

How to stop illegal fishing:

STATELESS VESSELS



stop illegal fishing



**AFRICAN PORTS
NETWORK**
to stop illegal fishing

WHAT IS A STATELESS VESSEL?

A vessel that lacks proper registration, has no flag, or has two or more flags can be considered stateless.



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The nationality of vessels provides a basis for maintaining order on the high seas: the absence of any authority over vessels on the high seas would lead to chaos. The 1982 United Nations Convention on the Law of the Sea (UNCLOS) requires States to determine the conditions for the granting of its flag – and therefore its nationality – to vessels.

Flag States have always had the primary responsibility for enforcement of their vessels on the high seas. They must exercise 'effective control' over their vessels, for example by ensuring: monitoring, control and surveillance (MCS) of the vessel; compliance with national, regional and international law and measures of regional fisheries management organisations (RFMOs); and that the vessel does not undermine the effectiveness of RFMO measures.

The international community continues to develop rules – and enforcement mechanisms – on a global and regional basis to deal with 'bad actors' on the high seas, and to control the activities of non-national vessels in areas under national jurisdiction.

The rules respond to a wide range of challenges presented by stateless vessels that wish to:

- fish illegally on the high seas, with no obligation to make reports or obey management measures agreed by RFMOs;
- carry out at-sea transshipments and 'laundering' of illegally caught fish;
- avoid submitting required information such as vessel owners or operators;
- avoid control and enforcement;

- avoid payment of registration fees and national legal requirements;
- smuggle arms, immigrants or be involved in other transnational crimes;
- avoid vessel safety, environmental and labour requirements; or
- continue fishing activity even though they may have been deregistered by a flag State.

Another challenge is the development of legal and enforcement mechanisms that apply to stateless vessels on the high seas. Boarding and inspection of vessels reasonably suspected to be stateless on the high seas is permitted under UNCLOS (Article 110), but this should first be mandated by national laws of the government whose vessel is involved in the apprehension.

The legislation should also provide specific offences for owners and operators of stateless vessels that participate in high seas illegal, unreported and unregulated (IUU) fishing operations, as appropriate linked to RFMO measures and decisions. It may also include a presumption that a fishing vessel was engaged in IUU fishing if it has no nationality and is therefore stateless in accordance with international law.

WHAT DOES STATELESSNESS MEAN FOR BOARDING, INSPECTION AND ENFORCEMENT?



LEGAL AND POLICY

LEGAL FRAMEWORK

1982 UN Convention on the Law of the Sea (UNCLOS)

- Requires vessels to sail under the flag of one State and provides that the ship is subject to that State's exclusive jurisdiction on the high seas, save in exceptional cases provided in international treaties.
- Prohibits vessels from changing their flags during a voyage or while in a port, save in the case of a real transfer of ownership or change of registry.
- Provides that vessels may be considered as without nationality where they sail under the flags of two or more States, using them according to convenience – such vessels cannot claim any of the nationalities.

Generally, a flag State has the same exclusive right to exercise legislative and enforcement jurisdiction over its vessels on the high seas as it does over its territory. Conversely, this means that vessels without nationality – or stateless vessels – cannot claim the protection of any State.

Stateless vessels cannot benefit from the freedom of the high seas because that freedom belongs only to States, not to individual vessels. However, the operation of a stateless vessel is not a universal crime.

2001 Food and Agriculture Organization (FAO) International Plan of Action to combat IUU fishing (IPOA-IUU)

The IPOA-IUU definition of “unregulated fishing” includes fishing activities in the area of an RFMO that are conducted by vessels without nationality.

The IPOA-IUU also encourages States to take measures consistent with international law in relation to stateless vessels on the high seas involved in IUU fishing.

HIGH SEAS



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On the high seas, States may board and inspect vessels where statelessness is suspected. For follow-up enforcement and other measures, States should ideally adopt legislation with extraterritorial effect and/or procedures that incorporate regional or international standards.

