



SPECIAL FEATURE: LEGAL ACTIONS RELATED TO US REGULATION, MANAGEMENT AND INDUSTRY

Several aspects of US regulatory, management and industry dynamics have been debated through the law in recent months. This special feature offers brief updates on some of the cases that are in motion.

US-Mexico tuna-dolphin debate continues

The ongoing tuna-dolphin dispute at the World Trade Organisation (WTO) between the US and Mexico has seen recent action. In the original case, the WTO's Appellate Body confirmed that the US dolphin-safe label discriminated against imported Mexican tuna products. In 2013, the US revised the policy in an effort to address the discrimination, but a WTO compliance panel and later, the Appellate Body of the WTO, ruled that these changes were insufficient to address the discrimination and bring the rule into compliance with international trade rules. Related to the these findings, in early 2016, Mexico asked the WTO's Dispute Settlement Body for authorization to suspend tariff concessions and other related obligations with the US on a list of goods worth nearly US\$475 million annually. The US objected to the level of the suspension and the matter was referred to arbitration.

At the same time, however, the US again introduced changes to its tuna-dolphin policy, saying that these were meant to resolve the compliance issue. The so-called 'final interim rule' was issued in March 2016. The final interim rule included changes to the certification standards for dolphin-safe labelling including enhanced documentation and captain training requirements.² These require captains of fishing vessels operating in all tuna fisheries outside of the Eastern Tropical Pacific to complete an online Tuna Tracking and Verification Program training course. The rule goes into effect on 21 May 2016.

In April of this year, the US requested that the new policy be reviewed by a compliance panel at the WTO. This request was unusual given that compliance panels are usually requested by complainants (Mexico in this case). Mexico rejected the request, citing procedural concerns since the case had already gone to arbitration. The US request has raised questions if arbitration over Mexico's request to suspend tariff concessions should proceed in light of new compliance panel process, or whether a compliance panel should wait until the arbiter circulates its decision. The US confirmed that it will ask for a special Dispute Settlement Body meeting so that it can table its second compliance panel request on the subject.³ It is not yet clear how the current set of concerns in the long standing dispute will be resolved.

In the meantime, US tuna companies and the industry association that represents them – National Fisheries Industry (NFI) – have objected to the US implementation of the new final interim rule. Industry objects to the new rule on grounds that it will increase operational costs for US tuna canneries and that industry has been adhering to dolphin safe labelling standards set by the federal government for many years. Industry representatives also argue that compliance with the training program will be challenging for high-skilled artisanal fisherman that operate in remote areas, noting that it will be the responsibility of buyers to ensure that the training has been completed. Such processes, industry argues, create administrative burdens in large and complex supply chains.⁴

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The US has introduced changes to its tuna-dolphin policy in an effort to comply with WTO

Canada protests US IUU rule

In 2015, the US passed into law the Illegal, Unreported and Unregulated Fishing Enforcement Act. The law develops permit and reporting requirements in favour of full traceability of seafood products – including tuna – for entry into the US supply chain in order to ensure that these products were lawfully acquired.⁵ Recently, Canada seafood exporters came forward with concerns about the impact that the rule would have on their domestic producers. Canada has argued that it has a model fisheries management regime that addresses IUU fishing and that it is concerned that Canadians selling fish to the US will be required to provide and retain data over and above data requirements of domestic sellers. For its part, the US has responded that it does not intend to discriminate and that instead, the new law ensures fair and equal treatment of all countries and fisheries.⁶ The US National Oceanic and Atmospheric Administration (NOAA) will publish a final IUU rule in September 2016 and importers will likely have up to a year from its publication date to implement the new policies.

US closes a loophole of seafood produced through forced labour

US law includes a ban on importing goods made by children or slaves. However, a loophole in the law allowed imports regardless of how they were produced if there was 'consumptive demand', or insufficient supply to meet domestic demand. Following from recent reports of human trafficking in seafood industries in Thailand, the Obama administration signed the Trade Facilitation and Trade Enforcement Act, which eliminated the language on 'consumptive demand' and opened the door for stronger enforcement against goods produced with child or forced labour.⁷ The ruling, which went into effect on 10 March 2016, gives enforcement agencies more room to investigate companies suspected of using child and forced labour. While the move has been seen as a signal that federal officials are preparing to enforce the ban on imports of goods made by children or slaves, enforcement will remain a challenge because of the complexity of global supply chains and will require a coordinated effort among brands, suppliers and governments and the corresponding will of involved parties.⁸ Fish and shrimp from Thailand top the US's list of good produced by child labour or forced labour. The US industry association NFI, which represents about 75 percent of the US seafood industry, said that their members want to see the ban enforced.⁹

