

**THE “GENUINE LINK” CONCEPT
IN RESPONSIBLE FISHERIES:
LEGAL ASPECTS AND RECENT
DEVELOPMENTS**

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FOREWORD & ACKNOWLEDGEMENTS

This study has been adapted from an internal report prepared as an FAO Secretariat background document for the interagency meeting on “genuine link”, convened in July 2005 by the IMO. The meeting was held following the call of the UN General Assembly “to study, examine and clarify the role of *genuine link* in relation to the duty of flag states to exercise effective control over ships flying their flags, including fishing vessels” (A/RES/58/14 para. 22). The present report aims at clarifying FAO’s stance on the issue, in the context of Illegal, Unreported

and Unregulated (IUU) fishing, but its conclusions only reflect the personal views of the author.

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ABSTRACT

The analysis of the origins of the genuine link principle in international law and its evolution with regard to relevant court decisions clearly shows the reluctance of certain states to consider the genuine link between a ship and its flag state as a precondition to the registration of vessels. This is even truer when the link is intended as an economic connection, based on the nationality of the beneficial owner of the vessel. As a result, the alternative to circumvent such a political impasse has been to focus on the main objective pursued by the negotiators of the 1958 High Seas Convention, when the term was first adopted, namely the exercise of effective jurisdiction and control over vessels by their flag state. Flag state responsibility and the duties arising therefrom were extensively provided for in the soft and hard international instruments adopted in the nineties to counteract IUU fishing and reflagging. More recently, complementary enforcement measures are being elaborated to enhance cooperation among states in the implementation of responsible fisheries management. International attention is now not only on the duties of flag states, but also on trade-related measures, port state control, state control over nationals and information retrieval and exchange. Of course, regional fisheries organizations have a key role in the adoption of these and other measures to achieve responsible fisheries.

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LIST OF ABBREVIATIONS

1958 Convention	1958 Convention on High Seas
1982 UN Convention	1982 United Nations Convention on the Law of the Sea
1993 FAO Compliance Agreement	1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas
1995 UN Fish Stocks Agreement	1995 UN Agreement for the Implementation of the Law of the Sea Convention relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
CCAMLR Convention	Convention on the Conservation of Antarctic Marine Living Resources
Code of Conduct	1995 FAO Code of Conduct for Responsible Fisheries
COFI	FAO Committee on Fisheries
FFA	Pacific Islands Forum Fisheries Agency
FFA Convention	Pacific Islands Forum Fisheries Agency Convention
FAO	Food and Agriculture Organization of the United Nations
HSTF	High Seas Task Force
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICJ	International Court of Justice
ILC	International Law Commission
IMO	International Maritime Organization
IPOA- IUU	2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing
ITF	International Transport Workers' Federation
IUU fishing	Illegal, Unreported and Unregulated fishing
ITLOS	International Tribunal for the Law of the Sea
NEAFC	North East Atlantic Fisheries Commission
OECD	Organisation for Economic Co-operation and Development
RFB	Regional Fisheries Body
RFMO	Regional Fisheries Management Organization
UN	United Nations Organization
UNCLOS	United Nations Conference on the Law of the Sea
UNICPOLOS	United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea
UNGA	United Nations General Assembly

INTRODUCTION

Since its first codification in the 1958 Convention on the High Seas, the existence of a genuine link between a flag state and the vessels flying its flag, as well as the effects on ship registration of the lack thereof have been the subject of great controversy, both in international disputes' settlement and among writers. The reason for such legal uncertainty is that no answer to these questions is found in international law and, more profoundly, in the dramatic divide between national interests in the existence of open registries¹. Open-registry states are those nations where the requirements set for ship registration are flexible and generally not based on nationality. Often being developing countries, these states do not have the ability and the resources to ensure control of all the ships flying their flag, which increases the number of potential IUU fishing vessels. The genuine link was originally intended as an economic and social connection between the owner of the vessel and the state of registration. This connection was required as a precondition to vessels' registration in order to facilitate the exercise of effective control and jurisdiction by flag states over the activities carried out by its fishing vessels, regardless of their location and in particular on the high seas, where only flagless ships might be boarded by foreign warships.

As a preliminary response to the recent calls of the UN General Assembly and the FAO Governing Bodies², this study attempts to

describe the contribution of the genuine link concept to the fight against Illegal, Unreported and Unregulated fishing and the reflagging of fishing vessels. The first chapter traces the roots of the genuine link, by providing a brief overview of the international public debate it has generated over the years, up to the most recent developments³. The second part then illustrates the general shift of attention towards flag state responsibility, as a means of achieving the ultimate goal of public order on the high seas, without resorting to genuine link. The recent focus on complementary enforcement tools and the role of regional fisheries organizations are introduced in the third part. Trade-related measures, port state control and state control over nationals are among the instruments that may contribute to ensuring effective control of vessels fishing on the high seas. From a fisheries management perspective, FAO pleads for a dissuasive approach to reflagging, focusing on post-registration issues to ensure effective jurisdiction and control over vessels by flag states, rather than on pre-conditions to ship registration. Indeed, much work has been done lately on flag state responsibility and on the implementation of effective measures to eradicate IUU fishing, conscious that the ongoing academic discussion on genuine link is polluted and frustrated by major national economic concerns. The aim is hence to attack the profitability of reflagging, instead of vainly trying to pursue the application of the genuine link criterion that is considered by many as interference in the "reserved domain"⁴ of states' domestic jurisdiction.

¹ An insightful analysis of ship registration is found in Ademun-Odeke, *An Examination of Bareboat Charter Registries and Flag of Convenience Registries in International Law*, in *Ocean Development and International Law*, Vol. 36, No. 4, p. 339-362, Taylor & Francis, 2005.

² Echoing the FAO Conference Resolution No. 6/2003, Progress Report on Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, the United Nations General Assembly, at its 58th session in 2003, called upon IMO, in collaboration with FAO and other relevant international organizations, "to study, examine and clarify the role of the *genuine link* in relation to the duty of flag states to exercise effective control over ships flying their flag, including fishing vessels" (UNGA Resolution 58/240 on Oceans and Law of the Sea, adopted 23 December 2003, ref. A/RES/58/240). A similar invitation was already found in UNGA Resolution 58/14 on Sustainable Fisheries, adopted 24 November 2003 (A/RES/58/14). UNGA Resolutions 59/24 (A/RES/59/24) and 59/25 (A/RES/59/25), adopted

17 November 2004, request the Secretary General to report on such study. It is worth reminding that the need for a definition of the "genuine link" concept had already been stressed in UNGA Resolution 54/32, adopted 24 November 1999 (A/RES/54/32), in connection with the implementation of the 1982 UN Convention on the Law of the Sea. More recently, the Rome Declaration on Illegal, Unreported and Unregulated (IUU) Fishing, adopted in Rome on 12 March 2005 by the FAO Ministerial Meeting on Fisheries, further underscored the need for establishing a genuine link between states and fishing vessels flying their flag, as part of the global efforts to prevent, deter and eliminate IUU fishing. In 2006, the UNGA reiterated the request to define the concept in Resolution 60/31 on Sustainable Fisheries, adopted 29 November 2005 (A/RES/60/31) and in the Report of the Review Conference on the Fish Stocks Agreement that was held in New York, 22-26 May 2006 (A/CONF.210/2006/15).

³ This does not include a systematic analysis of all the interpretations proposed in the relevant literature but only of those adopted by judicial decisions.

⁴ Advisory Opinion on Nationality Decrees Issued in Tunis and Morocco, *PCIJ Series B*, No. 4 (1923) p. 24.

