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THE EFFECTIVENESS OF THE SOUTHERN AFRICAN
DEVELOPMENT COMMUNITY'S RESPONSE TO
INTERNATIONAL EFFORTS TO CURB ILLEGAL,
UNREPORTED AND UNREGULATED FISHING IN THE
CONTEXT OF INDUSTRIAL MARINE FISHERIES AND THE
SADC COASTAL STATES.

By

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Master of Laws (Environmental Law).

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ABSTRACT

Illegal, unreported and unregulated fishing, more commonly referred to as IUU fishing (IUU fishing), is a global problem which affects both the high seas and the exclusive economic zones (EEZs) of States. Illegal fishing refers to fishing within the jurisdiction of a State in contravention of its laws and fishing by flag vessels in contravention of the requirements of the Regional Fisheries Management Organisations (RFMOs) of which a flag State is a member. Unreported fishing relates to misreporting or non-reporting of fishing within the area of control of a RFMO. Unregulated fishing involves fishing from vessels of flag States that are not members of the relevant RFMO. In the EEZs of States, IUU fishing usually includes activities such as unlicensed fishing, under- or non-reporting of catches, fishing in closed areas or during closed seasons, use of unauthorised fishing gear, exceeding quotas or taking prohibited species. On the high seas IUU fishing includes non-compliance with the conservation methods of RFMOs or fishing outside the area of an RFMO.

IUU fishing causes environmental, economic and social problems and is of particular concern to developing countries as these suffer the greatest losses from such activity. The coastal States of the Southern African Development Community (SADC) are responsible for managing and monitoring approximately seven million square kilometers of ocean. Major IUU fishing activities affecting these States include fishing in closed areas, illegal fishing methods and equipment, un-licensed foreign vessels, non-reporting and misreporting of catches by foreign vessels and illegal or unregulated transshipment at sea. The SADC therefore has much to lose from IUU fishing and a great deal to gain from participating in global efforts to curb these activities and developing a regional response.

This dissertation seeks to establish to what extent SADC has developed legal and policy instruments and institutions to curb IUU fishing and to what extent it has incorporated global and regional instruments and proposal designed to curb IUU fishing into these instruments. The dissertation then seeks to ascertain whether the legal and policy initiatives and institutions developed by SADC are effective in dealing with the problem of IUU fishing in the SADC region and globally.

ACRONYMS AND ABBREVIATIONS

| | |
|-----------------------|--|
| BC | Benguela Current. |
| BCC | Benguela Current Commission. |
| BC Convention | Benguela Current Convention. |
| Cancun Declaration | Declaration of Cancun. 1992 International Conference on Responsible Fishing. |
| CBD | Convention on Biological Diversity. |
| CCAMLR | Commission for the Conservation of Antarctic Marine Living Resources |
| CCAMLR Convention | Convention on the Conservation of Antarctic Marine Living Resources. |
| CDS/s | Catch Documentation System/s. |
| Code of Conduct | Code of Conduct for Responsible Fisheries. |
| Compliance Agreement | Agreement to Promote Compliance with Conservation Measures on the High Seas. |
| COP | Conference of the Parties of the CBD. |
| DRC | Democratic Republic of Congo. |
| EEZ/s | Exclusive Economic Zone/s. |
| FAO | Food and Agricultural Organisation of the United Nations. |
| Fish Stocks Agreement | The UN Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. |
| FOC | Flags of Convenience. |
| ICCAT | International Commission for the Conservation of Atlantic Tunas. |
| IOTC | Indian Ocean Tuna Commission. |
| IPOA-IUU | International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. |
| IUU fishing | Illegal, Unreported and Unregulated Fishing. |
| LME/s | Large Marine Ecosystem/s. |
| MCS | Monitoring, control and surveillance. |

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| MCS Centre | SADC Regional Monitoring, Control and Surveillance Centre. |
| MOP | Meeting of the Parties of SIOFA. |
| PSMA | Agreement on Port State Measures. |
| RFMO/s | Regional Fisheries Management Organisation/s. |
| Rio Declaration | Rio Declaration on Environment and Development. 1992 United Nations Conference on Environment & Development. |
| Rome Declaration | Rome Declaration on the Implementation of the Code of Conduct for Responsible Fisheries. 1999 FAO Ministerial Meeting on Fisheries. |
| SADC | Southern African Development Community |
| SADC Treaty | Treaty of the Southern African Development Community as Amended by the Agreement Amending the Treaty of the Southern African Development Community. |
| SAP | Benguela Current Commission Strategic Action Programme |
| SBSTTA | Subsidiary Body on Scientific, Technical and Technology Advice of the CBD. |
| SEAFO | South East Atlantic Fisheries Organisation. |
| SEAFO System | Recommendation on a System of Control and Enforcement adopted by the South Atlantic Fisheries Organisation. |
| SIOFA | Southern Indian Ocean Fisheries Agreement. |
| SoC | Statement of Commitment by SADC Ministers Responsible for Marine Fisheries on Illegal, Unreported and Unregulated Fishing. |
| SWIOFC | South West Indian Ocean Fisheries Commission. |
| UNCLOS | United Nations Convention on the Law of the Sea. |
| VMS/s | Vessel Monitoring System/s. |
| WTO | World Trade Organisation. |

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CHAPTER 1: INTRODUCTION

1.1 Overview and Historical Context of IUU Fishing

Illegal, unreported and unregulated fishing (IUU fishing) is a global problem which affects both the high seas and the exclusive economic zones (EEZs) of nations.¹ IUU fishing causes environmental, economic and social problems and is of particular concern to developing countries as these suffer the greatest losses from such activity.²

The Southern African Development Community (SADC) is an inter-governmental organisation, currently comprising of fifteen Southern African States. It was founded by the Treaty of the Southern African Development Community (SADC Treaty), largely for developmental and economic purposes.³ The topic of this dissertation directly affects the SADC coastal States, i.e., Angola, Democratic Republic of Congo (DRC), Madagascar, Mauritius, Mozambique, Namibia, Seychelles, South Africa and Tanzania. These States are responsible for managing and monitoring approximately seven million square kilometres of ocean.⁴ Most of them also have well developed industrial fisheries. Only the DRC and Tanzania have exclusively artisanal fisheries.⁵ Accordingly, for most of the SADC coastal States their fisheries sectors are very important in that they contribute to increased livelihoods and poverty alleviation.⁶ SADC therefore has a great deal to gain from participating in global efforts to curb IUU fishing activities and developing a regional response to IUU fishing.

¹ Marine Resource Assessment Group Ltd (MRAG) 'Review of the Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries' Synthesis Report (2005). Report prepared for the UK's Department for International Development. Available at http://www.imcsnet.org/imcs/docs/iuu_fishing_synthesis_report_mrag.pdf. Accessed on 21 August 2012.

² Department for International Development of the United Kingdom. Programme of Support to Tackling IUU Fishing in Southern Africa 'Programme Brief and Update No 1' (2007) at 4. Available at www.imcsnet.org/imcs/docs/tackling_iuu_fishing_southern_africa.pdf. Accessed on 31/7/2014.

³ Treaty of the Southern African Development Community (Windhoek) 17 August 1992. Entered into force on 30 September 1993. Amended by the Agreement Amending the Treaty of the Southern African Development Community (Windhoek) 1 January 2001. Entered into force on 14 August 2001. (SADC Treaty). Available at www.sadc.int/files/9113/5292/9343/SADC_Treaty.pdf. Accessed on 26 July 2014.

⁴ Food and Agricultural Organisation Fisheries Report No.859 'Report of the Regional Workshop on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing' Cape Town, South Africa, January 2008 at 10. Available at <ftp://ftp.fao.org/docrep/fao/010/0049e/10049e00.pdf>. Accessed on 19 July 2014.

⁵ Stop Illegal Fishing (2008) 'Stop Illegal Fishing in Southern Africa' Stop Illegal Fishing, Gaborone, Botswana. At 22 – 37. Available at www.stopillegalfishing.com/docs/sif_brochure_eng.pdf. Accessed on 31 July 2014.

⁶ SADC 'Fisheries'. Available at www.sadc.int/themes/agriculture-food-security/fisheries. Accessed on 8 August 2014.

Laws relating to the high seas have developed out of the two traditional uses, viz. fishing and navigation.⁷ In the fifteenth and sixteenth century disputes arose over excessive rights of navigation and fishing on the high seas.⁸ However, the Dutch were strong proponents of the concept of the freedom of the high seas and opposed the idea that the oceans were subject to national sovereignty.⁹ This so called ‘freedom of the high seas’ doctrine decreed that everyone was entitled to as much fish as they wanted from the high seas without interference.¹⁰ This doctrine became a principle of international law.¹¹ Fisheries problems being experienced today are as a direct result of this principle.¹² One such problem is that of IUU fishing.

Freedom of the high seas does not apply to all areas of the ocean. Coastal States have always been entitled to claim a territorial sea adjacent to their coastlines although the extent and location of such territorial sea has not always been clear.¹³ Other jurisdictional zones of varying extents and objectives have also been claimed, such as areas of the high seas contiguous to States’ territorial seas,¹⁴ fishing zones¹⁵ and the continental shelf.¹⁶ The laws governing the sea were thus uncertain¹⁷ and this together with the ever-greater use of the sea required the intervention of international conventions.¹⁸ Between 1958 and 1960 a number of conventions attempted to address some of these issues.¹⁹

⁷ McLean B and Glazewski J I ‘Marine Systems’ in Strydom H A and King N D (eds) *Environmental Management in South Africa* 2ed, Juta Law (2009) 455 at 493.

⁸ Dugard J *International Law: A South African Perspective* 3ed, Juta & Co (2005) at 354.

⁹ Ibid.

¹⁰ Kibel P S ‘The High Seas Lowdown: An Introduction to the Issue’ *Golden Gate University Law Review* 134 (2004) 453 at 453.

¹¹ Shaw M N *International Law* 6ed, Cambridge University Press (2008) at 554.

¹² Birnie P, Boyle A, Redgwell C *International Law and the Environment* 3ed, Oxford University Press (2009) at 706.

¹³ Shaw (n 11) at 554.

¹⁴ Ibid at 578.

¹⁵ Ibid at 581.

¹⁶ Ibid at 585.

¹⁷ Ibid at 555.

¹⁸ McLean et al (n 7) at 494.

¹⁹ 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva) 29 April 1958. Entered into force on 20 March 1966. Available at http://www.gc.noaa.gov/documents/8_1_1958_high_seas.pdf. Accessed on 8 August 2014. Convention on the Continental Shelf (Geneva) 29 April 1958. Entered into force on 10 June 1964. Available at <http://sedac.ciesin.columbia.edu/entri/texts/continental.shelf.1958.html>. Accessed on 8 August 2014. Convention on the High Seas (Geneva) 29 April 1958. Entered into force on 30 September 1962. Available at http://www.gc.noaa.gov/documents/8_1_1958_high_seas.pdf. Accessed on 8 August 2014. Convention on the Territorial Sea and the Contiguous Zone (Geneva) 29 April 1958. Entered into force on 10 September 1964. Available at http://www.gc.noaa.gov/documents/8_1_1958_territorial_sea.pdf. Accessed on 8 August 2014.

However, the most important international convention regarding the sea, the United Nations Convention on the Law of the Sea (UNCLOS) was finalised in 1982.²⁰

UNCLOS underpins the international legal basis for the utilization and conservation of the resources of the oceans.²¹ In relation to fisheries, it clarifies a twelve nautical mile territorial sea as well as a two hundred nautical mile EEZ.²² In the territorial sea a State has absolute sovereignty over living and non-living resources with no obligations to impose any fisheries conservation or management measures.²³ In its EEZ a coastal State has sovereign rights to utilize and manage these resources but must impose conservation and management measures in relation to fisheries.²⁴ On the high sea however, UNCLOS re-asserts the principle of freedom of the high seas including freedom of fishing.²⁵

Following UNCLOS, several international conferences and non-binding instruments also highlighted the need to manage fisheries more sustainably, such as the Cancun Declaration²⁶ and Agenda 21.²⁷ Although these were important developments, the scope of this work does not permit a fuller discussion.

In 1993 the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement) was approved by the Food and Agricultural Organization of the United Nations (FAO).²⁸ The Compliance Agreement encourages States to take effective action to ensure adherence to international conservation and management measures for living marine resources on the high

²⁰ 1982 UN Convention on the Law of the Sea (Montego Bay). 10 December 1982. Entered into force on 16 November 1994 (UNCLOS). Available at

www.un.org/Depts/los/convention_agreements/text/unclos/closindx.htm. Accessed on 28/7/2014.

²¹ Doulman D J, Swan J 'A Guide to the Background and Implementation of the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' FAO Fisheries and Aquaculture Circular No. 1074. (Rome 2012) at 1.

²² UNCLOS (n 20) Articles 3 and 57.

²³ Tsamenyi M, Hanich, Q 'Fisheries Jurisdiction under the Law of the Sea Convention: Rights and Obligations in Maritime Zones under the Sovereignty of Coastal States' *International Journal of Maritime and Coastal Law* 27 (2012) 783 at 785.

²⁴ UNCLOS (n 20) Article 56.

²⁵ Ibid Article 87.

²⁶ Declaration of Cancun. Adopted at the 1992 International Conference on Responsible Fishing, Cancun, Mexico, 6-8 May 1992. Available at

<http://www.uilapesca.eu/public/eventi/20121201/imm/pdf/05%20FAO%201992%20Cancun%20Declarati on%20on%20Responsible%20Fishing.pdf>. Accessed on 6 August 2014.

²⁷ Agenda 21. Adopted at the 1992 United Nations Conference on the Environment and Development (Rio de Janeiro) 3 – 14 June 1992. Available at www.sustainabledevelopment.un.org/content/documents/Agenda21.pdf. Accessed on 6 August 2014.

²⁸ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. 24 November 1993. Entered into force on 24 April 2003 (Compliance Agreement). Available at www.fao.org/docrep/MEETING/003/X3130E00.HTM. Accessed on 30 July 2014.

seas.²⁹ Importantly, the Agreement aims to prevent the use of flags of convenience (FOC) as a means of avoiding compliance with high seas fishing rules.³⁰ FOCs are a major contributor to IUU fishing.³¹

Ongoing problems with regard to the implementation of UNCLOS provisions for conservation of straddling and highly migratory fish-stocks³² prompted calls for a conference to improve implementation of these measures.³³ This resulted in the 1995 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement),³⁴ which aims to conserve and manage stocks in all regions of the world, inter alia, by the application of the precautionary principle and the ecosystems approach, and by emphasising the role of flag States in controlling vessels flying their flags on the high seas.³⁵ The Fish Stocks Agreement also emphasises the role of the Regional Fisheries Management Organisations (RFMOs) as vehicles for ensuring the conservation and management of straddling and highly migratory stocks.³⁶

In 1995 the FAO adopted The Code of Conduct for Responsible Fisheries (Code of Conduct), a voluntary instrument.³⁷ Its overall objective is to promote best practices for the rational and sustainable development and utilization of global fisheries.³⁸ This was followed in 1999 by the Rome Declaration on the Implementation of the Code of Conduct for Responsible

²⁹ FAO Corporate Document Repository. Fisheries and Aquaculture Department 'Decision-Making in Regional Fisheries Bodies or Arrangements: The Evolving Role of RFBs and International Agreement on Decision-making processes. Appendix 1. Available at www.fao.org/docrep/006/y5357e/y5357e07.htm. Accessed on 1 August 2014.

³⁰ Ibid.

³¹ DeSombre E 'Fishing under Flags of Convenience: Using Market Power to Increase Participation in International Regulation' *Global Environmental Politics* 5:4 (2005) 73 at 73.

³² UNCLOS (n 20) Articles 63(2) and 64.

³³ Doulman et al (n 21) at 9.

³⁴ The UN Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York) 4 August 1995. Entered into force on 11 November 2001 (Fish Stocks Agreement). Available at www.un.org/depts/los/convention_agreements/text/fish_stocks_agreement/CONF164_37.htm. Accessed on 30 July 2014.

³⁵ United Nations Oceans & Law of the Sea Division for Ocean Affairs and the Law of the Sea 'Fish Stocks Agreement Overview' Available at www.un.org/depts/los/convention_agreement/Background%20paper%20on%20UNFSA.pdf. Accessed on 6 August 2014.

³⁶ Fish Stocks Agreement (n 34) Part III, Article 8.

³⁷ FAO International Code of Conduct for Responsible Fisheries 31 October 1995 (Code of Conduct). Available at www.fao.org/docrep/005/v9878e00.htm. Accessed on 29 July 2014.

³⁸ Hosch G, Ferraro G, Failler P 'The 1995 FAO Code of Conduct for Responsible Fisheries: Adopting, Implementing or Scoring Results' *Marine Policy* 35 (2011) 189 at 189.

Fisheries.³⁹ The Rome Declaration undertakes to develop a global plan of action to deal effectively with all forms of IUU fishing⁴⁰ and is accordingly the first global initiative on IUU fishing.⁴¹ The Rome Declaration ultimately resulted in the 2001 International Plan of Action to Prevent, Deter and Eliminate, Illegal, Unreported and Unregulated Fishing (IPOA-IUU).⁴² The IPOA-IUU⁴³ is a voluntary instrument which provides measures, to be implemented through National Plans of Action or through RFMOs, to combat IUU fishing.⁴⁴

A further important international instrument to combat IUU fishing is the 2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA).⁴⁵ Port State members are encouraged to apply the agreement to foreign ships seeking entry to their ports and whilst in port.

RFMOs are another important development to combat IUU fishing. RFMOs are intended to deal with the difficulties of regulating fisheries, particularly on the high seas where restricting access is challenging and fishing may be unobserved.⁴⁶ RFMOs regulate based on species, regions or a combination of both. Some have jurisdiction only in international waters whilst others regulate specific species in national as well as international waters.⁴⁷ In this way RFMOs oversee most of the world's oceans and commercially important fish stocks.⁴⁸ RFMOs generally operate with a scientific committee and a commission, the latter creating the regulatory regime for conservation and management.⁴⁹ Provisions for RFMOs are contained in UNCLOS,⁵⁰ the Compliance Agreement,⁵¹ the Fish Stocks Agreement,⁵² the Code of

³⁹The Rome Declaration on the Implementation of the Code of Conduct for Responsible Fisheries. Adopted at the FAO Ministerial Meeting on Fisheries. Rome, 10-11 March 1999 (Rome Declaration). Available at www.fao.org/docrep/005/x2220e/x2220e00.htm. Accessed on 6 August 2014.

⁴⁰ Rome Declaration (n 39). Declaration j).

⁴¹ Doulman et al (n 21) at 4.

⁴² Ibid.

⁴³ FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. 3 June 2001 (IPOA-IUU). Available at www.fao.org/docrep/003/y1224e/y1224e00.HTM. Accessed on 29 July 2014.

⁴⁴ Doulman et al (n 21) at 12.

⁴⁵ FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Rome) 23 November 2009. Not yet in force. (PSMA). Available at www.fao.org/fishery/topic/166283/en. Accessed on 30 July 2014.

⁴⁶ Barkin J S, DeSombre E R 'Do We Need a Global Fisheries Management Organization?' *Journal of Environmental Studies and Science* 3:2 (2013) 232 at 233.

⁴⁷ Ibid at 235.

⁴⁸ Ibid.

⁴⁹ Ibid at 232 and 235.

⁵⁰ UNCLOS (n 20) Article 118.

⁵¹ Compliance Agreement (n 28) Article V and VI.