Class action cases on under-filled cans multiply

Several canned tuna brands and private label firms are facing lawsuits that allege under-filled tuna cans. Recent allegations in the form of class action suits have come against brands Starkist and Wild Planet Foods – a high end brand that markets its product as sustainable – and grocery outlet Trader Joes. Reportedly, testing by the National Oceanic and Atmospheric Administration has revealed that six of six lots and 106 out of 108 individual cans tested failed to meet federally mandated minimum standards of fill.¹⁰ In the Starkist case, a US \$12 million settlement was thrown out by a judge who found that the notice to class members was inadequate because the scope of the release changed without adequate notice to the class and that the release that it offered to Starkist against future claims was too broad.¹¹

In the midst of these lawsuits, US tuna brands renewed their ongoing push for a change in how weights are measured and communicated to consumers. Since the mid-1990s, the big three brands have petitioned the US Food and Drug Administration to change the canned tuna standard of identity from pressed cake to drained weight on grounds that pressed cake weight is difficult to measure, does not provide meaningful information to the consumer and diverges from the drained weight

US industry objects to the new rule on grounds of increased costs and their long compliance with dolphin-safe

Canada expresses concern of costs of IUU rule; US argues it ensures fair treatment

The US has amended law to enable stronger enforcement against goods made with child and slave labour



standard which is used for other canned foods that contain liquid. Reportedly, the effort is not directly connected to the under-fill lawsuits, though industry sources have been quoted as suggesting that the lawsuits give a fresh push for the change.¹²

FISHERIES REGULATION

Quantifying the cost of IUU fishing in the Pacific Islands region¹³

The Pacific Islands Forum Fisheries Agency (FFA) commissioned a study undertaken by MRAG Asia Pacific to quantify the cost of illegal, unreported and unregulated fishing (IUU) in the Pacific Islands region's tuna fishery. A report was released in March and marks the first study focussing exclusively on Pacific tuna; past studies have also included non-tuna species and used a different approach. MRAG estimated that 306,440 mt of tuna harvested in the Pacific region was related to IUU activities. The purse seine sector accounted for 70% in volume terms, largely driven by reporting violations and illegal fishing on FADs during the FAD closure period. The tropical and southern longline fisheries collectively accounted for 30% with IUU activities relating mainly to misreporting and illegal transshipping. However, given the high ex-vessel value of longline-caught fish, the tropical longline fishery accounted for 44% in value terms (\$272 million) of the total estimated value of IUU-related tuna catch of US \$616 million, while the purse seine fishery accounted for 37%.

Contrary to popular belief that IUU fishing is conducted by unlicensed pirate vessels, the majority of IUU catch was harvested by vessels with valid fishing licences. Unlicensed fishing only accounted for 4% of the estimated IUU catch, while reporting violations accounted for 54% and non-compliance with licencing conditions (e.g. illegal FAD fishing, use of non-licensed fishing gear) accounted for 29%. The estimates of the value of tuna catch through IUU activities in the WCPO region are also lower than the most commonly quoted 2009 estimate of \$707 million - \$1.5 billion, but this estimate also included non-tuna species. The report also makes the point that the economic losses to Pacific Island countries is much lower than the total value of IUU catches.

The study recommends stronger catch and transshipment monitoring arrangements for the longline sector (i.e. through increased observer coverage and electronic monitoring) and the replication of strong in-zone monitoring, control and surveillance arrangements on the high seas. For the purse seine sector, it is recommended that mechanisms for verifying fishing activity (e.g. non-fishing days, FAD fishing during the closure) be strengthened, that cannery data be used for catch verification and that FAD usage is better managed and monitored. For future estimates of IUU activity, the study also recommends using lost economic rent as an indicator rather than ex-vessel value and stronger monitoring and coordination of relevant statistics to improve accuracy of estimates.

