

Port State Measures to combat IUU fishing

The role of the FAO and the EU

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Année académique 2016-2017
Master en droit

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A special thank you to Professor Philippe Gautier for his time and for his guidance.
A warm thank you also to my best friend, Ms H  l  ne Webb, who assisted me all along the elaboration of this project.

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1. Introduction

The purpose of this Master's thesis is to analyse the role of the Food and Agriculture Organization of the United Nations (FAO) and the role of the European Union (EU) in fighting illegal, unreported and unregulated (IUU) fishing through Port State Measures (PSM). It is of great interest in terms of both international environmental law and international law of the sea to do research on IUU fishing because it is a global threat to sustainable fisheries and to the management and conservation of fisheries resources and marine biodiversity. In addition to these environmental issues, IUU fishing also raises several economic and social concerns. It is therefore a subject which has already been discussed by many authors especially in the Anglo-Saxon world. However, the particularity of this thesis in comparison to previous research is its main focus on the role of the FAO and of the EU in the conception and implementation of binding Port State Measures (PSM).

To develop this subject, we will start by raising awareness on IUU fishing (2.) by first defining the three core elements of the IUU concept separately (2.1.). We will then analyse the various consequences related to IUU fishing, namely in terms of environmental, economic and social repercussions (2.2.). Moreover, we will study the role of flags of convenience in that matter (2.3.), before analysing IUU fishing as a transnational organised crime (2.4.) and elaborating on the measures currently available to address IUU fishing (2.5.). We will then get to the heart of the subject of this thesis which is twofold: first, a detailed analysis of the 2009 FAO Agreement on PSM to Prevent, Deter and Eliminate IUU Fishing (3.), and second, an in-depth study of the European Council Regulation No 1005/2008 on IUU Fishing (4.), which will cover a discussion on whether this legal instrument is compatible with general international law (4.3.) including international trade law (4.4.), before ending this thesis with a general conclusion (5.).

The value and objective of this Master's thesis will be to provide answers to four main questions. Firstly, "Are port State measures the most effective policies for national and international authorities to combat IUU fishing activities?". Secondly, "Is the PSM Agreement sufficiently clear and precise to prevent, deter and eliminate IUU fishing?". Furthermore, "Is the European Council Regulation on IUU Fishing consistent with existing international instruments and measures to combat IUU fishing?". Finally, "Are the market-related measures set out in the IUU Regulation compatible with World Trade Organization (WTO) agreements?".

2. IUU fishing

2.1. Definition of IUU fishing

The term IUU fishing originated in the work of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) and was first formally used during the Commission's sixteenth session in 1997¹. Four years later, the FAO Committee on Fisheries adopted the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU)² which, in its third section, describes separately the three core elements of IUU fishing. It is important to note that the IPOA-IUU is a non-binding instrument and that it thus considered as *soft law*. The term *soft law* can be defined as “normative provisions contained in non-binding texts”³. Although some scholars⁴ believe that the IPOA-IUU gives more a description rather than a definition of IUU fishing, it is the closest thing to a definition that is currently available. It has since then been referred to in the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing⁵ and adopted by the European Council Regulation 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing⁶.

Illegal fishing specifically refers to fishing which is “conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations”⁷. It also constitutes fishing which violates the laws, regulation, and conservation and management measures adopted by a fishing vessel's flag State, or which generally violates national laws or international obligations of cooperating States to relevant RFMOs. This includes the following activities: harvesting prohibited species; using banned fishing gear; catching more than the set quota; and fishing without a licence⁸. In addition,

¹ CCAMLR, (1997), “Report of the sixteenth meeting of the Commission XVI”, available at www.ccamlr.org/en/ccamlr-xvi, consulted on February 21, 2017.

² FAO, (2001), *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU)*, Rome, FAO.

³ SHELTON, D., (2000), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford, Oxford University Press.

⁴ EDSON, W., (2001), “The International Plan of Action on Illegal Unreported and Unregulated Fishing: The Legal Context of a Non-Legally Binding Instrument”, in *The International Journal of Marine and Coastal Law*, p. 620; PALMA, M. A., TSAMENYI, M., EDSON, W., (2010), *Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing*, Leiden, Martinus Nijhoff, p. 37.

⁵ Article 1 (e), FAO, (2009), *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA)*, Rome, FAO.

⁶ Article 2, Council Regulation (EC) No. 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, *OJL 286/I*.

⁷ Section 3.1.1., IPOA-IUU, *op. cit.*

⁸ PEW CHARITABLE TRUSTS (PEW), (2013), “FAQ: Illegal, Unreported and Unregulated Fishing”, in *PEW Research & Analysis*, available at www.pewenvironment.org/news-room/fact-sheets/faq-illegal-unreported-and-unregulated-fishing-85899500819, consulted on February 21, 2017.

illegal fishing involves activities such as poaching into the exclusive economic zones (EEZs) and inshore areas by foreign fishing vessels⁹ and the use of destructive fishing methods including explosives¹⁰.

Unreported fishing refers to fishing activities “which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations”¹¹ or any similar lack of reporting or misreporting to RFMOs. Examples of unreported fishing include the practice of fishers keeping two logs: an official log for the inspectors and a “confidential” log for the owner. Fishers may also falsely record vessel locations or offload fish at ports with low regulatory and inspections standards, also called ports of convenience (PoC)¹². Subsection 3.2.2. IPOA-IUU concerns fishing activities which are unreported or misreported in contravention of the reporting procedures of a relevant RFMO. The wording “in contravention” implies that the State in question is bound by the RFMO’s measures, from which follows that “insofar as the State has not adopted the reporting procedures in its national law (in which case subsection 3.2.1 IPOA-IUU would apply), it is committing a violation of its international obligation *vis-à-vis* the RFMO, thereby making the fishing activities illegal”¹³. Indeed, if the State has not enacted legislation, the fisherman, national of that State, who has not complied with the rules of the RFMO but has complied with the local laws, will be considered as having conducted IUU fishing, nevertheless. However, “it is the State with jurisdiction, not the individual fishing vessel, that is committing the violation of international obligations”¹⁴. Therefore, some authors believe that the only way for another State to prevent the vessel from carrying out IUU fishing activities is by “a countermeasure which is legally directed at the State, but practically affects the fishing vessel”¹⁵. Due to the fact that there are doctrinal debates as to the admissibility of countermeasures by non-injured States, Article 21 of the Fish Stocks Agreement (FSA) attempts to avoid this issue by allowing member States of a relevant RFMO to board and inspect ships of non-members. However, this is restricted

⁹ DOULMAN, D.J., (2003), “Global overview of IUU fishing and its impacts on national and regional efforts to manage fisheries sustainability: The rationale for the conclusion of the 2001 FAO International Plan of Action”, Report of the Expert Consultation on Fishing Vessels Operating Under Open Registries and Their Impact on Illegal, Unreported and Unregulated Fishing, Miami, Florida, United States of America, 23-25 September 2003, in *FAO Fisheries Report No. 722*, p. 29.

¹⁰ DRAMMEH, O. K. L., (2000), “Illegal, unreported and unregulated fishing in small-scale marine and inland capture fisheries”, Expert Consultation, on Illegal, Unreported and Unregulated Fishing Organized by the Government of Australia in Cooperation with FAO, Sydney, Australia, 15-19 May 2000, in *FAO Fisheries Report No. 666*, p. 1.

¹¹ Section 3.2.1., IPOA-IUU, *op. cit.*

¹² ALEXEY, V., (2001), *Trawling in the Mist: Industrial Fisheries in the Russian Part of the Bering Sea*, Traffic International, Cambridge, p. 55.

¹³ THEILEN, J T., (2013), “What’s in a Name? The Illegality of Illegal, Unreported and Unregulated Fishing”, in *The International Journal of Marine and Coastal Law*, p. 541.

¹⁴ *Ibidem*, p. 545.

¹⁵ *Ibidem*.

to States party to the FSA, which makes it difficult to enforce international obligations related to conservation and protection of fish stocks.

Unregulated fishing is a broader term which includes fishing “conducted by vessels without nationality”¹⁶, or those flying the flag of a State not party to a RFMO within the jurisdiction of that RFMO, or more generally fishing in a manner which contravenes the conservation and management measures of that RFMO. This also includes fishing in areas where there are no applicable conservation or management measures, and “where such activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law”¹⁷. Moreover, to evade internationally agreed conservation and management rules, “the owners of the fishing vessels “re-flag” or register their vessels in, and fly the flags of, States that are not members of RFMOs”¹⁸. In the latter case, “the States that offer their flags to such vessels are generally referred to as “flags of convenience” (FoCs) or “open-registry” States”¹⁹. Furthermore, the fishing vessels that fly the flag of such States are often categorised as “free riders”²⁰. We will later cover the issue of flags of convenience (2.3.). While not all unregulated fishing explicitly violates the law, it is typically carried out as a means of circumventing the law. Indeed, firstly, those engaging in unregulated fishing often violate the law in other ways such as when not complying with shipping and labour regulations. Secondly, subsection 3.4. IPOA-IUU affirms that “notwithstanding paragraph 3.3, certain unregulated fishing may take place in a manner which is not in violation of applicable international law, and may not require the application of measures envisaged under the International Plan of Action”.

Note that “under international law, a country is not bound by the decisions of an RFMO to which it does not belong”²¹. As a result, RFMO rules apply only to states that are RFMO members. Hence, “vessels flagged to states that are not members, including vessels flying flags of convenience, are unregulated in RFMO waters”²² and “although RFMO member countries can apply some sanctions on uncooperative non-member countries, for example trade restrictions and import bans of certain types of fish products, the lack of control over non-member state fleets is an enormous loophole in the regional fisheries management scheme”²³. These considerations

¹⁶ Section 3.3.1., IPOA-IUU, *op. cit.*

¹⁷ Section 3.3.2., IPOA-IUU, *op. cit.*

¹⁸ SODIK, D. M., (2009), “Post-LOSC Legal Instruments and measures to address IUU Fishing”, in *Asian Yearbook of International Law*, p. 76.

¹⁹ BALTON, D. A., (2004), “Dealing with the bad actor’s of ocean fisheries”, Paper Submitted to the IUU Workshop, n. 13, 19-20 April 2004, in *Organization for Economic Co-operation and Development (OECD) Publications*, p. 2.

²⁰ SODIK, D.M., (2009), *op. cit.*

²¹ www.savethehighseas.org/publicdocs/rfmo.pdf, *Deep Sea Conservation Coalition*, consulted on Mai 9, 2017.

²² *Ibidem.*

²³ *Ibidem.*

imply not only that, “RFMOs are entirely dependent on the good faith efforts of their member states”²⁴ but also that “even where RFMO member countries do enforce the rules, ship owners are free to transfer their vessels to flags of convenience in order to circumvent restrictions”²⁵.

In view of the above comments, illegal, unreported and unregulated fishing activities raise similar legal issues such as the enforcement of national law and the enforcement of international obligations. Some authors believe that both unreported and unregulated fishing are subcategories of illegal fishing²⁶. This would explain why the IPOA-IUU only speaks of IUU fishing as a whole and not in terms of its individual elements. It goes without saying that understanding the term IUU fishing is useful to gaining a full picture of the issue itself. However, on the one hand, “treating IUU fishing as a comprehensive category can complicate policy solutions – the legislative and policy solutions to illegal fishing differ from those addressing unreported or unregulated fishing”²⁷. On the other hand, accepting that what is meant by IUU fishing is illegal fishing is a precondition for the enforcement – in the technical sense – of those provisions being violated, which implies that “only by acknowledging the illegality can effective measures to combat overfishing be taken”²⁸. In this regard, some scholars believe that it might be helpful to differentiate between the two forms of illegal fishing – violation of national law and violation of international obligations – rather than the different elements of IUU fishing.

2.2. Environmental, economic and social consequences of IUU fishing

The magnitude of IUU fishing has made it a serious global threat not only on marine ecosystems and on global food security, but also on local economies, state governance, local communities and legitimate fishers. It is self-evident that developing a precise picture of the size and scope of IUU fishing is a challenge given the clandestine nature of the practice. Nevertheless, various studies have attempted this difficult task. A 2008 study has estimated that the annual global IUU fishing catch was “between 11 – 26 million tonnes”²⁹, which has been estimated between “\$10 – 30 billion

²⁴ *Ibidem*.

²⁵ *Ibidem*.

²⁶ PALMA, M.A., *et al.*, (2010), *op. cit.*, pp. 44-47; BAIRD, R., (2004), “Illegal, Unreported and Unregulated Fishing: An Analysis of the legal, economic and historical factors relevant to its development and persistence”, in *Melbourne Journal of International Law*, p. 299, 302.

²⁷ PHELPS BONDAROFF, T. N., REITANO, T., VAN DER WERF, W., (2015), “The Illegal Fishing and Organized Crime Nexus: Illegal Fishing as Transnational Organized Crime”, in *The Global Initiative Against Transnational Organized Crime and The Black Fish*, p. 13, available at www.academia.edu/29824021/The_Illegal_Fishing_and_Organized_Crime_Nexus_Illegal_Fishing_as_Transnational_Organized_Crime, consulted on February 21, 2017.

²⁸ THEILEN, J.T., (2013), *op. cit.*, p. 544.

²⁹ PEW, (2013), “How to End Illegal Fishing”, in *PEW*, p. 1, available at www.pewenvironment.org/newsroom/reports/how-to-end-illegal-fishing-85899522612, consulted on February 21, 2017, citing AGNEW, D. J., PEARCE, J., PRAMOD, G., PEATMAN, T., WATSON, R., BEDDINGTON, J. R., PITCHER, T. J., (2009),

(USD)”³⁰. Moreover, it is estimated that “\$1.6 billion in seafood enters Europe annually, and that approximately 50% of all seafood sold in Europe has illegal origins”³¹. Regarding the global fish population, a United Nations’ FAO’s 2014 report found that 90.1%³² of the world’s fish stocks were fully exploited or over-exploited. In this regard, it is vital to stress the fact that the consequences of destabilising marine ecosystems are far reaching, extending well beyond global oceans which cover 71%³³ of our planet. A 2006 study by the National Oceanic and Atmospheric Administration in the United States noted that illegal fishing conducted in the northeastern United States represented a 108% increase over five years which is in line with other sources that suggest increases in IUU fishing off the coast of Africa and in Asia³⁴.

In addition to increased pressure on fish populations and marine ecosystems, clandestine fishing interferes with conservation efforts by confounding assessments of fish stocks. Indeed, by creating uncertainty regarding total catch levels, assessing fish stocks becomes more difficult and it potentially biases fisheries management in favour of “allowing more fishing than would otherwise be considered sustainable”³⁵. It also goes without saying that the impact of IUU fishing on marine ecosystems and marine wildlife has been severe³⁶, especially because IUU fishers seek to avoid regulations for the protection of marine species. As a matter of fact, not only do IUU fishers ignore catch quotas, but they also ignore “other regulations designed to reduce bycatch, allow for population recovery, and protect vulnerable non-target species such as marine mammals, birds, sharks and turtles”³⁷. IUU fishers are also known to actively engage in dangerous, damaging,

“Estimating the Worldwide Extent of Illegal Fishing”, in *PLoS One*, p. 4, available at

www.journals.plos.org/plosone/article?id=10.1371/journal.pone.0004570, consulted on February 21, 2017.

³⁰ AGNEW, D.J., *et al.*, (2009), *op. cit.*, provide an estimate of \$23.5 billion; SANDER, K., LEE, J., HICKEY, V., MOSOTI, V. B., VIRDIN, J., MAGRATH, W. B., (2014), “Conceptualizing Maritime Environmental and Natural Resources Law Enforcement – The Case of Illegal Fishing”, in *Environmental Development*, vol. 11, p. 114; DOULMAN, D. J., (2012), “Challenging Times for Sustainable Fisheries: Combatting Illegal, Unreported and Unregulated Fishing”, in *Vertic Brief*, p. 3; NELLEMAN, C., HENDRIKSEN, R., RAXTER, P., ASH, N., MREMA, E., (2014), “The Environmental Crime Crisis – Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources”, A UNEP Rapid Response Assessment, Nairobi and Arendal, in *United Nations Environment Programme and GRID-Arendal*, p. 19, available at www.pfbc-cbfp.org/news_en/items/Environmental-Crime-en.html, consulted on February 21, 2017.

³¹ DOULMAN, (2012), *op. cit.*, p. 2; LIDDICK, D. R., (2011), *Crimes Against Nature: Illegal Industries and the Global Environment*, Santa Barbara, California, USA, Praeger, p. 82, citing Environmental Justice Foundation (EJF), (2005), “Pirates and Profiteers: How Pirate Fishing Fleets are Robbing People and Oceans”, in *Reports by the Environmental Justice Foundation*, London, p. 6, available at www.ejfoundation.org/report/pirates-profiteers, consulted on February 21, 2017.

³² FAO, (2014), “The State of the World Fisheries and Aquaculture: Opportunities and Challenges”, in *FAO Publications*, Rome, p. 4, available at www.fao.org/3/a-i3720e.pdf, consulted on February 21, 2017.

³³ NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (NOAA), “Ocean & Coasts”, available at www.noaa.gov/ocean.html, consulted on February 21, 2017.

³⁴ STANDING, A., (2008), “Improving Governance to Combat Illegal Fishing in Africa”, in *Stop Illegal Fishing*, available at www.stopillegal fishing.com/news-articles/improving-governance-to-combat-illegal-fishing-in-africa-5, consulted on February 21, 2017; MILBURN, A., (2012), “The Escalation of Illegal Fishing in Asia”, in *Canadian Naval Review*, vol. 8, No. 1, pp. 33-34.

³⁵ AGNEW, D.J., *et al.*, (2009), *op. cit.*

³⁶ SANDER, K., *et al.*, (2014), *op. cit.*

³⁷ PHELPS BONDAROFF, T.N., *et al.*, (2015), *op. cit.*, p. 17.

and prohibited fishing practices such as dynamite fishing³⁸, and the use of prohibited gear such as driftnets³⁹. Apart from these activities which have serious negative impacts on the marine environment, “older and more polluting vessels employed by some IUU fishers have greater impact on the environment than other vessels”⁴⁰.

An examination of the economic costs of IUU fishing may encourage policy-makers to fight against it. Firstly, when fishers in coastal States suffer losses from reduced catches, this in turn impacts coastal States through the reduction of revenue sources such as landings fees, licencing fees, taxes, duties, and other levies⁴¹. This reduction of revenue can have significant impacts on governance. A striking example for the latter assertion is the case of Somali piracy⁴². The explosion of piracy emerged following the collapse of the Somali State, following which the latter was unable to govern its territory along with its waters, allowing pirates and armed groups to flourish. It has been documented that unemployment, lack of education, poverty, hunger and, above all, trawlers engaging in IUU fishing were the main drivers of piracy. Indeed, “illegal fishing and extreme poverty are the main factors that made fishermen and youths get involved in piracy as an alternative way of getting their daily bread”⁴³. It goes without saying that IUU fishers took considerable advantage of the collapse of Somali government which “may already have had disastrous effect on the sustainable management of Somali marine resources”⁴⁴. As a result, “the case of Somali piracy demonstrates that the weakening of state governance by IUU fishers and widespread illegal fishing can have far reaching ecological and economic consequences”⁴⁵.

Secondly, income generated by IUU fishing does not contribute to the overall economy. As noted by an inspector for the Marine Area Command New South Wales Police Force and Australian National Centre for Ocean Resources and Security, “financial gains do not find their

³⁸ NJOROGE, G., (2014), “Blast Fishing Destroying Tanzania’s Marine Habitats”, in *BBC Africa (Tanzania)*, available at www.bbc.com/news/world-africa-29049264, consulted on February 21, 2017.

³⁹ MARINE RESOURCES ASSESSMENT GROUP LTD. (MRAG), (2005), “IUU Fishing on the High Seas Impacts on Ecosystems and Future Science Needs”, Final Report, in *MRAG Reports*, London, UK, p. 53, available at www.marinemegafauna.org/wp-content/uploads/2013/02/IUU-Fishing.pdf, consulted on February 21, 2017.

⁴⁰ PHELPS BONDAROFF, T.N., *et al.*, (2015), *op. cit.*, p. 17, citing SANDER, K., *et al.*, (2014), *op. cit.*

⁴¹ SANDER, K., *et al.*, (2014), *op. cit.*, p. 113; HUGHES, J., (2011), “The Piracy-Illegal Fishing Nexus in the Western Indian Ocean”, Strategic Analysis Paper, in *Future Directions International*, p. 2.

⁴² UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC), (2010), “The Globalization of Crime: A Transnational Organized Crime Threat Assessment”, in *United Nations Publications*, Vienna, p. 11, available at https://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf, consulted on February 21, 2017, cited in UNODC, (2011), “Transnational Organized Crime in the Fishing Industry, Focus on: Trafficking in Persons, Smuggling of Migrants, Illicit Drug Trafficking”, in *United Nations Publications*, Vienna, p. 121, available [www.unodc.org/documents/human-trafficking/Issue Paper - TOC in the Fishing Industry.pdf](http://www.unodc.org/documents/human-trafficking/Issue_Paper_-_TOC_in_the_Fishing_Industry.pdf), consulted on February 21, 2017; KEMP, T., (2014), “The Link Between Illegal Fishing and Piracy”, in *CNBC Crime*, USA, available at www.cnbc.com/id/102013207, consulted on February 21, 2017.

⁴³ www.oceansbeyondpiracy.org/publications/somali-perspectives-piracy-and-illegal-fishing#_ftn2, *Somali Perspectives on Piracy and Illegal Fishing*, consulted on Mai 4, 2017.

⁴⁴ UNODC, (2010), “The Globalization of Crime: A Transnational Organized Crime Threat Assessment”, *op. cit.*, p. 193, cited in UNODC, (2011), *op. cit.*, p. 121.

⁴⁵ PHELPS BONDAROFF, T.N., *et al.*, (2015), *op. cit.*, p. 22.

way back to the fishers and crew. The funds are generally not reinvested in the industry in a legitimate manner; rather they provide finance for organized criminals to continue operations and finance other IUU fishing activities or facilitate diversified criminal activities within their syndicate's scope of reach"⁴⁶. As a matter of fact, IUU fishing is in close association with a range of illicit, dangerous and predatory practices such as extortion, laundering, bribery, but also human trafficking, drug dealing and even murder⁴⁷. We will later cover the issue of IUU fishing as a transnational organised crime (2.4.). Furthermore, by destroying marine ecosystems, IUU fishing can impact other industries unrelated to fishing such as ecotourism. For example, the shark-related tourism alone contributed \$800 million to the Bahamian economy over the past 20 years and whale shark diving in Thailand generated almost \$100 million in 2003⁴⁸. Finally, the following example illustrates the overall economic scale and impact of IUU fishing: in 2006, a high-level international High Seas Task Force estimated that sub-Saharan Africa lost an estimated \$1 billion a year due to IUU fishing, which was equal to a quarter of its annual fisheries export⁴⁹.

The social consequences of IUU fishing cannot be neglected as IUU fishing not only threatens food security but also harms legitimate fishers. Firstly, the fisheries sector represents a significant global industry and fish is an important source of protein for the world's population⁵⁰. In 2014, the FAO estimated that fisheries and aquaculture assured the livelihoods of 10% to 12% of the world population, representing more than 800 million people⁵¹. Moreover, developing countries are a major participant in this industry, providing 50% of global fish trade, which "contributes a greater amount to their net earnings from foreign exchange than meat, tea, bananas and coffee combined"⁵². Therefore, "the decimation of fish populations due to IUU fishing puts all of these people's livelihoods at risk, in addition to threatening the food security of billions"⁵³. Secondly, IUU fishers obviously have a competitive advantage over legitimate operators, "in so far as they are not constrained by regulations or quotas or other limitations to their operations such

⁴⁶ MCNULTY, J., (2013), "Western and Central Pacific Ocean Fisheries and the Opportunities for Transnational Organized Crime: Monitoring, Control and Surveillance (MCS) Operation Kurukuru", in *Australian Journal of Maritime and Ocean Affairs*, vol.5, No. 4, p. 147.

