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The European Council regulation on illegal, unreported and unregulated fishing: an international fisheries law perspective

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Keywords

European, Council, regulation, illegal, unreported, unregulated, fishing, international, fisheries, law, perspective

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The European Council Regulation on Illegal, Unreported and Unregulated Fishing: An International Fisheries Law Perspective

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Abstract

On 29 September 2008, the Council of the European Union (EU) adopted Council Regulation (EC) No. 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing. Essentially, the EU IUU Regulation establishes a framework in which access to EU markets for fisheries products is partly conditioned by the extent to which a country, area or region of origin is demonstrably or increasingly free of IUU fishing. Aside from the amendments to US legislation in 2007, the EU IUU Regulation is the only other domestic legislative measure adopted solely to combat IUU fishing, with four main components: port State measures against third-country vessels, a catch documentation scheme, IUU vessel listing, and listing of non-cooperating States. This article analyses the EU IUU Regulation in the context of international fisheries law, and particularly international efforts to combat IUU fishing. It is concluded that the measures outlined in the EU IUU Regulation, despite several ambiguities, are generally consistent with those called for under international fisheries instruments and measures being implemented by regional fisheries management organisations.

Keywords

illegal, unreported and unregulated (IUU) fishing; fisheries policy of the European Union; international fisheries law; international trade in fisheries products

¹ This article draws substantially on an earlier work by the authors: Martin Tsamenyi *et al.*, 'Fairer Fishing? The Impact on Developing Countries of the European Community Regulation on Illegal, Unreported and Unregulated Fisheries,' Economic Paper Series No. 86 (London: Commonwealth Secretariat 2009).

Introduction

On 29 September 2008, the Council of the European Union adopted Regulation No. 1005/2008 ‘establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing’ (referred to hereafter as the EU IUU Regulation).² The EU IUU Regulation, scheduled to apply from 1 January 2010,³ is intended to regulate the supply of fisheries products to EU markets in an effort to improve global fisheries sustainability. Essentially, the EU IUU Regulation establishes a system of access conditionality in which access to EU markets will be partly conditioned by the extent to which a country, area or region of origin of an exported fisheries product is completely or increasingly free of IUU fishing.

IUU fishing has been recognised as one of the major threats to the sustainability of fisheries resources globally and a threat to food security. For the past two decades, the United Nations General Assembly (UNGA), several Regional Fisheries Management Organisations (RFMOs) and other regional organisations have called on States to take measures, individually or jointly, to combat IUU fishing. The EU IUU Regulation is the first comprehensive legislation directed solely at addressing the threats posed by IUU fishing. Given the importance of the EU as a major market for fisheries products globally, the implementation of the EU IUU Regulation is of considerable significance. There have been a number of concerns about the implications of the EU IUU Regulation for the entry of fish and fishery products from third countries into the EU market, including the possibility of product exclusions for failing to comply with the regulations.

This article provides an analysis of the EU IUU Regulation in the context of international fisheries law and international efforts to combat IUU fishing. It discusses the general background and context of the EU IUU Regulation, including the development of international responses to IUU fishing and relevant EU policy objectives and measures. The article then focuses on the content of the EU IUU Regulation, analysing its various provisions and ambiguities, and examines whether the Regulation is consistent with existing international instruments and measures to combat IUU fishing. The article does not discuss the compatibility of measures set out in the EU IUU Regulation

² Council Regulation (EC) No. 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No. 2847/93, (EC) No. 1936/2001 and (EC) No. 601/2004 and repealing Regulations (EC) No. 1093/94 and (EC) No. 1447/1999 [2008] OJ L286/1.

³ See EC No. 1005/2008, Art. 57.

with World Trade Organisation (WTO) agreements—a clearly relevant issue that is investigated elsewhere by the authors.⁴

General Background and Context of the EU IUU Regulation

International Responses to IUU Fishing

IUU fishing is a global problem with significant environmental, economic and social consequences.⁵ It contributes to the depletion of fish stocks and also threatens habitats, which has cross-boundary effects on areas under national jurisdiction and the high seas. Because of the highly global nature of fisheries and fishing activities, any decrease in fish catch in one part of the world, regardless of the cause, threatens the food security of fish-importing States and consequently the global food supply.

Successive reports by the UN Food and Agricultural Organisation (FAO) have demonstrated the serious state of decline of most commercially harvested fish stocks.⁶ In this context, IUU fishing has been identified as ‘one of the most severe problems affecting world fisheries’⁷ and as the ‘main obstacle in achieving sustainable fisheries in both areas under national jurisdiction and the high seas.’⁸ A study in 2006 by the Marine Resources Assessment Group

⁴ See Tsamenyi *et al.*, *op cit. supra* n. 1, at Chapter 10.

⁵ See generally D.J. Agnew and C.T. Barnes, ‘Economic Aspects and Drivers of IUU Fishing: Building a Framework’ (Report prepared for OECD Workshop on Illegal, Unreported and Unregulated (IUU) Fishing Activities 2004, AGR/FI/IUU(2004)2) <<http://www.oecd.org/dataoecd/17/7/29468002.PDF>> accessed 12 January 2009; MRAG Ltd., ‘Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries’ (Report prepared for the High Seas Task Force and the Department for International Development, United Kingdom 2005) <http://www.high-seas.org/docs/IUU_DFID_Final_report_MRAG_2005.pdf> accessed 12 January 2009; and MRAG Ltd., ‘Illegal, Unreported and Unregulated Fishing on the High Seas: Impacts on Ecosystems and Future Science Needs’ (Report prepared for the High Seas Task Force and the Department for International Development, United Kingdom 2005) <http://www.high-seas.org/docs/Ecosystem_Impacts_IUU_Final_Report_MRAG_2005.pdf> accessed 12 January 2009.

⁶ See FAO, *The State of World Fisheries and Aquaculture* (Rome 2006) <<http://www.fao.org/docrep/009/A0699e/A0699e00.htm>> accessed 12 January 2009.

⁷ UNGA, ‘Oceans and the Law of the Sea: Report of the Secretary General’ (1999) UN GAOR 54th Session UN Doc A/54/429, 42.

⁸ UNGA, ‘Sustainable Fisheries, Including Through the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and Related Instruments: Report of the Secretary-General’ (2004) UN GAOR 59th Session UN Doc A/59/298, 13.

(MRAG) Ltd. estimated that the total loss to IUU fishing in Guinea, Liberia, Sierra Leone, Angola, Namibia, Mozambique, Kenya, Somalia, Seychelles and Papua New Guinea amounted to USD372 million, representing 19 per cent of their combined total value of the catch and 23 per cent of the declared value of the catch.⁹ A follow-up study in April 2008 by MRAG and the Fisheries Centre at the University of British Columbia estimated that losses from illegal catch in 17 FAO Statistical Areas were between USD10 billion and USD23 billion annually, representing about 11.06 million to 25.91 million tonnes of fish.¹⁰ Apart from its economic and environmental repercussions, IUU fishing has also been equated to ‘steal[ing] food from some of the poorest people in the world’¹¹ and is known to cause the displacement of legitimate fishing communities.¹²

Several international efforts have been made through the FAO, UNGA, and RFMOs to combat IUU fishing. The principal international instrument which addresses IUU fishing is the International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU), adopted under the auspices of the FAO in 2001.¹³ The IPOA-IUU provides for a range of measures that can be used by flag States, port States, coastal States, and market States to combat IUU fishing within their jurisdiction and on the high seas. These measures include:

- implementation of a fishing vessel registration and licensing system;
- maintenance of records of fishing vessels;
- implementation of monitoring, control and surveillance (MCS) measures;
- port enforcement actions;

⁹ See MRAG Ltd., ‘Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries’, *op cit.*, *supra* n 5.

¹⁰ See MRAG Ltd. and Fisheries Ecosystems Restoration Research, Fisheries Centre, University of British Columbia, *The Global Extent of Illegal Fishing* (April 2008).

¹¹ Environmental Justice Foundation, *Pirates and Profiteers: How Pirate Fishing Fleets are Robbing People and Oceans* (London 2005), 3 <www.ejfoundation.org/pdf/pirates_and_profiteers.pdf> accessed 12 January 2009.