I. The genuine link principle: a brief background

1. Introduction

The term "genuine link" makes its first official appearance in the 1958 Geneva Convention on the High Seas ("the 1958 Convention"). Its Article 5(1) reads:

"Each 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. Ships have the nationality of the state whose flag they are entitled to fly. There must exist a genuine link between the state and the ship; in particular, the state must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag".

This exact wording, with the exception of the last specification, is repeated in Article 91(1) of the 1982 United Nations Convention on the Law of the Sea ("the 1982 UN Convention):

"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. Ships have the nationality of the state whose flag they are entitled to fly. There must exist a genuine link between the state and the ship".

The first sentence of both articles restates the basic principle according to which states have the exclusive right to establish the conditions for the granting of nationality to ships. In relation to the nationality of fishing vessels, the assertion of such principle can be traced as far back as 1905, in the *Muscat Dhows case*⁵. The articles, however, go on

In deciding the question whether the dispute between France and Great Britain as to the Nationality Decrees Issued in Tunis and Morocco (French zone) was or was not a matter of domestic jurisdiction, the Permanent Court of International Justice stated that "in the present state of international law, questions of nationality are [...] in principle within [the] reserved domain" of states' jurisdiction. The Court went on to affirm that "the right of a state to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other states".

⁵ *Muscat Dhows case* (France v. Great Britain),

to require that a genuine link be established between the state and the ship, apparently imposing a limit to states' sovereignty in defining ship registration conditions. Further, the 1958 text specifies that such a link must enable the state to exercise effective jurisdiction and control in administrative, technical and social matters over the ships flying its flag⁶.

However, none of the conventions define what exactly should constitute a genuine link, nor do they establish which consequences may arise from the lack thereof. The next paragraph will attempt to give an answer to these questions by analysing the genesis and purpose of the concept.

2. Original meaning of genuine link

2.1 The *Nottebohm case* (1955)

As a starting point, it should be recalled that the *Nottebohm case*⁷ has clearly influenced the drafting of the 1958 Convention. Although dealing with the nationality of individuals, the 1955 decision of the International Court of Justice (ICJ) is extremely relevant to understanding the significance of the genuine link principle. The question raised was whether Liechtenstein had the right to exercise diplomatic protection on behalf of one of its nationals, Friedrich Nottebohm, against Guatemala. Born in Germany and possessing German nationality, Nottebohm had settled in Guatemala, where he had his business headquarters and where he had been spending most of his life. From time to time he visited his brother in Liechtenstein, where he had applied for naturalization. Eventually, he was granted Liechtenstein nationality through naturalization. The main question, however, was whether a unilateral act performed in the exercise of domestic jurisdiction had full international effect or not. The Court found that Liechtenstein was not entitled to exercise diplomatic protection against Guatemala, on the grounds –

Judgement of 8 August 1905, Permanent Court of Arbitration.

⁶ Article 94 of the 1982 UN Convention provides that the main duty of flag states is to exercise effective jurisdiction and control over their vessels, and then elaborates the concept by enumerating the main obligations that must be met.

⁷ *Nottebohm case*, 2nd phase (*Liechtenstein v. Guatemala*), Judgement of 6 April 1955, International Court of Justice (*ICJ Reports*, 1955).

"[t]hat naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation. In both respects, it was lacking the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a state in the position of Guatemala. It was granted without regard to the concept of nationality adopted in international relations. [...] Guatemala is under no obligation to recognize a nationality granted in such circumstances"⁸.

The decision of the Court was legally based on Article 1 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws which states that domestic nationality legislation shall be recognized by other states only if it is consistent with international law and custom and with the principles of law generally recognized with regard to nationality⁹. The Court hence found that the following principles were generally recognized:

"[N]ationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred [...] is in fact more closely connected with the population of the state conferring nationality than with that of any other state. Conferred by a state, it only entitles that state to exercise protection *vis-à-vis* another state, if it constitutes a translation into juridical terms of the individual's connection with the state which has made him his national"¹⁰.

Due to the specific subject matter of the dispute, the definition of "genuine connection" given by the court does not add much to the debate on the meaning of the concept with regard to vessels' nationality. However, the *Nottebohm* case highlights the consequence that might derive from the lack of a genuine link, which is the non-recognition of nationality by a third state, under specific circumstances.

This is purportedly the core of the debate on genuine link, in particular since the systematic application of such rule to ships would result in a massive quantity of flagless vessels, *i.e.* at least all those registered under open registers.

Further clarification on the genuine link concept, especially with regard to the nationality of vessels, can be found by briefly analysing the drafting process of the 1958 Convention.

2.2 The ownership element in the *travaux préparatoires*

The first draft of the 1958 Convention was prepared by the International Law Commission (ILC) between 1950 and 1956 and then presented to the delegates of the first United Nations Conference on the Law of the Sea (UNCLOS I) for discussion and adoption. The fact that the original drafts of Article 5 on the nationality of vessels have been modified before being adopted obviously means that no agreement could be reached on their wording. It is, however, essential to review them in order to understand what was borne in mind when the principle of "genuine link" was included in the 1958 Convention.

In the 1955 draft of Article 5, the Commission did not introduce the term genuine link, but listed a set of criteria indicating a minimum national element of the vessel:

"Each state may fix the conditions for the registration of ships in its territory and the right to fly its flag. Nevertheless, for purposes of recognition of its national character by other states, a ship must either:

1. Be the property of the state concerned; or
2. Be more than half owned by:

⁸ *Ibidem*, p.26.

⁹ Article 5 of said Convention bolsters the requirement of a genuine connection by providing that in case of dual nationality, a third state shall recognize in its territory either the nationality of the country residence, that of the country with which "he appears to be in fact most closely connected". This is however not applicable to vessels' nationality, because the case of a vessel with dual nationality is regulated under Article 6(2) of the 1958 Convention, which assimilates it to a ship without nationality.

¹⁰ *Ibidem*, p.23.

- (a) Nationals of or persons legally domiciled in the territory of the state concerned and actually resident there; or
- (b) A partnership in which the majority of the partners with personal liability are nationals of or persons legally domiciled in the territory of the state concerned and actually resident there; or
- (c) A joint stock company formed under the laws of the state concerned and having its registered office in the territory of that state".

The final draft of Article 5 that was presented to the delegates at UNCLOS I by the ILC in 1956 under Article 29(1), provided that:

"Each 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. Ships have the nationality of the state whose flag they are entitled to fly. Nevertheless, for 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".

For the sake of compromise, a looser terminology had been adopted, but the idea lying behind the new terminology was obviously the same, namely ownership of the vessel.

The final text adopted by the Conference – which is the one in force – added further ambiguity, by deleting the proposition that attempted to determine the consequence of the lack of a genuine link ("for purposes of recognition of the national character of the ship by other states") and by adding the requirement of effective exercise of jurisdiction and control in administrative, technical and social matters over ships by the flag state without specifying its relation to the genuine link requirement. In fact, the debate on the meaning of genuine link starts with this latter requirement: traditional maritime states considered that effective exercise of jurisdiction and control was the principal element of the genuine link, whereas the so called flag of convenience (FoC) states considered it as an independent requirement. The most plausible interpretation, however, seems to be the one expressed by the UN Special

Rapporteur on the Law of the Sea that the control and jurisdiction can only be effectively exercised where a factual relationship, other than registration, exists between the flag state and the ship¹¹. Thus, in the view of the Commission, the genuine link is the principal means of achieving effective control and jurisdiction.

It can be concluded that the information that may be drawn from the drafting process of Article 5 of the 1958 Convention is as follows:

- 1) The act of registration alone does not satisfy the genuine link requirement;
- 2) Conceptually, ownership of a vessel may constitute an element of the genuine link;
- 3) The final purpose of the genuine link requirement is effective control and jurisdiction.