⁵² Fish Stocks Agreement (n 34) Part III, Article 8.

Conduct⁵³ and the IPOA-IUU.⁵⁴ A number of RFMOs have been established in the SADC region.

IUU fishing is a serious problem in Southern Africa. Stop Illegal Fishing⁵⁵ estimates that currently one in every four fish in Africa is caught illegally.⁵⁶ In August 2001 SADC adopted the Protocol on Fisheries (Protocol).⁵⁷ This is the first attempt by it to address the problem of IUU fishing.⁵⁸ In 2002, at the meeting of SADC Marine Fisheries Ministers, concern was voiced about illegal fishing by local and foreign fishing fleets and a regional ministerial conference to discuss the problem was proposed.⁵⁹ In 2006 the United Kingdom Government offered funding and this set in motion new efforts by SADC to take action against IUU fishing.⁶⁰ This culminated in the signing of the SADC Statement of Commitment on IUU Fishing by SADC Fisheries Ministers in 2008.⁶¹

⁵³ Code of Conduct (n 37) Articles 1.2, 4.1, 6.5, 7.

⁵⁴ IPOA-IUU (n 43) Sections 78 – 84.

⁵⁵ Stop Illegal Fishing was launched in 2007 as a programme of NEPAD dedicated to the elimination of IUU fishing in Africa. It became a not-for-profit organisation registered in Botswana in 2013.

⁵⁶ Stop Illegal Fishing. Stop Illegal Fishing Case Study Series 06 'A Regional Policy that Drove Change' June 2013. Available at www.imcsnet.org/wp-content/uploads/2012/SIF-case-study-6-SADC-SoC.pdf. Accessed on 7 July 2014.

⁵⁷ Southern African Development Community Protocol on Fisheries (Gaborone) 14 August 2001. Entered into force on 8 August 2003 (Protocol). Available at www.sadc.int/files/5613/5292/8363/Protocol_on_Fishereis2001.pcf. Accessed on 26 July 2014.

⁵⁸ Ibid Article 8.

⁵⁹ Stop Illegal Fishing Case Study Series 6 (n 56).

⁶⁰ Ibid.

⁶¹ Statement of Commitment by SADC Ministers Responsible for Marine Fisheries on Illegal, Unreported and Unregulated Fishing, Windhoek, 4 July 2008 (SoC). Available at www.stopillegalfishing.com/Statement_of_Commitment.php. Accessed on 26 July 2014.

1.2 Central Research Question

IUU fishing is a problem which requires coherent action at a regional level.⁶² The focus of the dissertation will therefore be on the legal and policy responses of SADC as a regional organisation acting on behalf of its member States.

The main question to be answered is whether the legal and policy responses formulated by SADC in relation to industrial marine fisheries are effective in combating the problem of IUU fishing both at the regional level and as a contribution to the global effort to combat IUU fishing. In order to answer this question the following additional questions will also be addressed:-

- What are the main causes and effect of IUU in the SADC region?
- What are the key international and regional instruments, policies and proposals which have been developed to address IUU fishing?
- What legal and policy measures and institutions have been adopted by SADC to curb IUU fishing?
- Where are the shortcomings in the legal and policy measures adopted and the institutions developed by SADC in response to the problem of IUU fishing?
- What additional measures could be taken by SADC to strengthen its response and make it more effective?

In order to answer the above questions this dissertation will consider the measures, guidelines and policies adopted through international instruments as well as those developed by RFMOs to counter IUU fishing. It will then consider and evaluate the response developed by SADC in the context of the international and RFMO measures, guidelines and policies.

1.3 Research Methodology

The research conducted for this dissertation will rely on both primary and secondary sources of information. The primary sources to be considered will included international and regional conventions, policies, guidelines and recommendations. Secondary sources of information will include academic books and journals as well as internet websites, especially those of the international conventions, the RFMOs and SADC.

⁶² DFID UK 'Programme Brief Update No 1' (n 2) at 5.

The instruments, policies, guidelines and institutions of SADC to curb IUU fishing will be measured against the international conventions, agreements, policies and guidelines and the measures adopted by RFMOs to counter IUU fishing, in order to determine to what extent SADC has adopted these and developed effective responses to IUU fishing.

1.4 Theoretical Framework

SADC is an organisation of developing States and its objectives emphasise the economic advancement of these States, the alleviation of poverty and the enhancement of the standard and quality of life of the peoples of its States.⁶³ An appropriate management approach to its fisheries and to the problem of IUU fishing would accordingly be the ecosystem approach which concerns itself not only with conservation but also ensuring future economic prosperity.⁶⁴ An integral component of the ecosystem approach is the precautionary principle.⁶⁵ The precautionary principle and the ecosystem approach both evolved out of the failure of reactive and ad hoc approaches to environmental concerns and they are generally considered vital for successful conservation and sustainable utilization of natural resources.⁶⁶ This dissertation will therefore evaluate SADC efforts in relation to IUU fishing in the context of the precautionary principle and the ecosystem approach.

1.4.1 The Precautionary Principle

The precautionary principle ‘entails the application of preventative measures in situations of scientific uncertainty where a course of action may cause harm to the environment.’⁶⁷ The requirement to implement the precautionary principle or a precautionary approach can be found in many intergovernmental declarations, resolutions and programmes and multilateral environmental agreements.⁶⁸

⁶³ SADC Treaty (n 3) Article 5,

⁶⁴ Roxburgh T ‘A Guide to Implementing the Ecosystem Approach through the Marine Strategy Framework Directive’ PISCES, WWF-UK, WWF-Spain and The Environment Council at 9. Available at Assets.wwf.org.uk/downloads/the_pisces_guide.pdf. Accessed on 31 July 2014

⁶⁵ Trouwborst A ‘The Precautionary Principle and the Ecosystem Approach in International Law: Differences, Similarities and Linkages’ *Review of European Community & International Environmental Law* 18 (2009) 26 at 34.

⁶⁶ *Ibid* at 26.

⁶⁷ Kidd M *Environmental Law* 2nd ed, Juta (2011) at 9.

⁶⁸ Trouwborst A ‘Prevention, Precaution, Logic and Law: The Relationship between the Precautionary Principle and the Preventative Principle in International Law and Associated Questions’ *Erasmus Law Review* 2 (2009) 105 at 108.

The Rio Declaration provides that:-

‘In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.’⁶⁹

Agenda 21 also refers to the need to adopt a precautionary and anticipatory approach to prevent degradation of the marine environment.⁷⁰

The Convention on Biological Diversity (CBD)⁷¹ incorporates a precautionary approach in that it notes that ‘where there is a threat of significant reduction or loss of biological diversity, lack of full certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.’⁷² This has been supplemented by a decision of the Conference of the Parties adopted in 1995 which states that ‘The work [referring to the work of the Secretariat on Marine and Coastal Biological Diversity] should not be impeded by the lack of full scientific information and will incorporate explicitly the precautionary approach in addressing conservation and sustainable use issues.’⁷³

With regard to fisheries and IUU fishing, both the Fish Stocks Agreement and the Code of Conduct specifically require States and RFMOs to apply a precautionary approach.⁷⁴ The Johannesburg Plan of Implementation also reaffirms the precautionary approach as set out in the Rio Declaration.⁷⁵

The precautionary principle firstly concerns itself with the harm caused to the environment by the impacts of human activities and secondly with the uncertainty of these impacts on the environment.⁷⁶ The purpose of the precautionary principle is the adequate protection of the environment both for the good of the environment and for the good of humankind.⁷⁷ The

⁶⁹ Rio Declaration on Environment and Development. United Nations Conference on Environment & Development (Rio de Janeiro) 3 – 14 June 1992. Article 15. Available at <http://www.jus.uio.no/lm/environmental.development.rio.declaration.1992/portrait.a4.pdf>. Accessed on 22 August 2014.

⁷⁰ Agenda 21 (n 27) Chapter 17.

⁷¹ 1992 Convention on Biological Diversity (Rio de Janeiro) 5 June 1992. Entered onto force on 29 December 1993 (CBD). Available at <http://www.cbd.int/doc/legal/cbd-en.pdf>. Accessed on 22 August 2014.

⁷² CBD (n 71) Preamble and Paragraph 9.

⁷³ CBD COP 2 Decision 11/10. Jakarta November 1995. Annex II, paragraph 3(a).

⁷⁴ Fish Stocks Agreement (n 34) Articles 5(c) and 6. Code of Conduct (n 37) Articles 6.5 and 7.5.

⁷⁵ Plan of Implementation of the World Summit on Sustainable Development (Johannesburg) 4 September 2002 (Johannesburg Plan of Implementation). Paragraph 109(f). Available at www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf. Accessed on 14 November 2014.

⁷⁶ Trouwborst (n 65) at 27.

⁷⁷ Ibid.

principle requires that action to prevent environmental harm must be taken at an early stage even where scientific evidence of such harm is uncertain, provided that there are reasonable grounds for concern that serious and/or irreversible harm may be caused to the environment.⁷⁸

1.4.2 The Ecosystem Approach

The ecosystem approach requires the holistic management of human activity, using the best available knowledge regarding ecosystems in order to satisfy human needs without compromising the integrity or health of ecosystems.⁷⁹ It involves focusing on ecosystems not species, emphasises the links between ecosystems and species, is intended as a long term strategy and includes the impact of human activity.⁸⁰

The CBD advocates this approach as the primary basis for considering biodiversity and ecosystems.⁸¹ The ecosystem approach has been incorporated into the CBD by means of several decision of the CBD's Subsidiary Body on Scientific, Technical and Technology Advice (SBSTTA) and its Conference of the Parties (COP). This process commenced in 1995 when the SBSTTA recommended the ecosystem approach should be the primary framework for action taken under the convention.⁸² The ecosystem approach as advocated by the CBD can be summarised as follows: ecosystems are not isolated; protected areas must be planned in conjunction with adjacent areas; people are components of ecosystems and their livelihoods must always be a consideration; adaptive management is essential.⁸³

The Fish Stocks Agreement places emphasis on long term sustainability and measures to manage species belonging to the same ecosystem.⁸⁴ 'Sustainability' in the Agreement is intended in the sense of an ecosystem concept.⁸⁵ The Code of Conduct also promotes an ecosystem approach. Accordingly, not only targeted species but also species belonging to the same ecosystem must be conserved, the biodiversity of aquatic habitats and ecosystems must

⁷⁸ Ibid.

⁷⁹ Ibid at 28.

⁸⁰ Ibid.

⁸¹ Haines-Young R, Potschin M 'The ecosystem Concept and the Identification of Ecosystem Goods and Services in the English Policy Context' (2007) Paper to Department of Environment Food and Rural Affairs, Project Code NR0107 at 3.

⁸² First Meeting of the Subsidiary Body on Scientific, Technical and Technological Advice, 4 - 8 September 1995 Paris, France. Recommendation 1/3. Available at www.cbd.int/recommendations/sbstta/?m=sbstta-01. Accessed on 23 August 2014.

⁸³ Shepherd G (ed) 'The Ecosystem Approach: Learning from Experience' (2008) IUCN Gland, Switzerland. Available at www.cbd.int/doc/external/iucn/iucn-ecosystem-approach-en.pdf. Accessed on 22 August 2014.

⁸⁴ Fish Stocks Agreement (n 34) Articles 5(a) and (d).

⁸⁵ Birnie et al (n 12) at 736.

be preserved, and the impacts of environmental factors on target stocks and species belonging to the same ecosystem must be assessed.⁸⁶

The Rome Declaration noted the need to give greater consideration to the ‘development of more appropriate eco-system approaches to fisheries development and management’ and to achieving sustainability within the framework of the ecosystem approach.⁸⁷ Additionally the Johannesburg Plan of Implementation endorses the ecosystem approach as being critical to achieving sustainable fisheries management.⁸⁸

Whilst the core elements and purposes of the precautionary principle and the ecosystem approach often overlap it seems practical to view the precautionary principle as an integral component of the application of the ecosystem approach.⁸⁹ Even if this view is subject to challenge, what is clear is that the concepts are inter-related and both should be implemented in any fisheries management regime.

Having overviewed IUU fishing and the importance of the precautionary principle and the ecosystem approach, the next chapter will look in more detail at the meaning, causes and effects of IUU fishing.

⁸⁶ Code of Conduct (n 37) Articles 6.2; 7.2.2(d) and 7.2.3.

⁸⁷ The Rome Declaration (n 39) Statement 6 and Declaration 12 (c).

⁸⁸ Johannesburg Plan of Implementation (n 75) Paragraphs 30(d) and 32(c); Glavovic B C, Cullinan C ‘The Coast’ in Strydom H A and King N D (eds) *Environmental Management in South Africa* 2nd ed, Juta (2009) 868 at 917.

⁸⁹ Trouwborst (n 65) at 34.

CHAPTER 2: IUU FISHING: THE MEANING, CAUSES AND EFFECTS.

2.1 The Meaning of IUU fishing

The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU)⁹⁰ is a voluntary instrument concluded within the framework of the FAO Code of Conduct for Responsible Fisheries (Code of Conduct).⁹¹ It applies to all States and Entities and all fishers and defines IUU fishing as follows:-

- 3 'In this document
- 3.1 Illegal fishing refers to activities:
 - 3.1.1 conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;
 - 3.1.2 conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or
 - 3.1.3 in violation of national laws or international obligations management, including those undertaken by cooperating States to a relevant regional fisheries organization.
- 3.2 Unreported fishing refers to fishing activities:
 - 3.2.1 which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or
 - 3.2.2 undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.
- 3.3 Unregulated fishing refers to fishing activities:
 - 3.3.1 in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or
 - 3.3.2 in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.'
- 3.4 Notwithstanding paragraph 3.3, certain unregulated fishing may take place in a manner which is not in violation of applicable international law, and may not require the application of measures envisaged under the International Plan of Action (IPOA).⁹²

There appears to be some uncertainty as to whether this 'definition' of IUU fishing has any validity beyond the IPOA-IUU itself. The IPOA-IUU states that the described activities as

⁹⁰ IPOA-IUU (n 43).

⁹¹ Code of Conduct (n 37)

⁹² IPOA-IUU (n 43) Part II, Section 3.

being ‘In this document’,⁹³ implying that the definition is not intended to be applied except within the ambit of the IPOA-IUU.⁹⁴ It is however likely that the term ‘IUU fishing’, even where used in a different context, will be viewed as referring to the definition provided in the IPOA-IUU.⁹⁵

Illegal fishing is the clearest concept. It involves fishing in direct contravention of rules by which the fishing industry is bound.⁹⁶ Illegal fishing practices include non-compliance with fishing seasons, fishing without permits, catching prohibited species, using illegal gear and catching in excess of the allowable quota.⁹⁷ Most illegal fishing in the SADC region is conducted by non SADC flagged vessels, mostly ships flagged in China, Taiwan, South Korea or Indonesia, or fishing under FOCs offered by Equatorial Guinea, Cambodia, North Korea and Tonga.⁹⁸

Unreported fishing occurs when fishers do not accurately (or at all) report their catches to their governments or a relevant RFMO.⁹⁹ In Angola, Mauritius, Madagascar, Mozambique and Tanzania most unreported fishing in the industrial sector is conducted by Asian flagged vessels. In South Africa and Namibia such fishing is usually by South African and Namibian nationals or by ships flying their flags.¹⁰⁰ It has been suggested that this is due to the effective monitoring, control and surveillance (MCS) procedures and port state controls in these countries.¹⁰¹ This is concerning since it implies that these countries do not wish to control domestic IUU fishing, possibly for political reasons.

Unregulated fishing is possibly the most controversial area of IUU fishing. Firstly, it refers to fishing by vessels flying the flags of non-member States of relevant RFMOs.¹⁰² Fishing vessels are only bound by the regulations to which their flag States are party. A vessel flying the flag of a State which is not party to a specific RFMO can fish unregulated in the area of jurisdiction

⁹³ Ibid Part II.

⁹⁴ Edeson E ‘The International Plan of Action on Illegal, Unreported and Unregulated Fishing: The Legal Context of Non-Legally Binding Instrument’ *International Journal of Marine and Coastal Law* 16 (2001) 603 at 619.

⁹⁵ Ibid.

⁹⁶ Barkin et al (n 46) at 237.

⁹⁷ Riddle K ‘Illegal, Unreported, and Unregulated Fishing: Is international Cooperation Contagious?’ *Ocean Development & International Law* 37 (2006) 265 at 266.

⁹⁸ SADC ‘Study and Analysis of the Status of IUU Fishing in the SADC Region and an Estimate of the Economic Social and Biological Impact’ Volume 2-Main Report May 2008 at 34. Available at http://www.stopillegalfishing.com/doc/study_of_the_status_of_IUUfishing_in_sadcregion_n_estimate_ESBI_v_ol2_eng.pdf. Accessed on 1 September 2014.

⁹⁹ Barkin et al (n 46) at 237.

¹⁰⁰ SADC ‘Study and Analysis of the Status of IUU Fishing in the SADC Region and an Estimate of the Economic Social and Biological Impact’ (n 98) at 34.

¹⁰¹ Ibid.

¹⁰² IPOA-IUU (n 43) Section 3.3.1.

of such RFMO.¹⁰³ In this way, States which choose not to join RFMOs are attractive for vessels which want to fish outside of the regulatory regime.¹⁰⁴ Such activity is commonly referred to as flags of convenience (FOC) fishing.

Secondly the IPOA-IUU refers to unregulated fishing as fishing in areas or for species on the high seas, in respect of which there are no specific international regulations,¹⁰⁵ in other words, fishing which occurs on the high seas in areas not regulated by an RFMO or for species which are not protected by an international agreement. This kind of unregulated fishing especially in deep-sea fisheries is a serious problem.¹⁰⁶ Deep-sea fisheries occur in both EEZs and on the high seas and the majority are industrial and technologically advanced operations and therefore able to take large catches.¹⁰⁷ These fisheries target long-lived slow growing species resulting in greater risk of over-exploitation. In addition the fishing methods used adversely affect ecosystems, including bycatch of non-targeted species,¹⁰⁸ and seabed degradation.¹⁰⁹

Stop Illegal Fishing has identified some IUU fishing activities in the SADC region to be:-¹¹⁰

- Illegal fishing of highly migratory species, on the far edge of the EEZs in the Indian Ocean.
- Conflict between artisanal and industrial fleets mainly in coastal zones, e.g., prawn fishery in Mozambique.
- Fishing in restricted areas and during closed seasons, e.g., the fisheries in Mozambique.
- Use of FOCs. It has estimated that about 70 FOC IUU vessels are operating in the SADC region at any one time.
- Fishing by non-party vessels in a high seas RFMO area and consequently not adhering to the management measures of the RFMO.

¹⁰³ Barkin et al (n 46) at 237.

¹⁰⁴ Ibid.

¹⁰⁵ IPOA-IUU (n 43) Section 3.3.2.

¹⁰⁶ Molenaar E J 'Unregulated Deep-Sea Fisheries: A need for a Multi-Level Approach' *International Journal of Marine and Coastal Law* 19 (2004) 224 at 227.

¹⁰⁷ FAO Fisheries and Aquaculture Department. 'Deep-Sea Fisheries' Available at www.fao.org/fishery/topic/4440/en. Accessed on 21 August 2014.

¹⁰⁸ The World Wildlife Fund describes 'bycatch' as 'the incidental capture of non-target species such as dolphins, marine turtles and seabirds... hauled up with the catch and then discarded overboard dead or dying' Available at www.worldwildfund.org/threats/bycatch. Accessed on 4 September 2014.

