

ARTICLE

# Curbing “Dark” Activity at Sea: The Role of the Marine Insurance Industry

Priyal Bunwaree 

Barrister, Blue Marine Foundation, London, UK  
Email: [priyal@bluemarinefoundation.com](mailto:priyal@bluemarinefoundation.com)

## Abstract

Some fishing vessels breach maritime laws by operating with their mandatory tracking systems (Automatic Identification System (AIS)) switched off. Marine insurers act as enablers of this practice since these vessels cannot operate without insurance. This article explores why insurers in England take on the risk of insuring them and assesses how the insurers are operating against the regulatory framework in doing so. It identifies the solutions that could raise standards in marine insurance and lead to increased legal compliance by the insured vessels. This would consequently enhance maritime safety, while increasing transparency in fisheries across all oceans. Importantly, by discouraging vessels from going dark, any illegal activities underlying the non-transmission of AIS data, such as human, drug or weapon trafficking, illegal fishing or sanctions evasion, would also be curbed.

**Keywords:** dark vessels; due diligence; insurance

## I. Introduction

Transparency in fisheries is compromised by “dark” fishing vessels that fail to transmit their location through tracking systems known as automatic identification systems (AIS).<sup>1</sup> This practice increases chances of collision, putting the lives of crew and seafarers, and the marine environment at risk. Such concerns are not unfounded as there is evidence of dark fishing vessels colliding.<sup>2</sup> Beyond safety concerns, by obfuscating their whereabouts, some vessels attempt to hide activities like illegal, Unregulated and Unreported (IUU) fishing, human trafficking, smuggling of weapons and drugs, or sanctions evasion.<sup>3</sup> While it cannot be ascertained, without further investigation, that vessels switching off their AIS are partaking in such activities, going dark, especially for long periods, raises suspicion.

More than 150 fishing vessels operating across the Atlantic, Indian and Pacific oceans and that are legally obligated to operate their AIS were studied, revealing numerous and

---

<sup>1</sup> Dark vessels are those that switch off their tracking systems (Automatic Identification Systems (AIS)), leaving gaps in tracks on satellite imagery between the point of last transmission and that of the next transmission. It is commonly referred to as a “switching off” or “disabling” of AIS.

<sup>2</sup> B Maritime, “Thirty Rescued After Trawler Collision Off Argentina” (20 February 2019) available at <<https://www.bairdmaritime.com/security/non-naval-security/thirty-rescued-after-trawler-collision-off-argentina>> (last accessed 21 November 2024).

<sup>3</sup> P Bunwaree, “The Illegality of Fishing Vessels ‘Going Dark’ and Methods of Deterrence” (2023) 72 (1) *International and Comparative Law Quarterly* 179.

lengthy gaps in AIS transmission.<sup>4</sup> Many vessels were those of EU Member States, in particular France and Spain. A legal analysis of the dark behaviour revealed a widespread lack of enforcement of AIS laws by flag and coastal States, and significant lack of oversight by the EU and its Member States on their fishing vessels operating beyond EU waters.<sup>5</sup>

While the focus of the present article is not on the assessment of the illegality of the practice, some laws allow temporary AIS deactivation in case of imminent security risks. However, the exemption is conditional upon the system being switched back on as soon as the risk disappears, and a record being made in the vessel's logbook. For some of the vessels studied, piracy is often used as an excuse. Yet, it was shown that: (i) industry guidance specifically requires the AIS to remain operational in piracy areas; (ii) most of the vessels concerned either operated far away from piracy risk areas or went dark for extended periods of time; and (iii) verified logbooks showed no records of the disabling events, as required by law.<sup>6</sup> This indicates a widespread abuse of the very limited legal exception for AIS disabling. In fact, some shipowners stated that the AIS "could have been switched off for a commercial advantage. This is not illegal or inappropriate,"<sup>7</sup> reflecting a misunderstanding of applicable laws. These suggest that in many of the cases studied, the disabling of AIS is likely illegal.

Two solutions were proposed – firstly, that States enforce or bolster their AIS laws. Secondly, that the private sector, particularly marine insurers, act more responsibly, as they are key enablers of dark behaviour by insuring those vessels. Without insurance, the vessels cannot operate in international waters nor register to coastal States for fishing. In fact, insurers recognise the value of AIS data in their dealings: "AIS data can be extremely valuable evidence and can save significant costs, especially when investigating smaller incidents since it may not be necessary to appoint lawyers or to take formal witness statements."<sup>8</sup>

The spotlight on the illegality of AIS switching off prompted an increased interest from coastal States, which are most affected by dark vessels in their waters, to gather tracking data to identify fisheries crimes and sanction dark vessels.<sup>9</sup> While fines can deter the illegal switching off of AIS, government detection and investigation of these offences remains slow and uncommon compared to the extent of the issue, with only Spain and the UK reported to have sanctioned dark fishing vessels so far.<sup>10</sup> The alternative lever to State action, the marine insurance industry approach, could encourage effective and prompt

<sup>4</sup> Blue Marine Foundation, "Insurance Data for EU-Associated Purse Seine Fleets," November 2024 (2024) available at <<https://bit.ly/2024purseseineinsurers>>; OceanMind, "IOTC Catch-Effort Assessment, and AIS Usage by Flag-States in the Western Indian Ocean, 2016–2020" (OceanMind Ltd 2022), available at <<https://bit.ly/OceanMindReport2022>> (last accessed 13 December 2024); OceanMind, "AIS utilisation in ICCAT by European flagged fishing vessels" (OceanMind Ltd 2023) available at <<http://bit.ly/AtlanticAIS2023>> (last accessed 7 March 2025).

<sup>5</sup> Bunwaree, *supra*, n 3.

<sup>6</sup> *Ibid*, 197.

<sup>7</sup> Marine Stewardship Council, Decision of the independent adjudicator in the "Objection to the final draft report and determination on the proposed certification of the AGAC Four Oceans Integral Purse Seine Tropical Tuna Fishery (Indian Ocean)" (21 April 2022), para 156.

<sup>8</sup> North of England P&I Association, *An Introduction to P&I Insurance and Loss Prevention* (2nd edn, Newcastle upon Tyne, North of England P&I Association Ltd 2012) p 143.

<sup>9</sup> Blue Justice, "Blue Justice Ocean Surveillance Programme Launched in Partnership with Norwegian Government and UNDP" (Blue Justice, 22 September 2023) available at <<https://bluejustice.org/blue-justice-ocean-surveillance-programme-launched-in-partnership-with-norwegian-government-and-undp/>> (last accessed 18 November 2024).

<sup>10</sup> EC Alberts, "Spain Sanctions Fishing Vessels for Illegally 'Going Dark' Near Argentine Waters" (Mongabay, 11 January 2024) available at <<https://news.mongabay.com/2024/01/spain-sanctions-fishing-vessels-for-illegally-going-dark-near-argentine-waters/>> (last accessed 21 November 2024); Marine Management Organisation, "Fine of £26,677 Imposed for Fisheries Offences" (GOV.UK, 7 July 2017) available at <<https://www.gov.uk/government/news/fine-of-26677-imposed-for-fisheries-offences>> (last accessed 21 November 2024).

compliance with maritime laws and incidentally increase transparency in fisheries. It is an avenue that is further explored in this article as insurance can play a central role in governance beyond the State, with the power to regulate the behaviour of the insured, for example, through “inspections, surveillance, and changed contract conditions regarding ongoing assessment of their conformity to insurance standards . . .”<sup>11</sup>; and furthermore, “insurance offenders are punished in ways parallel to punishment in the criminal justice system” through increased premiums, revocation of cover, etc.<sup>12</sup>

This article assesses the role played by the marine insurance industry in enabling fishing vessels to operate dark (Section I). It analyses whether the insurance industry has a duty to curb such activities (Sections II and III) and considers steps the industry could take (Section IV).

Legal scholars confirmed the enabling role of marine insurers in relation to IUU fishing.<sup>13</sup> IUU fishing is difficult to prove from an evidential perspective, whereas the illegal switching off of AIS (which could enable IUU fishing) is a much clearer breach, easily identifiable and supported by evidence. Courts are also now relying on this technology in proceedings.<sup>14</sup> Since legal literature on dark vessels focuses on the illegal practice from an EU vessel perspective, and the fact that dark EU vessels have been fined, confirming the illegality of the practice, this article builds on these scenarios with a focus on the insurance cover contracted by EU-owned vessels. Many of the fishing vessels studied are insured in the UK<sup>15</sup>; this article thus focuses on UK-based insurers.

