Simplistic or Surreptitious? Beyond the Flawed Concept(s) of IUU Fishing

ANDREW SERDY*
School of Law, University of Southampton, Highfield, Southampton SO17 1BJ, UK

Introduction

In this chapter, the author has been asked to suggest directions in which the next stage of development of international fisheries law might lead. This is no easy task because there is a clear contrast between the situation now (2010) and in the first half of the 1990s when the last major international fisheries law conference was taking place: the United Nations (UN) Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks at which the eponymous 1995 United Nations Fish Stocks Agreement (UNFSA; UN 1995) was negotiated. At that time, the collapse of the Atlantic cod (also known as northern cod) Gadus morhua stock off the Grand Banks of Newfoundland and of the walleye pollock Theragra chalcogramma in the Bering Sea Doughnut Hole was driving home the fact that the basic legal framework applicable to international fisheries under Articles 63, 64, and 116–119 of the United Nations Convention on the Law of the Sea (UNCLOS; UN 1982) was proving inadequate to ensure the outcomes at which it was ostensibly aimed. At the risk of oversimplification of that framework, in essence it requires States participating in international fisheries to cooperate so as to maintain stocks at, or restore them to, the biomass generating the maximum sustainable yield (B_{MSY}). Nowadays, although the fisheries are on the whole in a possibly even more precarious state than ever, it is not possible to lay this easily at the door of inadequacies in UNFSA. True, the particular circumstances of its genesis has meant that it does not cover so-called discrete high seas stocks (those which never venture into any State’s exclusive economic zone [EEZ]). Such stocks, however, are relatively few in number.

Corresponding author: A.L.Serdy@soton.ac.uk


2 Kaye (2001), in analyzing the position of the States in the Bering Sea pollock fishery, which were aware of the likelihood of the impending collapse but ultimately failed to take any action to prevent it, makes the point that despite this, it was not at all clear that any of them were in breach of any obligation.

3 This concept is based on the surplus production model of fisheries, which posits that when a stock is reduced below its average unfished size (biomass) by fishing, the reduced competition for food and other density-dependent factors favoring the survival of individual fish operate to allow the stock as a whole to grow back towards its original biomass. This effect increases as the stock size diminishes until at a certain biomass, B_{MSY}, this net growth, or surplus production, reaches its greatest absolute level, the maximum sustainable yield. If the biomass is reduced below B_{MSY}, the advantageous conditions for net growth are no longer sufficient to compensate for the stock’s reduced reproductive capacity, which depends on its size, and the yield or net growth falls towards zero. See Cochrane (2002), where the process is described in reverse.

4 In fact, there is nothing in UNFSA that would be unsuitable for discrete high seas stocks, as the repetition of large parts of it in later treaties such as the Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean (2001), which does apply to such stocks, makes plain. To the extent that parts of it have or may in future come to represent customary international law (see footnote 13), they would be likely to apply without distinction to discrete high
(Churchill and Lowe 1999) and there is another treaty that does apply to them. Usually known, after the Food and Agriculture Organization of the United Nations (FAO) under whose auspices it was negotiated, as the FAO Compliance Agreement (FAO 1993), it in part duplicates UNFSA, though not necessarily in respect of boats shorter than 24 m.

The problem is therefore not so much the wrong laws or an absence of law, but rather insufficient effort being devoted to making the current laws and institutions work. It is idle to suppose that all would be well if only States were wise enough to see their way to making a judicious amendment or two to UNFSA. Instead, the question that needs to be asked at this juncture is why the implementation of UNFSA has remained so sporadic and incomplete. The answer suggested in this chapter is that the international fisheries policy community has collectively taken a wrong turn, with its attention unduly concentrated for a decade or more on the phenomenon (or, more accurately, for the imprecision is part of the problem, phenomena) of illegal, unreported, and unregulated (IUU) fishing. The solution, if there is one, will, in turn, most likely be found by a return to the legal basics, dusting off some general legal concepts and tools that have been largely neglected in international fisheries law and discourse. Principal among these is a systematic approach to compensation for economic harm caused by overfishing, which could counteract the continuing tragedy-of-the-commons pressures for increased short-term catches.

The Definition and its Elements

Since the problems grouped under the term “IUU fishing” are real enough, it will be necessary to dwell briefly on the definition in order to see why overattention to the issue has so far proved unhelpful to the cause of restoring fish stocks to $B_{MSY}$ and is likely to remain so. The term has its origin in an agenda item at the 1997 annual meeting of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), but it was not defined there (see CCAMLR 1997a). It was prompted by the report of CCAMLR’s Scientific Committee, in which the words “illegal,” “unreported,” and “unregulated” occasionally appear in association with each other but usually singly (CCAMLR 1997b). Nor was the term defined by the UN General Assembly in its first resolution that mentioned it (UN 2000, paragraph 10; see also the 13th preambular paragraph). It was left to Article 3 of the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated Fishing (IPOA; FAO 2001) to define each of the elements as follows:

3.1 Illegal fishing refers to activities

3.1.1 conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;

3.1.2 conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or

3.1.3 in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.
3.2 Unreported fishing refers to fishing activities
3.2.1 that have not been reported, or have been misreported, to the relevant national author-
ity, in contravention of national laws and regulations; or
3.2.2 undertaken in the area of competence of a relevant regional fisheries management orga-
nization which have not been reported or have been misreported, in contravention of the
reporting procedures of that organization.
3.3 Unregulated fishing refers to fishing activities
3.3.1 in the area of application of a relevant regional fisheries management organization that
are conducted by vessels without nationality, or by those flying the flag of a State not party
to that organization, or by a fishing entity, in a manner that is not consistent with or contra-
venes the conservation and management measures of that organization; or
3.3.2 in areas or for fish stocks in relation to which there are no applicable conservation or man-
agement measures and where such fishing activities are conducted in a manner inconsistent
with State responsibilities for the conservation of living marine resources under international
law.

Individually, these definitions are reasonable, but the drafters have let the work they put into them
largely go to waste. For the great weakness of the IPOA is that, apart from the introductory paragraphs
and a single mention in paragraph 72 of assistance to a State in “deterring trade in fish and fish products
illegally harvested in its jurisdiction,” all the measures within it are aimed simply at IUU fishing without
any further distinction being made among its elements. Exactly the same criticism can now also be leveled
at the 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported, and
Unregulated Fishing (FAO 2009). Clearly, however, some of the identified problems and the measures
aimed at countering them touch on only one or two of the elements, which are now considered in turn.

Illegal Fishing

Illegal fishing, at least that part of it within a State’s EEZ, is not of great moment as a matter of inter-
national law; rather, it is primarily a question of the resources the coastal State is prepared to devote to
law enforcement. Complaints about the unaffordable cost of this are beside the point. If the stocks in
the EEZ are truly valuable, then they are also worth paying substantial sums to protect. One suspects
that much of this part of the problem could have been avoided had many coastal States not been so
quick to declare full 200 nautical mile (M) EEZs simply because the law now allows this. Where the
gross economic benefit to a State from a full 200-M EEZ may become a much smaller net one after
subtracting the costs of effective enforcement and/or losses due to illegal fishing, there is nothing in
UNCLOS that prevents it either from declaring a narrower one and relying on the compatibility rule
of Article 7 of UNFSA to influence the management of the stock in the area beyond\textsuperscript{5} or from subse-
quently extending it in one or more steps to 200 M as its enforcement resources permit.\textsuperscript{6}

\textsuperscript{5} Article 7(2)(a) provides that measures for a straddling or highly migratory stock adopted by a fisheries commission must “not
undermine the effectiveness of” (i.e., must be no less conservative than) the measures for the same stock maintained by the
coastal State in its EEZ. The knowledge of other commission members that the coastal State could remove the area within 200
mi of the baselines from the regime of the high seas if dissatisfied with the commission’s measures would magnify that influ-
ence.

