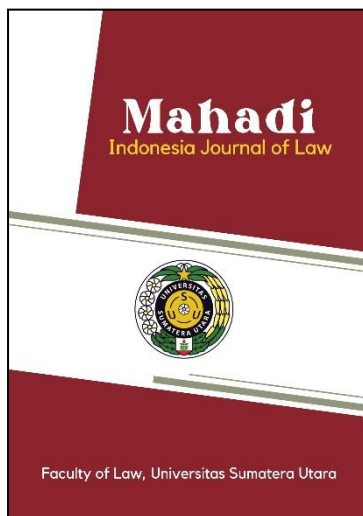




Port State Measures To Combat Illegal, Unreported, and Unregulated Fishing On The High Seas

Maulida Hadry Saadillah¹⁾

¹⁾Leiden Law School, University of Leiden
Email : maulidasaadillahmahadi@gmail.com



Abstract

Illegal, Unreported, and Unregulated (IUU) fishing on the high seas is a serious problem for the conservation and management of the resource of highseas fisheries. There is no statistic that can adequately explain the ecological impacts of overfishing as a result of IUU fishing and its effect on biodiversity. Port states play a pivotal role in preventing IUU caught fish from entering the local and international trade markets. Port state control maybe a deterrent to IUU operators since it would force them to call into more remote ports with less strict port state measures, therefore increasing the cost of operations for them. Thus, it can be said that port state measures are an effective means of preventing IUU high seas caught fish from being delivered to the consumer. This research showed that there is a need to undertake significant efforts to adopt the FAO Port State Model Scheme domestically, regionally and globally. The research recommends two efforts: a. ratifying the FAO Port State Model and b. cooperation agreement through international and regional MOU.

Keywords : *IUU Fishing, Port State Jurisdiction, High Seas*

INTRODUCTION

The high seas are recognized as common property that no one can possess and have exclusive rights over [1]. Illegal, Unreported, and Unregulated (IUU) fishing is a major problem on the high seas as it threatens ecosystems and sustainable fisheries. It is seen as a classic type of international environmental crime¹ and considered as one of the main obstacles in achieving sustainable world fisheries. Inadequate state measures when exercising jurisdiction and effective control over vessels in their ports grants the opportunity to IUU perpetrators to land their catches or to shift operations from one port to another or transship at sea.

There are several reasons why IUU fishing occurs; for instance, the increased demand for fish stock around the globe results in over-exploited EEZ's thus increasing the number of fishing vessels operating on the high seas [2]. Another cause is economic: most catches of IUU fishing fall into high market value categories and bring about significant economic gains. The greater the economic benefit of IUU fishing, the higher the chance that IUU fishing will flourish.

¹ High Seas Task Force, 'Closing The Net: Stopping Illegal Fishing on The high Seas', (2006), Governments of Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom, WWF, IUCN and the Earth Institute at Columbia University, 22.

Although the primary responsibility for fishing vessels on the high seas rests with the flag state, the failure of many flag states to prevent vessels flying their flag from conducting IUU fishing on the high seas has pushed the international community to turn to the port states where IUU catches are landed. Through denial of access to ports, port inspections, prohibition of landing and even detention or sanctions,² port states can help prevent IUU-caught fish from entering international and key markets.³ They can also intensify the effectiveness of other useful monitoring, control and surveillance (MSC) measures and provide an effective deterrent to the transshipment of IUU fish caught on the high seas.⁴

METHODOLOGY

International law grants states exclusive jurisdiction over their ports and the discretion to determine the conditions of entry for foreign vessels.⁵ This allows port states to take measures to complement the enforcement actions taken by both flag and coastal states. Coastal states can take necessary measures to prevent any breach of the conditions in the case of ships proceeding to internal waters or a call at a port facility outside internal waters.⁶ Port state measures would enable the port state to hold IUU vessels which escape detection by flag and coastal states and enter or are about to enter ports accountable. Those vessels would then be reported to the concerned states. The application of this measure may stop an increase in the number of port states which allow vessels to transit their catch acquired from IUU fishing.⁷

This research will discuss the methods used in eradicating IUU Fishing. This research explores international efforts to combat IUU fishing through port state measures embodied in international instruments. This research analyses data and information collected from relevant international instruments and literatures such as books and journal articles.

