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## CHAPTER 1

### 1 Introduction

Illegal, unreported and unregulated (IUU) fishing has become a worldwide challenge facing fisheries in the 21<sup>st</sup> century. IUU fishing has the effect of undermining existing management and conservation measures at a national, regional or international level. In addition, IUU also defeats the purpose of stock rebuilding initiatives, thereby resulting in untold economic, social and ecological losses, making sustainable use an impossible goal.<sup>1</sup>

According to the United Nations Food and Agriculture Organisation (FAO) 50 percent of the world's wild fish stocks are fully exploited, with 32 percent being over exploited, depleted or recovering from depletion.<sup>2</sup> The proportion of underexploited or moderately exploited fish stocks is around 18 percent.<sup>3</sup> With an ever increasing world population, the demand for protein sources continues to outstrip the supply, hence placing very heavy demands on already dwindling fish resources. The added demands on fisheries by IUU fishing is growing cause for concern. Since fishing is largely an economic activity, IUU fishing is by implication driven by economic factors.<sup>4</sup>

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<sup>1</sup> The Ministerially-led Task Force stated that IUU fishing was an obstacle to achieving sustainable development. "High Seas Task Force. Closing the net: Stopping illegal fishing on the high seas." (2006) Governments of Australia, Canada, Chile, Namibia, New Zealand and the United Kingdom, WWF, IUCN and the Earth Institute of Columbia University. Available at <http://www.high-seas.org/> (accessed 10 July 2010).

<sup>2</sup> FAO State of Fisheries and Aquaculture Report 2010, p35. Available at <http://www.fao.org/docrep/013/i1820e/i1820e00.htm> (accessed 15 November 2010).

<sup>3</sup> Ibid.

<sup>4</sup> Schmidt CC "Economic Drivers of Illegal, Unreported and Unregulated (IUU) Fishing" (2005) *International Journal of Marine and Coastal Law* vol 20 479-507.

In response to IUU fishing, States have developed a suite of various measures at an international level to fight the scourge of IUU fishing. International instruments include the 1982 Law of the Sea Convention,<sup>5</sup> the United Nations Agreement for Implementation of the provisions of the United Nations Convention for the Law of the Sea of 1982 relating to the Conservation of Highly Migratory Fish Stocks adopted in 1995 (the UN Fish Stocks Agreement)<sup>6</sup> and the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas adopted in 1993 (FAO Compliance Agreement).<sup>7</sup> All of these instruments were developed on the basis that States have a duty to adopt measures to ensure the sustainable use of living marine resources and to cooperate with each other to this end.<sup>8</sup> However, States are required to act in unison to ensure the effectiveness of these legally binding instruments to combat IUU fishing.

In addition, at the twenty-third session of the FAO Committee on Fisheries (COFI), members were called upon to develop an International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing (IPOA-IUU).<sup>9</sup> The IPOA-IUU is a voluntary instrument developed within the framework of the Code of Conduct for Responsible Fisheries<sup>10</sup>, which provides member

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<sup>5</sup> United Nations Convention on the Law of the Sea of 10 December 1982. Available at [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf) (accessed 10 November 2010).

<sup>6</sup> Agreement for the Implementation of the United Nations Convention on the Law of the Sea 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. 1995. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/274/67/PDF/N9527467.pdf?OpenElement> (accessed 18 April 2011).

<sup>7</sup> Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. Rome, FAO. 1993. p12. Available at <http://www.fao.org/DOCREP/MEETING/003/X3130m/X3130m00.HTM> (accessed 17 April 2011).

<sup>8</sup> LOSC. 1982. Articles 61 to 62 – Exclusive Economic Zone conservation and utilization of living resources; and Article 118 – Cooperation of States in the conservation and management of living resources [of the high seas].

<sup>9</sup> Introduction to IPOA-IUU. FAO. International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing. Rome, FAO. 2001. 24p. Available at <http://www.fao.org/docrep/003/y1224e/y1224e00.htm> (accessed 15 January 2010).

<sup>10</sup> FAO Code of Conduct for Responsible Fisheries. Rome, FAO. 1995. 41p. Available at <ftp://ftp.fao.org/docrep/fao/005/v9878e/v9878e00.pdf> (accessed November 2010).

States with a comprehensive suite of measures that could be taken in the fight against IUU fishing. Even though the IPOA-IUU is a soft law instrument, it called upon FAO members to accede to or ratify relevant international legally-binding instruments and to effectively implement their Law of the Sea Convention obligations in terms of conservation of living marine resources on the high seas and taking measures against their nationals acting contrary to the Convention.<sup>11</sup>

Be that as it may, IUU fishing still remains a challenge threatening fisheries on the high seas as well as within the exclusive economic zones (EEZ) of coastal States. States have also developed national legislation in order to combat IUU fishing. Furthermore, several regional fisheries management organizations (RFMOs) have been formalized, with competence over the management and conservation of various living marine resources and have subsequently also developed measures to combat IUU fishing.<sup>12</sup> The success of the measures is also largely dependent on cooperation and exchange of information between States and the relevant RFMOs.

In this context, the European Community (EC)<sup>13</sup> has also developed measures to further combat IUU fishing activities. On 29 September 2008 the EC Council of Ministers adopted Regulation No. 1005/2008.<sup>14</sup> The Regulation which entered into force on 1 January 2010 seeks to establish a Community System to prevent, deter and eliminate IUU fishing by setting out measures to be employed

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<sup>11</sup> LOSC Article 117 makes provision for the duty of States to adopt with respect to their nationals measures for the conservation of the living resources of the high seas.

<sup>12</sup> "Conference on the Governance of High Seas Fisheries and the UN Fish Agreement: Moving from Words to Action." *International Journal of Marine and Coastal Law* vol 20 605-629.

<sup>13</sup> European Community (EC) Regulations adopted prior to 2010 when the integrated economic entity became known as the European Union (EU). For purposes of this study, the relevant Regulation will refer to the EC or the Community if that Regulation pre-dates the 2010 European Union formalisation.

<sup>14</sup> Commission Regulation (EC) 1005/2008 of 29 September 2008 (29.10.2008) *Official Journal of the European Union* L 286/3. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:286:0001:0032:EN:PDF> (accessed 15 January 2010).

by States wishing to export their fish and fishery products into the Community.<sup>15</sup> South Africa is an exporter of fish and fishery products into the EC and therefore Regulation 1005/2008 applies to South Africa. The technical nature of the Regulation will undoubtedly require additional administration and management, while also having possible legal implications.

What are the legal and administrative implications for South Africa and how can South African legislation be strengthened to combat IUU fishing? This study explores these questions.

## 1.1 Rationale

The rationale for the study is based on the perception that the EC Regulation is an administrative burden to States that export their fishery products to European markets. Prior to the EC Regulation's entry into force on 1 January 2010, various studies indicated the need to guard against a burden for developing States, such as the African, Caribbean and Pacific Group of States.<sup>16</sup>

## 1.2 Aims of the study

The study aims to consider whether the implementation of Regulation 1005/2008 will simply be an administrative burden to South Africa and to determine whether the implementation offers opportunities for strengthening domestic legislation for fisheries management.

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<sup>15</sup> Ibid.

<sup>16</sup> Tsamenyi M, Palma MA, Milligan B and Mfodwo K "The New EC Regulation on Illegal Fishing: Implications for ACP countries" (2009) Common Wealth Trade Hot Topics. Issue #56. 3 February 2009. Available at [http://www.thecommonwealth.org/document/181889/34293/227379/229871/187911/tht56\\_the\\_new\\_ec\\_regulation\\_on\\_illegal\\_fishing.htm](http://www.thecommonwealth.org/document/181889/34293/227379/229871/187911/tht56_the_new_ec_regulation_on_illegal_fishing.htm) (accessed 16 February 2011).

### **1.3 Value**

The value of this study would be manifested in the recommended legislative amendments in an attempt to bring about harmonisation between South African legislation and international legal obligations in addressing IUU fishing in the global context. It is envisaged that the recommended legislative amendments will strengthen the legislation and South Africa's ability to combat IUU fishing generally.

### **1.4 Methodology**

This study is largely a desktop study and the research methodology used included a review of literature and current legislation as well as public documents from the fisheries management authority and fishing industry.

### **1.5 Structure**

The study is organised in chapters as follows; chapter 1 is an introductory chapter setting the scene for the study and the approach followed; chapter 2 presents an outline of South African fisheries, introduces the international and local challenges experienced in terms of IUU fishing; chapter 3 focuses on the international response to IUU fishing through soft and hard law provisions, including international conventions and agreements, and also considers the catch documentation schemes employed by regional fisheries management organisations that are of relevance to South Africa; chapter 4 introduces the EC Regulation to combat IUU fishing; chapter 5 contains a review of existing national legislation, regulations and permit conditions and the concomitant administration and management of fisheries in South Africa, while considering

the practical implications for implementing the EC-IUU Regulation with regard to management, administration, monitoring control and surveillance (MCS); chapter 6 recommends legislative amendments for strengthening South African legislation to deal more effectively with IUU fishing, draws conclusions from this study and also identifies possible areas for future studies.

## CHAPTER 2

### 2 Background

#### 2.1 Profile of South African fisheries

As from the 1<sup>st</sup> April 2010, the management authority of fisheries in South Africa is the Fisheries Branch of the Department of Agriculture, Forestry and Fisheries (DAFF).<sup>17</sup> For many years prior to that, fisheries were managed by the Branch Marine and Coastal Management (MCM) of the Department of Environmental Affairs and Tourism (DEAT).<sup>18</sup>

South African fisheries consists of highly diverse fisheries ranging from subsistence fisheries to more labour-intensive commercial fisheries in near shore waters and the highly industrialised and capital-intensive commercial fisheries which operate further offshore and on the high seas.<sup>19</sup> There are currently twenty-two commercial fisheries in South Africa, namely, fisheries for; abalone, hake deepsea trawl, hake inshore trawl, horse mackerel, small pelagic (anchovy and sardine), Patagonian toothfish, south coast rock lobster, KwaZulu-Natal prawn trawl, hake longline, west coast rock lobster (offshore), squid, tuna handline (pole), seaweed, demersal shark, hake handline, west coast rock lobster (nearshore), oysters, white mussels, netfishing (trek- and gillnets and beach seine), KwaZulu-Natal beach seine, large pelagic longline (tuna and

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<sup>17</sup> Proclamation by the President of South Africa in terms of Section Transfer of Administration and Powers and functions entrusted by legislation to certain Cabinet members in terms of section 97 of The Constitution. Published in General Notice 44, *Government Gazette* No. 32367, 1 July 2009.

<sup>18</sup> The author was employed by the DEAT for more than 13 years, initially in Sea Fisheries, which subsequently became the branch Marine and Coastal Management of DEAT.

<sup>19</sup> General Policy on the Allocation and Management of Long Term Commercial Fishing Rights: 2005. Department of Environmental Affairs and Tourism. Pretoria. Published in General Notice 931, *Government Gazette* No. 27683, 15 June 2005.

swordfish) and traditional linefish.<sup>20</sup> At the end of 2005, the Minister of Environmental Affairs and Tourism and his delegated authorities, allocated<sup>21</sup> long term commercial fishing rights in terms of section 18 of the Marine Living Resources Act (MLRA) for periods of up to 15 years.<sup>22</sup> This was the first time that fishing rights were allocated for periods of more than four years. The main reason for allocating long term commercial fishing rights was to address past imbalances in fisheries as a result of the Apartheid regime, which excluded commercial fishery participants on the basis of race as well as to provide the fishing industry with stability by encouraging industry to take ownership of the sustainable use of marine living resources for present and future generations.<sup>23</sup> Rights were allocated to about 2 485 rights holders.<sup>24</sup> In addition to the commercial fishing sectors there is also subsistence- as well as recreational fisheries. However, the latter is not permitted to sell their catch, so the EC Regulation would not be applicable to recreational fishing.<sup>25</sup>

Harvested marine living resources are for domestic markets as well as for exporting to international markets. The commercial fisheries earn about R 992 million per annum.<sup>26</sup> The total annual production of South African commercial fisheries was estimated at more than 600 000 tons.<sup>27</sup> The demersal fishing sectors contribute the greatest proportion of the total value of the fishing

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<sup>20</sup> Ibid.

<sup>21</sup> Fishing rights were allocated in terms of section 18 of the Marine Living Resources Act (Act No. 18 of 1998), hereafter referred to as the 'MLRA'. Available at <http://www.info.gov.za/view/DownloadFileAction?id=70675> (accessed 10 November 2010).

<sup>22</sup> See footnote 19. p 28.

<sup>23</sup> S2 of the MLRA. Objectives for (a) optimum utilisation and ecologically sustainable development of marine living resources; and (b) the need to conserve marine living resources for both present and future generations.

<sup>24</sup> DEAT Annual Review 2006-2007. Published by the Department of Environmental Affairs and Tourism. Pretoria. p30. Available at [http://www.environment.gov.za/AboutUs/StratDoc/Annual\\_Review/annual%20review%20200607.pdf](http://www.environment.gov.za/AboutUs/StratDoc/Annual_Review/annual%20review%20200607.pdf) (accessed 26 November 2010).

<sup>25</sup> S20 of the MLRA – “no person shall sell, barter or trade any fish caught through recreational fishing”.

<sup>26</sup> Branch GM and Clark BM “Fish stocks and their management: The changing face of fisheries in South Africa” (2006) *Marine Policy* vol 30 3-17.

<sup>27</sup> Moolla S “Contextualising illegal, unreported and unregulated fishing of marine resources in South African waters” (2008). Available at <http://www.feike.co.za/> (accessed 2 February 2010).

industry, while it is the second largest in fishing sectors in terms of tonnage landed.<sup>28</sup> South Africa predominantly exports its fish and fish products to EU Member States.<sup>29</sup> Approximately 28 000 direct and 120 000 indirect employment opportunities are derived from South African commercial fisheries<sup>30</sup> and it forms an important part of the socio-economics of coastal provinces in South Africa. However, South Africa is also a global player in international fisheries.

## 2.2 IUU fishing as a global challenge

IUU fishing is a global challenge experienced at a national level in the EEZ of coastal States, but also at an international level on the high seas.<sup>31</sup> A study on the scope of IUU fishing showed the linkages between the cost of IUU fishing and the benefit thereof. Motivating factors that influence the decision to engage or participate in IUU fishing include the probability of being caught, which is linked to the level of enforcement by States, the penalty if caught and the cost of avoiding being caught. Evading law enforcement or the penalty if the fisher is caught has proven to be a risk worth taking in the context of high value fish resources and the economic gains that could be realised from the IUU caught fish. A cost benefit analysis of 16 IUU fishing cases revealed that the penalty and fines imposed in 60 percent of the cases were insufficient to serve as a deterrent to IUU fishing and that if the fines were to be effective deterrents then they would have to be increased by as much as 24 times thereby making IUU fishing uneconomical.<sup>32</sup>

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<sup>28</sup> Payne AIL and Crawford RJM (Eds) "Oceans of Life off Southern Africa" (1995) Vlaeberg Publishers.

<sup>29</sup> "Appendix III. System requirements for effecting consignment based catch certificates in terms of Regulation EC 1005/2008". Document provided by the South African Deep Sea Trawling Industry Association (SADSTIA) (email 18 April 2011).

<sup>30</sup> DEAT Annual Report 2008/09. Published by the Department of Environmental Affairs and Tourism. Pretoria. p15.

<sup>31</sup> Schmidt CC "Economic Drivers of Illegal, Unreported and Unregulated (IUU) Fishing" (2005) *International Journal of Marine and Coastal Law* vol 20 479-507.

<sup>32</sup> Sumaila UR, Alder J and Keith H "Global scope and economics of illegal fishing" (2006) *Marine Policy* vol 30 696-703.

Furthermore, an analysis of 292 case study fisheries showed that a significant relationship exists between the level of IUU fishing and poor controls or governance.<sup>33</sup> Higher levels of IUU fishing were recorded in instances where there were fewer controls in the fishery, which included enforcement controls.<sup>34</sup>

Based on the global analyses of IUU fishing, it is evident that economics and enforcement play a major role in IUU fishing. In addition, IUU fishing remains a global challenge in that the analyses were based on 292 case study fisheries worldwide. Further consideration will now be given to specific IUU fishing cases, with special reference to cases that are of relevance to South Africa.

The highest profile case which transcended South African territory commenced in 2001, when an anonymous tip-off subsequently led to the arrest of the Director of Hout Bay Fishing, Arnold Bengis. Bengis was the mastermind behind massive under-reporting of south coast rock lobster spanning five years (1987 to 2001).<sup>35</sup> Hout Bay Fishing was a commercial rights holder in the south coast rock lobster fishery who had been exporting rock lobster and Patagonian toothfish to the USA far in excess of the quota for several years.<sup>36</sup> The illegal activities surrounding the under-reporting of the rock lobster catches, together with the subsequent export of the rock lobster and Patagonian toothfish to the USA resulted in a total of three court cases, two in the USA<sup>37</sup> and one in South

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<sup>33</sup> Agnew DJ, Pearce J, Pramod G, Peatman T, Watson R, Beddington JR and Pitcher TJ "Estimating the Worldwide Extent of Illegal fishing" (2009) PLoS ONE 4(2): e4570. Doi: 10.1371/journal.pone.0004570 Available at <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0004570> (accessed 16 June 2010).

<sup>34</sup> Ibid.

<sup>35</sup> *Houtbay Fishing Industries (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others (Houtbay Fishing)*. Case Number: Cape Provincial Division - 7390/01.

<sup>36</sup> Ibid.

<sup>37</sup> *United States of America v. Arnold Maurice Bengis, Jeffrey Noll and David Bengis*. 19 December 2006. Docket no. S1 03 Cr 308 (LAK) (AJP) and *United States v Arnold Maurice Bengis, Jeffrey Noll and David Bengis*, Case number 07-4895, 1-15 (2d Circ. 2011).

Africa.<sup>38</sup> In the South African court case, Hout Bay Fishing was found guilty in terms of the MLRA and sentenced to about R 40 million fines as well as the forfeiture of vessels, equipment, fish and the subsequent loss of fishing rights.<sup>39</sup> While, the other two court cases were conducted under the jurisdiction of the United States of America (USA) and in terms of the Lacey Act,<sup>40</sup> which states that:

It is unlawful for any person-

- (1) To import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law...
- (2) To import, export, transport, sell, receive, acquire, or purchase in interstate of foreign commerce – Any fish or wildlife taken, possessed transported, or sold in violation of any law or regulation of any State or in violation of any foreign law ...<sup>41</sup>

The international collaboration between South Africa and the USA also resulted in Bengis and co-conspirators being charged with importing illegally caught fish into the USA. Bengis was sentenced in the US courts to 46 months imprisonment and a fine of US\$5.9 million to the US government (Bengis and Noll).<sup>42</sup> In addition, Bengis was further ordered to forfeit the proceeds of the sale of his fish processing factory in Maine USA, worth US\$1.5 million.<sup>43</sup>

On the 4 January 2011 the second case of restitution claims for South Africa was concluded in the US Federal Appeals Court. The judgment held that:

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<sup>38</sup> See footnote 35.

<sup>39</sup> Ibid.

<sup>40</sup> *United States of America v. Arnold Maurice Bengis, Jeffrey Noll and David Bengis*. 19 December 2006. Docket no. S1 03 Cr 308 (LAK) (AJP).

<sup>41</sup> Ortiz P "An overview of the U.S. Lacey Act Amendments of 1981 and a Proposal for a Model Port State Fisheries Enforcement Act" (2005) prepared for the Ministerially led task force on Illegal, Unreported and Unregulated Fishing on the High Seas. Available at [http://www.illegal-fishing.info/uploads/Lacey\\_Act\\_Paper.pdf](http://www.illegal-fishing.info/uploads/Lacey_Act_Paper.pdf) (accessed 14 April 2011).