Although these statements only provide a partial definition of what the genuine link ought to be, they nonetheless have the merit of being at the source of the concept. In order to assess the viability of this approach, it is necessary to review the relevant decisions of international courts on nationality matters and to comment on the attempt of codifying the rules of shipping vessels' registration.

3. Failure of the economic approach

The focus on vessels' ownership brings about economic concerns in the debate around nationality. In this interpretation, the genuine link is viewed as an economic connection between the vessel and the flag state. The following review does not intend to assess the accuracy of such approach to genuine link, but only to point out the diplomatic deadlock it has caused. From the beginning, the association of genuine link and ownership was bound to fail, in particular because the provisions concerning vessels' ownership had been deleted during the drafting process by the ILC, before being submitted to UNCLOS I. Subsequently, the position of the ICJ in two important cases in 1960 and 1970 has progressively eroded the effectiveness of what may be called the economic approach. After the adoption of the 1982 UN Convention, this trend was

¹¹ Yearbook of the International Law Commission, 1951, Vol. II, pp.279.

further confirmed by the unsuccessful attempt made with the 1986 United Nations Convention for Registration of Ships ("the 1986 Registration Convention"). More recently, the International Tribunal for the Law of the Sea (ITLOS) declared that the genuine link principle does not intend to dictate criteria to question the validity of registration, thus overruling the *Nottebohm* jurisprudence.

3.1 The IMCO case (1960)

In this case¹², the ICJ gave an advisory opinion on the issue raised by the Assembly of the Intergovernmental Maritime Consultative Organization (IMCO)¹³ as to whether or not the Maritime Safety Committee had been elected in accordance with the Convention for the Establishment of the Organization. The question essentially concerned the interpretation of the rules on the composition of the Committee, in particular the following provision:

"The Maritime Safety Committee shall consist of fourteen Members elected by the Assembly from the Members governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations [...]"

The Assembly asserted that its discretionary powers in deciding which nations had an important interest in maritime safety extended to the determination of the largest ship-owning nations. In denying such claim, the Court then considered that the objective criterion to be used in electing the largest ship-owning nations was registered tonnage, rejecting the proposal of combining two criteria, namely registered tonnage and nationality of ownership.

Countries opposing the exclusive recourse to the registration criterion argued that a genuine link between Liberia and Panama and their registered ships was missing, because their domestic legislation did not include any requirement on the nationality of incorporation of ship-owning companies, or

¹² IMCO case, Advisory Opinion of 8 June 1960 on the Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization, International Court of Justice (*ICJ Reports*, 1960).

¹³ Former name of the International Maritime Organization (IMO).

on the nationality of vessels' management. Instead, besides favouring the election of two open register states, the Court's decision found that nationality of ownership does not contribute to identifying the largest ship-owning nations. Nationality of registration on its own is more significant.

3.2 The Barcelona Traction case (1970)

Another court decision that contributed to diminishing the significance of the ownership element in determination of nationality is the *Barcelona Traction* case¹⁴. This case dealt with nationality of corporations and diplomatic protection, without making any reference to vessels' nationality. However, a similarity with vessels is found in the relevance of registration as opposed to genuine link, with regard to the rights of states over the corporation.

The *Barcelona Traction, Light and Power Company Limited*, which carried out business in Spain, was incorporated in Canada, where it also had its headquarters. A few years after incorporation, Belgian nationals acquired the majority shareholding of the company. Following a number of actions taken by Spain against the company, Belgium instituted proceedings for reparation against Spain. Confirming one of Spain's preliminary objections, the Court found that Belgium did not have the right to exercise diplomatic protection on behalf of the corporation, because such right belongs to the state of incorporation, in whose territory the company has its registered office, *i.e.* Canada. In other words, the genuine link between the corporation and the state of beneficial ownership was considered to have no relevance in this matter¹⁵.

¹⁴ *Barcelona Traction, Light and Power Company, Limited case*, 2nd phase (Belgium v. Spain), Judgment of 5 February 1970, International Court of Justice (*ICJ Reports*, 1970).

¹⁵ It is worth noting, however, that in Judge Jessup's separate opinion some interesting considerations are made on the genuine link principle and on its meaning with reference to ships. The opinion actually claims that the genuine link concept is common to the nationality of individuals, corporations and ships and that, in the absence of a genuine link, third states could challenge the grant of nationality. Concerning the nationality of ships in particular, Judge Jessup assumes that the existence of a genuine link may be tested through the presence of elements such as management, ownership, jurisdiction and control.

This approach has recently been embraced by the ILC in the draft articles codifying international rules on diplomatic protection, adopted in first reading at its 56th session¹⁶. Despite the criticism expressed by the Special Rapporteur¹⁷ with regard to the reasoning of the Court in the Barcelona Traction case, the Commission chose to adopt this approach by providing, in draft Article 9, that the state of nationality of a corporation is the state of incorporation, which must coincide with the state in whose territory it has its registered office or the seat of his management or some similar connection. The necessity of a genuine link, especially in the form of majority shareholding, is explicitly excluded in the commentary to the article¹⁸.

Similarly, in adopting the rule on the nationality of individuals, the Commission chose to turn away from the *Nottebohm* jurisprudence, noting that its application in "today's world of economic globalization and migration [...] would exclude millions of persons from the benefit of diplomatic protection"¹⁹.

3.3 The 1986 Registration Convention

UNCLOS III, convened in 1973 to elaborate what was bound to become the 1982 UN Convention, deferred to the United Nations Conference on Trade and Development (UNCTAD) for the elaboration of the genuine link concept. As a result, in 1986 a diplomatic conference adopted the United Nations Convention for Registration of Ships, which addresses genuine link in economic terms. Although the 1986 Registration Convention is not applicable to fishing vessels, its provisions are useful to understand the subsequent change of perspective of the international community with regard to the genuine link issue.

The main purpose of the 1986 Registration Convention is to strengthen the genuine link between a state and ships flying its flag, as

well as to ensure effective jurisdiction and control over ships with regard to identification and accountability of shipowners and operators, and to administrative, technical, economic and social matters. Article 8 provides that flag states should ensure sufficient national participation in the ownership of vessels flying its flag in order to effectively exercise jurisdiction and control over such vessels. Similar provisions concerning the nationality of crews are found in Article 9, which deals with manning of ships. However, the fact that states may choose whether to comply with either the former or the latter provision, as stated in Article 7, stresses once again that the ultimate target is ensuring effective control over ships.

The reason for the loose language and optional provisions adopted is that the 1986 Registration Convention is the result of a compromise between developing states not having open registers, wishing to increase control over their exports, and developed states, now allied with open register states, opposing the economic approach to genuine link, if not genuine link *tout court*. This change in the position of some developed states on the issue is partly due to the increase of national shipowners registering their vessels with FoC states²⁰.

Lastly, the major element contributing to the non-viability of the ownership requirement and the economic approach is that the 1986 Registration Convention is not yet in force. Until 2005, it had not been ratified by any traditional maritime state or by any open-registry state. To date, only 14 states are parties to the Convention, and although the recent accession of Liberia seems to bring about new hopes, the target is still out of reach: to enter into force the Convention must be ratified by 40 states, whose combined tonnage amounts to 25 percent of world total.

3.4 The M/V Saiga case (1999)

A recent confirmation of the trend described in the foregoing sections of this study came in 1999 from ITLOS. The M/V Saiga oil tanker, supplying gas to fishing vessels off

¹⁶ Report of the International Law Commission (2004), Fifty-sixth session, Supplement No. 10 on Diplomatic Protection (A/59/10).

¹⁷ Fourth Report on Diplomatic Protection (2003), by John Dugard, Special Rapporteur, International Law Commission, Fifty-fifth session, (A/CN.4/530).

