

2000

Stateless Fishing Vessels: The Current International Regime And A New Approach

Deirdre M. Warner-Kramer

Krista Canty

University of Maine School of Law

Follow this and additional works at: <http://digitalcommons.maine.maine.edu/oclj>

Recommended Citation

Deirdre M. Warner-Kramer & Krista Canty, *Stateless Fishing Vessels: The Current International Regime And A New Approach*, 5 Ocean & Coastal L.J. (2000).

Available at: <http://digitalcommons.maine.maine.edu/oclj/vol5/iss2/3>

This Article is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Ocean and Coastal Law Journal by an authorized administrator of University of Maine School of Law Digital Commons. For more information, please contact mdecrow@maine.edu.

STATELESS FISHING VESSELS: THE CURRENT INTERNATIONAL REGIME AND A NEW APPROACH

Deirdre M. Warner-Kramer and Krista Canty***

I. INTRODUCTION

Recent years have witnessed numerous reports of vessels without nationality fishing in contravention of international conservation and management measures. During the summer of 1998, for example, four vessels registered to Sierra Leone were sighted fishing on the high seas in the Northwest Atlantic Fisheries Organization (NAFO) regulatory area. These vessels were known throughout the international community to be flying "flags of convenience"—having only the most tenuous link to their flag state. Bowing to direct diplomatic pressure, Sierra Leone refuted the vessels' registration, rendering them stateless and, therefore, subject to the jurisdiction of any state that approached them on the high seas.

Such situations are becoming more common. The apparent increase in vessels fishing on the high seas without the protection of a flag state likely has several causes. Many states, like Sierra Leone, known to grant flags of convenience, have yielded to direct diplomatic pressure and purged their registries of illegitimate vessels. Others have begun voluntarily applying the principles underlying the 1995 United Nations Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks¹ and the 1993 Food and Agriculture Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas.² Unfortunately, neither the

* International Affairs Officer, Office of Marine Conservation, Department of State. The views expressed in this article are solely those of the author and do not necessarily reflect those of the U.S. Department of State or of the United States Government.

** University of Maine School of Law, Class of 2001.

1. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, opened for signature Dec. 4, 1995, 34 I.L.M. 1542 [hereinafter Fish Stocks Agreement] (not in force).

2. Food and Agriculture Organization: Agreement to Promote Compliance with

international community nor the United States has effective tools at its disposal to deal with stateless vessels fishing illegally on the high seas.

This Article reviews the current status of international and United States domestic law applicable to vessels without nationality seen fishing the high seas in contravention of international conservation and management measures. The discussion begins in Part II with a survey of the international regime of the high seas, and reviews the importance of the exclusivity rule of flag state jurisdiction on the high seas and exceptions therein, including stateless vessels and vessels assimilated to stateless status. Part III is a brief analysis of international tools and how they interact in the current international legal regime of the high seas. Part IV outlines the High Seas Fishing Compliance Act of 1995 as it is currently written, and suggests a legislative change that would allow the United States to enforce international and multilateral agreements against stateless vessels and those assimilated to stateless status seen fishing on the high seas.

II. HIGH SEAS

A. Freedom of the High Seas

"The high seas are open to all states, and no state may validly subject any part of them to its sovereignty."³ From this customary rule of international law, codified in the 1982 United Nations Conference on the Law of the Sea (UNCLOS),⁴ it follows that no state has the right to prevent other states' vessels from using the high seas for any lawful purpose. All states enjoy freedom on the high seas, though the Geneva Convention on the High Seas (High Seas Convention)⁵ provides that this freedom "shall be exercised by all states with reasonable regard to the interest of other states in their exercise of the freedom of the high seas."⁶ UNCLOS subjects the right to fish on the high seas to several general conditions, including adherence to other treaty obligations assumed by a state,⁷ respect for the

International Conservation and Management Measures by Fishing Vessels on the High Seas, adopted Nov. 24, 1993, 33 I.L.M. 969 [hereinafter Compliance Agreement] (not in force).

3. R.R. CHURCHILL AND A.V. LOWE, *THE LAW OF THE SEA* 165 (2nd ed. 1988) [hereinafter CHURCHILL].

4. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, art. 89, 21 I.L.M. 1261, 1267 (1982) [hereinafter UNCLOS].

5. Geneva Convention on the High Seas, *opened for signature* Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962) [hereinafter High Seas Convention].

6. *Id.* art. 2.

7. See Christopher C. Joyner, *Compliance and Enforcement in New International Fisheries Law*, 12 TEMP. INT'L & COMP. L.J. 271, 278 (1998).

rights and duties of coastal states,⁸ and observance of the fundamental obligation to protect and preserve the marine environment.⁹ Though the United States is not a Party to UNCLOS, it does treat the majority of the Convention as customary international law.

