Combating IUU fishing: international legal developments

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Abstract
When the international Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) was adopted in 2001, the term illegal, unreported and unregulated fishing or "IUU fishing" instantly gained the attention of States, regional organisations, non-government organisations, and academic institutions.

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3. Combating IUU Fishing: International Legal Developments

Mary Ann Palma

Introduction

When the International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) was adopted in 2001, the term illegal, unreported and unregulated fishing or “IUU fishing” instantly gained the attention of States, regional organisations, non-government organisations, and academic institutions. States have adopted national plans of action and specific regulations to address IUU fishing. At a much larger scale, regional fisheries management organisations (RFMOs) have adopted resolutions and conservation and management measures to address IUU fishing in their areas of competence. In these organisations, records of fishing vessels, IUU vessel lists, vessel monitoring systems (VMS), observer programmes, boarding and inspection schemes, trade documentation systems, and trade restrictive measures are being implemented. These RFMO measures are continuously setting the standards for fisheries compliance particularly on the high seas.

More recently, other international initiatives have been developed to address IUU fishing, including the initial process towards the adoption of a legally binding agreement on port State measures to combat IUU fishing, schemes to label legally-caught fish by individual States and independent entities, legislative measures to address IUU fishing, and cooperative measures outside the framework of RFMOs. These international developments in addressing IUU fishing are examined in this chapter.

The IPOA-IUU

The IPOA-IUU is the first international voluntary instrument formulated to specifically address IUU fishing. Its objective is “to prevent, deter, and eliminate IUU fishing by providing States with comprehensive, effective, and transparent measures by which to act, including through appropriate regional fisheries management organisations, established in accordance with international law.” The main components of the IPOA-IUU are the scope and nature of IUU fishing, the measures that may be adopted by States to address the problem, and the implementation of the international plan of action through RFMOs. The IPOA-IUU also recognises the special requirements of developing States in its implementation. In this regard, it requires the

Footnotes:
1. Food and Agriculture Organisation (FAO), International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU), Adopted on 23 June 2001 at the 120th Session of the FAO Council.
2. IPOA-IUU, para. 8.
cooperation of States, Food and Agricultural Organisation (FAO), and international financial institutions to provide financial, technical and other assistance to developing States in order for them meet their requirements under the IPOA-IUU.\(^3\)

The IPOA-IUU is considered a comprehensive “toolbox”, which has a full range of measures that can be used by flag States, port States, coastal States, and “market States” or States which engage in the international trade in fish to deal with various manifestations of IUU fishing within the jurisdiction of States and on the high seas.\(^4\) Such measures include the implementation of a fishing vessel registration and licensing system, maintenance of a record of fishing vessels, and implementation of a monitoring, control and surveillance (MCS) system, the requirement to provide an advanced notice of port entry, inspection of fishing vessels in port, denial of fish landing and transhipment in port, catch documentation schemes, and trade restrictions. Measures that cut across the responsibilities of flag, coastal, port, and market States are categorized under “All State Responsibilities”. These measures include the 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 States to RFMOs.

As a “toolbox,” the IPOA-IUU attempts to embrace all existing measures which States, acting alone, in cooperation with other States, or through RFMOs, may adopt to combat IUU fishing.\(^5\) A State should be able to find an appropriate tool or a combination of tools in the IPOA-IUU, to address any incident of IUU fishing.\(^6\) There are some overlaps in the application of these measures, although no contradictory measures can be found within the IPOA-IUU. Most of these measures are also addressed in other fisheries-related international instruments, on which the IPOA-IUU is based, such as the United Nations Convention on the Law of the Sea (LOSC).\(^7\) UN Fish Stocks Agreement,\(^8\) FAO Compliance Agreement,\(^9\) and the FAO Code of Conduct for Responsible Fisheries.\(^10\)

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\(^1\) IPOA-IUU, para. 65.
\(^2\) FAO, Fisheries Department, 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, FAO, Rome, 2001, para. 16.
\(^3\) FAO Technical Guidelines for Responsible Fisheries: No. 9 para 16
\(^4\) FAO Technical Guidelines for Responsible Fisheries: No. 9 para 16
Paragraph 3 of the IPOA-IUU defines the scope and nature of each of the components of IUU fishing as:

3.1 Illegal fishing refers to activities:
   3.1.1 conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;
   3.1.2 conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or
   3.1.3 in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.

3.2 Unreported fishing refers to fishing activities:
   3.2.1 which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations, or
   3.2.2 undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.

3.3 Unregulated fishing refers to fishing activities:
   3.3.1 in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or
   3.3.2 in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.

A closer look at the text of the IPOA-IUU reveals the lack of apparent connection between Part II on the nature and scope of IUU fishing and Part IV on the implementation of measures to combat IUU fishing. While Part II of the IPOA-IUU discusses the scope of each component of IUU fishing, reference is only made to the general term “IUU fishing” in Part IV. The IPOA-IUU does not specify which measures address illegal fishing, unreported fishing, or
unregulated fishing. By failing to provide a clear link between Parts II and IV, the IPOA-IUU may encourage States to adopt flag, coastal, port, market, and all State measures as part of their compliance with the international plan of action, without examining how the international definition of IUU fishing applies within a national context. This shortcoming is reflected in most national plans of action (NPOAs) adopted by States. A number of States have incorporated specific measures against IUU fishing in their NPOAs, but simply adopted the IUU fishing definition under paragraph 3 of the IPOA-IUU without indicating how the definition relates to the specific nature of fishing activities occurring within their jurisdiction or to vessels flying their flags and conducting fishing operations on the high seas and RFMO areas. As a result, these NPOAs may have the tendency to become generic documents only with a list of measures, rather than a concrete plan of action targeting specific IUU fishing activities. It is reasonable to adopt a NPOA which is broad enough to cover a wide range of IUU fishing issues and measures; however, it is also necessary to identify priority IUU concerns which will be addressed by the NPOA, especially given the limited capacity of most States to simultaneously address all IUU fishing problems.

Despite some limitations of the IPOA-IUU, it can be considered as one of the most widely accepted non-binding instruments next to the FAO Code of Conduct as can be seen by the increasing adoption of IUU-related measures by States and regional organizations. By creating a non-binding instrument which embodies measures adopted in binding instruments, States are able to promote fisheries compliance, which has been largely hindered by the lack of ratification of some of the key international fisheries agreements. This also enables States to deal with IUU fishing activities in a more practical manner.

**Developments in Addressing IUU Fishing**

The IPOA-IUU not only reiterates fisheries management obligations found in binding agreements but further includes other obligations or fisheries management measures which may be difficult to incorporate in binding instruments. As the term IUU fishing has been more widely used, States and RFMOs have developed and adopted more stringent measures than those required under the IPOA-IUU. This section provides a discussion of the most recent developments in combating IUU fishing.

