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The Anthropocene, Autopoiesis and the Disingenuousness of the Genuine Link: Addressing Enforcement Gaps in the Legal Regime for Areas Beyond National Jurisdiction

Rosemary Rayfuse*

*University of New South Wales

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Rosemary Rayfuse

Abstract

The Earth has entered the anthropocene era; the era in which human activities have begun to have a significant global impact of the Earth's climate and ecosystems. Covering more than 60% of the Earth's surface, the oceans comprise a complex, dynamic and vast component of the Earth's ecological system, second in size only to the global atmosphere. The oceans are a major provider of ecosystem services, food, mineral and other resources, and a major medium for global transportation and communication. Nevertheless, while once thought inexhaustible, unlimited and capable of supporting any human activity or use, it is now clear that the oceans are exhaustible and that increasing and intensifying human activities and uses are pushing the oceans to the limits of their carrying capacity.

The Law of the Sea Convention establishes a legal order for the oceans intended to 'facilitate international communication, [and] promote peaceful uses of the seas and oceans, the equitable and efficient utilisation of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment'. However, particularly as regards areas beyond national jurisdiction, the law of the sea regime is fragmented both sectorally and geographically, leaving a large range of governance, regulatory, substantive and implementational gaps which serve to limit its effectiveness in securing a sustainable future for the oceans in areas beyond national jurisdiction.

The new reality of the context in which the legal regime for areas beyond national jurisdiction operates is one of increasing and increasingly unbridled human activity resulting in damage, both potential and real, from over-use, over-consumption and over-exploitation. This new reality has altered the fundamental balance between the context in which the law of the sea operates and the law of the sea itself. New legal developments are being called for to re-establish that equilibrium.

THE ANTHROPOCENE, AUTOPOIESIS AND THE DISINGENUOUSNESS OF THE GENUINE LINK: ADDRESSING ENFORCEMENT GAPS IN THE LEGAL REGIME FOR AREAS BEYOND NATIONAL JURISDICTION*

1. The Anthropocene, Autopoiesis and the Law of the Sea

The Earth has entered the anthropocene era; the era in which human activities have begun to have a significant global impact of the Earth's climate and ecosystems. According to the International Geosphere Biosphere Program, 'human activities are now so pervasive and profound in their consequences that they affect the Earth at a global scale in complex, interactive and accelerating ways' and 'have the capacity to alter the Earth System in ways that threaten the very processes and components, both biotic and abiotic, upon which humans depend'.¹ Covering more than 60% of the Earth's surface, the oceans comprise a complex, dynamic and vast component of the Earth's ecological system, second in size only to the global atmosphere. The oceans are a major provider of ecosystem services, food, mineral and other resources, and a major medium for global transportation and communication. Nevertheless, while once thought inexhaustible, unlimited and capable of supporting any human activity or use, it is now clear that the oceans are exhaustible and that increasing and intensifying human activities and uses are pushing the oceans to the limits of their carrying capacity.

The Law of the Sea Convention (LOSC)² establishes a legal order for the oceans intended to 'facilitate international communication, [and] promote peaceful uses of the seas and oceans, the equitable and efficient utilisation of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment'.³ However, particularly as regards areas beyond national jurisdiction, the law of the sea regime is fragmented both sectorally and geographically, leaving a large range of governance, regulatory, substantive and implementational gaps which serve to limit its effectiveness in securing a sustainable future for the oceans in areas beyond national jurisdiction. Moreover, the legal regime for areas beyond national jurisdiction is undermined by enforcement gaps resulting, inevitably, from the basic international law rules relating to treaty application, and adherence to the principle of flag state jurisdiction.

* Professor Rosemary Rayfuse, Faculty of Law, University of New South Wales, Australia

¹ International Geosphere Biosphere Program (2001), *Global Change and the Earth System: A Planet Under Pressure*, IGBP Science No. 4 The Role of Population

² United Nations Convention on the Law of the Sea, 10 December 1982 (LOSC), 21 *International Legal Materials* 1245 (1982)

³ LOSC preamble

Recurring regulatory and enforcement failures, now compounded by new challenges such as those posed by climate change, seriously threaten the realisation of those objectives and lead inexorably to calls for the law to develop to ‘fill the gaps’.

International law has been described as an autopoietic system,⁴ or one in which the elements of the system ‘interact with each other in such a way as to continually produce and maintain the elements and the relationships between them’.⁵ An autopoietic system seeks not to generate something other than itself, but rather to generate the elements of itself through processes internal to and shaped by it in order to maintain a stable organised state over a long period of time. Sometimes mistakenly interpreted as requiring ossification, autopoiesis more accurately requires the law to change and adapt to new realities and new contexts, just as these realities and contexts must change and adapt to the new laws. In other words, the law is shaped by the context in which it operates while that context is shaped by the law which operates within and upon it. Thus, while self-referential in that existing law must be perpetuated, international law is also self-generating in that the law must, through the processes internal to it, evolve to meet the new realities of the international context in which it exists and operates.

