

Non-Legally Binding International Fisheries Instruments and Measures to Combat Illegal, Unreported and Unregulated Fishing[†]

DIKDIK MOHAMAD SODIK*

Abstract

Illegal, unreported and unregulated (IUU) fishing is considered as a major threat to the world fish stocks. The battle against IUU fishing activities has recently become a high priority in the international fisheries management agenda. The international community, through the Food and Agriculture Organisation (FAO) has developed non-binding instruments to support the implementation of the multilateral fisheries-related agreements. This article is concerned with two instruments, namely the FAO Code of Conduct for Responsible Fisheries and the FAO International Plan of Action to Prevent, Deter, and Eliminate IUU Fishing (IPOA-IUU). The article will discuss the role of these non-binding international fisheries instruments in building on the frameworks under the 1982 Law of the Seas Convention (LOSC), the FAO Compliance Agreement, and the United Nations (UN) Fish Stocks Agreement to combat IUU fishing at the global and national level. The article focuses on the role of these two non-binding instruments and examines the significance of the instruments for the legally binding instruments. Finally, some conclusions are offered.

Introduction

In recent years, the international community has been faced with increased illegal, unreported and unregulated (IUU) fishing,¹ which occurs in all capture areas. The increasing problem of unregulated fishing on the high seas, including the practice of re-flagging vessels or registering in countries which operate open registers are contributory

[†] This is a modified version of a chapter of the author's PhD thesis carried out at the Australian National Centre for Ocean Resources and Security (ANCORS), Faculty of Law, University of Wollongong, Wollongong, New South Wales, Australia. The author would like to thank Professor Martin Tsamenyi, PhD for his valuable guidance on the thesis.

* Faculty of Law, Bandung Islamic University, Indonesia. The author can be reached at 7 Gerimis Street, Kopo Elok, Bandung, West-Jawa, Indonesia: email address: <ddk_20022002@yahoo.com>.

¹ The definition and scope of IUU fishing are discussed in Section 2.

factors to the depletion of marine resources. IUU fishing has threatened target fish stocks, undermined conservation and management measures of the national fisheries management authorities and the Regional Fisheries Management Organisation (RFMO).

According to the UN Food and Agriculture Organisation (FAO), approximately 47 per cent of the major fish stocks in the world are now fully exploited, 18 per cent are overexploited, and 10 per cent are significantly depleted.² There is no denying that the world's fisheries are experiencing a catastrophic crisis.³ In an effort to address the problem, in addition to the legally binding instruments developed at the global level to combat IUU fishing outlined and analysed briefly later, the international community, through the Food and Agriculture Organisation (FAO), has also developed non-binding instruments to support the implementation of the multilateral fisheries-related agreements.⁴

Non-binding instruments, often referred to as 'soft law,' provide policy guidance for States to support national efforts to combat IUU fishing. Examples of such policy guidance include the intention of the Code of Conduct for Responsible Fisheries, which was drafted to cover much more than high seas fishing. The non-legally binding character of the Code has also enabled it to set out many more norms and principles than those which are regulated in a legally binding international agreement such as the UN Fish Stocks Agreement.⁵ Adopted by a formal resolution of the FAO Conference, the Code of Conduct could also be considered as something which a juridical body could demonstrate as evidence of the possible development of new norms and principles in the area of international fisheries laws.⁶

Specifically, it should be noted that the IPOA-IUU has been formulated within the framework of the FAO Code of Conduct for Responsible Fisheries, in which a number of provisions also describe the relationship between the IPOA-IUU and other relevant international instruments. The IPOA-IUU is to be interpreted and applied in a manner consistent with the LOSC,⁷ the FAO Compliance Agreement and the UN Fish Stocks Agreement.⁸ Therefore it is of some interest to see the way that the IPOA-IUU has given effect to the basic provisions the Code of Conduct for Responsible Fisheries. Suffice it

2 Report of the UN Secretary General of Fifty-Ninth Session of the United Nations General Assembly, 24 August 2004 at 8.

3 Howard L Brown, 'The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: An Analysis of International Environmental Law and the Conference's Final Agreement', (1996–1997) 547 *Vermont Law Review* at 548.

4 The important multilateral fisheries-related agreements in this respect are the 1982 United Nations Convention on the Law of the Sea (hereinafter the 1982 LOSC), the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels (hereinafter the 1993 FAO Compliance Agreement), the 1995 UN 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 Species Fish Stocks 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 Species Fish Stocks (UNIA) 1995 (hereinafter the 1995 UN Fish Stocks Agreement)

5 William Edeson, 'The Code of Conduct for Responsible Fisheries: An Introduction' [1996], *The International Journal of Marine and Coastal Law* at 237.

6 William Edeson, 'Closing the Gap: The Role of 'Soft' International Instruments to Control Fishing', (1999) 20 *Australian Yearbook of International Law* at 103.

to note that the Code of Conduct and the IPOA-IUU, both of which are underpinned by the 1982 LOSC and post Law of the Sea legally binding instruments, will constitute the basis for future directions in the area of fisheries. This article is concerned with two instruments, namely the FAO Code of Conduct for Responsible Fisheries and the FAO IPOA-IUU.

The objective of the FAO Code of Conduct is to provide guidance to States to create or improve the legal and institutional framework for fisheries management in order to achieve responsible fisheries.⁹ In recognition of the fact that not all States are parties to binding fisheries instruments, the FAO has developed the IPOA-IUU as a non-legally binding instrument to strengthen the binding agreements. The IPOA-IUU contains wide-ranging provisions, including responsibilities of all States, coastal States, flag States, port State measures, and internationally agreed market-related measures.¹⁰ It can be said that the provisions of the IPOA-IUU set the international standard for the regulation of IUU fishing at the national level.¹¹

This article wraps up the analysis of the international legal framework to address IUU fishing by discussing the measures adopted in relevant non-binding international fisheries instruments to address the problem. The article considers the extent to which these non-binding international fisheries instruments build on the frameworks under the 1982 LOSC, the FAO Compliance Agreement and UN Fish Stocks Agreement to combat IUU fishing at the global and national levels. The article focuses on the role of these two non-binding instruments and examines the significance of the instruments for the legally binding instruments. It is argued that the former instruments represent an important contribution to the latter instruments essentially in four aspects by:

1. filling the gaps in the LOSC's provisions;
2. strengthening the LOSC's regime;
3. supplementing the post-LOSC legally binding fisheries instruments; and
4. filling the gap in the post-LOSC legally binding fisheries instruments.

This article begins by explaining definition of IUU fishing globally before turning to analyse causes and impacts of IUU fishing. It then discusses the non-legally binding international fisheries instruments for combating IUU fishing. Finally, some conclusions are offered.

7 Para 10 of the International Plan of Action to Prevent, Deter, and Eliminate IUU Fishing (IPOA-IUU) requires States to give full effect to relevant norms of international law, in particular as reflected in the United Nations Convention on the Law of the Sea, in order to prevent, deter and eliminate IUU fishing.

8 Para 13 of the IPOA-IUU provides that nothing in the Plan affects, or should be interpreted as affecting, the rights and obligations contained in the 1995 UN Fish Stocks Agreement and the 1993 FAO Compliance Agreement, for those States parties to those instruments.

9 Western Central Atlantic Fishery Commission, 'Use of Monitoring Control and Surveillance (MCS) in Fishing As An Integral Part of Fisheries Management in the WECAFC Region' (Western Central Atlantic Fishery Commission, Eleventh Session, St. George's, Grenada, 21–24 October 2003) at 3.

10 Judith Swan, 'International Action and Responses By Regional Fishery Bodies or Arrangements to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' in *FAO Fisheries Circular No 996*, Food and Agriculture Organization Rom (2004) at 2.

11 Carl-Christian Schmidt, 'Economic Drivers of Illegal, Unreported and Unregulated (IUU) Fishing', (2005) 20(3–4) *The International Journal of Marine and Coastal Law* at 479.

I. Definition of IUU Fishing

There are three components of IUU fishing, namely:

- a) illegal fishing;
- b) unregulated fishing; and
- c) unreported fishing.

The generally accepted definition of each of the components of IUU fishing is provided by the International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU).

A. Illegal Fishing

Paragraph 3.1 of the IPOA-IUU defines illegal fishing as fishing activities:

- a) 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 (3.1.1);
- b) conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organisation but operate in contravention of the conservation and management measures adopted by that organisation and by which the States are bound, or relevant provisions of the applicable international law (3.1.2); or
- c) in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organisation (3.1.3)

Illegal fishing occurs in marine capture areas both under the national jurisdiction of coastal States, in areas under the competence of regional fisheries management organisations (RFMOs), and on the high seas.¹² Illegal fishing in national waters covers two main activities. The first activity involves fishing conducted by both domestic and foreign vessels without proper authorisation. The second encompasses fishing activities that contravene the terms and conditions of a valid license.¹³ Illegal fishing involves a range of activities such as incursions (poaching) into the Exclusive Economic Zones (EEZs) and inshore areas by foreign fishing vessels, non-compliance by fishers with the terms of their fishing licenses, fishing by unlicensed vessels and unlicensed fishing in restricted areas.¹⁴ Another type of illegal fishing is the use of destructive fishing methods such as explosives and poisons, small-meshed fishing nets, and highly destructive fishing gears.¹⁵

12 John Fitzpatrick, 'Measures to Enhance the Capability of A Flag State to Exercise Effectiveness Control Over A Fishing' (Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia in Cooperation with FAO, Sydney, Australia, 15–19 May 2000) at 1.

13 William Edeson, above n6 at 98.

14 David J Doulman, 'Global Overview of IUU Fishing and Its Impacts on National and Regional Efforts to Manage Fisheries Sustainability: The Rationale for The Conclusions of the 2001 FAO International Plan of Action' (Report of the Expert Consultation on Fishing Vessels Operating Under Open Registries and Their Impact on Illegal, Unreported and Unregulated Fishing, Miami, Florida, United States of America, 23–25 September 2003) in *FAO Fisheries Report No 722*, Food and Agriculture Organization Rome (2003) at 29.

At a regional level, illegal fishing also occurs when member states of RFMOs fail to comply with the organisation's conservation and management measures.¹⁶ In this context, the term illegal fishing is used to refer to activities that contravene either national or international laws. These practices often go undeterred either because of the lack of political will or the lack of capacity of national or regional bodies to enforce existing fisheries laws.¹⁷

B. Unregulated Fishing

Paragraph 3.3 of the IPOA-IUU defines unregulated fishing as fishing activities:

- a) in the area of application of a relevant regional fisheries management organisation that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organisation, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organisation (3.3.1); or
- b) 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 (3.3.2).

From the above definition, it is apparent that unregulated fishing is commonly undertaken by vessels flying the flag of non-members of RFMOs. As a result, these vessels do not consider themselves to be bound by the conservation and management measures adopted by RFMOs.¹⁸ These states and their fishing vessels are often categorised as 'free riders'. The term unregulated fishing also refers to the harvesting of fish in areas where there are no management measures.¹⁹ Unregulated fishing activities are also caused by the ineffective application of international regulations at the national and regional levels.²⁰

Thus, the concept of unregulated fishing is a narrow one. It mainly applies to two circumstances, namely, fishing activities in areas covered by RFMOs by vessels without nationality and by vessels whose flag States are not members of RFMOs. The term unregulated fishing also applies to fishing on the high seas where there are no

15 Ousman K L Drammeh, 'Illegal, Unreported and Unregulated Fishing in Small-Scale Marine and Inland Capture Fisheries' (Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia in Cooperation with FAO, Sydney, Australia, 15–19 May 2000) at 1.

16 Kevin Bray, 'Illegal, Unreported and Unregulated Fishing' in Myron H Nordquist & John Norton Morton (eds), *Current Fisheries Issues and the Food and Agriculture Organizations of the United Nations* (2000), Centre for Oceans and Policies, University of Virginia School of Law at 122.

17 Lawrence Juda, 'Rio Plus the Evolution of International Marine Fisheries Governance' (2002) 33(2) *Ocean Development and International Law* at 119.

18 U R Sumaila, 'The Cost of Being Apprehended Fishing Legally: Evidences and Policy Implications' (Paper Submitted to the IUU Workshop, Directorate for Food, Agriculture and Fisheries, Fisheries Committee of OECD, 19–20 April 2004) at 3.

19 Lawrence Juda, above n17.

20 Blaise Kuemlengan, 'National Legislative Options to Combat IUU Fishing' (Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia in Cooperation with FAO, Sydney, Australia, 15–19 May 2000) at 6.

arrangements established to manage the resources and activities in such areas. In this case, it can be said that unregulated fishing results largely from the failure of the international community to establish RFMOs or from the inability of flag States to discharge their responsibilities over their vessels.

