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THE SOCIAL DIMENSION OF IUU FISHING

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THE SOCIAL DIMENSION OF IUU FISHING¹

1. Introduction

1. We all accept that the concept of sustainable development is built on three integral pillars: environmental, economic and social. However, in all the analyses of IUU fishing little consideration is given to the social dimension. The overwhelming concentration is on the environmental impact and on the economic or trade related areas. If the social dimension is addressed, it is generally only to examine the impact of artisanal fishing and food security. While these aspects are important, the failure to address the social aspect has led to a fixation on short-term piecemeal initiatives and a series of sticking plaster type solutions being put forward. Let's be frank — this approach has not solved the problem and is, in our opinion, unlikely to do so. The concentration on issues related to monitoring, control and surveillance may mitigate the problem, but it will not provide a complete solution, which can, in our opinion, only be achieved through the adoption of a holistic approach and this will require addressing the social dimension.

2. Another limitation is the refusal to look at the interrelationship between merchant shipping and IUU fishing. The vested interests of certain countries and questions of departmental jurisdiction meant that a valuable opportunity to address the issue, at the last session of the United Nations Informal Consultative Process on Oceans and the Law of the Sea, was lost. Instead of looking at the central problems of lack of flag State control, vessel registration and the issue of a “genuine link” in their totality, attempts were made to seek a separate approach. This is regrettable as the synergies between IUU fishing and the flag of convenience system in merchant shipping mean that such an approach will severely limit the progress that can be made in the area of IUU fishing. The merchant shipping industry is much more regulated than the fishing industry, where many of the key international instruments are poorly ratified or have yet to enter into force. However, despite the comprehensive set of widely ratified international regulations, there are still many problems in the shipping industry. The OECD Maritime Transport Committee has produced a number of documents that may also be relevant to the work on IUU fishing and we would suggest that many of the conclusions are equally applicable. A 2001 “*Report on the Competitive Advantages Obtained by Some Shipowners as a Result of Non-observance of Applicable International Rules and Standards*” showed that there was a positive economic incentive not to comply with international minimum technical standards. A related 2001 study on the “*The Cost to Users of Substandard Shipping*” found that the various costs associated with non-compliance with international standards are borne by numerous parties within the shipping industry, but not by those who use the services of such ships. A 2003 report on “*Costs Saving from Non-Compliance with International Environmental Regulations in the Maritime Sector*” examines the unfair commercial advantage afforded to sub-standard shipowners who fail to comply with international environmental regulations that apply to their ships.

3. While these OECD studies may be of indirect relevance in demonstrating the fundamental flaws in the regulatory system in which IUU fishing also operates, the 2003 Report on “*Ownership and Control of Ships*”, which examines mechanisms in both ship registers and corporate instruments that can facilitate the cloaking of beneficial ownership, is of direct relevance, as is the current “*Discussion paper on Ownership and Control of Ships: Options to Improve Transparency*”. These reports apply the disciplines

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of the Financial Action Task Force and the OECD work on the use of corporate vehicles for illicit purposes and on unfair tax competition to the maritime industry.

2. The social dimension

4. There are a wide variety of types of fishing. These range from small-scale artisanal fishers fishing on or near the coasts and returning home each day, to more sophisticated sea-going vessels operating well off the coast, to large factory fleets comprised of a variety of vessels operating for extended periods (including as much as one year) in harsh, distant waters. In distant water fisheries many fishers are employed on vessels registered in countries other than their own and the crew may be of mixed nationality. In order to examine the social dimension, it needs to be understood that many fishers are marginal or casual workers.

5. The independent International Commission on Shipping (ICONS) 2001 report entitled “*Ships, Slaves and Competition*”, although primarily addressing maritime transport, noted that:

“Fishing vessels are mostly unregulated and are a particular problem for safety of life, environmental pollution and crew abuse. There was a strong call for more international regulation of fishing vessels, particularly to combat the disregard of safety standards and the abuse of crews.” (para 2.18)

“A major problem is the lack of any widely accepted global conventions on safety and personnel requirements for fishing vessels, as well as the lack of enforcement of ILO instruments on labour conditions.” (para 2.20)

“The Commission also heard of the frequent recruitment of passport holders as fishing vessel crews and of the sub-standard living and working conditions imposed on those recruited under such circumstances.” (para 2.21)

6. The ILO Decent Work Programme focuses on four strategic objectives to:

- promote and realize fundamental principles and rights at work;
- create greater opportunities for women and men to secure decent employment and income;
- enhance the coverage and effectiveness of social protection for all; and
- strengthen tripartism and social dialogue.

