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## Free Trade Agreements and the Lacey Act: A Carrot and Stick Approach to Prevent and Deter Trade in IUU Fisheries

Ginna Arevalo

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# FREE TRADE AGREEMENTS AND THE LACEY ACT: A CARROT AND STICK APPROACH TO PREVENT AND DETER TRADE IN IUU FISHERIES

*Ginna Arevalo<sup>A</sup>*

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## INTRODUCTION

The U.S. is the world's largest importer of seafood,<sup>1</sup> importing virtually every fish sold in the U.S. market.<sup>2</sup> Trade statistics do not break down the percentage of imported wild harvested fish,<sup>3</sup> but a recent study estimated that twenty to thirty-two percent are caught illegally.<sup>4</sup> Trade in illegal, unreported, and unregulated (IUU) fisheries undermines efforts to conserve fish stocks,<sup>5</sup> generates global annual losses of up to twenty-three billion dollars, and weakens economic opportunity for U.S. fishermen.<sup>6</sup> To ensure that seafood sold in the U.S. is caught legally, on June 17, 2014, the President established a Presidential Task Force on Combating IUU Fishing (Task Force) and directed all U.S. agencies charged with overseeing the supply chain to enforce IUU fishing regulations.<sup>7</sup> The extent of this mandate is unclear, since most U.S. regulations are unenforceable abroad and the initial seafood suppliers are overseas.

1. *World Fish Trade to Set New Records*, FOOD & AGRIC. ORG. OF THE U.N., (Feb. 21, 2014), <http://www.fao.org/news/story/en/item/214442/icode/> [hereinafter *World Fish Trade*] (listing the top three importers in 2013: U.S. - \$19.0 billion, Japan - \$15.3 billion, and China - \$8.0 billion).

2. See generally *FishWatch U.S. Seafood Facts*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (NOAA), [http://www.fishwatch.gov/farmed\\_seafood/outside\\_the\\_us.htm](http://www.fishwatch.gov/farmed_seafood/outside_the_us.htm) (last visited Aug. 30, 2015).

3. *Id.*

4. Ganapathiraju Pramod et al., *Estimates of Illegal and Unreported Fish in Seafood Imports to the USA*, 48 *Marine Pol'y* 102–13 (2014), available at <http://www.sciencedirect.com/science/article/pii/S0308597X14000918>.

5. *Illegal, Unreported and Unregulated (IUU) Fishing*, FOOD & AGRIC. ORG. OF THE U.N., <http://www.fao.org/fishery/iuu-fishing/en> (last visited Aug. 30, 2015).

6. Barack Obama, *Presidential Memorandum-Comprehensive Framework to Combat IUU Fishing and Seafood Fraud*, THE WHITE HOUSE (June 17, 2014), <https://www.whitehouse.gov/the-press-office/2014/06/17/presidential-memorandum-comprehensive-framework-combat-illegal-unreported>.

7. *Id.*

As the world's largest importer of seafood,<sup>8</sup> the U.S. must ensure fish from unwanted fishing practices are not entering the U.S. market. Once the IUU fish are caught, they are combined with legally caught fish, making them indistinguishable from the rest when imported into the U.S.<sup>9</sup> While the U.S. has strict policies to combat IUU fishing activities, no such policies exist to deter the trade in IUU fisheries. The current U.S. trade controls may be described as “absent” compared to the controls implemented by the European Union.<sup>10</sup> Indeed, the Task Force recently made fifteen recommendations that “are broad in scope and call on agencies to take concrete and specific actions to combat IUU fishing . . . throughout the seafood supply chain.”<sup>11</sup> Without proper controls, it is plausible that IUU seafood has entered the U.S. market and enjoyed zero tariffs under free trade agreements (FTAs).

Illegal trade in fisheries also jeopardizes the food supply and source of income of many people around the world.<sup>12</sup> People like Julian Rivas, a Colombian fisherman who has fished the Eastern Tropical Pacific Seascape (ETPS)<sup>13</sup> for two decades, are concerned<sup>14</sup> about a dramatic decrease in catch that results from IUU fishing.<sup>15</sup> Since the goal of eliminating IUU fishing and the management of marine resources involves several actors,<sup>16</sup> states “shall” cooperate—directly or through regional fisheries management organizations/arrangements (RFMO/As)—to adopt marine conservation and management measures

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8. *World Fish Trade*, *supra* note 1.

9. Pramod et al., *supra* note 4.

10. *Id.*

11. DEPARTMENT OF AGRICULTURE (USDA) ET AL., PRESIDENTIAL TASK FORCE ON COMBATING IUU FISHING AND SEAFOOD FRAUD, ACTION PLAN FOR IMPLEMENTING THE TASK FORCE RECOMMENDATIONS (Mar. 15, 2015), *available at* [http://www.nmfs.noaa.gov/ia/iuu/noaa\\_task\\_force\\_report\\_final.pdf](http://www.nmfs.noaa.gov/ia/iuu/noaa_task_force_report_final.pdf). This paper analyses some of the mechanisms that the Presidential Task Force recently adopted, but the proposals articulate such mechanisms in a different way.

12. *World Fish Trade*, *supra* note 1.

13. *Eastern Tropical Pacific Seascape Project*, U.N. EDUC., SCIENTIFIC, & CULTURAL ORG., <http://whc.unesco.org/en/seascape/> (last visited Aug. 30, 2015).

14. Javier Herrera Silva, *La Reivindicación de los Pescadores del Chocó*, EL TIEMPO (June 29, 2013), <http://www.eltiempo.com/archivo/documento/CMS-12900038>.

15. *See generally Illegal, Unreported and Unregulated (IUU) Fishing*, *supra* note 5.

16. Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, The potential of the International Tribunal for the Law of the Sea in the management and conservation of marine living resources 2-3, Presentation to the Meeting of the Friends of the Tribunal at the Permanent Mission of Germany to the United Nations in New York (June 21, 2007), *available at* [https://www.itlos.org/fileadmin/itlos/documents/statements\\_of\\_president/wolfrum/friends\\_tribunal\\_210607\\_eng.pdf](https://www.itlos.org/fileadmin/itlos/documents/statements_of_president/wolfrum/friends_tribunal_210607_eng.pdf).

(CMMs).<sup>17</sup> In fact, Costa Rica, Panama, Colombia, and Ecuador (the CMAR' States) signed the San Jose Declaration in 2004<sup>18</sup> to cooperate to promote the ETPS.<sup>19</sup> Since then, they have adopted numerous CMMs to protect their marine resources relevant to the ETPS.<sup>20</sup> The problem is that vessels continue to IUU fish in this region due to the lack of cooperation between the CMAR' States and their poor levels of law enforcement.<sup>21</sup>

An aggravating factor is the fact that flag states fail to supervise and control vessels.<sup>22</sup> For instance, Panama, Colombia, and Ecuador failed to supervise the vessels that violated the CMMs of the Inter-American Tropical Tuna Commission (IATTC).<sup>23</sup> This RFMO is aimed to protect tuna stocks in a region that includes the ETPS' adjacent high seas,<sup>24</sup> but vessels continue to fish for tuna in violation of the IATTC's CMMs, because the levels of transparency in some developing States are not optimal. Moreover, the instruments creating RFMO/As and similar mechanisms are not always binding upon states, thereby preventing the enforcement of their CMMs within their territory and the application of the Lacey Act to regulate conduct overseas.

The Lacey Act is the most important domestic law to prevent and deter the trade in IUU fisheries. Although its coverage was expanded since 1935 to include "foreign laws,"<sup>25</sup> it is still unclear whether the violations of CMMs that states take directly or through

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17. See U.N. Agreement for the Implementation of the Provisions of the UNCLOS Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, arts. 6-8, Aug. 4, 1995, 2167 U.N.T.S. 97 [hereinafter UNFSA].

18. Declaración de San José para el Corredor Marino de Conservación del Pacífico Este Tropical entre las Islas Coco, Galápagos, Malpelo, Coiba, Gorgona at 7 (Nos. 1 and 3) [San Jose Declaration for the conservation of the Marine Corridor of the East Tropical Pacific the Islands of Coco, Galápagos, Malpelo, Coiba, Gorgona], Apr. 2, 2004, Colom.-Costa Rica-Ecuador-Pan [hereinafter the San Jose Declaration]. This paper does not advocate that the CMAR is an RFMA.

19. *Eastern Tropical Pacific Seascape Project*, *supra* note 13.

20. See, e.g., Project "Strengthening Monitoring and Control to Reduce Illegal, Unreported and Unregulated Fishing in the Eastern Tropical Pacific Seascape (ETPS)", MARVIVA, <http://www.marviva.net/index.php/en/proyectos/colombia/marviva-05> (last visited Aug. 30, 2015).

21. OSWALDO ROSERO, WILDAID, INC., AN ANALYSIS OF THE LAW ENFORCEMENT CHAIN IN THE EASTERN TROPICAL PACIFIC SEASCAPE 72 (2010), available at [http://www.wildaid.org/sites/default/files/resources/Law%20Enforcement%20Chain%20ETPS\\_0.pdf](http://www.wildaid.org/sites/default/files/resources/Law%20Enforcement%20Chain%20ETPS_0.pdf).

22. See generally *Illegal, Unreported and Unregulated (IUU) Fishing*, *supra* note 5.

23. Ecuador will not be addressed in this paper because it is not a party to an FTA with the U.S.

24. *Inter-American Tropical Tuna Commission (IATTC)*, FAO FISHERIES & AQUACULTURE DEP'T, <http://www.fao.org/fishery/rfb/iattc/en> (last visited Aug. 30, 2015).

25. Deborah F. Buckman, Annotation, *Construction and Application of 16 U.S.C.A. §§ 3371 to 3378, Enacted by Lacey Act Amendments of 1981*, Pub. L. 97-79, Nov. 16, 1981, 95

RFMO/As, such as the violations mentioned in this paper, would trigger the application of the Act. Indeed, the market participants who traded in seafood caught by IUU fishing vessels flagged to the three parties to U.S. FTAs—Costa Rica, Panama, and Colombia—were not punished.

In addition to domestic laws, seafood ecolabels and the FAO Agreement on Port State Measures (PSMA) may prevent IUU fisheries from entering the market. However, the seafood industry strives to secure low-cost seafood supplies<sup>26</sup> such as IUU fish, and most states have yet to implement effective port state measures. Despite having zero tariffs, the seafood industry declines to obtain voluntary seafood ecolabels such as the Marine Stewardship Council (MSC),<sup>27</sup> which has not been widely implemented in Costa Rica, Panama, and Colombia. These states also do not cooperate to close their ports to all IUU fishing vessels. By closing their ports, vessels travel longer distances and reduce the value of their IUU catch.<sup>28</sup> The PSMA may strengthen their cooperation, but it cannot be enforced unless incorporated into domestic legislation.<sup>29</sup> However, Costa Rica, Panama, and Colombia have yet to ratify the Agreement.<sup>30</sup>

Part I of this paper explains the role of different actors in the trade of duty-free IUU fish and how IUU catches may enter the U.S. market due to the states' failure to implement mechanisms that allow the U.S. to monitor fishing activities and landing of fish. It then highlights the issues of non-cooperation, law enforcement, and transparency displayed in IUU fishing incidents of three parties to U.S. FTAs—Costa Rica, Panama and Colombia—where vessels contravened CMMs of a RFMO, and CMMs of two of the CMAR's states. Part II outlines key elements of three international instruments—Cooperative Environmental Clauses of FTAs, FAO Guidelines for ecolabelling of wild fish, and the PSMA—that, despite their non-binding effect, may

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*Stat. 1073, Governing Control of Illegally Taken Fish and Wildlife*, 69 A.L.R. Fed. 2d 189 (2012).

26. Pramod et al., *supra* note 4.

27. *Labelling and Certification*, FAO FISHERIES & AQUACULTURE DEP'T, <http://www.fao.org/fishery/topic/13293/en> (last visited Aug. 30, 2015) (addressing the reasons eco-labels have not been implemented).

28. DAVID J. DOULMAN & JUDITH SWAN, FAO FISHERIES & AQUACULTURE CIRCULAR NO. 1074, 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 1 (2012), available at <http://www.fao.org/docrep/015/i2590e/i2590e00.pdf>.

29. *Port State Measures Agreement*, FAO FISHERIES & AQUACULTURE DEP'T, <http://www.fao.org/fishery/topic/166283/en> (last visited Aug. 30, 2015).

30. *Id.*

prevent IUU fisheries from entering foreign markets. These instruments are examined in light of the states' duties to cooperate to protect the environment in FTAs, and to protect the marine environment in UNCLOS.