\textsuperscript{6} It may be conceded that, as a reviewer has pointed out, this is politically rather unrealistic, but that does not detract from
the fact that the problem, as a foreseeable consequence of the coastal State’s policy decision to claim a full 200-mi EEZ, must
objectively be viewed as one it has chosen to have.
Fishing that is illegal because it is contrary to a conservation and management measure of a fisheries commission raises a different set of issues. Private persons, including corporations, are in most normal circumstances, including the fisheries context, not directly subject to international law, which works by way of interposition. Member States of the commission owe each other duties to limit their catch or effort as set out in a relevant measure, which they each implement in a manner of their own choosing (unless the measure specifies the exact mode of implementation). Usually, this is through imposing obligations of a public law nature on operators subject to their jurisdiction (i.e., in a given coastal State’s EEZ, all who fish there, legally or not, and on the high seas vessels flying the flag of the given Member State). The solution to illegal fishing of this kind is for States to hold each other rigorously to account and to visit noncompliance with dissuasive consequences, but so far, States have, in general, been less than assiduous in doing this. The unsurprising result is that, since noncompliance carries little or no cost beyond political embarrassment (and even of that not much, since States are conscious that the boot may before long be on the other foot), there is quite a lot of it.

Unreported Fishing

While unreported fishing does not fit neatly into the schema alongside illegal and unregulated fishing, the close link between unreported and illegal fishing can be seen in a 2007 case brought by Japan against Russia in the International Tribunal for the Law of the Sea (ITLOS) for prompt release of a vessel detained by the Russian authorities (The Hoshinmaru Case [Japan v. Russian Federation], Prompt Release, Judgment, ITLOS Reports 2005–2007, p. 18). The Hoshinmaru had a license from Russia to fish in the latter’s EEZ and had not exceeded any catch limit when boarded and inspected by the Russian authorities, but the basis for the Russian prosecution was that a significant amount of the catch of one species was falsely recorded as that of another. In other words, had the vessel continued fishing, it is very likely that it would eventually have exceeded the limit for at least one species, and the false record-keeping was a prelude to this. The ITLOS observed that the offense was not merely “minor” or “of a purely technical nature” (though this was somewhat at odds with its reduction of the bond for the vessel’s release from the 22 million rubles demanded by Russia to 10 million rubles—The Hoshinmaru Case, p. 50, paragraphs 99 and 100).

One way of making sense of unreported fishing may be to think of it as fishing that would be legal if it were reported, so that the only offense at domestic level consists in the failure to report it or in its misreporting, while on the international plane, the same acts or omissions amount to a breach of the duty found in Article 119, paragraph 2 of UNCLOS to exchange information including catch and effort statistics. For an appropriate policy response here, one must go back to the reasons for the existence of a reporting obligation. It is that any fisheries management authority—whether a coastal State in its EEZ7 or an international commission on the high seas—needs the scientists advising it to know exactly what tonnage of fish of each species has been caught, of what size, age, and sex distribution, where, by what gear, and how much effort has been expended in the process, as well as equivalent statistics for fish caught but not landed because of

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7 Nonreporting or misreporting to national authorities (See IPOA, paragraph 3.2.1) bears on international law only to the extent that statistics the State reports to fisheries commissions may thereby become false, which, in turn, places the State in breach of its own obligations to its fellow members.
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For whose benefit is this obligation contemplated? The immediate need is that of the scientists advising the authority, who need these data as inputs for their mathematical models, which is presumably what the drafters had in mind. Ultimately, though—at any rate for high seas stocks—the benefit flows to the entire international community, in particular to those States that have some chance of fishing a given stock profitably if it is maintained at, above, or restored to $B_{MSY}$ and which therefore have a legitimate interest in being kept up to date with the state of that stock. The duty to report is therefore incumbent on all States fishing on the high seas in the exercise of the freedom of fishing, whether or not they are members of (or formally cooperating with) the relevant fisheries commission, where one exists—certainly Article 119, paragraph 2 makes no such distinction. The question of to whom the report should be addressed is not worked out in great detail in the IPOA; paragraph 50 states simply that

flag States should make information from catch and transshipment reports available, aggregated according to areas and species, in a full, timely and regular manner and, as appropriate, to relevant national, regional, and international organizations, including FAO, taking into account applicable confidentiality requirements.

Since all States have at least potentially the legal interest described above in the continued health of high seas fish stocks, logic supports the report ultimately reaching the FAO as the UN specialized agency for fisheries with the most readily available means at its disposal for dissemination of the data to all concerned. Member States of a fisheries commission may choose to report collectively through it to the FAO and would be well advised to request nonmembers to report to the commission also as their agent for the purposes of the general duty of cooperation in UNCLOS Article 119.

To the extent that this is not happening, the answer here, in a rough parallel to the second kind of illegal fishing, is to hold States to account for their failure to report. It can be left to each State to decide whether to discharge the reporting obligation itself or require the fishing vessels it flags to do so. Note that if it chooses the latter course, it is not thereby wholly released from its obligation, as it remains responsible to other States to make good any omissions, acting in effect as guarantor of its vessels’ delegated compliance.

Unregulated Fishing

The worst confusion, assuming that is what it is, concerns unregulated fishing. When one dissects the oft-repeated phrase “prevent, deter, and eliminate IUU fishing,” it is easy to see why States would want to prevent, deter, and eliminate illegal and unreported fishing, but do they realize what they are calling for in wanting to “eliminate” unregulated fishing? The question is not merely rhetorical, for paragraph 3.4 of the IPOA, which immediately follows the definitions extracted above, undercuts the last one by stating that not all unregulated fishing is necessarily bad:

8 Articles 2(a) and 3 of annex I to UNFSA set out in some detail the minimum requirements to facilitate effective stock assessment.

9 Note that none of the relevant instruments imposes obligations of this kind on the commission itself; indeed, it would not have been sensible for them to do so as long as these bodies remain dependent on their member States and are sometimes paralyzed by disagreements among the latter. The International Law Commission’s work on the responsibility of international organizations is not yet complete but may in time afford a clue as to future developments in this direction.

10 While prevention and deterrence are sensible aims, elimination is not, of course, any more realistic than it would be to eliminate all crime, even in a police State; also see footnote 19.
Notwithstanding paragraph 3.3, certain unregulated fishing may take place in a manner that is not in violation of applicable international law and may not require the application of measures envisaged under the IPOA.

This is understandable, as few States, if any, actually forbid their fishing vessels from plying their trade in those parts of the high seas where no fisheries commission yet exists or where the one that does exist has only partial species coverage and the vessels are fishing for a species over which it has no mandate.

The situation is not helped by paragraph 3.3.1 of the definition of unregulated fishing (“in a manner that is not consistent with or contravenes the conservation and management measures of that organization”). This is problematic because if a State is neither a member of the relevant commission nor a formally cooperating nonmember,\(^\text{11}\) then it defies a basic principle of the law of treaties—the idea that treaties (and by extension obligations arising under treaties such as international fisheries regulations) bind only the parties to them and not third States without their consent\(^\text{12}\)—to say that either the State or the fishing by its vessels thereby “contravenes” such measures. Even more difficult to fathom is the last part of paragraph 79, which calls on States that are not members of a commission to give effect to their duty to cooperate by agreeing to apply the conservation and management measures established by that regional fisheries management organization or by adopting measures consistent with those conservation and management measures, and should ensure that vessels entitled to fly their flag do not undermine such measures.

For if a commission adopts catch or effort limits based on what it has decided is the maximum catch or effort a stock can safely sustain, then any nonmember catch will potentially “undermine such measures” unless the members are unlikely to reach their collective limit.\(^\text{13}\) On the other hand, if members are collectively over their limit, there does not seem to be any warrant for treating catch by a nonmember any differently from that by a member; yet, as seen below\(^\text{14}\), overcatch by the latter is usually treated very leniently.

