Unilateral Steps to End High Seas Fishing

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Abstract

White & Costello (2014) boldly propose that countries end fishing on the high seas, the vast expanse of the oceans that lies beyond national jurisdiction. Converting the high seas into a giant reserve for fish might increase overall global fish catches, by boosting fish catches within the adjoining areas of the oceans under national control. It also might help to protect marine biological diversity in an era of climate change. This essay identifies the potential that the United States, a large importer of fish, might unilaterally take steps to end fishing on the high seas, using its market leverage. It analyzes the advantages and disadvantages of unilateral steps to end fishing on the high seas, and addresses why it might be in the interest of a large importing country such as the United States to take such steps.

Introduction

In 2014, a prominent fisheries economist and a biologist published a bold proposal to end fishing on the high seas.[2] Roughly forty percent of the surface of the oceans is within nationally-controlled Exclusive Economic Zones (EEZs), and most wild fish are caught within these EEZs. The high seas, defined as the area beyond these EEZs, covers approximately sixty percent of the surface of the oceans and is the site of perhaps twelve percent of world fish catches.[3] However, that twelve percent understates the significance of high seas fish populations. The health of high

[1] This essay benefitted from many conversations with Jennifer Jacquet, Jessica Green and Bryce Rudyk; and research assistance from Julia Kindlon and Alex St. Romain.

[2] Crow White & Christopher Costello, Close the High Seas to Fishing?, 12:3 PLOS Biology 1 (March 2014); see also U. Rashid Sumaila et al., Fisheries Subsidies and Potential Loss in SIDS Exclusive Economic Zones: Food Security Implications, 18(4) Env't & Dev. Econ. 427 (2013); U. Rashid Sumaila et al., Winners and Losers in a World Where the High Seas Is Closed to Fishing, 5 Scientific Reports, Article No. 8485 (2015), https://www.nature.com/articles/srep08481; Louise S.L. Teh et al., Impact of High Seas Closure on Food Security in Low Income Fish Dependent Countries, PLOS ONE (December 29, 2016), http://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0168529&type=printable.

[3] Rogers et al., The High Seas and Us: Understanding the Value of High-Seas Ecosystems 4, 13 (Global Ocean Commission); see also Bloomberg Editors, Opinion: Ban Fishing on the High Seas (January 3, 2017), National Fisherman, https://www.nationalfisherman.com/viewpoints/national-international/opinion-ban-fishing-on-the-high-seas/. Rogers et al. explain the 12% statistic as follows: "We found that a total annual average of about 10 million tonnes of fish from highly migratory and straddling stocks were caught in the high seas, constituting just over 12% of the global annual average marine fisheries catch of 80 million tonnes. The landed value of this catch is estimated at about US$16 billion annually, which makes up about 15% of total global marine landed value of about US$109 billion (Swartz *et al.* 2012). Tuna species account for the largest share of value and the second largest share of total catch.").

seas fisheries also affects fisheries within EEZs because very few fish exist only in the high seas; many fish swim between EEZs and the high seas.[4]

The idea of establishing a reserve for fish on the high seas arises from the frustration of many environmentalists with the existing international regime for managing high seas fisheries.[5] This regime principally relies on just under twenty regional fisheries management organizations (RFMOs) to establish and allocate catch limits, and on flag and port states to enforce them.[6] Every ship must be registered in a state to enjoy the right to navigation; the flag state is the state where the ship is registered[7] while the port state controls the port where a vessel lands. In general, the RFMOs and the States that are supposed to implement their decisions have proven to be weak managers of the high seas fisheries under their charge. Roughly two-thirds of the fish stocks managed by RFMOs are "depleted or overexploited."[8]

The proponents of ending fishing on the high seas point to a number of advantages. Models predict that ending this fishing will increase fish populations on the high seas and within the adjoining EEZs, and therefore increase global fish catches.[9] It also may protect marine biological diversity, an important consideration in an era of ocean acidification and climate change.[10] In addition, it might have a positive distributional impact. The vessels of ten countries now catch over sixty percent of fish harvested on the high seas.[11] Modelling predicts that many more countries would benefit from higher fish catches if high seas fishing stops because of the predicted increase in EEZ fish catches.[12] The beneficiaries also could include many developing countries, although not all.[13] There also could be disadvantages of closing the high seas to fishing. It might lead to increased fishing within EEZs, which consequently would need to be

[4] Global Ocean Commission, From Decline to Recovery 75 (2014) ("Only 3% of the main high seas fish species are caught exclusively in the high seas."); Rogers et al., supra note , at 13 ("Forty-two percent of the global commercially important fish species we analysed are caught in both the high and coastal seas. Less than 1% are caught exclusively on the high seas. The highly migratory and 'straddling' stocks that occur in both the high seas and in EEZs account for 67% of the total global catch and 72% of the total landed value associated with global commercial fisheries.").

[5] See, e.g., Sarika Cullis-Suzuki & Daniel Pauly, Failing the High Seas: A Global Evaluation of Regional Fisheries Management Organizations 34:5 Marine Policy 1036 (2010); Global Ocean Commission, supra note ; Cassandra M. Brooks et al., Challenging the 'Right to Fish' in a Fast-Changing Ocean, 33 Stanford Environmental Law Journal 289, 297-302, 316-320, 323-324 (2014); White & Costello, supra note .

[6] Global Ocean Commission, supra note , at 7 (diagrams refers to 17 RFMOs).

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[8] Sarika Cullis-Suzuki & Daniel Pauly, Failing the High Seas: A Global Evaluation of Regional Fisheries Management Organizations 34:5 Marine Policy 1036, 1036 (2010) ("two-thirds of stocks fished on the high seas and under RFMO management are either depleted or overexploited").

[9] White & Costello 2014; Sumaila et al. 2015.

[10] Global Ocean Commission: From Decline to Recovery: A Rescue Package for the Global Ocean 75.

[11] Global Ocean Commission, From Decline to Recovery: A Rescue Package for the Global Ocean 7 & n. 9. See also Rogers et al., supra note , at 13 ("Focusing on the large pelagic species for which we have good data, we find that the 10 leading high-seas fishing nations together land 63% of the high-seas catch and capture 70% of the landed values, respectively... In other words, 10 countries reap the largest commercial share of this common heritage of humankind."). The ten countries are: "Japan, South Korea, Chinese Taipei (fishing entity), Spain, US, Chile, China, Indonesia, Philippines, France." Global Ocean Commission, supra note , at 9.

[12] White & Costello 2014; Sumaila et al. 2015.

[13] Teh et al. 2016.

better managed than they are now by many countries.[14] Without effective national management of EEZs, the benefits of stopping fishing on the high seas could be eroded.

The proposal to end fishing on the high seas is not as far-fetched as it might initially sound; there already are partial precedents. Fishing for anadromous stocks such as salmon already is prohibited "in the high seas areas of the North Pacific Ocean" by the North Pacific Anadromous Fisheries Commission.[15] As a result of a 2016 decision of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), fishing is prohibited in a vast area of the high seas in the Southern Ocean off Antarctica until 2052.[16] In 2009, CCAMLR established "[t]he first fully high seas MPA [marine protected area]" in the South Orkney Islands; this MPA does not have expiry date.[17]

This essay assumes that the idea of ending fishing on the high seas generally is worth considering. It focuses on the mechanism by which fishing might be stopped on the high seas.

Green & Rudyk have helpfully argued that there are three broad categories of mechanisms for ending fishing on the high seas. The first is multilateral options involving all (or most) countries. These include negotiating a framework for closure through a UN process, such as the negotiations that will begin in the fall of 2018 to establish a new implementing agreement under the auspices of the United Nations Law of the Sea Convention to protect biological diversity on the high seas. The second is plurilateral approaches involving small groups of countries. Green & Rudyk propose "fisheries clubs." For example, there are some areas of the high seas, called "donut holes," that are entirely surrounded by EEZs of different countries.[18] The countries bordering these holes could condition access to their EEZs on not fishing in the donut holes, and in effect form "Donut Hole clubs." The United States and Russia already have done something like this by excluding countries from fishing in an area of the Bering Sea surrounded by their EEZs, as have eight Pacific countries that deny access to their EEZs to countries whose vessels fish in an interior high seas area.[19] Another option that Green & Rudyk identify is a "High Seas Ban Club." Under this option, countries importing fish would condition selling fish in their own markets on that fish not being caught on the high seas. They would prohibit fishing vessels flying their flags from fishing on the high seas, and they would refuse to import fish from other countries whose vessels fish on the high seas (or accept fish from other vessels fishing on the high seas). The third broad category of mechanism for ending high seas fishing that Green & Rudyk mention, but do not elaborate, is countries acting unilaterally to

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[14] Rogers et al., supra note , at 13.

[15] NOAA January 2017 Report, supra note , at 54. This ban on high seas fishing is enforced by the US, working with "Canada, China, Japan, the Republic of Korea and the Russian Federation." Id.

[16] NOAA January 2017 Report, supra note , at 66; Michelle Innis, Coast of Antarctica Will Host World's Largest Marine Preserve, N.Y. Times, October 27, 2016, https://www.nytimes.com/2016/10/28/world/australia/antarctica-ross-sea-marine-park.html

[17] Brooks et al., supra note , at 310. The establishment of the South Orkney Islands MPA likely was facilitated by the fact that there was no ongoing fishing in the area when the MPA was established. Id. at 311.
See also CCAMLR, Conservation Measure 91-03 (2009), https://www.ccamlr.org/en/measure-91-03-2009.
On the small number of other marine protected areas on the high seas, see Brooks et al., supra note , at 309-2`6.

[18] Donut Holes, http://donutholes.ch/#

[19] Green & Rudyk 2018,

reduce fishing on the high seas, by prohibiting imports of fish caught on the high seas, and prohibiting fishing on the high seas by vessels flying their flags.