As a general rule, ships on the high seas are subject to the exclusive jurisdiction and authority of the state whose flag they lawfully fly.¹⁰ This principle of exclusivity of flag state jurisdiction is firmly rooted in the order of freedom of the high seas. The international community has traditionally viewed a fishing vessel as a floating piece of the territory of the nation whose flag it flies. Thus, it has followed in customary international law that, save exceptional circumstances, a flag state has the same exclusive right to exercise legislative and enforcement jurisdiction over its vessels on the high seas as it does over its territory.¹¹

The exclusivity rule was enunciated in the Permanent Court of International Justice in the *Case of the S.S. Lotus*:

[V]essels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them.¹²

This principle was codified in the High Seas Convention,¹³ and re-codified in UNCLOS.¹⁴ In *Lauritzen v. Larsen*,¹⁵ the United States Supreme Court emphasized the flag state's regulatory authority and corresponding responsibility, stating that "[e]ach State under international law may determine for itself the conditions on which it will grant its nationality . . .

8. See *id.* (citing UNCLOS, *supra* note 4, arts. 1, 87).

9. See *id.* (citing UNCLOS, *supra* note 4, arts. 117–19).

10. See Robert C.F. Reuland, *Interference with Non-National Ships on the High Seas: Peacetime Exceptions to the Exclusivity Rule of Flag State Jurisdiction*, 22 VAND. J. TRANSNAT'L L. 1161, 1164 (1989).

11. See Rachel Canty, *Limits of Coast Guard Authority to Board Foreign Flag Vessels on the High Seas*, 23 TUL. MAR. L.J. 123, 125 (1998). Customary international law results from a general practice of states followed out of a sense of legal obligation. See *id.* All states are bound by customary international law unless they have consistently and conspicuously engaged in a practice contrary to the recognized principle of international law. See, e.g., HENRY STEINER, ET AL., TRANSNATIONAL LEGAL PROBLEMS 240–44 (4th ed. 1994).

12. Case of the S.S. "*Lotus*" (Fr. v. Turk.), 1927 P.C.I.J. (Ser. A) No. 10, at 25.

13. See High Seas Convention, *supra* note 5, at arts. 6(1), 13. The High Seas Convention provides that "[s]hips shall sail under the flag of one State only and . . . shall be subject to its exclusive jurisdiction on the high seas." *Id.* art. 6(1).

14. UNCLOS, *supra* note 4, art. 92(1).

15. *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

thereby accepting responsibility for [a vessel] and acquiring authority over it."¹⁶

Nationality of ships is the basis upon which order of the high seas is maintained. The elaborate system of rules established for the high seas is meaningless unless a ship lawfully sails under the flag of a recognized state. The International Law Commission stated that "[t]he absence of any authority over ships sailing the high seas would lead to chaos. One of the essential adjuncts to the principle of the freedom of the seas is that a ship must fly the flag of a single State . . ."¹⁷ Thus, according to both international and domestic law, all vessels must have a nationality.¹⁸

B. Exceptions to Exclusivity Rule

The exclusivity of flag state jurisdiction is not absolute; there are circumstances that might render a vessel stateless. Current international law holds that a ship is stateless if it lacks proper registration or is not entitled to fly the flag of a recognized state. UNCLOS opens the possibility of another type of stateless vessel—one that does not have a genuine link to the flag state.¹⁹ This requirement, however, is not yet reflected in customary international law. In general, the rule remains that a ship is not stateless if it is registered with a recognized state, no matter how tenuous its connection to that state may be.

Although "statelessness" is not per se repugnant to the law of nations, in order to protect the international regime of the high seas, stateless vessels are generally subject to the jurisdiction of all nations.²⁰ In the case of *Molvan v. A.G. for Palestine*,²¹ the court held that stateless vessels enjoy the protection of no state, implying that if jurisdiction were asserted over such a vessel no state would be competent to complain.²² This means that public ships of every state may approach any private vessel encountered upon the high seas to ascertain her identity and nationality. If identity or nationality is in doubt, UNCLOS gives a public ship the right to board the suspect

16. *Id.* at 584.

17. *Report of the International Law Commission to the General Assembly*, 11 U.N. GAOR Supp. (No. 9) art. 30, comment(1) at 25, U.N. Doc. A/3159 (1956), reprinted in 1 Y.B. INT'L L. COMMISSION, 253, 279, U.N. Doc. A/CN.4/SER.A/1956/Add.1.

18. See H. Edwin Anderson, III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 TUL. MAR. L.J. 139, 141 (1996) (citing David Matlin, Note, *Re-evaluating the Status of Flags of Convenience Under International Law*, 23 VAND. J. TRANSNAT'L L. 1017, 1019 (1991)).

19. See UNCLOS, *supra* note 4, at 1287 (stating "... [t]here must exist a genuine link between the State and the ship.").

20. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 522 (1987).

21. *Molvan v. A.G. for Palestine*, 81 L.I.L. Rep. 277 (1948).

22. See CHURCHILL, *supra* note 3, at 172.

vessel and investigate its right to fly its flag.²³ Should examination of the vessel's papers and documentation discharge the original suspicion, the vessel may then proceed on its way. However, if it is determined that the vessel is without nationality, the investigating ship has the right to search the suspect vessel to discover evidence that would confirm the original suspicions of the public ship. If such evidence is found, the investigating ship may arrest the suspect vessel and place it under the jurisdiction of the investigating ship's flag state.