¹⁸ Report of the International Law Commission (2004), Fifty-sixth session, Supplement No. 10 on Diplomatic Protection, p. 52 (A/59/10)

¹⁹ *Ibidem*, p.32

²⁰ Churchill, R.R., *The Meaning of the "Genuine Link" Requirement in relation to the Nationality of Ships*, International Transport Workers' Federation (ITF) (2000) p.14.

the West African coast, was arrested by Guinean authorities. The *Saiga*, provisionally registered in Saint Vincent and the Grenadines, was owned by a Cypriot company, managed by a Scottish corporation and chartered to a Swiss firm. While St. Vincent alleged a breach of international law, Guinea objected, *inter alia*, to the admissibility of such claim because of the absence of a genuine link between the ship and its flag state, further asserting that as a consequence it was not bound to recognize the Vincentian nationality.

The Tribunal first rejected Guinea's claims on the consequences of the lack of a genuine link, totally opposing the application of the *Nottebohm* doctrine to ships' nationality. In this regard, it is worthwhile reporting two major statements of the Tribunal:

"The conclusion of the Tribunal is that the purpose of the provisions of the [1982 UN] 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 other states"²¹.

"There is nothing in article 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 recognize the right of the ship to fly the flag of the flag state"²².

Subsequently, the Tribunal briefly dismissed the claim concerning the lack of a genuine link between the *Saiga* and St. Vincent on the basis of insufficient justification of the contention by Guinea, without attempting to clarify the constitutional elements of genuine link.

Although questionable in its reasoning, as explained in Judge Warioba's dissenting opinion, the outcome of this judgement confirms, at the very least, the reticence of overtly applying the genuine link principle, whatever its meaning, to its full consequences.

²¹ The *M/V "Saiga"* case (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment of 1 July 1999, International Tribunal for the Law of the Sea, para. 83.

²² *Ibidem*, para. 82.

4. Observations

This brief review of the evolution of the genuine link concept highlights its thorny nature, in particular when it is defined in terms of nationality of ownership, and considered as a precondition to registration of vessels. Recalling Herman Meyers' farsighted views on the issue, as expressed in *The Nationality of Ships*²³ back in 1967, one might be more successful in focusing on the ultimate purpose of the genuine link principle, namely "safeguarding the necessary authority of the flag state in the best possible manner". The author goes on to affirm that "responsibility is the necessary corollary of a right", which allows the focus to move away from registration preconditions and towards the effect of registration – *i.e.* the duties of flag states.

II. Emphasis on flag state responsibility

1. Introduction

The nineties have been prolific in the development of international fisheries instruments. Several agreements and soft law instruments have been adopted with a view to enhancing the provisions of the 1982 UN Convention with regard to fisheries. Taking note of the impasse reached on the genuine link issue, they all shifted their attention onto the element of effective jurisdiction and control.

The negotiations of the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas ("the 1993 FAO Compliance Agreement"), which was initially intended to tackle the reflagging problem, somewhat determined the described trend in international fisheries management. A draft article entitled "Allocation of Flag", which attempted to specify the elements of genuine link, had to be deleted because the debate around it was about to "draw the negotiations into a legal quagmire"²⁴, thus compromising the

²³ Meyers, H., *The Nationality of Ships*, Martinus Nijhoff, The Hague (1967).

²⁴ Moore G., The FAO Compliance Agreement, in Nordquist M.H. and Moore J.N. (ed.), *Current Fisheries Issues and the Food and Agriculture Organization of the United Nations*, Martinus Nijhoff, The Hague

timely adoption of the agreement. The text of draft Article 4 read precisely as follows:

"1. No Party shall accord any fishing vessel to which the Agreement applies the right to fly its flag unless it is satisfied, in accordance with its own national legislation, that there exists a genuine link between the vessel and the Party concerned.

2. (a) In determining whether or not there exists a genuine link for the purposes of paragraph 1, each Party shall give due weight to all relevant factors, including in particular:

- (i) the nationality or the permanent residence of the beneficial owner or owners of the vessel in accordance with their national law;
- (ii) where the effective control over activities of the vessel is exercised. [...]"²⁵

As a consequence the negotiators preferred to focus, *inter alia*, on flag state responsibility and to spell out the duties of flag states in fisheries management, hence completing the provisions made by the 1982 UN Convention with regard to ships in general.

The concept of effective jurisdiction and control of flag states in a fisheries perspective was further developed in the 1995 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 ("the 1995 UN Fish Stocks Agreement"), as well as in the soft law instruments adopted by FAO, namely the 1995 Code of Conduct for Responsible Fisheries ("the Code of Conduct"), its Technical Guidelines and the 2001 International Plan of Action to Deter, Prevent and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA- IUU).

The International Maritime Organization (IMO) had taken the same approach when the Sub-Committee on Flag State

Implementation (FSI) was established at the end of 1992 with a view to ensuring implementation of IMO Conventions by flag states. Accordingly, in 1997, the FSI adopted the Guidelines to Assist Flag States in the Implementation of IMO Instruments²⁶. Furthermore, since 1998 the International Safety Management (ISM) Code²⁷ was made obligatory for all parties to the International Convention for the Safety of Life at Sea (SOLAS)²⁸. The Code also includes guidelines for its implementation.

Before detailing the duties of flag states in fisheries management, as set out in these instruments, the next section reviews the main flag state obligations established by the 1982 UN Convention.

2. Duties of flag states in fisheries management

2.1 The 1982 UN Convention

The 1982 UN Convention elaborates the concept of effective jurisdiction and control by enumerating the duties of flag states. However, it does not specifically oblige flag states to ensure responsible fisheries.

Under Article 94, states are required, in particular, to maintain a register of ships flying their flag and to assume jurisdiction over those ships, their master, officers and crew in administrative, technical and social matters. Paragraph 3 of the Article then makes a series of provisions requiring that states take measures for vessels flying their flag to ensure safety at sea. Further obligations are provided in Articles 98 to 101, concerning the duty to render assistance, the prohibition of the transport of slaves, and the repression of piracy. All states are subject to the provisions on prevention and control of marine pollution and resources conservation.

Concerning the duties of flag states on the high seas, the 1982 UN Convention basically refined and reorganized the provisions of the 1958 Convention on the issue. In fact, new obligations mainly

(2000), p.79.

²⁵ Draft Agreement on the Flagging of Vessels Fishing on the High Seas to Promote Compliance with Internationally Agreed Conservation and Management Measures, in *Report of the 20th Session of the Committee on Fisheries (COFI)*, held in Rome, 15-19 March 1993, Appendix F, FAO, Rome, 1993.

²⁶ IMO document A.847 (20) of 1997.

²⁷ The full title of the ISM Code is "International Management Code for the Safe Operation of Ships and for Pollution Prevention".

²⁸ The SOLAS Convention (1974) was amended in 1994 to incorporate the ISM Code. The requirements established by the Code became mandatory for all parties to the SOLAS in 1998.

concern the upkeep of a ship register for flag states and marine resources conservation for all states. Most importantly, however, the 1982 Convention specifies under Article 217 the actions to be taken by flag states to ensure compliance of their vessels with international law and to provide for effective enforcement of those rules, regardless of where the violation occurs. The subsequent Article makes similar provisions with regard to port states.

2.2 The FAO Compliance Agreement (1993)

The 1993 FAO Compliance Agreement mainly deals with flag state responsibility under Article 3. Other Articles also provide for duties of flag states, in particular with regard to record keeping and information exchange.