<sup>42</sup> Press release by NOAA Office of Law Enforcement on 28 May 2004. Available at [http://www.nmfs.noaa.gov/ole/news/news\\_NED\\_052804.htm](http://www.nmfs.noaa.gov/ole/news/news_NED_052804.htm) (accessed 2 February 2010)

<sup>43</sup> Ibid.

South Africa: (1) has a property interest in rock lobsters unlawfully harvested from its waters and (2) is a victim, as defined in the MVRA and VWPA, eligible to receive restitution. Accordingly restitution is owed to South Africa.<sup>44</sup>

The district Court was ordered to calculate restitution to South Africa.<sup>45</sup> The abovementioned judgment was hailed as groundbreaking the world over.

In a separate case which dramatically played out in the Southern Ocean, the high value Patagonian toothfish also proved irresistible to illegal fishers in the Australian EEZ around Heard and MacDonald Islands. In August 2003, a multilateral hot pursuit in the Southern Ocean after a 21-day chase spanning 3 900 nautical miles finally culminated in the arrest of the Uruguayan-flagged vessel, *Viarsa 1*, by the Australian Customs Service vessel, *Southern Supporter*.<sup>46</sup> The relevance of this case to South Africa is that the Australian authorities requested assistance from both South Africa as well as from the United Kingdom. Both countries heeded the call for assistance and consequently, the South African-flagged vessels SA *Agulhas* and the salvage tug the *John Ross* as well as the UK-flagged fisheries patrol vessel, the *Dorada* were all deployed to join in the epic hot pursuit.<sup>47</sup> Australian and South African officials were launched from the *John Ross* and boarded the *Viarsa 1* at which time the vessel was arrested. The *Viarsa 1* was subsequently escorted by the *Southern Supporter* to the port of Fremantle in Western Australia, where the vessel and its catch were seized under Australian law.<sup>48</sup> The assistance by South Africa and the UK in the longest ever hot-pursuit was critical to the successful apprehension of the illegal fishers. This clearly demonstrates that IUU fishing requires international collaboration.

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<sup>44</sup> *United States v Arnold Maurice Bengis, Jeffrey Noll and David Bengis*, 1-15 (2d Circ. 2011). "MVRA" refers to the Mandatory Victims Restitution Act of 1996; and "VWPA" refers to the Victim and Witness Protection Act of 1982.

<sup>45</sup> *Ibid.*

<sup>46</sup> Molenaar EJ "Multilateral hot pursuit and illegal fishing in the Southern Ocean: The pursuits of *Viarsa 1* and the *South Tomi*" (2004) *International Journal of Marine and Coastal Law* vol 19(1) 19-37.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

### 2.3 IUU fishing in South African fisheries

The Ministerially-led High Seas Task Force estimated that up to a quarter of Africa's total annual fish exports were being lost to IUU fishing in Sub-Saharan Africa.<sup>49</sup> This constitutes a major economic loss to developing States that are reliant on fish resources as a source of protein. In addition, these losses compromise food security and sustainable use in Sub-Saharan Africa.<sup>50</sup>

South African domestic fisheries have not been immune to the scourge of IUU fishing. The South African abalone domestic fishery has also been plagued by illegal fishing, with organized crime and international trade through Chinese triads fuelling the situation locally.<sup>51</sup> The abalone is a high value species, which is relatively accessible to fishers and therefore a target for illegal fishing in impoverished coastal communities. The poaching levels eventually reached epic proportions requiring considerable law enforcement efforts from Fishery Control Officers in collaboration with the South African Police Service however; the poaching negatively affected the economic viability of the abalone commercial fishery.<sup>52</sup> As a result of overfishing and ecological effects of rock lobster encroaching on abalone habitat, the net effect was the closure of the commercial fishery with effect from 1 February 2008.<sup>53</sup> After a period of three years, the Minister of Agriculture Forestry and Fisheries announced that the commercial abalone fishery would be re-opened, but under strict conditions.<sup>54</sup> Time alone will tell whether the poaching levels will be brought down to

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<sup>49</sup> High Seas Task Force (2006). Closing the net: Stopping illegal fishing on the high seas. Final report of the Ministerially-led Task Force on IUU fishing on the high seas. Available at [www.high-seas.org](http://www.high-seas.org) (accessed 10 July 2010).

<sup>50</sup> Ibid.

<sup>51</sup> Hauck M and Kroese M "Fisheries compliance in South Africa: A decade of challenges and reform 1994-2004" (2006) *Marine Policy* vol 30 74-83.

<sup>52</sup> Ibid.

<sup>53</sup> Statement by Marthinus van Schalkwyk, Minister of Environmental Affairs and tourism, regarding the suspension of the wild abalone commercial sector, Wednesday 30 October 2007. Available at <http://www.environment.gov.za//NewsMedia/MedStat/2007Oct31/31102007.pdf> (accessed 16 November 2010).

<sup>54</sup> The conditional re-opening of commercial abalone fishery in the 2010 season. Available at <http://www.pmq.org.za/files/docs/110208topic.DOC> (accessed 16 November 2010).

acceptable levels with a view to ensuring the sustainable use of the abalone resource.

Further afield, in South Africa's EEZ around the Prince Edward Islands, South Africa was also being robbed of its high value Patagonian toothfish, *Dissostichus eleginoides*, also commonly known as Chilean seabass. The Prince Edward Islands is located south of 60 degrees south and is therefore not only part of South Africa's EEZ, but also falls under the jurisdiction of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR).<sup>55</sup> South Africa is a founding member of the CCAMLR and is therefore also bound by CCAMLR provisions. CCAMLR estimates that IUU catches around the Prince Edward Islands were as high as 32 000 tons during 1996 to 1998, which at the time was worth US\$ 100 million.<sup>56</sup> In 1996, five experimental fishing permits were issued to South African operators to fish in the Prince Edward Islands when the TAC was 3 000 tons.<sup>57</sup> During the long term rights allocation process, the first commercial fishing rights were allocated to five right holders, but the TAC declined steadily to a level of 450 tons.<sup>58</sup> The fishery has been described as a high-risk, capital-intensive fishery, but the high Patagonian toothfish catch rate of 11.2 tons per day in 1996 made the fishing grounds extremely attractive to illegal fishers.<sup>59</sup> Unfortunately, the high catch levels resulted in unsustainably high illegal catches which has been equated to "mining" of the toothfish resource.<sup>60</sup> However, there was a subsequent reduction in the levels of illegal fishing due to the dramatic drop in catch rates to 0.8 tons per day, making the fishing operations uneconomical for illegal fishers.<sup>61</sup>

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<sup>55</sup> Article I of the Convention -CCAMLR. See basic documents available at [http://www.ccamlr.org/pu/e/e\\_pubs/bd/all.pdf](http://www.ccamlr.org/pu/e/e_pubs/bd/all.pdf) (accessed 11 November 2010).

<sup>56</sup> Policy for the Allocation and Management of long term commercial fishing rights in the Patagonian toothfish fishery. Department of Environmental Affairs and Tourism. Pretoria. Published in General Notice 931, *Government Gazette* No. 27683, 15 June 2005.

<sup>57</sup> Ibid.

<sup>58</sup> "Patagonian toothfish TAC for 2009-2010 fishing season". Document provided by official at Department of Agriculture, Forestry and Fisheries on 18 November 2010.

<sup>59</sup> Agnew DJ "The illegal and unregulated fishery for toothfish in the Southern Ocean, and the CCAMLR catch documentation scheme" (2000) *Marine Policy* vol 24 361-374.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

In terms of monitoring, control and surveillance, it was envisaged that the Environmental Protection Vessel, the *Sarah Baartman*, would undertake routine patrols around the Prince Edward Islands and that the additional legal presence of South African fishing vessels would also provide some scope for industry surveillance of the waters around the Prince Edward Islands. In addition, it was also hoped that the presence of the legal operators may act as a deterrent to would be illegal fishers. Nonetheless, the current low TAC level serves as a testament of the low abundance of toothfish in the waters of the Prince Edward Islands, which is probably not very attractive to illegal fishers at this time.<sup>62</sup>

Most recently in December 2009, Indo-Atlantic Shipping, a Cape Town-based fishing company was shut down by the South African Revenue Services (SARS) for tax evasion estimated at more than R 250 million. However, the National Director of Public Prosecutions has authorized the prosecution of the six accused on charges of racketeering in terms of the Prevention of Organised Crime Act (Act No. 121 of 1998), which if found guilty, carries a maximum sentence of R1000 million or life imprisonment.<sup>63</sup> The matter is therefore more serious than tax evasion and has also been transferred from the Cape Town Magistrate's Court to the High Court. The arrest of the accused came about as a result of collaboration between the Monitoring Control and Surveillance (MCS) Chief Directorate and SARS and is a clear demonstration of cooperative governance efforts to stem the tide of illegal fishing and related activities in South Africa.<sup>64</sup>

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<sup>62</sup> An objective of the Patagonian toothfish rights allocation policy was to ensure a legal presence in the Prince Edward Islands Exclusive Economic Zone and on the high seas under the jurisdiction of CCAMLR, in order to act as a deterrent to IUU fishing. See "Policy for the allocation and management of long-term commercial fishing rights in the Patagonian toothfish fishery: 2005". General Notice 931. *Government Gazette* No. 27683 of 15 June 2005.

<sup>63</sup> National Prosecuting Authority Media Statement issued on 15 December 2009. Available <http://www.npa.gov.za/UploadedFiles/Press%20Release%20on%20racketeering%20case%2015%20December%202009.pdf> (accessed 19 November 2010).

<sup>64</sup> *Ibid.*

Further efforts to combat illegal fishing activities include provision of a hot-line established by the Department of Environmental Affairs for the public to report contraventions of environmental legislation<sup>65</sup> as well as the tip-offs line of the Department of Agriculture, Forestry and Fisheries.<sup>66</sup> The hot-line and tip-offs line allows the general public to report any suspicious activities as they relate to environmental issues or fishing. This potentially greatly increases the MCS capabilities as it encourages a vigilant public to play an active role in reporting illegal activities while maintaining their anonymity.

It appears that the South African government is committed to combating IUU fishing by virtue of its actions in the abovementioned cases as well as the extent to which it has cooperated both nationally and internationally to address IUU fishing.

These international and domestic examples of IUU fishing illustrate the seriousness of the problem for sustainable use and economic and social reliance on marine living resources. Therefore, the consequences of IUU fishing are profound.

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<sup>65</sup> Available at <http://www.environment.gov.za> (accessed 18 November 2010).

<sup>66</sup> Available at [http://www.daff.gov.za/doaDev/fisheries/indexpage\\_DOCS/tipoffs/tipoffs.html](http://www.daff.gov.za/doaDev/fisheries/indexpage_DOCS/tipoffs/tipoffs.html) (accessed 18 November 2010).

## CHAPTER 3

### 3 International instruments relevant to combating IUU fishing

The economic, ecological and social implications of illegal, unreported and unregulated (IUU) fishing are a cause for national, regional and international concern. IUU fishing can undermine efforts for sustainable development, including stock rebuilding strategies for fish stocks that have been depleted.<sup>67</sup> In terms of international instruments to combat IUU fishing, both soft law and hard law instruments have been developed. This chapter will consider soft law provisions of the International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing (IPOA-IUU), as well as relevant hard law provisions in legally binding agreements that are already in force and those that are not yet in force.

Legally-binding instruments that are already in force includes; the United Nations Convention on the Law of the Sea (1982),<sup>68</sup> the FAO Compliance Agreement (1993),<sup>69</sup> and the UN Fish Stocks Agreement (1995).<sup>70</sup> The Agreement on Port State Measures has been signed and ratified by some

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<sup>67</sup> FAO. International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing. Rome, FAO. 2001. 24p. Available at <http://www.fao.org/docrep/003/y1224e/y1224e00.htm> (accessed 15 January 2010).

<sup>68</sup> United Nations Convention on the Law of the Sea of 10 December 1982. Available at [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf) (accessed 10 November 2010).

<sup>69</sup> FAO. Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. Rome, FAO.1993. p12. Available at <http://www.fao.org/DOCREP/MEETING/003/X3130m/X3130m00.HTM> (accessed 17 April 2011).

<sup>70</sup> Agreement for the Implementation of the United Nations Convention on the Law of the Sea 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. 1995. Available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/274/67/PDF/N9527467.pdf?OpenElement> (accessed 18 April 2011).

States, but is not yet in force.<sup>71</sup> The significance of these Agreements in combating IUU fishing will be considered below.

In addition, various international Conventions and Agreements have developed important tools in fisheries management, which may also serve to combat IUU fishing. One of the important tools to consider in the context of the EC-IUU Regulation 1005/2008 is the catch documentation schemes employed by various regional fisheries management organisations (RFMOs) with an emphasis on those being implemented by South Africa, in particular. The relevant RFMOs in this instance include; the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR);<sup>72</sup> the International Convention for the Conservation of Atlantic Tuna (ICCAT);<sup>73</sup> the Commission for the Conservation of Southern Bluefin Tuna (CCSBT);<sup>74</sup> and the Indian Ocean Tuna Commission (IOTC).<sup>75</sup>

### **3.1 International Plan of Action for IUU fishing (IPOA-IUU)**

The International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing (IPOA-IUU) is a voluntary instrument which was adopted by the Committee on Fisheries (COFI) of the United Nations Food and Agriculture Organisation (FAO) in March 2001.<sup>76</sup> The IPOA-IUU was

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<sup>71</sup> FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. FAO, Rome 2009. Available at <http://www.fao.org/Legal/treaties/037t-e.pdf> (accessed 19 April 2011).

<sup>72</sup> CCAMLR. South Africa is a founding member of the CCAMLR, which entered into force in 1982. See <http://www.ccamlr.org/pu/e/ms/contacts.htm> (accessed 16 January 2010).

<sup>73</sup> ICCAT. South Africa is a founding member of ICCAT. Available at [http://www.iccat.es/Documents/Commission/convention\\_parties.pdf](http://www.iccat.es/Documents/Commission/convention_parties.pdf) (accessed 26 April 2011).

<sup>74</sup> CCSBT. South Africa is a Cooperating Non-Member to the CCSBT. Available at [http://www.ccsbt.org/site/origins\\_of\\_the\\_convention.php](http://www.ccsbt.org/site/origins_of_the_convention.php) (accessed 26 April 2011).

<sup>75</sup> IOTC. South Africa is a Cooperating Non-Contracting Party to the IOTC. Available at <http://www.iotc.org/English/info/comstruct.php> (accessed 26 April 2011).

<sup>76</sup> See footnote 67.

developed within the framework of the Code of Conduct for Responsible Fisheries.<sup>77</sup>

The IPOA-IUU defines the terms illegal, unreported and unregulated fishing as:

“illegal fishing” means activities (i) 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; (ii) 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 or management measures adopted by that organisation and by which the States are bound, or relevant provisions of the applicable international law; or (iii) in violation of national laws or international obligations, including those undertaken by a cooperating State to a relevant regional fisheries management organisation.

“unreported fishing” means fishing activities (i) which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or (ii) undertaken in the area of competence of a relevant fisheries management organisation which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.

“unregulated fishing” means fishing activities (i) in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner not consistent with or contravenes the conservation and management measures of that organisation; or (ii) in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.

The definition of IUU fishing used in the EC Regulation on IUU is essentially identical to the abovementioned definitions in the IPOA-IUU.<sup>78</sup> Based on various literature it appears that the IPOA-IUU definitions are generally the most widely accepted.

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<sup>77</sup> Code of Conduct for Responsible Fisheries, Articles 1.1, 1.2, 3.1 and 3.2 [2d]... Available at <ftp://ftp.fao.org/docrep/fao/005/v9878e/v9878e00.pdf> (accessed 15 November 2010).

<sup>78</sup> Commission Regulation (EC) 1005/2008 of 29 September 2008 (29.10.2008) *Official Journal of the European Union* L 286/5. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:286:0001:0032:EN:PDF> (accessed 15 January 2010).

The objective of the IPOA-IUU is to provide States with a blueprint of comprehensive and transparent measures to prevent, deter and eliminate IUU fishing, including through relevant RFMOs.<sup>79</sup> The IPOA-IUU encompasses the principles and strategies of participation and coordination, phased implementation, comprehensive and integrated approach, conservation, transparency and non-discrimination.<sup>80</sup>

In terms of implementation of measures to prevent, deter and eliminate IUU fishing, the IPOA-IUU recognizes State responsibilities and in terms of international measures calls upon States to urgently ratify, accept or accede to, the 1982 UN Convention,<sup>81</sup> the 1993 FAO Compliance Agreement<sup>82</sup> and the 1995 UN Fish Stocks Agreement.<sup>83</sup> Accordingly, the IPOA-IUU requires States to fully implement the Code of Conduct for Responsible Fisheries together with its International Plans of Action.<sup>84</sup>

The IPOA-IUU requires States to consider effective ways of addressing IUU fishing in their national legislation. Furthermore, pursuant to the 1982 UN Convention and without prejudice to flag State responsibility on the high seas, States should take measures to deter their nationals from supporting or engaging in IUU fishing. In terms of international law, States should also take measures against vessels without nationality who engage in IUU fishing on the high seas. States should develop sanctions against IUU vessels and nationals involved in IUU fishing that are of a severity that would ensure a deterrent effect. The IPOA-IUU also refers to actions developed consistent with international law, to deal effectively with non-cooperating States engaging in IUU fishing in areas under the jurisdiction of a RFMO. States should not provide economic

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<sup>79</sup> IPOA-IUU. Rome, FAO. 2001. 24p.

<sup>80</sup> IPOA-IUU paragraphs 8 to 9.6. p4 to 5.

<sup>81</sup> See footnote 68.

<sup>82</sup> See footnote 69.

<sup>83</sup> See footnote 70.

<sup>84</sup> The Code of Conduct for Responsible Fisheries has the International Plan of Action for mitigating mortality of Seabirds associated with fishing (IPOA-Seabirds), an International Plan of Action for conservation and management of Sharks (IPOA-Sharks), an International Plan of Action for management of fishing Capacity (IPAO-Capacity) and the IPOA-IUU.

incentives, such as subsidies to vessels or persons engaged in IUU fishing. States must also develop comprehensive and effective monitoring, control and surveillance (MCS) of fishing activities, through, *inter alia*, vessel monitoring systems (VMS), observer programmes, databases, training and development, awareness raising in judiciary, etc.<sup>85</sup>

The IPOA-IUU also requires States to develop and implement National Plans of Action for IUU (NPOA-IUU) and to review these plans every four years. States should ensure that the efforts in the NPOA-IUU are well coordinated internally to ensure its effectiveness.<sup>86</sup> The IPOA-IUU also makes provision for cooperation between States, encourages publicity of actions taken by States in dealing with IUU fishing and that States should make their technical capacity and resources available to implement the IPOA-IUU.<sup>87</sup>

Notwithstanding the development of a National Plan of Action for IUU fishing (NPOA-IUU), South Africa has made its technical capacity and resources available to address IUU fishing in the spirit of the IPOA-IUU and cooperation by States, through *inter alia*, a transboundary patrol undertaken by the *Sarah Baartman* (South African Environmental Protection Vessel) with inspectors from South Africa, Mozambique, Tanzania and Kenya in March 2009. The multilateral patrol yielded the inspection of more than 40 fishing vessels, culminating in the arrest of six foreign fishing vessels.<sup>88</sup>

The IPOA-IUU provides details on flag State responsibilities, *inter alia*, fishing vessel registration, record of fishing vessels and authorisations to fish.<sup>89</sup> An

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<sup>85</sup> IPOA-IUU paragraphs 16 to 24. p6 to 8.

