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# Chasing Red Herrings

Flags of Convenience, Secrecy and the Impact  
on Fisheries Crime Law Enforcement

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Flags of Convenience, Secrecy and the Impact on Fisheries  
Crime Law Enforcement

*North Atlantic Fisheries Intelligence Group*

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# Forewords

As the Minister of Fisheries of Norway and as representative of the Norwegian chairmanship of the Nordic Council of Ministers, I believe that this report is both timely and important. The Nordic fishing industry, as in many other parts of the world, is globalized and dependent on competing in a fair global market. To achieve this for fish products there is a need for openness and transparency.

Secrecy in relation to ownership and control of companies and vessels in the fishing industry is a problem that affects fisheries management and enforcement. But it also affects the fishing industry itself and can give an unfair advantage for those that hide their illegal activities behind jurisdictions that offer anonymity.

Globally, there is evidence that transnational organized criminal groups are involved in illegal fishing and, as the report exemplifies, can make use of these services that provide anonymity and make investigations in such cases more difficult.

I believe that there is a need to focus on these issues and welcome this report as an important voice in this debate.

*Per Sandberg*

Norwegian Minister of Fisheries

**Figure 1: Per Sandberg**



Photo: Paul Paiewonsky



In my capacity as the Minister of Marine Affairs and Fisheries of the Republic of Indonesia, I believe transparency and sharing data for public are the key elements to obtain public trust and to create a fair competition in this fast-growing global economy.

Indonesia has been standing on the frontline of transparency reform and public sector data sharing since the enactment of our Public Information Disclosure Law in 2008. Bolstering the country's effort, the Ministry has been actively engaged in leading the global Fisheries Transparency Initiative (FiTI). We believe that transparency and data sharing are imperative to create an effective and accountable governance.

Preventing public disclosure of information related to fishery business, especially that involving vessel ownership and company affiliation, is a major impediment to achieving sustainable fisheries management and stringent fisheries enforcement. As illegal fishing involves transnational organized criminal actors, collaboration between countries to disclose and to actively exchange data shall expose illegal activities and modus operandi of an organized crime. Hence, transparency and public data sharing will close the gap for criminal syndicates to conduct their illegal operation.

I believe this report serves as a valuable insight for countries in pursuance of a global cooperation, together with FAO, UNODC and INTERPOL, to create an open fishery data access. Accordingly, I congratulate this report as a breakthrough in international fishing industry policy.

*Susi Pudjiastuti*

Minister of Marine Affairs and Fisheries of the Republic of Indonesia

Figure 2: Susi Pudjiastuti



# Declaration from the meeting of Nordic Council of Ministers for Fisheries, Aquaculture, Agriculture, Food and Forestry (MR-FJLS) in Ålesund, Norway on 28 June 2017

## *Nordic Minister Statement on Transnational Organized Fisheries Crime*

We, the Ministers of Denmark, Faroe Islands, Finland, Greenland, Iceland, Norway, Sweden and Åland;

*Recognize* that the Nordic countries are dependent on the sea and its resources and the opportunities it holds for the economy, food and well-being of our population and we are determined to support a healthy and thriving fishing industry that is based on fair competition and the sustainable use of the ocean.

*Recognize further* that the fishing industry in the Nordic region is globalized and dependent on competing in a fair global market.

*Are committed* to work towards the fulfilment of the UN Sustainable Development Goals.

*Are convinced* that there is a need for the world community to recognize the existence of transnational organized crime in the global fishing industry and that this activity has a serious effect on the economy, distorts markets, harms the environment and undermines human rights.

*Recognize* that this transnational activity includes crimes committed through the whole fisheries supply and value chain which includes illegal fishing, corruption, tax and customs fraud, money laundering, embezzlement, document fraud and human trafficking.

*Recognize further* the inter-continental flow of illegal fish products, illicit money and human trafficking victims in transnational organized fisheries crime cases and that all regions of the world need to cooperate when investigating such acts.

*Are convinced* that there is a need for north-south cooperation and that developing countries are particularly affected.

*Are convinced* that inter-agency cooperation between relevant governmental agencies is essential at a national, regional and international level in order to prevent, combat and eradicate transnational organized fisheries crime.

*Support* Nordic cooperation, in accordance with national and international law, and EU-law when applicable, against the challenge posed by transnational organized fisheries crime and will seek cooperation with other regions of the world in order to find effective solutions to these challenges.

# Executive summary

What are the impacts of flags of convenience and secrecy to the global effort to curb fisheries crime? In monetary terms, crimes in the fisheries sector – fisheries crime – are vastly profitable. A conservative estimate is that as much as USD 23.5 billion is lost to illegal and unregulated fishing each year. Still, the actual costs of fisheries crime to society, including tax crime and other ancillary crimes in the fisheries sector, far exceed the value of lost resources. Vulnerable coastal states lose out on revenue, employment opportunities and infrastructure development, and suffer the consequences of food insecurity, instability and loss of biodiversity.

This report is a joint effort between the INTERPOL Fisheries Crime Working Group (FCWG) and the North Atlantic Fisheries Intelligence Group (NA-FIG). It is a record of the conclusions and findings of a multi-disciplinary group of auditors, investigators and analysts who have come together at regular intervals over the last four years to analyse and discuss their experience and knowledge about flags of convenience and secrecy and their impacts on fisheries crime law enforcement.

The group's starting point was a joint acknowledgement that the ability to keep one's identity hidden behind a corporate veil is a key facilitator of fisheries crime, including tax crime and other ancillary crimes in the fisheries sector, and a fundamental challenge to effective fisheries crime law enforcement. By establishing a byzantine web of legal entities across the globe, beneficial owners of fishing companies and fishing vessels can hide behind a protective layer of obfuscation in secrecy jurisdictions, including those that confer nationality to ships known as flags of convenience.

Secrecy means that investigators "don't know what they don't know". When investigators do not know what they are looking for, they are unable to determine whether a corporate arrangement or business transaction is established for a legitimate or an illegitimate purpose. In most cases the full picture of an illegitimate corporate arrangement or business transaction may never emerge. Investigators are chasing the proverbial red herring, legal entities established to confuse and curtail efforts to identify criminal offences and hold criminals and tax evaders accountable.

How do these red herrings come about? In this report, secrecy in the fisheries sector is analysed as a legal and factual phenomenon by focusing on the jurisdictions that facilitate secrecy in fisheries – the flags of convenience – and particularly those that are contracted out to private companies, the so-called “private flags”.

Flags states – and by implication flags of convenience – are afforded a unique position in international law. Flag states have primary prescriptive and enforcement jurisdiction over vessels on their register. In practice, this means that flag states decide both which laws shall apply to the owners and operators of their vessels and whether – or not – to enforce them. The sovereign right to both grant nationality to vessels and exercise prescriptive and enforcement jurisdiction over them can be abused. This report finds that flags of convenience can operate like any other secrecy jurisdiction and allow the identity of owners and operators of fishing vessels to remain secret (chapter 2). The main impacts of secrecy on fisheries crime law enforcement are the following:

- *Investigators “don’t know what they don’t know”*: When investigators do not know what they are looking for, they are unable to detect criminal offences and identify criminal actors and organisation.
- *Procedural impediments*: Without knowing the identity of persons involved in a criminal activity, investigators may be unable to determine whether they have jurisdiction to investigate a case and whether they should share information with other relevant authorities. They may also be prevented from turning intelligence into evidence through mutual legal assistance requests.
- *Inadequate risk assessments*: Without knowing the identity of owners and operators of vessels, it is very difficult for law enforcement agencies to assess the risks associated with beneficial owners situated within their jurisdiction who, for instance, own and operate vessels used for fisheries crime elsewhere.

Who are the flag states that operate as flags of convenience and secrecy jurisdictions? This report shows that many flags of convenience are not administered by the flag states’ maritime administration, but are contracted out to private companies. In chapter 3, the practice of contracting out ship registers (private flags) to private companies (private flag companies) is examined. The chapter demonstrates that private flags are run as commercial entities, often by companies situated in developed countries on behalf of some of the world's least developed countries. The main impacts

of these contractual arrangements on fisheries crime law enforcement are the following:

- *Private flags may inhibit the effective exercise of flag state responsibilities under international law:* States that have contracted out their ship registers to private flags have often little, if any, revenue from or commercial interest in the ship register, and they often rely on the private flag company to pass domestic laws and engage in international negotiations. In some cases, the government administration in the flag state does not know the identity of the vessels in their register and most do not seem to have laws, resources or expertise to investigate or prosecute fisheries crime. It is therefore unlikely that these flag states will be able or willing to effectively exercise their law enforcement jurisdiction over their private flag fleet.
- *Private flags may inhibit cross-border police cooperation and mutual legal assistance to combat fisheries crime:* Ship registers that are operated and managed by private flag companies in jurisdictions other than the flag state makes it difficult to identify which jurisdiction should receive the mutual legal assistance request for information about the identity and nationality of vessels and their beneficial owners. This undermines law enforcement action at sea, which often hinges on ascertaining the identity and nationality of a vessel and its owner in a timely manner.

Chapter 4 examines the flagging pattern of vessels used for illegal fishing, including the profile of the flag states used by owners and operators involved in illegal fishing. The main findings are that owners and operators engaged in illegal fishing choose to register their vessels in ship registers of developing countries (97.5%), and many in states that are among the world's least developed (21.3%). Most of these ship registers are flags of convenience (82.2%), and more than 60% are private flags. A few select flags of convenience dominate the list of flag states targeted by these owners and operators engaged in illegal fishing, but a large portion of them also choose to use stateless vessels or fail to adequately inform about their vessels' nationality (29.3%). Moreover, a large portion (more than 60%) of the vessels used for illegal fishing are registered in flag states that do not require the fishing vessel to have an IMO ship identification number. The main impacts of strategic flagging on fisheries crime law enforcement are the following:

- *Ship owners can target flag states with inadequate criminalisation of fisheries crime:* Without adequate criminalisation of fisheries crime offences in domestic laws, investigators are unable to investigate fisheries crime, and non-flag states may be prevented from exercising extraterritorial jurisdiction over their nationals if the offence is not also an offence in the flag state (double or dual criminality). In addition, the lack of double criminality also undermines requests for mutual legal assistance. By choosing to register their vessels with private registers in economically vulnerable states, these owners and operators are in any case unlikely to be targeted by costly cross-border law enforcement actions.
- *Ship owners can create jurisdictional ambiguity:* The use of stateless vessels, vessels without a known nationality, and frequent changes of flag states (flag hopping) in fisheries crime cases create uncertainty as to which state has law enforcement jurisdiction under international law, with the effect that no state is likely to exercise its jurisdiction over the vessel and its owners.
- *Ship owners can take advantage of rule competition:* As long as key international provisions pertaining to safety and labour standards at sea are not mandatory for fishing vessels, flags of convenience have ample opportunity to compete on the basis of whether to make these rules applicable to fishing vessels. This includes legal frameworks ensuring that vessels are identifiable by IMO ship identification numbers, that their movements are traceable, and that seafarers are protected from labour abuse and exploitation. The lack of mandatory legal frameworks applicable to fishing vessels places fisheries crime law enforcement officers at a great disadvantage when trying to investigate fisheries crime, including cases of forced labour and human trafficking.

# Acronyms and abbreviations

AIS	Automatic Identification System
CAPproject	Capacity Building and Awareness Raising-project of the INTERPOL Fisheries Crime Working Group
CCP	UNODC/WCO Container Control Programme
dwt	Deadweight tonnage
FAO	Food and Agriculture Organization of the United Nations
FCWG	INTERPOL Fisheries Crime Working Group
FME	Foreign Maritime Entity
FOC	Flag of Convenience
GDP	Gross Domestic Product
IBC	International Business Corporation
ICJ	International Court of Justice
ICS	International Chamber of Shipping
ILO	International Labour Organization
IMO	International Maritime Organization
INTERPOL	International Police Organization
ITLOS	International Tribunal for the Law of the Sea
ITF	International Transport Workers' Federation
IUU	Illegal, Unregulated or Unreported (fishing)
LLC	Limited Liability Company
MOU	Memorandum of Understanding
NA-FIG	North Atlantic Fisheries Intelligence Group
NORAD	Norwegian Agency for Development Cooperation
OECD	Organization for Economic Co-operation and Development
PPP	Purchasing Power Parity
RFMO	Regional Fisheries Management Organization
SIDS	Small Island Developing State
SOLAS	Safety of Life at Sea Convention
TFTC	Task Force on Tax Crime and Other Crimes



UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNODC	United Nations Office on Drugs and Crime
USD	United States Dollars
WCO	World Customs Organisation

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### *Appendix (for official use only)*

The appendix is obtainable upon request to the INTERPOL General Secretariat.

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# 1. Report overview

## 1.1 Introduction

The flag state is a key institution of the international law of the sea. Among its functions are the following:

- The flag state has the sovereign right to set the conditions for and grant its nationality to vessels (Article 92(1) of the United Nations Convention on Law of the Sea (UNCLOS)).<sup>1</sup>
- The flag state has the sovereign right and duty to exercise its law enforcement jurisdiction over vessels granted its nationality, at times to the exclusion of other states (Articles 92(1) and 94(1)–(5) of UNCLOS).

This report is about how these core flag state functions under international law can be exploited by criminals engaging in fisheries crime, and the challenges fisheries crime law enforcement officers face when they are. The report covers the following three issues pertaining to vessel registration and the exercise of flag state law enforcement jurisdiction:

- *How flag states, known as flags of convenience (FOCs), facilitate the secrecy of vessel ownership.*

Chapter 2 describes the phenomenon of FOCs and how they facilitate secret (anonymous) ownership of vessels and the impact of secrecy on fisheries crime law enforcement.

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<sup>1</sup> Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, UN. (1982). *United Nations Convention on the Law of the Sea of 10 December 1982*. Available at: [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/UNCLOS-TOC.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm)

- *The contracting out of FOCs to private companies.*

Chapter 3 describes the contracting out of FOCs to private companies that facilitates vessel registration at an arm's length of the flag state's maritime administration (private flags), and the impact of private flags on fisheries crime law enforcement, both within the flag state and in cross-border police cooperation with other states.

- *The strategic flagging of vessels engaged in illegal fishing.*

Chapter 4 examines the flagging pattern of owners and operators of vessels used in illegal fishing activities, and how criminals can use the strategic flagging of vessels to undermine fisheries crime law enforcement.

The final chapter concludes with a list of recommendations for further action to rectify the challenges posed by FOCs and secrecy to fisheries crime law enforcement.

The report contains more detailed information in an appendix, which is classified as "for official use only".

## 1.2 About fisheries crime

In law, fisheries crime refers to criminal offences associated with the fishing industry.<sup>2</sup> The UN Office on Drugs and Crime (UNODC) "Stretching the Fishnet" report (2017)<sup>3</sup> provides an overview of some of the key criminal offences along the fisheries value chain, including corruption, fraud and forgery, tax crimes and organised crime. In monetary terms, crimes associated with the fishing industry are vastly profitable. A conservative estimate is that as much as USD 23.5 billion is lost to illegal and

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<sup>2</sup> de Coning, E. (2016). "Fisheries Crime" in Elliott, L. and Shaedla, W. (eds). *Handbook of Transnational Environmental Crime*. (Edward Elgar Publishing: Cheltenham). 146-167.

<sup>3</sup> UNODC. (Forthcoming 2017). *Stretching the Fishnet: Identifying Opportunities to Address Fisheries Crime*. Conference Edition (UNODC: Vienna).

unregulated fishing each year.<sup>4</sup> Still, the actual costs of fisheries crime (including tax crime, human trafficking and other offences) to society far exceed the value of pillaged resources. Vulnerable coastal states suffer from lost opportunity costs, including losses of revenue, employment opportunities and infrastructure development, as well as the added burdens of food insecurity, instability and a loss of biodiversity.

Marine living resources are important for the global food security and trade in developing countries. The international trade in fish and fish products reached USD 148 billion in 2014, and for some developing states the fisheries sector represents a critical source of foreign income.<sup>5</sup> The fishing industry is also one of the world's largest employers and food providers. The Food and Agriculture Organization of the United Nations (FAO) estimates that between 10% and 12% of the global population rely on the fishing and aquaculture industry for their livelihoods<sup>6</sup> and 3.1 billion people depend on fish and fish products for nearly 20% of their intake of animal proteins,<sup>7</sup> making the fisheries sector (including aquaculture) among the most critical industries for food security, poverty relief and human prosperity worldwide.

Global fish stocks have been in a steady decline since the 1970s. According to FAO, nearly a third of all fisheries resources are over-exploited or extinct. More than half of the global fish stocks are fully exploited and commercial fisheries of these fish stocks cannot expand further. Only 15% of global fish stocks are under-exploited, but these are mainly low-value species.<sup>8</sup>

The rapid decline in fish stocks has led governments to introduce conservation measures such as quota restrictions and catch certificates. Today, states are issuing fishing licenses to regulate the species caught, where they can be caught, the equipment that can be used, and operating periods, for instance.

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<sup>4</sup> Agnew DJ, Pearce J, Pramod G, Peatman T, Watson R, *et al.* (2009). Estimating the Worldwide Extent of Illegal Fishing. *PLoS ONE* 4(2): e4570. doi:10.1371/journal.pone.0004570

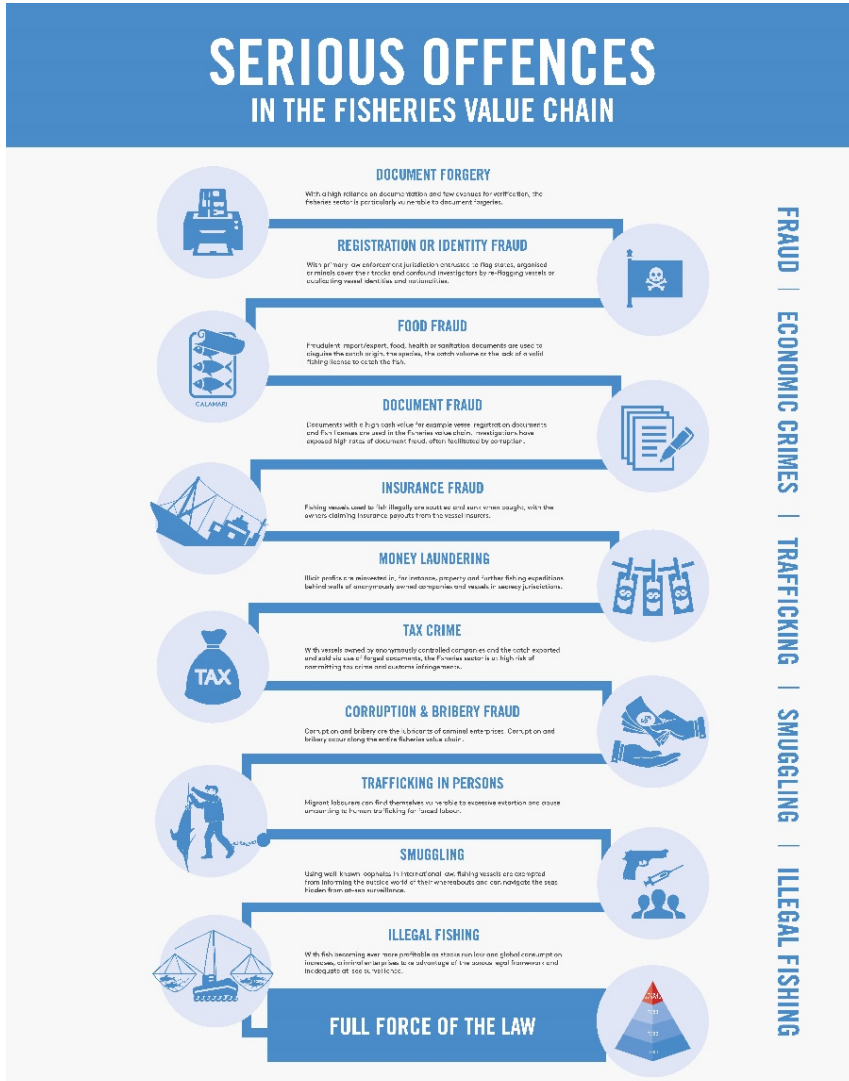
<sup>5</sup> FAO. (2016). *The State of the World Fisheries and Aquaculture 2016*. (FAO: Rome, Italy) at pp. 52 and 54. Available at <http://www.fao.org/publications/sofia/2016/en/>.

