

## The Substance of the IUU Regulation

In October 2007, the European Commission released a proposal for a council regulation 'establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing'.<sup>99</sup> In June 2008, the European Parliament adopted a non-binding report<sup>100</sup> on the IUU Regulation and several minor amendments to the Commission's proposal.<sup>101</sup> The amended Regulation was adopted by the Council of the European Union on 29 September 2008<sup>102</sup> and is scheduled to enter into force on 1 January 2010.<sup>103</sup> Upon entry into force, the IUU Regulation will regulate the highly complex multi-channel fisheries supply system of the EC in an effort to improve global fisheries sustainability.<sup>104</sup> Essentially, the IUU Regulation establishes a system of access conditionality in which access to its markets will be partly conditioned by the extent to which the country, area or region of origin of the exported fish product is completely free or increasingly free of IUU fishing.

Specifically, the IUU Regulation seeks to address the EC's objective of combating IUU fishing as follows.

### 8.1 Scope of the IUU Regulation

The IUU Regulation applies to IUU fishing and associated activities<sup>105</sup> carried out within the jurisdiction of EC member states, in addition to activities carried out by Community and non-Community vessels on the high seas or in waters under the jurisdiction of a third state.<sup>106</sup> IUU fishing within maritime waters of overseas countries and territories of EC member states (as listed in Annex II of the EC Treaty) is treated as taking place within the maritime waters of third countries.<sup>107</sup>

Fishing vessels subject to the IUU Regulation are broadly defined to include 'any vessel of any size used for or intended for use for the purposes of commercial exploitation of fishery resources, including support ships, fish processing vessels, and vessels engaged in transshipment and carrier vessels equipped for the transportation of fishery products, except container vessels'.<sup>108</sup>

In terms of product coverage, the IUU Regulation applies to 'any products which fall under Chapter 03<sup>109</sup> and Tariff headings 1604<sup>110</sup> and 1605<sup>111</sup> of the combined nomenclature established by Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the common customs tariff, with the exception of products listed in Annex 1 of this Regulation'.<sup>112</sup> Section 5.2.2 provides a detailed description of the combined nomenclature product categories referred to in the IUU Regulation.

## 8.2 Key elements of the IUU Regulation

Broadly speaking, the measures outlined in the IUU Regulation are, on paper, generally consistent with those called for under international fisheries instruments and measures being implemented by RFMOs. However, until the measures are actually implemented, it is difficult to draw any definitive conclusions about their practical implications (see Appendix 1). As noted in further detail below, one area where the IUU Regulation would appear to go further than current international efforts to combat IUU fishing relates to the restrictive trade measures against non-cooperating third countries.

Four elements of the IUU Regulation are particularly relevant to any consideration of its likely impact on trade with Commonwealth ACP member states. These elements are:

- Port control over third country fishing vessels;
- Catch certification requirements;
- Establishment of the Community IUU vessel list;
- Establishment of a list of non-cooperating third countries.

### 8.2.1 Port control of third country fishing vessels

Chapter II of the IUU Regulation deals with inspections and control of third country fishing vessels seeking access to the ports of EC member states. Under this chapter, landings or transshipments by third country fishing vessels shall only take place in designated ports of EC member states and subject to specific conditions.<sup>113</sup> Masters of third country fishing vessels intending to enter the ports of an EC member state are required to notify and submit specific information to the competent authorities of the relevant EC member state at least three working days before the estimated time of arrival at the port.<sup>114</sup>

The notice of intention to enter into port is to be accompanied by a validated catch certificate if the third country fishing vessel in question carries fisheries products on board.<sup>115</sup> The responsibility to verify the accuracy of the information transmitted by the third country fishing vessel in the prior notice and the catch certificate rests with the EC member state.<sup>116</sup> A third country fishing vessel may be granted authorisation to access the port if fishery products on board are accompanied by a catch certificate and after other information provided to the competent authorities of the relevant EC member state has been verified as complete.<sup>117</sup>