This is not merely a problem of drafting, as it might have been if the phrase “eliminate...unregulated fishing” had been chosen for the sake of euphony, and what States really wanted to eliminate was not unregulated fishing, as such, but the unregulatedness of fishing wherever it remains. That, though a concept that sadly does not trip anywhere near as easily off the tongue as the “IUU” acronym, would certainly be worth doing, as a necessary though not sufficient condition of ending the tragedy of the

\(^{11}\) This is a voluntarily acquired status that typically requires the State to abide by the commission’s conservation and management measures, even though formally it has no say in adopting them. Such formalized procedures exist in ICCAT (ICCAT 1997b), as well as in the Commission for the Conservation of Southern Bluefin Tuna (CCSBT 2003, attachment 7) and the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC 2009). The same status in NEAFC is applied for via article 34 of its 2010 Scheme of Control and Enforcement (NEAFC 2010). The WCPFC and the NEAFC instruments are the latest in a succession adopted by each containing such a provision.

\(^{12}\) See article 34 of the Vienna Convention on the Law of Treaties (UN 1969), which is taken as codifying the pre-existing customary law. An exception laid down in article 38 of the same convention is where the treaty or certain of its provisions have independently entered the corpus of customary international law binding on all States. Detailed technical regulations, however, are by their very nature incapable of undergoing this transformation, as the International Court of Justice made clear in confining it to provisions “of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law” in the North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), ICJ Reports 1969, p. 3 at 41–42 (paragraph 72).

\(^{13}\) This will occur only rarely, as the history of fisheries management amply demonstrates that limits are not normally adopted in advance of any need for them.

\(^{14}\) See A Better Alternative: State Responsibility section of this chapter.
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commons that afflicts the high seas. Yet, despite the gradual filling of the gaps in the collective spatial and species coverage of fisheries commissions, there is no evidence that States see this as their response to unregulated fishing. Rather, it is the underlying concept itself that is faulty, inasmuch as the better explanation for what is happening is that, consciously or otherwise, many States appear to favor eliminating unregulated fishing by assimilating it to illegal fishing, at least when it is done by others. To take just one example, the European Union’s 2007 strategy against IUU fishing contains such passages as

While 75% of world fish stocks are either fully or overexploited by legal fisheries, IUU fishing represents the hidden force which threatens to [exacerbate the] situation, (Commission of the European Communities 2007:2, emphasis in original).

This Communication describes the main characteristics of the IUU phenomenon, and outlines the core elements of a new strategy to ensure that in future, fisheries crime does not pay (Commission of the European Communities 2007:2, emphasis added).

IUU fishing...represents the theft of common fisheries resources and results in considerable losses to those fishermen who do abide by the rules (Commission of the European Communities 2007:4, emphasis added).

The EU fishing industry faces fierce competition from IUU operators who disregard all obligations legal operators take on (Commission of the European Communities 2007:4, emphasis added).

This attitude has survived into the 2008 regulation itself, the preamble stating that “[t]ranshipments at sea...constitute a usual way for operators carrying out IUU fishing to dissimulate the illegal nature of their catches.” (European Council 2008, 11th preambular paragraph [emphasis added]). As noted, the focus on criminality is justified by the definition for illegal fishing and by extension for unreported fishing, but the assumption that unregulated fishing is also illegal is altogether unwarranted.

False Assimilation of Unregulated to Illegal Fishing as a Disservice to Good Fisheries Management

At least three actual or potential deficiencies of recent fisheries policy discourse can be traced to the unthinking use of the IUU acronym. These are now examined.

Overestimation of the Scale of the Problem

The first way in which the exaggerated focus on IUU fishing is blurring the true picture is that it encourages States to overlook the fact that IUU operators too are subject to the broader cause of high seas overfishing, namely the tragedy of the commons. The consequence is that they are almost certainly overstating the scale of the problem, which is unlikely to be a good way of going about solving the perverse economic incentives underlying it.

For example, the EU strategy asserts that “the probable profits from IUU activities are generally high” and that “[i]n some instances...these activities can rightly be qualified as a form of...
cross-border organized crime” (Commission of the European Communities 2007, pages 5 and 6, respectively). As the somewhat tentative language inadvertently reveals, however, this appears to rely more on mythology than on solid empirical evidence. The rapid effect that the well-publicized 2007 port State control measures of the North-East Atlantic Fisheries Commission (NEAFC) had, 15 out of the 20 vessels of concern to it being detained within weeks at their next port call without even having attempted to evade the measures by landing their catch elsewhere (NEAFC 2007a), is strong evidence that we are not dealing here with underworld masterminds of the kind familiar from popular fiction, even though governments may occasionally imply otherwise under pressure from their own fishing industries. Granted, the companies involved in illegal fishing are more profitable than their legal counterparts because they have no compliance costs. But one of the main lessons of fisheries economics is that, in the absence of property rights, profit from high seas fishing is competed away. Thus, the more IUU operators there are in any fishery, the less profitable they can be. Conversely, if illegal fishing is truly generating a financial bonanza, and there is factual justification for the reference to organized crime, the criminals’ financial success can only be on the basis that they are enforcing their own monopoly on illegal activity. This, in an ironic way, renders a partially compensating service to the legal operators by keeping the scale of the problem actually rather small.

**Do As We Say, Not As We Do**

When a fishery commission acts against IUU fishing, it follows from the IPOA’s definition of it that it does so principally in support of its own conservation measures. But this logically requires such

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16 This view was recently reaffirmed by “[s]everal delegations”; see UN 2010a:7 (paragraph 21).
17 These are amendments to NEAFC’s Scheme of Control and Enforcement that came into force on 1 May 2007. NEAFC was created by the Convention on Future Multilateral Cooperation in the Northeast Atlantic Fisheries (1980).
18 See, for example, COLTO 2003:1–2:

> [T]here is mounting evidence that a loose network of Spanish fishers…have been organizing themselves to pool resources, share services, and exploit regulatory or government weaknesses. The traditionally independent deep sea fishers, often romanticized as ‘loveable rogues’ by the wider community, have set up sophisticated business arrangements between themselves, equivalent to conventional business syndicates and mutual societies, to maximize profit and spread risk in the pursuit of illegal activities. This is what is conventionally known as ‘organised crime’ and it is important that we call it for what it is, and that governments respond in an appropriate and commensurate way.

For its part, the High Seas Task Force (comprising the governments of Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom; the World Wildlife Fund; the International Union for the Conservation of Nature; and the Earth Institute at Columbia University) takes a measured approach (High Seas Task Force 2006). It first notes (p. 21),

> No enforcement regime will completely eliminate criminality. Even in well-regulated and policed communities, we can expect a background incidence of unreported crime…People live with a continuous degree of non-compliance that reflects both the limits (human and financial) of enforcement and social tolerance of delinquency…[T]he challenges of enforcement in the marine environment and the limitations imposed by international law mean that the background level of crime on the high seas is likely to be very much higher.