<sup>6</sup> FAO. (2014). *The State of the World Fisheries and Aquaculture 2014*. (FAO: Rome, Italy). Available at <http://www.fao.org/3/a-i3720e.pdf>.

<sup>7</sup> FAO. (2016). *Op. cit.* 5.

<sup>8</sup> FAO. (2016). *Op. cit.* 5, p. 39, Figure 13.

Figure 3: Crimes along the fisheries value chain



Law enforcement agencies are at the top of the bar to help catch and reduce criminal offences in fisheries value chain to help maintain the value of the fisheries value chain.



Source: [www.fishcrime.com](http://www.fishcrime.com)

Overfishing is sustained by criminal networks that own or operate vessels which ply the high seas and the coastal zones of weak governments burdened by corruption, conflict or with limited resources to monitor fishing activities. There is a thriving illicit market in fish and fish products. Fish remains a valuable commodity for operators willing to bend the rules. For example, each eight-hour shift of a moderately sized commercial fishing vessel can bring in as much as USD 150,000 when fishing grounds are reached. The potential profit is large. In one case, investigators estimated that a company had made EUR 100 million from its alleged illegal activities over a 10-year period.

In 2011, UNODC identified the fishing industry as particularly vulnerable to transnational organised crime, including human trafficking, corruption and environmental crime.<sup>9</sup> Subsequent reports have highlighted the vulnerability of the industry to tax and customs evasion,<sup>10</sup> forced labour and human trafficking,<sup>11</sup> and other criminalities in the value chain.<sup>12</sup> The habitual and organised illegal fishing of transnational fishing operators has prompted international organisations such as UNODC and INTERPOL to engage the full range of legal and institutional tools available to law enforcement to effectively facilitate cross-border law enforcement cooperation.<sup>13</sup>

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<sup>9</sup> UNODC. (2011). *Transnational Organized Crime in the Fishing Industry: Focus on Trafficking in Persons, Smuggling of Migrants, Illicit Traffic in Drugs*. (UNODC: Vienna). Available at [http://www.unodc.org/documents/human-trafficking/Issue\\_Paper\\_-\\_TOC\\_in\\_the\\_Fishing\\_Industry.pdf](http://www.unodc.org/documents/human-trafficking/Issue_Paper_-_TOC_in_the_Fishing_Industry.pdf)

<sup>10</sup> OECD. (2013). *Evading the Net: Tax Crime in the Fisheries Sector*. (OECD: Paris). Available at <http://www.oecd.org/tax/evading-the-net-tax-crime-in-the-fisheries-sector.htm>

<sup>11</sup> ILO. (2013). *Caught at Sea: Forced Labour and Human Trafficking in Fisheries*. (ILO: Geneva). Available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_214472.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_214472.pdf)

<sup>12</sup> UNODC. (Forthcoming 2017). Op. cit. 3.

<sup>13</sup> de Coning, E. (2016). Op. cit. 2.



## 1.3 Past reports

Figure 4: Past reports



The present report follows a string of reports that describe or comment on the challenges associated with FOCs and private flags. In 2011, UNODC published an issue paper<sup>14</sup> that examined, among others, the fishing industry's vulnerability to corruption relating to ship registers. The report noted that (p. 117):

[I]t is today largely regarded as common practice that a number of flag States are either unable or unwilling to adequately exercise their criminal enforcement jurisdiction over vessels flying their flag. Criminal acts committed on board vessels registered in these flag States (such as human trafficking or [fisheries] crimes) are in these instances frequently conducted with impunity.

Impunity is facilitated by a number of flag States that allow ship owners to maintain anonymity, because they allow vessels to be registered with untraceable ownership due to transnational corporate structures in jurisdictions where ownership information is protected by privacy or secrecy laws. As noted ..., a number of fishing operators engaged in [fisheries] crimes make use of financial havens to hide beneficial ownership and, according to a recent tax investigation, conduct wide-scale tax crime. By shielding beneficial ownership coastal States and

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<sup>14</sup> UNODC (2011). Op. cit. 9. The report was noted in among others UN General Assembly (UNGA) Resolution 63/112 (5 December 2008) UN Doc A/RES/63/112, operative clause 59; UNGA Resolution 64/72 (4 December 2009) UN Doc A/RES/64/72, operative clause 61; UNGA Resolution 65/38 (7 December 2010) UN Doc A/RES/65/38, operative clause 56; and UNGA Draft Resolution 66/68 UN Doc A/66/L.22, operative clause 60.

other interested parties are rendered unable to conduct targeted surveillance and gather important intelligence data. According to law enforcement officials interviewed during the study the practice is also seen to significantly hamper enforcement and prosecution of criminal activities.

The report goes on to note the significant competitive advantage that can be derived from operating without concern for fisheries management regulations and labour standards, and how this is exploited by private flag companies (p. 117):

A number of experts in both the fisheries and maritime sector consulted during this study pointed to the fact that some of the world's largest ship registries are operated by corporate entities with close connections to the shipping industry. The websites of some of these [private flag] registries suggest that the registries are run by corporate entities with the head office situated in (more) developed countries with seemingly little connection to the Maritime Administration of the flag State.

UNODC expresses the following concerns about the impact of private flags on the law of the sea (p. 120):

There would seem to be a possibility that these [private flag] registries could be involved in corrupt dealings or attempts at impropriety to obtain a license to run the register in order to take advantage of the flag State's inability or unwillingness to ensure for instance criminal law enforcement. Corrupt relations between [private flag] registers and flag States may have a potentially detrimental effect on the proper functioning of the international legal framework pertaining to the law of the sea, as well as investigations and prosecutions of transnational organized crime and marine living resource management and conservation efforts.

Similarly, the International Labour Organization (ILO) emphasises the problem of flags of convenience in the 2013 report "Caught at Sea"<sup>15</sup> about forced labour and human trafficking in the fisheries sector (p. 24):

Unfortunately, some flag States are unwilling or unable to meet their obligations under international law. Many are not members of international legal frameworks established to protect fishers at sea.... The flag State, however, does remain responsible under international law for the vessel, sometimes to the exclusion of other States.

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<sup>15</sup> ILO. (2013). Op. cit. 11.

As to the problem of secrecy and private flags, ILO notes (p. 24):

In addition, some flag States, known as “open registers” (Swan, 2003), allow fishing operators to register vessels owned by shell companies, which facilitates anonymous ownership of vessels (OECD, 2003, 2004). Typically [private flags] are established as corporate entities and operate with nominal connection with the flag State... The result is that some States have amassed large fleets over which they do not have the capacity to effectively exercise their flag State responsibility. Criminal activities and abuse on board these vessels may therefore be undetected or unaddressed. Fishing operators that wish to engage in deceptive and coercive labour practices and other criminal activities, such as fisheries crime, money laundering and illicit traffic in drugs may make use of the secrecy, lower standards, and lax law enforcement that registration in some of these [private flags] entails.

Moreover, in the “Evading the Net” report,<sup>16</sup> OECD described the challenge of secrecy and FOCs in the context of tax crimes in the fisheries sector (p. 20):

The fishing vessel will be registered with a national shipping register, but this may be in a different country to where the fishing company is located or even that which granted the license to fish. This separation of the vessel’s ownership, registration and licensing, the ease of use of flag states and the ability to change the name of a vessel means it is often difficult to establish the true beneficial owner of a particular fishing vessel. It may even be the case that a single fishing vessel has two identities – one of which is used for legal fishing activities and the other for illegal, unreported and unregulated fishing.

As to secrecy and vessel registration, OECD goes on to note (p. 31):

One of the most prevalent tactics utilized by those engaged in all types of crime in the fisheries sector is the flying of a flag of convenience, which involves registration of a fishing vessel in a jurisdiction that is different to that of its owner. Owners may register vessels in open registries (which accept registrations of ships owned by foreign entities) to avoid compliance with more robust and heavily enforced regulation in their own country. This may also be combined with the use of holding companies in offshore jurisdictions which do not engage in effective exchange of information, in order for the identity of owners to remain hidden.

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<sup>16</sup> OECD. (2013). Op. cit. 10.

## 1.4 The FAO Voluntary Guidelines for Flag State Performance

In 2009 the FAO Committee of Fisheries (COFI) convened a Technical Consultation on Flag State Performance to prevent, deter and eliminate illegal, unreported and unregulated fishing through effective implementation of flag state responsibilities. In 2014, the Technical Consultation presented a set of “Voluntary Guidelines for Flag State Performance” to COFI for endorsement. COFI endorsed the guidelines at its 31st session between 9 and 13 July 2014.

The voluntary guidelines contain a number of provisions that are of relevance to the topic of this report. In general the guidelines recommend the following:<sup>17</sup>

2. In its exercise of effective flag State responsibility, the flag State should:
  - a) act in accordance with international law with respect to flag State duties.
  - b) respect national sovereignty and coastal State rights.
  - c) prevent, deter and eliminate IUU fishing or fishing related activities in support of such fishing.
  - d) effectively exercise its jurisdiction and control over vessels flying its flag.
  - e) take measures to ensure that persons subject to its jurisdiction, including owners and operators of vessels flying its flag, do not support or engage in IUU fishing or fishing related activities in support of such fishing.
  - f) ensure the conservation and sustainable use of living marine resources.
  - g) take effective action against non-compliance by vessels flying its flag.
  - h) discharge its duty to cooperate in accordance with international law.
  - i) exchange information and coordinate activities among relevant national agencies.
  - j) exchange information with other States and give mutual legal assistance in investigation and judicial proceedings, as required by their respective international obligations.
  - k) recognize the special interests of developing States, in particular the least developed among them and small island developing States, and to cooperate to enhance their abilities as flag States including through capacity development.

Although the guidelines are voluntary, many of these provisions could, if implemented and adhered to, make significant improvements to the current law enforcement challenges associated with the registration of vessels in FOCs and private flags.

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<sup>17</sup> FAO. (2013). *Voluntary Guidelines for Flag State Performance*. Available at <http://www.fao.org/fishery/topic/16159/en>

## 1.5 Methodology

The report is the result of a joint analysis undertaken by the INTERPOL Fisheries Crime Working Group's (FCWG) sub-project on Capacity Building and Awareness Raising (CAPproject) and the North Atlantic Fisheries Intelligence Group (NA-FIG), in close cooperation with the INTERPOL General Secretariat and UNODC. The report captures the experiences and intelligence analyses of investigators and analysts ranging from government prosecution and police agencies, to fisheries, tax and customs agencies, as well as intergovernmental organisations (including INTERPOL and UNODC) when investigating, controlling or otherwise attempting to curb fisheries crime. These contributors are referred to collectively as "investigators" in this report. Invaluable input was also received during consultations with field officers and members of civil society. The material has been structured in a report format to make the findings accessible to a larger audience.

The work commenced in 2013 with financial support from the Norwegian Agency for Development Cooperation (Norad) and the Norwegian Church Aid, and preliminary results were presented for deliberations to the INTERPOL FCWG at the 3rd INTERPOL FCWG meeting in October 2014, to NA-FIG in March 2015, to the OECD Task Force on Tax Crime and Other Crimes (TFTC) in January 2016, and at the 5th INTERPOL FCWG-meeting in October 2016. In 2017, a joint working group from NA-FIG and the INTERPOL FCWG CAPproject drafted the final report. The final report is peer reviewed by experts at the INTERPOL General Secretariat and UNODC. The final report is published with the financial support of the Nordic Council of Ministers.

## 2. Secrecy facilitated by flags of convenience and the impact on fisheries crime law enforcement

### 2.1 Introduction

According to the FAO, the lack of transparency in the fishery sector is one of the core challenges to effective fisheries management:

[The] lack of basic transparency could be seen as an underlying facilitator of all the negative aspects of the global fisheries sector – [Illegal, Unreported and Unregulated] fishing, fleet overcapacity, overfishing, ill-directed subsidies, corruption, poor fisheries management decisions, etc. A more transparent sector would place a spotlight on such activities whenever they occur, making it harder for perpetrators to hide behind the current veil of secrecy and requiring immediate action to be taken to correct the wrong.

This chapter describes how FOCs undermine transparency in the fisheries sector and facilitate fisheries crime by providing criminals secrecy regarding the ownership and control of fishing vessels. How secrecy impacts on the investigation of fisheries crime is also examined.

The role of FOCs as a facilitator of illegal fishing is well documented.<sup>18</sup> However, the concept of FOCs itself does not have a universal definition. The chapter, therefore,

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<sup>18</sup> See, for instance, FAO. (2004). *Report of the Expert Consultation on Fishing Vessels Operating under Open Registries and their Impact on Illegal, Unreported and Unregulated Fishing*. Miami, Florida, United States of America, 23-25 September 2003. FAO Fisheries Report No. 722 (FAO: Rome); de Sombre, E. (2005). Fishing under Flags of Convenience: Using Market Power to Increase Participation in International Regulation. *Global Environmental Politics*, 5: 4; Gianni, M. and Simpson, W. (2005). *The Changing Nature of High Seas Fishing: How Flags of Convenience provide Cover for Illegal, Unreported and Unregulated Fishing*. Available at: <http://www.agriculture.gov.au/fisheries/iuu/high-seas>; Environmental Justice Foundation. (2009). *Lowering the Flag – Ending the Use of Flags of Convenience by Pirate Fishing Vessels*. (EJF: London); and Miller, DD. and Sumaila, UR. (2013) Flag use behaviour and IUU activity within the international fishing fleet: Refining definitions and identifying areas of concern. *Marine Policy*, 44: 204-211. Available at: <http://dx.doi.org/10.1016/j.marpol.2013.08.027>.

commences by establishing a working definition of FOCs for the purpose of this report (section 2.2.). Section 2.3. of this chapter explains how FOCs facilitate secrecy in vessel ownership. The chapter concludes with an analysis of the impact of secrecy on fisheries crime law enforcement (section 2.4.).

## 2.2 FOCs defined

A state with a ship registry is called a flag state. Some flag states are unable or unwilling to prescribe and enforce laws necessary to ensure, for instance, that the owners and operators of their fleet uphold minimum labour and safety standards, or refrain from engaging in criminal activities. When ship owners target these flag states for ship registration, the flag state is referred to as a “flag of convenience” (FOC) and sometimes as a “flag of non-compliance”.<sup>19</sup>

A uniform definition of an FOC does not yet exist. It may, however, be useful to define flags of convenience not by *what* they are, but *why* they are. Approached from this angle, a “flag of convenience” can be understood as *any ship registry that will provide a ship owner with a competitive advantage above registration in any other ship registry by exempting the ship owner from the negative costs and tax burdens of its business*. A flag of convenience will typically do this by absolving the ship owner from tax obligations, transaction costs, reputational damage, and penal sanctions, as well as by allowing the ship owner to externalise social costs (such as the costs of the consequences of non-compliance with labour, environmental or safety standards) that would otherwise have had to be paid for by the ship owning company.

The International Transport Workers’ Federation (ITF) has developed a list of 35 flag states it regards as FOCs.<sup>20</sup> This list is not conclusive, and FAO has, for instance, added a number of flag states to the ITF list.<sup>21</sup> Both the ITF and FAO lists of FOCs are more than 10 years old. As FOCs are a dynamic phenomenon (see Chapter 3),

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<sup>19</sup> Due to the flag states’ non-compliance with international law. See FAO. (2009). *Report of the Expert Consultation on Flag State Performance*. Rome, 23-26 June. (FAO: Rome). For an overview of different flag use behaviours, see Miller, DD and Sumaila, UR. *Ibid*.

<sup>20</sup> See [www.itfglobal.org](http://www.itfglobal.org).

<sup>21</sup> Swan, J. (2002). *Fishing Vessels Operating under Open Registers and the Exercise of Flag State Responsibilities: Information and Options*. FAO Fisheries Circular No. 980. (FAO: Rome). Available at <http://www.fao.org/3/a-y3824e.pdf>

there are constant changes being made to the list of FOCs as new ship registries are established and existing ones are discontinued. There are a number of additional flag states that can currently be added to the FOC-lists of ITF and FAO, particularly in the context of ship registries that offer convenience to the fisheries sector.

### 2.3 FOCs and secrecy

One of the mechanisms ship owners use to achieve the business advantages associated with FOCs is secrecy, or the structuring of ownership interests in a manner that hides the identity of the controlling commercial interests in a vessel. Secrecy can be harmful when used to hide the identity of key persons ultimately controlling a business entity – the “beneficial owners” of the entity – or persons who are otherwise involved in the operation of a business venture. Importantly, in this context a “person” refers to a natural person – a living, breathing human being – and not a “legal” person, such as a company, partnership or trust.

The identity of persons engaged in and controlling commercial activities is important for a number of reasons. These are:

- To trace business decisions that impact on the wealth and wellbeing of society back to a person or persons.
- To hold persons accountable for the harmful consequences of taking unreasonable risks or being involved in fraudulent or otherwise criminal activities.
- To ensure that all persons contribute to the welfare of society by carrying their fair share of the tax burden.
- To ensure fair competition and good governance through openness about business associations, and to avoid fraud, corruption and nepotism.

At its core, secrecy has two ingredients:

1. A corporate structure (typically a company, partnership, foundation or trust).
2. A “secrecy jurisdiction”, i.e., a sovereign or semi-sovereign jurisdiction that protects the identity of the owners of the corporate structure, their assets and/or their business dealings.



