

The Laws and Lawlessness that Make Up Illegal Fishing

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In 2018 a Russian-named vessel sailing under a Togo flag was chased from Africa to Indonesia at first by the Tanzania navy and then by an environmental group.¹ On board were Russian officers, believed to be linked to organized crime, 18 miles of gill nets, and a crew deemed to be enslaved. The vessel had been tracked by international authorities for 10 years, trying to prevent its illegal fishing reportedly worth \$50 million.

Illegal Fishing — U.S. and Internationally

Illegal fishing in the United States can mean a lot of things – fishing without a permit; using the wrong gear; fishing at the wrong time of year – leading to a slap on the wrist or a fine. But considered internationally, illegal fishing has big consequences. According to the United Nations (UN), illegal, unreported, and unregulated (IUU) fishing is “one of the greatest threats to marine ecosystems” because it threatens sustainability of fisheries as well as marine diversity.² These operations use large vessels to trawl the oceans, many from Asian countries. Additionally, The New York Times has reported slavery on board some ships, where men are kept on board for years.³ According to the UN, approximately one in every five fish caught worldwide originates from IUU fishing.⁴ With that many fish being harvested by crews unmindful of sustainability or catch methods, the results could be catastrophic to the environment, perhaps collapsing certain stocks.

The categories of IUU are explained by the U.S. Department of Commerce, National Oceanic and Atmospheric Administration (NOAA) as follows:

- *Illegal* means fishing that is conducted contrary to laws, rules, and regulations;

- *Unreported* refers to fishing that is not reported to the appropriate authorities in terms of size, location, method, or type of catch;
- *Unregulated* means fishing in an area where there are no conservation measures in place, or where the vessel is in an area managed by a regional fisheries management organization, but the vessel is not a member of that organization and/or is acting contrary to the conservation measures of that organization.⁵

According to NOAA when explaining IUU fishing, “Developing countries that depend on fisheries for food security and export income are most at risk from IUU fishing. For example, total catches in West Africa are estimated to be 40 percent higher than reported catches.” Thus, one problem caused by IUU fishing is that smaller operations, such as family-owned boats, have to work harder and travel farther to gather a decent catch after the large illegal fishing vessels overharvest their fisheries. Additionally, IUU fishing can lead to false identification of fish, leading to lower quality fish in the market and driving down the price of legally harvested fish.

Lanchas in the EEZ

The stakes are just as high even when the illegal vessels are small. For example, illegal red snapper fishing by foreign vessels in the Gulf of Mexico is a problem. Legal fishing is being adversely affected by fast moving, easily built vessels, known as a lancha, from Mexico. Red snapper stocks are teetering on the edge of overfishing, and recreational and commercial catch limits are strictly limited by regulation. For example, two years ago, the agency that established fishing quotas, NOAA Fisheries, set the recreational red snapper fishing season for just

three days, from June 1 to June 4 of 2017.⁶ Accordingly, having any non-permitted fishing takes a toll on the available red snapper.

However, this type of IUU fishing is a very different type of operation from the big vessels that sweep the oceans with miles of nets. Lanchas – low-freeboard open boats of about 20 feet with outboard motors – are small vessels carrying a few men. Because they are shallow skiffs, they can be pulled ashore easily, not requiring ramps or lifts, and can be launched easily as well. They are made of fiberglass, making them invisible to radar. And they are fast.

The U.S. Coast Guard intercepts these boats in the Gulf of Mexico when it can find them. According to data obtained by the author from the U.S. Coast Guard's 8th District, the Coast Guard has stopped and seized (known as interdiction) 234 lanchas from January 1, 2015 to June 19, 2019, in the U.S. exclusive economic zone (EEZ) of the Gulf of Mexico. (The EEZ begins where state waters end. Off the coast of Texas, that occurs at 9 nautical miles, or roughly 10 land miles from shore.) The Coast Guard seized 26,159 pounds of fish in 2018 from these boats, a remarkable thing considering it interdicted just 60 boats. Red snapper accounted for 10,875 pounds of that contraband. This means those 20-foot boats with 3-person crews and equipment are carrying an average of 435 pounds of fish per lancha. And they are motoring those overfilled vessels more than ten miles out to sea. Granted, the U.S. recreational red snapper private catch total for 2018 was 5.386 million pounds, making the illegal fishing haul less than one percent of that total. However, that amount tallies only the poundage seized by the Coast Guard. During those same years, the Coast Guard reports spotting 552 lanchas, and not all of those were interdicted.

In the case of lanchas in the U.S. EEZ, also known as federal waters, application of U.S. law is clear: the Magnuson-Stevens Fishery Conservation and Management Act (MSA) claims “exclusive fishery management authority” for the United States over all fish and fish resources within the EEZ.⁷ Under the MSA, no foreign fishing is allowed in the EEZ unless authorized and conducted under a permit. The permit requirement is a bit of a catch-22 as Congress prohibits NOAA from permitting foreign fishing except for that amount of fish

“which cannot, or will not be harvested by vessels of the United States.” As there is no surplus red snapper, the lancha operators would not be able to receive a permit even if they applied.