There is currently only one way that ships properly registered with a state may be rendered stateless. UNCLOS provides that "[a] ship which sails under the flags of two or more states, using them according to convenience, may not claim any of the nationalities in question with respect to any other state, and may be assimilated to a ship without nationality."²⁴ As previously discussed, order on the high seas depends on the existence of a flag state competent to ensure that ships under its flag adhere to international law. A vessel that uses two or more flags "according to convenience" violates the international regime of the high seas to the same extent as one with no flag at all.²⁵ Thus, a vessel may use no more than one flag at a time unless so entitled under international law.²⁶

III. FISHING VESSELS ON THE HIGH SEAS

As a result of chronic overfishing, the world's fisheries are in crisis. According to the United Nations Food and Agriculture Organization, approximately sixty percent of the world's fisheries are fully exploited or overfished.²⁷ There are simply too many boats chasing too few fish, both legally and illegally. In this atmosphere of competition, a fundamental conflict arose a decade ago between distant-water fishing nations and coastal states. As stocks close to home became fully exploited, vessels traveled greater distances in search of new fisheries. To protect their

23. Art. 110 of UNCLOS grants the right of visit boarding, which is the basis for the boarding, to determine whether a vessel is validly registered. See UNCLOS, *supra* note 4, art. 110. See also, High Seas Convention, *supra* note 5, art. 22.

24. UNCLOS, *supra* note 4, art. 92(2); see also High Seas Convention, *supra* note 5, art. 6(2).

25. See Reuland, *supra* note 10, at 1206 (citing H. MEYERS, THE NATIONALITY OF SHIPS 173 (1967)).

26. See UNCLOS, *supra* note 4, art. 92(1). A ship may be entitled to fly two or more flags as long as it does not intend to have double factors that connect it for different purposes to different states. See Reuland, *supra* note 10, at 1206 (citing 2 D. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 754-55 (I. Shearer ed. 1984)).

27. See U.N. Food and Agriculture Organization, *The State of World Fisheries and Aquaculture, at Part I World Review of Fisheries and Aquaculture* (visited Mar. 26, 2000) <<http://www.fao.org/docrep/w9900e/w9900e00.htm>>.

domestic fisheries, coastal states sought increased jurisdiction over marine resources beyond their exclusive economic zones (EEZs). At the same time, the distant-water nations, championing the principle of freedom on the high seas in UNCLOS, fought to obtain greater access to high seas fishery resources.

This conflict highlighted a major weakness in UNCLOS—it outlines only general rules of fisheries conservation and management and has little to say about stocks that straddle or migrate between the high seas and EEZs, or consequences for overfishing the high seas. In the early 1990s, the international community responded with a series of international fishery instruments, culminating in the Fish Stocks Agreement and the Compliance Agreement.

A. 1993 Food and Agriculture Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas

UNCLOS codified the well-established rule of exclusive flag state jurisdiction over vessels on the high seas. But flag states are often unable or unwilling to regulate their fishing vessels and even exploit the exclusivity rule to deny other states the ability to enforce international law against their vessels.²⁸ In the early 1990s, as the extent of the crisis in marine fisheries became clear, individual nations and regional management organizations began strengthening fisheries management and drastically reducing allowable catches. Many unscrupulous vessel owners reacted by changing their ships' flags to nations with no oversight of their fishing practices, or to states not participating in regional management agreements.

Fearing that reflagging vessels would seriously undermine multilateral agreements on the conservation and management of high seas fisheries, the international community adopted the Compliance Agreement in November 1993. Although the original impetus behind the Compliance Agreement was to deal with the problems of flag of convenience fishing, it grew into a tool delineating the duties of all flag states. It sets out three fundamental flag state responsibilities: each must take measures to ensure vessels flying its flag do not undermine the effectiveness of international conservation and management regimes; each must prevent its vessels from fishing on the high seas unless they have been authorized to do so; and each must ensure it can exercise effective control over vessels fishing under its flag on the high seas. The negotiators framing the Agreement intended the first responsibil-

28. See David Balton, *Dealing with the "Bad Actors" of Ocean Fisheries* (visited Mar. 20, 2000) <http://www.state.gov/www/policy_remarks/1999/990520_balton_fisheries.html>.

ity to apply to rules set by all regional fisheries organizations, whether or not a given flag state is a member.²⁹ The Agreement also calls upon states to cooperate in identifying vessels fishing in contravention of multilateral agreements; once a vessel is known to have undermined conservation and management measures, no party may authorize that vessel to fish on the high seas.³⁰

Although the Agreement has yet to enter into force—to date only fifteen of twenty-five necessary instruments of acceptance have been deposited—many nations have begun voluntarily applying its principles. As the “genuine link” provision of the Compliance Agreement becomes a part of customary international law, vessel owners will find it harder to reflag to countries that are unable, or unwilling, to enforce international conservation and management measures. Increased application of this requirement will not only inhibit vessels from acquiring flags of convenience in the first place, but also result in additional states refuting their flags of convenience. As with the four Sierra Leone vessels, a combination of voluntary application of the genuine link requirement and diplomatic pressures resulted in a flag state anticipatorily refuting its flags when the vessels were known to be fishing in violation of international law. Likewise, it is expected that additional high-seas fishing vessels flying flags of convenience will be rendered stateless.