### 2.3.1 *Secrecy-inducing corporate structures used by ship owners*

Most vessels today are owned by a form of limited liability company (LLC). Some LLCs are tailored to achieve secrecy in vessel ownership. These are divided into “shell”, “shelf” and “front” companies:<sup>22</sup>

- A *shell company* is a non-operational company, meaning that it does not carry out any significant form of economic activity. Although shell companies can have legitimate uses (such as facilitating a merger or a joint venture), beneficial owners of fishing vessels also use them to create layers of company structures to hide their identity. See more about layering below.
- A *shelf company* is a dormant company incorporated according to normal rules of incorporation with articles of association and shareholders, a board of directors and executive directors. The company is then purchased “off the shelf” from a company wholesaler, and the shares are transferred to the new owner and the old directors resign. Shelf companies give the appearance of long-standing business activities. They are also quick to register, as it merely requires the transfer of ownership and not the establishment of a new company. Shelf companies are also often shell companies, i.e., non-operational or without significant economic activities. Investigators frequently come across shelf companies in fisheries crime cases, particularly when the ship owner is engaged in flag hopping (on flag hopping 4).
- Unlike shell and shelf companies, *front companies* are operational companies that could be used to launder illegitimate money flows under the guise of legitimate business activities, for instance. The front company could act as an “independent” third party and intermediary between two business partners engaged in criminal activities, giving the appearance that they are not engaged directly. In fisheries, it is sometimes suspected that fish is sold and purchased by companies with the same beneficial owner through a front company. This can facilitate, among others, profit shifting, tax evasion, fraud and money laundering.

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<sup>22</sup> van der Does de Willebois, E., Sharman, J.C., Harrison, R., Park, J.W., and Halter, E. (2011). *The Puppet Masters. How the corrupt use legal structures to hide stolen assets and what to do about it.* (World Bank/UNODC: Washington DC).

### Box 1. Corporate vehicles for ship owners

Many ship owners are incorporated as International Business Corporations (IBCs). IBCs are often shell companies and a corporate vehicle offered in offshore financial centres to foreigners. Most jurisdictions that offer IBCs do not permit the company to carry out business locally; they are subject to what is known as “ring-fencing” legislation. See figure 5, below.

Figure 5: About the Marshall Islands IBC

The screenshot shows the website for International Registries, Inc. (IRI). The header includes the IRI logo, the company name, and the tagline "providing support to the Marshall Islands Maritime & Corporate Administrators". Navigation links include Home, About IRI, The Marshall Islands, and Contact Us. A search bar is located in the top right corner. Below the header is a menu with categories: CORPORATE SERVICES, MARITIME SERVICES, YACHT SERVICES, SEAFARERS' DOCUMENTATION, SEARCH & RESCUE, and INFO CENTER. The main content area is titled "CORPORATE SERVICES" and features a sidebar with navigation links: GENERAL INFORMATION, ELECTRONIC ANNUAL INVOICE, LEGAL, BUSINESS ENTITIES (with IBC highlighted), PARTNERSHIPS, LLC, FME, Entity Search, SHELF COMPANIES, and CORPORATE FAQs. The main text area contains the following information:

You are here: Corporate Services > Business Entities > IBC

The Republic of the Marshall Islands (RMI) Business Corporations Act (BCA) is modeled after the corporate laws of the United States (US) and the United Kingdom (UK), and allows for the appointment of a Managing Director and Corporate Secretary. Under the BCA, the Board of Directors and corporate officers may be individuals or business entities. Additionally, there is no mandatory requirement to file the names of directors, officers, or shareholders with the Registrar of Corporations or Registered Agent. However, this information may be filed or recorded voluntarily.

International Business Corporations (IBCs) are one of the most widely used business vehicles. IBCs are considered distinct legal entities and are utilized for a variety of purposes, such as holding securities and bank accounts, entering joint ventures, trust and estate planning, asset protection, public offerings for raising capital in world markets, international trade, and holding vessels.

IBCs give owners the ability to maximize profitability while minimizing personal liability. In the event of a business loss or lawsuit, shareholder liability is limited to his/her direct capital investment in the corporation.

**ENTITY FORMATION**

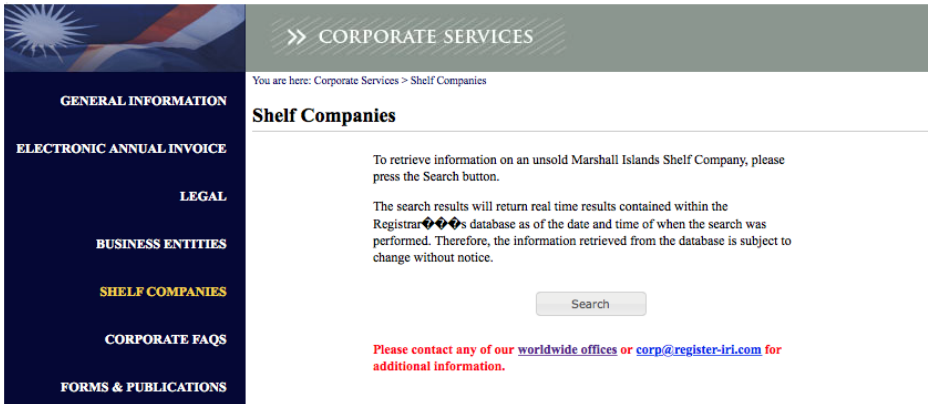
Entity formation is simple; a company may be formed in one (1) business day. The following information needs to be provided to any [IRI office](#) in order to proceed with the incorporation of a RMI IBC: corporate name, share structure, and organizational activity. RMI IBCs may also be formed [online](#).

Source: [www.register-iri.com](http://www.register-iri.com)

Another frequently used corporate vehicle to hide the beneficial ownership of vessels is a trust. The trust is a legal entity created by a settlor for the benefit of one or more beneficiaries and managed by a trustee. A trust may hold property, such as a vessel, a company, or the contents of a bank account, and the legal ownership of these assets is ceded from the settlor to the trust. The effect is that the legal ownership of assets can be separated from the actual controlling ownership of the assets. The alternative to a trust is the foundation, which, in a similar fashion to trusts, enables a benefactor, or “founder”, to cede assets to the foundation in the care of the foundation council for the benefit of beneficiaries. Trusts facilitate secrecy when the identity of the settlor or the

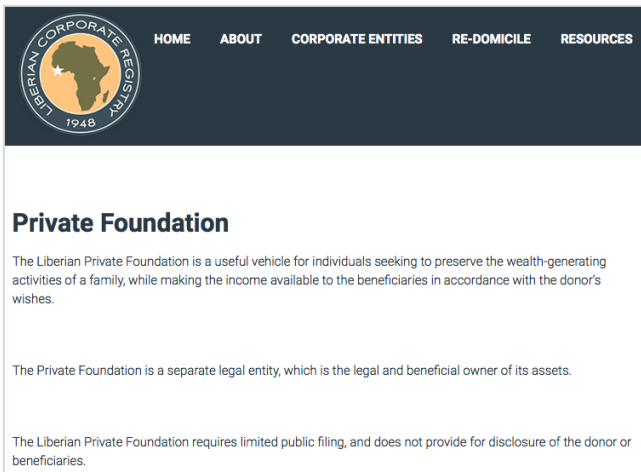
beneficiary is not disclosed. Trusts are also used to shield assets from the revenue services, as it is often difficult to ascertain who has controlling ownership of the assets held by the trust. Although trusts and foundations may be required to be registered, the information on these registers is often protected in secrecy jurisdictions.

Figure 6: Search function for Marshall Islands shelf companies



Source: [www.register-iri.com](http://www.register-iri.com)

Figure 7: The Liberian private foundation



Source: [www.liberiancorporation.com](http://www.liberiancorporation.com)

## Box 2. Modus operandi of Russian crab poachers

From Garden, E., Seafood.com News:<sup>23</sup>

Crab poachers in the Russian Far East are designing new schemes for illegal exports of domestic crab to foreign markets, according to recent statements of analysts from the Russian Rosrybolovstvo and the Russian Ministry of Internal Affairs.

According to a spokesman for Ilya Shestakov, head of Rosrybolovstvo, the majority of crab poachers have started to use transport ships for illegal deliveries of their catch in recent months.

...

In addition to transport vessels, the deliveries of illegal crab catch have also increased on the vessels, going under the flags of third-world countries (such as Belize, Sierra Leone, Cambodia, etc.), which are not always strictly controlled.

According to Vladimir Kolokoltsev, head of the Russian Ministry of Internal Affairs, vessels under "convenient flags" usually do not have means of satellite position control, permission for fish catch and do not require reporting about the passage of control points. Due to this, according to Kolokoltsev, the detection of such ships is usually associated only with serious problems.

...

Experts of the Russian Ministry of Internal Affairs have added that sales of illegal crab are also carried out in various ways, including at international fish auctions, where crab are supplied under fictitious contracts with offshore companies. After this, crab are sold at higher prices, while the received proceeds are deducted from the taxation, being deposited in the accounts in foreign banks.

Illegal crab fishing in the far east is an effectively organized business, which is managed by criminal groups that control not only production but also transportation and sales of Russian crabs at foreign markets.

The use of corporate vehicles alone will not always be sufficient to secure complete anonymity. Some structuring is often put in place to achieve secrecy. A frequently used technique is "layering", i.e., to hide one's identity behind a chain of corporate vehicles that own or control their subsidiaries by means of company shareholders and nominee directors. Maximum effect is achieved by establishing these corporate vehicles in different jurisdictions, which will hamper investigators' efforts to identify the beneficial owners as

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<sup>23</sup> Garden, E. (2017) *Crab poachers design new schemes for illegal activities in Russia*. Seafood.com News 13 July. Available at <https://www.undercurrentnews.com/2017/07/13/crab-poachers-design-new-schemes-for-illegal-activities-in-russia>.

they will have to obtain independent responses from each jurisdiction consecutively. Excessive, noneconomic use of layering, if visible, should raise a red flag among investigators.

A further technique is the use of “proxies” or “nominees”. Proxies hold a position or shares in a company on behalf of the actual owners. Proxies are often necessary in large publicly traded companies, but they are also used to hide the true identity of the beneficial owner or other interested parties if the information about their identity is not easily obtainable. Proxies are “professionals for hire”, but, in some instances, a beneficial owner will achieve the same effect by appointing a “front man”, which is a business associate or a trusted person in the family or the close friendship circle of the beneficial owner.

### 2.3.2 *Secrecy jurisdictions used by ship owners*

Secrecy jurisdictions are states that facilitate the establishment of secrecy-inducing corporate vehicles and shield the identity of individuals and businesses through secrecy laws and other protections. These states typically enact laws and regulations that make it difficult or impossible for investigators to determine the identity of the owners of bank accounts, beneficial owners of companies, or the beneficiaries of trusts or foundations, as well as the existence or origin of assets. They typically do so by the following means:

- *Professional privilege*: Professional privilege is devised to protect the confidentiality of information disclosed to certain professionals, such as lawyers (legal privilege), doctors, pharmacists and priests. While privilege is a basic principle of the attorney-client relationship, in some cases, it may be problematic, such as when it is invoked by lawyers who assist beneficial owners to set up elaborate corporate structures to hide their identity when committing a crime.
- *Procedural delays*: Whereas money is transferred instantaneously and offshore companies are set up over the Internet at minimal costs and in a matter of hours, investigations into ownership and assets could take months or even years. A number of jurisdictions go to great pains to make information sharing administratively time-consuming and procedurally difficult, which makes investigations costly and hard to succeed. Hence, although some jurisdictions may not offer secrecy *de jure*, it is *de facto* too resource-intensive or time-consuming to gain access to the information to make an investigation worthwhile in all but the most serious cases.

- *Due diligence omissions*: Although secrecy can be protected, in recent years, there has been increasing pressure on financial institutions and service providers to share information, even in secrecy jurisdictions. A way in which to sidestep the issue is simply not to know or to have poor routines for collecting, collating and storing data. This issue is currently addressed by the OECD Standard for Automatic Exchange of Financial Information in Tax Matters (see Chapter 5), which contains detailed due diligence rules of financial institutions to collect information (common reporting standards).<sup>24</sup>

International law provides that it is within the sovereign prerogative of a flag state to set the conditions for the registration of vessels on its register. A number of flag states have interpreted this right to allow the registration of vessels beneficially owned by foreigners. Flag states that allow the registration of vessels beneficially owned by foreigners have been labelled “open registers” because they are open to all ship owners, not only those residing within their jurisdiction. The consequence has been that ship owners from anywhere in the world could register vessels with these flag states and thereby avail themselves of the potential benefits arising from the flag state’s regulations and enforcement practices. Open registers have been widely criticised for lack of “genuine link” between the (foreign) beneficial owners of the vessels on their register and the flag state, and thus of being in breach of Article 91(1) of UNCLOS.<sup>25</sup> However, the International Tribunal for the Law of the Sea (ITLOS) has made it clear that other states cannot challenge the validity of a flag state’s grant of nationality to a vessel based on the lack of a genuine link between the owner and the flag state.<sup>26</sup>

From a law enforcement perspective, it is not flag states’ practice of registering foreign-owned vessels on their ship register that is particularly problematic. Rather, it

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<sup>24</sup> OECD. (n.d.). *Standard for Automatic Exchange of Financial Information in Tax Matters. The CRS Implementation Handbook*. (OECD: Paris). Available at: <http://www.oecd.org/tax/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf>.


<sup>25</sup> UN. (1982). Op. cit. 1. Article 91(1) of UNCLOS reads: “Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. *There must exist a genuine link between the State and the ship*” (Own emphasis).

<sup>26</sup> *The M/V “SAIGA” (No 2), Saint Vincent and the Grenadines v Guinea*, Merits, Judgment, ITLOS Case No 2, ICGJ 336 (ITLOS 1999), at para 83: “The conclusion of the Tribunal is that the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States.”

is the extent to which a flag state facilitates secrecy in beneficial vessel ownership. Secrecy is facilitated by open registers when they allow the registered owner of vessels on their ship register to be a local company owned by a foreign corporate vehicle without traceable beneficial ownership. These open registries become secrecy jurisdictions in their own right and provide ship owners with an added layer of secrecy over and beyond the protection already afforded them through the jurisdiction(s) where the corporate structure is situated.

In the past, FOCs openly advertised that they allowed anonymous ownership of ship owning companies. In recent times they have become more circumspect and the typical advertisement for anonymity is couched in more general terms.<sup>27</sup>

**Figure 8: Ownership requirements and other benefits of the Panamanian Registry**



**ADVANTAGES OF THE PANAMA REGISTRY**

- Ship Registry N°1 worldwide, established since 1925. Approximately 23% of the world's fleet is under the Panamanian flag.
- No nationality restrictions for registry.
- No nationality restrictions for manning.
- No minimum tonnage or age requirements for vessels.
- No re-inspections needed for vessels changing register if they have valid statutory certificates.
- Free LRIT for vessels (Long range identification and tracking system).
- Tokyo MOU White list.
- Paris MOU White list.
- Category "A" of the IMO Council.
- Registration procedure is fast and easy. A ship can be registered in a period of 8 hours if it complies with all the requirements.
- We offer discounts for new construction ships, for ships within 5 years of the laying of the keel, for ships that have not been detained in the past 24 months, for group of ships and much more.
- We accept dual registry under bare boat charter.

**OWNERSHIP**

- There are no requirements under Panamanian legislation for the owner, whether a natural or legal person, to be Panamanian.

Source: [www.panamaconsul.co.uk](http://www.panamaconsul.co.uk)

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<sup>27</sup> See figure 8 and box 3.

### Box 3. Examples of flag states' secrecy enabling ownership requirements<sup>28</sup>

- Bahamas: "There is no requirement for local ownership of a Bahamian registered ship. The ship is required to be surveyed on first registration and inspected annually thereafter" (p. 8).
- Comoros: "No restrictions" (p. 12).
- Liberia: "A vessel registered in Liberia may be owned by a Liberian corporation, registered business company, limited partnership or LLC or by a registered Foreign Maritime Entity (FME), being an entity existing in another jurisdiction and registered in Liberia for the purposes of owning or operating a vessel" (p. 25).
- Marshall Islands: "Ownership must be in the name of a Republic of the Marshall Islands (RMI), International Business Corporation, General Partnership, Limited Partnership (LP), Limited Liability Company (LLC) or Foreign Maritime Entity" (p. 30).

Source: Hill Dickinson (n.d.).

### Box 4. Case study on the use of secrecy jurisdictions in fisheries

In 2004, a large-scale poacher was convicted of criminal offences pertaining to the illegal extraction of South African West Coast Rock Lobster (the *Rock Lobster*-case). The poacher and his co-conspirators received various prison sentences and were ordered to forfeit USD 13.3 million to the US government.<sup>29</sup> In addition, the US District Court for the Southern District of New York ordered the offenders to pay just under USD 22.5 million in restitution to the Republic of South Africa for the West Coast Rock Lobsters they illegally harvested on the South African coast between 1987 and 2001.

In lieu of the restitution order, the prosecutors proceeded to file for an order to freeze the main offender's assets in his overseas accounts to secure payment. These pleadings provide insight into how secrecy jurisdictions can be used by criminals to hide their assets.

The pleadings alleged that the offender embarked on a deliberate scheme to hide his assets using layers of companies and trusts in secrecy jurisdictions. Initially, the offender controlled a company that held its assets in a Swiss bank account. The prosecutors, however, alleged that the offender transferred this money to companies with accounts in a Jersey bank once the restitution order was granted. Thereafter, the offender is alleged to have set up a scheme to spread the money out across a number of companies, trusts and real estate investments (see Figure 9, below)

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<sup>28</sup> From: Hill Dickinson. (n.d.). *International Ship Registration Requirements. Shipping "at a glance" guide 7*. (Hill Dickinson: Liverpool).

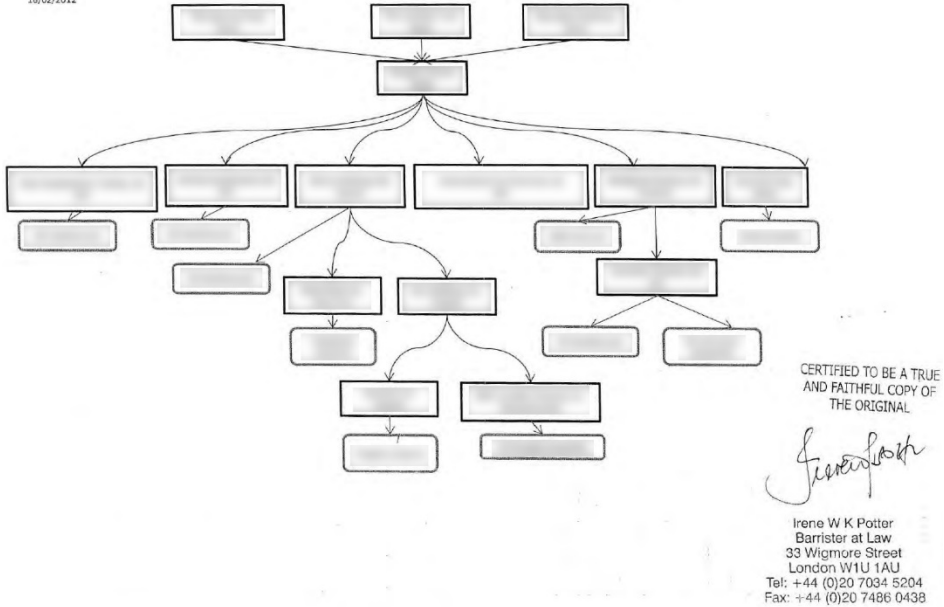
<sup>29</sup> *United States v. Bengis*, 631 F.3d 33, 36 (2d Cir. 2011).



