

COMBATTING IUU FISHING: Continual Improvement and Best Practices for IUU Listing Measures in Tuna RFMOs



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Abstract

To strengthen efforts to combat IUU fishing activities, this Technical Report reviews the IUU fishing listing measures in regional fisheries management organisations responsible for tuna management (t-RFMOs). The purpose of the review was to identify deficiencies and weaknesses in the current IUU fishing listing procedures and develop guidance on best practices to support and strengthen efforts for the conservation and management of tuna resources.

Best practices to strengthen measures for listing vessels that are presumed or found to have conducted IUU fishing include standardising the way the measures are drafted to support harmonisation between the t-RFMOs; having consistent activities that constitute IUU listing, and information to support the listing and punitive measures; implementing a decision-making process that removes the flag State from decisions regarding its own flag vessels; adopting an expanded range of admissible information; and implementing rigorous cross-listing and intersessional processes. This report also recognises the direct link between IUU vessel listing and the rigour of the other monitoring, control and surveillance (MCS) measures adopted by t-RFMOs. The report recommends strengthening these supporting measures as a way of supporting IUU vessel listing.

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The International Seafood Sustainability Foundation (ISSF) — a global coalition of seafood companies, fisheries experts, scientific and environmental organizations, and the vessel community — promotes science-based initiatives for long-term tuna conservation, FAD management, bycatch mitigation, marine ecosystem health, capacity management, and illegal fishing prevention. Helping global tuna fisheries meet sustainability criteria to achieve the Marine Stewardship Council certification standard — without conditions — is ISSF's ultimate objective. To learn more, visit iss-foundation.org, and follow ISSF on Facebook, Twitter, Instagram, YouTube, and LinkedIn.

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Executive Summary

To strengthen its efforts to combat IUU fishing activities, the International Seafood Sustainability Foundation (ISSF) requested a review of the IUU fishing listing measures in regional fisheries management organisations responsible for tuna management (t-RFMOs). The purpose of the review was to identify deficiencies and weaknesses in the current IUU listing procedures and develop guidance on best practices to support and strengthen efforts for the conservation and management of tuna resources.

Following a thorough analysis of the IUU fishing listing measures (refer to Analysis of t-RFMO IUU Fishing Listing Measures), the report finds that, overall, the t-RFMOs IUU fishing listing measures are largely consistent, particularly the measures adopted more recently. Key differences include the application of the measures, the activities that constitute IUU fishing, the roles and responsibilities of the groups during the IUU fishing listing process, the extent of the use of intersessional decision-making powers and the range of punitive measures to be taken by t-RFMO members, flag States, port States and coastal States on their own vessels and against a vessel listed as IUU fishing. The differences between the measures are highlighted in the summary table of the t-RFMO IUU fishing listing measures (Table 1).

Best practices on how to strengthen the IUU fishing listing measures are provided in the Recommendations Section. Key elements include standardising the way the measures are drafted to support harmonisation between the t-RFMOs; having consistent activities that constitute IUU fishing listing and information to support the listing and punitive measures; implementing a decision-making process that removes the flag State from decisions regarding its own flag vessels;

adopting an expanded range of admissible information; and implementing rigorous cross-listing and intersessional processes.

The report also recognises the direct link between IUU listing and the rigour of the other monitoring, control and surveillance (MCS) measures adopted by t-RFMOs. The report recommends strengthening these supporting measures as a way of supporting IUU fishing listing, including, for example, increasing VMS polling rates, strengthening RFMO compliance assessment processes and implementing responses for non-compliance, and increasing observer coverage.

Key Findings:

- 1 It is essential that RFMOs have rigorous MCS measures to support the identification and prosecution of IUU fishing.**
- 2 Implement a decision-making process that removes the flag State from decisions regarding its own flag vessels.**
- 3 Ensure activities that constitute IUU fishing are consistent across the t-RFMOs.**
- 4 Adopt a clear list of admissible information that can be used to demonstrate IUU fishing.**
- 5 Effective action to deter IUU fishing requires harmonization of strong MCS and IUU vessel listing measures across the tuna RFMOs.**

Research Questions

These self-reflection questions are for readers to begin to examine how aspects of our recommendations may help to improve their work. The questions are not intended to be comprehensive or represent every recommendation in the agenda. They are sample questions to inspire thinking about the gaps or strengths of the readers' work and where users of this agenda can expand efforts for more integrative resilience research and practice.

- **How can tuna RFMOs continue to take decisive action against those people that are operating illegally?** For example, are the RFMO measures supporting the identification of IUU fishing? Are the IUU fishing measures supporting the listing of vessels that are presumed to have been fishing contrary to the rules and regulations?
- **What are the current RFMO practices, and how effective have they been at detecting and deterring IUU fishing?** If they are not providing an effective mechanism to detect and deter IUU fishing, what more can be done? Do the vessels listed as IUU belong to the same flag, and, if so, are the actions by this flag State providing sufficient deterrents to IUU fishing?
- **How can the IUU fishing measures be strengthened to support the identification and listing of those vessels that are presumed or found to have been IUU fishing?** Are there lessons that could be learnt from the application of the existing measures? Are there additional practices that should be incorporated into the measures to further eliminate IUU fishing?

IUU Fishing Lists: An Overview

Illegal, unreported and unregulated (IUU) fishing continues to pose a considerable threat to the sustainability of global fisheries resources. IUU fishing contributes to overexploitation and impedes the recovery of fish stocks and the ecosystems (Bray, 2000, The World Bank, 2009). In reviewing global IUU fishing for all species combined, Agnew et al. (2009) estimated IUU catches at between 11-26 million tonnes with a value at between US\$10-23.5 billion, and for tuna resources, IUU fishing may represent as much as 10 percent of total catch. More recently, MRAG Asia-Pacific (2016) completed an IUU quantification study on behalf of the Pacific Island Forum Fisheries Agency (FFA). In it they estimated that in the longline sector in the western and central Pacific Ocean, IUU volumes are largely driven by misreporting (49% of total tropical longline volume) and post-harvest risks (39%), of which they cite is principally illegal transshipment. The report goes on to identify that the tropical longline fishery accounted for the highest ex-vessel value of IUU product (\$272.55m) due to the higher market value of its target species — that is, sashimi-grade tuna — and that therefore the tropical longline sector accounted for around 44% of total overall estimated IUU value in the region. In contrast, the purse seine sector accounted for 37% and the southern longline section accounted for 19% of the total overall estimates of IUU product value. However, given the inherent difficulty in estimating illegal activities these estimates, and their impact, may be significantly higher.

To combat IUU fishing, the international community has adopted hard and soft international legal instruments and regional and national initiatives. These instruments are designed to work in concert, but their effectiveness relies upon implementation by, and cooperation among, State actors, which is limited by, in some cases, human and financial capacity and/or political will. Hard legal instruments include the United Nations Convention on the Law of the Sea (UNCLOS) (*United Nations Convention on the Law of the Sea*) and its associated implementing agreement, the UN Fish Stocks Agreement (UNFSA) (*Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Seas of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 1995). Soft international legal instruments, such as the Code of Conduct on Responsible Fishing (Food and Agricultural Organisation of the United Nations, 1995) and its associated International Plans of Action (IPOAs), for example the *International Plan of Action to Prevent Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (IPOA-IUU) (Food and Agricultural Organisation of the United Nations, 2001), help to establish normative fisheries management arrangements and give rise to international customary law (Lodge et al., 2007). The IPOA-IUU was adopted in response to increased IUU fishing and acknowledged that the existing international framework did not provide sufficient governance to address IUU fishing (Bray, 2000). Consequently, the IPOA-IUU sets out a range of measures to be taken by flag and port States and by RFMOs. It also advises that regional fisheries management organisations (RFMOs) should give effect to their duty to cooperate, strengthen institutional capacity, implement mandatory reporting and effective compliance monitoring schemes, and use a broad range of data sources, among other things (Table 1).

At the RFMO level, RFMOs with a mandate to manage highly migratory and/or tuna and tuna like resources (t-RFMOs) have adopted a range of measures,¹ including monitoring, control and surveillance (MCS) measures. MCS measures includes vessel monitoring systems, port inspection and monitoring and observer and/or electronic monitoring programs, electronic reporting, regulation of or prohibitions on at-sea transshipment by some gears and trade measures to promote compliance and support sustainable fisheries management. These measures contribute to detecting, deterring and combating IUU fishing. All t-RFMOs have implemented measures to list vessels that are either presumed, or are found, to have conducted IUU fishing. Critically, given that a vessel requires people to operate it, it may be considered that listing a vessel on IUU fishing list is in fact identifying the people who have perpetrated the IUU fishing and who have undermined

¹ Throughout this Technical Report 'measures' is used to refer to the binding conservation and management measures, that's is Resolutions, Recommendations or Conservation and Management Measures adopted by the respective t-RFMOs.

the effectiveness of the t-RFMO's rules. Some t-RFMOs measures include elements in their IUU fishing measures² that require States to take actions against nationals, and some non-tuna RFMOs have adopted measures for the control of nationals.³ However, there may still be a need to consider the broader context of IUU fishing to take account of the simple fact that it is people that conduct IUU fishing, not the vessels per se.

