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Dealing with the "Bad Actors" of Ocean Fisheries

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DEALING WITH THE “BAD ACTORS” OF OCEAN FISHERIES¹

Introduction

1. The great British poet, William Wordsworth, once wrote in praise of “a few strong instincts, and a few plain rules.” The international community has begun to develop a few strong instincts in the face of declining ocean fisheries. Politicians, fisheries managers, environmental organizations -- and responsible industry leaders -- now instinctively call for a stronger conservation ethic to govern marine fishing activities. Their instincts also tell them to act upon sound scientific advice, rather than merely to pay lip service to science. They also know, instinctively, that to achieve sustainable fisheries, we must support the “good actors” of ocean fisheries: those flag States and vessel owners who play by agreed rules.

2. To support the good actors of ocean fisheries, the international community has also begun to develop a few plain rules to deal effectively with the “bad actors.” Today, I hope to describe briefly who those bad actors are, how their actions jeopardize sustainable fisheries, and how the international community has, in fits and starts, been creating a few plain rules for dealing with them.

The Bad Actors

3. Just who are these bad actors? They take several forms and their actions are also diverse, making a simple definition elusive. But as a U.S. Supreme Court justice once said about pornography: although it’s difficult to define, I know it when I see it. Similarly, those of us engaged in the effort to achieve sustainable fisheries through international cooperation know the bad actors when we see them, even if their activities are not easy to describe concisely.

4. Just a few weeks ago, the United Nations Commission on Sustainable Development adopted some language to describe some of the bad actors of ocean fishing:

. . . States which do not fulfill their responsibilities under international law as flag States with respect to their fishing vessels, and in particular those which do not exercise effectively their jurisdiction and control over their vessels which may operate in a manner that contravenes or undermines relevant rules of international law and international conservation and management measures.

5. As we say in the United States, this is quite a mouthful. To help further the discussion, I will try to give some concrete examples of the bad actors in action.

6. The classic bad actor is a fishing vessel owner who reflags his vessel for the purpose of avoiding internationally agreed fishery regulations. When fishing vessels are reflagged for this purpose, we say that they have obtained “flags of convenience,” because the States who allow such vessels to fly their flags offer a convenient way for the vessels to avoid being bound by the agreed rules. These “flag of

¹ This paper was prepared by David Balton, Director, Office of Marine Conservation, U.S. Department of State. The views expressed in this presentation are solely of those of the author and do not necessarily reflect those of the U.S. Department of State or of the United States Government generally.

convenience States” are often unwilling or unable to control the fishing activities of the reflagged vessels; indeed, such lack of control is precisely what makes these States so attractive and convenient to irresponsible vessel owners. The vessels typically have no real connection to such a flag State. The master, crew and real financial control all derive from elsewhere.²

7. In such situations, the governments of flag of convenience States are bad actors, too. Without them, this type of reflagging could not occur.

8. Not all vessels operating under flags of convenience are reflagged vessels. Some vessels are registered in flag of convenience States from the time they are built. When such vessels, and their reflagged cousins, fish for stocks that are under the regulation of a regional fishery management organization, they produce the phenomenon of “non-member” fishing.

9. Why are owners of these non-member vessels such bad actors? As you know, a family of regional fisheries organizations and arrangements now exists around the world. Some, such as the Northwest Atlantic Fisheries Organization and the International Commission for the Conservation of Atlantic Tunas, are formal bodies; others are less formal arrangements. But formal or informal, these organizations are the best means -- really the only means -- available to the international community to regulate fishing for shared marine stocks.

10. Unfortunately, given the present depleted status of such stocks, fishing opportunities are -- or should be -- limited. It thus follows that the regional fisheries organizations have had to become more and more parsimonious in the quotas they adopt and more and more restrictive in the other fishery rules they set.

