

Conference on the
Governance of High Seas Fisheries
and the UN Fish Agreement
Moving from Words to Action
St. John's, Newfoundland and
Labrador
May 1 to 5, 2005



Conférence sur la
Gouvernance des pêches en haute mer
et l'Accord des Nations Unies sur les
pêches
Passons à l'action
St. John's (Terre-Neuve-et-Labrador)
du 1^{er} au 5 mai 2005

**TO OUR CHILDREN'S CHILDREN'S
CHILDREN: FROM PROMOTING TO
ACHIEVING COMPLIANCE IN HIGH SEAS
FISHERIES**

by

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This paper was prepared as a 'backgrounder' for the Conference on the Governance of High Seas Fisheries and the UN Fish Agreement - Moving From Words to Action, held at St John's Newfoundland and Labrador, Canada, 1-5 May 2005.

1.0 Introduction

The increasingly parlous state of high seas fish stocks is now a well documented fact. So, too, is the fundamental cause - overexploitation. Yet despite more than a decade of international attempts to deter, prevent and eliminate illegal, unregulated and unreported (IUU) fishing, reduce overcapacity, and obtain adequate data and scientific knowledge to inform fisheries management decisions, IUU fishing continues apparently almost unabated, overcapacity still exists, we profess still not to possess adequate data and scientific knowledge to manage stocks sustainably, and high seas fish stocks are continuing to decline to ever more perilous levels with new fears now also being voiced for the broader marine environment arising from the effects of destructive fishing practices.

Certainly advances have been made. Globally, instruments such as the Fish Stocks Agreement (FSA),¹ the Compliance Agreement,² and the International Plan of Action to Deter, Prevent, and Eliminate IUU Fishing (IPOA-IUU),³ have been adopted. Regional Fisheries Organisations (RFOs), too, have been busy adopting an ever increasing range of conservation and management measures aimed at deterring IUU fishing and acquiring needed data and scientific knowledge. Yet the problems still persist. Clearly something more needs to be done.

It is acknowledged that there is little appetite within the international community for the negotiation of new global instruments, a process which, in any event, is often little more than a make-work project for international lawyers and bureaucrats. Rather, the general consensus appears to be that we are 'drenched' in instruments, both binding and non-binding, and what is needed now is simply for states to fully implement, comply with and, where non-compliance occurs, to enforce them. To that end, effective mechanisms are needed within RFOs not only to monitor compliance but also, where necessary, to enforce compliance by both contracting and non-contracting parties with the conservation and management measures adopted by those organisations.

The purpose of this paper is to provide a general overview of the current legal regime relating to compliance and enforcement in high seas fisheries and the measures which have been adopted by RFOs to date to detect and address non-compliance. Far from being a comprehensive exposé of the range and efficacy of all measures adopted to assist in the fight against IUU fishing, this paper provides only a brief introduction to the narrow issue of measures to monitor and enforce compliance. Based on a description and discussion of the limitations of current measures, this paper will identify some possible areas for further development of enforcement mechanisms which might better strengthen the ability of RFOs to move beyond the mere promotion of the concept of compliance to its actual achievement, thereby ensuring the long-term sustainability of high seas fisheries.

¹ 34 ILM 1542 (1995). Entered into force 11 December 2001. As of 13 July 2004 the FSA had received 52 ratifications.

² 33 ILM 968 (1994). Entered into force 24 April 2003. As of 19 August the Compliance Agreement had received 29 acceptances.

³ The text of the IPOA-IUU is available at <http://www.fao.org/fi/ipa/ipae.asp>

2.0 Defining ‘Compliance’ and ‘Enforcement’

As a preliminary matter it may be useful to address the apparent propensity to confuse, or conflate, the terms ‘compliance’ and ‘enforcement’. Often used interchangeably, the terms, while related, in fact refer to separate and distinct activities and actors. The Oxford English and Black’s Law Dictionaries define ‘compliance’ as “action in accordance with a recommendation, request, or command” or as “submission, obedience or conformance”. By contrast, ‘enforcement’ is “the act of compelling observance of a law”, or “the act of putting something such as a law into effect; the execution of a law; the carrying out of a mandate or command”. In other words, enforcement constitutes action to be taken by one actor when compliance is not otherwise forthcoming from another.

In the context of international law, compliance may be defined as the conformance by a state with its international obligations. Obviously, for a state to comply, it must first know what those international obligations are. These obligations may arise through the operation of either treaty or customary international law (or both). Transparent and effective means of monitoring compliance are needed to enable other interested or affected states to assess the level of compliance by a state with its international obligations. Should compliance not be forthcoming then enforcement, or the process of compelling that compliance, comes into play.