C. Unreported Fishing

Unreported fishing is defined in paragraph 3.2 of the IPOA-IUU as fishing activities:

- a) which have not been reported, or have been misreported to the relevant national authority, in contravention of national laws and regulations (3.2.1); or
- b) which are undertaken in the area of competence of a relevant regional fisheries management organisation which have not been reported or have been misreported, in contravention of the reporting procedures of that organisation (3.2.2).

Unreported fishing is thus a subset of the definition of illegal fishing and unregulated fishing. Failure to report catches to the competent authorities by fishing vessels or flag States may be illegal if it is done in contravention of reporting regulations. Alternatively, unreported fishing may also be unregulated if there are no rules requiring the reporting of catches.

2. Causes of IUU Fishing

Having outlined the definition of IUU fishing, this section provides an analysis of the major causes of IUU fishing. A number of factors account for the emergence and increase in IUU fishing globally. These factors include the increase in the demand for fisheries products globally, subsidies in the fisheries sector and overcapacity, of lack of the flag State control over fishing vessels, and ineffective fisheries monitoring, control and surveillance. These factors are examined below.

A. Increasing Demand for Fishery Products

There is an increasing demand for fishery products globally brought about by an increasing world population. However, commercial fish stocks within EEZs are generally fully exploited. As a result of these factors, an increasing number of fishers and fishing vessels are operating on the high seas.²¹ In the absence of appropriate management practices, the competition amongst fishers continues to increase and intensify.²² The increasing demand for fish, coupled with the decline of fisheries resources has contributed to the growing incidence of IUU fishing.

21 Rebecca Metzner, 'Fishing Aspirations and Fishing Capacity: Two Key Management Issues' (2005) 20(3–4) *The International Journal of Marine and Coastal Law* at 459. For such discussion see also 'Introductory Remarks' of The Honorary Frank E Loy at the Centre's Twenty-Fourth Annual Conference held at the Food and Agriculture Organization Headquarters in Rome from March 16–17, 2000 in Myron H. Nordquist & John Norton Moore (eds), above n16 at 9.

22 Ousman K L Drammeh, above n15 at 2.

B. Subsidies in the Fisheries Sector and Overcapacity

Subsidies in the fisheries sector have been identified as one of the issues affecting the sustainability of global fisheries resources.²³ The term subsidies is broadly applied to a wide range of government interventions, or to the absence of correcting interventions, that reduce costs and/or increase revenues of producing and marketing fish and fish products in the short, medium or long-term. Government interventions include financial transfers or the provision of goods or services at a cost below market price. The 'absence of correcting interventions' includes failure by governments to impose measures that correct external costs associated with fishing.²⁴

Subsidies in the fisheries sector have an impact on IUU fishing, overcapacity and trade in fish and fish products.²⁵ Under the current legal regime, individual fishermen or fleets do not receive any benefit from refraining from illegal fishing because the regime established by the international community is designed to protect the economic interests of fishing industries. For instance, according to the FAO, the world's fishing fleets incur costs of approximately US\$54 billion annually. A major portion of these costs are paid through government subsidies.²⁶

According to various non-government organisations and interest groups, the problem of overcapacity can be directly attributed to the payment of subsidies. Some subsidies are particularly used to construct and modernise fishing gears.²⁷ Large fishing nations have fleet capacities that are able to catch a considerable quantity of fish. Fishing vessels of these States are able to conduct activities within their own national waters, on the high seas, and under the jurisdiction of other States in accordance with bilateral fisheries agreements.²⁸ The use of purse seine and longlines enable the growing number of international fleets to harvest an ever-increasing number of target and non-target stocks in all oceans.²⁹

-
- 23 'Report and Documentation of the International Workshop on Factors Contributing to Un-sustainability and Overexploitation in Fisheries, Bangkok, Thailand, 4–8 February 2002, FAO/Japan Government Cooperative Programme' in *FAO Fisheries Report No 672*, Food and Agriculture Organization Rome (2002) at 15.
- 24 'Guide for Identifying, Assessing and Reporting on Subsidies in the Fisheries Sector' in *FAO Fisheries Technical Paper No 438*, Food and Agriculture Organization Rome (2004) at 7. For a discussion of the effects of these fisheries subsidies on IUU fishing, see also 'Report of the UN Secretary General on Oceans and the Law of the Sea at Fifty-Eight Session of the UN General Assembly,' A/58/65, 3 March 2003 at 42.
- 25 'Report of the Technical Consultation on the Use of Subsidies in Fisheries Sector' in *FAO Fisheries Report No 752*, Rome, 30 June–2 July 2004, Food and Agriculture Organization Rome (2004) at 1.
- 26 Patrick Shavloske, 'The Canadian-Spanish Fishing Dispute: A Template For Assessing the Inadequacies of the United Nations Convention on the Law of the Sea and A Clarion Call for Ratification of the New Fish Stock Treaty', (1996–97) 7(1) *Indiana International and Comparative Law* at 230.
- 27 Sali Jayne Bache, Marcus Howard & Stephen Dovers, *The Impact of Economic, Environment, and Trade Instruments Upon Fisheries Policy and Management* (Report Prepared for Fisheries and Aquaculture Branch, Australian Department of Agriculture, Fisheries and Forestry, Centre for Resource and Environment Studies, School of Government, University of Tasmania, Centre for Maritime Policy, University of Wollongong, Agriculture, Fisheries and Forestry-Australia and Antarctic CRC, September 2000) at 25.
- 28 Karen L Smith, 'Highly Migratory Fish Stocks: Can International and Domestic Law Save the North Atlantic Swordfish', (1999) 21 *Western New England Law Review* at 22.
- 29 Elisabeth DeLone, 'Improving the Management of the Atlantic Tuna: The Duty to Strengthen the ICCAT in Light of the 1995 Straddling Stocks Agreement', (1997–98) 6 *New York University Environmental Law Journal* at 659.

From a fisheries management perspective, there is a close link between the number of fishing vessels and IUU fishing. When a coastal State is faced with a large number of fishing vessels, its fishery resources are inevitably depleted. Essentially, the excess fleet capacity encourages more fishing vessels to engage in IUU fishing in order to maintain adequate return on fishing activities.³⁰ Much of this overcapacity can be traced to inadequate national fisheries management, including a lack of incentives to combat IUU fishing and the inappropriate allocation of fishing rights.³¹ Similarly, overfishing in the high seas is caused by a lack of incentives for States to discharge their duties in tackling the negative impacts of an overcapitalised fishing sector.³² Given the fact that fisheries subsidies and overcapacity are interlinked, there is a need to establish a comprehensive fishery management regime. Thus, in assessing the impacts of fishery subsidies, States must be aware of their negative impacts on the sustainability of fisheries resources and how certain types of subsidies contribute to IUU fishing.

C. Lack of Flag State Control over its Fishing Vessels

Over the past few decades, States whose vessels engage in fishing on the high seas have established RFMOs to regulate those fishing activities. The rules adopted by RFMOs are collectively referred to as conservation and management measures. These include measures on catch quotas, seasonal and area closures, and minimum mesh sizes.³³ Members of RFMOs not only include fishing nations, but also port States which have responsibilities to combat IUU fishing.³⁴

To evade internationally agreed conservation and management rules, the owners of fishing vessels 're-flag' or register their vessels in, and fly the flags of States which are not members of RFMOs. The States that offer their flags to such vessels are generally referred to as 'flags of convenience' (FOCs) or 'open registry' States.³⁵ Despite not having genuine links with FOC States, foreign fishing vessels are allowed to register under the flags of those States.

There are at least two motivations for foreign fishing vessels to register in FOC States. First, open register States do not have the desire and capability to exercise effective jurisdiction over fishing activities.³⁶ This enables fishing vessels to exploit low fees, tax exemptions, lower crew costs and financial savings by avoiding compliance with

30 Dominique Greboval, 'The International Plan of Action for the Management of Fishing Capacity and Selected Issues Pertaining to Illegal, Unreported and Unregulated Fishing' (Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia in Cooperation with FAO, Sydney, Australia, 15–19 May 2000) at 1.

31 *Why Fish Piracy Persists: The Economics of Illegal, Unreported and Unregulated Fishing*, OECD, Publishing (2005) at 14.

32 G T (Stan) Crothers & Lindie Nelson, 'High Seas Fisheries Governance: A Framework for the Future' (Paper Presented at Sharing The Fish Conference 06, Perth, Western Australia, 26 February–2 March 2006, the Department of Fisheries of the Australian Government in Cooperation with the FAO) at 2.

33 David A Balton, 'The Compliance Agreement' in Ellen Hey (ed), *Developments in International Fisheries Law* Kluwer International Law, The Hague/Boston/London (1999) at 34.

34 Terje Lobach, 'Port State Control of Foreign Fishing Vessels' in *FAO Fisheries Circular No 987*, Food and Agriculture Organization Rome (2003) at 6.

35 David A Balton, 'Dealing With the Bad Actor's of Ocean Fisheries' (Paper Submitted to the IUU Workshop, 19–20 April 2004, Directorate for Food, Agriculture and Fisheries, Fisheries Committee of OECD) at 2.

international safety standards. The second motivation behind fishing vessels registering in FOC States is the freedom of fishing due to the lack of effective control of FOC States. Even where an FOC State is a party to international treaties or a member of an RFMO, such States may be reluctant to implement any of its obligations.³⁷

It should be noted that the vast majority of FOC States are neither members of RFMOs nor parties to international fisheries agreements. Consequently, fishing vessels flying the flags of FOCs are not required to comply with agreed conservation and management measures adopted by RFMOs.³⁸ These fishing vessels are essentially free riders who enjoy the benefits of conservation efforts and scientific research established by member states of an RFMO, without bearing any of the associated costs. This situation is not only grossly unfair, but also compromises the integrity of the agreed measures.³⁹ This also makes it difficult for an RFMO to apply the conservation and management measures against vessels flying the flags of non-member States.⁴⁰

Important in this respect is a new approach discussed and agreed upon in the 2002 annual meeting of CCAMLR. CCAMLR endeavored to change the general perceptions of IUU fishing and FOC States by employing the new term of 'Flag of Non Compliance' (FONC).⁴¹ The term also covers vessels fishing illegally within the EEZs of States which have few resources available to conduct effective enforcement.⁴² The term FONC is used to emphasise the choice of an IUU fishing vessel to be flagged under a certain State and is determined by the lack of regulatory control that a flag State will exercise over the vessel.

It can thus be seen that the effectiveness of RFMOs in controlling the incidence of IUU fishing is entirely dependent on flag States being prepared to enforce and monitor the activities of their fishing vessels. The enforcement and monitoring of the activities of flag States is, in turn, dependant upon the existence of an adequate legal framework to manage fisheries and the technical capabilities of such States to implement such framework.

36 Annick Van Houtte, 'Flag Responsibility and the Contribution of Recently Concluded International Instruments in Preventing, Deterring and Eliminating Illegal, Unreported and Unregulated Fishing', Report of the Consultation of Fishing Vessels Operating Under Open Registers and Their Impact on Illegal, Unreported and Unregulated Fishing Vessels, Miami, Florida, United States of America, 23–25 September 2003, in *FAO Fisheries Report No 722*, Food and Agriculture Organization Rome (2003) at 48.

37 Judith Swan, 'Fishing Vessels Operating Under Open Registers and the Exercise of Flag State Responsibilities Information and Options' in *FAO Fisheries Circular No 980*, Food and Agriculture Organization Rome (2002) at 23.

38 Messra David, J Agnew & Collin T Barnes, 'Economic Aspects and Drivers of IUU Fishing: Building A Framework' (Paper Submitted to the IUU Workshop, 19–20 April 2004, Directorate for Food, Agriculture and Fisheries, Fisheries Committee of OECD, 2004) at 8.

39 David A Balton, 'Making the New Rules Work: Implementation of the Global Fisheries Instruments' in Myron H Nordquist & John Norton Morton (eds), above n16 at 110.

40 Judith Swan, 'Regional Fishery Bodies and Governance: Issues, Actions and Future Directions' in *FAO Fisheries Circular No 959*, Food and Agriculture Organization Rome (2000) at 10.

41 Terje Lobach, 'Port State Control of Foreign Fishing Vessels' in *FAO Fisheries Circular No 987*, above n34 at 8.

42 Aaron Hatcher, 'Incentives for Investment in IUU Fishing' (Paper Submitted to the IUU Workshop, 19–20 April 2004, Directorate for Food, Agriculture, and Fisheries, Fisheries Committee of OECD) at 5.

The International Commission for the Conservation of Atlantic Tunas (ICCAT) provides an example of the need to enforce and monitor activities of fishing vessels by flag States to control IUU fishing. In 1999, the ICCAT listed 61 fishing vessels flying the flags of its parties, in particular Ghana, Equatorial Guinea, Guinea, and Trinidad and Tobago as conducting activities contrary to the conservation and management measures of the Commission. In the view of ICCAT, either these States have failed to realise that their vessels are engaging in destructive fishing practices, or they are aware of these practices but have failed to act effectively to end such illegal fishing practices.⁴³ The failure of these states to ensure that the conservation and management measures of ICCAT are implemented contributes to the continuation of IUU fishing on the high seas.