Part III proposes a carrot and stick solution to the trade in IUU fisheries problem. First, it proposes that FTAs be used to compel the seafood industry to obtain seafood ecolabels to benefit from preferential tariffs and use cooperative environmental clauses of FTAs to induce action to enhance the port controls of states parties to FTAs. Second, it proposes that the Lacey Act can deter the trade in IUU fisheries through the likelihood of punishment; however, it must be amended to include CMMs of RFMO/As as a source that can trigger the Act. IUU fishing vessel lists of RFMO/As will then become an important tool to initiate proceedings under the Act, as well as the National Marine Fisheries Services' (NMFS) Biennial Reports gathering information on IUU lists of RFMOs.

#### I. TRADE IN IUU FISHERIES AND IUU FISHING ACTIVITIES

The process of importing seafood into the U.S. is very complex, and any action taken by one member of the seafood supply chain can affect the entire chain.<sup>31</sup> Being able to trace the product from the point of catch to the final consumer is necessary for sustainable seafood, but full traceability is often lacking.<sup>32</sup> Despite how many CMMs the states adopt, either directly or through RFMO/As, poor levels of law enforcement, non-cooperation, and lack of transparency continue to pose daunting challenges for full traceability of seafood imports from states such as Costa Rica, Panama, and Colombia. These challenges increase the likelihood that IUU fish have entered the markets of these state parties to FTAs to be exported.

##### A. *A Typical Duty Free IUU Fish Supply Chain: Lack of Trace-Back Procedures, Landing Controls, and U.S Trade Measures*

In 2011, U.S. market participants competed with seafood imports that included twenty to thirty-two percent of IUU fisheries,<sup>33</sup> as

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31. See generally NANCY VALLEJO ET AL., THE ROLE OF SUPPLY CHAINS IN ADDRESSING THE GLOBAL SEAFOOD CRISIS, UNITED NATIONS ENVIRONMENT PROGRAMME (2009), available at <http://www.unep.ch/etb/publications/Fish%20Supply%20Chains/UNEP%20fish%20supply%20chains%20report.pdf>.

32. See *id.* (discussing the lack of traceability in the seafood supply chain); see also Pramod et al., *supra* note 4.

33. Pramod et al., *supra* note 4.

the seafood supply chains are often hard to trace.<sup>34</sup> These chains are comprised of fishers, agents, processors, distributors, and wholesalers who work together to supply seafood to the final consumer.<sup>35</sup> The length of these supply chains depends on whether the fisheries are for domestic consumption or exports, and on the harvesting techniques.<sup>36</sup> Despite their differences, they all share a framework<sup>37</sup> that allows IUU fish to be concealed.<sup>38</sup>

The framework of captured wild fisheries consists of fishermen who harvest the fish and then deliver it to intermediaries<sup>39</sup> that transport it to its final destination. In Colombia, for example, industrial and small-scale vessels conduct fishing.<sup>40</sup> Industrial vessels export all catches.<sup>41</sup> Some small-scale vessels have motors that provide a greater range to catch larger fish stocks that are often sold to increase industrial production and for export.<sup>42</sup> The problem is that, in the past few years, small-scale vessels conducted IUU fishing activities in jurisdictional waters of Costa Rica and Colombia, as well as industrial vessels flagged to Panama and Colombia in the high seas, and these catches were possibly exported to the U.S.<sup>43</sup>

These vessels then deliver their catch, including illegal fish,<sup>44</sup> to intermediaries.<sup>45</sup> Historically, small-scale fishermen in developing states have lacked suitable distribution facilities,<sup>46</sup> so fish traders have provided an assured market outlet to small-scale seafood<sup>47</sup> that may include IUU fisheries.<sup>48</sup> These fisheries, for the most part, increase the industrial production in nations such as Colombia,<sup>49</sup> and enter the U.S.

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34. *Id.*

35. VALLEJO ET AL., *supra* note 31.

36. *Id.*

37. *Id.*

38. Pramod et al., *supra* note 4.

39. VALLEJO ET AL., *supra* note 31.

40. ALBA LUCÍA CEDIEL PARRA ET AL., DIAGNÓSTICO DE LAS PRINCIPALES PESQUERÍAS DEL PACÍFICO COLOMBIANO, FUNDACIÓN MARVIVA 34-35 (Juan Díaz et al. eds., 2011).

41. *Id.* at 34.

42. *Structure of the Fisheries and Aquaculture Sector*, FAO (Nov. 2003), <http://www.fao.org/fi/oldsite/FCP/en/COL/profile.htm>.

43. For further discussion of these incidents, see *infra* Part I.B.

44. Pramod et al., *supra* note 4.

45. VALLEJO ET AL., *supra* note 31.

46. A.F. MEDINA PIZZALI, FAO FISHERIES DEPARTMENT, SMALL-SCALE FISH LANDING AND MARKETING FACILITIES (1988), available at <http://www.fao.org/docrep/003/t0388e/T0388E01.htm>.

47. *Id.*

48. Pramod et al., *supra* note 4.

49. PARRA ET AL., *supra* note 40.

market, because some developing nations export most catches due to their high commercial value and demand in the international market.<sup>50</sup>

To deal with the IUU fishing problem, the United Nations (UN) has encouraged all nations to include port state measures (PSMs) in their domestic legislation,<sup>51</sup> but Costa Rica, Panama, and Colombia have yet to implement the PSMs that the UN proposes.<sup>52</sup> Although the UN FAO Agreement on Port State Measures (PSMA) allows them to verify that foreign-flagged vessels seeking permission to enter their ports have not IUU fished, these states have yet to deposit their instruments of ratification.<sup>53</sup> The UN has also encouraged ecolabels that certify the sustainable use of marine resources.<sup>54</sup> The MSC is one of the most respected trace-back programs<sup>55</sup> and has been implemented in some developing countries.<sup>56</sup> In Costa Rica, however, only two companies are MSC certified; Panama and Colombia each have only one MSC certification.<sup>57</sup>

The reluctance to employ PSMs and seafood ecolabels has undoubtedly made it more difficult for the U.S. to verify the initial source in the supply chain. Once IUU fisheries enter the foreign market, exporters and importers transport it through international borders<sup>58</sup> in bulk shipments of legal and illegal fish.<sup>59</sup> A foreign party exports the fish from overseas to a U.S. importer who makes the import declara-

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50. *Id.* at 34-35 (noting that, in Colombia, the industrial catch is to be exported, and the most valuable catch by small vessels goes to increase the industrial production to be exported); see also *Structure of the Fisheries and Aquaculture Sector*, *supra* note 42.

51. *Port State Measures Agreement*, *supra* note 29.

52. *Agreements on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, FAO, [http://www.fao.org/fileadmin/user\\_upload/legal/docs/037s-e.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/037s-e.pdf) (last updated Oct. 28, 2015).

53. *Id.*

54. FAO, GUIDELINES FOR THE ECOLABELLING OF FISH AND FISHERY PRODUCTS FROM MARINE CAPTURE FISHERIES 1 (Mar. 2009), available at <http://www.fao.org/docrep/012/i1119t/i1119t.pdf> [hereinafter FAO GUIDELINES].

55. JENNIFER GEE, EVIDENCE ON UTILIZATION OF THE FAO DRAFT EVALUATION FRAMEWORK AND THE ECONOMIC IMPACT FROM ECOLABELLING ON RETURNS TO THE FISHERIES SECTOR 7 (Feb. 2014), available at <http://www.fao.org/cofi/39786-070dcef7a66900b166177c97547890ab1.pdf>.

56. *Ecolabelling in Fisheries Management*, FAO FISHERIES & AQUACULTURE DEP'T, <http://www.fao.org/fishery/topic/12283/en> (last visited Aug. 30, 2015).

57. *Find a Supplier*, MARINE STEWARDSHIP COUNCIL (MSC), <http://cert.msc.org/supplierdirectory> (last visited Aug. 30, 2015) (providing an interactive tool to find businesses with MSC certificates for sustainable seafood).

58. See generally VALLEJO ET AL., *supra* note 31.

59. Pramod et al., *supra* note 4.

tion and pays the duties<sup>60</sup> that, for the most part, have been eliminated under the U.S. FTAs with Costa Rica, Panama, and Colombia.<sup>61</sup> Unless and until the U.S. can verify that the initial source in the supply chain was sustainably caught, there is a high probability that seafood of “mixed origin”<sup>62</sup> is entering the U.S. market, because the U.S. trade controls are insufficient to detect IUU fisheries.<sup>63</sup>

The U.S. continues to rely upon importers to verify the traceability of fisheries from the point of catch to the final consumer, but traceability involves coordinated action from all market participants.<sup>64</sup> Import transactions are conducted at ports of entry where Customs and Border Protection (CBP) enforces import regulations.<sup>65</sup> When a shipment reaches the U.S., the importer files entry documents and CBP examines the goods and documents.<sup>66</sup> Neither CBP nor importers can develop a “reasonable care” checklist to cover every trade, but it is assumed that their relationship is based on “informed compliance,” wherein CBP communicates the trade requirements and the importers comply with U.S. laws with reasonable care.<sup>67</sup> So, it is essentially left to the importers to verify that IUU fish were not concealed with legally-captured fish.<sup>68</sup>

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60. An exporter is “the party who makes (or on whose behalf an agent or broker makes) the export declaration. The exporter sells its goods to someone in another country, known as the importer.” *Exporter*, BUS. DICTIONARY, <http://www.businessdictionary.com/definition/exporter.html> (last visited Feb. 1, 2016). An importer is “the party who makes (or on whose behalf an agent or broker makes) the import declaration, and who is liable for the payment of duties (if any) on the imported goods.” *Importer*, BUS. DICTIONARY, <http://www.businessdictionary.com/definition/importer.html> (last visited Aug. 30, 2015).

61. *Free Trade Agreements*, DEP’T OF COMMERCE INT’L TRADE ADMIN., <http://trade.gov/fta/> (last visited Aug. 30, 2015) (listing the U.S. FTA partner nations, and a link to the FTA tariff tool where tariffs can be verified).

62. See Pramod et al., *supra* note 4 (addressing the concept of seafood of “mixed origin”). See generally Robin McDowell et al., *AP Investigation: Are Slaves Catching the Fish You Buy?*, ASSOCIATED PRESS (Mar. 25, 2015), <http://bigstory.ap.org/article/cc08a86b92694f74a12b639326d93de2/ap-investigation-are-slaves-catching-fish-you-buy> (noting that fisheries caught by illegal means, such as slavery, are being mixed with other legally caught fish to be exported to the U.S.).

63. See Pramod et al., *supra* note 4.

64. See generally VALLEJO ET AL., *supra* note 31.

65. U.S. CUSTOMS AND BORDER PROTECTION (CBP), IMPORTING INTO THE UNITED STATES - A GUIDE FOR COMMERCIAL IMPORTERS 6 (2006), available at <http://www.cbp.gov/document/publications/importing-united-states>.

66. *Id.*

67. *Id.*

68. See generally Pramod et al., *supra* note 4.

B. *IUU Fishing by Three Parties to U.S. Free Trade Agreements*

1. Violations of Conservation and Management Measures of Two Parties

Since every state may enact its own regulations to protect marine resources in its jurisdictional waters,<sup>69</sup> the IUU fishing definition includes illegal fishing activities by vessels in waters under the jurisdiction of another state without its permission or in contravention of its laws.<sup>70</sup> To illustrate, the parties to the 2004 San Jose Declaration established the Corredor Marino del Pacifico Este Tropical (CMAR) to cooperate,<sup>71</sup> direct, and pursue the ETPS' initiative,<sup>72</sup> but each state is sovereign to regulate fishing activities and to enforce such regulations in their EEZs<sup>73</sup> and territorial waters,<sup>74</sup> including IUU fishing regulations. Since 2004, the CMAR States have recognized the importance of the islands and surrounding waters of Galapagos, Cocos, Coiba, and Malpelo<sup>75</sup> through numerous CMMs. The islands and surrounding waters of Costa Rica and Colombia, for instance, are marine protected areas<sup>76</sup> where fishing activities are restricted;<sup>77</sup> however, IUU fishing continues to threaten their rich biodiversity and high productivity.<sup>78</sup>

Between 2011 and 2014, more than 27,000 pounds of IUU fish were confiscated, and 52 foreign vessels were reported as having engaged in IUU fishing in the jurisdictional waters of Colombia relevant

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69. YOSHIFUMI TANAKA, *THE INTERNATIONAL LAW OF THE SEA* 222 (2012).