¹⁰⁹ Molenaar (n 106) at 224.

¹¹⁰ Stop Illegal Fishing 'Can Illegal Fishing be Stopped? Experiences from Southern Africa' Undated Presentation to the International Monitoring, Control and Surveillance Network for Fisheries-related Activities. Available at www.imcsnet.org/imcs/docs/hot_topic_stop_illegal_fishing_bergh.pdf. Accessed on 2 September 2014.

Having considered what is meant by IUU fishing it is relevant to look at how problematic it is especially in developing countries. In 2008 developing countries provided 80% of global fish production and 50% of fish produce exports to developed countries.¹¹¹ Fisheries are thus an important economic activity for developing countries. The extent of illegal and unreported fishing globally has been estimated as at least thirty-five percent of global catches.¹¹² In monetary terms this amounts to losses of as much as \$23.5bn per annum representing 26 million tonnes of fish.¹¹³ These estimates include only illegal and unreported fishing.¹¹⁴ They do not take into account unregulated fishing. Taking into account that unregulated catches would increase these estimates, it can safely be stated that the extent of IUU fishing is well in excess of thirty-five percent of global catches. Given the value of fisheries to developing countries, it is obvious that IUU fishing is a considerable threat to their economies as it undermines their efforts to manage their fisheries, thereby reducing their income from fisheries and adversely affecting food security and efforts to eradicate poverty and sustainable livelihoods.¹¹⁵ IUU fishing is thus a threat to long-term sustainable fisheries in developing countries.¹¹⁶

2.2 The Causes of IUU Fishing

IUU fishing is caused by both economic and non-economic factors.

2.2.1 Economic Factors

Two of the most prevalent economic causes of IUU fishing are overcapacity and fishing subsidies.¹¹⁷ Overcapacity is caused where fishers have a greater capacity to fish than the legal fishing opportunities allocated to them, either by domestic laws or by the regulations of RFMOs.¹¹⁸ In fisheries where there is inadequate control these fishers will then engage in IUU

¹¹¹ World Wildlife Fund-SA Report 2011. 'Fisheries: Facts and Trends South Africa' at 6. Available at www.awasassets.wwf.org.za/downloads/wwf_a4_fish_facts_report_1r.pdf. Accessed on 17 July 2014.

¹¹² Pitcher T J, Cheung W L 'Fisheries: Hope or Despair' *Marine Pollution Bulletin* 74 (2013) 506 at 514. Quoting Agnew D J, Pierce J, Pramod G, Peatman T, Watson R, Beddington J R, Pitcher T 'Estimating the Worldwide Extent of Illegal Fishing' *PlosOne* 4 (2009) 1.

¹¹³ Agnew D J, Pierce J, Pramod G, Peatman T, Watson R, Beddington J R, Pitcher T 'Estimating the Worldwide Extent of Illegal Fishing' *PlosOne* 4 (2009) 1 at 4.

¹¹⁴ Agnew et al (n 113) at 1.

¹¹⁵ FAO 'The State of World Fisheries and Aquaculture (2012).' At 17. Available at www.fao.org/docrep/016/i2727e/i2727e.pdf. Accessed on 31 July 2014.

¹¹⁶ Ibid.

¹¹⁷ Le Gallic B, Cox A 'An Economic Analysis of Illegal, Unreported and Unregulated Fishing: Key Drivers and Possible Solutions' *Marine Policy* 30 (2006) 689 at 690.

¹¹⁸ Ibid.

fishing to satisfy their capacity and thereby overfish.¹¹⁹ In addition fleet overcapacity may cause political pressure on fisheries management to increase catch limits which exceed sustainable levels.¹²⁰

Fisheries subsidies have been identified as one of the main reasons for over-fishing and over-capacity.¹²¹ Fisheries subsidies may be described as ‘financial transfers, direct or indirect, from public entities to the fishing sector, which help the sector make more profit than it would otherwise’.¹²² Three main categories of subsidies have been identified, viz. beneficial subsidies, capacity-enhancing subsidies and ambiguous subsidies.¹²³ Beneficial subsidies nurture conservation and encourage control and surveillance and include marine protected areas and research and development.¹²⁴ Capacity-enhancing subsidies include fuel subsidies, boat construction, renewal and modernisation programmes, fishing port construction and renovation programmes, price and marketing support, tax exemptions and foreign access agreements which provide for the transfer of money and/or fishing technology in exchange for access to fishing markets in another fishing country.¹²⁵ Ambiguous subsidies are those the effects of which are unknown on fisheries but which could be either positive or negative.¹²⁶ Capacity-enhancing subsidies reduce the cost of IUU fishing capacity and thereby encourage IUU fishing.¹²⁷ The negative ambiguous subsidies would have the same effect. The amount of subsidies provided by governments worldwide to their fishing industries is high.¹²⁸ Sumaila et al estimate that the capacity enhancing subsidies provided to the SADC coastal States in 2003 amounted to approximately US\$ 219 000 000.¹²⁹

¹¹⁹ Porter G ‘Fisheries Subsidies and Overfishing: Towards a Structured Discussion’ UNEP Publication (2002) at 14. Available at www.unep.ch/etb/publications/fishiersSubsidiesEnvironment/FEvoll.pdf. Accessed on 20 August 2014.

¹²⁰ Ibid.

¹²¹ United Nations Environment Programme Press Release 22 December 2010, Geneva. Available at www.unep.org/Documents.Multilingual?Default.Print.asp?DocumentID=653&ArticleD=6875&l=en. Accessed on 19 July 2014.

¹²² Sumaila U R, Khan A S, Dyck A J, Watson R, Munro G, Tydemers P, Pauly D ‘A Bottom-up Re-estimation of Global Fisheries Subsidies’ *Journal of Bioeconomics* 12 (2010) 201 at 202.

¹²³ Sumaila et al (n 122) at 203.

¹²⁴ Ibid at 204.

¹²⁵ Ibid at 205.

¹²⁶ Ibid at 206.

¹²⁷ Le Gallic (n 117) at 690.

¹²⁸ Sumaila et al (n 122) at 217.

¹²⁹ Ibid at 218 to 219.

2.2.2 Non-Economic Factors

Non-economic factors causing IUU Fishing include institutional or governance issues and social factors.¹³⁰ The present international legal regime allows unregulated fishing, conducted either by ships flying the flags of countries which are not party to the RFMOs having jurisdiction in the area being fished and which are therefore not bound by such RFMO's regulatory framework, or by fishing in areas where there is no RFMO. Unregulated fishing is often conducted by FOC vessels. This kind of fishing is not illegal on the high seas, cannot be sanctioned, is difficult if not impossible to quantify and contributes to overfishing. Lack of effective flag State control is a further cause of IUU fishing. This problem occurs where States do not adequately control individuals subject to their legal jurisdiction in order to deter these individuals from supporting or engaging in IUU fishing.¹³¹ Poor port control is another factor contributing to IUU fishing. Most fishing vessels must call in at ports in order to land catches, refuel and take on provisions. States can therefore reduce IUU fishing by regulating access to their ports and port facilities. Some states however fail to implement port measures and are thus desirable ports of call for IUU fishers.¹³²

Another institutional or governance difficulty contributing to IUU fishing is that related to MCS. Examples of MCS measure which have been identified as contributing to IUU if poorly applied or absent are catch documentation systems (CDMs), vessel monitoring systems (VMSs) and transshipment of catches at sea.¹³³ Poor MCS results in a lesser probability of detection and thus encourages IUU fishing.¹³⁴ Insufficient penalties are also a contributing factor.¹³⁵ It has been suggested that most countries do not have sufficiently severe levels of sanctions to act as a deterrent to IUU fishing.¹³⁶

There are also social factors which may contribute to IUU fishing especially in developing countries.¹³⁷ Fishing crews from developing countries are often poor, uneducated and willing to work for very low wages and are thus easier targets for IUU fishing vessels.¹³⁸

¹³⁰ Le Gallic et al (n 117) at 690 to 691.

¹³¹ Erceg D 'Deterring IUU Fishing through State Control over Nationals' *Marine Policy* 30 (2006) 173 at 173.

¹³² 'Stop Illegal Fishing in Southern Africa' (n 5) at 67.

¹³³ Cameron A 'Is there Hope for the Fish?: The Post-Arbitration Effectiveness of the Convention for the Conservation of Southern Bluefin Tuna' *New York University Environmental Law Journal* 15 (2007) 247 at 281.

¹³⁴ Le Gallic et al (n 117) at 691.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Erceg (n 131) at 176.

2.2.3 Factors Causing IUU Fishing in the SADC

The key factors influencing IUU fishing in the SADC region are particularly difficult to define. Data on offences committed, which would identify causes, is very limited because States either do not have data available (for example in the DRC¹³⁹) or because States are unable to manage what data is available or because they don't have the ability to monitor activities occurring more than a few miles offshore.¹⁴⁰ It appears likely however that the main causes of IUU fishing in the SADC region are related to MCS capacity, including lack of effective collaboration in MCS operations among SADC coastal States.¹⁴¹ There is a significant relationship between governance and IUU fishing in the sense that States with good governance are likely to have good MCS procedures, including the enforcement of regulations and cooperation with neighbouring States on surveillance, and active participation in regional and sub-regional fisheries agreements.¹⁴²

The main MCS problems in relation to IUU fishing in the SADC region have been identified as being:-¹⁴³

- Limited knowledge of the extent of the activity. There is very little information on the scale of IUU fishing in the SADC region.
- Limited regional assets and capacity, i.e., lack of equipment and trained personnel;
- The vast size of the areas requiring surveillance. The area of responsibility of the SADC coastal States is approximately seven million square miles of sea. Monitoring is therefore technically and financially difficult.
- Limited or non-existent coordinated MCS systems for the region. There is currently no effective information sharing and exchange mechanism. Existing systems are geared towards domestic rather than regional requirements.
- Absence of a regional oversight body for MCS and information exchange.

SADC's attempts to address these issues will be considered in chapter 5.

¹³⁹ 'Stop Illegal Fishing in Southern Africa' (n 5) at 25.

¹⁴⁰ SADC 'Study and Analysis of the Status of IUU Fishing in the SADC Region and an Estimate of the Economic Social and Biological Impact' (n 98) at 6.

¹⁴¹ Ibid at 31 to 33.

¹⁴² MRAG (n 1) at 13.

¹⁴³ SADC 'Study and Analysis of the Status of IUU Fishing in the SADC Region and an Estimate of the Economic Social and Biological Impact' (n 98) at 31.

2.3 The Effects of IUU Fishing in the SADC

Fishing is a major source of food and income for the region.¹⁴⁴ However, this resource is being threatened by IUU fishing. The effects of IUU fishing are economic, social and environmental.

2.3.1 Economic Effects

The most obvious economic impact on developing countries is the direct value of the loss of the catch which the coastal State would have received if such catch had not been taken by IUU fishing.¹⁴⁵ In addition there is the loss of other direct revenue such as landing/port and licence fees. Then there is also the indirect losses of income and employment in related industries. These include reduced demand for fishing gear, boats and equipment. IUU fishing also negatively affects domestic industries such as fish processing and packaging, marketing and transport.¹⁴⁶ All of these impacts will be experienced to a greater or lesser degree by the SADC coastal States, although in some of the States the catch value loss is negligible since these States would not in any event be catching these resources themselves.¹⁴⁷ For example, only South Africa, Namibia and Angola have fishing fleets participating in the offshore large pelagic fishing sector.¹⁴⁸ However the loss of revenue from port activities and fish processing is thought to be considerable throughout the SADC.¹⁴⁹

2.3.2 Environmental Effects

The environmental impacts of IUU fishing manifest in impacts on the ecosystem. Fishing generally has the potential to damage fragile marine ecosystems and species. Legitimate and regulated fisheries are bound by measures which are aimed to minimise such damage but IUU fisheries are unlikely to comply with such requirements.¹⁵⁰ The environmental impact of these IUU fishing activities include shark and turtle bycatch and demersal fish discard.¹⁵¹ These activities also cause sea bed degradation due to bottom trawling.¹⁵² Whilst similar damage may also be caused by the legal fishing industry, IUU fishers often use more destructive methods

¹⁴⁴ Stop Illegal Fishing Case Study Series 06 (n 56).

¹⁴⁵ MRAG (n 1) at 5.

¹⁴⁶ Ibid.

¹⁴⁷ SADC 'Study and Analysis of the Status of IUU Fishing in the SADC Region and an Estimate of the Economic Social and Biological Impact' (n 98) at 37.

¹⁴⁸ Ibid at 38.

¹⁴⁹ Ibid.

¹⁵⁰ MRAG (n 1) at 5.

¹⁵¹ Ibid at 4 and 5.

¹⁵² Trawling involves boats dragging large nets along the seabed catching almost everything in their paths.

such as smaller mesh sizes, wire traces and hooks thereby catching bycatch at a higher rate than the legal fishers.¹⁵³

2.3.3 Social Effects

The social impact of IUU fishing manifests itself in reduced income for fishers and their families. There is also a negative impact on the food security of local communities as a result of the competing activities of IUU fishers in the inshore areas.¹⁵⁴ Whilst this work does not intend to consider artisanal fishing, it can be noted that this industry is negatively affected by industrial IUU fishing. Both foreign and domestic fleets often encroach into the areas reserved for artisanal fisheries causing conflicts between commercial and artisanal fishers and which conflicts have been known to lead to injury and loss of lives among artisanal fishers.¹⁵⁵ Both the economic and environmental effects of IUU fishing also contribute to reduced food security for artisanal fishers.¹⁵⁶

Having looked at the extent and effects of IUU fishing on the SADC region, the next chapter will look at the international instruments which attempt to regulate the problem.

¹⁵³ SADC ‘Study and Analysis of the Status of IUU Fishing in the SADC Region and an Estimate of the Economic Social and Biological Impact’ (n 98) at 38.

¹⁵⁴ Ibid at 39.

¹⁵⁵ MRAG (n 1) at 5 and 6.

¹⁵⁶ Ibid at 5.

CHAPTER 3: IUU FISHING IN THE CONTEXT OF INTERNATIONAL LEGAL

INSTRUMENTS.

The international instruments governing fisheries include both hard law and soft law.¹⁵⁷ Hard law is contained in legally binding global instruments.¹⁵⁸ In relation to fisheries the most important hard law instruments are the United Nations Convention on the Law of the Sea (UNCLOS),¹⁵⁹ the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement),¹⁶⁰ and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement).¹⁶¹ Also relevant is the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA) although this is not yet in force.¹⁶²

Soft law encompasses non-binding instruments such as interstate conference declarations, United Nations General Assembly instruments and resolutions and codes of conduct, guidelines and recommendations of international organisations such as the FAO.¹⁶³ Whilst some consider soft law not to be law at all it is nonetheless important since soft law is often transformed or incorporated into legally binding commitments.¹⁶⁴

¹⁵⁷ Kidd M 'Marine Biodiversity and Fisheries Governance: An Overview' in Couzens E, Honkonen T and Lewis M (eds) *International Environmental Law-making and Diplomacy Review 2012* University of Eastern Finland, Joensuu, Finland (2013) 45 at 54.

¹⁵⁸ High Seas Task Force (2006) 'Closing the Net: Stopping Illegal Fishing on the High Seas' Governments of Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom, WWF, IUCN and the Earth Institute at Columbia University, at 41. Available at www.oecd.org/sd-roundtable/papersandpublications/39375316.pdf. Accessed on 15 November 2014.

¹⁵⁹ UNCLOS (n 20).

¹⁶⁰ Compliance Agreement (n 28).

¹⁶¹ Fish Stocks Agreement (n 34).

¹⁶² PSMA (n 43).

¹⁶³ Birnie et al (n 12) at 35.

¹⁶⁴ Ibid.

3.1 The UN Convention on the Law of the Sea

One of the objectives of UNCLOS is to conserve and manage marine living resources.¹⁶⁵ It requires States to protect and preserve the marine environment.¹⁶⁶ Natural resources may be exploited in accordance with the duty to protect and preserve the environment.¹⁶⁷ UNCLOS gives States sovereign rights to explore and exploit, conserve and manage the natural resources and the jurisdiction to protect and preserve the marine environment within their EEZs.¹⁶⁸ UNCLOS also requires coastal States to ensure that the living resources in the EEZ are not endangered by over-exploitation.¹⁶⁹ Since IUU fishing is one of the causes of over-exploitation, UNCLOS hereby lays the foundation requiring States to take action against IUU fishing at least in their EEZs.

UNCLOS is less convincing regarding conservation and management of fisheries and fishing on the high seas. It retains the principle of freedom of the high seas for all States, including freedom of fishing.¹⁷⁰ This freedom of fishing is however restricted by the requirement that States must take measures to control the fishing activities of their nationals.¹⁷¹ States are also required to

‘take measures which are designed, on the best scientific evidence available to States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors.....’¹⁷²

Birnie et al question whether this requirement in fact obligates States to fish at sustainable levels.¹⁷³ If fishing on the high seas at sustainable levels is not an obligation under UNCLOS then these provisions are more about economic factors and are not designed to deter overfishing or IUU fishing on the high seas.

Importantly however, UNCLOS lays the foundation for establishing fisheries organisations on the high seas.¹⁷⁴ RFMOs can play an important role in dealing with IUU fishing and will be considered in chapter 4.

¹⁶⁵ Kidd (n 157) at 55.

¹⁶⁶ UNCLOS (n 20) Article 192.

¹⁶⁷ Ibid Article 193.

¹⁶⁸ Ibid Article 56.

¹⁶⁹ Ibid Article 61.2

¹⁷⁰ Ibid Article 87.

¹⁷¹ Ibid Article 117.

¹⁷² Ibid Article 119.

¹⁷³ Birnie et al (n 12) at 735.

¹⁷⁴ UNCLOS (n 20) Article 118.

All nine SADC coastal States are members of UNCLOS.¹⁷⁵

3.2 The Compliance Agreement

The Compliance Agreement was developed primarily to prevent the reflagging of vessels in order to avoid high seas conservation methods implemented by RFMOs. Only seven SADC coastal States are parties to the Compliance Agreement. The DRC and South Africa are not.¹⁷⁶

The object and purpose of the Compliance Agreement is to ensure that vessels fishing on the high seas do not undermine the effectiveness of international conservation and management measures. It means to achieve this primarily by making flag States responsible for the activities of their fishing vessels¹⁷⁷ and requiring them to keep a record of vessels entitled to fly their flags and authorised to fish on the high seas.¹⁷⁸ Parties may not allow vessels flagged to them to fish on the high seas without proper authorisation.¹⁷⁹ They must also ensure they are able to exercise effective responsibility over vessels before authorising them to fish on the high seas.¹⁸⁰

Some port State control of fishing vessels is provided for.¹⁸¹ Commentators have however indicated their disappointment with these measures as they are largely optional. Although there is an obligation to report the vessel to the flag State, there is no firm obligation to undertake a fuller investigation to determine illegal activities by the vessel. A further criticism which has been levied is that there is no provision for the port State to detain a vessel or take legal proceedings if there is evidence of violation of conservation measures.¹⁸²

The Compliance Agreement applies only to fishing vessels directly engaged in commercial fishing operations¹⁸³ and not to support vessels.¹⁸⁴ This is significant in that support vessels

¹⁷⁵ List of Parties to UNCLOS available at www.un.org/Depts/los/references_files/status2010.pdf. Accessed on 12 September 2014.