The new reality of the context in which the legal regime for areas beyond national jurisdiction operates is one of increasing and increasingly unbridled human activity resulting in damage, both potential and real, from over-use, over-consumption and over-exploitation. This new reality has altered the fundamental balance between the context in which the law of the sea operates and the law of the sea itself. New legal developments are being called for to re-establish that equilibrium. In the enforcement context, this requires careful consideration of the manner in which the law can more adequately protect the interests of the international community in areas beyond national jurisdiction by requiring states to comply with their specific treaty obligations and other generally accepted international norms and by addressing situations where a state is unwilling or unable to do so.

2. The Disingenuousness of the Genuine Link

The legal framework for enforcement of international law in areas beyond national jurisdiction is premised on the principle of flag state jurisdiction. The high seas are open to

⁴ A. D’Amato, ‘International Law as an Autopoietic System’ in R. Wolfrum and V. Röben (eds), *Developments of International Law in Treaty Making* (Springer: 2005) 335-399

⁵ ‘Autopoiesis’ www.cs.ucl.ac.uk/staff/t.quick/autopoiesis.html.

all states⁶ and every state has the right to sail ships flying its flag on the high seas.⁷ While on the high seas ships are generally subject only to the jurisdiction of the state whose flag they fly.⁸ The rules on nationality of ships govern the jurisdictional linkage between a flag state and ships flying its flag. Originally conceived of as a means of ensuring adequate and effective control and supervision of ships by states whose flag they fly,⁹ these rules somewhat disingenuously call, on the one hand, for the existence of a ‘genuine link’ yet, on the other hand, require no content to that link other than mere registration.¹⁰ In doing so they present a range of difficulties for those seeking to attach legal requirements to and consequences for the granting of a flag beyond the mere requirement to provide a vessel with documents to the effect that flag has been granted.¹¹ Indeed, these rules, coupled with the rule of flag state jurisdiction, establish what is, arguably, the most significant enforcement gap in the legal regime for the high seas.

While not actively encouraging it, the reality is that the rules on nationality of ships do nothing to discourage the practice of flagging ships to avoid the application of international obligations. Thus, ships may deliberately flag in a state not party to relevant treaty obligations. This practice has been well documented in the use of ‘flags of convenience’ to avoid controls relating to vessel source pollution or to avoid the application of conservation and management measures established by regional fisheries management organisations (RFMOs). Even where a state is party to a relevant treaty, it may become a flag of choice as a ‘flag of non-compliance’ due to its failure to adequately implement its treaty obligations either through a lack of political will to regulate activity, or through lack of financial and technical expertise, or lack of infrastructure to promote and, if necessary, enforce compliance.

The rules on nationality of ships have been described as ‘an axis of the law of the sea’, ‘a well-defended preserve of the sovereignty of the states’ and a fundamental rule on which ‘inter-state relations concerning activities at sea depend’.¹² Be that as it may, they provide no incentive for vessels to comply with internationally agreed rules and standards,

⁶ LOSC Art 87

⁷ LOSC Art 90

⁸ LOSC Art 92(1)

⁹ R. Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Martinus Nijhoff, 2004) at 28-29

¹⁰ LOSC Art 91

¹¹ See, eg, *The Grand Prince* case, (Belize v France), 125 *International Law Reports* 273 (ITLOS, 2001) and the *M/V Saiga* (No. 2) case (St Vincent and the Grenadines v Guinea) 120 *International Law Reports* 144 (ITLOS, 1997)

¹² T. Treves, ‘Flags of Convenience Before the Law of the Sea Tribunal’ 6 *San Diego International Law Journal* (2004-2005) 179-189 at 189

no incentive for flag states to ensure their vessels comply with those international obligations, and no guidance as to how this compliance can be effected or enforced in situations where a flag state is unwilling or unable to exercise its jurisdiction in respect of its vessels. Attention has therefore become focused less on the rules for the granting of nationality and the requirements of establishing the 'genuine link', and more on articulating the precise duties and responsibilities incumbent on states who chose to grant their flag.

3. Developing Flag State Responsibilities

For every right there is a concomitant duty. While states may have the right to grant their flag, the public order of the oceans and the principles of equality of user and due regard¹³ require the exercise of a reciprocal duty to effectively control their vessels and exercise jurisdiction over them in situations where the actions of their vessels interfere with the interests of other states. In theory, only those vessels over which the flag state is exercising effective control can enjoy the freedom of the high seas and its concomitant advantages. Where flag states fail in their duty to exercise their responsibility and jurisdiction effectively, then arguably they may be internationally responsible to other states which then acquire a reciprocal right to rectify the situation. The first task, therefore, lies in determining the precise content of the requirement of effective control, or the content of the responsibilities incumbent on flag states.