Moreover, in the court pleadings, it is alleged that, when the US prosecutors moved to freeze the offender's assets in the Jersey bank to secure the restitution order, the accused established three trusts on Nevis controlled by a front man (the offender's family lawyer) and with his three children as the beneficiaries. This elaborate structure was allegedly created to remove the offender further from the assets and thereby to thwart the freezing order.

Figure 9: Alleged ownership and control of assets in the Rock Lobster-case<sup>30</sup>

16/02/2012



Source: U.S. District Court Southern District of New York. (2013).

<sup>30</sup> U.S. District Court Southern District of New York. (2013). *Document 233-11 in Case 1:03-cr-00308-LAK*. New York, 23 April, p. 2.

### **Box 5. Advertisement on the advantages of registering a ship in Panama**

From “Advantages of registering a ship in Panama” on the Panama Maritime Authority (PMA) Certification website:

The Panama ship register allows the registration under a Panamanian corporation. This will give protection to the vessel and anonymous ownership. You will be able to use a bulletproof asset protection structure (corporation + foundation) to register and ensure that your vessel’s income and ownership will always be safe and anonymously protected.<sup>31</sup>

### **Box 6. About the Scottish Limited Partnership**

Entities providing anonymity are not confined to obvious secrecy jurisdictions. Scottish Limited Partnerships (SLPs) are registered on the UK corporate register. However, if the SLP has no trading presence in the UK, and its designated members (partners) are also not residents in the UK, no returns are required to be made to UK regulators for tax or otherwise. Also, UK authorities are unable to remove an SLP from the corporate register once it has been registered. If the designated members (partners) of an SLP are corporate entities registered in a secrecy jurisdiction, the UK authorities will not know and have no power to determine the beneficial ownership of an SLP. There is a body of evidence suggesting that SLPs are regularly being used by transnational organised crime groups.

### **Box 7. Statement on beneficial ownership before the International Court of Justice**

RL Weeks, representing the Government of Liberia in the case of the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization (the IMCO-case) before the International Court of Justice (ICJ), gave an oral statement about beneficial ownership of vessels at a hearing on 26 April 1960. In the report of the hearing, Weeks is quoted as stating (p. 397):

... there is no single, simple concept which can be invoked to (associate) a ship with a State. It is of little practical value to keep referring to a concept of “ownership” which has become unreal and meaningless, or to a concept of “beneficial ownership” which has become untraceable.<sup>32</sup>

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<sup>31</sup> PMA Certification. (2017). Advantages of registering a ship in Panama. Available at: <http://www.pmacertification.com/view.asp?idp=7&c=12>

<sup>32</sup> ICJ. (1960). *Part II of oral statements at hearings*. The Hague, 26 April. Available at: <http://www.icj-cij.org/files/case-related/43/043-19600426-ORA-01-00-BI.pdf>

## 2.4 The impact of secrecy on fisheries crime law enforcement

It is important to note that no industry is immune to the attractions of secrecy. In this regard, the fisheries sector is no different from any other economic sector, and some will make use of the same secrecy-enhancing mechanisms used by any other transnational business. Arguably, however, there are at least two inherent features of the fisheries sector that make secrecy a particular challenge to fisheries crime law enforcement.

The first relates to the nature of the marketplace for fish itself. Fish is a commodity that is captured, processed and transported across the world. Trade in fish is global, it is complex and is subject to competitive forces. The commodity itself is a vulnerable natural resource, and monitoring and controlling its extraction and processing have proved to be very difficult. Although new scientific methods are emerging, DNA traceability methods, for example, are not yet yielding sufficient results to ensure transparency. Moreover, tracking vessels at sea is still challenging (see chapter 4), and fish is often processed by factory vessels at sea or in free-trade zones. The lack of effective means to monitor and control resource extraction makes it difficult to enforce the traceability of fish and fish products that are captured, processed and traded internationally.

The second feature of the fisheries sector which makes secrecy a particular challenge pertains to the predicate activity, namely, industrial marine capture fisheries taking place at sea. This activity creates a unique set of practical and legal challenges to effective law enforcement. The legal regime at sea is fundamentally different from that on land. At sea, the law of the sea applies, codified in the widely ratified UNCLOS. As noted above, flag states decide which vessels they confer their nationality to and prescribe the laws that are applicable to them. But, in reality, the opposite is true. Ship owners and operators choose the nationality and the legal regime applicable to their vessels by registering their vessels in flag states with an amenable legal framework for their business activities. By establishing a byzantine web of legal entities across the globe, beneficial owners of fishing companies and fishing vessels can (and do) hide behind a protective layer of obfuscation in secrecy jurisdictions and FOCs.

Secrecy in fisheries presents at least three challenges to fisheries crime law enforcement, as described below.

#### **2.4.1** *Investigators “don’t know what they don’t know”*

From a law enforcement perspective, knowing the identity of owners and operators of vessels is, in most cases, critical to identifying, investigating and prosecuting fisheries crime and tax evasion. The fundamental challenge of secrecy for law enforcement officers is that “they don’t know what they don’t know”. When law enforcement officers do not know what they do not know, they are unable to detect criminal activities and identify criminals and criminal offences.

#### **2.4.2** *Investigators lack jurisdiction to turn intelligence into evidence*

Even if investigators have received intelligence suggesting that criminal activity has taken place, secrecy jurisdiction can effectively prevent investigators from being able to turn intelligence into evidence. A recent example is an attempt by investigators to seek confirmation from a marine insurance company about the beneficial ownership of vessels engaged in undisputed organised fisheries crime. When approached, the insurance company declared that they are barred from revealing information about the vessels’ ownership and the information sought could only be shared if the request came through the formal mutual legal assistance process. The insurance company claimed that this is a result of rules pertaining to privileged information about persons’ identity. A mutual legal assistance request could only be made if the investigators had an open case under investigation *in their jurisdiction*. As the vessel was presumed to be either stateless or registered in an FOC, and the identities of the owners and operators were unknown, it was not clear whether the investigators had jurisdiction in the case or indeed who did have jurisdiction.<sup>33</sup>

#### **2.4.3** *Inadequate risk assessments mean that fisheries crime remains a low priority crime*

Another challenge associated with secrecy is that it is difficult for investigators to assess the risk fisheries crime poses in their jurisdiction. For instance, one investigator expressed concern during an interview that a number of vessels beneficially owned and flagged within his jurisdiction were flagging out to an FOC and had shifted their fishing

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<sup>33</sup> The matter was eventually solved through other means.

activities to the exclusive economic zone of another coastal state. He suspected that the relevant coastal state has very little control over fishing activities in their waters, and that the owners used the vessels for illegal activities. The vessels were all officially sold to companies situated in secrecy jurisdictions and presumably resold to new shell companies, before eventually being registered with the FOC. It was therefore impossible to prove that nationals were still involved in the operation. Investigators are concerned that the opacity of beneficial ownership makes it nearly impossible to predict the extent to which nationals within their jurisdictions are engaging in illegal fishing activities around the world. This also impacts on states' risk assessments and their willingness to direct financial and human resources toward investigating and prosecuting their nationals' involvement in fisheries crime. The result of this is seen in the extent to which fisheries crime remains a low priority crime area. As one investigator put it: "I sometimes wish (the criminal network) had exported illegally caught fish and at least one stolen bicycle, because bicycle theft is a greater priority in my police district than fisheries crime, which does not even feature on our list of priorities."<sup>34</sup>

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<sup>34</sup> Interviews conducted during the course of drafting this report.

# 3. Private flags and the impact on fisheries crime law enforcement

## 3.1 Introduction

This chapter describes the contracting out of a number of FOCs to mostly foreign private legal entities detached from the government administration in the flag states they represent, and the impact this contractual arrangement has on fisheries crime law enforcement.

FOCs that are contracted out to private companies are referred to as “private flags” in this report. The companies that have gained the contractual title to establish and/or manage the private flags are referred to as “private flag companies”. Although all the private flags described in this chapter are also FOCs, the reverse is not true, i.e., not all FOCs are private flags.

In section 3.2., the chapter describes 17 known private flags and how they seem to be operated as commercial entities. In section 3.3., the contractual terms of six agreements entered into between governments and private flag companies for the establishment and/or management of private flags is examined. The chapter concludes with an explanation of how the existence of private flags and the contractual division of rights and responsibilities of private flags vis-à-vis the government institutions of the flag state impact on fisheries crime law enforcement (section 3.4.).

### 3.1.1 *Note on the methodology and sources particular to this chapter*

The information relied on in this chapter is primarily sourced from the websites of private registries and maritime consultants, and corroborated where possible by academic literature,<sup>35</sup> public statements to the media, news articles and information forwarded by the public.

In section 3.3., the chapter analyses six contracts entered into for the establishment and/or management of private flags. Private flag contracts are not readily available public documents and the contracts relied upon in this chapter have been obtained through informants and open sources. There is a limitation to this data, however. One of the contracts is incomplete in that one page is missing, and one contract is a renewal of the contractual arrangement where the terms of the original contract are unknown. There seems to be no reason to suggest that the documents obtained are forged or otherwise misleading, but it has not been possible to have the documents verified by the issuers.

## 3.2 The establishment and commercial operation of private flags

### 3.2.1 *About the private flags*

In the appendix to this report is a table of 17 current or recent flag states operated as private flags (figure A.1.). From the information available, it is evident that the ship registries of these flag states are established and/or managed by private flag companies. The list is not a closed list, and there are likely to be omissions. Allegedly, at least two private flags on the list are discontinued, and the contractual title to at least three private flags is disputed, with the relevant governments recently taking legal action to cancel or annul the contract with the private flag company.<sup>36</sup>

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<sup>35</sup> Coles, R. and Watt, E. (2009). *Ship Registration: Law and Practice* (Routledge: London); Ylönen, M. (2006). *Sovereign Ventures? Transborder Corporations and the Politics of Offshore*. MA Thesis. Department of Political Science, University of Tampere, Finland. Available at <https://tampub.uta.fi/bitstream/handle/10024/93842/gradu01320.pdf?sequence=12006>; and van Fossen, A. (2012). *Tax Havens and Sovereignty in the Pacific Islands*. (Pacific Studies Series, University of Queensland Press: Queensland).

<sup>36</sup> See the appendix to this report.

Some of the private flags on the list are among the largest flag states in the world. According to the IMO, the 17 private flags register 22,9% of global vessel tonnage. Despite their large ship registers, all the 17 private flags are developing countries, and most of them are economically vulnerable. Small island developing states (SIDS) comprise the majority (10) of the private flags on the list. These SIDS are situated in the Pacific (seven), two are in the Caribbean Sea and one in the Indian Ocean. The average population of the SIDS with private flags is 142,000 persons and they all have a GDP (PPP)<sup>37</sup> ranked among the lowest 15 countries in the world. Four of the SIDSs are in free association with other more affluent states.

Of the remaining seven private flags, four are African (West Africa (three), East Africa (one)), two are Asian, and one is Central American. Whereas the populations of these states range from less than 400,000 to more than 51 million, they all have a per capita GDP well below the world average, with five of them having a per capita GDP among the lowest third of the world.

The private flag companies seem to be predominantly foreign entities. Although it is not always immediately clear from their websites, background searches suggest that, of the 17 private flags identified, five have their head office in the US, three have links to the UK and four are linked to the same company in Singapore. Only two of the private flag companies state on their websites that they have or used to have their head office in the flag state. Many private flag companies do not provide the details of a local office in the flag state on their websites, suggesting that they do not have a local presence in the flag state at all.

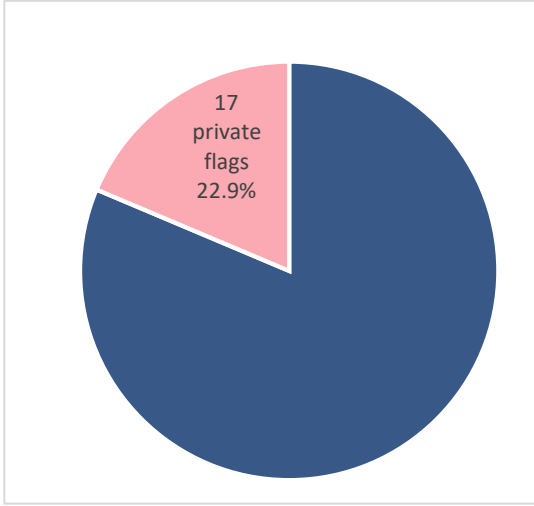
The establishment of private flags seems to be highly dynamic. Since the turn of the 21st century there has been a proliferation in small private flags, as evidenced by the new member states of the International Maritime Organization (IMO). A list of the new member states to IMO is provided in Table A.2. in the appendix to this report. Of the 15 new member states to IMO, at least eight are FOCs, and at least six of these FOCs are private flags that are among the SIDS identified above. Private flags are established and closed at regular intervals, possibly due to the timespan of the contracts, which often last about ten years, changing internal political climates within the flag state, breach of contract, and international pressure. It is important to keep in mind, however,

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<sup>37</sup> Purchasing power parity. The global rank is based on the forecasted estimates for 2017 of the International Monetary Fund (IMF), with the exception of one country not on the IMF list. For this country the country's rank in the CIA World Factbook is used. The list of flag states is found in figure A.1. in the appendix to the report.

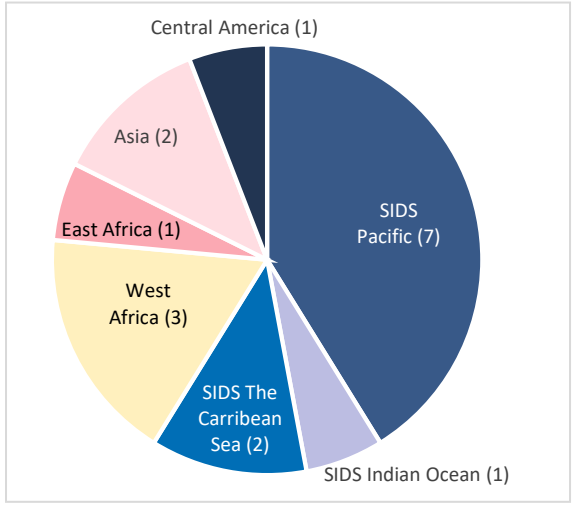


Figure 10: The 17 private flags' share of the global fleet



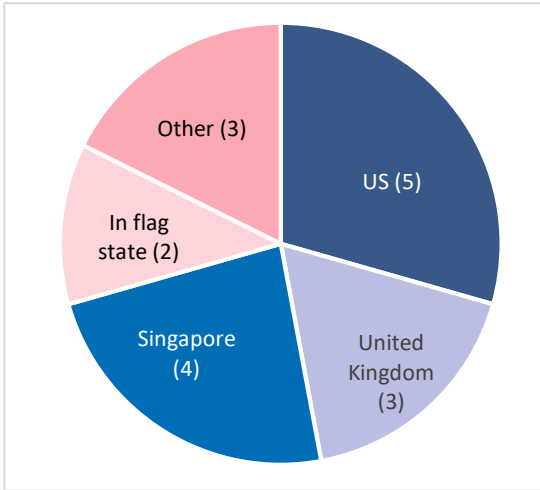
Source: Lloyd's List Intelligence.

Figure 11: Geographical spread of private flags



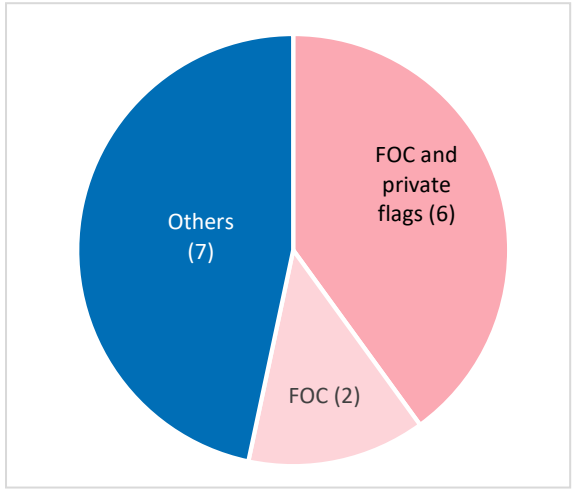
Source: Lloyd's List Intelligence.

Figure 12: Geographical spread of private flag companies' head office



Source: Internet and other open source information.

Figure 13: Number of FOCs and private flags among new member states of IMO since 2000 (n = 15)



Source: IMO website.

that private flag companies move from one state to another,<sup>38</sup> a number of flag states enter into contracts with new private flag companies successively,<sup>39</sup> and some private flag companies enter into contracts with more than one flag state.<sup>40</sup> However, a number of recent court cases between governments and private flag companies seems to suggest that it is easier to enter into private flag contracts than to exit them.<sup>41</sup>

### 3.2.2 *The commercial management of private flags*

Most private flags present themselves as commercial enterprises that actively solicit clients (ship owners and operators) at trade fairs and shipping industry gatherings and through their websites on the Internet. Information found on these websites is examined below.<sup>42</sup>

Whereas most private flags provide the contact details of representatives of the company that runs the register, they are not always explicit about the fact that the register is a commercial undertaking. One notable exception is a West African private flag that states on its website that the registry is, by law, not run by the government administration in the flag state. This private flag is also one of the few registries that provides any information on its website about the contractual arrangement between the flag state and the private flag company. Beyond this, the websites follow a similar pattern. Most websites list a number of affiliated offices around the world that will assist in the registration of vessels quickly and around the clock. The websites typically contain information about the commercial services offered by the private flag and some information about the domestic laws and regulations pertaining to vessel registration. There are also links to information about the fees charged and to the forms to be filled out. Under the section on the benefits of registration, the websites list key conveniences to the ship owner, such as the stability of the flag state, administrative expedience, low crew costs (for example, through provisions such as "crews of any nationality allowed"), anonymous beneficial ownership mechanisms, and tax exemptions. Whereas websites in the past were quite explicit about the secrecy offered

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<sup>38</sup> See the appendix to this report.

<sup>39</sup> See the appendix to this report.

<sup>40</sup> See the appendix to this report.

<sup>41</sup> See, e.g., *Union Marine Classification Services v Government of the Union of Comoros* (2015) EWHC 508 (Comm) (6 March 2015) and *Union Marine Classification Services v Government of the Union of Comoros* (2016) EWCA Civ 239 (12 February 2016).

<sup>42</sup> A list of websites examined for this section is found in figure A.3 in the appendix to this report.

by the private registries, they now contain more subtle references, such as “any corporate ship owning vehicle allowed” and “full confidentiality guaranteed.” As a curiosity, most websites also contain a short note about the climate, history, geography and currency of the flag state, at times illustrated with a picture of a palm tree.

Although private flags seem to be run as commercial enterprises, it is not immediately clear what the profit-generating motivation is for their establishment. Registration fees are generally quite low due to the competition between private flags. The income generated from registration is unlikely to make small private registers profitable if registration, mortgage and survey fees are the companies’ sole source of income. New and emerging private flags are unlikely to make a profit until they are established in the market. Unless they can attract large volumes of registrations, there is a high probability that private flags never become profitable. The apparent unprofitability of private flags has led to speculation that the motivation behind their establishment may be more sinister and possibly linked to organised crime.