¹² See DJ Agnew and CT Barnes, *op cit.*, *supra* n. 5, 27–28.

¹³ Food and Agriculture Organization (FAO), *International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing*, hereafter IPOA-IUU, Adopted at the Twenty-fourth Session of COFI, Rome, Italy, 2 March 2001; See also FAO, *Implementation of the International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing* (FAO Technical Guidelines for Responsible Fisheries No. 9, Rome 2002). See also ‘Food and Agriculture Organization; International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing Approved by FAO Committee on Fisheries, 2 March 2001’ (2001) 16 *The International Journal of Marine and Coastal Law* 660–678.

- catch documentation schemes; and
- trade restrictions.

The IPOA-IUU also sets out a number of general responsibilities of flag, coastal, port and market States, called “All State Measures”. These measures relate to:

- implementation of international instruments;
- development of national plans of action;
- cooperation among States;
- application of sanctions; and
- adoption of measures against IUU fishing by vessels without nationality and vessels flying the flags of non-cooperating members of RFMOs.¹⁴

The measures in the IPOA-IUU supplement provisions in other fisheries-related international instruments, such as the United Nations Convention on the Law of the Sea (LOSC),¹⁵ the UN Fish Stocks Agreement,¹⁶ the FAO Compliance Agreement,¹⁷ and the FAO Code of Conduct for Responsible Fisheries.¹⁸ A number of RFMOs have also put in place measures against IUU fishing.¹⁹

¹⁴ IPOA-IUU, paras. 10–33.

¹⁵ (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 396. For an overview of relevant provisions of the LOSC see R.R. Churchill and A.V. Lowe, *The Law of the Sea* (3rd edition, Manchester University Press, Manchester 1999) 279–327.

¹⁶ (adopted 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3. For an overview of relevant provisions of the UN Fish Stocks Agreement see Moritaka Hayashi, ‘The 1995 Agreement on the conservation and management of straddling and highly migratory fish stocks: significance for the Law of the Sea Convention’ (1995) 29 *Ocean and Coastal Management* 51–69.

¹⁷ (adopted 24 November 1993, entered into force 24 April 2003) 33 ILM 968. For an overview of relevant provisions of the FAO Compliance Agreement see Gerald Moore, FAO; The Food and Agriculture Organisation of the United Nations Compliance Agreement (1995) 10 *The International Journal of Marine and Coastal Law* 412–425. See also William Edeson, David Freestone, and Elly Gudmundsdottir, *Legislating for Sustainable Fisheries: A Guide to Implementing the 1993 FAO Compliance Agreement and 1995 UN Fish Stocks Agreement* (The World Bank, Washington, DC 2001).

¹⁸ FAO, *Code of Conduct for Responsible Fisheries* (Rome, 1995). For an overview of relevant provisions of the FAO Code of Conduct for Responsible Fisheries see William Edeson, ‘Current Legal Developments; Food and Agriculture Organization of the UN; The Code of Conduct for Responsible Fisheries: An Introduction’ (1996) 11 *The International Journal of Marine and Coastal Law* 233–238.

¹⁹ RFMOs that have put in place measures against IUU fishing include the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) <<http://www.ccsbt.org/>>; the Northwest Atlantic Fisheries Organisation (NAFO) <<http://www.nafo.int/>>; the Northeast Atlantic

The IUU fishing measures adopted by these RFMOs include:

- establishment of lists identifying vessels involved in IUU fishing;
- records of fishing vessels;
- vessel monitoring systems;
- transshipment regulations;
- observer programs;
- boarding and inspection procedures;
- port inspection schemes;
- trade documentation schemes; and
- trade-related measures, such as prohibition of fish landings from vessels involved in IUU fishing.

Several RFMOs have created IUU vessel lists that identify vessels flying the flags of non-contracting States, as well as contracting and cooperating non-contracting parties.²⁰

Outside the RFMO framework, States have increasingly adopted plans of action at a regional level to combat IUU fishing by implementing the provisions of international instruments described above. The EU and the Lake Victoria Fisheries Organisation, for example, are the first regional organisations to have adopted respective regional plans of action to prevent, deter, and eliminate IUU fishing.²¹ In the Asia-Pacific region, several Southeast Asian countries have adopted a regional plan of action to promote responsible fisheries and combat IUU fishing.²² The Southern African Development Com-

Fisheries Commission (NEAFC) <<http://www.neafc.org/>>; the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) <<http://www.ccamlr.org/>>; the Indian Ocean Tuna Commission (IOTC) <<http://www.iotc.org/>>; the Inter-American Tropical Tuna Commission (IATTC) <<http://www.iatcc.org/>>; the Western and Central Pacific Fisheries Commission (WCPFC) <<http://www.wcpfc.int/>>; and the International Commission for the Conservation of Atlantic Tunas (ICCAT) <<http://www.iccat.int/>>.

²⁰ See, e.g., WCPFC, 'Conservation and Management Measure to Establish a List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing Activities in the WCPO' (Conservation and Management Measure 2007–03) WCPFC Fourth Regular Session, 2–7 December 2007.

²¹ See, respectively, Commission (EC), 'Community Action Plan for the Eradication of Illegal, Unreported and Unregulated Fishing' (Communication) COM (2002) 180 final, 28 May 2002; Lake Victoria Fisheries Organisation, *Regional Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated (IUU) Fishing on Lake Victoria and Its Basin* (Bagamoyo, Tanzania, 27 May 2004).

²² *Regional Plan of Action (RPOA) to Promote Responsible Fishing Practices including Combating IUU Fishing in the Region* (Bali, Indonesia, 5 May 2007) <http://www.rpoa_sec.dkp.go.id/Regional%20Plan%20of%20Action_final.pdf> accessed 12 January 2009. Current RPOA participants are: Republic of Indonesia, Australia, Brunei Darussalam, Cambodia, Malaysia, Papua New Guinea, The Philippines, Singapore, Thailand, Timor-Leste and Vietnam.

munity (SADC) has also issued a Statement of Commitment to eradicate IUU fishing.²³

At the national level, some States have incorporated provisions into domestic legislation, particularly on State control over nationals, which are relevant to addressing IUU fishing.²⁴ Notable examples include New Zealand²⁵ and Australia.²⁶ New amendments to the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of the United States have also been adopted to specifically address IUU fishing, and include measures such as denial of port access and prohibition of imports of fishery products from offending countries.²⁷

Relevant EU Policy Objectives

The EU IUU Regulation forms part of a comprehensive regulation by the EU of fisheries and trade in fisheries products. The detailed analysis of the EU IUU Regulation set out later in this article must be understood in light of the overall policy framework within which the Regulation is situated. The development of the EU regulatory framework applicable to fisheries has been influenced by the fact that the EU is the leading importer of fish and has fishing fleets in every ocean in the world.²⁸ Whilst the EU considers itself as having a

²³ The SADC IUU Statement of Commitment will become a SADC Declaration when endorsed by its Council of Ministers. SADC aims to finalise a regional action plan by June 2009 and a review of progress on implementation of the Statement of Commitment is set for the end of 2011 (see ‘Southern African states move to eradicate “pirate” fishing’, TRAFFIC News (11 July 2008) <<http://www.traffic.org/home/2008/7/11/southern-african-states-move-to-eradicate-pirate-fishing.html>> accessed 12 January 2009). At this early stage of implementation, Mozambique has already signified its commitment under the SADC IUU Statement by undertaking immediate enforcement actions against a Namibian-flagged vessel *Antillas Reefer* and taking further investigation on its two sister vessels, *Paloma V* and *Aoster*, believed to have conducted IUU fishing in Mozambique waters (see ‘Mozambique: Country Seizes Namibian Pirate Fishing Ship “Antillas Reefer”’, Agencia de Informacao de Mocambique (Maputo) (18 July 2008)) <<http://allafrica.com/stories/200807180938.html>> accessed 12 January 2009.

²⁴ IPOA-IUU, para. 18.

²⁵ See *Fisheries Act 1996 Amendment Act (No. 2) 1999*, Art. 113A.