This essay elaborates and analyzes the potential for individual countries, such as the United States, to act on their own to reduce fishing on the high seas unilaterally, through an import ban on fish caught on the high seas, and a corresponding ban on US-domestic flagged vessels fishing on the high seas. Unilateral action is important to consider because it might have beneficial consequences in itself. It also might be a first step toward plurilateral or multilateral action that ultimately could prove even more effective in ending fishing on the high seas.

The essay describes the basic idea of a unilateral import ban and identifies precedents for the idea. It also identifies the advantages and the disadvantages of countries taking unilateral steps to end high seas fishing. The essay also addresses why it might be in the interest of the US to act unilaterally to ban the import of fish caught on the high seas, and their vessels fishing on the high seas. Because a US move to reduce fishing on the high seas might seem to involve the US unilaterally conferring a public good (leaving more fish on the high seas for other States' vessels), it is reasonable to ask whether the US might be willing to act unilaterally. The essay briefly concludes by underscoring the value of pursuing unilateral steps to end high seas fishing.

1. The Idea of a Unilateral Import Ban and Precedents For It

(a) The Basic Idea

The basic idea is that jurisdictions such as the US or the EU that are large markets for fish caught on the high seas might, acting on their own, ban the sale and the import of fish caught on the high seas. The ban would prevent the domestic fishers of the jurisdiction implementing it from harvesting fish on the high seas, and selling it in the implementing jurisdiction. The US might be able to accomplish this fairly simply because it has a record of the 467 vessels flying its flag fishing on the high seas.[20] It currently requires that all US flagged-vessels fishing on the high seas obtain a special "high seas" fishing permit.[21] The ban also would prohibit the importation of fish caught on the high seas.

A ban might be applied to *all* fish caught on the high seas. Alternatively, a jurisdiction might ban the harvesting (by vessels flying the jurisdiction's own flags), and the importation, of a select number of high priority fisheries caught on the high seas that are severely depleted, such as Pacific bluefin tuna.[22] The ban to protect priority species might be a first step toward banning all fish caught on the high seas, or an end in itself.

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[20] Email from Kerry Turner, Communications Specialist, NOAA Fisheries, Office of International Affairs and Seafood Inspection, January 19, 2018, 6:20pm.

[21] 50 CFR Subpart R; National Oceanic and Atmospheric Administration, International Affairs; High Seas Fishing Compliance Act; Permitting and Monitoring of U.S. High Seas Fishing Vessels, Final Rule, 80 Fed. Reg. 62488, 62492 (October 16, 2015). These permits last for five years, and the US can revoke them on certain grounds. 50 C.F.R. § 300.333. The EU also requires that its member states authorize fishing on the high seas by vessels flying their flag. WWF website (iuu watch).

[22] Amanda Nickson, Urgent Need for Cooperation to Help Severely Depleted Pacific Bluefin Tuna, Compass Points, August 24, 2017, http://www.pewtrusts.org/en/research-and-analysis/blogs/compass-points/2017/08/24/urgent-need-

It might be possible for unilateral trade-related measures to protect high seas fish because a small number of countries import a significant share of imported fish. "In 2014," the EU, the US and Japan "represented 63 percent by value and 59 percent by quantity of world imports of fish and fishery products."[23] The EU "is, by far, the largest single market for fish imports."[24] However, the US is "the largest single importer of fish," with Japan second, and China third; Chinese imports have been "growing."[25] Seafood imports also are important to the United States and the European Union. As of 2014, over ninety percent of "U.S. edible seafood supply" is imported.[26] Over sixty percent of "fish products" in the European Union are imported; the EU imports ninety percent "of its white fish."[27]

Given the concentrated nature of the market for fish imports, it makes sense to think about whether one or more of the big importing countries, such as the US, could use their leverage as buyers of fish to alter fishing behavior on the high seas. A caveat: The data presented above concern the markets for imported fish generally, not specifically the markets for fish caught on the high seas. In offering these statistics, I am implicitly assuming that the markets for imported high seas fish track the markets for imported fish generally. I have not been able to locate data on the markets for fish caught on the high seas specifically, and I suspect that such data does not currently exist.

In addition to a ban on the harvesting (by its own flagged vessels) and import of fish caught on the high seas, a country might end its subsidies for fishing on the high seas. Like agricultural subsidies, subsidies for fishing are common and efforts to eliminate them have been stymied.[28] The principal countries subsidizing fisheries are the same countries that are the major markets for imported fish – "Japan, China, the EU and the US."[29] Because a country banning the import of fish caught on the high seas would need to apply the same standards to its fishers as to foreign fishers to avoid running afoul of international trade law, it likely would

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for-cooperation-to-help-severely-depleted-pacific-bluefin-tuna (contrasting the management of the Pacific and Atlantic bluefin tuna fisheries); Anna Fifield, Tuna-fishing Nations Agree on Plan to Replenish Severely Depleted Pacific Bluefin Tuna Stocks, The Washington Post, September 1, 2017, https://www.washingtonpost.com/world/asia_pacific/tuna-fishing-nations-agree-on-plan-to-replenish-severely-depleted-bluefin-stocks/2017/09/01/7d83c314-8db0-11e7-91d5-ab4e4bb76a3a_story.html?utm_term=.98987c4ed1a8.

[23] FAO, The State of World Fisheries and Aquaculture. Contributing to Food Security and Nutrition for All 54 (2016)

[24] Id. at 54.

[25] Id. at 54.

[26] Regulatory Impact Review, supra note , at 4.

[27] Environmental Justice Foundation et al., The EU IUU Regulation: Building on Success, EU Progress in the Global Fight Against Illegal Fishing 4. "Spain, the UK, Germany, Italy, the Netherlands and France were the top 6 EU importers of wild-capture fish from external markets in 2014." Id. at 5.

[28] Global Ocean Commission, supra note , at 42. The now-defunct Trans-Pacific Partnership included "prohibitions on some of the most harmful fisheries subsidies, as well as enhanced transparency requirements for fisheries subsidy programs." NOAA Fisheries, Improving International Fisheries Management: Report to Congress Pursuant to Section 403(a) of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 51 (January 2017). It will be interesting to see if the revived version of the agreement (to which the United States will not be a party) will include these prohibitions on fishing subsidies. http://www.bbc.com/news/world-us-canada-42796603

[29] Global Ocean Commission, supra note , at 17 ("Developed countries grant 70% of fishing subsidies, with Japan, China, the EU and the US the highest spenders.").

forbid its fishers from harvesting selling fish caught on the high. As a result, there would no point to continuing to subsidize high seas fishing by the domestic fleet. By itself, the curtailment of subsidies for fishing on the high seas might lead to a significant reduction in high seas fishing. There is some evidence that fishing on the high seas is not profitable absent government subsidies, especially subsidies for fuel used by vessels.[30]

(b) Precedents

The idea of countries using import bans to alter fishing behavior is not novel. There are precedents for using such as bans to improve fishing behavior – within EEZs and on the high seas.

There would be three major elements to a unilateral ban by the US (or another country) on imports of fish caught on the high seas, which are worth keeping in mind in considering the precedents for such a policy step. First, the country would be applying its own standard to protect fish. That country, not a multilateral or plurilateral organization, such as a regional fisheries management organization (RFMO), would have determined that fish should not be caught on the high seas. Second, the country would be requiring that importers – not foreign states – prove that fish they are proposing to be brought into the country were not caught on the high seas. So the immediate burden of the ban would fall on private actors. But the ban might have reverberations back to flag States; importers might seek confirmation from flag states that their vessels are complying with the standards that the ban is enforcing. Third, the sanctions for violating the standard include an import prohibition.

Below I identify several precedents for a ban on high seas fishing, highlighting the elements that each precedent has in common with the proposal.

(1) US Precedents

[30] Global Ocean Commission, supra note , at 7 ("the majority of high seas fishing is carried out by only 10 nations, most of them developed nations, that rely heavily on subsidies to remain profitable"); id. at 17 ("countries grant at least US$30 billion a year in fishing subsidies, 60% of which directly encourages unsustainable practices. Fuel subsidies are the biggest component at 15–30%."); id. at 45 ("As an example specific to the high seas, subsidies for the high seas bottom trawl fleets of the 12 top high seas bottom trawling nations amount to US$152 million per year, which represents 25% of the total landed value of the fleet. Typically, the profit achieved by this vessel group is not more than 10% of landed value, meaning that this industry effectively operates at a deficit."); id. at 46 ("On the high seas, it is largely only States that can afford to subsidise their fleets with public funds that have the opportunity to fish: high seas fishing is carried out by 10 nations that rely heavily on subsidies to remain profitable. Fuel subsidies account for the greatest share of these capacity-enhancing subsidies, representing up to 30% of government fishing spending."); see also Suzanne Goldberg, Fuel Subsidies' Drive Fishing Industry's Plunder of the High Seas, The Guardian, June 23, 2014, https://www.theguardian.com/environment/2014/jun/24/fuel-subsidies-drive-fishing-industrys-plunder-of-the-high-seas ("American subsidies amounted to $137 million on a catch worth $368 million." (reporting on report of Global Ocean Commission)). The main sources for the information about subsidies in the Global Ocean Commission's report appear to be: U.R. Sumaila et al., A Bottom-up Re-estimation of global fisheries subsidies, 12 Journal of Bioeconomics 201 (2010); U.R. Sumaila, Subsidies to High Seas Bottom Trawl Fleets and the Sustainability of Deep-Sea Demersal Fish Stock, 34(3) Marine Policy 495 (2009).

For clarity, I first describe US precedents that place burdens on private actors. Then I describe US measures targeted at foreign governments.