¹⁷⁶ List of Parties to the Compliance Agreement available at http://www.fao.org/fileadmin/user_upload/legal/docs/1_012s-e.pdf. Accessed on 15 September 2014.

¹⁷⁷ Compliance Agreement (n 28) Article III.

¹⁷⁸ Ibid Article IV.

¹⁷⁹ Ibid Article III.2.

¹⁸⁰ Ibid Article III.3.

¹⁸¹ Ibid Article V.2.

¹⁸² Birnie P 'New Approaches to Ensuring Compliance at Sea: The FAO Agreement to Promote Compliance with International Conservation Measures by Fishing Vessels on the High Seas' *Review of European Community and International Environmental Law* 8 (1999) 48 at 53.

¹⁸³ Compliance Agreement (n 28) Article 1(a).

¹⁸⁴ Birnie P (n 182) at 51.

which assist fishing vessels with transshipment, refuelling and re-provisioning may be used to assist IUU fishing but cannot be acted against under this agreement.

An aspect of the Compliance Agreement of particular relevance to SADC is the requirement that States should, with the support of FAO, cooperate to provide assistance to developing countries in order to enable these to fulfil their obligations under the agreement.¹⁸⁵ Unfortunately FAO has not conducted dedicated capacity development initiatives to promote implementation of the Compliance Agreement by developing States.¹⁸⁶

3.3 The Code of Conduct for Responsible Fisheries

The Code of Conduct is probably the most important soft law instrument applicable to fisheries governance.¹⁸⁷ It sets out principles and standards applicable to the conservation, management and development of all fisheries.¹⁸⁸ Its provisions apply to FAO members and non-members, fishing entities, all levels of governmental and non-governmental organisations and to all persons involved in some way with the conservation, management and development of fisheries.¹⁸⁹ The Code of Conduct must be interpreted and applied in accordance with the provisions of UNCLOS and the Fish Stocks Agreement.¹⁹⁰ In addition it must be interpreted and applied in the light of the Cancun Declaration, the Rio Declaration, and Agenda 21.¹⁹¹ In this way it incorporates binding legal requirements as well as principles and voluntary provisions of best practice.¹⁹² Various international action plans have been developed within the framework of the Code of Conduct which are also voluntary and apply to all states and entities and all fishers.¹⁹³ One such plan, the International Plan of Action to Prevent, Deter and Eliminate Illegal Unreported and Unregulated Fishing (IPOA-IUU),¹⁹⁴ will be discussed later.

The Code of Conduct provides for application of the precautionary approach¹⁹⁵ and the ecosystem approach.¹⁹⁶ It also advocates the need to prevent overfishing and excess capacity.¹⁹⁷

¹⁸⁵ Compliance Agreement (n 28) Article VIII.

¹⁸⁶ Doulman et al (n 21) at 78.

¹⁸⁷ Kidd (n 157) at 58.

¹⁸⁸ Code of Conduct (n 37) Article 1.

¹⁸⁹ Ibid Article 1.3.

¹⁹⁰ Ibid Article 3.1 and 3.2(a).

¹⁹¹ Ibid Article 3.2(c).

¹⁹² Hosch et al (n 38) at 189.

¹⁹³ Kidd (n 157) at 59.

¹⁹⁴ IPOA-IUU (n 43).

¹⁹⁵ Code of Conduct (n 37) Article 6.5.

¹⁹⁶ Ibid Articles 6.1, 6.2 and 6.8.

¹⁹⁷ Ibid Articles 6.3 and 7.1.7,

All States should cooperate to promote conservation and management and ensure responsible fishing through RFMOs.¹⁹⁸

Flag State control over fishing vessels is important in preventing IUU fishing.¹⁹⁹ The Code of Conduct calls on flag States to exercise effective control over both fishing and support vessels authorised to fly their flags and to ensure that the activities of these vessels do not undermine international conservation and management measures.²⁰⁰ They should also keep records of fishing vessels entitled to fly their flag and authorised to fish,²⁰¹ and ensure that vessels flying their flags do not fish on the high seas or in the waters of another State unless they have been issued with a Certificate of Registry (by the flag State) and are authorised to fish by the relevant competent authority²⁰² (either by an RFMO if fishing on the high seas or by the State in whose waters the fishing takes place). Enforcement action against flag vessels contravening conservation and management measures should be taken and contraventions should be made an offence under the national laws of the flag State.²⁰³

Port State measures are only vaguely addressed in the Code of Conduct. Port States should establish procedures in their national legislation to achieve the objective of the Code of Conduct and to assist other States to achieve these objectives.²⁰⁴ Port States should also assist flag States who request assistance in respect of non-compliance by their flag vessels with conservation and management measures.²⁰⁵ The vague and ambiguous statement of port State measures in the Code of Conduct is unfortunate given the value of these measures in combating IUU fishing. All fish caught at sea must be landed and effective controls at ports can be used to detect and enforce against IUU fishing.²⁰⁶ However stronger port State measures are provided for in the IPOA-IUU and in the PSMA. Both these instruments will be considered below.

Implementation of the Code of Conduct is a challenge. Even some of the largest and most affluent countries report significant human and financial resource problems in their efforts to

¹⁹⁸ Ibid Article 6.12.

¹⁹⁹ Hosch et al (n 38) at 196.

²⁰⁰ Code of Conduct (n 37) Articles 6.11.

²⁰¹ Ibid Article 8.2.1.

²⁰² Ibid Article 8.2.2.

²⁰³ Ibid Article 8.2.7.

²⁰⁴ Ibid Article 8.3.1.

²⁰⁵ Ibid Article 8.3.2.

²⁰⁶ Swan J 'Port State Measures to Combat IUU Fishing: International and Regional Developments' *Sustainable Development Law & Policy* 7 (2006) 38 at 38.

implement.²⁰⁷ This will also be a problem affecting the SADC coast States. The Code does make some provision for developing countries. States, international organisations and financial institutions should adopt measures to assist developing countries.²⁰⁸ No measures are however specified and this provision relies on the political commitment of the international community to devise and implement programmes and projects to assist developing countries.²⁰⁹ A 2009 FAO study noted that, notwithstanding FAO resources available to support implementation of the Code in all regions of the world, implementation by developing countries remains a challenge.²¹⁰

3.4 The Fish Stocks Agreement

As noted earlier, UNCLOS does not deal adequately with the management of high-seas fishery resources.²¹¹ As a result and in order to deal with problems arising from straddling fish stocks and highly migratory fish stocks which are not bound by EEZ boundaries, the Fish Stocks Agreement was developed. Of the nine SADC coastal States, only five are members of this convention. Angola, DRC, Madagascar and Tanzania have not acceded. Cooperation among States is essential to conserve the marine environment and it is therefore vital that States adopt all relevant conservation instruments in order to protect the ocean and its resources from, inter alia, IUU fishing.²¹² The fact that four SADC Coastal States are not members of this convention is therefore a weakness in the SADC.

The purpose of the Fish Stocks Agreement is the long term conservation and sustainable use of straddling and highly migratory fish stocks through the effective implementation of UNCLOS.²¹³ The Agreement applies both to the high seas and to ‘areas under national jurisdiction’ of coastal States.²¹⁴ On the face of it ‘areas under national jurisdiction’ would appear to mean not only the EEZs but also other areas under national control such as the territorial seas. It has however been strongly argued that in fact this is not the case and that

²⁰⁷ Parker J, Doulam D, Collins J ‘Citation Analysis for the 1995 FAO Code of Conduct for Responsible Fisheries’ *Marine Policy* 34 (2010) 139 at 139.

²⁰⁸ Code of Conduct (n 37) Article 5.

²⁰⁹ Douman et al (n 21) at 79.

²¹⁰ Ibid.

²¹¹ Munro G R ‘The United Nations Fish Stocks Agreement of 1995: History and Problems of Implementation’ *Marine Resources Economics* 15 (2000) 265 at 277.

²¹² Erickson A L ‘Out of Stock: Strengthening International Fishery Regulations to Achieve a Healthier Ocean’ *North Carolina Journal of International Law and Commercial Regulations* 34 (2008) 281 at 288.

²¹³ Fish Stocks Agreement (n 34) Article 2.

²¹⁴ Ibid Articles 3.1 and 3.2.

‘areas under national jurisdiction’ in the context of the Fish Stock Agreement refers only to EEZs.²¹⁵ This is of relevance particularly in relation to RFMOs which are charged with conserving and managing stocks which migrate through various zones since they will have no jurisdiction over stocks in the territorial seas and other areas under coastal State sovereignty, thus reducing the effectiveness of their management measures.²¹⁶

The Fish Stocks Agreement requires that coastal States and States fishing on the high seas adopt measures to ensure long-term sustainability of stocks.²¹⁷ Most importantly, these shall ‘take measures to prevent or eliminate overfishing and excess fishing capacity.’²¹⁸ This provision is directly important to curbing IUU fishing since excess capacity is often a cause of IUU fishing, which in turn causes overfishing.

The Fish Stocks Agreement envisages the management of stocks through RFMOs and encourages both coastal and deep-sea fishing States to become members of relevant RFMOs or at least to agree to apply their conservation and management measures.²¹⁹ Importantly only States which are members of relevant RFMOs or agree to abide by their management measures are to be granted access to the fisheries resources to which the measures apply.²²⁰

The issue of FOC is addressed by the Fish Stocks Agreement. It provides that States which are not members of RFMOs or which have not agreed to apply the management measures of an RFMO shall not authorise their vessels to fish in the management area of that RFMO.²²¹ The agreement recognises that its provisions cannot bind non-parties and deals with this by way of a ‘carrot-and-stick approach.’²²² Non-member States of RFMOs and non-parties to the Fish Stocks Agreement which agree to comply with the conservation measures of the RFMOs in their fishing areas are to be rewarded.²²³ Such rewards are likely to be in the form of catch allocations.²²⁴ On the other hand, member States of RFMOs are permitted to take measures consistent with the agreement and international law to deter the activities of non-compliant vessels.²²⁵ Whilst the agreement does not spell out what deterrents are available, the provisions

²¹⁵ Tsamenyi et al (n 23) at 790.

²¹⁶ Ibid at 792.

²¹⁷ Fish Stocks Agreement (n 34) Article 5(a).

²¹⁸ Ibid Article 5(h).

²¹⁹ Ibid Article 8.1 and 8.3.

²²⁰ Ibid Article 8.4.

²²¹ Ibid Article 17.1 and 17.2.

²²² Lodge M W, Nandan S N ‘Some Suggestions Towards Better Implementation of the United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks of 1995’ *The International Journal of Marine and Coastal Law* 20 (2005) 345 at 356.

²²³ Fish Stocks Agreement (n 32) Article 17.3.

²²⁴ Lodge et al (n 222) at 356.

²²⁵ Fish Stocks Agreement (n 34) Article 17.4.

of the IPOA-IUU relating to, for example, denial of port facilities to non-compliant vessels is one of these.²²⁶ Of the SADC coastal States Mauritius is considered to be a FOC country.²²⁷

The Fish Stocks agreement also addresses the requirement of developing States. It requires parties to cooperate in order to improve the ability of developing countries to conserve and manage stocks and develop their fisheries for such stocks, participate in high seas fisheries and to participate in RFMOs.²²⁸ There is a requirement to establish a fund to support developing countries to implement the agreement.²²⁹ Known as the Part VII Assistance Fund, this fund was created in 2005. However, as at 2010 donors to the fund had contributed only slightly in excess of US\$900 000 of which only 24 percent was used to assist developing States.²³⁰

3.5 The International Plan of Action on IUU Fishing

The IPOA-IUU was formulated as a voluntary instrument under the Code of Conduct.²³¹ It aims to provide all States with comprehensive, effective and transparent measures by which to act against IUU fishing.²³² The IPOA-IUU sets out the responsibilities of all States, of flag States, of coastal States and of port States. It also deals with market-related measures and RFMOs²³³ and makes provisions for developing countries.²³⁴

3.5.1 All States Responsibility

The most important duties of all States are to implement national legislation which effectively addresses IUU fishing, take measures to ensure that their nationals do not support or engage in IUU fishing, ensure sufficiently severe sanctions for nationals caught in IUU fishing activities, undertake effective MCS measures, develop and implement national plans of action dealing with IUU fishing and co-operate with each other either directly or through RFMOs to prevent, deter and eliminate IUU fishing. This last requirement includes exchanging of information,

²²⁶ Munro (n 211) at 277.

²²⁷ International Transport Workers' Federation 'FOC Countries'. Available at www.itfglobal.org/flags-convenience/flags-convenien-183.cfm. Accessed on 16 September 2014.

²²⁸ Fish Stocks Agreement (n 34) Article 25 (a), (b), (c).

²²⁹ Ibid Article 26.

²³⁰ Doulman et al (n 21) at 80.

²³¹ Code of Conduct (n 37) Article 2(d).

²³² IPOA-IUU (n 43) Part III.8.

²³³ Ibid Part IV.

²³⁴ Ibid Part V.

obtaining, managing and verifying data, transferring expertise and technology and cooperating in MCS measures.²³⁵

3.5.2 Flag States Responsibility

Of the SADC coastal States, the DRC, Mauritius and South Africa are listed by the International Chamber of Shipping as being flag States.²³⁶ Under the IPOA-IUU, flag States are encouraged to ensure that their flag vessels do not engage in or support IUU fishing. Prior to registering a vessel, flag States should ensure that they can exercise the necessary control over the vessel. Flag States should also avoid flagging vessels with a history of IUU fishing.²³⁷ In addition flag States should deter their vessels from reflagging to other States in order to avoid having to comply with conservation and management measures and should adopt standardised rules to discourage reflagging.²³⁸ States should also take practical measures to prevent flag hopping such as denial of flag status and authorisation to fish.²³⁹ The intention here is to reduce the opportunities for vessels to change their names and registration while continuing to engage in IUU fishing.²⁴⁰ Flag States also have a responsibility to maintain a record of fishing vessels entitled to fly their flag and there are extra requirements for vessels authorised to fish on the high seas.²⁴¹ No vessel must be allowed to fish without an authorisation. In this regard, Flag States should ensure that vessels flagged to them fishing outside of their jurisdiction have a valid authorisation issued by that flag State whilst where a coastal State issues an authorisation to fish in its jurisdiction it should ensure that the vessel concerned also has the authorisation of its flag State.²⁴² Thus there is a system of checks and balances in that both coastal and flag States must ensure that vessels fishing do so with valid fishing permits.²⁴³ States may include conditions in their fishing authorisation including the requirement for the vessel to have a vessel monitoring system, to comply with catch reporting

²³⁵ Ibid Part IV Paragraphs 10-33.

²³⁶ International Chamber of Shipping ‘Shipping Industry Flag State Performance Table 2013/2014.’ Available at www.ics-shipping.org/docs/flagstateperformancetable.pdf. Accessed on 16 September 2014.

²³⁷ IPOA-IUU (n 43) Part IV Paragraph 36.

²³⁸ Ibid Part IV Paragraph 38.

²³⁹ Ibid Part IV Para 39. ‘Flag hopping’ is described as ‘repeated and rapid changes of a vessel’s flag for the purpose of circumventing conservation and management measures...’

²⁴⁰ Sodik D M ‘Non-legally Binding International Fisheries Instruments and Measures to Combat Illegal, Unreported and Unregulated Fishing’ *Australian International Law Journal* 15 (2008) 129 at 151.

²⁴¹ IPOA-IUU (n 43) Part IV Paragraph 42.

²⁴² Ibid Paragraph 45.

²⁴³ Swan J ‘Fishing Vessels Operating Under Open Registers and the Exercise of Flag State Responsibilities: Information and Options’ FAO (2002) Fisheries Circular No. 980 at 19. Available at www.fao.org/3/a-y3824e.pdf. Accessed on 17 September 2014.

systems, to allow observer coverage and for vessels to have an internationally recognised identification number which does not change regardless of changes of registration.²⁴⁴ These provisions enable States to more effectively monitor the activities of fishing vessels.²⁴⁵ The IPOA-IUU also addresses the major problem of support vessels which assist IUU fishing vessels.²⁴⁶ Flag States are encouraged to ensure not only their fishing vessels but also transport and support vessels do not support or engage in IUU fishing. Their vessels should not re-supply or assist with transshipment to or from IUU fishing vessels.²⁴⁷ In this way the IPOA-IUU addresses the shortcoming of the Compliance Agreement which excludes vessels not directly involved in commercial fishing activities.²⁴⁸

3.5.3 Coastal States Responsibility

The IPOA-IUU requires that coastal States should consider measures such as effective MSC, cooperation and exchange of information with other States, ensuring that fishing activities take place only with valid authorisations, vessels being required to be entered on a vessels record, requiring vessels to keep logbooks recording fishing activities, ensuring that vessels have the necessary authority of their flag States and refusing authorisation to vessels with a history of IUU fishing.²⁴⁹

3.5.4 Port States Responsibility

The IPOA-IUU also recommends port States measures which strengthen those of the Compliance Agreement, the Fish Stocks Agreement and the Code of Conduct.²⁵⁰ Firstly, States must ensure that their ports have the capacity to conduct inspections.²⁵¹ This is an important requirement since a State's ability to do so will determine its ability to implement measures against IUU fishing. Inspections should result in the collection of information on, inter alia, fishing gear and catch on board including origin, species and quantity which must be remitted to the vessel's flag State.²⁵² In order to determine whether vessels may have engaged in or

²⁴⁴ IPOA-IUU (n 43) Part IV Paragraph 47.

²⁴⁵ Swan (n 243) at 19.

²⁴⁶ Sodik (n 240) at 156.

²⁴⁷ IPOA-IUU (n 43) Part IV Paragraph 48.

²⁴⁸ Sodik (n 240) at 156.

²⁴⁹ IPOA-IUU (n 43) Part IV Paragraph 51.

²⁵⁰ Sodik (n 240) at 158.

²⁵¹ IPOA-IUU (n 43) Part IV Paragraph 57.

²⁵² Ibid Paragraphs 57 and 58.

supported IUU fishing, port States should require all vessels involved in fishing-related activities to give advanced notice of their intention to enter ports, to provide a copy of their fishing authorisation, details of their fishing trip and the quantities of fish on board.²⁵³ Where there is clear evidence that a vessel has engaged in IUU fishing activities, permission to land or tranship should be refused and the matter reported to the vessel's flag State. Where such IUU fishing is determined to have occurred on the high seas or in the jurisdiction of another coastal State, this should be reported to the flag State, and the relevant coastal State or RFMO.²⁵⁴ Another important requirement for port States is to develop a national strategy and procedures for port State control.²⁵⁵

Generally it is clear that effective implementation of international obligations regarding port State measures requires extensive capacity and financial resources.²⁵⁶ For example, the inspection and collection of data is an issue which is likely to be a problem for developing States, including some SADC States, as they may lack the resources to fulfil this requirement. With this in mind and in order to assist particularly developing countries, FAO coordinated a series of regional workshops.²⁵⁷ The Southern African Regional Workshop was held in Cape Town in January 2008 and was attended by eight of the nine SADC coastal States.²⁵⁸

3.5.5 Market-Related Measures

The inadequacy of regulations relating to the importing of fish is considered to contribute meaningfully to IUU fishing.²⁵⁹ The IPOA-IUU makes provisions for market-related measures but in a somewhat contradictory manner. On the one hand States are required to take all necessary steps to prevent fish caught by IUU fishing to be imported into or traded in their territories. On the other hand such trade-related measures should only be taken in exceptional circumstances and as a last resort where other measures have proven unsuccessful. Trade-related measures can also only be taken after prior consultation with interested States.²⁶⁰ This

²⁵³ Ibid Paragraph 55.