Before going on to point out (p. 22) that

IUU fishing on the high seas is a classic type of international environmental crime. It shares many characteristics with other outlawed trans-border activities such as the trades in illegally logged timber and endangered species, and the illegal movement and dumping of waste products. Unlike more traditional forms of predatory crime, these international environmental crimes are typified by loosely organised networks of individuals with specialist knowledge of the area in which they work. The focus of criminal activity is on inserting illegal product into the chain of supply that links producers, processors, retailers and final consumers. Within this chain may be identified activities such as the co-mingling of legal and illegal catches, the vertical integration of fishing businesses to facilitate money-laundering, the falsification of documentation and the bribery of officials…[S]pecialists learn how to take advantage of paper controls and how to influence regulatory decisions to create loopholes that can then be profitably exploited. While these activities are loosely organised, there is rarely a single entity directing the work of a unified network.
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measures to have been previously adopted or, at latest, at the same time; otherwise the cart is put before the horse. The most egregious example of this omission is by the Indian Ocean Tuna Commission (IOTC), which had not established catch or effort limits in any fishery at the time it passed Resolution 99/01 (IOTC 1999), whose preamble stated that the IOTC was

VERY CONCERNED that illegal, unregulated and unreported (IUU) fishing activities by large-scale tuna vessels in the IOTC area of competence have continued to increase, severely diminishing the potential effectiveness of conservation and management measures adopted by IOTC and impeding adequate stock assessment by the Scientific Committee. (IOTC 1999, last preambular paragraph)

The resolution in question contains mere statements of future intention to “limit the fishing capacity of the fleet of large-scale vessels fishing for tropical tunas in the IOTC area of competence, to ensure the long-term sustainable exploitation of tuna stocks.” The next meeting would do no more than “consider… the limitation of the capacity of the fleet of large-scale tuna vessels to the appropriate level” as well as “a season and area closure of the use of floating objects in the IOTC area of competence.” (IOTC 1999, operative paragraphs 1 and 2). No such measures were actually taken, however, at the 2000 meeting. Rather, in 2001, the IOTC passed another resolution addressed only to nonmembers, requesting them to reduce their fishing effort in 2002 to below that of 1999 and to provide not just their 1999 catch and effort data, but also the number of vessels as a yardstick by which to measure their compliance (IOTC 2001, 2nd preambular paragraph and operative paragraphs 1 and 2).

In these circumstances, it is difficult to see how anything except unreported fishing (and possibly illegal fishing of the first kind, which as noted above is not primarily an international concern) could logically have posed a problem at all for the IOTC. If anything, coupling the legitimate demand for nonmembers to disclose the extent of their fishing in the IOTC area—a consequence of the general duty of cooperation under UNCLOS Articles 118 and 119, though characteristically that is not mentioned—with the one-sided “request” to reduce effort would tend to reduce the incentive to provide such information, given that it would be used to judge “compliance” with the request.

What this illustrates is a regrettable propensity of States to favor imposing disciplines on others that they are not prepared to accept for themselves. The call at the World Summit on Sustainable Development (UN 2002, “WSSD Plan of Implementation,” subparagraph 31[f]) to “[e]liminate subsidies that contribute to illegal, unreported, and unregulated fishing” is a further example of this. Since it is subsidies to fisheries in general, having the effect of decreasing costs or inflating receipts or both, that contribute to overfishing (see Iceland 1999), it is hard to understand what kind of subsidies could possibly have the effect of increasing IUU fishing but not fishing of the kind that would meet the approval of the drafters of the document. Rhetoric of this kind cannot substitute for the hard political work of States to prepare the ground domestically for the abolition of their own harmful subsidies.

One should not, however, be too harsh on fishery commission member States. It is, after all, rational for States, in the absence of property rights in high seas fish stocks, to press for higher catch limits, despite the knowledge of the damage this does to the stocks, unless they can secure a guarantee that all other States will abide by the scientifically determined lower limits that will allow the stock to recover. Only the law can potentially supply that guarantee, but it is not yet in any state to do so. Within EEZs, so-called “rights-based fishing”—essentially creation of property rights in
fisheries under national jurisdiction—is showing good signs of success where it is being tried (Christy 1996; Grafton et al. 1996; Barnes 2009), though inevitably at some social cost because all who lack such a right are thenceforth excluded from the fishery unless they can buy their way in. The same idea is slowly spreading to high seas stocks and would have much to recommend it were the process within the numerous fisheries commissions not attended by a great deal of hypocrisy. For instance, resolutions of the Northwest Atlantic Fisheries Organization (NAFO) in 1998, and of the NEAFC in 2003 advise new entrants to expect allocations only of newly exploited or still unallocated stocks (Serdy 2010b). Compelling though the economic case is for closing depleted fisheries to new entrants (Munro 2003), as the only means of ensuring sufficient incentive to reverse the depletion, the legal considerations run wider. Ignoring considerations of equity, it is the very States that did the overfishing who, in effect, claim property rights by arguing that everyone else must stay out of the fishery if the stocks are ever to recover. Not only have they already caused losses to any States that could have profitably fished the stock at B_{MSY}, but they are now claiming to be entitled to be rewarded for having done so by exclusive rights in future. Rewarding first movers in this way may be economically efficient (Libecap 2007) albeit unpalatable from a fairness perspective. What is completely missing so far from the incipient debate, however, is any notion of compensation for the States who would have to give up their freedom of fishing on the high seas if this solution is to work.

As the author has previously argued elsewhere (Serdy 2010b), States that can prove a quantified loss in this situation ought to be suitably compensated. Even with that proviso, the idea that a minority of States in breach of their conservation obligations to all other States can nonetheless compulsorily purchase the others’ rights is little short of revolutionary and likely to provoke significant, if not overwhelming opposition. Closure of fisheries to new entrants being another way of describing the assimilation of unregulated to illegal fishing, it is reasonable to suppose that few, if any States adopting the IPOA would have been aware or, if their attention had been drawn to it, would have approved of this creation of quasi-property as a necessary consequence of their enthusiasm for eliminating unregulated fishing. Tempted though they may be to treat paragraph 4 of Article 8 of UNFSA in isolation, which restricts access to a fishery to those prepared to become members of or cooperate with the pertinent commission, this overlooks the last two sentences of the immediately preceding paragraph 3, by which

States having a real interest in the fisheries concerned may become members of such organization or participants in such arrangement. The terms of participation in such organization or arrangement shall not preclude such States from membership or participation; nor shall they be applied in a manner which discriminates against any State or group of States having a real interest in the fisheries concerned.

Moreover, UNFSA Article 11 is specifically directed at allocation to new entrants; thus, the idea that existing participants can arbitrarily decide that no one else has a “real interest” and shut the door to a fishery behind them does not seem consonant with the expectations of UNFSA’s negotiators. This may be why the proponents of a policy tending to entrench property-like rights of exclusive access are reluctant to acknowledge and defend it openly, desirable though that would be

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20 See also the discussion of the even more exclusionary proposals pressed by some of their members (Serdy 2010b). Molenaar takes a notably dim view of the NAFO resolution (Molenaar 2000).
on ethical grounds. Instead, they prefer to pursue it silently under cover of the “fight against IUU fishing,” seeking to create guilt by association with the other components of IUU fishing.

Although an economic argument exists for the necessity of assimilating unregulated to illegal fishing, this is surely not the way to go about it. The alternative route, namely the standard diplomatic technique of patient advocacy, stands a good chance of success in the light of the significant change in State practice concerning new entrants over the past 50 years. The evidence to date suggests that no State has objected to its exclusion from any fishery managed by a commission on the basis of the exclusionary approach just discussed. If so, the reason may be not simply a reluctance to bring legal disputes before formal mechanisms, but rather that by comparison with the 1950s, many more States now have a stake in one international fishery or another and see their interests as best served by excluding newcomers from these, for which the price—their own exclusion from fisheries they have not themselves yet entered if they cannot negotiate an allocation from the commission—is one they are prepared to pay. Thus, it is primarily the subterranean nature of the process that threatens to discredit the changes being wrought and hence their durability, not the substance itself of those changes.

Making Deterrent Trade Measures Unnecessarily Vulnerable to Legal Challenge

The proprietary attitude of States already entrenched in a fishery might not matter much if other States’ inaction is because they put a low value on their impaired rights. But it does weaken the legitimacy of some of the anti-IUU fishing measures adopted by commissions and their members. In particular, some fisheries commissions such as NAFO, NEAFC, and CCAMLR group multiple vessels on an IUU list. A consequence of being named on such a list is that the vessels concerned become subject to various kinds of dissuasive actions by the member States of the commission, such as confiscation of their catch if they call into one of its ports or refusal of port access altogether.21 Where the activity prompting the listing in question falls within the second limb of illegal fishing, it is possible that the vessel has not committed any offense under the law of any State, notably its own flag State, even though its actions are putting that State in breach of its obligations to other States. In such cases, strict procedural propriety would demand that injured States seek remedies only against the flag State and not against the vessels, but because the incompleteness of the international legal system renders such relief not easily achievable or sometimes even available, this must yield to the practical desirability of direct recourse against the vessel. A protest by the flag State would be met with the obvious riposte that if it is unwilling or unable to prevent actions by its vessels that put it in breach of its obligations, it should not complain if other States protect their own interests by doing the job for it.22 The

21 See NAFO 2009, as well as www.nafo.int/fisheries/frames/fishery-iuu.html; NEAFC 2010; also www.neafc.org/iuuguide, and the linked pages concerning the consequences for a vessel of being on NEAFC’s A or B list; and the CCAMLR conservation measures 10–06 (CCAMLR 2008a) and 10–07 (CCAMLR 2008b).

