Saving Fisheries on the High Seas: The Use of Trade Sanctions To Force Compliance with Multilateral Fisheries Agreements

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I. INTRODUCTION

Of the many marine resources in danger of overexploitation today, fisheries that populate the high seas are particularly at risk. Approximately 75% of global fisheries (including fisheries inside jurisdictional waters of nations) are fully exploited, overexploited or depleted.[1] Although the roots of today's crisis of global fisheries lie in overfishing, the problem is also directly linked to the failures of international agreements to ensure adequate conservation of these endangered resources. Over eighteen international regional fisheries management organizations (RFMOs) and global fisheries agreements exist for the conservation and sustainable fishing of global fisheries, including straddling stocks.[2] However, these organizations have largely failed to achieve their goals due to an inability to prevent illegal fishing either by organization members or by the vessels of states that are not members of the organizations. This Article will analyze the deficiencies of RFMOs and global fisheries agreements. In particular, this Article will argue that the compliance and enforcement mechanisms of RFMOs and fisheries agreements are ineffective against member states and nonmember states alike.

Fisheries organizations lack an enforcement tool that would coerce flag states to ensure compliance with fisheries conservation requirements among their vessels. Much of the problem lies in the intractability of unwilling flag states, which under international law possess the ultimate power over fishing fleets flying their nation's flag.[3] Trade measures are a solution to this problem. Trade measures possess the power and clout to force nation-states to alter their domestic practices in a manner that the existing enforcement tools of fisheries organizations cannot achieve.[4] Moreover, trade measures employed for environmental purposes—particularly in the arena of marine conservation—enjoy the endorsement

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1. Food and Agric. Org. (FAO) Conference, 32d Session, Rome, Italy, Nov. 29-Dec. 10, 2003, Progress Report on the Implementation of the International Plan of Action To Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated (IUU) Fishing ¶ 5, http://www.fao.org/docrep/meeting/007/J0403e.htm.

2. *See* FAO, Fisheries Dep't, Regional Fishery Bodies, http://www.fao.org/fi/body/rfb/chooseman_type.htm (last visited Aug. 31, 2006) This Article refers to fisheries agreements and organizations often as fisheries MEAs, in addition to its discussion of RFMOs.

3. United Nations Convention on the Law of the Sea, art. 94, Dec. 10, 1982, 1833 U.N.T.S. 397, 21 I.L.M. 1261 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

4. *See infra* Part IV.A-B.2.

of the WTO.[5] The Appellate Body decisions in the *Shrimp-Turtle*[6] dispute firmly established that article XX exceptions for environmentally based trade measures are acceptable within the WTO jurisprudential framework. This Article will argue that fisheries organizations should adopt trade measures as a means of protecting threatened fish stocks.

This Article will first discuss the nature of the global fisheries crisis, including a brief discussion of the phenomena of the state of global fisheries populations, the global fishing fleet, overcapitalization, and illegal fishing. In the second Part, the Article will analyze the major deficiencies in fisheries agreements. This Part will commence with an overview of the two most important multilateral fisheries agreements, the United Nations Convention on the Law of the Sea (UNCLOS)[7] and the Straddling Stocks Agreement.[8] Next, this Part will highlight the most debilitating defects in these organizations, including specific examples of RFMOs and other fisheries organizations. In the final Part, the Article will argue that the WTO's article XX environmental exceptions apply to global fisheries and that such trade measures are the best available means for fisheries organizations to ensure the conservation and sustainable harvesting of global fishing stocks.

II. THE GLOBAL FISHERIES CRISIS: THE FACTS

A. The State of Declining Fisheries

Many fisheries throughout the world are in a state of severe crisis. Due to sustained periods of overfishing, a number of fisheries have collapsed, and many more stand on the brink of potentially irreparable damage. Over the last 60 years, the global harvest of fish has undergone

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5. *See* Appellate Body Report, United States-Import Prohibition of Certain Shrimp and Shrimp Products (*Shrimp-Turtle I*), WT/DS58/AB/R (Oct. 12, 1998), *available at* http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm#r58; Appellate Body Report, United States-Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia (*Shrimp-Turtle II*), WT/DS58/AB/RW (Oct. 22, 2001), *available at* http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm#r58.

6. Sources cited *supra* note 5. This Article occasionally refers to both cases collectively as *Shrimp-Turtle*.

7. *See* UNCLOS, *supra* note 3.

8. 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, Aug. 4, 1995, 34 I.L.M. 1542 [hereinafter Straddling Stocks Agreement]. The Straddling Stocks Agreement entered into force on December 11, 2001, and currently has been ratified by 56 parties.

a 5-fold increase.[9] According to the United Nations Food and Agriculture Organization (FAO), the global catch of fish in 2001-2002 was approximately 84 million tons.[10] The corresponding effect on the health of fisheries populations has been devastating.[11]

According to the FAO, currently "10% of the world's major fisheries are significantly depleted, 18% are overexploited, and 47% are fully exploited."[12] The Oceans Commission, a blue-ribbon panel charged by the U.S. federal government with investigating the state of marine resources, found approximately 25% to 30% of fisheries to be overexploited.[13] This sad tally of figures indicates that only roughly one-quarter of fisheries across the world exist at sustainable levels.[14] Perhaps the greatest recent example of the reality of overfishing is the collapse of the North Atlantic cod fishery, which after 500 years of sustained fishing plummeted in the early 1990s to population levels 100 times below its historical average.[15] Despite efforts to revive the fishery, the Atlantic cod population has not rejuvenated over the last 15 years, and commercial harvesting of the fish has ceased.[16]

The rapid decline in fisheries is not restricted to populations that inhabit the high seas. Within U.S. waters, including those within the 200-mile Exclusive Economic Zone (EEZ), studies indicate that 82% of 191 domestic fish stocks have been utilized or fully utilized.[17] The decline in some of the more sought after fisheries in this area, which covers approximately 20% of global fisheries, is alarming.[18] For example,

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9. JAMES RASBAND, JAMES SALZMAN & MARK SQUILLACE, NATURAL RESOURCES LAW AND POLICY 427 (2004).

10. FAO, Fisheries Dep't, *The State of the World Fisheries and Aquaculture* 28 (2004), *available at* ftp://ftp.fao.org/docrep/fao/007/y5600e/y5600e01.pdf [hereinafter FAO 2004 Report].

11. *See, e.g.*, Tonya Dobryzinsky, Charlotte Grey & Michael Hirshfeld, *Oceana, Oceans at Risk: Wasted Catch and the Destruction of Ocean Life* 1, 4-6 (2002); *Oceana, Halting IUU Fishing: Enforcing International Fisheries Agreements* 2 (2003); FAO, Fisheries Dep't, *Review of the State of World Marine Fishery Resources* 6-8 (2005); FAO Fisheries Technical Paper 457, *available at* ftp://ftp.fao.org/docrep/fao/007/y5852e/y5852e00.pdf (last visited Oct. 10, 2006) (explaining the "state of exploitation" of world fisheries).

12. RASBAND, SALZMAN & SQUILLACE, *supra* note 9, at 427.

13. U.S. Comm'n on Ocean Policy, *An Ocean Blueprint for the 21st Century* 40 (2004), *available at* http://www.oceancommission.gov/documents/full_color_rpt/000_ocean_full_report.pdf [hereinafter Oceans Commission Report].

14. RASBAND, SALZMAN & SQUILLACE, *supra* note 9, at 427.

15. OCEANS COMMISSION REPORT, *supra* note 13, at 40, 275.

16. RASBAND, SALZMAN & SQUILLACE, *supra* note 9, at 427; MICHAEL HARRIS, LAMENT FOR AN OCEAN: THE COLLAPSE OF THE ATLANTIC COD FISHERY: A TRUE CRIME STORY 62, 202 (1998).

17. RASBAND, SALZMAN & SQUILLACE, *supra* note 9, at 428.

18. *Id.*

bluefin tuna populations have decreased by 90% since 1975; haddock has fallen 94% since 1960; Chesapeake Bay oysters have declined by 99%; Atlantic swordfish by over 50%; and Pacific red snapper by over 90%.[19] According to the United States National Marine Fisheries Service (NMFS), only 22% of the 959 stocks (211 stocks) under federal management are being fished in a sustainable manner.[20]

From a scientific perspective, the fisheries crisis results from two types of overfishing. First, too many fish are caught before they can spawn and replenish the diminished stocks with their offspring.[21] This form of overfishing, known as recruitment overfishing, is particularly harmful to the long-term viability of a fishery, because for every fish caught before it has a chance to spawn, effectively all of its future offspring are removed from the fishery as well.[22] The second form of overfishing, known as growth overfishing, occurs when fish are taken before they have grown to their full, adult size.[23] This does not directly cause a fishery to fail to replenish as with recruitment overfishing, but it does alter the character of a fishery, including a reduction in the fishery's overall biomass.[24] Both varieties of overfishing are widespread and frustrate efforts to achieve the maximum sustainable yield (MSY) necessary for fisheries to attain sustainable population levels.[25]

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19. Oliver A. Houck, *On the Law of Biodiversity and Ecosystem Management*, 81 MINN. L. REV. 869, 946-47 (1997); PEW OCEANS COMM'N, AMERICA'S LIVING OCEANS: CHARTING A COURSE FOR SEA CHANGE 2 (2003), *available at* http://www.pewtrusts.com/pdf/env_pew_oceans_final_report.pdf [hereinafter PEW OCEANS REPORT]. It should also be noted that the analysis of fisheries populations is an inexact science that is fraught with considerable uncertainty and lack of knowledge. Despite improvements in tracking technology and population projections, much is simply unknown about the state of many global fisheries. Christopher J. Carr & Harry N. Scheiber, *Dealing with a Resource Crisis: Regulatory Regimes for Managing the World's Marine Fisheries*, 21 STAN. ENVTL. L.J. 45, 54 (2002). For example, of 304 known U.S. fish stocks, the U.S. National Marine Fisheries Service (NMFS) has identified 93 currently being overfished or fished at unsustainable levels. PEW OCEANS REPORT, *supra* note 19, at 25. However, data do not exist for a further 655 fish populations, including 120 major fisheries that each yield over 200,000 pounds of fish annually. *Id.* at 35, 37.

20. PEW OCEANS REPORT, *supra* note 19, at 5.

21. RASBAND, SALZMAN & SQUILLACE, *supra* note 9, at 442.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 443. Maximum sustainable yield occurs when a certain amount of fish are caught, including larger fish that crowd out smaller, younger fish, such that an even greater number of younger fish can grow in the less resource competitive environment and later spawn, thereby increasing the overall population of the fishery. *Id.*

B. The Expansion of the Global Fishing Industry

The precipitous decline of many healthy global fisheries is directly caused by an exponential increase in fishing on the high seas.[26] The three main drivers of the increase in global fishing are the significant growth in the size of the global fishing fleet, technological advances in the methods for harvesting fish and storing and processing it at sea, and significant yields of bycatch that devastate fisheries not targeted by fishing fleets.[27]

The global fishing fleet dramatically increased through the early 1990s, more than doubling from 585,000 commercial boats in 1970 to 1.2 million in 1990.[28] According to the FAO, the current size of the global fishing fleet includes roughly 1.3 million decked vessels.[29] Additionally, 2.8 million undecked vessels plied marine and inland waters.[30] The powerhouses of the global fishing fleet, however, are the larger vessels, which in 2002 numbered 24,406, although growth has slowed due to capacity containment programs that have been adopted in a number of nations.[31]

Although the global fleet appears to have leveled off, the sheer number of vessels, as well as their harvesting capacity, far outstrips the abilities of many fisheries to provide sustainable harvests. For example, the Bering Sea crab fleet, numbered at 250 boats, is estimated to be 5 times larger than the fleet size necessary to harvest the existing population of crabs.[32] One of the phenomena thought to have fueled the massive expansion of the global fleet are widespread government subsidies that have allowed for the excess capacity to remain despite diminishing yields of fish.[33] In 2003, government subsidies were estimated to cover 25% of the $56 billion global fish trade.[34] The

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26. Due to the fact that fishing in global waters and national EEZs are inextricably linked, this Article may incorporate discussion of domestic fisheries. *See id.* at 462.

27. *Id.* at 434-38.

28. *Id.* at 463.

29. FAO 2004 Report, *supra* note 10, at 24.

30. *Id.*

31. *Id.* at 7. The majority of the global fleet is concentrated in Asia, with 85% of total decked vessels, 50% of powered undecked vessels and 83% of total nonpowered boats. *Id.* at 6-7. Europe possesses 8.9% of the global fleet, North and Central America possess 4.5%, Africa possesses 1%, South America possesses 0.6%, and Oceania possesses 0.2%. *Id.* at 24. Some fleets have actually decreased, notably the European Union (EU-15) fleet, which shrank from 96,000 vessels in 2000 to 88,701 vessels in 2003. *Id.* at 26.

32. PEW OCEANS REPORT, *supra* note 19, at 39.

33. *Id.* at 40; RASBAND, SALZMAN & SQUILLACE, *supra* note 9, at 435.

34. RASBAND, SALZMAN & SQUILLACE, *supra* note 9, at 435.

persistence of such a market distortion aggravates the fisheries crisis, because governmental support allows for unsustainable—and ultimately unprofitable—fishing to continue when the market might otherwise have corrected the size of the fleet.[35] Fisheries subsidies have come under increasing pressure for reform. At the Hong Kong ministerial meeting of the Doha round of talks, the WTO declared the intent of the members to reduce subsidies that contribute to the overcapacity of fishing fleets and the overfishing of fisheries.[36] The United States Trade Representative has also advocated for the reduction of fisheries subsidies.[37]

Intertwined with the problem of the excess fleet, and the subsidies that keep it afloat, is the phenomenon of the significant technological advances that have made fishing a much more successful trade. Among the multiple technological innovations that have allowed for much more precise and scientific fishing, both for large-scale commercial fleets as well as smaller single-vessel operations, are the widespread adoption of nylon nets, rockhopper gear and roller gear that allows for bottom trawling, outboard motors, sonar, geographic information systems, tracking buoys as well as satellite tracking.[38] Advances in gillnetting and longlining now allow for the hauling in of vast quantities of marine life.[39] Moreover, large factory ships with advanced freezing capabilities allow for more fleets to stay on the water longer, increasing the amount of "fresh" fish they are able to deliver to restaurants and grocery stores.[40] Thus, in addition to being large in size, vessels are now much more efficient at capturing marine life.