In truth, enforcement really consists of two elements: control and sanction. Control refers to the processes of invoking compulsion in order to achieve the sought after compliance and includes, *inter alia*, policing activities and possibly detention pending further investigation. Sanction refers to the formal application of the law through judicial or other processes and includes actions taken to prosecute and punish non-compliance. The object of enforcement is to compel compliance by compelling constraint of behaviour in such a way as to promote conformity with prescribed rules in order to make adherence to the rule more attractive than violation. Thus enforcement is a mechanism not only to promote compliance but to ultimately achieve compliance (or at least acceptable levels of compliance) through the termination and punishment of non-compliance as a means of deterrence. Achieving compliance is therefore the goal of enforcement.

Measures to promote compliance and measures of enforcement are therefore not necessarily co-extensive, although both are necessary elements of a functioning and effective legal system. Measures to promote compliance and measures of control and sanction are well developed in domestic legal systems. In international law, however, while the rhetoric is littered with references to ‘promoting’ compliance, far less verbiage has thus far been expended on references to ‘ensuring’ or ‘enforcing’ compliance. Such considerations are admittedly circumscribed by the nature of the international legal regime which sees states bound only by their treaty commitments and rules of customary international law and heavily influenced by the dictates of political expediency and perceived self interest. Nevertheless, as has been amply demonstrated in international law, while there may be a presumption that states should comply with their international obligations, there can be no presumption that states always do. In situations of continuing

non-compliance some form of international enforcement authority may ultimately be desirable.

3.0 The Current Legal Framework for Achieving Compliance Through Enforcement

Any discussion of the legal framework for compliance and enforcement in high seas fisheries must begin with an acknowledgment of the traditional principles, enshrined in the Law of the Sea Convention (LOSC),⁴ of freedom of fishing and exclusivity of flag state jurisdiction on the high seas. However, neither of these principles is, or ever has been, as absolute as their bald assertion suggests.

3.1 Constraints on the freedom of fishing

With respect to the freedom of fishing, while the LOSC confirms the right of all states for their nationals to enjoy the freedom of fishing on the high seas,⁵ that right is subject to a number of exceptions, including the obligation to cooperate in respect of conservation and management of high seas fish stocks, which is to be accomplished through establishment, where appropriate, of subregional or regional fisheries organisations.⁶ The FSA further institutionalises the duty to cooperate through the medium of RFOs by providing that only members of RFOs or non-members which agree to abide by the conservation and management measures adopted by RFOs can access the fishery concerned.⁷ States which do not agree to apply relevant measures are, nevertheless, still obliged to fulfill their duty to cooperate which includes the requirement that they must not authorise their vessels to fish for straddling or highly migratory fish subject to those measures.⁸

3.2 Constraints on the exclusivity of flag state jurisdiction

Neither is the principle of exclusivity of flag state jurisdiction absolute. Rather, it is conditioned by reference to possible exceptions and to the requirement that flag states exercise certain responsibilities in respect of their vessels.⁹ In other words, flag state jurisdiction is merely primary, not exclusive. Where a flag state fails to meet its responsibilities a secondary jurisdiction over its vessels may be vested in non-flag states.¹⁰

3.2.1 flag state responsibilities

⁴ 21 ILM 1245 (1982). Entered into force 16 November 1994. As of 25 January 2005 the LOSC had received 148 ratifications.

⁵ LOSC Art. 116.

⁶ LOSC Arts. 117 and 118.

⁷ FSA Art. 8.

⁸ FSA Art. 17(2).

⁹ LOSC Arts 92 and 94.

¹⁰ For a comprehensive analysis of this issue see R. Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Martinus Nijhoff, 2004).

The content of flag state responsibilities in respect of fishing vessels has developed considerably in the past decades and is now set out, for their respective parties, in the Compliance Agreement and the FSA. Both agreements oblige flag states to ensure, through various means such as vessel registers, fishing authorisations, and refusal of their flag to known IUU vessels, that their vessels do not engage in activities that undermine the effectiveness of international conservation and management measures including those adopted by RFOs.¹¹ The FSA further obliges flag states to, *inter alia*: establish and enforce licencing schemes and regulations for high seas fishing; establish a national register of vessels authorised to fish on the high seas; establish requirements and verification programs for marking vessels and gear, recording and reporting vessel position, and verifying catch of target and non-target species; adopt monitoring, control and surveillance measures including national, regional and global schemes, observer programs and the implementation of vessel monitoring systems (VMS); regulate high seas transshipment to ensure the effectiveness of conservation and management measures is not undermined; and regulate fishing activities to ensure compliance with regional subregional and global measures. In addition, where a subregional, regional or global system of monitoring, control and surveillance exists, flag states must ensure that their measures are compatible with that system.¹²

