

trade hot topics

The New EC Regulation on Illegal Fishing: Implications for ACP Countries

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Background

On 29 September 2008, the Council of the European Union adopted EC No. 1005/2008 “establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing” (referred to hereafter as the IUU Regulation).¹ The new IUU Regulation, scheduled to enter into force on 1 January 2010, is intended to regulate the highly complex multi-channel fisheries supply system of the European Community (EC). The passage of the IUU Regulation is part of the efforts by the EC to strengthen its regional fisheries enforcement framework and international commitment to combat illegal, unreported and unregulated (IUU) fishing. The impending implementation of the IUU Regulation has a number of potential fisheries trade and developmental implications for members of the African, Caribbean and Pacific Group of States (ACP). This issue of *Commonwealth Trade Hot Topics* highlights some of these concerns based on a recent study commissioned by the Commonwealth Secretariat.

Overview of the IUU Regulation

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 Regulation seeks to address the EC’s objective of combating IUU fishing by imposing stringent trade-related measures against fishing vessels and foreign states that support such fishing or fail to provide adequate documentation regarding fisheries products.

The Regulation applies to IUU fishing and associated activities 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 the waters under the jurisdiction of a third state (Article 1).² It applies to fishing vessels 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

¹ COUNCIL REGULATION (EC) No. 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, amending Regulations (EEC) No. 2847/93, (EC) No. 1936/2001 and (EC) No. 601/2004 and repealing Regulations (EC) No. 1093/94 and (EC) No. 1447/1999.

² The IUU Regulation adopts a categorisation of IUU fishing in broad terms similar to those used in the Food and Agriculture Organization (FAO) International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing (IPOA-IUU) and those adopted by Regional Fisheries Management Organisations (RFMOs) (see IUU Regulation, Articles 2 and 3). 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 maritime waters of third countries.

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vessels equipped for the transportation of fishery products, except container vessels”.³ In terms of product coverage, it applies to products which fall under the Harmonised System (HS) Chapter 03 (fish, crustaceans and molluscs) and tariff headings 1604 (prepared or preserved fish) and 1605 (prepared or preserved crustaceans and molluscs) of the Combined Nomenclature established by Council Regulation (EEC) No. 2658/87 of 23 July 1987, with the exception of several products listed in Annex 1 of the IUU Regulation (Article 2). The control, sanctioning and conditionality elements at the heart of the Regulation include: port state controls over third country fishing vessels, catch certification requirements, establishment of a Community IUU vessel list, and establishment of a list of non-co-operating third countries.

Port control of third country fishing vessels

The Regulation requires that landings or transshipments by third country fishing vessels shall only take place in designated ports of EC member states and subject to specific conditions (Articles 4 and 5). These conditions include the submission by masters of third country fishing vessels of a prior notice of entry and specific information required by competent authorities of the relevant EC member state (Article 6). 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 fishery products on board (Article 6). Only after the catch certificate and other information have been verified can a third country fishing vessel be granted authorisation to access the port of an EC member state (Article 7).

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 (Article 9). The Regulation also requires the mandatory inspection of all fishing vessels that have been sighted or presumed to have conducted IUU fishing and have been reported in the Community alert system, or have been listed under the Regional Fisheries Management Organisation (RFMO) IUU List (Article 9). 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 to follow various notification procedures and prohibit the landing or transshipment of catch in port (Article 11).

Catch certification requirements

Under the IUU Regulation the importation of fishery products into the EC will be allowed only when the import is accompanied by a catch certificate, completed by the master of the fishing vessel and validated by the flag state of the vessel.⁴ Exportation and indirect importation of fishery products are also subject to the validation of a catch certificate by the competent authorities (Articles 14 and 15).

Catch documents and any related documents that are validated in conformity with catch documentation schemes adopted by an RFMO 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 (Article 13).⁵ In this respect, the IUU Regulation gives wide powers to the competent authorities of EC member states to carry out all of the controls they deem necessary for the validation of the catch certificate and other information provided (Article 17). A range of actions may also be taken by EC member states against third country fishing vessels that have not complied with the catch certification requirements, including the refusal to import fishery products from that fishing vessel (Article 18).

EC IUU vessel list

A central feature of the new EC Regulation is the creation of a Community IUU vessel list, which will contain information on vessels identified by the EC and the member states to have engaged in IUU fishing (Article 25). The vessel list will also include IUU vessels listed by RFMOs on their respective lists (Article 30).