A third problem, very much the product of a larger fleet with greater capacity, is the problem of bycatch. Many of the modern fishing practices, particularly trawling and longline fishing, scoop up far more

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35. *See* PEW OCEANS REPORT, *supra* note 19, at 40, 80; MATTEO MILAZZO, SUBSIDIES IN WORLD FISHERIES: A REEXAMINATION, WORLD BANK TECHNICAL PAPER No. 406, at 5, 52 (1998); Tracey M. Price, *Negotiating WTO Fisheries Subsidy Disciplines: Can Subsidy Transparency and Classification Provide the Means Towards an End to the Race for Fish?*, 13 TUL. J. INT'L & COMP. L. 141, 155-57 (2005).

36. World Trade Org., Ministerial Declaration of 18 December 2005, D-2 WT/MIN(05)/DEC(2005), *available at* http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.pdf.

37. Press Release, U.S. Trade Representative, U.S. Submits Ideas in WTO To Reform Harmful Fisheries Subsidies (Mar. 19, 2003), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2003/March/US_Submits_Ideas_in_WTO_to_Reform_Harmful_Fisheries_Subsidies.html?ht=.

38. RASBAND, SALZMAN & SQUILLACE, *supra* note 9, at 435; PEW OCEANS REPORT, *supra* note 19, at 39.

39. PEW OCEANS REPORT, *supra* note 19, at 39.

40. RASBAND, SALZMAN & SQUILLACE, *supra* note 9, at 435.

quantities of marine life than the species targeted by fishing fleets.[41] A recent study by Pew Oceans Commission indicated that roughly 25% of fish caught in the 1980s and early 1990s was thrown overboard, dead and dying, creating annual bycatch waste of 60 billion pounds.[42] Although technological advancements, such as turtle excluder devices, have reduced some varieties of bycatch, the FAO still estimates that 25% of fish harvested is lost as bycatch.[43]

C. Illegal, Unreported, and Unregulated Fishing (IUU)

Despite the multiple efforts to regulate fisheries (efforts which will be analyzed below), both domestic and global fisheries are plagued with compliance problems. Many commercial fishers engage in fishing in contravention of either domestic laws or international agreements. This includes outright violations of the law, as well as failing to report actual numbers of fish caught pursuant to reporting requirements, or fishing in areas that lack regulation at all. Illegal, unreported, and unregulated (IUU) fishing is a pervasive and serious problem that has consistently hampered efforts to regulate fisheries effectively.[44]

III. THE MULTILATERAL SYSTEM FOR GLOBAL FISHERIES MANAGEMENT

A. The Proliferation of Fisheries Organizations and Their Inability To Stem the Tide of Overfishing

Since the awareness of the plight of many global fisheries began to spread over the last several decades, the international community has experienced a prolific growth in RFMOs and fisheries organizations and MEAs. The rapid multiplication in these organizations reflects not only a heightened concern for fisheries conservation, but also an increasing commitment on the part of a number of countries to vigorously work towards increased protection and management of these dwindling resources. Unfortunately, the growth of these institutions has been uneven, and many RFMOs and fisheries organizations are fraught with

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41. *Id.* at 436.
42. PEW OCEANS REPORT, *supra* note 19, at 5.
43. RASBAND, SALZMAN & SQUILLACE, *supra* note 9, at 436.
44. *See, e.g.*, Jessica K. Ferrell, *Controlling Flags of Convenience: One Measure To Stop Overfishing of Collapsing Fish Stocks*, 35 ENVTL. L. 323, 329 (2005); Judith Swan, *FAO International Action and Responses by Regional Fishery Bodies or Arrangements To Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, Fisheries Circular No. 996, § 1.1 (2004), *available at* ftp://ftp.fao.org/docrep/fao/006/y5361e/y5361e00.pdf.

problems. In this regard, they suffer from a general weakness afflicting many MEAs in other areas, including weak obligations, poor compliance and enforcement.[45] Further, MEAs possess a relatively new position in international law.[46] However, these institutional differences notwithstanding, RFMOs and fisheries organizations suffer from a number of specific problems that contribute both directly and indirectly to poor compliance and enforcement. As will be argued later, these defects can be remedied to a large degree by the adoption of trade sanctions as a stick for ensuring that global fisheries are adequately protected.[47]

B. UNCLOS

One of the seminal international agreements affecting the regulation of global fisheries is UNCLOS. UNCLOS, which has 149 member countries (not including the United States, which nevertheless follows much of UNCLOS as customary international law), grants exclusive fishery management authority to coastal states.[48] Importantly, UNCLOS confers upon coastal states Exclusive Economic Zones (EEZs) extending up to 200 miles offshore.[49] In these waters, which possess 90% of global fish resources,[50] coastal states enjoy vast powers of domestic regulation. The effect of UNCLOS on the powers of coastal states over the 200-mile EEZ cannot be underestimated. By conferring jurisdiction over such vast amounts of territory, the convention permitted sovereign states to extend the reach of their laws to cover most of the richest fishing grounds on the planet.[51] However, despite these positive attributes, UNCLOS has largely failed to correct the overexploitation of marine resources.[52]

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45. Teall Crossen, *Multilateral Environmental Agreements and the Compliance Continuum*, 16 GEO. INT'L ENVTL. L. REV. 473, 476, 499-500 (2004).

46. *See* Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AM. J. INT'L L. 623, 625, 628 (2000).

47. *See infra* Part IV.

48. UNCLOS, *supra* note 3, arts. 55-75.

49. *Id.* art. 57.

50. Donna R. Christie, *The Conservation and Management of Stocks Located Solely Within the Exclusive Economic Zone*, *in* DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW 396, 397 (Ellen Hey ed., 1999).

51. *See id.* at 397.

52. *Id.*

1. Fisheries Management

Recognizing the need to address the depletion of fisheries in EEZs, UNCLOS crafted a number of powers and obligations for fisheries management. UNCLOS grants coastal states the authority to determine the allowable catch for fisheries within their EEZ.[53] States, however, are charged with taking into account the best available scientific information in arriving at these limits.[54] Moreover, states are required to adopt measures to prevent overexploitation of the fisheries within their EEZ.[55] UNCLOS further imposes a duty to maintain or restore EEZ stocks to MSY levels, conditioned upon being "qualified by relevant environmental and economic factors."[56] Article 61 also mandates that measures adopted by states must take into consideration "effects on species associated with or dependent upon harvested species" so as to prevent those other species from being "seriously threatened."[57] Of paramount importance to the topic of this Article, article 63 requires coastal states to adopt measures, such as regional organizations, to conserve straddling stocks.[58] Additionally, parties are obligated to create international organizations for the management of highly migratory stocks when they do not exist.[59]

2. Foreign Fleets Operating Within EEZs

UNCLOS also addresses the use of EEZ fisheries by foreign fishing fleets. If a coastal state is unable to fish the waters of its EEZ to an optimum yield (due to a lack of capacity or otherwise), article 62 requires that the coastal state must enter into an agreement with other states to allow them to fish within the coastal state's EEZ.[60] UNCLOS also requires coastal states and other nations that fish highly migratory stocks to cooperate directly or through international organizations.[61]

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53. UNCLOS, *supra* note 3, art. 61(1). One of the practical effects of the establishment of EEZs was that it gave free reign to domestic fishing fleets to harvest marine resources without competition from global fleets. RASBAND, SALZMAN & SQUILLACE, *supra* note 9, at 462, 468. Perversely, rather than creating better conservation of stocks, it lead to the phenomenon of accelerating depletion of fisheries. *See id.* at 468.

54. UNCLOS, *supra* note 3, art. 61(2).

55. *Id.*

56. *Id.* art. 61(3).

57. *Id.* art. 61(4).

58. *Id.* art. 63.

59. *Id.* art. 64.

60. *Id.* art. 62.

61. *Id.* art. 64.

3. Dispute Settlement

UNCLOS provides for dispute settlement procedures for disagreements among party states concerning the interpretation or application of the treaty.[62] Parties must first attempt to resolve their differences through negotiation.[63] Failing that and other noncompulsory procedures such as conciliation, states may submit the dispute to a court or tribunal determined to have jurisdiction,[64] or to arbitration if the parties cannot agree to a court or tribunal.[65] The chosen court or tribunal must apply UNCLOS's provisions, as well as other international law in harmony with the convention,[66] and the decision is binding upon the parties.[67] The judgment rendered by the court or tribunal may involve temporary measures to "preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision."[68] Allowing for its application to be supplanted, UNCLOS provides that dispute resolution procedures in bilateral, regional or international agreements may supersede UNCLOS.[69] Lastly, the convention does not require coastal states to submit to compulsory tribunal or judicial proceedings if a dispute involves resources within the nation's EEZ, including the determination of total allowable catch, the allocation of surpluses to foreign fleets and the application of the coastal state's domestic laws and regulations within their EEZ.[70]

C. Straddling Stocks Agreement

The most important international agreement addressing fisheries on the high seas is the Straddling Stocks Agreement. The Straddling Stocks Agreement recognizes many of the problems inherent in UNCLOS, and attempts to clarify them by taking an ecosystem-based approach to migratory fish species that inhabit both EEZs and the high seas.[71] The Straddling Stocks Agreement also adopted a much more radical approach to controlling nonflag enforcement in the context of RFMOs,

62. *Id.* art. 286.
63. *Id.* art. 279.
64. *Id.* art. 286.
65. *Id.* art. 287(5).
66. *Id.* art. 293(1).
67. *Id.* art. 296(2).
68. *Id.* art. 290(1).
69. *Id.* art. 282.
70. *Id.* art. 297(3)(a).
71. Straddling Stocks Agreement, *supra* note 8, arts. 6-7.

and in general has made a number of positive steps towards an improved, ecosystem-based management approach than previously in place.[72] However, the agreement has not yet succeeded in reversing the decline of many migratory fish stocks.

Among the greatest successes of the Straddling Stocks Agreement is the provision for enforcement by nonflag states against the vessels of other flag states. By allowing for such open enforcement in the context of RFMOs, the agreement strikes another radical success by allowing for enforcement against nonparties to the RFMOs. In so doing, the Straddling Stocks Agreement goes beyond UNCLOS and gives RFMOs effective control over high seas fisheries.[73]

The Straddling Stocks Agreement lays out a stronger, clearer array of obligations than those originally elaborated upon in UNCLOS. These obligations range from improved information collection and sharing to enforcement provisions. Under the agreement, parties are obligated to collect accurate scientific, technical and statistical data and exchange it with other parties in a timely fashion.[74] In addition to technical information gathering and sharing, parties must also exchange information on their own domestic conservation measures for fish stocks that migrate between EEZs and the high seas or otherwise straddle them.[75] This duty to cooperate runs throughout the agreement, and parallels an endorsement of the precautionary principle.[76] The agreement applies the precautionary principle to conservation and management tools involving the best available science.[77]

1. Inspection and Reporting Requirements

An important development in the Straddling Stocks Agreement is an array of inspection and reporting requirements intended to bolster compliance amongst fishing fleets. A member state is authorized to inspect the catch, gear and documents of fishing vessels that voluntarily enter its ports.[78] Should the state discover a violation, it is required to report such violation to the flag state of the vessel in question.[79] When a

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72. *Id.* art. 17.

73. Rebecca Bratspies, *Finessing King Neptune: Fisheries Management and the Limits of International Law*, 25 HARV. ENVTL. L. REV. 213, 241 (2001).

74. Straddling Stocks Agreement, *supra* note 8, art. 14.

75. *Id.* art. 7(7)-7(8).

76. *Id.* art. 6.

77. *Id.* art. 6(7).

78. *Id.* art. 23(2).

79. *Id.* art. 23(4).

party either boards or inspects a foreign vessel, notice of the action must be given promptly to the flag state, including for violations of conservation measures.[80] Furthermore, flag states investigating violations of conservation measures must report on the status of the investigation and its result in a timely fashion.[81] Flag states must also maintain registries of all marine vessels that it has authorized to fly its flag.[82]

2. Obligation To Engage in International Fisheries Agreements

One of the strongest tools in the Straddling Stocks Agreement is an obligation to engage in international fisheries agreements if states do not wish to be banned from fishing regions. The Straddling Stocks Agreement mandates that states create RFMOs or join existing RFMOs, with a penalty of exclusion from fisheries for failure to do so.[83] As Marcos Orellana notes, "[t]his new role and authority envisaged for fisheries organizations represents a fundamental change in the law of the sea, as traditional freedoms in the high seas are being replaced by the duty to channel co-operation through international organizations."[84]

3. Application to Nonparties

A revolutionary extension of this strict requirement is the application of the provisions of the agreement to nonparties, including those not party to RFMOs. The Straddling Stocks Agreement states that nonparties are "not discharged from the obligation to cooperate, in accordance with the Convention and this Agreement, in the conservation and management of the relevant straddling fish stocks and highly migratory fish stocks."[85] This obligation is a significant transformation from traditional international legal norms of explicit consent to a binding treaty.[86] Moreover, to effect these means, the agreement confers explicit authority upon RFMOs to enforce these provisions.[87] These two prongs

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80. *Id.* art. 21(7), 21(9).
81. *Id.* arts. 19(1)(b), 20(3).
82. *Id.* art. 18(3)(c).
83. *Id.* art. 8(4).
84. Marcos A. Orellana, *The Law on Highly Migratory Fish Stocks: ITLOS Jurisprudence in Context*, 34 GOLDEN GATE U. L. REV. 459, 476 (2004).
85. Straddling Stocks Agreement, *supra* note 8, art. 17(1).
86. United Nations Conference on the Law of Treaties, Apr. 9–May 23, 1969, Vienna Convention on the Law of Treaties, art. 34 (May 23, 1969), *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.
87. Straddling Stocks Agreement, *supra* note 8, art. 21. However, if the experience of the *Southern Bluefin Tuna Case*, analyzed later in this Article, is any indication of the impact of

of the Straddling Stocks Agreement's approach to nonparty compliance problems mark a drastic departure from the customary free reign given to flag states on the high seas. In adopting such a bold strategy, the Straddling Stocks Agreement strikes at the heart of the crisis facing the management of fisheries on the high seas—the inability to control the vessels of states unwilling to either join RFMOs or to enforce the provisions of them against their national fishing fleets.

