



## **TECHNICAL AND COMPLIANCE COMMITTEE**

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### **REVIEW OF PARA. 3(j) OF CMM 2007-03**

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**WCPFC-TCC5-2009/16**

**1 September 2009**

#### **Introduction**

1. Paragraph 3(j) of CMM 2007-03 [IUU Fishing] permits the inclusion on the WCPFC IUU Vessel List of vessels that have not themselves engaged in IUU fishing activities but are associated with such vessels by reason of ownership or control. The majority of CCMs favour retaining this paragraph while the minority favour its removal.

2. At the Fourth Regular Session of the Technical and Compliance Committee (TCC4) CCMs agreed to recommend to the Commission not to apply para. 3(j) of CMM 2007-03 as a criterion for IUU listing in developing the Draft IUU Vessel List in 2009. During this period the Secretariat, in consultation with interested CCMs, was to develop additional procedures to give effect to this paragraph for discussion at TCC5. The Fifth Regular Session of the Commission (WCPFC5) endorsed this recommendation.

#### **Consultancy to review para. 3(j) of CMM 2007-03**

3. In early May 2009 the Secretariat contracted international legal consultant Mr William Edeson to develop additional procedures to give effect to para. 3(j) of CMM 2007-03 for discussion at TCC5. The scope of this work required the preparation of a paper on:

- a) the background to paragraph 3 (j) of CMM 2007-03;
- b) the extent to which a similar provision has been included in CMMs of other RFMOs, and the extent to which, if at all, steps have been taken to implement it;
- c) preparation of a draft procedure for consideration at TCC5 that is consistent with paragraph 3(j) of CMM 2007-03; and
- d) preparation of an explanatory note of the issues underlying the proposed procedure.

4. On 6 July 2009 the Secretariat distributed by e-mail a draft of the consultancy report (**Attachment 1**) to all WCPFC Official Contacts as a basis to support further consultation on this item at TCC5.

#### **Conclusion**

5. On the basis of the review undertaken by the consultant, TCC5 is invited to discuss para. 3(j) of CMM 2007-03 and consider additional procedures to support its application.



**Paragraph 3.j. of CMM 2007-03: a Possible Procedure to Implement its Provisions**

Report prepared for the WCPFC Secretariat by

W R Edeson  
June 2009

## **Executive Summary**

Paragraph 3.j of CMM 2007-03 permits the inclusion of vessels on the WCPFC IUU Vessel List that have not themselves engaged in IUU fishing activities but are associated with such vessels because they are under the control of the owner of a vessel already on the IUU Vessel List. Although many RFMOs have adopted similar IUU vessel lists, only three, (SEAFO, AIDCP/IATTC and WCPFC) have incorporated paragraph 3.j. None has so far implemented it in practice.

In the WCPFC, its implementation became contentious, which resulted in a decision at WCPFC5 at Busan, Korea in December 2008 to suspend the implementation for one year, to permit the development of procedures to give effect to this paragraph.

This Report analyses the existing procedures set out in CMM 2007-03 from the point of view of dealing with vessels coming within paragraph 3.j. Several amendments are required to permit the CMM 2007-03 procedure to deal with the category of vessels covered by paragraph 3.j. These are set out as specific proposals to the existing paragraphs of CMM 2007-03. They intend to supplement the existing procedures by specifically including the opportunity for a case to be made out that a vessel about to be placed on the List is not under the control of an owner of vessel on the IUU Vessel List.

In addition, two extra sub paragraphs to paragraph 15 have been recommended in order to give the TCC greater flexibility in dealing with such vessels.

## Introduction

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 3rd Regular Session (WCPFC3) in 2006. This CMM was revised at the 4th Regular Session (WCPFC4) of the WCPFC in 2007 and re-named CMM 2007-03. CMM 2007-03 gives effect in part to the International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing (IPOA-IUU) adopted by the UN Food and Agriculture Organization in 2001.

Paragraph 3 of CMM 2007-03, which specifies the range of activities deemed to constitute IUU fishing within the meaning of the CMM, provides in part 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:*

.....

*j. Are under the control of the owner of any vessel on the WCPFC IUU Vessel List.*

One issue that was not resolved during debate on the revised CMM at WCPFC4 relates to paragraph 3j 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 3j was carried over from CMM 2006-09 and was initially adopted unanimously in 2006.

At WCPFC4, some members of the Commission unsuccessfully sought to have paragraph 3j deleted. The arguments were summarised in the following terms in a document presented to TCC4<sup>1</sup>:

- *paragraph 3j is an effective tool to prevent and deter IUU fishing because it has the potential to compel 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. Therefore paragraph 3j is not invalid merely because it is not reflected in the IPOA-IUU;*
- *paragraph 3j may also be seen as a desirable progressive 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>2</sup>; and*

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<sup>1</sup> See WCPFC-TCC4-2008/12

<sup>2</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”.

- *the paragraph may be a desirable complement to existing port State, coastal State, market State, flag State and RFMO measures to combat IUU fishing which would encourage industry efforts to combat IUU fishing.*

Other members of the Commission opposed deletion of paragraph 3.j on various grounds. These were summarised in the following terms in the document submitted to TCC4:

- *paragraph 3 of CMM 2007-03 adopts the description of IUU fishing under the IPOA-IUU: “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...”. Although the activities constituting IUU fishing are not exhaustive under the IPOA-IUU, the description of these activities are vessel specific. Consequently, it can be argued that paragraph 3j of CMM goes beyond the scope of the IPOA-IUU;*
- *The listing of an entire fleet of an owner/controller for the violation of one vessel in the fleet may be seen to be disproportionate and excessive;*
- *The concepts of ‘control’ and ‘ownership’ contained in paragraph 3(j) fail to take into the complexities of the legal ownership and control of vessels (i.e. vessels may be subject to complex joint and beneficial ownership structures.);*
- *It is not clear what degree of ownership or control is sufficient for the purpose of paragraph 3j; neither is it clear how such owners/controllers would be identified;*
- *The failure to define the specific nature or degree of ‘ownership’ or ‘control’ may result in perverse or unfair consequences. For example, if vessel “A” is owned and operated by an entity, that vessel may be included on the IUU Vessel List pursuant to paragraph 3(j) if vessel “B”, in which the same entity enjoys a small and non-controlling interest, engages in IUU fishing;*
- *On the face of it, paragraph 3(j) would seem to permit the inclusion on the WCPFC IUU Vessel List of vessels that may not necessarily be fishing in the WCPFC Convention Area; and*
- *CMM 2007-03 does not provide clear guidance on the procedure for the inclusion and deletion of vessels coming under paragraph 3j on the IUU List. It is not clear, for example, whether the removal of a vessel or vessels ‘directly’ involved in IUU fishing would also entail the removal of vessels listed ‘indirectly’ pursuant to paragraph 3(j) or whether a separate process is required to remove such vessels from the IUU List. It is also not clear what the consequences of the change of ownership or control are for the IUU status of vessels subject to the paragraph 3j listing.*

This Report was commissioned by the WCPFC Secretariat in response to the above directive from WCPFC5. This Report analyses the existing procedures set out in CMM 2007-03 from the point of view of dealing with vessels coming within paragraph 3.j. The Report does not seek to open up the policy issues underlying paragraph 3.j, which have already been fully debated at TCC4 and WCPFC5. Instead, the mandate is to identify a procedure to implement paragraph 3.j as it stands. The terms of reference are set out in Annex I of this Report.