11. These smaller quotas and tighter restrictions, in turn, require significant sacrifice on the part of the Member States of regional fishery organizations. Every year the Member States work hard at the meetings of these organizations to adopt agreed fishing rules. The negotiations are often arduous, and only succeed -- if they succeed -- through the application of considerable political will. At the end of these meetings, the Member States then have the unenviable task of enforcing upon their unhappy fishing industries the smaller allocations and more onerous regulations just adopted.

12. Responsible vessel owners accept the smaller allocations and tighter regulations in the hope that today’s conservation efforts will yield greater fishing opportunities tomorrow. Other owners, however, reflag their vessels (or initially flag their new vessels) in States that are not members of the organization in question precisely to avoid these restrictions. These vessels then proceed to fish for the very same stocks in the very same region, unbound by the agreed rules. These non-member vessels are essentially free riders -- enjoying the benefits of conservation efforts and scientific research undertaken by Member States without bearing any of the costs. Not only is this grossly unfair -- it greatly compromises the integrity of the agreed rules and undermines the willingness of the remaining “good actors” to comply with them.

13. And when the good actors -- those fishing vessel owner who do not change flags -- start to violate the agreed rules, they become bad actors too.

14. I would include as a final category of bad actors those vessels that fish illegally within waters under the fishery jurisdiction of coastal States. The advent of Exclusive Economic Zones several decades ago placed vast areas of the planet’s surface under the fisheries jurisdiction of the world’s coastal States. For many of these States, however, their regulatory control over their EEZs remains nominal -- they have

² Of course, not all vessel owners reflag their vessels in order to avoid fishing restrictions. Many times fishing vessels are reflagged for completely legitimate reasons, including to gain legal access to regulated fisheries.

little ability to police fishing activities occurring more than a short distance from shore. In the face of dwindling stocks, the temptation to fish illegally in these areas often becomes too great to resist. The phenomenon of such illegal fishing is certainly growing; the only question is: by how much?

15. From these examples, perhaps we can distill a working definition of the bad actors of ocean fisheries: fishing vessel owners who do not observe agreed fishing rules (or EEZ fishing rules) and the flag States that fail to take action against them.

International Law Framework

16. Although the bad actors have undoubtedly been around for some time, their activities have only begun to draw serious political attention in the last decade or so, when a number of the world's key fish stocks began to collapse from overfishing. Until this decade, however, few international law tools existed to deal with the bad actors. The 1982 United Nations Convention on the Law of the Sea calls upon States to prevent overfishing within their EEZs, to ensure that their vessels only fished in other State's EEZs with permission, and to cooperate with other States in the conservation of high seas fisheries. The general obligations constitute a vital regulatory framework, but have not proved specific or comprehensive enough to achieve sustainable fisheries overall.

17. The 1982 Law of the Sea Convention also reaffirmed the well-established principle of *exclusive flag State jurisdiction* over vessels on the high seas. Under the Convention, generally speaking, only the flag State may exercise fisheries jurisdiction over vessels operating on the high seas. In recent years, this principle has become something of a safe haven for the bad actors. The flag States that are unable or unwilling to regulate their fishing vessels on the high seas often hide behind the principle of exclusive flag State jurisdiction to deny any *other* State the ability to take action against such vessels when they undermine agreed fishery rules. What results is an unfair dual system -- smaller quotas and stricter fishing regulations for the good actors and a regulatory vacuum for the bad actors.

18. Virtually all members of the international community continue to endorse the principle of exclusive flag State jurisdiction as reaffirmed in the Law of the Sea Convention. However, as I hope to demonstrate, the international community has now articulated a related principle: the exclusive jurisdiction over high seas fishing vessels enjoyed by flag States necessarily implies a corresponding duty. Flag States must ensure that their fishing vessels on the high seas do not undermine agreed fishery rules. Failure of flag States to fulfill this duty will have consequences, including, in some cases, some loss of exclusive authority over those vessels.

1993 FAO Compliance Agreement

19. The first treaty of global application that sought to address this problem of bad actors is the 1993 FAO Compliance Agreement, whose formal name is the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. The Compliance Agreement is an integral part of the Code of Conduct for Responsible Fisheries and is the only part of the Code that is legally binding.