A **State** may board and inspect fishing vessels on the high seas where there are reasonable grounds for suspecting that they are without nationality. Where there is evidence of this, the State may take such action as may be appropriate in accordance with international law.¹

International law does not clearly spell out the basis for the 'appropriate action', and three approaches have been taken:

1. Because stateless vessels enjoy the protection of no State, all States may exercise jurisdiction over such vessels. This *carte blanche* approach would include detention where there is evidence of IUU fishing but may have practical limitations in determining other 'appropriate action'.
2. States should enact a *jurisdictional* basis that extends its laws extraterritorially, including to stateless fishing vessels and enforcement activities by its officers on the high seas, as described below. This approach would clearly permit enforcement and prosecution following boarding and inspection. Importantly, it recognises that asserting jurisdiction over a stateless vessel only because it has no diplomatic protection would ignore the possibility of diplomatic protection of the individuals on the vessel by their national States.

3. Where a State has not enacted a jurisdictional basis over the stateless vessels, it should act in accordance with acceptable *regional or international standards of boarding, inspection and detention*. It may, for example, impose measures on the stateless vessel such as prohibiting the use of port but there may not be a legal basis for prosecution.

The *jurisdictional* basis recommended in the second approach would provide a platform for the most robust enforcement at national level of the activities of stateless vessels on the high seas. National legislation should:

- have extraterritorial application, including over its own vessels and for activities of its authorised officers;
- make stateless vessels subject to its jurisdiction;
- require the stateless vessel to be treated as one of its own;
- implement relevant RFMO measures in relation to stateless vessels;
- provide, as appropriate, that the ownership and operation of a stateless fishing vessel is a crime.

This means that the inspecting State could exercise the powers and prosecute the stateless vessel under any law applicable to its own vessels.

¹UN Fish Stocks Agreement, Article 21(17), based on Article 110 of UNCLOS.

NATIONAL WATERS

In the jurisdiction of the enforcing State, the stateless vessel is subject to all national legislation.

Where the stateless vessel is inspected, boarded and detained within the jurisdiction of the enforcing State, it is subject to all applicable national legislation and can be inspected, detained and prosecuted in accordance with all relevant laws.



RFMO AREA

Within an RFMO area of competence, a boarding and inspection scheme and subsequent measures must be agreed.

Boardings and inspections may be carried out under the authority of RFMOs in their areas of competence in accordance with an agreed scheme. For example, the IOTC scheme is carried out by inspectors and inspection vessels assigned to it by a Contracting Party, and officers must be authorised for such activities.

RFMOs have adopted measures that address vessels without nationality, which generally presume that stateless vessels are engaged in IUU fishing. For example, the Indian Ocean Tuna Commission (IOTC) Resolution 16/05 on Vessels without Nationality declares that stateless vessels fishing in the IOTC Area are undermining the IOTC Agreement and are engaged in IUU fishing. IOTC follow-up activities in relation to identified stateless vessels include encouraging effective actions such as prohibition of landings, transhipments and use of port services, adopting necessary measures and information sharing.

This is reflected, for example, in a European Union requirement for members to ensure that every stateless vessel that enters a port is inspected by their competent authority, and to prohibit landing and transhipment where fish is taken contrary to RFMO measures.²

²COUNCIL REGULATION (EC) No 1936/2001 of 27 September 2001 laying down control measures applicable to fishing for certain stocks of highly migratory fish.

CAN A STATELESS VESSEL LEGALLY ACCESS PORT SERVICES?