<sup>86</sup> IPOA-IUU paragraphs 25 to 27. p8.

<sup>87</sup> IPOA-IUU paragraphs 28 to 33. p9 to10.

<sup>88</sup> Article by Anton Kruger: Intern, Peace Missions Programme of the Institute for Security Studies, Pretoria on 20<sup>th</sup> October 2010. Available at [http://www.issafrica.org/iss\\_today.php?ID=1048](http://www.issafrica.org/iss_today.php?ID=1048) (accessed 15 November 2010).

<sup>89</sup> IPOA-IUU paragraphs 34 to 50. p10 to 14.

outline is also provided for the exercise of the sovereign rights of coastal States and measures which coastal States should take in the fight against IUU.<sup>90</sup>

In addition, the IPOA-IUU also provides details for port State measures, consistent with international law, for combating IUU fishing.<sup>91</sup> The IPOA encourages States to cooperate in the development of standardized port State control measures through bilateral and multilateral interventions within the relevant regional fisheries management organizations.<sup>92</sup> In response, the international community, through the FAO, has developed a Model Scheme on port State measures to combat IUU fishing.<sup>93</sup> The port State measures will be dealt with in greater detail later in this chapter.

The IPOA-IUU also provides for internationally agreed market-related measures, while recognizing the right of States to trade in fishery products that have been harvested in a sustainable manner and within the applicable laws and regulations or conservation and management measures, having regard for the rights and obligations established in the World Trade Organisation. The market-related measures should be applied in a fair, transparent and non-discriminatory manner.<sup>94</sup> The IPOA-IUU also states that trade-related measures should only be used as a last resort, if other measures to combat IUU fishing have failed and subsequent to consultation with interested States.<sup>95</sup> Trade-related measures could include the multilateral adoption of catch documents with certification requirements that provide for catch, import, export and re-export controls. The implementation of these measures should be done in a fair, transparent and consistent manner.

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<sup>90</sup> IPOA-IUU paragraphs 51 to 51.8. p14 to 15.

<sup>91</sup> IPOA-IUU paragraphs 52 to 64. p15 to 17.

<sup>92</sup> IPOA-IUU paragraph 62. p17.

<sup>93</sup> FAO. Model Scheme on port State measures to combat illegal, unreported and unregulated fishing. Rome, FAO. 2007. 46p. Available at <ftp://ftp.fao.org/docrep/fao/010/a0985t/a0985t00.pdf> (accessed 20 April 2011).

<sup>94</sup> IPOA-IUU paragraph 65. p17.

<sup>95</sup> IPOA-IUU paragraph 66. p18.

Paragraph 69 has been the approach followed by the EC in the IUU Regulation 1005/2008, especially in so far as a catch documentation and certification scheme has been adopted for import and export controls.<sup>96</sup> Furthermore, the provisions of species-specific trade-related measures have also been incorporated into the EC-IUU Regulation.<sup>97</sup>

States should take measures in raising awareness of the implications of conducting business with those engaged in IUU fishing through measures that would deter such business engagements. States should make provision for these measures in their national legislation, by making it illegal to conduct business with IUU fishing operators, specifically trading in their fish or fish related products.<sup>98</sup> Essentially this means that there should be consequences for anyone operating in the value chain of illegally caught fish. The consequences should be provided for in domestic legislation and should apply to everyone involved in the value chain of illegal fishing, thereby also acting as a deterrent to supporting IUU fishing. Provisions for creating awareness among fishers are also essential.<sup>99</sup>

The IPOA-IUU provides measures for the use of the Harmonized Commodity Description and Coding System for fish and fishery products and for standardised documentation schemes, and the possible use of electronic schemes to limit fraud and “avoid unnecessary burdens on trade”.<sup>100</sup> The development of electronic certification schemes is well justified in reducing the

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<sup>96</sup> Paragraph 13 of Commission Regulation (EC) 1005/2008 L286/2.

<sup>97</sup> Article 38 (1) of Commission Regulation (EC) 1005/2008 L286/21 states that: “...the importation into the Community of fishery products caught by fishing vessels flying the flag of such countries shall be prohibited...justified by the lack of appropriate measures adopted by this third country in relation to IUU fishing affecting a given stock or species, the prohibition of importation may only apply in respect of this stock or species.”

<sup>98</sup> IPOA-IUU paragraph 73. p19.

<sup>99</sup> IPOA-IUU paragraph 74. p19.

<sup>100</sup> IPOA-IUU paragraphs 75 and 76. p18.

potential for fraudulent use<sup>101</sup>. However, serious consideration should be given to who bears the cost for development of such schemes and consequently who carries the burden.

The IPOA-IUU also encourages research that would assist with the identification of processed products and the FAO should facilitate the development of databases of genetic markers that could be used in identification of fish species.<sup>102</sup>

The IPOA-IUU encourages member States to RFMOs to employ measures such as, institutional strengthening, development of compliance measures, mandatory reporting requirements, cooperation in exchange of information regarding IUU, development of records of fishing vessels authorized to fish in the area of competence of the RFMO, boarding and inspection regimes, observer programmes, IUU vessel lists and the development of action plans all in the fight against IUU.<sup>103</sup>

Several RFMOs have responded favourably to the IPOA-IUU where some RFMOs developed conservation and management measures consistent with the IPOA-IUU.<sup>104</sup> RFMOs such as ICCAT,<sup>105</sup> CCAMLR,<sup>106</sup> IOTC<sup>107</sup> and CCSBT<sup>108</sup> have developed records of vessels authorized to fish in their area of

<sup>101</sup> Commission Report CCAMLR XXI- 2002. Item 7: Catch documentation scheme for *Dissostichus* spp. (CDS), paragraph 7.15 states that the electronic use of the CDS would greatly reduce the opportunity for fraudulent activity. Available at [http://www.ccamlr.org/pu/e/e\\_pubs/cr/02/i7.pdf](http://www.ccamlr.org/pu/e/e_pubs/cr/02/i7.pdf) (accessed 26 April 2011).

<sup>102</sup> IPOA-IUU paragraph 77. p19.

<sup>103</sup> IPOA-IUU paragraphs 78 to 84. p20.

<sup>104</sup> IOTC Resolution 01/07 Concerning the Support of the IPOA-IUU Plan. Available at <http://www.iotc.org/English/resolutions.php> (accessed 26 April 2011). CCAMLR Conservation Measure 10-06 and 10-07 IUU vessel lists. Available at <http://www.ccamlr.org/pu/e/sc/fish-monit/iuu-list-09.pdf> (accessed 26 April 2011).

<sup>105</sup> Available at <http://www.iccat.es/en/vesselsrecord.asp> (accessed 26 April 2011).

<sup>106</sup> Available at <http://www.ccamlr.org/pu/e/sc/fish-monit/vess-licensed.htm> (accessed 26 April 2011).

<sup>107</sup> Available at <http://www.iotc.org/English/record/serach3.php> (accessed 26 April 2011).

<sup>108</sup> Available at [http://www.ccsbt.org/site/authorised\\_vessels.php](http://www.ccsbt.org/site/authorised_vessels.php) (accessed 26 April 2011).

competence and such records are publicly accessible on their websites. Similarly, RFMOs have also developed lists of vessels presumed to have engaged in IUU fishing (IUU vessel lists), which are also publicly available on their websites.<sup>109</sup> RFMOs have also developed boarding and inspection schemes<sup>110</sup> as well as observer programmes.<sup>111</sup>

The IPOA-IUU also provides for the special requirements of developing States, with regard to providing financial, technical and other support and assistance for training and capacity building. Special regard should be given to the least developed States and Small Island Developing States, in order that they too may meet the commitments of the IPOA-IUU and their obligations under international law, such as their responsibilities as flag or port States.<sup>112</sup> In addition, support should also be provided for reviewing and revising national legislation, improving and harmonizing data collection, strengthening regional institutions and integrated MCS systems, including satellite monitoring systems.<sup>113</sup>

The IPOA-IUU also provides for reporting in terms of RFMOs reporting on their plans to prevent, deter and eliminate IUU fishing, which will be published by the FAO.<sup>114</sup>

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<sup>109</sup> Commission Regulation (EU) No 468/2010 of 28 May 2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing. (29.5.2010) L131/22. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:131:0022:0026:EN:PDF> (accessed 27 April 2011).

<sup>110</sup> See CCAMLRs Conservation Measure 10-03 (2009) Port inspections of vessels carrying toothfish in Schedule of Conservation Measures in force 2010-11 season. Available at [http://www.ccamlr.org/pu/e/e\\_pubs/cm/10-11/all.pdf](http://www.ccamlr.org/pu/e/e_pubs/cm/10-11/all.pdf) Also see ICCAT Joint Scheme of International Inspection. Available at <http://www.iccat.int/en/Inspection.htm> (accessed 15 August 2011).

<sup>111</sup> See the CCAMLR Scheme for Scientific Observation adopted in 1992. Available at [http://www.ccamlr.org/pu/e/e\\_pubs/bd/pt10.pdf](http://www.ccamlr.org/pu/e/e_pubs/bd/pt10.pdf) Also see ICCAT Regional Observer Programme for bluefin tuna. Available at <http://www.iccat.int/en/ROPbft.htm> (accessed 15 August 2011).

<sup>112</sup> IPOA-IUU paragraph 85. p23.

<sup>113</sup> IPOA-IUU paragraph 86. p23.

<sup>114</sup> IPOA-IUU paragraph 87. p23.

Finally, the IPOA-IUU indicates the role of the FAO in so far as the FAO would collect relevant information and data; support for development and implementation of national and regional plans to combat IUU; convene Expert Consultations on the Implementation of the IPOA; investigate benefits of regional and global databases; and biennially evaluate progress on implementation of the IPOA-IUU.<sup>115</sup>

Although the IPOA-IUU is a voluntary soft law instrument providing measures for dealing with IUU fishing, it has become codified through laws and regulations adopted by RFMOs, member States and the EC through its IUU Regulation. Some RFMOs have incorporated various elements of the IPOA-IUU into their management and conservation measures, most notably the lists of authorized vessels, the IUU vessel lists and catch documentation schemes. In terms of the latter, according to the FAO progress report on implementation of IPOAs, eighty-five percent of FAO Members have implemented mechanisms to prohibit the processing and trade in IUU caught fish, with the EC-IUU Regulation making a significant difference.<sup>116</sup> In addition, 80 percent of FAO members reported that IUU fishing remained a problem and that 90 percent of these members started developing national plans of action to combat IUU fishing (NOPA-IUU).<sup>117</sup>

Unfortunately, South Africa was not one of those countries. The benefits of developing a NPOA-IUU is that it provides for documenting the development of measures and actions to combat IUU, which in turn allows Parties to identify gaps in their actions and they can therefore focus efforts on addressing those gaps. The NPOA-IUU provides for a systematic and structured approach in

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<sup>115</sup> IPOA-IUU paragraphs 88 to 93. p24.

<sup>116</sup> FAO. Committee on Fisheries. "Progress in the implementation of the Code of Conduct for Responsible Fisheries and Related instruments, including International Plans of Action and Strategies, and other matters. Rome, FAO. 31 January to 4 February 2011. p11. Available at <http://www.fao.org/docrep/meeting/021/k9050e.pdf> (accessed 28 April 2011).

<sup>117</sup> Ibid.

dealing with the challenges of IUU fishing nationally and this approach is strongly encouraged and needed.

### 3.2 FAO Compliance Agreement

The 1993 FAO Compliance Agreement was adopted on 24 November 1993 and entered into force on 24 April 2003.<sup>118</sup> The Compliance Agreement was developed to promote compliance by fishing vessels greater than 24 metres in length fishing on the high seas.<sup>119</sup> Article III of the Agreement provides for flag State responsibility and lists provisions, including provisions for authorising vessels flying its flag to fish on the high seas and ensuring that vessels flying its flag do not undermine conservation and management measures. The Compliance Agreement also provides for the cancellation of authorization if the vessels no longer fly its flag as well as not authorising a vessel registered to another Party, especially if the vessel previously contravened conservation and management measures. The Agreement also requires that each Party compiles a vessel record of vessels flying its flag, while also making provision for such vessels to be marked in terms of the flag State provisions. In addition, vessels flying its flag must provide information relating to the area of fishing, catches and landings. Parties to the Compliance Agreement must take enforcement actions against vessels flying its flag if such vessels have contravened conservation and management measures on the high seas.<sup>120</sup>

Effective flag State responsibility is critical to responsible fisheries and the lack thereof has often led to “flags of convenience” or “flags on non compliance”.<sup>121</sup>

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<sup>118</sup> FAO. Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. Rome, FAO.1993. p12. Available at <http://www.fao.org/DOCREP/MEETING/003/X3130m/X3130m00.HTM> (accessed 17 April 2011).

<sup>119</sup> Article II of the Compliance Agreement. p3.

<sup>120</sup> Article III of the Compliance Agreement p3 to 5.

<sup>121</sup> The term “flags of convenience” has been referred to as a major concern in the introduction of the IPOA-IUU and refers to States that do not exercise control over vessels flying their flag.

Article IV provides for Parties to maintain a record of fishing vessels authorised to fish on the high seas, while Article V makes provision for international cooperation between Parties to the Agreement.

The Agreement provides for information exchange between the Parties and the FAO in terms of the vessel record information.<sup>122</sup> Article VII provides for cooperation with developing countries in a similar manner to the IPOA-IUU in its special requirements of developing countries.<sup>123</sup> Parties to the Agreement are further required to encourage non-Parties to develop laws that are consistent with those of the Compliance Agreement and in so doing greatly increase the effectiveness of the Agreement through engaging with non-Parties.<sup>124</sup>

South Africa is not a Party to the Compliance Agreement.<sup>125</sup> The main objectives of the Compliance Agreement is to ensure flag State responsibility for vessels fishing on the high seas and to ensure effective information flow on a real-time basis relating to those vessels. With South Africa not being a party to the Agreement there are no obligations for South Africa to follow the approach provided for in the Agreement as it pertains to possible reflagging of vessels that may have acted contrary to international conservation and management measures. Nor does South Africa have access to the real-time database of all Party vessels that are authorised to fish on the high seas, except for those authorised through the relevant RFMO. In terms of the reflagging, it is submitted that South Africa would be acting irresponsibly if it allowed vessels to be registered to fly its flag without having considered the compliance history of the vessel on the high seas. It should be noted that South Africa is a Party to the Law of the Sea Convention, which also provides for duties of the flag State in

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<sup>122</sup> Article VI of the Compliance Agreement p6 to 8. The FAO maintains a high seas vessels authorisation record (HSVAR). Available at <http://www.fao.org/fi/hsvar/index.jsp> (accessed 27 April 2011).

<sup>123</sup> Article VII of Compliance Agreement p8, also see IPOA-IUU paragraphs 85 and 86. p23.

<sup>124</sup> Article VIII of the Compliance Agreement p9.

<sup>125</sup> See status of Compliance Agreement. Available at <http://www.fao.org/Legal/treaties/012s-e.htm> (accessed 27 April 2011).

exercising control over vessels flying its flag.<sup>126</sup> Therefore, there should be no reason for not exercising flag State responsibility whether on the high seas or in the EEZ. The Compliance Agreement however, makes further detailed provisions that support the principles and objectives relating to the flag State duties of the LOSC. In my view, the issues of inadequate flag State responsibility may exist among States that are not party to the LOSC or not party to any RFMOs or sub-regional organisations and these concerns may very well be limited to some of those States that have vessels flying their flag.

### **3.3 Straddling Fish Stocks Agreement**

The 1995 UN Fish Stocks Agreement was adopted on 4 August 1995 and entered into force on 11 December 2001 in terms of the UN Convention on the Law of the Sea in relation to straddling and highly migratory fish stocks. The Fish Stocks Agreement contains 50 articles and as such this section will highlight the provisions that are most relevant to the EC-IUU Regulation and the IPOA-IUU fishing.

In the preamble, the following recognition is made:

“... the management of high seas fisheries is inadequate in many areas and that some resources are overutilised; noting that there are problems of unregulated fishing, over-capitalisation, excessive fleet size, vessel reflagging to escape controls, insufficiently selective gear, unreliable databases and lack of sufficient cooperation between States.”

The abovementioned paragraph highlights some of the challenges faced in managing high seas fisheries and eludes to unregulated fishing in particular, which could be applicable to fishing vessels of non-Party States fishing in areas where a recognised RFMO exists, or in areas where there is no RFMO, but

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<sup>126</sup> LOSC Article 94 states that “Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. In particular... maintain a register ...”

vessels essentially engage in fishing activities that undermine the conservation of living marine resources in terms of international law.<sup>127</sup>

The objective of the Fish Stocks Agreement is to ensure the long-term sustainable use and conservation of highly migratory and straddling fish stocks through the implementation of the Agreement.<sup>128</sup> The Agreement applies to highly migratory and straddling fish stocks in areas beyond national jurisdiction, the high seas.<sup>129</sup>

The general principles of the Fish Stocks Agreement includes, the promotion of sustainable and optimal use of highly migratory and straddling fish stocks, while ensuring that the best available scientific advice is used in adopting measures for such stocks. Impact assessments should not only be done on fishery target species, but also on those species that are dependent on the target species, thereby making provision for the ecosystem approach to fisheries.<sup>130</sup> The Fish Stocks Agreement also takes account of the importance of maintaining stock levels and rebuilding depleted stocks through appropriate conservation and management measures. It also requires members to consider fishing capacity that is commensurate with sustainable utilisation levels that guards against overexploitation of fish stocks. In addition, the Fish Stocks Agreement also provides for information sharing as it relates to catches, vessels and fishing activities. Enforcement of conservation and management measures through the use of monitoring, control and surveillance are also requirements of the Agreement.<sup>131</sup>

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<sup>127</sup> See definition of "unregulated fishing" in the EC Regulation 1005/2008 L286/5.

<sup>128</sup> Article 2 of the Fish Stocks Agreement p4.

<sup>129</sup> Article 3 of the Fish Stocks Agreement p4.

<sup>130</sup> Parsons S "Ecosystem Considerations in Fisheries Management: Theory and Practice" (2005) *International Journal of Marine and Coastal Law* vol 20 381-422.

<sup>131</sup> Article 5 of the Fish Stocks Agreement p5 to 6.

In addition, the Fish Stocks Agreement deals with mechanisms for international cooperation and includes cooperation for conservation and management;<sup>132</sup> subregional and regional fisheries management organizations and arrangements<sup>133</sup> and their functions.<sup>134</sup>

The Fish Stocks Agreement makes provision for duties of the flag State.<sup>135</sup> Similarly, the Compliance Agreement reiterated the flag State responsibilities;<sup>136</sup> and the IPOA-IUU also elaborated on flag State responsibilities.<sup>137</sup> It can therefore be concluded that effective flag State responsibilities are critical to fighting IUU and ensuring the long-term sustainable use and conservation of fish resources, as it is a common thread through the abovementioned instruments.

The Fish Stocks Agreement addresses compliance and enforcement, including that of the flag State;<sup>138</sup> cooperation of members of RFMOs in enforcement and compliance, as well as boarding procedures and inspection of vessels as they relate to cooperation of members of RFMOs.<sup>139</sup> The provisions in article 21 allows for a Party to the Fish Stocks Agreement to board another Party's vessel if such vessel is found in waters subject to the jurisdiction of a RFMO, whether that other Party is a member of the said RFMO or not. This regional cooperation in enforcement is probably one of the most powerful provisions of the Fish Stocks Agreement and is certainly a motivating factor for increasing the number of Parties to the Agreement.

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<sup>132</sup> Article 8 of the Fish Stocks Agreement p9 to 10.

<sup>133</sup> Article 9 of the Fish Stocks Agreement p10 to 11.