The actions that may be taken by EC member states against vessels on the Community IUU vessel list are varied, and include: prohibitions on the grant of fishing authorisations; withdrawal of fishing permits;

³ IUU Regulation, Article 2(5). This definition is similar to the definition in several international and regional fisheries instruments and national fisheries legislation. See for example, Article 1(c), Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean.

⁴ This catch certificate template has similar content to the standard Dissostichus catch document form used by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) and the statistical document forms used by the Indian Ocean Tuna Commission (IOTC), International Commission for the Conservation of Atlantic Tunas (ICCAT), Inter-American Tropical Tuna Commission (IATTC), and Commission for the Conservation of Southern Bluefin Tuna (CCSBT).

⁵ RFMOs with existing catch documentation and statistical documentation schemes include CCAMLR, IOTC, ICCAT, IATTC, and CCSBT. These catch certification systems are established only for toothfish, swordfish, and some species of tuna.

refusal of access to EC ports and port services; confiscation of catches and gear; and prohibitions regarding the exportation and re-exportation of fisheries products (Article 37). Furthermore, fishing vessels flying the flag of EC member states are prohibited from assisting or engaging in fish processing operations, joint fishing operations or transshipment activities with fishing vessels on the Community IUU vessel list (Article 37).

EC list of non-co-operating third countries

A state may be identified as a non-co-operating third country if it fails to discharge the duties imposed upon it under international law as flag, port, coastal or market states and to take action to prevent, deter and eliminate IUU fishing activities (Article 31). The listing of such states is based on a number of considerations and factors, including: the examination of measures taken by the state to combat IUU fishing; whether the state concerned is co-operative with the EC in respect of investigations and responses to IUU fishing; the capacity of competent authorities in developing countries; ratification or accession to international fisheries instruments; and the nature of the state's participation in RFMOs (Article 31).

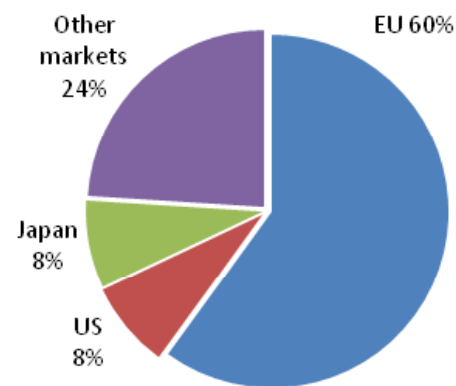
The IUU Regulation requires the prohibition on the importation into the EC of fishery products caught by fishing vessels flying the flag of non-co-operating third countries, and non-acceptance of catch certificates accompanying such products (Article 38). In cases where the identification of a non-co-operating 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 (Article 38). The IUU Regulation also provides for 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 agreements with such states (Article 38).

Fisheries Trade Implications of the IUU Regulation

The EC is the largest global market for fish, accounting for 40 per cent of global imports. In 2006, about 15 per cent of the total fisheries imports of EC came from ACP states with an estimated value of €1.4 billion. The economic significance of fisheries exports into the EC is much greater for the

ACP states, as approximately 60 per cent of fish and fishery products are currently exported by the ACP into the EU (Figure 1). However, the data on supplies of fisheries products to the EU by various regional groups show that East Asian, South-East Asian and Latin American exporters have now managed to close the significant gap in fisheries exports that the ACP had enjoyed during the late 1990s despite the fact that ACP member states are larger in number and have more diversified fishery products being exported to the EC.