LEGAL FRAMEWORK

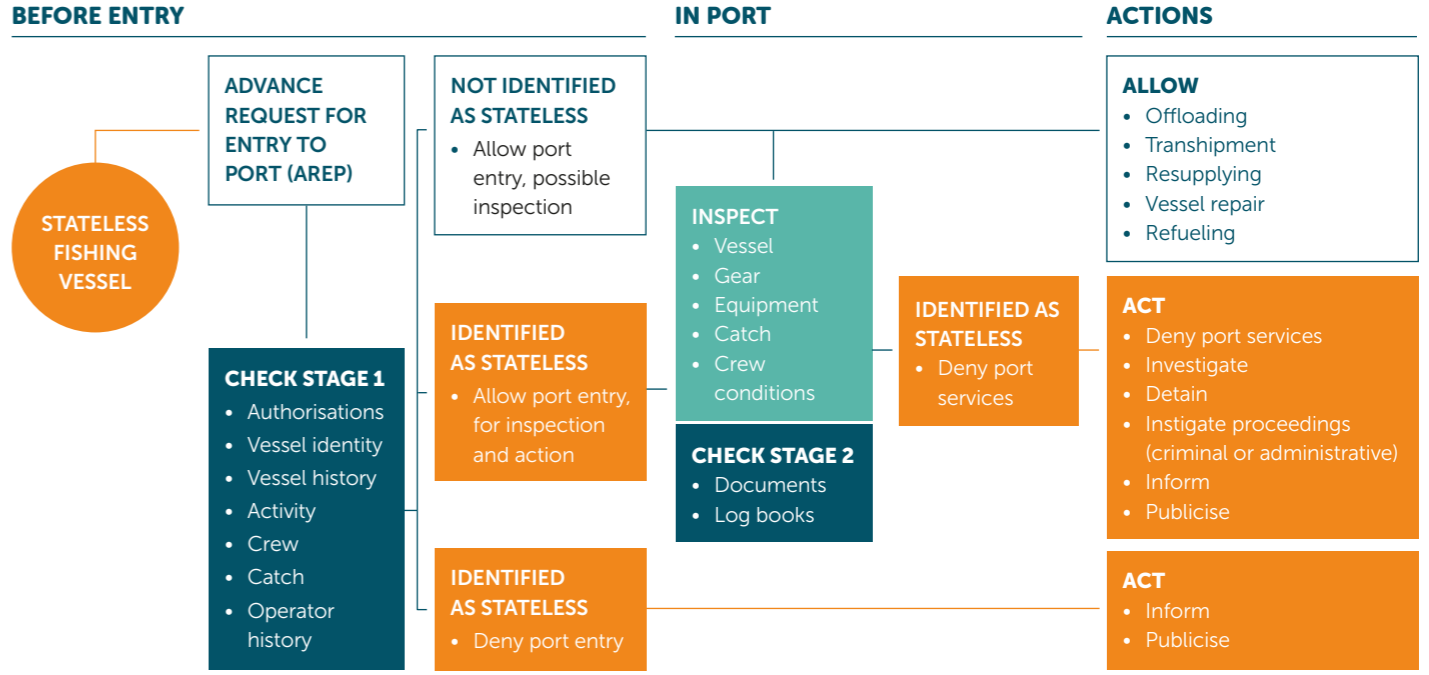
2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing (PSMA)

Where there is sufficient proof that the stateless vessel has been involved in IUU fishing or fishing related activities:

- denial of entry into and use of port services is required;
- however, entry into port may be allowed exclusively for inspecting the vessel and taking other appropriate actions at least as effective as denying port entry; and
- use of port must be denied for landing, transhipping, packaging, and processing of fish and for other port services

including, inter alia, refuelling and resupplying, maintenance and drydocking.

A port State is not legally obliged to provide entry into port or use of port services to any vessel, including stateless vessels, because it has sovereignty over its ports. In fact, members of RFMOs such as the IOTC encourage port States to prohibit landings, transhipments and access to port services to stateless vessels.





WHAT DOES THE STATELESSNESS OF THE VESSEL MEAN FOR THE CREW?

The statelessness of the vessel – and absence of protection by the flag State – would not block protection of the crew by their national governments based on their citizenship.

Crew members could be protected where the legislation of an enforcing State provides that stateless vessels are to be treated the same as their own and requires certain standards for the crew. Even without such legislation, in some cases the enforcing country may protect crew members and repatriate them.

However, crew members could be without protection where the laws of the enforcing country allow prosecution of crew or where they are imprisoned without legal process and their national governments are unsupportive. In this case, the crew would not be protected by UNCLOS, which prohibits imprisonment or corporal punishment only for fisheries offences committed in the exclusive economic zone.

It is difficult, if not impossible, for crew members to secure recourse against the operator of the vessel. For one thing, a stateless vessel is not bound by the laws of any country, including the rights and conditions for crew members. However, various avenues for support of crew members' rights and humanitarian assistance could be provided by the enforcing State, any relevant RFMO or civil society.