Defining IUU

Each t-RFMO highlights that the purpose of the IUU fishing measures is to give effect to recommendations from the IPOA-IUU. Specifically, to establish information on vessels engaged in IUU fishing (IPOA IUU Recommendation 80.4), develop and maintain records of vessels engaged in or supporting IUU fishing activities (IPOA IUU Recommendation 80.5), and multilaterally sanction such activity. The IPOA-IUU does not define IUU; rather it characterises the nature of 'illegal', 'unreported' and 'unregulated' fishing activities, but as Edeson (2000) notes, a precise definition or use of the terms was never intended; rather, they sought to identify the general nature of IUU fishing (Part II, paragraph 3(3.1-3.4) of the IPOA IUU). Under the IPOA-IUU:

'Illegal' refers to activities:

- a. conducted by a national or foreign vessel in the waters under the jurisdiction of a State without the permission of that State or in contravention of its laws, or
- b. conducted by vessels flying the flag of States that are parties to a relevant RFMO but operate in contravention of the conservation and management measures adopted by that organisation and by which States are bound, or relevant provisions of the applicable international law, or
- c. in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant RFMO.

'Unreported' refers to activities:

- d. which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations, or
- e. undertaken in the area of competence of a relevant RFMO which have not been reported or have been misreported, in contravention of the reporting procedures of that organisation.

'Unregulated' refers to activities:

- f. in the area of application of a relevant RFMO that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organisation, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organisation, or
- g. in areas or for fish stocks in relations to which there are no applicable conservation and management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation for living marine resources under international law.

Given the nature and scope of IUU fishing activities as defined in the IPOA-IUU, together with the outcomes from the t-RFMO member's compliance assessment processes, it is clear that IUU vessels lists could contain a much larger number of vessels. However, it is unlikely that a flag State will nominate its own vessel for IUU listing if it has contravened its own national laws, rather, the flag State will take action against its vessels consistent with its flag State responsibility and its

² Throughout this report, this term is used to refer to RFMO IUU Vessel Listing measures in order to encompass the broader concept of the purpose of these measures, which is to combat IUU fishing activities by vessels.

³ <https://cm.ccamlr.org/en/measure-10-08-2017>

own laws. In practice then, t-RFMO IUU fishing measures are only being used to address fishing activities that contravene or undermine the effectiveness of the t-RFMO measures on the high seas or in the national jurisdiction of coastal State to which the flag vessel has not been authorised or is operating in contravention the applicable laws of that State. This means that the IUU fishing measures are only really considering activities under a, b, c and f of the IPOA-IUU.

Interplay of IUU fishing lists and Compliance Assessment Processes

IUU fishing measures are a tool designed to punish those who benefit from the illegal activities and behaviour of individual vessels. The IUU fishing list is very different from RFMO processes that consider compliance at a State level (refer to [ISSF's Technical Report on RFMO Compliance Assessment Processes](#)). However, there is some utility in considering how the IUU fishing measure can support identification of systemic gaps in a State's laws and regulations and their ability to assert flag State control over the vessels and the people onboard.

For example, if there are a large, or consistent, number of IUU fishing nominations from a specific flag State's, it may be indicative of a lack of systems or processes and/or inadequate regulatory framework. In such circumstances, the IUU fishing measure could be used to trigger a more in-depth assessment of a State's implementation of their obligations related to other measures through the RFMO's Compliance Assessment process and/or remedial measures for that State. The development of the IPOA-IUU noted that there is not a problem with the activities that constitute IUU or the governance framework itself, but rather with the implementation of the measures by individual States (Bray, 2000, Edeson, 2000, Lodge et al., 2007).

It is also important to distinguish (i) flag State responsibility from vessel level responsibility and (ii) relatively minor non-compliance from wilful and ongoing IUU fishing activities. There are different State responsibilities: 1). in respect of its flag vessels, 2). responsibility to the t-RFMO to which it is a party. The FAO (2000) outlines flag State responsibilities: the flag State is responsible for controlling the fishing activities of the vessel wherever it is operating:

- if the vessel is fishing in the waters under the jurisdiction of the flag State, then the responsibility of the flag State is exclusive,
- if the vessel is fishing on the high seas, the flag State has traditionally had exclusive responsibility for the fishing activities of the vessel;

However, recent agreements or RFMO measures (e.g., WCPFC) have given other States certain rights to take action with respect to fishing vessels on the high seas, for example high seas boarding and inspection. Overall this equates to flag States having primary responsibility for preventing, eliminating and deterring IUU fishing.

In relation to RFMOs, in depositing an instrument of ratification, acceptance, approval or accession, States have a duty to cooperate in the activities of the RFMO and to implement the decisions of the RFMO in good faith. This includes implementing arrangements that give effect to the decisions at both the vessel and national level. However, State parties to UNCLOS and/or UNFSA also have a duty to cooperate in accordance with these obligations (e.g., Article 118 of UNCLOS) (Willcock and Lack, 2006).

In regard to flag State versus vessel level responsibility, a vessel may have provided all relevant operational catch and effort data to the national authority, but the national authority may not have provided to the Secretariat (or equivalent) by the prescribed deadline. In this example, listing the vessel as IUU becomes a very blunt tool to address the non-compliance. It may be more appropriate to consider what other processes and tools are available for use by the t-RFMO — for example, using the compliance assessment process and developing a graduated response to non-compliance. Again, using this example, other punitive measures that could be used include increasing observer coverage on the vessel or requiring monitoring of all transshipments, irrespective of at-sea or in-port and particularly where port State measures are yet to be adopted by the t-RFMO or port State, rather than listing the vessel as IUU. In relation to distinguishing minor non-compliance from ongoing or wilful non-compliance and as described earlier, if applied in its

entirety, the IUU fishing listing measure could result in the listing of all vessels from some flag States. This does not diminish the need for the IUU fishing listing measure, instead it strongly reinforces the need for a comprehensive compliance assessment process at all t-RFMOs such that the power and integrity of being IUU listed is not weakened.

Aims of the Technical Report

The International Seafood Sustainability Foundation (ISSF) requested a review of the measures used to list vessels that are presumed to have been IUU fishing in t-RFMOs. The aim was to identify deficiencies and weaknesses in the current IUU fishing measures and develop guidance on best practices to support and strengthen efforts for the conservation and management of tuna resources. The specific aims of this Technical Report are to:

- Review the current measures to list those vessels presumed to have conducted IUU fishing in t-RFMOs, identifying the commonalities and differences, strengths and weaknesses; and
- Identify the best practices for the IUU Fishing Listing measures, taking into account the relevant international framework.

Analysis of t-RFMO IUU Fishing Listing Measures

This comparison of the t-RFMO IUU fishing measures considers the principles, approaches and differences between the IUU fishing measures adopted by each of the t-RFMOs: CCSBT, IATTC, ICCAT, IOTC, WCPFC (Table 1). These measures have been adopted between 2010-2019 — almost 10 years for the oldest IUU fishing measure and each measure is tailored specifically for the treaty under which it is drafted and reflects the membership of that t-RFMO. However, to successfully prevent, deter and eliminate IUU fishing, there is a range of principles and elements that if harmonised is more likely to elicit the desired outcome. This section compares the approached used in each of the t-RFMOs to identify best practices and gaps that if addressed would strengthen the measures. A summary comparison of the t-RFMO IUU fishing measure text is provided at Table 2.

Table 1: Current active t-RFMO IUU Fishing Listing measures.

RFMO	Current Active Measure	Year	Cross referenced
CCSBT	<u>Resolution</u> on Establishing a List of Vessels Presumed to have Carried Out Illegal, Unreported and Unregulated Fishing Activities for Southern Bluefin Tuna (SBT)	Revised 2019	nil
IATTC	<u>Resolution C-19-02</u> : Amendment to Resolution C-15-01 on Establishing a List of Vessels Presumed to have Carried Out Illegal, Unreported and Unregulated Fishing Activities in the Eastern Pacific Ocean	Revised 2019	Joint Tuna RFMO www.tuna-org.org
ICCAT	<u>Recommendation 21-13</u> : Recommendation by ICCAT on Establishing a List of Vessels Presumed to have Carried Out Illegal, Unreported and Unregulated Fishing Activities <u>Recommendation 03-16</u> : Recommendation by ICCAT To Adopt Additional Measures Against Illegal, Unreported and Unregulated (IUU) Fishing	Revised 2021	Joint Tuna RFMO www.tuna-org.org IATTC: www.iattc.org IOTC: www.iotc.org WCPFC: wcpfc.int (plus CCAMLR, NEAFC, NAFO)
IOTC	<u>Resolution 18-03</u> : Resolution 18-03 On Establishing A List of Vessels Presumed to have Carried Out Illegal, Unreported and Unregulated Fishing in the IOTC Area of Competence	Revised 2018	Joint Tuna RFMO www.tuna-org.org IATTC: www.iattc.org ICCAT: www.iccat.int WCPFC: wcpfc.int
WCPFC	<u>CMM 2019-07</u> : Conservation and Management Measure to Establish A List of Vessels Presumed to have Carried Out Illegal, Unreported and Unregulated Fishing Activities in the WCPO	2019	Joint Tuna RFMO www.tuna-org.org

Objective of the Measure

Four of the five t-RFMO measures, CCSBT, IATTC, IOTC and WCPFC, provide a broad context or objective in which to interpret the measure. These RFMOs call for members to identify vessels that have acted contrary to the objectives of the specific treaty; for example, WCPFC states ‘...identify vessels that have acted in a manner that undermines the effectiveness of the WCPFC Convention...’, and then highlights the specific action to be taken by the members,⁴ that is to

⁴ Throughout this Technical Report, ‘members’ refers to Contracting Parties, Cooperating, non-Contracting Parties, Fishing Entities, Entities and Participating Territories of t-RFMOs.

generate a list of such vessels – the WCPFC IUU vessel list. The inclusion of an overarching objective or context paragraph places IUU fishing squarely in the treaty’s objective, thereby reinforcing the Commission’s need to take action consistent with the IPOA-IUU. Moreover, inclusion of context text provides clarity regarding the Commission’s role and the actions it must take to fulfil the provisions of the measure.