Where the information provided by the fishing vessel is not complete or its verification is pending, an EC member state, acting as a port state, may authorise port access or permit all or part of a landing in port, but must keep the fisheries products concerned in storage under the control of the competent authorities until the rest of the required information has been received or the verification process is completed.<sup>118</sup> If the verification process is not completed within 14 days of the landing, the EC port member state may confiscate and dispose of the fish in accordance with its national laws.<sup>119</sup> Storage costs are required to be borne by the operators of the vessel.<sup>120</sup>

Masters of third country fishing vessels intending to use the ports or transshipment facilities of an EC member state are also required to submit a declaration indicating the quantity of fishery products by species to be landed or transhipped, in addition to the date and place of each catch.<sup>121</sup> EC port member states are required to retain such declarations for a minimum period of three years and notify the European commission on a quarterly basis of quantities landed or transhipped by third country fishing vessels.<sup>122</sup>

EC member states are required to carry out inspections in their ports of at least 5 per cent of landings and transshipment operations by third country fishing vessels each year.<sup>123</sup> The proposed Regulation also requires the mandatory inspection of all fishing vessels that have been sighted as, or are presumed to have conducted, IUU fishing and have been reported via the Community alert system, or been listed in an RFMO IUU list.<sup>124</sup> The inspection may cover the fishing vessel's documents, logbook, fishing gear, catch on board and other possible evidence that might be of relevance to the alleged IUU fishing activities.<sup>125</sup>

If the results of inspection disclose evidence that a third country fishing vessel has engaged in IUU fishing, the EC port member state is required not to authorise the landing or transshipment of its catch in port.<sup>126</sup> In such circumstances, the EC port member state is to immediately notify its decision to the European Commission and transmit notification to the competent authority of the vessel's flag state.<sup>127</sup> Where the suspected IUU fishing has taken place on the high seas or in the maritime waters of a third country, the EC port member state is required to co-operate with the flag state in carrying out investigations into the suspected breach and, where appropriate, in applying penalties consistent with international law.<sup>128</sup>

### **8.2.2 Analysis of port control of requirements relating to third country fishing vessels**

The requirements in Chapter II of the IUU Regulation apply to third country fishing vessels intending to land, tranship or otherwise access port services in the ports of EC member states.<sup>129</sup> The port state requirements under the IUU Regulation will have extensive application, given its broad definition of 'fishing vessel'.<sup>130</sup> In practice, the port state measures will apply to third country fishing vessels that land their catch directly in the ports of EC member states and to third country exporters, even if the fish is transported by reefers.

The effectiveness of port state measures in combating IUU fishing is universally acknowledged and sanctioned by international fisheries instruments. It is, however, important that the implementation of such measures achieves a balance between combating IUU fishing and the safety of fishing vessels and their crew and appropriate safeguards against abuse of port state powers. The need for such safeguards is recognised in, for example, the Draft Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing currently under negotiation in the FAO.<sup>131</sup>

A major shortcoming of the provisions of the IUU Regulation on port entry require-

ments is that they do not contain sufficient safeguards for third country fishing vessels against undue delay resulting from unfounded inspection or denial of port access. The only safeguards provided relate to cases of *force majeure*<sup>132</sup> and the vague requirement that EC member states shall undertake inspections and verifications ‘on the basis of risk management’.<sup>133</sup> A requirement that inspections ‘cause minimum disturbance to the vessel’s activities and cause no deterioration in fish quality’ was proposed by the European Commission but not included in the final draft of the IUU Regulation.<sup>134</sup> It will be necessary for EC member states implementing the Regulation’s port state requirements to develop clear and transparent procedures, without which there is a risk that the port state measures will be implemented in an inconsistent and discriminatory manner.