D. Ineffective Fisheries Monitoring, Control and Surveillance

Broadly speaking, monitoring, control and surveillance (MCS) is a vehicle for implementing fisheries management plans and strategies. The goal of MCS is the establishment of data collection systems, enactment of supporting legislative instruments,⁴⁴ and implementation of management plans through participatory techniques and strategies.⁴⁵

The increase in the incidence of IUU fishing can be attributed to ineffective MCS.⁴⁶ IUU fishing in developing countries is largely caused by the inability of these countries to monitor and control fishing activities⁴⁷ due to inadequacy of MCS human and technical resources.⁴⁸ In particular, local fishery officers experience difficulties in monitoring and controlling fishing activities due to the limited number of trained personnel and means of transportation.⁴⁹ Additionally, ineffective MCS is exacerbated by insufficient capacities of member States and of RFMOs, as well as the lack of international cooperation to promote exchange of information about IUU fishers⁵⁰ and MCS activities.

43 Masayuki Komatsu, 'The Importance of Taking Cooperative Action Against Specific Fishing Vessels That Are Diminishing Effectiveness of Tuna Conservation and Management Measures' (Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia in Cooperation with FAO, Sydney, Australia, 15–19 May 2000) at 2.

44 P Flewweling, Corman Culliman, David Balton, R P Sautter & J E Reynolds, 'Recent Trends in Monitoring, Control and Surveillance Systems for Capture Fisheries' in *FAO Fisheries Technical Paper No 415*, Food and Agriculture Organization Rome (2002) at 7.

45 Blaise Kuemlengan, 'Legal Aspects of Implementing the FFA Vessel Monitoring System' in Myron H Nordquist & John Norton Moore (eds), above n16 at 409.

46 'Draft Chapter I – Economics of IUU Fishing Activities' (Paper Submitted to the IUU Workshop, Directorate for Food, Agriculture and Fisheries, Fisheries Committee, 12 March 2004) at 13.

47 John M Davis, 'Monitoring Control Surveillance and Vessels Monitoring Systems to Combat IUU Fishing' (Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia in Cooperation with FAO, Sydney, Australia, 15–19 May 2000) at 4.

48 Kelly Rigg, Remi Parmenton & Duncan Currie, 'Halting IUU Fishing: Enforcing International Fisheries Agreements' (Paper Submitted to the IUU Workshop, 19–20 April 2004, Directorate for Food, Agriculture and Fisheries, Fisheries Committee of OECD) at 3.

49 Ousman K L Drammeh, above n15.

50 David J Douman, above n14 at 26.

The provisions of the 1982 LOSC relating to fisheries have failed to fulfil the high expectation for MCS.⁵¹ Considering the problems that individual countries are faced by, there is a need for concerted action to develop regional and sub-regional cooperation against IUU fishing, which may include the harmonisation of fisheries regulations and collaboration on MCS activities.⁵² In order to achieve these objectives, it is crucial to formulate an adequate legal framework to address IUU fishing and develop sufficient MCS capabilities. Thus, in dealing with IUU fishing, attention must be given to the needs of developing countries in terms of financial and technical assistance, technology transfer, training and technical cooperation.⁵³ Staff will also need to possess the necessary skills to carry out this framework and anti-corruption issues will need to be addressed.

3. Impacts of IUU Fishing

To fully understand IUU fishing, one must look at some of the devastating impacts of the problem. Taking place in all capture areas, IUU fishing affects the sustainability of fishery resources. It also has long negative socio-economic and environment impacts on a broad range of other nations and communities within them who suffer depleted fishing stocks for subsistence and/or commercial fishing and loss of biodiversity generally.

A. Impact of IUU fishing on the Sustainability of Fisheries Resources

IUU fishing has serious consequences for the sustainability of fisheries resources.⁵⁴ IUU fishing undermines conservation and management measures established by national fisheries authorities within their EEZs and those of RFMOs.⁵⁵ Unreported fishing activities undermine the ability of coastal States to determine the status of fish stocks in their EEZs by making it difficult to compile accurate data on fish stocks for setting the total allowable catch.⁵⁶ This in turn compromises the ability of coastal States to achieve maximum sustainable yield.⁵⁷ Moreover, the use of flags of convenience by foreign fishing vessels undermines the ability of coastal States to conserve and manage fish stocks on the high seas.⁵⁸ As noted by the Environmental Justice Foundation:

51 Francisco Orrego Vicuna, *The Changing International Law of High Seas Fisheries* (Cambridge University Press, 1999) at 74.

52 Dato Junaedi Bin Che Ayubd, 'Opening of the Workshop,' Report of the FAO Regional Workshop on the Elaboration of National Plans of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, (Southeast Asia Subregion) Penang, Malaysia, 10–14 October 2004 in *FAO Fisheries Report No 757*, Food and Agriculture Organization Rome (2005) at 4.

53 Kevin Bray, 'Illegal, Unreported and Unregulated (IUU) Fishing' (International Conference on Fisheries Monitoring, Control and Surveillance, Brussels, Belgium, 24–27 October 2000) at 4.

54 Similar to violation of RFMOs regime, IUU fishing on the high seas was also widely considered to pose a serious threat to the world marine biodiversity. See Christopher C Joyner, 'The International Ocean Regime at the New Millennium: A Survey of the Contemporary Legal Order', (2000) 43 *Ocean and Coastal Management* at 163–203.

55 David J Doullman, above n14.

56 Lawrence Juda, above n17.

57 David Evans, 'The Consequences of Illegal, Unreported and Unregulated Fishing for Fishery Data and Management' (Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia in Cooperation with FAO, Sydney, Australia, 15–19 May 2000) at 1.

In addition to negative effects on target stocks, IUU fishing can severely impact the wider marine ecosystem. As IUU fishermen flout rules designed to protect the marine environment, including restrictions on the harvest of juveniles, closed spawning grounds, and gear modifications designed to minimise the by-catch of non-target species, they inflict damage on seabirds, marine mammals, sea turtles, and marine biodiversity as a whole. For example, illegal long-line vessels in the Southern Ocean are estimated to kill 100,000 seabirds, including tens of thousands of endangered albatrosses, each year. Quantifying the ecosystem effects of IUU fishing and distinguishing from those of legitimate fishermen is often extremely difficult, not least because the environmental damage inflicted by legitimate fishing is often so great. However, one clear and striking example of the environmental damage that IUU fishing can inflict on marine ecosystems are driftnets, which despite being banned under both EU and international law continue to be used across the Mediterranean basin by fleets from Italy, France, Morocco, Turkey and Algeria to target swordfish and tuna.⁵⁹

Excess fleet capacity, which is an issue related to IUU fishing, also has negative impacts on the sustainability of fisheries resources throughout the world⁶⁰ due to the lack of parity between a vessel's fishing capacity and its fishing possibilities. Excess fleet capacity can have various structural impacts, such as the prevalence of general overcapacity in the domestic fleet or inappropriate allocation of fishing rights.⁶¹ Associated with the increased number of vessels are the problems of overcapitalisation and excessive fishing efforts.⁶² Hence, the excess fleet capacity as the root cause of many fishery problems must be addressed.

RFMOs are confronted with similar IUU fishing problems like those faced by States in their EEZs.⁶³ However, a far more serious threat to the world's management of high seas fisheries is the danger posed by IUU fishing conducted by vessels flying flags of convenience.⁶⁴ It is estimated by the FAO that nearly 70 per cent of the total world's fisheries have been depleted.⁶⁵ Recently, the FAO has estimated that 25 per cent to 27 per cent of fish stocks are still relatively healthy and will probably become the focus of

58 Masayuki Komatsu, above n 43 at 3.

59 'Impact of IUU Fishing', <<http://www.ejfoundation.org/page163.html>> For discussion of some of the issues involved see, eg, Donald R Rothwell & Tim Stephens, 'Illegal Southern Ocean Fishing and Prompt Release: Balancing Coastal and Flag State Right and Interests' (2004) 53 *International Comparative Law Quarterly* at 180.

60 Dominique Greboval, 'The Measurement and Monitoring of Fishing Capacity: Introduction and Major Considerations' in S Pascoe & D Greboval, (eds), 'Measuring Capacity in Fisheries' in *FAO Fisheries Technical Paper No 445*, Food and Agriculture Organization Rome (2003) at 1.

61 'Draft Chapter I – Economics of IUU Fishing Activities', above n46 at 11.

62 Morton M Miller, Paul J Hooker & Peter H Fricke, 'Impression of Ocean Fisheries Management Under the Magnuson Act', (1990) 21 *Ocean Development and International Law* at 284.

63 Rachel Baird, 'Illegal, Unreported and Unregulated Fishing: An Analysis of the Legal, Economic and Historical Factors Relevant to Its Development and Persistence', (2004) 5 *Melbourne Journal of International Law* at 313.

64 Christopher J Carr & Harry N Cheiber, 'Dealing with a Resource Crisis: Regulatory Regimes for Managing the World's Marine Fisheries', (2002) 1 *The University of California International and Area Studies Digital Collection* at 11.

65 Judith Swan, 'Decision-Making in Regional Fishery Bodies or Arrangements: The Evolving Role of RBFS and International Agreement on Decision Making Process' in *FAO Fisheries Circular No 995*, Food and Agriculture Organization Rome (2004) at 8.

more fishing effort. Patagonian toothfish species have particularly been exploited and are in danger of further depletion. In addition to the depletion of the fish stocks, the FAO expects the range and magnitude of IUU fishing to increase. This ultimately undermines the sustainability of fish stocks.⁶⁶ In light of this, urgent conservation and management measures are needed by the international community.

B. Economic Impact of IUU Fishing

From an economic perspective, IUU fishing poses a number of problems.⁶⁷ For instance, re-flagging of fishing vessels may result in the loss of national income by coastal States from the higher fees that foreign fishing vessels should ordinarily be subject to. At the same time, the economic advantages of local fishing vessels having access to vast marine resources in the EEZs are lost through illegal fishing by foreign fishing vessels.⁶⁸ These macroeconomic consequences are particularly problematic for low and middle-income countries, which rely entirely on EEZ fisheries resources.⁶⁹ In addition to the degradation of fisheries resources,⁷⁰ the existence of excessive fishing capacity is also to blame for the dissipation of food production potential.⁷¹ This is further manifested in the form of overfishing of valued fish stocks.⁷²

It can thus be seen that IUU fishing has a number of serious negative effects on the proper conservation and management of fisheries by coastal States and RFMOs. The negative effects are more pronounced in the case of developing coastal States because of their difficulties in accurately determining the total allowable catch for their fisheries. The problems faced by many coastal States are further complicated by the reduction of national income and available resources. Viewed from an environmental perspective, marine environmental degradation can be a major barrier for sustainable fisheries. The interplay between management, economics, and environmental factors further complicates the problem which needs to be addressed by governments through the implementation of effective surveillance and fishery law enforcement strategies. The following sections provide an analysis of the non-binding international legal framework to address IUU fishing, which will highlight the measures that States need to adopt to effectively address the problem.

66 Kevin W Riddle, 'Illegal, Unreported and Unregulated Fishing: Is International Cooperation Contagious?', (2006) 37 *Ocean Development and International Law* at 267.

67 David A Balton, 'Global Review of Illegal, Unreported and Unregulated Fishing Issues: What's the Problem?' (Paper Presented at the IUU Workshop, 19–20 April 2000, Directorate for Food, Agriculture, and Fisheries, Fisheries Committee of OECD, 2000) at 2.

68 Transform Aqorau, 'Illegal, Unreported and Unregulated Fishing: Considerations for Developing Countries' (Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia in Cooperation with FAO, Sydney, Australia, 15–19 May 2000) at 3.

69 Messra David, J Agnew & Collin T Barnes, above n38 at 10.

70 Thorir Ibsen, 'Iceland's Proposal about Fisheries Subsidies' in Myron H Nordquist & John Norton Moore (eds), above n16 at 459.

71 Ichiro Nomura, 'Opening of the Consultation', Report of the Technical Consultation on the Use of Subsidies in the Fisheries Sector, Rome, 30 June–2 July 2004, in *FAO Fisheries Report No 752*, Food and Agriculture Organization Rome (2004) at 1.

72 Gordon R Munro & Colin W Clark, 'Fishing Capacity and Resource Management Objectives' in S Pascoe & Dominique Greboval (eds), above n60 at 13.

4. The FAO Code of Conduct for Responsible Fisheries

The FAO Code of Conduct was developed in response to a number of international calls for action to halt the growing depletion of global fish stocks. It was established in earlier sections that uncontrolled exploitation of global fishery resources and rapid expansion of the fishing industry worldwide became matters of global attention. The increasing problem of unregulated fishing on the high seas, including the practice of re-flagging vessels or registering vessels in countries which operate open registries are contributory factors to the depletion of marine fishery resources.