However, it is possible that the apparent lack of profitability of private flags has an innocuous explanation if the private flag is seen in a larger context where the commodity offered by private flags is not only ship registration, but also the business package that goes with it to successfully manage the maritime commercial operation. There are at least two features of private flags that lend support to this contention. *Firstly*, a number of private flags have “branched out” and offer several services. For instance, the private flag often operates closely with, or includes, an offshore company register to cater for the maritime industry. These private flag companies offer both offshore company registration and ship registration. A (now allegedly discontinued) private flag company that operated on behalf of a government in Africa is a case in point. This private flag company offered vessel registration and corporate formation services, the latter in six different jurisdictions. The private flag appeared to be promoting an International Offshore Company as the corporate vehicle of choice for ship owners registering vessels, as the private flag company provided an online registration form to establish such a ship owning company on its register’s website. In addition to this, the private flag offered ancillary maritime services, including international safety inspection certificates through an associated private classification society. In other words, the private flag company could offer ship registration as part of a package solution to ship owners and operators. The flagging pattern of owners and operators involved in illegal fishing activities (see Chapter 4) suggests that some private flags probably tailor these packages to meet the needs of different commercial

enterprises within the maritime industry, including owners and operators wishing to engage in illegal fishing.

*Secondly*, ship ownership and registration in private registries are facilitated by a variety of brokers, often in the form of law firms featuring themselves as maritime consultants. Many of the private flag companies and affiliates will also own a license or act as brokers for other private flags. A random list of 20 flag brokers advertising their services on the Internet is provided in figure A.4 in the appendix to this report. These brokers allege that they match ship owners with private registers and assist them in the registration process. For instance, one broker claims it is “a unique multifunctional maritime center” that “consists of the Official Representatives of many convenience and stable Flag Maritime Administration, as well as the Exclusive Representatives of various Classification societies”.<sup>43</sup> The broker will “quickly, easily and directly without delays and intermediaries ... provide the full range of services for the successful international shipping business operations, merchant ships operating ... , as well as for any international trading company”.<sup>44</sup> The company offers, in consultation with the client, to identify the right convenience register for the vessel according to its intended operation, and “to register a ship under the flag of convenience quickly and easily ... registration is performed within one or two business days”.<sup>45</sup>

The broad nature of the services offered and fees collected by these flag brokers and maritime consultants may possibly explain the profit generating motivation of the establishment of private flags.

#### **Box 8. About professional enablers in the maritime sector**

From Van Fossen (2012) at p. 180:

Other providers of financial services cannot replace FOC lawyers because highly legalistic conflicts arise, particularly between FOC laws and the complex and often contradictory laws of port-states and the owners' and operators' states. Conflicts of extraterritoriality demand specialised legal knowledge and contribute to the development of FOC law itself. The ambiguities and complications of international maritime law and ownership of operational

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<sup>43</sup> See the appendix to this report.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

structures of FOC vessels mean that the accidents involving them could become the substance of lawyers' dreams of eternal litigation. The market for legal services has expanded as institutions such as FOCs have removed economic activities from effective state regulation, allowing lawyers to find loopholes, exceptions and opportunities in the conflicts within the old state system so that their clients can increasingly choose their own laws.<sup>46</sup>

#### **Box 9. About private flag companies and sovereign immunity**

It is a general principle of taxation that the functions of government, including government agencies, are not subject to income tax on any profits generated. By concession, this may be extended to government agencies of one state operating in another state. This is often referred to as "sovereign immunity."

A private flag company with offices outside the flag state may, therefore, be regarded as granted sovereign immunity by the country where it is set up. In practice this means that the tax authority in the country where the private flag company is situated may be unable to assess these companies for tax. The ability to obtain sovereign immunity status for tax might be a factor when deciding where to locate a private flag. Sovereign immunity could potentially also shield the private flag company from investigations into their complicity with other criminal activities, including corruption.

### **3.3 The private flag contract**

This section analyses six contracts entered into between four governments (A, B, C and D) and five private flag companies for the establishment, development and/or management of private flags.

Figure A.5 in the appendix to this report provides an overview of the key findings from the analysis of these six private flag contracts.

#### **3.3.1 *The status of the contracts***

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<sup>46</sup> Van Fossen. (2012). Op. cit. 35.

Of the four governments, at least one government (A) is currently contractually bound by the terms of the contract. The contract between government A and the private flag company is an extension of an existing agreement, and the contractual terms of the original contract are not known. The contract with government B has lapsed, but it seems to have been recently renewed with the same private flag company on unknown terms. The contract with government C was not signed, but the private flag company currently alleges that it is operating the register, which suggests that an agreement was indeed entered into. Government D has entered into three contracts (contracts 1, 2 and 3) for the operation of its private flag since the turn of the millennium. Government D recently took a private flag company to court in trying to revoke a contract (2) on the grounds of breach of contract due to non-payment. It would seem that government D has entered into a new contract (3) with another company in the meantime.

### **3.3.2**     *The parties to the contracts*

Three of the four governments (A, B and D) are of states that are listed as the world's least-developed countries according to the UN, with the other one (government C) being of a state in free association with a more developed state and reliant on development aid to sustain itself. With the exception of government A, all the governments are among the smallest island states in the world with populations of 100,000 (government B), 1,600 (government C) and 780,000 (government D). All the states are ranked well below the world average on the UN Development Programme's (UNDP) Human Development Index. The private flag pertaining to government A is one of the world's largest ship registers, yet this country is ranked at the bottom of the UNDP Index. This private flag specialises in cargo vessels and has more than 2,300 vessels of more than 10,000 deadweight tons (dwt) on the ship register, which would mean that one in 2,000 inhabitants of this flag state would own a cargo ship if the vessels had been beneficially owned in the country.

None of the private flag companies have their registered head office within the jurisdiction of the flag state. One of the private flag companies has its head office in the US. The same private flag company with head office in Singapore has entered into two separate contracts with governments B and C. The last government (D) has entered into (at least) three contracts with different private flag companies

since the year 2000. These private flag companies have had head offices in Greece and the United Arab Emirates (UAE). In addition there is allegedly a company in India claiming that it holds the contract to register vessels on behalf of this government, but it has not been possible to obtain the contract as proof thereof.

### 3.3.3 *The terms of the contracts*

The material terms of the contracts stipulate that the right to manage and operate the register is granted to the private flag company for 10 to 25 years, often with provision for renewal. The compensation to the government is quite low, in one contract it is set at taxes collected only, whereas most set the compensation at between 30% and 60% of all income generated from the register, which is probably not much as the registration fees are generally quite low. Two contracts guarantee that the governments are compensated between USD 100,000 and USD 400,000 annually.

All of the six contractual arrangements concern the establishment, management or operation of ship registers that solicit foreign-owned vessels. Two of the governments (A and D) also contracted out the right to operate the offshore company register to the private flag companies, with the result that the private flag company can register both ship-owning entities and these legal entities as owners of the vessels on the ship register. All the private flag companies offer anonymous ownership of vessels. For example, one of the private flag companies stated on its website that its corporate registry is “committed to protecting confidentiality”, that it permits bearer shares, and that it requires no annual reporting or audits of the ship owning companies.<sup>47</sup>

At least two of the six contracts explicitly regulate the sharing of information about vessels on the ship register between the private flag company and the government administrations. These two contracts provide that a copy of the ship register be forwarded to the flag state administrations every three months. Government B is entitled to an annual audit of the private flag for the purpose of assessing taxes and can otherwise inspect the operations and tax collection of the private flag company upon giving reasonable notice. Government C is entitled to have a representative of the flag state administration situated at the office of the private flag company. None of the contracts contain clauses that expressly place a duty upon the private flag company to

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<sup>47</sup> See the appendix to the report.

forward reliable information about the identity or location of the vessels on the ship registry or their ownership interests upon request or in a timely fashion to the flag state administration.

It would seem that a certain adherence to international regulations is a prerequisite for the establishment of private flags. Two contracts set the condition that the government shall accede to relevant international treaties recommended by IMO and ILO *en masse*. These two contracts also include a provision that the government is bound to include the private flag company in bilateral and multilateral negotiations affecting the ship register. Three contracts entitle the private flag company to assist with the drafting of domestic shipping legislation. However, no reference is made in the contracts to amendments of for instance the flag states' criminal codes to ensure their provisions are applicable to vessels on the private flag register.

Two contracts entered into with government B and C assign the right to act on behalf of the government in cases of disputes pertaining to vessels on the ship registers to the private flag company. It is unclear whether this delegation of state powers extends to criminal investigations and law enforcement powers if a criminal offence takes place on board a vessel. None of the contracts explicitly regulate the duty to investigate criminal offences or who is liable for the costs incurred in the exercise of flag states' criminal law enforcement jurisdiction over vessels on the register.

The flag states' membership of IMO and attendance at IMO meetings are discussed in some of the contracts. Two governments (B and D) became members of IMO shortly before or after the entry into force of the contracts, with the third government (C) currently having set up an international register without (yet) having gained IMO membership. Three contracts regulate the payment of annual contributions to the IMO, and this responsibility is allocated to the private flag company in two contracts with the third stating that the company will pay should the government be unable to do so. One contract explicitly makes provisions for the private flag company to pay for attendance at IMO technical meetings (D2), and participation records from IMO meetings shows that the private flag company of government B attends meetings on behalf of the government at IMO.

One of the governments has expressed concern that it was unable to gain access to the IMO treaties it had signed because IMO charges a high fee for access to these instruments and only issues two free passwords to access the website on which they are published. Both of the passwords were taken possession of by the private flag company.



The two neophyte members of the IMO (B and D) are also on target lists for port state control, according to the International Chamber of Shipping (ICS) Flag State Performance Table 2015/2016.<sup>48</sup>

### 3.4 The impact of private flags on fisheries crime law enforcement

Private flags has an impact on both flag states' and non-flag states' ability to exercise fisheries crime law enforcement.

#### 3.4.1 Impact on flag states

According to Article 94(1) of UNCLOS flag states are required to "effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag".<sup>49</sup> In 2015, ITLOS interpreted the nature of a flag state's obligation to "effectively exercise its jurisdiction" when its vessels were engaged in illegal, unregulated or unreported (IUU) fishing in other coastal states' exclusive economic zones.<sup>50</sup> The Tribunal concluded that (para. 119):

It follows from the provisions of article 94 of the Convention that as far as fishing activities are concerned, the flag State, in fulfillment of its responsibility to exercise effective jurisdiction and control in administrative matters, must adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities which will undermine the flag State's responsibilities under the Convention in respect of the conservation and management of marine living resources. If such violations nevertheless occur and are reported by other States, the flag State is obliged to investigate and, if appropriate, take any action necessary to remedy the situation.

Furthermore, the Tribunal explained that the flag state's obligation is a "due diligence" obligation, i.e., that it is an obligation upon the flag state "to deploy adequate means,

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<sup>48</sup> ICS. (2016). *Shipping Industry Flag State Performance Table 2015/2016*. (ICS: London). Available at <http://www.ics-shipping.org/docs/default-source/resources/policy-tools/ics-shipping-industry-flag-state-performance-table-2015-16.pdf?sfvrsn=18>

<sup>49</sup> UN. (1982). Op. cit. 1.

<sup>50</sup> *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015*, p. 4

to exercise best possible efforts, to do the utmost" (para. 128) to prevent IUU fishing. The Tribunal emphasised, however, that this is not an obligation "of result" in each individual case, but an obligation to take all necessary measures to ensure compliance and to prevent IUU fishing by vessels flying its flag. While the Tribunal left it to the discretion of the flag state to decide "the nature of the laws, regulation and measures to be adopted", it stated that "the flag state nevertheless has the obligation to include in them enforcement mechanisms to monitor and secure compliance with these laws and regulations", and directed that "sanctions applicable to the involvement in IUU fishing activities must be sufficient to deter violations and to deprive offenders of the benefits accruing from their IUU fishing activities" (para. 138).<sup>51</sup>

Flag states that have contracted out the ship register to a private flag are less likely to be able to effectively exercise their flag state responsibilities as envisaged by ITLOS. *Firstly*, private flags (like most FOCs) offer anonymous ship ownership and investigations have shown that the private flags do not always provide the flag state administration with continuously updated information on the vessels it has on its register. This means that it will be difficult for law enforcement officers in these flag states to exercise effective control over vessels as they may not know which vessels are flying the flag state's flag, where the vessels are, or who owns or controls them.

*Secondly*, the lack of attention to the potential conflicts of interest that may arise between the flag state administration and the private flag company gives cause for concern. Of the 17 private flags identified, all are developing countries and nine of them are on the UN's list of least-developed countries. Almost all the private flag companies are situated in industrialised countries. It would seem that some flag state administrations leave the development of national and international laws and regulations entirely to the private flag company. The flag state may in many instances lack the technical expertise and resources to take informed decisions or engage meaningfully in international negotiations concerning maritime matters and may become entirely dependent on the expertise of the private flag company to develop its maritime policy, including that pertaining to the development of enforcement mechanisms to ensure compliance with fisheries regulations.

*Thirdly*, there is longstanding concern that flag states operated as private flags amass large foreign-owned fleets without government administrations with the

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<sup>51</sup> Ibid.

requisite resources and expertise to exercise their due diligence obligation over the fleet effectively. Whereas some of these functions can be outsourced to private companies, it remains doubtful the extent to which, for instance, a state's sovereign jurisdiction to exercise its criminal law enforcement jurisdiction can be contracted out to foreign companies situated abroad. The concerns over the consequences of FOCs on the flag state administrations' exercise of due diligence in adhering to international standards are reflected in the following statement from 1960 counsel for the United Kingdom before the ICJ in the *IMCO*-case:

I submit that the interest of a State in maritime safety is much more likely to flow from, for example, beneficial ownership of shipping on its Registry than from the mere fact of registration. Real interest, ability and technical experience are much more likely to be found in countries whose nationals *really* own large fleets than in countries where, for the sake of convenience, such fleets are registered.<sup>52</sup>

The dissenting opinion of Judge Moreno Quintano in this case reflects a similar concern (p. 32):

A merchant fleet is not an artificial creation. It is a reality which corresponds to certain indispensable requirements of a national economy. As an aspect of the economic activity of a country, it governs the amount of the normal movement of its international trade. ... The flag—that supreme emblem of sovereignty which international law authorizes ships to fly—must represent a country's degree of economic independence, not the interests of third parties or companies.<sup>53</sup>

Most of the private flags identified for the purpose of this report are situated in flag states without a domestic shipping industry or a fisheries sector engaged in commercial fisheries abroad. It is thus unlikely that there is significant domestic commercial interest or expertise in the private flag within the flag state. This disconnect between national policies and administration on the one hand and the commercial undertakings of the private flag company on the other may for instance explain the apparent silence on the

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<sup>52</sup> ICJ. (1960). Op. cit. 32, at p. 383.

<sup>53</sup> Dissenting Opinion of Judge Moreno Quintano, in ICJ. (1960). *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion of 8 June 1960*. Available at <http://www.icj-cij.org/files/case-related/43/043-19600608-ADV-01-02-EN.pdf>.

critical aspect of criminal law enforcement in the contracts analysed for the purpose of this report.

The default position in international law is that the flag state administration, regardless of their available resources or expertise, is responsible for exercising its criminal law enforcement jurisdiction over vessels on its register. It is therefore troublesome that contracts entered into between governments in developing countries and private flag companies do not consider how the costs of expensive cross-border investigations and prosecutions of fisheries offences will be met. Indeed, feedback received from representatives of government administrations that have attempted to cancel their private flag contracts suggests that this aspect has not been adequately addressed in the negotiations with the private flag company, and that entering into these contracts, therefore, comes at a significant risk to the government.

#### **3.4.2**     *Impact on non-flag states*

Non-flag states only have limited powers of law enforcement at sea, particularly in international waters, and must be careful not to exercise their jurisdiction over foreign vessels in breach of international law. The secrecy of vessel ownership provided by FOCs, as well as limited access to information about the identity and location of vessels on private flag registers, can create uncertainty as to a vessel's true nationality and, thus, what state has law enforcement jurisdiction over it. A recent case of a vessel that was fishing without a licence in an area of international waters regulated by a Regional Fisheries Management Organization (RFMO) is a case in point. When approached by a navy vessel from a nearby coastal state, officers on board the offending vessel alleged that the vessel was flagged to an FOC. The navy was unable to obtain reliable information about the status of the vessel from the flag state administration in a timely fashion, and the vessel was allowed to sail from the vicinity without further action taken. It was later confirmed that the offending vessel was not registered in the FOC and was, therefore, stateless at the time. As noted above, none of the contracts analysed for the purpose of this chapter seemed to contain provisions requiring the private flag company to forward information about the vessels on their ship register to the flag state administrations in a timely fashion.

Private flag companies present a particular challenge for investigators trying to confirm the nationality and ownership of vessels. For instance, in one case, investigators in a non-flag state were trying to obtain information about the

ownership and nationality of a vessel allegedly registered to a flag state in West Africa that had contracted out the ship register to a private flag company with head office in the US. To complicate matters, the private flag company in the US had subcontracted the actual registration of vessels to a subsidiary in Singapore. Uncertainty arose as to where the information was situated and to which of the three countries a request for mutual legal assistance should be addressed. An additional challenge is that mutual legal assistance requests can be a slow process and are subject to different rules in each country, and will have to be processed through different channels depending on the legal framework in place. Unfortunately, in these cases the vessel has most likely escaped by the time the mutual legal assistance request has been processed and the nationality of the vessel can be ascertained.

Investigators have to employ a cross-border and interdisciplinary approach to confirm a vessel's nationality and identity when vessels are registered in private flags and owned by companies established in secrecy jurisdictions. This makes fisheries crime investigations resource intensive and challenging, but they are not impossible. The expert assistance provided by international organisations such as NA-FIG, INTERPOL and UNODC is important in this regard, as they provide investigators with knowledge and networks to facilitate their investigations.

**Box 10. Case study on cross-border cooperation to ascertain a vessel's nationality**

In a recent case, a coast guard vessel confronted a fishing vessel fishing without a license on the high seas. When confronted, the captain declared the vessel's flag state to be an FOC. In the past, it would have been nearly impossible to verify the flag state of the vessel in question. The intelligence and awareness raising among investigators in networks such as the INTERPOL Fisheries Crime Working Group (FCWG), the UNODC Container Control Programme (CCP) and NA-FIG has changed this situation. With information about the private flag, including knowledge about the private flag company's headquarters, and the help of INTERPOL, investigators approached the private flag company, the INTERPOL liaison office in the flag state administration, and the INTERPOL liaison office in the European state where the private flag company is based, requesting that the status of the vessel be confirmed as a matter of urgency. It was immediately confirmed that the vessel was recently registered to the private flag. However, the private flag company proceeded to cancel the registration with immediate effect upon becoming aware that the registration documents were being fraudulently altered and presented to port state authorities to support the illegal activities of the owners and operators of the vessel.