7. It is self-evident that there is a substantial decent work deficit in the fishing industry and that this is related to the social dimension of IUU fishing. During the proceedings at the International Tribunal for the Law of the Sea in the CAMOUCO case, the Agent for the Government of France:

“mentioned the deplorable conditions of crew members on board the ships that had been arrested, with crew members often ill, badly nourished and living in unhygienic conditions close to slavery.” (ITLOS/Press 34)

3. Occupational safety and health

8. Fishing is among the most dangerous of all professions and the Conclusions of a 1999 ILO *Tripartite Meeting on Safety and Health in the Fishing Industry* led to fishing being formerly designated as an exceptionally hazardous industry. The international instruments that address vessel construction and the

training of crews (the 1993 Torremolinos Protocol to the Torremolinos International Convention for the Safety of Fishing Vessels and the 1995 International Convention on Standards of Training, Certification and Watchkeeping for Fishing Vessel Personnel (STCW-F)) have not entered into force. As a result there are no agreed international minimum standards in force for larger vessels (over 24 metres) that would enable a port State to exercise control over a foreign flagged vessel.

9. The lack of an internationally agreed regime for the enforcement of international minimum standards by port States over large distant water fishing vessels is in itself a problem. However, this is exacerbated in the case of IUU fishing operations, given that many of the vessels are old and badly maintained. The fact that IUU operations can lead to forfeiture of the vessel means that there are sound economic reasons for using old and unsafe vessels. This has considerable implications for those who serve on such vessels, both in terms of the facilities and amenities that are not available on such vessels, and also in terms of the safety of life at sea.

4. Employment on IUU vessels

10. Fishers may be employed through licensed or unlicensed recruitment and placement services or through other methods that are not consistent with the requirements of the law of the State of nationality or residence. For many years the Philippines has been requesting assistance to prevent its nationals from being employed on foreign flagged fishing vessels through informal networks which are outside the control of the Philippine Overseas Employment Administration (POEA). In these cases the fishers fly out of the Philippines on tourist visas and join the fishing vessel at a foreign port. Singapore has for many years been the first port of call.

11. There are many documented instances of the fisher having to pay a fee for the job, being responsible for the costs of joining the vessels and the costs of repatriation and having the contract of employment changed when joining the vessel. The employment may be for up to two or three years, with few opportunities to leave the vessel, and with the fishers being required to transfer to another vessel while at sea. The employment of many of these fishers is a form of bonded labour.

12. In other cases the fishers may be migrant workers or political refugees, whose status prevents them from being able to exercise what rights they may otherwise have had.

Examples of unfair contractual terms

13. In this section we provide a number of examples of what we consider to be grossly unfair contractual terms. While we suspect that the vessels were engaged in IUU operations, that may not be the case. However, they are illustrative of how the social dimension impacts on IUU fishing operations.

14. The following clauses were found in a contract for 2 years which paid US\$250 per month, with no guaranteed leave or rest periods, no additional overtime pay and a no strike clause:

“I understand fully that due to limited water supply, drinking water is supplied by ration. Therefore, sea water is to be used in bathing, washing clothes and tooth brushing.”

“Breakfast, lunch and dinner is provided for free. However, things for personal use is not given free. Snack foods such as bread, biscuit, coffee, milk, sugar, soft drinks, beer, liquor, cigarettes, soap etc. should be shouldered by the fisherman.”

“I also understand that the amount of US\$ 50 will be deducted by my captain to my salary every month. This will serve as my air ticket deposit in case I was not able to finish my contract but this amount should be refunded the moment I finish my contract.”

15. A fisher was paid US\$255 basic salary per month with no additional payments for any overtime performed, nor any additional leave pay, nor a share of the catch. The contract stated that the fisher was employed on board for 24 months with no entitlement to shore leave, nor any guaranteed rest periods per day, and was obliged to perform whatever work and whenever it was so decided by the Master. In addition the employer had the right to terminate the contract at any moment, for whatever reason, with no compensation payment. The fisher was, however, entitled to free repatriation at the end of the contract or if declared unfit for work due to injury and/or illness by a doctor.

16. We have come across a contract for up to 3 years, where the fishers are to be paid only when on board for a specific season and were not entitled to leave payment. There was a clause providing that if the fisher obtained other employment, the crew manning agent could claim the salary for breach of contract. The agent reserved the right to withhold the last 2 months' salary and only return the money to the fisher if the fisher showed up for the next season. There was nothing in the contract regarding hours of work, rest, holidays, etc. There were a number of other clauses:

“Every employee is required to cooperate with the company and owners/operators in their efforts to be “innocent owners.”

“The Company assures employment for up to three (3) years... If employee accepts employment from a competitor company during said 3 years while company continues to offer employment, the company will claim Employee's pay from that company and the last 2 months (discussed in another clause) will be forfeited.”