⁴⁷ VAN DIJK, J., TOINE, S., (2014), "Transnational Organized Crime Networks Across the World", in ALBANESE, J., REICHEL, P., *Transnational Organized Crime: An Overview from Six Continents*, United States, Sage, p. 21.

⁴⁸ PEW, (2011), "Million-Dollar Reef Sharks", in *PEW*, available at www.pewtrusts.org/en/research-and-analysis/reports/2011/05/02/milliondollar-reef-sharks, consulted on February 21, 2017.

⁴⁹ WELDEMICHAEL, A. T., (2012), "Maritime Corporate Terrorism and its Consequences in the Western Indian Ocean: Illegal Fishing, Waste Dumping and Piracy in Twenty-First-Century Somalia", in *Journal of the Indian Ocean Region*, vol. 8, No. 2, p. 113.

⁵⁰ FAO, (2010), "State of the World Fisheries and Aquaculture", in *FAO Publications*, Rome, pp. 3-4.

⁵¹ FAO, (2014), *op. cit.*, p. 6.

⁵² OECD, (2013), "Evading the Net: Tax Crime in the Fisheries Sector", in *OECD Publishing*, Centre for Tax Policy and Administration, p. 11.

⁵³ PHELPS BONDAROFF, T.N., *et al.*, (2015), *op. cit.*, p. 19.

as environmental or sanitary standards”⁵⁴. This means that IUU fishers are able to “maintain lower operating costs than their legitimate competitors”⁵⁵. IUU fishers are also able to acquire larger quotas and to access restricted fishing areas otherwise unavailable to legitimate operators⁵⁶. Furthermore, IUU fishers sell their products in the same markets as legitimate fishers which disrupts markets, lowering the price for legitimate fishers who suffer therefrom. Note that laundering illegal fish by mixing legal and illegal fish is called “transshipment”. This process enables IUU fishers to assume the legal documentation for the illegal fish⁵⁷. Given these pressures, a vicious circle may occur, forcing legitimate fishers to engage in IUU fishing to remain competitive or simply to remain in business. In other words, “unfair competition from illicit operations may pressure legitimate outfits to cheat as well”⁵⁸.

2.3. Role of flags of convenience in IUU fishing

According to the International Transport Workers Federation (ITF), a vessel operating under a flag of convenience (FoC) or “open registry” is one “that flies the flag of a country other than the country of ownership”⁵⁹. In fact, a majority of vessels are operating under foreign flags which does not necessarily mean that they breach the law. Nonetheless, FoC are increasingly used as a means not only to apply “very low wages, poor-on board conditions, inadequate food and clean drinking water, long periods of work without proper rest, leading to both stress and fatigue”⁶⁰ but also to avoid national and international regulations designed to manage fisheries and conserve fish stocks.

Under Article 94, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), “every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flags”. In other words, flag States have the obligation to adopt enforcement mechanisms to monitor and secure compliance with a range of international rules and standards on marine environment protection against vessels listed in their registry, including ship standards, working conditions and fisheries management.

⁵⁴ *Ibidem*.

⁵⁵ *Ibidem*, citing WILLOCK, A., LACK, M., (2006), “Follow the Leader: Learning from Experience and Best Practice in Regional Fisheries Management Organizations”, in *WWF International and TRAFFIC International*, available at www.wwf.eu/?69480/Follow-the-leader-Learning-from-experience-and-best-practice-in-regional-fisheries-management-organizations, consulted on February 21, 2017.

⁵⁶ GRIGGS, L., LUGTEN, G., (2007), “Veil over the nets (unravelling corporate liability for IUU fishing offences)”, in *Marine Policy*, vol. 31, pp. 159–168, cited in ÖSTERBLOM, H., (2014), “Catching Up on Fisheries Crime”, in *Conservation Biology*, vol. 8, No. 3, p. 877.

⁵⁷ STILES, M. L., KAGAN, A., SHAFTEL, E., LOWELL, B., (2013), “Stolen Seafood: The Impact of Pirate Fishing on Our Oceans”, in *Oceana*, p. 18, available at www.oceana.org/sites/default/files/reports/Oceana_StolenSeafood.pdf, consulted on February 21, 2017.

⁵⁸ LIDDICK, D.R., (2011), *op. cit.*

⁵⁹ ITF, (2009), “Flags of Convenience Campaign”, in *ITF Transport Sector*, available at www.itfglobal.org/flags-convenience/index.cfm, consulted on February 22, 2017.

⁶⁰ *Ibidem*.

Moreover, the International Tribunal for the Law of the Sea (ITLOS) rendered in 2015 an Advisory Opinion (Case No. 21) in which it states that “sanctions applicable to involvement in IUU fishing activities must be sufficient to deter violations and to deprive offenders of the benefits accruing from IUU fishing activities”⁶¹. In accordance with Article 9, paragraph 6, of UNCLOS, “a State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State” and “upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation”. However, in practice, the flag of a vessel certifies its nationality which is not necessarily the nationality of the vessel’s owners, which in turn makes it very difficult to enforce the laws designed to protect the maritime environment. Indeed, FoC States are “a haven for vessels owners who do not wish to comply with costly regulations, whether it applies to fisheries management, taxation, conservation measures or crew conditions”⁶².

Moreover, FoCs are easy, quick and cheap to acquire. Firstly, re-flagging a ship can cost around \$1,000⁶³ (mostly in legal fees), take as little as 24 hours⁶⁴, and vessels do not need to dock to acquire a new flag. Secondly, vessels can re-flag and change names several times in a season, a practice called “flag-hopping”, which enables the ship owners to take advantage of minimal regulations, cheap registration fees, low or no taxes, and freedom to employ cheap labour from the global labour market. Lastly, not only do shell companies, joint ventures, and hidden owners, make it extremely difficult to track individual vessels, and identify and penalise the real owners of vessels that fish illegally, but also the registries themselves are, in many cases, not even run from the country of the flag. The ITF believes there should be a “genuine link” between the real owner of a vessel and the flag the vessel flies, as required by Article 91 UNCLOS. However, the absence of a genuine link between a flag State and a ship does not give another State the right to refuse the recognition of the nationality of the ship. Indeed, ITLOS held in *M/V Saiga (No. 2)* that “the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States”⁶⁵.

⁶¹ Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, para. 138.

⁶² EJF, (2009), “Lowering the Flag – Ending the use of Flags of Convenience by Pirate Fishing Vessels”, in *EJF Publications*, London, p. 7, available at www.ejffoundation.org/sites/default/files/public/Lowering%20the%20flag.pdf, consulted on February 22, 2017.

⁶³ AGNEW, D. J., BARNES, C. T., (2004), “Economic Aspects and Drivers of IUU fishing: Building a Framework, in *OECD Publications*, Fisheries Committee, Directorate for Food, Agriculture and Fisheries, AGR/FI/IUU, p. 17.

⁶⁴ For example, Honduras: www.flagsofconvenience.com/pdf_files/Honduras.pdf, consulted on February 22, 2017.

⁶⁵ *M/V “SAIGA” (No. 2)* (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10, para. 83.

FoCs facilitate IUU operators' efforts to maximise profits by reducing operating costs, providing anonymity and making prosecution of wrongdoers almost impossible, and undermining RFMO efforts to combat IUU fishing. Firstly, besides the fact that FoCs allow vessel owners to avoid paying for fishing licences and to install vessel monitoring systems (VMS), FoCs also make it possible to avoid regulations requiring insurance, labour laws, crew training and the purchase of safety gear. Secondly, while in theory any State or RFMO which suspects a vessel of IUU fishing violations is advised to report the vessel to the flag State, which under Article 21 of the United Nations Fish Stocks Agreement is responsible for addressing violations, in practice, FoC States rarely appear to do so. In addition, the true beneficial owners of an IUU fishing vessel can easily be hidden by FoC registries. Indeed, besides a report by the OECD that identified 33 countries as having registration requirements that could facilitate anonymity, including several assuring no disclosure of beneficial ownership⁶⁶, it is a matter of fact that "many registries, despite their international obligations, do not appear to investigate or take into consideration whether a fisheries vessel has a history of IUU fishing"⁶⁷. Moreover, the current lack of a global system by which fishing vessels are identified and monitored, as well as the significant number of fishing vessels operating without International Maritime Organization (IMO) numbers, further facilitate IUU operators' efforts to change and hide vessel identities. In fact, a recent research on RFMO blacklisted vessels found that a major reason for low visibility of IUU vessels is due to significant gaps in documentation and communication of data⁶⁸.

Lastly, not only are gaps in the international framework, particularly UNCLOS, the reasons why IUU/FoC vessels are not forbidden to fish in the high seas, even if an RFMO is in place, but also penalty options against IUU/FoC vessels that undermine existing fisheries arrangements are so limited that they "reduce the potential effectiveness of sanctions"⁶⁹. In theory, contracting States can board and inspect fishing vessels operating in an area of the high seas governed by the RFMO, as long as there is sufficient evidence to suspect that particular vessel of engaging in IUU fishing⁷⁰, and the inspecting State can also follow up enforcement and pursue sanctions. In practice, however, following Article 21 of the UN Fish Stock Agreement, such ability to board and prosecute a vessel is dependent on the permission of the relevant flag State which can easily undermine this process.

⁶⁶ OEDC, (2003), "Ownership and Control of Ships", in *OEDC Publishing*, Maritime Transport Committee, pp. 23-34.

⁶⁷ EJF, (2009), *op. cit.*, p. 10.

⁶⁸ PEW Environment Group, (2010), "Port State Performance: Putting Illegal, Unreported and Unregulated Fishing on the Radar", in *PEW Publications*, p. 13.

⁶⁹ LE GALLIC, B., COX, A., (2005), "An economic analysis of illegal, unreported and unregulated (IUU) fishing: Key drivers and possible solutions", OECD, Paris, in *Marine Policy*, vol. 30, No. 6, p. 690.

⁷⁰ Article 21, UNGA, (1995), Fish Stock Agreement, New-York, UNGA.

Nonetheless, States can bring actions against FoC before international courts. Indeed, Part XV of UNCLOS contains a system for the peaceful settlement of disputes between the Parties to the Convention. Possible fora are the International Court of Justice (ICJ), ITLOS or an arbitral Tribunal. According to Article 304 of UNCLOS, a State can claim reparation for damage caused by an internationally wrongful act of another State. Note that “if and to the extent the practise of granting of Flags of Convenience to fishing boats is found to be in violation of international law, States with open registries may be financially liable for the damage caused through IUU fishing or their vessels”⁷¹. Particularly relevant in that matter is the Advisory Opinion (Case No. 21) that ITLOS rendered in 2015. Indeed, the Tribunal considers that “the liability of the flag State arises from its failure to comply with its “due diligence” obligations concerning IUU fishing activities conducted by vessels flying its flag in the exclusive economic zones of (...) States”⁷² members of an RFMO. Therefore, the Tribunal takes the view that “the flag State is not liable if it has taken all necessary and appropriate measures to meet its “due diligence” obligations to ensure that vessels flying its flag do not conduct IUU fishing activities in the exclusive economic zones (...) of States”⁷³ members of an RFMO.

FoCs may fail to fulfil their flag State responsibilities because they are either unwilling or unable to oversee and monitor the vessels that bear their flag. Undoubtedly, “many States lack the resources or capacity to undertake adequate fisheries monitoring and enforcement”⁷⁴, yet, “in the absence of these measures, FoC vessel owners can operate without any regulation or control”⁷⁵. Examples of requirements that are often lacking to enable effective monitoring by flag States include good infrastructure and communication between ship registries, the government and other regulatory bodies. What makes it even more complicated is the fact that some open ship registries are run by private companies based in other countries⁷⁶. Remaining up to date with legal changes can constitute a difficult task for administrations as “international rules affecting vessels are often complex, and changes will only be effective if they are actually incorporated into domestic law – with violations followed up by prosecution and effective penalties”⁷⁷.

In addition, flag States are also responsible for all support, refuelling and transshipment vessels (“reefers”) within their registry. Reefers are commonly known for allowing fishing vessels

⁷¹ EJF, (2009), *op. cit.*, p. 28.

⁷² Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p. 4, para. 146.

⁷³ *Ibidem*, para. 148.

⁷⁴ EJF, (2009), *op. cit.*, p. 14.

⁷⁵ *Ibidem*.

⁷⁶ For example, Liberia’s Register which is run by the U.S. based Liberian International Shipping and Corporate Registry (LISCR), available at www.liscr.com, consulted on February 22, 2017.

⁷⁷ EJF, (2009), *op. cit.*, p. 14.

to “tranship their catches, restock on food and bait, refuel and re-crew without having to make the lengthy (and costly) journey to port”⁷⁸. However, transshipment is often illegal and reefers will often load a combination of legal and illegal catches, mixing the two as part of an effective fish laundering process that gets fish into the marketplace⁷⁹. As long as reefers are able to support IUU fleets and facilitate the access of illegal fish to market, it will undoubtedly be extremely difficult to achieve adequate enforcement. Although the IPOA-IUU calls, under section 48, for flag States to ensure that none of their vessels re-supply vessels engaged in IUU fishing or tranship fish to or from these vessels, FoC States often demonstrate little capacity and/or will to do so, especially because the IPOA-IUU is a non-binding recommendation. Therefore, addressing flag State responsibilities, including banning the registry of reefers with FoCs, would be highly effective. However, there is resistance to an international law to this effect because of the role reefers play in some distant water legal fisheries. Furthermore, a 2009 analysis⁸⁰ of the 14 most significant FoC States regrettably revealed that EU companies (especially Spain) and East Asian companies (especially Taiwan, Honduras and Panama) dominate the ownership of FoC vessels.

Even though assessments of the total income FoC States gain from registering foreign-owned vessels is complex, as many of them are not transparent with either the costs associated with registering a vessel nor with the total number of vessels registered, a 2002 report for the FAO and a study conducted by the Marine Resources Assessment Group (MRAG) on behalf of the UK’s Department for International Development (DfID) both indicate a low income generation for open registries. Indeed, while the report for the FAO estimated at US\$3,083,100⁸¹ (4.9% of the total revenue gained from registering all types of vessels) the revenue gained from fishing vessels, the MRAG estimated that 20 FoC registries were obtaining total combined revenues of approximately US\$3.5 million⁸² each year. The US\$3-4 million values found by both studies are ludicrous when compared to total global economic losses to IUU fishing, which a 2009 report, mentioned earlier, estimated at between US\$10 and 23.5 billion each year⁸³. On these grounds, it makes little economic sense for FoC States to facilitate IUU fishing. This is without even mentioning the fact that FoC vessels are characterised by the lowest standards of working conditions, including incarceration, unsafe working conditions, and physical abuse, earning some

⁷⁸ EJF, (2009), *op. cit.*, p. 15.

⁷⁹ EJF, (2007), “Pirate Fish on your Plate”, in *EJF Publications*, London, p. 7, available at www.ejffoundation.org/sites/default/files/public/pirate_fish_on_your_plate_ejf.pdf, consulted on February 22, 2017.

⁸⁰ EJF, (2009), *op. cit.*, Table 3, p. 19.

⁸¹ SWANN, J., (2002), “Fishing Vessels Operating under Open Registries and the Exercise of Flag of State Responsibilities – Information and Options”, in *FAO Publication*, Fisheries circular No. 980, Rome, p. 20.

⁸² MRAG, (2005), “Review of Impact of Illegal, Unreported and Unregulated Fishing on Developing Countries”, in *MRAG Reports*, London, UK, an overview of this project is available at www.mrag.co.uk/experience/review-impacts-illegal-unreported-and-unregulated-iuu-fishing-developing-countries, consulted on February 22, 2017.

⁸³ AGNEW, D.J., *et al.*, (2009), *op. cit.*

of them the nickname “floating coffins”. Fortunately, as international efforts to address IUU fishing increase, FoC States will potentially suffer economic losses as a result of trade sanctions and new regulations such as the new IUU regulation. We will later analyse the European Council Regulation No 1005/2008 in depth (4.). Nonetheless, it is worth mentioning that since its implementation in January 2010, FoC States face being listed as non-cooperative, resulting in loss of access to the largest market in the world in terms of both volume and value, a market consuming over €55 billion worth of seafood in 2005⁸⁴. Therefore, “the potential loss of export revenues from the EU market could be devastating for national fishing operators and wider fisheries revenue (taxes etc.)”⁸⁵. The IUU regulation focuses on four key areas, all of which have direct relevance for any FoC State that relies on the EU market for fisheries exports. These are: the catch certification scheme; the EU IUU “blacklist”; control over EU national; and identification and listing of non-cooperating third countries, more commonly known as Flags of Non-Compliance (FONC), in other words States that “while not having open registry are nonetheless notorious for failing to enforce flag State obligations – particularly in high seas and distant water fisheries”⁸⁶.

2.4. IUU fishing as a transnational organised crime

When defining IUU fishing previously, we have seen that the majority of IUU fishing violates or contravenes some law, regulation or agreement, or the spirit of these legal instruments. As a result, IUU fishing is often categorised as an environmental crime. Some scholars think a step further and believe that, due to its transnational and highly organised nature, IUU fishing “constitutes a form of transnational organized crime”⁸⁷. To understand this statement, one must divide IUU fishers into three categories⁸⁸: the ignorant; the opportunist; and the habitual or repeat offender, which most accurately meets definitions of transnational organised crime. Criminologist Jay Albanese classifies transnational organised crime into the three following categories: illegal activities that somehow transcend international borders; transnationally mobile criminal organisations; and the extension of illegal governance across international borders⁸⁹. The link between IUU fishing and organised criminal syndicates was highlighted on the following occasions: in the December 4, 2009, United Nations General Assembly Resolution 64/72 on sustainable fisheries⁹⁰; at the

⁸⁴ EUROFISH AND INTERNATIONAL, ERNST & YOUNG, COGEA, (2009), “Study on the supply and marketing of fishery and aquaculture products in the European Union – Executive Summary”, in *DG Mare*, p. 3.

⁸⁵ EJF, (2009), *op. cit.*, p. 24.

⁸⁶ *Ibidem*, p. 11.

⁸⁷ PHELPS BONDAROFF, T.N., *et al.*, (2015), *op. cit.*, p. 37.

⁸⁸ Fishery Value Chain explored in OECD, (2013), *op. cit.*, p. 20.

⁸⁹ ALBANESE, J. S., (2011), “Transnational Organized Crime in Europe”, in *Transnational Organized Crime: An Overview from Six Continents*, Oxford, United Kingdom, Oxford University Press, p. 3.

⁹⁰ Paragraph 61, UNGA Resolution 64/72, December 4, 2009, cited in UNODC, (2011), *op. cit.*, pp 8-9.

meeting on the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS); and at the meeting of the Conference of Parties to the UN Convention Against Transnational Organized Crime in 2008⁹¹. Recently, beyond the mere fact of being connected with organised crime, there is also a growing recognition of illegal fishing as a serious and highly organised crime. This trend is quite visible through the following statements: the Salvador Declaration of the Twelfth United Nations Congress on Crime Prevention and Criminal Justice in 2010 identified illegal fishing as a “new trend in crime”⁹², and, more explicitly, the 2013 Code of Conduct Concerning the Repression of Piracy, Armed Robbery Against Ships, and Illicit Maritime Activity in West and Central Africa listed IUU fishing in its list of “transnational organized crime in the marine domain”⁹³, a list which included many well-established transnational criminal activities, such as money laundering, human trafficking, illegal dumping, maritime terrorism and hostage taking.

Furthermore, in some cases the existence of IUU fishing directly gives rise to further offences, as illegal fishers seek to evade taxes and launder the proceeds of their crimes. Indeed, “tax crime in the fisheries sector covers a broad range of offences, including the evasion of import and export duties on fish and fish products transported across national borders; fraudulent claims for VAT repayments; failure to account for income tax on the profits from fishing activity; and evasion of income tax and social security contributions and false claims for social security benefits by fishers and their families”⁹⁴. Other vulnerabilities in the fisheries sector have been observed by tax administrations and other government authorities as enabling tax crime to be committed more readily and perpetrators to escape detection. These include offshore jurisdictions, the use of FoCs, and resale of fishing vessels and assets. Firstly, it is “easier for fishing companies to hide their ownership structure, shelter income or disguise the destination of funds through the use of entities located in offshore jurisdictions which do not engage in effective exchange of information”⁹⁵ because “fish are caught in open waters and shipped or transhipped to be landed and processed in a wide range of countries, with substantial sums paid to intermediaries, agents and service providers in other countries who co-ordinate the sale and processing of fish and maintenance of

⁹¹ UNITED NATIONS, (2008), “Report of the Conference of Parties to the United Nations Convention Against Transnational Organized Crime on its Fourth Session”, in *United Nations Reports*, Vienna, October 8-17.

⁹² UNODC, (2010), “Activities of the United Nations Office on Drugs and Crime to Address Emerging Forms of Crime”, *CTOC/COP/2010/3*, August 4, 2010, at paras 162 and 290; UNODC, (2011), *op. cit.*, p. 96.

⁹³ ECONOMIC COMMUNITY OF CENTRAL AFRICAN STATES (ECCAS), ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS), THE GULF OF GUINEA COMMISSION (GGC), (2013), “Code of Conduct Concerning the Repression of Piracy, Armed Robbery Against Ships, and Illicit Maritime Activity in West and Central Africa (Yaoundé Code of Conduct)”, available at www.imo.org/OurWork/Security/WestAfrica/Documents/code_of_conduct%20signed%20from%20ECOWAS%20site.pdf, consulted on February 23, 2017.

⁹⁴ OECD, (2013), *op. cit.*, p. 26

⁹⁵ *Ibidem*, p. 31.

fishing vessels”⁹⁶. Secondly, fishing vessel owners who register in open registries often do so to avoid compliance with more robust and heavily enforced regulation in their own country and use “holding companies in offshore jurisdictions which do not engage in effective exchange of information, in order for the identity of owners to remain hidden”⁹⁷. Lastly, “the lack of transparency in the fisheries sector, caused by the use of flags of convenience of offshore companies, means that where fishing vessels and other capital assets are re-sold, transactions may go unreported or the sale price may be under-reported for tax purposes”⁹⁸, which can result in substantial amounts of tax revenue loss to countries.

2.5. Actions to address IUU fishing by national states, IOs and RFMOs

A recognition of the global threat presented by IUU fishing and the true nature of this problem is vitally necessary. Indeed, one of the greatest constraints in our capacity to respond effectively to the challenge of IUU fishing has been the slow recognition of the seriousness of the issue⁹⁹. Therefore, “a major policy shift is required if the problem is going to be successfully addressed, which will need to be underpinned by a global strategy that addresses all aspects of a necessary response, including prevention and monitoring measures, protection of endangered species and marine environments, as well as efforts to effectively prosecute those criminal actors found to be perpetuating IUU fishing at an organized level”¹⁰⁰.

Firstly, it might be helpful to develop a legal framework to combat IUU fishing as a transnational organised crime. For the latter recommendation to be effective, it is important not only to strengthen and amend international regulations, such as including a protocol to the UNTOC concerning environmental crime with specific provisions relating to IUU fishing, but also to strengthen and create domestic legislation designed to combat IUU fishing as a criminal activity. It is crucial to dramatically increase punishments for IUU fishing. For instance, confiscating and destroying vessels can constitute effective deterrents. In addition, sinking illegal fishing vessels guarantees that these vessels will not fish illegally in the future. More importantly, increased monitoring and inspections of fishing operations at ports and at sea is desperately needed, focusing not only on catches but also on “equipment and methods employed, labour standards on board vessels, accounting practices, etc.”¹⁰¹. In this regard, assistance from civil society should not be

⁹⁶ *Ibidem*.