## **I Paragraph 3.j, in the global context**

Provisions similar to paragraph 3.j of CMM 2007-03 are found in the SEAFO conservation and management measures concerning the establishment of an IUU vessel list, and in those of AIDCP and IATTC<sup>3</sup>. However, no further work has been done in these RFMOs to refine the interpretation or application of this provision.

Many RFMOs have adopted systems for dealing with the listing of IUU vessels<sup>4</sup>. The crucial difference is that, up to now, in most RFMOs, paragraph 3.j, or its equivalent, has not been included. There is, therefore, no effective guide as to how such a provision has been implemented in practice. The distinguishing characteristic of paragraph 3.j is that the presumption can lead to a vessel being placed on the WCPFC IUU Vessel List through its association with another vessel on the List, even though the vessel about to be listed may not have been involved in any “IUU” fishing, or, indeed, fishing within the WCPF Convention Area.

## **II The WCPC procedure for placing vessels on the IUU Vessel List**

It is useful to summarise the procedure adopted in CMM 2007-03 and to comment on specific paragraphs that raise particular problems with the operation of paragraph 3.j.

The WCPFC procedure for placing a vessel on the IUU vessel list depends on an assessment being made of evidence submitted to the TCC. The procedure has certain safeguards built into it.

Paragraph 1 calls for the identification at each meeting of “*those vessels which have engaged in fishing activities for species covered by the Convention Area in a manner which have undermined the effectiveness of the WCPF Convention and the WCPFC measures in force*” and to establish a list of such vessels.

It will be noted that there is no reference here to vessels coming within the scope of paragraph 3.j here, as the paragraph assumes that the vessels have been “engaged in fishing activities”.

In paragraph 2, it is stated:

*2. This identification shall be suitably documented, inter alia, on reports from Members, Cooperating Non-Members and Participating Territories (collectively CCMs) relating to WCPFC Conservation measures in force, trade information*

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<sup>3</sup> SEAFO Conservation Measure 08/06; AIDCP Res A-04-07; IATTC Res C 05-07.

<sup>4</sup> That is not to say that there are no important differences between them. For the purpose of this study, it is not necessary analyse these differences further. The following have been looked at: CCAMLR Conservation measure 10-06 (2008) Scheme to Promote Compliance by Contracting Party vessels with CCAMLR Conservation Measures; CCAMLR Conservation Measure 10-07 (2008) Scheme to Promote Compliance by non Contracting Party Vessels with CCAMLR Conservation measures; IATTC Resolution C 05-07: Resolution to Establish a List of Vessels Presumed to have Carried out Illegal Unreported and Unregulated Fishing Activities in the Eastern Pacific Ocean; ICCAT Recommendation 06-12 to Establish a List of Vessels Presumed to have carried out Illegal, Unreported and Unregulated Fishing Activities in the ICCAT Convention Area. Amended: 07-09, Recommendation By ICCAT Amending ICCAT's List Of Fishing Vessels Presumed To Be Engaged In Illegal, Unreported And Unregulated (IUU) Fishing Activities In The ICCAT Convention Area And Other Areas; IOTC Resolution 09/03 On establishing a List of Vessels Presumed to have Carried out Illegal, Unreported and Unregulated Fishing in the IOTC Area; Resolution C-05-7 Resolution To Establish A List Of Vessels Presumed To Have Carried Out Illegal, Unreported and Unregulated Fishing Activities In The Eastern Pacific Ocean; Resolution A-04-07 Resolution To Establish A List Of Vessels Presumed to have Carried Out Illegal, Unreported And Unregulated Fishing Activities In The Agreement Area; NAFO Conservation and Enforcement Measures 2009 Chapter VI, Article 56. NEAFC Scheme of Control and Enforcement Article 44.

*obtained on the basis of relevant trade statistics such as Food and Agriculture Organization of the United Nations (FAO) data, statistical documents and other national or international verifiable statistics, as well as any other information obtained from port States and/or gathered from the fishing grounds that is suitably documented. Information from CCMs should be provided in the format approved by the Commission.*<sup>5</sup>

Under paragraph 3, it is said:

*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.*

It will be noted that all of the sub paragraphs directly involve a fishing activity (including, for present purposes, non reporting of catches in paragraph c, and transshipment in paragraph g) except for sub-paragraph j. Here the wrongdoing consists of an association with the owner of a vessel that has been placed on the IUU vessel list, and who has control over the vessel about to be placed on the draft IUU list.

The subsequent paragraphs then set out a form of due process to reduce the risk of a vessel being placed wrongly on the list.

Thus, paragraph 4:

*4. At least 120 days before the annual meeting of the Technical and Compliance Committee (TCC), CCMs shall transmit to the Executive Director their list of vessels*

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<sup>5</sup> So far, no format has been developed by the Commission.

*presumed to be carrying out IUU activities in the Convention Area during the current or the previous year, accompanied by suitably documented information, as provided in para 2, concerning the presumption of this IUU activity.*

Paragraph 5 makes provision for notification to the flag State either directly or through the Executive Director that one of its vessels has been included on the draft list. Importantly, the paragraph adds: *“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.”*

Paragraph 6 provides for the Executive Director to prepare a *“draft IUU Vessel list”* which incorporates the lists of vessels and *“suitably documented information received pursuant to paragraph 4 and any other suitably documented information at his disposal”*. He is to transmit this to all CCMs and to non CCMs with vessels on the list *“together with all the supporting information”* at least 90 days before the TCC annual meeting.

Paragraph 7 requires that the Executive Director shall request each CCM and non CCMs with vessels on the draft list to notify the owner of the vessels of their inclusion on the list and the *“consequences of their inclusion being confirmed”* on the final IUU Vessel List.

It will be important to make sure here that the flag State is contacted where the vessel comes under paragraph 3.j, as the flag State of the vessel already on the IUU Vessel list may well be different from the one being placed on the draft IUU List.