### 8.2.3 Catch certification requirements

Chapter III of the IUU Regulation starts with the premise that the importation into the EC of fishery products obtained from IUU fishing shall be prohibited.<sup>135</sup> In general, the importation of fishery products into the EC is only allowed when it is accompanied by a catch certificate, completed by the master of the fishing vessel and validated by the flag state of the vessel. To be valid, the catch certificate must contain all information specified in the template documents shown in Annex II of the IUU Regulation,<sup>136</sup> including:

- Basic information such as the name of the fishing vessel, home port and registration number, call sign, licence number, Inmarsat number and IMO number (if issued);
- Information on the product (the type of species, catch areas and dates, estimated live weight and verified weight landed, as well as the applicable conservation and management measures and any transshipment at sea);
- Information and declaration on export and import of the fisheries product (including the vessel name and flag, flight number airway bill number, truck nationality and registration number, other transport documents and container number).

Exportation and indirect importation of fishery products are also subject to the validation of a catch certificate by the competent authorities.<sup>137</sup> Verifiable documentation or certification is required of products constituting one single consignment which are transported in the same form to the EC from a third country other than the flag state.<sup>138</sup> Similarly, verifiable certificates are required for products constituting one single consignment which have been processed in a third country other than the flag state.<sup>139</sup> Proper documentation is required of every step of transshipment or transit, as well as the exact description of the unprocessed and processed products and their respective quantities.

Catch documents and any related documents that are validated in conformity with catch documentation schemes adopted by an RFMO<sup>140</sup> and are recognised by the EC as complying with the requirements of the IUU Regulation will be accepted as catch certificates in respect of the products from species to which such catch documentation schemes apply.<sup>141</sup>

The IUU Regulation gives wide powers to the competent authorities of EC member

states to implement all the controls they deem necessary for the validation of the catch certificate and other information provided.<sup>142</sup> In addition to the inspection of fishing vessels at port, these control measures may consist of examining the products, verifying declaration data and the existence and authenticity of documents, examining the accounts of operators and other records, inspecting means of transport, including containers and storage places of the products, and carrying out official enquiries.<sup>143</sup> The competent authority of the EC member state may, for the purpose of verification, request the assistance of the competent authorities of the flag state or of a country other than the flag state from which fishery products have been indirectly imported.<sup>144</sup>

Importers are required to submit validated catch certificates to the competent authorities of the EC member state to which the product is intended to be imported at least three working days before the estimated time of arrival into the territory of that state.<sup>145</sup> However, an importer who has been granted the status of an approved economic operator has the option of merely advising the EC member state of the arrival of the products and keeping the validated catch certificates for verification by the competent authority at a later stage when the fisheries product has entered the territory of the EC state.<sup>146</sup> According to Article 16(3) of the IUU Regulation, the status of an approved economic operator may be granted on the basis of the following criteria:

- The establishment of the importer on the territory of that member state;
- A sufficient number and volume of import operations to justify the implementation of Article 16(2);
- An appropriate record of compliance with the requirements of conservation and management measures;
- A satisfactory system of managing commercial and, where appropriate, transport and processing records, which enables the appropriate checks and verifications to be carried out for the purpose of the IUU Regulation;
- The existence of facilities with regard to the conduct of these checks and verifications;
- Where appropriate, practical standards of competence or professional qualifications directly related to the activities carried out;
- Where appropriate, proven financial solvency.

These criteria are similar to those implemented to determine the list of authorised establishments complying with EC SPS regulations.

A range of actions may be taken by EC member states against third country fishing vessels that have not complied with the catch certification requirements.<sup>147</sup> EC member states are permitted to refuse importation of fisheries products without having to request additional evidence or send a request for assistance to the flag state on a number of discretionary grounds.<sup>148</sup>

## 8.2.4 Analysis of catch certification requirements

Under the IUU Regulation, the responsibility for preparing catch certificates rests with the fishing vessel. However, a catch certificate must be validated by a public authority of the flag state with the necessary powers to verify the information.<sup>149</sup> The requirement for flag state verification will pose some practical implementation challenges for ACP member states, as demonstrated below.

Generally, ACP member states only have control over their flagged vessels that fish in their own waters or in the waters of other states or on the high seas. Where a foreign flagged vessel is used to fish in the waters of an ACP member state, the responsibility for validating the catch certificate rests with the flag state and not the ACP member state in whose waters the fish was taken. Under this scenario, the ACP member state would not have any control over the action taken by such flag states to comply with the IUU Regulation.