Prima facie, the content of flag state responsibilities will depend on the treaty obligations to which a state has subscribed and the level and efficacy of its domestic implementation of the relevant treaty standards or obligations. By way of example, in its 2006 report, the High Seas Task Force¹⁴ suggests a number of general criteria that should be addressed in determining whether a flag state is a responsible flag state in respect of its fisheries related obligations. The first set of criteria relate to whether a state is a party to the global fisheries agreements, the LOSC, the Compliance Agreement¹⁵ and the UN Fish Stocks Agreement (FSA).¹⁶ Ratification of these treaties will provide *prima facie*, although

¹³ LOSC Art 87

¹⁴ High Seas Task Force, *Closing the Net: Stopping Illegal Fishing on the High Seas*, Appendix 4 (March 2006), available at <http://www.high-seas.org>.

¹⁵ 1993 FAO Agreement to Promote Compliance with International Conservation and Measures, 33 *International Legal Materials* 968 (1994)

¹⁶ 1995 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 24 *International Legal Materials* 1542 (1995)

not conclusive, evidence of responsibility. The presumption of responsibility will, however, be rebutted by instances of non-compliance.

The second set of criteria relate to whether a state is party to or cooperating with the relevant RFMO/regional arrangement. A responsible flag state will be expected to implement the obligation to cooperate by ratifying any relevant regional agreements or participating in regional arrangements. Indeed, the FSA stipulates that in order to have access to a fishery any state with a real interest in that fishery *must* either be a member of the relevant RFMO or cooperate with it and comply with its measures. Without getting into the vexed question of what constitutes a real interest, for present purposes, suffice it to say that this would include any state whose vessels fish in any way or at any time in the relevant fishery. Also relevant will be whether the flag state requires its vessels to comply with the conservation and management measures of the RFMO and whether the flag state itself complies with the obligations of membership or cooperation. A responsible flag state will do both. Whether a member of an RFMO or not, a flag state which does not ensure that its vessels comply with the regional conservation and management measures or which does not comply with its own obligations to implement the measures adopted, will *prima facie* be an irresponsible flag state.

The third set of criteria relate to whether the flag state has domestic measures in place which meet the internationally agreed minimum standards to ensure it exercises effective control over its vessels including measures to establish a register of fishing vessels, licensing and fishing authorisation requirements, vessel and gear marking standards, standards for verification of catch and effort data, and a working MCE regime. The absence of a formal regulatory system will be *prima facie* evidence of lack of responsibility although this presumption will have to be rebuttable in the case of developing states which lack management and other capacities. In such cases it will be relevant to enquire whether technical or other assistance has been requested or not, requested and provided, requested but not provided, or offered and rejected. By the same token, the presence of a formal regulatory system will be *prima facie* evidence of responsibility. However, this, too, will be rebuttable in the case of a state which demonstrates a consistent pattern of failure to utilize its powers to control its vessels. In this respect, it will be necessary to go beyond the HSTF guidelines to investigate whether a flag state has in place a working and effective system to sanction wrongdoing by its vessels which provides for punishment sufficient to discourage future violation through, for example, withdrawal of fishing or seafaring authorisation. Positive inferences as to the efficacy of the system will

be drawn where the measures have, in fact, discouraged violations. Adverse inferences will be available where the state's vessels continue to engage in IUU activities.

A similar analysis applies in respect of other activities in areas beyond national jurisdiction. For example, in the shipping context it is first necessary to identify whether a state is party to the various ILO and IMO conventions on crewing, working and construction standards and those relating to protection of the marine environment from vessel source pollution and dumping. Participation in these agreements will be *prima facie* evidence of responsibility. However, the presumption that a flag state is responsible is a rebuttable one. While states may generally be taken to intend to fulfil their international obligations, the continuing incidence of problems relating to substandard shipping is testament to their inability or unwillingness to always do so. It is therefore necessary to examine the regulatory structures in place in the flag state to ensure compliance by its vessels with these internationally agreed standards and to assess the assiduousness of their implementation to determine their efficacy.

Nevertheless, it is trite law that treaties are only binding on their parties. As will be immediately apparent these criteria appear to do nothing to overcome the patchwork of different levels of responsibility and differing obligations incumbent on each state as a result of their differing treaty relations. Indeed, it could be argued that these criteria go no further than simply re-articulating the requirement that states should comply with their treaty obligations and the logical consequence that failure to do so constitutes a breach of international law. Unfortunately, this does little to advance the articulation and understanding of the substantive content of flag state responsibilities. In particular, where a flag State is not party to all (or indeed any) of these international agreements difficult questions arise as to the precise responsibilities incumbent on it. In other words, it is necessary to determine whether there are any flag state responsibilities which are binding on all states as a matter of customary international law.