The point of articulating these flag state responsibilities is to ensure that flag states are able to ensure compliance by their vessels with international obligations. The Compliance Agreement makes this point by requiring parties to take enforcement measures against any of their vessels which act in contravention of the Agreement. This requires making contravention of the Agreement an offence under national law with provision for sanctions of sufficient gravity to effect compliance and deprive offenders of the benefits accruing from their illegal activities. For serious offences, sanctions must include refusal, suspension, or withdrawal of the vessel's authorisation to fish on the high seas.¹³

The FSA seeks to ensure compliance not just with its own provisions but with measures adopted by RFOs as well.¹⁴ Flag states are obliged to take enforcement action against their vessels for non-compliance with RFO measures irrespective of where violations occur and must conduct immediate and full investigations of alleged violations and report on the progress and outcome of those investigations to the state alleging the violation and the relevant RFO. They must require their vessels to provide information on the vessel's fishing activities to the investigating authorities and where sufficient evidence of a violation exists, flag states are obliged to refer the case to their authorities with a view to instituting proceedings without delay and to ensuring that further fishing activities are not carried out until any outstanding sanctions are complied with. Investigations and judicial proceedings are to be carried out expeditiously and sanctions imposed are to be adequate in severity to be effective in securing compliance and to discourage violations. Sanctions shall also deprive offenders of the benefits accruing from their illegal activities. Flag

¹¹ Compliance Agreement Arts. III and IV and FSA Art. 18.

¹² FSA Art. 18.

¹³ Compliance Agreement Art. II.

¹⁴ FSA Art. 19.

states are obliged to ensure that masters and other officers of their fishing vessels risk refusal, withdrawal or suspension of their tickets if they fail to comply with the flag state's obligations. In short, flag states are required to effectively enforce - and to enforce effectively.

3.2.2 international cooperation

Recognising, however, the difficulty of flag states acting alone to ensure compliance by their vessels, which may be spread over vast areas of the planet and never return to a 'home' port, the FSA calls for international cooperation to assist flag states in ensuring compliance by their vessels with measures adopted by RFOs. Members of RFOs are to exchange information on fishing activities of vessels of non-members and are to take measures consistent with international law and the FSA to deter the activities of those vessels which undermine the effectiveness of RFOs.¹⁵ Article 20 of the FSA obliges all states, both flag and non-flag, to cooperate either directly or through RFOs to ensure compliance with and enforcement of RFO measures. To this end, flag states may request the assistance of non-flag states which are then obliged to endeavour to meet the reasonable requests of the flag states in investigating alleged violations of RFO measures. States are also to assist each other in identifying vessels reported to have engaged in activities that undermine the effectiveness of RFO measures and, to the extent permitted by their national laws, are to establish arrangements for making evidence relating to violations available to prosecuting authorities in other states.

3.2.3 non-flag state jurisdiction

The FSA then goes further to delineate a secondary right of non-flag jurisdiction in situations where the flag state is either temporarily or permanently unwilling or unable to act. On the high seas, non-flag state members of RFOs may take action to deter vessels which have engaged in activities that undermine the effectiveness or otherwise violate the measures established by the RFO until such time as the flag state takes appropriate action.¹⁶ Precisely what those measures of deterrence might be are not spelled out. However, the FSA then provides a framework procedure for non-flag at-sea boarding and inspection by members of RFOs of vessels belonging to any state party to the FSA, regardless of whether they are also members of the RFO, in order to ensure compliance with that RFO's measures. In addition, where there are clear grounds for believing a violation of the RFOs measures has occurred, non-flag coastal state members may board and inspect such vessels if they enter an area under national jurisdiction during the same fishing trip. States are to establish, through RFOs, boarding and inspection procedures that are consistent with those set out in the FSA and where they have not done so then RFOs are to use the FSA procedures although members of RFOs can limit the application of these requirements as between themselves where they have adopted an alternative mechanism which otherwise effectively discharges the obligation to ensure compliance.¹⁷

Under the FSA a flag state has three working days to respond following a boarding and inspection and either investigate and take enforcement action itself or authorise the non-

¹⁵ FSA Art 17(4).

¹⁶ FSA Art. 20(7).

¹⁷ FSA Arts. 21-22.

flag inspecting state to do so. If the flag state fails to respond and a serious violation is believed to have occurred then the non-flag inspecting state may retain control of the vessel and take it to port pending further investigation and pending resumption, by the flag state, of its control. Clearly these provisions do not go so far as to obviate any reference to or consideration of the flag state, which effectively retains the right of veto over any further investigation or prosecution of its vessels. But they do mean that in certain, albeit limited, circumstances a vessel may be subject to non-flag seizure and arrest and that failure by a flag state to then adequately investigate and, where relevant, take enforcement action including judicial proceedings and sanctions will be a breach of the flag state's international obligations.