## 4. Strategic flagging of vessels and the impact on fisheries crime law enforcement

### 4.1 Introduction

The availability of FOCs and private flags means that ship owners and operators can make a strategic decision about the flag state with which to register their vessels. This chapter examines the flagging pattern of vessels used for illegal fishing and how strategic flagging of vessels can be used to undermine fisheries crime law enforcement. Owners and operators engaging in illegal fishing choose to register their vessels with certain flag states, and this will be examined in section 4.2. In section 4.3., the profile of the flag states used to register vessels engaged in illegal fishing activities is analysed, with a particular emphasis on the extent to which the flag state enables secret ownership of vessels and whether the flag state is likely to have the resources and expertise to exercise its law enforcement jurisdiction over vessels on its registry. The chapter concludes in section 4.4. by explaining the challenges to fisheries crime law enforcement posed by the strategic flagging of vessels with flag states that are unable or unwilling to exercise jurisdiction over vessels on their register.

#### 4.1.1 *Note on the methodology and sources particular to this chapter*

As illegal fishing activities are carried out covertly, it is difficult to find reliable data about the flagging pattern and motivations of owners and operators of vessels used for these ends. The best available data on vessels used for illegal activities is arguably found in the IUU vessel lists<sup>54</sup> published by RFMOs and Purple Notices<sup>55</sup> issued by INTERPOL. The IUU vessel lists and the INTERPOL Purple Notices contain data about vessels used by owners and operators to conduct IUU fishing or fisheries crime and also their flagging pattern at the time of the infraction. This data has been compiled and supplemented by the TryggMat Foundation. It must be emphasised that the data inevitably suffers from a degree of approximation as a vessel's true nationality is often difficult to confirm and the data sources have limitations.<sup>56</sup> Still, the data from these sources is probably the most accurate that can possibly be obtained at present in light of the secrecy mechanisms available to owners and operators engaging in illegal fishing activities.

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<sup>54</sup> RFMOs have adopted a "name and shame system" under which the names of vessels found to have been engaging in IUU fishing are being published. Participating states are required to take preventative measures to ensure that IUU-listed vessels are not allowed to operate in areas under their jurisdictional competence.

<sup>55</sup> INTERPOL Purple Notices are issued by INTERPOL Member Countries to raise awareness of a *modus operandi* or request information on offences to resolve them or assist in their investigation. See Article 82 of the INTERPOL Rules of Processing of Data.

<sup>56</sup> One limitation is that, as the data and recent cases suggest, vessel operators seem to want to keep the identity of the flag state hidden, possibly to prevent anyone from notifying the flag state of their activities. Without a reliable global database of fishing vessel registration the data presented suffers from a lack of verification. Another limitation is that flag states of vessels that eventually become IUU-listed or subject to an INTERPOL Purple Notice are often states that do not oppose or have little means to oppose the measure taken. While still accurately recorded, they may not in fact have the same "market share" of vessels used for illicit means, as indicated here. Finally, there are suggestions that ship owners and operators target certain flag states for engaging in certain forms of fisheries. As there are only nine out of more than 40 RFMOs that publish IUU-lists, they are arguably not representative of ship owners and operators flagging preferences in all high-risk activities globally. INTERPOL's Purple Notices are *ad hoc* and not representative of the use of flag states for vessels engaged in illicit activities *per se*.

## 4.2 Flagging pattern of vessels used for illegal fishing activities

As of November 2016, the TryggMat Foundation's website contained data on 249 fishing vessels used for IUU fishing and fisheries crime (illegal fishing). Figure 14 on page 64 identifies the 55 flag states used or allegedly used by owners and operators at the time of engaging in illegal fishing activities.<sup>57</sup> Note that each vessel may have had more than one flag state during the time of its engagement in the illegal activity or being listed as an IUU vessel.

The flagging pattern of vessels used for illegal fishing activities gives rise to the following observations from a fisheries crime law enforcement perspective:

1. A large number of vessels used for illegal fishing are stateless or have no known flag state.

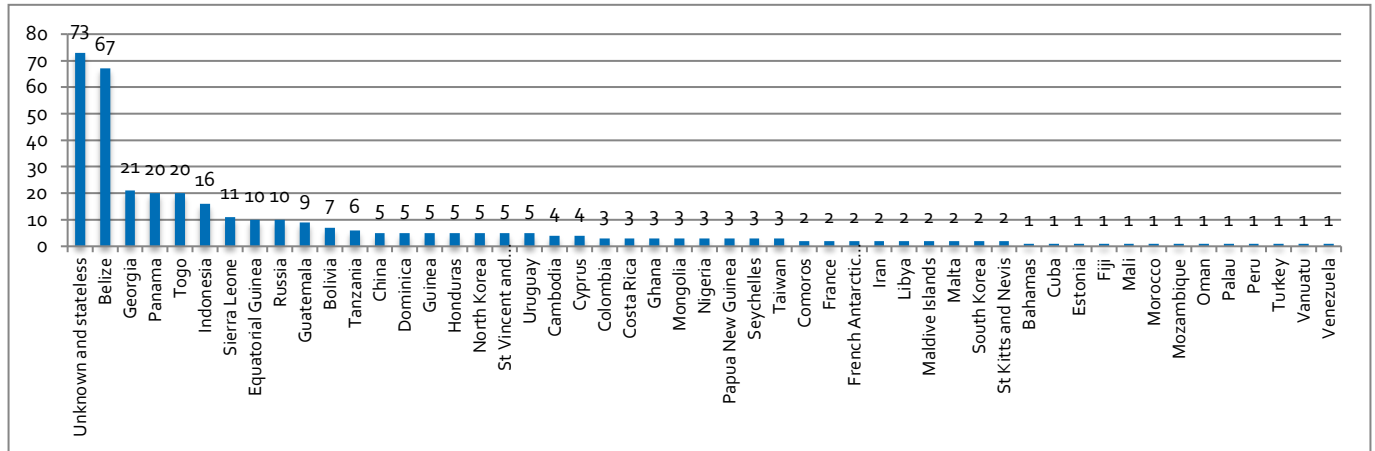
In the dataset, 52 vessels were stateless or did not have a known flag state at all during the period in which they were used in illegal fishing activities and a further 21 vessels had, for periods of time, no identifiable flag state or been declared stateless. This means that nearly a third (29.3%) of the vessels used for illegal fishing activities sailed with an unknown flag state or were stateless, which suggests that a significant portion of ship owners and operators engaging in illegal fishing activities chose not to register their vessels in a flag state at all or to hide their vessels' nationality.

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<sup>57</sup> The time of the illegal fishing activity is defined as the period for the listing on an IUU vessel list.



Figure 14: Flag states of fishing vessels used for illegal fishing (number of vessels per flag state) (n = 249)



Source: TryggMat Foundation and INTERPOL

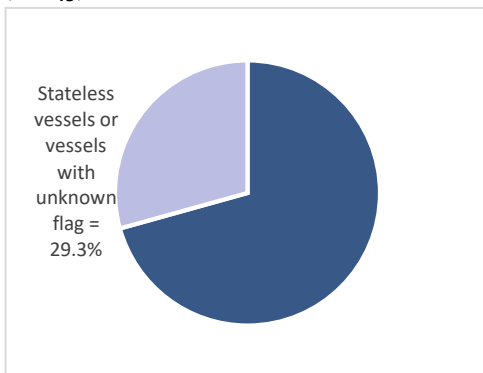
2. Owners and operators favour specific flag states when engaging in illegal fishing activities.

One flag state, Belize, is overrepresented in the dataset and 67 (or 34%) of the illegal fishing fleets with known flag states have allegedly been registered to Belize at the time of the infraction or while on the IUU vessel list. Other favoured flag states of owners and operators engaging in illegal fishing activities seem to be Georgia, Panama and Togo. The data suggests that more than half (57.9%) of the illegal fishing fleet with known flag states were registered to one or more of these four flag states.

3. Owners and operators engaging in illegal fishing conduct “flag hopping”.

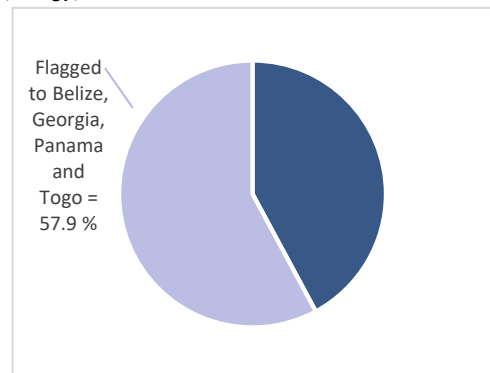
Frequent changes in vessel name and flag state is known as “flag hopping”. The vessels used for illegal fishing activities with known flag states were, on average, reflagged more than three times during their life span, and more than a quarter of the vessels were registered in five or more flag states. The data therefore tends to support the view that flag hopping is a phenomenon among ship owners and operators engaged in illegal fishing.

**Figure 15: Percentage of vessels used for illegal fishing with unknown flag state or that are stateless (n = 249)**



Source: TryggMat Foundation and INTERPOL.

**Figure 16: Percentage of vessels used for illegal fishing flagged to Belize, Georgia, Panama and Togo (n = 197)**



Source: TryggMat Foundation and INTERPOL.

Figure 17: News item on INTERPOL Purple Notice on the modus operandi of owners and operators of F/V Snake<sup>58</sup>

06 September 2013 - Media release  
**Norway requests first INTERPOL notice for illegal fishing**

LYON, France – Close cooperation between INTERPOL and Norway has led to the publication of the first Purple Notice for a vessel believed to be engaged in illegal fishing activities.

Issued to law enforcement in all 190 INTERPOL member countries, the Purple Notice seeks information on the fishing vessel "Snake", which has changed its name and registration multiple times in past years to avoid detection.

According to the Purple Notice, the "Snake" has operated under 12 different names in the past 10 years, and been registered under the flag of at least eight different countries. It is suspected of continuing to actively fish illegally in the South Atlantic Ocean off the coast of Southern and Central Africa.

The "Snake" has been blacklisted by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) since 2004, and by the South East Atlantic Fisheries Organisation (SEAFO) since 2007. As such, it is subject to sanctions including denial of fishing permits and permission to enter ports.

With the "Snake" suspected of violating national laws and international conventions, and amid concerns that the vessel has attempted to disguise its identity to continue its illegal fishing, the Norwegian Directorate of Fisheries, through the INTERPOL National Central Bureau (NCB) in Oslo, requested the Purple Notice.

"Fisheries crimes are often transnational, and increasingly we see that organized criminal networks are involved. There is a need to strengthen international cooperation to combat fisheries crime and Norway has given funds to support INTERPOL's work in this area," said Norway's Minister of Justice and Public Security, Grete Faremo.

The notice aims to gather information on the location and activities of the "Snake", as well as on the individuals and networks which own, operate and profit from its illegal actions. By determining the vessel's status and location, member countries will be able to investigate possible violations of their fishing laws and take appropriate enforcement measures should the "Snake" attempt to operate illegally in their waters.

INTERPOL Secretary General Ronald K. Noble said, "INTERPOL's global tools and services are equally suited for raising awareness of transnational crimes occurring on the high seas, as well as on land. I applaud Norway for taking a leading role in combating fisheries crimes and issuing the first Purple Notice for these illegal activities, which threaten the environment and the security of the world's citizens."

INTERPOL's Purple Notices are used to seek or provide information on modus operandi, objects, devices and concealment methods used by criminals.

"This is the first time INTERPOL's network has been used to combat illegal fishing. Cooperation through INTERPOL is a new tool in the fight against fisheries crime, and I am glad that Norway has been able to take on a leading role in this cooperation," said Lisbeth Berg-Hansen, Norway's Minister of Fisheries and Coastal Affairs.

By using Purple Notices to compile and share information about illegal fishing vessels, INTERPOL aims to foster increased monitoring of the highly mobile and elusive operators; encourage collaborative international action against illegal fishing; and improve the enforcement of fishing operations by supporting national fisheries authorities and regional fisheries management organizations.

"The type of cooperation demonstrated by the development of this notice is critical to combating fisheries crime, and goes to the heart of what the INTERPOL Environmental Crime Programme is working towards with its Project Scale," said David Higgins, Head of INTERPOL's Environmental Crime Programme.

Earlier this year, INTERPOL launched Project Scale, a global initiative to detect, suppress and combat fisheries crimes. The Norwegian Ministry of Foreign Affairs and the Norwegian Agency for Development Cooperation are major contributors to Project Scale, which seeks to raise awareness of fisheries crimes, coordinate law enforcement operations and analyse information on all types of crimes linked with illegal fishing.

"The Snake is one of a number of vessels persistently engaged in illegal fishing in the CCAMLR Convention Area and beyond. The vessel's activities undermines CCAMLR's conservation objectives and the science that supports the rational use of living marine resources," said Andrew Wright, CCAMLR Executive Secretary.

INTERPOL's international system of notices are used by member countries to request cooperation or share critical crime-related information with their law enforcement counterparts around the world.

Source: INTERPOL. (2013)

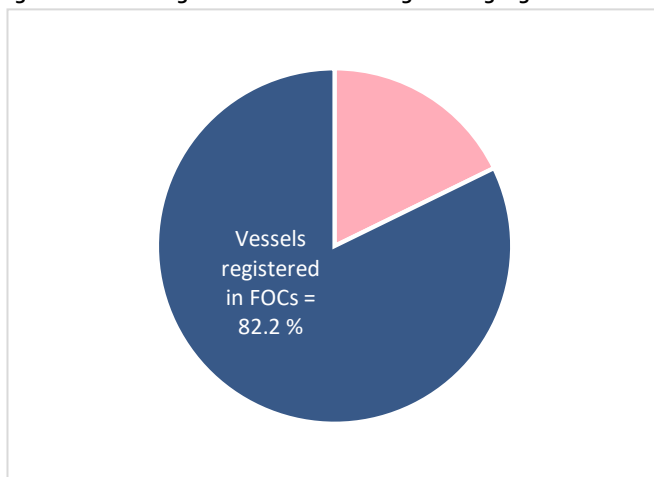
## 4.3 Flag state profile of vessels used for illegal fishing activities

### 4.3.1 *Flags of convenience, secrecy and vessels used for illegal fishing activities*

Of the 197 vessels used for illegal fishing activities with a known flag state, 162 (or 82.2%) have been registered in FOCs. Conversely, only 35 (or 17.8%) of these vessels have never been registered in an FOC. The four most often used flag states for vessels engaged in illegal fishing activities are all FOCs. As discussed in chapter 2, one of the key “conveniences” of flags of convenience is secrecy, i.e., that they enable owners and operators to hide their identity.

Another feature of the flag states targeted by owners and operators engaged in illegal fishing is that many of them seem to accept fishing vessels on their register without unique ship identification numbers (IMO numbers).<sup>59</sup> Nearly two thirds (160) of the vessels used for illegal fishing do not have an IMO number.

Figure 18: Percentage of vessels used for illegal fishing registered in FOCs (n=197)



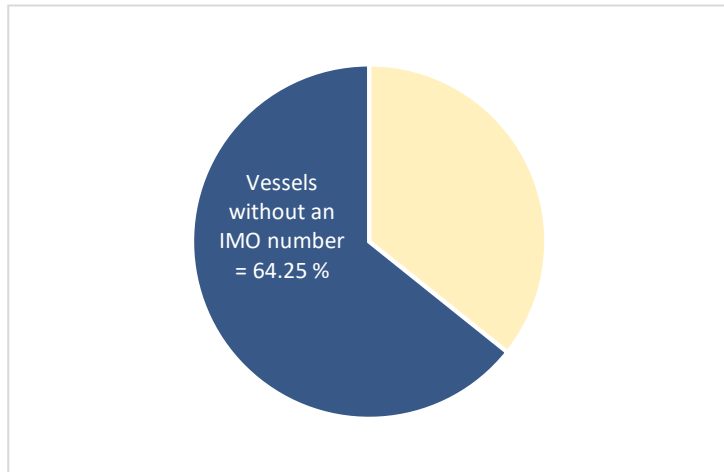
Source: TryggMat Foundation and INTERPOL.

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<sup>58</sup> INTERPOL. (2013). *Norway requests first INTERPOL notice for illegal fishing*. News, 6 September. Available at: <https://www.interpol.int/News-and-media/News/2013/PR104>

<sup>59</sup> Ship identification numbers are issued on behalf of IMO and are compulsory for all sea-going merchant vessels above 100 gross tons.

Figure 19: Percentage of vessels used for illegal fishing without an IMO number (n=249)



Source: TryggMat Foundation and INTERPOL.

#### 4.3.2 *Flag states' governance vulnerability and vessels used for illegal fishing activities*

In a study published in 2010, Österblom *et al.*<sup>60</sup> traced the flagging pattern between 1995 and 2009 of deep-sea fishing vessels engaged in illegal fishing activities in the Southern Ocean. The data showed that the owners and operators of these vessels were “fishing down the government index”,<sup>61</sup> i.e., they were progressively reflagging to registries in flag states with weaker governance indices (categorized by government effectiveness, regulatory quality, rule of law, and control of corruption). The authors concluded that illegal fishing operators are highly flexible and mobile, possess substantial financial means, and are able to adapt to changing regulations and exploit countries and regions with limited law enforcement capacity.

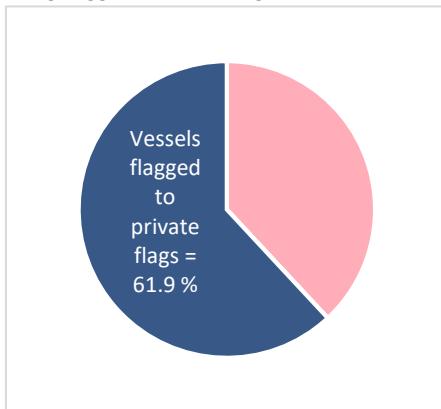
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<sup>60</sup> Österblom, H., Sumaila, UR., Bodin, O., Sundberg, JH. and Press, AJ. (2010). Adapting to regional enforcement: Fishing down the governance index. *PLoS ONE*, 5(9): e12832. Available at: <https://doi.org/10.1371/journal.pone.0012832>.

<sup>61</sup> *Ibid*, at p. 6.

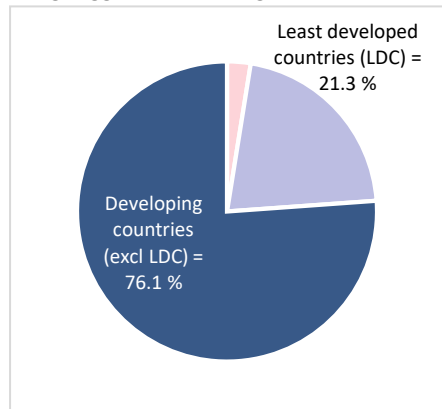
The data analysed for this report tend to support the finding of Österblom *et al.* *Firstly*, it would seem that owners and operators engaging in illegal fishing favour vessel registration in private flags. More than 60% (or 122 vessels) of the illegal fishing fleet with a known flag state were registered in 11 of the 17 private flags listed in figure A.1 in the appendix to this report. In chapter 3, this report argued that flag states that have contracted out the vessel registry to private flag companies are less likely to effectively exercise their law enforcement jurisdiction over the vessels flying their flag. *Secondly*, the available data suggests that ship owners and operators engaging in illegal fishing activities tend to target flag states that are fragile and economically vulnerable. Almost all (97.5 %) of the illegal fishing vessel fleets with known flag states have been flagged to developing countries and, of these, 42 vessels (or 21.3%) were registered in countries identified by the UN as least-developed.