<sup>134</sup> Article 10 of the Fish Stocks Agreement p11 to 12.

<sup>135</sup> Article 18 of the Fish Stocks Agreement p16 to 17.

<sup>136</sup> Article III of the Compliance Agreement p3 to 5.

<sup>137</sup> IPOA-IUU paragraphs 34 to 50.

<sup>138</sup> Article 19 of the Fish Stocks Agreement p18.

<sup>139</sup> Articles 21 and 22 of the Fish Stocks Agreement p20 to 24.

Article 23 makes provision for compliance and enforcement measures taken by a port State. Similarly, the IPOA-IUU also outlines port State measures to combat IUU.<sup>140</sup>

Based on the provisions of the IPOA-IUU, the FAO Compliance Agreement and the UN Fish Stocks Agreement, it is reasonable that States are called upon to ratify these Agreements as a legal means of addressing IUU fishing, while developing a National Plan of Action in terms of the IPOA-IUU would provide States with a comprehensive approach to dealing with the IUU challenge. These instruments could be akin to weapons in the arsenal for the war against IUU fishing. The common thread of flag State responsibility and authorisation of vessels, with withdrawal of such authorisation in the event of actions contrary to conservation and management measures are extremely powerful provisions if applied effectively by flag States. If all flag States adhered to this provision, the vessels presumed to have engaged in IUU fishing should remain flagless, unless a change in beneficial ownership can be proven. However, IUU fishing continues to plague the international community and the fact that a small proportion of States are obligated through these Agreements simply compounds the problem. A challenge with the Fish Stocks Agreement in particular is that large fishing nations like China, Japan, Korea, Central and South American States as well as States with open registers are not parties to the Agreement.<sup>141</sup> Since these Agreements appear to have fallen short on achieving the full effects of flag State responsibility, the international community has also focused its efforts on port State measures that could be used in the fight against IUU fishing.

As a responsible fishing nation, South Africa should accede to the Compliance Agreement, even though the impact on the global implementation of the Agreement will probably be negligible. However, all fishing nations should be

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<sup>140</sup> IPOA-IUU paragraphs 52 to 64.

<sup>141</sup> Lodge MW and Nandan SN "Some suggestions towards better implementation of the UNFSA" (2005) *Internal Journal of Marine and Coastal Law* vol 20 345-380.

encouraged to accede to the abovementioned Agreements and South Africa can only encourage and be in a position to influence other States to become parties to the Agreements if South Africa is a party to the Compliance Agreement as well.

### 3.4 Agreement on Port State Measures

Through the FAO Model Scheme on port State measures to combat IUU fishing port State measures have been developed in an effort to strengthen the ability of States to deal with the IUU challenge.<sup>142</sup> However, FAO Members were of the view that a legally-binding Agreement on the port State measures would be far more effective in the fight against IUU fishing and in 2010 Members adopted a legally binding Agreement on port State measures however, the Agreement is not yet in force.<sup>143</sup>

The Agreement obliges parties to apply the FAO Model Scheme on port State measures through the use of port inspections on foreign fishing vessels. The scheme recognizes the Code of Conduct for Responsible Fisheries and the IPOA-IUU. The scheme elaborates on port inspection procedures as well as the actions that should be followed if an inspector finds reasonable grounds to believe that a foreign vessel has engaged in or supported IUU fishing activities. The importance of relaying relevant information to the flag State is also underscored in the procedures provided in the scheme. The model scheme is to be applied in terms of international law and *force majeure* applies as provided for in international law.<sup>144</sup>

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<sup>142</sup> FAO. Model Scheme on port State measures to combat illegal, unreported and unregulated fishing. Rome, FAO. 2007. 46p. Available at <ftp://ftp.fao.org/docrep/fao/010/a0985t/a0985t00.pdf> (accessed 17 April 2011).

<sup>143</sup> FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. FAO, Rome 2009. Available at <http://www.fao.org/Legal/treaties/037t-e.pdf> (accessed 19 April 2011).

<sup>144</sup> LOSC 198, Article 73 Enforcement of Laws and regulations of the coastal State, "the coastal State may ... take such measures, including boarding, inspection, arrest ..." while Article 18

South Africa already ascribes to the model scheme even prior to the development of the Agreement on port State measures. In this regard South Africa has taken a pro-active approach to managing port access by foreign fishing vessels based on prior notification and information provided in order to make informed decisions on whether to allow a fishing vessel port access or not. The process allows for vessel screening by checking the vessel against the IUU vessel lists of RFMOs to which South Africa is a Member or Cooperating Non-Contracting Party. Port inspections are undertaken to examine documents of recorded catches onboard as well as the relevant vessel authorisations.<sup>145</sup>

### **3.5 Catch Documentation Schemes of International Agreements**

Catch documentation schemes have been adopted by various RFMOs with most catch documents being species-specific in nature. South Africa is obliged to use certain catch documents either as a Member of the particular RFMO or as Cooperating Non-Contracting Party to the RFMO. For purposes of this section the selected RFMOs are relevant as South Africa is obliged to implement their catch documentation schemes. This section will briefly consider the catch documents of the relevant RFMOs and how they relate to the catch documentation scheme of the EC-IUU Regulation.

#### **3.5.1 Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR)**

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provides for the right of innocent passage in the territorial sea of a coastal State and makes provision for the right of port access in instances of *force majeure* or distress.

<sup>145</sup> In terms of S51(2)(f) of the Marine Living Resources Act (No 18 of 1998), the powers of the fishery control officer includes inspection of foreign vessels licence, permit, log book, record of fish caught, etc.

South Africa is a founding Member of the CCAMLR and ratified the Convention in 1982 when it also came into force.<sup>146</sup> CCAMLR was also plagued with challenges of IUU fishing in the vast remote areas of the Southern Ocean, south of 60 degrees south. IUU fishing had occurred in areas under national jurisdiction as well as on the high seas in the Convention Area.<sup>147</sup> Due to the concerns of IUU fishing in 1999 CCAMLR adopted the *Dissostichus* catch document (DCD) specifically for *Dissostichus* species (*Dissostichus eleginoides*, Patagonian toothfish and *Dissostichus mawsoni*, Antarctic toothfish), as Conservation Measure 10-05.<sup>148</sup> The catch documentation scheme is species-specific. Paragraph 4 of Conservation Measure 10-05 states that:

Each Contracting Party shall require that each landing of *Dissostichus* spp. at its ports and each transshipment of *Dissostichus* spp. to its vessels be accompanied by a completed DCD. The landing of *Dissostichus* spp. without a catch document is prohibited.

Conservation Measure 10-05 further provides for the Commission to annually consider requests for assistance made by Non-Contracting Parties involved in the trade of *Dissostichus* spp. However, the proviso to the request is that they must motivate how the assistance will enable them to combat IUU fishing in the Convention Area.

CCAMLR subsequently adopted an electronic form of the DCD in 2004.<sup>149</sup> It is clear that the adoption of the catch documentation scheme by CCAMLR was a measure taken to address the challenge of IUU fishing for toothfish. For the 2010-11 fishing season in the CCAMLR Convention Area, 43 vessels flagged to

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<sup>146</sup> See <http://www.ccamlr.org/pu/e/ms/contacts.htm> (accessed 16 January 2010).

<sup>147</sup> Agnew DJ "The illegal and unregulated fishery for toothfish in the Southern Ocean, and the CCAMLR catch documentation scheme" (2000) *Marine Policy* vol 24 361-374.

<sup>148</sup> Schedule of Conservation Measures in force 2010-11 season. Available at [http://www.ccamlr.org/pu/e/e\\_pubs/cm/10-11/all.pdf](http://www.ccamlr.org/pu/e/e_pubs/cm/10-11/all.pdf) (accessed 26 April 2011).

<sup>149</sup> Conservation Measure 10-05 preamble states that "Acknowledging that all Contracting Parties have ceased using paper-format documentation and already issue and authorise all documents via the electronic system which has been trialled pursuant to Resolution 21/XXIII."

13 Member States were authorised to fish in the Convention Area.<sup>150</sup> The DCD is a critical tool in monitoring the fishing activities for toothfish and greatly facilitates access to markets for legally caught fish, while prohibiting market access for IUU caught fish. Coupled to the use of the DCD is also the requirement for vessel monitoring system (VMS) and centralized-VMS by all authorised vessels.<sup>151</sup> South Africa as well as the EU are members of CCAMLR and are obliged to implement all the CCAMLR provisions.

### **3.5.2 International Convention for the Conservation of Atlantic Tunas (ICCAT)**

South Africa is a Member of ICCAT and in 1992 ICCAT adopted the Bluefin Tuna Statistical Documentation Program (BCD). Recommendation 09-11 by ICCAT amending Recommendation 08-12 on ICCAT Bluefin Tuna Catch Documentation Program preamble states:

*Recognising* the situation of Atlantic bluefin tuna stocks and the impact that market factors have on the fishery;

*Taking into account* the rebuilding plan for western Atlantic bluefin tuna and the recovery plan for eastern Atlantic and Mediterranean bluefin tuna that ICCAT has adopted, including the need for complementary market related measures;

*Recognising* the necessity to clarify and improve the implementation of the bluefin tuna catch documentation scheme, providing detailed instructions for the issuance, numbering, completion and the validation of the bluefin tuna catch document.

The catch documentation is species-specific for bluefin tuna and aims to provide a means of monitoring the resource in terms of stock rebuilding and recovery. Identifying the origin of the bluefin tuna is also critical in the regions mentioned

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<sup>150</sup> Available at <http://www.ccamlr.org/pu/e/sc/fish-monit/vess-licensed.htm> (accessed 26 April 2011).

<sup>151</sup> See CCAMLR Conservation Measure 10-04 on Automated satellite-linked vessel monitoring system (VMS). In Schedule of Conservation Measures in force 2010-11 season. Available at [http://www.ccamlr.org/pu/e/e\\_pubs/cm/10-11/all.pdf](http://www.ccamlr.org/pu/e/e_pubs/cm/10-11/all.pdf) (accessed 26 April 2011).

in the preamble. The Program provides for domestic trade, import and export of bluefin tuna caught in the ICCAT Convention Area.<sup>152</sup>

Although the provisions of Rec. 09-11 does not specifically refer to the utility of the BCD in combating IUU fishing, the latter could be inferred since paragraph 3 of Rec. 09-11 states that bluefin tuna traded (domestically, exported or imported) must be accompanied by a validated BCD, with the exception of where a Bluefin Tuna Re-export Certificate (BFTRC) is provided. Any landing, delivery, harvest or trade in bluefin tuna without a completed and validated BCD or BFTRC is strictly prohibited.<sup>153</sup>

The latter prohibition would indeed apply to bluefin tuna where there is no validated BCD and where the fish were possibly caught in contravention of management and conservation measures, thereby constituting IUU fishing. As a Member of ICCAT, South Africa and the EU are obliged to implement its legally-binding provisions, such as the BCD.

### **3.5.3 Convention for the Conservation of Southern Bluefin Tuna (CCSBT)**

South Africa is a Cooperating Non-Member to the CCSBT and should comply with CCSBT provisions. The CCSBT has adopted a catch documentation scheme (CDS) for southern bluefin tuna (SBT). The CCSBT Resolution on the Implementation of a CCSBT Catch Documentation Scheme, as modified on 10

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<sup>152</sup> Rec 09-11. Available at <http://www.iccat.es/Documents/Recs/compendio.pdf-e/2009-11-e.pdf> (accessed 26 April 2011).

<sup>153</sup> Ibid.

October 2010, notes the need for tracking of product flow from catch to sale on domestic and export markets.<sup>154</sup>

In terms of the general provisions of the Resolution, the CDS for SBT also makes provision for recording tagging information. Furthermore, the CDS is used for transshipments, landings, exports, imports and re-exports by Members or Cooperating Non-Members and it is a requirement for all SBT to be accompanied by a catch document.<sup>155</sup> To provide a sense of scale, over the last year approximately 1 249 fishing vessels from 10 flags together with about 123 carrier vessels have been authorised by the CCSBT.<sup>156</sup> South Africa is obliged to implement the CCSBT provisions as a Cooperating Non-Member.

### 3.5.4 Indian Ocean Tuna Commission (IOTC)

South Africa is a Cooperating Non-Contracting Party to the IOTC and should comply with the IOTC provisions. The IOTC has adopted a catch documentation scheme in 2002 for bigeye tuna caught in the IOTC Convention Area. Resolution 01/06 concerning the IOTC bigeye tuna statistical document programme preamble recognises the Statistical Document Programme as a tool to assist combat IUU fishing operations.<sup>157</sup>

Again, to provide some perspective of scale, the IOTC currently has 7 650 authorised fishing vessels from 30 flags in the vessel record.<sup>158</sup>

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<sup>154</sup> CCSBT Resolution on Catch Documentation Scheme. Available at: [http://www.ccsbt.org/userfiles/file/docs\\_english/operational\\_resolutions/Resolution\\_CDS.pdf](http://www.ccsbt.org/userfiles/file/docs_english/operational_resolutions/Resolution_CDS.pdf) (accessed 26 April 2011).

<sup>155</sup> Ibid.

<sup>156</sup> Authorised vessel list of CCSBT last updated 14 April 2011. Available at [http://www.ccsbt.org/site/authorised\\_vessels.php](http://www.ccsbt.org/site/authorised_vessels.php) (accessed 26 April 2011).

<sup>157</sup> IOTC Resolution 01/06. Available at <http://www.iotc.org/English/resolutions.php> (accessed 26 April 2011).

<sup>158</sup> IOTC vessel record last updated 21 April 2011. Available at <http://www.iotc.org/English/record/search3.php> (accessed on 26 April 2011).

In conclusion, South Africa and many other fishing nations, including the EU, have experience in implementing some form of catch documentation scheme since 1992, when ICCAT adopted the Bluefin Tuna Statistical Document.<sup>159</sup> However, it should be noted that the catch documentation schemes adopted by CCAMLR, CCSBT, ICCAT and IOTC were species-specific catch documents. Whereas, the catch certificate in the EC-IUU Regulation is not species-specific but applies to all fish and fishery products, with the exception of those mentioned in Annex I<sup>160</sup> and Annex VIII.<sup>161</sup>

Based on a crude comparison of the abovementioned catch documents, the EC catch certificate most resembles the CCAMLR catch document used for toothfish (DCD). It should be noted that the CCAMLR catch document was based on a very discreet fishery for toothfish, which currently has 43 vessels flagged to 13 Member States authorised to fish in the 2010-11 fishing season.<sup>162</sup> Notwithstanding the exceptions mentioned above, the EC catch certificate would be applicable to all fishing vessels whose fishery products are destined for the EU markets and this would entail thousands of fishing vessels, whereas the model on which it was based was for a small, specific fishery with few vessels. This contrast is useful and will be considered further in terms of implications of implementation for South Africa.

South Africa's status as Cooperating Non-Member or Cooperating Non-Contracting Party does not in any way absolve South Africa from the obligations

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<sup>159</sup> In 1992 ICCAT adopted the Bluefin Tuna Statistical Document (BSD), which was the first catch documentation scheme adopted by a RFMO. See Agnew DJ "The illegal and unregulated fishery for toothfish in the Southern Ocean, and the CCAMLR catch documentation scheme" (2000) *Marine Policy* vol 24 361-374.

<sup>160</sup> Article 2 paragraph 8 of EC Regulation 1005/2008. L286/6 and L286/26.

<sup>161</sup> Annex VIII of EC Regulation 1010/2009. L280/39.

<sup>162</sup> CCAMLR list of authorized vessels. Available at <http://www.ccamlr.org/pu/e/sc/fish-monit/vess-licensed.htm> (accessed 26 April 2011).

of Member States however, as a non member South Africa does not have a vote in decision-making processes in the relevant RFMOs, which is not ideal.

RFMOs came under the spotlight in a recent global evaluation of their performance and effectiveness. With close to 60 percent of the oceans being outside of areas of national jurisdiction, the evaluation was conducted amidst growing concerns around decreasing fish stock levels on the high seas. Of 48 stocks assessed, 32 were found to be over-exploited and depleted which equates to 67 percent of stocks under RFMO management. It has been argued that IUU fishing remains rampant on the high seas, with little or ineffectual consequences and hence the dire situation of declining stock levels. The study concluded that the RFMOs should take greater accountability for their actions over the resources under their jurisdiction.<sup>163</sup> It is further submitted that the accountability of the RFMOs must be cascaded down to the Member States and their actions; and in so doing the possibility of saving high seas fish stocks from the tragedy of the commons could be realised.

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<sup>163</sup> Cullis-Suzuki S and Pauly D "Failing the high seas: A global evaluation of regional fisheries management organizations" (2010) *Marine Policy* vol 34 1036-1042.

## CHAPTER 4

### 4. The EC Regulation 1005/2008

In response to the challenge of illegal, unreported and unregulated (IUU) fishing on 29 September 2008 the Ministers of the European Union Member States adopted Regulation 1005/2008, a Community system to prevent, deter and eliminate IUU fishing.<sup>164</sup> The IUU Regulation entered into force on 1 January 2010.<sup>165</sup>

In addition to Regulation 1005/2008, the EC also adopted Regulation 1010/2009 on “laying down detailed rules for the implementation of Regulation 1005/2008, establishing a Community system to prevent, deter and eliminate illegal unreported and unregulated fishing.”<sup>166</sup> The EC also developed an “information note”, “technical note” and a note on “international cooperation” with all information relating to the implementation of Regulation 1005/2008.<sup>167</sup>

The Information Note essentially provides the background to the Community’s actions taken in terms of combating IUU fishing.<sup>168</sup> Reference is made to the various international meetings at which the EC presented its intention with regard to Regulation 1005/2008. The Information Note goes on to state that the

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<sup>164</sup> Commission Regulation (EC) 1005/2008 of 29 September 2008 (29.10.2008) *Official Journal of the European Union* L 286/3. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:286:0001:0032:EN:PDF> (accessed 15 January 2010).

<sup>165</sup> Article 57 of EC Regulation 1005/2008.

<sup>166</sup> Commission Regulation (EC) No 1010/2009 of 22 October 2010 (27.10.2009) *Official Journal of the European Union* L 280/5. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:280:0005:0041:EN:PDF> (accessed 15 January 2010).

<sup>167</sup> Available at [http://ec.europa.eu/fisheries/cfp/illegal\\_fishing/info/index\\_en.htm](http://ec.europa.eu/fisheries/cfp/illegal_fishing/info/index_en.htm) (accessed 17 April 2011).

<sup>168</sup> Information Note. Available at [http://ec.europa.eu/fisheries/cfp/illegal\\_fishing/info/information\\_note01\\_en.pdf](http://ec.europa.eu/fisheries/cfp/illegal_fishing/info/information_note01_en.pdf) (accessed 15 January 2010).

Community has one of the largest fishing fleets in the world and that the Community is the third largest catching power in the world. In addition, the Community is also the leading importer of fishery products worldwide. As a result of the high demand for fishery products, the Community also inadvertently becomes an attractive market for IUU operators to dispense of their illegal catches and the Information Note suggests that “IUU catches can be easily laundered” on Community markets.<sup>169</sup>

The Information Note summarises the main provisions of the IUU Regulation and concludes with reference to cooperation, which is elaborated in the “Cooperation Note” and also refers to the “Technical Note” which provides details of the catch certification scheme of the Regulation.

In terms of the latter, the Technical Note to Regulation 1005/2008 provides information on the certification scheme. The Technical Note identifies the following the three main objectives of the certification scheme in terms of ensuring traceability, serve as a tool facilitating compliance with conservation and management measures and cooperation between flag States and the country providing the market.<sup>170</sup>

In the Technical Note the Community acknowledges that the certification scheme was “inspired from existing catch documentation schemes already adopted by RFMOs for certain species and which are implemented in many countries.”<sup>171</sup> The Technical Note concludes on matters of cooperation.