A. Scope of Application of the FAO Code of Conduct

The FAO Code of Conduct was developed in 1993 by the FAO and unanimously adopted on 31 October 1995.⁷³ The FAO Code of Conduct is a non-mandatory instrument that establishes principles and standards of behaviour applicable to the conservation, management and development of all fisheries.⁷⁴ Article 1(2) of the FAO Code of Conduct states that the Code is intended to be global in scope.⁷⁵ This means that it applies to fishing activities both in zones of national jurisdiction and on the high seas and is therefore well suited to address the problem of IUU fishing. Further, the FAO Code of Conduct is intended to apply to both members and non-members of FAO as well as fishing entities,⁷⁶ sub-regional, regional and global organisations (whether governmental or non-governmental), and all persons concerned with the conservation, management and development of fisheries resources.⁷⁷

While not legally binding, the FAO Code of Conduct provides a necessary framework for national and international efforts to ensure sustainable exploitation of aquatic living resources in harmony with the environment.⁷⁸ In broad terms, the FAO Code of Conduct emphasises the need for all stakeholders in marine fisheries to adopt a broader approach to conservation and management of fisheries. Its provisions are directed not only at States but also at industry, non-governmental organisations and other stakeholders.

The FAO Code of Conduct also complements existing international obligations dealing with the sustainable management of fisheries.⁷⁹ Although the FAO Code of

73 Annick Van Houtte, 'Legal Aspects of Regional Cooperation in Monitoring, Control and Surveillance' (FAO/Norway Government Cooperative Programme – GCP/INT/648/NOR Regional Workshop on Fisheries Monitoring, Control and Surveillance, Kuala Lumpur and Kuala Terengganu, Malaysia, 29 June–3 July 1998) at 35.

74 Lee A Kimball, 'Deep-Sea Fisheries of the High Seas: The Management Impasse', (2004) 19(3) *The International Journal of Marine and Coastal Law* at 278.

75 Hasyim Djajal, 'The Emergency of the Concept of Fishing Entities', (2006) 37(2) *Ocean Development and International Law* at 119.

76 Martin Tsamenyi, 'The Legal Substance and Status of Fishing Entities in International Law: A Note', (2006) 37(2) *Ocean Development and International Law* at 129.

77 Blaise Kuemlengan, 'Legal Considerations for the 1995 FAO Code of Conduct for Responsible Fisheries and Related International Plans of Action,' (Appendix H), Report of the Workshop on the Implementation of the 1995 Code of Conduct for Responsible Fisheries in the Pacific Islands: A Call to Action, Naidi, Fiji, 27–30 October 2003 in *FAO Fisheries Report No 731* (2004) at 63.

78 David A Balton & Dorothy C Zbics, 'Managing Deep-Sea Fisheries: Some Threshold Questions', (2004) 19(31) *The International Journal of Marine and Coastal Law* at 254.

Conduct itself is not legally binding, some of its provisions are based on binding international instruments, such as the LOSC, the UN Fish Stocks Agreement, and the FAO Compliance Agreement⁸⁰ which will be briefly discussed in the succeeding sections. Therefore, the FAO Code of Conduct supports the implementation of the international agreements to effectively address IUU fishing.

B. General Principles of the FAO Code of Conduct

The FAO Code of Conduct is an instrument covering a wide range of issues on fisheries management and operations, aquaculture development, coastal area management, trade, and research.⁸¹ Of particular significance in combating IUU fishing is Article 6(1) which provides that the right to fish carries with it the obligation to do so in a responsible manner so as to ensure effective conservation and management.⁸² Under Article 6(2) of the FAO Code of Conduct, fisheries management should promote the maintenance of the quality, diversity and availability of fisheries resources in sufficient quantities for the benefit of present and future generations in the context of food security,⁸³ poverty and sustainable development. The article further provides that management measures should not only be adopted ensure the conservation of target species but also of species associated with or dependent upon the target species.⁸⁴

Article 6(3) of the FAO Code of Conduct contains provisions relevant to the prevention of IUU fishing. The provisions require States to prevent over-fishing and excess fishing capacity by implementing management measures to ensure that fishing efforts are commensurate with the productive capacity of the fishery resources and their sustainable utilisation. Article 6(3) should be read in conjunction with Article 6(6) which deals with the development of environmentally safe fishing gears and practices. Pursuant to these provisions, States are required to develop and apply selective and environmentally safe fishing gears and practices so as to maintain biodiversity, as well as conserve the population structure, aquatic ecosystems and fish quality. States and users of aquatic ecosystems are to minimise waste, catch of non-target species (both fish and non-fish), and impacts on associated or dependent species.

79 David J Douman, '1995 FAO Code of Conduct for Responsible Fisheries: Development Considerations and Implementation Challenges,' Report of the FAO Regional Workshop on Elaboration of National Plans of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Appendix F), above n52 at 35.

80 Rudiger Wolfrum, 'The Role of the International Tribunal for the Law of the Sea' in Myron H Nordquist & John Norton Moore (eds), above n16 at 377.

81 Penelope D Dalton, 'Implementing the International Code of Conduct for Responsible Fisheries' in Myron H Nordquist & John Norton Moore (eds), above n16 at 332.

82 Martin A Hall, Dayton L Alverson & Kaija I Metuzals, 'By-Catch: Problems and Solutions', (2000) 41(1-6) *Marine Pollution Bulletin* at 206.

83 Ichiro Nomura, 'IIFET 2004 Japan: What are Responsible Fisheries? State of World Fisheries and Future Sustainability Issues' (The Twelfth Biennial Conference of the International Institute of Fisheries and Trade, July 2004) at 7.

84 Transform Aqorau, 'Obligations to Protect Marine Ecosystems Under International Conventions and Other Legal Instruments' (Reykjavik Conference on Responsible Fisheries in the Marine Ecosystems Reykjavik, Iceland, 1-4 October 2001) at 5.

Article 6(4) further reinforces Articles 6(3) and 6(6) by providing that conservation and management decisions for fisheries should be based on the best scientific evidence available and take into account traditional knowledge of the resources and their habitat, as well as relevant environmental, economic and social factors. States must give priority to measures which increase their ability to do research and collect fisheries data so as to improve scientific and technical knowledge of fisheries including their interaction with the ecosystem.

Article 6(5) of the FAO Code of Conduct requires States and RFMOs to apply a precautionary approach widely to conservation, management and exploitation of living aquatic resources. The intention of Article 6(5) is to protect and preserve the aquatic environment by taking into account the best scientific evidence available. States must adopt a precautionary approach and must not use the absence of adequate scientific information as a reason to postpone or fail to take measures to conserve target species and associated or dependent species.

The precautionary approach emphasises the importance of policies that are designed to ensure the long-term sustainability of fisheries, rather than policies which are only a response to short-term considerations.⁸⁵ In relation to Articles 6(3) and 6(6) of the FAO Code of Conduct, the practical implication of applying the precautionary approach to fishery management includes prohibiting or regulating destructive fishing techniques. Prohibitive regulations on destructive fishing techniques would need to be adopted to promote selective, environmentally friendly fishing technologies and methods.⁸⁶ In applying the precautionary approach, States and RFMOs are required to evaluate properly the impacts of the introduction of new fishing gear, methods and operations on a commercial scale before being used.⁸⁷

C. International Cooperation

Article 64(1) of the LOSC requires coastal States and States fishing for highly migratory stocks to cooperate with a view to ensuring long-term conservation and management of such stocks. Cooperation is to be achieved directly or through appropriate international organisations to promote the optimum utilisation of such species through the region, both within and outside the EEZ. In regions where there are no appropriate international organisations, these States are obliged to cooperate in establishing such organisations and participating in their work.

Furthermore, in the area of the high seas, Article 118 obliges States to cooperate with each other in the conservation and management of living resources. Additionally Article 118 requires that States whose nationals exploit identical living resources, or different living resources in the same area are to enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. To this end, they are required to cooperate to establish subregional or regional fishery organisations.

85 Gerald Moore, 'The Code of Conduct for Responsible Fisheries' in Ellen Hey (ed), above n33 at 97.

86 David Vanderzwaag, 'The Precautionary Principle and Marine Environmental Protection: Slippery Shores, Rough Seas, and Rising Normative', (2002) 33(2) *Ocean Development & International Law* at 168.

87 Gerald Moore, 'The Code of Conduct for Responsible Fisheries' in Ellen Hey (ed), above n33 at 99.

Article 117 further imposes a duty on all States whose vessels fish on the high seas to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.

The FAO Code of Conduct reinforces the provisions of the LOSC regarding international cooperation through RFMOs. These provisions require States to cooperate with RFMOs to promote conservation and management measures and to ensure responsible fishing. Article 6(14) requires that international trade in fish and fishery products to be conducted in accordance with the principles, rights and obligations established by the World Trade Organisation (WTO) and other relevant international agreements. To this effect, States are to ensure that their policies, programs and practices concerning trade in fish and fishery products do not result in obstacles to fisheries trade.

D. Fisheries Management

Article 7(1)(1) of the FAO Code of Conduct addresses broader fishery management issues. States and all those engaged in fisheries management are to adopt measures for the long-term conservation and sustainable use of fisheries resources. These measures can be implemented through the adoption of appropriate policy, legal, and institutional frameworks.⁸⁸

For the purpose of implementing sustainable management principles, Article 7(1)(7) requires States to establish effective mechanisms for fishery MCS to ensure compliance with their conservation and management measures. In Article 7(1)(8), States are to take measures to prevent or eliminate excess fishing capacity and to ensure that levels of fishing efforts are commensurate with the sustainable use of fishery resources.⁸⁹

Article 7(1)(8) of the FAO Code of Conduct provides the means to ensure the effectiveness of conservation and management measures. Article 8(1)(1) provides that it is the duty of all States to ensure that only fishing authorised by the State occurs within their jurisdiction and that this fishing is done in a responsible manner. Under Article 8(1), States are to maintain a record of all authorisations to fish and statistical data of fishing operations. This obligation is further elaborated in paragraph 2.2.7 of the FAO Technical Guidelines for Responsible Fisheries.

There are two primary objectives of the FAO Technical Guidelines for Responsible Fisheries. The first is to ensure the long-term sustainability of living resources that can be harvested by the next generation in order to make a substantial contribution to world food security and employment opportunities. The second objective is to provide practical advice for implementing the provisions of Article 8 of the FAO Code of Conduct that would ensure that all fishing operations are conducted responsibly.⁹⁰ The

88 Barbara Hanchrad, 'The Implementation of the 1995 FAO Code of Conduct for Responsible Fisheries in the Pacific Islands' (Appendix I), in Report of the Implementation of the 1995 FAO Code of Conduct for Responsible Fisheries in the Pacific Islands: A Call to Action, above n77 at 76.

89 For discussion of these measures, see Report of the Twenty-sixth Session of Committee on Fisheries on 'Progress in the Implementation of the Code of Conduct for Responsible Fisheries and Related International Plans of Action', (Rome, Italy, 7–11 March 2005) at 7.

90 *FAO Technical Guidelines for Responsible Fisheries: Fishing Operations*, Food and Agriculture Organization Rome (1996) at 1.

Guidelines are to be applied by States on a voluntary basis, *inter alia* to (a) all fishing operations on all marine areas; (b) fishers, owners, managers, and competent authorities for the purpose of fishery management; and (c) all fishing vessels and fishing vessels engaged in transshipment.⁹¹

Paragraph 2.2.7 of the FAO Technical Guidelines for Responsible Fisheries requires authorisations to fish to contain details of the fishing activities of the authorised vessel as well as information regarding the names and addresses of those vessels. The authorisation should also contain the relevant technical information on any fishing vessel involved.⁹² The authorisation to fish must also contain a condition that the recipient(s) will abide by the provisions of the FAO Code of Conduct. The authorisation may also contain conditions concerning the area to be fished, species to be fished and quota for the vessel or fisher, type of fishing gear or fishing implements so authorised, and time or seasonal limitations.⁹³

E. Monitoring, Control and Surveillance

Fisheries MCS is an important part of the fisheries management system. The rapid depletion of target fish stocks as a result of IUU fishing in the 1980s and 1990s has led governments to seek more effective control over fishing activities and the trade of fish products.⁹⁴

As for the ocean governance, it is significant to note that Article III (1)(a) of the FAO Compliance Agreement imposes a duty on each State to take necessary measures to ensure that vessels flying its flag do not engage in any activity undermining the effectiveness of conservation and management measures. Moreover, Article III(2)(a) provides that a flag State cannot allow a fishing vessel entitled to fly its flag to be used for fishing on the high seas unless the vessel has been authorised by the appropriate authority or authorities of that flag State. An important follow-up to these provisions is Article III(3) which requires States to authorise fishing vessels entitled to fly its flag to fish on the high seas only when the State is able to exercise its responsibilities effectively. The FAO Compliance Agreement further imposes an obligation upon State parties to implement a licensing system and some other form of authorisation for their vessels to fish on the high seas.