The FSA also provides for non-flag measures to be taken by port states, on a non-discriminatory basis, when vessels are voluntarily within their ports. Measures to be taken include inspection of documents, fishing gear and catches and port states may also adopt regulations to prohibit landings and transshipments where it is established that the catch has been taken on the high seas in violation of RFO measures. While these provisions may reflect nothing more than the reality that coastal states are free, under customary international law, to close their ports to foreign vessels subject to any treaty obligations not to, their novelty lies in the application of that principle for the first time to the high seas fisheries context. It is unclear, however, whether these provisions envisage detention or prosecution of a vessel by the port state.

4.0 Current Measures for Enforcing Compliance Within RFOs

Within this framework, and pursuant to their own constitutive treaties, RFOs have adopted a range of measures aimed at ensuring compliance by both contracting parties (CPs) (including any cooperating non-contracting parties (CNCs)) and non-contracting parties (NCPs) with conservation and management measures and with broader obligations to refrain from IUU fishing. Of course, flag state implementation and enforcement is still considered the norm. However, RFOs are increasingly taking an interest in whether CPs are implementing their measures nationally and are adopting reporting procedures to monitor this. Additionally, as concerns over CP flag state implementation grow, measures providing for elements of non-flag state involvement are being considered and adopted. It appears that centralised and internationalised compliance monitoring and enforcement activities are becoming increasingly essential to the success and continued viability of RFOs.

In general two types of measure can be identified: control measures used to detect non-compliance; and sanction measures used to address non-compliance and deter further violations. Control measures include observer programs, vessel monitoring systems (VMS), air or sea surveillance and boarding and inspection schemes. Sanction measures include investigation and prosecution by the flag state, review and assessment of flag state compliance by RFOs, and follow up action by RFOs.

4.1 Measures applicable to contracting parties

4.1.1. measures of control

Measures requiring states to authorise and licence their vessels to fish on the high seas have been adopted in a number of RFOs. While not necessarily a control measure themselves, they are measures on which control actions, such as imposition of observers, VMS and other requirements may be based. Additionally, they can be used to establish a rebuttable presumption that any vessel engaged in high seas fishing which is not on the list is an IUU vessel. However, the efficacy of these measures in helping to control overexploitation is limited by the disjuncture between numbers of authorisations and capacity limits. The resolution on capacity adopted by the Indian Ocean Tuna Commission (IOTC), for example, contains a cap on the number of vessels ‘authorised’ to fish in the IOTC area. However, far more vessels are authorised than actually do, and can sustainably, fish there.¹⁸ The Inter-American Tropical Tuna Commission (IATTC) has agreed in principle on the optimum overall vessel capacity limit for the Eastern Pacific Ocean but has been unable to agree on its allocation which will, in any event, require a reduction of existing capacity. Nevertheless, if authorisations can be made to equate with capacity the idea appears sound.

Turning to the more direct control measures, nationally based observer programs are currently recommended or required by a number of RFOs. Their potential as an effective control measure is evidenced by the significant decline in infringements recorded by the Northwest Atlantic Fisheries Organisation (NAFO) upon introduction of the 100% observer coverage requirement in 1998. Nevertheless, and even despite requiring observer coverage in domestic fisheries, some states continue to object to the application of these programs to high seas fisheries. Arguably, these programs are costly. Moreover, disagreement persists as to whether observers should be tasked to record catch data for scientific and management purposes only or should also play a role in evidencing violations of management measures. Additionally, as flag state programs they are open to abuse, non-compliance and non-enforcement.

One solution is to require placement of international observers. The IATTC and its related Agreement on the International Dolphin Conservation Program (AIDCP), for example, require 100% observer coverage on all purse seine vessels over 363mt, to monitor dolphin mortality. A minimum 50% of the observers are to be IATTC appointed, trained and certified, while the rest are supplied by national observer programs. Observers fulfill both a scientific and a compliance monitoring role in that once they verify the dolphin mortality limit for a given vessel has been reached all fishing on the dolphin associate tuna must cease. However, in the past observers have been beaten bribed, kept confined to their cabin, and otherwise mistreated and misled. Such interference with observers can seriously undermine their effectiveness.