THEORETICAL FRAMEWORK FOR IUU FISHING

IUU Fishing

IUU Fishing is not a new phenomenon, it emerged in the 1990s when Regional Fisheries Management Organizations (RFMOs) introduced measures for fishery management on high seas.⁸ IUU fishing occurs when fishing vessels do not comply with international regulations on the high seas or regulations under RFMOs' area [3].

There is no specific definition of IUU Fishing in any legal instrument, however the International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing (IPOA-IUU)⁹ classified the nature and scope of IUU Fishing into three components which will be explained one by one in the following section. IPOA-IUU is a voluntary instrument, embedded within the framework of the Food and Agriculture

² The Antarctic and Southern Ocean Coalition (ASOC), 'The Use of Port State Measures to Improve Fisheries Compliance at the International Level: Issues and Instruments-the CCAMLR Case', (2006), 2

³ The PEW Environment Group, 'Port State Performance: Putting Illegal, Unreported and Unregulated Fishing on the Radar'. (2010), 3

⁴ Ibid, 5

⁵ United Nations Convention on the Law of the Sea, Montego Bay, Jamaica, concluded on 10 December 1982, in force 16 November 1994, 1833 UNTS 3; 21 ILM 1261 (1982). Hereinafter referred to as UNCLOS, Article 25 and 218

⁶ UNCLOS, Article 25(2)

⁷ Palma, Tsamenyi and Edeson, Op.Cit., 156

⁸ Ibid

⁹ Food and Agriculture Organization (FAO), International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing, adopted on 23 June 2001 at the 120th Session of the FAO Council. Hereinafter referred to as IPOA-IUU.

Organization (FAO) Code of Conduct for Responsible Fisheries in response to a call from the Twenty-third Session of the Committee on Fisheries (COFI).¹⁰ IPOA-IUU does not provide a limited definition of these three scopes, it merely describes what constitutes “illegal fishing”, “unreported fishing” and “unregulated fishing”.

In relation to types of fishing vessel, there are no restrictions on the types for vessel conducting illegal fishing within national waters. It can be viewed that illegal fishing may be conducted by both national and foreign vessels¹¹ without proper authorization [4]. However, IPOA-IUU provides limited types of fishing vessels for illegal fishing conducted in the areas under the jurisdiction of RFMOs, which are “vessels flying the flag of States that are Parties to a relevant regional fisheries management organization”.

According to Article 3 IPOA-IUU, illegal fishing refers to activities:

- a. *conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;*
- b. *conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or*
- c. *in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.*¹²

Article 3 IPOA-IUU constitutes unreported fishing as referring to fishing activities:

- a. *which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or*
- b. *undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.*¹³

Under Article 3 IPOA-IUU, Unregulated fishing refers to fishing activities:

- a. *in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or*
- b. *in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.*¹⁴

IPOA-IUU clearly distinguishes illegal fishing from unregulated fishing; illegal fishing refers to fishing activities conducted by vessels flying the flags of members of an

¹⁰ International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, <http://www.fao.org/docrep/003/y1224e/y1224e00.htm> (accessed on 20 July 2016)

¹¹ Ibid, 38

¹² IPOA-IUU, article 3

¹³ IPOA-IUU, article 3

¹⁴ IPOA-IUU, article 3

RFMO in contravention of conservation and management measures adopted by the RFMO. By comparison, unregulated fishing refers to fishing activities conducted by vessels flying the flag of a member of an RFMO which later reflag to a non-member state to avoid compliance with RFMO regulations [5].