70. FAO, *INTERNATIONAL PLAN OF ACTION TO PREVENT, DETER, AND ELIMINATE, ILLEGAL, UNREPORTED AND UNREGULATED FISHING* 2-3 (2001), available at <http://www.fao.org/docrep/003/y1224e/y1224e00.htm> [hereinafter IPOA-IUU]. See also 50 C.F.R. § 300.201 (2015) for the U.S. definition of illegal fishing.

71. San Jose Declaration, *supra* note 18 (Nos. 6 and 7).

72. *Id.*

73. U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, art. 56(1)(a), 1833 U.N.T.S. 418 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

74. See generally *id.* arts. 2, 25, and 33.

75. See *Eastern Tropical Pacific Seascape Project*, *supra* note 13; see also ROSERO, *supra* note 21.

76. See generally RAY HILBORN & ULRIKE HILBORN, *OVERFISHING, WHAT EVERYONE NEEDS TO KNOW* 105-06 (2012) (defining MPAs, MPAs' levels of protection and the effects of closing such areas).

77. *What are Marine Protected Areas (MPAs)?*, PROTECT PLANET OCEAN, <http://www.protectplanetoccean.org/collections/introduction/introbox/mpas/introduction-item.html> (last visited Aug. 30, 2015).

78. *Eastern Tropical Pacific Seascape Project*, *supra* note 13 (listing the major threats to the ETPS' marine ecosystem).

to the CMAR.<sup>79</sup> In Colombia, it was also reported that 22 foreign vessels with 11 tons of IUU fish collectively were detained,<sup>80</sup> and marine biologists denounced a massacre of 2,000 sharks by foreign-flagged vessels, presumably from Costa Rica.<sup>81</sup> Numerous IUU fishing incidents were also reported in Costa Rica.<sup>82</sup> Nationals of Nicaragua captained some of the detained IUU fishing vessels,<sup>83</sup> and at least one was flagged to Panama.<sup>84</sup> Costa Rican officials declared that at least twenty-five vessels were detained near Coco Island<sup>85</sup> and presented a list of recidivist vessels that were not punished.<sup>86</sup> It is imperative that everyone engaging in IUU fishing activities in jurisdictional waters relevant to the CMAR be punished in order to attain the goals of the San Jose Declaration.<sup>87</sup>

The extent to which the CMAR states have deterred future IUU fishing for the past eleven years is disappointing. There is little collab-

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79. Domestic IUU fishing vessel lists are almost non-existent in Colombia, but several agencies, non-governmental entities, and the media have reported numerous IUU fishing incidents providing insight into the IUU fishing situation. See *Inmovilizan Siete Barcos por Pesca Ilegal*, EL NUEVO SIGLO (May 29, 2014 6:32 AM), <http://www.elnuevosiglo.com.co/articulos/5-2014-inmovilizan-siete-barcos-por-pesca-ilegal.html>; *Inmovilizan Cinco Embarcaciones Extranjeras Pescando Ilegalmente en Aguas Colombianas*, EL ESPECTADOR (Aug. 4, 2014 11:32 AM), <http://www.elespectador.com/noticias/judicial/inmovilizan-cinco-embarcaciones-extranjeras-pescando-il-articulo-508486>; *Once Ecuatorianos y Cuatro Embarcaciones Detenidas con Pesca Ilegal en el Pacífico Colombiano*, ANDES (Feb. 20, 2013 3:15 PM), <http://www.andes.info.ec/es/judicial/once-ecuatorianos-cuatro-embarcaciones-detenidas-pesca-ilegal-pac%C3%ADfico-colombiano.html>.

80. *Armada Retiene Dos Barcos Ecuatorianos por Pesca Ilegal*, Noticias RCN (Aug. 27, 2013), <http://www.noticiasrcn.com/nacional-justicia/armada-retiene-dos-barcos-ecuatorianos-pesca-ilegal>.

81. David Sanz, *Masacre en un Santuario de Tiburones de Colombia*, ECOLOGÍA VERDE (Oct. 19, 2011), <http://www.ecologiaverde.com/masacre-en-un-santuario-de-tiburones-de-colombia>; see also *Detienen Embarcación que Realizaba Pesca Ilegal en el Pacífico Colombiano*, AGENCIA EFE (Oct. 16, 2011), <http://www.wradio.com.co/noticias/actualidad/detienen-embarcacion-que-realizaba-pesca-ilegal-en-el-pacifico-colombiano/20111016/nota/1563082.aspx>.

82. See *infra* notes 83-86.

83. *Guardacostas Captura Barco por Presunta Pesca Ilegal en Isla del Coco*, INFORMATIVO JBS (Mar. 13, 2014), <http://informativojbs.com/guardacostas-captura-barco-por-presunta-pesca-ilegal-en-isla-del-coco/>.

84. *Capturan un Barco Panameño con 12 Toneladas de Atún en la Isla Coco en Costa Rica*, LOBOESTEPARIO (Jan. 31, 2008), <https://loboestepariok.wordpress.com/2008/01/31/capturan-un-barco-panameno-con-12-toneladas-de-atun-en-la-isla-coco-en-costa-rica/>.

85. *Especies de la Isla del Coco son Perseguidas por Embarcaciones Pesqueras*, CR HOY (Oct. 14, 2012), <http://www.crhoy.com/especies-de-la-isla-del-coco-son-perseguidas-por-embarcaciones-pesqueras/>.

86. *Piratas Campeones en Ingresos Ilegales la Isla del Coco: Los Barcos Albatros, Franju III y Chaday I*, PRETOMA (Nov. 28, 2011), <http://www.pretoma.org/es/espanol-piratas-campeones-en-ingresos-ilegales-la-isla-del-coco-los-barcos-albatros-franju-iii-y-chaday-1/>.

87. See generally ROSERO, *supra* note 21.

oration among these states in the exercise of control over their vessels. Vessels flagged to these states, particularly to Ecuador,<sup>88</sup> often operate illegally in waters belonging to neighbor states due to their poor levels of law enforcement.<sup>89</sup> Costa Rica and Colombia, for instance, have particularly struggled to deter IUU fishing. A recent study from a non-governmental organization found that many cases in a Costa Rican city were dropped due to ambiguities in fisheries laws.<sup>90</sup> Indeed, from seventy cases, only seven were prosecuted.<sup>91</sup> It also found that procedures for the collection of evidence in Colombia were ineffective, so cases for IUU fishing were not opened and the offenders were released because there is a considerable institutional instability in the fisheries sector<sup>92</sup> and statutes of limitations are often missed.<sup>93</sup> Unless the CMAR States genuinely cooperate and improve law enforcement issues, the U.S. market participants will continue to be prevented from verifying that IUU fish are not concealed with legally caught fish to be exported to the U.S. Until then, the CMAR will continue to be nothing other than a meaningless “arrangement.”

## 2. Violations of Measures of a Regional Fisheries Management Organization

The illegal fishing definition also includes vessels flying the flag of a state party to an RFMO that conduct fishing activities in violation of regional CMMs or that undertake fishing activities in the area of competence of a relevant RFMO in contravention of the reporting procedures of that organization.<sup>94</sup> Other potentially serious illegal activities such as fraud and corruption expand the scope of this traditional definition.<sup>95</sup> These range from the payment of bribes to continue IUU fishing without punishment to conflicts of interest between gov-

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88. Because the U.S. does not have an FTA with Ecuador, this paper is limited to Costa Rica, Panama, and Colombia.

89. ROSERO, *supra* note 21.

90. *Id.*

91. *Id.*

92. *See id.* (providing an overview of the current fisheries' authority that suggests the Legislative and Executive have strongly disagreed on this subject to the point that the Constitutional Court had to intervene).

93. CONTRALORIA GENERAL DE LA REPUBLICA, INFORME DE AUDITORIA-AUNAP 26 (June 2013), available at <http://www.contraloriagen.gov.co/web/guest/agropecuario-2012> [hereinafter CONTRALORIA REPORT].

94. IPOA-IUU, *supra* note 70, at 2.

95. *Projects*, INTERPOL, <http://www.interpol.int/Crime-areas/Environmental-crime/Projects/Project-Scale> (last visited Aug. 30, 2015).

ernment officials and the seafood industry.<sup>96</sup> The corrective actions adopted by Panama and Colombia for IUU fishing violations of the CMMs of the IATTC raise awareness about this expanded definition of IUU fishing.

Between 2009 and 2011, many vessels flagged to Panama and Colombia IUU fished in a manner that violated CMMs of the IATTC.<sup>97</sup> The U.S. Government notified Panama that one of its vessels fished without a proper registry.<sup>98</sup> Panama then imposed a \$500,000 fine on this vessel.<sup>99</sup> It also suspended the fishing registry to a recurrent vessel and ordered it to pay \$704,930.<sup>100</sup> This vessel left Panama's registry to evade its obligations, so Panama recommended it to be added to IUU lists of RFMOs, because it re-flagged to Ecuador.<sup>101</sup> Thus, vessels reflagging to other states may undermine the effectiveness of these sanctions.<sup>102</sup>

Colombia was also notified that Colombia-flagged vessels fished without a registry, but Colombia took a different approach.<sup>103</sup> To avoid a U.S. negative certification, Colombia created Autoridad Nacional de Acuicultura y Pesca (AUNAP)<sup>104</sup> and transferred to it authority over fisheries, as well as activities in regulation, registration, monitoring, surveillance, and research on fisheries resources.<sup>105</sup> AUNAP was also granted authority to deny requests for the renewal offishing licenses for the vessels that fished without the IATTC's registry.<sup>106</sup> Because these vessels alleged that they violated IATTC due to the lack of the

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96. MAIRA MARTINI, TRANSPARENCY INTERNATIONAL, *ILLEGAL, UNREPORTED AND UNREGULATED FISHING AND CORRUPTION* 5-6 (2013), available at [http://www.transparency.org/whatwedo/answer/illegal\\_unreported\\_and\\_unregulated\\_fishing\\_and\\_corruption](http://www.transparency.org/whatwedo/answer/illegal_unreported_and_unregulated_fishing_and_corruption) (addressing the issue of corruption in the seafood supply chain in Africa).

97. NOAA FISHERIES, *IMPROVING INTERNATIONAL FISHERIES MANAGEMENT REPORT TO CONGRESS* 36, 38 (Jan. 2013), available at [http://www.nmfs.noaa.gov/ia/iuu/msra\\_page/2013\\_biennial\\_report\\_to\\_congress\\_jan\\_11\\_2013\\_final.pdf](http://www.nmfs.noaa.gov/ia/iuu/msra_page/2013_biennial_report_to_congress_jan_11_2013_final.pdf) (identifying Ecuador, among others).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* Panama also noted three vessels accused of fishing while flagged to Panama reflagged to Fiji or Vanuatu.

102. TANAKA, *supra* note 69, at 242 (discussing this practice and the practice of flag of convenience States).

103. NOAA Fisheries, *supra* note 97, at 37-39.

104. This translates to the National Authority of Aquaculture and Fisheries.

105. NOAA FISHERIES, *supra* note 97, at 37-39; see also D. 4181/2011, Nov. 3, 2011, *Diario Oficial* 48242-2011 [D.O.] (Colom.), available at <http://www.alcaldiabogota.gov.co/sis-jur/normas/Norma1.jsp?i=44640>; Funciones de la AUNAP, AUNAP, <http://www.aunap.gov.co/aunap/> (last visited Aug. 30, 2015).

106. NOAA FISHERIES, *supra* note 97, at 36, 38.

capacity allocated to Colombia,<sup>107</sup> the IATTC registered these vessels.<sup>108</sup>

The IATTC Convention mandates consideration of the overall issue of fishing capacity within the FAO Code of Conduct for Responsible Fisheries.<sup>109</sup> It follows that the new allocation to Colombia entails a duty to ensure it has decision-making processes that are expeditious and transparent as well as a duty to promote awareness of responsible fisheries through education and training.<sup>110</sup> However, the Comptroller's Office of Colombia—the entity that monitors agencies to ensure proper use of public resources—audited AUNAP and found many irregularities in their annual performance, particularly in the imposition of fines and sanctions to IUU vessels, and in the performance of agreements to promote marine research.<sup>111</sup>

In 2013, NMFS reported to Congress that these states engaged in IUU fishing, but they were not issued a negative certification or subjected to trade sanctions because they demonstrated correction of these violations.<sup>112</sup> The lack of transparency in implementing remedial actions makes it difficult to predict categorically whether vessels flagged to these states or lower officials also corrected these IUU fishing violations. These IUU fish landed in Panama and Colombia and entered these foreign markets possibly for export to the U.S.