Kiribati receives a 'yellow card' warning from the EU

Kiribati is the sixth and latest Pacific Island country to receive a yellow card warning from the EU for being potentially uncooperative in the fight against illegal, unreported and unregulated fishing (IUU). On 21 April, the EU advised that Kiribati (together with Sierra Leone and Trinidad & Tobago) have six months to address short-comings in implementing the EU's IUU Fishing Regulation or risk receiving a 'red card' which could potentially result in trade sanctions on fisheries imports. The EU's main concerns centre on Kiribati's capacity to control fishing activities by foreign fleets operating within its EEZ and the possibility of illegally caught fish being laundered

Several US brands and private labels have been accused of under-filling cans

Over 300,000mt of tuna valued at over \$US 600 million is caught in the Pacific tuna fishery through IUU-related activities

The majority of activity relates to reporting violations and non-compliance with licencing conditions

during transshipment in Kiribati ports due to weak traceability systems. The EU is also concerned that Kiribati's unwillingness to share operational information on foreign vessels operating in Kiribati waters undermines the European Commission's efforts to improve transparency and sustainability of the Western and Central Pacific tuna fishery.¹⁴

In 2015, Papua New Guinea and Vanuatu were successful in reforming their systems for controlling IUU fishing and had their yellow cards lifted; Fiji's was lifted in 2014. Solomon Islands is in the final stages of formal dialogue with the EC and is hopeful that its yellow card will be lifted by June, while Tuvalu is continuing its efforts to address the EC's issues.¹⁵ Interestingly, Kiribati, as well as Tuvalu, does not currently export fisheries products to the EU market. Both countries are yet to receive EU approval for the establishment of competent authorities for implementing the EU's IUU fishing and hygiene regulations, and as such, are not yet authorised to export fisheries products to the EU. Hence, should their yellow cards be upgraded to red cards, market sanctions on fisheries product exports to the EU sourced from Kiribati and Tuvalu-flag vessels will be largely ineffectual. However, the negative publicity associated with being deemed to be non-cooperative in controlling IUU fishing, may prompt other key market states receiving Kiribati and/or Tuvalu fisheries products to also take similar action.¹⁶

FISHERIES MANAGEMENT

PNA stands firm on Vessel Day Scheme; New CEO appointed

From 28 March-8 April, the Parties to the Nauru Agreement (PNA) met in Tarawa, Kiribati for a series of meetings to discuss a range of key issues:¹⁷

- *35th Annual PNA Meeting* – appointment of new CEO; development of an economic research program; US Multilateral Fishing Treaty; PNA positions for WCPFC14; review of PNA Fisheries Observer Agency.
- *21st Annual Palau Arrangement Meeting* – review of an independent report comparing effort and quota management systems; new PNA membership requests from other PICs.
- *21st Annual FSM Arrangement Meeting* – issues related to growing domestic fleets operating under FSMA; linking fishing access to on-shore development.
- *5th VDS Technical and Scientific Committee* – fishing effort; health of stocks; industry developments.

One of the key issues discussed by PNA parties was the merits of continuing to manage PNA's purse seine fishery with an effort-based system (i.e. Vessel Day Scheme) versus moving towards a catch quota system. This discussion stems from calls from Pacific Fisheries Ministers and Pacific Island Forum leaders to transition management of all tuna fisheries to catch-based systems over the next 10 years. PNA commissioned an independent review to compare the VDS with the New Zealand quota management system which concluded that the VDS is a "fully functioning fisheries management regime without peer for its class of fishery" and "[t]here is no evidence that for practical purposes, the present sustainability performance of the VDS is inferior to the quota management system given the nature and current state of the tuna fishery". On the basis of this review, PNA fisheries officials agreed to recommend to Ministers that the VDS system be maintained.¹⁸

Kiribati is the sixth PIC to receive an EU yellow card warning in IUU fishing

Other markets receiving Kiribati fish could potentially follow suit on the EU and apply market sanctions

PNA unanimously agreed to appoint PNG's Mr. Ludwig Kumoru as the new Chief Executive Officer (CEO) for PNA's Office in Majuro. Mr. Kumoru is currently serving as the Deputy Managing Director of PNG's National Fisheries Authority and is also Chair of WCPFC's Scientific Committee. Mr. Kumoru replaces Dr. Transform Aqorau who has held the CEO's position since 2010 when the PNA Office was first established in Majuro. Mr. Kumoru will take up his new post from 1 August and will follow in Dr. Aqorau's footsteps by focussing efforts on developing opportunities for adding value to the PNA fishery.