Paragraph 8 imposes an obligation on CCMs to *“closely monitor”* their vessels included on that list *“in order to follow their activities and possible changes of name, flag or registered owner.”* This obligation does not extend to non CMMs, and it would not be possible to impose this as an obligation on them. Consideration could be given to inserting a clause which urged them to do the same. (The proposal set out later incorporates this suggestion.)

Under paragraph 9, CCMs and non-CMMs should transmit to the Executive Director at least 30 days before the annual meeting of the TCC their comments, including suitably documented information, showing that the vessels have fished consistently with the WCPFC conservation measures, or the regulations of a State when fishing in waters under the jurisdiction of a State, or have fished exclusively for species not covered by the WCPF Convention.

There is an important gap between paragraph 9 and paragraph 3.j. Paragraph 3.j. leads to a vessel being placed on the provisional list on the basis that it is *“under the control of the owner of any vessel on the WCPFC IUU Vessel List”*, which involves no fishing activity in itself. However, paragraph 9 refers specifically to vessels that have fished in a manner consistent with the WCPFC measures, etc. Of course, it would be possible to place a vessel on the provisional list but then leave it to the flag State to demonstrate that, despite its being under the control of the owner of a vessel on the IUU vessel list, it has fished in accordance with the requirements of paragraph 9.

However, to be fully consistent with paragraph 3.j, it would be necessary to add here that the flag State of the vessel can submit suitably documented evidence that the vessel is not under the control of an owner of a vessel on the WCPFC IUU Vessel List.

Under paragraph 10, the Executive Director is to recirculate the list within two weeks of the TCC meeting to the CCMs and non CCMs concerned *“all the suitably documented information provided”* under the preceding paragraphs. However, under paragraph 11, *“additional suitably documented information may be submitted at any time”*. The Executive Director is to circulate this information immediately to all of the CCMs and non CCMs concerned.

Provision is then made for the preparation of a provisional and current IUU vessel list. (paragraphs 12 and 13)



In paragraph 14, the TCC at its annual meeting shall, “*following consideration of the draft IUU Vessel List and the suitably documented information circulated*” under paragraph 12 and 13, adopt a Provisional IUU Vessel List, and, where appropriate, recommend to the Commission the removal of a vessel from the current WCPFC IUU Vessel List.

Under paragraph 15, if the flag State can demonstrate certain facts, the vessel shall not be included on Provisional IUU Vessel list by the TCC. These are:

- a. The vessel fished in a manner consistent with WCPFC Conservation Measures or the laws and regulations of a State when fishing in waters under the jurisdiction of that State, or have fished exclusively for species not covered by the WCPFC Convention, or*
- b. Effective action has been taken in response to the IUU fishing activities in question, such as, inter alia, prosecution or the imposition of sanctions of adequate severity; or*
- c. That the case regarding the vessel or vessels that conducted IUU fishing activities has been settled to the satisfaction of the CCM that originally submitted the vessel for listing and the flag State involved.*

The same issue arises here as with paragraph 9 above. It could be interpreted to mean that the flag State could demonstrate that, even though a vessel is under the control of the owner of a vessel on the IUU vessel list, it has nonetheless conformed to paragraphs a to c of paragraph 15.

However, paragraph 3.j seems to be aimed at placing on the list a vessel that is under the control of the owner of a vessel which is already on the list irrespective of whether the vessel has met the requirements of paragraph 15. It has been assumed in this study that it is intended to include a vessel on the list if it is under the control of a vessel already on the IUU Vessel List, and even if it is complying with sub paragraphs a to c of paragraph 15. However, it is recommended that the TCC should nonetheless have a discretion to recommend non inclusion or removal from the list in certain circumstances, for example where the element of control or ownership is very low, the owner is unlikely to be able to be able to influence the fishing operations of the vessel, and the vessel is fishing in accordance with these sub paragraphs

Certain safeguards are provided:

First, under paragraph 16, the TCC shall not include a vessel on the Provisional IUU Vessel list if the notifying CCM did not follow the provisions of paragraph 5.<sup>6</sup>

Second, under paragraph 17, the TCC is only permitted to recommend the removal of a vessel from the current WCPFC IUU Vessel List if the flag State of the vessel submits the information provided for in Paragraph 25. Basically, these relate to the duties of a flag State, and its efforts to exercise effective control over the vessel. In one important respect, Paragraph 25 is compatible with paragraph 3.j as one of the bases for the TCC recommending the removal of a vessel from the WCPFC IUU Vessel List is that the flag State has submitted suitably documented information demonstrating that d) “*the vessel has changed ownership and that the new owner can establish that the previous owner no longer has any legal, financial or real interests in the vessel or exercises control over it, and that the new owner has not participated in IUU fishing activities*”. The only problem here is that the language does not permit a judgment to be made concerning any degrees of control or ownership. As will be seen below, a proposal is put forward which will allow the TCC to recommend the removal of a vessel from the List where the level of control or ownership is very low.

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<sup>6</sup> The latter paragraph states in part: “*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.*”

Under paragraph 20, the Commission reviews the Provisional IUU Vessel List, taking into account any new suitably documented information, and any recommendations to amend the current WCPFC IUU Vessel List. CCMs and non CCMs are urged to provide any “*new suitably documented information*” at least two weeks before the annual meeting of the Commission.

### **III Other provisions of the CMM dealing with ownership and control.**

In the same CMM, the question of ownership and control is addressed. Thus, paragraph 8 refers to CCMs monitoring the “*change of registered owner*” of vessels placed on the provisional list. However, in paragraph 19, it is stated that the Provisional IUU vessel List and the IUU Vessel List shall contain “(iii) *owner and previous owners, including beneficial owners, if any.*”

Paragraph 25, as we have already seen, which deals with removal from the IUU Vessel List, refers to CMMs and non CMMs requesting the removal of a vessel from the list during the intersessional period by demonstrating that: “(d) *the vessel has changed ownership and that the new owner no longer has any legal, financial or real interests in the vessel or exercises control over it, and that the new owner has not participated in IUU fishing activities.*”

Paragraph 25 refers to the new owner not having “*any*” legal, financial or real interests or exercises control over the vessel in question. In other words, these provisions are used without qualification: there are no degrees of control or ownership permitted. This is also important for the following reason: the vessel can be removed from the list only if it is established that the new owner has no interest whatsoever in the previous ownership of the vessel. Likewise, under paragraph 3.j, no degree of control, or ownership, is indicated.<sup>7</sup>

In view of the fact that the CMM uses these terms throughout in this way, no attempt has been made in the first proposed solution below to deal with paragraph 3.j by using degrees of control or ownership.