4. Dispute Resolution

Dispute resolution calls first for cooperation among the parties.[88] Next, parties are allowed to resolve their differences by any number of means, including "negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement," regional agreements or "other peaceful means."[89] UNCLOS dispute resolution provisions are also incorporated for disputes over the interpretation and application of the agreement.[90] Either the arbitral tribunal or court that adjudicates the dispute must apply UNCLOS's relevant provisions, as well as the Straddling Stocks Agreement and any relevant RFMO in addition to "generally accepted standards for the conservation and management of living marine resources and other rules of international law not incompatible with [UNCLOS], with a view to ensuring the conservation of the straddling fish stocks and highly migratory fish stocks concerned."[91] The dispute resolution mechanisms make conservation one of the clear objectives, and should add a strong conservationist perspective to any proceedings.

5. Third-Party and Port State Enforcement

In addition to allowing enforcement through RFMOs,[92] the agreement also allows third-party states and port states to carry out enforcement proceedings.[93] The authority of flag states is, as stated earlier, a pillar of customary international maritime law; however, the novelty arises in requiring third-party states to enforce compliance with RFMOs.

RFMO dispute resolution on compulsory dispute resolution provisions, successful resolution of disputes may be muted by mutual consent obligations in RFMOs. *See infra* Part III.D.1.

88. Straddling Stocks Agreement, *supra* note 8, art. 28.
89. *Id.* art. 27.
90. *Id.* art. 30.
91. *Id.*
92. *Id.* art. 21.
93. *Id.* arts. 19, 23.

Port states are authorized to carry out inspections on foreign vessels that voluntarily enter its harbors.[94] Port states may also ban foreign vessels if the port state has determined that the vessel's "catch has been taken in a manner which undermines the effectiveness of . . . conservation and management on the high seas."[95] The enforcement capacities of port states, as well as enforcement by RFMOs against nonparties, may create incentives for compliance by flag states that overcome traditional problems of flag state noncompliance. However, these provisions will only be effective if foreign fishing fleets actually wish to dock in the port state, and additionally, only if the port state desires to act on its authority.

The enforcement provisions also incorporate the duty to cooperate by focusing on information sharing, enforcement cooperation and cooperation in investigations.[96] However, the greatest enforcement device in the agreement comes through the empowerment of RFMOs. RFMO member states may board and inspect the vessels of nonmember states in the high seas.[97] Upon discovery of a violation of the RFMO, the boarding state shall gather evidence of such violation and notify the flag state.[98] At that point, the agreement places the onus on the flag state to either authorize the boarding state to carry out investigations and necessary enforcement proceedings or carry them out itself.[99] An important innovation to overcoming flag state intransigence is an allowance for the boarding state to bring the offending vessel to port in the event that the flag state fails to follow through on its enforcement obligations.[100] However, this power is constrained by the fact that the flag state can reassert its authority at any time,[101] including requesting the boarding state to release the vessel.[102] Additionally, flag states are also charged with ensuring compliance by their own fleet with RFMOs.[103]

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94. *Id.* art. 23(2).
95. *Id.* art. 23(3).
96. *Id.* art. 20.
97. *Id.* art. 21(1).
98. *Id.* art. 21(5).
99. *Id.* art. 21(6)(a)-(b).
100. *Id.* art. 21(8).
101. *Id.* art. 21(12).
102. *Id.*
103. *Id.* art. 19.

D. Weakness of Dispute Resolution Mechanisms

One problem that runs throughout many RFMOs and other multilateral agreements pertaining to fisheries is a generally weak set of dispute resolution provisions. Dispute resolution mechanisms are often frustrated by terms that strip agreements of the powers that they are vested with. Many agreements incorporate the dispute resolution provisions of UNCLOS due to its status as a framework convention. The experiences of fisheries disputes brought before UNCLOS tribunals indicate that the dispute resolution mechanisms in the convention are inadequate for dealing with the intricacies of fisheries management. The poor dispute resolution mechanisms, as illustrated by the examples below, are central to the failures of RFMOs and fisheries agreements to remedy overfishing. One answer to this problem lies in the need for stronger enforcement mechanisms, namely trade measures, that would obviate the need to rely on the complex, slow and unwieldy dispute resolution mechanisms available in many RFMOs and fisheries agreements.[104]

1. The *Southern Bluefin Tuna Case*

In the *Southern Bluefin Tuna Case*,[105] an UNCLOS arbitral tribunal refused to hear a dispute brought by Australia and New Zealand alleging that Japan was harvesting bluefin tuna in excess of its total allowable catch obligations.[106] Claiming that the tribunal was without jurisdiction to hear the case, the tribunal also struck down requirements adopted by the International Tribunal for the Law of the Sea (ITLOS) mandating that the three nations not exceed their total allowable catch limitations.[107]

Under the 1993 Convention for the Conservation of Southern Bluefin Tuna (CCSBT)[108] Australia, New Zealand and Japan agreed on a

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104. *See infra* Part IV.

105. S. Bluefin Tuna Case (*SBT I*), 38 I.L.M. 1624, 1635 (1999).

106. S. Bluefin Tuna Case (*SBT II*), 39 I.L.M. 1359, 1374-75 (2000).

107. *See* Bernard H. Oxman & Barbara Kwiatkowska, *Arbitration—Jurisdictional Effect of Different Dispute Settlement Provisions in Related Treaties—High Seas Fishing—Relationship Between UN Convention on the Law of the Sea and Specialized Treaties*, 95 AM. J. INT'L L. 162, 162 (2001); Thomas A. Telesca, *Sovereignty or the Precautionary Principle: Which Will Save Our Fish?*, 12 SOUTHEASTERN ENVTL. L.J. 23, 44-57 (2003); Deborah Horowitz, *The Catch of Poseidon's Trident: The Fate of High Seas Fisheries in the* Southern Bluefin Tuna Case, 25 MELB. U. L. REV. 810, 811 (2001).

108. Convention for the Conservation of Southern Bluefin Tuna, Austl.-Japan-N.Z., *opened for signature* May 10, 1993, 1819 U.N.T.S. 359 (entered into force on May 20, 1994), *available at* http://www.ccsbt.org/docs/pdf/about_the_commission/convention.pdf [hereinafter CCSBT].

combined annual total allowable catch of 11,700 tons of the highly prized fish that traverses the EEZs of Australia and New Zealand and the surrounding high seas.[109] Like other RFMOs, the CCSBT is plagued by a free rider problem, with nonmember flag state fleets continuing to engage in overfishing of bluefin tuna (the most active fleets from nonmember nations at the time of the dispute were Korea, Taiwan, and Indonesia. Since the dispute, Korea has joined the CCSBT).[110] Japan, however, was not satisfied with its quota of 6065 tons and embarked upon an "experimental fishing program" allowing for an additional catch of 1464 tons of tuna.[111] Australia and New Zealand protested this decision and ultimately initiated arbitral proceedings under UNCLOS.[112]

The CCSBT dispute resolution procedures provide that parties attempt to resolve the dispute through consultations involving negotiation, other peaceful means (including ongoing attempts throughout the course of the dispute), or seek arbitration or judicial settlement, including referral to the International Court of Justice (ICJ).[113] UNCLOS's dispute resolution procedures also call for negotiation and peaceful settlement[114] before initiating tribunal proceedings. If parties decide to bring suit, then they may elect arbitration before ITLOS, the ICJ, or before two other arbitral tribunals.[115] The parties failed to reach an agreement, and Australia and New Zealand then sought dispute resolution under UNCLOS, including temporary measures halting Japan's fishing under ITLOS proceedings.[116]

After securing temporary measures through ITLOS proceedings, the case went before the UNCLOS arbitral tribunal. The arbitral tribunal found that it lacked jurisdiction to hear the case because, although the case arose under both the CCSBT and UNCLOS, the requirements of article 16 of the CCSBT that any decision to go to arbitration must be consented to by all parties to the dispute had not been met.[117] The

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109. *Id.* art. 8(3).

110. *SBT II*, 39 I.L.M. at 1362; Commission for the Conservation of Southern Bluefin Tuna (CCSBT), About the Commission, http://www.ccbst.org/docs/about.html (last visited Sept. 4, 2006).

111. *SBT II*, 39 I.L.M. at 1366-67.

112. *Id.* at 1367-68.

113. CCSBT, *supra* note 108, art. 16.

114. UNCLOS, *supra* note 3, arts. 279-280, 283.

115. *Id.* art. 287(1).

116. *SBT II*, 39 I.L.M. at 1367-68.

117. *Id.* at 1398.

tribunal also noted the requirement of article 16(2) of the CCSBT that parties continue to seek resolution of the dispute by peaceful means.[118]

The decision of the UNCLOS tribunal that under the CCSBT parties must agree to arbitration rests partially on the Tribunal's reference to a host of maritime agreements enacted after UNCLOS that exclude compulsory arbitration.[119] In this the Tribunal endorsed the view that treaties may opt out of UNCLOS dispute resolution by adopting their own procedures. This result illustrates the fact that in practice, subsequent agreements have rendered UNCLOS's dispute resolution ineffective. Even though UNCLOS will most likely apply in tandem with the RFMO or other treaty in question, its provisions may be rendered redundant. As Thomas Telesca argues, because UNCLOS is a framework convention, it should not be cast aside by an implementing treaty such as the CCSBT.[120] However, the *Southern Bluefin Tuna Case* (*SBT*) sidelines UNCLOS as an effective tool for enforcing fisheries management obligations under compulsory measures.

The requirement of ongoing negotiations in the CCSBT, coupled with the consent to arbitration, creates an impossible process whereby an unwilling party can frustrate the efforts of complainants to resolve the case by refusing to agree to arbitration and continuing to prevent meaningful negotiations. As one of the judges in the ITLOS tribunal noted, article 16's requirement is "essentially circular."[121] Although this may be an unintentional result of the drafters, it condemns CCSBT parties to an impossible course of action in the face of foot-dragging and delaying tactics by adversaries.

2. The *Volga Case*

The *Volga Case*,[122] involving Australian attempts to prevent IUU fishing in its EEZ, further proves the inadequacy of tribunals to give substance to UNCLOS's dispute resolution and enforcement mechanisms. The result is that the ITLOS tribunal in the *Volga Case* ironically reduced the power of a nation to prevent IUU fishing in the same EEZ created by UNCLOS. Moreover, the tribunal in the *Volga*

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118. *Id.* at 1389.
119. *Id.* at 1391.
120. Telesca, *supra* note 107, at 69.
121. S. Bluefin Tuna Case (*SBT I*), 38 I.L.M. 1624, 1635, 1647-48 (1999).
122. Russian Fed'n v. Australia (*Volga Case*), ITLOS Case No. 11, 42 I.L.M. 159 (2002), *available at* http://www.itlos.org/startlz_en.html.

Case read UNCLOS to effectively diminish the attempts by nations to conserve fisheries through RFMOs.

The *Volga Case* was played out under the umbrella of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR),[123] a RFMO dedicated to conserving, among other species, the population of Patagonian toothfish in southern hemisphere waters. The CCAMLR entered into force in 1982.[124] As of November 2005 there were 24 members of the convention, including 23 nations and the European Community.[125]

The Patagonian toothfish has been the object of extensive fishing, perhaps to the point that the fishery will collapse.[126] Australian authorities acting within their EEZ detained a Russian fishing vessel, the Volga, which was found to contain 131,422 tons of illegally harvested toothfish.[127] The Australian government sought enforcement of Australian legal measures against the vessel, including criminal charges against the master and crew, and imposed substantial conditions for the release of the vessel.[128]

Both Russia and Australia are parties to the CCAMLR.[129] The CCAMLR takes an ecosystem approach to the conservation of marine resources in the Southern Ocean, and sets harvest limits on species within the convention's area.[130] Member state vessels must utilize a Catch Documentation System (CDS) and Vessel Monitoring System for toothfish, in addition to adhering to catch quotas and certain regional fishing prohibitions.[131] The strong requirements of the CCAMLR, unfortunately, do not contain any enforcement mechanisms. The

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123. Convention for the Conservation of Antarctic Marine Living Resources, May 20, 1983, 33 U.S.T. 3476, 19 I.L.M. 841 [hereinafter CCAMLR], *available at* http://www.ccamlr.org/pu/e/e_pubs/bd/ptl.pdf.

124. Comm'n for the Conservation of Antarctic Marine Living Res, General Introduction, http://www.ccamlr.org/pu/e/gen-intro.htm (last visited Aug. 31, 2006).

125. Comm'n for the Conservation of Antarctic Marine Living Res., Membership Introduction, http://www.ccamlr.org/pu/e/gen-intro.htm (last visited Aug. 31, 2006).

126. *See* Joint U.S. Department of Commerce/Department of State, Fact Sheet, Chilean Sea Bass Frequently Asked Questions (Mar. 26, 2002), http://www.state.gov/g/oes/rls/fs/2002/8989.htm (last visited Aug. 31, 2006) (on file with author).

127. *Volga Case*, ITLOS Case No. 11, 42 I.L.M. 159, ¶¶ 32, 51.

128. *Id.* ¶¶ 32, 40-46, 51.

129. Comm'n for the Conservation of Antarctic Marine Living Res., Official Membership Contacts, http://www.ccamlr.org/pu/e/ms/contacts.htm (last visited Aug. 31, 2006).