22 This is the effect of the reasoning employed by Rayfuse in arguing that where a State persistently breaches its customary and (where applicable) conventional duty to cooperate with other States and the institutions established by them in conserving high seas fish stocks, other States specially affected may depart from their own obligations towards the first State by way of a proportionate response satisfying the criteria for resort to countermeasures laid down in article 22 of the ILC’s draft articles on state responsibility (ILC 2001), as a circumstance precluding the wrongfulness of the otherwise unlawful response (Rayfuse 2004). Such an argument might have been employed by Canada as a defense to the merits of the action brought against it by Spain over the detention on the high seas of the Spanish-flagged Estai in 1995, dismissed by the International Court of Justice in 1998 for want of jurisdiction: Fisheries jurisdiction ([Spain v. Canada], Jurisdiction, ICJ Reports 1998, p. 432.
flag State will also be exposed to the risk of domestic political embarrassment for having allowed itself to be disabled from defending the interests of its vessel beyond the standard consular protections.

Another possible consequence of ignoring the distinction between illegal and unregulated fishing, however, is that these justifications are of no avail in support of trade measures against fishing that is merely unregulated. For example, Article 12, paragraph 1 of the European Council (EC) regulation (European Council 2008) now provides that “[t]he importation into the Community of fishery products obtained from IUU fishing shall be prohibited.” But a blanket response of this type is unsatisfactory for the reasons indicated above: a vessel engaged in unregulated fishing is by definition not committing any offense, so it is not clear why it should be treated in exactly the same way as a vessel that is fishing illegally.

As the compliance phase of the shrimp–turtle case showed (WTO 2001b, paragraphs 135–138), even unilateral measures underpinning international fisheries policy positions could survive scrutiny in the World Trade Organization (WTO), provided they were properly designed.23 The U.S. measures aimed at minimizing bycatch of turtles in shrimp fisheries were ultimately upheld, but the United States there was not seeking to impose more stringent anti-bycatch practices on foreign fleets than on its own. That rationale holds true as far as illegal and unreported fishing goes; the import prohibition in the EC regulation and others based on similar anti-IUU fishing texts would probably survive a challenge to it under the General Agreement on Tariffs and Trade (GATT),24 as long as a similar prohibition on the EU’s or commission members’ own vessels were being rigorously enforced.25 But the same cannot be said with confidence of unregulated fishing, which is not guaranteed to satisfy the test of the chapeau of GATT Article XX, which only protects measures that are “not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.” The rationale of this rule would invalidate trade barriers used by one State to exert pressure on another State to pursue a policy that the first State is not itself willing to adopt. But that in essence is what trying to eliminate unregulated fishing by trade bans means: asserting a right to fish a stock while denying it to others.

A Better Alternative: State Responsibility

What, then, should replace the focus on IUU fishing of the past decade? The 2009 Port State Measures Agreement (FAO 2009) contains that much that is useful; for example, Article 7 introduces a system of designation of ports open for foreign fishing vessels where an inspection regime

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23 The compatibility of the EC regulation with WTO rules was raised in 2010 at the annual informal meeting of the States parties to UNFSA (see UN 2010a, at 7 [paragraph 20]), but the reasons for the doubts were left unstated.

24 Since 1995, GATT has been maintained in force among members of the WTO pursuant to the Agreement Establishing the World Trade Organization (1994), article II (2) and (4).

25 As an observation in the EU strategy hints, however, “[t]he EU can only be seen as a credible actor against IUU fishing in the international arena if it is able to demonstrate that illegal fishing…by EU vessels and operators, is being adequately tackled.” (Commission of the European Communities 2007), the fulfillment of this condition has up to now been open to doubt. This risks the measure being found not to be “made effective in conjunction with restrictions on domestic production or consumption,” as article XX(g) of GATT requires if the defense of measures “relating to the conservation of exhaustible natural resources” is to succeed. This would have been the major point of vulnerability of Chile’s ban on port calls by Spanish vessels fishing on the high seas for swordfish beyond its EEZ in the WTO leg of its dispute with the European Community. Chile had no limit on its own catch (production) of swordfish beyond a restriction of the proportion of the catch represented by fish below a certain size threshold (Orellana 2002).
is applied. In addition, under Article 11, paragraph 1(a), one of the grounds for refusal of services by the port State to a vessel already in port is that the vessel lacks any authorization to fish from its flag State (which need not be party to the 2009 agreement), so reinforcing the advance towards customary status of the rule in Article 18, paragraphs 2 and 3(a) and (c) of UNFSA that it is no longer sufficient for any State to leave its own high seas fishing domestically unregulated; rather, it must positively authorize (and thus in an indirect sense make itself accountable for the actions of) each vessel that makes use of the freedom of fishing.26 Another step forward is Article 6, paragraph 2, by which each party must “to the greatest extent possible, take measures in support of conservation and management measures adopted by other States and other relevant international organizations.”27

Of course the weakness of this agreement, as of all treaty-based advances in international fisheries management, is that it is precisely the States that become parties to such treaties that are likely to be the ones most assiduous in carrying out their conservation obligations anyway. Conversely, the “problem” States, those taking little interest in fisheries conservation despite the involvement of their vessels and nationals in high seas fishing, are among the least likely to do follow suit and will become bound only by the slow and uncertain process by which those norm-creating rules within them that are of sufficient generality to do so achieve the status of custom.

There is thus little to be gained from mounting a frontal attack on the freedom of fishing, entrenched as it is in Articles 87 and 116 of UNCLOS, by way of seeking to amend these.28 Similarly unproductive would be trying to define the “real interest” that Article 8, paragraph 3 of UNFSA requires of a prospective new entrant to a fisheries commission. This is because it would not be wise for a commission to dismiss a State with no history in the fishery on the ground that it lacks a real interest. To do so would be to give it an incentive to begin exploiting the stock as a way of acquiring one and, in the meantime, would send the message that the commission was not interested in cooperating with the would-be member—hardly the ideal basis on which to seek to enforce cooperation on the latter’s part.

Rather, the emphasis should be on trying to make the existing basic concepts and institutions of international law, which are common to all States no matter how active in or disengaged from fisheries conservation, work better in the collective interests of States actually and potentially involved in international fisheries. To do this, the remainder of this chapter argues that what is missing from international fisheries law discourse is any sense of the practical applicability of the rule on the secondary obligation of reparation that arises as a result of the breach of a primary rule. This is a crucial aspect of the various legal doctrines collected under the rubric of State responsibility. In 2001, the International Law Commission, a body of experts reporting to the UN General Assembly and whose task is to codify and progressively develop international law, completed 50 years’ work

26 An initiative to be welcomed precisely because it attacks the unregulatedness of fishing as opposed to unregulated fishing.
27 This, though, is carefully circumscribed by article 4(2), which reinforces the pacta tertiis rule (see Unregulated Fishing section of this chapter) by specifying that “a [p]arty does not thereby become bound by measures or decisions of, or recognize, any regional fisheries management organization of which it is not a member.”
28 This would not only be extremely difficult to achieve, given the amendment mechanisms set out in articles 312 and 313 of UNCLOS, but risks destabilizing the law of the sea as a whole if States perceive a threat of the careful balance of the UNCLOS package deal being disturbed, leading them to try to protect their legal interests through a proliferation of proposals to amend other unrelated provisions. A more subtle call to qualify the freedom of fishing is made in the first of the 10 principles adopted by the International Union for the Conservation of Nature at its October 2008 Barcelona congress, which includes the statement that enjoyment of high seas freedoms should become “condition[ed]…on the implementation…of the duties” set out in UNCLOS (IUCN 2008).
on the subject with the finalization of its draft articles on state responsibility (ILC 2001). Article 35 provides that

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution

(a) Is not materially impossible;
(b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

This reaffirms the standard laid down by the Permanent Court of International Justice in the Chorzów Factory case (Case concerning the Factory at Chorzów [Claim for Indemnity] [Merits], [1928] PCIJ Series A, No 17) that

reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law (p. 47).