In addition, Article 18 (2) of the UN Fish Stocks Agreement places obligations upon flag States to ensure that vessels flying their flags are only authorised to fish when the flag State is certain that it is able to effectively exercise its responsibilities in respect of such vessels under the UN Fish Stocks Agreement and the LOSC.⁹⁵

91 *Id* at 2.

92 *Id* at 5.

93 *Id* at 6.

94 'FAO Fisheries and Aquaculture – Monitoring, Control and Surveillance,' (FAO/Fisheries Department, Rome, 19 May 2008) at 1.

95 David R Teece, 'Global Fishing and the Spanish-Canadian Turbot War: Can International Law Protect the High – Seas Environment', (1997) 8(1) *Colorado Journal International Environmental Law and Policy* at 120.

The FAO Code of Conduct also deals with MCS.⁹⁶ Article 6(10) provides that States are to ensure compliance with, and the enforcement of conservation and management measures. States must also establish effective mechanisms to monitor and control the activities of fishing vessels and fishing support vessels. Under Article 6(11), States are to exercise an effective control over those vessels flying their flags. They must also ensure that the fishing activities of their vessels do not undermine the effectiveness of conservation and management measures. States must also collect and provide data relating to their fishing activities.

With regard to the issues of implementation and enforcement procedures, Article 7(7)(1) of the FAO Code of Conduct provides that States are to ensure that effective local and national legal and administrative frameworks are established. In addition, Article 7(7)(2) requires States to ensure that laws and regulations stipulate the sanctions that will be imposed for violations and that these sanctions are adequate in severity to be effective. States are also required to implement sanctions which allow for the refusal, withdrawal or suspension of an authorisation to fish in the event of non-compliance with conservation and management measures in force.

Furthermore, according to Article 7(6)(2), States must adopt measures to ensure that no vessel is allowed to fish unless so authorised, in a manner consistent with international law of the high seas or in conformity with national legislation within areas of national jurisdiction. States are required under Article 7(7)(3) to implement effective fisheries law enforcement measures including observer programmes, inspection schemes and vessel monitoring systems. These measures are to be promoted and implemented by RFMOs in accordance with agreed regional procedures.⁹⁷

The requirement for flag State authorisation to fish on the high seas is consistent with the FAO Compliance Agreement and the UN Fish Stocks Agreement.⁹⁸ Article 7(8)(1) also indirectly refers to the re-flagging problem, addressed in legally binding agreements.⁹⁹ According to Article 7(8)(1), without prejudice to relevant international agreements, States are to encourage banks and financial institutions to require, as a condition of a loan or mortgage, fishing vessels or fishing support vessels not to be flagged in a jurisdiction other than that of the State of beneficial ownership. This requirement is intended to avoid the likelihood of non-compliance with international conservation and management measures. As such, the flag State should have capacity to avoid flagging a vessel on the basis of a previous or existing owner or operator with a history of non-compliance and with a legal, and beneficial or financial interest in the vessel.

96 See Elisabeth Mann Borgese, 'Integrating Sustainable Development and Regional Security' (Paper Prepared for the Seminar (Attachment 6), Report on Leadership Seminar on Mediterranean Basin Wide Co-development and Security, Malta, 21–24 September 2000, International Ocean Institute, Malta) at 9.

97 For this discussion, see Judith Swan, 'Decision-Making in Regional Fishery Bodies or Arrangements: The Evolving Role of RFBS and International Agreement on Decision-Making Processes' in *FAO Fisheries Circular No 995*, Food and Agriculture Organization Rome (2004) at 29.

98 Francisco Orrego Vicuna, above n51 at 232.

99 Annick Van Houtte, above n36 at 55.

Article 7(8)(1) should be linked to Article III(5) of the FAO Compliance Agreement, which deals with the problem of non-compliant vessels. Paragraph (a) of this article prevents a flag State from authorising an IUU fishing vessel previously registered in another State Party to the FAO Compliance Agreement, unless the flag State is satisfied that any period of suspension by another State Party of an authorisation for such fishing vessel to fish on the high seas has expired; and that no authorisation has been withdrawn by another State Party within the last three years. This provision is also applied to fishing vessels previously registered in a non-State Party to the FAO Compliance Agreement in order to ensure that sufficient information is available to the Party concerned on the circumstances in which the authorisation to fish was suspended or withdrawn. The underlying aim of Article III(5) of the FAO Compliance Agreement is to ensure that vessels operating on the high seas act in a manner consistent with the objective and purpose of international conservation and management measures without prejudice to relevant international agreements.

F. Flag State Responsibilities

The FAO Code of Conduct also addresses flag State responsibilities through Article 8(2).¹⁰⁰ Flag States are required to maintain records of fishing vessels entitled to fly their flags and which are authorised to fish. Records of fishing vessels should contain details of the vessels, their ownership and the authorisations to fish. Articles 8(2) and 8(2)(1) should be read with Article 8(2)(2) which provides that flag States should ensure that fishing vessels entitled to fly their flags do not fish on the high seas or in waters under the jurisdiction of other States unless they have been issued a Certificate of Registry and have been authorised to fish by the competent authorities.

According to Article 8(2)(3) of the FAO Code of Conduct, authorised fishing vessels should be marked in accordance with uniform and internationally recognisable vessel marking systems such as the FAO Standard Specifications and Guidelines for Marking and Identification of Fishing Vessels.¹⁰¹ Under Article 8(2)(4), fishing gears should be marked in order to identify the owner of the gear. National gear marking requirements should be consistent with internationally recognisable gear marking systems. With regards to non-Parties to the FAO Compliance Agreement, Article 8(2)(6) encourages States to accept the agreement and to enact implementing laws and regulations.

Article 8(2)(7) of the FAO Code of Conduct requires flag States to take enforcement measures against their fishing vessels that have contravened applicable conservation and management measures. States can make the contravention of such measures an offence in their national legislation.

In line with this article, Indonesia's Fisheries Law No. 31 of 2004 endeavours to deter fisheries-related offending through deterrent penalties. Article 9 of Law No. 31 on Fisheries prohibits all persons from possessing, controlling, carrying, and using certain

100 William Edeson, above n5 at 237.

101 Andrew R Smith, '1995 FAO Code of Conduct for Responsible Fisheries: Article 8 – Fishing Operations' (Appendix J), Report of the Workshop on the Implementation of the 1995 FAO Code of Conduct for Responsible Fisheries in the Pacific Islands: A Call to Action, above n77 at 96.

types of fishing gear within the fisheries management areas of the Republic of Indonesia. These include all fishing gear and supporting fishing gear that do not conform to the prescribed sizes or prescribed requirements or standards, and all other fishing gear that is prohibited. Perhaps most importantly, for the first time in Indonesia, Law No. 31 on Fisheries also introduces a substantial change to the actors who can be held responsible for violating fisheries regulations. To ensure that all persons fish responsibly, Article 8(1) of Law No. 31 on Fisheries prohibits all persons from using chemical substances or biological substances such as explosives when fishing. Under Article 8(2) and 8(3), the same prohibitions are applied to the vessel master or commander of a fishing vessel, fishing expert, and all crews of a fishing vessel, as well as the proprietor of a fishing company, and any person in charge of a fishing company, and/or operator of a fishing vessel.

Likewise, New Zealand also endeavours to combat fisheries-related offending through successful prosecution and deterrent penalties. Under Section 254 of Fisheries Act 1996, penalties for fisheries-related offences can include fines, forfeiture of fish, vessels, other property and quota and imprisonment. In general, deterrent penalties in the commercial fisheries sector are two to three times the benefit the offender would have obtained if the IUU fishing was not detected.¹⁰² The sanctions that are imposed are required to be suitably severe in order to be effective in securing compliance and discouraging violations. Sanctions should also deprive offenders of the benefits accruing from their illegal activities. For serious violations, the sanctions may include the refusal, withdrawal or suspension of the authorisation to fish.

G. Port State Measures

In addition to the above provisions, special provisions concerning the duties of port States are provided in the FAO Code of Conduct. To this end, Article 8(3)(1) requires port States to take measures that are necessary to achieve, and to assist other States in achieving, the objectives of the Code. Port States are required to implement these measures by establishing procedures in their domestic legislation which are in accordance with international law and any applicable international agreements. Port States must also provide other States with details of any regulations and measures that they have established.

In implementing the above measures, a port State cannot discriminate either in form or in fact between the vessels of any other State. Further, Article 8(3)(2) of the FAO Code of Conduct states the obligation of port States to provide appropriate assistance to flag States in accordance with national and international laws. Where a fishing vessel is voluntarily in a port or at an offshore terminal of the port State and the flag State of the vessel requests the assistance of the port State in respect of non-compliance with agreed conservation and management measures, Article 8(3)(2) requires port States to provide such assistance to the flag State.

¹⁰² *New Zealand Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* Ministry of Fisheries, Wellington, New Zealand (2004) at 15.

5. The IPOA-IUU

The International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing was adopted by the FAO Committee on Fisheries (COFI) on 2 March 2001.¹⁰³ The IPOA-IUU provides a more comprehensive framework to combat IUU fishing than the FAO Code of Conduct. It does so by strengthening the basic provisions of the LOSC, the FAO Compliance Agreement, the UN Fish Stocks Agreement and the FAO Code of Conduct.¹⁰⁴

The objective of the IPOA-IUU as set out in Part III is to prevent, deter and eliminate IUU fishing by providing all States with comprehensive, effective and transparent measures by which to act, including through appropriate RFMOs established in accordance with international law. The IPOA-IUU is therefore a comprehensive instrument or ‘toolbox’ which allows States to accept the measures contained in the IPOA-IUU and to meet their particular IUU fishing needs and challenges.¹⁰⁵

The IPOA-IUU clearly sets out the responsibilities of all States, flag States, coastal States, port States and market States to effectively address IUU fishing. The IPOA-IUU Fishing also deals with responsibilities and measures of States acting¹⁰⁶ through RFMOs¹⁰⁷ and non-member States of RFMOs. The measures should be integrated and applied in accordance with applicable international law.¹⁰⁸ The key aspects of the IPOA-IUU Fishing are outlined below.

A. Flag State Responsibilities

The basic responsibilities of flag States are provided in paragraphs 34-50 of the IPOA-IUU. These responsibilities pertain to fishing vessel registration, record of fishing vessels and authorisation to fish.

B. Fishing Vessel Registration

Paragraph 34 of the IPOA-IUU requires States to ensure that fishing vessels flying their flags do not engage in or support IUU fishing activities. For this purpose, prior to registering a fishing vessel, flag States should ensure that they can exercise their responsibilities over their flag vessels.

103 Erik Jaap Molenaar, ‘CCAMLR and Southern Ocean Fisheries’, (2001) 16(3) *The International Journal of Marine and Coastal Law* at 482.

104 Annick Van Houtte, above n36 at 56.

105 David J Doulman, ‘2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing: Background and Progress Towards Implementation’, Report of the FAO Regional Workshop on the Elaboration of National Plans of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Appendix G), above n52 at 40.

106 ‘Seventeenth Session of Fishery Committee for the Central Atlantic, Dakar, Senegal, 24–27 May 2004 on ‘Main Thrust of the Technical Consultations on IUU Fishing and Fishing Capacity and Subsidies in the Fisheries Sector’ (Rome, Italy, 24 June – 2 July 2004) at 2.

107 ‘Reports of the Regional Vessel Monitoring Systems Workshops: Southwest Indian Ocean, the Caribbean, Central America and Southeast Asia,’ in *FAO/Fish Code Review No 14* Global Partnership for Responsible Fisheries (Fish Code), Food and Agriculture Organization Rome (2005) at 4.

108 Judith Swan, ‘International Action and Responses By Regional Fishery Bodies or Arrangements to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing’ in *FAO Fisheries Circular No 996*, Food and Agriculture Organization Rome (2004) at 2.

Article III(5) of the FAO Compliance Agreement deals with the problem of non-compliant vessels. Paragraph (a) of this article prevents a flag State from authorising an IUU fishing vessel previously registered in another State Party to the FAO Compliance Agreement, unless the flag State is satisfied that any period of suspension by another State Party of an authorisation for such fishing vessel to fish on the high seas has expired; and that no authorisation has been withdrawn by another State Party within the last three years. This provision is also applied to fishing vessels previously registered in a non-State Party to the FAO Compliance Agreement in order to ensure that sufficient information is available to the Party concerned with the circumstances in which the authorisation to fish was suspended or withdrawn. The provision of Article III(5) of the FAO Compliance Agreement elaborates the concept of the genuine link between the vessel and its flag State under Article 91 of the LOSC, which requires a State to fix the conditions for the grant of its nationality to ships for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to it.