(a) Programs Targeting Private Actors

The US Seafood Import Monitoring Program

US law prohibits importing or selling fish taken contrary to the fishing laws of another country, or RFMO regulations.[31] The Seafood Import Monitoring Program (SIMP) is a new program that took effect on January 1, 2018 that attempts to ensure that fish imported into the US, like fish harvested by US-flagged vessels, are caught in compliance with fisheries regulation established by RFMOs and other countries, and are not mislabeled.[32] The SIMP was established by the National Marine Fisheries Service (NMFS) following a recommendation from the Obama-era Presidential Task Force on Combating IUU [illegal, unreported, and unregulated] Fishing and Seafood Fraud.[33] It is being implemented by NMFS and Customs and Border Protection in the Department of Homeland Security.[34]

The program requires approximately 2000 importers (or their 600 customs brokers) "to electronically report information prior to importing fish on where the fish was caught, how it was caught, and by what vessel."[35] The requirements currently apply to only a list of priority species, which appear to have been selected based on the risk that they are caught in violation of RFMO and other countries' fisheries regulations, the potential for the fish to be mislabeled ("seafood fraud"), and the existence of comparable reporting requirements for US fishers of these species.[36] According to NMFS, comparable reporting requirements are already imposed for the

[31] 16 USC 1857(1)(Q) ("It is unlawful … (Q) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish taken, possessed, transported, or sold in violation of any foreign law or regulation or any treaty or in contravention of any binding conservation measure adopted by an international agreement or organization to which the United States is a party"); 50 CFR 600.725 ("It is unlawful for any person to …(a) Possess, have custody or control of, ship, transport, offer for sale, sell, purchase, land, import, export or re-export, any fish or parts thereof taken or retained in violation of the Magnuson–Stevens Act or any other statute administered by NOAA or any regulation or permit issued thereunder, or import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish taken, possessed, transported, or sold in violation of any foreign law or regulation, or any treaty or in contravention of a binding conservation measure adopted by an international agreement or organization to which the United States is a party."); 16 USC 3372(a)(1) ("It is unlawful for any person … to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law.").

[32] The SIMP was established by rule-making, relying on 16 USC 1857(1)(Q) & 16 USC 1855(d).

[33] Presidential Task Force on Combating IUU Fishing and Seafood Fraud at 36-39.

[34] See National Oceanic and Atmospheric Administration, Magnuson-Stevens Fishery Conservation and Management Act: Seafood Import Monitoring Program, Final Rule, 81 Fed. Reg. 88975 (December 9, 2016). The program was challenged by seafood importers, and upheld, in Alfa International Seafood v. Ross, --- F.Supp.3d --- (2017)

[35] NOAA Final Rule, supra note , at 88982. The importers likely will transfer the filing responsibility to the roughly 600 customs brokers acting on their behalf. Final Regulatory Impact Review and Final Regulatory Flexibility Act Analysis, supra note , at 3.

[36] 80 Fed. Reg. 66867 (October 30, 2015); NOAA Final Rule, supra note , at 88989 (explaining stay of rule as to shrimp and abalone). The species are "abalone, Atlantic cod, blue crab, dolphinfish, grouper, king crab (red),

species on domestic US fishers;[37] this is presumably important to reduce the legal risk that the program violates WTO law prohibitions on discrimination against like products. (China has already objected that comparable reporting requirements are not imposed on US fishers.[38]) The priority species "represent[] approximately 39% of edible seafood imports by volume in 2014 and, because of the high value of several of the priority species, about 46% of imports by value."[39] Importers are required to have a permit to import these species.[40] NMFS plans to selectively audit the information that importers provide.[41] If NMFS cannot confirm that fish "was lawfully acquired and non-fraudulent," based on the information that the importers provide, then the fish could be excluded from the US and subject to forfeiture and the importer could face "enforcement action."[42]

The Seafood Import Monitoring Program is an important precedent for a ban on the import of high seas fish in two respects. First, like such a ban, the program imposes a burden on importers to know their product back to the point of harvest, including where the product was harvested. Second, the penalties for non-compliance include the exclusion of the fish, as would be the case with a ban.

Still, a ban on importing fish caught on the high seas would push the envelope compared with the program in two other respects. First, while the SIMP requires that importers provide information on where the fish was caught, it does not require that the location where fish was caught on the high seas be identified with great specificity.[43] Instead, the program requires that

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Pacific cod, red snapper, sea cucumber, sharks, shrimp, swordfish, albacore tuna, bluefin tuna, bigeye tuna, skipjack tuna, and yellowfin tuna." NOAA Report January 2017, at 14.

[37] Proposed Rule, February 5, 2016, at 6212 ("For the designated at-risk species, equivalent information is already being collected at the point of entry into commerce for the products of U.S. domestic fisheries pursuant to various Federal and/or State fishery management and reporting programs."); Presidential Task Force, supra note , at 7 ("Vessel Monitoring Systems (VMS) on board to track their location and movement in the U.S. EEZ and treaty waters. The U.S. VMS program currently monitors more than 4,000 vessels and is the largest national VMS program in the world. Permitted domestic commercial harvesters can also be required to submit a vessel trip report (VTR) for each fishing trip prior to landing. The VTR provides a detailed report of the vessel's fishing activity, including trip duration, location of fishing activity, gear used, catch harvested, catch composition (species and weight for both landed and discarded fish), and identity of who is purchasing the landed catch. This information can be verified by enforcement or by on-board and/or portside monitoring programs where used. At the point of sale, or entry into U.S. commerce, permitted dealers are often required to submit purchase records. These records can include species data that can be cross-referenced with landing records provided by the vessel."); NOAA January 2017 Report, supra note , at 13 ("In 2015, NMFS published a final rule amending regulations that govern all fishing by U.S. vessels on the high seas, pursuant to the High Seas Fishing Compliance Act (HSFCA). The rule … includes requirements for the installation and operation of enhanced mobile transceiver units for vessel monitoring, carrying observers on vessels, reporting of transshipments on the high seas, and protection of VMEs [vulnerable marine ecosystems].").

[38] http://spsims.wto.org/en/SpecificTradeConcerns/View/415; http://www.iuuwatch.eu/2017/10/wwf-report-urges-japan-adopt-monitoring-program/

[39] Regulatory Impact Review, supra note , at 3. See also id. at 7 ("The commodities subject to documentation requirements under the initial phase of the program amounted to about 50% of 2014 import value."). The species include the highly valuable bluefin tuna. NOAA Final Rule, supra note , at 88989-88991.

[40] Proposed Rule, February 5, 2016, at 6217.

[41] NOAA Final Rule, supra note , at 8892.

[42] NOAA Final Rule, supra note , at 8892.

[43] Anastasia Telesetsky, U.S. Seafood Traceability as Food Law and the Future of Marine Fisheries, 47 Envtl. L. 765, 779-780, 789 (2017).

for fish caught on the high seas, the location only be identified in terms of the major FAO fishing area, which is a broad categorization.[44] Banning the import of fish caught on the high seas likely would require more fine-grained information on the location of the harvest, as fish caught in EEZs would be allowed to be imported into the US (provided it was caught in compliance with national laws) while the same fish caught on the high seas would not. A more suitable approach might be that used in the European Union's Catch Certification Scheme, which apparently requires that the harvest location be described using GPS coordinates.[45] Second, the Seafood Import Monitoring Program involves the US implementing internationally determined standards – the program is intended to ensure that fish imported into the US are caught in compliance with the laws of the nations in whose EEZs the fish are caught, and with RFMO regulations. A ban to protect high seas fish would involve the US enforcing a US-determined policy of ending fishing on the high seas.

Other US Catch Documentation Schemes

The new SIMP builds on pre-existing US programs that require importers to document information related to fish harvesting to ensure compliance with international and US law.[46]

The United States has implemented the Catch Documentation Scheme adopted by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) in 2000.[47] This Catch Documentation Scheme primarily imposes burdens on flag states, although there are obligations on importers as well. CCAMLR is the RFMO that regulates catches of Antarctic and

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[44] NOAA Final Rule, supra note , at 88980 ("For fishing beyond national jurisdiction, the United Nations Food and Agriculture Organization (FAO) Major Fishing Area codes (*http://www.fao.org/fishery/cwp/handbook/H/en*) should be used. Specific instructions for reporting fishing area are provided in the NMFS Implementation Guide."). See also http://www.fao.org/3/a-bt979t.pdf; http://www.fao.org/cwp-on-fishery-statistics/handbook/general-concepts/major-fishing-areas-general/en/

However, when I contacted NMFS and asked about the choice to require that the catch area be identified in terms of FAO fishing area, I received a response that indicates that NMFS actually may be requiring a more specific description of whether fish is caught than I am suggesting in the text (where I draw on Telesetsky's analysis). NMFS indicated in an email to me: "NMFS regulations and the import reporting system allow for specification of fishing area as established by the competent authority and/or the applicable RFMO. In cases where there are no specific fishing areas identified/required by a competent authority, the fishing vessel should report landings by FAO area, and to indicate whether the fishing occurred within a nation's EEZ for that FAO area." Turner, supra note .

[45] NOAA Final Rule, supra note 888980. Notwithstanding the reference to the EU Catch Certification Scheme requiring GPS coordinates, the EU regulation, while requiring that the location of the catch be identified, does not state on the form included in the regulation how the location should be defined. Council Regulation (EC) No 1005/2008, Annex II (European Community Catch Certificate and Re-export Certificate) (item 3 requires "catch area(s) and dates"). GPS coordinates will be used to identify the location of "any transshipment at sea" in the Catch Documentation System of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR). NOAA January 2017 Report, supra note , at 52.

[46] For an overview of pre-existing programs, see NOAA Proposed Rule, supra note , at 6219 (February 5, 2016).

[47] http://www.nmfs.noaa.gov/ia/permits/amlr.html; 50 CFR Subpart G, s. 300.10 and following. For background, see Henrik Osterblom & U. Rashid Sumaila, Toothfish Crises, Actor Diversity, and the Emergence of Compliance Mechanisms in the Southern Ocean, 21 Global Envt'l Change 972 (2011). For a positive assessment of the impact of the toothfish documentation scheme, see Gilles Hosch, Catch Documentation Schemes: Practices and Applicability in Combatting IUU Fishing, http://www.fao.org/in-action/globefish/fishery-information/resource-detail/en/c/426994/.

The US is one of 30 countries that have implemented the CCAMLR catch documentation scheme for toothfish. http://www.nmfs.noaa.gov/ia/permits/amlr.html.

