

The International Plan of Action on Illegal Unreported and Unregulated Fishing: The Legal Context of a Non-Legally Binding Instrument

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ABSTRACT

This paper traces the evolution of the International Plan of Action on Illegal, Unreported and Unregulated Fishing (IPOA-IUU) from the expert consultation held in Sydney, Australia in May 2000, through the two technical consultations held in Rome at FAO and at COFI, to its adoption by the FAO Council in June 2001. It does not, except incidentally, enter into the substance of the provisions of the IPOA-IUU. It focuses instead on the legal context in which this voluntary instrument was negotiated, looking at some questions that arose in the course of its negotiation, such as for example the use of definitions, footnotes and addenda. It looks in particular at the relationship of the IPOA to the Code of Conduct for Responsible Fisheries, and to other International Plans of Action negotiated in the context of the Code of Conduct. It also examines the role given to international law in the IPOA, and its relationship to the 1982 LOS Convention and other international instruments.

Introduction

On 2 March 2001 the Committee on Fisheries of FAO, better known as COFI, agreed on an international plan of action to prevent, deter, and eliminate illegal, unreported and unregulated fishing. This plan is possibly the most important global instrument concerning fisheries since 1995 when both the FAO Code of Conduct for Responsible Fisheries and the 1995 UN Fish Stocks Agreement were finalised.¹

* The views expressed in this paper are personal and do not necessarily reflect the views of FAO.

¹ In this paper, International Plan of Action will be abbreviated as IPOA, Illegal, Unreported and Unregulated Fishing will be abbreviated as IUU, or IPOA-IUU, according to the context. The full text is reproduced below at p. 661. The United Nations Convention on the Law of the Sea of 10 December 1982 will be referred to as the 1982 LOS Convention, and the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing

The purpose of this paper is to explore the legal context in which the IPOA-IUU was negotiated. It leaves others to explore the substantive clauses of the Plan. An underlying purpose of the paper is to record the curious legal context in which much of the instrument was negotiated. In fact, the essential point is that the instrument, being "voluntary" in character in the sense that it is not intended to lead to the creation of legally binding obligations, was nonetheless negotiated in many ways as if there was a risk that it would become a binding legal text, or at the very least that it might have an impact on binding legal instruments, or even on the evolution of customary international law.

A brief summary of the Plan is appropriate

The Plan begins with an introduction (Part I), which outlines the background to the basic problem as well as a short history of the initiative. This is followed by Part II, which defines the components "illegal", "unreported" and "unregulated", as well as setting out its legal context. These aspects are discussed in detail in this paper.

The Plan then sets out in Part III objectives and principles, which are derived from the objectives and principles used in the earlier IPOAs.² It states the basic objective of the IPOA-IUU as being:

"to prevent, deter and eliminate IUU fishing by providing all States with comprehensive, effective and transparent measures by which to act, including through appropriate regional fisheries management organizations established in accordance with international law".³

Part IV is the heart of the Plan. It deals with the implementation of measures to prevent, deter and eliminate IUU fishing, which are covered under major headings concerning all state responsibilities, flag state responsibilities, coastal state measures, port state measures, internationally agreed market-related measures, research, and regional fisheries management organisations. There are separate parts on the special requirements of developing countries (Part V), reporting, and the role of FAO (Part VI).

While much of the IPOA-IUU reaffirms basic provisions of the 1982 LOS

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Vessels on the High Seas, approved by the FAO Conference on 24 November 1993 will be referred to as "the 1993 FAO Compliance Agreement". The Agreement for the Implementation 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 will be referred to as the "1995 UN Fish Stocks Agreement", and the 1995 FAO Code of Conduct for Responsible Fisheries will be referred to as the "Code of Conduct".

² These are the International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries, the International Plan of Action for Conservation and Management of Sharks, and the International Plan of Action for the Management of Fishing Capacity, discussed in more detail below at p. 607.

³ Para. 8.

Convention, the 1993 FAO Compliance Agreement, the 1995 UN Fish Stocks Agreement and the Code of Conduct, the IPOA-IUU does develop much more detailed actions than are to be found in the existing instruments referred to. Amongst the more novel aspects are: provisions on trade measures, port state controls and controls over nationals. More importantly, even though it does cover much old ground, the IPOA-IUU does provide a renewed impetus for States and regional fisheries bodies to address these issues.

Background

The terminology “Illegal, Unreported and Unregulated Fishing” (IUU) is generally accepted as having been initiated in the context of CCAMLR (Convention on the Conservation of Antarctic Marine Living Resources), and in particular at the sixteenth session of the Commission. Here it was noted that one of the major problems facing CCAMLR was that:

“IUU catches in the Commission’s area exceeded reported fishing by a factor several times over and that more than half the vessels presumed to engage in IUU fishing fly the flags of CCAMLR Member States”.⁴

When the matter was taken up in FAO, at COFI from 15–19 February 1999 on the basis of an Australian initiative, the mandate and scope of IUU was not precisely defined in any of its originating instruments. In the report of COFI itself, it was stated that:

“The Committee was concerned about information indicating increases in illegal, unreported and unregulated fishing, including fishing vessels flying ‘flags of convenience’.”