## II. Role played by the insurance industry in enabling “dark” vessels

### I. Legal requirements for fishing vessels to be insured

There are no international legal instruments specifically mandating fishing vessels to hold insurance, but some laws require that ships, in general, be insured and these apply to fishing vessels.<sup>16</sup> Relevant to the fishing vessels studied, the International Maritime Organization (IMO) published guidelines for shipowners to hold insurance for personal injury or death of seafarers,<sup>17</sup> and this was made compulsory in the Maritime Labour Convention (MLC).<sup>18</sup> Furthermore, implementing Directive 2009/20/EC, France and Spain require that owners of ships flying their flag hold insurance covering such ships and “insurance” is specifically defined in the Directive as being the type of cover provided by the International Group of P&I Clubs and similar insurers.<sup>19</sup> This provision is reflected in

<sup>11</sup> RV Ericson, A Doyle and D Barry, *Insurance as Governance* (Toronto, University of Toronto Press 2003) p 93.

<sup>12</sup> *ibid*, p 361.

<sup>13</sup> B Soyer, G Leloudas and D Miller, “Tackling IUU Fishing: Developing a Holistic Legal Response” (2018) 7 (1) TEL 139.

<sup>14</sup> *The Owners of the Vessel Sakizaya Kalon v The Owners of the Vessel Panamax Alexander* [2020] EWHC 2604 (Admlty).

<sup>15</sup> Blue Marine Foundation, *Insurance Data for EU-Associated Purse Seine Fleets*, *supra*, n 4.

<sup>16</sup> International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers Convention), Art 7. (Insurance or financial security for pollution damage is required for vessels over 1000 gross tonnage; this applies to all the EU vessels studied); Nairobi International Convention on the Removal of Wrecks (Wreck Removal Convention) Art 12 (requiring compulsory insurance or other financial security for vessels above 300 gross tonnage; this applies to all the EU vessels studied).

<sup>17</sup> IMO, *Guidelines on Shipowners’ Responsibilities in Respect of Maritime Claims*, Resolution A.931(22) (adopted 29 November 2001).

<sup>18</sup> Maritime Labour Convention (adopted 23 February 2006, in force 20 August 2013) 45 ILM 792.

<sup>19</sup> Directive 2009/20/EC of the European Parliament and of the Council of 23 April 2009 on the insurance of shipowners for maritime claims [2009] OJ L131/128, Art 3(b), 4(1).

Royal Legislative Decree 2/2011 and Royal Decree 1616/2011 for Spanish-flagged vessels,<sup>20</sup> and Articles L 5123-1 to 5123-7 of the *Code des Transports* for French-flagged vessels.<sup>21</sup> EU-owned vessels that reflag to some coastal States like the Seychelles and Mauritius also need liability insurance for registration.<sup>22</sup> Insurance cover indicates that the vessels meet safety and operational legal requirements, allowing them to operate in distant waters and reflag to coastal States in order to benefit from additional fishing quota. Without insurance, those vessels would not be able to carry out their fishing operations.

Fishing vessels usually hold two major types of marine insurance – Hull and Machinery (H&M) for damages to the vessel and Protection and Indemnity (P&I) for third party liabilities. Given the nature of fishing operations and the requirement by several States for liability insurance for fishing operations as a pre-condition of registration of the vessels, the most common form of insurance that fishing vessels hold is P&I insurance.<sup>23</sup> P&I clubs issue vessel owners with Blue Cards as proof of third-party liability insurance. These can cover accidental harm caused to seafarers, property and the environment such as the loss of life or injury of the crew and other seafarers, pollution, collision liability above that provided under H&M cover, damage to structures, wreck removal, fines, etc. The objective of AIS is to enhance the “safety of life at sea; the safety and efficiency of navigation; and the protection of the marine environment,”<sup>24</sup> and is thus directly relevant to P&I insurance cover.

## 2. Specificities of P&I Clubs and the mutual insurance provided

### a. P&I Club characteristics

Understanding the central role played by insurers in enabling vessels to go dark is crucial before their responsibility to curb dark activity can be explored. P&I Clubs are peculiar actors in the marine insurance industry and P&I insurance differs from common insurance structures, both in its historical development and in its legal framework. P&I Clubs are mutual associations where members, which include commercial shipowners, were traditionally both insured and insurers.<sup>25</sup> They are mostly based and regulated in London where they historically evolved and to this day maintain a central role in the provision of marine insurance globally. This is of particular importance to this article as many of those insurers are thus regulated under English law – the Financial Services and Markets Act 2000 and, because of their modern incorporated structures, the Companies Act 2006. Club Rules often include a jurisdiction clause to that effect<sup>26</sup>; for example, “[t]his policy shall be governed by and construed in accordance with English law.”<sup>27</sup>

<sup>20</sup> Real Decreto Legislativo 2/2011, de 5 de septiembre, por el que se aprueba el Texto Refundido de la Ley de Puertos del Estado y de la Marina Mercante (*Royal Legislative Decree 2/2011 of 5 September, approving the Revised text of the law on State ports and merchant marine*); Real Decreto 1616/2011, de 14 de noviembre, por el que se regula el seguro de los propietarios de los buques civiles para reclamaciones de derecho marítimo (*Royal Decree 1616/2011 of 14 November, regulating the insurance of owners of civil ships for maritime law claims*) (Spain).

<sup>21</sup> Code des Transports, arts L 5123-1 to 5123-7 (France).

<sup>22</sup> See, for example, Mauritius where third-party liability insurance is required before a foreign vessel can register to fly its flag. available at <<https://blueconomy.govmu.org/Pages/Departments/Shipping%20Division/Registration.aspx>> (last accessed 12 December 2024).

<sup>23</sup> DD Miller and Others, “Cutting a Lifeline to Maritime Crime: Marine Insurance and IUU Fishing” (2016) 14 (7) *Frontiers in Ecology and the Environment* 357.

<sup>24</sup> IMO Resolution A.1106(29), “Annex: Revised Guidelines for the Onboard Operational Use of Shipborne Automatic Identification System (AIS)” para 4.

<sup>25</sup> *The Standard Steamship Owners’ Protection and Indemnity Association (Bermuda) Ltd v Gann and Another* [1992] 2 Lloyd’s Rep 528, 553; however, this is no longer the case due to the incorporation of the clubs, see S Hazelwood, *P&I Clubs: Law and Practice* (4th edn, London, Informa Law 2010) p 64.

<sup>26</sup> These are terms and conditions that apply between the Club and its members.

<sup>27</sup> British Marine, “P&I Terms and Conditions 2024” cl 63.4 available at <<https://britishmarine.com/products/pi/>> (last accessed 14 December 2024).

The concept of mutuality, at the root of the P&I structures, dictates the differential behaviour and regulation of P&I Clubs compared to commercial insurers. In the eighteenth century, in a “spirit of mutual self-help,”<sup>28</sup> shipowners formed associations known as hull clubs to share risks in insuring their ships’ hulls. However, hull clubs declined in popularity as competition with insurance companies grew in the early nineteenth century. Major developments in liability law followed, such as the payment of damages for death or injury of workers during the course of their employment on ships, and in jurisprudence,<sup>29</sup> which precluded shipowners from claiming from their hull underwriters for damages occurring through collisions.<sup>30</sup> Shipowners thus needed additional protection which was provided at cheap cost through the hull clubs, revamped as “protection/protecting” clubs. As major maritime incidents later highlighted a need to indemnify shipowners for a wider range of risks, “protection” clubs evolved to include indemnity – the P&I Clubs were thus named. This historical evolution, driven by collision-related payouts, is highly relevant because the dark vessels are deliberately increasing their collision risks, while P&I Clubs keep renewing their cover.