⁹⁷ *Ibidem*.

⁹⁸ *Ibidem*, p. 33.

⁹⁹ ALBANESE, J. S., (2001), *Transnational Crime in the 21st Century: Criminal Enterprise, Corruption, and Opportunity*, Oxford, United Kingdom, Oxford University Press, p. 34.

¹⁰⁰ PHELPS BONDAROFF, T.N., *et al.*, (2015), *op. cit.*, p. 67.

¹⁰¹ *Ibidem*, p. 72.

undermined. As a matter of fact, non-governmental organisations (NGO) such as Sea Shepherd Global¹⁰² or the Black Fish's Citizen Inspector Network¹⁰³, both engaging in direct enforcement and monitoring of laws, have sometimes substantial outcomes and are especially vital when state actors are unwilling or unable to provide assistance.

Secondly, it is fundamental that States stop issuing FoCs to fishing vessels and fulfil their obligations as responsible flag States. In this regard, not only shall all flag States ratify all existing international conventions concerning fisheries responsibilities, but they also shall ensure that vessels seeking to enter their registries have no history of IUU fishing. Moreover, a wider use of trade sanctions by RFMOs to address vessels that engage in IUU fishing and an entry ban by port States of fish from vessels flying FoCs, are both hugely effective deterrents.

Lastly, since IUU fishing persists because of its profitability, it is also relevant to highlight the OECD's identification of the most cost effective ways for national and international authorities to address the IUU problem, grouped according to their point of impact on the economic operation of IUU fisheries¹⁰⁴. This includes measures aimed at reducing potential revenues and increasing both operating and capital costs. Firstly, examples of measures to reduce revenues from IUU fishing include: banning imports; introducing catch and trade document schemes; providing appropriate incentives for joining RFMOs; and improving compliance with current national and international obligations through better Monitoring, Control and Surveillance (MCS) capabilities, including broader cross country cooperation. Secondly, examples of measures to increase operating costs of IUU fishing include: eliminating tax havens; restricting accessibility to goods and services for IUU operators such as fuel; increasing penalties and sanctions; and applying the OECD Convention to combat bribery of foreign public officials. Finally, examples of measures to increase capital costs of IUU vessels include: restricting banking laws' use of IUU vessel capital as collateral; making flag States legally liable for damage resulting from the lack of appropriate maintenance; improving macroeconomic conditions in countries supplying low cost crew; and enforcing minimum vessel standards through port State controls.

Besides the formerly discussed actions to address IUU fishing available to national States, IOs and RFMOs, this Master's thesis focuses on tackling the problem of inconsistent and weak port State controls which permit the offloading of IUU fish at ports. Indeed, strong port controls and well-maintained black lists can empower ports to bar the entry of known IUU fishing vessels, a tool which can deter IUU fishers by increasing the cost of their operations, for example, by

¹⁰² For more information: www.seashepherdglobal.org, consulted on February 27, 2017.

¹⁰³ For more information: www.theblackfish.org/cin/, consulted on February 27, 2017.

¹⁰⁴ OECD, (2005), "Why Fish Piracy persists: The Economics of Illegal, Unreported and Unregulated Fishing", in *OECD Publishing*, Executive Summary, p. 17.

forcing them to seek out more remote and thus more costly ports. Instruments such as the legally binding Agreement of Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA) adopted by the FAO in November 2009 addresses this problem. Indeed, this international legal instrument “if signed and ratified by FAO members, will be effective in reducing IUU fishing”¹⁰⁵. Focusing on the key role of port States, it requires among other things denial of port entry and/or access to port services to vessels that have been engaged in IUU fishing. It represents a significant step forward in the global effort to combat IUU fishing. The following chapter will therefore be dedicated to an in-depth analysis of the PSMA.

3. The 2009 FAO Port State Measures Agreement

This chapter is dedicated to a detailed analysis of the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing (hereinafter PSM Agreement). We will first develop the evolution of port State measures and the process for the adoption of the binding PSM Agreement (3.1.) before elaborating on its objective and its core elements (3.2.). We will then consider the possible constraints and challenges to the implementation of the PSM Agreement (3.3.) before discussing issues of implementation in light of the recent entry into force of this international fisheries instrument (3.4.). Finally, we will explain the importance of incorporating trade-related measures into legislation implementing the PSM Agreement (3.5.).

3.1. Path to the adoption of a binding PSM Agreement

Port State measures have been developed due to an expanding global concern since the 1970s about the environment and the need for all countries to cooperate towards a sustainable use of resources. The point of departure of most binding and voluntary international fisheries instruments, such as those adopted by the FAO, is the 1982 United Nations Convention on the Law of the Sea (UNCLOS), a landmark instrument which provides the international legal basis for the protection and use of living and non-living resources of the world’s oceans. Article 218 UNCLOS “deals with port State enforcement jurisdiction, which refers to the port State's powers under which it may investigate foreign ships in its ports for alleged discharge violations, committed on the high seas or in the national waters of another State and, where the evidence warrants, take legal proceedings for the discharge violations”¹⁰⁶. Although, port State measures

¹⁰⁵ FLOTHMANN, S., VAN KISTOWSKI, K., DOLAN, E., LEE, E., MEERE, F., ALBUM, G., (2010), “Closing Loopholes: Getting Illegal Fishing Under Control”, in *Science*, vol. 328, p. 1235.

¹⁰⁶ BANG, H.S., (2009), “Port State Jurisdiction and Article 218 of the UN Convention on the Law of Sea”, in *Journal of Maritime Law & Commerce*, Vol. 40, No. 2, p. 296.

are addressed under Article 218 UNCLOS, this Article “does not provide for port State measures to be used as fisheries management tool to promote rational conservation and management or as a basis for framing sanctions against fishing vessels that have engaged in illicit activities”¹⁰⁷. The introduction of port State measures as a management tool started with the adoption of the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (1993 FAO Compliance Agreement) and progressively evolved to the point where an international binding agreement on port State measures was concluded in 2010 before entering into force on 5 June 2016.

In 1983, the General Assembly, in its resolution 38/161, *inter alia*, “welcomed the establishment of a special commission that should make available a report on environment and the global problematique to the year 2000 and beyond, including proposed strategies for sustainable development”¹⁰⁸. The commission later adopted the name World Commission on Environment and Development and published in 1987 a report¹⁰⁹ defining the concept of sustainable development by highlighting the need to reconcile economic growth on the one hand and environmental and social issues on the other hand. In 1991, the FAO/Netherlands Conference, known as the Den Bosch Conference, developed sustainable development concepts in relation to, *inter alia*, the fisheries sector, which was new, forward-looking, and went beyond traditional notions of conservation and management. The following year, the United Nations Conference on Environment and Development (UNCED), or Earth Summit, adopted not only Agenda 21, which, *inter alia*, addressed fisheries in respect to sustainable development, but also the Rio Declaration, consisting of 27 principles relating to the environment. Principle 15 codified for the first time at the global level the precautionary approach, which indicates that lack of scientific certainty is no reason to postpone action to avoid potentially serious or irreversible harm to the environment.

In 1998, the WTO Appellate Body, in the *Beef Hormones* case, highlighted the fact that “the status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges”. While the Appellate Body did not take a position on this question, it stated that “whether it (the precautionary principle) has been widely accepted by Members as a principle of general customary international law appears less than clear”. On the one hand, identifying whether one should speak about a precautionary approach or a precautionary principle is somewhat an abstract question. On the other hand, it is a very

¹⁰⁷ DOULMAN, D. J., SWAN, J., (2012), “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”, in *FAO Fisheries and Aquaculture Circular*, No. 1074, Rome, FAO, p. 1.

¹⁰⁸ www.sustainabledevelopment.un.org/milestones/wced, *Sustainable Development Knowledge Platform*, consulted on Mai 5, 2017.

¹⁰⁹ WCED, (1987), “Report of the World Commission on Environment: Our Common Future”, in *UN Documents*, available at www.un-documents.net/our-common-future.pdf, consulted on March 15, 2017.

important question because, according to Article 38(1)(c) of the Statute of the International Court of Justice, the ICJ, whose function is “to decide in accordance with international law such disputes as are submitted to it”, shall apply “the general principles of law recognized by civilized nations”. Particularly relevant in that matter is the following paragraph of the Advisory Opinion (Case No. 21) that ITLOS rendered in 2015: *The Chamber observes that the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law. (...) So does the following statement in paragraph 164 of the ICJ Judgment in Pulp Mills on the River Uruguay that “a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute” (...). This statement may be read in the light of article 31, paragraph 3(c), of the Vienna Convention, according to which the interpretation of a treaty should take into account not only the context but “any relevant rules of international law applicable in the relations between the parties”*. Hence, both the ICJ and ITLOS consider it to be a precautionary approach, rather than a principle, that is gradually growing into international custom. In the meantime, “the precautionary approach is modest as a rule of conduct and a rule of adjudication”¹¹⁰. Firstly, “the assessment of serious risk is often difficult to make since such risk may not be well known or discoverable through present-day science”¹¹¹. Secondly, this approach “contains no legal guidance about how to control the environmental risks”. Lastly, since the decision-making process of the precautionary approach essentially involves national policy, international courts, such as the ICJ in the 1997 *Gabcikovo-Nagymaros Project* case, and international tribunals, such as ITLOS in the 2001 *MOX Plant* case, “seem to encounter considerable difficulties with its application to a particular case where application of this approach is at issue”¹¹².

Following the UNCED, an unprecedented number of global and regional fisheries agreements and instruments were concluded, which reflects the growing concern about the unsustainable way in which many of the world’s fisheries had been exploited. In 2002, the World Summit on Sustainable Development (WSSD) adopted the World Summit on Sustainable Development Plan of Implementation (WSSD-POI), which focused on emerging fisheries issues and therefore encouraged the implementation of the ecosystem approach to fisheries management. The Biodiversity Committee on the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic defined this approach as “the comprehensive integrated management of human activities based on the best available scientific knowledge about the ecosystem and its

¹¹⁰ TANAKA, Y., (2012), *The International Law of the Sea*, Cambridge, Cambridge University Press, p. 241.

¹¹¹ *Ibidem*, p. 240.

¹¹² *Ibidem*.

dynamics, in order to identify and take action on influences which are critical to the health of marine ecosystems, thereby achieving sustainable use of ecosystem goods and services and maintenance of ecosystem integrity”¹¹³.

However, the ecosystem approach raises at least two issues. First, since there is no clarity on its normative content, “it seems debatable to what extent this approach will legally constrain States’ behaviour as a rule of conduct”¹¹⁴. Second, since specific measures under the ecosystem approach are to be determined taking various scientific, political, economic and social factors into account, which makes it a matter of national policy, some authors believe that “it will be difficult, if not impossible, for international courts and tribunals to judge the violation of the obligation to apply the ecosystem approach when the application of this approach has been disputed between States”¹¹⁵. Hence, “it appears questionable whether the ecosystem approach can be an independent rule of adjudication”¹¹⁶. Indeed, some authors believe that while the precautionary principle “is a standard feature of modern environmental treaties and must be deemed part of customary international law (...) the ecosystem approach is neither”¹¹⁷. Nonetheless, “it can be observed that international law concerning conservation of marine living resources has acquired a stronger ecological dimension with the emergence of the ecosystem approach”¹¹⁸.

Furthermore, although the WSSD-POI encouraged the development of national and regional plans of action to combat IUU fishing, twenty-five years after the Earth Summit, IUU fishing remains a global threat. In addition, “poor enforcement of port State measures and flag State responsibilities, leading to the creation of ports and flags of ‘non-compliance’, continues to undermine efforts to secure sustainable fisheries”¹¹⁹. The introduction of port State measures as a fisheries management tool began with the conclusion of the 1993 FAO Compliance Agreement¹²⁰, which seeks to enhance the role of the flag States by strengthening control over their flag vessels. Note that the Compliance Agreement entered into force on 24 April 2003. Under this Agreement, when a fishing vessel is voluntarily in the port of a Party to the Agreement and there are reasonable grounds for believing that the vessel has been used for activities that undermine international conservation and management measures, the flag State shall be notified by the port State.

¹¹³ Meeting of the Biodiversity Committee (BDC), Dublin, 20-24 January 2003, Summary Record BDC 2003, BDC/03/10/1-E, Annex 13, p. 1, para. 6.

¹¹⁴ TANAKA, Y., (2012), *op. cit.*, p. 238.

¹¹⁵ *Ibidem.*

¹¹⁶ *Ibidem.*

¹¹⁷ TROUWBORST, A., (2009), “The Precautionary Principle and the Ecosystem Approach in International Law: Differences, Similarities and Linkages”, in *Review of European, Comparative & International Environmental Law*, Vol. 18, No. 1, p. 36.

¹¹⁸ TANAKA, Y., (2012), *op. cit.*, p. 238.

¹¹⁹ DOULMAN, D. J., SWAN, J., (2012), *op. cit.*, p. 5.

¹²⁰ FAO, (1995), *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*, Rome, FAO.

However, it can be observed that the Agreement's provisions are significantly weaker than those found in subsequent instruments. Indeed, the Agreement provides that Parties may make arrangements with port States for investigatory measures to assess whether a vessel has operated contrary to the Agreement's provisions. It goes without saying that "the use of non-binding language in a binding instrument reduces its force and mandatory application"¹²¹. In fact, "this provision creates an imbalance as there is an obligation for the port State Party to cooperate with the flag State, but no reciprocal obligation for the flag State to cooperate with the port State"¹²². In addition, "a salient feature of the Agreement is that it has been accepted by relatively few parties, and that some of the world's most important fishing nations – such as China, Indonesia, India or Thailand – have not yet signed it"¹²³.

In 1995, the FAO Conference adopted the FAO Code of Conduct for Responsible Fisheries¹²⁴, a voluntary instrument which sets international standards and norms for the development, management and utilisation of fisheries and aquaculture resources. Article 8, paragraph 3, of the 1995 FAO Code of Conduct addresses port State duties, that countries are encouraged to apply in a non-discriminatory and transparent manner. However, this Article envisages a passive role for port States in combatting IUU fishing. For instance, port States shall provide assistance to a flag State if and when requested to do so. Therefore, the port State duties of the 1995 FAO Code of Conduct "might be considered rudimentary in terms of their capacity to act as a fisheries management tool"¹²⁵. Nonetheless, there are a few points for which the Code can be readily portrayed as having made important and direct contributions to the improvement of fisheries and aquaculture conservation and management on a global scale. Firstly, "the Code is the first international instrument that took across into the domain of fisheries and aquaculture management the principles of *responsible* and *sustainable* use of renewable aquatic resources"¹²⁶. Secondly, many countries that have developed and implemented National Plans of Action (NPOA) against IUU fishing "have done so in direct response to a pressing need on one hand (i.e. the one of eliminating IUU fishing), and along the lines of a model provided by one of the key Code-related instruments (the IPOA-IUU), on the other"¹²⁷. Lastly, "both the Code and its IPOAs, due

¹²¹ DOULMAN, D. J., SWAN, J., (2012), *op. cit.*, p. 6.

¹²² *Ibidem*.

¹²³ HOSCH, G., (2009), "Analysis of the Implementation and Impact of the FAO Code of Conduct for Responsible Fisheries since 1995", in *FAO Fisheries and Aquaculture Circular*, No. 1038, Rome, FAO, p. 28.

¹²⁴ FAO, (1995), *Code of Conduct for Responsible Fisheries*, Rome, FAO.

¹²⁵ DOULMAN, D. J., SWAN, J., (2012), *op. cit.*, p. 8.

¹²⁶ HOSCH, G., (2009), *op. cit.* p. 77.

¹²⁷ *Ibidem*.

to their universal applicability, form ideal tools to analyse the completeness of management frameworks, identify gaps, and address them in ways suggested by these same instruments”¹²⁸.

Another influential fisheries instrument is the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995 UN Fish Stocks Agreement or UNFSA)¹²⁹, which focuses on long-term conservation and management of some of the world’s major commercial fisheries. This Agreement is extremely important because “it underscores the sovereignty of States over their ports in accordance with international law and provides that a port State has the right and duty to take non-discriminatory measures under international law to promote regional and global conservation and management measures in those areas”¹³⁰. Article 23 of the Agreement indicates the type of measures that a port State may undertake while a vessel is voluntarily in port, such as inspecting documents, fishing gear and catch on board a vessel. Under the same Article, port States may adopt regulations to prohibit landing and transshipment where it has been established that the catch has undermined regional and global conservation and management measures on the high seas.

We shall now focus on one particular group of issues that have arisen with respect to the implementation of the Fish Stocks Agreement: issues relating to the implementation of flag State duties. It is important to underline that, “one of the most contentious achievements of UNFSA was to provide for the possibility of boarding and inspection of fishing vessels on the high seas by states other than the flag state”¹³¹. Note however that “the power to board and inspect is strictly circumscribed by safeguards designed to preserve at all times the right of the flag state to assert its primary jurisdiction”¹³². Despite the aforementioned achievement, “it is evident that not only has the problem of inadequate flag state control not gone away in the context of fisheries, but it continues to increase”¹³³. In that regard, the main problem consists in open registries, as “too often, reflagging is carried out by the nationals of states which have exhausted the resources of their own EEZs or their regional quotas allocated by RFMOs but seek additional quota in other regions through flags of convenience”¹³⁴. Nonetheless, “ultimately, where there has been persistent failure

¹²⁸ *Ibidem*, p. 78.

¹²⁹ FAO and UN, (1995), *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, New-York, USA, UN.

¹³⁰ DOULMAN, D. J., SWAN, J., (2012), *op. cit.*, p. 10.

¹³¹ LODGE, M.W., NANDAN, S.N., (2005), “Some Suggestions Towards Better Implementation of the United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks of 1995”, in *The International Journal of Marine and Coastal Law*, Vol. 20, No. 3-4, p. 363.

¹³² *Ibidem*.

¹³³ *Ibidem*.

¹³⁴ *Ibidem*, p. 364.

by a particular flag state to perform its duties under the 1982 Convention and UNFSA, there remains the possibility of enforcing those duties through recourse to the International Tribunal for the Law of the Sea under Part XV of the 1982 Convention”¹³⁵.

Following the rising international concern about IUU fishing, the FAO Council endorsed in 2001 the non-binding IPOA-IUU, which provides States with a set of comprehensive, effective and transparent measures, including port State measures. For instance, it clarifies that “admission of a vessel to a port refers to access by foreign vessels to ports and offshore terminals for activities such as transshipping and landing catch as well as refuelling and re-supplying”¹³⁶. Moreover, where a vessel has been granted access to port and there is clear evidence that it has engaged in IUU fishing, the IPOA-IUU provides that the port State should not allow the vessel to use the services of the port and should report the matter to the flag State. Indeed, “in the IPOA-IUU, the role of the flag State is given a high profile despite the clear recognition of the sovereignty of the port State over its ports under international law”¹³⁷. Regarding the effectiveness of this fisheries instrument, there is “the presumption that flag States will act upon information concerning IUU fishing by their vessels provided by port States following inspections”¹³⁸. However, “with an estimated 34 flags of non-compliance, accounting for some 15 percent of total flags in the world, there is likely to be a larger number of flag States that would not be interested in addressing instances of reported IUU fishing by their flag vessels”¹³⁹.

In 2002, an Expert Consultation was held at the FAO headquarters to “develop recommendations, focusing on practical fisheries outcomes, leading to the implementation of effective port State measures to combat IUU fishing”¹⁴⁰. The experts, taking inspiration from the practice of the IMO in respect of the merchant fleet, recognised that a memorandum of understanding (MOU) on port State measures “could serve as a cost-effective tool to enhance responsible fisheries management by reducing the incidence of IUU fishing”¹⁴¹. Three years later, the FAO Council endorsed the 2005 FAO Model Scheme on Port State Measures to Combat IUU Fishing (2005 FAO Model Scheme)¹⁴², a non-binding instrument designed not only to promote and reinforce the implementation of the IPOA-IUU but also to serve as a transitory step between the IPOA-IUU and the binding PSM Agreement. This FAO Model Scheme accommodates five

¹³⁵ *Ibidem*, p. 366.

¹³⁶ DOULMAN, D. J., SWAN, J., (2012), *op. cit.*, p. 12.

¹³⁷ *Ibidem*, p. 13.

¹³⁸ *Ibidem*.

¹³⁹ *Ibidem*.

¹⁴⁰ *Ibidem*.

¹⁴¹ *Ibidem*.

¹⁴² FAO, (2007), *Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing*, Rome, FAO.

determinant technical appendixes which focus on the following actions and activities: information to be provided in advance by foreign fishing vessels; port State inspection procedures of foreign fishing vessels; results of port State inspections; training of port State; and information on port State inspections. Consequently, “the purpose of the appendixes is to promote the uniform and harmonized application of the Scheme among countries and to make it easier for foreign fishing vessel masters to comply with port States measures adopted regionally”¹⁴³.

However, as the burden of transmitting information falls on the port State, not all States are currently prepared to implement port States measures. Indeed, in some cases, port States lack the necessary capacity, policy and legal frameworks, and institutional arrangements, which has resulted in PoCs. As a result, not only did the FAO call for extrabudgetary funds to assist the implementation of the FAO Model Scheme but it also “developed a comprehensive training programme, to be delivered globally, taking account of regional fisheries’ needs and differences”¹⁴⁴. Following the previous considerations, the FAO Model Scheme is surely more elaborate than the IPOA-IUU in terms of its focus on PSMs but some authors believe that “its potential success would be limited by its voluntary nature”¹⁴⁵. Additionally, the unsatisfactory results of the Model Scheme were highlighted by several UN resolutions¹⁴⁶ that called on States to negotiate a binding agreement under the auspices of the FAO. This finally led to the conclusion of the binding PSM Agreement which seeks to prevent, deter and eliminate IUU fishing through the implementation of effective PSMs, that may be more stringent if countries desire so.

3.2. Objective and core elements of the PSM Agreement

The objective of the PSM Agreement is to ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems, which can be achieved by fighting against IUU fishing. Therefore, “the PSM Agreement seeks to clarify States’ jurisdiction and to require States – authorised by customary international law – to take appropriate action within their ports to aggressively deter IUU fishing”¹⁴⁷. In UNCLOS, the sovereignty of the coastal State over its land territory and coastal waters is confirmed in Article 2(4) and “as ports lie usually wholly within a State’s territory and fall on that account under its territorial sovereignty, customary international

¹⁴³ DOULMAN, D. J., SWAN, J., (2012), *op. cit.*, p. 16.

¹⁴⁴ *Ibidem*.

¹⁴⁵ KUEMLANGAN, B., PRESS, M., (2010), “Preventing, Deterring and Eliminating IUU Fishing – Port State Measures”, in *Environmental Policy and Law*, 40/6, United Nations Activities, p. 264.

¹⁴⁶ UN General Assembly, (2005), *Resolution A/RES/60/31*, para. 33, 36, 42; UN General Assembly, (2006), *Resolution A/RES/61/105*, para. 33, 39, 42-44.