It does raise an important policy consideration, however, as the Commission might wish to insert a provision that gives it the discretion to remove from the WCPFC IUU Vessel List a vessel that is under the control of the owner of another vessel on that List where the extent of control or ownership is low, to the point that it would be impossible for the owner to exercise any effective control over the fishing operations of the vessel.

A draft option has been included below should the Commission or TCC wish to pursue this further.

### **IV The problem addressed by paragraph 3.j.**

The clear objective of paragraph 3.j is to prevent vessels with a previous involvement in IUU fishing to be able to carry on such fishing simply by changing registration, when the control or ownership of the vessel remains substantially unchanged. However, it is well known that questions of control, ownership and registration can become very complex.

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<sup>7</sup> CMM 2004-01 (Record of fishing vessels) places the following obligation on Members of the Commission:

*(f) ensure that no authorization to fish in the Convention Area is issued to a vessel that has a history of illegal, unreported or unregulated (IUU) fishing, unless the ownership of the vessel has subsequently changed and the new owner has provided sufficient evidence demonstrating that the previous owner or operator has no legal, beneficial or financial interest in, or control of the vessels, or the member concerned is satisfied that, having taken into account all relevant facts, the vessel is no longer engaged in or associated with IUU fishing;*

The problems here have been widely discussed and it is not necessary explore this in great detail. Two quotations will suffice to illustrate what is a well recognised problem in the Law of the Sea in general, and in Maritime Law.

In the first place, a ship may well have more than one owner (who may be natural or legal persons). The matter was put very well by Gold, Chircop and Kindred in Maritime law, in the context of Canadian shipping law, and their comments would apply with only slight adaptation to many other countries.

In reference to the situation under the Canada Shipping Act, they said:

*“Like a corporation, a ship is divided into shares, and, just as the shareholder owns a part of the corporation, the share-owner owns a part of the registered ship. However unlike a corporation, ....a registered ship is divided into only sixty four shares. In comparison, registered ships in Italy are divided into twenty-four shares, and in Cyprus and Liberia, into 100 shares.... In turn each share or part of a share, may be corporately owned, at least in relation to commercial vessels.....The actual owner of a ship or share should be distinguished from other persons who may have possession or control of the ship. In maritime law, the rights and duties of actual owners are frequently extended to a larger range of persons who may have chartered, or have management, operation or control of the ship.” (pp 153 -4)<sup>8</sup>*

In the particular context of fishing vessels, the problem of flags of convenience (FOC) and the related problem of ascertaining the real or beneficial ownership of a vessel has been very well documented. In a recent study, the matter was described in the following terms:

*“Most FOC vessels are registered to fictitious or shell companies, often located in the country that has issued the flag. Since the owners of FOC vessels often deliberately try to maintain a ‘legally invisible link’ between themselves – the ‘beneficial owner’ – and the company publicly listed as the registered owner of a vessel, the name, nationality and country of residence is usually carefully hidden.”<sup>9</sup>*

What these passages quoted above highlight is that it will be very difficult to come up with a definition of “control” or “ownership” that will readily satisfy the objectives of this resolution. The problem is also a real one in that, while many vessels undoubtedly use flags of convenience and have a widely dispersed ownership arrangement as part of a strategy for undertaking IUU fishing, others may have such ownership arrangements for legitimate business reasons.

Underlying this is the added problem of chartering of vessels, including bareboat chartering. Not all countries have the same rules with respect to chartering, and it provides another means of obscuring the question: who effectively controls or owns the vessel in question. In the WCPFC CMM under consideration, chartering is referred to only once, in paragraph 22, where it requires CMMs to “c. prohibit the chartering of a vessel on the WCPFC IUU Vessel List.” Like the rest of the CMM, it is a blanket prohibition on chartering; it does not treat bareboat chartering as a special case.

It was tempting to propose an arbitrary figure on which to base a decision by the TCC as to whether there existed a sufficient degree of ownership or control (e.g. 25% or more of the shareholding in a vessel). It is well known, however, that even when there is a higher level of

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<sup>8</sup> Edgar Gold, Aldo Chircop, and Hugh Kindred, *Maritime Law*, Irwin Law, 2004.

<sup>9</sup> “How flags of convenience provide cover for illegal, unreported and unregulated fishing” By M Gianni and W Simpson Published by WWF, DAFF (Australian Government) and ITF, October 2005, p.15

shareholding, this still may not lead to control. Much will depend on how the shares are structured: for example, there may be voting and non voting shares, there might be a management committee which effectively runs the company, and therefore the vessel, and several similar devices even though the actual shareholding is very low. Further, as the above quote from Gold, Kindred and Chircop reveals, the laws applicable will vary quite significantly from one country to another.

It is highly unlikely therefore that a clear measure of control or ownership can be reached that will make sense in the myriad of instances that could arise.

For the above reasons, no attempt has been made in this paper to attempt to define degrees of control or ownership as one of the means of implementing paragraph 3.j. Further, CMM 2007-03 places the primary responsibility on the flag State to make out the case for its vessels not to be included on the List. This accords with the view of the International Tribunal on the Law of the Sea in the Saiga No 2 case.<sup>10</sup>

## **V International Legal Responsibility**

There is one particular reason why care should be taken in preparing an IUU list, and which has a direct bearing on paragraph 3.j. If the list has been formulated incorrectly, and a vessel is placed on it with the result that the vessel operator has incurred considerable financial loss, it would be possible in certain circumstances for the flag State of the vessel to bring a claim against WCPFC Commission (and possibly against the State which provide the incorrect information). International law is not all that clear here, and the International Law Commission is currently studying the matter. However in view of the international legal personality accorded to WCPFC under its Convention<sup>11</sup>, it would be possible for a flag State to make a claim to the WCPFC on the international plane if it were established that the Commission had undertaken conduct which was attributable to it and if it amounted to a breach of an international obligation.<sup>12</sup>

Also, this risk should not be overstated. An important consideration here would be whether the procedures in place in CMM 2007-03 provided the flag State of the vessel the opportunity to furnish information that would avoid the wrongful inclusion on the list. If the procedures for putting a vessel on the list were applied fairly, and the flag State had an adequate opportunity to present its case, the risk of wrongful inclusion on the list should be small.<sup>13</sup>

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<sup>10</sup> See footnote 14 below.

<sup>11</sup> Article 9.6.