²⁵⁴ Ibid Paragraph 59.

²⁵⁵ Ibid Paragraph 61.

²⁵⁶ Sodik (n 240) at 161.

²⁵⁷ Ibid.

²⁵⁸ FAO Fisheries Report No. 859 'Regional Workshop on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing' (2008). Available at <ftp://ftp.fao.org/docrep/fao/101/i0049e/i0049e00.pdf>. Accessed on 19 July 2014.

²⁵⁹ Sodik (n 240) at 162.

²⁶⁰ IPOA-IUU (n 43) Part IV Paragraph 66.

does not encourage States to take a firm stance on IUU fishing through trade-related action. These rather vague measures may be due to concerns about falling foul of the requirements of World Trade Organization agreements. The IPOA-IUU encourages States to cooperate, including through RFMOs to adopt trade related agreements consistent with the WTO.²⁶¹ Measures suggested include CDSs and certification schemes.²⁶²

3.5.6 Regional Fisheries Management Organisations

The IPOA-IUU emphasises the role of RFMOs in dealing with the problem of IUU fishing. It encourages States to comply with and enforce the policies and measures of RFMOs relating to IUU fishing. States should also use the opportunities presented by RFMOs to develop innovative measures to combat IUU fishing.²⁶³

From the point of view of SADC the IPOA-IUU recognises that developing countries will require assistance in order to meet their obligations under the Plan. States, with the assistance of the FAO, should support training and capacity building, and provide financial, technical and other assistance to enable developing countries to meet their commitments under the plan.²⁶⁴ The FAO does receive funding from both the FAO Regular Programme and non-FAO resources.²⁶⁵

In conclusion, while much of the IPOA-IUU repeats the provisions of the Compliance Agreement, the Fish Stocks Agreement and the Code of Conduct, it does achieve a renewed focus on efforts to deal with IUU fishing. This is especially so as regards port State measures in respect of which the IPOA-IUU provides some strong guidelines.²⁶⁶ Although there is now an international agreement dealing with port State measures in relation to IUU fishing, this instrument appears to be some years away from entering into force, having to date achieved only three acceptances, and the port State measures in the IPOA-IUU can therefore continue to provide valuable guidance.

²⁶¹ Ibid Paragraph 68.

²⁶² Ibid Paragraph 69

²⁶³ Ibid Paragraph 78 to 84.

²⁶⁴ Ibid Part V Paragraph 85.

²⁶⁵ Doulman et al (n 21) at 81. The Regular Programme of the FAO concerns itself with internal operations including support for development needs. It is financed by member nations of the FAO. See www.nmfs.noaa.gov/ia/agreements/global_agreements/cofi.pdf. Accessed on 18 September 2014.

²⁶⁶ Edeson (n 94) at 622.

3.6 The Agreement on Port State Measures

As noted above, international instruments have for some time been developing port State measures for the purpose of promoting compliance with fisheries conservation and management standards. The Agreement on Port State Measures (PSMA), dedicated to port State measures to deal with IUU fishing, was adopted by the FAO in 2009. The PSMA will enter into force thirty days after twenty-five parties have deposited their instruments of acceptance. It currently has 11 Ratifications, two of which, Mozambique and Seychelles, are SADC coastal State.²⁶⁷

The PSMA is to be applied by parties to vessels not flying their flags.²⁶⁸ It requires parties to designate and publicise ports to which vessels may gain entry and to ensure that such ports have capacity to conduct inspections as required by the agreement.²⁶⁹ Vessels wishing to enter such ports must provide certain information in advance of entry.²⁷⁰ The information is designed to enable port State to assess whether the vessel requesting to enter its port has engaged in IUU fishing activities. Should a port State party have sufficient proof of IUU fishing activity by a vessel, it must deny that vessel entry into port. Port facilities may also be denied where IUU fishing activity is suspected after a vessel is already in port.²⁷¹ Where a vessel does not have a valid authorisation to fish as required by its flag State, or by a relevant coastal State, or where there is clear evidence that the vessel has engaged in IUU fishing in an area of national jurisdiction of a coastal State or there are other reasonable grounds for believing a vessel has engaged in IUU fishing, such vessel must be denied port services.²⁷²

Flag States are expected to cooperate in the implementation of the PSMA. They are requested to encourage their flag vessels to use the ports of States which are parties to the agreement or at least implement its provisions. A flag State which receives an inspection report indicating IUU fishing activity by one of its flag vessels must investigate the matter and if necessary take action against the vessel concerned.²⁷³

²⁶⁷ The PEW Charitable Trust News Room 2 June 2014 ‘Why-and How-to Ratify the Port State Measures Agreement.’ Available at www.pewtrust.org/en/about/news-room/news/2014/06/02/why-and-how-to-ratify-the-port-state-measures-agreement. Accessed on 30 October 2014.

²⁶⁸ PSMA (n 45) Article 3.

²⁶⁹ Ibid Article 7.

²⁷⁰ Ibid Article 8.

²⁷¹ Ibid Article 9.

²⁷² Ibid Article 11.

²⁷³ Ibid Article 20.

The agreement provides linkages to RFMO conservation and management measures. For example, the listing of a vessel on the IUU vessels lists of an RFMO can be used as proof that a vessel has engaged in IUU fishing for the purpose of denying it port entry.²⁷⁴ RFMOs must also be advised when a vessel has been denied entry to a port or access to its facilities.²⁷⁵ Inspection procedures should be agreed with RFMOs²⁷⁶ and inspection results forwarded to relevant RFMOs.²⁷⁷ These linkages should have the effect of strengthening the effectiveness of RFMOs.²⁷⁸

The provisions of the PSMA are stringent and it will be difficult for States with resource and capacity deficiencies to comply with its requirements.²⁷⁹ The developing countries of SADC will suffer from such difficulties. However, unless there is widespread acceptance and adherence to the PSMA its impact will be negated since IUU vessels will avoid those ports which impose stringent port State measures and use those that do not.²⁸⁰ For this reason the agreement has comprehensive provisions for developing countries. It calls on the international community and RFMOs to assist developing countries to evolve a legal basis for the implementation of port State measures, facilitate their participation in organisations which promote port State measures and provide technical assistance to strengthen their port State measures.²⁸¹ An important provision is the establishment of a funding mechanism to assist developing States in, inter alia, developing and enhancing MCS and training port officials and legal and enforcement officers.²⁸²

As noted earlier, the FAO held a series of workshops to promote the implementation of port State measures. An important aspect of these workshops was that they were conducted in cooperation with regional partners.²⁸³ The regional partners which participated in the workshop held in South Africa in January 2008 included the SADC secretariat. All the SADC coastal states except the DRC and Seychelles participated.

²⁷⁴ Ibid Article 9.4.

²⁷⁵ Ibid Article 11.3.

²⁷⁶ Ibid Article 12.1.

²⁷⁷ Ibid Article 15(b).

²⁷⁸ Douman et al (n 21) at 35.

²⁷⁹ Kidd (n 157) at 63.

²⁸⁰ Ibid.

²⁸¹ PSMA (n 45) Article 21.1.

²⁸² Ibid Article 21.4.

²⁸³ Douman et al (n 21) at 85.

Having considered the global instruments which have been developed to curb IUU fishing, the next chapter will consider the role of RFMOs in combating this problem.

CHAPTER 4: THE ROLE OF REGIONAL FISHERIES MANAGEMENT ORGANISATIONS IN COMBATING IUU FISHING

Regional fisheries bodies and Regional Fisheries Management Organisations (RFMOs) are the institutions most directly involved in the management of fisheries.²⁸⁴ RFMOs are ‘intergovernmental fisheries organisations or arrangements, as appropriate that have the competence to establish fisheries conservation and management measures.’²⁸⁵ RFMOs bring together States with a common interest in managing a specific species of fish or the fish resources of a region and which adopt common management rules binding on all parties. Such rules would include measures to combat IUU fishing. RFMOs differ from regional fisheries bodies which are consultative or advisory bodies without the power to establish conservation and management measures binding on their members.²⁸⁶

Although it is generally accepted that combating IUU fishing is mainly the responsibility of States, this responsibility can be greatly assisted by RFMOs.²⁸⁷ The Fish Stocks Agreement identifies RFMOs as important organisations in the conservation and management of straddling and highly migratory fish stocks.²⁸⁸ The IPOA-IUU also highlights the important role of RFMOs.²⁸⁹

The RFMOs which play a role in the SADC region and which will be considered in this chapter are the International Commission for the Conservation of Atlantic Tunas (ICCAT),²⁹⁰ the Indian Ocean Tuna Commission (IOTC),²⁹¹ the South East Atlantic Fisheries Organisation

²⁸⁴ Kidd (n 157) at 52.

²⁸⁵ Trade and Agriculture Directorate Fisheries Committee ‘Fishing for Development-Background Paper for Session 5: The Role of Regional Fisheries Management Organisations’ at 7. Paper prepared for ‘Fishing for Development’, a joint meeting of the Organisation for Economic Co-operation and Development’s Fisheries and Development Assistance Committee, with the FAO and the World Bank, held on 10 and 11 April 2014. Available at www.oecd.org/tad/events/fishing-for-development-2014-session-5-RFMOs.pdf. Accessed on 28 September 2014.

²⁸⁶ Trade and Agriculture Directorate Fisheries Committee (n 285) at 7.

²⁸⁷ Swan J ‘International Action and Responses by Regional Fisheries Bodies or Arrangements to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing’ FAO Fisheries Circular No.996 FAO Rome 2004 at 4.

²⁸⁸ Trade and Agriculture Directorate Fisheries Committee (n 285) at 6.

²⁸⁹ IPOA-IUU (n 43) Part IV Paragraphs 78 – 84.

²⁹⁰ Established by the International Convention for the Conservation of Atlantic Tunas (Rio de Janeiro) 14 May 1966. Entered into force on 21 March 1969 (ICCAT Convention). Available at www.iccat.int/Documents/Commission/BasicTexts.pdf. Accessed on 26 July 2014.

²⁹¹ Established by the Agreement for the Establishment of the Indian Ocean Tuna Commission (FAO Rome) 25 November 1993. Entered into force on 27 March 1996 (IOTC Agreement). Available at [ftp://ftp.fao.org/Fi/DOCUMENTS/iotc/Basic/IOTCA_E.pdf](http://ftp.fao.org/Fi/DOCUMENTS/iotc/Basic/IOTCA_E.pdf). Accessed on 26 July 2014.

(SEAFO),²⁹² and the Meeting of the Parties of the Southern Indian Ocean Fisheries Agreement (SIOFA).²⁹³ In addition, the Benguela Current Commission (BCC) is relevant.²⁹⁴

There are two further organisations which are relevant to fisheries in the SADC region which are not RFMOs. The first of these is the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR).²⁹⁵ CCAMLR is not an RFMO since its parent convention, the Convention on the Conservation of Marine Living Resources (CCAMLR Convention), is a conservation treaty.²⁹⁶ However, it is mandated to manage the rational use of marine living resources²⁹⁷ and has developed similar conservation measures as RFMOs, and its consideration alongside other RFMOs is useful. The second is the South West Indian Ocean Fisheries Commission (SWIOFC),²⁹⁸ which only has an advisory mandate²⁹⁹ and is therefore not an RFMO. SWIOFC can nevertheless contribute to combating IUU fishing by providing advice and information to RFMOs.

4.1 The International Commission for the Conservation of Atlantic Tunas

ICCAT was established in 1966 and is responsible for the conservation of tunas and tuna-like species in the Atlantic Ocean and adjacent seas.³⁰⁰ The SADC coastal States which are contracting parties to the ICCAT Convention are South Africa, Namibia and Angola. The DRC which is a SADC coastal State on the Atlantic has not adopted the Convention.³⁰¹ It is also not a cooperating non-contracting party.

²⁹² Established by the Convention on the Conservation and Management of Fisheries Resources in the South East Atlantic Ocean 20 April 2001. Entered into force on 13 April 2003 (SEAFO Convention). Available at www.seafo.org/AUConventionText.html. Accessed on 26 July 2014.

²⁹³ Established by The Final Act of the Conference on the Southern Indian Ocean Fisheries Agreement FAO (Rome) 7 July 2006. Entered into force on 21 June 2012 (SIOFA Agreement). Available at http://www.fao.org/fileadmin/user_upload/legal/docs/2_035t-e.pdf. Accessed on 25 September 2014. SIOFA is not a regional fisheries body but a fisheries “arrangement” as defined in Article 1(d) of the Fish Stocks Agreement. SIOFA does not establish a commission but makes decisions via Meetings of the Parties.

²⁹⁴ The Commission of the Benguela Current Convention (Benguela) 18 March 2013. Date of entry into force not yet established (BC Convention). Available at www.benguelacc.org/index.php/en/about/the-benguela-current-convention. Accessed on 26 July 2014.

²⁹⁵ Established by the Convention on the Conservation of Antarctic Marine Living Resources (Canberra) 20 May 1980. Entered into force on 7 April 1982 (CCAMLR Convention). Available at https://ccamlr.org/en/system/files/e_pt1.pdf. Accessed on 28 July 2014.

²⁹⁶ Kidd (n 157) at 52.

²⁹⁷ CCAMLR Convention (n 295) Article II.

²⁹⁸ Resolution and Statutes of the South West Indian Ocean Fisheries Commission (Statutes of SWIOFC). Established by Resolution 1/127 of the 127th Session of the FAO Council. (Rome) 25 November 2004. Available at www.fao.org/docrep/meeting/009/j3893e/j3893e01/htm. Accessed on 25 September 2014.

²⁹⁹ Statutes of SWIOFC (n 298) Article 4.

³⁰⁰ ICCAT Convention (n 290) Article I.

³⁰¹ Contracting Parties to ICCAT available at www.iccat.int/en/contracting.htm. Accessed on 28 July 2014.

ICCAT began taking measures in the early 1990s in an effort to deal with the high levels of IUU fishing in its convention area. These measures include:-

- Encouraging States to prevent reflagging of vessels as a means of avoiding conservation and management measures.³⁰²
- A CDS for Bluefin Tuna.³⁰³ This requires exporters of Bluefin Tuna to provide documentation identifying the location and flag of the vessel catching the fish.³⁰⁴
- An action plan to take trade restrictive measures against vessels fishing for blue fin tuna in contravention of its conservation measures.³⁰⁵
- A list of vessels suspected of IUU fishing in its convention area.³⁰⁶ This recommendation has been amended and amplified over the years, most recently in 2011.³⁰⁷
- A number of port State measures including a port inspection scheme and restrictions on landing and transshipment of catches by non-member vessels. The port inspection scheme³⁰⁸ requires ICCAT members to inspect all tuna fishing vessels in their ports, including those of ICCAT members. Violations by vessels of another State must be reported to the flag State and the ICCAT secretariat. Violations by a port State vessel must also be reported to ICCAT. In both cases the flag State must investigate and if necessary prosecute. Information on action taken must be reported to ICCAT. Minimum standards for port inspections have been recommended.³⁰⁹ Action to prevent the landing and transshipment of fish caught by the vessels of non-contracting parties which may have been caught in contravention of ICCAT conservation measures have also been recommended. Vessels of non-contracting parties sighted fishing in the ICCAT Convention area and voluntarily entering an ICCAT port must be inspected. If the vessel is found to have on board any species subject to ICCAT conservation

³⁰² ICCAT Resolution 92-3. Available at www.iccat.es/documents/Recs/compendiopdf-e/1992-03-e.pdf. Accessed on 1 October 2014.

³⁰³ ICCAT Resolution 94-4. Available at www.iccat.es/documents/Recs/compendiopdf-e/1994-04-e.pdf. Accessed on 1 October 2014.

³⁰⁴ Agnew D J 'The Illegal and Unregulated Fishery for Toothfish in the Southern Ocean, and the CCAMLR Catch Documentation Scheme' *Marine Policy* 24 (2000) 361 at 368.

³⁰⁵ ICCAT Resolution 94-3. Available at www.iccat.es/documents/Recs/compendiopdf-e/1994-03-e.pdf. Accessed on 1 October 2014.

³⁰⁶ ICCAT Resolution 02-23. Available at www.iccat.es/documents/Recs/compendiopdf-e/2002-23-e.pdf. Accessed on 1 October 2014.

³⁰⁷ ICCAT Resolution 2011-18. Available at www.iccat.es/documents/Recs/compendiopdf-e/2011-03-e.pdf. Accessed on 1 October 2014.

³⁰⁸ ICCAT Resolution 97-10. Available at www.iccat.es/documents/Recs/compendiopdf-e/1997-10-e.pdf. Accessed on 1 October 2014.

³⁰⁹ ICCAT Resolution 12-07. Available at www.iccat.es/documents/Recs/compendiopdf-e/2012-07-e.pdf. Accessed on 1 October 2014.

measures, the vessel may not land or transship any fish unless the vessel concerned can show that the fish on board were not caught in the ICCAT convention area or were caught in compliance with ICCAT conservation and management measures. Results of the inspection must be transmitted to the ICCAT secretariat, to be passed on to all ICCAT members and to the flag State of the vessel.³¹⁰

4.2 The Commission for the Conservation of Antarctic Marine Living Resources

The CCAMLR Convention entered into force in 1980 and is responsible for the conservation of marine living resources in the Southern Ocean. It was the first international agreement to take both an ecosystem approach and a precautionary approach to conservation in its convention area.³¹¹ South Africa and Namibia are members of CCAMLR whilst Mauritius is an acceding State and is thus bound by the provisions of the CCAMLR Convention.³¹² South Africa's interest lies in the Prince Edward Islands which forms part of its EEZ.³¹³ It appears that Namibia is a member of CCAMLR because its fishing industry is interested in fishing in CCAMLR waters.³¹⁴ In addition the Seychelles implements some of CCAMLR's conservation measures.³¹⁵

One of the species which fall under the protection of CCAMLR, and which is subject to intense IUU fishing, is the Patagonian toothfish (*Dissostichus eleginoides*).³¹⁶ Reliance on flag States to control fishing vessels has proved to be inadequate in the CCAMLR convention area and has facilitated IUU fishing. CCAMLR has developed conservation methods, aimed at fighting IUU fishing, which are not dependant on flag State action.³¹⁷ One of the most effective

³¹⁰ ICCAT Resolution 98-11. Available at www.iccat.es/documents/Recs/compendiopdf-e/1998-11-e.pdf. Accessed on 1 October 2014.

³¹¹ Fabra A, Gascon V 'The Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) and the Ecosystem Approach' *International Journal of Marine and Coastal Law* 23 (2008) 567 at 574 to 575.

³¹² CCAMLR distinguishes between member States and acceding States. An acceding State is a Contracting Party bound by the provisions of the CCAMLR Convention but is not a CCAMLR Member. Acceding States do not contribute financially to the organisation or participate in decision-making and are not permitted to fish in the CAMLR Convention Area. See www.ccamlr.org/en/organisation/explanation-terms. Accessed on 30 September 2014.

³¹³ FAO Fisheries Country Profile - South Africa. Available at www.fao.org/fi/oldsite/FCP/en/zaf/body/htm. Accessed on 30 September 2014.

³¹⁴ FAO Fisheries Country Profile - Namibia. Available at www.fao.org/fi/oldsite/FCP/en/nam/profile/htm. Accessed on 30 September 2014.