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Listing of IUU Vessels

In addition to establishing a record of fishing vessels,\textsuperscript{12} the IPOA-IUU encourages RFMOs to maintain a record of vessels engaged in IUU fishing.\textsuperscript{13} RFMOs such as the International Commission for the Conservation of Atlantic Tunas (ICCAT), Northeast Atlantic Fisheries Commission (NEAFC), Northwest Atlantic Fisheries Organisation (NAFO), Inter-American Tropical Tuna Commission (IATTC), Indian Ocean Tuna Commission (IOTC), and Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) have created IUU Vessel Lists for vessels flying the flags of Non-Contracting Parties which are published on their websites.\textsuperscript{14} Among these organisations, ICCAT, NEAFC, IOTC, and CCAMLR provide that fishing vessels flying the flag of a Non-Contracting Party sighted in their respective management areas are presumed to have carried out IUU fishing and are placed on a provisional IUU list.\textsuperscript{15} The flag States are required to demonstrate that their vessels sighted in the management areas of the RFMOs have not taken part of any IUU fishing activities or that effective action has already been taken in response to the IUU fishing activities in question.\textsuperscript{16} In order to be removed from the provisional IUU list, flag States have to prove that the vessel has changed ownership and that the previous owner no longer has any legal, financial, or real interests in the vessel.\textsuperscript{17} Flag States also have to demonstrate that the vessel did not take part in IUU fishing activities, or that the vessel was only fishing for unregulated resources and has fulfilled all relevant obligations.\textsuperscript{18}

While it is more common to include vessels flying the flags of Non-Contracting Parties (NCPs) members in the RFMO IUU Vessel list, some RFMOs also

\textsuperscript{12} Vessels found in the record of fishing vessels are deemed to be vessels entitled to fly the flag of a State and authorized to fish on the high seas.

\textsuperscript{13} IPOA-IUU, paras. 314.


\textsuperscript{15} ICCAT, Recommendation by ICCAT to Establish a List of Vessels Presumed to have Carried out IUU Fishing Activities in the ICCAT Convention area, 06-12, para. 1; NEAFC, Non-Contracting Party Scheme, no date, Art. 3(2); IOTC, Resolution 06/01 on Establishing a List of Vessels Presumed to Have Carried Out IUU Fishing in the IOTC Area, para. 1; CCAMLR Conservation Measure 10-07 (2006); Scheme to Promote Compliance by Non-Contracting Party Vessels with CCAMLR Conservation Measures, para. 1.

\textsuperscript{16} ICCAT, Recommendation by ICCAT to Establish a List of Vessels Presumed to have Carried out IUU Fishing Activities, paras. 1; NEAFC, Non-Contracting Party Scheme, Art. 3(1); IOTC, Resolution 96/01 on Establishing a List of Vessels Presumed to Have Carried Out IUU Fishing, para. 1; CCAMLR, Scheme to Promote Compliance by Non-Contracting Party Vessels with CCAMLR Conservation Measures, para. 3.

\textsuperscript{17} ICCAT, Recommendation by ICCAT to Establish an IUU List, para. 6; NEAFC Non-Contracting Party Scheme, Art. 9(3); IOTC Resolution on Establishing IUU Vessel List, para. 9; CCAMLR Scheme to Promote Compliance by Non-Contracting Party Vessels, para. 10.

\textsuperscript{18} ICCAT, Recommendation by ICCAT to Establish an IUU List, para. 6; NEAFC Non-Contracting Party Scheme, Art. 9(3); IOTC Resolution on Establishing IUU Vessel List, para. 9; CCAMLR Scheme to Promote Compliance by Non-Contracting Party Vessels, para. 10.
provide for a list of IUU vessels flagged by their Members. As an example, CCAMLR provides for an IUU list for vessels flying the flags of Contracting Parties or a CP-IUU Vessel List. A provisional CP-IUU Vessel List is created based on information provided by other Contracting Parties, trade statistics, and information gathered by port States. This procedure is similar to that established for creating a NCP-IUU Vessel List under CCAMLR Conservation Measure 10.07 (2006).

Similar to other RFMOs, the Western and Central Pacific Fisheries Commission (WCPFC) has adopted Conservation and Management Measure (CMM) 2007-03 on the establishment of a list of vessels presumed to have carried out IUU fishing in the Western and Central Pacific Ocean (revision of CMM 2006-09). Paragraph 3 of the CMM 2007-03 provides that vessels fishing for species covered by the WCPFC Convention are presumed to have carried out IUU fishing activities if there is evidence that such vessels:

a) harvest species covered by the WCPFC Convention in the Convention Area and are not either on the WCPFC Record of authorised vessels or a fishing vessel fishing exclusively in waters under their jurisdiction;

b) conduct fishing activities in waters under the jurisdiction of a state, without permission of that State, or in contravention of its laws and regulations;

c) do not record or report their catches made in the Convention Area as required by WCPFC measures in force, or make false reports;

d) take and land undersized fish in contravention of WCPFC Conservation Measures;

e) fish during closures in contravention of WCPFC Conservation Measures;

f) use prohibited fishing gear in contravention of WCPFC Conservation Measures;

g) transship with, participate in joint fishing operations with, support or re-supply vessels included in the IUU Vessel List;

h) are without nationality and harvest species covered by the WCPFC Convention in the Convention Area;

i) engage in fishing activities contrary to any other WCPFC Conservation Measures; or

j) are under the control of the owner of any vessel on the WCPFC IUU Vessel List.

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10 Most vessels included in current RFMO IUU Vessel Lists are flagged by non-contracting parties. As at January 2009, only IATTC, NEAFC and CCAMLR have included vessels of contracting parties in their IUU vessel lists.

11 CCAMLR, Conservation Measure 10-05 (2006), Scheme to Promote Compliance by Contracting Party Vessels with CCAMLR Conservation Measures, parts 2 and 3.

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 2007-05, 07 December 2007.
The same provision made reference to the IPOA-IUU as the basis of the definition or characterisation of IUU fishing in the CMM 2007-03. However, a closer look at the IPOA-IUU would suggest that paragraph 3(j) of CMM 2007-03 is not included within the scope of the international definition of IUU fishing.

The WCPFC CMM 2007-03 on IUU fishing was initially agreed unanimously by Members and Cooperating Non-Members of the Commission in 2006 without any substantive debate nor discussion of the policy rationale for paragraph 3(j). It can be argued that the implementation of paragraph 3(j) can be an effective tool in preventing and deterring IUU fishing by identifying beneficial owners of IUU vessels, encouraging corporate responsibility, and enabling States to take effective actions against their nationals as required under the IPOA-IUU.

However, the adoption of paragraph 3(j) of CMM 2007-03 has a number of implications. One, the listing of an entire fleet for the wrongdoing of one vessel under the same owner or controller seems to be too onerous, as well as inconsistent with other provisions of the same conservation and management measure, such as the application of equitable, transparent, and non-discriminatory measures. Two, extending the IUU list to vessels which have not committed IUU fishing but are associated with IUU vessels through ownership or control may not only prove to be a financial burden to a fishing company but will also affect the general economic situation of the flag State, particularly small island developing States with small fleets. Three, such criteria for IUU listing may encourage a quick transfer of ownership to avoid being on the IUU list. This will make it more difficult for the Commission to ascertain the beneficial ownership of vessels. Four, CMM 2007-03 is not clear on the process involved in reporting vessels which fall under the category of paragraph 3(j). Among the various RFMOs, only IATTC has a similar provision in its resolution on IUU listing. However, there has been no evidence to suggest that such provision has been implemented by the IATTC.

