

Flags of Convenience:
Legal Issues in relation to Fishing the Southern Ocean

“A merchant fleet is not an artificial creation. It is a reality which corresponds to certain indispensable requirements of a national economy. . . The flag - that supreme emblem of sovereignty which international law authorises a ship to fly - must represent a country’s degree of economic independence, not the interests of third parties or companies.”

- Simmonds, K. (1963) Commenting on the IMCO Case¹

Introduction

Flags of Convenience (FOC), whereby states open their fishing registries to nationals other than their own, can be particularly lucrative, especially if the owner intends to flout international standards on fishing standards in the Southern Ocean (DeSombre 2005). Fishing within the Southern Ocean falls under the regime of the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR). Ocean regulation is difficult because of the vastness of the ocean and the number of ships whose behaviour influences the success of international regulatory efforts (DeSombre 2005). In response, a number of initiatives under both CCAMLR and the newly founded High Seas Task Force (HSTF) are attempting to combat Illegal Unreported Unregulated (IUU) fishing.

There are large difficulties in the logistics of High Seas regulation that creates loopholes in the current IUU Southern Ocean system. Using FOCs of states that are not signatories to International agreements such as CCAMLR intensifies the problem, as they are not legally bound to abide by any measures implemented by international agreement. The use of FOCs by a number of CCAMLR nationals is evident yet current trends in international economy and business make these ‘front companies’ particularly difficult to apprehend (Australian Antarctic Division, 2003).

Upon sourcing information, no books or journal articles were found to focus solely on FOC in the Southern Ocean. Very few focused specifically on FOCs. There are few varying observations because there is often only one of them.

Flags of Convenience

FOC or ‘open registration’ is as old as the Spanish Main². FOCs have been used for everything from supplying booze during the 1920s prohibition, to helping escape

¹ Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, ICJ Reports (1960) 145 [hereinafter IMCO].

² The **Spanish Main** was the Caribbean coast of the Spanish Empire in mainland Central and South America. From the 16th to the 18th century the Spanish Main was the point of departure for enormous wealth in the form of gold, silver, gems, spices, hardwoods, hides and other treasures. The famous Spanish treasure fleets transported these to Spain. The traffic in treasure made the Spanish Main a haunt of pirates and privateers. (http://en.wikipedia.org/wiki/Spanish_Main)

European and North American unions that had driven up crew costs (Anonymous 1997). Surprisingly however there is little information in relation to FOCs, particularly in relation to fishing in the Southern Ocean.

The FOC system is where states have opened up the ship registration process – historically only nationals of a given state were eligible to register their vessels – to ships belonging to people who are not citizens or residents of the state. Ship registration confers a form of nationality: a ship must follow only the domestic and international obligations taken on by the state in which it is registered (DeSombre 2005). Currently you can go to a web site and register under any number of FOCs with ease (International Ship Registries 2006).

Although his research is highly dated, Van Fossen (1992) was the only material found to report on the impact FOCs were having on the open registry states. There was a huge rise in the Pacific Island's Flags of Convenience (PIFOCs) in the late 1980s. He defines PIFOCS as “devices by which small and weak states rent aspects of their sovereignty to capitalists, who pay for greater freedom of action outside core regulatory structures and high-waged protected core labour” (Van Fossen 1992, p20). Van Fossen concludes, “Registration fees benefit the indigenous elites in the capitals of PIFOC-issuing countries and tie them to serving the interests of global capitalism, although in different ways.”

FOCs: Fishing in the Southern Ocean

Regulation of High Seas fishing has only been an issue since the introduction of catch quotas under international law. Elevated restrictions on fishing quota ensure market prices stay high for fish such as the Patagonian toothfish. This creates ideal conditions for a lucrative business in the IUU fishing trade. Fishing vessels simply sidestep fishing quota costs and restrictions. FOCs can then help to improve their chances of evading detection and if detected dodging any reprimand within agreements such as CCAMLR.

The only figures found to give some sort of perspective on the size of the problem were from a non-verifiable Greenpeace survey that included 34 vessels. Ten were found to be flag of convenience (FOC) vessels, two with no name at all, three vessels with two names, two with the same name, 27 that displayed no country or port or registry and nine that had been sighted previously engaged in illegal operations (Greenpeace International, October 2002). The Australian Antarctic Division (2003) put IUU fishing as the ‘number one threat to the conservation of fisheries’.