In line with Article III(5) of the FAO Compliance Agreement, paragraph 36 of the IPOA-IUU requires flag States to avoid flagging vessels with a history of IUU fishing. The difference between the FAO Compliance Agreement and the IPOA-IUU is that the latter instrument has a wider scope in application¹⁰⁹ in the sense that it encourages all States involved in a chartering arrangement, including flag States and other States, to take measures to ensure that chartered vessels do not engage in IUU fishing.¹¹⁰

The legal exception to this rule relates to circumstances where the ownership of the vessel has changed, and the flag State can ensure that the change in ownership will not result in IUU fishing.¹¹¹ In this regard, it is important to note paragraphs 38 and 39 of the IPOA-IUU which deal with the matters of deterrence of re-flagging and flag hopping.¹¹² Under paragraph 38, flag States are required to deter their vessels from re-flagging for the purpose of avoiding the application of conservation and management measures that are adopted at the national, regional or global levels. Paragraph 38 also requires flag States to take actions and adopt rules that do not provide incentives for vessel owners to re-flag their vessels to other States.¹¹³ At the same time, under paragraph 39, States are required to take all necessary steps such as the denial to issue an authorisation to fish and the entitlement to fly that State's flag to prevent 'flag hopping'.

The objective of these provisions is to tackle the problem caused by vessels that change their names and registration, whilst continuing to engage in IUU fishing.¹¹⁴ Where there are two different agencies handling the functions of registration and fishing

109 Kelly Rigg, 'Halting IUU Fishing: Enforcing International Fisheries Agreements' (Paper Presented at the IUU Workshop, 19–20 April 2004, Directorate for Food, Agriculture and Fisheries, Fisheries Committee of OECD) at 6.

110 Judith Swan, above n37 at 17.

111 See Paragraphs 36 (1) and (2) of the IPOA-IUU.

112 *Australian Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, Department of Agriculture, Fisheries and Forestry of the Australian Government (2005) at 28.

113 David A Balton, 'IUU Fishing and State Control Over Nationals' (Paper Presented at the IUU Workshop, 19–20 April 2004, Directorate for Food, Agriculture and Fisheries, Fisheries Committee of OECD) at 5.

authorisation, problems also arise with respect to the ability of flag States to monitor the activities of their fishing vessels. The difficulty faced by States to address such problems is caused by unlicensed but registered vessels engaging in IUU fishing.¹¹⁵ To overcome this problem, paragraph 40 of the IPOA-IUU encourages flag States to ensure that appropriate links exist between the operation of their vessel registries and the records those vessels keep for their fishing vessels. Where such functions are undertaken by more than one agency, States should ensure that sufficient cooperation and information sharing exists between the agencies responsible for this function.

C. Record of Fishing Vessels

Article VI(1) of the FAO Compliance Agreement requires States to make certain information available to the FAO pertaining to the records of vessels authorised to fish on the high seas. These include:

- a) the name of the fishing vessel, registration number, previous names (if known), and port of registry;
- b) the previous flag (if any);
- c) the International Radio Call Sign (if any);
- d) the name and address of owner or owners;
- e) where and when built;
- f) the type of vessel; and
- g) the length.

Further, Article VI(2) requires States to make additional information available to the FAO for the purpose of recording information on the same vessels, including:

- a) the name and address of operator (manager) or operators (managers) (if any);
- b) the type of fishing methods;
- c) the moulded depth;
- d) the beam;
- e) the gross register tonnage; and
- f) the power of main engine or engines.

Correspondingly, Article 18(3)(c) of the UN Fish Stocks Agreement provides that each flag State agrees to the specific obligations to establish a national record or register of fishing vessels authorised to fish on the high seas

Consistent with these international fisheries instruments, paragraph 42 of the IPOA-IUU imposes obligations on flag States to maintain a record of fishing vessels entitled to fly their flags. For vessels authorised to fish on the high seas, the record of fishing vessels must include the information set out in Article VI(1) and (2) of the FAO Compliance Agreement. These include:

- a) the previous names of the vessels;

114 '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*, Food and Agriculture Organization Rome (2002) at 23.

115 Judith Swan, above n37 at 18.

- b) name, address and nationality of the natural or legal person in whose name the vessel is registered;
- c) name, street address, mailing address and nationality of the natural or legal persons responsible for managing the operations of the vessel;
- d) name, street address, mailing address and nationality of natural or legal persons with beneficial ownership of the vessel;
- e) name and ownership history of the vessel; and
- f) the history of IUU fishing vessel dimensions.

In the context of national legislation, Australia has implemented the provision contained in the 1993 FAO Compliance Agreement and the IPOA-IUU through the *Shipping Registration Act 1981* (Cth) and the *Fisheries Management Act 1991* (Cth). According to these laws, the information referred to above must be recorded in the particulars required to be entered into the Register for all registered vessels. These include registered fishing vessels, whether intending to fish on the high seas or waters under the jurisdiction of other countries.¹¹⁶ It is interesting in this context to note that applications to declare a foreign-flagged vessel to be an 'Australian vessel' must be consistent with Australia's obligations under international agreements. Applicants should be aware that the Australian Fisheries Management Authority (AFMA) would investigate international authorities about the compliance history of the vessel and master, ownership and beneficial interests. Applications may be rejected by AFMA if vessels have a history of IUU fishing activities. Whilst the AFMA declaration will not affect the vessel's flag status and a foreign-flagged vessel remains foreign-flagged, such declaration is in line with international and flag State responsibilities.¹¹⁷

As the paragraphs indicate above, an Australian-flagged fishing vessel owned or operated by a person with a history of serious non-compliance would not be authorised to fish on the high seas. A vessel owned or operated by an overseas person with a history of serious non-compliance would also not be authorised to fish in Australian fisheries waters. The above discussions reflect obligations that Australia has accepted as legally binding, either through global instruments, or through RFMOs.

Australia is a key party of international and regional fisheries and fisheries related forums. These include the Commission of Southern Bluefin Tuna (CCSBT), the Indian Ocean Tuna Commission (IOTC), the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC) and the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR).¹¹⁸

116 *Australian Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, above n112 at 29. See also Section 29 of *Shipping Registration Act 1981* and Sections 1 (1) (a) and (2) of the *Fisheries Management Act 1991*.

117 *Declaring a Foreign Boat to be an Australian Boat*, Australian Shipping Registration Office, Canberra (2003) at 4.

118 *Fisheries Legislation Amendment (New Governance Arrangements for the Australian Fisheries Management Authority and Other Matters) Bill 2008* at 7.

D. Authorisation to Fish

Authorisation to fish is an important part of fisheries management.¹¹⁹ The requirement to issue authorisations to fish in order to combat IUU fishing is stated in paragraphs 44–50 of the IPOA-IUU. An authorisation to fish can take the form of licensing or permission for a vessel to fish in a particular area.¹²⁰ Paragraph 44 of the IPOA-IUU urges States to adopt measures to ensure that no vessel is allowed to fish without proper authorisation.¹²¹ The issuance of licences to fish must be consistent with international law for the conservation and management of living resources on the high seas as provided under Articles 116 and 117 of the LOSC, as well as national legislation on the conservation and management of living resources in the EEZ.

Unlike the LOSC, the IPOA-IUU also regulates fishing in waters under the jurisdiction of other States. Paragraph 45 of the IPOA-IUU provides that flag States are to ensure that their vessels fishing in waters beyond national jurisdiction have valid authorisations to fish. Where a coastal State issues the same document, it should ensure that the vessels fishing in its waters are required to obtain an authorisation to fish issued by the flag State of the vessel.

Judith Swan has argued that these provisions provide a system of checks and balances by obligating coastal and flag States to ensure that their vessels and vessels fishing under their jurisdiction hold valid authorisations to fish.¹²²

The domestic legislation which implements paragraph 45 of IPOA-IUU in Australia and Indonesia provides prohibitions on fishing without authorisation beyond their national waters. The *Australian Fisheries Management Act 1991* contains permitting provisions for Australian-flagged fishing vessels engaging in fishing activities on the high seas.¹²³ Specifically, Australian flagged fishing vessels engaging in high seas fishing in South Pacific waters are required to have a fishing license issued by the Australian Fisheries Management Authority (AFMA).¹²⁴

Through their direct participation in fishing activities within the Australian Fishing Zone (AFZ) or in international fishing activities under the RFMO management, Australian nationals become more actively involved in fishing activities on the high seas or in foreign waters. The Australian Government has adopted regulations to control its nationals if they are engaged in fishing activities in specific areas outside the AFZ. This includes the Antarctic waters within 200 nautical miles of the Australian Antarctic Territory baselines, specified areas of the high seas associated with fishing for fishing for

119 John Fitzpatrick, 'Measures to Enhance the Capability of A Flag State to Exercise Effectiveness Control Over A Fishing' (Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia in Cooperation with FAO, Sydney, Australia, 15–19 May 2000) at 6.

120 Blaise Kuemlengan, 'National Legislative Options to Combat IUU Fishing' (Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia in Cooperation FAO, Sydney, Australia, 15–19 May 2000) at 3.

121 Duncan E J Currie, *Protecting the Deep Sea Under International Law: Legal Options for Addressing High Seas Bottom Trawling*, Greenpeace (2004) at 22.

122 Judith Swan, above n37 at 19.

123 See Sections 4, 4AA, 4AD of the *Fisheries Management Act 1991*.

124 A J Sampaklis, A K Morison & P I Hobsbawn, 'Australian Fishing for Non-Highly Migratory Fish (1987–2006) in the Area of the Proposed South Pacific Regional Fisheries Management Organization' (Working Paper presented at the Data and Information Working Group Meeting, Chile April, 2007) at 1.

southern or northern bluefin tuna, CCAMLR sub-area 58.5.2 and other specified CCAMLR waters, and the waters adjacent to the AFZ in the area off Tasmania known as the South Tasman Sea.¹²⁵

Consequently, it is an offence for an Australian-flagged fishing vessel to operate on the high seas or in foreign waters without the appropriate fishing permit. Importantly, operators using Australian-flagged fishing vessels on the high seas are also required to mark their vessels in accordance with the FAO standard specifications, facilitate the carriage of observers, complete catch and effort logs and operate a VMS which reports to AFMA. Additionally, Australian-flagged vessels must operate in line with Australia's obligations under international Agreements and other arrangements to which Australia is a member.¹²⁶ Apparently, these fishing activities are authorised through the issue of permits and concessions that are subject to specific management rules that are designed to ensuring the long-term sustainability of the fisheries resources. The Australian Government has taken greater responsibilities to tackle IUU fishing due to serious concerns at the effect of increasing IUU fishing on the sustainability of fish stocks and the marine environment.¹²⁷

Indonesia also appears to regard fishing by its nationals as well as vessels as being subject to its control. On the high seas, no person or legal entity may use an Indonesian flagged vessel to take fish for the purpose of sale, unless under the authority of and in accordance with a high seas fishing license.¹²⁸

Further, paragraph 46 of the IPOA-IUU provides that the authorisation, which include specific information such as the name of the vessel, area of fishing, species to be fished and gear to be used, need to be carried on board the vessel. Additionally, paragraph 47 of the IPOA-IUU allows flag and coastal States to impose conditions on any authorisation to fish. These conditions may include a vessel monitoring system (VMS), catch and transshipment, reporting conditions, observer coverage, maintenance of fishing and related log books, and navigational equipment. Such conditions must comply with international and national laws regarding conservation and management measures and the marking and identification of fishing vessels and gears. Paragraph 47 also requires that flag and coastal States honour their obligations under international law to require their fishing vessels to obtain authorisations to fish on the high seas or national waters. To this end, States must also ensure that their fishing vessels comply with applicable MCS measures.¹²⁹ These rules are designed to improve the ability of coastal and flag States to closely monitor the activities of their vessels.¹³⁰

125 *Australian Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, above n112 at 13.

126 *Steps Australia has taken to Address Illegal Fishing*, Department of Agriculture, Fisheries and Forestry, Australia, (2008) at 1.

127 *Country Note on Fisheries Management Systems*, Department of Agriculture, Fisheries and Forestry, Australia (2008) at 15.

128 Article 7 (2) of Regulation of the Minister of Marine Affairs and Fisheries No 5 of 2008 on Capture Fisheries Business.