²⁶ See *Fisheries Management Act 1991* (Cth), Part 6, Division 5A.

²⁷ See 16 USC 1826k HSDFMFA §609(d)(1) and §610(a). Section 403 of the Magnuson-Stevens Fishery Conservation Management Reauthorization Act amends the High Seas Drifnet Fishing Moratorium Protection Act by adding a new section on IUU fishing. It requires the Secretary of Commerce to identify, and list in a biennial report to Congress, a nation if its fishing vessels are engaged, or have been engaged in the preceding two years in IUU fishing. The amendments also provide for a certification procedure to determine if a nation has taken action to address IUU fishing activities.

²⁸ For a detailed examination of the economic significance of the EU fisheries market and fishing industry, see Martin Tsamenyi et al., *op. cit.*, *supra* n. 1.

major responsibility in promoting the sustainability of fisheries resources and in taking a lead in preventing, deterring and eliminating IUU fishing, it also certainly has an economic interest in combating IUU fishing. Given the high levels of support (including subsidies to the EU fleet), IUU fishing represents a source of price competition to EU fish and fishery products.

The management of fisheries and aquaculture in the EU is governed by the Common Fisheries Policy. The main objective of the Common Fisheries Policy is to ensure the exploitation of living aquatic resources that provides sustainable economic, environmental, and social conditions, primarily through the sustainable exploitation of living aquatic resources based on sound scientific advice and the precautionary approach to fisheries management.²⁹ The scope of the Common Fisheries Policy extends to the conservation, management and exploitation of living aquatic resources and aquaculture, as well as to the processing and marketing of fish and aquaculture products, where such activities are practised within the territory of EU Member States or in Community waters or by Community fishing vessels or nationals of EU Member States.³⁰

Since 1993, the EU Council has adopted a number of regulations to implement the Common Fisheries Policy.³¹ These regulations establish obligations for each EU Member State to ensure proper enforcement of all relevant fisheries conservation and management measures by vessels carrying its flag and operating in national waters, in waters of third States, and on the high seas.

²⁹ See Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy [2002] OJ L358/59, Art. 2.

³⁰ See EC No. 2371/2002, OJ L358/59, Art. 1. See generally European Commission, 'About the Common Fisheries Policy' (informational website) <http://ec.europa.eu/fisheries/cfp_en.htm> accessed 12 January 2009.

³¹ The principal EC regulations adopted to implement these measures are: EC No. 2847/93 establishing a control system applicable to the Common Fisheries Policy; Council Regulation (EC) No. 1093/94 of 6 May 1994 setting the terms under which fishing vessels of a third country may land directly and market their catch at Community ports [1994] OJ L121/3; Council Regulation (EC) No. 1447/1999 of 24 June 1999 establishing a list of types of behaviour which seriously infringe the rules of the common fisheries policy [1999] OJ L167/5; Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy [2002] OJ L358/59 (establishing conditions for the marketing of fish products and requiring Member States to cooperate with third countries and provide necessary assistance to ensure compliance with rules of the Common Fisheries Policy); and Council Regulation (EC) No. 768/2005 of 26 April 2005 establishing a Community Fisheries Control Agency and amending Regulation (EEC) No. 2847/93 establishing a control system applicable to the common fisheries policy [2005] OJ L128/1.

The European Community Plan of Action for the Eradication of IUU Fishing was adopted in 2002 in response to the call by the IPOA-IUU to address the problem of IUU fishing.³² The Community Plan of Action specifies 15 actions, divided into measures at the community level, RFMO level and the international level, and measures to be implemented in partnership with developing countries. Some of the specific measures under the Community Action Plan include:

- control over nationals;
- identification and monitoring of IUU vessels;
- identifying and quantifying illegal catch;
- requirements for catch certificates and documents;
- improvement of information on fishing vessels;
- definition of a substantial link between a State and a vessel;
- international cooperation; and
- provision for assistance to developing countries to control IUU fishing.

The Community Action Plan also recommends the adoption of a regulation to implement these measures.

In 2007 the EU adopted a formal strategy to combat IUU fishing.³³ While the focus of the earlier Community Plan of Action was to ensure effective flag State implementation by EU Member States, the EU Strategy to combat IUU fishing is intended to control IUU fishing products from third countries which enter the EU market. A number of criticisms have been raised on the EU strategy to combat IUU fishing. It was perceived that some of the measures applied to third-country vessels may lead to the exclusion of products of developing countries from the EU market if they are unable to comply.³⁴ Similarly, a total ban on all products from States whose vessels fail to comply with conservation and management measures, rather than a restriction solely applied to specific vessels or companies involved in illegal fishing, also posed a concern to some stakeholders.³⁵ Despite these criticisms, however, this strategy became the basis for the adoption of the EU IUU Regulation.

³² Commission (EC) 'Community Action Plan for the Eradication of Illegal, Unreported and Unregulated Fishing' (Communication) COM (2002) 180 final, 28 May 2002.

³³ See Commission (EC) 'On the new strategy for the Community to prevent, deter, and eliminate Illegal, Unreported and Unregulated Fishing' (Communication) COM (2007) 601 final, 17 October 2007.

³⁴ Consultation on the Elaboration of a new Strategy against IUU fishing by the European Community, Response Document Resulting from a stakeholder consultation meeting, Brussels, 20 February 2007, 16 March 2007, page 4.

³⁵ *Ibid.*

EU IUU Regulation and its Consistency with Existing International Instruments and Measures to Combat IUU Fishing

On 17 October 2007, the European Commission released a proposal for a Council Regulation ‘establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing’.³⁶ On 5 June 2008, the European Parliament adopted a legislative resolution approving a slightly amended version of the Commission’s proposal.³⁷ The amended proposal was adopted by the Council of the European Union on 29 September 2008³⁸ and is scheduled to apply from 1 January 2010.³⁹

The EU IUU Regulation implements the EU strategy to combat IUU fishing by providing for the imposition of stringent trade measures on fishing vessels and foreign States that support IUU fishing. The control, sanctioning and conditionality elements at the heart of the Regulation include:

- port State control over third-country fishing vessels;
- catch certification requirements;
- establishment of a Community IUU vessel list; and
- establishment of a list of non-cooperating third countries.

The specific provisions of the EU IUU Regulation, and an analysis of their consistency with the international fisheries instruments, are set out below.

Scope of the IUU Regulation

The EU IUU Regulation applies to IUU fishing and associated activities carried out within the jurisdiction of EU Member States, in addition to activities carried out by Community and non-Community vessels on the high seas or in

³⁶ Commission (EC) ‘Proposal for a Council Regulation Establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing’ COM(2007) 602 final, 17 October 2007.

³⁷ European Parliament legislative resolution of 5 June 2008 on the proposal for a Council regulation establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (COM(2007)0602—C6-0454/2007—2007/0223(CNS)) T6-0245/2008. See also European Parliament, ‘Community system against illegal, unreported and unregulated fishing’ (Press Release) (5 June 2008).

³⁸ Council Regulation (EC) No. 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No. 2847/93, (EC) No. 1936/2001 and (EC) No. 601/2004 and repealing Regulations (EC) No. 1093/94 and (EC) No. 1447/1999 [2008] OJ L286/1.

³⁹ EC No. 1005/2008, Art. 57.

the waters under the jurisdiction of a third State.⁴⁰ IUU fishing within maritime waters of overseas countries and territories of EU Member States (listed in Annex II of the Treaty establishing the European Community) is treated as taking place within maritime waters of third countries.⁴¹ The definition of IUU fishing set out in the EU IUU regulation is similar to those adopted in the IPOA-IUU and by RFMOs.⁴²

Fishing vessels subject to the EU IUU Regulation are broadly defined to include ‘any vessel of any size used for or intended for use for the purposes of commercial exploitation of fishery resources, including support ships, fish processing vessels, and vessels engaged in transshipment and carrier vessels equipped for the transportation of fishery products, except container vessels’.⁴³ This definition has equivalent provisions in several international and regional fisheries instruments and national fisheries legislation.⁴⁴

Port State Control of Third-country Fishing Vessels

Chapter II of the EU IUU Regulation deals with inspections and control of third-country fishing vessels seeking access to the ports of EU Member States. Under this Chapter, landings or transshipments by third-country fishing

⁴⁰ EC No. 1005/2008, Art. 1(3).