<sup>12</sup> Work is currently being undertaken at FAO to identify the criteria for the exercise of flag State responsibility. However, this is still at an early stage. It could lead to the development of a broad based approach where certain flag States were subject to sanctions because they had continuously failed to control their vessels. For two interesting developments along these lines, see Council Regulation (EC) no 1005/2008 of 29 September 2008 establishing a Community System to prevent, deter and eliminate illegal, unreported and unregulated fishing, and the US Magnuson-Stevens Fishery Conservation and Management Re-authorisation Act: Proposed Rule to Implement Identification and Certification Procedures to Address Illegal, Unreported and Unregulated (IUU) Fishing Activities and Bycatch of Protected Living Marine Resources, Federal Register Vol 74 No 9 (January 14 2009)

<sup>13</sup> It should also be noted that some vessels, even though under the control of the owner of a vessel on the IUU list, might be fishing on the high seas within the WCPFC Area, and if their flag State is not a CMM of WCPFC, and is not a party to the 1995 UN Fish Stocks Agreement, it might be argued that it is exercising the freedom of the seas with respect to fishing. If such a vessel is placed on the list and in consequence suffers loss attributable to this, it may also lead to responsibility on the part of the WCPFC. It would of course be up to the flag State to decide whether or not to pursue such a course of action. In view of the fact

## VI Problems with paragraph 3.j

The principal concern with paragraph 3.j is that it does not fit well into the scheme of CMM 2007-03. As has been indicated above, several of the passages do not reflect paragraph 3.j. For example in several of the provisions, no opportunity is provided to have a vessel not placed on the list or removed from the list, if the vessel is not under the control of an owner of a vessel already on the WCPFC IUU Vessel List.

Further, it is punishing an activity which does not involve fishing (or other activities closely associated with fishing such as transshipping or a failure to report, or misreporting, catches). It is the association that puts the vessel on the draft IUU vessel list, even though the vessel to be placed on the list may be conducting itself properly in the area covered by WCPFC. Indeed, it might not be undertaking fishing in the WCPF Convention Area.

Reliance on the link of association does not in itself appear to be contrary to international law. However, it is important to ensure that there is careful consideration given to each vessel before it is placed on the list as there may be situations where the link between the vessel about to be placed on the list and the vessel already on the list is too remote, for example, because the level of ownership or control is very slight, and the vessel has not been engaged in fishing within the WCPF Convention Area, or if it has, it has conformed to the requirements of the WCPF Convention. In such a situation, it is possible that the flag State of the vessel could make a claim to WCPFC that the vessel has been wrongly placed on the list and has in consequence suffered economic loss.<sup>14</sup> For example, under CMM 2007-03, paragraph 22 b, it is provided that CMMs are to “ensure that vessels on the WCPFC IUU Vessel List that enter ports voluntarily are not authorized to land, tranship, refuel or re-supply therein but are inspected upon entry.”

International law is still unclear here, and is still evolving. However, it would be useful to build into the procedure an opportunity for the TCC to exercise discretion in certain circumstances not to list a vessel simply because it is under the control of the owner of a vessel already on the IUU vessel list.

## VII A proposal

Paragraph 30 gives the TCC the power of review and, as appropriate, revision of the CMM. The TCC might want to revise CMM 2007-03 along the following lines set out below. The principal purpose is to give effect to the intent underlying paragraph 3.j by making it fit more effectively into the structure of CMM 2007-03.

It has been found easier to put forward the proposal as an amendment to the present CMM, as the main problem is with the procedure. Further, the mandate was to present a “draft procedure for consideration”.

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that the WCPFC has decided to close these high seas pockets, this may well be a risk that the Commission would prefer to take. Again, the risk, while real in a legal sense, should not be overstated.

<sup>14</sup> I have referred only to the flag State here. This is consistent with the approach in the *Saiga No 2* case (ITLOS), where it was said in the main opinion: “*The provisions referred to in the preceding paragraph indicate that the [1982 UN] Convention considers a ship as a unit, as regards the obligations of the flag State with respect to the ship and the right of a flag State to seek reparation for loss or damage caused to the ship by acts of other States and to institute proceedings under article 292 of the Convention. Thus the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant.*” (paragraph 106). However, it cannot be ruled out that other States might be able to take up a claim on behalf of a vessel in certain circumstances, for example, if there was a complex chartering arrangement. See also footnote 11 above.

Where a CCM presents suitably documented evidence that a vessel is under the control of the owner of a vessel on the WCPFC IUU Vessel IUU List, the following shall apply:

1. Paragraph 1 shall have added to it after the words “measures in force’ the following:” or which are under the control of the owner of any vessel on the WCPFC IUU Vessel List”.

Explanation: At present, paragraph 1 only refers to fishing activities, but does not refer to vessels that come within paragraph 3.j. this addition overcomes that gap.

2. Paragraph 4 of CMM 2007-03 shall be extended to apply to vessels under the control of the owner of a vessel on the WCPFC IUU vessel list. This can be achieved by adding to it to it after “previous year” the following: “*as well as any vessels presumed to be under the control of an owner of a vessel on the WCPFC IUU Vessel List*”.

Explanation: paragraph 4 refers to the CCMs transmitting to the Executive Director “*their list of vessels presumed to be carrying out IUU fishing activities...*”. However, paragraph 3.j does not necessarily depend on the finding that the vessel has engaged in “IUU” fishing activities. It requires merely the establishment of the association with the vessel on the WCPFC IUU Vessel List, that association being “*under the control of the owner*” of such a vessel.

3. Paragraph 8 should be extended by adding to it: “*Non CMMs whose vessels are on the draft IUU vessel list are urged to monitor the vessels on that list in order to follow their activities and possible changes of name, flag or registered owner.*” This substantially repeats paragraph 8, however, it “urges” non CMMs to do the same as CMMs. This is because, not being parties to the WCPF Convention, or cooperating non contracting parties, they cannot be placed under an obligation to do so.

4. Paragraph 9 should have added to it:

“*or that the vessels are not under the control of the owner of a vessel on the WCPFC IUU Vessel List*”.

Explanation: Paragraph 9 as it stands only refers to vessels having “*fished in a manner consistent with WCPFC conservation measures or the laws and regulations of a State when fishing in waters under the jurisdiction of that State, or have fished exclusively for species not covered by the WCPFC Convention.*” The addition to paragraph 9 gives the flag State the opportunity to demonstrate that the vessel in question is not under the control of the owner of a vessel on the WCPFC IUU Vessel List.

5. Paragraph 15 should have added to it the following:

“*d. The vessel is not under the control of an owner of any vessel on the WCPFC IUU Vessel list.*”

Explanation: Paragraph 15 currently allows the flag State to demonstrate that the vessel has fished consistently with WCPFC conservation measures, etc, or that effective action has been taken, for example, by the imposition of sanctions of adequate severity, or that the matter has been settled to the satisfaction of the CCM that originally submitted the vessel for listing.