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<sup>169</sup> Ibid.

<sup>170</sup> Technical Note. Available at [http://ec.europa.eu/fisheries/cfp/illegal\\_fishing/info/technical\\_note\\_en.pdf](http://ec.europa.eu/fisheries/cfp/illegal_fishing/info/technical_note_en.pdf) (accessed 15 January 2010).

<sup>171</sup> Ibid.

The success of effective implementation of the Regulation is largely dependent upon cooperation. Cooperation is mentioned in the Information Note as well as the Technical Note. Due to its critical importance a note on International Cooperation was also developed.<sup>172</sup>

Due to the worldwide phenomenon of IUU fishing and the fact that IUU operators are from different nationalities, international cooperation is necessary to deal effectively with measures to deter and eliminate IUU fishing. The Regulation has a three-pronged approach in order to provide a legal framework for dealing with IUU fishing, establish agreed rules with third countries concerned and provide support to developing countries.<sup>173</sup>

Since the success of IUU fishing has been assured through continued access to markets, the main objective of the Regulation is to prevent IUU caught fish from being traded with and between the Community Members. The Regulation attempts to achieve this through several mechanisms, including, port inspections, the requirement for a certification scheme, a Community alert system, an IUU vessel list for third country and Community Member States, a list of non-cooperating States, measures for fishing vessels and States involved in IUU, Community nationals, immediate enforcement measures and sanctions, and provisions adopted by RFMOs regarding fishing vessel sightings.<sup>174</sup> The section that follows will focus on these mechanisms in addressing IUU fishing. However, before considering the mechanisms, it is important to reflect on the context of the Regulation.

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<sup>172</sup> International Cooperation. Available at [http://ec.europa.eu/fisheries/cfp/illegal\\_fishing/info/cooperation\\_note\\_en.pdf](http://ec.europa.eu/fisheries/cfp/illegal_fishing/info/cooperation_note_en.pdf) (accessed 15 January 2010)

<sup>173</sup> Ibid.

<sup>174</sup> EC Regulation 1005/2008.

## 4.1 Context of the Regulation

The text of the Regulation is extensive, but the following paragraphs in the preamble are worth noting, as it provides the rationale and context of the Regulation:

Paragraph 5 states that:

In line with its international commitments, and given the scale and urgency of the problem, the Community should substantially enhance its action against IUU fishing and adopt new regulatory measures designed to cover all facets of the phenomenon.

Arguably, the abovementioned paragraph could be indicative of the Community's own international obligations in terms of various international law instruments. Paragraph 1 of the Regulation also makes specific mention of UNCLOS<sup>175</sup>, the UN Fish Stocks Agreement<sup>176</sup> and the FAO Compliance Agreement.<sup>177</sup> While in paragraph 3, the Regulation also refers to IUU fishing as a major threat to sustainable utilisation and the need to address "halting the loss of biodiversity by 2010 – and beyond". The latter commitment is aligned to the Convention on Biological Diversity and its objectives in curtailing the loss of biodiversity.<sup>178</sup> Therefore, the Regulation has also been developed pursuant to the Community's international obligations to adopt measures to ensure sustainable management of living marine resources and to cooperate in this regard. The Regulation gives effect to the practical implementation of some of the commitments contained in the various international conventions and agreements.

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<sup>175</sup> United Nations Convention on the Law of the Sea of 10 December 1982.

<sup>176</sup> United Nations 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 Highly Migratory Fish Stocks of 4 August 1995.

<sup>177</sup> Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas of 24 November 1993 of the Food and Agriculture Organisation of the United Nations.

<sup>178</sup> CBD objective of halting the loss of biodiversity by 2020. Available at <http://www.cbd.int/doc/decisions/cop-10/cop-10-dec-02-en.pdf> (accessed 17 April 2011).

The Regulation seeks to address fishing behavior which characterises IUU fishing that has negative impacts on the marine environment, the sustainability of living marine resources and the socioeconomics of law abiding fishermen. These aims touch on the fundamental pillars of sustainable development, viz. ecological, social and economic considerations.<sup>179</sup>

As fishing is an economic activity and coastal communities rely on fisheries for their food and livelihoods, dwindling fish resources as a result of IUU has serious socioeconomic implications, especially for those fishers who operate within the laws and regulations of a fishery.<sup>180</sup> Therefore, it is hoped that the Regulation would serve as a disincentive for unlawful fishing behavior, by disallowing access to the Community markets. One of the major drivers for IUU fishing is that there is an economic benefit which outweighs the risk of being apprehended and the costs of IUU fishing is also less than the returns.<sup>181</sup>

The practical mechanisms of the Regulation are discussed below.

#### **4.2 Inspections of third country fishing vessels in Member States ports (Chapter II)**

Third country fishing vessels only have access to ports of Member States if they meet the requirements of the EC-IUU Regulation, except in cases of *force*

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<sup>179</sup> The three interdependent and mutually reinforcing pillars of sustainable development are economic and social development and ecological protection. Plan of Implementation of the World Summit on Sustainable Development. Available at [http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/WSSD\\_PlanImpl.pdf](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf) (accessed 26 April 2011).

<sup>180</sup> The Ministerially-led Task Force of Governments of Australia, Canada, Chile, Namibia, New Zealand and the United Kingdom, WWF, IUCN and the Earth Institute of Columbia University. "High Seas Task Force (2006). Closing the net: Stopping illegal fishing on the high seas." Final report of the Ministerially-led Task Force on IUU fishing on the high seas. Available at [www.high-seas.org](http://www.high-seas.org) (accessed 10 July 2010).

<sup>181</sup> Schmidt CC "Economic Drivers of Illegal, Unreported and Unregulated (IUU) Fishing" (2005) *International Journal of Marine and Coastal Law* vol 20 479-507.

*majeure* or distress.<sup>182</sup> Third country vessels that meet the requirements of the Regulation may have access to port services, land their catches and conduct transshipment operations if and where necessary. In addition, transshipments between third country and Community vessels may only take place in port.

Member States are required to designate ports of access for landings and transshipments; for Masters or representatives of third country fishing vessels to notify authorities of port States of their arrival at least three working days in advance of arrival; authorization to access a port; and recording of landing or transshipment operations respectively.<sup>183</sup> In terms of these provisions, South Africa also allows foreign vessels to undertake transshipments in the designated ports of Cape Town, Port Elizabeth and Durban. Foreign and domestic vessels require a permit to undertake transshipments and such activity must be monitored by a fishery control officer or monitor.<sup>184</sup>

In terms of port inspections carried out by Member States, article 9 prescribes that 5 percent of landings and transshipments should be inspected per year in designated ports. The article further states that the inspections should be in accordance with benchmarks determined on the basis of risk management,<sup>185</sup> without prejudice to higher thresholds adopted by RFMOs. For example, CCAMLR requires 100 percent port inspections for fishing vessels that have toothfish onboard.<sup>186</sup> It is submitted that such a wide-reaching Regulation as the

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<sup>182</sup> Article 18 of the 1982 LOSC provides for the right of innocent passage in the territorial sea of a coastal State and makes provision for *force majeure* or distress.

<sup>183</sup> Articles 5, 6, 7 and 8 of EC Regulation 1005/2008.

<sup>184</sup> "Permit conditions for foreign and domestic vessels to transship in South Africa's Exclusive Economic Zone. January – December 2011." Provided by DAFF official (email on 18 August 2011).

<sup>185</sup> Article 54(2) deals with Committee procedure and states "where reference is made to this paragraph, Articles 4 and 7 of Decision 1999/468/EC shall apply. The period laid down in Article 4(3) of Decision 1999/468/EC shall be set at one month."

<sup>186</sup> CCAMLR Port inspections of vessels carrying toothfish, Conservation Measure 10-03 (2009) states that "Contracting Parties shall undertake inspections of all fishing vessels carrying *Dissostichus* spp. which enter their ports". See Schedule of Conservation Measures in force

EC-IUU Regulation should provide a higher threshold of port inspections in order to successfully achieve its objectives.

Article 10 provides details of inspection procedures, while article 11 describes the procedure in event of infringements. In terms of the latter, if the evidence found during the inspection suggests IUU fishing, then the authority should not allow the landing or transshipment to take place. The inspecting Member State should inform the Commission of its decision not to allow the landing or transshipment and should also provide the inspection report to the Commission, who in turn shall notify the flag State of the decision and infringement pursuant to article 3.<sup>187</sup> If the infringement took place within the jurisdiction of an RFMO, then the Commission shall also provide the Executive Secretary of the appropriate RFMO with a copy of the flag State notification.

Article 11, paragraph 4 has the effect of dramatically increasing the EC jurisdiction as it provides for the flag State to agree to transfer its jurisdiction to the port Member State if that port State's investigation reveals any infringements. If such a transfer of jurisdiction is agreed, then the port Member State may apply sanctions provided in its legislation. The same applies where a breach has taken place in a third country's maritime waters and that third country agrees to transfer its jurisdiction to the port Member State.

The provisions for port inspections by Community Member States appear extremely powerful, especially in the provisions of transfer of jurisdiction by third country States allowing the Community Member to then proceed with sanctions under its own laws.

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2010-11 season. Available at [http://www.ccamlr.org/pu/e/e\\_pubs/cm/10-11/all.pdf](http://www.ccamlr.org/pu/e/e_pubs/cm/10-11/all.pdf) (accessed 26 April 2011).

<sup>187</sup> Article 3 of the Regulation provides for scenarios under which fishing vessels will be considered as having engaged in IUU fishing.

The port State control provisions through inspections of third country fishing vessels in Member State's ports is consistent with international law as provided in the LOSC,<sup>188</sup> the Fish Stocks Agreement,<sup>189</sup> the IPOA-IUU<sup>190</sup> as well as the legally binding Agreement on port State measures.<sup>191</sup> The port State measures provisions in the EC-IUU Regulation are also in terms of the international obligations of the EU.

#### **4.3 The Certification Scheme (*Chapter III*)**

Paragraphs 9 and 13 of the preamble section of the Regulation states that as the world's largest market for fishery products the Community has a responsibility to ensure that IUU caught fish are not imported into its territory and prohibits imports of IUU products. It is envisaged that the use of a certification scheme for trade in fishery products will facilitate the prohibition of IUU products reaching Community markets.

Paragraph 15 of the Regulation states that it is essential for the certificate to contain information that clearly demonstrates the legitimacy of the fishery products destined for import into the Community. The flag State should validate the certificate thereby attesting to the compliance with conservation and management measures in the relevant fisheries. Based on the information provided, the import will be allowed or disallowed.

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<sup>188</sup> Article 218 of the LOSC provides for enforcement by the port State.

<sup>189</sup> UN Fish Stocks Agreement of 1995, article 23(2)

<sup>190</sup> FAO-IPOA-IUU paragraphs 52-64 on port State measures.

<sup>191</sup> FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.

The abovementioned provision is indicative of the certificate as a precondition for imports into the Community. Hence, the certificate has to be issued prior to the arrival of the fishery products for import.

Article 12 of the Regulation contains the provisions for the catch certification scheme, as contained in Annex II of the Regulation. The provision also allows for the establishment of an electronic traceability means of certification that may replace the document system, provided it has the same level of control by the relevant authorities.

Annex I of the Regulation contains a list of the products excluded from the scope of the Regulation. On 29 January 2010, after the Regulation came into force, Annex I was amended through Commission Regulation (EU) No 86/2010.<sup>192</sup> The amended Annex I came into force on the seventh day after its publication in the *Official Journal of the European Union*.<sup>193</sup>

In addition to the amended Annex I, Regulation 86/2010 also addressed the provisions of Article 12 of Regulation 1005/2008 mentioned above, which was also further elaborated in Regulation 1010/2009.<sup>194</sup> In Article 33 of the latter Regulation provision is made for “administrative cooperation with third countries concerning catch certificates”, which is listed in Annex IX of Regulation 1010/2009. Annex IX was subsequently amended in Regulation 86/2010, whereby the third countries Norway, United States and New Zealand provided

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<sup>192</sup> Commission Regulation (EU) No 86/2010 (30.1.2010) *Official Journal of the European Union* L26/1. States: “Whereas, Regulation (EC) No 1005/2008 applies to fishery products falling under the definition given in its Article 2. Annex I to that Regulation lists the products excluded from the definition of fishery products. That list may be reviewed each year and should now be amended on the basis of new information gathered under the administrative cooperation with third countries provided for in Article 20(4) of Regulation (EC) 1005/2008.”

<sup>193</sup> Article 3 of Regulation (EU) No 86/2010.

<sup>194</sup> Commission Regulation (EU) No 1010/2009 (27.10.2009) *Official Journal of the European Union* L280/6. Regulation for laying down detailed rules for the implementation of Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing.

specimens of their catch certificates for inclusion in Annex IX.<sup>195</sup> Several more third countries have subsequently notified the Commission of their templates for their catch certificates and frequent updates would probably be ongoing.<sup>196</sup>

Furthermore, Article 6 of Regulation 1010/2009 provides for a simplified catch certificate. This catch certificate is applicable to third country fishing vessels that meet criteria in so far as they are less than 12 metres without towed gear, or less than 8 metres with towed gear, or without a megastructure, or less than 20 Gross Tonnage. Third country fishing vessels that meet any of these criteria and land their catches in the flag State may pool their catches into one consignment as long as the consignment is accompanied by the simplified catch certificate referred to in Article 12. Annex IV provides a specimen of the simplified catch certificate. The simplified catch certificate must also be validated by the flag State authorities.<sup>197</sup>

Article 13 of Regulation 1005/2008 makes provision for the catch documentation schemes agreed and in force by RFMOs. The provision allows the acceptance of RFMO catch documents that are validated in a manner consistent with and in compliance with the requirements of Regulation 1005/2008. Article 7 of Regulation 1010/2009 recognises catch documentation schemes of RFMOs and a list of the RFMOs is provided in Annex V, Part I of the Regulation 1010/2009. The catch documentation scheme of the RFMOs recognised as complying with Regulation 1005/2008 without additional conditions include –

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<sup>195</sup> Commission Regulation (EU) No 86/2010 (30.1.2010) *Official Journal of the European Union* L26/1.

<sup>196</sup> Templates of catch certificates used by third countries. Available at [http://ec.europa.eu/fisheries/cfp/illegal\\_fishing/info/third\\_countries\\_catch\\_certificates\\_websites\\_en.pdf](http://ec.europa.eu/fisheries/cfp/illegal_fishing/info/third_countries_catch_certificates_websites_en.pdf) (accessed 18 April 2011).

<sup>197</sup> Commission Regulation (EC) No 1010/2009 L 280/8.

- *Dissostichus* spp. Catch documentation scheme as set out in Council Regulation (EC) No 1035/2001 of 22 May 2001 establishing a catch documentation scheme for *Dissostichus* spp.<sup>198</sup>
- ICCAT<sup>199</sup> Bluefin tuna Catch Documentation Programme as set out in ICCAT Recommendation 08-12 amending 07-10 on an ICCAT Bluefin tuna Catch Documentation Programme.

Annex V, Part II recognizes the catch documentation scheme of RFMOs, with additional conditions and includes the CCSBT (Commission for the Conservation of Southern Bluefin Tuna).

In summary, the Commission recognises the catch documentation schemes of the CCAMLR, ICCAT and CCSBT as being consistent with the catch documentation scheme prescribed by Regulation 1005/2008, with the CCSBT having an additional condition to include the Appendix on transport details.

In Regulation 1005/2008, Articles 14 and 15 respectively deal with the indirect importation of fishery products and the exportation of catches made by fishing vessels flying the flag of a Member State.<sup>200</sup> Article 16 of the Regulation provides for submission checks of catch certificates at least three days prior to the arrival of the fishery products for import. Adaptable deadlines are further provided in Article 8 of Regulation 1010/2009, where Annex VI provides for shorter deadlines for different modes of transport with, a four-hour period prior to arrival of products entering by air freight and railway and a two-hour period prior to arrival of products entering by road is prescribed.

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<sup>198</sup> Catch documentation scheme for *Dissostichus* spp. (toothfish) was adopted by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) as Conservation Measure 10-05. Available at [http://www.ccamlr.org/pu/e/e\\_pubs/cm/10-11/all.pdf](http://www.ccamlr.org/pu/e/e_pubs/cm/10-11/all.pdf) (accessed 26 April 2011).

<sup>199</sup> ICCAT is the International Commission for the Conservation of Atlantic Tunas. See <http://www.iccat.es/> (accessed 26 April 2011).

<sup>200</sup> Regulation 1005/2008 L286/10 and L286/11 respectively.

Article 16 of Regulation 1005/2008 also provides for importers who are approved economic operators (AEO) who may advise the Member State's competent authority of the arrival of consignments within the deadlines above and keep the validated catch certificate and make them available to the authorities for checks and verification purposes. The status of AEO is only applicable to Community Member States.<sup>201</sup>

It is submitted that these special provisions made for the AEO unfairly favours the AEOs, since they do not have to submit the certificates prior to the arrival of the products, but only need to inform the authorities of the arrival of the products. This unfair advantage by Community operators could also be construed as a means of "encouraging" third country States to enter into arrangements with such AEOs, as there are distinct benefits to using the AEO to import fishery products into the Community.

Article 17 of Regulation 1005/2008 provides for verification of catch certificates, which could be achieved through examining the products, authenticity of documents and data, accounts and records of operators as well as inspections of storage facilities, containers, notwithstanding the port inspections of the fishing vessels.

Article 17 also states that verifications will be focused on identified risks. In that regard verification would be conducted where the Member State has grounds to question the authenticity of the catch certificate, the validation seal or the signature of the relevant authority of the flag State; or if the verifying authority receives information that questions the compliance of the fishing vessel with relevant regulations, conservation or management measures; or fishing vessels, fishing companies or operators have been suspected of IUU fishing activities, including information received from RFMOs in terms of their processes for

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<sup>201</sup> Article 16, paragraphs 2 and 3 of Regulation 1005/2008.

establishing IUU vessel lists; or flag States or re-exporting countries that have been reported by RFMOs in terms of their adopted trade measures *vis-à-vis* flag States; or a Community alert notice published pursuant to Article 23 (1). Member States may also conduct random verifications.<sup>202</sup>

The Member State's competent authority may request assistance from the competent authority of the flag State or third countries if there is any doubt regarding the catch certificate. In addition, Regulation 1010/2009 also provides a further 15 criteria for verifications in Article 31 in terms of risks identified pursuant thereto.<sup>203</sup>

Article 18 of Regulation 1005/2008 provides the grounds for refusal of importation which include; the lack of a validated catch certificate; the products indicated on the certificate are different from the products that arrive for importation; the catch certificate is incomplete; the importer cannot demonstrate compliance with the provisions of Article 14(1) or (2); fishing vessel indicated on the catch certificate is included in the Community IUU vessel list; or the certificate has been validated by a non-cooperating State in terms of Article 31 of the Regulation.

Further refusal may also be based on certain responses to requests for further information by the Member State. If the exporter was not entitled to request validation of the certificate; or a reply indicating non compliance with relevant conservation and management measures; or the reply fails to respond to the questions raised; or the reply is not forthcoming within the specified time-frame, then the importation may be refused.

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<sup>202</sup> Article 17 paragraphs 3, 4 and 5 of Commission Regulation (EC) 1005/2008 L286/12.

<sup>203</sup> Article 31 of Commission Regulation (EC) 1010/2009 L280/14.

Article 18 also makes provision for the confiscation and disposal of fishery products in terms of national laws of the relevant Member State, as well as the right to appeal the decision. The Commission and the flag State should be notified of the decision of refusal and the consequent confiscation pursuant to Article 18 paragraph 5.<sup>204</sup>

Article 19 provides for transit and transshipment procedures, while Article 20 provides for flag State notifications and cooperation with third countries.