In the high seas fisheries context, it is arguably uncontroversial to suggest that there are two fundamental customary flag State duties: the duty to cooperate in the conservation and management of marine living resources, and the duty to effectively control vessels flying your flag. The difficulty lies in defining the precise content of these customary rules.

With respect to the duty to cooperate, under the LOSC cooperation requires the establishment, where appropriate, of sub-regional or regional fisheries organisations.¹⁷ For

¹⁷ LOSC Art 118

parties to the FSA the duty to cooperate means not only the duty to establish RFMOs but also that only members of RFMOs or non-members who agree to abide by the conservation and management measures adopted by those RFMOs can access the fishery concerned.¹⁸ States that do not agree to abide by RFMO measures must refrain from fishing. If they do not they have breached their duty to cooperate. The difficult question here is whether the duty to *cooperate or refrain* can now be regarded as a rule of customary international law binding on *all* states.

With respect to the duty to effectively control vessels, the LOSC requirement to ‘effectively exercise jurisdiction and control’¹⁹ includes the requirement for flag states to maintain a register of ships under their control. However, many states exempt fishing vessels from these requirements. Article 18 of the FSA makes clear that states shall only authorise their vessels to fish on the high seas where they can exercise flag state responsibilities effectively. Both the Compliance Agreement and the FSA provide more detail as to what this effective exercise of flag state responsibilities entails; for example, they oblige flag states to ensure through various means such as vessel registers, fishing authorizations and refusal of their flag to known IUU vessels, that their vessels do not engage in activities that undermine the effectiveness of RFMO measures. The FSA goes further and obliges flag states to establish schemes for, *inter alia*: licensing, national register of authorised vessels, vessel and gear marking, vessel reporting and recording, verification of catch data, monitoring control and surveillance (MCS), regulation of transshipment, and ensuring compliance with RFMO measures²⁰

A comprehensive review of state practice and *opinio juris* to definitively ascertain the customary status of these obligations is beyond the scope of this paper. However, a cursory review of state practice by both members and non-members of RFMOs²¹ would seem to suggest that, at the very least, flag states might now be considered, as a matter of customary international law, to have a duty to maintain a vessel register the contents of which are publicly available. Registration requirements should involve, at a minimum, verification of provenance and ownership of the vessel in order to ensure that known IUU vessels or vessels operated by known IUU operators are not admitted to the register. Arguably too, all flag states are now obliged not to accept vessels onto their register if they

¹⁸ FSA Art 8

¹⁹ LOSC Art 94

²⁰ FSA Arts. 18-19.

²¹ See, e.g., R. Rayfuse, ‘To Our Children’s Children’s Children: From Promoting to Achieving Compliance in High Seas Fisheries,’ 20(3-4) *International Journal of Marine and Coastal Law*, 2005, 509-532 at 525-527.

are not willing and/or able to exercise effective control over them. This willingness should be evidenced by acceptance and implementation in the domestic law of the flag state of relevant internationally agreed conservation and management measures, the establishment of an effective licensing regime which issues authorisations to fish only upon verification of a vessel's aptitude to comply with relevant measures and the identification of the persons responsible for the vessel's operation, and the existence of a national regulatory framework for monitoring, control and enforcement (MCE). This MCE framework should include binding requirements on the reporting of fishing data by vessels, requirements to monitor vessels through the use of vessel monitoring systems (VMS) and observer programs, at-sea and in-port inspection, and regulation of transshipments. In addition, it should provide for a system of sanctions adequate in severity to act as an effective deterrent, including the revocation of authorizations to fish.

A similar analysis can be made with respect to the rules relating to marine pollution. Take, for example, the case of high seas dumping. Dumping is defined, *inter alia*, as 'any deliberate disposal of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea'.²² Dumping is regulated under the LOSC which, in addition to its general obligations with respect to prevention of marine pollution and protection of the marine environment, sets out more specific obligations in respect of dumping. Article 210 of the LOSC requires all states to adopt national laws, regulations and other measures to prevent, reduce and control pollution of the marine environment by dumping. These laws, regulations and measures are to ensure that dumping is not carried out without the permission of the competent national authorities and, for dumping within the territorial sea, the exclusive economic zone or on the continental shelf (including the outer continental shelf), the express prior approval of the relevant coastal state. The national laws, regulations and measures adopted must be no less effective than internationally agreed global rules and standards, to prevent, reduce and control pollution from dumping.