⁴¹ EC No. 1005/2008, Art. 1(3). The territories listed in Annex II of the EC Treaty are: Greenland; New Caledonia and Dependencies; French Polynesia; French Southern and Antarctic Territories; Wallis and Futuna Islands; Mayotte; Saint Pierre and Miquelon; Aruba; Netherlands Antilles: Bonaire, Curaçao, Saba, Sint Eustatius and Sint Maarten; Anguilla; Cayman Islands; Falkland Islands; South Georgia and the South Sandwich Islands; Montserrat; Pitcairn; Saint Helena and Dependencies; British Antarctic Territory; British Indian Ocean Territory; Turks and Caicos Islands; British Virgin Islands; and Bermuda (see [2004] OJ C 310/400).

⁴² See EC No. 1005/2008, Arts. 2 and 3 and IPOA-IUU para. 3. See, e.g., WCPFC, ‘Conservation and Management Measure to Establish a List of Vessels Presumed to Have Carried Out Illegal, Unreported and Unregulated Fishing Activities in the WCPO’ (Conservation and Management Measure 2007–03) WCPFC Fourth Regular Session, 2–7 December 2007; ICCAT, ‘Recommendation by ICCAT Amending the Recommendation by ICCAT to Establish a List of Vessels Presumed to have Carried Out Illegal, Unreported and Unregulated Fishing Activities in the ICCAT Convention Area’ (Recommendation GEN 06-12) 15th Special Meeting of the Commission, 17–26 November 2006.

⁴³ EC No. 1005/2008, Art. 2(5).

⁴⁴ See, e.g., FAO, *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* (adopted 24 November 1993, entered into force 24 April 2003) 33 ILM 968, Art. 1(a); Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (adopted 5 September 2000, entered into force 19 June 2004) [2004] ATS 15, Art. 1(c); Convention on the Conservation and Management of Fishery Resources in the Southeast Atlantic Ocean (adopted 20 April 2001, entered into force 13 April 2003) 41 ILM 257, Art. 1(i).

vessels are required to take place only in designated ports of EU Member States and subject to specific conditions.⁴⁵

Masters of third-country fishing vessels intending to enter the ports of an EU Member State are required to notify and submit specific information to the competent authorities of the relevant EU Member State at least 3 working days before the estimated time of arrival in port.⁴⁶ The notice of intention to enter into port is to be accompanied by a validated catch certificate if the third-country fishing vessel in question carries fishery products on board.⁴⁷ The responsibility to verify the accuracy of the information transmitted by the third-country fishing vessel in the prior notice and the catch certificate rests with the EU Member State.⁴⁸

A third-country fishing vessel may be granted authorisation to enter the port if the fishery products on board are accompanied by a catch certificate, and after other information provided to the competent authorities of the relevant EU Member State has been verified as complete.⁴⁹ Where the information provided by the fishing vessel is not complete or its verification is pending, an EU Member State, acting as a port State, may authorise port access or permit all or part of a landing in port, but would need to keep the fishery products concerned in storage under the control of the competent authorities, until the rest of the required information has been received or the verification process is completed.⁵⁰ If the verification process is not completed within 14 days of the landing, the EU port Member State may confiscate and dispose of the fish in accordance with its national law.⁵¹ Storage costs must be borne by the operators of the vessel.⁵²

⁴⁵ EC No. 1005/2008, Arts. 4 and 5.

⁴⁶ The information to be provided includes: vessel identification; name of the designated port of destination and the purposes of the call, landing, transshipment or access to services; fishing authorisation, or, where appropriate, authorisation to support fishing operations or to transship fishery products; dates of the fishing trip; estimated date and time of arrival at port; the quantities of each species retained on board or, where appropriate, a negative report; the zone or zones where the catch was made or where transshipment took place, whether in Community waters, in zones under the jurisdiction or sovereignty of a third country or on the high seas; the quantities for each species to be landed or transhipped (see EC No. 1005/2008, Art. 6(1)). Masters of third-country fishing vessels are exempted from providing certain information specified in Article 6(1) where a catch certificate for the full catch to be landed or transhipped in EC territory has been validated in accordance with Chapter III of EC No. 1005/2008.

⁴⁷ EC No. 1005/2008, Art. 6(2).

⁴⁸ EC No. 1005/2008, Art. 17.

⁴⁹ EC No. 1005/2008, Arts. 7(1) and 7(2).

⁵⁰ EC No. 1005/2008, Art. 7(3).

⁵¹ EC No. 1005/2008, Art. 7(3).

⁵² EC No. 1005/2008, Art. 7(3).

Masters of third-country fishing vessels intending to use the ports or transshipment facilities of an EU Member State must also submit a declaration indicating the quantity of fishery products by species to be landed or transshipped, in addition to the date and place of each catch.⁵³ EU port Member States are required to retain such declarations for a minimum period of three years and notify the Commission on a quarterly basis of quantities landed or transshipped by third-country fishing vessels.⁵⁴

EU Member States are required to carry out inspections in their ports of at least 5 per cent of landings and transshipment operations by third-country fishing vessels each year.⁵⁵ The EU IUU Regulation also requires the mandatory inspection of all fishing vessels that have been sighted as having or are presumed to have conducted IUU fishing and have been reported in the Community alert system, or have been listed in an RFMO IUU List.⁵⁶ The inspection may cover the fishing vessel's documents, logbook, fishing gear, catch onboard and other possible evidence that might be of relevance to the alleged IUU fishing activities.⁵⁷

If the results of inspection disclose evidence that a third-country fishing vessel has engaged in IUU fishing, the EU port Member State must not authorise the landing or transshipment of the catch in port.⁵⁸ In such circumstances, the EU port Member State must immediately notify its decision to the Commission and transmit notification to the competent authority of the vessel's flag State.⁵⁹ Where the suspected IUU fishing has taken place on the high seas or in the marine waters of a third country, the EU port Member State must cooperate with the flag State in carrying out investigations into the suspected breach, and where appropriate, in applying penalties consistent with international law.⁶⁰

The requirements in Chapter II of the EU IUU Regulation apply to third-country fishing vessels intending to land, transship or otherwise gain access to port services in the ports of EU Member States.⁶¹ The port State requirements under the EU IUU Regulation will have extensive application, given the broad definition of 'fishing vessel' under the Regulation.⁶² In practice, the port State

⁵³ EC No. 1005/2008, Art. 8(1).

⁵⁴ EC No. 1005/2008, Arts. 8(2) and 8(4).

⁵⁵ EC No. 1005/2008, Art. 9(1).

⁵⁶ EC No. 1005/2008, Art. 9(2).

⁵⁷ EC No. 1005/2008, Art. 10(1).

⁵⁸ EC No. 1005/2008, Art. 11.

⁵⁹ EC No. 1005/2008, Art. 11(3).

⁶⁰ EC No. 1005/2008, Art. 11(4).

⁶¹ EC No. 1005/2008, Art. 4(2).

⁶² EC No. 1005/2008, Art. 2(5) broadly defines a fishing vessel as 'any vessel of any size used

measures would apply to third-country fishing vessels that land their catch directly in the ports of EU Member States and to third-country exporters, even if the fish is transported by reefers.

Consistency of Port State Control of Third-Country Fishing Vessels with International Instruments and Measures

Coastal States (including the relevant EU Member States) have a clearly established right under customary international law to designate which of their ports are open to international trade.⁶³ Coastal States also enjoy a broad customary right to prescribe conditions for access to their ports.⁶⁴ Accordingly, the port State control measures set out in the EU IUU Regulation—including the designation of specific ports to receive landings and transshipments of fisheries products and the application of detailed notification, certification and inspection requirements—may be viewed as consistent with the scope of port State jurisdiction recognised under customary international law.