Shortly afterwards, the FAO Ministerial meeting on Fisheries (Rome, 10–11 March 1999) adopted the Rome Declaration on the Code of Conduct for Responsible Fisheries, which in a preambular paragraph expressed concern at the growing amount of illegal, unregulated and unreported fishing activities being carried out, including vessels flying “flags of convenience”. To address the issue of IUU fishing and “flags of convenience”, the Ministers and Ministers’ representatives declared, in operative paragraph 12(j) that, without prejudice to the rights and obligations of States under international law, they:

“j) Will develop a global plan of action to deal effectively with all forms of illegal, unregulated and unreported fishing including fishing vessels flying

⁴ The full versions of the texts cited here can be found in D. Doulman, “Illegal, Unreported and Unregulated Fishing: A mandate for an International Plan of Action” at <http://www.affa.gov.au/ecoiuuf/papers.html>. (AUS: IUU/2000/4). The term “unauthorised” was already being used in General Assembly Resolutions concerning fishing. In recent years, the International Commission for the Conservation of Atlantic Tuna has also been using some of the same terminology.

'flags of convenience', as discussed in paragraph 33 of Annex G of the Report of the Consultation on the Management of Fishing Capacity, Shark Fisheries and Incidental Catch of Seabirds in Longline Fisheries, which met in Rome in October 1998, through coordinated efforts by States, FAO, regional fishery management bodies and other relevant international agencies such as the International Maritime Organization (IMO), as provided in Article IV of the Code of Conduct."

The FAO Council reiterated this at its 116th session in 1999. Here it stated *inter alia*:

"The Council noted that illegal, unauthorised and unreported fishing (IUU), including fishing by vessels flying 'flags of convenience', undermined conservation and management measures in fisheries. The Council urged that a global approach be taken by FAO to develop a strategy to address the problem of IUU, noting that this initiative should be carried forward through the development of an IPOA within the framework of the Code of Conduct."

The UN General Assembly took the matter further when it considered the matter in 1999.⁵ Here it referred in the preamble of a resolution to earlier resolutions regarding unauthorised fishing in zones of national jurisdiction, while in the operative paragraphs of the resolution, it called on States not to permit vessels flying their flags to engage in fishing on the high seas without having effective control over their activities and to take specific measures to control fishing vessels flying their flags. It also called upon IMO, in co-operation with FAO, regional fishery bodies and arrangements and other relevant organisations, and in consultation with States and entities, to define the concept of the genuine link between the fishing vessel and the State in order to assist in the implementation of the 1995 UN Fish Stocks Agreement.

The Government of Australia, in cooperation with FAO, organised an Expert Consultation on Illegal Unreported, and Unregulated Fishing in Sydney, Australia from 15–19 May 2000. At this meeting, a number of detailed background papers were prepared, which covered a wide range of issues,⁶ and proposals found in those background papers were compiled into a single document which became the basis for the discussion by the expert consultation. This text was initially scrutinised in a number of different subject groups and the final draft of the IPOA-IUU from this meeting was adopted following a debate in plenary at the consultation.⁷

The resulting text was taken up at the FAO Technical Consultation on Illegal,

⁵ General Assembly Resolution 54/32.

⁶ These papers can be found at the following website: <http://www.affa.gov.au/ecoiuuf/papers.html>

⁷ The text as adopted at the Sydney meeting can be found at the website referred to in the preceding footnote.

Unreported and Unregulated Fishing which was held in Rome from 2–6 October 2000. This was followed by a meeting of the Joint FAO/IMO Ad Hoc working group on Illegal, Unreported and Unregulated Fishing and related matters held in Rome from 9–11 October 2000 to discuss this further.⁸

While much progress was made at the October Technical Consultation, a second Technical Consultation was held in Rome from 22–23 February 2001, which was immediately prior to the session of COFI held from 26 February–2 March 2001. This second Technical Consultation came very close to finalising and agreeing on the text of the IPOA-IUU. However, a number of issues remained unresolved. Accordingly, during COFI, a group known as the “friends of the chair”, and convened by David Balton of the US delegation, worked to finalise an agreed text on these issues. At COFI itself, the text of the IPOA-IUU was agreed to, including the text dealt with by the friends of the chair.

The overall process was fortunate throughout its gestation in having at all stages excellent chairmen and convenors. In Sydney the expert consultation was chaired by Glen Hurry of Australia. At the Rome October meeting of the Technical Consultation, the chair was Andrew Jackson of the UK, who had previously been the main chairman of the SEAFO Process. In view of his success at almost bringing the negotiations to a conclusion at the end of the first round of the technical consultation, he was asked to chair the second round in February 2001. At COFI, the chair was Masayuki Komatsu from Japan who steered the proposal through COFI.

In view of the fact that COFI is only a Committee of the Council,⁹ the IPOA-IUU was then transmitted by COFI to the FAO Council for formal adoption at its 120th session from 18–23 June 2001. At this meeting the text was approved without any changes, though there were some comments made which cast light on how it might be interpreted.¹⁰

Relationship to the Code and to other IPOAs

The IPOA-IUU is stated to have been “elaborated within the framework of the FAO Code of Conduct for Responsible Fisheries as envisaged by Article 2(d)”.¹¹ In fact, this IPOA has to be seen against the background of the negotiation some

⁸ For a full report of the meeting, see *FAO Fisheries Report No. 937*. The meeting made a number of recommendations concerning port state controls and flag state controls. The recommendations are too numerous to discuss here but reference may be made to the checklist of flag state control and the criteria for inspections of a foreign flag fishing vessel by a port state. The outcome of the meeting was noted by COFI, and it was agreed that FAO should continue to cooperate with IMO, as appropriate, on these matters. (*COFI Report*, para. 97.)

⁹ FAO Constitution, Art. V.6.