The verification requirements of the IUU Regulation also have implications for fisheries access agreements. Most ACP member state fisheries access agreements are state/industry or state/fishing association agreements which do necessarily involve the flag states. This will make it almost impossible for the ACP member states to exercise any control over the flag states of such vessels. For the several ACP member states currently running open registries, the IUU Regulation will add another layer of responsibility to the already growing flag state responsibilities under international fisheries instruments. Such flag states will need to ensure that they have processes in place to discharge their verification functions. Failure to do so may result in a prohibition of fisheries exports or the reflagging of their vessels to other more responsible flags.

Another area of uncertainty in relation to the catch certification and verification requirements concerns their application to chartered fishing vessels and the so-called 'domestic-based foreign fishing vessels' operating as integral parts of the domestic fisheries in many Pacific Island states. Technically, these vessels are foreign flagged, but their fishing activities are wholly based in the host country and they have little or no connection with the flag state. The complexities of applying the verification requirements to charter and 'domestic-based foreign fishing vessels' are similar to those applicable to foreign fishing vessels generally.

The requirement for flag state verification also raises issues of transparency and accountability in relation to bilateral fishing agreements between ACP member states and the EC. Under such bilateral access agreements, the EC member flag state will be the authority responsible for providing the validation required, resulting in the EC flag state member approving its own validation. An additional source of uncertainty is the fact that EC member flagged fishing vessels are not required to submit prior notice of arrival into their national ports. Consequently, such vessels will not submit the validated catch certificates required under Chapter III of the Regulation. ACP member states will need to seek clarification from the EC on how the catch certification requirements will work in practice under their bilateral access agreements.

To prevent their products from being denied entry into the territories of EC member states for non-compliance with the catch certification and validation requirements under the IUU Regulation, ACP member states will need to ensure that they have adequate provisions and procedures in place, reflected in their national legislation and access/charter agreements, compelling the masters and the flag states of the vessels they license to comply with the catch certification and verification requirements. ACP member states will also need to be selective in the choice of the flags of vessels they license. A non-responsible flag state may not be willing or able to provide the necessary validation required by the IUU Regulation. ACP member states that utilise charter arrangements and license 'domestic-based foreign fishing vessels' may also need to review these arrangements to ensure that they have some control over the vessels in terms of compliance with the catch certification and verification requirements of the IUU Regulation. In addition, in order to facilitate export of fisheries products into the EC, ACP member states will also need to ensure that their fishing companies and establishments obtain the status of approved economic operators.

### **8.2.5 EC IUU vessel list**

A central feature of the IUU Regulation is the creation of a Community IUU vessel list which will contain information on vessels identified by the EC and the member states as having engaged in IUU fishing. The IUU list is to be established based on compliance with the regulation catch data and trade information obtained from national statistics and other reliable sources, vessel registers and databases, RFMO catch document or statistical document programmes, reports on sightings of presumed IUU vessels, including information obtained by RFMOs, other relevant information obtained in ports or on fishing grounds and other additional information provided by member states.<sup>150</sup> The IUU vessel list will also include IUU vessels listed by RFMOs on their respective IUU lists.<sup>151</sup>

The actions that may be taken by EC member states against vessels on the Community IUU vessel list are varied and include:<sup>152</sup>

- Flag member states shall not submit to the Commission any requests for fishing authorisations in respect of IUU fishing vessels;
- Current fishing authorisations or special fishing permits issued by flag member states in respect of IUU fishing vessels shall be withdrawn;
- IUU vessels flying the flag of a third country shall not be authorised to fish in Community waters and shall be prohibited from being chartered;
- Fishing vessels flying the flag of an EC member state shall not in any way assist, engage in fish processing operations or participate in any transshipment or joint fishing operations with fishing vessels on the IUU vessel list;

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

### **8.2.6 Analysis of EU IUU vessel list**

The measures stipulated by the IUU Regulation to be taken against vessels on the EC IUU list are generally consistent with provisions under international fisheries instruments and conservation and management measures adopted by various RFMOs (see Appendix 1). One area of concern, though, is the fact that trade prohibitions are not applied as a last resort. Given that investigations of alleged violations by fishing vessels usually take time to conclude, the application of an interim measure that does not include outright prohibition of the trade in affected fisheries products may be necessary to ensure procedural fairness.