As mentioned above, the 1993 FAO Compliance Agreement had to move a step away from the genuine link concept in addressing the reflagging issue and in promoting responsible fisheries. It did so by introducing the requirement of an authorization to fish on the high seas, specifying under Article 3 (3) that, no such authorization shall be granted –

“unless the Party [to the Agreement] is satisfied that it is able, taking into account the links that exist between it and the fishing vessel concerned, to exercise effectively its responsibilities under this Agreement in respect of that fishing vessel”.

At first sight, it would seem that the problem of genuine link was only shifted to another level instead of being solved, by separating it from the questions of registration and nationality of vessels and placing it on a fisheries management level. In fact, this provision changes perspective and imposes a condition that fulfils the same objective as genuine link – the authorization to fish “expresses the intent of the flag state to exercise control over fishing vessels entitled to fly its flag”²⁹. The authorization to fish

marks the end of the economic approach to genuine link and the adoption of the formal (administrative) approach, supported by the advocates of registration as sole element of the genuine link.

An important step further consisted in making the authorization to fish an obligation of flag states, which manifests the intention to raise awareness of flag state responsibility. Besides establishing a global registry of fishing vessels operating on the high seas, the whole Agreement attempts to ensure compliance of vessels with international fisheries legislation by providing the measures to be taken by flag states in this regard. Thus, flag states shall:

1. Ensure that fishing vessels flying their flag do not engage in activities that undermine the effectiveness of international conservation and management measures;
2. Ensure that all fishing vessels are marked in accordance with generally accepted standards for ready identification;
3. Require that fishing vessels provide them with the necessary information to meet their obligations under the Agreement;
4. Ensure that vessels fishing on the high seas have been granted a specific authorization;
5. Deny such authorization where it is not able to exercise effectively its responsibilities in respect of the fishing vessel;
6. Deny the authorization to non-complying vessels, previously registered in another states – a rule that has a number of exceptions;
7. Take enforcement measures on non-complying vessels, in particular making contraventions of the Agreement an offence under domestic law;
8. Maintain records of registered vessels that were granted an authorization to fish on the high seas;
9. Communicate to FAO information on the vessel, its owner and manager, the fishing method, the gross registered tonnage, and other relevant data.

Although legally binding, the effectiveness of these provisions entirely depends on the good will of flag states, because no specific consequences are provided for in the case of non-compliance. In fact, port states

²⁹ Fitzpatrick, J., Measures to Enhance the Capability of a Flag State to Exercise Effective Control over a Fishing Vessel, in *Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing*, Sydney, Australia, 15-19 May 2000, FAO Fisheries Report No. 666 (2001).

control is not addressed in the Agreement, except in Article 5(2), which suggests that the Parties should make arrangements regarding the undertaking by port states of investigatory measures as may be considered necessary to establish whether a fishing vessel, that is voluntarily in the port of a state other than its flag state, has been used contrary to the provisions of the Agreement.

2.3 The UN Fish Stocks Agreement (1995)

The 1995 UN Fish Stocks Agreement dedicates Article 18 to the duties of flag states.

The influence of the negotiations for the 1993 FAO Compliance Agreement is quite visible concerning a number of provisions, such as: ensuring vessels' compliance with conservation and management measures; requiring the marking of fishing vessels; granting authorizations to fish on the high seas only where the state is able to exercise effectively its responsibilities in respect of the fishing vessel; and the maintenance of a national record of fishing vessels with such authorization. However, the duty of record keeping is more developed in the 1993 FAO Compliance Agreement, which sets out in detail all the information that should be required with regard to vessels by the flag state.

Additional and more technical requirements are then set out in the 1995 UN Fish Stocks Agreement. Flag states should establish permit procedures and issue regulations to enhance control over fishing vessels; require recording and timely reporting of technical information from fishing vessel; require verification of the catch; adopt a monitoring, control and surveillance system ensuring compatibility with existing sub-regional, regional or global systems; regulate transshipment on high seas; and in general regulate fishing activities to ensure compliance.

Concerning information exchange, whereas the 1993 FAO Compliance Agreement provides that all states should cooperate and exchange information to assist flag states in identifying non-complying vessels, the 1995 UN Fish Stocks Agreement goes further, requiring that flag states provide all states access to the information contained in

the record of vessels authorized to fish on the high seas.

A last important provision is found under Article 19, which details the enforcement measures that flag states should take in order to meet the first and main obligation of ensuring compliance with international conservation and management measures by fishing vessels. These enforcement measures concern investigation, legal proceedings, suspension of authorization until compliance is secured and types of sanctions that should be inflicted to non-complying vessels. As in the 1982 UN Convention, this provision requires that flag states take enforcement measures against their non-complying vessels, regardless of the location of violations.

On the one hand, the 1995 UN Fish Stocks Agreement seems to restate the provisions of the 1993 FAO Compliance Agreement on the duties of flag states, however, only in as far as those provisions apply to straddling and highly migratory fish stocks. On the other hand, the former addresses the issue of enforcement more thoroughly than the latter as regards the regulation of port state control and the implementation and enforcement of conservation and management measures through Regional Fisheries Management Organizations (RFMOs). The 1995 Fish Stocks Agreement actually introduces port states control in relation to fisheries matters, and regulates boarding and inspection on the high seas by members of RFMOs or parties to the Agreement, to other members of the same RFMO or other parties to the Agreement.

3. Soft law instruments

In this direction, the soft law instruments adopted by FAO to promote responsible fisheries make large use of complementary concepts to flag state responsibility, namely RFMOs regulations, and coastal and port states measures. These texts have a wider scope than the two legally binding instruments, since they apply to all types of fisheries.

3.1 Code of Conduct for Responsible Fisheries (1995)

The Code of Conduct, prepared in response to a call from the International Conference on Responsible Fishing in the 1992 Declaration of Cancún, Mexico, regulates the duties of all states, and specifically those of flag and port states, under Article 8 on fishing operations. Fisheries management and enforcement measures implementation are also regulated under the Code.

The whole text of the Code puts strong emphasis on flag state responsibility, although Article 7 on fisheries management attempts to indirectly address the genuine link issue by providing that states should encourage financial institutions not to require, as a condition of loans or mortgages, that vessels be registered in a state other than that of beneficial ownership, where such a requirement would increase the likelihood of non-compliance³⁰.

After restating the principle of effective control of vessels by their flag states in Article 6.11, the Code goes on to enumerate, under Article 8.2, the duties of states to ensure compliance with international conservation and management standards. Its provisions concerning port states are more general than those in the 1995 UN Fish Stocks Agreement. However, the 1996 Technical Guidelines for Responsible Fisheries No. 1 on Fishing Operations³¹, in detailing the duties of states, have spelled out the modalities for inspections of foreign vessels by port states.

3.2 International Plan of Action for IUU Fishing (2001)

The IPOA-IUU text was developed within the framework of the Code of Conduct. Duties of flag states are elaborated in great detail and with explicit wording, making provisions on vessels registration, record of fishing vessels and authorization to fish. Paragraph 39, for instance, reads as follows:

“States should take all practicable steps, including denial to a vessel of an authorization to fish and the entitlement to fly that state’s flag, to

prevent "flag hopping"; that is to say, the practice of repeated and rapid changes of a vessel's flag for the purposes of circumventing conservation and management measures or provisions adopted at a national, regional or global level or of facilitating non-compliance with such measures or provisions”.

It is worth noting that provisions on record of fishing vessels, under Paragraph 42 of the IPOA-IUU, require information on beneficial ownership of the vessel.

Lastly, the Plan of Action makes large use of coastal and port states measures in the combat against IUU fishing, and puts forth the role of RFMOs in international fisheries management³².