#### *b. Provision of P&I cover to shipowners of dark vessels*

Unlike commercial insurance, P&I insurance is not set in a policy document. Shipowners seeking liability insurance apply to become members of a P&I Club and are then granted a Certificate of Entry upon acceptance. The insurance is provided through this Certificate of Entry which expressly refers to the articles of association of the Club and to the Rules of Association or classes.<sup>31</sup> The contractual relationship also includes club regulations, byelaws and any other arrangements entered into by the member with the Club. These must all be read together to construe the extent of insurance cover.<sup>32</sup>

Before this Certificate of Entry can be provided, a fair presentation of the risk must be made to the insurer,<sup>33</sup> and is based on the principle that marine insurance contracts must be of utmost good faith.<sup>34</sup> Therefore, shipowners should disclose the periods and circumstances under which their vessels operate dark – these are after all directly related to collision and related risks.<sup>35</sup> Furthermore, this duty of disclosure is repeated at the time of renewal of the insurance cover.<sup>36</sup> Application of this duty of fair presentation means that dark vessel histories should have been disclosed. Absence of such disclosure would amount to a breach of the duty of fair presentation. In such a case, since P&I Clubs opted out of the remedies for breach that usually apply in the insurance industry under Section 8 of the Insurance Act 2015 and only retained the strict remedy of the Marine Insurance Act 1906 before its amendment, “. . . if the utmost good faith be not observed by either party, the contract may be avoided by the other party.”<sup>37</sup>

It is unknown whether the common practice of going dark is disclosed by the shipowners. In case of non-disclosure, shipowners could still be protected as many insurers are aware of the dark activity of vessels that they insure; this matter is brought to their

<sup>28</sup> SJ Hazelwood, *P & I Clubs: Law and Practice* (3rd edn, London, LLP 2000).

<sup>29</sup> *De Vaux v Salvador* (1836) 4 Ad & E 420.

<sup>30</sup> Fatal Accidents Act 1846; Employers’ Liability Act 1880.

<sup>31</sup> JCB Gilman and J Arnould, *Arnould: Law of Marine Insurance and Average* (20th edn, London, Thomson Reuters 2021) paras 4–12.

<sup>32</sup> *The United Kingdom Mutual Steamship Assurance Association Limited v Nevill* (1877) LR 19 QBD 110.

<sup>33</sup> Insurance Act 2015, s 3.

<sup>34</sup> Marine Insurance Act 1906, s 17.

<sup>35</sup> Insurance Act 2015, s 7(4).

<sup>36</sup> *Re Wilson and Scottish Insurance Corporation Limited* [1920] 2 Ch. 28.

<sup>37</sup> Marine Insurance Act 1906, s 17 (Words in s 17 were since omitted (12 August 2016) by virtue of Insurance Act 2015).

attention and placed in the public domain by NGOs and the press.<sup>38</sup> On that basis, in application of Section 5 of the Insurance Act 2015, an insurer ought to know or will be presumed to know that those vessels go dark.<sup>39</sup> If insurers are aware of the extent of non-transmission of AIS data, from a risk assessment perspective the next questions that need to be raised are (i) whether the insurers have considered the breaches of AIS laws; (ii) whether they have verified any defences raised, for example security risks, and cross-checked with logbook data as shipmasters have a legal obligation to log the reasons for switching off. These will be considered in more detail in Section IV of this article. It is clear, however, that the risk assessment stage is not sifting out the dark vessels. The ongoing dark behaviour also suggests that insurance is being renewed yearly without additional conditions that would deter the vessels from going dark. One could assume that there is a disclosure and acceptance of the risks posed by dark vessels between the parties, however, forbearance clauses are inserted in the Club Rules to ensure that the inaction of insurers to raise an issue does not amount to an acceptance of the issue or breach.

### c. Materialisation of risk under P&I cover

Owners of the dark vessels studied are thus obtaining P&I cover against risks that they are deliberately enhancing through the illegal switching off of a legally mandated anti-collision tool, the AIS, likely in breach of international, EU, French and Spanish laws. Claims can arise in respect of various insured risks. In the event of a collision, the hull insurance of the vessel will cover three-quarters of the collision damage, as is traditional under English law, and the rest is then supplemented by the P&I cover for damages caused to the other vessel and its cargo. The P&I insurance contracted for fishing vessels would also involve cover for any loss of life or injury to third parties, crew liabilities or even fines. With respect to the latter, AIS misuse can attract administrative fines and is a criminal offence in some countries.<sup>40</sup> In considering whether a claim upon the materialisation of the insured risks would be upheld by the Clubs in the case of vessels operating dark, insurers will consider *inter alia* whether there is a breach of warranty – in the insurance cover or under the Marine Insurance Act 1906 – and whether any exclusion in the Club Rules apply.

Club Rules allow a large degree of discretion to directors and managers of the clubs both in deciding on insurable risks and in determining whether a claim should be upheld. Exemptions to the application of the Marine Insurance Act 1906 in the context of mutual insurance enhances that degree of discretion, and Club Rules can be formulated to include express contrary provisions to those of the Act.<sup>41</sup>

Under the Marine Insurance Act 1906, a warranty of legality applies, that is, “[t]here is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.”<sup>42</sup> This essentially means that “. . . the ship shall be navigated according to the law.”<sup>43</sup> In *Redmond v Smith* (1844), it was held that “[t]here can be no doubt that a policy on an illegal voyage is void and cannot be enforced; for it would be singular, if, when the contract for the voyage itself is void, a collateral contract for indemnity on the voyage should not be void also.”<sup>44</sup> This is reflected in Section 41 of the Marine Insurance Act 1906. It can

<sup>38</sup> K McVeigh, “London Ship Insurers Accused of Enabling Fishing Vessels to ‘Go Dark’” (The Guardian, 14 February 2023) available at <<https://www.theguardian.com/environment/2023/feb/14/london-ship-insurers-accused-of-enabling-fishing-vessels-to-go-dark>> (last accessed 20 November 2024).

<sup>39</sup> Insurance Act 2014, s 5.

<sup>40</sup> Bunwaree, *supra*, n 3.

<sup>41</sup> Marine Insurance Act 1906, s 55.

<sup>42</sup> *Ibid*, s 41.

<sup>43</sup> *Law v Hollingsworth* (1797) 7 TR 160.

<sup>44</sup> *Redmond v Smith* (1844) 7 M & G 474,288.

be considered that the relevant vessels that operate dark are not carrying out the adventure in a lawful manner, in breach of this implied warranty. Usually, for marine insurance policies, Article 10 of the Insurance Act 2015 applies, and the liability of the insurer is “suspended” during the period of the breach. Therefore, while the AIS is switched off without legal basis, the vessels are no longer under cover; but once the AIS is switched back on, cover resumes. However, P&I Clubs operate differently by virtue of Section 85 of the Marine Insurance Act 1906. Through Club Rules, which are express warranties, P&I Clubs can exclude cover even if the breach is remedied – that is, if the AIS is switched back on. As is the case in the application of the duty of disclosure considered above, P&I Clubs adopt a stricter approach to breach remediation compared to commercial insurance structures. The concept of suspended policy does not apply as Club Rules often exclude its application and state that the Club “shall be discharged from liability from the date of the breach, regardless of whether the breach is subsequently remedied.”<sup>45</sup>

Another usual difficulty in marine insurance contracts is in assessing the term “lawful.” In the present case-study, those vessels insured in the United Kingdom fly the flags of foreign States and never access UK waters. Furthermore, the breaches of AIS laws are those under international law (International Convention for the Safety of Life at Sea (SOLAS)), the laws of their flag States, or the coastal States where they operate. The question which thus arises is whether illegality under foreign or international law can render an adventure unlawful. It is a debated issue in marine insurance law. If in a foreign country the assured “carries out the adventure in an unlawful way according to the law of that country, it would be absurd if the English court did not recognise the illegality . . . .”<sup>46</sup> However, in P&I insurance, this does not pose any difficulty as Club Rules usually expressly require compliance with all statutory requirements of the flag State, for example:

#### “28.4 Statutory Requirements

##### Every Member

28.4.1 shall comply with all the statutory requirements of the state of the Ship’s flag relating to the construction, adaptation, condition, fitment, equipment, manning and loading of the Entered Ship . . . .”<sup>47</sup>

Some clubs go even further and specifically mention SOLAS:

- “The Assured warrants that the Insured Vessel(s) complies at the time of inception of this policy with all requirements of the Insured Vessel(s)’s flag state and SOLAS,[ . . . ] It is a condition precedent to liability under this policy that the Insured Vessel(s) has complied with such requirements throughout the policy period[ . . . ]”<sup>48</sup>

P&I Clubs are thus unlikely to pay out claims to vessels that operate dark. Even in applying the broader public policy test developed under *Patel v Mirza*,<sup>49</sup> as opposed to the strict *ex turpi causa* doctrine, it is likely that an insured’s claim would fail since a deliberate

<sup>45</sup> The Britannia Steam Ship Insurance Association Limited, *Class 3 Protection & Indemnity Rules 2024/2025* (Britannia P&I 2024) available at <[https://britanniapandi.com/wp-content/uploads/2024/08/Britannia-Rules-2024-Class-3-P\\_I-English.pdf](https://britanniapandi.com/wp-content/uploads/2024/08/Britannia-Rules-2024-Class-3-P_I-English.pdf)> (last accessed 13 December 2024).