## II. INTERNATIONAL COOPERATION-BASED INSTRUMENTS

International and regional cooperation between nations is necessary to combat IUU fishing. There are three major cooperation-based instruments that can be used by parties to FTAs to prevent IUU fisheries from entering their markets: (1) Cooperative Environmental Clauses of FTAs, (2) the FAO Guidelines for ecolabelling of wild fish, and (3) the PSMA.

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107. See generally *id.* at 37; see also LUIS ALBERTO ZULETA & ALEJANDRO BECERRA, *EL MERCADO DEL ATÚN EN COLOMBIA* 57-58 (May 2013), available at <http://www.repositorio.fedesarrollo.org.co/handle/11445/205> (concluding that IATTC regulations, restrictions, and allocations have had negative effects in the seafood industry and that the IATTC's allocation is limited).

108. See *Vessel Search*, IATTC, <https://www.iattc.org/vesselregister/VesselList.aspx?List=RegVessels&Lang=ENG#Colombia> (last visited Aug. 30, 2015). Scroll down and select Colombia. Once selected, a list of vessels will appear.

109. *Plan for Regional Management of Fishing Capacity-73rd Meeting*, INTER-AM. TROPICAL TUNA COMM. (IATTC) (June 20, 2005), <https://www.iattc.org/Meetings/Meetings2004-2008ENG.htm>.

110. FAO, Code of Conduct for Responsible Fisheries ART. 6 (1995) [hereinafter CCRF].

111. CONTRALORIA REPORT, *supra* note 93.

112. NOAA FISHERIES, *supra* note 97, at 38-39, 48-49.

A. *Cooperative Environmental Clauses of Three  
Free Trade Agreements*

FTAs open foreign markets to U.S. exporters by reducing barriers and by creating a better trading environment.<sup>113</sup> Yet, these agreements undermine efforts to deter IUU fishing, because FTAs may encourage the seafood industry to move and take advantage of relaxed environmental regulations in developing nations that often lack the resources to effectively enforce IUU fishing laws.<sup>114</sup> Recognizing this challenge and other environmental concerns, the drafters of FTAs have included environmental clauses.

These agreements typically begin with a preamble that confirms that the parties “shall” implement the FTAs in a manner consistent with environmental protection and conservation and that promotes sustainable development and cooperation on environmental matters.<sup>115</sup> These are very important goals. Indeed, an entire chapter is devoted to fulfill these objectives. The Dominican Republic-Central America FTA (CAFTA-DR), for instance, was the first FTA between the U.S. and a group of smaller developing economies, including Costa Rica, that contained an entire chapter addressing environmental provisions.<sup>116</sup> The FTA between the U.S. and Colombia (U.S.-Colombia FTA) and the FTA with Panama (U.S.-Panama FTA) each also have chapters devoted to environmental provisions.<sup>117</sup>

As to the enforcement of environmental laws, these FTAs emphasize each nation “shall” ensure its laws provide for high levels of

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113. *Free Trade Agreements*, *supra* note 61.

114. See generally C. O’Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements: Why the NAFTA Turned into a Battle*, 28 GEO. WASH. J. INT’L L. & ECON. 2, 75 (1994) (addressing these issues regarding NAFTA).

115. See, e.g., Trade Promotion Agreement, U.S.-Colombia, May 15, 2012, 112 P.L. 42; see also Free Trade Agreement, Dominican Republic-Central America-United States, Aug. 2, 2005, 109 P.L. 53; Trade Promotion Agreement, U.S.-Panama, Oct. 31, 2012, 112 P.L. 43.

116. Dominican Republic-Central American-United States Free Trade Agreement Implementation Act, Pub. L. No. 109-53, 119 Stat. 462 (2005), available at <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text> [hereinafter CAFTA-DR]; see also *Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR)*, EXPORT.GOV, <http://export.gov/%5C/FTA/cafta-dr/index.asp> (last updated July 1, 2015).

117. See United States-Colombia Trade Promotion Agreement Implementation Act, Pub. L. No. 112-42, 125 Stat. 462 (2011), available at <https://ustr.gov/trade-agreements/free-trade-agreements/colombia-fta/final-text> [hereinafter U.S.-Colombia FTA]; United States-Panama Trade Promotion Agreement Implementation Act, Pub. L. No. 112-43, 125 Stat. 497 (2011), available at <https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text> [hereinafter U.S.-Panama FTA].

environmental protection,<sup>118</sup> and “shall” not fail to effectively enforce environmental laws in a manner affecting trade.<sup>119</sup> However, these FTAs also provide that each party has the right to establish its own levels of environmental protection.<sup>120</sup> The greatest features of the FTAs—the Environmental Cooperation Provisions, countervail the recognition that each party is a sovereign nation. These emphasize the importance of cooperation to protect the environment and to promote sustainable development,<sup>121</sup> as well as acknowledge the importance of environmental cooperation in other fora.<sup>122</sup>

These provisions predominantly reflect the parties’ agreement to expand their cooperative relationship to protect the environment.<sup>123</sup> To achieve this goal, the parties agreed to implement cooperative environmental activities of the Environmental Cooperation Agreement (ECA) while at the same time promoting regional economic integration.<sup>124</sup> The ECA complements FTAs<sup>125</sup> on issues where trade and environment converge, and the Environmental Cooperation Commission (ECC) implements a work program that reflects the ECAs.<sup>126</sup> In other words, the cooperative environmental activities pursuant to the ECA are to be coordinated by the ECC.<sup>127</sup>

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118. U.S.-Panama FTA, *supra* note 117, at art. 17.1; CAFTA-DR, *supra* note 116, at art. 17.1; *see also* U.S.-Colombia FTA, *supra* note 117, at art. 18.1.

119. U.S.-Panama FTA, *supra* note 117, at art. 17.3; CAFTA-DR, *supra* note 116, at art. 17.2; U.S.-Colombia FTA, *supra* note 117, at art. 18.3.

120. U.S.-Panama FTA, *supra* note 117, at art. 17.1; CAFTA-DR, *supra* note 116, at art. 17.1; U.S.-Colombia FTA, *supra* note 117, at art. 18.1.

121. U.S.-Panama FTA, *supra* note 117, at art. 17.10(1); CAFTA-DR, *supra* note 116, at art. 17.9(1); U.S.-Colombia FTA, *supra* note 117, at art. 18.10(1).

122. U.S.-Panama FTA, *supra* note 117, at art. 17.10(5); CAFTA-DR, *supra* note 116, at art. 17.9(5); U.S.-Colombia FTA, *supra* note 117, at art. 18.10(3).

123. *Compare* U.S.-Panama FTA, *supra* note 117, art. 17.10(2), *and* CAFTA-DR, *supra* note 116, at art. 17.9(2) (establishing that the Parties recognize cooperation is important for achieving their shared environmental goals, including the development and improvement of environmental protection), *with* U.S.-Colombia FTA, *supra* note 112, at art. 18.10(2) (adding the language: “including . . . environmental protection, practices, and technologies.”).

124. *See, e.g.*, CAFTA-DR, *supra* note 116, at annex 17.9(1); U.S.-Panama FTA, *supra* note 117, at annex 17.10(1). *See generally* CAFTA-DR, *supra* note 116, at preamble; U.S.-Colombia FTA, *supra* note 117; U.S.-Panama FTA, *supra* note 117.

125. *See, e.g.*, *EPA Efforts in Latin America and the Caribbean*, ENVTL. PROTECTION AGENCY (EPA), <http://www2.epa.gov/international-cooperation/epa-efforts-latin-america-and-caribbean> (last visited Aug. 30, 2015).

126. *See, e.g.*, CAFTA-DR, *supra* note 116, at art. 17.9(4); U.S.-Panama FTA, *supra* note 117, at art. 17.10(4) (noting that the U.S.-Panama FTA eliminates the language “and periodically revising and updating” the work plan).

127. *See, e.g.*, U.S.-Colombia FTA, *supra* note 117, at art. 18.10(3).

Several issues on environmental cooperation are addressed more comprehensively in recent FTAs, particularly in their ECAs.<sup>128</sup> Regarding regional cooperation, these recognize the importance of regional cooperation for the protection and conservation of natural resources.<sup>129</sup> The ECAs then broaden the scope of application of the cooperative clauses in FTAs,<sup>130</sup> and authorize the ECC to define a work program that may include regional objectives.<sup>131</sup> For instance, an ECC has already defined a work program for environmental cooperation—the 2014-2017 U.S.-Colombia Work Program, which includes the regional goals of cooperation to promote best practices to conserve marine living resources, to address IUU fishing issues, and to enhance communication with relevant regional and international organizations.<sup>132</sup>

There are other collaborative activities that may be used to approach the problem of trade in IUU fisheries. These are the result of some priorities for key environmental cooperation activities that the parties to these three FTAs identified.<sup>133</sup> First, the parties recognized the need to strengthen each party's environmental management systems (i.e. reinforcing institutional and legal frameworks, as well as creating the capacity to implement and enforce environmental laws and policies).<sup>134</sup> Second, they recognized the importance of developing

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128. See generally Taylor, *supra* note 114 (addressing the environmental effects of the NAFTA).

129. Compare Media Note, Office of the Spokesperson U.S. Dep't of State, U.S. Panama Agreement on Environmental Cooperation, art. I (May 2, 2012), available at <http://www.state.gov/documents/organization/189455.pdf> [hereinafter U.S.-Panama ECA] (stating that the "parties agree to cooperate to protect . . . natural resources . . . and recognize the importance of both bilateral and regional cooperation"), with Press Statement, Bureau of Oceans and International Environmental and Scientific Affairs, U.S. Colombia Environmental Cooperation Agreement, art. 1 (Apr. 19, 2013), available at <http://www.state.gov/documents/organization/207971.pdf> [hereinafter U.S.-Colombia ECA] (stating the ECA's objective "is to establish a framework for strengthening bilateral and/or regional environmental cooperation . . . aimed at enhancing environmental protection and the conservation and sustainable use of natural resources . . .").

130. *EPA Efforts in Latin America and the Caribbean*, *supra* note 125 (stating that "[t]he U.S.-Colombia Environmental Cooperation Agreement (ECA) complements the U.S.-Colombia Trade Promotion Agreement.>").

131. See, e.g., U.S.-Colombia ECA, *supra* note 129, at art. 1, art. 2, and art. 4(4).

132. *EPA Efforts in Latin America and the Caribbean*, *supra* note 125.

133. Despite some differences—particularly in the U.S.-Colombia FTA—the most important priorities for key environmental cooperation activities are established in Annex 17.9(3) of the CAFTA-DR (citing Article V of the ECA with Costa Rica), Annex 17.10(3) of the U.S.-Panama FTA (citing Article IV of the ECA with Panama), and Articles II (a)-(f) and IV (2)(a)-(k) of the U.S.-Colombia ECA of April 19, 2013.

134. Compare CAFTA-DR, *supra* note 116, at annex 17.9(3)(a), and U.S.-Panama FTA, *supra* note 117, at annex 17.10(3)(a) ("strengthening . . . environmental management systems, including . . . institutional and legal frameworks and the capacity to . . . enforce . . .

and promoting incentives and other voluntary mechanisms to encourage environmental protection (i.e. through market-based and economic incentives for environmental management),<sup>135</sup> as well as partnerships to address conservation and management issues.<sup>136</sup> And third, they recognized the need to promote best environmental practices that could lead to sustainable management<sup>137</sup> and develop and promote environmentally friendly goods.<sup>138</sup> Finally, the CAFTA-DR and the U.S.-Panama FTA also provide that conserving and managing shared, migratory, and endangered species, as well as marine resources in MPAs, is a priority.<sup>139</sup>

### B. Key Measures of the FAO Port State Measures Agreement and Duties to Cooperate

The increasing reliance on port states to combat IUU fishing<sup>140</sup> began with the adoption of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and the recognition of the importance of port state measures (PSMs) as a fisheries management system.<sup>141</sup>

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laws”), with U.S.-Colombia ECA, *supra* note 129, at art. IV(2)(a) (“strengthening . . . environmental governance, management [and] capacity to . . . enforce . . . laws . . .”).

135. Compare CAFTA-DR, *supra* note 116, at annex 17.9(3)(b), and U.S.-Panama FTA, *supra* note 117, at annex 17.10(3)(b) (“developing and promoting incentives and other . . . voluntary mechanisms”), with U.S.-Colombia ECA, *supra* note 129, at art. IV(2)(d) (“developing and promoting . . . economic incentives . . . and voluntary mechanisms.”).