Magnuson-Stevens Act and Illegal Fishing

The MSA also addresses fishing on the high seas, or international waters. When it comes to international waters, no country has jurisdiction and law enforcement is voluntary, meaning a law is enforceable only upon countries that agree to submit to it. This is signified by entering treaties. Enforcement is a problem with treaties, however. Treaties can be self-enforcing (meaning a country that violates the treaty must turn itself in and/or punish its citizens who offend) and custom tailored (meaning treaties bind the member countries only to the extent they agree to be bound). For example, under the International Convention for the Regulation of Whaling, its 89 member countries agree to follow certain rules on harvesting whales, such as no commercial whaling. The treaty provides for self-monitoring if this rule is broken. Thus, each country enforces the law against its own citizens but not against other countries. Also, the treaty allows members that do not agree with a treaty provision to enter a “reservation,” allowing that country to act without legal consequences. For example, the whaling treaty bans commercial whaling, but countries can enter into a reservation allowing them to hunt commercially without being in violation of the treaty. Similar international treaties are in place for Atlantic tuna, North Atlantic salmon, Pacific salmon, and Western and Central Pacific fisheries, for example.

The MSA was amended to enforce the United States' IUU international treaty obligations regarding driftnets. Driftnets are massive nets – sometimes 50 miles long – that are not anchored. They are harmful to the ecosystem because of the large amount of bycatch, or unintended wildlife, captured by the net. According to one source, 7.3 million tons of animals are killed annually as bycatch in driftnets.⁸ The United Nations banned driftnets longer than 1.5 miles in 1993. The MSA does not authorize active enforcement against ships caught using illegal driftnets, however. Instead, the law requires NOAA to identify countries with vessels conducting IUU fishing, and report those countries to Congress, the President

and the offending nation. In other words, the IUU fishing is not stopped at the time of its discovery.

International Port State Treaty

A recent international treaty allows more active enforcement. The Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (or the Port State Measures Agreement, PSMA) tries to address IUU fishing by authorizing member states to act when ships come in to port, preventing the illegally harvested fish from entering markets. The treaty applies to foreign fishing vessels operated for profit once that vessel seeks permission to enter a member country's port. Smaller vessels that fish for subsistence quantities are exempt. The PSMA entered into force on June 5, 2016. A port country that is a signatory to the treaty – 61 countries are parties – has the authority to prevent the ship from docking, or offloading its cargo (except in exigent circumstances).

More particularly, under the treaty, when a member country has “sufficient proof” of IUU fishing, it can deny a vessel entry into its ports. And, under Article 11 of the PSMA, once a vessel has entered port, the member country can deny that vessel “the use of the port for landing, transshipping, packing and processing of fish.” Additionally, if the member state has “clear evidence” that the fish on board were taken in violation of law, the member state may also deny that vessel refueling, resupply, and maintenance. These restrictions do not apply in the case of the health and safety of the crew or the safety of the boat.

The treaty allows disputes regarding IUU fishing to be taken to the International Court of Justice, meaning enforcement can be meted out by an independent party. Compare that to the driftnet treaty where the most action allowed by statute is reporting the offenses. However, while the PSMA describes specific obligations of member countries, the United States does not have legislation in place to enact the treaty, meaning Congress has not delegated the actual U.S. enforcement duties to specific federal agencies.

Other Methods to Track IUU Fishing

The UN has developed an additional process to help identify and track IUU vessels. The Global Record is a list

of fishing vessels, refrigerated transport vessels, and supply vessels, allowing port states to check for valid, law-abiding ships. As part of that process, and under a separate treaty, a number is assigned to fishing vessels of 100 gross tonnage or more, known as an International Maritime Organization (IMO) Number. Smaller craft down to 12-meters long that are authorized to operate on the high seas also must have an IMO number. That number stays with the vessel for its entire life, even if there are changes of flag, ownership, or name. According to the UN, there is an effort to make the IMO Number compulsory for vessels in member states' fisheries.

Tracking vessels for their lifetime may make apprehension of IUU criminals easier but not a sure thing. In the case of the Russian-named vessel mentioned above, for example, the vessel provided a false IMO after being chased around the world claiming flags of at least eight nations.⁹ Radar images of the vessel were used to link the ship to the electronic tracking identification system it had spoofed, showing it was in the Falkland Islands, Fiji, and Norway, all at once. The 10-year chase of that ship illustrates how hard it is to enforce the law against the lawless. 🐟

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Endnotes

1. Richard Gray, *The Hunt for the Fish Pirates Who Exploit the Sea*, BBC (Feb. 18, 2019).
2. United Nations, Food and Agriculture Organization of the United Nations, *Illegal, Unreported and Unregulated (IUU) Fishing*.
3. Ian Urbina, *'Sea Slaves': The Human Misery That Feeds Pets and Livestock*, New York Times (July 27, 2015).
4. Food and Agriculture Organization of the United Nations, *Agreement on Port State Measures*.
5. NOAA Fisheries, *Understanding Illegal, Unreported, and Unregulated Fishing* (June 28, 2017).
6. *See* 82 Fed. Reg. 26376 (May 5, 2017). A month later, the season was changed to 39 days. 82 Fed. Reg. 27777 (June 19, 2017).
7. 16 U.S.C. § 1811(a).
8. The TerraMar Project, *Fishing Gear Summary: Why Driftnets Are So Harmful*.
9. Richard Gray, *The Hunt for the Fish Pirates Who Exploit the Sea*, BBC (Feb. 18, 2019).