<sup>46</sup> F Wang, *Illegality in Marine Insurance Law* (Informa Law from Routledge 2017) p 150.

<sup>47</sup> Britannia, *supra*, n 45.

<sup>48</sup> British Marine, *P&I Terms and Conditions 2024* (British Marine 2024), available at <<https://britishmarine.com/products/pi/>> (last accessed 13 December 2024).

<sup>49</sup> *Patel v Mirza* UKSC 42 [107].

illegal disabling of an anti-collision tool would be central to the P&I cover. “Imprudent” operations could also justify an exclusion of cover as a member of a Club must “act as a ‘prudent uninsured’ which means that the member must do everything reasonably practicable to minimise any losses.”<sup>50</sup>

This section has shown that P&I Clubs have consistently attempted to apply more stringent approaches than those applicable to commercial insurers, which could lead one to expect that dark fishing vessels would not be repeatedly insured. However, this is not the case and the explanation for this could lie in the degree of discretion applied by P&I Clubs, as the Clubs also use additional wording which allows a discretionary waiver of the provisions in the cover. For example, the assured’s compliance with statutory requirements (Clause 28.4.1 mentioned above) is mandated “PROVIDED ALWAYS THAT: the Board may in its discretion waive compliance with this Rule for such periods and on such terms as it thinks fit.”<sup>51</sup> This discretion could explain why, despite non-compliance with AIS laws, the insurance cover is maintained and renewed yearly. Whether it is ethical to maintain coverage for such vessels is questionable.

Should a shipowner make a claim following a collision involving its insured dark vessel for example, whether a discretion would apply in practice becomes more complex as other actors such as reinsurers will become involved. In fact, the International Group of P&I Clubs itself acts as a reinsurer for some of the Clubs concerned, where they pool their claims in a reinsurance pooling arrangement. Whether there would be a pay-out involving a dark vessel operating in breach of AIS laws is unlikely as “... the International Group serves as a brake on clubs placing too generous construction on its rules and paying out on an incident which is not strictly within the terms of its cover.”<sup>52</sup> Thus it is likely that such a claim would not be upheld, despite the discretion afforded by the rules in terms of statutory breaches.

Given the ongoing insurance of dark vessels and the unlikelihood that claims related to dark activity would be upheld, it is clear that the insurers are thus not exercising a private governance role by influencing policyholders. This unwillingness to regulate the behaviour of insureds who deliberately increase the risks under the cover equates to a loss-shifting attitude, rather than a loss-reduction behaviour by insurers; where “*loss-reduction reduces accident frequency or magnitude - leading to a safer world - while loss-shifting only reduces the insurers’ liability under a policy for the accident without concern for accident frequency or magnitude.*”<sup>53</sup> Such practices are termed the dark side of insurance where “*loss-shifting does not decrease risk in the world and may instead create more risk.*”<sup>54</sup> This aptly depicts the problem of insured dark vessels, whereby both seafarers and the environment are in more danger than they would have been, had a loss-reduction approach been adopted by insurers.

As shown above, it is partly due to their peculiar history and structure that P&I Clubs have a large degree of discretion in the handling of their business, operating within their own “bubble.” While the behaviour of insuring dark vessels might be legally sound within this “bubble,” it must not be overlooked that P&I Clubs in the UK operate within a wider framework of regulatory and financial crime laws. There are implications beyond the P&I Clubs’ discretionary decision to insure dark vessels. It is thus important to also explore the responsibilities of the insurers from a regulatory perspective.

<sup>50</sup> North of England P&I Association, *supra*, n 8, p176.

<sup>51</sup> Britannia, *supra*, n 45.

<sup>52</sup> SJ Hazelwood and D Semark, *P & I Clubs: Law and Practice* (4th edn, Lloyd’s List 2010) p 55.

<sup>53</sup> R Avraham and A Porat, “The Dark Side of Insurance” (2023) 19 (1) *Review of Law & Economics* 13 available at <<https://doi.org/10.1515/rle-2022-0054>> (last accessed 31 January 2025).

<sup>54</sup> *ibid.*



### III. Outside the “P&I bubble”

The crux of the matter is that insurers are providing P&I insurance to vessels exhibiting patterns of non-compliance with maritime laws and hence enabling increased risks for seafarers and the environment. However, while a large degree of discretion applies within P&I structures, outside those structures the P&I Clubs are bound by non-discretionary regulatory obligations, which include the requirement to conduct adequate risk assessments.

In the case of dark vessels, insurers are likely providing insurance cover with full knowledge, at the outset, that a related claim is unlikely to be upheld. Policyholders are thus contracting insurance that will not protect them if the insured risks materialise. This is critical in the case of P&I insurance whereby “suspended insurance” does not apply, and cover is unlikely to resume following a remedy of the breach (ie, here, switching the AIS back on). This is problematic since “a primary focus of state regulation is public confidence in the insurance industry and the protection of policyholders.”<sup>55</sup> The State governs the industry “at a distance, trying to foster and improve the corporate governance mechanisms of insurance companies,”<sup>56</sup> and regulators are to “address reasonable underwriting, investment, reinsurance, and marketing practices that protect policyholders from ‘undue loss.’”<sup>57</sup>

Besides this inadequate protection of the policyholder, dark vessels tend to engage in illegal activities, as flagged earlier. The illegal activity that marine insurers – and everyone else in the chain (such as reinsurers and brokers) – should be most concerned about, are financial crimes, due to severe financial and reputational risks. It is not alleged that the dark vessels studied are partaking in such activities, but it is material to assess the regulatory framework governing P&I Clubs to understand how the risks associated with dark vessels are being addressed, if at all.

#### I. Regulatory framework of insurance firms

A “twin peak” regulatory system applies to insurers, involving the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA). The regulators have separate mandates, but insurers are dually regulated. The FCA and the PRA must coordinate their functions<sup>58</sup>; and a Memorandum of Understanding (MOU) designates the PRA as lead regulator for dually regulated firms.<sup>59</sup> It is noted that “the FCA and the PRA take a close interest in the risk management practices of the firms they regulate.”<sup>60</sup>

The PRA oversees the prudential regulation of insurers and reinsurers through its PRA Rulebook and “The PRA’s approach to insurance supervision.”<sup>61</sup> It aims to ensure the soundness and safety of the firms, and under its insurance objective, to protect policyholders. It is “a contributor to, rather than the sole body responsible for, policyholder protection,”<sup>62</sup> and refers to the FCA’s complementary role. The PRA oversees

<sup>55</sup> Ericson, Doyle and Barry, *supra*, n 11, p 366.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> Financial Services and Markets Act 2000 (FMSA), s 3D.

<sup>59</sup> Bank of England and Financial Conduct Authority, “Memorandum of Understanding” (2024) para 24 available at <<https://www.bankofengland.co.uk/prudential-regulation/publication/2024/april/update-on-the-boe-and-fca-mou>> (last accessed 13 December 2024).

<sup>60</sup> Chartered Insurance Institute, *Risk Management in Insurance* (London, Chartered Insurance Institute 2024) 1/17.

<sup>61</sup> Bank of England, *PRA Rulebook* available at <<https://www.prarulebook.co.uk>> (last accessed 14 December 2024); Bank of England, *The PRA’s Approach to Insurance Supervision* (2023) available at <<https://www.bankofengland.co.uk/-/media/boe/files/prudential-regulation/approach/insurance-approach-2023.pdf>> (last accessed 14 December 2024).