³¹⁵ Baird R 'CCAMLR Initiatives to Counter Flag State Non-Enforcement in Southern Ocean Fisheries' *Victoria University of Wellington Law Review* 36 (2005) 733 at 736.

³¹⁶ Baird (n 315) at 735 footnote 10.

³¹⁷ Ibid at 735.

measures in this regard is a CDS.³¹⁸ All IUU fishing vessels must at some stage unload or tranship their IUU fishing catches. By implementing controls over the unloading and landing of fish, a RFMO can close the ports of its contracting parties and hence its markets to IUU caught fish.³¹⁹ CCAMLR has achieved this via its CDS.

The CCAMLR CDS was originally adopted in 1999³²⁰ and has been refined several times. For example, an electronic CDS has been developed and in 2004 a resolution was passed encouraging members to adopt same.³²¹ The CDS requires that contracting parties take steps to identify the origin of toothfish imported or exported into their territories in order to establish whether these fish were caught in the CCAMLR convention area and if so, that they were caught in compliance with CCAMLR conservation measures.³²² Only fish caught in compliance with CCAMLR conservation measures will then receive the necessary documentation required for landing in the ports of contracting parties, or transshipment to one of their vessels and for export and import.³²³ The CDS is accordingly an important component of port State control.³²⁴

CCAMLR has also established two IUU Vessels Lists, one for the vessels of non-contracting parties engaged in IUU fishing³²⁵ and one for contracting parties.³²⁶ Contracting parties with vessels on the list are required to take action to address the IUU fishing activity by these vessels, including denial of port rights. Non-contracting parties are requested to take similar action against their vessels on the list.³²⁷

³¹⁸ Ibid at 735.

³¹⁹ Ibid at 740.

³²⁰ CCAMLR Conservation Measure 170/VXIII renumbered as 10-05(2004). Available at www.ccamlr.org/en/measures-10-05-2004. Accessed on 30 September 2014.

³²¹ CCAMLR Resolution 21/XXIII. Available at www.ccamlr.org/sites/dupral.ccamlr.org/files/r21-XXIII.pdf. Accessed on 30 September 2014.

³²² Baird (n 315) at 743.

³²³ CCAMLR Conservation Measures 10-05 (2004) Paras 2, 3 and 8. Available at www.ccamlr.org/en/measure-10-05-2004. Accessed on 3 October 2014.

³²⁴ Baird (n 315) at 744.

³²⁵ CCAMLR Conservation Measures 10-07 (2003). Available at www.ccamlr.org/en/measure-10-07-2003. Accessed on 3 October 2014.

³²⁶ CCAMLR Conservation Measures 10-06 (2004). Available at www.ccamlr.org/en/measure-10-06-2004. Accessed on 3 October 2014.

³²⁷ Baird (n 315) at 754.

4.3 The Indian Ocean Tuna Commission

IOTC was established in 1993 and is mandated to manage tuna and tuna-like species in the Indian Ocean and adjacent seas.³²⁸ Its area of competence includes both the high seas and national waters of the adjoining coastal states. The SADC coastal States members are Madagascar, Mauritius, Mozambique, the Seychelles and Tanzania.³²⁹ South Africa is a Co-operating non-contracting party.

Two of the main functions of IOTC are to adopt conservation and management measures on the basis of scientific evidence and to keep under review the economic and social aspects of fisheries, taking into account the interests of developing coastal States.³³⁰ In 2012 IOTC adopted a resolution to implement a precautionary approach, including ecosystem considerations in the form of impacts on non-targeted species and their environment.³³¹

IOTC has approved a number of conservation measures aimed at eliminating IUU fishing. These include:-

- A CDS programme which requires that bigeye tuna imported into the territory of a contracting party be accompanied by an IOTC Bigeye Tuna Statistical Document validated by the flag State of the vessel which harvested the fish.³³²
- Port State Measures.³³³
- An IUU vessels list.³³⁴ IOTC members and cooperating non-contracting parties are required to advise the secretariat, on an annual basis, of all vessels presumed to have carried out IUU fishing in the IOTC convention area together with evidence of the IUU activities. Once a vessel appears on the IUU vessel list, the member or cooperating non-contracting party of the vessel are advised and requested to notify the owner of the vessel and to take all necessary measures to eliminate the IUU fishing activities including, if necessary, withdrawal of the registration or fishing licence of the vessel, and then to inform IOTC of the action taken.

³²⁸ IOTC Agreement (n 291) Article II.

³²⁹ FAO Fisheries and Aquaculture Department 'Indian Ocean Tuna Commission'. Available at www.fao.org/fishery/rfb/iotc/en. Accessed on 30 September 2014.

³³⁰ IOTC Agreement (n 291) Article V(c) and (d).

³³¹ IOTC Resolution 12/01. Available at www.iotc.org/cmm/resolution-1201-implementation-precautionary-approach. Accessed on 1 October 2014.

³³² IOTC Resolution 01/06. Available at www.iotc.org/cmm/resolution-0106-concerning-iotc-bigeye-tune-statistical-document-programme. Accessed on 1 October 2014.

³³³ IOTC Resolution 10/11. Available at www.iotc.org/cmm/resolution-1011-port-state-measures-prevent-deter-and-eliminate-illegal-unreported-and. Accessed on 1 October 2014.

³³⁴ IOTC Resolution 11/03. Available at www.iotc.org/cmm/resolution-1103-establishing-list-vessels-presumed-have-carried-out-illegal-unreported-and. Accessed on 1 October 2014.

- A Regional Observer Programme to monitor transshipment at sea was introduced in 2012.³³⁵ This is aimed at preventing the laundering of fish by transshipment at sea. Transshipment at sea can only occur in the IOTC convention area in accordance with the Observer Programme.

4.4 The South East Atlantic Fisheries Organisation

SEAFO was established in 2001 and is responsible for the conservation and management of fisheries resources in the South East Atlantic. The objective of the SEAFO Convention is ‘to ensure the long-term conservation and sustainable use of the fisheries resources in the Convention Area’³³⁶ The SEAFO convention area does not include any areas of national jurisdiction of the coastal States in the region.³³⁷ The definition of ‘fisheries resources’ excludes highly migratory species.³³⁸ This is a weakness of SEAFO since such species, if caught in the SEAFO convention area, are not protected by the Convention. Although ICCAT is responsible for the conservation and management of highly migratory species in the Atlantic, it does not have management measures in place for all the species found in its area.³³⁹ SEAFO could thus have played an important role in the management of these species.

The SEAFO Convention requires application of both a precautionary approach and the ecosystem approach to the conservation and sustainable use of the fisheries resources.³⁴⁰ It also makes provisions for flag State and port State duties. In addition it specifically recognises the interests of developing States in the region. Thus, in determining the nature and extent of participatory rights in fishing opportunities, SEAFO must take into account the interests of the developing States within whose jurisdiction the stocks also occur.³⁴¹ This provision applies to the SADC coastal States of Angola, Namibia and South Africa, whose national waters and EEZs adjoin the SEAFO convention area and who thus share some fish stocks. There are also

³³⁵ IOTC Resolution 12/05. Available at www.iotc.org/cmm/resolution-1205-establishing-programme-transshipment-large-scale-fishing-vessels. Accessed on 1 October 2014.

³³⁶ SEAFO Convention (n 292) Article 2.

³³⁷ Ibid Article 4.

³³⁸ Ibid Article 1.

³³⁹ Oceana ‘ICCAT: Where Fishing is Regulated for Migratory Species in the Atlantic.’ Available at <http://oceana.org/en/eu/media-reports/features/iccat-where-fishing-is-regulated-for-migratory-species-in-the-atlantic>. Accessed on 1 October 2014.

³⁴⁰ SEAFO Convention (n 292) Articles 3 and 7.

³⁴¹ Ibid Article 20(d).

general provisions relating to developing States which would apply to these three SADC States.³⁴² Decisions of SEAFO on all matters of substance must be made by consensus.³⁴³

One of the main problems facing SEAFO is that of IUU fishing in its convention area.³⁴⁴ In December 2013 SEAFO adopted the ‘SEAFO System’ (SEAFO System), as its primary conservation measure.³⁴⁵ This is a comprehensive set of recommendations intended to enhance the conservation of species and to combat IUU fishing.³⁴⁶ Some of the measures aimed at eliminating IUU fishing in the SEAFO System are a prohibition on transshipment at sea of fisheries resources covered by the Convention,³⁴⁷ and transshipment in port only with the prior consent of both the flag State and the port and subject to reporting requirements.³⁴⁸ As already noted these provisions will unfortunately not apply to highly migratory species.

The SEAFO System also recommends that the coastal States who are contracting parties with ports adjacent to the convention area maintain an effective system of port State measures.³⁴⁹ This requirement would apply to Angola, Namibia and South Africa. The measures are largely based on the IPOA-IUU and the PSMA. Port States must ensure designated ports have sufficient capacity to conduct inspections. They must require advanced notice of a foreign vessel wanting to enter port and based on information received with such notice may deny entry. Where there is sufficient proof of IUU fishing by a vessel, such as the inclusion of the vessel on an IUU vessel list, port entry must be denied or, if IUU activity is discovered after the vessel is already in port for any reason, it must be denied port services. Where a contracting party has denied a vessel the use of its port, this must be conveyed to the flag State and to the SEAFO secretariat. The responsibilities of flag States³⁵⁰ are also in accordance with the PSMA. Thus flag States which receive an inspection report indicating that there is evidence that its vessel has engaged in IUU fishing it must investigate and take enforcement action if necessary.

³⁴² Ibid Article 21.

³⁴³ Ibid Article 17.

³⁴⁴ SEAFO ‘The Commission-Introduction’. Available at www.seafo.org/CommIntroduction.htm. Accessed on 1 October 2014.

³⁴⁵ Recommendation on a System of Control and Enforcement adopted by the South Atlantic Fisheries Organisation at its 10th Annual Meeting in 2013 in Accordance with Article 16 of the Convention. Adopted on 12 December 2013. Entered into force on 15 February 2014 (SEAFO System). Available at www.seafo.org/ConservationMeasures/2014%20CM/SEAFO_System_2014.pdf. Accessed on 1 October 2014.

³⁴⁶ SEAFO Press Releases ‘Press Release 2013’ Available at www.seafo.org/Press_Releases.html. Accessed on 1 October 2014.

³⁴⁷ SEAFO System (n 345) Article 5.

³⁴⁸ Ibid Article 14.

³⁴⁹ Ibid Articles 19 to 26.

³⁵⁰ Ibid Article 25.

A further measure in the SEAFO System aimed at deterring IUU is the IUU vessels list.³⁵¹ There is an extensive list of activities which if found to exist will create the presumption that the vessel has engaged in IUU fishing.³⁵² The contracting parties and non-contracting parties with vessels on the SEAFO IUU Vessel List are required to notify the owners of the vessels and the consequences of being included on the list. In this regard Contracting parties must take domestic legislative measures creating consequences including denial of port services, prohibiting the chartering of such vessels, refusing such vessels flag status, prohibiting landing or transshipment of fisheries resources from such vessels and encouraging traders, importers and others to refrain from transacting in and transshipment of fisheries resources caught by IUU fishing vessels.³⁵³

The measures against IUU fishing provided for in the SEAFO System are therefore clear and comprehensive. They however do not apply to highly migratory species which are covered by the ICCAT provisions. As has been noted ICCAT does not cover all highly migratory species and therefore some species may not be protected at all.

4.5 The Meeting of the Parties of the Southern Indian Ocean Fisheries Agreement

SIOFA was signed in 2006 and entered into force in 2012. Its area of application is the South Indian Ocean excluding waters under national jurisdiction.³⁵⁴ Its objectives are the long-term conservation and sustainable use of the fisheries resources in this area.³⁵⁵ The fisheries resources it is tasked to manage exclude sedentary species subject to the fisheries jurisdiction of the coastal States and all highly migratory species.³⁵⁶ These highly migratory species will thus fall under the management of IOTC. The SADC coastal States which are members of SIOFA are Mauritius and Seychelles.

SIOFA takes decisions through a Meeting of the Parties (MOP) which has a management mandate and can take legally binding decisions by consensus.³⁵⁷ In formulating and adopting management measures the MOP is required to apply a precautionary approach.³⁵⁸ Whilst there

³⁵¹ Ibid Article 28.

³⁵² Ibid Article 28.4.

³⁵³ Ibid Article 28.16 and 17.

³⁵⁴ SIOFA Agreement (n 293) Article 3.

³⁵⁵ Ibid Article 2.

³⁵⁶ Ibid Article 1(f).

³⁵⁷ Ibid Articles 5.2; 6(d) and 8.

³⁵⁸ Ibid Article 4(c).

is no direct mention of the need to apply an ecosystem approach, ‘biodiversity in the marine system shall be protected’.³⁵⁹ This implies that an ecosystem approach is required.

The special needs of developing States bordering on the SIOFA area and which are members must be recognised.³⁶⁰ Furthermore all the developing States bordering on the SIOFA area (not only member States) must be recognised in terms of their dependency on fishery resources and the need to avoid conservation action which may be disproportionately burdensome on them.³⁶¹

SIOFA makes provision for flag State duties and port State duties. Flag State duties include requirements similar to those provided for in the international instruments. These however address IUU fishing only in so far as they relate to contravention of SIOFA measures and not the measures of any other organisations. Similarly the port State duties emphasise violations of SIOFA measures as a trigger for denying port access and facilities.³⁶²

SIOFA has not yet adopted any conservation and management measures. The first meeting of the MOP was held in October 2013.³⁶³ At this meeting a process to introduce conservation and management measures and to establish a scientific committee was agreed.³⁶⁴ It is likely therefore that the rather vague duties of flag States and port States will in the future be regulated by means of such measures so as to meaningfully address IUU fishing in the region.³⁶⁵

³⁵⁹ Ibid Article 4(f).

³⁶⁰ Ibid Article 4(g).

³⁶¹ Ibid Article 13.

³⁶² Ibid Article 12.

³⁶³ European Commission MARE Newsroom 21 October 2013. ‘First Meeting of the Southern Indian Ocean Fisheries Agreement (SIOFA). Available at ec.europa.eu/information_society/newsroom/cf/mare/itemdetail.cfm?item_id=12483. Accessed on 2 October 2014.

³⁶⁴ MARE Newsroom (n 363).

³⁶⁵ Statutes of SWIOFC (n 298) Paragraph 4(g).

4.6 The South West Indian Ocean Fisheries Commission

SWIOFC is not a RFMO and only has advisory powers.³⁶⁶ It was established in 2004 for the purpose of promoting the sustainable utilization of all living marine resources of the South West Indian Ocean region.³⁶⁷ It however recognises the authority of IOTC over the tuna and tuna-like species in its region.³⁶⁸ Its area of competence is limited to waters under national jurisdiction of the States in the region.³⁶⁹ SWIOFC therefore complements the functions of SIOFA which is tasked to manage the Indian Ocean high seas fisheries.

One of SWIOFC's basic aims is to promote application of the Code of Conduct, including the precautionary approach and the ecosystems approach to fisheries.³⁷⁰ It can therefore contribute meaningfully to combating IUU fishing in the Indian Ocean. The SADC member States of SWIOFC are Madagascar, Mauritius, Mozambique, Seychelles, South Africa and Tanzania.³⁷¹

4.7 The Benguela Current Commission

The Benguela Current Commission (BCC) was established in 2007 to enable Angola, Namibia and South Africa to better manage the Benguela Current Large Marine Ecosystem (LME).³⁷² This arrangement evolved into the Benguela Current Convention (BC Convention) which was signed in 2013.³⁷³ Although the BC Convention has been ratified by all three States³⁷⁴ it has not yet entered into force.³⁷⁵

The objective of the BC Convention is the promotion of 'a coordinated regional approach to long-term conservation, protection, rehabilitation, enhancement and sustainable use of the

³⁶⁶ Ibid Paragraph 4.

³⁶⁷ Ibid Paragraphs 2 and 4.

³⁶⁸ Swan J 'Harmonization of Fisheries Legislation and Assessment of the Implementation of Fisheries Management Plans and Rights Based Management Plans in the South West Indian Ocean' South West Indian Ocean Fisheries Project (October 2012) at 4. Available at E:Dissertation/the-harmonisation-of-fisheries-legislation-and-assessment-of-fisheries-management-plan-and-right-based-management%202012.pdf. Accessed on 26 July 2014.

³⁶⁹ Statutes of the SWIOFC (n 298) Paragraph 1.

³⁷⁰ Statutes of the SWIOFC (n 298) Paragraph 5.

³⁷¹ List of members of SWIOFC available at www.fao.org/fishery/rfb/swiofc/en#Org-LegalFoundation. Accessed on 26 July 2014.

³⁷² Benguela Current Commission (BCC). 'The Benguela Current Commission.' Available at <http://benguelacc.org/index.php/en/about/what-is-the-bcc>. Accessed on 15 October 2014.

³⁷³ BC Convention (n 294).

³⁷⁴ The Benguela Current Commission Strategic Action Programme 2015-2019. Adopted and signed on 21 August 2014 (SAP) at 11. Available at <http://www.benguelacc.org/index.php/en/news/latest-news/107-strategic-action-programme-available-for-download>. Accessed on 15 October 2014.

³⁷⁵ Email correspondence from the Executive Secretary of the BCC dated 17 October 2014.

Benguela Current Large Marine Ecosystem to provide economic, environmental and social benefits.³⁷⁶ LMEs are

‘regions of oceans space of 200 000 km² or greater, encompassing coastal areas from river basins and estuaries out seaward to the break or slope of the continental shelf or out to the seaward extent of a well-defined current system along coasts lacking continental shelves’³⁷⁷

The BC Convention provides for the establishment of, inter alia, a Commission³⁷⁸ which is authorised to implement conservation and management measures.³⁷⁹ It is also specifically required to promote collaboration and surveillance, including joint activities in the SADC region.³⁸⁰ This suggests collaboration with States other than the parties to the BC Convention, thus broadening the scope of cooperation beyond the Benguela Current LME.

The BC Convention requires application of the precautionary principle and an ecosystem approach.³⁸¹ This is facilitated by the Strategic Action Programme (SAP).³⁸² This programme is designed to provide practical actions to achieve sustainable integrate management of the LME.³⁸³ The SAP also recognises the need to interact with the wider SADC and international community in order to address IUU fishing.³⁸⁴

Having considered the international instruments which address IUU fishing as well as the role of RFMOs in the previous two chapters, the next chapter will look at how IUU fishing is being addressd by SADC.

³⁷⁶ BC Convention (n 294) Article 2.

³⁷⁷ Sherman K ‘Adaptive Management Institutions at the Regional Level: The Case of Large Marine Ecosystems’ *Ocean and Coastal Management* 90 (2014) 38 at 38.

³⁷⁸ BC Convention (n 294) Article 5.

³⁷⁹ Ibid Article 8(d).

³⁸⁰ Ibid Article 8(j).

³⁸¹ Ibid Article 4(1) (b) and (c) and 4(2) (a).

³⁸² SAP (n 374) at 9.

³⁸³ Ibid at 10.

³⁸⁴ Ibid 18.