Another approach currently being trialed in NAFO is that of electronic logbooks. This has the advantage of utilising cutting edge technology to reduce costs and inconvenience

¹⁸ For a broader discussion of the sustainability issue see R. Rayfuse, “The Challenge of Sustainable High Seas Fisheries” in N. Schrijver and F. Weiss (eds), *International Law and Sustainable Development: Principles and Practice* (Brill, 2004).

to observers and fishers alike. However, concerns remain as to the efficacy of the technology and the propensity for human ingenuity to find ways to circumvent it. These concerns appear justified in view of experience with VMS where instances of tampering have been reported on many occasions and where records have been deliberately falsified to indicate, for example, that vessels physically sighted in one area have not been there. The requirement for nationally operated VMS schemes has been introduced in most RFOs. However, more useful and less subject to tampering and fraudulent usage are the dual reporting systems adopted in NAFO and the North-East Atlantic Fisheries Commission (NEAFC) whereby vessels report to national authorities who then convey the information to the Secretariat. A centralised VMS has also recently been adopted in the Commission on the Conservation of Antarctic Marine Living Resources (CCAMLR) whereby vessels are obliged to report directly to both the flag state and the Secretariat.

While a useful tool for verifying vessel location during fishing operations, VMS does not, however, provide evidence of the manner in which fishing is carried out or confirm the type of gear used or other effects of fishing activities on the wider environment. Boarding and inspection may be utilised to verify this information and identify violations. However, while Japan has in the past sent an inspection vessel to the Mediterranean to inspect its tuna vessels fishing there, few states have the capacity or desire to maintain extensive long distance high seas inspection presence. Reciprocal boarding and inspection schemes can be utilised both to share the cost burden and to assuage doubts as to the efficacy of national inspections. Such schemes are in force in a number of RFOs, including the North Pacific Anadromous Fish Commission (NPAFC), CCAMLR, NAFO, NEAFC and in the Central Bering Sea. The International Commission for the Conservation of Atlantic Tunas (ICCAT) adopted a scheme in 1975 but it has never come into force. These schemes are supported by air and/or at-sea surveillance which assists with the gathering of intelligence and focusing of inspection effort. However, these schemes are costly, and provide fertile ground for disputes over such things as participation, cost recovery, objectivity of inspections, interference with fishing activity and economic loss, and reliability and evidentiary value of surveillance information and inspection reports. Additionally, to be truly effective these schemes require a level of cooperation between national enforcement agencies which currently is not extant in all RFOs.

Port state controls have been adopted by a number of states in their domestic fisheries. More recently, RFOs have begun to adopt reciprocal port inspection schemes such as the compulsory schemes found in NAFO and CCAMLR. Disagreement persists, however, as to whether all vessels should be inspected or only those which have been cited for fishing in violation of RFO measures. Additionally, in some RFOs, port inspection of CP vessels is merely discretionary, whereas that of NCP vessels is compulsory. Quite apart from the apparent discriminatory effect of this, the reality is that many port states lack the technical, administrative and financial resources necessary to full implement such schemes. Moreover, such schemes are of limited use in dealing with fisheries in which processing and transshipping is carried out at sea or in addressing the broader environmental impacts of destructive fishing practices on target and non-target species.

They are also of no use when vessels can engage in port-hopping to offload in non-participating port states.

Catch documentation schemes which monitor landings and trade flows assist in both obtaining statistical data for management purposes and in ensuring that IUU catch does not have a market. Fish not accompanied by documentation cannot be landed, imported or exported. These schemes, which generate large amounts of paper, are, however, labour intensive, and subject to creative and fraudulent reporting. CCAMLR has been trialing an electronic version of its toothfish Catch Documentation Scheme designed to reduce some of these difficulties and provide essentially real time data to facilitate verification and certification. Nevertheless, as with all measures these schemes are only successful in so far as they are effectively implemented, not only by CPs but by NCPs as well.

4.1.2 measures of sanction

Requirements on CPs to report on implementation and enforcement of RFO measures has long been a feature of RFO institutional life. Certainly, there is a presumption that states which become parties to RFOs will comply with RFO measures. But increasingly any presumption that they necessarily do comply has been replaced with a requirement to demonstrate through reporting procedures that they do comply. Annual review of these reports is generally carried out by a 'compliance' committee which reports a summary of its findings and recommends measures to improve compliance to the plenary. The efficacy of this process rests, however, both on the fact and on the content of these reports which, although they may be required may not be compelled. In addition, no sanction, other than public shaming, appears to exist for a failure to report.

Moreover, a fundamental structural inadequacy in ensuring compliance through national implementation results from the nature of the different national legal systems involved. In the absence of harmonised enforcement and penalty standards, reliance on national implementation means that a patchwork of differing and not necessarily compatible administrative and judicial measures and/or sanctions can arise causing confusion for both fishers and for national authorities trying to implement them. This in turn can lead to disagreement in the RFO as to the relative efficacy of implementation efforts.

Nevertheless, RFOs have been resorting to measures such as reliance on NGO reports and information received from CPs to assess the accuracy of reports and the relative merits of follow up action taken by the state involved. Where dissatisfaction is voiced this may be preceded or followed by a diplomatic demarche from a contesting CP. In addition, the power of public shaming or ridicule is used to attempt to influence recalcitrant CPs to mend their ways. In ICCAT, trade restrictive measures have been recommended against non-compliant CPs, although their effectiveness has been compromised by the use by other members of the objection procedures.