These internationally agreed global rules and standards are found in a number of global and regional treaties, the most important of which for present purposes are the 1972 London Dumping Convention,²³ and its 1996 London Protocol.²⁴ Under the 1972 Convention dumping of certain wastes and other matter listed in two annexes (the 'black

²² LOSC Art 1(5)

²³ 1972 Convention for the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, London, 29 December 1972. Into force 30 August 1975. 1976 UKTS 43, (the London Convention)

²⁴ 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 29 December 1972, London, 7 November 1996. Into force 24 March 2006. [2006] ATS 11 (the London Protocol)

list' and the 'grey list') is either outright prohibited or requires a special prior permit. Dumping of all non-listed wastes and other matter requires a general prior permit. Under the Protocol, the dumping of all wastes or other matter except those specifically listed is prohibited and dumping of those listed substances is subject to stringent permitting and environmental assessment requirements.

Eighty-two states are party to the London Convention while 28 states are party to the London Protocol, which replaces the London Convention for states party to both. *Prima facie*, only these states are bound by the respective treaty regimes. However, it has been argued that the London Convention and the London Protocol may both have much broader application. Article 210 of the LOSC requires states to adopt global rules and standards for the control of dumping, and to re-examine them from time to time. The ongoing revision of the London Convention and the adoption of the London Protocol might be said to fulfil this requirement such that, with the coming into force of the LOSC, all states parties to the LOSC are now bound by the obligations contained in the most recent document, the London Protocol, or at the very least by the provisions of the London Convention.²⁵ In addition, it has been asserted that 'there is no evidence of any non-party [to the London Convention or the London Protocol] dumping significant wastes at sea, or asserting a freedom to do so beyond that implied in the LOSC and various global and regional instruments'.²⁶ Admittedly, neither states nor individuals would be likely to publicise any unregulated or unlawful dumping activities they engage in. However, if this is correct, then in the absence of any state practice evidencing an assertion of a right to the contrary, it would appear arguable that the prohibition exists as a matter of customary international law. The issue is not, however, entirely free from doubt.

Clearly, in developing the concept of flag state responsibilities, the real challenge is to find a commonality of rules which are applicable to *all* states. In the absence of any authoritative articulation of the content of flag state responsibilities which are binding as a matter of customary international law, the best that can be said is that the precise content of these customary obligations remains vague and insufficiently developed to provide the basis for a clear and uncontroversial determination of rights and obligations. These substantive gaps when coupled with the rules on nationality of ships and flag state jurisdiction significantly hamper effective protection, preservation, conservation and

²⁵ L. de la Fayette, 'The London Convention 1972: Preparing for the Future' 13(4) *International Journal of Marine and Coastal Law* (1998) 515-536 at 516

²⁶ P. Birnie and A. Boyle, *International Law and the Environment* (2d) (2002) at 421

management of areas beyond national jurisdiction and the global application of enforcement mechanisms.

4. Ensuring Flag State Responsibility

A plethora of measures have been developed by states to persuade flag states to ensure their vessels comply with international rules and to address the enforcement challenges posed by the unwilling or unable flag state. Importantly, while these measures are only binding on states parties to the relevant treaty regime, in their operation these measures are intended to – and often do – influence and affect the behaviour of non-party states as well. By way of illustration, and for simple reasons of familiarity, the discussion here focuses primarily on measures adopted in the high seas fisheries context through RFMOs as illustrative of the challenges faced.

A now commonly used method in a number of treaty bodies including in the IMO and RFMOs is that of naming and shaming, particularly through the use of ‘negative lists’ of non-compliant vessels. Whether in the fisheries or the shipping context, blacklisting on a negative list can result in adverse consequences for listed vessels such as denial of flag or denial of port access. For example, under various RFMO schemes, member states are to take certain actions against listed vessels regardless of whether the vessel is flagged in a member or non-member state. These actions generally include: refusing to grant their flag to listed vessels; refusing to issue licences to fish in waters under national jurisdiction; refusing authorisation of catch landing or in-port transshipment; ensuring that fishing support, cargo vessels and mother-ships flying their flag do not participate in any transshipment operations with listed vessels; and prohibiting chartering of listed vessels. Beyond this, states are to discourage their importers, transporters and other sectors to refrain from any transactions with or transshipments from listed vessels. Due process mechanisms have been adopted to allow states to explain, contest and thereby possibly avoid the inclusion of their vessels on the lists.

However, while these lists are useful in identifying individual offending vessels and in revealing patterns of flag state behaviour they are subject to limitations. The tyranny of consensus decision-making in RFMOs means that member (unlike non-member states) states can block the listing of their vessels, despite cogent evidence to the contrary. Procedural rules, possibly anathema to the principle of sovereign equality of states, are therefore required to ensure that member states cannot block consensus vis-à-vis their own vessels. In addition, listed vessels, once identified, may simply move into another RFMO

area or change their name and register to avoid detection. RFMOs have therefore adopted the practice of making their lists publicly available and transmitting them to other RFMOs. In 2007 the five tuna RFMOs agreed to establish a common IUU list while others have agreed to reciprocal recognition of each other's lists.