4. Observations

This review of the international instruments adopted in the nineties shows a general trend towards diversification of approaches to compliance, within a fisheries management strategy, by circumventing the genuine link issue. Instead of trying to regulate registration of vessels to ensure order at sea, the international community has chosen to focus on duties of states, implementation and enforcement with regard to non-complying fishing vessels. To control fishing on the high seas, relevant instruments include flag state responsibility and the authorization to fish, as well as complementary concepts such as information exchange, port state control, and state control over nationals and RFMOs measures.

The following pages illustrate the direction taken by FAO since the turn of the decade in the promotion and enforcement of responsible fisheries, with an eye on the latest positions of IMO and the Organisation for Economic Co-operation and Development (OECD), respectively on flag states implementation and IUU fishing on the high seas.

³⁰ Article 7.8 of the Code of Conduct for Responsible Fisheries.

³¹ FAO, *Technical Guidelines for Responsible Fisheries No. 1 - Fishing Operations*, FAO, Rome, 1996.

³² Coastal state measures are dealt with in Paragraph 51, whereas port state measures are tackled under Paragraphs 52 to 64. The role of RFMOs is reviewed under Paragraphs 78 to 84.

III. Complementary enforcement measures: the role of RFMOs

1. Introduction

After a decade of efforts to promote responsible fisheries through international fisheries legislation, public attention is now directed at implementation and enforcement of existing instruments as the next challenge.

In February 1999, the FAO Committee on Fisheries (COFI) called attention to "increases in illegal, unreported and unregulated fishing, including fishing vessels flying *flags of convenience*". A few months later, UNGA Resolution 54/32³³ invited IMO and FAO to define the concept of genuine link, in connection with the implementation of the 1982 UN Convention.

Between 1999 and 2000, it was recognized that any further discussion on genuine link would have been of limited use as regards the promotion of responsible fisheries. Before and after the sharp position taken by ITLOS in the *M/V Saiga* case, several authors explicitly acknowledged the reality of facts³⁴.

In response to the UNGA Resolution, the Joint IMO/FAO Working Group on IUU Fishing stated in October 2000 that "there was little benefit in attempting to define the concept of genuine link between a vessel and the flag whose flag it flies" and that "a more appropriate approach was to address the key issues that might constitute effective flag state control of a fishing vessel"³⁵. In particular, the Working Group identified, *inter alia*, two fundamental factors: first, the need to ensure that the flag state link the registration of a fishing vessel with its authorization to fish; second, the necessity

to establish the consequences where a vessel does not comply with the authorization to fish.

Furthermore, much importance was given to flag state control, both at the Expert Consultation on Illegal, Unreported and Unregulated Fishing, held in 2000 in Sydney, Australia³⁶ and at the Expert Consultation on Fishing Vessels Operating under Open Registries, held in 2003 in Miami, Florida³⁷. Experts identified the maintenance of a record of fishing vessels and the adoption of a monitoring, control and surveillance system as the main tools to enhance flag state control.

Besides flag state responsibility, however, it was generally accepted that complementary enforcement tools needed to be taken into consideration in facing the problem of IUU fishing. In this direction, RFMOs may help create international pressure on vessels and flag states for compliance, with the cooperation of port states and states of nationality of the crew.

The IPOA-IUU extensively tackles the issue of international cooperation and the role of RFMOs in fisheries management, by promoting action by states at regional level. States that are not members of a relevant RFMO are nonetheless under an obligation to cooperate in addressing IUU fishing, and are furthermore encouraged to become members of relevant RFMOs.

³⁶ See Fitzpatrick, J., Measures to Enhance the Capability of a Flag State to Exercise Effective Control over a Fishing Vessel, in *Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing*, Sydney, Australia, 15-19 May 2000 (2001) FAO Fisheries Report No. 666.
³⁷ *Report of the Expert Consultation on Fishing Vessels Operating under Open Registries ad their Impact on Illegal, Unreported and Unregulated Fishing*, Miami, Florida, USA, 23-25 September 2003 (2004) FAO Fisheries Report No. 722.

³³ See footnote 2 above.

³⁴ See, for instance, Oude Elferink, A.G., *The Genuine Link Concept – Time for a Post Mortem?* (1999) Netherlands Institute for the Law of the Sea (NILOS), and Edeson W., Tools to Address IUU Fishing: the Current Legal Situation, in *Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing*, Sydney, Australia, 15-19 May 2000 (2001) FAO Fisheries Report No. 666.

³⁵ *Report of the Joint IMO/FAO ad hoc Working Group on Illegal, Unreported and Unregulated Fishing and Related Matters*, Rome, 9-11 October 2000 (2001) FAO Fisheries Report No. 637.

The tasks of non-FAO RFMOs³⁸ range from scientific research, data collection and elaboration, adoption of conservation and management measures, determination of allowable catch and quotas allocation. Conservation and management measures may include monitoring, control and surveillance schemes, boarding and inspection schemes, port measures, market-related measures, reporting and information exchange, and records of fishing vessels, including those authorized to fish and those engaged in IUU fishing.

As a complete review of measures to deter IUU fishing would go beyond the scope of this study, only the most outstanding ones are presented in this chapter.

2. Trade-related measures

Extremely valuable tools are those measures attacking the profitability of IUU fishing, namely trade-related measures. To be effective these measures generally imply the mandatory application of port state measures (denial of port access, obligatory inspection, prohibition of landing and transshipment, etc.), but are also intended to establish import and export controls or prohibitions and to create disincentives for doing business with IUU fishing vessels.

The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), which is among the most active of RFMOs in the adoption of such measures, is promoting the blacklisting IUU fishing vessels. In 2002, CCAMLR adopted a resolution defining Flag of Non-Compliance (FoNC) states as those party or non-party states that do not comply with

their obligations regarding jurisdiction and control according to international law, in respect of fishing vessels entitled to fly their flag that carry out their activities in the CCAMLR Convention area³⁹. Instead of pointing out the type of ship register (*i.e.* open registers), the Resolution chooses to highlight the status of compliance, thus avoiding the sensitivities attached to the more traditional concept of FoC states. In 2004, CCAMLR decided to annually identify and list contracting parties whose vessels have engaged in fishing activities in the Convention area, undermining the effectiveness of its conservation measures. Likewise, the North East Atlantic Fisheries Commission (NEAFC) established, the same year, a system for blacklisting non-contracting party IUU fishing vessels⁴⁰.

In a similar but reverse logic is the interesting measure of the adoption of a "white list" system by the International Commission for the Conservation of Atlantic Tunas (ICCAT). Only fishing vessels appearing on the list are authorized to operate in the Convention area, hence a presumption of compliance to ICCAT measures is basically established for "white listed" vessels⁴¹.

The idea of promoting compliance by restricting access to fishing to complying vessels only is not new. In fact, a 1982 decision of the South Pacific Forum provides that members of the Pacific Islands Forum Fisheries Agency (FFA) may only license foreign vessels to fish for tuna in their fishing zone, where those vessels are listed in good standing on the regional register maintained by the FFA itself⁴².

3. Port state control

Port state control over fishing vessels was given prominence in Article 23 of the 1995 UN Fish Stocks Agreement, where port states are accorded the right and duty to take measures to promote enforcement of

³⁸ The oldest regional fisheries organization was established in 1902. However, most of them were created after World War II and as recently as 2001. Although their nature and functions vary greatly, a general distinction can be made between FAO and non-FAO Regional Fisheries Bodies (RFBs). Furthermore, from a functional viewpoint, RFBs may have an advisory role or a management or regulatory function, depending on the type of tasks they are designed for and their constitutions. FAO RFBs that only perform an advisory role are those established under Article 6 of the FAO Constitution, whereas FAO RFBs or RFMOs established under Article 14 of the FAO Constitution may also recommend the adoption of measures and carry out programmes to ensure conservation and management of fishery resources. On the relationship between FAO and its RFBs an interesting paper is being prepared as an FAO internal report by Florence Poulain for the Fisheries Department, which may soon be adapted for publication.