4.2 Measures applicable to non-contracting parties

A compelling aspect of RFO practice in recent years has been the extent to which they have introduced measures aimed at preventing NCPs from undermining the effectiveness

of their conservation and management measures. Indeed, it appears the (confusingly conflated) rhetoric of IUU fishing has been most extensively applied in support of measures against NCPs even though CPs are by no means free from involvement in the practice. While RFOs cannot oblige NCP vessels to carry observers, VMS, electronic logbooks or otherwise comply with their measures, they can, and virtually all do, oblige their CPs not to allow landings or transshipments either at sea or in port of catches from NCP vessels unless it is established by positive proof that the fish were caught in a manner that did not undermine the effectiveness of the RFO's measures. Quite apart from lack of implementation of these measures due to concerns over disproportionate negative economic effects on developing country CP port states, the discriminatory effect of these measures which, in many RFOs are applied only against NCPs and not CPs may, however, be problematic.

Additionally, while they may not physically be able to stop NCP vessels from operating RFOs have sought to 'name and shame' IUU vessels through the adoption of 'negative lists' of IUU vessels. CPs are asked to provide information gathered from a range of sources to enable accurate designation to be made and measures have been adopted to deter or make impossible the reflagging of these vessels to CPs. This does not, however, deter reflagging to other NCPs.

Catch documentation schemes also play a role in addressing NCP fishing not merely by identifying its existence and extent. CPs may be called upon to prohibit importation of fish and fish products not accompanied by verifiable catch documentation. Denying market access should, in theory, make it unprofitable and therefore unpalatable for NCP vessels to continue to fish in a manner that undermines RFO measures. Similarly trade restrictive measures aim to disrupt market access by requiring CPs to refrain from importing specified fish or fish products from NCPs whose vessels have fished in contravention of RFO measures. However, the processes designed to implement such measures are cumbersome and lengthy, involving first identification, and then a request to rectify, followed by further assessment at yet another meeting of the RFO, followed by a threat to impose such measures. Given the annual nature of most RFO meetings, this process can take up to two or three years, during which time IUU fishing can and does continue. Then, when sanctions are imminent, the vessel can merely reflag to a non-designated NCP. In short, the greatest contribution of this approach to date seems to be to have encouraged the practice of flag-hopping and a more equitable distribution of registration royalties among a greater number of NCP states, not to mention promotion of port-hopping to offload in objecting or NCP ports which then act as 'launderers' of the IUU catch.

Increasingly RFOs are also adopting measures requesting CPs to board, inspect and, in some circumstances arrest, NCP vessels sighted fishing in contravention of RFO measures. This practice has been most extensively engaged in in the North Pacific, although NCP boarding and inspection has also been carried out in a number of other areas. With the exception of stateless or presumed stateless vessels this action is, however, dependent on the consent of the flag state. That consent may be manifested in a multilateral treaty such as the FSA, or a bilateral agreement or it may be granted on an *ad*

hoc basis. It may also be presumed where a flag state revokes registration upon the request of an inspecting state.

5.0 Some Thoughts on Strengthening Enforcement to Achieve Compliance in High Seas Fisheries

5.1 Some matters of principle

No discussion on strengthening enforcement would be complete if it did not start with the usual platitudes calling for better adherence to and implementation of existing international instruments. Certainly wider ratification of the Compliance Agreement and the FSA would assist in clarifying states' obligations. However, even in the absence of that wider ratification it is arguable that certain aspects of these agreements may now be binding on all states as a matter of customary international law.

It is arguable that states may now accept, as a matter of customary international law, the obligation to cooperate in respect of high seas fisheries through the medium of RFOs or other cooperative arrangements and that an essential element of that duty is the requirement for both member and non-member flag states alike to respect the measures adopted by RFOs either through compliance therewith or through restraint from fishing. Similarly, it is arguable that state practice indicates growing acceptance of the flag state responsibilities articulated in the Compliance Agreement and the FSA as obligations under customary international law. Failure by any flag state to comply with these obligations will constitute a breach of its international obligations. As a matter of international law, non-flag states may then be entitled to exercise secondary jurisdiction to induce compliance as a form of countermeasure.¹⁹

Given the central position ascribed to RFOs by the international community it seems appropriate that RFOs (and their members) should be the 'custodians' of this secondary jurisdiction as long as they, and the measures they adopt, meet the underlying test of legitimacy. In this respect other very important governance issues, not dealt with here, such as degree of agreement on specific measures, the availability and use of objection procedures, the adequacy of decision making procedures, rights to participation and allocation, and consistency and non-discrimination in the application of measures as between CPs and NCPs will all be relevant. Assuming these governance issues are adequately addressed, this strengthened institutionalisation of RFOs will go a long way to discouraging and avoiding further unilateral 'enforcement' acts and jurisdictional claims by states and toward strengthening the position of RFOs to act against the vessels of any state not fishing in compliance with their measures.