20. The FAO Compliance Agreement in fact began specifically as an effort to combat the practice of the reflagging of fishing vessels to avoid agreed fishing rules. As the negotiations on the Compliance Agreement proceeded, the scope of its provisions became broader. Instead of dealing solely with the reflagging phenomenon, the Compliance Agreement elaborates a set of specific duties for *all* flag States to ensure that their vessels do not undermine conservation rules.

21. Under the Compliance Agreement, a flag State may only permit its fishing vessel to operate on the high seas pursuant to specific authorization. A flag State may not grant such authorization unless it is

able to control the fishing operations of the vessel. If a vessel undermines fishery rules established by a regional fishery organization, the flag State must take action against the vessel including, in many cases, rescinding the vessel's authorization to fish on the high seas -- even if the flag State is not a member of the regional fishery organization.

22. In elaborating these duties, the Compliance Agreement does not explicitly alter the principle of exclusive flag State jurisdiction. Indeed, one might say that the Compliance Agreement is *premised* on the principle of exclusive flag State jurisdiction. Implicitly, however, the Compliance Agreement is sending another message to the bad actors: if flag States do not bring their high seas fishing vessels under control, the international community will be forced to find other ways to deal with the problem.

1995 UN Fish Stocks Agreement

23. The 1995 UN Fish Stocks Agreement basically incorporates these provisions of the Compliance Agreement in Article 18, concerning "Duties of the Flag State," and in Article 19, concerning "Compliance and Enforcement by the Flag State." One explanation for this overlap between the two treaties is that the negotiations on both of them took place at roughly the same time (although the Fish Stocks Agreement took considerably longer to conclude) and were conducted by many of the same individuals.

24. The Fish Stocks Agreement nevertheless takes matters a step farther than the Compliance Agreement in dealing with bad actors.

25. Rather than review the entirety of the Fish Stocks Agreement, with which the participants in this Conference are already familiar, I would like to highlight a few key provisions that are already proving helpful in dealing with the bad actors of ocean fisheries.

26. Articles 8(3) and 8(4) of the Fish Stocks Agreement seek to promote the integrity of regional fisheries organizations and the measures they adopt. To this end, they set forth "a few plain rules" that are particularly pertinent to the phenomenon of "non-member fishing." The first rule is that all States whose vessels fish for marine stocks regulated by regional fishery organizations should either join those organizations or, at a minimum, apply the fishing restrictions adopted by those organizations to their flag vessels. The second rule follows from the first: regional fishery organizations should be open to all States with a real interest in the fisheries concerned. The final rule also builds on the others: only Member States of regional fishery organizations (or other States that apply the fishing restrictions adopted by those organizations) shall have access to the regulated fishery resources.

27. When President Clinton transmitted the Fish Stocks Agreement to the U.S. Senate, he stated that these rules, "if properly implemented, would greatly reduce the problems of 'non-member' fishing that have undermined the effectiveness of regional fishery organizations." I believe this assessment remains true today. If all flag States took these few plain rules to heart, non-member fishing would, almost by definition, largely disappear.

28. To bolster these few plain rules, the Fish Stocks Agreement also includes Article 17, concerning "Non-Members and Non-Participants." This Article provides quite simply that States which do not join regional fishery organizations, and which do not apply the fishing restrictions adopted by those organizations to their flag vessels, are not discharged from their obligation to cooperate with other States. In particular, they shall not authorize their vessels to fish for the regulated stocks.

29. Article 17 further requires the Member States of the relevant organization to take affirmative measures to deter non-member fishing, providing such measures are consistent with the Fish Stocks Agreement and international law in general. As I will discuss momentarily, this notion of joint action to deter non-member fishing is already taking root in a number of regional fishery organizations.