As with the use of harvest strategies for fisheries management, clearly articulating roles and actions are likely to reduce politicisation of IUU decisions. For example, prior to the substantial amendments to the IOTC measure, the Compliance Committee and the Commission was instigating its intersessional decision-making process rather than taking a decision regarding a new IUU fishing nomination. The result was that the vessel would remain on the provisional IUU fishing list pending the intersessional process. Politicisation of the IUU fishing listing should be avoided as there is a risk that it weakens the IUU Fishing Listing procedure. Likewise, there is a need to reduce the lobbying by flag States that fight not to have their vessels listed, even in the event that there is clear evidence of IUU fishing.

A context paragraph also helps to distinguish vessel non-compliance from poor State implementation and compliance with the RFMO’s measures. If the IUU fishing measure was to be implemented according to the IPOA-IUU, it is possible that all vessels of some flag States could be nominated for IUU fishing listing. For example, if a t-RFMO member fails to provide mandatory catch and effort data in accordance with the relevant measures, it is in breach of the t-RFMO’s rules and aligns with point ‘e’ of the IPOA-IUU. However, the vessel is only responsible to provide catch and effort data to its flag State under the applicable State laws and regulations. The vessel is not required to report this data directly to the t-RFMO, and listing a member’s vessels as IUU punishes the vessels rather than the State that has responsibility for providing this information to the t-RFMO. In this instance, it would be better for the State to be assessed, and penalised, through the t-RFMO’s Compliance Assessment process rather than punishing each of the vessels using the relatively blunt IUU Fishing Listing procedure.

Including an objective or context paragraph is considered to be the best practice for t-RFMOs. Consistent with the *Vienna Convention on the Law of Treaties*, under international law it is important that any measure is read in its context. Providing a broader context can assist Parties recall the overarching issue that the measure was seeking to address through its adoption. Furthermore, the inclusion of a context paragraph clearly articulates the action the Commission must take to fulfil the requirements of the measure and may help to de-politicise the IUU fishing listing process.

It is essential to de-politicise the listing procedures for IUU fishing to the greatest extent possible thereby sending a clear message that IUU fishing will not be tolerated.

Application of the Measure

Each of the t-RFMOs specifies which vessels the measure applies to. CCSBT, ICCAT, IOTC and WCPFC measures apply to all vessels — fishing for Southern Bluefin Tuna in the case of CCSBT, or for vessels fishing for the species covered by each of the ICCAT, IOTC and WCPFC treaties within the treaty’s Area of Application. The IOTC measure goes a step further by highlighting that the measure also applies to the ‘owners, operators and masters that undertaken fishing and fishing related activities for species covered by the IOTC Agreement’ (paragraph 2). In the case of IATTC, the measure specifies the class of vessel that can be listed as IUU, that is

any fishing vessel greater than 23 meters length overall (paragraph 30). In addition, the ICCAT recommendation has a more expansive “stateless vessels” provision. The ICCAT IUU vessel listing measure covers vessels that are “without nationality and fishing or supporting fishing operations in the ICCAT Convention area.” In ICCAT, such stateless fishing or

supporting vessels are “deemed to be operating in contravention of the ICCAT Convention and undermining ICCAT’s conservation and management measures” and thus engaged in to be IUU fishing.⁵

Some treaties have a single definition of ‘fishing vessel’ included in the treaty itself (e.g., IATTC and WCPFC) and as such do not seek to clarify the meaning in every measure adopted. Other RFMOs specify a definition for specific management measures. For example, the IOTC has adopted broad definitions of both ‘fishing’ and ‘fishing related activities’ in its IUU fishing measure as such that measure applies to all fishing, support, carrier and supply vessels (paragraph 1(d-e)). However, the ICCAT measure lists the vessel types considered to be fishing vessels ‘...fish processing vessels, tug and towing vessels, vessels engaged in transshipment, and support vessels...’. Either way, it is important that the measure’s application be clear and consistent with the mandate of the treaty itself.

Given that IUU is a global issue, the best practice is to apply to IUU fishing measure to all vessels authorised to be fishing under the remit of the relevant RFMO equally. This provides members with sufficient ability to identify and list all activities contrary to the objectives of the treaty and decisions adopted thereunder. Any limit on the application of the IUU fishing measure reduces the ability of the members to take actions against IUU fishing in its entirety. A consistent application of the IUU fishing measures of t-RFMOs is also important in giving effect to the KOBE Recommendations regarding harmonisation and cross-listing. Both harmonisation and cross-listing IUU fishing is more difficult where the measures differ or are contradictory.

Activities that Constitute IUU Fishing

All t-RFMO IUU fishing measures identify activities that constitute IUU fishing. The activities are largely consistent between the t-RFMOs and with the IPOA-IUU (Table 2). But notwithstanding the catch-all criteria of ‘fishing in contravention of any other measure’, there are four important differences between the lists.

- All t-RFMOs have provisions for listing vessels that have operated inside the waters of a coastal State. However, there is a subtle and important difference in the language used to describe this activity in the WCPFC measure. IOTC and WCPFC can nominate a vessel as IUU where it has ‘engaged / conducted fishing activities in the waters under the national jurisdiction of a coastal State...’ versus ‘harvesting tuna or tuna like species’ in the CCSBT, IATTC and ICCAT measures. The critical difference pertains to the definition of ‘fishing’ in both the IOTC measure (paragraph 1(d)) and in the WCPFC Convention (Article 1(d)(i-vi)). The WCPFC Convention defines fishing as including activities such as ‘searching for, catching, taking or harvesting fish and attempting to search for, catch, take or harvest fish’. In the IOTC, the definition is consistent with WCPFC with the inclusion of ‘attracting’. In both instances this comprehensive definition greatly enhances the ability to nominate vessels for IUU listing in IOTC and WCPFC.
- Only the IOTC and ICCAT measures enable a nomination of IUU fishing for a vessel fishing with ‘insufficient quota, catch limits or effort allocations. It could be argued that the catch-all criteria, ‘fishing contrary to any other measure’, provides for this criterion and that specific inclusion of this language is of little consequence. However, given the measures are prescriptive on other key elements, such as transshipment, it would seem wise to include this provision, particularly in the case of CCSBT where the Management Procedure relies on compliance with the national catch limits.
- The IOTC alone has included the falsification or concealment of identity, markings or registration as an IUU offence. This criterion would seem to link closely to being without nationality and harvesting species covered by the treaty and it would seem beneficial for other RFMOs to include this element when they next revise their measures.
- The fourth difference is the inclusion of common ownership as a basis for IUU listing. Only IATTC and WCPFC include a clause of common ownership as a basis for IUU fishing listing. The common ownership criteria provide that

⁵ See ICCAT 21-12: Recommendation on Vessels without Nationality

where an owner of a vessel on an IUU fishing list has multiple vessels, that all additional vessels can also be listed on the IUU fishing list on the basis of the shared ownership. Inclusion of common ownership is also consistent with the theory of crime, that how individuals will act is based on the behaviour of others, and the recognition that there is at least some organised component to illegal fishing activities (Le Gallic, 2007).

- The fifth difference is the coverage of “stateless vessels.” As noted above, the ICCAT recommendation cover both vessels without nationality that are fishing or supporting fishing operations in the ICCAT Convention Area.

Recognising the need to act globally to prevent, deter and eliminate IUU fishing, particularly in tuna fisheries, there have been numerous calls for harmonisation of IUU fishing measures to the greatest extent possible. There is broad consistency between the t-RFMOs listing criteria, but all t-RFMOs would benefit from including key criteria to support the management arrangements, including a common ownership criterion, fishing with insufficient quota, catch or effort limits and fishing without nationality. Cross referencing and harmonising the criteria for listing a vessel as IUU would be the best practice.

Table 2: Comparison of the activities that constitute IUU Fishing in each of the five t-RFMOs.