Patagonia toothfish (commonly called Chilean sea bass).[48] CCAMLR and the US require that that all vessels harvesting in the area regulated by the Commission have a satellite-based Vessel Monitoring System (VMS).[49] The VMS must report, in "real-time," the vessel's location to either CCAMLR or the vessel's flag state, which must transfer it to CCAMLR.[50] To promote compliance with CCAMLR's toothfish regulations, every shipment of toothfish imported into the US must include a "Dissostichus [toothfish] catch document (DCD)" that is validated by the harvesting vessel's flag state.[51] In validating the document, the flag state "must" satisfy itself "through the use of VMS data … that the FAO area(s) or CCAMLR subarea(s) or division(s) where the [toothfish] …were taken was accurately reported by the vessel on the DCD."[52] In addition, the US requires that anyone importing frozen toothfish into the US – regardless of whether it is caught within the area regulated by CCAMLR – to obtain pre-approval of the importation from NMFS.[53] To obtain the pre-approval, the importer must be able to prove that the vessel harvesting the toothfish was reporting its location "in real-time" through VMS.[54] The

[48] CCAMLR has a broader mandate than other RFMOs. Brooks et al., supra note , at 303-306, 317-318, 321.

[49] For US requirements that vessels fishing in CCAMLR have VMS, see 50 C.F.R. § 300.112. The US appears to require that all vessels that it licenses to fish on the high seas have some kind of VMS that reports at least hourly on the vessel's location to NOAA's Office of Law Enforcement. 50 C.F.R. § 300.337(d). For CCAMLR's requirements that vessels have VMS, see Automated Satellite-linked Vessel Monitoring Systems (VMS), Conservation Measure 10-04 (2015) at para. 2 ("Each Contracting Party shall ensure that its fishing vessels, licensed in accordance with Conservation Measure 10-02, are equipped with an ALC that meets the minimum standards contained in Annex 10- 04/C. For finfish fisheries, commencing 1 December 2015, the ALC must transmit VMS data every hour while the fishing vessel is operating in the Convention Area. For all other fisheries, the ALC must transmit VMS data every four hours, with this requirement to change to every hour commencing 1 December 2019.").

[50] CCAMLR, Automated Satellite-linked Vessel Monitoring Systems (VMS), Conservation Measure 10-04 (2015) at paras. 11 & 12; 50 C.F.R. § 300.112.

[51] CCAMLR, Conservation Measure 10-05 (2017) at para. 1(i); 50 C.F.R. § 300.106(a).

[52] CCAMLR Conservation Measure 10-05, para. 5; see also id.("The Flag State's CDS Contact Officer shall not issue a Flag State Confirmation Number on a DCD if there is reason to believe that the information submitted by the vessel is inaccurate or that the Dissostichus spp. were taken in a manner inconsistent with CCAMLR conservation measures if fishing occurred in the CAMLR Convention Area. ").

[53] http://www.nmfs.noaa.gov/ia/permits/amlr.html; 50 C.F.R. § 300.106 (e).

[54] 50 C.F.R. § 300.106 (e)(1)(i) ("To import frozen Dissostichus species into the United States, a person must: (i) Obtain a preapproval certificate issued under § 300.105 for each shipment. Among the information required on the application, applicants must provide the document number and export reference number on the DED or DRED corresponding to the intended import shipment and, if requested by NMFS, additional information for NMFS to verify that the harvesting vessel reported to the C–VMS continuously and in real-time, from port-to-port, regardless of where the fish were harvested;"); 50 CFR § 300.105(d) ("NMFS may issue a preapproval certificate for importation of a shipment of frozen Dissostichus species if the preapproval application form is complete and NMFS determines that the activity proposed by the applicant meets the requirements of the Act and that the resources were not harvested in violation of any CCAMLR conservation measure or in violation of any regulation in this subpart. No preapproval will be issued for Dissostichus species without verifiable documentation that the harvesting vessel reported to C–VMS continuously and in real-time from port-to-port, regardless of where such Dissostichus species were harvested."). "Centralized Vessel Monitoring System (C–VMS) means the system operated by the Secretariat of CCAMLR that receives reports of positional and other information from satellite-linked mobile transceiver units located on vessels that are submitted to the CCAMLR Secretariat, either directly from the vessel or through the relevant flag State." 50 C.F.R. § 300.101. "Port-to-port means from the time the vessel leaves port to the time that

requirement that all toothfish imported into the US come from vessels using VMS means that, in theory, it should be possible to trace the location where the toothfish was harvested[55] – or at least confirm that the toothfish was not harvested in areas where CCAMLR and the US prohibit toothfish harvesting.[56] The requirement that all toothfish harvesting vessels report their location in real-time also emphasizes that there already are regulatory requirements that harvesting vessels on the high seas make known their location. Access to locational information about fishing vessels would be essential to enforcing an import ban on fish caught on the high seas.

The US also has implemented a Catch Documentation Scheme as required by the International Commission for the Conservation of Atlantic Tunas that is similar to the CCAMLR scheme.[57] In addition, the US has a regime regulating the use of the "dolphin-safe" label on tuna sold in the United States. It requires certification from the captain of the harvesting vessel that dolphins were not seriously injured or killed in catching the tuna, and the separation of tunas caught in ways that harmed dolphins and "dolphin-safe" tuna.[58] This regime is different from those mentioned above because it is focused on regulating the use of a label, rather than enforcing substantive (international or US determined) fishing standards.

(b) Authorities Targeting flag states[59]

Several statutory provisions authorize the NMFS or another federal agency to restrict imports of fish from countries based on the countries failing to ensure vessels flying their flag comply with US standards or international law. These authorities differ from the proposed import ban on fish caught on the high seas, because the authorities penalize countries, rather than private actors such as importers, by putting the burden on flag states to enforce fisheries regulations against vessels flying their flags. But, in other respects the authorities are useful precedents. Like the programs described above, they are precedents for the use of trade measures to alter fishing practices. Also, some of them also are precedents for using such

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the vessel returns to port and at all points in between. Real-time means as soon as possible, but at least every hour with no more than a 1–hour delay." 50 C.F.R. § 300.101.

[55] Telesetsky takes a broad view of the information generated by CCAMLR's Catch Documentation Scheme, while recognizing that the validity of the scheme depends greatly on flag states (which must monitor their vessels). Telesetsky, supra note , at 775-777.

[56] NMFS regulations go above and beyond CCAMLR regulations in defining the areas where toothfish where may be harvested for export to the US. 50 C.F.R. § 300.105(h) ("NMFS will not issue a preapproval certificate for any shipment of Dissostichus species: (1) Identified as originating from a high seas area designated by the Food and Agriculture Organization of the United Nations as Statistical Area 51 or Statistical Area 57 in the eastern and western Indian Ocean outside and north of the Convention Area;").

[57] NOAA January 2017 report, supra note , at 52; Telesetsky, supra note , at 777-778.

[58] ttps://www.fisheries.noaa.gov/national/marine-mammal-protection/dolphin-safe. See also SIMP, Final Regulatory Impact Review & Regulatory Flexibility Analysis, supra note , at 10 ("The Fisheries Certificate of Origin (NOAA Form 370), together with its supporting statements (captain, observer), provide a record of the harvest event and the circumstances of tuna capture which comport with the U.S. dolphin-safe labeling criteria.").

[59] For useful summaries of the statutory provisions authorizing trade-related measures to alter fishing practices abroad, see NOAA January 2017 Report, supra note , at 86-88 (Annex 2: United States Laws Addressing IUU Fishing, PLMR Bycatch, and Shark Conservation, including Summaries of Recent Enforcement Cases); NOAA Proposed Rule, supra note , at 6219 (February 5, 2016).

measures to enforce US, rather than international, fishing standards against foreign flagged vessels (Moratorium Protection Act § 1826k (equivalent conservation measures), Marine Mammal Protection Act, International Dolphin Conservation Program Act, Shrimp Turtle Law).

Under the High Seas Driftnet Fishing Moratorium Protection Act (the Moratorium Protection Act), NMFS is required "to identify countries whose fishing vessels were engaged in IUU [illegal, unreported, and unregulated] fishing or certain other activities," such as illegally fishing in US waters.[60] If the identified countries do not address the reasons for which they have been identified after consultations, fish imports ultimately may be banned from that country, and the US may deny port privileges to the country's vessels. In its 2017 report to Congress, NMFS identified "Ecuador and the Russian Federation, as having been engaged in IUU fishing based on reported violations of international conservation and management measures during 2014, 2015 or 2016."[61] It also identified "Mexico and the Russian Federation, as having vessels that fished without authorization in waters of the United States."[62] In addition, Mexico was identified "for overfishing stocks shared with the United States."[63] While NMFS did not prohibit the importation of fish from any of these countries, the US apparently has banned Mexican fishing vessels from entering a US port in the Gulf of Mexico.

Under the Marine Mammal Protection Act, NMFS has by rule "establishe[d] criteria and procedures for a harvesting nation to be able to import fish and fish products into the United States. The nation must demonstrate that its regulatory programs for reducing marine mammal mortality during fishing activities are comparable in effectiveness to those of the United States."[64] In addition there are special protections for dolphins. "Under the International Dolphin Conservation Program Act, an affirmative finding by the NOAA Assistant Administrator for Fisheries allows a nation to export to the United States yellowfin tuna harvested with purse seine nets in the Eastern Tropical Pacific. Ecuador, El Salvador, Guatemala, Mexico, and Spain currently have affirmative findings."[65]

The Shrimp Turtle Law bans the import of shrimp harvested in ways that may harm sea turtles, unless the exporting country has adopted comparable regulatory programs to the US to protect sea turtles. The State Department has certified that fourteen countries as having comparable regulatory programs, and many other countries have been identified as harvesting shrimp without harming sea turtles.[66] Even if a country is not certified, shrimp harvested there

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[60] NOAA Fisheries, Improving International Fisheries Management, January 2017 Report to Congress 3; see also Presidential Task Force, supra note , at 7; 16 USC § 1826j & § 1826k. The process for identifying a country under the Moratorium Protection Act, s. 609, is described in NOAA January 2017 Report, supra note , at 17-45.