Substitutes for State Responsibility Employed to Date

Compliance with treaty regimes, given States’ well-documented reluctance to invoke dispute settlement or other enforcement procedures against each other, is a problem affecting all fields regulated by international law (Chayes and Chayes 1995). Though in most cases there are sound international relations reasons for this, these reasons are of little comfort to those affected by the particularly acute form of the problem found in treaties regulating the global commons, where noncompliance by one party inevitably reduces the benefits derived by all others. Nonetheless, it is probably why, despite the positive reception the ILC draft articles have enjoyed among States and the lack of any adverse comment on Article 35, it has remained ignored in the fisheries world. At present, when a State exceeds its fishing quota in year 1 by \( x \) metric tons, the responses of other States involved in the fishery are ad hoc. It sometimes suffers no penalty at all, or in other cases is simply asked to take \( x \) metric tons less than its quota in year 2 or 3, and if \( x \) is large, the repayment tends to be spread out over a number of years. Thus, the International Commission for the Conservation of Atlantic Tunas (ICCAT) reduced Taiwan’s Atlantic bigeye tuna *Thunnus obesus* catch limit from 16,500 to 4,600 metric tons for 2006, in response to its misreporting of catch of around 15,000 metric tons (as estimated by Japan) from that stock as having been taken in the Indian Ocean where it was not subject to quota (ICCAT 2005a, 2005b). The present generalized ICCAT rule states that

\[ \text{For further examples, see below at the end of this subsection and, also, Serdy 2010a.} \]
with overages/underages, in which case that recommendation will take precedence (ICCAT 2000).

ICCAT does in fact impose a contingent 25% penalty in certain of its fisheries, applicable if quota is exceeded during two consecutive management periods (ICCAT 1996b, 1997a). But not even this will always be enough to bring about what the Chorzów Factory rule says should happen, namely restoration of the fish stock to the state it would have been in had the State concerned complied with its original quota obligation. This is what States should be aiming for if they are truly and not merely rhetorically concerned about the state of the world’s fish stocks. The omens, however, are not good: the extension of the 2 years to 3 and latterly 4 years for recent European Community overcatch of Atlantic bluefin tuna at ICCAT’s 2007 and 2008 meetings, respectively, represents successive moves even further away from the Chorzów Factory rule (ICCAT 2007, 2008a). Though not opposing the 2007 recommendation, the United States called for the compliance process to be reformed (United States 2007a) and decried ICCAT’s “overall picture of persistent compliance lapses” and “unwillingness to apply the available corrective instruments, namely quota penalties” (United States 2007b).

Possibly it is the extreme practical difficulty in “wiping out the consequences” of a breach of a catch limit that has deterred States from applying this prescription to such breaches. To some extent this is understandable, because it would seem to entail a complex set of problematic and contestable biological and economic calculations in order to account to other States for their losses suffered in reduced catchability or availability of overfished stocks. Restitution in kind, which under the ILC articles on state responsibility is the primary remedy whose feasibility must be investigated first before compensation can be considered (ILC 2001, Article 36[1]), involves establishing both (1) what the state of the stock would have been but for the breach, and (2) what future catch reduction is needed to restore it to that state.

With a possible exception for minor overcatches where the result it yields will not be far wrong, this cannot simply be a matter of deducting a tonnage from future catch 1 or 2 years hence equal to the overcatch, with an additional penalty formula applied in defined circumstances, as has been the pattern to date.30 For on the one hand, a stock whose biomass is above $B_{MSY}$ may not be damaged at all by the overcatch (to the contrary, it may even enhance the productivity of the fishery for others) while a stock whose biomass is short of $B_{MSY}$ but increasing will suffer less or more damage than the additional catch taken, depending on how high the catch limit is. On the other hand, a stock in a perilous state can be pushed over the brink to commercial extinction by a significant overcatch. This is possibly what happened to the South Tasman Rise orange roughy Hoplostethus atlanticus stock in 1999, when, on the assumption that the fishery would continue, New Zealand committed itself to “repay” 640 metric tons to the stock over the years 2000–2006. This was as a result of the large, unregulated catch by its fleet in 1999 after it had agreed with Australia on catch limits for that year but before that agreement could be reduced to writing and New Zealand’s limit could be enacted into domestic law. Yet, the repayment soon ceased to be of any practical significance because the fish themselves could no longer be found in commercially catchable quantities (Molenaar 2001, and sources therein). Although this represents little more than half of the notional overcatch had

30 The sole formal dispute on this in recent years, the Southern Bluefin Tuna Case, conforms to the pattern. The relief sought by Australia and New Zealand did not attempt to quantify the damage to the stock they alleged Japan had done but was simply future catch reductions by Japan equal to the 3,662 metric tons of experimental catch they claimed it had unlawfully taken (see Serdy 2010a).
the agreed limit been in force, it is more than a year's worth of New Zealand's quota, a proportion unsurpassed in international fisheries practice, though now run close by ICCAT's reduction of Taiwan's Atlantic bluefin tuna catch limit (discussed at the beginning of this subsection). In this situation, restitution in kind would not be possible and a monetary figure would need to be placed on the loss suffered by other actual and potential participants in the fishery—again no easy matter, but one where a range of economic data will be available to guide those charged with the calculations.

None of this, however, is an argument for not trying; the result may be imperfect and inexact, and the respondent State will be entitled to the benefit of any doubt. It will also be in its interest to argue, if there had been previous overfishing by other States, that the latter had contributed to their own loss and thus it should not have to bear the full burden alone (ILC 2001, Article 39). Even so, the very fact of being held to account may well be enough to make States' attitude to the fulfillment of their obligations significantly more rigorous.

The Main Benefit: Aligning Legal and Economic Incentives

State responsibility has a second crucial role to play in ensuring that the members of a fisheries commission do not collectively abandon their conservation obligations—not to each other (for voluntary abandonment inter se would seem to be legally unobjectionable), but to other States potentially interested in entering the fishery in future. No concerted effort is discernible to satisfy the target set in 2002 at the World Summit on Sustainable Development that action was required to

\[\text{maintain or restore stocks to levels that can produce the maximum sustainable yield with the aim of achieving these goals for depleted stocks on an urgent basis and where possible not later than 2015 (WSSD Plan of Implementation, subparagraph 31[a]).}\]

It is now all but inevitable that members of the various commissions will have the uncomfortable task of explaining to a future such gathering why this was not possible for the stocks they manage. The Commission for the Conservation of Southern Bluefin Tuna (CCSBT)\(^{31}\) has, for example, carried out modeling to estimate the likelihood of returning the depleted southern bluefin tuna (SBT) stock to \(B_{\text{MSY}}\) by 2020 under a number of management strategies if removals were reduced in the short term. The significance of these is that the more successful models show average removals over the period to 2020 exceeding removals of recent years, suggesting that the maximum sustainable yield (MSY) itself would be more than 20,000 metric tons per annum (Polacheck et al. 1999). For the CCSBT to adopt a management strategy that delays or prevents recovery of the stock to \(B_{\text{MSY}}\) is therefore to deny all potential new entrants' rights to share in the benefit that such a recovery would bring. This, however, is precisely what it seems to be doing, to judge from the debate on the management strategy in 2003–2004 (see Serdy [2010a] for further discussion of the debate). The ultimately adopted management procedure (since abandoned without yet being replaced, for other reasons) aimed at a probability of 50% that the parental biomass in 2014 would be smaller than that of 2004, which was its lowest yet recorded, and a 10% chance that by 2022, this biomass would be below that of 2004 (CCSBT 2005:8 [paragraphs 37 and 38] and 9 [paragraph 45]) and aiming for the stock in 2022 to be only 10% larger than its depleted state of 2002 (CCSBT 2003b:8 [paragraph 47]). In settling on these parameters, member States