The port State control measures set out in the EU IUU Regulation may also be characterised as an implementation of several international fisheries instruments that require or recommend the exercise of port State control over third-country fishing vessels. Article 23 of the UN Fish Stocks Agreement, for example, contains the following provisions:

for or intended for use for the purposes of commercial exploitation of fishery resources, including support ships, fish processing vessels, and vessels engaged in transshipment and carrier vessels equipped for the transportation of fishery products, except container vessels’.

⁶³ See RR Churchill and AV Lowe, *op. cit.*, *supra* n. 15, 62, which identifies several examples of relevant State practice.

⁶⁴ *Ibid.* In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the International Court of Justice commented that the right of a State to prescribe conditions for access to its ports derives from the legal status of internal waters, which are subject to the sovereignty of the relevant coastal State: see [1986] ICJ Rep 14, 111. Article 23(4) of the UN Fish Stocks Agreement acknowledges the right of a coastal State to ‘exercise . . . their sovereignty over ports in their territory in accordance with international law.’ The LOSC itself does not address in a comprehensive manner the issue of port state jurisdiction, but the wording of several articles ‘quite clearly presupposes that States may set conditions for entry into their ports’ (*Ibid.*, 63). LOSC Article 25(2) provides: ‘In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.’ See also LOSC Article 211(3), regarding, *inter alia*, publication of port conditions and public notification of those conditions; and LOSC Article 255, regarding rights of port access, subject to the provisions of a coastal State’s laws and regulations, for scientific research vessels.

Measures taken by a port State

1. A port State has the right and the duty to take measures, in accordance with international law, to promote the effectiveness of subregional, regional and global conservation and management measures. When taking such measures a port State shall not discriminate in form or in fact against the vessels of any State.
2. A port State may, *inter alia*, inspect documents, fishing gear and catch on board fishing vessels, when such vessels are voluntarily in its ports or at its offshore terminals.
3. States may adopt regulations empowering the relevant national authorities to prohibit landings and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas...

Detailed port State control measures have also been prescribed by a number of RFMOs⁶⁵ and are set out in the IPOA-IUU. Paragraph 52 of the IPOA-IUU calls upon States to employ port State control measures in order to prevent, deter and eliminate IUU fishing. Measures specified in subsequent paragraphs of the IPOA-IUU include:

- requiring advance notice of entry into port;
- requiring the provision of documentation regarding a vessel's authorisation to fish, details of fishing activities and quantities of fish on board;
- collecting detailed information regarding fishing vessels and their crews through port inspection activities;

⁶⁵ See ICCAT, 'Recommendation by ICCAT on Establishing Statistical Document Programs for Swordfish, Bigeye Tuna, and Other Species Managed by ICCAT' (Recommendation 00-22 SDP, 26 June 2001); ICCAT, 'Recommendation by ICCAT Concerning the ICCAT Bigeye Tuna Statistical Document Program' (Recommendation 01-21 SDP, 21 September 2002); ICCAT, 'Recommendation by ICCAT establishing a Swordfish Statistical Document Programme (Recommendation 01-22 SDP, 21 September 2002); ICCAT, 'Resolution by ICCAT Concerning the Effective Implementation of the ICCAT Bluefin Tuna Statistical Document Program' (Recommendation 94-05 SDP, 23 January 1995, Addendum); ICCAT, 'Recommendation by ICCAT Concerning the Implementation of the ICCAT Bluefin Tuna Statistical Document Program on Reexport (Recommendation 97-04 SDP, 12 December 1997, Attachment); CCSBT, 'Southern Bluefin Tuna Statistical Document Program' (Updated October 2003); IATTC, 'Resolution on IATTC Bigeye Tuna Statistical Document Program (Resolution C-03-01, 24 June 2003); IOTC, 'Recommendation by IOTC Concerning the IOTC Bigeye Tuna Statistical Document Programme (Resolution 01/06); CCAMLR, 'Catch Documentation Scheme for *Dissostichus* spp' (Conservation Measures 10-05 (2004)); IATTC, 'Agreement on the International Dolphin Conservation Program, Procedures for AIDCP Dolphin Safe Tuna Certification (amended, 20 October 2005).

- reporting suspected IUU vessels to the relevant flag State authority; and
- prohibiting vessels from engaging in landing or transshipment of fisheries products where evidence suggests the vessel has engaged in IUU activity,⁶⁶ all of which are also provided under the EU IUU Regulation.

The provisions of the EU IUU Regulation on port State control over third-country fishing vessels are also consistent with the Agreement on Port State Measures to Combat IUU Fishing recently concluded under the auspices of FAO.⁶⁷ The Agreement requires parties to implement port State control measures, including:

- designation of ports to receive fishing vessels;
- advance notification requirements;
- port inspection activities;
- denial of use of ports to non-compliant or suspected IUU vessels; and
- flag-state notification procedures for foreign vessels.⁶⁸

The port State control measures adopted in the EU IUU Regulation may be contrasted with relevant international instruments in terms of the balance struck between the implementation of measures to combat IUU fishing, ensuring the safety of fishing vessels and their crew, and the implementation of appropriate safeguards against abuse of port State jurisdiction. Several limitations on port State control set out in international instruments are absent from the EU IUU Regulation. For example, the EU IUU Regulation does not expressly implement provisions found in instruments, including the UN Fish Stocks Agreement and IPOA-IUU, which require port State control measures to be implemented in a manner that does not discriminate against vessels of a particular State or States.⁶⁹

⁶⁶ See IPOA-IUU paras. 52–60; FAO, *Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing* (Rome, 2007).

⁶⁷ See FAO, Technical Consultation to Draft a Legally-binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Third Resumed Session), Rome, Italy, 24–28 August 2009.

⁶⁸ Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Adopted in November 2009, Appendix V of the FAO Council, Hundred and Thirty-seventh Session, Rome, 28 September–02 October 2009, Report of the 88th Session of the Committee on Constitutional and Legal Matters (CCLM), 23–25 September 2009, *CL 137/5*, September 2009; http://www.fao.org/unfao/bodies/council/cl137/index_en.htm accessed 5 November 2009.

⁶⁹ See, e.g., UN Fish Stocks Agreement Art. 23 and IPOA-IUU para. 52, which provides that port control measures ‘should be implemented in a fair, transparent and non-discriminatory manner.’

Furthermore, the EU IUU Regulation does not contain safeguards for third-country fishing vessels against undue delay resulting from unfounded inspections or denial of port access, or safeguards regarding the safety, health and welfare of vessel crews. The only safeguards provided under the EU IUU Regulation relate to cases of *force majeure*⁷⁰ and the vague requirement that EU Member States shall undertake inspections and verifications ‘on the basis of risk management’.⁷¹ A requirement that inspections ‘cause minimum disturbance to the vessel’s activities and cause no deterioration in fish quality’ was proposed by the Commission but not included in the final draft of the EU IUU Regulation.⁷²

Catch Certification Requirements

Chapter III of the EU IUU Regulation is designed to prohibit the importation into the EU of fisheries products obtained from IUU fishing.⁷³ In general, the importation of fishery products into the EU is only allowed when accompanied by a catch certificate, completed by the master of the fishing vessel and validated by the flag State of the vessel, and verified by the EU Member State. The EU IUU Regulation requires that a valid catch certificate must contain all information specified in the template documents shown in Annex II of the EU IUU Regulation.⁷⁴

Exportation and indirect importation of fisheries products are also subject to the validation of a catch certificate by the competent authorities of the EU Member States.⁷⁵ Verifiable documentation or certification is required of products constituting one single consignment which are transported in the same form to the EU from a third country other than the flag State.⁷⁶ Similarly, verifiable certificates are required for products constituting one single

⁷⁰ EC No. 1005/2008, Art. 4(2).

⁷¹ EC No. 1005/2008, Arts. 9(1) and 17(3).

⁷² Commission (EC) ‘Proposal for a Council Regulation Establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing’ COM(2007) 602 final, 17 October 2007, Art. 11(1).

⁷³ EC No. 1005/2008, Art. 12(1).

⁷⁴ Information specified in the template documents shown in Annex II of the Regulation includes: basic information such as the name of the fishing vessel, home port and registration number, call sign, licence number, Inmarsat number and IMO number (if issued); information on the product (the type of species, catch areas and dates, estimated live weight and verified weight landed, as well as the applicable conservation and management measures and any transshipment at sea is also required); and information and declaration on export and import of the fishery product (including the vessel name and flag, flight number airway bill number, truck nationality and registration number, other transport documents and container number).