129 Lawrence Juda, above n17 at 120.

130 Judith Swan, above n37.

One of the difficulties that may be faced by States in implementing paragraph 47 of the IPOA-IUU relates to fishing by transport and support vessels. This is a major problem because many fishing vessels need the assistance of transport and other support vessels when engaging in IUU fishing. Thus, transshipment at sea by support vessels is one of the most common and difficult unreported fishing activities to deal with.¹³¹ To address this problem, paragraph 48 of the IPOA-IUU imposes an obligation on flag States to ensure that their fishing, transport and support vessels do not support or engage in IUU fishing. They are to ensure that none of their vessels re-supply fishing vessels engaged in such activities or tranship fish to or from these vessels. The exceptions to this rule are only recognised for humanitarian reasons such as the safety of crew members, among other things. In this respect, the IPOA-IUU fills the lacuna in the definition of fishing vessels under the FAO Compliance Agreement.¹³²

The IPOA-IUU gives power to flag States to control the fishing activities of transport and support vessels operating on the high seas. For this purpose, under paragraph 49, flag States are to ensure that all vessels conducting transshipment at sea have prior authorisation to conduct such activities issued by their authorities. In addition, flag States must also report to the national fisheries administration or other designated institutions on trans-shipment activities. Transshipment reports are to contain records of the date and location of the transshipments, the weight by species and catch area of the fish transhipped, the name, registration, flag and other information of the vessels and the port of landing. Paragraph 50 of the IPOA-IUU also requires flag States to make catch and transshipment reports available to relevant national, regional, and international organisations, including the FAO, subject to confidentiality requirements.

From the above discussion, it can be seen that the IPOA-IUU provides detailed requirements concerning chartering, transshipment, flag hopping and the registration of vessels.¹³³ There are a number of additional measures that may be undertaken to ensure that the activities of all types of fishing vessels are conducted in accordance with fisheries conservation and management measures. First, States may establish specific rules and procedures in their national laws to prevent re-flagging of vessels engaged in IUU fishing. Second, States may place independent observers onboard vessels who can monitor the position of the vessels as well as observe fishing operations.¹³⁴ Third, flag States are encouraged to develop the capacity to conduct regular patrols at sea in areas where vessels are known to fish.¹³⁵

There is a further need for flag State measures in preventing, deterring and eliminating IUU fishing to be complemented by actions of coastal States and port States.

131 Fishing Operations Vessel Monitoring Systems, *FAO Technical Guidelines for Responsible Fisheries No 9*, Food and Agriculture Organization Rome (1998) at 29.

132 See Article 1(a) of the FAO Compliance Agreement which defines a 'fishing vessel' as any vessel used or intended for the purposes of the commercial exploitation of living resources.

133 Rt Hon Simon Upton & Vangelis Vitalis, 'Stopping the High Seas Robbers: Coming to Grips with Illegal, Unreported and Unregulated Fishing' (Paper for the Round Table on Sustainable Development, 6 June 2003) at 6.

134 Fishing Operations Vessel Monitoring Systems, *FAO Technical Guidelines for Responsible Fisheries No 9*, above n131 at 30.

135 Id at 31.

Coastal and port States are to coordinate their activities and cooperate directly or through relevant RFMOs in a range of specified areas, such as in implementing an MCS system and in exchanging information on IUU fishing activities.¹³⁶ Cooperation in these areas is needed to achieve the objective of sustainable fisheries. The relevant RFMO is expected to serve as a forum in which cooperation to combat IUU fishing would take place and help formulate acceptable international standards.

E. Coastal State Measures

According to Article 62(4) of the LOSC, coastal States may adopt laws to regulate the activities of foreign fishing vessels in EEZs. Sub-paragraph (a) of Article 62(4) deals with power of coastal States to provide licenses to fishermen, fishing vessels, and fishing gears. Sub-paragraph (b) sets out the power of coastal States to determine the species that may be caught and fix the quota for the catch. These provisions are supported in sub-paragraph (c) and (d) which deal with the right of coastal States to regulate seasons, areas of fishing, fishing gear and types, sizes and number of vessels that may be used and the age and size of fish and other species that may be caught by foreign fishing vessels in the EEZ.

The requirements, as mentioned in these provisions, must be related to sub-paragraph (e) of Article 62(4) on the obligation of fishing vessels to provide information, particularly catch and effort statistics and vessel position. Further, under sub-paragraph (f), the coastal States are empowered to prescribe rules relating to fisheries research programmes, particularly with respect to the sampling of catches, disposition of samples and reporting of associated scientific data.

An important provision is found in sub-paragraph (g) of Article 62(4) which provides the authority of the coastal States to place observers or trainees on board the vessels. The coastal States, under sub-paragraph (h), are also entitled to regulate the landing of all or any of the catch by such vessels in their ports. The great emphasis placed on training of personnel and transfer of technology is stipulated in sub-paragraphs (i) and (j). This is to help increase technical expertise and management know-how of fishermen of the coastal State.

Paragraph 51 of the IPOA-IUU requires coastal States to meet their obligations under the LOSC and other international agreements, to prevent, deter and eliminate IUU fishing in their EEZs. For this purpose, coastal States are required to:

- a) consider the implementation of effective MCS programmes;
- b) enter into cooperation and exchange arrangements for data and information with other States;
- c) ensure that vessels are authorised to fish and that they maintain catch logs;
- d) ensure that at-sea transshipment and processing of fish are authorised or¹³⁷ conducted in conformity with management regulations; and
- e) avoid licensing vessels if they have a history of non-compliance and IUU fishing.

136 Annick Van Houtte, above n36 at 57.

137 Chris Hedley, 'FAO International Plan of Action to Prevent, Deter and Eliminate IUU Fishing' *Internet Guide to International Fisheries Law* <<http://www.intfish.net/ops/papers/1.htm>> accessed on 17 May 2006, originally published in (2001) No 5 *International Fisheries Bulletin* at 4.

F. Port State Measures

IUU fishers must eventually bring their catch to port¹³⁸ for landing or transshipment¹³⁹. State control of ports under international fishery laws and regional fishery agreements makes such a control an important part of fishery conservation and management measures.¹⁴⁰ Article 23(1) of the UN Fish Stocks Agreement gives a port State the right, and imposes a duty, to take measures in accordance with international law to promote the effectiveness of sub-regional, regional and global conservation and management measures. In doing so, the State cannot discriminate either in form or in fact against the vessels of all States. Paragraph 2 of Article 23 further provides that when vessels are voluntarily within its ports, the port State may, inter alia, inspect documents, fishing gear, and fish catches on board fishing vessels. Paragraph 3 of the same provision gives the power to port States to adopt regulations to prohibit landings and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of sub-regional, regional or global conservation and management measures.¹⁴¹

The application of these provisions is dependent upon the ability of port States to undertake surveillance of vessels carrying out fishing for straddling and highly migratory species.¹⁴² A difference between the power of port States under the FAO Compliance Agreement and the UN Fish Stocks Agreement is clearly evident. Under Article 23 of the UN Fish Stocks Agreement, the inclusion of the right of port States to take measures to prevent IUU fishing seems to be aimed at giving the enforcement power to a flag State. In contrast, the similar right under Article V(2) of the FAO Compliance Agreement requires an international arrangement.

The IPOA-IUU strengthens the FAO Compliance Agreement, the UN Fish Stocks Agreement and the FAO Code of Conduct by requiring port States to develop and apply control measures to combat IUU fishing.¹⁴³ Port State control measures consist of the inspection of documents, fishing gears, and fish catches on board fishing vessels and the establishment of procedures for prior notification by vessels.

Port State control is an example of a 'new' tool that could be used to address IUU fishing. In this respect, the obligation of the flag State needs to be supplemented and strengthened by port State control.¹⁴⁴ Thus, the failure of the flag State to fulfil its duty entitles the port State to take legal action to combat IUU fishing.

138 David J Douman, above n14 at 32.

139 *Stopping Illegal, Unreported and Unregulated Fishing*, Food and Agriculture Organization Rome (2002) at 15.

140 Terje Lobach, 'Port State Measures' (Paper Submitted as A Draft Paper to the IUU Workshop, 19–20 April 2004, Directorate for Food, Agriculture and Fisheries, Fisheries Committee of OECD) at 4.

141 Louise de La Fayette, 'Access to Ports in International Law', (1998) 11(1) *The International Journal of Marine and Coastal Law* at 5.

142 Dean Bialek, 'Sink or Swim: Measures under International Law for the Conservation of the Patagonian Toothfish in the Southern Ocean', (2003) 34(2) *Ocean Development and International Law* at 121.

143 *Canada's National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (Government of Canada, 2005) at 2.

144 Christopher Hedley & Louvirjanakul Kengran, 'International Fisheries Law and Policy Review' (FAO Expert Consultation on Port State Measures to Combat IUU Fishing, IFLPR (Special Issue), Ocean Law and Contributors, 2003) at 32.

Under paragraph 52 of the IPOA-IUU, port States are required to take measures, in accordance with international law, to prevent, deter and eliminate IUU fishing. Port State measures should be implemented in a fair, transparent and non-discriminatory manner. Parallel to paragraph 52, paragraph 55 of the IPOA-IUU states the need for port States to require all foreign fishing vessels engaged in fishing activities or transporting fish and fishery products to provide notice of an intention to use a port and its landing or transshipment facilities.

As part of their responsibilities, States are also required to establish procedures for prior notification by vessels so as to ascertain whether the vessel might have engaged in, or supported IUU fishing. Some of the information that must be gathered by port authorities includes a copy of the vessels' authorisation to fish, details of their fishing trip, and quantities of fish on board.¹⁴⁵

Another power conferred upon port States under paragraph 56 of the IPOA-IUU is the duty to deny access to foreign vessels to land or trans-ship fish in their ports. Any action taken by a port State to deny the landing of fish under paragraph 56 must be based on clear evidence that the vessel has engaged in IUU fishing.¹⁴⁶ Under paragraph 57, port States are required to publicise the ports where foreign flagged vessels may be permitted to enter as well as ensure that these nominated ports have the capacity to inspect such vessels.

Paragraph 58 of the IPOA-IUU provides that in the exercise of their right to inspect fishing vessels, port States should collect and remit specified information to relevant flag States and RFMOs. Information that must be remitted to flag States and RFMOs include the identification details of the vessel including the name, nationality, and qualifications of the master and the fishing master; fishing gear, the catch on board, including origin, species, form, and quantity; and other information required by relevant RFMO or international agreements, particularly on total landings and transhipped catch.

The information collected during a vessel inspection will give port States stronger legal basis to determine whether the vessel has engaged in or supported IUU fishing.¹⁴⁷ To this effect, paragraph 59 provides that if, in the course of an inspection, it is found that there are reasonable grounds to believe that the vessel has engaged in or supported IUU fishing in areas beyond the jurisdiction of the port State, the port State shall immediately report the matter to the flag State of the vessel. Port States may take additional action with the consent of, or at the request of flag States. Furthermore, port States are required to give the report on IUU fishing to relevant coastal States and RFMOs. This rule will be applicable if the suspected IUU fishing has occurred in waters under the jurisdiction of another State or in areas under the jurisdiction of an RFMO.¹⁴⁸

145 'Report of the Technical Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing, Rome, 31 August – 2 September 2004, Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing (Appendix E)' in *FAO Fisheries Report No 759*, Food and Agriculture Organization Rome (2004) at 24.

146 M Lack & G Sant, 'Patagonian Toothfish Are Conservation and Trade Measures Working', (2001) 19(1) *Traffic Bulletin* at 16.

147 Fishing Operations Vessel Monitoring Systems, *FAO Technical Guidelines for Responsible Fisheries No 9*, above n131 at 40.

148 *Ibid.*

In practice, port State requirements under paragraph 57 of the IPOA-IUU are difficult to implement for two reasons. First, some States have so many ports that it would be difficult to inspect them 24 hours a day during the year.¹⁴⁹ Second, most developing State ports are faced with constraints due to the lack of trained and qualified personnel to detect violations of fisheries laws.¹⁵⁰

A notable example in this regard is Indonesia, which has only has 534 fisheries observers¹⁵¹ and 505 civil servant fisheries investigators in the Department of Marine Affairs and Fisheries.¹⁵² Therefore, issues relating to capacity building to support the implementation of port State measures in developing countries must be addressed.

In this respect, it should be noted that the Committee on Fisheries (COFI) in 2007 recommended that FAO take its initiative in promoting capacity building in developing countries for implementing the Model Scheme and enhancing and strengthening the implementation of port State measures to combat IUU fishing. In September 2007 FAO convened an Expert Consultation to Draft a Legally-binding Instrument on Port State Measures in Washington, D.C, USA. The purpose of the Consultation was to develop a draft text for a legally-binding instrument on port State measures, based on the IPOA-IUU and the Model Scheme. Based on the FAO first draft, the Expert Consultation developed a draft agreement that will be considered at technical consultation in FAO Headquarters in June 2008.¹⁵³

Article 11(1) of the 2008 Draft Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing places an obligation on State Parties to endeavour to inspect a number of vessels in its ports in order to reach an annual level of inspections necessary to achieve the objective of this Agreement.¹⁵⁴ In order to determine which vessels to inspect, pursuant to paragraph 2 of the same article, a Party is to give priority to:

- a) vessels that have been denied the use of a port in accordance with Articles 9¹⁵⁵ or 17¹⁵⁶ of this Agreement; and
- b) requests from other relevant States or regional fishery management organisations that particular vessels be inspected.