As with paragraphs 4 and 9 above, it is necessary to allow the flag State to make out a case that the vessel is not under the control of the owner of a vessel on the WCPFC IUU Vessel List.

6. Paragraph 19 should have added to it the following:

In sub paragraph (iii), after “*beneficial owners*” add “*or other natural or legal persons capable of exercising control over the vessel.*”

Explanation: These extra words reflect paragraph 3.j. This extra information will probably be difficult to obtain, but if it is available, it should be included along with information on

ownership, including beneficial ownership. The addition will permit the keeping of information, where it is available, of the element of “control” over a vessel.

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The above proposal relies on the existing wording of CMM 2007-03 by avoiding reference to degrees of control or ownership. As mentioned, it was also the mandate of this study to focus on paragraph 3.j as it stands.

However, a weakness of the above proposal could be that it does not provide any flexibility to the TCC or the Commission not include a vessel on the list or to remove it from the list where the extent of the control or ownership was very slight and did not lead to a situation where the owner of a vessel already on the list could influence events on board. For example, a vessel might be under a very limited degree of control because of the complex shareholding in the vessel itself but the flag State of the vessel might have demonstrated that, despite the existence of such control or ownership, it had fully complied with all relevant conservation measures, and the other points referred to in paragraph 25.

The TCC might therefore wish to consider the addition of a provision to paragraph 15 as follows:

*2. The TCC may decide that a vessel should not be placed on the draft or Provisional IUU List if it is satisfied, in the light of all the information available to it, including any information provided by the flag State that:*

*a. the extent of the control of an owner of a vessel already on the WCPFC Vessel list is of such a character that the owner of the vessel on the WCPFC IUU vessel List is unlikely to be able to influence the fishing activities of a vessel that has been placed on the draft or provisional list; or*

*b. if it has been undertaking fishing in the Convention area, the vessel has fished in a manner consistent with WCPFC Conservation Measures or the laws and regulations of a State when fishing in waters under the jurisdiction of a State, or has fished exclusively for species not covered by the WCPFC Convention.*

Explanation: This proposal avoids attempting to define “control” or ownership”, which, as has been demonstrated under IV above, is likely to prove elusive. Instead, it give the TCC some flexibility to prevent a vessel being placed on the List if, for example, there is only a minor element of control over the vessel. This would be very appropriate where the extent of control or ownership did not enable the owner of the vessel that is already on the IUU Vessel List to influence the fishing operations of the vessel, or the vessel in question has been fishing consistently with WCPFC conservation measures, etc.

In addition to the situations covered in the above sub paragraph 2, it might be useful to give the TCC a more general discretion not to include a vessel on the list, for example, because the particular facts gave rise to uncertainty over the applicable international law and the potential for incurring international legal liability. For example, the vessel about to be placed on the list by its association with a vessel already on the WCPFC IUU vessel List might be undertaking fishing in the high seas areas of the WCPFC Area. If the flag State was not a party to WCPFC Convention or the 1995 UN Fish Stocks Agreement, the view might be taken that it was exercising a high seas freedom of fishing. Indeed, it can be expected that there will be both uncertainty or disagreement on these questions for the time being, and that views on such issues are likely to evolve.

The following provision would give the Commission discretion not to place the vessel on the List.

*3. Notwithstanding sub paragraphs 1 and 2, the TCC may decide, in the light of all of the available information, including that of the flag State, that a vessel under the control of the owner of a vessel on the WCPFC IUU Vessel list shall not be placed on the draft or provisional list.*

CMM 2007-03 with the above proposed changes highlighted is set out in **Annex II**.



## **Annex I**

### **Terms of reference**

#### **Introduction**

*Paragraph 3(j) of CMM 2007-03 [IUU Fishing] permits the inclusion on the WCPFC IUU Vessel List of vessels that have not themselves engaged in IUU fishing activities but are associated with such vessels by reason of ownership or control. The majority of CCMs favour retaining this paragraph while the minority favour its removal.*

*At the Fourth Regular Session of the Technical and Compliance Committee (TCC4) CCMs agreed to recommend to the Commission not to apply para. 3(j) of CMM 2007-03 as a criterion for IUU listing in developing the Draft IUU Vessel List in 2009. During this period the Secretariat, in consultation with interested CCMs, will develop additional procedures to give effect to this paragraph for discussion at TCC5. The Fifth Regular Session of the Commission (WCPFC5) endorsed this recommendation.*

#### **Objective**

*To develop additional procedures to give effect to para. 3(j) of CMM 2007-03 for discussion at TCC5.*

#### **Scope**

*The scope of work under this consultancy will require the preparation of a paper on:*

- 1. the background to paragraph 3 (j) of CMM 2007-03;*
- 2. the extent to which a similar provision has been included in CMMs of other RFMOs, and the extent to which, if at all, steps have been taken to implement it;*
- 3. preparation of a draft procedure for consideration at TCC5 that is consistent with paragraph 3(j) of CMM 2007-03; and*
- 4. preparation of an explanatory note of the issues underlying the proposed procedure.*

#### **Outputs**

*A concise review report containing the findings of the consultancy.*

**Annex II**  
**Fourth Regular Session**  
**Tumon, Guam, USA**  
**2–7 December 2007**

**CONSERVATION AND MANAGEMENT MEASURE TO ESTABLISH A LIST OF VESSELS PRESUMED TO HAVE CARRIED OUT ILLEGAL, UNREPORTED AND UNREGULATED FISHING ACTIVITIES IN THE WCPO**

**Conservation and Management Measure 2007-03**

*The Western and Central Pacific Fisheries Commission (WCPFC):*

*Recalling* that the FAO Council adopted on 23 June 2001 an International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing (IPOA-IUU). This plan stipulates that the identification of the vessels carrying out illegal, unreported and unregulated (IUU) fishing activities should follow agreed procedures and be applied in an equitable, transparent and non-discriminatory way.

*Concerned* that IUU fishing activities in the Convention Area undermine the effectiveness of the conservation measures adopted by the WCPFC.

*Further concerned* that there is a possibility that vessel owners engaged in such fishing activities may have re-flagged their vessels to avoid compliance with WCPFC measures.

*Determined* to address the challenge of an increase in IUU fishing activities by way of measures to be applied in respect to vessels, without prejudice to further measures adopted in respect of CCMs and non CCMs under the relevant WCPFC instruments.