*B. 1995 United Nations Agreement for the Conservation and
Management of Straddling Fish Stocks and
Highly Migratory Fish Stocks*

UNCLOS constitutes a vital regulatory framework, though it lacks specific provisions delineating the legal rights and duties of states that harvest fish swimming between EEZs and the adjacent high seas. This lack of provisions hindered effective implementation or enforcement of conservation measures for straddling or migratory stocks, and made conflicts between coastal states and distant water nations inevitable. The Fish Stocks Agreement was negotiated to build upon the general provisions of UNCLOS and address jurisdiction and management of straddling stocks.

This Agreement specifies mechanisms for cooperation between coastal states and distant-water nations, particularly the use of regional organiza-

29. See Stetson Tinkham, *Flag of Convenience and Illegal, Unregulated, and Unreported Fishing Threats to Sustainable Fishing*, Address at Conference on Fisheries Monitoring Control and Surveillance, Santiago, Chile (Jan. 25–26, 2000) (on file with the *Ocean and Coastal Law Journal*).

30. See Compliance Agreement, *supra* note 2, art. III, at 971; see also *id.* art. V, at 973.

tions, to ensure the long-term sustainability of straddling stocks.³¹ Notably, the Agreement prescribes a precautionary approach to fishery management.³² In seeking compatible conservation and management measures in areas of national jurisdiction and those on the high seas, the Agreement encourages states to cooperate to ensure the sustainability of stocks in their entirety regardless of jurisdictional location.³³ To date, twenty-six states of the needed thirty to bring the Fish Stocks Agreement into force have deposited instruments of ratification.

Articles 8(3) and 8(4) of the Fish Stocks Agreement seek to promote the integrity of regional fisheries management organizations (RFOs) by requiring that all states whose vessels fish for regulated marine stocks should either join the RFOs or apply the adopted fishing restrictions to their flag vessels.³⁴ Restricting access to regulated fishery resources to states that are members of RFOs, or that agree to apply the fishing rules established by such organizations,³⁵ has created conflict. Under traditional concepts of international law all states have the right to fish on the high seas, whether or not they are members of the organization that manages the fisheries in that high seas area.³⁶ Disputes often arise between RFO members and non-members who exercise their right and do not cooperate with such organizations.³⁷ Because states that are not members of RFOs have not undertaken obligations associated with such membership, they have no vested interest in conservation efforts and stand to benefit from harvesting as many fish as possible, as quickly as possible.

To address this, the Fish Stocks Agreement establishes new precedents for high seas enforcement. Article 21 allows non-flag states to board and inspect member and non-member vessels fishing on the high seas to ensure compliance with conservation and management measures established by RFOs.³⁸ Further enforcement action, including ordering a fishing vessel to port, may be taken in the case of serious violations by vessels whose flag

31. See Fish Stocks Agreement, *supra* note 1, art. 5, at 1550; *id.* art. 8, at 1553.

32. See *id.* art. 6, at 1551.

33. See *id.* art. 2, at 1549; *id.* art. 7, at 1552.

34. See Balton, *supra* note 28, at 5 (citing Fish Stocks Agreement *supra* note 1, art. 8, at 1553, which states: "Only those States which are members of such an organization . . . or which agree to apply the conservation and management measures established . . . shall have access to the fishery resources to which those measures apply.").

35. See Fish Stocks Agreement, *supra* note 1, art. 17, at 1559.

36. See generally U.S. Deputy Assistant Secretary of State for Oceans, Fisheries, and Space Mary Beth West, *New International initiatives to Restore and Sustain Fisheries* at a World Wildlife Conference in Lisbon (September 15, 1998).

37. See, e.g., Fisheries Jurisdiction (Spain v. Can.), Jurisdiction (Int'l Ct. Just. Dec. 4, 1998) <<http://www.icj-cij.org>> (dismissing on jurisdictional grounds Spain's application against Canada for seizing a Spanish vessel on the high seas).

38. See generally Fish Stocks Agreement, *supra* note 1, at arts. 1, 21.

state either cannot or will not exercise proper control over them.³⁹ Regardless of the violation, however, if a vessel is lawfully flying a flag and the flag state asserts jurisdiction, the parties to the RFO are without legal recourse to enforce established measures on the high seas, despite it being a regulated area.