In terms of the certification scheme of the EC-IUU Regulation, it is consistent with the IPOA-IUU in developing market-related measures to combat IUU fishing. In addition, several RFMOs adopted certification schemes that are mostly species-specific<sup>205</sup> and therefore the certification requirements of the EC-IUU Regulation are consistent with various international obligations in terms of the relevant RFMOs to which the EU is a Party.

#### **4.4 Community alert system (*Chapter IV*)**

Article 23 of Regulation 1005/2008 makes provision for the Commission to communicate to Member States' authorities, the concerned flag State, and where appropriate, a third country, on matters where well-founded doubt has been raised concerning compliance by fishing vessels with applicable laws and regulations or conservation and management measures. The Commission should then publish the information in an alert notice on its website and in the *Official Journal of the European Union* to serve as a warning to operators and to

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<sup>204</sup> Article 18 of Commission Regulation (EC) 1005/2008 L286/12 to L286/13.

<sup>205</sup> See chapter 3 above.

ensure that appropriate action is taken by the relevant authorities. Article 24 provides for actions following the issuance of alerts.<sup>206</sup>

As of 26 May 2011 there have been no alerts published in the *Official Journal of the European Union*.

This naming and shaming approach could have a huge impact on the reputation of the flag State or third country, as applicable. It is hoped that this approach will have the desired deterrent effect and that alerts published will be fully justified.

#### **4.5 Identification of IUU vessels (*Chapter V*)**

Articles 25 and 26 deal with alleged IUU fishing and presumed IUU fishing respectively. Article 25 provides for the Commission or a body designated by it to analyse the information on IUU contained in chapters II, III, IV, VIII, X and XI of the Regulation as well as any other relevant information.

In addition, Member States may submit any further relevant information at any time to the Commission regarding establishing the IUU vessel list. Furthermore, the Commission will identify vessels for which sufficient information has been gathered pursuant to Article 25 to presume that those fishing vessels have been engaged in IUU fishing, and thereby necessitating an official enquiry with the relevant flag State.<sup>207</sup> The Commission shall then subsequently inform the flag State or flag Member States of fishing vessels of an official enquiry into the alleged IUU fishing of their vessels. Flag States of third countries and flag Member States will be requested to provide any additional information regarding the vessels concerned.

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<sup>206</sup> Article 24 of Commission Regulation (EC) 1005/2008 L286/15.

<sup>207</sup> Article 26 of Commission Regulation (EC) 1005/2008 L286/16.

The chapter provides a detailed process for the establishment of the Community IUU vessel list as well as for the removal of fishing vessels from the Community IUU vessel list.<sup>208</sup> Article 29 prescribes the content, publicity and maintenance of the Community IUU vessel list. The final provisions for Chapter V, provides for the automatic inclusion of IUU vessels adopted by RFMOs into the Community IUU vessel list, thereby providing a single IUU vessels framework for the Community.

Subsequently, on 28 May 2010 the European Commission (then the European Union)<sup>209</sup> adopted Regulation 468/2010 on establishing the EU list of vessels engaged in IUU fishing.<sup>210</sup> Therefore, the current Community IUU vessel list contains all the names of IUU vessels as adopted by RFMOs and thus also meets the EU obligations in terms of those RFMOs.

At present there are no EU Member States vessels or South African vessels listed on the EU list of vessels engaged in IUU fishing.<sup>211</sup>

#### **4.6 Non-cooperating third countries (*Chapter VI*)**

The preamble of the Regulation 1005/2008 acknowledges that some States may fail to exercise their duties as flag, port, coastal or market States in taking action against fishing vessels or nationals that have acted contrary to conservation and

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<sup>208</sup> Articles 27 and 28 of Commission Regulation (EC) 1005/2008 L286/17.

<sup>209</sup> At the time of adopting EC Regulation 1005/2008, the regional economic integration organisation was referred to as the European Community (EC), but as of 2010 the regional economic integration organisation became known as the European Union (EU).

<sup>210</sup> Commission Regulation (EU) No 468/2010 of 28 May 2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing. (29.5.2010) L131/22. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:131:0022:0026:EN:PDF> (accessed 17 April 2011).

<sup>211</sup> Ibid.

management measures. The Regulation then states that the international, regional and Community should take the steps to identify those non-cooperating States.

Chapter VI provides detailed procedures for the identification of non-cooperating third countries, *démarches* which notifies countries of the possibility of being identified as non-cooperating third countries, establishment of a list of non-cooperating third countries, removal from the list of non-cooperating third countries, publicity of the list of those third countries and emergency measures.<sup>212</sup> Emergency measures adopted in terms of international obligations should last for a maximum of six months and the Commission could extend it by a further six months. Such emergency measures could include denial of port access, except in case of *force majeure* or distress, Member States' vessels may not engage in joint fishing operations with the third country and Member States' vessels may not fish in the waters of the third country concerned. In addition, Member States may not provide live fish for fish farming and live fish caught by the fishing vessel flagged to the third country may not be accepted for fish farming by Member States.<sup>213</sup>

Emergency measures would come into effect immediately and the third country concerned as well as Member States will be notified thereof and the emergency measures will also be published in the *Official Journal of the European Union*. The Commission's decision to institute the emergency measures could be referred to the Council and the Council could within one month of receiving the referral take a different decision based on a majority decision-making process.<sup>214</sup>

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<sup>212</sup> Articles 31-36 of Commission Regulation (EC) 1005/2008 L286/19.

<sup>213</sup> Article 36 of Commission Regulation (EC) 1005/2008 L286/20.

<sup>214</sup> *Ibid.*

Arguably, the abovementioned provisions contain some of the most far-reaching actions in the IUU Regulation, as it has the effect of excluding the identified third country from engaging in any fishing-related activity with all Member States, without prejudice to bilateral fishing agreements.<sup>215</sup> In addition, the publication of the list of non-cooperating third countries and the emergency measures could be politically embarrassing for the third countries concerned.

#### **4.7 Measures in respect of fishing vessels and States involved in IUU (Chapter VII)**

Chapter VII provides for action in respect of fishing vessels included in the Community IUU vessel list, including that existing authorisation of IUU listed vessels will be withdrawn and that third country vessels may not be chartered for fishing in Community waters. In addition, EC Member States vessels may not engage or support any fishing related activities with third country vessels that are listed on the Community IUU list. Community IUU listed vessels may only have access to their home port, while third country listed vessels may not have access to Community ports, except in instances of *force majeure* or distress for Community Member vessels or third country vessels. However, if listed vessels enter ports under *force majeure*, then the fish onboard as well as gear prohibited in terms of RFMO measures will be confiscated. Furthermore, Members may not provide third country vessels with fuel or any other services or change of crew, except in instances of *force majeure*. The prohibition of imports, exports, re-exports or processing of products from IUU listed vessels is also stated. The provisions also make allowance for IUU listed vessels to enter a Community port without crew for the vessel to be scrapped. Community members are not allowed to flag an IUU listed vessel.<sup>216</sup>

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<sup>215</sup> Ibid.

<sup>216</sup> Article 37 of Commission Regulation (EC) 1005/2008 L286/20 to L286/21.

Article 38 provides for action in respect of non-cooperating third countries which includes the prohibition of imports of fishery products if the third country has not cooperated in taking action. Further prohibitions include the purchase of non-cooperating third country vessels by Community operators as well as the export of Community vessels or reflagging Community vessels to non-cooperating third countries. Chartering agreements or joint fishing operations between Member States and non-cooperating third countries are also prohibited together with any trade arrangements between their nationals. If there are any existing bilateral fisheries agreements between Member States and non-cooperating third countries, then they will be terminated if the third country does not follow through on actions in terms of the IUU fishing. In addition, no further negotiations on fisheries agreements will be entered into with a non-cooperating third country.<sup>217</sup>

The latter provisions contain the most substantive consequences of the entire IUU Regulation and are quite far-reaching for IUU listed vessels and non-cooperating third countries pursuant to Article 31. It is submitted that the effect of these provisions is to exclude the offending vessels and the non-cooperating third countries from fishery-related activities with all Community Member States, most notably through denying access to Community markets and fisheries agreements.

#### **4.8 Community nationals (*Chapter VIII*)**

Article 39 contains provisions relating to nationals of Community Member States who support or engage in IUU fishing activities, without prejudice to the flag State responsibilities.<sup>218</sup> While, these provisions are not directly relevant to South Africa, it is important that there is an awareness of the existence of the

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<sup>217</sup> Article 38 of Commission Regulation (EC) 1005/2008 L286/21.

<sup>218</sup> Article 39 of Commission Regulation (EC) 1005/2008 L286/21.

provisions. Paragraph 33 of the preamble to Regulation 1005/2008 succinctly captures the rationale for the provisions by stating that nationals of Member States should be deterred from supporting or engaging in any IUU activities. To be effective Member States are required to ensure sufficiently stringent sanctions so that it has a deterrent effect on Community nationals in terms of IUU.

#### **4.9 Immediate enforcement measures and sanctions (*Chapter IX*)**

This chapter has seven articles relating to enforcement measures and sanctions. The articles address serious infringements, immediate enforcement measures, sanctions for serious infringements, accompanying sanctions and liability of legal persons.<sup>219</sup> However, the scope of this chapter is limited in so far as it applies to infringements committed within the territory of Member States, within maritime waters under the sovereignty or jurisdiction of Member States; infringements by Member States' vessels or nationals; and serious infringements committed on the high seas or within the jurisdiction of a third country pursuant to Article 11 (4).<sup>220</sup>

Notwithstanding the seemingly limited scope of chapter IX, when read together with Article 11 (4) with regard to the possible transfer of jurisdiction by a flag State or coastal State to the Member State, in accordance with international law, it has the effect of greatly expanding the scope of the provisions of immediate enforcement measures and sanctions.

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<sup>219</sup> Articles 42 to 46 of Commission Regulation (EC) 1005/2008 L286/22 to L286/23.

<sup>220</sup> Article 11(4) of Commission Regulation (EC) 1005/2008 L286/9.

#### **4.10 Implementation of provisions adopted within certain Regional Fisheries Management Organisations pertaining to fishing vessel sightings (*Chapter X*)**

Article 48 provides the procedure for dealing with sightings at sea in so far as the rules relating to sightings at sea adopted within RFMOs to which the Community is legally bound. The provisions take account of sightings by a Member States competent authority responsible for inspections at sea, where there are sightings of activities considered to be IUU, the Member State shall provide a report of the sighting and any relevant investigation to be submitted as evidence for implementation of the provisions of Regulation 1005/2008.

Furthermore, Article 48 (3) prescribes the kind of information that the master of a Community or third country fishing vessel should record in sighting activities considered to be IUU fishing. Information such as the name and description of the vessel, call sign, registration number, Lloyds IMO number, the vessel's flag State, latitudinal and longitudinal position at the time of identifying the vessel as well as the date and time, and where possible, photographs of the vessel that would support the sighting together with any other information relating to the observed activities of the vessel concerned.<sup>221</sup>

Moreover, Article 48 requires that the sighting report should be submitted to the Commission or body designated by it and subsequently to the flag State of the vessel sighted. Thereafter, the Commission shall make the report available to all Member States and, where appropriate, to the Executive Secretary of the RFMO concerned. Article 48 also states that nothing in this article would preclude the RFMO from applying stricter provisions, where such measures have been adopted.

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<sup>221</sup> Article 48(3) of Commission Regulation (EC) 1005/2008 L286/24.

Article 50 provides for investigation of sighted fishing vessels flagged to Member States and requires the Member State to report on investigations and actions to be taken. In addition, provision is also made for a peer-review type of process whereby Member States should verify whether the sighted vessel of the Member State concerned has carried out activities under their jurisdiction or whether the fish from that vessel has been landed or imported into their territory. The information received by the Commission shall be made available to all Member States.<sup>222</sup>

#### **4.11 Mutual assistance (*Chapter XI*)**

Article 51 provides for mutual assistance and cooperation between Member States as well as between Member States and third countries on matters relating to the implementation of the EC-IUU Regulation. To facilitate mutual assistance the Commission or a body designated by it will set up a system which will include an automated information system to assist competent authorities in dealing with IUU fishing.<sup>223</sup>

Mutual assistance that facilitates cooperation generally is also provided for in the IPOA-IUU,<sup>224</sup> the Compliance Agreement<sup>225</sup> and the Fish Stocks Agreement.<sup>226</sup>

#### **4.12 Final provisions (*Chapter XII*)**

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<sup>222</sup> Article 50 of Commission Regulation (EC) 1005/2008 L286/24.

<sup>223</sup> Article 51 of Commission Regulation (EC) 1005/2008 L286/25.

<sup>224</sup> IPOA-IUU provides for cooperation between States in terms of Monitoring, Control and Surveillance, paragraphs 28-31.

<sup>225</sup> Article VII provides for cooperation with Developing Countries, in particular.

<sup>226</sup> Part III of the Fish Stocks Agreement provides mechanisms for international cooperation.

The final provisions of chapter XII include implementation, financial support, Committee procedure, reporting obligations, repeals and entry into force. In terms of the latter, the EC-IUU Regulation came into force on 1 January 2010.<sup>227</sup>

The official web-site of the European Union contains all the information and documents relevant to the IUU Regulation 1005/2008, together with supporting documents providing details on various procedures for implementing the Regulation.<sup>228</sup>

#### 4.13 Conclusion

The importance of complying with conservation and management measures adopted by RFMOs is evident in the EC-IUU Regulation's recognition of catch documentation schemes adopted by certain RFMOs;<sup>229</sup> the provisions adopted by RFMOs concerning sightings at sea;<sup>230</sup> as well as establishing the EU list of vessels engaged in IUU fishing, based on vessels listed as IUU vessels by RFMOs.<sup>231</sup> The IPOA-IUU also elaborated on RFMOs and their role in combating IUU.<sup>232</sup> Furthermore, the IPOA-IUU provides for internationally agreed market-related measures that are implemented in a fair, transparent and non-discriminatory manner.<sup>233</sup>

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<sup>227</sup> Articles 52 to 57 of Commission Regulation (EC) 1005/2008 L286/25.

<sup>228</sup> Available at [http://ec.europa.eu/fisheries/cfp/illegal\\_fishing/info/index\\_en.htm](http://ec.europa.eu/fisheries/cfp/illegal_fishing/info/index_en.htm) (accessed 17 April 2011).

<sup>229</sup> Annex V of the EC Regulation 1010/2009 of 22 October 2009. "Laying down detailed rules for the implementation of Council regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing". *Official Journal of the European Union*. L280/27.

<sup>230</sup> Article 48 of EC Regulation 1005/2008. L286/23.

<sup>231</sup> Commission Regulation (EU) No 468/2010 of 28 May 2010. "Establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing." *Official Journal of the European Union*. L131/22.

<sup>232</sup> IPOA-IUU paragraphs 78 to 84. p20-23.

<sup>233</sup> IPOA-IUU paragraph 65. p17.

However, an area of concern in the EC-IUU Regulation includes the discriminatory nature of the use of approved economic operators (AEOs) of Member States. The AEOs are only required to notify the Member States relevant authorities of the arrival of fishery products for import, but do not have to provide the validated certificate at that time of notification. Other operators must notify the Member State authorities as well as provide the catch certificate at the time of notification. Admittedly, the criteria for AEOs is transparent and clear in the Regulation, it nonetheless provides the AEOs with an unfair advantage over other operators. This may have the effect of persuading parties that wish to export fishery products to the Community to do so through an AEO.

Another concern is delaying the landings of fishery products by third country vessels pending the outcome of an enquiry based on port inspections. It is noted that the Regulation does make provision for *force majeure* or distress in terms of international law as it relates to third country vessels requiring access to ports of Community Members. In terms of international law, no provision is made for safeguards for third country fishing vessels, especially where the denial of landings is proven to be unsubstantiated.<sup>234</sup> The deterioration of fishery products that may result from undue delays in such instances is not addressed. Ideally, port inspections should cause minimal delays and not have a negative impact on the quality of the fishery products.<sup>235</sup> Such a provision in the Regulation was recommended during the development of the Regulation, but was not included in the final text.<sup>236</sup>

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<sup>234</sup> Tsamenyi M, Palma MA, Milligan B and Mfodwo K "The European Council Regulation on Illegal, Unreported and Unregulated Fishing: An International Fisheries Law Perspective" (2010) *Marine and Coastal Law* vol 25 5-31.

<sup>235</sup> *Ibid.*

<sup>236</sup> Commission (EC) "Proposal for a Council Regulation Establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing" COM(2007) 602 final, 17 October 2007, Article 11 (1). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0602:FIN:EN:PDF> Accessed 15 November 2010.

In terms of port inspections, the 5 percent threshold for vessel inspections may seem somewhat inadequate for the Regulation to be effective. It is not apparent from the Regulation whether the same 5 percent threshold will also apply to fishery products imported through other means of transport such as in containers on container vessels or in air freight.

It is further noted that the listing of non-cooperating States is a novel approach in the EC-IUU Regulation, as it is not included in the Fish Stocks Agreement or the Compliance Agreement. Given the potential political implications associated with being listed as a non-cooperating third country in so far as bilateral agreements and negotiations thereof are concerned, this approach may indeed have the desired deterrent effect and is still to be tested. Non-cooperating third countries have not been identified at this time.

The listing of non-cooperating third countries as well as IUU vessels list includes publication in the *Official Journal of the European Union* and the website. It is hereby submitted that the community alert system and publication of such information provided for in chapter IV may be superfluous, as the IUU vessel lists and non-cooperating third country lists should sufficiently address the issue of publicising the lack of compliance with legislation and conservation and management measures. Furthermore, the prohibitions that apply to IUU listed vessels and non-cooperating third countries appear to be stringent penalties and should serve as a strong deterrent to IUU fishing, especially for those wishing to trade fishery products with Community Member States.

## CHAPTER 5

### 5. South African fisheries legislation and implementation of the EC Regulation

This chapter will focus on the South African legislation governing the conservation and management of fisheries. Consideration will be given to provisions for implementation of the EC-IUU Regulation in South Africa. The most important implementing provisions that would impact South Africa include the catch certification requirements, the Community IUU vessel list and the list of non-cooperating third countries.

Although the port State control provisions are also a major element of the Regulation, they would not apply to South Africa, as no South African-flagged vessels are allowed to land fishery products in Europe. As a general rule, South African-flagged vessels must land catches in designated ports as indicated in the fishery-specific permit conditions.<sup>237</sup>

Another important provision in the Regulation is that relating to nationals.<sup>238</sup> Although the provision applies only to EU Member State nationals, other international instruments like the 1982 Law of the Sea Convention<sup>239</sup> and the FAO International Plan of Action to deter and eliminate IUU fishing<sup>240</sup> call upon States to take measures to ensure that their nationals do not engage in or

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<sup>237</sup> Permit conditions for various fishing sectors makes provision for 'landing of fish' in South African ports, where the fishery control officer must be informed of the estimated time of arrival of the vessel.

<sup>238</sup> EC Regulation 1005/2008 Article 39 – Nationals supporting or engaged in IUU fishing. L286/21.

<sup>239</sup> LOSC Article 117 – Duty of States to adopt with respect to their nationals measures for the conservation of living resources of the high seas.

<sup>240</sup> FAO IPOA-IUU of 2001, Paragraphs 18 and 19 relating to State control over nationals.

support IUU fishing activities. Furthermore, States should also cooperate in identifying those nationals who are involved in IUU fishing.<sup>241</sup>

In considering the provisions of the EC-IUU Regulation as they relate to South Africa, special consideration will also be given to the MLRA provisions that would be most relevant in combating IUU fishing generally. Gaps will also be identified in the legislation in terms of South Africa's ability to combat IUU fishing through the current provisions.