³⁹ Convention on the Conservation of Antarctic Marine Living Resources, Canberra, 1980.

⁴⁰ Lobach, T., *Port State Measures* (2004). Paper submitted to the Workshop on Illegal, Unreported and Unregulated (IUU) Fishing Activities, hosted by the OECD Committee for Fisheries, 19-20 April 2004.

⁴¹ See Recommendation No. 02.22.

⁴² Moore, G., *Enforcement without Force: New Techniques in Compliance Control for Foreign Fishing Operations Based on Regional Cooperation* (1993) 24 *Ocean Development and International Law* 19-203.

regional and global conservation and management measures⁴³. Port states may carry out inspections and adopt regulations to prohibit landing and transshipment of catches that have been taken contrary to international law. As noted earlier, a general obligation of port states to establish measures to achieve responsible fisheries and assist flag states in identifying non-complying vessels was also included in the Code of Conduct.

The application of port state measures to fishing vessels was further elaborated in the 2001 IPOA-IUU text, based on the work of the 2000 Joint IMO/FAO Working Group on IUU Fishing. Enriched by the experience of IMO in port states control for merchant shipping and FAO's expertise in fisheries management, the Group developed a list of criteria for port state inspections⁴⁴ to support FAO in the adoption of measures with regard to fishing vessels.

An important principle established in the IPOA-IUU is the applicability of measures such as prohibition of landing and transshipment of catch, based on the presumption that vessels fishing in the area of an RFMO, but registered in states that are not party to or do not collaborate with said RFMO, may be engaging in IUU fishing. Other port state measures include prior notice for vessels to enter ports; denial of port access to IUU fishing vessels; examination of necessary authorizations and documents; inspections; and collection of information on the vessel and its activity (flag state; master and fishing master; fishing gear; catch on board; landed and transshipped catch; any other information required by regional or international agreements).

At regional level, CCAMLR has adopted a Catch Documentation Scheme to control toothfish poaching. The scheme provides that landings and transshipments of toothfish must be accompanied by a catch document, issued by the responsible official of the port state of landing. ICCAT had, prior to this, introduced a trade documentation scheme for bluefin tuna in the early

⁴³ As said earlier under the relevant heading, only basic provisions were made on port states in the 1993 FAO Compliance Agreement.

⁴⁴ Appendix G of the *Report of the Joint IMO/FAO ad hoc Working Group on Illegal, Unreported and Unregulated Fishing and Related Matters*, Rome, 9-11 October 2000 (2001) FAO Fisheries Report No. 637.

nineties⁴⁵, which requires that bluefin tuna, when imported, be accompanied by a validated statistical document issued at the point of landing.

Port states measures alone, however, are not sufficient to curb IUU fishing – international cooperation is necessary in order to achieve efficiency and effectiveness in the identification of non-complying vessels. The development of port state control at regional level has been discussed since 2000 in several international fora⁴⁶. After noting that port state control for fishing vessels could not be regulated under the existing regional Memoranda of Understanding (MoU) on port state measures that were developed for merchant shipping, it was established that a specific MoU had to be developed for fishing vessels. Hence, a draft MoU called "Model Scheme" on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing was presented at the Technical Consultation on Port State Measures, held in Rome in September 2004⁴⁷. At the 26th session of COFI this year, it was agreed that steps should be taken to make the model scheme operational. The provisions of the FAO model scheme are intended for voluntary adoption by states and RFMOs to achieve cooperation and coordination in fisheries-related port state control. At the same time, COFI supported the creation of a database for port state measures within FAO in order to review existing measures and monitor the development of port state control within each RFMO⁴⁸.

⁴⁵ See Recommendations No. 92-01 and No.93-03.

⁴⁶ See, for instance, Lobach, T., *Measures to be Adopted by the Port State in Combating IUU Fishing*, in *Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing*, Sydney, Australia, 15-19 May 2000 (2001) FAO Fisheries Report No. 666. However, the development of port state measures at a regional level started even earlier. For instance, ICCAT's revised port inspections scheme was adopted in 1997, (Recommendation No. 97-10). See also Recommendation No. 98-10 "concerning the ban on landings and transshipments of vessels from non-contracting parties identifies as having committed a serious infringement.", as well as Recommendation No. 97-11 on transshipments and vessel sightings.

⁴⁷ Appendix E of the *Report of the Technical Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing*, Rome, 31 August-2 September 2004 (2004) FAO Fisheries Report No. 759.

⁴⁸ *Progress in the Implementation of the Code of Conduct for Responsible Fisheries and Related International Plans of Action - Annex 1 on Database on Port State Measures System Requirements and Costs*,

4. Control over nationals

Every state can adopt national enforcement measures in order to ensure that its nationals do not engage in IUU fishing⁴⁹. A number of these measures are reviewed below, including the so-called Lacey approach, the registration of fishing masters working on foreign vessels, administrative and criminal sanctions, and overall monitoring and surveillance. RFMOs are in a strategic position to promote the adoption and harmonization of those measures considered more efficient or desirable.

The Pacific Islands Forum Fisheries Agency (FFA) has been promoting since 1993, in cooperation with the United States, the adoption of the long-arm approach to enforcement, which attempts to close the gaps between different national laws by giving relevance to the legislation of foreign states. The so-called "Lacey clause"⁵⁰ essentially makes it an offence to import fish caught contrary to national laws of another state. Thus far, three countries have enacted this provision in the FFA Convention⁵¹ area – Papua New Guinea (1994), Nauru (1997), Solomon Islands (1998)⁵², and Tonga (2002).

The registration of nationals working as fishing masters on foreign vessels is another important measure that might be quite effective in tracking responsibilities and hindering IUU fishing. As an example, Spanish Royal Decree No. 1134 of 2002⁵³ establishes that national fishing masters must communicate their enrolment on board of foreign vessels to the Ministry of Fisheries. Information on the foreign vessel

and on any change of flag it has made must be provided.

As recommended in the IPOA-IUU, states should also adopt a set of administrative sanctions as a deterrent against IUU fishing. These include: monetary penalties (fines); suspension and revocation of fishing authorization; temporary ineligibility to hold fishing authorizations; seizure of catch, gear or vessel; loss of fishing quota; and reimbursement of financial aid received by infringing vessel or of maritime liens. Sanctions should be of increasing severity according to the significance of the violation⁵⁴.

For more serious infringements, of course, criminal sanctions should be adopted and applied not only for fishing activities *strictu sensu*, but also for food- and trade-related activities such as processing, import or export of fish products.

Enforcement measures of general application, that should be adopted not only by states to their nationals but also by flag states, port states and coastal states, are investigation and collection of confidential information such as the identification of beneficial ownership (as mentioned in the IPOA-IUU) and the efficient monitoring and surveillance of fishing vessels on the high seas and on the border with Exclusive Economic Zones (EEZs) (e.g. boarding and inspection).

5. Observations

From the above review, it appears that effective control over fishing vessels can only be achieved through a multi-directional approach involving cooperation among all states. Besides establishing responsibilities of states, the key to achieving control is to be found in information and enforcement. Moreover, provisions and measures taken by states must be compatible and converge towards the same objective of abating IUU fishing. To this effect, regional organizations must be given a central role. Indeed, a central role has already been assigned to

working document of the Twenty-Sixth Session of the FAO Committee on Fisheries, Rome, 7-11 March 2005 (COFI/2005/2).

⁴⁹ A recent article on state control over nationals in responsible fisheries is Erceg D., Deterring IUU Fishing through State Control over Nationals, in *Marine Policy*, Vol. 30, No. 2, p. 173-179, Elsevier, 2006.