\(^{31}\) The CCSBT was created by the Convention for the Conservation of Southern Bluefin Tuna (1993).
appear to have been taking their cue from the views of industry representatives consulted during the CCSBT’s development of its management procedure. Since a stock that is depleted can still be fished sustainably—albeit at a yield far below MSY—it can still generate worthwhile economic returns. Thus, some preferred to aim to rebuild the stock to its 2002 level, others favored merely arresting its decline, but none called for rebuilding to $B_{\text{MSY}}$ (CCSBT 2003a, paragraph 7).

In other words, even if the 2004 management procedure had been fully implemented, it is not clear when, if ever, the SBT stock would have been rebuilt to $B_{\text{MSY}}$ as Article 5 of Annex II to UNFSA and Article 119, paragraph 1(a) of UNCLOS both require. On this basis, it is hard to avoid the conclusion that the members of the CCSBT are in collective breach of their conservation obligations under customary and conventional law to other States that could profitably fish a rebuilt stock at $B_{\text{MSY}}$. But the CCSBT is surely not unique in this—a similar analysis performed for other stocks managed by other commissions would no doubt come to the same conclusion for a good number of them, the eastern Atlantic and Mediterranean stock of Atlantic bluefin tuna possibly at the top of the list. The 2008 performance review of ICAAT, particularly in respect of this species, was devastating.

Fundamentally ICCAT’s performance to date does not meet its objectives for several of the species under its purview. ICCAT’s failure to meet its objectives is due in large part to the lack of compliance by many of its [members and cooperating nonmembers, who] have consistently failed to provide timely and accurate data and to implement monitoring, control and surveillance arrangements on [their] nationals...[Their] performance in managing fisheries on bluefin tuna particularly in the eastern Atlantic and Mediterranean Sea is widely regarded as an international disgrace...Most of the problems and challenges ICCAT faces would be simple to fix if [they] developed the political will to fully implement and adhere to the letter and spirit of the rules and recommendations of ICCAT...The Panel found the management of fisheries on bluefin tuna in the eastern Atlantic and Mediterranean and the regulation of bluefin farming to be unacceptable and not consistent with the objectives of ICCAT...ICCAT should investigate and develop a strict penalty regime that either has the capacity to suspend member countries that systematically break ICCAT regulations or can apply significant financial penalties for breaches. These measures need to be severe in the sense that [members and cooperating nonmembers] should clearly understand that they will suffer significant economic consequences if their actions are in breach of ICCAT rules (ICCAT 2008b).

This should not be surprising: the economics of fishing produce a paradigm shift when the $B_{\text{MSY}}$ barrier is breached so that operators will resist the injunction to restrict catches in order to rebuild the stock to $B_{\text{MSY}}$ from below, as they would need to take a substantial drop from the current level of catch in order to rebuild the stock to $B_{\text{MSY}}$ but would not be rewarded by much more catch in future.

Against this unpromising backdrop, the precautionary approach to fisheries in Annex II to UNFSA is less likely to succeed as a means of reversing depletion than in preventing it in the first place for stocks not overfished. Although setting $B_{\text{MSY}}$ as the limit reference point serves unexploited and lightly or moderately exploited stocks well (i.e., those that are above $B_{\text{MSY}}$), left to their own devices, as the CCSBT’s attitude and ICCAT’s performance show, those exploiting a stock already driven below $B_{\text{MSY}}$ will have insufficient economic incentive to rebuild the stock at all, to the detriment of those States that could reasonably hope to profit from access to a healthier, rebuilt stock.
The western Atlantic bluefin tuna stock is another example of this phenomenon: with the spawning stock biomass estimated in 1996 to be 13% of $B_{MSY}$, Panel 2 of ICCAT was informed that an annual catch of around 2,500 metric tons would roughly double it in 20 years, but to get to $B_{MSY}$ in 20 years would require a drastic reduction in catch to 500 metric tons per annum (ICCAT 1996c, paragraph 5.b.2). Despite this, Japan proposed raising the total allowable catch (TAC) to 2,500 metric tons from its then current 2,200 metric tons, (ICCAT 1996c, paragraph 6.b.3), a course of action adopted first by the panel (ICCAT 1996c, paragraph 6.b.17) and then by ICCAT itself (ICCAT 1996a, paragraph 13.4). Although a 20-year rebuilding program was adopted in 1998 (with a 20-year TAC unless amended—in “Recommendation by ICCAT to Establish a Rebuilding Program for Western Atlantic Bluefin Tuna” (ICCAT 1998), at the first signs of recovery in 2000, Canada and the United States wanted the TAC held at 2,500 metric tons (United States 2000; Canada 2000), but Japan argued for an increase to 3,000 metric tons, even though only two out of four assessments showed that this was sustainable (Japan 2000). In 2007, the TAC had to be reduced to 2,100 metric tons (ICCAT 2006, paragraph 3).

Evidently, then, something more is needed to bring the legal and economic incentives for depleted stocks into alignment, and it is suggested that willingness of injured States in the sense of Article 42 of the ILC’s draft articles (ILC 2001) to invoke State responsibility, which need not necessarily be a prelude to litigation, is the missing element. The international fisheries law community needs to treat quantified catch and effort limits as obligations of result rather than, as has mostly been the case hitherto, mere obligations of means, since fish caught in excess of a catch limit are lost to the stock even if the overcatch is, in legal terms, excusable. If this leads to overcatch, in effect, being repeatedly ignored with no downward adjustments made to future catch limits, then the stock will be vulnerable to depletion over time. Thus, the question that commissions should ask when faced with overcatch is not whether a State has behaved in a way that merits some sort of compensatory adjustment being levied against it, but who—the overcatching State or the members as a whole—should bear the loss when one of their number exceeds its quota, excusably or otherwise.

With State practice through fisheries commissions’ compliance committees now at least appearing to accept that quantified catch limits are obligations of result, a revived role for State responsibility may become a realistic possibility. For if all are accountable to each other thanks to their right to fish on the high seas, then the freedom of fishing in UNCLOS Article 87, as well as being the cause of the problem, paradoxically becomes part of the solution. Since paragraph 2 of Article 87 qualifies the freedoms of the high seas, including the freedom of fishing, by reference to the “due regard” that must be had to the interests of other States exercising the same or a different freedom, high seas fishing has never been a mere first-come-first-served affair in which latecomers have no rights against

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32 For this purpose, the States qualifying as “specially affected” by the breach of obligation in relation to a fish stock, so as to become entitled to invoke the responsibility of the wrongdoer State, would include at a minimum any State that can show that it could profitably fish the stock without subsidization if its biomass were restored to $B_{MSY}$—see Serdy (2010a).