### 8.2.7 EC list of non-cooperating third countries

In addition to a list of IUU vessels, the IUU Regulation provides for the establishment of a list of non-cooperating third countries. A state may be identified as a non-cooperating third country if it fails to discharge the duties incumbent upon it under international law as a flag, port, coastal or market state and to take action to prevent, deter and eliminate IUU fishing activities.<sup>153</sup> The listing of such states is based on a number of considerations and factors, including:

- Examination of measures taken by the state concerned in respect of recurrent IUU fishing activities carried out or supported by vessels flying its flag or by its nationals, or by vessels operating in its waters or using its ports, or of access of fisheries products stemming from IUU fishing activities into its market;
- Whether the state concerned effectively co-operates with the EC by providing a response to requests made by the European Commission to investigate, provide feedback or follow-up to IUU fishing and associated activities;
- Whether the state concerned has taken effective enforcement measures in respect of the operators responsible for IUU fishing, and in particular whether sanctions of sufficient severity to deprive the offenders of the benefits accruing from these activities have been applied;
- Whether the history, nature, circumstances, extent and gravity of the manifestations of IUU fishing activities have been considered;
- For developing countries, the existing capacity of their competent authorities;
- The ratification of or accession of the states concerned to international fisheries instruments, in particular to the LOSC, UN Fish Stocks Agreement and the FAO Compliance Agreement;
- The status of the state concerned as a contracting party to regional fisheries management organisations, or the state's agreement to apply the conservation and management measures established by such organisations;
- Any acts or omissions by the state concerned that may have diminished the effectiveness of applicable laws, regulations or international conservation and management measures;
- Where appropriate, specific constraints of developing countries, in particular in respect to monitoring, control and surveillance of fishing activities.<sup>154</sup>

The IUU Regulation requires the prohibition on the importation into the EC of fishery products caught by fishing vessels flying the flag of non-cooperating third countries, and non-acceptance of catch certificates accompanying such products.<sup>155</sup> In cases where the identification of a non-cooperating state is justified by the lack of appropriate measures

adopted by the state in relation to IUU fishing activities affecting a given stock or species, the prohibition of importation may only apply in respect of this stock or species.<sup>156</sup> Of particular relevance to the ACP member states is the provision in the IUU Regulation regarding the denunciation by the EC of any standing bilateral fisheries agreement or fisheries partnership agreements with such states, as well as refusal to enter into negotiations to conclude a bilateral fisheries agreement or fisheries partnership agreement.<sup>157</sup>

### **8.2.8 Analysis of EC list of non-cooperating third countries**

As noted above, the decision to list a state as a non-cooperating flag state will be based on a number of factors, such as the implementation of relevant international obligations, the IUU fishing record of the state and its nationals, and the record of the state in taking effective enforcement actions in respect of the IUU fishing activities by its vessels, nationals and operators. These factors are highly subjective and can be applied in an arbitrary manner. For example, it is not clear on what basis the EC will make a judgement. The standard to be applied to determine whether or not a state has taken effective measures in respect of its operators and whether sanctions applied to IUU fishers are of sufficient severity are also unclear.

One of the penalties that may be imposed on non-cooperating third countries is the prohibition of private trade arrangements between nationals of an EC member state and such states in order for a fishing vessel flying the flag of that member state to use the fishing possibilities of the non-cooperating state. Again, it is not clear how the EC will make this assessment in practice, given the highly complex nature of the commercial arrangements involved in industrial fisheries (including venture capital funds). There is potential for discriminatory treatment by the EC of non-cooperating third states should the EC fail to apply similar stringent measures against its own members that fail to discharge their international obligations and comply with other relevant EC regulations on fisheries control and enforcement.