Various RFOs have addressed the problem of “free for all” non-member fishing activity in two ways. First, some RFOs have imposed trade sanctions on non-member states, such as prohibiting the import of fish harvested by them.⁴⁰ Second, other RFOs have regulated or restricted landings of fish caught by non-member vessels.⁴¹

C. The NAFO Experience

The activities of non-member fishing vessels have presented a persistent problem in the NAFO Regulatory Area (NRA).⁴² In response to the serious depletion of managed fish stocks, NAFO members agreed to make individual sacrifices and impose moratoria on several of the stocks. Although the number of non-member vessels caught fishing in the NRA has decreased significantly—from forty-seven in 1988 to five in 1998—non-members continue to target fish stocks under moratoria or fully allocated to NAFO members.⁴³

In 1997, NAFO adopted a “Scheme to Promote Compliance by Non-Contracting Party Fishing Vessels with Conservation and Enforcement Measures Established by NAFO.”⁴⁴ This Scheme establishes a presumption that any non-member vessel sighted fishing in the NRA is undermining NAFO conservation and management measures. Should the vessel then enter the port of any NAFO member, that member must inspect the vessel

39. See *id.* arts. 6–8, 21.

40. For example, the International Commission for the Conservation of Atlantic Tunas (ICCAT) has adopted schemes to impose multilaterally-agreed trade restrictions on both members and non-members alike who undermine ICCAT conservation and management measures governing Atlantic bluefin tuna and Atlantic swordfish.

41. This approach was pioneered by NAFO, as discussed below, but other organizations such as ICCAT and the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) have instituted catch certification schemes that essentially serve the same purpose.

42. See GOV'T OF THE U.S., IMPLEMENTATION OF THE KEY PROVISIONS OF THE UNITED NATIONS AGREEMENT ON THE CONSERVATION AND MANAGEMENT OF STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS BY REGIONAL FISHERIES MANAGEMENT ORGANIZATIONS AND ARRANGEMENTS 8 (Dec. 1998) [hereinafter KEY PROVISIONS].

43. See *id.*

44. *Scheme to Promote Compliance by Non-Contracting Party Vessels with the Conservation and Enforcement Measures Established by NAFO* (visited Mar. 10, 2000) <<http://www.nafo.ca/management/scheme.pdf>>.

before it lands or transships any fish. Should the inspection reveal NAFO regulated species, landings and transshipments are prohibited unless the vessel can demonstrate that the species were harvested either outside the NRA or otherwise in a manner that did not undermine NAFO rules.

At its 1998 Annual Meeting, the NAFO Fisheries Commission strengthened the scheme by requiring that member enforcement officials report sightings of non-member fishing activity in the NRA.⁴⁵ The fishing vessels of NAFO members are then prohibited from receiving transshipments from those sighted and reported vessels. More recently, at its Twenty-first Annual Meeting in the fall of 1999, NAFO adopted a statement extending the Scheme to vessels "for which there are reasonable grounds for suspecting them to be without nationality."⁴⁶ Any stateless vessel now seen fishing in the NRA is presumed to be undermining NAFO conservation and management regimes, thus incurring the same landing restrictions as non-member vessels. More significantly, the statement included an exhortation to NAFO Contracting Parties to examine their own domestic measures allowing jurisdiction over stateless vessels.

IV. UNITED STATES LAW

Under international law, the United States Coast Guard has the authority to enforce U.S. laws extraterritorially with regard to stateless vessels. Under domestic law, it has been argued that Congress has granted the Coast Guard broad law enforcement authority to combat violations of U.S. law that occur on the high seas whenever there is a reasonable suspicion that there is a violation of a U.S. law with extraterritorial application.⁴⁷ United States statutory law provides: "[A] vessel subject to the jurisdiction of the United States includes—(A) vessel without nationality"⁴⁸ In *United States v. Marino-Garcia*,⁴⁹ the United States Court of Appeals for the Eleventh Circuit reasoned that "[v]essels without nationality are international pariahs. They have no internationally recognized right to navigate freely on the high seas."⁵⁰

45. See KEY PROVISIONS, *supra* note 42, at 9.

46. Northwest Atlantic Fisheries Organization, *Report of the General Council, 21st Annual Meeting, 13-17 September 1999, Dartmouth, N.S. Canada*.

47. See Canty, *supra* note 11, at 124 (citing 14 U.S.C.A. § 89(a) (West 1990)).

48. 46 U.S.C.A. § 1903(c)(1)(A) (West Supp. 1999). See also Fishery Conservation and Management, *as amended* PUB. L. NO. 102-251, § 301(b), 16 U.S.C.A. § 1802(44) (West Supp. 2000) (incorporating definition applied to drug cases to fishing violations under this statute).

49. See *United States v. Marino-Garcia*, 679 F.2d 1373 (11th Cir. 1982).

50. *Id.* at 1382.

As the law now stands, the United States Coast guard is authorized to stop and search any vessel subject to the jurisdiction of the United States.⁵¹ If the United States Coast Guard encountered a flagless vessel on the high seas and determined it to be stateless, it could be boarded and all applicable U.S. laws could be enforced against it. Usually, when stateless vessels are encountered on the high seas, the United States asserts jurisdiction and seizes them for violation of the Magnuson-Stevens Fishery Conservation and Management Act⁵² or the Maritime Drug Law Enforcement Act.⁵³

A. High Seas Fishing Compliance Act of 1995

The High Seas Fishing Compliance Act (HSFCA)⁵⁴ is the U.S. implementing legislation for the Compliance Agreement. As previously illustrated, the purposes and objectives of the Compliance Agreement are to specify flag states' responsibility towards fishing vessels entitled to fly their flags and operate on the high seas. The application of the HSFCA to stateless vessels could face an argument that it is not within the stated purposes and objectives of the Agreement. One response would be found in section 5501, which states that the purpose of the HSFCA is to "implement" the Compliance Agreement.⁵⁵ The use of the word "implement" does not necessarily encompass the purposes and objectives of the Agreement and transfer them into the HSFCA.⁵⁶

51. See 14 U.S.C.A. § 89(a) (West 1990).

52. See Magnuson-Stevens Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified as amended in scattered sections of 16 U.S.C.A.)