130. CCAMLR, *supra* note 123, art. II(3)(a).

131. Comm'n for the Conservation of Antarctic Marine Living Res., Schedule of Conservation Measures in Force (2003/04), Conservation Measures 10-04 (2002), 10-05 (2003), http://www.ccamlr.org/pu/e/e_pubs/cm/03-04/toc.htm.

convention lacks any tools for punishing member states found to be in violation its provisions.

Russia, as the flag state with ultimate authority over the Volga, initiated proceedings before an ITLOS tribunal, arguing that Australia's requirements for the release of the vessel were in violation of UNCLOS article 73(2), a provision mandating "prompt release" of vessels once a "reasonable bond" has been posted.[132] Among the conditions placed by Australia, a guarantee in the amount of AU$3,332,500 was demanded, and the Volga would have been required to comply with the CCAMLR obligations applicable to toothfish, including the use of Vessel Monitoring System (VMS) devices.[133] Although under UNCLOS, states enjoy jurisdiction over their EEZ, including the application of domestic law,[134] article 73 applies in the case of disputes over the release of vessels.[135] Article 73(1) permits states to seize vessels violating the domestic laws within their EEZ, including bringing legal sanctions and arresting the crew.[136] However, should a state not promptly release the vessel, the flag state may seek to initiate ITLOS tribunal proceedings to seek its release.[137] The ITLOS tribunal endorsed the Russian position, holding that the Australian conditions were unreasonable and a violation of article 73.[138]

In reaching this conclusion, the tribunal analyzed the reasonableness of the bond conditions by weighing the need for prompt release against the gravity of the offenses.[139] The tribunal held that article 73(2)'s reference to "bond or other security" could not include nonfinancial conditions, and therefore Australia's demand that the Volga adopt CCAMLR measures was in violation of UNCLOS.[140] The tribunal also found the financial bond to be too high, and reduced it to AU$1,920,000.[141]

Two key points underlie the rationale for the tribunal's decision. First, the tribunal saw its primary objective through the lens of article 292's requirement of the "prompt release" of a seized vessel.[142] Thus,

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132. UNCLOS, *supra* note 3, art. 73.
133. *Volga Case*, ITLOS Case No. 11, 42 I.L.M. 159, ¶¶ 51, 53.
134. UNCLOS, *supra* note 3, art. 297(3)(a).
135. *Id.* art. 73(1).
136. *Id.*
137. *Id.* art. 292.
138. *Volga Case*, ITLOS Case No. 11, 42 I.L.M. 159, ¶ 88.
139. *Id.* ¶ 63.
140. *Id.* ¶ 76.
141. *Id.* ¶ 90.
142. *Id.* ¶ 69.

with the aim to determine what conditions were proper to secure the release of the Volga as quickly as possible, the tribunal's perspective was biased in favor of striking down any measure that stood in the way of prompt release, notwithstanding other commitments under UNCLOS or the CCAMLR. Secondly, in its balancing test, the gravity of the alleged offense—IUU fishing in Australia's EEZ—was not accorded adequate weight. Considering the reach of Australian law within its own EEZ, and the international concern over the depletion of toothfish stocks, as evidenced in the CCAMLR, the gravity of the situation merited far more weight than it received by the tribunal. This indicates that, despite the strong commitments to the protection of marine fisheries enshrined in articles 61 and 62 of UNCLOS, tribunals are reluctant to allow those provisions to influence the reading of other UNCLOS provisions—such as the prompt release requirement—such that it gives effect to articles 61 and 62.

The result is that, in the face of conflicting values, UNCLOS' marine fisheries protection provisions are significantly reduced in strength. Coastal nations, such as Australia, who are not only charged by UNCLOS with protecting marine resources in the EEZ, but whose own domestic agenda seek to advance conservation efforts, are impeded upon by the inability of ITLOS tribunals to breathe life into the convention's conservation measures. These difficulties indicate that a stronger system is needed. Trade sanctions, condoned by the WTO and subjected to its dispute settlement process in the event that they are contested, are an attractive avenue around this problem.

E. Flag State Authority Nonenforcement

1. Gaps in the UNCLOS Framework

The greatest fault in UNCLOS concerning fisheries is the problem of flag state authority. One of the core principles of international maritime law is that a state shall exercise exclusive jurisdiction over ships that fly its flag on the high seas.[143] Although UNCLOS grants coastal states the right to conduct surveillance in their own EEZs, including the prevention of illegal fishing,[144] such powers generally do not extend to RFMOs other than to the contracting parties. Additionally, UNCLOS imposes a duty on all nations to control the activities of vessels flying its

143. UNCLOS, *supra* note 3, arts. 94, 111.
144. *Id.* art. 73(1).

flag.[145] Therefore, on the high seas, third parties are relatively powerless when flag states decide not to exercise their jurisdiction over IUU fishing vessels flying their flag. This power of exclusive jurisdiction, Christopher Carr argues, "has severely under-mined the effectiveness of regional organizations."[146]

A significant percentage of IUU fishing is ascribed to flag states notorious for not reining in its fleets on the high seas.[147] Moreover, because international law agreements generally only bind members to the agreement, fishing fleets prefer to hoist the flag of a jurisdiction that will clearly not exercise its jurisdiction to restrict fishing through international agreements or RFMOs.[148]

The duty placed on flag states to control their fleets has clearly failed. UNCLOS lacks any serious tools to coerce flag states to enforce against nonparties to RFMOs (including flags of convenience), or even to mandate compliance of member states with their obligations under RFMOs of which they are members.[149] A good case in point is that of Russia's failure to enforce its CCAMLR obligations in the *Volga Case*.[150] The problem is alleviated to some degree by the unique enforcement provisions of the Straddling Stocks Treaty;[151] however, even these provisions are problematic given the power of the flag state to reassert authority at any time.[152] UNCLOS and the Straddling Stocks Agreement have therefore been unable to deal successfully with the ramifications of IUU fishing.

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145. *Id.* art. 94.

146. Carr & Scheiber, *supra* note 19, at 60.

147. Panama, Liberia, the Bahamas, Bermuda, and Cyprus are among the major flag-of-convenience states. Christel Heideloff & Richard Monden, *Total Merchant Fleet by Country of Domicile*, SHIPPING STAT. & MARKET REV. No. 4 2004 (issue:4) (2004), extract *available at* http://www.isl.org/products_services/publications/samples/COMMENT_4-2004-short.shtml.en. A related problem is that of flags of convenience. However, this Article will focus on the failure of flag states to force their fleets to comply with international obligations. This Article will address flags of convenience insofar as they overlap with IUU fishing. *See* Ferrell, *supra* note 44, at 329-33 (discussing flag of convenience problems).

148. Bratspies, *supra* note 73, at 247.

149. Francisco Orrego Vicuna, *The International Law of High Seas Fisheries: From Freedom of Fishing to Sustainable Use*, *in* GOVERNING HIGH SEAS FISHERIES: THE INTERPLAY OF GLOBAL AND REGIONAL REGIMES 23, 41 (Olav Schram Stokke ed., 2001).

150. *See supra* Part III.D.2.

151. *See supra* Part III.C.3, 5.

152. Straddling Stocks Agreement, *supra* note 8, art. 21(12).

2. The Provisions in the Straddling Stocks Agreement Do Not Go Far Enough

The innovative provisions of the Straddling Stocks Agreement do not completely erase the problem of reluctant flag state enforcement. As previously mentioned, not only can flag states always reassert their authority,[153] and thereby thwart an otherwise aggressive enforcement action, but a number of other procedural requirements restrict the efficacy of third-party enforcement. An inspecting third-party state may only bring the violating vessel to port in order to initiate enforcement proceedings after either the failure of the flag state to act or with the permission of the flag state,[154] thus ensuring a period of inertia before enforcement can take place. As the *Volga Case* demonstrates, if a flag state fails to act and an enforcement action is taken by a third party, it is likely that the flag state will then step in to save its vessel. At that point, the enforcing third-party state is powerless to act against the violating vessel.

F. The Enforcement Powers Conferred upon NonFlag States Are Not Strong Enough

Closely corresponding to the relative inability to deal with flag state nonenforcement is the problem that nonflag states lack adequate powers to prevent fishing practices in contravention of RFMOs and other agreements. Notwithstanding the powers given to RFMO states and port states in the Straddling Stock Agreements and numerous RFMOs, nonflag states are still ill-equipped to deal with widespread fishing violations that occur over vast tracts of ocean.

1. The Size of RFMO Waters Places Tremendous Burdens on Patrolling Vessels

One of the primary problems facing RFMO member states, and parties to other fisheries conservation agreements, is the enormous task of carrying out enforcement and compliance proceedings. While RFMO members possess the authority to exclude nonmembers engaged in fishing within the region, or board and carry out enforcement proceedings against noncompliant vessels in the absence of the flag-state taking action itself, that charge carries substantial responsibilities and

153. *Id.*
154. *Id.* art. 21(7), (8), (17).

costs. RFMOs often encompass hundreds of thousands of square miles of ocean, some of which are in relatively uninhabited regions of the planet such as the Antarctic region, the Southern Ocean or the central Pacific Ocean. In these expanses, it is very hard to provide enforcement and compliance for every fishing vessel within the region, notwithstanding the ability to track the location of fishing fleets through VMS technology. First, the areas are so large that it is nearly impossible to cover them with inspection vessels absent a Herculean effort. Second, the numbers of inspection vessels available—mostly drawn from national navies and coast guards—are far outnumbered by the number of fishing vessels and the area of coverage.[155]

A corollary to this is the tremendous expense of patrolling RFMO waters. Navies and coast guards in most nations are overburdened with guarding their own coastline for security reasons, patrolling for drug trafficking and illegal immigration, and protecting sea lanes as well as other legitimate activities that national governments invariably put a higher value on than enforcing RFMO conservation measures in distant waters. Closely related to this is the problem of determining which nation's vessels should carry out these enforcement duties. A logical response is that all RFMO members should participate, either through providing inspection vessels or funding, in enforcement and compliance activities. However, distance from RFMO waters and the relative wealth of member states render this answer inoperable in practice.

2. RFMO Members Are Widely Dispersed and Often Far from RFMO Waters

A number of nations are members to RFMOs that cover waters far from their national boundaries. For example, Russia is a member of the CCAMLR, which covers waters in the Antarctic region—thousands of miles away from Russian soil.[156] It is impractical to assume that Russia will dispatch its navy or coast guard to patrol the Antarctic region for the purpose of enforcing the CCAMLR's requirements when it has no other national interest there. The same could also be said of wealthier CCAMLR members that are equally distant, such as Norway or the Netherlands. Perhaps more importantly, many RFMO members are developing countries or countries without the economic wherewithal to

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155. Carr & Scheiber, *supra* note 19, at 61.

156. Commission for the Conservation of Antarctic Marine Living Resources, *Basic Documents* (Dec. 2005), *available at* http://www.ccamlr.org/pu/e/e_pubs/bd/all.pdf.

budget for RFMO patrols. Namibia, one of the poorest countries in the world, is a CCAMLR member, and it is doubtful that it could ensure compliance in CCAMLR waters.[157] Russia, again, is also a good case in point. Russian fishing fleets ply the waters of the Southern Ocean for the obvious economic benefits they can reap, but the Russian navy is unlikely to carry out patrols in the far-off waters absent a pecuniary interest. Thus, as was the case in the *Volga Case* proceedings, enforcement is left to both the wealthier nations (which may arguably be more politically committed to strict compliance with the RFMO) and to those coastal states bordering the RFMO or those closest to it. Australia, being both a developed country with adequate enforcement capabilities and the will to use them, and with an extensive EEZ in close proximity to the CCAMLR area, in practice appears to be burdened disproportionately with enforcing the agreement.[158] There are far too many empty spaces left unpatrolled on the high seas for RFMOs to be effectively enforced. Moreover, it may be impractical to assume that these areas can ever be adequately patrolled.

3. The Political Will of RFMO Members Is Uneven

Without commitments from all members to enforce RFMOs, it is unlikely that the minority of willing nations will be able to accomplish the gargantuan task of ensuring compliance throughout an entire RFMO. It is important to remember that sending out vessels to patrol and inspect is not the only means for an RFMO member to meet its obligations. Port states are also charged with boarding and inspection powers,[159] and where a nation, such as Namibia, for example, lacks the wherewithal to patrol the RFMO waters, it can act to prevent violating vessels from using its ports. However, the powers of port state enforcement are also weakened when fishing vessels, particularly IUU vessels, can simply bypass RFMO ports and dock, transship, or off-load their catch in neighboring ports.

Although RFMO enforcement powers have had some effect on controlling the harvest of protected fisheries and reducing IUU fishing, the overall failure of the system is evident in the fact that many fisheries, including those protected by RFMOs, continue to decline precipitously. In the instance of Patagonian toothfish, for example, IUU fishing is

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157. *Id.*
158. *Id.*
159. Straddling Stocks Agreement, *supra* note 8, arts. 19, 73.

estimated to encompass at least 50% to 90% of the global total catch.[160] As Orellana suggests:

> The experience of other international fisheries co-operation regimes, notably ICCAT and CCAMLR, shows that efforts to engage non-contracting Parties may be nullified by the economic benefits accruing to these States from IUU fishing. Against this background, the ICCAT has consistently asserted that its calls for voluntary co-operation by non-contracting parties have been unsuccessful.[161]

The fact that existing RFMOs have largely been unsuccessful at curbing IUU fishing indicates that new RFMOs incorporating essentially the same operational framework will fall prey to the same problems with IUU fishing. The dangers of weak enforcement practices, combined with the practical difficulties of policing large areas that are the subject of increasing competition for diminishing resources, are evident in one of the more recently formed RFMOs, the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean.

4. Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean

The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Western and Central Pacific Convention) is one of the newest RFMOs, having entered into force on June 19, 2004, with 14 member states.[162] The Western and Central Pacific Convention focuses on the management of the region's fisheries, including the tuna fishery, which in comparison with other tuna fisheries is reportedly in good condition.[163] Both UNCLOS and the Straddling Stocks Agreement are overarching frameworks of the Western and Central Pacific Convention.