¹⁴⁷ KUEMLANGAN, B., PRESS, M., (2010), *op. cit.*

law acknowledges in principle full coastal State jurisdiction within ports”¹⁴⁸. In turn, it is the coastal State jurisdiction that “allows a port State not only to deny in principle access but also to prescribe non-discriminatory laws and regulations that determine conditions for the entry into its ports”¹⁴⁹. Indeed, in the *Nicaragua* case, the ICJ ruled that it is “by virtue of its sovereignty that the coastal state may regulate access to its ports”¹⁵⁰. In addition, Article 25(2) of UNCLOS states that “coastal states are empowered to set conditions regarding the admission of foreign vessels to their ports and internal waters and have the right to take steps to prevent the breach of these conditions”¹⁵¹. Hence, “the right to designate only certain ports as being open is not questioned, nor is the right to impose conditions upon entry”¹⁵². While “in practice most ports are open to foreign merchant vessels, the freedom of entry is only a presumption, subject to the coastal state's decision to close its ports for whatever reason and to whichever vessels it chooses”¹⁵³. Indeed, “there is no general right of free access in customary international law”¹⁵⁴. This conclusion is based on “the absence of sufficient evidence for a rule of customary international law amounting to a right of access that limits state sovereignty”¹⁵⁵ and has been acknowledged in the Article 4(1) of the PSM Agreement. In addition, this position is backed by the following two arguments. First, “many states have national legislation permitting them to regulate access to their ports and even to deny it”¹⁵⁶ for various reasons, including illegal fishing. For example, “Canada has at various times closed its ports to fishing vessels of the Soviet Union, the European Community, France, and other states engaged in overfishing”¹⁵⁷. Second, “states have entered into bilateral and multilateral treaties undertaking to open their ports to the ships of the other parties, which presupposes a lack of free access in customary international law”¹⁵⁸. Regarding enforcement jurisdiction, “both under customary international law and under conventional law the port State may exercise enforcement jurisdiction against a foreign vessel in breach of its rules and standards either in port or in its territorial sea”¹⁵⁹. As a result, “under customary international law, a port

¹⁴⁸ MOLENAAR, E.J., (1998), *Coastal State Jurisdiction over Vessel-Source Pollution*, Kluwer Law International, p. 101.

¹⁴⁹ *Ibidem*.

¹⁵⁰ ICJ, (1986), Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States), Merits, Judgment of 27 June 1986, para. 213.

¹⁵¹ WITBOOI, E., (2014), “Illegal, Unreported and Unregulated Fishing on the High Seas: The Port State Measures Agreement in Context”, in *The International Journal of Marine and Coastal Law*, Vol. 29, p. 293.

¹⁵² DE LA FAYETTE, L., (1996), “Access to Ports in International Law”, in *The International Journal of Marine and Coastal Law*, Vol. 11, No. 1, p. 1.

¹⁵³ *Ibidem*, p. 2.

¹⁵⁴ *Ibidem*.

¹⁵⁵ MARTEN, B., (2014), *Port State Jurisdiction and the Regulation of International Merchant Shipping*, Springer, Switzerland, p. 33.

¹⁵⁶ DE LA FAYETTE, L., (1996), *op. cit.*, p. 2.

¹⁵⁷ *Ibidem*, p. 9.

¹⁵⁸ *Ibidem*, p. 2.

¹⁵⁹ BANG, H.S., (2009), *op. cit.*, p. 295.

State has no jurisdiction over activities of a foreign vessel on the high seas”¹⁶⁰. However, under Article 218(1) UNCLOS, “the port State can exercise enforcement jurisdiction over foreign vessels lying in its ports in respect of violations committed either on the high seas or in the national waters of another State”¹⁶¹.

The authors of the PSM Agreement believe that it is through the implementation of effective PSMs that “IUU fishing can be effectively detected and addressed in a powerful and cost-effective manner, even where they occur far out to sea”¹⁶². Indeed, “without an international PSM Agreement, port States may be reluctant to exercise authority over foreign IUU fishing vessels in port if the fishing activity in question takes place outside that port State’s national jurisdiction (such as on the high seas)”¹⁶³. As a result, the PSM Agreement imposes a more stringent and uniform regulatory regime that not only restricts ‘port shopping’, which is the practice carried out by IUU fishers that consists in avoiding ports that impose strict PSMs in favour of PoCs, but also tightens penalties applicable when authorities apprehend IUU fishers. As a matter of fact, “strengthening the authority of the port State is effective because of the commercial nature of the port’s role as the place where fish enter the market”¹⁶⁴. Indeed, the market is a significant economic channel in the IUU fishing industry supply chain. As a result, if all States apply uniform PSMs, PoC will cease to exist and “IUU fishers will be intercepted before they can sell their fish, thus preventing the economic incentives that drive IUU fishing from ever reaching fruition depriving IUU fishers of the profit necessary to continue operating”¹⁶⁵. However, the prerequisite for implementing the PSM Agreement’s provisions is to adopt national legislation because “national laws translate the international obligations of the PSM Agreement, which would otherwise apply only to States, into appropriate national implementation obligations so that rights or obligations are transferred to individuals and can be enforced at national level”¹⁶⁶.

Furthermore, the role of the port State is strengthened throughout the PSM Agreement in three key innovative areas. Firstly, the PSM Agreement provides the following list of uses of the port which must, or may, be denied to fishing vessels: “landing, transshipping, packaging and processing of fish that have not been previously landed and other port services including, inter alia, refuelling and re-supplying, maintenance and dry docking”¹⁶⁷. Secondly, the denial of use of ports is required at three separate points in time: prior to entry into port if a vessel is on an IUU

¹⁶⁰ TANAKA, Y., (2012), *op. cit.*, p. 295.

¹⁶¹ BANG, H.S., (2009), *op. cit.*, p. 295.

¹⁶² DOULMAN, D. J., SWAN, J., (2012), *op. cit.*, p. 29.

¹⁶³ KUEMLANGAN, B., *et al.*, (2010), *op. cit.*

¹⁶⁴ *Ibidem.*

¹⁶⁵ *Ibidem.*

¹⁶⁶ *Ibidem.*

¹⁶⁷ Article 9(6), PSMA, *op. cit.*

Vessel List of an RFMO¹⁶⁸; upon entry into port if, for instance, the vessel does not have a valid authorisation required by its flag State or relevant coastal State¹⁶⁹; and after inspection when there are grounds for believing that a vessel has engaged in IUU fishing or fishing related activities¹⁷⁰. Lastly, the PSM Agreement defines the role of flag States¹⁷¹ not only to strengthen the cooperation between flag States and port States but also because the Preamble of the PSMA recognises that measures to combat IUU fishing should be built on the primary responsibility of flag States.

In the following, we will describe and analyse the essential provisions of the PSM Agreement while focusing particularly on those dealing both with the entry into port and the use of ports. The PSM Agreement is structured into ten parts. While Part 1 “lays the groundwork for the interpretation and application of the Agreement”¹⁷², Parts 2 to 4 provide “step-by-step requirements and procedures for vessels and port States, from the time prior to entry into port of a vessel through the use of ports, inspections and follow-up actions by the port State”¹⁷³.

Article 1 defines key terms which should be included in national law, unless national law is more stringent. As a matter of fact, “all of the terms defined in the Agreement are based on international best practices”¹⁷⁴. However, some terms, such as fishing related activities, port and vessel, “signal a strengthening and broadening of port State measures”¹⁷⁵. Firstly, the definition of ‘fishing related activities’ signals that the PSM Agreement extends to “any operation in support of, or in preparation for, fishing, including (...) the provisioning of personnel, fuel, gear and other supplies at sea”. Hence, the PSM Agreement extends bunkering of foreign vessels, also called support vessels, which closes a significant loophole. Note that ITLOS, in *M/V “Virginia G”*, took the view that “the regulation by a coastal State of bunkering of foreign vessels fishing in its exclusive economic zone is among those measures which the coastal State may take in its exclusive economic zone to conserve and manage its living resources”¹⁷⁶ under Article 56 of UNCLOS, read together with Article 62, paragraph 4, of UNCLOS. Secondly, the term ‘port’ is broader than in other fisheries instruments as it includes offshore terminals and other installations for landing, transshipping, packaging, processing, refuelling or resupplying. Note that seafood packaging refers to a service that occurs between the time fish are caught or harvested, and the time the final product is delivered to the customer. Its main functions are to contain, identify, describe, protect,

¹⁶⁸ Article 9(4) and (5), PSMA, *op.cit.*

¹⁶⁹ Article 11, PSMA, *op. cit.*

¹⁷⁰ Article 18, PSMA, *op. cit.*

¹⁷¹ Article 20, PSMA, *op. cit.*

¹⁷² DOULMAN, D. J., SWAN, J., (2012), *op. cit.*, p. 29.

¹⁷³ *Ibidem.*

¹⁷⁴ *Ibidem*, p. 37.

¹⁷⁵ *Ibidem.*

¹⁷⁶ ITLOS, (2014), *M/V “Virginia G” (Panama/Guinea-Bissau)*, Judgment, ITLOS Reports 2014, p. 4, para. 217.

and promote the fish or fish product. Lastly, the Agreement applies to any vessel, including foreign vessels. Furthermore, the definition of IUU fishing is taken from paragraph 3 of the IPOA-IUU¹⁷⁷.

Articles 3 “stipulates that Parties shall apply the Agreement to all ports globally in a fair, transparent, and non-discriminatory manner to all vessels carrying fish”¹⁷⁸. Although, “the Agreement does not apply to national vessels, in recognition of the sovereignty of the port State over its own flag vessels”¹⁷⁹, they shall “be subject to measures by the Party which are as effective as measures applied in relation to vessels entitled to fly its flag”¹⁸⁰.

Article 4 clarifies the rights and duties of Parties under relevant international law. Firstly, it recognises State sovereignty by providing that “nothing in the Agreement affects the sovereignty or sovereign rights of a Party over their waters or their ports”¹⁸¹. As a result, port States “have the right to deny entry into port and to adopt more stringent measures”¹⁸². Secondly, it explains what is binding and what is non-binding by making it clear that “a Party, in applying the Agreement, does not become bound by measures or decisions of, or recognize, an RFMO of which it is not a member”¹⁸³. Thirdly, international law governs the interpretation and application of the PSM Agreement, taking into account “applicable international rules and standards, including those established through the IMO”¹⁸⁴. Lastly, the PSM Agreement requires good faith of Parties.

Article 5 “recognises that domestic interagency or multi-sectoral coordination is vital for effective implementation”¹⁸⁵ of the PSM Agreement. In fact, port State controls “are imposed for a range of reasons, including health, safety, labour, pollution and fishing”¹⁸⁶. Therefore, “Parties should identify the relevant national authorities and develop strategies to coordinate their efforts”¹⁸⁷. Indeed, “establishing a clear framework in which national agencies can operate prevents confusion and dispute”¹⁸⁸.

Article 6 “requires cooperation and exchange of information among Parties and between Parties and relevant organisations”¹⁸⁹. For instance, cooperation is crucial to monitoring, control and surveillance (MCS) efforts in relation to highly mobile IUU fishers. Other areas in which cooperation is proven to be highly important are the determination of the identity and nationality

¹⁷⁷ Article 1(e), PSMA, *op. cit.*

¹⁷⁸ KUEMLANGAN, B., *et al.*, (2010), *op. cit.*

¹⁷⁹ DOULMAN, D. J., SWAN, J., (2012), *op. cit.*, p. 39.

¹⁸⁰ Article 3(2), PSMA, *op. cit.*

¹⁸¹ DOULMAN, D. J., SWAN, J., (2012), *op. cit.*, p. 40.

¹⁸² *Ibidem.*

¹⁸³ *Ibidem.*

¹⁸⁴ *Ibidem.*

¹⁸⁵ KUEMLANGAN, B., *et al.*, (2010), *op. cit.*

¹⁸⁶ DOULMAN, D. J., SWAN, J., (2012), *op. cit.*, p. 41.

¹⁸⁷ *Ibidem.*

¹⁸⁸ *Ibidem.*

¹⁸⁹ KUEMLANGAN, B., *et al.*, (2010), *op. cit.*, p. 265.

of those responsible for IUU fishing operations, and the denial of market access for IUU-caught fish in international trade. Article 16 “further requires the electronic exchange of information among States and RFMO’s, coordinated by FAO”¹⁹⁰. The United States, for example, has achieved not only national coordination but also cooperation and information exchange “by requiring multiple Department Secretaries to coordinate in determining whether foreign fishing vessels are complying with international conservation measures and in reporting those findings to FAO, and flag States when violations occur”¹⁹¹.

Article 7 “provides that Parties must designate ports to which vessels may request access and provide the ports with the necessary inspection resources”¹⁹². This is important because otherwise “IUU vessels could escape detection by landing fish or fish products at ports that otherwise may not expect a call by foreign vessels or may not be equipped to control landings and other activities”¹⁹³. Therefore, “Parties must provide a list of its designated ports to FAO, which will also give it due publicity”¹⁹⁴. Moreover, “mindful of the need for further capacity building to implement the Agreement, particularly in developing States”¹⁹⁵, the PSM Agreement “requires Parties, to the extent possible, to ensure that designated ports have sufficient capacity to conduct inspections”¹⁹⁶.

Article 8 “stipulates that Parties must require vessels to provide advance notice of their intent to enter a port”¹⁹⁷. This in turn ensures that port States have sufficient information in advance on which to base a decision to grant or deny a foreign vessel entry into port. Indeed, “given the high mobility of many foreign vessels, there is a corresponding need for rapid communication with other States, RFMOs and international organizations to verify the information or ask if there are grounds to suspect IUU fishing or related activities”¹⁹⁸. To facilitate such communications, “information such as the IMO number of the vessel has been useful in tracking vessels on RFMO IUU Vessel Lists”¹⁹⁹. Furthermore, national laws may vary in determining how much in advance a vessel must provide the information. For instance, while Namibia “requires 48 hours advance notice form anyone seeking to land marine resources in a Namibian port”²⁰⁰, Canada “only requires

¹⁹⁰ *Ibidem*.

¹⁹¹ *Ibidem*.

¹⁹² *Ibidem*.

¹⁹³ DOULMAN, D. J., SWAN, J., (2012), *op. cit.*, p. 43.

¹⁹⁴ *Ibidem*.

¹⁹⁵ *Ibidem*.

¹⁹⁶ *Ibidem*.

¹⁹⁷ KUEMLANGAN, B., *et al.*, (2010), *op. cit.*, p. 265.

¹⁹⁸ DOULMAN, D. J., SWAN, J., (2012), *op. cit.*, p. 43.

¹⁹⁹ *Ibidem*.

²⁰⁰ KUEMLANGAN, B., *et al.*, (2010), *op. cit.*, p. 265.

24 hours advance notice”²⁰¹. Finally, once the information has been provided to the port State, it must “make a decision, mindful that once a vessel is in port it should not be unduly delayed”²⁰².

Article 9 ensures that “only authorized vessels enter port and that, where there is sufficient proof of IUU fishing activities, vessels either do not enter port or are subject to other actions as effective as denial of entry”²⁰³. As stated previously, under customary international law, coastal State jurisdiction allows port States to deny port entry to foreign vessels, “even for activities unrelated to IUU fishing such as refuelling or resupplying”²⁰⁴. This in turn may serve as “a strong deterrent because it goes far beyond a prohibition to land fish, which could be done at the next port”²⁰⁵. Nonetheless, Article 10 provides refuge for vessels genuinely in distress. Furthermore, Article 9(1) requires Parties to decide whether to authorise or deny the entry into port based on the information provided under Article 8 and to communicate their decision to the vessel. On the one hand, according to Article 9(2), when the port State authorises entry, the vessel must present the authorisation upon its arrival in port. On the other hand, when the port State denies entry, Article 9(3) requires it to inform the flag State and relevant coastal States, RFMOs and international organisations. This is important because “a flag State may launch an investigation, an RFMO may advise its members, and a coastal State may decide to prohibit the vessel from entering its ports”²⁰⁶. Under Article 9(4), entry must be denied “where the port State has sufficient proof that a vessel has engaged in IUU fishing or related activities, in particular where it is on an RFMO IUU Vessel List”²⁰⁷. However, Article 9(5) recognises that “there may be circumstances where it would be better to allow the vessel entry into port for inspection and take other action that would be at least as effective as denial of port entry”²⁰⁸ such as, for instance, market-related measures (3.5.). When the vessel is allowed into the port under these circumstances, Article 9(6) requires the port State Party to “deny such vessel the use of its ports for landing, transshipping, packaging, and processing of fish and for other port services including, *inter alia*, refuelling and resupplying, maintenance and drydocking”.

Denial of the use of ports is probably the most important port State measure under the PSM Agreement because “without the ability to deny IUU fishing vessels use of port facilities, ‘ports of convenience’ will continue to exist”²⁰⁹. While Article 11 “requires that port States deny the use

²⁰¹ *Ibidem*.

²⁰² DOULMAN, D. J., SWAN, J., (2012), *op. cit.*, p. 44.

²⁰³ *Ibidem*.

²⁰⁴ *Ibidem*.

²⁰⁵ *Ibidem*.

²⁰⁶ *Ibidem*, p. 45.

²⁰⁷ *Ibidem*.

²⁰⁸ *Ibidem*.

²⁰⁹ KUEMLANGAN, B., *et al.*, (2010), *op. cit.*, p. 266.

of ports to vessels fishing without authorisation, in contravention of relevant fishery management requirements, or if there are reasonable grounds for believing the vessel was engaged in IUU fishing activities”²¹⁰, Article 18 “provides that if an inspection yields clear evidence that a vessel has engaged in or assisted IUU fishing, the port State shall deny the vessel use of its port”²¹¹. When denial of use occurs, both Articles “require that the port State notify the flag State or other relevant States and organisations of its findings”²¹². In respect to flag States, Article 20 holds them “responsible for vessels that are entitled to fly their flag and that engage in IUU fishing”²¹³.

Minimum elements for a port State inspection regime are covered under Articles 12 to 15. While Article 12 “requires each Party to conduct what it considers to be an adequate level of annual vessel inspections sufficient to achieve compliance with the Agreement and to set priorities as to what vessels should be inspected, with emphasis on vessels suspected of IUU fishing”²¹⁴, Article 13 “specifies that inspectors should have access to and inspect all relevant evidence, without unduly interfering with the vessel’s operations or its crew”²¹⁵. The IUU Regulation, for instance, not only imposes a minimum inspection requirement of five percent of landings and transshipments, which, as we will discuss later, is a debatable threshold, but also grants inspectors “access to all vessel compartments, gear, equipment and documents necessary to determine compliance”²¹⁶. In a similar fashion, Canada grants its inspectors “broad authority to inspect any vessel believed to be carrying fish and to have access to all appropriate cargo, containers and documents related to processing, transporting or marketing fish”²¹⁷, and Australia imposes a “detailed inspection regime extending beyond ports to Australian waters and the high seas”²¹⁸.

Finally, Article 24 “stipulates that Parties shall engage in monitoring and review of the implementation of the Agreement to assess progress towards achieving the Agreement’s objectives”²¹⁹. This must be done within the framework of the FAO and its relevant bodies.

3.3. Constraints and challenges to the implementation of the PSM Agreement

Although the PSM Agreement is a clear and precise response to the inefficiency of previous international fisheries instruments, its implementation may face the following key constraints and

²¹⁰ *Ibidem.*

²¹¹ *Ibidem.*

²¹² *Ibidem.*

²¹³ *Ibidem.*

²¹⁴ *Ibidem*, p. 265.

²¹⁵ *Ibidem*, p. 266.

²¹⁶ *Ibidem.*

²¹⁷ *Ibidem.*

²¹⁸ *Ibidem.*

²¹⁹ *Ibidem.*

challenges: institutional arrangements; legal considerations; financial needs; and lack of market State measures.

To implement the PSM Agreement efficiently, “there should be clear lines of authority and decision-making between the agency responsible for fisheries and those responsible for broader port controls, general enforcement matters, legal decision-making (e.g. as to whether there is sufficient evidence of IUU fishing) and, as appropriate, market-related measures”²²⁰. However, in many governments, unclear mandates of agencies and lack of interagency cooperation leads to “poor exchange of information or lack of information sharing”²²¹. Therefore, it is crucial that government agencies ensure the following: clear mandates; trained human capacity with the mandates including senior fisheries managers, legal personnel, inspectors and enforcement officers; databases containing a wide range of information; and the capability for effective follow-up of inspections. However, lack of financial resources, which is a major constraint, especially for developing countries, in turn results in lack of infrastructure and resources.

In some developing countries, “fisheries and related laws are sometimes very old and pre-date the international instruments developed since the mid-1990s”²²², which signals a generally weak or inadequate legal framework. For governments in such a situation, the challenge is twofold: first, “to seek legal assistance from donor countries or organizations to review and update legislation”²²³, and second, “to promote the political will needed to adopt the new legislation”²²⁴. Another serious constraint is the inadequacy of penalty levels and the inconsistency of such levels throughout a region, which is related to a more general lack of harmonisation of laws in a region. As a matter of fact, “this does not serve as an adequate deterrent and could jeopardize or dilute the outcomes of the MCS operations”. Therefore, the challenge is not only “to address penalty levels on a regional basis to promote their impact, consistency and effectiveness”²²⁵, but also “to seek harmonization through the implementation of the Agreement as a minimum standard”²²⁶.

Although the lack of financial means is probably the most obvious constraint to the implementation of the PSM Agreement, especially for developing countries, one needs to bear in mind that “port State measures offer one of the most cost-effective ways of combating IUU fishing”²²⁷. Indeed, “other MCS tools, such as at-sea patrols and aerial surveillance, are far more expensive and, while they are complementary tools, they may not be as productive in identifying

²²⁰ DOULMAN, D. J., SWAN, J., (2012), *op. cit.*, p. 87.

²²¹ *Ibidem.*

²²² *Ibidem*, p. 89.

²²³ *Ibidem.*

²²⁴ *Ibidem.*

²²⁵ *Ibidem.*

²²⁶ *Ibidem.*

²²⁷ *Ibidem.*

vessels that have been engaged in IUU fishing or related activities”²²⁸. Because “vessel owners would lose revenue if they were denied landing privileges and other services”²²⁹, PSMs are powerful deterrents against IUU fishing. Consequently, to successfully combat IUU fishing and in turn achieve sustainability of the fish stocks, the challenge is “to estimate the cost of operations for port State measures and the resulting benefits for fisheries management, and consider it as part of an overall national strategy for prioritization of financial resources and/or requests for assistance by developing countries and/or partnerships to meet the needs”²³⁰. Some governments may argue that “denial of port entry or port services does not contribute to the financial needs of the country because it results in a loss of revenue to the economy”²³¹. In truth, States with PoC may lose much more than what they would gain by allowing entry or use of services, because of the actions that the international community may take against them according to Article 20(3) PSM Agreement.

To prevent IUU-caught products from entering national and international markets, market State measures, which can include “the banning of products from States found to be undermining conservation and management measures, or rejecting shipments that lack the required documentation of their legal provenance”²³², are becoming more and more popular. Historically, trade measures to combat IUU fishing were implemented mainly by RFMOs. Nowadays, “the international community accepts that market State measures can be a powerful tool against IUU fishing without creating unnecessary or hidden barriers to trade”²³³, which is why such measures have been implemented at the regional level by the EU. Indeed, we will later analyse the catch certification scheme embodied in the IUU Regulation (4.3.2.), which “is intended to improve traceability of all marine fishery products traded with the European Community Members and facilitate the control of their compliance with conservation and management measures, in cooperation with third countries”²³⁴. As a result, fisheries products can only be imported into the EU when accompanied by a catch certificate. In a nutshell, market State measures contribute to “closing the loophole that allowed products derived from IUU catches to compete virtually without any restriction with products obtained from legitimate fishers”²³⁵. This in turn reduces the incentive for fishers to engage in IUU fishing or related activities. We will later not only cover further into detail the advantages of market State measures and their complementarity with PSMs but also analyse the famous WTO *Swordfish* dispute between the EU and Chile (3.5.).

²²⁸ *Ibidem*.

²²⁹ *Ibidem*, p. 90.

²³⁰ *Ibidem*.

²³¹ *Ibidem*.

²³² *Ibidem*.