Figure 20: Percentage of vessels used for illegal fishing flagged to private flags (n = 197)



Source: TryggMat Foundation and INTERPOL.

Figure 21: Percentage of vessels used for illegal fishing flagged to developing countries (n = 197)



Source: TryggMat Foundation and INTERPOL.

### 4.3.3 *Safety and labour standards and vessels used for illegal fishing*

FOCs have different approaches to the acceptable level of safety and labour standards of their fleets. In a study of FOCs in the Pacific, van Fossen maintains that some FOCs have deliberately raised the maritime safety and labour standards to avoid being targeted for inspection and control.<sup>62</sup> This has led to the development of different segments in the FOC market, with a number of established FOCs actively promoting themselves as high-quality ship registers in contrast to low-quality FOCs that compete by offering lower standards.<sup>63</sup>

The Shipping Industry Flag State Performance Table issued by ICS provides a measure of flag states' adherence to internationally recognized safety standards.<sup>64</sup> According to ICS, only three of the 10 largest vessel registries in the world are on a port state's target list for inspection and control, and this is only to a limited extent, the rest are on so-called white lists issued by port states.<sup>65</sup> In merchant shipping overall, there would thus seem to be a leaning towards high-quality flag states.

In contrast, none of the top 10 flag states of choice for owners and operators engaged in illegal fishing activities are on all the port states' white lists in the ICS Shipping Industry Flag State Performance Table. Five of the top 10 flag states used by owners and operators engaging in illegal fishing activities are on one or more port state target lists, with the most utilised flag state, Belize, on all three of the target lists, according to ICS.

## 4.4 **The impact of strategic flagging on fisheries crime law enforcement**

The data examined in this chapter demonstrates that owners and operators engaged in illegal fishing activities strategically flag their vessels with selected FOCs, the majority of which are private flags contracted out by economically vulnerable developing countries. Half of the most frequently used flag states are on port states' watch lists for inspection and control, according to ICS. The data also shows that nearly a third of the

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<sup>62</sup> van Fossen, A. (2012). Op. cit. 35, at pp. 196-201.

<sup>63</sup> Ibid.

<sup>64</sup> ICS. (2016). Op. cit. 46.

<sup>65</sup> Paris Memorandum of Understanding (MOU), Tokyo MOU and the United States Coast Guard (USCG) QUALSHIP.

vessels used for illegal fishing were stateless or had no known flag state, and that some owners and operators change their flag states frequently, possibly engaging in what is labelled as “flag hopping”.

The strategic flagging of vessels used for illegal fishing activities poses at least three challenges to fisheries crime law enforcement and these are explained below.

#### **4.4.1 *Inadequate criminalisation of fisheries crime***

The strategic flagging of vessels means that owners and operators engaged in fisheries crime can choose to flag their vessels in jurisdictions that have not adequately criminalised the activity they are engaging in. Investigation and prosecution of fisheries crime hinge on the existence of a penal provision that criminalises the conduct in question. Without a suspicion that an applicable criminal offence has taken place, law enforcement officers cannot undertake a criminal investigation.

Rules of jurisdiction can make it particularly challenging to identify an applicable criminal offence for the purpose of fisheries crime investigations. Most domestic laws are geographically limited to the territory of the state. Offences committed on board vessels may fall outside the scope of a statute when they take place while the vessel is outside the state’s territory. For instance, in a recent case, investigators in a flag state were surprised to learn that it had not criminalised fishing on the high seas without a license. The result was that the flag state was unable to initiate a criminal investigation into the activity in question.

States that do not criminalise offences committed on board vessels on their register when they are outside their territory can also affect the ability of other states to exercise their jurisdiction over their nationals that may own, control or be on board the vessel at the time. In these instances, a non-flag state would exercise its extra-territorial jurisdiction over criminal offences committed by their nationals, also known as the active nationality principle in international law. Many jurisdictions require “double criminality”, i.e., that the activity is an offence in both territories, in order to apply the active nationality principle as a jurisdictional basis. This would limit their extra-territorial criminal law enforcement jurisdiction over their nationals to instances where the flag state has also criminalised the offence. The double criminality requirement is also found in mutual legal assistance treaties to effectuate cross-border police and judicial cooperation, and a flag state’s failure to criminalise offences committed by or on board vessels on their register could possibly preclude mutual legal assistance in some instances.



**Box 11. Example of the exercise of extraterritorial jurisdiction over nationals on the high seas**

A recent case before the Spanish Supreme Court illustrates the consequences of the active nationality principle and the double criminality requirement. In 2016, the offices of a Spanish company were searched and persons behind the company were arrested and charged with environmental crime, money laundering, forged documentation and organised crime. The law enforcement action came in the wake of a multilateral operation coordinated by INTERPOL and subsequent investigations carried out by Guardia Civil pertaining to the activities of vessels on the high seas allegedly flagged to FOCs. In December of the same year, the Spanish Supreme Court decided that the company could not be tried for these offences because Spain does not have jurisdiction over the activities of its nationals on the high seas since the activity was not also an offence there. In other words, there was no double criminality.

#### 4.4.2 *Jurisdictional ambiguity*

Flag hopping and the frequent use of vessels without a known flag state suggest that ambiguity as to the true nationality of vessels is a strategy employed by owners and operators engaged in illegal fishing. For example, investigations have revealed that vessels used for illegal fishing sail under the pretence of being registered in an FOC, but are, in fact, registered in another flag state. Investigators have also come across owners and operators who have made repetitive re-flagging in FOCs a part of their modus operandi of illegal fishing. By creating ambiguity as to the nationality of the vessel, these owners and operators can, at times, avoid non-flag state law enforcement action because of the difficulty experienced in ascertaining the vessels' true nationality and thus the state with law enforcement jurisdiction over them.

Owners and operators engaged in illegal fishing can achieve jurisdictional ambiguity by taking advantage of the quick and easy registration procedures of FOCs. Ship-owning companies can be incorporated within hours, and so too can vessels be re-flagged. For instance, one private flag company states on its website that "the registration process is simple, user-friendly and fast, allowing a vessel to be registered in approximately 24 hours if all necessary requirements are met."<sup>66</sup> On the other hand, obtaining information from the flag state confirming registration is not always as

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<sup>66</sup> See the appendix to this report.

“simple, user-friendly and fast” as the registration procedure. In some cases, investigators have found it difficult, if not impossible, to verify the flag state of vessels engaged in illegal fishing, which has effectively prevented non-flag state law enforcement efforts.

Flag state ambiguity is sometimes used to hide the fact that the vessel is indeed stateless. Stateless vessels cause particular challenges for fisheries crime law enforcement. The exercise of law enforcement jurisdiction over owners and operators of stateless vessels is not straightforward in international law<sup>67</sup> and will ultimately rely on the domestic laws of the non-flag state wishing to exercise its jurisdiction over the activities taking place on board the vessel in question. These domestic laws must take cognisance of the challenges associated with the exercise of non-flag state law enforcement jurisdiction over owners and operators of stateless vessels to enable fisheries crime law enforcement. For instance, there seems to be little precedence on how the rule of double criminality would apply in cases of stateless vessels. The result is that law enforcement officers are generally reluctant to invoke non-flag state law enforcement jurisdiction in fisheries crime cases involving stateless vessels.

The frequent use of FOCs by owners and operators engaged in illegal fishing means that fisheries crime investigations require expert investigators who work in a cross-border and interdisciplinary manner to confirm a vessel’s nationality or a lack thereof. These investigations are resource intensive and challenging, but they are not impossible. Organisations such as NA-FIG, INTERPOL and UNODC are critical in this regard as they provide investigators with knowledge and networks to facilitate their investigations.

#### 4.4.3 *Rule competition*

Rule competition is a common phenomenon in the globalised economy whereby states seek to attract commercial investments by offering favourable business conditions. Some flag states seem to engage in rule competition by advertising that they offer stable registration conditions, tax rates, and safety and labour standards to owners and operators registering their vessels on their ship register. Yet, another form of rule competition is also possible, in which flag states compete by offering the most lenient

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<sup>67</sup> See Scanlon, Z. (2017). Taking Action against Fishing Vessels without Nationality: Have Recent International Developments Clarified the Law? *International Journal of Marine and Coastal Law*, 32: 54-68.

laws and regulations, at times to the extent that they place people and societies at risk of exploitation and abuse.

States have sovereign jurisdiction to enter into international agreements and to enact these agreements in domestic law. As two researchers put it, “[t]he state exists in a state of privilege, yet privilege is not only the freedom to act, it is the freedom *not* to act”.<sup>68</sup> A law enforcement problem associated with FOCs is that their governments are willing to exercise their freedom not to act in the sense that they have omitted to enter into international agreements or, if the government does sign an agreement, it fails to convert these international agreements into enforceable (and enforced) domestic law.

Whereas rule competition is common in the shipping industry as a whole, it is likely to have particularly severe consequences for fisheries. The international standards applicable to the merchant shipping industry are generally compulsory, and there are only limited avenues for differentiation. On the other hand, most international instruments negotiated through international organisations are voluntary insofar as they apply to fishing vessels. The result is that international legal instruments that secure transparency in vessel and crew movement, ownership and control structures are not mandatory for fishing vessels. The fact that most FOCs do not prescribe to or enforce minimum safety and labour standards to fishing vessels means that many fishing vessels engaged in illegal fishing are untraceable, as well as unsafe or unseaworthy, and some are also associated with severe forms of labour exploitation.

Three gaps in the international regulations of fishing vessels cause particular challenges for fisheries crime law enforcement. Each of these is discussed below.

### IMO ship identification numbers<sup>69</sup>

Investigation into fisheries crime is often dependent upon the ability to ascertain the identity of fishing vessels. The vessel’s IMO ship identification number, which should be clearly displayed on the vessel’s hull and in the ship documents, is the main source of vessel identification today. The IMO number follows the vessel through its lifetime. Both IMO and some private companies gather information about a vessel based on the

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<sup>68</sup> Alderton, T. and Winchester, N. (2002). Globalisation and De-regulation in the Maritime Industry. *Marine Policy*, 26: 35-43, at p. 39.

<sup>69</sup> Regulation XI-1/3-1 of the International Convention for the Safety of Life at Sea (SOLAS).

IMO number and make this information available to law enforcement agencies. These databases are critical sources of information for investigators, banks, insurance companies and the like to assess the risks associated with a vessel and its owners or operators. Without an IMO number, law enforcement officers find it difficult to cross-check a vessel's catch data with other information or detect whether a vessel is sailing with forged ship registration papers for instance.

IMO ship identification numbers are mandatory for merchant vessels and their owners, but not for fishing vessels. As seen above, nearly two thirds of the vessels used for illegal fishing did not have IMO numbers, suggesting that owners and operators engaging in illegal fishing have a preference for flagging their vessels in flag states that do not require IMO numbers for fishing vessels.

### **Automatic Identification System (AIS) transceivers<sup>70</sup>**

Signals from AIS transceivers are presently one of the most important data sources for tracking vessels' movements at sea. AIS signals are radio signals sent from the vessel primarily to alert other vessels about its whereabouts to avoid collisions. Land- and satellite-based receivers can also pick up the signals. This makes it possible for both law enforcement officers and the public to track vessel movements at sea and to detect illegal fishing and fish transshipment activities.

AIS transceivers are mandatory for merchant vessels, but not for fishing vessels. Just about all vessels have AIS transceivers, but not all flag states require fishing vessels to turn their AIS transceivers on, particularly when the vessel is sailing in international waters. In recent years, a number of private companies and NGOs have advertised their ability to track fishing vessels' movements at sea and detect illegal activities. The result is that fishing vessels used for illegal fishing have their AIS transceivers turned off when they can, and investigators find that it has become harder to track fishing vessels' movement patterns at sea.

### **Decent working conditions for fishers**

Fishing is regarded as one of the most dangerous occupations in the world and, at sea, fishers' safety and wellbeing are at the mercy of senior officers and the protection afforded by the flag state. A number of investigations in recent years have uncovered forced labour and human trafficking of fishers of a severity that prompted UNODC to

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<sup>70</sup> Regulation XI-1/3-1 of SOLAS.

describe the practice as “cruel and inhumane treatment in the extreme”.<sup>71</sup> Law enforcement officers uncovering these crimes are mainly notified when vessels come to port. Internationally accepted rules for decent working conditions for fishers would set an industry standard and assist law enforcement officers to detect and prevent labour exploitation and forced labour in fisheries.

Decent working conditions for seafarers are regulated internationally in the ILO Maritime Labour Convention (2006). Again, fishing vessels are exempt from this legal framework. The equivalent legal instrument for fishing vessels, the ILO Work in Fishing Convention No. 188 (2007), has only received ten ratifications in ten years, and there are no private flags among the ratifying states. Unlike the ILO Maritime Labour Convention, the ILO Work in Fishing Convention No. 188 is not yet in force, although it will be soon. Responsible flag states will make sure that these instruments are made mandatory for fishing vessels on their ship registers in any case, whereas FOCs may choose not to pass domestic laws to this effect or, if they do, they may choose not to enforce them.

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<sup>71</sup> UNODC. (2011). Op. cit. 9, p. 3.

# 5. The way forward

## 5.1 Summary of main findings

This report has examined the impact of flags of convenience (FOCs) and secrecy on fisheries crime law enforcement. The report is the result of the joint efforts of investigators and analysts of NA-FIG and the INTERPOL Fisheries Crime Working Group (FCWG), with the assistance of the Secretariats at INTERPOL Environmental Security Programme and UNODC. The report's objectives is to assist law and policy makers and investigators to better understand the facilitators of fisheries crime and the challenges associated with fisheries crime law enforcement. FOCs is the common denominator in the most of the cases members of NA-FIG and the INTERPOL FCWG come across. However, relatively little information is available about these FOCs and what exactly they do that makes fisheries crime law enforcement so challenging.

When examining FOCs from the point of view of fisheries crime law enforcement, it becomes clear that there are three features of these flag states that create serious impediments to fisheries crime law enforcement, particularly when these three features operate together.

*Firstly*, FOCs enable secrecy by hiding the ownership of vessels. It is nearly impossible to investigate fisheries crime without knowing the identity of the owner and operator of vessels or other assets.

*Secondly*, governments that have contracted their ship register out to private flag companies may be unable to exercise their law enforcement jurisdiction because the registry (and the information contained therein) is physically managed and kept outside the flag state's jurisdiction. As a result, government agencies in the flag state may not have access to information about the identity and ownership of vessels on their ship register, or the resources and expertise necessary to carry out cross-border investigations of crimes committed by owners and operators of their fleet. It must be kept in mind that vessels registered to FOCs are unlikely ever to present themselves physically within these flag states' territorial jurisdiction, particularly if the flag state is landlocked.

Thirdly, shipowners engaged in fisheries crime can (and do) strategically flag their vessels in economically vulnerable states, knowing that these flag states will not have a record of their identity, or the resources and expertise necessary to exercise the flag state's exclusive law enforcement jurisdiction over the vessel.

#### **Box 12. Combatting fisheries crime yields results in Indonesia**

Law enforcement and policy reform have obviously created benefits for a sustainable fisheries development... Nowadays, fish products are largely available in local markets because local fishermen are able to fish a lot more than they used to, and the government may reduce its expenditures on diesel subsidies. It is shown by the fact that fish catch in local fishing ports with local vessels have increased by, 62.53%. Higher numbers of catch means that there are more fish available for consumption, which solves Indonesia's food security issue, particularly for protein supply. National fish consumption has escalated to 41.11kg/cap/year in 2015, as opposed to 37.89kg/cap/year in the previous year. Another good impact is represented by the increase in annual GDP in fisheries sector. Indonesian Center Bureau of Statistics revealed that the GDP in fisheries has increased to 8.37% in 2015, while the year before it was only 7.35%.<sup>72</sup>

Source: Susi Pudjiastuti, Minister of Marine Affairs and Fisheries of the Republic of Indonesia. Public Statement. Jakarta, Indonesia, 30 April 2016.

## **5.2 Recommendations**

Fisheries crime is a serious threat to the sustainability of global marine living resources and undermines good governance and the rule of law, as well as coastal populations' livelihoods and coastal states' income from a valuable marine sector. Moreover, fisheries crime threatens the global community's commitment to attain the Sustainable Development Goals (SDGs), particularly those pertaining to the eradication

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<sup>72</sup> Pudjiastuti, S. (2016). Public Statement by the Minister of Marine Affairs and Fisheries of the Republic of Indonesia. Jakarta, Indonesia, 30 April.

of poverty (SDG 1) and hunger (SDG 2), the protection of life below the water (SDG 14), and decent work and economic growth (SDG 8). Preventing and combatting fisheries crime should be high on the global agenda.

There are no easy solutions to the fisheries crime law enforcement challenges posed by FOCs and secrecy. There cannot be because FOCs are adaptive and fisheries crime is an amorphous problem, complex in its design, and inherently adjustable to new circumstances. Rather than a single solution, this report suggests a number of measures that may cause structural changes by improving, *firstly*, transparency in fisheries (section 5.2.1.) and, *secondly*, states' fisheries crime law enforcement capability (section 5.2.2.).

### **5.2.1**     *Transparency in fisheries*

#### **Information about beneficial ownership of vessels**

The problem of secrecy is not unique to fisheries. Rather, the recording of accurate information about beneficial ownership of legal entities has been the subject of extensive international negotiations, particularly in the context of tax avoidance, money laundering and terrorist financing. The most notable developments have been the OECD Standard for Automatic Exchange of Financial Account Information in Tax Matters (AEOI), and the Financial Action Task Force's (FATF) International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation Recommendations (FATF Recommendations). Both of these measures include detailed recommendations and requirements for the recording of beneficial ownership information and for the sharing of this information. However, while both these measures would, if implemented, provide beneficial ownership information, they are either not intended for sharing information beyond tax authorities or do not make specific reference to the standard of information recorded by ship registers.

IMO has also introduced a system of IMO company identification numbers, but this system is less reliable in that it seems to only record the "registered" owner which could be different from the "beneficial" owner, and is voluntary of vessels, in the context of fishing vessels. Moreover, the data registered by IMO seems to be based on the information forwarded by the ship owners themselves and could, therefore, be outdated or misleading if the owner's intention is to engage in criminal activities.



- *Recommendation 1: It is recommended that the existing legal standards on the recording and sharing of information about beneficial ownership of companies and assets be applied and adapted to the specific context of beneficial ownership of vessels and fisheries crime law enforcement.*

### **Information about vessels' identities and nationalities**

FAO is currently in the process of developing the prototype for a Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels (Global Record) that uses IMO numbers as unique vessel identifiers. The Global Record is likely to improve vessel identification and thereby make a very important contribution to fisheries crime law enforcement. However, it is critical that such a record contain reliable and updated data, particularly regarding the nationality of vessels. As noted above, a problem at present is that the vessel data recorded by IMO seems to be primarily based on information forwarded by ship owners, and not flag states. The result is that data pertaining to vessels used for illegal fishing is frequently outdated and/or misleading.