The Secretariat of the WCPFC has also highlighted a number of issues with respect to the implementation of paragraph 3(j) of CMM 2007-03. It maintains that placing an entire fleet in the WCPFC IUU Vessel List for the violation of one vessel in the fleet may be excessive and may over-burden the Commission in their implementation of CMM 2007-03. The concepts of control and ownership under the provision do not take into account the complexities of legal ownership and control of vessels, including beneficial ownership structures that may not be easily traceable. Paragraph 3(j) also has the potential

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to permit the inclusion on the WCPFC IUU Vessel List of vessels that may not necessarily be fishing in the WCPFC Convention area.\textsuperscript{24}

The issue with respect to the implementation of paragraph 3(j) of CMM 2007-03 was raised by South Korea at the Fourth Regular Session of the Commission in 2007. Since then, there has been a lack of consensus among WCPFC Members on the matter. South Korea, with the support of other Members of the Commission, proposed the deletion of this provision\textsuperscript{25} while other WCPFC Members support the implementation of paragraph 3(j), subject to further elaboration of practical guidelines, as a strong deterrent to IUU fishing.\textsuperscript{26} It was agreed by the majority of the WCPFC Members and Co-operating Non-members at the Fourth Regular Session of the Technical Compliance Committee in October 2008 that the Commission will not apply paragraph 3(j) of CMM 2007-03 as a criterion for IUU listing in developing the Draft IUU Vessel List in 2009 and that additional procedures that will give effect to the provision would need to be developed for discussion at the next meeting of the WCPFC Technical and Compliance Committee.\textsuperscript{27}

Another issue associated with the WCPFC CMM 2007-03 is its implementation with respect to CMM 2004-01 on Record of Fishing Vessels and Authorisations to Fish. Under Article 24(4) of the WCPFC Convention and paragraph 4 of CMM 2004-01, each Member of the Commission is required to maintain a record of fishing vessels entitled to fly its flag and authorized to fish in the Convention Area beyond areas of national jurisdiction. The vessels in the national record are then submitted to the WCPFC for inclusion in the WCPFC Record of Fishing Vessels. Any vessel not included in the WCPFC Record of Fishing Vessels are deemed not authorized to fish for, retain on board, tranship or land highly migratory fish stocks in the Convention Area beyond the national jurisdiction of the flag State.\textsuperscript{28} This prohibition implies that vessels not included in the WCPFC Record of Fishing Vessels are considered IUU fishing vessels, as substantiated by paragraph 3(a) of CMM 2007-03. The implementation of CMM 2004-01 and CMM 2007-03 could mean the establishment of two lists, a Record of Fishing Vessels or a White List, and an IUU List or a Black List, which may not necessarily complement each other. This also raises the question as to whether or not the implementation of CMM 2004-01 alone makes the CMM 2007-03 redundant.

\textsuperscript{24} WCPFC TCC, Conservation and Management Measure 2007-03: Outstanding Issues from WCPFC4, para. 8.
\textsuperscript{25} WCPFC, Summary Report of the Fourth Regular Session, Tumon, Guam, 3-7 December 2007, paras 310 and 311.
\textsuperscript{26} WCPFC TCC, Fourth Regular Session, Pohnpei, Federated States of Micronesia, 2-7 October 2008, Summary Report, para. 115.
\textsuperscript{27} WCPFC TCC, Summary Report of the Fourth Regular Session, para. 115.
\textsuperscript{28} WCPFC, Record of Fishing Vessels and Authorisations to Fish, Conservation and Management Measure 2004-01, 10 December 2004, para 11.
Other Forms of IUU Listing

There are other less formal initiatives aimed at “ naming and shaming” IUU fishers by compiling and making available to the general public information about activities of IUU fishers. These initiatives include the Watch List of the Coalition of Legal Tuna Operators (COLTO), the International Southern Oceans Longline Fisheries Information Clearing House (ISOFISH), and Greenpeace International. Although these measures are not provided under the IPOA-IUU nor conducted directly by States, they nevertheless encourage States to take measures against IUU vessels included in the lists. Through the campaigns of these organisations, governments have taken actions to curb IUU fishing and IUU fishers have been discouraged to engage in such activities.

Adoption of a Legally-Binding Agreement on Port State Measures

Under the IPOA-IUU, port States are encouraged to cooperate bilaterally, multilaterally, or within RFMOs, in developing harmonised measures for port State control of fishing vessels similar to port State agreements which were adopted to trace substandard vessels. A Model Scheme on Port State Measures to Combat IUU Fishing was adopted by the FAO in 2005 which outlines principles and guidelines to be used by States as a reference for the negotiation and adoption of measures at the national, regional, and international level, and enhances the effectiveness of the system of port States. The FAO Model Scheme provides guidelines for carrying out inspections of foreign vessels in ports, a list of information that should be provided by vessels in advance to port States, expected results from port inspections, training of port inspectors, and a proposed information system among port States. The scheme conforms to the measures adopted under the IPOA-IUU and all relevant rules of international law.

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34 IMO, “IUU,” p. 01.
35 For example Paris Memorandum of Understanding (MOU) on Port State Control (PSC), Indian Ocean MOU on Port State Control, Black Sea MOU on Port State Control, Tokyo MOU on Port State Control, Caribbean MOU on PSC, Latin American Agreement on Port State Control of Vessels.
37 FAO Fisheries Report No. 739, Appendix E.
At the Twenty-seventh Session of the FAO Committee on Fisheries (COFI), it was agreed that an expert consultation be convened in 2007 to prepare a draft agreement on port State measures to combat IUU fishing and present it to the Twenty-eighth COFI Session in 2009. Three technical consultations have also been held since then to deliberate on the draft agreement.

The draft port State agreement applies to all foreign fishing vessels that are seeking entry into a port State or are in one of its ports, with the exception of artisanal vessels of a neighbouring State engaged in fishing for subsistence. A port State may also choose not to apply the agreement to licensed chartered vessels which are fishing exclusively in areas under its national jurisdiction. However, in both circumstances, the draft port State agreement provides that a port State must ensure that those vessels are subject to effective measures that prevent IUU fishing. The draft port State agreement also recognises the sovereignty of States over ports located in their territories, including the right to adopt more stringent measures than what is provided under the agreement in accordance with international law.

The provisions of this draft port State agreement are based on the FAO Model Scheme, however, the legal nature of this agreement would strengthen the application of port enforcement actions against vessels believed to have conducted IUU fishing. For example, Article 9 of the draft port State agreement provides for the right of a port State to deny a vessel the use of its ports for landing, transhipping, or processing of fish if:

- the vessel was engaged in fishing in an area and for fish under the competence of an RFMO and was not flying the flag of a State that is a member or a cooperating non-member of that organisation;
- has been reported as engaged in, or supporting IUU fishing in an RFMO area or in areas under the national jurisdiction of a coastal State;
- has been identified as participating or supporting unreported and unregulated fishing activities in areas or in relation to species where there are no applicable conservation or management measures and where the said...

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41 Draft Port State Agreement, Art. 3(1).
42 Draft Port State Agreement, Paragraphs and Art. 4(1)(a).
fishing activities are not carried out in accordance with responsibilities relevant to the conservation of living marine resources that fall on the State in accordance with international law.

In such cases, the burden of proof lies with the fishing vessel. The draft agreement also provides for mechanisms for appeal in cases where the owner, operator, or representative of the fishing vessel does not agree with the actions of the port State. It also provides for the obligation of the Party to the agreement to ensure that the owner or operator of the fishing vessel is entitled to compensation for any loss or damage suffered as a consequence of undue delay. These provisions are not found in the FAO Model Scheme and offer protection to fishing vessels in case of undue delay, which is crucial if an international agreement on port State measures is to be adopted.