[61] NOAA January 2017 Report, supra note , at 4.

[62] NOAA January 2017 Report, supra note , at 4; see also id. at 29-30, 32.

[63] NOAA January 2017 Report, supra note , at 4.

[64] NOAA January 2017 Report, supra note , at 5. See also id. at 12-13 ("Section 101(a)(2) of the MMPA requires the banning of imports of fish caught with commercial fishing technology that results in the incidental kill or serious injury of ocean mammals in excess of U.S. standards."); id. at 69; 81 Fed. Reg. 54389 (August 15, 2016); Rob Williams et al., U.S. Seafood Import Restriction Presents Opportunity and Risk, 354: 6318 Science 1372 (10 December 2016).

[65] NOAA January 2017 Report, supra note , at 13; see also 50 CFR 216.24(f)(8).

[66] NOAA January 2017 Report, supra note , at 86 (Annex 2: United States Laws Addressing IUU Fishing, PLMR Bycatch, and Shark Conservation, including Summaries of Recent Enforcement Cases); see also id. at 67; 16 USC

may still be imported if the harvesting vessel was using appropriate technology to protect sea turtles.[67]

The High Seas Driftnet Fisheries Enforcement Act allows "identification of nations whose vessels are engaging in high seas fishing with large-scale driftnets; such identification may lead to limitations on port entry and on the importation of certain products from those nations."[68]

"The Pelly Amendment to the Fishermen's Protective Act provides for the possibility of trade-restrictive measures when the Secretary of Commerce certifies to the President that nationals of a foreign country are" fishing in ways that undermine international fisheries regulations.[69] The President can order the Treasury Secretary "to prohibit the importation of products from the certified country."[70]

(2) Non-US Precedents

The US is not the only major seafood importer to use import bans and the threat of them to alter fishing practices abroad. The European Union has two programs that target countries, threatening to ban seafood imports from those countries.

The EU has a certification scheme under which it imposes obligations on the governments of flag states to ensure compliance with international fisheries regulations (such as RFMO regulations), and the domestic laws of the countries where fish are harvested.[71] The certification scheme was established in a regulation adopted in 2008 and implemented in 2010.[72] All fish imported into the EU – not just priority seafood as under the US SIMP program -- must include a "catch certificate which certifies compliance with fisheries laws and conservation measures."[73] This catch certificate must include a certification from the flag state of the harvesting vessel attesting "to the origin and legality of the fish"[74] – in other words, the location where the fish was harvested must be identified, and the flag state must certify that it was caught in compliance with domestic and international fisheries regulations.[75] EU countries selectively

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1537; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990 (Public Law 101-162), Section 609.

[67] Tracy P. Varghese, The WTO's Shrimp-Turtle Decisions: The Extraterritorial Enforcement of U.S. Environmental Policy Via Unilateral Trade Embargoes, 8 Environmental Lawyer 421, 426, 441 (2002); Julia

[68] NOAA January 2017 Report, supra note , at 86-87 (Annex 2: United States Laws Addressing IUU Fishing, PLMR Bycatch, and Shark Conservation, including Summaries of Recent Enforcement Cases)

[69] NOAA January 2017 Report, supra note , at 13.

[70] NOAA January 2017 Report, supra note , at 13.

[71] Environmental Justice Foundation et al, supra note , at 7.

[72] Environmental Justice Foundation et al., supra note , at 6.

[73] Environmental Justice Foundation et al., supra note , at 6.

[74] Environmental Justice Foundation et al., supra note , at 7; see also Council Regulation 1005/2008/EC on the Community system to prevent, deter and eliminate IUU fishing, 2008 O.J. L. 286/1 at 2.

[75] Council Regulation (EC) No 1005/2008 of 29 September 2008, Preamble (15), art. 12 & Annex II.

audit the accuracy of the catch certificates received with fish imports.[76] Fish caught in violation of applicable law are denied "entry into the EU."[77]

In addition to the Catch Certification Scheme administered by EU countries, the European Commission also administers a "carding process" which also targets states.[78] The Commission investigates whether countries are implementing their obligations as "flag, coastal, port or market states under international law."[79] If the Commission determines that a country is "non-cooperating" it may "yellow-card" the country.[80] To have the yellow card removed (and be "green-carded") the country needs to improve its compliance with international fisheries regulations. If the country does not introduce reforms, it may be "red-carded"; a red card results in seafood imports from that country being banned from the EU.[81] Although a failure to comply with the certification procedure could result in a country being carded, the catch certification and carding processes are distinct and the carding process is focused on ensure country compliance with international fisheries regulations.[82] The EU has interacted "with almost 50 third countries seeking improvements in measures to combat IUU fishing."[83] It has yellow-carded 20 countries; 9 of these 20 have "been delisted."[84] Four countries have been red-carded.[85] Some of the countries that have been carded were not exporting seafood to the EU when they were carded, which reduces the likelihood that the carding would have much impact on behavior by the country.[86]

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All of the programs highlighted above suggest that there are precedents for the three key elements of a unilateral import ban on fish caught on the high seas, although there is no single existing program that combines all three elements. First, there are precedents for a country acting unilaterally to enforce substantive fishing standards that it has established on its own, not as a member of an RFMO ((Moratorium Protection Act § 1826k (equivalent conservation measures), Marine Mammal Protection Act, International Dolphin Conservation Program Act, Shrimp Turtle Law)). Second, there is a precedent for putting the burden on importers to know the location where their product is harvested (the US Seafood Import Monitoring Program). (There are more precedents for requiring flag states to know the locations where their vessels are harvesting: the CCAMLR catch documentation scheme and the EU catch certification regime). Third, there are precedents for using import bans to penalize countries for non-compliance with fisheries regulations (US SIMP, CCAMLR catch documentation scheme, Moratorium Protection

[76] Environmental Justice Foundation et al., supra note , at 7.
[77] Environmental Justice Foundation et al., supra note , at 7.
[78] Environmental Justice Foundation et al, supra note , at 8. See EU IUU Regulation, art. 31.
[79] Environmental Justice Foundation et al., supra note , at 8.
[80] Environmental Justice Foundation et al, supra note , at 19 n. 15 (citing EU IUU Regulation, art. 31(2)).
[81] Environmental Justice Foundation et al. supra note , at 9.
[82] Gilles Hosch, Catch Documentation Schemes: Practices and Applicability in Combatting IUU Fishing, http://www.fao.org/in-action/globefish/fishery-information/resource-detail/en/c/426994/
[83] Environmental Justice Foundation et al, supra note , at 8.
[84] Environmental Justice Foundation et al, supra note , at 8.
[85] Environmental Justice Foundation et al, supra note , at 8.
[86] Hosch, supra note .

Act § 1826k, Marine Mammal Protection Act, International Dolphin Conservation Program Act, Shrimp Turtle Law, Pelly Amendment, EU catch certification system, EU carding process). Some of the precedents provide for banning the importation of specific shipments of fish because they do not comply with fishing standards, while other precedents allow for banning the importation of fish generally from a country whose flagged vessels are deemed non-compliant.

With these precedents demonstrating the potential for an import ban on fish caught on the high seas, I turn to the advantages and disadvantages of unilateral action to end high seas fishing.

2. Advantages and Disadvantages of a Unilateral Import Ban

(a) Advantages

White & Costello seemed to envisage ending high seas fishing through a multilateral agreement. But trying to negotiate the end of high seas fishing through a UN process is likely to be cumbersome and very time-consuming – and all the negotiating effort may not succeed. In 2017, the United Nations General Assembly agreed to proceed in 2018 with negotiating a new implementing agreement under the United Nations Convention on the Law of the Sea (UNCLOS) to protect marine biodiversity and achieve other goals relating to the high seas. The process of persuading the General Assembly to proceed with a new agreement addressing Biodiversity Beyond National Jurisdictions (BBNJ) started in 2004.[87] Fourteen years later, all the General Assembly has agreed to do is start negotiations.

A single jurisdiction taking unilateral steps likely would be able to proceed much faster than a multilateral UN-led process like the BBNJ negotiations. (As an aside, the BBNJ negotiations themselves might be given further impetus by a country taking unilateral steps to ban high seas fishing. The negotiation of the UNCLOS proceeded in tandem with countries unilaterally expanding their claims to fisheries in the oceans.)

One jurisdiction taking unilateral steps also might be a first step toward plurilateral efforts like the "High Seas Ban Club" that Green & Rudyk propose, or a multilateral effort to negotiate a reserve for fish on the high seas. Such plurilateral and multilateral efforts require at least one national champion to make headway, and a first mover could become that champion.

One jurisdiction's experience implementing an import ban, and banning its own vessels from fishing on the high seas, also might provide lessons for other countries in how to proceed. As an example of the impact of one jurisdiction acting on others, the US decision to implement its Seafood Import Monitoring Program "was informed by the early success of the European Union's Catch Documentation System in reducing IUU fishing and seafood fraud in the European Union."[88]

With a ban in place in one jurisdiction, it likely would be cheaper and easier for other jurisdictions to implement similar bans. As mentioned above, the EU implemented its Catch Certification Scheme for all imports in 2010, eight years before the US starting implementing its

[87] Brooks et al., supra note , at 314-315.
[88] Alfa International Seafood v. Ross, --- F.Supp.3d --- (2017).

Seafood Import Monitoring Program in 2018. The final regulatory impact review for the SIMP suggested that the costs of implementing it would be minimal for "fishing entities" in countries exporting to the US which also export to EU countries and so are already complying with the EU catch certificate system.[89]

(b) Disadvantages

On the other hand, there are downsides to trying to end high seas fishing through a unilateral import ban.[90]

Leakage/Displacement

One disadvantage is the potential for displacement (or leakage[91]) of high seas fish and fishing vessels.