53. See 46 U.S.C.A. §§ 1901-1904 (West Supp. 1999); see also electronic mail communication from Rachel Canty, United States Coast Guard, Law Enforcement, to Author (Feb. 23, 2000) (on file with *Ocean and Coastal Law Journal*). In the past, the United States Coast Guard, in concurrence with the United States Attorney General and other appropriate agencies, has exerted jurisdiction and prosecuted stateless vessel for illegally fishing in U.S. waters or smuggling drugs or migrants. See *id.*

54. 16 U.S.C.A. §§ 5501-5509 (West Supp. 1999).

55. See *id.* § 5501. Section 5501 states, in part, that :

[I]t is the purpose of [the Act] (1) to implement the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, adopted by the Conference of the Food and Agriculture Organization of the United Nations on November 24, 1993; and (2) to establish a system of permitting, reporting, and regulation for vessels of the United States fishing on the high seas.

Id.

56. Congressional use of the word implement as opposed to a direction that "[t]he Secretary shall promulgate regulations as may be necessary to carry out the purpose and objectives of the Convention" as found in the Northwest Atlantic Fisheries Convention Act of 1995, implies more latitude in the United States's application of the Compliance Agreement. Northwest Atlantic Fisheries Convention Act of 1995, PUB. L. NO. 104-43, 16 U.S.C.A. §§ 5601-5610 (West Supp. 1999).

That aside, the first unlawful act cited in the HSFCA is "to use a high seas fishing vessel in contravention of international conservation and management measures . . ."⁵⁷ Under international law, any state may make a stateless vessel subject to their jurisdiction. Once the stateless vessel is subject to the jurisdiction of the United States, it is appropriately treated as a vessel of the United States. A stateless vessel, once under the jurisdiction of the United States, fishing in contravention of international conservation and management measures should, therefore, fall within the scope of the HSFCA.

Unfortunately, the HSFCA, as currently written, is limited in its applicability to stateless vessels. In section 5502(4), the HSFCA defines a high seas fishing vessel as:

any vessel of the United States used or intended for use—(A) on the high seas; (B) for the purpose of the commercial exploitation of living marine resources; and (C) as a harvesting vessel, as a mother ship, or as any other support vessel directly engaged in a fishing operation.⁵⁸

Section 5502(10) notes: "the terms 'vessel subject to the jurisdiction of the United States'⁵⁹ and 'vessel without nationality'⁶⁰ have the same meaning as in section 1903(c)(3)" of the Maritime Drug Law Enforcement Act (MDLE).⁶¹ The MDLE also contains a separate definition for a "vessel of

57. 16 U.S.C.A. § 5505(1) (West Supp. 1999).

58. *Id.* § 5502.

59. 46 U.S.C.A. § 1903(c)(1) (West Supp. 1999) defines a "vessel subject to the jurisdiction of the United States" to include:

(A) a vessel without nationality; (B) a vessel assimilated to a vessel without nationality, in accordance with paragraph (2) of article 6 of the 1958 Convention of the High Seas; (C) a vessel registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States; and (E) a vessel located in the territorial waters of another nation, where the nation consents to the enforcement of United States law by the United States.

Id.

60. *Id.* § 1903(c)(2). Section 1903(c)(2) defines a "vessel without nationality" to include:

(A) a vessel aboard which the master or person in charge makes a claim of registry, which claim is denied by the flag nation whose registry is claimed; (B) any vessel aboard which the master or person in charge fails, upon request of an officer of the United States empowered to enforce applicable provisions of United States law, to make a claim of nationality or registry for that vessel; and (C) a vessel aboard which the master or person in charge makes a claim of registry and the claimed nation of registry does not affirmatively and unequivocally assert that the vessel is of its nationality.

Id.

61. *Id.* § 1903(c).

the United States.”⁶² Except for the difference of a few words, which do not function to alter the meaning of the section, the HSFCFA utilizes the same language to define “vessel of the United States,”⁶³ which does not encompass stateless vessels. In specifying that a high seas fishing vessel must be a vessel of the United States, the HSFCFA appears to preclude prosecution of stateless vessels assimilated to U.S. jurisdiction.⁶⁴

The difficulty in applying the HSFCFA against stateless vessels is found in section 5505 states that “it is unlawful for any person subject to the jurisdiction of the United States—(1) to use a high seas fishing vessel on the high seas in contravention of international conservation and management measures” as recognized by the United States.⁶⁵ Section 5502(4) defines a high seas fishing vessel to include only vessels of the United States. If the language of the HSFCFA were to be changed, the United States would be able to prosecute stateless vessels fishing on the high seas under any law that U.S. vessels must obey.⁶⁶ Utilizing the HSFCFA in this manner would

62. The definition is as follows:

(1) a vessel documented under chapter 121 of title 46 or a vessel numbered as provided in chapter 123 of that title; (2) a vessel owned in whole or part by—(A) the United States or a territory, commonwealth, or possession of the United States; (B) a State or political subdivision thereof; (C) a citizen or national of the United States or (D) a corporation created under the laws of the United States or any State, the District of Columbia, or any territory, commonwealth, or possession of the United States; . . . (E) a vessel that was once documented under the laws of the United States and, in violation of the laws of the United States, was either sold to a person not a citizen of the United States or placed under foreign registry or a foreign flag, whether or not the vessel has been granted the nationality of a foreign nation.