²³³ *Ibidem*.

²³⁴ *Ibidem*, p. 91.

²³⁵ *Ibidem*.

To summarise, IUU fishing must be addressed “comprehensively and in different, mutually reinforcing ways”²³⁶ because “the Agreement on its own cannot be expected to solve the world’s IUU fishing problems”²³⁷, and although “political will and good governance are essential prerequisites to meet the challenges of overcoming the constraints”²³⁸, raising awareness on IUU fishing, as this Master’s thesis intends to, is also a possible solution to overcome the problems.

3.4. Entry into force and role of the FAO in the implementation of the PSM Agreement

According to Article 29, the PSM Agreement shall enter into force thirty days after the date of deposit with the Depositary of the twenty-fifth instrument of ratification, acceptance, approval or accession. When the PSM Agreement closed for signature on 21 November 2010, 17 FAO Members had signed it, including the EU, which had already created the comprehensive IUU Regulation that entered into force on 1 January 2010. For several years, increasing awareness on the environmental, economic and social consequences of IUU fishing (2.2.) accelerated the urgent need for ratification and implementation of a binding PSM Agreement. On 5 June 2016, the PSM Agreement, finally, came into force, which is “an important milestone in the fight against IUU fishing”²³⁹. It is now of fundamental importance that Parties develop and adopt implementing legislation. In that respect, “FAO will have a high-profile role in administering and supporting the implementation of the Agreement, requiring cooperation across several departments of the Organization”²⁴⁰ including the Fisheries and Aquaculture Department and the Office of Corporate Communications and External Relations.

It goes without saying that “FAO occupies a special position as a facilitator in helping States implement treaties such as this Agreement, as evident from the numerous regional capacity-building and training workshops that have been held frequently around the world”²⁴¹. Many Articles of the PSM Agreement refer to FAO’s technical role in its implementation. While some responsibilities are passive in nature, the following require FAO to adopt a proactive role. Firstly, Article 16 “foresees a coordination role for FAO to facilitate the exchange of information with existing databases”²⁴². Secondly, Article 21 “anticipates that FAO will have responsibility for the administration of the ad hoc working group to support State Parties, including matters relating to

²³⁶ *Ibidem*, p. 94.

²³⁷ *Ibidem*.

²³⁸ *Ibidem*, p. 92.

²³⁹ FAO, (2016), “The State of World Fisheries and Aquaculture 2016 – Contributing to food security and nutrition for all”, in *FAO Publications*, Rome, p. 97.

²⁴⁰ DOULMAN, D. J., SWAN, J., (2012), *op. cit.*, p. 25.

²⁴¹ KUEMLANGAN, B., *et al.*, (2010), *op. cit.*, p. 267.

²⁴² DOULMAN, D. J., SWAN, J., (2012), *op. cit.*, p. 25.

the scheme of contributions, identification and mobilization of funds, the development of criteria and procedures to guide implementation, and progress in the implementation of the funding mechanisms”²⁴³. Lastly, Article 24 “relates to FAO’s role in monitoring and reviewing the implementation of the Agreement and coordinating the review conference”²⁴⁴. As such activities have major financial and human resource implications for FAO, “their costs will need to be incorporated into the regular budget of the FAO Fisheries and Aquaculture Department”²⁴⁵.

Several civil society organisations, such as Pew Charitable Trusts, Stop Illegal Fishing and WWF, encourage States to become party to the PSM Agreement and to implement its measures. However, in practice, introducing or amending any national legislation include challenges, such as “facilitating integration or consistency of the proposed legislation into the broader national system of governance including all relevant national legislation, procedures, interagency cooperation and institutional arrangements and judicial/administrative systems”²⁴⁶. Therefore, “to address these challenges in an efficient and straightforward manner”²⁴⁷, it is necessary to review the following elements: national fisheries legislation; national procedures; and other related national legislation and procedures. To assist the development of legislation on PSMs and to strengthen human capacity for implementation, a series of FAO capacity-development workshops as well as regional training courses for inspectors and development of resource materials have been delivered all over the world.

In addition, complementary projects, such as the project “Sustainable Management of Tuna Fisheries and Biodiversity Conservation” are being coordinated by the Global Environment Facility (GEF), an organisation established on the eve of the 1992 Rio Earth Summit which tackles the planet’s biggest environmental issues through its strategic investments. In 2016, FAO published a technical paper, funded by GEF, on design options for the development of tuna catch documentation schemes (CDS) which “clarifies the nature of CDS and what they can achieve, and identifies the factors to be considered in the design of such schemes as a management and monitoring, control and surveillance tool in tuna fisheries”²⁴⁸. Note that “the Project aims to achieve responsible, efficient and sustainable tuna production and biodiversity conservation in the

²⁴³ *Ibidem*.

²⁴⁴ *Ibidem*.

²⁴⁵ *Ibidem*.

²⁴⁶ SWAN, J., (2016), “Implementation of port State measures – Legislative template, Framework for procedures, Role of regional fisheries management organizations”, in *FAO Publications*, Rome, p. 6.

²⁴⁷ *Ibidem*.

²⁴⁸ FAO, (2016), “Design options for the development of tuna catch documentation schemes”, FAO Fisheries and Aquaculture Technical Paper, in *FAO Publications*, Rome.

areas beyond national jurisdiction focusing on three thematic areas, namely; improving management, combatting IUU fishing, and protecting biodiversity”²⁴⁹.

A complementary issue is flag State performance. Although flag States are already required to maintain a record of their registered vessels together with information on their authorisation to fish, such as the species they may fish for and the type of gear they may use, many fishing vessels engaged in illegal activities circumvent such control measures by ‘flag-hopping’, which consists in registering with new flag States to avoid detection. Therefore, to complement the PSM Agreement, FAO endorsed the 2014 FAO Voluntary Guidelines for Flag State Performance²⁵⁰, a set of international guidelines that holds States more accountable for the activities of fishing vessels flying their flags. These guidelines promote information exchange and cooperation among countries so that flag States can refuse to register vessels that have previously been reported for IUU fishing, or that are already registered with another flag State. In addition, the guidelines provide recommendations on how countries could encourage compliance and take action against non-compliance by vessels, and on how to enhance international cooperation to assist developing countries to fulfil their flag State responsibilities. Although the guidelines are voluntary, their endorsement by the Twenty-first session of the FAO Committee on Fisheries (COFI), is a public signal by countries of their intent to adhere to a shared set of standards for flag State performance in the fight against IUU fishing activities.

3.5. Trade-related measures to enhance the effectiveness of the PSM Agreement

As stated before, the PSM Agreement cannot solve the world’s IUU fishing problems on its own. Unquestionably, “the future of sustainable fisheries depends on taking a holistic approach to combatting IUU fishing”²⁵¹. Therefore, we recognise that “the long-term success of PSMA will depend on the ability of states to link their port state measures to trade-related enforcement, including potential closures of markets and requirements for traceability”²⁵². We also acknowledge that “if the PSMA is to be effective, it should be reimagined by its parties as a trade-related agreement and not simply an enforcement agreement”²⁵³. This section is dedicated to explaining how incorporating trade-related measures into legislation implementing the PSM Agreement can significantly enhance the effectiveness of the PSMs that the latter embodies.

²⁴⁹ *Ibidem*.

²⁵⁰ FAO, (2014), *Voluntary Guidelines for Flag State Performance*, Rome, FAO.

²⁵¹ TELESETSKY, A., (2015), “Scuttling IUU Fishing and Rewarding Sustainable Fishing: Enhancing the Effectiveness of Port State Measures Agreement with Trade-Related Measures”, in *Seattle University Law Review*, vol. 38, No. 4, p. 1269.

²⁵² *Ibidem*, p. 1238.

²⁵³ *Ibidem*, p. 1256.

As a matter of fact, “including trade-related measures in IUU prevention efforts would increase their effectiveness because trade in fisheries products is significant”²⁵⁴. World trade in fish and fisheries products has grown significantly in recent decades not only in terms of quantity, rising by more than 515 percent from 1976 to 2014 if one considers just trade in fish for human consumption, but also in terms of value, with exports rising from US\$8 billion in 1976 to US\$148 billion in 2014²⁵⁵. Consequently, “given the significance of international trade for a state’s economy, trade measures can provide a strong driver to influence state behaviour”²⁵⁶. Korea, for example, adopted the Distant Waters Fisheries Development Act to control Korea’s fleets, the most significant of a series of measures taken by Korea to proactively prevent, deter and eradicate IUU fishing, because of the threat by the EU of market closure²⁵⁷. Indeed, the EU has responded to continued increasing trends in IUU fishing “by passing trade legislation that prohibits trade in specific species from specific states suspected of condoning IUU fishing”²⁵⁸.

Although the international community has understood the potential effectiveness of trade measures in improving IUU preventing effort, the reference to “trade” was dropped from the text of the PSM Agreement after a 2006 Expert Consultation²⁵⁹, which “reflects a lost opportunity to enhance the effectiveness of the PSMA since most of the exported fish will enter into trade through a port”²⁶⁰. Even though the PSM Agreement does not explicitly envisage the use of trade-related mechanisms, “it is possible for PSMA members, operating within the multilateral context of the PSMA, to invoke unilateral trade-restrictive mechanisms in order to achieve the objectives of the PSMA”²⁶¹. Indeed, “state parties must have the flexibility not just to restrict access to ports, which may increase traffic into ports of convenience, but also to eliminate trade opportunities with states that host ports of convenience”²⁶². However, the prohibition of landing, the prohibition of transshipping and the refusal of other port services could amount to a breach of WTO rules, as we shall see later when analysing both the *Swordfish* dispute and the *Shrimp-Turtle* case.

In short, “addressing trade linkages is an integral part of ending IUU fishing since IUU fishing is fuelled by the potential profits of international trade”²⁶³. For all these reasons, Parties to

²⁵⁴ *Ibidem*.

²⁵⁵ FAO, (2016), *op. cit.*, pp. 51-52.

²⁵⁶ TELESETSKY, A., (2015), *op. cit.*, p. 1257.

²⁵⁷ EJF, (2015), “Bold Action Taken by Korea to Combat Illegal, Unreported and Unregulated (IUU) Fishing Shows EU IUU Regulation is Working”, in *Reports by the Environmental Justice Foundation*, London, available at <http://ejfoundation.org/news/bold-action-taken-korea-combat-illegal-unreported-and-unregulated-iuu-fishing-shows-eu-iuu>, consulted on March 21, 2017.

²⁵⁸ TELESETSKY, A., (2015), *op. cit.*, p. 1260.

²⁵⁹ DOULMAN, D. J., SWAN, J., (2012), *op. cit.*, p. 125.

²⁶⁰ TELESETSKY, A., (2015), *op. cit.*, p. 1258.

²⁶¹ *Ibidem*, p. 1260.

²⁶² *Ibidem*.

²⁶³ *Ibidem*, p. 1259.

the PSM Agreement should consider adopting domestic implementation legislation that not only “requires trade documentation certificates before accepting landing of fisheries products”²⁶⁴, but that also “allows parties to unilaterally close access to their domestic markets to IUU fish sales where trade documentation is either inadequate or suspected as fraudulent”²⁶⁵. Needless to say that “these additions to any implementing legislation for the PSMA would greatly strengthen a legislative framework that directly contemplates the use of market closures”²⁶⁶.

Because fish and seafood go through increasingly complex delivery chains, traceability has become an increasing concern for countries that worry about food safety. While Russian fish, for instance, are sent to China for processing before being exported to the EU, they are listed for trade purposes as Chinese fish filets because under those circumstances existing trade rules require “the country of origin to be China if a product increases 40% in value from the processing”²⁶⁷. However, this “eliminates significant information for understanding the trade flows of fishery products”²⁶⁸. Because recent reports²⁶⁹ suggest that a relatively large quantity of fish have been mislabelled at the point of sale, “an increasing need exists to accurately track the chain of custody from ocean to plate in a way that ensures no mixing of legal and illegal products”²⁷⁰. In that respect, “trade documentation schemes become an increasingly important tool for assisting port officials in their efforts to identify potential IUU cargo”²⁷¹.

Traceability information is certainly a first step to determine whether a given cargo was obtained illegally. However, “simply closing a port for landing from fishing or transport vessels as the PSMA contemplates will not be sufficient to combat the pre-existing problems of ports of convenience because IUU fishing products can still be laundered into the markets of states who are parties to the PSMA”²⁷². Indeed, “as long as ports of convenience continue to exist as alternative landing sites, and thereby undermine the application of strict port measures, the PSMA cannot be adequately implemented without either trade-specific measures or some reference to trade relations”²⁷³. Therefore, “if properly implemented, market closures could be a particularly potent tool for regulating trade in IUU fish because these closures would make it more expensive

²⁶⁴ *Ibidem*, p. 1261.

²⁶⁵ *Ibidem*.

²⁶⁶ *Ibidem*.

²⁶⁷ *Ibidem*.

²⁶⁸ *Ibidem*.

²⁶⁹ OCEANA, (2011), “Oceana Study reveals Seafood Fraud Nationwide”, in *Oceana Reports*, available at http://oceana.org/sites/default/files/National_Seafood_Fraud_Testing_Results_Highlights_FINAL.pdf, consulted on March 20, 2017.

²⁷⁰ TELESETSKY, A., (2015), *op. cit.*, p. 1262.

²⁷¹ *Ibidem*, p. 1263.

²⁷² *Ibidem*, p. 1264.

²⁷³ *Ibidem*, p. 1265.

for IUU fishing operations to reach their desired destinations”²⁷⁴, making IUU fishing less attractive as a revenue-generating activity. However, while it is recognised in Article 4 of the PSM Agreement that, in the exercise of their sovereignty over their ports, States may adopt more stringent port measures, including such measures adopted pursuant to a decision of a RFMO, “flag states have argued in the past that the unilateral closure of a port violates trade provisions under WTO rules”²⁷⁵, especially WTO principles of most-favored-nation treatment and non-discrimination. Nonetheless, “the WTO has never decided the legality of closing a port for alleged conservation purposes”²⁷⁶. This has not been altered in any way during the *Swordfish* dispute proceedings between the EU and Chile.

From 1991 to 2001, the EU and Chile had been engaged in a controversy over swordfish fisheries in the South Pacific. While Chile claimed that the EU failed to cooperate with the coastal State to ensure the conservation of the highly migratory species, in violation of UNCLOS, the EU claimed that the Chilean denial of port access violated substantive provisions of the General Agreement on Tariffs and Trade (GATT). In 1998, the Spanish National Association of Owners of deep-sea Longliners lodged a complaint pursuant to the Trade Barriers Regulation (TBR). The European Commission initiated an investigation under the TBR and concluded not only that the Chilean ban violated the principle of freedom of transit, established by Article V of GATT 1994, but also that by making unloading in Chilean ports impossible for swordfish catches made by Community vessels, the Chilean measures rendered impossible the importation of the affected catches into Chile, which is contrary to Article XI of GATT 1994²⁷⁷. At first, consultations between the Parties failed in finding an amicable solution. For that reason, in 2000, both Parties resorted to different international law regimes to support their positions. While the EU requested the establishment of a WTO Dispute Settlement Body (DSB), Chile invited the EU to engage in formal dispute settlement before ITLOS under UNCLOS Part XV. In January 2001, the EU and Chile reached an amicable settlement that not only suspends both WTO and ITLOS proceedings but also provides for access of EU vessels to designated Chilean ports in exchange for commitments on cooperation in the management of stocks and fishing efforts²⁷⁸. Although the Parties agreed in October 2008 on a Draft Text, which would constitute the basis for the establishment of a new "Understanding Concerning the Conservation of Swordfish Stock in the South Eastern Pacific Ocean"²⁷⁹, the *Swordfish* case is worth studying in some depth.

²⁷⁴ *Ibidem*.

²⁷⁵ *Ibidem*, p. 1264.

²⁷⁶ *Ibidem*.

²⁷⁷ www.europa.eu/rapid/press-release_IP-01-116_en.htm, *EU – Chile Swordfish dispute*, consulted on Mai 6, 2017.

²⁷⁸ *Ibidem*.

²⁷⁹ www.trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154243.pdf, *Recent developments in WTO dispute settlement and TBR cases*, consulted on Mai 6, 2017.

There is hardly any doubt that Chile's measures were not in conformity with Articles V and X of GATT 1994. However, to justify its measures, Chile could rely on Article XX (g) of GATT 1994, which is an exception relating to "the conservation of exhaustible natural resources". In that regard, four considerations need to be developed. Firstly, the WTO Appellate body in the *Shrimp-Turtle* case affirmed that "living resources and marine living resources in particular qualify as exhaustible natural resources"²⁸⁰. Therefore, the swordfish stocks undoubtedly qualify as an exhaustible natural resource. Secondly, the more difficult question concerns whether the nexus between those stocks, largely found beyond the EEZ, and Chile is sufficient to entitle the latter to resort to Article XX (g). In the *Shrimp-Turtle* case, the Appellate Body answered in the affirmative because sea turtles also passed through waters under US jurisdiction. Note that in the *Swordfish* case "the link between the stocks at hand and Chile are even closer, as the swordfish populations live in an area which comprises Chile's EEZ and the adjacent high seas"²⁸¹. Thirdly, to justify its actions, Chile would have to show that its measures are related to conservation. Particularly relevant here is that the Appellate Body in the *Shrimp-Turtle* case not only examined the general structure and design of the measure at hand, considering the policy goal it intends to serve, but also took into account the proportionality of the measure. Although no definite answer is possible, as information on the *Swordfish* case is limited, it is likely that Chile's measures meet this standard. Lastly, Article XX (g) requires that such measures are made in conjunction with "restrictions on domestic production or consumption". Note that, "the requirement is met in the case at hand, as Chile had provided for similar restrictions for its own fishing vessels"²⁸². We will later further develop the lessons that can be drawn from the *Shrimp-Turtle* case in relation to the IUU Regulation (4.4.).

Even though adequate documentation schemes and market closures are feasible options for implementing the PSM Agreement, "states that link market closures to port measures must be prepared to respond to leakages in the market"²⁸³. In fact, when vessels transshipping IUU fish products are no longer permitted in certain ports, these will attempt to deliver their cargo to PoCs. This means that, in the short run, non-cooperating States may benefit financially from cooperating State's market closures. Therefore, "in order to address the problems with leakage, domestic implementation of the PSMA requires a uniform approach across a given region"²⁸⁴. In the near future, "if PSMA parties were to harmonize their port enforcement fishery laws to require

²⁸⁰ STOLL, P. T., VÖNEKY, S., (2002), "The Swordfish Case: Law of the Sea v. Trade", in *ZAÖRV*, p. 30.

²⁸¹ *Ibidem*.

²⁸² *Ibidem*, p. 31.

²⁸³ TELESETSKY, A., (2015), *op. cit.*, p. 1266.

²⁸⁴ *Ibidem*.

traceability and to enable market closures, there may be very real opportunities to focus resources on IUU enforcement efforts in more concentrated geographical areas”²⁸⁵.

Article 4(4) PSM Agreement stipulates that any application of PSMs shall be interpreted and applied in conformity with international law, including international trade law. As a result, potential conflicts with existing trade law measures may occur, as we have seen in both the *Swordfish* dispute and the *Shrimp-Turtle* case. A possible source of conflict between trade measures and the GATT rules is reported to be the fact that some trade measures may violate the principle of non-discrimination. According to WTO rules, a country “should not discriminate between its trading partners (giving them equally “most-favoured-nation” or MFN status) and it should not discriminate between its own and foreign products, services or nationals (giving them “national treatment”)”²⁸⁶. However, GATT Article XX on General Exceptions lays out a number of specific instances in which WTO members may be exempted from GATT rules, including Article XX(d)’s exception for measures necessary to secure compliance with the prevention of deceptive practices, and Article XX(g)’s exception relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. As a result, GATT Article XX allows WTO members to apply conservation measures as long as they do not create a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. With regards to the PSM Agreement and any implementing legislation with trade-related measures, these “should survive legal scrutiny because the agreement focuses on identifying vessels engaged in any IUU fishing versus vessels engaged in legal fishing”²⁸⁷. Nonetheless, “when a state closes ports and potentially creates a barrier to a market, the burden would be on the state to prove that there are legitimate conservation concerns related to the particular species that a vessel was planning on introducing into the channels of trade”²⁸⁸.

In the view of the above considerations, whenever a wronged State is confronted with “more stringent port states measures than those provided for”²⁸⁹ in the PSM Agreement, including potential closures of markets and requirements for traceability, that State might be willing to resort to different international law regimes to support its position and reopen markets. From a WTO/GATT perspective, it can request the establishment of a WTO DSB or introduce a Technical Barriers to Trade (TBT) claim. However, these trade disputes are unlikely to be successful for suspected IUU fishing products not only given “the justification under GATT Article XX, and the

²⁸⁵ *Ibidem*.

²⁸⁶ www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm, WTO, consulted on March 22, 2017.

²⁸⁷ TELESETSKY, A., (2015), *op. cit.*, p. 1267.

²⁸⁸ *Ibidem*, p. 1268.

²⁸⁹ Article 4(1)(b), PSMA, *op. cit.*

support for the PSMA by a number of key fishing import states”²⁹⁰, but also because “past case law suggests that conservation-related trade measures that are limited in scope to ending IUU fishing activities are likely to be considered legitimate trade measures”²⁹¹. From a law of the sea perspective, the wronged State can invite the other State to engage in formal dispute settlement before ITLOS under UNCLOS Part XV.

Although the proceedings before ITLOS have been suspended in the *Swordfish* dispute, it is relevant to analyse whether the prohibition on the unloading of swordfish in Chilean ports can be regarded as lawful from an international law of the sea perspective. The condition for a lawful prohibition of unloading is, according to Article 23 of the UN Fish Stocks Agreement, the existence of a multilateral conservation measure. In August 2000, Chile and three other coastal States adopted a framework agreement for the conservation of living marine resources on the high seas of the South Pacific, also called the Galapagos Agreement. The problem is that the Galapagos Agreement does not meet the conditions laid down in Article 8, paragraph 3, of the UN Fish Stocks Agreement, which expressly states that multilateral measures must be made by “an organization or arrangement” to which all States “having a real interest in fisheries concerned” may become members and must not be treated discriminatorily. Indeed, the Galapagos Agreement gives coastal States a veto-right regarding all substantive questions such as setting limits on the catch and fishing licences. As a result, the Galapagos Agreement is “discriminatory towards non-coastal States and cannot be regarded as a multilateral measure in the sense of the UN Fishstock Agreement”²⁹². This conclusion is debatable as Chile has not signed the UN Fish Stocks Agreement and “its rules do not yet reflect customary law”²⁹³. A more convincing argument is the wording of Article 64 UNCLOS which “provides for the non-discriminatory cooperation between coastal and fisheries States”²⁹⁴ in the protection of swordfish stocks. Therefore, “no agreement giving a veto-right to coastal States for the protection of swordfish could be seen as lawful according to UNCLOS”²⁹⁵. At last, according to the law of the sea, Chile’s prohibition on unloading swordfish is unlawful.

²⁹⁰ TELESETSKY, A., (2015), *op. cit.*, p. 1269

²⁹¹ *Ibidem.*

²⁹² STOLL, P. T., VÖNEKY, S., (2002), *op. cit.*, p. 25.

²⁹³ *Ibidem.*

²⁹⁴ *Ibidem.*

²⁹⁵ *Ibidem.*

4. The European Council Regulation on IUU Fishing

As the world's largest importer of fisheries products, the EU has adopted an innovative policy to fight against IUU fishing worldwide, by forbidding fisheries products to access the EU unless they are certified as legal. This final chapter is dedicated to an in-depth study of the European Council Regulation No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate IUU fishing, which entered into force on 1 January 2010 (hereinafter IUU Regulation). We will first develop the general background and the context in which the IUU Regulation was developed (4.1.). We will then elaborate on the core elements of the IUU Regulation (4.2.) before examining whether the latter are compatible with existing international fisheries instruments on the one hand (4.3.), and international trade law on the other hand (4.4.).