¹⁰ Japan took the opportunity to draw attention to its view that the use of the term “relevant” in respect of regional fisheries bodies was especially relevant to the Commission established under the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, which it did not regard as being a relevant organisation in view of certain shortcomings in the Agreement.

two years earlier of three other IPOAs. These are: the International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries, the International Plan of Action for Conservation and Management of Sharks and the International Plan of Action for the Management of Fishing Capacity. These three IPOAs, which were also negotiated within the context of Article 2(d) of the Code of Conduct, were adopted by COFI at its 23rd session in February 1999, and endorsed by the FAO Council in June 1999.

All three have the same structure, and introductory and final clauses. The first two, concerning seabirds and sharks, are very specific in their focus, while the third addressed the more general issue of fishing capacity. These IPOAs are clearly drafted in non-mandatory language, using "should" throughout except where they refer to possible action being undertaken by FAO, where it uses "will", but even there they refer to action being "as and to the extent directed by its Conference". Further, it was suggested that when the IPOA on IUU was to be prepared, the IPOA on the Management of Fishing Capacity might be used as a blueprint.¹²

Legal status

Like the Code of Conduct itself¹³ and the three other IPOAs referred to, the present IPOA is "voluntary". While this term is not explained any further, it is apparent both from the non-mandatory language used, and from the general context in which all the negotiations took place, that by this it is meant that it is not intended to give rise to any legally binding obligations. While the point is self evident from the text, it is also apparent in other ways, for example, that the IPOA-IUU requires no formal act of acceptance by States, it is not structured like an internationally binding instrument, and it has no provisions on signature, entry into force or any other standard final clauses found in a binding international agreement.

If there were any lingering doubt, the status of the IPOA-IUU is also reflected in a number of declarations and reservations made. Mexico, for example, at the meeting of COFI, stressed that:

"the IPOA-IUU, which is a voluntary instrument, offered a range of alternative tools to combat IUU fishing but this did not imply that States were obligated to use all of them, as it was the sovereign right of each State

¹¹ Article 2(d) states: "the objectives of the Code are to . . . (d) provide guidance which may be used where appropriate in the formulation and implementation of international agreements, both binding and voluntary."

¹² One small confusion that arose here was that, while the English version used the non-mandatory language of "should", the French and Spanish texts used the mandatory terms "*devrait*" and "*debera*". In the IPOA-IUU, the non-mandatory language in the Code of Conduct itself was reverted to in all three languages.

¹³ Para. 1.1 of the Code merely states: "This Code is voluntary."

to decide which tools might be used. In this connection, the adoption of the IPOA-IUU does not affect, nor should it be understood as affecting, the rights and obligations of States, in accordance with international law, and neither prejudice the position of States in other international fora.”¹⁴

The European Community, supported by Canada, also stated that the IPOA-IUU “is not a legal text but a political text”.¹⁵ Norway also pointed out that “it reserved its right to exercise stronger measures to prevent, deter and eliminate IUU fishing than was reflected in the IPOA-IUU”.¹⁶

However, while the IPOA-IUU lacks this legally binding status, this does not mean that it is necessarily completely devoid of any legal effect. This point is explored more generally elsewhere, in relation to so-called soft law instruments.¹⁷

Style

The overall drafting style of the IPOA-IUU reflects a pattern which seems to have evolved as a consequence of UNCED, which was continued by the Code of Conduct itself, and also continued in the three IPOAs drafted within the framework of the Code of Conduct. This can be described as a somewhat verbose essay style of drafting. By contrast, the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement (and even more so the 1982 LOS Convention) were negotiated in more traditional ways, with a more rigorous legal scrutiny of the text, and an attempt to achieve a relatively high level of legal consistency. It has to be said, however, that this may not matter very much inasmuch as the IPOA-IUU is not a binding legal instrument.

One other aspect, which underlines that the IPOA-IUU is not intended to be a formal binding instrument is that it, like the three other IPOAs, all have short essay-style introductions, which are virtually unknown in binding legal instruments. Strictly speaking, these are as much part of the text as the substantive parts.

There some other aspects of style that merit specific mention.

(a) Footnotes

This may seem a trivial issue, but it is worth documenting some of the discussion on whether footnotes could be used.

¹⁴ Para. 98.

¹⁵ Para. 99.

¹⁶ Para. 104.

¹⁷ See further, W. Edeson, “Closing the Gap: the Role of ‘soft’ International Instruments to Control Fishing”, (1999) 20 *Australian Yearbook of International Law* 8. See also H. Hillgenberg, *Soft law and the Legal Adviser*, a collection of essays by Legal Advisers of States, Legal Advisers of International Organisations and Practitioners in the Field of International Law (United Nations, 1999). See also generally, Shelton (ed.), *Commitment and Compliance: The Role of Non binding Norms in the International Legal System* (Oxford, 2000).

There was some discussion in the margins of the meeting that the use of footnotes might have resolved the problems of some delegations with regard to declarations or reservations, but they were not used. The point is of interest inasmuch as a footnote was added into the text of the Code of Conduct at a very late stage in the process of finalising it. The footnote concerned the non-application of a number of international instruments, and it was specifically inserted to deal with the sensitive question of the application of the 1982 LOS Convention to Turkey and Venezuela. Time constraints prevented it being incorporated into the text itself, though it would have been relatively easy to do so from a drafting point of view.¹⁸ In the International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries, the International Plan of Action for Conservation and Management of Sharks and the International Plan of Action for the Management of Fishing Capacity, several footnotes were included, more as references to articles. While the point may seem trivial to some, from a drafting point of view it is obviously desirable that footnotes should be avoided in a text such as an IPOA. Even if it is not a legal document, it is clear that it is intended to have an important effect in the international community, and might be used for example as a basis for justifying legislative action in a national legal system. For that reason alone, but also in order to follow what might be described as “best drafting practices” such as those normally used in binding legal instruments, the use of footnotes should be avoided. Hopefully, their non-use in the IPOA-IUU can be regarded as a good precedent to be followed in future documents of this kind, while the previous precedents can be discarded.