	CCSBT	IATTC	ICCAT	IOTC	WCPFC
Harvesting species covered by the treaty when not authorised to do so	✓	✓	✓	✓	✓
Failure to record and report catches or making false reports	✓	✓	✓	✓	✓
Used prohibited fishing gears	✓	✓	✓	✓	✓
Transshipped or joint operations with unauthorised or IUU listed vessels	✓	✓	✓	✓	✓
Conduct transshipment operations at sea with unauthorised carrier vessels	x	✓	x	x	x
Fishing during spatial or temporal closures	x	✓	✓	✓	✓
Take or land under-sized fish	x	x	✓	✓	✓
Conducted fishing operations in national waters without authorisation or contrary to the laws of that coastal State	✓	✓	✓	✓	✓
Are without nationality and harvested species covered by the treaty	x	✓	✓	✓	✓
Are without nationality and supporting fishing operations	x	x	✓	✓ ⁶	x
Are under the control of the owner of any vessel on the t-RFMO IUU fishing list	x	✓	✓	✓	✓
Fished without sufficient quota, catch limit or effort allocations	x	x	✓	✓	x
Engaged in fishing or related activities having intentionally falsified or concealed its identity, registration or markings	x	x	x	✓	x
Engage in fishing activities contrary to any other binding CMM	✓	✓	✓	✓	✓

Information on Alleged IUU Fishing Activities

Information to support listing a vessel as IUU fishing is largely consistent between the t-RFMOs (Table 3). The important differences include:

- IOTC provides for 'information from other sources' and includes examples such as information obtained from port States and/or collected in the fishing grounds.
- IOTC provides for the submission of information by 'third parties'. In doing so, the IOTC provides a process for the use of the information that includes investigation by the flag State within a prescribed period of time.
- CCSBT and WCPFC stipulate that any nomination and the associated evidence/ information are also provided directly to the flag State of the vessel as well as the Secretariat.

One of the differences in this component of the IUU fishing measures is the degree of specification regarding what type of information can be used to support a nomination of IUU fishing. Increased specification ensures that there is an upfront agreement regarding what information is admissible for the Commission's deliberations. This was important for CCSBT in its historical deliberations regarding the identification of misreported catches. Although unclear, Polacheck (2012)

⁶ IOTC Res. 18/03 includes: "engaged in fishing or fishing related activities whilst being without nationality."

suggests the protracted deliberations at CCSBT may have been shortened if trade data had been identified as a valid source of information. In any event, de-politicisation of t-RFMO decision-making processes is likely to provide greater transparency and strengthen governance arrangements that benefit the sustainability of the resource.

Information from external sources or third parties, including non-government organisations, is permissible in the IOTC process. For example, the IOTC IUU fishing measure allows for the submission of information from third parties (paragraph 7) and outlines the process for its use. Specifically, any information from third parties is to be sent to the flag State, which has 60 days to investigate and report the outcome/ progress of the investigation to the IOTC Secretariat. Following this, the Secretariat is to present all the information to all CPCs for consideration of nomination to the draft IUU vessel list, particularly in the case of the allegation in the waters of a coastal State.

Third parties can and do collect information on vessels. If part of a robust framework, this information could be utilised to support, or refute, IUU fishing nominations. Third Parties can also assist in the dissemination of information and coordination of regional initiatives to support implementation of punitive measures as implemented by t-RFMOs. Given the impact of IUU fishing and the cost of undertaking effective MCS activities, and consistent with the recommendations from the IPOA-IUU, there is a strong argument to allow the use of information from external third parties, such as NGOs, scientific cruises, etc. However, it is imperative that, as for all information sourced from members, any external information be sourced in a manner consistent with all applicable international laws, suitably documented, and verifiable. Moreover, any information provided must adhere to confidentiality requirements of the information, including for example not publishing information on alleged IUU cases or the vessel names prior to actions being taken by the nominating State or through the t-RFMO. A failure to adhere to due process may undermine listing the vessel as IUU.

All t-RFMOs allow additional information on the alleged IUU activities to be provided at any time, except IOTC, which stipulates that information and/or comments must be provided 15 days in advance of the annual Compliance Committee meeting (paragraph 10). Noting the need for accurate information to support decision-making, it is possible that allowing information to be submitted at any time may weaken the IUU listing process where the promise of additional information being used to delay a Commission's decision. It is important to recall that to prevent, deter and eliminate IUU fishing, the international community agreed that the burden of proof be placed with the flag State to prove that the vessel had not conducted IUU fishing. With this in mind, having new information continually provided makes any consideration by other parties more difficult and is likely to benefit the alleged IUU fishing vessel over the nominating State. There needs to be a balance between providing the most accurate information and providing sufficient time for assessment by other parties such that a decision can be taken regarding the alleged IUU activity.

The best practice is to clearly specify what information, and from who, can be used to support an IUU fishing nomination. In addition, as practiced in WCPFC, ensuring that all information is made available to all parties as soon as practicable following the nomination to enable thorough and timely investigation by the flag State.

Table 3: Summary of the information requirements of the different t-RFMOs pertaining to alleged IUU fishing activities.

	CCSBT	IATTC	ICCAT	IOTC	WCPFC
Information provided from:					
Members	✓	✓	✓	✓	✓
Cooperating non-Contracting Parties	✓	✓	✓	✓	✓
Other relevant sources submitted by the members (e.g. port States and/or suitably documented information from the fishing ground)	✓	✓	x	✓	✓
Third Parties	x	x	x	✓	x
Information sourced from:					
Relevant measures and decisions	✓	✓	✓	✓	✓
Reports by members on vessel inspections	✓	x	✓ ⁷	x	x
Reports by members on measures in force	✓	✓	✓	✓	✓
Catch and trade information (FAO, CDS, national & international verifiable statistics)	✓	✓	✓ ³	✓	✓
Information from port States	✓	✓	✓ ³	✓	✓
Any other additional information	✓	✓	✓	✓	✓
Information reported to:					
Secretariat	✓	✓	✓	✓	✓
Directly to the flag State of the IUU vessel	✓	✓	x	x	✓
Further information provided at the time	✓	✓	✓	✓	✓
Report using a prescribed form/format	✓	✓	✓	✓	✓

Listing Procedures

T-RFMO IUU fishing measures follow a similar process: draft, provisional, and final IUU fishing list. The greatest variation in the process related to the agreement of the provisional IUU fishing list. Overall, listing procedures should be streamlined, transparent, and clearly articulate the information requirements, roles and responsibilities at each step of the process. There also needs to be sufficient time to enable collection, collation and dissemination of the information/evidence by the Secretariat and for members to undertake a thorough assessment prior to taking a decision. As highlighted above, there is also a role of third parties in the IUU fishing listing process, which to date has only been utilised by the IOTC to date.

DRAFT IUU VESSEL LIST

The process to establish the draft IUU fishing list is as follows. Information is provided by the nominating member to the Secretariat who compiles all relevant information together into the draft IUU fishing list. The Secretariat then circulates the

⁷ Where there are relevant Recommendations adopted by the Commission and in-force.

information on all new nominations to members within a prescribed time period. The IATTC and IOTC processes also require that the information on nominations of alleged IUU cases from the previous two years also be presented at this time and in ICCAT allegations from the previous three years can be presented. In CCSBT, IATTC, ICCAT and IOTC, the existing IUU fishing list is also circulated at this time. CCSBT and WCPFC also state that the initial nomination and associated information be sent by the nominating member concurrently to the Secretariat and directly to the flag State. All t-RFMOs require that the nomination and supporting evidence be circulated to members and non-members whose vessels are being nominated for listing (Table 4). All t-RFMOs require that members monitor the activities of the vessels nominated for IUU listing, and all request that the flag State notifies the vessel owners to ensure they are aware of the ramifications of an IUU fishing listing.

To further streamline IUU fishing listing processes, it would be beneficial for all t-RFMOs, or through other regional processes (e.g., port State measures), to have any IUU nominations sent directly to the flag State and for the flag State to acknowledge receipt of the information. Implementing such a requirement provides greater time for the flag State to investigate the allegations and comply all relevant information for the consideration of the compliance committee (or equivalent).

As identified under the Information section above, some t-RFMOs have implemented standardised forms for information on the alleged IUU activity. Standard forms help ensure that nominating States provide at least the minimum information about the incident, making the information comparable across IUU cases. Again, this is likely to assist other members in assessing the evidence in a timely manner, enabling a decision to be taken. Of course, implementing a standardised form does not negate the ability of the nominating State to provide additional information regarding the nomination. A further benefit of using standardised forms is to reduce any possible delays while States seek additional information. As already noted, providing guidance on what constitutes admissible evidence is likely to expedite the IUU Fishing Listing process.

Table 4: Timeframes for the provision of information for the draft and provisional IUU Fishing lists.

	Draft IUU Vessel List	Provisional IUU Vessel List
CCSBT	10 weeks (70 days) for initiation nominations and a further information required 6 weeks before Compliance Committee	4 weeks (28 days) prior to the Compliance Committee
IATTC	55 days before the annual session	15 days before annual meeting re-circulate all information including any new information
ICCAT	90 days before the annual session	2 weeks (14 days) prior to the Commission meeting
IOTC	55 days before the annual session	15 days prior to Compliance Committee meeting
WCPFC	55 days before the Technical and Compliance Committee	30 days prior to the Technical and Compliance Committee

PROVISIONAL IUU VESSEL LIST

The process for establishing the provisional IUU fishing list is consistent among the RFMOs, except in ICCAT. ICCAT, at its 2018 Commission meeting, agreed to amendments to their IUU fishing measure that removed the agreement of a provisional IUU fishing list. Instead, ICCAT recirculates the draft IUU fishing list and presents this to the Permanent Working Group for the Improvement of ICCAT Statistics and CMMs (the PWG). The PWG assess the information and can either refer matters to the Compliance Committee or simply forward the list of the Commission for adoption (paragraph 7).