The Institute of Shipping Economics and Logistics in its *Shipping Statistics Yearbook 2003* identified the four leading open-registry fishing states as:

- Belize
- Panama
- Honduras
- St Vincent and the Grenadines

The Organisation for Economic Co-operation and Development (OECD) revealed the up and coming FOC fisheries include:

- Bolivia
- Georgia
- Cambodia

- Vanuatu
(DeSombre 2005)
Australia continues to have trouble with Uruguay and Togo FOCs illegally fishing within the Australian exclusive economic zone (EEZ) around Heard Island and McDonald Islands in the Southern Ocean (Molenaar 2004).

The advantages for FOC states to offer ship registration are numerous, most noticeably to raise income from registration fees and taxes. In an effort to increase the number of ship registrations, and thereby the revenue gained from them, these states often avoid taking costly international regulations such as CCAMLR. Ship owners who want to avoid being bound by international regulation can choose to register their ships in these open registries (DeSombre 2005).

For those who operate them, fishing vessels flagged in open registries can be particularly lucrative, especially if the owner intends to ignore international standards set by convention. For example, IUUs operate outside the directive of the International Labour Organization Convention and if national laws are weak, employee treatment is not regulated. Employment crew costs account for up to 30 percent of total catch value for nationally registered vessels, which would give an IUU huge financial benefit if regulations were not adhered to. Taxes are also lower, and many states that offer FOC operate as tax havens as well, decreasing even further any tax burden. Most important, however, is the opportunity to fish without having to abide by national or international limits (DeSombre 2005).

Associated Conventions

In the last few decades, contemporary international law has created two conventions; the **United Nations Convention on the Law of the Sea (UNCLOS)** and **Convention on the Conservation of Antarctic Marine Living Resources (CCAMLA)**. Both regulate what was once a ‘global commons’, a free for all, outside of sovereign control. ‘Third state’ parties that have not yet signed up either of these conventions are still not legally bound by them. Both conventions continue to struggle for jurisdiction to control these waters (Bray 2000).

➤ United Nations Convention on the Law of the Sea (UNCLOS)

In the 1982 United Nations Convention on the Law of the Sea (UNCLOS) the capacity was created for coastal states to assert vast maritime claims over waters adjacent to their coastlines, creating the Exclusive Economic Zone (EEZ). This new regime, in combination with parallel initiatives to regulate some aspects of high seas fishing activities, has meant that ‘legal’ fishing on the high seas (‘global commons’) is now subject to extensive regulations (Rothwell & Stephens 2004).

➤ Commission on the Convention of Antarctic Marine Living Resources (CCAMLA)

“After 21 years of operation, CCAMLR is now considered one of the most developed and sophisticated regional fisheries management organisations (RFMOs)” (Rothwell & Stephens 2004, p173). With 24 state members, its measures are precautionary in nature and primarily directed towards the operations of its member states. Upon

becoming a CCAMLR signatory, the country must then ratify these measures into national law. This extends the CAMLR mandate to the countries nationals.

Since these regulations have tightened IUU fishing has increased and is becoming an increasingly significant challenge to the authority of CCAMLR to manage. It is a dual problem. Firstly ensuring 'internal compliance' by CCAMLR parties with its Conservation Measures and secondly, tackling the fishing activities of vessels flying flags of non-Member States (FOCs).

CCAMLR generally lacks the teeth to give contracting parties an incentive to improve their compliance records. This was painfully illustrated at the 22nd Annual CCAMLR Meeting (2003), when the Russian Federation blocked consensus to ensure that none of its vessels would appear on CCAMLR's IUU Vessel List (Molenaar 2004).

The implications for CCAMLR are that taking an increasingly tougher stand towards non-contracting parties is becoming more difficult to justify. If contracting parties to CCAMLR will not abide by the restrictions, countries in a position to offer lucrative FOC deals are unlikely to think twice about their options.

Legal Issues: Confronting the Regulation of FOCs

There are a number of legal issues relating to the ineffectiveness of combating FOCs. Total enforcement of the "Law of the High Seas" is virtually impossible due state sovereignty³ issues. Imposing restrictions on state activities is an impingement on the recognised freedoms of that state to be governed only by their own internal laws. In addition, if IUU perpetrators are caught in the act, there are plenty of loopholes for both convention signatories and third states.