One criticism that may be raised of the text of the draft agreement on port State measures is the characterisation of actions that may be grounds for believing that a vessel has engaged in, or supported IUU fishing. Article 17 of the draft port State agreement lists a number of actions constituting IUU fishing which contain qualifiers that may be subject to different interpretations, such as “serious failure to maintain accurate records of catch and catch-related data”, “serious misreporting of catch”, “significant fishing in a closed area during a closed season or contrary to applicable effort or quota requirements,” “using fishing gear that is significantly inconsistent with authorised gear,” and “serious failure to comply with requirements for VMS.” These references to IUU fishing activities are not as strong compared to the list of activities considered as IUU fishing under RFMO conservation and management measures. This provision would therefore need further review if States are aiming for a harmonised set of port measures to combat IUU fishing.

One of the identified advantages of the current process of drafting the port State agreement is that it is considered more inclusive than the development of the FAO Model Scheme. The adoption of the draft port State agreement also addresses the constraints and gaps found in the implementation of the FAO Model Scheme and may strengthen the prospects for coordinated efforts to combat IUU fishing. However, just like in any international agreement, only a wide ratification and effective implementation of the agreement can achieve the objective of deterring IUU fishing in ports.

43 Draft Port State Agreement, Art. 18.
44 Draft Agreement on Port State Measures, Art. 19
46 Swain, Port State Measures to Combat IUU Fishing, p. 43.
Measures to Prevent IUU Fishing in National Legislation

States have incorporated provisions in national legislation to strengthen measures to combat IUU fishing. For example, a number of States have adopted measures to exercise effective control over their nationals. Some States have made it a violation of their law for their nationals to engage in fishing activities that violate fisheries conservation and management laws of any other State or that undermine the effectiveness of conservation and management measures adopted by a relevant RFMO.47 For example, New Zealand, in its fisheries legislation, prohibits its nationals from taking or transporting fish, aquatic life, or seaweed in the national fisheries jurisdiction of a foreign State contrary to the laws of that State.48 Australia also makes it an offence for its citizens fishing in foreign vessels beyond the Australian fisheries zone to conduct operations in contravention of international conservation and management measures in the high seas, such as those established by the WCPFC.49

Some States have also exercised jurisdiction based on the active nationality principle, by enacting laws which would punish their own nationals for taking part in IUU fishing operations, even if on board the vessels of other States.50 An example of a State which has exercised this kind of jurisdiction is the United States, through the Lacey Act Amendments of 1981. According to this Act, “It is unlawful for any person to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish or wildlife taken, possessed, transported or sold in violation of any law or regulation of any State or in violation of a foreign law.”51 This approach of “long arm enforcement” has been considered effective in controlling the IUU fishing activities of US nationals outside national jurisdiction.52 Pacific Island States have also implemented Lacey Act-type laws that authorize them to regulate fisheries imports such as Federated States of Micronesia, Marshall Islands, Nauru, Papua New Guinea, Solomon Islands, and Tonga.53

In addition to the Lacey Act, the US has specifically adopted a definition of and measures to address IUU fishing that appear to be more rigorous than what is

47 FAO Technical Guidelines for Responsible Fisheries: No. 9, FAO, Rome, 2002, par. 3.2.2.
48 “New Zealand, Fisheries Act 1996 Amendment Act (No. 2) 1999, Art. 113A. A New Zealand national is defined as either a New Zealand citizen, a person who is ordinarily resident in New Zealand, or a body corporate established by or under New Zealand law.
49 See Australia, Fisheries Management Act 1991, Division 5A, Subdivision A.A.
51 United States Lacey Act, Title 15, § 3372(a)(1).
required under the IPOA-IUU. The definition of IUU fishing has been incorporated in Section 403 of the *Magnuson-Stevens Fishery Conservation and Management Reauthorisation Act*. Section 403 amends the High Seas Driftnet Fishing Moratorium Protection Act by adding, among other things, a new Section 609 on IUU fishing. Section 609(a)(3) provides the definition of IUU fishing, at the minimum as:

a) fishing activities that violate conservation and management measures required under an international fishery management agreement to which the United States is a party, including catch limits or quotas, capacity restrictions, and bycatch reduction requirements;
b) overfishing of fish stocks shared by the United States, for which there are no applicable international conservation or management measures or in areas with no applicable international fishery management organisation or agreement, that has adverse impacts on such stocks; and
c) fishing activity that has an adverse impact on seamounts, hydrothermal vents, and cold water corals located beyond national jurisdiction, for which there are no applicable international conservation or management measures or in areas with no applicable international fishery management organisation or agreement.\(^5^\)

By adopting this definition of IUU fishing, the US has extended the application of the *Magnuson-Stevens Fishery Conservation and Management Reauthorisation Act* of 2006 to areas beyond national jurisdiction and to fisheries with no current international regulations.

In implementing this provision, the US lists a nation if:

1. fishing vessels of that nation are engaged, or have been engaged during the preceding calendar year in fishing activities or practices,
a) in waters beyond any national jurisdiction that result in bycatch of a protected living marine resource; or
b) beyond the exclusive economic zone of the United States that result in bycatch of a protected living marine resource shared by the United States;
2. the relevant international organisation for the conservation and protection of such resources or the relevant international or regional fishery organisation has failed to implement effective measures to end or reduce such bycatch, or the nation is not a party to, or does not maintain cooperating status with, such organisation; and
3. the nation has adopted a regulatory program governing such fishing practices designed to end or reduce such bycatch that is comparable to that of the United States, taking into account different conditions.\(^5^\)

\(^5^\) 16 USC 1826k High Seas Driftnet Fishing Moratorium Protection Act (HSDFMPA) §609(a)(3).
\(^5^\) 16 USC 1826k HSDFMPA §609(a).
The US also aims to establish a procedure for determining if a nation listed under section 609 of the amended High Seas Driftnet Moratorium Protection Act has taken corrective actions with respect to the offending activities of its fishing vessels. Such certification procedure shall provide for giving notice and an opportunity for comment by such nation. Any nation which has not been certified or for which a negative certification has been issued will be subject to 16 USC 1826(a), (b)(3), and (b)(4) which provide for the denial of port privileges for the IUU vessels, prohibition on the imports of fish and fish products, and application of other economic sanctions.

In January 2009, a rule to implement the identification and certification procedures to address IUU fishing activities has been proposed. This proposed rule is accompanied by a draft environmental assessment, regulatory impact review, and regulatory flexibility act analysis. An environmental assessment explores the impacts of IUU fishing and bycatch of protected marine living resources which provides the public with a context for reviewing proposed certification action. Two separate procedures are being developed for the purpose of implementing the amended legislation. One procedure is for the certification of nations that have been identified as having fishing vessels engaged in IUU fishing and the other is for nations that have been identified as having fishing vessels engaged in activities resulting in the bycatch of protected living marine resources. At the time of writing, the US is soliciting comments on the IUU certification procedure and the draft environmental assessment, which are yet to be finalized.