Cook Islanders oppose EU purse seiner deal

On 21 October 2015, the EU and the Cook Islands initialled an eight-year Sustainable Fisheries Partnership Agreement (SFPA) and associated Implementation Protocol, granting in-principle access to Cook Islands EEZ for four large-scale Spanish purse seiners. This marks the first bilateral fisheries access agreement established between the EU and Cook Islands. Under the Implementation Protocol, the four purse seiners will be licenced to fish for tuna for four years initially, based on a reference tonnage of 7,000 mt/year. Fishing access fees payable by the European Commission (EC) to Cook Islands under the SPFA will be € 367,500/year on average. In addition, the EC will pay an additional € 350,000/year to Cook Islands Government to support the strengthening of fisheries policy, particularly monitoring, control and surveillance. Vessel owners will contribute € 55-70 for every metric tonne of tuna actually caught in Cook Islands waters. The EC estimates Cook Islands will receive € 5.3 million in total for the duration of the four-year protocol.¹⁹

The Cook Islands Government has met considerable resistance from the Opposition Leader (and former Fisheries Minister) Teina Bishop, together with concerned local residents, local fishermen and environmentalists about the EU-agreement. Over 4,000 (out of a total 11,000) local residents have signed a petition lodged to the Government in protest of the agreement raising concerns about the sustainability of a FAD-dependent purse seine fishery, although purse seine vessels from other, larger fleets have fished in Cooks Islands waters for several years. The Government has also been questioned by environmentalists over its intentions to establish a marine reserve, while at the same time establishing a fisheries access agreement with large-scale purse seiners.²⁰ Local fishermen are concerned about overfishing by purse seiners compromising food security. The Opposition Leader has criticised the Government for initialling the SFPA before canvassing the views of local residents. He also alleges the agreement is invalid and illegal as it should have been signed by the Prime Minister, rather than the Secretary of Marine Resources.²¹ A leaked email to the media from a Foreign Affairs official indicates concern over monitoring mechanisms for payments under the agreement, the absence of limits on fishing vessel days in line with existing purse seine management measures and the ability of purse seiners to exceed the tonnage limits set.²² However, the Secretary for Marine Resources has rebutted these concerns and despite criticism in the media, the Prime Minister, Henry Puna, with the backing of Cabinet, continue to support the agreement.

In the past, the EU has also established FPAs with Solomon Islands and Kiribati. However, the Implementing Protocol for both FPAs are no longer in force, with Solomon Islands' expiring in 2012 and Kiribati, in 2015. One of the primary reasons Solomon Islands opted not to renew the protocol in 2012 related to the EU's refusal to incorporate a fishing day limit into the FPA in line with the PNA's Vessel Day Scheme (VDS). The EU has been a long-standing opponent to the VDS. Concerns have also been raised that the fees payable by the EU under FPAs are considerably lower on a \$/day fished basis than the minimum benchmark price established by PNA. Without

PNA members maintain a firm position that VDS will not be placed by a quota management system

In October 2015, the Cook Islands and EU initialled a sustainable fisheries partnership agreement for four Spanish purse seiners

Despite widespread opposition, Cook Islands Government continues to support the fisheries agreement with the EU



protocols in place with Kiribati and Solomon Islands, the EU purse seine fleet would be confined to fishing in the Eastern high seas of the WCPFC Convention Area (403 days/year), although it is understood that the vessels withdrew from the region when the protocol with Kiribati was not renewed.²³

Solomon Islands' MSC fisheries assessment progresses favourably

On 31 March, the draft certification report for Marine Stewardship Council (MSC) certification of the Solomon Islands purse seine and pole and line skipjack and yellowfin tuna fishery was published, following a 12 month assessment by the certifying body, MRAG Americas. The certification covers five purse seiners (free-school and anchored FAD sets) and two pole and line vessels owned by Tri Marine's National Fisheries Development Ltd. (NFD), which operate within Solomon Islands' archipelagic waters and EEZ. NFD's total tuna catch is around 25,000 mt/year, the majority of which is supplied to Soltuna, Solomon Islands' Noro-based tuna processing facility which is also majority-owned by Tri Marine.