➤ Sovereignty Issues

Van Fossen (1992) was the only notable source that looked at FOCs from a perspective of historical impacts on FOCs. He views the FOC system as being justified in international law largely by the doctrine of the sovereign equality of states and flag state control over vessels. He perceives the conflicting issues surrounding FOCs as being generally accepted and widely acknowledged. Van Fossen's position is that conflicting interpretations of the High Seas doctrine by Third World states, labour unions and environmentalists (as well as their own incompatible objectives) have weakened and fragmented the anti-FOC campaign. Those countries who have historically played a vital role in developing FOCs, predominantly lawyers, have done so by exploiting loopholes in the prevailing conceptions of sovereignty (Van Fossen 1992).

➤ Use of "Front Companies"

Vessels flagged to CCAMLR Members, are often owned by 'front companies' hiding behind a corporate veil. 'Front companies' are the most visible 'tip' of a usually complex, trans-national corporate structure deliberately constructed to disguise the identity of the beneficial owners. The beneficiaries are very difficult to link conclusively to the IUU fishing (Australian Antarctic Division 2003).

³ "The exclusive right to exercise supreme political power over that state" (Molenaar 2004, p19).

When Hopper (1999) looked into where these 'front countries' were based he found that many were nationals of CCAMLR nations. "Although not condoned by the governments concerned, it has been taking place from within the organisation which set itself up to provide stewardship of the area. But that does not dissolve those governments of responsibility" (Hopper 1999, p6-7).

➤ Need for a "Genuine Link"

The FOC institution depends on a system of international law. Article 91 of the UNLOS conventions provides that "ships have the nationality of the State whose flag they are entitled to fly. There must exist a '*genuine link*' (emphasis added) between the State and the ship". Defenders contend that the link is genuine when the formal legal connections to the owner in the FOC country are completed through formal agreement. In contrast, opponents object that the ownership structures are shams designed to prevent or inhibit the creation of a new and more just oceanic system (Van Fossen 1992).

Recent work done by Robin Churchill from the University of Cardiff gives some guidance based on case law and various agreements. Churchill (2000) concludes "Registration does not in itself, make that link genuine ... A State has a discretion as to how it ensures that the link between itself and a ship having its nationality is genuine". However, the State must warrant it can "demonstrate that it is able effectively to exercise its jurisdiction and control over a ship, a State must be able to show that the necessary mechanisms for such exercise are in place at the time when the ship is granted its nationality" (Churchill 2000, p.4-5).

However, the definition has not yet been tested in a court of law and is still only relevant to those who have signed up to UNLOS and are willing to go to the International Court of Justice for trial (Churchill 2000).

➤ A Requirement for "Prompt Release"

UNCLOS is sending particularly mixed messages about illegal fishing and FOCs. Article 73(1) of the UNCLOS Convention requires "arrested vessels and their crews shall be *promptly released* upon the posting of a reasonable bond or other security" (United Nations Law of the Sea 1982).

The contemporary connection between IUU fishing and prompt release cases clearly poses a challenge for the international community. Associated with this development has been the growth in open registries. The cloak of protection provided by flags of convenience in a globalised fishing industry has made it doubly difficult for effective prosecution of illegal fishing operators. An arrested fishing vessel can be released re-flagged, re-named and re-crewed so as to return to engage in further IUU activities, making combating these activities all the more difficult. It is clear that a phenomenon has developed which demands strong action by coastal States. (Rothwell & Stephens 2004)

IUU fishing and FOC states have been able to persist and arguably, thrive, through the operation of two key principles of international law. The right to the freedom of fishing on the high seas and the principle of flag state authority have operated to allow

fishers to exercise their high seas rights whilst concurrently avoiding regulation if they choose to do so. (Baird 2005)

There are few controls designed solely for dealing with FOC. The predominant method is to persuade or 'shame' those states with open registries to putting tighter restrictions on vessel registrations. These states are often developing nations and have little to loose upon accepting bribes.

Often those nationals registering their boats with FOCs are also members of CCAMLR. However, contemporary international law is yet to bear its teeth into those leading the crime. Continued and large-scale non-compliance by contracting parties to the CCAMLR Convention undermines the CCAMLR Commission's credibility, authority and effectiveness. This could cause a downward spiral as more states see a 'get rich quick' way to make money.

Measures for Combating FOCs

Avoidance of reprimand is primarily made possible by the inability of coastal states and RFMOs to take action on the high seas against rogue fishers and the inability or unwillingness of certain flag states to exercise effective control over their flagged fishing vessels (Baird 2005).