5.2 Some practical matters

¹⁹ For discussion of this point see R. Rayfuse, 'Countermeasures and High Seas Fisheries Enforcement' in (2004) 51(1) *Netherlands International Law Review* 41-76.

Even without engaging in protracted theoretical legal argument or discussion of broader governance issues, however, it appears that a number of practical improvements can be made within RFOs to better strengthen their ability to ensure compliance by CPs and NCPs with their conservation and management measures. A few broad ideas are presented here which, it is hoped, will stimulate further discussion.

With respect to control measures it is useful to remember that their objective is to establish what is being done, where, and by whom, in order to ascertain whether the RFO's conservation and management measures are being complied with or whether they are being undermined. Clearly no one measure will be the 'silver bullet'. Rather an integrated combination of measures which provide comprehensive real-time (or close thereto), accurate, meaningful and verifiable information in a cost-effective and non-discriminatory manner is needed.

To this end centralised, or dual, VMS and electronic catch or statistical documentation schemes should be the norm. When combined with information obtained from lists of vessels authorised to fish in the relevant RFO area this information can be used not only to promptly ascertain the state of a fishery but to immediately strengthen port controls and choke landings and transshipments of IUU catch. In this context further development of port state measures could be pursued with particular reference to the Model Scheme on Port State Measures to Combat IUU Fishing adopted by the FAO Technical Consultation to Review Port State Measures to Combat IUU Fishing in September 2004.²⁰ However, while extremely useful, port state controls, even combined with VMS and other technology, are still not capable of ascertaining whether certain types of RFO measures were violated at-sea. Other measures remain necessary.

One hundred percent non-national on board observers may be an ideal but it is recognised as a difficult one to achieve. Where observers are used, however, to the greatest extent possible they should be non-nationals trained, certified and deployed under the authority of the RFO. Given the apparently successful deterrence effect of on-board observers, attempts to fully replace observer programs with electronic logbooks should be resisted, at least until the technology is such that it can record precisely what an observer would record and sufficient other measures are in place to ensure the same level of compliance. Consideration could also be given to adopting procedures to ensure that information received from scientific observers which may be relevant to enforcement issues is accepted and acted upon.

Reciprocal at-sea boarding and inspection schemes should be adopted in all RFOs. As pressure on stocks continues RFOs are all moving inexorably towards the adoption of measures relating to gear and capacity restrictions, closed seasons and areas, and other measures eminently suited to at-sea boarding. The nature of the species being fished is increasingly becoming irrelevant. Existing schemes could be built on and strengthened through better and more integrated coordination between national agencies. The potential for such coordinated operations to successfully reduce IUU fishing has been amply

²⁰ FAO Fisheries Report No 759 (Rome, 2004).

demonstrated by the North Pacific Anadromous Fish Commission (NPAFC) in its fight against high seas driftnetting. Costs could be rationalised and minimised through coordination of inspection activity with VMS and other technology. Further rationalisation could also be made by provision for the gathering of intelligence information from a broad range of sources including trade, industry, VMS, airborne surveillance and other shipping, as is done in the North Pacific, and not limited to information obtained from designated inspection platforms only. To assuage concerns about possible abuse of boarding and inspection, compensation schemes could be developed within RFOs against which monetary claims could be made should physical damage occur. The funds for these schemes could be obtained from fines or other sanctions imposed on vessels committing violations.

While coastal states would both have an interest in and bear a responsibility for provision of inspection platforms, fishing states who are not coastal states could be obliged to provide inspection hardware and personnel or funds in lieu, possibly as a criterion for allocation of quota. These costs could be factored into the price of authorisations granted by the flag state. Alternately, costs could be calculated as a percentage of the contributions paid by CPs and be paid out of the budget of the RFO. States contributing to the inspection presence could be reimbursed or given an 'enforcement rebate'. Costs might also be funded, as in the case of compensation schemes, by the proceeds gained from fines or other sanctions imposed on vessels found to have committed violations. Costs for developing coastal states, in particular, could possibly be rationalised through greater participation in the FAOs Monitoring Control and Surveillance (MCS) Network and, possibly, application of the Assistance Fund which has now been established under Part VII of the FSA.