136. Compare CAFTA-DR, *supra* note 116, at annex 17.9(3)(c), and U.S.-Panama FTA, *supra* note 117, at annex 17.10(3)(c) (“fostering partnerships to address . . . conservation and management issues”), with U.S.-Colombia ECA, *supra* note 129, at art. II(2)(d) (“facilitating partnerships . . . to promote . . . best practices . . .”).

137. Compare CAFTA-DR, *supra* note 116, at annex 17.9(3)(f) (“promoting best practices leading to sustainable management of the environment”), and U.S.-Panama FTA, *supra* note 117, at annex 17.10(3)(f) (“promoting best practices of environmental management leading to sustainable management”), with U.S.-Colombia ECA, *supra* note 129, at art. IV(2)(b) (“strengthening the conservation and sustainable use of natural resources”), art. (2)(c) (“promoting mechanisms to support the conservation and sustainable use”).

138. Compare CAFTA-DR, *supra* note 116, annex 17.9(3)(h), and U.S.-Panama FTA, *supra* note 117, at annex 17.10(3)(h) (“developing and promoting environmentally beneficial goods and services”), with U.S.-Colombia ECA, *supra* at note 129, art. IV(2)(g) (“promoting the development . . . on environmental goods and services.”).

139. Compare CAFTA-DR, *supra* note 116, at annex 17.9(3)(d) (“conserving and managing shared, migratory, and endangered species in international trade and management” of MPAs), with U.S.-Panama FTA, *supra* note 117, at annex 17.10(3)(d) (“conserving and managing species that are shared, migratory, endangered, or subject to international commercial trade, as well as” MPAs).

140. A. Skonhoft, *Port States Measures*, FAO FISHERIES & AQUACULTURE DEP’T, <http://www.fao.org/fishery/psm/en> (last updated Dec. 4, 2013).

141. DOULMAN & SWAN, *supra* note 28 (explaining that UNCLOS can be interpreted to include provisions on PSMs).

Since then, “increasing political pressures” have influenced nations to agree to an UNCLOS regime that has gradually become binding *hard law*.<sup>142</sup> This is a regime of cooperation that involves port states, coastal states, flag states, and regional and international organizations.<sup>143</sup>

Although coastal states have sovereign rights over natural resources in their EEZs, they cannot disregard the duties set forth in UNCLOS<sup>144</sup> that include the duty to ensure living resources are not endangered by over-exploitation.<sup>145</sup> Foreign flagged-vessels fishing in another state’s EEZ must also cooperate and comply with fishing reporting and landing requirements in addition to other CMMs.<sup>146</sup> UNCLOS also calls for cooperation between neighbor nations, directly or through an RFMO, to protect straddling and highly migratory fish stocks.<sup>147</sup> In other words, UNCLOS has numerous provisions relating to a common duty to cooperate to “protect and preserve the marine environment” which also includes numerous obligations to cooperate to prevent, deter, and eliminate IUU fishing.<sup>148</sup>

Some of the objectives of the International Plan of Action to prevent, deter, and eliminate IUU Fishing (IPOA-IUU) invoke the need for PSMs to combat IUU fishing.<sup>149</sup> The PSMA develops these measures and is built upon the cooperation between port states, as well as the cooperation of port states with flag states, coastal states, and RFMOs.<sup>150</sup> It is also based on the premise that regional cooperation is

142. Harry N. Scheiber et al., *Ocean Tuna Fisheries, East Asian Rivalries, and International Regulation: Japanese Policies and the Overcapacity/IUU Fishing Conundrum*, 30 U. HAW. L. REV. 97, 100-01 (2007).

143. DAVID HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 745 (3d ed. 2007).

144. UNCLOS, *supra* note 73, at arts. 56(1)(a), 56(2).

145. Marion Markowski, *THE INTERNATIONAL LAW OF EEZ FISHERIES* 26-6 (2010); *see also* UNCLOS, *supra* note 73, at art. 61.

146. MARKOWSKI, *supra* note 145, at 26-6; *see also* UNCLOS, *supra* note 73, at art. 62(4).

147. UNCLOS, *supra* note 73, at arts. 63(1), 63(2); *see also* UNFSA, *supra* note 17, at art. 8.

148. UNCLOS, *supra* note 73, at art. 19. *See, e.g.*, CCRF, *supra* note 110, at art. 8.1 (noting the duties of all states include the supervision and control of fishing operations), art. 8.2 (listing flag state’s duties such as authorizing fishing operations and enforcing measures against IUU fishing vessels), and art. 8.3 (noting the port states role in implementing these measures). *See* IPOA-IUU, *supra* note 70, at 4-10 (listing states’, flag states’, coastal states’, and port states’ responsibilities in implementing measures against IUU fishing); *see also* Press Release, International Tribunal for the Law of the Sea, Tribunal Delivers its Advisory Opinion Regarding Illegal, Unreported and Unregulated Fishing Activities (Apr. 2, 2015), *available at* [https://www.itlos.org/fileadmin/itlos/documents/press\\_releases\\_english/PR\\_227\\_EN.pdf](https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_227_EN.pdf) (observing similar obligations in the case of fish stocks that occur both within the EEZs members to the SRFC and its adjacent high seas).

149. Skonhoft, *supra* note 140.

150. DOULMAN & SWAN, *supra* note 28, at 35.

necessary to ensure harmonization in the scope, structure, application, and sanctions of domestic port measures to combat IUU fishing.<sup>151</sup> To this end, effective regional mechanisms oriented to strengthen cooperation must be established, including closing all ports to IUU fishing vessels.<sup>152</sup>

The denial of use of ports is a key measure under the PSMA. Port uses such as “landing, transshipping, packaging and processing of fish that have not been previously landed and other port services including, *inter alia*, refueling and re-supplying, maintenance and dry docking” would always be denied to IUU fishing vessels.<sup>153</sup> These uses may be denied prior to entry into port (i.e. when a vessel is on IUU vessel lists of an RFMO), upon entry into port (i.e. when a foreign vessel is fishing without authorization from the flag or coastal state, or cannot confirm whether the catch complied with domestic and RFMOs’ fishing requirements), or after an inspection (i.e. when a vessel has engaged in IUU fishing or fishing related activities).<sup>154</sup>

The most interesting feature of the PSMA is the use of cooperation provisions to impose obligations upon flag state parties and non-parties. The PSMA’s Preamble calls for cooperation between flag states and port states.<sup>155</sup> Parties must undertake actions relating to ports and to the supervision and control of their fishing vessels.<sup>156</sup> In their capacity as flag states, they must cooperate with port inspections, request other port states to inspect vessels flying its flag if they were engaged in IUU fishing, encourage their vessels to use ports that comply with the PSMA, initiate immediate investigation and proceedings against IUU fishing vessels flying its flag identified by any port state, report actions taken against IUU fishing vessels, and take other actions to combat IUU fishing.<sup>157</sup> They are also required to encourage non-parties to become parties to the PSMA, and must deter activities of non-parties that undermine the effective implementation of the

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151. *Id.* at 5.

152. *Id.*

153. Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing art. 9(6), FAO Conference (Nov. 22, 2009), available at [http://www.fao.org/fileadmin/user\\_upload/legal/docs/037t-e.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/037t-e.pdf) [hereinafter PSMA].

154. DOULMAN & SWAN, *supra* note 28, at 34 (citing Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported And Unregulated Fishing at arts. 9(4)-(5), 11, and 18).

155. *Id.*

156. *Port State Measures Agreement*, *supra* note 29.

157. *Id.*; see also PSMA, *supra* note 153, at art. 20.6.

Agreement.<sup>158</sup> To this end, the PSMA encourages public identification of states that contravene the Agreement.<sup>159</sup>

Another innovative requirement is the sharing of information at the international level, particularly IUU vessel lists.<sup>160</sup> The PSMA aims to combat IUU fishing through cooperation between states and RFMOs, and by effective communication and coordinated action amongst flag states, coastal states, and relevant RFMOs and international organizations.<sup>161</sup> The PSMA establishes numerous mechanisms and requirements related to procedures for notification, communication, and release of information.<sup>162</sup> It also provides assistance for developing nations to develop the legal mechanisms and technical capacity necessary to implement PSMs against IUU Fishing.<sup>163</sup>

### C. *Voluntariness of Ecolabelling Programs and Cooperation Obligations of Flag States*

Another important aspect of UNCLOS is the reassurance that every nation has the right for its nationals to engage in fishing on the high seas.<sup>164</sup> This right is subject to treaties to which the flag state is a party, the UNCLOS rights and interests of coastal states, and the UNCLOS provisions on the high seas.<sup>165</sup> These provisions include the flag state's duty to adopt measures for the conservation of living resources in the high seas, to cooperate with other states and RFMOs in the conservation and management of shared and highly migratory fish stocks, and to adopt conservation measures for those nationals fishing on the high seas.<sup>166</sup> In addition, flag states must keep their vessels under sur-

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158. DOULMAN & SWAN, *supra* note 28, at 36.

159. *Id.* at 62 (noting the PSMA encourages identification of states that may not be acting in a manner consistent with it, and encourages the development of procedures for identifying such states through RFMOs and the FAO).

160. *Id.* at 35.

161. *Id.*

162. *Id.*

163. *Id.*

164. UNCLOS, *supra* note 73, at art. 87(e).

165. *Id.* at 116(a)-(c).

166. *See id.* at arts. 117, 118, 119; *see also Southern Bluefin Tuna (Australia v. Japan; New Zealand v. Japan)*, Case No. 3 & 4, Order of Aug. 27, 1999, ITLOS Rep., available at <https://www.itlos.org/en/cases/list-of-cases/case-no-3-4/> (ordering States to ensure catches do not exceed the annual national allocations at the levels last agreed by the parties, and to make further efforts to reach agreement with other States and fishing entities to ensure optimum utilization of the stock).

veillance and control, and take measures to prevent vessels from IUU fishing in the high seas and in the EEZs of other states.<sup>167</sup>

Of particular relevance for voluntary ecolabel programs is the fact that flag states assume jurisdiction over each vessel and its crew<sup>168</sup> because “the ship, everything on it, and every person involved or interested in its operations” are considered as a unit linked to the flag state.<sup>169</sup> Once a vessel meets the flag state’s conditions for the grant of its nationality, it is entitled to receive flag documents.<sup>170</sup> The vessel itself, its activities, and its crew must comply with the flag state’s domestic laws because the registration is treated like a grant of citizenship.<sup>171</sup> Each vessel and its crew should then comply with CMMs while exercising the right to fish; however, this is one of the flag states’ greatest challenges in policing, particularly for developing nations.<sup>172</sup>

To deal with this challenge, the international community has encouraged the involvement of all nations in ecolabelling schemes because they are designed to certify and promote labels for products from well-managed marine capture fisheries and to assure sustainable use of fisheries resources, as well as to incentivize a reduction of environmental impacts.<sup>173</sup> In other words, ecolabelling schemes entitle a fishery product to bear a distinctive logo that certifies the fish were harvested in compliance with conservation and sustainability standards.<sup>174</sup>

The MSC was found to be the most compliant with the Guidelines for the Ecolabelling of Fish and Fishery Products from Marine Capture Fisheries (FAO Guidelines).<sup>175</sup> The FAO Guidelines aim to promote ecolabelling schemes that verify a specific fishery operates in

167. See UNCLOS, *supra* note 73, at art. 94(1); see also TED McDORMAN ET AL., INTERNATIONAL OCEAN LAW 289 (2005) (addressing and citing to the UNFSA).

168. See UNCLOS, *supra* note 73, at art. 94(2)(b); see also S.S. “Lotus,” 1927 P.C.I.J. (ser. A) No. 10 at 26 (Sept. 7) (stating there is no doubt ships on the high seas are subject to the jurisdiction of the State whose flag they fly).

169. M/V “SAIGA” (No. 2) (St. Vincent v. Guinea), Case No. 2, Order of July 1, 1999, ITLOS Rep. at 106.

170. UNCLOS, *supra* note 73, at art. 91(1); see also M/V “SAIGA,” *supra* note 169, at 63 (stating that under art. 91, it is for the flag states “to fix the conditions for the grant of its nationality to ships” under domestic law, and “to issue . . . flag documents to that effect”).

171. McDORMAN ET AL., *supra* note 167, at 147-48.

172. See TANAKA, *supra* note 69, at 152; see also McDORMAN ET AL., *supra* note 167 (stating that flag states can take measures to ensure their vessels’ compliance with CMMs while they exercise the right to fish).