⁷⁵ EC No. 1005/2008, Arts. 14 and 15.

⁷⁶ EC No. 1005/2008, Art. 14(1).

consignment which have been processed in a third country other than the flag State.⁷⁷ Proper documentation is required of every step of transshipment or transit, as well as the exact description of the unprocessed and processed products and their respective quantities.

Catch documents and any related documents validated in conformity with catch documentation schemes adopted by an RFMO⁷⁸ and recognised by the EU as complying with the requirements of the EU IUU Regulation will be accepted as catch certificates in respect of the products from species to which such catch documentation schemes apply.⁷⁹

The EU IUU Regulation gives wide powers to the competent authorities of EU Member States to carry out all the controls necessary to verify the catch certificate and other information provided.⁸⁰ In addition to the inspection of fishing vessels in port, these control measures may include:

- examining the products;
- verifying declaration data and authenticity of documents;
- examining the accounts of operators and other records;
- inspecting means of transport, including containers;
- inspecting storage places of the products; and
- carrying out official enquiries.⁸¹

The competent authority of the EU Member State may, for the purpose of verification, request the assistance of the competent authorities of the flag State or of a country other than the flag State from which fishery products have been indirectly imported.⁸²

Importers are required to submit validated catch certificates to the competent authorities of the EU Member State into which the product is intended to be imported at least three working days before the estimated time of arrival into the territory of that State.⁸³ However, an importer who has been granted the status of an approved economic operator has the option to merely advise the EU Member State of the arrival of the products and keep the validated catch certificates for verification by the competent authority at a later stage

⁷⁷ EC No. 1005/2008, Art. 14(2).

⁷⁸ In existing RFMOs, catch certification and statistical documentation regimes are only established for specific species of tuna, swordfish, and/or toothfish.

⁷⁹ EC No. 1005/2008, Art. 13(1).

⁸⁰ EC No. 1005/2008, Art. 17.

⁸¹ EC No. 1005/2008, Art. 17(2).

⁸² EC No. 1005/2008, Art. 17(6).

⁸³ EC No. 1005/2008, Art. 16. This requirement may be adapted according to the type of fishery product, distance to the place of entry, and the transport used.

when the fishery product has entered the territory of the EU Member State.⁸⁴ The status of an approved economic operator may be granted on the basis of criteria set out in Article 16(3) of the EU IUU Regulation.⁸⁵

A range of actions may be taken by EU Member States against third-country fishing vessels that have not complied with the catch certification requirements.⁸⁶ EU Member States are permitted to refuse importation of fishery products on a number of discretionary grounds, without having to request additional evidence or send a request for assistance to the flag State.⁸⁷

Consistency of Catch Certification Requirements with International Instruments and Measures

The catch certification requirements set out in the EU IUU Regulation may be viewed as consistent with international instruments and measures. The IPOA-IUU specifically encourages the implementation of catch certification

⁸⁴ EC No. 1005/2008, Art. 16(2).

⁸⁵ The criteria for granting the status of approved economic operator set out in Article 16(3) of EC No. 1005/2008 are: the establishment of the importer on the territory of that Member State; a sufficient number and volume of import operations to justify the implementation of Article 16(2); an appropriate record of compliance with the requirements of conservation and management measures; a satisfactory system of managing commercial and, where appropriate, transport and processing records, which enables the appropriate checks and verifications to be carried out for the purpose of the EC No. 1005/2008; the existence of facilities with regard to the conduct of those checks and verifications; where appropriate, practical standards of competence or professional qualifications directly related to the activities carried out; and where appropriate, proven financial solvency.

⁸⁶ EC No. 1005/2008, Art. 18.

⁸⁷ EC No. 1005/2008, Art. 18. Discretionary grounds for requesting assistance from the relevant flag state include: the importer has not been able to submit a catch certificate for the products concerned; the products intended for importation are not the same as those mentioned in the catch certificate; the catch certificate is not validated by the public authority of the flag State; the catch certificate does not indicate all the required information; the importer is not in a position to prove that the fishery products comply with the conditions set out in Article 14(1) or 14(2) regarding certification requirements for indirect importation of fishery products; a fishing vessel figuring on the catch certificate as the vessel of origin of the catch is included in the Community IUU vessel list or in the IUU vessel lists of RFMOs; the catch certificate has been validated by the authorities of a flag State identified as a non-cooperating third country in accordance with Article 31; the competent authorities have received a reply to a request for assistance from a third country, according to which the exporter was not entitled to request the validation of a catch certificate; the competent authorities have received a reply according to which the products do not comply with the conservation and management measures or other conditions are not met; the competent authorities have received no reply within the stipulated deadline; the competent authorities have received a reply which does not provide pertinent answers to the questions raised in the request for assistance.

requirements. As noted above, the IPOA-IUU calls upon States to employ port State control measures to combat IUU fishing, including measures that require fishing vessels to provide documentation regarding their authorisation to fish, fishing activities, and the nature and quantity of fisheries products on board.⁸⁸ Paragraph 69 of the IPOA-IUU also calls for the implementation of the following measures:

Trade-related measures to reduce or eliminate trade in fish and fish products derived from IUU fishing [which] could include the adoption of multilateral catch documentation and certification requirements, as well as other appropriate multilaterally-agreed measures such as import and export controls or prohibitions. Such measures should be adopted in a fair, transparent and non-discriminatory manner. When such measures are adopted, States should support their consistent and effective implementation.

Systems of catch documentation have also been adopted, primarily as an information-gathering and trade-tracking tool, by several RFMOs.⁸⁹ The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), for example, has adopted a Conservation Measure that, *inter alia*, requires Contracting Parties to prohibit the import, export or re-export of toothfish (*Dissostichus* spp.) that is not accompanied by appropriate catch documentation.⁹⁰ The catch certificate template shown in Annex II of the EU IUU Regulation is similar to the *Dissostichus* spp. catch document form used by CCAMLR and statistical and catch document forms used by the Indian Ocean Tuna Commission (IOTC), International Commission for the Conservation of Atlantic Tunas (ICCAT), Inter-American Tropical Tuna Commission (IATTC), and Commission for the Conservation of Southern Bluefin Tuna (CCSBT).⁹¹

⁸⁸ See above, n. 66.

⁸⁹ See FAO, 'Harmonization of Catch Documentation Schemes' (Paper prepared for FAO Committee on Fisheries, Sub-Committee on Fish Trade, 11th Session, 2–6 June 2008) (March 2008) COFI:FT/XI/2008/5 <ftp://ftp.fao.org/docrep/fao/meeting/013/k2250e.pdf> accessed 12 January 2009.

⁹⁰ See CCAMLR, 'Catch Documentation Scheme for *Dissostichus* spp' (Conservation Measures 10-05 (2006)) Art. 10.

⁹¹ See, e.g., CCAMLR, 'Catch Documentation Scheme for *Dissostichus* spp' (Conservation Measures 10-05 (2006)); IOTC, 'Recommendation by IOTC Concerning the IOTC Bigeye Tuna Statistical Document Programme (Resolution 01/06); ICCAT, 'Recommendation by ICCAT Concerning the ICCAT Bigeye Tuna Statistical Document Program' (Recommendation 01-21 SDP, 21 September 2002); IATTC, 'Resolution on IATTC Bigeye Tuna Statistical Document Program (Resolution C-03-01, 24 June 2003); CCSBT, 'Southern Bluefin Tuna Statistical Document Program' (Updated October 2003).

However, the requirement of the EU IUU Regulation with respect to the validation of catch certificates by a public authority of the flag State⁹² poses some practical implementation challenges for non-EU Member States intending to comply with the EU IUU Regulation.