<sup>62</sup> Bank of England, *Approach to Insurance Supervision*, *supra*, n 61, para. 15.

that the insurers meet their obligations towards their clients while the FCA ensures that they are treated fairly.<sup>63</sup> The PRA imposes Threshold Conditions, “the minimum requirements that firms must meet at all times.”<sup>64</sup> These include conducting their business in a prudent manner, taking into consideration the effect on the UK financial system and the policyholders.<sup>65</sup> In application of the PRA “fundamental rules” which insurers should follow and which are relevant to this article, an insurer must: conduct its business with integrity (Rule 1), and due skill, care and diligence (Rule 2); act in a prudent manner (Rule 3); have effective risk strategies and risk management systems in place (Rule 5); and, organise and control its affairs responsibly and effectively (Rule 6).<sup>66</sup> It is said that “the PRA takes a forward-looking approach to supervision and undertakes stress tests in the insurance sector to identify potential harms to policyholders or the wider economy.”<sup>67</sup>

The FCA regulates insurers, reinsurers and brokers. It has a role to play in policyholder protection and it also undertakes the prudential supervision of brokers who are not regulated by the PRA. It requires the firms to follow its principles, which include acting with integrity<sup>68</sup>; acting with skill, care and diligence<sup>69</sup>; and taking reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.<sup>70</sup> These three principles concern activities wherever they may occur and are not limited to UK territory.<sup>71</sup> Breaches can lead to disciplinary sanctions.<sup>72</sup>

Whether insurers and reinsurers who repeatedly insure dark vessels, especially those with a history of AIS switching off, comply with the above obligations, is unlikely. Regarding the PRA’s mandate, whether the insurance policies protect policyholders adequately is questionable. AIS primarily ensures safety at sea and minimises collision risks. By providing cover to vessels that regularly operate dark, which would likely invalidate claims of incidents at sea, the insurers are not providing adequate protection to policyholders. Scholars noted that “[t]he PRA expects insurers to have a ‘risk appetite’, but only one which is ‘consistent with the PRA’s objectives’; any other form of hunger is no longer a normally imperfect market process, but rather a moral hazard, a sinful gluttony . . .”.<sup>73</sup> If insurers knowingly or negligently insure vessels despite their illegal behaviour, it shows serious lacunae in the integrity of those firms, and they are not abiding by FCA and PRA fundamental obligations and rules about acting diligently, conducting their business with due skill and care, and in a prudent manner. Adequate risk management systems are also evidently lacking. It was noted that “[e]thical behaviour by insurers and intermediaries towards all their stakeholders (internal and external) is an expectation.”<sup>74</sup>

<sup>63</sup> *Ibid.*

<sup>64</sup> Bank of England, Approach to Insurance Supervision, *supra*, n 61, para 25.

<sup>65</sup> FMSA, Sch 6, s 4D.

<sup>66</sup> Bank of England, PRA Rulebook, *supra*, n 61.

<sup>67</sup> N John, L Hodgson and C Weston-Simons, *Insurance Law Handbook* (5th edn, London, Bloomsbury Professional 2021) 358.

<sup>68</sup> FCA Handbook, Prin.2.1.1, Principle 1.

<sup>69</sup> *Ibid.*, Principle 2.

<sup>70</sup> *Ibid.*, Principle 3.

<sup>71</sup> FCA Handbook, Prin.3.3.1.

<sup>72</sup> *Ibid.*, Prin.1.1.7.

<sup>73</sup> M Everson, “Regulating the Insurance Sector” in N Moloney, E Ferran and J Payne (eds), *The Oxford Handbook of Financial Regulation* (Oxford, Oxford University Press 2015).

<sup>74</sup> Chartered Insurance Institute, *supra*, n 60, 2/18.

## 2. Financial crime regulation

The “integrity objective” of the FCA is defined *inter alia* as protecting and enhancing the integrity of the UK financial system so that it is not being used for a purpose connected with financial crime.<sup>75</sup> The FCA’s Financial Crime Guide describes financial sanctions as “... restrictions put in place by the UK government or the multilateral organisations that limit the provision of certain financial services or restrict access to financial markets, funds and economic resources in order to achieve a specific foreign policy or national security objective.”<sup>76</sup> Risks of financial crimes must be treated “in the same manner as risks faced by the business.”<sup>77</sup> These are relevant as vessels could go dark to evade sanctions through illegal ship-to-ship transfers or illegal port calls. The proliferation of weapons is also covered by the FCA guidance, which is relevant to dark vessels since the smuggling of weapons is another example of an illegal activity that could be masked by the switching off of AIS.

In addition to being regulated by the FCA for financial crime matters, insurers need to comply with laws and guidance applied by financial crime authorities. From a general perspective, overly lengthy AIS transmission gaps might mean illegal activities are taking place at sea but there could also be illegal port calls to sanctioned countries in the region. Sanctions compliance is a serious matter for corporates given the monetary and reputational stakes. Ensuring the proper behaviour of firms has been a central focus of the UK government and HM Treasury since 2010 as a push against financial crimes saw the implementation of the Bribery Act 2010, the Criminal Finances Act 2017, and the Economic Crime (Transparency and Enforcement) Act 2022. HM Treasury Office of Financial Sanctions Implementation (OFSI) and the Office of Foreign Assets Control of the US Department of the Treasury (OFAC) released guidance applicable to the maritime insurance industry. Both OFSI’s General Guidance and its Maritime Guidance issued in 2020 and recently updated, are relevant to UK insurers and reinsurers since they provide financial services.<sup>78</sup> While the Maritime Guidance recognises the legitimate reasons for switching off AIS, it also recognises that it is a “common evasion practice” and that “vessels engaged in illicit activities may also intentionally disable their AIS transponders.”<sup>79</sup>

Insurers breaching sanctions law face civil and criminal penalties. Under section 146 of the Policing and Crimes Act 2017, a failure to comply with financial sanctions legislation is a strict liability offence. Applying this fact to the context of AIS, if vessels are going dark to avoid sanctions, their UK insurers could breach sanctions legislation regardless of whether they were aware of the illegal activities. Unlike other financial crimes legislation that the United Kingdom has implemented over the years, such as the failure to prevent bribery or the failure to prevent the facilitation of tax evasion, P&I clubs would have no defence of having reasonable measures in place, because the Economic Crime (Transparency and Enforcement) Act 2022 does not make provision for it. The risks that P&I Clubs expose themselves and all others in the chain to are thus high, because without further

<sup>75</sup> FSMA 2000, s1D(2)(b).

<sup>76</sup> FCA, *Financial Crime Guide: A Firm’s Guide to Countering Financial Crime Risks* (London, FCA 2024), para 7.1.4.

<sup>77</sup> *Ibid*, para 2.2.1.

<sup>78</sup> OFSI, “UK Financial Sanctions General Guidance” (18 November 2024). available at <<https://www.gov.uk/government/publications/financial-sanctions-general-guidance/uk-financial-sanctions-general-guidance>> (last accessed 22 November 2024), updating the General Guidance for financial sanctions under the Sanctions and Anti-Money Laundering Act 2018 (December 2020); OFSI, *Financial Sanctions Guidance for Maritime Shipping* (5 March 2024) available at <<https://www.gov.uk/government/publications/financial-sanctions-guidance-for-maritime-shipping/financial-sanctions-guidance-for-maritime-shipping#maritime-insurance>> (last accessed 22 November 2024), updating Maritime Guidance : Financial sanctions guidance for entities and individuals operating within the maritime shipping sector (December 2020).

<sup>79</sup> *Ibid*.

investigation of the AIS transmission gaps it is not possible for insurers to ascertain whether dark vessels are breaching financial crime laws.

### 3. Sustainability risks

Sustainability risks are increasingly in the spotlight and are particularly relevant in the case of dark vessels due to concerns over human trafficking and IUU fishing. Without further investigation, insurers cannot ascertain whether gaps in AIS transmission conceal sustainability risks. Some P&I Clubs have voluntarily published sustainability reports.<sup>80</sup> However, some statements are at odds with the current practice of insuring dark vessels, especially since AIS is prescribed as a tool for the protection of the marine environment under the law.<sup>81</sup> For example, in 2022, the International Group of P&I Clubs released its first ESG report, closely aligned with the UN Sustainable Development Goals (SDGs), stating: “We are working to help create safer environments for seafarers and to reduce the number of accidents at sea” – which is at odds with reinsuring clubs that insure dark fleets operating in breach of maritime safety laws. Referring to SDG 14 on the conservation of marine resources, it also highlighted increased levels of reinsurance cover.<sup>82</sup> While strong reinsurance mechanisms can support this objective, the effort is undermined by the insurers who are contributing to increased collision-risks at sea by enabling those vessels with “dark histories” to keep navigating with significant AIS gaps.