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160. M. Lack & G. Sant, *Patagonian Toothfish: Are Conservation and Trade Measures Working?*, 19 TRAFFIC BULL. 1, 15 tbl. 9 (2001); Ian J. Popick, *Are There Really Plenty of Fish in the Sea? The World Trade Organization's Presence Is Effectively Frustrating the International Community's Attempts to Conserve the Chilean Sea Bass*, 50 EMORY L.J. 939, 943 (2001)).

161. Orellana, *supra* note 84, at 479.

162. Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Sept. 5, 2000); 40 I.L.M. 278 [hereinafter Western and Central Pacific Convention].

163. W. Pac. Reg'l Fishery Mgmt. Council, Report of the Chairman on the Work of the Second Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Central and Western Pacific annex 3 (June 13, 1997).

The Western and Central Pacific Convention is an important development, for the region is home to the largest tuna fishery.[164] Approximately two-thirds of the global harvest of tuna is caught in the area covered by the agreement, representing an annual commercial value of $1.5 to $2 billion.[165] In terms of tuna, skipjack, yellowfin, bigeye, northern bluefin, and albacore species, all are covered by the agreement.[166] Other species covered include marlin, swordfish, and sailfish.[167]

The scale of the Western and Central Pacific Convention is massive, covering virtually all of the western and central areas of the Pacific Ocean, including EEZs.[168] The Western and Central Pacific Convention seeks to ensure the long-term sustainability of the region's fisheries, and in doing so places an emphasis on the utilization of the best scientific evidence available, the precautionary principle, and the protection of the region's biodiversity.[169]

The Commission created by the agreement holds the authority to determine catch limits and quotas for member states, including within their own EEZs.[170] Additionally, the Commission may also regulate the types of vessels allowed for fishing, the sizes of the fish caught, gear to be used and time limitations for harvesting.[171]

Commission decisions are subject to arbitration if necessary.[172] Importantly, Taiwan, which despite possessing the world's sixth largest fishing fleet has not been party to many international agreements, due to its unique political circumstances, is allowed to participate in decision-making. This was done by allowing "fishing entities" to participate, so long as they agreed to be legally bound by the agreement.[173] In the Commission's second meeting, it set laudable goals of reducing the bycatch of seabirds (including albatrosses) and sea turtles.[174]

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164. *Id.*

165. Press Release, W. Pac. Reg'l Fishery Mgmt. Council, Tuna Treaty for Central-Western Pacific Enters Final Stretch (Apr. 9, 2000).

166. Western and Central Pacific Convention, *supra* note 162, art. 1(f). All highly migratory fish stocks listed in Annex I of UNCLOS are incorporated as protected fish stocks in the Western and Central Pacific Convention.

167. *Id.*

168. *Id.* art. 3

169. *Id.* art. 5.

170. *Id.* art. 10.

171. *Id.*

172. *Id.* annex I.

173. *Id.* art. 9(2).

174. W. & Cent. Pac. Fisheries Comm'n, 2d Sess., Dec. 12-16, 2006, *Resolution on the Incidental Catch of Seabirds*, Resolution-2005-01; W. & Cent. Pac. Fisheries Comm'n, 2d Sess.,

The Western and Central Pacific Convention allows for both flag state enforcement, as well as port state enforcement.[175] Additionally, it allows for boarding and inspection rights, and observers on fishing vessels.[176] Importantly, there is also a requirement that all member state vessels install VMS devices to track their position.[177] The agreement's compliance regime, it is argued, is one of the strongest of all RFMOs.[178]

However, the experiences of other RFMOs indicate that the successful management of the area's fisheries will depend on the willingness of the members to enforce the provisions. With the profitable tuna fishery within its purview, and particularly given the relatively healthy state of the stocks, the region will come under increasing pressure from fishing fleets eager to absorb the profits. The attractiveness of the fisheries in the central and western Pacific will no doubt also grow with the accelerating decline of fisheries elsewhere. At this stage in the Western and Central Pacific Convention's infancy, it is uncertain whether the agreement will be effective, but the Convention at least has undergone considerable efforts to ensure that the region is covered with the strongest regime possible. However, given the plight of global fisheries, the overcapitalization of fishing fleets, and the health of the RFMO's stocks, the usual laundry list of compliance measures utilized in the past may not suffice. While the creation of the RFMO will no doubt encourage politically willing participants to fish in a more sustainable fashion, the Western and Central Pacific Convention is less likely to be effective against noncompliant fishing fleets. Equipped with the same compliance measures as other RFMOs, the Western and Central Pacific Convention lacks teeth. Particularly in such a vast area as the Pacific Ocean, the organization needs the kind of tools that can convince noncompliant nonmembers and other IUU fishing nations to change the practices of their fleets. It is likely that without alternative enforcement measures that could be employed alongside the boarding and port state inspection powers, the convention may fall prey to the same difficulties that have severely hampered other RFMOs.

Dec. 12-16, 2005, *Resolution To Mitigate the Impact of Fishing for Highly Migratory Fish Species on Sea Turtles*, Resolution-2005-04, *available at* http://wcpfc.org (follow "Decisions of Commission" hyperlink).

175. Western and Central Pacific Convention, *supra* note 162, art. 24.

176. *Id.* art. 26.

177. *Id.*

178. Violanda Botet, *Filling in One of the Last Pieces of the Ocean: Regulation of Tuna in the Western and Central Pacific Ocean*, 41 VA. J. INT'L L. 787, 809-10 (2001).

The potential problems posed for the Western and Central Pacific Convention, as well as the problems discussed earlier concerning the challenges of patrolling vast areas with relatively few vessels, suggest that if an enforcement mechanism could penalize a violator without having to hunt them down on the open ocean, many of the logistical dilemmas RFMOs suffer from would disappear. Trade sanctions could achieve this effect. More than bans on transshipment and landing, a trade sanction levied against an entire nation can affect an entire nation's industry in one blow. Such an effect is very hard to bring about by patrolling the vast expanses of many RFMO waters.

G. Consensual Quotas with Opt-Out Allowances Corrupt RFMOs

Another difficulty in the operation of RFMO management envisioned in the Straddling Stocks Agreement can be seen in the reality that some RFMOs possess consensual quotas with opt-out allowances. For example, the Northwest Atlantic Fisheries Organization (NAFO) sets harvesting quotas, but member states can choose to opt out of them if they so desire.[179]

1. Northwest Atlantic Fisheries Organization

The NAFO manages fishery resources and coordinates scientific research on fisheries in the northwest region of the Atlantic Ocean, including the resource rich Grand Banks.[180] NAFO has 13 member states, and the NAFO's charter agreement, the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries (NAFO Convention) covers 19 fish stocks (comprising 11 species) within the region, with the notable exceptions of tuna, marlin, whales and sedentary species such as shellfish.[181]

The main function of NAFO is to set annual total allowable catches for each of the fish stocks it manages, which are then allocated in individual quotas for each member state.[182] The Fisheries Commission sets the catches and quotas, and also determines the enforcement

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179. Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, Oct. 24, 1978, 1135 U.N.T.S. 369 (entered into force on Jan. 1, 1979), arts. 11-12 [hereinafter NAFO Convention].

180. *Id.* art. I.

181. *Id.* annex I.

182. Northwest Atlantic Fisheries Organization (NAFO), Conservation and Enforcement Measures, NAFO FC Doc. 06/1 Serial No. N5206 (2005), annex I.A [hereinafter NAFO Conservation and Enforcement Measures].

measures.[183] These quotas are enforced through NAFO inspectors, who are empowered to board the vessels of member states and verify compliance with the quota and a VMS tracking system.[184] In addition to the quotas, the Fisheries Commission also establishes bycatch requirements,[185] gear requirements,[186] minimum fish size requirements,[187] and area and time restrictions.[188]

Despite its sound structure and membership, that generally seeks to adhere to conservation principles, NAFO suffers from the ability of its members to opt out of measures adopted by the NAFO Fisheries Commission.[189] This has been most widely used for the total allowable catch limits, and corresponding national quotas, set by the Fisheries Commission. Unfortunately, this escape hatch has been heavily relied upon by member states to continue to harvest according to their own desires notwithstanding their commitments to NAFO. Between 1979 and 2003, 12 member states opted out of 72 conservation and management measures a total of 90 times.[190] An absurd result of the Straddling Stocks Agreement's requirements for enforcement against nonparties in the context of NAFO opt-out provisions is that NAFO members would be put in the awkward position of enforcing NAFO's obligations against nonparties, but not against NAFO members that do not comply with the total allowable catches because they have exercised their right to opt out of the quota.[191]

The reality of an absence of binding quotas is best illustrated by the example of flounder quotas. In 1986, . NAFO established a quota of 700 tons for flounder.[192] The EU determined that this quota was too low for its members to accept, and objected to the limit of 700 tons. The EU then established a quota for itself of 21,161 tons.[193] This outrageous 30-fold increase in the quota was permissible under article 12 of the agreement.

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183. NAFO Convention, *supra* note 179, arts. 11-12.
184. NAFO Conservation and Enforcement Measures, *supra* note 182, art. 21.
185. *Id.* art. 9.
186. *Id.* art. 10.
187. *Id.* art. 11.
188. *Id.* art. 12.
189. NAFO Convention, *supra* note 179, art. 12.
190. Howard Schiffman, *Reservations in Marine Environmental Treaties: Practical Observations and Legal Limitations*, 26 WHITTIER L. REV. 1003, 1006 (2005).
191. Bratspies, *supra* note 73, at 250.
192. RASBAND, SALZMAN & SQUILLACE, *supra* note 9, at 465.
193. *Id.*

The sad result of this trend has been to gut much of the strength of the agreement. Ironically, however, the greatest controversy arising out of NAFO involved pro-conservation and pro-fishing uses of the opt-out provisions by member states. These conflicting uses pitted strengthened enforcement capabilities against decisions to harvest fish at higher levels than condoned by NAFO. For years, European member states had opted out of total allowable catches for many of the region's fisheries, much to the ire of Canada. Spain initiated ICJ proceedings against Canada after the Canadian government carried out an enforcement action against a Spanish fishing vessel outside of the Canadian EEZ.[194] The Spanish vessel, the Estai, was fishing for Greenland halibut (or turbot) just outside of Canada's EEZ. Canada had responded, in part, to the European fishing practices by placing a reservation on the ICJ's jurisdiction over Canadian enforcement actions in the NAFO region.[195]

While the Spain-Canada conflict illustrates that the opt-out provisions can be used equally to achieve conservation goals, as well as to persist in unsustainable fishing, the greatest lesson is that the power of member states to choose not to adhere to the terms of NAFO renders much of the RFMO inoperable. Without binding provisions, agreements such as NAFO fall prey to freerider problems that leave the RFMO only as strong as its weakest link.[196]

2. The Weak Link in RFMO Flexibility

These examples highlight the double-edged sword of the Straddling Stocks Agreement's reliance upon RFMOs. Allowing RFMOs to be the drivers behind the implementation of the agreement gives it the flexibility to address varying conditions and circumstances in different fisheries and regions. However, by coupling itself to RFMOs, the agreement is also in many ways wedding itself to the weakest link in the chain, because the Straddling Stocks Agreement in effect can only be as effective as the RFMOs charged with its implementation. Obviously,

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194. David R. Teece, *Global Overfishing and the Spanish-Canadian Turbot War: Can International Law Protect the High Seas Environment?*, 8 COLO. J. INT'L ENVTL. L. & POL'Y 89, 97 (1997).

195. Clyde H. Farnsworth, *Canada and Spain Face Off over Fishing Zone*, N.Y. TIMES, Mar. 12, 1995, at 19.

196. *See* Howard L. Brown, *The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: An Analysis of International Environmental Law and the Conference's Final Agreement*, 21 VT. L. REV. 547, 584-85 (1997); Clyde H. Farnsworth, *North Atlantic Fishing Pact Could Become World Model*, N.Y. TIMES, Apr. 17, 1995, at 2; Schiffman, *supra* note 190, at 1007; Teece, *supra* note 194, at 98.

idiosynchracies in RFMOs could be harmonized by negotiating agreements with more uniform membership requirements and scope. However, it is more likely that RFMOs will be as varied as the relative bargaining power of the parties to them, and the circumstances and nature of the fisheries management issues they face.

The delegation of standards and enforcement powers to nations and RFMOs, resulting in a lack of substance in the agreement, has been criticized by some.[197] However, the inherent flexibility in the Straddling Stocks Agreement in terms of addressing the many stakeholders and fisheries that need to be regulated is one of the greatest assets of the agreement. What is important though is that by linking its success to RFMOs, the RFMOs need to be aggressive in their conservation methods, and members need to be rigorous in enforcement of their provisions against other members and nonmembers—including IUU fishing vessels. The conservation and precautionary principles, while not technically substantive in and of themselves, are important in this respect to drive members of both the Straddling Stocks Agreement and RFMOs to adopt strict compliance measures that are vigorously enforced.[198] For the Straddling Stocks Agreement to have set detailed standards itself would have been too impracticable, and perhaps impossible given the many species of marine life, the varying conditions, and the fishing nations involved.

A more valid criticism is that the Straddling Stocks Agreement fails to deal with fish stocks that crash, or are on the brink of crashing. One suggestion is the creation of "special prevention zones" where fishing areas would be closed until a fish stock replenishes.[199] While it would be outside of the scope for the agreement to provide limits and other technical provisions for all migratory fish stocks, it certainly is within reason for the agreement to require a total ban on fishing when a stock crashes or is judged to be within imminent danger of crashing.