These legislative measures are significantly different from the measures adopted under the United States NPOA-IUU. The latter has less restrictive policies than what has been provided under the amended Magnuson-Stevens Fishery Conservation and Management Reauthorization Act. By embracing a similar concept of an RFMO IUU Vessel List and adopting specific measures to address IUU fishing in areas outside its jurisdiction, the US may be considered to be applying a much “longer arm of enforcement,” in terms of broadening the application of its national laws to fisheries outside its jurisdiction and by imposing a requirement for other States to adopt conservation and management regulations similar to those of the US. The

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56 16 USC 1826 & HSDFMA § 609(d)(1)
57 16 USC 1826 & HSDFMA § 609(d)(1).
59 50 CFR, §300.102 and 201. Protected living marine resources are defined as non-target fish, sea turtles, or marine mammals that are protected under United States law or international agreement, including the Marine Mammal Protection Act, the Endangered Species Act, the Shark Finning prohibition Act, and the Convention on International Trade in Endangered Species of Wild Flora and Fauna. but exclude species, except sharks, that are managed under the Magnuson-Stevens Fishery Conservation and Management Act the Atlantic Tuna Convention Act or by any international fishery management organisation.
implementation of these provisions has a potential impact on the trade relationships of the US with other States. If a trading partner of the US cannot ensure that its fish products have been derived through legal means, the fish exports of that partner country run the risk of being rejected at the border and will not reach the US market. These IUU measures have detrimental impacts particularly on developing States, as in the case of the application of the new regulation adopted by the European Community against IUU fishing which is discussed in succeeding sections.

Promoting Responsible Fishing Through Trade Documentation and Labelling

Trade Documentation for Fish under RFMOs

Trade documentation refers to “schemes established by RFMOs that require documentation to accompany particular fish and fish products through international trade identifying the origin of fish for the purpose of ascertaining levels of unreported fishing.” Two of the most commonly used schemes for documenting fish and fish product are catch certification and trade documents. Catch certification is issued by relevant national authorities at the point of harvesting and covers all fish to be landed or transshipped, while a trade document is issued only with respect to products that enter international trade. RFMOs such as ICCAT, IATTC, IOTC, and the Commission for the Conservation of Bluefin Tuna (CCSBT) have adopted trade documentation programmes, while CCAMLR has adopted a Catch Documentation Scheme for toothfish (Dissostichus) which is an amalgam of catch certification and trade documentation schemes.

The Bluefin Tuna Statistical Document Programme of ICCAT applies to all bluefin tuna imported into the territory of a Contracting Party. The Bluefin Tuna Statistical Document Programme of ICCAT applies to all bluefin tuna imported into the territory of a Contracting Party. The Bluefin Tuna Statistical Document Programme must contain information on imported, exported, or re-exported fish and fish products such as the name of the country issuing the document; description of vessel; name of the exporter and the importer; description of fish for re-export; area of harvest of the fish in the shipment; gear utilised to catch the fish; type of product and total weight; and point of export. The document is validated by a government official of the flag State.

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61 FAO Fisheries Report No. 697, p. 1. For example, IATTC states that bigeye tuna caught by purse seiners and purse-seiners and destined principally for conservation are not subject to the statistical document requirement. See IATTC, Resolution C-03-01, Resolution on IATTC Bigeye Tuna Statistical Document Program, 24 June 2003, para. 1.
62 ICCAT, Recommendation by ICCAT Concerning the ICCAT Bluefin Tuna Statistical Document Program, 92-41 SDD, 25 July 1993, Appendix, para. 1; ICCAT, Resolution by ICCAT Concerning the Effective Implementation of the ICCAT Bluefin Tuna Statistical Document Program, 94-05 SDD, 13 January 1995, Addendum; ICCAT, Recommendation by ICCAT Concerning the Implementation of the
of the vessel that harvested the tuna. ICCAT also implements equivalent Statistical Document Programmes for swordfish, bigeye tuna, and other species. Other RFMOs such as the CCSBT, IATTC, and IOTC have very comparable statistical document programmes and utilise very similar trade document forms.

Unlike the statistical document programmes, the Catch Documentation Scheme for Dissostichus spp. (CDS) adopted by CCAMLR aims not only to identify the origin of toothfish imported into or exported from its territories, but also to determine whether the toothfish was harvested in a manner consistent with CCAMLR conservation measures. Each landing of toothfish at the port of a Contracting Party needs to be accompanied by a Dissostichus catch document (DCD) which contains information of the issuing authority; description of the vessel; reference number of the fishing license; weight of, area where, and date when the catch was taken; date and port at which the catch was landed, and information on the recipients of the catch and amount of each species and product type received. In addition to this information, the DCD also requires information on landing and transhipment. Provision for the collection of the information in the DCD is not found in the trade documents of ICCAT, CCSBT, IATTC, and IOTC. However, similar to the practice of these RFMOs, validation of the DCD also needs to be undertaken by proper authorities of CCAMLR Members. The Export of Re-export Government Authority Validation is not certified when the shipment of toothfish is declared to have been caught by any vessel included in the IUU list. If, as a result of the examination of a DCD, a question arises as to the information contained in the

ICCAT Bluefin Tuna Statistical Document Program on Re-export, 97-04 SEP, 12 December 1997, Attachment.

63 ICCAT, Bluefin Tuna Statistical Document Program, Appendix, para. 1; ICCAT, Resolution by ICCAT Concerning Validation by a Government Official of the Bluefin Tuna Statistical Document, 93-02 SEP, 10 November 1993; ICCAT, Recommendation by ICCAT on the Validation of Bluefin Statistical Documents between ICCAT Contracting Parties Which are Members of the European Community, 96-10 SEP, 04 August 1997.
66 IATTC, Resolution C-03-01, Resolution on IATTC Bigeye Tuna Statistical Document Program, C-03-01, December 2001; IOTC, Resolution 01/05, Recommendation by IOTC Concerning the IOTC Bigeye Tuna Statistical Document Programme.
document, the flag State is called upon to cooperate with the importing State to resolve the question.\footnote{CCAMLR, Catch Documentation Scheme, Art. 10.}

There are two major gaps in the implementation of trade documentation and catch certification schemes. First, there is no complete coverage of fisheries trade utilising these schemes. In the case of CCAMLR’s CDS for example, among the 56 States trading for toothfish, only 35 States are believed to be complying with CDS requirements.\footnote{IATTC, Agreement on the International Dolphin Conservation Program, Procedures for AIDCP Dolphin Safe Tuna Certification, amended, 20 October 2005.} This gap may create an opportunity for the trade of IUU caught toothfish. Second, statistical document programmes do not require statements that the catch had been made in compliance with regional fisheries conservation and management measures and do not directly prohibit the importation of illegally harvested tuna. Hence, such types of catch documentation schemes do not necessarily identify IUU-caught fish. There is therefore a need to fill these gaps in the implementation of trade documentation and catch certification schemes in order for this measure to effectively address IUU fishing.