173. FAO GUIDELINES, *supra* note 54, at 2, 108; see also GEE, *supra* note 55, at 1-4.

174. FAO GUIDELINES, *supra* note 54, at 5.

175. GEE, *supra* note 55, at 2.

compliance with domestic and international regulations, and has no adverse impacts on the ecosystem.<sup>176</sup> MSC therefore is guided by a principle that a fishery must be conducted in a manner that avoids depletion of exploited fisheries, or in a manner that increases populations already depleted.<sup>177</sup> It also promotes compliance with domestic and international marine conservation standards and incorporates frameworks for responsible and sustainable use of fisheries.<sup>178</sup> Fishing operations, on the other hand, must allow for the maintenance of the ecosystem on which the fishery depends.<sup>179</sup>

Although the MSC ecolabelling program and other similar programs are voluntary and market-driven, the FAO Guidelines and the normative basis for all sustainable fisheries standards are based on international fisheries instruments such as UNCLOS, the 1995 UN Fish Stocks Agreement, and the 1995 Code of Conduct for Responsible Fisheries, as well as all applicable national legislation.<sup>180</sup> The minimum substantive requirements and the criteria for assessing whether a fishery can be certified for an ecolabel to be awarded to a fishery are also based on these instruments.<sup>181</sup> While some states may be bound by these international instruments, they are not bound by the FAO guidelines and ecolabelling programs.

### III. PROPOSALS TO PREVENT AND DETER TRADE IN IUU FISHERIES

#### A. *Free Trade Agreements Can Help Prevent IUU Fisheries from Entering the Market*

##### 1. Enforcing Cooperative Environmental Clauses to Enhance Foreign Port Controls

Greater attention should be given to port controls abroad, because the lack of adequate port controls in seafood-exporting nations increases the probability of IUU fisheries entering the U.S. market.<sup>182</sup> The PSMA is used as an important tool to combat, prevent, deter, and

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176. FAO GUIDELINES, *supra* note 54, at 6-7, 10.

177. GEE, *supra* note 55, at 7.

178. FAO GUIDELINES, *supra* note 54, at 6-7.

179. *Id.*

180. *Id.* at 1, 13-14 (addressing the sustainable fisheries standards that comprise quantitative and qualitative indicators of the governance or management systems of a fishery, as well as of its outcome in terms of conservation).

181. *Id.* at 5.

182. *See generally* Skonhofs, *supra* note 140 (stating that there is an urgent need to enhance port state controls and port measures to combat IUU fishing); *see also* Pramod et

eliminate IUU fishing because it allows port states to enforce CMMs against IUU fishing, blocks the entrance of IUU catches into their market, makes operation of IUU fishing vessels rather difficult, and enhances cooperation between nations to identify IUU vessels.<sup>183</sup>

Had the U.S. led other nations along the East Pacific Ocean in harmonizing the scope, structure, application, and sanctions of their PSMA to combat IUU fishing, the vessels flagged to Panama, Costa Rica, and Colombia that caught the IUU fish that were possibly exported to the U.S. would have been denied the use of ports. These vessels would have been forced to travel longer distances to find a port that would have allowed them to land their catch, thereby increasing its operational cost and decreasing the value of their IUU catch. The denial of ports for landing, transshipping, and processing of fish, as well as for refueling and re-supplying, maintenance, and dry-docking, is a fundamental purpose of the PSMA.<sup>184</sup>

The PSMA encourages port states to deny use of ports to all IUU vessels so that the vessels on IUU vessel lists of RFMOs (such as the ones flagged to Colombia and Panama) would have been denied the use of ports. This denial of port access would also apply to foreign vessels, such as the ones flagged to Ecuador and other neighboring states that engaged in IUU fishing in jurisdictional waters of Colombia and Costa Rica (or the vessels that fished without being on the IATTC registry or that contravened this RFMO's fishing regulations). Had these vessels been denied the use of ports, their catch would not have entered the foreign markets to be exported.

The PSMA also imposes obligations on flag states' parties and non-parties. Had these three nations been parties to the PSMA, they would have cooperated with port inspections and requested other port states to inspect the vessels that were suspected of having engaged in IUU fishing. The countries would have also encouraged all their vessels to use ports that comply with the PSMA, and would have initiated proceedings against IUU fishing vessels. In the case of vessels that IUU fished in jurisdictional waters of Colombia and Costa Rica and in the IATTC area, these states could have reported actions taken against these vessels to make this information public.

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al., *supra* note 4 (explaining where and how IUU fisheries enter the U.S. market and estimating the amount of IUU fish entering the U.S. seafood market).

183. *Mozambique Takes a Strong Stand on Illegal Fishing*, WORLD WILDLIFE FUND (Sept. 17, 2014), [http://wwf.panda.org/what\\_we\\_do/footprint/smart\\_fishing/resources\\_and\\_publications/?229033/Mozambique-takes-a-strong-stand-on-illegal-fishing](http://wwf.panda.org/what_we_do/footprint/smart_fishing/resources_and_publications/?229033/Mozambique-takes-a-strong-stand-on-illegal-fishing).

184. *See supra* Part II.B.

Even if these states do not wish to become a party to the PSMA, they can implement similar PSMs as the ones in the PSMA. The U.S. must use all mechanisms available to compel them to implement such measures. First, it can use tariffs to compel state parties to FTAs to strengthen their port controls, as having preferential tariffs on numerous goods and services also benefits other sectors of the economy. Second, the cooperative environmental clauses of FTAs can be enforced to improve port controls. ECAs under FTAs already recognize the importance of regional cooperation for the protection of natural resources, so the ECC can define a work program that may include regional objectives, such as harmonization in the scope, structure, and sanctions of their port measures to combat IUU fishing.

The ECC's work program may include a broad range of activities, as the parties to these three FTAs have already recognized numerous priorities for key environmental cooperation activities. They agreed to take actions to strengthen their environmental management systems that may include PSMs against IUU fishing. They also agreed to promote best environmental practices leading to sustainable management, such as implementing PSMs. In order to force IUU vessels to travel longer distances and reduce the profitability of IUU fishing, the ECC's work program may include activities that require Costa Rica, Panama, and Colombia to deny the use of ports to all IUU fishing. Because IUU vessels will be forced to travel longer distances, they may choose to make sustainable use of the resources so they are allowed to land their catch.

## 2. Conditioning Preferential Tariffs to Encourage Voluntary Seafood Ecolabels

FTAs also increase the profits of the seafood industry—and any government action that increases seafood industry profits is tantamount to a fisheries subsidy.<sup>185</sup> This subsidy is being granted to imports of fresh or chilled fish, frozen fish, fish fillets and other fish meat, dried fish, crustaceans, mollusks, and aquatic invertebrates that enter the U.S. market in shipments of seafood of “mixed origin,” including IUU fisheries.<sup>186</sup> Unless a system to monitor fishing activities is

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185. LENA WESTLUND, FAO CONSULTANT, GUIDE FOR IDENTIFYING, ASSESSING AND REPORTING ON SUBSIDIES IN THE FISHERIES SECTOR 7 (2004), *available at* <ftp://ftp.fao.org/docrep/fao/007/y5424e/y5424e00.pdf>.

186. These seafood products enjoy zero tariffs. For specific information relating to tariffs of all seafood imports see EXPORTS.GOV, <http://export.gov/fta/ftatarifftool/TariffSearch.aspx> (last visited Aug. 30, 2015) (user simply needs to indicate whether he or she is importing or exporting goods, select the partner country, and search for the product).

implemented, the U.S. is prevented from verifying whether a shipment contains IUU catches and, as a result, duty free IUU fish will continue to enter the U.S market.

The parties to these three FTAs also have recognized the importance of developing and promoting incentives and other voluntary mechanisms to encourage environmental protection that include market-based and economic incentives for environmental management, such as zero tariffs for market participants that certify their seafood. Thus, the U.S. may use tariffs to encourage voluntary certifications. These certifications are a very important tool when it comes to verifying that a fishery complies with CMMs, as well as to corroborate that a shipment of seafood does not contain IUU fish.

To certify a fishery, an FAO Guideline compliant program (such as the MSC) assesses the management systems, the fishery and associated stock, and the serious impacts of the fishery on the ecosystem.<sup>187</sup> The presence of these programs also fosters development and support of fisheries to become increasingly sustainable.<sup>188</sup> These programs reduce the environmental impacts resulting from fishing activities, and benefit all market participants. Fishers-producers get easy access to markets, recognition, price premiums, and increased negotiating power for access to the resources; retailers and suppliers receive value for the brand, price premiums, and reassurance of future supplies. Consumers are reassured that the seafood has reduced ecological impacts.<sup>189</sup> Unfortunately, although the benefits of these programs are apparent, cost remains the key factor in implementing them.

Costs depend on the industry's structure, but may be countered with the price premiums that a consumer would pay for certified seafood products.<sup>190</sup> These stimuli are important, yet insufficient, to compel the seafood industry to certify their seafood. Tariffs, on the other hand, are more compelling when deciding whether to certify seafood. Tariffs are a very important aspect of import-export businesses and constitute a crucial cost factor when importing and exporting seafood. The seafood industry should not receive preferential treatment when importing seafood to the U.S. whenever it does not certify its seafood. The U.S. is in the bargaining position to condition preferential tariffs to coerce the industry to certify seafood through the MSC or another program in accordance with FAO Guidelines.

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187. *See supra* Part II.C.

188. GEE, *supra* note 55, at 1, 9.

189. *Id.*

190. *Id.*

An ecolabel or certificate will have to accompany seafood imports from any state party to an FTA, so the U.S. can verify the initial producer's compliance with CMMs. Tariffs will only be eliminated upon showing of such ecolabel or certificate. The seafood industry will have to examine the price premiums and other benefits in certifying as well as the savings of having preferential tariffs, and then subtract the costs relating to a certification program.<sup>191</sup> Accordingly, it can decide whether to implement a new certification and ecolabelling program, or assume the increased costs associated with not receiving zero or reduced tariffs.

A simple cost-benefit analysis of the economic incentives of FTAs compared to the costs of certifying seafood will permit the U.S. to ensure preferential tariffs do not constitute yet another incentive to trade in IUU fisheries.<sup>192</sup> Conditioning preferential tariffs is an effective way to use the current trade legal framework to ensure increased seafood imports reach U.S. consumers at lower prices but not at the expense of U.S. fishermen who have to comply with stringent U.S. fishing regulations. The U.S. must ensure that U.S. trade policies and fishing regulations are in order, but do not provide an unlawful price advantage to foreigners.

#### *B. Bolstering the Lacey Act to Deter Trade in IUU Fisheries*

As previously discussed, one of the most significant challenges in preventing IUU fish from entering the U.S. market is that most cooperation-based instruments are not binding unless the exporting nation agrees to be bound. No matter what steps the U.S. takes to reduce IUU fishing activities and the trade in IUU fish in its territory and jurisdictional waters, the challenge of eliminating IUU fishing goes beyond its boundaries. Even if the U.S. intends to provide extraterritorial application to its domestic wildlife conservation laws<sup>193</sup> such as the Lacey Act, it is unclear whether such laws would apply to all foreign-flagged vessels and their crews when they violate CMMs of

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191. The economic and financial considerations of this analysis are beyond the scope of this paper. For a definition of cost benefit analysis, see *Cost Benefit Analysis (CBA)*, Bus. Dictionary, <http://www.businessdictionary.com/definition/cost-benefit-analysis-CBA.html#ixzz3WdkAWRvr> (last visited Aug. 30, 2015).

192. Although this paper relates to the use of tariffs in FTAs, the solution proposed in this paper would also be applicable to other nations that are non-parties to FTAs that import seafood into the U.S. and receive preferential tariffs under the original GATT, succeeded by the Agreements Establishing the World Trade Organization.

193. HUNTER ET AL., *supra* note 143, at 1510-30 (discussing the extraterritorial application of U.S. environmental statutes).

RFMO/As, or to U.S. nationals who trade in fisheries caught by vessels in IUU lists of RFMOs.

### 1. The Act's Element of Violation to Foreign Laws and U.S. Treaties

The Act provides for certain civil and criminal penalties<sup>194</sup> to deter unlawful trade in fisheries.<sup>195</sup> Under section 3372(a)(1) of the Act, it is unlawful “to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the [U.S.] . . . .”<sup>196</sup> Section 3372(a)(2)(A), on the other hand, makes it unlawful “to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law.”<sup>197</sup> Two types of laws are particularly important to apply the Act to conduct overseas: foreign laws and U.S. treaties.