However, if a more prosaic reason is needed for avoiding footnotes, it should be mentioned that in the joint FAO/DOALOS publication “International Fisheries: Instruments with Index”, a crucial (indeed the only) footnote in the Code of Conduct (concerning the non-application of the 1982 LOS Convention and other relevant international agreements) was left out in error on editorial grounds. Indeed, on many documents on websites, footnotes are not immediately visible, and may not be included when a document is printed out.

b) Declarations, reservations, and addenda

As with footnotes, there was much discussion, mainly in the margins of the meeting, whether declarations, reservations or other addenda could be attached to the IPOA-IUU itself. This came up at the final session at COFI. This possibility was not accepted by the meeting, on the basis that the Rules of Procedure of COFI provide for the statement of minority views:

¹⁸ The footnote stated: “References in this Code to the United Nations Convention on the Law of the Sea 1982 or to other international agreements do not prejudice the position of any State with respect to signature, ratification or accession to the Convention or with respect to such other agreements.”

“At each session, the Committee shall approve a report to the Council embodying its views, recommendations and decisions, including when requested a statement of minority views ...”¹⁹

While this would not of itself preclude the inclusion of declarations or reservations, it was clear at the meeting that no other way of dealing with these except in the report was acceptable on political grounds. The matter became a source of major controversy at the final meeting as several delegations considered that the IPOA-IUU did not go far enough in some areas, and went too far in others; accordingly they wanted to reserve their positions. The strongest objection came from Canada which considered that in some respects the IPOA-IUU did not go far enough on boarding and inspection regimes, but went too far with respect to market measures. Canada made the following statement:

“Canada feels that this objective was not fully achieved with the current draft text of the IPOA. Moreover, an important ‘state of the art’ tool was left out of the text which Canada believes should have been expressly included.

Canada considers that the international community has accepted that boarding and inspection regimes should include requirements for fishing vessels to permit access by duly authorized inspectors from regional fisheries management organizations or states other than the flag state. Canada accepts that Members consider that the IPOA includes such measure. Canada considers, however, that such measure should have been set out explicitly in order to meet the objectives set out in the IPOA and, more generally, promote good fisheries conservation and management practices.

For these reasons, Canada feels it must put a reservation on paragraphs 20.10 and 70.7(bis) of the draft IPOA on IUU fishing.

Canada reserves its position with respect to the section of the draft International Plan of Action on IUU fishing titled ‘Internationally Agreed Market-Related Measures’ (paragraphs 53(bis) to 66). Canada recognizes the right of states, consistent with the Marrakech Agreement establishing the WTO, to adopt or enforce measures relating to the conservation of exhaustible natural resources. Canada does not, at this time, endorse as an automatic policy, an undertaking to apply sanctions with respect to trade in fish and fish products in cases of IUU fishing with respect to all regional fisheries management organizations. Rather, states should decide on the use of trade measures on a case-by-case basis, having due regard to the specific circumstances.”

¹⁹ Rule VI, *Records and Reports* (Rules of Procedure of the Committee on Fisheries, Basic Texts of FAO).

The full text of the Canadian statement was appended to the report of COFI. The matter caused a lot of tension in the final moments of the meeting, not so much over the substance of what Canada was saying, but because most countries present considered that it was inappropriate to add reservations as an annex to the IPOA itself. In terms of precedent, there were very few instances of this. The problem for Canada was simply that, if its concern, as expressed in its reservation, was not linked to the document itself in the form of an annex or some other attached addendum, then its point was at risk of being lost for the future. While a number of states²⁰ shared the basic Canadian concern that the IPOA-IUU did not go far enough in some respects and too far in others, they were reluctant to see the equivalent of reservations added into the text, thereby diminishing the effect of what had been achieved. In other words, while supporting Canada's view that the IPOA-IUU was not a perfect instrument, there was a concern that the document might become lost in a forest of declarations and reservations. In this regard, the basic perception was that, as it was not the practice in binding international agreements to append reservations to the text of the agreement itself, it would also be inappropriate to do it for a voluntary instrument such as an IPOA.

In the end, the meeting incorporated all the declarations and reservations into the report of COFI at that part of the meeting dealing with IUU fishing, and the IPOA-IUU went forward with the intention that it would be a free-standing document like the Code of Conduct and the three other IPOAs. This was left unchanged by the Council when it formally adopted the report of COFI.

Relationship with international law, the 1982 LOS Convention and other international instruments

While it is clear that the IPOA-IUU is not intended to give rise to binding legal obligations, the text itself makes the point about compliance with international law, or being in conformity with the 1982 LOS Convention, so frequently that a person unfamiliar with the intense negotiations surrounding the IPOA-IUU might reasonably wonder if in fact there was a genuine insecurity by some that it might give rise to such obligations. The result is that there is an enormous amount of redundancy in the text in the form of clauses that say it is subject to the 1982 LOS Convention or to international law, accompanied by inconsistent ways of saying much the same thing.

It is useful to give just a few examples of this redundancy.

To start with, it is stated in paragraph 5:

“The FAO Code of Conduct for Responsible Fisheries, in particular Articles 1.1, 1.2, 3.1 and 3.2 applies to the interpretation and application of this IPOA and its relationship with other international instruments . . . The

²⁰ Norway in particular. See *COFI Report*, para. 104.

