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**CONSERVATION AND MANAGEMENT MEASURE 2007-03: OUTSTANDING ISSUES FROM WCPFC4**

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**WCPFC-TCC4-2008/12**  
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**Paper prepared by the Secretariat**

**INTRODUCTION**

1. The Western and Central Pacific Fisheries Commission (WCPFC) adopted Conservation and Management Measure (CMM) 2006-09, entitled '*Conservation and Management Measure to Establish a List of Vessels Presumed to have Carried out Illegal, Unreported and Unregulated Fishing Activities in the WCPO*', at its 3<sup>rd</sup> Regular Session (WCPFC3) in 2006. This CMM was revised at the 4<sup>th</sup> Regular Session (WCPFC4) of the WCPFC in 2007 and re-named and numbered CMM 2007-03. CMM 2007-03 gives effect to the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) adopted by the UN Food and Agricultural Organization in 2001.

2. Paragraph 3 of CMM 2007-03, which specifies the range of activities deemed to constitute IUU fishing within the meaning of the CMM, provides as follows:

3. For the purposes of this conservation measure, vessels fishing for species covered by the WCPFC Convention are presumed to have carried out IUU fishing activities, as described in the IPOA on IUU fishing, in the Convention Area when a CCM presents suitably documented information that such vessels, *inter alia*:

- a. Harvest species covered by the WCPFC Convention in the Convention Area and are neither on the WCPFC record of authorized vessels nor a fishing vessel fishing exclusively in waters under the jurisdiction of its flag State, or
- b. Conduct fishing activities in waters under the jurisdiction of a coastal State, without permission of that State, or in contravention of its law and regulations, or
- c. Do not record or report their catches made in the Convention Area consistent with WCPFC measures, or make false reports, or
- d. Take and land undersized fish in a way that undermines WCPFC conservation measures, or
- e. Fish in a closed area or during a closed season in a way that undermines WCPFC conservation measures, or
- f. Use prohibited fishing gear in a way that undermines WCPFC conservation measures, or
- g. Tranship with, participate in joint fishing operations with, support or re-supply vessels included in the IUU Vessel List, or
- h. Are without nationality and harvest species covered by the WCPFC Convention in the Convention Area, or

- i. Engage in any other fishing activities that undermine the provisions of the WCPFC Convention or any other WCPFC conservation measures, or
- j. Are under the control of the owner of any vessel on the WCPFC IUU Vessel List.

3. One issue that was not resolved during debate on the revised CMM at WCPFC4 relates to paragraph 3(j) which permits the inclusion on the WCPFC IUU List of vessels that have not themselves engaged in IUU fishing activities, but are associated with vessels on the IUU List by reason of ownership or control. Paragraph 3(j) was carried over from CMM 2006-09 and was initially adopted unanimously in 2006.

4. At WCPFC4, Korea, with the support of several CCMs, unsuccessfully sought to have paragraph 3(j) deleted on the basis that:

- it is unfair to penalise affiliates when the incident is not directly attributable to them;
- the paragraph is not a relevant example of IUU fishing activities as enumerated under the IPOA-IUU;
- other regional fisheries management organizations (RFMOs) have not adopted similar provisions in their respective measures to combat IUU fishing; and
- the sanction to be imposed on owners of vessels on the WCPFC IUU Vessel List should be decided by flag States and not the Commission<sup>1</sup>.

5. WCPFC4 adopted the revised CMM 2007-03 and agreed to defer discussion on paragraph 3(j) to WCPFC5. The Secretariat was tasked to prepare a paper on the matter raised by Korea so that it could be considered at TCC4, together with other issues associated with CMM 2007-03.<sup>2</sup>

#### **RFMO PRACTICE**

6. All tuna-RFMOs currently have implemented conservation and management measures to combat IUU fishing. These various measures also require the creation of IUU Vessel Lists. However, only the measure adopted by the Inter-American Tropical Tuna Commission (IATTC) has identical provisions<sup>3</sup> to paragraph 3(j) of CMM 2007-03. To date, however, the IATTC has not implemented this provision of its measure.

#### **CONSIDERATION OF PARAGRAPH 3(J)**

7. CMM 2006-09 was adopted at WCPFC3 without any substantive debate on paragraph 3(j). Consequently, and at that time, there was no discussion of the policy rationale for paragraph 3(j).