Id. § 1903(c)(3).

63. 16 U.S.C.A. § 5502(9) (West Supp. 1999).

64. According to the National Oceanic and Atmospheric Administration’s Assistant General Counsel for Fisheries, Margaret Hayes, the United States Coast Guard had recognized the limitation in using the term “vessel of the United States” as a result of their experience prosecuting stateless vessels under the MDLE. See Electronic Mail from Margaret Hayes, NOAA General Counsel to Deirdre Warner-Kramer (Mar. 21, 2000) (on file with the *Ocean and Coastal Law Journal*). Unfortunately, though the Coast Guard successfully lobbied to include the additional term, “vessel subject to the jurisdiction of the United States” in the text of the HSFCFA, the inclusion did not occur until the text of the legislation had been drafted and, as will be demonstrated, does not function to rectify the initial limitation.

65. A plain language reading of the definition of “fishing vessels” in the Compliance Agreement permits the inclusion of stateless vessels throughout the body of the Agreement. Under Article I, DEFINITIONS, a “fishing vessel” includes “any vessel used or intended for use for the purposes of the commercial exploitation of living marine resources, including mother ships and any other vessels directly engaged in such fishing operations. Compliance Agreement, *supra* note 2, at 970.

66. The potential issue of how the stateless vessel would be treated under the applicable convention once it is subject to the jurisdiction of the United States, i.e. as a Contracting Party or non-Contracting Party, is addressed later in this paper.

not add any additional restrictions regarding conservation and management measures to U.S. fishermen under either domestic or international law. It would simply broaden the applicability of existing domestic laws to vessels subject to the jurisdiction of the United States. This would afford an additional authority to the United States in effort to make stateless vessels accountable to international conservation and management measures when fishing on the high seas.

*B. Suggested Change to the HSFCA
and Resulting Enforcement Authority*

The suggested change to the HSFCA would affect section 103(4) as follows:

The term "high seas fishing vessel" means any vessel of the United States *or subject to the jurisdiction of the United States (insert)* used or intended for use—

Similar language already exists in the prohibition against large-scale driftnet fishing contained in the Magnuson-Stevens Fishery Conservation and Management Act.⁶⁷ This prohibition was used in the summer of 1999 when the United States Coast Guard sighted a vessel named the *Ying Fa* engaging in large-scale driftnet fishing in the North Pacific. The vessel claimed to be registered in the People's Republic of China, but China refuted her registration. Declaring the vessel to be stateless, the Coast Guard seized her and her catch under the Magnuson-Stevens Act, and towed her to port. The vessel's crew was repatriated to their home countries, and the vessel was sold at auction.

The technical change suggested above would make three additional violations available to prosecute stateless vessels fishing any high seas area managed by a regional fisheries organization. As the United States is a party to the Compliance Agreement, this is not just limited to organizations to which the United States is a Contracting Party. First, section 5505(2) makes it unlawful "to use a high seas fishing vessel on the high seas, unless the vessel has on board a valid permit . . ."⁶⁸ Any stateless vessel made

67. See 16 U.S.C.A. § 1857 (West Supp. 2000). "It is unlawful (1) for any person (M) to engage in large-scale driftnet fishing *that is subject to the jurisdiction of the United States*, [emphasis added] including use of a fishing vessel of the United States to engage in such fishing beyond the exclusive economic zone of any nation." *Id.*

68. 16 U.S.C.A. § 5502(2) (West Supp. 1999). The term "to use" is not defined in the HSFCA and it is unclear if it is broad enough to include the mere existence of a fishing vessel on the high seas, without a permit, as a violation absent evidence that fishing is in progress.

subject to the jurisdiction of the United States must meet the same requirements as U.S. vessels, though no stateless vessel could actually be in possession of such a permit. Of the unlawful acts delineated in the HSFCA, the use of a high seas fishing vessel on the high seas without a valid permit is the most unambiguous.

Second, it is prohibited under section 5505(9) "to ship, transport, offer for sale, sell, purchase, import, export, or have custody, control, or possession of, any living marine resource taken or retained in violation of this title or any regulation or permit issued under this title." Section 5509(e) sets a rebuttable presumption that "all living marine resources found on board a high seas fishing vessel and which are seized in connection with an act prohibited by section 5509 are presumed to have been taken or retained in violation of this title" As long as the vessel is found to be in violation of the HSFCA, or any regulation or permit issued under the HSFCA, any fish found on board are presumed to have been taken or retained in violation of the HSFCA. Thus, the need to prove, for example, that the species of fish caught on board are regulated and were caught by directed fishing, not bycatch, is not necessary.