IPOA responds to fisheries specific issues and nothing in it prejudices the positions of States in other fora.”

If one looks at the articles referred to in the Code of Conduct itself, the following protections are already covered:

“1.1 This Code is voluntary. However, certain parts of it are based on relevant rules of international law, including those reflected in the United Nations Convention on the Law of the Sea of 10 December 1982. The Code also contains provisions that may be or have already been given binding effect by means of other obligatory legal instruments amongst the Parties, such as the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas 1993, which, according to FAO Conference resolution 15/93, paragraph 3, forms an integral part of the Code.”²¹

“3.1 The Code is to be interpreted and applied in conformity with the relevant rules of international law, as reflected in the United Nations Convention on the Law of the Sea 1982. Nothing in this Code prejudices the rights, jurisdiction and duties of States under international law as reflected in the Convention.

3.2 The Code is also to be interpreted and applied:

- a. in a manner consistent with the relevant provisions of the 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;
- b. in accordance with other applicable rules of international law, including the respective obligations of States pursuant to international agreements to which they are party; and
- c. in the light of the 1992 Declaration of Cancun, the 1992 Rio Declaration on Environment and Development, and Agenda 21 adopted by the United Nations Conference on Environment and Development (UNCED), in particular Chapter 17 of Agenda 21, and other relevant declarations and international instruments.”

It might have been thought that these provided sufficient guidance in the context of an instrument already described as voluntary to protect States from binding commitments that might not have been in conformity with international law. Indeed, there were several drafts of these clauses in order to ensure that they did not have that effect.²²

²¹ 1.2 has not been included as it does not address the question of compliance or compatibility with international law. It deals with the scope of the Code of Conduct.

²² See further W. Edeson, “The Code of Conduct for Responsible Fisheries: An Introduction”, (1996) 11 *International Journal of Marine and Coastal Law* 97.

However, as if this was not well and truly enough, there was added a further clause as follows:

“13. Nothing in the IPOA affects, or should be interpreted as affecting, the rights and obligations of States under international law. Nothing in the IPOA affects, or should be interpreted as affecting, the rights and obligations contained in the 1995 UN Fish Stocks Agreement and the 1993 FAO Compliance Agreement, for States parties to those instruments.”

In addition to this very general paragraph there are numerous instances where some reference or other is made to international law or to conformity with the 1982 LOS Convention or sometimes both.

Extracts from just one of these instances will illustrate the point:

“80. States, acting through relevant regional fisheries management organisations, should take action to strengthen and develop innovative ways, in conformity with international law, to prevent, deter, and eliminate IUU fishing. Consideration should be given to including the following measures:

...

80.2 development of compliance measures in conformity with international law;

...

80.8 development within a regional fisheries management organisation, where appropriate, of boarding and inspection regimes consistent with international law, recognising the rights and obligations of masters and inspection officers;

...

80.11 definition of circumstances in which vessels will be presumed to have engaged in or to have supported IUU fishing; ...”

And so on.

An essay could be written on how states could develop “innovative ways, in conformity with international law” to prevent, deter, and eliminate IUU fishing. This reference to international law is so vague as to be close to meaningless. Part of the difficulty here is that it is not clear whether the reference to international law is intended to refer to existing international law, in other words, to a static legal regime, or whether the reference to international law takes in its evolution through State practice; in other words, customary international law. The reference to “innovative ways” might suggest that it was this dynamic aspect of customary international law that was referred to. However, the references to international law were nearly always intended to have a restraining effect on the scope of the IPOA-IUU.

In some instances, of course, the use of such a phrase masks a basic disagreement between states as to what international law actually provides. Most probably, in the context of port state controls, it was intended to provide

language that different groups could agree on, while leaving their differing perceptions of international law untouched by the IPOA-IUU.²³

One of the problems with this overkill of references “in accordance with international law”, “in conformity with international law”, and the like is not just that it is redundant in view of the introductory operative clauses, but that it can give rise to the mischievous argument that, where such a clause is not included, then by implication, international law is not a constraint.²⁴ Just as an example of this, paragraph 80.11 has been included above to illustrate the problem. Here, no safeguarding reference to international law is found, yet it will be immediately apparent that, where presumptions are involved, difficult questions of proof can arise, not only in international law, but also in national law.²⁵ If ever a safeguarding reference were needed, it would be here. Admittedly this is more a logical point than a serious argument of interpretation given the nature and context of the negotiations, but the practice of making frequent redundant references does fly in the face of elementary drafting practice.

What it does reveal more importantly is that the meetings to negotiate the text, especially once it became a formal technical consultation, were highly political in character, and representatives were often more obsessed with securing a perceived political position than they were with producing a well-written legal text. It is worth repeating that the meeting was fortunate to have been excellently chaired throughout its proceedings, both in Sydney and in Rome, but not even that saved the text from the verbose redundancy with which it is rich.

What it does suggest for the future, however, is that even though the text is essentially non-legal in character, it would be useful if there were an opportunity for it to be edited in between sessions in order that much of this kind of redundancy could be omitted. This was done to some extent with the Code of Conduct itself where, in between sessions, the FAO secretariat was able to revise the text to standardise the wording. With the IPOA-IUU, while it was suggested by the Norwegian delegation at the October Technical Consultation that the text should be “washed” in order to remove or harmonise these numerous redundant

²³ Port state measures are dealt with at paras. 52–64 of the IPOA-IUU. For a discussion of port state controls see D. Anderson, “Port States and Environmental Protection” in A. Boyle and D. Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford, 1999), p. 325 and p. 337.