The assessment team deemed the fisheries to be well managed, with good stock assessments and harvest strategies in place. Both skipjack and yellowfin stocks are at or above target reference points (MSC Principle 1 – Target Species). They found that environmental impacts are minimal given low volumes of by-catch, low levels of interaction with endangered, threatened or protected (ETP) species, no adverse impacts on habitat and minimal impacts on the ecosystem (MSC Principle 2 - Ecosystem). Overarching legislation and regulation affecting target stocks and ecosystems are well developed (MSC Principle 3 – Management System). Hence, a draft recommendation has been made by the assessors that the fisheries receive MSC certification, but subject to five conditions. Within five years of the certification, reference points and harvest control rules need to be developed and implemented for skipjack and yellowfin. Greater transparency in national-level decision-making processes is also required.²⁴

Following publication of the draft certification report, a 30-day public comment period commenced which ended on 2 May. The assessment team must now review the report in light of any stakeholder comments received and, if need be, revise scores and scoring justification. After doing so, the Final Report and determination will be published (anticipated in late May). Provided scores remain largely unchanged and there are no objections lodged to the Final Report and determination, the fishery will become MSC certified and products meeting MSC's Chain of Custody (traceability) requirements will be eligible to carry the MSC's eco-label. If objections are lodged and cannot be resolved internally by the certifying body, client (Tri Marine) and objecting stakeholder, the assessment will proceed to independent adjudication. A final outcome on the certification would then be expected to be delayed by a further 2-3 months.

Tri Marine has entered its Solomon Islands fisheries into MSC certification in response to growing demand for certified-sustainable tuna products from customers, particularly in Australia, New Zealand and Europe. The company is hopeful the certification will be finalised by July 2016.²⁵ An MSC assessment of Tri Marine's US purse seine fishery (free-school sets) for skipjack and yellowfin within the Western and Central Pacific Ocean is also nearing completion, with the Final Report and determination due to be published in the next few weeks.²⁶

*The draft
certification
report
recommends
Solomon Islands
purse seine
and pole and
line fisheries
for MSC*

*Tri Marine
hopes to
officially
obtain MSC
certification by
July*

TUNA INDUSTRY

Purse seine bycatch utilisation in Pacific Island transshipment ports

The utilization of purse seine bycatch that is unloaded during transshipment in Pacific Island country ports is a relatively small, but important aspect of transshipment that provides benefits to PICs. The ports of Majuro, Tarawa, Pohnpei, Rabaul and Honiara have hosted the largest volumes of transshipment activity in the WCPO, roughly one million tonnes in total in recent years.²⁷ The utilization of purse seine bycatch (rainbow runner, oceanic triggerfish and others), as well as that of small target tunas, including those damaged during fishing or freezing operations, can provide various benefits to Pacific Island locations where transshipment takes place.

Activities relating to utilization of these segments of the purse seine catch are usually unrecorded and are for the most part unregulated. Recent estimates have put the total annual volume of bycatch and undersized or damaged target tunas that are unloaded for local consumption in the five major transshipment ports at between 1,000 to 1,500 tonnes.²⁸ Cash or barter transactions with vessel captains, crews, middlemen and others creates a “grey economy” that can provide seasonal employment and income to the participants, as well as an additional protein source for consumers. On the negative side, unregulated transfer of bycatch from fishing vessels may have some detrimental social impacts relating to women trading sex for fish, as well as food safety issues.

The various means of unloading, distributing, marketing and otherwise disposing of this unwanted (by the vessel) catch depends on a variety of factors, some of which are unique to the port concerned. In Majuro for example, the local preference for reef fish means that brine frozen bycatch and unwanted tunas have a very limited local market. By comparison, the estimated 600+ tons unloaded annually in Solomon Islands finds a ready market in an urban population that includes a large number of low wage earners and a large central market in close proximity to transshipping activities in Honiara. In Rabaul and Pohnpei the apparent suppression of or lack of interest in regularized marketing has resulted in back-door ‘leakage’ that nevertheless finds its way to local consumers by a variety of means. One of the main concerns in Tarawa has been competition with local fishermen that has been addressed in the past by allowing only one marketer of unloaded bycatch and designating certain areas on the atoll that are off-limits to its marketing.