Where a foreign-flagged vessel is used to fish in the waters of a particular coastal State, the EU IUU Regulation attributes responsibility for validating the catch certificate to the flag State and not to the particular coastal State in whose waters the fish was taken. Consequently, access by the coastal State's fisheries products to the EU market may be subject to the actions of another (flag) State over which the coastal State may have little influence or control. This implementation challenge is particularly relevant to several Pacific Island States who have developed the concept of 'domestic-based foreign fishing vessels' under which foreign-flagged fishing vessels are encouraged to relocate their operations to Pacific Island States. In this context it is foreseeable that a non-responsible flag State may not be willing or able to provide the necessary catch certificate validation required by the EU IUU Regulation, thereby inhibiting the ability of the coastal State to export its fisheries products to the EU market.

The requirement for flag State verification also raises issues of transparency and accountability in relation to bilateral fishing agreements between the EU and a number of States.⁹³ Under such bilateral access agreements, the EU Member flag State will be the responsible authority to provide the validation required, resulting in the EU Member flag State verifying its own validation. An additional source of uncertainty is the fact that EU Member State-flagged fishing vessels are not required to submit prior notice of arrival into their national ports. Consequently, such vessels will not submit validated catch certificates required under Chapter III of the Regulation.

Furthermore, there are concerns with respect to the lack of capability of States to adopt and implement a catch certification system compatible with the one provided under the EU IUU Regulation. Catch certification systems entail cost, particularly on the part of the non-EU developing States, funding for which may not be immediately available to them. Without appropriate technical assistance to developing States from the EU, the effective implementation of the EU IUU Regulation may be hindered.

⁹² EC No. 1005/2008, Arts. 12(3) and 12(4).

⁹³ For a catalogue of bilateral fishing agreements between the EC and other States, see European Commission, 'About the Common Fisheries Policy: Bilateral fisheries partnership agreements between the EC and third countries' (Informational website) (8 October 2008) <http://ec.europa.eu/fisheries/cfp/external_relations/bilateral_agreements_en.htm> accessed 12 January 2009.

The Community IUU Vessel List

A central feature of the EU IUU Regulation is the creation of a Community IUU vessel list, which will contain information on vessels identified by the EU and the Member States as having engaged in IUU fishing. The IUU list is to be established on the basis of:

- compliance with the EU IUU Regulation;
- catch data;
- trade information obtained from national statistics and other reliable sources;
- vessel registers and databases;
- RFMO catch documents or statistical programmes;
- reports on sightings of presumed IUU vessels, including information obtained by RFMOs;
- other relevant information obtained in ports or on fishing grounds; and
- other additional information provided by EU Member States.⁹⁴

The Community IUU vessel list will also include IUU vessels listed by RFMOs on their respective IUU lists.⁹⁵ Before placing a vessel on the Community IUU vessel list, the Commission must provide the vessel's owner and/or operator with a detailed statement of reasons and evidence supporting the intended listing, and afford an opportunity for these persons to be heard and to defend their case.⁹⁶

The actions that may be taken by EU Member States against vessels on the Community IUU vessel list are varied and include the refusal of port access or services to a listed vessel, prohibition of importation of fisheries products carried, in addition to confiscation of the catch or fishing gear.⁹⁷

⁹⁴ EC No. 1005/2008, Art. 25.

⁹⁵ EC No. 1005/2008, Art. 30.

⁹⁶ EC No. 1005/2008, Art. 27(2).

⁹⁷ EC No. 1005/2008, Art. 37. Actions against vessels on the Community IUU vessel list specified in Article 37 include the following: flag Member States shall not submit to the Commission any requests for fishing authorisations in respect of IUU fishing vessels; current fishing authorisations or special fishing permits issued by flag Member States in respect of IUU fishing vessels shall be withdrawn; IUU vessels flying the flag of a third country shall not be authorised to fish in Community waters and shall be prohibited to be chartered; fishing vessels flying the flag of an EU Member State shall not in any way assist, engage in fish processing operations or participate in any transshipment or joint fishing operations with fishing vessels on the IUU vessel list; IUU vessels flying the flag of a Member State shall only be authorised access to their home ports and no other Community ports except in case of *force majeure* or distress; IUU vessels flying the flag of a third country shall not be authorised to enter into a port of a Member State, except in case of *force majeure* or distress; alternatively, a Member State

Consistency of the Community IUU Vessel List with International Instruments and Measures

Paragraph 81 of the IPOA-IUU calls upon States, acting through relevant RFMOs, to establish records of vessels engaged in IUU fishing. Several RFMOs have established listing procedures for vessels presumed to have or identified as having engaged in IUU fishing, in addition to prescribing a wide range of measures to be taken against listed vessels.⁹⁸ The measures set out in conservation and management measures adopted by RFMOs are generally consistent with measures stipulated by the EU IUU Regulation to be taken against vessels on the Community IUU Vessel List.⁹⁹

may authorise the entry into its ports of an IUU fishing vessel on the condition that the catch on board and, where appropriate, fishing gear prohibited pursuant to conservation and management measures adopted by RFMOs are confiscated; Member States shall confiscate the catch and, where appropriate, fishing gear prohibited pursuant to RFMO conservation and management measures on board IUU fishing vessels which have been authorised to enter their ports for reason of *force majeure* or distress; IUU fishing vessels flying the flag of a third country shall not be supplied in ports with provisions, fuel or other services, except in case of *force majeure*; IUU fishing vessels flying the flag of a third country shall not be authorised to change the crew, except as necessary in case of *force majeure*; Member States shall refuse the granting of their flag to IUU fishing vessels; the importation of fishery products caught by such vessels shall be prohibited, and accordingly catch certificates accompanying such products shall not be accepted or validated; the exportation and re-exportation of fishery products from IUU vessels for processing shall be prohibited; IUU fishing vessels with no fish and crew on board shall be authorised to enter a port for its scrapping, but without prejudice to any prosecution and sanctions imposed against that vessel and any legal or natural person concerned.

⁹⁸ See ICCAT, 'Recommendation by ICCAT to Establish a List of Vessels Presumed to have Carried out IUU Fishing Activities in the ICCAT Convention area' (Recommendation 06-12); IOTC, 'Resolution 06/01 on Establishing a List of Vessels Presumed to Have Carried Out IUU Fishing in the IOTC Area'; IATTC, 'Resolution to Establish a List of Vessels Presumed to have Carried out IUU Fishing Activities in the Eastern Pacific Ocean' (Resolution C-05-07); WCPFC, 'Conservation and Management Measure to Establish a List of Vessels Presumed to have carried out Illegal, Unreported and Unregulated Fishing Activities in the WCPO (Conservation and Management Measure 2007-03, 07 December 2007)', NEAFC 'Non-Contracting Party Scheme'; CCAMLR, 'Scheme to Promote Compliance by Non-Contracting Party Vessels with CCAMLR Conservation Measures' (Conservation Measure 10-07 (2006)); CCAMLR, 'Scheme to Promote Compliance by Contracting Party Vessels with CCAMLR Conservation Measures' (Conservation Measure 10-06 (2006)); NAFO, 'Scheme to Promote Compliance by Non-contracting Party Vessels with Recommendations Established by NAFO' (Conservation and Enforcement Measures, Chapter VI).