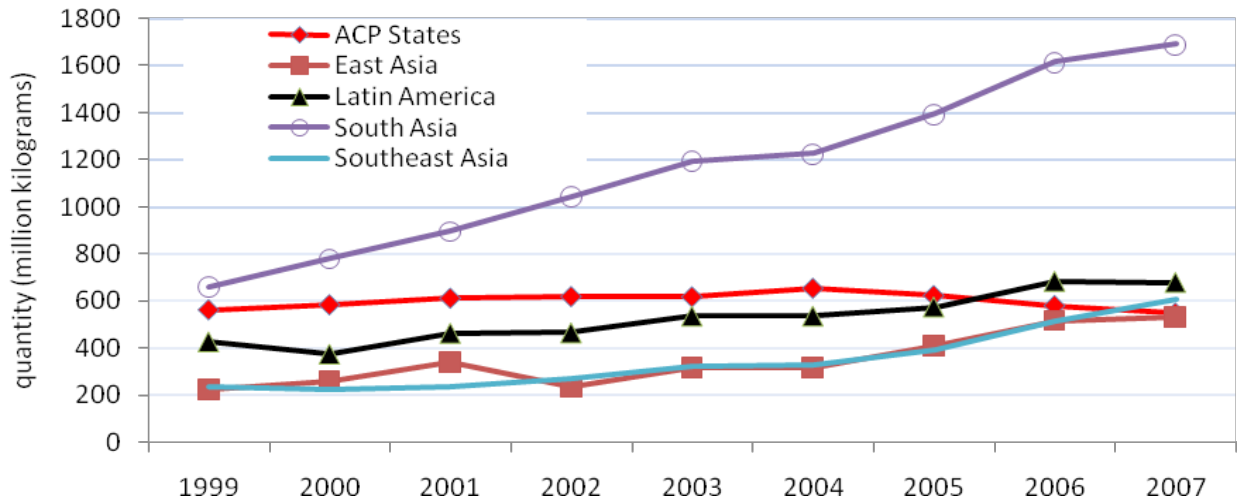
Figure 1. Destination of ACP Fisheries Exports, Value in US Dollars, 2006



Source: UN COMTRADE database



Figure 2. Fisheries Exports into the EU by Regions



Source: Data obtained from EuroStat External Trade Dataset

With the adoption of the IUU Regulation, there is a possibility for the ACP share of the EC fisheries market to be negatively impacted. While there is some scope for alternative markets for ACP fisheries exports to the USA and Japan, a point needs to be made that these markets are also moving towards establishing IUU control restrictions similar to the EC's IUU Regulation.⁶ In addition to trends in ACP-EC fisheries exports, the trade and development impacts of the IUU Regulation need to be assessed in light of the current framework for ACP-EC fisheries trade relations. Through the Cotonou Agreement, Economic Partnership Agreements (EPAs), as well as Interim Economic Partnership Agreements (IEPAs), ACP exports of fisheries products to the EC are given preferential tariff treatment, including duty-free and quota-free (DFQF) market access. The IUU Regulation has indirect impacts on DFQF access, Generalised Systems of Preference schemes (GSP) and Rules of Origin (ROO) applied under these arrangements.

Trade and development impacts: DFQF access under EPAs, IEPAs and GSP schemes

The IUU Regulation does not purport to modify the DFQF access granted pursuant to these trade frameworks, or amend any specific EC trade regulation as a result of its future implementation (Article 56). Similarly, the Regulation does not directly curtail access to the EC market by the current beneficiaries of the GSP, GSP-EBA and GSP+. However, the IUU Regulation may have indirect implications for the ability of ACP member countries to take advantage of DFQF access. Additional administrative requirements to implement the IUU Regulation may also have indirect impacts on the ability of GSP,

GSP-EBA and GSP+ beneficiaries to attain the basic objective of these market access arrangements, which is to promote economic development and poverty reduction. The indirect impediments to DFQF and GSP schemes access are twofold.

First, provisions of the IUU Regulation regarding port state control over third country fishing vessels do not set out clear provisions stipulating the rights of third country fishing vessels during port inspections. The IUU Regulation makes no direct provision for the prevention of unnecessary delays to the fishing vessel being inspected, and does not establish a compensation or complaint framework regarding actions of the port state. Second, as noted above, the new arrangements set out detailed conditions of access of third country fishery products to EC territories, including provisions regarding port state notification and catch certification. These provisions have the effect of making DFQF access for all types of fishery products conditional on the adoption of complex legal, administrative and technical procedures by EC members, and between EC member states and third countries. Many ACP countries have little capacity to enforce complex fisheries regulations and establish catch certification systems. In the event that such states are listed under the EC list of non-co-operating third countries, the IUU Regulation is clear on the sanctions to be imposed, which include the prohibition of importation or reconsideration of bilateral fisheries access agreements. If applied without proper consultation, such sanctions, particularly the latter, may prove detrimental to the development of ACP economies. The trade-restrictive effect is anticipated to some

⁶ For example, the USA's Magnuson-Stevens Fishery Conservation and Management Reauthorisation Act. 16 USC 1826(a), (b)(3), and (b)(4).

extent by the fact that the Regulation requires administrative authorities in EC member states to co-operate with third states in the development of compliance procedures, and further requires the adoption of a system of mutual assistance to that end (Article 51).