4.1. General background and context

According to the principle of conferral laid down in Article 13(2) of the Treaty on the European Union (TEU), the EU may only act within the limits of the competences conferred upon it by the EU Treaties to attain the objectives provided therein. As a result, the competences that have not been conferred upon the EU in the Treaties remain with the Member States. The 2009 Treaty of Lisbon not only clarifies the division of competences between the EU and its Member States but also classifies these competences into three categories. While Articles 4 and 6 of the Treaty on the Functioning of the European Union (TFEU) establish shared and supporting competences, respectively, Article 3 confers exclusive competences in which the EU alone is able to legislate and adopt binding acts. This is relevant because, among other areas, the EU has exclusive competence in conservation of marine biological resources under the Common Fisheries Policy (CFP). In force since 1 January 2014, the new CFP's overall objective is "to make fishing sustainable from an environmental, economic and social perspective"²⁹⁶. In the interest of reaching its objectives, Article 2(1) of Regulation (EC) No 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the CFP, which was repealed by Regulation (EU) No 1380/2013 on the CFP, insists on the fact that the Community shall not only apply the precautionary approach in taking measures designed to protect and conserve living aquatic resources, but also aim at a progressive implementation of an eco-system-based approach to fisheries management. We defined earlier (3.1.) not only the concept of precautionary approach but also the notion of ecosystem approach when analysing the path to the adoption of the PSM Agreement.

²⁹⁶ EUROPEAN COMMISSION (2016), "Maritime affairs and fisheries", in *The European Union explained*, p. 6.

The European Commission is composed of 31 departments including the Directorate-General (DG) Mare which is “responsible for EU policies on maritime affairs and fisheries”²⁹⁷. DG Mare works to achieve the following objectives: protect the maritime environment while maintaining Europe's competitiveness; implement the new common fisheries policy; use the potential of Europe's seas to create sustainable jobs that preserve natural resources; and establish rules for the management and governance of the world's oceans together with global partners²⁹⁸. The European Commission works to ensure that our exploitation of the seas remains rigorously sustainable under the premise that environmental protection and economic growth “are intertwined and interdependent rather than opposed”²⁹⁹. It goes without saying that overfishing is one of the challenges that Europe's seas face today. Therefore, collective international action is essential, especially because 60% of our oceans are beyond national jurisdiction³⁰⁰. Through the medium of its bilateral relations with third countries, “the EU promotes the principles of sustainable fisheries, of biodiversity protection and of good governance, and projects them onto a worldwide scale”³⁰¹. Indeed, the European Commission has “a clear mandate to engage in shaping international ocean governance in the UN, other multilateral forums and bilaterally with key global partners, moving towards an improved, more sustainable and better enforced framework”³⁰². In respect to IUU fishing, “the EU applies not only its political weight but also its market weight, by refusing to import products that do not comply with international rules”³⁰³.

Although some progress had been made under the Commission's 2002 IUU Action plan, directly inspired by the 2001 FAO IPOA-IUU, the European Commission issued in 2007 a Communication proposing a new comprehensive strategy for the Community to prevent, deter and eliminate IUU fishing both in Community and international waters. Indeed, IUU fishing threatened not only the CFP but also fish stocks, marine biodiversity, fragile ecosystems and law-abiding fisherman. According to the Commission, an efficient legal framework to fight IUU fishing must first, encompass all fishing and related activities linked to IUU practices to target the whole supply chain, and second, fully integrate a trade dimension, which means closing the doors of Europe to illegal products through the launch of a regime of control by the port State, under which fish or fish products must be certified by the flag State before landing or import into the EU. This proposal

²⁹⁷ https://ec.europa.eu/info/departments/maritime-affairs-and-fisheries_en, *DG Mare*, consulted on Mai 10, 2017.

²⁹⁸ https://ec.europa.eu/info/topics/maritime-affairs-and-fisheries_en, *Maritime affairs and fisheries*, consulted on Mai 10, 2017.

²⁹⁹ EUROPEAN COMMISSION, (2016), *op. cit.*, p. 3.

³⁰⁰ http://ec.europa.eu/dgs/maritimeaffairs_fisheries/consultations/ocean-governance/contributions/doc/belgium_en.pdf, *Consultation on International Ocean Governance*, p. 1, consulted on April 28, 2017.

³⁰¹ EUROPEAN COMMISSION, (2016), *op. cit.*, p. 5.

³⁰² *Ibidem*, p. 10.

³⁰³ *Ibidem*, p. 5.

lead to the adoption of the IUU Regulation, which not only lists fishing vessels presumed to be engaged in IUU fishing and designates ports open to vessels from third countries but also establishes two blacklists, a catch certification scheme and serious sanctions.

4.2. Core elements of the IUU Regulation

The Preamble of the IUU Regulation recalls that “the failure by some States to discharge the duty incumbent on them under international law as flag, port, coastal or market States, to take appropriate measures to ensure compliance by their fishing vessels or nationals with rules on the conservation and management of fisheries resources is one of the main drivers of IUU fishing and should be addressed by the Community”³⁰⁴. Therefore, “in addition to its action at international and regional levels, the Community should be entitled to identify those non-cooperating States, on the basis of transparent, clear and objective criteria relying on international standards, and, after giving them adequate time and to respond to a prior notification, adopt non-discriminatory, legitimate and proportionate measures with respect to those States, including trade measures”³⁰⁵. Indeed, the European Commission contends that “the IUU Regulation is a transparent and non-discriminatory instrument applying to all fishing vessels, under any flag, which seeks to prevent, deter and eliminate IUU fishing, in all maritime waters”³⁰⁶. In turn, “to ensure that no products derived from IUU fishing appear on the European market, the Regulation seeks to ensure full traceability of all marine fishery products traded with the EU, by means of a catch certification scheme”³⁰⁷ framed by Articles 12 to 22 of the IUU Regulation.

The reasons for which this scheme constitutes an essential part of the IUU Regulation are twofold. First, it covers both processed and unprocessed marine products. As a consequence, EU catches exported to a third country and re-exported to the EU from there after processing have to be accompanied by a catch certificate. Second, it is “intended to improve the traceability of all marine fishery products traded with the Community and facilitate the control and compliance with conservation and management rules, in cooperation with third countries”³⁰⁸. The IUU Regulation is indeed, to a large extent, based on the responsibility and commitments of third countries. As a matter of fact, not only shall the certificate be validated by the competent authority of the flag State, but in the presence of well-founded doubts on the validity of the catch certificates or in

³⁰⁴ Preamble, para. 30, Council Regulation (EC) No. 1005/2008, *op. cit.*

³⁰⁵ Preamble, para. 31, Council Regulation (EC) No. 1005/2008, *op. cit.*

³⁰⁶ EUROPEAN COMMISSION, (2009), *Handbook on the practical application of Council Regulation (EC) No. 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing*, Version 1 - 10/2009, Mare A4/PS D (2009) A/12880, p. 8.

³⁰⁷ *Ibidem.*

³⁰⁸ *Ibidem*, p. 16.

respect of the management and conservation measures, EU Member States shall inform the third country concerned and ask it to carry out all relevant verifications, the results of which will make it possible to take a decision for accepting or refusing the goods on the EU market.

The role of the European Commission is to ensure and facilitate the implementation and practical operation of the catch certification scheme. To this end, the European Commission executes various practical activities which include the following: “the distribution of information on the IUU Regulation to third countries and EU Member States’ authorities and the support of projects which are aimed at facilitating compliance with the IUU Regulation (training sessions, seminars, etc); the development of detailed procedures to facilitate the implementation of the IUU Regulation in cooperation with third countries, taking into account specific situations, such as (...) the national control system; (...); the establishment, monitoring and publication of the list of catch documents of recognised RFMO catch documentation schemes; and the annual revision and publication of the list of fishery products excluded from the scope of the IUU Regulation”³⁰⁹. Note that the EU has notified the IUU Regulation to the WTO on 10 February 2009 through a communication (WT/L/747) claiming that the “implementation of its provisions, including its catch certificate, will not represent a trade barrier”³¹⁰ but will on the contrary “facilitate legal trade and prevent it from facing unfair competition from illegal products”³¹¹. We will later not only observe that the catch certificate is directly inspired from instruments already adopted, at regional level, which have proved to be efficient to combat IUU fishing and to facilitate the legal trade with fisheries products (4.3.2), but also analyse whether the IUU Regulation, especially its catch certificate, complies with international trade law (4.4.).

The IUU Regulation also includes provisions on port state control for third-country fishing vessel. Under Article 6, masters of third countries fishing vessels must notify the competent authorities of an EU Member State whose designated port facilities they wish to use at least three working days prior to the estimated time of arrival, otherwise entry into that port may be denied. In respect to transshipment operations, which are generally acknowledged to be a way to launder illicit catches, these will be submitted to improved control rules. Indeed, according to Article 4, outside EU waters fishing vessels flying the flag of an EU Member State are not authorised to tranship catches at sea from third-country fishing vessels unless the fishing vessels are registered as carrier vessels under the auspice of a RFMO. Moreover, Article 7 provides that third-country fishing vessels will be granted authorisation to land or to tranship when complete prior notice has been given and the fisheries products are accompanied by a validated catch certificate. Note that,

³⁰⁹ *Ibidem*, p. 31.

³¹⁰ *Ibidem*, p. 9.

³¹¹ *Ibidem*.

according to Articles 9 and 10, EU Member States will carry out inspections of at least five percent of all landings and transshipments by third-country fishing vessels each year and by using benchmarks based on harmonised criteria for risk management. However, vessels will systematically be inspected in cases of suspicion or findings of non-compliance with conservation and management measures.

Articles 27 to 30 of the IUU Regulation establish an EU IUU vessels list which intends to ensure that vessels that continue to carry out IUU fishing activities, because their flag States fail to apply effective sanctions on them, will be prevented from selling their products for export to the EU. In practice, the European Commission acts according to the following step-by-step procedure. First, whenever a fishing vessel is presumed to carry out IUU fishing activities, the European Commission notifies this to the flag State of the concerned fishing vessel. In addition, this notification shall issue an official request to the flag State to take not only “all the necessary measures to investigate the alleged IUU fishing and share the results of this investigation with the Commission on a timely basis”³¹² but also “immediate enforcement action should the allegation formulated against the fishing vessel concerned be proven to be founded, and (...) inform the Commission of the measures taken”³¹³. It is essential that the flag State not only shares the results of its investigation but also proves to the European Commission that it has taken appropriate measures in response to that official request because otherwise the fishing vessel is listed by the European Commission on the EU IUU vessel list. Note that restrictive measures will be applied to IUU listed vessels, including withdrawal of fishing authorisations, ban on trade of product and prohibition to enter EU Member State ports (except in cases of force majeure or distress). This list may contain third countries as well as EU vessels. Moreover, the list automatically comprises vessels included in the IUU lists adopted by RFMOs around the world³¹⁴. Indeed, “nine regional fisheries management organisations (RFMOs) maintain or share lists of vessels that have been found to carry out or support IUU fishing within their own or adjacent convention areas”³¹⁵. However, IUU lists adopted by NGOs, such as the Greenpeace International Blacklist³¹⁶, for example, although they have indicative value, are not included in the EU IUU vessel list because “they are not based upon facts established by the competent authorities and are not supported by a contradictory consultation with the flag state”³¹⁷.

³¹² Article 26 (2) (b), Council Regulation (EC) No. 1005/2008, *op. cit.*

³¹³ Article 26 (2) (c), Council Regulation (EC) No. 1005/2008, *op. cit.*

³¹⁴ Article 30, Council Regulation (EC) No. 1005/2008, *op. cit.*

³¹⁵ www.iuu-vessels.org/iuu, *Combined IUU Vessel List*, consulted on Mai 10, 2017.

³¹⁶ www.greenpeace.org/international/en/campaigns/oceans/pirate-fishing/Blacklist1/, *Greenpeace International Blacklist*, consulted on Mai 10, 2017.

³¹⁷ EUROPEAN COMMISSION, (2009), *op. cit.*, p. 81.

Under Articles 31 to 35 of the IUU Regulation, the European Commission will identify third countries that fail to cooperate in the fight against IUU fishing, by failing to discharge their duties under international law as a flag, port, coastal or market. If no appropriate measures are taken by that country to improve the current situation, the European Commission will notify the country concerned that it may be identified as non-cooperating and give opportunity to respond to the allegation, or to take appropriate measures to rectify the situation within an appropriate time frame. If no significant action is taken, the Council of the European Union may list the country as a non-cooperating third country, which will consequently be prohibited to trade any fisheries products with the EU.

Note that RFMOs do not have an analogous procedure. While a member of an RFMO may institute proceedings before an international court or tribunal under the terms of the RFMO's constitutive instruments concerning the peaceful settlement of disputes, if another member fails to perform its duties as a flag State under those instruments and remains unresponsive to calls for compliance with its obligations, the RFMO's dispute settlement arrangements would not be applicable in the case of a non-member. However, if the flag State concerned is party to UNCLOS, then one or more members of an RFMO which are also parties to that Convention may institute proceedings under Part XV of UNCLOS on the grounds that the flag State is failing to exercise effective jurisdiction and control over its vessel(s) in contravention of its duties as defined in Article 94 and Articles 117 to 119 of UNCLOS. Indeed, Articles 117 to 119 of UNCLOS lay down the duty to cooperate over high seas fisheries and the conservation of living resources. It goes without saying that "a decision against a flag State would damage its reputation and could make its flag less attractive"³¹⁸. A further possibility for RFMOs is to adopt market-related measures, including import prohibitions and documentation schemes.

It goes without saying that IUU fishing activities can only be prevented, deterred and eliminated if States can effectively track down IUU operators. Therefore, Articles 44 to 46 of the IUU Regulation establish a system of effective, proportionate and dissuasive sanctions for serious infringements in respect of both natural and legal persons. A comprehensive harmonised system of administrative sanctions is introduced, together with enforcement and accompanying measures for serious infringements. This should ensure that operators engaging in or supporting IUU fishing, including by trading, can be deprived from the benefit of these activities and be discouraged from participating in such activities. To this end, EU Member States will have to impose a maximum sanction of at least five times the value of the fisheries products obtained by committing the serious

³¹⁸ LODGE, M.W., ANDERSON, D., LOBACH, T., MUNRO, G., SAINSBURY, K., WILLOCK, A., (2007), *Recommended Best Practices for Regional Fisheries Management Organizations*, Chatham House, London, p. 69.

infringement, and a maximum sanction of at least eight times the value of the fisheries products in case of a repeated infringement within a five-year period for any serious infringement. The value of the prejudice of the fishing resources and the marine environment will as well be taken into account.

Furthermore, administrative authorities of EU Member States need to cooperate with each other, with public authorities of third countries and with the European Commission to ensure the effective implementation of the IUU Regulation. However, the exchange and the use of information between authorities at international level require a legal framework to determine the scope and conditions of such cooperation, including the protection of personal data. To that end, Article 51 of the IUU Regulation provides for the setting up of a systematic and automated administrative cooperation and exchange of information concerning potential and detected IUU fishing, the IUU Fishing Information System, which will cover the following areas: exchange of information on request; exchange of information on spontaneous basis without prior request; and requests to take enforcement measures such as verifications, administrative enquiries or any other type of appropriate enforcement action. This system of Mutual Assistance allows Member States to alert each other of suspected transactions of IUU fisheries products, and can be used by the European Commission to send alerts and information to all Member States. Note that “since 2010 the Commission has sent more than 160 Mutual Assistance messages to Member States' authorities to direct their controls and checks towards situations of risk and to request investigations on presumed IUU fishing activities”³¹⁹. Some of these messages, for instance, were sent to Member States regarding non-compliant behaviour by third country fishing vessels operating in West Africa, resulting in “more than 4.2 million EUR in fines imposed by various coastal States”³²⁰. Another example concerned fake licenses granted by a third country which led to the recovery from the third country concerned of “more than 2 million EUR of licencing fees”³²¹.

Finally, in respect to assistance and capacity building to developing countries for the purpose of implementing the IUU Regulation, the European Commission was able to help several third countries to achieve fundamental changes in their fisheries polices during the last few years. Indeed, “the Commission, often in conjunction with the European Fisheries Control Agency (EFCA), has carried out tailor made capacity building sessions on catch certification and on Monitoring, Control and Surveillance (MSC) tools and policy to certain third countries in response to specific requests”³²². Note that such actions were conducted in the Philippines, Curacao, Cape

³¹⁹ COM (2015) 480 final, p. 4.

³²⁰ *Ibidem*.

³²¹ *Ibidem*.

³²² *Ibidem*, p. 7.

Verde, Ghana, Papua New Guinea, Solomon Islands and Korea³²³. In addition, 55 developing countries have received technical assistance from the EU through the two following programmes on sustainable and equitable management of fisheries: “the ACP FISH II program for the African, Caribbean and Pacific Group of States (ACP) amounting to 30 million EUR and the Environment and Sustainable Management of Natural Resources including Energy (ENRTP) program amounting to 2 million EUR”³²⁴. To sum up, the IUU Regulation “aims at helping third countries, including developing nations, through dialogue, cooperation and technical and development aid to re-enforce their policies and tools, sanction in a sufficiently deterrent manner, those who infringe the rules, improve the conservation and sustainable use of marine resources and offer better opportunities to fishing communities and honest operators”³²⁵.

4.3. IUU Regulation and its consistency with international fisheries instruments

In the following paragraphs, we critically analyse port State control of third-country fishing vessels (4.3.1.), catch certification requirements (4.3.2.), the EU IUU vessel list (4.3.3.), and the EU list of non-cooperating third countries (4.3.4.). The objective is to provide answers to the following question: “Is the IUU Regulation consistent with existing international fisheries instruments?”. We will observe that the fundamental provisions of the IUU Regulation are predominantly consistent with both international fisheries instruments and measures implemented by RFMOs.

4.3.1. Port State control of third-country fishing vessels

The coastal State plays a central role in the exploitation, conservation and management of natural resources in its EEZ, and UNCLOS is the primary legal framework for coastal State measures to ensure sustainable management and conservation of living resources. According to Article 56 (b) UNCLOS, the coastal State has jurisdiction in its EEZ regarding the protection and preservation of the marine environment. According to Article 73 UNCLOS, the coastal State has the right to enforce its laws and regulations relating to fisheries and conservation in its EEZ. Article 73(1) UNCLOS authorises the coastal State to take such measures as may be necessary to ensure compliance with its laws and regulations, including boarding and inspection. Chapter II of the IUU Regulation deals with inspections and control of third-country fishing vessels seeking access to the ports of EU Member States. Under Articles 4 and 5 of the IUU Regulation, landings or transshipments by third-country fishing vessels are required to take place only in designated ports of EU Member States and are subject to specific conditions. As elaborated previously (3.2.),

³²³ *Ibidem*.

³²⁴ *Ibidem*, p. 8.

³²⁵ *Ibidem*, p. 5.

customary international law acknowledges full coastal States jurisdiction within ports³²⁶. Consequently, not only do “coastal States (including the relevant EU Member States) have a clearly established right under customary international law to designate which of their ports are open to international trade”³²⁷ but they also “enjoy a broad customary right to prescribe conditions for access to their ports”³²⁸. As a result, “the port State control measures set out in the IUU Regulation – including the designation of specific ports to receive landings and transshipments of fisheries products and the application of detailed notification, certification and inspection requirements – may be viewed as consistent with the scope of port State jurisdiction recognised under customary international law”³²⁹.

Moreover, the port State measures set out in the IUU Regulation are consistent with several international fisheries instruments that require or recommend the exercise of port State control over third-country vessels. Firstly, Article 23 of the Fish Stocks Agreement sets for the right and the duty of a port State to promote the effectiveness of subregional, regional and global conservation and management measures by, *inter alia*, denying access to port facilities for landings and transshipments, where it has been established that the catch has been taken in a manner which undermines the effectiveness of the latter conservation and management measures on the-high seas. Secondly, paragraph 52 of the IPOA-IUU calls upon States to employ port State control measures to prevent, deter and eliminate IUU fishing. Note in this regard that all the measures stated in the subsequent paragraphs of the IPOA-IUU are also provided under the IUU Regulation. Lastly, as we have seen in the previous chapter, the PSM Agreement requires parties to implement port State measures, in the same way as the IUU Regulation, including: the designation of ports for use by foreign fishing vessels; the prior notification to enter designated ports; the sharing of information with port authorities; and the denial of entry or the inspection of vessels that have been involved in IUU fishing. This explains why the entry into force of the PSM Agreement has been welcomed by the European Commission.

However, several limitations on port State control set out in international instruments are absent from the IUU Regulation. Article 23 of the UN Fish Stocks Agreement, paragraph 52 of the IPOA-IUU, and Article 3(4) of the PSM Agreement, state that port control measures should, or shall, “be implemented in a fair, transparent and non-discriminatory manner”, whereas the IUU Regulation does not expressly accommodate provisions which require port State control measures

³²⁶ CHURCHILL, R.R., LOWE, A.V., (1999), *The Law of the Sea*, 3rd edition, Manchester University Press, Manchester, pp. 279-327.

³²⁷ TSAMENYI, M., PALMA, M.A., MILLIGAN, B., MFODWO, K., (2010), “The European Council Regulation on Illegal, Unreported and Unregulated Fishing: An International Fisheries Law Perspective”, in *International Journal of Marine and Coastal Law*, p. 18.

³²⁸ *Ibidem*.

³²⁹ *Ibidem*.

to be implemented in a manner that does not discriminate against vessels of a particular State or States. Furthermore, the IUU Regulation does not contain safeguard for third-country fishing vessels against undue delay resulting from unfounded inspections or denial of port access. The only safeguards provided under the Regulation relate to cases of *force majeure*³³⁰ and the vague requirement that EU Member States shall undertake inspections and verifications “on the basis of risk management”³³¹. A requirement that inspections “cause minimum disturbance to the vessels activities and cause no deterioration in fish quality” was proposed by the European Commission but not included in the final text of the IUU Regulation³³². Therefore, it is necessary for EU Member States implementing the IUU Regulation’s port State requirements “to develop clear and transparent procedures, without which there is a risk that the port states measures will be implemented in an inconsistent and discriminatory manner”³³³. Moreover, a right to compensation and appeals concerning the actions of the EU Member port States are also not included in the port State scheme under the IUU Regulation. These safeguards are not only recognised in Article 13 of the PSM Agreement but also in Article 7, paragraph 2, of the International Convention for the Prevention of Pollution from Ships (MARPOL), in Chapter XI-2 Reg. 3.1 no. 1 2nd sentence of the International Convention for the Safety of Life at Sea (SOLAS) and in Part 4 of Resolution 16/11 of the Indian Ocean Tuna Commission (IOTC) on PSMs to prevent, deter and eliminate IUU fishing. Indeed, “the entitlement of the ship to claim compensation seems to be well accepted in the law concerning port State control”³³⁴. The above considerations show that the port State control measures adopted in the IUU Regulation may need to be revised to find a better balance between combatting IUU fishing on the one hand, and appropriate safeguards against abuse of port State power on the other hand. On that matter, the upcoming judgment of ITLOS in *M/V Norstar* Case (Panama v. Italy) will be particularly relevant, as Panama submitted an application to the Tribunal which requests “compensation from Italy for damage caused by the illegal arrest of the MV Norstar in 1998”³³⁵ contending that Italy violated several provisions of UNCLOS, in particular the right of freedom of navigation.