First, vessels might continue to fish on the high seas, and merely sell their product to countries without a ban, continuing high seas fishing. The US and the EU seem like the best candidates for introducing an import ban on fish caught on the high seas, given their significance as markets for imported fish, and their track records in establishing unilateral programs to promote respect for fisheries regulations. But even if one or both of them acted unilaterally, there still would be other markets that might be able to absorb the fish that the US and the EU would no longer allow to enter their markets.[92] To be sure, there may be limits to where high seas fish will be displaced. Some high seas fish (such as bluefin tuna) are luxury products that are unlikely to be affordable to many people in developing countries.[93] But there are emerging markets to which such fish might be diverted if it is not allowed to be sold in the US or the EU; also, the price of fish caught on the high seas might decline in the face of bans that reduce demand for it, making it more affordable for countries for which the fish previously had been too costly. For example, China might increase its importation of fish caught on the high seas. It is already a large seafood importer, and as mentioned above, its imports are growing as a result of

[89] Final Regulatory Impact Review and Regulatory Flexibility Analysis, supra note , at 7. See also id. at 9-10 ("The data required to be provided by the harvester to the U.S. importer aligns very closely with the data requirements of the European Union catch certification program and several RFMO schemes. Providing this information to buyers for the U.S. program should be no more costly or burdensome.").

[90] The three risks that I identify of proceeding unilaterally are similar to the three risks that Green & Rudyk identify with the high seas ban club option. Green & Rudyk, supra note , at 6 ("There are three issues that may limit the effectiveness of a high seas ban club: sufficient monitoring/transparency, preventing leakage, and concordance with existing international law.").

[91] Green & Rudyk use the term "leakage." Green & Rudyk, supra note , at 6.

[92] Similarly, Hosch argues that a seafood importing country should unilaterally implement a catch documentation scheme only if it "controls the largest share of the import market for a specific resource." http://www.fao.org/in-action/globefish/fishery-information/resource-detail/en/c/426994/

[93] See Fifield, supra note (describing Japan as "by far the world's biggest consumer of bluefin, eating about 80 percent of the global haul in the $42 billion tuna industry," and noting that "Pacific bluefin is particularly prized in Japan for its fatty underbelly, called "otoro," which sells for as much as $23 per piece at Michelin-starred sushi restaurants in Tokyo").

its economic growth. It is also the largest exporter of fish,[94] and one of the one of the countries spending the most on subsidies for fishing.[95]

One factor that might limit the extent to which fish would continue to be caught on the high seas and sold elsewhere is that the banning jurisdiction would no longer be subsidizing high seas fishing by vessels flying its flag. As mentioned above, fishing on the high seas may not be economic absent subsidies, especially for fuel, and so unless vessels were able to re-flag in jurisdictions that would subsidize them, vessels may have little choice but to stop fishing on the high seas.

A second form of displacement might involve fishing vessels, rather than fish. As suggested above, vessels flying the flag of the jurisdiction implementing the ban might seek to re-flag in another country still allowing high seas fishing. The country likely would ban fishing on the high seas by vessels flying its own flag so as to fully exclude high seas fish from its market and reduce the likelihood of successful challenges under WTO law. Its own-flagged vessels that fish the high seas therefore might choose to re-flag in other jurisdictions that continue to allow high seas fishing. If the jurisdictions in which the vessels re-flag are more lenient than the banning country (prior to enforcing the ban) in enforcing RFMO regulations, than the displacement of vessels could have deleterious consequences overall for the state of high seas fish. However, if, as some evidence suggests, high seas fishing is unprofitable absent government subsidies, especially fuel subsidies, then vessels wanting to continue to fish on the high seas would be limited to re-flagging with countries willing to subsidize high seas fishing by vessels that had not previously flown their flags. So the need for subsidies might curtail the ability of vessels to continue fishing the high seas by re-flagging.

Even if vessels flying the flag of the banning country did not re-flag with another country, there would still be many vessels allowed to fish on the high seas, because their flag nations permit it. These vessels might catch the fish that any vessels exiting the high seas fail to catch, provided there still were markets for the fish (see discussion above for the potential for high seas fish to be displaced to different markets if a single jurisdiction bans its importation).

Notwithstanding the potential that some of the environmental benefits of a unilateral ban might be eroded through displacement of fish and fishing vessels to other countries, there still may be a case for acting unilaterally. Unilateral action by a major seafood importer might be an initial step toward the development of a norm favoring the protection of high seas populations as a form of fish bank.[96] With emerging economies such as China and India apparently showing interest in expanding their fleets of vessels harvesting on the high seas, now might be an opportune time to take steps that would emphasize the benefits of protecting the high seas, and enhance catches in EEZs.

Enforcement

[94] FAO, The State of World Fisheries and Aquaculture. Contributing to Food Security and Nutrition for All 54 (2016)

[95] Global Ocean Commission, supra note , at 17 ("Developed countries grant 70% of fishing subsidies, with Japan, China, the EU and the US the highest spenders.").

[96] Green & Rudyk, supra note .

A second set of concerns with acting unilaterally relates to whether a single jurisdiction actually could exclude all fish caught on the high seas from its domestic market. Keeping out fish caught on the high seas would require knowing where fish was caught, and in particular knowing that it was not caught on the high seas. This information is not easy to determine, however. The supply chain for seafood is complex. Fish may be caught on the high seas, transshipped (meaning transferred) at sea, landed at port, exported to another jurisdiction for processing, and then exported to another country for sale to end-consumers. Along the way, there are many opportunities for commingling fish caught from one vessel with fish caught by others: a ship receiving fish at sea might be receiving fish from several vessels, and so might a processor.

The complexity of the supply chain has made it possible for fish caught illegally (in contravention of RFMO and domestic fishing regulations) to be exported to countries around the world. "Estimates suggest that global IUU catches correspond to between 13% and 31% of reported fisheries production."[97] "[I]llegal and unreported catches represented 20-32% by weight of wild-caught seafood imported to the USA in 2011.[98] The precedents for a ban on high seas fish described above are intended to reduce IUU fishing, by curtailing access to US and EU markets for fish that is illegally caught in violation of RFMO and national regulations. The US Seafood Import Monitoring Program, the EU Catch Certification Scheme, and toothfish catch documentation scheme are especially relevant because they require that fish arriving at a nation's borders come with documentation about where it was caught, which is exactly the information that would be needed to enforce a ban on the importation of fish caught on the high seas. Moreover, there are indications that at least one of these precedents has succeeded in curtailing IUU fishing. While Hosch doubts that the EU Catch Certification Scheme has reduced imports of IUU fish into the EU, Hosch explains that:

> In CCAMLR, IUU fishing for Toothfish in the Convention Area by non-licensed "pirate" vessels was the most pressing issue, and IUU incidence in the late nineties was estimated to exceed official catches by more than double before the putting in place of the CDS [Catch Documentation Scheme]. In 2015, the Coalition of Legal Toothfish Operators (COLTO) estimated the fraction of IUU catch to be 6% of the total annual harvest, crediting the CDS as one of a mix of effective enforcement actions instrumental in achieving this result.[99]

A ban on high seas fishing might be easier to implement than the variety of international fisheries regulations that the US, the EU and other countries are currently struggling to enforce. These existing regulations permit fishing on the high seas subject to various limitations such as overall catch limits not being exceeded, and restrictions on when, where and how fish are taken.[100] An outright ban would require verifying only the location of the harvest, not when the

[97] Environmental Justice Foundation et al, supra note , at 3.
[98] Ganapathiraju Pramod et al., Estimates of Illegal and Unreported in Seafood Imported into the USA, 48 Marine Policy 102, 102 (2014).
[99] http://www.fao.org/in-action/globefish/fishery-information/resource-detail/en/c/426994/
[100] See, e.g. conservation measures under CCAMLR. https://www.ccamlr.org/en/conservation-and-management/browse-conservation-measures

fish was caught or what kind of gear was used. The key to effectively implementing a ban would be the ability to know, for every shipment of fish that might have come from the high seas, where the fish was caught with a high degree of confidence, so as to be able to exclude fish caught on the high seas. Because few fish are caught exclusively on the high seas (only one or three percent of fish), the species of the fish could not be used as a proxy for "high seas fish."[101] However, it might be the case that certain species of fish are more likely to be caught on the high seas than in EEZs. If this is true, then the species type might be used as a basis for selectively auditing the information about the origins of the fish. As in the US Seafood Import Monitoring Program and the EU Catch Certification Scheme, a jurisdiction imposing a ban likely would not verify the accuracy of information provided about the origin of every shipment of fish entering the country, but rather selectively audit the information based on the risk of inaccuracy (or, more specifically, the risk that the fish was caught on the high seas).

As under the Seafood Import Monitoring Program, importers could be required to supply information about the location where the fish they are importing was harvested (or have that information available in case they were chosen for an audit). This would put the burden on importers to know the origins of their product, as the SIMP does. It would likely be necessary to require that the location information be provided in terms of GPS coordinates as the EU Catch Certification Scheme apparently requires, as specifying the major FAO fishing area as the SIMP requires for high seas fish likely would not be sufficient to verify whether the fish was caught on the high seas. Alternatively, using the EU and CCAMLR's toothfish Catch Certification Schemes as models, importers could be required to provide a certificate validated by the flag state of the harvesting vessel as to the location of the harvest. This approach puts the major burden on the flag state; the importer is merely a conduit for the information about harvest location.

Regardless of whether importers or flag states have the burden of validating the location of the harvest, it would be necessary to have a means of verifying that information. Under the toothfish documentation scheme (which Hosch's comments implies is the most successful of the existing catch certification schemes), the ability to verify the location of the catch seems to derive from the requirement that all vessels fishing in the CCAMLR area have satellite-based Vessel Monitoring Systems (VMS) relaying their locations to their flag state and/or CCCAMLR. Vessels with VMS have a unit on them that sends information to a satellite; the information permits identification of the location, speed and direction of the vessel. VMS is useful for determining whether a vessel is fishing in an area closed to fishing, as the high seas would be under a ban, because the pattern of the pings from the vessel can be used to determine if the vessel is stationed (and likely fishing) in a an area, or merely transiting through it.[102] So if all vessels that could fish on the high seas had VMS, then the location where there vessels are harvesting could be tracked and known. Small fishing vessels participating in near-shore fisheries would not be need to be equipped with VMS because they would not be able to harvest fish on the high seas.