*Considering* the action undertaken in other regional tuna fisheries organizations to address this issue;

*Conscious* of the need to address, as a matter of priority, the issue of vessels conducting IUU fishing activities;

*Noting* that efforts to prevent, deter and eliminate IUU fishing must be addressed in the light of all relevant international fisheries instruments and in accordance with other international obligations, including the rights and obligations established under the World Trade Organization (WTO) Agreement; and

*Recalling* Articles 23 and 25 of the WCPF Convention regarding the obligations of members of the Commission and provisions for compliance and enforcement;

*Adopts the following conservation and management measures in accordance with Article 10 of the Convention:*

**Identification of IUU activities**

1. At each annual meeting, the Commission will identify those vessels which have engaged in fishing activities for species covered by the Convention within the Convention Area in a manner which has undermined the effectiveness of the WCPF Convention and the WCPFC measures in force, or which are under the control of the owner of any vessel on the WCPFC IUU Vessel List and shall establish, and, as necessary, amend in subsequent years, a list of such vessels (the IUU Vessel List), in accordance with the procedures and criteria set out in this conservation measure.

2. This identification shall be suitably documented, *inter alia*, on reports from Members, Cooperating Non-Members and Participating Territories (collectively CCMs) relating to WCPFC

Conservation measures in force, trade information obtained on the basis of relevant trade statistics such as Food and Agriculture Organization of the United Nations (FAO) data, statistical documents and other national or international verifiable statistics, as well as any other information obtained from port States and/or gathered from the fishing grounds that is suitably documented. Information from CCMs should be provided in the format approved by the Commission.

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 WCPF 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.

#### **Information on alleged IUU fishing activities**

4. At least 120 days before the annual meeting of the Technical and Compliance Committee (TCC), CCMs shall transmit to the Executive Director their list of vessels presumed to be carrying out IUU activities in the Convention Area during the current or the previous year, as well as any vessels presumed to be under the control of the owner of a vessel on the WCPFC IUU Vessel List, accompanied by suitably documented information, as provided in para 2, concerning the presumption of this IUU activity.

5. 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.

### **Draft IUU Vessel List**

6. The Executive Director shall draw up a draft IUU Vessel List incorporating the lists of vessels and suitably documented information received pursuant to para 4, and any other suitably documented information at his disposal, and shall transmit it, together with all the supporting information provided, to all CCMs, as well as to non-CCMs with vessels on the list, at least 90 days before the TCC's annual meeting.
7. The Executive Director shall request each CCM and non-CCM with vessels on the draft IUU Vessel List to notify the owner of the vessels of their inclusion in that list, and of the consequences of their inclusion being confirmed in the IUU Vessel List.
8. Upon receipt of the draft IUU Vessel List, CCMs shall closely monitor the vessels included in that list in order to follow their activities and possible changes of name, flag or registered owner. *Non CMMs whose vessels are on the draft IUU vessel list are urged to monitor the vessels on that list in order to follow their activities and possible changes of name, flag, and registered owner.*
9. As appropriate, CCMs and non-CCMs with vessels on the list should transmit, at least 30 days before the TCC's annual meeting, their comments to the Executive Director, including suitably documented information, showing that the vessels have fished in a manner consistent with WCPFC conservation measures or the laws and regulations of a State when fishing in waters under the jurisdiction of that State, or have fished exclusively for species not covered by the WCPFC Convention, *or that the vessels are not under the control of the owner of a vessel on the WCPFC IUU Vessel List.*
10. The Executive Director shall re-circulate the draft IUU Vessel List, two weeks in advance of the TCC's annual meeting, to the CCMs and the non-CCMs concerned, together with all the suitably documented information provided pursuant to paras 4 and 9 above.
11. CCMs and non-CCMs may at any time submit to the Executive Director any additional suitably documented information regarding any vessels on the draft IUU Vessel List. The Executive Director shall circulate this additional information to all CCMs and to the non-CCMs concerned immediately upon receipt of such information.

### **Provisional and current IUU Vessel List**

12. The WCPFC's IUU Vessel List adopted during the previous year, as well as any new suitably documented information regarding this list, including intersessional amendments, shall be transmitted to CCMs and the non-CCMs concerned in conjunction with the draft IUU Vessel List and materials outlined in para 6.
13. CCMs and non-CCMs with vessels on the current WCPFC IUU Vessel List should transmit at least 30 days before the annual meeting of the TCC, but may submit at any time, to the Executive Director suitably documented information regarding any of the vessels on the current WCPFC IUU Vessel List, including, where appropriate, suitably documented information as provided for in paragraph 25. The Executive Director shall re-circulate the current WCPFC IUU Vessel List two weeks in advance of the annual meeting of the TCC to the CCMs and non-CCMs concerned, together with all the information provided pursuant to paragraph 12 and this paragraph.
14. At its annual meeting, the TCC shall:
  - (i) following consideration of the draft IUU Vessel List and the suitably documented information circulated under paras 6, 10 and 11, adopt a Provisional IUU Vessel List; and

(ii) following consideration of the current WCPFC IUU Vessel List and the suitably documented information circulated under paras 12 and 13, recommend to the Commission which, if any, vessels should be removed from the current WCPFC IUU Vessel List.

15. The TCC shall not include a vessel on the Provisional IUU Vessel List if the vessel's flag State demonstrates that:

a. The vessel fished in a manner consistent with WCPFC Conservation Measures or the laws and regulations of a State when fishing in waters under the jurisdiction of that State, or have fished exclusively for species not covered by the WCPFC Convention, or

b. Effective action has been taken in response to the IUU fishing activities in question, such as, *inter alia*, prosecution or the imposition of sanctions of adequate severity; or

c. That the case regarding the vessel or vessels that conducted IUU fishing activities has been settled to the satisfaction of the CCM that originally submitted the vessel for listing and the flag State involved; or

*d. The vessel is not under the control of the owner of a vessel on the WCPFC IUU Vessel List.*

**2. The TCC may decide that a vessel should not be placed on the draft or Provisional IUU List if it is satisfied, in the light of all the information available to it, including nay information provided by the flag State that:**

**a. the extent of the control of an owner of a vessel already on the WCPFC Vessel list is of such a character that the owner of the vessel on the WCPFC IUU vessel List is unlikely to be able to influence the fishing activities of a vessel that has been placed on the draft or provisional list; or**

**b. if it has been undertaking fishing in the Convention area, that the vessel has fished in a manner consistent with WCPFC Conservation Measures or the laws and regulations of a State when fishing in waters under the jurisdiction of a State, or has fished exclusively for species not covered by the WCPFC Convention.**

**3. Notwithstanding sub paragraphs 1 and 2, the TCC may decide, in the light of all of the available information, including that of the flag State, that a vessel under the control of the owner of a vessel on the WCPFC IUU Vessel list shall not be placed on the draft or provisional list.**

16. The TCC shall not include a vessel on the Provisional IUU Vessel List if the notifying CCM did not follow the provisions of para 5.