In addition, some Member States are believed not to have investigated or rejected any fish whatsoever since the law came into force, despite significant fish imports outside the EU. This

³³⁰ Article 4(2), Council Regulation (EC) No. 1005/2008, *op. cit.*

³³¹ Articles 9(1) and 17(3), Council Regulation (EC) No. 1005/2008, *op. cit.*

³³² Article 11(1), COM (2007) 602 final.

³³³ TSAMENYI, M., PALMA, M.A., MILLIGAN, B., MFODWO, K., (2009), *Fairer Fishing? – Trade and Fisheries Policy Implications for Developing Countries of the European Community Regulation on Illegal Fishing*, London, United Kingdom, Commonwealth Secretariat, p. 46.

³³⁴ WENDEL, P., (2007), *State Responsibility for Interferences with the Freedom of Navigation in Public International Law*, Berlin, Germany, Springer, p. 81.

³³⁵ https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_241_rev_EN.pdf, *ITLOS/Press 241*, consulted on May 12, 2017.

lack of uniformity in the implementation of the Regulation may contribute to the displacement of trade flows of IUU fish towards European ports with weaker controls, which is extremely problematic given that once fish consignments enter the EU, they are, according to Articles 28 to 37 TFEU, in free circulation, hence not subject to further checks if transported to other EU Member States. Indeed, “since 2010, around 350 consignments have been rejected under the Regulation (...), including rejections for both procedural/documentary non-conformities and linkages to IUU fishing”³³⁶ which seems low compared to the pre-Regulation estimate of IUU imports, namely 500,000 tonnes imported to the EU annually³³⁷. In addition, “major importing MS with high trade volumes and relatively high-risk trade flows have reported very few rejections since the Regulation came into force”³³⁸. For instance, “Germany would be expected to have rejected a higher number of consignments since the Regulation came into force, or at least submitted a higher number of verification requests to third countries”³³⁹. In fact, Germany imports around twice the volume of IUU Regulation fisheries products from China than does the UK³⁴⁰. However, while the UK rejected a total of 16 consignments over the two-year period 2012/13, of which nearly a third were processed in China, for reasons including fraudulent catch certificates and mismatches between species indicated on catch certificates and in consignments, Germany, by contrast, rejected a total of only 10 consignments from all third countries between 2010 and early 2015³⁴¹. This data suggests that Germany is not implementing adequate procedures to identify and reject IUU products in accordance with the Regulation. As of today, the European Commission has not instigated infringement proceedings according to Article 260 TFEU against Germany or any other Member State. However, note that a legal opinion of February 2017 produced by Attorneys-at-law Günther in Hamburg (Germany) concludes that, since imports of fisheries products are not sufficiently controlled as they enter the German territory, Germany has not taken all the necessary measures at the national level to effectively enforce the IUU Regulation, and therefore, Germany is in breach of Article 291, paragraph 1, TFEU³⁴². Only time will tell whether the Commission will use its discretionary prerogative to instigate infringement proceedings against Germany.

³³⁶ EJF, OCEANA, PEW THE PEW CHARITABLE TRUSTS, WWF, (2017), “EU IUU Regulation – Analysis: Implementation of EU seafood import controls”, Executive Summary March 2017, in *EJF Publications*, p. 5.

³³⁷ *Ibidem*.

³³⁸ *Ibidem*.

³³⁹ EJF, OCEANA, PEW THE PEW CHARITABLE TRUSTS, WWF, (2016), “Improving performance in the fight against illegal, unreported and unregulated (IUU) fishing – Germany – A major player in the global fight against illegal fishing”, Issue Brief May 2016, in *EJF Publications*, p. 5.

³⁴⁰ *Ibidem*, p. 6.

³⁴¹ *Ibidem*.

³⁴² EJF, OCEANA, WWF, (2017), “The duty of EU member states to enforce the IUU Regulation: Effective control of all catch certificates as a pre-condition to contain illegal fishing and to protect marine resources”, Legal Opinion Summary, in *EJF Publications*; www.iuuwatch.eu/wp-content/uploads/2015/06/ENG_LegalOpinion_IUU_130217.pdf, *Legal opinion produced by Attorneys-at-law Günther*, consulted on May 12, 2017.

4.3.2. Catch certification requirements

Chapter III of the IUU Regulation is designed to prohibit the importation into the EU of fisheries products obtained from IUU fishing. Particularly relevant is Article 17 of the Regulation which gives wide powers to the competent authorities of EU Member States to carry out all the controls necessary to verify the catch certificates. Indeed, in addition to the inspection of fishing vessels in port, these control measures may include examining the products, inspecting storage places of the products, and carrying out official enquiries. Are those measures consistent with existing international fisheries instruments? Firstly, paragraph 69 of the IPOA-IUU expressly encourages the implementation of catch certification requirements. Secondly, the Commission of the Conservation of Antarctic Marine Living Resources (CCAMLR) has adopted a conservation measure that requires contracting parties to prohibit the import, export or re-export of toothfish that is not accompanied by appropriate catch documentation³⁴³. Consequently, the catch certification requirements set out in the IUU Regulation may be viewed as consistent with international instruments and measures.

However, the IUU Regulation's catch certification scheme raises at least two issues. First, since catch certification systems are costly, especially for developing third countries, there are concerns with respect to the lack of capability of States to adopt and implement a scheme compatible with the one provided under the IUU Regulation. Second, where a foreign-flagged vessel is used to fish in the territorial waters of a coastal State, the IUU Regulation attributes responsibility for validating the catch certificates to that particular flag State and not to the coastal State in whose waters the fish was taken. As a result, access by the coastal State's fisheries products to the EU market are subject to the actions of that particular flag State over which the coastal State may have little influence or control. In other words, a flag State that is not willing or able to provide necessary catch certificate validation required by the IUU Regulation may hinder the ability of the coastal State to export its fisheries products to the EU market.

On 2nd December 2011, the Institute for European Environmental Policy published an independent review which analyses the first 18 months of implementation of the IUU Regulation. In this report, the authors suggest that "the catch certification scheme as it stands is not working to prevent illegally fished products from entering the EU market as the paper certificates are open to fraud"³⁴⁴. Firstly, most of the 250,000 catch certificates received annually across the EU are in paper format. Secondly, there is currently no facility for sharing or cross-checking certificates

³⁴³ Article 10, CCAMLR, (2006), *Catch Documentation Scheme for Dissostichus spp.*, Conservation Measures 10-05 (2006).

³⁴⁴ LUTCHMAN, I., NEWMAN, S., MONSANTO, M., (2011), "An independent review of the EU Illegal, Unreported and Unregulated Regulations", in *Institute for European Environmental Policy*, p. 19.

between Member States. As a result, those elements hinder a coordinated EU-level action and facilitate the importation of illegally caught fish. Furthermore, we note that, in designing the IUU Regulation, the European Commission failed to learn from the CCAMLR which adopted an electronic catch documentation scheme that has contributed to a significant overall decline in IUU fishing since 2003. Consequently, the European Commission planned to modernise the catch certificate system in 2016 by establishing “a centralised, digital, EU-wide database, with a standard risk analysis tool, for processing, cross-checking and storing information”³⁴⁵, but failed to meet its own self-imposed deadline.

Moreover, two real-life studies undertaken by a coalition of international NGOs demonstrate the weakness in the catch certificate scheme seven years after its application³⁴⁶. The first case study analyses how a suspected illegal consignment was allowed into one Member State because authorities had no knowledge it had been rejected by another Member State due to a misused catch certificate. Indeed, under the current paper-based catch certificate scheme, copies of the same certificate may be used to import multiple consignments into different points across the EU, exceeding the total weight certified by the original document. Therefore, the delivery of an EU-wide database of catch certificates is an urgent priority if consignments are to be scrutinised effectively, and IUU fish denied entry to the EU market. The second case study shows how suspect imports can successfully be blocked when countries use rigorous and harmonised checks. Appropriately, an EU-wide database of catch certificates information is needed. It follows from these studies the urgency of a harmonisation of IUU import controls across all EU Member States, in accordance with a risk-based approach.

Nonetheless, the certification scheme creates the basis for cooperation with third countries. Indeed, “to date 91 third countries have notified their competent authorities under the IUU Regulation and apply the EU catch certification scheme for exports to the EU15”³⁴⁷. Note that “as part of the evaluation process for third countries the Commission, in conjunction with the European Fisheries Control Agency (EFCA), analyses samples of catch certificates from third countries to identify weaknesses and shortcomings in their validation systems”³⁴⁸. As stated previously, in that context the European Commission has provided training and capacity building to third countries, ensuring continuous improvements in their catch certificate validation systems. In addition, “several third countries have introduced modern IT systems to cross check the data

³⁴⁵ EJF, OCEANA, THE PEW CHARITABLE TRUSTS, WWF, (2016), “The EU IUU Regulation: Building on success EU progress in the global fight against illegal fishing”, in *EJF Publications*, p. 18.

³⁴⁶ EFJ, OCEANA, THE PEW CHARITABLE TRUSTS, WWF, (2017), “Improving performance in the fight against illegal, unreported and unregulated (IUU) fishing – Case studies highlighting the need for improved implementation of the EU IUU Regulation Catch Certificate (CC) Scheme”, in *EFJ Publications*.

³⁴⁷ COM (2015) 480 final, p. 5.

³⁴⁸ *Ibidem*.

needed to validate catch certificates and some have also introduced market State measures (such as national catch certification systems) as recommended in FAO's IPOA³⁴⁹. Hence, we believe that the EU catch certificate scheme has improved the traceability of marine fisheries products traded with the EU throughout the production chain, from the fishing net to the plate.

4.3.3. The EU IUU vessel list

While Article 27 of the IUU Regulation provides for the establishment of an EU IUU vessel list which shall contain information on vessels identified by the EU and the Member States as having engaged in IUU fishing, Article 30 states that the EU IUU vessel list will include IUU vessels listed by RFMOs on their respective IUU lists. In addition, the EU IUU vessel list “is to be established based on compliance with the regulation catch data and trade information obtained from national statistics and other reliable sources, vessel registers and databases, RFMO catch document or statistical document programmes, reports on sightings of presumed IUU vessels, including information obtained by RFMOs, other relevant information obtained in ports or on fishing grounds and other additional information provided by member states”³⁵⁰.

Regarding the consistency of the EU IUU vessel list with international fisheries instruments, note that paragraph 81 of the IPOA-IUU calls upon States, acting through relevant RFMOs, to establish records of vessels engaged in IUU fishing. Indeed, “several RFMOs have established listing procedures for vessels presumed to have or identified as having engaged in IUU fishing, in addition to prescribing a wide range of measures to be taken against listed vessels”³⁵¹. An interesting device in that respect is a combined IUU vessel list, created and updated by Trygg Mat Foundation, which contains all vessels listed for participating in IUU fishing by RFMOs and vessels that have been on these lists but later delisted since 2004³⁵². Moreover, according to Article 37 of the IUU Regulation, the range of actions that may be taken by EU Member States against vessels on the EU IUU vessel list include: denial of fishing authorisations or permits; prohibition on the chartering of such vessels; denial of port access and provisioning; confiscation of catches and fishing gear; and prohibition on the exportation and re-exportation of fisheries products. These measures are generally consistent conservation and management measures adopted by RFMOs³⁵³.

However, IUU vessel lists raise several issues, including the fact that trade prohibitions are not applied as a last resort. Indeed, “given that investigations of alleged violations by fishing

³⁴⁹ *Ibidem*.

³⁵⁰ TSAMENYI, M., *et al.*, (2009), *op. cit.*, p. 49.

³⁵¹ TSAMENYI, M., *et al.*, (2010), *op. cit.*, p. 27.

³⁵² www.iuu-vessels.org/iuu, *Combined IUU Vessel List*, consulted on Mai 10, 2017.

³⁵³ PALMA, M.A., *et al.*, (2010), *op. cit.*, p. 252 ; TSAMENYI, M., *et al.*, (2010), *op. cit.*, p. 27.

vessels usually take time to conclude, the application of an interim measure that does not include outright prohibition of the trade in affected fisheries products may be necessary to ensure procedural fairness³⁵⁴. In addition, the de-listing procedures are problematic “as they include subjective assessment of what constitutes adequate responses by the flag state”³⁵⁵. In turn, RFMOs could face liability for wrongful listing. Also, “measures against other vessels, not listed but owned by the same company, raises legal questions”³⁵⁶. Another issue which is addressed in the Institute for European Environmental Policy’s 2011 report is the unreliability or incompleteness of the EU IUU vessel list. Indeed, the EU IUU vessel list is viewed to be “overly dependent on the procedures and decisions of RFMOs”³⁵⁷. Firstly, RFMO vessel black lists are known to be slow, cumbersome and political. Secondly, most RFMO vessel black lists are updated annually. Therefore, the authors of the report recommend that the European Commission itself establishes a system of listing vessels, as it is provided for in Article 27 of the IUU Regulation. However, progress in using the Regulation’s IUU vessel list has been slow, given that, so far, no IUU vessels identified by the European Commission have been added to the IUU vessel list³⁵⁸.

Furthermore, “vessels engaged in or supporting IUU fishing frequently change registry, in part to avoid enforcement by a flag state or to avoid measures taken by states individually or through RFMOs against IUU vessels (e.g., through blacklisting)”³⁵⁹. Therefore, it is possible that such vessels may be without registry while in ports and although the consequences of statelessness are not spelled out in UNCLOS, a growing number of RFMOs, such as ICCAT, call on their members to board, search, and, if it has been fishing in a manner which undermines the relevant RFMOs' management and conservation measures, arrest and prosecute a stateless vessel³⁶⁰. Hence, “port states should ensure that their national legislation allows them to take enforcement action against stateless vessels within their ports, as well as on the high seas and within their maritime zones, for behaviour that would have been illegal if committed by their own vessels”³⁶¹.

³⁵⁴ TSAMENYI, M., *et al.*, (2009), *op. cit.*, p. 49.

³⁵⁵ PALMA, M.A., *et al.*, (2010), *op. cit.*, p. 215.

³⁵⁶ *Ibidem*.

³⁵⁷ LUTCHMAN, I., *et al.*, *op. cit.*, p. 20.

³⁵⁸ Commission Implementing Regulation (EU) 2016/1852 of 19 October 2016 amending Regulation (EU) No 468/2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing, *OJL* 284.

³⁵⁹ MOLENAAR, E.J., (2007), “Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage”, in *Ocean Development & International Law*, Vol. 38, p. 244.

³⁶⁰ ICCAT, (1997), *Recommendation by ICCAT on Transshipments and Vessel Sightings*, Recommendation 97-11, para. 2.

³⁶¹ MOLENAAR, E.J., (2007), *op. cit.*

4.3.4. The EU list of non-cooperating third countries

The EU procedure for identifying non-cooperating countries in the fight against illegal fishing, the so-called “carding process”, has had significant positive results to date, as we will see below. The carding process begins with the initiation of dialogue by the European Commission. During this period of dialogue, the Commission gathers relevant information to evaluate the country’s compliance with its international fisheries obligations and assesses the system in place to combat IUU fishing. Depending on the results of this assessment and subsequent efforts by the country to undertake necessary reforms, the Commission may decide to issue an official warning to the country (yellow card or “pre-identification”), which may be followed by formal identification as non-cooperation country (red card), or lifting of the pre-identification (green card), depending on the progress made. Note that the granting of the red card consists of two distinct steps. First, the European Commission identifies the country as non-cooperating, resulting in a ban on import of the country’s fisheries products regulated by the IUU Regulation into the EU. Second, the Council of the EU adopts the final decision to list the country as non-cooperating, resulting in a number of restrictive measures, including a prohibition on EU vessels operating in the country’s waters³⁶².

While in theory, the identification of non-cooperating third countries shall be based on the review of all information as set out under Article 31(2) of the IUU Regulation, taking into account the parameters listed in Article 31(4) to (7) of the IUU Regulation, in practice, it is not clear on what basis and standard the EU will determine whether a State has taken effective measures in respect to its operators, or whether sanctions applied to IUU fishers are of sufficient severity. Nonetheless, several recitals of the Commission Implementing Decision identifying Sri Lanka as a non-cooperating third country in fighting IUU fishing shed some light on the matter³⁶³. Firstly, the Commission established that Sri Lanka had not prohibited its vessels from fishing illegally on the high seas nor had it immediately adopted legislation allowing for high seas fishing and for issuance of licences for high seas fishing to avoid the illegal fishing activities of its fishing vessels. Secondly, according to the Commission, the sanctioning system introduced by Sri Lanka, namely a maximum fine of 8,429 EUR, could not be considered as being in line with Article 19(2) of the Fish Stocks Agreement which stipulates, *inter alia*, that sanctions should be adequate in severity and deprive offenders of the benefits accruing from their illegal activities. Thirdly, the Commission considered that the continued fishing by Sri Lankan vessels in breach of conservation and management measures of the IOTC was a clear indication that Sri Lanka had failed to

³⁶² Articles 33 and 38, Council Regulation (EC) No. 1005/2008, *op. cit.*

³⁶³ Commission Implementing Decision of 14 October 2014 identifying a third country that the Commission considers as a non-cooperating third country pursuant to Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, OJ L 297.

undertake its flag State responsibilities under Article 118 of UNCLOS. Moreover, Sri Lanka's failure to fulfil the IOTC obligations, namely, to provide the IOTC with the required information on statistics, VMS, catch and effort, transshipment in port, and observer programme. This demonstrated its failure to fulfil its obligations as flag State, as laid down in Articles 117 and 118 of UNCLOS, which stipulate a State's duties to adopt measures for their nationals for the conservation of living resources of the high seas and to cooperate on conservation and management measures for living resources in the areas of the high seas. Lastly, the Commission's visit to Sri Lanka in November 2010 highlighted elements of concern, such as lack of VMS, lack of legislation for catch reporting, lack of observer scheme, poor reporting on vessels and nationals identified as involved in IUU fishing, and inadequate means of inspection, amounting in a breach of Article 18(3) of the Fish Stocks Agreement. In view of the above, the European Commission reached the conclusion that Sri Lanka failed to discharge its duties under international law as flag, port, coastal or market State and to take action to prevent, deter and eliminate IUU fishing.

Although the listing of non-cooperating States for the non-compliance of their flagged vessels with the IUU Regulation is neither provided for in the IPOA-IUU nor in other international fisheries instruments, “some of the actions adopted under the IUU Regulation against non-cooperating States are already being practised by a number of States and RFMOs”³⁶⁴. Indeed, “several RFMOs have established procedures for imposing trade-restrictive measures against specific States in response to non-compliance with conservation and management measures or other relevant international obligations”³⁶⁵. The International Commission for the Conservation of Atlantic Tunas (ICCAT), for instance, has issued a recommendation that “enables the Commission to implement WTO-compatible trade measures against Contracting Parties that have failed to discharge their obligations under the ICCAT Convention or against non-Contracting Parties that have failed to discharge obligations under international law to co-operate with ICCAT in the conservation and management of tuna and tuna-like species”³⁶⁶. Note that ICCAT has imposed such measures on several States, including Georgia³⁶⁷ and St. Vincent and the Grenadines³⁶⁸. However, unlike the imposition of trade measures by RFMOs, which are characterised as a multilateral and cooperative response to IUU fishing, the European Commission’s list of non-

³⁶⁴ TSAMENYI, M., *et al.*, (2010), *op. cit.*, p. 30.

³⁶⁵ TSAMENYI, M., *et al.*, (2010), *op. cit.*, p. 30; CCAMLR, (2006), *Scheme to promote compliance by Contracting Party vessels with CCAMLR conservation measures*, Conservation and Management Measure 10-06 (2006), which provides for the imposition of trade-related measures “that may be necessary to prevent, deter, and eliminate the IUU fishing activities identified by the Commission”.

³⁶⁶ TSAMENYI, M., *et al.*, (2010), *op. cit.*, p. 30; Article 2 and 6, ICCAT, (2006), *Recommendation by ICCAT Concerning Trade Measures*, Recommendation 06-13 GEN.

³⁶⁷ ICCAT, (2003), *Recommendation by ICCAT for bigeye tuna-restrictive measures on Georgia*, Recommendation 2003-18.

³⁶⁸ ICCAT, (2002), *Recommendation by ICCAT concerning the trade sanction against St. Vincent and the Grenadines*, Recommendation 2002-20.

cooperating third countries and associated provisions for restrictive trade measures “are unilateral actions which represent a progressive development of international responses to IUU fishing”³⁶⁹. Therefore, both the establishment of a list of non-cooperating third countries and the response of third countries to its implementation “is yet to be tested in practice”³⁷⁰.

In 2014, the EU identified first Cambodia, Guinea, and Belize³⁷¹ and then Sri Lanka³⁷² as non-cooperating third countries, and adopted the trade measures listed in Article 38 of the IUU Regulation against them. According to the European Commission, they all “failed to fulfil their duties as flag, coastal, port or market states typically by disrespecting the United Nations Convention on the Law of the Sea (UNCLOS) or the United Nations Fish Stocks Agreement”³⁷³. Following the respective Council Implementation Decisions identifying them as non-cooperating third countries, the competent authorities of the Member States were bound to refuse the importation into the EU of fisheries products caught by vessels from these countries without having to request any additional evidence. However, between December 2014 and October 2016, Belize, Sri Lanka and Guinea were all removed³⁷⁴ from the non-cooperating third countries list because these countries had not only demonstrated commitment to reforming their legal system and adopting new fisheries management rules but also strengthened sanctions and improved their fleet control. Consequently, the trade ban on fish caught by vessels of these countries was lifted.

In June 2013, the Environmental Justice Foundation (EJF) issued a briefing reporting that the Republic of Korea constituted one of these flag States without adequate controls over their fishing fleets, and whose vessels are engaged IUU fishing³⁷⁵. Indeed, Korean vessels had been operating without a VMS in West Africa since EJF began documenting their activities in 2008. Hence, Korean authorities were unable to meaningfully control their vessels or accurately validate the catch certificates of fish consignments exported to the EU. Nonetheless, the European

³⁶⁹ TSAMENYI, M., *et al.*, (2010), *op. cit.*, p. 30.

³⁷⁰ *Ibidem.*

³⁷¹ Council Implementing Decision of 24 March 2014 establishing a list of non-cooperating third countries in fighting IUU fishing pursuant to Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing, *OJL 91*.

³⁷² Commission Implementing Decision of 14 October 2014, *op. cit.*

³⁷³ www.europa.eu/rapid/press-release_IP-14-304_en.htm, *EU takes concrete action against illegal fishing*, consulted on Mai 11, 2017.

³⁷⁴ Council Implementing Decision of 15 December 2014 amending Implementing Decision 2014/170/EU establishing a list of non-cooperating third countries in fighting IUU fishing pursuant to Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing as regards Belize, *OJL 360*; Council Implementing Decision (EU) 2016/992 of 16 June 2016 amending Implementing Decision 2014/170/EU establishing a list of non-cooperating third countries in fighting IUU fishing pursuant to Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing as regards Sri Lanka, *OJL 162*; Council Implementing Decision (EU) 2016/1818 of 10 October 2016 amending Implementing Decision 2014/170/EU to remove the Republic of Guinea from the list of non-cooperating third countries in fighting illegal, unreported and unregulated fishing, *OJL 278*.

³⁷⁵ EJF, (2013), “Keeping illegal fish out of Europe – Ensuring Success for the IUU Regulation”, in *EJF Publications*.

Commission decided in April 2015 to withdraw the warning to the Republic of Korea, due to the significant structural reforms in its fisheries management systems with the help of the European Commission, including new legislation, improved monitoring, control and inspection set-ups, and modernisation of its traceability systems.