There are several hurdles to improving the benefits to PICs from bycatch and small tuna unloaded in transshipment ports, not the least of which is a lack of data on these activities at almost every level. In spite of most transshipment ports being in or near urban areas, these locations are small on even a regional scale and are relatively isolated from potential markets for value-added products. The loining plant in Majuro for example identified high freight costs to world markets for its fish meal as one of the major factors that make the product only marginally profitable.

Currently, the further development of reliable supply chains to local markets are also hindered by several factors, including the impacts of FAD bans which can lower bycatch volumes and changing fishing conditions that can alter transshipping patterns amongst the ports concerned. At least one organization, ISSF, has undertaken studies on a global basis to address some of these issues and has funded one pilot project in the region to help identify means by which benefits to PICs can be increased²⁹. It is clear, however, that ‘one size will not fit all’ situations and this needs to be kept in mind when regulatory or other controls on unloaded bycatch are considered.

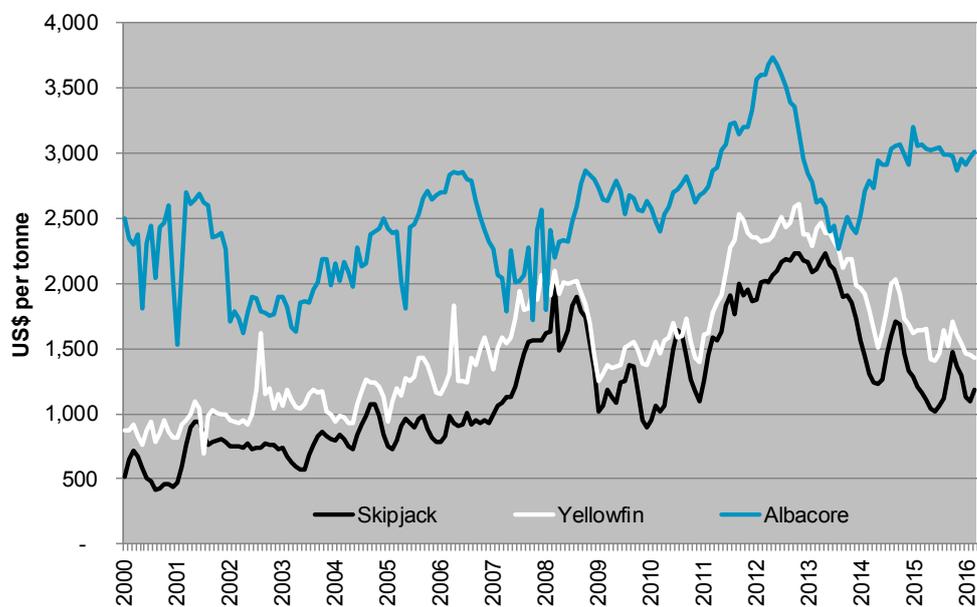
Purse seine bycatch utilization can provide economic and food security benefits to Pacific Islanders in transshipment ports

Purse seine bycatch utilization is largely unrecorded and unregulated

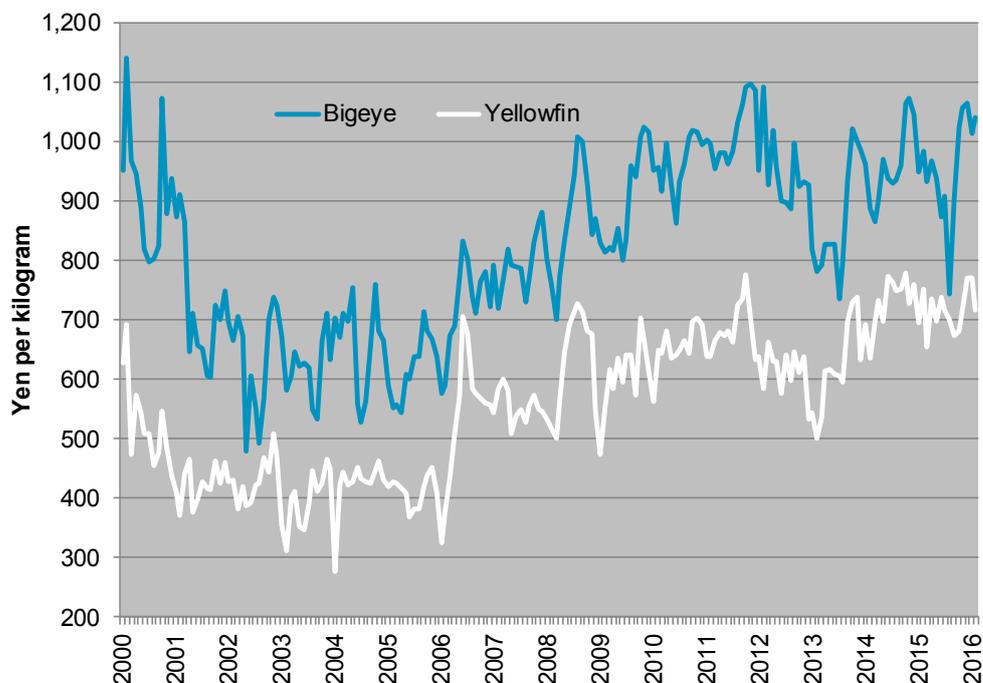
‘One size will not fit all’ for bycatch utilization which needs to be considered when developing regulatory and other controls