The FCA and the PRA also place increasing importance on ESG and ethics, noting that “. . . the impact of organisations on the environment is a subject of strong interest to many stakeholders. . . .”<sup>83</sup> The FCA intends to challenge firms where it identifies potential greenwashing.<sup>84</sup> With the introduction of an anti-greenwashing rule since May 2024,<sup>85</sup> non-compliance with ESG principles and exaggerated sustainability claims are now more than a mere ethical issue. Furthermore, while beyond the scope of this article, it is noted that AIS data has been used to calculate GHG emissions in climate-related initiatives.<sup>86</sup> Insurers enabling vessels to operate with significant AIS gaps undermine such efforts as dark operation impedes the availability of AIS data.

### 4. Addressing inadequate regulation

In response to a parliamentary question on what steps the regulators are taking in relation to firms that insure dark vessels, the UK government stated: “[i]nsurers make decisions about the terms on which they will offer cover following an assessment of the relevant risks. This is usually informed by the insurer’s claims experience and other industry-wide statistics and standards. The Government does not intend to intervene in these commercial decisions by insurers as this could damage competition in the market.”<sup>87</sup> Here,

<sup>80</sup> The Britannia Steam Ship Insurance Association Limited, *Sustainability Report 2022* (July 2022) available at <<https://britanniapandi.com/wp-content/uploads/2022/07/Britannia-Sustainability-Report-07-2022.pdf>> (last accessed 13 December 2024).

<sup>81</sup> See SOLAS; IMO Resolution A.1106(29), *supra*, n 24.

<sup>82</sup> International Group of P&I Clubs, *Sustainability Report 2022* (International Group of P&I Clubs September 2022) available at <[https://safety4sea.com/wp-content/uploads/2022/09/IGPI-sustainability\\_report-2022\\_09.pdf](https://safety4sea.com/wp-content/uploads/2022/09/IGPI-sustainability_report-2022_09.pdf)> (last accessed 13 December 2024).

<sup>83</sup> Chartered Insurance Institute, *supra*, n 60, 2/15.

<sup>84</sup> FCA, “Strategy for Positive Change: Our ESG Priorities” (2021) available at <<https://www.fca.org.uk/publications/corporate-documents/strategy-positive-change-our-esg-priorities>> (last accessed 14 December 2024).

<sup>85</sup> FCA, Environmental, Social and Governance (ESG) Sourcebook (FCA 2021), ESG 4.3.1.

<sup>86</sup> IMO, “Just-In-Time Arrival Study for Container Vessels” (IMO June 2022) available at <<https://greenvoyage2050.imo.org/wp-content/uploads/2022/06/JIT-Container-Study.pdf>> (last accessed 14 December 2024).

<sup>87</sup> Written Question HL2584, House of Lords Written Questions and Answers, 19 February 2024.

the nature of the relationship between the State and insurers is overlooked; it is effectively symbiotic rather than fragmented – “State and insurance industry regulators are part of each other’s liberal risk regimes. The State governs corporate governance, and corporations in turn govern the State.”<sup>88</sup> Scholars noted that “the industry actively invites the State to regulate selected aspects of its practices” and “the State in turn actively encourages the industry to underwrite risks. Insurance relieves the State of having to compensate losses . . . .”<sup>89</sup> However, in this case, the insurers are failing to self-regulate effectively within the meta-regulatory approach adopted by the FCA and the PRA. Meta-regulation fails because it is difficult to reconcile the insurers’ private interests in leveraging the dark side of insurance – where they focus on loss shifting – with the regulators’ public regulatory goals.<sup>90</sup> The persistent reluctance to enforce oversight of the industry for fear of interfering in commercial matters, despite clear breaches of regulatory rules and principles, has created a dangerous vacuum in the regulatory framework where policyholders remain inadequately protected, seafarers and the marine environment face increased risks directly enabled by insurers, and there are risks of sanctions evasion and greenwashing claims.

#### IV. Insuring fishing fleets responsibly

To avoid breaching FCA/PRA regulatory rules and financial crime legislation, insurers can adopt several measures.

##### I. Enhanced due diligence

OFSI recommended a risk-based approach, identifying regions with higher risks of illegal behaviour and carrying out enhanced due diligence (EDD) for vessels that operate in these areas.<sup>91</sup> It further added “. . . the onus is on the organisation to ensure that it has put in place sufficient measures to ensure it does not breach financial sanctions.”<sup>92</sup> A mere check of lists of sanctioned vessels is unlikely to be sufficient, as many vessels that disable their AIS might not appear on those lists; for example, there are reports that “for every sanctioned vessel that continues to commit probable dark port callings and dark ship-to-ship transfers, there could be three more vessels not on any sanctions list that are actively taking part in the same type of probable illicit activity.”<sup>93</sup>

Lloyd’s issued further guidance on sanctions evasion stating that each party in the insurance chain (brokers, insurers and reinsurers) is individually liable for sanctions compliance.<sup>94</sup> While primarily focused on cargo and hull cases, it also encompasses fishing vessels, as it states, “[w]hile this guidance primarily relates to marine cargo and hull classes and exposure to sanctions programmes targeting the DPRK, Syria and Iran, it is also intended to outline best practice principles regarding broader sanctions due diligence and

<sup>88</sup> Ericson, Doyle and Barry, *supra*, n 11, p 366.

<sup>89</sup> *Ibid*, p 361.

<sup>90</sup> C Coglianese and E Mendelson, “Meta-Regulation and Self-Regulation” in R Baldwin, M Cave and M Lodge (eds), *The Oxford Handbook of Regulation* (Oxford, Oxford University Press 2010) 146.

<sup>91</sup> OFSI, “Maritime Guidance: Financial Sanctions Guidance for Entities and Individuals Operating within the Maritime Shipping Sector (December 2020).

<sup>92</sup> *Ibid* p 8.

<sup>93</sup> S Villyn, “A Message to the Marine Insurance Market: Conduct Your KYC or Risk Fines” (Lloyd’s List, 28 July 2021) available at <<https://lloydslist.maritimeintelligence.informa.com/LL1137678/A-message-to-the-marine-insurance-market-Conduct-your-KYC-or-risk-fines>> (last accessed 13 December 2024).

<sup>94</sup> Lloyd’s, “Market Bulletin Y5246: Countering North Korean and Other Sanctions Evasion Tactics” (2 April 2019) p 3 available at <<https://assets.lloyds.com/assets/y5246/1/Y5246.pdf>> (last accessed 14 December 2024).

screening for the London (re)insurance market,”<sup>95</sup> and, when referring to OFSI guidance, it states “[t]he Maritime Guidance provides information on sanctions evasion practices, and due diligence measures which should be considered to mitigate the risk of any sanctions breach.”<sup>96</sup> Lloyd’s thus also calls for EDD measures to be applied in high-risk cases. These involve the presence of a primary risk factor, that is, a geographical high-risk location (including areas known for illicit marine activity and areas near sanctioned territories), in combination with any other secondary risk factor such as AIS anomalies, flags of convenience and complex vessel ownership structures. Lloyd’s further states, “if enhanced due diligence measures do not mitigate the level of perceived risk, consideration should be given as to whether it is prudent to proceed with the provision of cover”.<sup>97</sup>

In relation to the dark vessels, there are such repeated suspicious behaviours by the vessels studied, including the use of flags of convenience through complex mechanisms of ownership,<sup>98</sup> lengthy AIS gaps close to sanctioned countries and areas listed as geographically high-risk and known for illicit marine activities, including Iran, Somalia, the Red Sea and the Persian Gulf/Hormuz Straits. Such behaviours meet the threshold for EDD as a primary risk factor is present in many instances, together with three out of the six secondary risk factors listed by Lloyd’s.<sup>99</sup>

Insurers have a better understanding of additional compliance controls that could be implemented before insuring those vessels, for example, a “pre-bind review of a vessel’s AIS history could assist in identifying unusual patterns of activity of clients operating in and around high-risk geographical areas.”<sup>100</sup> Although the focus is on the United Kingdom in this paper, OFAC also released prior similar guidance to OFSI, encouraging the marine insurance industry to look into historic dark behaviour and “... to investigate signs and reports of AIS transponder manipulation before entering into new contracts involving problematic vessels or when engaging in ongoing business.”<sup>101</sup>

Without EDD insurers cannot ensure that fishing vessels with lengthy AIS gaps are not engaging in activities breaching financial sanctions; such behaviours are not limited to cargo ships but are seen in fishing vessels that are also being used in transnational organised crime activities.<sup>102</sup> Application of the above guidelines and of EDD should thus have led to many of the vessels studied being flagged by P&I Clubs. The ongoing dark behaviour means that there are thus two possibilities – either EDD is not being applied, or the dark vessels are being insured despite the risks flagged.