In the case of CCSBT, IOTC and WCPFC, the draft IUU fishing list is presented to the Compliance Committee or equivalent, who are tasked with determining the vessels to be included in the provisional IUU fishing list. Although in

practice the IATTC processes may be similar, the language in the measures reads as if the Secretariat, based on the information submitted by the nominating State and the flag State in response to the allegation and any other information submitted, 'draw up' the provisional IUU fishing list. For example, the newly amended IATTC measure states, *'the Committee for the Review of the Implementation of Measures Adopted by the Commission shall each year examine the provisional IATTC IUU Vessel List, as well as the information that supports that inclusion, and shall remove a vessel from the provisional IATTC IUU Fishing list if the vessel's flag State can demonstrate its compliance'* (paragraph 12). However, in contrast, Annex D of the measure clearly states that the Review Committee reviews the draft IUU fishing list in generating the provisional IUU fishing list and that the Commission reviews the provisional IUU fishing list before making the final determination on the IUU fishing list. It is important that any convoluted and contradictory text be simplified and clarified to ensure effective implementation of the measure. This is the case for the IATTC measures regarding the role of the Director/Executive Secretary in drafting the provisional list and the Committee examining the provisional IUU fishing list (paragraphs 12, 6 and 9 respectively) compared to adopting the provisional IUU fishing list after consideration of the draft IUU fishing list in CCSBT and WCPFC (paragraph 7(i) and paragraph 12(a-b) respectively). A summary of the decision-making processes for listing a vessel as IUU is provided in Table 5. If in practice the draft IUU fishing list simply becomes the provisional IUU fishing list without any consideration of the information by a subcommittee, then it may be possible to simplify the measures to have only a draft and a final IUU fishing lists.

In reviewing the process for drafting the provisional IUU fishing list the best practice of t-RFMOs is to clearly differentiate roles of the different groups. Consistent with the treaties themselves, it is the role of the members to take binding decisions at t-RFMOs including any decisions regarding the inclusion of a vessel on the provisional or final IUU fishing list. The role of the Secretariat should remain as a facilitator and disseminator of information between t-RFMO members.

FINAL IUU FISHING LIST

All t-RFMOs require that the final IUU fishing list be adopted by the Commission. Although in practice the Commission does not have to support recommendations made by one of its subsidiary bodies, the language used to describe the actions of the Commission in the ICCAT measure suggests that the Commission simply adopts the draft IUU fishing list. In contrast, the language in the CCSBT, IATTC, IOTC and WCPFC measure is more prescriptive: the Commission reviews the recommendation of its subsidiary body and is to arrive at a decision pending that review. Pros and cons for either language can be argued: subcommittees have technical expertise and as such may be more qualified to judge the merits of the evidence presented and Commission can be politicised. Conversely, the Commission is responsible for upholding due process and is ultimately responsible for the work and decisions of the t-RFMO. Given this, it is imperative that IUU fishing measures are drafted to remove, as much as possible, any potential to politicise the IUU fishing listing procedure.

It is important that the Commission can, and does, take a decision on listing vessels on the RFMO's IUU fishing vessels during its annual session. This requires clearly articulating that the Commission must 'establish a list of vessels that have undertaken IUU fishing activities in the current or previous year'. Any failure of a Commission to take effective action against IUU fishing poses a real risk in weakening the ability of the measures to address IUU fishing. Implementing intersessional listing processes can assist in early identification and action against IUU fishers while ensuring that punitive actions are taken rapidly. However, history at the IOTC also highlights that intersessional listing procedures can also act as a way to defer the Commission's decisions during the annual session, and should be guarded against. With the removal of the intersessional listing mechanism in IOTC's 2017-03 measure, there are no longer intersessional listing processes in any of the t-RFMOs.

In all of the t-RFMOs, the final decision on listing a vessel is taken by all members of the t-RFMO. There is no differentiation of the flag State of the vessel versus all of the other members of that t-RFMO, with the result being that the flag State of the alleged IUU fishing has direct input into the decision to include one of its vessels on the IUU fishing list. This is particularly problematic for t-RFMOs where decision-making under the treaty is by consensus. The best practice

would be that the flag State of the vessel in question is not involved in the decision of whether to include the vessel on the IUU fishing list, or similar to the practice in the Compliance Monitoring Scheme of the WCPFC, that the flag State cannot block consensus on the listing decision. Amending this rule in both IUU fishing listing, and for compliance assessments generally, is likely to result in increased transparency and accountability regarding the implementation of t-RFMO measures.

Table 5: t-RFMO decision-making for draft, provisional and final IUU Vessel Lists

	Draft IUU Fishing List	Provisional IUU Fishing List	Final IUU Fishing List
CCSBT	Secretariat compiles all information submitted – no decision point	Compliance Committee considers the draft IUU fishing list and decides on the provisional IUU list	Commission reviews provisional IUU fishing list and adopts the final IUU fishing list
IATTC	Director draws up the draft IUU fishing list based on the evidence provided by members and circulates the draft IUU fishing list – no decision point	Director includes all information and responses submitted and 'compiles the provisional IUU fishing list. Committee for the Review of the Implementation of Measures Adopted by the Commission considers the provisional IUU fishing list	Commission reviews the provisional IUU fishing list and adopts the final IUU fishing list
ICCAT	Executive Secretary compiles all information and responses submitted by members and circulates the draft IUU fishing list – no decision point	The PWG examines the draft IUU fishing list. If necessary refers CMMs to the Compliance Committee or forwards the list to the Commission for adoption	Commission adopts the IUU fishing list presented by the PWG – no clause calling for review of the decision of the PWG
IOTC	Executive Secretary compiles all information and responses submitted by members and circulates the draft IUU fishing list – no decision point	Compliance Committee examines the draft IUU fishing list to establish the provisional IUU fishing list	Commission adopts the final IUU fishing list taking into account the recommendations from the Compliance Committee
WCPFC	Secretariat compiles all information submitted and circulates the draft IUU fishing list – no decision point	Technical and Compliance Committee considers the draft IUU fishing list and establish the provisional IUU fishing list	Commission reviews Provisional IUU Fishing List and adopts the final IUU fishing list

RESOLVED IUU FISHING CASES: INFORMATION TO THE COMMISSION

It may be important to consider strengthening information sharing mechanisms between States and/or regionally as a way to combat and deter organised crime associated with IUU fishing. There has been an increasing incidence at t-RFMOs of alleged IUU fishing cases involving unlawful fishing activities in the national waters of a coastal State being resolved bilaterally without the matter being considered through the Commission process. There has also been an increasing incidence of States nominating vessels for IUU vessel listing either in response to a failed, or to instigate, bilateral negotiations between the flag State and the nominating State (e.g., WCPFC and IOTC). These instances of IUU fishing, although occurring within the national waters of a coastal State, are very likely to have impacted and undermined the overall management of the resource.

Noting that this is not improper, bilateral negotiations may undermine the identification of wilful IUU fishing activities, mask ongoing/organised IUU fishing, or hide compliance or implementation issues of the flag State. As such there is a strong

argument that all IUU fishing cases should be, at minimum, presented to the Commission for information, but ideally for the Commission's consideration. Presenting all IUU fishing cases would help ensure the strength, integrity and transparency of the IUU fishing listing process. Presenting all IUU fishing cases, even if only for information, means that all members have an opportunity to assess a specific IUU case against compliance with measures and against the impact on the resource generally, thereby ensuring that it is not masking organised crime, ongoing or wilful non-compliance, or a systemic issue with the flag States regulatory arrangements. In undertaking bilateral negotiations, there is no transparency of the process between the two States, and there can be no assessment of whether the flag State has taken sufficient actions to remedy the issue or if there should be additional punitive actions against the vessel's owner and operator to ensure that they do not benefit from the IUU fishing. Nor is there a mechanism to investigate the flag State's implementation of their other RFMO obligations.

Ideally, irrespective of the matter being resolved bilaterally, the information on the alleged case should still be provided to the Commission for information either through the compliance assessment process or in discussions on other IUU cases such that the Commission can have a broader context. By doing so, the Commission sends a clearer message that IUU fishing will not be tolerated.

Delisting Process

All t-RFMOs include a specific delisting procedure in their measure. The delisting processes for CCSBT, IATTC, ICCAT, IOTC and WCPFC are consistent. Each of these t-RFMOs requires that a delisting nomination, including evidence demonstrating why the vessel should be delisted, be submitted by a member or non-member whose vessel appears on the IUU fishing list (i.e., the flag State).

The vessel can be removal from the draft or provisional IUU fishing lists once the flag State/entity demonstrates that the vessel did not partake in IUU fishing activities or that effective action has been taken in response to the alleged IUU fishing activity. WCPFC also includes a clause that the case has been settled to the satisfaction of the member originally nominating the vessel and the flag State involved. The IOTC has also made clear that if its Compliance Committee is unable to agree to a vessel's inclusion or not on the provisional IUU fishing list, that the vessel will be included for the consideration by the Commission (paragraph 15).