²⁴ Based on the Latin maxim of interpretation “*inclusio unius est exclusio alterius*”.

²⁵ For a discussion of this, see D. Freestone, “The Burden of Proof in Natural Resources Legislation: Some Critical Issues for Fisheries Law”, FAO Legislative Study No. 63. Note also the discussion of burden of proof issues raised by Vice-President Wolfrum in *Saiga No. 2*, Judgment of the International Tribunal for the Law of the Sea (http://www.un.org/Depts/los/ITLOS/Judg_E.htm).

references, probably a combination of lack of time and increased political sensitivity led to this suggestion not being followed up.²⁶

One other aspect of the IPOA-IUU should be mentioned: in 1995 when the Code of Conduct was finalised, it was taken for granted that it would be interpreted and applied in a manner consistent with the 1995 UN Fish Stocks Agreement. Indeed, a lot of effort went into ensuring a high level of harmony with the Code of Conduct and this is reflected in Article 3.2 of the Code of Conduct itself. By 2001, there was an interesting shift in emphasis. It was apparent that several states were anxious to minimise the effect of the 1995 UN Fish Stocks Agreement, and this to some extent explains the more frequent references to the 1982 LOS Convention than to the 1995 UN Fish Stocks Agreement. Thus, in the IPOA-IUU, the 1995 UN Fish Stocks Agreement is referred to in the general interpretative clauses quoted above,²⁷ once in paragraph 11 where states are urged to ratify certain international agreements, including the 1995 UN Fish Stocks Agreement, and only once in the substantive provisions (paragraph 24.10). The tone of the latter reference is itself interesting:

“24. States should undertake comprehensive and effective monitoring, control and surveillance (MCS) of fishing from its commencement, through the point of landing, to final destination, including by:

24.10 ensuring effective implementation of national and, where appropriate, internationally agreed boarding and inspection regimes consistent with international law, recognizing the rights and obligations of masters and of inspection officers, and noting that such regimes are provided for in certain international agreements, such as the 1995 UN Fish Stocks Agreement, and only apply to the parties to those agreements.”

The reference to the 1995 UN Fish Stocks Agreement by itself would seem unremarkable given that that it has a special role already referred to in the Code of Conduct as outlined above.²⁸ However, what the sentence gives in referring to the 1995 UN Fish Stocks Agreement, it also takes away to the extent that it adds, some might think superfluously,²⁹ that it only applies to parties to those

²⁶ With the Code of Conduct, the terms “in conformity with”, “in a manner consistent with” and “in the light of” were all given different emphases in Article 3. These phrases were in fact subject to detailed scrutiny. For a discussion of this, see W. Edeson, *supra* note 22 at p. 97.

²⁷ See Code of Conduct, Art. 3.2 and IPOA-IUU, para. 13.

²⁸ See above p. 613.

²⁹ This is not the place to open up the debate of the effect of the possible impact of the 1995 UN Fish Stocks Agreement on non-parties. For a discussion of this, see further E. Franckx, “Pacta Tertiis and the 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”, (June 2000) *FAO Legal Papers Online* 8; R. Reyfuse, “The United Nations Agreement on Straddling and Highly Migratory Stocks as an Objective Regime: A Case of Wishful Thinking?”, (1999) 20 *Aust YBIL* 253.

agreements. On the other hand there are eight references in the IPOA-IUU to the 1982 LOS Convention. Although it would be wrong to make too much of this point, it certainly reflected an unease on the part of some countries at the 1995 UN Fish Stocks Agreement, in particular as regards its provisions on high seas boarding and inspection by non-flag States. On the other hand, no one seemed to have concerns about the significance of the 1982 LOS Convention, nor was it considered necessary to make the point that it only applied to States parties.³⁰ No doubt this reflected that fact that the Convention has been accepted very widely in the international community and, at least in respect of its fisheries provisions, is regarded as reflecting customary international law.³¹

Definitions

When the Code of Conduct for Responsible Fisheries was formulated, definitions were avoided wherever possible, and on the rare occasion one was necessary, the definition was absorbed into the text.³² It was taken for granted, given the voluntary nature of the text, and the fact that it had to be applied in a number of different countries and legal systems, that definitions were both unnecessary and possibly unhelpful.

In the first draft submitted at Sydney, except for purely formal definitions such as those referring to the 1982 LOS Convention, the 1993 FAO Compliance Agreement, and the 1995 UN Fish Stocks Agreement, there were no definitions included in the text, though there had been some informal discussions among participants prior to that meeting suggesting their possible use. A major problem in defining the terms is that it was clear from the background to the development of the IUU problem that the terms were not being used in a precise legal manner but instead were used to refer to the general nature of the issue.

Instead of a definition there was included a statement of scope:

“The scope of the IUU fishing problem encompasses fishing and related activities, including:

³⁰ In the Code of Conduct, the question of the application of the 1982 LOS Convention was controversial to Venezuela and Turkey. To meet their concerns, a footnote was inserted. See note 18 above.

³¹ When the report of COFI was adopted by the FAO Council, four FAO members, Japan, Korea, Thailand and the European Community expressed some reservations about the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, which in view of its close reliance on the 1995 UN Fish Stocks Agreement, and the diminished role accorded to it in the IPOA-IUU itself, suggests that caution is needed in describing it as if it is a universally applicable agreement like the 1982 LOS Convention. At an inter-sessional meeting in Yaizu, Japan, China and Japan expressed “concern” about the high seas boarding and inspection provisions of the 1995 UN Fish Stocks Agreement ([ftp://ftp.fao.org/fi/document/iotc/SS2 Report.pdf](ftp://ftp.fao.org/fi/document/iotc/SS2%20Report.pdf)).