\textit{AIDCP Dolphin Safe Tuna Certification}

The Agreement on the International Dolphin Conservation Program (AIDCP) provides for the certification of AIDCP Dolphin Safe Tuna and Tuna Products.\footnote{AIDCP, Procedures for AIDCP Dolphin Safe Tuna Certification, para 1.} An AIDCP Dolphin Safe Tuna Certificate is a document issued by the department of a national government which is responsible for implementing the procedures for the certification of AIDCP Dolphin Safe Tuna.\footnote{AIDCP, Procedures for AIDCP Dolphin Safe Tuna Certification, para 1.} An AIDCP Dolphin Safe Tuna Label may be used on the packaging of the tuna certified under the program.\footnote{AIDCP, Procedures for AIDCP Dolphin Safe Tuna Certification, para 4(4).} It is a graphic representation which distinguishes dolphin safe tuna and tuna products. This certification is implemented together with the System for Tracking and Verification of Tuna.\footnote{AIDCP, System for Tracking and Verifying Tuna, para 2.} The purpose of the system for tracking and verifying tuna is to enable dolphin safe tuna to be distinguished from non-dolphin safe tuna from the time of capture, during unloading, storage, transfer, and processing, or to the time it is ready for retail sale.\footnote{AIDCP, Procedures for AIDCP Dolphin Safe Tuna Certification, para 3.} Tuna which is positively identified by the IATTC as having been caught in contravention of IATTC tuna conservation and management measures is not eligible for AIDCP Dolphin Safe Tuna Certificate.\footnote{AIDCP, Procedures for AIDCP Dolphin Safe Tuna Certification, para 1.} Suchmeasure not only addresses illegal fishing for tuna in the IATTC area, but also bycatch issues associated with IUU fishing. Among the Pacific Island countries, only Vanuatu has ratified the AIDCP. There are also other dolphin-safe tuna labelling initiatives which are

\footnote{IATTC, Agreement on the International Dolphin Conservation Program, Procedures for AIDCP Dolphin Safe Tuna Certification, amended, 20 October 2005.}
supported by non-government organisations, either with or without a third party certification process.\textsuperscript{9}

\textit{Marine Stewardship Council Eco-labelling Standard}

Another scheme that promotes sustainable fishing, although it does not directly target IUU fishing, is eco-labelling. One of the most popular initiatives in eco-labelling is the formulation of the Marine Stewardship Council (MSC).\textsuperscript{10} Principles and Criteria for Sustainable Fisheries. These principles consider the status of the target fish stocks, impact of the fishery on the ecosystem, and performance of the fishery management system.\textsuperscript{31} Certain operational criteria under these principles ensure that fishing activities are in compliance with all legal and administrative requirements of a State and that fish has not been caught through IUU fishing activities, such as the use of destructive fishing methods.\textsuperscript{32} Fisheries which conform to these principles and criteria are certified. However, the MSC eco-labelling programme is voluntary and has a very limited scope. As at October 2008, there are 858 MSC-labelled seafood products sold in 34 countries worldwide.\textsuperscript{33} This involves 35 fisheries accredited to the MSC standards and 74 others are currently undergoing assessment.\textsuperscript{34} Over 7 per cent of the world’s wild-capture fisheries are now engaged in the program, either as certified fisheries or in full assessment against the MSC standard for a sustainable fishery.\textsuperscript{35} There is currently no company owned by Pacific Island countries which is certified to carry a MSC logo.

To address the inability of some fisheries to conform to existing standards for sustainable fishery, a new process has been established to develop new technical guidelines to help fisheries with insufficient data to be certified under the MSC. The new guidelines introduce a risk assessment that will be initiated on small-scale and data-deficient fisheries to assess their performance and provide an alternative route to certification against MSC standards.\textsuperscript{36} There are currently four fisheries in Africa and South America which are participating in the trials to test the new guidelines for the assessment of small-scale and data-deficient fisheries.\textsuperscript{37}

\textsuperscript{8} US Department of Commerce Dolphin Safe, Flipper Seal of Approval, Greenpeace Dolphin Safe, Earth Island Dolphin Safe, John West Dolphin Friendly labels.

\textsuperscript{9} Marine Stewardship Council (MSC) is an independent, global, non-profit organisation which seeks to harness consumer purchasing power to generate change and promote environmentally responsible stewardship for the world’s most important renewable food source. The MSC was first established by Unilever and World Wide Fund for Nature in 1997. See \url{www.msc.org}. Accessed on 17 March 2008.

\textsuperscript{10} Marine Stewardship Council (MSC), International Eco-labelling in Fisheries, April 2004, p. 4.

\textsuperscript{11} MSC, International Eco-labelling in Fisheries, p. 17.


\textsuperscript{13} MSC Website. Certified Fisheries.

\textsuperscript{14} MSC Website. Certified Fisheries.


\textsuperscript{16} MSC Website. Developing world fisheries embark on journey to MSC eco-label.
There are various advantages for implementing eco-labelling schemes for fish and fisheries products. Eco-labelling programmes can provide information about the environmental impact of products, provide consumers with the opportunity to express their environmental or ecological concerns through their purchasing behaviour, enhance incentives for producers to supply products that meet eco-labelling requirements, and encourage retailers and consumers to buy only fisheries products that come from sustainably managed resources.\textsuperscript{35} For the purpose of combating IUU fishing, eco-labelling schemes may be used to distinguish between fish which have been caught contrary to fisheries conservation and management measures of a State or RFMO and those which have been caught in a sustainable manner.

However, there are challenges in the implementation of the MSC eco-labelling scheme. There have been criticisms that eco-labelling processes of certain fisheries, such as the western rock lobster, New Zealand hoki and South Georgia toothfish, have been inaccurate and misleading, have failed to address the problem of IUU fishing, and have not complied with the MSC Principles and Criteria for Sustainable Fisheries.\textsuperscript{55} Another challenge is the accountability in and transparency of the MSC certification process, as well as the refinement and consistent interpretation and implementation of the MSC Principles and Criteria.\textsuperscript{60} It has been submitted that the implementation of the MSC eco-labelling process could be improved through the identification of critical indicators for failing a certification process such as the failure to follow scientific advice in management and the levels of IUU fishing in the fishery and by-catch levels.\textsuperscript{91}

\textit{Unilever’s Fish Sustainability Initiative (FSI)}

Related to the campaign on sustainable fisheries is Unilever’s Fish Sustainability Initiative (FSI). Unilever has committed to buy its fish from sustainable sources and supports the Marine Stewardship Council standard for fish certification. In 1996, Unilever wrote to all of its suppliers asking them to confirm that their fish were legally caught in specified FAO statistical areas and has stopped doing business with suppliers who could not offer that confirmation.\textsuperscript{55} Unilever has established its own assessment tool known as the ‘traffic light system’, where each fishery is assessed according to five indicators: fisheries research, quota system, regulatory tools, control systems, and long-term management plan.\textsuperscript{93} The effect of fishing on marine ecosystems is also taken into account.\textsuperscript{94} The assessment results are graded based on three

\textsuperscript{35} Diasa, C. Eco-labelling and Sustainable Fisheries, FAO, Rome 1006, p. 7.
\textsuperscript{56} Ports and Hayward, International Trade, Eco-labelling, and Sustainable Fisheries, p. 13.
\textsuperscript{91} Ports and Hayward, International Trade, Eco-labelling, and Sustainable Fisheries, p. 13.
\textsuperscript{94} Unilever, Fishing for the Future II: Unilever’s Fish Sustainability Initiative (FSI), p. 6.
colours—red, green, and yellow. A fishery that gets all green colours is deemed sustainable and Unilever recommends that they seek certification under MSC standards. Those that show a mix of green and yellow are deemed managed and progressing, and those that get one or more red are considered poorly managed. The fishery is deemed unmanaged if its assessment scores red in all five indicators. Unilever does not obtain fish from unmanaged fisheries and supports those which are making progress towards sustainability.