In relation to the information provided to support delisting, each of the t-RFMOs required that the flag State provide sufficient information to support the delisting nomination. However, the t-RFMOs have differences regarding mandatory information/ actions to be taken in respect of the vessel. Of the list of information outlined in Table 6. CCSBT, IATTC, IOTC and WCPFC outline that points i and ii are mandatory and must be accompanied by one of ii, iv or v. In contrast, ICCAT requires that the CPC meet 'one or more' of the requirements. IOTC has included a new element for delisting, that being if the vessel has been sunk or scrapped.

It is important to note that there is a subtle difference in the WCPFC language related to the flag State monitoring and control (point ii above). The WCPFC measure states that the flag State '*...will be able to assume effective flag State duties with regard the monitoring and control of the vessels fishing activities...*' (emphasis added). In comparison, the CCSBT and IOTC measures use the following language: '*...it is and will continue to assume effective flag State duties with regard the monitoring and control of the vessels fishing activities...*' (emphasis added). Although subtle, this change vastly alters the implications for the member, since 'will be able to' implies that the member with the IUU fishing should be able to comply with this element in the future, but that in the meantime the vessel would be allowed to resume fishing without implementing mitigation measures to remove the IUU activity by the flag State. This issue has been identified and resolved in the latest ICCAT measure (Rec 2018-08); it now requires that 'the flag CPC *has and will* continue to assume effectively its responsibility with respect to this vessel.' (emphasis added) (paragraph 6(b)(ii)).

In relation to delisting processes, Erceg (2006) highlights the longstanding and inherent problem of separating the flag State responsibilities with respect of their obligations under UNCLOS, the UNFSA and the relevant RFMO: there is a

need for improvement in the control of the nationals themselves by their respective flag States, particularly relating to control of nationals on the high seas. This has been highlighted numerous times in relation to preventing and combating IUU fishing, including through the recommendations for flag States in the IPOA-IUU itself.

In addition, the age-old issue of clarifying what constitutes ‘adequate severity’ and ‘effective action’ by the flag State against an IUU fishing listed vessel. Rather, actions against illegal fishers are defined in the national legislation of the flag State, leaving ‘adequate severity’ and ‘effective action’ against IUU fishing up to the flag State of the IUU fishing itself and irrespective of another State’s interpretation of the legislation. Depending on the State, this could result in the implementation of ineffective deterrents against IUU fishing.

In amending t-RFMO IUU fishing listing measures, it will be important to include clear guidance of what constitutes ‘adequate severity’ and ‘effective action’, or alternatively what is not adequate severity or effective action, by the flag State to have the vessel removed from the draft, provisional or final IUU fishing lists and what evidence is required to support this. Implementing a formulaic approach, such as in the IOTC measure, to the removal of vessels from the draft, provisional and final IUU fishing lists ensures that the process is transparent and that all members have an opportunity to assess the actions taken by the flag State.

The best practice is to identify exactly what information elements are mandatory required before a vessel can be delisted and a formulaic approach to the delisting procedure to ensure the process is as transparent as possible.

Table 6: Information to be presented by flag States in support of a delisting nomination.

	Delisting Information / Actions	CCSBT	IATTC	ICCAT	IOTC	WCPFC
a.	The flag State has adopted measures to ensure the vessel complies with the measures of the relevant t-RFMO	✓	✓	✓	✓	✓
a.i	The flag State can effectively assume monitoring and control of the vessel	✓	✓	✓	✓	✓
a.ii	The flag State has taken effective action in response to the IUU activities e.g. prosecution and/or sanctions of ‘adequate severity’	✓	✓	✓	✓	✓
b.	The flag State can demonstrate that the vessel has changed ownership and that the previous owner has no legal, financial or real interest in the vessel or exercises any control over its Cooperating non-Contracting Parties	✓	✓	✓	✓	✓
c.	The IUU fishing activities / prosecution against the vessel has been settled to the satisfaction of the Member(s) that originally nominated the vessel and the flag State of the vessel	✓	x	x	✓	✓
d.	The vessel has been sunk or scrapped	x	✓	x	✓	x
e.	The vessel did not take part in any IUU fishing activities described in the measure	x	x	✓	x	x

INTERSESSIONAL LISTING AND DELISTING

All t-RFMOs have provisions for intersessional decision-making to delist a vessel from the IUU fishing list. Intersessional delisting processes were included in the IUU fishing measures to enable delisting as soon as the IUU fishing issue had been resolved by the flag State. Intersessional delisting provides a strong incentive for flag States to take swift and decisive action to remedy the IUU activity. It is important that the intersessional delisting process provides a thorough and transparent assessment of the actions taken by the flag State, including if they adequately remedy the IUU activity such

that other t-RFMO members can be confident in their assessment. This is particularly pertinent for flag States with multiple vessels concurrently listed, or vessels continually nominated for IUU listing over time.

The ICCAT and IOTC intersessional delisting processes are very similar. Both measures require submission of the removal request to the Executive Secretary. For ICCAT, the request for delisting is required by 15 July annually. IOTC allows delisting at any time. Following circulation of the information, members are given 30 days in which to respond to the Secretariat in writing prior to the information being tallied by the Executive Secretary. To remove the vessel from the IUU fishing list in ICCAT, the Executive Secretary reviews the feedback from members and if a member objects (assumed to be one as it is not specified), the vessel remains on the final IUU fishing list with the removal request forwarded to the PWG for assessment.

For IOTC, delisting requires that 50% of eligible voting members respond and a two-thirds majority of members expressing their position and casting a positive or negative vote (i.e., abstaining is not counted in the two-thirds majority of members). Under the IOTC measure, the Executive Secretary notifies ‘...all CPCs, the flag State of the vessel(s) if not a CPC, and any other non-Contracting Party that may have an interest...’. Both measures call for the publication of the new IUU fishing list on the respective website and circulation of the decision to other RFMOs.

Like ICCAT and IOTC, CCSBT and IATTC provide for intersessional delisting of vessels included on their respective IUU fishing lists. In both CCSBT and IATTC, the measure simply refers back to the intersessional decision-making processes continued in the Rules of Procedure. In CCSBT, for example, it is ‘consistent with Rule 6(5) of the CCSBT Rules of Procedure’, which states: *“Where necessary when the Commission is not in session, decisions of the Commission shall be taken by a unanimous vote of the Members effected by post or other means of textual communication including facsimile. In circumstances where the Chair is satisfied that a Member has received a proposal, and that Member has not responded within 21 days to the proposal, the Member shall be taken to have responded to that proposal in the affirmative”*. The WCPFC intersessional delisting procedure simply follows the general provisions for delisting a vessel from the WCPFC IUU fishing list as outlined in paragraphs 26-29 of the CMM.

Depending on the confidentiality rules of the different t-RFMOs, undertaking intersessional deliberations on IUU fishing listing may result in a less transparent process than the standard IUU fishing listing procedure conducted during the annual session. For example, all intersessional communications from WCPFC are considered confidential and are provided to members only; this would mean that any information pertaining to an IUU fishing listing nomination would not be provided to NGOs, for example, which reduces the transparency of the process.

Although now no longer being used, it is important to remain cognisant of the possible ramifications of including intersessional listing procedures. There may be a tendency to use the intersessional listing process as a way to delay the decision on the specific IUU case, and despite it being legal, it undermines the IUU fishing listing process by allowing the alleged IUU fishing vessel to continue fishing operations while the decision is pending. If this were the case, it is likely to weaken the IUU fishing listing measure, making this tool impotent in the fight against IUU fishing. As such, any inclusion of intersessional listing or delisting should be carefully drafted to ensure a rigorous and transparent process is adopted and implemented by t-RFMOs. For example, the t-RFMOs could consider revising the IUU fishing listing measures to only invoke intersessional listing or delisting vessels from flag States not previously included on the IUU fishing list or of new vessels not previously considered by the Commission.

Actions to be taken by Members, including Trade Measures & Sanctions

The IUU fishing listing measures all stipulate the actions to be taken by States if a vessel is included on a t-RFMO final IUU fishing list in respect of their own flag vessels and actions directly against the IUU listed vessel. The actions are largely consistent between the measures (Table 7).

All t-RFMOs require that the members not take trade measures or sanctions on a vessel included on the draft and provisional IUU fishing lists. However, all t-RFMOs recognise the rights of flag States and coastal States to take proper actions consistent with international law. Only CCSBT specifically references 'applicable World Trade Organisation' measures as being included in the 'international law'. There is a curiosity in the IATTC measure: in paragraph 15, once the final IUU vessel list has been adopted by the Commission, the Commission asks that only non-members with vessels on the IATTC IUU fishing list take measures to eliminate IUU fishing and specifically refers to the withdrawal of the fishing registration. However, this specific element is not included in paragraph 16, which refers to both members and cooperating non-members (CPCs).

In their review of using trade measures to combat IUU fishing, Le Gallic and Cox (2006) summarise the theory of the economics of crime and punishment. The theory suggests that risk-neutral individuals will commit an offence if, and only if, their private expected benefit exceeds the expected sanction for committing the crime. The theory assumes that 1. individuals are risk-neutral, 2. an individual's compliance decision is not influenced by the behaviour of other individuals, and 3. the decision to fish illegally are solely based on maximising profit and that any penalties incurred are simply 'a cost of doing business'. It is important to review this theory if the international community is truly seeking to implement measures to prevent, deter and combat IUU fishing. Le Gallic and Cox (2006) identify two key drivers for illicit fishing activities:

- overcapacity in the global fishing fleet: driving fishers to find the most profitable practices (e.g., reducing vessel and crew costs while maximizing catches) in a manner which may, or may not, be permissible in their country of origin, and
- insufficient and weak national and international governance structures, including continued use of Flags of Convenience, exploiting loopholes / weaknesses in conservation and management measures, and the politicisation of IUU decision-making.