### **5.1 Marine Living Resources Act**

The Marine Living Resources Act (MLRA) is the primary legislation for the management and conservation of living marine resources in South Africa.<sup>242</sup> The objectives and principles of the MLRA are as follows:

- (a) The need to achieve optimum utilization and ecologically sustainable development of marine living resources;
- (b) The need to conserve marine living resources for both present and future generations;
- (c) The need to apply precautionary approaches in respect of the management and development of marine living resources;
- (d) The need to utilize marine living resources to achieve economic growth, human resource development, capacity building within fisheries and mariculture branches, employment creation and a sound ecological balance consistent with the development objectives of the national government;
- (e) The need to protect the ecosystems as a whole, including species which are not targeted for exploitation;
- (f) The need to preserve marine biodiversity;
- (g) The need to minimise pollution;
- (h) The need to achieve to the extent practicable a broad and accountable participation in the decision-making processes provided for in this Act;
- (i) Any relevant obligation of the national government or the Republic in terms of any international agreement or applicable rule of international law; and

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<sup>241</sup> Ibid.

<sup>242</sup> MLRA (Act No. 18 of 1998), published in *Government Gazette* No. 18930, Cape Town, 27 May 1998.

- (j) The need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry.<sup>243</sup>

It is submitted that IUU fishing could severely undermine the achievement of the MLRA objectives and principles mentioned above. IUU fishers have no regard for the ecological, social and economic consequences that IUU fishing activities may have on a coastal State, thereby negatively impacting the principle of sustainable use or any management attempts at stock recovery.<sup>244</sup>

In terms of the application of the MLRA, the Act applies to; persons, South African<sup>245</sup> or not as well as to all fishing vessels, including foreign, and aircraft,<sup>246</sup> to fishing activities conducted by local fishing vessels in South African waters, on the high seas or in the waters of another coastal State and also in the Prince Edward Islands.<sup>247</sup>

It is particularly important to consider the provisions of section 3(1)(a) and (b), as the former applies strictly to persons (whether nationals/citizens or not) and fishing vessels in South African waters under national jurisdiction, while the latter implies that regardless of where in the world a South African fishing vessel

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<sup>243</sup> S2 of the MLRA.

<sup>244</sup> Agnew DJ, Pearce J, Pramod G, Peatman T, Watson R, Beddington JR and Pitcher TJ. "Estimating the Worldwide Extent of Illegal fishing" (2009) PLoS ONE 4(2): e4570. Doi:10.1371/journal.pone.0004570 Available at <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0004570> (accessed 16 June 2010).

<sup>245</sup> The MLRA defines a "South African person" as (a) a South African citizen in terms of the South African Citizenship Act, 1995 (Act No. 88 of 1995); (b) a company registered in terms of the Companies Act, 1973 (Act No. 61 of 1973), of which the majority of shareholders, as prescribed by the Minister, are South African persons; (c) a close corporation in terms of the Close Corporations Act, 1984 (Act No. 69 of 1984), of which the majority of members are South African persons; or (d) a trust in which – (i) the majority of trustees having the controlling power at any given time are South African citizens, or (ii) a majority of the beneficial interests are held by South African citizens; (x)

<sup>246</sup> The MLRA defines "aircraft" as any craft capable of self-sustained movement through the atmosphere and includes a hovercraft. The MLRA provision applies to aircraft on or in the airspace above South African waters. Aircraft may also be used to identify schools of fish.

<sup>247</sup> S3 of the MLRA.

may be, including in the waters of another coastal State, the MLRA shall apply to that vessel.<sup>248</sup> It is submitted that paragraph 2 of section 3 reinforces the extraterritorial application of the MLRA pursuant to paragraph 1 (b), where it applies to South African vessels beyond areas of national jurisdiction. It is submitted that these provisions adequately address the scope of application of the MLRA in terms of nationals and international law obligations.<sup>249</sup>

The MLRA broadly makes provision for *inter alia*; administration; management of Marine Living Resources, through Local Fishing, Commercial Fishing, General Local Matters, Foreign Fishing and High Seas Fishing; Marine Protected Areas; Prohibited Activities and Stowage of Gear; Law Enforcement; Judicial matters; and General Provisions.

## 5.2 Administration of South African fisheries

The MLRA makes provision for several instruments and mechanisms to be used for effective management of fisheries. The Minister determines a total allowable catch (TAC) and/or total applied effort (TAE), or a combination of the two, which could be apportioned to subsistence, recreational, local commercial and foreign fishing respectively.<sup>250</sup> The TAC and TAE shall apply to a particular species or group of species of fish.<sup>251</sup>

No person may undertake commercial or subsistence fishing, unless a right has been granted for them to undertake that activity.<sup>252</sup> Fishing rights are allocated for commercial or subsistence fishing, mariculture or fish processing

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<sup>248</sup> For purposes of the context of IUU fishing, the interpretation is confined to fishing vessels and not aircraft.

<sup>249</sup> LOSC Article 117– Duty of States to adopt with respect to their nationals measures for the conservation of living resources of the high seas.

<sup>250</sup> S14 of the MLRA.

<sup>251</sup> MLRA defines “fish” as the marine living resources of the sea and the seashore, including any aquatic plant or animal whether piscine or not, and any mollusc, crustacean, coral, sponge, holothurians or other echinoderm, reptile and marine mammal, and includes their eggs, larvae and all juvenile stages, but does not include sea birds and seals.

<sup>252</sup> S18 (1) of the MLRA.

establishments in terms of section 18 of the MLRA and such rights may be valid for a period of no more than 15 years. In managing fisheries the Minister may also determine sustainable conservation and management measures.<sup>253</sup>

Section 13 of the MLRA establishes the requirement for a permit to exercise a right granted in terms of section 18 and also to conduct any activity in terms of the Act. The permit could be equated to the legal proof or licence to undertake activities provided for in terms of the MLRA. In addition, it is mandatory for all permits to be issued subject to conditions.<sup>254</sup> Permit conditions are legally binding and the MLRA states that failure to comply with permit conditions could result in future permits being denied. Furthermore, the permit may only be valid for a period of one year and all permits are also issued subject to receipt of fees prescribed by the Minister. Permit holders are required to have the permit at the place of the activity, as the permit can be inspected at any time.

The permit is one of the most important documents required to perform any activity in terms of the MLRA, including in exercising a right issued in terms of section 18.

In terms of the administration of fishing activities in South Africa, it appears that great reliance is placed on the permit conditions of each fishery or activity in terms of the MLRA. This is evident from the suite of permit conditions developed annually for each fishery and MLRA provided activities on an annual basis, including the import and export of fish and fishery products.<sup>255</sup>

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<sup>253</sup> S18 (7) of the MLRA.

<sup>254</sup> S13(2)(b) of the MLRA.

<sup>255</sup> Permit conditions for 2010 available at [http://www.daff.gov.za/daoDev/fisheries/21\\_HotIssues/April2010/FishingPermitConditions2010.htm](http://www.daff.gov.za/daoDev/fisheries/21_HotIssues/April2010/FishingPermitConditions2010.htm) (accessed 18 November 2010).

In addition to the mandatory requirement for permit conditions, the MLRA also makes discretionary provision for the development of regulations in terms of commercial fishing. Section 21(3) states that the Minister may make regulations in nine areas. The current MLRA regulations broadly make provision for *inter alia*; administrative matters; rights of access, other rights, permits and licenses; closed seasons and other time restrictions and closed areas; use of gear; species restrictions; mariculture; landing, transportation, delivery, receipt, processing and marketing of fish and fish products; and compliance control.<sup>256</sup>

Therefore, Regulation 27 dealing with the disposal of fish and aquatic plants reinforces the requirement for a permit for any trade in fish or fish products and indicates the significance of the permit.<sup>257</sup> As mentioned previously, pursuant to section 13(2)(b) the permit must be issued subject to conditions and based on the significance thereof, the export permit conditions is relevant.<sup>258</sup>

The export permit conditions for fish and fish products states that renewal of the export permit requires the submission of copies of statistical documents or catch documents for bigeye tuna, swordfish, bluefin tuna, Patagonian toothfish and Antarctic toothfish.<sup>259</sup> Similarly, the export permit conditions have been used as the mechanism for implementing the EC-IUU Regulation.<sup>260</sup>

### 5.3 Implementation of the EC-IUU Regulation in South Africa

The Fisheries Branch of the Department of Agriculture, Forestry and Fisheries (DAFF) uses the permit conditions for the Export of Fish and Fish Products as

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<sup>256</sup> Regulations in terms of the MLRA, 1998, published in *Government Gazette* 20796, 14 January 2000 (as amended).

<sup>257</sup> *Ibid.*

<sup>258</sup> "Permit conditions for export of fish and fish products 2010". Available at [http://www.daff.gov.za/daaDev/fisheries/21\\_HotIssues/April2010/FishingPERMITCONDITIONS2010/export2010conditions.pdf](http://www.daff.gov.za/daaDev/fisheries/21_HotIssues/April2010/FishingPERMITCONDITIONS2010/export2010conditions.pdf) (accessed on 18 November 2010).

<sup>259</sup> *Op cit* paragraph 2.3.

<sup>260</sup> "Permit conditions: Export of Fish and Fish Products 2011" provided by DAFF official (email on 18 April 2011).

the mechanism for implementing the EC-IUU Regulation and paragraph 9 of the 2011 permit conditions for exports to the European Union states that:

9.1 Should the Permit Holder export any fish/fish products to the EU that was harvested from 1 January 2010, the Permit Holder must apply for an EU catch certificate for each consignment.

9.2 The Permit Holder must apply for the EU catch certificate to the relevant Fisheries Manager from the Department via e-mail annexing the following documents: Copy of a valid MLRA Export Permit including its annexures ...<sup>261</sup>

Furthermore, as from 1 April 2011, the Department implemented an electronic version of the EC catch certificate.<sup>262</sup> Article 12(4) of the EC-IUU Regulation allows for the electronic traceability instead of the paper-based catch certificate, provided that the same level of control is maintained by the relevant State authority.<sup>263</sup> Several third countries have notified the EC of the template of catch certificate that they would be using pursuant to article 12(4).<sup>264</sup> It was noted that even though South Africa has implemented an electronic catch certificate, South Africa does not appear in the list of third countries that have provided templates of their certificates.<sup>265</sup>

Notwithstanding, the recognised catch documentation schemes adopted by regional fisheries management organizations (RFMOs),<sup>266</sup> which South Africa is

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<sup>261</sup> Ibid.

<sup>262</sup> The Electronic Catch Certification System <http://www.catchcertificate.co.za> (accessed 20 April 2011).

<sup>263</sup> Commission Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing of 29 September 2008 (29.10.2008) *Official Journal of the European Union* L 286/3. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:286:0001:0032:EN:PDF> (accessed 15 January 2010).

<sup>264</sup> Commission regulation (EC) No 86/2010 of 29 January 2010 (30.01.2010) *Official Journal of the European Union* L 26/1, Annex II, templates from Norway, USA, New Zealand. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:026:0001:0016:EN:PDF> (accessed 17 June 2010). The list of third countries has grown considerably and can be found at [http://ec.europa.eu/fisheries/cfp/illegal\\_fishing/info/third\\_countries\\_catch\\_certificates\\_websites\\_en.pdf](http://ec.europa.eu/fisheries/cfp/illegal_fishing/info/third_countries_catch_certificates_websites_en.pdf) (accessed 16 April 2011).

<sup>265</sup> Ibid.

<sup>266</sup> Annex V of Commission Regulation (EC) No 1010/2009 of 22 October 2009 (27.10.2009) *Official Journal of the European Union* L 280/27. Available at <http://eur->

obliged to implement either as a Member or Cooperating Non-Contracting Party, the simplified catch certificate would also be applicable to South Africa.<sup>267</sup> The simplified catch certificate applies to vessels that are less than 12 metres overall length, whose catches are not sufficient to make up one consignment and therefore several vessels' catches are combined into a single consignment, which would require a simplified catch certificate for the exports.<sup>268</sup> This simplified catch certificate can thus be traced back to several fishing vessels and catches and therefore, in my view, the catch certificate could serve the purpose of a "consignment certificate", as it accompanies each consignment of fish and fishery products entering the EU.

On average there has been about 13 614 consignments to the EU per year. This could constitute about 56 consignments per day for export.<sup>269</sup> With this number of consignments being issued per week-day, it presumably creates more administration for fishing companies that export consignments of fishery products on a daily basis to the EU. In addition, the Department's existing fisheries managers also have added responsibilities to their workload, as they are required to validate the catch certificates.<sup>270</sup>

South Africa has several ways of recording fish catches. South African fishing vessels are required to carry logbooks for recording all catches made at sea,<sup>271</sup> while landings are recorded on landing sheets.<sup>272</sup> These logbooks and landing sheets must be submitted to the Department periodically for data capture,

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[lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:280:0005:0041:EN:PDF](http://lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:280:0005:0041:EN:PDF) (accessed 17 April 2011).

<sup>267</sup> The simplified catch certificate pursuant to Article 6 of EC Regulation 1010/2009.

<sup>268</sup> Article 6 of EC Regulation 1010/2009.

<sup>269</sup> "Appendix III. System requirements for effecting consignment based catch certificates in terms of Regulation EC 1005/2008". Document provided by the South African Deep Sea Trawling Industry Association (SADSTIA) (email 18 April 2011).

<sup>270</sup> Annex II of EC Regulation 1005/2008 – section 9 of the certificate requires flag State authority validation. L268/27.

<sup>271</sup> "Hake Deep-sea Trawl Permit conditions 2011" provided by DAFF official (email on 24 May 2011).

<sup>272</sup> "Hake Longline Permit conditions 2011" provided by DAFF official (email on 24 May 2011).

monitoring and management of fishing allocations (quota). Once the Right Holder's full allocation has been caught, the permit would cease to be valid, thus preventing the Right Holder from exceeding its allocation and overfishing.<sup>273</sup> The success of this type of allocation management is underpinned by shore-based monitoring of landings and inspections, including inspecting documents onboard the fishing vessel, such as the valid permit, vessel licence and logbook. However, subsequent to monitoring landings and submitting logbooks and landing sheets, there appear to be no further traceability requirements.

Notwithstanding the regional fisheries management organisations catch and statistical documents and the recently employed EC catch certificate, there are no traceability requirements from boat to plate within South Africa. Such traceability will allow for the tracking of fish from the catch at sea to the market. Several countries have recently introduced traceability requirements.<sup>274</sup> Traceability requirements appear to be an emerging trend globally and South Africa should consider the merits and costs of introducing traceability in its current fisheries management approach. Traceability methods could serve to underpin the objectives of ensuring sustainable use of living marine resources in terms of the MLRA.<sup>275</sup>

In terms of fishery products entering the EU, the EC-IUU Regulation requires prior notification of landing of fish products, with at least three days notification prior to the estimated time of arrival,<sup>276</sup> except where fresh fish products are being landed a four-hour prior notification period is required.<sup>277</sup> South African products are never landed directly in EU ports by South African-flagged fishing

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<sup>273</sup> Ibid.

<sup>274</sup> The USA and EU have introduced mandatory traceability requirements, while Japan has legal requirements for businesses which are similar to traceability. It's also been noted that Chile is developing legislation for traceability requirements. FAO. State of Fisheries and Aquaculture Report 2010. p73. Available at <http://www.fao.org/docrep/013/i1820e00.htm> (accessed 15 November 2010).

<sup>275</sup> S2(a) of the MLRA.

<sup>276</sup> Article 6 of EC-IUU Regulation 1005/2008. L286/8.

<sup>277</sup> Annex I of EC Regulation 1010/2009. L280/20.

vessels, but are predominantly transported by airfreight (fresh product) and container vessels (frozen product).<sup>278</sup>

The deadline for submission of the catch certificate is four hours prior to entry for airfreight and railway transported consignments and two hours prior to arrival for products transported by road.<sup>279</sup> The recently introduced Electronic Catch Certification System of the Fisheries Branch should facilitate the timely submission of catch certificates.<sup>280</sup>

The administrative and management provisions of the permit, together with the permit conditions and regulations are enforced through the provisions of chapter 6 of the MLRA on law enforcement in so far as it provides for observers, powers of fishery control officers, including beyond South African waters, seizure or immobilisation of vessels, vehicles or aircraft where necessary.<sup>281</sup> The enforcement provisions of the MLRA are implemented through the Monitoring, Control and Surveillance Chief Directorate of the Fisheries Branch in DAFF.

#### **5.4 Monitoring Control and Surveillance (MCS)**

The Monitoring, Control and Surveillance (MCS) Chief Directorate of the Fisheries Branch in DAFF is responsible for monitoring compliance with marine laws and regulations, with 31 compliance stations around the coast of South Africa.<sup>282</sup> The then Branch Marine and Coastal Management introduced a requirement for all fishing vessels greater than 5 metres in length<sup>283</sup> to have a

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<sup>278</sup> "Appendix III. System requirements for effecting consignment based catch certificates in terms of Regulation EC 1005/2008". Document provided by the South African Deep Sea Trawling Industry Association (SADSTIA) (email 18 April 2011).

<sup>279</sup> Article 8, Annex I of EC Regulation 1010/2009. L280/28.

<sup>280</sup> The Electronic Catch Certification System <http://www.catchcertificate.co.za> (accessed 20 April 2011).

<sup>281</sup> S50 to S57 of the MLRA.

<sup>282</sup> Marine Living Resources Fund Annual Report 2005-2006. p9. Published by the Department of Environmental Affairs and Tourism. (Author is in possession of a copy).

<sup>283</sup> "West Coast Rock Lobster (Nearshore) permit conditions for 2010-2011 fishing season". Available at

satellite Vessel Monitoring System (VMS) onboard, thereby boosting the monitoring capacity for fishing vessels.<sup>284</sup>

In an effort to increase MCS capabilities between 2004 and 2005 the South African government invested R440 million in environmental protection vessels to carry out at sea inspections and increase visible policing of fishing vessels. Three inshore vessels of 48 metres in length, *Lilian Ngoyi*, *Ruth First* and *Victoria Mxenge*; a 14 meter long interceptor vessel, the *Florence Mkhize*, capable of speeds of up to 70 knots; and one offshore patrol vessel, the 83 metre long *Sarah Baartman*, were procured for patrolling the vast South African coastline and the South African exclusive economic zone (EEZ).<sup>285</sup> In addition to conducting patrols in the EEZ, the *Sarah Baartman* has also been involved in regional patrol initiatives. In March 2009, South Africa in collaboration with Mozambique, Tanzania and Kenya, undertook a transboundary patrol with the *Sarah Baartman* and inspectors from all four countries participating in the joint patrols. The multilateral patrol yielded the inspection of more than 40 fishing vessels, with the arrest of six foreign vessels.<sup>286</sup> It is obvious that the South African government has recently invested substantially in enforcement capabilities for marine living resources.

Chapter 6 of the MLRA provides for law enforcement by fishery control officers in South African waters as well as beyond South African waters.<sup>287</sup> For purposes

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[http://www.daff.gov.za/doaDev/fisheries/21\\_HotIssues/April2010/FishingPermitCond2011/Nears\\_hore\\_as\\_at10Feb2011.pdf](http://www.daff.gov.za/doaDev/fisheries/21_HotIssues/April2010/FishingPermitCond2011/Nears_hore_as_at10Feb2011.pdf) (accessed 26 April 2011).

<sup>284</sup> In 2006-7 68 transgressions were detected through VMS. Available at [http://www.environment.gov.za/AboutUs/StratDoc/Annual\\_Review/annual%20review%20200607.pdf](http://www.environment.gov.za/AboutUs/StratDoc/Annual_Review/annual%20review%20200607.pdf) (accessed 26 November 2010).