TUNA PRICE TRENDS³⁰

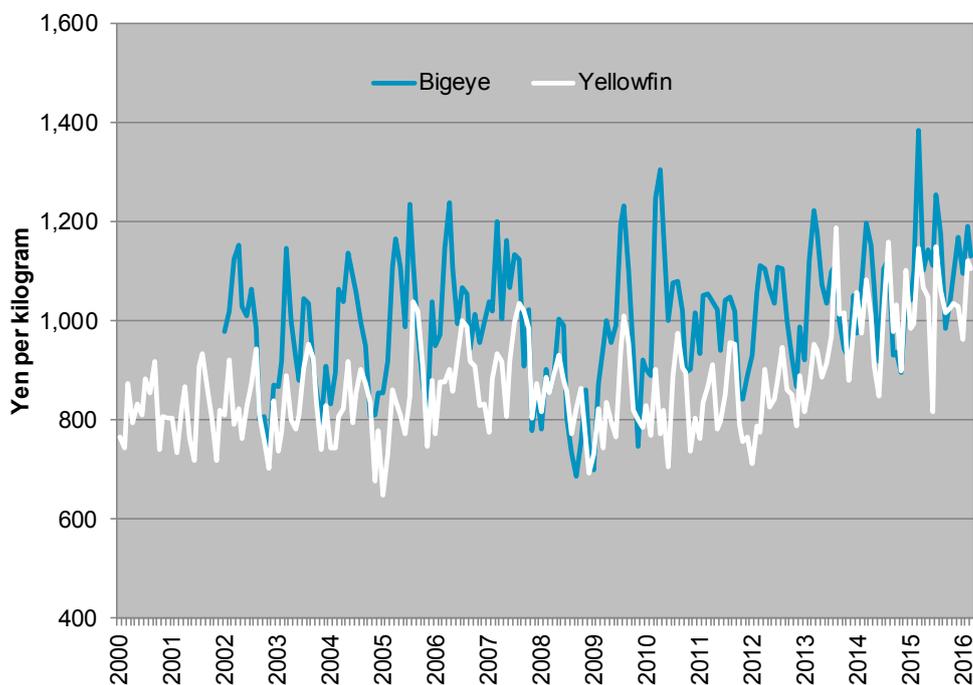
Bangkok canning-grade prices to March 2016³¹