There is very little literature on combating the means of FOCs themselves. Because of the sovereign position each country holds, these countries are free to do as they please with few impacts. The efforts of international organisations can only go as far as to persuade open registry states to join the relevant fishery management agreements. These efforts have had little impact on their own (DeSombre 2005).

The most effective efforts to persuade states with open registry to join agreements, or individual ship owners to uphold them regardless of their legal obligation to do so, have come through the use of trade restrictions (DeSombre 2005). However, because of the highly political nature of international agreements and the influence of external political activities, measures for combating FOCs by means of political pressure and sanction is at times a highly controversial topic.

Listed below are the current measures for combating IUU fishing activity in the Southern Ocean. Purely through their regulatory process, these measures also enhance the efforts to decrease FOCs. There are a number of regional and global organisations trialling the various methods.

➤ Measures taken by CCAMLR

- Port state controls under international law
- Catch Documentation Schemes (CDS)
 - CDS documents where and by whom the fish was caught. The fish is given a certificate that is progressively checked from the dock where it is unloaded to those buying at the fish markets.
- Automated satellite-linked Vessel Monitoring Systems (VMS)
 - VMS monitors the location of fishing vessels- then analysis and presents this information to the monitoring and surveillance personal.

- Vessel lists
- Ministerial High Seas Task Force (HSTF)

➤ High Seas Task Force

A Ministerial High Seas Task Force (HSTF) was established under the auspices of the Round Table on Sustainable Development at the Organisation for Economic Cooperation and Development in December 2003.

The HSTF covers all areas of the High Sea whether controlled by a nation or not, whether the flag ship is covered or if the catch has not been reported. It simply covers “*fishing in violation of national or international obligations*” (Baird 2005, p2).

The goal of the High Seas Task Force was to set priorities among a series of practical proposals for confronting the challenge of IUU fishing on the high seas. The end result was a pragmatic and prioritized action plan that was both analytically sound and politically saleable and would act as a catalyser (See Figure 1 for ‘*Proposals for Action of High Seas Task Force*’) (HSTF 2006).

There is little to convince that the HSTF may have any differing effect to that of previous efforts. The few initiatives expressed are primarily extensions of what CCAMLR has done previously.

➤ New Zealand’s Efforts

All operators of New Zealand (NZ) registered vessels must have a high seas fishing permit if they want to take or transport fish on the high seas. In addition, all New Zealand nationals using foreign vessels on the high seas must have an authorisation (equivalent to a high seas fishing permit) from the government to which that vessel is “flagged” (See Figure 3: NZ Fisheries Act Section 113E).

In the past NZ has taken a hands-on approach to deterring IUUs off our Southern Shores. Operation Mawson in 1998 flew 15 patrols, starting at about 60 degrees south latitude and going down to 74 degrees south. NZ’s view is that “In this case the national strategy was to go down there, catch people in the act of conducting illegal fisheries and then, as a political imperative, show photographs and evidence to the world media. The task was to project New Zealand’s foreign policy out into the world through the media” (Hopper 1999, p7).

➤ Greenpeace International

In true Greenpeace style, the legendary NGO continues to chase down ‘pirates’, chain together FOCs in German Ports and have recently been instructed to remove themselves from the top of a crane unloading FOC vessels in Las Palmas. Grass roots action is another valuable way to create unwanted attention for FOC countries, in the hopes that it will make governments sit up and pay attention (Greenpeace International 2006).

In order for FOC fishing to be combated effectively, multiple strategies are required including action through multiple organisations such as the FAO, regionally through Regional Fisheries Management Organisations (RFMOs) such as CCAMRA, sub-regional and bi-lateral agreements. Legitimate trade measures and initiatives such as

the CDS, plus international institutions such as International Tribunal for the Law of the Sea (ILTOS).

A Brief Conclusion

Flags of Convenience (FOCs) and Illegal Unregulated Unreported fishing vessels (IUUs) in the Southern Ocean are having large impacts on fisheries and fisheries management. Although exact figures are not obtainable, Greenpeace International found a third of the vessels intersected were IUUs (Greenpeace International, October 2002). For companies that operate vessels, fishing vessels flagged in open registries can be particularly lucrative. For countries with open registries, having IUUs is equally as profitable. However, Van Fossen also points out the negative impacts of the FOC trade on the open registry states. Increasing corruption and the limitation of national identity in developing states created by the onslaught of FOCs are some of the impacts mentioned (Van Fossen 1992).