H. Restricting Qualified RFMOs

One of the sharpest criticisms of the Straddling Stocks Agreement is a weakness inherent in linking its radical nonparty enforcement measures to RFMOs. Rebecca Bratspies argues that because the agreement allows for RFMOs to set the total allowable catch, it does not

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197. Brown, *supra* note 196, at 584.
198. Straddling Stocks Agreement, *supra* note 8, arts. 6-7.
199. Brown, *supra* note 196, at 585.

effectively protect many endangered high seas fisheries because most are either without RFMOS or are lacking effective ones.[200] The contingency provisions allowing for coastal states to manage fisheries (i.e., through setting total allowable catches, etc.) fails in Bratspies' view because fisheries regions without RFMOs are most likely to be bordered by coastal states lacking the capacity to effectively manage high seas fisheries to begin with.[201]

One of the unfortunate practical effects of the Straddling Stocks Agreement's heavy reliance upon RFMOs appears to be that it excludes certain effective fisheries management organizations from its definition of RFMOs charged with enforcing the agreement. For example, the International Commission for the Conservation of Atlantic Tuna (ICCAT) would not qualify as an RFMO under the Straddling Stocks Agreement because it does not possess regulatory powers and only applies to one species, tuna.[202] Likewise, the CCSBT would not qualify under the agreement for the same reason. The Southern Pacific Forum Fisheries Agency would also not qualify because its membership is limited to nation-states and other self-governing entities in the South Pacific. While the Straddling Stocks Agreement should be lauded for its approach to noncompliance problems and the flexibility inherent in relying on RFMOs for implementation, the agreement should not penalize those organizations that have been at the forefront of effective management.

I. CDS, VMS, and IUU Vessel Listing Systems Have Proven Easy To Manipulate

One of the unfortunate developments in attempts to ensure compliance is that several of the innovative schemes to track vessel catches, vessel activities, and IUU vessels have fallen short of their goals. Despite the adoption of technologically advanced systems such as VMS, or logistical tools such as CDS, RFMOs continue to suffer from classic problems of misreporting that reduce the efficacy of such measures.[203] These problems illustrate that without a powerful enough antidote, many of the same dilemmas that frustrate compliance will continue to arise regardless of technological or organizational innovation.

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200. Bratspies, *supra* note 73, at 249.

201. *Id.*

202. *Id.* at 249-50.

203. Rachel Baird, *CCAMLR Initiatives To Counter Flag State Non-enforcement in Southern Ocean Fisheries*, 36 VICT. U. WELLINGTON L. REV. 733, 748 (2005).

1. CCAMLR Loopholes in the CDS Systems

In addition to the lack of enforcement powers, one of the greatest criticisms of CCAMLR is that the CDS system is widely abused by IUU fishing vessels.[204] Notwithstanding the reported difficulties, the CCAMLR attempts to reduce IUU fishing through its CDS system. Members of CCAMLR must identify the origin of toothfish catch that is either brought into or out of its territory.[205] Vessels must file CDS documentation upon exporting/importing, transshipping or landing toothfish.[206] Member states have similar duties to ensure that CDS documentation has been completed.[207] The greatest flaw in this system is that there is lack of a method for verifying the authenticity of CDS documentation. Fishers simply report false numbers to CCAMLR, and these numbers are not verified.[208] Amongst IUU fishers are vessels reportedly from a number of CCAMLR member states,[209] including a number of fleets allegedly operated by organized crime.[210] While arguments have been made that IUU fishing has declined since the implementation of the CDS system, it is hard to dispute the possibility that falsification of logbooks may occur.[211]

2. Lack of Widespread Adoption of VMS Devices

Another measure adopted to prevent IUU fishing, and falsification of CDS documents in particular, is the utilization of VMS devices that rely on satellites to track the location of fishing fleets.[212] However, the success of this system is uncertain. In one case, the location of a Uruguayan vessel apprehended by Australia for IUU fishing did not match its VMS data.[213]

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204. Env't & Conservation Org. of Aotearoa, New Zealand, Commission Not Up to Task (Oct. 31, 2002), *available at* http://www2.asoc.org/Documents.XXICCAMLR.xxiccamlreco5.htm.

205. CCAMLR, *supra* note 123, Conservation Measure 10-05, ¶ 2 (2005).

206. *Id.*

207. *Id.* ¶ 3.

208. Commission Not Up to Task, *supra* note 204.

209. *Id.*

210. Antarctic & S. Ocean Coal. (ASOC), *Priorities Issues for the XXI Meeting of the Convention on the Conservation of Antarctic Marine Living Resources* (Oct. 2002), *available at* http://www.ccamlr.org/pu/e/e_pubs/cr/03/all.pdf.

211. Baird, *supra* note 203, at 735.

212. CCAMLR, *supra* note 123, Conservation Measure 10-04 (2005).

213. Baird, *supra* note 203, at 748 (citing David Fickling, *Toothfish Poachers Arrested After 7000km Chase*, MANCHESTER GUARDIAN WKLY., Sept. 10, 2003). After a two-year legal battle over the vessel, a jury in Australia acquitted the crew of the charges of illegal fishing

The widespread adoption of VMS methods, however, would vastly improve the CDS system. In particular, a centralized VMS run by a third party, such as through the CCAMLR secretariat or an empowered commission, would diminish the opportunities for abuse of the system.[214]

3. IUU Vessel Lists

There have been a number of instances of ports denying access to alleged IUU fishing vessels.[215] Partially a result of shutting out fishing fleets lacking CDS documentation, over 90% of toothfish caught under the CDS system are from CCAMLR member states.[216] Of course, the apparent widespread problems with falsification of CDS documentation mar these statistics.

Another approach ancillary to the CDS system is a series of IUU vessel lists.[217] One list exists for noncontracting party IUU vessels and one for noncompliant vessels of CCAMLR member states.[218] The lists, particularly the one for noncompliant CCAMLR member state vessels, has been criticized for pushing IUU member state vessels to flags of convenience.[219] While this phenomenon has no doubt occurred, it also bespeaks either the reluctance or inability of some CCAMLR member states to adequately deal with IUU fishing in their own national fleets. Additionally, member states with vessels placed on the list are required to deal with the problem by means such as revoking the vessel's registration or license and banning the importation, transshipment or landing of its catch.[220] These measures may aggravate the flag of convenience problem by pushing noncompliant vessels into other states and ports. Additionally, as Orellana points out, the economic benefits attained

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brought against them by the Australian government. Andrew Darby, *Jury Sinks Canberra in Patagonian Toothfish Case*, THE AGE, Nov. 7, 2005, *available at* www.theage.com.au/news/national/jury-sinks-canberra-in-patagonian-toothfish-case/2005/11/06/1131211945815.html.

214. Baird, *supra* note 203, at 748.

215. *Id.* at 745-46.

216. Denzil Miller, Eugene Sabourenkov & Natasha Slice, *Unregulated Fishing—The Toothfish Experience*, *in* THE ANTARCTIC SYSTEM FOR THE 21ST CENTURY 20 (Michael Richardson & Davor Vidas eds., 2005).

217. CCAMLR, *supra* note 123, Conservation Measure 10-06, ¶¶ 1, 4; *id.* Conservation Measure 10-07, ¶ 2 (2005).

218. *Id.*, Conservation Measure 10-07 (2005); *id.* Conservation Measure 10-06 (2005).

219. Spanish Delegate, Comm'n for the Conservation of Antarctic Marine Living Resources Report of the Twenty Second Meeting of the Comm'n ¶ 8.42, *available at* http://www.ccamlr.org/pu/e/e_pubs/cr/02/i8.pdf.

220. CCAMLR, *supra* note 123, Conservation Measure 10-06, ¶ 18 (2005).

through IUU fishing render ineffective any attempts to coerce nonmember states to comply.[221]

J. Vague and Ambiguous Language

Many international legal instruments suffer from accusations of being vague, ambiguous, and aspirational at best.[222] Fisheries MEAs demonstrate these shortcomings. In particular, many of the framework agreements, such as UNCLOS, lack strong standards and hard obligations. This is more understandable in such framework agreements that are intended to provide an overarching umbrella to foster the development of more specific agreements, and fortunately, many RFMOs contain more explicit requirements. Nonetheless, the vague and hortatory nature of UNCLOS, in particular, raises questions about the actual strength of its provisions.

1. UNCLOS

From a textual perspective, the language of UNCLOS is vague and ambiguous, leaving adequate room for parties to bend the provisions to fit their own needs. Article 61(1)'s requirement that states determine the allowable catch of fisheries within their EEZ, notwithstanding the utilization of the more forceful "shall," appears ambiguous as to whether states are strictly required to set catch levels. While an argument may be made that the requirement in article 62 to determine the extent to which foreign fishing fleets may operate in domestic EEZs creates a responsibility to set an allowable catch, the language of article 61's text is vague enough to perhaps only confer the power on coastal states to determine the allowable catch should they wish to do so.[223]

The reference to the utilization of the best available scientific evidence creates at best a means to facilitate the management of fisheries in the absence of adequate scientific information. However, requiring that such evidence only be "tak[en] into account" arguably fails to establish any firm legal obligation to utilize objective scientific criteria.[224]

A firmer obligation arises in the duty to prevent overexploitation. However, as will shortly be demonstrated, the juxtaposition of such firm

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221. Orellana, *supra* note 84, at 479.

222. *See, e.g.*, Erika de Wet, *The International Constitutional Order*, 55 I.C.L.Q. 51, 67-68 (2006) (discussing UNCLOS).

223. Donna R. Christie, *It Don't Come EEZ: The Failure and Future of Coastal State Fisheries Management*, 14 J. TRANSNAT'L L. & POL'Y 1, 7-8 (2004).

224. *Id.* at 10.

language with the obvious failures of coastal states to reverse the decline of fisheries is proof of the glaring failure of UNCLOS.

2. FAO 1995 Code

Contemporaneous with the Straddling Stocks Agreement is the FAO Code, which was unanimously adopted in 1995 and incorporates the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (FAO Compliance Agreement).[225] The FAO Code, though limited due to its voluntary nature, creates a framework for responsible fishing practices designed to conserve and better manage marine resources. Among its overarching principles, the FAO Code holds sustainable use as one of the core objectives of the agreement.[226] Complementing sustainable use is the adoption of the precautionary principle for dealing with the lack of adequate data on fisheries populations.[227]

The primary vehicle for achieving the FAO Code's goals is through flag states. They carry the responsibility in the form of a duty to ensure that national fishing fleets comply with both the FAO Code and the FAO Compliance Agreement.[228]

The FAO Code and the FAO Compliance Agreement, recognizing problems of IUU fishing, attempt to restrict vessels migrating to flags of convenience. They require each state to ensure that parties do not reflag under its own flag so as to avoid fishing restrictions in other jurisdictions.[229] Although a worthy goal, this attempt lacks practical insight into the economies of the flag of convenience states and IUU fishing. States that permit such fishing practices under their flag, mostly developing countries, stand to gain everything from turning a blind eye to its fleets, and stand to lose everything by enforcing standards for sound fisheries management.

As a voluntary agreement, the FAO Code enjoys the freedom to place far-reaching obligations on its members. Unfortunately, the FAO Code does so in vague terms that leave much to be desired. Article 6.3, for example, charges states with the task to "prevent over fishing and

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225. FAO, CODE OF CONDUCT FOR RESPONSIBLE FISHERIES (1995), *available at* http://www.fao.org [hereinafter FAO CODE]; FAO, Agreement To Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 33 I.L.M. 969 [hereinafter FAO Compliance Agreement].

226. FAO CODE art. 7.2.1.

227. *Id.* art. 7.5.

228. FAO Compliance Agreement, *supra* note 225, art. 3(2).

229. *Id.* art. 3; FAO CODE, *supra* note 225, art. 8.2.2.

excess fishing capacity and should implement measures to ensure that fishing effort is commensurate with the productive capacity of the fishery resources and their sustainable utilization. States should take measures to rehabilitate populations as far as possible and when appropriate."[230] As Bratspies argues, these provisions fail to define "where states may take these measures, by what means states should prevent overfishing, and what in fact constitutes overfishing."[231] Without more exact terms, the FAO Code can only rise to the level of a hortatory document that leaves many details to later agreements. As one criticism of the FAO Code pointed out, "[a] fundamental concept underlying the implementation of the Code is the assumption that governments want better managed fisheries, and that they are prepared to take difficult decisions in the short-term, as a means of attaining longer-term sustainability gains."[232] This may be true of the more proactive states, but it is not true of those states that due to a lack of political will or technical capability are not willing to make short-term sacrifices. Thus, the FAO Code is best viewed as a building block for more progressive states to develop stronger, binding and more exact fisheries management agreements.

IV. THE USE OF TRADE MEASURES TO STRENGTHEN MULTILATERAL FISHERIES AGREEMENTS

The failure of existing fisheries agreements to reverse the decline of fish stocks that straddle EEZs and the high seas indicates that the existing compliance and enforcement tools are insufficient. The porous nature of RFMO enforcement powers, and the practical difficulties inherent in patrolling such vast expanses of ocean, reveal the fact that additional compliance mechanisms need to be added to the arsenal RFMOs can invoke to ensure the protection of endangered fisheries. Giving the power to third-party states to board and inspect the fishing vessels of other states is a bold and innovative step in the right direction for management of global fisheries. So too are the powers vested in port states, and the development of CDS and VMS systems. However, these measures have not been enough. What is absent from the tools that RFMOs are equipped with is the ability to adopt a measure that truly goes to the core of the problem facing RFMO enforcement problems—

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230. FAO CODE, *supra* note 225, art. 6.3.

231. Bratspies, *supra* note 73, at 235.

232. David J. Doulman, Code of Conduct for Responsible Fisheries: Development and Implementation Considerations (2000), *available at* http://www.fao.org.

one that can reasonably ensure flag state compliance. Due to the inherent powers of states, notwithstanding third-party boarding rights, to reassert control of their flagged vessels, the best compliance mechanism is one that can compel the source—the flag state itself—to ensure that its fleet does not contravene the terms of an RFMO. Trade measures are one answer to this dilemma.

The WTO has emerged as one of the most effective multilateral regimes. As the governing body for international trade matters, the subject matter of the WTO's jurisdiction is directly related to the plight of global fisheries. Moreover, WTO jurisprudence has developed a unique sphere of protection for environmental and natural resource concerns in the regulation of international trade. The Appellate Body's interpretation of the article XX environmental exceptions in the *Shrimp-Turtle* dispute endorsed the utilization of trade measures to prevent certain environmental harms.[233] The circumstances of global fisheries, and the multilateral regimes that have developed for their protection, suggest that trade measures used to enforce compliance with RFMOs would fall within the zone of environmental protection that the Appellate Body in *Shrimp-Turtle* held as permissible under the WTO.