30. But, as professors used to ask in seminars on arms control, what if deterrence fails? For such situations, the Fish Stocks Agreement contains Articles 21 and 22. These articles are a set of carefully negotiated provisions that permit, under certain circumstances, States other than flag States to board and inspect fishing vessels on the high seas and, where they find evidence that the vessels have engaged in serious violations of agreed fishing restrictions, to take limited enforcement action to prevent further violations.

31. A number of governments that have not yet ratified the Fish Stocks Agreement have expressed concerns that these provisions stray too far from the principle of exclusive flag State jurisdiction. The more I have considered these provisions, however, the more I have come to see how they mostly codify existing international practice.

32. First, a number of regional fishery organizations and arrangements, including NAFO, the North Pacific Anadromous Fish Commission and the Central Bering Sea Pollock Convention, had set up joint boarding and inspection regimes even before the Fish Stocks Agreement was negotiated. Second, the Fish Stocks Agreement retains the very crux of exclusive flag State jurisdiction: no other State may take action against a fishing vessel on the high seas without the consent of the flag State. However, like the NAFO, NPAFC and Central Bering Sea Conventions that preceded it, the Fish Stocks Agreement gives flag States a mechanism to provide such consent in advance -- by becoming party to the Fish Stocks Agreement.

33. Finally, and perhaps most importantly, the Fish Stocks Agreement expressly recognizes the authority of the flag State to require any other State that may be taking enforcement action against one of its vessels to turn over that vessel to the flag State -- provided that the flag State is ready, willing and able to take effective enforcement action against the vessel itself.

34. In short, the Fish Stocks Agreement secures the rights and prerogatives of responsible flag States, while giving other responsible States certain limited authority to deal with bad actors who have not been deterred from their bad actions.

35. I should say a brief word about at least two other provisions of the Fish Stocks Agreement that are designed to address illegal fishing in EEZs. In cases where there is evidence of such fishing, Article 20(6) requires the flag State to cooperate with the coastal State in taking enforcement action. Moreover, Article 25, which provides for cooperation with developing States, calls specifically upon Parties to render assistance to developing coastal States to help them achieve greater enforcement capacity within their EEZs.

36. Finally, Article 23 of the Fish Stocks Agreement calls upon port States to exercise their prerogatives in ways that can address the problems caused by the bad actors. Along these lines, some RFMOs have already adopted schemes, discussed below, to prevent the landing of fish caught by non-member vessels in ways that undermine agreed fishing rules.

Examples of Regional Fishery Organization Actions

37. Today, neither the FAO Compliance Agreement nor the Fish Stocks Agreement is yet in force. But the principles and approaches contained in those treaties are already having effect, and a number of the regional fishery bodies are beginning to take decisive action against the bad actors involved in their fisheries.

38. To date, two approaches have been adopted to deal with the problem of non-member fishing. One approach uses trade as a lever. This approach was developed by the International Commission for the Conservation of Atlantic Tunas (ICCAT) in response to growing evidence that fishing activities of vessels

from several non-members of ICCAT were adversely affecting ICCAT's efforts to conserve bluefin tuna and swordfish.

39. In 1994, ICCAT adopted the Bluefin Action Plan Resolution. This Plan provides a process for identifying non-members whose vessels are engaged in fishing activities that diminish the effectiveness of ICCAT measures for bluefin tuna. Such non-members are given a year to rectify their fishing practices. If they do not do so, ICCAT can authorize its Members to prohibit the importation of bluefin tuna products from the non-members in question.

40. The very next year, ICCAT identified Belize, Honduras and Panama as non-members whose vessels were fishing in a manner that diminished the effectiveness of ICCAT's bluefin tuna measures. When the governments of these nations failed to rectify the fishing practices of their vessels, ICCAT instructed its Members to prohibit the importation of bluefin tuna products from them. These trade embargoes remain in effect.³

41. ICCAT has also adopted a similar approach for dealing with non-member fishing that diminishes the effectiveness of ICCAT's swordfish measures. ICCAT has recently identified the same three States under this procedure, but has not yet imposed trade restrictions.