The third violation is listed at section 5505(1): a prohibition against using a vessel in contravention of international conservation and management measures. Prosecution under this rule, however, would be a bit more complicated. Determining a violation in this case would depend largely on the standard by which a vessel is measured under the appropriate implementing legislation.⁶⁹ The majority of international fisheries agreements classify violations of conservation and management measures depending on whether the vessel is one of a Contracting Party (CP) or non-Contracting Party (NCP). Currently, the only international fisheries agreement to deal explicitly with stateless vessels is NAFO. As previously mentioned, NAFO recently passed a new rule subjecting stateless vessels to the same standard or violations as NCP vessels.

In other regulatory areas, the question of how stateless vessels are classified is critical. The HSFCA requires that under section 5505(1), there must be a violation of the relevant convention for there to be a violation of the HSFCA. Yet in order to find a violation, there must be a standard against which to measure the violator.

In most regional fisheries organizations, enforcement of conservation and management measures against NCP vessels depends upon the existence of a flag state. Restrictions such as trade sanctions or landing prohibitions are meaningless if there is no flag state to which to apply them. Clearly, then, stateless vessels cannot be considered NCP vessels. If, however, the

69. For the purposes of international conservation and management measures the implementing legislation typically refers back to the governing convention.

stateless vessel, now made subject to the jurisdiction of the United States, is to be considered a vessel of a CP, it raises further questions of whether the vessel is then entitled to the fishing privileges available to vessels of the United States. If so, in order to utilize section 5505(1), the procedures for allotting the U.S. share of the total allowable catch in the relevant regulatory area must be reviewed. If the national entitlement is divided among U.S. vessels prior to the fishing season, a stateless vessel fishing without a vessel quota would be a violation of section 5505(1). If, however, the U.S. national catch entitlement is divided among vessels of the United States on a first come, first served basis and the U.S. quota has not yet been filled, it is unclear if a stateless vessel, now treated as a vessel of the United States, is actually violating any international conservation and management measure.

Assuming that this question will soon be addressed in all regional organizations as it was in NAFO, the proposed changes to the HSFCFA would make all international conservation and management measures, as recognized by the United States and applied to vessels of the United States, applicable to vessels subject to the jurisdiction of the United States. Specifically, it would apply whether or not the term "vessel subject to the jurisdiction of the United States" was included in substitution or in addition to "vessel of the United States" in any given piece of implementing legislation. Furthermore, it would create a uniform penalty scheme for the violation of such measures regardless of the penalties ascribed by the relevant implementing legislation.⁷⁰

V. CONCLUSION

The recent efforts of the international community reflect a definitive movement toward conservation and a heightened need for fair play on the high seas. The international community is developing rules on both a global and regional basis to deal with "bad actors" on the high seas.⁷¹ Even as the Compliance Agreement and the Fish Stocks Agreement are moving closer to entry into force, individual nations and regional fisheries

70. The "CIVIL PENALTIES AND PERMIT SANCTIONS" of section 5507(a) allow a penalty for each violation up to the amount of \$100,000. See 16 U.S.C. § 5507(a) (West Supp. 1999). Under section 5507(b), Permit Sanctions, penalties refer primarily to suspending or revoking a high seas fishing permit. See *id.* § 5507(b). Forfeiture under section 5509 includes: "any high seas fishing vessel . . . used and any living marine resources . . . taken or retained, in any manner, in connection with or as a result of the commission of any act prohibited by Section 5505 . . . shall be subject to forfeiture to the United States . . ." 16 U.S.C.A. § 5509 (West Supp. 1999).

71. See Balton, *supra* note 28, for a discussion on who these bad actors are and how their actions jeopardize sustainable fisheries.

organizations have begun putting the principles they contain into action. The international community has begun to call instinctively for a stronger conservation ethic to govern high seas fishing.

Despite these notable measures, bad actors continue to jeopardize the sustainability of the world's fishery resources. The international community continues to face both nations and vessels that are unwilling to adhere to international law and undermine conservation and management schemes. Numerous nations continue to offer "flag of convenience" registry to fishing vessels with no accompanying oversight of their fishing practices. Parties to international agreements and regional organizations often exceed agreed quotas or are out of compliance with conservation and management regimes. Furthermore, nations continue to subsidize their fishing industries, leading to overcapitalization and increasing pressure to maximize harvest. The suggested legislative change to the HSFCA would forge a useful tool for United States enforcement of international and multilateral agreements on the high seas against stateless vessels. Specifically, this proposed change would allow the United States to prosecute any vessel assimilated to stateless status for two and possibly three violations: (1) using a high seas fishing vessel on the high seas without a valid permit; (2) taking and/or possession of fish; and possibly (3) fishing in contravention of international conservation and management measures. As countries continue to cooperate to conserve and manage high seas resources, vessels without nationality should not be allowed to undermine progress made through shared sacrifices for no other reason than the lack of an effective enforcement tool.