RFMOs and other fisheries organizations should utilize this extraordinarily powerful weapon to ensure the compliance with fisheries agreements that inspection vessels have been unable to attain on the high seas. Trade sanctions would reduce the enormous compliance and enforcement difficulties that have plagued RFMOs and fisheries MEAs. RFMOs—either collectively or as individual member states—would be able to strike a hard economic blow to noncompliant states. The fact that the effects would be felt on states, as opposed to just individual fishing vessels, is important. In acting against an entire nation, that nation's government is much more likely to respond as the economic effects begin to reverberate than if the catch of only one vessel is seized and its crew fined. Moreover, utilizing trade sanctions reduces the burden on patrolling RFMO waters, and transfers the enforcement and compliance to more easily controllable mechanisms like customs inspections for imports. Trade sanctions are a powerful and very helpful tool that RFMOs and fisheries MEAs should adopt.

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233. *See infra* Part IV.B.

A. Environmental Trade Measures Under the WTO

The WTO, comprising 149 member states, aims to reduce and eliminate barriers to international trade, such as tariffs, quotas, import prohibitions and other restrictions on the free flow of goods and services.[234] Among the three most important pillars of the WTO system relevant to fisheries are the requirements for most-favored nation status (MFN), national treatment and the elimination of quantitative restrictions.[235] The principle of MFN requires that WTO members treat products from all other WTO members equally, without putting any preference on one party's goods over another.[236] The principle of national treatment mandates that members treat imported products no different from the treatment afforded their own domestic products.[237] The WTO also bans import and export prohibitions and quotas (with some exceptions outside the scope of this Article).[238] The WTO does allow for general exceptions to these core rules, and those exceptions are enshrined in article XX.[239]

Article XX contains two important exceptions for environmental matters. First, article XX(b) allows for measures that would otherwise violate the GATT rules where "necessary to protect human, animal or plant life or health."[240] Second, article XX(g) allows for exceptions to the GATT when "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[241] In allowing such environmental measures otherwise inconsistent with the GATT, article XX also imposes a general requirement in its preamble (commonly called the "chapeau") that the environmental measures "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."[242] This framework for

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234. *See* World Trade Org., Understanding the WTO, 61 Stat. A-11, 55 U.N.T.S. 194 (Oct. 30, 1947), http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_text_e.pdf.

235. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, arts. I, III, XI [hereinafter GATT]. The GATT was incorporated into the WTO Agreement when the argument was established. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144, annex 1A, ¶ 1(a).

236. GATT, *supra* note 235, art. I.

237. *Id.* art. III.

238. *Id.* art. XI.

239. *Id.* art. XX.

240. *Id.* art. XX(b).

241. *Id.* art. XX(g).

242. *Id.* art. XX.

applying environmental measures ensures that they are not conducted either in a manner or for a purpose that is contrary to the spirit of the GATT and the WTO.[243]

B. WTO Jurisprudence Supports the Use of Trade Measures in Fisheries MEAs

The most important development in the WTO for fisheries is the *Shrimp-Turtle* dispute.[244] In that dispute, which arose out of U.S. attempts to restrict the importation of shrimp from nations that had not taken adequate measures to protect sea turtles from being killed as bycatch in shrimp harvesting, the WTO Appellate Body ruled that article XX's environmental exceptions allowed for the utilization of trade measures to protect endangered sea turtles.[245] Importantly, the Appellate Body embraced the use of MEAs in resolving trade and environment conflicts.[246] Both the premise of the *Shrimp-Turtle* dispute—concern over the protection of an endangered marine resource, sea turtles—and the Appellate Body's endorsement of a multilateral approach to resolving such disputes, strongly indicate that trade measures are a viable compliance mechanism for fisheries MEAs.[247] As John Knox argues, "[m]easures taken pursuant to an MEA, even if taken against non-parties, appear virtually certain to pass [WTO] muster."[248]

1. The *Shrimp-Turtle* Dispute

The origins of the *Shrimp-Turtle* dispute lie in the efforts of the United States to protect endangered sea turtles that are often swept up as bycatch by shrimp fishers.[249] Sea turtles are protected in the United States by the Endangered Species Act,[250] and U.S. shrimp fishing vessels

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243. Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, *Shrimp-Turtle I*, WT/DS58/AB/R, ¶ 159 (Oct. 12, 1998), *available at* http://www.wto.org/english/tratop_e/dispu_e/distab_e.htm#r58.

244. *See* Robert Howse, *The Appellate Body Rulings in the* Shrimp/Turtle Case*: A New Legal Baseline for the Trade and Environmental Debate*, 27 COLUM. J. ENVTL. L. 491, 494-95 (2002).

245. *Shrimp-Turtle I*, WT/DS58/AB/R, ¶ 135.

246. *Id.* ¶ 189.

247. John H. Knox, *The Judicial Resolution of Conflicts Between Trade and the Environment*, 28 HARV. ENVTL. L. REV. 1, 42 (2004).

248. *Id.* at 41-42.

249. *Shrimp-Turtle I*, WT/DS58/AB/R, ¶ 4.

250. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2000). The sea turtles are also protected internationally through the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, app. I, 27 U.S.T. 1087, 1118.

are required to utilize turtle excluding devices (TEDs), which operate as trap doors that allow sea turtles to escape from the nets used to catch shrimp.[251] The U.S. legislation also required that TEDs be adopted by foreign shrimp fleets exporting their shrimp products to the United States.[252] One of the statute's requirements was that the U.S. State Department negotiate bilateral and multilateral agreements with other nations to adopt TEDs.[253] Nations that enacted comparable programs for reducing sea turtle bycatch could become certified, thus exempting them from the ban.[254] Prior to the dispute proceedings in the WTO, such negotiations were successfully concluded only with Caribbean nations.

As a result of domestic litigation to require the federal government to enforce the statute,[255] the United States placed a ban on shrimp imports from countries not requiring their fishing fleets to utilize TEDs. Malaysia, Thailand, India and Pakistan subsequently initiated dispute settlement proceedings in the WTO.

a. The Appellate Body's Ruling in *Shrimp-Turtle I*

The Appellate Body issued two decisions in the *Shrimp-Turtle* dispute, one in 1998 and one in 2001. In its 1998 decision, the Appellate Body upheld the ruling by the initial panel that the U.S. import prohibition was not permissible under the article XX exceptions.[256] Specifically, the Appellate Body ruled that although the import prohibition did qualify under article XX(g)'s exception for "exhaustible natural resources,"[257] the United States' application of the measure failed the requirements of the chapeau.[258]

The Appellate Body's ruling that the import ban failed to come within the scope of the article XX exceptions was an important

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251. Sea Turtle Conservation; Shrimp Trawling Requirements, 52 Fed. Reg. 24,244 (June 29, 1987) (to be codified at 50. C.F.R. pts 217, 222, 227).

252. Dep'ts of Commerce, Justice & State, The Judiciary, and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-162, § 609, 103 Stat. 988, 1037-38 (1990) (codified at Endangered Species Act of 1973, 16 U.S.C. § 1537 (2000)).

253. *Id.* § 609(a)(1)-(4).

254. Revised Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 58 Fed. Reg. 9015 (Feb. 18, 1993).

255. Earth Island Inst. v. Christopher, 20 C.I.T. 1221, 942 F. Supp. 597 (Ct. Int'l Trade 1996); Earth Island Inst. v. Christopher, 20 C.I.T. 1389, 948 F. Supp. 1062 (Ct. Int'l Trade 1996).

256. *Shrimp-Turtle I*, WT/DS58/AB/R, ¶ 191 (Oct. 12, 1998); *see also* Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to Article 2.5 by Malaysia, WT/DS58/AB/R, at 7.62 (June 15, 2001).

257. *Shrimp-Turtle I*, WT/DS58/AB/R, ¶¶ 121, 141, 145, 149.

258. *Id.* ¶ 188.

acknowledgement of the feasibility of environmental trade measures under the WTO. In discussing the use of the import ban to protect sea turtles, the Appellate Body indicated that the "means and ends relationship" between the import prohibition and the protection of the endangered sea turtles was valid, and "not disproportionately wide in its scope and reach."[259] With this ruling, the Appellate Body validated the use of unilateral trade measures for environmental purposes under the WTO.[260] The Appellate Body also found that because the TED requirements applied both domestically and abroad, it satisfied article XX(g)'s mandate for even-handed application.[261]

Notwithstanding the appropriateness of an import prohibition, the Appellate Body ultimately found that the U.S. measures were in violation of the chapeau's requirement that the means adopted not constitute an "arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."[262] The Appellate Body determined that the manner in which the United States applied the import ban constituted unjustifiable discrimination.[263] The United States' actions were deemed to be an attempt to coerce foreign governments to adopt the same conservation measures as the United States[264] This, the Appellate Body found, constituted discrimination because "discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries."[265]

Additionally, the United States had engaged in unjustifiable discrimination by failing to negotiate bilateral and multilateral agreements with other countries, including the complainants in the dispute, prior to adopting the unilateral import prohibition.[266] The fact that the United States had only negotiated agreements with Caribbean nations was particularly telling in the eyes of the Appellate Body.[267] Moreover, the Appellate Body also found the actions to rise to the level

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259. *Id.* ¶ 145.
260. Howse, *supra* note 244, at 500.
261. *Shrimp-Turtle I*, WT/DS58/AB/R, ¶ 144.
262. GATT, *supra* note 235, art. XX; *Shrimp-Turtle I*, WT/DS58/AB/R, ¶¶ 184, 186.
263. *Shrimp-Turtle I*, WT/DS58/AB/R, ¶ 188.
264. *Id.* ¶ 165.
265. *Id.*
266. *Id.* ¶ 170.
267. *Id.* ¶¶ 177-179.

of arbitrary discrimination because the certification process was inflexible and rigid.[268] The informal and casual nature of the certification process further denied transparency and accountability.[269]

b. The Appellate Body's Ruling in *Shrimp-Turtle II*

Following this adverse decision, the United States moved to bring its trade measures into conformity with the GATT. The import prohibition was not rescinded, instead, the United States adopted a number of measures to satisfy the chapeau of article XX. Foreign governments were given more flexibility to determine the methods to ensure adequate protection of sea turtles in shrimp fishing.[270] This allowed for a circumvention of the requirement on shrimp imports coming only from certified countries.[271] The United States also engaged in negotiations with Indian Ocean and Southeast Asian nations.

Malaysia, one of the complainants in *Shrimp-Turtle I*, initiated a second round of dispute proceedings, arguing that the United States' efforts were still in violation of the WTO.[272] After an initial panel ruling rejected Malaysia's claims,[273] the Appellate Body affirmed.[274]

Reaffirming the propriety of the import prohibition under article XX(g), the Appellate Body found that the United States had rectified its previous contravention of the chapeau. In particular, the Appellate Body found that the "ongoing serious, good faith efforts to reach a multilateral agreement" demonstrated compliance with the chapeau.[275] Interestingly, the Appellate Body rejected the argument that the United States needed to have successfully concluded negotiations.[276] The Appellate Body also approved of the amendments to the certification process, finding them to contain a sufficient "degree of flexibility" that would avoid

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268. *Id.* ¶ 181.

269. *Id.* ¶ 187.

270. Revised Guidelines for the Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 36,946, 36,949 (July 8, 1999).

271. Steve Charnovitz, *The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality*, 27 YALE J. INT'L L. 59, 99 (2002).

272. NATHALIE BERNASCONI-OSTERWALDER ET AL., ENVIRONMENT AND TRADE: A GUIDE TO WTO JURISPRUDENCE 127 (2006).

273. WTO Dispute Panel Report on the United States Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, WT/DS58/RW, para. 153 (June 15, 2001).

274. *Shrimp-Turtle II*, WT/DS58/AB/RW, ¶¶ 96, 152 (Oct. 22, 2001).

275. *Id.* ¶ 152.

276. *Id.* ¶¶ 123, 133.

discrimination.[277] The *Shrimp-Turtle* dispute represents a significant development in the international protection of endangered natural resources, and successfully illustrates that international trade measures can be utilized to protect the environment when carried out in a multilateral setting that does not discriminate amongst the parties.[278]

2. *Shrimp-Turtle* Condones the Use of Trade Measures by Fisheries MEAs

The law that emanates from the two Appellate Body rulings in the *Shrimp-Turtle* dispute and the facts of the dispute strongly indicate that RFMOs and other fisheries MEAs can adopt trade measures as an enforcement mechanism without violating the WTO. As Steve Charnovitz argues, production and process method restrictions such as the ones at issue in *Shrimp-Turtle*, are permissible under the WTO.[279] First, it is now settled that as a matter of WTO law endangered marine resources can qualify as "exhaustible natural resources" under article XX(g).[280] Second, two of the clear messages in the Appellate Body's rulings were that unilateral trade measures are appropriate when all of article XX's requirements have been met, and that multilateral solutions are a necessary precursor to such actions. WTO members must engage in good faith, multilateral negotiations that allow flexibility in arriving at conservation measures among differently situated members. RFMOs and other fisheries MEAs are well poised to meet these parameters.

At the heart of the objectives of fisheries MEAs is the conservation of marine resources that are without doubt "exhaustible natural resources."[281] It is because of the very recognition of the fact that fish stocks can be exhausted that fisheries MEAs came into existence. In this regard, the facts of the *Shrimp-Turtle* dispute are uniquely analogous to the situation of many global fisheries. Although sea turtles are not themselves the desired catch of fishing fleets, the desire to preserve a variety of marine resource that crosses through multiple EEZs, territorial waters, and the high seas is remarkably similar to efforts to conserve straddling fish stocks. Fish stocks qualify as living resources under article XX(g).[282] The fact that many fish stocks are now protected by

277. *Id.* ¶ 148.
278. Charnovitz, *supra* note 271, at 96.
279. *Id.* at 98-99.
280. GATT, *supra* note 235, art. XX.
281. *Shrimp-Turtle I*, WT/DS58/AB/R, ¶ 135 (Oct. 12, 1998).
282. *Id.* ¶ 133.