Consistent with Article 19(2) of UNFSA, it is critical that any punitive measures are of an adequate severity such that they deter future IUU activities. T-RFMOs should continue to harmonised punitive measures applied to vessel listed as IUU fishing and have these measures apply to the vessel owner(s) and operator(s) globally. Inclusion of a cross-listing procedure in the measure would support this outcome. The harmonisation and globalisation of punitive measures against IUU fishing vessel owners and operators sends a clear message from the international community that IUU fishing will be dealt with decisively. Importantly, as outlined by the theory, without strong global action, IUU fishers are likely to continue to undertake IUU fishing irrespective of the t-RFMO or ocean they are operating in because the pay-off of IUU fishing remains higher than the risk of being caught or the penalty even if caught.

The specific punitive measures would ideally be reflective of other international law; for example any sanctions related to port access should reflect the measures identified in the *FAO Agreement on Port State Measures to Prevent Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA) (Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing)*. As previously highlighted, a significant proportion of actions in support of preventing IUU fishing remains at the national level, e.g., implementing effective flag State control over nationals. As such, any t-RFMO measures for national level implementation should reflect the recommendations from Part IV of the IPOA-IUU. Moreover, there is a need for t-RFMOs to continue to strengthen their compliance assessment and review processes to ensure that members are giving effect to the measures adopted by t-RFMOs.

Regional cooperation is required for punitive measures or sanctions to be effective. There are a range of regional initiatives working to ensure it is increasingly difficult for IUU fishing vessel owners and operators to profit from their illegal operations. For example, 56 nations and two RFMO are members of the *International Monitoring, Control and Surveillance Network for Fisheries-related Activities (MCS Network)*, eleven countries in South-East Asia operate under the *Regional Plan of Action to Promote Responsible Fishing Practice, including Combating Illegal, Unreported and Unregulated Fishing in South East Asia (IPOA-IUU)*, five East African countries implemented the *Fish-i Africa* initiative

and recently the members of the Forum Fisheries Agency have adopted the text of the *Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region* which provides for bilateral and/or plurilateral agreements between the members to share information, assets and personnel for fisheries enforcement activities. Each of these regional initiatives have been effective at stopping the landing of illegal catches in ports, resulting in greater deterrence of IUU fishing in these regions.

The best practices in the t-RFMOs includes continued harmonisation of the punitive measures for vessel listed on IUU fishing lists, implementation of simple cross-listing of other RFMO IUU fishing lists, ratification and implementation of the PSMA. At the RFMO level, there is a need to strengthen RFMO compliance assessment processes to support the assessment of actions that are of adequate severity and to strengthen regional cooperation to penalise those vessels identified as conducting IUU fishing.

Table 7: Actions to be taken by States in response to an IUU Fishing Listing decisions.

	CCSBT	IATTC	ICCAT	IOTC	WCPFC
States are to ensure that their flag fishing vessels do not engage in fishing activities with vessels on the IUU Fishing List, specifically					
refuse to grant their flag to an IUU fishing vessel	✓	✓	✓	x	x
tranship and landing	✓	✓	✓	✓	✓
joint fishing operations	✓	✓	✓	✓	✓
assist or engage in fish processing operations	✓	x	✓	✓	8
Ensure, excepting <i>force majeure</i>, that vessels on the respective IUU Fishing List are not authorised to					
grant the State's flag (unless evidence the vessel changed ownership and that the previous owner has no legal, financial or control over the vessel)	✓	✓	✓	✓	✓
remove or withdraw the authorisation to fish or pose alternative sanctions consistent with relevant domestic law	✓	✓ ⁹	x	✓	x
land, transship, refuel, resupply	✓	✓	✓	✓	✓
import	✓	✓	✓	✓	✓
engage in other commercial transactions	✓	✓	✓	✓	✓
gain port entry (if foreign flagged) with the exception of vessel inspection / enforcement action	✓	✓	✓	✓	x
If IUU fishing vessel enters ports voluntarily, it is not authorised to:					
land, transship	✓	✓	x	✓	✓
refuel, resupply	✓	x	x	✓	✓
engage in other commercial activities	✓	x	x	✓	x
must be subject to mandatory inspection if enters port voluntarily	✓	x	✓	✓	✓
be chartered	✓	✓	✓	✓	✓
trade domestically or internationally	✓	x	x	x	x
Other					
encourage traders, importers, transporters, etc, to refrain from commercial interactions with vessels on the IUU fishing list	x	✓	✓	✓	✓
collect and exchange information with other members and non-members for the purpose of searching for, controlling and preventing false declarations	✓	✓	✓	✓	✓
monitor vessel on IUU fishing vessel lists and submit information to Secretariat	x	x	✓	x	x

Cross-Listing

CCSBT, IATTC, ICCAT and IOTC have specific provisions for cross-listing vessels from other t-RFMOs. WCPFC is the only t-RFMO without any cross-listing procedures included in its measure. The adoption of a cross-listing procedure has been proposed for several years in the WCPFC, but it has not yet been adopted.

⁸ Blank boxes indicate that the t-RFMO IUU Vessel Listing measure does not include this element.

⁹ This only applies to non-members with vessels on the IUU Vessel list as outlined in paragraphs 15 (and 16).

The ICCAT measure outlines specific guidelines for the cross-listing of IUU vessels from other tuna RFMOs IUU vessel lists. Paragraph 11 and 12 outline the process for cross listing IUU fishing vessels from other RFMOs, including neighbouring non-tuna RFMOs. The Executive Secretary disseminates the other t-RFMOs adopted IUU fishing lists together with all evidence provided to support the listing of the vessel as IUU in the other t-RFMO, plus any additional information regarding the listing, to all Parties. All vessels listed, or delisted, from other t-RFMO IUU fishing lists 'shall be' included on the final ICCAT IUU fishing list, unless there is an objection received from a Contracting Party within 30 days from the date of the transmission of the information. Paragraph 11(a-c) highlights that a Contracting Party can make an objection based on (i) satisfactory information to establish that the vessel didn't engage in IUU fishing or that effective action has been taken by the flag State (e.g. prosecution, imposition of sanctions of adequate severity that have been complied with), (ii) there is insufficient supporting information regarding the listing; or for non-tuna RFMO vessels, (ii) that there is an insufficient nexus to the conservation and management of ICCAT species to warrant cross-listing. In this instance, the vessel is placed on ICCAT's draft IUU fishing list and is assessed in a manner consistent with the draft IUU fishing listing procedures included in the ICCAT measure.

The CCSBT procedure together with the IATTC and IOTC measures includes provisions for cross listing. For example, the CCSBT IUU fishing listing measure provides that the Extended Commission 'may consider' cross-listing IUU fishing lists from other t-RFMOs provided that the procedures outlined for cross-listing a vessel are followed. In all three t-RFMOs, cross listing is permissible for any IUU fishing vessel listed in any of the other relevant RFMOs (as defined in the measure) and that includes both tuna and non-tuna RFMOs. The measures provide for the automatic listing of all IUU fishing vessels from these RFMOs, unless there is an objection received in writing within 30 days of the receipt of the information from the Executive Secretary (paragraph 29, 21 and 35 of CCSBT, IATTC and IOTC respectively). Similar to the ICCAT procedure, in the event of an objection, the matter is deferred to the next session of the RFMO. Removal from the list is automatic once it is removed from the original IUU fishing vessel list. Inclusion of cross-listing IUU fishing between RFMOs is consistent with historical recommendations, including from the High Seas Task Force (2006).

Cross-listing provides a comprehensive global approach to combating IUU fishing activities and as such should be encouraged for all t-RFMOs. However, it is important for t-RFMOs to consider the process for cross-listing vessels to preserve the overall global approach to combating IUU fishing. As noted above, the CCSBT, IATTC, ICCAT and IOTC cross-listing processes provide for the reassessment of the IUU evidence presented to the original t-RFMO, which poses a risk that the two t-RFMOs take different decisions based on the presentation of the same evidence. This could be due to differences in membership, potentially different political circumstances, different comprehension of that t-RFMO's measures, or the context for the listing. If this were to occur, it would likely raise questions from the flag State regarding the original listing and in doing so undermine the global action on IUU and the IUU fishing listing process itself.

The best practice is to include cross-listing of other RFMO IUU fishing lists. If simple cross-listing of vessels was not possible and a reassessment of IUU cases was to be undertaken by each t-RFMO, it would be critical to have as much harmonisation between the t-RFMO IUU fishing listing measures as possible. Moreover, it would be imperative that any penalties associated with an IUU fishing listing be consistent among the t-RFMOs, such that the same penalties — for example, in relation to port access — apply globally.

Publication of the IUU Fishing List

The publication of the adopted IUU fishing list is consistent among all t-RFMOs. All measures provide that the Secretariat will take measures consistent with the confidentiality rules of the specific t-RFMO to publicise the adopted IUU fishing list, including placement on that RFMO's website and transmission to other RFMOs for the primary purpose of enhancing cooperation to combat IUU fishing activities. IOTC and WCPFC have a specific provision to send the FAO a copy of the respective final adopted IUU fishing list.