Moreover, RFOs might consider specifically authorising application of their reciprocal boarding and inspection schemes to NCPs. As between states parties to the FSA this would represent no difficulty. NCPs who are parties to the FSA have agreed to the application of these measures in any event. For NCPs who are not parties to the FSA, RFOs could more aggressively and more promptly pursue flag state consent for boarding and inspection on an *ad hoc* basis, as is done in the North Pacific, and adopt provisions announcing their intent to board, inspect and possibly arrest suspected IUU vessels in the event of non-response from the flag state within a certain time frame.

With respect to sanction measures, the objective is to punish non-compliance and deter future violation. To be effective in the long run these processes must be and must be seen to be fair, non-discriminatory and transparent. Any punishment must be credible and of sufficient severity to act as a deterrent to future violative conduct and as a guarantor of the ultimate success of the control measures. However, to maintain their legitimacy and deterrence effect, as well as the integrity of the system they are called in aid of, they should also be fair, consistent and, equally important, consistently applied.

As a first step, RFOs need to strengthen their compliance monitoring abilities both in respect of CPs and NCPs. Compliance of enforcement committees with effective terms of reference, should be able to receive and act on information in real time rather than await

the annual meeting of the RFO. To assist in ensuring prompt, appropriate and adequate responses RFOs could develop a range of measures aimed at ensuring greater transparency by which CPs can verify, at the point of alleged violation or inspection what steps have been taken by the flag state to verify and investigate allegations of violation. They could also develop a range of uniform sanctions or penalties to be applied in cases of violation of RFO measures which CPs must then implement in their domestic legislation. This harmonisation of domestic remedies would both ensure equality as between CPs and render assessment by the RFO of CP compliance more meaningful and effective. RFOs should also seek to carefully spell out the implications of various implementational failures. For example, where a CP has over a period of time failed to investigate or prosecute violations by nationals of RFO measures or to apply credible sanctions then RFOs might consider applying a range of disincentives going beyond public shaming and the trade restrictive measures approach to measures that temporarily reduce or deny quota allocation for failure effectively to implement or enforce RFO measures or requiring flag states to effectively 'ground' their vessels not merely by denying authorisations to fish but by requiring vessels to be held in port until such time as the sanction was lifted. This would require determination of the relevant time period over which failure was to be assessed and what exculpatory circumstances might be considered.

Additionally, a significant constraint on enforcement exists where RFOs have objection procedures which allow CPs to escape the application either of conservation and management measures or of enforcement measures or both. Measures should therefore also be considered to restrict or eliminate the use of objection procedures either for certain types of decisions or for all purposes. Analysis of the application of the procedures prescribed in the Western and Central Pacific Fisheries Commission (WCPFC) for overcoming misuse of the objection procedure may well prove useful in this respect.

With respect to NCPs, RFOs could work more effectively together to exchange, in real time, information on IUU fishing activities. In this way vessels engaged in IUU fishing might be publicly 'hounded' around the world's oceans making it increasingly difficult for them to transship or land their catch anywhere. This would require a strengthening of Secretariats to ensure adequate staff and technological resources to receive, assess, transmit and publicise relevant information.

Adoption of enhanced enforcement measures by RFOs will likely give rise to as many disputes as to their interpretation and application as they resolve. RFOs should therefore also consider establishing efficient and cost-effective dispute settlement mechanisms which can resolve disputes relating to the interpretation or application of those measures expeditiously and 'in house'.

6.0 Conclusion

Recent years have seen a flurry of activity at the global and regional levels, particularly within RFOs, aimed at promoting compliance with conservation and management

measures adopted by them and at preventing IUU fishing. Over the past 15 years this practice has made considerable inroads into the interpretation and application of the principles of freedom of fishing and exclusivity of flag state jurisdiction, identifying more clearly the responsibilities which are incumbent on all flag states and the situations in which RFOs and CP non-flag states can exercise secondary jurisdiction over vessels fishing in contravention of RFO measures where the flag state, whether CP or NCP, is unwilling or unable to comply with those responsibilities.

This paper has sought to present just a few ideas as to how RFOs might build on these recent developments to better improve their enforcement activities and thereby ensure greater compliance by fishing vessels of all states with the conservation and management measures adopted by those organisations. It is arguable that what has been presented here represents little more than a mere tinkering around the edges and that what is really needed is a relocation of the debate over IUU fishing from the law of the sea to the law relating to trade and economic matters. Certainly the issue of control of beneficial ownership and interests involved in IUU fishing, other than those actors physically operating at sea may not be conducive to resolution to under law of the sea rules. Alternately, or additionally, a fundamental reappraisal of the existing international legal regime governing high seas fisheries might be called for. Discussion and resolution of these issues are, however, beyond the scope of this paper. In the meantime, one thing is certain; given the human propensity to circumvent rules and restrictions placed on their activities, complacency is not an option. Only by taking compliance with and enforcement of conservation and management measures adopted by RFOs seriously can we ensure that there will be fish left in the high seas for our childrens' children's children.