RFMOs have also moved to adopt 'positive' lists, or registers of fishing vessels authorised to fish in a regulatory area. Unauthorised vessels are deemed to be IUU vessels. However, in some cases the requirement to authorise only applies to specific gear type or to fishing vessels greater than 24 meters in length. Smaller vessels, still capable of fishing on the high seas, refrigerated transport vessels and other supply vessels may not be included and can therefore be used in the practice of laundering catch. In addition, authorisations are not necessarily linked to quota. In other words, states are free to authorise vessels with capacity far in excess of that needed to take allocated quota. This lack of capacity control does nothing to reduce the likelihood of overfishing. Moreover, as with negative lists, problems of consistency and application can arise as between the different lists adopted by different organisations. The FAO is currently examining the feasibility of and *modus operandi* for a global record of fishing vessels which will serve as a single record of all fishing, refrigerated transport, and supply vessels. The actual use to which the record will be put remains to be seen.

Controls, and in some cases bans, on transshipments either as between vessels of member states or between vessels of member states and non-member states are also increasingly frequent. Controls may include the requirement to establish a record of carrier vessels and conditions for at-sea transshipment such as flag state authorisation, notification procedures and the use of on-board observers. However, monitoring and controlling at-sea transshipments are notoriously difficult and the regulations easily circumvented thereby allowing catch laundering. Even the presence of third-party observers may be insufficient deterrent if the observer's role is limited to catch data recording for scientific purposes or if transshipment occurs outside the regulatory area beyond the jurisdictional area of the observer. Some RFMOs therefore now require transshipment to take place only within designated member state ports after advance notification to the port state of the precise details of the catch to be transhipped, including total weight to be landed and the port and time of landing.

Port state measures have therefore also become increasingly popular. Under customary international law, port states are entitled to control access to their ports and persons and activities within their territory, subject only to exception in the case of *force*

majeure or in cases specifically agreed to in treaties. However, a natural corollary of the right to control is the right not to control. To encourage adoption of port state controls international agreements have been developed to provide an agreed minimum content to the rights of port states to act in support of internationally agreed measures, although nothing in these agreements prevents states from adopting more stringent measures should they desire to do so. Having originally found their application in the shipping context, measures requiring aspects of port state control are increasingly being adopted in a number of RFMOs.

Post state measures have the potential to be very effective, indeed, perhaps too much so in that their introduction can lead vessels to seek port in states which have not adopted the controls. The phenomenon of ports of convenience has been tackled in the shipping context by the introduction of regional MOUs on port state control which seek to harmonise the measures taken. In the shipping context vessels generally follow common routes and use common ports on a regular basis so monitoring in this way can be reasonably, albeit not wholly, effective in identifying and detaining substandard ships. In the fisheries context, however, vessels may tranship at sea or off-load in ports of states not party to the relevant RFMO scheme. The banning of at-sea transhipment and the imposition of conditions on landing goes some way to alleviating this. Nevertheless, the existence of ports of convenience and the proliferation of inconsistent, unharmonised RFMO port state control schemes poses a real threat to the efficacy of RFMO measures. For this reason efforts are underway to develop a global legally binding agreement on port state measures. However, even when adopted, without global adherence, the phenomenon of ports of convenience will still persist.

Increasingly intertwined with port state measures, the use of trade-related measures such as catch documentation and certification schemes as well as export and import controls or prohibitions is becoming more widespread. The purposes of certification schemes are to create negative incentives to deter non-compliance with measures adopted by RFMOs by removing the profitability of non-compliant behaviour, to create positive incentives to comply by removing competitive advantages arising from non-compliance, and to provide information on the amount of fish in trade and which countries are involved to enable more effective management and enforcement decisions to be taken. Catch certifications are issued at the point of harvesting and cover all fish to be landed or transhipped. They thus enable landings and trade flows to be monitored and make it possible to restrict access to markets for fish taken in contravention of RFMO measures.

These schemes are linked with port state control in that they require vessels to provide prior notification of landing, including a declaration that the vessel has not been engaged in IUU fishing which must also be confirmed by the flag state. Failure to make the appropriate declaration will result in denial of port access and if there is evidence that the catch was taken in contravention of RFMO measures then the port state must not allow it to be landed or transhipped.