17. In another contract the period of employment is 13 -15 months, subject to an extension or reduction at the discretion of the fishing master, with the amount of the monthly bonus payable also subject to the fishing master's discretion. There is a clause which provides:

“The crew must work hard and obey the instructions given by the fishing master or the officers onboard.”

18. Another contract provided that the fisher was entitled to receive a lump sum overtime payment of US\$15 per month. There were no clauses on how many hours the fisher was expected to work, nor any provision concerning rest periods, nor any entitlement to shore leave during the duration of the contract. The amount payable for death or incapacity was left to the discretion of the owner. However, there was a provision which provided that:

“In case of death of crew, the corpse shall be cremated or shall be disposed of in the place where it occurred.”

19. There was also a provision that if the fisher decided to leave the vessel for whatsoever reason any accumulated salary or fish catch bonuses was forfeited, as was also the case if the fisher began to think about striking to defend his rights.

Examples of abuse of fishers

20. In this section we provide a number of illustrative examples of gross abuse of fishers. For example, removal of the appendix as a condition of employment for Chinese fishers from Yongchuan County (Sichuan province) employed to work on foreign fishing vessels through a manning agency. In one case the fisher had to pay US\$470 in order to secure a place, then US\$49 for the operation and wages vary between US\$130 and 180 per month.

21. There are cases where Filipino fishers had to pay approximately US\$450 each to be hired on 3 year contracts, with no right to enjoy any leave, for US\$200 per month and were expected to work 18 to 22 hours per day.

22. In some cases the alleged abuses are extreme. A Filipino fisher states:

“I was chained for thirty days, that is for two periods of fifteen days, in a two square meter storeroom. I was not only chained but also beaten up with a baseball bat.”

23. The reason for this treatment was that the fisher was so tired after working twenty hours per day, with just two hours sleep, that he was no longer able to work. The fisher also comments that:

“Very often we ache all over. To take a bath or wash our clothes, we use sea water. When we ask for little water to drink, it’s more likely to invite more maltreatment.”

24. 22. Another Filipino fisher advises:

“We often had to sleep with our work clothes and sometimes wet working clothes. We were denied medical treatment and medicine... We were only permitted to eat what was left after the *** crew had eaten and were left with half finished cups of coffee to drink and food left over... We were required to massage *** officers and crew on a daily basis after our long hours of work. We were punched, kicked and beaten on the head with closed fists by the *** personnel regularly. The *** crew often grabbed our sensitive parts, applied pressure to the extent that we cry in pain. They also squeezed our necks until we fall to our knees”

25. Another fisher notes:

“We were taken by force to work even we were sick. We were denied access to medication and treatment... We were given very little food and water. Most often we drink dirty water, so that some of us constantly suffer from severe stomach ache and diarrhoea. We work 20 to 22 hours daily but were only allowed some two-hours night sleep... We were hit like animals every time we commit errors in our work...”

5. Share system

26. Traditionally the income of fishers has often been directly linked to the catch and the revenue derived from the sale of the catch. However, we consider that this system leads to unsafe fishing practices and inefficient utilisation of available fish resources. In the context of IUU fishing operations it facilitates cheating the crew, who may be unaware that they are engaged in IUU fishing operations.

27. We consider that in the long term such “share” systems should be replaced by fixed wage systems that may, as the result of a collective bargaining agreement, possibly be supplemented by bonus systems. There should also be in place a guaranteed minimum wage system that should, in all instances, provide fishers with an income equivalent to that of comparable shore-based workers. Share based remuneration systems, where they continue to exist, should be fair and transparent, ensure the best possible prices for the catch and enable fishers to verify the basis on which their income is calculated.

6. Flags of convenience

28. It is generally accepted that flags of convenience (FOCs) are integral to the problem of IUU fishing and the inability of the FOC system to exercise effective control over vessels which fly its flags are central to the problems. The 2003 G8 Action Plan on the Marine Environment and Tanker Safety stresses

the need to address the lack of effective flag State control of fishing vessels, in particular those flying Flags of Convenience. Fishers live and work on the vessel and as international law establishes that a ship has the nationality of the flag it flies it has important ramifications for the crew, with regard to both civil and criminal jurisdiction and for their ability to exercise their human and trade union rights. Article 94 of the United Nations Convention on the Law of the Sea (UNCLOS) sets out the duties of a flag State and requires that the flag State shall effectively exercise jurisdiction and control in administrative, technical, social and labour matters over ships flying its flag and in doing so the flag State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.