WHAT DOES STATELESSNESS MEAN FOR VESSEL INSURANCE?

It may be possible for stateless vessels to hold insurance. A repugnant consequence is that the operator could sink the vessel to remove evidence of IUU fishing and avoid steep fines and penalties, but at the same time claim insurance for the loss of the vessel.

It is often a matter for the individual insurance companies to determine whether or not to insure non-compliant vessels. A 2016 study by Oceana found that vessels included in RFMO IUU Vessel Lists seemed to be insured just as often as law-abiding, flagged vessels.³ So for some companies, the statelessness or illegal activities of the vessel do not deter insurers from granting coverage.

However, insurance companies may be controlled by national law. For example, the European Union has made it a crime to aid and abet illegal fishing, including insuring

vessels involved in it, but leaves it up to its member countries to set penalties.⁴

States should adopt and enforce legislation that requires verification of certain information prior to granting an insurance policy to fishing vessels. This should include full details of the owner, operator and master, the vessel's flag and activities (past and current) and ensuring it is not on an IUU vessel list or is otherwise a 'bad actor'. It should require insurance to be terminated without payment under certain conditions, including statelessness.

³https://eu.oceana.org/sites/default/files/oceana_iuu_and_marine_insurance_brochure.pdf

⁴www.slate.com/articles/health_and_science/science/2016/07/the_self_sunk_pirate_ship_the_thunder_and_recent_research_expose_how_insurance.html?via=gdpr-consent

SUMMARY

How, when, by whom can stateless vessels be boarded, inspected or detained?

Stateless vessels on the high seas can be boarded and inspected:

- by persons authorised by any State, providing there are reasonable grounds for suspecting that they are without nationality; or
- in accordance with a relevant RFMO boarding and inspection scheme.

Where there is evidence of statelessness, States may take such actions and measures as may be appropriate in accordance with international law, which can include:

- the exercise of jurisdiction over a stateless vessel where there is evidence of IUU fishing, including detention;
- those agreed through an RFMO in relation to unregulated fishing; and
- those permitted under the national law of the enforcing State.

Measures against stateless vessels and their owners and operators may include:

- denial of landing, transhipment and other use of port services;
- prosecution of the vessel in accordance with the laws of the enforcing State; and
- proposal to include the vessel on an IUU Vessel List of a relevant RFMO.

RESOURCES

Available on www.stopillegalfishing.org

CASES FEATURING STATELESS VESSELS:

- **IUU Listed Vessels De-flagged** (FISH-i Africa investigation No.3)
- **A Repeat Offender Brought to Book: the NESSA 7** (FISH-i Africa investigation No.9)
- **Regional and International Cooperation Nets Illegal Vessel** (FISH-i Africa investigation No.16)
- **COBIJA Exploits Weak States to Escape Sanctions** (FISH-i Africa investigation No.22)
- **Prosecution of TAWARIQ 1** (SIF Case Study 14)

RESOURCES TO IDENTIFY AND CONTROL STATELESS VESSELS:

- Document Verification Manual for Fisheries Enforcement
- Photo Manual for Fisheries Enforcement
- Evidence Collection Manual for Fisheries Enforcement

ACRONYMS

BMZ	German Federal Ministry for Economic Cooperation and Development
FAO	Food and Agriculture Organization of the United Nations
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
IOTC	Indian Ocean Tuna Commission
IPOA-IUU	International Plan of Action to combat IUU fishing
IUU	Illegal, unreported and unregulated fishing
PSMA	FAO Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing
PSM-SIF	Port State Measures to Stop Illegal Fishing
RFMO	Regional fisheries management organisation
SIF	Stop Illegal Fishing
UNCLOS	United Nations Convention on the Law of the Sea

The 'How to Stop Illegal Fishing' series aims to improve awareness and understanding of the roles and responsibilities of different actors in stopping illegal fishing. As with all of SIF's publications it targets the needs of African fisheries and countries, is based on evidence and analysis, and places legality in the fisheries sector as an essential element of sustainable development.

This guidance has been compiled with the assistance of Judith Swan and has drawn on evidence produced by the FISH-i Africa Task Force and the Stop Illegal Fishing Investigative Unit.

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