RFMOs and other MEAs further bolsters the argument that article XX(g) can be used to protect them through trade measures. Indeed, the commentary from the WTO has already acknowledged the appropriateness of trade measures in RFMOs and fisheries MEAs. For example, in discussing the toothfish trade restrictions in the CCAMLR's CDS scheme, officials at the WTO stated that the approach "provide[s] examples of appropriate and WTO-consistent (i.e., non-discriminatory) use of trade measures in multilateral environmental agreements."[283]

3. Fisheries MEAs Solidify the Applicability of Article XX(g)

One of the important linkages made by the Appellate Body in finding that sea turtles satisfied the requirement of being "exhaustible" was that they were protected by international agreements. In interpreting the applicability of article XX(g)'s provisions for "exhaustible natural resources," the Appellate Body looked to various MEAs to determine that living natural resources were covered by the provision.[284] The Appellate Body also looked upon the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) to find that sea turtles qualified as exhaustible natural resources for purposes of article XX(g). In *Shrimp-Turtle II*, the WTO explicitly approved of MEAs, stating that the trade measures would "be accepted under Article XX if they were allowed under an international agreement."[285] This, in addition to the Appellate Body's unusual utilization of the environmental and sustainable development principles enshrined in the WTO Agreement's preamble, indicate that MEAs can be an important interpretive tool when analyzing article XX.[286]

RFMOs and fisheries MEAs, like CITES, are multilateral agreements that protect marine resources. In determining whether article XX(g) applied to fisheries protected by MEAs, a WTO panel would likely find that, as in the case of the sea turtles in *Shrimp-Turtle*, the nature of the fisheries MEAs was sufficient evidence of their exhaustibility. As the Appellate Body stated in *Shrimp-Turtle I*, "[t]he exhaustibility of sea turtles would in fact have been very difficult to controvert since all of the seven recognized species of sea turtles are

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283. WTO Secretariat, WTO Committee on Trade and Environment, *Environmental Benefits of Removing Trade Restrictions and Distortions: The Fisheries Sector,* (WT/CTE/W/167, Oct. 16, 2000); *see* Baird, *supra* note 203, at 750.

284. *Shrimp-Turtle I*, WT/DS58/AB/R, ¶ 135.

285. *Shrimp-Turtle II*, WT/DS58/AB/RW, ¶ 5.88 (Oct. 22, 2001).

286. BERNASCONI-OSTWERWALDER ET AL., *supra* note 272, at 267.

today listed in [CITES]."[287] As more and more fisheries come under pressure, efforts to further protect straddling stocks as endangered species would only add to this conclusion. Thus, it is probable that the language of fisheries MEAs, structured to preserve a resource determined to be under threat, would satisfy this prong of article XX(g).

Another important attribute of RFMOs and fisheries MEAs in WTO analysis is their inherently multilateral nature. The Appellate Body emphasized the importance of a multilateral approach to solving environmental problems, and specifically chose to rely on certain MEAs for support in making its ultimate conclusion.[288] Fisheries organizations are the exact kind of multilateral decision-making bodies that the WTO framework lauds. Fisheries MEAs and RFMOs adopt as central tenets the importance of "ongoing serious, good faith efforts" that the Appellate Body held central to complying with article XX's chapeau.[289] Moreover, RFMOs are generally open to all parties and do not suffer from the inflexibility that the Appellate Body saw in the U.S. TED certification process.

One concern that may arise is whether the provisions of the Straddling Stocks Agreement and certain RFMOs allowing for enforcement actions against nonmember vessels, including exclusion from the RFMO region, would violate the chapeau. However, in light of the Appellate Body's emphasis that parties must engage in ongoing, good faith efforts to negotiate multilateral resolutions, it is unlikely that RFMOs would run afoul of the chapeau in this respect. Were an RFMO to act to exclude the fishing vessels of a nonmember, it should also attempt to engage the nonmember state in negotiations to join the RFMO, or otherwise comply with the RFMO's catch limits. Importantly, the Appellate Body did not require the successful conclusion of an agreement, just good faith efforts to reach one.[290] Thus, the intransigence of a nonmember should not frustrate the efforts of an RFMO in the eyes of the WTO. Moreover, the general power of flag states to reassert their authority over their flagged vessels should help to prevent the threat of arbitrary discrimination. Thus, it is likely that RFMOs and other fisheries MEAs would not be deemed to violate the chapeau of article XX.

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287. *Shrimp-Turtle I*, WT/DS58/AB/R, ¶ 136.
288. *Shrimp-Turtle II*, WT/DS58/AB/RW, ¶ 152.
289. *Id.*
290. *Id.* ¶¶ 123, 133, 152.

4. The Territorial Nexus

One concern that may arise in the use of trade measures is whether article XX requires a territorial nexus linking the natural resource being protected to the enforcing member state. In the *Shrimp-Turtle* dispute, the Appellate Body did not fully resolve the issue. It stated that because individual representatives of all of the endangered sea turtle species at issue were present at times in U.S. waters, to the extent that a nexus would be required, it was satisfied in this context.[291] The Appellate Body failed to establish, however, whether a nexus was absolutely required, and what would satisfy its requirements.

One implication of this ruling for global fisheries and migratory species on the high seas is that the species in question might need to be present in the jurisdictional waters of the state adopting trade measures for its protection. In the case of a number of straddling stocks, this would not pose a problem for many RFMO members, because by definition, these fish species cross many domestic and EEZ waters in their migratory cycles.[292] However, a strict nexus requirement would pose difficulties for RFMO members that distant water nations, whose fishing fleets may ply the RFMO waters but whose territory may not include areas that the protected fish inhabit. On the enforcement level, this may mean that only states with waters covered by the RFMO would be able to utilize trade measures.

However, this may not be the prevailing view. Robert Howse argues that the territorial nexus is largely a nonissue, because article XX(g) already requires that unilateral trade measures accompany restrictions on the enforcing nation's own domestic production and consumption.[293] In order to not contravene the requirements of article XX(g) and the chapeau, a state must already have put in place domestic regulation that will apply even-handedly.

> By virtue of this condition, article XX(g) already requires a link between environmental trade measures and domestic regulation dealing with the same conservation problem. Were a WTO member to target its conservation concerns solely at the policies of other countries, without putting its own house in order, then it would not be able to meet this condition of XX(g).[294]

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291. *Shrimp-Turtle I*, WT/DS58/AB/R, ¶ 137.
292. *Id.*
293. Howse, *supra* note 244, at 504.
294. *Id.*

The Appellate Body in *Shrimp-Turtle I* alluded to this as well, pointing to the coupling of the international application of the U.S. law with similar domestic restrictions.[295] Under this view, then, the notion of a territorial nexus would be rendered moot by the GATT's requirements of national treatment and the ban in the chapeau of article XX on "arbitrary or unjustifiable discrimination between countries where the same conditions prevail."[296]

5. Recommendations

Existing as well as new RFMOs and fisheries MEAs should adopt amendments incorporating trade measures as one of the compliance and enforcement mechanisms they may employ. However, in addition to these changes, it is fundamentally important that states undertake to cure their own compliance and enforcement problems as well. Although a number of fishing nations have taken praiseworthy action to enforce fisheries agreements and better manage fish stocks, virtually all nations have allowed for overfishing and the unsustainable exploitation of marine resources to continue. Thus, prior to and concurrent with incorporating trade sanctions into RFMOs and fisheries MEAs, states should vigorously assert their own powers over their fishing fleets to ensure that they too are in full compliance with the fisheries conservation and management agreements. This may require the enactment of domestic legislation, or it may simply involve an increase in compliance and enforcement against fishing fleets under the obligations of existing RFMOs and fisheries MEAs. Regardless, improvements in fisheries management cannot successfully be attained without the full cooperation of all states, including those not necessarily accused of rampant IUU fishing. Many European and North American fishing nations—including those most supportive of fisheries agreements—need to ensure that their own fleets are in compliance. This has been a particular challenge in the case of U.S. fisheries management. This point also bears some importance in terms of meeting WTO requirements. In the *Shrimp-Turtle* dispute, the Appellate Body condoned the United States' actions as acceptable under article XX (notwithstanding the original violation of the chapeau) partially because the United States had previously put in place similar restrictions domestically, thus ensuring that domestic fishing fleets were not afforded better treatment than

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295. *Shrimp-Turtle I*, WT/DS58/AB/R, ¶ 147.

296. *See* Knox, *supra* note 247, at 35.

foreign fleets.[297] For RFMO members not to demand compliance amongst their own fleets, and then to adopt trade sanctions against noncompliant third-party states may ultimately be deemed a violation of the chapeau of article XX as well as the principle of national treatment. States should therefore deal with their own fleets as severely as they do those of other fishing nations.

There are a number of types of trade measures that RFMOs and fisheries MEAs should develop, in order to tailor an individual enforcement action to the nature of the problem and the violating party.

The strongest and most effective form of sanction would be a total import ban similar to that adopted by the United States in *Shrimp-Turtle*. RFMO and fisheries MEA members could enforce a prohibition on the import into their nations of fish and marine resources harvested in areas covered by the agreements by members and nonmembers in violation of the agreements. An example of this provision already exists in the ICCAT. The organization can recommend that its members ban imports of tuna from nonmember parties that take advantage of the fishery.[298] By banning the import of the protected fish into member states, the economic impact of nonmembers and noncompliant members would often be quite severe due to the fact that many MEA and RFMO members are among the largest markets for consumption of fish. This in turn would ideally coerce flag states to join fisheries MEAs, and more importantly, ensure that their own fishing fleets are in compliance.

Lesser sanctions should also be adopted in the event that RFMOs and fisheries MEA members do not wish to wield the harshest stick against noncompliant fishing nations. For example, members could utilize tariffs and quotas on IUU-harvested fish. This may provide the benefit of edging nonmembers and noncompliant members that would ideally comply with RFMO standards, but for various reasons, such as institutional incapacity, or other political factors, may not be able to achieve compliance. By using a less restrictive enforcement mechanism, such as a tariff, RFMOs and fisheries MEAs may create incentives for compliance that would not exist were a nation's fishing fleets subjected

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297. *Shrimp-Turtle I*, WT/DS58/AB/R, ¶ 45.

298. Jean-Pierre Ple, *Responding to Non-Member Fishing in the Atlantic: The ICCAT and NAFO Experiences*, *in* LAW OF THE SEA: THE COMMON HERITAGE AND EMERGING CHALLENGES 197, 200 (Harry N. Scheiber ed., 2000); Andrew Fagenholz, *A Fish in Water: Sustainable Atlantic Canadian Fisheries Management and International Law*, 25 U. PA. J. INT'L ECON. L. 639, 658 (2004).

to total bans. Other less restrictive sanctions would include transshipment bans and bans on landing IUU fish in member ports.

However, given the extent of the global fisheries crisis, MEAs should rely on the most powerful arrow in their quiver—import prohibitions—to create the greatest effect on noncompliant fishing nations. Simply increasing the cost of fish through tariffs is unlikely to help replenish overfished stocks when there is an increasing demand for many of the exploited species. With demand high, tariffs are likely not to deter fleets from engaging in a profitable trade. Rather, the greatest deterrent is prohibiting those vessels from participating at all.

Import prohibitions may also help solve the flag of convenience problem. Some of the most egregious flags of convenience, such as Panama and Liberia, are popular because they impose little or no restrictions on vessels flying their flags. There is a plausible argument that in the context of commercial fishing, these nations would be unlikely (or unable) to enforce RFMO and MEA requirements against their flagged vessels were they subjected to an import prohibition. Therefore, commercial fishing vessels that once enjoyed the free reign given by flags of convenience might quickly lose interest in them when the valuable catch they harvest is not allowed in their traditional markets. This may entice fishing fleets to migrate away from flags of convenience and return to their true home nation, which may in turn require the previously noncompliant fleets to meet international standards. This is likely because commercial fleets are likely to prefer lower revenues than suffer a total loss of their market.

In order to not run afoul of article XX as interpreted in the first *Shrimp-Turtle* decision, member states should also engage in ongoing negotiations with nonmembers, and continuously seek to include them in the multilateral regulatory system. This will satisfy the requirement for good faith negotiations. Such negotiations should also be vigorously undertaken immediately prior to the adoption of any trade measures in retaliation for IUU fishing or violation of RFMO and MEA restrictions.

V. CONCLUSION

The international community has come a long way in protecting global fisheries. The innovations of the Straddling Stocks Agreement are significant and laudable. Also impressive is the proliferation of RFMOs and fisheries agreements aimed at better managing this collective resource. However, the system is far from perfect. The numerous problems with global fisheries management discussed in this Article indicate that serious revisions are desperately needed. In particular, the

lack of compliance and enforcement threatens to break the system. Trade sanctions are the best available means for members of the international community that are committed to fisheries conservation to coerce the unwilling to fish in a more sustainable fashion.

Of course, trade sanctions are not the only mechanism for improving RFMOs and fisheries agreements. A number of other avenues should also be explored, such as market incentive mechanisms through individual transferable quotas,[299] better controls on the loading and unloading of IUU fish,[300] better IUU vessel lists,[301] improved catch documentation systems,[302] and conservation trusts.[303] However, these reforms are beyond the scope of this Article. Instead, this Article argues that trade sanctions are one of the most potent weapons that can be wielded to enforce the conservation principles elegantly laid out in an increasing array of international legal instruments. The world would be well served by their incorporation into RFMOs and fisheries agreements.

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299. *See* Carr & Scheiber, *supra* note 19, at 48.
300. *See* Baird, *supra* note 203, at 739.
301. *See id.* at 740.
302. *See id.* at 743.
303. *See* Bratspies, *supra* note 73, at 250; PEW OCEANS REPORT, *supra* note 19, at 32-34.