CHAPTER 5: SADC INITIATIVES TO CURB IUU FISHING

The Southern African Development Co-ordinating Conference was established in 1980 to further the cause of national political liberation among the Southern African States. In 1982 it was agreed to transform the Conference into the Southern African Development Community (SADC) and to this end the Treaty of the Southern African Development Community (SADC Treaty)³⁸⁵ was negotiated.³⁸⁶ The SADC Mission Statement is to ‘promote sustainable and equitable economic growth and socio-economic development through efficient, productive systems, deeper cooperation, good governance and durable peace and security.’³⁸⁷

The SADC Treaty does not create institutions with powers to bind the individual SADC States. It is effectively the member States themselves which formulate and implement policies and decisions.³⁸⁸ The highest decision making body of the SADC is the Summit, made up of the Heads of State or Government of all the SADC member States.³⁸⁹ Although the Summit is described as the supreme policy-making institution of the SADC capable of making binding decisions, all decisions must be made by consensus.³⁹⁰ This tends to result in decisions which are vague and give wide discretion to member States to implement in order to achieve consensus. Furthermore sanctions against a member State are almost impossible since the member State in violation is able to veto any sanction.³⁹¹

The objectives of the SADC Treaty include promoting ‘sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation....’ as well as achieving ‘sustainable utilisation of natural resources and effective protection of the environment.’³⁹² As discussed in Chapter 2, IUU fishing causes economic, environmental and social problems which directly negate the objectives of the SADC Treaty. There are thus economic, environmental and social gains which can be achieved by SADC from the control of IUU fishing.³⁹³ Economically, well managed fisheries will enable SADC coastal States to

³⁸⁵ SADC Treaty (n 3).

³⁸⁶ SADC ‘History and Treaty’ Available at www.sadc.int/about-sadc/overview/history-and-treaty/. Accessed on 17 October 2014.

³⁸⁷ SADC ‘SADC Mission’ Available at www.sadc.int/about-sadc/overview/sadc-mission/ Accessed on 17 October 2014.

³⁸⁸ Saurombe A ‘The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration’ *Potchefstroom Electronic Law Journal* 15 (2012) 454 at 458.

³⁸⁹ SADC Treaty (n 3) Article 5.

³⁹⁰ *Ibid* Article 10.

³⁹¹ Saurombe (n 388) at 461.

³⁹² SADC Treaty (n 3) Article 5(a) and (g).

³⁹³ Stop Illegal Fishing Programme Studies Project No 8 ‘The Impacts of Flags and Ports of Non Compliance in the SADC Region’ Volume 1-Executive Summary, February 2008 at 6. Available at

negotiate more lucrative fisheries partnerships with especially the European Union. In addition, well managed SADC ports which deny access to IUU fishing vessels would encourage compliant operators thereby increasing activities such as fish processing and packaging. Environmentally, there would be less damage to marine ecosystems and fish stocks and possibly the recovery of stocks from overfishing. Socially, reduction of IUU fishing would improve food security and income for fishers and reduce the conflict created in the artisanal fishing sectors.³⁹⁴

5.1 SADC Protocol on Fisheries

In recognition of the importance of fisheries to the SADC region and in order to support international conventions for the sustainable use and protection of living aquatic resources and the aquatic environment, the Protocol on Fisheries (Protocol) was concluded.³⁹⁵ It entered into force in 2003.³⁹⁶ It aims to promote responsible and sustainable use of living aquatic resources and ecosystems in order to promote and enhance food security and human health, safeguard the livelihood of fishing communities, generate economic opportunities in the region, ensure benefits for future generations and eradicate poverty.³⁹⁷

The Protocol defines ‘illegal fishing’ to mean ‘any fishing or related activity carried out in contravention of the laws of a State Party or the measures of an international fisheries management organisation accepted by a State Party and subject to the jurisdiction of that State Party.’³⁹⁸ Illegal fishing and related activities by nationals must be made an offence in the national laws of the State Parties.³⁹⁹ In addition, State Parties must cooperate to establish region wide comparable levels of penalties for illegal fishing by non-SADC flag vessels and by SADC flag vessels conducting fishing in the waters of another Party State.⁴⁰⁰ Party States should also foster joint actions when there are reasonable grounds for believing that a vessel

www.atopillegalfishing.com/doc/impact_of_flags_n_perts_of_non_compliance_ES_eng.pdf. Accessed on 2 September 2014.

³⁹⁴ Ibid.

³⁹⁵ SADC ‘Documents and Publications: Protocol on Fisheries’. Available at www.sadc.it/documents-publications/show/Protocol_on_Fisheries2001.pdf. Accessed on 13 October 2014.

³⁹⁶ Protocol (n 57).

³⁹⁷ Ibid Article 3.

³⁹⁸ Ibid Article 1.

³⁹⁹ Ibid Article 8.2.

⁴⁰⁰ Ibid Article 8.4(b).

has been used to undermine the effectiveness of measures adopted under the Protocol, including notifying the flag State and undertaking port investigations.⁴⁰¹

The Protocol also contains indirect provisions which are aimed at curbing IUU fishing. For example, State Parties may authorise vessels flying their flags to fish in SADC waters only where they are able to exercise effectively their responsibilities under the Protocol and they must take steps to ensure that these vessels comply with measures adopted under the Protocol and that they do not undermine the effectiveness of these measures.⁴⁰² A further measure considered important in curbing IUU fishing and which is provided for in the Protocol is the need to prevent overfishing and excess fishing capacity, including from outside the SADC region.⁴⁰³ Furthermore, State Parties must use existing fisheries law enforcement resources optimally and cooperate in the use of MCS resources to make these more cost effective.⁴⁰⁴ They should also cooperate, including, through international fisheries organisations, to ensure compliance with and enforcement of, international management measures.⁴⁰⁵

An obvious omission in the Protocol is the absence of any provision relating to port controls or the use of designated ports by foreign vessels. However, the Protocol encourages its State Parties to make provision in their fisheries and other relevant legislation in accordance with the provisions of UNCLOS, the Fish Stocks Agreement and the Compliance Agreement.⁴⁰⁶ As we have seen in Chapter 3, the Compliance Agreement and the Fish Stocks Agreement both contain some provisions for port measures, which although weak, could be adopted by SADC coastal States. The Compliance Agreement also has provision relating to flag State responsibility. Thus SADC States could legislate to ensure that their flag vessels are not permitted to engage in high seas fishing without the necessary authorisation granted by the appropriate authority of that SADC State and that they are able to exercise effective responsibility over these vessels before granting authorisation to fish on the high seas.⁴⁰⁷ The Fish Stocks Agreement addresses the issues of FOC. In implementing this, SADC States would be required not to authorise their vessels to fish in the management areas of RFMO of which

⁴⁰¹ Ibid Article 8.4(c).

⁴⁰² Ibid Article 5.3 and 5.4.

⁴⁰³ Ibid Article 77.8 and 7.9.

⁴⁰⁴ Ibid Article 9.1.

⁴⁰⁵ Ibid Article 9.2.

⁴⁰⁶ Ibid Article 6.2.

⁴⁰⁷ Compliance Agreement (n 28) Article III.1 and III.2.

they are not members or whose conservation and management measures they have not agreed to apply.⁴⁰⁸

The Protocol is not a conservation instrument per se as it seeks to conserve and manage in the context of sustainable use in order to achieve food security, safeguard livelihoods, generate economic opportunities, ensure benefits for future generations and eradicate poverty. In this context it advocates a version of the ecosystem approach and the precautionary principle which is vague and confusing. It requires protection of aquatic ecosystems including their biodiversity and unique habitats ‘which contribute to the livelihood and aesthetic values of the people and the Region’.⁴⁰⁹ This suggests that protection does not apply to all ecosystems but only to those with value to humans. Similarly, the precautionary principle is advocated only to ensure that activities by State Parties within their jurisdiction and control ‘do not cause excessive transboundary adverse impacts’.⁴¹⁰ This implies that provided adverse impacts are not excessive and transboundary they need not be mitigated.

5.2 SADC Statement of Commitment on IUU Fishing

At the meeting of SADC Marine Fisheries Ministers in May 2002, concern was expressed about IUU fishing in the SADC region by both foreign and SADC State fleets. Consequently a Regional Ministerial Conference was convened by the SADC Secretariat in conjunction with the UK Government in July 2008.⁴¹¹ This conference was attended by representatives of all the current SADC coastal States (except Seychelles which had withdrawn its membership effective from July 2004 but re-joined in August 2008).⁴¹² The conference identified priority areas for urgent attention. These included strengthening fisheries MCS, improving regional cooperation, strengthening fisheries governance and legal frameworks and engaging all role players in the chain of custody.⁴¹³ In order to address these priorities the SADC Statement of Commitment on IUU Fishing (SoC) was signed.⁴¹⁴ This is a statement of political intent and is not in itself legally binding on the SADC coastal States. The Protocol makes provision to

⁴⁰⁸ Fish Stocks Agreement (n 34) Article 17.1 and 17.2.

⁴⁰⁹ Protocol (n 57) Article 14.1.

⁴¹⁰ Ibid Article 14.2.

⁴¹¹ Stop Illegal Fishing Case Study Series 06 (n 56).

⁴¹² Stop Illegal Fishing ‘Ministerial Conference 2nd to 4th July 2008, Windhoek, Namibia’. Available at www.stopillegal fishing.com/ministerial_conference.php. Accessed on 13 October 2014.

⁴¹³ Stop Illegal Fishing ‘Ministerial Conference’ (n 412).

⁴¹⁴ SoC (n 61).

develop and adopt annexes which will then form an integral part of the Protocol.⁴¹⁵ The process required to annex the SoC to the Protocol has not yet been achieved and this is an issue which should be attended to as a matter of urgency.⁴¹⁶

The commitments contained in the SoC are in the areas of MCS capacity and operations; cooperation in international instruments; regional cooperation and information sharing; and trade and market related measures.⁴¹⁷ These are:-

- Effective implementation of existing MCS and improving flag State responsibility among SADC States.⁴¹⁸
- Developing national Plans of Action on IUU fishing which should form the basis of a regional Plan of Action; developing national and regional port State measures tailored to the needs of the SADC region; establishing of a task force to identify, in line with global initiatives, any further actions and measures which could be taken at the regional level to combat IUU fishing.⁴¹⁹
- Establishing a regional MCS centre, enhancing MCS capacity and developing standard boarding and inspection procedures; ensuring a functional VMS for all SADC countries; implementing agreed regional MCS standard; cooperating with other States, RFMOs, LMEs Programmes and other arrangements to support global action against IUU fishing; developing regional information exchange protocols to enable SADC members to share information on inspections, licences and offences and IUU fishing activities; establishing a data base of licenced and IUU vessels; developing an Annex to the Fisheries Protocol detailing how implementation of the MCS and law enforcement provisions of the Protocol is to be made operational; implementing certain measures by 2010, including requiring all fishing vessels to notify of their entry and exit into the EEZ of any SADC coastal State with the quantity of catch on board, implementing a progressive ban on transshipment at sea in the SADC region,

⁴¹⁵ Protocol (n 57) Article 21.

⁴¹⁶ ACPFishII Programme of the European Union 'Final Technical Report: Follow up Action to Feasibility/Assessment Study for the SADC Regional Fisheries MCS Coordinating Centre' April 2013 at 17. Available at http://acpfish2-eu.org/upload/Programme_Documents/Reports/2013/NPDS2013.pdf. Accessed on 6 October 2014.

⁴¹⁷ Stop Illegal Fishing "Notes Towards the Development of an Action Plan for the Implementation of the SADC Statement of Commitment on IUU Fishing" (April 2009). Stop Illegal Fishing, Gaborone, Botswana. Available at www.africanfisheries.org/sites/default/files/knowledge_outputs/200904_sif_notes_action_plan_for_sadc_implementation.pdf. Accessed on 13 October 2014.

⁴¹⁸ SoC (n 61) Resolutions 2 and 9.

⁴¹⁹ Ibid Resolutions 3, 4, 5, 8 and 10.

prohibiting access to SADC ports by any vessels listed in the IUU vessels list of an RFMO and reviewing and harmonizing laws to ensure they incorporate internationally agreed port measures to combat IUU fishing, provide for sufficient and harmonious sanctions and penalties.⁴²⁰

- Developing effective measures to trace fish and fishery products to identify those derived from IUU fishing.⁴²¹

The goals of the SoC are to be achieved through a plan of action which was to be finalised by June 2009. In April 2009 SADC convened a working group to prepare the plan of action. It was however only in July 2010 at a meeting of SADC Ministers responsible for Natural Resources and Environment that an Action Plan to implement the SoC was approved.⁴²² This Action Plan does not appear to be publicly available, however it apparently provides for the setting up of the Regional Fisheries Monitoring, Control and Surveillance Centre (MCS Centre) to be hosted in Mozambique and describes the mission of the MCS Centre as being

‘to coordinate fisheries MCS and enforcement activities (in port and at sea), to set up a regional platform for the coordination of a regional Patrol Plan and for supporting the capacity building for harmonized implementation of the SADC Protocol on Fisheries and development of training’⁴²³

5.3 The SADC Regional MCS Centre

The first meeting of the IUU task force was held in September 2011. The main purpose of the meeting was to discuss and develop a strategy for the establishment of the MCS Centre.⁴²⁴ The priorities which were identified by the IUU task force were to assess implementation of the SoC, to develop a financial sustainability plan and a Charter for the MCS Centre and to train inspectors and observers on MCS compliance and enforcement.⁴²⁵ In October 2012 the SADC Secretariat organised a workshop for representatives of all SADC States to discuss the process

⁴²⁰ Ibid Resolutions 5, 11, 12, 13, 14 and 15.

⁴²¹ Ibid Resolution 6.

⁴²² Record of Meeting of Ministers Responsible for Natural Resources and Environment, 16 July 2010, Victoria Falls, Zimbabwe. Available at www.cbdn.int/iyb/doc/celebrations/iyb-swaziland-meetingministers-en/pdf. Accessed on 14 October 2014.

⁴²³ ACPFishII Programme of the European Union ‘Final Technical Report: Assessment Study for the Installing and Start-up of the SADC MCS Regional Centre’ 30 May 2011 at 8. Available at <http://acpfish2-eu.org/uploads/projects/id4/NFDS%20FTR%20SADC%20MCS%20Centre%20-24%20June%202011%20low%20res.pdf>. Accessed on 14 October 2014.

⁴²⁴ Stop Illegal Fishing “First Meeting of the SADC IUU Task Force” Available at www.stopillegal-fishing.com/sifnews_article.pho?ID=70. Accessed on 7 July 2014.

⁴²⁵ ACPFishII Programme ‘Final Technical Report: Follow up Action to Feasibility/Assessment Study for the SADC Regional Fisheries MCS Coordinating Centre’ (n 416) at 4.

of implementation of the SoC and the establishment of the MCS Centre.⁴²⁶ Despite these actions and having committed to the development of the MCS Centre in the SoC in 2008, this important tool in combating IUU fishing in the SADC region and globally has still not been established.⁴²⁷ The main stumbling block appears to be start-up funding.⁴²⁸

Bearing in mind the aims of the Protocol, the SoC and the Action Plan, the MCS Centre could provide vital services to combat IUU such as:-⁴²⁹

- A register of fishing vessels that operate within SADC waters or are flagged to SADC States.
- A VMS to facilitate sharing of national VMS information.
- Sharing of MCS related information between SADC States, RFMOs and other entities.
- A central electronic database where fisheries information is accessed.
- Coordination and harmonisation of standards relating to observers and their reports.
- Coordination of assets used for surveillance
- Advice and support on law enforcement.
- Support for implementation of port State measures.
- Support for capacity building to improve the MCS capacity of States.

Notwithstanding that the SoC is not yet a binding instrument and that the MCS Centre has not yet been established, the SoC has been credited with some notable successes in fostering regional cooperation resulting in actions taken against IUU fishing.⁴³⁰

Having identified and considered the SADC measures to combat IUU Fishing, the final chapter will assess the effectiveness of these measures and consider possible improvements or additional measures which could be taken by SADC.

⁴²⁶ SADC Press Information Note ‘1st Workshop on the Implementation of the SADC Statement of Commitment on IUU Fishing and Elaboration of a Sustainability Plan for the SADC Regional Fisheries Monitoring Control and Surveillance Coordination Centre, in Windhoek, Namibia 16-17 October 2012’ Available at <http://acpfish2-eu.org/uploads/press%20releases/Press%20Information%20Note%20%20windhoek%2016-17%20oct-%201st%20Workshop%20-%20LT%20-%20MS.pdf>. Accessed on 13 October 2014.

⁴²⁷ ACPFishII Programme ‘Final Technical Report: Follow up Action to Feasibility/Assessment Study for the SADC Regional Fisheries MCS Coordinating Centre’ (n 416) at 17.

⁴²⁸ Ibid

⁴²⁹ ACPFishII Programme ‘Final Technical Report: Assessment Study for the Installing and Start-up of the SADC MCS Regional Centre’ (n 423) at 14 to 17.

⁴³⁰ Davies S, Ssemakulu M, Josupeit H ‘The Pan African Fisheries and Aquaculture Policy Framework and Reform Strategy: How to Stop Illegal Fishing in Africa’ Policy Brief 14, February 2014 at 3. Available at http://www.africanfisheries.org/sites/default/files/knowledge_outputs/paf_pb14_iuu_control_regional_level.pdf. Accessed on 15 October 2014.

CHAPTER 6: ASSESSMENT OF THE EFFECTIVENESS OF SADC MEASURES TO
CURB IUU FISHING

The previous chapters have considered the international provisions aimed at curbing IUU fishing, the role of the RFMOs and the measures adopted by SADC to prevent, deter or eliminate IUU fishing. This chapter will consider the effectiveness of the SADC measures

6.1 Incorporation of the Precautionary Principle and the Ecosystem Approach

As discussed in Chapter 1, the Code of Conduct on Responsible Fisheries (Code of Conduct) and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement) both emphasise the need to apply the precautionary principle. These two instruments also advocate an ecosystem approach. The Agreement on Port State Measures (PSMA) also recognises the detrimental effect of IUU fishing activities on marine ecosystems.⁴³¹

The SADC provisions regarding implementation of both the precautionary principle and the ecosystem approach are vague and confusing. The SADC Protocol on Fisheries (Protocol) only requires application of the precautionary principle to ensure that activities conducted by State Parties in their own jurisdiction, i.e., in their national waters and EEZs, ‘do not cause excessive transboundary adverse impacts.’⁴³² This implies that the precautionary approach is not required where the effects of activities conducted by parties in their own jurisdictions are not transboundary, or if transboundary, are not excessive. There are two problems with this form of the precautionary principle. Firstly, there is no indication of what is intended by ‘excessive adverse impacts.’ The precautionary principle requires preventative action where impact on the environment is uncertain. Secondly, it implies that adverse impacts which are confined to the sea under a State’s national jurisdiction need not be avoided or mitigated. With regard to the ecosystem approach advocated in the Protocol, only aquatic ecosystems ‘which contribute to the livelihood and aesthetic value of the people and the region’ need to be protected.⁴³³ These vague provisions of the Protocol contrast sharply with the provision of the Benguela Current Convention (BC Convention) which clearly and simply states that the

⁴³¹ PSMA (n 45) Preamble.

⁴³² Protocol (n 57) Article 14.2.

⁴³³ Ibid Article 14.1.

Parties must apply the precautionary principle and take necessary measures to protect the marine ecosystem against adverse impacts.⁴³⁴ It seems that both the precautionary principle and the ecosystem approach have been deliberately weakened and limited in the Protocol. This is perhaps a result of the need for consensus in the SADC Treaty in the decision making process.