Despite the apparent attractiveness of these certification schemes, their efficacy in combating IUU fishing has been somewhat limited by their *inter partes* application and by their circumvention by landing in non-party ports. Technical shortcomings include double counting of catch, inadequate application to all catch and all species, and the ever present practice of fraudulent reporting.²⁷ In general, catch documentation schemes have proven more effective than mere trade documentation schemes, and a number of RFMOs are considering replacing the latter with the former. To be truly effective these schemes should apply to all sectors of the fleet regardless of size or gear, all forms of product (live, fresh, frozen, traded, for domestic consumption) and all stages of the catching, landing, transport, processing, trading and marketing chain. The introduction of electronic documentation will also reduce the potential for fraud, improve the speed at which information can be exchanged, and reduce the compliance burden on legitimate operators and regulatory authorities.²⁸ However, there remains a need to harmonise the various RFMO schemes to make their application by port states more streamlined and therefore both more attractive and more effective.

At-sea measures allowing for direct enforcement by one state against vessels of another state also exist. The LOSC provides for non-flag state enforcement in cases of piracy, slave trading unauthorised broadcasting, and stateless vessels. Other treaty and customary regimes allow for non-flag enforcement in cases of illicit drug trafficking, self defence, intervention in the case of accidents at sea, and in support of sanctions and blockades adopted pursuant to Chapter VII of the United Nations Charter. In the fisheries

²⁷ See, eg, C. Roheim and J.G. Sutinen, "Trade and Marketplace Measures to Promote Sustainable Fishing Practices" ICTSD Natural Resources, International Trade and Sustainable Development Series Issue Paper No 3, International Centre for Trade and Sustainable Development and the High Seas Task Force, Geneva, Switzerland (2006) available at <http://www.high-seas.org/> and C. Roheim, "Seafood Supply Chain Management: Methods to Prevent Illegally-Caught Product Entry into the Marketplace". Paper prepared for IUCN World Conservation Union – US for the project PROFISH Law Enforcement, Corruption and Fisheries Work, (2008) available at <http://www.illegal-fishing.info/item_single.php?item=document&item_id=555&approach_id=16>

²⁸ M. Lack, "Catching on? Trade-related measures as a fisheries management tool" Traffic International, Cambridge, UK (2007) available at <http://www.traffic.org/fisheries/>;

context, non-flag state boarding and inspection is provided for in a number of bilateral treaties²⁹ and RFMO schemes³⁰ as well as Articles 20-22 of the FSA. However, these schemes only operate *inter partes* or as against stateless vessels. Of course consent to boarding, inspection and arrest can always be given by a flag state in *ad hoc* cases. However, there appears as yet to be no recognised general right of non-flag at-sea enforcement in the absence of flag state consent.

5. The Wages of Sin: Bearing the Consequences of Irresponsibility

It will be immediately apparent that all of the measures described above relate to measures that are to be taken by a flag state or by another state either in respect of or against individual vessels or private persons (be they individual or corporate) in particular situations of non-compliance. However, the rights of high seas access and use are granted by the LOSC not to individuals but to states. The purpose of defining the primary rules binding upon flag states and assessing a flag state's performance therewith must, presumably, be to determine the consequences that attach to a failure to comply with those rules not just in respect of individual vessels but also as against the state *qua* state.

With respect to individual instances of flag state failure, according to the 2008 Report of the UN Secretary General on Oceans and Law of the Sea 'there is now a prevailing view that fishing vessels on the high seas which are not effectively controlled by their flag states are liable to sanctions by other states, should they happen to contravene international conservation and measures'.³¹ Application of the general rules on state responsibility suggests that where a flag state has failed to ensure compliance by its vessel with its international obligations then any injured state may take action against that particular vessel. This would include coastal states whose rights in their exclusive economic zone have been adversely affected through, for example, pollution originating in

²⁹ See, e.g., U.S.-China Memorandum of Understanding on Effective Cooperation and Implementation of United Nations General Assembly Resolution 46/215 of December 20, 1991, (3 December 1993).

³⁰ See, e.g., Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (16 June 1994), 34 *ILM* 67 (1994), Art. XI; Convention on the Conservation of Anadromous Stocks in the North Pacific Ocean (11 February 1992) 22 *Law of the Sea Bulletin* 21-29, Arts. IV and V. See, also, Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries (24 October 1978), 1135 UNTS 369, Art. XI(5); Convention on the Conservation of Antarctic Marine Living Resources (20 May 1980), [1982] ATS 9, Art. X; International Convention for the Conservation of Atlantic Tunas (14 May 1966), 673 UNTS 63, Art IX(3); Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (5 September 2001), 40(2) *ILM* 277, Arts. 25 and 32; Convention on the Conservation and Management of Fishery Resources in the South East Atlantic (20 April 2001) 41(2) *ILM* 257, Art. 16(3).