- *Recommendation 2: It is recommended that the unique vessel identifiers proposed by the Global Record of Fishing Vessels, Refrigerated Transport Vessels and Supply Vessels be made mandatory for all fishing vessels. The information on the Global Record should be independently verified in a timely manner by flag states so that it can serve as a legal basis for ascertaining beneficial ownership and the nationality of fishing vessels.*

### **Information about vessel movements**

A major challenge for fisheries crime law enforcement at present is that fishing vessels are hard to track because they are not required to have AIS transceivers and, if they have AIS transceivers, these can easily be tampered with to transmit misleading information. The alternative Vessel Monitoring System (VMS) is satellite based and is a more reliable sources of vessel movement data. Many states today require that fishing vessels have VMS and the absence of an enforceable VMS regime in FOCs is a strong indicator of risk and is likely to be a reason why their registries are chosen by owners and operators engaging in illegal fishing. However, even if a state requires fishing vessels to have VMS, access to a vessel's VMS data is often restricted to specific

agencies in flag and coastal states only, which means that it can be difficult for law enforcement officers in other states or in other agencies within a state to collate data or verify information presented to them.

- *Recommendation 3: It is recommended that the international legal framework pertaining to vessel tracking data and the sharing of this data be improved to take cognisance of the need for law enforcement agencies, including tax authorities, to have access to reliable data about vessel movements to detect and investigate fisheries crime.*

### **Access to information and information sharing**

Fisheries crime is overwhelmingly transnational, and there is a great need for timely access to information and information sharing across borders to overcome the impediments caused by FOCs and secrecy. To achieve this, investigators need to form secure networks of trust and mutual support to impart information and knowledge and make effective use of existing legal frameworks for mutual legal assistance.

- *Recommendation 4: It is recommended that information-sharing networks, such as NA-FIG, UNODC's Container Control Programme and the INTERPOL FCWG, be further strengthened with a particular emphasis on building trust, sharing knowledge between governments, and sharing information between law enforcement agencies. A particular focus should be on the needs of developing countries to engage and benefit from these networks.*

#### **5.2.2 States' fisheries crime law enforcement capability**

##### **Assist developing countries to assess the risks and responsibilities associated with FOCs**

Developing countries are often exploited as facilitators of secrecy through private flags, and as victims of some of the most severe consequences of fisheries crime. It would seem, however, that there is little awareness within developing countries of the consequences of contracting out the ship register to private flag companies, in particular the resources required to exercise flag state enforcement jurisdiction in accordance with international law.

- *Recommendation 5: It is recommended that awareness is raised in developing countries about the challenges associated with FOCs and private flags from a fisheries crime law enforcement perspective. This could include capacity building on the risks associated with private flag contracts and how to make the best use of the tools and services available at international organisations, such as INTERPOL and UNODC, to build law enforcement capacity to detect, prevent and combat fisheries crime.*

### **Criminalisation of fisheries crime**

Fisheries crimes are unique in that they frequently take place at sea and are, therefore, subject to a different jurisdictional regime than crimes taking place on land. A consequence of this is that many ordinary criminal offences may not apply to fisheries crimes because they are geographically limited to a state's territory. Moreover, states have, in general, not adequately criminalised offences committed by their own nationals on board foreign vessels at sea or offences committed on board stateless vessels, with the result that these activities are not investigated or prosecuted.

- *Recommendation 6: It is recommended that states be provided assistance to criminalise fisheries crime offences and strengthen their legal frameworks to take cognisance of the unique legal and practical circumstances of investigating and prosecuting crimes at sea, particularly in light of the law enforcement challenges associated with FOCs, secrecy and stateless vessels.*

### **Mutual legal assistance in fisheries crime cases**

Fisheries crime law enforcement is both difficult and resource intensive, requiring a high degree of cross-border cooperation and mutual legal assistance. Many fisheries crime investigations are like a complicated jigsaw puzzle, with pieces spread out across the world, and it is often unclear which authority ultimately has jurisdiction to prosecute the offence in question. As a result, successful fisheries crime investigations depend on law enforcement agencies' willingness to spend resources on assisting other countries in their investigations. To achieve this, fisheries crime investigations need global political commitment and a strong legal framework for mutual legal assistance, coupled with cost reimbursement for states that have limited resources for fisheries crime law enforcement.

- *Recommendation 7: It is recommended that states actively support one another through multilateral operational cooperation and by strengthening the existing treaty regime for mutual legal assistance to take into consideration the particular challenges of FOCs and secrecy for fisheries crime law enforcement. For instance, a pool of funds could be established to cover expenses associated with law enforcement actions, including for the repatriation of victims of human trafficking.*

### **Flag state responsibility**

Ultimately, the flag state remains a key institution for law enforcement over vessels at sea and, as such, fisheries crime law enforcement largely hinges on flag states' willingness and ability to exercise their flag state responsibilities in accordance with international law. A number of measures have been put in place to engage flag states to achieve this, of which the most notable measures are the FAO Voluntary Guidelines on Flag State Performance and EU Regulation No. 1005/2008. The EU Regulation entitles the European Commission to identify non-cooperating third countries in combating illegal, unreported and unregulated (IUU) fishing and prohibits the import of fishery products caught by fishing vessels flying the flags of such countries. Both of these measures have provisions for flag state audits, which, in the case of the EU Regulation, has led to positive changes in flag state accountability.

- *Recommendation 8: It is recommended that further efforts are made to strengthen flag states' ability to exercise their flag state jurisdiction, possibly by placing greater emphasis on the accountability of flag states to exercise their flag state responsibility in accordance with international law. It must also be borne in mind, however, that a number of these flag states are economically vulnerable states with their ship registers operated at arm's length by private companies in more developed countries and on contractual terms that may have to be honoured.*



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# Sammendrag

## Bekvemmelighetsflagg, sekretnesse og effektiv rettshåndhevelse av fiskerikriminalitet

Temaet for denne rapporten er rettshåndhevelse av kriminalitet i fiskerisektoren eller "fiskerikriminalitet". Problemstillingen som diskuteres er hvilke følger anonymt eierskap av fartøy og bruk av bekvemmelighetsflagg får for den globale bekjempelsen av fiskerikriminalitet.

I 2017 undertegnet de åtte nordiske fiskeriministrene en felleserklæring der de sier at "[v]erdenssamfunnet må anerkjenne at det grenseoverskridende organisert kriminalitet eksisterer i den globale fiskerinæringen, og at denne aktiviteten har alvorlige konsekvenser for økonomien, påvirker markedene, skader miljøet og undergraver menneskerettighetene". Et konservativt estimat viser at så mye som 23,5 milliarder amerikanske dollar går tapt hvert år på verdensbasis som følge av ulovlig og uregulert fiske. Likevel vil kostnaden av fiskerikriminalitet langt overstige den faktiske verdien av tapte marine ressurser, særlig dersom tapte inntekter som følge av skattekriminalitet og annen relatert kriminalitet i fiskerisektoren er medregnet. For sårbare kyststater vil fiskerikriminalitet i tillegg medføre tap av sysselsettingsmuligheter og skatteinntekter, som kunne vært brukt til infrastrukturutvikling og investeringer i lovlig næringsvirksomhet. I et større perspektiv er det grunn til å tenke seg at fiskerikriminalitet kan utgjøre en trussel for matsikkerheten, naturmangfoldet og den politiske sikkerheten i landene som rammes.

Denne rapporten er utarbeidet som resultat av et samarbeid mellom INTERPOLs arbeidsgruppe mot fiskerikriminalitet (INTERPOL Fisheries Crime Working Group (FCWG)) og Nord-atlantisk fiskerietterrettningsgruppe (North Atlantic Fisheries Intelligence Group (NA-FIG)). Rapporten presenterer analyser og funn gjort av en tverrfaglig gruppe bestående av revisorer, etterforskere og analytikere. Faggruppen har holdt regelmessige møter de siste fire årene for å analysere og diskutere erfaringer og kunnskap om bekvemmelighetsflagg og sekretnesse, og innvirkning disse har på rettshåndhevelsen av fiskerikriminalitet. Faggruppens utgangspunkt var en felles

anerkjennelse om at sekreterie, eller muligheten til å skjule ens identitet bak selskaper i juridiksjoner som verner den reelle eierens identitet fra innsyn (sekreterie-juridiksjoner), tilrettelegger for fiskerikriminalitet. Ved å etablere et nettverk av juridiske enheter over hele kloden kan redere involvert i straffbare handlinger skjule seg bak et beskyttende lag av anonyme selskapsstrukturer etablert i sekreterie-juridiksjoner.

Sekreterie utgjør en grunnleggende utfordring for effektiv håndhevelse av rettsnormene i samfunnet. Sekreterie fører til at etterforskere "ikke vet hva de ikke vet". Når etterforskere ikke vet hva de ser eller hva de leter etter, er de heller ikke i stand til å fastsette om en bedrift eller forretningstransaksjon er opprettet for et legitimt eller ulovlig formål.

Tema for denne rapporten er hvordan flaggstater kjent som bekvemmelighetsflagg blir benyttet som sekreterie-juridiksjoner for å skjule det reelle eierskapet av fiskefartøy. Flaggstats-instituttet har en sentral rolle i havretten. Flaggstater har både lovgivnings- og håndhevelsesjuridiksjon over fartøy som seiler under deres flagg. I praksis har dette betydning at flaggstatene bestemmer både hvilke lover som skal gjelde for eiere og operatører av fartøy som fører deres flagg, og (tilsynelatende) om de velger å håndheve disse lovene. Et viktig tema for faggruppen var å analysere hvordan staters suverene rettigheter i havretten til å både bevilge nasjonalitet til skip og utøve lovgivnings- og håndhevelsesjuridiksjon, kan bli misbrukt av kriminelle som ønsker å holde sin identitet skjult, og hvordan dette påvirker myndighetenes håndhevelsesmuligheter. Kapittel 2 av denne rapporten forklarer hvordan bekvemmelighetsflagg kan sammenlignes med enhver annen sekreterie-juridiksjon og tillater at identiteten til de reelle eiere forblir skjult. De vesentligste følgene av sekreterie for rettshåndhevelsen av fiskerikriminalitet er:

- *Etterforskere vet ikke hva de ikke vet:* Når etterforskere ikke vet hva de leter etter, kan de heller ikke oppdage kriminelle handlinger eller identifisere kriminelle aktører og nettverk.
- *Prosedurale hindringer:* Dersom etterforskere ikke vet identiteten til personene involvert i en straffbar handling, kan det også være vanskelig å identifisere hvem som har myndighet til å etterforske og straffeforfølge disse personene, eller om de kan eller bør dele opplysninger om mulige straffbare handlinger med andre relevante myndigheter.

- *Utilstrekkelige risikovurderinger:* Uten å vite identiteten til eieren eller operatøren av fartøy, er det svært vanskelig for rettshåndhevende myndigheter å vurdere risikoen for at personer i egen jurisdiksjon er redere eiere av fartøy som blir benyttet til straffbare handlinger andre steder.

De mange utfordringene som følger av sekreterie i bekvemmelighetsflagg ledet arbeidsgruppen til å spørre seg hva man egentlig vet om hvordan bekvemmelighetsflagg driftes. Flere i faggruppen hadde erfart at det i møte med bekvemmelighetsflagg som ledd i en etterforskning kunne virke som at skipsregisteret ikke var underlagt flaggstatenes sjøfartsadministrasjon, men snarere så ut til å være driftet av private selskaper utenfor flaggstatens jurisdiksjon. Kapittel 3 presenterer noen av de sentrale funnene faggruppen har gjort ved å se nærmere på praksisen med at noen bekvemmelighetsflagg blir kontraktsutsatt og driftet av private selskaper (skipsregister-foretak). Blant de sentrale funnene er at kontraktsutsatte bekvemmelighetsflagg tilsynelatende drives kommersielt, og ofte av selskaper som ligger i industrialiserte land på vegne av noen av verdens mest sårbare utviklingsland. De vesentligste følgene av kontraktsutsatte bekvemmelighetsflagg for rettshåndhevelse av fiskerikriminalitet er:

- Kontraktsutsatte bekvemmelighetsflagg kan hemme flaggstater i å effektivt utøve sin lovgivnings- og håndhevingsmyndighet og å oppfylle sine folkerettslige forpliktelser. Flaggstater som har kontraktsutsatt skipsregisteret til private skipsregister-foretak, har tilsynelatende meget begrensede inntekter fra, eller kommersiell interesse i, skipsregisteret, og det kan virke som om flere av disse flaggstatene mangler egenhendig maritim ekspertise. Det gir grunn til bekymring at noen av disse flaggstatene overlater ansvaret for utviklingen av både den nasjonale og internasjonale skipsfarts-lovgivningen til de private skipsregister-foretakene. Det er også bekymringsverdig at myndighetene i flaggstaten ikke alltid virker å være kjent med identiteten til fartøyene registrert i skipsregisteret eller de reelle eierne av disse fartøyene. I slike tilfeller er det i realiteten lite sannsynlig at kompetent håndhevelsesmyndighet i flaggstaten har mulighet og evne til å effektivt utøve sin håndhevelsesjurisdiksjon over eiere eller operatører av fartøy benyttet til fiskerikriminalitet.
- Kontraktsutsatte bekvemmelighetsflagg kan hemme grenseoverskridende politi- og påtalesamarbeid for å bekjempe fiskerikriminalitet. Det faktum at en rekke

skipsregistre driftes og administreres av private foretak i en annen jurisdiksjon enn flaggstaten, kompliserer prosessen med å identifisere hvilken jurisdiksjon en rettsanmodning skal fremmes til ved behov for å avklare et fartøys identitet, nasjonalitet og eierinteresser. Dette undergraver rettshåndhevelsen på havet, der det ofte er avgjørende å raskt fastslå identiteten og nasjonaliteten til fartøy og redere før en eventuell rettshåndhevelse kan iverksettes.

Eiere og opertører av fartøy kan benytte seg av et bredt utvalg av bekvemmelighetsflagg for sine fartøy. Et interessant spørsmål for faggruppen var om det var mulig å se noe mønster i hvordan eiere og operatører av fartøy brukt til ulovlig fiske benytter seg av bekvemmelighetsflagg for sine fartøy, med andre ord, hvordan de strategisk velger å flagge sine fartøy. Til dette formålet valgte faggruppen å se nærmere på flaggstatene benyttet til de 249 fartøyene INTERPOL og regionale fiskerforvaltningsorganisasjoner har stadfestet at har vært involvert i ulovlig fiske. Kapittel 4 presenterer noen av de sentrale funnene fra analysen av strategisk flagging av fiskefartøy benyttet for ulovlig fiske. Blant de viktigste funnene er at eiere og operatører involvert i ulovlig fiske tilsynelatende velger å registrere sine fartøy i skipsregistre i utviklingsland (97,5 prosent), og en stor andel av disse i land som er ansett å være blant verdens minst utviklede (21,3 prosent). De fleste fartøyene har seilet under bekvemmelighetsflagg (82,2 prosent), og mer enn 60 prosent var registrert i kontraktsutsatte bekvemmelighetsflagg. Fire bekvemmelighetsflagg dominerer listen over flaggstater av fartøy benyttet for ulovlig fiske. Det er videre bekymringsverdig at en stor andel av fartøyene er statsløse fartøy eller har ukjent nasjonalitet (29,3 prosent). Videre er mer enn 60 prosent av fartøyene som brukes til ulovlig fiske registrert i flaggstater som ikke krever at fiskefartøyet skal ha IMO nummer. Følgene av strategisk flagging for rettshåndhevelsen av fiskerikriminalitet er:

- Fartøyeiere og opertører kan velge å registrere fartøy i flaggstater med manglende eller fraværende kriminalisering eller håndhevelse av fiskerikriminalitet. Manglende straffelovgivning gjør at myndighetene ikke har tilstrekkelig hjemmelsgrunnlag i nasjonal lovgivning til å etterforske og sanksjonere fiskerikriminalitet. Dette får konsekvenser både for flaggstatens evne til rettshåndhevelse, og også andre lands rettshåndhevelse i tilfeller der deres borgere er involvert i ulovlig fiske ved bruk av fartøyer registrert hos bekvemmelighetsflagg. De fleste land vil lene seg på flaggstatens jurisdiksjon i disse tilfellene. De kan også benytte seg av prinsippet om personaljurisdiksjon

over egne borgeres straffbare handlinger i utlandet, men typisk bare der handlingen er straffbar i begge land (dobbel straffbarhet). Det stilles også ofte krav om dobbel straffbarhet for å kunne effektivere en rettsanmodning om rettslig eller politisk bistand i en straffesak.

- Fartøyeiere og operatører kan skape usikkerhet rundt statenes jurisdiksjonsmyndighet. Ved å benytte seg av statsløse fartøy, fartøy med ukjent nasjonalitet og hyppige endringer i flaggstat («flagghopping») skaper man usikkerhet om hvilken stat som har jurisdiksjonsmyndighet i henhold til havretten. Myndigheter i tredjepartsland vil ofte velge å avstå fra å utøve jurisdiksjon over fartøy med uavklart nasjonalitet. Dette skjer særlig dersom den nasjonale lovgivningen i tredjepartslandet ikke spesifikt hjemler rettshåndhevelse over statsløse eller antatt statsløse fartøy.
- Fartøyeiere og operatører kan dra nytte av regelkonkurransen. Viktige internasjonale bestemmelser om krav til arbeidsmiljø og sikkerhet til sjøs er ikke obligatoriske for fiskefartøy. Mens ansvarlige flaggstater uansett vil regulere minimumsstandarder for fartøyene i sitt register, vil bekvemmelighetsflagg kunne konkurrere med kostnadsbesparelsene det vil medføre å ikke måtte etterleve krav til arbeidsmiljø og sikkerhet om bord fiskefartøy. Resultatet er at reglene for sikker navigasjon til sjøs, som blant annet forsøker å sikre at alle handelsfartøy kan identifiseres av et IMO nummer, at fartøyet kan spores, og at sjøfolk ikke blir utnyttet av sine arbeidsgivere, ikke gjelder for fiskefartøy under mange bekvemmelighetsflagg. En alvorlig følge av dette er at kontroll- og håndhevelsesmyndigheter generelt har liten mulighet til å effektivt kontrollere etterlevelse av regelverk for å sikre trygge arbeidsforhold eller identifisere tilfeller av tvangsarbeid og menneskehandel om bord fiskefartøy som seiler under bekvemmelighetsflagg.



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## **Chasing Red Herrings**

Secrecy, or the ability to keep one's identity hidden behind a corporate veil, is a key facilitator of fisheries crime, including tax crime and other ancillary crimes in the fisheries sector. Secrecy means that investigators "don't know what they don't know" and is a fundamental challenge to fisheries crime law enforcement. The focus of this report is the jurisdictions that facilitate secrecy in fisheries, the flags of convenience, and particularly those that are contracted out to private companies, the so-called private flags, and the impact flags of convenience and secrecy has on effective fisheries crime law enforcement.

The report is the result of the joint effort of the INTERPOL Fisheries Crime Working Group (FCWG) and the North Atlantic Fisheries Intelligence Group (NA-FIG), with the input and support of the Secretariats at INTERPOL and the United Nations Office on Drugs and Crime. It was made possible with the financial support of the Norwegian Agency for Development Cooperation (Norad) and the Nordic Council of Ministers.



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