149 Terje Lobach, above n34 at 12.

150 Transform Aqorau, 'Illegal Unreported and Unregulated Fishing: Considerations for Developing Countries' (Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia with FAO, Sydney, Australia, 15–19 May 2000) at 2.

151 *National Plan Draft of Action of Indonesia to Prevent to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, Department of Marine Affairs and Fisheries of the Republic of Indonesia, Jakarta, 2004 at 27.

152 *Department of Marine Affairs and Fisheries Declares War Against IUU Fishing Fishers*, Department of Marine Affairs and Fisheries of the Republic of Indonesia (2008) at 1.

153 'Trade Related Measures for Sustainability: Progress on A Binding Instrument on Port State Measures' (Committee on Fisheries Sub-Committee on Fish Trade, Eleventh Session, Bremen, Germany, 2–6 June 2008) at 3.

154 Article 2 provides that the objective of this Agreement is to ensure the long-term conservation and sustainable use of living marine resources through strengthened and harmonized port State measures to prevent, deter and eliminate illegal, unreported and unregulated fishing.

155 See Article 9.

156 See Article 17.

Further, paragraph 3 of the same Article requires Parties to agree through regional fisheries management organisations or otherwise, on minimum levels of inspections of vessels. This is with a view to reaching a coordinated level of inspections necessary to achieve the objective of this Agreement. These obligations can be fulfilled only by a port State which has adequate facilities, a large number of patrol vessels, and properly qualified persons to inspect violations of fisheries laws.

In response to mounting international attention to the significant role of port State measures in deterring IUU fishing, the Government of Sweden is a funder of the FAO through the Fish Code Programme. Through the Trust Fund on Port State Measures, the Government of Norway has organised a series of regional workshops to develop national capacity and promote regional coordination convened by the FAO.¹⁵⁷ The FAO is currently applying for donor countries for US\$ 1 million to support a project designed to help developing countries deny port access to IUU fishing vessels. The funds would be used to finance an ongoing FAO project launched in 2005 when the FAO developed a Model Scheme for stronger port State measures that could be adopted by countries for the battle of IUU fishing.¹⁵⁸

In addition to the above measures, Australia has been working, with other countries either directly or through the Food and Agriculture Organisation (FAO) and International Maritime Organisation (IMO), to review port State measures on the international plane. This is with the purpose of providing for the implementation of port State measures that could assist in combating IUU fishing.¹⁵⁹ Australia is expected to participate at technical consultation in FAO Headquarters in June 2008.

The above discussion shows that the port State measures require a huge budget in order to ensure the effective implementation of international obligations. Limited financial capacity and the high cost of undertaking port State measures have encouraged the FAO to ensure a priority focus on the needs of developing countries by mounting a series of regional workshops. These have the purpose of developing national capacity and promoting regional coordination. This is due to a bigger problem posed by developing countries which do not have the financial and human resources to carry out port State measures. It would be helpful if governments of developing countries had a primary budget to finance the port State measures in combating IUU fishing.

One particular concern is that the draft agreement has not yet been adopted by the FAO technical consultation. Lack of binding port State measures may work as a driver for IUU fishing activities. Therefore, the continued work of a draft agreement is essential to finalise the draft instrument's provisions that require parties to implement a minimum standard for port State measures.

157 Ichiro Nomura, 'Strengthening Port State Measures in the Indian Ocean: The Key to Improving Fisheries Management and Combating IUU Fishing' (IOC-FAO-IOTC International Symposium and Workshop, Labourdonnais Hotel Port Louis, Mauritius, 18–22 June 2007) at 2.

158 'More Funding Needed in Fight against Illegal Fishing-Fisheries' News Posted by Asia Pacific Fishery Commission on 25 June 2008 <<http://www.apfic.org/modules/news/>> (accessed date on November 9, 2008).

159 *Australian Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, above n112 at 34.

6. Internationally Agreed Market-Related Measures

In recent decades, the international trade in fish and fishery products has increased significantly. According to FAO statistics, virtually all States exported part of their fisheries products, while almost as many States reported fishery products. However globally, there is no reliable data to show the exact amount of fish and fishery products traded internationally that are derived from IUU fishing.¹⁶⁰ Although 40 per cent of the total world fish products are traded internationally, the existing import regulation relating to trade related measures is not adequate to deal with IUU fishing.¹⁶¹

The inadequacy of import regulations in regards to trade in fish and fisheries products is seen as a contributing factor in the continuation of IUU fishing. Increasingly, it is recognised that fisheries trade measures would be dealt with more effectively and with greater consistency if they were harmonised with international law.

Accordingly, paragraph 65 of the IPOA-IUU recognises the right of States to trade in fish and fishery products harvested in a sustainable manner. Under paragraph 66 of the IPOA-IUU, States are urged to take all necessary measures, consistent with international law, to prevent trade in fish and fishery products harvested by IUU fishing vessels. Thus, the use of trade-related measures has become one of the most effective measures to combat IUU fishing. These measures are to be taken in accordance with the principles, rights and obligations established under the General Agreement on Tariffs and Trade (GATT) and other relevant agreements of the World Trade Organisation (WTO) such as the Agreements on Technical Barriers to Trade, Pre-shipment Inspection, Rules of Origin, Import Licensing Procedures, and Subsidies and Countervailing Measures. These rules must also be implemented in a fair, transparent and non-discriminatory manner.

In order to meet their fisheries trade commitments, States are required to collect adequate data about vessels harvesting a particular fish. RFMOs can assist States in this regard by developing and adopting catch certification and trade documentation schemes.¹⁶² International trade measures cannot be established by a single State, but rather through the cooperative efforts of those States party to existing RFMOs. This is in accordance with the LOSC and the UN Fish Stocks Agreement.¹⁶³ Paragraph 68 of the IPOA-IUU also requires that trade-related measures be used to support cooperative efforts by States to ensure that trade in fish and fish products does not in any way

160 Fishing Operations Vessel Monitoring Systems, *FAO Technical Guidelines for Responsible Fisheries No 9*, above n131 at 47.

161 Linda A Chaves, 'Illegal, Unreported and Unregulated Fishing: WTO-Consistent Trade Related Measures' (Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Australian Government in Cooperation with FAO, Sydney Australia, 15–19 May 2000) at 3.

162 Anna Willock, 'Using Trade and Market Information to Assess IUU Fishing Activities' (Paper Submitted to the IUU Workshop, 19–20 April 2004, Directorate For Food, Agriculture and Fisheries, Fisheries Committee of OECD) at 2.

163 Sali Yayne Bache, Marcus Howard & Stephen Dovers, above n27 at 75. For more comprehensive descriptions of the role of RFMOs in this subject, see Judith Swan, 'The Role of National Fisheries Administrations and Regional Fishery Bodies in Adopting and Implementing Measures to Combat Illegal, Unreported and Unregulated (IUU) Fishing' in Elisabeth Mann Borgese, Aldo Chirco & Moira McConnel (eds), *Ocean Yearbook 16* (2002) at 237.

encourage IUU fishing. Paragraph 68 emphasises the role of RFMOs in the establishment of such multilateral trade related measures which do not undermine the effectiveness of conservation and management measures in accordance with the LOSC.¹⁶⁴ Likewise, paragraph 69 of the IPOA-IUU encourages States to adopt multilateral catch documentation and certification schemes so as to reduce trade in fish and fish products derived from IUU fishing. Such measures also include the adoption of appropriate multilaterally agreed measures for controlling and prohibiting imports.

In fact, trade documents have been issued for tuna and swordfish by the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) and the Indian Ocean Tuna Commission (IOTC),¹⁶⁵ and for patagonian toothfish by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR).¹⁶⁶ Member States of these RFMOs agree to deny the landing in their ports of any fish caught outside their areas of competence or those fish and fishery products lacking appropriate documentation.¹⁶⁷ It is interesting to note in this connection that as a member of CCAMLR, Australia has adopted, implemented and strengthened a CCAMLR Catch Documentation Scheme (CDS) for Patagonian toothfish. Australia has also supported the United States of America (USA) in its pursuit of an electronic CDS (eCDS) to strengthen the integrity of the system and participated in its trials of the eCDS over recent years.¹⁶⁸

In the context of trade restrictions, the main issue has been the impact of such measures on WTO obligations relating to non-discrimination in international trade. Articles XI and XIII of the WTO Agreements provide that import bans on fish and fish products may not be allowed unless there is proof that such imports have detrimental impact on fishery resource conservation and management.¹⁶⁹ Restrictive trade measures impact on members and non-members of RFMOs and create import restrictions against non-member States that are also members of the WTO.¹⁷⁰ A question therefore may be raised as to whether these trade measures are consistent with WTO Obligations.¹⁷¹ A

164 Marcus Howard, 'IUU Fishing: Contemporary Practice' in Alex G Oude Elferink & Donald R Rothwell (eds), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (2004) at 94. For an interesting discussion, see Carl-Christian Schmidt, 'Globalization, Industry Structure, Market Power and Impact on Fish Trade' (Paper Prepared for the FAO Industry and Expert Consultation on International Trade, Rio de Janeiro, Brazil, 3–5 December 2003) at 12.

165 Messra David, J Agnew & Collin T Barnes, above n38 at 15.

166 D J Agnew, 'The Illegal and Unregulated Fishery for Toothfish in the Southern Ocean, and the CCAMLR Catch Documentation Scheme', (2000) 24(5) *Marine Policy* at 368.

167 Rt Hon Simon Upton and Vangelis, above n133 at 9.

168 *Australian Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, above n112 at 36.

169 Ruangrai Tokrisna, 'WTO-Consistent Trade-Related Measures to Address IUU Fishing, Developing Country Issues' (Expert Consultation on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia in Cooperation with FAO, Sydney, Australia, 15–19 May 2000) at 4.

170 Julia Green & David Agnew, 'Catch Document Schemes to Combat Illegal, Unreported and Unregulated Fishing: CCAMLR's Experience with Southern Ocean Toothfish' in Elisabeth Mann Borgese, Aldo Circop & Moira McConnel (eds), *Ocean Yearbook 16* (2002) at 189–190.

171 Bertrand Le Gallic, 'Using Trade Measures in the Fight Against IUU Fishing: Opportunities and Challenges' in *IIFET, 2004 Japan Proceedings* (2004) at 6. For useful discussion see Christopher C Joyner & Zachary Tyler, 'Marine Conservation Versus International Free Trade: Reconciling Dolphins with Tuna and Sea Turtles with Shrimp' (2000) 31(1–2) *Ocean Development and International Law* at 140.

similar question could also be raised in regards to catch documentation schemes issued by CCSBT and IOTC.

Exchange of information at the global level is essential for any multilateral trade measure to work. Accordingly, paragraph 76 of the IPOA-IUU recognises that these measures are only effective if the information can be shared and understood quickly. To this effect, paragraph 76 encourages the use of standardised trade documentation and catch certification. These multilateral measures ensure the effectiveness of the conservation and management measures by eliminating unscrupulous practices and avoiding unnecessary burdens on trade. The availability of globally shared databases is therefore a very important step in the successful implementation of these provisions to combat IUU fishing.

7. Conclusions

It can be seen from the earlier discussion that IUU fishing takes on different forms and occurs in areas under national jurisdiction, areas under the competence of RFMOs, and on the high seas. The threat of IUU fishing and the environmental and economic consequences flowing from the problem has been acknowledged. This article analysed two important non-binding international instruments to combat IUU fishing, namely the FAO Code of Conduct for Responsible Fisheries and the IPOA-IUU. These instruments, although not legally binding, provide adequate policy guidance for States to combat IUU fishing. Cumulatively, the two instruments fill the gaps in the LOSC framework. The FAO Code of Conduct has filled the lacuna and strengthened the LOSC dealing with sustainable fisheries management and international cooperation. The IPOA-IUU has filled the gap in the LOSC relating to fishing in EEZs of other countries and the role of RFMOs in the establishment of multilateral trade related measures. These policy instruments also supplement post-LOSC legally binding instruments. The IPOA-IUU has filled the gap and complemented the FAO Compliance Agreement in relation to the definition of fishing vessels and chartered vessels. It has also strengthened and complemented the FAO Compliance Agreement, UN Fish Stocks Agreement and the FAO Code of Conduct with regard to port State control measures.

Accordingly, the effective implementation of these international instruments would significantly enhance the long-term sustainability of straddling fish stocks and highly migratory species.¹⁷² This, however, requires financial capacity, high cost well-trained personnel and also a skill base of staff for enforcing fisheries law within the EEZ and on the high seas.

172 See David J Douman, above n52 at 30.