## 2. AIS “switch off” clauses

In their 2020 guidance, OFSI and OFAC recommended AIS screening, flagging dark behaviour, contacting dark vessels, and inserting AIS “switch off” clauses in contracts to

<sup>95</sup> *Ibid.*

<sup>96</sup> Lloyd’s, “Market Bulletin Y5358 Marine Sanctions Guidance – Enhanced Due Diligence Measures” (10 December 2021) available at <<https://assets.lloyds.com/media/b0d0d819-da66-46df-a5f6-90a8556b2749/Y5358-Marine-sanctions-guidance%E2%80%9393Enhanced-Due-Diligence-measures.pdf>>.

<sup>97</sup> Lloyd’s, “Market Bulletin Y5246,” *supra*, n 94.

<sup>98</sup> OceanMind, “IOTC Catch and Effort Assessment and AIS Usage in the Western Indian Ocean, 2021–2023” (2024) available at <[https://static1.squarespace.com/static/645662d9155d6a5bec4b27e8/t/663e6b40851e173ca680a80/1715366736384/OM24-012+IOTC+catch+effort+2021-2023\\_final.pdf](https://static1.squarespace.com/static/645662d9155d6a5bec4b27e8/t/663e6b40851e173ca680a80/1715366736384/OM24-012+IOTC+catch+effort+2021-2023_final.pdf)>.

<sup>99</sup> Lloyd’s, “Market Bulletin Y5246”, *supra*, n 94.

<sup>100</sup> *Ibid* p 4.

<sup>101</sup> OFAC, “Sanctions Advisory for the Maritime Industry, Energy and Metals Sectors, and Related Communities: Guidance to Address Illicit Shipping and Sanctions Evasion Practices” (14 May 2020) available at <<https://ofac.treasury.gov/media/37751/download?inline>> (last accessed 14 December 2024).

<sup>102</sup> Global Initiative Against Transnational Organized Crime, “What’s Happening Below Deck?” (21 March 2022) available at <<https://globalinitiative.net/analysis/whats-happening-below-deck/>> (last accessed 14 December 2024).

allow termination.<sup>103</sup> This would protect insurers and reinsurers while acting as a strong deterrent against illegal AIS manipulation, hence increasing safety and transparency at sea. Given a P&I cover's discretionary nature, which creates uncertainty about whether a claim will be upheld for vessels breaching AIS laws, an AIS switch-off clause provides clarity from the outset – cover would cease immediately, and claims would likely fail.

The Lloyd's Market Association (LMA), which aims “to identify and resolve issues which are of particular interest to the underwriting community,”<sup>104</sup> opposed termination clauses stating that interruption in AIS signals happens frequently and may not be deliberate.<sup>105</sup> The LMA argued that such a clause could “produce commercial chaos” and that insurers cannot police illegal activities such as illicit ship-to-ship transfers, further adding that “it is an exceptionally rare criminal who is deterred from an enterprise because they lack insurance.”<sup>106</sup> However, this perspective overlooks the fact that many vessels operate with an AIS switched off for suspiciously long periods – in some cases, up to eight months at a time.<sup>107</sup> Contrary to the LMA, OFAC and OFSI guidance acknowledge legitimate reasons for AIS data gaps, but stress that lengthy AIS switching off, especially in geographically high-risk regions, warrant further attention. Furthermore, the LMA underestimates the enabling role of the insurance industry and its potential deterrent effect, since vessels cannot operate without cover. This abdication of responsibility by the industry not only explicitly confirms their rejection of a role as private regulator – evidenced by the failure to adequately assess risks, to oversee the insured's behaviour and enforce compliance through contract clauses or “sanctions” such as policy termination – but it also further evidences the dark side of insurance in prioritising loss-shifting over loss-reduction.<sup>108</sup>

AIS switch-off clauses have been successfully implemented by organisations like the Baltic and International Maritime Council (BIMCO), the largest international shipping association. BIMCO's clause, aimed at chartering activities, specifically considers cases of legitimate AIS disabling: “there are circumstances where it may legitimately be switched off. The purpose of the clause is to ensure that when this is done legitimately, it does not give rise to termination rights and ensures a balance of the rights and responsibilities between owners and charterers in preventing AIS manipulation to evade sanctions.”<sup>109</sup> It requires vessels to comply with SOLAS and IMO Guidelines during the six months before the vessel arrives at the first loading port.<sup>110</sup> It refers explicitly to AIS manipulation, deliberate switching off or other acts disabling the system. The clause also allows charterers to request justification of any apparent breach within 72 hours, failing which the contract may be terminated.

The Joint Hull Committee (JHC), operating under the LMA, also published an AIS switch-off clause.<sup>111</sup> The JHC clause merely repeats, under Clause 1, the SOLAS requirements for AIS to be in operation at all times.<sup>112</sup> Under Clause 2, it provides that insurers will not be liable in the case of AIS switching-off unless the insured had no control of the AIS or if it

<sup>103</sup> OFSI, “Maritime Guidance (2020),” *supra*, n 91, p 8.

<sup>104</sup> Lloyd's, “LMA” available at <<https://www.lloyds.com/market-directory/committees-and-associations/lloyd-market-association-lma>> (last accessed 14 December 2024).

<sup>105</sup> Global Legal Group, *International Comparative Legal Guides: Insurance & Reinsurance 2021* (10th edn, London, Global Legal Group 2021) p 3.

<sup>106</sup> *Ibid.*

<sup>107</sup> OceanMind (2022), *supra*, n 4.

<sup>108</sup> Avraham and Porat, *supra*, n 53.

<sup>109</sup> BIMCO, “AIS Switch Off Clause 2021” available at <[https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/ais\\_switch\\_off\\_clause\\_2021](https://www.bimco.org/contracts-and-clauses/bimco-clauses/current/ais_switch_off_clause_2021)> (last accessed 14 December 2024).

<sup>110</sup> *Ibid.*

<sup>111</sup> JHC, *Circular: AIS Operation Clause (JH2021-008)*, (25 January 2021) available at <[https://www.lmalloyds.com/LMA/Underwriting/Marine/JHC/jhc\\_circulars.aspx](https://www.lmalloyds.com/LMA/Underwriting/Marine/JHC/jhc_circulars.aspx)> (last accessed 15 January 2024).

<sup>112</sup> *Ibid.*

was switched off due to safety reasons. The last requirement under Clause 3 is to allow reinsurers to access the AIS records and logbook data to assess the legality of any AIS switching off. It must be noted that the JHC published a “fishing vessels due diligence clause” in 2023.<sup>113</sup> However, irrespective of the title of that clause, the essence of the clause itself focuses on vessels sanctioned for IUU fishing practices and does not address the misuse of AIS by fishing vessels.

The BIMCO and JHC AIS clauses are very different, with the latter being drafted in a less stringent manner and with no consideration of automatic termination. The BIMCO clause better reflects the OFSI and OFAC guidance whereas the JHC clause, although not providing for immediate termination, would allow an inspection of logbooks. However, the JHC model clause would not have a major impact if adopted in P&I insurance; P&I Clubs already have extensive powers to verify vessel data relating to dark activities: “[a] P&I Club may also have a right to inspect and survey any member’s vessel at any reasonable time. Specific risks may be excluded as a result of a survey if a defect is found, until the defects found are remedied to the satisfaction of the surveyor appointed by the club. In extreme cases the entire cover may be withdrawn.”<sup>114</sup> Thus, logbooks, which by law should have records of all AIS disabling periods and their reasons, should be easily verifiable by P&I Clubs – the issue lies in the discretion allowed in whether to terminate cover.