³² For example, the inclusion of the European Community within the term “States”, and the inclusion of aquaculture within references to fisheries. See Art. 1.4.

- fishing in areas under national jurisdiction without the authorisation of the coastal State;
- fishing which contravenes or undermines conservation and management;
- failure to effectively exercise the required jurisdiction or control over vessels and nationals;
- failure to fully and accurately meet fishery and fishing vessel data collection and reporting requirements.”

However, by the time of the meeting in October, there had developed a significant political demand for the inclusion of definitions, and at an early stage of the October Technical Consultation, a group was formed in order to work on definitions.

The October Technical Consultation included the following definitions:

“3. In this document:

3.1 Illegal fishing refers to activities:

- 3.1.1 conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;
- 3.1.2 conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or
- 3.1.3 in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.

3.2 Unreported fishing refers to fishing activities:

- 3.2.1 which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or
- 3.2.2 undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.

3.3 Unregulated fishing refers to fishing activities:

- 3.3.1 in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation

and management measures of that organization; or
 3.3.2 in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.

3.4 Notwithstanding paragraph 3.3, certain unregulated fishing may take place in a manner which is not in violation of applicable international law, and may not require the application of measures envisaged under the International Plan of Action (IPOA)."

These were left untouched at the second meeting in Rome in February, but were the subject of a comment by the European Community as follows:

"The European Community recorded its concern that the definition of IUU fishing in paragraph 3 of the IPOA-IUU is not entirely appropriate, but could be accepted in the interest of supporting adoption of the IPOA with the understanding that the European Community would not recognise this definition as having any force other than in the context of the IPOA-IUU."³³

The position of the European Community is supported by the fact that the definition is stated to be "[I]n this document", which lends support to the view that the definition does not in its own right have an impact beyond the instrument itself. However, there are many instances where definitions accepted in one context as having a special meaning nonetheless radiate a meaning beyond that particular context, however inaccurate that may be from a purely legal point of view. It is probable that, if the term IUU fishing is used in other contexts, it will now be assumed to be referring to this definition found in the IPOA-IUU itself, despite its imperfections, unless it is explained in that other context as having another meaning.

If anything, the inclusion of definitions reflected an assumption that they were good without much understanding of their role. One consequence is that the abbreviation IUU is described in the first sentence of the IPOA-IUU, but nowhere is it linked to the definition of the terms in their individual components. Thus, the effort of defining the terms is largely wasted since the phrase "IUU fishing", which is the one used throughout the document, is so broad when the three components are put together that it is doubtful if we have progressed much beyond the statement of the scope of the IUU fishing problem referred to in the Plan as it was adopted at the Sydney meeting.

This is not the moment to discuss the role of definitions in international

³³ Para. 98. Its principal concern was with the need to elaborate more on the meaning of "unreported" and "unregulated".

instruments. It has to be said, however, that there is now a tendency to assume that definitions are inherently useful in many international instruments. Curiously, the practice, which developed mainly in legislation of the common law world, is now in retreat in that world, at least to the extent that what precise role a definition serves before it is included in a statute is being questioned much more rigorously. There is also a tendency, certainly outside the common law world, to confuse the difference between a definition, having the very precise role that it is understood to have in the common law world, with an explanation. In the common law instance, the definition not only provides for economy of language by avoiding needless repetition of the same or similar phrases, but usually serves a more important purpose of containing the elements necessary to be proved if, for example, a prosecution is brought. For that reason alone, definitions are often very tightly drafted, and indeed, may not always explain the term all that well, especially if for reasons of economy of language in the rest of the text, some disparate elements are included in the definition. To put the point another way, the definition may not always be a good explanation of the term in question as it may be, for sound legal reasons, rather artificial. Because definitions have not played a role in civil law thinking to anything like the extent that they have in the common law world, there is a tendency for lawyers from civil law systems, when adopting definitions, to see them more as explanations. However, it is most unlikely that the participants at a meeting see the distinction quite so sharply, nor, in the case of the present IUU, that there was time to address the character of the definitions. Not surprisingly, therefore, we have definitions of these key terms that are more akin to a description in parts. This is borne out by the fact that each term is introduced by the phrase “refers to”, which would suggest it was more in the nature of an explanation.

Application to fishing entities

It is well accepted that the term “fishing entities” is understood to be an oblique reference to Taiwan Province of China (without a comma).

It is worth tracing the development of the reference to “fishing entities” in this IPOA-IUU. At the Sydney expert consultation, the draft on which discussion was based made no reference to fishing entities. However, there was a general reference in Article 1.2 of the Code of Conduct which stated that it applied to “fishing entities”.³⁴ Thus, there was no need to refer to it specifically in the text of the IPOA-IUU. In the final moments of the Sydney meeting, however, it was decided that there would be included an explicit reference in the IPOA itself to fishing entities. This resulted in a superfluous extra reference to it.

At the October Technical Consultation in Rome, this double reference was left

³⁴ This reference itself had been carefully included in the Code of Conduct following the reference in the 1995 UN Fish Stocks Agreement, which in states in Art. 1.3 that: “This Agreement applies *mutatis mutandis* to other fishing entities whose vessels fish on the high seas.”

unchanged, though several attempts were made to raise the issue for discussion, which were unsuccessful.³⁵ At the February meeting, however, another change was introduced by Argentina which involved adding after the reference to “fishing entities” the words “*as referred to in the Code of Conduct*”.