Regarding foreign laws, Congress has the power to regulate commerce with foreign nations<sup>198</sup> and does not unconstitutionally delegate legislative power to foreign governments by incorporating foreign laws into the Act,<sup>199</sup> because these laws are not assimilated into federal laws.<sup>200</sup> The U.S. government does not apply the foreign law, but rather looks to it to determine if the Act's provisions are triggered.<sup>201</sup> Because these laws cover numerous regimes around the world, defendants often raise challenges on vagueness grounds. These challenges generally are unsuccessful because the language that imposes civil sanctions is reviewed for vagueness with a high degree of flexibility, and the language that imposes criminal penalties is reasonably certain to survive “an attack for failure to provide sufficient notice.”<sup>202</sup>

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194. U.S. v. Lee, 937 F.2d 1388, 1390-91 (9th Cir. 1991).

195. BLOCH McMUNIGAL, CRIMINAL LAW: A CONTEMPORARY APPROACH, CASES, STATUTES, AND PROBLEMS 31 (2005) (defining deterrence as a notion of reducing crime through the fear of punishment).

196. 16 U.S.C. § 3372(a)(1) (2015).

197. 16 U.S.C. § 3372(a)(2)(A).

198. U.S. CONST. art. I, § 8, cl. 3.

199. *Rioseco*, 845 F.2d at 301-02.

200. U.S. v. 594,464 Pounds of Salmon, 871 F.2d 824, 830 (9th Cir. 1989).

201. *Id.*

202. The Act has survived vagueness challenges despite the fact that it provides for both civil and criminal penalties because the standard of review for each is different. The language providing for civil sanctions “is reviewed for vagueness with somewhat ‘greater tolerance’ than one involving criminal penalties.” To impose criminal sanctions, the Act re-

An issue often raised is the vagueness of the phrase “any foreign law.” The Act’s definition of the word “law” begins with the word “laws,” and does not establish whether the word “laws” is restricted to foreign statutes or whether it includes other legally binding foreign regulations and rules.<sup>203</sup> To determine its plain meaning, courts have turned to dictionary definitions and cited broad and narrow definitions.<sup>204</sup> Law means any rule of conduct that has binding legal force, but also simply means a statute.<sup>205</sup> Courts, therefore, have held the term law is ambiguous and have looked beyond the language to determine legislative intent.<sup>206</sup>

The Act is a federal law that was introduced in 1900 to protect wildlife and proscribe interstate illegal trafficking in wildlife,<sup>207</sup> and was amended in 1981 due to the increased illegal trade in fisheries and wildlife.<sup>208</sup> The intent of Congress in amending the Act “was to expand its scope and enhance its deterrent effect.”<sup>209</sup> It intended for foreign laws to include regulations, non-statutory provisions such as resolutions, and other legally binding provisions that foreign governments may promulgate to protect wildlife,<sup>210</sup> such as decrees.<sup>211</sup> It also includes foreign laws that only impose civil fines,<sup>212</sup> and economic regulations relating to wildlife.<sup>213</sup> Certainly, the underlying law must be valid during the time period charged in the indictment.<sup>214</sup> Courts often look to the forum where the law was promulgated to determine

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quires a showing of knowledge, which mitigates its potential vagueness. *See id.* at 829; *see also Lee*, 937 F.2d at 1394-95.

203. *U.S. v. McNab*, 331 F.3d 1228, 1236-37 (11th Cir. 2003), as amended (May 29, 2003).

204. *Id.* at 1237.

205. *Id.*

206. *See id.*

207. *Id.*

208. *See id.*; *see also 594,464 Pounds of Salmon*, 871 F.2d at 827.

209. *McNab*, 331 F.3d at 1238 (quoting *594,464 Pounds of Salmon*, 871 F.2d at 828).

210. *See Lee*, 937 F.2d at 1395-96 (holding that the term “any foreign law” encompasses a foreign regulation); *see also 594,464 Pounds of Salmon*, 871 F.2d at 830 (holding that a Taiwanese regulation is a “foreign law” under the Act).

211. *U.S. v. 2,507 Live Canary Winged Parakeets (Brotogeris Versicolorus)*, 689 F. Supp. 1106, 1114 (S.D. Fla. 1988) (holding that a shipment that contravened a Peruvian decree was a violation of the Lacey Act).

212. *594,464 Pounds of Salmon*, 871 F.2d at 828-29 (holding that a law imposing civil sanctions triggers the Act).

213. *Lee*, 937 F.2d at 1392 (holding that a salmon regulation intended as an economic measure falls under the Act).

214. *See generally U.S. v. Reeves*, 891 F. Supp. 2d 690, 697 (D.N.J. 2012) (rejecting the argument that an invalid state regulation not passed in accordance with state laws could serve as the Act’s predicate).

its validity and effect,<sup>215</sup> and rely on experts of foreign law to determine the validity of the offenses under foreign law.<sup>216</sup> Therefore, the government has the burden of establishing the validity of the underlying law.<sup>217</sup>

In addition to foreign laws, U.S. treaties also may trigger the Act. The Constitution grants the President the power to make treaties<sup>218</sup> with foreign nations that the President negotiates and the Senate ratifies to be effective.<sup>219</sup> Even if an agreement is not submitted to the Senate for approval, it is effective so long as the President signs.<sup>220</sup> These are known as Executive Agreements, and can be used for any purpose.<sup>221</sup> Both Treaties and Executive Agreements are binding under international law<sup>222</sup> and upon the parties<sup>223</sup> that have consented to be bound.<sup>224</sup> In this context, a violation by a party to a U.S. Treaty or Executive Agreement is sufficient to apply the Act, as well as a violation of U.S. regulations adopted under a treaty, such as regulations on catch limits.<sup>225</sup> With regard to non-parties, the U.S. may give extraterritorial application to domestic laws,<sup>226</sup> but it is unclear whether an executive agreement relating to CMMs may also apply overseas. The general rule is that U.S. laws are presumed not to

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215. *See id.* at 707 (holding that the term “law or regulation of any state” in 16 U.S.C. § 3372(a)(2)(A) requires reference to the state law to determine if a given requirement qualifies as a law or regulation under state law); *see also* U.S. v. Molt, 599 F.2d 1217, 1218-19 (3d Cir. 1979) (holding that foreign laws and regulations referred to in the Act are laws and regulations for the protection of wildlife in Fiji and Papua New Guinea).

216. *See, e.g., Molt*, 599 F.2d at 1220 (stating the lower court overlooked the testimony of an expert witness); *see also* 2,507 Live Canary Winged Parakeets, 689 F. Supp. at 1113-14 (relying on experts’ testimony).

217. *See generally* United States v. Sohapp, 770 F.2d 816, 824 (9th Cir. 1985).

218. U.S. CONST. art. II, § 2, cl. 2.

219. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 368 (3d ed. 2006).

220. *Id.*

221. *Id.* at 668.

222. *How to . . . Research Treaties*, U.S. SENATE, <http://www.senate.gov/reference/common/faq/Treaties.htm> (last visited Aug. 30, 2015) (addressing the differences between treaties and executive agreements).

223. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 339.

224. *See id.* at art 2(g), at 333 (defining the term “party”).

225. *See, e.g.,* United States v. Cameron, 888 F.2d 1279, 1280 (9th Cir. 1989) (holding that violations to catch limits adopted by the International Pacific Halibut Commission (IPHC) were sufficient for the Act to be applied, as well as regulations promulgated by the IPHC, which are deemed to be adopted in accordance to 16 U.S.C. §§ 773-773k).

226. *See generally* HUNTER ET AL., *supra* note 143, at 1509 (addressing extraterritorial application of U.S laws); *see also* *Black’s Law Dictionary* (10th ed. 2014) for a definition of extraterritorial.

have extraterritorial effect,<sup>227</sup> but the application of U.S. laws overseas “has become increasingly common.”<sup>228</sup>

As a preliminary consideration, courts have applied the presumption against extraterritoriality in a manner inconsistent with prior precedents relating to the use of federal statutes to regulate conduct outside the U.S. boundaries.<sup>229</sup> In the early 1990s, for instance, the Supreme Court adopted a test of strict presumption against extraterritoriality.<sup>230</sup> In this regard, it appears the Court has moved away from a strict presumption test to numerous alternative tests, but this variation has added “to the incoherence of the Court’s jurisprudence.”<sup>231</sup>

So far, the courts have consistently reaffirmed that there is a “longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the U.S.”<sup>232</sup> Despite other interpretations to restrict the scope of the presumption against extraterritoriality, courts have held that only Congress may overcome this presumption and proscribe or regulate conduct outside of the boundaries of the U.S.<sup>233</sup> Courts must then determine whether Congress clearly manifested and intended to proscribe or regulate conduct beyond the U.S. territory because “whether Congress has actually exercised that authority is a matter of statutory interpretation.”<sup>234</sup> Although courts will take different approaches to the presumption against extraterritoriality, courts

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227. See *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 133 (2d Cir. 2014) (recognizing a presumption against extraterritoriality); see also *Morrison v. Nat’l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877-78 (2010) (holding that “when a statute gives no clear indication of an extraterritorial application, it has none”).

228. Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 844 (2009).

229. See John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT’L L. 351, 396 (2010) (noting that “since the early 1990s, the U.S. Supreme Court’s jurisprudence with respect to the reach of federal statutes has become incoherent and inconsistent with the Court’s earlier decisions”); see generally Randall S. Abate, *Dawn of a New Era in the Extraterritorial Application of U.S. Environmental Statutes: A Proposal for an Integrated Judicial Standard Based on the Continuum of Context*, 31 COLUM. J. ENVTL. L. 91 (2006).

230. See Knox, *supra* note 229, at 375-76 (citing *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991), and stating that in “the early 1990s, the Court dramatically strengthened the presumption against extraterritoriality”); see also *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) [hereinafter *Aramco*] (quoting *Foley Bros. v. Filardo*, 336 U.S. 281 (1949)).

231. See Knox, *supra* note 229, at 377.

232. See *Aramco*, 499 U.S. at 248; see also *Morrison*, 130 S. Ct. at 2877; *Smith v. United States*, 507 U.S. 197, 203-04, (1993); *European Cmty.*, 764 F.3d at 133.

233. See *Foley Bros.*, 336 U.S. at 285; see also *European Cmty.*, 764 F.3d at 133.

234. See HUNTER ET AL., *supra* note 143, at 1513.

will more commonly allow extraterritorial application of economic laws than environmental laws.<sup>235</sup>

## 2. Amending the Act to Include Conservation and Management Measures of Regional Fisheries Management Organization/Arrangements

The Lacey Act has far-reaching criminal and civil effects on IUU fishing activities abroad and the trade of IUU fisheries caught beyond the U.S. jurisdictional waters, and may deter the trade in IUU fisheries. However, it must be amended to provide a revised and more comprehensive scheme, because the current provisions relating to the extraterritorial application of the Act are inadequate.

There is uncertainty as to whether CMMs of a RFMO such as the IATTC's CMMs may qualify as "foreign laws" under the Act.<sup>236</sup> To illustrate, three instruments are important for these CMMs to have binding effect: the Convention for the Establishment of an Inter-American Tropical Tuna Commission (IATTC Convention), the Protocol to Amend the 1949 Convention (The Protocol), and the Convention for the Strengthening of the 1949 Convention (Antigua Convention).<sup>237</sup> Costa Rica ratified the IATTC Convention,<sup>238</sup> so it has the force of a Treaty for this State. Panama ratified The Protocol, but Colombia did not even sign it.<sup>239</sup> It is, therefore, a treaty for Panama, but has no binding effect for Colombia.<sup>240</sup> Panama and Costa Rica also ratified the Antigua Convention,<sup>241</sup> but Colombia has not even signed it.<sup>242</sup> Therefore, it

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235. *Id.* at 1514.

236. This proposal will not address the extraterritorial application of § 3372(a)(1) since all instruments mentioned in this paper may be applied extraterritorially so long as they are ratified by the U.S. But the process of ratification is often long and courts are reluctant to give extraterritorial application of U.S. environmental laws, so deterring IUU fishing activities and the trade in IUU fisheries through § 3372(a)(1) is as of yet more uncertain.

237. *See generally* CARRIE S. SOLTANOFF, NOAA OFFICE OF INTERNATIONAL AFFAIRS, INTERNATIONAL AGREEMENTS CONCERNING LIVING MARINE RESOURCES OF INTEREST TO NOAA FISHERIES 42 (2013), available at [http://www.nmfs.noaa.gov/ia/resources/2013\\_int\\_agr\\_book.pdf](http://www.nmfs.noaa.gov/ia/resources/2013_int_agr_book.pdf).

238. Convention for the Establishment of an Inter-American Tropical Tuna Commission, U.S.-Costa Rica, Mar. 3, 1950, 1 U.S.T. 230 [hereinafter IATTC Convention].