6.2 Participation in the International Agreements.

Under the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) all states should adopt the United Nations Convention on the Law of the Sea (UNCLOS), the Fish Stocks Agreement and the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement).⁴³⁵ Participation by the SADC coastal States in these binding international instruments is not consistent. All nine SADC coastal States are members of UNCLOS. However, only seven SADC coastal States are parties to the Compliance Agreement. Only five SADC Coastal States are parties to the Fish Stocks Agreement.

The Protocol encourages States to take action against IUU fishing by making provisions in their legislation in accordance with UNCLOS, the Fish Stocks Agreement and the Compliance Agreement.⁴³⁶ As has been noted, UNCLOS does not provide strong conservation and management measures, especially as regards high seas fisheries. Stronger measures are demanded by the Compliance Agreement and the Fish Stocks Agreement, especially in relation to flag State responsibilities and FOC fishing. The Protocol should have required those coastal States which have not acceded to these two agreements to do so. These would then also benefit from the provisions for assistance to developing countries provided for in the agreements.

With regard to the PSMA, only Mozambique and Seychelles have to date acceded to this agreement.

⁴³⁴ BC Convention (n 294) Article 4.

⁴³⁵ IPOA-IUU (n 43) Part IV Paragraph 11.

⁴³⁶ Protocol (n 57) Article 6.2.

6.3 All States Responsibility

Under UNCLOS all States have an obligation to control the fishing activities of their nationals.⁴³⁷ The Code of Conduct envisages that all States should ensure that they comply with and enforce management and conservation measures and establish effective MCS mechanisms.⁴³⁸ The IPOA-IUU proposes more detailed obligations, the most important of which is the responsibility of all States to develop and implement National and Regional Plans of Action to combat IUU fishing.⁴³⁹ These plans can make provision for all the other obligations assigned under the IPOA-IUU to States. In this area SADC action is poor. The SoC commits to prioritizing the development and adoption of National Plans of Action on IUU as a matter of urgency. Such plans will then form the basis to devise a regional Plan of Action on IUU.⁴⁴⁰ Of the nine SADC coastal States only two countries, Mauritius⁴⁴¹ and Namibia,⁴⁴² have developed and implemented National Plans of Action. Most of the other States are still in the process of preparing their plans while in the case of South Africa it is unclear whether it has taken any action to develop such a plan.⁴⁴³ This suggests that SADC has not taken its commitment to National Plans of Action seriously. As a result there is also no Regional Plan of Action since the SoC envisages such a regional plan being developed out of the various National Plans. It would be more logical and practical to first develop the Regional Plan of Action, which can then guide the individual States in the development of their National Plans to ensure that policies, management measures and legislation are harmonized for all the States. Such a Regional Plan of Action for IUU Fishing has long been in place for Lake Victoria.⁴⁴⁴

The Protocol requires that IUU fishing by nationals must be made an offence. States must also establish region-wide comparable penalties for IUU fishing.⁴⁴⁵ The SoC concedes the need to harmonize national legislation, provide for adequate sanctions and penalties and improve MCS.⁴⁴⁶ The MCS Centre can play a vital role in improving MCS in the region and it should

⁴³⁷ UNCLOS (n 20) Article 117.

⁴³⁸ Code of Conduct (n 37) Article 6.10.

⁴³⁹ IPOA-IUU (n 43) Paragraphs 25 and 26.

⁴⁴⁰ SoC (n 61) Resolution 8.

⁴⁴¹ Swan (n 368) at 59.

⁴⁴² Stop Illegal Fishing 'Assessing the IPOA-IUU' Available at www.stopillegalfishing.com/doc/publication/eng/assessing-the-IPOA-IUU.pdf. Accessed on 28 October 2014.

⁴⁴³ Ibid.

⁴⁴⁴ Lake Victoria Fisheries Organization (LVFO) Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated (IUU) Fishing on Lake Victoria and its basin. Adopted by the Governments of The Republics of Kenya, Tanzania and Uganda on 27 May 2004. Available at ftp.fao.org/fi/DOCUMENT/IPOAS/Regional/lakevictoria/LVFO_RPOA_IUU.pdf. Accessed on 28 October 2014.

⁴⁴⁵ Protocol (n 57) Article 8.

⁴⁴⁶ SoC (n 61) Resolutions 15(e), 2, 5 and 15(f).

be urgently established and become operational. In the area of legislation, the SADC coastal States need to greatly strengthen and harmonize laws.⁴⁴⁷ This does not mean that all the States must adopt identical laws but the laws should be compatible to allow for shared and joint management and enforcement.⁴⁴⁸ Regarding offences and penalties, these vary among the States in terms of the level of fines and the imposition of penalties other than fines. Generally the laws are weak or, in some cases non-existent, and the level of fines too low.⁴⁴⁹ These issues need to be addressed urgently, as provided for in the SoC.

6.4 Flag State Measures

The key provisions of the Compliance Agreement require flag States to be responsible for the activities of their fishing vessels.⁴⁵⁰ The Code of Conduct also requires flag States to be able to exercise effective control over both fishing and support vessels flagged to them,⁴⁵¹ and they must keep a record of the vessels entitled to fly their flag and authorised to fish.⁴⁵²

Additional duties for flag States are provided in the IPOA-IUU. These include:-

- Avoiding flagging a vessel with a history of IUU except in certain circumstances;⁴⁵³
- Deterring reflagging and ‘flag hopping’ and avoiding the creation of incentives for such action;⁴⁵⁴
- Ensuring that their vessels, involved in transshipment at sea, are authorized to engage in this activity.⁴⁵⁵

As noted in Chapter 3, The DRC, Mauritius and South Africa are considered to be flag States. The Protocol makes provision for some flag State control. Thus States may only allow their flag vessels to fish in SADC waters if they can exercise effective control over them.⁴⁵⁶ The SoC reaffirms this obligation and extends it to fishing beyond SADC waters.⁴⁵⁷ The SoC also

⁴⁴⁷ Swan (n 368) at 14.

⁴⁴⁸ Ibid at 3.

⁴⁴⁹ Ibid at 22.

⁴⁵⁰ Compliance Agreement (n 28) Article III.

⁴⁵¹ Code of Conduct (n 37) Article 6.

⁴⁵² Ibid Article 8.

⁴⁵³ IPOA-IUU (n 43) Paragraph 36.

⁴⁵⁴ Ibid Paragraphs 38 and 39.

⁴⁵⁵ Ibid Paragraph 49.

⁴⁵⁶ Protocol (n 57) Article 5.

⁴⁵⁷ SoC (n 61) Resolution 9.

envisages a progressive ban on transshipment at sea in the SADC region.⁴⁵⁸ In addition it commits to the development of a data base of both licenced and IUU fishing vessels.

Neither the Protocol nor the SoC make any mention of the requirements to keep a list of vessels entitled to fly the flag of a SADC State, the need to ensure that SADC State flagged vessels do not engage in or support IUU fishing or the need to avoid flagging vessels with a history of IUU fishing (notwithstanding the creation of a SADC IUU fishing vessel list). These are important tools in the fight against IUU fishing and should have been included. There is also no mention of the requirement for authorizations being granted before vessels may engage in fishing activities.

6.5 Coastal State Measures

Coastal States have a general duty to ensure that marine resources are not over-exploited under both UNCLOS in relation to their EEZs,⁴⁵⁹ and under the Fish Stocks Agreement in relation to the high seas.⁴⁶⁰ The Code of Conduct similarly advocates the need to prevent overfishing and excess capacity.⁴⁶¹ The Protocol acknowledges the need to prevent overfishing and excess fishing capacity in relation to foreign fishing endeavours as well as fishing conducted by SADC States.⁴⁶²

As was discussed in Chapter 2, capacity-enhancing and ambiguous subsidies by States to their industrial fishing industries contribute to excess fishing capacity and thus encourage IUU fishing. All SADC coastal States are thought to subsidise their fisheries by providing beneficial as well as capacity-enhancing and ambiguous subsidies. In most cases the capacity-enhancing subsidies far exceed the beneficial subsidies.⁴⁶³ A commitment by SADC to reduce capacity-enhancing and ambiguous subsidies to its industrial fisheries should be a priority.

The IPOA-IUU also requires coastal States to implement measures to combat IUU fishing in their EEZs. These measures include effective MCS, cooperation with other States and RFMOs, preventing fishing, transshipment and processing of fish at sea without authorisation and

⁴⁵⁸ Ibid Resolution 15(c).

⁴⁵⁹ UNCLOS (n 20) Article 61.2.

⁴⁶⁰ Fish Stocks Agreement (n 34) Article 5(h).

⁴⁶¹ Code of Conduct (n 37) Article 6.

⁴⁶² Protocol (n 57) Article 7.

⁴⁶³ Sumaila et al (n 122) at 218 to 219.

keeping a record of authorised vessels. Vessels with a record of IUU fishing should also not be licenced to fish in the waters of coastal States.⁴⁶⁴

As we have seen, the SoC addresses MCS in a fairly comprehensive manner. It commits to the establishment of the MCS Centre to assist and support all the SADC coastal States. It also commits to the development of regional MCS standards and endorses information exchange on inspections, licences, offences and IUU fishing. All these functions can be accommodated through the MCS Centre.

The SoC does not concern itself with the need to prevent overfishing or reduce excess fishing capacity. Nor does it deal with any of the other coastal State measures recommended by the IPOA-IUU. For example, there is no requirement to use the list of IUU vessels to avoid licencing these vessels. It also does not make any provision for requiring vessels fishing in SADC waters to be authorised by the relevant coastal States. This of course does not mean that individual States cannot adopt such measures. However a clear message to do so through the SoC would have the effect of reminding States of their obligations and commitments.

6.6 Port State Measures

Most of the SADC coastal States have important ports accommodating industrial fishing. Only the DRC does not have any fisheries ports.⁴⁶⁵ Port State measures should therefore be a priority for SADC. Some port State measures are provided for in the Compliance Agreement but these are largely optional. The Code of Conduct also only addresses port State measures vaguely. More comprehensive measures are laid down in the IPOA-IUU.

The Protocol is silent on port State measures. The SoC commits to developing national and regional port State measures to meet the needs of the SADC region.⁴⁶⁶ It also requires that all commercial fishing vessels operating in the waters under the national jurisdiction of their flag State and which use a SADC port more than once, must have a VMS.⁴⁶⁷ This is a measure to monitor the activities of these vessels for possible IUU fishing activities although no mention is made of how information gathered from such monitoring is to be used. A further port initiative to curb IUU fishing required by the SoC is the development of a process to prohibit

⁴⁶⁴ IPOA-IUU (n 43) Paragraphs 51.

⁴⁶⁵ 'Stop Illegal Fishing in Southern Africa' (n 5) at 24.

⁴⁶⁶ SoC (n 61) Resolution 4.

⁴⁶⁷ Ibid Resolution 15(b).

vessels listed as IUU vessels by any RFMO from accessing any SADC port.⁴⁶⁸ Whilst this is potentially a good measure, it is dependent on such a process being developed. It is unclear why such a process needs developing as it would be a simple matter to deny such vessels access to SADC ports since most RFMOs have well established and published IUU vessels lists.⁴⁶⁹ It appears as though SADC wants to be seen to be denying IUU vessels access to its ports whilst not actually requiring its member States to do so.

Although the port State measures adopted by SADC to date are fairly weak and the Port State Measures Agreement is not yet in force and has to date only been ratified by two SADC coastal State, at least five of these States have adopted port measures in line with international recommendations and requirements. The measures taken by these SADC States include designated ports, prior notification of entry into port by both foreign and domestic vessels, documentation requirements to enter port, port departure requirements and port inspections.⁴⁷⁰ Nevertheless more effective port State measures could be achieved by way of the adoption by all the SADC coastal States with ports accessible by industrial fishing vessels of the PSMA. The MCS Centre could assist with implementing port State measures, including the Port State measures agreement and the national and regional port State measures referred to in the SoC.

6.7 Market-Related Measures

The IPOA-IUU calls on all States to prevent the importation and trading of illegally caught fish. Such action, by closing markets to illegally caught fish, will reduce the incentive to catch fish illegally.⁴⁷¹ The trade-related measures suggested by the IPOA-IUU include CDMs and import and export controls or prohibitions.⁴⁷² However, the recommendations in the IPOA-IUU on market related measures to curb IUU fishing do not encourage States to take firm action in this regard since such measures should only be implemented in exceptional circumstances and in consultation with interested parties.⁴⁷³

The SoC is equally weak in promoting trade-related measures. It merely acknowledges the need to develop more effective measures to trace fish and fisheries products to enable

⁴⁶⁸ Ibid Resolution 15(d).

⁴⁶⁹ For example, there is an online combined IUU Vessel list shared by eight RFMOs, including CCAMLR, ICCAT, IOTC and SEAFO. List available at <http://iuu-vessels.org/iuu>. Accessed on 25 September 2014.

⁴⁷⁰ FAO 'Port State Measures.' Available at www.fao.org/fishery/psm/search/en. Accessed on 30 October 2014.

⁴⁷¹ Riddle (n 97) at 284.

⁴⁷² IPOA-IUU (n 43) Para 69.

⁴⁷³ Ibid Paragraph 66.

identification of these fish or products which have derived from IUU fishing.⁴⁷⁴ It does not recommend any measures to be adopted once these IUU fish and products have been identified. Such measures could be achieved by a CDS. The CDS can be a very effective trade measure to combat IUU fishing as is evidenced by the CCAMLR CDS for the Patagonian Toothfish, which is implemented as a port measure. SADC could thus develop a CDS, based on the CCAMLR model, in respect of fish caught in SADC waters or on the high seas within the areas of the RFMOs of which SADC States are members. Another effective trade measure which could be copied is the trade sanctions adopted by ICCAT with regard to the ban on importing Atlantic Bluefin Tuna from certain countries which were fishing in contravention of ICCAT regulations.⁴⁷⁵

Market-related or trade measures can also be used to discourage FOC fishing. An important advantage of FOC fishing is the opportunity to fish without having to comply with domestic or international limits.⁴⁷⁶ Therefore an obvious way to deal with FOC fishing is to persuade those States which offer FOC opportunities to join the relevant RFMOs. However RFMOs themselves have not been successful in this regard. A more successful effort has been the threat or imposition of trade sanctions against countries offering FOC and against FOC vessels.⁴⁷⁷ Such trade sanctions can be effectively implemented as port measures and several SADC countries have in fact done so.⁴⁷⁸

6.8 Regional Fisheries Management Organisations

As discussed in Chapter 4, RFMOs can greatly assist States in combating IUU fishing. UNCLOS, the Fish Stocks Agreement and the IPOA-IUU all emphasise the importance of RFMOs. It is therefore essential that SADC coastal States become members of all the RFMOs which are active in their regions.

Neither the Protocol nor the SoC promote membership of RFMOs. Notwithstanding this, SADC coastal State membership in relevant RFMOs is good. The DRC has failed to join ICCAT and should be encouraged to do so. All the SADC coastal States with an interest in the CCAMLR are either members of the Commission, an acceding State or implementing some of

⁴⁷⁴ SoC (n 61) Resolution 6.

⁴⁷⁵ ICCAT Resolution 96-11. Available at www.iccat.es/documents/Recs/compendiopdf-e/1996-11-e.pdf. Accessed on 1 October 2014.

⁴⁷⁶ De Sombre (n 31) at 74.

⁴⁷⁷ Ibid at 77.

⁴⁷⁸ FAO 'Port State Measures' (n 470).

its conservation measures. All the Indian Ocean SADC States are members of IOTC and all the SADC States with a direct interest in the South East Atlantic are members of SEAFO. South Africa, Mozambique and Tanzania would benefit from joining SIOFA and should be encouraged to do so. All States on the Indian Ocean are members of SWIOFC.

The IPOA-IUU recommends that States should cooperate to establish RFMOs in regions where none exist. In the SADC region the BCC has been established to manage the Benguela Current LME. The BCC should cooperate with SEAFO, which is charged with the management and conservation of fisheries resources on the high seas adjacent to the BBC area.

Conclusion

IUU fishing causes environmental, economic and social harm and is of particular concern to developing countries which suffer the greatest losses from this activity. Most SADC coastal States have industrial fisheries and the sector is important to increase livelihoods and reduce poverty. It is therefore important for SADC to take measures to curb IUU fishing. Whilst it has taken some useful measures, there are concerns which should be addressed in order to more effectively curb IUU fishing both in the SADC region and to contribute to the global effort.

The following are some of the concerns:-

1. Application of the precautionary principle and the ecosystem approach is regarded as essential for effective conservation and management of natural resources including fisheries resources. Both these management tools are only weakly incorporated into the Protocol. The SoC also does not make any commitment to implementing these concepts. Although it has been acknowledged that the requirements of an ecosystem approach, and by incorporation, the precautionary principle, may be onerous for developing countries, their implementation would benefit the SADC generally to achieve its objectives of economic growth, poverty alleviation, sustainable utilisation of natural resources and effective protection of the environment.
2. Participation by SADC coastal States in international instruments is not consistent. States which are not parties to the Compliance Agreement and the Fish Stocks Agreement must be encouraged by SADC to adopt these agreements in order to strengthen IUU fishing efforts and become eligible for the assistance provided to developing States under these agreements. In addition the remaining seven SADC coastal States must be encouraged to accede to the PSMA.

3. Lack of MCS capacity, including lack of effective MCS collaboration among SADC coastal States has been identified as a major contributing factor to IUU fishing in the SADC region. MCS measures provided for in the SoC are generally good and the MCS Centre is an excellent concept. However, although the idea of this Centre was conceived in 2008, it has still not been established. Urgent attention must be given to making the Centre operational.
4. Flag State obligations are weakly provided for in the Protocol and the SoC. A list of SADC-flagged vessels, to contribute to the identification FOC vessels, should be created. This is a service which the MCS Centre could provide together with the listing of IUU and licenced vessels.
5. The process of prohibiting vessels listed on the IUU vessels lists of RFMOs from entering SADC ports should be a simple matter as most RFMOs have such lists in place, and this measure must be urgently adopted through the MCS Centre.
6. SADC should develop some market-related measures, which could be adopted by its States, to prevent the importation of fish caught by IUU fishing into SADC States.
7. Fisheries subsidies for the SADC industrial fishing industries should be scrapped.
8. Compatible fisheries laws and penalties for contravention for all the SADC coastal States should be developed. This process could be assisted by the MCS Centre.
9. A SADC institution or mechanism should be developed to coordinate regional governance and enforcement.⁴⁷⁹ One of the functions of the IUU Task Force is to identify, in line with global initiatives, any further actions and measures which could be taken at the regional level to combat IUU fishing.⁴⁸⁰ The development of a SADC regional governance and enforcement mechanism would be within this mandate.

⁴⁷⁹ A regional governance structure and a regional enforcement authority, rather than national governance and enforcement mechanisms, is suggested by Telesetsky in relation to LMEs. Telesetsky A 'Restoration of Large Marine Ecosystems: Strengthening Governance for an Emerging International Regime Based on "Ecoscape" Management' *University of Hawaii Law Review* 35 (2013) 735 at 759 -760.

⁴⁸⁰ SoC (n 61) Resolution 10.

10. Membership by SADC coastal States in RFMOs is good. The creation of the BBC will increase conservation and management of resources on the west coast of the SADC area especially if there is cooperation with SEAFO.

11. The process required to annex the SoC to the Protocol, thereby making it an integral part of the Protocol, should be urgently undertaken.

Addressing these concerns would provide for better action or measures against IUU fishing thereby contributing to the SADC Treaty's objective of 'sustainable utilisation of natural resources and effective protection of the environment' and to the global effort to prevent, deter and eliminate IUU fishing.

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