P&I Clubs should focus on vessels with significant AIS gaps using AIS monitoring software. As shown by BIMCO, before considering termination, requests for justification of an apparent breach could be made. For vessels switching off their AIS in general, the law provides that this action should always be recorded and reported by other means; hence, evidence in support of this could be requested. In fact, vessels operating in the Indian Ocean have shown significant AIS gaps without corresponding logbook entries, in clear breach of the law: “. . . there is no record in vessel logbooks, nor other, verifiable, contemporaneous evidence of the reason for having AIS off or in another mode . . . .”<sup>115</sup>

While AIS switch off clauses allowing termination are not standard in the marine insurance industry, cesser-of-insurance clauses allow termination for sanctions risks: “[c]esser-of-insurance provisions included in P&I club rules involve the termination of a member’s or a vessel’s entry, where the employment of an insured ship exposes the P&I club to the risk of being, or becoming subject to, any sanction, prohibition or adverse action in any form whatsoever by any State or international organisation.”<sup>116</sup> However, such clauses are not being implemented in the case of dark fishing vessels given the recurring patterns observed and ongoing cover. They are also restrictive since they will not be triggered in regions not relevant to sanctions compliance.

## V. Conclusion

P&I Clubs “play an important role in regulating marine safety and environmental performance,”<sup>117</sup> yet their provision of cover to dark vessels is problematic. It is unclear whether P&I Clubs follow industry guidance, carry out EDD and still proceed with insuring the vessels; or whether they simply disregard the risks associated with dark fishing vessels. Either way, this is concerning because P&I Clubs are an “important component of a system

<sup>113</sup> JHC, *Circular: Fishing Vessel Due Diligence Clause (JH2023-010)* (23 March 2023) available at <[https://www.lmalloyds.com/LMA/Underwriting/Marine/JHC/jhc\\_circulars.aspx](https://www.lmalloyds.com/LMA/Underwriting/Marine/JHC/jhc_circulars.aspx)> (last accessed 15 January 2024).

<sup>114</sup> North of England P&I Association, *supra*, n 8, p 176.

<sup>115</sup> Marine Stewardship Council, “CAB Response to the Remand to the Objection against the Certification of AGAC Indian Ocean tuna purse seine fishery” (19 May 2022) p 18.

<sup>116</sup> North of England P&I Association, *supra*, n 8, p 177.

<sup>117</sup> P Bennett, “Mutuality at a Distance? Risk and Regulation in Marine Insurance Clubs” (2000) 32 (1) *Environment and Planning A: Economy and Space* 147.



of checks and balances within the maritime system of governance.”<sup>118</sup> Furthermore, since this is a mutual insurance structure, it is also unclear whether these risks are disclosed to other Members “who compete fairly in all aspects of their operations and have a common attitude towards quality.”<sup>119</sup> Perhaps it is the nature of P&I insurance itself – the concept of mutuality and the high level of discretion – that explains why they keep being insured by P&I Clubs, as it is said that “a P&I club will usually try to include rather than exclude claims and the club’s directors are allowed to exercise discretion under rules . . . .”<sup>120</sup> However, this article showed that outside the “P&I bubble” the regulatory requirements of the FCA, PRA and the OFSI should encourage P&I Clubs to reconsider this practice of insuring dark vessels, especially if they are not implementing deterrents such as EDD and AIS switch off clauses that include termination of cover.

P&I Clubs must have adequate risk management systems in place. Conducting EDD, including a dark history and patterns assessment, can help insurers identify high-risk fishing vessels. There are several ways in which insurers deal with risk. They can transfer the risk to reinsurers, which is arguably the current approach for dark vessels. However, this puts all those in the chain at risk of regulatory and financial crime sanctions. It is unclear whether reinsurers are aware of the deliberate risks, especially those relating to sanctions evasion, that the insurers are passing on to them. It is said that “[r]einsurers treat their insurance company partners in the same way as they treat ordinary policyholders: with suspicion”<sup>121</sup> and they are thus “silent regulators” of the insurers.<sup>122</sup> Hence, it is unlikely that the reinsurers are aware and willing to undertake the risks taken by the P&I Clubs.

Alternatively, insurers can “treat” the risks by implementing controls. Controls could involve detective control such as using easily accessible and affordable AIS monitoring software and verification of whether the vessels are going dark for legal reasons. As suggested by financial crime regulators, insurers can also adopt a preventative control system where termination clauses are specified in the policies for switching off AIS. It will of course only make commercial sense if the controls are cost-effective and that is a matter for the insurers to estimate through their cost-benefit analyses.

Should adequate controls be considered too costly, insurers can terminate the risk by refusing cover or renewal of cover for fishing vessels with dark histories. This is possible as “Club Rules generally provide that the club is at liberty to refuse membership without stating the grounds thereof.”<sup>123</sup> Furthermore, fishing vessels represent a very small portion of the business of P&I clubs – major ships insured include bulk cargos, container ships, cruise ships, oil tankers, reefers etc. Hence, if an AIS switch off clause supporting automatic termination is not considered proper, insurers could simply exclude dark fishing vessels from their business operations. In addition to protecting themselves from sanctions risks, this will decrease the risks of putting seafarers and the marine environment in danger, increasing legal compliance and reducing sustainability risks.

While such measures would create strong incentives for vessels to keep their AIS in operation, there is a possibility that the shipowners would prefer to seek alternative non-UK based insurers to insure their ships. However, the risks of being sanctioned are also real; the PRA previously acted swiftly in the enforcement of its Fundamental Rules. For example, it imposed a fine of £9,695,000 on MS Amlin Underwriting Limited for failing to

<sup>118</sup> F Furger, “Accountability and Systems of Self-Governance: The Case of the Maritime Industry” (1997) 19 (4) *Law & Policy* 445, p 462.

<sup>119</sup> Bennett, *supra*, n 117, p 147.

<sup>120</sup> North of England P&I Association, *supra*, n 8, p 180.

<sup>121</sup> Ericson, Doyle and Barry, *supra*, n 11, p 365.

<sup>122</sup> A Abramovsky, “Reinsurance: The Silent Regulator?” (2009) 15 *Connecticut Insurance Law Journal* 345.

<sup>123</sup> Hazelwood (2000), *supra*, n 28, p 38.

have effective risk strategies and management systems and for failing to organise and control its affairs responsibly and effectively.<sup>124</sup> The PRA requires that “insurers should have robust frameworks for risk management, including for financial and operational risks.”<sup>125</sup> If OFSI and industry guidance had been effectively applied, it is unlikely that dark vessels flouting AIS laws would have been insured. In this case, an investigation by the PRA could thus be triggered.<sup>126</sup>

None of the major actors in the system are responsibly undertaking their expected roles – the policyholders (shipowners), expected to be “agents of prevention”<sup>127</sup> in the insurance structure, are enhancing the risks by deliberately operating dark, in breach of the law and industry guidance; the insurer, trusted to self-regulate by the State, adopts a loss-shifting behaviour, failing to: enforce an adequate surveillance of the insured, apply the necessary “sanctions,” and adequately protect the policyholder; the reinsurers are not “suspicious” of the insurers; and the regulators are failing to enforce the rules and principles that regulated firms should follow.

Scholars recently established that the dark side of insurance is overlooked,<sup>128</sup> which, in this instance, equates to the loss-shifting attitude of enabling and encouraging the insured’s vessels to operate dark and refusing to regulate the ongoing risky and illegal behaviour of the insured. This dark side of the insurance industry not only enables but perpetuates dark activity at sea. While this can be explained by the notion that in a world without risk, insurance becomes obsolete, insurers should not, however, disregard regulatory obligations or the guidance of financial crime regulators in reducing risks of financial crimes. By insuring fishing vessels responsibly, the marine insurance industry can have a far more significant impact than States enforcing their AIS laws individually. Given that the insured vessels operate across all oceans, marine insurance is not only one of the ways of tackling illegal AIS switching off and related offences, but it is the most effective way to do so.

**Acknowledgments.** I am grateful to Jess Rattle and Dr George Duncan-Jones for their invaluable insights into the operations of dark fishing vessels and for reviewing drafts of this article.

<sup>124</sup> Bank of England, “PRA Fines MS Amlin Underwriting Limited” (17 October 2022) available at <<https://www.bankofengland.co.uk/news/2022/october/prafinesmsamlinunderwritinglimited>> (last accessed 14 December 2024).

<sup>125</sup> Bank of England, Approach to Insurance Supervision, *supra*, n 61, para. 65.

<sup>126</sup> PRA, “Policy Statement: Conducting Statutory Investigations” (PRA, 2013) available at <<https://www.bankofengland.co.uk/prudential-regulation/publication/2013/conducting-statutory-investigations>> (last accessed 1 December 2024).

<sup>127</sup> Ericson, Doyle and Barry, *supra*, n 11.

<sup>128</sup> Ronen Avraham and Ariel Porat, *supra*, n 53.