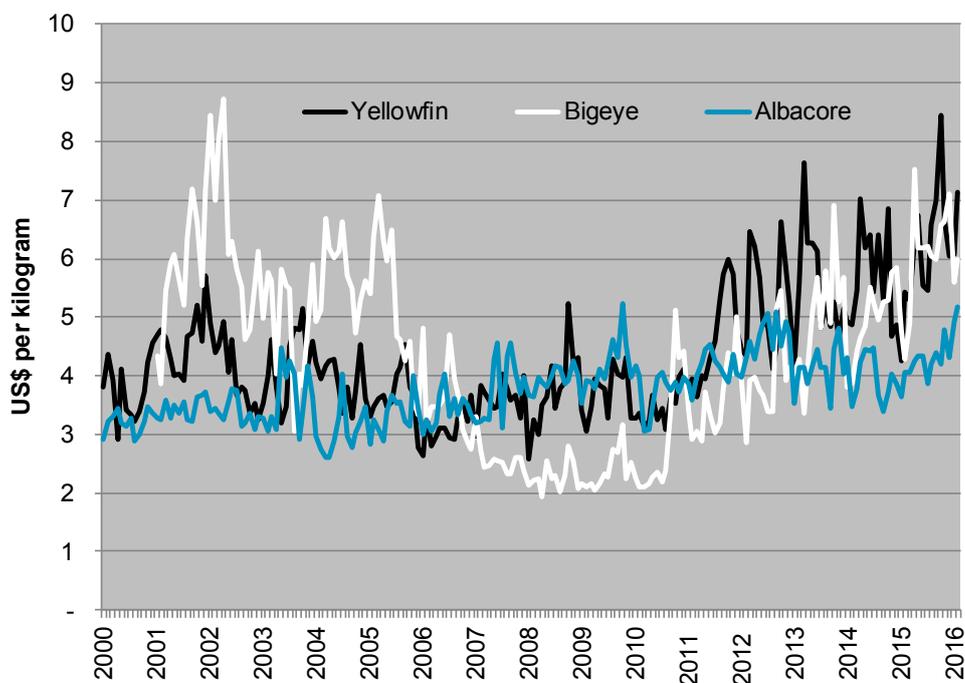
Japan frozen sashimi prices (ex-vessel, Japanese ports) to February 2016³²



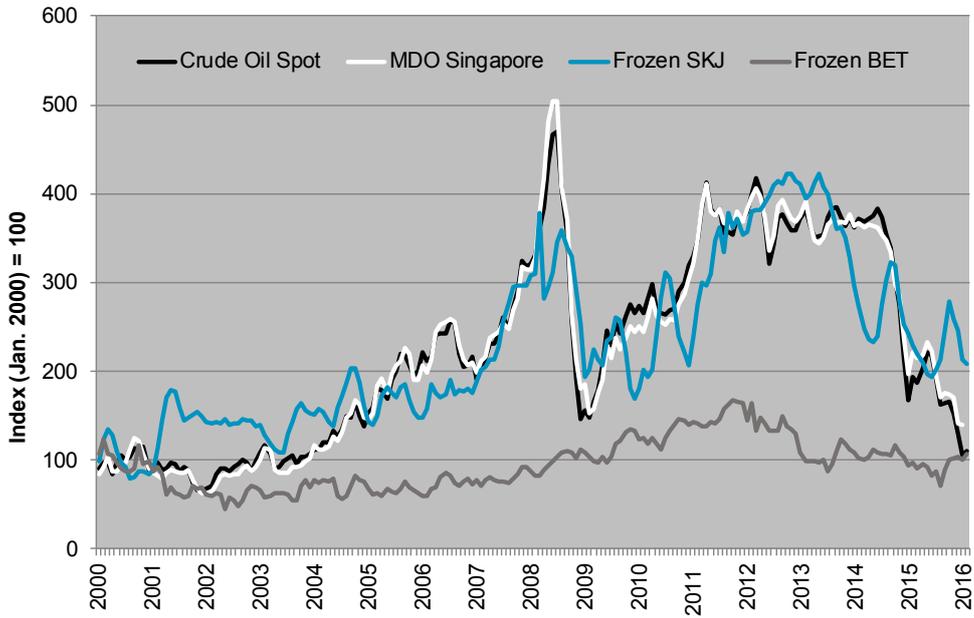
Japan fresh sashimi prices (origin Oceania) to March 2016³³



US imported fresh sashimi prices to February 2016³⁴



Crude oil, canning-grade frozen skipjack (SKJ) and frozen bigeye (BET) price index to February 2016³⁵



¹ Prepared for the FFA Fisheries Development Division by Dr Liam Campling, School of Business and Management, Queen Mary University of London, Dr Elizabeth Havice, University of North Carolina at Chapel Hill and Mike McCoy, independent consultant, all Consultant Fisheries Trade and Market Intelligence Analysts, Fisheries Development Division, FFA. Desktop publishing by Antony Price. The authors would like to thank Mike Batty for his input on an earlier draft of this briefing. The contents of this briefing (including all analysis and opinions) are the responsibility of the authors and do not necessarily reflect the positions or thinking of the FFA Secretariat or its Members.

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¹⁵ Industry source, pers.comm.

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