Unregulated fishing is often carried out by vessels flying the flag of nonmembers of RFMOs, thus these vessels are not obliged to comply with the relevant RFMOs' regulations regarding conservation and management [6]. These states and vessels are recognized as "free riders". The term unregulated fishing also refers to activities of vessels without nationality or stateless vessels operating in areas under the jurisdiction of an RFMO. These vessels become stateless due to multiple nationalities, meaning they sail under two or more flags, or because of the revocation of their registrations by flag states, due to a lack of compliance with the laws of the flag states [7].

The Regulations of Port State Jurisdiction

In terms of port state measures, the Twenty-seventh Session of the FAO Committee on Fisheries established a legally binding agreement on port state measures to combat IUU fishing.¹⁵ This agreement was established in response to the wide variations in the sovereign discretion of a coastal state to formulate their applicable standards in their ports. Such discretion resulted in different standards among members of RFMOs in terms of inspection procedures, the information required from vessels entering their port and the penalties to impose. This variation weakened the effectiveness of international conservation and management measures to combat IUU Fishing.¹⁶ The Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (FAO Port State Measures Agreement)¹⁷ preamble stated "*that port state measures provide a powerful and cost effective means of preventing, deterring and eliminating illegal, unreported and unregulated fishing*".

The FAO Port State Measures Agreement adopted the FAO Model Scheme on Port State Measures and other provisions on the integration of port state measures from other relevant measures in addressing IUU Fishing. It examined cooperation and exchange of information among national authorities and states, requirements for prior entry into port, use of ports, port inspection procedures, training of inspectors, the role of flag states, requirement of developing states, dispute settlement, dealing with non-parties, and monitoring and review of the implementation of the agreement.¹⁸ This agreement will enter into force 30 days after the deposit of the 25th instrument of ratification, acceptance, approval or accession; so far 9 states have ratified, 2 states have accepted, 2 states have approved and 22 states have accessed the instrument.¹⁹ Once it enters into force, the procedures and inspection measures that need to be taken to halting IUU Fishing will be commonly standardized and it will also contribute to harmonized port state measures, enhanced regional and international cooperation and prevent IUU fishing catches from entering into national and international market.

¹⁵ FAO, Committee on Fisheries, Report of the Twenty-seventh Session of the FAO Committee on Fisheries, Rome, Italy, 5–9 March 2007, FAO Fisheries Report No. 830 (Rome: FAO, 2007), at para. 68.

¹⁶ Mary Ann Palma, Martin Tsamenyi and William Edeson, 'Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing', (Leiden: Martinus Nijhoff Publishers : 2010), 63.

¹⁷ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Adopted in November 2009, Appendix V of the FAO Council, Hundred and Thirty-seventh Session, Rome, 28 September–02 October 2009, Report of the 88th Session of the Committee on Constitutional and Legal Matters (CCLM), 23–25 September 2009, CL 137/5, September 2009.

¹⁸ Palma, Tsamenyi and Edeson, Op.Cit., 64.

¹⁹ FAO Port State Measures Agreement, Article 29.

RESULT AND DISCUSSION

The FAO Compliance Agreement (FAO CA) provides a general requirement for port states to notify the flag state when it has reasonable grounds to believe that a vessel entering its ports has undermined international conservation and management measures. This instrument also requires port states to arrange investigations with flag states.²⁰ The UN Fish Stocks Agreement established not only the right of the port state to take measures upon fishing vessels but also a positive duty on those states to do so. Thus, the UN Fish Stocks Agreement has become an important instrument in the development of port state control. Article 23 of the UN Fish Stocks Agreement, states that in order to promote the effectiveness of sub-regional, regional and global conservation and management measures, confers a port state the right and duty to take nondiscriminatory measures in compliance with international law.²¹

Therefore, a port state may inspect the documents, fishing gear and catch on board fishing vessels according to this provision. Besides these two international instruments, IPOA-IUU also provides port state control in its provisions. For instance, IPOA-IUU encourages state members of RFMOs to develop port state measures aimed at preventing landings from vessels flagged to non-members that have been engaged in fishing activities within the area of the organization, unless it can be demonstrated that catch was taken in a manner consistent with relevant conservation and management measures.²²