The term, admittedly ambiguous, has now come to be seen as causing problems for Argentina, presumably in that its vagueness might lead to it being applied to other entities, such as the Falkland Islands/Malvinas. Argentina entered into the report of the meeting a declaration to the effect that it means the same as in Article 305 of the 1982 LOS Convention.

“The Argentine Republic interprets that the term ‘entities’ contained in the Code of Conduct for Responsible Fisheries and in the International Plans of Action adopted within its framework, including the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing just adopted, refers to the entities referred to in Article 305 of the 1982 UN Convention on the Law of the Sea.”³⁶

The problem here is that the term has been accepted for at least the last six years as a means of referring to Taiwan Province of China without opening up questions of recognition of that entity. That usage has been followed in other international instruments concerning the fisheries sector.³⁷

Where next?

The report of COFI concluded with the following request:

“110. The Secretariat was requested to disseminate widely the IPOA and to transmit it to Members, regional fisheries management organizations, relevant inter-governmental organizations and NGOs.

111. Given the international importance of IUU fishing and the need to address it, the Members agreed that the issue and the IPOA-IUU be further considered at the Twenty-fifth Session of COFI. Of particular interest to Members at the next Session of COFI would be the progress achieved in implementing the IPOA-IUU.”

³⁵ There were some attempts to raise the matter indirectly by reverting to a formulation used in the three IPOAs adopted in 1999. In those instruments, there is a footnote which states: “In this document the term ‘State’ includes Members and non-members of FAO and applies *mutatis mutandis* also to ‘fishing entities’ other than States.”

³⁶ In fact Art. 305 does not mention entities. On the other hand, Art. 1 of the 1982 LOS Convention does mention the entities referred to in Art. 305, which does not include Taiwan Province of China.

³⁷ See for example, the Convention On The Conservation And Management Of Highly Migratory Fish Stocks In The Western And Central Pacific Ocean, Art. 9(2) and Annex 1, and the Convention On The Conservation And Management Of Fishery Resources In The South East Atlantic Ocean, Arts. 2.11 and 23.4.

The IPOA-IUU itself calls on States to “develop and implement, as soon as possible but no later than three years after the adoption of the IPOA, national plans of action to further achieve the objectives of the IPOA and give full effect to its provisions as an integral part of their fisheries management programmes and budgets”.³⁸ It can be expected also that the subject of IUU will be taken up by regional fisheries bodies with renewed attention with the completion of the IPOA-IUU.³⁹ It can also be expected that it will be the subject of technical cooperation programmes either dedicated specifically to IUU, such as the preparation of technical guidelines to assist countries in the implementation of the IPOA-IUU, or more generally to implementing the Code of Conduct.

Some conclusions

As mentioned at the beginning, it has not been the purpose of this paper to enter into a discussion of the substantive provisions of the IPOA-IUU. However, it can be said that, while much of the substantive provisions are repetitive of what is found in, for example, the Code of Conduct, the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement, a major achievement is that it has given a renewed focus to efforts to tackle the problem of IUU fishing. Further, some of the measures proposed, while already available to States, are elaborated upon in the IPOA-IUU, thus providing strong guidelines as to how to proceed next. This is especially apparent with regard to the provisions on port state controls where the existing powers available to the port state are elaborated upon, and this will provide a useful basis for the enactment of more effective measures. The same can be said for the provisions on trade measures. The provisions dealing with nationals can also be referred to as one instance where the IPOA-IUU has, if not overtly, furthered the interpretation of Articles 117–119 of the 1982 LOS Convention, by emphasising the responsibility of a state to control its “nationals” in addition to its responsibilities as a flag state with respect to the vessel.⁴⁰

As the present writer has already commented elsewhere, the role and effect of

³⁸ Para. 25.

³⁹ It was already discussed at some length at the Working Group on the Future of NEAFC, London, 24–26 April 2001.

⁴⁰ The background to this is that the language in Arts. 116, 117, 118 and 119.3 of the 1982 LOS Convention is in terms of a national, or about a “fisherman”. If one looks at the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, it is apparent that the term “nationals” is defined in Art. 14 to retain the traditional meaning: “in Articles 1, 3, 4, 5, 6 and 8, the term ‘nationals’ means fishing boats or craft of any size having the nationality of the State concerned, according to the law of that State, irrespective of the nationality of the members of their crews”. However, this definition is dropped from the 1982 LOS Convention. The IPOA-IUU gives an implicit blessing to the interpretation of the term to have this wider meaning than is found in the 1958 Convention. See further W. Edeson, “Tools to Address IUU Fishing: The Current Legal Context” at <http://www.affa.gov.au/ecoiuuf/papers.html>.

these so-called soft law instruments is difficult to pin down, but in the present instance, the IPOA-IUU has provided a focus for future action which can be taken up, for example, by donors in formulating technical assistance programmes, or by providing a basis for action by regional fisheries management organisations. It also provides a stimulus to states to use their existing powers more effectively to tackle the problem of IUU fishing.⁴¹

It is worth remembering that the IPOA-IUU is intended to be a tool box from which states and regional fisheries management organisations can draw ideas for future action. This analogy was used on numerous occasions in the formulation of the IPOA-IUU. In this regard, although the matter was put with a slightly different emphasis, the Code of Conduct as well was intended to be seen in this light. In that instance, it was intended not merely that it could be drawn upon as appropriate, but that the individual Articles might be published separately and accompanied by their own technical guidelines. The IPOA-IUU also lends itself to this approach and it can be expected that its different elements can be presented as a basis for action by themselves.

⁴¹ See further, W. Edeson, "Closing the Gap: the Role of 'soft' International Instruments to Control Fishing", (1999) 20 *Aust YBIL* 88.