For any substantial progress in respect to FOCs, measures must be tightened. Consequences for engaging in FOC and IUU must be visible to other states that may see this as a benefit. Poorer countries need more support in patrolling their waters and ports to ensure that those boats that are taking on their state flags are abiding by their national laws.

Available information about this topic is meagre. There is little focus on this particular aspect of law. Impacts on the Southern Ocean fisheries and ecology are noted but literature only scrapes the surface of a highly political subject. **DeSombre** article was very helpful in looking at the initial issues involved in open registries. **Van Fossen's** material, although very dated, outlining the deeper issues about FOC was particularly helpful and the only source to analyse the state FOCs.

The topic of IUUs and FOCs are particularly political and at times highly volatile. Although there is a huge issue and the impacts are well known, there is also huge controversy surrounding the subject due to its high political nature.

APPENDIX

➤ Figure 1: Proposals for Action of High Seas Task Force

1) Strengthen the International Monitoring Control and Surveillance Network.
2) Establish a global information system on high seas fishing vessels.
3) Promote broader participation in the United Nations Fish Stocks Agreement (UNFSA) and the Food and Agriculture Organization of the United Nations (FAO) Compliance Agreement.
4) Promote better high seas governance by: A. Developing a model for improved governance by RFMOs; B. Independent review of Regional Fisheries Management Organisation (RFMO) performance; C. Encouraging RFMOs to work more effectively through better coordination; and D. Supporting initiatives to bring all unregulated high seas fisheries under effective governance.
5) Adopt and promote guidelines on flag state performance.
6) Support greater use of port and trade measures by: A. Promoting the concept of responsible port states; promoting the FAO Model Port State Scheme as the international minimum standard for regional port state controls and supporting FAO's proposal to develop an electronic database of port state measures; B. Reviewing domestic port state measures to ensure they meet international minimum standards; and C. Strengthening domestic legislation controlling import of IUU product.
7) Fill critical gaps in scientific knowledge and assessment.
8) Address the needs of developing countries.
9) Promote better use of technological solutions.

(HSTF, 2006)

➤ Figure 2: Article 73(1) of the UNLOS Convention

Article 73

Enforcement of laws and regulations of the coastal State

1. The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.
2. Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security.
3. Coastal State penalties for violations of fisheries laws and regulations in the exclusive economic zone may not include imprisonment, in the absence of agreements to the contrary by the States concerned, or any other form of corporal punishment.

(United Nations Law of the Sea)

➤ Figure 3: NZ Fisheries Act Section 113E

PROHIBITION ON USING FOREIGN-FLAGGED VESSELS
<p>Section 113E of the Fisheries Act prohibits New Zealand nationals from using vessels that are not registered under the Ship Registration Act 1992 to take fish on the high seas. This prohibition is waived if the New Zealand national has an authorisation from a country that meets certain criteria (this is discussed in more detail below). There are two aspects of this prohibition worth clarifying:</p>
<p><u>A New Zealand national</u> Section 2 of the Fisheries Act 1996 defines a New Zealand national as:</p> <ul style="list-style-type: none">(a) A New Zealand citizen;(b) A person who is ordinarily resident in New Zealand(c) A body corporate established by or under New Zealand law
<p><u>Registration under the Ship Registration Act 1992</u> New Zealand nationals using vessels that are not registered under the Ship Registration Act are subject to section 113E of the Fisheries Act. This means that the national must:</p> <p>Either:</p> <p>Register the vessel under the Ship Registration Act and apply for a New Zealand high seas fishing permit;</p> <p>Or:</p> <p>Apply for an authorisation from the state to which the vessel is currently registered (making sure that the state is one of those that falls within the categories listed in section 113E).</p>
<p><u>Authorising States</u> Section 113E provides that the prohibition on the use of foreign vessels on the high seas by New Zealand national operators may be waived if the vessel's activities are covered by an authorisation from another country. However, the country issuing the authorisation must:</p> <ul style="list-style-type: none">• Be a party to the United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement);• Be a party to the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessel on the High Seas;• Be a party to, or have accepted the obligations of, a global regional, or sub-regional fisheries organisation or arrangement to which the authorisation relates; or• Have signed the Fish Stocks Agreement and have the legislative and administrative mechanisms in place to control its vessels on the high seas in accordance with that Agreement.

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