More companies are now supporting more sustainable fisheries. Retailers like Wal-Mart and Asquith and Dairies (ASDA) have pledged to switch to 100 per cent MSC-certified fish within 3 to 5 years. The widening campaign against IUU fishing is progressively establishing a trend towards buying legally-caught fish, which could result in loss of market for fishing companies which cannot comply with international and regional certification processes.

Regional Cooperation to Address IUU Fishing

Cooperation among States to combat IUU fishing also exists outside the framework of RFMOs. Some of the recent examples of this form of cooperation are: the adoption of the Regional Plan of Action to Promote Responsible Fishing involving States in Southeast Asia; the proposed strategies to eradicate IUU fishing in the European Community; High Seas Task Force work on Best RFMO Practices; and the Africa Caribbean and Pacific Group of States-European Union (ACP-EU) Joint Parliamentary Assembly meeting on IUU fishing. These initiatives highlight the need for strengthened cooperation among States in order to effectively address IUU fishing.

Regional Plan of Action to Promote Responsible Fishing, including Combating IUU Fishing in the Region

The Regional Plan of Action (RPOA) to Promote Responsible Fishing Practices including Combating IUU Fishing in the Region was approved by the Ministers of Republic of Indonesia, Australia, Brunei Darussalam, Cambodia, Malaysia, Papua New Guinea, The Philippines, Singapore, Thailand, Timor-Leste and Vietnam on 5 May 2007 at Bali, Indonesia. The RPOA is a voluntary instrument that draws on core principles from binding and non-binding international fisheries instruments for promoting responsible fishing practices. The objective of the RPOA is to enhance and strengthen the overall level of

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5 Unilever, Fishing for the Future II: Unilever's Fish Sustainability Initiative (FIS), p. 6.
fisheries management in the region, in order to sustain fisheries resources and the marine environment, and to optimise the benefit of adopting responsible fishing practices.\textsuperscript{96}

There are 12 actions adopted under the RPOA which cover conservation of fisheries resources and their environment, managing fishing capacity, and combating IUU fishing in three areas: the South China Sea, the Arafura-Timor Seas, and the Sulawesi Seas (Celebes Sea). Some of the specific actions include collaboration to compile an overview of artisanal and industrial fishing; the current status of fish stocks trade flows and markets; implementation of international and regional instruments; improvement of data collection systems; assessment and management of fishing capacity; adoption of port State measures; implementation of regional market measures; strengthening of MCS systems; monitoring of transhipment activities; and capacity-building.

In order to ensure the implementation of the RPOA, a Coordination Committee composed of officials from participating States has been established. The Coordination Committee is a high level decision-making body which provides strategic advice and direction to RPOA members. Regular meetings are held to discuss and monitor the implementation of the RPOA. At the initial meeting of the RPOA, five strategic priority areas were identified for strengthening and implementing further measures. These areas are strengthening MCS systems, coastal State responsibilities, regional capacity building, current resource and management situation in the region, and port State measures. Workshops have been held on MCS in order to identify relevant issues, needs, and potential actions for the region.\textsuperscript{97}

\textit{EC Regulation on IUU Fishing}

Apart from its active participation in RFMOs in combating IUU fishing, the European Commission (EC) has adopted specific measures to address the problem. The EC is one of the first regional organisations to adopt a Community Action Plan for the Eradication of IUU Fishing in 2002.\textsuperscript{100} The Community Action Plan focused on strengthening the control of fishing activities, particularly of European Union (EU) vessels and nationals to deter

\textsuperscript{96} Joint Ministerial Statement, \textit{Regional Ministerial Meeting on Promoting Responsible Fishing Practices including Combating Illegal, Unreported, Unregulated (IUU) Fishing in the Region, Bali, Indonesia}, 04 May 2007, para. 5; \textit{Regional Plan of Action (RPOA) to Promote Responsible Fishing Practices including Combating Illegal, Unreported, Unregulated (IUU) Fishing in the Region}, para. 3.

\textsuperscript{97} Workshop on Monitoring, Control and Surveillance for the Implementation of the Regional Plan of Action to Promote Responsible Fishing Practices including Combating IUU Fishing in the Region, Bali, Indonesia, 4-6 March 2008; Pre-meeting of the Regional Plan of Action to Promote Responsible Fishing Practices including Combating IUU Fishing in the Region Coordination Committee on Monitoring, Control and Surveillance for the implementation of the RPOA, Manila, Philippines, 28 April 2008.

and sanction illegal fishing activities. Four years after the adoption of the European Community Plan of Action, a new strategy was proposed to address IUU fishing. The strategy aims to improve port State control of third country fishing vessels and control of third country fishery products to close the market to IUU fish products.

There have been a number of criticisms on the proposed EC strategy to combat IUU fishing. It was perceived that proposed measures on traceability of fish and fishery products from third country vessels may lead to the exclusion of products of developing countries from EU markets if they are unable to comply. The requirement on third country flag States to demonstrate that produce on board vessels has been caught legally through certification is a capability that may not exist in developing countries. Similarly, a ban on all products from States which fail to ensure that their vessels comply with conservation and management measures, rather than a restriction solely applied to specific vessels or companies involved in illegal fishing, is also of concern to some stakeholders. In these proposed measures, the aim to demonstrate compliance with the EU strategy lies with the developing flag State.

Despite concerns raised by developing trade partners of the EC, this strategy became the basis for drafting the EC IUU Regulation. On 29 September 2008, the Council of the European Union adopted EC No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing. This regulation is scheduled to enter into force on 1 January 2010.

The EC IUU Regulation applies to "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 trawling and carrier vessels equipped for the transportation of fishery products, except container vessels". The EC IUU Regulation also applies to "any products which fall under Chapter 03 (fish and crustaceans, molluscs and other aquatic invertebrates), and Tariff headings 1604 (prepared or preserved fish; caviar and caviar substitutes prepared from fish eggs) and 1605 (crustaceans, molluscs and other aquatic invertebrates, prepared or preserved) of the Combined Nomenclature established by Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the

102 Consultation on the Elaboration of a new Strategy against IUU fishing by the EC, p. 4.
103 Consultation on the Elaboration of a new Strategy against IUU fishing by the EC, p. 4.
105 EC No 1005/2008, Article 57.
106 EC No 1005/2008, Art. 2(2).
Common Customs tariff, with the exception of products listed in Annex 1 of this Regulation.\footnote{EC No 1005/2000, Art 2(8).}

The EC IUU Regulation comprises four key elements: port control over third country fishing vessels; catch certification requirements; establishment of the Community IUU vessel list; and establishment of a list of non-cooperating third countries. Among these components, the implementation of catch certification requirements and listing of non-cooperating third countries would have the most impact on Pacific Island States.