[101] Supra note 4.

[102] Natural Resources Defense Council & Cleary Gottlieb Steen & Hamilton, LLP, The Magnuson Stevens Fishery Conservation and Management Act: Lessons From U.S. Fisheries Management 25-26 (March 2016); In the Matter of Jason Robinson, SW 1002974, *9 (NOAA 2013) (cited in NRDC & Cleary, supra, at 26 n. 182).

I do not know how widespread the use of VMS is in fisheries worldwide. VMS is an important component of US fisheries management. The US claims to have "the largest national VMS fleet in the world"; it monitors over 4,000 fishing vessels using VMS.[103] VMS is used to monitor US vessels fishing in the US EEZ;[104] in addition, all US-flagged vessels permitted to fish on the high seas are required to have VMS.[105] The EU also has detailed requirements for VMS for fishing vessels flying the flags of member states of the EU.[106]

It might be possible to make VMS the norm among fishing vessels worldwide. It might initially be costly to install VMS on fishing vessels, but once VMS is operating it seems reasonably cheap to maintain and use to track vessels.[107] In the 2015 rulemaking requiring that all US vessels fishing on the high seas have VMS, NMFS estimated that it cost "[u]p to $3,100" to purchase a VMS unit for a vessel, and "$50-400" to install it.[108] However, another source suggests that a VMS unit might cost less than $1,000.[109] The cost of sending reports from a VMS is small ($0.06 per report, according to the 2015 rulemaking), as is the cost of maintaining the VMS ($50-100 annually).[110] So NMFS estimated that in subsequent years, after the VMS was installed, the VMS would cost a vessel $625 a year, assuming a certain number of reports.[111] The entity monitoring the VMS data (the flag state, for example) also would face costs, such as the cost of receiving the data and the costs of paying people to review it.[112] A country banning the import of high seas fish might subsidize the cost of other countries' vessels installing VMS on fishing vessels and establishing operations to monitor the VMS data.[113] It is an open question how an exporting country would value the cost of installing VMS on its fishing vessels to ensure

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[103] http://www.nmfs.noaa.gov/ole/about/our_programs/vessel_monitoring.html. According to this website, VMS is used in over 22 fisheries (domestic and high seas) in which US vessels participate. http://www.nmfs.noaa.gov/ole/slider_stories/2015/3june15_vms_program_codifies_requirements.html

[104] http://www.nmfs.noaa.gov/ole/about/our_programs/vessel_monitoring.html; In the Matter of Jason Robinson, SW 1002974, *6 (NOAA 2013) (Pacific groundfish fishery)

[105] National Oceanic and Atmospheric Administration, International Affairs; High Seas Fishing Compliance Act; Permitting and Monitoring of U.S. High Seas Fishing Vessels, Final Rule, 80 Fed. Reg. 62488, 62492 (October 16, 2015); 50 CFR Subpart Q 300.337.

[106] EU Regulation, EC No 1224/2009, from November 20, 2009, article 9.

[107] NRDC & Cleary, supra note , at 26.

[108] National Oceanic and Atmospheric Administration, International Affairs; High Seas Fishing Compliance Act; Permitting and Monitoring of U.S. High Seas Fishing Vessels, Final Rule, 80 Fed. Reg. 62488, 62492 (October 16, 2015).

[109] Brett Wiedoff, Pac. Fishery Mgmt. Council, Vessel Movement Monitoring – Scoping and Strawmen Alternatives at 11 (Apr. 2015), http://www.pcouncil.org/wp-content/uploads/2015/04/I1_SupStaffPPTOverview_Wiedoff_APR2015BB.pdf (cited in NRDC & Cleary, at 26, no. 185).

[110] National Oceanic and Atmospheric Administration, International Affairs; High Seas Fishing Compliance Act; Permitting and Monitoring of U.S. High Seas Fishing Vessels, Final Rule, 80 Fed. Reg. 62488, 62492 (October 16, 2015).

[111] National Oceanic and Atmospheric Administration, International Affairs; High Seas Fishing Compliance Act; Permitting and Monitoring of U.S. High Seas Fishing Vessels, Final Rule, 80 Fed. Reg. 62488, 62492 (October 16, 2015).

[112] NRDC & Cleary, supra note , at 26.

[113] When NMFS mandated that all US-flagged high seas vessels install VMS, it reimbursed part of the cost that vessels incurred in purchasing VMS. http://www.nmfs.noaa.gov/ole/slider_stories/2015/3june15_vms_program_codifies_requirements.html; National Oceanic and Atmospheric Administration, International Affairs; High Seas Fishing Compliance Act; Permitting and Monitoring of U.S. High Seas Fishing Vessels, Final Rule, 80 Fed. Reg. 62488, 62489 (October 16, 2015).

continued access to the market of the country banning the import of high seas fish, relative to giving up that market for its products and diverting its products to states with more lenient regulations.

There also are other newer technologies that might enable the location of fishing vessels worldwide to be tracked, although I am not certain whether these technologies would be able to generate the information that would be necessary for a jurisdiction to enforce an import ban on fish caught on the high seas. Automatic ship identification systems (AISs) provide "publicly accessible" data "about a ship's identity, position, and course."[114] McCauley et al. argue that using satellites, it would be now be "possible to use AIS to observe vessel activity anywhere," if fishing vessels were required to have AIS transponders.[115] Currently, only a small number of fishing vessels worldwide are equipped with such units.[116] Although AIS has some disadvantages relative to VMS, AIS provides publicly accessible data, in contrast to VMS systems, which are "'closed-access.""[117] Because the information is public, it can be used by NGOs to help states enforce fishing regulations, including prohibitions on fishing in protected areas of the oceans.[118] For example, the Pew Charitable Trusts has funded the development of "Project Eyes on the Seas" that uses AIS and other data for this purpose.[119] "Eyes on the Seas" will be used to help Palau enforce its marine sanctuary.[120] NOAA also has "new Boat Detection products" that use satellite data to detect "vessels that are lit or use lights, including fishing vessels using lights to attract fish."[121] These apparently "can detect human activity in marine protected areas." [122]

There also are older methods of enforcing fishing regulations that might be used to verify the location of fish catches, including requiring the presence of human observers on fishing vessels, and trip reports.[123] However, it can be expensive to place human observers on fishing vessels,[124] and trip reports by vessels need to be validated.

As mentioned above, a ban on the importation of high seas fish likely would be accompanied by the banning jurisdiction prohibiting its fishing vessels from fishing on the high seas. It likely would be administratively straightforward for the US and the EU to prohibit their vessels from fishing on the high seas. The US requires that vessels have a special permit to fish on the high seas and there currently are 467 US-flagged vessels permitted to do so.[125] The EU

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[114] Douglas J. McCauley et al., Ending Hide and Seek At Sea, 351 Science 1148 (11 March 2016).
[115] McCauley et al., supra note , at 1148.
[116] McCauley et al., supra note , at 1148-1149
[117] McCauley et al., supra note , at 1148.
[118] McCauley et al., supra note , at 1148.
[119] http://www.pewtrusts.org/~/media/assets/2015/03/eyes-on-the-seas-brief_web.pdf
[120] http://www.pewtrusts.org/en/about/news-room/press-releases/2015/01/21/pew-unveils-pioneering-technology-to-help-end-illegal-fishing
[121] NOAA January 2017 report, supra note , at 59.
[122] NOAA January 2017 report, supra note , at 59.
[123] NRDC & Cleary, supra note , at 26-27.
[124] NRDC & Cleary, supra note , at 27; National Oceanic and Atmospheric Administration, International Affairs; High Seas Fishing Compliance Act; Permitting and Monitoring of U.S. High Seas Fishing Vessels, Final Rule, 80 Fed. Reg. 62488, 62493 (October 16, 2015). NMFS reports that "Most high seas fishing vessels are already subject to requirements for carrying an observer." Id. It is presumably referring to US-flagged high seas vessels.
[125] It is difficult to bring a successful takings claim for the revocation of a fishing permit. American Pelagic.

also requires that its member countries authorize fishing on the high seas by vessels flying their flags.

Legal Risks

It would be a major departure from existing US policy for the US to ban the importation of fish caught on the high seas. The US has attempted to improve the status of high seas fisheries by strengthening the RFMOs and invested significant efforts in improving their capacity and operations. The Seafood Import Monitoring Program is one example of these efforts, as it is intended to help enforce RFMO fisheries regulations. Because both the executive branch and Congress have been committed to strengthening the RFMOs, it might be necessary for Congress to specifically authorize a ban on high seas fishing, and the retirement of existing permits authorizing US vessels to fish on the high seas.[126] [Need to further investigate whether NMFS could by regulation ban high seas fishing and the import of high seas fish, under current legislative authorities.]

In addition to the possibility that legislation may be necessary to authorize a ban, any ban would have to be carefully crafted to be consistent with WTO law. Foreign countries exporting fish to the US, including China and Canada, have already raised concerns about whether the Seafood Import Monitoring Program complies with international trade law.[127] Past US efforts to unilaterally alter fishing practices by foreign vessels to protect sea turtles and dolphins have given rise to celebrated WTO cases.[128] Green & Rudyk indicate that a "High Seas Ban Club" could be implemented to be comply with international trade law;[129] assuming their analysis is correct, international trade law also should not stand in the way of a properly crafted unilateral ban on the import of fish caught on the high seas. [Need to expand the analysis of the WTO consistency of a unilateral ban on the importation of high seas fish.]