However, there are a few cases related to “ports of convenience” which help IUU fishing flourish. This term refers to ports and terminals around the world which apply substandard shipping and labor standards. When it comes to fisheries, it refers to ports where there are no rules and procedures established by authorities to ensure that only legally caught fish are landed or transshipped in their ports. “Ports of convenience” usually do not provide adequate inspection of fishing vessels, gears, and fish catch. They also do not conduct a thorough investigation into the origin of the fish, compliance with fisheries regulations and the authenticity of relevant documents. These inadequate port state procedures allow the IUU operators to launder their catch and are considered by FAO Committee on Fisheries to “undermine, frustrate and neutralize efforts to prevent, deter and eliminate IUU fishing”.²³

In addressing this issue the FAO established the FAO Model Scheme to Combat IUU Fishing in 2005 and the FAO Port State Measures Agreement to Prevent, Deter and Eliminate IUU Fishing in 2009. The FAO Model Scheme corroborates the provisions found in the IPOA-IUU and provides international best practice and guidance on various issues, such as prior notification requirements, inspection procedures, types of information to be reported, training of inspectors and exchange of information. However, the FAO Model Scheme is not an international agreement, but it provides a model to follow through other arrangements.²⁴ Such measures have been adopted under the FAO Port State Measures Agreement.²⁵

This has been strengthened by the UN General Assembly through its resolution on sustainable fisheries in 2005, urging states to cooperate, especially at the regional level, through RFMOs to apply the FAO Model Scheme and promote its application. A year later, as the UN General Assembly believed that combatting IUU fishing could be achieved through enhanced port state controls, it then urges states to cooperate to adopt all necessary port measures, consistent with international law, taking into account

²⁰ Food and Agriculture Organization (FAO), International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing, adopted on 23 June 2001 at the 120th Session of the FAO Council. Hereinafter referred to as IPOA-IUU, Article V(2)

²¹ UN Fish Stocks Agreement, Article 23

²² FAO, International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing, adopted at the Twenty-fourth Session of COFI, Rome, Italy, adopted on 23 June 2001 at the 120th Session of the FAO Council. Hereinafter referred to as IPOA-IUU, para. 63

²³ FAO, Committee on Fisheries, Eleventh Session, Bremen, Germany, 2-6 June 2008, Trade Related Measures for Sustainability: Progress on a Binding Instrument on Port State Measures, COFI-ET/XI/2008/6, para. 12.

²⁴ The Antarctic and Southern Ocean Coalition (ASOC), ‘The Use of Port State Measures to Improve Fisheries Compliance at the International Level: Issues and Instruments-the CCAMLR Case’, (2006), 6

²⁵ Palma, Tsamenyi and Edeson, Op.Cit., 159

Article 23 of the UN Fish Stocks Agreement and to promote the development and application of minimum standards at the regional level.²⁶

There are several port state measures set out by international fisheries instruments including the IPOA-IUU and FAO Port State Measures Agreement: advanced notice of port entry, designation of ports, inspection of fishing vessels, enforcement actions and cooperation with flag states. The IPOA-IUU requires fishing vessels and vessels involved in fishing related activities to provide reasonable advance notice of their entry into port, a copy of their authorization to fish, details of their fishing trip and quantities of fish on board.²⁷ This requirement is also provided in the FAO Port State Measures Agreement under article 8.²⁸ Designation of ports is also important to ensure proper monitoring and control of the activities of foreign fishing vessels admitted to those ports. Port states need to designate ports in certain manners where they are capable of conducting adequate inspections.²⁹

Another requirement as stipulated in the Port State Measure Agreement is the conduct of adequate inspections of foreign fishing vessels in order to monitor compliance with relevant conservation and management measures. Several steps are provided to conduct a proper inspection, including the procedure for inspection, what to inspect, the precautions that need to be taken when inspecting vessels, information that needs to be collected, reporting of information to relevant authorities and safeguarding and confidentiality of information.