8. Possible policy reasons for paragraph 3(j) in both the WCPFC and IATTC IUU Vessel List measures include that:

- paragraph 3(j) is an effective tool to prevent and deter IUU fishing because it has the potential to encourage the owners/controllers of fishing vessels, who actually derive financial benefits from IUU fishing activities, to assume corporate responsibility for all their fishing vessels;
- the list of activities constituting IUU fishing under the IPOA IUU is not exhaustive, thus RFMOs must be able to adopt progressive measures to combat IUU fishing activities as those activities evolve;

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<sup>1</sup> Paragraph 306, WCPFC4 Summary Record

<sup>2</sup> Paragraph 312, WCPFC4 Summary Record

<sup>3</sup> IATTC, Resolution C-05-07, Resolution to Establish a List of Vessels Presumed to have Carried out IUU Fishing Activities in the Eastern Pacific Ocean. The original version of CMM 2006-09 was based on the IATTC measure.

- paragraph 3(j) is a desirable implementation of the provisions in the IPOA-IUU for all States to take effective actions against nationals and beneficial owners who derive financial benefits from IUU fishing;<sup>4</sup> and
  - paragraph 3(j) is a desirable complement to existing port State, coastal State, market State, flag State and RFMO measures to combat IUU fishing.
9. Issues associated with implementing paragraph 3(j) of CMM 2007-03 include:
- The listing of an entire fleet of ‘an owner/controller’ for the violation of one vessel in the fleet is disproportionate and excessive and will over-burden the Commission and CCMs in their implementation of CMM 2007-03.
  - The concepts of ‘control’ and ‘ownership’ do not take into account the complexities of the legal ownership and control of vessels (i.e., individual vessels may be subject to complicated joint and beneficial ownership structures, including non-controlling interests in several countries which are not easily traceable).
  - The degree of ‘ownership’ or ‘control’ required is not specified, nor is how such owners/controllers’ would be identified;
  - Paragraph 3(j) has the potential to permit the inclusion on the WCPFC IUU Vessel List of vessels that may not necessarily be fishing in the WCPFC Convention Area.
  - The procedure for the inclusion and deletion of paragraph 3(j) vessels on the IUU List leaves many questions un-answered (for example, does the removal of a vessel or vessels ‘directly’ involved in IUU fishing also entail the removal of vessels listed ‘indirectly’ pursuant to paragraph 3(j), or is a separate process required to remove such vessels from the WCPFC IUU Vessel List?).
  - The consequences of a change of ownership or control for the “IUU status” of vessels subject to the paragraph 3(j) listing are not clear.
  - The description of the activities constituting IUU fishing under the IPOA-IUU is vessel specific; thus paragraph 3(j) may be seen to go beyond the scope of the IPOA-IUU.

## CONCLUSION

10. To implement fully CMM 2007-03, that includes paragraph 3(j), it will be necessary to develop additional procedures to give effect to that provision. The specific issues that would need to be addressed include:

- Developing a clear process of identifying fishing vessels subject to paragraph 3(j) for listing on the WCPFC IUU Vessel List.
- Clarification on which Members of the Commission would have the power to initiate the listing of paragraph 3(j) vessels on WCPFC IUU Vessel List.
- Defining when a vessel is deemed to be ‘under the control of the owner of any vessel on the WCPFC IUU Vessel List’ and what constitutes ‘ownership’ and ‘control’ for the purpose of the application of CMM 2007-03.

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<sup>4</sup> The relevant paragraphs of the IPOA-IUU are paragraphs 18 and 19.

Paragraph 18 provides: “In the light of relevant provisions of the 1982 UN Convention, and without prejudice to the primary responsibility of the flag State on the high seas, each State should, to the greatest extent possible, take measures or cooperate to ensure that nationals subject to their jurisdiction do not support or engage in IUU fishing. All States should cooperate to identify those nationals who are the operators or beneficial owners of vessels involved in IUU fishing”.

Paragraph 19 provides: “States should discourage their nationals from flagging fishing vessels under the jurisdiction of a State that does not meet its flag State responsibilities”.

- Providing for consultation with vessel ‘owners/controllers’ during the IUU vessel listing process, in the same way as CMM 2007-03 makes provisions for consultation with flag States,<sup>5</sup> to ensure due process.
- Clarifying the procedures for the removal of vessels subject to paragraph 3(j) from the WCPFC IUU Vessel lists.

11. Alternatively, the Commission could consider amending CMM 2007-03 with respect to paragraph 3(j), which it would have to do so in accordance with its Rules of Procedure for decision-making.

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<sup>5</sup> For example, paragraph 5 of CMM 2007-03: “Before or at the same time as transmitting a list of presumed IUU vessels to the Executive Director, the CCM shall notify, either directly or through the Executive Director, the relevant flag State of a vessel’s inclusion on this list and provide a copy of the pertinent suitably documented information. The flag State shall promptly acknowledge receipt of the notification. If no acknowledgement is received within 10 days of the date of transmittal, the CCM shall retransmit the notification through an alternative means of communication”.