In relation to the information provided in the IUU fishing list itself, the t-RFMO IUU fishing list information is consistent and includes, *inter alia*, the current and previous name, flag, owner contact details, IMO/UVI number, call sign and photographs. It is essential that the IUU fishing lists contain consistent information on the IUU fishing themselves to strengthen the identification of the vessel such that the punitive actions can be implemented. There needs to be sufficient information to enable any other State, including port States, to identify the vessel and as such must also include, *inter alia*, a photograph within a prescribed period of time, IMO/UVI, and/or any other distinguishing features. Furthermore, t-RFMOs might like to consider listing if the vessel or the vessel owner is included on any other t-RFMO IUU fishing list. Importantly, a single, central repository of this information on current IUU fishing listings, possibly held at FAO or the joint t-RFMO website (www.Tuna-Org.org), would greatly assist in identifying wilful or organised crime components of IUU fishing, but it is imperative that this information be maintained with the most current and up-to-date information.

To assist easy identification of IUU fishing, it may be beneficial for t-RFMOs to consider providing direct links to, or directly cross-referencing, the adopted IUU fishing listed from other t-RFMOs on each of the t-RFMO websites, such as ICCAT does. Members of t-RFMOs may also consider cross-referencing the adopted IUU fishing listing on selected NGO websites to further highlight IUU vessels.

Recommendations

This review demonstrates that opportunities to strengthen IUU fishing measures remain. The recommendations are split into two groups. The first group of recommendations outlines the best practices for the IUU fishing measures themselves and seeks to address the fundamental weaknesses and gaps in the measures to effectively deter IUU fishing.

Table 8 sets out the recommended action required for each of the five t-RFMOs to strengthen their IUU Fishing Listing measures.

The second group of recommendations relates to the integration of the IUU fishing measure within the other RFMO measures. These recommendations recognise the concomitance between the MCS measures adopted by t-RFMOs, implementation by flag States and the IUU fishing measure. This includes MCS measures such as observer coverage, VMS reporting times, transshipment inspections in-port, prohibition on at-sea transshipment, use of electronic monitoring and reporting, and compliance assessment processes themselves, including the provision of responses to non-compliance. In fact, the IUU fishing measure is only as effective as the ability of the supporting MCS measures are in identifying the IUU fishing activity. Robust, effective, fully implemented MCS measures providing a 'level-playing field', also require a rigorous mechanism to assess compliance of members with these other measures at the t-RFMOs.

t-RFMO IUU Fishing Measures

Recommendation 1: Include an overarching context paragraph in the measures to i) place the IUU Fishing Listing measure in the framework of the treaty's objective; and ii) to define the role, action, and outcome that the Commission needs to achieve to fulfil the requirements of the measure.

Recommendation 2: Implement a broad definition of 'fishing vessel' and 'fishing activities', and apply the IUU fishing measure to all fishing vessels and fishing activities to ensure that all vessels and all activities can be included in the measure.

Recommendation 3: Harmonise the criteria that constitute IUU fishing across t-RFMOs, and include additional criteria related to the management used for the fishery (catch and effort quota or limits), regarding common ownership and vessels without nationality, including vessels without nationality that are engaging in fishing or supporting fishing activity.

Recommendation 4: Provide a mechanism for information from third parties to be included as evidence of IUU fishing with associated rules and regulations to maintain consistency with international law and confidentiality.

Recommendation 5: Implement streamlined IUU fishing listing and delisting processes with clearly defined information requirements, roles, responsibilities and timeframes.

Recommendation 6: Require that members be responsible at all stages of the IUU fishing processes and that the Commission adopts an IUU fishing list annually. But remove the flag State from the decision-making of listing one of its own flag vessels on the IUU fishing list.

Recommendation 7: Amend measures to ensure that information on all alleged IUU fishing cases is provided to the Commission, at minimum for information, even if the matter has been resolved bilaterally prior to the commencement of the meeting. Ideally, the measure should provide for an assessment of all IUU fishing cases to aid identification of organised and/or repeat IUU offenders, and also assess or define what actions need to be taken by the flag State to ensure compliance with relevant provisions regarding flag State control in international law.

Recommendation 8: Implement a formulaic approach to delisting vessels from the IUU list including defining what constitutes 'adequate severity' and 'effective action'. Require that all punitive measures and/or sanctions imposed on the vessel have been met prior to delisting the vessel, that is that flag States 'have taken', rather than 'will take', actions.

Recommendation 9: Implement provisions for cross-listing IUU fishing listed in other t-RFMOs, but do not include a reassessment of the original IUU fishing case.

Recommendation 10: Implement strong and decisive punitive measures to effectively deter IUU fishers. Consider listing punitive measures considered to be of 'adequate severity' in the measure. Apply the punitive measures in all t-RFMOs and RFMOs generally.

Recommendation 11: Provide sufficient information on the IUU fishing list to enable identification of the vessel and make the list public and provide a direct link to other t-RFMO IUU lists on the RFMOs website and or other organisations such as FAO, Tuna-org.org or NGOs.

MCS Measures to Support Effective IUU Fishing Listing

Recommendation 12: Strengthen MCS measures that support the identification of illegal/illicit fishing activities generally and remove loopholes from these measures.

Recommendation 13: Build the capacity of developing coastal States to identify, monitor activities of fishing vessels in their EEZs, and prosecute IUU fishing cases.

Recommendation 14: Consider implementing an independent audit process for flag States that have vessels repeatedly listed as IUU to identify any deficiencies and capacity needs to strengthen flag State control.

Recommendation 15: Increase information-sharing between t-RFMOs, between the individual member States, and between plurilateral regional organisations.

Table 8: Recommended actions for the five t-RFMOs to strengthen their IUU fishing listing measure. ✓ denotes that the RFMO is largely consistent with this element. ✗ this element is not currently included in the RFMOs IUU fishing measure.

Recommendation number and brief description	CCSBT	IATTC	ICCAT	IOTC	WCPFC
1. <u>Context paragraph</u> : tying the measure with the treaty's objective	✓	✓	✗	✓	✓
2. <u>Application</u> : measure applies to all vessels associated with tuna fishing and ensure all potential cases of IUU are brought before the Commission to aid identification of repeat offenders or ensure flag States have adequately resolved the issue	✓ ✗	✗ ✗	✓ ✗	✓ ✗	✓ ✗
3. <u>Criteria constituting IUU fishing</u> :					
consistency between t-RFMOs	✗	✗	✗	✗	✗
criteria related to the management of the fishery (e.g. catch and effort quota or limits)	✗	✗	✓	✓	✗
criteria for common ownership	✗	✓	✗	✓	✓
criteria for vessels without nationality; including fishing and supporting vessels	✗	✗	✓	✓	✗
4. <u>Admissible information</u> : include information from third parties, with associated rules and regulations to maintain consistency with international law and confidentiality, etc.	✗	✗	✗	✓	✗
5. <u>Vessel listing procedures</u> : streamlined & transparent with clearly defined roles and responsibilities	✓	✗*	✓	✓	✓
6. <u>Decision making</u> : members are responsible for decision making at all stages of the IUU fishing listing procedure, the Commission to adopt an IUU fishing list, and amend measures so the flag State of the nominated vessel is not part of the decision to list the vessel as IUU	✓ ✗	✓ ✗	✓ ✗	✓ ✓	✓ ✗
7. <u>Delisting procedures</u> :					
a. implement a formulaic approach including what constitutes 'adequate severity' and 'effective action'	✗	✗	✗	✓	✗
b. require that all punitive measures/sanctions are met prior to delisting	✗	✗	✓	✓	✗
c. review the actions of flag States to ensure they					
i. have taken action to address the issue					
ii. have the ability to assert flag State responsibility through a thorough review of their actions through a rigorous and transparent compliance monitoring scheme	✗	✗	✓	✓	✗
iii. are fulfilling their obligations under UNFSA and IPOA-IUU					
8. <u>Cross listing</u> : implement cross-listing; do not include a re-assessment of the original IUU evidence	✓ ✗	✓ ✗	✓ ✗	✓ ✗	✗

* RFMO measure drafting lack clarity regarding the roles and responsibilities of the members and the Secretariat though in practice it may be that the members are solely responsible

9. <u>Punitive measures</u> : Implement strong and decisive punitive measures to effectively deter IUU fishers. Consider listing punitive measures considered to be of 'adequate severity' in the measure. Apply the punitive measures in all t-RFMOs and RFMOs generally	x	x	x	x	x
10. <u>IUU Vessel Lists</u> : harmonise the information contained in the IUU Vessel Lists across the t-RFMOs to enable effective tracing of the vessel globally	x ^π	x	x	x	x
include additional information on beneficial ownership, common ownership and IMO/UVI number	x	✓	x	x	x
provide a direct link to other t-RFMO IUU lists on the RFMOs website and or other organisations such as FAO, Tuna-org. or NGOs	x	✓	✓ ^Δ	✓	x [◊]

^π RFMOs have inconsistent information on the IUU Vessel List

^Δ Does not include link to CCSBT's IUU Vessel List

[◊] Only includes link to Tuna-org.org

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