239. *Protocol to Amend the 1949 Convention to the Establishment of an Inter-American Tropical Tuna Commission*, IATTC, <https://www.iattc.org/conventionprotocoleng.htm> (last updated July 24, 2012).

240. For a treaty to be valid in Colombia, its Congress must approve it. The President may only give provisional application to treaties relating economic and commercial nature that must always be sent to Congress for approval, otherwise, the effect and application of such treaty will be suspended. *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 224.

241. *Antigua Convention*, IATTC, <https://www.iattc.org/IATTCdocumentationENG.htm> (last updated Feb. 10, 2014).

has binding effect as a treaty for Costa Rica and Panama, but has no binding effect on Colombia.

In cases of violations of CMMs of this RFMO, courts will have to decide whether the IATTC Convention, The Protocol, and the Antigua Convention are valid foreign laws of Costa Rica, Panama, and Colombia, sufficient to trigger the Act and whether the CMMs adopted by the IATTC, an RFMO that was established by these instruments, are also valid foreign laws. Given the very broad judicial interpretation of the Act's three-word phrase "any foreign laws,"<sup>243</sup> it is safe to conclude a court will likely find these instruments are foreign laws as long as an expert determines they are valid.<sup>244</sup> In the cases of Costa Rica and Panama, an expert will likely find the instruments ratified by the States valid, but Colombia has not signed or ratified any of them. Thus, these instruments are not valid laws in Colombia.<sup>245</sup>

The case law relating to the validity of these instruments under section 3372(a)(2)(A) is limited to nonexistent. Courts will have to determine whether fishing or trade activities that contravene CMMs of this RFMO, established by an instrument to which a State has not agreed to be bound, will trigger section 3372(a)(2)(A). To deal with this challenge, courts will likely rely on the opinion of an expert on foreign law who will determine whether the CMMs that gave rise to the underlying court proceedings are valid laws in that particular State, so that the trier of fact may decide whether or not it was unlawful "to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish or wildlife taken, possessed, transported, or sold . . . in violation of any foreign law."<sup>246</sup>

The risk if the Act is not amended is a deluge of judicial opinions with different conclusions concerning the validity of the same instrument. For instance, consider the IUU fishing vessels flagged to Panama and Colombia that violated the IATTC's CMMs detailed in this paper. An expert in foreign law will probably establish that the CMMs of the IATTC, or to be more precise, the CMMs implementing The Protocol and the Antigua Convention, are valid laws in Panama because Panama has signed and ratified these instruments, but Co-

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242. *Id.*

243. For further discussion on this broad interpretation, see *supra* Part III.B.1.

244. For further discussion about the validity of "foreign laws" see *id.*

245. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P] art. 224 (mandating that for a treaty to be valid, it must be approved by Congress, and establishing that the President may only give provisional application to treaties relating economic and commercial nature that must always be sent to Congress for approval, otherwise, the effect and application of such Treaty will be suspended).

246. 16 U.S.C. § 3372(a)(2)(A).

Colombia has neither signed nor ratified them. Therefore, an expert will probably establish that the same CMMs are not valid laws for Colombia. As a result, a court will likely apply the Act to proscribe IUU fishing activities conducted by Panamanian nationals, but not against Colombian nationals. At the same time, U.S. nationals who have traded in these IUU fisheries may be punished only if they imported, exported, transported, sold, received, acquired, or purchased fisheries caught by IUU fishing vessels flagged to Panama, and not if the vessels were flagged to Colombia.

In addition to issues concerning the enforcement of CMMs of RFMOs, courts will have to deal with issues related to CMMs of RFMAs. Instruments that stipulate the parties' express intent not to be bound often create RFMAs. These instruments may take the form of Arrangements,<sup>247</sup> Memorandums of Understanding,<sup>248</sup> or even Declarations, so long as they relate to a "cooperative mechanism established in accordance with [UNCLOS] and [UNFSA] by two or more States" to establish CMMs in a sub-region or region.<sup>249</sup> Indeed, the term "Declaration" is "deliberately chosen to indicate that the parties do not intend to create binding obligations but merely want to declare certain aspirations."<sup>250</sup> Although the San Jose Declaration<sup>251</sup> states that "the parties agreed" to create a joint management system for the sustainable use of marine resources in the ETPS,<sup>252</sup> it uses the term "Declaration" so a court will likely find that it is not legally binding because it simply declares the aspirations of the CMAR States. And, unlike the Universal Declaration of Human Rights, the San Jose Declaration does not reflect customary international law.

It is highly unlikely that CMMs of RFMAs will qualify as foreign laws unless they have been adopted by national legislation. Since

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247. See, e.g., International Fisheries, MINISTRY FOR PRIMARY INDUSTRIES, <http://www.fish.govt.nz/en-nz/Publications/Ministerial+Briefings/Ministerial+Briefing+05/Annex+1+-+Fisheries+Management+in+New+Zealand/Internationalfisheries.htm> (last visited Aug. 30, 2015).

248. See, e.g., *Introduction*, INDIAN OCEAN - SOUTH-EAST ASIAN MARINE TURTLE MEMORANDUM OF UNDERSTANDING, <http://www.ioseaturtles.org/introduction.php> (last visited Aug. 30, 2015).

249. UNFSA, *supra* note 17, at art. 1(d).

250. *Definition of Key Terms Used in the UN Treaty Collection*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1\\_en.xml](https://treaties.un.org/Pages/overview.aspx?path=overview/definition/page1_en.xml) (last visited Aug. 30, 2015) (stating that few declarations not originally intended to be binding, but reflecting customary international law such as the Universal Declaration of Human Rights, may be considered binding).

251. This paper does not advocate that the CMAR is a Regional Fisheries Management Arrangement because the CMAR does not focus on specific marine species and it appears that the CMAR does not have managerial functions.

252. *Eastern Tropical Pacific Seascape Project*, *supra* note 13.

sovereign States are reluctant to enter into agreements that curtail their right to exploit marine resources within their jurisdictional waters or their right to fish on the high seas, the U.S. will continue to be prevented from deterring IUU fishing activities overseas. Subsequently, these IUU fisheries will continue to enter foreign markets, including the markets of parties to the U.S. FTAs, possibly to be exported to the U.S.

These challenges impose a high burden on the court system, and increase the time and costs involved in judicial proceedings. A court will need to determine on a case-by-case basis whether these sources of law are sufficient to trigger the Act, which may lead to conflicting results. Congress can alleviate this burden by amending section 3372(a)(2)(A). The following amendment is being proposed to clarify that CMMs of RFMO/As will also trigger the Act: “(a) Offenses other than marking offenses: It is unlawful for any person . . . (2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce (A) any fish or wildlife taken, possessed, transported, or sold . . . in violation of any foreign law *or conservation and management*<sup>253</sup> measures of Regional Fisheries Management Organizations<sup>254</sup> or Arrangements.”<sup>255</sup>

### 3. Leveraging the Act’s Automatic Application: IUU lists of RMFOs and the NMFS

The purpose of the proposed amendment to section 3372(a)(2)(A) is to clarify that other laws, such as CMMs of RFMO/As, may also trigger application of the Act. Once the Act offers a straightforward rule that makes the trade of fisheries taken in violation of CMMs adopted by RFMO/As unlawful, the inclusion of a certain foreign-flagged vessel in an IUU list of a RFMO would automatically trigger the Act. Consequently, the crew and owner of such vessel, and U.S. nationals who trade in its catch, would be subject to investigation under the Act.

Numerous RFMOs have databases of IUU fishing lists, which contain the information of vessels that have presumably violated the CMMs of a RFMO. Examples include: the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the Inter-American Tropical Tuna Commission (IATTC), the International Com-

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253. For a definition of conservation and management, see UNFSA, *supra* note 17, at art. 1(b).

254. *Id.* at arts. 9 and 10 (addressing the objectives and functions of RFMO/As).

255. For a definition of arrangement, see *id.* at art. 1(d).

mission for the Conservation of Atlantic Tunas (ICCAT), the Indian Ocean Tuna Commission (IOTC), the Northwest Atlantic Fisheries Organisation (NAFO), the North East Atlantic Fisheries Commission (NEAFC), the South East Atlantic Fisheries Organisation (SEAFO), Western and Central Pacific Fisheries Commission (WCPFC), South Pacific Regional Fisheries Management Organisation (SPRFMO). Indeed, the National Marine Fisheries Service (NMFS) often gathers information from publicly available databases that include IUU vessel lists of RFMOs.<sup>256</sup>

Since 2006, the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act has required the U.S. Secretary of Commerce to submit a biennial report to Congress identifying nations whose vessels were engaged in IUU fishing.<sup>257</sup> The first biennial report to Congress was submitted in 2009 and included six nations identified by the NMFS as having been engaged in IUU fishing in the years of 2007 and 2008.<sup>258</sup> Those nations were France, Italy, Libya, Panama, People's Republic of China, and Tunisia.<sup>259</sup> In the following report, Colombia, Ecuador, Ghana, Italy, Mexico, Panama, the Republic of Korea, Spain, Tanzania, and Venezuela were identified.<sup>260</sup> This year, Colombia, Ecuador, and Mexico were identified again.<sup>261</sup>

These reports outline numerous IUU fishing incidents by foreign-flagged vessels that violated CMMs of RFMO/As, such as the ones described in this paper. It is then further proposed that the Act or its implementing regulations authorize the U.S. government to initiate automatic proceedings against the owner of the foreign-flagged IUU vessel and all U.S. nationals who trade in fisheries caught by vessels identified by the NMFS as having violated CMMs of a RFMO or that have been included in IUU list of RFMOs to which the U.S. is a party.<sup>262</sup>

#### CONCLUSION

Several IUU fishing incidents in jurisdictional waters and adjacent high seas of three state parties to FTAs—Panama, Costa Rica,

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256. NOAA FISHERIES, *supra* note 97, at 15, 18.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. NOAA FISHERIES, IMPROVING INTERNATIONAL FISHERIES MANAGEMENT FEBRUARY 2015 REPORT TO CONGRESS 23-26 (Feb. 2015), available at [http://www.nmfs.noaa.gov/ia/iuu/msra\\_page/2015noaareptcongress.pdf](http://www.nmfs.noaa.gov/ia/iuu/msra_page/2015noaareptcongress.pdf).

262. *Id.*

and Colombia—have occurred. Although the amount of IUU catch that entered these markets cannot be determined, the probability that these fish entered the U.S. market is high because these nations have problems with law enforcement, non-cooperation, and lack of transparency that prevent full traceability of their seafood imports.

Under the current international legal framework, it is difficult to prevent these IUU fish from entering the markets of these three nations, and with the current domestic mechanisms in place, the U.S. could not verify that shipments of seafood from these nations did not contain IUU fish. Yet, preferential tariffs in FTAs did not discriminate between legally caught and IUU fish, so the IUU fish caught in the incidents mentioned in this paper also enjoyed zero tariffs. On the other hand, legal proceedings against the owners of all the foreign-flagged IUU vessels and other market participants who traded in those IUU fisheries have not been instituted, so future unlawful conduct has not been deterred. Moreover, it is unclear whether these violations would trigger the application of the Lacey Act.

The U.S. can take three actions to fight against trafficking in IUU fisheries and to assure U.S. fishermen are able to distribute seafood to U.S. consumers at equal or better rates than competitors who trade in IUU fisheries and enjoy zero tariffs. First, while foreigners are subject to less stringent fishing requirements compared to the requirements the U.S. fishermen are subjected to, most of their catch enjoy zero tariffs, so FTAs' preferential tariffs to seafood should be granted only to those importers who can prove the catch sought to be imported has not undermined efforts to conserve fish stocks or jeopardized the food supply and source of income of foreigner fishermen.

Second, tariffs could be used to compel state parties to FTAs to enhance their port controls. Seafood is only one of the many goods that enjoy zero tariffs. Since having preferential tariffs to other goods and services is beneficial to other sectors of the economy, undertaking activities under the cooperative environmental clauses of FTAs to improve port controls would be less burdensome to state parties to FTAs than losing preferential tariffs for all other goods and services. Third, the U.S. can combat trafficking in IUU fisheries by imposing civil and criminal penalties to any foreigner or U.S. national engaging in the trade of IUU fish taken in violation of conservation and management measures of RFMO/As. Accordingly, foreigners and U.S. nationals who traded in IUU fish caught by the vessels identified by the NMFS as having violated CMMs of the IATTC would be punished automatically.

These actions will prevent IUU fisheries from entering foreign markets and will deter future trade in IUU fisheries. They are effective measures to ensure sustainable use of marine resources and to balance the market conditions of U.S. fishermen, so both foreign and U.S fishermen may benefit.