Trade and development impacts: Utilisation of ROO

Implementation of the Regulation would impose an indirect additional burden on countries of origin to ensure that all value added fish of a particular product coming from other countries has not been obtained through IUU means.

Existing EC regulations on ROO⁷ only determine where goods originate, not where they have been shipped from. In the case of fishery products, the current EC rules do not verify whether or not a product has been derived from IUU fishing. Because different derogations apply in current IEPA arrangements, it would be difficult to trace how particular products falling under the derogation may have been obtained through IUU fishing.

The IUU Regulation does not clarify how the ROO are to be applied in the context of prohibiting fisheries imports from offending vessels and states listed under the EC IUU vessel list and list of non-co-operating third countries. In fact, the existing ROO are insufficient to implement these provisions of the IUU Regulation. The proof of origin, for example, only traces goods back to the exporter's business and not the fishing vessel. These certificates are only used to establish preference products and countries and not their compliance with fisheries laws and regulations.

In the case of the Pacific IEPA, the global sourcing rules of origin for fresh and frozen fish fillets apply in order to provide Pacific Island States exporters with maximum flexibility in buying fish for value-added processing and export. The implementation of the IUU Regulation would impose additional burden on the Pacific Island States to ensure that all value added fish has not been derived from IUU fishing. Although these rules "shall apply without prejudice" to EC Sanitary and Phytosanitary (SPS) measures and combating IUU fishing in the Pacific Island region, as provided in the PACP IEPA, it is uncertain as to how such rules would be applied in practice and in a proportionate manner. The implications of the IUU Regulation on the utilisation of the 15 per cent value tolerance rule in current EPAs and IEPAs, and application of the global sourcing rules of origin in the Pacific IEPA, have clear parallels with the operation of the EU SPS scheme.

Policy and Governance Implications of the IUU Regulation for the ACP States

The actual implications of the IUU Regulation on ACP member states can only be fully assessed when they are implemented. However from the text of the IUU Regulation, one can identify particular areas which will give rise to implementation challenges for ACP member states. For example, the requirements for catch certification and validation of such certificate would require the implementation of appropriate legislative and administrative measures to ensure compliance. ACP flag states will need to have legislative and administrative measures in place to monitor and control their vessels (through, for example, vessel monitoring systems and observer programmes). They will also need to implement effective fisheries management measures such as fishing authorisations and data collection systems. These requirements will, undoubtedly, impose additional resource and administrative burden on the already stressed and weak administrations of most ACP member states.

EC member states and ACP member states have equal international obligations to prevent, deter, and eliminate IUU fishing. Measures to combat IUU fishing such as the ones contained in the IUU Regulation will become prevalent and embedded parts of national, regional, sub-regional and international fisheries governance arrangements to ensure sustainable and responsible fishing practices. Hence, the fundamental policy issue for the EC and ACP states is one of developing the required capacity to assist the ACP states in implementing the requirements of the IUU Regulation. Without the necessary technical and financial resources to implement and enforce these new demands, it is likely that several ACP states will suffer economic hardship as a result of the IUU Regulation's entry into force. Experience with the EC SPS measures is a key example here and shows a well-known double standard as these rules seem to be less strictly enforced within certain EC member states.

While the IUU Regulation is a welcome development, it will need to be implemented in a fair and transparent manner. The EC must acknowledge the vulnerability of developing countries and the difficulties that they will face in implementing the requirements of the IUU Regulation. It is essential that developing countries do not, either directly or indirectly, bear a disproportionate burden of global efforts to combat IUU fishing.

⁷ These are contained in Articles 66-97 and Annexes 14-18 and 21 of Commission Regulation No. 2454/93 (the implementing provisions of the Community Customs Code), as amended by Regulations (EC) Nos. 12/97, 1602/2000 and 881/2003.

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ITRC is entrusted with the responsibilities of undertaking policy-oriented research and analysis on trade and development issues and providing informed inputs into the related discourses involving Commonwealth members. The ITRC approach is to scan the trade and development landscape for areas where orthodox approaches are ineffective or where there are public policy failures or gaps, and to seek heterodox approaches to address those. Its work plan is flexible to enable quick response to emerging issues in the international trading environment that impact particularly on two highly vulnerable Commonwealth constituencies - least developed countries (LDCs) and small states.

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ITRC undertakes activities principally in three broad areas:

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- It contributes to the processes involving the multilateral and bilateral trade regimes that advance the more beneficial participation of Commonwealth developing country members, particularly small states and LDCs.

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