29. The flag State is fundamental to ensuring that fishers enjoy decent work and are not subject to abuse and exploitation. Fishers do not only need protection from violations of international labour standards: all basic human rights and protection from crimes against the person must also be guaranteed on board vessels, even when they are in international waters. In such cases there can be conflicting claims from different States. UNCLOS clearly places the responsibility with the flag State. However, those concerned with the application of international law view FOCs as being likely to undermine the system. The International Law Commission has expressed its concern, stating that:

“If the ship flew a flag of convenience, the State of registration would have no interest in exercising diplomatic protection should the crew’s national Governments fail to do so.” (Report of the 54th Session of the United Nations General Assembly).

30. In view of the fact that only the flag State is entitled to make an application for the prompt release of the vessel and crew under Article 292 of UNCLOS, this is an area of concern.

31. Transparency of ownership is also important to fishers as this information may be vital if they try to enforce their rights and recover outstanding entitlements. The OECD Maritime Transport Committee Report on “*Ownership and Control of Ships*” (March 2003) states:

“Open registers [FOCs], which by definition do not have any nationality requirements, are the easiest jurisdictions in which to register vessels that are covered by complex legal and corporate arrangements. The arrangements will almost certainly cover a number of international jurisdictions which would be much more difficult to untangle.”

32. While the OECD report was looking at the issue in terms of maritime security, the conclusions are just as relevant for the use of a vessel for illicit purposes, including IUU fishing. The report notes that a number of FOC registers advertise anonymity as a desirable attribute of their register and states:

“However, in many instances, such as in the case of a known terrorist wishing to remain hidden, the normal procedure would be to use a multi-layered approach, employing a variety of methods, spread over a number of different jurisdictions. Such corporate arrangements are common in the off-shore sector, and any investigators, be from taxation authorities, law enforcement agencies, security forces or others will find the cloaking processes almost impenetrable. Like peeling an onion, isolating and removing one layer simply reveals another, and another, and because these cloaking devices are relatively cheap and easy to create, those who have a need or a desire to do so can hide themselves very deeply indeed.”

33. The issue of the ‘genuine link’ is critical because it ought to mean that a shipowner has some form of substantive presence in the flag State in terms of assets and resources that can be subject to fines and penalties in the event of serious breaches of regulatory standards. The United Nations General Assembly Resolution on Sustainable Fisheries (A/RES/58/14):

“Invites the International Maritime Organization and other relevant competent international organizations to study, examine and clarify the role of the “genuine link” in relation to the duty of flag States to exercise effective control over ships flying their flag, including fishing vessels.” (para 22)

34. An identical clause is provided in The United Nations General Assembly Resolution on Oceans and the Law of the Sea (A/RES/58/240). This Resolution also:

“Requests the Secretary-General, in cooperation and consultation with relevant agencies, organizations and programmes of the United Nations system, to prepare and disseminate to States a comprehensive elaboration of the duties and obligations of flag States, including the potential consequences for non-compliance prescribed in the relevant international instruments.” (para 29)

7. Conclusions

35. It is hoped that this paper has demonstrated the need to address the decent work deficit which exists in the fishing industry and that the social dimension is an integral component of IUU fishing. While the elaboration of a new ILO instrument for the fishing sector is important and merits the support of the OECD, the issue of the social dimension cannot be ignored and needs to be integrated into a holistic approach to the elimination of IUU fishing. In addition there is a pressing need to promote the ratification of the IMO fisheries-specific instruments.

36. The synergies between FOC operations in the fishing industry and in the maritime sector point to the need for an integrated approach. It is regrettable that the issue of the “genuine link” was referred to the IMO, as it logically belongs to the United Nations Division for Ocean Affairs and the Law of the Sea. It is nevertheless suggested that the OECD and its member economies should support the IMO in elaborating the “genuine link” and that this should later be adopted as an implementing agreement, which would complement UNCLOS and secure the effective implementation by flag States of their obligations under both UNCLOS and applicable international law.

37. The work of the United Nations in preparing a comprehensive elaboration of the duties and obligations of flag States could provide a useful additional tool to combat IUU fishing and in addressing the social dimension. The OECD and its member economies should support this work and ensure that, once it is adopted, it is given a suitable status, perhaps as an integral annex to a General Assembly Resolution.

38. The link between concealment of the beneficial ownership and control of IUU fishing vessels and the link to vessel registration clearly demonstrate the need to support the work on improving the transparency of ownership and control, which is currently underway within the OECD Maritime Transport Committee. It is suggested that the OECD could promote the negotiation of an agreement or policy statement, which member States could apply to companies which own or operate vessels established in or operating from their jurisdiction. This could be extended to non-OECD economies by securing commitments from them, as has been done in the case of the FATF and tax havens. It is essential that information is readily available on the ownership of IUU fishing vessels and who buys their catch. In many cases it will be multinational corporations, which are subject to OECD and other applicable instruments, and many of them will have adopted voluntary codes and initiatives with regard to the social dimension.