Despite certain flaws in the implementation of the IUU Regulation, we can praise the implementation of the non-cooperating third country list. Since 2010, the European Commission has investigated more than 200 cases involving vessels from 27 countries. As a result, sanctions against almost 50 vessels roughly amounting to 8 million EUR have been imposed by flag and coastal states and both legislative and administrative reforms to improve catch certification and fleet monitoring have been introduced in several third countries³⁷⁶. Nonetheless, NGOs advise the European Commission to maintain a regular, transparent assessment of third countries by: “continuing to provide public information on the criteria used to assess third countries; appropriately sanctioning non-cooperating third-countries in the fight against IUU fishing; ensuring the process is applied in a fair manner to any state supporting or not effectively combatting IUU fishing activities; and providing capacity-building and technical support to carded countries and ensuring cohesion with development programmes”³⁷⁷.

4.4. IUU Regulation and its consistency with international trade law

Henceforth, we will study the compatibility of the four elements of the IUU Regulation, seen above, in respect to the GATT/WTO framework. We will undertake this analysis by reference to trade rules established by WTO Agreements, interpretations of such agreements by the WTO’s DSB in the context of compulsory WTO dispute resolution proceedings and the degree to which such measures have been accepted internationally as a legitimate response to IUU fishing.

Firstly, the prohibition of the importation, exportation, re-exportation and indirect importation of fisheries products on the basis of non-compliance with catch certification requirements under the IUU Regulation may be seen as a quantitative restriction under Article XI (1) of the GATT. However, Article XX of the GATT establishes several exceptions to the application of the agreement, and provides, *inter alia*, that “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (...) (g) relating to the conservation of exhaustible natural resources”. Therefore, “the IUU Regulation may be viewed as justifiable in terms of Article XX (g) for two reasons: (a) the Regulation has been designed

³⁷⁶ [www.europa.eu/rapid/press-release MEMO-15-4807_en.htm](http://www.europa.eu/rapid/press-release_MEMO-15-4807_en.htm), *European Commission Fact Sheet*, consulted on April 25, 2017.

³⁷⁷ EJF, *et al.*, (2016), *op. cit.*

fundamentally for the purpose of conserving fisheries resources; and (b) (...) it forms part of a EC strategy to impose equivalent restriction on both domestic and international IUU fishing vessels”³⁷⁸. However, the question of whether Article XX of the GATT may be invoked to protect interests outside the territorial jurisdiction of the Member taking the measures remains an open and contested one. On the one hand, in the first *Tuna/Dolphin* dispute, while the Panel could see “no valid reason supporting the conclusion that the provisions of Article XX(g) apply only to policies related to the conservation of exhaustible natural resources located within the territory of the contracting party invoking the provision”³⁷⁹, it concluded that if Article XX were “to permit contracting parties to take trade measures so as to force other contracting parties to change their policies within their jurisdiction, including their conservation policies, the balance of rights and obligations among contracting parties, in particular the right of access to markets, would be seriously impaired”³⁸⁰. On the other hand, in the *Shrimp-Turtle* dispute, the Appellate Body stated the following: “We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)”³⁸¹. Indeed, “the fact that the sea turtle species that the United States sought to protect were known to migrate through the waters of several countries, including waters over which the United States exercises jurisdiction, was considered sufficient to justify the possibility of the United States invoking Article XX(g)”³⁸². To sum up, WTO jurisprudence on this question has not been conclusive. The *Swordfish* dispute could have given further guidance on this matter but the Parties decided to suspend the proceedings before the WTO DSB. Nonetheless, “it may be feasible for the EU to argue that a sufficient nexus exists where fisheries resources are shared (for instance, in areas of the high seas where EU distant water fleets are operating or in the waters of coastal states where the EU has concluded agreements to grant access to its vessels)”³⁸³.

Regarding the *chapeau* requirement of Article XX, which requires that the application of a trade measure does not constitute a “means of arbitrary or unjustifiable discrimination”³⁸⁴, the Appellate Body in the *Shrimp-Turtle* case affirmed in 2001 that, to meet the requirements of the *chapeau*, WTO members “need to make serious efforts, in good faith, to negotiate a multilateral

³⁷⁸ TSAMENYI, M., *et al.*, (2009), *op. cit.*, p. 59.

³⁷⁹ WTO, (1991), United States – Restrictions on Imports of Tuna, Panel Report, DS29/R, para. 5.20.

³⁸⁰ *Ibidem*, para. 5.26.

³⁸¹ WTO, (1998), United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, WT/DS58/AB/R, para. 133.

³⁸² DE SCHUTTER, O., (2015), *Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards*, Hart Publishing, UK, Chapter 3.

³⁸³ BAUMÜLLER, H., (2010), *op. cit.*, p. 6.

³⁸⁴ https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm, WTO, consulted on April 27, 2017.

solution before resorting to unilateral trade measures”³⁸⁵. In that respect, it referred to Principle 12 of the Rio Declaration on Environment and Development States confirming that “environment measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus”³⁸⁶. Note that the Appellate Body specified that Malaysia was “incorrect in its contention that avoiding arbitrary and unjustifiable discrimination under the chapeau of Article XX requires the conclusion of an international agreement on the protection and conservation of sea turtles”³⁸⁷. Bearing the above considerations in mind, some authors believe that “the IUU Regulation may be viewed as consistent with the *chapeau* of Article XX because: (a) catch certification requirements may be satisfied by documentation adopted by RFMOs; the Regulation has been developed in the context of international efforts and consultation to combat IUU fishing; and (c) the Regulation provides for assistance to and consultation with affected states”³⁸⁸.

Furthermore, catch certification requirements set out in the IUU Regulation may be viewed as technical barriers to trade, thereby coming under the Technical Barriers to Trade (TBT) Agreement, which requires that technical regulations and measures should not create unnecessary obstacles to international trade. Article 2.2 of the TBT Agreement states that “technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate object, taking into account the risks non-fulfilment would create”. Fortunately, the latter Article sets out several legitimate objectives, including the protection of human life or health or protection of the environment. According to Article 2.4 of the TBT Agreement, “Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations”. Consequently, “the IUU Regulation can be viewed as compatible with the above articles by virtue of the fact that catch certification requirements set out in the Regulation are predominantly consistent with measures adopted by RFMOs and called for by the IPOA-IUU to prevent the depletion of fish stocks by IUU fishing”³⁸⁹. Moreover, Article 8(1) of the PSM Agreement provides that Parties shall require a minimum set of information that they deem necessary before granting entry to ports.

Secondly, the international community has widely accepted port State measures, such as the following: requiring EU Member States to carry out inspections in their ports of at least five percent of landings and transshipment operations by third-country fishing vessels each year;

³⁸⁵ WTO, (2001), United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia – Report of the Appellate Body, para 115-134.

³⁸⁶ *Ibidem*, para 124.

³⁸⁷ *Ibidem*, para 134.

³⁸⁸ TSAMENYI, M., *et al.*, (2009), *op. cit.*, p. 60.

³⁸⁹ *Ibidem*, p. 61.

requiring the mandatory inspection of all vessels that have been listed on an RFMO IUU list; and restricting landing, transshipment and trade of seafood caught through IUU means. Indeed, similar measures “have already been mandated under international fisheries agreements and conservation and management measures adopted by RFMOs”³⁹⁰. Therefore, such port enforcement actions taken against IUU vessels under the IUU Regulation “are unlikely to be challenged in WTO fora”³⁹¹. This is especially true given the current Doha Round of negotiations to achieve consistency between multilateral environmental agreements (MEAs) and WTO rules, which is “a unique opportunity for creating positive synergies between the trade and environment agendas at the international level”³⁹². Nonetheless, to be consistent with the principle of non-discrimination set out in the GATT and TBT Agreement, the EU shall take precautions before taking any port state enforcement action against foreign vessels. This is especially true with respect to the requirement to inspect five percent of landings and transshipments by third-country fishing vessels each year. Indeed, it is extremely important that the EU ensures “that the identification and the listing of vessels believed to have conducted IUU fishing has been conducted in a transparent manner that avoids arbitrary discrimination against specific flag states”³⁹³. That is precisely why each EU Member State acting as a port State will have to establish “a more detailed, fair, transparent and non-discriminatory procedure that establishes that a vessel has indeed engaged in IUU fishing”³⁹⁴. Regarding the prohibition of the importation and exportation of seafood derived from IUU fishing on foreign fishing vessels, the only way for such trade-related measures to fully comply with WTO rules and principles is to apply them in a fair and non-discriminatory manner. As a matter of fact, “if the importation of a fisheries product from a third country is prohibited without established national administrative arrangements being put in place, the probability that the proposed measures would be considered arbitrary or discriminatory increases”³⁹⁵.

Thirdly, there may certainly be instances where listing a flag State as non-cooperating and consequently prohibiting trade with vessels flying the flag of that State may be justified. This might be the case not only on the basis of international fisheries instruments, but also on the basis that the State has continuously failed to take action against IUU fishing, despite assistance, consultation and co-operation from the EU. Nonetheless, the imposition of similar types of trade restrictions have been ruled in the past as unilateral and contrary to WTO agreements. Although we have seen above that Article XX (g) of the GATT can be used to justify trade measures aimed

³⁹⁰ *Ibidem*.

³⁹¹ *Ibidem*.

³⁹² https://www.wto.org/english/tratop_e/envir_e/envt_intro_e.htm, WTO, consulted on April 27, 2017.

³⁹³ TSAMENYI, M., *et al.*, (2009), *op. cit.*, p. 62.

³⁹⁴ *Ibidem*.

³⁹⁵ *Ibidem*.

at the conservation of marine resources, the extent of this provision has been tested in one of the most well-known WTO disputes, the *Shrimp-Turtle* case. In 1997, India, Malaysia, Pakistan and Thailand launched a dispute procedure against the US over a ban imposed on imports of certain shrimps and shrimp products from these countries. The ban was justified by a US regulation that prohibited the importation of shrimps if they were harvested in a way that adversely affected endangered sea turtles. In 1998, the Appellate Body³⁹⁶ ruled in favour of the complaining countries. While it did not object to the US law as such, it felt that the US had contravened WTO rules by discriminating between WTO members in the application of the law. Moreover, the Appellate Body criticised the US regulation for not providing exporting countries with sufficient flexibility to implement programmes suitable for their different conditions, but essentially required them to adopt the same programme as the US³⁹⁷. Thereafter, “Malaysia brought a second case against the revised guidelines that the US had adopted in response to the WTO ruling”³⁹⁸. In this case, the Appellate Body sided with the US, affirming that “the Panel correctly reasoned and concluded that conditioning market access on the adoption of a programme *comparable in effectiveness*, allows for sufficient flexibility in the application of the measure so as to avoid arbitrary or unjustifiable discrimination”³⁹⁹. Note that the Panel had the following reasoning: “a measure that, in its design and application, allows certification of exporting Members having regulatory programmes *comparable in effectiveness* to that of the United States does take into account the specific conditions prevailing in the exporting WTO Members and is, therefore, flexible enough to meet the requirements of the chapeau of Article XX”⁴⁰⁰.

In view of the previous comments, the question to what extent the EU may be discriminating between countries will primarily depend on how the regulation is applied in practice. In this regard, the *Shrimp-Turtle* ruling provides the following useful lessons for the IUU Regulation: “the acceptance of the initial notification by flag states of their competent authorities and conservation measures, and the decision to blacklist IUU vessel or non-cooperating third countries should be done in an open and transparent manner, including explanations of how the decisions were taken and an opportunity for countries to appeal; any capacity-building or technology transfer related to the implementation of the IUU Fishing Regulation should be made available across the board; the EU should make equal efforts to engage bilaterally or multilaterally with countries before imposing unilateral trade sanctions; and exporting countries should be given sufficient flexibility

³⁹⁶ Appellate Body Report, US-Shrimp, *op. cit.*

³⁹⁷ Appellate Body Report, US-Shrimp, *op. cit.*, at paras 164, 165 and 177.

³⁹⁸ BAUMÜLLER, H., (2010), “Combating Illegal Fishing in the EU: Interaction with WTO Rules”, in *The Royal Institute of International Affairs*, p. 5.

³⁹⁹ WTO, (2001), United States – Import prohibition of certain shrimp and shrimp products, *op. cit.*, para. 144.

⁴⁰⁰ *Ibidem*, para. 142.

to implement locally adapted regulations and enforcement measures to comply with the IUU Fishing Regulation”⁴⁰¹. Taking this into account, “the listing of a state as non-cooperating for failure to comply with the catch certification requirements is arguably justified in terms of Article XX (g) because: (a) the catch certification requirements contain a sufficient degree of flexibility by accepting documentation adopted by RFMOs; (b) the Regulation has been developed in the context of international efforts and consultation to combat IUU fishing; and (c) the Regulation provides for assistance to and consultation with affected states”⁴⁰².

Another issue is the possible denunciation of standing bilateral fisheries agreements with third states and prevention of fisheries partnership agreements⁴⁰³. While this may be viewed as a form of economic sanction that would directly affect developing states, note that Article 42 of the 1969 Vienna Convention of the Law of Treaties provides the possibility to legally denounce a treaty. However, this Article specifies that the denunciation of a treaty may take place “only as a result of the application of the provisions of the treaty or of the present Convention”. Indeed, Article 56 of the same Convention adds that “except in certain limited and specified circumstances, a treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal”⁴⁰⁴. Therefore, “if implemented, these specific features of the IUU Regulation may not only be viewed as more restrictive than existing requirements adopted by RFMOs and set out in the IPOA-IUU, but may also have strong negative implications for international trade in fish and fisheries products, contrary to the basic objectives of the WTO system”⁴⁰⁵.

Lastly, it is of fundamental importance to discuss the question of whether the application of different rules for EU and non-EU operators is discriminatory in regard to Article 3 of the GATT. While the IUU Regulation in principle also applies to EU vessels, the latter are exempt from a number of provisions, such as those dealing with port inspections and the requirement to obtain a catch certificate. Instead, EU vessels are covered by the Control Regulation⁴⁰⁶ “which strengthens the system of inspection, monitoring, control, surveillance and enforcement of the Common Fisheries Policy throughout the market chain”⁴⁰⁷. However, under the national treatment principle, WTO members are not allowed to discriminate between nationals and foreigners. Specifically,

⁴⁰¹ BAUMÜLLER, H., (2010), *op. cit.*

⁴⁰² TSAMENYI, M., *et al.*, (2009), *op. cit.*, p. 63.

⁴⁰³ Article 37 (8) and (9), Council Regulation (EC) No. 1005/2008, *op. cit.*

⁴⁰⁴ BRILMAYER, L., TEFALIDET, I.Y., (2011), “Treaty Denunciation and *Withdrawal* from Customary International Law: An Erroneous Analogy with Dangerous Consequences”, in *The Yale Law Journal*, vol. 120.

⁴⁰⁵ TSAMENYI, M., *et al.*, (2009), *op. cit.*, p. 64.

⁴⁰⁶ Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy.

⁴⁰⁷ BAUMÜLLER, H., (2010), *op. cit.*, p. 3.

according to Article 3 of the GATT, any foreign origin product “shall be accorded treatment no less favourable than accorded to like products of national origin in respect of all laws”. Therefore, “the application of different rules to foreigners and nationals, while in principle permitted under WTO rules, could raise questions about WTO compatibility if it amounts to discrimination against non-EU countries”⁴⁰⁸. A helpful illustration with regards to this issue is Mexico’s 2012 challenge to the US regulations establishing conditions for the attribution of a “Dolphin-safe” label on tuna products, based upon bringing certain documentary evidence that varied depending on the fishing area and on the fishing method. Note that “these measures enacted by the US to limit purse-seine fishing (the primary method used by the Mexican industry), considered to be harmful to dolphins, were not acknowledged by the WTO Appellate Body”⁴⁰⁹. The different requirements imposed on third states such as documentation, tracking and verification depending on the fishing area, subjecting the product to additional burdens, were considered to be *de facto* discriminatory. Indeed, the Appellate Body⁴¹⁰ found that the measure’s scope of application, which set stricter labelling conditions for tuna caught in the Eastern Tropical Pacific Ocean, was discriminatory.

As noted above, under WTO law, the EU is allowed to apply different rules to foreigners and nationals as long as the rules applied to foreigners do not result in “less favourable” treatment. Although the definition of such treatment has not yet been defined, a number of WTO cases⁴¹¹ have come to the conclusion that “the application of different rules should not distort competition in a way that results in protection for domestic production”⁴¹². As a result, “the application of different rules may become contentious where EU vessels are fishing overseas along-side foreign vessels but do not have to fulfil the same requirements to bring their fish into the EU”⁴¹³. Ultimately, “how a panel would rule should a dispute over the EU regulations arise will very much depend on how the two regulations are applied in practice”⁴¹⁴. Indeed, transparent and fair implementation of the regulations will be crucial to prevent a WTO challenge on the one hand, and to ensure the continued willingness of European businesses and trading partners to implement these measures on the other hand. Nonetheless, the EU can get support from the PSMA given that it “largely leaves it up to the parties to decide how they deal with their nationals”⁴¹⁵.

⁴⁰⁸ *Ibidem*.

⁴⁰⁹ LEROY, A., GALLETII, F., CHABOUD, C., (2016), “The EU restrictive trade measures against IUU fishing”, in *Marine Policy*, vol. 64, p. 84.

⁴¹⁰ WTO, (2012), US – Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Report of the Appellate Body, see especially paras. 298-99.

⁴¹¹ WTO, (2000), Korea – Various Measures on Beef, Report of the Appellate Body, WT/DS169/AB/R; WTO (2001), EC – Measures Affecting Asbestos and Products Containing Asbestos, Report of the Appellate Body, WT/DS135/AB/R.

⁴¹² BAUMÜLLER, H., (2010), *op. cit.*, p. 7.

⁴¹³ *Ibidem*.

⁴¹⁴ *Ibidem*.

⁴¹⁵ *Ibidem*.

5. Conclusion

Following the in-depth analysis of both the PSM Agreement and the IUU Regulation, we are now capable to provide concise answers to the four fundamental questions that were raised in the introduction of this Master's thesis.

Firstly, the question was raised whether PSMs are the most effective policies for national and international authorities to combat IUU fishing activities. In that regard, it has been established that IUU fishing can be effectively addressed through PSMs in a powerful and cost-effective manner. However, various constraints, such as lack of interagency cooperation, lack of financial resources, lack of harmonisation of laws in a region and lack of trained personnel, make it very difficult for States, especially developing countries, to implement the PSM Agreement's provisions into national laws. Therefore, IUU fishing must be addressed comprehensively and in different, mutually reinforcing ways. Indeed, adopting a holistic approach is key to successfully combat IUU fishing. That is precisely the reason why the 2014 FAO Voluntary Guidelines for Flag State Performance is a fabulous addition to the PSM Agreement. Even more powerful complements are trade-related measures, such as market closures and trade documentation schemes, because they eliminate trade opportunities with States that host PoCs without violating international trade rules, making IUU fishing less attractive as a revenue-generating activity. In summary, PSMs are effective policies for national and international authorities to combat IUU fishing activities, but adding trade-related measures to implementing legislation would be even more compelling because of the commercial nature of the port's role as the place where fish enter the market.

Secondly, we have been wondering whether the PSM Agreement is sufficiently clear and precise to prevent, deter and eliminate IUU fishing. We have established that the PSM Agreement serves as a clear and precise response to the inefficiency of previous international fisheries instruments, especially due to its binding nature. It is a stringent and uniform regulatory regime providing step-by-step requirements and procedures for vessels and port States. Moreover, incorporating the definition of IUU fishing from the IPOA-IUU is a pragmatic solution for achieving harmonisation across regions because many countries have already integrated this definition into their national laws. The PSM Agreement has also the following advantages: on the one hand, being adamant when obliging port States to deny port entry under certain circumstances; on the other hand, being flexible when admitting other actions as effective as denial of port entry. However, dropping from the text trade-related measures, such as market closures and trade documentation schemes, reflects a significant lost opportunity to enhance the effectiveness of the PSM Agreement. In conclusion, even though the provisions of the PSM Agreement are sufficiently

clear and precise to meet its objectives, the FAO absolutely needs to adopt a proactive role in administering and supporting the implementation of the Agreement.

Thirdly, we raised the question of whether the IUU Regulation is consistent with existing international instruments and measures to combat IUU fishing. On that matter, it has been established that the fundamental provisions of the IUU Regulation are generally speaking consistent with international fisheries instruments and measures implemented by RFMOs, with the exception of the listing of non-cooperating States and the related unilateral imposition of trade restrictions. While many authors believe that the EU needs to establish mechanisms and procedures to ensure proper and effective implementation of the four core measures provided in the IUU Regulation, they accentuate the fact that such procedures need to take into account precautions and safeguards that would, on the one hand, ensure the conformity of the IUU Regulation with international and regional fisheries instruments, and on the other hand, respect the rights and obligations of States and vessels. In the end, we strongly believe that “given the increasing global attention being given to IUU fishing and the proliferation of measures adopted to address it, legislative measures such as those contained in the EU IUU Regulation are likely to become prevalent and embedded in parts of national, regional, sub-regional and international fisheries governance arrangements to ensure sustainable and responsible fishing practices”⁴¹⁶.

Finally, we questioned the compatibility of the market-related measures set out in the IUU Regulation with WTO agreements. Although, WTO jurisprudence is unclear on the question of whether Article XX of the GATT may be invoked to protect interests outside the territorial jurisdiction of the Member taking the measures, we have established that the IUU Regulation is generally speaking consistent with WTO rules. Moreover, many authors, such as Heike Baumüller, believe that it is unlikely that countries would challenge the IUU Regulation itself. Indeed, no country so far has officially expressed concerns over the WTO compatibility of the IUU Regulation. In fact, the view of many scholars is that the IUU Regulation creates some consistency between measures to combat IUU fishing and international trade rules, given that the process is transparent and non-discriminatory. On a final note, Heike Baumüller warns however that alleged discrimination between countries and questions over how the decision to impose a trade ban was reached could become contentious issues. Some hypothetical questions could include the following: Has the EU provided more support or leniency to some countries than others? Has the EU made equal efforts to negotiate multilateral catch documentation schemes with all regions? Has the EU made sufficient effort to collaborate with a country before designating it as a non-cooperating third country or adding one of its vessels to the EU IUU vessel list?

⁴¹⁶ TSAMENYI, M., et al., (2009), *op. cit.*, p. 31.

LIST OF ACRONYMS

Acronym	Definition
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
CDS	Catch documentation schemes
CFP	Common Fisheries Policy
COFI	FAO Committee on Fisheries
DfID	Department for International Development
DG	Directorate-General
DSB	WTO Dispute Settlement Body
EC	European Community
EEZ	Exclusive economic zone
EJF	Environmental Justice Foundation
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FOC	Flag of convenience
FONC	Flags of Non-Compliance
GATT	General Agreement on Tariffs and Trade
GEF	Global Environment Facility
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICJ	International Court of Justice
IMO	International Maritime Organization
IOTC	Indian Ocean Tuna Commission
IPOA-IUU	International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing
ITF	International Transport Workers Federation

ITLOS	International Tribunal for the Law of the Sea
IUU	Illegal, unreported and unregulated
MARPOL	International Convention for the Prevention of Pollution from Ships
MCS	Monitoring, Control and Surveillance
MEA	Multilateral environmental agreement
MOU	Memorandum of understanding
MRAG	Marine Resources Assessment Group
NGO	Non-governmental organization
NPOA	National Plan of Action
PoC	Port of convenience
PSM	Port State Measures
PSMA	Agreement of Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing
SOLAS	International Convention for the Safety of Life at Sea
TBR	Trade Barriers Regulation
TBT	Technical Barriers to Trade
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNFSA	Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks
UNICPOLOS	United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea
VMS	Vessel monitoring systems

WSSD	World Summit on Sustainable Development
WSSD-POI	World Summit on Sustainable Development Plan of Implementation
WTO	World Trade Organization

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