⁵⁰ The name derives from the US Lacey Act (U.S.C. Title 16, Chapter 53), which was passed in 1900 to outlaw interstate traffic in birds and other animals illegally killed in their state of origin. The Lacey Act is named after its sponsor, Iowa Congressman Lacey.

⁵¹ *Pacific Islands Forum Fisheries Agency Convention*, Honiara, 1979.

⁵² Kuemlangan, B., National Legislative Options to Combat IUU Fishing, in *Report of and Papers Presented at the Expert Consultation on Illegal, Unreported and Unregulated Fishing*, Sydney, Australia, 15-19 May 2000 (2001), FAO Fisheries Report No. 666.

⁵³ *Real Decreto No. 1134/2002 – Sanciones en materia de pesca marítima a españoles enrolados en buques con abanderamiento de conveniencia*.

⁵⁴ For a comparative review of administrative sanctions, see Cacaud P., Kuruc M., Spreij M., *Administrative Sanctions in Fisheries Law*, Legislative Study No. 82, FAO, Rome, 2003.

regional organizations under the 1995 UN Fish Stocks Agreement and the IPOA-IUU, in particular with regard to monitoring, control, surveillance and enforcement; boarding and inspection; exchange of information and scientific research; compliance by non-member states; and settlement of disputes. Following this international drive, during the last decade several RFMOs have actually increased their activity and some have even reformed their statute to broaden their mandate and enhance their powers⁵⁵. Nonetheless, much remains to be done particularly in the fields of cooperation of non-member states, enforcement of conservation and management measures and peaceful settlement of disputes.

CONCLUSION

Despite recent requests to further discuss and clarify the genuine link concept⁵⁶, the issue seems to have lost significance in terms of its perceived effectiveness in the fight against reflagging and IUU fishing. There is widespread disagreement with the interpretation of the genuine link concept according to the economic criterion of beneficial ownership, in order to determine nationality of vessels. States have made it clear that they intend to preserve, rather than erode their sovereignty over matters related to ships' nationality.

Indeed, the acknowledgement by FAO experts of the political veto against such reading can be traced back to 1993, during the negotiations of the 1993 FAO Compliance Agreement. This view was further expressed in several other

⁵⁵ Hedley, C., *Entry into force of the United Nations Fish Stocks Agreement: An Initial Assessment*, OceanLaw Online Paper No. 7, December 2001 and SWAN J., *International Action and Responses by Regional Fishery Bodies or Arrangements to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, Fisheries Circular No. 996, FAO, Rome, 2004.

⁵⁶ As already mentioned, requests on further clarification of the genuine link were made by the FAO Conference of 2003, the UN General Assembly of 2004, the FAO Committee on Fisheries of 2005, the FAO Ministerial Meeting on Fisheries of 2005 and lately by the *Conference on the Governance of High Seas Fisheries and the UN Fish Agreement – Moving from Words to Action*, held in St. John's, Newfoundland and Labrador, Canada, 1-5 May 2005. This conference hosted ministers and senior officials from 49 countries, and 19 countries participating at a concurrent Ministerial Roundtable adopted a Ministerial Declaration stressing the need to define the genuine link concept.),

occasions, primarily at the Joint IMO/FAO Working Group of 2000. In this regard, IMO recently stated, at the fifth meeting of the Open-ended Informal Consultative Process on Oceans and the Law of the Sea held in June 2004⁵⁷, that –

“Questions relating to ownership of vessels should be considered as subject matters of an economic corporate nature that clearly fall beyond the purview of the law of the sea and the mandate of the international organizations as defined in the Convention on the Law of the Sea; in the view of IMO, what is important for the purposes of establishing a “genuine link” is to identify who assumes the responsibility for the operation and control of the vessel”.

The question of beneficial ownership⁵⁸ really falls within the purview of provisions on information exchange. Regional fisheries organizations, in particular CCAMLR, are discussing the collection and exchange of information on beneficial ownership of registered ships as a duty of flag states. This could help with a view to identifying strict liabilities under domestic law.

In order to make progress in curbing IUU fishing and promoting responsible fisheries, the situation urges the movement towards discussions on the consequences of non-compliance and other pragmatic approaches that may prevent, deter and eliminate IUU fishing, rather than a refocus on the interpretation and implementation of the term “genuine link”.

Up to now, international authorities have elaborated on the concept of flag state responsibility to ensure compliance with fisheries conservation and management measures. Currently, FAO is closely collaborating with states and regional fisheries organizations to put in place effective port state control schemes, data collection and exchange systems, and to

⁵⁷ Paper on *Strengthening of Flag State Implementation*, submitted by IMO at the fifth meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, 7-11 June 2004 (A/AC.259/11).

⁵⁸ The mechanisms through which owners may conceal beneficial (or ultimate) ownership of vessels, thus undermining effective control over ships, are thoroughly analysed by the Maritime Transport Committee (MTC) of OECD in its paper on *Ownership and Control of Vessels*, OECD, Paris, 2003.

foster global and regional cooperation, inspired by the port state control system for merchant ships.

The right direction for further action seems to be found in the proposals of IMO and of the High Seas Task Force⁵⁹ to draw attention to flag state performance. In the 2004 Report of the Consultative Group on Flag State Implementation, a UN interagency task force, IMO proposed the inclusion of a "performance clause" in international conventions⁶⁰, providing for sanctions and penalties to be applied where convention requirements are not complied with. An audit scheme would then be adopted in order to monitor flag state performance. In a similar vein, but with regard to fishing vessels, the High Seas Task Force proposed, at its meeting in March 2005, to prepare guidelines on flag states performance as regards high seas fishing vessels, on the model of the guidelines developed at the Round Table of Shipping Industry Organizations. Such initiatives might create a starting point for the identification of the consequences of failure by states to perform their duties.

In summary, FAO's next steps in addressing the issues in question should be the following:

1. Strengthen the role of regional fisheries organizations in enhancing flag state and port state control;
2. Promote progress in port state control to encourage flag states to comply with conservation and management measures, support the adoption of the FAO model scheme on port state control, along the lines of regional cooperation and information exchange;

3. Encourage the adoption of trade-related measures by states and RFMOs;
4. Support the adoption of measures aiming at state control over nationals;
5. Ensure collation and maintenance of relevant information and exchange thereof, taking as a point of departure the establishment and maintenance of the FAO Register of High Seas Fishing Vessels, the proposed Global Register of Fishing Vessels, the database on port states, and RFMO measures;
6. Improve monitoring, control and surveillance in general, including the adoption of national plans of action to implement the IPOA-IUU provisions;
7. Make further progress in enhancing flag state responsibility by initiating monitoring and assessment of flag states performance⁶¹; and
8. Further discuss enforcement against non-compliance by vessels and states with a view to providing incentives for compliance and disincentives for non-compliance.

⁵⁹ The High Seas Task Force is a group of fisheries ministers and international NGOs working together to develop an action plan designed to combat illegal, unregulated and unreported fishing on the high seas. The decision to form the High Seas Task Force was taken following a meeting of the Round Table on Sustainable Development at the OECD held on 6 June 2003. Membership of the Task Force to date includes fisheries ministers from the United Kingdom, Australia, Canada, Chile, Namibia, and New Zealand.

⁶⁰ A similar clause was adopted in 1995, in the revised International Convention on Standards of Training, Certification and Watchkeeping for Seafarers of 1978.

⁶¹ See the final report of the High Seas Task Force, *Closing the Net: Stopping Illegal Fishing on the High Seas*, Governments of Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom, WWF, IUCN and the Earth Institute at Columbia University, 2006.

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