17. The TCC shall recommend removal of a vessel from the current WCPFC IUU Vessel List only if the vessel's flag State submits to the Executive Director the information provided in para 25 of this measure.

18. Following the examination referred to in para 14, the TCC shall submit the Provisional IUU Vessel List to the Commission for its consideration, and as appropriate, recommend any proposed changes to the current WCPFC IUU Vessel List.

19. The draft IUU Vessel List, Provisional IUU Vessel List, and the WCPFC IUU Vessel List shall contain the following details for each vessel:

(i) name and previous names, if any;

(ii) flag and previous flags, if any;

- (iii) owner and previous owners, including beneficial owners, or other natural or legal persons capable of exercising control over the vessel, if any;
- (iv) operator and previous operators, if any;
- (v) call sign and previous call signs, if any;
- (vi) Lloyds/IMO number;
- (vii) photographs, where available;
- (viii) date first included on the IUU Vessel List; and
- (ix) summary of activities which justify inclusion of the vessel on the list, together with references to all relevant documents informing of and evidencing those activities.

### **WCPFC IUU Vessel List**

20. At its annual meeting the Commission shall review the Provisional IUU Vessel List, taking into account any new suitably documented information related to vessels on the Provisional IUU Vessel List, and any recommendations to amend the current WCPFC IUU Vessel List made pursuant to paragraph 18 above, and adopt a new WCPFC IUU Vessel List. To the maximum extent possible CCMs and non CCMs shall provide any new suitably documented information at least two weeks before the annual meeting of the Commission.

21. Upon adopting the new WCPFC IUU Vessel List, the Commission shall request CCMs and non-CCMs with vessels on the WCPFC IUU Vessel List to:

- a. notify the owner of the vessels of its inclusion on the WCPFC IUU Vessel List and the consequences that result from being included in the list, and
- b. take all the necessary measures to eliminate these IUU fishing activities, including, if necessary, the withdrawal of the registration or the fishing licenses of these vessels, and to inform the Commission of the measures taken in this respect.

22. CCMs shall take all necessary non-discriminatory measures under their applicable legislation, international law and each CCMs' international obligations, and pursuant to paras 56 and 66 of the IPOA-IUU to:

- a. ensure that fishing vessels, support vessels, mother ships or cargo vessels flying their flag do not participate in any transshipment or joint fishing operations with, support or re-supply vessels on the WCPFC IUU Vessel List;
- b. ensure that vessels on the WCPFC IUU Vessel List that enter ports voluntarily are not authorized to land, tranship, refuel or re-supply therein but are inspected upon entry;
- c. prohibit the chartering of a vessel on the WCPFC IUU Vessel List;
- d. refuse to grant their flag to vessels on the WCPFC IUU Vessel List in accordance with para 1f, Section A, in Conservation and Management Measure 2004-01;
- e. prohibit commercial transactions, imports, landings and/or transshipment of species covered by the WCPFC Convention from vessels on the WCPFC IUU Vessel List;
- f. encourage traders, importers, transporters and others involved, to refrain from transactions in, and transshipment of, species covered by the WCPFC Convention caught by vessels on the WCPFC IUU Vessel List;

g. collect, and exchange with other CCMs, any appropriate information with the aim of searching for, controlling and preventing false import/export certificates for species covered by the WCPFC Convention from vessels on the WCPFC IUU Vessel List.

23. The Executive Director shall take any measure necessary to ensure publicity of the WCPFC IUU Vessel List, in a manner consistent with any applicable confidentiality requirements, including placing it on the WCPFC website. Furthermore, the Executive Director shall transmit the WCPFC IUU Vessel List to the FAO and to other regional fisheries organizations for the purposes of enhancing cooperation between the WCPFC and these organizations aimed at preventing, deterring and eliminating IUU fishing.

24. Without prejudice to the rights of CCMs and coastal states to take proper action, consistent with international law, including applicable WTO obligations, the CCMs shall not take any unilateral trade measures or other sanctions against vessels on the draft or Provisional IUU Vessel Lists, pursuant to paras 6 or 14, or that have been removed from the WCPFC IUU Vessel List, pursuant to paras 17 and 20, on the grounds that such vessels are involved in IUU fishing activities.

### **Modification of the WCPFC IUU Vessel List**

25. CCMs and non-CCMs with a vessel on the WCPFC IUU Vessel List may request the removal of the vessel from the list at any time during the intersessional period by submitting to the Executive Director suitably documented information demonstrating that:

- a) it has adopted measures that will seek to ensure that the vessel complies with all WCPFC measures; and
- b) it will be able to assume effectively flag state duties with regards to the monitoring and control of the vessel's fishing activities in the Convention Area; and
- c) it has taken effective action in response to the IUU fishing activities that resulted in the vessel's inclusion in the WCPFC IUU Vessel List, including prosecution or the imposition of sanctions of adequate severity; or
- d) the vessel has changed ownership and that the new owner can establish that the previous owner no longer has any legal, financial or real interests in the vessel or exercises control over it, and that the new owner has not participated in IUU fishing activities, or
- e) the case regarding the vessel or vessels that conducted IUU fishing activities has been settled to the satisfaction of the CCM that originally submitted the vessel for listing and the flag State involved.

26. The Executive Director will transmit the removal request, with all the supporting information, to the CCMs within 15 days following the receipt of the removal request. CCMs shall promptly acknowledge receipt of the removal request. If no acknowledgement is received within 10 days of the date of transmittal, the Executive Director shall retransmit the removal request and shall use additional means available to ensure the request has been received.

27. Each Commission Member shall examine the removal request and notify the Executive Director in writing of its decision, and the rationale therefore, regarding the removal of the vessel within 40 days following the notification by the Executive Director. Decisions on the request to remove the vessel shall be made in accordance with Rule 30 of the Rules of Procedure.

28. If Commission Members agree to the removal of the vessel from the WCPFC IUU Vessel List within the period stipulated in para 27, the Executive Director will inform CCMs, non-CCMs,

FAO and other regional fisheries management organizations, and will remove the vessel from the WCPFC IUU Vessel List, as published on the WCPFC website.

29. If Commission Members disagree with the request for the removal of the vessel from the IUU Vessel List, the vessel will be maintained on the WCPFC IUU Vessel List and the Executive Director will inform the CCMs and/or non-CCMs that made the removal request.

**Review**

30. This Conservation and Management Measure shall be subject to review and, as appropriate, revision by the TCC.