<sup>285</sup> DEAT Annual Review 2005/6. Department of Environmental Affairs and Tourism. p33-34. (Author is in possession of a copy). Available at [http://www.environment.gov.za/AboutUs/Annual\\_Report/DEAT%20Annual%20Report%2005-06%20LR.pdf](http://www.environment.gov.za/AboutUs/Annual_Report/DEAT%20Annual%20Report%2005-06%20LR.pdf) (accessibility problem).

<sup>286</sup> Anton Kruger: Intern, Peace Missions Programme of the Institute for Security Studies, Pretoria, 20 October 2010. "Illegal Fishing and the Rising Threat of Piracy." Available [http://www.issafrica.org/iss\\_today.php?ID=1048](http://www.issafrica.org/iss_today.php?ID=1048) (accessed 15 November 2010).

<sup>287</sup> S52 of the MLRA – Powers of fishery control officers beyond South African waters.

of this study the focus would be on fishery control officers' powers within South African waters, with special reference to port State control in South Africa.

Section 51 of the MLRA provides for fishery control officers to, *inter alia*, order any local fishing vessel in or beyond South African waters and foreign vessel in South African waters to stop; require the master of a fishing vessel to stop its fishing activities and to assist fishery control officers or any other person as required with boarding the vessel; inspect the vessels certificate of registry, licence, permit, fishing log book with record of fish caught and any other documents, including the crew register and safety certificates; and determine whether any contraventions of the Act have been committed through various enquiries. Most importantly, where there are grounds to suspect an offence has occurred the fishery control officer must take or order the master to take the vessel to a designated port in South Africa for further enquiries or searches. The fishery control officer may also take samples of the fishery products onboard. Such samples could possibly be used for species identification purposes or as evidence. In addition, if there are reasonable grounds to suspect that an offence is either in progress or was committed and fish was illegally obtained or that there is prohibited fishing devices, substances or gear onboard, then provided the fishery control officer has the concurrence of the person in charge, a search may be conducted without a search warrant, if any delays in acquiring the warrant may defeat the purposes of such a search.<sup>288</sup>

The provisions in paragraph 51(3)(a) is the only place in the MLRA where illegal fishing is mentioned. However, the MLRA does not define illegal fishing. The terms unregulated and unreported are not used at all in the MLRA and are therefore also not defined. This is considered to be a gap in the legislation, especially since IUU fishing has proven to be the greatest challenge in sustainable fisheries management.

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<sup>288</sup> S51 of the MLRA.

Based on the provisions of section 51 of the MLRA, it is evident that the legislation sufficiently allows for port State control by South Africa, as fishery control officers also have powers to carry out inspections at sea or in port on both foreign and local fishing vessels.<sup>289</sup>

The EC-IUU Regulation also provides for port inspections on third country fishing vessels entering EU ports.<sup>290</sup> However, as previously mentioned, South African-flagged fishing vessels never land their catches in EU ports and therefore the port inspection provisions would not apply to South African fishing vessels.<sup>291</sup>

Even though the MLRA provides powers to fishery control officers to enforce inspections of both local and foreign fishing vessels, the MLRA could be strengthened through detailed and transparent provisions for exercising port State control in line with the provisions of the Law of the Sea Convention,<sup>292</sup> the IPOA-IUU fishing<sup>293</sup> and the Agreement on Port State Measures.<sup>294</sup> It is submitted that the transparency of detailed port State control provisions is considered as a gap in the manner in which it is communicated by South Africa, e.g. port State control provisions for foreign fishing vessels should be made

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<sup>289</sup> S51(2)(a) "...fishery control officer may without a warrant – order any foreign fishing vessel in South African waters ... to stop."

<sup>290</sup> Articles 9, 10 and 11 of EC Regulation 1005/2008. L286/9.

<sup>291</sup> Permit conditions for various fishing sectors makes provision for 'landing of fish' in South African ports, where the fishery control officer must be informed of the estimated time of arrival of the vessel. See "West Coast Rock Lobster (Nearshore) permit conditions for 2010-2011 fishing season". Available at [http://www.daff.gov.za/doaDev/fisheries/21\\_HotIssues/April2010/FishingPermitCond2011/Nears\\_hore\\_as\\_at10Feb2011.pdf](http://www.daff.gov.za/doaDev/fisheries/21_HotIssues/April2010/FishingPermitCond2011/Nears_hore_as_at10Feb2011.pdf) (accessed 26 April 2011). Also see "Hake deep-sea trawl permit conditions 2010-2011" and "Hake longline permit conditions 2011". Documents provide by DAFF official.

<sup>292</sup> LOSC Article 58 regarding the rights and duties of other States in the exclusive economic zone ... (3) ... States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

<sup>293</sup> FAO-IPOA-IUU paragraphs 52 to 64 on Port State Measures.

<sup>294</sup> Although South Africa has not yet signed or ratified the Agreement on Port State Measures, the measures are nonetheless considered here as a means of strengthening South Africa's ability to combat IUU fishing.

more visible on the DAFF website, so that foreign vessels' owners, operators and agents representing them may have access to the legislative requirements prior to visiting South African ports, and in so doing ensure their compliance with South African legislative provisions.

Furthermore, the MLRA also describes what constitutes prohibited activities, including; prohibited fishing methods (explosive, fire-arms, poison or noxious substances);<sup>295</sup> prohibited gear (gear not meeting the prescribed mesh size, or other prescribed standards);<sup>296</sup> interference with gear (interfering with any fishing gear of other persons without their consent; obstructing the fishing operations of other persons; destroying, damaging, displacing or moving fishing gear or equipment or markers attached thereto); driftnet fishing, except on the authority of a permit;<sup>297</sup> and the use of fish aggregating devices without a permit.<sup>298</sup>

Arguably, the prohibited activities of the MLRA are largely limited to fishing methods and fishing gear and hence could be further elaborated to strengthen the MLRA in the fight against IUU fishing, especially with regard to, *inter alia*, false labeling or marking and violating the fishery laws of other coastal States. Elaborated general prohibited activities are therefore identified as a gap in the MLRA.

## 5.5 Summary of implementation and legislative gaps

In terms of South Africa's implementation of the EC-IUU Regulation, it appears that the use of the export permit conditions to refer to the Regulation's

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<sup>295</sup> S44 of the MLRA.

<sup>296</sup> S45 of the MLRA.

<sup>297</sup> S47 of the MLRA.

<sup>298</sup> S48 of the MLRA.

requirements is entirely appropriate in the South African context. There have been cost implications associated with the implementation of the Regulation in that an electronic documentation system was developed and implemented, fishing companies appointed additional staff to administer the certificates and the fisheries managers of the Branch Fisheries in DAFF have additional responsibilities in terms of flag State authority validation of each certificate. Nonetheless, the export of South African fishery products to the EU markets continue, which demonstrates South Africa's ability to comply with the requirements of the EC-IUU Regulation.

Based on the implications of implementation of the EC-IUU Regulation in South Africa and the fact that the Regulation prescribes a 5 percent inspection rate of documents and landings,<sup>299</sup> it is submitted that the Regulation is an administrative burden to South Africa. The EU should seriously consider increasing its inspection rate of certificates and consignments in order to bring about a sense of balance between implementation by third countries and monitoring and evaluation follow through by the EU.

The following gaps have been identified either in the MLRA or in fisheries management:

- definitions of illegal, unreported and unregulated fishing;
- detailed transparent provisions for exercising port State control; and
- elaborated general prohibited activities.

In conclusion, addressing the above gaps through appropriate legislative amendments or improved fisheries management approaches would strengthen South Africa's ability to deal more effectively with IUU fishing. In terms of traceability, it is recommended that the merits and costs of implementing traceability in the current fisheries management approach should be explored

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<sup>299</sup> Article 9 of the EC Commission Regulation 1005/2008 on port inspections.

and that the development of traceability provisions should be based on the practicalities associated with each fishery. Traceability requirements could be incorporated into the fishery permit conditions.

The next chapter will consider legislative amendments to address the gaps identified in this chapter.

## CHAPTER 6

### 6 Recommendations and Conclusion

In chapter 5, the Marine Living Resources Act (MLRA)<sup>300</sup> was considered in terms of implementation of the EC-IUU Regulation and generally in the fight against illegal, unreported and unregulated fishing. As a result, certain gaps were identified in the MLRA. This chapter will recommend legislative amendments to the MLRA with a view to strengthening South Africa's ability to combat IUU fishing. General conclusions are made based on this study and further actions which South Africa could take in terms of international law in order to become a more formidable opponent to IUU fishing are also suggested.

#### 6.1 Recommended Legislative Amendments

The MLRA makes no provision for the definition of illegal, unreported and unregulated fishing and only refers once to illegal fishing.<sup>301</sup> It is therefore recommended that definitions be provided for the terms "illegal", "unreported" and "unregulated" fishing, as defined in the FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU).<sup>302</sup>

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<sup>300</sup> Marine Living Resources Act 1998 (Act No. 18 of 1998).

<sup>301</sup> S51(3)(2) of the MLRA.

<sup>302</sup> FAO. International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing. Rome, FAO. 2001. 24p. Available at <http://www.fao.org/docrep/003/y1224e/y1224e00.htm> (accessed 15 January 2010).

Another gap identified in the MLRA was the lack of sufficiently transparent and detailed provisions on port State control measures. Considering that South Africa is a relatively active port State with some 900 foreign fishing vessels visiting designated ports annually,<sup>303</sup> the MLRA in its current form could be strengthened in terms of the requirements of a foreign fishing vessel seeking access to South African ports. To enable South Africa to pursue its port State responsibilities with greater legal vigor, it is suggested that the following amendments be made to the MLRA section 13 on Permits, by inserting the following after paragraph 13(1):

13(2)(a) No foreign fishing vessel shall enter the exclusive economic zone of the Republic without a permit, except in cases of *force majeure* or distress as provided for in international law.

13(2)(b) All foreign fishing vessels or their representatives shall apply for the permit pursuant in (a) at least seven working days in advance of arrival; and notify the authorities of their estimated time of arrival at least 24 hours prior to making port calls within the Republic.

13(2)(c) All foreign fishing vessels making port calls within the Republic shall maintain on board the vessel the permit that authorised the fishing activity, the vessel licence, an accurate and complete fishing logbook for each day of fishing activity, whether the fishing took place within the exclusive economic zone of the Republic or not. The record keeping must also include:

- (i) Name of fishing vessel;
- (ii) Date, time, latitude and longitude of the location at which the setting of fishing gear was begun, and for when the set was ended;
- (iii) Amount and species of any fish caught during each set;
- (iv) Signature of vessel operator and date of signature; and
- (v) Any other information requested by the Minister.<sup>304</sup>

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<sup>303</sup> "2009 Report of foreign vessel activity in South African ports." 13 December 2010. Department of Agriculture, Forestry and Fisheries (DAFF). Presented at Ships Agents Management Working Group meeting. Document provided by DAFF official (email 11 April 2011).

<sup>304</sup> Ortiz P "An overview of the US Lacey Act Amendments of 1981 and a Proposal for a Model Port State Fisheries Enforcement Act. November 2005. Amended in order to be consistent with the language used in the MLRA. Available at [http://www.illegal-fishing.info/uploads/Lacey\\_Act\\_Paper.pdf](http://www.illegal-fishing.info/uploads/Lacey_Act_Paper.pdf) (accessed 18 April 2011).

The abovementioned requirements should also be made publicly available on the DAFF website so that it is accessible to foreign vessel owners, operators and their agents representing them in South Africa.

In order to take account of the urgency to address IUU fishing as well as the need to provide information in that regard, it is further suggested that section 42 of the MLRA which deals with "implementation of international conservation and management measures" as it relates to South Africa's international obligations requires strengthening by inserting the following paragraph after 42(3), but before the existing paragraph 42(4):

Pursuant to paragraph (3) above, the Minister shall provide appropriate or required information:

- (a) In the exercise of port State controls;
- (b) On preventing, deterring and eliminating illegal, unreported and unregulated fishing, to enable the Republic and other States to better implement the objects of international conservation and management measures.<sup>305</sup>

Furthermore, although the MLRA provides details of prohibited activities and stowage of gear,<sup>306</sup> it is recommended that more detailed general prohibitions would be useful in the fight against IUU fishing. It is also acknowledged that the EC-IUU Regulation<sup>307</sup> was developed because IUU fishing was seen as an international challenge that transcends the national jurisdiction of States, but requires international collaboration to deal effectively with the problem. The Regulation therefore has the effect of extending the jurisdiction of the EU to include all fish and fishery products that are traded with and between EU members, especially with the provision for third country States to transfer their

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<sup>305</sup> Ibid.

<sup>306</sup> S44 to S49 of the MLRA.

<sup>307</sup> Commission Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing of 29 September 2008 (29.10.2008) *Official Journal of the European Union* L 286/3. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:286:0001:0032:EN:PDF> (accessed 15 January 2010).

jurisdiction to EU port Member States.<sup>308</sup> Similarly, the Lacey Act of the United States has the effect of expanding the port State control to include taking action against IUU fishing outside the jurisdiction of the US, including in the waters of another coastal State, if and when the illegally caught fish is imported into the US.<sup>309</sup> The MLRA has no provisions akin to the Lacey Act.<sup>310</sup>

Given the gap identified in prohibited activities, it is strongly recommended that a Lacey-type provision be incorporated into the MLRA to strengthen South Africa's ability to deal with IUU fishing not just nationally but internationally.<sup>311</sup> It is suggested that two paragraphs be inserted in the MLRA under chapter 5, which deals with "prohibited activities and stowage of gear". The new section should be referred to as "General prohibitions" and should read as follows:

#### General prohibitions

- (a) No person shall import, export, transport, sell, receive, acquire or purchase any fish taken, possessed, transported, or sold in contravention with this Act or with any law or regulation of a foreign State.<sup>312</sup>
- (b) No person shall falsify, fail to make and/or maintain, or fail to have on board vessel catch records as required by this Act.<sup>313</sup>

In light of the above suggested amendments, it is further recommended that section 44(2) "No person shall land, sell, receive or possess any fish taken by

<sup>308</sup> Article 11 paragraph 4 of EC Regulation 1005/2008. L286/9.

<sup>309</sup> Ortiz P "An overview of the US Lacey Act Amendments of 1981 and a Proposal for a Model Port State Fisheries Enforcement Act. November 2005. Available at [http://www.illegal-fishing.info/uploads/Lacey\\_Act\\_Paper.pdf](http://www.illegal-fishing.info/uploads/Lacey_Act_Paper.pdf) (accessed 18 April 2011).

<sup>310</sup> Ortiz noted that several nations have adopted the Lacey-Act type laws, including Papua New Guinea, Nauru, Federated States of Micronesia, Marshal Islands, Solomon Islands and Tonga. Op cit footnote 311 p27.

<sup>311</sup> One of the most infamous examples of the long arm of the US Lacey Act was the successful prosecution of Arnold Bengis of Hout Bay Fishing. See *United States of America v. Arnold Maurice Bengis, Jeffrey Noll and David Bengis*. Docket no. S1 03 Cr 308 (LAK) (AJP). See presentation by Elinor Colbourne "Prosecutions under the Lacey Act". Available at [http://www.chathamhouse.org.uk/files/18374\\_130111colbourn.pdf](http://www.chathamhouse.org.uk/files/18374_130111colbourn.pdf) (accessed 16 April 2011).

<sup>312</sup> These provisions are suggested by Ortiz in the Proposed Model for Port State Fisheries Enforcement, but have been amended in order to be consistent with the language used in the MLRA.

<sup>313</sup> Ibid.

any means in contravention of this Act” be deleted, as it would be superfluous if the Lacey-type provisions are included in the MLRA.

Further suggested amendments to chapter 5 on “prohibited activities and stowage of gear” is suggested to deal with false labeling or marking by inserting the following paragraph after section 49 (2)(b):

False Labeling or Marking

No person shall-

- (1) Import, export, or transport any container or package containing any fish unless the container or package has previously been plainly marked, labeled, or tagged in accordance with required standards.
- (2) Submit any false record, account, or label, or label for, or any false identification of any fish which has been, or is intended to be –
  - a. Imported, exported, transported, sold, purchased, or received from any foreign State; or
  - b. Transported within the Republic and in transit between the Republic and foreign States.”<sup>314</sup>

In addition to the above recommendations for MLRA amendments, it is also recommended that South Africa urgently develops a National Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing (NPOA-IUU in terms of the IPOA-IUU),<sup>315</sup> signs and ratifies the FAO Compliance Agreement<sup>316</sup> and the legally-binding Agreement on Port State Measures.<sup>317</sup>

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<sup>314</sup> Ibid.

<sup>315</sup> FAO. IPOA-IUU.

<sup>316</sup> FAO. Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. Rome, FAO.1993. p12. Available at <http://www.fao.org/DOCREP/MEETING/003/X3130m/X3130m00.HTM> (accessed 17 April 2011).

<sup>317</sup> FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. FAO, Rome 2009. Available at <http://www.fao.org/Legal/treaties/037t-e.pdf> (accessed 19 April 2011).

## 6.2 Conclusions

Arguably, the EC-IUU Regulation could be viewed as a laudable attempt by the EU to combat IUU fishing. While it is too soon to determine the effectiveness of the Regulation in achieving its objectives, it nevertheless follows many of the internationally prescribed measures for dealing with IUU fishing, with market-related measures as the very last resort.

South Africa has a relatively good legislative framework for dealing with IUU fishing however, the legislation has not kept pace with more recent trends in combating IUU fishing and hence the recommended amendments to the MLRA are an attempt to strengthen South Africa's ability to combat IUU fishing, while also modernising the legislation in the international context.

South Africa would also increase its international standing by ratifying the Agreements that are most relevant to the fight against IUU fishing, such as the FAO Compliance Agreement and the FAO Agreement on Port State Measures.<sup>318</sup>

Based on the implications of implementation of the EC-IUU Regulation in South Africa<sup>319</sup> and the fact that the Regulation prescribes a 5 percent inspection rate of landings and transshipments,<sup>320</sup> it is submitted that the Regulation is an administrative burden to South Africa. The EU should seriously consider increasing its inspection rate of certificates and consignments in order to bring

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<sup>318</sup> According to the Status of these Agreements, South Africa has not signed nor ratified these two Agreements. Status of FAO Agreement on Port State Measures available at <http://www.fao.org/Legal/treaties/037s-e.htm> and status of FAO Compliance Agreement available at <http://www.fao.org/Legal/treaties/012s-e.htm> (accessed 20 April 2011).

<sup>319</sup> Discussed in chapter 5 above.

<sup>320</sup> Article 9 of the EC Commission Regulation 1005/2008 on port inspections. However, the Regulation does not indicate whether the same inspection rate applies to the certificate and all consignments of fishery imports into the EU.

about a sense of balance or proportionality between implementation by third countries and monitoring and evaluation by the EU.

Future work that would be extremely valuable would be the cost of implementation of the EC-IUU Regulation to South Africa and other developing States, as well as the benefits that may have accrued to those States and the EU. These future studies would be useful in determining whether the catch certificate required by the EC-IUU Regulation is "just another piece of paper"<sup>321</sup> or an administrative burden to all developing States.

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<sup>321</sup> 6<sup>th</sup> International Forum on Illegal Unreported and Unregulated Fishing, 13-14 January 2011, Chatham House. Presentation by Markus Bürgener: South Africa's experiences in implementing the Regulation. Available at [http://www.chathamhouse.org.uk/files/18372\\_130111burgener.pdf](http://www.chathamhouse.org.uk/files/18372_130111burgener.pdf) (accessed 15 April 2011).

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