouring to eliminate some of the uncertainties surrounding joint ventures and charters. The revised formulation which was adopted by the CWP reads:

*The flag State of the vessel performing the essential part of the fishing operation shall be responsible for the provision of catch and landing data.*

*Where a foreign flag vessel is fishing in the waters under the national jurisdiction of another State, the flag State of the vessel shall have at all times the responsibility to provide relevant catch and landing data. The only exceptions to this shall be:*

*(a) where the vessel undertakes fishing under a charter agreement or arrangement to augment the local fishing fleet, and the vessel has become for all practical purposes a local fishing vessel of the host country;*

*(b) where the vessel undertakes fishing pursuant to a joint venture or similar arrangement in waters under the national jurisdiction of another State and the vessel is operating for all practical purposes as a local vessel, or its operation has become, or is intended to become, an integral part of the economy of the host country.*

*In any situation where there is uncertainty as to the application of these criteria, any agreement, charter, joint venture or other similar arrangement shall contain a provision setting out clearly the responsibility for reporting catch and landing data, which shall be reported to the flag State, and, where relevant, to any coastal State in whose waters fishing operations are to take place or competent sub-regional, regional or global fisheries organization or arrangement*

## Annex I

Extract from M. Tsamenyi and K. Mfodwo, Integrated Fisheries Monitoring – the Legal Framework, pp 12-14. Paper presented at International Conference on Integrated Fisheries Monitoring, Sydney 1-5 February, 1999

AGREEMENTS	MONITORING PROVISIONS
<b>ICCAT</b>	<p>Under Article IX, the Contracting Parties agree:</p> <ul style="list-style-type: none"> <li>• To furnish, on the request of the Commission, any available statistical, biological &amp; other scientific information the Commission may need for the purposes of the Convention;</li> <li>• to allow the Commission to obtain such information on a voluntary basis direct from companies &amp; individual fishermen when their official agencies are unable to obtain &amp; furnish the information to the Commission.</li> </ul> <p>In Annex II to the Final Act, the Parties:</p> <ul style="list-style-type: none"> <li>• recognised the need to collect adequate statistics on catch &amp; fishing effort &amp; the necessary biological data, &amp; make available for publication the statistical &amp; related economic data with a view to enabling the International Commission for the Conservation of Atlantic Tunas;</li> <li>• urged all countries to take steps without delay to create, where they do not already exist, offices within their fisheries administrations suitably staffed &amp; having appropriate financial &amp; legislative support to undertake the collection &amp; the processing of the data to be used by the Commission.</li> </ul>
<b>IOTC</b>	<p><u>Institutions</u></p> <ul style="list-style-type: none"> <li>• IOTC Commission undertakes continuous review of the conditions &amp; trends of the stocks.</li> <li>• Commission gathers, analyses &amp; disseminates scientific information, catch &amp; effort statistics &amp; other data relevant to the conservation &amp; management of the stocks.</li> <li>• Commission encourages, recommends &amp; co-ordinates research &amp; development activities in respect of the stocks &amp; fisheries covered by the Agreement.</li> <li>• Commission decides scope &amp; form of fisheries statistics &amp; the intervals at which they shall be provided (Article XI).</li> <li>• Commission endeavours to obtain fishing statistics from fishing States or entities which are not Members of the Commission.</li> </ul> <p><u>Member States</u></p> <ul style="list-style-type: none"> <li>• Required to co-operate, through the Commission, in the establishment of an appropriate system to keep under review the implementation of conservation &amp; management measures taking into account appropriate &amp; effective tools &amp; techniques to monitor the fishing activities &amp; to gather the scientific information required for the purposes of the Agreement (Art. X(3)).</li> <li>• Members of the Commission agree to co-operate in exchanging information regarding on fishing by non-Parties to the Convention(Art. X(4)).</li> <li>• Members of the Commission shall, on the request of the Commission, provide such available &amp; accessible statistical &amp; other data &amp; information as the Commission may require (Article XI).</li> </ul>
<b>AGREEMENTS</b>	<b>MONITORING PROVISIONS</b>
<b>CCSBT</b>	<p><u>Institutions</u></p> <p>The Commission is required to collect &amp; accumulate the following information under Article 8:</p> <ul style="list-style-type: none"> <li>• Scientific information, statistical data &amp; other information relating to southern bluefin tuna &amp; ecologically related species;</li> <li>• Information relating to laws, regulations &amp; administrative measures on southern bluefin tuna fisheries;</li> <li>• Any other information relating to southern bluefin tuna.</li> </ul> <p>The Commission is also required to develop, at the earliest possible time &amp; consistent with international law, systems to monitor all fishing activities related to southern bluefin tuna in order to enhance scientific knowledge necessary for its conservation.</p> <p><u>Member States</u></p>

<b>AGREEMENTS</b>	<b>MONITORING PROVISIONS</b>
	<p>The Parties undertake under Article 5 to:</p> <ul style="list-style-type: none"> <li>• Expeditiously provide to the Commission information, fishing catch &amp; effort statistics &amp; other data relevant to conservation of southern bluefin tuna &amp;, as appropriate, ecologically related species;</li> <li>• Cooperate in collection &amp; direct exchange, when appropriate, of fisheries data, biological samples &amp; other information relevant for scientific research on southern bluefin tuna &amp; ecologically related species;</li> <li>• Cooperate in the exchange of information regarding any fishing for southern bluefin tuna by nationals, residents &amp; vessels of any State or entity not party to the Convention.</li> </ul>
<b>CCAMLR</b>	<p><u>Institutions</u></p> <p>The functions of the Commission under Article IX(1) include to:</p> <ul style="list-style-type: none"> <li>• Compile data on the status of &amp; changes in population of Antarctic marine living resources &amp; on factors affecting the distribution, abundance &amp; productivity of harvested species &amp; dependent or related species or populations;</li> <li>• Ensure the acquisition of catch &amp; effort statistics on harvested populations;</li> <li>• Analyse, disseminate &amp; publish the information referred to immediately above &amp; the reports of the Scientific Committee.</li> </ul> <p><u>Member States</u></p> <p>Under Article XX the Members of the Commission agree:</p> <ul style="list-style-type: none"> <li>• to provide annually to the Commission &amp; to the Scientific Committee such statistical, biological &amp; other data &amp; information as the Commission &amp; Scientific Committee may require in the exercise of their functions;</li> <li>• to provide information about their harvesting activities, including fishing areas &amp; vessels, so as to enable reliable catch &amp; effort statistics to be compiled;</li> <li>• that in any of their harvesting activities, advantage shall be taken of opportunities to collect data needed to assess the impact of harvesting.</li> </ul> <p>Article XXIV requires the establishment of a system of observation &amp; inspection on the defined principles - both have been established and are fully operational.</p>