⁹⁹ See, e.g., WCPFC, 'Conservation and Management Measures to Establish a List of Vessels Presumed to have carried out Illegal, Unreported and Unregulated Fishing Activities in the WCPO (Conservation and Management Measure 2007-03, 07 December 2007) Art. 22, which provides: 'CCMs shall take all necessary non-discriminatory measures under their applicable legislation, international law and each CCM's international obligations, and

EU List of Non-Cooperating Third Countries

In addition to a list of IUU vessels, the EU IUU Regulation provides for the establishment of a list of non-cooperating third countries. A State may be identified as a non-cooperating third country if it fails to discharge the duties incumbent upon it under international law as a flag, port, coastal or market State and to take action to prevent, deter and eliminate IUU fishing activities.¹⁰⁰

The listing of such States is based on a number of considerations and factors set out in Article 31 of the EU IUU Regulation. Considerations and factors include:

- the State's implementation of relevant international obligations;
- the IUU fishing record of such a State and its nationals; and
- the record of the State in taking effective enforcement actions in respect of the IUU fishing activities by its vessels, nationals and operators.¹⁰¹

pursuant to paras. 56 and 66 of the IPOA-IUU to: a. ensure that fishing vessels, support vessels, mother ships or cargo vessels flying their flag do not participate in any transshipment or joint fishing operations with, support or re-supply vessels on the WCPFC IUU Vessel List; b. ensure that vessels on the WCPFC IUU Vessel List that enter ports voluntarily are not authorized to land, transship, refuel or re-supply therein but are inspected upon entry; c. prohibit the chartering of a vessel on the WCPFC IUU Vessel List; d. refuse to grant their flag to vessels on the WCPFC IUU Vessel List in accordance with para. 1f, Section A, in Conservation and Management Measure 2004-01; e. prohibit commercial transactions, imports, landings and/or transshipment of species covered by the WCPFC Convention from vessels on the WCPFC IUU Vessel List; f. encourage traders, importers, transporters and others involved, to refrain from transactions in, and transshipment of, species covered by the WCPFC Convention caught by vessels on the WCPFC IUU Vessel List; g. collect, and exchange with other CCMs, any appropriate information with the aim of searching for, controlling and preventing false import/export certificates for species covered by the WCPFC Convention from vessels on the WCPFC IUU Vessel List.'

¹⁰⁰ EC No. 1005/2008, Art. 31(3).

¹⁰¹ See EC No. 1005/2008, Arts. 31(4), 31(5), and 31(6) and 31(7). In detail, considerations and factors upon which the listing of a State is based include: examination of measures taken by the State concerned in respect of recurrent IUU fishing activities carried out or supported by vessels flying its flag or by its nationals, or by vessels operating in its waters or using its ports, or of access of fisheries products stemming from IUU fishing activities into its market; whether the State concerned effectively cooperates with the EC by providing a response to requests made by the European Commission to investigate, provide feedback or follow-up to IUU fishing and associated activities; whether the State concerned has taken effective enforcement measures in respect of the operators responsible for IUU fishing, and in particular whether sanctions of sufficient severity to deprive the offenders of the benefits accruing from these activities have been applied; the history, nature, circumstances, extent and gravity of the manifestations of IUU fishing activities considered; for developing countries, the existing capacity of their competent authorities; the ratification of or accession of the States concerned to international fisheries instruments, and in particular the LOSC, UN Fish Stocks Agreement, and the FAO Compliance Agreement; the status of the State concerned as a contracting party

However, it is not clear what basis and standard the EU will implement to determine whether a State has taken effective measures in respect of its operators, or whether sanctions applied to IUU fishers are of sufficient severity.

The EU IUU Regulation requires the prohibition on the importation into the EU of fishery products caught by fishing vessels flying the flag of non-cooperating third countries, and non-acceptance of catch certificates accompanying such products.¹⁰² In cases where the identification of a non-cooperating State is justified by the lack of appropriate measures adopted by the State in relation to IUU fishing activities affecting a given stock or species, the import prohibition may only apply to this stock or species.¹⁰³ Of particular relevance to non-EU Member States is the provision in the EU IUU Regulation regarding the denunciation by the EU of any standing bilateral fisheries agreement or fisheries partnership agreements with such States, as well as refusal to enter into negotiations to conclude a bilateral fisheries agreement or fisheries partnership agreements with such States.¹⁰⁴

Another penalty that may be imposed on non-cooperating third countries is prohibition of private trade arrangements between nationals of an EU Member State and such States in order for a fishing vessel flying the flag of that Member State to use the fishing possibilities of the non-cooperating State. Again, it is not clear how the Commission will make this assessment in practice, given the highly complex nature of commercial arrangements involved in industrial fisheries (including venture capital funds). There is potential for discriminatory treatment of non-cooperating third States should the EU fail to apply similarly stringent measures against its Member States which fail to discharge their international obligations and comply with other relevant EU Regulations on fisheries control and enforcement.

Consistency of Action Against Non-Cooperating Third Countries with International Instruments and Measures

The listing of non-cooperating States for the non-compliance of their flagged vessels with the EU IUU Regulation, as well as the criteria for creating such a list, is neither provided for in the IPOA-IUU nor in other international

to regional fisheries management organisations, or the State's agreement to apply the conservation and management measures established by such organisations; any acts or omissions by the State concerned that may have diminished the effectiveness of applicable laws, regulations or international conservation and management measures; where appropriate, specific constraints of developing countries, in particular in respect to monitoring, control and surveillance of fishing activities.

¹⁰² EC No. 1005/2008, Art. 38.

¹⁰³ EC No. 1005/2008, Art. 38(1).

¹⁰⁴ EC No. 1005/2008, Arts. 38(8) and (9).

fisheries instruments. However, some of the actions adopted under the EU IUU Regulation against non-cooperating States are already being practised by a number of States and RFMOs. Several RFMOs have established procedures for imposing trade-restrictive measures against specific States in response to non-compliance with conservation and management measures or, in some cases, other relevant international obligations.¹⁰⁵ For example, ICCAT Recommendation GEN-0613 enables the Commission to implement WTO-compatible trade measures against Contracting Parties that have failed to discharge their obligations under the ICCAT Convention or against non-Contracting Parties that have failed to discharge obligations under international law 'to co-operate with ICCAT in the conservation and management of tuna and tuna-like species.'¹⁰⁶ ICCAT has imposed such measures against specific States on several occasions.¹⁰⁷

The imposition of trade measures by RFMOs is subject to the decision-making processes of the relevant RFMO and may therefore be characterised as a multilateral, cooperative response to IUU fishing. On the other hand, the Commission's list of non-cooperating third countries and associated provisions for restrictive trade measures are unilateral actions outside RFMO processes and therefore represent a progressive development of international responses to IUU fishing. This measure, as well as the response of non-EU Member States to its implementation, is yet to be tested in practice.

Conclusion

The measures outlined in the EU IUU Regulation are, on paper, generally consistent with those called for under international fisheries instruments and measures being implemented by RFMOs. One area where the EU IUU Regu-

¹⁰⁵ See, e.g., CCAMLR, 'Scheme to promote compliance by Contracting Party vessels with CCAMLR conservation measures' (Conservation and Management Measure 10-06(2006)) which provides for the imposition of trade-related measures 'that may be necessary to prevent, deter, and eliminate the IUU fishing activities identified by the Commission.' See also NEAFC, 'Scheme of Control and Enforcement' (February 2008), Art. 46; IATTC 'Resolution on the Adoption of Trade Measures to Promote Compliance' (Resolution C-06-05, expired in June 2007); ICCAT, 'Recommendation by ICCAT Concerning Trade Measures' (Recommendation 06-13 GEN); IOTC, 'Recommendation by IOTC Concerning Trade Measures' (Recommendation 03/05).

¹⁰⁶ See ICCAT, 'Recommendation by ICCAT Concerning Trade Measures' (Recommendation 06-13 GEN), Arts. 2, 6.

¹⁰⁷ See, e.g., 'Recommendation by ICCAT for bigeye tuna trade-restrictive measures on Georgia' (Recommendation 2003-18); 'Recommendation by ICCAT concerning the trade sanction against St. Vincent and the Grenadines' (Recommendation 2002-20).

lation would appear to go further than most current international efforts to combat IUU fishing relates to the listing of non-cooperating States and the unilateral imposition of trade restrictions, and other economic sanctions, on non-cooperating third countries. The EU would need to establish mechanisms and procedures in order to ensure proper and effective implementation of port State measures for third-country vessels, catch certification schemes, listing of Community IUU vessels, and listing of non-cooperating States. Such procedures would also need to take into account precautions and safeguards that would ensure the conformity of the EU IUU Regulation with international and regional fisheries instruments, particularly with respect to the rights and obligations of States and vessels.

The sustainability of fisheries resources and the significance of fisheries trade are the main drivers for the 'global policing' approach by the EU to combat IUU fishing. Such an approach can also be seen in other regions of the world. Given the increasing global attention being given to IUU fishing and the proliferation of measures adopted to address it, legislative measures such as those contained in the EU IUU Regulation are likely to become prevalent and embedded in parts of national, regional, sub-regional and international fisheries governance arrangements to ensure sustainable and responsible fishing practices.