Port states may take enforcement actions against a fishing vessel if there are clear grounds that such vessel has engaged in IUU fishing. Fishing vessels which are presumed to have engaged in IUU fishing may have several sanctions imposed, such as the denial of entry into port and prohibition of landing and transshipment of fish. The prohibition of landing and transshipment of fish measures are considered to be one of the most effective measures in deterring IUU fishing, as restrictions of this nature directly impact the marketing or trade of fish. Port states may apply other means of enforcement such as monetary penalties for related fisheries violations.³⁰

The cooperation of flag states is required in order for a port state to extend its jurisdiction over the actions of a foreign vessel outside its territory since it is subject to some uncertainty. Therefore, in response to this problem, the IPOA-IUU and the FAO Model Scheme provides the requirement for port states to cooperate with flag states in undertaking some of its measures with enforcement actions and the exchange of information.³¹

Poor compliance with port state measures against IUU-listed vessels is a hindrance to combatting IUU fishing on the high seas. Most RFMOs do not share lists of vessels engaging in IUU fishing, leaving port states capable of taking enforcement action only against vessels listed by their own RFMOs. There are several reasons for non-compliance of port state measures. First, the enforcement authorities lacking information of IUU vessels visiting their ports or they make mistakes in identifying those vessels. This lack of information and mistakes can benefit IUU operators if their vessels' IMO numbers are not recorded on the RFMO's IUU vessel list. Second is a lack of cooperation between national fisheries authorities and enforcement authorities. It has been reported as one of the key reasons for non-compliance of

²⁶ UNGA, Sixtieth session, Agenda Item 75(b), Resolution adopted by the General Assembly, Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments, 10 March 2006, A/RES/60/31, para. 42.

²⁷ IPOA-IUU, para. 55

²⁸ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Adopted in November 2009, Appendix V of the FAO Council, Hundred and Thirty-seventh Session, Rome, 28 September-02 October 2009, Report of the 88th Session of the Committee on Constitutional and Legal Matters (CCLM), 23-25 September 2009, CL 137/5, September 2009, article 8

²⁹ Palma, Tsamenyi and Edeson, Op.Cit., 163

³⁰ Ibid, 166

³¹ IPOA-IUU, para. 56-59 and FAO Model Scheme, para. 3.6.

port state measures. National fisheries authorities do not send any notices relating to IUU-listed vessels or vessels believed to engage in IUU fishing. It demonstrates that national authorities do not feel obliged to take responsibility in ensuring enforcement of port measures. Many national laws do not implement the measures set by RFMOs, deriving port states of the power to take enforcement action against IUU vessels. Port states also interpret the denial of port access and port services differently. Some states feel obliged to deny access to vessels listed on the IUU vessel list, while others feel obliged to apply such denial only if the vessel is carrying fish that have been caught not in violation of conservation and management measures while requesting port access.

The third reason for non-compliance is because RFMOs are not eager enough to encourage their members to effectively implement port state measures. RFMOs do not require members to provide information regarding port visits by IUU-listed vessels to the ports of their members and they do not consistently evaluate the compliance of port state measures by their members. If their members do not comply with the regulations of RFMOs, they will not impose sanctions on them.³²

In order to address the abovementioned problems, this study recommended that there is a need to undertake significant efforts to adopt the FAO Port State Model Scheme domestically, regionally and globally. There are two efforts recommended namely, ratifying the FAO Port State Model and cooperation agreement through international and regional MOU. All port states should ratify the FAO Port State Model Scheme because most port state control regimes lack knowledge on procedural matters of port state measures, leading to dissimilarities when implementing the measures. At the domestic level, the port state has to meet current international standards as set out in the FAO Model Scheme, while at the regional level, the FAO Port State Model Scheme should be applied to all RFMOs as an international minimum standard for port state control. The FAO Port State Model Scheme must be implemented globally to harmonize port state measures in conformity with the minimum standards of the Model Scheme.