33 The distinction is that when a State is under an obligation of result, it must bring about (or avoid) a certain outcome but is left free to choose the method by which it does so; an obligation of means imposes on affected States some generally uniform or coordinated course of conduct directed towards a particular international policy goal, and as long as the State adheres to that conduct, it commits no breach, even if that proves inadequate to achieve the goal. In the fisheries context, limiting a State’s catch to a particular amount is (and should always have been) an obligation of result; imposing that catch limit in its domestic law with suitable penalties for breach (which may occur as a result of the actions of private individuals) would be the corresponding obligation of means—but the latter is not how catch limits are normally expressed in international instruments.
first exploiters, nor, in the light of Article 11 of UNFSA, which sets out factors to govern the allocation to newcomers, can Article 8, paragraph 4 of the same instrument be read as a mandate for their peremptory exclusion. Rather, the creation by UNCLOS Article 116 of a legal pecking order for access to stocks means that those States at the bottom face the risk of being left with nothing. From this and the duty of cooperation whose status as customary international law is not in doubt, an obligation can be derived on those higher up that order to manage the fishery in a way that maximizes the likelihood that something will, in due course, be left over for those below (i.e., conservatively in accordance with the precautionary approach to fisheries in Annex II to UNFSA).

**Adjuncts to State Responsibility**

If success of fisheries commissions is gauged by the health of the stock(s) under their management, the problems of the past are still very much with us. Above all else, what is required is for noncompliance with conservation obligations such as catch limits to be visited with real dissuasive consequences (i.e., to enforce the secondary obligation to restore the stock to the position it would have been in had the delinquent State originally complied). The compulsory dispute settlement provisions of UNFSA, leading to binding decisions, make an approach based on revival of State responsibility more realistic, whether or not an aggrieved State actually resorts to them to challenge exclusionary policies of fisheries commissions or their insufficient responses to breach of obligations. No aggrieved State has yet invoked it for either reason, but, since the negotiations that have so far fended off that prospect have not necessarily yielded lastingly satisfactory outcomes, it should not be assumed that this will remain so indefinitely.

Indeed, increased attention to State responsibility has other potential benefits for the management of international fisheries. It makes accounting properly for catch all the more crucial. Since past understatement of catches and profits will serve to diminish the compensation available, raising the profile of State responsibility in fisheries should become a factor dissuading States from concealing the full extent of their fishing activity. Concern to limit potential compensation could also be a far-reaching way to integrate the work on disciplines on fishery subsidies in the WTO’s Doha round into the broader international fisheries law framework. As compensation at the international level is payable to States and not to the individual vessels or persons of their nationality who have suffered the loss, a State faced with a claim for compensation would naturally be inclined to insist as to quantum that the gross losses of those individuals be discounted for any subsidies, which do not represent a loss to the subsidizing State.

Nor should States be able to limit their liability even inter se by according themselves high quotas in commissions. To the extent that a quota binds other members of the commission, quotas that are part of a TAC that is in biological terms too high leave members with no legal recourse against States that fish within those quotas, and limit the compensation payable if the quotas are exceeded. Accordingly, the rule should be that quota decisions are not to be taken as a voluntary assumption of risk by those members objecting to it as too high and not subsequently exceeding their own quotas under it, or those voting against it for this reason where there is no objection procedure. In this way, the revival of State responsibility will give States an incentive to move away from lowest com-

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34 The Doha negotiating mandate is in WTO 2001a, paragraph 28. In the WSSD Plan of Implementation, subparagraph 31(f) notes the necessity of “completing the efforts undertaken at WTO to clarify and improve its disciplines on fisheries subsidies.”
mon denominator decision-making procedures and promote efficacious alternatives in the fisheries commissions of which they are members. Any lasting alteration of the international fisheries law landscape will of course require a great deal more elaboration on the part of interested States and scholars in the years ahead, building on the ILC draft articles on state responsibility.

Conclusions

For the future, therefore, we must hope to see the last of the IUU acronym, sooner rather than later, as an obstacle to clarity of thought and hence to good policymaking. Its deleterious consequences are manifested primarily in two ways:

1. It has too easily allowed fisheries commissions to shift the blame and attention from their own shortcomings onto others; as a second-order set of issues it can at best supplement, but not substitute for, putting their own houses in order by adopting management strategies fitting the description of the precautionary approach to fisheries set out in Annex II to UNFSA;

2. Encouraged by the lack of differentiation within the IPOA itself, it obscures the policy responses required by treating as one what are really several distinct problems calling for as many distinct solutions; moreover, the equation of “unregulated” with “illegal,” though in economic terms possibly a necessary condition for any lasting solution to overfishing, is something that should be done openly and after proper debate, rather than unwittingly or by terminological sleight of hand.

Since the IUU phraseology has, over the past few years, thoroughly permeated not just UN General Assembly and fisheries commission resolutions, but even some newer treaty texts, it is likely to require a concerted effort to reverse the trend. This will be no easy matter given the appeal the acronym holds for generalist officials with no great interest in fisheries and their political masters keen to find and defeat widely perceived problems. The consequence of its oversimplification to this end, though, is that what ails the fisheries is misdiagnosed, which cannot be a recommended way to begin curing it.

What does unite most elements of IUU fishing, as defined by the IPOA, is that one way or another the fishing takes place outside the framework of, or contrary to the obligations accepted through, a fisheries commission. As previously noted, and some States are beginning to recognize, commission members have a weak political, and for that matter legal, case for insisting on nonmembers living by rules that they themselves have repeatedly proved unwilling to enforce against each other, discriminating against outsiders while excusing each other’s overfishing. States’ rhetoric on taking the fight to IUU fishers is therefore destined to remain of only limited effect until they are prepared to treat their own obligations far more seriously than hitherto by accepting the ordinary

35 An entire section, paragraphs 44 to 61, running to well over two pages of the most recent UN General Assembly fisheries resolution (UN2010b), is devoted to IUU fishing, which is also mentioned in paragraphs 65, 70, 71, 78, and 93, to say nothing of the associated preambular paragraphs.

36 Beyond the FAO Port State Measures Agreement itself (FAO 2009), see Southern Indian Ocean Fisheries Agreement (2006, article 6(1)(i)); Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (2009, 7th preambular paragraph and articles 8[i], 23[1][d], 24[1][c], 27[1][d], and [f] and 31[3]); (NAFO 2007, last preambular paragraph and articles 1][i] and VI[9]). NEAFC’s new treaty (NEAFC 2007b), being provisionally applied pending its entry into force, is a heartening exception.

37 See footnote 25.

38 An example in point is that NAFO’s IUU list scheme (NAFO 2009) applies only to nonmember vessels.
legal consequences of failure to honor them through the underused tool of general international law: State responsibility.

An essential element of any case for property rights is that they will increase the overall level of economic benefits, which means that the winners can afford to compensate the losers, those who are denied access to fish stocks by such a development. (If they cannot, the change is not economically efficient, which fatally undermines the case for proceeding.) What is unsatisfactory is not the institution of property rights as a solution to the tragedy of the commons afflicting high seas fisheries, but only the current state of affairs in which hostility to undifferentiated IUU fishing is being used, deliberately or not, as a cloak to conceal their consolidation by fishing States who are succeeding both in avoiding being held to account to other States for their past overexploitation and in keeping off the agenda any prospect of compensation for those States affected by the loss of freedom of fishing. It is only marginally less objectionable if fishing States are acting this way because they do not realize the appropriative nature of this process in which they are engaged. On the other hand, if the States that on this analysis are the losers from this development are rationally failing to react because they put only a low value on the rights they stand to lose, that would put a different complexion on matters—but such a comforting conclusion could only be safely drawn after considerable empirical research.39 If the rebuilding of a stock requires the abolition of the residual freedom of high seas fishing, then attention needs to turn to how States are to be compensated for their compulsory exclusion from a share of the maximum sustainable yield and, in particular, to work out a widely acceptable method or formula for calculating the quantum of compensation due. As this is unlikely to be easy, the earlier a start can be made on the task, the better.

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References


39 While the immediate concerns of the delegation that proposed its inclusion in the FAO Port State Measures Agreement (FAO 2009) are not clear, article 4(3), which provides that the agreement does not oblige its parties “to give effect to measures or decisions of a regional fisheries management organization if those measures or decisions have not been adopted in conformity with international law,” may offer a tantalizing clue that the conclusion would be premature.


beyond the flawed concept(s) of IUU fishing


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