The EC IUU Regulation requires that the importation, exportation and indirect importation of fishery products be allowed only when accompanied by catch certificates validated by the flag State of the vessel.\footnote{EC No 1005/2000, Art 14 and 15.} As a rule, importers must submit validated catch certificates to the competent authorities of the EC member State in 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.\footnote{EC No 1005/2000, Art 16. This requirement may be varied according to the type of fishery product, distance to the place of entry, and the transport used.} If an importer has been granted the status of an approved economic operator, it has the option to merely advise the EC member State of the arrival of the product and keep the validated catch certificates for verification of the competent authority at a later stage when the fishery product has entered the territory of the EC member State.\footnote{EC No 1005/2000, Art 16(3).} The status of an approved economic operator may be granted on the basis of certain criteria, including an appropriate record of compliance with relevant conservation and management measures.\footnote{EC No 1005/2000, Art 11.} If a third country fishing vessel has not complied with catch certification requirements under the EU IUU Regulation, a range of actions may be taken by an EC member State, such as the refusal to import the fishery product associated with the catch certification.\footnote{EC No 1005/2000, Art 11.}

The implementation of catch certification requirements under the EC IUU Regulation has a number of implications for Pacific Island States. In order to ensure that fisheries products are not denied entry into the territories of the EC Members, Pacific Island States will need to establish a national catch certification and validation scheme that complies with the requirements of the EC IUU Regulation. Such a scheme would also need to take into account the nature and management of domestic-based foreign-owned fishing vessels operating in a number of Pacific Island States and ensure that they exercise control over the activities of vessels under such arrangement. In order to facilitate export of fishery products into the EC, Pacific Island States would further need to establish a system for granting fishing companies and establishments the status of approved economic operators, similar to the
regulations on determining authorised establishments which comply with EC Sanitary and Phytosanitary Regulations. The implementation of national catch certification systems to meet the requirements of the EC IUU Regulation entails cost to developing trade partners of EC member States, including Pacific Island States.

Another measure adopted under the EC IUU Regulation which has a potential negative impact on Pacific Island States is the establishment of a list of non-cooperating States. According to the EC IUU Regulation, 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 flag, port, coastal or market States and to take action to prevent, deter and eliminate IUU fishing activities. The listing of such States is based on a number of factors, including the implementation of relevant international obligations by the third country in question, the IUU fishing record of its vessels, operators and nationals, and its record in taking effective enforcement actions in respect of the IUU fishing activities by its nationals.

Furthermore, the EC IUU Regulation prohibits the importation into the EC of fishery products caught by fishing vessels flying the flag of non-cooperating third countries and non-acceptance of catch certificates accompanying such products. The EC IUU Regulation also contains a provision on the denunciation by the EC of any standing bilateral fisheries agreement or fisheries partnership agreements with non-cooperating third countries, refusal to enter into negotiations to conclude a bilateral fisheries agreement or fisheries partnership agreements with such States, and prohibition of private trade arrangements between nationals of an EC Member State and the non-cooperating third country. These particular provisions may affect the Federated States of Micronesia, Solomon Islands, and Kiribati which currently have bilateral access agreements with the EC. Enforcement of this nature functions as economic sanctions and goes beyond what is provided under the IPOA-IUU and RFMO schemes against IUU fishing. Since procedures on how these provisions will be implemented have not been established, it is not clear as to how the EC will make the assessment of how and why a State can be listed as a non-cooperating State. There is potential for discriminatory application of these provisions should the EC fail to implement the same level of stringent measures against its Members.

113 EC No 1005/2008 Art. 31(5).
114 EC No 1005/2008 Art. 31(4), 31(5), and 31(6) and 31(7).
115 EC No 1005/2008 Art. 38.
116 EC No 1005/2008 Art. 38(8) and (9).
ACP-EU Joint Parliamentary Assembly Meeting on IUU Fishing

As a response to the impending implementation of the EC IUU Regulation, the ACP-EU Joint Parliamentary Assembly held a meeting in Port Moresby, Papua New Guinea on 25 November 2008 to discuss the threats posed by IUU fishing and the necessary interventions within the context of EC IUU Regulation. A number of issues have been raised by ACP States such as the lack of capacity and resources to implement the new regulation, increased pressure on the market of fishery products entering EU territories, and the lack of proper consultation by the EC when the regulation was being prepared. The ACP-EU Joint Parliamentary Assembly resolved that further meetings be conducted in 2009 and 2010 to discuss the scale of IUU fishing issues and the support that the EC may offer the ACP States to adapt and comply with the new regulation.

RFMO Best Practices

In March 2008, the Ministerially-led Task Force on IUU Fishing on the High Seas launched a report which included a proposal to develop a “model” for improved governance by RFMOs. In January 2007, an initiative began to develop a common methodology and set of criteria for the core functions of the five main RFMOs to guide the organisations through individual performance reviews. The report has nine subject areas: general practice; conservation and management; allocation; compliance and enforcement; decision-making; dispute settlement; transparency; special requirements of developing countries; and institutional practices.

The report reiterates some of the key measures implemented by RFMOs and recommends the adoption of a comprehensive system of control to ensure compliance with their conservation and management measures. This system of control should include a register of all fishing vessels, transhipment and support vessels, and a centralised VMS that reports high seas fishing operations.


120 The Ministerially-led task force on IUU fishing on the high seas was established in 2003 under the auspices of the Round Table on Sustainable Development at the Organisation of Economic Co-operation and Development (OECD) to respond to work with international non-government organisations (NGOs) to draft an action to combat IUU fishing on the high seas. The Ministerial membership of the Task Force included fisheries ministers from Australia, Canada, Chile, Namibia, New Zealand, and the UK. See High Seas Task Force Website, www.high-seas.org. Accessed on 10 January 2009.

to RFMOs in real time. It is recommended that the system should also have port State measures that would only allow landing and transhipment in ports from fishing vessels confirmed to have confirmed to conservation and management measures. The system of control should further have trade and market-related measures such as catch certification and trade documentation scheme, particularly for high-value fisheries. Other proposed measures to be included in the system are observer programmes and inspection schemes.\footnote{Recommended Best Practices for RFMOs: Executive Summary, p. 4.}

There are other RFMO practices recommended by the High Seas Task Force on compliance and enforcement. The report recommends a system for punishing flag States and/or their vessels and nationals for violations of RFMO conservation and management measures, as well as the requirement to follow up any violations by its flagged vessels and report on the domestic actions taken to the relevant RFMO. Another recommended practice is the adoption of schemes to target non-party fishing in contravention of RFMO conservation and management measures, such as blacklisting non-party vessels and listing irresponsible flag States followed by agreed actions against those vessels and States.\footnote{Recommended Best Practices for RFMOs: Executive Summary, p. 13.} This report indicates the general view of most RFMOs that IUU vessel listing should be directed against vessels of third parties fishing in RFMO areas. In the case of nationals of members of RFMOs, the report recommends that schemes to promote compliance by national vessels must be adopted. In this report, there was no reference to the creation of IUU listing for vessels flying the flags of RFMO members.

Conclusion

After the adoption of the IPOA-IUU, various measures have been adopted to address IUU fishing at a much broader and more effective manner. Most of these measures are being implemented rigorously by individual States and regional organisations, and it will not be surprising to see the adoption of more stringent measures to combat IUU fishing in years to come. Such development not only signifies the increasing awareness on the negative impacts of IUU fishing, but also demonstrates a better understanding of the gaps in the existing international regulatory framework and the need to strengthen measures to deal with the problem. However, there are still a number of issues that need to be addressed in the implementation of measures such as IUU vessel listing, trade documentation, labelling of fish, and listing of non-cooperating States. Such measures need to take into account the nature of IUU fishing issues and the legal implications of adopting some of these restrictive measures. States will also need to strengthen measures at the domestic level to control their nationals and explore other avenues of cooperation in order to address IUU fishing.
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