Cooperation between states, between states and RFMOs and between RFMOs through regional Memorandum of Understanding (MOUs) is required to improve port state measures. This MOU could apply to non-members, as they can be applied to all port states within a region regardless of RFMO membership. Beside the regional MOU, port states should take all necessary measures to combat IUU fishing on the high seas, including contributing to harmonizing port state measures between RFMOs and the FAO Port State Model Scheme, establishing an effort to prevent, deter and eliminate IUU fishing as a national priority (including port state measures to curb IUU fishing on the high seas), and intensifying inspection and enforcement measures against IUU operators.

CONCLUSION

Although international legal frameworks have provided provisions regarding IUU fishing on the high seas, they have so far been unable to halt vessels from undertaking IUU fishing activities. On the other hand, IUU operators take advantage of loopholes caused by irresponsible flag states who grant their flag to vessels who wish to avoid the consequences of applicable rules. These irresponsible flag states are unable or unwilling to exercise their jurisdiction over fishing activities conducted by vessels flying their flag, which encourages fishing vessels to register in their states. In response to this problem, the international community then turned to port states where IUU catches are landed, granting a right to apply

³² The PEW Environment Group, Op.Cit., 12

measures such as denial of access to ports, port inspections, prohibition of landing and even detention or sanctions. These measures are intended to prevent IUU-caught fish from entering international trade and key markets while at the same time deterring IUU operators from transshipping their high seas IUU catches. Nevertheless, the problem does not stop there; there are a few cases related to “ports of convenience” which help IUU fishing flourish. These port states do not provide adequate inspections of fishing vessels nor do they conduct thorough investigations, allowing IUU operators to launder their catch and thus undermining efforts to prevent, deter and eliminate IUU fishing on the high seas.

To address these issues, there is a need to adopt the FAO port State Model Scheme on a domestic, regional and global scale. This Model Scheme can help create international standard for port state control at the domestic and regional level, thus harmonizing port state measures globally. There is also a need to establish cooperation between states, between states and RFMOs and between RFMOs through regional MOUs on port state measures to improve the measures and to make combatting IUU fishing on the high seas a national priority. Ultimately, combatting IUU fishing on the high seas depends not only upon flag state but also port state responsibility to enforce their measures.

REFERENCES

- [1] M. Cecilia Engler, “Establishment and Implementation of a Conservation and Management Regime for High Seas Fisheries with Focus on the Southeast Pacific and Chile”, www.un.org. [Accessed: 14-June-2016], p. 1.
- [2] Rebecca Metzner, “Fishing Aspirations and Fishing Capacity: Two Key Management Issues”, *The International Journal of Marine and Coastal Law*, p. 459, 2005.
- [3] Rachel Baird, “Illegal, Unreported and Unregulated Fishing: An Analysis of The Legal, Economic and Historical Factors Relevant to Its Development and Persistence”, *Melbourne Journal International Law*, p. 299, 2004.
- [4] Dikdik Mohamad Sodik, “Non-Legally binding International Fisheries instruments and Measures to combat Illegal, Unreported and Unregulated Fishing”, *Australia International Law Journal*, p.129, 2008.
- [5] Mary Ann Palma, Martin Tsamenyi and William Edeson, “Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing”, *Leiden: Martinus Nijhoff Publishers*, p.48, 2010.
- [6] U R Sumaila, “The Cost of Being Apprehended Fishing Legally Evidences and Policy Implications”, *Paper Submitted to the IUU Workshop, Directorate for Food, Agriculture and Fisheries, Fisheries Committee of OECD*, p.3, 2004.
- [7] Ted L. McDorman, “Stateless Fishing Vessels, International Law, and the UN High Seas Fisheries Conference”, *Journal of Maritime Law and Commerce*, p.531, 1994.