One factor that might complicate efforts to defend a unilateral import ban is the widespread perception that international law provides a right to fish on the high seas. As Brooks et al. emphasize, however, there is no absolute right to fish on the high seas; even under the Law

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[126] For evidence of NOAA's commitments to strengthening the RFMOs, see NOAA January 2017 report, supra note . On Congress's commitment, see 16 U.S.C.A. § 1826i(a) (directing "the Secretary, in consultation with the Secretary of State" to "take actions to improve the effectiveness of international fishery management organizations").

[127] http://spsims.wto.org/en/SpecificTradeConcerns/View/415; http://www.iuuwatch.eu/2017/10/wwf-report-urges-japan-adopt-monitoring-program/; Bruno G. Simões & Tobias Dolle, The Global Combat Against IUU Fishing: The United States Proposes a New Seafood Traceability Program, 7 Eur. J. Risk Reg. 421 (2016).

[128] For a recent decision upholding the latest version of the US rules governing the use of dolphin-safe labelling, see United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Recourse to Article 21.5 of the DSU by the United States; Second Recourse to Article 21.5 of the DSU by Mexico (Reports of the Panels, 26 October 2017).

[129] Green & Rudyk, supra note , at 6 ("Any ban on imports is a prima facie violation of WTO rules on limits on quantitative restrictions, but could reasonably be allowed through the general exception "relating to the conservation of exhaustible natural resources" in Article XX of the GATT. Such an exception would require demonstrating that the proposed fish trading club was not a disguised restriction on trade and a tailored response to the problem of IUU fishing on the high seas.").

of the Sea Convention, the right to fish on the high seas is "conditional" upon conserving "the marine environment."[130]

3. Why the United States Might Act Unilaterally to End High Seas Fishing

A country banning the import of high seas fish in order to protect these fish populations would be a conferring a positive externality. Moreover, as discussed above, there is no guarantee that one country's actions to protect high seas fish would not be undermined by the actions of other countries' fishing vessels. They could simply harvest the fish that the banning jurisdiction prohibits its vessels from taking, and sell that fish elsewhere. So is there any reason to think that a jurisdiction, such as the US, might take it upon itself to unilaterally ban the importation of fish caught ono the high seas?

As the precedents outlined in part 1(b) suggest, the US (and the EU) already have taken measures intended to protect high seas fish that impose administrative costs on the US and the EU, without any guarantee of a corresponding benefit to the US and the EU – or to high seas fisheries, because other importing countries may continue to disregard RFMO regulations. The history of measures such as the Seafood Import Monitoring Program, the Shrimp Turtle Law, and the dolphin-safe labelling regime, suggests that there might be some circumstances under which the US might ban the importation of fish caught on the high seas in the future, even though, as mentioned above, this would be a major departure from the existing US policy of trying to protect high seas fisheries through the RFMOs.

While I still need to inquire further into the history of these unilateral measures, two conditions are likely conducive to unilateral US action to protect international fisheries or marine mammals.

One is concerted pressure from the US environmental community to protect the fish or marine mammal population, linked with public outrage. Vivid images of dolphins being harmed by tuna fishers appear to have played a role in the US establishing its "dolphin-safe" tuna labelling regime.[131] Environmental groups also played a role by organizing boycotts of tuna caught in ways that harmed dolphins, and lobbying for legislation.[132] I do not know of any particularly charismatic high seas fish. But there still may be a similar potential to generate public outrage at fishing on the high seas. In 2015, the New York Times published a series of 6 articles on "lawlessness on the high seas."[133] The series emphasizes that high seas fishing is not only environmentally destructive, but also entails massive violations of human rights, because

[130] Brooks et al., supra note , at 293; see also id. at 295-296.
[131] Denis A. O'Connell, Tuna, Dolphins, and Purse Seine Fishing in the Eastern Tropical Pacific: The Controversy Continues, 23 UCLA J. Envtl. L. & Pol'y 77, 78 (2005); Jennifer Ramach, Note, Dolphin-Safe Tuna Labelling: Are the Dolphins Finally Safe?, 15 Va. Envtl L.J. 743 (1996).
[132] O'Connell, supra note , at 85; Ramach, supra note , at 753.
[133] See, e.g., Ian Urbina, A Renegade Trawler, Hunted for 10,000 By Vigilantes, N.Y. Times, July 28, 2015, http://www.nytimes.com/2015/07/28/world/a-renegade-trawler-hunted-for-10000-miles-by-vigilantes.html

fishing crew on vessels fishing on the high seas, where police are faraway, are sexually and physically abused, denied pay, and killed.[134]

I have not surveyed US environmental groups for their positions on high seas fishing. But my impression is that the environmental groups that take an interest in high seas fishing are still focusing on protecting the high seas through RFMOs and the BBNJ process at the UN. If these groups grow sufficiently frustrated with the BBNJ process and the RFMOs, they may switch to favoring an outright ban on high seas fishing. The Pew-funded Global Ocean Commission report from 2014 argued that if environmental conditions in the oceans continued to decline, then the high seas should be turned into a "regeneration zone" – a protected area, where fishing would be banned -- until regulatory measures were introduced to protect them.[135] Pew is a leading funder of work to protect the oceans, and this recommendation could signal an openness to considering the more radical option of ending fishing on the high seas if existing multilateral and plurilateral processes failed to bear fruit. Even if Pew and other environmental groups were to shift to supporting the end of fishing on the high seas, they still might want favor plurilateral and multilateral approaches to doing so because of concerns that unilateral steps ultimately would not yield much by way of environmental protection. However, as mentioned above, unilateral steps by the US or the EU ultimately could become a stepping stone to plurilateral or multilateral options, and a national champion would be need to stop fishing on the high seas.

A second condition conducive to unilateral action would be a lack of opposition from the domestic fishing industry for an import ban. Active support from the domestic fishing industry might be even more helpful politically. There are some reasons for thinking that portions of the US fishing industry might not oppose a unilateral ban on high seas fishing by US vessels, and the importation of fish caught on the high seas.

The current US policy of trying to enforce RFMO fisheries regulations through programs such as the Seafood Import Monitoring Program likely is in the interests of the US fishing industry. Enforcing international rules may help to level the playing field between the US fishing industry, which is stringently regulated under the federal Magnuson-Stevens Act, and international fishers, and so protects the domestic industry from being "unfairly" undercut on price.[136] An outright ban on the import of fish caught on the high seas would increase demand

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[134] See e.g., Ian Urbina, 'Sea Slaves": The Human Misery That Feeds Pets and Livestock, N.Y. Times, July 27, 2014 http://mobile.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html?referer=http://www.nytimes.com/interactive/2015/07/12/world/100000003785574.embedded.html ; Ian Urbina, Tricked and Indebted on Land, Abused or Abandoned At Sea, N.Y. Times, November 9, 2015, http://www.nytimes.com/2015/11/09/world/asia/philippines-fishing-ships-illegal-manning-agencies.html.

[135] Global Ocean Commission, supra note , at 74-76.

[136] Presidential Task Force, supra note , at 5; NOAA, SIMP Proposed Rule February 5, 2016 at 6216 ("The domestic fishing community also expressed the desire for importers to be held to the same documentation standards that apply to U.S. fisheries because they feel that they 'already provide a staggering amount of information and demonstrate a high degree of traceability.'"); see also id. at 6218; Final Regulatory Impact Review at 2 ("IUU fishing in other parts of the world can cause problems in places where there are strong rules managing fisheries, such as the United States….IUU fishers gain an unfair advantage in the marketplace over law-abiding fishing operations as they do not pay the true cost of sustainable production.").

for the fish caught by the domestic industry, and potentially the price that the domestic industry can command, even more than enforcing existing international rules.

Moreover, few US fishers might suffer if the US banned vessels flying its flag from fishing on the high seas. "The U.S. EEZ is the largest in the world,"[137] and most of the US catch is caught within the US EEZ.[138] Only 5.6% (by weight) or 6.5% (by value) of the US catch is from the high seas.[139] Tuna is by far the most important species that US flagged vessels catch on the high seas; tuna accounts for 98% (by weight) and 95% (by value) of the US high seas catch.[140] These high seas tuna catches apparently are concentrated in the Pacific,[141] where the US has a large national marine monument in its EEZ that likely reduces the ability to fish for tuna in the EEZ. Even though there are some US vessels that stand to lose from a ban on fishing on the high seas, their losses might be mitigated by redirecting them to harvest in the US EEZ, or financially compensating them outright by buying them out of high seas. The US has previously bought out fishing vessels to reduce pressure on EEZ fisheries. It is an open question whether a combination of a push by environmentalists for a ban on stopping high seas fishing, and tacit support from the large portion of the US fishing industry that does not participate in fishing on the high seas, might be sufficient to induce the US to be a first mover in ending high seas fishing. But it is possible to imagine a confluence of factors that could lead the US to unilaterally ban fishing on the high seas.

Conclusion

The bold proposal to end fishing on the high seas is worth considering because of its potential for significant environmental benefit. While the proposal remains a "fringe idea" at the moment, supported perhaps only by a few conservationist-minded academics, it is possible to imagine ways that it might be implemented. This essay has sought to emphasize the potential for unilateral steps to implement a ban, by a leading seafood importer such as the United States. Given the risk of leakage discussed above, a unilateral import ban is probably best regarded as a stepping stone toward plurilateral or multilateral action. But someone always needs to take the first step.

[137] http://www.gc.noaa.gov/documents/2011/012711_gcil_maritime_eez_map.pdf
[138] Kindlon memo (citing Sea Around Us, Catches by EEZ by the fleets of USA).
[139] Percentages are author's own calculations based on commercial landings data in Fisheries of the United States 2015 at 14, 17 (572,819,000/10,265,735,000 lbs, and $356,783,000/5,487,101,000); see also Kindlon memo (citing Sea Around Us, Catches by EEZ by the fleets of USA).
[140] Percentages are author's own calculations based on commercial landings data in Fisheries of the United States 2015 at 14, 17 (562,704,000/572,819,000 lbs and $338,784,000/356,783,000).
[141] Kindlon memo (citing Sea Around Us, Catches by EEZ by the fleets of USA).