42. ICCAT's use of multilateral trade restrictions represents the first time that such measures have been authorized by an international fishery management organization to ensure cooperation with agreed conservation and management measures. One would expect that other regional fishery organizations will consider similar steps if non-member fishing is not otherwise brought under control.

43. The other approach, first developed by the NAFO, involves restrictions on landings of fish caught by non-member vessels. Many fish stocks managed by NAFO are in serious trouble. NAFO members have imposed moratoria on fishing for several stocks, causing considerable hardship on those who formerly depended on these harvests for their livelihoods. NAFO enjoys one advantage over ICCAT, however. Because the NAFO Regulatory Area is a relatively compact high seas area, a NAFO joint inspection regime allows for close monitoring of all fishing activity in the Regulatory Area, by members and non-members alike.

44. In 1997, NAFO adopted a "Scheme to Promote Compliance with the Conservation and Enforcement Measures Established by NAFO." The Scheme sets up a presumption that any non-member vessel that has been observed fishing in the Regulatory Area is undermining the NAFO fishing restrictions. This presumption reflects the fact that all of the valuable groundfish stocks in the Regulatory Area are under moratorium or fully allocated. Even fishing activity for less valuable fish stocks cannot be undertaken without serious, adverse bycatch of depleted fish stocks. If a non-member vessel sighted fishing in the Regulatory Area later enters a port of a NAFO member, the NAFO member may not permit the vessel to land or transship any fish until the vessel has been inspected. If the inspection shows that the vessel has on board any species regulated by NAFO, landings and transshipments are prohibited unless the vessel can demonstrate that the species were either harvested outside the Regulatory Area or otherwise in a manner that did not undermine NAFO rules.

45. The Commission for the Conservation of Antarctic Marine Living Resources has also adopted a modified version of the NAFO Scheme and is currently considering other related measures, including a catch certification scheme. I am also aware that, for matters closer to this part of the world, the North-East

³ One of the nations under ICCAT's bluefin tuna trade embargo recently took the step of joining ICCAT, presumably for the purpose of having the trade embargo lifted. Panamanian vessels will henceforth be bound to observe all ICCAT measures.

Atlantic Fisheries Commission is also working to adopt its own program, which will be based on the NAFO experience.

FAO Initiatives

46. This spring, the international community has devoted substantial additional attention to the problem of bad actors. The Government of Australia, in particular, is to be commended for its leading role in this endeavor and for coming up with a new acronym -- IUU fishing -- which stands for “illegal, unauthorized and unregulated” fishing. This phrase, although perhaps not as mellifluous as one might hope, may come as close as the English language permits in capturing the problems posed by the bad actors in a succinct way.

47. In February, the FAO Committee on Fisheries adopted a far-sighted International Plan of Action to address the problem of overcapacity in many of the world’s fisheries. One aspect of that Plan of Action calls upon States to work together in addressing IUU fishing. Two weeks after the COFI meeting, the FAO convened a follow-up ministerial-level meeting on global fisheries issues. At this meeting, the fisheries ministers of the world issued a declaration in which they agreed that the FAO would give priority to develop a full Plan of Action dealing exclusively with IUU fishing, a step that the Commission on Sustainable Development endorsed just last month.

48. Where will these actions take us? It is too soon to tell. One promising development is that policy makers are beginning to think more creatively in approaching the problem of bad actors. For example, within the International Maritime Organization, efforts have been underway to control the bad actors of *ocean shipping* -- those flag States and vessel owners who do not abide by agreed rules in that area. In light of this, the CSD last month encouraged the IMO to work with the FAO and the UN itself in dealing with the parallel problems together.

Conclusion

49. The recent efforts of the international community to deal with the bad actors reflect “a few strong instincts” toward conservation and a heightened need for fair play in ocean fisheries. The international community, on both global and regional bases, is developing “a few plain rules” for the bad actors as well. In time, we may see the plainest rule of all: unless bad actors become good actors, their right to fish will be in jeopardy.