³¹ Report of the Secretary General on Oceans and Law of the Sea (Advanced and unedited text) UN Doc a/63/50 (2008) para 249

the high seas or overfishing of straddling and highly migratory stocks. In the fisheries context this would also include members of an RFMO whose interests in the stocks regulated have been adversely affected by the activity in question. Port states, too, would be placed to take action on the basis of their sovereign right to control access to their ports and the activities and persons within their territory.

What is not yet resolved is the issue of standing of other non-specifically affected states to take action on the basis of protection of the interests of the international community as a whole. In the pollution context Article 218 of the LOSC gives port states the right to institute proceedings against vessels voluntarily in their ports in respect of any discharge from such vessels which has taken place on the high seas, although this right is subject to the right of flag-state pre-emption should a flag state intervene to take over the matter.³² However, no similar jurisdictional entitlement appears yet to be recognised in the high seas fisheries context. Neither does there appear to be scope for its application in the case of environmental damage to the high seas water column and its resources occasioned by seabed activities either on the outer continental shelf or in the Area.

With respect to the broader question of a consistent pattern of failure by a flag state, it will be recalled that all states are under an obligation to exercise their high seas freedoms with due regard for the interests of other states. These interests include not only the rights of all states to access and use, but also the corollary rights to not access or use, as well as the interests of the international community as a whole in the protection and preservation of the marine environment and conservation and sustainable use of its resources. A consistent pattern of failure by a flag state to meet its responsibilities would arguably constitute a breach not only of those particular responsibilities but also a breach of the requirement of due regard articulated in Article 87 of the LOSC and an abuse of right contrary to Article 300 of the LOSC. In other words, while not entirely free from doubt, a consistent pattern of failure may be open to invocation by any and *all* states.

Regardless of which states have standing to invoke, the question remains as to the consequences for a flag state that flow from a consistent pattern of failure to effectively control its vessels. Certainly, the irresponsible flag state may be subject to public humiliation through naming and shaming and even diplomatic protests. Port states may close their ports to vessels of irresponsible flag states or otherwise deny port services. Other states may adopt non-discriminatory trade measures or other sanctions designed to persuade

³² LOSC Art 228

the recalcitrant flag state to see the error of its ways. RFMOs may remove vessels from the register of authorised fishing vessels or deny quota to member flag states who fail to effectively control their vessels. Each of these approaches has been taken in at least one RFMO or treaty body and could well be implemented in others.

More controversially, it is now being suggested that since states have the right to grant their flag, they also have the right not to grant their flag and the correlative duty to decline to do so unless they are both willing and able to effectively control their vessels. Grant of flag, followed by a consistent pattern of failure to effectively control could therefore result in a denial of the right for that state's vessels to use the high seas. In other words, while a state would not lose its right to grant flag, the grant of flag by an irresponsible flag state or by a state which subsequently fails in its obligation to effectively control its vessels would not be opposable to other states and its vessels would not enjoy the protection of the flag state – at least until such time as other states were satisfied that the flag state had taken steps to remedy its failings. There is no doubt that this is a serious consequence to be resorted to only in extreme circumstances. However, at some stage the logical consequence of developing the concept of legally binding flag state responsibilities must be admitted.

6. Conclusion: Addressing the Enforcement Gaps in the Legal Regime for Areas Beyond National Jurisdiction

At a general level, enforcement gaps in the legal regime for areas beyond national jurisdiction can be identified as a lack of effective compliance and enforcement mechanisms and institutions and a lack of standing of states and international organisations to protect the interests of the international community as a whole. Despite the adoption of an increasing number of creative and complex enforcement measures, problems persist as a result of the inability or unwillingness of flag states to effectively control their vessels.

There are many who eschew the development of more law while others, far more knowledgeable and competent than this pretender, have expended considerable energies analysing existing deficiencies and divining, designing and discussing new and ever more creative measures to deal with these enforcement gaps. Recent suggestions include a range of measures such as taxation, anti-corruption, labour, human rights and eco-labelling schemes that states could be required to adopt to control either their vessels or the interaction of their nationals with vessels flagged in other states. Essentially these measures

seek to deny individuals the economic advantages gained from the offending activity to reduce the incentive to engage in the activity and the likelihood of its recurrence.

There is no doubt that denying economic advantage can be a key element in controlling the activities of individuals, whether in the shipping, fishing or any other context. However, to ensure adequate protection of the legitimate interests of all states in areas beyond national jurisdiction it may now be necessary to attach real consequences not just to the activity of individuals but to that of flag states as well. This may require the development of new law. In this respect, developments of globally applicable regimes for port state measures, a global register of vessels and global MCS frameworks will help. In the end, however, it may simply require states brave enough to test the waters of international dispute settlement to clarify the content of generally accepted international norms and the bounds of state responsibility for protection and preservation of the marine environment and the conservation and management of the marine living resources in areas beyond national jurisdiction.